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Washington State
Court of Appeals
Division Two

December 15, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ERNEST M. EDSEL, an individual, and JUDY LAMB, an individual,

Appellants,

v.

PATRICK GILL, an individual; BARBARA BOWMAN, an individual; DEREK LAMOUREAUX, an individual; AMBERLEE D'APPOLIONIO, an individual, and JOHN DOES (1-10),

Respondents.

No. 53461-4-II

UNPUBLISHED OPINION

GLASGOW, J.—Ernest M. Edsel and Judy Lamb[1] sued the landlords who owned the duplex next door to Edsel's home and their tenants over activities Edsel alleged constituted nuisance, trespass, and violation of an easement. The trial court granted the defendants' 2018 partial motion for summary judgment and the defendants' 2019 motion for summary judgment on the rest of Edsel's claims. Edsel appeals the 2019 summary judgment ruling. He also argues that the trial court erred by denying his motion to compel discovery and rejecting two declarations that he submitted. Edsel asks this court to grant two motions under RAP 10.4(d), challenges the trial court's award of attorney fees to the defendants, and requests attorney fees on appeal.

[1] Lamb was included in the complaint, but she later assigned her claims to Edsel who substituted himself as the only plaintiff. For simplicity, we refer to the appellants as "Edsel."

We reverse the trial court's dismissal of the burning nuisance claim against the tenants, alleging that they burned materials in their fire pit that caused noxious fumes and smoke to drift onto Edsel's property and into his home. But we otherwise affirm the trial court's 2019 summary judgment ruling. We do not review the trial court's 2018 partial summary judgment order because Edsel did not designate it in his initial or amended notice of appeal. We deny Edsel's motions to this court because RAP 10.4(d) does not permit a party to file a nondispositive motion in their brief. We remand for the trial court to reconsider its attorney fees award. We do not award attorney fees to any party on appeal.

FACTS

A. Background

In 2016, a trust, whose sole beneficiaries were Edsel and his wife Lamb, purchased a house in Bremerton, Washington. Edsel and Lamb moved into the house. Next door to Edsel and Lamb was a duplex owned by Patrick Gill and his wife Barbara Bowman. Gill and Bowman rented the duplex to two sets of tenants, Derek and Anna Lamoureux and Amberlee D'Appolionio and Joshua Dodge.

Edsel and his landscapers noticed marijuana plants growing in buckets and in the ground at Gill and Bowman's duplex. D'Appolionio had a medical marijuana license. Edsel notified the police about the marijuana plants, and an officer spoke with D'Appolionio but took no further action. Edsel also complained to the tenants and landlords about the tenants' use of a fire pit in their yard and vehicle noise.

A private driveway provides access to Gill and Bowman's duplex and other neighborhood properties, but does not abut Edsel's property. Mutual easements recorded in 1977 contained a

maintenance provision for any private road built in the easement's common area in the future. According to Edsel, the tenants crowded the driveway with cars, failed to clean up trash, and used drugs in the driveway.

B. Complaint and Discovery

In 2018, Edsel sued Gill, Bowman, and two of their tenants, alleging nine causes of action. Count one alleged nuisance on the basis that the tenants grew marijuana plants in the yard of Gill and Bowman's duplex. Counts two and three alleged nuisance and trespass based on the argument that smoke and noxious odors from the tenants' fire pit wafted inside Edsel's home. Counts four and five alleged noise nuisance and trespass claims based on the defendants' use of loud vehicles. Count six alleged that the condition of the driveway constituted a nuisance because there was trash in the driveway and it did not comply with various local, state, and federal regulations for private roads. Count seven alleged that the defendants breached a maintenance agreement for the private common area driveway contained in the 1977 mutual easements. Counts eight and nine were nuisance and trespass claims based on the defendants' alleged failure to maintain English ivy on their side of the property, causing it to grow into Edsel's yard.

Edsel sought discovery from Gill and Bowman, who provided some of the materials Edsel requested but objected with regard to others. Edsel filed a motion to compel production of the remaining materials, including documents Edsel had provided to the landlords' insurer, Farmers Insurance, before losing his own copies. Edsel also sought materials from the landlords about their tenants. The trial court denied Edsel's motion to compel.

