No. 41557-7-II

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

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

Appellants,

v.

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

Respondents.

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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I. SUMMARY OF REPLY ARGUMENT

Respondents obfuscate this straightforward appeal in their Second Supplemental Brief filed on March 25, 2013. First, Respondents continue to mischaracterize the Moores' and Kruegers' claims, asserting that the nuisance *per se* claim was merely a claim for violation of the Shoreline Management Act ("SMA").[1] That is incorrect. Second, they misstate the elements of a nuisance claim by asserting that "physical damage" must be shown. The law requires that a complaining party need only establish interference with use and enjoyment of property for an actionable nuisance, which Appellants have done. Third, Respondents ignore that "injury" is a broader term than physical damage. *See Rettkowski v. Department of Ecology*, 128 Wn.2d 508, 518, 910 P.2d 462 (1996) ("The common law definition of "injury" is '[t]he invasion of any legally protected interest of another.'") (Citing Black's Law Dictionary 785 (6th ed. 1990)).

The key question, which Respondents evade, is whether the ***commercial use*** of the structure on the Loves' property is a nuisance. Because the commercial use causes the Appellants distress and discomfort, and would cause an ordinary person occupying their homes such distress and discomfort, it is a nuisance *per se* and in fact. That Mason County issued a residential building permit for the construction of the structure is immaterial. The Loves later illegally converted their use of

[1] This argument ignores the fact that private citizens cannot seek injunctive relief for SMA violations and that damages claims were abandoned before trial. *Compare* RCW 90.58.210 and .230 *with* RCW Chapter 7.40, RCW 7.48.010, .020 and RCW 7.48.120.

the structure from residential to commercial without the required SMA permit. Based on the actual use of the structure—the commercial use—this Court should reverse and hold that Appellants established nuisance.

II. REPLY ARGUMENT

Without any citation to authority, Respondents incorrectly suggest in their issue statements that an abuse of discretion standard applies. *Resps' Second Supplemental Brief* at 5. To the contrary, this Court reviews *de novo* whether the trial court applied the correct legal standard to the findings. *State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981). For this review, the Court gives no deference to the trial court. *Id.* This Court, therefore, must evaluate anew whether the facts do or do not support the conclusion that SOS is a nuisance in fact and/or nuisance *per se*. *See Rasmussen v. Bendotti*, 107 Wn. App. 947, 954, 29 P.3d 56 (2001) (every conclusion of law necessarily incorporates the facts found in arriving at the conclusion). This Court should conclude that the facts set out in the Trial Court's Supplemental Findings of Fact and Conclusions of Law establish a nuisance. *See* Note 3, Note 5, *infra*.

A. Respondents' Argument Against Nuisance *Per Se* Fails Because the Trial Court's Supplemental Findings of Fact and Conclusions of Law Demonstrate Satisfaction of Both Elements of the Doctrine.

The supplemented record shows that Appellants established a nuisance *per se*. This Court directed the trial court to enter supplemental findings whether: (1) engine shop operations interfere with the Appellants' use and enjoyment of their property, and (2) SOS operates lawfully. A

nuisance inquiry does not require any showing that the Appellants suffered "tangible" physical injury to themselves or their property, nor that property values were diminished. Respondents' contention that the lower court's findings are supported by substantial evidence and the record as a whole is based on conclusory statements instead of argument. *See Resps' Second Supplemental Brief* at 2-5. Further, this Court directed that the trial court was not to consider "whether interference with Plaintiffs' enjoyment of their property is ***reasonable***," or to balance any factors, when analyzing a nuisance *per se* claim.[2] (Emphasis supplied).

In satisfaction of the first prong of the test, the trial court held that Love's activities prevent Appellants' "normal use" of their properties. Suppl. Findings of Fact and Conclusions of Law, CL 16.1, Supplemental Clerk's Papers (SCP) 238. Respondents thus focus on attempting to convince this Court that the second prong, that SOS operates illegally, is unmet. Respondents fail.

1. SOS is Not in Compliance with the Law, So Appellants Established Nuisance Per Se.

The trial court clearly found SOS was not operating in compliance with the law.[3] These findings satisfy the second part of the nuisance *per*

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[2] Order at p. 2, citing *Tiegs v. Boise Cascade Corp.*, 83 Wn.App. 411, 418, 922 P.2d 115 (1996), *aff'd sub nom Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998)("when the conditions giving rise to a nuisance are also a violation of statutory prohibition, those conditions constitute a nuisance per se, and ***the issue of the reasonableness of the defendant's conduct and the weighing of the relative interests of the plaintiff and defendant is precluded because the Legislature has, in effect, already struck the balance in favor of the innocent party***"). (Emphasis Supplied.)

[3] *See* Amended and Supplemental Findings of Fact and Conclusions of Law, FF 47-48 (SCP 217), 50 (SCP 218), 69 (SCP 220), 71 (SCP 221), 80-83 (SCP 222-223), 86 (SCP 223); CL 31 (SCP 242). *See also* Appellants' Supplemental Brief, pp. 16-17.

se test. Respondents avoid addressing these findings and the resulting conclusion. Instead, they set up a straw man argument that a person "across town" could not sue a property owner for building a structure without a permit. See *Resps' Second Supplemental Brief* at 8. According to Respondents, this somehow shows that failure to obtain a required shoreline permit is not a nuisance. It does not show that. The attempted analogy is inapplicable because Appellants are not "across town," nor are they challenging a building permit decision.

