

7

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

2016 OCT 21 PM 2:59

Court of Appeals No. 74328-7-I

**COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I**

LARRY L. PETERSON and SUSAN PETERSON, husband and wife
Appellants

v.

GREGG SMITH and KELLY SMITH, husband and wife
Respondents

REPLY BRIEF OF APPELLANTS

Paul A. Spencer, WSBA #19511
Gerald M. Hahn, WSBA #158
Oseran Hahn, P.S.
10900 NE Fourth Street #1430
Bellevue WA 98004
425-455-3900
pspencer@ohswlaw.com
Attorneys for Appellants

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT.....2

 A. Law of the Case supports reversal, not affirmance.....2

 B. By not addressing the issues on appeal, the Smiths concede the Order of Removal is indefensibly erroneous.4

 C. The Petersons acted diligently and in good faith to cooperate with the Smiths regarding replacement of the pilings supporting the Peterson dock canopy.....12

 D. The trial court made an ad hoc decision based on personal factors rather than Washington rule of law.....15

 E. This Court should deny the Smiths’ request for attorney’s fees.19

 F. The Petersons move to strike the Smiths’ improper references to matters outside the record.....21

III. CONCLUSION.....23

TABLE OF AUTHORITIES

CASES:	PAGES
<i>Advocates for Responsible Development v. Western Wash. Growth Management Hearings Bd.</i> , 170 Wn.2d 577, 245 P.3d 764 (2010)	2, 20
<i>Alderwood Associates v. Wash. Environmental Council</i> ,.....	17
96 Wn.2d 230, 635 P.2d 108 (1981)	
<i>Bierce v. Grubbs</i> , 84 Wn. App. 640, 929 P.2d 1142 (1997).....	21
<i>Braut v. Tarabochia</i> , 104 Wn. App. 728, 17 P.3d 1248 (2001)	21
<i>Bulaich v. AT & T Information Systems</i> , 113 Wn.2d 254,	13
778 P.2d 1031 (1989)	
<i>Canal Station North Condo. Assoc. v. Ballard Leary Phase II, LP</i> ,.....	4
179 Wn. App. 289, 322 P.3d 1229 (2013)	
<i>City of Olympia v. Palzer</i> , 107 Wn.2d 225, 728 P.2d 135 (1986)	5
<i>Crown Controls, Inc. v. Smiley</i> , 110 Wn.2d 695,	19
756 P.2d 717 (1988)	
<i>Edwards v. Le Duc</i> , 157 Wn. App. 455,	21
238 P.3d 1187 (2010)	
<i>Ensley v. Mollmann</i> , 155 Wn. App. 744, 230 P.3d 599 (2010)	21
<i>Gebbie v. Olson</i> , 65 Wn. App. 533, 828 P.2d 1170 (1992)	17
<i>Goldmark v. McKenna</i> , 172 Wn.2d 568, 259 P.3d 1095 (2011)	20
<i>Ha v. Signal Electric, Inc.</i> , 182 Wn. App. 436,	21, 22
332 P.3d 991 (2014), <i>rev. den.</i> 182 Wn.2d 1006 (2015)	
<i>House v. Erwin</i> , 81 Wn.2d 345, 501 P.2d 1221 (1972),	18
<i>reversed on rehearing on other grnds</i> , 83 Wn.2d 898, 524 P.2d 911 (1974)	

<i>Loc Thien Truong v. Allstate Property and Cas. Ins. Co.</i> ,.....	22
151 Wn. App. 195, 211 P.3d 430 (2009)	
<i>Lodis v. Corbis Holdings, Inc.</i> , 192 Wn. App. 30,	2
366 P.3d 1246 (2015), <i>rev. den.</i> , 185 Wn.2d 1038 (2016)	
<i>Lowe v. Double L Properties, Inc.</i> , 105 Wn. App. 888,	9
20 P.3d 500 (2001).	
<i>Nattah v. Bush</i> , 770 F.Supp.2d 193 (D.D.C. 2011).....	2
<i>Peyton Bldg., LLC v. Niko's Gourmet, Inc.</i> , 180 Wn. App. 674,	4
323 P.3d 629 (2014)	
<i>Presidential Estates Apt. Assoc. v. Barrett</i> , 129 Wn.2d 320,	10
917 P.2d 100 (1996)	
<i>Proctor v. Huntington</i> , 169 Wn.2d 497,	4, 10, 11
238 P.3d 1117 (2010)	
<i>Protect the Peninsula's Future v. City of Port Angeles</i> ,	20
175 Wn. App. 201, 304 P.3d 914 (2013)	
<i>Pub. Hosp. Dist. No. 1 of King County v. University of</i>	22
<i>Washington</i> , 182 Wn. App. 34, 327 P.3d 1281, <i>rev. den.</i> ,	
337 P.3d 326 (2014)	
<i>San Juan County v. No New Gas Tax</i> , 160 Wn.2d 141,	17
157 P.3d 831 (2007)	
<i>Satomi Owners Ass'n v. Satomi, LLC</i> , 167 Wn.2d 781,	4
225 P.3d 213 (2009)	
<i>Schreiner v. City of Spokane</i> , 74 Wn. App. 617, 874 P.2d 883	20
(1994)	
<i>Smith v. Peterson</i> , 2012 WL 432246 (Feb. 12, 2012).....	2, 5, 8
<i>State v. Quintero Morelos</i> , 133 Wn. App. 591, 137 P.3d 114	22
(2006)	

