

NO. 50982-2-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

THERESA BOYLE and KENT BOYLE,
husband and wife

Appellants,

v.

JOHN W. LEECH and BRENDA G. LEECH,
husband and wife

Respondents

FILED
COURT OF APPEALS
DIVISION II
2018 MAR 23 PM 4:55
STATE OF WASHINGTON
BY  DEL J. MILLER

RESPONDENTS' BRIEF

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I. INTRODUCTION

This appeal arises out of a nuisance complaint made by Appellants Kent & Theresa Boyle against Respondents John & Brenda Leech. The Boyles' complaint concerns a tree located entirely on the Leech property that naturally sheds cones, needles, and branches. At times, the debris from the Leeches' tree blows onto the neighboring Boyle property. The only evidence in the record is that these are naturally occurring events in the life cycle of the tree and there is no evidence that the Leeches have done anything that causes or contributes to this natural tree debris. The trial court granted the Leeches motion for summary judgment dismissal, and denied reconsideration of that order. In response to the Appellants' brief, Respondents respectfully request the Court of Appeals affirm the trial court's decision as a matter of law.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Trial court did not err in dismissing Boyles' case on summary judgment because Boyles failed to present any evidence that the Leeches acted unlawfully or omitted to perform a duty.
2. The trial court did not err and summary judgment is appropriate because Leeches use of their property (allowing the tree to live on their property) was not an unreasonable use of the property.
3. This Court should not reverse the summary judgment order on the basis of "needing to hear from experts" or because a site visit was never requested or conducted by the trial court.

III. STATEMENT OF THE CASE

Facts

This case concerns a tree¹ located at 1311 Starling Street, Steilacoom, Washington. CP 35 and 38. This property is the residence of John and Brenda Leech. CP 35. The Leeches also own the adjacent property located at 1402 Rainier Street, Steilacoom, Washington, that they use as a rental property. CP 35. The tree in question has its trunk located on the property at 1311 Starling Street, and the branches of that tree overhang the Leeches' rental property located at 1402 Rainier Street (thus trunk and branches are entirely confined to the two Leech properties). CP 38. The Boyles own the property located at 1406 Rainier Street, Steilacoom, Washington. CP 35 and 38. The Boyles share a common property boundary with both of the Leeches' properties. CP 38.

The tree in question has been located on the Leech property since the 1930s. CP 36. John Leech grew up in the house on 1402 Rainier Street and has been involved with the property since the 1950s. CP 35. The Leeches moved to the house located at 1311 Starling Street in 1995,

¹ Note that the identification of this tree in the record by Boyles' expert, Brian Allen, incorrectly identifies this tree as a Giant Sequoia (*sequoiadendron giganteum*). CP 73. The tree is in fact a Coastal Redwood (*sequoia sempervirens*). The correct name of the tree does not appear in the record before the Court, but the photos of the needles, branches, and cones (CP 58-60, 62-65, and 67) clearly identify this as a Coastal Redwood. The genus and species of this tree has never been argued as a material fact in this motion and therefore this minor error was not addressed further in the record for purposes of summary judgment.

and have lived there since. CP 35. They have owned the property located at 1402 Rainier Street since 2014. *Id.*

The tree itself is located entirely on the Leech properties. CP 36. The trunk of the tree is located approximately 70 feet from the common boundary with the Boyle property and the closest branch is approximately 50 feet from the same common boundary. CP 36 and 38. No part of the tree overhangs the Boyle property. CP 36. No prior owners of the property located at 1406 Rainier Street have complained to the Leeches about the tree in question. CP 36. Furthermore, no other neighbors have complained to the Leeches about the tree in question. CP 36 and 75. Kent Boyle and the neighbors, the Quackenbushes, state that the debris happens when the wind blows. CP 51 and 74.

