STATE OF WASHINGTON
BY
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No. 41557-7-II

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

HAL MOORE and MELANIE MOORE; and
LESTER KRUEGER and BETTY KRUEGER,

Appellants,

v.

STEVE'S OUTBOARD SERVICE, and
STEVEN LOVE and MARY LOU LOVE,

Respondents.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

This appeal challenges the decision by the Superior Court to ignore an unpermitted and illegal nuisance *per se* and instead find no nuisance existed based upon opinions of a handful of the Respondent's friends and customers. The Superior Court was impermissibly swayed by testimony of Respondents' customers who did not live next to the illegal business, but who claimed that they personally were not bothered by the operations. Visiting a business for a few minutes to deliver or pick up a boat motor is not the same thing as living next door to a business which emanates noise, fumes and disruption throughout the day, each work day.

The Trial Court also erroneously side-stepped questions regarding permitting of the activity in question – a boat motor repair and service located in a high end residential area along Hood Canal - and ruled that because there were sources of noise and fumes associated with residential activities and a State highway in the vicinity of the unpermitted commercial business conducted by Respondents, the operations did not constitute a nuisance. A claim of nuisance is not resolved by considering routine activities which occur in a residential neighborhood but by considering the actual impact of the activity at issue on the complaining parties and whether it complies with the law.

II. ASSIGNMENTS OF ERROR

A. The Trial Court erred in entering its final Court's Decision After Trial on November 12, 2010 which dismissed Appellants' request for injunctive relief to redress the nuisance *per se* that exists by virtue of (1) Respondents' illegal business operations in the shoreline environment that has been continuing without required shoreline permits or approvals, (2) violation of a State right-of-way permit, and (3) the local noise ordinance.

B. The Trial Court erred in apparently concluding in its final Decision After Trial on November 12, 2010 that building permits approved by Mason County for (1) replacement of an existing residential carport and (2) construction of a new "storage shed" now used for commercial operations satisfied Shoreline Management Act and the County's Shoreline Master Program requirements for approval of a commercial business located within shoreline jurisdiction.

C. The Trial Court erred in concluding in its final Court's Decision After Trial on November 23, 2010 that Appellants failed to show by a preponderance of evidence that the Respondents' business is a nuisance under any legal theory.

D. The Trial Court erred in entering Judgment dated December 20, 2010 "against Plaintiffs and in favor of the Defendants ...."

E. The Trial Court erred by entering Findings of Fact and Conclusions of Law in its Memorandum Opinion of September 22, 2010, which were incorporated into the Decision After Trial of November 23, 2010, in narrative fashion without the specificity and separate treatment required by Civil Rule 52(a).

F. If proper findings of fact, Appellants assign error to the following findings set forth in the Memorandum Opinion of September 22, 2010, and incorporated into the Decision After Trial of November 23, 2010, that are unsupported by the record:

> 1. Regarding the noise level of Mr. Love's outboard motor business, on an average day of operation, boat motors are not normally being run while they are being serviced or repaired. At most, a motor is run for 15 minutes with most of this time

being at idle. Motors are generally run in a tank of water at the rear of Mr. Love's shop. (Memorandum, p.4, **CP 111**.)

2. Another outside noise in the area is Mr. Krueger's leaf blower. The greatest overall volume of noise however is from general traffic on the adjacent state highway including motorcycles which produce far more noise than the outboard motors. On the waterside, the noise of boat motors and jet skis are frequent, especially in the summer. (Memorandum, p.4, **CP 111**.)

3. Regarding the odor and smoke allegations, Mr. Love's business is clean, technologically up-to-date and Mr. Love is environmentally conscious. Smoke production is no longer a part of Mr. Love's testing procedures. Previously, Mr. Love would spray a fogging material in an engine creating smoke until the engine stalled and quit. Mr. Love has not done this since the year 2000. Mr. Love's new procedure does not require the same method of fogging to accomplish the same result. Additionally, regarding smoke in the general area, the Kruegers heat two garages with wood stoves and these smoke at times. (Memorandum, pp.4-5, **CP 111-12**.)

4. Running boat motors will create exhaust fumes. However as set forth above as to the noise issue, motors at Mr. Love's business are run for a very limited amount of time. This is not significant especially when the plaintiffs' homes also closely abut a state highway. (Memorandum, p.5, **CP 112**.)

5. Regarding the issue of traffic safety, SR 106 along Hood Canal is a busy highway especially in the summer months or when the Hood Canal Bridge is not usable. Parking is limited, and, especially in the summer months, many boats and other vehicles are parked along this highway in the state right-of-way. Vehicles using SR 106 daily include private passenger vehicles some of which are towing boats,

commercial vehicles such as delivery trucks, propane trucks, and log trucks. The portion of SR 106 at issue in this case, is relatively straight. (Memorandum, pp-5-6, **CP 112-13**.)

6. Thom Adams, a Shelton Police Officer and former reserve sheriff's deputy familiar with this area testified regarding the highway condition as did Mr. Gordon, a neighborhood resident and retired law enforcement officer. Neither witness had seen any traffic safety problems. No known accidents have occurred in this area in 20 years. (Memorandum, p.6, **CP 113**.)

7. Mr. Love is acutely aware of the necessity of safety precautions as an auto accident could mean the end of his business. The procedure used by Mr. Love in directing his clientele how to drop off and pick up their boats was characterized by one witness, a former nuclear safety officer, as being similar to the safety briefings he was used to in the Navy. (Memorandum, p.6, **CP 113**.)

8. Mr. Love only takes work by appointment so he knows when to expect a vehicle pulling a boat trailer to arrive. He instructs customers to call when they are in the area to drop off their boat for work. If coming from the Belfair direction the customer normally drives past Mr. Love's location and turns around at the nearby state park. The customer then drives back to Mr. Love's and comes to a stop off the travelled portion of the highway on the right-of-way with Mr. Love present. The boat trailer is unhooked from the vehicle and moved by Mr. Love's tractor onto his property. The tractor is equipped with a light bar and is a safe method of moving the boat trailers. Boats are not stored parked on the shoulder of the highway. Boats are parked on the shoulder of the highway during drop-off and for the shortest time possible, usually 15 to 20 minutes. After the work is completed the boats

> are moved to a fenced-in area to await pick-up by the customer. (Memorandum, pp.6-7, **CP 114-15**.)
>
> 9. Also important to the issues of noise, odor and traffic safety are the unusual hours of business operation and the volume of Mr. Love's business. (Memorandum, p.7, **CP 115**.)
>
> 10. Plaintiffs have not shown by a preponderance of the evidence that Defendants' business is a nuisance (Memorandum, p.8, **CP 116**.) ....

G. If proper Findings of Fact, Appellants generally assign error to any other language in the Trial Court's Memorandum Decision of September 22, 2010 construed as outcome determinative facts that are unsupported by the record.

H. The Trial Court erred in apparently concluding that noise testing was required to demonstrate a violation of Mason County's noise ordinance.

I. The Trial Court erred in entering its Memorandum Decision of September 22, 2010 incorporated into its Final Decision After Trial to the extent it ruled that a nuisance was not shown "by the preponderance of the evidence" entitling Appellants to an injunction because (1) someone in Mason County issued building permits for reconstruction of an existing carport serving residential purposes or construction of another new building now used for commercial purposes; (2) that there were other sources of smoke and fumes in the neighborhood other than Respondent's business; (3) that there were other sources of noise in the neighborhood from the existing highway and boat traffic on Hood Canal or yard maintenance activities other than Respondent's business; and/or (4) there is traffic in the vicinity of Respondent's property not associated with operation of Respondents' business.

J. The Trial Court erred in entering its Memorandum Decision of September 22, 2010 incorporated into its Decision After Trial concluding that Appellants pursued an action for damages or injunctive relief under the Shoreline Management Act.

K. The Trial Court erred in awarding attorney fees to Respondents in its Order on Defendants' Motion for Attorneys' Fees and Costs on

November 12, 2010 and its Order on Defendants' Supplemental Motion for Attorneys' Fees and Costs on December 20, 2010 because there was no statutory authority or other legal basis for the award.

