

NO. 69513-4-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

DEVON JAMES,

Appellant,

v.

TERESA ANN WRIGHT and THOMAS LEE
CARTWRIGHT,

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

While the Cartwrights in their reply brief focus on bamboo-related issues, the trial of this action in 2009, and a pervasive campaign they say James waged over a ten-year period to vex, harass and annoy them, they sidestep the primary issues on this appeal, which relate to the rockery on James's property, and whether there is substantial evidence that the rockery (a) was a proper subject for the trial court's post-trial rulings, since it was not mentioned in the Permanent Injunction and was not the subject of litigation at trial, (b) ever provided any lateral support to the Cartwrights' pool or hillside, (c) was restored by James to its "prior condition," (d) should be a proper source of controversy when the Cartwrights failed to investigate their claims about the rockery, and (e) should provide a substantial basis for awarding the Cartwrights a significant amount of attorney's and expert's fees to litigate over.

Despite the Cartwrights' arguments, James is the victim here. Even after trial he was subject to the Cartwrights' constant calls to the police regarding alleged violations of various court orders (CP 936-37), motion after motion filed by the Cartwrights to gain some leverage in the litigation, and finally multiple legal proceedings regarding his rockery, based initially on inadmissible and false evidence that

removal of portions of the rockery caused cracking near the Cartwright pool. When that argument was decisively rejected, the Cartwrights continued with arguments that their slope was destabilized by James's rockery activities, necessitating an evidentiary hearing and no evidence of the de-stabilization. Finally, the trial court required James to take steps to *permanently stabilize* the Cartwrights' slope—which actions ultimately cost \$1,300—even though there was never cited any legal basis as to why James had the legal obligation to permanently stabilize the Cartwrights' property. Ultimately James sold his house and moved far away. He contests both the legal and reasonable basis for the trial court's requiring him to pay some \$50,000 in attorney's fees and expert witness fees in litigation over his rockery, which litigation was improvidently started and continued by the Cartwrights.

II. REPLY TO ARGUMENTS RAISED BY RESPONDENT

A. The Cartwrights Fail to Cite to the Record and Incorrectly Cite to the Record.

The majority of the Cartwrights' 26-page factual recitation (RB 1 to 23) is essentially an ad hominem attack on James regarding many unproved matters not germane to this appeal. Unsupported statements, argument and mischaracterization of the record are numerous and are contained in Appendix A attached hereto. These portions of the Cartwrights' brief violate the requirement that the

statement of the case contain a “fair statement” of the relevant facts and procedures “without argument” and that each factual statement must contain a reference to the record. RAP 10.3(a)(5). James requests that these statements be disregarded and stricken.

B. The Cartwrights Desperately—and Unsuccessfully --Try to Tie the Rockery Issues together with the Bamboo Issues.

There are no bamboo issues in this appeal. This appeal deals with the rockery issues improvidently inserted into these proceedings by the Cartwrights. Yet the Cartwrights try to link bamboo issues to a planter box to the rockery so as to make the unsupported argument that these issues are “inextricably” linked (RB at 36).¹ There are numerous examples set forth in Appendix A.

C. The Cartwrights Do Not Contest Certain Key Points.

¹The Cartwrights claim the rockery issues were “inextricably linked” to 2009 findings regarding a boundary claim and the Permanent Injunction. RB at 36. Yet the Cartwrights fail to explain how the discredited claim that the rockery provides lateral support for anything, especially the Cartwright pool or hillside, is linked either to the 2009 trial court findings, which mention in passing that Frank Friedman, the previous owner of both the Cartwright and James properties “directed the surveyor to set the boundary line so that it ran in a semi-circular fashion around the in-ground swimming pool on Friedman’s property, far enough away from the pool so as to provide the pool with lateral support” (CP 683-84, ¶ 11 of findings of fact). Finding 11 means nothing other than Mr. Friedman wanted to leave enough *ground* to provide support for his pool; there is no mention of the *rockery’s* providing lateral support for either the pool or the hillside. The parties refer to the slope in the area as “the rockery” because “the slope contains rocks.” Id. ¶ 12.

The Cartwrights do not contest that Ms. Wright falsely told their expert that the rockery in question was engineered and failed to tell him about the Cartwrights' jackhammering near their pool (AB AB 42-43).

The Cartwrights do not contest that the sole basis for entry of an order requiring James to restore the rockery to its prior condition (CP 1003, ¶ 3.10) was Ms. Wright's declaration under penalty of perjury that the pool deck was cracking and the pool was "at risk" (CP AB 8). Yet the trial court ultimately determined that there was "no causal connection" between the deck settlement and cracking around their pool "and plaintiff's post-trial rockery work" (CP 2043, ¶ 2). The Cartwrights do not dispute that they failed to investigate their pool-cracking claim, even though their own expert advised them in his report that further investigation was needed (AB 42). This conduct satisfies the definition of a frivolous claim. RAP 18.9(a). It is particularly egregious, because the pool-cracking claim spawned all of the subsequent litigation about the rockery, which litigation dragged on long after all the bamboo and other issues were resolved.

