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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON
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W. BRANDT BEDE and LESLIE K. McLAUGHLIN BEDE,
husband and wife, Appellants

v.

DARYL W. YOREK and KELLY M. YOREK,
husband and wife, Respondents

APPELLANTS' OPENING BRIEF

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I.
INTRODUCTION

The Appellants Brandt and Leslie Bede (the "Bedes") appeal the Trial Court's decision granting a prescriptive easement to the Respondents Daryl and Kelly Yorek ("Yorek") over the Bedes' boxwood hedge and subsequent award of damages based on the removal of the hedge. The Bedes further appeal the Trial Court's decision determining the more than six foot tall concrete wall constructed by the Yoreks was not a spite wall.

II.
ASSIGNMENTS OF ERROR

The Bedes assign error to the Trial Court's Order Granting Motion for Dismissal of Spite Fence Claim dated June 5, 2015, including Findings of Fact No. 3-9 and its Conclusion of Law, a copy of which is attached at Appendix A.¹

The Bedes also assign error to the Trial Court's June 12, 2015, Findings of Fact and Conclusions of Law² as follows:

Finding of Fact Nos. 1.9, 1.10, 1.11, 1.14, 1.15, 1.16, 1.17, 1.18, 1.25, 1.28, 1.29, 1.30, 1.35, 1.36, 1.37, 1.38, 1.39, 1.40, 1.41, 1.42.

¹ CP 118-121.

² CP 136-152.

Conclusion of Law Nos. 2.5, 2.6, 2.7, 2.8, 2.9, 2.10, 2.15, 2.20.

A copy of the Trial Court's Findings of Fact and Conclusions of Law is attached at Appendix B.

Lastly, the Bedes assign error to the Trial Court's Order Awarding Attorneys' Fees and Costs dated June 5, 2015³, a copy of which is attached at Appendix C and the Judgment dated June 12, 2015⁴, a copy of which is attached at Appendix D.

III.
ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR

1. Did the Trial Court err in awarding to the Yoreks a prescriptive easement over the Bedes' hedge when the Yoreks failed to provide any evidence to support any of the elements for a prescriptive easement?

2. Did the Trial Court err in awarding to the Yoreks their attorney's fees and costs pursuant to the Waste Statute, RCW 4.24.630, when the Trespass Statute, RCW 64.12.030 applies and the Waste Statute expressly states it is not applicable?

3. Did the Trial Court err in dismissing the Bedes' spite fence claim when the Yoreks' concrete wall damages the Bedes

³ CP 122-124.

⁴ CP 125-126.

enjoyment of their property to a significant degree, the wall was constructed for the purpose of *injuring or annoying* the Bedes and it serves no really useful or reasonable purpose?

IV.
STATEMENT OF THE CASE

1. Overview.

The Bedes and the Yoreks reside in an upscale North Tacoma neighborhood where they own adjoining properties. RP 4/14/15 at 21. A small portion of their properties is divided by a boxwood hedge. RP 4/14/15 at 37-38. In 2012, the Bedes removed about 20 feet of the boxwood hedge because it was either dead or dying and became an eyesore. RP 4/14/15 at 39-41. With the exception of one plant, which was also dead, the Bedes only removed plants on their property. RP 4/14/15 at 48-50, 88-89; Exhibit 34.

Immediately afterwards, the Yoreks removed the remaining boxwood plants to the west and constructed a more than 6 foot tall concrete wall within one inch of the property line. RP 4/14/15 at 55-56; Exhibits 4-9. The concrete wall was constructed along that part of the property line where the hedge had been removed and then the Yoreks extended the wall through the curb and into the Bedes' driveway. *Id.* The concrete wall interferes with the Bedes use of their

property, creates a safety hazard to vehicles and pedestrians and is out of character with the rest of the neighborhood. RP 4/14/15 at 32, 35-37, 63-66.

Prior to the Yoreks construction of the concrete wall into the Bedes' driveway, the Bedes and their predecessors had used the driveway for decades. RP 4/14/15 at 22-25. However, an easement had never been recorded.

As a result of the Yoreks' actions, the Bedes commenced this action to (1) establish a prescriptive easement over the driveway to the extent it traverses the Yoreks' property and (2) to require the Yoreks' to remove the concrete wall because it was a spite wall. CP 1-13.

The Yoreks counterclaimed alleging (1) they too have established a prescriptive easement over the driveway to the extent it traverses the Bedes' property and (2) the Bedes removed part of a boxwood hedge that was located on the Yoreks' property for which they are entitled to damages. CP 14-18. The Yoreks dismissed their remaining claims relating to the Bedes' cyclone fence and arborvitae plant hedge at trial and did not pursue their claim for emotional distress. RP 4/14/15 at 4-7; CP 54-55.

The parties agreed that both have a prescriptive easement over the existing pavement of the driveway to the extent it traverses the others' property.⁵ RP 4/14/15 at 11-12, 14, 16. The only dispute regarding the driveway was how far back the vegetation along the driveway needed to be cut so that it did not encroach over the paved area. RP 4/14/15 at 14, 16, 20. The Trial Court resolved that issue, which is not the subject of this appeal. Appendix B Findings of Fact 1.20 – 1.24 and Conclusions of Law 2.11-2.12. CP 139-140, 144.

This appeal arises out of the Trial Court's subsequent decision to extend the easement through the planting bed and over the boxwood hedge that was on the Bedes' property, declare that the boxwood hedge was owned by the Yoreks and award the Yoreks damages for the Bedes' removal of that portion of the hedge located on the Bedes' property. The Bedes also appeal the Trial Court's decision to dismiss their spite wall claim.

2. The Boxwood Hedge.

There was a boxwood hedge that began at the radius curb where the driveways split, then running easterly to a large cedar tree, then around the cedar tree and continuing on adjacent to the mutual

⁵ The Bede and Yorek properties, the driveway and the property lines are all depicted on Exhibit 20, which was admitted at trial.

property line. RP 4/14/15 at 51. The boxwood hedge had been installed decades earlier and was approximately 4.5 feet tall. RP 4/14/15 at 63; RP 4/15/15 at 43.

By 2012, portions of the hedge became very unattractive as it was dead or dying due to the shade from a large cedar tree, and its roots were being choked by competing root systems and debris from the cedar tree. RP 4/14/15 at 39-41. Consequently, the Bedes removed a portion of the boxwood hedge located on their property and between the large cedar tree and toward the radius curb (a distance of approximately 20 feet). See Exhibits 34, 47.

The Bedes knew where the boxwood hedge was located relative to the property line between their and the Yoreks' property because a survey stake was installed adjacent to the cedar tree (where the Bedes began removing the boxwood hedge) and another survey stake was installed 30 feet away, just beyond the radius curb. RP 4/14/15 at 41-44. It was between those two stakes that the Bedes removed approximately 20 feet of the boxwood hedge. *Id.* The Bedes located the stalks of the boxwood plants relative to the property line using a string line between the survey stakes. RP 4/14/15 at 45-46.

Although the boxwood hedge ran parallel to the driveway, the property line does not. Consequently, most of the boxwood hedge is on the Bedes' property, except when it nears the radius curve, at which point it crosses over onto the Yorek property. RP 4/14/15 at 51. The Bedes only removed one boxwood plant from the Yoreks' property (closest to the radius curb), because it was dead. RP 4/14/15 at 49-50. Otherwise, all the boxwood hedge removed by the Bedes were located on the Bedes' property. *Id.*

The Yoreks then immediately removed the remaining plants on their property and constructed a thirty foot long and more than six foot tall prefabricated concrete wall in its place. RP 4/14/15 at 55-56; Exhibits 4-9, 68, 86-87, 95.

3. The Concrete Wall

Unlike the boxwood hedge, that was parallel to the Bedes' driveway, the Yoreks constructed the concrete wall within an inch of the property line and projected it through the curbing and into the Bedes' driveway. Exhibits 4-7, 86. The added height of the wall makes it impossible to see cars and pedestrians exiting either property, resulting in a dangerous condition likely to result in personal injury or property damage. RP 4/14/15 at 63, 117-118. Additionally, because the wall projects into the Bedes' driveway, it impairs the

Bedes ability to back trailers onto their property and anywhere away from the wall because it completely eliminates the necessary turning radius into their property. RP 4/14/15 at 32, 35-37.

The concrete wall is very unsightly. Exhibits 6-9. The Yoreks faced the finished side of the wall, which is textured cultured stone, toward themselves. Exhibits 62, 64, 68, 87. The side facing the Bedes is unfinished, rough with spalding cracks and pock marked from the air pockets that were not removed prior to the concrete curing in the forms. Exhibits 6-9. The Bedes' side has lines of excess concrete where it overflowed the form and variations in color made even more apparent by all the imperfections that the manufacturer clearly never intended anyone to see let alone be displayed at the entrance to an upscale home. *Id.*

4. The Trial Court's Decisions.

The Bedes consider the concrete wall to be a spite wall and requested that the Trial Court have it removed. The Trial Court disagreed and dismissed their claim. Appendix A; CP 118-121. The Trial Court further granted to the Yoreks a prescriptive easement over the Bedes' boxwood hedge and, because of the easement determined the Bedes wrongfully removed the hedge and awarded to the Yoreks damages and attorney's fees. Appendices B, C and D.

The Bedes subsequently filed this appeal. CP 153-194.

V.
ARGUMENT

1. Standard of Review

The Court of Appeals reviews the trial court's decision following a bench trial by asking whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712, 334 P.3d 116, 119 (2014) citing *Casterline v. Roberts*, 168 Wash.App. 376, 381, 284 P.3d 743 (2012). "Substantial evidence" is the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). The application of the law to the facts is a question of law that the Court of Appeals reviews de novo. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wash.2d 432, 441, 191 P.3d 879 (2008).

