

FILED
COURT OF APPEALS
DIVISION II

2019 OCT -7 AM 11:24

STATE OF WASHINGTON

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No. 53461-4-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

ERNEST EDSSEL,
JUDY LAMB,
APPELLANTS / PLAINTIFFS

v.

PATRICK GILL,
BARBARA BOWMAN,
DEREK LAMOUREUX,
AMBERLEE D'APPOLLONIO,
AND JOHN DOES (1-10),
RESPONDENTS / DEFENDANTS

APPEAL FROM KISTAP COUNTY SUPERIOR COURT,
THE HON. WILLIAM C. HOUSER, PRESIDING
Cause No. 18-2-00098-18

REPLY BRIEF OF APPELLANT

ERNEST M. EDSSEL, ESQ.
WA State Bar # 32274
Appellant *Pro Se*
307 E. 30th St., Bremerton, WA 98310
Tel. 360-373-2910

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**APPELLANTS' REPLY TO BRIEFS
OF ALL RESPONDENTS:
ARGUMENT IN REPLY**

- I. Respondents' arguments require that this court ignore well-established law governing Judicial Admissions and Summary Judgments, including *Trimble v. WSU*, 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000), *Reed v. Streib*, 65 Wn.2d 700, 708, 399 P.2d 338 (1965), and this court's *Riley v. Andres*, 107 Wn.App. 391, 395-96, 27 P.3d 618 (2001) and *Arnold v. Saberhagen*, 157 Wn.App. 649, 661-662, 240 P.2d 162 (2010).

Respondents, in the arguments set forth in their briefs, require that this court ignore, reject, or modify well-established law governing summary judgments and judicial admissions. The abandonment of such controlling caselaw is the only way that the nuisance and trespass defendants can extricate themselves from the no-win situation that they find themselves in this appeal.

Simply put, the Respondents are caught in a bind that consists, in this case, of the proverbial rock and three very hard places.

- A. **THE PROVERBIAL ROCK:** a summary judgment ruling is reviewed *de novo*, with "the appellate court engag[ing] in the same inquiry as the trial court." *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000)(quoting *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000)); and, in any such appellate-reviewed motion for summary judgment, ***all facts submitted and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party.*** *Trimble*, 140 Wn.2d at 93 (emphasis added).

Accordingly, this means that under the proverbial rock of *Trimble*, 140 Wn.2d at 93, **all** of the following three sets of facts submitted by the Appellants, **and all** reasonable inferences therefrom, **must** be viewed in the light most favorable to the nonmoving party:

- 1. Plaintiffs' CR 56 responses, testimony, and other related papers or documents filed with the court [CP 259-292 (including realtor eyewitness and expert witness David McDonald, at CP 285-292), 326-457, 505-513, 505-513, 523-586, 588, 590-721, 760-769, 773-777, 850-876, 878-880, 883-1278, 1289-1391, 1394-1422, and 1504-1520];

- 2. General contractor ER 803(a)(6), RCW 5.45.010, and RCW 5.45.020 business records with respect to noxious weed nuisance and trespass repairs and mitigation (including business records of eyewitness and licensed general contractor Joel Anderson and his licensed subcontractor Tim Smythe, at CP 722-759, who worked on repairing and mitigating damages from Respondents' invasive vegetation at Appellants' residence) and which business records were considered and reviewed by the court in discovery disputes (CP 722-769, 773-777, 1285-1286) and then **mentioned at footnote 2 on page 2 (CP 1280) of the court's summary judgment**

order of 21 March 2019 (CP 1279-1284).¹ The court reviewed and considered the business records of the general contractor witnesses who worked on Plaintiffs' residence when the court ruled, on 26 March 2019, that said business records and reports were not protected work product. CP 1285-86; and,

- 3. Signed and authenticated (or sworn) landscaping contractor eyewitness (and expert witness) ER 803(a)(6), RCW 5.45.010, and RCW 5.45.020 business records with respect to invasive vegetation nuisance and trespass repairs and mitigation (including business record summaries of landscaping contractor David Herzog, at CP 915-931, and sworn declarations of his landscaping employees, Mr. Estrada and Mr. Osorio).

In addition to the proverbial *Trimble* rock, the nuisance & trespass defendants are caught in a no-win situation created by three "hard places" that consist of:

¹ ER 803(a)(6)[Records of Regularly Conducted Activity. (Reserved. See RCW 5.45)].

RCW 5.45.010: "'Business' defined. The term 'business' shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not."

RCW 5.45.020: "Business records as evidence. A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

B. • THE JUDICIAL ADMISSION, CP 1420-21: the Respondents are caught in a no-win situation with their admission as to the truth of *all* allegations that Plaintiffs submitted to the court, up to and including the summary judgment hearing. See, CP 1420-1421; and see, p. 10 - 18 of Appellants' brief).

