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## ASSIGNMENTS OF ERROR

The plaintiff assigns error to the following orders and rulings by the trial court.

1. The court erred by granting defendant a summary judgment of dismissal of the plaintiff's claims for prescriptive easement, trespass, and for injunction for erecting a spite fence.

2. The trial court erred by denying plaintiff's motion for reconsideration of the summary judgment.

3. The trial court erred by denying plaintiff's motion for leave to file a late reply to the defendant's counterclaims and by granting defendant summary judgment on defendant's counterclaims.

4. The trial court erred by awarding defendant attorney fees in the amount of \$7,425 and statutory costs in the amount of \$205.24.

5. The trial court erred by canceling the notice of lis pendens after the notice of appeal from the summary judgment was filed.

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## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the defendant, as the moving party for summary judgment under CR 56, establish that when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits are

considered, in the light most favorable to the plaintiff, as the nonmoving party, no genuine issue of material fact exists. This issue pertains to assignments of error numbered one and two.

2. Did the trial court have discretionary authority to deny plaintiff's motion to file a late reply to defendant's counterclaims based on CR 15(a). This issue pertains to assignment of error numbered three.

3. Did the trial court abuse discretion by granting defendant an order awarding a lump sum of \$7,425 attorney fees and costs \$205.25 without requiring segregation. This issue pertains to assignment of error numbered four.

4. Did the trial court abuse discretion by ordering the cancellation of the lis pendens when the lawsuit was not settled, discontinued, or abated pursuant to the requirement of RCW 4.28.320. . This issue pertains to assignment of error numbered five.

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#### STATEMENT OF THE CASE

#### **I. PLEADINGS AND DOCUMENTS AND PROCEEDINGS WHICH RESULTED IN SUMMARY JUDGMENT OF DISMISSAL.**

In accordance with RAP 9.12, the pleadings and documents filed

before the hearing on defendant's motion for summary judgment (VR from 09-23-2005) are identified in the Order to Certify to the Record on Hearing the Motion for Summary Judgment. (CP 486-487)

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**II. PLEADINGS AND DOCUMENTS AND PROCEEDINGS WHICH RESULTED IN JUDGMENT FOR DAMAGES AND AWARD OF ATTORNEY FEES AND COSTS.**

After the court granted summary judgment dismissing the plaintiff's claims, the court, after hearing argument, (VR on 11-22-2005) granted defendant judgment awarding damages, attorney fees, and costs. (CP 453-456)

The motion for attorney fees and costs was heard by the trial court on November 22<sup>nd</sup>, 2005 (VR 11-22-2005), and the trial court ruled orally that the plaintiff's lawsuit was not frivolous. (VR 11-22-2005, at page 24) This finding is reflected in paragraph seven (7.) to the court's order awarding damages, attorney fees and costs. (CP 453-456)

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**III. PLEADINGS AND PROCEEDINGS WHICH RESULTED IN CANCELLATION OF THE LIS PENDENS.**

On November 22<sup>nd</sup>, 2005, defendant filed a motion to cancel the lis pendens filed by plaintiff at the commencement of the case. (CP

462-470). The trial court heard argument on defendant's motion on December 9, 2005 (VR 12-09-2005) and ordered that the notice of lis pendens would be cancelled. (CP 471-472)

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## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The standard of review on appeal from a summary judgment is de novo review of the precise record considered by the trial court. *LeBeuf v. Atkins*, 93 Wn.2d 34, 36, 604 P.2d 1287 (1980) When reviewing an order of summary judgment, the appellate court considers and performs the same inquiry as the trial court. *Ames v. Fircrest*, 71 Wn. App. 284, 289, 857 P.2d 1083 (1993) This standard of review pertains to the issues raised in assignments of error numbered one and two.

The standard of review when considering a trial court's interpretation of a statute or court rule is de novo. *Spokane County v. Specialty Auto*, 119 Wn. App. 391, 396, 79 P.2d 448 (2003), affirmed 153 Wn.2d 238, (2004); *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 845, 43 P.3d 43 9 2002); *State v. Roggenkamp*, 153 Wn.2d 614, 625 (Feb., 2005) This standard or review pertains to the assignments of error numbered three and five.

The standard for review when considering an award of attorney fees is two-pronged. First the Court must determine whether the relevant statute provided for an award of fees, and this is a question of law and is reviewed de novo. Secondly, the amount of the award is reviewed under the abuse of discretion. This standard of review pertains to assignment of error numbered four. *Lindsay v. Pac. Topsoils, Inc.* 129 Wn.App. 672 , 684 (Aug., 2005)

**II. THE TRIAL COURT ERRED BY GRANTING  
DEFENDANT SUMMARY JUDGMENT DISMISSING THE  
PLAINTIFF'S CLAIM FOR PRESCRIPTIVE EASEMENT.**

A.) The required proof to establish a prima facie case of an adverse or prescriptive easement is stated in *Anderson v. Secret Harbor Farms*, 47 Wn.2d 490, 493, 288 P.2d 252 (1955). In this case the Supreme Court set forth the claimant's burden of proof as follows at page 494.

*Just as soon as there is proof that the use of another's land has been open, notorious, hostile, continuous, uninterrupted and for the required time, the presumption of a permissive use is spent; it disappears. The one claiming the easement has established a prima facie case.*

The period required to establish a prescriptive right of way is ten years. *Todd v. Sterling*, 45 Wn.2d 40, 273 P.2d 245 (1954). In this case the Court said at pages 42-43:

*The claimant must prove that his use of the other's land has*

*been open, notorious, continuous, and uninterrupted over a uniform route adverse to the owner of the land sought to be subjected, and with knowledge of such owner when he was able, within the law, to assert and enforce his rights. Proof of the other elements creates a presumption that the use was adverse, unless otherwise explained. The burden is upon the owner of the servient estate to rebut this presumption by showing that such use was permissive.*

B.) The proof submitted to the court by plaintiff at the hearing on the defendant's summary judgment motion is sufficient to establish a prima facie case for prescriptive easement and is not contradicted by defendant. The proof offered by plaintiff to the trial court is stated as follows.

1. Plaintiff's answer to defendant's first discovery requests, referenced at CP 184 and CP 210. Plaintiff was asked and responded to written interrogatories as follows.

*# 4: If you contend there is a roadway on the premises, please describe in detail all facts that support your contention.*

Answer: Plaintiffs and their witnesses will testify that at least beginning in 1985 and previously the driveway furnishing access to the plaintiff's home was considerably wider than the 15 feet of land owned by plaintiff, probably 4 or 5 feet.

*#5: If you contend there is an easement on the premises which benefits the Plaintiffs, please describe in detail all facts that support your contention.*

Answer: Plaintiffs and their witnesses will testify to the location of the road during the term of plaintiff's occupancy of their home, and that it was wide enough to accommodate even large garbage trucks for removal of garbage whereas now the trucks

are quite severely restricted.

*#6: If you contend that you have used the Premises for ingress and egress at any time during the last 10 years, please describe in detail all facts that support your contention.*

Answer: Plaintiffs and their witnesses will testify that the traveled portion of the road was considerably wider than 15 feet from the west line of plaintiffs' land abutting 168<sup>th</sup> St. E.

