

63457-7

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

NO. 63457-7

CHRISTOPHER BOFFOLI,

Appellant,

v.

BOAZ AND JENI HALL,

Respondents.

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STATE OF WASHINGTON
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BRIEF OF APPELLANT

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I. INTRODUCTION

Christopher Boffoli is entitled to be free of nuisance and trespass in his home. The trial court erred in finding that “smoking is a civil right to the citizens of our community” and in ignoring nuisance and trespass law. 5/26/09 RP at 4-5. Further, Christopher Boffoli was entitled to a jury trial on the issue of whether his neighbor’s heavy cigarette and charcoal grill smoking caused the damage Mr. Boffoli alleged. The trial court erred in denying Mr. Boffoli a jury, and in finding that Washington law does not support a cause of action for nuisance and trespass caused by smoke.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in denying Mr. Boffoli’s jury demand.

B. The trial court erred in ruling that there was no cause of action for smoke from a neighbor’s property, in view of Washington’s long-established statutory and common-law nuisance and trespass laws.

C. In the alternative, substantial evidence does not support the trial court’s finding that the cigarette and charcoal grill smoke injected into Mr. Boffoli’s home did not constitute a nuisance, and that the particles in cigarette and charcoal grill smoke intentionally ejected onto Mr. Boffoli’s land by Defendant did not constitute a trespass.

III. ISSUES PRESENTED

1. A litigant is entitled to a jury trial if the cause of action lies primarily in law, rather than equity. Christopher Boffoli sued his neighbor for the torts of nuisance and trespass, which sound in law, and asked for damages and injunctive relief. Did the trial court err in refusing Mr. Boffoli's jury demand?

2. Noxious odors can be a nuisance under long-established Washington law. Particles, such as the particles found in smoke, can trespass on private property. Christopher Boffoli presented evidence that his neighbor's cigarette smoking intruded into Boffoli's home, and presented expert testimony that it could harm his health. Did the trial court err in ruling that "smoking is a civil right to the citizens of our community" and that "based on the evidence, and the law, that there is no legal authority" for the court to issue an injunction or assess damages for cigarette and charcoal grill smoke?

3. Substantial evidence must support every finding of fact. Although the trial court did not enter findings of fact and its ruling is unclear, if this court finds that it did reach the merits of Mr. Boffoli's claim, then the trial court ignored uncontroverted evidence that the smoke

ejected by Defendant was a nuisance because it endangered the health and disturbed the repose of Mr. Boffoli and his guests, and that the particles from the smoke trespassed on his land. Should the trial court's dismissal of the case be reversed?

IV. PROCEDURAL SUMMARY

On October 9, 2007, Plaintiff/Appellant Christopher Boffoli (Boffoli) filed a lawsuit naming Boaz and Jeni Hall¹ and their landlords Keith and Carmen Orton as defendants. On June 6, 2008, the Honorable Christopher Washington granted the Ortons' motion for summary judgment and dismissed them from the case. On December 18, 2008, Christopher Boffoli filed a jury demand and paid the required jury fee for a jury of six persons. CP 18. On April 21, 2009, the Honorable Charles Mertel refused Boffoli's jury demand, and the matter proceeded to a bench trial. 4/21/09 RP at 14-15. On April 22, 2009, Judge Mertel entered judgment in favor of Boaz Hall. CP 43. This appeal timely followed. CP 44-46.

¹ Boaz Hall's wife, Jeni Hall, was no longer residing with Boaz Hall by the time of trial.

V. STATEMENT OF THE CASE

In 2006, Christopher Boffoli bought a townhouse at 4508 41st Avenue SW in an emerging neighborhood in West Seattle. 4/21/09 RP at 36. Mr. Boffoli does not smoke. 4/21/09 RP at 67-68. He is familiar with the risks of exposure to secondhand cigarette smoke, and is concerned about his long-term health if he is exposed to it. *Id.* Although he knows that he cannot avoid all contact with cigarette smoke, he avoids any location that has a high concentration of it, or where he would be exposed to cigarette smoke for an extended period of time. *Id.* The townhouse he purchased is located on the south end of the townhouse building, and has its only air intake vents on the south side, along with a majority of its windows facing to the south. 4/21/09 RP at 43-46.

