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NO. 526883-II

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

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WALLACE JOHNSON,

Appellant/Plaintiff,

v.

BERNARD McAULEY and LINDA McAULEY,  
husband and wife,

Respondents/Defendants.

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**RESPONDENTS' BRIEF**

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## **I. INTRODUCTION**

Appellant, Wallace Johnson, assigns error to the ruling of the trial court in this matter granting summary judgment in favor of Respondents, Bernard McCauley and Linda McCauley, and dismissing Mr. Johnson's claims against Bernard and Linda McCauley as a matter of law. However, in this case, the trial court ruling on summary judgment as it relates to Bernard and Linda McCauley was correct and should be affirmed.

Mr. Johnson challenges the trial court's granting of summary judgment dismissing his claims of nuisance "relating to or arising out of construction of the residence and barn located on the McCauley property." In its ruling, the trial court granted summary judgment as to Mr. Johnson's nuisance claims against Bernard and Linda McCauley on two grounds: latches and "per se on its merits." The construction of a home and barn on a piece of property is not a nuisance as a matter of law. Operation of a horse boarding business is not a nuisance as a matter of law. In addition, based on Mr. Johnson's failure to act, the doctrine of latches was utilized appropriately as a matter of law by the trial court.

## **II. STATEMENT OF THE ISSUE**

**A.** Did the trial court correctly rule that the construction of a residence and barn by Bernard and Linda McCauley, on their property, and a horse boarding business are not a nuisance as a matter of law?

**B.** Did the trial court correctly rule that the claims brought against Bernard and Linda McAuley by Mr. Johnson are barred under the doctrine of laches and subject to dismissal as a matter of law?

### **III. STATEMENT OF THE CASE**

Appellant, Wallace Johnson (hereinafter “Johnson”), and Respondents, Bernhard and Linda McAuley (hereinafter “the McAuleys”) are the owners of adjacent property located in Thurston County, Washington. The McAuleys purchased their property in October 1994, later constructing a home and barn on their property in 1995, in which they resided for over 20 years. Johnson purchased his property in or about 1995 and eventually built a home on the property, which he and his wife moved in to in December 2007. In 2008 the 48<sup>th</sup> Court Home Owner’s Association (“HOA”) encompassing the McAuleys and Johnson properties was incorporated. Johnson served as President of the HOA from 2008 to 2012. Johnson filed a lawsuit against the McAuleys and the HOA on August 12, 2016. CP 1-9. The lawsuit alleged that the McAuleys’ construction of a modular home as the main dwelling, subsequent construction of a barn that does not “conform to the architectural scheme of the main dwelling,” and allegedly conducting a horse boarding business on the property “that is visible to public view” constitutes an actionable nuisance. CP1-9. On or

about November 1, 2017, the McAuleys filed for summary judgment dismissal of all claims brought by Johnson. CP 350-360.

The trial granted the McAuleys' motion for summary judgment based on a finding that Johnson's motion for nuisance per se fails as a matter of law and under the doctrine of laches.

#### **IV. ARGUMENT AND AUTHORITIES**

The Court of Appeals reviews a grant of summary judgment de novo. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007) (citing *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005); *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005)). Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Bostain*, 159 Wn.2d at 708, (citing CR 56(c)); *Korslund*, 156 Wn.2d at 177; *Berrocal*, 155 Wn.2d at 590. The court views facts and reasonable inferences therefrom most favorably to the nonmoving party. In the end, summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Id.*

At issue before the trial court in this case was whether or not summary judgment dismissal of Johnson's nuisance claim was warranted as a matter of law. Contrary to Johnson's appellate briefing, interpretation of restrictive covenants, and whether or not the McAuleys disregarded, or "flagrantly

disregarded” any restrictive covenants applicable to the property does not create genuine issues of material fact that apply to a legal nuisance analysis.

