

No. 69615-7-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

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.

BRIEF OF RESPONDENTS-CROSS APPELLANTS

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A. INTRODUCTION

David Duncan bought property in an area that he had loved since childhood and turned it from a junk-filled vacant lot into a beautiful sanctuary where he could enjoy his love of trees. However, his neighbors have kept him in near-constant litigation over use of his property in an attempt to preserve the privileges they enjoyed when the property was vacant. Before he purchased the property, the neighbors had permission to cross the vacant lot to the beach over any path they chose. When Duncan bought the property, he moved the path to one that would be less intrusive. The neighbors, unhappy with the new path Duncan provided, caused their property owners' organization to sue him in 2005 claiming that he should provide them with the specific path they preferred. The trial court in that case ordered Duncan to provide a path within specific boundaries, but denied their claims to establish exact path within those boundaries.

A few of Duncan's upland neighbors who were members of the organization – Tilkov, Gajdics; Cotter; and Hulme, ("the Litigants") – were unhappy with the result from the 2005 litigation and sued Duncan again in 2011 alleging many of the precise same claims. They also raised a new issue: they were upset that some of the trees Duncan cultivated interfered with their view over his property. Because they had no view easement and did not seek to purchase the lowland property themselves to

preserve that view, they sued Duncan claiming the trees were “spite structures” and sought a court order to have them removed, and an injunction to prevent him from planting other trees. The trial court again gave the Litigants some of what they wanted, by requiring Duncan to remove some trees, and by ordering him to tear down his seven foot fence and build a six foot fence instead.

If the Litigants wanted to maintain control over the land, they should have purchased it themselves. Instead they are attempting to control Duncan and his property through serial litigation, so that they, not Duncan, have the benefit of the use and enjoyment of the property.

This Court should end this litigiousness now, and unequivocally hold that Duncan has the right to reasonably use and enjoy his property in peace.

B. COUNTERSTATEMENT OF ISSUES RELATING TO APPELLANTS’ ASSIGNMENTS OF ERROR

Duncan acknowledges the Litigants’ assignments of error but believe the issues are more appropriately formulated as follows:

- (1) Because an express easement must comply with the statute of frauds, were express easement claims properly dismissed for failure to produce an easement that adequately describes the servient estate?

(2) Were prescriptive easement claims properly dismissed based on collateral estoppel when those claims were adjudicated in a previous matter?

(3) Did spite structure claims fail regarding the Duncan property because that property is not adjoining, nor anywhere near, any of the Litigants' properties?

(4) Did the trial court's finding that the Poplar trees on the Black Pines property were not spite structures have substantial evidentiary support in the record?

(5) May the trial court's ruling that the Poplar trees were not spite structures be upheld because trees are not structures under the statute?

C. COUNTERSTATEMENT OF THE CASE

The Litigants have repeatedly brought legal action against Duncan in an attempt to curtail Duncan's property rights. CP 1057; Appendix A at 3.¹ As established in previous litigation from which no appeal was taken, all of the property at issue here was once owned by David Bell. CP 174; Appendix B at 2. Bell sold 58 of the upland lots to individual purchasers

¹ Many of the facts are taken from the trial court's findings and conclusions in the first and second lawsuits regarding Duncan's property. For the Court's ease of reference, those findings and conclusions are included at Appendices A and B. Appendix A, the findings and conclusions from the present action, is located in at CP 1056-68. Appendix B, the findings and conclusions from the 2005 action, is located at CP 173-81.

in the early 1960's. *Id.* Several of these deeds were granted to the Litigants, or to their predecessors in interest. CP 1057. Bell retained an open area between the sets of lots as open space (the "reserve"). *Id.* Bell kept the lowland lots nearer the beach in his possession. *Id.* He included in the deeds language that generally allowed the Litigants access over Bell's land to the beach. *Id.* The various deeds of the four neighbors refer to this easement in slightly different variations of grammar and structure, but in substance are all the same:

"The purchasers are to have the perpetual privilege of foot travel to and from the said property to the tide flats on the beach, for recreational use; this easement to apply to foot path or foot paths over the reserve on the said plat of the Party of the First Part, and extends to the Second Party, grantees, heirs, executors, administrators and assigns...."

CP 17-19, 24-25. At the time of execution of these deeds, there was no recorded plat of this property. Appendix B at 2.

In 1962, Bell sold the "reserve" between the individual upland lots to the Bell's Grove Property Owners of Point Roberts ("BGPOPR"), a non-profit corporation of which all of the homeowners are members. *Id.*; Appendix A at 3. The deed for that common area also contained reference to an easement for beach access similar to the one listed in the individual deeds granted to the Litigants. *Id.* However, the BGPOPR deed was somewhat more specific about the location of the access area, describing it as "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.” Appendix B at 2-3.²

In the 1960’s, residents used what they called the “original path” to the beach, which was essentially a straight line right down the middle of the area enclosed by the extended lines drawn by the trial court in the first action. Appendix B at 2. Later, in the 1970s, residents began changing their route to what they call the “historic path,” which veered outside of the extended lines. *Id.* However, as the trial court found in the first action, that use was by Bell’s permission. *Id.*

David Duncan grew up visiting and enjoying the Northwest region where Point Roberts sits. VRP 120-121. He loved the natural beauty of the land, particularly the trees. He was forced to sell the property in 1975 when he and his new wife moved to San Diego. *Id.* However, Duncan never lost his emotional attachment to the region, and in 2003 he jumped at the chance to buy the property he owns now at Bell’s Grove. VRP 124. The land was in terrible condition, full of debris, equipment, and dilapidated buildings. *Id.* at 123. Duncan worked to clean up the property, and decided to make a home there. *Id.*

Duncan loves trees, they are his passion and hobby. CP 162; Appendix A at 4. Because of his love and knowledge of trees, he drew up

² There is a drawing of this area as determined in a previous action included Appendix B at 8.

a plan to plant many varieties of trees on his property. CP 127; Appendix A at 4. Because of the wind and salt spray, he had to abandon his original tree plan in favor of more hardy trees suitable for the environment, which included Leylandii Cypress. *Id.* at 129. However, he also sought to infuse colors, choosing Nyssa Sylvatica, Robinia Frisia, and others. *Id.* at 130.

In 2003, Duncan closed off the historic path to the beach that Bell had allowed by permission, and provided a new access path that followed the eastern boundary of his property. Appendix B at 4.

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. Appendix B at 1. It has been undisputed through two trials that the access easement exists, the question is its location. *Id.* The Litigants did not participate in that action as individuals, but were all members of BGPOPR. Appendix A at 3.

In 2007 after a bench trial, the trial court determined that BGPOPR had an express access easement for a footpath across Duncan's property to the beach, but only in the area between the extended lines. Appendix B at 4. The trial court rejected BGPOPR's claim for a prescriptive easement over the "historic path," concluding that use of that path was permissive, not hostile. *Id.* at 5. The trial court also rejected BGPOPR's claim that the easement was at the fixed, specific route that they desired. *Id.* at 4.

Within the extended line area, the trial court ruled that Duncan had the right to designate or re-designate its location from time to time. *Id.* The court held that Duncan would have until August of 2007 to designate the easement location in a manner that was consistent with the court's judgment. *Id.* No appeal was taken from the 2007 ruling. Duncan designated a path in accordance with the trial court's 2007 order. Appendix A at 6.

Beginning in August 2007, Duncan began noticing trees being cut down on his property. CP 144-45. The Litigants began approaching him about trees they did not like and other aspects of his property that they wanted changed. *Id.* Duncan did not sue over these damages or take any other legal action against his neighbors.

In 2011, the Litigants (who again are all members of BGPOPR) sued Duncan and Black Pines, LLC. CP 1, 188. They claimed that easement language in their individual deeds gave them rights to the "historic path" sought and denied in the BGPOPR proceedings. CP 194. They made no mention of the 2007 order rejecting their claims to a specific path and affirming Duncan's right to designate the path. *Id.* They also brought new claims regarding Duncan's trees, labeling them spite structures under RCW 7.40.030 and demanding their removal and an

injunction against any vegetation being planted anywhere near their property lines. CP 199-200.

The trial court dismissed the Litigants' easement claims on summary judgment. CP 986-87. The spite structure claims were tried by the bench. The trial court found only two "structures" to be illegal under RCW 7.40.030: 16 Cypress trees that were located near the Tilkov and Cotter boundaries, and a one-foot "extender" erected on top of an existing six-foot fence along the Tilkov boundary. Appendix A at 10.

The trial court found that while Duncan's six-foot fence was permissible and not spiteful, the top foot was, because it blocked Tilkov's "common law right to light and air." *Id.* at 12. The trial court also found that the Cypress trees were a "structure" because "limiting RCW 7.40.030 to a built-up structure out of dimensional lumber would be inconsistent with the intent of the statute." *Id.* at 10.

The trial court ordered Duncan to lower the fence height to six feet, ordered removal of the 16 Cypress trees, and issued a permanent injunction against any vegetation or fence higher than six feet against Duncan and any of his relatives. *Id.* at 11.

The Litigants appealed from the trial court's ruling. Duncan moved to amend the judgment; that amendment was granted to allow Duncan to replace certain vegetation that had become sick or damaged

with like vegetation. CP 1106. Duncan cross appealed from the judgment.

D. SUMMARY OF ARGUMENT OF RESPONDENT

The trial court correctly ruled that the Litigants' easement claims were unsustainable as a matter of law. They are barred by res judicata and/or collateral estoppel. The claims at issue here were raised or could have been raised in the 2005 action, and the Litigants are in privity with BGPOPR regarding those claims.

The express easement claim failed because the deeds at issue did not sufficiently describe the burdened property. The equitable part performance exception to the statute of frauds does not apply at all here. The Litigants have not been denied an easement, they have simply been denied the precise path to the beach that they prefer. Also, the path that the Litigants seek here was used by permission and was not hostile.

The trial court correctly ruled that the two rows of Poplar trees added to a pre-existing Poplar grove after the 2007 action was not a spite structure. Both the law and substantial evidence supports the trial court's findings on that issue.

E. ARGUMENT

The trial court properly dismissed the Litigants' express and prescriptive easement claims on summary judgment.³ They failed to demonstrate any disputed issue of *material* fact regarding those claims. Regarding the express easement claim, the Litigants failed to provide a deed complying with the statute of frauds or the part performance exception. Regarding the prescriptive easement claim, that issue was decided in the prior proceeding and could not be relitigated. Also, there was no evidence that use of the Litigants' preferred path was continuous or hostile.

(1) Every Easement Claim the Litigants Raise Is Barred By the Doctrine of Res Judicata

The Litigants argue that the trial court erred in granting Duncan summary judgment on all of the easement claims they raised below. Br. of Appellants at 26-40.

