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Trial Court No. 15-2-00384-5

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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EMPRESS ESTATE LLC, a Washington limited liability company; and,  
ZOHIER SALEEM,

Appellants,

v.

TIMOTHY J. DOYLE and TERRI DOYLE, husband and wife and the  
marital community comprised thereof,

Respondents/Cross-Appellants.

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**APPELLANTS EMPRESS ESTATE LLC AND ZOHIER  
SALEEM'S REPLY BRIEF AND CROSS-RESPONDENT'S  
RESPONSE BRIEF**

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## I. INTRODUCTION

Respondents Timothy and Terri Doyle<sup>1</sup> acquired their parcel knowing it was subject to a 60-foot-wide road and utilities easement that served several other parcels. They also knew the road (“Empress Lane”) provided the only access to the Empress Estates’ (“Empress”) bed-and-breakfast and event center. Doyle knew his servient estate would frequently be burdened with commercial traffic related to the Empress.<sup>2</sup>

Doyle admits these facts. He also admits his desire to see Empress fail because it conflicts with his desire for a bucolic home. Doyle has engaged in antagonistic activity (harassing guests, shooting guns during events, placing forbidding signs within the easement, allowing animals loose on the road, placing multiple and forbidding challenging speed bumps, and storing equipment, vehicles, trailers on or near Empress Lane) to discourage potential guests from doing business with the Empress.

Empress and its owner, Zohier Saleem,<sup>3</sup> sued for quiet title and tortious interference to try to protect their business and property. Saleem asked the court to issue an injunction to curb Doyle’s conduct and to declare Empress’ rights under the easement.

Doyle counterclaimed, and also asked the court to issue an injunction to require Empress and its guests to respect his property rights

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<sup>1</sup> While Mr. and Mrs. Doyle were named in the lawsuit, Mr. Doyle was the primary person involved in the dispute. For ease, this Response/Reply will primarily refer to Mr. Doyle.

<sup>2</sup> Most of the Empress’ larger events—events that cause greater traffic—occur on weekends.

<sup>3</sup> We will refer to the Plaintiffs/Appellants as either “Empress” or “Saleem.”

(not park on his property, not pet his animals, and limit the number of vehicles that could use Empress Lane during any one activity).

Both sides sought and obtained preliminary relief in 2013 and again in 2015. And then, after holding a hearing on the merits in 2017, the trial judge granted both sides a permanent injunction where it balanced each side's competing interest in the reasonable uses of their respective properties, including their respective interest in the easement. This injunction restricted Doyle from using his property in a manner designed to harm the Empress' business. It also placed conditions on the Empress, designed to protect Doyle's property rights.

**A. Doyle's Cross-Appeal**

On his cross appeal, Doyle only challenges certain provisions of the Final Injunction because he believes they are unlawful (e.g., removal of cedar fence from the easement) or not supported by substantial evidence (limit the number of speed bumps to two). He primarily tries to distinguish this court's ruling in *Littlefair v. Schulze*, 169 Wn. App. 659, 278 P. 3d 218 (2012) to argue that because they do not interfere with Empress' *current* use of the entire 60-foot-wide easement, his various fences, improvements, or storage of personal property within the easement should be allowed.

But, as analyzed below, this Court made clear in *Littlefair* that a dominant easement holder can prevent a servient owner from constructing or maintaining any permanent or semi-permanent structure, improvement, or even personal property from an easement, even if those items do not

interfere with the easement holder's current use of the easement. The *Littlefair* Court suggested the dominant estate must take action to have those items removed lest they risk losing their right to future use of the easement by virtue of adverse possession.

Doyle also challenges, as an abuse of discretion, the trial court's ruling limiting him to two speed bumps on that portion of Empress Lane that passes by his home. Because this condition is well within the trial court's discretion, and is supported by "substantial evidence," it should not be disturbed on appeal.

And finally, Doyle claims the trial court erred when it allowed Empress to have up to 68 parking places, which was the number approved and required by Cowlitz County when it approved Empress' site plan. While acknowledging he did not avail himself of the Land Use Procedures Act's (LUPA) administrative or judicial review processes, Doyle still wants to use this appeal to attack the County's SEPA determinations or land-use decisions. Because he did not properly raise these issues below or use the proper channels to challenge the County's approval, this Court should reject Doyle's collateral challenge.

**B. Doyle's Response to The Empress' appeal**

In his Response Brief, Doyle admits a trial judge cannot impose punitive sanctions for alleged violations of a preliminary injunction unless the *applicant* for the preliminary injunction posted an injunction bond as required under CR 65(c). Doyle instead tries to find a safe harbor by

claiming he never requested the court to grant him preliminary injunctive relief, and that the trial court did so on its own (“*sua sponte*”).

But the record clearly shows otherwise; Doyle did ask for and received preliminary equitable relief and he was required to perfect his right to enforce the injunction by posting security. The trial court erred when it enforced an injunction against Saleem that was not supported by a bond, as required by law.

Finally, Doyle argues that the two sets of fines imposed against Saleem were remedial and not punitive because Saleem had the opportunity to purge the contempt. Yet, Doyle cannot cite to any portion of the contempt order, or even the record, that supports this creative argument. There is also no evidence to support the judge’s decision that Doyle suffered \$1,500 in damages from the three violations of the preliminary injunction. CP 723.

## II. RESTATEMENT OF CROSS-APPELLANTS’ ISSUES

Doyle’s cross appeal raises the following issues:

**Issue One:** Did the trial court abuse its discretion when it ordered Doyle to cease activities that threatened to interfere with the Empress’ business?

**Answer:** Trial courts have broad discretion to issue injunctions that provide equitable relief to the parties. Here, the trial court balanced Doyle’s property interest with Empress’ rights to be free of Doyle’s improper interference with its business. Like an umpire in a baseball game, neither side was completely satisfied with the Judge’s call. The trial court properly exercised its discretion when he restrained Doyle from interfering with Empress’ business.

