

No. 34123-9-II

**IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

RONALD L. and SHERRY A. BEERS, husband and wife,

Appellants,

vs.

DEANNA ROSS,

Respondent.

BRIEF OF RESPONDENT DEANNA ROSS

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I. SUMMARY OF ARGUMENT

Once a party has submitted adequate evidence to support a motion for summary judgment, the responding party is obligated to set forth specific facts to rebut the moving party's contentions. The responding party cannot rely on speculation or argumentative assertions that unresolved factual issues remain.

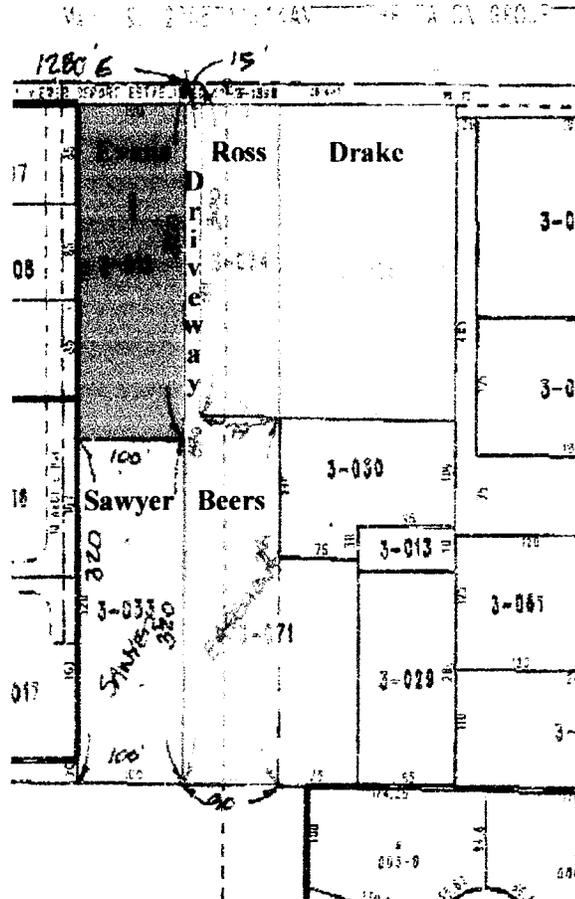
Yet that is exactly what happened when Plaintiffs/Appellants Ronald and Sherry Beers responded to Defendant/Respondent Deanna Ross' motion for summary judgment. Because the Beers failed to carry their burden, leaving the trial court without any genuine issue of material fact before it, the trial court's rulings on summary judgment, cancellation of the Beers' lis pendens, and attorney's fees were all correct and must be affirmed.

II. STATEMENT OF THE CASE

A. FACTUAL HISTORY

This is a dispute involving property owned by Deanna Ross and a driveway owned by Ronald and Sherry Beers. A plat map attached as an exhibit to Ronald Beers' deposition shows the relative positions of the parties' and Ms. Ross' witnesses' parcels (the highlighting has been added

for ease of identification):



CP 63; CP 142.

The driveway on the Beers' property has been in existence for several decades. One of Ms. Ross' neighbors, Nathan Drake, has lived in the area since 1941, and remembers the driveway as it existed before there was a house on Ms. Ross' property. CP 99-01. Mr. Drake testified that the driveway had **always served the neighboring properties**, that it was

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always considered to be a “free road,” and that no one had ever needed “permission” to use the driveway. *Id.*

After Ms. Ross purchased her lot in 2001, she began using the Beers’ 15 foot-wide driveway for ingress and egress. CP 166-73. Ms. Ross’ lot did not have its own driveway. CP 170.

In early 2005, Ron Beers informed Ms. Ross that she could no longer use his driveway for ingress or egress. CP 170-71. Shortly thereafter, Ms. Ross received enough money to act on her long-held plans to have her property surveyed, a fence erected, and a new driveway created on her property. *Id.*

Ms. Ross had her property surveyed on April 1, 2005. CP 171.

The Beers never raised any issues as to the accuracy of Ms. Ross’ survey. On April 10, Ms. Ross had a neighbor, Nathan Drake, use his backhoe to move gravel that she had installed on the Beers’ driveway back to her property. CP 99-105; CP 175-84. Mr. Drake also re-leveled the Beers’ driveway as a courtesy. *Id.* On or about April 15, Ms. Ross had a fence erected **on the surveyed lines of her west and south boundaries.** CP 171; CP 155.

Mr. Beers admitted in deposition that he was aware that Ms. Ross

wanted to put up a fence for **at least three years** prior to the time he filed suit. CP 114, lines 11-14. **However, at no time prior to filing suit did Mr. Beers ever tell Ms. Ross that he believed he had a prescriptive right to the west 5-7 feet of her property.** CP 114, line 23 through CP 115, line 8.

Mr. Beers testified that the **only** times that he used Ms. Ross' property was when two vehicles had to pass each other in opposite directions on his driveway.

Q So you've described to me that you have used my client's property when vehicles pass each other on the driveway. Is there any other time that you've used my client's property?

A **No.**

CP 119, lines 9-13. This "passing" occurred "a half a dozen times a year." CP 115, lines 14-21. Mr. Beers claimed to know of several witnesses who saw cars passing on his driveway, but he did not think it was necessary to identify them in his interrogatory answers:

Q So, we're talking about people who enter your property and passed cars side by side on the driveway. And you've indicated that there are some racing track people who did that?

A Yes.

Q And they have not been identified in your answers to interrogatories?

A Yes.

Q And I'm asking you why they are not identified?

A **I will say for the fourth time, I did not think it was necessary.**

CP 116, line 17 through CP 117, line 2 (emphasis added). The Beers did not present any testimony from these alleged witnesses in response to Ms. Ross' motion for summary judgment.

Although Mr. Beers claimed that one section of his driveway veered out onto Ms. Ross' property, he later admitted that he had never used the "veered out" section:

Q Is that the area that Ms. Ross graveled for parking purposes?

A This area north and south, and east of the tree is behind her house that she graveled then she made a circle right here so she had a turnaround circle, like right around the tree and up to her driveway – or up to her garage, excuse me, up to her garage. That's where part of that twenty yards of gravel went.

Q Let me stop you right there. You can see that her circle, her turnaround circle that you're describing comes out to the driveway. **How do we know that Ms. Ross's use of that property rather than your use made that curve that you're talking about in the driveway?**

A I never did go on her property to make a circle.

Q **You never used the curved portion of her property?**

A **No, no, never have.**

Q **How did you get up to your house?**

A **I come straight up the driveway.**

Q **Did you ever veer out like what you've drawn in Exhibit 25 onto Ms. Ross's turn around area?**

A **No. I never have.**

Q Okay. So you're saying that Ms. Ross did that?

A Ms. Ross did what?

Q That she drove on the veer out section next to her parking area?

A Yes.

CP 139, line 4 through CP 140, line 4 (emphasis added); CP 157.

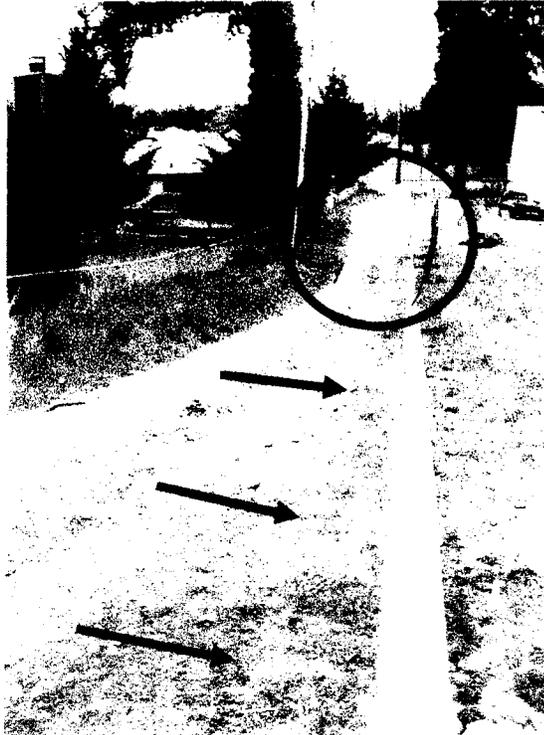
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*Id.*¹

When asked why there were no visible signs that he had driven on Ms. Ross' property, Mr. Beers stated that he **hadn't** driven on any grassy areas.

Q So you can't show that you ever used that part of Ms. Ross's property either? Is that right?

A That's not her – now what grass line are you talking about? **There's grass on the east and the west**

¹ The handwritten markings that appear on CP 157 were drawn on Exhibit 25 by Mr. Beers during his deposition. CP 139, lines 22-24. The red circle has been added to highlight where Mr. Beers made his marks, and the red arrows have been added to highlight the grassy areas that were referenced during Mr. Beers' testimony.

side of the fence.

Q That's a really good point. If you're driving over all of that grass using the driveway, how can the grass still be growing there?

A The grass is further over than twenty-two feet. If in your photograph 25 here, your grass is behind the tree, and in order to drive on the grass you would have to hit that tree.

Q I'm talking about the grass that's on your side of the fence, Mr. Beers.

A You asked me about the grass on her side.

Q And then you brought up the point that there's grass on both sides of the fence.

A Uh-huh. (Nods head)

Q So I'm asking you: How is that grass there if you've been driving all over that property?

A **I haven't used this portion over here. . . .**

Q I'm asking you about your use of the property. Why is there grass there if you've been driving over it?

A **I haven't driven over that part.**

Q Okay.

