

No. 46728-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STUART F. McCOLL,

Appellant,

v.

GEOFFREY A. ANDERSON;  
CLALLAM COUNTY DEPARTMENT OF COMMUNITY DEVELOPMENT  
ADMINISTRATOR; and PROSECUTOR OF CLALLAM COUNTY,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Erik Rohrer  
Cause No. 13-2-00571-1

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**BRIEF OF RESPONDENT ANDERSON**

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## I. INTRODUCTION

The Appellant, Stuart F. McColl asks the Court to reverse Judge Rohrer's Summary Judgment granting dismissal of Mr. McColl's lawsuit and awarding Mr. Anderson partial attorney's fees. On appeal, Anderson asks the Court to dismiss the appeal. In the alternative, Anderson asks the Court to affirm Judge Rohrer's grant of summary judgment. Anderson seeks an award of attorney's fees on appeal.

## II. ISSUES PRESENTED BY APPEAL

- A. Is this appeal subject to dismissal for failure to timely appeal the trial court's final orders?
- B. Has the Appellant sufficiently identified the issues raised in his appellate brief in order to allow meaningful review? Similarly, has he waived issues which he raised in the trial Court by his statements there and/or by his failure to identify the issue and provide citation to the record and argument regarding the same on appeal?
- C. Is Respondent Anderson entitled to attorney's fees on appeal?

## III. STATEMENT OF THE CASE

### A. Factual Background.

Geoff Anderson owns Lot 22 of the Plat of Sportsman's Park, located on the north shore of Lake Sutherland in Clallam County. He originally acquired this property with his ex-wife in 1978. CP 202. The property was used for recreational

purposes as the Anderson children were growing up. Anderson moved there as his full time residence following his divorce in the mid 1990s. CP 202. Mr. Anderson is now retired and lives there with his wife, Charlotte. He has owned the property over 35 years. He has lived there, as his primary residence, for almost 20 years. CP 202.

When Anderson originally acquired his property it had a dock and an old boathouse. CP 203. In approximately 1983, he applied for and obtained a permit from Clallam County to rebuild the dock and boathouse which were part of a unified structure. CP 203. Final construction proceeded and was completed under this granted permit. CP 203.

In 2007, a severe storm hit the lake. CP 203. Many docks around the lake were severely damaged, some destroyed. *Ibid.* After the storm, the word among property owners around the lake was that the County considered this to be an emergency situation and property owners would be allowed to take care of any necessary repairs. CP 203. As time went on storm debris in the lake continued to flow toward the outlet at the shallow east end of the lake eventually blocking the outlet into Indian Creek. CP 203. The accumulated debris became so bad that a group of property owners banded together in a work party to haul away substantial amount of the debris, re-opening the outlet. *Ibid.* This caused the water level of the lake to drop substantially. CP 203.

The drop in water level affected the use of the boathouse by the Andersons. They could only get their boat about half way into the boathouse before it would hit shore due to the drop in water level. Because of this, in 2008, Anderson hired a pile driver working in other areas of the lake to install four new pilings which would allow extension of the boathouse and adjacent dock by six feet (6') water-ward. CP 204. This allowed Geoff and Charlotte Anderson to again use the boathouse and dock in the manner that it had been used prior to the storm. As part of this work Anderson also placed one new beam inside the boathouse on the eastern side. This raised the height of the boathouse on the east end approximately seven inches (7") although the roof of the boathouse still slopes to the east. Both before and after this work, the Andersons used the top of the boathouse for sun bathing and jumping into the water. Of the approximately 20 boathouses on the lake, almost all of them use the roof for sunbathing and jumping into the lake. CP 204. No objection was made by any of the neighbors or authorities to the work done by Anderson in 2008, at that time or subsequently, until McColl acquired his property in 2012 and filed this lawsuit in 2013. CP 185, 202-206.

The total cost and value of the work done by Anderson in 2008, including the piles and extension of the dock and boathouse by six feet, was substantially under \$10,000. Mr. Anderson understood that \$10,000 was the exemption

amount for having to obtain a shoreline substantial development permit.

*Declaration of Geoff Anderson*, CP 204. The work also seemed to fall within the exemption for “normal maintenance or repair of existing structures... including damage by accident, fire, or elements...” CP 204. The foregoing facts are set forth in the unrebutted Declaration of Geoff Anderson, CP 202-206.

Mr. McCall acquired Lot 21 from Lakesutherlandrealty.com Inc. by Quit Claim Deed in February, 2012. *Declaration of David V. Johnson, Exhibit B*, CP 196. The Deed lists Mr. McColl as the President of the grantor, Lakesutherlandrealty.com, Inc. The corporation, Lakesutherlandrealty.com, Inc. acquired Lot 21 from the Estate of Carol Polhamus, via a Bargain and Sale Deed, on November 8, 2010. *Declaration of David V. Johnson, Exhibit A*, CP 196. Copies of the respective deeds, and a site map, are attached at CP 196-201. This lawsuit was filed in June, 2013. CP 99.

In his appellate brief, Mr. McColl complains of a portable bamboo privacy screen used occasionally by the Andersons on their dock-boathouse for privacy from Mr. McColl's immediately adjacent property. The top of the Anderson boathouse is almost directly across from the second story deck on the McColl house and the screen provides both parties necessary privacy.<sup>1</sup> CP 204.

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In his brief at page 6, McColl misrepresents Anderson's answer to Request for Admission #17. To the requested admission that, “The document attached hereto as Exhibit E as compared to Exhibit F shows the bamboo privacy screen blocked the plaintiff's westerly lake view” the answer was, “partially admit, partially deny. It depends upon where the plaintiff is on his property.” CP 21.

A view from McColl's second story deck to the west is shown as Exhibit 5 in the Appendix to Appellant's brief with his own deck railing being shown in the lower right corner. The bamboo screen is then shown in Exhibit 6 to Appellant's brief with a "close-up" depiction clearly taken from a different distance and/or with a different lens setting, resulting in a distortion in depicting what is seen from the McColl property with the naked eye. *Compare Appellant's Brief Exhibits 5 and 6.* Appellant claims this portable screen is actionable as an interference with his view.

Anderson stores one or two floats in the water adjacent to their dock, between their property and McColl's. One float is used for dock repairs. The other float is used for swimming in deeper water and to store water "toys" out of the water. CP 204. A photo of one float is attached to Appellant's brief as Appendix Exhibit 4. Mr. McColl contends the float is a public nuisance because it contains materials which violates a provision in Clallam County's Shoreline Master Program which prevents the use of petroleum based treatments or preservatives, including creosote, arsenic or copper in the water. He offered no evidence indicting the use of such preservatives and does not argue this issue significantly on appeal.

**B. Procedural Background.**

Stuart McColl filed his original Complaint in June, 2013. CP 99-109. He

filed his Re-Amended Complaint in March, 2014. CP 46-53. Following discovery, both Clallam County and Geoff Anderson filed motions for summary judgment. CP 78, 183. Mr. McColl also filed a motion for summary judgment. CP 33. Following argument on September 5, 2014, Judge Rohrer entered an Order granting Clallam County's Motion for Summary Judgment. CP 65, 182.

Hearing on Anderson's Motion for Summary Judgment was September 26, 2014, at which time Anderson's Motion to dismiss all claims was orally granted. See *Clerk's minutes*, CP 164| Oral Opinion CP 126-135. In his ruling Judge Rohrer also awarded Anderson attorney's fees incurred in defense of McColl's claim for damages under the Shoreline Management Act, RCW Ch 90.58 and RCW 90.58.230. CP 165.

During the hearing an extended colloquy took place between Judge Rohrer and Mr. McColl relating to Mr. McColl's claims on various issues. The title page of the transcript of the argument is at CP 12. The Report of Proceedings (transcript) itself was submitted separately on appeal by the Superior Court Clerk. During questioning by Judge Rohrer, Mr. McColl agreed that the statute of limitations barred his claims for relief under the Shoreline Management Act to the extent they related to the work done by Anderson 2008, stating "I've conceded that any damage caused by expansion of the boathouse is not an issue." CP 12, transcript page 15. Under questioning, he further agreed that the only damage claim(s) that he was making that were not barred by the statute of limitations were his claim for nuisance

for the floats and the portable bamboo privacy screen. CP 12, transcript page 16.

Mr. McColl expressed his feelings to Judge Rohrer thusly:

MR. McCOLL: I would hope that this is over today. I've won cases and I've lost cases and there's a certain closure that comes, in even losing a case. If you lose a case there's a closure that comes and says this is the end of it we move on and now we know for certainty what we're going to do next. I would hope that there's closure today and I would ask you to help find the just answer to this and to find closure. I know that this is not going to go away. This is on my front doorstep. Until it physically goes away, it's not going to legally go away and so I would ask you to understand you cannot brush me off. I'd ask you not to brush me off and say Mr. McColl, scatter along now, be on your way because I will continue until it is over because it is right in my front doorstep and I believe that you would do the same thing. I believe that if you were in my position and you were here and I was there that you would do the same thing. If it was right in front of your house that you'd do the exact same thing.

CP 12, transcript page 19. McColl made a similar threat to Anderson's counsel earlier in the case. CP 147, Ex. B; CP 160; *Appendix A-7*.

Upon further questioning Judge Rohrer was able to narrow the issue to interference with Mr. McColl's view.

THE COURT: Okay, then let me just ask you this because I, too would like this to be over.

MR. McCOLL: Yes.

THE COURT: And I'm guessing Mr. Anderson would probably be okay if this was over and his family and I'm sure your family as well. What is it exactly, I mean outside of the law, what is it that you want to occur:

MR. McCOLL: Blocking my view is unacceptable.

THE COURT: It sounds like we're down to he's not suppose to have - I mean your world would be improved mightily if he would take down the little

bamboo screen and remove whatever dock structure you believe is, I think you said is a pile of junk or garbage or something like that. Is that kind of the bottom line and I suppose implicit in this would be don't shoot golf balls at you and I don't know what else.

MR. McCOLL: Yes, yes, yes, you are down the right line. There are three things that matter to me. It is unacceptable to block my view. It's not acceptable. There's a bunch of junk in the water right next to my house. It is not acceptable. And having a deck where it completely compromises my house, its privacy I don't want a deck sitting in front of me. That annoys me and bothers me. Those are the three things that matter to me.

CP 12, pages 18-19. The referenced 'junk' in the water is the floats.

On October 2, 2014, McColl prematurely filed a Notice of Appeal to the Court of Appeals appealing "all of the decisions made by Judge Rohrer regarding this matter including his decision to deny the Plaintiff Summary Judgment involving Writ of Mandamus, Warrant of Abatement, and Acknowledgment of Damages and fees due the Plaintiff." CP 59. Attached to his Notice of Appeal were a copy of the Judge's Order denying reconsideration of the dismissal of his claims against the County and a copy of the Clerk's minutes from the hearing at which the trial judge orally granted Anderson's motion for summary judgment. CP 61-64.

In a letter dated October 15, 2014, the Court of Appeals Clerk, citing CR 54(b), questioned whether the attachments to the Notice of Appeal were appealable "as a matter of right", and placed this matter on the court's motion docket for "appealability." See *Appendix A-1 through A-2*. In his response dated October 27, Mr. McColl asked that "the file be left open for a period of 60 days while the

remaining issues in the case including Judgment in the case is filed.” *Appendix A-3 through A-4*. He referenced an upcoming hearing regarding attorney’s fees awarded to Anderson, scheduled in the trial Court for October 30<sup>th</sup>, and acknowledged there would be another hearing after that “on the Findings and Judgment which usually occurs shortly thereafter.” *Appendix at A-3 through A-4*. On November 13, 2014, Commissioner Schmidt ruled, “The motion to determine appealability is stayed for 60 days while the trial Court conducts further proceedings.” *Appendix A-5*.

Back in the trial Court, counsel for Anderson submitted his Declaration requesting attorney’s fees and a proposed form of Judgment. CP 145-163. The attorney fee award was based upon RCW 90.58.230, which allows recovery of attorney’s fees by the prevailing party when a claim for damages is brought under the Shoreline Management Act. CP 146. McColl filed a responsive declaration, stating under penalty of perjury that , “During the entire course of this case I never requested damages under RCW 90.58.” CP 144. He repeated the same statement in his Amended Response to Anderson’s Request for Fee Award, stating “Plaintiff never asked for damages under that statute, therefore Defendant cannot be awarded attorney’s fees allowed under that statute.” CP 142. Anderson’s attorney filed documentation clearly rebutting these statements, showing Mr. McColl had, indeed, sought damages under RCW 90.58 and 90.58.230. CP 137-

140. Judge Rohrer agreed and on October 30, 2014, after hearing additional argument, he signed the Judgment and Order Granting Summary Judgment to Anderson and awarding partial attorney's fees and costs on the shorelines damages claim in the total sum of \$4,133.50. CP 09-11. Judge Rohrer specifically rejected McColl's claim that he had never made a claim under RCW 90.58 or sought damages under 90.58.230. In his subsequent Memorandum Opinion and Order denying McColl's Motion for Reconsideration he reiterated "not only has Mr. McColl repeatedly referred to RCW 90.58 (Shoreline Management Act) as a basis for his claims in this case, but Mr. McColl specifically requested attorney fees pursuant to RCW 90.58.230." CP 04, 05-06. *See Supplemental Declaration of David V. Johnson Re Request for Attorney's Fees*, CP 137-141.

The trial Court entered his final Order Granting Summary Judgment in Anderson's favor on October 30, 2014 (CP 09) and his Memorandum Opinion and Order denying reconsideration on November 17, 2014. CP 04. These orders concluded this case in the Superior Court. Mr. McColl never appealed either of these Orders.

On January 14, 2015, Anderson's attorney was notified by the appellate Court of a notation ruling by Commissioner Schmidt that date stating, "[t]he November 17, 2014 order makes this matter appealable as a matter of right. The Clerk will issue a perfection schedule in due course." *Appendix A-6*. The import of

this letter on the procedural issues raised herein is unclear. See Argument; IV (A), infra.

#### IV. ARGUMENT

##### **A. Motion to Dismiss Appeal - Failure to Perfect Appeal**

Pursuant to RAP 10.4, Respondent Anderson moves in this brief to dismiss this appeal. This motion is based upon Mr. McColl's failure to appeal or identify in any properly filed and served Notice of Appeal, an appealable order of the trial Court. As previously indicated by the Court of Appeals Clerk, Mr. McColl initially filed a Notice of Appeal on October 2, 2014 which challenged preliminary rulings by the trial court. CP 59-60. The Clerk raised the issue of whether the matters from which relief was sought in that Notice were appealable and placed the issue on the court's motion docket for hearing before the Commissioner. See *Appendix A-1*. In response to the Clerk's correspondence, and acknowledging that final orders had not been entered, McColl requested "the file be left open for a period of 60 days while the remaining issues in the case including Judgment in the case is filed." *Appendix A-4*. The Court Commissioner obliged and on November 13, 2014, Commissioner Schmidt entered a ruling stating, "[t]he motion to determine appealability is stayed for 60 days while the trial court conducts further proceedings." *Appendix A-5*.

RAP 2.2(a) lists those superior court decisions that may be appealed.

None of the appealable decisions listed in this rule include a trial court's oral ruling on a summary judgment motion or clerk's minutes reflecting the same. Yet these are the only rulings identified in the only Notice of Appeal filed in this case. CP 59-64. Under RAP 2.4(a), with certain exceptions not applicable here, the appellate Court reviews only the decision or parts of a decision designated in a Notice of Appeal. Mr. McColl never filed a Notice of Appeal from either the final Order Granting Summary Judgment in Anderson's favor entered on October 30, 2014 (CP 09), or the Memorandum Opinion and Order denying reconsideration entered on November 17, 2014 (CP 04). Moreover, under RAP 2.4(b), the appellate Court in a civil case will review a final judgment not designated in the notice of appeal only if the notice designates an order deciding a timely post-trial motion involving CR 50(b), CR 52(b), or CR 59. None of these post-trial motions were involved here.

Under RAP 6.1, the appellate Court "accepts review" of a trial decision upon the timely filing in the trial court of a notice of appeal "from a decision which is reviewable as a matter of right." RAP 5.2(a) requires that a notice of appeal be filed within 30 days of the appealable decision or, in the case of certain timely motions, including a motion for reconsideration, within 30 days of the entry of the order deciding that motion. RAP 5.2(e). The Appellant in this case complied with none of these requirements with respect to the judgment entered in favor of the

defendant Anderson or the denial of his motion for reconsideration. Even if Mr. McColl's premature Notice of Appeal were considered to be a notice for discretionary review, a possibility considered under the Clerk's letter issued October 15, 2014 (see *Appendix A-1*), a party seeking review must still file a notice of appeal from the final judgment "within the time period provided by rule 5.2," in order for the appeal to be perfected. See RAP 5.1(e). Mr. McColl's failure to properly file or amend his notice of appeal to include the final judgment or the order denying reconsideration, within 30 days of entry of either of those orders, precludes further review and warrants dismissal of this appeal.

Nor is it an excuse that Mr. McColl is representing himself *pro se* in this matter. A *pro se* litigant is held to the same standard as an attorney representing his or her client. Westberg v. All-Purpose Structures, Inc., 86 Wash.App. 405, 411, 936 P.2d 1175 (1997), Batten v. Abrams, 28 Wash.App. 737, 739 n. 1, 626 P.2d 984, review denied, 95 Wash.2d 1033 (1981).

**B. Waiver of Certain Claims on Appeal by Appellant's Statements in the Trial Court**

In his appellate brief, at page 12, Mr. McColl claims a "statutory right to pursue damages if the facts show Defendant violated the Shoreline Management Act." He then argues that the facts involving the alleged impact on his view as a result of the structures used by Anderson, support a claim for damages under the

SMA. Reference to this claim for damages on appeal occurs at pages 5, 7, 10, 12 and 13 of Appellant's Brief. In the trial court, Mr. McColl clearly waived any claim for damages under the SMA for the construction that occurred in 2008, in his colloquy with Judge Rohrer. CP 12, pages 15-19.<sup>2</sup> The only damage claim he did not concede was his claim for interference with his view under State Department of Ecology v. Pacesetter Construction Co., Inc., 89 Wn.2d 203, 571 P.2d 196 (1977) and his nuisance claim for the bamboo privacy screen, the "deck," and the "trash" or "dock junk" in the water. CP 12 pages 16-19. He is bound by these concessions on appeal.

**C. Waiver of Nuisance Claim on Appeal as a Result of Failure to Fully Argue Issue or Provide Proper Citations; Failure to Establish Elements of Nuisance.**

Washington courts have consistently held that a party waives issues not fully argued in their appellate briefs. See In Re Guardianship of Lamb, 173 Wn.2d 173, 198 n.8, 265 P.2d 876 (2011), rejecting attempts by litigants to incorporate by reference arguments contained only in trial court briefs.

In Assignment of Error 1 (the only alleged error that involves the Respondent Anderson) Mr. McColl states the trial court "erred in dismissing the Plaintiff's entire case without applying the applicable statutes, codes, and case law that grant the Plaintiff access to a writ of mandamus, warrant of abatement, and damages." App. Br.

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<sup>2</sup> "At CP 12, page 15, McColl stated "...I've conceded than any damage caused by expansion of the boathouse is not an issue."

page 4. His claim for a warrant of abatement is based on his claim for nuisance under RCW 7.48.020. See Appellant's brief page 9 n. 17. Although he claims entitlement to a warrant of abatement, he fails to argue or cite any facts or authority in his appellate brief as to how the improvements complained establish the elements of an actionable nuisance. Without arguing or citing authority establishing how the trial court's decision dismissing his nuisance claim was in error, the issue has been waived on appeal.<sup>3</sup>

That said, and without knowing the factual basis for the claim of nuisance on appeal, the following discussion, portions of which were submitted to the trial court on the issue of nuisance, may be of some relevance.

1. **Statute of Limitations.** Since there is no specific statute of limitations governing a nuisance claim in Washington, it is subject to the two-year catchall period applicable under RCW 4.16.130. See In re Hanford Nuclear Reservation Litigation, 780 F.Supp. 1551, 1574 (E.D.Wash.1991) (Washington's two-year limitations period under RCW 4.16.130 governs nuisance claims); Mayer v. City of Seattle, 102 Wn.App. 66, 75, 10 P3d 408 (2000); White v. King County, 103 Wash. 327, 329, 174 P. 3 (1918) (two-year limitation applies to negligent injury to real property). The two year limitation period begins when the plaintiff's cause of action accrues. In this case, any cause of action for nuisance

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<sup>3</sup> Throughout his brief McColl erroneously refers to the Superior Court Clerk's "sub nos." when making a reference to the Clerk's Papers from the record below. This makes review of his reference to the record below almost impossible. The confusion substantially affects the availability of meaningful review.

accrued when the work that is now complained of was completed in 2008. This lawsuit was not brought until 2013, considerably beyond the 2 year limitation period. Mr. McColl may argue that this is a continuing nuisance. In the case of an alleged continuing nuisance, the 2 year limitation period dates back to limit the damages to those which occurred within 2 years prior to the date of filing of the lawsuit. Wallace v. Lewis County, 134 Wn.App. 1, 19, 167 P.3d 101 (2006). The only "nuisance" damage alleged by the plaintiff, however, is unspecified damage to the value of his property. This damage, if any, would also have accrued more than 2 years prior to filing this action and would likewise be barred by the statute of limitations.

**2. Elements Necessary for a Nuisance Claim.** The statutory provisions addressing nuisance law in Washington are included in RCW Chapter 7.48, the initial provisions of which were adopted in 1881 and have been subsequently interpreted and modified by case law and legislative enactment. In Grundy v. Thurston County, 155 Wn.2d 1, 117 P.3d 1089 (2005), the Supreme Court summarized the basic elements of a nuisance claim as follows:

"Nuisance is 'a substantial and unreasonable interference with the use and enjoyment of land.'" Bodin v. City of Stanwood, 79 Wash.App. 313, 318 n. 2, 901 P.2d 1065 (1995) (quoting 1 William H. Rodgers, Environmental Law § 2.2, at 33 (1986)).

Washington's law of nuisance is codified in chapter 7.48 RCW.

Nuisance is broadly defined as "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 ... or in any way renders other persons insecure in life, or in the use of property." RCW 7.48.120.

A nuisance "which affects equally the rights of an entire community or neighborhood" is a public nuisance. RCW 7.48.130. Among the enumerated public nuisances is "[t]o obstruct or impede, without legal authority, the passage of any river, harbor, or collection of water." RCW 7.48.140(3). Any nuisance that does not fit the statutory definition of a public nuisance is a private nuisance. RCW 7.48.150.

An actionable nuisance is "whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property." RCW 7.48.010. Any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance may sue for damages and for injunctive relief to abate the nuisance. RCW 7.48.020.

155 Wn.2d at 6-7. For additional examples of an actionable public nuisance see RCW 7.48.140.

In addition to the foregoing, nuisance requires a *substantial* and unreasonable interference with the use and enjoyment of land. See Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 923, 176 Wn.2d 909 (2013) (quoting Bodin v. City of Stanwood, 79 Wn.App. 313, 318 n.2, 901 P.2d 1065 (1995)). See also Peterson v. King County, 45 Wn.2d 860, 863, quoted by Mr McColl at page 7 of his brief as requiring a substantial invasion of an interest in land order for there to be an actionable claim for nuisance. Mr. McColl failed to present evidence of a

substantial interference with the use and enjoyment of his land, a prerequisite to a finding of nuisance under RCW 7.48.020 and case law interpreting the same. His objections to the bamboo privacy screen and the storage/repair platforms (the only two items that arguably originated within the 2 year limitation period) were personal.<sup>4</sup> He addressed these items at the summary judgment hearing. With regard to the platforms in the water, Mr. McColl stated to Judge Rohrer and the Court responded:

MR. MCCOLL: ....Clearly, looking at the photographs, this is a pile of junk that's right in front of my property that is in the public lake. That is, if it was in front of your property, Your Honor, that if it was in your public lake property, in the public property, you'd agree it was a nuisance too. If it was not placed there with a permit I think you'd agree that it is a nuisance, that it annoys and offends both the public and the private property owner immediately adjacent to the pile of junk.

So I would appeal to you, not only legally, I'd appeal to you emotionally that if this pile of junk was in front of your house you would certainly agree that it annoys you and that it is a nuisance and there's not much more we can say about that pile of junk than that, it there? Are there questions?

CP 12, transcript at page 10.

A similar showing of "actual and substantial damage" is required in the context of a claim for trespass. See Grundy v. Brack Family Trust, 151 Wn.App.

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At the hearing on summary judgment Mr. McColl agreed that the bamboo privacy screen and the "trash" out in the water were the only two things that were within the two year statute of limitations. See CP 12, transcript at page 16.

557, 213 P.3d 619 (2009). In Brack, supra, the Supreme Court reversed the trial court's award of damages for trespass, holding that the evidence failed to show sufficient damage to the plaintiff's property to constitute a trespass.

**D. Claim for Damages under Shoreline Management Act and County Shoreline Code and Master Program**

Aside from the waiver of this claim by statements made to the trial court, and failure to submit a properly prepared appellate brief, Appellant's claim for relief under the SMA and County Shoreline Code and Master Plan are barred by the statute of limitations and other applicable defenses. Mr. McColl claim for damages under the Shoreline Management Act, RCW Chapter 90.58, is based on RCW 90.58.230 which states that a person violating the provisions of this chapter can be liable for "all damage to public or private property arising from such violation..." The damages include the cost of restoration of the "affected area" to its condition prior to the violation. When private persons bring a claim for damages under this section, attorney's fees are available to the "prevailing party."<sup>5</sup>

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RCW 90.58.230 reads in its entirety, states:

90.58.230. Violators liable for damages resulting from violation--Attorney's fees and costs

Any person subject to the regulatory program of this chapter who violates any provision of this chapter or permit issued pursuant thereto shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to violation. The attorney general or local government attorney shall bring suit for damages under this section on behalf of the state or local governments. Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons similarly situated. If liability has been

**1. Statute of Limitations.** There is no specific statute of limitations for damage claims made under RCW 90.58.230. Under such circumstances, the default statute of limitations under RCW 4.16.130 applies. It states:

4.16.130. Action for relief not otherwise provided for

An action for relief not otherwise provided for, shall be commenced within two years after the cause of action shall have accrued.

In this case, Mr. McColl's lawsuit was filed substantially more than two years following the dock and boathouse work done by Mr. Anderson in 2008. Under these circumstances, any claim for damages as a result of alleged shorelines violations related to the dock work in 2008 comes too late.

**2. Shorelines Standing - Subsequent Purchaser Rule.** Mr. McColl is also without "standing" to bring the claims made since he was not the owner of the adjacent property allegedly damaged in 2008. Mr. McColl did not acquire ownership of his property until 2012. CP 196, 201, Stated another way, Mr. McColl was not within the "zone of interest" of persons protected by SMA requirements because he was not the owner of the adjacent property at the time

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established for the cost of restoring an area affected by a violation the court shall make provision to assure that restoration will be accomplished within a reasonable time at the expense of the violator. In addition to such relief, including money damages, the court in its discretion may award attorney's fees and costs of the suit to the prevailing party.

the work was done and, therefore, suffered no compensable damage. Cf. KS Tacoma Holdings, LLC v. Shorelines Hearings Bd., 166 Wn.App. 117, 272 P.3d 876 (2012).

In addition to the 'zone of interest' test for an action under the SMA, Mr. McColl's damage claim is barred by the principles recognized in the "subsequent purchaser rule." It is undisputed that Mr. McColl did not own Lot 21 when Mr. Anderson extended his dock and placed a new beam in the boathouse in 2008, In fact, Mr. McColl didn't acquire Lot 21 until 2012, 4 years later. Besides the statute of limitations issues presented, the "subsequent purchaser rule" holds that a subsequent owner who purchased the property after the event about which he complains, cannot seek damages or other relief as a result of that event. The presumption behind the rule is that the prior circumstances affecting the property are presumed to have been taken into account in the subsequent purchase transaction. See Wolfe v. State of Washington Dept of Transportation, 173 Wn.App. 302, 293 P.3d 1244 (2013). While application of this rule in Wolfe was in the context of a claim for inverse condemnation, the same rationale applies here where (1) the claim relates to activity undertaken prior to the purchase, and (2) the prior activity is the basis for a claim of diminution in value of the property made by the subsequent purchaser. The claim that was dismissed by the Court in Wolfe

was a claim for “continuing nuisance,” the same as the claim made by Mr. McColl here. 173 Wn.App. at 307. Similarly, in Hoover v. Pierce County, 79 Wn.App. 427, 903 P.2d 464 (1995), the Court held that the subsequent purchaser did not have “standing” to bring his claim under of the subsequent purchaser rule. In Hoover, the plaintiff’s claim was for new flooding which had occurred after they had purchased, though allegedly caused by a condition existing before purchase. The Court of Appeals rejected the argument that the purchaser had a new cause of action and held that they had no standing to sue by virtue of the subsequent purchaser rule. 79 Wn.App. at 433.

Judge Rohrer based his ruling dismissing Mr. McColl’s claims, in part, on the “subsequent purchaser rule”. CP 126, 129. Mr. McColl has not assigned error to or challenged on appeal this basis for Judge Rohrer’s ruling. His failure to do so precludes reversal of the judge’s decision on these grounds. RAP 10.3(a)(3)(6). See also Weber v. Associated Surgeons, P.S., 146 Wn.App. 62, 65, 189 P.3d 817 (2008) stating failure to provide argument or authority in support of an assignment of error precludes review on appeal.

**3. County Shoreline Code Violations.** Although raised in the trial Court, Mr. McColl fails to discuss this claim on appeal. Not only is the issue thereby waived, it suffers from the same statute of limitations and “subsequent

purchaser” problem applicable to his claim under the SMA.

**4. Shoreline Master Program.** On appeal Mr. McColl cites Clallam County’s Shoreline Master Program alleging at page 6 of his brief a violation of CCC SMP 5.18-C-1.d which states “...boathouses shall have sloped roofs with a minimum pitch of 3:1 (horizontal to vertical).” See Appellant’s Brief, fn 7 and accompanying text.<sup>6</sup> Neither the Shoreline Management Act nor the Clallam County Code provides for a private cause of action for violation of a provision in the County’s Shoreline Master Program. See RCW 90.58.230; CCC 35.01.130(3). The authority to take action, as it relates to “uses” made of the shorelines in conflict with Clallam County’s shoreline master program, rests in the Prosecuting Attorney. CCC 35.01.130(2). Moreover, any such private cause of action would be subject to the same 2 year statute of limitations and subsequent purchaser rule discussed above.

**E. Damages under Ecology v. Pacesetter’s “Conclusion of Law.”**

Appellant argues that the trial court’s decision has denied him access to damages accessible to him through a “conclusions of law” stated by the Washington Supreme Court in State Department of Ecology v. Pacesetter

<sup>6</sup>

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The work done in 2008 did not change the historical use of the boathouse roof which had always been used to sunbathe and jump into the lake. CP 204. This use was clearly in place when Mr. McColl acquired his property. See discussion, supra.

Construction Co., Inc., 89 Wn.2d 203, 571 P.2d 196 (1977). App. Br. at 10-11.<sup>7</sup>

Mr. McColl erroneously takes out of context and seeks to apply a conclusion of law applicable under the facts of that case, as a universal principle of law applicable here.

Pacesetter involved a constitutional challenge to the 35' height limitation under the Shoreline Management Act. In upholding the constitutionality of the height limitation, the Supreme Court considered economic impact on view as supporting the constitutionality of the height restriction. 89 W.2d at 208-212. The Court's opinion, however, does not adopt the trial court's Conclusions on Law no. 9 as a statement of law but rather in support for the constitutionality of the 35' height restriction. There is no height restriction violated by the Anderson's boathouse in the instant case and none is cited. Pacesetter's constitutional analysis is inapplicable here.

Mr. McColl also cites Hunt v. Anderson, 30 Wn.App. 437, 635 P.2d 156 (1981) as establishing a setback rule involving view protection. In that case, however, there existed a specific county regulation (Regulation 10.8) which required "proposed structures shall be such that obstruction of scenic views and

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<sup>7</sup> "Conclusion of Law no. 9 stated, "If one house sits far ahead of the others, then for that one person's financial benefit, he would be allowed to cause a drastic invasion into the aesthetics of the neighborhood and a tremendous financial loss to all of his neighbors."

vistas is minimized.” 30 Wn.App. at 440, see n.3. The Court held that the prior setback of the plaintiffs’ homes on either side of the defendant’s lot together with Regulation 10.8, supported the ruling requiring the defendant to place his mobile home further back, so as not to significantly affect the plaintiffs’ existing view. The instant case presents no setback issues. Both the Anderson home and the McColl house are close to the water, a location consistent with many other homes in the area. Nor is there any applicable County regulation involving view presented here. Also, contrary to the facts in Hunt v. Anderson, the boathouse ‘deck’ that Mr. McColl complains about was in place when he bought his property. CP 202-205. If anything, Hunt recognizes the rights of existing owners with respect to such improvements.

**F. Protected Property Right through Zoning.**

Mr. McColl also argues at page 12 of his brief that he has a protected “property right to a view ... granted to him through zoning ... which he [Plaintiff] relied upon when he purchased his property.” Yet he fails to cite any such zoning provision. Because there is no applicable height restriction here under Clallam County’s zoning or other environmental regulation, this argument fails.

**G. Common Law Claim for Loss of View.**

Mr. McColl appears to suggest he believes he has a common law right to

a particular view. This argument, however, runs afoul of the clear holding in Asche v. Blumquist, 132 Wn.App. 784, 133 P.3d 475 (2006), which states there is no common law property right in view across a neighbor's property and no nuisance claim that can be claimed on the basis an alleged interference with view. While Asche v. Blumquist recognized that an enforceable right may be available where a specific height limitation is imposed under zoning or other land use regulation, no such height limitation is applicable here, either to Anderson's boathouse or the portable bamboo screen. Dismissal of claims related to alleged interference with view occasioned by the Anderson's boathouse or privacy screen should be affirmed.

#### **H. Trial Court's Judgment Awarding Attorney's Fees.**

The Respondent has not appealed the trial court's award of partial attorney's fees or the basis therefore. Having failed to appeal or assign as error, and having failed to address or argue the same in Appellant' brief, such award in the total sum of \$4,133.50, should be affirmed. CP 09-11.

#### **I. Respondent's Request for Award of Attorney's Fees on Appeal**

The basis for the trial court's award of attorney's fees, RCW 90.58.230 is equally applicable on appeal. Accordingly, the Respondent, Geoff Anderson, seeks recovery under RCW 90.58.230 of his attorneys fees incurred in defending

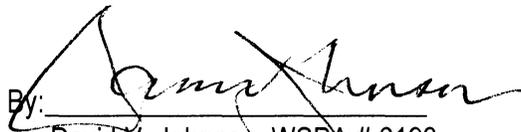
the claim for damages under the Shoreline Management Act on appeal. This request is made under RAP 18.1, which allows an award of attorney's fees on appeal where a statutory provision allows for the same. The amount of request is to be determined under RAP 18.1(d) through (h).

#### **V. CONCLUSION**

Defendant Anderson requests that the trial court's dismissal of the claims against him be affirmed and that he be awarded costs and attorney's fees under authority cited herein.

RESPECTFULLY SUBMITTED this 23rd day of February, 2015.

JOHNSON RUTZ & TASSIE, PLLC  
Attorneys for Respondent Anderson

By:   
David V. Johnson, WSBA # 6193

## APPENDIX

- A1-A2 October 15, 2014, letter from Washington State Court of Appeals
- A3-A4 Appellant's Response Regarding Readiness Issue
- A-5 November 13, 2014, letter from Washington State Court of Appeals
- A-6 January 14, 2015, letter from Washington State Court of Appeals
- A-7 January 1, 2014, letter from McColl to Attorney Dave Johnson



# Washington State Court of Appeals

## Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

October 15, 2014

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mjohnsen@karrtuttle.com

**CASE #: 46728-3-II**  
**Stuart McColl, Appellant v. Geoffrey Anderson, et al., Respondents**  
**Clallam County No. 13-2-00571-1**  
**Case Manager: Cheryl**

Mr. McColl and Counsel:

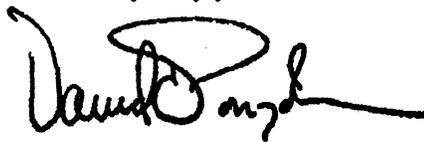
The decision appealed from in the above referenced matter is a Memorandum Opinion and Order Re: Motion for Reconsideration. In a case with more than one claim or multiple parties, where the trial court directs the entry of judgment as to one or more, but fewer than all the claims or parties, CR 54(b) requires written findings supporting the determination that there is no just reason for delay. It appears that either no findings have been filed or that the findings are not sufficient, and therefore it is questionable whether the order is appealable as a matter of right as provided in RAP 2.2(d). See Fox v. Sunmaster Products, Inc., 115 Wn.2d 498 (1990); Doerflinger v. New York Life Ins. Co., 88 Wn.2d 878 (1977); Nelbro Packing Co. v. Baypack Fisheries, 101 Wn. App. 517 (2000) (five required types of findings).

