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STATE OF WASHINGTON

BY _____
DEPUTY

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

DIANE DUMOND and GREG DUMOND,
single individuals,
Appellants,

v.

VIETNAMESE BAPTIST CHURCH OF TACOMA, INC., a Washington
Corporation; and CHARLES L. KELLY, JR. and JANE DOE KELLY,
as a Marital Community,
Respondents.

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

A. STANDARD OF REVIEW.

On review, a prescriptive easement involves mixed questions of law and fact. *Erickson v. Chase*, 156 Wn. App. 151, 160 (2010) (citing *Lee v. Lozier*, 88 Wn. App. 176, 181, 945 P.2d 214 (1997)). Findings of fact are reviewed for substantial evidence. *Lee*, 88 Wn. App. at 181. The question of whether those findings of fact establish a prescriptive easement is reviewed de novo. *Id.*

Unchallenged factual findings are deemed verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). In that event, the reviewing court determines whether the conclusions of law are supported by the findings of fact. *Id.*

B. RESPONDENTS' USE OF THE ALLEY WAS HOSTILE.

1. UNCHALLENGED USE FOR THE PRESCRIPTIVE PERIOD CAN SUPPORT EITHER HOSTILE OR PERMISSIVE USE.

Respondents' claim of permissive use improperly rests on a broad factual contention: that the use during the prescriptive period was not challenged. At trial, the Respondents presented no specific evidence whatsoever of any facts supporting alleged permissive use. On appeal, the Respondents cite no specific

evidence from the trial record supporting the alleged permissive use. Despite this lack of any specific evidence of permissive use in the record (*e.g.*, no conversations regarding permission, no specific acts indicating acquiescence), Respondents couch their argument in language of “inference.”

Respondents state that “permissive use is inferred where a property owner allows shared use of an existing right of way.” *See* Br. of Respondents at 14. But such an inference is permissible *only* when there are specific facts or circumstances supporting the inference; otherwise, calling the use permissive simply because it is unchallenged imposes an inappropriate presumption of permissive use. *Cf. Kunkel v. Fisher*, 106 Wn. App. 599, 23 P.3d 1128 (2001) (denying a request for prescriptive easement) as limited by *Drake v. Smersh*, 122 Wn. App. 147, 89 P.3d 726 (2004) (granting a request for a prescriptive easement). *Kunkel* and *Fisher* together clearly require other facts and circumstances beyond mere unchallenged use to infer permissive use under the neighborly accommodation doctrine.

Drake (decided in 2004) discussed *Kunkel* (decided in 2001) and criticized the presumption of permissive use when based solely upon unchallenged use for the prescriptive period.

[W]e recognize on reflection that our analysis in *Kunkel* extended the *implication* of permissive use by neighborly accommodation too far when we applied a *presumption* of permissive use.

Drake, 122 Wn. App. at 153-54 (italics original).

Drake justified the *Kunkel* result by distinguishing the cases factually, noting in *Kunkel* there was

[S]ignificant evidence in the record that **Kunkel discussed using the easement with the Fisher's predecessor in interest who gave him permission** to drive over the property. Even Kunkel testified that his neighbors were very accommodating to him about the use. Based on this evidence, it was clear that Fisher's predecessor permitted Kunkel's use or, at a minimum, acquiesced in it.

Drake, 122 Wn. App. at 152-53 (emphasis added).

Here, other than mere unchallenged use, there are no facts whatsoever in the record that support an inference of permissive use. Despite the language in their appellate brief to the contrary, the record is devoid of any facts that would support an inference

or permissive use. At trial, Respondents actually relied on a *presumption* of permissive use, not an *inference*.¹

This lack of any facts that would support a presumption (or inference as couched by Respondents) of permissive use is fatal to their argument. *As stated above, unchallenged use for the prescriptive period can support a finding of either adverse or permissive use.* Respondents repeatedly cite *Cullier v. Coffin*, 57 Wn.2d 624, 358 P.2d 958 (1961) in support of their position. But even *Cullier*, one of the cases principally relied upon by the Respondents, specifically acknowledges that unchallenged use alone can support either adverse or permissive use. *Cf. Cullier*, 57 Wn.2d at 627 (“[U]nchallenged use for the prescriptive period is a circumstance from which an inference may be drawn that the use was adverse.”) and, on the other hand, *Cullier*, 57 Wn.2d at 626 (“The fact that no permission was expressly asked, and that no permission was expressly given, does not preclude a use from being permissive under the circumstances of this case.”).

