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COURT OF APPEALS

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STATE OF WASHINGTON

BY _____
CUSHMAN

No. 34571-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

HAROLD and ENID ROBERTS, a married couple

Respondents,

v.

ROBERT DUNN and SHIRLEY DUNN, individually,

Appellants.

BRIEF OF APPELLANTS ROBERT DUNN AND SHIRLEY DUNN

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I. ASSIGNMENTS OF ERROR

1. Finding of Fact 4 (CP 1103): The trial court improperly exercised its discretion and committed legal error by reforming the 2002 Settlement Agreement to only require the “exploration of alternatives” as opposed to requiring a permit application to Thurston County.

2. Finding of Fact 5 (CP 1103-04): The trial court improperly exercised its discretion and committed legal error by allowing evidence and awarding civil damages under the antiharassment statute, RCW 10.14, for magazine subscriptions. Further, res judicata barred relitigation based of this issue, which had been tried in an earlier antiharassment suit between the parties.

3. Finding of Fact 7 (CP 1104): The trial court improperly exercised its discretion and committed legal error in finding that the Dunns’ firewood wall amounted to harassment pursuant to RCW 10.14, and nuisance, and awarding civil damages therefor.

4. Finding of Fact 8 (CP 1104): The Court improperly exercised its discretion and committed legal error by imposing a view easement over the Dunn property for a view of the Roberts’ address.

5. Finding of Fact 10 (CP 1104): The Court improperly exercised its discretion and committed legal error in allowing evidence and an award of injunctive damages for harassment pursuant to RCW 10.14 for items stacked on Dunn’s property

and spray painted writing on Dunn's pavement. Res judicata barred relitigation of this issue, which had been tried in an earlier antiharassment suit between the parties.

6. Finding of Fact 12 (CP 1105): The trial court improperly exercised its discretion and committed legal error by excluding from trial the Dunns' easement rights over the road through the Roberts' property, but then entering an injunction limiting the Dunns' use of such road.

7. Finding of Fact No. 14 (CP 1105): The trial court erred in making findings and awarding judgment based on harassment pursuant RCW 10.14 relating to log chips and mice. These issues are barred by res judicata. They were litigated in a previous antiharassment case.

8. Finding of Fact No. 16 (CP 1105): The trial court's decision that the log wall is a fence, and cannot be over eight feet high is legally erroneous and not supported by substantial evidence.

9. Finding of Fact No. 21 (CP 1105): The trial court improperly exercised its discretion and committed legal error by refusing to hear issues related to the Dunns' easement across Roberts' property.

10. Finding of Fact No. 22 (CP 1106): The trial court improperly exercised its discretion and committed legal error by finding that manure in the trench was harassment pursuant to

RCW 10.14. This issue was previously litigated. Res judicata barred relitigation in this case.

11. Finding of Fact No. 23: The trial court improperly exercised its discretion and committed legal error prohibiting Dunn's compost bin, since it did not find it to be "harassment or an intended act". This matter was also adjudicated in a prior lawsuit, and was res judicata.

12. Finding of Fact No. 25 (CP 1106): The trial court improperly exercised its discretion and committed legal error in finding that fires were harassment pursuant to RCW 10.14, and based on a nuisance theory. This issue was litigated to conclusion in two prior cases. Res judicata barred relitigation thereof in this case.

13. Conclusion of Law 2 (CP 1106): Finding of Fact 4, upon which the conclusion is based, was unsupported by substantial evidence. The Court improperly exercised its discretion and committed legal error by reforming the 2002 Settlement Agreement.

14. Conclusion of Law 3 (CP 1106): The Court improperly exercised its discretion and committed legal error in awarding damages under RCW 10.14. The Court erred in awarding \$10,850 against Shirley Dunn. No Finding of Fact or evidence shows Shirley Dunn mailed or sanctioned the mailing

of magazine subscriptions. This issue was litigated in a prior lawsuit, and is barred res judicata.

15. Conclusion of Law 5 (CP 1107):The Court improperly exercised its discretion and committed legal error in concluding the “firewood wall” on the Dunn property constituted a nuisance, Finding of Fact 7 contains no finding that the Roberts were prevented from accessing their sand filter. Res judicata barred relitigation of this issue.

16. Conclusion of Law 7 (CP 1107): It was error to award damages and injunctive relief for scaffolding and stacking items by the wall based on harassment pursuant to RCW 10.14. This issue was also litigated in a prior lawsuit, and is res judicata.

17. Conclusion of Law 8 (CP 1107): The Court improperly exercised its discretion and committed legal error in enjoining the listed activities on the Dunn property, erroneously creating a “view easement” servitude over the Dunn property for the benefit of the Roberts’ property.

18. Conclusion of Law 10 (CP 1108): The Court improperly exercised its discretion and committed legal error in awarding judgment for damage to the road through the Roberts’ property while refusing to try the Dunns’ easement rights through the same area.

19. Conclusion of Law 12 (CP 1108): The Court improperly exercised its discretion and committed legal error by admitting evidence and entering judgment on a harassment theory, per RCW 10.14 for mice and log chips. This incident was also litigated previously and is res judicata.

20. Conclusion of Law 14 (CP 1108): Finding of Fact 16 is unsupported by substantial evidence. The Court improperly exercised its discretion and committed legal error in awarding Roberts a view easement over the Dunn property.

21. Conclusion of Law 18 (CP 1109): The Court improperly exercised its discretion and committed legal error in allowing evidence and awarding injunctive relief and damages to the Roberts for manure or compost in the trench pursuant to RCW 10.14. This matter had been litigated. Res judicata barred relitigation in this present case.

22. Conclusion of Law 20 (CP 1109): The Court improperly exercised its discretion and committed legal error in awarding \$5,000 in general damages against Robert Dunn. The antiharassment statute, RCW 10.14, does not provide for award of general damages. If such general damages were awarded under a nuisance or other theory the Court failed to identify the theory on which it awarded damages.

23. Conclusion of Law 21 (CP 1109): The Court improperly exercised its discretion and committed legal error in

granting permanent injunctive relief restricting the Dunns' use of the driveway over the Roberts' property while simultaneously refusing to try the nature and extent of the Dunns' easement rights over the road.

24. Conclusion of Law 23 (CP 1109-10): The trial Court improperly exercised its discretion and committed legal error in granting permanent injunctive relief as to the frequency and types of fires the Dunns may have on their property. If this relief is based on harassment under RCW 10.14, the court improperly exercised its discretion and committed legal error in awarding permanent injunctive relief not authorized by the antiharassment statute, absent the findings required by RCW 10.14.080(4). To the extent such conclusion is based upon the corresponding Finding 25, it is unsupported by substantial evidence. The court improperly exercised its discretion and committed legal error in imposing a view easement on the Dunn's property for the benefit of the Roberts without any legal or factual basis. This matter had been litigated to conclusion in two prior proceedings and was res judicata.

25. Conclusion of Law 27 (CP 1110): The Court improperly exercised its discretion and committed legal error in awarding \$17,145.35 in attorney's fees and costs to the Roberts. If such an award was based on RCW 10.14, the award is

improper. RCW 10.14 does not apply to this litigation. The Court also awarded numerous improper cost items as fees.

26. Conclusion of Law 29 (CP 1111): The Court improperly exercised its discretion and committed legal error in ordering the log wall cut, See *supra* Conclusion 14 and Finding of Fact 16.

27. Supplemental Conclusion of Law 2 (CP 1291): The Court improperly exercised its discretion and committed legal error in making findings and awarding judgment for damage to the roadway. It refused to consider the Dunns' easement over the roadway.

28. Supplemental Conclusion of Law 3 (CP 1291): The Court improperly exercised its discretion and committed legal error in making findings and awarding judgment for damage to the roadway, while refusing to try the scope of the Dunns' easement over the roadway.

29. Judgment¹: The Court improperly exercised its discretion in awarding \$31,070.00 jointly against Robert Dunn and Shirley Dunn. This is inconsistent with Conclusion of Law 20, which awarded \$5,000 in general damages against Robert Dunn only. This also improperly awards \$10,850 in Conclusion

¹ A copy of the Judgment, entered May 26, 2006, is attached hereto as Appendix 1. On June 1, 2006, appellants filed a Supplemental Designation of Clerk's Paper (CP 1326) specifying the Judgment however, the trial court clerk omitted it in the subsequent Clerk's Papers Index. Dunn will take the necessary steps to correct this omission in the record.

of Law 3 against Shirley Dunn. (See Assignments of Error 14 and 22). The, \$19,645.35 award of attorneys' fees and costs contains improper costs mischaracterized as attorney's fees. (See Assignment of Error 25).