The only case cited by Respondents on nuisance *per se*, *Motor Car Dealers Assoc. of Seattle v. Fred S. Haines Co.*, 128 Wash. 267, 272, 222 P. 611 (1924), supports Appellants' arguments. The Supreme Court held that a nuisance per se is an act which is a nuisance "at all times in all locations" because it is illegal. Respondents' unpermitted engine shop business is illegal at all times in the shoreline jurisdictional zone.

2. The Building Permit Is Not at Issue; LUPA Does Not Bar the Nuisance Claims or Undermine the Trial Court's Supplemental Findings Which Support Illegality Under the Doctrine of Nuisance.

Respondents next assert that this Court should ignore the illegality of the use of the carport because Appellants failed to appeal the residential building permit issued for a carport in 1994. This Court should reject the flawed argument. The structure is not the issue. The trial court held illegal the Love's present use of that carport as a commercial engine shop operation. This use, and not the mere existence of the carport, interferes with the Appellants' ability to talk on the phone, watch television, sit on

their front porches and generally enjoy their retirement homes. Mere issuance of the building permit – which does not authorize the use that is causing the nuisance – does not foreclose Appellants' nuisance claims under the Land Use Petition Act, Ch. 36.70C RCW.

No authority supports Respondents' argument. In *Asche v. Bloomquist*, 132 Wn. App. 784, 799-800, 133 P.3d 475 (2006) (cited at *Resps' Second Suppl. Br.* 11-12), the Court of Appeals held that LUPA does **not** bar private nuisance claims. The Court dismissed the claim not based on LUPA but because the claimed injury, a blocked view, did not support a nuisance claim. *Id.* at 802.

B. Respondents' Argument Against Nuisance In Fact Fails Because The Law Requires No Showing of Physical Damage or Economic Injury

1. A Nuisance Plaintiff May Show Only Interference With Use and Enjoyment of Property, Like Appellants Have.

This Court directed the trial court to apply this two-part test to evaluate Appellants' nuisance in fact claim: (1) whether the engine shop interferes with the use and enjoyment of the Appellants' property, and (2) whether such interference is reasonable, balancing the rights, interests and convenience of the ***parties***. (Emphasis added). The record demonstrates that this showing was made.

The Court's directive did not include physical "tangible" injury as an element. The statutory definition of nuisance is not limited to physical "tangible" injury as Respondents claim:

> Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either ***annoys***, injures or endangers the comfort, repose, health or safety of others, offends decency . . .; ***or in any way renders other persons insecure in life, or in the use of property.***

RCW 7.48.120 (emphasis added).[4] Respondents would have this Court re-write nuisance law and set the bar much higher for a person suffering the indignation Appellants have to obtain relief. They cite not a single case that supports their argument that a showing of physical harm to property or economic loss is required. This Court should reject their argument. *Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998), does not establish such a requirement. The *Tiegs* court plainly ruled that "[a]n actionable nuisance must either injure the property ***or*** unreasonably interfere with enjoyment of the property. *Id.* at 13 (emphasis added) (citing *Crawford v. Central Steam Laundry*, 78 Wash. 355, 139 P. 56 (1914)). The showings are in the alternative. No case ever has required showing both for a nuisance claim.

2. The Trial Court Found that the Engine Shop Operations Interfered with Appellants' Use and Enjoyment of Property.

As detailed in Appellants' Supplemental Brief filed January 4, 2013, pp. 14-15, the Supplemental Findings of Fact and Conclusions of Law show that the first part of the nuisance test (interference with use and enjoyment) has been met.[5] The Trial Court found that Respondents'

[4] Further, RCW 7.48.020 permits an action for nuisance "by any person whose property is, or whose patrons or employees are, injuriously affected ***or whose personal enjoyment is lessened by the nuisance***." (Emphasis added). Respondents' argument conflicts with the italicized portion of the statute.

[5] Resp. Second Supp. Br. at p.2. *See* Amended and Suppl. Findings of Fact and Conclusions of Law, FF 22-23 (SCP 212), 29-30 (SCP 214), 35-36 (SCP 215); CL 16.1, 16.3 (SCP 233).

illegal commercial activities resulted in noise and fumes which prevent Moore and Krueger firm enjoying their residential waterfront property "in the normal manner." *See infra,* p.3. Respondents do not challenge these findings or conclusions. Their contention is irrelevant that the lower court failed to find "... the Moores and Kruegers suffered any particular injury." *Resp. Second Suppl. Br.* at p. 9. The unchallenged findings and conclusions establish that the Love's engine shop operations have interfered with Appellants' use and enjoyment of their properties.[6]

3. The Trial Court Erroneously Applied the "Reasonableness" Test.

Respondents continue to cite the same cases to support their assertion that the Moores and Kruegers "should not have been" disturbed by the noise, fumes, odors, smoke and dangerous highway encroachments that have been ongoing for years, even though their subjective judgment is irrelevant.[7] The question is not whether the interference from the engine shop is "substantial" in the judgment of the Defendant, part-time residents, customers or other interested parties. Rather, "the question of liability [depends] upon how ordinary persons ***occupying the home or premises of [plaintiffs]*** would have been affected by the acts of [defendants]."

