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**Court of Appeals**  
**Division II**  
**State of Washington**  
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No. 50982-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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THERESA and KENT BOYLE,

Appellants,

v.

JOHN and BRENDA LEECH,

Respondents.

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APPELLANTS' BRIEF

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## I. INTRODUCTION

This is a nuisance case. The operative facts are that tannic acid (used in tanning leather and dyeing fabrics) from Leechs' 120 foot high giant sequoia tree causes ugly staining of Boyles' home, patio, outdoor furniture and vehicles. Special products, and even power washing is needed to remove the staining. Known for shedding toxic debris, giant sequoia trees are normally found in Northwest forests. Such trees are out-of-place in crowded neighborhoods.

The Boyles want the Leechs to abate the problem in some fashion or pay damages. The Leechs have refused. The trial court, while expressing sympathy for the Boyles, inexplicably granted summary judgment for the Leechs without hearing live testimony or visiting the site. The court held that as a matter of law no reasonable person could conclude that tannic acid staining constituted a nuisance. (RP 7).

THE COURT: I've read through the entirety of this. I looked at the pictures and my sympathies lie entirely with the plaintiffs in this case, entirely. And I think it is just so unfortunate that their neighbor has not been able to provide them some sort of relief on some level because it's really unfortunate. But my task today is whether, as a matter of law, there's a basis for a nuisance action, and I don't think there is. I'm going to grant your motion.

In essence, the court said “I agree there is a nuisance but I can’t do anything about it.” That makes no sense.

## II. ASSIGNMENT OF ERROR AND ISSUE

The trial court erred in holding as a matter of law that no reasonable person could conclude that the tannic acid staining of Boyles’ property constitutes a nuisance. Since nuisance involves acts which annoy reasonable people, the issue presented is whether the annoyance felt by the Boyles is reasonable. At a minimum, the issue deserves hearing from experts and a site visit.

## III. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The relevant facts are from the Declarations of Kent Boyle<sup>1</sup>; his neighbors, Dennis and Donna Quackenbush<sup>2</sup>; and Brian Allen<sup>3</sup>, an arborist.

Kent Boyle and his wife purchased their home at 1406 Rainier Street, Steilacoom, Washington in May of 2013. They did not move in until July 2013. Shortly after moving in, they observed fallout from the giant sequoia tree next door at 1402 Rainier Street, but just picked up the debris that was in the yard and cleaned out their gutters every few

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<sup>1</sup> CP 51-68

<sup>2</sup> CP 74-76

<sup>3</sup> CP 69-73

weeks. They further observed that the real fallout from the tree seemed to occur when the wind blew from the south to north, which is the general direction it blows in the community. This caused the debris to land directly onto their entire lot, front to back and side to side. It also blew the tree debris that accumulated on their neighbor's flat roof (Mr. Leech's rental) into their yard. The debris from this tree further accumulates in their neighbor's yard to the north of them.

Kent Boyle brought the roof debris that accumulates on Mr. Leech's rental to his attention about two years ago. About a month later, Mr. Leech cleaned off his roof and has not cleaned it since. The tree is constantly dropping debris year-round that continues to land in Boyles' yard when it blows off Leech's roof. When you couple that with the debris that falls directly into Boyles' yard from the tree, there is a significant mess to clean up.

Throughout this time, Boyles noticed some red-colored staining that occurred around parts of their home but the problem became extreme over the next 18-20 months. It shows up year-round but the extensive damage with the staining occurs generally in the late summer, fall and winter months. It comes from seeds in the cones which are part of the debris.

