

No. 69615-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MIT D. TILKOV and SUSAN L. TILKOV, in their individual capacities and as a marital
community; TIBOR GAJDICS; KATHRYN LYNNE COTTER; and SANDRA D.
HULME,

Appellants/Cross-Respondents,

v.

DAVID L. DUNCAN, in his individual capacity; BLACK PINES, LLC, a Washington
limited liability company,

Respondents/Cross-Appellants.

APPELLANTS/CROSS-RESPONDENTS' REPLY/RESPONSE BRIEF

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I. INTRODUCTION

This appeal presents a question as to the appropriateness of granting summary judgment on this record in relationship to the existence of an express or prescriptive easement, especially where the Trial Court denied a directly competing Motion for Summary Judgment based upon the existence of a material issue of fact. Much of Respondents' response comprises irrelevant editorials and attacks on the character of the Appellants Mit and Susan Tilkov ("Tilkovs"), Tibor Gajdics ("Gajdics"), Kathryn Lynne Cotter ("Cotter"), and Sandra D. Hulme ("Hulme"). Such tactics are typically used where there is an absence of any meritorious legal or factual response.

As to the actual legal issues, Respondents ignore essential facts and unopposed Trial Court conclusions in an attempt to avoid the inevitable reality that there is an issue of fact on all easement claims, and that res judicata and collateral estoppel do not apply. Most importantly, Respondents fail to acknowledge the Trial Court's unopposed finding that the pertinent language relied upon to establish an express easement "was intended to grant an easement" and the ruling in the prior lawsuit upon which res judicata and collateral estoppel is based that: "Defendant Duncan stipulated that the rights granted under the individual deeds to the

lot owners were not the subject of this action.” CP 174. It is these individual deeds on which an express easement is sought.

In their cross-appeal, Respondents promote a narrow application of Washington’s spite structure statute, RCW 7.40.030, to artificially constructed items. Such a narrow interpretation conflicts with the rulings in Lakes at Mercer Island Homeowners Ass’n v. Witrak, 61 Wn.App. 177, 810 P.2d 27, rev. denied, 117 Wn.2d 1013 (1991) and Baillargeon v. Press, 11 Wn.App. 59, 66, 521 P.2d 746 (1974); would destroy the purpose and intent of the statute; and conflict with factually analogous rulings in other states. Finally, Respondents argue there is no substantial evidence to support the Trial Court’s findings of fact on the application of RCW 7.40.030 to an addition to a fence, or a row of Cypress trees that will reach upwards of 60 feet. Respondents do this by ignoring many supportive facts, and asking this Court to re-evaluate its rendition of the facts on a de novo review. The Trial Court’s findings and conclusions are aptly supported by the evidence, including all that it viewed on a site visit, which Respondents insisted be facts upon which the Trial Court could rely.

II. REPLY TO RESPONDENTS' RESPONSE ON APPEAL

A. The Trial Court Erred in Dismissing the Easement Claims.

1. Respondents' Res Judicata and Collateral Estoppel Defenses Have Been Waived or Are Inapplicable.

Respondents first seek to apply res judicata and/or collateral estoppel to the express and prescriptive easement claims. Both have been waived or alternatively do not apply.

i. Respondents Waived Any Res Judicata Defense.

It is true that Respondents raised res judicata as an affirmative defense. CP 522. However, the defense was never presented or argued by Respondents. Generally, “[a] failure to preserve a claim of error by presenting it first to the trial court generally means the issue is waived.” Karlberg v. Otten, 167 Wn.App. 522, 531, 280 P.3d 1123 (2012). Specifically as to res judicata, the defense can be waived where not prosecuted or relied upon, where the relying upon defendant knows of the existence of both causes of action in time to raise the defense. Landry v. Luscher, 95 Wn.App. 779, 786, 976 P.2d 1274 (1999). Respondents’ failure to raise, litigate, or advance the defense constitutes a waiver, and is precluded from review when presented for the first time on appeal. Milligan v. Thompson, 110 Wn.App. 628, 42 P.3d 418 (2002) (failure of

party to raise res judicata in response to motion for summary judgment precludes appellate review under RAP 9.2); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a)).

ii. Respondents Waived the Collateral Estoppel Defense as to the Express Easement Claims.

In arguing for application of collateral estoppel to the express easement claims, Respondents fail to inform this Court that this defense was dismissed at the Trial Court level. In the Trial Court's April 29, 2011, Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment, the Trial Court ruled as follows:

Collateral estoppel does not apply to bar Plaintiffs' claims for express easement or spite fence, and this defense is therefore stricken as to these claims as a matter of law. The Court is deferring [sic] a ruling on whether collateral estoppel bars Plaintiffs' prescriptive [sic] easement claims.

CP 665. This ruling was made because Respondents limited their collateral estoppel defense to the prescriptive easement claims only, and never presented, argued, or opposed Appellants' Motion for Summary Judgment with this defense. CP 554-557. They therefore waived the collateral estoppel defense as to the express easement claims for the same reasons they waived the res judicata defense.

iii. Res Judicata and Collateral Estoppel Do Not Apply to Any Easement Claim.

Res judicata applies where a prior cause of action is identical to a presented claim in four respects: “(1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.” Landry v. Luscher, *supra*, 95 Wn.App. at 783 (citations omitted). The parties must at least have “privity” which arises where there is “a mutual or successive relationship to the same right, property, or subject matter of the litigation.” *Id.* at 784. In terms of the causes of action, there are four considerations:

(1) Would the second action destroy or impair rights or interests established in the first judgment? (2) Is the evidence presented in the two actions substantially the same? (3) Do the two suits involve infringement of the same rights? (4) Do the two suits arise out of the same nucleus of facts?

Id. (citation omitted).

Collateral estoppel applies where the following elements exist:

(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of [the] doctrine must not work an injustice.

State v. Mullin-Coston, 152 Wn.2d 107, 114, 95 P.3d 321 (2004) (quoting State v. Bryant, 146 Wn.2d 90, 98-99, 42 P.3d 1278 (2002)).

Respondents maintain that the express easement claim litigated in the matter Bell's Grove Property Owners of Point Roberts v. David L. Duncan, Whatcom County Superior Court Cause No. 05-2-02831-5 ("Bell's Grove Action") is the same express easement claim advanced by these individual parties. In Respondents' words: "The cause of action and subject matter was a claim to establish the precise same easement they again seek in this action." Brief of Respondents-Cross Appellants, p. 11 (emphasis added). Recall that the easement claim litigated in the Bell's Grove Action was that contained in a 1962 easement from David Bell to Bell's Grove that conveyed:

...a perpetual right in [plaintiff Bell's Grove Association] and in all members of [Bell's Grove Association] now and in the future for a right of travel and access for pedestrian foot travel use only over and across the area lying between the extended north and south lines of the conveyed tract from the southerly portion of the conveyed tract to the beach.

CP 174-75 ("Bell's Grove Easement").

The express easement in this case was conveyed in individual deeds by Mr. Bell to each of the parties' predecessors in the 1950s:

The purchaser is to have the perpetual privilege of foot gravel [sic] to and from the said property to the tide flats on the Beach, for recreational use; this easement to apply to foot paths over the reserve on the Grantor's said plat, and extends to the second party, Grantees, heirs, executors and administrators and assigns.