2. The Trial Court Erred in Finding That The Yoreks Had An Easement Over the Bede's Boxwood Hedge.

Although the parties agreed that each had a prescriptive easement over the existing paved driveway for access, the Trial Court, sua sponte, determined that the Yoreks had a prescriptive

easement over the Bedes' planting bed and boxwood hedge stating as follows:

Now, when they built that driveway, and I assume that the Wilkerson sandstone blocks were part of the original blocks, you know, they took that drive up, and they curved it, which made sense because we have the cedar tree sitting right smack-dab, you know, so if you want to do it straight up the property line, you're going to run into the cedar tree; so they curved it, so I'm ruling that the curve goes up to the cedar tree -- the easement portion of the sandstone blocks goes up to the cedar tree and to the end of where it runs -- so there was testimony that the blocks ended about six feet from the concrete pad that's on the [Bede's] property, so the easement runs up to the concrete pad. Everything on the one side, you know, [Bede's] side, belongs to them; everything on [Yoreks'] side belongs to them, which means those hedges were grandfathered in and are on [Yoreks'] side of the sandstone blocks. (Emphasis added).

I mean, my guess is when they built this -- I mean, you're basically talking about a triangle of land, not a significant amount; and nobody really cared so that the [Yoreks'] predecessors landscaped it with the hedge because it -- you know, I mean, it's a small amount of property. It doesn't make sense that they were going to -- they wouldn't incorporate it with the other side because they're taking part of the [Yoreks'] lot. Presumably, the [Yoreks'] lot, you know, [Bedes] have an easement over it. [Yoreks] have an easement over some of [Bedes'] lot which means that the [Bedes] should not have been removing those -- that boxwood hedge because it had been there for almost as long as the driveway.

Now, the property from the inside of each curb belongs to each adjacent landowner. (Emphasis added).

RP 4/16/15 at 17-19.

The Trial Court further explained her decision as follows:

What I'm going to do is: I'll award [the Yoreks] for the [concrete wall] that they had to put up in place of the boxwood, and I will award the treble damages because I think the [Bedes] behavior, in unilaterally ripping those down simply because he didn't like their looks, was wholly inappropriate; and I mean, again, they were grandfathered in there as much as the fact that the [Yoreks'] driveway -- you know, their land has a driveway that's going over it that there, really, is no legal entitlement to that other than you have -- there's a quiet title action, you know; and, I mean, if you file a quiet title action, the quiet title down by the bottom of the driveway, well, the Court is quieting title in the upper part, as well. (Emphasis added).

RP 4/16/15 at 22.

After the Trial Court concluded issuing her decision, the

Bedes asked for clarification as follows:

MR. ROBERTS: Your Honor, I have a question for you. You used the term "quiet title." Now, what we've been talking about is a prescriptive easement for access.

THE COURT: Well, yes. But, I mean -- at some point, the action showed up on the docket as a quiet title. But, I mean, the bottom line is: It is a prescriptive easement because, I mean, they've been making use of this property for a number of years, and this --

MR. QUINLAN: Mutually.

THE COURT: Yeah, illegally.

MR. QUINLAN: Right.

THE COURT: But, I mean, after this much time, that's where the driveway is; that's where the easement is, and they charted it to go up like that.

MR. ROBERTS: And that's where the – so the prescriptive easement extends all the way to the cedar tree?

THE COURT: All the way to the cedar tree --

MR. QUINLAN: Along the curb.

THE COURT: -- along the curb. Because as I pointed out, you're basically talking about an extremely small V, not enough to be here fighting about that; and those boxwoods were planted, obviously, by the [Yoreks'] predecessors. They've been there for 40 or 50 years, you know. They have as much of a right for the easement as does the driveway that affects the [Yoreks'] property and, in fact, this does impact the [Yoreks'] property a whole lot more because it doesn't look -- if there was an actual agreement for an easement, [Bedes'] predecessors would have been paying the [Yoreks] for the use of that property because they're basically taking part of their land away, and they ran it to go past the cedar tree; and basically from the cedar tree down, you're talking about a small V that is going to be incorporated into the [Yoreks] property. That's where those boxwoods were, and those boxwoods should not have been taken down. (Emphasis added).

RP 4/16/15 at 24-26.

Based on the Trial Court's oral decision, she made the following findings of fact:

1.9 At all times material to this lawsuit, the common driveway commenced at the City of Tacoma right-of-way on Madrona Drive and terminated at the location of a cedar tree at or near a concrete pad located on the Bede property.

1.10 The common driveway boundaries are depicted on the document attached to these Findings of Fact and Conclusions of Law as Exhibit "C," which exhibit is incorporated herein by this reference as though fully restated.

1.11 The parties and their predecessors-in-interest have used the common driveway for access ingress and egress to and from their respective homes.

...

1.14 The Yoreks and their predecessors-in-interests' use of that portion of the common driveway depicted on Exhibit "C" that is over and along the Bedes' real property has been (1) adverse to the title owner, (2) open, notorious, continuous and uninterrupted for 10 years, and (3) with the owner's knowledge of the adverse use when he or she was able to enforce his or her rights.

1.15 Therefore, the Yoreks have an easement, by prescription, over and along that portion of the Bede's real property depicted as the easement on Exhibit "C" hereto.

Appendix B; CP 138-139.

a. The Driveway Does Not Extend To the Cedar Tree.

Exhibit C to the Findings of Fact depicts the location of the driveway and the cedar tree, which clearly demonstrates the driveway terminates at the radius curb and well prior to the cedar tree. Appendix B; CP 152. This is also clear from all of the exhibits. See Exhibits 20, 62, 64, 68. Consequently, there is no evidence, let alone substantial evidence, to suggest the prescriptive easement for

driveway access should be extended beyond the boundaries of the paved road.

b. The Trial Court Erred in Finding that the Yoreks Had an Easement For the Hedge.

The Trial Court determined that the Yoreks' predecessors planted the hedge, that this is a small "V" shaped area and that the Yoreks have as much right to an easement over the landscaping bed as the Bedes do over the access road. RP 4/16/15 at 25-26.

Consequently, the Trial Court made the follow Findings of Fact:

1.17 An established, mature boxwood hedge, including its root base and stems existed on the inside of the Wilkerson sandstone curbing bordering the Yorek real property and the common driveway and occupied the space from the Yorek real property to the curb, and belonged to the Yoreks.

1.18 The real property and improvements, including plants, hedges and foliage, on the Yoreks' side of the common driveway easement belongs to the Yoreks.

...

1.36 The Bedes intentionally removed the boxwood hedge, knowing the location of the Yorek property line, which property line was visibly indicated by a surveyor rebar located in the vicinity of the boxwood hedge.

1.37 The Bedes willfully and intentionally committed an act of trespass and waste by removing the Yoreks' boxwood hedge.

1.38 The Yoreks mitigated their trespass and waste damages by installing the concrete fence, as they had no

reasonable means to replace the mature boxwood hedge with a boxwood hedge of similar height and density.

There was no evidence that the Yoreks' predecessors had installed the hedge. On the contrary, it appeared the hedge was installed by the Bedes' predecessor as the stalks were located on the Bede property, with the only exception being where it neared the radius curb and around the cedar tree. RP 4/14/15 at 51.

Moreover, even if there was substantial evidence to support those findings, they still do not fulfill the necessary elements for a prescriptive easement. "In order to obtain a prescriptive easement [the Yoreks] would have to show (1) use adverse to the title owner, (2) open, notorious, continuous and uninterrupted use for 10 years, and (3) the owner's knowledge of the adverse use when he was able to enforce his rights". *Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 694, 709 P.2d 782 (1985).

The Yoreks provided no testimony that they maintained the boxwood hedge and admitted that they never went onto the Bedes property nor saw the hedge from the Bedes' side. RP 4/15/15 at 39. On the other hand, the Bedes had maintained the hedge since 1978, when they purchased their property. RP 4/14/15 at 38. The Yoreks further admitted that the Bedes trimmed the hedge without talking to

Yoreks. RP 4/15/15 at 34. Consequently, the Yoreks could not have a prescriptive easement over the hedge.

3. The Trial Court Erred In Awarding Attorney's Fees to the Yoreks.

At trial, the Yoreks argued⁶ the Bedes removal of the boxwood hedge constituted a violation of the trespass statute, RCW 64.12.030, which states in pertinent part as follows:

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, . . . timber, or shrub on the land of another person, . . . without lawful authority, in an action by the person . . . against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

After the trial, the Yoreks argued that the Bedes violated the waste statute, RCW 4.24.630, which states in pertinent part as follows:

(1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. . . . In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

⁶ RP 4/15/15 at 79-82.

(2) This section does not apply in any case where liability for damages is provided under RCW 64.12.030 . . .
(Emphasis added).

Despite the plain language of RCW 4.24.630(2) and the Yoreks prior arguments, the Trial Court applied RCW 4.24.630⁷ and awarded to the Yoreks their attorney's fees in the amount of \$7,990.75.⁸

RCW 4.24.630 is often referred to as the "waste statute" while RCW 64.12.030 is often referred to as the "timber trespass statute". See *Gunn v. Riely*, 185 Wn.App. 517, 344 P.3d 1225 (2015). Both statutes allow an injured party to recover damages related to the injury of land. However, a major distinction is the waste statute allows for the recovery of attorney's fees while the timber trespass statute does not.

As a matter of law, the waste statute does not apply when the timber trespass statute does. *Gunn*, 185 Wn. App. at 524.⁹ In *Gunn*,

⁷ The Trial Court order also references RCW 4.84.010 which provides for attorney's fees if there is an agreement between the parties expressly permitting such an award. RCW 4.84.010(6). The Yoreks' claim for damages for the removal of the boxwood did not relate to any agreement nor was any agreement introduced at trial. Therefore, under RCW 4.84.010(6) the Yoreks would only be entitled to statutory attorney's fees in the amount of \$125.