Res judicata, or claim preclusion, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2)

³ This Court is well aware of the standard of review. This Court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. *Id.*

The Litigants are all members of the BGPOPR, and could have participated in the 2005 action against Duncan. The quality of the parties is identical. *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 535, 762 P.2d 356, 359 (1988). The cause of action and subject matter was a claim to establish the precise same easement they again seek in this action. The individual deeds upon which they now sued were all in place in 2005, there is no explanation as to why they did not join in that action in their individual capacities and have these claims resolved then.

Rather than bring these claims in 2005, the Litigants brought them separately and have put Duncan through endless litigation spanning eight years. Res judicata bars these easement claims, and they were properly dismissed on summary judgment.

(2) The Easement Claims Regarding the “Historic Path” Were Decided in the Prior Proceeding and Are Barred by Collateral Estoppel

The Litigants argue that easement rights to the “historic path” they prefer are theirs by express easement, or were acquired by prescription. Br. of Appellants at 37-40.⁴

⁴ Tilkov argued below that he acquired easement rights to the “original path” in the same manner, but has abandoned that argument on appeal.

Collateral estoppel prevents parties from being allowed to have a “second bite at the apple” and relitigate issues that were resolved in a prior dispute. The doctrine promotes judicial economy and serves to prevent inconvenience or harassment of parties. *Reninger v. Dep' t of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). Also implicated are principles of repose and concerns about the resources entailed in repetitive litigation. 14A Karl B. Tegland, *Washington Practice, Civil Procedure* § 35.32 at 446 (1st ed. 2003). Collateral estoppel provides for finality in adjudications. Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 806, 813–14, 829 (1985).

Collateral estoppel may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). Further, the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 264–65, 956 P.2d 312 (1998). For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is

asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306-07, 96 P.3d 957, 961 (2004).

Although the Litigants claim that they may re-raise the express easement issue by virtue of their individual deeds, those deeds contain language that is virtually identical to that contained in the BGPOPR deed. A court has already adjudicated this claim.

There is also privity of the parties. Privity is determined according to whether parties had a fair opportunity to litigate an issue: “Where the parties against whom collateral estoppel is being asserted have had no previous opportunity to raise certain issues, their claim on those issues should not be barred. On the other hand, one whose property interests have already been asserted and litigated by his or her predecessor should be prevented from reasserting and relitigating the same interests.” *Spahi v. Hughes-Nw., Inc.*, 107 Wn. App. 763, 774-75, 27 P.3d 1233, *modified*, 33 P.3d 84 (2001), *citing State ex rel. Dean by Mottet v. Dean*, 56 Wn. App. 377, 381, 783 P.2d 1099 (1989)

There is no injustice to the Litigants if the 2007 order is imposed against them. They have access to the beach, it is simply not the route they prefer. They have had their day in court on that issue.

The issues of whether easement rights to the “historic path” were acquired by express easement or by prescription were decided in the 2007 case. CP 177. Summary judgment on that issue was appropriate.

(3) Tilkov’s Express Easement Claim to a Particular Path to the Beach Failed as a Matter of Law Because the Servient Estate Was Not Sufficiently Described

The Litigants claim that their choice of access route – their preferred path to the beach – was granted as an express or prescriptive easement. Br. of Appellants at 26-34. At the outset, it is critical to note that the Litigants have an easement through Duncan’s property, it is just not the easement they want. The Litigants’ easement claims are not about access. They are about forcing their *preferred route to the beach* across Duncan’s property, rather than the existing easement rights that were already established in a prior action.

The Litigants presented no evidence to necessitate a trial on either the express or prescriptive easement claims. Those claims failed as a matter of law and were properly dismissed on summary judgment.

(a) The Express Easement Claim Failed Because the Deed Did Not Sufficiently Describe the Burdened Property, In Fact, the Deed Did Not Describe the Burdened Property at All

The Litigants argue that property purchasers in this development were granted express easements to cross Duncan’s property on a path of

their choosing by virtue of a statement in their deeds. Br. of Appellants at 26-29.⁵ That statement provides: “The purchasers are to have the perpetual privilege of foot travel to and from the said property to the tide flats on the beach, for recreational use; this easement to apply to foot path or foot paths over the reserve on the said plat of the Party of the First Part, and extends to the Second Party, grantees, heirs, executors, administrators and assigns....” CP 19.⁶

For an express easement to satisfy the statute of frauds, the burdened property must be particularly described. “[A] grant of easement must describe a specific subservient estate; *that is an absolute.*” *Berg v. Ting*, 125 Wn.2d 544, 549, 886 P.2d 564, 568 (1995) (emphasis added). The deed “must contain a description of the land sufficiently definite to locate it without recourse to oral testimony,” or at least contain a reference to another document with a sufficient description. *Berg*, 125 Wn.2d at 551, quoting *Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429, 430 (1960).

⁵ The Litigants also argue in a later section of their brief that there was a disputed issue of material fact regarding whether the trial court correctly concluded that easement only cover the “reserve.” Br. of Appellants at 31-32. Presumably this is a variation on the argument that there was sufficient evidence to necessitate a trial on the issue of the identity of the servient estate, and thus is addressed in this section of the brief of respondents.

⁶ The various deeds of the four neighbors contain slightly different variations of grammar and structure, but in substance are all the same. CP 17-18, 24-25.

An easement may be “floating” on the servient property, meaning the *easement’s* location need not be directly established in the conveying document. However, while the easement itself can be “floating,” the servient estate itself must still be sufficiently described in order to comply with the statute. *Berg*, 125 Wn.2d at 551.

In *Berg*, the purported easement included language such as “...the exact location of which shall be determined by reference to the conditionally granted application when the same is finally approved and recorded.” *Id.* at 548. Our Supreme Court concluded that the easement grant was invalid because it relied on a nonexistent document – a future plat – as the sole source of the description of the servient estate. *Id.* at 554.

Here, the granting language is just as vague as that in *Berg*, if not more so. The deeds simply grant an easement “over the reserve on the said plat,” a plat that was not recorded and did not exist at the time the deeds were granted. CP 23. There is absolutely no legal description of the “reserve” in evidence, and no way to ascertain the servient estate without recourse to oral testimony. For example, the Litigants’ expert opined that, despite the deed’s language indicating the easement was over the “reserve,” the “reserve” in the plan of survey could not possibly be the servient estate “because an easement over the reserve will not get someone

to the beach.” CP 362. However, this “fact” is not ascertainable without resort to oral testimony, which dooms an express easement as a matter of law.

The Litigants concede that under the statute of frauds, a purported express easement is invalid if the burdened land is not so insufficiently described in the deed that it cannot be located without recourse to oral testimony. Br. of Appellants at 29. However, they aver that a genuine issue of material fact exists because their expert’s oral testimony conflicted with Duncan’s expert oral testimony regarding what precise property this language identifies. *Id.* at 29-30.

In their introduction to this issue, the Litigants describe the trial court’s “extraordinary move” of first finding an issue of material fact regarding the express easement claim, but later concluding that the claim failed as a matter of law. Br. of Appellants at 26. The trial court’s actions are not at all extraordinary when understood in the unique context of an express easement claim. An express easement cannot exist as a matter of law if oral testimony is required to prove it. *Berg*, 125 Wn.2d at 551. Therefore, the Litigants’ reliance on expert testimony to “raise an issue of material fact” is precisely what doomed their claim as a matter of law.

The Litigants do not appear to recognize the inherent flaw in their express easement argument. They correctly state that the burdened

property must be identifiable without recourse to oral testimony, but then offers oral testimony regarding the identity of the burdened property described in the deed and claims that trial court erred. 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.

The Litigants' express easement argument also collapses because they simultaneously claim that the easement is "floating," *and* claim that the express easement is in a precise location: their preferred access method. Br. of Appellants at 9. Again, they are not arguing that they should be granted a floating easement, they already have one. They are claiming that the deed language conveys an express easement *along the particular route they have chosen. Id.*

The express easement here cannot both be "floating" and also in a exact location, the two concepts are mutually exclusive. If the Litigants concede that the easement granted by the deeds is floating, then the floating easement established in the 2007 order already comports with the deeds at issue. Thus the issue of the express easement claim is moot and the trial court was justified in not trying it.

As a matter of law, no express easement exists in these deeds. It cannot be proved without recourse to oral testimony, and thus cannot

succeed and there is no trial issue. The trial court's ruling on this point should be upheld.

(b) The Litigants' Ill-Defined Part Performance Argument Should Be Rejected

The Litigants make passing reference to "part performance" and suggest that equity should apply to avoid Duncan's unjust enrichment. Br. of Appellants at 30-31. Presumably, they are referring to the part performance exception to the statute of frauds, as they cite *Kirk v. Tomulty*, 66 Wn. App. 231, 237, 831 P.2d 792, 796, *review denied*, 120 Wn.2d 1009 (1992). *Id.* They argue that equity demands they be granted the precise path to the beach that they have requested. *Id.*

The part performance doctrine as applied to easements⁷ states that equity abhors unjust denial of an easement if the character, terms and existence of the contract can be clearly and unequivocally established to the satisfaction of the court. *Canterbury Shores Assocs. v. Lakeshore Properties, Inc.*, 18 Wn. App. 825, 829, 572 P.2d 742 (1977). The crucial inquiry is whether creation of an easement was, in fact, intended. *Kemery v. Mylroie*, 8 Wn. App. 344, 346, 506 P.2d 319 (1973). If there is any ambiguity as to the existence of an easement, the court determines the intention of the parties by examining such factors as the construction of

⁷ The Litigants mistakenly state the test for part performance as it relates to agreements to convey estates in real property, rather than easement agreements. Br. of Appellant at 30-31, citing *Berg*, 125 Wn.2d at 556.

the pertinent language, the circumstances surrounding the transaction, the situation of the parties, the subject matter, and the subsequent acts of the parties involved. *Kalinowski v. Jacobowski*, 52 Wash. 359, 367–68, 100 P. 852 (1909); *Scott v. Wallitner*, 49 Wn.2d 161, 162, 299 P.2d 204 (1956). However, the “equities of all parties” should be considered. *Delano v. Luedinghaus*, 70 Wash. 573, 575, 127 P. 197 (1912).

In *Kirk*, this Court concluded that equity demanded enforcement of a disputed easement without which the dominant estate would have been “landlocked.” *Kirk*, 66 Wn. App. at 231, 238. As the law abhors a result where land is effectively rendered useless by a denial of access, such a result is not surprising.

Thus, *Kirk* is readily distinguishable from this case, where the argument is over which easement the Litigants prefer, rather than total denial of access. The Litigants offer no evidence or explanation as to why their preferred route, as opposed to the current route, is inequitable. None of the declarations filed in support of partial summary judgment on the easement claims make any reference to hardships or inequities endured by having to follow the path Duncan designated after the 2007 lawsuit concluded. CP 35-38, 47-49, 58-61.

Nor does equity demand that Duncan be forced to acquiesce to the precise path the Litigants want. The 1962 BGPOPR deed that allows

members of BGPOPR to cross Duncan’s property to access the beach— contained language that reserved to the owner of the servient estate the right to designate the location of the path from time to time. Appendix B at 4. The Litigants’ theory would require the court to impose 58 individual easements that could not be relocated, even by Bell himself, contrary to the BGPOPR deed. The fact that the path was actually moved also indicates that the Litigants or their predecessors in interest – the users of the path who acquiesced to the change – intended that it could be moved by the owner of the servient estate.