The Cartwrights do not dispute that after it was established that James caused no damage to the Cartwrights' pool, their rockery claims then morphed into the claim that soil on the top of their slope was

“raveling”.² Yet they failed to show that anything James did caused the raveling. They argued in their brief that Mr. Merriman so found (RB 36), but the citation to CP 1906 does not state that *James* caused the raveling. James removed subjacent support ?? CP 2523-24, see CP 1906-07.

The Cartwrights’ claims next morphed into the assertion that James should pay for the permanent stabilization of their slope, even though there was no evidence and no legal authority submitted that James had a legal basis to permanently stabilize the Cartwright slope.³

D. The Cartwrights Overlook Certain Procedural and Jurisdictional Issues.

1. The 4-22-11 Order and Subsequent Orders Were Not Final and Appealable (RB 28).

In general, timely appeal of a final judgment is sufficient to obtain review of prior rulings and orders in the case. *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498, 504, 798 P.2d 808 (1990). James timely appealed the judgments for attorney’s fees and expert fees entered in September, 2012

²“Raveling” refers to “something raveled out, as a thread drawn or separated from a knitted or woven fabric.” *Webster’s Encyclopedic Unabridged Dictionary of the English Language* (Random House 1996) 1604.

³Even under the trial court’s erroneous order of 4/22/11 requiring James to “replace the rockery, which provides lateral support for the Cartwright pool, that he moved and return it to its prior condition[,]” (CP 1003), James was not required to pay for permanent stabilization of the Cartwrights’ slope.

through March, 2013.⁴

The Cartwrights claim that the 4-22-11 contempt order was a final and appealable order, because an “adjudication of contempt is appealable . . .” (RB at 28). However, the only part of the 4-22-11 order James is appealing from is the paragraph ordering him to “replace the rockery . . . and return it to its prior condition” (CP 1003, ¶ 3.10). That is not a finding of contempt,⁵ as James had not previously been ordered to replace the rockery or keep it in any specific condition.⁶ Paragraph 3.10 is, in fact, a new order unrelated to any issue raised in the pleadings, litigated at trial or contained in the Permanent Injunction.

The decisions which a party may appeal are set forth in RAP

⁴The September, 2012 order was later vacated.

⁵The trial court never entered a specific finding that James was in contempt of the 4-22-12 order with respect to the rockery.

⁶The Cartwrights cite *State ex rel. Bradford v. Stubblefield*, 36 Wn.2d 664, 673, 220 P.2d 305 (1950) for the proposition that an order modifying an earlier injunction “would seem to be an appealable order[,]” but in that case the court held that it was unnecessary to decide if the appellant’s failure to appeal an earlier order was now binding on the court, because the earlier order was interpreted by the parties in a certain manner, and the owner of the fat-rendering plant in question acted in reliance upon the order, which factors “all go to create a situation in which it would be unfair for [the court] to now go behind the [earlier] order and consider anew the scope of the previous decree and injunction.” 36 Wn.2d at 673. Bradford therefore does not help the Cartwrights here.

2.2(a)(1) through (13). Only two of the thirteen decisions listed in that rule have any possible application here. Under RAP 2.2(a)(3), a party may appeal as of right "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." RAP 2.2(a)(3). The 4-22-11 order did not "determine" the action,⁷ did not prevent a final judgment, and did not discontinue the action. That order is thus not appealable under RAP 2.2(a)(3).

In addition, RAP 2.2(a)(13) permits an appeal as a matter of right from "[a]ny final order made after judgment that affects a substantial right." RAP 2.2(a)(13); *State v. Richardson*, 177 Wn.2d 351, 302 P.3d 156 (2013). The 4-22-11 order was made after judgment and arguably affects a substantial right, but it was not a "final" order. A final order "terminates the litigation between the parties ... and leaves nothing to be done ..." *Black's Law Dictionary* 630 (6th ed. 1990); *State v. Smith*, 117, Wn.2d 263, 271-72, 814 P.2d 652 (1991). The litigation was not terminated between the parties, and indeed more than ten orders were entered in the case following the 4-22-11 order. See Appendix B.

Similarly, except for the judgments entered in this case, none of the

⁷The action continued for another eighteen months following this order.

other orders entered following the 4-22-11 order was final.⁸ None of those orders terminated the litigation and left nothing further to be done, until the final judgments were entered. It follows that all of the orders designated in the notices of appeal come within the scope of review in this appeal.⁹

In this regard, it makes sense that the law would not require James to file ten appeals in this case, one for each order that was entered. There is an “indisputable policy against allowing piecemeal appeals.” *Bank of America v. Owens*, ___ Wn. App. ___, ___ P.3d ___ (#70225-4-I decided 10/14/13). See, e.g., *Minehart v. Morning Star Boys Ranch. Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (“Piecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business.”) (quoting *Maybury v. City of Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959)); *Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 253, 884 P.2d 13 (1994) (“The policy served by requiring finality before appeal is to conserve appellate energy and eliminate delays caused by

⁸The order of 4-12-12 (CP 1670-71) required the parties to propose a third independent geotechnical engineer who would advise the trial court regarding three questions. The order filed on 7-2--12 deferred ruling on a motion pending receipt of Mr. Merriman’s report (CP 1894-95). James moved for reconsideration of the order dated 9-7-12 (CP 2023-25), which was granted in an order dated 10-17-12 (CP 2042-44).