CP 22 (“Tilkov Easement”).

The express easement rights litigated in each case are not similar, identical, or even related. Indeed, in the findings and conclusions in the Bell's Grove Action, the Trial Court specifically recognized that the individual easement rights were not litigated in the Bell's Grove Action: “Defendant Duncan stipulated that the rights granted under the individual deeds to the lot owners were not the subject of this action.” CP 174. For Respondents, who were parties to both actions, to suggest that res judicata and collateral estoppel apply is not only incorrect, it is a misrepresentation of the record from the Bell's Grove Action.

Nor are the prescriptive easement claims identical in any respect. As Respondents themselves point out, there were two different routes historically used across Respondents' property: (1) what is referred to as the “Original Path”; and (2) what is referred to as the “Historic Path.” Respondents further concede that the route litigated in the Bell's Grove Action was the Historic Path: “In 2005, BGPOPR sued Duncan to

establish an exact location of BGPOPR's deed easement, and alternatively pursued a claim for a prescriptive easement along the historic path." Brief of Respondents-Cross Appellants, p. 6 (emphasis added). The Historic Path was used after the 1962 Bell's Grove Easement. CP 175.

The prescriptive easement sought here is over the Original Path, based upon use of the area distinct from use of the Historic Path and prior to the 1962 Bell's Grove Easement. This Original Path had nothing to do with the prescriptive claim raised by Bell's Grove, which sought to establish a prescriptive easement over the Historical Path. Again, Respondents are not being forthright with the Court as to the critical distinctions between the two cases.

2. There Is at Least an Issue of Fact on Compliance With the Statute of Frauds.

Again, for an easement, the statute of frauds requires that the burdened property be "sufficiently described." Berg v. Ting, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). Respondents make two essential points in arguing that the at-issue express language in the original conveying documents fail to comply with the statute of frauds. First, they contend that use of expert testimony alone confirms that the burdened property is inadequately described in the language because it resorts to oral testimony

to determine its location. Brief of Respondents-Cross Appellants, pp. 17-18 (“It is precisely because oral testimony had to be proffered regarding the identity of the burdened land that the trial court was correct in concluding that an express easement did not exist as a matter of law.”) (emphasis in original). This new position is not only incorrect, but hypocritical.

In opposing Appellants’ original Motion for Summary Judgment to establish an express easement claim as a matter of law, Respondents introduced the Declaration of J. Thomas Brewster and Declaration of Michael V. Gilbertson in opposition to the motion. CP 563-586. They then successfully argued as follows:

Mr. Brewster’s declaration alone is sufficient to defeat the Plaintiffs’ motion for summary judgment. Defendants present a statement from a licensed surveyor that the servient parcel cannot be determined without recourse to oral testimony. This conclusion is fatal to Plaintiffs [sic] motion because, at the very least, it creates an issue of material fact as to whether the deeds relied upon by Plaintiffs satisfy the statute of frauds.

CP 551. The Trial Court then denied the motion, concluding initially that the pertinent language was intended to grant an easement, but that there was a “question as to what property would be burdened by such easement.” CP 665. Respondents’ successful reliance upon expert

testimony to create an issue of fact and avoid Appellants' Motion for Summary Judgment judicially estoppes them from arguing the contrary here. Skinner v. Holgate, 141 Wn.App. 840, 847, 173 P.3d 300 (2007).

Second, and related, Respondents continue to argue that the pertinent language in the deeds, which again was found as intended to be an easement, does not adequately describe the burdened property. In this, Respondents focus exclusively on one sentence in the deeds as the source of this description: "over the reserve on the said plat..." The language of the pertinent deeds contains more description, however, by identifying the burdened property: "THE PURCHASER is to have the perpetual privilege of foot travel to and from the said property to the tide flats on the beach, for recreational use." These two sentences together provide the description of the area burdened by the easement. In this, Dennis DeMeyer's expert testimony does not constitute unauthorized oral testimony to identify the location of the burdened property, but is instead expert opinion to interpret the document's language from a surveyor's perspective:

d. The route to get from the sold lot to the beach necessarily requires crossing Defendants' property. I disagree with Mr. Brewster's reading of the pertinent language that the only burdened property is the "reserve," as shown on the Plan of Survey. I do agree with Mr.

Brewster that such a restricted interpretation of the language would make the entire paragraph meaningless because an easement over the reserve shown on the Plan of Survey will not get someone to the beach.

e. Instead, I interpret the language as identifying two different locations burdened by the easement. The first is described in the first phrase or sentence: “The purchaser is to have the perpetual privilege of foot gravel [sic] to and from the said property to the tide flats on the Beach, for recreational use;” The identified area here is that portion of remaining land to get to the tide flats itself, and is represented in the Plan/Plat of Survey as lots 61 and 62.

f. The second area covered by the easement is set out in the second phrase or sentence: “this easement to apply to foot paths over the reserve on the Grantor’s said plat....” In my opinion, the burdened property identified in this sentence is the reserve tract as marked on said plan/plat.

CP 362-63. This testimony and other information was sufficient to create an issue of fact, as the Trial Court itself agreed existed in denying Appellants’ original Motion for Summary Judgment.

3. Respondents Ignore and Do Not Oppose the Trial Court’s Error in Interpreting the Burdened Property as Described in the Deeds.

It is important to recognize in the context of the statute of frauds issue that the real basis of the Trial Court’s granting of summary judgment was its conclusion that the pertinent language in the deeds described the burdened property as the “reserve” area as designated on the unrecorded

plat, and therefore did not include Appellants' property. Appellants explained how this conclusion constituted legal error. Appellants/Cross-Respondents' Opening Brief, pp. 28-31. In response, Respondents disregard this issue as simply being a variation of the argument relating to the statute of frauds, and therefore ignore it entirely. Brief of Respondents-Cross Appellants, p. 15, n. 5. This is incorrect. The Trial Court actually reached a conclusion as to what property was burdened by the easement in a manner that was both procedurally and substantively erroneous. This conclusion itself establishes that there is sufficient language in the document to satisfy the statute of frauds.

4. Respondents Concede That the Part Performance Doctrine Applies.

Respondents do not disagree that the part performance could satisfy the statute of frauds, even if the language itself cannot survive the test, nor essentially, the pertinent elements to meet this exception.¹ Indeed, Respondents themselves identify that the part performance is appropriate if the flawed language establishes an intent to create an

¹ Respondents question reliance upon Berg v. Ting, *supra*, 125 Wn.2d 544 for the elements of part performance because this case does not relate to conveyance of an easement. Brief of Respondents-Cross Appellants, p. 19, n. 7. Berg did relate to the conveyance of an easement, and it is presumed that Respondents are merely mistaken.

easement: “The crucial inquiry is whether creation of an easement was, in fact, intended.” Brief of Respondents-Cross Appellants, p. 19.

In recognizing this, Respondents admit that part performance is appropriate in this case, as the Trial Court concluded unequivocally as follows: “The Court concludes that while the subject language contained in the individual Warranty Deeds that are in Plaintiffs’ title history, and is quoted below, was intended to grant an easement,....” CP 665. This conclusion is not contested, challenged, or even referenced by Respondents.

