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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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APPELLATE CASE NO. 362345

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BARRY MOORE, et. ux,  
Appellants

v.

CAROL HANSON, et. al.  
Respondents

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

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**BRIEF OF APPELLANT**

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**ASSIGNMENTS OF ERROR**

1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF REMOVAL OF LATERAL SUPPORT.
2. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF TIMBER TRESPASS.
3. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF NUISANCE.

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

ISSUE NO. 1

WHEN THERE ARE CONFLICTING DECLARATIONS OF WITNESSES AND EXPERTS AS TO THE CAUSE FOR THE LOSS OF LATERAL SUPPORT TO APPELLANTS' FENCE LINE, IS THE GRANTING OF A MOTION FOR SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT IN ERROR?

(Assignment of Error No. 1)

ISSUE NO. 2

WHEN THERE ARE CONFLICTING DECLARATIONS RELATING TO THE ISSUES OF TIMBER TRESPASS BY

BOTH THE APPELLANTS AND THE RESPONDENTS, IS  
THE GRANTING OF RESPONDENTS MOTION FOR  
SUMMARY JUDGMENT AN ERROR?

(Assignment of Error No. 2)

ISSUE NO. 3

WHETHER LANDSCAPING JOINTLY MAINTAINED BY  
THE PARTIES AND THEIR PREDECESSORS THAT  
OVERLAPS THE BOUNDARY BETWEEN THEIR  
PROPERTIES, REQUIRES THE CONSENT OF BOTH  
PARTIES BEFORE THE LANDSCAPING CAN BE  
REMOVED?

(Assignment of Error No. 2)

ISSUE NO. 4

WHERE THE NONMOVING PARTY SETS FORTH FACTS  
THAT THEIR USE AND ENJOYMENT OF THEIR  
PROPERTY HAS BEEN DAMAGED BY THE MOVING  
PARTY REMOVING OF JUNIPERS GROWING ON BOTH  
SIDES OF THEIR PROPERTY LINE WITH THE MOVING  
PARTY, IS THERE A GENUINE ISSUE OF MATERIAL  
FACT TO SUPPORT A CLAIM OF NUISANCE?

(Assignment of Error No. 3)

## **STATEMENT OF THE CASE**

### **HISTORY - LATERAL SUPPORT:**

Appellants initially plead 5 separate causes of action against Respondents. (CP 3-11). Respondents filed a motion for partial summary judgment relating to four (4) of the Appellants complaints, namely: (1) loss of lateral support; (2) enjoining Respondent's interference with wall construction; (3) timber trespass; and (4) nuisance. (CP 28-30). There remains an unresolved issue as to Quieting Title, relating to the fence line location, which is not addressed herein. (CP 3-5). It is conceded that the issue relating an injunction is moot.

At the time that Appellants purchased their property their chain link fence was in place, as was the juniper hedge occupying both sides of the fence. (CP 87-88, lines 29 - 9). The junipers were planted on or near the property line by Respondents parents and Appellants predecessors in title had constructed the chain link fence. (CP 50-51, lines 26-2). The junipers and the chain link fence, which occupy the boundary between Appellants and Respondents properties, provided both security for Appellants' swimming pool and privacy. (CP 88, lines 17-32).

The junipers were jointly maintained by both Appellants and Respondents parents. (CP 87-88, lines 29-9) Beginning in 2015, Respondent began, either personally or by others at her

direction, to remove the junipers occupying both sides of the chain link fence. (CP 88, lines 19-23). The removal of the junipers caused damages to Appellants' fence, bending the base outward and creating a gap that was a security risk that could allow children and small animals access to their swimming pool. (CP 88, lines 24-30).

On June 3rd and 4th, 2017, while working in their yard, Appellants observed their chain link fence to be intact, except for bent section of fencing that had occurred in 2015. (CP 89, line 10-16). Later that month, on June 10, 2017, Appellants discovered that a substantial portion of the bank supporting their chain link fence had been excavated, completely exposing the footing supporting the fence on both sides of the fence. (CP 89-90, lines 23 - 5 and CP 98-100)

In addition to the undermining and removal of support of Appellants' fence, Appellants also park their John Deere tractor on the property adjacent to and near the fence. (CP 89, line 17-19 and CP 111) . Appellant's concern being that the removal of the lateral support by Respondent has jeopardized their fence, but also it is a concern that the use of their tractor along the same area may cause the embankment to fail. (CP 91, lines 15-21).