¹ In Respondents’ closing argument at trial Respondents’ attorney argued: “The use is **presumed** to be permissive, without evidence of the hostile element of the prescriptive acquisition because prescriptive acquisition is disfavored.” 2 RP 249. *See also*, 2 RP 257 (closing argument “[The law] also, as we have gone over in great length, **assumes** that use is permissive unless there is an affirmative act of some party...”) and in Respondents’ motion for summary judgment “Washington courts apply a **presumption** of permissive use ... [t]o avoid this **presumption** the claimant must ...”) CP 37-38 (emphasis added).

Hence, neither a party seeking nor a party opposing a prescriptive easement can rely merely upon “unchallenged use” for the determination of whether the use was adverse or permissive. The court can and should consider whether the use was challenged, but the ultimate determination of whether the use was adverse or permissive must rest upon the other facts and circumstances existing in the particular case.

In this case, other than the fact it was unchallenged, there was no evidence of permissive use adduced at trial. There is no evidence of a single conversation regarding permissive use of the property at issue having ever occurred. During the prescriptive period, there is no evidence whatsoever of a single specific act of accommodation or acquiescence (*e.g.*, putting up a fence indicating the owners right to block the driveway but with a gate permitting access at the owners option). There is no evidence of a familial or close personal relationship from which permissive use might be inferred. The only evidence Respondents rely upon is the broad and unsupported fact that the use was unchallenged for the prescriptive period. Respondents then, in language couched as “inference” in their appellate brief, improperly ask the Court to

affirm what is actually a presumption of permissive use from this otherwise unsupported fact.

2. THE UNDISPUTED FACTS AND CIRCUMSTANCES SUPPORT THE HOSTILE NATURE OF THE APPELLANTS' UNCHALLENGED USE.

Since unchallenged use can imply either hostile or permissive use, the court must also consider the other facts and circumstances of the individual case. In this case Respondents have not cited a single instance of a fact or circumstance that would support an inference of permissive use. In contrast, the record at trial supports the inference that the unchallenged period was hostile because: (A) the Dumonds took specific actions demonstrating a clear intent to impose a separate servitude, and (B) the mistaken belief the Alley was a public right of way explains why, despite the Dumonds' specifically hostile acts, there were never any confrontations with any affected property owners for so many years.

3. THE UNCHALLENGED USE WAS HOSTILE BECAUSE THE DUMONDS TOOK SPECIFIC ACTIONS TREATING THE ALLEY AS THEIR OWN

Respondents argue *Drake v. Smersh*, 122 Wn. App. 147, 89 P.3d 726 (2004) is distinguishable from this case. Respondent's argument is unpersuasive. *Drake* is precisely on point.

In *Drake*, the court found permissive use, or neighborly accommodation, did *not* apply even though the use was unchallenged and the use did not harm the servient estate because

[T]he driveway was the only existing access to the property, and it was located on the [servient] lot. There is no evidence that [dominant estate owner] asked for permission or received express consent either to use the driveway or to extend it onto his own property with a bulldozer. In addition, the record shows no relationship between [dominant estate owner] and the [servient estate owner] from which one could infer permissive use. Nor does it show any circumstance that suggests neighborly sufferance or acquiescence.

Drake, 122 Wn. App. at 154.

Those facts, which prevented application of the neighborly accommodation doctrine and supported adverse use in the *Drake* case, are almost identical to the facts in this case. The Alley behind the Dumond house is the only access for the rear facing garages. 1 RP 21, 25-26. The Dumond family did not ever ask for or receive permission to use the Alley. 1 RP 37-38; 1 RP 92. In 1959, the

Dumonds tore down the old house and built a new house. All construction materials for building the new house were delivered through the Alley. 1 RP 20; CP 95. *The Dumonds also constructed a driveway extending from the Alley to their new rear facing garage.* 1 RP 20-21. This is exactly what occurred in *Drake*. As in *Drake*, this extension of the Alley with the Dumonds' own driveway is evidence of an imposition of a separate servitude upon the Alley they used to access their property.

