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No. 50323-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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

Plaintiffs/Appellants,

v.

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

Respondents/Cross-Appellants

**RESPONDENTS AND CROSS-APPELLANTS
RESPONSE BRIEF**

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A. ASSIGNMENTS OF ERROR

1) The trial court erred in ordering Doyle to remove a cedar fence in an unused portion of an easement area and replace it with a wire fence and remove gate posts without a finding that the cedar fence or gate posts could establish an adverse possession claim.

2) The trial court erred in enjoining Doyle from placing a fence in the unused easement area in the future.

3) The trial court erred in allowing a total of 68 vehicles to park on Saleem's property.

4) The trial court erred in ordering Doyle to remove a speed bump in an easement without a finding that the speed bump unreasonably interfered with the use of the easement.

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1) Does the cedar fence or gate posts affect Empress' use of the easement? (Assignment of Error No. 1)

2) Can the trial court enjoin Doyle from putting fences in the unused portion of the easement in the future. (Assignment of Error No. 2)

3) Does the County allow Saleem to have 68 vehicles parked on Empress property? (Assignment of Error No. 3)

4) Does the speed bump that the court ordered removed unreasonably affect Empress' use of the easement? (Assignment of Error No. 4)

C. COUNTER-STATEMENT OF THE CASE

This case involves a dispute between neighbors over the use of a shared easement. In 2002 Respondents Timothy Doyle and Terri Doyle (together referred to as "Doyle") purchased property in rural Cowlitz County.¹ He purchased his 5.4 acre lot to raise horses and other farm animals and provide a safe and peaceful living environment for his children.² His property is bisected by a private road easement ("Empress Lane") which passes through his front yard and is located about twenty (20) feet from his shop.³ The easement benefits several other large parcels of property.⁴ In 2011, with the consent of neighbors, Doyle constructed a

¹ CP 12 (2013 case)

² CP 12, ¶4 (2013 case)

³ CP 12, ¶3 (2013 case)

⁴ CP 1 (2013 case)

gate, operated by a keypad, to limit the unregulated flow of traffic on Empress Lane and allow his children to safely walk to the bus stop.⁵

In 2012 Appellant Zohier Saleem ("Saleem") purchased property ("Empress Estates") benefited by the easement.⁶ Saleem intended to operate a bed and breakfast inn and a wedding and events center.⁷

At the time he purchased the property, Saleem did not have the authority to operate a bed and breakfast nor the requisite permits for large events.⁸ Despite this, Saleem ignored local authorities and continuously held large events open to the public resulting in increased traffic utilizing the easement during these events.⁹

Saleem's defiance of authority was exhibited soon after he purchased Empress Estates. Saleem was charged with theft of services after the Woodland police caught him at nearby Horseshoe Lake pumping water from the lake using power from the City's maintenance building. Saleem told the police that his well at Empress Estates was not working.

⁵ CP 12, ¶12-15 (2013 case)

⁶ CP 4, ¶2 (2013 case)

⁷ CP 4, ¶5 (2013 case)

⁸ CP 41, Ex. L (2013 case); CP 62, Ex. 3-4 (2015 case)

⁹ CP 12 (2013 case)

He also represented to the police that he had permission from the city to take water from the lake, which turned out to be untrue.¹⁰

On January 19, 2013 he had a "Grand Opening Event" at Empress Estates.¹¹ Soon thereafter, the Cowlitz County Department of Building and Planning scheduled an inspection of Empress Estates due to activities being held without the required permits.¹² On January 29, 2013 the Cowlitz County Health Department notified Saleem that he was not supposed to open Empress Estate to the public without reactivating the public water system, submitting an application and scheduling an inspection.¹³

Undeterred, Saleem had a Vendor Open House Event on March 19, 2013.¹⁴ In May, 2013 Saleem was again notified by the Cowlitz County Building Department that it had come to their attention that he intended to host a bridal show. The Building Department warned him that this activity would be in violation of multiple Cowlitz County Codes.¹⁵

¹⁰ CP 62, Ex. 6 (2015 case)

¹¹ CP 4, ¶11 (2013 case)

¹² CP 57, Ex. 16 (2015 case)