Respondents engineer, Mr. Paul Nelson, expressed the opinion that the rock wall had deteriorated as a result of surface

erosion and not as a result of failure of the slope. (CP 13, line 6-8). Further, his opinion was that the existing slope and boulders were not in immediate or imminent danger of failing, since the slope and boulder had been stable for many years. (CP 13, line 9-10). Later, in addressing the failure of the rock wall, not the failure of the slope, he stated that it was due to excessive rain fall. (CP 32, line 3-6). His opinion being that the wall is providing the same lateral support to Appellants' property as it has for the last several years. (CP 32, line 7-10). Finally, Mr. Nelson sets forth that the lateral support must provide for a surcharge on the ground, such as vehicle loads, as an element of providing lateral support. (CP 32, lines 19-24).

It must be noted, that the issue is not the threat to the Appellants' pool, but the lateral support for their chain link fence and parking of their John Deere tractor on the property adjoining the slope where the soil and support has been removed by Respondents. (CP 91, lines 15-21).

Mr. John Pearson, a fencing contractor, examined the Appellants' fence in both June and July, 2017, to assess the damage to the fence. (CP 79, lines 28-32). He noted that the fence had been undermined by the removal of soil, causing the fence to sag and to provide a gap, creating a security issue for Appellants swimming pool. (CP 81, paragraphs 2 - 4).

Mr. Evan Laubach, a professional engineer, on August 1, 2017, examined the property. (CP 71, lines 28-33). His opinion was that prior to the excavation by Respondents, that a few feet of shelf existed along the property line prior to the removal of the rock wall and the soils. (CP 75, paragraph 2.b.). Further, that the embankment had either failed or someone had removed the soil, causing the Appellants' fence to fail. (CP 75, paragraph 2.c.). He further states that he tested the moisture levels on Appellants side of the fence and found that there is no evidence that the property has been saturated with water, nor were there any "rivulets" suggesting the flow of surface water onto the wall and slope area. (CP 76, paragraph 4a., b. and c.). His observation was that the junipers were not the cause of the fence to fail, but the removal of the soil was the cause. (CP 77, paragraph 5). In addition, the Pullman City Code provides that the ground must not be disturbed within 2 feet of a property line without the consent of the adjoining land owner. (CP 75, paragraph 3) Appellant has never granted permission for excavation of soil within 2 feet of their property line. (CP 93, line 5-6)

Judge Libey in rendering his oral ruling on the summary judgment motion found that there was no documented factual issue that the Moores fencepost was exposed by the removal of lateral support. (RP 4, lines 11-16). He further surmised that the

fenceposts could have been pulled down by the junipers weight or that the footing for the fenceposts could have been exposed by erosion. (RP 4, lines 17-24)

The foregoing primarily addresses the issue of loss of lateral support, but it also are relevant to the issues of timber trespass and nuisance.

#### TIMBER TRESPASS:

Mr. Laubach states that the junipers have grown through the fence and are an integral part of the fence. (CP 77, paragraph 5.) This position is further amplified by Mr. Pearson who observed the junipers growing on both sides of the fence and that they have been cut on Appellants side of the fence. (CP 81, second and third paragraphs).

Mr. Moore, presented pictures showing the condition of the junipers on his side of the property line. (CP 110-111). In addition, the photos show that there are juniper stumps and trunks on Appellants side of the property line. (CP 101, 102, 113, and 117). By a comparison of CP 110 and CP 100, the junipers on Appellants side of the fence have been completely removed. Further CP 102 shows a stump that has been cut on Appellants side of the fence and CP 113 and 114 further show that junipers on Appellants side of the fence have been removed.

When Respondent had her property surveyed it did not

locate the junipers. (CP 51, lines 11- 15). Appellant found the survey marker on the west end of Respondents property, showing that the junipers were located on or over the property line on Appellants side of the chain link fence. (CP 116-117). The junipers originally planted by Respondents parents (CP 50-51, line 26-1), are now rooted and growing on both Appellants and Respondents sides of the fence. (CP 116-117).