The Respondents' admission, CP 1420-1421, means that all of the following allegations are admitted by Respondents as true: (1) all allegations, including allegations of trespass, nuisance, including *per se* nuisances, breach of enforceable common area maintenance agreements, *and resulting actual and substantial damages*, as set forth in the Original and Second Amended Complaint (CP 11-26 and 190-215); (2) all motions, responses, testimony, and documents submitted by Plaintiffs at CP 47-104, 105-129, 179-187, 216-258, and 1504-1520; (3) Plaintiffs' CR 56 responses, testimony, and other related papers or documents filed with the court [259-292 (including realtor eyewitness and expert witness David McDonald, at CP 285-292), 326-457, 505-513, 505-513, 523-586, 588, 590-721, 760-769, 773-777, 850-876, 878-880, 883-1278, 1289-1391, 1394-1422, and 1504-1520]; (4) all general contractor (and expert witness) ER 803(a) (6), RCW 5.45.010, and RCW 5.45.020 business records with respect to noxious weed nuisance and trespass repairs and mitigation (including business records of eyewitnesses and licensed general

contractor Joel Anderson and his licensed subcontractor Tim Smythe, at CP 722-759, who worked on fixing and mitigating damages at Appellants' residence from Respondents' invasive vegetation) and which business records were considered and reviewed by the court in discovery disputes (CP 722-769, 773-777, 1285-1286) and then mentioned at footnote 2 on page 2 (CP 1280) of the court's summary judgment order of 21 March 2019 (CP 1279-1284); and, (5) all landscaping contractor and expert witness ER 803(a)(6), RCW 5.45.010, and RCW 5.45.020 business records with respect to noxious weed nuisance and trespass repairs and mitigation (including business record summaries of landscaping contractor David Herzog, at CP 915-931, and his landscaping employees, Mr. Estrada and Mr. Osorio).

Respondents' judicial admission also means that summary judgment cannot be granted because there are **true** and genuine issues of material fact concerning every cause of action, as set forth in all of the allegations that are conceded as true in:

- Plaintiffs' Second Amended Complaint (CP 190-215),
- all motions and responses filed by Plaintiffs, including Plaintiffs' motions to enlarge time for a response to the summary judgment motions (CP 850-876 and CP 878-880); and,
- Plaintiffs' responses to the summary judgment motions (CP 883-1239).

C. • **THE REED V. STREIB DECISION:** Respondents are in a no-win situation given that summary judgment law requires that ***all evidence submitted by the non-moving party must be treated as true***, giving it all inferences most favorable to the nonmovant. *Reed v. Streib*, 65 Wn.2d 700, 708, 399 P.2d 338 (1965)(“We must treat this evidence as true, and giving it inferences most favorable to the nonmovant”)[the evidence was ***an unauthenticated letter of the moving party attached to an affidavit of the nonmoving party***; the court held that the contents of the letter could be inferred as creating a genuine issue of material fact with respect to a business conspiracy to harm Mr. Davis, the nonmovant. See, *Reed*, at 708, where the court does not deem the letter to be authenticated evidence but merely an attachment to an affidavit].

Accordingly, this means that:

a. ***all evidence*** submitted and offered in Plaintiff’s CR 56 responses (CP 883-1239) **are taken as true** under *Reed*, at 708;

b. ***all of the evidence*** listed in CP 1240-1250 and 1251-1265, Plaintiffs’ Index Guide and Topical Guide to the ten (10) exhibits attached to the CR 56 responses **are taken as true** under *Reed*, at 708, including CP 915-931, the signed and authenticated David Herzog documents.

D. • **RILEY, ARNOLD & MICHIGAN NATIONAL BANK:**

Third, the Respondents are in a no-win situation pursuant to summary judgment law of this court, which has repeatedly held that summary judgment is not proper, and that the case should go to trial, when material facts are particularly within the knowledge of the moving party. *Riley v. Andres*, 107 Wn.App. 391, 395-96, 27 P.3d 618 (2001); *Arnold v. Saberhagen*, 157 Wn.App. 649, 661-662, 240 P.2d 162 (2010). Both cases cite *Michigan Nat. Bank v. Olson*, 44 Wn.App. 898, 905, 723 P.2d 438 (1986), which held that in summary judgment proceedings, where material facts are particularly within the knowledge of the moving party, the matter should proceed to trial “in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.”

After all, summary judgment is not designed to cut off litigants. *Keck v. Collins*, 181 Wn.App. 67, 86-87, 325 P.3d 306 (2014), *aff'd*, 184 Wn.2d 358, 357 P.3d 1080 (2015).