30. February 24, 2006 Permanent Injunction (CP 1112): The Court improperly exercised its discretion and committed legal error in entering a February 24, 2006 Permanent Injunction, Paragraph 2, 5, 7, and 8 (CP 1113-15). Since these paragraphs are worded identically to Conclusions 8, 15, 22, and 24, appellants incorporate and adopt the arguments pertaining to Assignment of Error 17, 20, 23, and 24.

31. March 17, 2006 Order Granting Plaintiff's Motion for Contempt (CP 1217): The trial court improperly exercised its discretion and committed legal error in granting plaintiff's motion for contempt, in ordering Dunn to cut the log wall to no more than 8' and to remove all landscaping on Dunn's property adjacent to the Roberts' wall that was not of the type that existed when the permanent injunction was entered. Dunn assigns error to this based upon the arguments and authorities pertaining to Assignments of Error 4, 8, 16, 17, 20, 26, and 31.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court improperly exercised its discretion and legally erred in concluding that the 2002 Settlement Agreement only required an "exploration of alternatives" by

erroneously using extrinsic evidence to interpret the contract in a manner that varied and changed the plain meaning thereof?
(Assignments of Error 1 and 13).

2. Whether the trial court committed legal error and improperly exercised its discretion in awarding permanent injunctive relief, damages, costs, and attorney's fees pursuant to the antiharassment statute, RCW 10.14, et seq., where such statute does not provide for permanent injunctions absent specific findings required by RCW 10.14.080(4), such statute does not provide for awards of general damages, and where plaintiffs did not procedurally follow the petition and hearing procedure of the statute? (Assignments of Error 2, 3, 4, 5, 7, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 29, 30 and 31).

3. Even if RCW 10.14 provided a legal basis for permanent injunctive relief, was it nonetheless beyond the scope of such statute to enjoin activities such as: parking or placing objects within the currently landscaped area; parking or placement of objects within 6' of the boundary wall in the currently unlandscaped area; maintaining a vertical log wall; placing anything that obstructs the view of the Roberts' house number; or building fires in the Dunns' outdoor fireplace or on their beach; where such activities occurred entirely on the Dunn property, and did not interfere with the Roberts' reasonable use of their property? (Assignments of Error 4, 5, 17, 30, 24, 26, 30, and 31).

4. Whether the doctrine of *res judicata* barred relitigation in this action of matters that had been litigated and decided in previous lawsuits, such as: (a) mailing of magazine subscriptions; (b) stacking items next to the Roberts' wall; (c) log chips and mice coming over wall; (d) placement of a compost bin; (e) compost in trench; (f) placing scaffolding next to the Roberts' wall; and (g) beach fires? (Assignments of Error 2, 7, 10, 11, 12, 14, 15, 16, 19, 21, and 24).

5. Whether the trial court legally erred and improperly exercised its discretion imposing a "view easement" servitude on the Dunn property in favor of the Roberts property by (1) ordering the Dunns to cut the vertical log wall down to 8' in height; (2) by precluding the erection of scaffolding on the Dunn property; (3) by imposing the restrictions on parking and placement of objects referenced in Conclusion of Law 8; and (4) by restricting the building of fires referenced in Conclusion of Law 23, in the absence of any specific findings that these activities trespassed on, or interfered with the Roberts' use of, their property? (Assignments of Error 4, 5, 8, 12, 13, 17, 20, 24, 26, 30, and 31).

6. Whether, even if the Court had the authority to award general damages under RCW 10.14, it nonetheless improperly exercised its discretion and committed legal error in awarding \$5,000 in general damages for multiple activities, without specifying which part of the award was based on nuisance and which part of

the award was based on harassment? (Assignments of Error 14, 21, 22, 25, and 29).

7. Whether the trial court legally erred and improperly exercised its discretion in holding that the placement of the “firewood wall” by Robert Dunn amounted to nuisance, when this structure was totally on the Dunn property, and did not interfere with the Roberts’ use of their property in any way? (Assignments of Error 3, 4, 15, 17, 20, 22, 25, and 29).

8. Whether the trial court improperly exercised its discretion in denying defendant’s motions to amend their pleadings and later to consolidate a second lawsuit to allow adjudication of the Dunns’ easement rights over the Roberts’ driveway in the present lawsuit, but nevertheless entered a permanent injunction restricting the Dunns’ use of the Roberts’ driveway in the absence of any determination of such legal rights? (Assignments of Error 6, 9, 18, 23, 27, and 28).

9. Whether the trial court abused its discretion and committed legal error in awarding Roberts costs and attorney’s fees under RCW 10.14, the antiharassment statute? (Assignments of Error 14, 25, and 26).

10. Whether the Court improperly exercised its discretion and committed legal error in entering a judgment against Shirley Dunn which included \$5,000.00 in general damages and \$10,850.00 in damages for magazine subscriptions where

Conclusion of Law No. 20 specified the awarded \$5,000 against Robert Dunn only, and where there is no finding of fact or evidence to hold Shirley Dunn liable for damages for magazine subscriptions? (Assignments of Error 14, 22, 25, and 29).

11. Whether the trial court improperly exercised its discretion when it included costs not properly allowable as attorneys fees under RCW 10.14.090(2)? (Assignments of Error 25 and 29).

12. Whether the court's March 17, 2006 Order Granting Plaintiff's Motion for Contempt was erroneous as being based on erroneous legal grounds, pursuant to (Assignments of Error 4, 5, 8, 12, 16, 17, 20, 24, 26, 30, and 31).

III. STATEMENT OF THE CASE

The Dunn family has lived in and enjoyed the Bliss Beach area since Robert Dunn's great-grandparents homesteaded in the area. Robert Dunn's grandfather, and later his parents, originally owned the properties in question, including what is now the Roberts' property. (RP 485-86). Shirley Dunn has lived in her present home at 4928-6 Cooper Point Road N.W. for 43 years. She was married to Charles Dunn, father of Robert Dunn, until Charles Dunn's death. (RP 584).

Bliss Beach Road serves as the driveway for both properties, running from west to east, through the properties of

Dunn, Roberts, the Marcuses, and finally to the Dunns' boat ramp.
(RP 486-87; Ex. 28)

In 1994, Charles Dunn and Shirley Dunn negotiated a sale of adjacent property at 4928-8 Cooper Point Rd. NW to Harold and Enid Roberts. Trial Exhibit 109 is a Statutory Warranty Deed from Charles and Shirley Dunn to the Roberts, recorded August 4, 1994, and refers to two other critical documents which establish Bliss Beach Road. Exhibit A to Ex. 109 makes it subject to:

AN EASEMENT FOR INGRESS AND EGRESS OVER AN EXISTING 20' WIDE STRIP OF LAND AS ESTABLISHED FOR ROAD PURPOSES BY FRED D. DUNN, ET AL., IN INSTRUMENT RECORDED NOVEMBER 18, 1958 UNDER AUDITOR'S FILE NO. 603975 AND AS AMENDED BY INSTRUMENT RECORDED SEPTEMBER 1, 1967, UNDER AUDITOR'S FILE NO. 767400.

Exhibit B to Ex. 109 contains the following:

4. BOAT LAUNCH/RAMP. Grantor is an undivided one-half owner of an existing boat launch/ramp in the vicinity of the property being purchased by Grantee, accessible by the private road easement. ...

6. ROAD EASEMENT. Grantee shall have a perpetual non-exclusive easement to use the existing private road called "BLISS BEACH ROAD" (parcel B Exhibit A) which shall run with the land, and which connects to the County road called "COOPER POINT ROAD". ...

The September 15, 1958 easement (Ex. 103) referred to in Ex. 109 refers to a:

... paved roadway located on Lots Nine (9) and Ten (10) of Billings Subdivision according to the Plat thereof recorded in Volume 3 of Plats, Page 13, Records of Thurston County, and which roadway was paved by the several parties to this

Agreement during the year 1958, and shall be reserved to them, their heirs, successors and assigns as a means of ingress and egress in their several properties henceforth.

The Grantors reserve a like use in said roadway for themselves, their heirs, successors and assigns.

The easement herein contemplated shall extend from the middle of the present paved road to line ten (10) feet on each side of the center line of the present paving.