⁸ Appendix B - Finding of Fact 1.42, Conclusions of Law 2.7, 2.8, 2.9, 2.10, and 2.15; CP 143-145; Appendix C - Order on Attorney's Fees; CP 122-124; and Appendix D - Judgment; CP 125-135.

⁹ The Yoreks recognized only RCW 64.12.030 applied as extensively discussed in their Trial Brief. CP 26-36.

the Court rejected a request for attorney's fees under RCW 4.24.630 because the waste statute expressly states it does not apply to a claim for timber trespass or damages to the trees, plants or shrubs of another. *Id.* at 225-227; *see also* RCW 64.12.030. The Yoreks argued they were entitled to damages pursuant to the timber trespass statute in their Trial Brief stating "[t]here is no dispute as to whether the boxwood hedge in this case are "any shrub" as contemplated in [RCW 64.12.030]." CP 26. The Yoreks even acknowledged the application of the *Gunn* decision to this case, stating as follows:

A January 2015 Division 2 case recently looked at the timber trespass statute. *Gunn v. Riely*, __ Wn. App. __, __ P.3d __ (2015). **The issue in *Gunn* was whether the trial court erred by awarding damages under the waste statute and not the timber trespass statute. The Court of Appeals determined the trial court's award of damages under the waste statute was in error.** (Emphasis added).

CP 26-27.

Since the Yoreks' claim for damages relates to the removal of a shrub, in this instance the boxwood hedge, damages can only be awarded under the timber trespass statute. Consequently and as a matter of law, the waste statute does not apply. Since the timber trespass statute does not afford a party the right to attorney's fees, as confirmed by the Court in *Gunn*, the Yoreks are not entitled to

recover their attorney's fees and this Court should reverse the Trial Court in that regard.

4. The Trial Court Improperly Dismissed The Bedes' Spite Fence Claim.

At the conclusion of the Bedes' case in chief, the Trial Court granted the Yoreks' motion to dismiss the Bedes' spite fence claim and allowed the wall to remain. RP 4/15/15 at 6-9; Appendix A; CP 118-121. The Trial Court determined that the Bedes had failed to prove the elements for a spite fence under RCW 7.40.030¹⁰, which are: "(1) that the structure damages the adjoining landowner's enjoyment of his property in some significant degree; (2) that the structure is designed as the result of malice or spitefulness primarily or solely to injure and annoy the adjoining landowner; and (3) that the structure serves no really useful or reasonable purpose." *Baillargeon v. Press*, 11 Wash. App. 59, 66, 521 P.2d 746, 750 (1974) *rev. denied* 84 Wn.2d 1010 (1974). The Bedes did prove each of these elements. Moreover, allowing the concrete wall to project into the Bedes'

¹⁰ RCW 7.40.030 states "An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal."

driveway contradicts the Trial Court's findings that the Bedes have a prescriptive easement.

a. The Yoreks' Concrete Wall Damages the Bedes' Enjoyment of Their Property.

The Trial Court mischaracterized the first element from *Baillargeon* in its Order Granting Motion for Dismissal of Spite Fence Claim under Findings of Fact No. 6 and 7 as follows:

6. The Defendants' concrete fence does not cause significant damage to the Plaintiffs' use and enjoyment of their property.

7. The Plaintiffs' subjective opinion that the Defendants' concrete fence is not aesthetically pleasing and does not equate to a significant impairment of use and enjoyment of their property, and any such subjective opinions can be mitigated by the Plaintiffs by planting vegetation along the fence, painting the Plaintiffs' side of the fence or other means of covering the concrete fence's appearance from the Plaintiffs' view.

Appendix A; CP 120.

The first criterion only requires "that the structure damages the adjoining landowner's enjoyment of his property in some significant degree." It does not require the Bedes to show that the Yoreks' wall interferes with the Bedes' use of their property, although in this case it does.

The parties live in an upscale neighborhood with upscale homes and landscaping. The Bedes take great pride in making their property attractive and welcoming. The Yoreks concrete wall is

unsightly and completely out of character with the neighborhood and properties and the first thing someone sees upon entering the Bedes' property. But beyond the "aesthetics" of the concrete wall¹¹, it also presents a safety hazard.

The concrete wall is over six feet tall and extends into the driveway where the Yorek and Bede driveways intersect. It prevents anyone exiting from either property to see vehicles or pedestrians and invites the possibility of a collision¹². This is even more dangerous when considering the presence of children, who use the sport court opposite the concrete wall, and the possibility of a child chasing an errant ball into an oncoming car.

Lastly, the wall makes considerably more difficult and in some instances impossible the ability to back a trailer into an area on the Bedes' Property that is away from the wall because the turning radius of the vehicle is now impaired by the protruding wall.

The concrete wall amounts to a visual blight that puts people and property at risk of damage or injury and interferes with access to the Bedes property. All of these problems significantly damage the Bedes' ability to enjoy their property thus fulfilling the first element.

¹¹ The Trial Court suggested the Bedes could mitigate the aesthetics of the concrete wall by planting in front of it. However, there is no space to plant anything for much of the wall without removing the curbing and driveway. RP 4/14/15 at 65. The Trial Court also suggested the Bedes could paint or cover up the concrete wall. This ignores the fact that although the concrete wall is within an inch of the property line, it is still on the Yoreks' property and owned by the Yoreks.

¹² The Trial Court concluded the concrete wall was not a visual impairment because there had not been any accidents in the two years since it was constructed. The lack of an accident does not negate the fact that the wall presents a danger.

- b. The Concrete Wall Was Designed As A Result Of Malice And Spitefulness And With The Intent To Injure And Annoy The Bedes.

The Trial Court also mischaracterized the second element in its Order Granting Motion for Dismissal of Spite Fence Claim under Findings of Fact No. 4 and 5 as follows:

4. There is no evidence that the Defendants' intentions relating to their decision to install the concrete fence was motivated out of spite or malice directed at the Plaintiffs;
5. There is no credible evidence that that Defendants' intentions relating to their decision to install the concrete fence were solely motivated to injure and annoy the Plaintiffs;

Appendix A; CP 120.

Although the Bedes must show the concrete wall was "designed as the result of malice or spitefulness primarily or solely to injure and annoy" them, that element is not based on what was in the Yoreks' minds when they constructed the concrete wall nor are the Bedes required to prove what was in the Yoreks' minds at that time. Rather, the Court considers the concrete wall's character or location or use, and then determines if an ordinary beholder would conclude that the concrete wall was "manifestly erected with the leading purpose to annoy the adjoining owner or occupant in his use of his premises." *Karasek v. Peier*, 22 Wash. 419, 431, 61 P. 33, 37 (1900).

Every attribute of the wall was specifically designed and intended to annoy the Bedes. The height of the concrete wall (over 6 feet), the location of the concrete wall (within an inch of the property line and only for a very short distance), the appearance of the wall (the pock marked and unfinished side faces the Bedes), the fact it projects through the curb and into the driveway to the Bedes' detriment but not to the Yoreks' detriment, it is not an extension of an existing wall nor is there a similar concrete wall anywhere on the Yoreks' property. All of these characteristics demonstrate the Yoreks' leading purpose in constructing the wall was to annoy the Bedes.

c. The Concrete Wall Serves No Useful or Reasonable Purpose.

The Trial Court addressed the third element in its Order Granting Motion for Dismissal of Spite Fence Claim under Finding of Fact No. 3 as follows:

3. The concrete fence installed by the Defendants serves a useful and reasonable purpose in that it provides Defendants a privacy screen from the Plaintiffs' property, the Plaintiffs' vehicles and the Plaintiffs' boat, with blue tarp, and the Defendants' fence restores and fills the space left bare from the Plaintiffs' unilateral removal of a mature boxwood hedge that was located previously where the concrete fence is now located.

Appendix A; CP 119.

First, this finding is in error to the extent that it finds a “useful and reasonable purpose” is screening. If that were the criterion, then all spite walls would fail this element because all spite walls provide some form of screening. Second, the fact that the concrete wall replaces the prior boxwood hedge is to suggest that the two are similar, which they are not.

The boxwood hedge was approximately 4 feet tall where the concrete wall is over 6 feet tall. The boxwood hedge did not obscure visibility for drivers where the concrete wall does. The boxwood hedge was behind the curbing where the concrete wall penetrates the curbing and extends into the driveway.

The concrete wall does not screen the Bedes’ vehicles or boat because neither are parked (or were parked) adjacent to the boxwood hedge.

- d. The Yoreks Must Remove The Entire Wall And Repair The Damage They Caused.

The Bedes can demonstrate that all three elements of RCW 7.40.030 are met, that the concrete wall is a spite fence and that it must be removed. Moreover, it conflicts with and interferes with the Bedes’ prescriptive easement for their driveway access.

Consequently, the Trial Court erred in dismissing the Bedes' spite wall claim and should have ordered its removal.

VI.
CONCLUSION

There was no evidence to support the findings that the Yoreks had a prescriptive easement over the Bedes hedge and thus no basis for an award of attorney's fees. Moreover, the Trial Court's award of attorney's fees must be reversed because RCW 4.24.630 is inapplicable.

The Bedes fulfilled all of the requirements for establishing the Yoreks' concrete wall was a spite fence and that claim should not have been dismissed. Moreover, dismissing the claim directly conflicts with the prescriptive easement granted by the Court.

For those reasons, the Trial Court decisions should be reversed.

Respectfully submitted this 16th day November, 2015.

ROBERTS, JOHNS & HEMPHILL, PLLC



MARK R. ROBERTS, WSBA #18811

Attorneys for Appellants

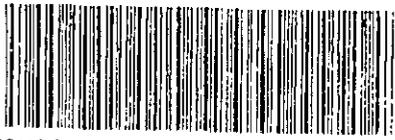
Brandt and Leslie Bede

VII.
APPENDIX

Letter:	Document Title:
A	Order Granting Motion for Dismissal of Spite Fence Claim Dated June 5, 2015
B	Findings of Fact and Conclusions of Law dated June 12, 2015
C	Order Awarding Attorneys' Fees and Costs dated June 5, 2015
D	Judgment dated June 12, 2015

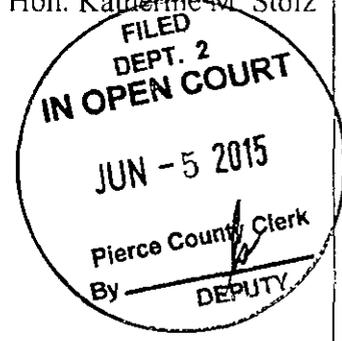
APPENDIX A

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13-2-15148-6 44782773 ORG 05-08-15

Hon. Katherine M. Stolz



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

W. BRANDT BEDE and LESLIE K.
McLAUGHLIN BEDE, husband and wife,

Plaintiffs,

No. 13-2-15148-6

**ORDER GRANTING MOTION FOR
DISMISSAL OF SPITE FENCE CLAIM**

v.

DARYL K. YOREK and KELLY M.
YOREK, husband and wife,

Defendants.

This matter having come on the Motion of Defendants, Daryl K. Yorek and Kelly M. Yorek, made in open Court during trial before the Honorable Kathryn M. Stolz, for an Order of Dismissal of the Plaintiffs' claim relating to their Second Claim for Relief: Spite Fence, made pursuant to Civil Rule 41(b)(3); the Plaintiffs, W. Brandt Bede and Leslie K. McLaughlin Bede appeared in person and by and through their attorney, Mark R. Roberts of the law firm of Roberts, Johns & Hemphill, PLLC; the Defendants, Daryl K. Yorek and Kelly M. Yorek appeared in person and by and through their attorney, Thomas P Quinlan of the law firm of Smith Alling, P.S.

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Evidence and Testimony: During the Plaintiffs' case-in-chief and before Plaintiffs rested their trial presentation and case, the Court heard the oral testimony of Plaintiffs, W. Brandt Bede and Leslie K. McLaughlin Bede; further, the Court reviewed all of the document exhibits stipulated by the parties to be admitted as evidence at trial, which admitted exhibits are more fully identified and described in the Exhibit Record dated April 21, 2015, and filed of record herein; and, further, the Court reviewed, became familiar with, and considered the admissions of the respective parties contained within the Plaintiffs' Complaint, the Defendants' Answer, Affirmative Defenses, and Counterclaims, and the Plaintiffs' Answer and Affirmative Defenses to Counterclaims.

Findings of Fact: Based upon the foregoing and pursuant to Civil Rule 41(b)(3) and Civil Rule 52, the Court makes the following findings of fact, to wit:

1. Plaintiffs' Complaint identified RCW 7.40.030 as a basis and articulates as a cause of action for violation of said statute alleging that a concrete fence installed by the Defendants on their real property along its common boundary with the Plaintiffs' real property constitutes a "spite" fence;
2. The Defendants have denied liability and denied the concrete fence installed was a "spite" fence;
3. The concrete fence installed by the Defendants serves a useful and reasonable purpose in that it provides Defendants a privacy screen from the Plaintiffs' property, the Plaintiffs' vehicles and the Plaintiffs' boat, with blue tarp, and the Defendants' fence restores and fills the space left bare from the Plaintiffs' unilateral removal of a mature boxwood hedge that was located previously where the concrete fence is now located;

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4. There is no evidence that the Defendants' intentions relating to their decision to install the concrete fence was motivated out of spite or malice directed at the Plaintiffs;

5. There is no credible evidence that that Defendants' intentions relating to their decision to install the concrete fence were solely motivated to injure and annoy the Plaintiffs;

6. The Defendants' concrete fence does not cause significant damage to the Plaintiffs' use and enjoyment of their property;

7. The Plaintiffs' subjective opinion that the Defendants' concrete fence is not aesthetically pleasing and does not equate to a significant impairment of use and enjoyment of their property, and any such subjective opinions can be mitigated by the Plaintiffs by planting vegetation along the fence, painting the Plaintiffs' side of the fence or other means of covering the concrete fence's appearance from the Plaintiffs' view;

8. The Defendants' election to install the concrete fence on their real property, with decorative side facing their property, is reasonable and within the Defendants' rights as real property owners;

9. The Plaintiffs have failed to sustain their burden of proof on their claim that the Defendants' installation of the concrete fence on their property is a "spite" fence, contrary to RCW 7.40.030.

Based upon the foregoing findings of fact, the Court hereby grants, pursuant to Civil Rule 41(b)(3), the Defendants' Motion for Dismissal of the Plaintiffs' Second Claim for Relief: Spite Fence herein, with prejudice; this Order is a final order within the meaning of Civil Rule 54.

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Dated this 5th day of June, 2015.

[Handwritten signature of Katherine M. Stolz]
KATHERINE M. STOLZ
Superior Court Judge

Presented by:
SMITH ALLING, P.S.

FILED
DEPT. 2
IN OPEN COURT
JUN - 5 2015
Pierce County Clerk
BY *[Signature]*
DEPUTY

[Handwritten signature of Thomas P. Quinlan]
Thomas P. Quinlan, WSBA #21325
Attorney for Defendants

Approved as to form;
Notice of presentation waived by:
ROBERTS, JOHNS & HEMPHILL, PLLC
[Handwritten signature of Mark R. Roberts]
Mark R. Roberts WSBA No. 18811
Attorney for Plaintiffs

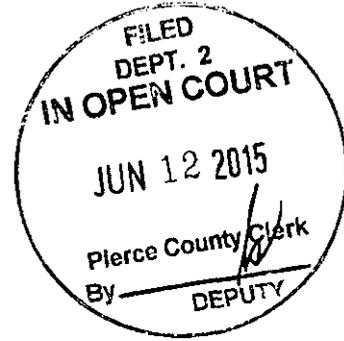
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APPENDIX B

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Hon. Katherine M. Stolz



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

W. BRANDT BEDE and LESLIE K.
McLAUGHLIN BEDE, husband and wife,

Plaintiffs,

No. 13-2-15148-6

**FINDINGS OF FACT AND
CONCLUSION OF LAW**

v.

DARYL K. YOREK and KELLY M.
YOREK, husband and wife,

Defendants.

This matter having come on regularly for trial before the Court on April 13, 2015 through April 15, 2015; the Plaintiffs, W. Brandt Bede and Leslie K. McLaughlin Bede appeared in person and by and through their attorney, Mark R. Roberts of the law firm Roberts, Johns & Hemphill, PLLC; the Defendants, Daryl K. Yorek and Kelly M. Yorek appeared in person and by and through their attorney, Thomas P Quinlan of the law firm Smith Alling, P.S.

Evidence and Testimony: The Court heard the oral testimony of Plaintiffs, W. Brandt Bede and Leslie K. McLaughlin Bede, the oral testimony of Defendant, Kelly M. Yorek.; and, the rebuttal oral testimony of Plaintiff, W. Brandt Bede; further, the Court reviewed the

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1 documents admitted as evidence at trial, which admitted exhibits are more fully identified and
2 described in the Exhibit Record dated April 15, 2015; and, further the Court reviewed,
3 became familiar with and considered the admissions of the respective parties contained within
4 the Plaintiff's Complaint, the Defendant's Answer, Affirmative Defenses, and Counterclaims,
5 and the Plaintiffs' Answer and Affirmative Defenses to Counterclaims.

6 **I. FINDINGS OF FACT**

7 Based upon the foregoing, the Court, deeming itself fully informed in the premises,
8 and pursuant to Civil Rule 52, the Court makes the following findings of fact, to wit:

- 9 1.1 The Plaintiffs, W. Brandt Bede and Leslie K. McLaughlin Bede are married
10 (collectively the "Bedes").
- 11 1.2 The Defendants, Daryl K. Yorek and Kelly M. Yorek are married (collectively the
12 "Yoreks").
- 13 1.3 The Bedes are the fee simple owners of real property and improvements commonly
14 known as 4141 North Madrona Way, Tacoma, Pierce County, Washington, Pierce County
15 Assessor tax parcel numbers 5555100060 and 0221251002; the legal description of said real
16 property is attached to these Findings of Fact and Conclusions of Law as Exhibit "A," which
17 exhibit is incorporated herein by this reference as though fully restated herein.
- 18 1.4 The Yoreks are the fee simple owners of real property commonly known as 4151
19 North Madrona Way, Tacoma, Pierce County, Washington, Pierce County Assessor tax parcel
20 numbers 5555100050 and 00221251008; the legal description of said real property is attached
21 to these Findings of Fact and Conclusions of Law as Exhibit "B," which exhibit is
22 incorporated herein by this reference as though fully restated.
- 23 1.5 The Bedes' real property is located south of and adjacent to the Yoreks' real property.

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1.6 The Bede and Yorek homes have been in existence for at least six decades, during which time a common driveway from Madrona Way, a public road, right-of-way, served as driveway access for ingress and egress to the parties' respective real properties.

1.7 At all times material to this lawsuit, the common driveway was and has been graded and paved.

1.8 At all times material to this lawsuit, the common driveway has been approximately twelve (12) to thirteen (13) feet wide (except at the public right-of-way where the apron is wider) and bordered by curbing consisting of either Wilkerson sandstone blocks and/or aggregate exposed concrete.