When Christopher Boffoli bought his townhome, he had no idea that he was purchasing a location that would be regularly inundated with heavy cigarette smoke. 4/21/09 RP at 46-47. He soon discovered, though, that although he could avoid other private places where cigarette smoking occurred, and could enjoy smoke-free areas in Washington's public buildings, his own home would be regularly filled with smoke emanating

from his neighbor's property and entering Mr. Boffoli's windows and air intake vents. 4/21/09 RP at 47-63; Ex. 1.

Defendant/Respondent Boaz Hall (Hall) lives immediately to the south of Boffoli, in a rented duplex unit. 4/21/09 RP at 37. Boaz Hall smokes cigarettes heavily and frequently. 4/21/09 RP at 47-53. He is prohibited by his lease from smoking indoors, and he chooses to smoke on a small deck in a yard immediately outside his door, adjacent to Boffoli's townhouse vents and near his windows. *Id.* There are numerous locations in the yard where he could smoke that are further from Boffoli's residence; he has chosen a location that is immediately next to a fence constructed by Boffoli, and adjacent to Boffoli's air intake vents and windows. 4/21/09 RP at 64-65. Hall's prodigious smoking habits cause volumes of smoke to flow directly into both Boffoli's air intake vents and the windows of his townhouse. 4/21/09 RP at 47-52; 57-58. Hall has also placed his charcoal grill on the deck next to Boffoli's windows, and uses grilling practices that produce volumes of heavy, black, odoriferous charcoal smoke. 4/21/09 RP at 60-62; Ex. 1. Since the windows are one of Boffoli's primary means of ventilation in the summer, and he has no means of closing the air vents, his home is regularly fumigated by Hall. 4/21/09 RP at 45-46; 51-52.

Once Boffoli realized the extent of the problem, he acted reasonably and courteously, as any neighbor should. 4/21/09 RP at 68-69. He first contacted Hall directly about his concerns, to no avail. *Id.* He then contacted the Halls' landlord, and asked if they would exercise control over their premises by directing the Halls to smoke so as not to cause a nuisance. 4/21/09 RP at 69-71. Boffoli then followed up with a series of letters, outlining the problem and asking the landlords to take reasonable steps to ameliorate it. *Id.* All of Mr. Boffoli's requests have been ignored.

There are other options for Hall to continue smoking without damaging Boffoli's townhome and endangering Boffoli's health. 4/21/09 RP at 64-65. Hall could smoke on the sidewalk, only a few steps outside. 4/21/09 RP at 64. Hall could ask his landlords, the Ortons, for permission to use the east-facing yard for charcoal grilling and smoking. Hall could switch to a gas grill. Instead, defendant Hall has continually chosen to smoke and grill right up against Boffoli's air intakes and windows.

At his wit's end, Boffoli consulted an attorney, and despite a letter outlining the situation and asking for a reasonable resolution, no resolution was achieved. 4/21/09 RP at 73. On October 9, 2007, with no other

recourse, Boffoli filed a lawsuit. 4/21/09 RP at 73-74. When Hall and the Ortons failed to correct the problem after months of notice, Boffoli paid to construct a fence between his home and Hall's residence. 4/21/09 RP at 71-73. The City's maximum fence height is six feet, and Boffoli discovered that the fence did nothing to cure the smoke problem. 4/21/09 RP at 73. He later paid for an air conditioner, but the odor and smoke in his home continued through the air vents. 4/21/09 RP at 75-76.