There is yet more evidence in the record of the Dumonds treating the Alley as their own, in contrast to how the Dumonds treated the adjacent yards of their various neighbors. For example, the Dumonds removed trash (*e.g.*, an old mattress) and debris from the Alley although they would not have removed the same items from their neighbors' backyards. 1 RP 62, 69, 143-45. The Dumonds also mowed, weeded and weed-whacked the length of the Alley, including portions of the Alley behind homes other than the Dumonds' own home. 1 RP 54-55, 64, 80-81, 142-45. The fact that the Dumonds treated the entire Alley as their own by removing trash and mowing or weeding as needed shows an imposition of a separate servitude other than mere unchallenged

use. See *Lingvall v. Bartmess*, 97 Wn. App. 245, 254-55, 982 P.2d 690 (1999) (finding that claiming and maintaining area around trees by landscaping and mowing is evidence of hostility).

The record clearly shows a period of unchallenged use. Under the law, unchallenged use can support an inference of either hostile or permissive use. Here all of the evidence in addition to unchallenged use shows only facts and circumstances (extending a driveway from the Alley, removing debris and mowing and weeding the entire Alley) supporting an inference of hostile use. Hence, the trial court erred here by finding the period of unchallenged use was permissive. This Court should reverse the trial court's finding of permissive (which Respondents now try to characterize as an inference) use because the only facts presented at trial supplemental to the unchallenged use were facts that show the use was hostile.

4. THE MISTAKEN BELIEF THAT THE ALLEY WAS A PUBLIC RIGHT OF WAY INFERS HOSTILITY BECAUSE IT EXPLAINS THE LACK OF ANIMOSITY BETWEEN AFFECTED PROPERTY OWNERS FOR SO MANY YEARS.

Respondent argues that *Dunbar v. Heinrich*, 95 Wn.2d 20, 622 P.2d 812 (1980) "does not stand for the proposition that a

mistaken belief a road is public right of way entails adverse use.”

Br. of Respondent at 25.

Respondents miss the point of *Dunbar*. In *Dunbar* the claimant began driving on a road in 1960 under the mistaken belief the road was a public right-of-way. In 1970, the claimant learned that he did not in fact have a right to drive on the land. In 1977, new owners purchased the affected property and the claimant filed suit to establish a prescriptive easement. Since the claimant had only actually driven on the road with knowledge he was not entitled to do so for seven years (less than the 10 required by statute) at the time the suit was initiated, the issue in *Dunbar* was whether the Claimant's belief the use was with permission (i.e., a public right of way), when it actually was not, defeated the hostility element. The Court said such a mistaken belief did not defeat the hostility element and held that use with a mistaken belief of public right of way could still be considered hostile. *Dunbar*, 96 Wn.2d at 27 (“Although subjective intent may have some relevance in an adverse possession case where the user claims title, the claim in a prescriptive easement case is merely to use which could have been prevented by the rightful

owner. We therefore hold that adversity is to be measured by an objective standard; that is, by the objectively observable acts of the user and the rightful owner.”)

The acts the Court relied upon in *Dunbar* for holding the use to be adverse, even though there was a mistaken belief that it was a public right of way included: the claimant breaking in a “crude driveway” in 1963, the claimant never asking permission to do so, the claimant never being granted permission, claimant’s deed specifically excepting the property in question, the claimant never claiming legal ownership of the property, the claimant inquiring in 1972 as to whether he could purchase the property and the claimant continuing to use the road after 1972 just as he had as before. *Dunbar*, 95 Wn.2d at 24.

Here, as in *Dunbar*, the Dumonds’ mistaken belief there was a public right-of-way does not *create* hostility—rather, the point is that this subjective belief does not negate the other acts of hostility. The mistaken belief that there was a public right-of-way perfectly explains why the Dumonds’ “hostile” acts such as construction of a driveway as an extension of the Alley, mowing/weed-whacking in the Alley and removing items that

were lying in the Alley did not result in any altercations between neighbors. These “hostile” acts are similar to those in *Dunbar*, and as in *Dunbar* the mistaken belief in the Dumond case is a circumstance that explains why there was a lack of any confrontations between homeowners which would show any obvious animosity.