C. 2018 Motion for Partial Summary Judgment

In 2018, Gill and Bowman moved for partial summary judgment seeking dismissal of Edsel's claims for noise trespass, common area nuisance, and breach of the common area maintenance agreement regarding the driveway. The tenants joined the landlords' motion.

Edsel then amended his complaint and substituted himself as plaintiff for Lamb, his wife. The second amended complaint was otherwise substantively identical to the initial complaint. Edsel responded to the defendants' motion for partial summary judgment two days before the hearing.

The defendants moved to strike Edsel's response and supporting declarations. The trial court granted the defendants' motion to strike because the response and supporting declarations were untimely. The trial court granted the defendants' motion for partial summary judgment, dismissing Edsel's noise trespass, common area nuisance, and breach of the common area maintenance agreement claims against both sets of defendants. Edsel filed a motion for reconsideration and clarification, which the trial court denied.

D. 2019 Motion for Summary Judgment

In 2019, the defendants moved for summary judgment dismissal of the rest of Edsel's claims. Edsel responded and filed declarations from himself, Lamb, David Herzog (who operated the landscaping business that worked on Edsel's property), Pedro Estrada and Marcelo Osorio (landscapers who worked for Herzog), and an unsigned and undated declaration from Dr. Helen Shaha (Edsel's and Lamb's primary care physician). The trial court denied Edsel's motion for a continuance to obtain Dr. Shaha's signature. Defendants moved to strike Edsel's responsive materials. The trial court declined to consider Herzog's declaration because it did not state it was

sworn under the laws of Washington, and the court did not consider Dr. Shaha's declaration because it was unsigned and undated.

During the summary judgment hearing, counsel for the landlords stated, "[M]y clients deny everything. But for purposes of this motion, we're accepting as true Mr. Edsel's allegations." Clerk's Papers (CP) at 1382.

The trial court granted the defendants' summary judgment motion, dismissing the rest of Edsel's claims against both sets of defendants. Edsel then filed several posthearing motions, including a motion asking the trial court to reconsider or amend its summary judgment order. These motions were based on Edsel's assertion that the landlords' lawyer made a "judicial admission" allegedly conceding all liability when he stated, "[W]e're accepting as true Mr. Edsel's allegations." CP at 1327-329 (boldface omitted). The trial court denied Edsel's motion to reconsider or amend the summary judgment order. The trial court awarded attorney fees to the defendants, finding Edsel's claims frivolous.

Edsel appeals the trial court's denial of his motion to compel discovery, 2019 summary judgment order, order denying reconsideration, and award of attorney fees to the defendants. Edsel assigns error to the trial court's 2018 partial summary judgment order and the trial court's order denying his motion for reconsideration of that ruling, but he never designated either order in his initial or amended notice of appeal.

ANALYSIS

I. SCOPE OF APPEAL AND APPELLATE MOTIONS UNDER RAP 10.4(d)

A. 2018 Partial Summary Judgment Order and Order Denying Reconsideration

As an initial matter, we hold that neither the 2018 partial summary judgment order nor the order denying Edsel's motion for reconsideration of that ruling is properly before this court.

Under RAP 2.4(a), appellate courts generally review only decisions "designated in the notice of appeal." RAP 2.4(b) provides an exception that applies where "the order or ruling prejudicially affects the decision designated in the notice." For RAP 2.4(b) to apply, "'[t]he issues in the two orders must be so entwined that to resolve the order appealed, the court must consider the order not appealed.'" *Cox v. Kroger Co.*, 2 Wn. App. 2d 395, 407, 409 P.3d 1191 (2018) (internal quotation marks omitted) (quoting *Foster v. Gilliam*, 165 Wn. App. 33, 45, 268 P.3d 945 (2011)).

The trial court's 2018 partial summary judgment order did not prejudicially affect its 2019 summary judgment decision. Had the trial court denied the defendants' 2018 partial summary judgment motion, it could still have dismissed Edsel's other claims in its 2019 summary judgment order. RAP 2.4(b) thus does not apply. The same is true for the order denying reconsideration. We also reject Edsel's argument that the defendants continued to litigate these claims by implied consent by answering Edsel's amended complaint. Nothing in the defendants' answers conflicted with the trial court's dismissal.

