

[Faint stamp and handwritten initials]

No. 69513-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEVON T. JAMES, a married man,

Appellant,

v.

TERESA ANN WRIGHT and THOMAS LEE CARTWRIGHT,
wife and husband,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE HOLLIS HILL

BRIEF OF RESPONDENTS

SMITH GOODFRIEND, P.S.

CAIRNCROSS &
HEMPELMANN, P.S.

By: Howard M. Goodfriend
WSBA No. 14355

By: Stephen P. VanDerhoef
WSBA No. 20088

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

542 2nd Avenue. Suite 500
Seattle, WA 98104
(206) 587-0700

Attorneys for Respondents

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESTATEMENT OF ISSUES PRESENTED FOR REVIEW	3
III.	RESTATEMENT OF THE CASE	4
	A. A Common Grantor Subdivided These Interlocking Waterfront Parcels, Protecting Respondents' View And Lateral Support.	5
	B. From 2002 Through 2007, James Undertook A Campaign Of Harassment, Consisting Of Verbal Abuse, Threats, Spite Structures, Surveillance, Violence, And Unsuccessful Abuse Of The Anti-Harassment Process.	7
	C. In 2007, James Continued His Campaign Of Harassment By Filing Baseless Civil Litigation In Which Wright And Cartwright Prevailed And, In 2009, Obtained A Permanent Injunction.	10
	D. In 2011, The Trial Court Found James In Contempt Of Its Permanent Injunction.	14
	E. James Continued To Oppose The Trial Court's Enforcement Of Its Orders And In 2012, After Several Hearings, Including An Evidentiary Hearing, Ordered James To Remove Offending Substitute Vegetation, Restore The Rockery That He Removed And The Support That He Undermined.....	18

F.	By October 2012, The Bamboo, Substitute Planting, And Rockery Issues Had All Been Definitively Resolved In Respondents' Favor, And They Were Awarded The Fees And Costs They Incurred Forcing James To Follow The Trial Court's Orders. James And His Counsel Forced Wright And Cartwright To Incur Additional Fees Over The Next Five Months.....	25
IV.	ARGUMENT	26
A.	This Court's Review Is Limited To The September 2012 Order Modifying Its Previous Equitable Orders And The Subsequent Attorney Fee Orders Because James Did Not Timely Appeal From The Trial Court's Earlier Equitable Orders That He Now Seeks To Collaterally Attack On Appeal.	26
1.	James Failed To Timely Appeal The 2009 Injunction, The 2011 Contempt Order Or The 2012 Orders Requiring Him To Remove Bamboo, Additional Spite Fence Structures, and Substitute Plantings.	26
2.	The Trial Court's 2011 And 2012 Contempt Orders Are Not Void For Lack Of Subject Matter Jurisdiction.	29
B.	The Scope Of Equitable Relief Imposed By The Trial Court Was Not An Abuse Of Discretion, And Was Supported By Substantial And Admissible Evidence.....	33
1.	Standard of Review: The Court Reviews The Scope of The Equitable Relief Ordered By The Trial Court For Abuse of Discretion.	34

F.	By October 2012, The Bamboo, Substitute Planting, And Rockery Issues Had All Been Definitely Resolved In Respondent's Favor, And They Were Awarded The Fees And Costs They Incurred Forcing James To Follow The Trial Court's Orders. James And His Counsel Forced Wright And Cartwright To Incur Additional Fees Over The Next Five Months.....	25
IV.	ARGUMENT	26
A.	This Court's Review Is Limited To The September 2012 Order Modifying Its Previous Equitable Orders And The Subsequent Attorney Fee Orders Because James Did Not Timely Appeal From The Trial Court's Earlier Equitable Orders That He Now Seeks To Collaterally Attack On Appeal.	26
1.	James Failed To Timely Appeal The 2009 Injunction, The 2011 Contempt Order Or The 2012 Orders Requiring Him To Remove Bamboo, Additional Spite Fence Structures, and Substitute Plantings.	26
2.	The Trial Court's 2011 And 2012 Contempt Orders Are Not Void For Lack Of Subject Matter Jurisdiction.	29
B.	The Scope Of Equitable Relief Imposed By The Trial Court Was Not An Abuse of Discretion, And Was Supported By Substantial And Admissible Evidence.....	33
1.	Standard of Review: The Court Reviews The Scope of The Equitable Relief Ordered By The Trial Court For Abuse of Discretion.	34

2.	The Trial Court's 2011 And 2012 Decisions Directing James To Restore The Rockery Were Supported By Substantial Evidence And Within The Trial Court's Discretion.....	35
3.	The Trial Court's Discretionary Evidentiary Decisions Provide No Basis For Reversal.....	37
C.	The Trial Court Did Not Abridge James' Right To Due Process Or To Trial By Jury.....	39
D.	The Trial Court's Fee Awards, Supported By Extensive Findings, Were Not An Abuse Of Discretion.....	41
1.	This Court Reviews The Trial Court's Fee Award Under Its Permanent Injunction And The Contempt Statute For Abuse Of Discretion.....	41
2.	James Was Charged With That Portion Of The Fees That He Caused Wright And Cartwright To Incur In Opposing James' Extensive Attempts To Evade The Court's Equitable Orders.....	44
E.	James Is Liable For Attorney Fees On Appeal And His Counsel Should Be Sanctioned.....	48
V.	CONCLUSION.....	49

TABLE OF AUTHORITIES

FEDERAL CASES

<i>U.S. v. Oakland Cannabis Buyers' Cooperative</i> , 532 U.S. 483, 121 S. Ct. 1711, 149 L.Ed.2d 722 (2001).....	29
---	----

STATE CASES

<i>Beltran v. State Dept. of Social and Health Services</i> , 98 Wn. App. 245, 989 P.2d 604 (1999).....	29
<i>Bercier v. Kiga</i> , 127 Wn. App. 809, 103 P.3d 232 (2004), <i>rev. denied</i> , 155 Wn.2d 1015 (2005).	37-38
<i>Bering v. SHARE</i> , 106 Wn.2d 212, 721 P.2d 918 (1986), <i>cert. dismissed</i> , 479 U.S. 1050 (1987).....	42
<i>Boeing Co. v. Sierracin Corp.</i> , 108 Wn.2d 38, 738 P.2d 665 (1987)	34
<i>Bowers v. Transamerica Title Insurance Co.</i> , 100 Wn.2d 581, 675 P.2d 193 (1983).....	48
<i>Brown v. Safeway Stores, Inc.</i> , 94 Wn.2d 359, 617 P.2d 704 (1980)	40
<i>Brown v. Voss</i> , 105 Wn.2d 366, 715 P.2d 514 (1986).....	34
<i>Bushong v. Wilsbach</i> , 151 Wn. App. 373, 213 P.3d 42 (2009)	27
<i>Carrara, LLC v. Ron & E Enterprises, Inc.</i> , 137 Wn. App. 822, 155 P.3d 161 (2007).....	27
<i>Collings v. City First Mortgage Services, LLC</i> , 175 Wn. App. 589, 308 P.3d 692 (2013).....	46

<i>Diamco, Inc. v. Mettler</i> , 135 Wn. App. 572, 145 P.3d 399 (2006), <i>rev. denied</i> , 161 Wn.2d 1019 (2007).....	43
<i>Engstrom v. Goodman</i> , 166 Wn. App. 905, 271 P.3d 959, <i>rev. denied</i> , 175 Wn.2d 1004 (2012)	35
<i>Estates of Smaldino</i> , 151 Wn. App. 356, 212 P.3d 579 (2009), <i>rev. denied</i> , 168 Wn.2d 1033 (2010)	30
<i>Fiore v. PPG Indus., Inc.</i> , 169 Wn. App. 325, 279 P.3d 972, <i>rev. denied</i> , 175 Wn.2d 1027 (2012)	44
<i>Fisher Properties, Inc. v. Arden-Mayfair, Inc.</i> , 115 Wn.2d 364, 798 P.2d 799 (1990), <i>modification denied</i> , 804 P.2d 1262 (1991).....	43, 47
<i>Greyhound Lines, Inc. v. City of Tacoma</i> , 81 Wn.2d 525, 503 P.2d 117 (1972)	27
<i>Griffin v. Draper</i> , 32 Wn. App. 611, 649 P.2d 123, <i>rev. denied</i> , 98 Wn.2d 1004 (1982).....	30
<i>Hanson v. Shim</i> , 87 Wn. App. 538, 943 P.2d 322 (1997), <i>rev. denied</i> , 134 Wn.2d 1017 (1998)	40
<i>In re Marriage of Davisson</i> , 131 Wn. App. 220, 126 P.3d 76, 158 Wn.2d 1004 (2006)	34
<i>In re Marriage of Haugh</i> , 58 Wn. App. 1, 790 P.2d 1266 (1990)	39
<i>King v. Riveland</i> , 125 Wn.2d 500, 886 P.2d 160 (1994).....	34
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998)	48
<i>Marriage of James</i> , 79 Wn. App. 436, 903 P.2d 470 (1995).....	34