**Issue Two:** Can a servient owner maintain structures, improvements, or substantial personal property within an easement, even if those items don't interfere with the dominant owner's current use of the easement?

**Answer:** Under *Littlefair v. Schulze*, a servient owner cannot maintain permanent or semi-permanent structures or improvements (or even personal property) within an easement area, even if those items don't interfere with the dominant owner's current use of the easement, lest the dominant owner be at risk of losing their rights to the easement by virtue of adverse possession. The question is whether those items could trigger the servient owner to later claim adverse use to the unused portions of the easement.

Here, the trial judge did the same type of balancing that the trial court did in *Littlefair* and ruled that some, but not all, of the structures or personal property needed to be removed from the easement. However, this Court made clear that a dominant owner can (and perhaps must) insist upon having all permanent or semi-permanent improvements, be removed from the easement, even if those items don't interfere with the dominant owner's current use. Because fences are one of the best examples of a servient owner claiming ownership, the trial court erred in not requiring Doyle to remove all fences from the easement area.

**Issue Three:** Did the trial court abuse its discretion when he limited Doyle to two speed bumps, instead of three?

**Answer:** Trial courts have broad discretion to issue injunctions that provide equitable relief to the parties. Here, Empress asked the court to require Doyle to remove all three speed bumps, and presented evidence to show the hardship these bumps had on those using Empress Lane. The court also considered Doyle's evidence and concerns about the risk of speeders. The court then weighed the competing interest and allowed Doyle to maintain two speed bumps, under certain conditions. The Judge did not abuse his discretion and there was substantial evidence to support his ruling.

**Issue Four:** Can Doyle use this appeal to challenge Cowlitz County's SEPA determinations or land-use approvals of Empress's Site Plan that requires and allows for 68 parking spaces?

**Answer:** Under LUPA, a party waives their right to collaterally attack a final SEPA determination or land-use decision unless they have availed themselves of Washington’s land-use appeal process. Since Doyle did not challenge or appeal Cowlitz County’s approval of the Empress’ Site Plan, he is barred from challenging them on this appeal.

### **III. COUNTER STATEMENT OF THE CASE<sup>4</sup>**

#### **A. Doyle’s Counter-Statement of the Case is unsupported, irrelevant, confusing, and not supported by citations to the record**

Much of what Doyle writes in his Counterstatement is either a regurgitation of his self-serving declarations not adopted as findings by the judge (e.g., Doyle had “consent of his neighbors” to install a gate or that Saleem was somehow responsible for running over Doyle’s chickens, shooting his black lab or spooking his horses) or contain irrelevant information designed only to impugn Saleem’s character (e.g., Saleem stole water from Horseshoe Lake and electricity from a City maintenance building).

Doyle also includes facts related to the County’s land-use and SEPA decisions, but cites to Clerks Papers that have no bearing on the issue. For example, on pages 9 through 11 of his Response Brief, Doyle describes facts about the County having made various SEPA determinations and requiring traffic studies. Yet, he cites to Clerk Papers 48, exhibits A through C. These have nothing to do with those issues.

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<sup>4</sup> Respondents’ Brief is littered with irrelevant facts that have no bearing on the appeals and are asserted to only disparage Saleem and Empress. The facts come solely from the unsubstantiated declarations of the Doyles. Tellingly, the trial court never adopted any of the facts proffered by the Doyles, and Saleem submits the facts are not supported by substantial evidence.

Doyle's mistaken reference to the record makes it impossible for Appellants to adequately respond.

**B. Doyle has no rights to the Easement beyond the borders of his property**

In an attempt to challenge Saleem's right to use the Empress properties<sup>5</sup> (as opposed to his use of the easement), Doyle mischaracterizes his rights under the easement as a "shared easement." Respondent's Br. P.2. Doyle does this to try and give himself legal standing (dominant estate rights) to challenge the Empress' rights as a servient owner of that portion of Empress Lane that runs through the Empress Estates' property. In other words, Doyle wants to claim a right under the easement to dictate what Saleem can do within that portion of the easement that runs across the Empress' property.

But the easement begins at Doyle's north property line and runs through the south edge of his property where it then serves the remaining parcels, including the Empress.<sup>6</sup> Because he only owns the first parcel (and because there is no road maintenance agreement providing otherwise), Doyle only has the right to use that portion of the easement that crosses over and serves his property. His right to the easement therefore ends at his south boundary line. This means Doyle does not have standing to complain about the Empress' use of its property, even if that

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<sup>5</sup> The Empress Estates is now comprised of two properties; the Empress Estate property and the adjoining Embratora property which Saleem acquired **after** the April 22, 2015 Amended Order of Injunction.

<sup>6</sup> The map shows the easement running through the Empress Property to serve a portion of another lot.

use encroaches upon the easement. Only the dominant estate holders can complain about the Empress' use of that portion of the easement that runs across Saleem's parcels.

Indeed, as stated by the original property developer, Julius Ledgett, the easement was only intended to provide ingress and egress to the various lot. CP 156-158. Doyle lacks standing to challenge uses of those portions of the easement that extend beyond his property line.

**C. Doyle did not appeal Cowlitz County's land-use approvals or SEPA determinations**

Albeit confusing, it seems Doyle also wants to challenge, for the first time on appeal, Cowlitz County's land-use approvals and SEPA determinations related to Empress' commercial development and its right to maintain 68 parking spaces. After complying with SEPA and the land-use procedures, Cowlitz County approved Empress's site plan for additional parking related to its new event center on February 24, 2017. CP 139-142, 150-153. In addition to the 30 spaces that already existed on site (including with the easement area running through Empress' property), the County required (and allowed) Empress to create an additional 38 parking spaces, for a total of 68 spaces. *Id.*; see also CP 724-725.