Expert testimony presented at trial demonstrated that secondhand cigarette smoke in any quantity is hazardous to human health. 4/21/09 RP at 113. Dr. Christopher Covert-Bowlds is a physician, and was qualified as an expert on the risks of secondhand cigarette smoke. 4/21/09 RP at 107-113. Dr. Covert-Bowlds described the scientific evidence showing that exposure to secondhand smoke can be as dangerous, or more so, than smoking. 4/21/09 RP at 113-117. Secondhand smoke contains known human carcinogens. 4/21/09 RP at 113-114. Smoking does not need to occur in the same room in order to be dangerous to bystanders: outdoor smoking can cause as great of a risk. 4/21/09 RP at 115-16. Washington has recognized the dangers of secondhand smoke. The Washington Legislature has found that:

The people of the state of Washington recognize that exposure to secondhand smoke is known to cause cancer in humans. Secondhand smoke is a known cause of other diseases including pneumonia, asthma, bronchitis, and heart disease. Citizens are often exposed to secondhand smoke in the workplace, and are likely to develop chronic, potentially fatal diseases as a result of such exposure. In order to protect the health and welfare of all citizens, including workers in their places of employment, it is necessary to prohibit smoking in public places and workplaces.

RCW 70.160.011. As Dr. Covert-Bowlds testified, cigarette smoke is a combination of particles and gases. 4/21/09 RP at 110. These particles are physical items that can travel through the air and be deposited and remain on surfaces. 4/21/09 RP at 114-15. Many of the particles that comprise cigarette smoke are toxic, and create health risks. *Id.*

Boffoli has also ascertained that removing smoke odors requires extra cleaning work, and identified cleaning companies that provide those services for between \$300 and \$400. 4/21/09 RP at 75-76. He presented uncontroverted testimony regarding the loss of use of his townhome, and the market value of the townhome, as well as the cost of constructing the fence and obtaining an air conditioner to try and stop the smoke. 4/21/09 RP at 74-76. Other witnesses testified that they, too, can smell the smoke

in Boffoli's townhouse and other townhouses in the building, and have tried to persuade Mr. Hall to modify his conduct, all to no avail. 4/21/09 RP at 91-92; 96-97; 101-03.

VI. ARGUMENT

A. Standard of Review

The trial court's conclusions of law are reviewed de novo. In this case, the trial court's conclusion that Washington law does not recognize a cause of action for cigarette and charcoal grill smoke is reviewed de novo. *Rasmussen v. Bendotti*, 107 Wn. App. 947, 954-55, 29 P.3d 56, 60-61 (2001). If this court finds that the trial court did resolve the factual questions, then the trial court's finding that Mr. Boffoli's evidence was insufficient to prove the elements of nuisance and trespass is reviewed for substantial evidence. *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 78, 180 P.3d 874, 876 (2008). Substantial evidence is evidence sufficient to convince a fair-minded person of the truth of the matter. *Cox v. O'Brien*, 150 Wn. App. 24, 34, 206 P.3d 682 (2009).

B. The Trial Court Erred in Refusing Boffoli's Jury Demand

Article I, Section 21 of the Washington State Constitution provides for a trial by jury. The Constitution states unequivocally that "[t]he right

of trial by jury shall remain inviolate.” *Id.* This right is guarded “jealously” by the appellate courts. *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 710, 116 P.2d 315 (1941). The constitutional right to a jury trial applies where a civil action is purely legal in nature. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980). Conversely, where the action is purely equitable in nature, there is no right to a jury trial. *Id.* Where an action includes elements of both law and equity, the overall nature of the action is determined by considering all the issues raised by all of the pleadings. *Id.*

In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded discretion and a decision denying the right to a jury trial is reviewed for an abuse of discretion. *Brown*, 94 Wn.2d at 368. However, appellate courts have instructed trial courts to exercise their discretion with reference to specific factors, including:

- 1) who seeks the equitable relief; 2) is the person seeking the equitable relief also demanding trial of the issues to the jury; 3) are the main issues primarily legal or equitable in their nature; 4) do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury; 5) are the equitable and

legal issues easily separable; 6) in the exercise of such discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed; 7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues.