Judge Libey ruled that the junipers were originally planted by the Hanson's parents and that they had grown onto Appellants side of the fence. However, since they were planted by Respondents parents, the responsibility to maintain them remained with Respondent, as well as the right to remove them. (RP 4-5, lines 25-6). Appellants argued that the ruling ignored the exhibits showing the severed stump and growth from the ground on Appellants side of the fence. (RP 8, line 3-7). The courts response being that this was de minimis. (RP 8, line 16-19).

#### NUISANCE:

As a separate claim, Appellant claims that the removal of the junipers has invaded their right to privacy and is a nuisance. (CP 9, lines 16-29). From the time they had purchased their property, they had enjoyed the privacy and security from their patio and swimming pool area. (CP 95-96, lines 22-3). The junipers were jointly maintained by both Plaintiffs and

Defendants. (CP pages 87-88, lines 29 - 9)

From 2015 through 2018, Respondent removed junipers from both Appellants side of the fence and Respondents side of the fence.

(CP page 95, lines 10-18) Also, see Exhibit E, showing a portion of the area where junipers have been removed compared to the area where they have not been removed from both sides of the property line. (CP page 113-114). The removal of the junipers from the common boundary between the parties property was at no time consented to by Appellants, in fact their objections were raise with Respondents. (CP 88, line 19-24). The ability of Appellants to enjoy their patio and swimming pool area has substantially interfered with their comfort, safety of others, and created an insecurity in their use of their property, by the removal of the junipers along the common boundary between their property and the Respondents. (CP 95-96, lines 28-3).

It should be noted that the City of Pullman requires that the top of an engineered retaining wall, the ground cannot slope upward at a slope greater than 2.5 horizontal to 1 vertical. (CP 78, paragraph 8.d.) The elevation change from ground level to the top of the embankment was 5 feet 6 inches. (CP 77, paragraph 8.a.) Further, the City of Pullman requires that the ground not be disturbed within 2 feet of a property line, without the consent of

the adjoining property owner. (CP 77, paragraph 8.b.) The wall designed by Respondents engineer, uses a 4 foot wall. (CP 46).

## ARGUMENT

### STANDARD FOR REVIEW

CR 56(c):

“... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law.”

*Barker v. Advances Silicon*, 131 Wn.App. 616, 128 P.3d 633 (2006), was a sex discrimination case. P brought a motion for summary judgment by alleging facts that made a prima facie case. D then rebutted the claim. P did not bring forth additional facts to defeat the rebuttal. Summary judgment granted. On appeal, addressing the shifting burdens the court held:

“Only if both parties meet their intermediate burdens and produce evidence supporting reasonable competing inferences of both discrimination and nondiscrimination should the case be sent to a jury. (Citations omitted)”  
*supra.*, page 623

...

“The burdens at all three intermediate stages are burdens of

production, not of persuasion. (Citations omitted). On motion for summary judgment the trial court does not weigh evidence or assess witness credibility. Neither do we do so on appeal: “our job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. This is the jury’s role, once a burden of production has been met.”(citations omitted). *supra.*, page 624

The standard for review of an order granting summary judgment is set forth *Grundy v. Thurston County*, 155 Wn.2d 1, 117 P.3d 1089 (2005), as follows:

“ When reviewing a grant of summary judgment, an appellate court undertakes the same inquiry as the trial court. [citation omitted] (“This court reviews the facts and law with respect to summary judgment de novo.”). Summary judgment is proper “if the pleadings, depositions, answers to interrogators, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” [citations omitted] “[T]he court must consider all facts submitted and all reasonable inference from the facts in the light most favorable to the nonmoving party.” [citations omitted] *supra.* Page 6.

A material fact is one upon which all or part of the outcome of the litigation depends. *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990).

A genuine issue of material fact exists where reasonable

minds could differ regarding the facts controlling the outcome of the litigation. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

With the foregoing Statement of the Case and the Standard For Review, Appellant argues as follows:

#### ISSUE NO. 1

WHEN THERE ARE CONFLICTING DECLARATIONS OF WITNESSES AND EXPERTS AS TO THE CAUSE FOR THE LOSS OF LATERAL SUPPORT TO APPELLANTS FENCE LINE, IS THE GRANTING OF A MOTION FOR SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT IN ERROR?