¹³ CP 62, Ex. 4 (2015 case)

¹⁴ CP4, page 4, para. 13 (2013 case)

¹⁵ CP 57, Ex. 12 (2015 case)

Nevertheless, Saleem held the event anyway.¹⁶ On June 2, 2013 Saleem held a hot rod event at Empress Estates.¹⁷

Because of a lack of parking, many cars attending the large events would park in the easement along Empress Lane, back to the Doyle property.¹⁸ The Empress' events caused significant disruption to Doyle's rural lifestyle with loud music, headlights, noise, cars parked adjacent to his property, and occasional intruders trying to touch his horses. As things escalated, Doyle had his chickens run over, his black lab shot and later killed, and his horses spooked.¹⁹ Doyle, attempting to document the disruptions, began to photograph Empress patrons.²⁰

In June 2013 Saleem filed a Complaint against Doyle for an order enjoining him from interfering with Empress patrons.²¹ Simultaneously, Saleem filed a motion for a preliminary injunction requesting that a gate positioned at the entrance of Empress Lane, remain open or be removed.²²

Doyle filed an objection detailing the disruptions caused by Saleem's

¹⁶ CP62, page 6 (2015 case)

¹⁷ CP62 page 6 (2015 case)

¹⁸ CP 68 (2013 case)

¹⁹ CP 68 (2013 case)

²⁰ CP 68 (2013 case)

²¹ CP 1 (2013 case)

²² CP 2 (2013 case)

events and his safety concerns.²³ On June 19, 2013 Judge Warning entered a Preliminary Injunction requiring the gate to remain open, but also imposed other conditions, including requiring Saleem to take reasonable steps to ensure that his patrons do not disturb Doyle and limiting the amount of vehicles that could park on the Empress Estates property to ten (10).²⁴ This vehicle limitation was intended to limit the amount of cars passing through the Doyle property and to protect against cars parking on the easement.²⁵ Pursuant to RCW 7.40.080 the judge required Saleem, the party requesting the preliminary injunction, to give a \$5,000.00 bond.²⁶

Around this time, Saleem filed a Planning Clearance application for a bed and breakfast. The Cowlitz County Building Department, by correspondence dated June 24, 2013, requested additional information to complete their review. Specifically, the Building Department informed Saleem that *"any proposed parking must be located outside the 60'*

²³ CP 12 (2013 case)

²⁴ CP 15 (2013 case)

²⁵ CP 80, p. 3, para. 3 (2015 case)

²⁶ CP 15 (2013 case)

easement area because the Cowlitz County Code prohibited the required parking spaces to be located within street easements.²⁷

Finally, on August 22, 2013 Saleem obtained planning clearance to open up his bed and breakfast which specified "***No parking is permitted in the street easement.***"²⁸

In December of 2013 the Cowlitz Building Department warned Saleem of violating fire code and accessibility regulations if he were to have a public New Years Eve party he was advertising on his website. The letter reminded him "...you are fully aware that your facility has received approvals only for limited commercial residential occupancies, namely, your bed and breakfast business for up to five (5) units."²⁹ After Saleem ignored the Department's warning he was issued a Notice of Violation on January 2, 2014 because he was "operating in direct violation of State and County codes" and the case was referred to the Prosecuting Attorney's Office.³⁰

²⁷ CP41 Ex. L (2013 case)

²⁸ CP 79, Ex. 25 (2015 case)

²⁹ CP 68, Ex. D (2013 case)

³⁰ CP 68, Ex. E (2013 case)

While Saleem continued to have public events at the Empress Estate, the Cowlitz Building Department continued to send warning letters to him. By letter dated April 2, 2014, the director of the Building Department set forth requirements that Saleem would have to do to forestall enforcement actions.³¹ On August 27, 2014 in an e-mail from a Cowlitz County Commissioner to David Brittell, Saleem's architect, the commissioner spoke of Saleem's "continued willful code violations that pose serious threats to public health and safety."³² In other words, Saleem continued to hold public events at the Empress property without the proper permitting.

