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Superior Court Case No. 08-2-04296-9

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

MYKAYLO STEFANKIV and HANNA STEFANKIV

Appellants

v.

BERN KEO and SAVOUTH KEO

Respondents

RESPONDENTS' BRIEF

A. Janay Ferguson, WSBA #31246
FERGUSON SELL, PLLC
1424 Fourth Avenue, Suite 311
Seattle, Washington 98101
(206) 624-6400

Attorney for Respondents Bern Keo and
Savouth Keo

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I. INTRODUCTION

Respondents Bern and Savouth Keo have owned their Lynnwood home since 1995. For that entire 14 year period, the Keos' home has been serviced by a sewer line which runs across the neighboring property, now owned by Appellants Mykhaylo and Hanna Stefankiv. The Stefankivs purchased their home only a few years ago, in 2005.

Over 20 years ago, the Keos' property and the Stefankivs' property were part of the same parcel. The original owners, Mary and Steven Stafford, filed for and received approval to record a short plat in 1988. The following year, 1989, the Staffords obtained a side sewer permit running across Lot 1 (the property now owned by the Stefankivs) to service a house to be built on Lot 2 (the property now owned by the Keos). While the Staffords still owned Lot 1, they sold Lot 2 to the first of many buyers. Later, the Staffords also sold Lot 1.

The recorded documents demonstrate the Staffords intended to burden Lot 1 with a sewer line easement for the benefit of Lot 2. The spatial relationship of the two lots, and the location of clearly visible manholes serving the public sewer main, make clear that sewer lines extending from the Keos' home were likely to run beneath the Stefankivs' property.

In 2007, while remodeling their home, the Stefankivs damaged the Keos' sewer line. Claiming the Keos' sewer line constituted a trespass and a nuisance, the Stefankivs filed suit against the Keos to remove the sewer line. The Stefankivs did not consider that the sewer line constituted

an implied easement. Notwithstanding the Superior Court's summary judgment dismissal of their claim, they still insist the sewer line must be removed. Ignoring undisputed facts supporting by evidence in the public record, they claim they are entitled to a trial on their claims.

For the reasons detailed below, the Keos seek relief from this onerous, costly, and unnecessary litigation and request this Court affirm the Superior Court's orders granting summary judgment dismissal of the Stefankivs' claims and denying the Stefankivs' procedurally improper motion to strike. The Keos also seek an award of attorney fees pursuant to RAP 18.9

II. ASSIGNMENTS OF ERROR

The Keos assign no error to the trial court's decision. The Keos do, however, offer the following counter-statement of the issues raised by Plaintiffs/Appellants Stefankivs' assignments of error.

III. STATEMENT OF ISSUES

1. This Court should affirm the Superior Court's order denying the Stefankivs' motion to strike. The Superior Court did not abuse its discretion when it denied the procedurally defective motion to strike because the Superior Court applied the correct legal standard governing the admissibility of documents offered in support of a summary judgment motion.

2. This Court should affirm the Superior Court's order granting summary judgment dismissal of the Stefankivs' claims. The Keos' sewer line satisfies all elements required to find an implied

easement and the existence of the implied easement is a complete defense to the Stefankivs' factually indistinguishable claims for trespass and nuisance.

3. This Court should grant the Keos' request for attorney fees pursuant to RAP 18.9 because the Stefankivs' appeal is frivolous.

IV. STATEMENT OF THE CASE

A. **Factual Background: History of the Lots Now Owned by the Stefankivs and the Keos**

The properties now owned by the Stefankivs and the Keos on 188th Street S.W. in Lynnwood, Snohomish County, were originally part of a single parcel owned by Steven and Mary Stafford. CP 112–118. During the Staffords' ownership, a single sewer line, originally permitted in 1963, serviced the lone house on the parcel. CP 120.

In 1988, the City of Lynnwood wished to improve 188th Street S.W. and in consideration of a power of attorney executed in favor of the City for the proposed improvements, granted the Staffords approval to file a short plat. CP 122–125. The proposed street improvements included “modifications to the sanitary sewer system, including adjustment of existing manholes to grade and extending existing sewer laterals[.]” CP 124. In 1988, the Staffords filed for, and received approval to record, a short plat, creating two lots, commonly known as 6132 188th Street S.W. (Lot 1, now owned by the Stefankivs) and 6134 188th Street S.W. (Lot 2, now owned by the Keos). CP 112–118.

In 1989, while the Staffords still owned both parcels, they obtained a side sewer permit running across Lot 1 to service a house to be built on the newly-created Lot 2. CP 127. This sewer line was in place when the Staffords sold Lot 2, the lot benefited by the sewer, to Charles and Christine Cox in 1991. CP 129–130.

In 1993, the Coxes improved the sewer serving Lot 2. CP 132. That same year, while the Staffords still owned Lot 1, the Coxes sold lot 2 to Theodore and Arlene Wolff. CP 134–135. Two years later, the Wolffs conveyed Lot 2 to the Keos, who own it today. CP 139.

In 1994, after the Coxes improved Lot 2 and sold it to the Wolffs, the Staffords sold Lot 1, the lot burdened by the sewer line, to Timothy and Tiphonie Anderson. CP 137. Lot 1 was transferred several more times thereafter. The Andersons sold Lot 1 to Ivan Gomez and Stephanie Henry. CP 141. Mr. Gomez and Ms. Henry sold Lot 1 to Andrew and Constance Lysene. CP 143–144. The Lysenes sold Lot 1 to Jeanne Patton. CP 146. In March 2005, Ms. Patton conveyed Lot 1 to the Stefankivs. CP 148–150. By that time, Lot 1 had continuously been burdened with the sewer line for 16 years.

In conjunction with the closing of Ms. Patton's conveyance to the Stefankivs, Pacific NW Title issued the Stefankivs a commitment for title insurance, which, amongst other provisions, warned the Stefankivs that Lot 1 might be burdened by "[e]asements, or claims of easements" that were not recorded and provided the Stefankivs the prior recordings related to Lot 1, including a copy of the Short Plat Map recorded in August 1988.

CP 152–158. The Short Plat Map stated that drainage systems for “proposed houses” would in future be “directed into a dry well system.” CP 158; CP 112–118.

In 2007, during excavation for a remodeling project, the Stefankivs allegedly “discovered” the sewer line. CP 187, ¶4. Their contractor had damaged the line. This lawsuit followed.

For the Court’s convenience, the table below summarizes the history of the Lots.

| Year | Owner | | Action |
|------|-------------|-------|---|
| | Lot 1 | Lot 2 | |
| 1963 | Stafford | | Sewer Permit for Property before platting |
| 1988 | | | Short Plat dividing Stafford Property into Lots 1 & 2 |
| 1988 | | | Agreement for Short Plat on Approval of LID |
| 1989 | | | Stafford applies for Side Sewer Plat that affects both Lots |
| 1991 | | Cox | Stafford conveys Lot 2 to Cox, granting implied easement |
| 1993 | | | Cox applies for improvement to Side Sewer Plat for Lot 2 |
| 1993 | Anderson | Wolff | Cox conveys Lot 2 to Wolff |
| 1994 | | | Stafford conveys Lot 1 to Anderson burdened by easement |
| 1995 | Gomez/Henry | Keo | Wolff conveys Lot 2 to Keo |
| 1998 | | | Anderson conveys Lot 1 to Gomez/Henry |
| 2000 | | | Gomez/Henry conveys Lot 1 to Lysene |
| 2002 | | | Lysene conveys Lot 1 to Patton |
| 2005 | Stefankiv | | Patton conveys Lot 1 to Stefankiv |
| 2007 | | | Stefankivs damage Keos' sewer line |
| 2008 | | | Stefankivs sue the Keos |

B. Procedural Background

1. The Stefankivs' Complaint

The Stefankivs' complaint includes two "causes of action," for trespass and nuisance. CP 188. In its entirety, the trespass claim reads as follows: "[t]he placement and maintenance of the defendants' sewer line on the plaintiffs' property constitutes a continuing trespass." CP 188, ¶10. The nuisance claim is similarly brief, alleging only that "[t]he placement and maintenance of the defendants' sewer line on the plaintiffs' property constitutes a nuisance." CP 188, ¶11.

The Stefankivs requested the Superior Court enter an "[i]njunction ordering the defendants to abate and remove the sewer line from the plaintiffs' property. CP 188. They also sought "special and general damages" in an unspecified amount. *Id.*

2. The Superior Court Denied the Stefankivs' Motion to Strike

The Keos filed a motion for summary judgment on the grounds that their sewer line occupies an implied easement and cannot constitute either a trespass or a nuisance as a matter of law. CP 167–179. In support of their summary judgment motion, the Keos filed 16 exhibits, authenticated by a declaration of counsel. CP 107–166. The exhibits included true and correct copies of public records relating to the Keo and Stefankiv properties, including a Short Subdivision Application, a sewer permit, sewer permit applications, and statutory warranty deeds. *Id.* Also amongst the exhibits were copies of pictures of the properties, taken by

Mr. Keo, and an estimate by a contractor, Roto-Rooter, of the cost to relocate the Keos' sewer line. *Id.*

On the same day the Stefankivs filed a response to the Keos' summary judgment motion, the Stefankivs filed a motion to strike "certain incompetent and inadmissible exhibits" submitted in support of the Keos' motion. CP 47–50. The motion was unaccompanied by a note for motion, as required by Snohomish County Local Rule 7(b)(2)(B). *Id.* The motion to strike challenged five of the Keos' exhibits, on the following grounds:

- Exhibit B (copy of the sewer permit obtained in 1963): ER 402, ER 602, ER 802 and "lack of foundation";
- Exhibit D (1989 City of Lynnwood application for side sewer permit): ER 602, ER 802 and ER 901;
- Exhibit F (1993 City of Lynnwood application for side sewer permit): ER 602, ER 802 and ER 901;
- Exhibit O (photographs of the Keo and Stefankiv properties, taken by Mr. Keo): "[l]ack of foundation and assumes facts not in evidence"; and
- Exhibit P (copy of the Roto-Rooter estimate): ER 802, ER 701, ER 702, CR 26 and CR 33.¹

CP 49. The motion to strike did not provide any additional details regarding the Stefankivs' evidentiary challenges. CP 47–50.

¹ The Stefankivs also moved to strike Paragraph 16 of the Keos' attorneys' declaration, which authenticated the photographs, alleging "[l]ack of foundation and assumes facts not in evidence." CP 49.

In strict reply, the Keos provided a declaration of Mr. Keo, attaching a copy of the photographs (as Exhibit R) and the Roto-Rooter estimate (as Exhibit S). CP 29–39.

Notwithstanding the Stefankivs’ failure to note the motion to strike for hearing, the Superior Court ruled on the motion at the summary judgment motion and issued an order denying the motion to strike in full. CP 5. In addition to denying the motion to strike Exhibits B, D, F, and P, the Superior Court admitted Exhibit O “to support [the] Keo Declaration.” *Id.*

3. The Superior Court Dismissed the Stefankivs’ Claims with Prejudice

The Keos moved for summary judgment dismissal of the Stefankivs’ complaint. CP 157–179. The issue before the Superior Court was whether the court should dismiss the Stefankivs’ complaint with prejudice “because the Keos’ sewer line is within an implied easement and therefore cannot constitute either a trespass or a nuisance as a matter of law.” CP 171.

In the Stefankivs’ response, styled as both a response to the Keos’ summary judgment motion and as a “cross motion for partial summary judgment,” the Stefankivs raised several arguments. CP 51–63. First, they claimed the Keos’ “predecessor’s failure to record a side-sewer easement violates Washington Law” and invalidated the easement against the Stefankivs, as “innocent purchaser[s] for value.” CP 54–56. Second, the Stefankivs argued, without any supporting evidence, that the Keos’

“side-sewer” constituted a trespass as well as a nuisance. CP 56–59. Finally, after repeating their evidentiary challenges to the Keos’ summary judgment exhibits, the Stefankivs asserted, without benefit of legal authority, the implied easement theory was “inapplicable” and that even under an implied easement theory, “there are multiple genuine issues of material fact.” CP 61–62.

After reviewing the parties’ submittals and hearing oral argument, the Superior Court granted the Keos’ motion for summary judgment and dismissed the Stefankivs’ complaint with prejudice. CP 3–4. This appeal ensued.

V. ARGUMENT

A. Standard of Review

The Stefankivs appeal from two orders of the Honorable Eric Lucas, Snohomish County Superior Court: (1) the order denying the Stefankivs’ motion to strike materials submitted in support of the Keos’ summary judgment motion; and (2) the order granting the Keos’ motion for summary judgment and dismissing the Stefankivs’ complaint with prejudice. CP 3–5.² These orders are reviewed for abuse of discretion and de novo, respectively. The applicable standards of review are addressed in more detail below.

² Inexplicably, the Stefankivs did not designate the Notice of Appeal in their Designation of Clerk’s Papers, as required by RAP 9.6(b)(1)(A). *See* CP 1–2 (Designation of Clerk’s Papers).

With regard to both orders, the Superior Court’s rulings should be affirmed if this Court determines there is any legal theory supporting the Superior Court’s conclusions, even if this Court’s theories or reasoning diverge from those of the Superior Court. *See La Mon v. Butler*, 112 Wn.2d 193, 200–01, 770 P.2d 1027 (1989).

B. This Court Should Affirm the Superior Court’s Order Denying the Stefankivs’ Motion to Strike

1. The Order Denying the Stefankivs’ Motion to Strike Is Reviewed for Abuse of Discretion

A trial court’s ruling on an evidentiary matter “will not be overturned absent manifest abuse of discretion.” *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) (internal citation and marks omitted). This discretionary standard applies to motions to strike evidence submitted with a motion for summary judgment. *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004), *rev. denied*, 153 Wn.2d 1016 (2004).

A trial court abuses its discretion “[w]hen it takes a view no reasonable person would take, or applies the wrong legal standard to an issue.” *Cox*, 141 Wn.2d at 439.

Here, in response to the Stefankivs’ motion to strike, which failed to comply with the Snohomish County Local Rules, the Superior Court held the exhibits challenged by the Stefankivs were admissible. CP 5. The Keos argued, and the Superior Court agreed, that the Stefankivs’ myriad objections to the Keos’ exhibits lacked merit. CP 13–18; CP 5.

As detailed below, the Superior Court did not abuse its discretion when it denied the Stefankivs' motion to strike.

2. The Stefankivs' Motion to Strike Was Procedurally Defective

The Washington Supreme Court has “recognize[d] that a superior court has a legitimate interest in regulating civil practice in its courts so as to promote the efficient administration of justice[.]” *Whitney v. Buckner*, 107 Wn.2d 861, 868, 734 P.2d 485 (1987). For this reason, pursuant to CR 83, superior courts are “empowered to promulgate local rules not inconsistent with the civil rules adopted by [the Washington Supreme] [C]ourt.” *Id.*

“A local rule is proper if it merely requires that a procedural step be taken by one wishing to assert a legal right.” *Lemon v. Lemon*, 59 Wn. App. 568, 573, 799 P.2d 748 (1990). As the *Lemon* court noted, “[r]unning a trial court is no easy business. Trial judges have the right to expect lawyers to read and follow the rules or supply a good reason for not doing so.” 59 Wn. App. at 574.

Snohomish County Local Civil Rule 7(b)(2)(B) requires “[a]ny party desiring to bring any civil motion prior to trial, other than a motion for summary judgment” to file the motion at least six (6) court days before the day the motion will be heard. SCLCR 7(b)(2)(B). The motion must be accompanied by a “note for motion calendar,” a court-approved form which must be signed by the attorney or pro se party filing the motion. *Id.*

The note for motion should also identify “the type or nature of the relief sought” and should provide a certificate of mailing of all documents. *Id.*

Here, the Stefankivs readily admit they did not file a note for motion with their motion to strike. Appellants’ Br. at 11. Ignoring the unambiguous language of SCLCR 7(b)(2)(B), the Stefankivs justify their failure to follow the rules by claiming “neither the Court Rules nor the case law requires that [a motion to strike] be formally noted for hearing.” Appellants’ Br. at 12. The Stefankivs also insist the motion to strike was “directly related” to the Keos’ summary judgment motion and thus, “does not exist separate from the context of the summary judgment motion[.]” Appellants’ Br. at 11–12.

None of these reasons excuse the Stefankivs’ decision to flout the Superior Court’s local rules. Their insistence there was “no prejudice” to the Keos ignores the inconvenience to the Superior Court and Superior Court clerk. Justice is not administered efficiently when a party chooses to rewrite the local rules to suit themselves. To the extent the Superior Court denied the Stefankivs’ motion to strike because the motion was not properly before the court, this Court should find no abuse of discretion. Trial courts must be permitted to rely upon properly enacted local rules and to insist on litigants’ compliance with such rules.

