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No. 70049-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

WILLIAM D. WAHL,

Appellant,

v.

MICHAEL L. AND HOROMI RITTER

Respondents

RESPONDENTS' BRIEF

Counsel for Respondents Ritter:

Alfred E. Donohue, WSBA #32774
W. Sean Hornbrook, WSBA #31260
WILSON SMITH COCHRAN DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, Washington 98164
Telephone: 206.623.4100
Facsimile: 206.623.9273

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I. INTRODUCTION

In 1979 Appellant William Wahl and his adjoining neighbors Thomas and Audrey Podl (hereinafter “Podls”) settled a contentious lawsuit where Wahl risked having his uncompleted home torn down. VRP 164:2-165:15. The settlement granted the Podls—and their successors—six easements across Mr. Wahl’s property that were very broad in nature. Tr. Ex. 1. In fact, the easements effectively gave the Podls near exclusive use of the easement areas.

For example, EA III required that Wahl build a dock for the Podls use and moorage of two 50 foot boats. That easement only permits Wahl to use the dock for temporary moorage if that moorage did not interfere with the Podls use. The easement explained that “[i]n the event of a conflict between the Owners A (Wahl) and B (Podl) over the use of Easement III, Owner B (Podl) shall have priority with the understanding that Easement III is Owner B’s private area, . . .” Tr. Ex. 1 at 6.

EA II granted the Podls use of a shore area adjacent to the dock and access to the shore and dock along a corridor. As with EA III, the language in EA II similarly explained that “Owner B (Podl) shall have priority with the understanding that Easement II is Owner B’s private area, to the extent provided herein.” *Id.* at 5-6.

The Podls sold their property to Michael and Horomi Ritter in 1999. VRP 700:19-22. Shortly after purchasing the home, there was a leak in an underground storage tank on the property. VRP 701:4-25. Subsequent remediation efforts were significant, and required removing large amounts of earth from both the Ritter and Wahl property. Remediating this leak required work in several easement areas. VRP 823-27 (testimony from remediation engineer Lambie).

As part of the remediation work, the Ritters expanded a stairway from EA I to area II from three to five feet. The Ritters also removed a deck that was partially in EA I replaced it with a patio that also partially encroached onto EA I. The patio functioned to drain water away from a retaining wall and to provide a foundation for required safety railings.

After the remediation work, the Ritters removed a small portion of the Wahl driveway that had been rebuilt to encroach on their five foot access in EA II because Wahl was parking cars in the easement and blocking their access.

Mr. Wahl prohibited the Ritters from continuing to run water and electricity along Easement areas I and II to the dock, claiming that the easements did not permit such activity. It is from the aftermath of the Ritter's remediation work and Mr. Wahl's actions that Mr. Wahl's lawsuit and appeal stem.

Following a seven day trial, the Court concluded that while Mr. Wahl could continue to use EA II “for non-recreational uses, including ingress and egress,” he could not use the easement for motor vehicle “ingress or egress, or for parking for any period of time.” CP 637.

The Court concluded that while the Ritter patio encroached onto EA I, “[t]he encroachment of the patio does not interfere with any other use of the property covered by EA I” and was therefore permitted. The Court also concluded that under the terms of the easement, the Ritters could install railings and expand the width of the steps in EA I from three to five feet. The court further concluded that “[t]here was no showing at trial that extending the width of the steps . . . interfered with or impaired use by Owner A, and were done for safety reasons, all clearly within the authority granted Owner B in EA I.” CP 638.

The Court interpreted EA I and EA II to permit the Ritters “to run power lines and water hoses to the dock in EA III and to the southerly portion of EA II, as a ‘park area.’” CP 637. And finally, the Court interpreted EA III (in conjunction with the Bellevue Municipal Code) to permit two jet skis to count as one boat “for purposes of the vessel limitation in EA III, in part due to their smaller size.” CP 638.

Mr. Wahl continues to complain about these rulings from the trial court:

1. Mr. Wahl disagrees with the Trial Court's interpretation of easement II as prohibiting him from driving or parking cars on a five foot section of the easement. But he ignores substantial evidence that his use of the easement for driving and parking interfered with the Ritter's priority use. Prior owner Audrey Podl testified that Mr. Wahl's driveway had not extended into the easement area when she lived there.
2. Mr. Wahl challenges the Court's findings and conclusions that the easement's broad language permits the Ritters to run power to the dock in Easement III. He also disagrees with the Court's conclusion (based in part on the City of Bellevue's code governing jet skis) that jet skis be counted as ½ a boat. Again, substantial evidence supports the Court's findings of fact and the Court's legal conclusion is correct.
3. He ignores substantial evidence that planters placed in EA I were necessary for drainage and safety and argues that the placement of the planters is not permitted by the easement. He also fails to rebut the substantial evidence that the slight encroachment of the patio did not interfere with his use of EA I.
4. He complains because stairs down the easement are five feet wide at their base and that they should be three feet wide, despite no language in the easement setting a width for the stairs and substantial evidence that the increased width was done for safety reasons and that the increased width did not interfere with or impair his use of EA I.

There are several themes running throughout Mr. Wahl's briefing. First, he ignores the broad nature of the easements and the language granting the Ritters powerful rights to control and use the easement areas. Second, he ignores the substantial evidence before the trial court

demonstrating that the Ritters' uses were consistent with the easements. Instead, he relies almost exclusively on Mr. Wahl's own testimony while brushing aside contrary testimony from former owner Podl, the remediation contractor, the city of Bellevue, and others. Finally, Mr. Wahl misstates facts and law. For example, he claims that the Court of Appeals reviews the trial court's findings of fact de novo. But as this court well knows, the appellate standard of review for a trial court's findings of fact is for substantial evidence supporting the trial court's findings. The trial court heard testimony during a seven day trial and rendered a memorandum decision that was later reduced to findings of fact. As demonstrated below, substantial evidence supports each of the trial court's findings. Those findings of fact should be treated as verities on appeal.

The trial court applied those findings to the easement agreement and entered conclusions of law that this court reviews de novo. Those conclusions are also correct. The Ritters ask that the Court affirm the trial court's decision in its entirety.

Finally, the trial court correctly concluded that the Ritters were entitled to attorney fees under RCW 4.84.270. The Ritters ask that this court affirm the trial court's award of fees and that this court also award fees to the Ritters on appeal pursuant to RAP 18.1 and RCW 4.84.290.

II. ASSIGNMENTS OF ERROR

A. Appellant Wahl has assigned error to nearly all of the trial court's findings of fact.¹ But Mr. Wahl ignores the evidence that supports the trial court's findings, and instead focuses on select testimony that supports his theories. Notably, Mr. Wahl does not challenge the Court's finding that there was only one trespass, and that Mr. Wahl did not suffer any damages from that one-time trespass. This finding is therefore a verity.

B. Mr. Wahl challenges nearly all of the trial court's conclusions of law.² But he does not challenge Conclusion of Law 35 dismissing "all of Plaintiff's claims for any damages . . . as not supported by evidence presented at trial."

C. Finally, Mr. Wahl challenges the Court's award of attorney fees to the Ritters under RCW 4.84.270.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did substantial evidence support each of the Court's findings of fact?

B. Does the broad language of the 1979 easement permit the Ritters to use the easement in the manner that the trial Court interpreted the easement?

¹ Appellant Wahl challenges Findings 4, 9, 11-12, 15-19, and 21-22.

² Appellant Wahl challenges conclusions 26-34. He does not challenge conclusion 35, which dismissed all of Plaintiff's claims for any damages . . . "as not supported by evidence presented at trial."

C. Did the trial court properly award the Ritters their attorney fees pursuant to RCW 4.84.270 when the evidence showed that Mr. Wahl sought less than \$10,000 in damage?