Respondents’ only opposition to application of part performance is a contention that the individual Appellants already have access to the beach under the easement granted to the Bell’s Grove Association, so therefore the Trial Court was correct as a matter of equity in refusing to apply, or at least allow the fact finder to consider, a doctrine that admittedly applies. Brief of Respondents-Cross Appellants, pp. 19-21. Respondents appear to rely on Delano v. Luedinghaus, 70 Wn. 573, 575, 127 P. 197 (1912) for the proposition that the Trial Court could simply refuse to apply the admittedly applicable part performance doctrine based upon “equity.”

Delano is not a statute of frauds case nor a part performance case. Indeed, its 1912 date is far before adoption of the part performance doctrine. The court in Delano merely stated that the competing equities of parties to a deed should be considered in interpreting its intent.

Here, pertinent language was intended to create an easement. Thus, the part performance doctrine applies. The Trial Court had no authority or right to simply refuse to apply the doctrine because of an easement granted to Bell's Grove. The inequity and inconsistency of such a conclusion is paramount in the fact that Mr. Bell continued to include the language found as intended to create an easement in individual lot deeds even after granting the easement to Bell's Grove. If Mr. Bell intended the Bell's Grove Easement to be a substitute for the individual easements, he would have ceased this action.

5. The Burdened Property for the Tilkov Easement Is the Property Legally Described in His Conveying Documents.

It is undisputed that the deed originally conveying the property to Respondents contained a full and complete legal description of Respondents' property, and an incorporation and exception to the easement granted to Tilkovs' predecessors. Since the property burdened by this incorporated and excepted to easement is legally described in the

conveying documents to Respondents, there is no statute of frauds problem, and the Tilkov Easement is otherwise unchallenged.

In an extraordinary move, Respondents maintain that the Tilkov Easement is nonetheless unenforceable because the physical location of the easement itself is not legally described: “Exhibit B to Duncan’s deed does in fact refer to an easement, and it expressly states that the location of the easement is indeterminate: ‘Right of travel and access for pedestrian and foot travel use only. We are unable to determine the exact location of said easement.’” Brief of Respondents-Cross Appellants, p. 22 (emphasis in original). What is extraordinary is that Respondents earlier recognized correctly that the law does not require that the location of the easement itself be legally described to be enforceable: “An easement may be ‘floating’ on the servient property, meaning the easement’s location need not be directly established in the conveying document.” *Id.* at p. 16 (emphasis in original). Since the conveying documents to Respondents legally describe the burdened property, the easement created by the conveying documents to Respondents is enforceable.

6. Respondents Provide No Response at All on the Prescriptive Easement Claims.

Respondents do not provide any substantive response to the prescriptive easement claims. This means that Respondents do not dispute the facts that were presented at the Trial Court level, the legal consequences of these facts, or the Trial Court's error in failing to at least recognize the existence of an issue of fact.

B. The Trial Court Committed Legal Error in Limiting the Application of RCW 7.40.030.

RCW 7.40.030 provides a right of recovery and relief for a spite structure under the following parameters:

An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal.

(Emphasis added). The Trial Court precluded Tilkovs and Cotter from seeking recovery under the statute in relationship to actions that occurred on the Duncan Property located across the street from the Black Pines Property because their properties were not "contiguous." This conclusion is based upon the distinction in title ownership only, not upon the substantive reality that Respondent David Duncan ("Duncan") and

Respondent Black Pines, LLC are related in every respect. The definition of adjoining simply does not require, as contended by Respondents, continuity of ownership between the neighboring properties, only that they be adjoining. Under the context of the situation, the Duncan Property and Black Pines Property are one and the same in every respect and “adjoining” the Tilkovs and Cotter properties.

More importantly, at the time that Duncan planted the at-issue trees in 2003-04, he owned both properties, and therefore his actions and the impacts of the planting of 30-40 trees to create a potentially 60-70 foot high fence should have been subject to trial. Respondents maintain that summary judgment was nonetheless appropriate because there were no facts that the trees on the Duncan Property could interfere with Cotter’s and Tilkovs’ use and enjoyment of their properties. Brief of Respondents-Cross Appellants, pp. 25-26.

The evidence in the record established that Duncan initially asked the county to refrain from requiring any vegetative buffers as part of a short plat of the Duncan Property because: “the application of required landscaping would reduce the ocean views from these waterfront lots plus those upland owners and passersby on Edwards Road. Views of the ocean are encouraged by other sections of Whatcom County Code.” CP 321

(emphasis added). This request was followed by the planting of 30-40 Leylandii Cypress trees in a relatively straight line and parallel with Edwards Drive. CP 251. It was uncontested that the Leylandii Cypress tree is noted “for its rapid growth and slender columnar shape...and makes an excellent wind break as it provides a dense barrier...” CP 336. These trees are expected to grow between 60 to 70 feet in height, with a 15-25 foot spread. CP 335. Cotter explained how these trees and the other planting activities have transformed the cabin she has enjoyed since 1964 from a light and airy beach property to a cabin in the woods. CP 253. There was sufficient evidence for the issue of harm caused by these 30-40 trees to go to the fact finder, and summary judgment was therefore inappropriate.

C. There Is a Lack of Substantial Evidence to Support the Trial Court’s Findings of Fact, Conclusions of Law, and Rulings That a Grove of Poplar Trees Planted on the Black Pines Property Does Not Violate RCW 7.40.030.

In response to the challenge to the facts supporting the Trial Court’s determination on relocated Poplars adjacent to the Cotter Property, Respondents cite the following alleged findings and conclusions by the Trial Court: (1) the lack of “spiteful” actions associated with these trees was not limited to the timing of planting and Bell’s Grove Action; (2) the

trees were found to be planted out of “necessity” in relocating the path as required in the Bell’s Grove Action; and (3) the trees were not sufficiently close to have the same impact on the Cotter Property as the line of trees along the common boundary line. Brief of Respondents-Cross Appellants, pp. 26-27.

On the first point, the Trial Court found in its entirety on the issue of spitefulness as to these trees, as follows:

15. This Court finds that the Poplar grove in particular, and the rest of the trees planted by Duncan in general, were not planted by Duncan as a result of his malice or spitefulness, or primarily or solely to injure and annoy the adjoining landowners because the planting of the grove and the other trees occurred prior to the commencement of the Bell’s Grove Action. Finally, these trees are not planted closely enough (within ten feet) to the northern Black Pines’ property line and therefore do not have the same impact on the Tilkov and Cotter properties as the 16 trees referenced above.

CP 1063. The timing of the lawsuit and the action was therefore the only basis relied upon by the Trial Court to find a lack of spitefulness. The timing of the planting is a variety, as the Trial Court found: “These additional two rows of Poplars were planted by Duncan after the Bell’s Grove Action was concluded.” CP 1059.