⁹James is not appealing the 2009 Permanent Injunction, as suggested by the Cartwrights (RB at 27).

interlocutory appeals.").¹⁰

Moreover, the provisions of RAP 2.2(d) make it clear that a party does not automatically lose the right to appellate review of either "appealable orders" or partial "final judgments" by failing to file a notice of appeal within 30 days. Indeed, in this particular the Rules of Appellate Procedure were specifically designed to eliminate "a trap for the unwary" which existed under the prior rules "in that a failure to appeal an appealable order could prevent its review upon appeal from a final judgment." *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 134, 750 P.2d 1257, 756 P.2d 142 (1988). "RAP 2.4(b) solved the problem by including prior appealable orders within the scope of review." *Id.* See, *Fox, supra*, 115 Wn.2d at 505.¹¹

Furthermore, a claim of error may be raised for the first time on

¹⁰In *Fox v. Sunmaster Products*, 115 Wn.2d 498, 505, 798 P.2d 808 (1990) the court concluded that requiring immediate appeal from a partial final judgment, even one appealable under RAP 2.2(d), "would simply encourage multiple and perhaps unnecessary appeals in multiparty and multiclaim cases." 115 Wn.2d at 505.

¹¹Under RAP 2.4(b), an appellate court will review an order or ruling "not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review." *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 105 Wn. App. 813, 819, 21 P.3d 1157 (2001), *modified on other grounds*, 146 Wn.2d 370, 46 P.3d 789 (2002).

appeal if it is a “manifest” error affecting a constitutional right. RAP 2.5(a)(3); *State v. Boss*, 144 Wn. App. 878, 891-92, 184 P.3d 1264 (2008).

The constitutional errors are the deprivation of James’s right to a jury trial on the lateral support claim and a denial of due process. As explained in Section E herein, these are manifest errors of constitutional dimensions, and they were prejudicial. “The right to a jury trial is a valuable constitutional right, and its waiver must be strictly construed.” *Wilson v. Horsley*, 137 Wn.2d 500, 511, 974 P.2d 316 (1999).

It follows that James may have reviewed in this appeal all the orders beginning with the one decided 4-22-11 (CP 1001-03).

2. The Trial Court Lacked Jurisdiction to Enter Unrelated Orders Regarding the James Rockery.

“Jurisdiction” is “a word of many, too many, meanings.” *Rockwell International Corp. v. U.S.*, 49 U.S. 457, 467, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed2d 210 (1995)). Generally speaking, jurisdiction is the power of a court to hear and determine a case. *Marriage of Buecking*, 174 Wn.2d 131, 272 P3d 840 (2013); *State v. Posey*, 174 Wn.2d 131, 139, 272 P.3d 840 (2012).

Washington courts, however, “have been inconsistent in their understanding and application of jurisdiction” and the courts’ view of the

elements of jurisdiction has been “evolving.” *Buecking, supra*, 174 Wn.2d. There has been confusion in terminology even in recent cases coming from this Court. *MHM & F, LLC v. Pryor*, 168 Wn. App. 451, 277 P.3d 62 (2012) (pointing out confusing terminology).

As interpreted by this Court, subject matter jurisdiction refers to a court's ability to entertain a type of case, not to the court's authority to enter an order in a particular case. *See State v. ZDI Gaming, Inc.*, 173 Wn.2d 608, 618, 268 P.3d 929 (2012) (“[i]f the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction” (*internal quotation marks omitted*) (quoting *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994))).

The trial court here had subject matter jurisdiction in the sense mentioned above: it had the constitutional authority to hear the Cartwrights' lateral support claim. Washington superior courts have broad constitutionally based jurisdictional authority. *Orwick v. City of Seattle*, 103 Wn.2d 249, 251, 692 P.2d 793 (1984). Nevertheless, that authority was not properly invoked, because the trial court had specifically “retain[ed] jurisdiction “for the sole purpose of reviewing, as necessary, whether or not James is complying with this Permanent Injunction” (CP 720, ¶ 6). The trial court therefore had limited authority to deal with further issues in the case. When the

Cartwrights asked the trial court to grant relief on their claim of interference of lateral support for their pool, they were going beyond the trial court's retained authority to hear the claim. It was manifest error for the trial court to address the lateral support issue without affording James the opportunity to confine the Cartwrights' claims to pleadings which could be tested and controverted, as in a normal civil case. The error was not harmless, as it proliferated eighteen months of litigation regarding the rockery and questions raised by the trial court and addressed to an independent geotechnical expert apart from any anchoring in fixed claims which could be evaluated.