L. The Trial Court erred in setting the amount of attorney fees it did in its Order on Defendants' Motion for Attorneys' Fees and Costs on November 12, 2010 and its Order on Defendants' Supplemental Motion for Attorneys' Fees and Costs on December 20, 2010.

M. The Trial Court erred in entering Judgment in favor of Respondents against Appellants in the amount of $36,034.69 on December 20, 2010.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Is an unpermitted commercial use within the shoreline environment which violates a State highway access permit and local noise ordinance a nuisance *per se*, such that injunctive relief pursuant to RCW Chapter 7.48 should be granted? (Assignments of Error A, C, D and I).

2. Are questions concerning the level of noise, odors, fumes and traffic safety issues resulting from an unpermitted commercial use within the shoreline environment relevant to the determination of whether a nuisance *per se* exists? (Assignments of Error A, C, D and I).

3. Does Mason County's approval of building permits for (a) converting a residential carport into an enclosed structure proposed to be a "rebuilt carport," and (b) a storage shed designated for residential use <u>both</u> located and constructed within 200 feet of the shoreline and now used for business purposes satisfy Shoreline Management Act and County Shoreline Master Program provisions that require a shoreline substantial

development permit or conditional use permit for commercial development or use within the shoreline environment? (Assignments of Error A, B, C, D and I).

4. Does the fact that there are sources of noise and fumes and traffic associated with single-family residential uses and a State highway in the vicinity of Respondent's business justify dismissal of Appellants' claims for nuisance without regard to or consideration of the actual impact of the business on the Appellants? (Assignments of Error A, C, D, H and I).

5. Are the Superior Court Findings set out in its Memorandum Decision to support entry of a Judgment or Order of Dismissal supported by substantial evidence? (Assignments of Error D, E, F and G).

6. Does the preponderance of the evidence demonstrate that Respondent's business operations unreasonably interfere with Appellants' quiet use and enjoyment of their property such to constitute a nuisance? (Assignments of Error C, D, H and I).

7. Where Appellants' arguments to support a claim of nuisance *per se* allege violation of the Shoreline Management Act, but they did not independently seek relief pursuant to the statute, is it proper to award attorneys' fees to Respondents under RCW 90.58.230? (Assignments of Error D, J, K, L and M).

8. Where Appellants did not seek monetary damages at trial against Respondents, Appellants' action for injunctive relief was prosecuted under RCW Chapter 7.48 (nuisance), and Appellants were not permitted as a matter of law to seek injunctive relief under RCW 90.58.230, is it proper to award attorneys' fees to Respondents under RCW 90.58.230? (Assignments of Error D, J, K, L and M).

9. If RCW 90.58.230 (which is not a prevailing party statute) applies, did the Trial Court abuse its discretion awarding Respondents their attorney fees and costs under that law? (Assignments of Error D, J, K, L and M).

10. Is it proper to award attorneys' fees to Respondents pursuant to RCW 90.58.230, for costs incurred in responding to a citation issued by the Washington Department of Fish and Wildlife that is unrelated to Appellants' nuisance claims in the case at bar? (Assignments of Error D, K, L and M).

11. Where Respondents (a) submitted generalized billing statements to support their motion for attorneys fees and (b) such statements do not reference work done in response to alleged claims brought pursuant to the Shoreline Management Act and/or RCW 90.58.230, is it proper to award attorneys' fees? (Assignments of Error D, J, K, L and M).

12. Is the amount of attorney fees and costs awarded excessive under the facts and circumstances? (Assignments of Error D, K, L and M).

IV. STATEMENT OF THE CASE

Appellants Les and Betty Krueger and Hal and Melanie Moore bought waterfront homes in a quiet waterfront residential neighborhood along Hood Canal's south shore so that they might enjoy a peaceful life in one of the most beautiful, and serene places in the country. **RP 8:18-19; 10:1-5 (Krueger); 89; 91:19-20; 92:1 (Moore).**[1] The Krueger home was purchased in 1965; the Moore home in 1986. **RP 8:18-19; 91:19-20.** The Kruegers live in their home year round. **RP 13:15-16.** The Moores use their home seasonally. **RP 92**. The neighborhood is "high end" residential. **RP 16:2; 40:3-6**. Unfortunately, peaceful use and enjoyment of their property has been significantly disrupted by Respondent Steven Love's operation (d/b/a "Steve's Outboard Service") ("SOS") of his commercial boat engine repair business across the street from the Moores' home. When it became apparent that Love would not close or move the business, the Moores and Kruegers decided to file a law suit in 2006 pursuant to Washington's nuisance statute, RCW Chapter 7.48. **CP 120-128**[2], seeking an injunction on various grounds including that Love's commercial

[1] References in the text to "RP" mean "Verbatim Report of Proceedings"
[2] References in the text to "CP" mean "Clerk's Papers."

operation lacks required permits. Damage claims were abandoned at trial. **RP 68 (Krueger); RP 106:6-7; 106:6-24 (Moore).**

A. Commencement of the Business.

Steve's Outboard Service is operated on Love's residential property in out-buildings. **RP 14:16-18.** Love's business is located across the street from the home of Hal and Melanie Moore and two doors down from the home of Les and Betty Krueger. **CP 108, Ex.14**[3]**; RP 12:7-17.** Love's business shares a boundary with the Krueger's property occupied by their caretaker. **Ex.14**. Love purchased his property from the Kruegers in 1986. **RP 14:12-17; RP 308:2, 9.** Love started SOS in 1990 as a part time operation, working on the side from his full time employment at Sande Boat Works. **RP 14; 307:16-18; 356:11-24.** Love switched to full-time operation of Steve's Outboard Service in 1994. **CP 357:1-3; 8-10.**

B. Expansion of Business and Failure to Obtain Required Permits or Approvals.

Love's business is within 200 feet of the shoreline of Hood Canal. *See* **Ex.2** (shoreline permit application) and **Ex.8**. In 1994, as part of his expansion to full time, Love sought shoreline permits to build a 30-foot by 45-foot metal building repair shop at his home "to provide for boat motor repair shop." **Exs.1-2, CP 357**. Love's application for a Shoreline

[3] References in the text to "Ex" mean "Trial Exhibits." Plaintiffs trial exhibits (1-27) were transmitted to this Court by letter dated March 29, 2011. The Superior Court Clerk did not assign separate Clerk's Papers designations for the exhibits.

Substantial Development Permit ("SSDP") and a Shoreline Conditional Use Permit ("CUP") stated that the proposal was "to enlarge existing business due to safety and need for more space." **Ex.1.** Love knew he needed a shoreline CUP to operate a commercial business. **RP 361:15-23.**

Love withdrew his shoreline permit application after the Kruegers and Moores objected that the expansion of his engine repair business would be incompatible with the residential character of the neighborhood. **Ex.3; RP 362; 377; 378:1-2.** No shoreline permit or other permits have ever been obtained to conduct the Love business. **RP 390; 84:7-13, 17-22.** The business has enlarged over the years. **RP 15:1-11.** It is "bigger than it started out." **RP 105:13.** Impacts associated with the business have "gotten worse" over time. **RP 26; 44:18-25; 79:4-15.**

Despite withdrawing his shoreline application in 1994, in 1995 Love constructed a new two story garage in the approximate location of an old open-sided carport ("the Blue Building")[4] and then installed another 8′ x 15′ building described as "storage shed / pumphouse" with a proposed "storage shed use." **RP 338; 339:20-23; 340:1; Exs.5, 6; RP 396:14-23.** Love uses both buildings to run SOS. **Exs.5, 6; RP 97.** These buildings were not there when the property was purchased in 1986. **RP 24:11-13.**

[4] The building permit application was to "replace" an existing carport next to the Love home. **Ex.5.** There was no mention of a business use.

The operations are a "commercial business." **TR 43:1-24.** SOS "looks like a commercial business." **RP 97:15; 77:10-18**. It is a commercial use in a high end residential area. **RP 16:2; 40:3-6.** Love also uses the property adjoining his residence to work on boats. **RP 44:4-17; RP 83-84**. Customer boats are kept about a week on the property, with 3-4 on average on the premises. **RP 343:20-25; 344:1-6.** There are hundreds of customers per year.