2. In defendant's second discovery requests to plaintiff, (CP 210-211) plaintiff was asked and answered the written interrogatory as follows.

*#1: If you allege that you and/or your predecessors in interest have used the westerly 5 feet of the Premises for the last 20 or more years, please state all facts which support your allegation.*

Answer: Plaintiffs moved to 1102 ½ E. 168<sup>th</sup> Street in January, 1986, and from that date until approximately 2005, the road contour and the road width was not changed and did extend onto and across the defendant's property although the exact distance was never known until the survey by defendant.

3. The plaintiff submitted signed declarations by witnesses who who made statements verifying plaintiff's long-term use of defendant's property as part of the established driveway. The witnesses are identified as follows.

a.) Dale Schmidt said in affidavit (CP 229-230) that before defendant put up a fence he had no difficulty backing in with a garbage truck. Now, however, with the fence installed by defendant about half way down the driveway there is a power pole, and it makes it "real bad to get in the driveway."

b.) Joel Howard signed an affidavit (CP 231-232) stating for as long as plaintiffs lived at the property in question the driveway was approximately 5' to 6' feet wider than it is now. He also verified that plaintiff kept the driveway in good repair.

c.) Plaintiffs' daughter, Cheryl Chandarais, signed an affidavit (CP 233-235) and stated that during the past 18-20 years she visited plaintiff by using the driveway, and that the driveway is considerably narrower since the addition of the fence installed by defendant. She further commented that the driveway was formerly always wide enough to allow 2 cars to pass one another without difficulty. She too verified that the driveway was maintained by plaintiffs.

4. The defendant produced affidavits of witnesses who are neighbors to the property of the parties and who testified about the origin of the driveway, its location, and its mutual use by the predecessors in interest to both parties.

a.) Nathan Drake, defendant's easterly neighbor, said he had occupied his property since 1941 (CP 107-109). He stated the driveway was used for access to the defendant's home when the home was built around 1941. He said that the road ran down the west 15 feet of the property along the fence and that the road looped around the neighbor's property and then came back toward defendant's garage. He referred to

the driveway as a “free road,” and said no one was ever kept from using the road.

b.) Another neighbor, Milton Evans, signed an affidavit (CP 158-159) stating he lived on his property west of the driveway for approximately six years, and he verified the driveway was in existence before defendant moved to her home.

c.) Another neighbor, James Boyd, signed affidavit (CP 160-161) indicating he had lived in his home located across the street from the defendant for 16 years. He stated the driveway was used by both plaintiffs and by renters who occupied the home now owned by defendant.

5. Plaintiff signed a declaration (CP 236-245). In his declaration plaintiff, Ronald L. Beers, made the following statements of fact:

a.) When he first moved to his home in 1986 the driveway was more than 15 feet wide.

b.) A utility pole was placed on the driveway right-of-way and leaned toward the east. By installing her fence where she did, the defendant made it much more difficult to driver around the utility pole.

c.) From the location of the utility pole northward (toward 168<sup>th</sup> St. E.), the driveway veered much more onto defendant’s land.

d.) Since defendant installed the fence, the large trucks which turn into the driveway have extreme difficulty, and the driveway around the utility pole is very constricted.

e.) After's defendant had gravel excavated from the driveway and then graded for a new driveway on defendant's land, it was very difficult to determine where the used portion of plaintiff's driveway crossed over onto defendant's land. The photographs do show where the road curved outward around the utility pole and crossed the defendant's property.

f.) Plaintiff identified a photograph ( CP 244) depicting the driveway after defendant excavated the roadbed and before the fence was installed.

C.) The plaintiff's evidence of the prescriptive easement is not contradicted by the defendant, nor by defendant's witnesses, nor by the plaintiff's deposition testimony.

1.. In answer to written interrogatory III.d, (found at CP 224), defendant stated: *I have never had any discussions with the plaintiff about the use of the driveway.*

2. Defendant stated in affidavit (CP 165): I started using the Beers' driveway immediately after I bought my property because I did not have a driveway of my own. Defendant also stated: On April 10, 2005, I had my

neighbor, Nathan Drake, bring his backhoe over to the Beers' driveway and move my gravel over so that I could use it for my own driveway.

3. Defendant stated in affidavit (cp 165): I decided to put more gravel down in January 2003. My mother used her credit card to pay for another 10 yards of gravel, but I later paid her back. I took a picture of the driveway and the two gravel piles just before the gravel was spread. My photograph was included in Exhibit 4 to Ron Beers deposition, but Ron drew on it, so it was also marked as Exhibit 6. The photo is also on page 4 of my motion for summary judgment. In January 2003 I spread my gravel over the Beers' driveway next to my garage, and in my turnaround area. The photograph referred to by defendant is shown at CP 65, and at CP 92-93. There does not appear to be any grass or other vegetation growing on the road surface of the driveway before defendant spread the gravel on the plaintiff's driveway.

4. Defendant introduced selected portions of the deposition testimony of plaintiff Ronald L. Beers (CP 113-134) and also offered eight photographs (CP 89-96), some of which are referred to in plaintiff's deposition testimony. From the selected portions of the testimony of the plaintiff given in deposition taken by defendant, the defendant argued to

the trial court (CP 247) that plaintiff's affidavit contradicted his deposition and therefore should be stricken. When examined in context with plaintiff's other deposition testimony, however, it will be observed that there is no contradiction between plaintiff's deposition testimony and the plaintiff's signed declaration.

a.) In argument, (CP 247) defendant pointed to deposition testimony by plaintiff (CP 122) who, when asked whether there is any time other than when vehicles pass that he used defendant's property, and plaintiff said no. But defendant did not include the following question and answer found at CP 122:

Q: But the only time you've actually used it is when cars pass by each other on the driveway?

A: No, I did not say that.

Q: Explain what you just told me then?

A: We have used twenty to twenty-two feet for nineteen and a half years and two days.

b.) In the plaintiff's affidavit opposing the defendant's motion, the plaintiff stated: (CP 237) I made a continuous habit to drive over the established road to avoid a utility pole located on the west fifteen feet of my land. The utility pole is depicted in numerous photographs offered by defendant. Where this pole is standing the road has always veered

eastward onto the defendant's land. It was that way when I moved to the property, and it is still that way today, except that defendant installed a fence making it much more difficult to drive around the utility pole. From the location of the utility pole and northward toward 168<sup>th</sup> Street E., the road veered much more onto defendant's land than it did up closer to my home.

c.) Another example of what defendant argued was a contradiction between plaintiff's deposition testimony and plaintiff's declaration is found at CP 247 where defendant quoted from a selected portion of plaintiff's deposition testimony found at CP 142. The plaintiff testified that he had not driven over a portion of the driveway formed by a turnaround installed by defendant. Plaintiff stated in his affidavit (CP 238):

*All I can testify is that when I moved to my property the road was established, and around the utility pole and from the utility pole northward it was considerably more than fifteen feet. Particularly at the entrance to the property on 168<sup>th</sup> Street there was a much greater road surface to make turns both left and right from 168<sup>th</sup> St. The way DEANNA ROSS positioned her fence now, the entrance is nearly impossible for large trucks to turn into my property.*

The plaintiff testified that before the defendant installed her fence, there was ample room for two cars to pass unimpeded on the established driveway. (CP 118) This testimony was corroborated by

the affidavits of other witnesses including plaintiff's guest, Joe V. Howard (CP 231-232) and plaintiff's daughter, Cheryl Chandarais, (CP 233-234). The turnaround area that plaintiff said he did not cross was located east and adjacent to the driveway that served for an entrance way to both parties' residences. Defendant stated in her affidavit that in 2003 she spread gravel over the Beers' driveway, next to my garage, and in my turnaround area. (CP 165) The area referred to by defendant as "my turnarouand area" is located east of the established driveway and did not form part of the established driveway.