Matter of J.R.H. , 83 Wn. App. 613, 922 P.2d 206 (1996).....	30
McCleary v. State , 173 Wn.2d 477, 269 P.3d 227 (2012).....	35
MHM & F, LLC v. Pryor , 168 Wn. App. 451, 277 P.3d 62 (2012)	31
Morgan v. Kingen , 141 Wn. App. 143, 169 P.3d 487 (2007), <i>aff'd</i> , 166 Wn.2d 526, 210 P.3d 995 (2009).....	44
R.A. Hanson Co., Inc. v. Magnuson , 79 Wn. App. 497, 903 P.2d 496 (1995), <i>rev. denied</i> , 129 Wn.2d 1010 (1996)	48
Rivers v. Washington State Conference of Mason Contractors , 145 Wn.2d 674, 41 P.3d 1175 (2002).....	40
Seattle Northwest Securities Corp. v. SDG Holding Co., Inc. , 61 Wn. App. 725, 812 P.2d 488 (1991).....	28
Singletary v. Manor Healthcare Corp. , 166 Wn. App. 774, 271 P.3d 356, <i>rev. denied</i> , 175 Wn.2d 1008 (2012) (App. Br. at 36)	30
State ex rel. Bradford v. Stubblefield , 36 Wn.2d 664, 220 P.2d 305 (1950)	28
State ex rel. Dep't of Ecology v. Anderson , 94 Wn.2d 727, 620 P.2d 76 (1980)	39
State v. Noah , 103 Wn. App. 29, 9 P.3d 858 (2000), <i>rev. denied</i> , 143 Wn.2d 1014 (2001)	30
Sunnyside Valley Irrigation Dist, v. Dickie , 149 Wn.2d 873, 73 P.3d 369 (2003)	35

<i>Veit ex rel Nelson v. Burlington Northern Santa Fe Corp.</i> , 171 Wn.2d 88, 249 P.3d 607 (2011).....	38
<i>Wagner v. Wheatley</i> , 111 Wn. App. 9, 44 P.3d 860 (2002).....	28
<i>Washington Fed'n of State Employees, Council 28, AFL-CIO v. State</i> , 99 Wn.2d 878, 665 P.2d 1337 (1983).....	34
<i>Watson v. Maier</i> , 64 Wn. App. 889, 827 P.2d 311, <i>rev. denied</i> , 120 Wn.2d 1015 (1992).....	49

STATUTES

28 U.S.C. § 1292.....	29
RCW 4.24.510.....	10
RCW 4.84.185.....	10
RCW 7.21.030.....	2-3, 41-42, 48, 50
RCW 7.40.030.....	10

RULES AND REGULATIONS

CR 59.....	25
CR 60.....	25
ER 804.....	38
RAP 2.2.....	27
RAP 2.4.....	27
RAP 5.2.....	27
RAP 10.4.....	4
RAP 18.9.....	3, 49

CONSTITUTIONAL PROVISIONS

Washington Const. Art I, § 21..... 39
Washington Const. Art. IV, § 6 31

OTHER AUTHORITIES

1 Pomeroy, *Equity Jurisprudence* §§ 111, 170,
175a (5th ed. 1881)..... 32
1 Story, *Equity Jurisprudence* § 28 (14th ed. 1918) 32

I. INTRODUCTION

This appeal is the culmination of seven years of litigation and harassment maintained by appellant Devon James against his neighbors, respondents Teresa Wright and Tom Cartwright. The litigation has produced a one-year then a ten-year antiharassment order against James in 2006 and 2007, a Permanent Injunction following a nine day trial in 2009 that required James to remove a spite fence and abate a nuisance, a Contempt Order in 2011 after James failed to comply with the injunction, and then multiple post-judgment hearings (including an evidentiary hearing and site visit) that have generated a record over 2500 pages long and numerous superior court orders compelling James to abide by the Permanent Injunction and Contempt Order, to restore the rockery comprising the parties' boundary to its former condition, and to pay most of the respondents' attorneys' and experts' fees and costs.

James failed to appeal many of the orders about which he now complains, and fails to even acknowledge the trial court's extensive findings of fact entered over the many years of this litigation. Instead, he makes a frivolous attack on the trial court's "subject matter jurisdiction," and raises baseless constitutional

claims, arguing that he had a right to trial by jury in this purely equitable action and that the trial court denied him the right to notice and an opportunity to be heard. The trial court's equitable jurisdiction, in requiring James to remove his spite fence and abate the nuisance he created along the parties' property line, was sufficiently broad to authorize the court to require James to remediate the rockery he destabilized and allay the court's justifiable concerns, based on unchallenged findings and the trial judge's site visit, that James had undermined support for his neighbor's property.

The trial court granted an award of reasonable fees under RCW 7.21.030(4) supported by extensive findings under the lodestar method that James forced respondents Teresa Wright and Tom Cartwright to incur thousands of dollars to enforce the court's equitable orders. The award of \$75,000 in fees and expenses – an amount substantially less than Wright and Cartwright incurred in enforcing the court's 2007 Injunction and 2009 Contempt Order – was not an abuse of discretion and was not unreasonable given the years of litigation engendered by James' campaign of harassment and his flouting of the trial court's authority to make it stop.

James' appeal is frivolous. This court should affirm and award additional fees on appeal under RCW 7.21.030(4) and RAP 18.9.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the collateral bar doctrine preclude judicial review of the trial court's 2009 injunction, its 2011 contempt order, and its 2012 orders enforcing those orders that James failed to timely appeal?

2. Did the trial court abuse its discretion in requiring James to remove bamboo maintained as a spite fence, remove vegetation that he planted as its functional equivalent, and then restore the rockery that he disassembled and failed to restore as part of his spite fence campaign along the parties' boundary?

3. Did the trial court deprive James of the right to trial by jury by entering equitable orders or deny him procedural due process of law where those orders were entered after notice, after the presentation of evidence, including live testimony, and the court's own site visit?

4. Did the trial court abuse its discretion in awarding fees incurred in securing compliance with the court's equitable and contempt orders under the lodestar method?

5. Are respondents entitled to fees on appeal?

III. RESTATEMENT OF THE CASE

James' overlength brief¹ relies on selective portions of the expansive multi-thousand page record generated by this seven-year litigation to recite a self-serving version of the facts that ignores completely the extensive due process he received and the trial court's factual findings, including those from 2009 and 2011 that he failed to timely appeal and to which he cannot now assign error.

The following restatement of the facts relies on those findings that, as argued below, are verities on appeal. Where appropriate respondents also cite to the substantial evidence before the trial court that supports those few findings to which James has timely assigned error:

¹ James did not obtain permission to file a 56-page brief. See RAP 10.4(b).