The operations mostly occur Monday through Friday. **RP 48:5-9, 13-14**. Love conceded that he still works five days a week starting around 10:00 to 10:30 a.m. and ending by 5:00 p.m. generally, although he still works longer hours in the summer months and sometimes on Saturdays. **RP 309:18-20, 22**. He alleged that the number of jobs has started to decline the last several years. **RP 311:16-21**. Even so, for the years between 2004 and 2009, the number of jobs ranged between 127 to 199 per year. *See* Memorandum Decision, pp.7-8, **CP 115-16**.

C. <u>Impact of the Business</u>.

The repair, maintenance and/or testing of outboard marine engines and boats activities typically occur within ten feet of Highway 106 in an area that is not enclosed by walls or a permanent roof and sometimes on the road right-of-way. *See* **Ex.15**. Love leaves the workshop door open when he is working on boats. **RP 98:1-7**. Love's counsel inquired using

the words "when does the noise and chaos begin?" **RP 311:22-25.** SOS's operations produce a significant level of noise and engine exhaust[5] and odor. **RP 15:12-25; 16:5-10; 24:14-24.** The engine motors are "revved up" and a tractor that is used to move customer boats onto the Love property is noisy. **RP 16:5-10; 81:12-25.** In the warmer months when the Kruegers and Moores would like to enjoy the outdoors, they often must avoid using their decks and yards because the noise and smell from Love's engine repairs is so offensive. **RP 16-17; 67:13-24; 90:6 (Krueger); RP 90:6**. The sound is a "different kind" than road traffic. **RP 17:7-14**. The obnoxious activity occurs on a regular basis and is common when Love is working on boats. **RP 25:1-25; 93; 95:20.**

The Kruegers and Moores have to shut doors to be able to talk or use a phone due to the noise. **RP 95:1-17; 96:20-25; 97:1-13.** The Moores, who live the closest, can see plumes and smell fumes from the commercial operation. **RP 96:1-5, 18-19.** The smoke is "billowing up." **RP 94**. The Moores can smell exhaust. **RP 117:24-25; 118:1.** The noise is bad enough that the Moores cannot watch television or have normal conversations when the engines are being revved up. **RP 104.** The exhaust and noise are "continuous" each day during the work week. **RP 119:8-12.** The Kruegers' and Moores' quiet use and enjoyment is

[5] **Exhibit 20(3)** is a picture of the exhaust fumes. *See also* **RP 18.** The Kruegers' caretaker who lives uphill of Love complains of fumes. **RP 24:14-24**.

materially affected. **RP 46:1-11; RP 49-50; 93; 96:1-5, 10-19.**

Love's customers usually bring their engines in still attached to their boats, and many are parked on or adjacent to State Route 106, including in front of the Appellants' properties. *See* **Exs.15-17; RP 36:1-16; 37; 41:1-6, 13-18.** There is little room to park on the shoulder. **RP 53**. Customers' boats are regularly parked both within and over the shoulder line, sometimes for an hour or two. **RP 38:9-12; 39:1-15, 22-24; 40:7-19; 91:6-15; 100:3-16**. Love maneuvers parked boats onto his property by using an unlicensed tractor. **RP 114:10-14.** The Moores have not given permission to Love to park boats in front of their home. **RP 91:16-18.** The parking and maneuvering of boats brought in for repair obstructs and encroaches upon public use of State Route 106 and creates a significant level of fear for the Kruegers and Moores. **RP 115:1-2; 104; 115:1-2; Exs.15-17.** Mrs. Krueger described the parking on the right-of-way as "a hazard." **RP 36:1-16; 37.** Delivery trucks coming to the business also park on the Highway. *See* **Ex.18**. These trucks are seen "almost every week." **RP 28:12-16; 29; 99.**

Love downplayed the boats parked on the shoulder, claiming that it occurred only 15-20 minutes and rarely up to an hour. **RP 345:8-17**. He conceded there is more traffic on the State highway over the years, and less time to maneuver things "around safely." **RP 310.** He agreed that if

an accident occurs, it would "shut down his business," demonstrating the seriousness of the risk. **RP 353.**

D. Course of Litigation, Superior Court's Decision and Post Decision Orders Awarding Attorney Fees and Costs.

Appellants instituted suit on June 23, 2006 by filing a complaint for damages and injunctive relief. **CP 120-28.** The core claims were a continuing "public nuisance" and "nuisance." **CP 122-23**. Appellants named Mason County as a party alleging its failure to enforce the Shoreline Management Act. **CP 124-25**. The County moved for summary judgment contending in part it was protected from liability by Public Duty Doctrine as to the alleged failure to enforce the provisions of its shoreline use regulations. **SCP 182-93.**[6] Mason County was dismissed from the proceeding by order entered December 18, 2006. **SCP 180-81.**

Bench trial was held on June 3 and June 4, 2010. On September 22, 2010, the Trial Court entered a Memorandum Decision and directive requesting counsel to prepare an "order" for the court's signature. **CP 116.** The Memorandum Decision held that under the "preponderance of the evidence," Appellants failed to show that "Defendant's business is a nuisance nor that they are entitled to injunctive relief under any of the theories presented," (**CP 114**) and dismissed

[6] References in the text to "SCP" mean "Supplemental Clerk's Papers."

Appellants' claims. **CP 115**. The Trial Court's dismissal of the nuisance claims was based on narrative factual findings and conclusions of law without the specificity and separate treatment required by Civil Rule 52(a).

The Trial Court found persuasive that a few neighbors in the vicinity of Love's commercial business (but not next door like the Moores and Kruegers) perceived SOS's operations as fairly unobtrusive, clean and up-to-date, and environmentally conscious. The Trial Court emphasized that there were sources of noise and fumes in the vicinity and on the State Highway which created impacts, but the lower court did not explicitly address the specific complaints of Moore and Krueger regarding the disruption caused by SOS's commercial activities on them. In a conclusionary fashion the Trial Court merely summarized then dismissed Appellants' nuisance claims without specific analysis. The Trial Court stated that "someone" in Mason County issued a building permit approval for reconstruction of an existing carport serving residential purposes and a new shed and inspected the work. The Trial Court stated that no specific evidence of diminished property value was presented, without acknowledging that damage claims had been withdrawn. Memorandum Opinion, pp.8-9, **CP 116-17**.

On November 12, 2010, the court entered an order entitled "Court's Decision After Trial" incorporating its narrative Findings of Fact

and Conclusions of Law in its Memorandum Decision entered September 22, 2010, dismissing Appellants' claims and granting Respondent's motion for costs and attorney's fees in the amount of $16,812.50. **CP 61-62**. Respondent's motion was based upon RCW 90.58.230.. **CP 81-84.** A timely notice of appeal of the court's Decision After Trial was filed on December 8, 2010. **CP 15-18**. Thereafter, the court entered an order on Defendants' Supplemental Motion for Attorney's Fees and Costs in the amount of $19,222.19 "additional to the sum of $16,812.50 ordered to be paid by the Appellants by order dated November 12, 2010." **CP 13-14**. The Supplemental Motion claimed fees for responding to a citation issued by the State of Washington Department of Fish and Wildlife for Love's extension of a dock. **CP 60; 23-59 (Casey Affidavit)**. The Moores and Kruegers were not parties to that proceeding. **CP 19-22.** The final judgment was entered on December 20, 2010 in favor of Respondents and included a total award of $36,035.69 and the a ruling "against the Plaintiffs and in favor of the Defendants ...." **CP 10-12**. A timely Amended Notice of Appeal of the court's Judgment and Order on Defendants' Supplemental Motion for Attorney's Fees and Costs was filed on December 22, 2010. **CP 4-9**.

