

JUN 05 2013

JOAN P. WHITE  
SAN JUAN COUNTY, WASHINGTON

SUPERIOR COURT OF WASHINGTON,  
COUNTY OF SAN JUAN

HELMAR MILLER, an individual and  
ANNA MYERS, an individual,

Plaintiffs,

vs.

SPIRIT COVE CEMETERY  
ASSOCIATION, a Washington nonprofit  
corporation; and GEORGE E. SWINDELLS  
and SUSAN HAWES-SWINDELLS,  
husband and wife,

Defendants.

CASE NO. 12-2-05266-3

DEFENDANTS' REPLY IN SUPPORT OF  
SUMMARY JUDGMENT

"If facts are on your side, argue the law. If the law is on your side, argue the  
facts. If neither the law nor the facts are on your side, confuse them."

-- Philip W. Porter, Cleveland: Confused City on a Seesaw 70 (1976).

**I. Introduction**

As a preliminary matter, Defendants would like to take this opportunity to re-focus the  
Court's attention to the proper issues currently before it. Plaintiffs filed a lawsuit against  
Defendants alleging that Defendants' "willfully violated RCW § 27.44.040 by moving the  
headstone of Thomas She-Kla-Malt." *Plaintiffs' Compl.*, at 4. Plaintiffs also alleged that the  
headstone relocation violated a real covenant. *Id.* at 4. Defendants subsequently moved for

Defendants Reply - I

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1 partial summary judgment on the issues of whether the relocation of the headstone was a  
2 violation of RCW § 27.44.040 or a violation of the cited real covenant. *Defs. Motion Partial*  
3 *Summ Judg.* It is now abundantly clear that the relocation neither violated RCW § 27.44.040 nor  
4 the cited real covenant. Plaintiffs have confused questions of fact with questions of law, and  
5 have not presented this Court with a single, genuine issue of material fact that might preclude  
6 summary judgment from issuing. *See, Pls. Response in Opp. to Defs. Motion for Partial Summ.*  
7 *Judg.* Therefore, based on the pleadings filed to date (and upon consideration of the relevant  
8 portions of each) Defendants vigorously maintain that summary judgment on these issues is  
9 appropriate as there are no genuine issues of material fact and Defendants are entitled to  
10 judgment as a matter of law. Defendants respectfully request that this Court grant Defendants'  
11 Motion for Summary Judgment, dismiss Plaintiffs' claims with prejudice, and award fees and  
12 costs as provided for under RCW § 27.44.050(4).  
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17 As an additional preliminary matter, Defendants also object to Plaintiffs' Service of their  
18 Response in Opposition to Defendants' Motion for Partial Summary Judgment. Defendants'  
19 Counsel did not consent to email service of pleadings or papers and never received a hard-copy  
20 of Plaintiffs' filings. Defendants' Counsel has not had an opportunity to review the hundreds of  
21 pages submitted in support of Plaintiffs' arguments and she is currently participating in a two-  
22 day Shoreline Hearings Board Hearing. To the extent that Plaintiffs failed to properly serve  
23 Defendants pursuant to LCR 5, 6 and CR 6(e), this has caused prejudice to Defendants.  
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## II. Argument

### A. There are No Genuine Issues of Material Fact.

#### 1. RCW § 27.44.040

Plaintiffs have not met their burden to establish that genuine issues of material fact exist and ought to preclude summary judgment from issuing. Defendants presented a version of the factual issues surrounding the relocation of Thomas She-Kla-Malt's headstone in their Motion for Partial Summary Judgment. Having met their burden, Plaintiffs are now tasked with presenting *admissible evidence* demonstrating the existence of a genuine issue of material fact. *Pacific Northwest Shooting Park Association v. City of Sequim*, 158 Wn.2d 342, 351, 144 P.3d 276 (2006) (referencing *Vallandigham v. Clover Park School District No. 400*, 154 Wn.2d 16, 27, 109 P.3d 805 (2005)). If the nonmoving party cannot meet this burden, summary judgment is appropriate. *Pacific Northwest Shooting Park Ass'n*, 158 Wn.2d at 351.

Plaintiffs submitted volumes of information in their responsive pleadings, most of which is either irrelevant to the claims asserted or inadmissible under CR 56(e). Plaintiffs finally explain the basis for their claim on page 22 of their response, writing that "[i]n this case, the disputed issue of material fact is whether Defendants' actions constituted removal, mutilation, defacement, injury, or destruction . . . pursuant to RCW § 27.44.040." *Pls. Response in Opp. to Defs. Motion for Part. Summ. Judg.*, at 22. However, this is a *question of law*, properly before the Court on Defendants' Motion for Partial Summary Judgment. "The interpretation and application of a statute to a particular factual configuration is treated as a question of law." *Nuttall v. Dowell*, 31 Wn. App. 98, 107 n.1, 639 P.2d 832 (1982)(referencing *Leschi v. State Highway Commission*, 84 Wn.2d 271, 285, 525 P.2d 774 (1974)). Plaintiffs fail to acknowledge

1 that the act of interpreting and applying statutes *are questions of law*. *Bostain v. Food Exp., Inc.*,  
2 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

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4 There are no genuine issues of material fact: unsurprisingly, Plaintiffs' declarations recall  
5 nearly the same experiences as those presented by the Defendants, Stephen Kenady, and  
6 Stephanie Kramer. *Compare* Swindells Decl. at 3, Kramer Decl., and Kenady Decl., at 3, *with*  
7 Miller Decl., ¶¶ 12-16 and Myers Decl., ¶¶ 7-10 (cited in *Pls. Response in Opp. to Def Motion*  
8 *for Partial Summary Judgment*, at 15 – 16). Although the relocation clearly had a different  
9 subjective impact on each individual present (*i.e.*, the “industrial crane-bulldozer” was actually a  
10 skid-steer loader) there is no dispute over who performed the relocation or who was present that  
11 day. For the purposes of applying RCW § 27.44 there are no genuine issues of material fact in  
12 dispute.  
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## 14 2. Real Covenant

15 Similarly, Plaintiffs have not offered any genuine issues of material fact in regards to the  
16 cited real covenant. *See, Pls. Response in Opp. to Defs. Motion for Partial Summ. Judg.*  
17 First, Plaintiffs have not established that the relocation can be characterized as a “development”  
18 activity under the MDNS. Second, Plaintiffs do not have any claims to legal title of the Cemetery  
19 parcel and have not established otherwise. Although, Plaintiffs do claim ownership interests in  
20 certain objects located on the Cemetery parcel under federal statutory provisions, this claim of  
21 ownership is not unique to them as enrolled Lummi Indians. In fact, by Plaintiffs' reasoning any  
22 of the three thousand named persons on Sealed Exhibit A to the “Stipulation and Agreed Order  
23 Regarding Visitation, Maintenance, and Access Rights of Cemetery Beneficiaries” have standing  
24 to enforce the cited real covenant, assuming that it even applies.  
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2 **3. Questions of law.**

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4 Although Plaintiffs claim to be the “most competent to determine ... whether an injury  
5 through the removal of the headstone occurred as contemplated by RCW § 27.44.040(1),” *Pls.*  
6 *Response in Opp. to Defs. Motion for Partial Summ. Judg.*, at 21, this question of law is properly  
7 reserved for the trial Court and does not present a genuine issue of material fact. Again,  
8 questions of statutory interpretation are questions of law. *Bostain v. Food Exp., Inc.*, 159 Wn.2d  
9 700, 708, 153 P.3d 846 (2007). Unsurprisingly, Plaintiffs are not empowered to determine  
10 whether the headstone’s relocation violated RCW § 27.44, that is reserved strictly for the trial  
11 Court. To the degree that the trial Court should interpret the cited statute through a culturally  
12 specific lens, is for the Court to decide alone, however Plaintiffs have not offered any cases or  
13 legal arguments supporting such an approach.  
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16 When looking to previous rulings it is clear that Defendants actions were not violative of  
17 the cited statute. To wit, the Court in *Lummi Nation v. Golder Associates, Inc.*, 236 F. Supp.2d  
18 1183 (W.D. Wash. 2002) explained that when applying RCW § 27.44 to a specific set of facts,  
19 that “The legislature did not, however, want to . . . arbitrarily prevent construction where the  
20 property owner takes adequate preservation measures.” *Lummi Nation*, 236 F. Supp.2d at 1193.  
21 And as shown in Defendants’ Motion for Partial Summary Judgment, Defendants took every  
22 possible step to ensure that the Lummi Nation, The Department of Archeological and Historic  
23 Preservation, and the Department of Licensing approved of headstone’s relocation. Defendants  
24 even met with the Lummi Nation and Plaintiffs to this action to hear discuss Plaintiffs concerns;  
25 however, once the Lummi Nation and multiple state agencies approved of the relocation,  
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27 Defendants were not obligated to also secure Plaintiffs’ individual approval. Plaintiffs are upset  
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Defendants Reply - 5