*Bay v. Hein*, 9 Wn. App. 774, 515 P.2d 539 (1973), a case involving the excavation and removal of lateral support on neighboring properties, recognized the duty to provide lateral support, both as a common law duty as well as, the constitutional right, as follows:

“... In this jurisdiction, the rule of lateral support, insofar as an  
“improvement” is concerned, has been clearly enunciated. Under our constitution [Const. Art. I. § 16 (amendment 9)], every landowner in this state has a natural right to lateral support. [citations omitted] Whoever violates that natural right to support renders himself liable to the landowner for the resulting damage, not only to the land, but also to the improvement. [citations omitted]. The landowner may not,

however, by placing an improvement upon his land, increase his neighbor's duty to support the land laterally.[citation omitted]. *Bay, supra.* at pages 776-777

The Declaration of Barry Moore, clearly establishes that loss of lateral support of their fence was the result of the actions of Respondents in removing the soil along the fence line and around the footings supporting the fence. (CP 89, lines 10-16; CP 89-90, lines 23-5; CP 98-100). This position is further supported by the Declaration of Evan Laubach that erosion has not caused the fence to fail nor to expose the footings, since there is no showing that "rivulets" appear along the fence line and embankment. (CP 76, paragraph 4.b.). His opinion, based upon his examination of the property was: (1) that there was not enough water being added to the soil on the top side of the embankment that would cause the slope to fail (CP 76, paragraph 4.a.); (2) that there had not been surface water running over the embankment (CP 76, paragraph 4.b.); and (3) that there were no signs of moisture along the Respondents north property line.(CP 76, paragraph 4.c.)

Appellants observed that on June 3rd and 4th, 2017, the fence was intact, except for a small bent section and that all the supporting posts were in place. (CP 89, lines 10-16). Then again on June 10, 2017 they discovered that the footing for one of the

posts had been completely excavated around, leaving the fence post and fence hanging in mid-air, supported only by adjacent fencing. (CP 89-90, lines 23-5)

Mr. Paul Nelson, Respondents engineer was of the opinion that the deterioration of the “rock wall” was a result of surface erosion from an extremely wet fall, winter and spring, not a failure of the slope. (CP 32, line 3-6).

Clearly, there is a difference of opinion between the two professional engineers, and Appellant, as to whether Respondents have caused the lateral support of the embankment to fail, damaging Appellants’ fence.

## ISSUE NO. 2

WHEN THERE ARE CONFLICTING DECLARATIONS RELATING TO THE ISSUES OF TIMBER TRESPASS BY BOTH THE APPELLANTS AND THE RESPONDENTS, IS THE GRANTING OF RESPONDENTS MOTION FOR SUMMARY JUDGMENT AN ERROR?

Timber Trespass RCW 64.12.030, is defined as:

“Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, ..., timber or shrub on the land of another person, ... , without lawful authority, in an action by such person, ... against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages

claimed or assessed therefore, as the case may be.”

Substantial removal of junipers occurred in the spring or early summer of 2015, when the Appellants first discovered the gap in the fence and the loss of enjoyment of their property that was invaded by the removal of junipers. (CP 94, line 5-8). Pictures show that the junipers are rooted on both sides of the fence, which has been the boundary observed by the parties since at least 1989. (CP 102, 110, 116,117).

Respondent acknowledges that she removed a juniper bush by sawing through the trunk and some branches of the bush and pulling the branches down into her yard. (CP 51, line 17-20).

In the case of *Happy Bunch v. Grandview N.*, 142 Wn. App. 81, , 173 P.3d 959 (2007), the following facts were stated:

“At the time of Grandview’s purchase, 12 mature trees stood either on or near the boundary line between the Happy Bunch and Grandview properties. Some portion of the trunks of 10 of the trees extended from the Happy Bunch property onto the Grandview property. The trial court found that because the center of most of the trees lay on the Happy Bunch side of the boundary line, it is likely that all of the trees were originally planted on Happy Bunch’s property.” *supra.* pages 85-86

The court then held:

“ “[a] tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not;

and trespass will lie if one cuts and destroys it without the consent of the other' ".[citation omitted] The trees being owned in common, the trial court correctly ruled that Grandview had an interest in the trees proportionate to the percentage of their trunks growing on Grandview's property. Thus, the trial correctly awarded Happy Bunch only that portion of the trees' value reflecting Happy Bunch's property interest in them." *supra.* page 93.