There is nothing equitable about granting the Litigants the right to dictate additional, inconsistent, or different easements than the one they already enjoy. Tilkov’s argument about part performance should be rejected. In is unsupported in the record or by case law.

(c) The Deed That References the “Tilkov Easement” Expressly Declares that the Location of the Easement Is Indeterminate

In his final argument regarding an express easement, the Litigants claim that the deed conveying Duncan’s property identifies the “Tilkov easement” and thus summary judgment was improper. Br. of Appellants at 34-37. They aver that “Exhibit B” to the Duncan deed makes specific reference to this easement, and that the trial court should not have “ignored” that fact. *Id.* at 37.

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." CP 104.

This evidence does not alter the legal issue that was before the trial court: was the burdened property sufficiently described in the deed, without reference to oral testimony, to comport with the statute of frauds. It was not, and the trial court's summary judgment ruling should stand.

(4) The Litigants' Spite Structure Claims Were Not Sustained on Either Legal or Factual Grounds, the Bench Verdict Should Stand

The Litigants brought a number of spite structure claims against Duncan, some of which involved trees planted on the Black Pines property, which is directly adjoining the Tilkov and Cotter properties. Appendix A at 3. The other claims involved the Duncan property, which lies south of Edwards Drive and many hundreds of feet from any neighbor's property. CP 324; Appendix A at 2. The trial court found in favor of the Litigants on one of the claims involving the Black Pines property, and in favor of Duncan on the others. Appendix A at 10-11.

The Litigants challenge portions of the trial court's verdict regarding their spite structure claims under RCW 7.40.030. Br. of Appellants at 40-45. First, they argue that the trial court excluded any

claims relating to the Duncan property on the improper basis that the Duncan parcel (as opposed to the Black Pines parcel) was not contiguous with any of their properties. *Id.* at 41-42. Second, they argue that there was no evidence to support the factual finding that a grove of Poplar trees planted on the Black Pines property in 2003, and added to in 2009, were not a spite structure under the statute. *Id.* at 43-45.

The spite structure claims were heard in a bench trial, thus the standard of review is whether substantial evidence supports the court's findings, and whether, under *de novo* review, the conclusions of law resulting from those factual determinations are correct. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 555, 132 P.3d 789, 793 (2006) *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007).

(a) “Contiguous” and “Adjoining” Are Synonymous Terms According to the Litigants’ Own Argument

RCW 7.40.030 provides in relevant part: “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.”

The Litigants argue that the trial court should not have rejected their spite structure claims regarding trees on the Duncan property. Br. of Appellants at 40-42. They aver the trial court improperly rejected these claims because instead of applying the statutory language that under RCW

7.40.030 properties must be “adjoining,” with a requirement that the plaintiff’s properties be “contiguous” with the Duncan property. *Id.* at 41; CP 1065.

In challenging the trial court’s interpretation and application of the statute, the Litigants specifically take issue with the notion that the word “contiguous” is synonymous with the word “adjoining.” Br. of Appellants at 41-42. They cite the definitions of those words as follows:

The dictionary definition of contiguous is “being in actual contact: touching along a boundary or at a point.” Whereas, adjoining is defined as “touching or bounding at a point or line.”

Id. (citations omitted).

Although these two definitions – cited by the Litigants themselves – are virtually identical, they insist that the “definitive distinction between the two words is the requirement in ‘contiguous’ for there being actual contact or touching.” *Id.* at 42.

The Litigants’ own argument proves that the trial court was correct. “Contiguous” and “adjoining” are synonymous terms with no meaningful distinction. Both definitions cited “touching” as an element. The fact that the trial court used the word “contiguous” does not imply any misapplication of the statute.

None of the Litigants' properties touch the Duncan property, only the Black Pines property. Thus, the trial court correctly excluded of any claims regarding structures on the Duncan property.

(b) There Was No Evidence that Trees on the Duncan Property, Which Is Hundreds of Feet Away Over a Road, Interfered With the Litigants' Use or Enjoyment of Their Property

The Litigants next argue that even if "adjoining" does mean "touching," the Duncan property and the Black Pines property were both owned by Duncan in 2003, all trees were technically on an "adjoining" property. Br. of Appellants at 42-43.

Even if the trial court had considered the Duncan property to be retroactively "adjoined" to the Black Pines property, the ruling is still correct. RCW 7.40.030 does not prohibit a landowner from making valuable, enjoyable improvements to his property just because his neighbors take issue with him. *Jones v. Williams*, 56 Wash. 588, 594, 106 P. 166, 169 (1910). It merely prohibits useless structures that substantially interfere with their use and enjoyment of land. *Id.* The Duncan property is hundreds of feet from the property of any of the Litigants. CP 298, 324. There was no evidence presented to the trial court on summary judgment that any trees on the Duncan property could conceivably interfere with their use and enjoyment of their land. To suggest that RCW 7.40.030

should prohibit Duncan from ever planting trees anywhere on his property because his neighbors object, regardless of the distance from their land, would be an abuse of the limited purpose of the statute.

(c) Substantial Evidence Supports the Trial Court's Finding that the Poplar Grove Planted on the Black Pines Property in 2003 and Adjusted Later Was Not Planted Out of Spite

The Litigants argue that there is no substantial evidence to support the trial court's finding that the Poplar trees were not planted out of spite. Br. of Appellants at 43-45. They concede that the grove was planted in 2003, but claim that because some of the Poplars were planted later, the trees were planted out of spite by definition. *Id.* They also argue, "the very nature of the Poplar trees evidences their hostile nature." *Id.* at 45.

The Litigants do not present argument regarding any of the factual grounds for the Poplar ruling other than timing. However, the trial court found that the Poplar trees were not planted out of spite on several grounds, only one of which was the timing of the planting. Appendix A at 4-5, 8.⁸ The trial court found that "tree planting is one of Duncan's hobbies." *Id.* The court also found that most of the Poplar grove was planted prior to the 2005 action. *Id.* The two additional rows of Poplars planted after the 2005 action were relocated from their original intended

⁸ All of the following findings are unchallenged and are therefore verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611, 615 (2002).

location not out of spite, but because the new easement pathway established after the Bell's Grove action necessitated it. *Id.* Also, the trial court found that the Poplar grove was not sufficiently close to any plaintiff's property to have the same impact as the Cypress trees that the court found to be subject to the statute. Appendix A at 8.

Also, the Litigants make no argument and point to no evidence that the additional Poplar trees replanted after the Bell's Grove action concluded were somehow different in kind or quality as compared to the 2003 Poplars, which they concede were planted long before the Litigants sued Duncan.

Finally, the Litigants make no argument regarding the trial court's finding that "no easement has been granted to Tilkov or Cotter for a view over the Black Pines Property, and they have no common law right to a view easement over the Black Pines property." Appendix A at 11. This is critical because it demonstrates that none of Litigants can meet the test for finding a spite structure based on their claimed loss of view, which apparently was their principle source of irritation. Br. of Appellants at 21-22.

This Court has articulated a three-part test a claim under RCW 7.40.030:

We conclude that in order to apply the spite fence statute, RCW 7.40.030, to restrain the erection of a fence or other structure or to abate an existing structure, the court must find (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*.

Baillargeon v. Press, 11 Wn. App. 59, 66, 521 P.2d 746, *review denied*, 84 Wn.2d 1010 (1974) (emphasis added). Property owners cannot sue their neighbors for obstructing their view unless they have a right to that view:

As a general rule, a landowner has no natural right to air, light or an unobstructed view and the law is reluctant to imply such a right. However, such a right may be created by private parties through the granting of an easement or through the adoption of conditions, covenants and restrictions or by the legislature.”

Pierce v. NE. Lake Washington Sewer & Water Dist., 123 Wn.2d 550, 557, 870 P.2d 305, 309 (1994) (internal citations omitted).

It is undisputed that the Litigants have no easement right to permanent views over Duncan’s property, and should not, through misuse of RCW 7.40.030, obtain such an easement by virtue of a permanent injunction prohibiting Duncan from ever planting any trees on his property.⁹

⁹ The trial court’s finding that 16 Cypress trees were spite structures was based on the finding that they blocked Tilkov and Cotter’s light and air, not their view. This Cypress finding is addressed *infra* section F(3)(b).

The evidence supports the trial court's conclusion that the Poplar trees did not obstruct any Litigant's light or air. The first row of Poplar trees, as the Litigants admit, is 24 feet from the fence. Br. of Appellants at 25; VRP 99-101.

Ample evidence supports the trial court's findings regarding the Poplar grove, and its ruling that the grove was not planted out of spite should be upheld.

- (d) This Court Can Uphold the Finding that the Poplar Trees Were Not Spite Structures on the Alternate Grounds that Trees Are Not Structures Under the Plain Language of the Statute

A trial court's ruling can be affirmed on any grounds supported by the record. *Syrovoy v. Alpine Resources, Inc.*, 80 Wn. App. 50, 906 P.2d 377 (1995), *review denied*, 129 Wn.2d 1012, 917 P.2d 130 (1996).

Even if this Court finds no evidence to support the trial court's findings that the Poplar trees were not planted out of spite, this Court can uphold the ruling on the legal grounds that trees do not constitute structures under the plain language of RCW 7.40.030.

To avoid repetition, argument in on this issue developed *infra* section F(3)(a) is hereby incorporated by reference.

- (5) The Litigants' Appeal Is Nothing More Than a Continued Abuse of the Legal System to Harass Duncan; Duncan Should Be Awarded Attorney Fees on Appeal

This Court may award attorney fees on appeal to a party under RAP 18.1 if there is a basis in law, contract or equity to do so. Under RAP 18.9, a party may be awarded attorney fees on appeal if another party uses the rules for delay, or files a frivolous appeal.

The Litigants have not only proven to be capable of repeated harassing litigation, they are not even satisfied with their victories. None of the arguments raised on appeal have any merit, and are part of an ongoing cycle of abuse. They should be ordered to pay Duncan's attorney fees for having to respond to their frivolous appeal.

F. ARGUMENT OF CROSS-APPELLANT

(1) Assignments of Error

1. The trial court erred in entering finding of fact 9.
2. The trial court erred in entering finding of fact 13.
3. The trial court erred in entering finding of fact 14.
4. The trial court erred in entering finding of fact 16.
5. The trial court erred in entering finding of fact 17.
6. The trial court erred in entering conclusion of law 4.
7. The trial court erred in entering conclusion of law 7.
8. The trial court erred in entering conclusion of law 8.

9. The trial court erred in entering its order dated December 22, 2012, requiring abatement of the fence and Cypress trees in “conclusions of law” 9 and 10.¹⁰

10. The trial court erred in entering its order dated December 22, 2012, enjoining Duncan from having a fence or vegetation above six feet within 10 feet of the Tilkov and Cotter property lines in “conclusion of law” 8.