IV. STATEMENT OF THE CASE

A. Underlying Facts of Litigation

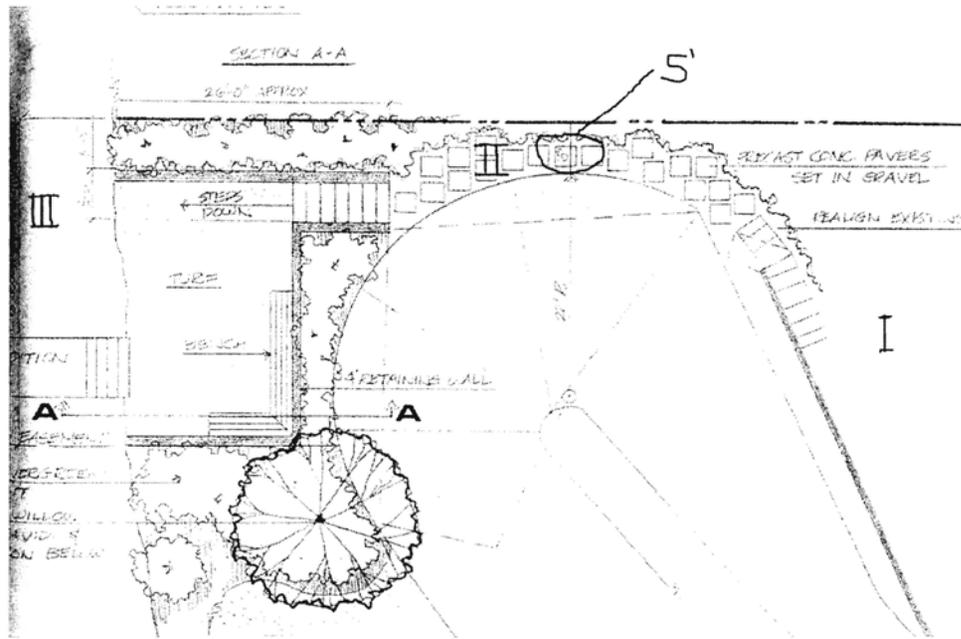
This lawsuit concerns property in Bellevue on Lake Washington and the recreational use of an easement burdening the Wahl property.

Recreational use of the easement area by the Ritters' predecessors dates to at least 1955. Tr. Ex. 1 at 1. That easement governed the use of the easement area until 1978. In 1978, Mr. Wahl began constructing a new residence on his property and threatened to exclude the Podls from the easement area. The Podls filed a lawsuit seeking a declaration regarding their rights to use the easement area for recreational purposes and to enjoin construction of Mr. Wahl's residence. VRP 610-14.

In November 1978, Mr. Wahl and the Podls settled the lawsuit. Key to the settlement was recoding of a new easement to replace a 1955 easement. VRP 164-66. This easement agreement created a series of six easement areas to benefit what later became the Ritter property. Tr. Ex. 1. At issue in this litigation are easement areas I, II, and III.

Included in this easement was a landscaping plan that the parties worked on with the assistance of landscape architect Jo Frey. VRP 660-64. The landscaping plan included a five foot access along the north boundary

between easement areas I and III. This access route was bounded on the south by the Wahl driveway, which was rounded. *Id.*



Tr. Ex. 3, showing the driveway and easement areas I, II, and III.

1. The 1978 Easement Agreement

The 1978 Easement agreement creates six easement areas. Tr. Ex. 1. EA I is directly west of the Ritter residence on a steep slope. EA II runs along the northern property boundary and is five feet wide at its narrowest point and is bounded on the south by the Wahl driveway. EA II then opens up into an area along the lake adjacent to EA III, which is a dock constructed by Mr. Wahl for the benefit of the Ritter property. As is evident from the plain language of the Easement Agreement, the Ritters have extensive rights over Easement areas I, II, and III, with EA II and EA

III each explaining that the Ritters “have priority use with the understand that [EA II / EA III] is owner B’s private area.”

2. The 1999 cleanup

The Ritters purchased the Podl property in December 1999. Just one week later, Mr. Ritter learned that there was a leaky underground storage tank (“UST”) on their property that required extensive remediation. VRP 701:4-25. Most of the excavation for the remediation occurred in EA I. Tr. Ex. 33. The remediation took several years.

Below is Trial Exhibit 25, 1, showing remediation work to EA I.



As part of the remediation, changes were made to EA I and II. For example, a deck on EA I was removed and the walkway access across EA

I from the Ritter home to EA II was modified. This included widening stairs at the bottom of EA I from 3 to 5 feet. See, e.g., Tr. Ex. 33; VRP 764-65; 791-92; 797-99.

Before the contractor would prepare final work plans and mobilize for the remediation, it required the parties to sign an access agreement. Mr. Wahl, represented by his current counsel, negotiated and signed the “Agreement for Right of Entry.” Tr. Ex. 88. By this agreement, Mr. Wahl acknowledged the landscaping and pavement on his property (including Easement I) may not be replaced in the exact location. Mr. Wahl also agreed to limit the Ritter’s liability for any resulting damages. *Id.*

The Ritter Property lies 30-50 feet higher than Lake Washington and is stabilized by two concrete retaining walls. VRP 703:10-22; Ex. 33 (showing final site grading plan). The area remediated is a “steep slope critical area”³ as defined by the Bellevue Land Use Code. Because of this designation, the City of Bellevue required the Ritters obtain a Critical Areas Land Use Permit and prepare a Critical Areas Report, landscape restoration plan and a landscape monitoring/maintenance plan. The area remediated was broken down into planting zones, and each zone required a certain number of specific plants planted in specific locations. The City of Bellevue also required a Clearing and Grading Permit which required a

³ VRP 796:6-10.

landscaping plan and permanent erosion control for “covering all exposed soils with vegetation, pavement or structures.”⁴

Because of the remediation, it was necessary for the steep slope to be reconfigured. For example, the stairs going down to Lake Washington were moved and the retaining walls were re-built and reconfigured. VRP 1074:12-1075:5; *compare* Tr. Ex. 11 and 33. These necessary modifications were allowed under the Right of Entry Agreement. Tr. Ex. 88. Additionally, John Lambie, lead project engineer from SES testified that widening the stair width from three to five feet had several benefits.⁵

The Ritters installed a patio rather than replace their wood deck.⁶ This patio was a component of the retaining wall reconfiguration and was designed to catch water and funnel it into a storm drain. VRP 850:16-20. For the patio to provide drainage necessary to protect the new retaining walls, it was necessary to build a small portion of the Ritter’s patio on Easement I. The patio was installed with a slight incline away from the top retaining wall to catch rain and funnel it into a drain installed on the patio. VRP 849:18-850:20. In addition, the patio provides a foundation for the

⁴ *See, e.g.*, VRP 784, 797. A Critical Land Use Permit is required when excavating more than 50 cubic yards and clearing over 1,000 square feet. *See* Bellevue BCC 23.76.090.

⁵ The original stairs landed on Mr. Wahl’s property in the middle of the driveway. The new stairs were turned to empty along the five foot easement path in EA II. The base of the stairs was also widened to five feet to conform to EA II. VRP 825:2-18

⁶ The wood deck also encroached slightly onto EA I and had been in place since at least 1974. Tr. Ex. 32 (May 16, 2007 letter from City of Bellevue).

safety railing required by the City of Bellevue. VRP 795:3-796:13. The City would not have approved the patio without the appropriate drainage and safety railing. VRP 797:3-798:2. Contractor Dan Reynolds testified that if the patio configuration was altered, it could affect drainage and the integrity of the retaining walls and that removing the patio would require redesigning the drainage for the retaining walls because the water from behind the retaining walls drains onto the concrete and into drains in the patio. VRP 1066:2-1067.23; 1068:3-11. He testified that the designers did not take into account the patio and planter boxes as a structural component of the walls. VRP 1074:22-1075:5.