<i>State v. Ray</i> , 130 Wn.2d 673, 926 P.2d 904 (1996).....	19
<i>State v. Stalker</i> , 152 Wn. App. 805, 219 P.3d 722 (2009).....	17, 18
<i>Tiffany Family Trust Corp. v. City of Kent</i> , 155 Wn.2d 225, 119 P.3d 325 (2005)	20

Rules

RAP 12.2.....	2
RAP 2.2.....	19
RAP 9.11.....	22

I. INTRODUCTION

The crux of this appeal comes down to this: Smiths claim “any efforts by the Petersons to alter or deal with the pilings was subject to the Smith’s permission and agreement.” Resp’t Brief at 10. They do not cite to the record or specific language in Footnote 10 that requires this. As argued in Petersons’ opening brief, the Smiths’ contention is contrary to the trial court’s expressly stated decision in *Smith I* when she refused to order removal of the encroaching dock canopy.

So I don’t mind the Petersons continuing to make use of the pilings in the way that they have, but that I think does not give them ownership of the property going forward. They will have use of it, but if they sell it to somebody else, that needs to be explained that it’s really somebody else’s property... **[B]ut if the Petersons want to repair or replace the pilings, I think...that they should be able to do that. There probably should be some notice to the Smiths it’s going to happen. It needs to be prompt, needs to be effective, and then that’s it.**

CP 132-134 (May 27, 2010 VRP at 36-38) (bold added).

Because the exact same issue—the Petersons’ right to repair or replace the Smith pilings to continue to support the Peterson dock canopy—was exhaustively litigated in *Smith I* and unquestionably determined in favor of the Petersons, the trial court erred in denying the Petersons’ motion to repair the pilings to keep the canopy in place, and instead granting the Smiths’ motion for removal and total extinguishment of the Petersons’ vested rights.

II. ARGUMENT

A. Law of the Case supports reversal, not affirmance.

Smiths argue Law of the Case without analysis. Footnote 10, quoted verbatim by the Smiths, is the appellate court's summary or paraphrasing of the trial court's ruling on "the legal relationship...imposed on the parties" regarding the canopy and pilings. *Smith v. Peterson*, 2012 WL 432246, *7 n. 10 (Feb. 12, 2012). The appeals court did not purport to add to or diminish the rights or duties of the parties in any way contrary or supplemental to what the trial court had already done. No cites to the record are found in Footnote 10.

"Under the law of the case doctrine, [the trial court] may not revisit any issues that it has previously resolved, nor may it re-evaluate the merits of any disputes settled by the [appellate court] on appeal." *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 58, 366 P.3d 1246 (2015), *rev. den.*, 185 Wn.2d 1038 (2016), *quoting Nattah v. Bush*, 770 F.Supp.2d 193, 201 (D.D.C. 2011); RAP 12.2 (postjudgment motions may not challenge issues already decided by appellate court).

The law of the case is fixed by the Court of Appeals, specifically Footnote 10. This Court clearly ruled that if the parties could not agree on a piling solution, the Petersons "must devise a different solution" to support the canopy so that it could remain in place, despite the slight encroachment. The canopy is there to stay and is not removable. This Court did not rule the canopy must be *removed* if the parties could not

agree. Affirming the Petersons' right to maintain the canopy in place became the law of the case.

The Smiths are precluded from relitigating the canopy issue anew; the trial court could not retroactively change its 2010 decision. In this appeal, the Smiths are unable to cite anything in the record where the trial court decided the Petersons' right to repair the pilings "was subject to the Smiths permission and agreement." In fact, the record shows the trial court specifically ruled the Petersons' right to repair or replace the pilings was **not** subject to the Smiths' permission and agreement. CP 132-34 (May 27, 2010 VRP at 36-38); CP 467-469 (Feb. 26, 2010 VRP at 34-36). Only "some notice" was required, which is what the Petersons did in 2014-2015. *See* Section II.C, *infra*. Judge Schapira suggested "cooperation" between the parties because the trial court was not in a position to rule on specific plans or proposals regarding the reconstruction of the canopy or pilings because neither party had specific plans to offer at that time. CP 195 (Aug. 13, 2010 VRP at 52).