A **That's not the driveway. . . .**

Q And I assume that would be true of the grass that's on the **east side of your driveway as well?**

A **Yes.**

CP 134, line 15 through CP 136, line 3 (emphasis added). *See also* CP 157.

When asked about alleged damage to his property as a result of Ms. Ross' removal of her gravel and putting up her fence, **Mr. Beers could not put any value on the claimed damage.** CP 128, lines 16-19; CP 130, line 24 through CP 131, line 1; CP 137, line 23 through CP 138, line 1; CP 141, lines 5-9; CP 158. Mr. Beers admitted in deposition that he has no trouble using his driveway for ingress or egress; that the garbage man can still collect his garbage; that the fire department has never told him that his property cannot be accessed; and that he has never been told that an ambulance will not come to his home if he calls 911. CP 118, lines 2-16; CP 120, line 21 through CP 121, line 3; CP 122, lines 17-21; CP 171-72; CP 186.

B. PROCEDURAL HISTORY

On February 25, 2005, Ronald and Sherry Beers filed an action to quiet title to a portion of Ms. Ross Ross' property and to enjoin her from interfering with their use of their driveway. CP 2-5. Ms. Ross filed a document entitled "Answer, Defenses, and Counterclaims" on April 18,

2005. CP 8-12. That document contained specific allegations regarding Ms. Ross' counterclaims (including quiet title to her entire parcel), separate from her answers to the Beers' allegations. *Id.* **The Beers did not file a reply to Ms. Ross' counterclaims.**

On or about June 3, 2005, the Beers filed an Amended Complaint, adding claims for damages, trespass, and waste. CP 28-32. On June 8, 2005, Ms. Ross responded with an "Answer to Amended Complaint, Defenses, and Counterclaims," again containing allegations of her counterclaims separate from her answers to the Beers' allegations. CP 35-38. **The Beers did not file a reply to Ms. Ross' counterclaims.**

On or about July 22, 2005, the Beers filed a Second Amended Complaint. CP 49-54. On July 28, 2005, Ms. Ross filed her "Answer to Second Amended Complaint, Defenses, and Counterclaims," for the third time containing allegations of her counterclaims separate from her answers to the Beers' allegations. CP 57-60. **The Beers did not file a reply to Ms. Ross' counterclaims.**

On August 18, 2005, Ms. Ross filed a motion for summary judgment of dismissal on the Beers' claims, and a motion for summary judgment on her counterclaims. CP 62-195. **Ms. Beers' motion for**

summary judgment on her counterclaims was based on the Beers' failure to file any reply. CP 70; CP 81-82.

The Beers responded to Ms. Ross' motion **without attaching any testimony from Mr. Beers' deposition.** CP 206-21; CP 229-45. Instead, the Beers attached a declaration from Mr. Beers that **conflicted** with his deposition testimony. CP 247-48; CP 274-75; CP 437-39; 9/23/05 RP 5:1-4; 9/23/05 RP 14:23 – 15:22. The Beers attached declarations from witnesses who did not provide relevant evidence satisfying the legal elements of prescriptive use. CP 229-35.

The Beers also attempted to file a late reply to Ms. Ross' counterclaims without permission from the trial court. CP 226-28. The unauthorized reply was followed by a motion for permission to file a late reply, which was denied. CP 196-98; CP 272-73.

On September 29, 2005, Ms. Ross moved for an award of attorney's fees and costs as the prevailing party in an action worth less than \$10,000 and because the Beers' lawsuit was frivolous. CP 276-96. Ms. Ross initially requested \$8,705.80 in fees and costs; however, by the time of the hearing on Ms. Ross' motion, her fees had increased by another \$5,337.50. CP 448. After hearing oral argument, the trial court awarded

Ms. Ross only \$7,425.00 in attorney's fees and \$205.24 in costs. CP 453-56. A judgment in Ms. Ross' favor was entered on November 22, 2005. CP 457-58.

On November 23, 2005, Ms. Ross moved to cancel the Beers' notice of lis pendens since there was no longer any pending lawsuit that affected title to her property. CP 462-69. The trial court granted Ms. Ross' motion on December 9, 2005. CP 471-72.

III. ARGUMENT

A. THE BEERS HAVE WAIVED ASSIGNMENT OF ERROR NO. 2, SO THE TRIAL COURT'S DECISION ON RECONSIDERATION MUST BE UPHELD.

The Beers assigned error to the trial court's denial of their motion for reconsideration. Appellants' Brief at 1. However, the Beers did not brief the issue and provided no citations in support of their assignment of error. Although the Beers briefed the issue regarding summary judgment, the trial court's decision there is reviewed *de novo*, not for abuse of discretion. Appellants' Brief at 4-18; *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004). When an issue is not briefed, **the assignment of error is deemed waived**. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808-09, 828 P.2d 549 (1992).

Based on the foregoing, the Beers have waived their assignment of error regarding their motion for reconsideration, and the trial court's ruling on that motion must be upheld.

B. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT BECAUSE THE BEERS FAILED TO ANY RAISE GENUINE ISSUES OF MATERIAL FACT.

This Court reviews a grant of summary judgment *de novo*, applying the same standard as the trial court. *Crisp v. VanLaecken*, 130 Wn. App. 320, ___, 122 P.2d 926, 927 (2005) (attached hereto as Appendix A-1).

CR 56 provides that a motion for summary judgment may be granted

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

CR 56(c). A material fact is one on which the result of litigation depends.

Lybbert v. Grant County, 93 Wn. App. 627, 631, 969 P.2d 1112 (1999).

When reasonable minds could reach but one conclusion regarding claims of disputed fact, such questions may be determined as a matter of law. *Miller v. Likins*, 109 Wn. App. 140, 144, 34 P.3d 835 (2001).

After the moving party has submitted adequate evidence to support its motion, the nonmoving party **must set forth specific facts** rebutting the

moving party's contentions and disclosing the existence of issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (emphasis added). The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991).

1. The trial court was correct in granting summary judgment of dismissal because the Beers failed to establish any genuine issues of material fact on prescriptive use.

Prescriptive rights are **not** favored in Washington. *Lingvall v. Bartmess*, 97 Wn. App. 245, 249, 982 P.2d 690 (1999). In order to establish a prescriptive easement, **the party claiming prescription** must prove **all** of the following elements: (1) use **adverse** to the right of the servient owner; (2) **open, notorious, continuous, and uninterrupted use** for the **entire prescriptive period**; and (3) **knowledge** of such use by the owner at a time when he was able to assert and enforce his rights. *Dunbar v. Heinrich*, 95 Wn.2d 20, 22, 622 P.2d 812 (1980). The period required to establish a prescriptive easement is 10 years. *Id.* Here, the Beers were unable to establish genuine issues of fact on any of the above elements.

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- (a) *The Beers failed to establish that their use of Ms. Ross' property was adverse.*

If the essential facts are not in dispute, whether use is adverse or permissive is purely a question of law. *Lingvall*, 97 Wn. App. at 250. At its inception, use is **presumed to be permissive**. *Gray v. McDonald*, 46 Wn.2d 574, 578, 283 P.2d 135 (1955). The fact that no permission was expressly asked and that no permission was expressly given does not preclude a use from being permissive. *Cuillier v. Coffin*, 57 Wn.2d 624, 627, 358 P.2d 958 (1961). Courts may imply that a use is permissive “when the facts in a case support an inference that use was permitted by **neighborly sufferance or accommodation.**” *Drake v. Smersh*, 122 Wn. App. 147, 154, 89 P.3d 726 (2004) (emphasis added). Use of a way on another’s land, in the absence of circumstances expressing a purpose to impose a separate servitude upon the land, is presumed to be permissive only. *Cuillier*, 57 Wn.2d at 627-28.

In the present case, it is undisputed that the Beers’ driveway had always been **shared** by neighboring property owners, including Ms. Ross and her predecessors in interest. CP 99-100 and 169-73. The Beers presented absolutely **no evidence** to refute this. CP 206-21 and 229-35. Ms. Ross stated that had she ever seen the Beers cross onto her property

while using the driveway, **she would have allowed them to do so** to stay on good terms as a neighbor. CP 171-72. The Beers presented **no specific facts** showing that Ms. Ross had notice that the Beers were using her property in a way that was **adverse** to her interests.

The Beers argue that their interrogatory answers, declarations from witnesses, and declaration of Mr. Beers established genuine issues of material fact on the issue of adverse use that should have precluded summary judgment. Appellants' Brief at 6-16. However, the Beers' summary judgment response materials **did not rebut Ms. Ross' contrary allegations.**

In the Beers' first set of interrogatory answers, they claimed that their driveway was much wider than it is presently. CP 210-11. Even viewing the evidence in a light most favorable to the Beers, the Beers did not present facts establishing that **their use** of the adjacent property is what made the driveway wider. The Beers did not present facts establishing that the driveway was wider because of use that was **adverse** to Ms. Ross' title.

The Beers did not present facts establishing that Ms. Ross had **notice** of adverse use of her property. Without such facts, the Beers could not succeed in raising genuine issues of material facts on all elements of

prescriptive use.

Similarly, the witness declarations that the Beers attached to their summary judgment response were insufficient to raise issues of fact. The garbage truck driver's declaration did not contain **any** information that was relevant to prescriptive use. CP 229-230.

Mr. Howard's declaration did not provide any evidence that **the Beers' use** of Ms. Ross' property caused their driveway to be wider. CP 231-32. Mr. Howard did not provide any information about whether the Beers used Ms. Ross' property **adversely**. Mr. Howard did not provide any information about what **notice** Ms. Ross had of the Beers' adverse claim. Again, without specifics, such evidence was insufficient to raise issues of fact on prescriptive use.