Doyle tries to confuse the court by misreading the County's approval (and the trial court's subsequent adoption) of the site plan. However, the approved site plan clearly shows what the County required

and allowed in relation to the new event center. CP 153.<sup>7</sup> First, the undisputed testimony of the project's architect, Lisa Slater, clearly shows the existing and additional parking allowed by the County in connection with the new event center. CP 139-142. And second, the Declaration of Cowlitz County's Director of Building and Planning also demonstrates the County had (1) completed the SEPA process, (2) reviewed and approved the construction of the new "Multi-use Building" and (3) and approved the site plan. CP 150-153.

Doyle did not challenge or appeal the County's SEPA or land-use decision. He instead tries to cloud the facts by referring to prior plans, decisions, and comments from County staff issued well before the County approved the final Site Plan to claim the Empress is in violation of Cowlitz County code, or SEPA. But as indicated by the County's approval of the site plan, these problems were cured or rendered moot with the County's most recent approval of the Empress' site plan. CP 152.

**D. Doyle requested and received injunctive relief, but did not post a bond to perfect his right to enforce the preliminary injunction.**

In response to Saleem's first request for injunctive relief, the Doyles filed a *Memorandum in Support of Defendant's Answer to*

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<sup>7</sup> CP 142 is identical to what the County approved, but provides a more readable copy.

*Complaint for Injunctive Relief and Damages*. CP 730-739. In that Answer, Doyle specifically requested that Saleem “be ordered to maintain his business in accordance with Cowlitz County Code and ensure that his clientele not disturb the [Doyle] or [Doyle’s] property during the course of him conducting business.” CP 739. The trial court granted both Saleem and Doyle’s requests for injunctive relief.

Specifically, the June 19, 2013 Preliminary Injunction provided Doyle the following relief: it (1) prohibited the Doyles from blocking the access easement; (2) required Empress to take steps to not disturb the Doyles; and, (3) restrained both parties from harassing one another. CP 72-73. Indeed, paragraphs 2 and 3 matched the Doyles’ requested relief.

And while the Empress was required to post a \$5,000 bond, Doyle was not required to post any type of security. *Id.* This meant, under CR 65(c), the injunction was never perfected, and therefore was not enforceable.

On April 22, 2015, the 2013 reciprocal Injunction was supplemented by an Amended Order of Injunction. CP 75. The Empress was required to maintain its \$5,000 injunction bond. However, Doyle was still not required to post a bond, as required by law.

Despite Doyle’s failure to ever post a bond or other security, the trial court still chose to enforce the Injunction against Saleem by finding him in Contempt. The first judge to find contempt determined that Doyle could rely upon Saleem’s \$5,000 bond as security for his injunction. CP

331. The trial court also ordered Saleem's \$5,000 bond be forfeited as a sanction for violating the court's Amended Injunction. *Id.*

#### **IV. RESPONSE ARGUMENTS TO DOYLE'S CROSS-APPEAL**

##### **A. The Trial Court did not abuse its discretion to order Doyle to stop interfering with Empress' business and easement interests**

RCW 7.40.020 authorizes courts to issue injunctions. A trial court's decision to grant an injunction, and the terms of that injunction, are reviewed under the abuse of discretion standard. *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000); RCW 7.40.020. "Trial courts have broad discretionary power to fashion injunctive relief to fit the particular circumstances of the case before it." *Hoover v. Warner*, 189 Wn. App. 509, 528, 358 P.3d 1174, 1184 (2015). And since a suit for an injunction is an equitable proceeding, trial courts are "vested with a broad discretionary power to shape and fashion injunctive relief to fit particular facts, circumstances, and equities of the case before it. 43A C.J.S. Injunctions § 235, at 512 (1978)." *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36, 39 (1982). Appellate courts must give "great weight to the trial court's exercise of discretion in equitable cases" and only if that discretion is abused will the appellate court "interfere with" that judgment. *Id.*

Here, the trial court was faced with conflicting interests, evidence, and arguments regarding their competing interest and claimed harms.

On one hand, Doyle was using his ownership of the entry to Empress Lane to accomplish his goal of causing Empress to fail so that he

would no longer be bothered by commercial traffic.<sup>8</sup> For example, he (1) allowed animals to roam on the road, (2) placed obnoxious speed bumps without adequate warning signs on Empress Lane, (3) fired his gun during Empress' events, (4) placed dead animal carcasses within the easement, (5) placed unfriendly signs ("Danger! Shooting Range!") near the road, (6) parked travel and equipment trailers, construction equipment or other personal property on the easement, and (7) placed fences and fence posts in close proximity to the road, all designed to cause potential customers from wanting to have the Empress host their events. CP 159-163; also see CP 211-225 for photographs showing how Doyle cluttered Empress Lane and the easement with various property, vehicles, fences, signs and general debris.

In addition to suing for quiet title to the easement, Empress sued for and produced evidence to support its intentional interference with a contractual relationship or business expectancy claim: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an *improper purpose* or used *improper means*; and (5) resultant damage. *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992);

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<sup>8</sup> Despite the court's Final Injunction, Doyle continues to engage in some of these activities. Saleem has filed a Motion for Contempt to protect his business.

*Leingang v. Pierce Cty. Med. Bureau*, 131 Wn.2d 133, 157, 930 P.2d 288, 300 (1997).

On the other hand, the trial court also needed to honor Doyle's rights, including his right to not have Empress overuse the easement or affect his right to quiet enjoyment of his property. In particular, the judge had to determine to what extent Empress' use of Empress Lane unreasonably exceeded the scope of the easement or its activities interfered with Doyle's quiet enjoyment of his property.