**A. CONSTRUCTION OF A MODULAR HOME, CONSTRUCTION OF A BARN THAT DOES NOT CONFORM TO THE ARCHITECTURAL SCHEME OF THE MAIN DWELLING, AND BOARDING OF HORSES THAT MAY BE SUBJECT TO PUBLIC VIEW DO NOT CREATE GENUINE ISSUES OF MATERIAL FACT TO SUPPORT A CLAIM OF NUISANCE.**

Whether a particular activity is a nuisance is determined upon the facts of the case. Nuisance is defined in RCW 7.48.010, which states that actionable nuisance is “... whatever is injurious to health or indecent or offensive to the sense, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property ... .” The term “unlawful and unreasonable” are synonymous. *Karasek v. Peier*, 22 Wash. 419, 61 P. 33 (1900) P.33 (1900).

Courts, when analyzing a nuisance claim between neighbors, have said rights in “the use and enjoyment of property are relative, but are also equal. Equity cannot restrict one land owner to confer benefits on the other.” *Collinson v. John L. Scott*, 53 Wn. App. 481, 488, 778 P.2d 534 (1989) citing *McInnes v. Kennell*, 47 Wn.2d 29, 38, 286 P.2d 713 (1955). In *Collinson* the court ruled that a lawfully erected building or structure cannot be complained of as a nuisance merely because it obstructs the view of a neighboring property.

It is a well-settled principle in Washington law that something may “offend against the aesthetic sense, but this would not be sufficient to make it a nuisance.” *Zey v. Town of Long Beach*, 144 Wash. 582, 584, 258 P. 492 (1927) (citing *Hughson v. Wingham*, 120 Wash. 327, 207 P. 2 (1922)). This principle was strongly adopted and reinforced by the Supreme Court in *Mathewson v. Primeau*, 64 Wn.2d 929, 395 P.2d 183 (1964). The *Mathewson* case firmly held “[t]hat a thing is unsightly or offends the aesthetic sense of a neighbor, does not ordinarily make it a nuisance or afford ground for injunctive relief.” *Id.* at 938. Aesthetic considerations cannot constitute the “unauthorized interference” with someone’s “use of their property” which underpins a nuisance claim.

The *Mathewson* case has been cited positively by other state courts in support of the same principle. (See *Wernke v. Halas*, 600 N.E.2d 117, 122 (Ind. Ct. App. 1992) (it is well settled throughout this country that, standing alone, unsightliness, or lack of aesthetic virtue, does not constitute a private nuisance”); *Myrick v. Peck Elec. Co.*, 2017 VT 4, ¶ 5, 204 Vt. 128 (“unpleasant appearance alone does not interfere”) (citation omitted)).

As quoted above, there is ample language in support of this principle holding that unsightliness “alone,” or “without more” will not constitute a nuisance. Something may impair the value of an adjoining property, but not be a nuisance. *Morin v. Johnson*, 49 Wn.2d 275, 282, 300 P.2d 569 (1956). In the case at hand, Johnson argues exclusively perceived damage to property value

based on the acts of the McAuleys on their own property. Even if evidence was presented by Johnson establishing some diminution in value based on the appearance of the McAuleys' home, or the McAuleys' barn, or even the appearance of some horses, this diminution in value evidence would not constitute a nuisance as a matter of law. As discussed in the Vermont Supreme Court case citing our Washington case:

[A] decrease in property value does not mean there has been an interference with that property's use, a requisite for a nuisance claim. (Citing *Oliver v. AT&T Wireless Servs.*, 76 Cal. App. 4th 521, 534 90 Cal. Rptr. 2d 491 (1999)).

Additionally, a claim of nuisance based solely upon diminution in property value invites speculation, as “[p]roperty values are affected by many factors; a decrease in market value does not mean there is a nuisance, any more than an increase means there is not. (Citations omitted.) And such a rule would be one-sided: a plaintiff alleging diminished property value because of activities on a neighbor's land—such as construction of an oddly-shaped house—would have a claim for damages, but a neighbor whose activities resulted in an increase in the property owner's value—such as construction of a palatial estate—would have no claim for contribution for the activity that increased property value. *Myrick*, at ¶ 13.