In this case, material facts are particularly within the knowledge of the moving party Respondents with respect to: (a) a hidden and unlicensed marijuana grow operation growing in planters and pots that can be quickly moved into vans and vehicles for covert transportation in and out of the property; (b) drug house activities

concerning the use and trafficking of illicit substances; (c) night-time burning of garbage and other toxic substances; and, (d) levels of noise and vibration generated by motorcycles and other vehicles owned by Respondents and their guests. See, p. 6-7 of Appellant's Brief; see also, CP 190-215 (Second Amended Complaint).

Therefore, under *Riley*, 107 Wn.App., at 395-96, *Arnold*, 157 Wn.App., at 661-662, *Michigan Nat. Bank*, 44 Wn.App., at 905, and, *Keck*, 181 Wn.App., at 86-87, the Appellants Edsel cannot be cut off with summary judgment, punished for being unable to produce at summary judgment proceedings material facts that are particularly within the knowledge of the moving parties, especially with respect to:

- (a) an unlicensed and mobile pot grow operation;
- (b) drug house activities;
- (c) night-time burning of garbage and other toxic substances;
- (d) levels of noise and vibration generated by motorcycles and other vehicles owned by Respondents and their guests.

II. Time to reverse failed and flawed summary judgments, as required by *Grundy* and *MJD Properties* caselaw.

Truth, equity, justice, and judicial economy are greatly advanced when attorneys for defendants admit and concede, in open

court, to the absolute truth of all allegations of a plaintiff. CP 1420-1421.

The defendants' admission and concession at CP 1420-21 includes:

a. all allegations concerning the nuisance, trespass, and common area maintenance agreement causes of action of Appellants Edsel; and,

b. all allegations that Appellants Edsel are entitled to sue in law and equity to enforce duly-recorded common area maintenance agreements that affect all neighboring residents and property owners, including the three property owners who were duly served and who consented to and did not object to being joined or added as plaintiffs to the litigation under CR 19 and 20. See, CP 47-104.

The Respondents cannot extricate themselves from their judicial admission, not even when they deceptively twist simple facts, such as implying that the Respondent property owners, and two property owners who objected to being joined or added, are a majority of three out of seven property owners. The Respondents' new math fails at arithmetic, just like the rest of their appellate arguments. Three out of seven is not a majority. After being duly-served, a total of four out of seven property owners consented, and did not object, to being

added or joined as plaintiffs on the common area claims for nuisance and breach of recorded covenants and agreements. See, CP 47-104.

Likewise, Respondents failed to support their summary judgment motions, not even able to produce any certified copies of government records or any affidavit from any Bremerton police officers, other law enforcement agencies, and fire departments as to what legal or illegal drug or burning activities had been observed by third party government agencies at Respondents' property.

Moreover, it is well-established law that governmental inaction and permits do not justify the summary judgment dismissal of a nuisance action. *Grundy v. Thurston County*, 155 Wn.2d 1, 3, 117 P.3d 1089 (2005)(the Supreme Court expressly held that a legal, county-permitted seawall that sends water into the neighbor's residence and property is an actionable nuisance, reversing the trial court and this second division, which dismissed in summary judgment plaintiff Grundy's private nuisance claim against her neighbor).

And in *MJD Properties v. Haley*, 189 Wn.App. 963, 358 P.3d 476 (2015), the court reversed the trial court's summary judgment against a *pro se* attorney plaintiff who sued a neighbor for the nuisance of a legal light on a neighbor's driveway and the "spite" nuisance of a legal tree, planted on said neighbor's property, that blocked the plaintiff's view of Lake Washington.

Lastly, Respondents refuse to disclose whether their judicial admission was a mistake.

Or, was it accidental confusion that pride would not withdraw? Was it a guilty conscience or a Freudian slip? Was it designed to force Respondents' insurer to cover the Appellants' claims?

Perhaps oral arguments in this appeal will reveal the motive.

Even if the Respondents had not made a judicial admission as to the absolute truth of all allegations of Appellants Edsel in the litigation, the Appellants Edsel have clearly shown by offers of evidence and testimony proof, and actual submissions thereof, that they can and will produce, for a jury, in admissible form, ***more than sufficient physical evidence and testimony*** to support and prove all of their causes of action from the following persons:

1. themselves;
2. eyewitness and expert realtor David McDonald, who will testify on Respondents' "coming to the nuisance" affirmative defenses and the financial damages and impairment caused by the Respondents with respect to the value of the property where Appellants Edsel reside;
3. eyewitness and expert landscapers Herzog, Estrada, and Osorio, who saw the large marijuana grow operation when working on and documenting their repair and mitigation of invasive English Ivy vegetation growing and rooted at Respondent's property;

4. eyewitness general contractors Joel Anderson and Tim Smythe, who saw the invasive English Ivy vegetation when working on and documenting their repair and mitigation of damages to drainpipes and the basement slab by said noxious weed growing and rooted at Respondent's property; and,

5. treating physician Dr. Helen Shaha who will testify as to the generally accepted deleterious health effect of smoke and how the Respondent's burning activities negatively impacted the health, physical safety, and well-being of both Appellants Edsel.

