

Court of Appeals No. 74328-7-I

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

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COURT OF APPEALS  
STATE OF WASHINGTON  
2013 SEP 19 PM 2:55

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

v.

GREGG SMITH and KELLY SMITH, husband and wife  
Respondents

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**APPELLANTS, LARRY and SUSAN PETERSON'S  
OPENING BRIEF**

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## I. INTRODUCTION

This appeal involves an ongoing property dispute between two waterfront neighbors. Over 55 years ago, long before these parties purchased their properties, a dock canopy on the Peterson property was constructed in a way that crossed the boundary line, supported by three pilings on the Smith property. The total area the Peterson dock canopy intrudes onto the Smith property is 117 square feet (the equivalent of 2.5 ping pong tables or a small dining room in a typical house), all over water, in the shorelands of Lake Washington. The dock canopy and pilings are not connected to the Smiths' dock and do not interfere in any material way with the Smiths' use and enjoyment of their property.

Litigation between the parties resulted in a 2010 decision by the Honorable Judge Carol Schapira denying the Smiths' an injunction to remove the Peterson dock canopy, the trial court ruling that removal would result in waste. Judge Schapira also granted the Petersons an "easement" to maintain their dock canopy and to use the Smith pilings to continue supporting it. Although she did not use that legal term in the findings of fact, conclusions of law or judgment, as the Court of Appeals ruled and as argued below, Judge Schapira intended the Petersons have an easement: the dock canopy could remain in place supported by the Smith pilings. The Petersons could repair, replace, or otherwise maintain the pilings after giving "some notice" to the Smiths, stopping short of requiring mutual consent before repairs were undertaken.

In 2012 the Court of Appeals affirmed Judge Schapira's decision granting an easement for the canopy to remain and be supported by the pilings, providing in summary fashion ("Footnote 10") a cooperative process to resolve future disputes regarding repair or maintenance. The Court of Appeals' decision became the law of the case, as will be discussed below. The Petersons followed that process by making several reasonable offers without cost or inconvenience to the Smiths. Rejecting those offers out of hand, the Smiths refused to negotiate and insisted the dock canopy must be totally removed from their property.

In 2015, the parties filed cross-motions to enforce the 2010 judgment as affirmed by the Court of Appeals. The Smiths sought an order to remove the dock canopy as an encroachment that prevented them from using all of their property. Petersons sought an order affirming their right to repair the Smith pilings to maintain the dock canopy in its existing footprint or with less intrusion onto the Smith property.

Judge Schapira granted the Smiths' motion and denied the Petersons' motion. Instead of enforcing the easement she had granted to the Petersons in 2010, the judge terminated it altogether. Ruling the Smiths had an absolute right to quiet enjoyment of their property, and they had not consented to repairs, she ordered the Peterson dock canopy removed or modified by June 1, 2016. This appeal followed.

## **II. ASSIGNMENTS OF ERROR**

- A. The trial court erred in granting the Smiths' motion to enforce or modify the 2010 judgment.

- B. The trial court erred in denying the Petersons' cross-motion to enforce the 2010 judgment as affirmed by the Court of Appeals in Footnote 10.

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. By ordering removal instead of repair, did the trial court err in failing to reason through the Arnold elements as required by *Proctor v. Huntington*, 169 Wn.2d 491 (2010)?
- B. Does issue preclusion bar relitigating the Petersons' right to repair since Smith I decided the Peterson easement includes the right to repair or replace the Smith pilings?
- C. Did the trial court err by disregarding the law of the case where Footnote 10 confirmed the Petersons' easement and explained procedures for resolving disputes regarding repair or replacement of the dock canopy, and the Petersons followed all of those procedures in good faith?
- D. Does claim preclusion bar relitigating the Petersons' easement to stop them from repairing or replacing the Smith pilings?
- E. Does the trial court's order of removal violate the Petersons' easement rights?

### IV. STATEMENT OF THE CASE

In a prior action and appeal (referred to as "*Smith I*"),<sup>1</sup> the Smiths and Petersons exhaustively litigated a case of boundary dispute, adverse possession, and ejectment. That dispute adjudicated the Smiths' claim to eject the Petersons' encroaching dock canopy at the west end of the

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<sup>1</sup> The case was tried in 2010, appealed to Division One, affirmed in 2012, denied reconsideration, then denied review by the Washington Supreme Court. Clerk's Papers (CP) 1.

properties.<sup>2</sup> The Smiths sought injunctive relief to “enjoin[n] the [Petersons] from trespassing or causing others to trespass on any of the Smiths’ property or the disputed portion of the dock,” which included “hir[ing] a contractor to enter [Smiths’] portion of the disputed property to make repairs or changes.” CP 481-82 (Pltff. Complaint to Quiet Title and for Injunctive Relief - July 8, 2008). The Petersons counterclaimed for ownership of the dock canopy area under an adverse possession theory.<sup>3</sup>

Judge Schapira denied both claims, but provided equitable relief to the Petersons. Declining to enjoin the Petersons in any respect, the trial court granted the Petersons an easement to continue using their dock canopy partially supported by three Smith pilings. CP 75, 83-4, 86. Not seeking to enlarge their own rights or lessen the easement rights of the Petersons, the Smiths did not appeal the dock canopy ruling.

On appeal, the Petersons argued “the trial court’s ruling failed to identify the legal relationship between [the Petersons] and the Smiths with respect to the canopy.” *Smith v. Peterson*, 2012 WL 432246, at \*7 n. 10 (hereafter “Footnote 10”). The Court of Appeals held the trial court’s ruling was “quite clear” on the legal relationship. *Id.*

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<sup>2</sup> The Peterson dock canopy is pictured at CP 42-44 & 274-75, and drawn to scale as the “BOAT HOUSE” at the west end of the PLS Survey and Property Line Detail dated July 26, 2010 (CP 77).

<sup>3</sup> *Smith v. Peterson*, No. 66245-7-I, 2012 WL 432246, at \*6-7 (Div. I Feb. 13, 2012) (unpublished).

