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STATE OF WASHINGTON
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No. 41557-7-II (consol. w/44377-5-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.

APPELLANTS' SUPPLEMENAL OPENING BRIEF
RE: DENIAL OF MOTION TO REOPEN

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I. INTRODUCTION

In this consolidated appeal, this brief addresses the trial court's erroneous denial of Appellants' motion to reopen the record to introduce evidence relevant to issues remanded by this Court.[1] *See* Order, Appendix A-1. The proffered certifications from Mason County and the State of Washington Department of Ecology demonstrate that the permits necessary for Respondents to legally conduct their business are not on file. The denial was in error, providing an independent basis for reversal.

Although the Court has other grounds on which to reverse dismissal of Appellants' claims, a fair, orderly and efficient resolution of all issues on appeal may be reached by reversing the trial court's denial of the motion to reopen and considering the proffered evidence, which evidence confirms that Respondents' business is illegal, and thus, a nuisance.

Appellants first sought injunctive relief years ago to redress the disruptive impacts of an adjacent, unpermitted engine shop in their Hood Canal residential neighborhood. Their claims put at issue whether the

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[1]This brief addresses the issues raised in Court of Appeals Case No. 44377-5-II concerning the trial court's denial of Appellants' motion to reopen the record on remand to admit certifications from Mason County and the State of Washington Department of Ecology demonstrating that Respondents never obtained a shoreline permit. This Court consolidated this appeal with the original appeal, Case No. 41557-7-II, which addresses whether the trial court correctly applied the law to the facts when it dismissed Appellants' claims of nuisance in fact and nuisance *per se* and awarded attorney fees to Respondents. Appellants' briefing in Case No. 41557-7-II is incorporated by this reference.

startling engine revving, fumes, smoke and dangerous intrusion of traffic into the right-of-way interfered with Appellants' use and enjoyment of their properties, and whether the engine shop is a lawful, permitted use.

When the trial court denied the injunctive relief after a bench trial, Appellants appealed. This Court determined that the record was insufficient for review. It stayed the appeal and remanded the matter for additional fact-finding by the trial court. *Order Staying Appeal and Remanding to Trial Court* ("Remand Order"), April 6, 2012. *See* Appendix A-2.

During that remand, Appellants moved to reopen the case to introduce evidence confirming that Respondents never obtained a shoreline permit allowing them to conduct an engine shop business within the regulated shoreline. This evidence was relevant to a key question that this Court remanded to the trial court: "whether SOS operates lawfully, including its compliance with the Shoreline Management Act (ch. 90.58 RCW), the Mason County Code, and any other relevant law." *Id.* at p. 2.

Appellants proffered certifications from the Washington State Department of Ecology Custodian of Records of the Mason County Department of Community Development for Land Development Permits, pursuant to RCW 5.44.040, confirming that no shoreline permit was ever issued for the SOS engine repair shop operations and that the Loves, in

fact, withdrew their shoreline permit applications.[2]

The trial court denied the motion to reopen and did not enter any findings of fact or conclusions of law resolving whether SOS operates in compliance with the law. Instead, the trial court flatly refused to address the issue required by the Remand Order. The trial court believed that the remanded issue was irrelevant, stating:

> Whether or not Mr. Love is operating in violation of the Shoreline Management Act, other Mason County or Washington State regulations or permits would not change the result.

Amended and Supplemental Findings of Fact and Conclusions of Law, CL 31 (Supplemental Clerks Papers ("SCP") 241-43).[3]

The trial court is wrong. As this Court already recognized in its Remand Order, resolution of Appellants' claims requires evaluation of whether the engine repair shop is a lawful operation.[4] The trial court failed to address this key issue on remand as this Court directed, ignoring additional evidence proffered by Appellants that SOS operates illegally.

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[2] *See* CP2 232-331; 13-231. Citations to Clerk's Papers designated in Appeal No. 44377-5-II are designated herein as "CP2" (clerk's papers second appeal).