V. ARGUMENT

A. Standard of Review.

1. Decision on the Merits.

This court's review of the decision begins with a determination of whether the court applied the correct legal standard to the facts under consideration. Such review is *de novo*. *See Rasmussen v. Bendotti*, 107 Wn. App. 947, 954, 29 P.3d 56 (2001) (citing *State v. Williams,* 96 Wn.2d 215, 220, 634 P.2d 868 (1981).). Every conclusion of law necessarily incorporates the factual determinations made by the court in arriving at the legal conclusion. *Rasmussen*, 107 Wn. App. at 954. In other words, the Trial Court's decision that the facts as set forth in the Memorandum Decision support the conclusion that Respondents' business operations within the shoreline environment is not a nuisance *per se* or private nuisance (under common law or statute) is a determination that is reviewed *de novo*.

The findings on which the decision was based must be supported by substantial evidence. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.,* 115 Wn.2d 364, 369, 798 P.2d 799 (1990).). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 819, 828 P.2d 549 (1992).). If the findings are not supported by

substantial evidence, the reviewing court need not defer to the Trial Court's judgment. *See Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 685, 314 P.2d 622 (1957).). Even if findings are supported by substantial evidence, they must justify the court's conclusions. *Hegwine v. Longview Fibre Co.,* 162 Wn.2d 340, 353, 172 P.3d 688 (2007).).

2. Attorney Fees and Costs Award.

The decision to award attorneys' fees is reviewed for abuse of discretion. *Lay v. Hass*, 112 Wn. App. 818, 826, 51 P.3d 130 (2002)) (quoting *Mackey v. Am. Fashion Inst. Corp.*, 60 Wn. App. 426, 429, 804 P.2d 642 (1991). A Trial Court abuses its discretion when it bases its denial on untenable grounds or reasons. *Moreman v. Butcher,* 126 Wn.2d 36, 40, 891 P.2d 725 (1995).). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist,* 79 Wash. App. 786, 793, 905 P.2d 922 (1995). A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take," *State v. Lewis,* 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990), and arrives at a decision "outside the range of acceptable choices." *Rohrich,* 149 Wn.2d at 654.

B. Respondent's Business Constitutes a Nuisance *Per Se* Because It Lacks Necessary Shoreline Permits.

It was conceded at trial that Respondents did not have shoreline permits for their business operations. **RP 390.** However, the Trial Court's ruling did not address whether a shorelines permit was (or should have been) obtained by Respondents. The Decision simply refers to issuance of a building permit for a residential carport converted to business use and construction of a new storage shed in fact illegally used for a business purpose. Memorandum Decision at p.8, **CP 116.**

If the Trial Court's ruling is an implicit finding that all necessary permits had been issued for Respondent's boat engine repair business, the record contains ample evidence to the contrary. To the extent the court ruled that Respondent's commercial operation does not require a shoreline CUP or SSDP, such conclusion is erroneous because contrary to the Shoreline Management Act ("SMA") and the Mason County Shoreline Master Program ("SMP"). *See* RCW 90.58.140 (development on shorelines is prohibited unless consistent with SMA and County Shoreline Master Program); MCC § 7.04.032 (development undertaken without applicable shoreline permits is unlawful); MCC § 7.16.005 (requiring shoreline substantial development permit for all commercial development

in urban or rural shoreline environments); MCC § 7.16.040 (requiring shoreline conditional use permit for certain uses).

1. Respondents Did Not Obtain a Shoreline Permit for their Business Operations.

Respondents recognized that construction of a repair shop within 200 feet of Hood Canal required shoreline permits. **Ex.1**. The County advised them that the project would require shoreline permits. **Ex.2**. Love applied for a Shoreline Substantial Development Permit and a Shoreline Conditional Use Permit in May 1994 (SHR94-0018 and SEP94-00115). At the same time, he submitted building permit applications for the new 30′ x 45′ metal garage and an 8′ x 15′ storage shed (BLD94-00750 and BLD 94-01263). Respondents withdrew the shoreline applications in September 1994 and did not re-apply. **Exs.3, 4**.

Love introduced no evidence to prove he obtained shoreline permits. There is no proof that he even contacted Mason County to ascertain the status of his business. His counsel only speculated that they "must have been issued." *See* Defendants' Closing Argument at pp.6-7 ("It is entirely possible from this evidence that the Loves were issued all needed shorelines permits for the carport"). **SCP 151-52.** The only evidence on which Respondents relied was an erroneous entry on the County's "Case Activity" listing that the (withdrawn) shoreline applications

"were issued for a proposed 30′ by 45′ metal building for a boat repair shop." **Ex.17**. Review of a timeline of events shows otherwise. The County issued building permits in June 1994 (BLD94-01263) and August 1994 (BLD94-00750), *before* Defendants withdrew their shoreline permit application in September 1994.

Speculation and conjecture or an admittedly erroneous notation on a public record cannot support a finding that shoreline permits were issued. *See Johnson v. Aluminum Precision Prods., Inc.,* 135 Wn.App. 204, 208-09, 143 P.3d 876 (2006) (mere speculation and conjecture will not sustain a finding).). Without copies of the permits in evidence, the court could not reasonably infer that shoreline permits were obtained. *See Johnson*, 135 Wn. App. at 208-09.. Moreover, Respondents' allegations that they had, in fact, secured shoreline permits was an affirmative defense to Appellants' nuisance *per se* claims. Accordingly, the question must be determined in light of the evidence most favorable to the plaintiff. *See Gordon v. Deer Park School Dist. No.* 414, 71 Wn.2d 119, 426 P.2d 824 (1967); *Trudeau v. Haurbrick,* 65 Wn.2d 286, 396 P.2d 805 (1964); *Farrow v. Ostrom,* 10 Wn.2d 666, 117 P.2d 963 (1941).

2. <u>A Shoreline Permit is Required for Respondents' Building and SOS's Business Operations</u>.

The Trial Court's decision may indicate that Appellants' nuisance

per se claim was dismissed because "Mason County approved the permit and inspected the building several times." Memorandum Decision at p.8, **CP 114**. But the building permits were for residential structures and use, not commercial operations. *See* p.12, *infra*. Because Love alleged without proof that the County could not locate the planning files, Respondents guessed "it is entirely possible that those files contain all necessary permits." Defendants' Closing Argument, p.6. **SCP 150**. There is no proof that they did. Appellants produced evidence that the Respondents failed to obtain shoreline permits and Mr. Love conceded that he did not have shoreline permits. Love failed to rebut the evidence by producing a copy of the permit or calling Staff to testify accordingly, relying on speculation and conjecture, which cannot support a finding that they were issued shoreline permits (*see Johnson, supra,* 135 Wn. App. at 208-09), and is insufficient to overcome Appellants' proof. *See Gordon,* 71 Wn.2d 119.

Respondents alleged that they "are not in violation of any law," because the County "said so." *See* Defendants' Closing Argument at p.6, **SCP 150**. The County did not explicitly determine that Love's business was legal. At most, the County's Case Activity Report cited "lack of evidence to support the fact that a violation has occurred..." **Ex.17.** The notation was based upon the mistaken belief that permit applications later withdrawn were in fact approved and shoreline permits "issued." *Ibid.*

Thus, the "determination" is factually and legally wrong and not substantial evidence. Love called no County witnesses on this point.

Respondents further argued that, perhaps the County determined they did not need any shoreline permits. Defendants' Closing Argument at p.6, **SCP 150**. Respondents asserted that if such decision had been made, it would be "supportable under the Shoreline Management Code *[sic]*". *Id.* at p.7, **SCP 151**. The record does not support a finding that the County decided the permits were not required. The County specifically informed Respondents that shoreline permits ***were*** required for their proposal. **Ex.2** (April 11, 1994 letter from the County to Defendants). There is no evidence the County reconsidered this determination.

a. Respondents' Marine Engine Repair Business is not a Home Occupation or Single-Family Residential Use.