...The [trial] court determined that **the Petersons had acquired an easement** to use all portions of the moorage slip to the south of the northern pilings on the Smith property. **The court further explained that the canopy covering the slip belonged to the Petersons and that its removal would be wasteful and destructive.** Accordingly, the court made clear that the Smiths would not be permitted to remove the supporting pilings as such an action might “damage the canopy.” Nevertheless, the trial court explained that the pilings could not be replaced or repaired absent “**cooperation**”<sup>4</sup> by the Smiths. **Instead, in the absence of such an agreement, the Petersons must devise a different solution to support the canopy at such time as the pilings required replacement....**

*Id.* (bold added); CP 18, 95.

Concerning the Peterson dock canopy attached to the Smith pilings, Judge Schapira found it had intruded onto the Smith property “[f]or over 50 years.” *See* CP 83.

The canopy is attached to the pilings but is not a fixture. It is a metal cover on top of wood that can be moved, removed or modified. It

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<sup>4</sup> The reference to “cooperation” was likely based on Judge Schapira’s remarks at the August 13, 2010 hearing to review proposed findings and conclusions:

THE COURT: Honestly, Mr. Watts, even if I thought I could do something about this, I don't think I can. If they don't own the pilings of course they can't replace them without some level of cooperation. Can they replace the canopy? Could there be something cantilevered? Are there other ways to solve this problem? That would be nice. But I can't just wave my hand and make it so.

CP 195. When the August 13 hearing took place, the Washington Supreme Court had not yet issued its ruling in *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010) (Aug. 19, 2010). As discussed below, *Proctor* affirmed the trial court’s “tremendous discretion” to do justice when fashioning an equitable remedy in encroachment situations. *Proctor*, 169 Wn.2d at 502-503 (encroaching party permitted to purchase acre of land at fair market value from owner claiming trespass).

would be wasteful to remove it, but it does not affect the ownership of the shorelands below or the Smith pilings.

CP 83-4 (FF 13); CP 75 (10/13/2010 judgment). In a conclusion of law, the trial court ruled:

The Smiths own the Smith pilings. The Peterson's own the dock and everything South of the boundary line shown on the survey. The northerly slip of the dock may be used by the Petersons even though it may put a boat close to the boundary line near the easternmost Smith piling.

CP 86. Granting the Petersons an easement, the trial court ruled, "The Peterson's may continue to use the slip on the North side of the dock, although it may cross slightly the Smith south boundary in the water." CP 75, 84.

At a hearing on May 27, 2010, Judge Schapira specifically addressed the issue of the Petersons' right to repair or replace the Smith pilings. The judge clarified that the Peterson "easement" includes the right to "repair or replace the pilings" owned by the Smiths.

[DEFENDANTS' COUNSEL]: Petersons your Honor, need to replace those pilings. The evidence was clear in court that they're worn out. Is that part of this use that you...otherwise, the canopy is going to collapse.

...

THE COURT:...If the Smiths for whatever reason – we know they have another dock. **If they have no interest in these pilings, I don't think that the Petersons should be hostage to that.** I think we do know that the pilings, at least some of them -- again, these two or three that I'm talking about that hold up the canopy do need some work on that. I'm not going to order the Smiths to maintain those pilings for the benefit of the Petersons. **The Petersons have an interest in doing that. Shall I – I don't mind trying to help parties. 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.**

CP 131-4. This oral ruling, among others, was specifically incorporated into the Findings of Fact and Conclusions of Law. CP 80.

The Petersons in every respect complied with and attempted to fulfill the requirements as stated by the trial court and this Court in Footnote 10. Offers to repair or replace the pilings were made by the Petersons to the Smiths, and between counsel, in compliance with the court decisions in *Smith I*. CP 267, 269 (Peterson Decl.); CP 279-298 (Exs. 1-7 to Hahn Decl.). The Smiths, however, consistently thwarted the courts' decisions, failing even to consider any of the alternatives proposed by the Petersons at no cost to the Smiths. *Id.*

In 2015 the Smiths sought another bite of the injunction apple by filing a motion to enforce or "modify" the trial court's 2010 judgment. CP 19-31. They moved the trial court to allow them to remove the pilings and tear down the Petersons' dock canopy, or terminate the easement to prevent the Petersons from repairing and/or replacing the Smith pilings to maintain the Peterson dock canopy. CP 20, 30. Smiths alleged the pilings continued to deteriorate, the parties were "unable to reach an agreement," and Smiths "[wished] to remove/modify the pilings...to use their own property as they see fit." CP 20. According to Mr. Smith's declaration: "We simply want to sever any possible future dealings with the Petersons and want them as

legally distanced from our property as possible so we can more fully enjoy our property without interference.” CP 36.

Because of the Smiths’ persistent efforts to obstruct the Petersons’ repair and maintenance rights, the Petersons filed a cross-motion asking the trial court to enforce its judgment and allow the Petersons to repair or replace the Smith pilings so that they could enjoy their dock easement rights as the courts in *Smith I* ruled they could in 2010. CP 251.<sup>5</sup> Mr. Peterson’s declaration explained the dock and canopy had been built more than 50 years ago, six years before he and his wife purchased their property, and had been used and maintained at the Petersons’ sole cost. CP 266-7. The dock canopy overhang and attachment to the Smith pilings intrude onto the Smith property by 16 inches on the west water side and 5 feet on the shore side, a total of approximately 117 square feet. CP 267. Petersons’ use of the Smith property does not interfere with the Smiths’ use of their property in any way. *Id.* Even though the Petersons’ offers to repair or replace the pilings included proposals to relocate the pilings entirely onto the Peterson property so that the intrusion would be reduced, all offers had been rejected by the Smiths. CP 267, 269.

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<sup>5</sup> Before the City of Bellevue would allow the Petersons to replace or repair the three Smith pilings that support the canopy, it required a signed agreement to that effect, or court order that clearly provided the Petersons have a right notwithstanding the Smiths refusal to agree. CP 36 (¶16); CP 329. Insisting that no structures occupy the disputed area, the Smiths refused to agree. A court order is therefore necessary for the Petersons to obtain a city permit.