Boyles' proposed remedy is to remove the tree. CP 73.²

The record contains no evidence of any rooftop accumulation as alleged by Boyles. Appellants' Opening Brief at 3.³ There is no evidence

² Boyles note in their Opening Appellate Brief that they want to explore options "short of cutting down the tree" but the only evidence available in the record is from Boyles' arborist, Brian Allen, who states, "Due to client's [Boyles'] motivations, and potential for continued worsening damage to the surrounding property, removal is recommended." CP 73. The Declaration of Kent Boyle (CP 51-52) is silent as to his requested remedy.

³ The Declaration of Kent Boyle as filed with the trial court and contained in the Clerk's Papers (CP 51-52) is the correct filing and not an error in transmittal. Plaintiff's declaration filed with the trial court is only two pages with attached photos. It appears several pages were never filed with the trial court. Boyles never corrected this. Thus, almost all of the Boyles' arguments at summary judgment and in their Opening Brief are unsupported by any evidence in the record. Specifically, Appellant's Opening Brief pages 3-5 are statements that are not supported by any evidence in the record.

in the record of any interaction between the Boyles and the Leeches concerning the tree in question. *Id.* at 4. There is no evidence in the record of any cleanup efforts undertaken by the Boyles. *Id.* at 4-5.

The Boyles' complaints about the tree are the result of the natural life cycle of the tree. CP 69-70 and 73: The tree is not considered a "high risk tree." CP 73. There is no evidence in the record that naturally occurring tannins from trees are "toxic."⁴ *Id.* at 1. There is no evidence in the record that the tree in question is "out-of-place in crowded neighborhoods."⁵ *Id.* There is no evidence in the record that any of the tree debris on the Boyles' property were the result of Leeches' unlawful acts or the Leeches omitting to perform any duty.

Procedural History:

Boyles filed their complaint on September 28, 2016. CP 1-2. Their sole cause of action was nuisance. CP 2. They did not allege trespass, negligence or any other cause of action. The trial court granted summary judgment dismissing the Boyles' claim on August 25, 2017. CP 83. The Boyles' Request for Reconsideration was filed on August 31, 2017. CP 84-86. At the invitation of the trial court, Leeches filed a

⁴ The Boyles use this term "toxic" in their brief and at the trial court reference a "harmful chemical" (CP 43), but Boyles never define these terms nor do they present any evidence that naturally occurring tannins are "toxic" or "harmful." Query whether the presence of tannins in Washington grapes that make Washington wines thus constitutes a nuisance because tannins are a toxic agent?

⁵ Again, the tree has been there since the 1930s. CP 36.

response to the Motion for Reconsideration on September 27, 2017. CP 88-93. The trial court denied reconsideration on October 9, 2017. CP 94. Notice of appeal was filed on October 10, 2017.

IV. ARGUMENT

A. Standard of Review

1. Summary Judgment Standard.

An order granting summary judgment is reviewed de novo. *Velt v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 98, 249 P.3d 607 (2011). The appellate court reviews summary judgment orders de novo, applying the same standard as the trial court. *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 349, 96 P.3d 979 (2004). Summary Judgment is proper if the evidence, viewed in a light most favorable to the nonmoving party, shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). “We will affirm an order granting summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A material fact is one which the outcome of the litigation depends.” *Federal Home Loan Bank of Seattle v. Barclays Capital, Inc.*, 1 Wn.App.2d 551, 556, 406 P.3d 686 (Div. 1, 2017) (citations omitted).

Where the defendant is the moving party and has shown the absence of material fact, the plaintiff must come forward with competent

evidence showing the existence of a genuine issue of material fact for trial. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) overruled on other grounds by *Young v. Key Pharms., Inc.*, 130 Wn.2d 160, 922 P.2d 59 (1996). All evidence submitted by the parties to a motion for summary judgment must be “admissible in evidence.” In responding to a motion for summary judgment, the nonmoving party is prohibited from relying on “allegations, conjecture, or speculation to create an issue of material fact.” CR 56(e); *Geppert v. State*, 31 Wn. App. 33, 38, 639 P.2d 751 (1982).

2. Reconsideration

Boyles do not specifically allege any assignment of error related to denial of their Motion for Reconsideration, but since their overarching argument is that it was error for the trial court to grant summary judgment (which was ostensibly the subject of the Motion for Reconsideration), this standard is addressed in an abundance of caution.