6. Photographs taken of the driveway before and after defendant excavated gravel on the plaintiff's driveway illustrate that the established width of the driveway extended at least five feet onto the defendant's land. In one photograph ( CP 91), taken prior to the excavation of the roadbed by defendant in April, 2005, the curvature of the driveway is depicted looking north toward 168<sup>th</sup> St. E. The utility pole located on the plaintiff's land is shown at the left next to the fence on the west side of the plaintiff's land, and the turnaround area referred to by defendant is located on the right around a tree where a car is parked facing east toward defendant's garage. This photograph depicts the full extent of the road base where the driveway intersects with 168<sup>th</sup> St. E. On the north side of 168<sup>th</sup> St. E. opposite the entrance to the driveway it will be observed in

the photograph that the width of the established driveway is much wider than the distance between a utility pole and a post to the right of the utility pole.

Another photograph illustrates the view of the driveway after defendant put her fence up. This photograph (CP 95) shows the location of defendant's fence in relation to the old driveway. In this view of the driveway looking northward toward 168<sup>th</sup> St. E., the defendant's fence, if extended across 168<sup>th</sup> St. would be almost mid-way between the utility pole and the post. The driveway entrance and curvature of the driveway around the utility pole located on the left in the photograph (west side of driveway) is shown. The constriction of the driveway entrance and reduced width of the road for a considerable distance southward is evident in the photograph. The driveway is no longer wider than the utility pole and the post on the north side of 168<sup>th</sup> St. E. The width of the driveway has been reduced by five or more feet. This was pointed out in plaintiff's deposition testimony (CP at 139) and in the plaintiff's affidavit, (CP 238):

D.) The defendant argued in the motion for dismissal that the defendant was unaware that the established road base of the driveway encroached upon her land. (CP 249) It is notable that defendant did not obtain a survey to monument her property boundary until April, 2005. (CP 166) It is reasonable to infer that since the driveway went directly past the

defendant's garage and house (the defendant's home is depicted in one photograph (CP 91), defendant was well aware of the location of the established driveway. Defendant stated in her affidavit that "It was my understanding that the Beers' driveway was open to everyone. (CP 165) Since the defendant acknowledged that she thought the entire driveway was owned by the plaintiff, it is inferable that the defendant also knew plaintiff used the entire driveway adversely and never requested permission from defendant or her predecessor to use that portion of the driveway which encroached on defendant's land.

It is well established in Washington that a prescriptive easement may be acquired by clear proof that the land was used in an open, notorious, continuous and uninterrupted manner for 10 years, that the use was adverse to the owner, and that the owner had knowledge of the use. *Smith v. Breen*, 26 Wn. App. 802, 804, 614 P.2d 671 (1980), citing to numerous Washington appellate decisions. Circumstances in which a common road that runs across the property of adjoining landowners has been determined to create prescriptive easements are cited in *Smith v. Breen*, supra, at page 804 where the court observed (page 805) that adverse use is not permissive or made in subordination to the rights of the servient tenant.

When the testimonial evidence in trial on adverse character of the use of property is in doubt, without permission being requested, on the one hand, nor an express overt act serving unmistakable notice by the adverse user of a right to use a road, on the other side, the character of the use is an issue of fact. In this circumstance, the courts have uniformly concluded that whether the adverse character of the use has been sufficiently proved is an issue of fact. See e.g., Gray v. McDonald, 46 Wn. 2d 574, 578-579, 283 P.2d 135 (1955); Smith v. Breen, supra, at 804 The Supreme Court stated in Cullier v. Coffin, 57 Wn.2d 624, 627, 358 P.2d 958 (1961):

*“We think, however, a more accurate statement, based on the results and holdings in all of our cases, would be that such unchallenged use for the prescriptive period is a circumstance from which an inference may be drawn that the use was adverse. Such unchallenged use is but one circumstance, and there may well be a combination of circumstances from which the trier of the facts could determine that such use was permitted as a neighborly courtesy and was not adverse.” (Citations omitted)*

Recent appellate decisions which which illustrate that the character of use, whether permissive or adverse, is an issue of fact are Miller v. Jarmin, 2 Wn.App. 994, 997, 471 P.2d 704 (1970); Drake v. Smersh, 122 Wn. App. 147, 151, 89 P.3d 726 (2004) A party can establish a prescriptive easement even though the owner of the servient estate and others who wanted to go on the property also used it, so long as the claimant exercises his right independent of others. Drake v. Smersh, supra. Adverse user is

such use of property as the owner himself would exercise entirely disregarding the claims of others, asking permission from no one, and using the property under a claim of right. *Malnati v. Ramstead*, 50 Wn.2d 105, 108, 309 P.2d 754 (1957)

In concluding this argument, plaintiff urges that the evidence presented to the court in the form of affidavits and photographs clearly shows that both plaintiff and defendant and defendant's predecessors used the entire width of the established driveway, and that plaintiff used the entire width of the driveway for more than 20 years. The driveway was established when plaintiff moved to his residence in the mid 1980's, and that defendant had reasonable notice that the driveway was the plaintiff's driveway and was used by plaintiff with acquiescence of, but not the permission of defendant and her predecessors in interest. Until April, 2005, when defendant excavated gravel from plaintiff's driveway and then installed a fence there was never any interference with plaintiff's use of the driveway across the entire width of the driveway, including the four or five feet which are shown, based on recent survey, to encroach on defendant's land.

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**III. THE TRIAL COURT ERRED BY GRANTING SUMMARY  
JUDGMENT DISMISSING THE PLAINTIFF'S CLAIM FOR  
TRESPASS.**

A.) The amended complaint filed by the plaintiff (CP 48) alleged that defendant removed gravel and dirt from the plaintiff's driveway with the purpose and objective of building up her own driveway immediately adjacent to and parallel with the plaintiff's driveway. (CP 52) In answer to the amended complaint, defendant admits that she removed the gravel which she had purchased and installed on a portion of plaintiff's driveway. (CP 58) Defendant pleaded in affirmative defense that her actions were justified. (CP 59)

The photograph at CP 95 illustrates the piles of dirt and gravel that defendant excavated from the plaintiff's driveway and removed to her property after defendant said that "Ron Beers told me that I was not allowed to use his driveway anymore." (CP 165) Defendant's neighbor, Nathan Drake, stated in affidavit that "Deanna Ross asked me to help her move the gravel that she put down on the driveway next to her house and garage. (CP 108) In response to defendant's request Mr. Drake stated that "I moved the gravel onto Deanna's property and left it in a pile for her to make her new driveway."