On October 26, 2015, the trial court granted Smiths' motion and denied the Petersons' cross-motion. Judge Schapira entered an "order enforcing [the October 14, 2010] judgment." CP 396-97. The Petersons were ordered to remove, modify or relocate their dock canopy on or before June 1, 2016 so that it would no longer rest on the Smith pilings and "no longer encroach or overhang upon the Smith property." *Id.* Further, if the Petersons do not remove the canopy by June 1, the Smiths are permitted to remove or modify the pilings on their property "without further interference by the Petersons." CP 397. Judge Schapira reasoned:

THE COURT: The Smiths, just like the Petersons, are entitled to the quiet enjoyment of their property. 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.

Report of Proceedings (RP) (Oct. 26, 2015) 18. The judge stated that since the parties were unable to settle their repair and maintenance dispute amicably in the five years since she issued her 2010 ruling, she would not require them to continue trying to reach a compromise solution. *Id.* at 15-18. "I've given everybody a lot of time to come up with either engineering or solution that will work." *Id.* at 15-16 (Judge Schapira). The judge would not allow the canopy to "overhang" any longer onto the Smiths' property "[b]ecause, of course, that means that the Smiths can't do X or Y with their own pilings." *Id.* at 16. "At a certain point, this isn't overhang. It's hung over for five years, and the Smiths are entitled to quiet enjoyment." *Id.* at 16.

With respect to Footnote 10, Judge Schapira's interpretation was that *mutual agreement* was required before the dock canopy could be repaired or maintained in the area of encroachment, a resolution process she believed had proven to be unworkable.

[DEFENDANTS' COUNSEL]: And despite the Court of Appeals stating 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 happened here. I mean, it was never impossible to solve this. That doesn't mean the parties were able to. I'm not ordering them to keep trying and trying and trying. It doesn't seem to work.

*Id.* at 17. The following week Judge Schapira retired from the bench. *Id.* at 15. Petersons' motion for reconsideration was denied by a different judge. CP 431.

## V. STANDARD OF REVIEW

Review in this case is *de novo*. *See Morgan v. City of Federal Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009) ("When the record before the trial court consists entirely of "documentary evidence, affidavits and memoranda of law," this court stands in the same position as the trial court and reviews the trial court's decision *de novo*."); *Niemann v. Vaughn Comm. Church*, 154 Wn.2d 365, 374-75, 113 P.3d 463 (2005) ("[T]he question of whether equitable relief is appropriate is a question of law...[and]...review of trial court's grant of equitable relief [is] *de novo*."); *Cole v. Laverty*, 112 Wn. App. 180, 186, 49 P.3d 924 (2002) (*de novo* review of order granting termination of easement by adverse

possession, viewing evidence in the light most favorable to dominant estate owner, and affirming only if there is no genuine issue of material fact and moving party is entitled to judgment as a matter of law).

## VI. ARGUMENT

### A. Ordering removal instead of repair, the trial court erred in failing to reason through the *Arnold* elements as required by *Proctor v. Huntington*, 169 Wn.2d 491 (2010).

In *Smith I* the courts granted the Petersons *an easement* to use, repair, and maintain the Smith pilings to continue the support of their slightly encroaching dock canopy. CP 75 (Oct. 13, 2010 judgment); CP 83-84 (findings); CP 86 (conclusion of law ¶6); CP 131 (May 27, 2010 hearing); CP 197 (Aug. 13, 2010 hearing); CP 467-9 (Feb. 26, 2010 hearing); Footnote 10. From that point on, the Petersons could not be trespassing or encroaching<sup>6</sup>—they had a legal right to be there. *See City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986) (“An easement is a right, distinct from ownership, to use in some way the land of another...”); *State ex rel. Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 494, 156 P.2d 667(1945) (easement is “a privilege to use another’s land”).

Here, even if the Petersons’ easement had not been created, if they were mere trespassers who had absolutely no right whatsoever to be there,

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<sup>6</sup> Encroachment, a form of trespass, “occurs when one builds a structure on another’s land.” *Proctor*, 169 Wn.2d at 496 (2010). Trespass includes failing to remove a thing that one is under a duty to remove from the land of another, in the absence of consent *or other privilege to do so*. *See Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 681-2, 709 P.2d 782 (1985).

under the flexible rules of equity endorsed in *Proctor v. Huntington*, an injunction to remove (“eject”) the Peterson dock canopy from the Smith property still would not be just or equitable.

“[I]njUNCTIONS should not mechanically follow from any encroachment.” *Proctor*, 169 Wn.2d at 502.<sup>7</sup> “[T]he evolution of property law in Washington [is] away from rigid adherence to an injunction rule and toward a more reasoned, flexible approach...in lieu of rote application of a property rule.” *Id.* at 504.<sup>8</sup>

Contrary to *Proctor*, Judge Schapira applied a “rote application of [the] property rule” in favor of the Smiths’ “quiet enjoyment” of their property. *Proctor* requires an entirely different approach. There is no “hard and fast rule” of granting injunctions to eject an encroacher “as a

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<sup>7</sup> In *Proctor*, the trial court refused to issue an injunction to force unknowing encroachers to remove their home, garage and well. Instead of removal, the trial court required the landowner seeking ejectment to deed the one-acre parcel underlying the encroachment to the encroacher and accept payment of fair market value. The Supreme Court affirmed, rejecting the “traditional” approach that gives property owners an “absolute right to eject trespassers-and to require them to remove encroaching structures.” *Proctor*, 169 Wn.2d at 496 & 501 (“equity power transcends the mechanical application of property rules”).

<sup>8</sup> “Property rules are characterized by all-or-nothing relief afforded to the party who is deemed to have the legal right.” *Proctor*, 169 Wn.2d at 496. The Smiths’ motion for removal was grounded on an absolute property rule theory. CP 35 (“We [are] simply asking this Court to enforce its Judgment and its finding that we own the property as adjudicated and own the “Smith pilings” as found by this court.”); CP 28 (motion). Their one-sided approach furthered their own interests, but gave short shrift to the Petersons’ right to use the Smith pilings to support their dock canopy.

matter of course.” *Id.* at 502. “[T]he court must grant equity in a meaningful manner, not blindly.” *Id.*, quoting *Arnold v. Melani*, 75 Wn.2d 143, 152 (1968). “A court asked to eject an encroacher must instead reason through the Arnold elements as part of its duty to achieve fairness between the parties” and “mitigate harsh or unjust results.” *Id.* at 497, 502-503. There are five “Arnold elements”:

[A] mandatory injunction can be withheld as oppressive when, as here, it appears ... that:

(1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.