The uncontroverted evidence is that the Dumonds used the Alley with the mistaken belief it was a public right of way from 1960 until 2007. 1 RP 39-40. To some extent the general public also used it as a public Alley from 1960 through some point in the 1980s. Finding of Fact No. 7. Respondents argue this Court should consider the unchallenged use to be permissive because the Dumonds did not use the Alley in a manner the Respondents’ predecessors in interest objected to or minded. *But this is an argument devoid of any factual support whatsoever in the record.* There was no testimony or evidence of any kind regarding any conversations between the Respondents’ predecessors in interest or with the Dumonds or their predecessors in interest.

The unchallenged use in this case must be considered in light of all of the facts and circumstances. Here there are no facts

or circumstances or indicating permission or acquiescence. The uncontroverted evidence is that the Dumonds, and to some extent the general public, considered the Alley to be a public right of way. This mistaken belief of public right of way is a circumstance supporting the inference of hostile use during the unchallenged period because it explains why the "hostile" acts (extending the Alley with a driveway, weed-whacking, removing items behind other neighbor's houses) showing intent to impose a separate servitude were unchallenged by the Defendants' predecessors in interest.

5. USE BY THE GENERAL PUBLIC DOES NOT NEGATE HOSTILITY BECAUSE THE DUMONDS TREATED THE ALLEY AS THEIR OWN AND HAD TO USE THE ALLEY TO ACCESS THEIR REAR FACING GARAGE.

The unchallenged use of the Alley by the Dumonds' predecessors in interest began in 1959. At that time, all of the roads (not just the Alleys) in the area were dirt or gravel. 1 RP 27-28. The Alley in question and the Alleys on the adjacent blocks to the north and south all appeared the same visually. 1 RP 32-34, 134, 151, 163. In fact, Alleys on the blocks directly north and south of the Alley continued to appear in largely the same

condition as the Alley in question through at least the year 2006.

Finding of Fact 9, CP 456.

The use of the Alley was by the Dumonds, their neighbors and the by the general public. City garbage trucks used the Alley to pick up garbage from 1960 through 1978. 1 RP 32. The general public used the Alley, even though it was not a legal Alley, as a thoroughfare from north to south without making any stops, as well as to make stops to the houses along the Alley. 1 RP 39, 142; 1 RP 73, 142, 176; 1 RP 161, 171; 1 RP 151-152; 1 RP 174-176.

Respondent cites *Anderson v. Secret Harbor Farms*, 47 Wn.2d 490, 495, 288 P.2d 252 (1955) as a case involving use of a right of way by the general public that supports a finding of hostility in this case. Although *Anderson* involved a footpath and this case involves a road, they are otherwise quite similar. *Anderson* involved a "well-defined footpath across the land of plaintiffs to their own property. The footpath existed prior to 1890 and has been used by defendants and their predecessors in interest since that time." *Anderson*, 47 Wn.2d at 491. The footpath was used for many years without incident until 1946 when 'No Trespassing' signs were put up by the affected property

owners and ignored by the neighboring property owners claiming an easement.

In this case, there is a well-defined Alley that has been used continuously without incident by the Dumonds and their predecessors in interest from 1960 until 2007 when fences were first put up.

In *Anderson* the Plaintiffs commenced an action to enjoin defendants from using the footpath and Defendants counter-claimed for prescriptive easement. In an argument almost identical to Respondents' argument here, the *Anderson* Plaintiffs argued and the trial court found the use was by "implicit permission as a neighborly act" because the footpath was also used by the general public. *Anderson*, 47 Wn.2d at 493. But the Supreme Court reversed. After acknowledging Plaintiffs' argument that a person coming on the property of another generally does so with permission, *Anderson* then notes:

[A]n engaging argument is made in the instant case that the use, being permissive in its inception, cannot ripen into a prescriptive right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate,

such as tearing down or ignoring 'No Trespassing' signs, as occurred in 1946.

Anderson, 47 Wn.2d at 493-94.