Id., quoting, *Scavenius v. Manchester Port District*, 2 Wn. App. 126, 129-30, 467 P.2d 372 (1970). If the nature of the case is doubtful, deference should be given to the constitutional nature of the right and a jury trial should be allowed. *S.P.C.S., Inc. v. Lockheed Shipbuilding and Const. Co.*, 29 Wn. App. 930, 934, 631 P.2d 999 (1981). Actions in tort and requests for monetary damages based thereon are legal in nature. *Brown*, 94 Wn.2d at 366; *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 710-12, 116 P.2d 315 (1941); *see also, In re Marriage of Kaseburg*, 126 Wn. App. 546, 557, 108 P.3d 1278 (2005) (A “tort claimant is typically entitled to a jury trial”).

There can be no doubt that the issues raised by the pleadings in this case are primarily legal. When Mr. Boffoli filed a complaint against Mr. Hall, he alleged two causes of action: the torts of trespass and nuisance. Actions in tort are actions sounding in law. *Brown*, 94 Wn.2d

at 366. Mr. Boffoli requested two forms of relief: damages incurred as a result of Mr. Hall's nuisance and trespass, and injunctive relief. But his claims against Mr. Hall are unquestionably rooted in law and the mere fact that he also sought injunctive relief does not change the analysis. The Washington Supreme Court has noted that if the cause of action in the complaint is strictly legal in its nature, an equitable component of relief "does not change an action at law" to one in equity. *Watkins*, 9 Wn.2d at 711-12.

Watkins involved "a purely legal cause of action, sounding in tort for conversion, and demands [for] money damages." *Watkins*, 9 Wn.2d at 711. Although equitable relief – an accounting – was "incidentally involved" in awarding damages associated with the legal claim, it did not convert a legal action into an equitable one. *Id.* at 711-12. The Washington Supreme Court there reversed the trial court's ruling precisely because the lower court confused these issues. *Id.* at 731. In this case, like *Watkins*, Mr. Boffoli's tort claims should have been determined by the jury. *See also, Wilber v. Western Properties*, 14 Wn. App. 169, 540 P.2d 470 (1975) (affirming jury award of damages in suit to abate nuisance); *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 622, 358 P.2d 975, 977 (1961)

(proper for jury to consider whether dust from a cement plant met the elements of nuisance).

In this case, the trial court abused its discretion because it failed to properly weigh the aforementioned *Brown* factors. *Brown*, 94 Wn.2d at 368. The *Brown* factors tip heavily in favor of granting Mr. Boffoli's request for a jury trial. The only claims Mr. Boffoli pled against Mr. Hall were legal. Mr. Boffoli sought both an injunction and monetary damages. The issues are primarily legal. *Brown*, 94 Wn.2d at 366; *Watkins*, 9 Wn.2d at 711. Claims of trespass and nuisance hardly present the type of complexity warranting a bench trial, which is why tort claims are jury issues. *Id.* At the very least, the court should have retained discretion to weigh Mr. Boffoli's claim for injunctive relief once a jury had determined his legal claims. The trial court erred in ruling otherwise, and the matter should be remanded for a jury trial on these legal issues.

C. The Trial Court Erred in Finding That Washington Law Does Not Have a Cause of Action for Damage Caused by Cigarette Smoking

1. Hall's smoking is a nuisance.

The trial court erred in finding that cigarette smoke intruding into a residence cannot be a nuisance. The court found:

The legislature has drawn the line with regard to public buildings. So that's clear. So it's a very difficult task for this Court, what both parties are asking the Court to do, which is, in essence, to legislate. 4/22/09 RP at 66.

...

Currently, smoking is a civil right to the citizens of our community, and I emphasize our community, albeit, a right restricted in public spaces.

...