*Proctor*, 169 Wn.2d at 500, quoting *Arnold*, 75 Wn.2d at 152.

Here, the trial court failed to reason through the *Proctor*/*Arnold* elements. It mechanically enforced the Smiths’ property rights, leaving the Petersons with nothing but costs of removal and the uncertainty of rebuilding without the slight encroachment that has existed 56 years. The Petersons’ cross-motion to enforce the 2010 judgment asked the trial court to utilize its equitable powers to allow the Petersons to repair or replace the pilings that support the Petersons’ canopy in accordance with *Proctor v. Huntington*. CP 251. The Petersons’ evidence demonstrated they satisfied all five *Proctor*/*Arnold* elements by clear and convincing evidence:

**1. The encroacher did not act in bad faith, or negligently, willfully, or indifferently in locating the encroaching structure.**

The Petersons have owned their property in excess of 44 years. As noted by the trial court and Court of Appeals, the metal and wood canopy has been covering the north dock for over 50 years. Petersons utilized and improved the dock and canopy *at their sole expense*. There was no evidence that they in any way acted in bad faith, negligently, willfully, or indifferently.

**2. The damage to the landowner was slight and the benefit of removal equally small.**

One is hard pressed to understand any damage to the Smiths or their property. They continue to have full use of their property and the three pilings that can be utilized to tie off a boat. There is no evidence of any damage to the Smiths. In fact, since 2014 the Petersons have been paying property taxes on the entire north dock and dock canopy. CP 267-9, 271-3 (Peterson Decl.). Since the encroachment in *Proctor* of nearly **an acre of buildable land** was allowed to remain, the dock canopy intrusion here of only 117 square feet over the water is unquestionably a “slight” detriment to Smiths’ property rights. *See Proctor*, 169 Wn.2d at 501-502.

**3. There was ample remaining room for a structure suitable for the area and no real limitation on the property’s future use.**

The three Smith pilings are right next to the Petersons’ dock and appear to be part and parcel of the Petersons’ dock. There is no space for the Smiths to build anything there, they have full use of the three pilings, and more than adequate ingress and egress for watercraft. There is no

remaining property which could be utilized for future use. CP 266-67 (Peterson decl.).

**4. It is impractical to move the dock canopy as built.**

The Peterson dock canopy has been in that location for 50 years. *Id.* It is supported by pilings on the south side of the Peterson property. To remove the pilings on the north side or to require the cutting off of the **16' x 5'** plus canopy overhang [*See CP 77 survey*] would not only be wasteful and unsightly it would require elimination of the entire canopy being used by the Petersons. Since there was no evidence of any actual damage to the Smith property and no remaining property that could be utilized by the Smiths, removal would add nothing to the Smith property. CP 266-7 (Peterson decl.)

**5. There was enormous disparity in resulting hardships.**

The encroaching dock canopy was built years before the Petersons acquired their property in 1966 and decades before the Smiths acquired their property in 2007. *Id.* The Smiths demolished the existing home and did not move onto their property until the new home was finished in 2015. CP 372 (¶11). Mr. Smith testified before a City of Bellevue Hearing Examiner that when he purchased the property he had oral and written representations from his sellers that they would own a portion of the Petersons' dock and canopy. CP 332 (Cause No. AAD 15-65 on August 6, 2015). He further testified that he did not have a survey done to confirm ownership. *Id.* He testified that he did not bring a lawsuit against the

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sellers for misrepresentation. *Id.* In addition, he admitted that the Petersons had offered to repair or replace the pilings. CP 333-35.

The Petersons fully complied with Footnote 10. Following the Court of Appeals' decision confirming the Petersons own the dock and canopy, but not the pilings, offers have been made by the Petersons to repair or replace the pilings. CP 411-430. The repairs they proposed, rejected by the Smiths, would maintain the existing dock and canopy within the existing footprint allowed by the courts or, alternatively, reduce any encroachment. The proposed repairs do not involve replacement of the dock or canopy or relocation farther onto the Smiths' property.

Finally, the Smiths, at their request, had the King County Assessor remove the dock and the canopy from their real estate taxes and place the entire burden of the taxes on the dock and encroaching canopy on the Petersons, who are now paying those taxes. CP 267-69.

In accordance with the rationale and holding of *Proctor*, the Petersons should be allowed to keep the dock canopy in place and repair or replace the three Smith pilings that support the canopy. Here, the overhang was "slight" (approximately 16 inches for the water side of the end of the dock and something a little bit more than 5 feet on the shore side). The 117 square feet of overhang [CP 267, 269] pales in comparison to the nearly 43,560 square feet of encroachment allowed to remain in *Proctor*, 372 times larger than the slight intrusion here.

In Footnote 10 the Court of Appeals held the pilings could be replaced or repaired with the cooperation of the Smiths or, "in the absence

of...an agreement,” the Petersons could “devise a different solution to support the canopy...” By 2015, the Smiths’ steadfast refusal to cooperate required the trial court to evaluate the Petersons’ “different solution[s]” and fashion an equitable remedy respecting the Petersons’ easement rights granted in *Smith I. See Proctor*, 169 Wn.2d at 502-503; *see also*, *Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 159 Wn. App. 536, 544, 248 P.3d 1047 (2011) (courts have authority to fashion and impose appropriate enforcement orders under inherent authority to control litigation, manage their own affairs, and achieve the orderly and expeditious disposition of cases).

The trial court should have allowed the Petersons to perform maintenance and repairs to the dock canopy and pilings. Another reasonable alternative (offered by the Petersons, but rejected by the Smiths) would be to construct new pilings on the Peterson side of the boundary, subject to permit, and once completed removing the old pilings as requested by the Smiths. Among the solutions for resolving the deteriorating pilings, the Petersons offered to buy the area beneath the canopy (the 117 square foot waterbed) from the Smiths, but the Smiths refuse to sell. A sale remedy, as ordered in the *Proctor* case, would have the Petersons purchase from the Smiths the water surrounding and under the three Smith pilings so that it becomes the Petersons’ property, which would then be theirs to utilize as they see fit. A sale would eliminate any question as to encroachment of the canopy.