3. The Superior Court Did Not Abuse Its Discretion by Declining to Strike as Exhibits True and Correct Copies of Public Records the Stefankivs Produced in Discovery

Documents submitted in support of summary judgment pursuant to CR 56(e) must be authenticated to be admissible. *Int'l Ultimate*, 122 Wn. App. at 745. Only a “prima facie showing of authenticity” is required. *Int'l Ultimate*, 122 Wn. App. at 745–46. This showing can be satisfied by offering “proof sufficient to for a reasonable fact-finder to find in favor of authenticity.” *Int'l Ultimate*, 122 Wn. App. at 746. Moreover, as this Court explained, CR 56(e) does not limit the type of evidence allowed to authenticate a document; it merely requires “some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be.” *Id.*

In *Int'l Ultimate*, the defendants objected to exhibits submitted with a summary judgment motion, arguing the affiant attorney lacked personal knowledge of the proffered documents and that the exhibits were thus inadmissible under ER 602.³ 122 Wn. App. at 746. This Court rejected that argument, holding the proper evidentiary challenge should be made pursuant to either ER 901 (authenticity) or ER 802 (hearsay). *Int'l Ultimate*, 122 Wn. App. at 745. “If the documents are properly authenticated and are not excluded because of hearsay, then an attorney may rely on them in a summary judgment motion regardless of any lack of

³ In the Superior Court, the Stefankivs made an identical argument. CP 49. On appeal, they have apparently abandoned their ER 602 objections to the Keos’ summary judgment exhibits. *See generally* Appellants’ Br. 13–19 (discussing Stefankivs’ evidentiary objections).

personal knowledge [by the attorney].” *Int’l Ultimate*, 122 Wn. App. at 746. The Court concluded ER 901’s authentication requirement may be satisfied “when the party challenging the document originally provided it through discovery.” *Int’l Ultimate*, 122 Wn. App. at 746.

The Stefankivs challenged three exhibits to the Keos’ summary judgment motion which the Stefankivs themselves produced in discovery: Exhibit B (the sewer permit obtained in 1963), Exhibit D (the 1989 City of Lynnwood Application for Side Sewer Permit with approved Side Sewer Plat), and Exhibit F (the 1993 City of Lynnwood Application for Side Sewer Permit). *See* CP 49; CP 20–28. Under *Int’l Ultimate*, the authenticity of these exhibits cannot be disputed.

The Stefankivs also claimed Exhibits B, D, and F were inadmissible hearsay, and challenged the relevancy of Exhibit B. CP 49. With regard to the hearsay exception, all three documents clearly fit into the well-established hearsay exception for public records. *See, e.g., Brundrige v. Fluor Fed. Servs.*, 164 Wn.2d 432, 450, 191 P.3d 879 (2008) (noting a public record is excepted from hearsay “when a hearsay declarant who is a public official makes an out-of-court statement while acting pursuant to his or her official duty”). The Stefankivs did not claim these public records were false or were not obtained from the City of Lynnwood’s files. *See generally* CP 47–49. Nor did the Stefankivs explain why they objected to Exhibit B as irrelevant. *Id.* As the Keos explained, the document is clearly relevant, as it shows the sewer lateral attaching to the City of Lynnwood when the short plat application was

approved. CP 17. Moreover, the Stefankivs conceded the document's relevance when they produced it in response to the Keos' discovery requests. CP 20–28.

The Superior Court's order denying the motion to strike the Keos' Exhibits B, D and F should be affirmed. The Superior Court did not abuse its discretion by declining to strike as exhibits true and correct copies of public records the Stefankivs produced in discovery.

4. The Superior Court Did Not Abuse Its Discretion by Declining to Strike Photographs Authenticated by Mr. Keo's Declaration

The Stefankivs moved to strike Exhibit O submitted with the Keos' summary judgment motion. CP 49. Exhibit O is a compilation of four photographs taken by Mr. Keo of the Stefankiv and Keo properties. CP 160–163. The pictures were submitted as evidence of the spatial relationship of the Stefankiv and Keo lots, which provided the Stefankivs with visual notice of the sewer line. CP 170. As the Keos explained in their summary judgment motion, when the Stefankivs purchased their property, the Keos' house was located behind the Stefankivs' lot, and two manholes serving the public sewer main were clearly visible in 188th Street in front of the Stefankivs' property. *Id.*

The Stefankivs' objection to the photographs was based on their claim that the affiant attorney, the Keos' counsel, lacked personal knowledge of the lots and their spatial relationship. CP 49. In strict reply, the Keos submitted Mr. Keo's declaration, which testified, based on his

personal knowledge, that the photographs were a “fair and accurate representation” of the Stefankivs’ property. CP 29–30.

The Superior Court’s order denying the motion to strike the Keos’ Exhibit O should be affirmed. The Superior Court did not abuse its discretion by declining to strike photographs authenticated by Mr. Keo’s declaration and Mr. Keo’s description of the photographs based on his personal knowledge.⁴

5. The Superior Court Did Not Abuse Its Discretion by Declining to Strike the Contractor’s Bid for Relocation of the Keo’s Sewer Line

To support their argument regarding the necessity of the implied easement, the Keos submitted as Exhibit P contractor Roto-Rooter’s estimate of the cost of relocating the sewer line. CP 165–166. As discussed in Section V, C, 2, c, below, an easement by implication is necessary if the cost to create a substitute without trespassing on a neighboring property is unreasonable. *Berlin v. Robbins*, 180 Wash. 176, 189, 38 P.2d 1047 (1934).

The Stefankivs moved to strike Roto-Rooter’s estimate as hearsay. CP 49. They also claimed the Roto-Rooter bid includes opinion testimony calling for an expert opinion, and is thus inadmissible under ER 701 and ER 702. *Id.* And, without explanation, the Stefankivs claimed the exhibit is inadmissible under CR 26 and CR 33, which respectively concern

⁴ The photographs were attached to Mr. Keo’s declaration in strict reply as Exhibit R. CP 32–36.

“General Provisions Governing Discovery” and “Interrogatories to Parties.” *Id.*

As with their other evidentiary objections, the Stefankivs’ arguments in support of their motion to strike the Roto-Rooter estimate fail. With regard to the hearsay objection, the contractor’s estimate is admissible under the hearsay exception for business records. *See Int’l Ultimate*, 122 Wn. App. at 748–49 (finding no abuse of discretion by trial court in admitting summary judgment exhibits under the business records hearsay exception; documents were authenticated and were made “in the regular course of business, at or near the time of the act, condition or event” (quoting RCW 5.45.020)). As Mr. Keo’s declaration made clear, the estimate was provided to him personally, at his request, “to identify the costs associated with the work necessary to provide [the Keos’] home with sewer service if [they] were no longer able to use the existing sewer line.” CP 30.⁵

The Stefankivs did not elaborate on why the Roto-Rooter estimate is inadmissible under ER 701 and 702. CP 49. Apparently, they confused authentication with opinion based on scientific, technical, or other specialized knowledge. As noted above, the estimate is an admissible business record. Similarly, the Stefankivs did not explain why the exhibit is inadmissible under CR 26 and CR 33. *Id.* On appeal, they claim, without factual support, that “the author’s qualifications and status as an

⁵ The Roto-Rooter estimate was attached to Mr. Keo’s declaration in strict reply as Exhibit S. CP 37–39.

expert witness were not disclosed notwithstanding the service of an interrogatory seeking information regarding experts.” Appellants’ Br. at 18. But, as the Keos explained in response to the Stefankivs’ motion to strike, the Roto-Rooter estimate was available for the Stefankivs’ inspection and copying since June 2008. CP 18; CP 6–12.

The Superior Court’s order denying the motion to strike the Keos’ Exhibit P should be affirmed. The Superior Court did not abuse its discretion by declining to strike Roto-Rooter’s bid for relocation of the Keos’ sewer pipe.

C. This Court Should Affirm the Superior Court’s Order Granting Summary Judgment Dismissal of the Stefankivs’ Claims for Trespass and Nuisance

1. The Order Granting Summary Judgment Is Reviewed De Novo

This Court reviews a trial court’s summary judgment ruling de novo and “engage[s] in the same inquiry as the trial court.” *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). The moving party has the initial burden of “showing there is no dispute as to any issue of material fact.” *Id.* Once the moving party meets this initial showing, the inquiry shifts to the non-moving party. *Young v. Key Pharms.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The non-moving party “may not rely on speculation [or] argumentative assertions that unresolved factual issues remain” but must “set forth *specific facts* that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” *Seven Gables Corp. v.*

MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (emphasis added).

The Superior Court did not err when it held the Stefankivs failed to meet their burden to demonstrate the existence of a genuine issue of material fact precluding summary judgment. Rather than respond to the legal and factual points raised in the Keos' motion for summary judgment, the Stefankivs declined to address the law of implied easement in their responsive brief. *See* CP 51–63. Instead, the Stefankivs unsuccessfully argued that Washington's recording statute, and prior property owners' failure to record the easement, prevented summary judgment dismissal of their claims, an argument they have abandoned on appeal. CP 54–63. And, rather than setting forth specific facts to rebut the Keos' arguments, the Stefankivs relied upon a list of 20 items they characterize as "genuine issues of material fact" that in fact are nothing more than argumentative speculation. CP 62–63. These "issues" include "[i]s it reasonable and necessary to take an innocent person's property to correct another person's mistake?" and "[d]oes the inability of the plaintiffs to use their property in the way that they want interfere with the use of their property?" CP 62–63.

As detailed below, the Superior Court did not err when it granted summary judgment dismissal of the Stefankivs' claims. The Keos' sewer line satisfies all elements required to find an implied easement and the existence of the implied easement is a complete defense to the Stefankivs' claims for trespass and nuisance. To the limited extent the Stefankivs

responded to the Keos' implied easement argument – the basis for the Keos' summary judgment motion – the Stefankivs failed to meet their burden as the non-moving party to show a genuine issue of material fact. This Court should affirm the Superior Court's summary judgment dismissal of the Stefankivs' complaint.

2. The Stefankivs Appeal the Superior Court's "Findings" and "Comments" Yet Fail to Provide This Court with the Necessary Record on Review

“A party seeking review has the burden of perfecting the record so that [the appellate court] has before it all of the evidence relevant to the issue[s].” *Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 612, 937 P.2d 1148 (1997); *see also Bonneville v. Pierce County*, 148 Wn. App. 500, 508, 202 P.3d 309 (2008) (noting appellant's failure to provide an official transcript of the motion hearing and the trial court's ruling precluded review of issue on appeal and “does not meet RAP standards”). Accordingly, RAP 9.2 provides that “[a] party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review.” RAP 9.2(b). If a verbatim report of proceedings is not available because “either the court reporter's notes or the videotape of the proceeding being reviewed are lost or damaged[,]” a party may prepare a narrative report of proceedings to be provided to the appellate court or the parties may prepare and sign an agreed report of proceedings. *See* RAP 9.3, RAP 9.4.

Here, the Stefankivs claim the Superior Court erred when it issued its summary judgment dismissal order in this case, focusing on “multiple

comments” allegedly made by the Superior Court which the Stefankivs claim “clearly demonstrated that a determination of fact questions had occurred.” Appellants’ Br. at 22. Yet, the Stefankivs explicitly declined to provide a verbatim report of the summary judgment hearing so this Court might determine if their criticisms are warranted.⁶

This Court should decline to review the Stefankivs’ appeal of the Superior Court’s “findings” and “comments” because the Stefankivs have failed to perfect the record on appeal as required by the Rules of Appellate Procedure.

3. The Keos’ Sewer Line Satisfies All Elements of an Implied Easement

An easement implied from prior use has three elements under Washington law: (1) unity of title and subsequent separation by grant of the dominant estate; (2) apparent and continuous use; and (3) that the easement is reasonably necessary to the proper enjoyment of the dominant estate. *Berlin*, 180 Wash. at 179-80. The principle underlying the concept of an implied easement is that all things necessary to the reasonable use and enjoyment of land impliedly accompany its grant. *Id.*

As discussed below, the Keos’ sewer line satisfies all three elements and thus occupies an implied easement.

⁶ See Statement of Arrangements, filed with this Court on March 26, 2009, which states the Stefankivs “do not intend to provide either a *verbatim* or partial report of proceedings as part of the record on review.” Statement of Arrangements at 1 (emphasis in original).

a. *The Lots Shared Unity of Title and a Grant of Easement on Division*

The first element of an implied easement, unity of title and subsequent separation, is an absolute requirement for an implied easement. *Evich v. Kovacevich*, 33 Wn.2d 151, 157, 204 P.3d 839 (1949) (noting “the cardinal consideration upon the question of easement by implication is the presumed intention of the parties concerned”); *Rogers v. Cation*, 9 Wn.2d 369, 379, 115 P.2d 702 (1941) (holding “the presumed intention of the parties, is the prime factor in determining whether an easement by implication has been created”). The strength of the second and third elements – apparent and continuous use and necessity – is not necessarily conclusive regarding the existence of an implied easement. Rather, these elements are merely aids to determine the “cardinal consideration”: the presumed intention of the parties at severance as disclosed by the extent and character of the use, the nature of the property, and the relation of the separated parts to each other. *Evich*, 33 Wn.2d at 157.

Here, the Stefankivs cannot dispute that the lots were owned by a common owner, the Staffords, when the original property was subdivided in 1988. CP 112–118. Nor can there be any dispute that shortly after subdividing the common property, and during the period of their common ownership of the two lots, the Staffords obtained a side sewer plat in 1989 benefiting Lot 2 (the Keos’ property or the dominant estate). CP 127. Finally, there is no dispute that the Staffords continued to own Lot 1 (now

the Stefankivs' property or the servient estate) after they burdened it with a sewer line benefiting Lot 2. CP 129–130.

For these reasons, it is not open to reasonable dispute that at the time of separation, the Staffords intended to grant the benefits of the side sewer agreement burdening Lot 1 to the Coxes (who purchased Lot 2 from the Staffords), since the Staffords both obtained the side sewer agreement and retained the servient property after the transfer. The use of the side sewer agreement was a necessary benefit of property ownership impliedly transferred by the Staffords to the Coxes.

b. *The Easement Is Apparent and Has Been Used Continuously for Nearly Twenty Years*

The second element establishing the Keos' implied easement is met because the easement was apparent, as that term has been defined by Washington courts. Nearly 75 years ago, the Washington Supreme Court approved a Rhode Island Supreme Court decision which held, in the context of an implied easement, that “apparent” did not mean “visible” and “may mean little more than continuous.” *Berlin*, 180 Wash. at 184.

In *Berlin*, the Washington Supreme Court imputed knowledge of an underground water pipe to the appellant, who had not lived on the servient estate, from “community knowledge” of the water system and because short sections of the pipe were visible after heavy rain. 180 Wash. at 181–187. After reviewing precedent from other jurisdictions involving both water and sewer pipes, the *Berlin* Court concluded the implied easement at issue was apparent because “[t]he test is not whether

the pipe was actually visible its entire length or a large part thereof.” *Berlin*, 180 Wash. at 181. The Court also relied on the visibility of a faucet connected to the pipes and approved the concept that the easement was “apparent” because the nature of the piping connections would have been readily understood by any plumber examining them. *Berlin*, 180 Wash. at 185.

More recently, Division Three of this Court held an implied easement existed between two properties where a buried pipeline delivered water to the dominant orchard property. *See Fossum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995). The *Fossum Orchards* court held “[p]ipelines need not be visible to be apparent, particularly if appliances connected therewith are obvious.” *Id.* It concluded that an artificial structure such as a pipe or other fixture might, without more, constitute an apparent or continuous easement. *Id.*

Here, the sewer line easement has been in continuous service for nearly 20 years. The sewer service supplied by the easement has not been interrupted except by the Stefankivs in 2007, during excavation for their remodeling project. CP 187, ¶4.

The easement is further demonstrated by the location of the two properties. A public sewer main is located in front of the Stefankiv property, while the Keo property is visible directly behind the Stefankiv property. CP 29–36. Two manholes serving the public sewer main, which are still present, were clearly visible in front of the Stefankivs’ property. *Id.*

Finally, the Stefankivs had recorded notice that sewer laterals were affected by the Staffords' short plat and the related power of attorney. CP 122–125. The short plat also referenced the existence of a dry well system for drainage of the “proposed houses” to be built after the short plat’s recording. CP 117. Therefore, it cannot be disputed it was apparent that the Keos’ sewer line ran to the main beneath the Stefankivs’ property. The easement was continuous and apparent.

Responding to the Keos’ motion for summary judgment, the Stefankivs declined to address well-established Washington precedent (*Berlin and Fossum Orchards*) regarding when an implied easement is “apparent.” CP 51–63. Rather, the Stefankivs relied on speculation and argumentative assertions, exemplified in their 20-item list of “factual issues,” to respond to the Keos’ implied easement argument. CP 62–63. This Court should affirm the Superior Court’s summary judgment dismissal as the Stefankivs have failed to meet their burden as the non-moving party.

c. *The Easement Is Reasonably Necessary for Enjoyment of the Keos’ Lot*

The third element demonstrating the Keos’ easement by implication – necessity – is satisfied as well. “The degree of necessity [for an easement by implication] is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made.” *Evich*, 33 Wn.2d at 158–59. In an easement by implication, as the factors demonstrating the easement

increase, the level of necessity supporting the implied easement decreases.