VIEW C, LOOKING SOUTHERLY

Blowup of photo in Tr. Ex. 2 showing planter and deck on edge of EA I.

City of Bellevue code dictated where, how many and what kind of plants the Ritters could install. Because of these requirements and safety concerns, the Ritters installed concrete planter boxes on top of the upper terrace next to their patio. VRP 904-07. These planter boxes serve multiple design purposes. First, the concrete planter boxes are a retaining device for the soil and help with erosion control. Second, the concrete planter boxes act as a retaining wall and safety railing on top of the upper retaining wall due to the height of the wall. The City of Bellevue required a retaining device or railing for safety. If concrete planter boxes were not used, then the City would have required that the Ritters install some form of railing at this location. But because of the landscaping and planting requirements, as well as the need for drainage, the planter boxes were the most practical and efficient solution. VRP 796:22-798:2; 853:2-24; 1077:22-1078:1.

3. Mr. Wahl's use of EA II

Sometime after 2000, Mr. Wahl had his driveway rebuilt to encroach into EA II.⁷ EA II is for the Ritter's recreational use and for access between their residence and the dock. Tr. Ex. 1. Despite this express purpose, Mr. Wahl used EA II for parking his cars and trucks. His

⁷ Mr. Wahl's brief cites testimony by Mr. Wahl that he had always used EA II for parking and driving and that the driveway always encroached into EA II. But his testimony is inconsistent with former owner Audrey Podl, who testified that after the 1978 easement agreement, EA II was not paved and was not used for driving or parking. VRP 621-23.

tenants have also used the area for parking their vehicles. VRP 580:1-15.

This use interfered with the Ritter's use of the easement.



Above is a photo exhibited at trial showing three of Mr. Wahl's cars blocking EA II's path from the Ritter residence to the lake. Tr. Ex. 99.

Later, the Ritters cut the driveway back to clear a five foot path (consistent with EA II) and installed pavers. Shortly after Mr. Wahl commenced this litigation, the trial court prohibited any future vehicle traffic on the easement area and ordered that the Ritters install pavers in the five foot easement area. Tr. Ex. 6 (April 29 preliminary injunction). Despite the Court's order, Mr. Wahl continued to drive over and park

vehicles on the easement. His impermissible use caused damage to the pavers, as shown below.



This photo exhibited at trial (part of Tr. Ex. 99) depicts damage caused to the pavers due to Mr. Wahl's continued use of the five foot easement area following the trial Court's April 29, 2011 Order.⁸ On May 25, 2012, the trial court issued an order for sanctions and contempt against Mr. Wahl for his violation of the preliminary injunction and his continued use of the easement area for vehicles. CP 537-41. Mr. Wahl has not appealed this contempt order.

⁸ Other photos in Tr. Ex. 99 document repeated damage caused by Mr. Wahl's vehicles using the five foot easement area between August 2011 and December 2011.

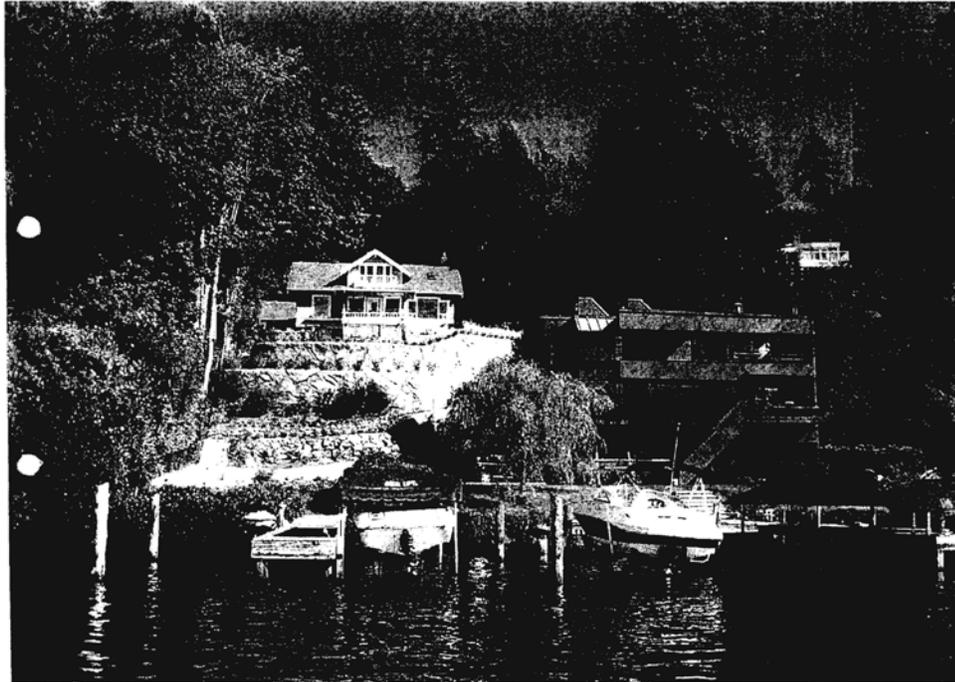
4. EA III—The Dock

The 1978 Easement agreement created a separate recreational easement area for a dock adjacent to EA II to be used as “Owner B’s private area.” The easement expressly included recreational uses including but not limited to swimming, boating, fishing, ingress, egress, or any other recreational use.” Tr. Ex. 1 at 6.

The easement agreement further required that Mr. Wahl build a dock for the Podl’s use (“The New Dock shall be paid for by Wahl . . .”). Tr. Ex. 1 at ¶ 4. The dock was to be “for the permanent mooring of not over two boats belonging to Owner B, neither of which shall exceed 50 feet.” The easement granted the Ritters “priority use” with the only limit on the Ritter’s use that their use “not unreasonably interfere with Owner A’s privacy in the use and enjoyment of his residence.” *Id.*

Since shortly after purchasing their residence in 2000, the Ritters have used the dock to moor a small boat. VRP 714-15. In 2002, they installed a lift for two jet skis. Tr. Ex. 44. When the Ritters moved into the home in early 2001, there was water running from the Ritter property to the dock, VRP 700-01; 650:7-11. Mr. Wahl had power installed at the dock which the Podls used. VRP 641:11-15. After the Ritters moved in, Mr. Wahl cut off power to the dock and the Ritters ran their own power. VRP 948:23-25. Water and electricity at the dock were necessary for

powering the boat lift,⁹ charging batteries,¹⁰ and providing water for other uses.¹¹ Mr. Wahl removed the water and power and took the position that the Ritters could no longer access utilities at the dock. VRP 229:20-25.



Above is Trial Exhibit 99, 4, showing the Ritter dock and residence to the left. The Wahl residence is to the right of the photo.

B. Procedure Below

Mr. Wahl filed suit against the Ritters on March 23, 2011. CP 1324-33. The Court issued a preliminary injunction on April 29, 2011. CP 97-100. Following discovery, the matter was tried without a jury to the

⁹ VRP 717:9-25.

¹⁰ VRP 962:12-963:2.

¹¹ VRP 718:10-15.

honorable Richard D. Eadie beginning September 12, 2012. On October 26, 2012, the Court filed a Memorandum Decision outlining the Court's decision. CP 625. On February 21, 2013, the Court entered its Findings of Fact, Conclusions of Law, and Order. CP 631-42.

After trial, the Court awarded the Ritters \$22,288 for attorney fees and costs under RCW 4.84.250. CP 1322-23. The Court's final judgment was entered on August 2, 2013. CP 1455-56.