In 1998, the Roberts demolished the pre-existing home at 4928-8, and designed and constructed a very large house, pushing to the limits Thurston County's requirements for permeable surface (RP 74, 97; 332-33; Finding 2). Charles Dunn negotiated the transfer of more property to the Roberts for this purposes resulting in a boundary line adjustment which resulted in the Dunns transferring to the Roberts a triangular strip of property pursuant to BLA 970029 (Ex. 111) on the northern edge of the Dunn property, just north of the "Bliss Beach Road" common driveway. (RP 114-16).

At the time Charles Dunn passed away, BLA 970029 (Ex. 111) had been approved, but the Quit Claim Deeds transferring the BLA property had not been executed or recorded. The Roberts, with Charles Dunn's permission, had located a sand filter, measuring approximately 15' x 32' in the Dunns' front yard, just south of Bliss Beach Road. (RP 86). After her husband's death,

Shirley Dunn disputed the validity and need of BLA 970029 and of having the Roberts' sand filter on her property, and litigation ensued between her and the Roberts under Thurston County Superior Court Cause No. 00-2-1644-9. The parties eventually settled that lawsuit pursuant to an October 9, 2002 Settlement Agreement (Ex. 114) and dismissed the suit with prejudice pursuant to a Stipulated Order of Dismissal entered October 17, 2002. (Ex. 116; CP 102). Prior to such settlement, one of the litigated issues in that case had been fires in the Dunn's outdoor fireplace. On August 2, 2002, Judge Richard Strophy ruled on a Motion for a Preliminary Injunction brought by Roberts wherein they requested that the Court require the Dunns to abate beach fires and fires in the Dunns' outdoor fireplace. (Ex. 23, pp. 2, 4, and 10). Judge Strophy denied the requested injunction against burning. (Ex. 23, p. 27).

In 2003, the Roberts sued Robert Dunn in a Thurston County Superior Court antiharassment action under Cause No. 03-2-30079-6. (See Orders admitted as Ex. 20). That case culminated in a 4-day trial in front of Hon. Christine Pomeroy, whose oral ruling appears at CP 473-83. In that case, Judge Pomeroy again denied the Roberts' request to enjoin the Dunns'

fires on the beach and in their outdoor fireplace. (CP 343). The parties also fully litigated the issues of scaffolding on the Dunn property; chicken compost in the trench; placement of appliances and objects near the Roberts' wall; wood chips thrown over the Roberts' wall; mailbox issues; the writing of "remove this wall" on the Dunns' pavement; the mailing of magazine subscriptions; and the placement of the compost bin on the Dunn property. (CP 474-480). All of these issues culminated in a 02/28/03 Order for Protection, which was extended and modified by "Order Modifying/Terminating Order for Protection-Harassment" dated May 23, 2003 (Ex. 20).

The Roberts commenced the present litigation in 2004. Their Complaint recites a litany of allegations, most of which were the subject of the two prior lawsuits. The Roberts continued to attempt to block the Dunn's access through the Roberts' property to Dunn's boat ramp. It is the Dunns' position that pursuant to the 1958 and 1967 easement documents, (Ex. 103 and 104). Bliss Beach Road is in fact 20' wide as it runs through the Roberts' property, and that the Roberts had no right to replace the pre-existing asphalt with paver stones or to construct walls, railings, gardening, and other improvements within the roadway, or to

otherwise attempt to restrict the Dunns' vehicular access over the roadway. On August 12, 2005, the trial court in the instant case denied Dunns motion to amend their Answer to join such counterclaims in the present lawsuit. (CP 593) The Dunns then filed a complaint for declaratory and injunctive relief in a separate lawsuit under Thurston County Superior Court Cause No. 05-2-01699-7, and moved to consolidate the two lawsuits. The Court denied the consolidation motion on October 14, 2005. (CP 696) During the trial of the instant case, the Court ruled that it was not going to decide any issues relating to the property rights of the present parties over the road. (Finding 21, CP 1105). Thus, the Court admitted Exhibits 103 and 104, the 1958 and 1967 instruments that created Bliss Beach Road, "for background purposes only". (RP 587) The Court precluded the Dunns from submitting evidence concerning the historical use of the asphalt road prior to the Robert's installation of paver stones. (RP 265-68).

Despite its refusal to try any issues, or permit the Dunn's to present evidence, relating to the Dunns' easement rights over the road, the Court allowed plaintiffs to admit, and give their opinions about, an interlocutory order regarding boat ramp access entered in the prior litigation under Cause No. 00-2-1644-9. (CP 103-05; 455).

The Court ultimately found that the Dunns damaged the Roberts' brick pavers, by driving a heavy vehicle across them and by dragging a heavy object across them (Finding 12; Supp. Finding 2), and found that the Dunns were responsible for the damage (Conclusion 10 and Supp. Conclusion 3). The Court went on to permanently enjoin the Dunns from driving over the easement with any type of unusually sized vehicle (Conclusion 21; CP 1114), and awarded \$6,000.00 in damages to the Roberts for the damage (Supp. Conclusion 2, CP 1291).

The trial court allowed testimony and evidence concerning numerous previously litigated incidents from 1999 forward, including: placement by Rob Dunn of boards and other objects on the Dunn property near the Roberts' wall in 2001 and 2002 (RP 93-94; 124-25); items placed on the BLA area in 2002 that were the subject of the 2000 litigation (CP 115-16; 119-20); chicken manure in a trench along the Dunns' wall in 2002 (CP 122); compost bin on Dunn property in 2002 (CP 131-32); scaffolding on the Dunn property in 2002 (CP 132-37); 2003 unsolicited magazine subscriptions (CP 146-47; 351-52); wood chips coming over the Roberts' fence in 2002; and fires in the Dunns' outdoor fireplace

from 2002 forward (CP 214-15; 362-63) which were all subject to prior litigation.

One controversy in the instant suit concerns the right of Roberts to locate a sand filter for their septic system on the Dunn property. The 1994 Deed (Ex. 109) states in Exhibit B thereto in paragraph 3:

In the event that the existing septic system and drain field [on 4928-8] is at some future time condemned or not approved by a regulatory agency for any reason, grantor agrees to provide a suitable drain field on adjoining property owned by Grantor. If a satisfactory drainage system cannot be provided on Grantor's adjoining property, a drain field will be provided on a portion of Grantor's vacant property approximately forty two (42) acres, which is closest to Grantee's property that can be approved for such drain field.

The sand filter is part of the sewage system authorized by the county for the Roberts. The drain field for this system is located higher up on a hill, which is owned by the Dunns. The sewage gets pumped from the sand filter up the hill via a pump, after it filters through the sand filter. (RP 554-55) Eliminating the sand filter below, and moving the entire septic system up the hill would require a different sized pump. (RP 555-56). Pursuant to the Settlement Agreement dated October 9, 2002, (Ex. 114), Shirley Dunn and the Roberts settled litigation under Cause No. 00-2-01644-9 on several terms, including:

Mrs. Dunn shall sign a septic easement modified pursuant to this Agreement. **The easement shall require that the Roberts immediately apply for a waiver of the sand filter**

requirement for their septic system so that the sand filter portion of the easement may be converted to a pipeline easement and, if a waiver is not granted by Thurston County Department of Environmental Health, Roberts shall immediately apply for and attempt to obtain approval of an installation of an aerobic device in their septic tank so as likewise to eliminate the requirement for the sand filter and convert the sand filter easement to a pipeline easement. If neither of the foregoing can be accomplished, Roberts shall apply for approval for moving the sand filter to a location adjacent to the current drain field on the top or upon the upper portion of the Dunn property. Roberts shall commence all such efforts immediately and shall employ Jim Dickinson, a licensed septic designer, to assist with their application and installation. If Dickinson is not able to do the work, Roberts shall employ another licensed septic designer.²

Plaintiffs called Steven W. Peterson, a licensed sewage system inspector for Thurston County, who testified he was present at a meeting in the latter part of 2002 among Harold Roberts, Robert Dunn, Jim Dickinson, and himself. (RP 546) Mr. Dickinson recalled that at the time, there was not an approved aerobic treatment device to go into the existing septic tank. While he thought it unlikely the county would waive the requirement of the sand filter, (RP 548) he did not think there would be any problem getting County approval to relocate the sand filter. He testified:

“[I]f a proposal to relocate the sand filter was made, we would review it like any other proposal ... relocating it, we relocate sand filters often.” (RP 548-49)