Id.

Unlike an easement by prescription, the necessity element for an easement by implication is relatively low. The easement's existence does not turn on whether the dominant property (the Keos') is landlocked. Rather, the easement is necessary if the cost to create a substitute without trespassing on a neighboring property is unreasonable. *Berlin*, 180 Wash. at 189. Here, the Keos provided evidence that estimates the cost of a new sewer line to be more than \$30,000. CP 38–39. This is an unreasonable expense, particularly since a side sewer agreement created and transferred by the original owners to the dominant property has continuously provided the Keo property with sewer service for nearly 20 years.

This case is factually analogous to the Washington Supreme Court's decision in *Evich*. In that case, the entrances to adjoining houses were served by a walkway providing access to the front steps of both houses and a flight of steps leading down to a public sidewalk. *Evich*, 33 Wn.2d at 154. The Supreme Court found it unreasonable to require the benefited owner to pay for the expense of constructing a new walk between the two houses, when the original walk was necessary to the reasonable and convenient use and enjoyment of each house on the original property before division, the use was apparent, and there was strong evidence that the original owner intended to grant the use and enjoyment of the walk to the dominant property at severance. *Evich*, 33 Wn.2d at 158–59. The Court held “[w]here, as here, the facts so strongly

militate in favor of a finding that the parties fairly, though tacitly, intended that the continued use of the walkway pass as appurtenant to the granted estate, it might confidently be asserted that the requirement of necessity became correspondingly less.” *Evich*, 33 Wn.2d at 158. The *Evich* Court determined the disproportionate expense and inconvenience involved in constructed a new flight of steps or another walk satisfied the necessity requirement. *Id.*

Here, the deciding factor in favor of necessity is not whether a sewer line could be run by some other means at whatever cost from the Keo property to the public main, but whether the sewer line was necessary to the use of the Keo property at severance and whether the cost of a new line is reasonable now. Considering the intent demonstrated by the Staffords’ efforts to secure a side sewer agreement before transferring the Keos’ lot in 1991, and the current cost in excess of \$30,000 to obtain a similar line, the necessity element of an implied easement has been met.

The Stefankivs challenged the Roto-Rooter estimate for installation of a new sewer line on several grounds, as discussed in Section V, B, 5, above. But those arguments ultimately fail and the Superior Court declined to grant the Stefankivs’ motion to strike the estimate and the other challenged exhibits. CP 5. Moreover, absent their unsupported and erroneous challenges to the Roto-Rooter estimate, the Stefankivs provide no reason to find the amount of the estimate unreasonable, or any evidence to support such a finding.

For these reasons, this Court should affirm the Superior Court’s summary judgment order and find the Keos have satisfied all elements of an implied easement.

4. The Implied Easement Constitutes a Complete Defense to the Stefankivs’ Factually Indistinguishable Claims for Trespass and Nuisance

a. *The Nuisance and Trespass Claims Seek to Protect the Same Rights*

The Stefankivs’ complaint includes two “causes of action”: nuisance and trespass. CP 188. Upon examination, however, it is clear the Stefankivs’ claims are factually indistinguishable and seek to protect the same rights.

A nuisance is “an unreasonable interference with another’s use and enjoyment of property.” *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998) (internal citation omitted). A nuisance may be either public or private. RCW 7.48.130, RCW 7.48.150. A public nuisance affects equally the rights of an entire community or neighborhood; a private nuisance is one that is not a public nuisance. *Id.* Whether an invasion of a property interest is a trespass or a nuisance depends upon the nature of the property interest at issue. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 690-91, 709 P.2d 782 (1985). “If the intrusion interferes with the right to exclusive possession of property, the law of trespass applies. If the intrusion is to the interest in use and enjoyment of property, the law of nuisance applies.” *Id.*

Here, the property interest affected by the sewer line is a possessory one as the Stefankivs seek to exclude the Keos' sewer line. Thus, the Stefankivs' legal claim is properly for trespass rather than nuisance because the alleged interference relates to the Stefankivs' exclusive possession of Lot 1 rather than to the use and enjoyment of their property. CP 186–189.

Even if the Stefankivs' claims were assumed to be legally distinct for argument's sake, the trespass and nuisance claims seek a single form of relief: removal of the Keos' sewer line. CP 188. A party's characterization of its legal theory of recovery is not binding on the court; it is the nature of the claim presented that controls relief. *See Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 882, 567 P.2d 230 (1977). "In order for a complaint to set out multiple claims for relief, each claim must arise from a different factual occurrence or transaction." *Doerflinger*, 88 Wn.2d at 881-82; *see also Snyder v. State*, 19 Wn. App. 631, 635, 577 P.2d 160 (1978) (noting "three separate legal theories based upon one set of facts constitute one 'claim for relief'"). For example, "[a] 'negligence claim presented in the garb of nuisance' need not be considered apart from the negligence claim." *Atherton Condo Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 527, 799 P.2d 250 (1990) (*quoting Hostetler v. Ward*, 41 Wn. App. 343, 360, 704 P.2d 1193 (1985), *rev. denied*, 106 Wn.2d 1004 (1986)) (discussing summary judgment dismissal of nuisance claim based on the same omission to perform a duty which allegedly constituted negligence).

The Stefankivs' nuisance claim against the Keos arises from the same facts as their trespass claim: a sewer line running from the Keos' property, Lot 2, to the public main located in 188th Street under the Stefankivs' property, Lot 1. CP 188. The nuisance claim is therefore indistinguishable from the trespass claim and both claims fail for the same reason: the implied easement.

b. *The Sewer Line Does Not Constitute a Trespass*

“A trespass is an intrusion onto the property of another that interferes with the other's right to exclusive possession.” *Bradley*, 104 Wn.2d at 690-91 (internal citation and marks omitted). An entry upon another person's land that might otherwise be wrongful is not a trespass if it is a privileged entry, that is, if the right to enter was granted by a current or former owner to the allegedly trespassing party. *See* RESTATEMENT (SECOND) OF TORTS §158 (1965).

An easement is such a grant of entry. An easement is a “right, distinct from ownership, to use in some way the land of another, without compensation.” *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986). As detailed above, the Keos have an easement by implication. Thus, their ordinary use of the easement cannot constitute a trespass as a matter of law. The owner of an easement only trespasses if she misuses, overburdens, or deviates from an existing easement. *Mielke v. Yellowstone Pipeline Co.*, 73 Wn. App. 621, 624, 870 P.2d 1005 (1994).

The Stefankivs' complaint did not allege any such overburdening. CP 186–189. Rather, the Stefankivs allege the Keos should not be

allowed to use a sewer line in place on the Stefankivs' property for nearly twenty years. The only party interfering with the easement is the Stefankivs, who damaged the Keos' sewer line during their remodeling process.

The Keos have an implied easement for their sewer line. For this reason, as a matter of law, the Stefankivs cannot establish the Keos either trespassed on the Stefankivs' property or committed a nuisance. This Court should affirm the Superior Court's summary judgment dismissal of the Stefankivs' complaint with prejudice.

D. This Court Should Award Fees to the Keos Pursuant to RAP 18.9

RAP 18.9 provides for an award of "terms or compensatory damages" when a party "files a frivolous appeal." "[A]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal." *In re Marriage of Penry*, 119 Wn. App. 799, 804 n.2, 82 P.3d 1231 (2004).

The Stefankivs' appeal can only be characterized as frivolous. The Stefankivs' opening brief merely repeats the same speculative "factual issues" contained in their response to summary judgment and fails to grapple with the on-point legal authorities cited by the Keos. The Stefankivs do challenge the Superior Court's alleged "findings" and "comments" at the summary judgment hearing, but expressly declined to provide a verbatim report of proceedings for this Court's review. For

these reasons, the Keos respectfully request the Court award to award them attorneys' fees pursuant to RAP 18.9.

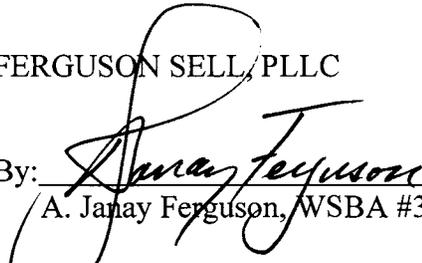
VI. CONCLUSION

For the foregoing reasons, Bern and Savouth Keo respectfully request that the Court affirm the Superior Court's orders and dismiss with prejudice Mykhaylo and Hanna Stefankiv's complaint.

RESPECTFULLY SUBMITTED this 22nd day of June, 2009.

FERGUSON SELL, PLLC

By:


A. Janay Ferguson, WSBA #31246

Attorney for Respondents Bern and Savouth Keo

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COURT OF APPEALS
DIVISION ONE

JUN 22 2009

Court of Appeals No. 63128-4
Superior Court Case No. 08-2-04296-9

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

MYKAYLO STEFANKIV and HANNA STEFANKIV

Appellants

v.

BERN KEO and SAVOUTH KEO

Respondents

RESPONDENTS' BRIEF

A. Janay Ferguson, WSBA #31246
FERGUSON SELL, PLLC
1424 Fourth Avenue, Suite 311
Seattle, Washington 98101
(206) 624-6400

Attorney for Respondents Bern Keo and
Savouth Keo

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| ER 702 | 7, 16, 17 |
| ER 802 | 7, 13 |

| | |
|-----------------------|--------------|
| ER 901 | 7, 13, 14 |
| RAP 9.2..... | 20 |
| RAP 9.3..... | 20 |
| RAP 9.6(b)(1)(A)..... | 9 |
| RAP 18.9..... | 2, 3, 31, 32 |
| SCLR 7(b)(2)(B)..... | 7, 11, 12 |

OTHER AUTHORITIES

| | |
|---|----|
| RESTATEMENT (SECOND) OF TORTS § 1.58 (1965) | 30 |
|---|----|

I. INTRODUCTION

Respondents Bern and Savouth Keo have owned their Lynnwood home since 1995. For that entire 14 year period, the Keos' home has been serviced by a sewer line which runs across the neighboring property, now owned by Appellants Mykhaylo and Hanna Stefankiv. The Stefankivs purchased their home only a few years ago, in 2005.

Over 20 years ago, the Keos' property and the Stefankivs' property were part of the same parcel. The original owners, Mary and Steven Stafford, filed for and received approval to record a short plat in 1988. The following year, 1989, the Staffords obtained a side sewer permit running across Lot 1 (the property now owned by the Stefankivs) to service a house to be built on Lot 2 (the property now owned by the Keos). While the Staffords still owned Lot 1, they sold Lot 2 to the first of many buyers. Later, the Staffords also sold Lot 1.

The recorded documents demonstrate the Staffords intended to burden Lot 1 with a sewer line easement for the benefit of Lot 2. The spatial relationship of the two lots, and the location of clearly visible manholes serving the public sewer main, make clear that sewer lines extending from the Keos' home were likely to run beneath the Stefankivs' property.

In 2007, while remodeling their home, the Stefankivs damaged the Keos' sewer line. Claiming the Keos' sewer line constituted a trespass and a nuisance, the Stefankivs filed suit against the Keos to remove the sewer line. The Stefankivs did not consider that the sewer line constituted

an implied easement. Notwithstanding the Superior Court's summary judgment dismissal of their claim, they still insist the sewer line must be removed. Ignoring undisputed facts supporting by evidence in the public record, they claim they are entitled to a trial on their claims.

For the reasons detailed below, the Keos seek relief from this onerous, costly, and unnecessary litigation and request this Court affirm the Superior Court's orders granting summary judgment dismissal of the Stefankivs' claims and denying the Stefankivs' procedurally improper motion to strike. The Keos also seek an award of attorney fees pursuant to RAP 18.9

II. ASSIGNMENTS OF ERROR

The Keos assign no error to the trial court's decision. The Keos do, however, offer the following counter-statement of the issues raised by Plaintiffs/Appellants Stefankivs' assignments of error.

III. STATEMENT OF ISSUES

1. This Court should affirm the Superior Court's order denying the Stefankivs' motion to strike. The Superior Court did not abuse its discretion when it denied the procedurally defective motion to strike because the Superior Court applied the correct legal standard governing the admissibility of documents offered in support of a summary judgment motion.

2. This Court should affirm the Superior Court's order granting summary judgment dismissal of the Stefankivs' claims. The Keos' sewer line satisfies all elements required to find an implied

easement and the existence of the implied easement is a complete defense to the Stefankivs' factually indistinguishable claims for trespass and nuisance.

3. This Court should grant the Keos' request for attorney fees pursuant to RAP 18.9 because the Stefankivs' appeal is frivolous.

IV. STATEMENT OF THE CASE

A. **Factual Background: History of the Lots Now Owned by the Stefankivs and the Keos**

The properties now owned by the Stefankivs and the Keos on 188th Street S.W. in Lynnwood, Snohomish County, were originally part of a single parcel owned by Steven and Mary Stafford. CP 112–118. During the Staffords' ownership, a single sewer line, originally permitted in 1963, serviced the lone house on the parcel. CP 120.

In 1988, the City of Lynnwood wished to improve 188th Street S.W. and in consideration of a power of attorney executed in favor of the City for the proposed improvements, granted the Staffords approval to file a short plat. CP 122–125. The proposed street improvements included “modifications to the sanitary sewer system, including adjustment of existing manholes to grade and extending existing sewer laterals[.]” CP 124. In 1988, the Staffords filed for, and received approval to record, a short plat, creating two lots, commonly known as 6132 188th Street S.W. (Lot 1, now owned by the Stefankivs) and 6134 188th Street S.W. (Lot 2, now owned by the Keos). CP 112–118.

In 1989, while the Staffords still owned both parcels, they obtained a side sewer permit running across Lot 1 to service a house to be built on the newly-created Lot 2. CP 127. This sewer line was in place when the Staffords sold Lot 2, the lot benefited by the sewer, to Charles and Christine Cox in 1991. CP 129–130.

In 1993, the Coxes improved the sewer serving Lot 2. CP 132. That same year, while the Staffords still owned Lot 1, the Coxes sold lot 2 to Theodore and Arlene Wolff. CP 134–135. Two years later, the Wolffs conveyed Lot 2 to the Keos, who own it today. CP 139.

In 1994, after the Coxes improved Lot 2 and sold it to the Wolffs, the Staffords sold Lot 1, the lot burdened by the sewer line, to Timothy and Tiphonie Anderson. CP 137. Lot 1 was transferred several more times thereafter. The Andersons sold Lot 1 to Ivan Gomez and Stephanie Henry. CP 141. Mr. Gomez and Ms. Henry sold Lot 1 to Andrew and Constance Lysene. CP 143–144. The Lysenes sold Lot 1 to Jeanne Patton. CP 146. In March 2005, Ms. Patton conveyed Lot 1 to the Stefankivs. CP 148–150. By that time, Lot 1 had continuously been burdened with the sewer line for 16 years.

In conjunction with the closing of Ms. Patton's conveyance to the Stefankivs, Pacific NW Title issued the Stefankivs a commitment for title insurance, which, amongst other provisions, warned the Stefankivs that Lot 1 might be burdened by "[e]asements, or claims of easements" that were not recorded and provided the Stefankivs the prior recordings related to Lot 1, including a copy of the Short Plat Map recorded in August 1988.

CP 152–158. The Short Plat Map stated that drainage systems for “proposed houses” would in future be “directed into a dry well system.”

CP 158; CP 112–118.

In 2007, during excavation for a remodeling project, the Stefankivs allegedly “discovered” the sewer line. CP 187, ¶4. Their contractor had damaged the line. This lawsuit followed.

For the Court’s convenience, the table below summarizes the history of the Lots.

| Year | Owner | | Action |
|------|---|-------------------------|---|
| | Lot 1 | Lot 2 | |
| 1963 | Stafford | | Sewer Permit for Property before platting |
| 1988 | | | Short Plat dividing Stafford Property into Lots 1 & 2 |
| 1988 | | | Agreement for Short Plat on Approval of LID |
| 1989 | | | Stafford applies for Side Sewer Plat that affects both Lots |
| 1991 | | Cox | Stafford conveys Lot 2 to Cox, granting implied easement |
| 1993 | | | Cox applies for improvement to Side Sewer Plat for Lot 2 |
| 1993 | | Anderson | Wolff |
| 1994 | Stafford conveys Lot 1 to Anderson burdened by easement | | |
| 1995 | Gomez/Henry | Keo | Wolff conveys Lot 2 to Keo |
| 1998 | | | Anderson conveys Lot 1 to Gomez/Henry |
| 2000 | | | Gomez/Henry conveys Lot 1 to Lysene |
| 2002 | Lysene | Keo | Lysene conveys Lot 1 to Patton |
| 2002 | Patton | | Patton conveys Lot 1 to Stefankiv |
| 2005 | Stefankiv | | Stefankivs damage Keos' sewer line |
| 2007 | | Stefankivs sue the Keos | |
| 2008 | | | |

B. Procedural Background

1. The Stefankivs' Complaint

The Stefankivs' complaint includes two "causes of action," for trespass and nuisance. CP 188. In its entirety, the trespass claim reads as follows: "[t]he placement and maintenance of the defendants' sewer line on the plaintiffs' property constitutes a continuing trespass." CP 188, ¶10. The nuisance claim is similarly brief, alleging only that "[t]he placement and maintenance of the defendants' sewer line on the plaintiffs' property constitutes a nuisance." CP 188, ¶11.