The Court has concluded that based on the evidence, and the law, that there is no legal authority for the Court to issue this injunction. I don't like this, because is it (sic) leaves this matter unsettled and unresolved as between the neighbors. Nevertheless, it is the Court's conclusion that I have no legal or factual authority for granting this injunction, and therefore the matter is to be dismissed.

5/26/09 RP at 4-5.

But Christopher Boffoli has a right to be free of nuisance in his home, and the trial court erred in dismissing the case on a mistaken belief that there was no authority to issue an injunction or grant damages. RCW 7.48.120 governs nuisance, and provides in pertinent part:

Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others....

Mere compliance with criminal or other laws does not insulate Hall from a nuisance claim. *Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998). In evaluating the evidence of whether Hall's conduct "annoys, injures or endangers the comfort, repose, health or safety of others," the court was to use its normal and ordinary sensibilities. *Riblet v. Ideal Cement Co.*, 57 Wn.2d at 622. For example, in *Riblet*, plaintiffs alleged that dust falling from a cement plant onto their property constituted a nuisance. The *Riblet* court held that it was proper for the jury to consider testimony from the plaintiffs, as well as from their neighbors, regarding the amount of dust and whether it affected them. 57 Wn.2d at 623.

Washington has long recognized a cause of action for nuisance, and held that offensive odors and dust can be a nuisance. In *Jones v. Rumford*, 64 Wn.2d 559, 392 P.2d 808 (1964), the court upheld a jury award of \$500 for the nuisance caused by the odor and flies of a chicken farm. Likewise, in *Riblet, supra*, the court held that dust could properly be a nuisance. 57 Wn.2d at 623. Similarly, in *Vicwood Meridian*

Partnership v. Skagit Sand and Gravel, 123 Wn. App. 877, 98 P.3d 1277 (2004), the court evaluated the impact of the Right To Farm Act on an allegation that odors from a mushroom facility constituted a nuisance.

Other states also recognize that smoking can be a common-law or statutory nuisance. In *Birke v. Oakwood Worldwide*, 169 Cal.App.4th 1540, 1546, 87 Cal.Rptr.3d 602 (2009), the California Court of Appeals reversed a lower court's ruling that the plaintiff alleged insufficient facts to show cigarette smoke emitted by the defendant caused a public nuisance.² Likewise, courts in New York have found in favor of plaintiffs claiming a private nuisance from secondhand smoke emanating from a neighbor's residence. *Duntley v. Barr*, 10 Misc.3d 206, 805 N.Y.S.2d 503 (2005).

In this case, Boffoli's uncontroverted evidence was that his home is awash in smoke that he and his guests find offensive. 4/21/09 RP at 47-63. He is unable to enjoy his townhome because he must keep his windows closed in summer, and even then, the construction of the air intakes on his residence means the noxious odors emanating from the Halls' residence invade his home year-round. 4/21/09 RP at 73-78. Boffoli is not alone in finding Hall's smoking offensive. Other neighbors

² However, *Birke* did not provide an affirmative ruling on the subject since the court was asked only to rule on the trial court's demurrer.

and visitors to Boffoli's home testified that they have smelled cigarette smoke. 4/21/09 RP at 91-92, 96-97; 101-03.

Tellingly, most Washington citizens share Boffoli's aversion to smelling smoke in an enclosed building. Washington voters passed Initiative 901 in 2005. Initiative 901, codified as RCW 70.160.075, bans cigarette smoking in public places, including:

[W]ithin a presumptively reasonable minimum distance of twenty-five feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited so as to ensure that tobacco smoke does not enter the area through entrances, exits, open windows, or other means (emphasis added).

A person of ordinary sensibilities would also be offended by the long-term health risks secondhand smoke subjects Boffoli to. Washington has found that secondhand cigarette smoke is a health hazard:

The people of the state of Washington recognize that exposure to second-hand smoke is known to cause cancer in humans. Second-hand smoke is a known cause of other diseases including pneumonia, asthma, bronchitis, and heart disease. Citizens are often exposed to second-hand smoke in the workplace, and are likely to develop chronic, potentially fatal diseases as a result of such exposure. In order to protect the health and welfare of all citizens, including workers in

their places of employment, it is necessary to prohibit smoking in public places and workplaces.