Second, there is nothing in the Findings and Conclusions which equates that these trees were planted as a required or necessary response to

the Trial Court's forced relocation of Duncan's path in the Bell's Grove Action. Finally, any finding by the Trial Court as to the "qualitative feeling" of any of the Poplar trees is not supported by the undisputed evidence that: (1) these trees will grow to 50-60 feet in height, and have a 30 foot spread; and (2) the trees are causing a reduction in light and air to the Cotter property, making the Cotter property damper, and otherwise making the property less desirable. Appellants/Cross-Respondents' Opening Brief, pp. 21-24. Indeed, Respondents go so far as to maintain that the Trial Court actually made a specific finding that the Poplar trees did not obstruct Cotter's light or air, which it did not. *Id.* at p. 29. Even if it did, Cotter's undisputed testimony at trial was to the contrary. RP 99-101, lines 10-17.

Respondents also make a half-hearted argument that the lack of a view easement somehow negates applicability of RCW 7.40.030 to the Poplar trees. The statute does not, however, require implication of an easement right, which is why Respondents cannot cite any authority for the proposition. Indeed, the statute would be unnecessary if an easement right needed to be implicated, as a party could simply sue on the easement itself. As the court in Baillargeon makes clear, one need only prove

damage to the enjoyment of his/her property, not interference with an easement or other property right.

Moreover, views from property are absolutely protected by RCW 7.40.030 to the extent the activity otherwise meets the statutory elements, as made clear by the court in Baillargeon where it explained the purpose of the statute:

In Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888), however, an equally divided court held that a screen erected solely to shut out the light and view from the neighbor's window should be abated as a nuisance. The court characterized the erection of the screen as a wanton infliction of damages and concluded that no person has a legal right to erect a useless structure for the sole purpose of injuring his neighbor.

Baillargeon v. Press, supra, 11 Wn.App. at 63 (emphasis added) see infra. pp. 46 to 48.

Finally, Cotter testified, without any contrary evidence, that the Poplar trees were blocking light and air to the property, thereby making it damp and dark. Thus, interference with a “view” was not the only basis to seek protection under RCW 7.40.030 over the Poplar trees. Instead, the uncontested evidence established that the Poplar trees were blocking light and air. These are rights that even Respondents concede are protectable under the statute.

D. Respondents' Request for Attorneys' Fees Under RAP 18.9 Is Inappropriate and Unsupported.

Respondents cite RAP 18.9, and make the following one-sentence basis to support an award of attorneys' fees and costs for the appeal: "None of the arguments raised on appeal have any merit, and are part of an ongoing cycle of abuse." Brief of Respondents-Cross Appellants, p. 30. Missing from this "analysis" is even a recognition of the standards for imposing a sanction, or application of the standard to the appeal. Instead, the request is nothing more than an attempt to alter the perspective on the arguments, and to bully Appellants.

An appeal is frivolous under RAP 18.9 under the following general guidelines:

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not for that reason alone frivolous; (5) an appeal is frivolous if there are no debatable issues on which reasonable minds might differ, and the appeal is so totally devoid of merit that there was no reasonable possibility of reversal.

Carrillo v. City of Ocean Shores, 122 Wn.App. 592, 619, 94 P.3d 961 (2004) (citing Streater v. White, 26 Wn.App. 430, 434-35, 613 P.2d 187 (1980)). Under this standard, “[r]aising at least one debatable issue precludes finding that the appeal as a whole is frivolous.” Advocates for Responsible Development v. Western Washington Growth Management Hearings Board, 170 Wn.2d 577, 580, 245 P.3d 764 (2010).

Here, Appellants should prevail on appeal, thereby making the request moot and meritless. Even if the Court were to uphold the Findings and Judgment, there is nothing frivolous or harassing about the appeal. As to the easement issues, the Trial Court concluded that the at-issue language contained in the individual deeds “was intended to grant an easement.” Compliance with the statute of frauds from the language contained in the individual deeds was confirmed and supported by testimony of a professional surveyor. Application of the part performance is certainly justified, where Respondents themselves concede that it should apply if the document that fails to comply with the statute of frauds nonetheless indicated an intent to create an easement, which is here undisputed. Moreover, there is certainly a debatable issue relating to dismissal of the prescriptive easement claim, where Respondents make not a single reference to this claim, or defend the Trial Court’s dismissal on

summary judgment. As to the spite structure claims, Respondents have failed to provide a single piece of evidence to preclude its application to the Poplar trees.

III. RESPONSE TO RESPONDENTS' CROSS APPEAL

In their cross appeal, Respondents make three arguments: (1) the legal argument that trees cannot be a "structure" under the spite structure statute RCW 7.40.030; (2) a contention that there is a lack of substantial evidence to support the Trial Court's conclusion that the extender added by Duncan to his fence next to the Tilkov Property is injuring or annoying Tilkovs; and (3) there is no substantial evidence to support the decision on the Cypress trees.

A. Counter Statement of Facts.

Although they challenge the factual support for the Trial Court's finding of harm arising from the extender of the fence next to the Tilkov Property, and the finding of maliciousness and harm associated with the row of Cypress trees, noticeably absent from their brief is any recitation of the actual evidence relating to either.

1. Counter Statement of Facts Relating to the Extender.

There is no opposition to Finding of Fact No. 7, which outlines the initial stages of construction of fencing between the properties:

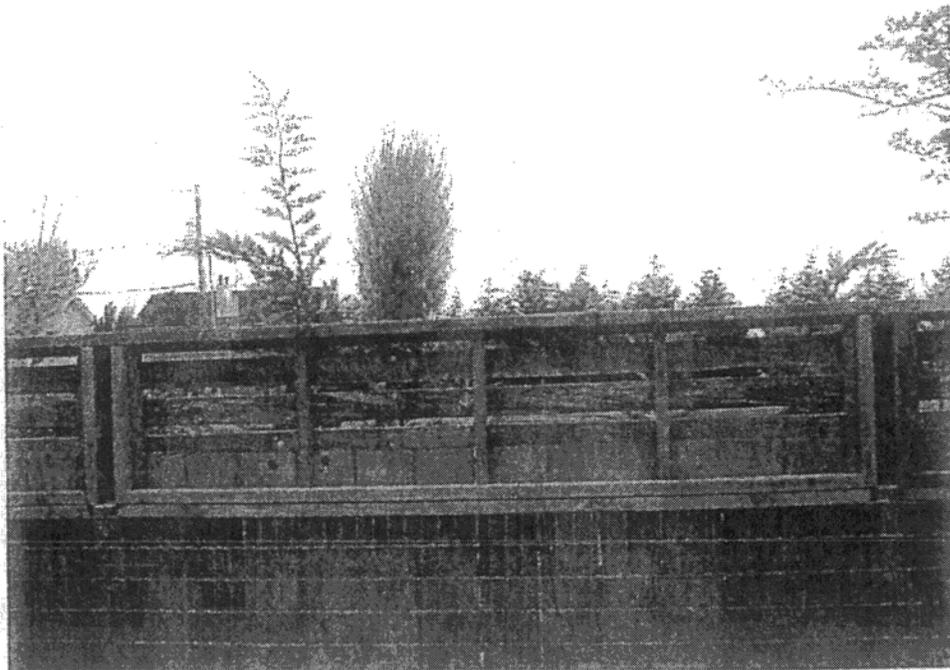
7. Duncan has also constructed a fence along the common boundary line between the Black Pines Property and the properties owned by Tilkov and Cotter. He first installed a wire fence, but in 2007 started to fill in this fence with wood, making it a total of six feet high. Duncan filled in the wire fence with wood to have more privacy from the property owners of Bell's Grove who had recently sued him and to protect the vegetation on his property from being cut or damaged.