“[C]ourts usually grant the easement owner injunctive relief when it is desired and when the defendant’s conduct in fact interferes with the easement rights.” Dan B. Dobbs, *1 Law of Remedies: Damages-Equity-Restitution*, at 785 (Pract. Treatise Series 2d ed. 1993); Wash. St. Bar Assoc., *1 Washington Real Property Deskbook* § §7.9(4), at 7-27 (4th ed. 2009 & 2014 Supp.) (hereafter “Deskbook”) (easement owner may protect his or her interest by means of injunction against obstruction of easement). This Court should reverse and remand with instructions to grant the Petersons’ cross-motion.

**B. Issue preclusion barred relitigating the Petersons’ right to repair: *Smith I* decided the Peterson easement includes the right to repair or replace the Smith pilings that support the Peterson dock canopy.**

Issue preclusion bars relitigation of an issue in subsequent proceedings involving the same parties. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). The Petersons’ right to repair or replace the Smith pilings was litigated and decided in favor of the Petersons in *Smith I*. At a hearing on May 27, 2010, Judge Schapira anticipated there would be conflicts between the parties and they might not be able to agree on repairs and maintenance. She ruled the Petersons’ have the right, at their discretion, to repair or replace the Smith pilings so long as the Petersons give “some notice” to the Smiths.

[DEFENDANTS’ COUNSEL]: Petersons your Honor, need to replace those pilings. The evidence was clear in court that they’re worn out. Is that part of this use that you...otherwise, the canopy is going to collapse.

...

THE COURT: ...If the Smiths for whatever reason – we know they have another dock. **If they have no interest in these pilings, I don't think that the Petersons should be hostage to that.** I think we do know that the pilings, at least some of them -- again, these two or three that I'm talking about that hold up the canopy do need some work on that. **I'm not going to order the Smiths to maintain those pilings for the benefit of the Petersons. The Petersons have an interest in doing that. Shall I – I don't mind trying to help parties. 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.**

...

THE COURT: 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 [Petersons' predecessors in interest] were not particularly interested in repairs and the Smiths and the Petersons have been in litigation.**

...

THE COURT: **So I'm really not indicating a joint tenancy. I'm trying to find a resolution to one part of this problem...**

CP 132-34 (bold added). Judge Schapira specifically *rejected* a “joint relationship” solution that would require joint agreement before the Petersons could make repairs.

In Footnote 10 the Court of Appeals explained how “the trial court’s ruling was quite clear” on the Petersons’ repair rights: the Petersons must try “cooperation” first and “in the absence of an

agreement...devise...different solution[s] to support the canopy at such time as the pilings requir[e] replacement.” Footnote 10.

Complying with *Smith I*, the Petersons tried cooperation, giving notice to the Smiths of their intent to repair or replace the pilings and offering “different solutions.” Seeking to “hold the Petersons hostage,” precisely the result the trial court said it wished to avoid in 2010, the Smiths refused to agree to anything except total removal of the Peterson canopy and termination of the easement. These obstructionist tactics required a court order to enforce the Petersons’ easement rights, not a revocation of their easement rights.

**C. The trial court erred by disregarding the law of the case – Footnote 10 confirmed the Petersons’ easement and a process to enable the Petersons to repair or replace the Smith pilings.**

The trial court cannot ignore the appellate court's specific holdings and directions that enunciate a principle of law, which must be followed in later stages of the same litigation. *Cook v. Brateng*, 180 Wn. App. 368, 375, 321 P.3d 1255 (2014); *Bank of America, N.A. v. Owens*, 177 Wn. App. 181, 189-90, 311 P.3d 594 (2013) (remand), *rev. denied*, 179 Wn.2d 1027 (2014). The “law of the case” doctrine refers to “the binding effect of determinations made by the appellate court on further proceedings in the trial court.” *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (internal quotations and citations omitted). Courts apply the doctrine “to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision

of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.” *Id.*, quoting 5 Am.Jur.2d Appellate Review § 605 (2d ed.1995). Law of the case doctrine binds the parties, the trial court, and subsequent appellate courts. *See Owens*, 177 Wn. App. at 190; RAP 12.2.

In Footnote 10,<sup>9</sup> the appropriateness of the Peterson easement remedy was finally determined, confirming the continuing easement in favor of the Petersons’ and explaining the process for repairing the pilings. The question whether the easement should be limited, subject to restrictions, or replaced with some other kind of remedy was determined or could have been more fully determined in *Smith I*. *See Cogdell v. 1999 O’Ravez Family, LLC*, 153 Wn. App. 384, 220 P.3d 1259 (2009) (trial court abused its discretion ordering easement as equitable remedy for encroachment without offsetting relief for owner of land such as ejection (removal), damages, or forced sale of disputed property, where inappropriate easement remedy “created a situation which continues to create conflict”; appeals court vacated easement and remanded for trial court to provide meaningful relief consistent with *Proctor v. Huntington*). Thus, the law of the case prevented the trial court from revisiting the

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<sup>9</sup> Law of the case applies to “decisions,” “rulings,” or “holdings” of an appellate court. *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008); *City of Camas v. Kiggins*, 120 Wash. 40, 44, 206 P. 951 (1922). It applies equally to holdings in a footnote. *Cf. Perez v. Stephens*, 784 F.3d 276, 280-281 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 502 (2015) (reversing district court for failing to follow Footnote 4 in *Perez I* deemed a ruling that necessarily assessed and dismissed jurisdiction argument and was binding precedent).

appropriateness of its original easement remedy, and its decision to completely eliminate the easement was erroneous. *See Owens*, 177 Wn. App. at 189-91.

Similarly, *Cogdell* demonstrates the easement issue could have been determined differently had the Smiths appealed that ruling. Their failure to appeal the easement remedy in *Smith I* prevented them from collaterally attacking it in their 2015 motion to enforce or “modify.” *See Marley v. Dept. of Labor and Indus.*, 125 Wn.2d 533, 537-8, 886 P.2d 189 (1994) (claim preclusion requires unappealed order of a trial court or agency, even if erroneous, is final and binding and cannot be collaterally attacked). After the *Smith I* appeals process was exhausted in 2012, CR 60(b) did not provide the Smiths an avenue for relief by a motion to enforce or “modify” in 2015. *Burlingame v. Consolidated Mines and Smelting Co., Ltd.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986) (“Errors of law are not correctable through CR 60(b); rather, direct appeal is the proper means of remedying legal errors.”).