A. A Common Grantor Subdivided These Interlocking Waterfront Parcels, Protecting Respondents' View And Lateral Support.

Appellant Devon James and respondents Teresa Wright and Tom Cartwright own adjacent waterfront parcels² on Three Tree Point, in Burien, Washington. (CP 682-83) Wright and Cartwright purchased their property in 1999 and James purchased his in 2001. (CP 683) Their two parcels were created by Frank Friedman's division of a large lot into two, with respondents' home located uphill from James' home. (CP 683) Their lots are irregularly-shaped and essentially interlocking; the "wide" portion of respondents' lot, where their home is located, is on Maplewild Avenue Southwest, uphill from the "wide" portion of James' lot where James' home is located. (CP 683) Respondents' lot includes a narrower, steep and stepped pathway, adjacent to James' lot, that accesses the beach. (CP 683) James' home is essentially at the bottom of the hill, on the beach and includes a narrow driveway, adjacent to the Wright/Cartwright lot, to access Maplewild Avenue. (CP 683, 1380 (site plan showing both properties))

² While this appeal was pending, James sold his home. (App. Br. 16-17)

Because of the configuration of the two lots, a substantial portion of respondents' view of Puget Sound is over James' lot. For this reason, Mr. Friedman, who lived in the Wright/Cartwright uphill home after he subdivided the property and sought to preserve his existing view (CP 686), drafted an easement that preserved the upper lot's right to use the top of the lower lot's garage as a patio and limited the height of the garage or any replacement structure to its existing height. (CP 686) Mr. Friedman also drafted a height restriction that attached to James' lot and limited the height of any construction above the lowest point of the adjoining grade of the public, pedestrian path that crossed both lots parallel to the Puget Sound shoreline (sometimes referred to as the "Indian Trail," because it pre-dates European settlement). (CP 685-86)

In addition, an in-ground swimming pool built by Mr. Friedman continues to exist on the respondents' property, adjacent to a steep slope. (CP 683-84) Mr. Friedman directed that the boundary line between the two lots be set in a semi-circular fashion around the pool, at the upper portion of a rockery supporting a slope down to James' driveway, to preserve the lateral support the

surrounding property provided to the pool. (CP 683-84, 2007-11; 3/4/09 RP 139-40)

B. From 2002 Through 2007, James Undertook A Campaign Of Harassment, Consisting Of Verbal Abuse, Threats, Spite Structures, Surveillance, Violence, And Unsuccessful Abuse Of The Anti-Harassment Process.

Shortly after his 2001 purchase, James took offense at a beach structure that Wright/Cartwright built. (CP 686) He prophetically threatened to follow his mother's lead in engaging in expensive litigation with his neighbors and to "destroy their view of the water." (CP 687-8, FF 25, 30) He repeatedly referred to his campaign against them as his own "jihad." (CP 814, 1343)

Respondents offered to discuss a mutually-agreed solution but James refused to do so. (CP 687) When the City of Burien approved the design and building of respondents' structure, James followed through on his threats by destroying the garage roof/patio that respondents had spent thousands of dollars maintaining at James' request. (CP 686-87, 693) James also built massive, raised planters, a fence to which he attached 10 foot lattice work, and an elaborate structure of poles, netting, structural support, wires, ties, guy lines, and ropes along the parties' common boundary and the upper elevations of his lot to ensure that the

bamboo he planted in those boxes would most effectively block the respondents' view and invade their property. (CP 687-8) James' bamboo quickly grew to a height of 25 feet and significantly blocked respondents' view of Puget Sound. (CP 687-88) James also installed a vapor light focused directly into Wright's and Cartwright's living room windows. (CP 688)

James escalated his harassment against Teresa Wright. He smashed a 2 x 4 into a fence near Teresa's head, and sprayed her with a garden hose while calling her vile names. (CP 689) On one occasion James tailgated Teresa while she was driving with her six year old daughter, following within inches of their car. (CP 53-54) On another he swerved his car, fishtailing toward Teresa and her daughter when they were walking home from school on an unprotected shoulder near the parties' homes. (CP 689, 55) He surveiled, verbally taunted and threatened Teresa. (CP 689) He brandished what appeared to be a firearm in a threatening manner toward Tom Cartwright, later claiming it was a toy gun. (CP 690)

James' campaign of terror forced Teresa and Tom, at one point, to place their home on the market. James stole their "for sale" flyers so prospective buyers could not see them. (CP 689)

He spray-painted the exterior wall of respondents' pool house. (CP 689-90) He installed vapor lights at the peak of his roof that he directed into their bedroom windows. (CP 690) He piled his dogs' fecal waste along the property line, concentrating the foul smell as close to Tom and Teresa as possible. (CP 690) James' harassment was comprehensive and it was relentless.

In 2006, James turned to the courts as a means to harass his neighbors. He sought a preemptive but baseless petition in district court for an anti-harassment order against Wright and Cartwright. (CP 53-54, 58-60; *see also* App. Br. 3-4) After a two-day evidentiary hearing, King County District Court Judge Elizabeth Stephenson denied James' petition and ordered James to have no contact with the Wright, Cartwright and their daughter for one year. (CP 77-78, 80-81, 691) When James repeatedly violated that one-year order, James was charged criminally. (CP 691) In addition, Judge Stephenson extended the anti-harassment order for an extraordinary ten-year term to 2017. (CP 90, 691, 1964-65, 1967-88)

C. In 2007, James Continued His Campaign Of Harassment By Filing Baseless Civil Litigation In Which Wright And Cartwright Prevailed And, In 2009, Obtained A Permanent Injunction.

In 2007, James filed this retaliatory lawsuit against his neighbors, alleging adverse possession, nuisance and malicious prosecution among other claims. (CP 682) Several of his claims were dismissed at summary judgment in 2008. (CP 682)

On May 15, 2009, after a nine-day trial, King County Superior Court Judge Hollis Hill (“the trial court”) denied all of James’ remaining claims. (CP 692-94) Finding “evidence of malice on [James’] part replete throughout the record of this case,” (CP 683), the trial court awarded statutory damages and attorneys’ fees to Wright and Cartwright under the Anti-SLAPP statute, RCW 4.24.510. (CP 694-99)³ The trial court also found James liable for maintaining a “spite fence” under RCW 7.40.030:

[James] erected a structure intended to spite, injure and annoy the [respondents], one that caused significant damage to [respondents’] enjoyment of their property by significantly damaging their view and by causing them significant clean up responsibilities given the way that the bamboo grows and the need to trim the branches which grow over their property and

³ The Court declined to award fees under RCW 4.84.185 because it did not “find that [James’] **entire** action was frivolous.” (CP 699 (emphasis added))

dig up rhizomes from the bamboo that grows into their property in order to keep the plants from spreading.

(CP 695)

The court concludes that the erection of a structure to ensure that the bamboo grows to its full height of 25 feet or more, well over the height needed to satisfy [James'] privacy and aesthetic concerns, serves no reasonable purpose for [James] and therefore falls within the spite fence statute.

(CP 695-96)

The trial court also found that James' bamboo, the related structures and the campaign of harassment against his neighbors created a nuisance:

[James] has substantially and unreasonably interfered with the Cartwrights' use and enjoyment of their property by the acts described in Findings of Fact 37 through 43 and by planting the bamboo and constructing structures to support the bamboo's growth to spite the Cartwrights as described above in Findings of Fact 37 through 43 and by planting the bamboo and constructing the structures to support the bamboo's growth to spite the [respondents] as described above. [James'] acts led [respondents] to obtain an anti-harassment restraining order, which is now in effect until 2017. His acts have annoyed and endangered the comfort of the Cartwrights and have lessened the Cartwrights' personal enjoyment of their property.

(CP 698) James did not, and has not now, challenged the trial court's findings and conclusions.

Although James removed most of his spite structures and trimmed his bamboo to the 12 foot limit in the midst of trial, the trial court remained “concerned that [he] could re-construct them in the future.” (CP 696) The court was aware that James was more than willing to ignore and find creative ways to circumvent the court’s order and therefore entered a Permanent Injunction prohibiting James from maintaining any “structure” that could support bamboo at a height greater than 12 feet. (CP 696-99, 718-21)

The trial court’s unchallenged Permanent Injunction

permanently enjoin[ed] [James] and his spouse, officers, agents, servants, and employees from erecting any structure on his property . . . , which structure has as one of its purposes to support the bamboo planted on the [James’] Property to grow higher than its now existing height of twelve (12) feet. The term “structure” as used herein, includes but is not limited to any piece of work artificially built up or composed of parts joined together in some definite manner, such as by ropes, guy lines, stakes, poles, lattice work, netting, and/or any other such means.

(CP 719) The court also permanently enjoined James from preventing bamboo from encroaching Wright/Cartwright’s property,

allowing any of the bamboo planted on [his] property and any additional bamboo that may be planted from time to time, and its rhizomes, culms, branches, or any part of it to encroach upon the [respondents’] property.... [James] is ordered to take any and all measures necessary to prevent the bamboo planted

on [James'] property from encroaching onto [respondents'] property.

(CP 719-20)

The court also ordered James to reduce the height of a fence he built and from shining lights into his neighbors' windows:

[James] is further enjoined from installing additional outdoor lighting on his property that would have the effect of shining into [respondents'] windows. [James] is further enjoined to ensure that outdoor lighting on his property not be directed at [Wright/Cartwright's] property.