To fully comply with the trial court's and Footnote 10's "cooperation" condition, and because the City of Bellevue required a court order before either party could remove or modify the canopy and pilings, the Petersons filed their cross-motion to enforce and did not resort to self-help. CP 36 (¶16); CP 329 (Drews email dated Aug. 3, 2015).

B. By not addressing the issues on appeal, the Smiths concede the Order of Removal is indefensibly erroneous.

The Smiths' brief fails to address nearly all the issues presented for review as outlined in the Petersons' opening brief. The Smiths do not address *Proctor v. Huntington*, issue and claim preclusion, law of the case, or violation of easement rights except in a most cursory manner. Instead, the Smiths take the position the appeal is so obviously meritless only 11 citations to the record and 4-5 citations to legal authority are necessary. Nearly four pages of the Smiths' 13-page brief are devoted to large block quotes of proceedings in *Smith I*.

Failing to respond on the merits, the Smiths are conceding they have no arguments to make. See *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 807-08, 225 P.3d 213 (2009) ("significant failing" for respondent to argue without citing authority); *Peyton Bldg., LLC v. Niko's Gourmet, Inc.*, 180 Wn. App. 674, 684, 323 P.3d 629 (2014) (rejecting respondent's argument for lack of adequate, cogent argument and briefing citing supporting legal authority on issues presented for review); *Canal Station North Condo. Assoc. v. Ballard Leary Phase II, LP*, 179 Wn. App. 289, 303, 322 P.3d 1229 (2013) (failure to cite authority is concession that argument lacks merit).

The Smiths spend much of their brief contesting "straw man" matters that are not at issue, arguing in non sequiturs and self-negating contradictions.

The trial court's authority to enforce its orders is not at issue. *See* Resp't Brief at 8. The issue on appeal is whether the trial court correctly enforced the actual orders that emerged from *Smith I*, including Footnote 10 of the Court of Appeals decision, or did the trial court err in revisiting the merits of her original ruling in 2010, retroactively adding terms, conditions, and restrictions that were not stated in *Smith I* when the Petersons were given an easement to maintain their dock canopy despite a slight encroachment on the Smith property.

The Smiths contend: “[T]he canopy resting on the pilings is being allowed solely for the Petersons’ convenience—not as a right.” Resp’t Brief at 8, 10. Of course the canopy was allowed solely for the Petersons’ convenience—the dock it covered was ruled to be the Petersons dock. The courts in *Smith I* dismissed the Smiths attempt to claim that they had rights in the Peterson dock as a co-owner. *See* 2012 WL 432246, * 5-6. The portion of the canopy that slightly encroaches over the Smiths’ shorelands property provides shelter and cover for the north slip of the Peterson dock. It does not affect the use of Smiths’ use of the water or their property.

The Smiths cite no authority or portions of the record to support their claim the canopy was allowed to remain “not as a right.” Resp’t Brief at 8. An easement is a right to use. *E.g., City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986), cited in Petersons’ Opening Brief at 11. In 2010, the trial court ruled it was not going to order the canopy to be removed because it would be “wasteful, destructive, and doesn’t assist anybody.” CP 197 (Aug. 13, 2010 VRP at 54). The judge agreed with

Petersons' counsel that by ruling the canopy could remain in place and the Smiths could not remove or destroy any portion of the encroaching canopy was "in the nature of *an easement*" that included the Petersons' right to repair and maintain the Smith pilings to continue supporting the canopy in place. CP 467-69 (Feb. 26, 2010 VRP at 34-36). More than a mere "convenience," the remedial right going forward described by Judge Schapira at the May 27, 2010 hearing was an easement by any other name:

So I don't mind the Petersons *continuing to make use* of the pilings in the way that they have, but that I think does not give them ownership of the property going forward. *They will have the use of it*, but if they sell it to somebody else, that needs to be explained that it's really somebody else's property.... *I don't want there to be more fights because I didn't say something, but if the Petersons want to repair or replace the pilings, I think...that they should be able to do that. There probably should be some notice to the Smiths it's going to happen. It needs to be prompt, needs to be effective, and then that's it.* ...I'm not worried about 5 or 10 or 20 years from now. I'm not going to worry about that. *But as I say, for now I think that there does need to be a solution to this problem*, because we know that the care of the pilings has been postponed because the Heaths [Smiths' predecessors] were not particularly interested in repairs and the Smiths and the Petersons have been in litigation.

CP 132-34 (May 27, 2010 VRP at 36-38) (italics added). In Footnote 10, this Court similarly described an easement ("The court determined that the Petersons had acquired an easement to use all portions of the moorage slip...").