The Stefankivs requested the Superior Court enter an "[i]njunction ordering the defendants to abate and remove the sewer line from the plaintiffs' property. CP 188. They also sought "special and general damages" in an unspecified amount. *Id.*

2. The Superior Court Denied the Stefankivs' Motion to Strike

The Keos filed a motion for summary judgment on the grounds that their sewer line occupies an implied easement and cannot constitute either a trespass or a nuisance as a matter of law. CP 167–179. In support of their summary judgment motion, the Keos filed 16 exhibits, authenticated by a declaration of counsel. CP 107–166. The exhibits included true and correct copies of public records relating to the Keo and Stefankiv properties, including a Short Subdivision Application, a sewer permit, sewer permit applications, and statutory warranty deeds. *Id.* Also amongst the exhibits were copies of pictures of the properties, taken by

Mr. Keo, and an estimate by a contractor, Roto-Rooter, of the cost to relocate the Keos' sewer line. *Id.*

On the same day the Stefankivs filed a response to the Keos' summary judgment motion, the Stefankivs filed a motion to strike "certain incompetent and inadmissible exhibits" submitted in support of the Keos' motion. CP 47–50. The motion was unaccompanied by a note for motion, as required by Snohomish County Local Rule 7(b)(2)(B). *Id.* The motion to strike challenged five of the Keos' exhibits, on the following grounds:

- Exhibit B (copy of the sewer permit obtained in 1963): ER 402, ER 602, ER 802 and "lack of foundation";
- Exhibit D (1989 City of Lynnwood application for side sewer permit): ER 602, ER 802 and ER 901;
- Exhibit F (1993 City of Lynnwood application for side sewer permit): ER 602, ER 802 and ER 901;
- Exhibit O (photographs of the Keo and Stefankiv properties, taken by Mr. Keo): "[l]ack of foundation and assumes facts not in evidence"; and
- Exhibit P (copy of the Roto-Rooter estimate): ER 802, ER 701, ER 702, CR 26 and CR 33.¹

CP 49. The motion to strike did not provide any additional details regarding the Stefankivs' evidentiary challenges. CP 47–50.

¹ The Stefankivs also moved to strike Paragraph 16 of the Keos' attorneys' declaration, which authenticated the photographs, alleging "[l]ack of foundation and assumes facts not in evidence." CP 49.

In strict reply, the Keos provided a declaration of Mr. Keo, attaching a copy of the photographs (as Exhibit R) and the Roto-Rooter estimate (as Exhibit S). CP 29–39.

Notwithstanding the Stefankivs’ failure to note the motion to strike for hearing, the Superior Court ruled on the motion at the summary judgment motion and issued an order denying the motion to strike in full. CP 5. In addition to denying the motion to strike Exhibits B, D, F, and P, the Superior Court admitted Exhibit O “to support [the] Keo Declaration.” *Id.*

3. The Superior Court Dismissed the Stefankivs’ Claims with Prejudice

The Keos moved for summary judgment dismissal of the Stefankivs’ complaint. CP 157–179. The issue before the Superior Court was whether the court should dismiss the Stefankivs’ complaint with prejudice “because the Keos’ sewer line is within an implied easement and therefore cannot constitute either a trespass or a nuisance as a matter of law.” CP 171.

In the Stefankivs’ response, styled as both a response to the Keos’ summary judgment motion and as a “cross motion for partial summary judgment,” the Stefankivs raised several arguments. CP 51–63. First, they claimed the Keos’ “predecessor’s failure to record a side-sewer easement violates Washington Law” and invalidated the easement against the Stefankivs, as “innocent purchaser[s] for value.” CP 54–56. Second, the Stefankivs argued, without any supporting evidence, that the Keos’

“side-sewer” constituted a trespass as well as a nuisance. CP 56–59. Finally, after repeating their evidentiary challenges to the Keos’ summary judgment exhibits, the Stefankivs asserted, without benefit of legal authority, the implied easement theory was “inapplicable” and that even under an implied easement theory, “there are multiple genuine issues of material fact.” CP 61–62.

After reviewing the parties’ submittals and hearing oral argument, the Superior Court granted the Keos’ motion for summary judgment and dismissed the Stefankivs’ complaint with prejudice. CP 3–4. This appeal ensued.

V. ARGUMENT

A. Standard of Review

The Stefankivs appeal from two orders of the Honorable Eric Lucas, Snohomish County Superior Court: (1) the order denying the Stefankivs’ motion to strike materials submitted in support of the Keos’ summary judgment motion; and (2) the order granting the Keos’ motion for summary judgment and dismissing the Stefankivs’ complaint with prejudice. CP 3–5.² These orders are reviewed for abuse of discretion and *de novo*, respectively. The applicable standards of review are addressed in more detail below.

² Inexplicably, the Stefankivs did not designate the Notice of Appeal in their Designation of Clerk’s Papers, as required by RAP 9.6(b)(1)(A). *See* CP 1–2 (Designation of Clerk’s Papers).

With regard to both orders, the Superior Court's rulings should be affirmed if this Court determines there is any legal theory supporting the Superior Court's conclusions, even if this Court's theories or reasoning diverge from those of the Superior Court. *See La Mon v. Butler*, 112 Wn.2d 193, 200–01, 770 P.2d 1027 (1989).

B. This Court Should Affirm the Superior Court's Order Denying the Stefankivs' Motion to Strike

1. The Order Denying the Stefankivs' Motion to Strike Is Reviewed for Abuse of Discretion

A trial court's ruling on an evidentiary matter "will not be overturned absent manifest abuse of discretion." *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) (internal citation and marks omitted). This discretionary standard applies to motions to strike evidence submitted with a motion for summary judgment. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004), *rev. denied*, 153 Wn.2d 1016 (2004).

A trial court abuses its discretion "[w]hen it takes a view no reasonable person would take, or applies the wrong legal standard to an issue." *Cox*, 141 Wn.2d at 439.

Here, in response to the Stefankivs' motion to strike, which failed to comply with the Snohomish County Local Rules, the Superior Court held the exhibits challenged by the Stefankivs were admissible. CP 5. The Keos argued, and the Superior Court agreed, that the Stefankivs' myriad objections to the Keos' exhibits lacked merit. CP 13–18; CP 5.

As detailed below, the Superior Court did not abuse its discretion when it denied the Stefankivs' motion to strike.

2. The Stefankivs' Motion to Strike Was Procedurally Defective

The Washington Supreme Court has “recognize[d] that a superior court has a legitimate interest in regulating civil practice in its courts so as to promote the efficient administration of justice[.]” *Whitney v. Buckner*, 107 Wn.2d 861, 868, 734 P.2d 485 (1987). For this reason, pursuant to CR 83, superior courts are “empowered to promulgate local rules not inconsistent with the civil rules adopted by [the Washington Supreme] [C]ourt.” *Id.*

“A local rule is proper if it merely requires that a procedural step be taken by one wishing to assert a legal right.” *Lemon v. Lemon*, 59 Wn. App. 568, 573, 799 P.2d 748 (1990). As the *Lemon* court noted, “[r]unning a trial court is no easy business. Trial judges have the right to expect lawyers to read and follow the rules or supply a good reason for not doing so.” 59 Wn. App. at 574.

Snohomish County Local Civil Rule 7(b)(2)(B) requires “[a]ny party desiring to bring any civil motion prior to trial, other than a motion for summary judgment” to file the motion at least six (6) court days before the day the motion will be heard. SCLCR 7(b)(2)(B). The motion must be accompanied by a “note for motion calendar,” a court-approved form which must be signed by the attorney or pro se party filing the motion. *Id.*

The note for motion should also identify “the type or nature of the relief sought” and should provide a certificate of mailing of all documents. *Id.*

Here, the Stefankivs readily admit they did not file a note for motion with their motion to strike. Appellants’ Br. at 11. Ignoring the unambiguous language of SCLCR 7(b)(2)(B), the Stefankivs justify their failure to follow the rules by claiming “neither the Court Rules nor the case law requires that [a motion to strike] be formally noted for hearing.” Appellants’ Br. at 12. The Stefankivs also insist the motion to strike was “directly related” to the Keos’ summary judgment motion and thus, “does not exist separate from the context of the summary judgment motion[.]” Appellants’ Br. at 11–12.

None of these reasons excuse the Stefankivs’ decision to flout the Superior Court’s local rules. Their insistence there was “no prejudice” to the Keos ignores the inconvenience to the Superior Court and Superior Court clerk. Justice is not administered efficiently when a party chooses to rewrite the local rules to suit themselves. To the extent the Superior Court denied the Stefankivs’ motion to strike because the motion was not properly before the court, this Court should find no abuse of discretion. Trial courts must be permitted to rely upon properly enacted local rules and to insist on litigants’ compliance with such rules.

3. The Superior Court Did Not Abuse Its Discretion by Declining to Strike as Exhibits True and Correct Copies of Public Records the Stefankivs Produced in Discovery

Documents submitted in support of summary judgment pursuant to CR 56(e) must be authenticated to be admissible. *Int'l Ultimate*, 122 Wn. App. at 745. Only a “prima facie showing of authenticity” is required. *Int'l Ultimate*, 122 Wn. App. at 745–46. This showing can be satisfied by offering “proof sufficient to for a reasonable fact-finder to find in favor of authenticity.” *Int'l Ultimate*, 122 Wn. App. at 746. Moreover, as this Court explained, CR 56(e) does not limit the type of evidence allowed to authenticate a document; it merely requires “some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be.” *Id.*

In *Int'l Ultimate*, the defendants objected to exhibits submitted with a summary judgment motion, arguing the affiant attorney lacked personal knowledge of the proffered documents and that the exhibits were thus inadmissible under ER 602.³ 122 Wn. App. at 746. This Court rejected that argument, holding the proper evidentiary challenge should be made pursuant to either ER 901 (authenticity) or ER 802 (hearsay). *Int'l Ultimate*, 122 Wn. App. at 745. “If the documents are properly authenticated and are not excluded because of hearsay, then an attorney may rely on them in a summary judgment motion regardless of any lack of

³ In the Superior Court, the Stefankivs made an identical argument. CP 49. On appeal, they have apparently abandoned their ER 602 objections to the Keos’ summary judgment exhibits. *See generally* Appellants’ Br. 13–19 (discussing Stefankivs’ evidentiary objections).

personal knowledge [by the attorney].” *Int’l Ultimate*, 122 Wn. App. at 746. The Court concluded ER 901’s authentication requirement may be satisfied “when the party challenging the document originally provided it through discovery.” *Int’l Ultimate*, 122 Wn. App. at 746.

The Stefankivs challenged three exhibits to the Keos’ summary judgment motion which the Stefankivs themselves produced in discovery: Exhibit B (the sewer permit obtained in 1963), Exhibit D (the 1989 City of Lynnwood Application for Side Sewer Permit with approved Side Sewer Plat), and Exhibit F (the 1993 City of Lynnwood Application for Side Sewer Permit). *See* CP 49; CP 20–28. Under *Int’l Ultimate*, the authenticity of these exhibits cannot be disputed.

The Stefankivs also claimed Exhibits B, D, and F were inadmissible hearsay, and challenged the relevancy of Exhibit B. CP 49. With regard to the hearsay exception, all three documents clearly fit into the well-established hearsay exception for public records. *See, e.g., Brundrige v. Fluor Fed. Servs.*, 164 Wn.2d 432, 450, 191 P.3d 879 (2008) (noting a public record is excepted from hearsay “when a hearsay declarant who is a public official makes an out-of-court statement while acting pursuant to his or her official duty”). The Stefankivs did not claim these public records were false or were not obtained from the City of Lynnwood’s files. *See generally* CP 47–49. Nor did the Stefankivs explain why they objected to Exhibit B as irrelevant. *Id.* As the Keos explained, the document is clearly relevant, as it shows the sewer lateral attaching to the City of Lynnwood when the short plat application was

approved. CP 17. Moreover, the Stefankivs conceded the document's relevance when they produced it in response to the Keos' discovery requests. CP 20–28.

The Superior Court's order denying the motion to strike the Keos' Exhibits B, D and F should be affirmed. The Superior Court did not abuse its discretion by declining to strike as exhibits true and correct copies of public records the Stefankivs produced in discovery.

4. The Superior Court Did Not Abuse Its Discretion by Declining to Strike Photographs Authenticated by Mr. Keo's Declaration

The Stefankivs moved to strike Exhibit O submitted with the Keos' summary judgment motion. CP 49. Exhibit O is a compilation of four photographs taken by Mr. Keo of the Stefankiv and Keo properties. CP 160–163. The pictures were submitted as evidence of the spatial relationship of the Stefankiv and Keo lots, which provided the Stefankivs with visual notice of the sewer line. CP 170. As the Keos explained in their summary judgment motion, when the Stefankivs purchased their property, the Keos' house was located behind the Stefankivs' lot, and two manholes serving the public sewer main were clearly visible in 188th Street in front of the Stefankivs' property. *Id.*

The Stefankivs' objection to the photographs was based on their claim that the affiant attorney, the Keos' counsel, lacked personal knowledge of the lots and their spatial relationship. CP 49. In strict reply, the Keos submitted Mr. Keo's declaration, which testified, based on his

personal knowledge, that the photographs were a “fair and accurate representation” of the Stefankivs’ property. CP 29–30.

The Superior Court’s order denying the motion to strike the Keos’ Exhibit O should be affirmed. The Superior Court did not abuse its discretion by declining to strike photographs authenticated by Mr. Keo’s declaration and Mr. Keo’s description of the photographs based on his personal knowledge.⁴

5. The Superior Court Did Not Abuse Its Discretion by Declining to Strike the Contractor’s Bid for Relocation of the Keo’s Sewer Line

To support their argument regarding the necessity of the implied easement, the Keos submitted as Exhibit P contractor Roto-Rooter’s estimate of the cost of relocating the sewer line. CP 165–166. As discussed in Section V, C, 2, c, below, an easement by implication is necessary if the cost to create a substitute without trespassing on a neighboring property is unreasonable. *Berlin v. Robbins*, 180 Wash. 176, 189, 38 P.2d 1047 (1934).

The Stefankivs moved to strike Roto-Rooter’s estimate as hearsay. CP 49. They also claimed the Roto-Rooter bid includes opinion testimony calling for an expert opinion, and is thus inadmissible under ER 701 and ER 702. *Id.* And, without explanation, the Stefankivs claimed the exhibit is inadmissible under CR 26 and CR 33, which respectively concern

⁴ The photographs were attached to Mr. Keo’s declaration in strict reply as Exhibit R. CP 32–36.

“General Provisions Governing Discovery” and “Interrogatories to Parties.” *Id.*

As with their other evidentiary objections, the Stefankivs’ arguments in support of their motion to strike the Roto-Rooter estimate fail. With regard to the hearsay objection, the contractor’s estimate is admissible under the hearsay exception for business records. *See Int’l Ultimate*, 122 Wn. App. at 748–49 (finding no abuse of discretion by trial court in admitting summary judgment exhibits under the business records hearsay exception; documents were authenticated and were made “in the regular course of business, at or near the time of the act, condition or event” (quoting RCW 5.45.020)). As Mr. Keo’s declaration made clear, the estimate was provided to him personally, at his request, “to identify the costs associated with the work necessary to provide [the Keos’] home with sewer service if [they] were no longer able to use the existing sewer line.” CP 30.⁵

The Stefankivs did not elaborate on why the Roto-Rooter estimate is inadmissible under ER 701 and 702. CP 49. Apparently, they confused authentication with opinion based on scientific, technical, or other specialized knowledge. As noted above, the estimate is an admissible business record. Similarly, the Stefankivs did not explain why the exhibit is inadmissible under CR 26 and CR 33. *Id.* On appeal, they claim, without factual support, that “the author’s qualifications and status as an

⁵ The Roto-Rooter estimate was attached to Mr. Keo’s declaration in strict reply as Exhibit S. CP 37–39.

expert witness were not disclosed notwithstanding the service of an interrogatory seeking information regarding experts.” Appellants’ Br. at 18. But, as the Keos explained in response to the Stefankivs’ motion to strike, the Roto-Rooter estimate was available for the Stefankivs’ inspection and copying since June 2008. CP 18; CP 6–12.