That is precisely the same faulty argument Respondents make here. Respondents argue since there were no signs ignored, fences torn down, altercations between neighbors or acrimonious relationships until 2007 then there was no hostility. *See, e.g.*, 2 RP 250-251, 257² *Anderson* specifically rejects this argument:

The fallacy of the argument is this: just as soon as there is *proof* that the use of another's land has been open, notorious, hostile, continuous, uninterrupted and *for the required time*, the presumption of a permissive use is spent; it disappears. The one claiming the easement has established a *prima facie* case. (It is not necessary to say that such proof 'creates a *presumption* that the use was *adverse* unless otherwise explained,' although there is authority for it. It then becomes incumbent upon the one denying the existence of the easement to contravert the *prima facie* case.

Anderson, 47 Wn.2d at 494 (Emphasis original.)

² From Respondent's closing argument at trial: "'A use that was permissive at its inception cannot ripen into a prescriptive use without distinct and positive assertion by the dominant owner of a right hostile to the true owner'" That means putting up a sign. That means putting up a gate. That means taking some action that would lead a rational person to believe that I don't have permission to go here." 2 RP 250-251; [U]se is permissive unless there is an affirmative act of some party on the estate being against whom the right is seeking to be imposed, does something to create hostile use, a fence, a sign, something, which never, ever happened from 1960 forward. They have not, in this case, Plaintiffs have not proven the elements of prescriptive easement usage." 2 RP 257

Anderson then goes on to note if there is “*express permission*” (emphasis original), then of course it cannot later ripen into hostile use. *Anderson*, 47 Wn.2d at 494. But *Anderson* reversed the trial court because:

The only facts appearing in the record, and relied upon by the trial court to support the finding of an implied permissive use, are (1) the use of the path by the general public and (2) the inaccessibility of defendants’ land at low tide, except by use of the path. Neither of these factors establishes a permissive use.

Anderson, 47 Wn.2d at 494.

Here, Respondents also argue the Alley was used by the general public and the Dumonds’ use was no different. But this is incorrect. As shown above, the Dumonds did evidence an intent to impose a separate servitude by extending the Alley by building a driveway to it, mowing and weed-whacking the entire length of the Alley and removing debris from portions of the Alley behind other neighbor’s yards that they would not otherwise have removed from their neighbor’s actual yards.

In addition, the Alley was the only access the Dumonds had to their rear facing garage. 1 RP 21, 25-26. This is important because as *Anderson* states:

The finding of fact that the path was the only possible access path to the harbor imports, under the circumstances of this case, a use in derogation of the title of the record owner.

The evidence in this case discloses that the path is a well-defined, uniform route of pedestrian travel which has been in continuous, uninterrupted, open and notorious use without deviation in course by defendants and their predecessors in interest for longer than the prescribed statutory period. Its use and been with the knowledge of the owners, at a time when they were able to assert and enforce their rights.

Anderson, 47 Wn.2d at 255 (Internal quotation marks omitted.)

Respondent also cites *Lingvall v. Bartmess*, 97 Wn. App. 245, 250-251, 982 P.2d 690 (1999) because the driveway was used by the claimant and others. *Lingvall* actually supports finding a prescriptive easement because in *Lingvall*, as is the case here, there were acts by the property owners that showed an intent to impose a servitude independent of the use made by the general public.

In *Lingvall* the claimants used a disputed roadway as the sole access to their property. Other individuals also used the disputed roadway. The claimants built a barn on their property

and used the disputed roadway to get to the barn. Later the claimants built a house on their property and used the disputed roadway to get to their new house.

The facts in *Lingvall* are similar to the facts in this case. The Dumonds tore down an old house and built a new house with a rear facing garage. The Dumonds extended the Alley with a driveway as the sole means of accessing the new rear facing garage. The *Lingvall* court specifically found this was sufficient to establish a prescriptive easement even though the roadway was also used by other individuals. *Lingvall*, 97 Wn. App. at 252.

For all of these reasons the hostile nature of the use by the Dumonds is not negated by the fact that the general public also used the Alley. Respondents' argument at trial, that there must be some overt and obvious sign of hostility, such as ignoring signs or ignoring or building fences, has been specifically rejected by the court in *Anderson*, 47 Wn.2d at 493-94 (1955) and *Lingvall*, 97 Wn. App. at 254 (1999). The Dumonds treated the Alley as their own by extending their driveway from it and mowing and weed-whacking and removing debris from the Alley. The Dumonds' only possible access to their rear facing garage was through the Alley.