(CP 720) Reflecting its concern that James was unlikely to comply with its orders, the trial court repeatedly made express its intent to retain jurisdiction to continue to enforce its orders:

This Court shall retain jurisdiction over this case for the sole purpose of reviewing, as necessary, whether or not [James] is complying with this Permanent Injunction. In the event that the [respondents] raise an argument that [James] is not complying with or reasonably dealing with the terms of this Permanent Injunction, this Court, under its continuing jurisdiction, shall review the matter and at that time make a determination and entry of an additional order, as necessary to accomplish the terms of this Permanent Injunction.

(CP 720)

The court ordered that it would award attorneys' fees and costs related to any action respondents would be forced to take to enforce the Permanent Injunction:

If any of the Court's injunctions, as described in these Conclusions of Law, are violated and the [respondents] in subsequent litigation, are successful in proving a violation of this Injunction, the [respondents] may be entitled to a judgment against [James] for their reasonable attorneys' fees and costs related to or arising from their enforcement efforts.

(CP 698, 720)

D. In 2011, The Trial Court Found James In Contempt Of Its Permanent Injunction.

James appealed the trial court's Findings of Fact and Conclusions of Law and Permanent Injunction, but soon abandoned his appeal. (CP 2571) Instead, and continuing the pattern found by the trial court, James sought new ways to circumvent both the letter and intent of the trial court's orders and injunction. Wright and Cartwright spent two years, from 2009 through early 2011, trying to avoid additional litigation, attempting to negotiate with James to comply with the trial court's Permanent Injunction. When those efforts failed, Wright and Cartwright were forced to hire counsel, re-hire bamboo experts, and seek relief from James' post-trial plantings and his systematic removal of their rockery in the course of building additional spite structures to support additional bamboo and other plantings. (CP 1290-1408)

On April 22, 2011, after visiting the site to view the bamboo, planting, spite fence and rockery issues firsthand (CP 920; CP 1657-59, 1661), the trial court reaffirmed and clarified its May 15, 2009 Permanent Injunction and found James in contempt of court for failing “to take any and all measures necessary to prevent the bamboo planted on [his] property from encroaching” onto the [respondents’] property. . . [and by] erecting structures to support the bamboo planted on his property to grow higher than twelve feet.” (CP 1001) The court also found that James “removed survey markers between the properties” and “removed portions of the rockery, which provides lateral support for the [respondents’] pool, and failed to return it to its prior condition. (CP 1002) In addition, the court found:

- James failed to stop the continuing invasion of his bamboo onto respondents’ property. (CP 1001-03)
- He constructed additional spite structures to support the growth of bamboo over 12 feet. (CP 1001-03)
- He rebuilt and expanded a large planter box described in the court’s 2009 Findings of Fact. (CP 1002-03)
- He removed survey markers between the parties’ properties. (CP 1002-03)

- In a continuing effort to plant invasive and view-blocking vegetation, he removed portions of the rockery which provides lateral support to the respondents' property, installed wood planter boxes or retaining walls, and failed to return the rockery to its prior condition. (CP 1002-03,1343)
- He failed to remove the sodium light that continued to serve no purpose other than to shine into respondents' windows. (CP 1003)

The trial court's Contempt Order required James to comply with all recommendations of respondents' bamboo expert to prevent encroachment of bamboo onto respondents' property. (CP 1002) This included, but was not limited to, "removing the existing bamboo along the shared property line, installing a proper seamless barrier, and replanting any bamboo to no closer than three to five feet from the shared boundary." (CP 1002) The court required James to pay remedial sanctions of \$200 per day until he fully complied or, alternatively, required James to:

remove any bamboo within three feet of the . . . shared property line and replace it with an ornamental shrub species that is not invasive [and] must be maintained at a height of no more than 12 feet from the lowest point of the Indian Trail.

(CP 1002)

The court ordered James, again under threat of a \$200 per day penalty to "remove any structures that are being used to support the bamboo planted on his property to grow higher than

twelve feet” and reduce the height of all bamboo on his property to 12 feet in height. (CP 1003) Under threat of a \$200/day fine, the trial court again ordered James to remove the lights he mounted at the peak of his roof and in his driveway. (CP 1003) It ordered him to “pay the cost of replacing the survey markers between the two properties that he removed within 30 days.” (CP 1003) The court also ordered James to replace the rockery, which it had previously determined provides lateral support for the Cartwright pool, and return it to its prior condition. (CP 1003)

Finally, the trial court ordered James to reimburse respondents for any damage caused by comprehensive bamboo removal, to pay the Wright/Cartwright’s attorneys’ fees and costs “incurred to enforce this court’s May 15, 2009 permanent injunction” and to reimburse respondents \$923.40 for the costs of retaining a bamboo expert to ensure James’ compliance with the court’s orders concerning bamboo control. (CP 1002-03)

James did not appeal the trial court’s Contempt Order. But he did nothing to prevent the continued invasion of bamboo on to the respondents’ property. He constructed additional spite structures to support over 30 additional trees and shrubs that he

intended to substitute for the view-blocking bamboo he had been ordered to control or remove and that violated or would quickly grow to violate the court's ban on vegetation over 12 feet in height, and he refused to return the rockery to its prior condition (CP 1363-73, 1644-64)

Respondents again attempted to address the bamboo, substitute planting and rockery issues without court involvement. They consulted again with the expert arborist (Mr. Greenforest) whose testimony was accepted by the trial court at trial in 2009 and again when issuing its 2011 Contempt Order, and a geotechnical engineer (Mr. Roberts) to confirm how the rockery, particularly as it was modified with a wood planter box or retaining wall, must be properly restored. (CP 1363-73) In October 2011, Wright and Cartwright asked James to address violations of the contempt order. (CP 1363-73)

E. James Continued To Oppose The Trial Court's Enforcement Of Its Orders And In 2012, After Several Hearings, Including An Evidentiary Hearing, Ordered James To Remove Offending Substitute Vegetation, Restore The Rockery That He Removed And The Support That He Undermined.

James ignored respondents' request. He filed a "Motion for Entry on Land and Removal of Bamboo" on January 14, 2012, (CP

1188), requiring Wright and Cartwright to respond through counsel and to retain a bamboo expert (Mr. Magnotti). The trial court denied James' motion and ordered him to appear to show cause "why all bamboo should not be removed from his and the defendant's property due to his continuing failure to contain said bamboo as ordered by this Court May 15, 2009." (CP 1286-87) After another hearing, the trial court issued its March 27, 2012 Order Compelling Removal of Bamboo which definitively resolved the bamboo issue in respondents' favor. (CP 1582-4) That order required James to "hire [respondents' bamboo expert] Bruce Magnotti to supervise the removal of all bamboo on plaintiff's and defendants' property west of the Indian Trail," and to pay all of Wright/Cartwright's attorney fees and expert costs incurred in responding to James' motion. (CP 1583)

James did not appeal the March 27, 2012 Order. Though he refused to hire Mr. Magnotti as directed by the court, he finally removed the bamboo, but still refused to repair his rockery and or remove substitute plantings as required by the Contempt Order.

On April 12, 2012, after an evidentiary hearing (CP 1655-70), the trial court, prohibited James from substituting view-

obstructing vegetation for previously-banned bamboo by ordering that James maintain substitute plantings at a height no greater than 12 feet:

[p]lantings installed to replace bamboo pursuant to paragraph 3.3 of this Court's 4/22/11[Contempt] Order must be maintained at a height of no greater than 12 feet above the lowest point of the Indian Trail. No ornamental plantings not referred to in the preceding sentence which were installed since the issuance of the May 15, 2009 Permanent Injunction may be supported to grow above 12 feet.

(CP 1671) The trial court also ordered the parties to retain an independent geotechnical engineer

for the purpose of advising the Court 1) whether any reconfiguration of the James property known as the "rockery" done by or on behalf of Mr. James since the Court's entry of it[s] Permanent Injunction has destabilized the Wright-Cartwright property in any way; 2) if the Wright-Cartwright property has been destabilized by Mr. James['] reconfiguration of the "rockery" what, if anything can be done to secure and stabilize that Wright/Cartwright property; and 3) the estimated cost of any repair/reconfiguration/stabilization, if any.