A trial court’s decision to grant or deny a motion for reconsideration is within the sound discretion of the trial court and will be overturned only upon an abuse of discretion. *Bringle v. Lloyd*, 13 Wn.App. 844, 848, 537 P.2d 1060 (1975). “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.” *Arthur West v. Dept. of Licensing*, 182 Wn.App. 500, 516, 331

P.3d 72 (2014). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; and it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Id.*

The scope of an appeal is determined by the notice of appeal, the assignments of error, and the parties' substantive arguments. RAP 5.3(a). No error was assigned to trial court's denial of the appellant's Motion for Reconsideration by the Boyles, therefore, pursuant to RAP 10.3(a)(4) this issue should not be before the Court. In addition, under RAP 10.3(a)(6) the Boyles have cited no legal authority and cite to no relevant parts of the record as it relates to any assignment of error regarding reconsideration. "To enforce this rule, this court does not review issues not argued, briefed, or supported with citations to authority." *Christian v. Tohmeh*, 191 Wn.App. 709, 728, 366 P.3d 16 (Div. 3, 2015) (citations omitted). "We do not consider conclusory arguments" and "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit appellate review." *Id.* (citations omitted). Thus, any issue pertaining to the trial court's denial of the Motion for Reconsideration is not properly before this

Court. And, as argued below, there is no abuse of discretion given Boyles's lack of evidence as it pertains to their nuisance claim.

B. There is no genuine issue of material fact supporting a nuisance claim stemming from the natural life cycle of a healthy tree located on the Leech property.

Boyles make three assignment of errors:

1. "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." Appellants Brief at 2.

2. "Since nuisance involves acts which annoy reasonable people, the issue presented is whether the annoyance felt by Boyles is reasonable." *Id.*

3. "The issue deserves a hearing form experts and a site visit." *Id.*

None of these assignment of errors are meritorious. All of them miss the fundamental fact that Boyles presented no evidence that the Leeches committed any act or failed to perform any required duty. As such, they cannot make a prima facie case for a nuisance claim. In addition, the standard that Boyles advocate for would create an unworkable situation, a flood of litigation, and ignores the basic biology of plants.

1. Boyles fail to present any evidence to establish a material fact that shows Leeches committed any unlawful act or omitted to perform a duty thereby constituting a nuisance.

The Boyles' first two assignment of errors are without merit. First and foremost, the record is devoid of any ruling or comment by the trial

court that “no reasonable person could conclude that tannic acid staining of Boyles’ property constitutes a nuisance.” See Report of Proceedings (RP). Second the critical factor is not whether what the Boyles felt was “reasonable” but whether the Leeches did any act that constituted a nuisance. Boyles never address this threshold question. Thus, Boyles’ first two assignment of errors ignore the critical requirement that the Leeches must have done something that caused the complained of nuisance.

Washington’s nuisance law is codified in chapter 7.48 RCW.

RCW 7.48.120 defines nuisance:

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

Emphasis added. RCW 7.48.010 defines an actionable nuisance as:

The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

The Washington case of *Hostetler v. Ward*, 41 Wn.App. 343, 704 P.2d 1193 (Div. 2, 1985), review denied, 106 Wn.2d 1004 (1986), goes through an analysis of nuisance law as applied to a negligence claim. In that opinion, the court extensively cites to *Taylor v. Cincinnati*, 143 Ohio St. 426, 55 N.E.2d 724, 727, 729-732 (1944), on its exposition of what constitutes a nuisance.

Nuisance is a form of tort but it is not restricted to a single type of tortious conduct. "Nuisance" is a term used to designate the wrongful invasion of a legal right or interest. It comprehends not only the wrongful invasion of the use and enjoyment of property, but also the wrongful invasion of personal legal rights and privileges generally. However, such right or interest may be invaded by any one of several types of wrongful conduct, and the liability of a defendant, in any case, depends upon the type of his wrongful conduct with respect to the right or interest invaded. "The tort of * * * nuisance includes intentional harms, and harms caused by negligent, reckless or ultrahazardous conduct." 4 Restatement of Torts, 220.