V. SUMMARY OF ARGUMENT

Mr. Wahl has challenged nearly every finding of fact—even though each finding is supported by substantial evidence. For many of the findings, he presents no evidence to contradict the court's finding. For example, he challenges the court's finding that “the encroachment of the patio does not interfere with any other use of the property covered by EA I.” But he provides no contrary evidence, and in fact, tacitly admits that he has no evidence by stating that “[i]nterference with another use, however, is irrelevant.” Each finding is supported by substantial evidence and should therefore be treated as a verity on appeal.

He challenges all but one of the trial court's conclusions of law. He even claims error for the trial court's conclusion that “EA II is a

recreational easement.”¹² This claimed assignment of error ignores the plain language in EA II, which states “Easement II: This Easement shall be for recreational use, including but not limited to” Tr. Ex. 1. Each of the trial court’s conclusions of law are supported by the clear and unambiguous language of the Easement, and by the extrinsic evidence that Mr. Wahl insisted the parties submit to the court to show the parties’ intent. Most of that evidence comes from Mr. Wahl’s own trial testimony. It is perhaps because substantial evidence contradicts that testimony that he asks this court to review the findings of fact de novo and to substitute its own judgment for the trial court’s assessments of credibility and weighing of evidence.

Mr. Wahl sought an order requiring that the Ritters remove a small portion of a patio located partially on EA I and which was an integral part of the retaining wall and drainage system for the hillside. The court found and concluded that this use was necessary and did not interfere with Mr. Wahl’s use of the easement. Mr. Wahl also complained about the base of a stairway on EA I which was five feet wide instead of the three feet he preferred. The court found and concluded that this expanded width was for safety reasons, did not interfere with Mr. Wahl’s use of EA I, and was within the authority granted to the Ritters by EA I. The trial court’s

¹² CP 636. See Appellant’s brief, Assignment of Error 1 and 5.

finding and conclusion are also supported by the “oppression” exception for removal. *Proctor v. Huntington*, 169 Wn.2d 836, 846, 192 P.3d 958 (2008).

Mr. Wahl complains that the trial court illegally excluded motor vehicles from EA II. He fails to inform this court that evidence at trial demonstrated that his use of EA II for vehicles had interfered with the Ritters’ priority use. He also fails to submit testimony and other substantial evidence demonstrating that EA II had never been intended for motor vehicle ingress or egress. The trial court correctly concluded that EA II was not for motor vehicle ingress or egress.

He complains about the Ritters’ use of the dock in EA III. First, he argues that their mooring two jet skis on the dock along with a single boat exceeds the permitted two boat maximum contained in EA III. But the trial court properly construed the easement to accommodate the reasonable use of the dominant estate and to consider changes to the natural use of the easement “which may be different from those existing at the time of the grant.” *Logan v. Brodrick*, 29 Wn. App. 796, 800, 631 P.2d 429 (1981).

Specifically, the court considered the Bellevue Municipal code and concluded that it was proper to count each Jet Ski as ½ a boat. The court also correctly found and concluded that EA III’s language—and the

parties' original intent—was that it contemplated running water and power to the dock to achieve the recreational intent of the easement.

Finally, the Ritters are entitled to their reasonable attorney fees both at trial and from this appeal. Mr. Wahl alleged less than \$10,000 in damages, received an offer of judgment for less than \$10,000, and then recovered nothing at trial. RCW 4.84.250 entitles the Ritters to their reasonable attorney fees. The Ritters also seek attorney fees on appeal pursuant to RAP 18.1 and RCW 4.84.290.

VI. ARGUMENT

A. Standard of Review

“In a bench trial where the trial court has weighed the evidence, [the Court of Appeal’s] review is limited to determining whether substantial evidence supports the trial court's findings of fact and whether those findings support the court's conclusions of law.” *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 56, 63-65, 277 P.3d 18, 24 (2012) (citing *Standing Rock Homeowners Ass'n v. Misich*, 106 Wash.App. 231, 242–43, 23 P.3d 520 (2001)). “Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true.” *Id.*; *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000). Despite this clear mandate, Mr. Wahl invites the Court

of Appeals to disregard the trial court's role and to re-weigh evidence and testimony from trial and assess witness credibility.

The Court of Appeals reviews questions of law and conclusions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003).

B. Interpreting Easements

“[D]eeds are construed to give effect to the intentions of the parties, and particular attention is given to the intent of the grantor when discerning the meaning of the entire document.” *Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57 (2007). Interpreting deed is a mixed question of fact and law. *Newport Yacht Basin Ass'n*, 168 Wn. App. at 64. What the parties intended is a question of fact and the legal consequence of that intent is a question of law. *Id.*

Generally, the Court determines the intent of the parties from the language of the deed as a whole. *Sunnyside Valley*, 149 Wash.2d at 880, 73 P.3d 369 (citing *Zobrist v. Culp*, 95 Wash.2d 556, 560, 627 P.2d 1308 (1981)). “In the construction of a deed, a court must give meaning to every word if reasonably possible.” *Hodgins v. State*, 9 Wash.App. 486, 492, 513 P.2d 304 (1973) (citing *Fowler v. Tarbet*, 45 Wash.2d 332, 334, 274 P.2d 341 (1954)). Washington courts have long recognized that where the plain language of a deed is unambiguous, the court will not consider

extrinsic evidence. *Sunnyside Valley*, 149 Wash.2d at 880, 73 P.3d 369; *In re Estate of Little*, 106 Wash.2d 269, 287, 721 P.2d 950 (1986); *City of Seattle v. Nazaremus*, 60 Wash.2d 657, 665, 374 P.2d 1014 (1962); *Tacoma Mill Co. v. N. Pac. Ry. Co.*, 89 Wash. 187, 201, 154 P. 173 (1916) (“[I]f the intention of the parties may be clearly and certainly determined from the language they employ, recourse will not be had to extrinsic evidence *65 for the purpose of ascertaining their intention.”).

As Professor Stoebuck has explained, “[o]ne does not need rules to interpret a document that is clear on its face, but only when it is in some way unclear.” 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 7.9, at 485 (2d ed. 2011). This is also the approach of other jurisdictions. “Where there is no ambiguity in the language used in a deed, the intention of the parties must be arrived at from such language, giving it its common and accepted meaning.” 23 AM.JUR.2D *Deeds* § 194 (2012) (citations omitted); *see, e.g., Peterson v. Barron*, 401 S.W.2d 680, 685 (Tex.Civ.App.1966) (“It is elementary, of course, that there must be some ambiguity in a deed before extrinsic evidence is admissible to vary the terms thereof.”). Relying on the deed language instead of a party’s subjective testimony is particularly important—when as here—only one of the two original parties still has an interest in the affected properties.

Despite the clear language of the easements, Mr. Wahl argued at trial that the easement language was ambiguous and that extrinsic evidence was necessary to interpret the 1978 easement. The trial court permitted him to submit testimony and documents to prove his desired meaning. He now claims—at times—that the language was clear on its face and that extrinsic evidence is not necessary to interpret the easement. At other times, he relies on his own testimony to show the meaning of the easement.¹³ When the testimony does not favor his interpretation, he ignores the unfavorable testimony.¹⁴

As explained below, the broad language in the 1978 easement gives broad rights over portions of Mr. Wahl's property to the Ritters. The easement designates EA II and EA III as recreational easements for the Ritters' benefit for activities such as boating, picnicking, fishing, "or any other recreational use" and explains that EA II and EA III are each "owner B's private area, . . ." Tr. Ex. 1 at 5-6.

Mr. Wahl's biggest complaint is actually the broad grant of that easement, and not the court's findings and conclusions. But Mr. Wahl is bound by the broad language in the easement he granted in 1978. And that

¹³ See, e.g., Brief of Appellant at 32 (relying on "the extensive evidence of driveway, parking and other uses since 1979" to support his interpretation of EA II as allowing motor vehicle use).

