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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

APPELLATE CASE NO. 362345

BARRY MOORE, et . ux,
Appellants

v.

CAROL HANSON, et. al.
Respondents

APPEAL FROM THE SUPERIOR COURT OF
WASHINGTON FOR WHITMAN COUNTY
HONORABLE GARY J. LIBEY, JUDGE
Case No. 17-2-0257-38

REPLY BRIEF OF APPELLANT

HOWARD M. NEILL, WSBA No. 05296
AITKEN, SCHAUBLE, PATRICK, NEILL & SCHAUBLE
Attorney for Appellant
165 NE Kamiaken, Suite 210
P.O. Box 307
Pullman WA 99163
Telephone: (509) 334-3505 Fax: (509) 334-5367 Email:
asprn@pullman.com

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REPLY TO RESPONDENTS INTRODUCTION

Respondents Introduction contains certain inaccuracies that are addressed hereafter.

1. Respondent states that the Moore property sits at a slightly higher elevation than the Hanson property. The Moore property actually is at least 5' 6" higher at the fence line than the Hanson property. (CP 77, paragraph 8.a).

2. "Ms. Hanson (and her predecessors) has long maintained a rock wall that provides a minimal degree of lateral support to the Moores' property." The lateral support for the Moores' property has been provided by the soil embankment, not by the rock wall. (CP 100; CP 73-74, paragraph C)

3. "Ms Hanson removed one juniper bush, which allegedly exposed a footing of a fence post owned by the Moores." Substantially more than one juniper as claimed by Ms. Hanson. (CP 56 and 100). The footing that was exposed was not due to the removal of junipers, it was caused by excavating completely around the footing. (CP 98).

4. "The fence did not fall, but apparently a gap appeared under the fence such that the cement footing of the fence floated in mid-air." However, the excavation by Hanson has caused the fence to both lean precariously and affecting the integrity of the fence itself. (CP 100).

5. “At some point in time, Ms. Hanson allegedly cut a branch of a juniper bush that grew from a root on the Moores’ side of the fence leaving a four inch “stump”.” The four inch stump shows a flat surface, obviously having been sawed off, not merely cut. (CP 102).

6. “The Moores argue that their speculative testimony, and the non-germane opinions of their engineer, present genuine issues of material fact that preclude summary judgment.” The Moores declarations are not mere speculation, they are based upon facts and first hand knowledge of Mr. Moore and his retained professional engineer. (CP 71-78 and 87-120)

7. “The Moores stack inference upon inference, but fail to put forth admissible evidence establishing, by a preponderance of the evidence, that Ms. Hanson cause a loss of lateral support or committed a timber trespass or nuisance.” The removal of the soils around the footings supporting the Moores’ fence shows that the lateral support that had held the fence in place for over 40 years had been removed (CP 98); the stump shows the timber trespass (CP 102); and the nuisance resulting from the removal of the juniper bushes allowing an unobstructed view into the Moores’ property. (CP 99, 100 and 110).

REPLY TO STATEMENT OF FACTS

Respondents Statement of Facts contains certain

inaccuracies that are addressed hereafter.

1. “The root balls and a majority of the branches of the juniper bushes are on Ms. Hanson’s property.” The root balls and the majority of the juniper bushes are not on Ms. Hanson’s property. (CP 56 and 110, 111). Although initially planted by Hansons’ parents, over the last 40 plus years the junipers have set down trunks and roots on the Moores’ side of the fence, as shown by the four inch stump that had been severed. (CP 102, 110, 111 and 113).

2. “In recent years, the rock wall on Ms. Hanson’s property has deteriorated through natural erosion and possibly from the weight and roots of the juniper bushes.” Hanson speculates that the rock wall on her property has deteriorated through natural erosion and possibly from the weight and roots of the juniper bushes (CP 51 and Decl. of C. Hanson at para. 3). The picture attached merely shows where the rock wall has been removed and the soil piles from the excavation by Hanson. (CP 105).

3. “Ms. Hanson also wanted to remove the overgrown juniper bushes.” This was not stated. The reference to paragraph 4 of the Decl. Of C. Hanson does not state this position.

4. “Soon after the Court’s order, Ms. Hanson removed the juniper bushes, **and, on or about September 29, 2018,**

contractors retained by Ms. Hanson constructed the retaining wall according to her engineered plans. See Appendix B.”

Partial summary judgment was granted on July 13, 2018. The Appendix B is not information either considered or available to the court at the time the motion was granted. This **bolded** statement and Appendix should not be considered by the appellate court in reviewing the matter de novo. RAP 9.12 and 10.3(a)(8).

STANDARD OF REVIEW

In addition to the Standard of Review set forth by both Appellant and Respondent, it should be noted that on appeal, the appellate court may only consider those matters presented to the trial court for its consideration before entry of the summary judgment. *American Universal Ins. Co. v. Ranson*, 59 Wn.2d 811, 815, 370 P.2d 867 (1962); RAP 9.12.