Respondents argued that their commercial boat engine repair business might be a "home occupation," under MCC § 7.08.010, and thus exempt from the requirement for either an SSDP or shoreline CUP. Defendants' Closing Argument, pp.8-9, **SCP 152-53**. The County must issue a statement of exemption, WAC 173-27-050, and no such statement was issued. Further, there is no exempt activity. Unless the property owner can show, among other things, that: (1) the business is conducted within a dwelling which is the property owner's residence; (2) exterior

development costs are less than $2,500; and (3) no alteration is made to the exterior of the residence or the site, including parking and signs, a shoreline substantial development permit is required. MCC § 7.08.010. There is no evidence the County determined the Respondents' use to be a "home occupation." Respondents do not conduct the business within their dwelling, but inside the new carport, outside of the facility, and even within the waters of Hood Canal. **RP 349:13-14**.

Respondents also speculated that "it seems likely that the planner actually classified [the proposal] as "home occupation," or some other similar classification in existence in 1994." Defendants' Closing Argument at p.10, **SCP 154**. The Case Activity Report does not so state. *See* **Ex. 17**. A finding cannot be based on mere conjecture. *Johnson, supra,* 135 Wn. App. at 208-09;; *Rogers Potato Service*, 119 Wn. App. at 820;; *State v. Hutton,* 7 Wn. App. at 728.

b. Respondents' Marine Engine Repair Business is Not a Cottage Industry. But Even if It Were, a Shoreline Conditional Use Permit is Required.

Love referred to his business as a "cottage industry." **RP 381:10-25.** The Mason County SMP defines "cottage industry" as:

> "Cottage industry" means small scale commercial or industrial activities on residential properties performed in the residence or building accessory thereto. The principle practitioner must reside on the property. Cottage industries are considered as

> residential uses and minor commercial development and substantial developments under this master program provided they do not alter the character of the site as a residential property and wholesale and retail trade is minimal. Cottage industries must comply with all applicable county ordinances and require a conditional use permit.

MCC § 7.08.010.. Love's commercial activity has altered the character of his property from residential to commercial and the retail activity is not "minimal. *See* pp. 10-16, *infra*. Moreover, if a use is determined to be a "cottage industry," it must obtain a shoreline CUP. *Id.* If, however, the use is too intensive to qualify, the property owner must obtain an SSDP. *Id.*; MCC § 7.16.005.. There is no evidence Respondents obtained either type of shoreline permit. Without ***any*** shoreline permit, Respondents violated the SMA and SMP by constructing a new building and conducting intensive repair shop operations on site. *See* RCW 90.58.140((1); MCC § 7.16.005; MCC § 7.16.040.[7] It is uncontroverted that Love's use commenced in 1990 and has existed "since at least 1994," so is not grandfathered. **Ex.7**.

[7] It is important to note that Appellants did not seek affirmative relief under the SMA. Evidence that Respondents constructed a building and operated a business within the shoreline environment but without shoreline permits was introduced solely to support the claim of nuisance *per se*. Plaintiffs' Closing Argument, p.2, pp.7-13, **SCP 152-57**. Opposition to Defendant's Attorney Fees, pp.1-5, **CP 68-73.**

C. **Respondents' Unpermitted Business Within the Shoreline Environment Is a Nuisance *Per Se*.**

1. Nuisance Law in General.

A claim for nuisance in Washington is governed by both common law and statute. RCW 7.48.120 defines "nuisance" as:

> 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.

This definition applies to a "nuisance *per se*," which arises when a person fails to comply with applicable law, thereby causing injury.

One of the most notable differences between an "ordinary" nuisance claim, and a claim of nuisance *per se* is whether the action is lawfully permitted or allowed. If the business is being conducted unlawfully, and/or without all required permits, "that is in violation of statutes, regulations or permits, and it interferes with the use and enjoyment of property, it is a nuisance *per se*." *Gill v. LDI*, 19 F.Supp.2d 1188, 1198-99 (W.D.Wash. 1998); *Tiegs v. Watts*, 135 Wn.2d 1, 14-15, 954 P.2d 988 (1998); *State v. Boren*, 42 Wn.2d 155, 163, 253 P.2d 939 (1953). That a governmental authority ignores a nuisance is not a defense if adjoining properties are injured. *Tiegs*, 135 Wn.2d at 14.

2. Respondents' Business Has Been Operating in Violation of Statutes and Regulations.

Appellants established at trial that Respondents do not have a shoreline permit for their expanded marine engine repair business. Further, the use violates Love's right-of-way permit which prohibits use of the right-of-way by customers. *See* **Ex.9**, Access Connection Permit, Special Provision No. 9. It also violates the Mason County Noise Ordinance. Respondents did not rebut this evidence.[8]

A shoreline approval is not mere formality. This Court has construed the SMA for waters of statewide significance (such as Hood Canal) as recognizing statewide interests over local and requiring preservation and protection of the natural character of the shoreline. *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 39-40, 202 P.3d 334 (2009). The SMA calls for "coordinated planning ..." of shoreline uses. RCW 90.58.020; *Nisqually Delta Ass'n v. City of DuPont*, 103 Wash.2d 720, 726, 696 P.2d 1222 (1985). Without compliance with permit requirements, the goals and objectives of the SMA cannot be implemented. *See also* MCC § 7.36.060 (Mason County SMP is to be "liberally construed to give full effect to the objectives and purposes for which it was enacted").

[8] **Exhibits 16-19** show customers parking on the shoulder.

Respondents' business eschews SMA policies and circumvents the permit application and review process established by the SMA and the Local Project Review Act, RCW 36.70B. Love's activities substantially alter the site as a residential property. *Compare* **Ex.15** (active business) *with* **Ex.28** (photo of Respondents' home at time of purchase); *see also* **Exs.15-17**. He must illegally use the State highway shoulder because he circumvented the process which would have disclosed the inadequacy of on-site parking. The Love property is very small and burdened with steep slopes. *See* **Ex.14**.

Respondents failed to comply with MCC § 15.05.020(b)[9] (requiring a preapplication meeting to discuss "the nature of the proposed development, application and permit requirements, fees, review process and schedule, applicable plans, policies and regulations" with planning staff and affected departments, agencies and/or special districts to the preapplication meeting), WAC 197-11-310 and MCC § 8.16.040(a) (requiring a SEPA environmental checklist and threshold determination before permit issuance).[10] Affected agencies, including the Mason County

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[9] Pursuant to MCC § 15.03.015(c)(3)(C), an application for a shoreline permit is a Type III (quasi-judicial) process; *see also* MCC § 15.03.030(10) (defining shoreline permits as Type III decisions).

[10] Respondents' project is not categorically exempt under SEPA. *See* WAC 197-11-305 and MCC § 8.16.010 and MCC § 8.16.020(d) because, as discussed above, it is not a residential use or home occupation and does not fall within other listed exemptions. Further, no determination was made by the County pursuant to MCC § 8.16.030(a) which requires "Each department within the county that receives an application for a license or,

Road District, WSDOT, and the local Fire District, were not given the opportunity to review an environmental checklist for Respondents' business, as required by WAC 197-11-340(2)(b); MCC § 8.16.010 (incorporating state SEPA regulations by reference). If they had issues related to steep slopes, fire safety, toxic and hazardous waste, storm water, pollution, access, shorelines, on-site parking, buffer and setback review (not to mention a review of the compatibility of the use as required in a shoreline CUP application) these would have been addressed. The County must "retain all documents required by the SEPA rules and make them available in accordance with RCW 42.17." MCC § 8.12.020(d); WAC 197-11-504(1). No such records exist here because there was no compliance by Respondents with the required process.

3. Appellants' Use and Enjoyment of Their Life or Property is Substantially Diminished as a Result of the Unpermitted Business Operations.

A nuisance may also exist, as set forth in RCW 7.48.010, for:

> ...whatever is injurious to health or indecent or offensive to the senses, or an obstruction of the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property....