¹⁴ See, e.g., Audrey Podl and Jo Frey's testimony about historic use of EA II and Audrey Podl's testimony about power and water to the boat dock.

language clearly and unambiguously gives the Ritters the right to nearly exclusive control over EA I, EA II, and EA III, and grants the Ritters the right to make decisions about maintenance and repairs to the easement areas at issue.

C. The broad language in Easement II.

Easement II is for the Ritter's "recreational use, including but not limited to access, gardening, lawns, rockeries, boating, picnicking, fishing, swimming, lawn sports, ingress and egress, or any other recreational use." The Easement grants near exclusive control to the Ritters over the area adjacent to the dock and adjacent to the Wahl driveway, explaining that "Owner B has priority use over Easement II" and that "In the event of a conflict between Owners A and B over the use of Easement II, Owner B shall have priority with the understanding that Easement II is Owner B's private area, to the extent provided herein." Tr. Ex. 1 at 5-6.

Despite this broad language, Mr. Wahl raises a number of arguments about takings, property rights, and constitutionality. Each of these arguments carefully ignores the broad language of the easement, and the trial court's limited conclusion that the recreational nature of the easement is inconsistent with motor vehicle ingress or egress, or for parking for any period of time. But it is the scope of the easement that governs, not abstract constitutional principles. And EA II is for

recreational use by the Ritters and to provide ingress and egress. It does not grant Mr. Wahl the right to operate motor vehicles on the easement area, nor does it permit him to park vehicles on the easement area. *Brown v. Voss*, 105 Wn.2d 366, 371, 715 P.2d 514 (1986) (holding that when determining the scope of easement, courts look to the language of the original grant to determine permitted uses). The original grant was for recreational purposes and for the Ritters' benefit. Reasonable use is determined by use necessary to accommodate the dominant estate (the Ritters) and not the servient estate (Mr. Wahl). *Logan*, 29 Wn. App. at 800.

a. Substantial Evidence Supports the Court's exclusion of motor vehicles from EA II.

Mr. Wahl challenges Finding of Fact 4, claiming that the court found that the Ritters "sought and were granted exclusive use" of the walking path. But Finding 4 does not make any such finding. In fact, Finding 4 does not even make a "finding"—it merely lays out the Ritters' claims and defenses for their use of Easement II.

Substantial evidence supports the Court's finding that Mr. Wahl's parking and driving in EA II is inconsistent with its intended use and purpose. Mr. Wahl admitted to parking vehicles in EA II. He also admitted to authoring a document admitting that he has known he is not supposed to

park in the easement area. VRP 581:1-582:5. Jo Frey, the landscape architect hired by Mr. Wahl in 1978 to create the landscape plan that is Trial Exhibit 3, also testified to the original intent of the parties. She testified that the path that is EA II was originally a five foot easement path designed for pedestrians only. She confirmed that if the parties had intended any vehicles to be driven or parked on the area, she would have suggested different materials than pea gravel and pavers, which are identified in Trial exhibit 3. VRP 665:3-667:5. Other evidence also confirms that the original parties did not intend EA II to have motor vehicle traffic.

Audrey Podl testified that between 1978 and 1984 (when she moved) she did not ever recall seeing a car drive in EA II. She also did not recall ever seeing a car park in EA II. 621:10-622:9. Nor did the driveway encroach into the easement area. Instead, the path was covered with pavers or flagstone. *Id.*; VRP 622:25-623:8. This substantial evidence supported the court's findings that Mr. Wahl's later use of the easement for driving and parking motor vehicles was inconsistent with the express language of the easement as well as the parties' original intent. The trial court's findings and conclusions are supported by substantial evidence that the easement does not provide for motor vehicle use and that using motor vehicles in the easement interferes with the Ritter's priority use. CP 636-

37, at ¶ 27-28. From these findings the trial court correctly concluded that EA II does not permit motor vehicles.

b. Mr. Wahl's use of vehicles in the easement interfered with the Ritter's use and the use was inconsistent with the purpose of Easement II.

The trial court concluded that EA II was not intended for vehicular traffic. This conclusion is consistent with the Court's findings and the language in EA II. Mr. Wahl asked the court to consider extrinsic evidence to interpret the parties' intent for EA II. But the same substantial evidence supporting findings 4 and 9 also demonstrates that EA II was never intended for vehicle traffic.

EA II does not expressly permit motor vehicle traffic. The five foot strip at issue in EA II is for the Ritters to access the lower portion of EA II and to access the dock in EA III. At best, Plaintiff has relied on extrinsic evidence to show past use of the easement by motor vehicles. But that use, as demonstrated by Tr. Ex. 99, interfered with the Ritters' use of the easement.

Mr. Wahl argues that the trial court's conclusion deprives him of the use of EA II. That is incorrect. The court's finding only prohibits motor vehicle use by Mr. Wahl. And testimony at trial supported the court's interpretation. He also raises arguments about the court's

discussion of privacy and about the “last antecedent” rule. These arguments—and every other—are without merit.¹⁵

D. The broad language in Easement I Permits the Ritters’ Use.

EA I governs the area immediately to the West of the Ritter residence and permits ingress and egress, view control, “and safety of [the Ritter’s] property by installing and maintaining rockeries, like retaining devices, and steps and paths.” Tr. Ex. 1 at 4. Under the express terms of the easement, the Ritters have control over EA I “in accordance with paragraph 6 in a manner mutually agreeable to [Mr. Wahl and the Ritters] at [the Ritter’s] sole expense.” Id. at 5.

The Court found that although landscaping decisions were governed by paragraph six, maintenance of rockeries or other retaining devices was not governed by that paragraph. Mr. Wahl did not challenge that finding.

a. Substantial Evidence Supports the Court’s Findings and Conclusions that the Patio Extension was Necessary for Drainage and Safety

Plaintiff has challenged several of the trial court’s findings relating to EA I. At issue is whether the patio installed by the Ritters functions as a

¹⁵ Mr. Wahl’s discussion of the “last antecedent” rule makes no sense. Citing a sentence from *Berrocal v. Fernandez*, 155 Wn.2d 585, 121 P.3d 82 (2005), he argues that “ingress and egress” must be read separately from “not unreasonably interfere with Owner B’s priority use of the easement” at the end of the sentence. But *Berrocal* actually rejects an argument identical to Mr. Wahl’s, instead explaining that “the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to *all antecedents* instead of only the immediately preceding one.” (emphasis in original).

retaining and/or safety device. Also at issue is whether expanding the base of the stairs from three to five feet was for safety reasons. Substantial evidence supports the trial court's findings.

Between 2006 and 2009, remediation work at the Ritter residence required rebuilding retaining walls. To prevent water from affecting the integrity of the retaining walls, the Ritters had Wyser Construction extend the concrete patio to the edge of the retaining walls. This patio encroaches slightly onto EA I. Dan Reynolds testified that the patio extension serves several important purposes—by providing a foundation for mandatory safety railings along the retaining wall and for providing drainage of water away from the retaining wall. *See, e.g.*, VRP 1062:18-24; 1064:9-19; 1065:5-21. This and other testimony and evidence provides substantial evidence supporting each of the challenged findings.

In Finding 15, the Court found that if the patio were moved further away from the slope (and on to the Ritter's property) "there would be a flat open semi-circular area approximately 40' in length, with a width of 4' at its widest part and less than 1' at each end, which could conceivably be a safety hazard as the area is at the top edge of a steep slope." This finding is supported by substantial evidence.¹⁶ As the court explained in its

¹⁶ The City of Bellevue also concluded that improvements in easement area 1—including the planter boxes— were landscape features. Tr. Ex. 38, p. 12 (March 3, 2010 email from D. Pyle at City to Mr. Wahl).

findings, the Ritters presented evidence that the encroachment of the patio and planter boxes was for safety and to provide necessary drainage.