After considering the facts, the trial court determined that, at least to some extent,<sup>9</sup> Doyle's tactics unreasonably interfered with Empress' business. The trial court also found some of what Doyle was placing or maintaining within the easement violated Empress' easement rights. But the court also determined that some restrictions needed to be placed on Empress' use of the easement, including provisions to make sure guests did not park on Doyle's property, and that the Empress use parking monitors for large events to avoid parking violations. CP 282.

The result was the issuance of an injunction that attempted to place restrictions on both sides. The court tried to carve out a remedy to protect both side's interest; a result that ultimately failed to make either side completely happy. But the question on appeal is whether the trial court abused its discretion. Other than to reargue what he argued below, Doyle has failed to show abuse of discretion.

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<sup>9</sup> Saleem believes the trial court did not go far enough to curb Doyle's tortious activities.

**B. Under *Littlefair v. Schulze*, Doyle cannot have any permanent or semi-permanent structures or improvements within the easement area**

Doyle also challenges the trial court's decision requiring him to remove some of his fences and property from the easement, while also allowing him to keep other items. This raises the question of whether, and to what extent, a servient owner can maintain structures, improvements, or substantial personal property within an easement where those items do not interfere with the dominant owner's *current* use of the easement.

Both sides agree that this court's holding in *Littlefair v. Schulze*, 169 Wn. App. 659, 278 P.3d 218 (2012), *rev. den.*, 176 Wn.2d 1018, 297 P.3d 706 (2013) governs, or at least provides guidance to, the outcome of this case. However, the parties disagree on what this court held in *Littlefair* or how that holding should be applied.

The facts and legal issues present in *Littlefair* are strikingly similar to the facts and law present here. *Littlefair* owned a 40-foot-wide easement across Schulze's property. However, the actual road (Gordon Road) only used about 12 to 14 feet of that easement, which the trial court found was adequate for its intended purpose.

The servient owner, David Schulze, placed log decks, trailers, and vehicles south of Gordon Road. Schulze also built a cattle fence north of Gordon Road. While none of these items encroached upon the road, they were all within the 40-foot easement.

The evidence at trial showed the current roadway, which was 12 to 14 feet wide, was sufficient for the purposes and uses by the parties. *Id.*

The trial court also found that Schulze's fence did not interfere with Littlefair's actual and current use of the road.

The dominant owner, Peter Littlefair, sued to require Schulze to remove all of the items from both sides of the road. He argued his rights to the easement trumped Schulze's rights. He also claimed the fence was barred under a local ordinance that prohibited fences within easements.

The trial court in *Littlefair* was presented with the same sort of competing property interests present in this case.<sup>10</sup> In an attempt to balance those interests, the judge ordered Schulze to remove everything from the south side of the road. However, he allowed Schulze to retain the fence along the north side of the Road. The court found that, with removal of the items south of the road, the fence could remain, because there would be no interference with Littlefair's use of the road, including having to drive on the shoulder to avoid pot holes.

Dissatisfied with what appeared to be a balanced ruling, Littlefair appealed. On appeal, this Court overturned the trial court's decision in *Littlefair v. Schulze, supra*. While the Court of Appeals overturned the decision on the ground that the fence violated a County Code that prohibited fences from easement areas, it independently determined that the issue involving Schulze's fence required remand.<sup>11</sup>

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<sup>10</sup> But unlike the case at hand, tortious interference was not at issue in the *Littlefair* case.

<sup>11</sup> "But we need not remand for the trial court to address these issues because the county ordinance discussed below compels the conclusion that the court should have ordered Schulze to remove his fence." *Id.* at 668.

This Court began its analysis in *Littlefair* by recognizing that, as the servient owner, Schulze was still entitled to the full use of his property, provided his use did not interfere with “the original purpose of the easement.” *Id. citing Thomson v. Smith*, 59 Wn. 2d 397, 407 P. 2d 798 (1962).

But this Court then jumped quickly into an extensive analysis of how easements can be terminated through adverse possession, and what acts of a servient owner can rise to the level of adverse or hostile use:

Where the servient owner creates an obstruction that ‘clearly interferes with the proper enjoyment of the easement,’ such use may lead to an adverse possession claim by the servient owner if the dominant estate owner currently uses the easement.

*Littlefair*, 169 Wn. App at 666 (citations omitted).

This Court addressed Schulze’s argument that, since his use of the easement area (placement of the livestock fence) did not actually interfere with *Littlefair*’s current use of the easement, it could not be considered “adverse” and therefore could not form the basis to terminate the easement.

Schulze asked how a servient owner’s use could be considered ‘hostile’ for purposes of adverse possession if that use does not actually interfere with the dominant owner’s current use. This Court rejected Schulze’s arguments and held: “a dominant estate owner has the right to protect his rights in the easement by requiring the servient estate owner to

remove any structure that could deny the easement owner his full easement rights.” *Id.* (internal citations omitted).

This Court added that: “As the servient owner, [Schulze was] entitled to enjoy the full use of his property, but [could not] build structures that *although arguably not interfering with current easement use*, would by adverse possession principles deny the easement owners their right to the *future expanded* easement use.” *Id.* (emphasis added).

This Court noted: “It follows that a dominant estate owner has the right to protect his rights in the easement by requiring the servient estate owner to remove any structure that could deny the easement owner his full easement rights.” *Id.* at 666 (citations omitted) (emphasis added).

And then, specifically rejecting Schulze’s argument that until Littlefair sought to expand his use of the easement, the fence could not be considered adverse, the Court stated: “Schulze’s fence appears to be a permanent structure that could establish an adverse possession claim by Schulze; if so, Littlefair is entitled to have it removed to prevent loss of a major portion of the 40-foot easement.”