The resulting unfairness is amplified by the wording of the Permanent Injunction. Parties should have a right to rely on the wording of court decrees, particularly mandatory injunctions, which may invoke the contempt power. Here the trial court used the term "jurisdiction" with an express limitation on the purpose for which that jurisdiction was retained. Yet the trial court did not use the word "jurisdiction" in the sense of class or type of case the court had the power to hear; rather the word "jurisdiction" in the Permanent Injunction, in light of the current evolving judicial interpretation of that term, means the trial court's power to enter a decision in the particular case. Either way, the trial court's entering an order requiring James to return the rockery to its prior condition, when that order had nothing to do with the enforcement of the Permanent Injunction, exceeded the "jurisdiction," or

certainly the retained power of the trial court to decide further issues in the case. See, *Mader v. Health Care Authority*, 109 Wn. App. 904, 924, 37 P.3d 1244 (2002), *remanded on other grounds*, 149 Wn.2d 458 (2003) (trial court acted “beyond its authority” by retaining jurisdiction to determine the eligibility for benefits of college instructors not before the Authority).

The Cartwrights claim that the trial court had the equitable power to grant relief on the Cartwrights’ lateral support claim (RB at 31). While the trial court does undoubtedly have the equitable power to enforce the injunction already issued, the Cartwrights cite no authority establishing the sweeping claim that when a trial court retains jurisdiction solely to enforce an injunction, the trial court nevertheless can exercise broad equitable power regarding a matter outside the injunction, as the lateral support claim was here.¹²

In addition, the Cartwrights mischaracterize the record when they assert that the court found that James “continued to damage the Wright/Cartwright property by . . . removing the rockery that provided some measure of slope stability to their property so that he could build more wood structures to support more bamboo planting along another

¹²Nor can the new matter be reasonably construed to be a *modification* of the injunction if the new matter relates to new claims, new issues and new evidentiary proof, and not to the underlying injunction supported by evidence at trial (RB 37). .

stretch of the parties' shared boundary. (CP 1001-02)" (RB at 33). That portion of the record referred to, when it refers to the rockery at all, simply states that "James removed portions of the rockery, which provides lateral support for the Cartwright pool, and failed to return it to its prior condition" (CP 1002, ¶ 2.5, 4-22-11 Order). There is no substantial evidence to support the Cartwrights' statement.¹³

E. The Trial Court Erred in Considering the Cartwrights' Claims Regarding the Alleged Lack of Lateral Support for Their Pool and in Striking the Declaration of Jennifer James (RB 37-39).

1. Ms. Wright's Hearsay, Vague and Conclusory Declaration in Support of an Order Requiring James to Return the Rockery to its Prior Condition Was Inadmissible (AB at 41).

The sole evidentiary basis for the trial court's ordering James to return the rockery to its prior condition were three sentences in Ms. Wright's declaration. The Cartwrights do not dispute that this testimony was conclusory and vague; they argue only that it was not

¹³The Cartwrights also assert that "[u]nder the pretense of removing bamboo, James removed survey markers between the parties' property and removed portions of the rockery that marked this sloping boundary. (CP 1003; CP 1660) James does not deny it" (RB at 35). James most certainly denies this assertion, as it is not contained in the record cited. CP 1003, page 3 of the 4-22-11 Order, lists various orders James is to comply with. It makes no assertions about James's conduct. CP 1660 is part of the declaration of Ms. Wright dated 3-29-12. It consists of conclusory allegations.

hearsay, based on ER 804(b)(1).¹⁴ This argument is without merit. ER 804(b)(1) does not apply on its face, because (1) there is no evidence that Mr. Friedman, the witness, was unavailable, as required by ER 804(b)(1); (2) Mr. Friedman's testimony was not given as a witness, since what Ms. Wright provided was an out-of-court rendition of what she thought Mr. Friedman's testimony was (this is the hearsay); and (3) James did not have an opportunity and similar motive to develop Mr. Friedman's testimony either at trial or at his deposition, because lateral support, if any, provided by the rockery was not an issue raised in the pleadings or at trial.¹⁵

¹⁴ER 804(b)(1) provides that "former testimony" is not excluded by the hearsay rule *if the declarant is unavailable as a witness*" as follows: "*Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination*" [italics added].

¹⁵The Cartwrights argue that the trial court found in 2009 "that the boundary line containing the rockery was designed 'to provide the pool with lateral support'" (CP 683-84). (RB 38-39). This is completely misleading. First, a boundary line, a thin imaginary line marking the boundary between two properties, cannot "contain" the rocks and boulders alleged by the Cartwrights to have been removed from the rockery. The trial court also did not "find" that either the boundary line or the rockery was "designed" to provide lateral support. What the trial court found following trial in 2009 was that Mr. Friedman, the former owner, "directed the surveyor to set the boundary line so that it ran in a semi-circular fashion around the in-ground swimming pool on Friedman's property, far enough away from the pool so as to provide the pool with lateral support" (CP 683-84, ¶ 11). There is no

The trial court also made an evidentiary error in *sua sponte* striking the declaration of Jennifer James (CP 1670). The Cartwrights try to claim it was not error (RB 37), but Ms. James made the following statement, for example in her declaration: “There are no structures and there are no plantings that violate the courts [sic] 12' height requirement. The rockery is substantially restored to its previous condition” (CP 1516, ¶ 49). This statement is important, as it contradicts the Cartwrights’ assertions that James did not properly restore the rockery.