B. RAP 10.4(d) Motions to Vacate

Edsel moves under RAP 10.4(d) for this court to vacate the 2018 partial summary judgment order and remand for the trial court to grant his motion to compel because, he claims, the discovery

he should have received would have included dispositive evidence. Edsel also moves under RAP 10.4(d) for this court to reverse both summary judgment orders and remand for a trial on damages based on his theory that his opposing counsel made a judicial admission at the 2019 summary judgment hearing. We deny both motions.

RAP 10.4(d) provides, "A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits." *See Money Mailer, LLC v. Brewer*, 194 Wn.2d 111, 130, 449 P.3d 258 (2019) (citing RAP 17.4(d), which is identical to RAP 10.4(d)). Edsel's motions are inappropriate for RAP 10.4(d) because they would not preclude a hearing on the merits. Instead, they would require this court to consider the merits of Edsel's arguments about the trial court's errors.[2]

II. Orders Properly Appealed

A. Order Denying Motion to Compel Discovery

Edsel contends that the trial court erred by denying his motion to compel discovery of documents he produced, sent to Gill and Bowman's insurer, and then lost when his basement flooded. Edsel asserts that Gill and Bowman should have obtained and produced these documents in discovery. We disagree.

"A trial court's denial of a motion to compel . . . [is] reviewed for an abuse of discretion." *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168,

[2] Gill and Bowman argue that Edsel's appellate brief improperly incorporated by reference material from the record, and they ask this court to disregard all arguments and evidence contained in attachments incorporated by reference. Under RAP 10.3(a), "it is improper to attempt to 'incorporate by reference' into a party's merits brief arguments made in other pleadings." *State v. I.N.A*, 9 Wn. App. 2d 422, 426, 446 P.3d 175 (2019). Edsel's incorporation by reference of the attachments to his brief is improper. We note, however, that to the extent Edsel's attachments include documents contained in the record, we have reviewed the entire record in this case.

183, 313 P.3d 408 (2013). CR 34(c) governs requests for production of documents from nonparties and "does not preclude an independent action or a subpoena issued pursuant to rule 45 against a person not a party for production of documents." CR 45(a)(1)(C) provides a means for a party to subpoena a third person and require them to "produce . . . documents . . . in [their] possession, custody or control." Under CR 26(b)(1)(A), the court may limit discovery from an opposing party if "the discovery sought . . . is obtainable from some other source that is more convenient, less burdensome, or less expensive."

Farmers Insurance, not Gill and Bowman, had the documents Edsel sought. Farmers Insurance has never been a party to this lawsuit. In some contexts, a party might have sufficient "control" over documents to trigger a requirement that their insurer provide documents related to that party, but there is no evidence here that the landlords had sufficient control over the documents to invoke such a requirement. Edsel could have sought the documents from Farmers Insurance through CR 34(c) and CR 45(a)(1)(C), but he did not, and he provides no reason for failing to do so.[3] The trial court properly denied the motion to compel the landlords to produce documents that Farmers Insurance held.

Edsel also argues that he was entitled to "documents and images concerning [the] [t]enants." Br. of Appellant at 34. We disagree.

"A party appealing a summary judgment [order] because he has allegedly not been permitted to conduct adequate discovery must indicate what relevant evidence he expects the additional discovery would provide." *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d

[3] To the extent Edsel argues that the documents were destroyed due to the "[d]efendants' destruction or spoliation of [p]laintiffs' evidence," Edsel provides no evidence to support any assertions about spoliation. CP at 116-17.

619, 627, 818 P.2d 1056 (1991). Here, Edsel asserts only that the trial court's discovery ruling was prejudicial because it "discontinued [his] full ability . . . to prove [his] case in summary judgment." Br. of Appellant at 33. Edsel does not identify what relevant evidence this additional discovery likely would have yielded or how that evidence would have helped him defeat the defendants' summary judgment motions. *See Howell*, 117 Wn.2d at 627. The trial court properly denied Edsel's motion to compel materials about the tenants.

B. 2019 Motion for Summary Judgment

Edsel argues that the trial court erred by granting the defendants' 2019 motion for summary judgment because genuine issues of material fact supported his remaining claims. We reverse the dismissal of the burning nuisance claim against the tenants but affirm the trial court's summary judgment dismissal of the other claims.