The Roberts never applied to the county to waive the sand filter requirement; to install an aerobic device; or to relocate the sand filter. (RP 228-29; 405; 553). Mr. Peterson, the county

² (Emphasis added.)

official, could not and would not give an opinion as to whether any of these options would have been approved, without having an actual application to evaluate. (RP 553-54)

Septic designer James Dickinson testified he was present for a 2002 on-site meeting. He recalled that moving the sand filter to the top of the hill would require changes to the electrical and hydraulic equipment. (RP 618-19) The aerobic device option had to be ruled out because the proposed equipment was not on the list of usable devices approved by the state. (RP 619-20) Mr. Dickinson opined that waiver of the sand filter requirement was an option, but the Roberts never applied for it, and he could not give an opinion as to whether a waiver would be granted or not without a written application being made. (RP 620-21)

The Roberts contended that Robert Dunn verbally waived the requirements of the agreement in the 2002 onsite meeting. Robert Dunn was not an owner of the Dunn property in 2002. As far as any oral assent by Robert or Shirley Dunn to leave the sand filter in the Dunn yard, Harold Roberts testified that Mr. Dunn said, "Just leave it where it is." Jim Dickinson merely recalled:

The only thing that I can say is that I was probably explaining the difficulties and the costs and both the contractor and the electrical contractor was talking a lot of money to do either one of these and I remember - - I tried to explain what both of them were and what it would involve, and at some point they just said to leave it alone.³ (RP 625).

³ (RP 625).

In 2004, Robert Dunn and others stacked firewood around part of the perimeter of the Dunn property. (RP 462). This stack of wood was approximately 6' in height. It did not block the Roberts' access to their sand filter. (RP 465; 571) There was no testimony from the Roberts that they tried to get to their sand filter and were prevented, from doing so by the stack of firewood.

Twice a year, the Dunns historically had fires on the beach following spring and fall cleanup. (RP 468; 594). They regularly had fires in their outdoor fireplace on their patio, particularly on the evenings when Mr. Dunn and his friends would come in to warm up after boating, or during the day on the 4th of July. (RP 468).

In 2004, Robert Dunn installed a decorative vertical wall on the Dunn property out of driftwood logs. (Ex. 15; 130, p.p. 20-21). Mrs. Roberts does not believe Mr. Dunn erected this structure solely to harass her. (RP 244). Besides liking the way it looks, Mr. Dunn testified that it does afford the patio area some privacy from constant photography by the Roberts. (RP 498-99).

IV.ARGUMENT

- 1. The Trial Court Erred in Mischaracterizing the 2002 Settlement Agreement as Only Requiring “an Exploration of Alternatives,” Effectively Reforming the Contract in a Manner at Clear Odds With the Plain Meaning Thereof.**

Exhibit 114 unequivocally required the Roberts to (1) “immediately apply” for a waiver of the sand filter requirement, and

if such was denied, to (2) “immediately apply” for approval of an aerobic device to obviate the need for a sand filter, and failing to that, (3) to “apply for approval” to move the sand filter off of the Dunn yard. Roberts did none of these things. The Court erred by ignoring the plain language of the agreement.

The construction of contractual provisions presents a pure question of law.⁴ The goal in the interpretation of contracts is to ascertain the intention of the parties.⁵ Interpretation is the process whereby one person gives meaning to the symbols of expression used by another person.⁶ If any ambiguity exists in the contract, the doubt created thereby will be resolved against the one who prepared the contract.⁷ The intent of the parties may be discovered not only from the actual language of the agreement, but also from “viewing the contract as a whole, the subject matter and objective of the contract, all circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretation advocated by the parties.”⁸ A Court may not resort to parol evidence for the purpose of ascertaining the meaning of otherwise clear and unambiguous language of a contract in order to

⁴ *Denny’s Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wn. App. 194, 201, 859 P.2d 619 (1993).

⁵ *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

⁶ *Id.*, citing 3 A. Corbin, *Contracts* sec. 532, at 2 (1960).

⁷ *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 520, 527 P.2d 1115 (1974).

⁸ *Berg*, 115 Wn.2d at 667.

determine the intent of the parties.⁹ Parol evidence admitted to interpret the meaning of a contract cannot alter the terms contained in the contract. Thus, use of parol, or extrinsic, evidence as an aid to interpretation does not convert a written contract into a partly oral, partly written contract.¹⁰ Moreover, parol evidence may not add to, subtract from, modify, or contradict the terms of a fully integrated written contract.¹¹ Extrinsic evidence may not include (1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract.¹²

In the present case, the only extrinsic evidence that the trial court considered was the self-serving testimony of the Roberts and the vague recollection of two other witnesses that Shirley or Rob Dunn, on one occasion, verbally said to leave the sand filter where it was. Robert Dunn did not own the property at the time, and thus would not have had the authority to waive any of the terms of the agreement. The evidence does not support a finding that Shirley Dunn mad such a waiver.

The evidence certainly does not rise to that required to support a finding of express waiver of the clear and unequivocal

⁹ *Id.*, at 669

¹⁰ *DePhillips v. Zolt Const. Co., Inc.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (1998).

¹¹ *DePhillips*, 136 Wn.2d at 32, (citing *In Re marriage of Schweitzer*, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997)).

¹² *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

contract terms. As the Court of Appeals held in *Bill McCurley Chevrolet v. Rutz*¹³:

Waiver is the intentional relinquishment of a known right. The person against whom waiver is claimed must have intended to relinquish the right and the person's conduct must be inconsistent with any other intent. [Citations omitted]. To constitute implied waiver, there must exist unequivocal acts or conduct evidencing intent to waive; intent will not be inferred from doubtful or ambiguous fact. [Citations omitted].

In summary, even if one could accept the vague testimony that either Rob Dunn or Shirley Dunn said to leave the sand filter where it was, such single statement could not rise to the level of a full waiver of the plain terms of the settlement agreement. Clearly, the trial court lacked an adequate factual and legal basis to interpret the agreement in a manner that defeated its plain language.

2. The Doctrine of *Res Judicata* Barred Relitigation in the Present Action of Matters that had Already Been Litigated and Decided in Previous Lawsuits.

The trial court permitted the relitigation of the issue of beach fires for which Judge Strophy had denied an injunction in Cause No. 00-2-1644-9 before the parties stipulated to dismiss all causes in that case with prejudice. The trial court further admitted evidence and allowed relitigation of most of the issues that had

¹³ 61 Wn. App. 53, 58, 808 P.2d 1167 (1991); *rev. den.* 61 Wn. App. 53, 808 P.2d 1223 (1991).

been the subject of a trial and final orders in the antiharassment case before Judge Pomeroy under Cause No. 03-2-30079-6. The Court granted permanent injunctive relief and damages as it saw fit, without regard for the 2002 case in which the issue of beach fires had been dismissed with prejudice, or the rulings and orders entered in either of the prior cases. The Court allowed the admission of police reports and county health official reports from the prior proceedings,¹⁴ magazine subscription forms and related materials,¹⁵ along with voluminous photographic evidence dating back to 1998 and before.¹⁶

Res judicata and collateral estoppel are designed to prevent relitigation of already determined matters, and to curtail multiplicity of actions and harassment in the courts.¹⁷ To make a judgment res judicata in a subsequent action there must be a concurrence of identity in four respects: (1) of subject matter; (2) of cause of action; (3) of persons and parties; and (4) the quality of the persons for or against whom the claim is made.¹⁸ The doctrine of collateral estoppel differs from res judicata in that, instead of preventing a relitigation of the same claim or cause of action, it estops a party from asserting new facts previously found in prior litigation, even though a different claim or cause of action is asserted.¹⁹ A

¹⁴ Ex. 2 and 3.

¹⁵ Ex. 4-9.

¹⁶ Ex. 10-16.

¹⁷ *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 395, 429 P.2d 207 (1967).

¹⁸ *Id.*, 71 Wn.2d at 396.

¹⁹ *Seattle-First National Bank v. Kawachi*, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978).

judgment is res judicata as to every question which was properly part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated.²⁰ Res judicata applies to matters actually litigated and those that could have and should have been raised in the prior proceeding.²¹

Applying these rules to Judge Strophy's ruling regarding fires in Cause No. 00-2-01644-9, the present case involves the same subject matter: fires on the Dunns' beach and outdoor fireplace. The causes of action were similar or identical (nuisance and/or harassment). The parties are the same. Shirley Dunn was a party to the 2000 action, as well as the present case. While Robert Dunn was not a party to the 2000 case, he and Shirley are both beneficiaries and trustees of the trust which now owns the Dunn property in question. The "quality" of persons for or against whom the claim is made relates to the degree of controversy and motivation of the litigants in the related action.²² Here, the quality of the persons for and against whom the claims were made is virtually identical. Res judicata precluded relitigation of the issue of outdoor fires after the 2000 litigation, which culminated in Judge Strophy's denial of injunctive relief relating to the fires, with the entire cause of action then disposed of with an agreed dismissal with prejudice. Further, collateral estoppel prevented the Roberts from retrying

²⁰ *Id.*, 91 Wn. 2d at 226.