This Court then concluded that because “[t]he trial court erred by failing to address the *possibility* that Schulze’s fence could support an adverse possession claim for a major part of the easement” its decision needed to be reversed (and not just remanded). *Id.* at 667-668 (emphasis added).

Under *Littlefair*, a dominant owner not only has the right to insist upon the removal of permanent or semi-permanent structures or

improvements from the unused portions of the easement area, their failure to do so, within the 10-year adverse possession deadline, could cause them to lose their right to expand their use of the easement.

Applying this court's ruling in *Littlefair* means Doyle cannot place or store anything within the easement area that could ripen into an adverse possession claim and extinguish any of the dominant easement holder's rights to expand upon that easement, even if those items don't currently interfere with the use of the road. The *Littlefair* Court did not focus on whether the encroachment actually interfered with the current use, since that is not a requirement for an adverse possession claim. It instead looked at whether the item placed within the easement could "possibly" be grounds for asserting a claim of adverse possession.

In trying to distinguish *Littlefair*, the trial judge here wrote that Doyle's "wire fence" was "not the kind of permanent structure that was prohibited in *Littlefair*" and that "such fences are routinely placed along the road to keep animals and children in..." CP 727.

But the livestock fence Schulze installed in *Littlefair* is nearly identical to the livestock fence Doyle built. See 2011 Wa. App Ct. Briefs LEXIS 688 (2011), Trial Exhibit 44 for a picture of the fence.

Fences (regardless of quality, condition, or purpose) have long been the standard (or text book example) for finding hostility, as they are clear evidence that an adverse possession claimant is treating the land inside the fence "as [his] own against the world." *Roy v. Cunningham*, 46 Wn. App. 409, 413, 731 P.2d 526 (1986). Here, as in *Littlefair*, the fence

runs, for the most part, parallel to Empress Lane. There is no rational basis for the court here to have dismissed Empress' concerns about the fence serving to prevent future expansion of the easement.

This is especially true where “a fence purports to be a fence line, rather than a random one, and when it is effective in excluding an abutting owner from the unused part of a tract otherwise generally in use, it constitutes prima facie evidence of hostile possession up to the fence.” *Acord v. Pettit*, 174 Wn. App. 95, 107-09, 302 P.3d 1265 (2013) (internal citations omitted).

Doyle relies upon *City of Edmunds v. Williams*, 54 Wn. App. 632, 637, 774 P.2d 1241 (1989) for the proposition that construction of a fence in an easement area is not, in and of itself, a sufficiently inconsistent use to constitute adverse possession. The *Edmunds* case, from Division I, involved an easement that went unused for a period of fifteen plus years. *Id.* at 637. The Court made one comment about the fence under those specific facts. The *Edmunds* Court did not establish a bright line test for fences as its ruling was limited to the narrow facts of the case.

Regardless, this Court's decision in *Littlefair* followed after *Edmunds*, demonstrating this Division's differing views on fences within easements, and the concerns about the “possibility” of adverse possession.

Doyle also tries to distinguish the *Littlefair* case because this Court also found error with the trial court's finding that the fence may have interfered with those who wanted to drive around pot holes and its refusal

to enforce Skamania County's code that prohibits fences from being placed within easement areas.

However, the Court's opinion mainly focuses on the adverse possession concerns of allowing fences to be built within easement areas. While it does address these other issues, and ultimately reverses (as opposed to remand) the trial court's decision, the adverse possession sections of the opinion stand independent of these portions of the opinion. Had this Court only intended to resolve the appeal on the ordinance violation, it would have clearly stated. Instead, most of this Court's opinion is devoted to addressing problems inherent in allowing servient owners to maintain fences within easement areas, even when those fences don't interfere with the dominant owner's current use.

This Court in *Littlefair* clearly stated a rule that, absent the easement holder's consent, a servient owner cannot maintain permanent or semi-permanent structures within an easement area, lest the holder of the dominant estate risk having their right to expand upon that easement terminated.

The trial court in this case correctly ruled that Doyle needed to remove his cedar fences (or other obstructions) within the easement area. However, the trial court should have also required Doyle to remove all of the other fences or posts, including the livestock fences that were "arguably" hostile to Empress (or the other parcel owners) to expand upon their use of the easement. At minimum, this court should remand that issue

to the trial court to determine why Doyle's livestock fence is different than the fence described in *Littlefair*.

**C. The trial court's ruling prohibiting Doyle to maintain structures within the easement was ripe for judicial determination**

Doyle next claims the trial court erred by preventing him from placing new fences within the easement area because, until he actually builds the fence, there is no controversy. In other words, he wants to force the Empress to sue each time Doyle decides to place some new structure within the easement.

Such approach would not only ignore the trial court's current ruling, it would call into question all injunctions or declaratory relief actions where relief and determinations affect future behavior, which would probably include most injunctions and declaratory judgments.

Such a ruling would also waste tremendous public and private resources in having to litigate every new complaint, regardless how similar it was to the previous determination. Courts should be encouraged to issue injunctions and declaratory relief that are clear, forward-looking, and designed to avoid further litigation.

Here, there was (and still is) an actual, justiciable controversy between Doyle's wrongful interference with Empress' business and easement interest and Doyle's right to quiet enjoyment of his property. The trial court attempted to resolve this dispute in a way to address the current issues as well as into the future. The trial court did not err in

resolving whether, and to what extent, Doyle could encroach upon the easement.