1. Summary judgment burden and standard of review

In reviewing a summary judgment decision, we apply the same standard as the trial court. *Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 569, 459 P.3d 371, *review denied*, 195 Wn.2d 1031 (2020). We review all evidence and reasonable inferences "in the light most favorable to the nonmoving party." *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate "if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c); *Mackey*, 12 Wn. App. at 569. We consider only the evidence that was brought to the trial court's attention. RAP 9.12. We review the trial court's conclusions of law de novo and may affirm on any basis supported by the record. *Bavand v. OneWest Bank FSB*, 196 Wn. App. 813, 825, 385 P.3d 233 (2016).

"[T]he moving party has the initial burden to show there is no genuine issue of material fact," and "meets this burden by showing that there is an absence of evidence to support the plaintiff's case." *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wn. App. 178, 183, 401 P.3d 468 (2017). "Once the moving party has made such a showing, the burden shifts to the nonmoving party to set forth specific facts that rebut the moving party's contentions and show a genuine issue of material fact." *Id.* "An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Keck*, 184 Wn.2d at 370.

Under CR 56(e), the nonmoving party "may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." To sufficiently rebut the moving party's contentions, the nonmoving party's response must be based on "personal knowledge, must set forth facts that would be admissible in evidence, and must show affirmatively that the declarant of such facts is competent to testify to the matters stated therein." *Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 286, 227 P.3d 297 (2010).

"A declaration that contains only conclusory statements without adequate factual support does not create an issue of material fact that defeats a motion for summary judgment." *Id*. at 288. And the "'nonmoving party . . . may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.'" *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 722, 425 P.3d 837 (2018) (quoting *Seven Gables Corp. v. MGM/UA Entm't Co*., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). If the plaintiff "'fails to make a showing sufficient to establish the existence of the element essential to that party's case, and on which that party will bear the burden of proof at trial,'" summary judgment is proper. *Young v.*

Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

2. Landlord liability

As an initial matter, we hold that the trial court properly dismissed the noise and burning nuisance claims against Gill and Bowman because landlords ordinarily are not liable for nuisances created by tenants. In general, a landlord in Washington is not liable to a third person for a nuisance caused by a tenant, unless the nuisance activity was contemplated when the parties signed the lease. *See Frobig v. Gordon*, 124 Wn.2d 732, 736, 881 P.2d 226 (1994); *Maas v. Perkins*, 42 Wn.2d 38, 43-44, 253 P.2d 427 (1953). Under RCW 59.18.130(5), it is the tenant's duty to prevent a nuisance on the rental premises. Edsel produced no evidence that the tenants' noise or burning activities were contemplated when the lease was signed. Accordingly, we affirm the dismissal of Edsel's noise and burning nuisance claims against the landlords.

We note, however, that this principle does not apply to the vegetation nuisance claims against the landlords because there was no evidence that the tenants were responsible for controlling vegetation on Gill and Bowman's property.

3. Exclusion of Dr. Shaha and Herzog declarations

Edsel argues that the trial court erred by striking Dr. Shaha's and Herzog's declarations. We disagree.

a. Dr. Shaha declaration

To support his response to the defendants' 2019 summary judgment motion, Edsel submitted an unsigned declaration from Dr. Shaha, Edsel's and Lamb's physician. The trial court

struck the declaration and did not consider it because the declaration "was submitted unsigned and undated, and thus inadmissible." CP at 1283.

Although we typically review a trial court's evidentiary rulings for abuse of discretion, appellate courts "review de novo a trial court's evidentiary rulings made in conjunction with a summary judgment motion." *Portmann v. Herard*, 2 Wn. App. 2d 452, 463, 409 P.3d 1199 (2018). Under CR 56(e), unsigned affidavits are inadmissible and "should not be considered in ruling on summary judgment motions." *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993). The trial court properly struck Dr. Shaha's unsigned declaration.