Here, through the backdoor the Smiths’ 2015 motion alleged “errors of law” in the judicially created dock canopy easement affirmed in *Smith I*—it was wrong to take away their property rights, cooperation was unworkable or impossible, it “created a situation which continues to create conflict” (*Cogdell*).

**D. Claim preclusion barred relitigating the Petersons’ easement to stop them from repairing or replacing the Smith pilings.**

Claim preclusion prevents piecemeal litigation and ensures finality of judgments. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005). “[I]f an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim.” *Karlberg v. Otten*, 167 Wn. App. 522, 535-536, 280 P.3d 1123 (2012).<sup>10</sup> Claim preclusion applies “not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time.” *Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997).

Bringing a motion to eject the Petersons through a “motion to enforce or modify” in 2015, the Smiths sought injunctive relief that was already addressed and denied by the courts in *Smith I*. In that original action, the Smiths alleged a cause of action for injunctive relief to “enjoin[n] the [Petersons] from trespassing or causing others to trespass on any of the Smiths’ property or the disputed portion of the dock,” which

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<sup>10</sup> In *Karlberg*, the second action to establish an old fence as the boundary line was precluded by res judicata (claim splitting) where the first action established the boundary line halfway between survey line and old fence. “Where judgment in the first action determines the boundary line between two adjoining properties, the judgment is preclusive of future attempts to move the boundary line in one direction or another.” *Karlberg*, 167 Wn. App. at 539-540.

included “hir[ing] a contractor to enter [Smiths’] portion of the disputed property to make repairs or changes.” CP 481-82 (Pltffs. Complaint). Not only did the trial court deny the Smiths’ claim for injunctive relief—declining to enjoin the Petersons in any respect—the Court granted the Petersons an easement to “continue to use the slip on the North side of the dock” and enjoined the Smiths from removing the canopy covering the Petersons’ dock. CP 75, 83-4, 86.

Where a *judgment creating an easement* disposes of all claims, is appealed and affirmed, it directly precludes all further proceedings in the same case, except clarification and enforcement proceedings, and it collaterally precludes other suits based on the same claim. *See Kemmer v. Keiski*, 116 Wn. App. 924, 932-933, 68 P.3d 1138 (2003). Clarification, which can be accomplished at any time, “explains or refines rights already given,” but cannot grant “new rights nor exten[d] old ones.” *Id.* at 933-4 (reversing August 2001 judgment providing “substantial and significant modification” by expanding uses in May 2000 judgment easement that was not mere clarification, and was not accomplished in compliance with CR 59, CR 60 or other exception to preclusion).<sup>11</sup>

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<sup>11</sup> Courts lack inherent power or Rule 60(b) authority to modify a judgment unless the error appears on the face of the judgment. *Seattle-First Nat. Bank Connell Branch v. Treiber*, 13 Wn. App. 478, 482, 534 P.2d 1376 (1975). A change in facts after judgment will not support CR 60 relief. *Tamosaitis v. Bechtel Nat’l, Inc.*, 182 Wn. App. 241, 255, 327 P.3d 1309 (2014), *rev. denied*, 181 Wn.2d 1029 (2014). The “any other reason” language of CR 60(b)(11) is “not a blanket provision authorizing reconsideration for all conceivable reasons.” *State v. Keller*, 32 Wn. App. 135, 141, 647 P.2d 35 (1982) (reasons must relate to irregularities which are extraneous to the action of the court or go to the question

In *Smith I*, the trial court specifically ruled the Smiths have no right to tear down the Petersons' dock canopy, in whole or in part, and the Petersons have the right to "maintain the canopy." CP 465-69 (Feb. 26, 2010 hearing). The court specifically granted the Petersons an easement to use, repair and replace the pilings to support their encroaching dock canopy. CP 131-4 (May 27, 2010 hearing). Repairs only required "some notice" to the Smiths, but not their agreement. CP 133-4 (May 27, 2010 hearing).<sup>12</sup> Since the Smiths were barred from relitigating the Petersons' easement rights, the trial court erred in granting the Smith motion and denying the Petersons' cross-motion.

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of the regularity of its proceedings); *see also Wagers v. Goodwin*, 92 Wn. App. 876, 881-882, 964 P.2d 1214 (1998) (proceeding under CR 60(b)(11) to reopen judgment is available only in "unusual" and "extraordinary circumstances" such as retroactive application of new statute or situations that involve "reliance on mistaken information"); *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (circumstances must relate to irregularities "extraneous to the action of the court").

<sup>12</sup> A trial court's oral decisions are used to interpret and explain the findings and judgment. *Wallace Real Estate Inv. Inc. v. Groves*, 72 Wn. App. 759, 770, 868 P.2d 149 (1994). They are final and binding decisions on the scope of the Petersons' easement rights for purposes of res judicata and collateral estoppel. *See In re Custody of M.J.M.*, 173 Wn. App. 227, 242, 294 P.3d 746 (2013) (oral ruling has final and binding effect when "formally incorporated into the findings, conclusions, and judgment"). Here, the findings and conclusions recite: "[T]he Court incorporates its oral rulings made on January 28, 2010, February 26, 2010, May 27, 2010, and August 13, 2010." CP 80.

**E. The trial court's order of removal violates the Petersons' easement rights.**

Easements are property rights that give the holder rights to use the owner's land. *Admasu v. Port of Seattle*, 185 Wn. App. 23, 36, 340 P.3d 873 (2014), *rev. denied*, 183 Wn.2d 1009 (2015). To the owner of the burdened estate, easements are subtractions or from his or her full spectrum of rights, or burdens on the title. *Id.* Here, the Peterson easement is both affirmative and negative: (1) it is *affirmative* in that it gives Petersons, the easement holders, the right or privilege to use the Smith's property to support their dock canopy, and (2) it is *negative* in that it gives the Petersons the right to restrict the Smiths' exercise of general and natural rights of a property owner to, for example, destroy or remove the Peterson dock canopy. *See Deskbook* §7.2(2), at 7-4. As the servient estate<sup>13</sup> holder, the Smiths have the right to make all uses of the servient land that are *not inconsistent with* the rights of the Petersons, the dominant estate holder. *See Deskbook* §7.2(5), at 7-6; *Crisp v. VanLaecken*, 130 Wn. App. 320, 323, 122 P.3d 926 (2005).