The Superior Court’s order denying the motion to strike the Keos’ Exhibit P should be affirmed. The Superior Court did not abuse its discretion by declining to strike Roto-Rooter’s bid for relocation of the Keos’ sewer pipe.

C. This Court Should Affirm the Superior Court’s Order Granting Summary Judgment Dismissal of the Stefankivs’ Claims for Trespass and Nuisance

1. The Order Granting Summary Judgment Is Reviewed De Novo

This Court reviews a trial court’s summary judgment ruling de novo and “engage[s] in the same inquiry as the trial court.” *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). The moving party has the initial burden of “showing there is no dispute as to any issue of material fact.” *Id.* Once the moving party meets this initial showing, the inquiry shifts to the non-moving party. *Young v. Key Pharms.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The non-moving party “may not rely on speculation [or] argumentative assertions that unresolved factual issues remain” but must “set forth *specific facts* that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” *Seven Gables Corp. v.*

MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (emphasis added).

The Superior Court did not err when it held the Stefankivs failed to meet their burden to demonstrate the existence of a genuine issue of material fact precluding summary judgment. Rather than respond to the legal and factual points raised in the Keos' motion for summary judgment, the Stefankivs declined to address the law of implied easement in their responsive brief. *See* CP 51–63. Instead, the Stefankivs unsuccessfully argued that Washington's recording statute, and prior property owners' failure to record the easement, prevented summary judgment dismissal of their claims, an argument they have abandoned on appeal. CP 54–63. And, rather than setting forth specific facts to rebut the Keos' arguments, the Stefankivs relied upon a list of 20 items they characterize as "genuine issues of material fact" that in fact are nothing more than argumentative speculation. CP 62–63. These "issues" include "[i]s it reasonable and necessary to take an innocent person's property to correct another person's mistake?" and "[d]oes the inability of the plaintiffs to use their property in the way that they want interfere with the use of their property?" CP 62–63.

As detailed below, the Superior Court did not err when it granted summary judgment dismissal of the Stefankivs' claims. The Keos' sewer line satisfies all elements required to find an implied easement and the existence of the implied easement is a complete defense to the Stefankivs' claims for trespass and nuisance. To the limited extent the Stefankivs

responded to the Keos' implied easement argument – the basis for the Keos' summary judgment motion – the Stefankivs failed to meet their burden as the non-moving party to show a genuine issue of material fact. This Court should affirm the Superior Court's summary judgment dismissal of the Stefankivs' complaint.

2. The Stefankivs Appeal the Superior Court's "Findings" and "Comments" Yet Fail to Provide This Court with the Necessary Record on Review

“A party seeking review has the burden of perfecting the record so that [the appellate court] has before it all of the evidence relevant to the issue[s].” *Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 612, 937 P.2d 1148 (1997); *see also Bonneville v. Pierce County*, 148 Wn. App. 500, 508, 202 P.3d 309 (2008) (noting appellant's failure to provide an official transcript of the motion hearing and the trial court's ruling precluded review of issue on appeal and “does not meet RAP standards”). Accordingly, RAP 9.2 provides that “[a] party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review.” RAP 9.2(b). If a verbatim report of proceedings is not available because “either the court reporter's notes or the videotape of the proceeding being reviewed are lost or damaged[,]” a party may prepare a narrative report of proceedings to be provided to the appellate court or the parties may prepare and sign an agreed report of proceedings. *See* RAP 9.3, RAP 9.4.

Here, the Stefankivs claim the Superior Court erred when it issued its summary judgment dismissal order in this case, focusing on “multiple

comments” allegedly made by the Superior Court which the Stefankivs claim “clearly demonstrated that a determination of fact questions had occurred.” Appellants’ Br. at 22. Yet, the Stefankivs explicitly declined to provide a verbatim report of the summary judgment hearing so this Court might determine if their criticisms are warranted.⁶

This Court should decline to review the Stefankivs’ appeal of the Superior Court’s “findings” and “comments” because the Stefankivs have failed to perfect the record on appeal as required by the Rules of Appellate Procedure.

3. The Keos’ Sewer Line Satisfies All Elements of an Implied Easement

An easement implied from prior use has three elements under Washington law: (1) unity of title and subsequent separation by grant of the dominant estate; (2) apparent and continuous use; and (3) that the easement is reasonably necessary to the proper enjoyment of the dominant estate. *Berlin*, 180 Wash. at 179-80. The principle underlying the concept of an implied easement is that all things necessary to the reasonable use and enjoyment of land impliedly accompany its grant. *Id.*

As discussed below, the Keos’ sewer line satisfies all three elements and thus occupies an implied easement.

⁶ See Statement of Arrangements, filed with this Court on March 26, 2009, which states the Stefankivs “do not intend to provide either a *verbatim* or partial report of proceedings as part of the record on review.” Statement of Arrangements at 1 (emphasis in original).

a. *The Lots Shared Unity of Title and a Grant of Easement on Division*

The first element of an implied easement, unity of title and subsequent separation, is an absolute requirement for an implied easement. *Evich v. Kovacevich*, 33 Wn.2d 151, 157, 204 P.3d 839 (1949) (noting “the cardinal consideration upon the question of easement by implication is the presumed intention of the parties concerned”); *Rogers v. Cation*, 9 Wn.2d 369, 379, 115 P.2d 702 (1941) (holding “the presumed intention of the parties, is the prime factor in determining whether an easement by implication has been created”). The strength of the second and third elements – apparent and continuous use and necessity – is not necessarily conclusive regarding the existence of an implied easement. Rather, these elements are merely aids to determine the “cardinal consideration”: the presumed intention of the parties at severance as disclosed by the extent and character of the use, the nature of the property, and the relation of the separated parts to each other. *Evich*, 33 Wn.2d at 157.

Here, the Stefankivs cannot dispute that the lots were owned by a common owner, the Staffords, when the original property was subdivided in 1988. CP 112–118. Nor can there be any dispute that shortly after subdividing the common property, and during the period of their common ownership of the two lots, the Staffords obtained a side sewer plat in 1989 benefiting Lot 2 (the Keos’ property or the dominant estate). CP 127. Finally, there is no dispute that the Staffords continued to own Lot 1 (now

the Stefankivs' property or the servient estate) after they burdened it with a sewer line benefiting Lot 2. CP 129–130.

For these reasons, it is not open to reasonable dispute that at the time of separation, the Staffords intended to grant the benefits of the side sewer agreement burdening Lot 1 to the Coxes (who purchased Lot 2 from the Staffords), since the Staffords both obtained the side sewer agreement and retained the servient property after the transfer. The use of the side sewer agreement was a necessary benefit of property ownership impliedly transferred by the Staffords to the Coxes.

b. *The Easement Is Apparent and Has Been Used Continuously for Nearly Twenty Years*

The second element establishing the Keos' implied easement is met because the easement was apparent, as that term has been defined by Washington courts. Nearly 75 years ago, the Washington Supreme Court approved a Rhode Island Supreme Court decision which held, in the context of an implied easement, that “apparent” did not mean “visible” and “may mean little more than continuous.” *Berlin*, 180 Wash. at 184.

In *Berlin*, the Washington Supreme Court imputed knowledge of an underground water pipe to the appellant, who had not lived on the servient estate, from “community knowledge” of the water system and because short sections of the pipe were visible after heavy rain. 180 Wash. at 181–187. After reviewing precedent from other jurisdictions involving both water and sewer pipes, the *Berlin* Court concluded the implied easement at issue was apparent because “[t]he test is not whether

the pipe was actually visible its entire length or a large part thereof.” *Berlin*, 180 Wash. at 181. The Court also relied on the visibility of a faucet connected to the pipes and approved the concept that the easement was “apparent” because the nature of the piping connections would have been readily understood by any plumber examining them. *Berlin*, 180 Wash. at 185.

More recently, Division Three of this Court held an implied easement existed between two properties where a buried pipeline delivered water to the dominant orchard property. *See Fossum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995). The *Fossum Orchards* court held “[p]ipelines need not be visible to be apparent, particularly if appliances connected therewith are obvious.” *Id.* It concluded that an artificial structure such as a pipe or other fixture might, without more, constitute an apparent or continuous easement. *Id.*

Here, the sewer line easement has been in continuous service for nearly 20 years. The sewer service supplied by the easement has not been interrupted except by the Stefankivs in 2007, during excavation for their remodeling project. CP 187, ¶4.

The easement is further demonstrated by the location of the two properties. A public sewer main is located in front of the Stefankiv property, while the Keo property is visible directly behind the Stefankiv property. CP 29–36. Two manholes serving the public sewer main, which are still present, were clearly visible in front of the Stefankivs’ property. *Id.*

Finally, the Stefankivs had recorded notice that sewer laterals were affected by the Staffords' short plat and the related power of attorney. CP 122–125. The short plat also referenced the existence of a dry well system for drainage of the “proposed houses” to be built after the short plat’s recording. CP 117. Therefore, it cannot be disputed it was apparent that the Keos’ sewer line ran to the main beneath the Stefankivs’ property. The easement was continuous and apparent.

Responding to the Keos’ motion for summary judgment, the Stefankivs declined to address well-established Washington precedent (*Berlin and Fossum Orchards*) regarding when an implied easement is “apparent.” CP 51–63. Rather, the Stefankivs relied on speculation and argumentative assertions, exemplified in their 20-item list of “factual issues,” to respond to the Keos’ implied easement argument. CP 62–63. This Court should affirm the Superior Court’s summary judgment dismissal as the Stefankivs have failed to meet their burden as the non-moving party.

c. *The Easement Is Reasonably Necessary for Enjoyment of the Keos’ Lot*

The third element demonstrating the Keos’ easement by implication – necessity – is satisfied as well. “The degree of necessity [for an easement by implication] is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made.” *Evich*, 33 Wn.2d at 158–59. In an easement by implication, as the factors demonstrating the easement

increase, the level of necessity supporting the implied easement decreases.

Id.

Unlike an easement by prescription, the necessity element for an easement by implication is relatively low. The easement's existence does not turn on whether the dominant property (the Keos') is landlocked. Rather, the easement is necessary if the cost to create a substitute without trespassing on a neighboring property is unreasonable. *Berlin*, 180 Wash. at 189. Here, the Keos provided evidence that estimates the cost of a new sewer line to be more than \$30,000. CP 38–39. This is an unreasonable expense, particularly since a side sewer agreement created and transferred by the original owners to the dominant property has continuously provided the Keo property with sewer service for nearly 20 years.

This case is factually analogous to the Washington Supreme Court's decision in *Evich*. In that case, the entrances to adjoining houses were served by a walkway providing access to the front steps of both houses and a flight of steps leading down to a public sidewalk. *Evich*, 33 Wn.2d at 154. The Supreme Court found it unreasonable to require the benefited owner to pay for the expense of constructing a new walk between the two houses, when the original walk was necessary to the reasonable and convenient use and enjoyment of each house on the original property before division, the use was apparent, and there was strong evidence that the original owner intended to grant the use and enjoyment of the walk to the dominant property at severance. *Evich*, 33 Wn.2d at 158–59. The Court held “[w]here, as here, the facts so strongly

militate in favor of a finding that the parties fairly, though tacitly, intended that the continued use of the walkway pass as appurtenant to the granted estate, it might confidently be asserted that the requirement of necessity became correspondingly less.” *Evich*, 33 Wn.2d at 158. The *Evich* Court determined the disproportionate expense and inconvenience involved in constructing a new flight of steps or another walk satisfied the necessity requirement. *Id.*

Here, the deciding factor in favor of necessity is not whether a sewer line could be run by some other means at whatever cost from the Keo property to the public main, but whether the sewer line was necessary to the use of the Keo property at severance and whether the cost of a new line is reasonable now. Considering the intent demonstrated by the Staffords’ efforts to secure a side sewer agreement before transferring the Keos’ lot in 1991, and the current cost in excess of \$30,000 to obtain a similar line, the necessity element of an implied easement has been met.

The Stefankivs challenged the Roto-Rooter estimate for installation of a new sewer line on several grounds, as discussed in Section V, B, 5, above. But those arguments ultimately fail and the Superior Court declined to grant the Stefankivs’ motion to strike the estimate and the other challenged exhibits. CP 5. Moreover, absent their unsupported and erroneous challenges to the Roto-Rooter estimate, the Stefankivs provide no reason to find the amount of the estimate unreasonable, or any evidence to support such a finding.

For these reasons, this Court should affirm the Superior Court's summary judgment order and find the Keos have satisfied all elements of an implied easement.

4. The Implied Easement Constitutes a Complete Defense to the Stefankivs' Factually Indistinguishable Claims for Trespass and Nuisance
 - a. *The Nuisance and Trespass Claims Seek to Protect the Same Rights*

The Stefankivs' complaint includes two "causes of action": nuisance and trespass. CP 188. Upon examination, however, it is clear the Stefankivs' claims are factually indistinguishable and seek to protect the same rights.

A nuisance is "an unreasonable interference with another's use and enjoyment of property." *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998) (internal citation omitted). A nuisance may be either public or private. RCW 7.48.130, RCW 7.48.150. A public nuisance affects equally the rights of an entire community or neighborhood; a private nuisance is one that is not a public nuisance. *Id.* Whether an invasion of a property interest is a trespass or a nuisance depends upon the nature of the property interest at issue. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 690-91, 709 P.2d 782 (1985). "If the intrusion interferes with the right to exclusive possession of property, the law of trespass applies. If the intrusion is to the interest in use and enjoyment of property, the law of nuisance applies." *Id.*

Here, the property interest affected by the sewer line is a possessory one as the Stefankivs seek to exclude the Keos' sewer line. Thus, the Stefankivs' legal claim is properly for trespass rather than nuisance because the alleged interference relates to the Stefankivs' exclusive possession of Lot 1 rather than to the use and enjoyment of their property. CP 186–189.

Even if the Stefankivs' claims were assumed to be legally distinct for argument's sake, the trespass and nuisance claims seek a single form of relief: removal of the Keos' sewer line. CP 188. A party's characterization of its legal theory of recovery is not binding on the court; it is the nature of the claim presented that controls relief. *See Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 882, 567 P.2d 230 (1977). "In order for a complaint to set out multiple claims for relief, each claim must arise from a different factual occurrence or transaction." *Doerflinger*, 88 Wn.2d at 881-82; *see also Snyder v. State*, 19 Wn. App. 631, 635, 577 P.2d 160 (1978) (noting "three separate legal theories based upon one set of facts constitute one 'claim for relief'"). For example, "[a] 'negligence claim presented in the garb of nuisance' need not be considered apart from the negligence claim." *Atherton Condo Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 527, 799 P.2d 250 (1990) (quoting *Hostetler v. Ward*, 41 Wn. App. 343, 360, 704 P.2d 1193 (1985), *rev. denied*, 106 Wn.2d 1004 (1986)) (discussing summary judgment dismissal of nuisance claim based on the same omission to perform a duty which allegedly constituted negligence).

The Stefankivs' nuisance claim against the Keos arises from the same facts as their trespass claim: a sewer line running from the Keos' property, Lot 2, to the public main located in 188th Street under the Stefankivs' property, Lot 1. CP 188. The nuisance claim is therefore indistinguishable from the trespass claim and both claims fail for the same reason: the implied easement.

b. *The Sewer Line Does Not Constitute a Trespass*

“A trespass is an intrusion onto the property of another that interferes with the other's right to exclusive possession.” *Bradley*, 104 Wn.2d at 690-91 (internal citation and marks omitted). An entry upon another person's land that might otherwise be wrongful is not a trespass if it is a privileged entry, that is, if the right to enter was granted by a current or former owner to the allegedly trespassing party. *See* RESTATEMENT (SECOND) OF TORTS §158 (1965).

An easement is such a grant of entry. An easement is a “right, distinct from ownership, to use in some way the land of another, without compensation.” *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986). As detailed above, the Keos have an easement by implication. Thus, their ordinary use of the easement cannot constitute a trespass as a matter of law. The owner of an easement only trespasses if she misuses, overburdens, or deviates from an existing easement. *Mielke v. Yellowstone Pipeline Co.*, 73 Wn. App. 621, 624, 870 P.2d 1005 (1994).

The Stefankivs' complaint did not allege any such overburdening. CP 186–189. Rather, the Stefankivs allege the Keos should not be

allowed to use a sewer line in place on the Stefankivs' property for nearly twenty years. The only party interfering with the easement is the Stefankivs, who damaged the Keos' sewer line during their remodeling process.

The Keos have an implied easement for their sewer line. For this reason, as a matter of law, the Stefankivs cannot establish the Keos either trespassed on the Stefankivs' property or committed a nuisance. This Court should affirm the Superior Court's summary judgment dismissal of the Stefankivs' complaint with prejudice.