To properly consider and determine tortious liability in accordance with legal principles, it is necessary to differentiate and classify the several types of tortious conduct. In general, they may be designated as follows: (1) Culpable and intentional acts resulting in harm; (2) acts involving culpable and unlawful conduct causing unintentional harm; (3) nonculpable acts or conduct resulting in accidental harm for which, because of the hazards involved, the law imposes strict or absolute liability notwithstanding the absence of fault; and (4) culpable acts of ** inadvertence involving unreasonable risks of harm.

Hostetler v. Ward at 357. The Ohio supreme court goes on to note that the fourth type described above is properly brought in a negligence claim. Washington has adopted such a position and “where allegedly a nuisance is the result of negligence, rules applicable to negligence should be applied.” *Hostetler v. Ward* at 360. In addition, Boyles do not allege any nuisance under a strict liability or nuisance per se standard.⁶ Thus, the third and fourth type of nuisance described by the Ohio Supreme are not applicable to the present case.

The important consideration in this analysis is that there must be an *act* or *conduct* by the offending party (either doing something or failing to do some duty). That is the plain reading of RCW 7.48.120. The Ohio Supreme Court’s analysis adopted by this Court still requires that there be “culpable and intentional acts” or “culpable and unlawful acts” in order to have a nuisance. Thus, under a plain reading of RCW 7.48.120 and Washington case law, there must be some conduct on the part of a party to create a nuisance. Here, Boyles present no evidence whatsoever that the tree is shedding debris because of any “culpable or intentional act” or “culpable and unlawful act” by the Leeches. There is no evidence in the record that the debris lands in the Boyles’ yard because of anything the

⁶ “A nuisance per se is an activity that is not permissible under any circumstances, such as an activity forbidden by statute or ordinance.” *Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn.App. 252, 277, 337 P.3d 328 (Div. 2, 2014).

Leeches have done or failed to do. In addition, Boyles fail to articulate any duty owed and breached by the Leeches with regard to the tree. This is simply the result of a tree that has been living in that spot for over 80 years without complaint. CP 35-36. The only evidence from Boyles' expert is that this is a tree that is naturally producing cones and sap. CP 69-70. Leeches are aware of no Washington law that establishes a duty of a landowner to prevent naturally occurring cones, seeds, and needles from a tree located entirely within their property boundary from being deposited on the property of another. Given this failure to present evidence of any act or failure to comply with a duty, summary judgment in favor of Leeches is appropriate.

Boyles rely on one single case to support their position on appeal. *MJD Properties LLC v. Haley*, 189 Wn.App. 963, 969, 358 P.3d 476 (Div. 1, 2015) is a case involving two feuding neighbors. After commencement of litigation, MJD installed several outdoor lights that were ostensibly used to illuminate a parking area at night.⁷ However, these lights shined light directly into Haley's bedroom window. Haley complained that these actions constituted a nuisance. MJD argued that there was no nuisance because the lights were in compliance with local municipal code. Haley

⁷ There was also MJD's planting of a tree along the common property boundary that was positioned directly in front of the Haley's windows and deck that blocked their views. The court did consider this fact and found that a tree planted in such a manner could constitute a spite structure under RCW 7.40.030.

argued that the light shades could be easily adjusted to illuminate the parking area as desired while not shining light directly into their bedroom window. The court found that compliance with municipal code was not a complete bar to a nuisance claim and that the actions of MJD could constitute a nuisance claim. The court stated, “A nuisance includes the *acts* that annoy, injure, or endanger the comfort, repose, health, or safety of others and renders the other persons insecure in life or other use of property.” (Emphasis added). The court goes on to add, “an *activity* constitutes a nuisance when it....” *Id.* (Emphasis added).