Pursuant to RAP 6.2(b), I am placing this matter on the court's motion docket for appealability. The motion will be considered without oral argument. **A written response shall be filed no later than October 30, 2014.** Division II General Order 91-1. Counsel will be advised, in writing, at a later date of the commissioner's decision. **PLEASE NOTE:** If sufficient written findings are entered and a copy forwarded to this court, the clerk's motion will be stricken.

The requirement that a party file a notice for discretionary review has been waived, if necessary, assuming the notice of appeal has been timely filed. In its decision on the appealability issue, the court will advise the parties if a motion for discretionary review is

necessary and set the due date for the motion for discretionary review. If counsel have any questions concerning this action, do not hesitate to contact this office.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Ponzoha", with a large, stylized flourish at the end.

David C. Ponzoha,  
Court Clerk

DCP: c

No. 46728-3-II

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Clallam County Case No: 13-2-00571-1

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STUART MCCOLL (Plaintiff)  
Appellant

v.

Geoff Anderson (Defendant)  
Sheila Miller / DCD Administrator / Clallam County (Defendant)  
Will Payne / Prosecutor / Clallam County (Defendant)  
Respondents

---

APPELLANT'S RESPONSE REGARDING READINESS ISSUE  
PLACED ON DOCKET BY THE COURT'S CLERK

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Stuart McColl, Pro Se  
1038 Hooker Road  
Sequim, WA 98382  
Ph: 360-582-0202  
Email: [stu@softwarehero.com](mailto:stu@softwarehero.com)

The Appellant exercised an abundance of caution regarding the time requirement outlined in RAP 5.2(a). The rule requires filing with this court within 30 days of the decision to appealed as he did in fact do.

The Appellant does not disagree with the Clerk regarding timing issue brought up in his letter dated October 15, 2014.

The Appellant asks that the file be left open for a period of 60 days while the remaining issues in the case including Judgment in the case is filed. The Appellant wishes to let the court know that a hearing on attorney's fees is scheduled for October 30, 2014 in Clallam Superior Court. It appears the only hearing after that will be a hearing on the Findings and filing of Judgment which usually occurs shortly thereafter.

Respectfully Submitted this 27 day of October, 2014.

A handwritten signature in black ink, appearing to read 'Stuart McColl', is written over a horizontal line.

Stuart McColl - Litigant Pro Se



Washington State Court of Appeals  
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

November 13, 2014

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mjohnsen@karrtuttle.com

CASE #: 46728-3-II  
Stuart McColl, Appellant v. Geoffrey Anderson, et al., Respondents

Counsel:

On the above date, this court entered the following notation ruling:

**A RULING BY COMMISSIONER SCHMIDT:**

The motion to determine appealability is stayed for 60 days while the trial court conducts further proceedings.

Very truly yours,

David C. Ponzoha  
Court Clerk



Washington State Court of Appeals  
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

January 14, 2015

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mjohnsen@karrtuttle.com

CASE #: 46728-3-II  
Stuart McColl, Appellant v. Geoffrey Anderson, et al., Respondents

Mr. McColl & Counsel:

On the above date, this court entered the following notation ruling:

**A RULING BY COMMISSIONER SCHMIDT:**

The November 17, 2014 order makes this matter appealable as a matter of right. The Clerk will issue a perfection schedule in due course.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Ponzoha", with a large, stylized flourish at the end.

David C. Ponzoha  
Court Clerk

Stuart McColl  
1038 Hooker Road  
Sequim, WA 98382

01-10-14

Dave Johnson  
804 South Oak  
Port Angeles, WA 98362

**RECEIVED**  
JAN 10 2014

JOHNSON RUTZ & TASSIE  
ATTORNEYS AT LAW

Mr. Johnson:

I have notated the lies you told today in court in front of the judge about how the DCD had no objection to Mr. Anderson's projects.

Trust me Mr. Johnson, I will be listening very carefully to you and the things you say, and the things you do, and if I catch you getting out of line at all, I will pursue you with the same enthusiasm you see me pursuing Mr. Anderson. You don't want that.

I remind you that you are an officer of the court.

You see Mr. Johnson, I understand the games people like you play ... and that is why I do my own legal work. You and I know how this ends, Mr. Anderson loses and has to correct his violations ... and it's just a game of you stringing him out for the fees he pays you.

Best Regards,

  
Stuart McColl

Appendix A-7

EXHIBIT

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CP 160

**CERTIFICATE OF MAILING**

I certify under penalty of perjury under the laws of the State of Washington, that this date I caused to be delivered, via first class mail, to:

Clerk  
WA State Court of Appeals, Div II  
950 Broadway, Suite 300  
Tacoma, WA 98402

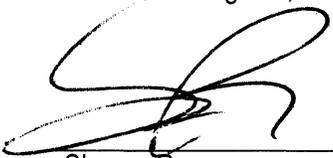
Stuart McColl  
1038 Hooker Road  
Sequim, WA 98382  
**Appellant**

Mark Johnsen  
Karr Tuttle Campbell  
701 Fifth Avenue, Suite 3300  
Seattle, WA 98104  
**Respondent Clallam County**

FILED  
COURT OF APPEALS  
DIVISION II  
2015 FEB 24 PM 1:06  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

a true and correct copy of the Brief of Respondent Anderson.

SIGNED and DATED at Port Angeles, WA, on February 19, 2015.

Signature:   
Print Name: Sharon Prosser