**D. Doyle lacks standing to challenge Cowlitz County's approval of the Empress' Site Plan**

The Amended Final Order on Permanent Injunction expressly authorizes the Empress to maintain “a multi-use commercial facility such as a bed-and-breakfast, event center, or other multi-use facility” as approved by the County. CP 279. Under section III.3 of the Injunction, the Empress is:

[A]llowed to have as many parking spaces as allowed by Cowlitz County Building and Planning Department, provided the Plaintiffs do not allow cars to park within the Empress Lane easement. Plaintiffs will therefore be initially allowed the 55 parking spaces currently provided for on the Empress and Embratora properties. Once the 13 planned spaces are constructed, the Plaintiffs can add 13 more spaces, for a total of 68 spaces as provided in the Site Plan. If allowed by Cowlitz County, the Plaintiffs can add additional parking spaces by (1) creating additional spaces on Plaintiffs' Property or (2) acquiring a recorded easement or easement in gross from adjoining parcels. CP 280-81.

With regard to what the court meant by the Empress Lane easement, Section III.4 states that “[n]o Empress Guest shall be allowed to park within the easement area leading to Plaintiffs' property.”

Two things are clear: First, Empress can park as many vehicles on its Property as permitted by Cowlitz County which, at the time the court issued the injunction, was 68. The court properly deferred to Cowlitz

County to determine the amount of traffic that Empress Lane could accommodate, at least to serve Empress' current activities. It is also clear that Empress may need to improve or even expand upon the 60-foot-wide easement to accommodate additional uses.

And second, the court only intended to prevent Empress from parking vehicles off-site; that is, no cars could be parked on any portion of the easement "leading to the Plaintiffs' property." As evidenced by its adoption and incorporation of the County approved site plan (CP 724-725), the trial court did not intend to prevent Empress from using the existing parking stalls shown to be within that portion of Empress Lane that passes through Empress' property. Instead, the trial court held that in the event the Empress needs additional parking places to accommodate future development, it must create those off of the easement area ("so long as it is located outside the easement"). CP 725.

As evidenced by the site plan, which the court specifically incorporated into the Final Injunction, the Empress is permitted (and required) to have 68 parking spaces, all of which must be located on-site. This included the 30 spaces that already existed, including several shown to be within that portion of the easement that runs through Empress' property. CP 724-725; CP 139-142.

While difficult to track (especially since his Response Brief cites to portions of the record that have no bearing on the issue), it seems Doyle wants to use his cross-appeal to attack Cowlitz County's SEPA determinations and land-use approvals. But the law clearly precludes such

collateral attacks, especially when the party has failed to avail themselves of the administrative process.

The Land Use Petition Act (LUPA) is the exclusive means for property owners, opponents, and public agencies to affect, challenge, or appeal SEPA and land-use decisions. RCW 36.70C.010. With certain exceptions not pertinent here, LUPA provides the “exclusive means of judicial review of land use decisions.” RCW 36.70C.030(1); *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 449, 54 P.3d 1194, 63 P.3d 764 (2002); *Harlan Claire Stientjes Family Tr. v. Thurston Cty.*, 152 Wn. App. 616, 621, 217 P.3d 379, 382 (2009). LUPA provides a clear, consistent and predictable process, including timely judicial review. LUPA also guarantees property owners forced through what can sometime be an intensive and expensive review process, the one thing they want most; finality.<sup>12</sup>

The Washington Supreme Court has also ruled that LUPA's exhaustion-of-administrative remedies requirement must be strictly enforced. RCW 36.70C.010; *Durland v. San Juan County*, 182 Wn.2d 55, 66, 240 P.3d 191 (2014). ). If no appeal is filed within the 21-day period,

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<sup>12</sup> As the Washington Supreme Court stated in *Skamania Cty. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3d 241, 250 (2001):

We have also recognized a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that “[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property. . . . To make an exception . . . would completely defeat the purpose and policy of the law in making a definite time limit.” *Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974).

the land use decision is deemed valid and lawful, and any challenge is forever barred. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181-82, 4 P.3d 123 (2000). This includes the type of collateral attack being attempted by Doyle in this case. See *Durland v. San Juan County*, 174 Wn. App. 1, 13, 298 P.3d 757 (2012) (“[A] party may not collaterally challenge a land use decision for which the appeal period has passed via a challenge to a subsequent land use decision.”); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005) (challenge to grading permit amounted to untimely collateral attack of earlier special use permit, where authorization for grading permit came from special use permit, whose appeal period had passed, and where sole basis for challenging grading permit was that extensions of special use permit were improper).

Doyle did not challenge or appeal Cowlitz County’s SEPA determinations or approval of Empress’ land-use application. He is therefore barred from challenging those decisions here.

Doyle also tries to shoehorn his obligation as the servient owner under the easement to obtain standing to challenge Saleem’s use of the Empress’ properties. In other words, Doyle claims standing, under the easement, to challenge Empress’ use of its property, even though Doyle’s right to use the easement only extends to the south edge of his property.

The easement here was created by plat and was only intended to provide ingress, egress, and utilities for the various lots.<sup>13</sup> CP 156-157. There is no evidence of any recorded covenants, conditions or restrictions or road maintenance agreements that would grant reciprocal easement rights to the easement. There are also no common areas that would require or allow Doyle to use the easement to access areas beyond his property.

As such, Doyle does not have any right to object to Empress encroaching upon that portion of the easement that runs through its property.

**E. The trial court correctly ordered the removal of the speed bumps from the easement area**

On his third assignment of err, Doyle challenges the trial court's authority to order him to remove one of his three speed bumps from Empress Lane, absent a specific finding of fact regarding how three, versus two, speed bumps are unreasonable.

As stated above, trial courts have broad discretion when issuing equitable relief. Those decisions will be upheld upon substantial evidence.

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<sup>13</sup> Here, Doyle never attempted to present evidence that he somehow had a right to enforce the easement beyond the boundaries of his property and therefore he cannot claim such right:

The rules of contract interpretation apply to interpretation of an easement and a deed. The interpretation of an easement and a deed is a mixed question of law and fact. "What the original parties intended is a question of fact and the legal consequence of that intent is a question of law." Because intent is a question of fact, the court did not err in ruling on summary judgment that there were material issues of fact.