Plaintiff, Ronald Beers, testified in deposition taken by defendant that he had put gravel on his driveway several times. (CP 124) He said that the last time he put gravel down was in 1994 (CP 125) The plaintiff said that the gravel removed by defendant belonged to plaintiff “because she put it on my property.” (CP 126) The defendant said that the piles of gravel and dirt belonged to defendant because “they are my gravel and grass.” (CP 166) Plaintiff said that the excavation caused by defendant damaged the driveway because it removed the base to the road and, “ now its mostly dirt.” (CP 131-133) Defendant stated in her affidavit that her excavator did not cause any damage to the driveway, “and the driveway is in better shape now than it was in 2001.” (CP 166) Plaintiff obtained a proposal to repair the driveway which plaintiff said suffered “diminished stability” and is now “much lower than it was before.” (CP at 241) The proposal by Dirtworks, Inc. for repairs to the driveway is attached to the affidavit of the plaintiff and estimates that the 30 ton of 5/8 minus rock to be delivered and spread will cost \$1,066.24. (CP at 245)

Trespass is defined as when a person “enters or remains unlawfully” in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain. RCW 9A.52.010 The defendant acknowledged that she was personally informed by plaintiff she was no longer permitted to use plaintiff’s driveway. (CP 165)

Notwithstanding defendant's acknowledgment, she hired her neighbor to excavate gravel and dirt from plaintiff's road and transfer the material to defendant's premises. A private property owner may restrict the use of property so long as the restrictions are not discriminatory. State v. Bellerouche, 129 Wn.App 912, 915 (Oct., 2005), citing to State v. Blair, 65 Wn. App. 64, 67, 827 P.2d 356 (1992) A person's presence may be rendered unlawful by a revocation of the privilege to be there. State v. Collins, 110 Wn.2d 253, 258, 751 P.2d 837 (1988) This right to exclude exists even if the property is otherwise open to the public. State v. McDaniels, 39 Wn.App. 236, 240, 692 P.2d 894 (1984)

The right of recovery against a person for intentional intrusion upon land is set forth in Restatement of Torts, 2<sup>nd</sup> Ed., §158:

*Liability for intentional intrusions on land. One is subject to liability to another for trespass irrespective of whether he thereby causes harm to any legally protected interest of the other if he intentionally (a) enters land in possession of the other, or causes a thing or a third person to do so.*

*Comment J: Causing entry of a third person. If by any act of his, the actor intentionally causes a third person to enter land, he is as fully liable as though he himself enters. Thus, if the actor has commanded or requested a third person to enter land in possession of another, the actor is responsible for the third person's entry if it be a trespass.*

The Washington Supreme Court invoked this rule of liability in *Fodrney v. King County*, 9 Wn.2d 546, 557-558, 115 P.2d 667 (1941), where the Court said:

*It has often been held that one who authorizes and directs another to commit an act of trespass is responsible to the owner of the property damaged by the trespass and that such persons are jointly liable with those who actually do the act.*

The measure of damages for trespass is found in *Burr v. Clark*, 30 Wn.2d 149, 158, 190 P.2d 769 (1948):

The measure of damages in tort actions is that indemnity which will afford an adequate compensation to a person for the loss suffered or the injury sustained by him as the direct, natural and proximate consequence of the wrongful act or omission.

In the case of real property, where the injury is only temporary, and the property can be restored to its original condition at a reasonable expense, and at a cost less than the diminution in the value of the property, the general rule for the measure of damages is the cost of restoration.

The plaintiff stated in his affidavit opposing the motion for summary judgment (CP 242):

*The defendant has reduced the crown of the driveway at least six inches, thereby producing a much lower road surface and increasing the problem for drainage. In addition, to remove the gravel that defendant claims was her property, even after it was ground down to form a part of the driveway roadbed, defendant also removed a good portion of the dirt and rocks which formed the base of the driveway.*

Defendant states in her affidavit that the driveway is still in better shape now than it was before she installed the gravel. (CP at 166)

The issue of who owned the gravel that defendant excavated is a matter that should be referred to the trier of the fact. It cannot be said on the circumstances that are present whether reasonable persons could reach only one conclusion, which is the standard of reviewing a trial court's summary judgment. The trial court must consider all of the facts and reasonable inferences from them in the light most favorable to the nonmoving party and grant summary judgment only if reasonable persons could reach but one conclusion. *Ames v. Fircrest*, 71 Wn. App. 284, 289, 857 P.2d 1083 (1993)

#### **IV. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT DISMISSING THE PLAINTIFF'S CLAIM FOR ERECTING A SPITE FENCE.**

A.) The fence erected by defendant is illustrated in photographs in the record before the court at the hearing on summary judgment. (CP 94-95) The parties own adjoining parcels of land which share a common boundary of 300 feet from the south right-of-way line for 168<sup>th</sup> St. E. (CP 111-112, 145, 162) The common boundary forms the east perimeter of the plaintiff's legally described driveway which is 15 feet in width.

The plaintiff alleged in the amended complaint (CP 52) that the

Defendant erected her fence *in the location where it was erected for spite and malice, to injure, annoy, harass, and impede the plaintiffs and any delivery persons.*

B.) The record before the court shows that defendant erected her fence after she was told by plaintiff that she was not permitted to use the plaintiff's driveway any more. (CP 165) The defendant ordered a survey to locate her west boundary line and contracted to have the fence installed precisely on the west boundary. (CP 166) Defendant states in her affidavit that she did not put up the fence to spite the plaintiff. (CP 167)

Plaintiff states in his affidavit (CP 238) and in his deposition testimony (CP 118) that the established driveway was considerably wider than 15 feet. Plaintiff also states that now the fence erected by defendant has been put right on the property line, a large truck, such as the refuse disposal vehicle, has approximately one foot of clearance (CP 121, 238), or seven inches on one side and five inches on the other side. (CP 138) Plaintiff states that now the fence has been put on the property line, turning into the driveway is considerably more difficult ("entrance is nearly impossible for large trucks to turn into my property,"(CP 238)).

C.) The Washington Legislature enacted the spite fence statute in 1883, and the statute remains to this date a prohibition against the malicious erection of structures. The statute is codified in RCW 7.40.030:

*An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal.*

The plaintiff alleges in the amended complaint (CP 52) that the defendant's fence was erected in the location where it was installed for spite and malice and to injure the plaintiff. The Washington Supreme Court said in Karasek v. Peier, 22 Wash. 419, (1900) that the fence erected in the case before the court might not appear to an ordinary observer to be manifestly erected for the leading purpose to spite and annoy the neighbor. Yet the Court held that the trial court's finding (that malice prompted the erection of the fence) was substantially supported by the evidence, and that the trial court's finding ( that the fence was erected for the sole purpose of spiting and annoying the respondent) was amply sustained by the evidence. The Supreme Court took particular notice of the fact that although appellant insisted he had built the fence to keep out children and chickens and to support flowers and vines, yet appellant conceded during the trial that a lower fence existed formerly and that a lower fence would have served his purposes as well as the high fence he erected (nine feet in height opposite respondent's windows).