²¹ *See, DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 891-92, 1 P.3d 587 (2000), *rev. den.* 146 Wn.2d 1016, 51 P.3d 87 (2002).

²² *See generally, Bordeaux, supra*, 71 Wn. 2d at 397.

both the facts and issues relating to the outdoor fires in the present case.

The above-principles of res judicata and collateral estoppel similarly precluded relitigation of those matters tried before Judge Pomeroy in the 2003 antiharassment suit. The party in that proceeding was Robert Dunn, a party to the present proceeding. The identical facts were tried regarding scaffolding, chicken compost in the trench, objects stacked near the Roberts' wall, wood chips thrown over the wall, beach fires, magazine subscriptions, etc. Judge Pomeroy denied Roberts any relief regarding fires. The cause of action (harassment) was identical to the present proceeding.²³

Further, res judicata also bars the issues tried in the 2003 Anti-harassment lawsuit because at the time the anti-harassment order expired the Roberts produced no new evidence showing that the harassment barred by the temporary order was likely to continue. The Roberts were not asking for "new relief" but were instead asking the Court to extend an earlier order that had expired by its own terms. The evidence before the Court at the time the initial order was issued did not warrant extension of the order beyond one year, and the Roberts subsequently failed to present new evidence that would warrant reissuing the order. The issue of

²³ It should be noted that the only finding of nuisance in the present case appears in Conclusion of Law fire, relative to the "firewood wall". All other relief awarded by the trial court in the present case was based on a harassment theory pursuant to RCW 10.14.

extending the previous order beyond its one year term had already been determined in the earlier action, and thus is barred by res judicata.

In summary, the trial court erred by allowing trial in a third successive lawsuit of the outdoor fire issue, and by allowing retrial of the issues that had been the subject of previous RCW 10.14 litigation between the same parties in 2003. The items in this proceeding that were barred by res judicata and/or collateral estoppel are:

1. Magazine subscriptions (Finding 5; Conclusion 3, 20).
2. Writing "remove wall" on pavement (Finding 10).
3. Stacking, planting, or placement of items near wall (Finding 10, Conclusions 7 and 8).
4. Throwing log chips over wall (Finding 15; Conclusions 12 and 20).
5. Compost in trench (Finding 23; Conclusions 18 and 20).
6. Beach fires (Finding 26; Conclusions 20 and 23).
3. **The Trial Court Erred in Awarding Permanent Injunctive Relief, General Damages, Attorney's Fees and Costs Under the Antiharassment Statute, RCW 10.14.**

The trial court expressly held that the antiharassment statute, RCW 10.14, will allow – after expiration of a one-year order of protection – a second trial, in which the plaintiff can recover damages, costs, and attorney's fees occasioned by the previously

adjudicated harassment. In reality, the Court erroneously created a new general damages tort of “harassment”.

A petition for a temporary order of protection is not a civil action for damages.²⁴ The only civil cause of action for harassment is purely a creature of Washington’s antiharassment statute, RCW 10.14, whose purpose is:

...[T]o provide victims with the speedy and inexpensive method of obtaining civil antiharassment protection orders preventing all further unwanted contacts between the victim and the perpetrator.²⁵

The statute’s specific purpose is to enjoin harassing conduct. The statute is not intended to provide redress for *past injury*.²⁶ Nothing in the statute authorizes an award of compensatory damages.

The court below erred both in its choice and interpretation of the antiharassment statute. The Trial Court’s choice of law applying to facts is a question of law reviewed de novo.²⁷ A Court’s statutory interpretation is also reviewed de novo.²⁸ Therefore, this Court reviews the trial court’s application and interpretation of RCW 10.14 de novo.

²⁴ See, *Emmerson v. Weilep*, 126 Wn. App. 930, 937, 110 P.3d 214 (2005), *rev. den* 155 Wn.2d 1026, 126 P.3d 820 (2005).

²⁵ RCW 10.14.010.

²⁶ *Burchell v. Thibault*, 74 Wn. App. 517, 522, 874 P.2d 196 (1994).

²⁷ *Emmerson v. Weilep*, 126 Wn. App. 930, 938, 110 P.3d 214 (2005); *State v. Law*, 110 Wn. App. 36, 39, 38 P.3d 374 (2002).

²⁸ *Emmerson*, *supra*, 126 Wn. App. at 935; *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997).

RCW 10.14.010 establishes the procedure for obtaining an antiharassment order. Plaintiffs did not follow this procedure. To obtain an antiharassment order, the person alleging that he is being harassed must file a petition and affidavit stating the specific facts and circumstances underlying the petition.²⁹ For purposes of obtaining such an order, unlawful harassment is defined as (1) a knowing and willful (2) course of conduct (3) directed at such specific person (4) which seriously alarms, annoys, harasses, or is detrimental to a person and (5) serves no legitimate or lawful purpose.³⁰ The petitioner may obtain a temporary *ex parte* order on filing the petition.³¹ Generally, the court then sets a show cause hearing no later than 14 days from the issuance of the temporary order.³² If the court finds by a preponderance of the evidence that unlawful harassment exists, then "a civil antiharassment protection order shall issue prohibiting such unlawful harassment."³³ The order shall be effective for a year or less, unless the court makes an additional finding that "the respondent is likely to resume unlawful harassment . . . when the order expires."³⁴

When construing a statute, the primary objective is to carry out the intent of the Legislature.³⁵ That intent is determined

²⁹ RCW 10.14.040(1).

³⁰ RCW 10.14.020(1); *Burchell v. Thibault*, *supra*, at 521.

³¹ RCW 10.14.080(1).

³² RCW 10.14.080(2).

³³ RCW 10.14.080(3).

³⁴ RCW 10.14.080(4).

³⁵ *State v. Gettman*, 56 Wn. App. 51, 53, 782 P.2d 216 (1989).

primarily from the language of the statute. Words are given their plain and ordinary meaning unless a contrary intent appears. If the language is clear and unambiguous, there is no need for judicial interpretation. Statutes should be construed so as not to render any portion meaningless or superfluous.³⁶ The obvious legislative intent of RCW 10.14.010 et seq. is to award temporary antiharassment orders of not more than one year in duration unless specific findings are made. Costs and attorney's fees are available only in proceedings under the specific statutory scheme.

There is no common law cause of action for "harassment". The Legislature "is presumed to know the existing state of the case law in those areas in which it is legislating, and a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it."³⁷ Here, there is no clear expression that the Legislature intended to create a general common law tort cause of action for "harassment" that would support civil lawsuits for damages and permanent injunctions.

The trial court's permanent injunction does not meet the requirement of RCW 10.14.080(4) which requires:

An order issued under this chapter shall be effective for not more than one year unless the court finds that the respondent is likely to resume unlawful harassment of the petitioner when the order expires...

³⁶ *Id.*

³⁷ *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994).

The Court made no such finding to support the numerous permanent injunctions entered in this case. While the courts have broad authority to frame antiharassment orders, the authority is not limitless, and must be warranted by the facts.³⁸

Further, the trial court erred in awarding costs and attorney's fees pursuant to RCW 10.14.090(2). Washington courts follow the American rule in not awarding attorney's fees as costs absent a contract, statute, or recognized equitable exception.³⁹ RCW 10.14.090(2), which was the sole authority upon which Plaintiffs sought fees, states:

(2) The Court may require the respondent to pay the filing fee and court costs, including service fees, and to **reimburse the petitioner for costs incurred in bringing the action,** including a reasonable attorney's fee.⁴⁰

"The action" is defined by RCW 10.14.040, which states: "There shall exist *an action* known as a Petition for an Order of Protection in cases of unlawful harassment".⁴¹ The statute provides for a recovery of fees to the *petitioner* only in proceedings where a party petitions the Court for an antiharassment order. This statute is not a mechanism for recovery of attorney fees in a general civil litigation context. The trial court erred in so holding.