CP 1060. Prior to this wire fence, there had been no fencing between the properties. RP 17.

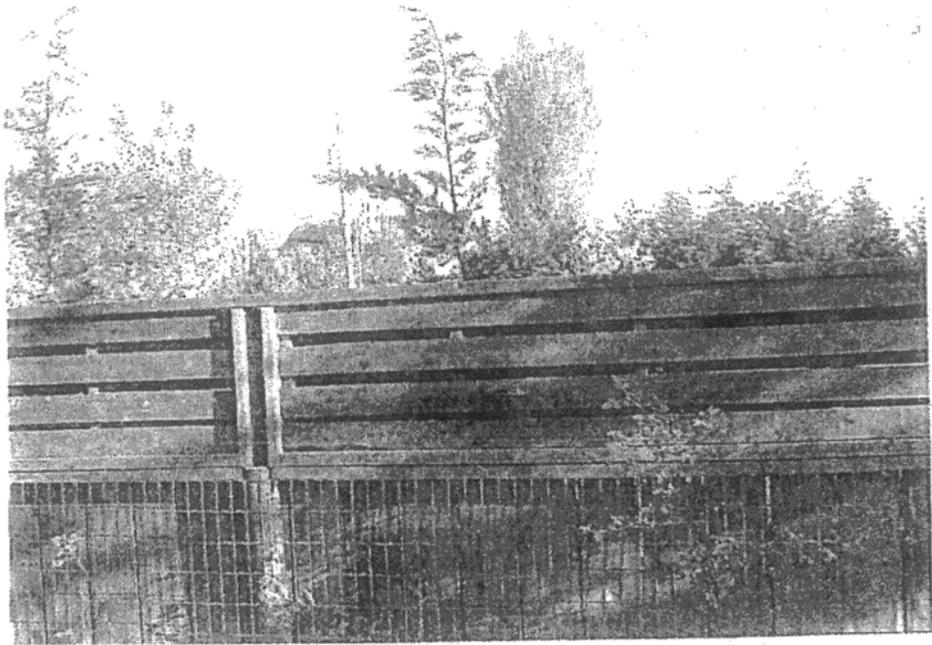
Prior to the wood fence, the view from Tilkovs' house was as follows:



Ex 23, p. 2. Tilkovs testified during trial that following construction of the original wood fence, and in around April 2010, Duncan constructed an “extender” on the wood fence, but only in front of his property. Initially, the extender was like a trellis, and not fully filled in. RP 42. The initial construction looked as follows from the same vantage point as the above photograph:



Ex 23, p. 8; RP 42-43. The fence stayed this way for a couple of months, when Duncan filled in the extender completely, so it couldn't be seen through anymore. RP 43. Once completed, the fence extender looked as follows from the same vantage point of all the photographs:



Ex 23, p. 8; RP 43. The extender made the fence a total of seven feet nine inches in places according to Tilkovs. RP 47-48.

As to impact of the extender, Tilkovs identified that the fence is to the south of his cabin, meaning it is impacting a southern exposure. RP 54. The existence of the extender blocks out natural light, air, and views as testified to by Tilkovs, RP 55, which is equally obvious from the pictures that were admitted as evidence. In addition to this testimony, the Trial Court made an onsite inspection, and “[t]he parties agreed that the Court would consider everything it saw during the site visit as evidence.” CP 1056.

2. Counter Statement of Facts Relating to the Cypress Trees.

In arguing that there is not substantial evidence to support the ruling on the Cypress trees, Respondents do not contend that the actual facts recited by the Trial Court are not supported by the record. Instead, they apparently contend that the admitted evidence is insufficient to support the factual conclusions. Accordingly and importantly, there is no actual challenge to the Trial Court's numerous findings of fact, nor any contrary "evidence" submitted by Respondents to dispute them. CP 1061-64.

B. A Row of Planted Trees That Will Grow to 60 Feet in Height and Be a Solid Wall Is a "Structure" Under the Spite Fence Statute.

Respondents' renewed argument as to the meaning of structure under RCW 7.40.030 remains identical to that correctly rejected by the Trial Court. Again, RCW 7.40.030 provides as follows:

An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal.

Construction of a statute is a question of law. State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003) (citing City of Pasco v. Pub. Employment

Relations Comm'n, 119 Wn.2d 504, 507, 833 P.2d 381 (1992)). A court interpreting a statute must discern and implement the legislature's intent. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). Respondents necessarily propose a narrow and literal interpretation of the term "structure," but "[n]either a liberal construction nor a strict construction may be employed to defeat the intent of the legislature, as discerned through traditional processes of statutory interpretation." Estate of Bunch v. McGraw Residential Center, 174 Wn. 2d 425, 432, 275 P.3d 1119 (2012). Finally, the spirit or purpose of an enactment should prevail over express but inept wording. Alderwood Water Dist. v. Pope & Talbot, Inc., 62 Wn.2d 319, 321, 382 P.2d 639 (1963).

RCW 7.40.030 originated from recognition by courts that a person's use of his/her property could be limited by its impacts on a neighbor:

In Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888), however, an equally divided court held that a screen erected solely to shut out the light and view from the neighbor's window should be abated as a nuisance. The court characterized the erection of the screen as a wanton infliction of damages and concluded that no person has a legal right to erect a useless structure for the sole purpose of injuring his neighbor.

Baillargeon v. Press, *supra*, 11 Wn.App. at 63. Thus, the purpose of the statute is to protect neighbors from intrusion on their use of property by the placement of items that serve no legitimate purpose but to annoy or harass their neighbor. Certainly, Respondents cannot disagree that a solid row of 50- to 60- foot high trees impact a property owner's "view," "light," and "air" just as much, if not more, than the 9-foot high fence found to be a structure in Karasek v. Peier, 22 Wn. 419, 61 P. 33 (1900).

Respondents' principal contention is a representation that for "over 100 years" the courts in this state have interpreted the term "structure" under the statute to mean a man made and artificial object. Brief of Respondents-Cross Appellants, pp. 34-35. This statement is an overstatement, not factually correct, would lead to absurd results, and fails to carry out the intent of the statute.

The "over 100 years" of "precedent" interpreting the at-issue term involves a total of two cases: (1) Karasek v. Peier, *supra*, 22 Wn. 419; and (2) Baillargeon v. Press, *supra*, 11 Wn.App. In Karasek, the court, in finding that a "fence" was a structure, pointed out as follows:

Of course, it is true that a house is a structure, but it is also true that there are many other things which may properly be designated as structures, - such, for instance, as a telegraph line, a wharf, or a bridge. 'In the broadest sense, a structure is any production or piece of work

artificially built up or composed of parts joined together in some definite manner; any construction.’ Cent. Dict. And we have no doubt that a fence is a structure, within the meaning of the statute.

Karasek v. Peier, *supra*, 22 Wn. at 425. Similarly, the court in Baillargeon v. Press, *supra*, 11 Wn.App. applied the statute to a fence, without adding any additional explanation to the meaning of the term.

Respondents seek to limit application of the term utilized in Karasek to find that a fence was a structure: “‘In the broadest sense, a structure is any production or piece of work artificially built up or composed of parts joined together in some definite manner; any construction.’” Karasek v. Peier, *supra*, 22 Wn. at 425. In their eyes, this requires an artificial edifice, and not a vegetative configuration planted by a party. First, this interpretation of the above language is too limiting in and of itself, as the definition includes any “production...composed of parts joined together in some definite manner....” A row of 60-foot high trees with a 30-foot reach planted side by side several feet apart is a production composed of parts joined together, just as the Trial Court concluded.

More importantly, the more analogous case providing the proper analysis to interpret the meaning of the term “structure” is provided by

Lakes at Mercer Island Homeowners Ass'n v. Witrak, supra, 61 Wn.App., a case completely ignored by Respondents.² There, the court concluded that a row of “trees” was a “fence” under a set of restrictive covenants because to rule otherwise would frustrate the purpose of the prohibition on fences:

Witrak urges the court to reject as a matter of law the notion that fences may be naturally grown because it is not expressly provided for in the covenant. We are not persuaded. Normally, a property owner can plant a row of trees or other foliage to create a barrier between two contiguous pieces of property. Such ‘fencing’ occurs on a regular basis. Prior courts have recognized that planting large bushy trees close together along a property line is indeed a ‘fence.’ Shrubs performing the role of a fence in delineating property lines are expressly subject to ACC control. The difference between a ‘shrub’ and a ‘tree’ seems to be primarily botanical rather than functional. What is the difference for these purposes between a line of 15’ cedar trees and line of 15’ laurel shrubs? Given the covenant's clear concern with height and obstruction of neighbors' light and view, it would be a strange reading indeed that would require prior approval of relatively low shrubbery delineating a lot line but allow a property owner to plant large trees along the same lot line without ACC approval. Clearly the language cannot be interpreted as a matter of law to require such a result.

Id. at 182-83. Karasek specifically concluded that a “fence” was a structure, and in Witrak, the court concluded that a row of trees was a

² Interestingly, Respondents were more thorough in their analysis at the Trial Court level, as they at least referenced this case to the court and attempted, unsuccessfully, to distinguish its analysis.

fence. Therefore, a row of trees is necessarily a “structure.” The importance of this association is critical, since RCW 7.40.030 has long been recognized as the “spite fence” statute. Baillargeon v. Press, supra, 11 Wn.App. at 62 and 66.

Other courts have consistently concluded that a row of trees is a “structure” under comparable statutes. For instance, in Wilson v. Handley, 97 Cal.App.4th 1301, 119 Cal.Rptr.2d 263 (2002), the California Court of Appeals considered whether a row of trees constituted a “structure in the nature of a fence” under California’s spite fence statute. It first concluded that a row of trees was a “structure” because it met the definition set out in Merriam-Webster’s Collegiate Dictionary (10th ed. 2000), which included “something arranged in a definite pattern of organization.” “Under this broad definition, a row of trees, arranged in a line by the person who planted them, could easily constitute a ‘structure.’” Id. at 267. See also Vanderpol v. Starr, 194 Cal.App.4th 385, 123 Cal.Rptr.3d 506 (2011) (“If the rule were otherwise, we potentially would be creating an exception to the statute that could swallow the rule.”); Dowdell v. Bloomquist, 847 A.2d 827, 830 (S.Ct. R.I. 2004) (“we nonetheless believe that the trees, when taken as a whole, fall well within the statutory definition of a ‘structure in the nature of a fence.’”).

It is also important to recognize that to the extent that reference to a dictionary is appropriate, as was the case in Karasek, the more relevant definition is that provided now as recognized in the California case of Wilson v. Handley, *supra*, 97 Cal.App.4th. The dictionary definition now for “structure” includes “something arranged in a definite pattern of organization.” CP 339.

Respondents for the first time rely upon the ruling in Dalton v. Bua, 47 Conn. Supp. 645, 822 A.2d 392 (2003),³ and argue that the court ruled that its comparable spite fence statute that a row of trees could never be a structure or otherwise subject to relief. A closer reading of the case disproves this interpretation. In Dalton, the plaintiff sought relief under the spite fence statute based upon the failure to trim naturally growing vegetation. The court carefully limited the scope of its ruling to exclude a “planted” row of vegetation, as here:

The walls and fences at issue in the malicious structure cases decided since 1867 have been constructions built by persons. When a construction is malicious, the law says, “Don't build it.” Hedges, however, grow naturally. There is no suggestion that the hedge in question here was maliciously planted. The suggestion, rather, is that it has maliciously been allowed to grow. (The Daltons seem not to mind a four-foot hedge; it is an eight-foot or

³ It is worth noting that the ruling in Dalton came from a Superior Court of Connecticut, which is its trial court level. The case is therefore not from an appellate court, and in that has even less persuasive influence.

nine-foot hedge that bothers them.) Rather than, “Don't build it,” the Daltons want the law to say, “You must trim it.” This is a significant difference. The complaint is not that the Buas have done something. The complaint, rather, is that they have not done something. Whatever the problems of the action/inaction distinction in the tort or criminal law; see State v. Miranda, 245 Conn. 209, 715 A.2d 680 (1998); that distinction lies at the textual heart of the malicious structure statutes in question here. These statutes prohibit malicious “structures” from being “erected.” They do not require naturally growing plantings to be affirmatively trimmed.

Id. at 394-95 (emphasis added).

The complaint here is precisely that Duncan planted a row of trees that will grow to 60 feet in height, and that he did so maliciously and for no other intent than to harass, injure, and annoy Cotter and Tilkovs. Thus, they are seeking to have Respondents remove an obstruction that Duncan affirmatively created. Dalton certainly does not stand for the proposition that there is an inherent quality to a planting that prohibits it from review, but instead stood for the proposition that the statute does not impose an affirmative duty to maintain naturally occurring objects.

The goal in interpreting a statute is to give meaning to its intent. RCW 7.40.030 is intended to protect property owners from actions taken by other property owners that damage, injure, or destroy a party's right to use his/her property. In this, the statute focuses upon the effect of a

party's action, not the mechanism. If Respondents' absurdly narrow interpretation were followed, then the defendant in Karasek would have been prohibited from constructing an eight- or nine-foot high wooden fence, but could have replaced it at the exact same location with a row of 60-foot high trees that were growing together. This interpretation clearly does not advance the intent of the statute.

C. There Is Substantial Evidence to Support the Trial Court's Ruling That the Cypress Trees Meet the Elements of Baillargeon v. Press.

In seeking reversal of the ruling on the Cypress trees, Respondents do not disagree that the essential elements are set out in Baillargeon v. Press, supra, 11 Wn.App. at 66:

(1) that the structure damages the adjoining landowner's enjoyment of his property in some significant degree; (2) that the structure is designed as the result of malice or spitefulness primarily or solely to injure and annoy the adjoining landowner; and (3) that the structure serves no really useful or reasonable purpose.

Respondents challenge the Trial Court's factual findings of elements 2 and 3. They agree that these are essential "findings of fact," Baillargeon v. Press, supra, 11 Wn.App. at 67, and therefore the standard of review is whether or not there is substantial evidence to support the conclusions. Brief of Respondents-Cross Appellants, pp. 37-41.

Again, in arguing that there is no substantial evidence to meet elements 2 and 3, Respondents do not dispute the “facts” or the evidence in the record relied upon by the Trial Court to make its findings. So, for instance, in arguing that there is “no evidence in the record to support the trial court’s finding that the Cypress trees were planted solely or primarily with intent to injure or annoy,” *id.* at p. 38, Respondents point to the fact that Duncan historically planted trees as a hobby, and questioned the Trial Court’s reliance upon the timing of planting in relationship to animosity between the parties. *Id.* at pp. 38-39.

Thus, they do not challenge that there is evidence of the following: (1) historical animosity between the parties; (2) involvement of the parties in the Bell’s Grove Action; (3) the physical nature, character, location, and use of the fence extender and the Cypress trees; (4) the timing of Duncan’s planting of the trees in relationship to the dispute with Tilkovs over the cutting of roses; and (5) the fact that Duncan previously advocated for the use of landscaping to protect water views of upland properties. Evidence exists to support all of these factual bases to find animosity.

For instance, Appellant Mit Tilkov explained that he had received a letter from Duncan claiming that he had improperly trimmed rose bushes and threatened to file a timber trespass case, RP 23-24; that when

Appellant Mit Tilkov tried to talk to Duncan, he refused to accept a map prepared by him, and instead told Mit that the issue over the path “was going to be ugly” and that the path “would never happen,” RP 39; that Duncan destroyed work that had been done to create a path across the county right of way by Bell’s Grove even after stating to the Trial Court in the Bell’s Grove Action that the “path users can use any portion of the right-of-way they wish when travelling between the northern path and the southern path,” Ex 42 and RP 28-34. Duncan was also subjected to impeachment through his prior deposition testimony, in which he testified as follows:

"Q. Okay. Any other fences that you've put up on the subject property?"

"A. Not a new fence, but recently I've been closing in the fence that adjoins Bells Grove on the north side of the one acre which is north of Edwards Drive just for more privacy, because it seems like the neighbors north of that property are somewhat hostile. It's a little more peaceful for me to be enjoying my property if it's solid."

"Q. Who are these neighbors?"

"A. The Bells Grove residents."

"Q. Give me a name."

"A. I don't have names."

"Q. Mit?"

"A. No."

"Q. How have they expressed this hostility?"

"A. I think it's called a lawsuit."

"Q. Nothing in particular with the people? It's just to separate you from the whole membership?"

"A. Pretty much."

"Q. So if they hadn't have filed a suit, you wouldn't have put that fence up?"

"A. I would have put the open wire fence up, but I probably wouldn't have enclosed it with the wood."

RP 222-23. There are facts supporting the animosity between the parties.

There is also no question that Duncan was involved in a long-standing lawsuit with Bell's Grove. Moreover, there is no dispute as to

the nature of the Cypress trees and the fence extender. This includes the fact that the trees are planted along the common boundary lines, are a few feet apart, and reach 60 feet in height. Nor is there any dispute as to the timing of the plantings and their circumstances. The row of trees in front of the Cotter Property occurred pursuant to the following sequence of events:

And we were down at our cabin in early two, or, yeah, early 2010, we were down with friends in the middle of January, and there were eagles roosting in a tree, a large tree down on Edwards, and my girlfriend was out on the deck with binoculars while I was making breakfast. She was watching the eagles, and I saw Mr. Duncan out on his

drive, out on the driveway, because in wintertime, there's no leaves on the poplars, and you could see through to his driveway, and I could see Mr. Duncan.

And a few minutes later, my girlfriend came in and said that Mr. Duncan came out and was sort of looking at her, and she thought he thought she was spying on him. In other words, she had the binoculars and everything but was watching the eagles, and then she went, I said, oh, don't worry about it.

She went back outside. I continued in the kitchen which faces south, and saw him leave in his vehicle, and then a few minutes later, I heard a vehicle come down the grove, our road to Bells Grove, and it's a dirt, gravel road so you hear cars, and given that it's January, there's nobody down -- very, not very many Canadians that type of year, so very quiet. It was a beautiful, sunny day, and sort of caught a glimpse of his vehicle in a large living room window on the south side.

But then a few minutes later, my girlfriend came in and said Mr. Duncan came down the grove. I guess he was seeing who was parked there, who was at the cabin, because my girlfriend has absolutely like white hair, so if he looked, he would know it wasn't me, but I said, well, maybe he's just -- because he would never be able to see my car from his driveway, because of the, the fence and

the rosebushes and that.

Q. Then what happened?

A. Didn't see, talk to him that weekend at all, had no altercation. We went down about, my husband and I went back down about five or six weeks later, and noticed that there were these new trees planted between the mound and our fence, the property line and/or Mr. Duncan's fence, and there was nine new trees planted, these Leyland cypress, and they probably were at that time maybe four, four to five feet tall.

Q. Okay.

A. Four feet tall.

RP 94-96. Similar timing of plantings of the trees in front of Tilkovs' residence, along with an observation of Duncan in a tree in front of the Tilkovs' cabin lining up what could be seen from the cabin, followed by installation of the extender. RP 103-04.

The court in Karasek explained the type of evidence that would prove the element of motive:

As to the proof of motive, the court was of the opinion that the question whether the structure was maliciously erected is to be determined by its character, location, and use, rather than by an inquiry into the actual state of mind of the person erecting it. Upon this point the learned court observed: '* * * We think no rule can be laid down that is on the whole more easy of application, and more likely to be correct in its application, than that the structure intended by the statute must be one which, from its character or location or use, must strike an ordinary

beholder as manifestly erected with the leading purpose to annoy the adjoining owner or occupant in his use of his premises.’ Although we concede that this rule will generally be more correct in its application than any other general rule that could be laid down, it is apparent that it cannot be relied on in all cases, to the exclusion of other legitimate evidence.

Karasek v. Peier, *supra*, 22 Wn. at 431-32. Here, all of the evidence relied upon to find motive is uncontested, and comports with this ruling. Respondents attempt to have this Court qualitatively examine the facts to see if the Trial Court was correct, which is not allowed.

In terms of the Trial Court’s finding of element 3, again, there is no dispute as to the underlying supporting facts, including the growing pattern of the trees; the fact that the trees will create a wall; the lack of additional privacy for Respondents from this wall; the failure of the additional wall of trees to provide a better setting for the walking route of Duncan, given the fact that the septic mound and fence that runs north and south down the middle of the property block any travel along the tree line or between the common boundary line and the trees; and Duncan’s ability to accomplish these goals with other plantings that are less intrusive.

Despite challenging the findings of fact as to the characteristics of the trees, Respondents provide no reference to any facts to dispute the reality that these trees will form a 60-foot high wall along the common

boundary line. Instead, they point to the fact that trees are good things, and promoted by Whatcom County regulations. This is not the point. The inherent quality of trees is not an issue. Duncan's materials that he gathered prior to planting these trees provide the following undisputed descriptions of the Cypress trees:

Height: The Cypress, Leyland grows to be 60' – 70' feet in height.

Spread: "The Cypress, Leyland has a spread of about 15' – 25' at full maturity.

Attributes: Noted for its rapid growth and slender columnar shape....

Ex 5, pp. 58-59. These trees are running in a straight line adjacent to the Cotter and Tilkov Properties. RP 96-97.

Finally, in terms of both elements, Respondents ignore the fact that the Trial Court made a personal site visit, and the parties stipulated that everything that was seen was evidence. These personal observations allowed the Trial Court to see the nature, quality, and characteristics of the plantings, all of which support its findings as to motive and benefit. There is more than sufficient evidence to support the Trial Court's findings and conclusions as to the Cypress trees.

D. There Is Substantial Evidence to Support the Trial Court's Findings and Conclusions That the Extender Is Damaging the Tilkovs' Enjoyment of Their Property.

Respondents also challenge the following finding by the Trial Court as to the fence extender: "These Cypress trees and the fence extender damage the enjoyment of the [sic] Tilkov and Cotter in a significant degree, including, but not limited to, by blocking light, air, and views from portions of each of the properties." CP 1062. This is the first element of the Baillargeon test. They propose that this finding is not supported by the facts because Tilkovs did not testify that the extender itself, as distinct from the fence, blocked light and air, and the pictures of the extender clearly show that it does not. Brief of Respondents-Cross Appellants, pp. 41-44.

The Trial Court's finding of fact cannot be disturbed if supported by substantial evidence. Frank Coluccio Constr. Co. v. King County, 136 Wn.App. 751, 761, 150 P.3d 1147 (2007). Substantial evidence means sufficient evidence to persuade a rational, fair-minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The Court must defer to the trier of fact, here the Trial Court, on issues of credibility and the weight of

conflicting evidence. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994).

Respondents do not dispute that the fence extender impacts and damages Tilkovs' views from the property in some significant way, but instead seek to exclude views as an interest protected by RCW 7.40.030. This is incorrect. Baillargeon v. Press, *supra*, 11 Wn.App. at 63 (citing as supportive authority Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888) which upheld abatement of screen that shut out light and view). They appear to rely upon Collinson v. John L. Scott, Inc., 55 Wn.App. 481, 778 P.2d 534 (1989) for this proposition. However, Collinson actually states the contrary. There, the court reviewed whether a legally constructed building could be abated based upon the nuisance statute, RCW 7.48.010, solely on the basis that it blocked another's view. The court went on to conclude that in the context of RCW 7.48.010: "The better reasoned rule following the rationale in Karasek is that a building or structure cannot be complained of as a nuisance merely because it obstructs the view from neighboring property." *Id.* at 488 (emphasis in original). Importantly, the court noted the distinction between the relied-upon statute and RCW 7.40.030, and specifically restricted its ruling: "In the instant case, unlike in Karasek, there were no allegations of malicious or malevolent conduct.

Therefore, we need not decide whether such allegations would be sufficient to state a nuisance cause of action.” Id. at 488, n. 3.

Here, Tilkovs are not arguing that the fence extender should be abated merely because it blocks their view, which is uncontested. Instead, they maintain that it must be abated because it was maliciously constructed in violation of RCW 7.40.030, and in this manner, damages their enjoyment of their property, including views from the property. The statute protects against damages an “adjoining landowner’s enjoyment of his property in some significant degree....” Baillargeon v. Press, supra, 11 Wn.App. at 66. Views are a component of the enjoyment from one’s property, and therefore inherently protected under the statute, so long as the other elements are present, which is admitted by the lack of challenge by Respondents. Protection of views has been relied upon in other cases to find a nuisance or spite structure. See e.g. Jenkins v. Dale E. & Betty Fogerty Joint Revocable Trust, 386 S.W.3d 704 (Ark.App. 2011); Green Acres Trust v. Wells, 72 So.3d 1123 (Miss.App. 2011).

This situation is comparable to that presented in Wimberly v. Caravello, 136 Wn.App. 327, 341, 149 P.3d 402 (2006), where the court upheld an injunction prohibiting a garage based upon a covenant because it impacted the neighbor’s view. In upholding the injunction, the court

noted: “The impairment of the views of surrounding view lots is substantial. And the benefit of removing the obstruction is equally great.”

Moreover, even if view rights are not a protectable “enjoyment” under the statute, there is substantial evidence supporting the Trial Court’s conclusion as to the impact of the extender on light and air into the Tilkov Property. This evidence includes the photographs themselves which show the extension of blockage of air and light onto the property, Tilkovs’ testimony, and the Trial Court’s personal visit to the site.

IV. CONCLUSION

Based upon the above, Appellants respectfully request that the following relief be granted:

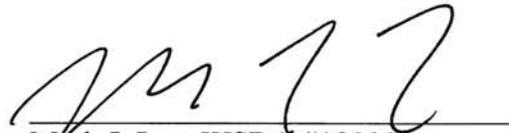
- that the Trial Court’s denial of Appellants’ Motion for Partial Summary Judgment be reversed, and judgment entered in Appellants’ favor on an express or prescriptive easement claim;
- alternatively, that the Trial Court’s granting of Respondents’ Motion for Partial Summary Judgment on Easement Claims be reversed, and Appellants’ quiet title claims be remanded for trial;
- that the Trial Court’s legal conclusion that the Cypress trees located on the Duncan Property cannot be the subject of a claim by

Appellants under RCW 7.40.030 be reversed, and the claim remanded for trial;

- that the Trial Court's findings and conclusions and judgment finding that the Poplar trees are not in violation of RCW 7.40.030 be reversed, that judgment be entered against Respondents on this claim, and that the matter be remanded for determination of the proper abatement and injunctive relief to be awarded; and

- that the Trial Court's findings and conclusions and judgment on Respondents' violations of RCW 7.40.030 be affirmed.

DATED this 5th day of July, 2013.



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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

MIT D. TILKOV and SUSAN L.)	
TILKOV, in their individual capacities)	Court of Appeals No.
and as a marital community; TIBOR)	69615-7-1
GAJDICS; KATHRYN LYNNE COTTER;)	
and SANDRA D. HULME,)	
)	
Appellants/Cross-Respondents,)	PROOF OF
)	SERVICE
v.)	
)	
DAVID L. DUNCAN, in his individual)	
capacity; BLACK PINES, LLC, a)	
Washington limited liability company,)	
)	
Respondents/Cross-Appellants.)	
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COURT OF APPEALS
STATE OF WASHINGTON

SUZANNE M. COLLINS DECLARES AS FOLLOWS:

1. I am a paralegal with Brownlie Evans Wolf & Lee, LLP, am over the age of 18, and make this declaration based upon personal knowledge and belief.

2. On July 5, 2013, I caused to be delivered to the attorneys named below via First Class United States mail, postage prepaid,



Appellants/Cross-Respondents' Reply/Response Brief at the following addresses:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge and belief.

July 5, 2013

Bellingham, Washington

Suzanne M Collins
Suzanne M. Collins

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STATE OF WASHINGTON
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