Testimony documents the significant impact Respondents' business has had on Appellants. *See* pp.12-15, *infra.* Since 1994, noise

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in the case of governmental proposals, the department initiates the proposal, [to] determine whether the license and/or the proposal is exempt."

and exhaust fumes from Respondents' engine repair business have been disrupting and disturbing Appellants' peaceful use and enjoyment of their property. Each year since 2006, Love has performed approximately 150-200 outboard engine repairs. A steady stream of boats and motors from all over arrives at the business with attendant safety risk. Customers are instructed to drive past the shop, honk their horn, drive up to the State Park (2 miles away), do a U-turn and return to park along the highway right-of-way. *See, e.g.,* Carr Testimony, **RP 239; 244:12-25.** After the boat is dropped off, Love takes out a tractor, hooks it up to the boat/trailer, and maneuvers the boat into and across SR 106 to push the boat into the workshop. **RP 241; 242:21-25; 243:1-8**. Pulling out of SOS onto the State highway is described as "kind of scary" by a customer. **RP 234:19-21; 244:1-5.** Neighbors who supported Love conceded he's "got a business there." **RP 123**.

Traffic is only part of the impact on the Moores and Kruegers. Noisy motors are frequently started and run outside. Respondents "rev" up engines as part of diagnostic testing causing a "startle reflex." This disturbs and upsets the Moores and Kruegers. They find it difficult to keep their windows open or even talk on the phone or watch television. *See* pp.12-14, *infra*. The Memorandum Decision did not address any of the specific impacts suffered by the Moores and Kruegers. The Trial

Court disavowed the personal discomfort and anguish of Appellants, with references to Love's own testimony or his supporters and with an apparent judgment that the Appellants should not be bothered by the noise, fumes, odors and smoke emanating from the business being operated on residential property, or the traffic safety issues which greatly concern them along this relatively narrow strip of highway. *See* Memorandum Decision at p.4-8, **CP 111-15**.

RCW 7.48.010 asks whether the action "essentially interfere[s] with the comfortable enjoyment of life and property" of the complainants. In other words, "[a] nuisance is an unreasonable interference with another's use and enjoyment of property." *Kitsap County v. Allstate Ins. Co.,* 136 Wn.2d 567, 592, 964 P.2d 1173 (1998). Per RCW 7.48.020,). Per RCW 7.48.020, "Such action may be brought by any person whose property is ... injuriously affected or whose ***personal enjoyment*** is lessened by the nuisance." (Emphasis added.) It is irrelevant what non-parties believe about the impacts.

Nuisance law in Washington State requires a determination of whether the personal inconvenience, discomfort and anguish suffered by a plaintiff is of a level to constitute a nuisance. *E.g., Riblet v. Spokane-Portland Etc. Co.*, 45 Wn.2d 346, 355, 174 P.2d 574 (1954). Generalized impacts are only part of the question – impacts on the complaining party

must be considered as well. As in the *Riblet* case, this court should reverse the Trial Court's dismissal of the private nuisance claims because there is ample evidence in the record detailing the personal discomfort and annoyance suffered by the Moores and Kruegers. *See* pp.12-15, *infra*. The Trial Court side-stepped this question, choosing to focus on the general impacts of noise, odors, smoke and traffic in the vicinity and relying on Love' description of his business operations, without any consideration of the personal discomfort which Plaintiffs detailed in testimony.

When determining whether the impact of loud noises on nearby properties rise to the level of a nuisance, courts must consider specific impacts on the complaining party's property. In *Davis v. Taylor*, 132 Wn.App. 515, 132 P.3d 783 (2006),), the court upheld a Trial Court ruling that a nuisance existed and was not exempt under "right to farm" laws. The plaintiffs had purchased a residential lot in an existing subdivision and built a home. *Id.* at 518. The lot was in a quiet neighborhood adjacent to an apple orchard, which had been in existence for almost 50 years. The owners of the orchard decided to convert their property to a cherry orchard and began using propane cannons and cherry guns to scare off birds. Evidence established that the cannons and guns were fired within 100 feet of the plaintiffs' home, from sunrise to sunset throughout summer months. The noise shook the plaintiffs' home and prevented them

from leaving windows open. The plaintiffs suffered startle reflexes each time the noises went off. *Id.* at 518-19. In upholding the determination of a nuisance, the Court of Appeals noted that the area had been pastoral prior to the new farming operations. *Id.* at 522. The use was not exempt under right-to-farm regulations, and was a nuisance because of its disruptive noise. *Id.* at 523.

Noise impacts of a drive-in theater on residential neighborhoods was also deemed to be a nuisance in *Bruskland v. Oak Theater*, Inc., 42 Wn.2d 346, 254 P.2d 1035 (1953). Although the theater was situated in a small business district, noise and traffic impacts impacted nearby homes. This was due to the fact that patrons were required to make a sharp turn at an intersection, causing motor noise, shrieking of brakes and confusion. Headlights of the cars also would shine into bedroom windows. *Id.* at 348. The jurors received instructions that, if the evidence established that noises of traffic in the area was already such that they could be heard inside the homes of the plaintiffs, that could be taken into consideration in determining whether there had been an unreasonable and substantial invasion of their repose and enjoyment of their home by reason of the theater operation. The court held that "the question of liability does not depend upon how respondents themselves were affected, but upon how ordinary persons occupying the home or premises of respondents would

have been affected by the acts of appellants." *Id.* at 349. It ruled that the appellants established a lawful business at a location legally zoned for that purpose, but the business was operated such to be a nuisance. *Id.* at 351. *See also Payne v. Johnson*, 20 Wn.2d 24, 145 P.2d 552 (1944).

In each of these cases, the individual impacts of business noise on the complaining parties were considered, rather than judging whether such impacts were "unreasonable." As with the Appellants here, noise which impacted the ability to leave windows open, get restful sleep, not be startled or disturbed, and that could be heard inside their homes, constituted a nuisance - even if properly permitted.

4. Respondents' Business Operations Violate the Mason County Noise Ordinance.

The Mason County noise ordinance was adopted:

> ...to minimize the exposure of citizens to adverse effects of excessive noise and to protect, promote and preserve the public health and welfare, by controlling the level of noise in a manner which promotes the use, value and enjoyment of property, sleep and repose, and the quality of the environment.

MCC § 9.36.010-.-.020.

Mason County categorizes residential properties such as those of the parties as "Class A," and the "Environmental Designation for Noise Abatement" or "EDNA." MCC § 9.36.040(1)(A). The Mason County noise code prohibits "public disturbance noises" within Class A EDNA's:

> It is unlawful for any person to cause, or for any person in possession of real or personal property to allow to originate from the property, sound that is a public disturbance noise. **The following sounds are hereby determined to be public disturbance noises**:
>
> ***
>
> (3) **the creation of frequent, repetitive or continuous sounds in connection with the starting, operation, repair, rebuilding or testing** of any motor vehicle, motorcycle, off-highway vehicle, **or internal combustion engine**, within a Class A EDNA, so as to unreasonably disturb or interfere with the peace, comfort, and repose of the community.

(Emphasis supplied)

A violation of the Noise Ordinance was established which demonstrates that Love's business is a nuisance *per se*. Appellants testified extensively regarding the disturbance they have suffered as a result of frequent and repetitive starting, repair, rebuilding and testing of internal combustion engines within their neighborhood, which is a Class A EDNA. The Trial Court only discussed how the operations are conducted and then enumerated other sources of noise in the neighborhood. *Id.* It did not address the specific impact of the commercial activities on Appellants' enjoyment of their property nor the Noise Ordinance standards.

The Lower Court's analysis misses the mark. The issue is whether Respondents' specific noise-generating activities conducting an engine repair shop in the middle of a residential neighborhood

unreasonably disturbs or interferes with Appellants' peace, comfort and repose. The record amply supports such a finding.

The plain language of MCC § 9.36.010-.040 establishes that specific noise level measurements are not required to determine a violation of the noise ordinance. The Trial Court's implied ruling that the absence of noise level measurements was fatal to Appellants' claims is also in error.

D. **The Record Contains Substantial Evidence to Support Appellants' Allegations of Injury and Offense Resulting From Respondents' Unpermitted Business Operations**.

1. The Preponderance of the Evidence Standard Was Not Properly Applied by the Trial Court.

Appellants had to show by a preponderance of the evidence that Love's business was not properly permitted, and that its illegal operation "either annoys, injures or endangers [their] comfort, repose, health or safety." *See* RCW 7.48.120.. They did this, although the Trial Court failed to consider nuisance *per se* or the RCW 7.48.120 standards.