The Court also found that “[t]he encroachment of the patio does not interfere with any other use of the property covered by EA I.” Mr. Wahl challenges this finding, but provides no basis for that challenge. Instead, Mr. Wahl argues that “[i]nterference with another use, however, is irrelevant” because it is a trespass.” To establish trespass, Mr. Wahl must meet four elements: “(1) an invasion affecting an interest in the exclusive possession of property; (2) an intentional doing of the act which results in the invasion; (3) reasonable foreseeability that the act done could result in an invasion of plaintiff’s possessory interest; and (4) substantial damages to the res.” *Seal v. Naches–Selah Irrigation Dist.*, 51 Wn. App. 1, 5, 751 P.2d 873 (1988). The court found that the encroachment of the patio does not interfere with any other use of the property covered by EA I. Contrary to Plaintiff’s assertion, to establish a trespass, Plaintiff must show an act affecting an interest in the exclusive possession of property and resulting damage. The court’s finding—which Mr. Wahl has effectively conceded by not submitting any evidence to contradict it—supports a finding and conclusion that the Ritters did not trespass. Substantial evidence supports finding of fact 16. Nor has he challenged the Court’s conclusion that all

of Mr. Wahl “claims for any damages are dismissed as not supported by evidence presented [at] trial.” CP 638 at ¶35.

Mr. Wahl also argues that the easement agreement requires consent for all activities in EA I. But this argument is inconsistent with the actual language in the Easement Agreement. Mr. Wahl’s argument also conflates the different notice and consent requirements for “common interest areas” and areas of “mutual concern.” Because EA I is an area of “mutual concern,” the mutual consent provision in paragraph 6 does not govern. Instead, it is the authority granted to the Ritters by EA I to install and maintain steps and paths without obtaining consent that governs.

Pursuant to paragraph 6, landscaping decisions are divided into two categories—areas of “mutual concern” and “common interest areas.” For areas of mutual concern (EA I, EA II, EA III and EA IV), decision-making is determined by a mutually agreed landscaping plan containing assigned responsibilities. Paragraph 6 identifies a landscaping plan with assigned maintenance responsibilities. EA V and EA VI are defined as “common interest areas.” Significant landscape or structural changes to “common interest areas” require mutual consent.

The reasonable reading of paragraph 6, when read in conjunction with EA I, is that non-landscaping decisions for EA I are left to the discretion of the Ritters. Notably, when the Ritters decided to increase the

stair width from three to five feet, the site engineers provided Mr. Wahl with copies of the revised plans depicting the change in width. Mr. Wahl did not object. VRP 829:13-830:3.

The court found that the reference in EA I to paragraph 6 regarding consent only related to maintaining the landscaping and not to maintaining rockeries or retaining devices. This is the only reasonable reading of paragraph 6. Regardless of the consent provisions in the agreement, the court concluded that the patio and stairs were necessary in their current configuration for safety purposes.

Plaintiff challenges the Court's finding in paragraph 18 that "EA I gives [the Ritters] authority to install and maintain steps and paths" and that "[t]here was no showing at trial that extending the width of the steps within EA I from 3 to 5 feet in any way interfered with or impaired use by [Mr. Wahl], and were done for safety reasons, all clearly within the authority granted [the Ritters] in EA I." Substantial evidence at trial supports these findings. As explained above, the original configuration of the stairs had them empty onto the driveway. The new configuration—expanded from three to five feet—was done to conform the stair width to the EA II pathway. The width was also expanded for safety reasons. See, e.g., VRP 1062:18-19 (testimony from general contractor that "As far as the stairways -- going down the stairways -- were put a little wider for

safety precaution.”). Even Mr. Wahl’s own witness Suzanne Stumpf testified that the stair width at the bottom was expanded from three to five feet for “aesthetic and functionality of the stairs.” VRP 122:10. As with Mr. Wahl’s other challenges to the trial court’s factual determinations, Finding 18 is supported by substantial evidence and should be treated as a verity on appeal.

b. Conclusions 30-31 are correct because the patio and stairs each serve a proper purpose and do not interfere with Mr. Wahl’s use of EA I.

As explained above, there is no evidence that the patio in EA I interferes with Mr. Wahl’s use and Mr. Wahl admits as much. Instead, he argues that the use interferes with his constitutional right “to exclude others from entering and using” his property. Brief of Appellant at 47. But Mr. Wahl’s argument ignores the limited rights he has to EA I. It also ignores the Ritter’s right to use and modify EA I for “safety of their property by installing rockeries, like retaining devices and steps and paths.” His argument also ignores the Agreement for Right of Entry, in which Mr. Wahl acknowledged the landscaping and pavement on his property (including Easement I) may not be replaced in the exact location. Tr. Ex. 88. Mr. Wahl also agreed to limit the Ritter’s liability for any resulting damages. *Id.*

Moreover, evidence at trial confirmed that Mr. Wahl was notified of the changes to the width in the stair, and that he did not object to the changes. Mr. Wahl, as the servient owner, has the burden of proving misuse of the easement. *Logan*, 29 Wn. App. at 800, 631 P.2d 429. He has failed to meet that burden.

D. The broad language in Easement III.

Easement III is for the Ritter's "recreational use, including but not limited to the dock, for the permanent mooring of not over two boats belonging to [the Ritters], neither of which shall exceed 50 feet, access, swimming, boating, fishing, ingress, egress or any other recreational use." The Easement grants near exclusive control to the Ritters over the dock, explaining that "Owner B has priority use over Easement III" and that "In the event of a conflict between Owners A and B over the use of Easement II, Owner B shall have priority with the understanding that Easement II is Owner B's private area, to the extent provided herein." Tr. Ex. 1 at 6.

Despite this broad language, Mr. Wahl argues that the Ritters have exceeded the scope of their easement by running power and water lines through EA I and II to the dock, and that EA III does not permit jet skis to count as ½ boat for purposes of the limitation on moorage.

a. Substantial Evidence Supports the trial court's findings concerning the dock and its use.

The trial court found that water and electricity were contemplated by the language in EA III, and that access to both was required for the Ritters' full use of EA III. The trial court found no basis for limiting the Ritters from running power lines or hoses within EA II to the dock in EA III, given the clear right to use the dock for permanently mooring boats and engaging in "any other recreational use" at the dock. As with Mr. Wahl's other challenges, he ignores the broad language of the easement, instead characterizing the easement as one for ingress and egress. But the express purpose of EA III is not just for "ingress and egress"—the express purpose of EA III is to grant the Ritters "recreational use" "with the understanding that Easement III is [the Ritters] private area, . . ." Tr. Ex. 1. It is through this lens of the Ritters' recreational use that the scope and purpose of EA III must be read.

The court's finding that the easement permitting power and water to the dock is consistent with the plain language of the easement and its express intent. As the court reasoned, "[w]ater and electricity is required to operate the boat lifts at the dock in EA III, and to charge batteries of the boats moored there. If [Ritter] cannot install the utilities needed and cannot run water and electricity across EA II he is effectively deprived of

the full use of EA III, and the dock. This would be an absurd result.” CP 634. Unlike the few decisions cited by Mr. Wahl relating to “ingress and egress” easements, EA II and EA III are recreational easements which grant “priority use” to the Ritters and which permit the Ritters to treat EA II and EA III as their “private area.” Tr. Ex. 1 at 6-7. Water and electricity are incidental to EA III’s contemplated use and are necessary for the Ritters’ recreational use of EA III.