Ms. Chandanais' declaration also did not contain specific information establishing adverse use. CP 233-35. Ms. Chandanais asserted that she passed another vehicle on the driveway three times during the last 18-20 years. *Id.* Ms. Chandanais did not claim that she was an owner or resident of the Beers' property when she supposedly used Ms. Ross' property to pass another vehicle on the Beers' driveway. The use Ms. Chandanais described was not alleged to be **adverse** to Ms. Ross. There

was nothing in Ms. Chandanais' statement that established that Ms. Ross **knew** Ms. Chandanais was using Ms. Ross' property or that Ms. Ross had **notice** that Ms. Chandanais' use was adverse.

The testimony of witnesses supporting Ms. Ross (Nathan Drake, Milton Evans, and James Boyd) did not raise issues of material fact because it was not contradicted (or even addressed) by the Beers. CP 99-104; CP 160-61; CP 163-64; CP 206-21. Ms. Ross' witnesses only supported her argument that there was an established history of **permissive** use of the Beers' driveway, which in turn supported the inference that Mr. Beers' use of her property was also permissive. *Id.*

As for Mr. Beers' declaration, it should be noted that the trial court determined that **it contradicted his sworn deposition testimony**, and refused to consider it for purposes of summary judgment pursuant to *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989). CP 247-48; CP 274-75; CP 437-39; 9/23/05 RP 5:1-4; 9/23/05 RP 14:23 – 15:22. Ms. Ross has filed a separate motion to strike the declaration and any references thereto.

But even if this Court considers it, it does not raise any issues of fact regarding adverse use. Mr. Beers' declaration does not contain

specific facts that establish that his use of Ms. Ross' property was **adverse** or that Ms. Ross had **notice** of any adverse use at a time when she could have asserted her ownership rights. The undisputed evidence before the trial court raised a presumption that the Beers' use of Ms. Ross' property was **permissive due to neighborly courtesy**. The Beers failed to rebut that presumption, so the trial court's ruling which dismissed the Beers' claim of prescription was correct.

(b) *The Beers failed to establish that their use of Ms. Ross' property was open, notorious, continuous, and uninterrupted for the entire prescriptive period.*

Mr. Beers' own testimony established that the Beers did not make "continuous" and "uninterrupted" use of Ms. Ross's property. Mr. Beers stated in deposition that his **only** use of Ms. Ross' property occurred **6 times per year** when vehicles passed each other. CP 115, lines 14-21. Mr. Beers never claimed that he used Ms. Ross's property frequently enough to establish a "shoulder" or "passing lane" as part of the driveway. Using Ms. Ross' property for a matter of **seconds** once every two months was not sufficient for the Beers to satisfy the "continuous" and "uninterrupted" use requirements of a prescriptive easement.

Neither was it sufficient to establish the "open" and "notorious"

requirements. The Beers' use of Ms. Ross's property was so infrequent and fleeting that the first time she learned of such use was at Mr. Beers' deposition. CP 171. Additionally, Mr. Beers confirmed that he never told Ms. Ross that he believed he had a right to her property at any time prior to filing suit. CP 114, line 23 through CP 115, line 8. There was **no** evidence before the trial court that Ms. Ross had **notice** of the Beers' alleged adverse use of her property at a time when she could have asserted her ownership rights.

Finally, the Beers did not establish that they used Ms. Ross's property for the entire prescriptive period. The evidence before the trial court showed that in 1998, Mr. Beers prevented another neighbor, Sandy Sawyer, from using the driveway to bring a double-wide mobile home onto Mr. Sawyer's property because at that time, **the driveway was only 15 feet wide**. CP 113, lines 22-25; CP 88-97. Mr. Beers' actions show that **as of 1998, the driveway did not cross onto Ms. Ross's property**. Thus, even if the Beers' use of Ms. Ross's property was open, notorious, continuous, and uninterrupted starting in 1998, **the use had not gone on long enough** to satisfy the prescriptive period. Because the Beers could not have satisfied the open, notorious, continuous, and uninterrupted use

requirements for the entire 10-year period, the trial court was correct in dismissing the claim on summary judgment.

The above argument presumed that Mr. Beers' declaration, which directly conflicts with his deposition testimony, would be disregarded pursuant to *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989). However, even if the Court considered the declaration, it would not raise any genuine issues of material fact regarding open, notorious, continuous, or uninterrupted use.

Mr. Beers' declaration contains a vague and conclusory statement that he had a "continuous habit" of driving over the "established road." CP 237. No specific facts regarding **where or how often** Mr. Beers used Ms. Ross' property are given. *Id.* The declaration does not contain specific facts, such as actual measurements, showing that the "established road" was on Ms. Ross' property. No specific facts are alleged that show that Mr. Beers' use of Ms. Ross' property was **adverse**, or that she had **notice** of such adverse use. Without specific facts to rebut Ms. Ross' evidence, the trial court could not have ruled in the Beers' favor. The trial court was correct in dismissing the Beers' claim on summary judgment.

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- (c) *The Beers failed to show that their use of Ms. Ross' property was sufficient to give her notice of such use at a time when she was able to assert and enforce her rights.*

As explained above, the Beers claimed that they used Ms. Ross's property only six times a year. CP 115, lines 14-21. Because of the infrequency of the Beers' use, Ms. Ross did not have any knowledge of it until she attended Ron Beers' deposition. CP 171. Mr. Beers admitted that he **never** told Ms. Ross that he thought he had right to her property prior to filing suit. CP 114, line 23 through CP 115, line 8. In short, there was **no evidence** before the trial court that Ms. Ross had knowledge of the Beers' use at a time when she was able to assert and enforce her rights. As a matter of law, the Beers could not have succeeded on their prescription claim and the trial court was correct in dismissing it on summary judgment.

2. The trial court was correct in dismissing the Beers' trespass claim because the Beers failed to establish any genuine issues of material fact regarding damages proximately resulting from trespass.

“[E]very plaintiff claiming damages has the burden of proof to present sufficient evidence from which damages can be determined on some rational basis and other than by pure speculation and conjecture.”

O'Brien v. Larson, 11 Wn. App. 52, 54, 521 P.2d 228 (1974). In cases

where a plaintiff cannot prove any damage, the plaintiff's claim can be dismissed: "[W]here the action is for damages only, there being involved no property or personal rights having value in themselves, **a failure to prove substantial damages is a failure to prove the substance of the issue, and warrants a judgment of dismissal.**" *Ketchum v. Albertson Bulb Gardens, Inc.*, 142 Wn. 134, 139, 252 P. 523 (1927) (emphasis added). *See also Ahmann-Yamane, LLC v. Tabler*, 105 Wn. App. 103, 115, 19 P.3d 436 (2001) ("Accordingly, Ahmann fails to prove that dismissal of the petition caused damages. . . . The trial court properly granted summary judgment."); *O'Brien*, 11 Wn. App. at 54-55 (trial court was correct in dismissing plaintiff's claim for fraud when plaintiff failed to prove damages).

In her summary judgment motion, Ms. Ross argued that because the Beers had suffered no damage from trespass onto their property, their trespass claim must be dismissed. CP 76-80. Ms. Ross relied extensively on Mr. Beers' deposition testimony, in which **he could not put any value on the damage that he believed had been done to the driveway.**

Q What would be the value of the gravel that's in those circled areas?

A **I have no idea. . . .**

Q Can you tell me what the value of the damage of those arrowed areas would be?

A **I have no idea. . . .**

Q Are you claiming any damage as a result of that?

A Yeah. There's a hole there.

Q What's the value of that hole?

A **I have no idea.**

Q Okay. So you're saying that you have some grass missing from your property?

A Yes, I do?

Q How much is that grass worth?

A **I have no idea. I never put any monetary value on it.**

CP 128, lines 16-19; CP 130, line 24 through CP 131, line 1; CP 137, line 23 through CP 138, line 1; CP 141, lines 5-9. *See also* CP 123, lines 9-16; CP 154; CP 158.

In response to summary judgment, the Beers did not refer to Mr. Beers' deposition. CP 218-220. The only evidence of possible damages from trespass was presented in Mr. Beers' declaration, which directly contradicted his sworn deposition testimony. CP 247-48; CP 274-75; CP 437-39; 9/23/05 RP 5:1-4; 9/23/05 RP 14:23 – 15:22. Because the trial

court could not consider Mr. Beers' declaration, there was no genuine issue of material fact regarding damages. *See Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989). The trial court was correct in dismissing the Beers' trespass claim.

Even if the trial court had considered Mr. Beers' declaration on summary judgment, it still did not create any genuine issue of material fact on damages. The receipt that Mr. Beers' attached to his declaration simply gave an estimate for grading and spreading rock. CP 245. Nowhere did Mr. Beers provide any expert testimony stating on a "more probable than not" basis that Ms. Ross' trespass, **rather than the natural soil and moisture conditions already present on the Beers' property**,² caused damage to the Beers' driveway. Without a causal link³ between Ms. Ross' trespass and the condition of the Beers' property, the Beers' damage claim had to fail as a matter of law. The trial court correctly dismissed the Beers' claim on summary judgment.

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² See CP 160-61; CP 163-64; CP 169-70; CP 175-84.

3. The trial court was correct in dismissing the Beers' spite fence claim because the Beers failed to establish any genuine issue of material fact on "malice" or "intent."

In order to apply the spite fence statute, a court must find (1) that the structure significantly damages the adjoining landowner's enjoyment of his property; (2) that the structure is designed as the result of malice or spitefulness solely to injure and annoy the adjoining landowner; and (3) the structure serves no really useful or reasonable purpose. *Baillargeon v. Press*, 11 Wn. App. 59, 66, 521 P.2d 746 (1974), *rev. denied* 84 Wn.2d 1010 (1974).

Here, Mr. Beers admitted in deposition that he has **no trouble** using his driveway for ingress or egress; that the garbage man can still collect his garbage; that the fire department has never told him that his property cannot be accessed; and that he has never been told that an ambulance will not come to his home if he calls 911. CP 118, lines 2-16; CP 120, line 21 through CP 121, line 3; CP 122, lines 17-21; CP 171-72; CP 186. There was thus no evidence of any "significant" damage to the Beers' property as a result of Ms. Ross' fence.

³ According to the authorities cited by the Beers in their brief, proximate cause is a required element of the measure of damages for trespass. Appellants' Brief at 21-22.

Mr. Beers knew **for at least three years** prior to filing suit that Ms.

Ross intended to erect a fence on her property:

Q How long have you known that Ms. Ross intended to put a fence on her property?

A **She's been talking to it off and on for probably three years.**

CP 114, lines 11-14 (emphasis added). Ms. Ross testified that she had not been able to afford putting up the fence any sooner, so the timing of the fence erection was due to financial considerations, not “spite.” CP 170-72.

Finally, the Beers submitted no evidence that Ms. Ross’ fence served no useful or reasonable purpose.

With such an astounding lack of evidence on this claim, it is no wonder that **the Beers did not respond to Ms. Ross’ summary judgment motion on the spite fence claim.** CP 206-21. The Beers fell far short of establishing any genuine issues of material facts. With Ms. Ross’ undisputed evidence before it, the trial court had no choice but to grant summary judgment dismissing the Beers’ spite fence claim. There was no error.

C. THE TRIAL COURT WAS CORRECT IN DENYING THE BEERS’ REQUEST TO FILE A LATE REPLY AND GRANTING SUMMARY JUDGMENT ON MS. ROSS’ COUNTERCLAIMS.

A trial court’s decision on a motion to file a late reply is reviewed for abuse of discretion. *Hays v. Mercantile Inv. Co.*, 73 Wn. 586, 591, 132 P. 406 (1913). CR 7(a) provides that “[t]here **shall** be . . . **a reply to a counterclaim denominated as such** . . .” (Emphasis added.) Under CR 15,⁴

[a] party **shall** plead in response to an amended pleading within the time remaining for a response to the original pleading or **within 10 days after service of the amended pleading**, whichever period may be the longer
. . .

CR 15(a) (emphasis added). For purposes of interpretation of court rules, the word “shall” is **mandatory**, rather than permissive. *Case v. Dundom*, 115 Wn. App. 199, 202, 58 P.3d 919 (2003). When a plaintiff fails to file a timely reply, **a court does not abuse its discretion in refusing to allow the plaintiff to file a late reply** and entering a default against the plaintiff. *Hays v. Mercantile Inv. Co.*, 73 Wn. 586, 590-91, 132 P. 406 (1913).

When a reply is not filed, there are other serious consequences for the plaintiff. “Averments in a pleading to which a responsive pleading is

⁴ Ms. Ross argued below that the 10-day time limit provided in CR 15 applied to the Beers’ final reply because her counterclaims were being filed in response to the Beers second **amended** complaint. However, even if the 10-day time period did not apply and the Beers had 20 days in which to file their reply, they still missed the deadline.

required, other than those as to the amount of damage, **are admitted when not denied** in the responsive pleading.” CR 8(d) (emphasis added).

The Superior Court Civil Rules require a reply to a counterclaim; **it is not optional**. [citations omitted] The reply must fairly meet the substance of any averment denied. **Failure to deny an averment in a counterclaim constitutes an admission**.

Jansen v. Nu-West, Inc., 102 Wn. App. 432, 438, 6 P.3d 98 (2000)

(emphasis added).

Here, it is undisputed that while Ms. Ross filed her third answer and counterclaims on July 28, 2005, the Beers did not even attempt to submit a reply until August 29, 2005, **after** the 10-day time limit in CR 15 had run and **after** Ms. Ross’ summary judgment motion was filed. CP 57; CP 226. Ms. Ross had in fact **relied** on the lack of a reply in making her motion for summary judgment on her counterclaims. CP 81-82. The Beers never explained why they failed to file a reply, even though they amended their complaint twice and thus had **three chances** to comply with the mandatory language of CR 7 and 15. Under the circumstances, the trial court was within its discretion to deny the Beers’ request to file a late reply. *See Hays*, 73 Wn. at 590-91.

The Beers argue that the trial court erred because they **did** reply to

Ms. Ross' counterclaims. Appellants' Brief at 32. However, the Beers' argument is unpersuasive because it ignores the fact that they violated CR 7 and 15 three times, and that the trial court denied the Beers' request to file the reply. 9/23/05 RP at 13:6-7; CP 272-73.

The Beers' attempt to distinguish *Hays* is also unpersuasive. Appellants' Brief at 30-32. In *Hays*, the plaintiff failed to file a reply within the prescribed time period. 73 Wn. at 590. The defendants, relying on the failure to file a reply, then moved for a default judgment on their affirmative defenses. *Id.* The plaintiff tendered a late reply, but the trial court refused to accept it and entered a default against the plaintiff. *Id.* The trial court's actions were upheld by the Washington Supreme Court. *Id.*

The Beers' conduct goes beyond the plaintiff's in *Hays*, as the Beers had **three opportunities** file a reply, but failed to do so. Like the defendants in *Hays*, Ms. Ross relied on the failure to file a reply and the resulting party admissions in bringing a dispositive motion on her counterclaims. Because of the Beers' multiple rule violations, and because Ms. Ross relied on the lack of any reply, the trial court correctly applied *Hays* and denied the Beers' motion to file a late reply.

The Beers argue that Ms. Ross' counterclaims were "mere denials

of the complaint stated affirmatively,” so there was no need to reply.

Appellants’ Brief at 33-35. The Beers argument is flawed, though, because all three of Ms. Ross’ answers contained denials and affirmative defenses **separate and apart** from her counterclaims. CP 8-12; CP 35-38; CP57-60.

The counterclaims were not mere denials stated affirmatively, because they alleged different facts and causes of action (quiet title, trespass, emotional distress, assault) from the Beers’ second amended complaint (easement by prescription, property damage). CP 49-54; CP 57-60. The Beers were required to file a reply to Ms. Ross’ counterclaims, but did not. The Beers’ cited federal authorities are not applicable.

The Beers argue that they should not have been deemed to have admitted the allegations in Ms. Ross’ counterclaims because Ms. Ross had not filed a motion for default under CR 55. Appellants’ Brief at 35-36. However, the Beers offer **no legal authority** for the idea that a motion for default is required before CR 8 takes effect. Appellants’ Brief at 35-36. There is, in fact, no such requirement. The Beers failed to file a timely reply under CR 7 and 15; therefore, by operation of court rule, they admitted Ms. Ross’ counterclaims pursuant to CR 8 and *Jansen v. Nu-West, Inc.*, 102 Wn. App. 432, 438, 6 P.3d 98 (2000).

The Beers complain that Ms. Ross did not attach any testimonial or documentary evidence in support of her counterclaims. Appellants' Brief at 36-37. This argument only highlights the prejudice that Ms. Ross would have faced if the Beers had been permitted to "take back" their admissions by filing a late reply. The reason Ms. Ross did not attach any testimonial or documentary evidence is because **she was relying on the Beers' party admissions**. CP 81-82. If a late reply had been accepted by the trial court, Ms. Ross would not have been permitted to attach additional evidence supporting her counterclaims after her original summary judgment motion had been filed. CR 56. Furthermore, Mr. Beers' deposition had already been taken and no questions were posed regarding Ms. Ross' counterclaims, again in reliance on the Beers' "admissions." CP 110. Ms. Ross would not have been permitted to take a second deposition of Mr. Beers. CR 30. If the Beers had been permitted to file a late reply, Ms. Ross would have been unable to prepare adequately for trial. The trial court did not abuse its discretion in denying the Beers' request to file a late reply.

The Beers argue that the trial court erred in granting summary judgment on Ms. Ross' counterclaims. However, because the Beers failed

to file a timely reply, the following facts were established by party admission:

- Ms. Ross held fee simple title ownership of her property;
- There were no easements on Ms. Ross' property;
- Ron Beers' trespassed onto Ms. Ross' property;
- Ronald Beers verbally assaulted and harassed Ms. Ross;
- Ronald Beers endangered Ms. Ross' minor son;
- Ronald Beers caused Ms. Ross emotional distress; and
- Ronald Beers harassed Ms. Ross' invitees.

Based on these admissions, there was no issue of material fact that needed to be preserved for trial. The trial court correctly granted summary judgment on Ms. Ross' counterclaims.

D. THE TRIAL COURT DID NOT ERR IN AWARDING MS. ROSS ATTORNEY'S FEES AND COSTS.

This Court reviews the reasonableness of an award of attorney fees under the abuse of discretion standard. *Beckman v. Wilcox*, 96 Wn. App. 355, 367, 979 P.2d 890 (1999), *rev. denied* 139 Wn.2d 1017, 994 P.2d 847 (2000). Construction of a statute is a question of law which is reviewed *de novo*. *Rettkowski v. Dept. of Ecology*, 128 Wn.2d 508, 515,

910 P.2d 462 (1996).

RCW 4.84.250 provides that in actions where damages are ten thousand dollars or less, the “prevailing party” is entitled to an award of attorney’s fees and costs. Under RCW 4.84.270,

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 . . .

(Emphasis added.)

Here, it is undisputed that Ms. Ross was the “prevailing party” on the Beers’ claims because she successfully had the claims dismissed. CP274-75. Because Mr. Beers did not assign any value to the alleged damage on his property, the Beers’ claims were worth less than \$10,000. CP 128, lines 16-19; CP 130, line 24 through CP 131, line 1; CP 137, line 23 through CP 138, line 1; CP 141, lines 5-9; CP 158. Ms. Ross gave proper notice that she would be claiming attorney’s fees and costs under RCW 4.84.250. CP 60. Under the above-cited statutes, the trial court was **required** to award Ms. Ross her attorney’s fees and costs.

The Beers argue that the trial court’s award was erroneous because

Ms. Ross had never made a settlement offer on her counterclaims. Appellants' Brief at 40. However, the Beers' argument is contradicted by the plain language of RCW 4.84.270, *supra*. Under the statute, a defendant **must** be awarded attorney's fees **if the plaintiff recovers nothing**. RCW 4.84.270. *See also Public Utilities District No. 1 of Grays Harbor v. Crea*, 88 Wn. App. 390, 393, 945 P.2d 722 (1997), *rev. denied* 134 Wn.2d 1021, 958 P.2d 316 (1998) ("Under these statutes, when a plaintiff seeks less than \$10,000 in damages and recovers nothing, the defendant is entitled to attorney's fees, regardless of whether an offer of settlement has been made by either party."). Since the Beers' claims were dismissed, they recovered nothing and the trial court's award of attorney's and costs to Ms. Ross was proper.

The Beers argue that the trial court erred in granting Ms. Ross' attorney's fees without segregating between fees earned defending their legal claim, as opposed to their equitable claim. Appellants' Brief at 41. However, this Court has noted that Division III permitted an award of "combined" attorney's fees under RCW 4.84.250 when an equitable claim had been joined to one for damages. *Lay v. Hass*, 112 Wn. App. 818, 821 n.3, 51 P.3d 130 (2002), *citing Hanson v. Estell*, 100 Wn. App. 281, 289-

90, 997 P.2d 426 (2000). In the *Lay* case, this Court upheld an award of “combined” attorney’s fees, even though the plaintiffs brought equitable and legal claims together. *Lay*, 112 Wn. App. at 826. Here, because Ms. Ross prevailed on **all** of the Beers’ claims, it was proper for the trial court to apply RCW 4.84.250 and award Ms. Ross her attorney’s fees and costs.

The Beers argue that the trial court did not make a sufficient record to support its award of attorney’s fees and costs. However, the Beers have provided the court with the transcript of the hearing on Ms. Ross’ motion for attorney’s fees. 11/22/05 RP, at 17-42. Although separate findings and conclusions on attorney’s fees were not entered, the transcript contains the trial court’s questions, colloquy, and reasoning behind its award. *Id.* It is obvious from the transcript that the trial court considered the experience of defense counsel, her hourly rate, the number of hours billed, the work performed, and the type of claims that were brought. *Id.* The trial court made a downward adjustment of Ms. Ross’ request, again showing that the trial court made a reasoned decision based on the information presented. *Id.* Given that Ms. Ross was successful on all of the Beers’ claims and no segregation of fees was necessary, any error that the trial court may have made in failing to enter findings and conclusions was **harmless**.

The Beers argue that because this case did not go to trial, Ms. Ross should not have been permitted to recover her pro rata costs incurred in taking Mr. Beers' deposition, pages from which were attached to her summary judgment motion. Appellants' Brief at 43-44. However, a grant of summary judgment is a **final judgment on the merits with the same preclusive effect as a full trial.** *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 892, 1 P.3d 587 (2000). RCW 4.84.250 itself does not distinguish between trial and summary judgment; it merely refers to the "action." A party is entitled to the costs of taking depositions if the depositions were taken and used **for trial purposes.** *Kiewit-Grice v. State*, 77 Wn. App. 867, 874, 895 P.2d 6 (1995), *review denied*, 127 Wn.2d 1018, 904 P.2d 299 (1995). RCW 4.84.010 states explicitly that

the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

RCW 4.84.010(7). Here, because Ms. Ross used portions of Mr. Beers' deposition as evidence for "trial purposes"—for obtaining a judgment against the Beers—she is permitted to recover her pro rata costs incurred in taking Mr. Beers' deposition. The trial court's award of costs was proper.

The Beers argue that the trial court erred in awarding Ms. Ross' attorney's fees because the amount was excessive based on the work alleged to have been done. Appellants' Brief at 44-45. *Assuming arguendo* that the amount claimed was excessive, the trial court took this into consideration and appropriately reduced Ms. Ross' award (out of the nearly \$13,500 in fees that were earned, only \$7,425.00 were awarded). CP 342; CP 447-48; CP 456. The Beers have not shown that the trial court abused its discretion in making such a reduction.

In addition, the Beers' arguments about work done by defense counsel are not well taken. The amounts billed by defense counsel were for **actual amounts of time** spent on Ms. Ross' case. CP 280-87. While the Beers may have felt that Ms. Ross was engaging in processes that served only to "impede litigation," that was clearly not the case, as Ms. Ross was successful in ending the litigation on summary judgment. Surely the Beers did not expect Ms. Ross to simply sit back and allow the Beers to prosecute their claims without any opposition.

As for accusations that defense counsel over-billed, the Beers did not submit any evidence that the pleadings and documents that were filed with the trial court were deficient in law or fact, or that the work billed was

not actually done. Just because the final product (*e.g.*, the response to the Beers' motion to amend their complaint) was "short" does not mean that defense counsel did not research a variety of legal issues before submitting her final draft. The fact that defense counsel had to come back to court several times and wait to argue motions is no reason to reduce her fees. The Beers offer no authority for their argument that it was unreasonable for the trial court to award attorney's fees for the time defense counsel spent on pleadings and court appearances. The trial court's award of fees and costs was not an abuse of discretion and must be upheld.

E. THE TRIAL COURT WAS CORRECT IN CANCELING THE NOTICE OF LIS PENDENS ON MS. ROSS' PROPERTY.

The Beers argue that it was error for the trial court to cancel the notice of lis pendens on Ms. Ross' property after all of the Beers' claims had been dismissed on summary judgment. CP 45-50. The record below shows that the Beers did not file any response to her motion.

RCW 4.28.320 provides in pertinent part:

[T]he 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 added.) **When an action has been dismissed on the merits, it is proper to cancel a lis pendens** and clear the record of any cloud that the adverse party had produced. *Cashmere State Bank v. Richardson*, 105 Wn. 105, 109, 177 P. 727 (1919).

Here, Ms. Ross was an aggrieved party because the Beers' claims had been dismissed, yet title to her real property was still clouded by the Beers' lis pendens. There was good cause for the lis pendens to be canceled because all of the Beers' claims were dismissed with prejudice. The Court should note that the Beers chose **not** to file a supersedeas bond. *See* RAP 8.1(b). There was no action still pending that affected title to Ms. Ross' property, so the notice of lis pendens was correctly cancelled.⁵

The Beers attempt to parse RCW 4.28.320 and argue that its terms were not satisfied when the trial court cancelled the notice herein.

Appellants' Brief at 47. Black's Law Dictionary defines "discontinuance" as

⁵ The trial court had authority to hear Ms. Ross' motion under RAP 7.2(e). The Beers did not object to the trial court entering an order on the motion.

the cessation of the proceedings in an action where the plaintiff voluntarily puts an end to it . . . **or at any other time by order of the court of a judge.** A non-suit; **dismissal.** Under Rules practice, “**dismissal**” is **appropriate term for discontinuance**; may be voluntary or **involuntary** and may effect counterclaim, cross claim or third party claim.

BLACK’S LAW DICTIONARY 464-65 (6th ed. 1990) (emphasis added) (copies attached hereto as Appendix A-2). The phrase “abatement of action” is defined as follows: “Abatement is an **entire overthrow or destruction of the suit** so that it is quashed and ended. . . . **See Dismissal; Vacate.**” *Id.* at 4 (boldface added) (copy attached hereto as Appendix A-3).

Clearly, the terms of RCW 4.28.320 were satisfied because Ms. Ross was successful in having all of the Beers’ claims dismissed by order of the court. Under the above-quoted definitions, the Beers’ claims were “discontinued” and “abated,” so the trial court’s cancellation of the notice of lis pendens on Ms. Ross’ property was proper.

F. MS. ROSS REQUESTS THAT SHE BE AWARDED HER ATTORNEY’S FEES AND COSTS ON APPEAL.

RCW 4.84.290 provides in pertinent part:

[I]f the prevailing party on appeal would be entitled to attorneys’ fees under the provisions of RCW 4.84.250, the court deciding the appeal **shall** allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys’ fees for the appeal.

(Emphasis added). Here, Ms. Ross was the prevailing party below for purposes of RCW 4.84.250 (see Section D, *supra*). If Ms. Ross prevails on appeal, she respectfully requests that the Court grant her attorney's fees and costs on appeal. *See* RAP 18.1.

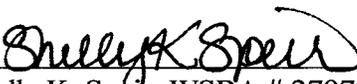
IV. CONCLUSION

The Beers failed to establish any genuine issues of material fact in responding to Ms. Ross' motion for summary judgment of dismissal. As such, the trial court was required to grant Ms. Ross' motion. The trial court did not abuse its discretion in denying reconsideration of its order on summary judgment, awarding attorney's fees and costs, or canceling the notice of lis pendens on Ms. Ross property. Based on the foregoing, Ms. Ross respectfully requests that the Court affirm the trial court's decisions herein and grant her an award of attorney's fees and costs on appeal.

DATED: April 19, 2006.

Respectfully submitted,

**TROUP, CHRISTNACHT, LADENBURG,
McKASY & DURKIN, INC., P.S.**



Shelly K. Spear, WSBA # 27979
Attorney for Respondent Ross

APPENDIX A-1

Court of Appeals of Washington,
Division 2.

Jerre CRISP and Sharon Crisp, husband and wife,
Appellants,

v.

Ronald A. VANLAECKEN and Peggy A.
VanLaeken, husband and wife, Respondents.

No. 31567-0-II.

Nov. 15, 2005.

Background: Landowner filed action against owner of **easement** to relocate **easement**, and the Superior Court, Clark County, Roger Bennett, J., granted summary judgment for **easement** owner. Landowner appealed.

Holding: The Court of Appeals, Houghton, J., held that **easement** could not be relocated without consent of dominant owner.
Affirmed.

West Headnotes

[1] Easements 1

141k1 Most Cited Cases

The term "easement" means a right, distinct from ownership, to use in some way the land of another, without compensation, which forms a burden on the land and an interest in land.

[2] Easements 38

141k38 Most Cited Cases

A servient estate owner may use the **easement** for any purpose that does not interfere with the proper enjoyment of the **easement**.

[3] Easements 24

141k24 Most Cited Cases

Unless limited by the terms of creation or transfer, appurtenant **easements** follow possession of the dominant estate through successive transfers.

[4] Easements 48(6)

141k48(6) Most Cited Cases

Trial court properly refused to grant owners of servient estate right to relocate **easement** to permit

sale of lot containing **easement**, without the consent of owner of the dominant estate; the contrary rule of the Restatement (Third) of Property was rejected. Restatement (Third) of Property (Servitudes) § 4.8(3).

*926 Le Anne Marie Bremer, Steven Erik Turner, Miller Nash LLP, Vancouver, WA, Heather K. Cavanaugh, Miller Nash LLP, Portland, OR, for Appellant.

*927 Peter Kerry Jackson, Jackson Jackson & Kurtz Inc., Battle Ground, WA, for Respondent.

HOUGHTON, J.

¶ 1 Jerre and Sharon Crisp appeal from a trial court summary judgment order. They argue that the trial court erred in refusing to relocate an **easement** without the **easement** holders' consent. We decline to adopt a rule proposed in Restatement (Third) of Property (Servitudes) § 4.8(3) (2000) that, under certain circumstances, would allow a servient estate owner to relocate the **easement** without the dominant estate owner's consent and, accordingly, we affirm.

FACTS

¶ 2 The Crisps own two adjoining lots in Ridgefield: (1) tax lot 103/104 where they reside and (2) vacant tax lot 67. Ronald and Peggy VanLaeken, who own land to the north and northeast of lot 67, hold an **easement** allowing them to travel across lot 67 to access their property. [FN1] But the VanLaekens have been using a driveway on lot 103/104 to access their property. [FN2]

FN1. In 1969, the VanLaekens acquired the **easement** by statutory warranty deed from Ronald VanLaeken's parents, Joseph and Margaret VanLaeken. Joseph and Margaret originally acquired the **easement** in 1957. The deed describes the **easement** as one "for road purposes as the same is presently laid under the property above excepted, which **easement** gives access to the public road on the South line of said excepted property to the property herein conveyed." Clerk's Papers at 67.

FN2. The VanLaekens do not assert prescriptive rights to use the driveway on lot 103/104.

¶ 3 The Crisps want to sell lot 67 to a third party who would construct a single family home on it. Due to some legal and physical constraints, [FN3] the only appropriate place for a homesite is in the middle of lot 67, near the VanLaekens' **easement**.

FN3. The west side of the parcel is comprised of a steep wooded ravine and a creek. A septic tank and drain field must be located on the east side to avoid contaminating the water source used by a neighbor, Jerry Keesee. Therefore, a home can be placed only in the middle of the parcel.

¶ 4 In order to facilitate the sale and future development of lot 67, the Crisps proposed granting the VanLaekens an express **easement** across lot 103/104. The proposed **easement** would be located approximately 75 feet to the west of the **easement's** present location. The Crisps offered to grade and pave the proposed **easement**.

¶ 5 The VanLaekens refused to accept the new proposed **easement** in exchange for relinquishing their rights to the existing **easement**. The Crisps filed an action seeking a court order relocating the **easement**. The trial court granted the VanLaekens' motion for summary judgment. The Crisps appeal.

ANALYSIS

Standard of Review

¶ 6 We **review** a grant of **summary judgment** de novo, applying the same **standard** as the trial court. *Stalter v. State*, 151 Wash.2d 148, 155, 86 P.3d 1159 (2004). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). Here, the facts are undisputed, and we decide whether as a matter of law the trial court properly granted summary judgment. *Clawson v. Grays Harbor College Dist. No. 2*, 148 Wash.2d 528, 536-37, 61 P.3d 1130 (2003).

Easement Relocation

¶ 7 The Crisps contend that the trial court erred in granting summary judgment. They argue that the VanLaekens' refusal to accept the new **easement** renders the Crisps' lot 67 "virtually worthless." Appellant's Brief at 5. For policy reasons, the Crisps urge us to adopt the rule proposed in section 4.8(3) of

the Restatement that would allow an owner of servient estate to relocate an **easement** without an **easement** holder's consent under certain conditions.

[1][2][3] ¶ 8 The term "**easement**" means " 'a right, distinct from ownership, to use in some way the land of another, without compensation.' " *928 *City of Olympia v. Palzer*, 107 Wash.2d 225, 229, 728 P.2d 135 (1986) (quoting *Kutschinski v. Thompson*, 101 N.J.Eq. 649, 656, 138 A. 569 (1927)). It forms a burden on the land and an interest in land. *Kesinger v. Logan*, 113 Wash.2d 320, 326, 779 P.2d 263 (1989). A servient estate owner may use the **easement** for any purpose that does not interfere with the proper enjoyment of the **easement**. *Thompson v. Smith*, 59 Wash.2d 397, 407-08, 367 P.2d 798 (1962). "Unless limited by the terms of creation or transfer, appurtenant **easements** follow possession of the dominant estate through successive transfers." *Green v. Lupo*, 32 Wash.App. 318, 323, 647 P.2d 51 (1982).

¶ 9 Section 4.8(3) of the Restatement [FN4] sets forth a minority view:

FN4. Comment f to that section explains:

This rule is designed to permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the **easement** holder. It complements the rule that the **easement** holder may increase use of the **easement** to permit normal development of the dominant estate, if the increase does not unduly burden the servient estate.... This rule is not reciprocal. It permits unilateral relocation only by the owner of the servient estate; it does not entitle the owner of the **easement** to relocate the **easement**. The reasons for the rule are that it will increase overall utility because it will increase the value of the servient estate without diminishing the value of the dominant estate and it will encourage the use of **easements** and lower their price by decreasing the risk the **easements** will unduly restrict future development of the servient estate. In addition, permitting the servient owner to change the location under the enumerated circumstances provides a fair trade-off for the vulnerability of the servient estate to increased use of the **easement** to accommodate changes in technology and development of the dominant estate.

Unless expressly denied by the terms of an **easement**, ... the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an **easement**, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not

- (a) significantly lessen the utility of the **easement**,
- (b) increase the burdens on the owner of the **easement** in its use and enjoyment, or
- (c) frustrate the purpose for which the **easement** was created.

¶ 10 In *MacMeekin v. Low Income Housing, Inst., Inc.*, 111 Wash.App. 188, 190, 45 P.3d 570 (2002), Division One declined to adopt this minority view, noting:

Washington appellate courts have not adopted the approach of Restatement (Third) of Property (Servitudes) (2000) under which an **easement** generally may be relocated by the owner of the servient estate, regardless of how the **easement** was acquired, so long as the relocation will not significantly lessen the utility of the **easement**, increase the burdens on the owner of the **easement** in its use and enjoyment, or frustrate the purpose for which the **easement** was created. We decline to adopt the Restatement (Third) approach, and adhere to the traditional rule that **easements** may not be relocated absent mutual consent of the owners of the dominant and servient estates, regardless of how the **easement** was created.

¶ 11 The *MacMeekin* court provided a detailed analysis of its reasons for refusing to adopt the minority rule, reviewing a number of Washington cases with similar holdings. *Coast Storage Co. v. Schwartz*, 55 Wash.2d 848, 854- 55, 351 P.2d 520 (1960) (consent required of all interested parties to relocate express **easement**); *State ex rel. Northwestern Elec. Co. v. Clark County Superior Court*, 28 Wash.2d 476, 488, 183 P.2d 802 (1947) (**easement** right, once granted and exercised, cannot be changed "at the pleasure of the grantee"); *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wash.2d 75, 88, 123 P.2d 771 (1942) (an adverse use creates a prescriptive **easement** that cannot be terminated or abridged at the will of the servient estate owner); *White Bros. Crum Co. v. Watson*, 64 Wash. 666, 670, 117 P. 497 (1911) (cannot change character of servitude without consent).

¶ 12 Division One observed that [t]he traditional approach favors uniformity, stability, predictability and property rights. The

Restatement (Third) approach favors flexibility, and the development potential *929 of the servient estate. Under the traditional approach, the holder of the servient estate must purchase the right to relocate the **easement** if he is to have it at all. Under the Restatement (Third) approach, relocation may be forced upon the holder of the dominant estate against his will.

MacMeekin, 111 Wash.App. at 205-06, 45 P.3d 570. We agree with Division One.

[4] ¶ 13 Here, the warranty deed unambiguously created an **easement** burdening lot 67. [FN5] The Crisps argue only that they want to build a home on their lot and, therefore, this court should grant them the right to relocate the VanLaekens' **easement**. We decline to do so.

FN5. Although the Crisps call it a "purported" **easement** because it lacks legal description, they impliedly concede that the **easement** exists. The Crisps also impliedly concede that, although **easement** location may not have been described precisely, its present location interferes with the Crisps' ability to build a home on lot 67. Thus, they ask us to treat the **easement's** existence and location interfering with home construction on lot 67 as a verity. *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 93 Wash.2d 210, 213, 608 P.2d 254 (1980); *McIntyre v. Fort Vancouver Plywood Co.*, 24 Wash.App. 120, 123, 600 P.2d 619 (1979).

¶ 14 Judicial relocation of established **easements**, such as the one at issue here, would introduce uncertainty in real estate transactions. The Restatement's version of the relevant rule could invite endless litigation between property owners as to whether a servient estate owner may relocate an existing **easement** without a dominant estate owner's consent.

¶ 15 Affirmed.

We concur: BRIDGEWATER, J., and QUINN-BRINTNALL, C.J.

130 Wash.App. 320, 122 P.3d 926

END OF DOCUMENT

KEYCITE

⊙ Crisp v. VanLaecken, 130 Wash.App. 320, 122 P.3d 926 (Wash.App. Div. 2, Nov 15, 2005) (NO. 31567-0-II)
History

=> 1 Crisp v. VanLaecken, 130 Wash.App. 320, 122 P.3d 926 (Wash.App. Div. 2 Nov 15, 2005) (NO. 31567-0-II)

APPENDIX A-2

BLACK'S LAW DICTIONARY®

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American and English Jurisprudence,
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By

HENRY CAMPBELL BLACK, M. A.

SIXTH EDITION

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THE PUBLISHER'S EDITORIAL STAFF

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ST. PAUL, MINN.
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C.C. § 2-316.

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giving number of situations in
each of contract terms. Collins
v. Bell, Okl.App., 623 P.2d
rantly.

used to control seller's liabil-
situations in which seller can
Lecates v. Hertrich Pontiac
A.2d 163, 171. See e.g. War-

iew by uncovering; to expose;
re; to reveal to knowledge; to
prance, or make known. See

ng. Revelation; the imparta-
ret or not fully understood.
ication; the statement of the
tion, or the manner in which

vealing of certain financial
believed relevant to investors
ies in some venture; the re-
information be provided pro-
they can make an intelligent
See Prospectus.

Act "disclosure" is a term of
anner in which certain infor-
loan), deemed basic to an
credit transaction, shall be
15 U.S.C.A. § 1601 et seq.
Co. of Louisa, D.C.Va., 384
losure statement.

Compulsory disclosure; Dis-
ion Act; Full disclosure; Sub-

m sometimes used in law of
ligation of parties to reveal
its revelation is necessary
e parties to each other. See

Federal Truth in Lending
e charge, annual percentage
of periodic payments, and
disclosed in consumer loan
only done by means of a
companies or is made a
also Truth-in-Lending Act

deprive commonable lands
by inclosing and appropri-

wans/. Ending, causing to
up, leaving off. Refers to
ent of a project, structure.

The cessation of the proceedings in an action where
the plaintiff voluntarily puts an end to it, either by
giving notice in writing to the defendant before any step
has been taken in the action subsequent to the answer,
or at any other time by order of the court of a judge. A
non-suit; dismissal. Under Rules practice, "dismissal"
is appropriate term for discontinuance; may be volun-
tary or involuntary and may effect counterclaim, cross
claim or third party claim. Costs may be assessed.
Fed.R. Civil P. 41. See Dismissal.

In common law pleading, that technical interruption
of the proceedings in an action which follows where a
defendant does not answer the whole of the plaintiff's
declaration, and the plaintiff omits to take judgment for
the part unanswered.

Discontinuance of an estate. The termination or sus-
pension of an estate-tail, in consequence of the act of the
tenant in tail, in conveying a larger estate in the land
than he was by law entitled to do. 2 Bl.Comm. 275; 3
Bl.Comm. 171. An alienation made or suffered by ten-
ant in tail, or by any that, is seised in *autre droit*,
whereby the issue in tail, or the heir or successor, or
those in reversion or remainder, are driven to their
action, and cannot enter. The cesser of a seisin under
an estate, and the acquisition of a seisin under a new
and necessarily a wrongful title.

Disconvenable /diskənviynəbəl/. L. Fr. Improper; un-
fit.

Discount. In a general sense, an allowance or deduction
made from a gross sum on any account whatever. In a
more limited and technical sense, the taking of interest
in advance.

A deduction from an original price or debt, allowed for
paying promptly or in cash. Method of selling securities
(e.g., treasury bills) which are issued below face value
and redeemed at face value. Difference between a
bond's current market price and its face value. Reduc-
tion in normal selling price of goods.

The low initial interest rate lenders offer on adjusta-
ble-rate mortgages. It usually applies for one or two
years. After the discount period ends, the rate usually
increases, depending on the index used to determine the
interest rate.

To purchase an instrument or other right to the
payment of money, usually for an amount less than the
face amount or value of the right.

A discount by a bank means a drawback or deduction
made upon its advances or loans of money, upon nego-
tiable paper or other evidences of debt payable at a
future day, which are transferred to the bank. Al-
though the discounting of notes or bills, in its most
comprehensive sense, may mean lending money and
taking notes in payment, yet, in its more ordinary sense,
the discounting of such means advancing a considera-
tion for a bill or note, deducting or discounting the
interest which will accrue for the time the note has to
run. Discounting by a bank means lending money upon
a note, and deducting the interest or premium in ad-
vance. That step in lending transaction where interest

DISCOVERED PERIL DOCTRINE

on loan is taken in advance by deducting amount there-
for for term of loan, giving borrower face value of
obligation less interest. Russell v. Lumbermen's Mortg.
Co., Com.Pl., 27 Ohio Misc. 171, 273 N.E.2d 803, 804.

See also Rebate; Rediscount; Rediscount rate.

Quantity discount. Allowed manufacturers or wholesal-
ers for purchases in large amounts. Robinson Patman
Act requires that such be justified by savings of seller.

Trade discount. Price reduction to different classes of
customers; e.g. discount given by lumber dealers to
builders and contractors.

Discount bond. A bond sold for less than face or
maturity value. No interest is paid annually, but all
interest accrues to the maturity date when it is paid.

Discount broker. A bill broker; one who discounts bills
of exchange and promissory notes, and advances money
on securities. A securities broker that executes buy and
sell orders at rates lower than full service brokers.

Discount loan. A loan in which the bank deducts the
interest in advance at the time the loan is made.

Discount market. Segment of the money market in
which banks and other financial institutions trade com-
mercial paper.

Discount rate. Percentage of the face amount of com-
mercial paper which a holder pays when he transfers
such paper to a financial institution for cash or credit.
Rate charged for discounting loan. See Discount; Redis-
count rate.

The rate of interest used in the process of finding
present values (discounting).

The discount rate is the rate charged Federal Reserve
System member banks for borrowing from the country's
district Federal Reserve banks. The rate, which is set
by the Federal Reserve Board, controls the supply of
money available to banks for lending and provides a
floor for interest rates.

Discount shares. Shares of stock issued as fully paid
and nonassessable for less than the full lawful consider-
ation. Par value shares issued for cash less than par
value. Discount shares are considered a species of wat-
ered shares and may impose a liability on the recipient
equal to the difference between the par value and the
cash for which such shares were issued.

Discount stock. See Discount shares.

Discount yield. Yield on a security sold at a discount.

Discover. To uncover that which was hidden, concealed,
or unknown from every one. To get first sight or
knowledge of; to get knowledge of what has existed but
has not theretofore been known to the discoverer.
Shellmar Products Co. v. Allen-Qualley Co., C.C.A.Ill., 87
F.2d 104, 108. Under U.C.C., refers to knowledge rather
than reason to know. U.C.C. § 1-201(25). See also
Discovery; Notice.

Discovered peril doctrine. The doctrine of discovered
peril (or "last clear chance") is regarded as a limitation
of, or an exception to, the general rule of contributory

APPENDIX A-3

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Rights in general. The relinquishment of a right. It implies some act of relinquishment done by the owner without regard to any future possession by himself, or by any other person, but with an intention to abandon. See Waiver.

Trademarks and trade names. There must be not only nonuser, but also an intent to abandon and to give up use of trademarks permanently. *Neva-Wet Corporation of America v. Never Wet Processing Corporation*, 277 N.Y. 163, 13 N.E.2d 755, 761.

Water rights. As applied to water rights may be defined to be an intentional relinquishment of a known right. It is not based on a time element, and mere nonuser will not establish "abandonment" for any less time, at least, than statutory period, controlling element in "abandonment" being matter of intent. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894, 899. To desert or forsake right. The intent and an actual relinquishment must concur. Concurrence of relinquishment of possession, and intent not to resume it for beneficial use. Neither alone is sufficient. *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 62 P.2d 206, 211.

Abandun, abandum, or abandonum /əbændən(əm)/. Anything sequestered, proscribed, or abandoned. *Abandon, i. e., in bannum res missa*, a thing banned or denounced as forfeited or lost, whence to *abandon, desert, or forsake*, as lost and gone.

Ab ante /əb ɛnti/. Lat. Before; in advance. Thus, a legislature cannot agree *ab ante* to any modification or amendment to a law which a third person may make.

Ab antecedente /əb ɛntəsɪdɛnti/. Lat. Beforehand; in advance.

Ab antiquo /əb ɛntɪkwɔ/. From old times; from ancient time; of old; of an ancient date. 3 Bl.Comm. 95.

Abarnare /əbarnəri/. Lat. To discover and disclose to a magistrate any secret crime.

Ab assuetis non fit injuria /əb əswɪtəs non fit ɪnjʊriə/. From things to which one is accustomed (or in which there has been long acquiescence) no legal injury or wrong arises. If a person neglects to insist on his right, he is deemed to have abandoned it.

Abatable nuisance. A nuisance which is practically susceptible of being suppressed, or extinguished, or rendered harmless, and whose continued existence is not authorized under the law. *Fort Worth & Denver City Ry. Co. v. Muncy*, Tex.Civ.App., 31 S.W.2d 491, 494.

Abatementum /əbɛtəmɛntəm/. L. Lat. In old English law, an abatement of freehold; an entry upon lands by way of interposition between the death of the ancestor and the entry of the heir.

Abatare /əbətəri/. To abate.

Abate. To throw down, to beat down, destroy, quash. To do away with or nullify or lessen or diminish. In *re Stevens' Estate*, Cal.App., 150 P.2d 530, 534. To bring entirely down or demolish, to put an end to, to do away

with, to nullify, to make void, *Sparks Milling Co. v. Powell*, 283 Ky. 669, 143 S.W.2d 75, 77. See also *Abatement*; *Abatement of action*.

Abatement. A reduction, a decrease, or a diminution. The suspension or cessation, in whole or in part, of a continuing charge, such as rent.

Legacies. A proportional diminution or reduction of the pecuniary legacies, when the funds or assets out of which such legacies are payable are not sufficient to pay them in full. Uniform Probate Code, § 3-902. See *Ademption, infra*, as to specific legacies and devises.

Nuisance. See *Nuisance*.

Plea in abatement. See *Plea*.

Taxes. Diminution or decrease in the amount of tax imposed. Abatement of taxes relieves property of its share of the burdens of taxation after the assessment has been made and the tax levied. *Sheppard v. Hidalgo County*, 126 Tex. 550, 83 S.W.2d 649, 657.

Abatement of action. Abatement is an entire overthrow or destruction of the suit so that it is quashed and ended. *Carver v. State*, 217 Tenn. 482, 398 S.W.2d 719. See *Dismissal*; *Vacate*.

Pleas in abatement have been abolished by Fed.R. Civil P. 7(c); such being replaced by a motion to dismiss under Rule 41. In certain states however this plea still exists to attack jurisdiction, or service of process, or to allege that a prior action between the same parties concerning the same subject matter is pending.

Abator /əbɛtər/. In real property law, a stranger who, having no right of entry, contrives to get possession of an estate of freehold, to the prejudice of the heir or devisee, before the latter can enter, after the ancestor's death. In the law of torts, one who abates, prostrates, or destroys a nuisance.

Abatuda /əbətɪwɔdə/. Anything diminished. *Moneta abatuda* is money clipped or diminished in value.

Abavia /əbɛviə/. Lat. In the civil law, a great-great-grandmother.

Abavita /əbɛmɛtə/. A great-great-grandfather's sister. This is a misspelling for *abamita (q.v.)*.

Abavunculus /əbɛvɪŋkyləs/. Lat. In the civil law, a great-great-grandmother's brother (*avaviae frater*). Called *avunculus maximus*.

Abavus /əbɛvəs/. Lat. In the civil law, a great-great-grandfather.

Abbacinare /əbɛsənəri/. To blind by placing a burning basin or red-hot irons before the eyes. A form of punishment in the Middle Ages. Also spelled "abacinare." The modern Italian is spelled with two b's, and means to blind. *Abbacination.* Blinding by placing burning basin or red-hot irons before the eyes.

Abbacy /əbɛsi/. The government of a religious house, and the revenues thereof, subject to an abbot, as a bishopric is to a bishop. The rights and privileges of an abbot.

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I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate to the best of my knowledge.

DATED this 25 day of April, 2006.



SHELLY K. SPEIR, WSBA # 27979

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

RONALD L. and SHERRY A.
BEERS, husband and wife,

Plaintiffs/Appellants,

v.

DEANNA ROSS,

Defendant/Respondent.

APPEAL NO. 34123-9-II

CERTIFICATE OF SERVICE

Shelly K. Speir, on oath, hereby states and declares:

On April 19, 2006, I caused copies of the Brief of Respondent

Deanna Ross and this Certificate of Service to be filed with the Court and served via U.S. Mail on the following:

Alan Rasmussen
Attorney for Appellants
P.O. Box 118
144 S. 161st Street
Spanaway, WA 98387-0118

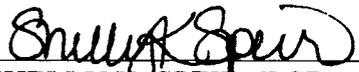
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I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate to the best of my knowledge.

DATED this 19 day of April, 2006.



SHELLY K. SPEIR, WSBA # 27979



**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

RONALD L. and SHERRY A.
BEERS, husband and wife,

Plaintiffs/Appellants,

v.

DEANNA ROSS,

Defendant/Respondent.

APPEAL NO. 34123-9-II

CERTIFICATE OF SERVICE

Shelly K. Speir, on oath, hereby states and declares:

On April 18, 2006, I caused copies of the Respondent's Motion to Strike Portions of the Appellants' Brief and this Certificate of Service to be filed with the Court and served via U.S. Mail on the following:

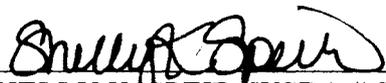
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SHELLY K. SPEIR, WSBA # 27979

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THE STATE OF WASHINGTON
DIVISION II

RONALD L. and SHERRY
BEERS, husband and wife,

Appellants,

v.

DEANNA ROSS, unmarried;
WASHINGTON STATE
HOUSING FINANCE
COMMISSION; THE
LEADER MORTGAGE CO.,
nka U.S. BANK HOME
MORTGAGE,

Appellee

No. 34123-9-II

JOINDER OF U.S. BANK,
HOME MORTGAGE IN
RESPONDENT'S BRIEF
FILED BY DEANNA
ROSS

print w/ resp. Brief

U.S. Bank Home Mortgage hereby files a joinder in the
Brief of Respondent Deanna Ross.

DATED this 10th day of May, 2006.

PRESTON GATES & ELLIS LLP

By 

David C. Neu, WSBA # 33143
Attorneys for Respondent
U.S. Bank Home Mortgage

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BY 

CERTIFICATE OF SERVICE

The undersigned, declares as follows:

1. I am a citizen of the United States, over the age of 21 years, and I am not a party to the above-entitled action. I am competent to be a witness.

2. On May 10, 2006, I caused to be served on the following parties, by depositing into the U.S. mail, first-class, postage prepaid, an envelope containing the following document:

**JOINDER OF U.S. BANK, HOME
MORTGAGE IN RESPONDENT'S
BRIEF FILED BY DEANNA ROSS**

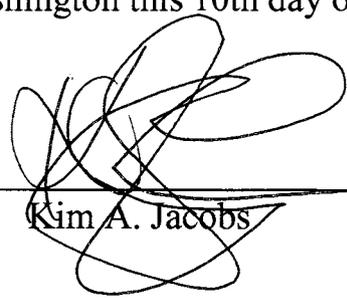
Alan Neil Rasmussen
Attorney at Law
PO Box 118
Spanaway, WA 98387

Shelly K. Speir
Troup Christnacht Ladenberg
6602 19th Street W.
Tacoma, WA 98466-6193

I declare under penalty of perjury according to the laws of the State of Washington that the above statements are true and correct.

DATED at Seattle, Washington this 10th day of May, 2006.

By _____


Kim A. Jacobs

JUDGE



COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

RONALD L. and SHERRY
BEERS, husband and wife,

Appellants,

v.

DEANNA ROSS, unmarried;
WASHINGTON STATE
HOUSING FINANCE
COMMISSION; THE
LEADER MORTGAGE CO.,
nka U.S. BANK HOME
MORTGAGE,

Appellees/Respondents.

No. 34123-9-II

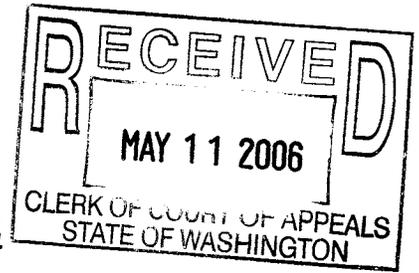
JOINDER OF U.S. BANK,
HOME MORTGAGE IN
RESPONDENT'S BRIEF
FILED BY DEANNA
ROSS

U.S. Bank Home Mortgage hereby files a joinder in the
Brief of Respondent Deanna Ross.

DATED this 10th day of May, 2006.

PRESTON GATES & ELLIS LLP

By 
David C. Neu, WSBA # 33143
Attorneys for Respondent
U.S. Bank Home Mortgage



CERTIFICATE OF SERVICE

The undersigned, declares as follows:

1. I am a citizen of the United States, over the age of 21 years, and I am not a party to the above-entitled action. I am competent to be a witness.

2. On May 10, 2006, I caused to be served on the following parties, by depositing into the U.S. mail, first-class, postage prepaid, an envelope containing the following document:

JOINDER OF U.S. BANK, HOME MORTGAGE IN RESPONDENT'S BRIEF FILED BY DEANNA ROSS

Alan Neil Rasmussen
Attorney at Law
PO Box 118
Spanaway, WA 98387

Shelly K. Speir
Troup Christnacht Ladenberg
6602 19th Street W.
Tacoma, WA 98466-6193

I declare under penalty of perjury according to the laws of the State of Washington that the above statements are true and correct.

DATED at Seattle, Washington this 10th day of May, 2006.

By _____

Kim A. Jacobs