The trial court also properly denied Edsel's CR 56(f) motion for a continuance to obtain Dr. Shaha's signature, noting that Edsel failed to "provide[] a reasonable justification" for why he needed more time to get a signed copy of Dr. Shaha's declaration. CP at 1283. We review a trial court's CR 56(f) ruling for abuse of discretion. *West v. Seattle Port Comm'n*, 194 Wn. App. 821, 834, 380 P.3d 82 (2016). The trial court may deny a CR 56(f) motion if "'the moving party does not offer a good reason for the delay in obtaining the evidence.'" *Id.* at 833 (quoting *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990)).

Here, it was Edsel who alleged that smoke from the defendants' fire pit damaged his and Lamb's health. Edsel filed his complaint in January 2018, and he had ample time to obtain a signed declaration from Dr. Shaha. We affirm the trial court's decision to deny Edsel's motion for a continuance because he did "'not offer a good reason for the delay in obtaining the evidence.'" *Id.* (quoting *Coggle*, 56 Wn. App. at 507).

b. Herzog declaration

Edsel argues that the trial court erred by striking Herzog's declaration on the grounds that it did not state that it was certified or declared under the laws of Washington, as required by RCW 9A.72.085(1). We disagree.

Under RCW 9A.72.085(1), whenever a sworn affidavit is required in a proceeding, it must:

> (a) Recite[] that it is certified or declared by the person to be true under penalty of perjury;
> (b) Is subscribed by the person;
> (c) State[] the date and place of its execution; and
> (d) State[] that it is so certified or declared under the laws of the state of Washington.

The Herzog declaration stated that it was made "[p]ursuant to Texas Civil Practice and Remedies Code Section 132.001(d)" by David Herzog "under penalty of perjury." CP at 915. But the declaration was not "certified or declared under the laws of the state of Washington." RCW 9A.72.085(1). Nor has Edsel argued below or on appeal that the applicable laws of Texas are comparable to the applicable laws of Washington.

Herzog contends that the reference to penalties for perjury is enough to incorporate penalties under Washington law. But that is inconsistent with the statute's plain language, which requires both the penalty of perjury language and the language ensuring the declaration is made under the laws of Washington. *Id.* Herzog's declaration did not meet Washington's requirements for a valid declaration and the trial court properly rejected it.

4. Trial court's dismissal of remaining nuisance and trespass claims

Edsel argues that the trial court erred by dismissing his four remaining nuisance claims and two remaining trespass claims because genuine issues of material fact existed for each of these

claims. We reverse the dismissal of the burning nuisance claim against the tenants but otherwise affirm the trial court's 2019 summary judgment order dismissing all of Edsel's remaining claims.

a. Nuisance and trespass elements

A plaintiff may bring a nuisance action "based on intentional, reckless, or negligent conduct." *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 769, 332 P.3d 469 (2014). In an action for negligent nuisance, the plaintiff must establish the negligence elements of duty, breach, causation, and damages. *Donner v. Blue*, 187 Wn. App. 51, 65, 347 P.3d 881 (2015). The plaintiff typically must prove that the alleged nuisance "'interfere[d] unreasonably with [their] use and enjoyment of their property.'" *Moore v. Steve's Outboard Serv.*, 182 Wn.2d 151, 155, 339 P.3d 169 (2014) (quoting *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998)); *see also* RCW 7.48.120.

Similarly, a plaintiff may bring a trespass action based on either a negligent or intentional intrusion onto the plaintiff's property. *Hurley*, 182 Wn. App. at 771. "'Negligent trespass' requires proof of negligence (duty, breach, injury, and proximate cause).'" *Id.* (internal quotation marks omitted) (quoting *Pruitt v. Douglas County*, 116 Wn. App. 547, 554, 66 P.3d 1111 (2003)).

b. Marijuana grow nuisance

Edsel argues that the trial court erred by dismissing his marijuana grow nuisance claim because the marijuana plants next door unreasonably interfered with the use and enjoyment of his property. We disagree.