Appellants also would be entitled to their requested relief if the preponderance of the evidence showed that Respondents' operations were "injurious to health or indecent or offensive to the senses, or an obstruction of the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property." *See* RCW 7.48.010.

Appellants meet this standard and the preponderance of the evidence supports Appellants in this regard.

The preponderance of the evidence standard is a 51% rule. That is, the prevailing party is the one that produces (even if only slightly) more convincing evidence than the opposing side. *See Gallamore v. City of Olympia*, 34 Wash. 379, 386, 75 P. 978 (1904).978 (1904).

In *State v. Harris*, 74 Wash. 60, 62, 132 P. 735 (1913), the court noted that "preponderance of the evidence" does not mean a greater number of witnesses on one side than the other, but the greater weight of credible evidence. "It means that evidence which strikes your minds as having more convincing force than the evidence to which it is opposed." *Id.* at 62.

2. The Trial Court's "Findings" Regarding the Impacts of Noise, Smoke, Fumes, Odors, Traffic Safety from Respondents' Business Operations on Appellants are Not Supported by Substantial Evidence.

This Court cannot re-weigh the evidence considered by the Trial Court, but may reverse if it determines that substantial evidence does not support its decision. *E.g., Fisher Properties, supra,* 115 Wn.2d at 369; *Cowiche Canyon Conservancy,* 118 Wn.2d at 819. In this appeal, the Trial Court's narrative findings do not justify the conclusions that a nuisance *per se* or nuisance was not shown. None of the Trial Court's "findings" addresses the central issue whether Respondents' engine repair

shop has interfered with Appellants' enjoyment of their homes due to its offensive noise, odors, smoke and unsafe traffic operations.

The Trial Court's decision is merely a subjective judgment that the Moores and Kruegers "shouldn't be offended" because some other neighbors and customers are not. But even those favoring Love can hear the noise. Respondents' own witnesses testified that the boat motors can be heard. **RP 123; 132:9-10 (David); 142:12-17 (Jacobs); 151:5-9; 162:14-16 (Gordon); 204:9-15; 209:1-6; 208:21-25; 229:17-25; 228:1-2 (Adams).** While the Kruegers burn a wood stove, so does Love.

Here, the Trial Court's "findings" are not based on evidence as to essential facts to support the judgment – namely, whether the impacts on Appellants of the marine engine repair business rise to the level of a nuisance, and whether Respondents' business was properly permitted but must be to support dismissal. *See Stevens v. King County*, 36 Wn.2d 738, 745, 220 P.2d 318 (1950). The preponderance of the evidence standard to support the dismissal of claims was not met. The court failed to make findings on essential facts, and crafted a decision based on outcome determinative statements based upon the testimony of highly interested witnesses or her own subjective judgments.

a. Evidence of Noise Impacts on Appellants.

Unlike other neighbors in the vicinity who visit only on weekends or holidays, the Kruegers reside full time near Respondents' engine repair shop. **RP 13:15-16.** The Moores are directly across from the business. **RP 110:12-25; 111:1-2**. *See* **Ex.15**. Appellants' level of annoyance and disturbance is at a higher level than that of people who are only occasionally staying along Hood Canal, or customers who are dropping their boats off.

Respondents' commercial operations include repair, maintenance and testing of outboard marine engines and boats. These practices take place in an area of Love's property that is unenclosed and within 10 feet of Highway 106. Mr. Love leaves the workshop door open when he is working on boats. **RP 98:1-7**. He "revs" up engines outside and uses a noisy tractor to maneuver boats around the property. **RP 16:5-10; 81:12-25.** During summer months, the sound is so disturbing that Appellants are forced to go inside. **RP 15:12-25; 16-17; 67:13-24; 90:6 (Krueger).**

Yet, even indoors, Appellants are continually harassed by the intrusive noise. They are held prisoners in their own homes. They have to shut doors and windows to be able to talk or use a phone. **RP 95:1-17; 96:20-25; 97:1-13**. The noise is so disruptive that the Moores cannot watch television or have normal conversations when the engines are being revved up. **RP 104**. The exhaust and noise are "continuous" each day of the week. **RP 119:8-12**. The noise impacts of Respondents' business are

of a "different kind" than road traffic. **RP 17:7-14**. The noise is so bad that the Kruegers decided not to develop property they own next to SOS because it "would get the noise and fumes more." **RP 47:8-19.**

The Memorandum Decision states with respect to noise that there are other sources than Love's operations and "at most, a motor is run for 15 minutes with most of the time being at idle." Memorandum Decision at p.4, **CP 111**. The length of time that Respondents allege they "rev" engines is not determinative of whether the noise is disruptive.

Appellants testified that the engine repair shop noise is of a different quality than road traffic. Moreover, Appellants did not complain about other sources of noise that can be expected in a residential waterfront community (leaf blowers, road traffic, jet skis). The engine repair shop in this area of retirement and vacation homes creates disruptive noise that affects Appellants' lives and enjoyment of property.

b. Evidence of Smoke, Odor and Fumes Impacts on Appellants.

The Trial Court's decision acknowledged that "[r]unning boat motors will create exhaust fumes." Memorandum Decision at p. 5, **CP 112**. However, the court judged that Appellants should not be bothered because "motors at Mr. Love's business are run for a very limited amount of time." *Id.* The judge also opined that "[t]his is not

significant especially when the plaintiffs' homes also closely abut a state highway." *Id.*

The Moores, who live the closest to Respondents, testified that they can see plumes and smell fumes from the commercial operation. **RP 96:1-5, 18-19**. The smoke is "billowing up." **RP 94**. Appellants have had to abandon their decks and patios because of the fumes and foul fumes. They did not testify that road traffic passing by on Highway 106 had a similar impact. Nor did they complain about smoke from wood stove heaters, which could be expected in a residential neighborhood.

c. **Evidence of Traffic Impacts on Appellants**.

Appellants testified about the fear they experience as a result of the parking of customers' boat trailers in front of their properties on the narrow shoulder, and intruding into SR 106. *See* **Exs.15-17; RP 36:1-16; 37; 41:1-6, 13-18.** The dangerous conditions often persist for several hours, as road traffic must navigate around the boats. **RP 38:9-12; 39:1-15, 22-24; 40:7-19; 91:6-15; 100:3-16**. In addition to the parking issue, Respondent maneuvers the boat trailers into SR 106, encroaching thereon and obstructing traffic. **RP 114:10-14.**

Delivery trucks coming to the business also encroach onto the Highway "almost every week." *See* **Ex.18**; **RP 28:12-16; 29; 99.** Appellants are fearful of the hazardous traffic impacts of this operation.

RP 115:1-2; 104; 115:1-2; *see also* **RP 36:1-16; 37.** This impacts the quiet use and enjoyment of their property. **RP 46:1-11; RP 49-50.** The length of time the customers allegedly encroach into the highway is irrelevant. It only takes a moment for an accident to occur.

The court judged that Appellants should not be concerned because "[p]arking is limited, and, especially in the summer months, many boats and other vehicles are parked along this highway in the state right-of-way. Vehicles using SR 106 daily include private passenger vehicles some of which are towing boats, commercial vehicles such as delivery trucks, propane trucks, and log trucks. The portion of SR 106 at issue in this case, is relatively straight." Memorandum Decision at p.5, **CP 112**. The Trial Court also apparently determined that encroachment into the Highway was not dangerous because "[n]o known accidents have occurred in this area in 20 years." *Id.*

The Trial Court was apparently impressed by a description of Respondents' instructions to his customers as to how to drop off and pick up their boats as akin to safety briefings used in the Navy. *Id.* at 6. This opinion of a non-expert witness not impacted by the business operations does not mean that the operations are, in fact, safe. The court judged that the safety issues should be of no concern because "[b]oats are parked on the shoulder of the highway during drop-off and for the shortest time

possible, usually 15 to 20 minutes." *Id.* Once again, however, WSDOT prohibits customers parking on the shoulder.