(2) Issues Relating to Assignments of Error

1. Can trees be considered “structures” under the plain language of RCW 7.40.030, when Washington courts have held for over 100 years that “structures” are artificial, human-made edifices? (Assignments of Error 2-10)

2. Was there insufficient evidence to conclude that a seven-foot fence blocked Tilkov’s light and air, when a six-foot fence did not? (Assignments of Error 1, 3, 4, 6, 7, 8-10)

(3) Summary of Argument

For over 100 years, Washington courts have consistently interpreted the term “structure” in Washington’s spite structure statute to mean artificial, human-made edifices. It has never been interpreted to include vegetation of any kind, including trees. Trees and hedges have

¹⁰ For clarity, “conclusions of law” 9 and 10 are actually orders of relief, as opposed to true conclusions of law.

been used since time immemorial along property boundaries, and the Legislature was capable of including natural vegetation in the definition of “structure” if it so chose. It did not, and courts cannot and should not rewrite the plain meaning of “structure” to include trees.

A structure is not a “spite structure” unless it interferes with a substantial property right of an adjoining neighbor. The trial court found that a six foot fence was reasonable, served a useful purpose, did not interfere with Tilkov’s light and air, and was not spiteful. However, the trial court concluded that a seven foot fence met none of these tests, and interfered with Tilkov’s light and air.

There is no evidence in this record to support the finding that the six foot fence was reasonable and unobtrusive, but the seven foot fence constituted a spite structure. All of the photographs and testimony Tilkov submitted leads to the indisputable conclusion that a one-foot addition to the fence did not interfere with Tilkov’s light and air, and did not convert the fence from a reasonable structure to a spite structure.

(4) Argument

(a) The Trial Court’s Conclusion that Trees Could Constitute a Spite Structure Was Incorrect as a Matter of Law

The trial court found that of all the trees Duncan planted over the years, 16 Cypress trees near the Tilkov and Cotter properties were “spite

structures” under RCW 7.40.030. Appendix A at 11. The trial court ordered their removal, and enjoined Duncan from having *any* vegetation on the Black Pines property more than six feet in height within ten feet of the Tilkov and Cotter boundaries. *Id.*

Again, under the spite structure statute, a court may enjoin or require the abatement of “any structure intended to spite, injury, or annoy an adjoining proprietor.” RCW 7.40.030. The statute does not define “structure.”

A court’s fundamental objective in constructing a statute is to ascertain and carry out the intent of the Legislature. *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). The court must interpret the statute as written and not add language, even if it believes the Legislature intended a different result. *Cerrillo v. Esparza*, 158 Wn.2d 194, 204, 142 P.3d 155, 160 (2006). Legislative intent is implemented by giving effect to the plain meaning of a statute, and the plain meaning may be gleaned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. *Flight Options, LLC v. Dep’t of Revenue*, 172 Wn.2d 487, 500, 259 P.3d 234 (2011).

When a statute is unambiguous, construction is not necessary and the plain meaning controls. *Faben Point Neighbors v. City of Mercer*

Island, 102 Wn. App. 775, 778, 11 P.3d 322, 324 (2000), *review denied*, 142 Wn.2d 1027 (2001). If a statute is susceptible to two or more reasonable interpretations, the statute is ambiguous, but a statute is not ambiguous merely because two or more interpretations are conceivable. *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432, 275 P.3d 1119, 1122-23 (2012).

For 100 years, the plain and unambiguous meaning of “structure” as used in RCW 7.40.030 has been an edifice that is artificial and constructed by a person. The Supreme Court’s *Karasek* decision was the first to interpret the spite fence statute. *Karasek v. Peier*, 22 Wash. 419, 426, 61 P. 33, 35 (1900). In *Karasek*, neighbors argued over a fence that one of them erected between their properties. The complaining neighbor contended that the statute did not apply because a fence was not considered a “structure” within the meaning of the statute. *Id.* at 424. The court adopted the dictionary definition of the term “structure” as “that which is built; a building; especially a building of some size of magnificence; an edifice.” *Id.* The Supreme Court then concluded that the term “structure” meant: “any production or piece of work *artificially* built up or composed of parts joined together in some definite manner; *any construction*. *Id.* at 425 (emphasis added).

Ten years after *Karasek*, the Supreme Court continued to read “structure” to meaning something artificial, constructed by a person. *Jones*, 56 Wash. 588. In that case, it held a structure that “enhances the value, usefulness, and enjoyment of land is not a nuisance, and *the builder* cannot be assigned as a legal reason for preventing such construction.” *Id.* at 588 (emphasis added). The use of the term “builder” again connotes something artificial and constructed.

In fact, no court in Washington has ever held the word “structure” in our spite structure statute to include vegetation or trees. Likewise, the Legislature has never amended the statute to expand the definition of “structure” in the 100 years since *Karasek* was decided.

Had the Legislature intended to include vegetation, shrubs, trees, and the like in the statute, it certainly could have chosen to do so. *See, e.g., Town of Clyde Hill v. Roisen*, 111 Wn.2d 912, 767 P.2d 1375, 1376 (1989). In *Roisen*, our Supreme Court examined an ordinance imposing height restrictions on “naturally grown fences.” *Id.* at 914. The town specifically defined “fence” as “any barrier which is *naturally grown or constructed...*” *Id.* (emphasis added). Thus, the town council considered “naturally grown” and “constructed” fences to be distinct concepts, and specifically included both in their ordinance. *Id.*

In an excellent analysis of a similar statute that preexisted Washington's law, Connecticut's Supreme Court rejected an expansion of the term "structure" in its spite fence statute to include hedges or trees. *Dalton v. Bua*, 47 Conn. Supp. 645, 648, 822 A.2d 392, 395 (Super. Ct. 2003). The Court first observed that in the 150 years since its enactment, the Connecticut spite fence statute has "been applied only against man-made constructions." *Id.* at 647. The court also noted that the Legislature was undoubtedly aware of the possibility that hedges might sometimes be used as fences, yet chose not to write the statute to include them:

Hedges, which have been planted since biblical times; see Mark 12:1; obviously existed in 1867, but neither the legislature in enacting the statute nor the courts in interpreting it since have suggested that they can be "structures" within the meaning of the statutory text.

Id.

Trees are not "constructed" or "built" like a building, fence or other "artificial edifice." They grow. There is nothing in the plain meaning of the term "structure" that would lead anyone to believe that a tree should be considered a "structure." The trial court erred when it rewrote the statute based upon what the court believed the Legislature intended, rather than based upon its plain language. Appendix A at 10.

The plain meaning of "structure" in RCW 7.40.030, as announced by our Supreme Court and uncontroverted since its inception, is something

artificial and not natural. The Legislature chose not to include naturally grown objects such as trees, bushes, or vegetation in its definition of “structure.” It was not for the trial court, nor for any court, to alter that definition on the Legislature’s behalf.

Trees are not spite structures under RCW 7.40.030. The trial court’s ruling to the contrary should be reversed.

(b) Under This Court’s *Baillargeon* Decision, Sufficient Evidence Did Not Support Conclusion that the Cypress Trees Were Spite Structures

The trial court found that the 16 Cypress trees were spite structures. Appendix A at 10. The court distinguished those particular trees from the many other trees Duncan had cultivated and enjoyed and concluded they alone were planted with malicious intent to annoy or injure Tilkov and Cotter. *Id.*

Again, under *Baillargeon* three part test, substantial evidence must exist that (1) the trees damaged Tilkov’s or Cotter’s enjoyment of their property in some significant degree; (2) the trees were designed as the result of malice or spitefulness primarily or solely to injure and annoy the adjoining landowners; and (3) the trees serve no really useful or reasonable purpose. *Baillargeon*, 11 Wn. App. at 66 (emphases added).¹¹

¹¹ Under the first prong of the test regarding the adjoining landowner’s enjoyment, a court cannot restrict one property owner’s use in order to “confer a benefit on the other.” *Id.*, quoting *McInnes v. Kennell*, 47 Wn.2d 29, 35, 286 P.2d 713, 716

Under the second and third prongs of the *Baillargeon* test, substantial evidence does not support the findings that the Cypress trees were primarily planted to injure and served no useful or reasonable purpose.

In findings that are verities on appeal, the trial court established that tree planting is Duncan's hobby, and that he plants trees for the enjoyment of caring for them and watching them grow. Appendix A at 4. The trial court found that Duncan "bought the property with tree planting in mind." *Id.* He planted many trees both before and after there was any litigation between the parties here. *Id.* Duncan "implemented his planting plan without regard for the effect of his actions on Tilkov, Cotter, and the other neighbors in Bell's Grove." *Id.*

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. In fact, the trial court's findings regarding Duncan's long-standing practice of planting and cultivating trees demonstrate that

(1955). In other words, a property owner may not, through use of the spite structure statute, obtain a benefit he did not otherwise have at the expense of his neighbor. *Id.* The trial court mentioned that the Cypress trees blocked Tilkov's and Cotter's views, Appendix A at 7, but in its conclusions of law made clear that the enjoyment lost was light and air, not views. Appendix A at 11. For clarity, this Court should affirm that Tilkov and Cotter could not maintain any claim under RCW 7.40.030 for any injury to their views. This is important, because the suggestion that they can sue Duncan for injury to their views could perpetuate the cycle of endless litigation that appears to be forming here.

his primary purpose of tree planting is a hobby, not to offend his neighbors. There is no evidence in the record that the “primary” or “sole” purpose of planting the Cypress tree was malice and annoyance of neighbors.

The timing of the planting and proximity to property lines alone cannot be sufficient evidence of malice. It suggests that once a property owner’s neighbor complains about anything, suddenly that property owner can undertake no other lawful activity without creating an inference that the activity is done out of malice. This creates an improper restriction on the free and lawful use of property warned of by our Supreme Court in

Jones:

In this country real estate is an article of commerce. The uses to which it should be devoted are constantly changing as the business of the country increases, and as its new wants are developed. Hence it is contrary to the well-recognized business policy of the country to tie up real estate where the fee is conveyed with restrictions and prohibitions as to its use, and hence, in the construction of deeds containing restrictions and prohibitions as to the use of property by a grantee, all doubts should, as a general rule, be resolved in favor of a free use of property and against restrictions.

Jones, 56 Wash. at 592.

Also, the notion that the Cypress trees serve *no* reasonable or useful purpose is contrary to the record. Duncan planted the trees for their

beauty and privacy, and there is no dispute that they serve that purpose. Appendix A at 4; VRP 194.

The idea that the trees served no reasonable or useful purpose is also repugnant to the history and laws of Washington. In fact, ornamental trees increase the value of land, and their damage or removal without permission is remediable at law. *Tronsrud v. Puget Sound Traction, Light & Power Co.*, 91 Wash. 660, 661, 158 P. 348, 349 (1916). In addition to their aesthetic value, trees provide a number of other valuable services, including *inter alia*, protection from wind and soil erosion, prevention of water pollution, providing shade, and serving as habitat for wildlife. *Pearce v. G. R. Kirk Co.*, 22 Wn. App. 323, 328, 589 P.2d 302, 305 *aff'd*, 92 Wn.2d 869, 602 P.2d 357 (1979); WAC 222-30-020. Washington has entire subagencies devoted to the protection of trees, including the Department of Natural Resources' Forest Practices Board established in 1974 by the Forest Practices Act. RCW 76.09.010-.935.