D. This Court Should Award Fees to the Keos Pursuant to RAP 18.9

RAP 18.9 provides for an award of "terms or compensatory damages" when a party "files a frivolous appeal." "[A]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal." *In re Marriage of Penry*, 119 Wn. App. 799, 804 n.2, 82 P.3d 1231 (2004).

The Stefankivs' appeal can only be characterized as frivolous. The Stefankivs' opening brief merely repeats the same speculative "factual issues" contained in their response to summary judgment and fails to grapple with the on-point legal authorities cited by the Keos. The Stefankivs do challenge the Superior Court's alleged "findings" and "comments" at the summary judgment hearing, but expressly declined to provide a verbatim report of proceedings for this Court's review. For

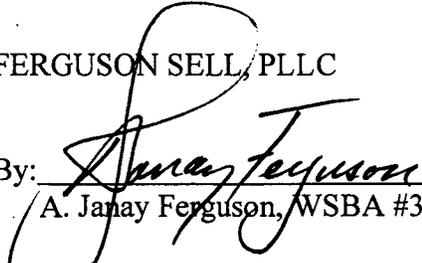
these reasons, the Keos respectfully request the Court award to award them attorneys' fees pursuant to RAP 18.9.

VI. CONCLUSION

For the foregoing reasons, Bern and Savouth Keo respectfully request that the Court affirm the Superior Court's orders and dismiss with prejudice Mykhaylo and Hanna Stefankiv's complaint.

RESPECTFULLY SUBMITTED this 22nd day of June, 2009.

FERGUSON SELL, PLLC

By: 

A. Janay Ferguson, WSBA #31246

Attorney for Respondents Bern and Savouth Keo

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COURT OF APPEALS
DIVISION ONE

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No. 631284

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MYKAYLO STEFANKIV and HANNA STEFANKIV,

Appellants,

vs.

BERN KEO and SAVOUTH KEO,
Respondents.

APPELLANTS' BRIEF

Thomas R. Buchmeier, WSBA #5557
Thomas R. Buchmeier, P.S.
19125 Northcreek Parkway
Suite 120
Bothell, WA 98011
Telephone: 425-774-1113
Facsimile: 425-672-3767

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INTRODUCTION

This is a case involving an attempt by the owners of real property to require the removal of a neighbors' sewer line from their property and for damages against the neighbors for trespass. The trial court denied the landowners' motion to strike, dismissed the landowners' claims and granted the neighbors' motion for summary judgment of dismissal based upon a theory of implied easement.

The plaintiffs, Mykhaylo and Hanna Stefankiv, claim that because the trial judge considered incompetent evidence and decided issues of fact, the denial of their motion to strike and the dismissal of their action was improper.

A. Assignments of Error

1. The trial court erred in denying the plaintiffs' motion to strike certain of the evidence submitted in support of defendants' Motion for Summary Judgment.

2. The trial court erred in granting the defendants' Motion for Summary Judgment.

3. The trial court erred in denying the plaintiffs' Cross-Motion for Summary Judgment.

B. Issues Pertaining to Assignments of Error

1. Issues pertaining to Assignment of Error No.1

(i) Do the Civil Rules require that a motion to strike evidence which has been submitted in support of a motion for summary judgment be separately noted from the scheduled summary judgment hearing?

(ii) Are non-certified, unsworn documents admissible in support of a motion for summary judgment because they were obtained in discovery?

(iii) In this case is the refusal to strike evidence submitted in support of a motion for summary which does not meet the requirements of CR 56(e) a manifest abuse of discretion?

2. **Issues Pertaining to Assignment of Error No.2.**

(i) Is it appropriate for the court to determine questions of fact when hearing and deciding a motion for summary judgment?

(ii) Did the plaintiffs show that genuine issues of material fact exist with respect to the defendants' claim of implied easement?

3. **Issues Pertaining to Assignment of Error No.3.**

(i) Did the defendants prove that a genuine issue of material fact exists with respect to plaintiffs' claims of trespass and of nuisance?

C. Statement of the Case.

Plaintiffs, Mykhaylo and Hanna Stefankiv are natives of the Ukraine who emigrated to the United States in 2001. CP 80-89, CP 97-106. In 2005 the Stefankivs purchased a home located at 6132 188th Street SW, Lynnwood, Washington. The Stefankivs

physically inspected the property, utilized a professional real estate person and obtained title insurance in completing their transaction. CP 80-89, CP 97-106. The Stefankiv home is located on a "panhandle" or "flag-lot" which was created in 1988 by a City of Lynnwood Declaration of Short subdivision and of Covenants (hereinafter short-plat) which was instituted by its then owner, Stafford. CP 107 Exhibit A. Subsequent to the short-plat, Stafford sold both lots which were created by the short-plat to others. Neither of the deeds from Stafford nor any of the subsequent deeds in the chain of title granted a sewer line easement across Lot 1 to Lot 2 or reserved a sewer line easement across Lot 1 in favor of Lot 2. CP 107-110, Exhibits E,G,H,I,J,K,L. In 1991 when Stafford sold Lot 2 there was no house on Lot 2. CP 107-110, Exhibit E. When the defendants purchased Lot 2 in 1995 there was a house on Lot 2. CP 107-110, Exhibit I. Stafford sold Lot 1 in 1994 and the Stafankivs eventually purchased Lot 1 in 2005. CP

107-110, Exhibits I and M. Neither the recorded short-plat nor the map attached to the short-plat makes reference to a sewer line across Lot 1 to serve Lot 2. CP 107-110, Exhibits A and N. The recorded short-plat does not reserve or grant a sewer easement over Lot 1 but does legally describe and visually depict a private road servicing Lot 2 for the purpose of ingress, egress and the laying of utilities including "sewer pipes, mains or conduits". CP 107-110, Exhibit N.

In 2007 the Stefankivs began an extensive remodel of their house. CP 80-89, CP 97-106. During the remodel project the Stefankivs' building contractor made an excavation on the plaintiffs' property, Lot 1. During the excavation process on the Stefankiv property (Lot 1) the building contractor unexpectedly encountered a sewer line which services the Keo property (Lot 2) and damaged it. CP 80-89, CP 97-106. Subsequently, the Stefankivs allowed the Keos' agents to come on their property and repair the damaged sewer line.

The plaintiffs Stefankiv demanded that the Keos remove the sewer line from their property. CP 80-89, CP 97-106. The defendants Keo responded by claiming that they had an implied easement to have the sewer line on the plaintiffs land and demanded money damages for the damage to the sewer line. CP 80-89, CP 97-106. The plaintiffs Stefankiv commenced an action for trespass of the sewer line on their property and for nuisance based upon the interference with their right to freely use their real property. CP 184-189.

The defendants Keo brought a Motion for Summary Judgment of Dismissal of the Stefankivs' lawsuit. The stated basis for the Keo motion was that, "The Keo sewer line occupies an implied easement." CP 167. In support of their motion for summary judgment the defendants Keo submitted the Declaration of defendants' counsel, A. Janay Ferguson (hereinafter Ferguson Declaration) and various attached Exhibits A through P. CP 107-166. Plaintiffs moved, pursuant to Civil Rule 56(e) to

strike certain of the documents and the declaration which had been submitted in support of the Keo motion. CP 47-50. In addition, the plaintiffs responded to the Keo motion and pursuant to Snohomish County Local Civil Rule 56(c)(1)(A)(i), brought a cross-motion for summary judgment on the trespass and nuisance claims. CP 51-63.

The trial court denied the plaintiffs' motion to strike Exhibits B, D, E, O and P and Paragraph 16 of the Ferguson Declaration. CP 5. In denying the Motion to Strike the trial judge ruled: **1)** that the Motion to Strike was not properly before the court because it had not been separately noted; **2)** the statements of fact set forth at Paragraph 16 of the Ferguson Declaration were admissible notwithstanding the fact that there was a lack of foundation and that such statements assumed facts which were not in evidence; and, **3)** the meaning of Exhibits B, D, E, O, and P " could be explained at trial by someone from the City of Lynnwood" and that, "I can do that here".

The trial court denied the plaintiffs' cross-motion and granted the defendants' Motion for Summary Judgment. CP 3-4. In granting the defendants' motion the court's stated reasons were that: 1) the fact that there was a house to the rear of Lot 1 and a manhole cover in the street made it "obvious" that there was a sewer line on for Lot 2 on Lot 1; 2) the language of the an agreement not to protest LID for street improvements would put a purchaser on notice of the possible presence of a sewer line on the property which the plaintiffs were purchasing; 3) the fact that there was no house or other structure requiring sewer service on Lot 2 during the period of Stafford's ownership of Lot 1 and Lot 2 was not relevant to the claim of implied easement; 4) the language of Schedule B, II., B., 2. of the plaintiffs' title insurance policy should have caused the plaintiffs to investigate the possibility of the existence of claims of easements; and 5) the plaintiffs should have

"checked" for underground lines before digging.

D. Argument.

I. Appellate Standard of Review.

An appellate court reviews a trial court's grant of summary judgment *de novo* and engages in the same inquiry as the trial court viewing the facts and the reasonable inferences from those facts in a light most favorable to the nonmoving party. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 544, 55 P.3d 519 (2002). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c).

The burden is on the moving party (in this case the defendants Keo) to establish by facts such as would be admissible in evidence at trial that there are no issues of material fact. CR 56 (c). The moving party is held to a strict standard.

Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992). Any doubt as to the existence of a material fact is resolved against the moving party. *Atherton Condominium Ass'n v. Blume Development, Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Summary judgment should be granted if reasonable persons could only reach one conclusion with regard to the material facts. *Teagle v. Fisher & Porter, Co.*, 89 Wn. 2d 149, 152, 570 P.2d 438 (1977). In fact, an order granting a summary judgment cannot be granted if the record submitted in support of the motion shows any reasonable hypothesis that entitles the non-moving party to the relief which it seeks. *Selberg v. United Pacific Ins.*, 45 Wn.App. 469, 473, 726 P.2d 468 (1986).

In order for the defendants to prevail upon their Motion for Summary Judgment, the defendants should have been required to support their motion with evidence that is made upon personal knowledge, that is admissible, and that affirmatively shows

the competence of the witness. *McKee v. American Home Products*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989); *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 412, 553 P.2d 107 (1976); *Meadows v. Grants Auto Brokers, Inc.*, 71 Wn.2d 874, 878, 431 P.2d 216 (1967).

II. Assignment of Error No.1. The trial court erred in denying the plaintiffs' motion to strike certain of the evidence submitted in support of defendants' Motion for Summary Judgment.

(i) Do the Civil Rules require that a motion to strike evidence which has been submitted in support of a motion for summary judgment be separately noted from the scheduled summary judgment hearing?

The plaintiffs' Motion to Strike, which was timely served and filed with the response materials, was not accompanied by a calendar note because the motion directly related to the nature and quality of the evidence submitted in support of summary judgment. Such a motion does not exist separate from the context of the summary judgment

motion and neither the Court Rules nor the case law requires that it be formally noted for hearing.

It is well-established that the preservation of a claim that material submitted in support of a motion for summary judgment is defective under CR 56 must be raised by objection or motion to strike. *Parkin v. Colocousis*, 53 Wn.App.649, 769 P.2d 326 (1989). The failure to move to strike before summary judgment is entered waives any objection on appeal. *Turner v. Kohler*, 54 Wn.2d App. 688, 775 P.2d 474 (1989).

The fact that a calendar note did not accompany the motion in this case demonstrability did not result in any prejudice to the defendants. This was not a situation where opposing counsel had not received actual notice of the hearing. Nor was it a situation where opposing counsel did not have time to prepare. A responsive declaration (CP 6-12) and a response in opposition to the motion (CP 13-19) were presented by defendants' counsel and were considered by the trial court at the time of

the hearing. *Rivard v. Rivard*, 75 Wn.2d 415, 451 P.2d 677 (1969). No prejudice to the defendants was suggested by their counsel nor found by the trial court because the motion was not accompanied by a calendar note.

(ii) Are non-certified, unsworn documents which are produced in discovery admissible in support of a motion for summary judgment because they were obtained in discovery?

The relief sought by the plaintiffs' Motion To Strike was the exclusion of certain specified documents and a portion of the declaration of defense counsel for the reason that the materials were incompetent under CR 56(e). (CP 47-50). The materials and the reasons for striking them were:

Exhibit B to the Declaration of A. Janay Ferguson
ER 402, ER 802 and lack of foundation.

Exhibit D to the Declaration of A. JANAY Ferguson
ER 802 and ER 901.

Exhibit F to the Declaration of A. JANAY Ferguson
ER 802 and ER 901.

Paragraph 16 of Declaration of A. JANAY Ferguson
Lack of foundation and assumes facts not

in evidence.

Exhibit O to the Declaration of A. JANAY
Ferguson
Lack of foundation and assumes facts not
in evidence.

Exhibit P to the Declaration of A. JANAY
Ferguson
ER 802, ER 701, ER 702, CR 26 and CR 33.

It is apparent that the reason that the listed documents and Paragraph 16 of the Ferguson declaration were submitted in support of the summary judgment motion was to establish the truth of the matters set forth therein. These materials also suffer from various additional evidentiary defects.

Exhibit B to the Ferguson declaration: This non-certified and unsworn document contains a very simple line drawing, the notation "6132 188th St. S.W." and the words "Inspected by Allon O'Neal on April 29, 1963". CP 107-110 Exhibit B and Appendix 1 to Appellants' Brief. Without foundation there is no way to determine the meaning or significance, if any, of the document. Plaintiffs' objections to this document are that its relevance cannot be established on its face, neither the defendants nor

counsel have shown personal knowledge regarding the document, the document is hearsay, is unintelligible and Ferguson lacks any personal knowledge to state what the document is or what relevance it has.

Exhibit D to the Ferguson declaration: This non-certified and unsworn document dated July 31, 1989 bears the caption "City of Lynnwood, Public Works" "Application for Side Sewer Permit". CP 107-110 Exhibit D and Appendix 2 to Appellants' Brief. As was the case with Exhibit B this document is not self-explanatory and is unintelligible without explanation and neither the defendants nor counsel have shown personal knowledge regarding the document or its meaning. Also, the document is clearly hearsay which is offered for the truth of the matter stated therein.

Exhibit F to Ferguson declaration: This non-certified and unsworn document bears the same City of Lynnwood caption as Exhibit D but is dated November 15, 1993. CP 107-110 Exhibit D and Appendix 3 to Appellants' Brief. As was the case with Exhibits B and D the document is not self-

explanatory, is unintelligible without explanation and neither the defendants nor counsel have shown personal knowledge regarding the document or its meaning. Again, the document is clearly hearsay which is offered for the truth of the matter stated therein.

Paragraph 16 of Ferguson declaration: In Paragraph 16 of her declaration defense attorney Ferguson makes statements regarding lines drawn on photographs (Exhibit O) "...showing the proposed location of the relocated sewer from Lot 2 to the sewer main located in 188th Street SW" and "...a close view of a portion of the proposed location of the relocated sewer line as it would extend from the Keos' property" and "... a close view of the proposed location of the relocated sewer line as it would connect to the sewer main in [sic] located in 188th Street SW". CP 109-110. Appendix 4 to Appellants' Brief. CR 56(e) affirmatively requires a showing that an affiant is competent to testify to the matters stated in an affidavit. The Ferguson declaration does not contain any reference to her personal knowledge of facts and/or her

competency to testify. By her conclusive statements Ferguson assumes that she knows where a "relocated sewer line" would be and where it would connect to the sewer main in 188th Street SW. These conclusive statements are not part of the evidence which was properly before the trial court and as such should be stricken.

Exhibit O to Ferguson declaration: This exhibit consists of 2 photographs with lines drawn on them purporting to depict the location of the "relocated sewer line". This exhibit is subject to the same objections for the same reasons as Paragraph 16 of the Ferguson declaration because there was no evidence properly before the trial court determining the place of relocation of the sewer line. CP 107-110 Exhibit O.

Exhibit P to Ferguson declaration: This exhibit is a non-certified and unsworn and unsigned 2 Page "Proposal" apparently prepared by the Roto-Rooter Services Company. CP 107-110 Exhibit O and Appendix 5 to Appeal Brief. The objections which plaintiffs raised to this document are that the document is hearsay offered for the truth of the

matter stated therein, the document sets forth opinion testimony which requires expert qualification and because the author's qualifications and status as an expert witness were not disclosed notwithstanding the service of an interrogatory seeking information regarding experts. CR 26, CR 33. Absent a foundation showing of a basis for the expertise and the facts upon which an expert opinion is based such an opinion is not admissible and should not have been considered by the trial court in deciding the summary judgment motion. ER 701, ER 702, ER 802.