³⁸ See, *Trummel v. Mitchell*, 156 Wn.2d 653, 668, 131 P.3d 305 (2006).

³⁹ *The City of Seattle v. McCreedy*, 131 Wn.2d 266, 273, 931 P.2d 156 (1997).

⁴⁰ RCW 10.14.090(2) (emphasis added).

⁴¹ RCW 10.14.040.

4. The Court Lacked a Proper Evidentiary and Legal Basis for Holding That the Dunns' Vertical Log Wall is a "Fence" and in Directing That it be Cut to a Height of No More Than 8 Feet.

Finding 16 states, "The vertical log wall is considered a fence, and therefore cannot be more than 8 feet high measured from the surface of the grassy area that slopes down to the beach". The court went on in Conclusion 14 and in the permanent injunction order to direct that the Dunns cut the vertical log wall to no more than 8 feet measured from the surface of the grassy area sloping down to the beach. Such Findings and Conclusions lacked a proper evidentiary and legal basis.

The Court did not base the 8 foot height limitation on any statute, ordinance, or other legal standard. The sole source of the 8-foot limitation was Ex. 33, a November 23, 2004 letter from Thurston County Development Services to Shirley Dunn, stating in condition footnote 1: "The applicant shall reduce the height of the fence to 8 feet as measured from the base of each pile log along the sloping grade." This comment was made in connection with Mrs. Dunn's permit application. Nowhere in Finding 16, nor in Conclusion 14, did the Court state the legal standard under which it ordered the Dunns to cut the vertical log wall. Even if the vertical log wall required a permit, that fact at most would give the county the right to take further enforcement measures. It could not give neighbors a civil cause of action for injunction and damages.

Building permits are not relevant to a nuisance case. As our Court stated in *McInnes v. Kennell*⁴² in which the Court rejected the argument that failure to secure a building permit for a fence made the fence a nuisance:

The fact that the fence was erected without a building permit, although the Court found that the defendant acted in good faith, does not make it an outlaw to be assailed and destroyed by anyone or abated at the private suit of any person. The failure to secure a building permit does not cause damage. [Citation omitted]. The question narrows down to this: does the fence infringe upon some individual right of plaintiff?

There is no cause of action for “destroying one’s view”. As our Supreme Court stated in *Karasek v. Peirer*⁴³:

The respondent, as we have stated, bases her claim to an injunction upon the allegation in her complaint that the light has been cut off from her windows, and her house made less rentable and consequently damaged, by the erection of the fence by the appellant. But neither, or both, of these effects upon her property constitutes a cause of action in her favor unless they are the result of an unreasonable, and therefore unlawful, use by the appellant of his own premises. 1 Wood, Nuisances (3d ed.), pp. 2, 3. **At common law a man has a right to build a fence or other structure on his own land as high as he pleases, although he thereby completely obstructs his neighbors' light and air, and the motive by which he is actuated is immaterial.** *Rideout v. Knox*, 148 Mass. 368 (19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560; *Mahan v. Brown*, 13 Wend. 261 (28 Am. Dec. 461; *Letts v. Kessler*, 54 Ohio St. 73 (40 L. R. A. 177, 42 N. E. 765; *Frazier v. Brown*, 12 Ohio St. 294; *Falloon v. Schilling*, 29 Kan. 292 (44 Am. Rep. 642; *Chatfield v. Wilson*, 28 Vt. 49; *Lord v. Langdon*, 91 Me. 221

⁴² 47 Wn.2d 29, 38, 286 P.2d 713 (1955).

⁴³ 22 Wn. 419, 427, 61 P. 33 (1900).

(39 Atl. 552; *Phelps v. Nowlen*, 72 N. Y. 39 (28 Am. Rep. 93; 2 Washburn, Real Property (5th ed.), p. 362.

(Emphasis added.)⁴⁴

In summary, no evidentiary or legal basis supports the order to cut the vertical log wall. Finding 16 is devoid of evidence to show that the Roberts would have a private cause of action related to the vertical log wall. Conclusion 14 states no legal theory that would be supported by any finding of fact – be it nuisance or harassment – to sustain the Court’s injunction. Neither nuisance nor harassment was alleged, argued, or proven in connection with this structure. Rather, the finding and conclusion simply orders the Dunns to do something without specifying any basis. The judgment of the trial court should be reversed.

5. The Court Erred in Finding That the Placement of the Firewood Wall by Robert Dunn Constituted a Nuisance.

Finding 7 states that Robert Dunn built a firewood wall with a motive of upsetting the Roberts, and Finding 8 states that some of the firewood was stacked in a manner that obscured the view over the Dunn property of the Roberts’ house number coming down the road. Conclusion 5 states, “the placement of the ‘firewood wall’ by Robert Dunn, including the firewood against the Roberts’ wall, constitutes a nuisance.”⁴⁵ The Findings and the Conclusion are in

⁴⁴ *Karasek* involved a suit under the predecessor of RCW 7.40.030, which permits the injunction of “spite fences” and the like. This statute was not pled or argued, or relied on by the trial court. In any event, RCW 7.40.030 does not authorize the issuance of an injunction against structures which enhance the value and enjoyment of land, and are not nuisances, regardless of the motives of the owner and his intent to annoy his neighbor. *See, Jones v. Williams*, 56 Wash. 588, 106 P. 166 (1910).

⁴⁵ This item was the only nuisance conclusion in the entire case.

error in two respects. First, the evidence does not support a conclusion of nuisance, since the log wall was entirely on the Dunn property, and did not interfere with the beneficial use and enjoyment by the Roberts of their own property. Secondly, the Court's permanent injunction of the placement of items in the future within the currently landscaped area or within 6 feet of the "wing wall" (See Conclusion 8) improperly imposed a "view easement" servitude over the Dunn property for the benefit of the Roberts.

The trial evidence was compelling that Roberts replaced the modest sized original residence on their lot with the largest structure for which they could get county approval. Photographic evidence, (e.g., Ex. 15, p. 14) demonstrates that the Roberts placed their house number on a wall in a location where the line of sight to the number as one comes down Bliss Beach Road is across the Dunns' property. By holding that the Dunns must maintain a clear view of the number as one comes down the road, and by permanently enjoining the placement of landscaping or other objects on the Dunn property within specified distances of the Roberts' wall, the Court in fact imposed a "view easement" servitude on the Dunn property without legal justification. One cannot build to the extreme edge of one's lot and then complain because an adjacent landowner, in exercising the same privilege, has cut off the light, air, or view one formerly enjoyed. One cannot claim entitlement to the generosity of neighbors, but must depend

upon oneself, by reserving space enough on one's own land for all one's requirements, such as parking, light, air and view included.⁴⁶

The applicable Washington nuisance statute reads:

Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.⁴⁷

RCW 7.48.120 states: "A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." RCW 7.48.150 provides "every nuisance not included in the definition of RCW 7.48.130 is private."

The Washington legal standards applicable to private nuisance cases are well-established and consistent with the law of other jurisdictions.

The general legal principle to be inferred from court action in nuisance cases is that one landowner will not be permitted to use his land so unreasonably as to interfere unreasonably with another landowner's use and enjoyment of his land.⁴⁸

The permanent injunction precluding objects (including scaffolding, compost bin, wood, and usual types of landscaping, etc.) must fail, because the Roberts did not demonstrate any clear legal right to impose controls over the Dunn property. Finding 7,

⁴⁶ See, *Triplett v. Jackson*, 5 Kan.App. 777, 48 P. 931 (1897); *Paul v. Cantani*, 52 Misc. 2d 72, 275 N.Y.S. 2d 299 (1966); *United States v. Causby*, 328 US 256, 66 S. Ct. 1062, 90 L.Ed. 1206 (1946).

⁴⁷ RCW 7.48.120

⁴⁸ *Jones v. Rumford*, 64 Wn.2d 562-63; 392 P.2d 808 (1964).

which states that Robert Dunn stacked the firewood with the motive of upsetting the Roberts, that it was designed to “get the goat” of the Roberts, and was “done with the specific purpose of causing the Roberts grief” does not support the “nuisance” Conclusion of Law No. 5. Findings of Fact must support the Conclusions of Law.⁴⁹ To sustain a nuisance conclusion, there would have to have been a finding that the firewood wall somehow interfered with the Roberts’ use and enjoyment of their property. There was no such testimony or finding. The fact that the firewood wall was constructed around the sand filter is immaterial. Robert Dunn offered un rebutted testimony that the sand filter was accessible from the back side of the wood wall. (RP 465). The Roberts never testified that they tried to access the sand filter, or that they were unsuccessful in doing so. As entered, the Findings and Conclusions do not support a nuisance conclusion, and consequent permanent injunction and damages relative to the firewood wall.