Trees apparently also serve a reasonable and useful purpose in the minds of Whatcom County legislators. Trees are encouraged, and in some cases mandated, in the Whatcom County Code and other applicable ordinances and development plans. For example, the county code expressly requires that trees be maintained by certain Point Roberts residents as a buffer for visual and aesthetic purposes:

20.72.350 Building setbacks/buffer areas. (1) Building setbacks along Tye Drive and Roosevelt Road are increased to 50 feet and 40 feet respectively. In existing treed areas along Tye Drive and Roosevelt Road, *a 50-foot/40-foot vegetative buffer comprised of existing trees shall be maintained for visual or aesthetic purposes except for necessary ingress and egress points.*

Whatcom County Code § 20.72.350 (emphasis added). The code also states in relevant part: “Planting of street trees along the road frontage(s) of the subject parcel shall be required.” *Id.* at 20.73.657(1).

Trees are not a nuisance, and on this record they were not planted primarily to spite neighbors. The trial court erred in finding that sufficient evidence supported its conclusion that all three elements of the *Baillargeon* test were satisfied here.

- (c) The Trial Court’s Ruling that Duncan Must Lower the Height of His Existing Fence Is Unsustainable on This Record; There Is No Evidence That the Extra Foot Obstructs Any Light or Air to Tilkov’s Windows

There is currently a seven-foot fence between the Black Pines property and the Tilkov property.¹² Appendix A at 6.¹³ The trial court found that the first six feet of the fence was reasonable and useful, but the top foot of the fence was a spite structure. *Id.* at 9. The court found that

¹² None of the other plaintiffs’ properties were involved in the dispute over the “extender.” Appendix A at 10.

¹³ The trial court found, and it is undisputed, that the fence complies with all zoning codes and regulations. *Id.*

this top foot deprived Tilkov of his “common law right” to light and air. *Id.* at 11. The trial court ordered demolition of the top of the fence, and enjoined Duncan from having any fence over six feet at the property boundary line, regardless of its design. *Id.*

The trial court also acknowledged that Tilkov could sustain no spite structure claim regarding the fence extender in the absence of interference with Tilkov’s “common law right to at least a modicum of light and air,” but found that the top foot of the fence interfered with light and air. *Id.*

Contrary to the trial court’s conclusion, there is no “common law right” to light and air in the United States, and there has not been for over a century. *Collinson v. John L. Scott, Inc.*, 55 Wn. App. 481, 485, 778 P.2d 534, 537 (1989). “At common law a man has a right to build a fence or other structure on his own land as high as he pleases, although he thereby completely obstructs his neighbors’ light and air, and the motive by which he is actuated is immaterial.” *Karasek*, 22 Wash. at 427. A right to light and air can be acquired in this country only by express or implied easement, or by statute. *Id.* at 428.

Thus, Tilkov may have a *statutory* right to light and air, here but only upon the trial court’s finding that the additional foot of fence meets the *Baillargeon* test. Again, under that test, no structure is a spite structure

unless it damages the adjoining landowner's enjoyment of his property in some significant degree. *Baillargeon*, 11 Wn. App. at 66.

There is no evidence that the top foot of the fence blocked Tilkov's enjoyment of light or air, but the first six feet did not. Multiple views from Tilkov's house of the seven-foot fence shows plenty of light reaching the camera; the fence does not appear to be close enough to his residence to directly block any light or air from reaching his windows. Ex. 22. One can still see distant lowland trees and sky in photos both with and without the extender. *Id.* Tilkov never testified nor presented any evidence demonstrating that the extra foot on the fence blocked any light or air from coming to his property.

In fact, Tilkov admitted on the stand that the fence extender did not interfere with light on his property:

Q. Are – is the fence and the trees, are they starting to impact the light, the natural light that's coming into your window?

A. Not yet, they're not high enough to do that, as we saw.

Q. Is it darker? Is it darker on your property because –

A. Well, it's darker by the fact that the fence is there. I mean, it is dark.

VRP 54-55. Note that Tilkov did not say that the fence *top* interfered with light by any measurable degree of difference from the fence itself. He said that his property was darker because “the fence is there.” *Id.* Tilkov also

presented photographs of the fence with and without the extender. Ex. 22.

There is no discernible difference in light.

Tilkov testified and demonstrated with photographs that Tilkov himself was encouraging the growth of wild roses to at least the height of the top of the fence with the extender if not higher. VRP 49; Exs. 22, 23. He testified that the wild roses grew quite high and pre-existed the fence extender, and was annoyed when Duncan cut them back. VRP 52-53. It is inconsistent with logic to argue that an extra foot of fence injures Tilkov's use and enjoyment of his property because it blocks light and air, when an eight foot rosebush on Tilkov's own property is steadily growing along his fence line.

In order to sustain the trial court's ruling that the fence extender was a spite structure, there had to be a finding, supported by substantial evidence, that a seven foot-high interfered with Tilkov's light and air in a way that the six-foot fence did not. There is no such evidence.

G. CONCLUSION

This endless litigation regarding the easement route should at last concluded by affirming the trial court's dismissal under the doctrines of collateral estoppel and res judicata, as well as the undisputed facts.

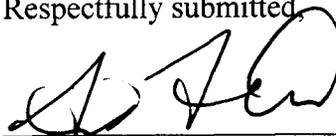
The remedies of injunction and abatement should be reserved for those instances where one property owner has maliciously deprived

another of a substantial rightful use of property. That is simply not the case here. Property owners should not be able to restrict their neighbor's land use rights to obtain benefits for themselves that they otherwise do not enjoy.

The trial court's ruling should be affirmed as to the easement claims and the denial of spite structure claims as to most of the trees on Duncan's and Black Pines' property. However, the trial court's rulings that the 16 Cypress trees and top foot of fence were spite structures should be reversed. Duncan should be awarded his attorney fees on appeal.

DATED this 7th day of June, 2013.

Respectfully submitted,



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APPENDIX

APPENDIX A

1 FINDINGS OF FACT

2 1. All of the Plaintiffs own lots in what is typically known as "Bell's Grove,"
3 which is located in Point Roberts, Whatcom County, Washington. Plaintiffs Mit D. and
4 Susan L. Tilkov ("Tilkov") own that real property legally described in Exhibit A to the
5 First Amended Complaint to Quiet Title in Easement, Breach of Easement, Trespass,
6 and Violation of RCW 7.40.030 (filed October 21, 2011, Sub No. 52) ("First Amended
7 Complaint"). Plaintiff Kathryn Lynne Cotter ("Cotter") owns that real property legally
8 described in Exhibit C to the First Amended Complaint. Plaintiff Tibor Gajdics
9 ("Gajdics") owns that real property legally described in Exhibit B to the First Amended
10 Complaint. Plaintiff Sandra Hulme ("Hulme") owns that real property legally described
11 in Exhibit M to the First Amended Complaint. The properties owned by Hulme and
12 Gajdics are not contiguous to any property owned by Defendants.
13

14 2. Defendant David L. Duncan ("Duncan") owns that real property located in
15 Whatcom County, Washington legally described in Exhibit D to the First Amended
16 Complaint ("Duncan Property"). The Duncan Property is not contiguous to any property
17 owned by Plaintiffs. Defendant Black Pines, LLC ("Black Pines") is a Washington
18 limited liability company and owns that property legally described as follows:
19

20 The east 13 acres of the west 33 acres of Government Lot 1, Section
21 11; Township 40 North, Range 3 West of W.M.
22 Excepting therefrom the North 1470 feet thereof.
23 Also except that portion thereof lying south of Edwards Drive.
24 Also except the right-of-way for Edwards Drive.
25 Situate in Whatcom County, Washington.

23 Plaintiffs' Exhibit 26. ("Black Pines Property"). Duncan originally acquired the Black
24 Pines Property and Duncan Property together from Stanley Vincent Bell on or about

25 **FINDINGS OF FACT AND CONCLUSIONS
OF LAW - 2**

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1 October 16, 2000, and recorded a statutory warranty deed on November 18, 2000.
2 Plaintiffs' Exhibit 10. Duncan is the sole owner of Black Pines.

3 3. The Black Pines northern property line is the southern property line for the
4 property owned by Tilkov and Cotter. There is a strip of land between the Tilkov and
5 Cotter properties whose southern property line is a portion of the northern property line
6 of the Black Pines Property that is owned by the Bell's Grove Property Owners of Point
7 Roberts ("Bell's Grove Association"). The general configuration of the properties is
8 shown on Plaintiffs' Exhibit 1, which is attached hereto and incorporated by reference as
9 Exhibit A.

10
11 4. Each Plaintiff is a member of the Bell's Grove Association. In 2005, the
12 Bell's Grove Association commenced a lawsuit against Duncan seeking to quiet title in
13 an easement allowing Bell's Grove Association members to use a particular portion of
14 the Duncan Property, and to cross the Duncan Property and Black Pines Property to get
15 to the beach, Bell's Grove Property Owners of Point Roberts v. David L. Duncan,
16 Whatcom County Superior Court Cause No. 05-2-02831-5 ("Bell's Grove Action"), which
17 culminated in 2007 with the entry of Findings of Fact and Conclusions of Law ("2007
18 Findings") and a Judgment ("2007 Judgment"). The 2007 Judgment required Duncan to
19 allow Bell's Grove Association members use of the beach on the Duncan Property and
20 identified parameters for the location of the access route across the Duncan Property
21 and the Black Pines Property to get to the beach. The 2007 Findings are set out in
22 Plaintiffs' Exhibit 7, and the 2007 Judgment is at Plaintiffs' Exhibit 8, all of which are
23 incorporated herein by reference.
24

25 **FINDINGS OF FACT AND CONCLUSIONS
OF LAW - 3**

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1 5. Duncan short platted the Black Pines Property into two lots and the
2 Duncan Property into three lots.

3 6. Tree planting is one of Duncan's hobbies. He enjoys working with trees,
4 planting them, pruning them, and watching them grow over time. Mr. Duncan bought the
5 property with tree planting in mind. He began working on planting plans for this property
6 while he was still living in California in 2001 through 2003. Since approximately 2003,
7 Duncan has planted many trees on the Duncan Property and the Black Pines Property.
8 Duncan implemented his planting plan without regard for the effect of his actions on
9 Tilkov, Cotter, and the other neighbors in Bell's Grove. There are also several trees and
10 shrubs that grew naturally on the property, were not planted by Duncan, and/or pre-
11 existed Duncan's ownership. The following plantings are of particular relevance to this
12 case:
13

14 a. Duncan began planting several forest-like, uneven rows of Cypress
15 trees in 2003 parallel to Edwards Drive on the Duncan Property.