Edsel may have rebutted the defendants' contention that the marijuana plants were legal because he and his landscapers alleged that they saw dozens of marijuana plants. But Edsel provided no evidence that his ability to use or enjoy his own property decreased due to the

marijuana plants next door, regardless of the quantity. Edsel also declared that some marijuana grow operations can be associated with violence and crime. These statements do not contain specific facts, as CR 56(e) requires, alleging that any violence or crime occurred in this case. Mere allegations or conclusory statements unsupported by evidence do not establish a genuine issue of material fact. *See Martin*, 191 Wn.2d at 722; *Lane*, 154 Wn. App. at 286-87. We affirm the dismissal of Edsel's marijuana grow nuisance claim.

c. Noise nuisance

Edsel argues the trial court erred by dismissing his noise nuisance claim because the defendants' use of noisy motorized vehicles unreasonably interfered with the use and enjoyment of his property. Lamb stated that noise "interrupt[ed] the peaceful and quiet enjoyment and use of our residence," and pointed to noise caused by the defendants warming up a car at early morning hours, for example. CP at 901. Edsel stated that the defendants "engag[ed] in noise . . . activities designed to force my wife and [me] out of our residence" and described the noises as continuous and very loud for a period of hours. CP at 906-07, 989-90. Real estate broker David McDonald's declaration alleges that the noises would reduce Edsel's property values. CP at 962.

These declarations establish that the tenants made noise, but Edsel has not offered specific facts showing that the volume, frequency, or duration of that noise exceeded ordinary and reasonable levels. His noise nuisance claim thus does not meet CR 56(e)'s requirement that plaintiff present "specific facts showing that there is a genuine issue for trial." Because Edsel's declarations are conclusory and lack adequate factual support, we affirm the dismissal of Edsel's noise nuisance claim.

d. Burning nuisance and trespass

Edsel argues that the trial court erred by dismissing his burning nuisance and trespass claims because smoke and particulate matter from the defendants' fire pit wafted onto his property, entered his home, and harmed his and Lamb's health. We reverse the trial court's summary judgment dismissal of the burning nuisance claim against the tenant defendants.[4]

Edsel claimed that smoke and particulate matter from the defendants' fire pit "left a filthy film of soot . . . on [his] . . . furniture and clothes" and brought a "disgusting and sickening smell or stench in the air while the smoke comes towards and inside our residence." CP at 907. Edsel and Lamb declared that the particulate matter bothered their lungs and the smell nauseated them. Taking Edsel's and Lamb's declarations as true, they establish a genuine issue of material fact as to whether the tenants' burning unreasonably interfered with Edsel and Lamb's enjoyment of their property. Edsel's and Lamb's declarations contain specific facts alleging that the burning occurred daily for a period of time, caused soot to accumulate in their home, and the odor was repulsive, acrid, and nauseating. Even without a doctor's declaration, Edsel and Lamb described physical symptoms sufficient to establish a genuine issue of material fact with regard to harm. We reverse the summary judgment dismissal of the burning nuisance claim against the tenants.

Edsel asserts that the trial court should not have dismissed his smoke trespass claim. But the Washington Supreme Court has affirmed summary judgment against plaintiffs who brought trespass claims involving transitory substances or materials that quickly dissipate because those substances do not, "as a matter of law, 'interfere with a property owner's possessory rights.'" *Wallace v. Lewis County*, 134 Wn. App. 1, 16, 137 P.3d 101 (2006) (quoting *Bradley v. Am.*

[4] As explained above, we affirm the dismissal of the burning nuisance claim against the landlords.

Smelting & Ref. Co., 104 Wn.2d 677, 691, 709 P.2d 782 (1985)). Smoke is a transitory substance that dissipates. As a matter of law, Edsel has not shown a genuine issue of material fact for his smoke trespass claim.

e. Vegetation nuisance and trespass

Edsel argues that the trial court erred by dismissing his vegetation nuisance and trespass claims because the defendants allowed ivy on their side of the property to grow over and under a retaining wall. We disagree.

In nuisance actions based on encroaching vegetation, the plaintiff must show actual damages from the encroaching vegetation, and the mere fact that vegetation extends onto the plaintiff's property does not constitute a nuisance. *Gostina v. Ryland*, 116 Wash. 228, 232, 199 P. 298 (1921); *see Moore*, 182 Wn.2d at 155. Estrada's and Osorio's declarations state that the ivy appeared to have only leaves and stems on Edsel's property but that its roots appeared to originate in Gill and Bowman's property. Edsel's supporting declarations also asserted that his retaining wall and fence were damaged by the ivy from the defendants' side of the fence and that ivy from the defendants' property entered a drainpipe that had an opening on the defendants' property, plugged the pipe, and flooded his property.