RCW 70.160.075. Likewise, states across the nation have banned both indoor and outdoor smoking, finding cigarette smoke is a health hazard and nuisance. Exposure to secondhand smoke can be as dangerous or more so than smoking. 4/21/09 RP at 114. Secondhand smoke is a known human carcinogen. 4/21/09 RP at 113-14. Smoking does not need to occur in the same room in order to be dangerous to bystanders: outdoor smoking can cause as great of a risk. 4/21/09 RP at 115-16.

The trial court was briefed on the applicable Washington law and presented with facts showing that the elements of nuisance had been met. 4/21/09 RP at 53-58. The trial court erred in concluding that the Legislature's decision to make smoking in public places a nuisance per se meant that there was no cause of action for private smoking. 4/22/09 RP at 66. The court erroneously thought it was being asked "to legislate," when in fact the elements of nuisance are clearly present. 4/22/09 RP at 66. The trial court erred in finding there was "no legal authority for the Court to issue this injunction." 5/26/09 RP at 5. The matter must be

remanded for a jury trial, or in the alternative for entry of findings properly evaluating the elements of nuisance.

2. Hall's smoking is a trespass.

Boffoli is additionally entitled to relief because Hall's smoking is an ongoing trespass. RCW 4.24.630 governs the cause of action of trespass and provides, in pertinent part:

Every person who goes onto the land of another ... 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. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to act.

In addition to this statutory remedy, trespass is a common-law tort. In *Bradley v. Am. Smelting*, the court expanded on Washington's law of trespass as it relates to airborne particles, and held that trespass required:

- 1) an invasion affecting an interest in the exclusive possession of his property;
- 2) an intentional doing of the act which results in the invasion;
- 3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and
- 4) substantial damages to the res.

Bradley v. Am. Smelting and Ref. Co., 104 Wn.2d 677, 691, 709 P.2d 782, 785 (1985). All of the elements of both RCW 4.24.630 and common-law trespass are met by the smoke emanating from Hall's property into Boffoli's townhome. An "invasion" can be accomplished by a thing rather than a person, including an airborne particle. *Bradley*, 104 Wn.2d at 686. Cigarette and charcoal smoke contains airborne particles. 4/21/09 RP at 110. In this case, Boffoli has stated that he can smell the odor of smoke, not only when the Halls are smoking, but afterwards as well, which demonstrates that particles have been deposited and remain in Boffoli's residence. 4/21/09 RP at 47-51.

Boffoli also proved that the smoke invasion interferes with the exclusive use of his property, and that substantial damage to the property has occurred. 4/21/09 RP at 75-79. He has lost the full use and enjoyment of his townhome, spent over \$6000 on an air conditioner, \$1800 on a fence, and must spend between \$300 and \$400 to have the odors removed from his home if the smoking ever stops. 4/21/09 RP at 71-77. Uncontroverted evidence was presented that Hall intentionally caused the smoke particles to enter Boffoli's townhome: "intent" is established where an act is done with knowledge that it will to a substantial certainty result in

the entry of the foreign matter. *Bradley*, 104 Wn.2d 677. There is no requirement that the tortfeasor intend to harm another. *Id.* at 682. In this case, Hall knows the smoke is entering Boffoli's property because Boffoli has told him that it is harmful and the smoke stream is patently visible.

The trial court erred in finding that there were neither facts nor law supporting a cause of action for smoking; both nuisance and trespass protect Christopher Boffoli's right to be free of noxious odors and harmful particulates and gases in his home. The matter must be reversed and remanded for either a jury trial, or to consider the evidence in light of the law of trespass.