[3] The trial court also failed to comply with the deadline in the Remand Order to enter findings of fact and conclusions of law by June 25, 2012, 60 days from the date of the Remand Order. *Remand Order* at p. 1, 3. Without explanation, the trial court delayed entry of findings of fact and conclusions of law until October 15, 2012.

[4] Because SOS is not a lawful operation (and its operation interferes with Appellants' use and enjoyment of their properties), it is a nuisance *per se*. It is a nuisance in fact because Respondents have no "right" to operate their illegal business against which a court might balance Appellants' legal rights to enjoy their properties. Appellants' Supplemental Br. at pp. 18-19; Appellants' Supplemental Reply Br. at pp. 8-9.

Pursuant to RAP 7.3 and its authority to secure the fair and orderly review of a case, and for efficiency, this Court should consider the evidence to resolve the consolidated appeal (Case No. 41557-7-II).

II. ASSIGNMENT OF ERROR

The trial court erred in entering its *Order Denying Plaintiff's Motion to Reopen Case to Introduce Evidence on Remand* on December 21, 2012, on the erroneous basis that the evidence was irrelevant when (1) the proffered evidence addressed the remanded issue whether Defendants operate their business lawfully, including in compliance with the Shoreline Management Act, and (2) such evidence was highly relevant to Appellants' nuisance claims.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Where this Court directed the trial court on remand to determine whether Defendants' engine shop operations are lawful, did the trial court abuse its discretion when it denied a motion to reopen the record to admit evidence that shows the engine shop is not permitted under the Shoreline Management Act?

2. Did the trial court abuse its discretion when it determined, in contravention of this Court's Remand Order, that whether Defendants obtained required permits for their engine shop within the shoreline environment was irrelevant to its determination whether a nuisance *per se*

or a nuisance in fact exists?

3. Does the failure of Mason County, the State of Washington and/or any other governmental entity to take any action against the unpermitted engine shop repair business demonstrate the legality of the use?

IV. STATEMENT OF THE CASE

A. This Court Determined that the Trial Court's Underlying Decision Did Not Contain Sufficient Findings and Conclusions to Address Elements of Nuisance in Fact and Nuisance *per se.*

The trial court's original decision failed to contain essential findings and conclusions to support its dismissal of Appellants' claims of nuisance in fact and nuisance *per se*. Respondent Steven Love operates a commercial marine engine repair shop (d/b/a "Steve's Outboard Service") ("SOS") within 200 feet of Hood Canal without a required shoreline permit and in contravention of the requirements of a right-of-way permit and the Mason County Noise Ordinance.

When the trial court dismissed Appellants' claims, it failed to address whether a shoreline permit was, or should have been, obtained by Respondents.[5] The Memorandum Decision simply referred to issuance of

[5] As set forth in Appellants' Opening Brief at pp. 23-29 in Case No. 41557-7-II, Respondent's commercial operation requires a shoreline CUP or SSDP, under 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

a building permit for residential structures, which the Loves later converted to business use without notice, review or approval. *See* Memorandum Decision at p.8, CP 116.

No shoreline permit ever issued. Love was unable to introduce any evidence that his business operated lawfully, including in compliance with SMA requirements. The record demonstrated that Respondents originally applied for a shoreline permit at the County's direction in 1994, but they withdrew the application after the County issued building permits for a residential building in the approximate location of an old carport and for a residential building described as a "storage shed/pumphouse."[6]

In their arguments to the trial court and on appeal, Respondents have speculated that the County never enforced its requirements on SOS because either: (a) decided that no shoreline permit was required,

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

[6] In 1994, Mr. 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**. Love's application for a Shoreline Substantial Development Permit ("SSDP") and a Shoreline Conditional Use Permit ("CUP") stated that the reason for the proposal was "to enlarge existing business due to safety and need for more space." **Ex.1**. Love knew he needed a 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**. After withdrawal of his shoreline permit application, Love stated that he intended "... to continue to explore, with our neighbors, a more feasible plan that might more adequately address their concerns ...." **Ex.3**. Yet, the business has enlarged over the years. **RP 15:1-11**. Impacts associated with the business have "gotten worse" over time. **RP 26; 44:18-25; 79:4-15 (Krueger); RP 105:13 (Moore).**

(b) determined that the business operations were exempt from shoreline permitting requirements, or (c) issued a permit, but then lost the planning file containing the required shoreline permit. None of this speculation can sustain a finding that a permit was, in fact, 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); *Rogers Potato Service, LLC v. Countrywide Potato*, LLC, 119 Wn. App. 815, 820, 79 P.3d 1163 (2003) (a finding cannot be supported by speculation or conjecture).

Notwithstanding the lack of evidence that SOS's operation was lawful, or any findings on this issue, the trial court dismissed Appellants' claims after a two-day bench trial and awarded attorney fees to Respondents. Appellants appealed.

B. On Appeal of that Underlying Decision, this Court Remanded With Instructions to the Trial Court to Enter Findings and Conclusions on Nuisance in Fact and Nuisance *per se*.

On appeal in Case No. 41557-7-II, this Court found that the trial court's findings and conclusions did not adequately address the legal issues. *Remand Order*. This Court stayed the appeal and remanded for the trial court to address Respondents' liability for nuisance in fact and nuisance *per se, stating* in relevant part, "***the trial court entered a memorandum opinion that does not address the legal issues necessary***

for us to review its decision." (Emphasis added). *Id.* at p.1.

The Remand Order directed the trial court to enter findings and conclusions to address nuisance in fact, which turns on "(1) whether Defendants interfere with the Plaintiffs' use and enjoyment of their property, and (2) whether such interference is reasonable, balancing the rights, interests and convenience of the parties." *Remand Order* at p.2. It also directed to enter findings and conclusions to address nuisance per se, which turns on (1) whether Defendants interfere with the Plaintiffs' use and enjoyment of their property, and (2) whether SOS operates lawfully, including its compliance with the Shoreline Management Act ("SMA"), Mason County Code, and any other relevant law. *Id.*

C. Appellants Moved to Introduce Evidence on Remand Confirming that Respondents Never Obtained a Shoreline Permit.

The proceedings on remand did not achieve this Court's stated objectives. After receiving the Remand Order, the trial court issued a Notice of Issue to the parties herein, stating that the matter would be "called for hearing re: Remand from Court of Appeals," on Monday, June 4, 2012.

To assist the trial court to comply with the Remand Order and enter the required findings and conclusions on both the issue of nuisance *per se* and nuisance in fact, Appellants filed a motion requesting leave to

admit Certifications from the Washington State Department of Ecology and the Custodian of Records of the Mason County Department of Community Development for Land Development Permits pursuant to RCW 5.44.040. CP2 332-345. Ecology and the County are agencies with jurisdiction over Respondents' commercial operations. The Certifications confirm that no shoreline permit is on file for the SOS engine repair shop operations. CP2 232-331; 13-231. The Certifications also evidence the Loves' withdrawal of their Shoreline permit applications, stating that "the files reflect SHB 94-00018 and SEP00115 were withdrawn." *Id.*

Appellants requested that the trial court reopen the record for the limited purpose of properly and fully determining the remanded issues. CP2 332-345.

D. The Trial Court Denied the Motion to Reopen for Lack of Relevance.

The trial court refused to admit the evidence proffered by Appellants that established Respondents had no legal right to operate an engine repair shop out of a structure on their residential property within the shoreline environment. The trial court's Amended and Supplemental Findings of Fact and Conclusions of Law, though not completely clear, sheds light on the reasons for its denial of the motion to reopen.

First, the court agreed that "***Mason County mistakenly determined***

that shoreline permits had been issued," for the building in which the SOS engine shop operations take place (Amended and Supplemental Findings of Fact and Conclusions of Law, FF 86 (SCP 212-243) (emphasis added). It made no finding or conclusion, however, that the business had ever been reviewed by Mason County for consistency with SMA requirements. Nor did the trial court find or conclude that a shoreline permit was not required for the SOS engine shop. The trial court instead ruled that the lack of any enforcement action by the County or any other governmental entity was, in effect, an approval. FF 88-90; CL 28-29 (SCP 218-40). Then the trial court declared that it mattered not whether the SOS engine shop operates in violation of the SMA, and declined to make any ruling on the issue despite this Court's clear directive to enter findings and conclusions on this point. See CL 31 (SCP 241-43).

V. ARGUMENT

A. Standard of Review

A trial court has discretion to grant or deny a motion to reopen a case to take additional testimony or admit evidence. *Sweeny v. Sweeny,* 52 Wn.2d 337, 339, 324 P.2d 1096 (1958) (affirming trial court's grant of motion to re-open where remand order for entry of new findings did not restrict evidence to appeal record); *Rochester v. Tulp,* 54 Wn.2d 71, 74, 337 P.2d 1062 (1959) (reversing denial of motion to reopen). A trial

court's denial of a motion to reopen should be reversed for abuse of discretion when it is based 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 for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

B. The Trial Court Abused Its Discretion When It Refused to Reopen the Record to Comply with the Remand Order's Direction to Determine Whether SOS Operates in Compliance with the SMA

The trial court abused its discretion when it denied Appellants' motion to reopen for the limited purpose of introducing evidence relevant to the remanded issues. The Remand Order did not restrict the trial court's consideration. The trial court erroneously concluded that the proffered evidence was irrelevant, when it was highly relevant to its evaluation of Appellants' claims.

1. The Remand Order Did Not Restrict the Trial Court's Consideration to the Pre-Existing Record.

This Court's Remand Order permitted the trial court to open the record. Courts must examine the ruling of the appellate court to determine the scope of remand. *See Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (1999) (remanding hearing examiner's decision for

entry of additional findings and conclusions); *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 903 P.2d 986 (1995) (remanding decision for further proceedings because City's decision was not supported by substantial evidence).

Here, the Remand Order directed the trial court to enter findings and conclusions on several issues that the trial court had failed to address in its Memorandum Decision. Specifically, the trial court was directed to determine whether SOS operates lawfully, including its compliance with the Shoreline Management Act." *Remand Order* at p.2. The Certifications from the Department of Ecology records custodian and Mason County unambiguously demonstrated that SOS did not operate lawfully because it did not have the proper permits. CP2 232-331; 13-231.

There is nothing in the Remand Order that precluded the trial court from taking additional evidence on remand. *See, e.g., Sweeny*, 52 Wn.2d at 339 ("There was no direction that new findings be entered upon the evidence contained in the appeal record, or that the 'further proceedings' be limited to the trial court's consideration of that record only"). In *Sweeny*, the motion to reopen was granted in order to allow evidence related to a key issue in the case – the welfare of the child. *Id.* at 340. Similarly, the trial court in this case also could have, and should have, reopened to consider evidence related to the key issue: whether

appropriate shoreline permits/approvals existed.

In *Rochester, supra*, 54 Wn.2d 71, the Washington Supreme Court concluded that the trial court had abused its discretion by denying a motion to reopen. *Rochester* was an action for conversion of items of personal property from an estate. The defendant had testified that the allegedly converted items were removed from the decedent's home and transported by a commercial trucking company to the defendant's home on September 29, 1953. The trial court concluded that the action was barred by the three-year statute of limitations because the action was filed three years and one day after September 29, 1953. Two months after trial, the plaintiff moved to reopen to admit bills of lading from the trucking company showing that the goods were removed from the decedent's home on October 1, 1953, meaning that the action timely was brought.

The Supreme Court reversed the trial court's decision to deny the motion to reopen, finding the denial an abuse of discretion when the evidence would permit resolution of the dispute on the merits, stating:

> We can see only one justification for a refusal to reopen the case for such apparently decisive evidence, and that is the feeling that there had been a lack of diligence in failing to produce evidence which was at all times readily available. We feel that, under the circumstances disclosed, the plaintiff's counsel were not at fault in relying upon the statements of California

> counsel that the trucking company records, kept in Los Angeles, were not available. ***Under the circumstances here presented, the trial court abused its discretion in refusing to reopen this case for the reception of the additional evidence, which would seem to make it possible to dispose of this case on its merits.***

Id. at 74 (emphasis added). This Court similarly should conclude that, based on the Remand Order, the trial court could have reopened the record to receive Appellants' evidence in order to comply with the Remand Order and resolve the remanded issue.

2. The Proffered Evidence Would Resolve a Key Remanded Issue.

The proffered evidence would resolve a key issue in the Remand Order. The trial court had the opportunity to consider valuable evidence of disinterested parties: the Department of Ecology's and Mason County's certifications. The certifications demonstrate that Respondents never obtained necessary approvals for their business because no permits are on file. Based on this evidence, the business use constitutes a nuisance *per se* and a nuisance in fact.

Without consideration of the proffered certifications, the trial court could answer the inquiry regarding the legality of the SOS business operations based only on the ***lack of evidence*** introduced by Respondents at trial to rebut Appellants' arguments that they had failed to obtain

approval for the engine repair shop. *See State v. N.M.K.*, 129 Wn. App. 155, 162, 118 P.3d 368 (2005) (admission of evidence that an event or matter was *not* recorded in public records is admissible to show that it did not occur or did not exist); Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence,* 409-10 (2005). *See also United States v. Keplinger*, 776 F.2d 678, 689-90 (7th Cir. 1985) (absence of records that would ordinarily exist if a particular event had occurred is properly admitted to show that the event did not occur). This lack of evidence remains sufficient to support Appellants' claims based on the original record in the original appeal (Case No. 41557-7-II). But for purposes of this later appeal (Case No. 44377-5-II), the two certifications showing that Respondents did not obtain the proper permits was probative of the claims.

C. That Respondents' Do Not Have Shoreline Permits for their Business is Relevant to a Determination of Nuisance in Fact and Nuisance *per se*.

Because the trial court's decision to deny Appellants' motion to reopen was based on a misinterpretation of the law of nuisance, this Court should reverse.

The trial court rejected the proffered evidence based on only one reason: its conclusion that the evidence was not relevant. This single rationale for denial of the motion fails. The law and the Remand Order

establish that the proffered evidence was relevant.[7] The trial court's decision, therefore, was an abuse of discretion. *See Setterlund v. Firestone*, 104 Wn.2d 24, 28-30, 700 P.2d 745(1985) (Brachtenback, J., dissenting) (where trial court denies a motion to reopen based on an incorrect understanding of what is relevant under the law, reversal is warranted). Errors of law justify reversal for abuse of discretion. *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003) This Court should reverse.

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.

Operation of the SOS engine repair shop is a nuisance *per se* and a nuisance in fact because Respondents failed to obtain a shoreline permit in compliance with the SMA, and also failed to comply with the Mason County Noise Ordinance and the terms of its Highway Right-of-Way

[7] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Salas, supra*, 168 Wn.2d at 669, citing ER 401. "The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible." *Id.*, citing *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006).

Permit.[8]

1. Nuisance *per se* Requires a Determination of Whether Respondents Comply with the SMA.

A business is a nuisance *per se* if the business is being conducted unlawfully, and/or without all required permits, "and it interferes with the use and enjoyment of property. . . ." *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 877 (1998); *State v. Boren*, 42 Wn.2d 155, 163, 253 P.2d 939 (1953). The trial court's determination in Supplemental Conclusions of Law 28 and 31, that the engine shop should be construed as permitted because Mason County or other governmental entities did not take any action to shut it down (SCP 230-43), is clear error of law. That a governmental authority tolerates a nuisance is not a defense if adjoining properties are injured. *Tiegs*, 135 Wn.2d at 14.[9]

Contrary to the trial court's approach, compliance with the SMA is mandatory. *See, e.g., Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 39-40, 202 P.3d 334 (2009) (SMA recognizes statewide interests over local and requiring preservation and protection of the natural character of

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[8] The trial court's Supplemental Findings of Fact and Conclusions of Law do not contain any conclusions with respect to SOS's compliance with the Noise Ordinance or the Right-of-Way permit. *See* SCP 212-43.

[9] As discussed in Appellants' Supplemental Reply Brief at p. 1, the term "injury" includes "distress" or "impairment," not just physical or economic harm. *See Rettkowski v. Department of Ecology*, 128 Wn.2d 508, 518, 910 P.2d 462 (1996) ("The common law definition of "injury" is '[t]he invasion of any legally protected interest of another.'") (Citing Black's Law Dictionary 785 (6th ed. 1990).

the shoreline); *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 943, 230 P.3d 1074 (2012) (ruling that a governmental entity cannot waive shoreline permitting requirements). The goals and objectives of the SMA, including the public's general rights and personal property rights protected by shoreline permit review processes, are severely compromised if parties fail to comply with shoreline permit requirements. *Department of Ecology v. City of Spokane Valley*, 167 Wn.App. 952, 962-63, 275 P.3d 367 (2012). In this regard, an owner's failure to obtain a permit deprives surrounding property owners the opportunity to participate in the public process associated with permitting to ensure that any potential impacts of the proposal are mitigated or avoided. *Id.*

As set forth in Appellants' Supplemental Br. at pp. 10-12, a statement in the Case Activity Report (Ex. 7) that a County staff person may have erroneously determined the use to be a "cottage industry" does not establish the existence of a shoreline conditional use permit, which must be issued to permit a cottage industry. *See also* Opening Br. at pp. 24-25 (Case No. 41557-7-II). To the extent the trial court denied the motion to reopen on the basis that the Case Activity Report established a legal use, the trial court abused its discretion because the facts did not support that determination. *E.g., Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

Both the law and this Court's Remand Order require a determination whether Respondents' engine shop operations comply with the law. The SMA permitting requirements implement fundamental state policies for the benefits of all citizens; they cannot be waived or excused. The trial court's ruling that a factual inquiry into Respondents' compliance with the SMA is irrelevant in this case is an abuse of discretion, contradicts the Court's Remand Order and should not be condoned. *See Salas*, 168 Wn.2d at 669.

2. Whether SOS Lacks Shoreline Permits is Relevant to the Inquiry for Nuisance in Fact that Requires a Balancing of "Rights"

A determination that a business is operating without required permits to the detriment of surrounding property owners is required for the second inquiry into Appellants' nuisance in fact claims: whether interference with a property owner's use and enjoyment of their property is "reasonable, balancing the rights, interests and convenience of the parties." *See* Remand Order at p.2 (citing *Tiegs*, 135 Wn.2d at 13); *see also* RCW 90.58.140(1), (2). Here, the court cannot fully balance the rights of the parties until it determines what those rights are, including a determination whether Respondents' have any right under the law to operate their business. The proffered evidence establishes that they do not have any such right, because the business operation contravenes the law.

As briefed by Appellants in their Supplemental Brief at pp. 16-17

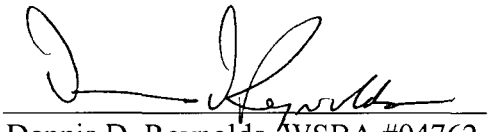
and their Supplemental Reply Brief at pp. 8-9 (Case No. 41557-7-II), the trial court erred in weighing Appellants' recognized private property rights against the Respondents' rights when, in fact, Respondents failed to obtain the legal right to operate their business. Where the Respondents' business operations violate the law, and where the trial court found that SOS interfered with the use and enjoyment of Appellants' properties, *see* FF 47-48, 50, 69, 71, 80-83, 86, CL 31 (SCP 220-43), the trial court should have enjoined Respondents' operations.

VI. CONCLUSION

This Court should conclude that the trial court abused its discretion in denying Appellants' Motion to Reopen Case on Remand to Introduce Evidence. The proffered evidence further establishes the Appellants' right to injunctive relief on their nuisance claims. The basis for the ruling – that evidence of the Respondents' failure to obtain required Shoreline Management Act permits is irrelevant to the issues of nuisance in fact and nuisance *per se* – is untenable because it applies the wrong legal standard and rests on facts unsupported in the record.

To resolve this protracted appeal, this Court should reverse the trial court ruling on Appellants' request to reopen and consider the evidence to resolve Case No. 41557-7-II.

RESPECTFULLY SUBMITTED this 10th day of April, 2013.

By 

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2013, I caused the original and one copy of the document to which this certificate is attached to be delivered for filing via hand-delivery to:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402
(253) 593-2970, tel

I further certify that on this 10th day of April, 2013, I caused a copy of the document to which this certificate is attached to be delivered to the following via email and U.S. mail:

Bruce J. Finlay, WSBA #18799
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DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 10th day of April, 2013.

Christy Reynolds
Legal Assistant

APPENDIX

REC'D & FILED
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2012 DEC 21 P 1:24
GINGER BROOKS, CO. CLERK
BY _____ DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR MASON COUNTY

HAL MOORE and MELANIE MOORE, husband and wife; and LESTER KREUGER and BETTY KREUGER, husband and wife, Plaintiffs, v. STEVE'S OUTBOARD SERVICE, a sole proprietor, operating in Washington; STEVEN LOVE and MARY LOU LOVE, husband and wife and the marital community they together compose, Defendants.	No. 06-2-00563-9 ORDER DENYING PLAINTIFFS' MOTION TO REOPEN CASE TO INTRODUCE EVIDENCE ON REMAND

THIS MATTER came on for hearing before this Court on the motion of Plaintiffs to reopen to introduce evidence on remand from the Department of Ecology Records Custodian and the Mason County Department of Community Development Records Custodian consisting of copies of Defendants' permit files to address the issue of whether Defendants operate their business lawfully, including compliance with the Shoreline Management Act.

The Court being duly advised, having considered the records and files herein, including the Declaration of Dennis D. Reynolds in Support of Plaintiffs' Motion to Reopen Case to Introduce Evidence on Remand, with attached documents, dated May 24, 2012, and the Supplemental Declaration of Dennis D. Reynolds in Support of Plaintiffs' Motion to Reopen Case to Introduce Evidence on Remand, with attached documents dated June 13, 2012, and

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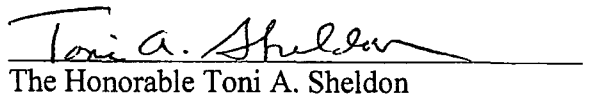
FILE COPY

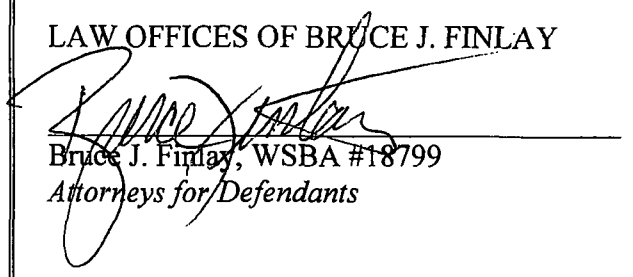
having heard argument of counsel on June 25, 2012, IT IS HEREBY ORDERED that Plaintiffs motion is DENIED.