MJD Properties LLC v. Haley does not provide guidance in this case. First and foremost, the *MJD* case involved an *act* by MJD to position lights that shone in Haley’s bedroom window. This was an ongoing neighbor dispute and the actions show that there was an escalating tit-for-tat behavior. The inference from the facts is clear: MJD installed the lights and positioned them to shine into Haley’s bedroom at night to annoy Haley. This case does not support Boyles’s case. Boyles use the case to argue that staining and debris are greater annoyances than light. However, Boyles miss the critical point of the *MJD* case: that there must be action by the offending party to constitute a nuisance. There is no evidence in the record that the Leeches did anything or had control over any factor that caused or contributed to the complained of debris. Thus,

MJD Properties LLC v. Haley does not stand for the proposition that the trial court erred in granting summary judgment.

2. In addition to the Boyles' failure to present evidence of any act by the Leeches, Boyles also fail to establish a legal case that a tree located entirely on the Leech property can constitute a nuisance by shedding natural tree debris.

Since there is no evidence showing that the Leeches acted or failed to perform any duty, the next analysis is whether a tree, alone, can constitute a nuisance. Leeches are aware of no controlling Washington case that holds that a tree, plant, or other vegetation, on their own and without encroaching on another's property, can commit the tort of nuisance. Leeches can find no reported Washington cases dealing with a similar scenario to the case *sub judice* in which nuisance is claimed for a tree located solely on the alleged tortfeasor's property.

The closest case that could be found dealing with a tree nuisance claim tree is *Gostina v. Ryland*, 116 Wn. 228, 199 P. 298 (1921). In that case, branches from a tree located on respondent's property overhung the common property boundary and into appellant's yard. The trees shed debris (as trees do) and it caused plaintiffs to have to clean their gutters and pick up debris form the yard. The court found that the trees were a nuisance to the extent that the branches overhung appellant's yard and deposited debris. After analysis, the court concluded that appellants were

justified in removing the branches that overhung their property. But, the court declined to allow a landowner the authority to cut down the entire encroaching tree. The court specifically held, “[t]he remainder of the trees will doubtlessly shed their leaves and needles upon the respondent’s premises; but this they must endure positively without remedy.” *Gostina v. Ryland* at 235.

This basic premises has been adopted by other Washington cases dealing with trees and allows for self-help remedies up to the common property boundary, but not beyond. *Herring v. Pelayo*, 198 Wn.App. 828, 397 P.3d 125 (Div. 2, 2017) held that where a tree is located on a common boundary, the property owners may trim the vegetation overhanging their property line, but not in a manner that kills the tree. In *Mustoe v. Ma*, 193 Wn.App. 161, 371 P.3d 544 (Div. 1, 2016), the court found a landowner has a legal right to engaging self-help to trim the branches and roots of a neighbor’s tree that encroaches onto his or her property. In *Lewis v. Krussel*, 101 Wash. App. 178, 2 P.3d 486 (2000), the court declined to extend a duty for landowners to remove healthy trees even if similar trees had previously fallen on plaintiff’s property and damaged structures. These cases all recognize that an individual has no authority over the trees located on a neighbor’s property.

In the present situation, no part of the tree in question encroaches

upon Boyles' property. The trunk of the tree is located entirely within Leeches' property and the closet branch is at least fifty feet away from the Boyles' property line. CP at 36 and 38. Thus, as the *Gustina* court holds, the Boyles are without remedy under the nuisance statute.

3. Allowing nuisance claims regarding naturally occurring debris from trees in the Pacific Northwest would create an unworkable situation.

There is also the practical consideration of allowing a nuisance cause of action based purely upon tree debris passing between properties. To allow nuisance claims as a relief for naturally occurring tree debris would put all landowners in a precarious position where they must choose between unreasonable measures to prevent the wind from carrying tree debris outside the confines of their property, or removing all trees from their property. Boyles ask that the Court expand Washington nuisance law to a degree that puts all potential property owners with trees or vegetation on their property at risk for being sued for nuisance if some natural byproduct of the living vegetation cross property lines. Washington cases have not addressed this practical consideration but several other states have directly addressed the impracticality of the position that Boyles advocate.