ARGUMENT

LOSS OF LATERAL SUPPORT:

It is without question, that at the time that Moores filed their complaint alleging the issue of the loss of their lateral support for their fence line, that no action had been taken by Hanson to actually construct a properly designed retaining wall. (CP 89, lines 10-16 and lines 23-29). Clearly, at the time that the action was commenced, the lateral support of Appellants fence had been removed by Respondents. (CP 89, lines 23-31). The

issue was not moot at that time.

Hanson claims that the matters alleged are not “ripe for adjudication”, based upon *Diversified Indus. Dev. Corp. V. Ripley*, 82 Wn.2d. 811, 815, 514 P.2d 137 (1973). This authority is misplaced, since this is not an action under the Uniform Declaratory Judgments Act, RCW 7.24.010, et. seq.. The *Ripley* decision specifically recognized the standard of review under the act, as follows:

“This court, in applying the Uniform Declaratory Judgments Act, RCW 7.24, has, in the absence of the intrusion of issues of broad overriding public import, steadfastly adhered to the virtually universal rule that, before the jurisdiction of a court may be invoked under the act, there must be a justiciable controversy:... These elements must coalesce, otherwise the court steps into the prohibited area of advisory opinions.” (Citations and standards omitted) supra 814-815

Ripley was a case in which the Plaintiff sought a declaratory judgment to address issues that might occur in the future, to declare that an exculpatory clause in plaintiffs (lessors) lease shifted the responsibility to the defendants (tenants), should the minor child who was injured, on their property, bring suit upon attaining the age of majority for the injuries sustained. The court addressed the issues dealing with “ripeness” and held that this was not a justiciable controversy under the Uniform

Declaratory Judgments Act, RCW 7.24.010, et. seq., since it was speculative if the issue would ever occur. The case at bar is not, and never has been a request for a declaratory ruling from the court. The focus of this case was based upon the immediate loss of lateral support (CP 89, lines 23-31) and the damages caused by the removal of the lateral support, i.e. the removal of the soil supporting Moores' fence. (CP 81) . The "ripeness" doctrine is limited to declaratory judgment matters and is not relevant to the present case.

Clearly, as of the time of the hearing on the motion for summary judgment, lateral support had been removed and Moores had sustained damage to their fence by the removal of the lateral support and by the creation of a gap that could place children and small animals in danger by having access to their pool. Summary judgment was not appropriate and should have been denied.

TIMBER TRESPASS:

Hanson removed a single juniper in 2014. (CP 51, line 17-19). It was not until the spring of 2015 when a substantial portion of the junipers were removed. (CP 88, lines 19-22). At that time is when it was further discovered that the four inch stump, not merely a root, of a juniper had been sawed through on Moores' property. (CP, 102). Once again, clearly, the shrub had been

removed from Moores' property. This action, pursuant to RCW 64.12.010 et. seq. constituted timber trespass. Even if only a single juniper was shown to have been removed in 2015, it was established that it had occurred and that summary judgment was not appropriate and should have been denied.

Whether the junipers were boundary line shrubs, again, was addressed by the declarations of Moore. The shrub line is shown on Moores' side of the boundary line. (CP 94, lines 2-5 and CP 110). The fact that the shrubs may have been planted by Hansons predecessors is no longer relevant. The shrubs have seeded and grown with dense trunks on Moores side of the property line. (CP, 116-117 and CP 94, lines 13-18). Taken in the light most favorable to the nonmoving party, Moores, there is a material issue of fact as to whether the juniper shrubs were in fact boundary line shrubs. Summary judgment should have been denied.

NUISANCE:

Prior to Hansons removal of the juniper shrubs along the common property line of the parties, Moores enjoyed the ability to utilize their patio and swimming pool without the ability of others to observe them and see into their property. By Hansons removal of the juniper bushes, this quiet enjoyment and use of their

property has been destroyed, by the unobstructed view of others, including Hansons, into their property. (CP, 95-96, lines 22-3)

Jones v. Rumford, 64 Wn.2d 559, 392 P.2d 808 (1964) (odors from a chicken farm was an unreasonable use of the property); *MJD Properties, LLC v. Haley*, 189 Wn.App. 963, 358 P.3d 476, (2015) (Neighbors security light shining into the adjoining neighbors bedroom); and *Grundy v. Thurston County*, 155 Wn.2d 1, 117 P.3d 1089 (2005) (neighbors permitted sea wall causing water to flow into adjoining neighbors property), each stand for the proposition that a neighbors lawful but unreasonable use or modification of their property that causes an adjoining neighbor to lose the comfortable enjoyment of their property does constitute a nuisance. Furthermore, it was not the removal of a “single” juniper bush, but the removal of an entire section of junipers. (CP 56, 99, 100, 114).

Based upon the information presented to the trial court, a four foot retaining wall had been designed. (CP page 46). It would not have been necessary to remove the juniper bushes, since sufficient distance would have been available to leave the juniper bushes in place. See attached Appendix 1.

The removal of the boundary line junipers has substantially and unreasonably interfered with Moores use and enjoyment of their patio and swimming pool by creating an unobstructed view

into their property by Hanson and others.