Contradicting their Reply Brief position, below the Smiths conceded the Petersons have a valuable property "right" in the canopy where it was located and as connected to the Smith pilings. They conceded

the court could order the Smiths to pay compensation to the Petersons for the wastage of that property caused by removal:

[SMITHS' COUNSEL]: Now five years ago it was a waste. If you still find it a waste today, five years later, then maybe they compensate the Petersons for a portion of removal of that. Or maybe they compensate for the value of that. But it's got to be removed.

VRP (Oct. 26, 2015) at 4. Despite this concession, the trial court disregarded waste and extinguished all property rights of the Petersons without compensation.

Smiths do not refute the cases cited in Peterson's opening brief (Section VI.A at p. 11) that define an easement as a "right to use the land of another." Here, the Smiths concede Petersons had an easement, but claim it was not an "exclusive" easement. Resp't Brief at 2, 9. While technically true, that still does not provide grounds for elimination of the Petersons' dock canopy and extinguishment of their easement rights. *See* Section VI.E of Petersons' Opening Brief, esp. pp. 30-33.

The Smiths argue "when the time came, the Petersons were required to remove the canopy and stop the encroachment." Resp't Brief at 10 n. 13. Footnotes 9 and 10 cannot be interpreted in so strained a manner. What time? No specific time is provided anywhere. The Peterson easement to keep and maintain the canopy was not limited to a certain time or called "temporary" by any court. What language in the Court of Appeals decision said the Petersons were required to "remove the canopy

and stop the encroachment”? No such language is cited by the Smiths.

There is none.

The Smiths argue the Petersons failed on their theories of adverse possession and prescriptive easement. This is also not an issue. Resp’t Brief at 8-9. The Petersons’ claim for adverse possession (ownership) to the underlying shorelands of the Smith property as a result of the presence of the Peterson dock canopy was unsuccessful. It is important to note, however, the trial court decision in *Smith I* was concerned with *ownership*, *i.e.*, legal title. See CP 75 (judgment ¶7 - canopy “*does not affect the ownership* of the shorelands below or the Smith pilings”); see also FF 13 at CP 84; CP 86 (CL ¶7) (“Petersons *have not established a title* by prescriptive easement to the canopy overhang and to the shoreland under it.”). The Court of Appeals was similarly focused on title, *i.e.*, “ownership” was not established by adverse possession. 2012 WL 432246, *7 & n. 9.

Prescription was not the basis for the trial court’s grant of an easement to allow the Peterson dock canopy to remain and the Peterson have “a right to maintain the canopy” so it could serve its canopy function for the benefit of the Petersons. CP 467-69 (Feb. 26, 2010 VRP at 34-36). The basis was to prevent waste, an equitable basis. *Id.*; CP 197 (Aug. 13, 2010 VRP at 54). A judicially imposed easement to allow the canopy to remain—the remedy Judge Schapira granted in 2010 and confirmed in Footnote 10—does not depend on prescription or a grant from the Smiths; it is imposed by a court from “balancing the respective interests to fashion

an appropriate remedy.” *Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888, 894, 20 P.3d 500 (2001).

Five years later when the cross-motions to enforce were brought to the court in 2015, the waste rationale from 2010 remained as viable as it was before, but the court completely abandoned it by overlooking what it had ruled in 2010. Having granted easement rights to the Petersons that did not require the Smiths’ permission or consent (only notice), the trial court had no authority to retroactively restrict, condition or terminate those easement rights. *See, e.g., Lowe*, 105 Wn. App. at 896 (discussed in Section VI.E of Petersons’ Opening Brief).

During the 2010 proceedings, Judge Schapira orally ruled she would not allow the Smiths to prevent the Petersons from rebuilding the pilings to maintain the dock canopy even with the overhang encroachment. CP 133-34 (May 27, 2010 VRP at 37-38); *see* Peterson Opening Brief at 18-20. No “agreement” was necessary because she “didn’t think that the Petersons should be hostage” to the Smiths—the judge ruled the Petersons could repair or replace the pilings without the Smiths’ consent, only notice. CP 133-34. The judge could not have said it any clearer in her contemporaneous clarification at that May 27, 2010 hearing.

The Petersons’ cited this hearing transcript in the 2015 cross-motions, but the judge disregarded it. *See* CP 227-28 (Def. Response in Opp. to Pltff. Motion to Enforce); CP 253, 262-63 (Def. Cross-Motion to Enforce). What Judge Schapira did was go back and change her prior

ruling on the merits. But she did not have authority to expand upon or revisit her prior ruling to adjust the rights of the parties anew. *See* Peterson Opening Brief at 24; *cf.*, *Presidential Estates Apt. Assoc. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996) (trial court cannot “go back, rethink the case, and enter an amended judgment that does not find support in the trial court record”).