In March of 2015 both parties brought cross-motions for contempt in violation of the June 19, 2013 order. Both parties were found in contempt. The judge supplemented the June 19, 2013 Order with an additional order dated April 22, 2015 which increased the number of vehicles which could park on the Empress Property to thirty (30).³³ The Order further specified that Saleem and his invitees *were not to park in*

³¹ CP 68, Ex. F (2013 case)

³² CP 63, Ex. F2 (2013 case)

³³ CP 91 (2013 case)

the easement area. Both parties were prohibited from photographing or videotaping the other's premises.³⁴

In the meantime, Saleem filed a second lawsuit against Doyle on April 10, 2015 alleging interference with easement, damage to property, interference with business expectancy, nuisance, outrage, and intentional infliction of emotional distress. In the second lawsuit, Saleem's LLC, Empress Estate, LLC, was also named as a Plaintiff. The two cases were consolidated in July, 2015.³⁵

In 2016 Saleem went ahead with his plans to construct a new multi-purpose building which he intended to operate as an events center. The construction of the multi-purpose building triggered the State Environmental Policy Act (SEPA)³⁶, which requires the County to evaluate the potential adverse environmental impact of any proposal involving the public. The determination whether impacts are likely to be significant is called the "Threshold Determination." Saleem's application was reviewed by Cowlitz County and he initially obtained a SEPA

³⁴ CP 91 (2013 case)

³⁵ CP 9 (2015 case)

³⁶ Chapter 43.21C RCW

Determination of Nonsignificance on May 26, 2016 which meant that Saleem was not required to obtain an environmental impact statement.³⁷ However, after further review, the Cowlitz County Public Works determined that the proposed project would have a substantial traffic impact requiring a traffic impact study to look at the impact on the existing private easement.³⁸ Ultimately, the County informed Saleem that they were considering withdrawing the SEPA Determination of Nonsignificance.³⁹ Rather than comply with SEPA requirements which would require a traffic impact study and possibly an environmental impact statement, Saleem opted instead to reduce the size and scope of the project so that it would qualify for a "categorical exemption" from SEPA requirements.⁴⁰ The Cowlitz County Code exempts "minor construction" which is defined as a commercial building with a *maximum* of 12,000 square feet and *40 parking spaces*. Cowlitz County Code 19.11.040 Table 19.11.040-1 attached hereto as Appendix A. Accordingly, a revised site plan was submitted which indicated 38 on-site parking stalls. All 38

³⁷ CP 48, Ex. A (2015 case)

³⁸ CP 48, Ex. B (2015 case)

³⁹ CP 48, Ex. C (2015 case)

⁴⁰ CP 48, Ex. F (2015 case)

parking stalls are located *outside* the 60' easement as required by the County.⁴¹ The site plan also depicts the footprint of the existing building (the bed and breakfast) and the existing asphalt paving with approximately 30-40 existing parking spaces *located within the easement*. The site plan clearly states that the parking stalls required by the County should be "outside of the road access easement."⁴² The requirement of only 38 parking stalls kept Saleem's project under the 40 parking stall maximum allowed for the new facility to be exempt from SEPA requirements. Because all 38 stalls were located outside the easement, the plan complied with the County's specific requirement that Saleem not have parking in the 60' road easement. In short, the site plan does not consider the existing parking spaces in the easement as part of the parking required or allowed for the new facility.

On January 5, 2017, Doyle filed another Motion for Contempt citing numerous times that Saleem had over thirty (30) vehicles parked at the Empress Estates including numerous cars parked in the easement

⁴¹ CP 44 (2015 case)

⁴² CP 44, See Project Information in bottom left box (2015 case)

area.⁴³ Saleem objecting, claiming that Doyle could not prove that he intentionally violated that court's order and arguing that the court's restriction of thirty (30) cars served no legitimate purpose.⁴⁴ Saleem also argued that cars parked on adjacent properties (owned by Saleem under an LLC) should not be counted in the 30 vehicle limit.⁴⁵

On January 18, 2017 the court, in an oral ruling, found Saleem in contempt and ordered forfeiture of his \$5,000.00 bond. The trial court, however, reconsidered its decision, and, in a written order found that Saleem violated the April 21, 2015 order and imposed a \$5,000 fine, but held that Saleem could purge \$4,500 of the \$5,000 fine if he obeyed the court's order in the future.⁴⁶

On May 1, 2017 Saleem filed a motion to amend the preliminary injunction to increase the amount of allowed vehicles that could park on his property to 68, citing the 38 new parking stalls *and* the 30 existing

⁴³ CP 16 (2015 case)

⁴⁴ CP 21 (2015 case)

⁴⁵ Previously, in November 14, 2015 Saleem had purchased an adjacent parcel of property under the name Embratora, LLC. On the site plan for the new event center, the additional new 25 parking stalls are located on the parcel owned by Embratora, LLC.