But Edsel failed to show the existence of a genuine issue of material fact regarding the essential element of causation, which he would have the burden of proving at trial. *See Donner*, 187 Wn. App. at 65. Edsel declared that he saw "large plugs of distinct plant root and stem matter" that were "consistent" with ivy in his drainpipe, but he only speculates that the ivy in his drainpipe originated on Gill and Bowman's property. CP at 905. None of the evidence properly before the trial court contained specific facts as required by CR 56(e) to establish that any damage to Edsel's

drainpipe and other parts of his property was caused by ivy originating in the defendants' yard. *See Martin*, 191 Wn.2d at 722; *Lane*, 154 Wn. App. at 286-87; *Young*, 112 Wn.2d at 225-26. We affirm the dismissal of Edsel's vegetation nuisance claim.

With regard to trespass, Edsel's failure to show causation or damage is also fatal because a plaintiff claiming negligent trespass has the burden of establishing proximate cause. *Hurley*, 182 Wn. App. at 771-72. Like his nuisance claim, Edsel's ivy trespass claim fails because he did not show the existence of specific facts sufficient to prove the necessary element of causation. We also affirm the dismissal of Edsel's vegetation trespass claim.

5. <u>Alleged attorney admission</u>

Edsel argues that the trial court erred by granting the defendants' 2019 summary judgment motion and by not granting his motion for reconsideration on the basis that the landlords' lawyer made a dispositive judicial admission conceding liability by stating at the summary judgment hearing, "[O]f course, my clients deny everything. But for purposes of this motion, we're accepting as true Mr. Edsel's allegations." CP at 1382.

To bind a party, an attorney's admission must be a "'distinct and formal'" statement "'made for the express purpose of dispensing with the formal proof of some fact at the trial.'" *Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d 329, 354 n.14, 190 P.3d 38 (2008) (internal quotation marks omitted) (quoting *Dodge v. Stencil*, 48 Wn.2d 619, 622, 296 P.2d 312 (1956)). Gill and Bowman's lawyer did not admit Edsel's version of the facts was true when he explained that his clients *denied* Edsel's version of the facts, but acknowledged the summary judgment standard. We reject this argument.

III. Attorney Fees

A. Trial Court's Denial of Edsel's Attorney Fees Request

Edsel argues that the trial court should have awarded attorney fees to him instead of to the defendants. We review an award of attorney fees for abuse of discretion. *Dalsing v. Pierce County*, 190 Wn. App. 251, 261, 357 P.3d 80 (2015). Here, the trial court awarded attorney fees to the defendants under RCW 4.84.185, which authorizes an attorney fees award to the prevailing party for defending a frivolous action. Because we reverse the trial court's dismissal of Edsel's burning nuisance claim against the tenant defendants, we direct the trial court to reconsider attorney fees on remand.

B. Attorney Fees on Appeal

On appeal, the tenants seek attorney fees under RAP 18.1. Under RAP 18.1(a) and RCW 4.84.185, we may award attorney fees to the prevailing party if the other party's appeal was frivolous. Because we reverse the trial court's dismissal of Edsel's burning nuisance claim against the tenants and because the majority of Edsel's other arguments were not frivolous, we deny the tenant defendants' request for attorney fees on appeal.

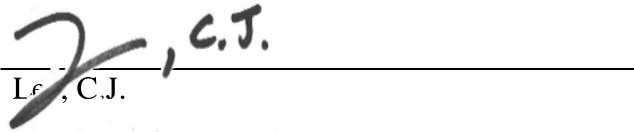
CONCLUSION

We reverse only with regard to the burning nuisance claim against the tenants and remand to the trial court to reconsider its award of attorney fees in light of our opinion. We conclude that the 2018 partial summary judgment ruling is not before us, and we otherwise affirm the 2019 summary judgment ruling dismissing Edsel's other claims. We deny the tenant defendants' request for attorney fees on appeal.

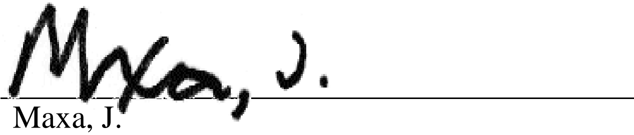
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:



Lee, C.J.



Maxa, J.