On facts almost identical to these, in *Anderson* even though the trial court had found the use to be permissive by neighborly accommodation, the Supreme Court nevertheless reversed and imposed a prescriptive easement. (“The evidence preponderates against the trial court’s findings of fact to the contrary.”) *Anderson*, 47 Wn.2d at 496. This court should reverse the Trial Court and grant the request for prescriptive easement.

6. THE CASES CITED BY RESPONDENTS ARE DISTINGUISHABLE AND SUPPORT A FINDING OF HOSTILE USE IN THIS CASE.

Respondent criticizes the Appellant’s reliance on *Imrie v. Kelley*, 160 Wn. App. 1, 5, 250 P.3d 1045 (2010). As noted in the opening brief, *Imrie* is distinguishable but instructive. Respondent argues that in *Imrie* the owner of the servient estate exercised *more* control over the use by maintaining fences across the disputed road and claims that to suggest an exercise of more control demonstrates permissiveness is absurd. Br. of Respondent at 24. But this is what *Imrie* does in fact hold.

Imrie specifically references the fact that fences were maintained across the disputed road at all points where it crossed the property line. *Imrie*, 160 Wn. App. at 5. The court in *Imrie*

indicated exercise of control by maintaining a fence during the period of otherwise unchallenged use was a fact showing acquiescence toward the use and supporting a finding the use was permissive. *Imrie*, 160 Wn. App. at 10-11, quoting, *Millard v. Granger*, 46 Wn.2d 163, 164, 279 P.2d 438 (1955) (*Imrie* quotes *Millard* as follows: “the Millards put a gate on the road, but gave keys to everyone who wished to use the road. The court found that this gate served as ‘notice to the world that the road was not a public road,’ and that the furnishing of keys to the gate was an overt act of permission to use the road.”). Here, there were no such acts of acquiescence from which the Trial Court could infer assent or permissive use for the entire period of 1960 through 2007. For this reason *Imrie* is both distinguishable and instructive as to why the Trial Court erred in this case by presuming that the use was permissive.

Respondents also rely on *Roediger v. Cullen*, 26 Wn.2d 690, 179 P.2d 669 (1946). Br. of Respondent at 15-16. But *Roediger* is distinguishable. In *Roediger* the path at issue was constructed by members of the entire community. *Roediger*, 26 Wn.2d at 698. In *Roediger* the path was “maintained by the

members of the community by mutual effort and for their mutual use." *Roediger*, 26 Wn.2d at 699. The Supreme Court noted that:

It appears conclusively that, during the entire life of the path, those who used it united in keeping it passable. At certain points, the path frequently washed out. At least one other point, it was necessary to construct and maintain a rough sort of bridge or walkway. The residents all had an interest in the use of the path, and all, in a neighborly manner, took part in making the necessary repairs, whether on their own property or on the property of their neighbors.

Roediger, 26 Wn.2d at 698.

Nothing remotely similar to the facts in *Roediger* is supported by the record in this case. There was public use of the disputed Alley in this case but that is all. There was no testimony suggesting the Alley was created or maintained by the general public or the other neighbors who used the Alley. The Dumonds testified that when necessary they mowed, weed-whacked or removed items from behind other neighbor's houses, but there was no "mutual community enterprise" as existed in *Roediger*.

Roediger was specifically mentioned and distinguished in *Anderson v. Secret Harbor Farms, Inc.*, 47 Wn.2d 490, 496, 288 P.2d 252 (1955) where the court did find a prescriptive easement for

specific defendants who used a public path for their own independent purposes. This case is far more similar to *Anderson* (which established a prescriptive easement) as discussed extensively above. Respondent's reliance on *Roediger* is misplaced because the facts are very different from the facts here. Comparison of *Roediger* and *Anderson* actually supports an inference that the use by the Dumonds in this case was hostile and that a prescriptive easement should be granted.