Kent Boyle, approached Mr. Leech in November of 2015 regarding the staining problem. Mr. Boyle showed him photographs and gave him the opportunity to observe the staining on their home. At that time, Mr. Leech agreed to remove the staining but said he would not be able to physically do it as he had just had surgery. He then gave Mr. Boyle the phone number of his handyman (Craig Ross) whom Mr. Boyle contacted immediately. Mr. Ross came to the Boyles' home and observed the staining and agreed to remove it. He never came back. When Mr. Boyle contacted him he said he would be coming by but the weather was preventing him from completing the task. In March, Mr. Boyle contacted Mr. Leech again and informed him that the problem had never been taken care of. Mr. Ross never did show up to do the work so Mr. Boyle cleaned up the problem himself. Mr. Leech also informed Mr. Boyle that his landscape maintenance person would clean their yard of the debris that had fallen from the tree and gave them a date when that would happen. The landscape people did not show on that date and Mr. Boyle again cleaned the mess up himself. Mr. Boyle related this information to Mr. Leech and was informed that his landscape maintenance person had showed up but could not do the job because he did not have a rake.

Further discussion took place with Mr. Leech and he offered to clean the Boyles' yard up to four times per year with his landscape maintenance people and reimburse up to \$200 per year for a cleaning service for the Boyles' home. While they appreciated Mr. Leech's offer, it did nothing more than scratch the surface. In the fall/winter of 2016 alone, the Boyles had their gutters cleaned and roof cleaned numerous times of nothing more than the debris that falls from the tree.

Throughout 2016, Mr. Boyle logged roughly 22 hours cleaning automobiles of the dark-colored substance that covers them from the seed fallout of the tree. He was quoted in excess of \$100 per automobile to remove the substance, which does not come off with a simple cleaning. You need to use solvents and a clay bar. Mr. Boyle cleaned vehicles of the substance a total of 12 times over a 5-month period in 2016 alone. That would total over \$1200 just to clean vehicles if he were to take them to the detail shop. Not to mention the time and expense to take them in and wait for them to be cleaned. August 24, 2016, Mr. Boyle spent in excess of four hours cleaning his entire lot of tree debris only to come home on August 28<sup>th</sup> and find the entire lot covered again and there were numerous areas where staining occurred, as well. He spent an additional 4.5 hours cleaning up that mess.

The staining has ruined a number of pieces of yard and deck furniture and cushions. Mr. Leech's renters had to discount the price of their outdoor furniture they were selling prior to their move to Chicago because it was so badly stained from the tree fallout. The former owner of the Boyles' home painted all the decks around the house brown to conceal the staining that occurs from the tree, as well.

Representative photos of the debris and staining are attached to the Declaration of Kent Boyle in Support of Opposition to Motion for Summary Judgment.<sup>4</sup>

Mr. Boyles' neighbors to the north, Dennis and Donna Quackenbush, have lived in their home at 302 Pierce Street, in Steilacoom, WA for 21 years. They too have been dealing with the staining from the tree fallout for about the past 10 to 12 years. They say it seems to be getting worse.<sup>5</sup>

When the wind blows, the tree on the Leech's property drops cones and red like seeds that end up in their yard and on their back patio/deck that is to the north of the tree on the other side of the Boyle home.

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<sup>4</sup> CP 56-68

<sup>5</sup> CP 74-76

This debris has caused excessive staining on their deck railings and floor and has also stained deck furniture, cushions, umbrellas and other items on their deck. There are also a number of branches and twigs that drop off the tree and into their yard both in the front and back that are difficult to clean up as they need to be mulched in the lawnmower.

The staining that occurs does not come off easy and requires products like 409, or Comet and they have even used a power washer to try to remove the staining as well. They have observed that this is a year-around problem but happens predominately when the wind blows. The staining seems to occur when the seeds come in contact with moisture on their deck. It can be rain or just dew that brings out the red staining that occurs.

The Quackenbushes cannot remember if they have contacted the Leeches about this problem. They just thought there was nothing they could do about it.

The Quackenbushes have also observed the fallout from the tree that occurs on the Boyle property, both in debris from the tree in the form of branches and limbs along with the staining as well.

Kent Boyle retained Brian Allen in June of 2016 to inspect a giant sequoia tree located at 1402 Rainier Street, Steilacoom, WA, which is immediately adjacent to his property at 1406 Rainier Street.