Ms. James also comments on a photograph of some rocks submitted by Ms. Wright and states that Ms. Wright’s statements are false, and that “[n]o significant rocks were moved at all”(CP 1515, ¶ 47).

Ms. James also commented with respect to paragraph 4 of Ms. Wright’s March 7th declaration that “all plantings are below 11' in the area noted as to be controlled in the court order (photo 14)” (CP 1514, ¶ 41). This is a factual statement and is admissible.¹⁶ A “trial court commits

mention of a *rockery* in the trial court’s finding referred to.

¹⁶Ms. James also stated: “None of the ropes, strings, etc. photographed by Ms. Wright were supports of any kind. The photos we have been given by Wright-Cartwright are not dated, and the one with the unpainted planter box must be a year or so old, as that structure has long been removed (photo 23, 24, 25). There are no wooden planter boxes at all, even though Mr. Greenforest refers to them. There is nothing holding up anything. There is a one-foot high by 4-5' green board in one area of the garden which I can remove (photo 23). There is no support for the remaining bamboo (photo 25,

reversible error only when it considers inadmissible evidence and the defendant can show that the verdict is not supported by sufficient admissible evidence, or that the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made.” *State v. Read*, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002).

F. James Was Denied the Right to Due Process and the Right to Trial by Jury.

The Cartwrights argue that James’s constitutional right to a jury trial was not violated, because one is not entitled to a jury in civil contempt proceedings (RB 39). This argument fails for the simple reason that the rockery was not mentioned in the Permanent Injunction, nor litigated at trial, and therefore the trial court’s order requiring James to return the rockery to its “prior condition” (CP 1003)¹⁷ following a post-trial motion was not a valid part of any

26). We carefully searched the entire property March 25, 2012. There are no new retaining walls, the dirt and rock slope has been carefully replanted after the bamboo was removed and all rocks are in place (photos 1,2,3,4)” (CP 1512, ¶ 35). Ms. James’s declaration also goes through Ms. Wright’s March 7th declaration paragraph by paragraph and comments on the accuracy of the paragraphs (CP 1512, 1513, 1514, 1515, and 1516).

¹⁷It is very unclear what that “prior condition” was, or when it was established, as the Cartwrights’ evidentiary support for the order was meager and conclusory at best. It is also unclear whose *rockery* is being referred to, as the Cartwrights occasionally claim that *their* rockery was dismantled. Evidently, the order was intended to require James to restore the lateral support for the Cartwrights’ pool, which support was never absent. Accordingly, James complied with the 4-22-11 order, as whatever action he

contempt proceeding.¹⁸ It was a totally separate action, regarding a completely different issue.

In this regard, "loss of lateral support" is defined generally as a neighbor's actions that cause a party's property to slide or to slip down a slope or bank. See, e.g., *State v. Williams*, 12 Wn.2d 1, 9, 120 P.2d 496 (1941). The Washington Constitution provides that "no private property shall be taken or damaged for a public or private use without just compensation having been first made." Constit., art. 16, § 1. This provision has been construed to provide a cause of action for interference with lateral support. *Muskatell v. City of Seattle*, 10 Wn.2d 221, 232-33, 116 P.2d 363 (1941). Jury trials are commonly provided in these cases. See, e.g., *Muskatell, supra*, 10 Wn.2d at 228; *Snyder v. Roberts*, 45 Wn.2d 865, 847, 278 P.2d 348 (1955).

Furthermore, cases involving damage claims for interference with lateral support meet the criteria of claims for which a jury was available at common law, since the right of recovery, as noted above, derives from the Washington Constitution. See, *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 646-49, 771 P.2d 711 (1989); *Brown v.*

took resulted in what the court apparently wanted: lateral support for the Cartwrights' pool.

¹⁸Also, an adjudication of contempt may or may not be a final judgment, depending on the circumstances. 1 Washington App. Deskbook 6-7. See 33 A.L.R.3d 448 (1970).

Safeway Stores, Inc., 94 Wn.2d 359, 365, 368, 617 P.2d 704 (1980) (jury trial available in legal action).

The Cartwrights' claim that James was undermining lateral support for their pool was thus a claim for which James could have requested a jury to decide. Because the Cartwrights improperly tagged that claim along with other, unrelated claims which did come within the scope of the Permanent Injunction, they deprived James of his constitutionally guaranteed right to a jury trial on the lateral support claim.¹⁹ Because the Cartwrights impermissibly injected their legal claim regarding lateral support into a post-trial contempt proceeding, they should not be able to argue that the equitable contempt proceeding does not permit a jury trial.

The Cartwrights argue that due process requires only notice and an opportunity to present one's position before a competent tribunal, and James had due process "in spades" (RB at 40). The cases cited by the Cartwrights for this argument, *Rivers v. Washington state Conference of Mason Contractors* 145 Wn.2d 674, 697, 41 P.3d 1175 (2002) and *Hanson v. Shim*, 87 Wn. App. 538, 943 P.2d 322 (1997),

¹⁹The Cartwrights' claim that James removed a survey marker was also not properly within the scope of the Permanent Injunction, as the survey markers were not mentioned in the Permanent Injunction. James simply had the markers replaced and does not appeal here the impropriety of the trial court's ruling on survey markers (CP 1003, ¶ 3.9).

rev. denied, 134 Wn.2d 1017 (1998) involved claims that the court's not permitting oral argument deprived the litigants of due process and are thus distinguishable. There was no issue of improper notice or procedural irregularities in those cases.