C. RESPONDENTS' REQUEST FOR ATTORNEY'S FEES IS NOT PROPERLY BEFORE THE COURT AND SHOULD BE DENIED.

1. RESPONDENTS DID NOT APPEAL THE TRIAL COURT'S AWARD OF ATTORNEY FEES IN THEIR FAVOR.

Respondents' request for attorney's fees is not properly before this Court. The Respondent sought in excess of \$18,000 in attorney's fees from the trial court pursuant to RCW 4.84.250. As discussed more fully below, Appellants argued to the trial court that RCW 4.84.250 is limited to damage actions and is not applicable to equitable actions such as a prescriptive easement. Appellants further argued that any award of fees should be segregated to only those fees related to Respondent's counter-claim for damages. The trial court agreed and

entered an order granting only \$1,171.61 for those attorney's fees limited to the counter-claim for damages. *Those attorney's fees have been paid and that order was not appealed.*

2. CHAPTER 4.84 RCW IS INAPPLICABLE TO THIS APPEAL BECAUSE THIS WAS AN EQUITABLE ACTION.

To the extent this court considers Respondents' request for attorney fees, the request should be denied. The traditional "American rule" is that attorney fees are not awarded as costs absent a contract, statute, or recognized equitable exception. *City of Seattle v. McCready*, 131 Wn.2d 266, 274, 931 P.2d 156 (1997); *State ex rel. Macri v. City of Bremerton*, 8 Wn. 2d 93, 113-14, 111 P.2d 612 (1941).

Here, Respondents' request is made pursuant to RCW 4.84.290, which provides:

If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250: PROVIDED, That if, on appeal, a retrial is ordered, the court ordering the retrial shall designate the prevailing party, if any, for the purpose of applying the provisions of RCW 4.84.250.

In addition, if 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.

RCW 4.84.250 provides:

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, **in any action for damages** where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

Emphasis added.

Clearly, RCW 4.84.250 and 4.84.290 are not applicable here. This was and is not primarily a damage action. The case at issue here is an equitable action for prescriptive easement. Damages are generally not allowed in such equitable actions. *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001). Hence, the fee shifting provision of RCW 4.84.250 *et seq.* is not applicable to prosecuting or defending the prescriptive easement claim because it only applies to actions for "damages." See *In re 1992 Honda Accord*, 117 Wn. App. 510, 523, 71 P.3d 226 (2003) ("As the City aptly notes, Mr. Becerra did not file an action for damages. Rather, he contested the impoundment of his

vehicle and requested refund of the fees incurred in connection with that action. RCW 46.55.120(3)(e). He did not seek statutory loss of use damages. *Id.* Accordingly, the statute [RCW 4.84.250 *et seq.*] ordinarily would not apply." (Internal citations omitted.)).

This small claims attorney fee shifting statute may be used even though parties are seeking other relief besides damages. *See, e.g., Hanson v. Estell*, 95 Wn. App. 642, 976 P.2d 179 (1999); *Lay v. Hass*, 112 Wn. App. 818, 51 P.3d 130 (2002). But this does not create a right to the attorney fees incurred in an equitable action simply because a party has also pleaded a damage component to the action. This would undermine and contravene the very purpose of the statute.

The purpose of the fee shifting statute in chapter RCW 4.84 is to encourage settlement, enable the prosecution of small claims without the award being offset by the costs, and discourage parties from unjustifiably increasing the cost of litigation by resisting meritorious claims. These purposes have been affirmed repeatedly over the course of more than 30 years since enactment of the statute. *Williams v. Tilaye* 174 Wn.2d 57, 62, 272 P.3d 235 (2012); *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987);

Northside Auto Serv., Inc. v. Consumers United Ins. Co., 25 Wn. App. 486, 492, 607 P.2d 890 (1980).

Here, Respondents' attempt to use the fee shifting statute is in direct contradiction to the purpose of RCW 4.84.250 *et seq.* Denial of attorney fees, even if arguably allowable under RCW 4.84.250, has been affirmed when awarding fees would contravene the intent of the statute:

In its cross appeal, the City contends that when a defendant makes an offer of judgment, which is rejected, and prevails at trial, he is entitled to attorney fees under RCW 4.84.250 and .270. Although these statutes are, perhaps, susceptible of the interpretation urged by the City, the obvious intent of the legislature was that they apply only to actions for small claims-where the amount pleaded by the plaintiff is \$1,000 ^{FN1} or less. The trial court correctly struck from the City's cost bill the \$3,000 attorney fee request.

FN1. This amount has since been increased to \$10,000. RCW 4.84.250.