(CP 1670-71)

The parties agreed to hire one of the engineers recommended by their respective engineers, Mr. Merriman. (CP 1676) Before Mr. Merriman had a chance to inspect the rockery, however, James completed significant remediation work on the

rockery, and in the process, he both admitted its unstable condition and sought to minimize its defects before the independent expert could inspect it. (CP 1711-12, 1718) His crew spent several days moving trees and placing rocks along the fence line, and they removed at least three large destabilizing trees that James had previously planted from the hillside and replaced them with smaller trees and rocks. (CP 1711-12, 1718)

Mr. Merriman visited the newly-configured and partially stabilized rockery on May 2 and issued his conclusions via an email report as specified in his engagement letter that same day. (CP 1701-02, 1906-07) James had stilted the analysis by ensuring that Mr. Merriman inspected the rockery after James had completed several days of remediation work. While he concluded that he did not believe any “major problems” existed, Mr. Merriman found that “two ‘details’ . . . need to be cleaned up in order to fully support the soil under the [respondents’] property.” (CP 1701, 1906)

First, he found that James had “remov[ed] subjacent support of some of the soils on the [respondents’] property as a result of removing some of the rockery rocks” (CP 1701, 1906) Mr. Merriman recommended the installation of a “2 or 3 block high wall to support

the soils [at the top of the slope] so they do not continue to ravel and undermine the [respondents'] property." (CP 1701, 1906)

Second, Mr. Merriman recommended replacement of the wood timbers Mr. James installed that would eventually rot and fail and that were, at the time of his visit, "holding back 2 to 3 feet of soils which are in turn is [sic] holding back the soils under the Cartwright property" with "a more 'permanent' solution that is designed to resist the lateral soil loads." (CP 1701, 1906-7)

Respondents' counsel contacted James' counsel to again determine "whether we can submit an agreed plan to the Court rather than asking her to formulate one for us." (CP 1703) James and his counsel again refused to respond, but rushed headlong into incomplete remediation. (CP 1720-21) A construction crew appeared unannounced on May 23, 2012 and without any attempt to coordinate work on rockery that exists on both parties' property. (CP 1720-21) They proceeded to remove the rotting wooden timbers James had installed from February to July of 2010 after removing a significant quantity of rocks and soil from both his and respondents' portions of the rockery to shore up the remaining rockery and form the northern side of the bamboo planting box he

built in 2010. (CP 1720-21) Admitting the need to fulfill Mr. Merriman's second requirement, the crew replaced the timber wall with a concrete block wall that was roughly consistent with the wall suggested by Mr. Merriman and engineered by James' geotechnical expert. (CP 1720-21, 1754-55, 1757-58) Unfortunately, more soil collapsed on the upper slope and James failed to address Mr. Merriman's first requirement to stabilize the raveling occurring on that upper slope of the rockery. (CP 1720-2, 1755-56)

After another month of opposition to the motion to confirm Mr. Merriman's findings, the trial court issued an order on June 28, 2012, again asking Mr. Merriman, as the court's advisor, to answer specific questions about the impact of James' post-2009 rockery disassembly and wooden retaining wall work, the impact of James' subsequent remediation to address the court's previous requirements, and the cost of any additional remediation work Mr. Merriman recommended. (CP 1894-95)

On September 7, 2012, the trial court entered an Order Confirming Final Report of Kurt Merriman and Granting Award of Fees and Costs. The court found:

1. [James'] post trial reconfiguration of his rockery removed subjacent support of some of the soils on [respondents'] property.
2. There is no causal connection between the deck settlement and cracking around [respondents'] pool and [James'] post trial rockery work.
3. At present, there is no evidence of slope instability.
4. [James] has completed all but one repair and reconfiguration of his property.
5. In order to permanently stabilize support of [respondents'] property and prevent raveling and undermining of [respondents'] property, the exposed soils on the low slope between the [respondents'] fence and [James'] fence must be protected.

(CP 2023-24)

The court then ordered James to “complete the second remediation step to stabilize the top of the slope as outlined on page 2 of the Final Merriman report, at Mr. James' expense” and to pay Wright/Cartwright's “reasonable attorneys' and experts' fees and expenses related to [their] prevailing efforts to enforce the Court's April 22, 2011 [Contempt] Order, and the [sic] securing stabilization of the slope” (CP 2023)

On James' motion for reconsideration, the trial court revised its order concerning the manner in which James was required to

finish Mr. Merriman's second requirement to stabilize the top of the slope. (CP 2232-33)

F. By October 2012, The Bamboo, Substitute Planting, And Rockery Issues Had All Been Definitively Resolved In Respondents' Favor, And They Were Awarded The Fees And Costs They Incurred Forcing James To Follow The Trial Court's Orders. James And His Counsel Forced Wright And Cartwright To Incur Additional Fees Over The Next Five Months.

Because the bamboo, substitute planting, and rockery issues were resolved in their favor, the court awarded Wright and Cartwright the fees and costs they incurred forcing James to follow the trial court's orders. (CP 2233) The trial court initially entered Findings of Fact and Conclusions of Law and Judgment on October 18, 2012, granting Wright/Cartwright all their requested fees, in the amount of \$64,672.60. (CP 2234-43) James moved for reconsideration on the ground that his counsel had failed to timely respond to the fee request. (CP 2259-61)

The trial court found that "[n]ormally, an attorney's neglect or incompetence in responding to a dispositive motion will not constitute sufficient grounds to vacate a judgment entered on a motion pursuant to CR 60," but concluded pursuant to CR 59(a)(1) "that the inaction of [James'] counsel has materially affected [his]

substantial rights and substantial justice has not been done.” (CP 2360) Erring yet again on the side of ample due process, the court vacated its October 18, 2012 Judgment, (CP 2360-61), and on December 6, 2012, entered new Findings of Fact and Conclusions of Law granting respondents \$55,441.50 in attorneys’ and experts’ fees and expenses. (CP 2432-41) After additional briefing and the entry of additional Findings and Conclusions supporting the award of additional fees and costs, on February 1, 2013, the trial court entered final judgment in favor of respondents in the amount of \$75,179.08. (CP 2503-06; 2557-59)

IV. ARGUMENT

A. This Court’s Review Is Limited To The September 2012 Order Modifying Its Previous Equitable Orders And The Subsequent Attorney Fee Orders Because James Did Not Timely Appeal From The Trial Court’s Earlier Equitable Orders That He Now Seeks To Collaterally Attack On Appeal.

1. James Failed To Timely Appeal The 2009 Injunction, The 2011 Contempt Order Or The 2012 Orders Requiring Him To Remove Bamboo, Additional Spite Fence Structures, and Substitute Plantings.

James timely appealed only the September and October 2012 orders modifying the trial court’s Permanent Injunction and Contempt Order addressing the rockery under his October 31, 2012

Notice of Appeal. (CP 2291) His appeal is timely only as to these September and October 2012 orders and the trial court's subsequent attorney fee awards. See RAP 2.4(f), (g).

A party must seek review within 30 days of the entry of an appealable order for this court to acquire appellate jurisdiction. RAP 5.2; **Carrara, LLC v. Ron & E Enterprises, Inc.**, 137 Wn. App. 822, 825-26, 155 P.3d 161 (2007) (dismissing appeal filed more than 30 days after entry of appealed order); **Bushong v. Wilsbach**, 151 Wn. App. 373, 213 P.3d 42 (2009) (same). James' October 31, 2012 Notice of Appeal (CP 2291) is untimely for this court to review many of the appealable orders challenged in his brief. James is bound by the final and appealable equitable orders from which he failed to appeal within 30 days.

The trial court entered its 2009 Permanent Injunction as part of its final judgment following a seven day trial. (CP 681, 718) The 2009 injunction was appealable as a matter of right. RAP 2.2(a)(1); **Greyhound Lines, Inc. v. City of Tacoma**, 81 Wn.2d 525, 527, 503 P.2d 117 (1972). James voluntarily dismissed his appeal from that final injunction in 2009. (CP 2571)

James listed in his October 31, 2012 notice of appeal the trial court's April 22, 2011 contempt order. (CP 1001, 2291) That too was a final and appealable order. See **Wagner v. Wheatley**, 111 Wn. App. 9, 15-16, 44 P.3d 860 (2002) ("An adjudication of contempt is appealable if it is a final order or judgment; i.e., the contumacy – the party's willful resistance to the contempt order – is established, and the sanction is a coercive one designed to compel compliance with the court's order."); **Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.**, 61 Wn. App. 725, 812 P.2d 488 (1991). James' attempt to appeal the 2011 Contempt Order, eighteen months after it was entered, comes too late for this court to exercise appellate jurisdiction.