Before the trial court and on appeal, Johnson argues that the McAuleys using of their land in violation of an HOA covenant transforms the land use into a nuisance per se and is actionable in a private nuisance suit. In a case between adjacent property owners where one owner was using their property with a permit, the Washington State Supreme Court held that the failure to obtain a permit does not transform a use of land into a nuisance per se unless

the legislature has specifically so declared or the courts of this state have specifically so found. *Moore v. Steve's Outboard Serv.*, 182 Wn.2d 151, 339 P.3d 169 (2014). Here the McAuleys are not aware of any statute or case law that supports a position that an alleged violation of an HOA covenant is a nuisance per se.

A nuisance per se is “an act, thing, omission, or use of property which of itself is a nuisance, and hence is not permissible or excusable under any circumstance,” regardless of the reasonableness of the defendant's conduct. *Id.* (lead opinion by Smith, J., writing for four justices) (citing *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 154 P. 450 (1916)). Another requirement of a nuisance per se is that the act must be a nuisance at all times. Johnson has failed to show, that even if the McAuleys’ activities were in violation of HOA covenants (which is not necessarily being conceded), said failure to comply with an HOA covenant is a nuisance at all times and under all conditions. As discussed above, the allegation of nuisance raised by Johnson is based on aesthetics and the alleged violation of the HOA covenants. Again, as argued above, Johnson’s claims fail as a matter of law as to both allegations and the trial courts summary judgment dismissal was appropriate.

In the case at hand Johnson has alleged and presented nothing more than argument and evidence related to the aesthetic value of the McAuleys’ home and barn. Johnson argues that the boarding of horses must be a nuisance

due to the fact they may be subject to public viewing. Johnson relies on summary statements relating to damages arising from the McAuleys' buildings being somehow inconsistent with certain homeowner's provisions. Based on Johnson's arguments at the trial court level and in his appellate brief, if the McAuleys had built a nicer house or a nicer barn, then no nuisance would exist. This type of argument raised by Johnson to support a nuisance claim under Washington law does not create a genuine issue of material fact on which a trial court, or any other finder of fact could reasonably rely upon. The arguments raised by Johnson are exactly the type of argument that should be dismissed at a summary judgment level. As such, the ruling of the trial court granting summary judgment in favor of the McAuleys was appropriate and appropriate as a matter of law.

**B. AT SUMMARY JUDGMENT THE TRIAL COURT CORRECTLY RULED THAT THE CLAIMS BROUGHT BY JOHNSON AGAINST THE MCAULEYS ARE BARRED UNDER THE DOCTRINE OF LACHES AND SUBJECT TO DISMISSAL AS A MATTER OF LAW.**

Laches, while said to be founded on the principle of equitable estoppel, *Crodle v. Dodge*, 99 Wash. 121, 168 P. 986 (1917); *Young v. Jones*, 72 Wash. 277, 130 P. 90 (1913), is an equitable principle that in a general sense relates to neglect for an unreasonable length of time, under circumstances permitting diligence, to do what in law should have been done. *Lyle v. Haskins*, 24 Wn.2d 883, 168 P.2d 797 (1946); *Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d

616, 157 P.2d 302 (1945). It also requires an intervening change of condition, making it inequitable to enforce the claim. *McKnight v. Basilides*, 19 Wn.2d 391, 143 P.2d 307 (1943); *Anderson Estate, Inc. v. Hoffman*, 171 Wash. 378, 18 P.2d 5 (1933). The doctrine is also derived from the familiar maxim that equity aids the vigilant, not those who slumber on their rights. *Leschner v. Dep't of Labor and Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947).

The elements of laches are (1) knowledge or reasonable opportunity for discovery of the cause of action; (2) an unreasonable delay in commencing the action; and (3) damage to the defendant resulting from the unreasonable delay. *Lopp v. Peninsula School Dist. No. 401*, 90 Wn.2d 754, 585 P.2d 801 (1978).

1. Johnson had knowledge of the structures built on the McAuleys' property prior to even purchasing his property, and for reasons unknown, unreasonably delayed the commencement of any nuisance action against the McAuleys for over 20 years.