16 b. Duncan planted a grove of Poplar trees consisting of three rows of
17 ten trees running north to south on Lot 1 of the Black Pines Property, which lot is
18 generally south of the Cotter property. As part of a later installation of a septic mound
19 on Lot 1, Duncan relocated some of the Poplars near the Cotter boundary, and included
20 them as part of an expanded grove that added two additional rows running north to
21 south on the east side of the original grove. These additional two rows of Poplars were
22 planted by Duncan after the Bell's Grove Action was concluded. Relocation of the
23 pathway caused Duncan to rethink his planting pattern and he decided to expand the
24

1 grove to the east. The most northerly row of poplars in the original grove was cut down
2 by unknown persons. The Court finds that the poplar grove has a different quality to it
3 and that its planting was not spiteful.

4 c. Duncan later planted nine Cypress trees on Lot 1 generally running
5 in a row east to west, and from 7 to 10 feet from the Cotter property line. These trees
6 are "fast growing" and will likely reach heights of 60-70 feet, and have a spread of 15-25
7 feet wide. Plaintiffs' Exhibit 5, pages 58-59. These trees were planted after entry of the
8 Judgment in the Bell's Grove Action.

9 d. Duncan has planted an additional seven Cypress trees on Lot 2 of
10 the Black Pines Property within 10 feet of the Tilkov Property line in an irregular
11 staggered row amongst pine tree that he planted earlier and around an existing
12 Hawthorne tree on the fence line. These trees are "fast growing" and will likely reach
13 heights of 60-70 feet, and have a spread of 15-25 feet wide. Plaintiffs' Exhibit 5, pages
14 58-59. These trees were planted after entry of the Judgment in the Bell's Grove Action.

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

21 8. Duncan continued to fill in or construct a wood fence across the common
22 boundary lines of the Tilkov and Cotter properties. In 2007, just after the Bell's Grove
23
24

25 **FINDINGS OF FACT AND CONCLUSIONS
OF LAW - 5**

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1 Action finished, Tilkov trimmed wild rose bushes growing on the Black Pines Property
2 side of the fence to match the height of the wire fence. Exhibit 23, page 4. Tilkov did
3 this cutting without seeking Duncan's permission, but the Court finds that Tilkov's
4 actions were not particularly unreasonable or intrusive. Duncan responded to this
5 action by sending Tilkov a letter denouncing his action and threatening to sue him for
6 timber trespass.

7
8 9. In April 2010, Duncan began to install an "extender" on the 6-foot high
9 fence, in front of, inter alia, Tilkov's Property. The extender is essentially solid,
10 interferes with light and air, and one can't see through it. Plaintiffs' Exhibit 22; Plaintiffs'
11 Exhibit 23, pp. 7-8 and 12-13. There is no evidence in the record that the fence with the
12 extender violates any provision of County code and Plaintiffs make no such contention.

13 10. Duncan installed a new footpath across the Black Pines Property and
14 Duncan Property for the Bell's Grove Association following the Bell's Grove Action. The
15 new route was different than had been used by Bell's Grove residents, and the portion
16 on the Black Pines Property did not line up with the portion on the Duncan Property.
17 Bell's Grove Association sought to have the Court require that the two segments of the
18 path line up. During this process, Duncan represented to the Court that the Bell's Grove
19 Association could use any portion of the right-of-way they wished. Exhibit 42. The
20 Court reserved ruling on the motion.

21
22 11. In May 2009, the Bell's Grove Association attempted to install a gravel
23 walkway in the Whatcom County right-of-way that runs along the southern boundary of
24 the Black Pines property to link the two trails. No permission was obtained from

1 Whatcom County or Mr. Duncan to do this work. The evidence regarding the
2 subsequent events concerning this gravel walkway was inconclusive as to whether and
3 to what extent Mr. Duncan took steps to undo the work done by the Association. What
4 is clear to the court on this subject is that these events amount to further evidence of
5 conflict between the parties.

6 12. Duncan has installed a septic system on the Black Pines Property that
7 parallels the Cotter property, is approximately three feet high, is sandy, and difficult to
8 walk up and down. The planted Cypress trees along the Cotter property are located
9 between this mound and the fence running on the common boundary line. Duncan has
10 also installed a solid wood fence running north and south on the Black Pines Property
11 on either side of the approximately 7-foot wide path for the Bell's Grove residents.
12 These fences create a physical barrier between the east (Lot 2) and west (Lot 1) sides
13 of the Black Pines Property. The Cypress trees planted near the Tilkov Property have
14 or will fill in to prohibit walking between the fence line and the trees unless the branches
15 are pruned back as the trees grow.
16

17 13. This Court finds that all of the above-referenced Cypress trees in
18 paragraphs 6(c) and (d) of the Findings were planted by Duncan near the Tilkov and
19 Cotter properties. While they do not currently shade either of the Plaintiffs' properties,
20 all of them will likely grow to a potential height of 60-70 feet and have a spread of 15-25
21 feet. These Cypress trees and the fence extender damage the enjoyment of the Tilkov
22 and Cotter in a significant degree, including, but not limited to, by blocking light, air, and
23 views from portions of each of the properties. The Cypress trees will likely create a 60-
24

25 **FINDINGS OF FACT AND CONCLUSIONS
OF LAW - 7**

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1 to 70-foot high wall directly in front of the Tilkov and Cotter properties.

2 14. This Court finds that the Cypress trees referenced above in paragraphs
3 6(c) and (d) of the Findings, and the fence extender in front of the Tilkov property were
4 designed primarily or solely to injure and annoy Tilkov and Cotter. This finding is based
5 upon the historical animosity of the parties; the fact that the parties were involved in a
6 prior lawsuit over the location of the path; the nature, character, location, and use of the
7 fence extender and the Cypress trees; the timing of Duncan's actions, the dispute with
8 Tilkov over the cutting of roses, and the fact that Duncan had previously advocated for
9 the use of landscaping to protect water views of upland properties. Exhibit 19.
10

11 15. This Court finds that the Poplar grove in particular, and the rest of the
12 trees planted by Duncan in general, were not planted by Duncan as a result of his
13 malice or spitefulness, or primarily or solely to injure and annoy the adjoining
14 landowners because the planting of the grove and the other trees occurred prior to the
15 commencement of the Bell's Grove Action. Finally, these trees are not planted closely
16 enough (within ten feet) to the northern Black Pines' property line and therefore do not
17 have the same impact on the Tilkov and Cotter properties as the 16 trees referenced
18 above.
19

20 16. This Court finds that the Cypress trees referenced above in paragraphs
21 6(c) and (d) of the Findings, and the fence extender in front of the Tilkov property, serve
22 no really useful or reasonable purpose. This finding is based upon a lack of a really
23 useful reasonable purpose of these items in relationship to the stated reason advanced
24 by Duncan for their presence, including to gain privacy, create an enjoyable forest
25

1 configuration, and as part of a potential footpath that would run through the trees on the
2 Black Pines Property. The fence extender does not provide any more protection of
3 Duncan's vegetation or privacy than the prior six-foot high fence. The extender and
4 Cypress trees referenced above in paragraphs 6(c) and (d) of the Findings as installed
5 or planted are not serving to provide any more privacy or forest configuration than could
6 be obtained without the items, and the potential "path" between the Cypress trees and
7 fence line cannot be installed as proposed, given the proximity of the trees to the fence,
8 the difficulty in getting over the septic mound, and the installation of a fence running
9 north and south between Lots 1 and 2 of the Black Pines Property. There is no walking
10 space available now between the Cypress and Duncan's fence along the property with
11 Tilkov. The above-referenced trees do not serve any purpose for the pathway desired
12 by Duncan. The trees do not serve any purpose to provide color that could not be
13 accomplished from different trees, or different locations that do not impact Duncan's
14 neighbors.
15

16 17. This Court finds that the configuration of the Cypress trees referenced
17 above in paragraphs 6(c) and (d) of the Findings have caused or will cause them to
18 grow together in a generally uniform manner to create wall-like structures upwards of
19 60-70 feet high.
20

21 CONCLUSIONS OF LAW

22 1. This Court has jurisdiction over the parties, and venue is appropriate in
23 this Court.

24 2. Plaintiffs seek equitable relief under RCW 7.40.030, which provides:

25 **FINDINGS OF FACT AND CONCLUSIONS
OF LAW - 9**

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

6 The standards for proving entitlement to relief under this provision are the following:

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

12 Baillargeon v. Press, 11 Wn.App. 59, 66, 521 P.2d 746 (1974).

13 3. The Court concludes that relief under RCW 7.40.030 is only available to a
14 person who owns property directly contiguous to the property on which the complained
15 of structure has been placed. For this reason, Hulme and Gajdics cannot seek recovery
16 under RCW 7.40.030. Nor can any of the Plaintiffs seek recovery for any activities on
17 the Duncan Property.

18 4. The extender located on the fence between the Black Pines Property and
19 the property owned by Tilkov is a "structure," as that term is used in RCW 7.40.030.
20 The 16 Cypress trees are planted in a manner that has resulted, or will result, in them
21 growing together to form screens, and in this form are structures under RCW 7.40.030.
22 The Court concludes that limiting RCW 7.40.030 to a built-up structure out of
23 dimensional lumber would be inconsistent with the intention of the statute.

24 5. The Court further concludes that RCW 7.40.030 is an overlay to zoning
25 laws, and therefore a lawful use can violate the statute if it is unreasonable and the
elements set out above are established. The Court concludes that a structure that

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW - 10**

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1 complies with local zoning regulations may still be found to violate RCW 7.40.030.

2 6. No easement has been granted to Tilkov or Cotter for a view over the
3 Black Pines Property, and they have no common law right to a view easement over the
4 Black Pines Property.

5 7. The Court concludes that Tilkov and Cotter do have a common law right to
6 at least a reasonable modicum of light and air. The fence extender and the Cypress
7 trees along and within ten feet of the fence-line interfere with Tilkov's and Cotter's
8 common law right to light and air.

9 8. Based upon the Court's findings of fact, which are incorporated herein by
10 reference as conclusions, this Court concludes that Duncan has violated RCW 7.40.030
11 by installing the extender on the fence line, and by planting the Cypress trees
12 referenced above in paragraphs 6(c) and (d) of the Findings. The Court concludes that
13 these actions are an unreasonable use of the Black Pines Property, and infringe upon
14 the reasonable uses and enjoyment of the Tilkov and Cotter properties. This Court
15 concludes that Tilkov and Cotter are entitled to equitable relief in the form of abatement
16 of these items and a permanent injunction prohibiting Defendants from constructing,
17 planting, having, or installing any fence, hedge line or plant within ten feet of the
18 common property lines with the Tilkov Property and the Cotter Property, above six feet
19 in height as measured from the ground adjacent to any fence, hedge line or plant. This
20 permanent injunction is personal in nature and does not run with the land, and therefore
21 only extends to Defendants and any other owner of the Defendants' property that is
22 related to any of the Defendants, but not to any independent third person.
23
24

25 **FINDINGS OF FACT AND CONCLUSIONS
OF LAW - 11**

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1 9. This Court concludes that relief relating to the extender between the Black
2 Pines Property and the Tilkov Property shall occur through complete removal within 60
3 days following entry of a Judgment. Defendants shall be entitled to trim back the tall
4 hedge that grows over the extender from Tilkov's Property to the extent that doing so is
5 necessary to perform this work.