The defendants' response to the Motion to Strike was to assert that because some of the documents had been obtained from plaintiffs in discovery they were not subject to the requirements of CR 56(e) citing *Int'l Ultimate, Inc., v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 745-746, 87 P.3d 774 (2004). The defendants' position and that adopted by the trial court is considerably broader than the court's holding in *Int'l Ultimate*. In fact, in that case the court expressly ruled that while the fact that documents were obtained

from the opposition in discovery was sufficient to satisfy the authentication requirements of CR 56(e) it was not sufficient to overcome other objections to admissibility such as hearsay. *Int'l Ultimate*, at 735. The only documents relevant to the Motion to Strike which the plaintiffs provided to defendants in discovery were Exhibits B, D and F. The objections which plaintiffs have raised relative to Exhibits B, D, and F have not been to the authenticity but rather to other rules effecting the admissibility of evidence such as hearsay, relevance, foundation and opinion testimony. It remains the law that a "court may not consider inadmissible evidence when ruling on a motion for summary judgment." *Int'l Ultimate*, at 744.

(iii) Is the refusal to strike evidence submitted in support of a motion for summary which does not meet the requirements of CR 56(e) a manifest abuse of discretion?

It is well-established that a trial court abuses its discretion when it takes a view no reasonable person would take, or applies the wrong

legal standard to an issue. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995) (citing *Fraser v. Beutel*, 56 Wn. App. 725, 734, 785 P.2d 470 (1990)). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 136 (1997).

The summary judgment process is not now and has never been one which is properly utilized to clear court calendars or otherwise dispose of cases. It is rather a well-designed procedure whereby the law can be applied to cases with settled facts and a just result obtained without the need for a trial. When there is divergence from the established procedures, as defined in the Civil Rules and the decisions interpreting those

rules, citizens are prejudiced and deprived of their right to due process of law. The number and quality of the erroneous evidence rulings which were made by the trial court in this action when combined with the improper determination of issues of fact and the refusal to recognize the existence of issues of fact resulted in the plaintiffs losing the right to use, control and enjoy their property. This cannot be an appropriate standard to be applied to this litigation. The standard to which the trial court is expected to conform is detailed clearly in CR 56 and the case law. Violence was done to that standard in this case. At a minimum the trial court considered inadmissible evidence, considered hearsay, considered testimony and conclusions without foundation and opinion testimony without qualification as an expert. Anyone of these deficiencies alone might not be sufficient to establish the abuse of discretion. However, it is not appropriate to consider the deficiencies in any way other than the aggregate. The denial of the plaintiffs' Motion to Strike was a manifest abuse of discretion and should properly

be reversed.

II. Assignment of Error No.2. The trial court erred in granting the defendants' Motion for Summary Judgment.

(i) Is it appropriate for the court to determine questions of fact when hearing and deciding a motion for summary judgment?

Any genuine issue of material fact about which reasonable minds could differ is not a question to be resolved at summary judgment. CR 56(c), *Christen v. Lee*, 113 Wn.2d 479, 514, 980 P.2d 1307 (1989). In announcing a decision in this case the trial court made multiple comments which clearly demonstrated that a determination of fact questions had occurred.

One such comment made by the trial court was words to the effect that, the fact that there was a house to the rear of Lot 1 and a manhole cover in the street made it "obvious" that there was a sewer line on Lot 1. This comment was made notwithstanding the declarations of both of the

plaintiffs that they did not observe a manhole in 188th Street. And, if they had made such an observation they did not know then and do not know now what information such an observation would give them about the location of the Keo sewer line. CP 80-89 and CP 97-106. In as much as there was no evidence of a connection, real or metaphorical between the Keo house and any particular manhole it is impossible to understand how or why the trial court could believe that such an observation would make the sewer line "obvious" but not believe that a genuine issue of material fact was involved.

Another comment made by the trial court was that the language of the recorded *Power of Attorney and Agreement Not to Protest Formation of Local Improvement District For Street Improvements* (CP 107-110 and Appendix 5 to Appellants' Brief) would put a reasonable purchaser on notice of the possible presence of a sewer line for Lot 2 on the property which plaintiffs were purchasing. This assessment was made notwithstanding the fact that the document

(which expired by its terms 7 years before plaintiffs purchased their home) was of a generic nature and made no direct reference to either Lot 1 or Lot 2 (except in so much as signing the document was a condition to obtaining approval of the original short-plat). There was no evidence before the court regarding what a reasonable purchaser would do. The court's stated reasoning is most difficult to understand considering those facts and that a determination of reasonableness is typically a question of fact. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 736, 927 P.2d 240 (1996).

The trial court also expressed the view that the language of Schedule B, Paragraph B.2 of the Stefankivs' title insurance policy was such that it would put a reasonable purchaser on notice of the possible presence of claims of easements against Lot 1 for the Lot 2 sewer line. The language which the trial court believed was pertinent is:

"B. GENERAL EXCEPTIONS:

* * *

2. Easements or claims of easements,
not shown by the public record.

* * * "

CP 107-110 Exhibit N and Appendix 6 to Appellants' Brief.

Anyone familiar with Washington title insurance policies will recognize the quoted language as a generic exception to coverage which occurs in virtually every title insurance policy issued in the State of Washington (and probably in most other states of the United States). There was no evidence before the court from which it could be concluded that the cited language would create a duty to investigate in the mind of a reasonable purchaser. The use of this policy language to impose such a duty of investigation upon the purchaser of real property under the circumstances of this case is unrealistic at best and is also an impermissible factual determination of reasonableness made by the court. *Bodin, Id.*

Another view which was expressed by the trial

court was that the plaintiffs "should have checked" before digging in their back yard. Since there was no evidence defining reasonable activity when digging in your yard and there is no duty of care established by law this is apparently another expression of the trial court's belief in how a reasonable person acts under such circumstances. However, it is a determination of fact which is not properly made by the court when deciding a motion for summary judgment. Beyond that problem it would have made no difference if the plaintiffs had "checked" since there is no recorded document which reflects the location of the sewer line. While the unrecorded City of Lynnwood *Application for Side Sewer Permit* dated July 31, 1989 (CP 107-110 Exhibit D and Appendix 2 to Appellants' Brief) may depict the line to be located on Lot 1, the unrecorded *Application for Side Sewer Permit* dated November 15, 1993 (CP 107-110 Exhibit F and Appendix 3 to Appellants' Brief) depicts the sewer line in another location. In light of the "should have checked"

comments the trial court apparently resolved the conflicting information between the 1989 application and the 1993 application in favor of the former. The problem is of course that such a determination involves an issue of fact and must be determined at trial not on summary judgment.

(ii) Did the plaintiffs show that genuine issues of material fact exist with respect to the defendants' claim of implied easement?

Even under the defendants' theory of the case there are multiple genuine issues of material fact and Summary Judgment is not appropriate.

The concept of implied easement requires: 1. Unity of title and subsequent separation; 2. The "existence of an apparent and continuous quasi easement for the benefit of one part of the estate to the detriment of the other during the unified period"; and, 3. "A certain degree of necessity" that the quasi easement exist after severance. *Adams v. Cullen*, 44 Wn.2d 502, 506, 268 P.2d 451

(1954). There logically could have been no apparent quasi side-sewer easement across Lot 1 during the period that the ownership was unified because there was no structure on Lot 2 requiring sewer service during that period. It was not until after the common owner, Stafford, sold Lot 2 in 1991 that a structure was built on the property. During the time that Stafford held Lot 1 and Lot 2 in common ownership there could be no "apparent and continuous" sewer line easement because there was nothing for a sewer line to service on Lot 2. If it is suggested that such a line was apparent or that there was something for a sewer line to service it is an issue of fact. In a like manner there was no necessity "to any degree" that any alleged quasi side-sewer easement exist after severance. By the terms of the Declaration of Short Subdivision and Covenants Lot 2 has direct and unimpeded access to the public sewer line in the public street which is located adjacent to Lot 2 and the sewer line for Lot 2 clearly was intended to go in that access. The

defendants have also argued that the expense of moving their sewer line is a reason to find that an implied easement exists across the Stefankiv property. However, the evidence submitted in support of this position, the Roto-Rooter estimate, is defective and inadmissible expert opinion for the reasons set forth at Page 12 above and should not have been considered by the court. Absent the estimate there is no basis to find necessity for an implied easement when the defendants' property is contiguous to the public street.

In addition to the issues discussed above many other issues of fact were identified by plaintiffs:

1. Was there anything visible on Lot 1 by reason of which the plaintiffs knew or should have known of the alleged implied easement?;
2. Was there anything visible in the public street_by reason of which the plaintiffs knew or should have known of the alleged implied easement?;
3. Does the "Pan Handle" or "flag" configuration_of Lot 2 reasonably lead to the belief that its access and utilities

would be located in the access road? ; 4. Does the language of Paragraph (8) of the Declaration of Short Subdivision and of Covenants lead to the belief that the access and utilities for Lot 2 would be located in the access road? ; 5. Does the language of the recorded Power of Attorney and Agreement not to Protest Formation of Local Improvement District for Street Improvements lead to the belief that an alleged implied side-sewer easement existed on Lot 1? ; 6. Was there a structure located on Lot 2 during the ownership of Stafford? ; 7. Did any such structure have sewer service? ; 8. Where is the side-sewer line for Lot 2 located on Lot 1? ; 9. At what point in time did the side-sewer line on Lot 1 become apparent? ; 10. Before the side-sewer line was damaged in 2007 was there any way that plaintiffs could have known of its existence on Lot 1? ; 11. What is the reasonable cost of accessing the public sewer by means of the access road for Lot 2? ; 12. What is the value of the defendants' house? ; 13. Did the

plaintiffs have any information which would lead a reasonably prudent person to inquire into the quality of the title to the property which they purchased? ; 14. Is the existence of the alleged implied side-sewer easement necessary for the convenient and comfortable enjoyment of Lot 2 as it existed when severance was made and there was no structure or sewer service for Lot 2? ; and, 15. Does the fact that a side-sewer line exists at an unknown location under Lot 1 diminish the value of the plaintiffs' property and effect their use and enjoyment?

III. Assignment of Error No.3 The trial court erred in denying the plaintiffs' Cross-Motion for Summary Judgment.

(i) Did the defendants establish that a genuine issue of material fact exists with respect to plaintiffs' claims of trespass and of nuisance?

The Complaint alleges causes of action for

trespass and for nuisance based upon the location of the Keo sewer line on the Stefankivs' property. The trespass claim is based upon the presence of the sewer line without legal authority and the refusal to remove it. *Bradley v. American Smelting & Refining Co.*, 104 Wn.App. 677, 709 P.2d 782 (1985). The nuisance claim is based upon the existence of the line containing raw sewage at unknown locations under the surface of the plaintiffs' property. RCW 7.48.010. Except to argue incorrectly that the same facts cannot suppose claims of trespass and nuisance (*Bradley, Id.*) the defendants did not respond to the plaintiffs' Cross-Motion for Summary Judgment on the trespass and nuisance claims. Rather, defendants relied in the trial court and in this appeal upon prevailing on their implied easement theory. CR 56(e). In light of that reliance and the lack of the submission of any factual dispute to plaintiffs claims, it can only be that the trial court concluded, as a matter of law, that plaintiffs' Complaint should be dismissed. Such a conclusion

is erroneous and should be reversed. *Bradley, Id.*

CONCLUSION

The defendants Keo failed to meet their burden on summary judgment to show by competent, admissible evidence that no genuine issue of material fact exists with respect to their claim of implied easement. The trial court manifestly abused its discretion when incompetent evidence was considered in support of the motion. The trial court erred when it decided genuine issues of material fact, ignored other genuine issues of material fact, imposed standards of conduct which were not supported by evidence or the law and failed to consider the material evidence and reasonable inferences therefrom in a light most favorable to the plaintiffs. The trial court erred when it found that an implied easement existed notwithstanding the defendants' failure to prove essential elements of the cause of action. The trial court erred when it dismissed the factually undisputed trespass and nuisance claims of the plaintiffs.

Plaintiffs respectfully request that this court reverse the Order on Plaintiffs' Motion to Strike and the Order Granting Defendants' Motion for Summary Judgment and return this matter to the Snohomish County Superior Court for further proceedings.

DATED this 21st day of May, 2009.

Respectfully submitted,

THOMAS R. BUCHMEIER, P.S.

By: 

Thomas R. Buchmeier, WSBA 5557
Attorney for Appellants
Mykhaylo and Hanna Stefankiv

APPENDIX

1

6132 188 ST

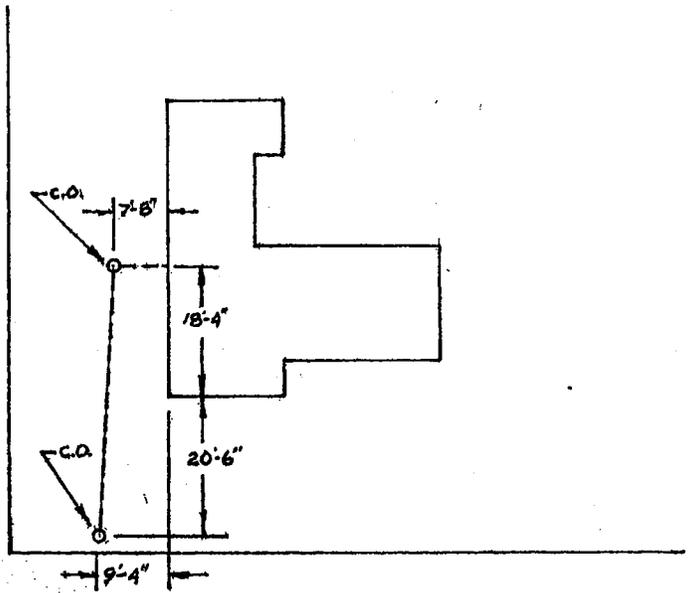
6132 188th St. S.W.

#687

(Olympic View)

\$10.00

BUILDING



INSPECTED BY Allon O'Neall ON April 29, 1963

SCALE: 1" = 20'

LEGAL:



CITY OF LYNNWOOD

Public Works

APPLICATION

for
SIDE SEWER PERMIT

Card No _____
Easement No _____

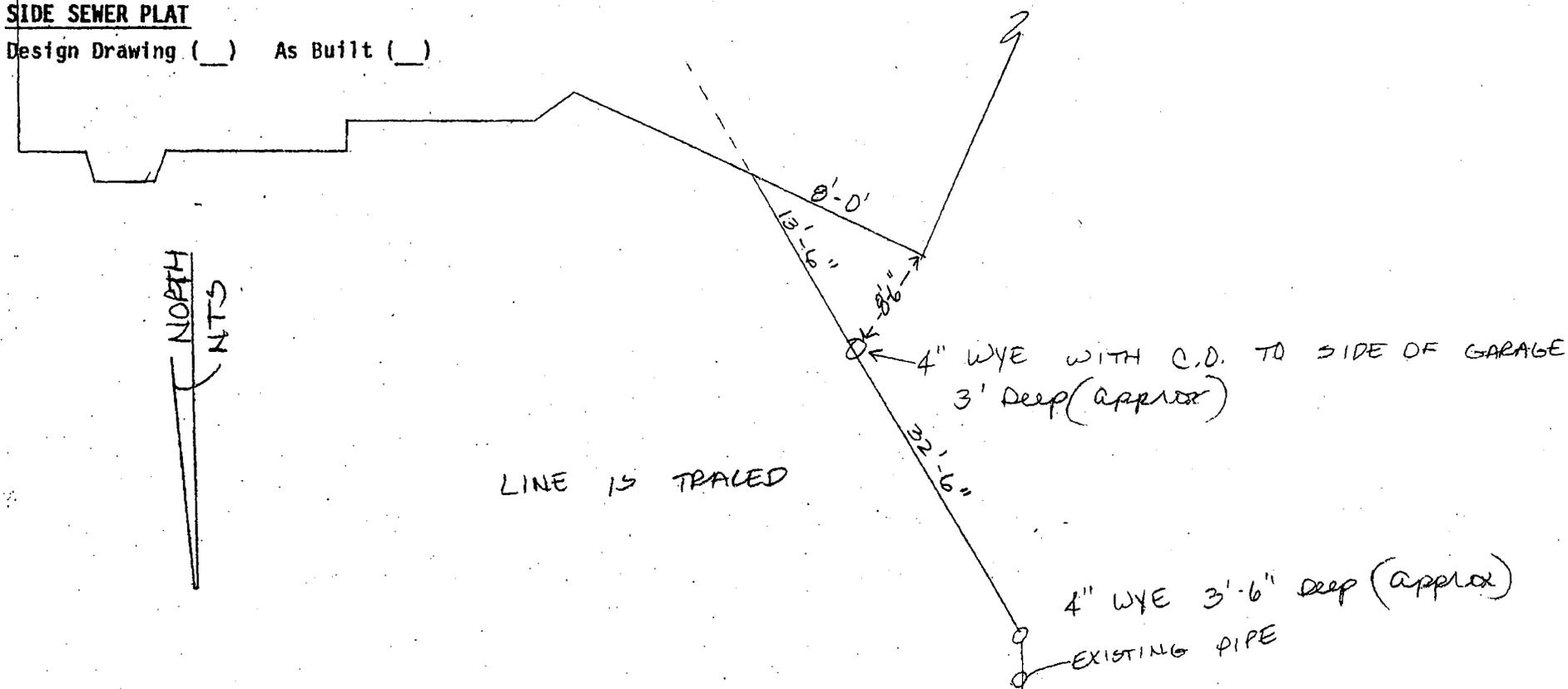
NEW WORK () REPAIRS ()

OWNER COX CONTRACTOR COX PERMIT NO 98472

HOUSE NO 6134 STREET OR AVE 188 ST. SW. LOT NO _____ BLOCK NO _____ NAME OF SUB DIVISION _____

SIDE SEWER PLAT

Design Drawing () As Built ()



Pipe Installation Inspected and approved for backfill:

Date 11-15-93 By A. Miller

Final Connection to House Service Inspected and Approved:

Date _____ By _____

As-Built Sewer Plat Certified Correct:

Date _____ By _____

24-001

Deposit Rec'd \$ _____

APPLICATION APPROVED:

Date _____ By _____

SPECIAL CONDITIONS: _____

00981

Hon. Eric Lucas
Moving Party: Defendants Keo
Motion: Summary Judgment
Date: February 12, 2009 at 9:30 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SNOHOMISH

MYKHAYLO and HANNA STEFANKIV,
husband and wife,

Plaintiffs,

v.