In addition to the plain language in EA III, at Mr. Wahl’s request, the court examined extrinsic evidence submitted by the parties. That evidence demonstrated that the parties intended that the easement include running water and power to the dock. Evidence before the trial court included an October 6 1976 letter¹⁷ addressing power and water at the dock and testimony by former owner Audrey Podl that power was actually installed at the dock by Wahl. VRP 641:11-17. This evidence, when considered with other trial exhibits and witness testimony, provides substantial evidence that the parties intended running utilities to the dock located in EA III. In fact, Mr. Wahl first claimed that the easement did not include water and power when he began having disagreements with the Ritters over other issues.

¹⁷ Tr. Ex. 4 at 3-4. See also background section, *supra*.

b. Running utilities to EA III is consistent with both the easement agreement and the parties' conduct.

The trial court found that water and electricity were contemplated by the intent and language in EA III, and that access to both water and power were required for the Ritters to enjoy the full use of EA III.

The plain language of Easement III is unambiguous. The Ritters can permanently moor boats to the new dock, and the Ritters have priority usage of the new dock. The City of Bellevue Municipal Code explicitly includes a boat lift in its definition of moorage:

Moorage. Any device or structure used to secure a vessel for anchorage, but which is not attached to the vessel, such as a pier, buoy, dock, ramp, **boat lift**, pile, or dolphin.”¹⁸

Accordingly, the court's conclusion that a boat lift is contemplated by the easement is supported by substantial evidence. CP 635 at ¶ 21. As is the court's finding that boat moorage devices require power and water to operate them. *Id.* at 633-34.

Mr. Wahl also challenges the Court's finding and conclusion that under EA III, the Ritters can maintain two Jet Skis and one boat. His arguments ignore the court's reasoning and the intent of the easement. “When considering the reasonable scope of an easement courts will ask whether the extent of use should have been reasonably contemplated by the original parties.” *Logan*, 29 Wn. App. at 800-801, (holding that

¹⁸ Bellevue, Washington, Municipal Code Chapter 20.50.034. (emphasis added).

“[c]hanges in surrounding conditions and modernization of recreational vehicles are to be reasonably contemplated” when evaluating changes to an easement’s use). The trial court concluded that when the easement was created, jet skis were not contemplated as part of the easement. The court therefore properly concluded that counting a small jet ski as equivalent to a 50 foot boat was not what the original easement intended or contemplated. So long as the new use is within what the easement contemplates, the fact that the original parties to the easement could not foresee changes in technology will not foreclose the new use. *Sunnyside Valley Irrigation Dist. V. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003) (recognizing that changes in technology can affect the scope of an easement).

Mr. Wahl complains because under the Bellevue Municipal Code, “small watercraft” and “Jet Ski” are defined as “vehicles” and not a boat. This misses the point. The same code defines “watercraft” as a boat. Accepting his argument, Jet Skis are not boats and therefore not even subject to the limitations in EA III.

He again misinterprets the recreational nature of the easement by relying on *Snyder v. Haynes*, 152 Wn. App. 774, 781, 217 P.3d 787 (2009), a decision interpreting an “ingress and egress” easement as not permitting “nonconforming recreational” all-terrain vehicles. In fact, the

Snyder court noted that the existing road easement was only for “ingress and egress” and the off road vehicles could not legally be used for that purpose. The court also held that the use of all terrain, off road, and other unlicensed vehicles was a change in use. *Id.* His citation to *Snyder* highlights Mr. Wahl’s fundamental misunderstanding of the nature, purpose, and function of EA II and EA III as easements “for recreational use.” Jet skis are precisely the type of use contemplated by a recreational boating easement.¹⁹

The more reasoned approach is that which the trial court took. It is undisputed that Jet Skis are smaller than boats—Mr. Wahl does not present any evidence to challenge the Court’s finding that Jet Skis are smaller in size. It is also undisputed that jet skis were not contemplated when the easement was granted. The court looked at the general language in EA III relating to mooring boats and found that the language used in EA III permitted changing and evolving uses. The court then considered the small size of the Ritter Jet Skis, and looked to the purpose of the broad easement, for “recreational use” including “boating.” The court looked at how the City of Bellevue defined jet skis, and concluded that jet skis would count as one-half boat for the vessel limit of EA III. This conclusion was correct.

¹⁹ Applying the court’s reasoning in *Snyder*, a use not contemplated by EA III’s grant would be dirt bikes or ATVs.

E. The trial court properly awarded the Ritters attorney fees.

Finally, Mr. Wahl challenges the trial court's award of attorney fees and costs under RCW 4.84.250 et seq. He raises two challenges. First, he argues that by not pleading a specific amount of damages in his Complaint, he is immune from RCW 4.84.250. As explained below, he did specifically plead an amount less than \$10,000. And by rejecting an offer exceeding the amount of damages he was seeking—and then recovering nothing at trial—he became liable for the Ritters' fees that related to defending against his damage claims.

Although this matter primarily involved Mr. Wahl's quiet title action and the parties' respective rights and obligations pursuant to an Easement Agreement, Mr. Wahl also asserted a claim for actual monetary damages totaling less than \$10,000 at trial. Mr. Wahl elected to request damages less than \$10,000 at trial *after* the Ritters placed him on notice of their intent to seek attorneys' fees if Mr. Wahl failed to prevail on a damages claim of less than \$10,000. Because Mr. Wahl failed to prevail on his \$7,059.32 damages claim at trial, RCW 4.84.250 *mandates* an award of attorney fees.

Mr. Wahl asserted claims for trespass, timber trespass, and monetary damages. He subsequently requested actual nominal damages of less than \$10,000 at trial. Again, despite on point interrogatories and

requests for production directed to Mr. Wahl during discovery, he failed to articulate or disclose any actual damages prior to trial other than a \$4,400 driveway bid,²⁰ a \$2,000 dock repair estimate,²¹ and a \$659.32 repair estimate for alleged electrical damage.²² These alleged damages total \$7,059.32. At trial, Mr. Wahl requested that the Court award all of the aforementioned as actual damages if he prevailed on his claims. CP 1041. Mr. Wahl did not prevail on any of his damage claims.²³

Because Mr. Wahl's claims for actual damages at trial totaled less than \$10,000, the prevailing party provision regarding attorney fees outlined in RCW 2.84.250, *et seq.*, applies. Additionally, on July 13, 2012, the Ritters served Mr. Wahl with an Offer of Settlement in the amount of \$9,900.00 pursuant to RCW 4.84.280, *et seq.*, which he immediately rejected. CP 908; CP 736. Because Mr. Wahl's actual claimed damages were less than \$10,000 and he rejected Defendant Ritter's \$9,900 Offer of Settlement in a cause of action where he recovered nothing, the Ritters became the prevailing party pursuant to RCW 4.84.250, *et seq.* As the prevailing party pursuant to the statute, the Ritters are entitled to recover their reasonable attorneys' fees and costs. The trial court properly awarded

²⁰ Trial Ex. 53.

²¹ *Id.*

²² *Id.*; [Trial Ex. 58].

²³ It is notable that the Court acknowledged that Plaintiff had requested these damages at trial where the Memorandum Decision states "Plaintiff's claims for damages are dismissed as not supported by evidence presented at trial," CP 638 (*emphasis added*).

the Ritters \$22,288 for fees and costs related to Mr. Wahl's damage claims. CP 1323. This was only a portion of the more than \$180,000 that the Ritters incurred defending Mr. Wahl's various claims. CP 1040-42 (Court order regarding all fees incurred).