6 10. This Court concludes that relief relating to the Cypress trees within 10 feet
7 of the Tilkov and Cotter Properties shall occur through abatement within 60 days
8 following entry of a Judgment in one of two ways (or using a combination of the two
9 ways) at the discretion of Defendants:

10 a. Some or all of the Cypress trees referenced with paragraphs 6(c)
11 and (d) of the Findings and within ten feet of the Tilkov Property or the Cotter Property
12 shall be removed; or

13 b. Any remaining of the Cypress trees referenced with paragraphs
14 6(c) and (d) of the Findings and within ten feet of the Tilkov Property or the Cotter
15 Property shall be trimmed and hereinafter maintained at a height no higher than six feet
16 above ground, as measured from the base of each tree.

17 11. Based upon the Findings of Fact, this Court concludes that Defendants'
18 planting of the Poplar grove and the rest of the trees on Defendants' property does not
19 violate RCW 7.40.030.

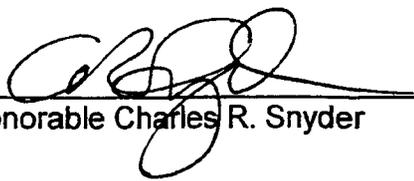
20 12. The Court finds and concludes that Plaintiffs are the substantially
21 prevailing parties, and entitled to recoverable attorneys' fees and costs.

22 13. Any and all Findings of Fact are incorporated herein to the extent they are

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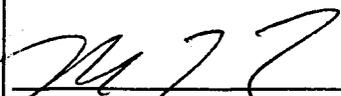
a conclusion of law.

DATED this 22 day of October, 2012.



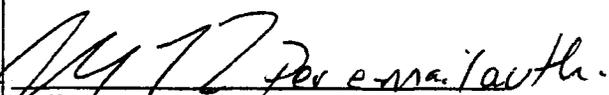
Honorable Charles R. Snyder

Presented by:



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Approved as to form:



Jeffrey Taraday, WSBA #28182
of Lighthouse Law Group PLLC
Attorneys for Defendants

APPENDIX B

SCANNED 9
FILED IN OPEN COURT
8/18 2007
WHATCOM COUNTY CLERK
Deputy *CS*

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SUPERIOR COURT OF WASHINGTON, FOR WHATCOM COUNTY

BELL'S GROVE PROPERTY OWNERS
OF POINT ROBERTS, a Washington
non-profit corporation,

Plaintiff,

vs.

DAVID L. DUNCAN,

Defendant.

No. 05-2-02831-5
(Judge Charles R. Snyder)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Trial. This case was tried to the bench on July 17 & 18, 2007. Witnesses were called to testify, exhibits were admitted and argument was heard.

Parties. Plaintiff Bell's Grove appeared through its president, Mit Tilkov, and was represented by its counsel of record, John Belcher of Belcher Swanson Law Firm, PLLC. Defendant David Duncan appeared personally and through his counsel of record, Jeffrey Taraday of Foster Pepper, PLLC.

Findings. The court enters the findings of fact below.

1. At all times material to this suit, plaintiff Bell's Grove Property Owners of Point Roberts ("Bell's Grove") has been a non-profit corporation

74

Appendix A

1 organized under the laws of the State of Washington. Bell's Grove has performed
2 all acts necessary to maintain this suit.¹

3
4 2. At all times material to this suit, defendant David L. Duncan has
5 been a resident of Whatcom County, Washington.² In November 2000, Mr. Duncan
6 acquired the property south of the unrecorded plat of Bell's Grove down to the
7 beach, together with second class tidelands.³

8 3. David Bell originally owned all of the property depicted on
9 Exhibit 32, together with second class tidelands. Mr. Bell sold off ~~some of the~~ ⁵⁸ odd-lots
10 ~~to~~ ^{to other parties, most, if not all,} individuals.⁴ Some of the deeds Mr. Bell gave to these lot purchasers contained
11 language entitling the purchaser to beach access for recreational use. However,
12 these deeds did not specifically indicate the route the purchaser was to take to get
13 down to the beach from the lot being purchased.⁵

14
15 4. In 1962, David Bell sold to plaintiff Bell's Grove the area
16 depicted on Exhibit 32 as "Bell's Grove Common Area."⁶ The deed David Bell gave
17 plaintiff Bell's Grove also conveyed:

18
19 ... a perpetual right in [plaintiff Bell's Grove Association] and in all
20 members of [Bell's Grove Association] now and in the future for a right
21 of travel and access for pedestrian foot travel use only over and
22 across the area lying between the extended north and south lines of

22 ¹-Established by pleadings.

23 ² Ibid.

24 ³ This property is depicted on Exhibit 32 as the area labeled "N" (north of Edwards
25 Drive and south of the unrecorded subdivision) and "1, 2 & 3" (south of Edwards Drive). The
26 legal description of this property is shown on the attached Exhibit A.

⁴ Numbered 1-60 on Exhibit 32.

⁵ See Exs. 18, 60, and 61 (first page). Defendant Duncan stipulated that the rights
granted under the individual deeds to the lot owners were not ~~involved~~ ^{the subject of} this action.

⁶ This common area was sometimes referred to as the "boulevard" and "reserve" by
witnesses and/or in documents.

1 the conveyed tract from the southerly portion of the conveyed tract to
2 the beach.⁷

3 By "extended north and south lines of the conveyed tract", the parties referred to the
4 lines running north to south, i.e., the extended east and west boundary lines of the
5 common area. This area is depicted by dotted black lines on Ex. 32 and on the
6 attached Exhibit B and is hereafter referred to as "the area between the extended
7 lines" or "the extended lines."

8
9 ^{Prior to} 5. ^{residents of Bell's Grove (who} At the time of the 1962 deed, the path used by ^{CRB} plaintiff
^{would later become members of the plaintiff upon incorporation)}
10 members to access the beach went more or less down the middle of the area

11 between the extended lines.⁸ Sometime thereafter – in the 1960's or 1970's – the

12 members began using a different path over part of the route to the beach. South of
13 ^{along the side of} Edwards Drive, the members began veering to the southeast ^{to follow} a driveway ^{and/or}

14 and then south to a boat ramp.⁹ Approximately one-third of this "historic path" is
15 outside the extended lines. This historic path was used with the permission of

16 David Bell and, later on, with the permission of his son Stan. ^{This historic path}

17 ^{benefited David Bell and Stan Bell by routing the foot traffic so that}
18 ^{it no longer passed through the middle of his campground business)} 6. At the time of the 1962 deed and up until 2003, plaintiff ^{and its} ^{CRB}

19 members used the path for foot travel (with room for two or three people to walk

20 ^{including} abreast), ^{for} wheeling handcarts (loaded with gear) and ^{for} ~~wheeling~~ hand-pushed

21 trailers (carrying boats) down to the beach. The width of the path ^{(As distinguished from the driveway, which} was ^{was used by permission)} ^{CRB}

22 approximately 5-7 feet. There were no fences around the path or other obstructions
23
24

25 ⁷ Exhibit 2.

26 ⁸ Depicted by a dotted green line labeled "original path" on Ex. 32.

⁹ Depicted by a dashed green line labeled "historic path" on Ex. 32.

1 preventing boats seven feet or more in width from being hand-trailed down the
2 path. In places where the path ^{the path} ^{OVER A} and passed through some logs ^{and passed through some logs}
3 ~~pathway was closer to 5' wide but not otherwise obstructed~~ ^{at the south end of the club}
4 7. The parties intended the 1962 deed to grant plaintiff and ^{the physical}
5 plaintiff members (now and in the future), their families and guests the right to use ^{and it did implicitly}
6 the beach ~~for non-business purposes~~. Since execution of the deed and up until the
7 present, plaintiff members, often accompanied by their families and guests, have
8 used all parts of the beach (as shown on the attached Exhibit C) for recreational
9 purposes under a claim of right (i.e., without asking the permission of anyone). The
10 use was obvious to David Bell and (later on) to his son Stan.

11
12 8. On approximately May 17, 2003, Mr. Duncan closed off the
13 historic path and provided a new path, part of which follows the eastern boundary of
14 his property (i.e., outside the extended lines).¹⁰

15 **Conclusions of Law.** From the foregoing findings of fact, the court makes
16 the conclusions of law set out below.

- 17 1. The court has jurisdiction of the subject matter and of the
18 parties to this action.
19
20 2. The 1962 deed grants plaintiff and plaintiff members the right to
21 access the beach down a path located in the area between the extended lines. Mr.
22 Duncan has the right to designate (or re-designate) the location of the path from
23 time to time within the extended lines.
24
25

26 ¹⁰ Depicted by a red line labeled "current path" on Ex. 32.

1 3. Neither plaintiff nor plaintiff members have any right of access
2 other than the legal right discussed in paragraph 2 above. Plaintiff's use of the
3 "historic path" – part of which lies outside the extended lines – was permissive and
4 gave rise to no prescriptive rights or rights by acquiescence.
5

6 4. The 1962 deed impliedly grants plaintiff and plaintiff members
7 an easement to use the beach, ~~for recreational purposes~~. While the 1962 deed ^{est}
8 does not contain a legal description of the entire beach area plaintiff and plaintiff
9 members were entitled to use, the parties' performance over the course of the next
10 several decades establishes the intended area as that shown on Exhibit C.
11

12 Alternatively, the use of the beach by plaintiff members for several
13 decades has established plaintiff's and plaintiff members' easement for beach rights
14 by prescription since that use was open, notorious, adverse, continuous and hostile.
15

16 5. Since the 1962 deed does not set out the width of the path, that
17 width is established by the rule of "reasonable enjoyment" as discussed in
18 Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 884-885, 73 P.3d 369 (2003).
19 Pursuant to the rule of reasonable enjoyment, the path should be ~~seven~~ seven feet
20 in width ~~without any fencing or other obstructions around it which would interfere~~ ^{est}
21 ~~with pushing hand trailers loaded with boats extending out over the sides to a width~~
22 ~~of seven feet~~. The members have no right to use the path for vehicular use.
23

24 6. In view of the deadman's statute (RCW 5.60.030), the court
25 sustained defendant's objections to proffered evidence by plaintiff members
26 concerning conversations with David Bell or Stan Bell, and the court did not

1 consider such evidence in making its decision. However, the deadman's statute
2 does not apply to documents, and the court did consider these documents.