BERN and SAVOUTH KEO,
husband and wife,

Defendants.

NO. 08-2-04296-9

DECLARATION OF A. JANAY
FERGUSON IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

I, A. Janay Ferguson, under penalty of perjury of the laws of the State of Washington declare as follows:

1. I am and at all times hereafter mentioned a U.S. citizen, a resident of Washington, and over the age of 21 years.

2. Attached hereto as Exhibit A to my declaration is a true and correct copy of a Short Subdivision Application [for the real property owned by Steven and Mary Stafford, commonly known as 6132 188th Street S.W.], File No. 87-SEG-0004, recorded on August 30, 1988 in Snohomish County under Recording No. 8808300054.

3. Attached hereto as Exhibit B to my declaration is a true and correct copy of of the sewer permit obtained in 1963 for the real property then commonly known as 6132 188th Street S.W, dated April 29, 1963.

DECLARATION OF A. JANAY FERGUSON
IN SUPPORT OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT - 1

COPY

Ferguson Sell, PLLC
1424 Fourth Avenue, Suite 311
Seattle, WA 98101
Telephone: 206.624.6400
Facsimile: 206.652.5298

1 4. Attached hereto as Exhibit C to my declaration is a true and correct copy
2 of Power of Attorney and Agreement not to Protest formation of Local Improvement
3 District for Street Improvements [of 188th Street S.W.], recorded in Snohomish
4 County on October 6, 1988, under Recording No. 8810060029.

5 5. Attached hereto as Exhibit D to my declaration is a true and correct copy
6 of a City of Lynnwood Application for Side Sewer Permit with approved Side Sewer
7 Plat, Permit No. 997583, dated July 31, 1989.

8 6. Attached hereto as Exhibit E to my declaration is a true and correct copy
9 of a Statutory Warranty Deed conveying Lot 2 from Steven and Mary Stafford to
10 Charles and Christine Cox, recorded in Snohomish County on April 19, 1991 under
11 Recording No. 9104190380.

12 7. Attached hereto as Exhibit F to my declaration is a true and correct copy
13 of a City of Lynnwood Application for Side Sewer Permit, Permit No. 98472, dated
14 November 15, 1993.

15 8. Attached hereto as Exhibit G to my declaration is a true and correct
16 copy of a Statutory Warranty Deed conveying Lot 2 from Charles and Christine Cox to
17 Theodore and Arlene Wolff, recorded in Snohomish County on March 3, 1994 under
18 Recording No. 9403030310.

19 9. Attached hereto as Exhibit H to my declaration is a true and correct copy
20 of Statutory Warranty Deed conveying Lot 1 from Steven and Mary Stafford to
21 Timothy and Tiphonie Anderson, recorded in Snohomish County on May 27, 1994,
22 under Recording No. 9405270485.

23 10. Attached hereto as Exhibit I to my declaration is a true and correct copy
24 of Theodore and Arlene Wolff to Bern and Savouth Keo, recorded in Snohomish
25 County on February 28, 1995, under Recording No. 9502280372.

1 11. Attached hereto as Exhibit J to my declaration is a true and correct copy
2 of a Statutory Warranty Deed conveying Lot 1 from Timothy and Tiphonie Anderson to
3 Ivan Gomez and Stephanie Henry, recorded in Snohomish County on July 28, 1998,
4 under Recording No. 9807280440.

5 12. Attached hereto as Exhibit K to my declaration is a true and correct copy
6 of Statutory Warranty Deed conveying Lot 1 from Ivan Gomez and Stephanie Henry
7 to Andrew and Constance Lysene, recorded in Snohomish County on April 13, 2000,
8 under Recording No. 200004130337.

9 13. Attached hereto as Exhibit L to my declaration is a true and correct copy
10 of Statutory Warranty Deed conveying Lot 1 from Andrew and Constance Lysene to
11 Jeanne Patton, recorded in Snohomish County on October 29, 2002, under Recording
12 No. 200210291097.

13 14. Attached hereto as Exhibit M to my declaration is a true and correct
14 copy of Statutory Warranty Deed conveying Lot 1 from Jeanne Patton to Hanna and
15 Mykhaylo Stefankiv, recorded in Snohomish County on March 10, 2005, under
16 Recording No. 200503100310.

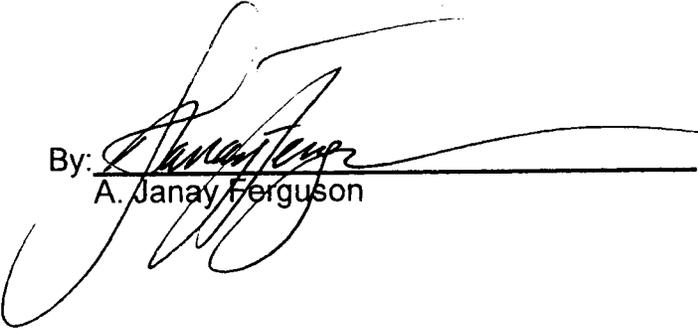
17 15. Attached hereto as Exhibit N to my declaration is a true and correct copy
18 of, an ALTA Commitment (Schedules A & B) from Pacific NW Title to the Stefankivs
19 and produced by Plaintiffs in discovery on October 3, 2008.

20 16. Attached hereto as Exhibit O to my declaration is a true and correct
21 copy of pictures of the Keo and Stefankiv properties, taken by Bern Keo during April
22 2008. Picture 1 is a front view of the properties looking south from 188th Street SW.
23 Picture 2 is the same view incorporating a line showing the proposed location of the
24 relocated sewer from Lot 2 to the sewer main located in 188th Street SW. Picture 3 is
25 a close view of a portion of the proposed location of the relocated sewer line as it
26 would extend from the Keos' property. Picture 4 is a close view of a portion of the

1 proposed location of the relocated sewer line as it would connect to the sewer main in
2 located in 188th Street SW.

3 17. Attached hereto as Exhibit P to my declaration is a true and correct copy
4 of an estimate by Roto-Rooter to relocate the Keos' sewer line, dated May 13, 2008.

5 DATED this 7th day of January, 2009 in Seattle, Washington.

6
7
8 By: 
9 A. Janay Ferguson

1 proposed location of the relocated sewer line as it would connect to the sewer main in
2 located in 188th Street SW.

3 17. Attached hereto as Exhibit P to my declaration is a true and correct copy
4 of an estimate by Roto-Rooter to relocate the Keos' sewer line, dated May 13, 2008.

5 DATED this 7th day of January, 2009 in Seattle, Washington.
6
7
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9 By: _____
A. Janay Ferguson
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APPROVED BY SNOHOMISH COUNTY AUDITOR: DEAN V. WILLIAMS, COUNTY AUDITOR

right to challenge in accordance with state law the amount of an L.I.D. assessment placed against the property subject to this Power of Attorney. This Agreement and Power of Attorney shall be a conveyance of an irrevocable interest in land and the said property owners do by these presents convey to the City of Lynnwood such limited interest in the real property described in Exhibit "B".

This Agreement and Power of Attorney shall be a covenant to run with the fee title to the above-described real property for ten years from the date of this agreement; provided, the city shall deliver a signed release of this Agreement and Power of Attorney after installation of all the contemplated improvements shall have been completed, and if done by Local Improvement District, after transmittal of the final assessment roll to the County of Snohomish pursuant to law.

The undersigned Owners do hereby warrant that the person named as "property owner" on the signature lines below are all of the persons or entities having any interest in the aforesaid real property and that they have full power to grant this Agreement and Power of Attorney.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 13 day of July, 19 88.

Property Owner:

[Signature]
STEVEN S. STAFFORD
[Signature]
MARY R. STAFFORD

STATE OF WASHINGTON)
(ss
COUNTY OF SNOHOMISH)

On this day personally appeared before me Steven S. Stafford and Mary R. Stafford to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 13th day of July, 19 88.

[Signature]
NOTARY PUBLIC in and for the
State of Washington, residing at
Bothell, Washington

ACCEPTED AS TO FORM:

8810060029

[Signature] 8/16/88
City Attorney Date

598E1/2

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- I. The following are the requirements to be complied with:
- A. Instruments necessary to create the estate or interest to be insured must be properly executed, delivered and duly filed for record.
 - B. Payment to or for the account of the grantors or mortgagors of the full consideration for the estate or interest to be insured.
- II. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:
- A. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records, or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires of record for value the estate or interest or mortgage thereon covered by this commitment.
 - B. GENERAL EXCEPTIONS:
 - 1. Rights or claims of parties in possession not shown by the public records.
 - 2. Easements, or claims of easements, not shown by the public record.
 - 3. Encroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey or inspection of the premises.
 - 4. Any lien, or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records, or liens under the Workmen's Compensation Act not shown by the public records.
 - 5. Any title or rights asserted by anyone including but not limited to persons corporations, governments or other entities, to tide lands, or lands comprising the shores or bottoms of navigable rivers, lakes, bays, ocean or sound, or lands beyond the line of the harbor lines, as established or changed by the United States Government.
 - 6. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water.
 - 7. Taxes or special assessments which are not shown as existing liens by the public records.
 - 8. Any service, installation, connection, maintenance, capacity, or construction charges for sewer, water, electricity or garbage removal.
 - 9. Indian tribal codes or regulations, Indian treaty or aboriginal rights, including, but not limited to, easements or equitable servitudes.
 - C. SPECIAL EXCEPTIONS:
As on Schedule B, page 2, attached.

... Continued ...



PROPOSAL
Roto-Rooter Services Company
25232 74th Avenue South
Kent, WA 98032
(253) 520-0081

License # ROTORSC122BR

Proposal Submitted To: Name Mr. bern Keo, Street 6134 188th St. S.W., City Lynwood, State Wa, ZIP 98037. Work To Be Performed At: Name Same, Street, City, State, ZIP, Telephone Number. Roto-Rooter hereby proposes to furnish all the materials and to perform all the labor necessary for the completion of: From 4" PVC in drive way to city main 135 feet away will install new PVC per code Cost will Be \$14770.00 Plus W.S.S.T. Install Man Hole in drive way up to 5' deep per code \$5755.00 Plus W.S.S.T. Install Man Hole in right of way a depth up to 10 feet deep per code \$10125.00 Plus W.S.S.T. All work must be approved by the city and the engineer, before the start of work. All inspection's will be called in by Roto-Rooter. Asphalt is the responsibility of the Owner (Bern Keo). The prices listed above include: labor, material, equipment, hauling, sawcut. Note: If city only required one manhole price adjustment for the manhole not needed will be deducted.

1. Roto-Rooter will perform the work described above and supply all required materials for the sum of \$0.00.

Option A (complete if applicable):

Customer will make payment as follows:

- % of the cost (\$) upon execution of this Agreement.
% of the cost (\$) upon the start of the work.
Balance of the cost upon completion of the job (\$).

Option B (check if applicable):

- The total sum will be billed upon completion of the work and is payable within 30 days (commercial accounts with approved credit only).

2. The approximate starting date is , and the approximate completion date is . Neither date is guaranteed. Unexpected conditions or problems could cause delays.

3. If a box is checked below, Roto-Rooter is providing a service guarantee on the terms provided with this proposal.

Table with 3 columns: Service Type, Commercial, Residential. Rows include Main/Branch Lines, Toilet Auger, Plumbing Repair, Plumbing Replacement, Extended Guarantee.

4. THE TERMS AND CONDITIONS PROVIDED WITH THIS PROPOSAL WILL BE BINDING ON THE PARTIES.

5. This proposal may be withdrawn by Roto-Rooter if not accepted within 30 days. This proposal constitutes the entire agreement between the parties, and no modifications will be valid unless in writing and signed by both parties.

6. Other

Respectfully Submitted:

Signature Steve Harris Printed Name Date 5/5/2008

ACCEPTANCE OF PROPOSAL

Customer authorizes the work and accepts the above terms (including the terms and conditions provided).

Accepted: Signature Printed Name Date

Roto-Rooter Services Company Terms and Conditions

The following terms apply to all work performed by Roto-Rooter Services Company or its affiliates ("us") for the customer indicated on first page of this proposal ("you").

1. **Your Responsibilities.** You agree to (a) remove any hazards, obstructions or dangerous conditions around the job site not caused by our work, (b) limit access to the job site so that people not working on our job are not exposed to dangerous conditions relating to our job, (c) place appropriate warnings to warn of dangerous conditions when we are not on the job site, and (d) provide us with adequate access.
2. **Exceptions to Our Responsibilities.** We are not responsible for (a) personal injury, property damage or other damage or loss to you or others arising out of our work, except to the extent caused by our negligence or failure to perform the work in accordance with the contract between us; (b) defective, damaged, or deteriorated lines, mold, lead piping, or other unexpected or undisclosed conditions, and the consequences of such conditions, including delays, broken fixtures or lines, and lodged equipment (if we encounter such a condition, we may stop work, and you will pay us a reasonable charge for the work performed); (c) the time required to complete our work with reasonable diligence; (d) unless explicitly stated in writing, any damage necessary to complete our work, including damage to landscaping, walls, painting, tile or concrete or similar items; (e) damage caused by the removal of any clean out, drain cover or cap; or (f) tasks we perform in accordance with your specific instructions.
3. **Release and Hold Harmless.** You release us from (and if you are a commercial customer, you will defend and indemnify us and hold us harmless against) all damages, claims, demands, settlements, judgments, liabilities, costs and expenses, including reasonable attorneys' fees, allegedly arising out of (a) breach of your responsibilities under paragraph 1, or (b) matters for which we disclaim responsibility under paragraph 2.
4. **Our Guarantee.** If we provide a parts or equipment guarantee, as your exclusive remedy, we will give you the benefit we receive, if any, under the manufacturer's warranty. If we provide a service guarantee, it covers only drainage failure in the line serviced, and defective plumbing workmanship, during the guarantee term. As your exclusive remedy under our service guarantee, we will, at our option, either do the work again at no labor cost or refund your payment. Guarantees do not apply to problems arising out of main sewer line backup or improper, abnormal or unanticipated use or conditions. Except as explicitly stated in writing, we are not giving any guarantees or making any warranties. **WE DISCLAIM ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.** For problems or inquiries, you should contact our General Manager at the phone number listed on the front of our proposal.
5. **Limitation of Damages.** Our liability to you for any claim arising out of our work on any job (other than a claim permitted by these terms for personal or bodily injury) will in no event exceed three times the amount you actually pay us for the work on that job. **EXCEPT FOR A CLAIM PERMITTED BY THESE TERMS FOR PERSONAL OR BODILY INJURY OR PROPERTY DAMAGE, YOU WAIVE ANY RIGHT TO RECOVER INCIDENTAL DAMAGES, CONSEQUENTIAL DAMAGES, OR DELAY DAMAGES.**
6. **Overdue Amounts.** If you fail to pay us any amount when due, we will charge you interest on the amount due at the rate of 1.5% per month (but not exceeding the highest rate legally permissible). You will reimburse us for the reasonable attorneys' fees we incur in all stages of collection.
7. **General.** These terms are part of our contractual agreement and will prevail over any inconsistent terms in any other agreement between us, including the terms of any purchase order, and may be modified only in a written instrument signed by both of us which specifically refers to the provisions to be modified. If any of these terms is held invalid or unenforceable, the remaining provisions will not be affected and will continue to apply.