The trial court's March 2012, April 2012 and June 2012 orders concerning bamboo, the height of substitute plantings, and the appointment of a geotechnical advisor (CP 1582-84; 1670-71, 1894-95), further enforced the injunction and the contempt order due to James' continued non-compliance. These orders were also appealable. See **State ex rel. Bradford v. Stubblefield**, 36 Wn.2d 664, 673, 220 P.2d 305 (1950) ("order constituted a modification of

the earlier injunction and would seem to be an appealable order.”)⁴
James’ October 2012 notice of appeal was filed more than 30 days
after these orders .

James is bound by the trial court’s unappealed and enforceable orders, including its May 15, 2009 permanent injunction (CP 717), its April 22, 2011 Contempt Order enforcing and clarifying the May 15, 2009 Injunction (CP 1001), and the three orders entered in 2012 further enforcing both its 2009 injunction and its 2011 contempt/clarification order. (CP 1582-84, 1670-71, 1894-95) Each of those orders now establishes the law of the case. See ***Beltran v. State Dept. of Social and Health Services***, 98 Wn. App. 245, 254, 989 P.2d 604 (1999) (unappealed summary judgment is “now the law of the case”).

2. The Trial Court’s 2011 And 2012 Contempt Orders Are Not Void For Lack Of Subject Matter Jurisdiction.

The collateral bar rule precludes James’ challenge to the trial court’s 2011 Contempt Order enforcing its 2009 Permanent Injunction (CP 1001), and its April 12, 2012 order (CP 1670) that he

⁴ Orders granting or denying modification of injunctions are appealable orders under federal law. 28 U.S.C. § 1292(a)(1); see ***U.S. v. Oakland Cannabis Buyers’ Cooperative***, 532 U.S. 483, 488, 121 S. Ct. 1711, 149 L.Ed.2d 722 (2001).

claims unduly modified or expanded the trial court's 2009 Permanent Injunction. James' attempt to avoid the collateral bar rule by arguing that the previous unappealed orders are "void" is utterly without merit.

"A contempt judgment will normally stand even if the order violated was erroneous or was later ruled invalid." **Matter of J.R.H.**, 83 Wn. App. 613, 616, 922 P.2d 206 (1996) (declining to review validity of order underlying contempt order because it was not timely appealed); **Griffin v. Draper**, 32 Wn. App. 611, 614, 649 P.2d 123 (appeal of contempt order did "not bring forward the original judgment for review because the appeal is more than 30 days from the judgment"), *rev. denied*, 98 Wn.2d 1004 (1982).

An order is "void" only where the trial court lacked jurisdiction over the person or over the subject matter of the dispute. **Estates of Smaldino**, 151 Wn. App. 356, 366, 212 P.3d 579 (2009), *rev. denied*, 168 Wn.2d 1033 (2010); **State v. Noah**, 103 Wn. App. 29, 46, 9 P.3d 858 (2000), *rev. denied*, 143 Wn.2d 1014 (2001). The superior court's "subject matter jurisdiction refers to the general category of controversies it has authority to decide and is distinct from the facts of any specific case." **Singletary v. Manor**

Healthcare Corp., 166 Wn. App. 774, 782, 271 P.3d 356, *rev. denied*, 175 Wn.2d 1008 (2012) (App. Br. at 36). This court has recently rejected similar attempts to narrowly define the court's subject matter jurisdiction in cases involving the use or possession of real property:

Whether the superior court ruled correctly or incorrectly in this particular case, it did not lack subject matter jurisdiction. The court's subject matter jurisdiction in cases involving the title or possession of real property is expressly granted by the state constitution and has not been "vested exclusively in some other court." Wash. Const. art. IV, sec. 6. We narrowly construe exceptions to the constitution's jurisdictional grant.

MHM & F, LLC v. Pryor, 168 Wn. App. 451, 460, ¶ 20, 277 P.3d 62 (2012).

James invoked the superior court's subject matter jurisdiction in 2007 by filing a complaint that sought to adjudicate the parties' respective rights and liabilities over their shared boundary. (CP 3-9) See Art IV, § 6 ("The superior courts have original jurisdiction in all cases in equity . . ."). Through its Permanent Injunction, the trial court imposed equitable relief in 2009 and again when it ordered compliance with its injunction in its 2011 Contempt Order.

James' argument that the trial court lacked jurisdiction to address in its 2011 Contempt Order the rockery that James disassembled while constructing elaborate timber structures to support his planting of invasive bamboo along his boundary with Wright/Cartwright is without merit. Even were the rockery issue not inextricably bound up with James' maintenance of a nuisance and spite fence along the parties' boundary, equity courts have always been able to adopt their decrees to changed conditions and circumstances. See 1 Story, *Equity Jurisprudence* § 28 (14th ed. 1918); 1 Pomeroy, *Equity Jurisprudence* §§ 111, 170, 175a (5th ed. 1881).

The trial court's injunction and its orders of contempt based on findings made after a nine day trial were well within its equitable jurisdiction, as were its orders modifying the equitable relief it provided based on James' noncompliance with its orders. James' argument that the trial court exceeded its "subject matter jurisdiction" by modifying its Permanent Injunction or Contempt Order to require James to refrain from substituting other vegetation for bamboo and allowing it to grow over 12 feet and to restore the

rockery and remediate the instability he caused to the respondents' property is patently without merit.

B. The Scope Of Equitable Relief Imposed By The Trial Court Was Not An Abuse of Discretion, And Was Supported By Substantial And Admissible Evidence.

Even were the court inclined to expand the scope of review beyond the September and October 2012 orders requiring James to restore the rockery and the attorney fee and expense awards that James chose to timely appeal, the trial court's 2011 and 2012 enforcement orders were well within its discretion. James alleges that he attempted to comply with the trial court's injunction by dismantling his spite fence, but the trial court found that in the process he continued to damage the Wright/Cartwright property by, among other things, failing to control the height and footprint of this bamboo, building additional spite structures to support substitute trees and shrubs to circumvent the trial court's injunction, and removing the rockery that provided some measure of slope stability to their property so that he could build more wood structures to support more bamboo planting along another stretch of the parties' shared boundary. (CP 1001-02) The trial court's findings were supported by substantial and unchallenged evidence on appeal and

its equitable orders enforcing and/or modifying its injunction were well within its discretion, and based on substantial evidence, including the court's own site visit. (CP 920; 3/8/11 RP 37-38)

1. Standard of Review: The Court Reviews The Scope of The Equitable Relief Ordered By The Trial Court For Abuse of Discretion.

James' challenge to the trial court's equitable orders is reviewed for abuse of discretion:

The duration and scope of an injunction are decided on the facts of each case at the trial court's discretion. **Boeing Co. v. Sierracin Corp.**, 108 Wn.2d 38, 63, 738 P.2d 665 (1987); **Brown v. Voss**, 105 Wn.2d 366, 372, 715 P.2d 514 (1986). The trial court's decision exercising that discretion will be upheld unless it is based upon untenable grounds, or is manifestly unreasonable, or is arbitrary.

King v. Riveland, 125 Wn.2d 500, 515, 886 P.2d 160 (1994). Accord, **Washington Fed'n of State Employees, Council 28, AFL-CIO v. State**, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). This court also reviews for abuse of discretion the trial court's contempt sanctions that enforce its previous orders. **In re Marriage of Davisson**, 131 Wn. App. 220, 224, 126 P.3d 76, 158 Wn.2d 1004 (2006); **Marriage of James**, 79 Wn. App. 436, 439-40, 903 P.2d 470 (1995).

This court reviews the facts found by the trial court to support its equitable orders for substantial evidence and its evidentiary decisions in refusing to strike a declaration for abuse of discretion. ***Sunnyside Valley Irrigation Dist, v. Dickie***, 149 Wn.2d 873, 879, 73 P.3d 369 (2003); ***Engstrom v. Goodman***, 166 Wn. App. 905, 910, 271 P.3d 959, *rev. denied*, 175 Wn.2d 1004 (2012). Unchallenged findings are verities on appeal. ***McCleary v. State***, 173 Wn.2d 477, 514, 269 P.3d 227 (2012).

2. The Trial Court's 2011 And 2012 Decisions Directing James To Restore The Rockery Were Supported By Substantial Evidence And Within The Trial Court's Discretion.