Here, the judge made no effort to “clarify” or “interpret”—she extinguished all previously established rights of the Petersons by judicial fiat based on an inflexible rule that “the Smiths were entitled to quiet enjoyment.” VRP 16, 18. This approach was error, in violation of the *Proctor/Arnold* analysis that must be undertaken before an encroaching structure is ordered removed.

Proctor specifically rejected Judge Schapira’s absolute “quiet enjoyment” approach as mechanical and wrong. *See* Peterson Opening Brief at 12-13. Before the Petersons’ canopy could be removed from the Smiths’ property, the trial court had to “reason through the *Arnold* elements as part of its duty to achieve fairness between the parties” and “mitigate harsh or unjust results.” *See Proctor*, 169 Wn.2d at 497, 502-03. The trial court did not do that at all.

Without citing authority, and ignoring the *Proctor* case prominently cited in Petersons’ cross-motion (CP 252, 255-60), the trial court’s ruling was based on four factors: (1) the parties’ failure to reach agreement since 2010, (2) the canopy was “not a permanent structure,” (3) it was possible for the Petersons to build their own pilings to hold the

canopy up, and (4) the Smiths had a right to quiet enjoyment. VRP (Oct. 26, 2015) at 15-16, 18.

Missing entirely from the trial court's 2015 analysis is any mention of the "waste" of the canopy that would result from removal. Waste was the primary reason the trial court gave in 2010 when it decided to allow the canopy to remain fixed to the Smith pilings and not permit the Smiths to remove it, as requested in the Smiths' complaint. *See* Resp't Brief at 3, 4, 9 & n. 9. If removal was wasteful in 2010, there were no new facts in the record of the 2015 cross-motions to indicate it would not also be wasteful to remove the canopy by June 1, 2016, the deadline given in the court's order. *See* CP 396-97 (Oct. 26, 2015 order enforcing judgment). The canopy is a structure - "a metal cover on top of wood" (CP 75 judgment ¶7; CP 84 FF 13) - custom-built to provide cover for the north slip of the Peterson dock for more than 40 years. *See* CP 43, 44, 275 (photographs); CP 267 (Peterson Decl. ¶3). The "overhang" on the north end extends over the Smiths property by 177 square feet. *Id.*

In violation of *Proctor*, the trial court's failure to consider (or "reason through") waste, the impracticality of removing the canopy, the slight intrusion and slight benefit to the Smiths of removal, the good faith of the Petersons, and the enormous disparity in hardships from removal, was error.

The Petersons jumped through all hoops required by the trial court and this Court in *Smith I*. Accordingly, this Court should reverse and remand with instructions to grant the Petersons' cross-motion to permit

them to maintain and repair the dock canopy in the same configuration it was in 2010 (*see* CP 39, 77 survey), including the right to remove and/or replace the three dilapidated Smith pilings supporting the canopy.

C. The Petersons acted diligently and in good faith to cooperate with the Smiths regarding replacement of the pilings supporting the Peterson dock canopy.

The Smiths claim, without citing to the record, “the Petersons did nothing to solve this problem,” “the Petersons have failed to act,” and “[t]he Petersons’ refusal to address this issue and work something out with the Smiths over...a 5-6 year period was simply unreasonable.” Resp’t Brief at 5, 8-9. The record, as well as admissions elsewhere in the Smiths’ brief, does not support these bald allegations. As the Smiths’ note, in 2008 the Petersons sought approval from the City of Bellevue to replace the pilings because of their rotten state. Resp’t Brief at 4 n. 7. The Petersons tried to engage the Smiths in cooperative planning to replace the pilings years before Judge Schapira issued her ruling in 2010. *See* CP 46-47 (letter from Petersons’ attorney to Smiths’ attorney dated Sept. 3, 2008). The *Smith I* litigation at the superior court and Court of Appeals lasted from 2008-2012.

Following the mandate, the Petersons continued cooperative efforts in 2014-2015 (before the Smiths sought court intervention), initiating communications that included offering three reasonable proposals (CP 294-95): (1) the Petersons would replace the existing Smith pilings in the same location at their sole cost; (2) the Petersons would build new pilings

to support the canopy on their own property provided the Smiths agree to removal of the three existing (rotten) pilings owned by the Smiths; and (3) the Petersons proposed to buy the 117 sq. ft. waterbed underneath the canopy and be solely responsible for the pilings and any liability issues arising therefrom. CP 276-277 (Hahn Decl.), and Exs. 1-6 (CP 279-295). The Smiths rejected all offers, refusing to negotiate any solution that placed the rebuilt Peterson canopy within a 12-foot setback of the property line, even though the canopy was not subject to the City's setback requirement. CP 296-98 (Smith counsel letter); CP 231-34 (Peterson briefing on non-conforming use exception to 12-foot setback); CP 302 (City Response July 29, 2015 in AAD 15-6 stating position that "the docks and canopy are legally established, non-conforming structures...[that] may remain and be maintained").