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[6] Respondents argue that the trial court found Ms. Moore's testimony about noise not "credible." Resp. Second Suppl. Br. at p. 2-3. However, regardless of whether the trial court agreed with assertions concerning the level of noise ("deafening" or otherwise), it did, nonetheless find and conclude that SOS operations interfered with the Appellants' use and enjoyment of their properties. *See* Amended and Suppl. Findings of Fact and Conclusions of Law, FF 17 (SCP 211), 22-23 (SCP 212), 25 (SCP 213), 29-30 (SCP 214); CL 16.1 and 16.3 (SCP 233).

[7] Resp Second Supp. Br. at pp. 6-7, 10 (citing *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 358 P.2d 975 (1961), *Crawford, supra*, 78 Wash. 355, and *Brady v. City of Tacoma*, 145 Wash. 351, 259 P.2d 1089 (1927)).

Bruskland v. Oak Theater, Inc., 42 Wn.2d 346, 349, 254 P.2d 1035 (1953) (emphasis added).[8]

The trial court never applied this correct legal standard. Instead, the trial court marginalized the personal inconvenience, discomfort and anguish suffered by the Moores and Kruegers when it compared the circumstances of this case-- as characterized by Mr. Love – with the facts of a few reported nuisance cases. The trial court's conclusion, moreover, is inconsistent with these authorities:

- *Davis v. Taylor*, 132 Wn.App. 515, 132 P.3d 783 (2006), (conversion of residential property into a cherry orchard and use of propane cannons and cherry guns to scare off birds constituted a nuisance).

- *Haan v. Heath*, 161 Wash. 128, 132, 296 P. 816 (1931) (defendants' business in a residential district deprived plaintiffs of comfort and repose to which they are entitled).

- *Bruskland v. Oak Theater*, Inc., 42 Wn.2d 346, 254 P.2d 1035 (1953) (noise impacts of a drive-in theater on residential neighborhoods is a nuisance).

Error also is shown because commercial uses—like the one at issue—located unreasonably in a residential neighborhood constitute a nuisance. *Brady v. City of Tacoma*, 145 Wash. 351, 360-61, 259 P. 1089 (1927). This Court should reject the trial court's conclusion when any ordinary person in the Appellants' home would have suffered the same

[8]RCW 7.48.010 asks whether the action "essentially interfere[s] with the comfortable enjoyment of life and property." *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998).

interference from the Love's illegal, commercial use that their testimony demonstrated.

4. The Trial Court Had No Discretion to Balance the "Rights" of the Parties Because the Love's Use Is Illegal.

Appellants' right to use and enjoy their land for any legitimate purpose is a constitutional, fundamental property right in Washington. On the other hand, Respondents do not enjoy any protected property rights with respect to their engine shop – despite Mason County's failure to take any corrective action – because it lacks required SMA permits. *See* RCW 90.58.140(1), (2). The trial court erred when it attempted to "balance" the parties' rights concerning the impact of the *illegal* business on the affected residential properties. As a matter of law, Respondents' illegal commercial activity is an unreasonable interference with Appellants' recognized rights.

C. No Basis for the Attorney Fee Award Exists Where Appellants Abandoned Damage Claims.

There is a distinction between being damaged or injured and asking for money damages. Respondents accuse Appellants of trying to have it "both ways," but it is Respondents who take inconsistent positions. On the one hand, they allege no evidence was presented regarding damages. This is consistent with Appellants' testimony that they were ***abandoning*** damages claims. On the other hand, Respondents insist Appellants were seeking damages based on an isolated statement by Appellants' attorney in closing that Respondents take out of context.

Closing argument is not evidence. *State v. French*, 101 Wn. App. 380, 390, 4 P.3d 857 (2000). There is no basis for an award of fees to Respondents for defending this injunction lawsuit under Chapter 7.48 RCW.

Respondents do not deny that an award of attorney fees under a discretionary statute like RCW 90.58.230 depends on the circumstances of the case. *See Hunt v. Anderson*, 30 Wn. App. 437, 443, 635 P.2d 156 (1981). Where the record confirms Appellants were seeking only injunctive relief under Chapter 7.48 RCW (and no relief under Chapter 90.58 RCW), it was abuse of discretion for the court to "punish" them for abandoning their damages claim by awarding attorney fees.

III. CONCLUSION

The Court of Appeals should reverse the decision of the trial court and vacate the award of attorney fees to Respondents.

RESPECTFULLY SUBMITTED this 4th day of April, 2013.

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2013, I caused the document to which this certificate is attached to be delivered for filing via U.S. Mail to:

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I hereby further certify that on this 4th day of April, 2013, I caused a copy of the document to which this certificate is attached to be delivered to the following via U.S. mail:

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Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 4th day of April, 2013.

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