The boundary line between the parties' properties lies on a steep slope, with the Wright/Cartwright property on the uphill portion. (FF 11-12, CP 683-84 (unchallenged)) The trial court found, based on her own site visit as well as Teresa Wright's declaration, (CP 891-910), that under the pretense of removing bamboo, James removed survey markers between the parties' property and removed portions of the rockery that marked this sloping boundary. (CP 1003; CP 1660) James does not deny it.

James instead argues that there was no evidence that his removal of the rockery undermined any portion of the adjacent

uphill property. (App Br. 41-44) But Judge Hill found, based upon the advisory, independent geotechnical report of Mr. Merriman that James' reconfiguration of the parties' rockery boundary had both undermined and caused raveling at the top of the slope and created an eventually-rotting wood planter box or retaining wall that required replacement with a concrete wall, (CP 1906), that James "removed subjacent support" for the Wright/Cartwright property and was required to take steps to "prevent raveling and undermining of [Respondents'] property." (CP 2523-24; see CP 1906-07) Even should this court review those findings, they are supported by substantial evidence.

The trial court's September 7, 2012 rockery remediation order was inextricably linked to its 2009 findings in James' unsuccessful boundary claim as well as its resulting Permanent Injunction that directed James to remove the bamboo and supporting structures that comprised his spite fence along the parties' boundary. There, the trial court found that the parties' common grantor set the boundary line to provide the uphill property, including the pool, with lateral support. (FF 11, CP 683-

84)⁵ The trial court did not exceed its authority, let alone its broad equitable discretion in modifying its prior injunction upon James' post-trial reconfiguration of and damage to the rockery as he continued his bamboo planting campaign with the construction of wood planter boxes and retaining walls.

3. The Trial Court's Discretionary Evidentiary Decisions Provide No Basis For Reversal.

James' evidentiary challenges are meritless. James concedes that his mother's declarations contained inadmissible hearsay. (App. Br. 44) They also contained an irrelevant narrative attack on Judge Hill's previous unappealed 2009 Findings. (CP 1503-17, 1520-31) The trial court did not abuse its discretion in striking her declarations.

James argues that "the admissible [parts] should have been considered," but does not tell the court what specific testimony was not hearsay, how it was relevant (it was not) and where he preserved his argument below (he did not). James' failure to support his evidentiary arguments with legal argument and citations to the record, standing alone, is grounds to reject them. ***Bercier v.***

⁵ Although now a verity on appeal, that finding too was supported by substantial evidence. Friedman testified in 2009 that the rockery "was there to hold up the land." (3/4/09 RP 140; CP 2007-11)

Kiga, 127 Wn. App. 809, 824, 103 P.3d 232 (2004), *rev. denied*, 155 Wn.2d 1015 (2005).

Moreover, Judge Hill's evidentiary rulings were harmless. James cannot show how his mother's declarations would have changed the trial court's decision, which was based on uncontroverted evidence that James damaged the rockery, including the court's own site visit, and expert testimony regarding the extent of the damage. See *Veit ex rel Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 117-18, 249 P.3d 607 (2011).

James also complains that only the "hearsay, vague and conclusory" testimony of Teresa Wright supported the trial court's initial concerns that James' removal of the rockery undermined lateral support for the pool. (App. Br. 41) James is wrong. In her declaration, Teresa stated that the "former owner of the property testified at trial that this rockery aided in the lateral support of the pool." (CP 799) The record, of which the trial court was well aware, contains this testimony of the former owner, whom James cross-examined. (3/4/09 RP 140) It is not hearsay. ER 804(b)(1). Moreover, the trial court found in 2009 that the boundary line

containing the rockery was designed “to provide the pool with lateral support.” (FF 11, CP 683-84) This 2009 finding provides substantial evidence to support the trial court’s concerns that removal of the rockery may undermine the uphill lot’s lateral support, regardless whether it considered Teresa Wright’s declaration.

C. The Trial Court Did Not Abridge James’ Right To Due Process Or To Trial By Jury.

James’ constitutional arguments are frivolous. James was not entitled to a jury trial on the purely equitable issues relating to the trial court’s injunction and its order of contempt. Over the course of six years, the trial court gave James more process than any litigant could possibly be due.

James cites no authority to support his contention that the trial court’s Contempt Order of April 22, 2011 (CP 1001-03), violated his right to trial by jury under Washington Const. Art I, § 21. There is no right to trial by jury in civil contempt proceedings because they are purely equitable in nature, *In re Marriage of Haugh*, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990), as was the trial court’s injunction. *State ex rel. Dep’t of Ecology v. Anderson*, 94 Wn.2d 727, 730, 620 P.2d 76 (1980). “Where an action is purely

equitable in nature, there is no right to a trial by a jury.” **Brown v. Safeway Stores, Inc.**, 94 Wn.2d 359, 617 P.2d 704 (1980).

James’ due process argument is equally frivolous. “Due process requires only that a party receive proper notice of proceedings and an opportunity to present [its] position before a competent tribunal.” **Rivers v. Washington State Conference of Mason Contractors**, 145 Wn.2d 674, 697, 41 P.3d 1175 (2002); **Hanson v. Shim**, 87 Wn. App. 538, 551, 943 P.2d 322 (1997), *rev. denied*, 134 Wn.2d 1017 (1998).

James got due process in spades. His own brief refutes his contention that there were “no pleadings about the rockery issues,” (App. Br. at 39), as he concedes that he was served with a motion and declaration on February 16, 2011 in which Teresa Wright complained, among other things, that James had removed not only her survey markers, but large portions of the rockery. (CP 799) (App Br. 39) He ignores that the trial court, after hearing oral argument and with James’ consent, conducted a site view of the property to view the contested boundary and the rockery first hand. (CP 920; 3/8/11 RP 38) He ignores that he requested and received the right to discovery and an evidentiary hearing where he was

allowed to present his own expert and cross examine the respondents' expert. (CP 1670) He ignores that the trial court ordered the respondents to cooperate with him and hire an independent expert who then provided advisory opinions upon which the trial court ultimately based her rockery remediation order. James cannot complain that he lacked notice of an issue that he himself created and that the trial court repeatedly addressed in multiple court hearings from March 2011 through August 2012.

James had notice and an opportunity to address each of the issues raised at each stage of the proceedings. His due process argument is utterly devoid of merit.

D. The Trial Court's Fee Awards, Supported By Extensive Findings, Were Not An Abuse Of Discretion.

1. This Court Reviews The Trial Court's Fee Award Under Its Permanent Injunction And The Contempt Statute For Abuse Of Discretion.

James ignores both the plain language of the unappealed May 2009 Permanent Injunction, which provides for an award of fees in enforcement proceedings (CP 720), as well as the trial court's express statutory authority under RCW 7.21.030(3) to award attorney fees or other expenses in order to make whole a party seeking to ensure compliance with the court's orders:

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

RCW 7.21.030. The trial court has substantial discretion in making an award of attorney fees and expenses under the contempt statute. See *Bering v. SHARE*, 106 Wn.2d 212, 247, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987).

Wright and Cartwright have already addressed James' argument that "rockery/stabilization issues were outside the scope of the Permanent Injunction," (App Br. 45), which is the primary basis for his challenge to the fee award. (Arg. §§ A, B, supra) James argues that a fee award was improper because the trial court's contempt order "entered on 4/22/11 (CP 1001-03) contained no attorney's fee clause." This argument ignores not only the plain language of the order, which expressly required James to pay Cartwright "attorney fees and costs incurred to enforce this court's May 15, 2009 permanent injunction," (CP 1003), but also the trial court's statutory authority to award attorney fees under RCW

7.21.030, even were its previous orders silent on the subject of fees.

James' primary challenge, however, is not to the trial court's authority to award fees, but to the amount of fees it assessed. The trial court entered extensive findings of fact under the lodestar method, establishing the reasonable hours expended by Wright's and Cartwright's counsel, the reasonable hourly rate for their services in a case involving a high degree of patience and perseverance over four years. (CP 2432-41) As James assigns error to only three of those findings (App. Br. xi-xii, Assignments of Error 12, 14-16, challenging findings 1.4, 2.3, 2.5 (CP 2434, 2436-37)), the majority of the trial court's findings are verities for purposes of appeal. ***Diamco, Inc. v. Mettler***, 135 Wn. App. 572, 576, 145 P.3d 399 (2006), *rev. denied*, 161 Wn.2d 1019 (2007).

Since a legal basis exists for the award and the findings are largely verities on appeal, this court's review is limited to determining whether the trial court manifestly abused its discretion in setting the amount of fees. See ***Fisher Properties, Inc. v. Arden-Mayfair, Inc.***, 115 Wn.2d 364, 375, 798 P.2d 799 (1990), *modification denied*, 804 P.2d 1262 (1991). "[I]t is the trial judge

who watches a case unfold and who is in the best position to determine the proper lodestar amount.” *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 351, ¶ 41, 279 P.3d 972, *rev. denied*, 175 Wn.2d 1027 (2012), *quoting Morgan v. Kingen*, 141 Wn. App. 143, 163, ¶ 55, 169 P.3d 487 (2007), *aff’d*, 166 Wn.2d 526, 210 P.3d 995 (2009). Rather than defer to the trial court’s findings, James would have this court ignore the trial court’s extensive familiarity with this litigation and substitute its own judgment for that of the trial court.

2. James Was Charged With That Portion Of The Fees That He Caused Wright And Cartwright To Incur In Opposing James’ Extensive Attempts To Evade The Court’s Equitable Orders.

This trial court did not abuse its discretion in awarding Wright and Cartwright approximately \$75,000 in attorney fees and expenses over four years of litigation for (1) enforcing the trial court’s 2009 Permanent Injunction, (2) ensuring compliance with its 2011 Contempt Order, (3) limiting the height of replacement plants and restoring the rockery in 2012, and (4) litigating their entitlement to attorney fees in 2012 and 2013. Here, the trial court did not blindly adopt counsel’s fee request. To the contrary, it reduced its

award of attorney fees on James' untimely objection and crafted its own extensive findings that James largely ignores.

The trial court scrupulously analyzed "those issues upon which [Wright/Cartwright] did and did not prevail." (CP 2435) James concedes that Wright and Cartwright prevailed on all bamboo related enforcement issues, including those resulting in the 2011 contempt order and the April 2012 orders requiring James to remove bamboo and substitute vegetation growing above the height of 12 feet.⁶

The trial court also properly ordered James to pay fees "related to the [Wright/Cartwright's] prevailing efforts to enforce the Court's April 22, 2011 Order and securing stabilization of the slope." (CP 2024, 2535) Diligently following the lodestar method, it found that the hourly rates charged by respondent's trial counsel, were reasonable given counsel's experience (FF 4.1, CP 2536 (unchallenged)), and that counsel's time was "necessitated by plaintiff's failure to abide by court orders," including both the

⁶ James contends that Wright and Cartwright failed in their "efforts to establish a view easement over the James property" (App Br. 45). They made no such effort, but argued, as the trial court found, that James was using bamboo, planter boxes and substitute vegetation to violate the deed restrictions on his property and the trial court's Permanent Injunction. (FF 2.3, CP 1002; CL 25, CP 698)

injunction and April 22, 2011 contempt order. (FF 4.2, CP 2536 (unchallenged)) After James belatedly challenged the trial court's first award of approximately \$64,000 in fees, the trial court revised its initial award downward by over 15% to approximately \$54,000. (CP 2234-40, 2360-61, 2529-38)

James' contention that the trial court refused to segregate fees is without merit, and ignores its specific finding that James bore the overwhelming responsibility for most of the fees incurred. See ***Collings v. City First Mortgage Services, LLC***, 175 Wn. App. 589, 609, 308 P.3d 692 (2013) ("But for City First's wrongful conduct, Collings would not have been involved in the litigation . . ."). The trial court reduced Wright's and Cartwright's recoverable attorney fees because it did not order the full remediation they requested on the top of the slope and therefore did not entirely prevail on the rockery issue.⁷ The trial court also awarded partial expert fees for Favero Greenforest (horticulture/substitute planning issues), Bruce Magnotti/Seattle Bamboo (bamboo), Tim Roberts (geotechnical/ rockery) and one half of Kurt Merriman's fees

⁷ Cairncoss and Hemplemen recorded fees and expenses of \$54,896.20 from the April 2011 contempt order until September 2012. (CP 2163)

(geotechnical/rockery), finding “some but not all the requested [expert] fees and expenses are reasonable.” (FF. 3.1, CP 2536-37 (unchallenged))⁸ The trial court was sufficiently familiar with these experts’ work to fairly allocate their fees between recoverable and non-recoverable services.

Further, there was nothing unreasonable in the trial court’s award of additional fees incurred due to James’ counsel’s failure to timely oppose the original fee request, and subsequent briefing on the issue of attorney fees. Respondents were entitled to fees in presenting their request for attorney fees and for defending their entitlement to fees. See e.g., *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 378, 798 P.2d 799 (1990).

James cites to inapplicable federal authority to support a conclusory argument that this court should reduce or disallow entirely purported “block billed” time entries, but fails to acknowledge Washington law that requires the trial court to base a fee award on “reasonable documentation” of the work performed:

[for an attorney fee award,] the attorneys must provide reasonable documentation of the work performed. This documentation need not be

⁸ The trial court reviewed a table summarizing all experts’ efforts, and their fees and expenses, together with their invoices. (CP 2392-97)

exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.)

Bowers v. Transamerica Title Insurance Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983). The trial court reviewed each of the challenged time entries and determined that counsel provided sufficient documentation to support the fee award. The trial court here took “an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.” ***Mahler v. Szucs***, 135 Wn.2d 398, 434, 957 P.2d 632, 966 P.2d 305 (1998) (emphasis in original). This court should not second guess its determination.

E. James Is Liable For Attorney Fees On Appeal And His Counsel Should Be Sanctioned.

Wright and Cartwright have needlessly incurred additional attorney fees in defending the trial court’s orders on appeal. James’ challenge to the trial court’s contempt and resulting attorney fee orders mandates an award of attorney fees on appeal under RCW 7.21.030(4) and pursuant to the unappealed and final provisions of the Permanent Injunction. (CP 720) ***R.A. Hanson Co., Inc. v.***

Magnuson, 79 Wn. App. 497, 903 P.2d 496 (1995), *rev. denied*, 129 Wn.2d 1010 (1996).

James and his counsel should also pay sanctions under RAP 18.9. This appeal is utterly devoid of merit. In particular, James' appeal of a contempt order entered 18 months earlier, his attack on the trial court's "subject matter jurisdiction," his frivolous constitutional arguments, and his refusal to acknowledge unchallenged findings of fact, are inexcusable. His counsel should know better. He should be jointly and severally liable for respondents' fees. See **Watson v. Maier**, 64 Wn. App. 889, 891, 827 P.2d 311 ("About half of the practice of a decent lawyer is telling would be clients that they are damned fools and should stop.") (Alexander, J.) (quoting Elihu Root), *rev. denied*, 120 Wn.2d 1015 (1992).

V. CONCLUSION

The record as a whole, rather than the stilted and inaccurate citations to it by James, exposes the breadth of James' harassment and spite of his neighbors. It also confirms the extensive process he was provided while he waged a campaign that the trial court repeatedly sought to halt in a series of orders providing for

equitable relief, most of which James never appealed and are now final. Although the monetary award did not make Teresa Wright and Tom Cartwright whole, it provided a fair assessment of their fees and expenses in the many years it took to secure compliance with the court's orders. James is liable under RCW 7.21.030(4) and the court's injunction for the fees incurred in responding to this appeal. His appeal is frivolous. This court should affirm the trial court's orders and award fees on appeal.

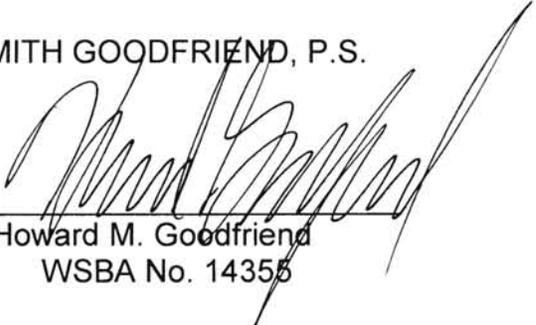
Dated this 4th day of December, 2013.

CAIRNCROSS &
HEMPELMANN, P.S.

By: 

Stephen P. VanDerhoef
WSBA No. 20088

1SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend
WSBA No. 14355

Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 4, 2013, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Stephen P. VanDerhoef Cairncross & Hempelmann 524 Second Avenue, Suite 500 Seattle, WA 98104-2323	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Dan Young Law Offices of Dan R. Young 1000 2nd Ave Ste 3310 Seattle, WA 98104-1019	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 4th day of December, 2013.



Victoria K. Vigoren