D. In the Alternative, the Trial Court Erred by Finding that Boffoli had not Presented Sufficient Evidence to Meet the Elements of Nuisance and Trespass

Although the trial court's ruling appears to be based on a mistaken belief that smoke could not be a nuisance or a trespass, if this court finds that the trial court's determination that there is no legal authority to establish nuisance and trespass is essentially a factual finding that Boffoli presented insufficient evidence to establish, then that finding should be reversed. 5/26/09 RP at 4-5.

Every factual finding must be supported by substantial evidence. *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. at 78, 180 P.3d at 876. While a reviewing court should not reweigh credibility or substitute its judgment for that of the trial court, the record must contain substantial evidence supporting each finding or the trial court's determination must be reversed. *State, Dept. of Licensing v. Sheeks*, 47 Wn. App. 65, 68-71, 734 P.2d 24 (1987). For example, in *Sheeks*, the trial court found, based upon the testimony of a physician, that a motorist had been hypothermic rather than under the influence of alcohol and reinstated his driver's license. The court of appeals reversed after reviewing the physician's testimony and finding that although the physician had described the symptoms and effects of hypothermia, there was no testimony that the symptoms of hypothermia matched the motorist's conduct on the night he was arrested.

In this case, the absence of evidence supporting the trial court's finding for Hall is even more stark than in *Sheeks*. As described in detail above, Boffoli presented uncontroverted evidence that the elements of nuisance and trespass were met. The elements of nuisance were met because Boffoli watched cigarette and charcoal grill smoke emanate from Boaz Hall and enter his air intake vents and windows, clearly establishing

that Hall was the cause of the nuisance. 4/21/09 RP at 52-53, 57-60; Ex. 1; RCW 7.48.120 (elements of nuisance). Hall knew that the smoke was intruding into Boffoli's townhome, both because Hall could watch it enter the vents and because Boffoli told him that smoking in that particular location caused an invasion. 4/21/09 RP at 68-69; Ex. 1. The smoke endangered Boffoli's and his guests' health and annoyed them. 4/21/09 RP at 67-68; 113-17. Damage was caused to his townhome. 4/21/09 RP at 74-76. Likewise, Boffoli proved trespass by presenting uncontroverted evidence that cigarette smoke is composed of particles that can affix to a surface, that the odor of lingering smoke meant that particles were present, and that special cleaning was required to remove the particles. 4/21/09 RP at 75-76; 110; *Bradley v. Am. Smelting and Ref. Co.*, 104 Wn.2d 677, 709 P.2d 782. The elements of both nuisance and trespass were met.

In his defense, Boaz Hall argued that he did not cause the invasive smoke, but had no explanation for Boffoli's testimony that he had been observed causing the invasion. 4/21/09 RP at 52-53. Hall presented no evidence contradicting a photograph showing clouds of thick black smoke leaving his charcoal grill and entering Boffoli's vents, nor did he present any evidence that Boffoli had been mistaken when Boffoli watched Hall

smoke next to Boffoli's air vents while Boffoli could smell the smoke inside his residence. Ex. 1; 4/21/09 RP at 52-53. Although Hall argued extensively about the actual distance of the charcoal grill and smoking from Boffoli's windows, Hall presented no evidence challenging the uncontroverted testimony that the smoke intruded into Boffoli's townhome. Likewise, the testimony regarding the health risks of cigarette smoking was uncontroverted, as was the testimony regarding damages.

The trial court erred in finding that the elements of nuisance and trespass had not been met by Boffoli's uncontroverted evidence, and the matter should be reversed for entry of findings in favor of Boffoli.

VII. CONCLUSION

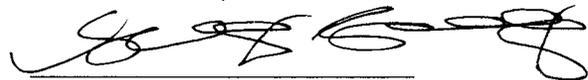
For the reasons argued herein, the matter should be reversed either for a jury trial or for entry of findings in favor of Christopher Boffoli.

DATED this 20th day of July, 2009.

Respectfully submitted,

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