⁴⁶ CP 27 (2015 case)

parking spaces *located within the 60' easement*,⁴⁷ despite the fact that he was prohibited by the April 22, 2015 order, the building department and the site plan from utilizing the existing parking spaces located within the easement. Saleem referred to the declaration of the Cowlitz Building Department director, Elaine Placido, in which she stated that the 38 new parking stalls designated on the site plan and required for the new events facility are in addition to "existing parking."⁴⁸ Saleem argued that the 30 parking spaces within the easement were "existing parking" that Ms. Placido referred to in her declaration. Saleem failed to point out, however, that Ms. Placido's declaration went on to qualify the existing parking spaces as being "*outside of the private, Right of Way Easement as required under prior Department permitting.*" Therefore, the additional "existing parking spaces" referred to by the Cowlitz Building Department director in her declaration *did not include* the 30 or so spaces in the easement that Saleem represented were allowed by the County.⁴⁹ Saleem also neglected to point out that increasing the amount of parking spaces to

⁴⁷ (CP 40, 2015 case)

⁴⁸ CP 46 (2015 case)

⁴⁹ It is presumed that the existing parking spaces that the director referred to in her declaration pertained to the bed and breakfast parking located outside the easement.

over forty (40) would trigger SEPA because it would exceed the maximum amount of parking spaces allowed to qualify the new events center project for a categorical exemption from SEPA requirements.

In June 2017 Doyle again filed a contempt motion against Saleem for exceeding the 30 car limitation set forth in the court's April 22, 2015 order.⁵⁰ Again, Saleem argued that any vehicles parked in the parking stalls on the Embratora property should not be included in the 30 car prohibition since the vehicles were parked on property owned by his LLC, and not by him individually, therefore, according to his logic, he did not technically violate the judge's order.⁵¹ Saleem also argued that the court's order prohibiting Saleem or his guests from parking in the easement area did not include the easement area adjacent to his property, but only the easement area running through Doyle's property.⁵² Finally, Saleem argued that Doyle could not prove that he "clearly, willfully or intentionally" violated the judge's order.⁵³

⁵⁰ CP 33 (2015 case)

⁵¹ CP 42 (2015 case)

⁵² CP 42, (2015 case)

⁵³ CP 42 (2015 case)

Ultimately, the trial court once again found Saleem in contempt of the April 22, 2015 order by allowing more than 30 cars to park on Empress property on April 22, 2017, April 24, 2017 and June 7, 2017.⁵⁴ The trial court included the cars parked upon the Embratora, LLC property in the 30-car limitation based upon Saleem's representation to the County that parking on the Embratora property was "on site" for purposes of his required parking.⁵⁵ The trial court also found that Defendant had been damaged in the amount of \$1,500.00.⁵⁶

The trial court entered an Amended Final Order On Permanent Injunction on October 2, 2017 and incorporated by reference its Findings of Fact set forth in its July 3, 2017 Order.⁵⁷ The trial court ordered:

- a) Saleem would initially be allowed to park 55 vehicles on the Empress property with an additional 13 allowed once the new parking stalls adjacent to the new event center were constructed for a total of 68.
- b) Doyle is required to remove a speed bump and gateposts located within the easement.