In *Ponte v. Da Silva*, 388 Mass. 1008, 446 N.E.2d 77 (1983)⁸ the Massachusetts supreme court found that blowing leaves and sap onto an adjoining property was not unreasonable and could not be the basis for a private nuisance claim. The court noted that “[t]o impose liability for injuries sustained as a result of debris from a healthy tree on property adjoining the site of the accident would ignore reality and would be unworkable.” *Ponte v. Da Silva* at 78. This rule was adopted by Kentucky in *Schalbach v. Forest Lawn Memorial Park*, 687 S.W.2d 551, 552 (1985) review denied, where the court stated, “Imposing liability upon a landowner for damage resulting from the natural dropping of leaves and other ordinary debris would result in innumerable lawsuits and impose liability upon a landowner for the natural processes and cycles of trees.” Maryland also adopted the Massachusetts Rule in the case of *Melnick v. C.S.X. Corp.*, 68 Md.App. 107, 510 A.2d 592, cert. granted 307 Md. 753, 517 A.2d 102 echoing the same rationale regarding overhanging vegetation.

In *Whitsell v. Houlton*, 2 Haw.App. 365, 366, 632 P.2d 1077 (1981)⁹ the Hawaii court noted:

⁸ Several states have adopted the “Massachusetts Rule” as stated in *Michalson v. Nutting*, 275 Mass. 232, 175 N.E. 490 (1931) concerning overhanging branches. This case relies on the *Michalson* case as the underpinning of its decision.

⁹ There is also the “Hawaii Rule” that multiple states have adopted that takes a slightly different approach than the Massachusetts Rule.

We hold that non-noxious plants ordinarily are not nuisances; that overhanging branches which merely cast shade or drop leaves, flowers, or fruit are not nuisances; that roots which interfere only with other plant life are not nuisances; that overhanging branches or protruding roots constitute a nuisance only when they actually cause, or there is imminent danger of them causing, sensible harm to property other than plant life, in ways other than by casting shade or dropping leaves, flowers, or fruit; that when overhanging branches or protruding roots actually cause, or there is imminent danger of them causing, sensible harm to property other than plant life, in ways other than by casting shade or dropping leaves, flowers, or fruit, the damaged or imminently endangered neighbor may require the owner of the tree to pay for the damages and to cut back the endangering branches or roots and, if such is not done within a reasonable time, the damaged or imminently endangered neighbor may cause the cutback to be done at the tree owner's expense.

This case specially excludes leaves, flowers, and fruit (which would be similar to a cone with seeds in this case) from being a nuisance. See also *Abbinett v. Fox*, 103 N.M. 80, 703 P.2d 177 (1985) adopting the Hawaii Rule outlined above.

Finally, the Utah Supreme Court in *Cannon v. Neuberger*, 1 Utah 2d 369, 268 P.2d 425 (1954) looked at this issue and summarized the issue as follows:

It is common knowledge that winds break branches from trees, and that trees in this climate, hard wood, or otherwise, shed twigs branches, leaves or needles. To hold trees to be a nuisance subject to abetment in equity, or subject to action at law for damages, merely because leaves or twigs or even branches in the ordinary course of affairs may be blown from them onto neighbor's lots, would be to

condemn to abolition all shade trees in communities sufficiently settled to have perils of such experiences. It would thus require only a short time until the prevalence of trees in this state would be reduced to the 'lone Cedar' which pioneers found upon their entrance into Salt Lake Valley,, and our communities would revert to blistering, windswept desert. Neither law nor equity could encourage, much less contribute to, such a condition.

C. As a matter of law, the trial court properly granted the Leeches motion for summary judgment because keeping a tree is a reasonable use of property.

“In private nuisance an intentional interference with plaintiff’s use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability.” *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 923, 296 P.3d 860 (2013) quoting The Restatement (Second) of Torts §cmt. D at 102 (1979). “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.” *MJD Properties, LLC v. Haley* at 970. “To apply the nuisance doctrine, a court balances the rights, interests, and convenience unique to the case.” *Id.* “The burden is on the plaintiff in a nuisance case to show that the use of property made by the defendant is unreasonable in relation to the correlative rights of the two parties. Rights of adjoining landowners in the use and enjoyment are relative, but they are also equal.” §3:13. Private Nuisances, 16 Wash. Prac., Tort Law and

Practice §3:13 (4th ed.).