Here, the 2010 judgment expressly created an *interest in land*:

This Judgment runs with the land of both parties and is binding upon their heirs, successors and assigns.

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<sup>13</sup> A servient estate is burdened by the easement; a dominant estate benefits from the easement. *See M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 655, 145 P.3d 411 (2006).

CP 76 (¶ 11). This language created an easement *appurtenant* in favor of the Petersons. *See Heg v. Alldredge*, 157 Wn.2d 154, 161, 137 P.3d 9 (2006) (“An easement appurtenant which runs with the land is not a mere privilege to be enjoyed by the person to whom it is granted or by whom it is reserved. It passes by a deed of such person to his grantee and follows the land without any mention whatever.”). Unless limited by the terms of creation, appurtenant easements follow possession of the dominant estate through successive transfers. *Crisp*, 130 Wn. App. at 323; *Deskbook* § 7.7(1)(a & b), at 7-28 (successor to servient estate takes subject to easement). Thus, the Peterson easement was intended to be permanent and lasting, not temporary and subject to revocation. *See Deskbook* § 7.8(1), at 7-30 (easement, unless expressly limited, “lasts as long as the estate to which it is appurtenant exists”); *Deskbook* § 7.9(1), at 7-36 (unlike a license revocable at will, “an easement is usually a permanent interest in an estate”).<sup>14</sup> Here, no duration was fixed by the courts in *Smith I*.

When *Smith I* created an easement in favor of the Petersons, the rights of the parties were fixed at the time of creation and the trial court

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<sup>14</sup> The Peterson easement is a property right, not a mere license or revocable privilege. *See Proctor v. Huntington*, 146 Wn. App. 836, 852, 192 P.3d 958 (2008), *aff'd*, 169 Wn.2d 491, 238 P.3d 1117 (2010) (“Licenses and easements are distinct in principle... The basic difference is that an easement is a right and a license is a privilege.”). “Unlike an easement, a license is revocable and nonassignable and does not exclude possession by the owner of the servient estate.” *Showalter v. City of Cheney*, 118 Wn. App. 543, 548, 76 P.3d 782 (2003) (business owner with mere license had no property right to maintain supporting posts for its canopy on public sidewalk required to remove canopy without compensation since city had right to withdraw permission to encroachment).

was not at liberty to reduce or eliminate those rights. *See Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888, 896, 20 P.3d 500 (2001) (trial court abused its discretion modifying earlier judgment that only required dominant estate holder of judicially created easement to “notify” servient estate holder before conducting maintenance by adding limitation requiring dominant estate holder to obtain “permission” of servient estate holder before conducting maintenance; servient estate holder's ability to limit dominant estate holder's existing maintenance rights could not be increased after first judgment).

As in *Lowe*, the Petersons were not required to obtain the Smiths’ *permission* or *consent* before proceeding with maintenance and repairs to the pilings and dock canopy. CP 132-34 (May 27, 2010 hearing).

“Cooperation” was all that was required:

...Nevertheless, the trial court explained that the pilings could not be replaced or repaired absent “cooperation” by the Smiths. **Instead, in the absence of such an agreement, the Petersons must devise a different solution to support the canopy at such time as the pilings required replacement....**

Footnote 10 (bold added). Cooperation does not mean “agreement” or “permission” is required. “Cooperation” means “a situation in which people work together to do something.” <http://www.merriamwebster.com/dictionary/cooperation> (accessed: Mar. 16, 2016); *see also Spokane County v. City of Spokane*, 148 Wn. App. 120, 127, 129, 197 P.3d 1228 (2009) (interpreting statutes to “encourage cooperation and coordination between counties and cities” where legislature intended them to work together to

plan, but nothing in the language required this goal of cooperation and coordination be reached through “joint planning areas” or required counties and cities to enter into joint planning agreements); *Burr v. Lane*, 10 Wn. App. 661, 669, 517 P.2d 988 (1974) (“cooperation” means giving “full, fair, and frank disclosure of all information”).

The Petersons cooperated in good faith by notifying the Smiths and proposing multiple solutions to work together on, all of which the Smiths unreasonably rejected. The only “solution” acceptable to the Smiths was total removal of all encroachments and total extinguishment of the Petersons’ easement rights.

Judge Schapira had no authority to modify *Smith I* by requiring mutual consent to repairs instead of cooperation and then terminating the easement altogether for lack of agreement. Her 2015 order eliminates the pilings in order to prevent the Petersons from using their dock and canopy tied to those pilings for more than 55 years. This violates *Smith I* (Footnote 10) where “the court made clear that the Smiths would not be permitted to remove the supporting pilings as such an action might “damage the canopy.”” The Petersons should not suffer a forfeiture of their easements rights when they gave their good faith cooperation with the courts’ explicit instructions in *Smith I*, but the Smiths did not. *Cf. State v. Tracer*, 173 Wn.2d 708, 721 n. 11, 272 P.3d 199 (2012) (“Harrison should not suffer negative consequences for his good faith cooperation with the court’s explicit instructions.”).

“Washington law does not favor termination of easements.” *Cole*, 112 Wn. App. at 186. The servient estate holder may not, by his own volition, terminate or abridge the easement. *See Deskbook* §7.8(2), at 7-31. Easements may not be terminated or relocated without the consent of the dominant owner, “regardless of how the easement was created.” *Id.* (termination); *MacMeekin v. Low Income Hous. Inst, Inc.*, 111 Wn. App. 188, 190, 45 P.3d 570 (2002) (relocation). Unauthorized use or alterations in the character of the easement will not terminate the easement where the general purposes for which it was originally granted continue to be served and the servitude area is not materially increased. *Deskbook* §7.8(2)(g), at 7-35. “[N]ormal changes in the manner of use resulting from the passage of time or in resulting new needs and uses will not constitute a deviation from the original [easement] grant.” *Deskbook* §7.6(1)(c), *citing Logan v. Broderick*, 29 Wn. App. 796, 631 P.2d 429 (1981).