*Pelly v. Panasyuk*, 2 Wn. App. 2d 848, 864, 413 P.3d 619, 628-29 (2018) (internal citations omitted).

There is no dispute that Doyle built or placed three sets of large speed bumps across that portion of Empress Lane that runs through his property. There is also evidence that these speed bumps were installed and maintained to “hinder” access to the Empress Estates (and other property owners). For example, one of the neighbors, Gary Loomis, testified to the many things Doyle had done to try and intimidate Saleem, or to make it difficult to operate his business. This specifically included tearing out portions of the paved road which Saleem and Loomis had built, and installing speed bumps “to hinder access to Empress Estates and to other easement owners.” CP 160. The photographs of Empress Lane also show the speed bumps. CP 213, 214, 217, 218. The judge also conducted a “jury view” of Empress Lane and made his own determinations regarding the number and nature of speed bumps?<sup>14</sup>

Based on all of this evidence, the court reasoned that Doyle could have two reasonably placed and marked speed bumps within the easement area, located at each end of the easement. CP 589. The court certainly did not abuse his discretion.

Findings of fact are not required for every contention made by parties to a case—findings of fact are only required for all material issues. *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704,707, 592 P.2d 631 (1979). The trial court need only make findings sufficient to inform an appellate court “what questions the trial court decided and the manner in which it

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<sup>14</sup> Appendix One, Letter from Commissioner David Nelson regarding site visit.

did so.” *Tacoma v. Fiberchem*, 44 Wn. App. 538, 541, 722 P.2d 1357 (1986).

## V. REPLY BRIEF ARGUMENTS

### A. **The Trial Court erred in allowing Doyle to enforce a preliminary injunction issued without security under CR 65(c) after he applied for and was preliminary injunctive relief.**

Doyle concedes that an *applicant* for a preliminary injunction must post security under CR 65(c), and that failure to do so means the preliminary injunction was not perfected and is therefore unenforceable.

But Doyle argues he never *applied* for a preliminary injunction and therefore was not required to post security under CR 65(c). He claims the court simply granted him a preliminary injunction *sua sponte*. His claim is factually incorrect and in direct contradiction to the record.

As stated *supra*, Doyle countered Empress’ motion for a preliminary injunction by making his own request for injunctive relief. He specifically requested the court to order Saleem “to maintain his business in accordance with Cowlitz County Code and ensure that his clientele does not disturb [Doyle] or [Doyle’s] property during the course of him conducting business.” CP 739. Doyle wanted Empress to stop its guests from harassing his family or his animals.

Doyle received the preliminary relief he requested in the form of the June 19, 2013 preliminary injunction, which provided the following: (1) prohibited the Doyles from blocking the access easement; (2) required Empress to take steps to not disturb the Doyles; and, (3) restrain both

parties from harassing one another. CP 72-73. Paragraphs 2 and 3 matched the Doyles' requested relief. Doyle was granted the preliminary relief for which he applied for. Empress was required to post a \$5,000 bond; Doyle posted no security. *Id.*

Because the Doyles requested injunctive relief pending a final determination of the case, the requirements of RCW 7.40.080 and CR 65(c) apply in full force. As the court stated in *Swiss Baco Skyline Logging Co. v. Haliewicz*, 14 Wn. App. 343, 345, 541 P.2d 1014, 1016 (1975), “[t]he security requirement as it exists today accomplishes two things. First, it is a condition to obtaining injunctive relief between private parties. Second, it provides a remedy to the restrained party if it is later determined restraint was erroneous in the sense that it would not have been ordered had the court been presented all the facts.” (Internal citations omitted).

The bond is a condition to obtaining injunctive relief between private parties. A party cannot be held in contempt of an injunction where no bond was posted. In short, Doyle failed to perfect the 2013 or 2015 Injunctions and he lacked the ability to enforce them against Saleem and Empress. The trial court's two findings of contempt must therefore be reversed as a matter of law.

**B. The award of sanctions against Saleem and Empress were punitive and violated RCW 7.21.040.**

Two separate judges found Saleem and Empress in contempt for allegedly parking too many cars on their property on four separate

occasions. Saleem adamantly denies these charges, but also submits that the fines imposed by the two judges were criminal in nature and were imposed in violation of RCW 7.21.040.

Doyle argues the fines were not punitive because the Orders included provisions to allow Empress to “purge” the contempt. Creative writing, but there is no factual support for his contention.

The court’s oral order requiring Saleem and Empress to pay a \$5,000 fine was a penalty for their alleged failure to comply with the Amended Injunction. On Saleem and Empress’ motion for reconsideration, the trial court reduced this “fine” to \$500, but never offered Saleem and Empress an opportunity to purge the contempt. The court instead “suspended” the remaining \$4,500 fine as though Saleem and Empress were criminal defendants serving bench probation. CP 75.

According to the express terms of the Order of Contempt, the sanction was a punitive sanction, at least in the amount of \$500. There was no purge clause for the \$500 fine. CP 330-331. The trial court violated RCW 7.21.040 when it imposed a punitive sanction against Saleem and Empress. The later fine of \$1,500 was punitive for the same reasons since it too failed to provide a means for Saleem and Empress to purge the contempt.

As Doyle admits, a remedial sanction must contain a purge clause or it loses its coercive character and becomes punitive. *In re Structured Settlement Payment Rights of Rapid Settlements, Ltd.*, 189 Wn. App. 584, 613, 359 P.3d 823 (2015), *review denied*, 185 Wn.2d 1020, 369 P.3d 500

(2016). Further, remedial monetary sanctions can only accrue from the date of the contempt finding, and there must be a purge clause included to avoid being a punitive sanction. *See State v. Sims*, 1 Wn. App. 2d 472, 476, 406 P.3d 649, 651 (2017).