Furthermore, the Court lacked legal authority to grant a permanent injunction regulating the items listed in Conclusion 8, (i.e., placement of objects, parking, nonconforming landscaping, and other items in the currently landscaped area) or within six feet of the wing wall. The Court’s ostensible theory for enjoining these items was harassment, under RCW 10.14, which as theory was improper, as discussed above. The Roberts never argued that

⁴⁹ *Lakeside Pump & Equipment, Inc. v. Austin Const. Co.*, 89 Wn.2d 839, 842, 576 P.2d 392 (1978).

these items were a nuisance. Under the broader law of injunctions, the record is devoid of any legal theory granting the Roberts the clear legal right to regulate activities on the Dunn property. An injunction may issue only when the petitioner is able to show a well-grounded fear of an immediate invasion of a clear legal or equitable right, resulting in a substantial injury, either existing or expected.

LeMaine v. Seals, 47 Wn.2d 259, 267, 287 P.2d 305 (1955);

Nielson v. King County, 72 Wn.2d 720, 725, 435 P.2d 664 (1967).

Injunctive relief is an extraordinary, equitable remedy, and cannot issue in doubtful cases. *Isthmian S.S. Co. v. National Marine Eng'rs Beneficial Ass'n*, 41 Wn.2d 106, 117, 247 P.2d 549 (1952). "Equity cannot restrict one landowner to confer a benefit on the other. It is only when an unreasonable or unlawful use of land by one property owner infringes upon some right of another in the reasonable use and enjoyment of his land that equity can intervene." *McInnes*, 47 Wn.2d 29 at 38.⁵⁰

In summary, the trial court lacked a proper legal basis to enter the permanent injunction, which should be reversed.

6. The March 17, 2006 Contempt Order (CP 1217) was in Error.

The Court's March 17, 2006 Order Granting Plaintiff's Motion for Contempt (CP 1217) is moot and of no effect, to the extent that the Findings, Conclusion, Judgment, and consequent Permanent Injunction (CP 1112) are found to be erroneous.

⁵⁰ *Citing Riblet v. Spokane-Portland Cement Co.*, 41 Wn.2d 249, 254, 248 P.2d 380 (1952).

It is generally held that civil contempt proceedings terminate when the suit in which the contempt arose is abated or finally disposed of, as by reversal. In a civil contempt proceeding, if for any reason the complainant becomes disentitled to the further benefit of such order, the civil contempt proceeding must be terminated.⁵¹ Thus, reversal of the trial court's injunction mandates reversal of the contempt order as well.

7. The Trial Court Erred in Refusing to Try Issues Relating to the Dunns' Easement Over the Roberts' Driveway, While Nevertheless Awarding Permanent Injunctive Relief, Restricting the Dunns' Use Thereof.

CR 15 provides that a party may amend its pleading by leave of court, which shall be freely given when justice requires. The amendment of pleadings is left to the sound discretion of the trial court, and is reviewed only for abuse of discretion.⁵² An abuse of discretion is discretion manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.⁵³ Similarly, it is left to the trial court's discretion whether to grant or deny a motion to consolidate.⁵⁴ CR 42(a) provides:

When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all of the matters in issue in the action; it may order all the actions consolidated; and it may make such orders

⁵¹ *State ex rel. Kerl v. Hofer*, 4 Wn. App. 559, 565, 482 P.2d 806 (1971) (quoting 17 C.J.S. Contempt Sec. 68 (1963)).

⁵² *Trohimovich v. Dept. of Labor & Industries*, 73 Wn. App. 314, 319-20, 869 P.2d 95 (1994).

⁵³ *Id.*, citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 42 P.2d 775 (1971).

⁵⁴ *See, Jeffery v. Weintraub*, 32 Wn. App. 536, 547, 648 P.2d 914 (1982).

concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Consolidation may avoid duplication of effort, expense, and litigation, and may prevent inconsistent results from two disputes involving similar or identical issues.⁵⁵ Piecemeal litigation is disfavored.⁵⁶

The trial court improperly exercised its discretion in denying the defendants' motions to amend their pleadings, and later to consolidate the two lawsuits. The defendants in the present lawsuit were Robert Dunn and Shirley Dunn. Shirley Dunn, as trustee of the trust in which Robert Dunn is a beneficiary is the plaintiff in the road easement lawsuit filed under Cause No. 05-2-01699-7 (See CP 648, Complaint for Injunctive Relief and Damages). Even though the court denied defendants motions to amend or consolidate the Court ultimately entered permanent injunctive relief restricting the types of vehicles the Dunns can drive over the Roberts' driveway (Conclusion 21) and entered judgment for \$6,000 in damages against the Dunns for damage to the roadway (Supplemental Conclusion 3) This permanent injunction could not have been reached without trying the easement issues which would

⁵⁵ See, *S. K. Barnes, Inc. v. Valiquette*, 23 Wn. App. 702, 706, 597 P.2d 941 (1979), *rev. den.* 92 Wn.2d 1033 (1979).

⁵⁶ *Brown v. General Motors Corp.*, 67 Wn.2d 278, 282, 407 P.2d 461 (1965).

have been joined by amendment or consolidation. The Court allowed no evidence as to the appropriateness of removal by the Roberts of the original asphalt surface comprising Bliss Beach Road, the converting of a neighborhood thoroughfare into a private garden area, the construction of the wing wall, and the placement of gardens, planters, and the like within the road. In the second lawsuit, Mrs. Dunn seeks a declaration that Bliss Beach Road is in fact 20 feet wide, and seeks a declaration that the Roberts' placement of these improvements constitutes a nuisance. The permanent injunction in the present case creates a high likelihood that there will be inconsistent adjudications between the two cases. In summary, the court's refusal to try the causes together should be reversed as a manifest abuse of discretion.

8. Even if the Trial Court had Authority Under 10.14 to Award Costs and Attorney's Fees, the Court Erred in Awarding, as Attorney's Fees, Costs That Were Not Properly Taxable.

The trial court awarded \$19,645.35 in "reasonable attorney's fees and costs" (See Appendix 1), but failed to distinguish between costs and fees.

The breakdown of the judgment is as follows:

Total amount:	\$50,715.35
Principal amount:	\$31,070.00

Breakdown according to Conclusions of Law:

Harassment related to magazines (Conclusion 3):	\$10,850.00
General Damages (Conclusion 20)	\$5,000.00
Wiring (Conclusion 2):	\$1,200.00
Fees for Septic Consultant Jim Dickinson pursuant to 2002 Settlement Agreement (Conclusion 25):	\$520.00
Wall/Driveway damages (Supplemental Conclusions 2 and 3):	\$11,000.00
Contempt Sanctions:	\$2,500.00
Attorney's fees and costs:	\$19,645.35
Breakdown:	
Counterclaim Fees for 2002 Settlement Agreement:	\$1,000.00
Attorney's Fees/Costs under 10.14 (Conclusion 27):	\$17,145.35
Fees from Contempt Motion:	\$1,500.00

A large portion of the "fees and costs" are itemized in the plaintiffs' attorney's billing summaries. Plaintiff's Supplemental Brief Re: Attorney's Fees and Costs (CP 1056). The billing summaries appear at CP 1060-1062. These billing summaries separately break out fees and "expenses". "Expenses" were included in the trial court's award.

RCW 10.14.090(2) makes an award of attorney's fees and costs discretionary:

(2) The Court may require the respondent to pay the filing fee and court costs, including services fees, and to reimburse the petitioner for costs incurred in bringing the action, including a reasonable attorney's fee...

The Roberts mischaracterized – and the Court awarded as attorneys fees– many items listed in the billing records as

“expenses”. RCW 4.84.010 defines the items that may be allowed as taxable costs to the prevailing party.(See appendix 1 for text of statute.)

Based upon the itemized costs discussed in detail in Defendants’ Response to Plaintiff’s Motion for Fees (CP 1068-70), the only costs that would have been properly awardable to the Roberts as the prevailing party would have been a \$110.00 filing fee.

In summary, it was reversible error for the Court to mischaracterize as attorney’s fees an amalgamation of miscellaneous costs. No fees or costs were properly allowable under RCW 4.84.010, in this case.