Klein v. City of Seattle 41 Wn. App. 636, 639-640, 705 P.2d 806 (1985) (internal citations omitted).

Awarding fees relating to the prosecution or defense of the prescriptive easement claim would contravene the intent of the small claims attorney fee shifting statute cited by Respondents.

The damage element of this action, which is the only claim that could trigger the provisions of RCW 4.84.250 *et seq.*, has never been contested or disputed. Appellants answer to Respondent's counter-claim, specifically noted that the amount of damages was not contested. At trial, Appellants required no expert witness or contractor to testify as to the amount of damages sustained by Respondents. The documentary evidence offered by Respondents relating to the claimed amount of damages was admitted without objection by Appellants. Essentially, Appellants stipulated to the *amount* claimed by Respondents as damages. The only disputed or contested issue in this case was Appellants original claim of prescriptive easement.

The claim of prescriptive easement is clearly and unambiguously an equitable action for which damages are not appropriate and the fee shifting provisions of chapter 4.84 RCW for damages actions are not applicable. *Virtually all of the litigation and cost associated with this case was related to the meritorious prosecution and defense of the prescriptive easement claim. There was no unjustifiable resistance of the damage element of the claim. In such circumstances, the legislative intent by adopting the fee shifting statute*

is contradicted by awarding substantial and unsegregated attorney fees for all claims involved in this action. As noted above in Klein v. City of Seattle 41 Wn. App. 636, 639-640, 705 P.2d 806 (1985), attorney fees should not be awarded pursuant to RCW 4.84.250 et seq. when to do so would undermine the intent of the statute.

3. THIS APPEAL IS NOT FRIVOLOUS.

This is not a frivolous appeal. When there are no “debatable issues upon which reasonable minds could differ” and if an appeal is “totally devoid of merit” that there is “no possibility of reversal,” an appeal may be deemed frivolous. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987). “Any doubts should be resolved in favor of the appellant.” *Id.* at 692.

There are several debatable issues upon which reasonable minds could differ in this matter, in particular but not limited to, the issue of hostile versus permissive use of the Alley by the Dumonds.

Applicable case law strongly supports reversal of the trial court in this matter. Any lingering doubts with this Court should be resolved in favor of the Dumonds. Therefore, there should be no award of attorney fees to the Respondents on the basis of this being a frivolous appeal.

Therefore, no attorney fees should be awarded to the Respondents. The trial court properly segregated out a small amount of attorney's fees limited and related only to the counter-claim for damages. That order was not appealed. No further fees should be awarded on this appeal because it does not fall within the purview of RCW 4.84.250 and to do so would undermine the statute.

CONCLUSION

As shown above, unchallenged use of property for the requisite statutory period can support either hostile or permissive use. The undisputed facts in the record clearly show the Appellants' use of the Alley was hostile. Any challenges made to the Appellants' use of the Alley occurred long after the prescriptive easement had ripened. Therefore, this Court should reverse the trial court.

The Respondents' request for attorney fees has no basis in the law. Chapter 4.84 RCW does not apply to actions wherein equity is sought. Moreover, because there are debatable issues in this appeal, this Court should reject Respondents' argument that this appeal is frivolous. Respondents' request for attorney's fees on this basis should also be denied.

DATED this 1st day of February, 2013.

RESPECTFULLY SUBMITTED,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end.

Daniel Cook, WSBA #34866
Attorney for Appellants

A smaller, more compact handwritten signature in black ink, appearing to be the name 'Barbara' followed by a stylized flourish.

Barbara McInville, WSBA #32386
Attorney for Appellants

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II by personal service, and delivered a copy of this document via United States Postal Service to the following:

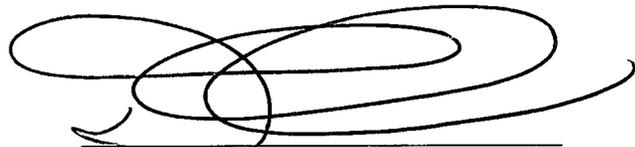
Stanley Rumbaugh, last know counsel of record;

sent via e-mail to stan@rraw-law.com

sent via US Mail, postage prepaid, to:

P.O. Box 1156
Tacoma, WA 98401-1156

Signed at Tacoma, Washington on this 15th day of February, 2013.



Daniel Cook