A “punitive sanction” is “a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.” RCW 7.21.010(2). Such sanctions do not allow the party to purge the contempt. *State v. Buckley*, 83 Wn. App. 707, 711, 924 P.2d 40 (1996). “Unless the contemptuous act occurred in the presence of the court, the procedure requires the county prosecutor or city attorney to file a complaint or an information and for a trial to occur before a neutral judge. RCW 7.21.040(2), .050(1); *see also In re Interest of Mowery*, 141 Wn. App. 263, 276, 169 P.3d 835 (2007).” *State v. Sims*, 1 Wn. App. at 480.

The trial court’s only remedy for contempt by Saleem and Empress, with the posting of a bond by the Doyles, was a remedial sanction for violation of the 2015 Injunction. Doyle does not challenge that the alleged acts leading to imposing the fines occurred outside the presence of the Court, and Saleem and Empress were afforded no opportunity to purge the \$500 contempt.

Finally, the second judge attempted to circumvent the statute by referring to the \$1,500 as “damages” as opposed to a “penalty” or

“sanctions.”<sup>15</sup> However, there was absolutely zero evidence presented regarding damages. Indeed, Doyle did not even request damages as part of his Motion for Contempt. CP 296-97. Further, even if the \$1,500 sanction was damages, there was no ability to purge the amount and the damages were sanctions. Trial courts are not allowed to create these types of loopholes to get around the limitations places upon them by the Legislature, and the trial judge here was attempting to create statutory exceptions where none exist. Absent a request for or evidence of pecuniary damages, the trial court erred in imposing \$1,500 in damages for the alleged violation of the injunction.

In sum, the trial judge erred in imposing criminal like sanctions (fines) for alleged violations of the Amended Preliminary Injunction. The contempt orders should therefore be vacated.

## VI. CONCLUSION

The trial court correctly ordered Doyle to remove the cedar fence and other items from the easement area. The trial court also acted within its discretion to limit the number, nature, and type of speed bumps that Doyle could maintain within the easement. However, under *Littlefair*, the court should have ordered Doyle to remove the other fences that could constitute adverse possession and prevent users of the easement, including Saleem and the Empress from utilizing the entire 60-feet in the future.

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<sup>15</sup> CP 723. “I find that Doyle is damaged from the three violations in the combined amount of \$1,500.” The judge further noted in a footnote (#4) that “[t]his amount is not part of the \$4,500 held in abeyance by Judge Evans.”

This court should also reject Doyle's attempt to collaterally attack Cowlitz County's approval of Empress' SEPA and land-use approvals and uphold the trial court's incorporation of the site plan approved by the County.

Finally, the trial court's orders of contempt should be vacated because the underlying injunction was never perfected by Doyle posting security as required under CR 65(c) and because the fines were punitive and not remedial in nature and therefore issued in violation of RCW 7.21.040.

DATED this 21st day of May, 2018.

Respectfully Submitted,

LANDERHOLM, P.S.



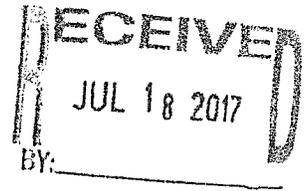
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PHILLIP J. HABERTHUR, WSBA # 38038  
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Attorneys for Appellants



## **APPENDIX 1**



July 17, 2017

Timothy J. Doyle  
Terri Doyle  
1087 Lewis River Road  
#165  
Woodland, WA 98674

Bradley W. Anderson  
Landerholm  
P.O. Box 1086  
Vancouver, WA 98666

Re: Empress Estates v. Doyle

Dear Parties:

Thank you for your presentations at the hearing on July 12, 2017 and the invitation to visit the properties. Based on the additional input, I have modified the proposed order as set forth below:

1. I am directing the Defendant to move the fence corner structure with the "shooting range" sign to outside the 60' easement. This is a permanent structure and violates the requirements of Littlefair.

2. The monitor for the Empress will need to stand by the Empress sign just before the Empress Lane intersection. This will help avoid any contact with the Defendant.

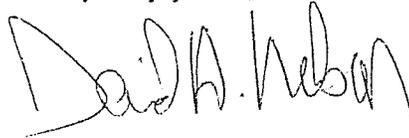
3. I modified the provision addressing the first 500 feet north of the Empress property on Empress Lane. The concern raised was that other owners may park on Empress Lane, for which Mr. Saleem did not want to face a contempt hearing. Therefore, I modified III.5 of the order to state "five or more vehicles parked within the 60 foot easement and within 500 feet of the north line of the Empress and Embratora" properties will raise a rebuttable presumption. This prevents the problem of many cars parking along the easement while allowing for a few cars that may not be related to Empress' activities.

4. If Empress Lane is widened thereby requiring Mr. Doyle move his fence and equipment to 6 feet from the road surface, I am requiring that the entire length of Empress Lane be widened. What I want to prevent is having only the portion of the road through Mr. Doyle's property be widened, while leaving the remaining part of Empress Lane the same width.

5. I am allowing the Defendants to leave one speed bump, per lane of travel, at the south side of their property, in their discretion. I observed two speed bumps, so 1 will need to be removed.

I enclose with this letter the file endorsed Order Granting Plaintiffs' Motion for Permanent Injunction and Order Re: Motions for Contempt.

Very truly yours,

A handwritten signature in black ink, appearing to read "David A. Nelson". The signature is written in a cursive, somewhat stylized font.

David A. Nelson

DAN/sac  
Enclosures

**LANDERHOLM, P.S.**

**May 21, 2018 - 4:36 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50323-9  
**Appellate Court Case Title:** Empress Estate, LLC, et al., App/Cross-Resp v. Timothy J. Doyle, et ux,  
Res/Cross-App  
**Superior Court Case Number:** 15-2-00384-5

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