Appellant has shown that the junipers were rooted on both their side of the boundary fence and Respondents side of the boundary fence. (CP 100, 101, 102, 110, 113, 114, 116, and 117). Respondents admission, at least by inference, was that she had cut the junipers and pulled them through the fence. (CP 51, lines 17-20) coupled with Appellants observation of the continued removal of junipers from their side of the fence. (CP 95, lines 10-18). This act of cutting and removal would require that junipers were removed from Appellants' property. This being the case, then there exists conflicting genuine issues of material fact that require a trial. Summary judgment, in Respondents favor, on the issue of timber trespass should not have been granted.

### ISSUE NO. 3

WHETHER LANDSCAPING JOINTLY MAINTAINED BY  
THE PARTIES AND THEIR PREDECESSORS THAT  
OVERLAPS THE BOUNDARY BETWEEN THEIR

PROPERTIES, REQUIRES THE CONSENT OF BOTH PARTIES BEFORE THE LANDSCAPING CAN BE REMOVED?

*Happy Bunch, supra.* in a situation similar to this case found that the trees were originally planted on Happy Bunch's property, but had grown into the neighbors property over time. That since the trees then occupied both sides of the property line, then the removal of the trees occupying both properties required the consent of the adjoining property owner. *Happy Bunch, supra.* at page 93.

Appellant's attempted to stop the removal of the junipers, but were only met with resistance from the neighbors. (CP 88, lines 19-24).

Therefore, the removal of the junipers on Appellants side of the property, without their consent, should constitute timber trespass. The trial courts failure to acknowledge this as a genuine issue of material fact, erred in granting Respondents motion for summary judgment dismissing Appellants claim. The trial court acknowledged that cutting occurred, but found it to be "de minimis".

(RP 8, lines 16-19)

#### ISSUE NO. 4

WHERE THE NONMOVING PARTY SETS FORTH FACTS

THAT THEIR USE AND ENJOYMENT OF THEIR PROPERTY HAS BEEN DAMAGED BY THE MOVING PARTY REMOVING OF JUNIPERS GROWING ON BOTH SIDES OF THEIR PROPERTY LINE WITH THE MOVING PARTY, IS THERE A GENUINE ISSUE OF MATERIAL FACT TO SUPPORT A CLAIM OF NUISANCE?

RCW 7.48 defines a nuisance as either a public nuisance, RCW 7.48.120. or a private nuisance, RCW 7.48.150. A public nuisance must affect an entire community or neighborhood. RCW 7.48.130. Any nuisance that does not affect an entire community or neighborhood, is a private nuisance. RCW 7.48.150.

RCW 7.48.010 Actionable nuisance defined:

“The obstruction..., of 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.”

RCW 7.48.120 Nuisance defined:

“Nuisance consists in unlawful doing an act, ..., which act either annoys, injures or endangers the comfort, repose, ..., or unlawfully interferes with, obstructs or tends to obstruct, ..., or in any way renders others person insecure in life, or in the use of property.”

In *Jones v. Rumford*, 64 Wn.2d 559, 392 P.2d 808 (1964) construing the nuisance law where a chicken ranch was operating lawfully in a neighborhood, but the neighbors complained about

the odors coming from the business as a nuisance, the court in finding that a nuisance existed, held:

“... even if a person conducts a plant in the best manner which is practicable with a sound operation, he may still be using his property in an unreasonable manner.” *supra*. page 562.

*MJD Properties, LLC v. Haley*, 189 Wn.App. 963, 358 P.3d 476, (2015), a case in which battling neighbors lodged various claims against one another. Defendant claimed that Plaintiff’s security light was a nuisance because it shined into their bedroom and that a minor adjustment to the light would stop the light from invading the bedroom. The court held:

“Viewing the evidence in the light most favorable to [the nonmoving party], a trier of fact could find that the driveway light, without the available adjustment of its shield, offends the senses “so as to essentially interfere with the comfortable enjoyment of” [the nonmoving party’s] home.” *supra*, page 972.