9. The Court Erred in Awarding \$5,000.00 in General Damages Against Robert Dunn Without Specifying the Legal Basis for Such Damages. Further, the Court Erred in Rendering a Judgment That Included All Judgment Amounts Jointly and Severally Against Robert Dunn and Shirley Dunn.

The Court awarded \$5,000.00 in General Damages against Robert Dunn only. See Conclusion 20. However, the Court failed to specify on what theories (i.e., nuisance, harassment, etc.) it awarded such damages. It is impossible to tell from the record the basis of the award of damages, without resort to speculation.

A party need not prove damages with mathematical certainty to recover where the fact of damages is well-established. . . . The evidence of damage, however, must be sufficient to

afford a reasonable basis for estimating loss, so that speculation and conjecture do not become the basis. . . . Further, the damages must be reasonable foreseeable, . . . and proximately cause by the act upon which liability is based.⁵⁷

In the present case, it is impossible to tell among the myriad of claims, which ones gave rise to the \$5,000.00 award of damages and on what legal theory, and by what measure. The damage award should be reversed as being overly speculative and devoid of a coherent evidentiary basis.

Per conclusion 20, the \$5,000.00 damages award was to be against Robert Dunn only. However, the Judgment (Appendix 1) shows all amounts, including the \$5,000.00 as being awarded jointly and severally against Shirley Dunn and Robert Dunn. This was clearly erroneous. Similarly, the \$10,850.00 award of damages for outrage and harassment related to the magazine subscriptions was also awarded jointly and severally against Robert Dunn and Shirley Dunn. There is no evidence in the record to support imposition of liability on Shirley Dunn, who testified she did not know about the subscriptions until after they had already been sent. (RP 480). Finding 5 specifies that only Robert Dunn committed the acts alleged, does not mention Shirley Dunn, and certainly offers no

⁵⁷ *Burkheimer v. Thrifty Inv. Co., Inc.*, 12 Wn. App. 924, 928, 533 P.2d 449 (1975) (citations omitted)

support for any Conclusion of Law holding her responsibility for damages therefor.

V. CONCLUSION

In summary, this Court should reverse the judgment of the Court below and dismiss the Roberts' claims in whole or in part, based on the authorities and argument outlined above. Insufficient evidence supports the Court's interpretation of the 2002 Settlement Agreement to only require the "exploration of alternatives" as opposed to the plain language of the contract, which required the Roberts to make actual permit applications to Thurston County. The Court either held that the Dunns waived the requirements of the agreement, in the absence of substantial evidence to support a knowing waiver of the agreement, or alternatively, the Court committed legal error by rewriting the agreement between the parties.

The Court's order requiring the Dunns to cut the vertical log wall down to an 8-foot height was erroneous, because the Court did not state the legal basis in Conclusion 14 for the order. Finding 16 is not supported by substantial evidence as to why the structure should be considered a "fence". Nor does Roberts have a private cause of action for code violations.

The Court misinterpreted and misapplied RCW 10.14, which prescribes a specific statutory procedure which was not followed in the present instance. The Court had no authority to order

permanent injunctions under that statute in excess of one year duration without making the mandatory findings required by RCW 10.14.080(4), which the Court failed to do. The Court further erred by awarding general damages under the statute, when RCW 10.14 makes no provision therefor, and in derogation of the clear legislative intent of the statute, which is to prevent unlawful harassment, not to provide redress for past injuries. The Court erred in awarding costs and attorney's fees under RCW 10.14.090(2). The procedures required by RCW 10.14 were not followed, and the statute does not apply.

The Court further erred in its award of costs and attorney's fees by improperly awarding nontaxable costs mischaracterized as attorney's fees in derogation of RCW 4.84.010. Retrial of most of the nuisance and harassment claims that were litigated in the present case was barred by res judicata and/or collateral estoppel, given the fact that these matters had been fully litigated in prior proceedings.

The only activity in the whole case that the Court held was a nuisance, the firewood wall, was located entirely on the Dunn property, did not affect any property rights of the Roberts, and there was no evidence that it prevented them from accessing the sand filter located on the Dunn property. Therefore, the Court erred in finding that the placement of the firewood wall (Finding 7, Conclusion 5) constituted a nuisance.

The March 17, 2006 contempt order was in error, based upon the erroneous Findings, Conclusions, and Judgment it was based upon. Upon reversal of the underlying adjudication, this Order should be overturned.

The trial court erred in refusing to try issues relating to the Dunns' easement over the Roberts' driveway, while nevertheless awarding permanent injunctive relief restricting the types of vehicles with which the Dunns may traverse the driveway. The Court manifestly abused its discretion in denying joinder of the present lawsuit with the related lawsuit involving the Dunns' easement rights over the driveway. Failure to try both causes together created a high likelihood of inconsistent adjudications, and was clearly erroneous.

Finally, the May 26, 2006 Judgment is completely erroneous. In derogation of Conclusion 20, which awarded \$5,000.00 against Robert Dunn only, and Finding 5 which specified that only Robert Dunn mailed the offending magazine subscriptions, the trial court nevertheless awarded the full amount of damages – including \$10,850.00 for the magazine subscriptions – jointly and severally against Robert Dunn and Shirley Dunn. This was clearly erroneous and should be reversed.

Pursuant to RAP 18.1, Dunns request fees based upon their contract with the Roberts and based upon the law.

DATED this 18 day of September 2006.



Jon E. Cushman, WSBA No. 16547
Nate J. Cushman, WSBA No. 34944
Attorneys for Appellants Dunn

Hon. GARY TABOR

MAY 26 2006

RECEIVED

MAY 30 2006

CUSHMAN LAW OFFICES, P.S.

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

HAROLD and ENID ROBERTS, a married couple,

NO. 04-2-00590-3

Plaintiff,

JUDGMENT

v.

ROBERT DUNN and SHIRLEY DUNN, individually,

Defendants

JUDGMENT SUMMARY

Pursuant to RCW 4.64.030, this Judgment shall be summarized as follows:

Judgment Creditor(s):	Harold and Enid Roberts
Judgment Debtor(s):	Shirley Dunn and Robert Dunn
Principal Judgment Amount:	\$31,070.00

JUDGMENT - 1

Williams, Kastner & Gibbs PLLC
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(253) 593-5620 (Tacoma)
(206) 628-2420 (Seattle)

1847328.1

COPY

Prejudgment Interest at 12% per annum	\$0,00
Reasonable Attorneys' Fees and Costs:	\$19,645.35

Principal Judgment Amount, Interest, Costs, and Attorneys' Fees Shall Bear Interest at 12% Per Annum.	
Attorney for Judgment Creditor:	Timothy L. Ashcraft of Williams, Kastner & Gibbs PLLC

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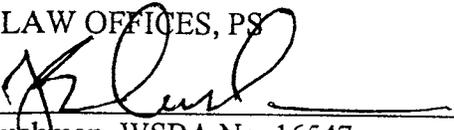
2 WILLIAMS, KASTNER & GIBBS PLLC

3

4 BY: 
5 Timothy L. Ashcraft, WSBA No. 26196
6 Attorneys for Plaintiffs

7 Approved as to form; notice of presentment waived:

8 CUSHMAN LAW OFFICES, PS

9 By: 
10 Jon Cushman, WSBA No. 16547
11 Attorneys for defendants

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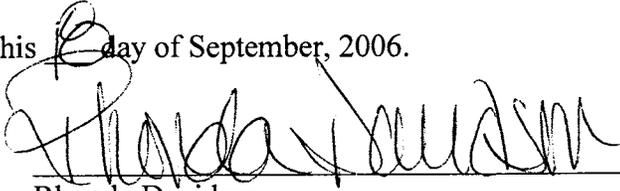
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Rhonda Davidson certifies and declares as follows:

1. I am a legal assistant at Cushman Law Offices, P.S. I am over the age of 18, not a party to this action and competent to testify to the facts set forth herein.
2. On September 18, 2006, I placed with ABC Legal Messengers an original of Defendants' Appeal Brief for filing with the Court and provided a copy via e-mail and by messenger to counsel for Respondents at the following address:

Timothy L. Ashcraft
Williams, Kastner & Gibbs
1301 A Street Suite 900
Tacoma, WA. 98402-4299

DATED at Olympia, Washington this 18 day of September, 2006.


Rhonda Davidson

FILED
COURT OF APPEALS
JULY 18 2006
06 SEP 18 PM 4:03
STATE OF WASHINGTON
BY _____
DEPUTY