It will be observed that in Kaasrek, supra, the Supreme Court

held that the issue of wrongful intent – malevolence was the dominant motive – was determined to be a finding of fact. The same observation is made in *Baillargeon v. Press*, 11 Wn. App. 59, 521 P.2d 746 (1974). In this case the trial court found that a 6-foot high grape stake fence above a concrete block rockery or retaining wall was “beautiful and expensive” and “necessary to do something to the gap created by cutting down cedar trees.” (at page 61) But when the appellant next decided to extend the 6-foot fence to the street right-of-way in front of the property the respondent protested because of the nearness to their home and what they referred to as the “blank billboard effect.” On appeal the court said (at page 64), that the trial court made no express finding that the proposed fence would constitute a private nuisance, but the court also concluded the fence was in violation of the provisions of RCW 7.40..030. The Court of Appeals ruled that because of the trial court’s failure to make an express finding that the fence constituted a private nuisance, i.e. that the structure damages the adjoining landowner’s enjoyment of his property in some significant degree, the fact must have been found against the party having the burden of proof. The Court’s holding is stated in *Baillargeon, supra*, at 67:

*We hold that the question of whether or not the appellant’s proposed fence would serve a really useful or reasonable purpose is a question of material fact, and therefore the*

*failure of the trial court to resolve the question in an express finding in favor of respondents, who had the burden of proof, requires reversal.*

D.) In the immediate case the plaintiff showed the trial court persuasive evidence that the fence erected by defendant on her exact boundary does damage the plaintiff's enjoyment of his property in some significant degree. According to plaintiff, the fence constricts the entrance to his driveway and makes turning into and out of the driveway extremely difficult. Plaintiff stated in affidavit that because of the erection of the fence in the location where it was installed, it is much more difficult to drive around the utility pole, and nearly impossible for delivery trucks to turn into plaintiff's driveway.

Defendant stated in affidavit that her fence was not installed to spite the plaintiff. However, defendant has not offered any explanation why the same fence at the same height could not be relocated four or five feet inside of defendant's boundary without diminishing or detracting from the utility of the fence. Certainly the defendant would concede that the present location of the fence hinders and impairs vehicular traffic going to and from plaintiff's residence and presents a risk to both vehicles entering and leaving the plaintiff's premises. Whether these concerns voiced by plaintiff are real or imagined, the trial court should hear evidence in trial, and it was error for the trial court to dismiss the

complaint without hearing evidence in trial. Summary judgment is not proper unless reasonable persons could reach but one conclusion from all of the evidence. *Cawdrey v. Hanson Baker*, 129 Wn. App. 810, 815 (Aug., 2005)

**V. THE TRIAL COURT ERRED BY DENYING THE PLAINTIFF LEAVE TO FILE A LATE REPLY TO DEFENDANT'S COUNTERCLAIMS.**

A.) The defendant's motion for summary judgment to dismiss all of the plaintiff's claims was filed August 18, 2005 (CP 62) and was joined with a motion to grant defendant summary judgment on all of the defendant's counterclaims. Specifically, defendant asked the trial court to grant summary judgment on all of defendant's counterclaims because the plaintiff had not filed a reply before the date when defendant filed her motion for summary judgment. (CP 82) When plaintiff filed a motion to grant leave to file a late reply to the counterclaims on August 19, 2005 (CP 196-198), which motion was filed the day after receiving defendant's motion for summary judgment, defendant filed a response objecting to plaintiff's motion (CP 201-205) Plaintiff filed a reply to the defendant's counterclaims on August 29, 2005 (CP 226-228) without leave of court.

B) Before the hearing on defendant's motion for summary judgment, plaintiff filed memorandum of legal authority (CP 206-228)

and cited to CR 55(a)(2). The defendant filed a reply to the plaintiff's memorandum (CP 246-256) in which defendant argued to the court:

*As to Ms. Ross' counterclaims, the Beers are deemed to have admitted all of her allegations because they failed to file a timely reply.*

The trial court entered simultaneous orders denying plaintiff's motion for leave to file a late reply and granting summary judgment on all of the defendant's counterclaims on September 27, 2005. (CP 2712-276) At that date the trial of the lawsuit was scheduled for February 23, 2006.

Defendant argued in support of the motion for summary judgment on defendant's counterclaims that plaintiff was foreclosed from making a reply to defendant's counterclaims under CR 15 (a) which provides:

*A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.*

The defendant served her amended answer and counterclaims on the plaintiff's counsel on July 28, 2005. Defendant argued that since plaintiff failed to serve a reply to the counterclaims by August 8, 2005, plaintiff was foreclosed from filing a late reply with or without leave of court, CR 15(a). Defendant argued that plaintiff's failure to serve a reply constituted an admission that all of the defendant's counterclaims are true.

(CP 81) The admission to the truth of all averments in the counterclaim, defendant argued, is based on CR 8(d):

*Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.*

Plaintiff's reply to the defendant's counterclaims was due by August 8, 2005 and was not filed until August 29, 2005. (CP 226-228) Plaintiff's motion to file a late reply was filed August 19, 2005 (P 196-198), the day after defendant filed the motion for summary judgment on August 18, 2005 (CP 62). The hearing on defendant's motion for summary judgment was held September 23, 2005, and the orders denying plaintiff leave to file a late reply and order granting defendant summary judgment were entered September 27, 2005 (CP 272, 274).

C.) CR 15(a) does not state explicitly that failure to file a timely reply to a counterclaim precludes a party from filing and serving a late reply before hearing on a motion for summary judgment. Defendant argued to the trial court that no reply was filed before the defendant's motion for summary judgment was filed (CP 203). Therefore, the defendant argued the court should not permit a late reply to the counterclaim. Defendant cited to *Hays v. Mercantile Inv. Co.* 73 Wash. 586, 132 Pac. 406 (1913) for the ruling that requires the trial court to deny plaintiff the right to file a late reply. The case cited by defendant is quite

readily distinguished from the immediate case for the reason that, as the court stated at page 590:

*When the answer setting up these facts in the present action had been served and filed and five days had elapsed without a reply thereto having been made by the plaintiff, the defendants moved for default against the plaintiff for lack of a reply to the affirmative matter in their answer, which motion was resisted by the plaintiff, who then tendered a reply which the court refused permission to file on the ground that it was tendered too late and after the period of five days from the service of the answer. The default was entered.*

At page 591 the court further explained the rationale for its holding that the trial court's exercise of discretion would be sustained as follows:

*It is contended that the court abused his discretion in entering judgment of default against the appellant and in refusing appellant leave to file his reply. We find in this no abuse of discretion, since an examination of the reply which was tendered shows that it in no manner controverted or denied the facts set forth in the affirmative defense showing practically the same facts as here pleaded had been pleaded in the former action, nor as to the contents of the decree in that action but merely denied the legal effect of that decree.*

In the immediate case the defendant relies on Hays v. Mercantile Inv. Co., supra, when defendant argues to the court that, "The Beers are now too late to file a reply, so under the rule of *Hays*, the Court must deny the motion." (CP 204) But the defendant diverted the court's attention away from the rationale for the court's holding in the case cited, that it was not an abuse of discretion for the trial court to refuse the late reply because

“[t]he reply which the appellant tendered to that answer did not deny the facts so pleaded.” *Hays v. Mercantile Inv. Co supra*, at page 592.