The holding adopts the language from *Collinson v. John L. Scott, Inc.* 55 Wn. App 481, 483, 778 P.2d 534 (1989) that “equity cannot restrict one landowner to confer a benefit on the other”. However, the court went on to hold that an adjustment to the light shield would not cause any harm to MJD. *supra*, page 971

Also *Grundy v. Thurston County*, 155 Wn 2d 1, 117 P.3d 1089 (2005), which held that a neighbors raising the height of

their seawall, that would force seawater onto plaintiffs property, created an issue of material fact to as to whether the raised seawall substantially and unreasonably interfered with plaintiffs use and enjoyment of her property.

The distance from ground level to the Appellants fence was 5'6". (CP 77, paragraph 8.a.). Respondent had designed a 4 foot retaining wall. (CP 46). Using the requirement of the City of Pullman, (CP 77, paragraph 8.a. and b.), a 4 foot retaining wall would need to be at least 5 feet 9 inches from the existing fence. ( 2 foot set back and 2.5 to 1 slope, [3feet 9 inches] for a 4 foot high wall). Therefore, properly constructed, it would not have been necessary to remove any of the junipers. The junipers in November 2017 showed a healthy growth for the junipers. (CP 110, 111).

It was also found by Evan Laubach, "It would also appear that the alignment of the west rock section is the same that existed on this east side. This would have provided a few feet of shelf along the property line that no longer exists." (CP 75, 2.b.). Therefore, both the City of Pullman required set back and the original location where the junipers were planted tend to show that the removal of the junipers was not necessary, having been planted on the 2 foot shelf.

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 a properly 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 is conflicting position with respect to the necessity 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 a properly engineered retaining wall been constructed, since the retaining wall would have allowed the junipers to remain intact. Both Appellants enjoyment of their property and Respondents construction of a retaining wall could have taken place without damage or harm to either party.

### **CONCLUSION**

The fact that Respondent had removed the soil around the footing holding up the Appellant's fence, clearly establishes that there was a genuine issue of material facts, for which Respondents motion for summary judgment on the issue of Loss of Lateral Support should have been denied.

There also exists genuine issues of material fact as to the

issue of timber trespass. Appellants have shown that junipers trunks on their side of the fence have been cut. Respondent by implication has indicated that she has removed junipers from Appellants side of the fence. The cutting and removal of growing trunks falls directly within the definition of timber trespass, RCW 64.12. et.seq. The Respondents motion for summary judgment on the issue of Timber Trespass should have been denied.

The case law recognizes that there must be consent from an adjoining neighbor for the removal of landscaping that covers the boundary between adjoining properties. Appellant did not consent to the removal of the juniper shrubs that occupied the boundary with Respondents. Therefore, there exists genuine issues of material facts and summary judgment should not have been granted.

There also exists material facts as to the issue of nuisance. Respondents engineers designed a retaining wall. Appellants engineers have established the building code requirements for the engineered retaining wall. Had the retaining wall been designed before Respondent undertook to remove the juniper bushes, the junipers could have been retained and Appellants would have continued to comfortable enjoyment of the patio and swimming pool area of their home.

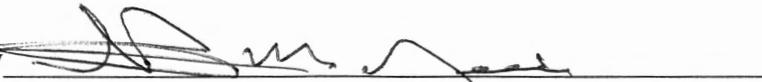
Upon examination of the pleadings, depositions, answers to

interrogators, and admissions on file, together with the affidavits, there are genuine issues of material facts that were not addressed by the court. When considered, de novo, summary judgment in favor of the Respondents should not have been granted. It is respectfully requested that the matter be reversed and remanded to the court for trial of the issues, together with the unresolved issue of adverse possession.

Respectfully submitted this  
29th day of November 2018

AITKEN, SCHAUBLE, PATRICK NEILL & SCHAUBLE

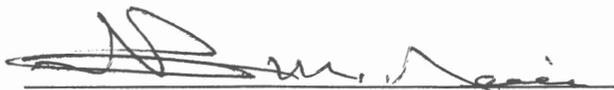
By



Howard M. Neill WSBA No. 05296  
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that on this 29th day of November 2018, I caused a full, true and correct copy of this APPELLANT'S BRIEF to be mailed to attorney for Respondent, Paul 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.

A handwritten signature in black ink, appearing to read "Howard M. Neill", is written over a horizontal line.

Howard M. Neill