Below, the Smiths argued the Peterson proposals were inadmissible settlement negotiations that should be excluded under ER 408. CP 393-94. Though the trial court did not rule on admissibility, the proposals were admissible to show the Petersons had acted in good faith to comply with the trial court's 2010 decision as supplemented by Footnote 10 of the appeals court's decision before resorting to court. *See Bulaich v. AT & T Information Systems*, 113 Wn.2d 254, 264-265, 778 P.2d 1031 (1989) (when settlement offeror offers relevant evidence, "other purpose" exception to ER 408 is met).

At the 2015 hearing, Smiths' counsel explained how his clients had obstructed every effort by the Petersons to resolve the dispute outside of court:

[SMITHS' COUNSEL]: Now, I haven't brought up settlement discussions, Your Honor, because I don't think it's appropriate, and they keep doing that. But the offers they have made require my clients to agree. So my clients will not agree to something that is in violation of the land use code. So if they come up with a solution that the city of Bellevue will approve that has nothing to do with my clients having to go along with... Let them go and find a solution that doesn't impact my clients yet lets my clients use their property. That's all we want....

VRP (Oct. 26, 2015) at 12.

No offer the Petersons made or could make would satisfy the Smiths unless it amounted to the Petersons forfeiting all their rights to the dispute strip, i.e., complete removal of the dock canopy and relocation 12-feet from the boundary line. Despite Footnote 10's mention of "cooperation" by the Smiths, the Smiths assumed a recalcitrant and unreasoning refusal to cooperate.

[SMITHS' COUNSEL]: We want to just be left alone to eat our tiny little sliver of sandwich and not be bothered by these people anymore. And that canopy is going to keep it going.

VRP (Oct. 26, 2015) at 13.

By granting the Smiths' an absolute veto power over any piling proposals, no matter how unreasonable their veto was, a revision not adopted in *Smith I* and a repudiation of Footnote 10, the trial court negated the Petersons' property rights based entirely on its overweighting of the

Smiths' right as landowner to "the quiet enjoyment of their property."

VRP (Oct. 26, 2015) at 18.

D. The trial court made an ad hoc decision based on personal factors rather than Washington rule of law.

The Smiths argue "Judge Schapira was in the best position to interpret her own findings of fact as well as this Division's affirmation of her judgment." Resp't Brief at 10 (*italics in original*). This mischaracterizes what actually occurred below: the judge did not do any "interpreting" and she was hardly in the "best position." Contrary to Smiths' contention, Judge Schapira was not "presiding over this case for nearly 6 years" on a continuous basis. *See* Resp't Brief at 1. All original proceedings occurred in 2010. After findings and a judgment were entered on October 13, 2010, there were no proceedings for Judge Schapira to preside over until the parties' cross-motions to enforce were filed in 2015, which are the subject of this appeal.

The judge disclosed during the 2015 hearing on these motions it had been five years since she last heard and decided the case, and she had not refreshed her recollection about what occurred in the original proceedings. VRP (Oct. 26, 2015) at 3. Needing confirmation from counsel about a central fact, the judge asked whether the pilings supporting the Peterson dock canopy were on the Smiths' property or on the Petersons' property.

THE COURT: Can you maybe remind me. Because perhaps in my mind, I'm wrong. The pilings that we're talking about are not on the Petersons' property.

[PETERSONS' COUNSEL]: That's correct, your Honor.

VRP (Oct. 26, 2015) at 8. At the hearing, the judge did not refer to any prior rulings or decisions of the superior court or the Court of Appeals. Nor did the judge mention any pleadings. Instead of "clarifying" or "interpreting" prior judgments and decisions and enforcing them accordingly, Judge Schapira assumed the view that she was resolving a dispute for the parties that they were unable to resolve by themselves. On the cusp of retirement after 27 distinguished years on the bench, the judge gave a rambling, fragmented explanation of her decision:

- "Land use cases are notoriously difficult." VRP (Oct. 26, 2015) at 15.
- People not getting along is "not unusual in these land use cases." *Id.* at 18.
- "There are many ways to...slice the Subway sandwich. Not happening." *Id.* at 16.

[THE COURT]: [I] don't care how [the Petersons] do it, and I don't care if they decide to just take it down. But it's not going to rest on the Smiths' property. It's not going to overhang the Smiths' property anymore.

[PETERSONS' COUNSEL]: And despite the Court of Appeals indicating that that is an option under Footnote 10, Your Honor?

[THE COURT]: Everything is an option. People talking to each other is the best option. Unfortunately, that's not what's happened here. I mean, it was never impossible to solve this. That doesn't mean to keep trying and trying and trying. It doesn't seem to work....

...And, again, this isn't something that has led to horse trading, just the opposite. They continue to bring the matter to court. The Court is resolving it.