Therefore, considering the evidence presented to the court, Appellants right to the enjoyment of their swimming pool and patio area by the protection provided by the boundary line junipers would not have been harmed, had the four foot engineered retaining wall, as designed by Respondents engineer, been constructed. Furthermore, it would not have been necessary to remove any of the junipers to construct the retaining wall with the required 5 foot 9 inch minium set back.

There are conflicting position with respect to the necessity and reasonableness of removing the juniper bushes, which shows a genuine issue of material fact, necessary to be resolved by a trial. It would not have been necessary to remove the junipers had the retaining wall been constructed as proposed (CP 46), since the retaining wall would have allowed the junipers to remain intact. Both Moores enjoyment of their property and Hansons construction of a retaining wall could have taken place without damage or harm to either party.

**MOTION TO STRIKE APPENDIX B TO
RESPONDENT'S BRIEF:**

Appellant moves to strike Appendix B to Respondent's Brief. This motion is based upon the fact that the trial court, in rending its opinion granting the partial summary judgment, did not

and could not have consider the retaining wall that was constructed many months after the argument. *American Universal Ins. Co. v. Ranson*, 59 Wn.2d 811, 815, 370 P.2d 867 (1962); RAP 9.12. and 10.3(a)(8).

RAP 9.12 as is relevant to the issue provides:

“On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial courts. ...”

RAP 10.3(a)(8) as is relevant to the issue provides:

“(8) *Appendix*. An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)”

CONCLUSION

After considering the information presented to the trial court, de novo before this court, it is respectfully requested that the decision of the trial court be reversed and the matter remanded to the trial court for trial.

Three causes were dismissed on the Respondent’s motion for partial summary judgment, namely: Loss of Lateral Support; Timber Trespass; and Nuisance. The record clearly shows that this was in error, as follows:

1. Loss of Lateral Support was established by the showing that Moores' fence line had been undermined by the removal of the soil and lateral support that had provided support for the fence for approximately 40 years.(CP 98-100).

2. Timber Trespass was established by the showing of the cut juniper trunk on the Moores' property. (CP 102)

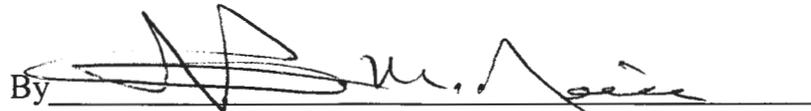
3. Nuisance was established by considering the planned four foot retaining wall, that would allow a total of five feet nine inches of space between Hanson retaining wall and Moores fence line to be installed, without the necessity of removing the juniper bushes. By the removal of the juniper bushes, Hansons actions has substantially and unreasonably interfered with Moores use and enjoyment of their property, as well as, creating a safety hazard by making gaps under their fence that endangers children and small animals by having access to the pool area..

Based upon the foregoing, the trial court was in error in granting the motion for partial summary judgment.

Moores motion to strike Appendix B of Hanson Brief should also be granted. The wall was not in place at the time of the hearing on the motion for partial summary judgment. In addition, the damages to Moores fence was not repaired at the time of the hearing, nor has it been repaired.

Respectfully submitted this
19th day of February 2019

AITKEN, SCHAUBLE, PATRICK NEILL & SCHAUBLE

By 

Howard M. Neill WSBA No. 05296
Attorney for Appellant

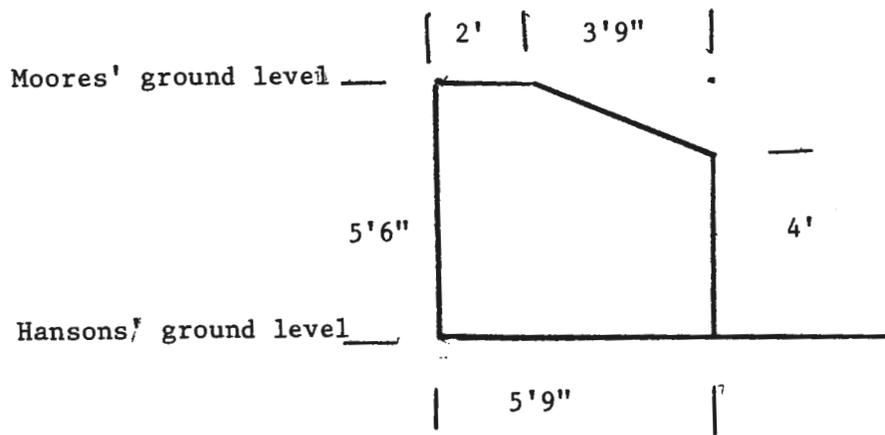
CERTIFICATE OF MAILING

I certify that on this 19th day of February 2019, I caused a full, true and correct copy of this REPLY BRIEF OF APPELLANT to be mailed to attorneys for Respondent, Trish D. Usab and Paul S. Stewart of Paine Hamblen LLP, 717 West Sprague Avenue, Suite 1200, Spokane, WA 99201-3505, by first class United States Mail, with postage fully prepaid thereon.



Howard M. Neill

Appendix 1



Not to scale