Here there is a glaring issue of improper notice and procedural irregularities affecting James's substantial rights. Based on the trial court's order that James return the rockery to its "prior condition" in the context of its providing lateral support for the Cartwrights' pool (CP 1003, ¶ 3.10) James would naturally assume that the "prior condition" related to lateral support, and all he had to do was provide lateral support for the Cartwrights' pool. It is incontestable at this point that the rockery never provided lateral support for the Cartwrights' pool, and the trial court specifically found that there was no causal connection between James's post-trial rockery work and cracks around the pool (CP 2043, ¶ 2). Yet the Cartwrights kept running with the rockery claim and asserted that James had to stop the raveling on the Cartwrights' slope, and even later argued that James had to pay to permanently stabilize the Cartwrights' slope. The trial court erroneously adopted this approach. This serial shifting of claims is not reasonable or proper notice of the claim James ultimately had to defend, especially when conflicting factual averments are

decided essentially on the basis of declarations on the motion calendar, resulting in an attorney fee award exceeding \$50,000, when James had a right to have his defenses considered by a jury. “Due process of law guarantees no particular form of procedure; it protects substantial rights.” *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) (quoting *NLRB v. Mackay Co.*, 304 U.S. 333, 351, 58 S.Ct. 904, 82 L.Ed. 1381 (1938)) [internal quotes omitted]. *State v. Hotrum*, 120 Wn. App. 681, 684, 87 P.3d 766 (2004).

G. The Trial Court’s Attorney Fee Award Was Improper.

The Cartwrights assert that the trial court properly ordered James to pay attorney’s fees for the Cartwrights’ “securing stabilization of the slope.” (CP 2024, 2535) (RB at 45). What is meant is the *permanent* stabilization of the slope. Yet the stabilization of the slope was beyond the power the trial court retained to deal with post-trial issues, and the Cartwrights have not cited to the trial court or this court any legal principle which requires a neighbor to pay to *permanently* stabilize the slope of another neighbor, absent some activity which proximately caused de-stabilization.

Regardless of whether the trial court took an active role in reviewing the Cartwrights’ fee request and was familiar with the work

of their experts (RB 46-48), the Cartwrights' counsel's time records show that the overwhelming majority of attorney's fees was generated in litigating over rockery issues, which were instigated by the Cartwrights on a false premise. Therefore, the Cartwrights, under the very authority they cite (RB 46) should be responsible for the fees incurred. The Cartwrights do not dispute that segregation of the fees would show that.

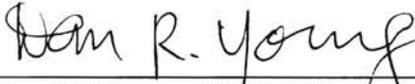
With respect to block billing, lumping five dissimilar activities into a total does not give the reviewing court an adequate basis to determine the reasonableness of the fees. There is a reason the federal courts have adopted the approach of more transparency in fees. It is not exhaustive or too minute to list the different activities one has engaged in during the day on a case and how long each one took (RB 48).

III. CONCLUSION

For the reasons set forth above, this Court should reverse the attorney fee award in favor of the Cartwrights.

RESPECTFULLY SUBMITTED: January 6, 2014.

Law Offices of Dan R. Young

By 
Dan R. Young, WSBA # 12020
Attorney for Appellant James

APPENDIX A

1. No Citation to the Record.

The following statements in the Respondents' Brief are argumentative, contain no citation to the record and should therefore be stricken/disregarded:

"Because of the configuration of the two lots, a substantial portion of respondents' view of Puget Sound is over James' lot." RB at 6.

"James escalated his harassment against Teresa Wright." RB at 8.

"James' campaign of terror forced Teresa and Tom, at one point to place their home on the market." RB at 8.

"James' harassment was comprehensive and it was relentless." RB at 9.

"In 2006, James turned to the courts as a means to harass his neighbors." RB at 9.

"Instead, and continuing the pattern found by the trial court, James sought new ways to circumvent both the letter and intent of the trial court's orders and injunction." RB at 14.

"Wright and Cartwright spent two years, from 2009 through early 2011, trying to avoid additional litigation, attempting to negotiate with James to comply with the trial court's Permanent Injunction." RB at 14.

When those efforts failed, Wright and Cartwright were forced to hire counsel, re-hire bamboo experts, and seek relief from James' post-trial plantings and his systematic removal of *their* rockery in the course

of building additional spite structures to support additional bamboo and other plantings. (CP 1290-1480).” [italics added.]¹

“James did not appeal the trial court’s Contempt Order. But he did nothing to prevent the continued invasion of bamboo on to the respondents’ property.” RB at 17

“Respondents again attempted to address the bamboo, substitute planting and rockery issues without court involvement.” RB at 18.

“James ignored respondents’ request. He filed a “Motion for Entry on Land and Removal of Bamboo” on January 14, 2012 (CP 1188), requiring Wright and Cartwright to respond through counsel and to retain a bamboo expert (Mr. Magnotti). ” RB at 18.