VRP (Oct. 26, 2015) at 17-18; *see also* VRP 15.

The Smiths offer a strange test for determining whether the trial court abused its authority:

As Judge Schapira's own reasoning showed, she did not abuse her authority or discretion in enforcing her own order and requiring the Petersons to remove the encroaching canopy.

Resp't Brief at 9 (italics added). An abuse of discretion standard does not compare a judge's "own reasoning" to his or her decision. Trial court discretion is not unlimited—it must be exercised *within the law*. *State v. Stalker*, 152 Wn. App. 805, 810, 219 P.3d 722 (2009) ("A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law."). An injunction entered without findings of fact or conclusions of law, the Order of Removal here is reviewed as a matter of law to determine if there was "a clear legal right to it"—*i.e.*, if this Court finds "any set of facts" that would legally justify maintaining the Petersons' canopy as allowed in *Smith I*, then "the trial court must be reversed." *See Alderwood Associates v. Wash. Environmental Council*, 96 Wn.2d 230, 233-34, 635 P.2d 108 (1981); *see also San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 153-63, 157 P.3d 831 (2007) (reversing trial court grant of injunction based on de novo review determining moving party failed to establish "a clear legal or equitable right"); *Gebbie v. Olson*, 65 Wn. App. 533, 537-38, 828 P.2d 1170 (1992) (appeals court engages in

same inquiry as trial court when reviewing summary judgment granting permanent injunction).

Here, rather than following legal rules and precedent, the trial court's rationale stemmed from a psychological aversion to conflict. According to Judge Schapira: "I am a middle child. I like it when people get along." VRP (Oct. 26, 2015) at 18; *see also id.* at 15-16 (parties' five years of inability to come up with workable solution was long enough).

With due respect to the judge's candor and concerns, the court's personal approach to adjudication fell short of the *rule of law* judges are required to follow.

The law must be reasonably certain, consistent, and predictable so as to allow citizens to guide their conduct in society, and to allow trial judges to make decisions with a measure of confidence. The doctrine of *stare decisis* provides this necessary clarity and stability in the law, gives litigants clear standards for determining their rights, and prevents the law from becoming subject to incautious action or the whims of current holders of judicial office.

Stalker, 152 Wn. App. at 810-11, (citations and internal quotations omitted). Stability is "especially important in an area such as transactions involving realty, where there is particular reliance on the certainty of the applicable legal rules." *House v. Erwin*, 81 Wn.2d 345, 348, 501 P.2d 1221 (1972), *reversed on rehearing on other grnds*, 83 Wn.2d 898, 524 P.2d 911 (1974).

Without *stare decisis*, the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declarations and assertions—a kind of amorphous

creed yielding to and wielded by them who administer it. Take away stare decisis, and what is left may have force, but it will not be law.

State v. Ray, 130 Wn.2d 673, 677, 926 P.2d 904 (1996).

When a certain legal principle has already been established in a jurisdiction, there is much to be said for its continued existence. The continuity of legal principles allows citizens to choose courses of action with a reasonable expectation of what the future legal consequences will be, even if those consequences might not arise for a considerable period of time. These interests, together with a desire to provide a society of laws and not of men, form the basis for the theory of stare decisis.

Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 704-05, 756 P.2d 717 (1988).

Here, the trial court disregarded the law, delivering a quick, unprincipled “fix”—attempting to prevent future conflicts, the judge eliminated the Petersons’ easement rights. This was error. The trial court arbitrarily changed course and ordered removal of the Petersons’ canopy after it had specifically rejected the very same remedy in *Smith I*. Following the rule of law, this Court should enforce the Petersons’ right to repair and maintain the pilings as previously adjudicated in *Smith I* and reverse the Order of Removal.

E. This Court should deny the Smiths’ request for attorney’s fees.

The Smiths are requesting attorney’s fees pursuant to RAP 18.9(a) for a “frivolous appeal.” Resp’t Brief at 11. As the foregoing and Petersons’ opening brief demonstrate, this is not a frivolous appeal.

(1) the Petersons have a right to appeal under RAP 2.2;

(2) all doubts as to whether the appeal is frivolous are resolved in favor of the Petersons;

(3) the record is considered as a whole;

(4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; and

(5) an appeal is frivolous only if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

See Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 241, 119 P.3d 325 (2005). “A frivolous action is one that cannot be supported by any rational argument on the law or facts.” *Goldmark v. McKenna*, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011) “Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous.” *Advocates for Responsible Development v. Western Wash. Growth Management Hearings Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010); *Schreiner v. City of Spokane*, 74 Wn. App. 617, 625, 874 P.2d 883 (1994) (“An appeal is not frivolous, however, if the appellant can cite a case supporting its position.”).

In deciding whether the Peterson appeal is frivolous, this Court “do[es] not judge the purity of the reasons that motivated [them] to appeal” because all doubts are resolved in the Petersons’ favor. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 221, 304 P.3d 914 (2013).

Because they present “several debatable, and even meritorious, arguments,” the Petersons’ appeal is not frivolous. *See Ha v. Signal Electric, Inc.*, 182 Wn. App. 436, 456-57, 332 P.3d 991 (2014), *rev. den.* 182 Wn.2d 1006 (2015); *see also Ensley v. Mollmann*, 155 Wn. App. 744, 760, 230 P.3d 599 (2010) (“Considering the entire record, Ensley’s appeal is not frivolous. Ensley cites applicable case law and presents several issues that are at least debatable.”); *Braut v. Tarabochia*, 104 Wn. App. 728, 735, 17 P.3d 1248 (2001) (“[A]lthough we find no abuse of discretion on these facts, the issue was certainly not settled and the appeal is not frivolous.”); *Bierce v. Grubbs*, 84 Wn. App. 640, 646, 929 P.2d 1142 (1997) (“[T]he central issue on appeal...is a matter of genuine dispute among the parties. The appeal is not frivolous.”).

F. The Petersons move to strike the Smiths’ improper references to matters outside the record.

Smiths’ brief improperly refers to a separate motion on the merits and other matters outside the record. *See* Resp’t Brief at 1, 8-9, 12. On October 4, 2016, Commissioner Neel declined to act on the Smiths’ motion on the merits, and referred the Petersons’ motion to strike supplemental materials to the Panel “for consideration along with the merits of the appeal.”

The Smiths cannot incorporate allegations and arguments presented in their motion on the merits. *See Edwards v. Le Duc*, 157 Wn. App. 455, 459 n. 5, 238 P.3d 1187 (2010) (refusing to consider respondent’s “passing treatment” of laches issue incorporated by reference

to motion to dismiss because RAP 10.3 requires all arguments and citations to authority must be included within respondent's brief).

The Smiths failed to request or bring a motion under RAP 9.11(a) to obtain this Court's permission to expand the appellate record to add evidence outside the record. *See Pub. Hosp. Dist. No. 1 of King County v. University of Washington*, 182 Wn. App. 34, 50-51, 327 P.3d 1281, *rev. den.*, 337 P.3d 326 (2014) (denying motion); *State v. Quintero Morelos*, 133 Wn. App. 591, 599, 137 P.3d 114 (2006) (denying motion to supplement record with affidavit of attorney as not needed to resolve issues on review).

When a party unilaterally adds new evidence outside the record without court permission, the evidence is stricken and not considered. *See Ha*, 182 Wn. App. at 456 (granting motion to strike two exhibits attached to reply brief that were created after trial court order under review and thus deemed unnecessary for review); *Loc Thien Truong v. Allstate Property and Cas. Ins. Co.*, 151 Wn. App. 195, 200 n. 1, 211 P.3d 430 (2009) (granting motion to strike documents attached to brief that were not part of record on appeal). Failure to properly make a timely request to expand the record is grounds for sanctions. *Ha*, 182 Wn. App. at 456.

Here, the Smiths make no request whatsoever. They cannot possibly meet the six RAP 9.11 criteria. Evidence outside the record is not "needed to fairly resolve the issues on review" when it involves matters occurring after the trial court issued its orders under review. *See Pub. Hosp. Dist. No. 1*, 182 Wn. App. at 51.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

Division I Court of Appeals 600 University St. One Union Square Seattle, WA 98101-1176 Phone: 206-464-7750	Messenger Service <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>
Brian Krikorian Law Offices of Brian H. Krikorian 4100 194 th Street SW, Suite 215 Lynnwood, WA 98036 bhkrik@bhklaw.com Attorneys for Respondents Gregg and Kelly Smith	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/>

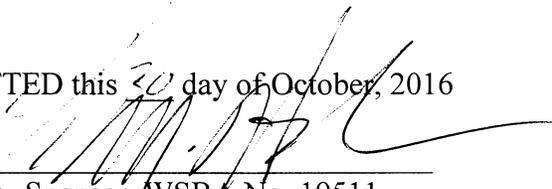
DATED: October 20, 2016, at Bellevue, Washington


Cheryl C. Cook

III. CONCLUSION

The Petersons respectfully request this Court reverse and remand with instructions to grant the Petersons' cross-motion to enforce their right to maintain the dock canopy and repair the Smith pilings that support it.

RESPECTFULLY SUBMITTED this 30 day of October, 2016



Paul A. Spencer, WSBA No. 19511
Gerald M. Hahn, WSBA No. 158
Oseran Hahn, P.S.
Attorneys for Appellants
10900 NE 4th Street, Suite #1430
Bellevue, WA 98004