3 7. Mr. Duncan should be ordered to ^{designate location} ~~relocate~~ the path ^{CRJ} between the
4 extended north and south lines on or before 31 Aug 07
5 Mr. Duncan may close the ~~old~~ ^{shown on the South View Short Plat} path (shown as "current path" in red on Exhibit 32)
6 when the new path is completed. The path shown on the Southview Short Plat
7 shall be removed from the plat. ^{CRJ}

9 DONE IN OPEN COURT this 10 day of August, 2007.

10

11

12

13

14 Presented by:
15 Belcher Swanson Law Firm, PLLC

16

17

By: 
John C. Belcher, WSBA #5040
Lawyer for Plaintiff

Copy received:
Foster Pepper, PLLC

By: 
Jeffrey Taraday, WSBA #28182
Lawyer for Defendant

18

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19

20

21

22

23

24

25

26

Exhibit A

THE EAST 13 ACRES OF THE WEST 33 ACRES OF GOVERNMENT LOT 1, IN SECTION 11,
TOWNSHIP 40 NORTH, RANGE 3 WEST OF W.M. TOGETHER WITH THE FOLLOWING DESCRIBED
PROPERTY:

ALL SECOND CLASS TIDELANDS IN FRONT OF A PORTION OF SAID LOT 1, WHICH PORTION IS
MORE PARTICULARLY DESCRIBED AS COMMENCING AT A CONCRETE MONUMENT ON THE
MEANDER LINE OF SAID LOT 1, WHERE SAID MEANDER LINE IS INTERSECTED BY THE EAST
LINE OF THE WEST 20 ACRES OF SAID LOT 1 (SAID WEST 20 ACRES BEING THE TRACT OWNED
BY J.A. LARGAUD); THENCE EAST ALONG SAID MEANDER LINE, A DISTANCE OF 300.00 FEET
TO A CONCRETE MONUMENT, WHICH LATTER MONUMENT MARKS THE SOUTHEAST CORNER
OF A TRACT OF LAND OWNED BY SAID D.G. BELL. EXCEPT THE FOLLOWING DESCRIBED
PROPERTY:

BEGINNING AT A POINT 431.00 FEET EAST OF THE NORTHWEST CORNER OF SAID LOT 1;
THENCE RUNNING EAST 189.44 FEET; THENCE SOUTH 20.00 FEET, PARALLEL WITH THE WEST
LINE OF SAID GOVERNMENT LOT 1, TO THE TRUE POINT OF BEGINNING; THENCE SOUTH
1450.00 FEET, PARALLEL WITH THE WEST LINE OF SAID GOVERNMENT LOT 1; THENCE WEST
89.44 FEET, PARALLEL WITH THE NORTH LINE OF SAID GOVERNMENT LOT 1; THENCE NORTH
1450 FEET, PARALLEL WITH THE WEST LINE OF SAID GOVERNMENT LOT 1; THENCE EAST
89.44 FEET TO THE TRUE POINT OF BEGINNING. ALSO, EXCEPT THE FOLLOWING DESCRIBED
PROPERTY AND ALL PARCELS LYING NORTH OF SAID PROPERTY:

A TRACT OF LAND IN SAID GOVERNMENT LOT 1, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT 431.00 FEET EAST OF THE NORTHWEST CORNER OF SAID LOT 1;
THENCE RUNNING EAST 289.44 FEET; THENCE SOUTH 1420.00 FEET, PARALLEL WITH THE
WEST LINE OF SAID GOVERNMENT LOT 1 TO A POINT, THE BEGINNING OF THIS DESCRIPTION;
RUNNING THENCE WEST 100.00 FEET; THENCE SOUTH 50.00 FEET; THENCE EAST 100.00 FEET;
THENCE NORTH 50.00 FEET TO THE PLACE OF BEGINNING OF THIS DESCRIPTION. ALSO,
EXCEPT THE FOLLOWING DESCRIBED PROPERTY AND ALL PARCELS LYING NORTH OF SAID
PROPERTY:

LOT 49 IN SUBDIVISION WITHIN SAID GOVERNMENT LOT 1 NOT ON FILE. BEGINNING AT A
POINT 431.00 FEET EAST OF THE NORTHWEST CORNER OF SAID LOT 1; THENCE RUNNING
EAST 100.00 FEET; THENCE SOUTH 1420.00 FEET, PARALLEL TO THE WEST LINE OF SAID LOT 1
TO A POINT, THE BEGINNING OF THIS DESCRIPTION; THENCE WEST 100.00 FEET; THENCE
SOUTH 50.00 FEET; THENCE EAST 100.00 FEET; THENCE NORTH 50.00 FEET TO A POINT, THE
BEGINNING OF THIS DESCRIPTION. ALSO, EXCEPT THAT RIGHT-OF-WAY COMMONLY
REFERRED TO AS EDWARDS DRIVE.

SITUATE IN WHATCOM COUNTY, WASHINGTON.

EXHIBIT B

The area lying between the extended east and west boundary lines of the "boulevard" or common area conveyed to plaintiff Bell's Grove from David Garfield Bell by Quit Claim Deed dated September 5, 1962, recorded under Whatcom County Auditor's file number 936144, from the south portion of the common area to the beach. The legal description of this common area is:

Beginning at a point 431 feet east of the northwest corner of Government Lot 1, in Section 11, Township 40 North, Range 3 West, Whatcom County, Washington, thence running east 189.44 feet, thence south 20 feet parallel with the west line of said Government Lot 1, to the true point of beginning; thence south 1450 feet parallel with the west line of said Government Lot 1; thence west 89.44 feet, parallel with the north line of said Government Lot 1; thence north 1450 feet, parallel with the west line of said Government Lot 1; thence east 89.44 feet to the true point of beginning.

A sketch of this area appears below, and the dotted lines indicate the extended east and west boundary lines of the common area.

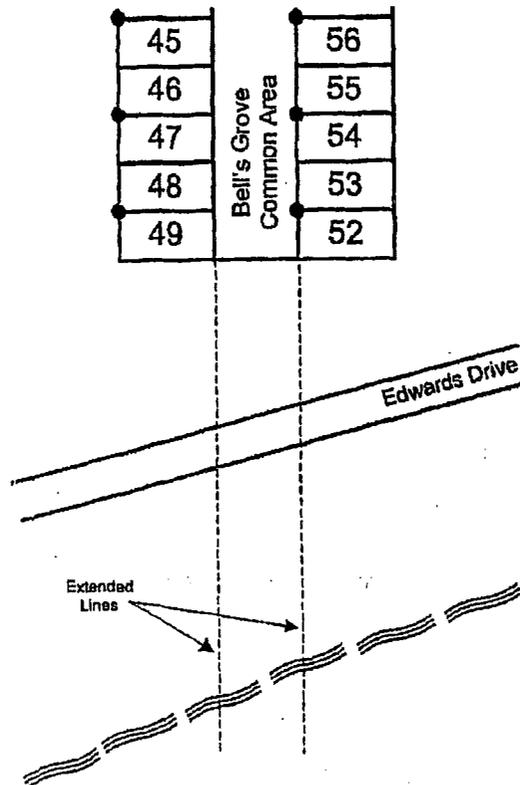
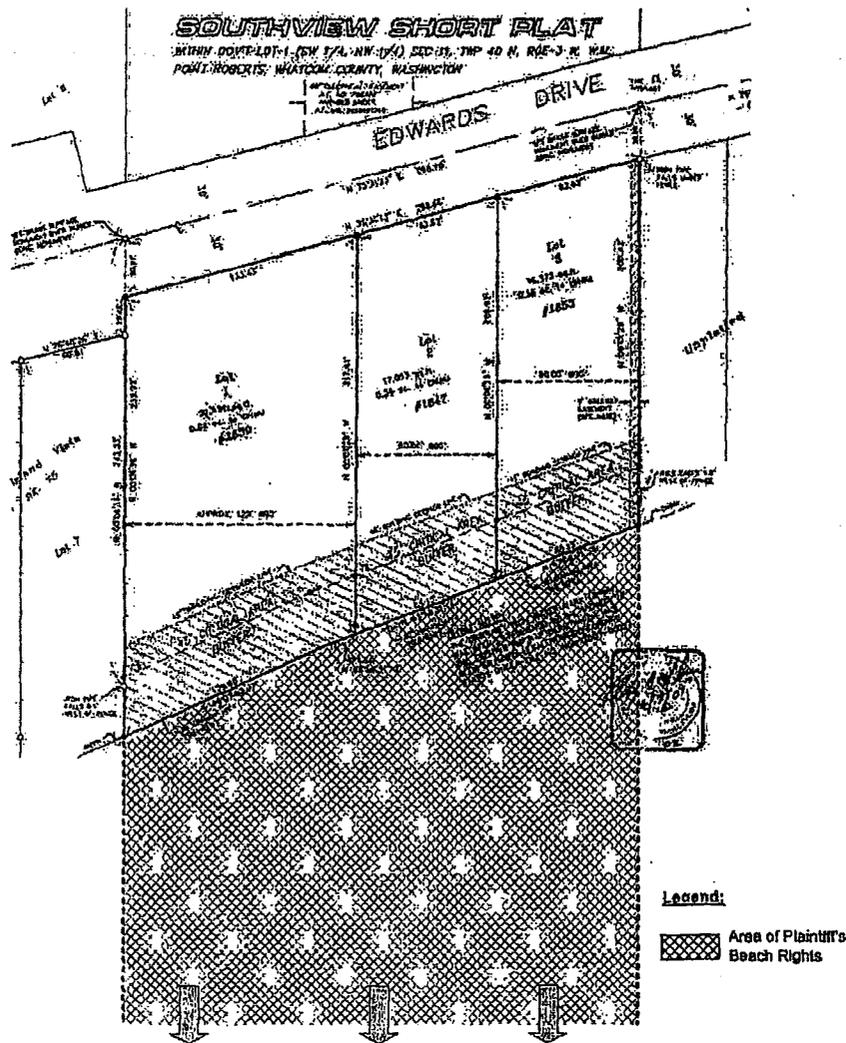


EXHIBIT C

That part of defendant's property (including second class tidelands) legally described on Exhibit A which lies south (seaward) of the ordinary high water mark (OHWM). The OHWM of defendant's property as of May 2000 is shown on the Southview Short Plat recorded June 29, 2001, under Whatcom County Auditor's File No. 2010604598.¹ The OHWM changes over time, and plaintiff's beach rights follow the OHWM as it changes. The sketch below depicts the area over, across and under which plaintiff has beach rights.



→ As of the date of this document the OHWM is established at the toe of the existing rip rap berm. ues

¹ A note on the plat map states that the OHWM "has been established in the vicinity of the existing rip rap berm..."

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Postal Service for service a true and accurate copy of the Brief of Respondents-Cross Appellants in Court of Appeals Cause No. 69615-7-I to the following:

Mark J. Lee
Brownlie Evans Wolf & Lee, LLP
230 E. Champion Street
Bellingham, WA 98225

Jeff Taraday
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1100 Dexter Avenue N., Suite 100
Seattle, WA 98109

Original sent by ABC Legal Messengers for filing with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 10, 2013, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick