SWEDELSON GOTTLIEB
Community Association Attorneys

What The Heck Is A Spite Fence?

By David Swedelson and Joan Lewis Heard,

Community Association Attorneys at SwedelsonGottlieb

"Every body does not see alike.... The tree which moves some to tears of joy is in the eyes of others only a green thing that stands in the way." Blake, William *The Complete Writings of William Blake*. Oxford: Oxford University, 1957, 793. This private nuisance action embodies the truth of William Blake's observation.[1]

Trees and views; 2 big community association issues. If an owner is not entitled to a view, and most owners do not have such a legal entitlement (as will be addressed in this article), they may claim, as one owner did in a recent lawsuit against a long time firm client, that the association's trees constitute an impermissible spite fence which can be a nuisance. So what the heck is a spite fence? It is a fence that is over ten feet in height that is built on or near the property line with the intent to harm the neighboring property owner. California Civil Code Section 841.4 states:

> *Any fence or other structure in the nature of a fence unnecessarily exceeding 10 feet in height maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property is a private nuisance. Any owner or occupant of adjoining property*

[1] The above quote comes directly from *Wilson v. Handley*, 119 Cal.Rptr.2d 263 at 265 (2002), one of the California Court of Appeal cases that holds that trees can be, under certain circumstances, a spite fence.

injured either in his comfort or the enjoyment of his estate by such nuisance may enforce the remedies against its continuance prescribed in Title 3, Part 3, Division 4 of this code.

But can trees be considered a fence? Yes they can. There are two Court of Appeal decisions that have held that trees can be, under certain limited circumstances, a spite fence. We discuss them at length as the decisions in these cases show that a community association could be maintaining a spite fence.

The first California case to hold that trees can be a spite fence is *Wilson v. Handley* 119 Cal.Rptr.2d 263 (2002). Follow this link for the entire opinion of the Court of Appeal. In that case, the court presented the following facts: Plaintiffs, Wendy Wilson and Jane Cassady, and defendants, Leon and Sue Handley were neighbors in the City of Yreka; the Handleys' property adjoins both Plaintiffs' properties. When Wilson began building a two-story log house on her property, the Handleys planted a row of evergreen trees along the property line. Afraid the trees would block their views of Mt. Shasta, the plaintiffs brought a lawsuit to require the Handleys to remove the trees. Plaintiffs relied in part on California's spite fence statute (Cal. Civ. Code § 841.4), which declares that any "fence or other structure in the nature of a fence" that unnecessarily exceeds 10 feet in height and is maliciously erected or maintained for the purpose of annoying a neighbor is a private nuisance.

The question presented in that case was whether a row of trees planted parallel to a property line can be a "fence or other structure in the nature of a fence" within the meaning of the spite fence statute. The Court of Appeal disagreed with the trial court that had ruled that the trees could not be a fence. The appeals Court determined that because the spite fence

statute must be liberally construed, that Court concluded that a row of trees can be a "fence or other structure in the nature of a fence" and thus can be a spite fence under section 841.4. The Court, however, did not decide whether the trees in question were a spite fence, only that they could be a spite fence, and sent the case back to the trial court to determine if the Handleys' trees were planted with the intent to harm the plaintiffs.

In determining that trees can be a fence, the Court stated as follows: "The question that remains is whether a row of trees can be a structure "in the nature of a fence." The Handleys suggest it cannot because "[a] line of unconnected trees cannot prevent intrusion nor straying from within." While it is true one definition of the word "fence" is "an enclosing structure ... intended to prevent intrusion from without or straying from within" (Black's Law Dict., 5th ed. (1979) p. 556, col. 2**), a "fence" can also be a "structure ... erected ... to separate two contiguous estates" (*Ibid.*) or "a barrier intended ... to mark a boundary" (*Merriam-Webster's Collegiate Dict.* (10th ed. 2000) p. 428, col. 1)**. In light of the history and purpose of the spite fence statute, we conclude these latter definitions more accurately express what constitutes a "fence or other structure in the nature of a fence" within the meaning of section 841.4.

The Court also included some commentary on the history of spite fences that helps us understand why the legislature enacted the spite fence law and stated as follows: The rise of spite fence statutes in the United States stems from the general repudiation in this country of the English doctrine of "ancient lights," under which a landowner could acquire an

easement over adjoining property for the passage of light and air. (See *Western Granite & Marble Co. v. Knickerbocker* (1894) 103 Cal. 111, 113, 37 P. 192; *Venuto v. Owens-Corning Fiberglass Corp.* (1971) 22 Cal.App.3d 116, 127, 99 Cal.Rptr. 350.) Such a doctrine was ill-suited to conditions existing in the early part of this century in a new and rapidly growing country. At that time, society had a significant interest in encouraging unrestricted land development. Moreover a landowner's rights to use his land were virtually unlimited; it was thought that he owned the center of the earth and up to the heavens. In contrast, light had little social importance beyond its value for aesthetic enjoyment or illumination." (*Sher v. Leiderman* (1986) 181 Cal.App.3d 867, 876, 226 Cal.Rptr. 698.) Under American common law, it was said that "a man has a right to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor's light and air." (*Rideout v. Knox* (1889) 148 Mass. 368, 372, 19 N.E. 390, 391.)

The Court referenced an example of a spite fence that was the motivation for the spite fence statute. In the 1870s, when Charles Crocker sought to purchase an entire city block on San Francisco's Nob Hill on which to build a mansion, and a local undertaker named Yung would not sell his small lot to Crocker, Crocker bought the remainder of the block and built a fence 40 feet high on his property around Yung's lot. (Lewis, Oscar *The Big Four*. New York: Knopf, 1951, 111, 118-119.) Eventually, Yung sold out and Crocker procured the entire block.

Beginning in 1888, Courts in some states began to hold that a fence erected for no purpose except to harm a neighbor could be abated as a nuisance under the common law. (See *Burke v. Smith* (1888) 69 Mich. 380,

37 N.W. 838; Annot., Spite fences and other spite structures (1941) 133 A.L.R. 691, 692-697, § II.a., and cases cited.) In California, a predecessor to the current spite fence statute regulating the height of division fences and partition walls in cities and towns was enacted in 1885. Under this earlier law, a landowner could not build a fence or partition wall more than 10 feet high without obtaining a permit from the board of supervisors or the city council, and the governmental entity could not grant the permit unless the landowner secured the written consent of the owner or occupant of the adjoining property affected by the proposed fence or wall. (See *Western Granite & Marble Co. v. Knickerbocker, supra,* 103 Cal. at p. 114, 37 P. 192.)

The California Supreme Court concluded that if the Legislature intended the law to apply to a structure built entirely on the landowner's property, it was unconstitutional because it was not "competent for the legislature to vest in [a landowner] the power to prevent his neighbor from building such structure as he pleases, provided it is not a nuisance, and it is not such merely because it obstructs the passage of light and air." (*Id.,* at p. 115, 37 P. 192.) Accordingly, to render the law constitutional, the Court construed it as applying only to **fences built on the boundary line** and thus resting partly on the land of the adjoining owner. (*Id.* at p. 116, 37 P. 192.) This is important as it helps define what the law intends when it states that the row of trees, to be a spite fence, must be on or near the property line. And this is important to this case as none of the trees Plaintiff claims are obstructing her view and constitute a spite fence are anywhere near her property line.

In 1913, the California Legislature joined a growing number of states

and adopted the current spite fence statute, which was likely drawn from the Massachusetts statute, declaring it a private nuisance to maliciously erect or maintain "[a]ny fence or other structure in exceeding ten feet in height ... for the purpose of annoying the owner or occupants of adjoining property, ..." (Stats. 1913, ch. 197, § 1, p. 342.) The statute was upheld against constitutional challenge in 1920. (*Bar Due v. Cox* (1920) 47 Cal.App. 713, 716, 190 P. 1056.) The spite fence statute remained uncodified until 1953, when it was codified as § 841.4 of the Civil Code.

As shown by the discussion above, spite fence statutes were enacted to prevent what would otherwise be the lawful practice of a landowner erecting or maintaining an unnecessarily high barrier between his or her property and an adjoining property to annoy the neighboring landowner. In light of this statutory purpose, a structure need not be built to prevent intrusion from without or straying from within to be a "fence or other structure in the nature of a fence" within the meaning of the spite fence statute. **Instead, the structure need only be built to separate or mark the boundary between adjoining parcels—albeit, in an unnecessarily high and annoying manner.** (See *Lovell v. Noyes* (1898) 69 N.H. 263, 46 A. 25 **[noting that a fence, "in the ordinary meaning of the term," is "a structure erected upon or near the dividing line between adjoining owners, for the purpose of separating the occupancy of their lands"]**.)

The Court in *Wilson*, in stating in its ruling that trees can be a spite fence, stated as follows: “Given the purpose of spite fence statutes like section 841.4, and the rule of liberal construction that applies to section 841.4, we conclude a row of trees **planted on or near the boundary line**

between adjoining parcels of land can be a "fence or other structure in the nature of a fence." The Handleys argue, however, that a row of trees cannot be a *spite* fence because it is the "natural condition" of trees to be more than 10 feet high, and a fence must "unnecessarily" exceed 10 feet in height to be a spite fence under section 841.4."

If it is determined that there are trees in a row on or near the property line, a court must still find that these trees are being maintained for spiteful purposes. As to this issue, the Court in *Wilson* stated as follows: "As we read the spite fence statute, the question whether a particular fence or fence-like structure "unnecessarily" exceeds 10 feet in height cannot be answered without reference to the ostensible purpose or purposes the defendant claims for the structure. The spite fence statute expresses the judgment of the Legislature that a fence—that is, a structure built to separate or mark the boundary between two adjoining parcels—does not need to be more than 10 feet high to serve that purpose. However, if a fence or fence-like structure serves some other purpose as well, then its height above 10 feet may be justified by that additional purpose. (See *Rideout v. Knox, supra,* 148 Mass. 368, 19 N.E. at p. 392 ["Even the right to build a fence above [the statutory limit] is not denied when any convenience of the owner would be served by building higher.... If the height above [the statutory limit] is really necessary for any reason, there is no liability"].)

The *Wilson* court provided examples as to when something built or maintained on or near the property line is not to be considered a spite fence even if it is being maintained to annoy the neighboring property

owner, stating: “For example, in *Lovell v. Noyes, supra,* 69 N.H. 263, 46 A. at page 25, the Supreme Court of New Hampshire addressed whether a shed that was 15 feet tall and used for storing carriages could be deemed a spite fence. The Court acknowledged the structure was "designed to take the place of a `fence'" and that "[t]here was evidence tending to show that it was erected for the sole purpose of annoying the plaintiff." (*Ibid.*) Nevertheless, the court reversed a verdict in favor of the Plaintiff because "[a] building, whether it be a dwelling house, warehouse, stable, or shed for the storage of carriages, etc., must be more than five feet in height, to be of utility." (*Ibid.*)

The Court in *Wilson* then referenced the facts in that case, and stated that “Sue Handley testified they planted the row of trees for aesthetic purposes and to protect their privacy.” If the Trial Court credits Sue Handley's testimony, then the Court could reasonably conclude that the trees—even if they are a "structure in the nature of a fence"—do not exceed 10 feet in height "unnecessarily" if their growth in excess of 10 feet is necessary to maintain their aesthetic qualities or to protect the Handleys' privacy. On the other hand, if the Court discredits Sue Handley's testimony and finds that the trees serve no purpose other than to separate or mark the boundary between the adjoining parcels and to annoy Plaintiffs, then the Court could reasonably conclude that the trees "unnecessarily" exceed 10 feet in height. In any event, this is a determination for the Trial Court to make in the first instance.”

As the Court in *Wilson* so clearly stated, “in the spite fence statute before this court, the Legislature declared as a nuisance only those fences

and other fence-like structures that are unnecessarily more than 10 feet high and **that are maliciously erected or maintained for the purpose of annoying a neighbor**. Thus, what makes a spite fence a nuisance under section 841.4 is not merely that it obstructs the passage of light and air, but that it does so unnecessarily for the malicious purpose of annoyance."

As to what constitutes malice, the *Wilson* Court pointed to a Massachusetts case and stated: "In upholding the Massachusetts spite fence statute against constitutional challenge more than 100 years ago, the Supreme Judicial Court of Massachusetts explained the "malice" element of the statute as follows: "The fences must be `maliciously erected, or maintained for the purpose of annoying' adjoining owners or occupiers. This language clearly expresses that there must be an actual malevolent motive, as distinguished from merely technical malice.... [W]e are of opinion that it is not enough to satisfy the words of the act that malevolence was one of the motives, **but that malevolence must be the dominant motive,—a motive without which the fence would not have been built or maintained. A man cannot be punished for malevolently maintaining a fence for the purpose of annoying his neighbor merely because he feels pleasure at the thought he is giving annoyance, if that pleasure alone would not induce him to maintain it, or if he would maintain it for other reasons, even if that pleasure should be denied him."** (*Rideout v. Knox, supra,* 148 Mass. 368, 19 N.E. at p. 392.) (Emphasis added.)

The Court in *Wilson* adopted the "dominant purpose" test for determining whether the "malice" element of section 841.4 has been

satisfied, and stated that “the pertinent question is whether the Handleys' dominant purpose in planting the row of evergreen trees along their property line with plaintiffs was to annoy plaintiffs. This is a factual determination to be made by the trial court in the first instance based on the evidence received at trial.”

Therefore, and based on the Court’s decision in *Wilson*, if the facts show that an association is maintaining the trees at a height taller than ten feet primarily for reasons other than to annoy an owner of a property in the association or even a neighboring property — for example, to "beautify" the association’s common area, then annoyance would not the dominant purpose of the row of trees and the "malice" element of section 841.4 is not satisfied. On the other hand, if an owner can prove and a court finds the association is maintaining the trees primarily to annoy an owner, and other purposes such as the aesthetics of the community were only subordinate to the dominant purpose of annoyance, then the "malice" element has been satisfied.

The second of the two leading cases on this issue is the 2011 case of *Vanderpol v. Starr,* (2011) 194 Cal.App.4th 385. Follow this link for the Court of Appeals decision. The facts in that case are demonstrative of the malice required and are not in any way similar to the case now before this Court.

In the *Vanderpol* case, the Court noted that California real property law coming out of the 1800s recognized that property owners’ rights to use their land are not limitless, but that property owners are entitled to be free from unreasonable interference of light and air. In the *Vanderpol* case, the jury found that the Starrs had created a spite fence; Patterson cannot prove

the same.

Here are the facts in the *Vanderpol* case: the Vanderpols' property adjoins that of the Starrs. Situated on a hillside, the Vanderpols' land is above the Starrs' property, and both have views of the Pacific Ocean. When the Vanderpols purchased the property in 1999, a line of eucalyptus trees ran along the Starrs' side of a fence separating the two parcels. The trees did not block the Vanderpols' view. The prior owner stated there was an arrangement with the property owner below to keep the trees trimmed to heights that would not disrupt the view. The trees were about 9 to 12 feet tall and had been recently trimmed.

In 2001 and 2002, the Vanderpols approached their downhill neighbors and by agreement the trees were trimmed to a uniform height of 14 feet. However, in 2004 plans were made to trim the trees. However on the day the trees were to be trimmed, Mrs. Starr met Mr. Vanderpol in her back yard and stated that she would only allow a few trees in the corner of her lot to be trimmed two or three feet off the top. Mr. Vanderpol responded that was not what he and the Starrs had agreed on. **The conversation intensified and Mrs. Starr called Mr. Vanderpol a "bully" and said she knew how to "deal" with bullies.** She demanded that Mr. Vanderpol leave her property and threatened to call the police. Instead, Mr. Vanderpol called the police when the Starrs threatened his pets.

About a month later, the Starrs began planting approximately 85 new trees new trees along the common border, including up to 20 pine trees and 65 Italian cypresses. Mrs. Starr testified the new trees were to provide a visual screen between her property and that of the Vanderpols. In 2007, the

Vanderpols' counsel notified the Starrs that their trees were obstructing his clients' view and were annoying, and advised them to trim their trees. Mr. Vanderpol estimated the trees were then four to five times higher than when he and his wife moved to the residence in 2000. The Starrs did not trim their trees.

The Vanderpols sued the Starrs in 2009, alleging a cause of action for private nuisance based on California's "spite fence" statute, *Civil Code* section 841.14. The jury found that the Starrs maliciously maintained trees that unnecessarily exceeded 10 feet for the dominant purpose of annoying the Vanderpols, and found this conduct was a substantial factor in causing harm to the Vanderpols.

The Court of Appeal agreed with the jury and expressly adopting the Wilson decision (spite fence statutes were enacted to **prevent unnecessarily high barriers between properties**, . . . a row of trees planted or **maintained at or near the boundary line between adjoining parcels** can be a "structure in the nature of a fence" for purposes of section 841.4.) concluded that a row of trees serving as a barrier between parcels can satisfy the statutory language of a "structure in the nature of a fence." The Court of Appeal did not dispute the jury's finding that the trees were a spite fence, and sent the case back to the trial court because it had not shown that the Vanderpols had sustained "injury in their comfort or the enjoyment of [their] estate by such nuisance", and, because of that, the injunction was unwarranted under the statute. The case was remanded for further trial on that issue. And it is clear from the facts that the Vanderpols should have prevailed under the facts.

So, it is possible for a California community association to be sued for creating a spite fence and that includes a spite fence made out of a row of trees. Whether an owner suing the association for the loss of their view or the loss of air or light as a result of the row of trees can prove that the dominant purpose of the trees was to bother the owner would depend on the facts.

In a case that our firm recently handled, a jury found that the trees in our association client's park were not unnecessarily over ten feet and thus found that there was no spite fence. Follow this link for more on that case.

David Swedelson and Joan Lewis Heard are part of the litigation and trial team at SwedelsonGottlieb. They are community association legal experts.