The Boyles cannot present any evidence establishing the Leeches use of their property was unreasonable. Here Leeches simply allowed a tree on their property to live. This is a lawful right that the Leeches have in how to use their property. The tree naturally sheds cones/seeds, needles, and branches. These natural products contain tannins. That is an entirely normal function of a tree. As noted above, in the *MJD Properties, Inc. v. Haley* case (infra.), Haley offered evidence that the light shade could be easily adjusted to direct light the other way. In this case, Boyles offer no remedy other than removal of the tree. CP 73. Unlike Haley, Boyles offer no lesser alternative showing how this supposed nuisance could be abated absent removal of the tree. As noted earlier, this is beyond the self-help remedy available under Washington law, and it is an unreasonable restriction on the Leeches legal right to have this majestic 80- year old tree on their property.

D. Boyles' final assignment of error that the court should hear form experts and conduct a site visit is meritless.

Boyles' final assignment of error is that they request the court conduct a "hearing from experts and a site visit." Appellant's Brief at 2. This assignment of error is meritless.

First and foremost, it is incumbent on the Boyles to present expert

testimony to the trial court when responding to a motion for summary judgment. Where the defendant is the moving party and has shown the absence of material fact, the plaintiff must come forward with competent evidence showing the existence of a genuine issue of material fact for trial. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) overruled on other grounds by *Young v. Key Pharms., Inc.*, 130 Wn.2d 160, 922 P.2d 59 (1996). CR 56(c) allows for affidavits from expert witnesses. Boyles never requested a continuance under CR 56(f) nor do they assign any error for refusing to delay the trial court's consideration of the motion. Thus, it is improper to reverse a summary judgment order for the purpose of gathering expert evidence.¹⁰ The time for the Boyles to present the expert testimony was in their response to summary judgment.

Furthermore, putting aside the legal argument, the practical consideration is that Boyles did present the testimony of their expert – Brian Allen in the form of his declaration and report. CP 69-73. Allen was disclosed as their expert (CP 26) and he did present a declaration in response to the summary judgment. Boyles do not identify what, if any,

¹⁰ CR 56(f) states, "Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Here, Boyles present no "reasons stated" why they were unable to produce any affidavits and do not enlighten the Court on what these mysterious experts would even say.

other expert testimony they desire.

Second, Boyles have never requested that the trial court conduct an inspection of the tree and properties as now requested. Boyles had adequate opportunity to present evidence to the trial court to support their case on summary judgment. They could have requested an inspection of the Leech property under CR 34. As the record shows, this was never done or requested. Boyles could have produced additional photos, video, declarations, etc., to present their evidence to trial court in support of their position opposing summary judgment. As the record shows, Boyles never requested a continuance in the summary judgment hearing under CR 56(f) to obtain sufficient evidence to present to the trial court. Boyles presented no additional facts or evidence when they filed their Request for Reconsideration. Therefore, it would be error for this Court to reverse an order of summary judgment for purposes of conducting a site visit that was never requested until the appeal.

V. RAP 18.1

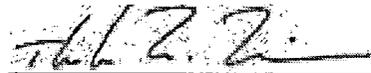
Pursuant to RAP 18.1, respondents John & Brenda Leech request that any and all statutory costs and fees that they may be entitled to as the prevailing party.

VI. CONCLUSION

For all the reasons stated above, Respondents John & Brenda Leech request that this court affirm the trial court's order granting their motion for summary judgment dismissal. In addition, pursuant to RAP 14.2, Respondents seek an award of costs for this appeal.

DATED this 23rd day of March, 2017.

LAW OFFICES OF SWEENEY & DIETZLER



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Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY under penalty of perjury that on the 23rd day of March, 2018, I sent for filing and delivery a true and correct copy of the foregoing Respondent's Brief by the method indicated below, and addressed to the following:

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