1.9 At all times material to this lawsuit, the common driveway commenced at the City of Tacoma right-of-way on Madrona Drive and terminated at the location of a cedar tree at or near a concrete pad located on the Bede property.

1.10 The common driveway boundaries are depicted on the document attached to these Findings of Fact and Conclusions of Law as Exhibit "C," which exhibit is incorporated herein by this reference as though fully restated.

1.11 The parties and their predecessors-in-interest have used the common driveway for access ingress and egress to and from their respective homes.

1.12 The Bedes and their predecessors-in-interests' use of that portion of the common driveway depicted on Exhibit "C" that is over and along the Yoreks' real property has been (1) adverse to the title owner, (2) open, notorious, continuous and uninterrupted for 10 years, and (3) with the owner's knowledge of the adverse use when he or she was able to enforce his or her rights.

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1.13 Therefore, the Bedcs have an easement, by prescription, over and along that portion of the Yoreks' real property depicted as the easement on Exhibit "C" hereto.

1.14 The Yoreks and their predecessors-in-interests' use of that portion of the common driveway depicted on Exhibit "C" that is over and along the Bedes' real property has been (1) adverse to the title owner, (2) open, notorious, continuous and uninterrupted for 10 years, and (3) with the owner's knowledge of the adverse use when he or she was able to enforce his or her rights.

1.15 Therefore, the Yoreks have an easement, by prescription, over and along that portion of the Bede's real property depicted as the easement on Exhibit "C" hereto.

1.16 The driveway easement is bordered on both sides by long standing landscaping as well as Wilkerson sandstone or concrete curbing on both of the parties' real property.

1.17 An established, mature boxwood hedge, including its root base and stems existed on the inside of the Wilkerson sandstone curbing bordering the Yorek real property and the common driveway and occupied the space from the Yorek real property to the curb, and belonged to the Yoreks.

1.18 The real property and improvements, including plants, hedges and foliage, on the Yoreks' side of the common driveway easement belongs to the Yoreks.

1.19 The real property and improvements, including plants and foliage, on the Bedes' side of the common driveway easement belongs to the Bedes.

1.20 It is equitable to require each party to prune or maintain the plants, hedges, and foliage on their property, at that owners' sole expense, so that such plants, hedges, and foliage do not extend more than six inches (6") outside of the curbs of the common driveway

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easement area. Tree limbs and vegetation more than ten feet (10') above the road is not required to be trimmed.

1.21 Allowing for plants, hedges, and foliage to extend up to six inches (6") inside of the curbs of the common driveway easement area does not impede either parties' access, ingress or egress from their property and use of the common driveway, and the parties shall be permanently enjoined from allowing their plants, hedges, or foliage from growing into the common driveway easement beyond six (6) inches from the curb.

1.22 There is no basis to allow for either party to trim, prune, cut, remove, or in any way alter or affect the plants, hedges, or foliage of the other party. The Portuguese laurel hedge on the Yorek's property presently grows beyond six inches (6") in to the common driveway easement.

1.23 Pruning the Yoreks' Portuguese laurel hedge to be within six (6) inches of the curb along the common driveway easement will damage the Portuguese laurel hedge, on a more probable than not basis, which damage can be mitigated by allowing for periodic pruning in increments over a six (6) month period-of-time.

1.24 It is equitable to allow the Yoreks six (6) months to prune their Portuguese laurel hedge to be up to six inches (6") inside of the curb of the common driveway easement area.

1.25 Except for plants, hedges, and foliage, it is equitable for each of the parties to be jointly responsible for the maintenance and repairs of the common driveway easement between the edges of the curb, and from the common driveway easement point-of-beginning at Madrona Way to its termination point, as depicted on Exhibit "C."

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1.26 The asphalt or hard surface of the common driveway is in need of repair, including filling of pothole(s) and patching of asphalt or hard surface in the vicinity of its driveway termination point.

1.27 It is equitable to require that each party obtain their own independent estimate for repair of the asphalt or hard surface of the common driveway as noted above; the parties will engage the services of a licensed and registered contractor with the lowest bid or estimate for repairs, unless the parties agree in writing to the contrary; each party shall be responsible for one-half of the cost of said lowest bid for repair.

1.28 The Yoreks' concrete fence does not unreasonably impede the Bedes' use and enjoyment of the common driveway easement nor does the concrete fence pose a safety or danger of risk of vehicular accident, collision or pedestrian injury.

1.29 The Yoreks' concrete fence is on the Yorek's side of the Wilkerson sandstone curb where the boxwood hedge previously was located.

1.30 There is no evidence of personal injury, automobile accident, or collision during the parties' common use of the driveway easement, including during the years that the parties' children resided in their homes, so as to lead the Court to conclude the concrete wall is a visual impairment that would lead to an injury or property damages, on a more likely than not basis.

1.31 The Yoreks' concrete fence runs alongside, but inside their property line; and, it extends beyond the Wilkerson sandstone curbing which curves into the Yoreks' driveway apron along the Yoreks' side of the property line.

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1 1.32 It is equitable to allow the Bedes, at their election and sole expense, to pay to have the
2 last panel of the Yoreks' concrete fence removed by the same contractor the Yoreks' used to
3 install the concrete fence.

4 1.33 The Bedes shall make their election to have the last panel of the Yoreks' concrete
5 fence removed within sixty (60) days of the date of entry of Judgment by making such
6 election in writing to the Yoreks.

7 1.34 In the event the Bedes make such election (as set forth in the previous finding of fact),
8 it is equitable to require the Bedes to pre-pay in advance the Yoreks' cost of removing the last
9 panel of the Yoreks' concrete fence and repairing and replacement of the Wilkerson sandstone
10 curbing-with Wilkerson sandstone, concrete or block where the last panel will be removed,
11 which prepayment of such expense is a condition to the removal of said fence panel.

12 1.35 There is no credible evidence to indicate that the Yoreks acquiesced or agreed to
13 Bede's unilateral removal of their boxwood hedge.

14 1.36 The Bedes intentionally removed the boxwood hedge, knowing the location of the
15 Yorek property line, which property line was visibly indicated by a surveyor rebar located in
16 the vicinity of the boxwood hedge.

17 1.37 The Bedes willfully and intentionally committed an act of trespass and waste by
18 removing the Yoreks' boxwood hedge.

19 1.38 The Yoreks mitigated their trespass and waste damages by installing the concrete
20 fence, as they had no reasonable means to replace the mature boxwood hedge with a boxwood
21 hedge of similar height and density.

22 1.39 Replacement of a boxwood hedge of like kind, height, and density would, on a more
23 probable than not basis, cost more than the installation of the concrete fence.

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1 1.40 The cost of the concrete fence of \$1,230.00 was reasonable in amount and was
2 necessitated by the Bedes' unilateral removal of the boxwood hedge, which provided a
3 privacy screen from view of the Bedes' property, vehicles and boat with blue tarp cover.

4 1.41 As a direct and proximate result of the Bedes' actions, the Yoreks have sustained
5 reasonable damages of one thousand two hundred thirty dollars (\$1,230.00), which damages
6 shall be trebled in amount because Bede intentionally trespassed.

7 1.42 The Yoreks are entitled to reasonable attorneys' fees and costs, under RCW 4.24.630,
8 RCW 4.84.010.

9 **II. CONCLUSIONS OF LAW**

10 Based upon the foregoing Findings of Fact, the Court makes the following
11 Conclusions of Law, to wit:

12 2.1 The Court has subject matter jurisdiction over the controversies, claims,
13 counterclaims, and defenses herein.

14 2.2 The Court has personal jurisdiction over each of the parties.

15 2.3 Venue is proper in Pierce County, Washington.

16 2.4 The Bedes have established an easement by prescription for ingress and egress to
17 their real property over that portion of the Yoreks' real property more particularly shown in
18 Exhibit "C" hereto; said easement is hereby confirmed and quieted in favor of the Bedes,
19 which easement shall run with the land.

20 2.5 The Yoreks have established an easement by prescription for ingress and egress to
21 their real property over that portion of the Bedes' real property more particularly shown in
22 Exhibit "C" hereto; said easement is hereby confirmed and quieted in favor of the Yoreks,
23 which easement shall run with the land.

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1 2.6 The boxwood hedge was the Yoreks and was located within the Yoreks' real property.

2 2.7 The Bedes committed intentional trespass, waste and injury to the Yoreks' real
3 property and improvements by cutting and removing the Yoreks' boxwood hedge, contrary to
4 RCW 4.24.630.

5 2.8 The Bedes intentionally entered onto the Yoreks' real property and cut and removed
6 the Yoreks' boxwood hedge, without authorization from the Yoreks and as a result, the
7 Yoreks' damages shall be trebled in accordance with RCW 4.24.630.

8 2.9 The Yoreks have mitigated their damages by installation of the decorative concrete
9 fence located on their real property, but nonetheless have been damaged in the amount of one
10 thousand two hundred thirty dollars (\$1,230.00), which damages shall be trebled in amount
11 pursuant to RCW 4.24.630 and RCW 4.84.010.

12 2.10 The Yoreks shall be awarded reasonable attorneys' fees and costs, pursuant to RCW
13 4.24.630 and RCW 4.84.010.

14 2.11 The Yoreks are permanently enjoined from allowing their plants, hedges, and foliage
15 from growing beyond six inches (6") from the inside of the driveway curbing within the
16 common driveway easement; however, the Yoreks shall have up to six (6) months from date
17 of entry of Judgment to prune the Portuguese laurel hedge running along said easement to the
18 specified location.

19 2.12 The Bedes are permanently enjoined from allowing their plants, hedges, and foliage
20 from growing beyond six inches (6") from the inside of the driveway curbing within the
21 common driveway easement. Tree limbs and vegetation more than ten feet (10') above the
22 road is not required to be trimmed.