In summary, none of the Trial Court's "findings" on the issues of noise impacts, smoke, odors and fumes, and traffic impacts pertain to the essential facts necessary to support its judgment. *See Stevens*, *supra*, 36 Wn.2d at 745. These include: (1) whether Respondents' business was properly permitted; (2) whether the business "annoys, injures or endangers the comfort, repose, health or safety" of the Appellants; or (3) whether Respondents' operations were "injurious to health or indecent or offensive to the senses, or an obstruction of the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property." *See* RCW 7.48.120; RCW 7.48.010. Substantial evidence does not support the Trial Court's dismissal of Appellants' nuisance claims: at most, the testimony shows Love is considered a "good guy" by some neighbors and customers.

E. <u>The Award of Attorneys' Fees to Respondents Was Abuse of Discretion Because There Was No Basis for Fees and Costs.</u>

Respondents requested fees pursuant to the Shoreline Management Act. RCW 90.58.230.[11] Appellants made clear, however, that they were

[11] RCW 90.58.230 provides a cause of action for private persons to "bring suit for damages" resulting from a violation of the Shoreline Management Act or violation of a permit issued under the Shoreline Management Act. The prevailing party in a case brought under RCW 90.58.230 may, at the court's discretion, be awarded its reasonable

not seeking damages under RCW 90.58.230 through their trial brief, their post-trial brief, their opposition to the motion for attorneys fees, and – most importantly – through their testimony at trial. They could not, as a matter of law, seek injunctive relief under RCW 90.58.230 because only a government entity may request such relief. *Hedlund v. White*, 67 Wn. App. 409, 414, 836 P.2d 250 (1992). There is no other statutory basis on which to award attorneys' fees.

Under Washington law, attorney fees and costs cannot be awarded unless allowed by statute or contract. *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 540, 585 P.2d 71 (1978). The Trial Court's order should be reversed for abuse of discretion. *See Moreman,* 126 Wn.2d at 40; *Rohrich,* 149 Wn.2d at 654. The Trial Court's award of attorneys' fees was abuse of discretion because there is no legal basis on which to grant such fees. *See Moreman v. Butcher,* 126 Wn.2d 36, 40, 891 P.2d 725 (1995)) (abuse of discretion when award is based on untenable grounds or reasons); *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (a decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard).

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attorneys' fees. Appellants did assert that Respondents' business operations are taking place without a shoreline permit, but solely to support the claim of a "nuisance *per se*." *See Tiegs v. Watts*, 135 Wn.2d 1, 14-15, 954 P.2d 877 (1998).

F. **The Award of Attorneys' Fees Was Abuse of Discretion Because it Unduly Chills Behavior, Was Not Properly Supported and Included Amounts Incurred in a Separate Legal Matter.**

An award of attorney's fees is not required by RCW 90.58.230; it is discretionary. Merely because a party prevails does not require an award of attorney's fees under a discretionary statute like RCW 90.58.230. *E.g., Matter of Estate of Niehenke,* 117 Wn.2d 631, 818 P.2d 1324 (1991) (attorneys fees under RCW 11.96.140 inappropriate); *Chemical Bank v. Washington Public Power Supply System*, 104 Wn.2d 98, 702 P.2d 128 (1985) (upholding denial of attorneys fees under RCW 4.28.185(5); *Brower Co. v. Noise Control of Seattle, Inc.*, 66 Wn.2d 204, 401 P.2d 860 (1965) (Trial Court did not abuse its discretion in disallowing attorney's fees under RCW 60.04.130).

Aside from the fact that RCW 90.58.230 is not applicable, it was an abuse of discretion to award Respondents attorney fees and costs under that law. The issues raised below by Appellants involve important questions regarding the proper use of private property located within shorelines and application of land use laws involving shoreline uses and public safety. The courts of this state are encouraging of citizens raising issues as to shoreline use and the application of regulatory laws. Under these circumstances, the award of attorney fees is an undue deterrent,

punishing Appellants' use of the courts to raise legitimate concerns when government defaults on its responsibilities.

The Trial Court's orders on the motions for attorneys fees contain no specific findings as to the reasonableness of the rates, the hours expended, or that the court had actually reviewed the individual time entries. This is error. Washington requires an adequate record on which to review fee awards, and findings and conclusions *in the order*, or a remand is automatic. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

The award also was abuse of discretion because Respondents failed to justify their total claim. The burden of proof is on the attorney requesting fees on behalf of the client. The United States Supreme Court ruled:

> The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise "billing judgment" with respect to hours worked .... And should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.

Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).). The Trial Court has an obligation to decide what is a reasonable award of fees and may not rely solely on the billing records of the party's attorney. *See Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). As set out above, the Trial Court failed in its duty in this regard.

Here, Respondents submitted vague, generalized block-billing records that did not specify the claims on which their attorneys spent time. **CP 23-59**. Mr. Finlay's declaration is unsupported by any time records to justify his "flat fee" or request for an additional $10,000 over the flat fee charged. **CP 76-78**. Block-billing practices are usually insufficient to show a right to attorneys' fees. *See e.g., Washington State Democratic Party v. Reed*, 343 F.3d 1198 (9th Cir. 2003); *Mendez v. County of San Bernadino,* 540 F.3d 1109 (9th Cir. 2008) (affirming court's discounting of block-billed hours by 75%). Because Respondents' attorneys time records fail to meet even minimal requirements to demonstrate the reasonableness of the fees, the court's award was abuse of discretion.

The Trial Court also erred by including amounts spent responding to a citation issued by the Washington Department of Fish and Wildlife for a dock extension in 2008. This matter was not part of the lawsuit, nor was it brought by Appellants against Respondents. The citation concerned a structure with which Appellants are not concerned. The court abused its discretion by including these amounts for an unrelated matter in its award.

Finally, the fees charged are unreasonable and excessive. A Trial Court has broad discretion in fixing the amount of an award of attorney's fees. *E.g., In re Renton,* 79 Wn.2d 374, 485 P.2d 613 (1971). However, such awards must be reasonable, exercised on tenable grounds and for

tenable reasons. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). One of the seminal cases regarding the reasonableness of a discretionary fees award is *Bowers v. Transamerica Title Insurance Company*, 100 Wn.2d 581, 675 P.2d 193 (1983). It ruled that the Trial Court should consider the number of hours reasonably expended in light of the type of work performed; experience and expertise of the attorneys who performed the work; the time spent on unsuccessful claims, duplicated effort, and otherwise unproductive time; and the reasonable hourly rate determined in light of the attorneys' usual and customary rates; the level of skill required; time limitations imposed by the litigation; the amount of the potential recovery; the attorneys' reputations; and the undesirability of the case. The court should consider adjusting the award if the attorneys were employed under a contingent fee agreement, and based upon the quality of the work performed. This list is similar to the factors in RPC 1.5(a) for determining the fee reasonableness. The Trial Court entered no orders addressing these factors. **CP 61-62; 122-123.**

Here, given that Appellants were not seeking damages, the case was not complex or lengthy, and did not require a high level of skill to defend, the Trial Court should have at a minimum significantly reduced the requested fees presuming reasonableness is an issue this court reaches on appeal. Appellants submitted two witnesses. Respondents called

twelve witnesses in addition to Mr. Love. The testimony was highly cumulative. Respondents unduly extended the trial by presenting highly cumulative testimony.

VI. CONCLUSION

This Court should grant the appeal and rule that a nuisance *per se* is established, and further order that no attorney fees or costs are properly awarded to Respondents. This Court should remand for (1) entry of an order of abatement or injunction to restrain any commercial activity, and (2) entry of an order vacating the award of attorney fees and costs.

RESPECTFULLY SUBMITTED this 16th day of May, 2011.

By _____

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON
BY
DEPUTY

I hereby certify that on this 16th day of May, 2011, I caused the original and one copy of the document to which this certificate is attached to be delivered for filing via overnight mail to:

Clerk of Court
Court of Appeals, Division II
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Tacoma, WA 98402
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I further certify that on this 16th day of May, 2011, I caused a copy of the document to which this certificate is attached to be delivered to the following via e-mail and overnight mail:

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Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 16th day of May, 2011.

Christy Reynolds
Legal Assistant