DONE ~~IN OPEN COUR~~T this 21 day of December 2012.
TAS


The Honorable Toni A. Sheldon

Presented by:

LAW OFFICES OF BRUCE J. FINLAY


Bruce J. Finlay, WSBA #18799
Attorneys for Defendants

Approved as to Form; Notice of Presentation Waived:

DENNIS D. REYNOLDS LAW OFFICE

Approved by email
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HAL MOORE and MELANIE MOORE, husband and wife; and LESTER KRUEGER and BETTY KRUEGER, husband and wife, Appellants, v. STEVE'S OUTBOARD SERVICE, a sole proprietorship operating in Washington; STEVEN LOVE and MARY LOU LOVE, husband and wife and the marital property they together comprise, Respondents.	No. 41557-7-II ORDER STAYING APPEAL AND REMANDING TO TRIAL COURT

This matter came on for oral argument on April 6, 2012. Hal and Melanie Moore and Lester and Betty Krueger (the Moores) appeal the trial court's judgment dismissing their nuisance claims against Steve's Outboard Service and Steve and Mary Lou Love (SOS) and granting attorney fees to SOS. The trial court entered a memorandum opinion that does not address the legal issues necessary for us to review its decision. We therefore stay this case and remand to the trial court for entry of written findings of fact and conclusions of law within 60 days of the date this order is filed.

APPENDIX A-2

The trial court's findings and conclusions must address nuisance in fact, which turns on (1) whether SOS interferes with the Moores' use and enjoyment of their property; and (2) whether such interference is reasonable, balancing the rights, interests, and convenience of the parties. *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998); *Highline School Dist. No. 401, King County v. Port of Seattle*, 87 Wn.2d 6, 18 n.7, 548 P.2d 1085 (1976); *Jones v. Rumford*, 64 Wn.2d 559, 563, 392 P.2d 808 (1964) (quoting *Riblet v. Spokane-Portland Cement Co.*, 41 Wn.2d 249, 254, 248 P.2d 380 (1952), *overruled on other grounds in Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985)).

The trial court's findings and conclusions must also address nuisance per se, which turns on (1) whether SOS interferes with the Moores' use and enjoyment of their property; and (2) whether SOS operates lawfully, including its compliance with the Shoreline Management Act (ch. 90.58 RCW), the Mason County Code, and any other relevant law. *Tiegs v. Boise Cascade Corp.*, 83 Wn. App. 411, 418, 922 P.2d 115 (1996) (quoting *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 276 (Utah 1982)).

In the event that the superior court concludes that the Moores do not prevail on theories of nuisance in fact or nuisance per se and that SOS is entitled to reasonable attorney fees, the court must support its decision on attorney fees with written findings of fact and conclusions of law setting forth a complete lodestar analysis. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 593, 220 P.3d 191 (2009); *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632, 966 P.2d 305 (1998). SOS is directed to supplement the record with all necessary documentation to support any award of attorney fees.

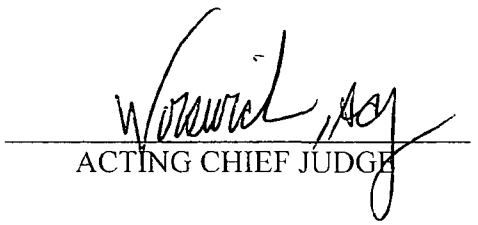
No later than 30 days after the superior court has entered the findings and conclusions herein ordered, SOS shall designate such findings and conclusions as supplemental clerk's papers under RAP 9.10. The parties may provide supplemental briefing to this court within 20 days after the supplemental clerk's papers are designated.

It is so **ORDERED**.

Panel: Jj. Worswick, Hunt, Quinn-Brintnall.

DATED this 26th day of April, 2012.

FOR THE COURT:



ACTING CHIEF JUDGE

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