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1 that the Lummi Nation consented to the relocation despite their protests and are now even  
2 claiming to be the parties tasked with “determin[ing] ... whether an injury through the removal  
3 of the headstone occurred as contemplated by RCW § 27.44.040(1).” *Pls. Response in Opp. to*  
4 *Defs. Motion for Partial Summ Judg.*, at 21. Plaintiffs have failed however to establish that there  
5 are any issues of material fact outstanding and thus, summary judgment is appropriate under the  
6 present circumstances.  
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10 **B. There is no intent to develop the Cemetery parcel.**

11 As a point of clarification, Defendants have appended an aerial map of the Pearl Little  
12 Estate from the San Juan County Assessor’s website to this Reply in order to facilitate the  
13 Court’s understanding of the claims being presented. Plaintiffs assert in various forms of hearsay  
14 and inadmissible evidence that Defendants and their Counsel, Ms. O’Day are colluding to  
15 establish an “*elaborate ‘new joint use dock, a dock access trail, and a parking lot’*”. *Pls.*  
16 *Response in Opp. to Defs. Motion for Partial Summ. Judg.*, at 13. The real covenant that  
17 Plaintiffs cited was part of an MDNS issued when Ms. O’Day and the then previous owners, as  
18 her neighbors executed a boundary line modification. *Defs. Memo. in Support of Defs. Motion*  
19 *for Partial Summ. Judg.*, at 11. Any plans of coordinated development as perpetuated by  
20 Plaintiffs is not relevant to the claims that they advanced under RCW § 27.44.040 or the cited  
21 covenant. While Defendants are currently attempting to secure a permit to construct a dock, that  
22 dock is not going to be installed or impact the Cemetery parcel. Defendants have even offered  
23 the Lummi Nation and all Cemetery Beneficiaries limited rights of use and access. Again,  
24 Plaintiffs unfounded assertions are only offered to distract and mislead the court from the  
25 impotent claims presently before it.  
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1     **C.     Defendants hold legal title to the Cemetery Parcel.**

2             Another point of clarification is that Defendants are not alleging to have ownership  
3     interests in the headstone itself. *See, Pls. Response in Opp. to Defs. Motion for Partial Summ.*  
4     *Judg.*, at 24. In fact, this is exactly why Defendants consulted with the Lummi Nation and  
5     various state agencies and hired a professional archeologist to conduct the relocation. The  
6     Defendants do however hold proper legal title to the Cemetery parcel and Plaintiffs have not  
7     established their “justicible interest” to seek the enforcement of a real covenant without having  
8     vertical privity of estate. *See, Def. Mot. Partial Summ Judg.*, 12 -13. Because the cited covenant  
9     does not apply to the relocation of the headstone, and because Plaintiffs lack standing and  
10    vertical privity of estate to seek the enforcement of the covenant, and because Defendants  
11    complied with the terms of the covenant by hiring a professional archeologist and coordinating  
12    the relocation with the Lummi Nation, DAHP, and the DOL, Defendants cannot be found to have  
13    violated the real covenant relied upon by Plaintiffs.  
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18    **D.     Plaintiffs responsive pleadings are misleading and incendiary.**