“James did not appeal the March 27, 2012 Order. Though he refused to hire Mr. Magnotti as directed by the court, he finally removed the bamboo, but still refused to repair his rockery and or remove substitute plantings as required by the Contempt Order.” RB at 19.

“James had stilted the analysis by ensuring that Mr. Merriman inspected the rockery after James had completed several days of remediation work.” RB at 21.

2. Citation for only part of the Statement

In the following cases, there is a citation which supports part of the statement, but not all the statement, usually the argumentative part, which should also be stricken/disregarded:

¹A reference in the record to CP 1290 - 1480, a span of 190 pages, is not a specific enough citation to the record.

“The court was aware that James was more than willing to ignore and find creative ways to circumvent the court’s order and therefore entered a Permanent Injunction prohibiting James from maintaining any ‘structure’ that could support bamboo at a height greater than 12 feet. CP 696-99, 718-21.” RB at 12. The first part of the sentence is pure argument.

“Reflecting its concern that James was unlikely to comply with its orders, the trial court repeatedly made express its intent to retain jurisdiction to continue to enforce its orders . . . (CP 720).” RB at 13. This again is pure argument.

“He constructed additional spite structures to support over 30 additional trees and shrubs that he intended to substitute for the view-blocking bamboo he had been ordered to control or remove and that violated or would quickly grow to violate the court’s ban on vegetation over 12 feet in height, and he refused to return the rockery to its prior condition (CP 1363-73, 1644-64).” RB at 17-18. The declarations of Jennifer James contradict these assertions, which are based solely on the argumentative declarations of Ms. Wright.

“After another month of opposition to the motion to confirm Mr. Merriman’s findings, the trial court issued an order on June 28, 2012, again asking Mr. Merriman, as the court’s advisor, to answer specific questions about the impact of James’ post-2009 rockery disassembly and wooden retaining wall work, the impact of James’ subsequent remediation to address the court’s previous requirements, and the cost of any

additional remediation work Mr. Merriman recommended. (CP 1894-95)” RB at 23. This mischaracterizes the scope of the three questions asked of the independent geotechnical engineer. James never opposed the motion to confirm Mr. Merriman’s findings and his counsel specifically stated he had no objection to the confirmation (CP 1823).

“Mr. Merriman visited the newly-configured and partially stabilized rockery on May 2 and issued his conclusions via an email report as specified in his engagement letter that same day. (CP 17-1-02, 1906-07)” RB at 21. The rockery was stabilized; it just was not *permanently* stabilized.

First, he found that James had “remov[ed] subjacent support of some of the soils on the [respondents’] property as a result of removing some of the rockery rocks” (CP 1701, 1906)” RB at 21. Mr. Merriman never found that James had removed any subjacent support. Mr. Merriman’s report is rephrased from the passive voice to the active voice to distort what was actually written in the report.

“James and his counsel again refused to respond, but rushed headlong into incomplete remediation. (CP 1720-21)” RB at 22. James performed only one of the items mentioned by Mr. Merriman because the Cartwrights wanted the “cadillac” treatment—a \$5,000 fix when a \$500 was perfectly adequate.

The long paragraph at the bottom of page 22 to the top of page 23 of Respondents’ Brief is argumentative and based primarily on the argumentative declaration dated 6-6-12 of Ms. Wright (CP 1716-1761) and

the declaration of her counsel dated the same day (CP 1683-1709). The Cartwrights assert that Mr. Merriman ‘found that James had ‘remov[ed] subjacent support of some of the soils on the [respondents]’ property.’ (CP 1701, 1906).” (RB 21). Mr. Merriman’s report does not state that *James* removed subjacent support of some of the soils on the Cartwright property (CP 1905). Rather, Mr. Merriman states that “the reconfiguration of the James rockery performed by or on behalf of Mr. James has not destabilized the Wright-Cartwright property in any way” (CP 1907).

“A construction crew appeared unannounced on May 23, 2012 and without any attempt to coordinate work on rockery that exists on both parties’ property. (CP 1720-21) They proceeded to remove the rotting wooden timbers James had installed from February to July of 2010 after removing a significant quantity of rocks and soil from both his and respondents’ portions of the rockery to shore up the remaining rockery and form the northern side of the bamboo planting box he built in 2010. (CP 1720-21) Admitting the need to fulfill Mr. Merriman’s second requirement, the crew replaced the timber wall with a concrete block wall that was roughly consistent with the wall suggested by Mr. Merriman and engineered by James’ geotechnical expert. . . Unfortunately, more soil collapsed on the upper slope and James failed to address Mr. Merriman’s first requirement to stabilize the raveling occurring on that upper slope of the rockery. (CP 1720-2, 1755-56).” (RB 22-23). These assertions are taken entirely from the declarations of Ms. Wright and are contradicted

by the declarations of the worker crew who did the work and Ms. James (CP 1881-82, 1883-84, 1885-86, 1887-89, 1890-93, 1841-60). The trial court never made an explicit ruling about which version it accepted. It is interesting to note that while the Cartwrights fault James for doing work without coordinating it, it is apparent that there was no cooperation between these neighbors. Since the work crew stated that they at all times stayed on the James side of the property line, there would be no reason to try to attempt any kind of coordination.