The McAuleys' purchased their property in October 1994, and had fully constructed their home and barn by March 1995. CP 341-349. Johnson purchased his property in December 1995. CP 463-470. According to Johnson, he and his wife have been "residents" at their property since December 2007. *Id.* Johnson filed the Complaint against the McAuleys in August 2016. There is no question Johnson had knowledge of the McAuleys' home and barn, and he had knowledge of any covenants involved at the time

of his purchase of the property. CP 17-110. Even though he could see the McAuleys' property from his property, Johnson then proceeds to wait over 20 years to bring any action against the McAuleys or the HOA.

One case particularly instructive under this circumstance is the case of *Ames Lake Community Club v. State*. In this case, the Washington State Supreme Court held that the Ames Lake Community Club was barred by the doctrine of laches from enforcing covenants contained on the face of a plat where the Ames Lake Community Club waited only a period of 11 years (1951-1962) to bring an action and was thus barred from enforcing the covenants. *Ames Lake Cmty. Club v. State*, 69 Wn.2d 769, 774, 420 P.2d 363, 366 (1966). Another significant factor utilized by the court in applying the laches doctrine in *Ames* was the fact that in that case the State had made a number of valuable improvements.

2. The McAuleys have been significantly prejudiced by Johnson's unreasonable and unjustified failure to bring his action for nuisance in a timely fashion.

The facts in this case are undisputed that the McAuleys have resided on their property for over 20 years prior to Johnson initiating any suit against them. The McAuleys improved their property, maintained their property, and enjoyed their property for that entire period of time. To allow Johnson to proceed with his claims would undermine the life on their property created and maintained by the McAuleys. Johnson's timing in bringing an action

against the McAuleys is clearly violative of the equity based doctrine of laches as a matter of law. To allow Johnson to assert an allegation that Johnson was aware of 20 years prior is without merit. The trial court correctly granted summary judgment in favor of the McAuleys under the doctrine of laches.

#### **V. REQUEST FOR AWARD OF ATTORNEY FEES ON APPEAL**

The trial court denied attorney fees to the McAuley's at the time it granted the motion for summary judgment. In the state of Washington, attorney fees may be awarded where authorized by a contract, a statute, or a recognized ground in equity. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849, 726 P.2d 8 (1986).

“An appeal is deemed ‘frivolous,’ such that it is subject to dismissal if, considering the entire record, no debatable issues are presented upon which reasonable minds might differ and it is so devoid of merit that there is no reasonable possibility of reversal.” RAP 18.9(c). *In re Guardianship of Wells*, 150 Wn. App. 491, 208 P.3d 1126 (2009).

Based on the arguments raised by Johnson in the trial court and this appeal, we believe the McAuleys are entitled to reasonable attorney fees.

#### **VI. CONCLUSION**

For the reasons set forth above, the trial court's summary judgment rulings, which are the subject matter this appeal, dismissing Johnson's nuisance

claims against McAuley as a matter of law should be affirmed. Finally, the Court should grant reasonable attorney fees to respondents.

RESPECTFULLY SUBMITTED this 26th day of March, 2016.

YOUNGLOVE & COKER, P.L.L.C.

/s Christopher John Coker  
Christopher John Coker, WSBA #28229  
Attorney for Respondents

## **PROOF OF SERVICE**

I, Angie Dowell, hereby declare under penalty of perjury under the laws of the State of Washington that on March 26, 2019, I served a copy of the Respondents' Brief and this Proof of Service to be electronically filed with the Court of Appeals, Division II using their e-filing system at [coa2filings@courts.wa.gov](mailto:coa2filings@courts.wa.gov), and caused a true and correct copies of the same to be sent via electronic service per agreement of counsel, to the following:

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

Dated this 26th day of March, 2019, at Olympia, Washington.

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Angie Dowell, Paralegal  
Younglove & Coker, P.L.L.C.

# YOUNGLOVE & COKER

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## Transmittal Information

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