D.) The plaintiff in the immediate case tendered a reply to the defendant’s counterclaim, (CP 226-228) and denied all of the material allegations of fact alleged in the defendant’s counterclaims. Specifically, defendant alleged in the counterclaim: CP 59-60)

[16]. There are no easements or rights-of-way on the Ross property for the benefit of the public or the Plaintiffs. This allegation was denied by plaintiff who alleged in the reply (CP 226) that paragraph 16 is denied based on plaintiff’s claimed easement over west five feet of defendant’s land.

[17.] At various times since the Defendant gained title to the Ross Property Ronald L. Beers has trespassed on the Ross property and verbally assaulted and harassed the Defendant and her children. This allegation was denied by plaintiff. (CP 227)

[18.] At various times since the Defendant gained title to the Ross Property, Plaintiff Ronald L. Beers chased the Defendant’s minor son in the Plaintiff’s truck, endangering the minor and causing the Defendant to suffer emotional distress. This allegation was denied by plaintiff. (CP 227)

[19.] At various times since the Defendant gained title to the Ross property, Plaintiff Ronald L. Beers has harassed the Defendant's invitees. This allegation was denied by plaintiff. (CP 227)

In addition to the denying the factual allegations of the defendant's counterclaim, plaintiff also alleged in affirmative defense the plaintiff's claimed right to prescriptive easement and that plaintiff denied ever engaging in any harassment or alleged verbal assault.

E.) The court will observe that defendant made only a general denial to the material allegations of the plaintiff's complaint. The allegation that plaintiff established a prescriptive easement by using the westerly four or five feet of defendant's land (CP 51) was denied generally by defendant (CP 58) and the allegation designated by defendant as a counterclaim in paragraph 16 ("There are no easements or rights-of-way on the Ross property") is more properly designated as an affirmative defense since it raises no new factual allegations. There is authority that suggests where averments of a pleading in answer are designated as a counterclaim but are, in fact, merely denials of the complaint stated affirmatively, no reply is required. The case of *Vevelstad v. Flynn*, 230 F.2d 695, 703 (C.A. Alaska, 1956), applied this rule wherein the court said:

*With respect to this we agree with the trial court that the*

*allegations of this fourth defense and counterclaim, which were incorporated from similar allegations in the so-called third defense, were mere denials in affirmative form of the allegations of the complaint. Said the trial court: " Obviously, by incorporating such allegations into what is denominated a defense and counterclaim, the defendant may not compel the plaintiff to repeat, in negative form in a reply, the allegations of his complaint, and hence I conclude that the failure to file a reply in the instant case does not constitute an admission under rules 7(a) and 8(d) F.R.C.P. "*

The treatise, by Wright & Miller, Miller Federal Practice and Procedure Civil 3<sup>rd</sup> at §1279, in discussing the effect of failure to deny under Federal Rule of Civil Procedure 8(d) states at pages 696-697, that any affirmative defense raised in an answer is automatically deemed denied, and that facts first raised in an answer are considered denied. This automatic denial, according to the authors, will occur even if an affirmative defense has been mistakenly designated as a counterclaim. However, the authors go on to point out that if an answer contains a valid counterclaim, the plaintiff must respond to it, or the facts contained therein will be considered admitted by virtue of the first sentence in Rule 8(d). Federal Civil Rule 8(d), like Washington Civil Rule 8(d) provides as follows:

*Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.*

Rule 8(d) was applied in *Peters & Russell, Inc. v. Dorfman*, 188 F.2d 711, 713 (1951), where the court pointed out that plaintiff's failure to reply to defendant's counterclaim was not the result of inadvertence but rather an intentional failure on the part of counsel who made no request to the trial court to grant leave to file a reply and made no effort to answer the counterclaim when the absence of reply had been brought to the attention of the court and counsel after the trial had been held. Under this circumstance the court ruled that it was not an abuse of discretion for the trial court to deny plaintiff leave to submit a reply.

F.) The issue raised by plaintiff in memorandum submitted to the court (CP 207-208) is whether the defendant was required to first file a motion for default against plaintiff, pursuant to Rule 55(a), before seeking a Rule 12(c) adjudication of judgment on the pleadings for the lack of a reply. Civil Rule 55(a) provides as follows:

*(1) When a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided in these rules and that fact is made to appear by motion and affidavit, a motion for default may be made.*

*(2) Any party may respond to any pleading or otherwise defend at any time before a motion for default and supporting affidavit is filed, whether the party has previously appeared or not. If the party has appeared before the motion is filed, he may respond to the pleading or otherwise defend at any time before the hearing on the motion. (emphasis supplied)*

In denying the plaintiff's motion for leave to file a late reply to the defend-

ant's counterclaims, the trial court necessarily decided that once defendant moved for summary judgment, plaintiff's right to reply to the counterclaims was foreclosed absent leave of the court. Defendant's argument (CP 252) was accepted by the trial court, that there is no requirement defendant file a motion for default before hearing a motion for summary judgment. While the plaintiff would agree that a CR 56 motion for summary judgment on a counterclaim may be filed without filing a motion for default, when the motion for judgment on the counterclaim is based exclusively on the plaintiff's failure to timely serve a reply to the counterclaim, CR 55 does permit plaintiff to respond to any pleading or otherwise defend before the hearing on the motion. It is the plaintiff's failure to serve and timely file a reply that served as the basis for defendant's motion for summary judgment on the counterclaims. There could be no other basis for two reasons. First, in the defendant's motion for summary judgment on the counterclaims, the issue is stated (CP 71): "Whether defendant Ross is entitled to summary judgment when the Plaintiffs failed to deny the allegations contained in the counterclaim." Second, defendant offered no testimonial or documentary evidence outside the pleadings in support of the motion for summary judgment on defendant's counterclaims.

The defendant did not even reference the counterclaims in the defendant's declaration offered in support of summary judgment. (CP 164) There was no evidence offered by any witness to support the allegations of the counterclaims that plaintiff had engaged in any course of conduct which 1) trespassed on defendant's property, 2) verbally assaulted or harassed the defendant and her children, 3) endangered the defendant's minor child or harassed the defendant's invitees.

What defendant titled as a motion for summary judgment on the counterclaims (CP 62) was in actuality a CR 12(c) motion for judgment on the pleadings in which defendant argued plaintiff lost the right to contest the defendant's counterclaims because a reply was not filed timely. There was no evidence offered by defendant outside the pleadings to support the motion for summary judgment on the counterclaims. The defendant could have presented evidence from a wide range of sources in making the showing required by CR 56 (c) of the nonexistence of a genuine issue of material fact. See e.g. *Bernal v. American Honda*, 11 Wn. App. 903, 906, 527 P.2d 273 (1974) But defendant made no offer of any proof at all to support the allegations of the counterclaims. The burden is on the moving party seeking summary judgment to prove that no genuine issue of fact exists which could influence the outcome at trial.

Trane Co. v. Brown-Johnston, Inc., 48 Wn. App. 511, 513, 739 P.2d 737 (1987) Instead of offering any factual evidence to support the motion for summary judgment on the counterclaims, defendant argued that plaintiff's failure to timely serve a reply constitutes an admission of all the allegations in the counterclaim. (CP 81)

The court may conclude that the plaintiff does not have the right to submit a late reply to a counterclaim under CR 55(a)(2) before hearing a motion for summary judgment. In this event, the plaintiff argues the circumstances in this case should have influenced the trial court to grant plaintiff leave to file a late reply, and the order denying plaintiff leave to file a late reply is an abuse of discretion. The trial was not scheduled for several months after plaintiff's motion to file a late reply was served. Contrary to the trial court's oral decision (VR on 11-10-2005, at page 6) the motion to file a late reply and the reply that plaintiff did file late were filed and served prior to the hearing on defendant's motion for summary judgment. The plaintiff's failure to reply to defendant's counterclaims was due to inadvertence and was not intentional. (VR on 11-10-2005 at page 5) The trial court should have granted leave to submit the late reply to the counterclaim in the exercise of discretion and refusal to grant leave to plaintiff was an abuse of discretion.

Defendant made no attempt to show that a late reply would prejudice the defendant's opportunity to present any evidence in proof of the counterclaims. Even if the trial court allowed plaintiff to file a late reply to the counterclaims of defendant, defendant's motion for summary judgment could have been addressed when the motion was scheduled to be heard. If a late reply to the defendant's counterclaims were allowed by the trial court, defendant would have been required to produce some evidence to support the counterclaims, but since there was no evidence offered by the defendant, the trial court's order denying plaintiff's motion to grant leave to file a late reply (CP 272-273) foreclosed conducting a trial on the merits of the counterclaims.

Abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3<sup>rd</sup> 124 (2004) In this litigation, the filing of a late reply would still have been well in advance of the trial and the motion for summary judgment. The reply to the counterclaim was filed by plaintiff on August 29, 2005 (CP 226), and the motion to file a late reply was filed August 19, 2005 (CP 196) whereas the hearing on the motion for summary judgment was argued Sept.23, 2005 (CP 274) There was no prejudice to the defendant by permitting plaintiff to file a late reply to the counterclaims because the counterclaims were

based on the same facts as were raised by the plaintiff's amended complaint.

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**VI. THE TRIAL COURT ERRED BY GRANTING  
DEFENDANT ATTORNEY FEES FOR THE WHOLE CASE AND  
IN DEFENSE TO ALL OF THE PLAINTIFF'S CLAIMS  
WITHOUT SEGREGATION AND WITHOUT FINDINGS BEING  
ENTERED.**

A.) The defendant's motion for recovery of reasonable attorney fees and costs (CP 276-296) was not based on defendant's counterclaims in the answer to plaintiff's amended complaint. The defendant never made any offer in settlement of any kind as required by RCW 4.84.280.

There being no settlement offer tendered by the defendant, and the trial court having determined that plaintiff's suit was not frivolous, (VR 11-22-2005, page 25), the only statutory authority for an award of attorney fees to defendant is RCW 4.84.270 which authorizes attorney fees in a small claim if the plaintiff *seeking relief in an action for damages ... recovers nothing*.

B.) The defendant did prevail against the plaintiff's claim for trespass damages for the cost of restoring the driveway, and the amount of the estimated repair cost to the driveway is well below the \$10,000

maximum authorized for a small claim in RCW 4.84.250. The issue raised is whether the award of attorney fees should be based on only the time and legal services devoted to defending the action for damages or may be based on defending the entire case including the action for prescriptive easement and injunction.

C.) The plaintiff emphasized this point in written argument to the court (CP at 300), and in oral argument the trial court appeared to be cognizant of the case law that requires allocation of legal services between claims (VR on 11-22-2005 at page 37). However, in the court's oral decision after hearing argument (VR 11-22-2005 at page 42) the trial court made no distinction between legal services rendered in defense to the equitable claims of plaintiff as distinguished from the claim for trespass damages.

In some circumstances it could be argued that segregation between legal services performed in defense of one claim as distinguished from other claims is impractical or even impossible where claims and issues are so intertwined that no distinction could be made that would realistically allocate the legal services devoted to one aspect of the litigation as distinguished from others. This question was never addressed in the immediate case because the trial court, while noting the argument, concluded that the lack of detail in defendant's legal fees was "of no

consequence” based on the summary judgment. (VR 11-22-2005 at page 37).

D.) The plaintiff would refer to the Supreme Court’s decision in in Mahler v. Szucs, 135 Wn2d 398, 435, 957 P.2d 632 (1998), that without an adequate record on which to review an award of fees the proper course is to remand the case for entry of findings and conclusions to establish such a record. In Mahler, supra, at page 435, the Court said:

*Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to develop such a record. (Citations omitted) Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.*

The record before the court in the immediate case does not conform with the required findings and conclusions necessary to establish an adequate record for review of the trial court’s fee award. This would seem particularly true if the court does conclude that an apportionment should be made between the defendant’s legal services allocated to defense of plaintiff’s claim for damages distinguished from plaintiff’s equitable action for quiet title and injunction. One court has ruled that when other facts are shown to warrant attorney fees to the prevailing party in an action for damages, nothing in RCW 4.84.250

prohibits the award of attorney fees when the prevailing party has requested equitable relief in addition to damages. *Hanson v. Estell*, 100 Wn.App. 81, 290, 997 P.2d 426 (2000)

An award of nominal damages to the prevailing party based on trespass against trees and shrubs was held sufficient to qualify for award of reasonable attorney fees even though it appeared the principal claim in the complaint was to quiet title. *Lay v. Hass*, 112 Wn. App. 818, 826, 51 P.3d 130 (2002) In this case the court observed that there was no motion to apportion the fees requested by the prevailing party between the claim for damages and the quiet title claim. The Court also observed that the defendant, against whom judgment for attorney fees was entered, pursuant to RCW 4.84.260, was not disputing the hourly rate, number of hours expended, the difficulty of the case, or the quality of the legal representation.

E.) In the immediate case plaintiff did object to the defendant's request for attorney fees and the defendant's cost bill. (CP 297-301) Concerning the defendant's cost award , the amount of \$205.24 was based on apportionment of the total charges for 33 pages of deposition testimony used in the motion for summary judgment. (VR 11-22-2005 at pages 16-17). The statute governing costs, RCW 4.84.010 (7), limits the recoverable costs to "transcriptions of depositions used at trial." Since

there was no trial the court should have denied defendant any sum for the deposition transcription costs that were charged. *Kiewit-Grice v. State*, 77 Wn. App. 867, 874, 895 P.2d 6 (1995)

F.) The plaintiff's objections to the defendant's request for reasonable attorney fees was also based on excessive time, and for legal processes that served only to impede the litigation, encumber the court with unnecessary pleadings, and which contributed nothing to the just disposition of the action. The plaintiff pointed out that the nature of this litigation was a suit in equity, and not an action for damages. In plaintiff's initial complaint filed February 25, 2005, plaintiff did not make any allegation of damages nor request a judgment for damages. (CP 2-5). Thereafter, three months later on May 20, 2005, plaintiff moved the court to grant leave to file an amended complaint (CP 13-16). Defendant filed a 10-page response (CP 17-27) objecting to the plaintiff's motion to amend the complaint to join a necessary party who held a deed of trust against defendant's land (copy of the deed of trust assignment was appended to the motion at CP 16). The same could be said of defendant's objection to plaintiff's motion to serve additional defendants by mail. (CP 45-47)

The record of the declaration by Ms. Speir appended to the motion for fees shows that defendant's attorney charged 6.00 hrs. for preparing the response to plaintiff's motion to amend the complaint. (CP

284) The response to the motion to amend the complaint composed four pages. (CP 17)The motion to amend was then noted and argued to the trial court on June 3<sup>rd</sup>, 2005, and the court granted the motion to amend the complaint. (CP 33-34). Defendant charged an additional two hours for attorney time arguing this motion. (CP 284). The entry of the order granting leave to amend the complaint is the date when plaintiff's lawsuit was converted from an action strictly in equity to an action in equity and at law. The amended complaint was filed June 3<sup>rd</sup>, 2005 (CP 28-32).By that date defendant's attorney charged 34.28 hrs. for legal services including the 8 hrs. spent opposing plaintiff's motion to amend the complaint.

The rule is stated that if only some of a party's claims warrant the right to recover attorney fees, the award must properly reflect a segregation of time spent on issues for which fees are authorized from time spent on other issues. Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 690, 82 P.3d 1199 (2004) The same rule should apply to legal services performed in the defense against a party's claims.

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**VII. THE TRIAL COURT ERRED BY ENTERING THE ORDER TO CANCEL THE LIS PENDENS AFTER THE PLAINTIFF FILED NOTICE OF APPEAL.**

A.) . The defendant's motion to cancel the notice of lis pendens was filed Noember 23<sup>rd</sup>, 2005 (CP 462-470), and the plaintiff filed notice of appeal on November 30, 2005. When the matter was addressed to the court in oral argument conducted December 9, 2005, (RP on 12-09-2005, pages 1-16) the trial court entered the order to cancel the lis pendens, (CP 471-472), after plaintiff's notice of appeal was filed and served on opposing counsel. The plaintiff urges that this order was improperly entered because the defendant did not show that the cancellation was permitted under the statute, RCW 4.28.320 providing as follows.

*At any time after an action affecting title to real property has been commenced. . . the plaintiff . . . may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encmbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action. For the purpose of this section an action shall be deemed pending from the time of filing such notice: PROVIDED, HOWEVER, That such notice shall be of no avail unless it shall be followed by the first publication of the summons, or by the personal service thereof on a defendant within sixty days after such filing. And the court in which the said action was commenced may, at its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on*

good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be evidenced by the recording of the court order. (Emphasis supplied)

The plaintiff argues that under the circumstances of this case, where plaintiff has appealed the trial court's judgment, the trial court is not vested with discretion to cancel the lis pendens because the action has not been settled, discontinued or abated. Defendant cited to the trial court the decision in Cashmere State Bank v. Richardson, 105 Wash. 105, 177 Pac. 727 (1919), in which the Supreme Court did hold (109) that the trial court's order to cancel the lis pendens would be sustained. It should be noted that in Cashmere, *supra*, the appellate court stated that the appellant was amply protected by its superseding the judgment. The Court did not address the statutory language which has remained unchanged since the law was first enacted in 1893, Chapter 127, §17, now codified in RCW 4.28.320. The statute stipulates that before the trial court may order cancellation of the notice of lis pendens it must first be shown that the action has been *settled, discontinued or abated*.

The appellate court will review an issue of statutory interpretation de novo. City of Olympia v. Drebeck, 156 Wn.2d 289, at 295 (2006)

Defendant argued that since a judgment and decree was entered, the case is no longer pending i.e. has been discontinued. (RP from 12-09-2005), whereas plaintiff argued that so long as the appeal is pending the case has not been “discontinued,” and therefore this notice of lis pendens should remain on file with the county auditor.

The common and dictionary definition of the word “discontinue” is to “stop” or “give up” or put and “end” one’s endeavor. Webster’s New World Dictionary, College Ed., defines “discontinue” to mean “to stop” or “end.” It is said that an appellate court may rely on a dictionary definition to give words their ordinary understanding when a statute lacks a statutory definition in the enactment. State v. Castilla, 131 Wn. App. 7, at page 11 (2004) published Feb. 21, 2006. See Thurston County v. City of Olympia, 151 Wn.2d 171, at 175, 86 P.3d 151 (2004):

*When interpreting a statute, we first look to the ordinary meaning of the words used by the legislature. We will adopt the interpretation of statutes which best advances the legislature purpose and avoids unlikely, absurd, or strained consequences. (Citation omitted)*

In the immediate case the plaintiff’s claim for prescriptive easement was made to establish plaintiff’s right to use four or five feet of established driveway. The purpose of recording the notice of lis pendens is to protect against subsequent encumbrances acquiring liens

or taking security interests against the servient estate without knowing the nature and purpose of pending litigation affecting real estate. To cancel the lis pendens would require plaintiff to join yet additional parties to the litigation and to require plaintiff to conduct additional research on title or additional discovery. The plaintiff is not seeking to stay enforcement of defendant's judgment. Plaintiff is seeking only to preserve the notice of the pendency of the action by maintaining the notice of lis pendens to obviate the necessity of joinder of additional parties in the case.

The Supreme Court invoked the principle of nosicur a sociis, which the Court said provides that a single word in a statute should not be read in isolation, and that the meaning of words may be indicated or controlled by those with which they are associated. State v. Roggenkamp, 153 Wn.2d 614, at 623 (2005) In the immediate case this principle is applicable to the word "discontinued" when read in conjunction with the words "settled" and "abated" before and after the word "discontinued" in RCW 4.28.320. Each word connotes an end to litigation without possibility of appeal, or when there is a termination of the case without further opportunity to litigate. Defendant's argument that a final judgment serves to end or "discontinue" the litigation is a strained interpretation which would lead to an absurd

result requiring the party seeking to impose a prescriptive easement on land with the burden of further litigation expense by researching the title records to join additional parties who may acquire security interests in the affected land while the appeal is pending.

If the servient estate is encumbered by a third party's security interest subsequent to the filing of the lis pendens while the appeal is pending, the record of notice provided by the lis pendens would obviate mandatory joinder of additional "necessary parties" under CR 19 (a). The statute, RCW 4.28.320, governs the cancellation of the lis pendens, and in the current posture of the case the court should not cancel the lis pendens until the case is discontinued by the final judgment after the appeal is decided.

**VIII. PRAYER**

WHEREFORE, plaintiffs pray the Court order reversal of the trial court on each of the orders and rulings above argued and remand this case for trial.

Date: March 23, 2006

s/   
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