No facts supported termination of the Peterson easement. *Smith I* did not establish any time limits or termination contingencies. Continued wear of the Smith pilings requiring imminent repair was foreseen in *Smith I*. The Petersons’ proposals to repair the pilings to maintain the dock canopy did not materially increase the servitude area—in fact they would have decreased it. The Petersons did not consent to termination.

The trial court erred by eliminating the Petersons’ property interest to confer a benefit on the Smiths, treating the Smiths’ “right to quiet enjoyment” as dispositive. *See RP* (Oct. 26, 2015) 16, 18. “The owner of an easement has...a right closely resembling the fee owner’s right to use and

enjoyment of land...” Dan B. Dobbs, *1 Law of Remedies: Damages-Equity- Restitution*, at 784 (Pract. Treatise Series 2d ed. 1993).

Rights of adjoining landowners in the use and enjoyment of their property are relative, but they are also equal. Equity cannot restrict one landowner to confer a benefit on the other. *It is only when an unreasonable or unlawful use of land by one property owner infringes upon some right of another in the reasonable use and enjoyment of his land that equity will intervene.*

*McInnes v. Kennell*, 47 Wn.2d 29, 38, 286 P.2d 713 (1955) (reversing injunction requiring removal of neighbor’s fence erected along boundary line without permit) (italics added).

A servient estate owner cannot “interfere with the dominant landowner's enjoyment of the easement.” *Colwell v. Etzell*, 119 Wn. App. 432, 444, 81 P.3d 895 (2003) (Sweeney, J., concurring); *Littlefair v. Schulze*, 169 Wn. App. 659, 665-66, 278 P.3d 218 (2012) (servient owner may not interfere with original purpose of easement; dominant owner has right to protect rights in easement); *Veach v. Culp*, 92 Wn.2d 570, 575, 599 P.2d 526 (1979) (servient owner may not “materially interfere with the use by the holder of the easement”). Only when a servient owner is “subjected to a greater burden than that originally contemplated by the easement grant” does the servient owner have the right to restrict such use in a reasonable fashion necessary for his protection “as long as such [restriction does] not unreasonably interfere with the dominant owner's use.” *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 241, 23 P.3d 520 (2001), quoting *Rupert v. Gunter*, 31 Wn. App. 27, 31, 640 P.2d 36 (1982). Before adjusting easement rights, courts must

consider (1) the increased burden on the servient estate, (2) whether the restrictions sought by the servient owner are reasonably necessary for its protection, and (3) the degree to which restrictions interfere with the dominant owner's use. *See Nw. Properties Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n*, 173 Wn. App. 778, 793, 295 P.3d 314 (2013).

The trial court did not consider any of these factors. Despite affirming the Petersons' right to repair and maintain the Smith pilings to preserve their dock canopy in 2010, in 2015 Judge Schapira ordered a complete cessation of the Petersons' easement rights without considering the burdens on the Smith property, the interference on the Petersons' use, or less drastic restrictions. There was no "increased burden" on the Smiths' servient estate—the pilings were worn and needed replacing when the trial court created the easement in its judgment of October 14, 2010.<sup>15</sup>

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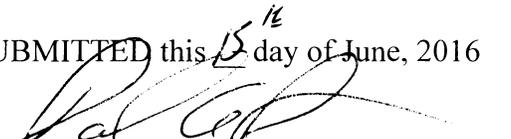
<sup>15</sup> The repair rights of a dominant estate holder are firmly established in Washington law. Maintenance and repair is allowed to correct conditions interfering with the holder's use and enjoyment of the easement and thus render it effectual and usable under the new conditions. *Hughes v. Boyer*, 5 Wn.2d 81, 90, 104 P.2d 760 (1940); *Deskbook* § 7.6(3), at 7-26; William B. Stoebuck and Dale A. Whitman, *The Law of Property* § 8.9, at 460 (3rd ed. 2000) (easement holder allowed reasonable improvements and maintenance "to make the easement serve its intended purposes"). "[A]n implied or secondary easement... is applied to the right to enter and repair and do those things necessary to the full enjoyment of an easement as existing." *White Bros. & Crum Co. v. Watson*, 64 Wash. 666, 670, 117 P. 497 (1911). "[R]esponsibility for the maintenance and repair of an easement to keep it in proper condition lies with the owner of the easement—the dominant estate." *Donner v. Blue*, 187 Wn. App. 51, 56, 347 P.3d 881 (2015).

The Smiths' claims of safety hazard were overblown and speculative.<sup>16</sup> Ordering removal of the canopy that occasioned no harm or injury was error. *See Baillargeon v. Press*, 11 Wn. App. 59, 67-68, 521 P.2d 746 (1974) (denying request of party seeking removal of encroachment for lack of damage).

## VII. CONCLUSION

For the foregoing reasons, the Petersons respectfully request this Court reverse and remand with instructions to grant the Petersons' cross-motion to enforce 2010 judgment as confirmed by Footnote 10. To respect the lengthy judicial proceedings that occurred in *Smith I*, this is the only equitable remedy that maintains the Peterson dock canopy, allowing them to obtain a city permit to make ordinary and necessary repairs to the Smith pilings to keep the canopy standing as ordered in *Smith I*.

RESPECTFULLY SUBMITTED this <sup>12</sup>15 day of June, 2016



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<sup>16</sup> City of Bellevue inspector Thomas Miller testified the Peterson dock canopy attached to the Smith pilings is "structurally sound" and declined the Smiths' demand for abatement action in March 2015. CP 335-7; CP 305-6. The trial court did not cite any safety issues in her ruling. The Petersons' proposals to fix or replace the pilings would take care of any safety concerns. CP 269 (Peterson decl.); CP 279-80, CP 294-95 (proposals).

**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 <sup>th</sup> 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"/>

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 STATE OF WASHINGTON

DATED: June 15, 2016, at Bellevue, Washington

  
 Cheryl C. Cook