3. Incorrect Citations.

“Mr. Friedman directed that the boundary line between the two lots be set in a semi-circular fashion around the pool, at the upper portion of a rockery supporting a slope down to James’ driveway, to preserve the lateral support the surrounding property provided to the pool. (CP 683-84, 2007-11; 3/4/09 RP 139-40).” There is no admissible evidence that the rockery supported the slope. The rockery was an Alpine rockery, which sat on top of the dirt. The *ground* around the pool supported the pool.

“The court also ordered James to replace the rockery, which it had previously determined provides lateral support for the Cartwright pool, and return it to its prior condition. (CP 1003).” RB at 17. There is no admissible evidence in the record that the *rockery* ever provided lateral support for the Cartwright pool. The statement at CP 1003 is based entirely on the hearsay and conclusory statement (hence inadmissible) of Ms. Wright.

“They consulted again with the expert arborist (Mr. Greenforest) whose testimony was accepted by the trial court at trial in 2009 and again when issuing its 2011 Contempt Order, and a geotechnical engineer (Mr. Roberts) to confirm how the rockery, particularly as it was modified with a wood planter box or retaining wall, must be properly restored. (CP 1363-73).” RB at 18. This statement implies that there was something to “restore,” without stating what the “restoration” consisted of. These statements are not accurate.

“They proceeded to remove the rotting wooden timbers James had installed from February to July of 2010 after removing a significant quantity of rocks and soil from both his and respondents’ portions of the rockery to shore up the remaining rockery and form the northern side of the bamboo planting box he built in 2010. (CP 1720-21)”. RB at 22-23. This statement is contradicted by the work crew who actually did the work on the property. If the work crew were one inch over the line, it is highly likely that Ms. Wright would have called the police.

The Cartwrights argue “James completed significant remediation work on the rockery, and in the process, he both admitted its unstable condition and sought to minimize its defects before the independent expert could inspect it. (CP 1711-12, 1718).” RB at 21. This is incorrect. James was not ordered to refrain from working on his property. He was ordered to return it to its prior condition. If he did that, Cartwrights should not complain. But Ms. James explained that she did not do any work in anticipation of Mr. Merriman’s arrival.

She wanted to make sure she was complying with the court's order. (CP 1841-45).

**APPENDIX B: Time Line of Orders Entered in
James v. Cartwright**

5/15/09	Permanent Injunction	CP 718 - 722
4/22/11	Order on Contempt/Clarification-- James in contempt re preventing spread of bamboo, erecting structures; James to comply with Favero's recommendations or remove bamboo within 3' of property line, remove structures used to support bamboo to grow higher than 12', remove light on roof, remove driveway lights, pay cost of removing survey markers, replace rockery, pay attorney's fees, pay Greenforest's costs	CP 1001 - 03
7/7/11	Judgment for Attorney's Fees, Costs and Sanctions For 4-22-11 Contempt Order (as of 6-15-11 James Not comply with 12' Limitation on Bamboo-- Sanctions addressed in Separate Order) (Not appealed)	CP 1128 - 29
2/24/12	Order Denying Motion for Entry Upon Cartwrights' Land	CP 1286 - 87
3/27/12	Order to Remove Bamboo (Not appealed)	CP 1582 - 84
4/12/12	Order re Enforcement of Permanent Injunction--Geotech to be appointed to answer 3 questions; clarification re height limitations	CP 1670 - 71
7/2/12	Order on Def's Motion for Order Confirming Expert's Report--Mr. Merriman is to answer 3 questions	CP 1894 - 95

9/7/12	Order confirming the final report of Mr. Merriman, ordering James to complete 2 nd remediation step (replacement of timber wall with concrete block wall) and ordering attorney's fees & costs with briefing schedule	CP 2023-25
9/28/12	Order re Reconsideration—permitting James to file a response	CP 2258
10/17/12	Order granting reconsideration & clarifying 9-7-12 order requiring James to complete “final remediation” of top of slope	CP 2232-33
11/21/12	Order granting reconsideration	CP 2360-61
12/6/12	FOF/COL, Order granting Defendant's attorney's fees	CP 2432 -41
12/20/12	Judgment [Summary]	CP 2481 - 82
1/10/13	FOF/COL & Order Granting Defendants' Fees	CP 2503 - 06
2/1/13	Judgment Updated Summary	CP 2547 - 49
3/13/13	Judgment [Summary]	CP 2561 - 62

DECLARATION OF SERVICE

I, Dan R. Young, declare to be true under penalty of perjury under the laws of the State of Washington as follows:

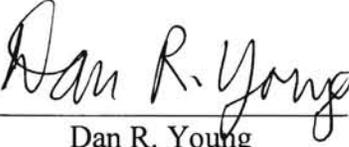
1. I am an attorney representing the appellant Devon James in this action.
2. On January 6, 2014, I sent by the USPS, first class mail with pre-paid postage affixed,

a copy of the foregoing Reply Brief of Appellant to the following:

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Dated: January 6, 2014, at Seattle, Washington.



Dan R. Young

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON