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DIVISION II

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STATE OF WASHINGTON
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NO. 37356-4-II

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

JOHN AND GEORGIA HUBER husband and wife,

Appellants

vs.

ANN C. and JOHN DOE SOUTHARD,

Respondents

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred in ruling at trial that Hubers failed to lay an adequate foundation for the introduction of the testimony about construction costs estimates of Hubers' Expert Ryan Moore, a licensed engineer, and excluding his testimony.
- B. The trial court erred in ruling that the excavation work that was done on Hubers' property was within the scope of Southland's easement rights.
 - a. The trial court erred in treating the 11.63 foot driveway curb cut as a recorded grant of easement instead of a prescriptive easement (if it was an easement at all).
 - b. The trial erred in grossly expanding the scope of the prescriptive easement (if it was an easement at all) for ingress and egress to include major excavating and grading on Hubers' property outside the area of historical use.
 - c. The trial court erred in failing to award damages to the Hubers and by only requiring the Southards to remove a trespassing decorative wall.
- C. The trial court incorrectly ruled that there was substantial evidence to support the following finding of facts:
 - a. Finding of Fact #1: Although "vague", easement rights were specifically identified adequate to put Huber on notice that Lot 20 and 22 owners could use Huber's property for reasonable ingress and egress.

- b. Finding of Fact #2: That Southard had the benefit of an ingress and egress easement over lot 21. No evidence was presented of any easement of Hubers for use of lot 22. There is no easement burdening lot 22 for the benefit of lot 21.
 - c. Finding of Fact #3: The excavation done was for the purpose of improving ingress and egress access to the real property. That portion of the excavation which encroached onto Lot 21 was a reasonable use within the terms of the easement over Plaintiff's real property.
 - d. Finding of Fact #4: Two winters and a severe storm have occurred since Defendant's excavation and there was no evidence presented of damage or problems with erosion or wasting of soil off the cut bank on Lot 21.
 - e. Finding of Fact #6: The low wall does not unreasonably block access to Plaintiff, Hubers' Lot 21.
 - f. Finding of Fact #7: Plaintiff's failed to lay an adequate foundation for introduction of engineering testimony or reports.
- D. The trial court incorrectly ruled as a matter of law on the following conclusions of law:
- a. Conclusion of Law #2: That in excavating and re-aligning the driveway including work on Plaintiff's Lot 21, the Defendant, Ann C. Southard, acted

within the scope of her easement rights.

- b. Conclusion of Law #3: No trespass occurred in excavating or work on the driveway.

II. STATEMENT OF FACTS

Appellants John and Georgia Huber and Respondent Ann C. Southard are adjoining landowners. The Hubers are co-owners of Lot 21 of Hillmont Terrace in Montesano, Washington. CP 21. The Hubers purchased the lot on December 29, 1995 from Earl Kiel. CP 21. Earl Kiel purchased the property from G.R. and Patricia Stephenson and Charles and Linda Caldwell on May 19, 1987. CP 25. Southard owns Lot 22 of Hillmont Terrace in Montesano, Washington. CP 21. Southard purchased the lot from Wayne and Patricia Kennedy on June 22, 2002. CP. 25.

Huber's deed recorded on January 11, 1996 contains language "Subject to: covenants, conditions, and restrictions of record: Also, rights of the public to make all necessary slopes; **unrecorded easement rights for ingress and egress to the**

adjacent owners at Lot 20 and Lot 22.” CP 21.

A small portion of a driveway serving Southard’s lot and a 11.63 foot driveway curb cut were located on Hubers’ property. 9.26 feet of the curb cut was located on the Southard’s property. The driveway encroachment on the Hubers’ property was a pie shaped piece that extended from the curb cut back 36.17 feet long, and narrowed out to zero. RP 54. The original driveway which started from the curb cut wrapped around the back of the Southard’s house on the Southard’s property, but this portion of Southard’s property is not at issue RP 3. Southard and Hubers shared the curb cut and driveway for access to both their properties. RP 3. The Huber’s believed that they had an easement across the Southard’s property, at least to the extent of the curb cut and existing driveway. RP 59.

Without Hubers’ permission, Southard cut a new driveway. RP 83. Ms. Southard testified that when she purchased her home there was an eleven foot wide encroachment by the curb cut on the

Hubers' property which remains today, and is the same encroachment that shows up on the survey Exhibit 8. PR 85. Ms. Southard testified that she did not move or reshape the pie-shaped portion of the driveway that historically encroached on the Hubers' property but built a new driveway on her property that required her to remove 500 cubic yards of bank on Huber's property. PR 85.

After Southard bought lot 22, Southard began major excavation and grading along and across the common boundary with lot 21 without the permission of the Hubers. RP 50. This work included digging into a bank located on the Huber's property and cutting out the toe of the slope in order to construct a two-story garage. CP 3. Ms. Southard testified at trial that there was excavation beyond the garage and into the hillside onto Lot 21. RP 87. Southard constructed a fence/retaining wall in the cut on the front portion of lot 21, Hubers' lot, denying the Hubers access to their property. RP 50.

The excavation caused land slides and local destabilization

of the Hubers' property subjecting the lot to more erosion. RP 31-32. By digging into the bank located on Hubers' property and cutting out the toe of the slope, Southard violated building codes. Southard did not have permission to cut on the Hubers' property. Southard had no permit for grading. The slope was too steep to make a cut without engineering, and violates the building code. RP 31-33. According to David C. Strong, Hubers' geotechnical expert, there are two options to re-stabilize the slope. RP 33. The first method is to put the dirt back, and regrade it back to how the bank existed prior to the excavation. RP 33. At trial, Mr. Strong estimated that it would cost approximately \$20,000.00 to bring in dirt to stabilize the slope. RP 41. Another option is to construct a retaining wall along the property line matching the previously existing natural grade. RP 33. At trial Mr. Strong estimated that it would cost \$100,000.00 to build a retaining wall. RP 41.

The Huber's filed suit alleging trespass. CP 2. Southard counterclaimed alleging that she had a legal right to utilize the

Huber's real property for certain purposes. CP 14.

On January 2, 2007, there was a one day bench trial.

Huber's hired David C. Strong, an engineering geologist, to perform field observations, discuss code requirements for grading, and make recommendations, and cost estimates to restore the useful building area to Huber's lot. CP 3. Mr. Strong is a Washington licensed engineering geologist. RP 28. Mr. Strong provides geological assessments of properties and has been providing such assessments for over 30 years. RP 28. Mr. Strong observed the property in January of 2006, was given a site plan, was shown the survey of the Huber's property, the approximate top of the present cut slope and was given a general plat of the area. RP 29.

Mr. Strong went on to testify that the top of the cut slope had extended onto the Huber's property. RP 30. Mr. Strong also testified that there was a mass wasting event and he could see a mud line on the Southard garage. RP 31. Mr. Strong further testified the cut exceeded the maximum legal cut slope of two to one (26

degrees) according to the building code and was mainly on the Hubers' property without some type of agreement. RP 32. The cut slope on Hubers' property is 50 degrees. RP 39. Mr. Strong estimated that in excess of 500 cubic yards of dirt had been removed from Hubers' property. RP 33. Mr. Strong said there were two ways to repair the injury to Hubers' land: (1) replace the soil; (2) build a retaining wall. RP 33. Finally, Ms. Strong estimated costs over \$20,000.00 to replace the dirt removed by Southard, and over \$100,000.00 to build a retaining wall. PR 41.

Hubers' second expert was Ryan Moore, an engineer with eight years experience. He also performed a site inspection of lot 21 to determine construction costs for revetment of the cut area. RP 65. Mr. Moore recommended the same two options as Dave Strong. One option was to build a retaining wall and the second option was replacing the soil that had been removed from Hubers' property. Mr. Moore suggested two alternate types of two retaining walls, a soldier pile retaining wall and a cantilever retaining wall. RP 66.

Mr. Stewart objected to Mr. Moore's testimony and report because Mr. Moore did not have a site survey to precisely locate the toe of the slope in relation to the property line, and therefore could not give a precise repair cost estimate. Mr. Moore "was only to provide estimates for construction techniques to replace the wall or to aide in from Dave's report, or Mr. Strong's report." Mr. Stewart's objection was sustained. RP. 67-68.

Mr. Moore further testified on direct examination that based upon his conversation with Dave Strong and information received from Dave Strong, that Moore could develop construction estimates. Defendant objected and the Court sustained. RP 69-70

He went to describe his site visit and to state that based upon the information he had from Strong and the site visit, he could develop an estimate. Respondent objected to foundation. Since Moore didn't have the exact location of the boundary the court sustained the objection. RP 70-74.

Moore then said he didn't need a survey and that it was

common engineering practice to develop construction estimates with the information he had. RP 72-74.

The trial court incorrectly assumed that Mr. Moore couldn't testify whether the repairs were being performed to fix damages on Southard's property or the Hubers' property, which is incorrect. Dave Strong had already testified that 500 cubic yards of dirt had been removed from Hubers' lot 21, and the excavation had left an illegal, excessively steep and unstable slope and blocked Hubers' access to their own lot. Mr. Moore's opinion was not dependant on knowing where the Huber/Southards boundary line was located. RP 71.

- 6 Q So this common engineers estimate is
7 professionally
accepted in engineering circles?
8 A Yes. It's -- correct.

RP 72.

Mr. Dysart laid a proper foundation for Mr. Moore to testify as to the construction options and to provide engineer's estimates as to the costs of repairing the damage to the Hubers' property from

the excavations. RP 74-76.

2 Q All right. And, given that distinction, um, the
3 estimates that you have made in your preliminary survey
4 of the project would be accepted as valid engineering
5 estimates less the more advanced topographical survey,
6 which usually would not be prepared unless the actual
7 construction was being proposed on the property?

8 A These type of estimates would be used if the person was
9 shopping for a contractor prior to choosing their exact
10 construction technique that type thing is what she is
11 would be used nor.

12 MR. DYSART: Your Honor, I would move to
13 admit the -- Mr. Moore's estimates based on his
14 testimony, the foundation there.

RP 78.

After the vior dire of the witness by Respondent's counsel
the trial court still sustained Ms. Stewarts objection. RP 79.

On cross-examination, Mr. Moore again testified that he
could provide estimates for construction costs without a survey. RP
80-81. Trial Court ignored the fact that expert witness Dave Strong
had already established off of Exhibit 8, the survey, that the illegal
slope excavated by Southard was on the Hubers' property. RP 30.
Moore did not need to testify about that.

Ms. Southard testified there was excavation beyond the garage and into Hubers' hillside onto lot 21. RP 87 and 93. Ms. Southard also testified that the wood retaining wall was constructed on Hubers' property. RP 87. Ms. Southard offered to remove the retaining wall. RP 87. Ms. Southard testified that the excavation was done prior to the garage being constructed. RP 90. Further, Ms. Southard testified that she only obtained a permit for the construction of the garage and not for the excavation of the hillside. RP 91. On Cross-examination, Ms. Southard admitted that she did the excavation prior to constructing the garage. RP 98.

In closing arguments, Mr. Dyart stated "I don't think that under any easement theory that Miss Southard would be justified in removing 500 yard of soil from my client's property." RP 117 ". . . but was instead relying upon the fact that she had walked out what she thought was the boundary line." RP 118

In Mr. Stewart's closing arguments, he acknowledges that there had been a trespass. RP 120. Stewart basically acknowledges

that the “unrecorded easement” in Hubers’ deed was most likely created to reflect the curb cut that overlapped the boundary and nothing more. RP 120.

5 THE COURT: Do you believe that this pie
6 shaped the piece of the driveway is within the area of
7 the easement that you contend is created by the deed
8 from Keel to Huber?

9 MR. STEWART: Yes. And I believe it's also
10 the same deed from Stevenson and Caldwell to Keel that
11 came down through. It appears to me and I am merely
12 speculating, they went in developed the whole thing.
13 Put in aprons to the lots. When they got done, they
14 said, oops, we have got an apron that's kind of on both
15 sides, we better put some language in there they will
16 share a driveway, or at least they will share the apron
17 on to the road. And that appears to be what has
18 happened, what happened over the years.

RP 125.

Mr. Stewart told the court that Ms. Southard had a permit to excavate on the Hubers’ property which is false. RP 128. Ms.

Southard only had a permit to construct the garage. RP 58.

Also, in his closing argument Mr. Stewart stated that he didn’t believe there had been a legal wrong. RP 121. He stated “we

believe the work done inadvertently onto my client's neighbor's property was well within the easement." RP 120. That is not correct. RP 120. The excavation of Hubers' hillside was outside the scope of any easement Southard had by prescription (she had none by grant).

Despite hearing the testimony at trial, the trial court ruled that the excavation was a reasonable use of Southard's easement rights and that Huber's failed to lay an adequate foundation for Mr. Moore. CP 28 and 29.

IV. ARGUMENT

A. The Court of Appeals Reviews the Trial Court's Failure to Admit Expert Testimony For Abuse of Discretion.

When reviewing a Trial Court's decision to admit expert testimony, the Court of Appeals reviews the Trial Court's decision for abuse of discretion. State v. Nation, 110 Wash.App. 651, 660 (2002) citing State v. Stenson, 132 Wash.2d 668, 715, 940 P.2d 1239 (1997). "A court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary." State

v. Nation, 110 Wash.App. 651, 660 (2002) citing State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

B. There Was a Proper Foundation Laid For The Introduction of Testimony From Hubers' Expert David Strong.

The trial court erred in ruling that Hubers failed to lay a proper foundation for the introduction of testimony from Hubers' expert Mr. Moore in regards to construction estimates. According to Washington Rule of Evidence 703,

the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inference upon the subject, the facts or data need not be admissible in evidence.

Washington case law allows for the trial court to admit expert testimony when certain requirements of ER 703 are met. In Nation v. State, 110 Wn.2d 651, 662, 41 P.3d 1204 (2002), the court laid out the framework for admitting

expert testimony under ER 703.

First the judge should find that the underlying data are of a kind reasonably relied upon by experts in the particular field in reaching conclusions. And second, since the rule is concerned with trustworthiness of the resulting opinion, the judge should not allow the opinion if (1) the expert can show only that he customarily relies upon such material, and (2) the data are relied upon only in preparing for litigation. Thus, as stated in the Comment to ER 703, the expert must establish that he as well as others would act upon the information for purposes other than testifying in a lawsuit. Nation v. State, supra.

Here, the trial court abused its discretion in excluding the testimony of Mr. Moore for lack of foundation. Mr. Moore testified that it is a common practice for engineers to provide estimated construction costs with a site visit and the information he received from Dave Strong. RP 72. Moore further stated that to provide construction estimates he did not need to know the exact location of the Southward/Huber boundary line, making a survey unnecessary. RP 71. Also, even if the exact boundary line was needed, Strong had

already testified that the excavation was on the Hubers' property and not Southard, according to the survey. It was manifestly unreasonable or arbitrary for the trial court to exclude Mr. Moore's testimony and the trial court erred in excluding it because it's common engineering practice to provide construction estimates without a survey, based upon the information Mr. Strong had.

C. The Trial Court Erred In Finding That Excavation of The Driveway Was Within The Scope of the Easement.

a. There was no recorded easement.

According to RCW 64.04.020, "every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by *this act to take acknowledgments of deeds." RCW 64.04.020. An easement is an interest in land that is subject to the requirements of RCW 64.04.020. Beebe v. Swerda, 58 Wash.App. 375, 379 (1990).

Here, there was no recorded easement. None of the requirements of RCW 64.04.020 were met. **The “easement” was not signed by the grantor, the Hubers’ or their predecessors. Further, the easement was not in writing.** Therefore, because the requirements of RCW 64.04.020 were not fulfilled, Southard did not have a written easement and no such easement exists between the Hubers and Ms. Southard or their lots. The trial court erred in finding that Ms. Southard had an easement that allowed her to excavate 500 yards of her neighbor’s property without permission to build a garage and a driveway.

b. If an Easement Does Exist, It Is an Easement by Prescription Only.

If an easement does exist between the Hubers and Ms. Southard, it is an easement by prescription and not a written easement. “The burden of proving the existence of a prescriptive right always rests upon the one who is to benefit

from its establishment. This burden of proof never shifts. An easement by prescription must be established by the facts.”

Anderson v. Secret Harbor Farms, 47 Wn.2d 490, 493, 288 P.2d 252 (1955).

Here, the burden of proof is on Southard to prove that a prescriptive easement exists. She failed to do so.

“In order to obtain a prescriptive easement, a claimant must prove the following elements: (1) use adverse to 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 Wash.2d 20, 22 (1980). The period required to establish a prescriptive easement is 10 years. RCW 4.16.020.

The court could not determine that a prescriptive easement existed at all on this record, let alone in allowing 500 yards of new excavation onto the Hubers’ lot. The only

prescriptive easement that could possibly exist would be limited to the pie-shaped portion of the driveway that historically encroached on the Hubers' property and not the portion of Hubers's property where Ms. Southard excavated for her garage and driveway. Southard's driveway never extended to the portion of Hubers' lot where the excavation took place. Southard exceeded the scope of any possible prescriptive easement by excavating in to Hubers' hillside.

The trial court erred in concluding that the 500 yards of excavation which encroached onto the Hubers' lot was a reasonable use of the unrecorded easement, which had no terms, and could only be prescriptive, and was not proved.

c. The Trial Court Erred In Not Narrowly Construing The Easement by Prescription.

The trial court erred in holding that the portion of the excavation which encroached onto the Hubers' property was a reasonable use within the terms of an easement. There was no

written easement granted. According to Northwest Cities Gas Co. v. Western Fuel Co., the scope of a prescriptive easement is determined by the nature and use during the prescriptive period. Northwest Cities Gas Co. v. Western Fuel Co., 13 Wash.2d 75, 92-94.

Here, the trial court erred in determining that the 500 yards excavated from the Hubers' property was within the scope of any easement, prescriptive or by grant. The excavation was done in an area never before subject to any adverse prescriptive use. The scope of any possible prescriptive easement was the small pie shaped piece that encroached on the Hubers' property and did not include the excavated portion of the lot. The pie shaped portion was the only portion of the Hubers' lot that was ever used by Southard during the prescriptive period. The trial court erred in finding one, and in grossly expanding the scope of any such easement to include the excavation work on Hubers' property.

D. The Trial Court Erred In Awarding Inadequate Damages to the Huber's By Only Requiring Southard to Remove a Trespassing Decorative Wall.

Clearly a trespass has occurred onto Hubers' property. Even Southard's attorney admits in his closing that a trespass has occurred. The trial court erred in not awarding damages according to the two options recommended by Hubers' expert Dave Strong. The first option is to put the dirt back, and regrade it back to how the bank existed prior to the excavation. At trial, Mr. Strong estimated that it would cost approximately \$20,000.00 to bring in the dirt to stabilize the slope. Another option is to construct a retaining wall along the property line matching the existing natural grade. At trial Mr. Strong estimated that you could expend \$100,000.00 to build a retaining wall. Southard's excavation work has clearly exceeded the scope of any prescriptive easement she might have (not proved) and Hubers should be awarded damages for such trespass. Courts regularly

award damages for trespass (even if nominal damages). Bradley v. American Smelting and Refining Company, 104 Wash. 677, 689, 709 P.2d 782 (1985). Here damages should be at least \$20,000.00.

E. The Trial Court Incorrectly Found The Following Facts

The Court of Appeals reviews a trial court's decision to determine whether findings are supported by substantial evidence. Dorsey v. King County, 51 Wn.App. 664, 668-669, 754 P.2d 1255 (1988). Findings of facts are considered verities on appeals as long as they are supported by substantial evidence on the record. In re Marriage of Thomas, 63 Wn.App. 658, 660, 821 P.2d 1277 (1991). "Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true." Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

"The fact that a court designates its determination was a "finding" does not make it so if it is in reality a conclusion of law.

Under Washington practice, a conclusion of law mislabeled as a finding, will be treated as a conclusion of law.” Moulden & Sons, Inc v. Osaka Landscaping & Nursery, Inc, 21 Wash.App. 194, 197, 584 P.2d 968 (1978).

Finding of fact #1 is as follows: “Although “vague”, easement rights were specifically identified adequate to put Huber on notice that Lot 20 and 22 owners could use the Huber’s property for reasonable ingress and egress.” Here, this finding of fact is a conclusion of law and not a finding of fact. The trial court incorrectly stated that it was a finding of fact.

Further, the trial court unlawfully expanded any easement that existed to include excavating 500 yards of dirt from Hubers’ lot. This was not a reasonable use of any easement that existed. The scope of the easement is determined by the nature and use during the prescriptive period. Northwest Cities Gas Co. v. Western Fuel Co., 13 Wash.2d 75, 92-94, 123 P.2d 771 (1942). The scope of any prescriptive easement was at most the small pie shaped piece that

encroached on the Hubers' property and did not include the excavated portion of the lot.

Finding of fact #2 is as follows: That Southard had the "benefit of ingress and egress easement over lot 21. No evidence was presented of any easement to Hubers for use of lot 22. There is no easement burdening lot 22 for the benefit of lot 21." Here, there is no evidence that Southard had an easement for ingress and egress over Lot 21 except for the use of the small pie shaped piece of Hubers' property starting at the curb cut. There was no evidence of a grant of an easement. There was inadequate evidence for a prescriptive easement.

Finding of fact #3 is as follows: "The excavation was done for the purpose of improving ingress and egress access to the real property. That portion of the excavation which encroached onto Lot 21 was a reasonable use within the terms of the easement over the Plaintiff's real property." Here, there is no evidence supported by the record that an easement on Hubers' lot had ever been granted to

Southard's lot, nor was there evidence of the scope of any such easement except one by prescription. There is no evidence the excavation was a reasonable use of any easement of record or by prescription. Again, Southard had at most a prescriptive easement that historically encroached on the Hubers' property at the curb cut, and not the portion of Hubers's property where Ms. Southard excavated for her garage and driveway. RP 54. Southard's historical encroachment on Hubers' lot never extended to the portion of Hubers' lot where the excavation took place. Southard exceeded the scope of any possible prescriptive easement by excavating in to Hubers' hillside.

Finding of fact #4 is as follows: "Two winters and a severe storm have occurred since Defendant's excavation and there was no evidence presented of damage or problems with erosion or wasting of soil off the cut bank on Lot 21." Here, there is evidence to support that the soil came off the cut bank of lot 21. Ms. Southard testified that the soil came from Hubers' property, lot 21. RP 95.

Also, Strong testified that the grading caused the local destabilization of lot 21 subjecting it to more erosion. RP 32. Further, Strong testified that lot 21, Hubers' lot contributed to the earth movement. RP 35.

Finding of fact #6 is as follows: "The low wall does not unreasonably block access to Plaintiff, Hubers Lot 21." Here, there is no evidence to support this finding of fact. Both Mr. and Mrs. Huber testified that their access was blocked to property because of the wall and fence that was installed by Southard. RP 16, 50, and 51.

Finding of fact #7 is as follows: "Plaintiff's failed to lay an adequate foundation for introduction of engineering testimony or reports." This is contrary to the evidence a proper foundation was laid for the introduction of the testimony about construction costs estimates by Hubers' Expert Ryan Moore because it's common engineering practice to provide construction cost estimates without a survey. RP 80 and 81.

V. CONCLUSION

The trial court erred in ruling that Hubers failed to lay an adequate foundation for the introduction of the testimony by Ryan Moore about construction cost estimates. There was certainly an adequate foundation laid without a survey.

The trial court erred in ruling that the excavation work that was conducted on Hubers' property was within the scope of any easement held by Southard. Southard had at most a prescriptive easement, although that was not adequately proved. The 11.63 foot driveway curb cut was not a recorded grant of easement. It may be a prescriptive easement but that was not proved. The trial erred in ruling that Southard had an prescriptive easement that allowed major excavation and grading on the Hubers' property.

Lastly, the trial court erred in awarding inadequate damages. The court should reverse the decision below, find a trespass against Southard, and remand for the trial court to determine damages to be awarded to Hubers within the range of the evidence (\$20,000.00-

\$100,000.00). Alternatively, this Court should reverse and remand for a new trial.

\$100,000.00). Alternatively, this Court should reverse and remand
for a new trial.

Respectfully Submitted this 23rd day of July, 2008.

CUSHMAN LAW OFFICES, P.S.

A handwritten signature in black ink, appearing to read 'JEC', written over a horizontal line.

Jon E. Cushman, WSBA #16547
Ryan W. Gunn, WSBA #39312

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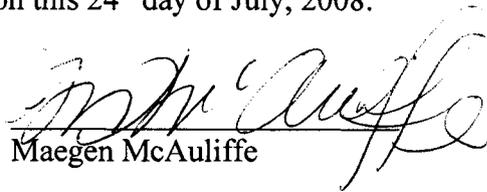
Maegen McAuliffe certifies and declares as follows:

STATE OF WASHINGTON
BY Maegen McAuliffe
DEPUTY

1. I am a Paralegal at Cushman Law Offices, P.S. I am over the age of 18, and not a party to this action.
2. That on July 24, 2008, I sent via U.S. Mail, first class postage prepaid, a true and correct copy of the Appellant's Opening Brief to the following attorney for Respondents Southards:

Charles K. Wiggins
Wiggins & Masters, PLLC
241 Madison Avenue North
Bainbridge Island, WA 98110
3. That On July 24, 2008, I sent via facsimile, 206-842-6356, the above documents to Charles K. Wiggins, attorney for Southards..

Dated at Olympia, Washington this 24th day of July, 2008.


Maegen McAuliffe