Mr. Allen is a certified arborist and is also ISA Tree Risk Assessment certified. He is the president of Archon Tree Services, Inc.

Mr. Allen inspected the tree in June of 2016 and rendered a report, copy of which is attached as **Exhibit A** to the Declaration of Brian Allen in Support of Opposition to Motion for Summary Judgment.<sup>6</sup>

Mr. Allen observed excessive sap and excessive cone production on the Boyle's property which obviously came from the sequoia tree.

The sap and cones from the sequoia tree contain tannic acid. Tannic acid is a chemical substance used in tanning leather and in dyeing fabric. When it comes in contact with water, it leaves a dark rust-colored stain which is extremely difficult to remove. In Mr. Allen's opinion, that is the cause of the staining which he observed on the Boyle property.

#### IV. SUMMARY OF ARGUMENT

Viewing the evidence in the light most favorable to Boyles, a reasonable person could (and probably would) conclude that the tannic acid staining of Boyles' property constituted a nuisance. Boyles

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<sup>6</sup> CP 73

deserve their day in court to help determine whether abatement of the nuisance or damages is the proper remedy.

## V. ARGUMENT

### A Standard of Review

A grant of summary judgment is reviewed *de novo*. *Briggs v. Nova Servs.*, 166 Wash.2d 794, 801, 213 P.3d 910 (2009). Summary judgment is appropriate only where viewing all facts and resulting inferences most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

### B Tannic Acid Staining is a Nuisance

The law of nuisance is stated in *MJD Properties LLC v. Haley*, 189 Wn.App 963, 969, 358 P.3d 476 (2015):

A nuisance includes the acts that annoy, injure, or endanger the comfort, repose, health, or safety of others and renders other persons insecure in life or in the use of property. An activity constitutes a nuisance when it interferes unreasonably with a neighbor's use and enjoyment of his or her property. In a nuisance case, the fundamental inquiry always appears to be whether the use of certain land can be considered as reasonable in relation to all the facts and surrounding circumstances. To apply the nuisance doctrine, the court balances the rights, interests and convenience unique to the case.

In the *MJD Properties* case, the plaintiff alleged that a driveway light on the neighbor's property was a nuisance because it caused excessive light to shine into plaintiff's bedroom window. The trial court rendered summary judgment for the defendant. The appellate court reversed holding that the trial court erred by dismissing plaintiff's action.

In our case, the annoyance is greater than a shining light. It is tannic acid which stains Boyles' property and requires special products to remove. The interests to be balanced are not Leechs' right to a tree versus Boyles' right to be free of staining. The real issue is whether Leechs should have any obligation to do anything to help resolve the staining problem caused by Leechs' tree. What is needed is a trial to explore what solutions, short of cutting down the tree, are feasible.<sup>7</sup> The trial court, sitting as a court in equity, then has full power to help fashion a remedy which is fair to both sides considering "the rights, interests and convenience unique to this case." Either that, or award damages.

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<sup>7</sup> See *Cannon v. Neuberger*, 1 Utah 2d 396, 268 P.2d 425 (1954) in which the court found that tree debris was a nuisance, granted some relief but refused to require the tree to be cut down. The appeals court relied heavily on the fact the trial court had visited the premises and had made first-hand observation of the conditions.

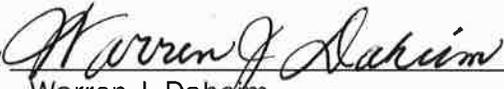
VI. CONCLUSION

For all the above reasons, the summary judgment should be reversed.

Dated this 22<sup>nd</sup> day of February, 2018.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By   
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**CERTIFICATE OF SERVICE**

I, Gerri Downs, certify that on the 22<sup>nd</sup> of February, 2018, I forwarded a true and correct copy of the foregoing to Respondents as follows:

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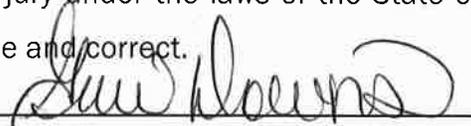
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