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1 2.13 The Yoreks are permanently restrained from trimming, pruning, cutting, altering, or
2 removing any plants, hedges, or foliage on the Bedes' real property.

3 2.14 The Bedes are permanently restrained from trimming, pruning, cutting, altering, or
4 removing any plants, hedges, or foliage on the Yoreks' real property.

5 2.15 The Yoreks are the prevailing party for purposes of assessment of costs and attorneys'
6 fees, under RCW 4.84.010 and RCW 4.24.630, respectively.

7 2.16 The Bedes may remove the last panel of the concrete fence beyond the curb, which
8 election must be confirmed by written notice within sixty (60) days of the date of entry of
9 judgment herein; and, the removal of said panel shall occur only after such time as the Bedes
10 have prepaid the Yoreks' installation contractor's actual cost of the panel's removal and cost
11 of replacing of the Wilkerson sandstone curbing or concrete curbing located at the present
12 location of the concrete wall.

13 2.17 The parties shall jointly and mutually maintain the common driveway easement and
14 shall share the costs of repairs of the common driveway surface.

15 2.18 The parties shall each obtain an estimate from a licensed registered contractor for
16 repair of the pothole and asphalt in the common driveway, and each party shall be responsible
17 for one-half of the lowest estimate of repairs for the driveway asphalt surface, including
18 pothole and asphalt patch.

19 2.19 The Court shall enter Judgment confirming the Bedes' prescriptive driveway easement
20 and injunctive relief as set forth herein.

21 2.20 The Court shall enter Judgment confirming the Bedes' prescriptive driveway easement
22 and injunctive relief as set forth herein, and shall further enter Judgment on the Yoreks'
23 trespass counterclaim as set forth herein.

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Dated this 12th day of June, 2015.

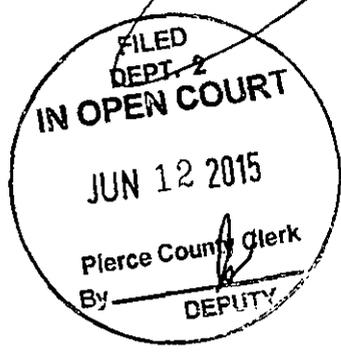
[Handwritten Signature]
HONORABLE KATHERINE M. STOLZ

Presented by:

SMITH ALLING, P.S.

[Handwritten Signature]

Thomas P. Quinlan, WSBA #21325
Attorney for Defendants



Approved as to form;
Notice of presentation waived by:

ROBERTS, JOHNS & HEMPHILL, PLLC

[Handwritten Signature]

Mark R. Roberts WSBA #18811
Attorney for Plaintiffs

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EXHIBIT "A"



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EX 16 X 2015

THE LAND REFERRED TO IN THIS POLICY IS SITUATED IN THE STATE OF WASHINGTON, COUNTY OF PIERCE AND IS DESCRIBED AS FOLLOWS:

PARCEL A

LOT 10 OF REPLAT OF LOTS 6 TO 14, MASON HEIGHTS, AS PER PLAT RECORDED IN VOLUME 11 OF PLATS, PAGE 86, RECORDS OF PIERCE COUNTY AUDITOR; TOGETHER WITH A PORTION OF LOT 9 OF REPLAT OF LOTS 6 TO 14, MASON HEIGHTS, AS PER PLAT RECORDED IN VOLUME 11 OF PLATS, PAGE 86, RECORDS OF PIERCE COUNTY AUDITOR, DESCRIBED AS FOLLOWS:

BEGINNING ON THE EAST LINE OF SAID LOT 9, 40 FEET SOUTH OF THE NORTHEAST CORNER THEREOF;

THENCE RUNNING SOUTH ALONG SAID EAST LINE 30 FEET TO THE SOUTHEAST CORNER OF SAID LOT 9;

THENCE WEST ALONG THE SOUTH LINE OF SAID LOT 9, 134 FEET;

THENCE NORTHEASTERLY TO THE POINT OF BEGINNING;

PARCEL B

THE WEST 100 FEET OF THE SOUTH 190 FEET OF THE NORTH 300 FEET OF THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 25, TOWNSHIP 21 NORTH, RANGE 02 EAST OF THE W.M., IN PIERCE COUNTY, WASHINGTON,

EXCEPT THE FOLLOWING DESCRIBED TRACT:

BEGINNING ON THE EAST LINE OF SAID REPLAT OF LOTS 6 TO 14, MASON HEIGHTS 300 FEET SOUTH OF THE NORTHEAST CORNER OF SAID PLAT;

THENCE NORTH 45 FEET TO THE NORTHEAST CORNER OF LOT 11 OF SAID PLAT;

THENCE ON AN EXTENSION OF THE NORTHERLY LINE OF SAID LOT 11

SOUTHEASTERLY 58 FEET;

THENCE SOUTHERLY 32.5 FEET TO A LINE PARALLEL WITH AND 300 FEET

SOUTH OF THE EXTENDED NORTH LINE OF SAID PLAT AT A POINT 51 FEET

EAST OF THE INTERSECTION OF SAID PARALLEL LINE WITH SAID EAST

LINE OF SAID REPLAT;

THENCE WEST 51 FEET TO THE POINT OF BEGINNING.

ABBREV LEGAL

PARCEL 1 LOTS 10 OF REPLAT OF LOTS 6-14 MASON HTS VOL 11 PG 86

PARCEL B SEC 25 TWP 21 N R 2 E WM NW QTR NE QTR

EXHIBIT "B"



PARCEL A:

Beginning at the Southwest corner of Lot 9 of Replat of Lots 6 to 14 of MASON HEIGHTS, TACOMA, WASHINGTON, as per plat recorded in Volume 11 of Plats, page 86, records of Pierce County Auditor, being the point of intersection of the South line of said Lot 9 with the Easterly line of Madrona Way as laid out on May 20, 1935; thence Northerly along the Easterly line of Madrona Way, a distance of 50 feet; thence in a Northeasterly direction 295 feet, more or less, to a point on the East line of Lot 8 of Mason Heights 60 feet North of the Southeast corner of said Lot 8; thence South 100 feet along the East line of said Lots 8 and 9 to a point 30 feet North of the Southeast corner of said Lot 9; thence in a Southwesterly direction to a point on the South line of said Lot 9 and 134 feet West of the Southeast corner of said Lot 9; thence West 140.52 feet, more or less, along the South line of said Lot 9 to the point of beginning.

Situate in the City of Tacoma, County of Pierce, State of Washington.

PARCEL B:

That portion of the Northeast 1/4 of the Northwest 1/4 of the Northeast 1/4 of Section 25, Township 21 North, Range 2 East of the W.M., described as follows:

Beginning at a point on the East line of Lot 9 of Replat of Lots 6 to 14, MASON HEIGHTS, TACOMA, WASHINGTON, as per plat recorded in Volume 11 of Plats, page 86, records of Pierce County Auditor, 30 feet North of the Southeast corner thereof; thence East 100 feet; thence North 110 feet; thence West 100 feet to a point on the East line of Lot 8 of said Replat, which point is 60 feet North of the Southeast corner of said Lot 8; thence South along the East line of said Lots 8 and 9 to the point of beginning;

Situate in the City of Tacoma, County of Pierce, State of Washington.

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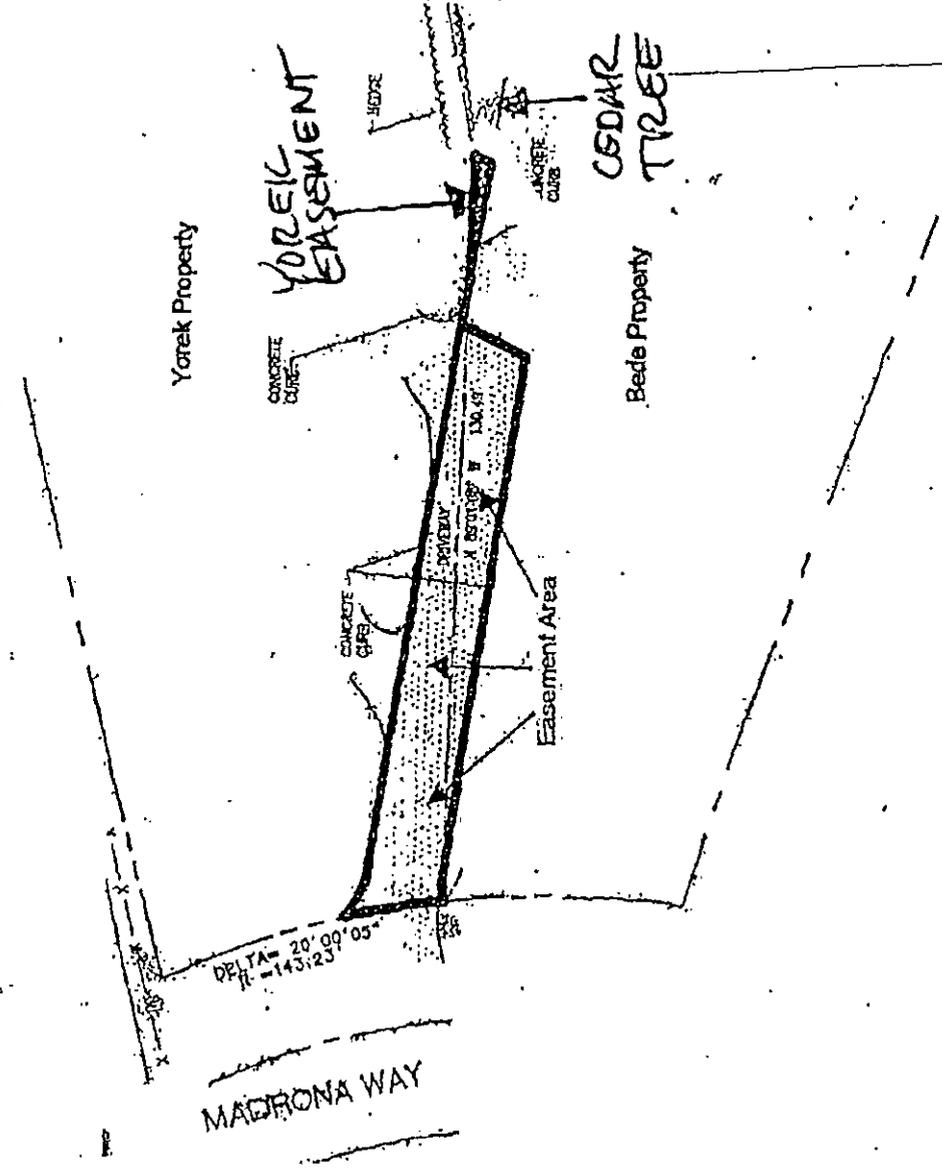
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EXHIBIT "C"



EXHIBIT C
Depiction of Easement

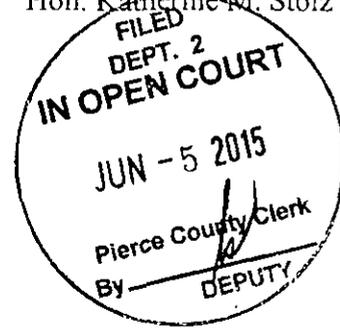


APPENDIX C



13-2-15148-6 44782781 ORRE 06-08-15

Hon. Katherine M. Stolz



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

W. BRANDT BEDE and LESLIE K.
McLAUGHLIN BEDE, husband and wife,

No. 13-2-15148-6

Plaintiffs,

**ORDER AWARDING ATTORNEYS'
FEES AND COSTS**

v.

DARYL K. YOREK and KELLY M.
YOREK, husband and wife,

Defendants.

This matter having come on the Motion of Defendants, Daryl K. Yorek and Kelly M. Yorek, for an Order Awarding Attorney's Fees and Costs; said request being made by Motion but also having been affirmatively plead in the Defendant' Answer, Affirmative Defenses and Counterclaims filed herein; the Plaintiffs, W. Brandt Bede and Leslie K. McLaughlin Bede appeared in person and by and through their attorney, Mark R. Roberts of the law firm of Roberts, Johns & Hemphill, PLLC; the Defendants, Daryl K. Yorek and Kelly M. Yorek appeared in person and by and through their attorney, Thomas P Quinlan of the law firm of Smith Alling, P.S.;

The Court considered the Motion for an award of Attorney's Fees and Costs, the Declaration of the Yorek's counsel, Thomas P. Quinlan with attachments; the response filed

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1 by the Bedes, the Yoreks' Reply and the Court having heard the oral argument of counsel;
 2 further, the Court is mindful of the matters addressed to the Court at trial. Based upon the
 3 foregoing and pursuant to RCW 4.24.630, ~~4.84.250~~ ^{the wife} and RCW 4.84.010, the Court makes the
 4 following findings of fact, to wit: KLD

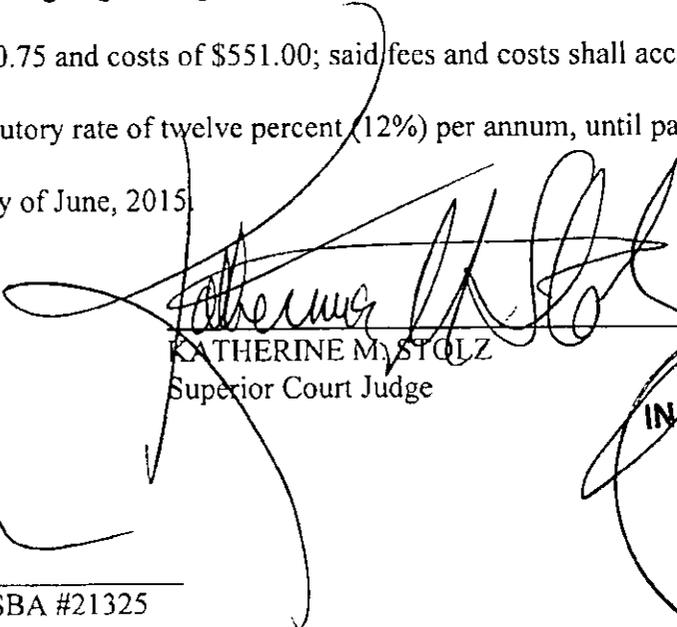
5 1. The Yoreks' attorney's hourly rate of \$300.00 charged to the Yoreks is reasonable in
 6 amount and consistent with amounts charged by attorneys of counsels' experience in the
 7 geographic vicinity of Pierce County and South Puget Sound; likewise, the paralegal rate of
 8 \$125.00 charged for legal services is similarly reasonable in amount and customary.

9 2. The Yoreks' professional services time charged for attorney and paralegal services
 10 involved in prosecuting their counterclaim, under RCW 4.24.630 and RCW 4.24.250 is ^{the wife}
 11 reasonable in amount; KLD

12 3. The Cost Bill filed herein adequately identifies costs allowed under RCW 4.84.010
 13 and RCW 4.24.630.

14 Based upon the foregoing findings of fact, the Court hereby awards the Yoreks'
 15 attorney's fees of \$7,990.75 and costs of \$551.00; said fees and costs shall accrue interest
 16 from this date at the statutory rate of twelve percent (12%) per annum, until paid.

17 Dated this 5th day of June, 2015.

18 
 19 KATHERINE M. STOLZ
 Superior Court Judge

20 Presented by:

21 SMITH ALLING, P.S.


22 Thomas P. Quinlan, WSBA #21325
 23 Attorney for Defendants

FILED
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 IN OPEN COURT
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 Pierce County Clerk
 By  DEPUTY

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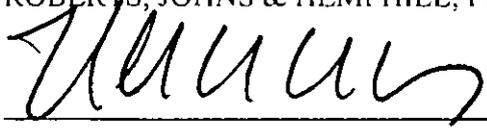
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Approved as to form;

Notice of presentation waived by:

ROBERTS, JOHNS & HEMPHILL, PLLC



Mark R. Roberts WSBA #18811
Attorney for Plaintiffs

APPENDIX D

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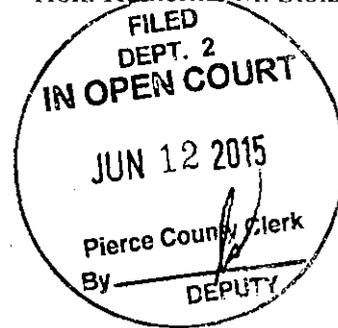
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13-2-15148-6 44829654 JD 06-16-15

Hon. Katherine M. Stolz



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

W. BRANDT BEDE and LESLIE K.
McLAUGHLIN BEDE, husband and wife,

No. 13-2-15148-6

JUDGMENT

Plaintiffs,

v.

DARYL K. YOREK and KELLY M.
YOREK, husband and wife,

Defendants.

JUDGMENT SUMMARY

A.	Judgment Creditor	Daryl K. Yorek and Kelly M. Yorek
B.	Judgment Debtor	W. Brandt Bede and Leslie K. McLaughlin Bede
C.	Principal Judgment Amount	\$ 3,690.00
D.	Interest to Date of Judgment	\$ -0-
E.	Attorney's Fees	\$ 7,990.75
F.	Costs	\$ 551.00
G.	Other Recovery Amount	\$ -0.00
H.	Judgment shall bear interest at 12%	
I.	Total amount of Judgment	\$ 12,231.75
J.	Attorney for Judgment Creditor:	Thomas P. Quinlan
K.	Attorney for Judgment Debtor:	Mark R. Roberts

Date: June 12, 2015.

Appearances: This matter came on regularly for trial before the Court on April 13, 2015 through April 15, 2015; the Plaintiffs, W. Brandt Bede and Leslie K. McLaughlin Bede

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1 appeared in person and by and through their attorney, Mark R. Roberts of the law firm
2 Roberts, Johns & Hemphill, PLLC; the Defendants, Daryl K. Yorek and Kelly M. Yorek
3 appeared in person and by and through their attorney, Thomas P Quinlan of the law firm
4 Smith Alling, P.S.

5 **Prior Orders:** On this date, the Court entered its written Findings of Fact, Conclusions of law
6 and Order Awarding Fees and Costs to the Defendants Daryl K. Yorek and Kelly M. Yorek.

7 Based upon the foregoing, it is now therefore,

8 ORDERED ADJUDGED AND DECREED that W. Brandt Bede and Leslie K.
9 McLaughlin Bede are awarded a prescriptive easement for ingress and egress to their real
10 property commonly known as 4141 North Madrona Way, Tacoma, Pierce County,
11 Washington, Pierce County Assessor tax parcel numbers 5555100060 and 0221251002; the
12 legal description of the Bede real property is attached to this Judgment as Exhibit "A," which
13 exhibit is incorporated herein by this reference as though fully restated herein; said
14 prescriptive easement being on and along the common driveway which is approximately
15 twelve (12) to thirteen (13) feet wide and bordered by curbing consisting of either Wilkerson
16 sandstone blocks and/or aggregate exposed concrete and commencing at the city of Tacoma
17 right-of-way on Madrona Drive and terminating at the location of a cedar tree at or near a
18 concrete pad located on the Bede property; and, said prescriptive easement boundaries being
19 more particularly depicted on the document attached to this Judgment as Exhibit "C," which
20 exhibit is incorporated herein by this reference as though fully restated; said prescriptive
21 easement shall run-with-the land; it is further,

22 ORDERED ADJUDGED AND DECREED that Daryl K. Yorek and Kelly M. Yorek
23 are awarded a prescriptive easement for ingress and egress to their real property commonly

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1 known as 4151 North Madrona Way, Tacoma, Pierce County, Washington, Pierce County
2 Assessor tax parcel numbers five 5555100050 and 00221251008; the legal description of said
3 real property is attached to these Findings of Fact and Conclusions of Law as Exhibit "B,"
4 which exhibit is incorporated herein by this reference as though fully restated herein; said
5 prescriptive easement being on and along the common driveway which is approximately
6 twelve (12) to thirteen (13) feet wide and bordered by curbing consisting of either Wilkerson
7 sandstone blocks and/or aggregate exposed concrete and commencing at the city of Tacoma
8 right-of-way on Madrona Drive and terminating at the location of a cedar tree at or near a
9 concrete pad located on the Bede property; and, said prescriptive easement boundaries being
10 more particularly depicted on the document attached to this Judgment as Exhibit "C," which
11 exhibit is incorporated herein by this reference as though fully restated; said prescriptive
12 easement shall run-with-the land; it is further,

13 ORDERED, ADJUDGED and DECREED that title to and in the real property and
14 improvements, including plants, hedges and foliage, on the Yoreks' side of the common
15 driveway easement belongs to the Yoreks; and, title to the real property and improvements,
16 including plants and foliage, on the Bedes' side of the common driveway easement belongs to
17 the Bedes; it is further,

18 ORDERED, ADJUDGED and DECREED that it is equitable to require each party and
19 their respective successors-in-interest to prune or maintain the plants, hedges and foliage on
20 their property so that such plants, hedges and foliage do not extend more than six inches (6")
21 outside of the curbs of the common driveway easement area; provided, however, the Yoreks
22 shall have six (6) months from the date of this Judgment to prune their Portuguese laurel
23 hedge to be up to six inches (6") inside of the curb of the common driveway easement area;

1 tree limbs and vegetation more than ten feet (10') above the road is not required to be
2 trimmed ; it is further,

3 ORDERED, ADJUDGED and DECREED that except for plants, foliage and hedges,
4 which are the sole responsibility of the parties and their respective successors-in-interest as set
5 forth above, it is equitable for each of the parties and their successors-in-interest to be jointly
6 responsible for the maintenance and repairs of the common driveway easement between the
7 edges of the curb and from the common driveway easement point-of-beginning at Madrona
8 Way to its termination point, as depicted on Exhibit "C" hereto; and further, each party shall
9 obtain their own independent estimate for repair of the asphalt or hard surface of the common
10 driveway as noted above; the parties will engage the services of the licensed and registered
11 contractor with the lowest bid or estimate for repairs, unless the parties agree in writing to the
12 contrary; each party shall be responsible for one-half of the cost of said lowest bid for repair;
13 it is further,

14 ORDERED, ADJUDGED and DECREED that it is equitable to allow the Bedes, at
15 their sole expense, to pay to have the last panel of the Yoreks' concrete fence removed by the
16 same contractor the Yoreks' used to install the concrete fence; provided however, the Bedes
17 shall make their election to have the last panel of the Yoreks' concrete fence removed within
18 sixty (60) days of the date of entry of Judgment by making such election in writing to the
19 Yoreks and shall pre-pay in advance the Yoreks' cost of removing the last panel of the
20 Yoreks' concrete fence and the repair and replacement of the curbing located at the place
21 where the last panel will be removed with Wilkerson sandstone, concrete or block, which
22 prepayment of such expense is a precondition to the removal of the Yoreks; failure to make
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1 such timely election and prepayment shall relieve the Yoreks' of any such further obligation
2 relating to removing the fence panel; it is further,

3 ORDERED, ADJUDGED and DECREED that Daryl K. Yorek and Kelly M. Yorek
4 shall be awarded monetary Judgement against W. Brandt Bede and Leslie K. McLaughlin
5 Bede, individually and the marital community composed thereof in the principal amount of
6 One Thousand Two Hundred Thirty Dollars (\$1,230.00), which amount shall be trebled
7 pursuant to RCW 4.24.630 for a total amount of Three Thousand Six Hundred Ninety Dollars
8 (\$3,690.00) and attorney's fees in the amount of Seven Thousand Nine Hundred Ninety and
9 75/100 (\$7,990.75) and costs of \$551.00, pursuant to RCW 4.24.630 and RCW 4.24.010,
10 respectively; said Judgment shall accrue interest at the statutory rate of twelve percent (12%)
11 per annum.

12 Dated this 12th day of June, 2015.

[Handwritten Signature]
HONORABLE KATHERINE M. STOLZ

13 Presented by:

14 SMITH ALLING, P.S.

[Handwritten Signature]

15 Thomas P. Quinlan, WSBA #21325
16 Attorney for Defendants

FILED
DEPT. 2
IN OPEN COURT
JUN 12 2015
Pierce County Clerk
By *[Signature]*
DEPUTY

17 Approved as to form;
18 Notice of presentation waived by:

19 ROBERTS, JOHNS & HEMPHILL, LLC
[Handwritten Signature]

20 Mark R. Roberts WSBA #18811
21 Attorney for Plaintiffs

EXHIBIT "A"



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5-19-2015

THE LAND REFERRED TO IN THIS POLICY IS SITUATED IN THE STATE OF WASHINGTON, COUNTY OF PIERCE AND IS DESCRIBED AS FOLLOWS:

PARCEL A
LOT 10 OF REPLAT OF LOTS 6 TO 14, MASON HEIGHTS, AS PER PLAT RECORDED IN VOLUME 11 OF PLATS, PAGE 86, RECORDS OF PIERCE COUNTY AUDITOR, TOGETHER WITH A PORTION OF LOT 9 OF REPLAT OF LOTS 6 TO 14, MASON HEIGHTS, AS PER PLAT RECORDED IN VOLUME 11 OF PLATS, PAGE 86, RECORDS OF PIERCE COUNTY AUDITOR, DESCRIBED AS FOLLOWS:
BEGINNING ON THE EAST LINE OF SAID LOT 9, 40 FEET SOUTH OF THE NORTHEAST CORNER THEREOF;

THENCE RUNNING SOUTH ALONG SAID EAST LINE 30 FEET TO THE SOUTHEAST CORNER OF SAID LOT 9;
THENCE WEST ALONG THE SOUTH LINE OF SAID LOT 9, 134 FEET;
THENCE NORTHEASTERLY TO THE POINT OF BEGINNING;

PARCEL B
THE WEST 100 FEET OF THE SOUTH 190 FEET OF THE NORTH 300 FEET OF THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 25, TOWNSHIP 21 NORTH, RANGE 02 EAST OF THE W.M., IN PIERCE COUNTY, WASHINGTON,
EXCEPT THE FOLLOWING DESCRIBED TRACT:

BEGINNING ON THE EAST LINE OF SAID REPLAT OF LOTS 6 TO 14, MASON HEIGHTS 300 FEET SOUTH OF THE NORTHEAST CORNER OF SAID PLAT;
THENCE NORTH 45 FEET TO THE NORTHEAST CORNER OF LOT 11 OF SAID PLAT;
THENCE ON AN EXTENSION OF THE NORTHERLY LINE OF SAID LOT 11 SOUTHEASTERLY 58 FEET;

THENCE SOUTHERLY 32.5 FEET TO A LINE PARALLEL WITH AND 300 FEET SOUTH OF THE EXTENDED NORTH LINE OF SAID PLAT AT A POINT 51 FEET EAST OF THE INTERSECTION OF SAID PARALLEL LINE WITH SAID EAST LINE OF SAID REPLAT;

THENCE WEST 51 FEET TO THE POINT OF BEGINNING.

ABBRV LEGAL
PARCEL 1 LOTS 10 OF REPLAT OF LOTS 6-14 MASON HTS VOL 11 PG 86
PARCEL B SEC 25 TWP 21 N R 2 E WM NW QTR NE QTR

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EXHIBIT "B"



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PARCEL A:

Beginning at the southwest corner of Lot 9 of Replat of Lots 6 to 14 of MASON HEIGHTS, TACOMA, WASHINGTON, as per plat recorded in Volume 11 of Plats, page 66, records of Pierce County Auditor, being the point of intersection of the south line of said Lot 9 with the Easterly line of Madrona Way as laid out on May 20, 1935; thence Northerly along the Easterly line of Madrona Way, a distance of 50 feet; thence in a Northeasterly direction 295 feet, more or less, to a point on the East line of Lot 8 of Mason Heights 60 feet North of the Southeast corner of said Lot 8; thence South 100 feet along the East line of said Lots 8 and 9 to a point 30 feet North of the Southeast corner of said Lot 9; thence in a Southwesterly direction to a point on the South line of said Lot 9 and 134 feet West of the Southeast corner of said Lot 9; thence West 140.59 feet, more or less, along the South line of said Lot 9 to the point of Beginning;

Situate in the City of Tacoma, County of Pierce, State of Washington.

PARCEL B:

That portion of the Northeast 1/4 of the Northwest 1/4 of the Northeast 1/4 of Section 25, Township 21 North, Range 2 East of the W.M., described as follows:

Beginning at a point on the East line of Lot 9 of Replat of Lots 6 to 14, MASON HEIGHTS, TACOMA, WASHINGTON, as per plat recorded in Volume 11 of Plats, page 86, records of Pierce County Auditor, 30 feet North of the Southeast corner thereof; thence East 100 feet; thence North 110 feet; thence West 100 feet to a point on the East line of Lot 8 of said Replat, which point is 60 feet North of the Southeast corner of said Lot 8; thence South along the East line of said Lots 8 and 9 to the point of beginning;

Situate in the City of Tacoma, County of Pierce, State of Washington.

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EXHIBIT "C"