A trial court may award attorney fees only where there is a contractual, statutory, or recognized equitable basis. *Riss v. Angel*, 80 Wn. App. 553, 563, 912 P.2d 1028 (1996). RCW 4.84.250 provides for attorneys' fees to the prevailing party in any action for damages where the amount pleaded is \$10,000 or less. In determining who is the prevailing party, the defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280. *See also Pub. Utilities Dist. No. 1 v. Crea*, 88 Wn. App. 390, 393, 945 P.2d 722 (1997). Pursuant to the plain language of the statute, if RCW 4.84.250 does apply, then an award of attorney fees is mandatory and not discretionary. *Kingston Lumber Supply Co. v. High Tech Dev. Inc.*, 52 Wash. App. 864, 867, 765 P.2d 27 (1988). In addressing the Legislative intent of RCW

4.84.250 with respect to an award of attorneys' fees, the court in *Kingston*

Lumber Supply explained that an award is mandatory:

If the amount in controversy is \$10,000 or less, RCW 4.84.250 mandates fees to the prevailing party...it simply makes mandatory some awards that would otherwise be optional.

Id. RCW 4.84.250 applies to any case involving damages claims of less than \$10,000, regardless of whether a claim for damages is joined with claims for other relief. *Lay v. Hass*, 112 Wash. App. 818, 821, 51 P.3d 130 (2002). This includes claims for quiet title, trespass, and encroachment. *Lay*, 112 Wash. App. at 825. "Nothing in the statute prohibits parties from seeking other relief besides damages..." *Hanson*, 100 Wash. App. at 290. If an action involves a claim for monetary recovery, it is an action for damages. *Kingston*, 52 Wash. App. at 867 (foreclosure action).

Lay v. Hass involved a property line dispute, and plaintiff's complaint included claims for quiet title, trespass, encroachment, and deliberate interference. *Lay* at 821. Later, plaintiff filed a motion for summary judgment in which plaintiff also alleged \$433 in damages—an amount in controversy of less than \$10,000—thereby making RCW 4.84.250 applicable, despite the fact that a quiet title action is a claim for equitable relief and damages are ordinarily not allowed. *Id.* at 825. In affirming the trial court's award of attorney fees pursuant to RCW

4.84.250 in a matter involving equitable relief and nominal damages, the *Lay* court explained that the amount of monetary damages sought determined whether fees could be recovered:

Thus, the Hasses had notice of the Lays' intent to seek an award of attorney fees, and the Lays made a timely settlement offer to the Hasses in their November 14, 2000 letter. Furthermore, the Lays' motion for nominal damages and attorney fees set forth clearly the exact damages they sought, \$433. The trial court did not err in finding RCW 4.84.250 applicable.

Id.

In *Hanson v. Estell*, plaintiff's complaint included claims for contempt, violation of a court order and injunctive relief. *Hanson*, 100 Wash. App. at 283. Defendant counterclaimed for trespass, frivolous lawsuit, and injunction. In response to the defendant's counterclaims, the plaintiff served the defendant with a \$200 offer of settlement pursuant to RCW 4.84.280 in compliance with the statute's requirements. *Id.* At trial the defendant was awarded \$100 on the trespass claim, failing to beat the \$200 offer of settlement, so the plaintiff moved for attorney's fees as the prevailing party pursuant RCW 4.84.260. *Id.* In rejecting the defendant's argument that the plaintiff was not entitled to attorney fees under RCW 4.84.250 because claims also included injunctive relief in addition to damages, the *Hanson* court explained that "[n]othing in the statute

prohibits parties from seeking other relief besides damages and this court does not so construe its requirements.” *Id.* at 290.

Decisions interpreting RCW 4.84.250 do not require that a cause of action only include a claim for damages in order for the prevailing party to be entitled to attorney fees. Both *Lay* and *Hanson* allowed for attorney fees pursuant to the statute where claims included quiet title, equitable relief, and injunctive relief. The sole issue for RCW 4.84.250 to apply is whether the cause of action also involves a claim for nominal damages totaling less than \$10,000. If there is such a claim, then the statute necessarily applies and the prevailing party is entitled to an award of attorney fees and costs, provided that party followed the other requirements outlined in the statute.

Mr. Wahl asserted a number of claims in law and equity in this matter. But he also alleged actual monetary damages. Mr. Wahl failed to prevail on any of his causes of action against the Ritters and this Court dismissed all of his claims for damages as not supported by the evidence presented at trial. CP 636-38. Again, Mr. Wahl’s alleged actual damages at trial were a \$4,400 driveway bid [Trial Ex. 53], a \$2,000 dock repair estimate [Trial Ex. 55], and a \$659.32 repair estimate for alleged electrical damage. [Trial Ex. 58]. Mr. Wahl’s alleged actual damages total \$7,059.32. Because the alleged actual damages total less than \$10,000,

RCW 4.84.250, *et seq.* applies. The Ritters also served Mr. Wahl with a \$9,900 Offer of Settlement accordance with the applicable terms of RCW 4.84.250, *et seq.*

Because Mr. Wahl failed to prevail on any of his claims, failed to “beat” the Ritters Offer of Settlement, and failed to recover any of his alleged damages at trial, the Ritters are the prevailing party pursuant to the statute and the trial court properly awarded attorney fees and costs incurred defending Mr. Wahl’s claims. The Ritters ask that the Court affirm the trial court’s award of fees under RCW 4.84.250 *et seq.*

Mr. Wahl’s second argument is that the trial court did not enter findings or conclusions as required by *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998). This is incorrect. The court actually provided a memorandum decision outlining its reasoning. In its order, the court specifically found that the hourly rates were reasonable, and that not all work performed by the Ritters’ counsel was related to the damage claim. The court required that the Ritters resubmit a fee petition setting forth the hours allocated to the damage claim. CP 1040-42. The Ritters’ counsel did, and the Court awarded \$20,902 in attorney fees related to the damage claim. The court referred to the original order in its award, interlineating that “As previously found, fees were based on reasonable rates and the hours expended with regard to damage issues falling under RCW

4.84.250, including the allocation of a percentage of work common to all claims, is reasonable.” CP 1322-23. Even if the Court’s order is technically insufficient to meet the specificity requirements of *Mahler*—and it does—the remedy is to simply remand to the trial court for entry of findings supporting its award.

F. Pursuant to RAP 18.1, the Ritters requests an award of their attorney fees on appeal.

As discussed in the preceding section, the trial court properly awarded the Ritters their attorney fees under RCW 4.84.270 and the cases applying and interpreting that statute. The statute applies equally to the Ritters’ attorney fees on appeal. *Butzberger*, 151 Wn.2d at 313. Therefore, pursuant to RAP 18.1, the Ritters request an award of its fees on appeal. The Ritters also request fees on appeal pursuant to RCW 4.84.290.

VII. CONCLUSION

For the reasons set forth above, the Ritters respectfully request that the trial court’s Findings of fact, Conclusions of Law and Order, as well as its later award of attorney fees, be AFFIRMED. The Ritters also seek their reasonable attorney fees for this appeal.

DATED and respectfully submitted this 2nd day of December,
2013.

By *s/ Alfred E. Donohue* _____
Alfred E. Donohue, WSBA #32774
W. Sean Hornbrook, WSBA #31260
Counsel for Respondents Ritters
WILSON SMITH COCHRAN DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, Washington 98164
Telephone: 206.623.4100
Electronic mail: donohue@wscd.com

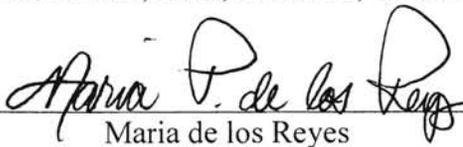
DECLARATION OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served and filed the attached document as follows:

Attorney for Plaintiff
Gregory A. McBroom
Livengood, Fitzgerald & Alskog
121 Third Ave.
PO Box 908
Kirkland, WA 98083-0908

- Via U.S. Mail
- Via Facsimile: (425) 828-0908
- Via Hand Delivery
- Via Email: mcbroom@lfa-law.com

SIGNED this 2nd day of December, 2013, at Seattle, Washington.



Maria de los Reyes

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