19            Plaintiffs’ responsive pleadings are misleading and designed to confuse and mislead this  
20    Court. There are a number of “factual” allegations contained in Plaintiffs’ responsive pleadings  
21    that are irrelevant, baseless, and otherwise inadmissible. A notable example: Plaintiffs write  
22    “Maggie Fitzhugh excluded an Indian burial ground on the land from the property so deeded to  
23    Pearl.” *Pls. Response in Opp. To Defs. Mot. For Summ. Judg.*, at 5. However, Plaintiffs’  
24    counsel, failed to inform this Court of the essential following sentence from that same Supreme  
25    Court case, that “At a subsequent Bureau of Indian Affairs probate proceeding, it was determined  
26    that Pearl, as Maggie’s only child and sole heir, *had also inherited the Indian burial ground.*”  
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Defendants Reply - 7

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1 *Matter of Estate of Little*, 106 Wn.2d 269, 272, 721 P.2d 950 (1986). This is just one example of  
2 tactics employed by Plaintiffs to distract the Court from the meritless claims actually before it.

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4 Plaintiffs also mislead this Court by attempting to mischaracterize the present dispute in  
5 terms of ethnic lineage and cultural superiority. In fact, whereas (by Plaintiffs' own admission)  
6 Defendants strove to present a balanced and culturally sensitive (albeit insipid) exercise in  
7 statutory interpretation, Plaintiffs' responsive pleadings make constant references to a clash of  
8 cultures that are allegedly causing great prejudice and harm to Plaintiffs. *See generally, Pls.*

9 *Response in Opp. to Defs. Motion for Partial Summ. Judgment*. These incendiary remarks  
10 distract the Court from addressing the real issues presently before it: whether Defendants  
11 violated RCW § 27.44.040 when they hired a professional archeologist to conduct a controlled  
12 relocation of a headstone, only after receiving express consent from the Lummi Nation, the  
13 Department of Archeological and Historic Preservation, and the Department of Licensing.  
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16 Ultimately, Defendants hold legal title to a portion of what once was the Pearl Little  
17 Estate. *See*, Swindells Decl., at 1. That tract of land includes a Cemetery parcel that Defendants  
18 have protected and stewarded since acquiring title. *Id.* In fact, the creation of Defendant Spirit  
19 Cove Cemetery Association was designed expressly to ensure that the desires of the Lummi  
20 Nation were carried out with respect to management and care of the Cemetery. *Id.* at 2. Several  
21 Lummi Indians currently sit on the Spirit Cove Cemetery Association's Board of Directors. *Id.*  
22 The relationship between Defendants and the Lummi Nation are based on trust and mutual  
23 respect. The Lummi Nation, only after numerous attempts to provide Plaintiffs with an  
24 opportunity to hear about the relocation, to ask questions, and reconsider did the Lummi Nation  
25 offer its consent. *See*, Swindells Decl., Kenady Decl. The Lummi Nation, on behalf of the  
26 Cemetery Beneficiaries consented to the relocation.  
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Defendants Reply - 8

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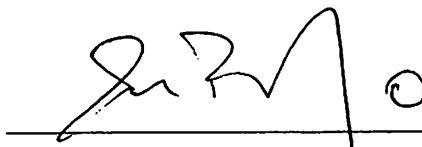


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### III. Conclusion

It is clear that Plaintiffs felt deep hurt and great pain when the Lummi Nation ultimately decided to approve the relocation over Plaintiffs' protests; but, it was this approval (among others) that ultimately made the relocation legally sound and not violative of RCW § 27.44.040. Plaintiffs may be upset that Defendants honored the wishes of the Lummi Nation despite Plaintiffs' protests, but this is a dispute to be resolved between Plaintiffs and the Lummi Nation. To file hundreds of pages of responsive pleadings, many of which have absolutely no bearing to the claims at issue and ignite tempers over matters of ethnic and cultural sensitivities likely constitutes an abuse of the judicial system. At the very least it has subjected Defendants to increased financial expense and emotional stress. Ultimately, the claims asserted by Plaintiffs lack merit. Plaintiffs have clearly failed to establish that there are any genuine issues of material fact and that Defendants are not entitled to judgment as a matter of law.

Respectfully Submitted this 5th of June, 2013.



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