⁵⁴ CP 113 (2015 case)

⁵⁵ CP 113 (2015 case)

⁵⁶ CP 113 (2015 case)

⁵⁷ CP 80 (2015 case)

c) Doyle is to replace an existing cedar fence in the easement area with a wire fence.

d) Defendant in the future could not construct any fence inside the 60' easement.⁵⁸

The trial court offered no reason why the cedar fence and the gate posts, subject to removal, were different from the other various permanent improvements in the 60' easement, such as:

- utility boxes⁵⁹
- a hedge⁶⁰
- the Empress sign on a fence pole⁶¹
- the entrance to the Empress Estates which extends out into the road portion of the easement area as depicted on Saleem's site plan.⁶²

Doyle asserts that he should be allowed to keep improvements in the unused portion of the easement area unless there is a determination that an improvement interferes with Saleem's use of the easement, constituting a basis for an adverse possession claim. Doyle also asserts that the 68

⁵⁸ CP 114 (2015 case)

⁵⁹ CP 62 & CP 64 (2015 case)

⁶⁰ CP 62 & CP 64 (2015 case)

⁶¹ CP 41 Ex. D (2013 case)

⁶² CP 44 Ex. B (2015 case), CP 42, Ex. E (2015 case)

vehicle limitation that the court placed on Saleem far exceeds what Saleem is allowed by the County.

D. ARGUMENT

1. Standard of Review

The trial court has prohibited Doyle's cedar fence from being within the 60' easement area based on *Littlefair v Schulze*, 169 Wn. App. 659, 278 P3d 218 (2012). Doyle is challenging the trial court's conclusion of law that *Littlefair* prohibits a permanent improvement within an easement area without a determination that the improvement has incidents of adverse possession. The trial court has also prohibited the Doyles from erecting any fences in the easement area in the future. The standard of review of a trial court's conclusions of law are de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

The Doyles are also challenging the following findings of facts:

- 1) The trial court's determination that Saleem has the authority to park up to 68 vehicles on their property.

2) The trial court's lack of a determination that a cedar fence and other improvements are permanent improvements which affect Saleem's ability to utilize the easement.

"When findings of fact and conclusions of law are entered following a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence, and if so, whether the findings support the trial court's conclusions of law and judgment." *Sunnyside Valley Irrigation Dist. v. Dickie*, 111 Wn.App. 209, 214, 43 P.3d 1277 (2002). "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." *Cingular Wireless, LLC v Thurston County*, 131 Wn.App. 756, 768, 129 P.3d 300 (2006).

2. Does *Littlefair v Schulze* Prohibit Any Permanent Improvement From Being Placed In An Unused Easement Area?

a. *Littlefair* only prohibits improvements that could establish an adverse possession claim in an unused easement area.

The trial court, on the basis of *Littlefair*, ordered the Doyles to remove an existing cedar fence and replace it with a wire fence and prohibited the Doyles from erecting any fences in the 60' easement area in the future. Saleem argues that *all* of Doyle's fences should be removed

from the easement area on the basis of *Littlefair*. Both the trial court and Saleem omit an important condition discussed in *Littlefair*. *Littlefair* prohibits improvements in an easement area ***that could establish an adverse possession claim.***

Generally, a servient estate owner may use his property in any reasonable manner that does not interfere with the original purpose of the easement. *Thompson v Smith*, 59 Wn. 397, 407, 367 P.2d 798 (1962). The rights of both dominant and servient estate owners are not absolute and must be construed to allow reasonable enjoyment of both interests. *Cole v Laverty*, 112 Wn.App. 180, 185, 49 P.3d 924 (2002).

The *Littlefair* court refined this concept further by holding that a servient owner is entitled to enjoy the full use of his property but cannot build structures that by adverse possession principles deny easement owners their right to future easement use. *Littlefair* involved a 12-14' road within a 40' easement area. Schulze, the servient owner, constructed a fence on his property which lies within the 40-foot wide reserved area. *Littlefair* sued, asking the court to order Schulze to remove the fence. 169 Wn. App. at 659. *Littlefair* testified that the fence prevented the road

users from pushing snow off the road on the fence side. He also testified that the fence prevented him from driving around potholes in the road. Schulze did not dispute this testimony and admitted that he build the fence, in part, to prevent drivers from driving around the potholes. 169 Wn. App. at 668. The court noted that Littlefair was entitled to reasonable use of the land on either side of the 12-14' road for traversing the road and snow removal and concluded that the 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.⁶³ 169 Wn. App. at 668.

Construction of a fence in an easement area is not, in and of itself, a sufficiently inconsistent use to constitute adverse possession. *City of Edmunds v Williams*, 54 Wash. App. 632, 637, 774 P. 2d 1241 (1989). An adverse possession claim would only arise where a servient owner creates an obstruction that clearly interferes with the proper enjoyment of an easement. *Cole*, 112 Wn.App at 184

⁶³ This issue was not remanded for the trial court to address as the court held that the county ordinance, which prohibited a fence from being constructed within an easement, was a basis for the trial court to order Schulze to remove his fence.

b. The trial court's findings do not support its conclusion that the cedar fence and gate posts should be removed.

The trial court made no finding that the cedar fence or the gate posts that it ordered be removed interfered with Saleem's use of the easement. There were no facts alleged that the cedar fence or the gate posts interfered with Saleem's use of the easement. There are no facts that Saleem attempted to use that portion of the easement that the fence or the gate posts are located, or that the cedar fence or gate posts could support a claim of adverse possession.

The trial court provides no explanation why the cedar fence and gate posts must be removed but other significant permanent improvements within the 60' easement area, such as utility boxes, a hedge, the Empress sign on a fence pole, and the entrance to the Empress Estate which juts out into the center of the easement road, do not have to be removed. The trial court, in crafting its order, was clearly trying to strike a middle ground between the two parties and to minimize future disagreements. However the resulting permanent injunction appears to address some of Saleem's random complaints about Doyle stemming from his deep seated dislike of Doyle, rather than on any interference of Saleem's use of the easement.

The trial court's findings simply do not provide any basis for requiring Doyle to remove his cedar fence, and replace it with a wire fence, or to remove gate posts while other permanent improvements are allowed to remain in the unused easement area.

3. The Trial Court's Ruling That the Doyles are Prohibited From Placing Fences in the Easement in the Future is Not Ripe for Judicial Determination.

The trial court's injunction prohibits the Doyles from placing any future fences in the easement area is not ripe for judicial determination. Under the doctrine of ripeness, the court's jurisdiction is limited to justiciable controversies which require: "[A]n actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement...[and] which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic. *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 223, 232 P.3d 1147 (2010). In this case, the trial court was attempting to limit future controversies from arising between the parties but the injunction against future fences overreaches. The issue of the Doyles' ability to construct fences in the easement area in the future

was not at issue. The trial court's injunction prohibiting the Doyles from constructing any future fences in the easement area is therefore premature and not ripe for judicial determination.

4. The Trial Court Erred In Allowing a Total of 68 Vehicles to Park on Saleem's Property.

The trial court, in its July 3, 2017 order, states "...the number of vehicles allowed must not exceed the number of parking spaces actually constructed, and ***approved by Building and Planning.*** (emphasis supplied). The trial court also made the following finding:

"Currently, the Empress Estates' property has 30 spaces and the Embratora property has 25 spaces. Therefore, there are 55 spaces available, allowing for 55 vehicles. Thirteen additional spaces are planned next to the Event Center. When they are constructed the total spaces will be 68, allowing for 68 vehicles." pp. 7-8.

The trial court incorrectly included parking spaces in the existing easement in his determination of how many vehicles Saleem would be allowed to have on his property. The site plan submitted by the architect for county approval specifically requires 38 spaces, however, while the site plan includes the footings of the Empress Estate building and approximately thirty (30) marked parking spaces along the easement area,

there is no designation that the spaces in the easement area will be used for parking.⁶⁴ The 38 designated parking stalls on the site plan are all located outside the easement area. Further, the site plan specifically prohibits parking in the easement area. This is consistent with the county's previous correspondence with Saleem notifying him that his guests would not be allowed to park in the easement area. It is also consistent with Elaine Placido's declaration that the 38 parking stalls are in addition to current parking spots *located outside the easement*⁶⁵. Finally, Saleem reduced the size of his project to come within the exemption from SEPA regulations, which allows no more than 40 parking spaces. Although the county required 38 parking spaces, the maximum amount of parking stalls allowed are 40. The trial court's determination that Saleem may have up to 68 vehicles on his property is not supported by substantial evidence. The trial court's holding allowing 68 vehicles on Saleem's property should be reversed and remanded back to the trial court for a determination which

⁶⁴ CP 44 (2015 case)

⁶⁵ Presumably Ms. Placido is referring to the existing parking adjacent to the Empress Estate bed & breakfast.

does not include the parking spaces in the easement area and which is consistent with the site plan.

5. The Trial Court's Ruling That the Doyles Must Remove a Speed Bump is Not Supported By Any Evidence That It Interferes With Saleem's Easement Rights.

Doyle submitted numerous declarations regarding safety concerns because of the high volume of traffic occasioned by Saleem's public events held at the Empress property. Doyle put in several speed bumps to slow traffic down. The trial court, without making a finding regarding the Doyle's speed bumps⁶⁶, requires Doyle to remove a speed bump without any finding that the speed bump impeded Saleem's or his guests' use of the easement road.

6. The Trial Court Correctly Found Saleem In Contempt of the April 22, 2015 Order.

a. Doyle Was Not Required To Post A Bond Because He Did Not Request Injunctive Relief.

Saleem initially petitioned the court for a temporary restraining order. After considering all the facts presented, the trial court granted

⁶⁶ The trial court merely adopted Saleem's language in his proposed order. P. 10.

Saleem's request but also imposed conditions on Saleem, including a prohibition against Saleem having more than 10 vehicles (later increased to 30) parked on his property. These conditions were imposed upon Saleem *sua sponte* by the trial court. Saleem, having been found in contempt, now argues that he should be able to ignore the conditions imposed by the trial court because Doyle did not furnish a bond, citing RCW 7.40.080 and CR 65(c). However, RCW 7.40.080 requires a bond of the party *requesting* injunctive relief. Saleem requested injunctive relief; Doyle did not. Therefore the bond requirements of RCW 7.40.080 do not apply to Doyle.

Saleem cites the case of *Evar, Inc. v Kurbitz*, 77 Wn.2d 948, 468 P.2d 677 (1970). In *Evar*, the party *requesting the injunction* did not furnish a bond, therefore, the bond requirement of RCW 7.40.080 was applicable.

In *In re the Matter of the Guardianship of Matthews*, 156 Wn.App. 201, 232 P.3d 1140 (2010) a GAL sought a temporary restraining order. The court accepted the GAL's recommendation and imposed a TRO. But after granting the TRO, the trial court imposed a bond requirement on the

guardianship petitioner pursuant to RCW 7.40.080. 156 Wn.App. at 212. The court in *Matthews* held that the lower court improperly imposed a bond requirement stating that because the GAL and not the petitioner sought the TRO, there was no statutory authority for the trial court to impose a bond requirement on the guardianship petitioner. 156 Wn.App. at 212.

In this case, not only was Doyle not required to furnish a bond under RCW 7.40.080 because he did not petition for a preliminary injunction, but the trial court lacked a statutory basis for requiring a bond.

b. Saleem Clearly Violated the Trial Court's Order.

Doyle brought a contempt motion against Saleem citing the numerous times that Saleem had more than thirty (30) cars parked at the Empress property in direct violation of the court's order. Saleem never contradicted Doyle's assertion, arguing instead 1) that there were only 30 parking spaces on Empress property and therefore it was impossible for him technically to violate the judge's order, 2) any cars parked on the adjacent Embratora property (owned by Saleem) should not be included in the 30 vehicle count, and 3) that he could violate the court's order because

Doyle did not post a bond. All three defenses were rejected by the court. "Any 'intentional...[d]isobedience of any lawful judgment, decree, order or process of the court' is a contempt of court as defined by RCW 7.21.010(i)(b)."⁶⁷ Saleem, therefore, was properly held in contempt by the trial court.

c. The \$1,500 Fine Imposed Upon Saleem Was Proper Because It Was Imposed After Saleem Had the Opportunity To Purge His Contempt.

Doyle brought a contempt motion against Saleem in January 2017. In March 2017 the trial court found that Saleem violated the court's 30 vehicle limitation and fined him \$5,000.00, but held that Saleem could purge \$4,500 of this contempt if he obeyed the court's order in the future. However, Saleem continued to repeatedly violate the trial court's order and was fined \$1,500.00 in October, 2017. The sanction imposed by the trial court in March 2017 was a remedial sanction because it contained a purge clause. When Saleem continued to disregard the trial court's order, he was fined \$1,500.00. Saleem was given the opportunity to purge the contempt

⁶⁷ *In re of Rapid Settlements, Ltd.'s*, 189 Wash. App. 584, 601, 359 P.3d 823 (2015).

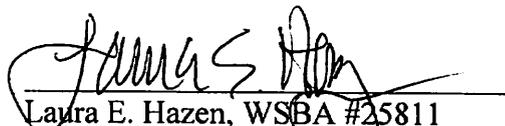
but chose not to. The \$1,500.00 sanction, therefore, was remedial and not punitive.

E. CONCLUSION

The portions of the trial court's permanent injunction requiring Doyle to remove his cedar fence, gate posts and speed bump should be vacated. The trial court's prohibition against Doyle erecting a fence in the future in the 60' easement should also be reversed and vacated. The case should be remanded back to the trial court for an order imposing a vehicle restriction on Saleem that is consistent with the County's authorization of 38 parking stalls per the site plan. Finally, the finding of contempt against Saleem should be upheld.

Dated: March 26, 2018

Respectfully submitted,



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Attorney for Respondents/Cross-Appellants

Appendix A

19.11.040 Categorical exemptions.

A. WAC 197-11-800 identifies certain proposed actions that are categorically exempt from threshold determination and EIS requirements, subject to the rules and limitations contained in WAC 197-11-305. Local governments are authorized to raise the exempt levels for minor new construction, based on local conditions. The county adopts the following sections of SEPA rules and statute by reference, as supplemented in this section:

WAC

- 197-11-305 Categorical exemptions.
- 197-11-800 Categorical exemptions.
- 197-11-880 Emergencies.
- 197-11-890 Petitioning DOE to change exemptions.
- 197-11-908 Critical areas.

RCW

- 43.21C.410 Battery charging and exchange station installation.

B. Cowlitz County establishes the following exempt levels for minor new construction under WAC 197-11-800(l), based on local conditions:

**Table 19.11.040-1: Exempt Threshold Levels for
Minor New Construction**

Project Type	Exemption Threshold
Single-family residential	20 units
Multifamily residential	25 units
Barn, loafing shed, farm equipment storage, produce storage or packing structure	40,000 square feet
Office, school, commercial, recreational, service, storage building, parking facilities	12,000 square feet and 40 parking spaces
Fill or excavation	1,000 cubic yards*

* As well as all excavation, fill or grading necessary for an exempt project
identified in this subsection.

C. The demolition of any structure or facility, the construction of which would be exempted under Table 19.11.040-1, is categorically exempt, except for structures or facilities with recognized historical significance.

D. A proponent of an action thought to be categorically exempt may request a statement of exemption from the responsible official. Such a request shall be submitted in writing and shall contain sufficient detail and description of the proposed action from which to determine whether or not it is exempt. If the proposed action is

determined to be exempt, a statement of exemption signed by the responsible official will be provided.

E. These categorical exemptions from SEPA shall not exempt these projects from review under the county's critical areas ordinance.

F. Whenever the county establishes new exempt levels under this section, it shall send them to the Department of Ecology under WAC 197-11-800(1)(c). [Ord. 18-008 § 2 (Exh. A), 2-13-18.]

CERTIFICATE OF SERVICE

On the 27th day of March, 2018, I caused a true and correct copy of the following document: Respondents And Cross-Appellants Response Brief in Court of Appeals Cause No. 50323-9-II to be delivered via first class United States Mail, postage paid, to the following:

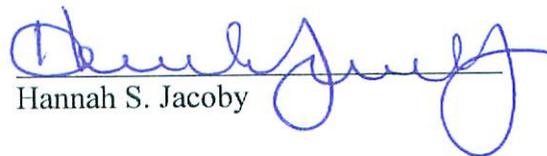
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: March 27, 2018

At: Camas, WA 98607


Hannah S. Jacoby

HAZEN, HESS & OTT, PLLC

March 27, 2018 - 11:56 AM

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