III. Time to reverse erroneous attorney fee awards.

Attorney fees awarded to all Respondents as a prevailing party, and as sanctions against the undersigned, are factually baseless and legally meritless when the Respondents have made the admission, CP 1420-1421, that all allegations (of fact and law) by the Appellants are conceded to be true. At the very least, sanctions need to be vacated and remanded for the trial court to determine what sanctions, if any, are applicable in light of the all-encompassing admission made by Respondents at CP 1420-1421. *If Respondents had made their judicial admission at the start of litigation, then there would have been no need for all or almost all other motions and responses by all*

of the parties. Appellants would have been entitled to a judgment on their pleadings (with a jury only called to hear the issue of damages).

Furthermore, “prevailing party” attorney fee awards must be vacated as soon as the trial court’s summary judgment order is reversed or vacated since Respondents would obviously not be a “prevailing” party.

IV. Conclusion as Respondents withdraw their Supplemental Designation of Clerk’s Papers.

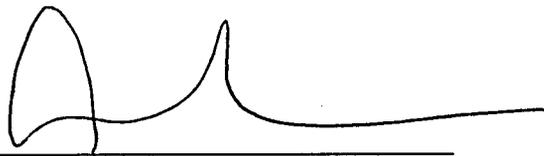
As with the trial court, the Respondents expect sophistry, deception, and class envy to again win the day, especially when they argued in their briefs about the length of the granite counter in Appellants’ kitchen, the value of the boat collection of Appellant’s family, and the amount of Amazon stock distributed by the Appellants’ family trust to multiple beneficiaries.

Of course, Respondents did not disclose whether the 12-foot granite counter in the kitchen was inexpensive Colorado granite or gold-flecked Himalayan granite from Kashmir. Nor did Respondents disclose whether the Amazon stock distributed by a family trust consisted of undivided fractional interests in common stock shares that have no voting power.

Thus, it is no surprise that on 13 August 2019, Respondents Gill and Bowman filed (in this appeal and in Kitsap County Superior Court), a *Notice of Withdrawal* of their massive 6 August 2016 Supplemental Designation of Clerk's Papers (for more than twenty-four [24] papers, including papers that Respondents filed in support of their motions for summary judgment). All such carefully designated papers contradict their appellate arguments or disprove their assertions of fact and law. It is the Respondents who need to be sanctioned and appeal costs imposed on them.

Appellants have actual and substantial damages, including a ruined basement, blocked drainpipe, respiratory ailments, and the impaired use and enjoyment of their residence. A jury can and will find these injuries to have been caused by the Respondents' activities. The summary judgment and attorney fee orders must be vacated and reversed. Let right be done.

RESPECTFULLY SUBMITTED on this 7 day of October, 2019.



ERNEST M. EDSSEL, ESQ.
WA STATE BAR # 32274/ APPELLANTS PRO SE
307 E. 30th St., Bremerton, WA 98310
Tel. 360-373-2910

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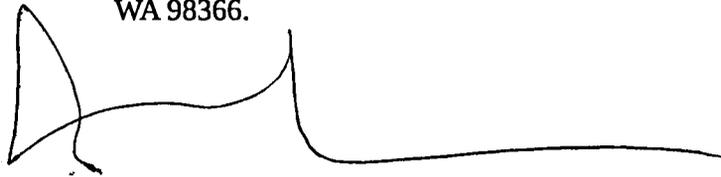
PROOF OF SERVICE BY _____
DEPUTY

Sworn Certificate of Service

On this 7 day of October, 2019, in Kitsap County, WA State, pursuant to RAP 17.4 and 18.5, the undersigned, under penalty of perjury and upon personal knowledge, declares that he served or caused to be served a true and correct copy of the foregoing paper(s) upon all Defendants by mailing said copy via 1st Class, U.S. Mail, postage prepaid [or next day confirmed USPS or Fedex courier delivery], as follows (without the contents of Appendix One and Three, which have previously been served upon counsel named below):

Respondents Gill and Bowman thru attorney Shawn Butler, Esq., at 1001 4th Ave, Ste # 4200, Seattle, WA 98154-1154;

Respondents Lamoureux and D'Appollonio thru attorney, John Groseclose, Esq., at 1155 Bethel Avenue, Port Orchard, WA 98366.



ERNEST M. EDSSEL, ESQ.
WA STATE BAR # 32274
Appellant Pro Se
307 E. 30th St., Bremerton, WA 98310
Tel. 360-373-2910