

43723-6-II

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

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JEFF BOWLBY and STEFANIE PLOWMAN,

Respondents,

v.

SCOTT and DONNA WILLIAMS,

Appellants.

2013 MAR 22 PM 1:51  
COURT OF APPEALS  
DIVISION II  
BY *[Signature]*  
DEPUTY

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REPLY BRIEF OF APPELLANTS

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## Table of Contents

I. RESTATEMENT/CLARIFICATION OF FACTS .....	1
A. OWNERSHIP BY THE SHULTZ AND KELLER FAMILIES .	1
B. USE OF THE EASEMENT .....	3
C. RELATIONSHIP BETWEEN BOWLBY AND WILLIAMS ....	7
II. ARGUMENT .....	9
A. A PRESCRIPTIVE EASEMENT WAS NOT ESTABLISHED .	9
B. THE WILLIAMS HAVE A RIGHT TO A CLOSED GATE AS A REASONABLE RESTRAINT ON THE EASEMENT .....	13
C. THE AWARD OF FEES WAS IN ERROR .....	15
1. The Award under RCW 4.24.630(1) Was in Error.....	16
2. The Award Under RCW 4.84.185 Was in Error .....	19
III. CONCLUSION.....	21

## TABLE OF AUTHORITIES

### Cases

<i>Camus v. Culpepper</i> , 157 Wn.App. 1046 (2010) .....	19
<i>Clipse v. Michels Pipeline Const., Inc.</i> , 154 Wn. App. 573, 225 P.3d 492 (2010) .....	17, 18
<i>Colwell v. Etzell</i> , 119 Wn.App. 432, 81 P.3d 895 (2003) .....	18
<i>Cuillier v. Coffin</i> , 57 Wn.2d 624, 358 P.2d 958 (1961) .....	11
<i>Drake v. Smersh</i> , 122 Wn.App. 147, 89 P.3d 726 (2004) .....	10, 12
<i>Gander v. Yeager</i> , 167 Wn. App. 638, 282 P.3d 1100 (2012) .....	15, 16
<i>Granston v. Callahan</i> , 52 Wn. App. 288, 759 P.2d 462 (1988) .....	10
<i>Kunkel v. Fisher</i> , 106 Wn.App. 599, 23 P.3d 1128 (2001) .....	9, 12
<i>Nw. Cities Gas Co. v. W. Fuel Co.</i> , 13 Wn.2d 75, 123 P.2d 771 (1942) .....	9, 11
<i>Rupert v. Gunter</i> , 31 Wn.App. 27, 640 P.2d 36 (1982) .....	13, 14
<i>Saddle Mountain Minerals, LLC v. Santiago Homes, Inc.</i> , 146 Wn.App. 69, 189 P.3d 821 (2008) .....	17
<i>Seattle v. Nazaremus</i> , 60 Wn.2d 657, 374 P.2d 1014 (1962) .....	14
<i>Snyder v. Haynes</i> , 152 Wn.App. 774, 217 P.3d 787 (2009) .....	13

<i>Standing Rock Homeowner 's Ass 'n v. Misich,</i> 106 Wn. App. 231, 23 P.3d 520 (2001).....	14
<i>State ex rel. Carroll v. Junker,</i> 79 Wn.2d 12, 482 P.2d 775 (1971).....	13
<i>State ex rel. Quick–Ruben v. Verharen,</i> 136 Wn.2d 888, 969 P.2d 64 (1998).....	20
<i>State v. Alvarado,</i> 164 Wn.2d 556, 192 P.3d 345 (2008).....	16
<i>Wright v. Dave Johnson Ins. Inc.,</i> 167 Wn. App. 758, 787, 275 P.3d 339, 355, <i>review denied,</i> 175 Wn.2d 1008, 285 P.3d 885 (2012).....	20

**Statutes**

RCW 4.24.630 .....	19
RCW 4.24.630(1).....	16, 17, 18, 21
RCW 4.84.185 .....	16, 19, 20, 21

**COME NOW** Appellants, Scott and Donna Williams (together the “Williams”), by and through their attorneys of record, SMITH ALLING, P.S. and Kelly DeLaat-Maher, and submit appellants’ reply brief to respondents’ brief on appeal as follows:

**I. RESTATEMENT/CLARIFICATION OF FACTS**

In their introduction, Mr. Bowlby and Ms. Plowman assert that the genesis of the disagreement and reason for the Williams’ actions to unilaterally undertake making changes to the road stems from a conversation wherein he learned of their plans to open an adult family home. See Respondent’s Brief, p. 1. Testimony at trial demonstrates a different and much more complex scenario between the parties.

**A. OWNERSHIP BY THE SHULTZ AND KELLER FAMILIES**

Prior to Williams purchase of their home and back parcels, the whole of the properties at issue in this litigation were owned by the same family. Celia Keller testified that her grandparents, the Olsons, initially owned all of the properties. Her parents, John and Janna Schultz, subsequently purchased the properties, but then deeded a small portion back to the Olsons on which to live. RP 320:14-24. Janna Schultz eventually deeded the Bowlby property to her daughter and husband, Jake and Celia Keller, in 1958. Defendant’s Exhibit 16. Ms. Keller owned the

Bowlby property from 1958 to 2003, at which time it was transferred to William and Michelle Bennison. *Id.*

The back five acres of the Williams properties were once broken into three separate tax parcels, identified as Parcels A, B and C. In 1966, Jana and John Schultz transferred Parcel A to Joe and Lillian Keller. Defendant's Exhibit # 3. In 1974, Joe Keller transferred Parcel A to Jake and Celia Keller, under Auditor's No. 2452247. Defendant's Exhibit # 6. Shortly thereafter, Janna Schultz transferred parcel B to Jake and Celia Keller under Auditor's No. 2582537 on December 6, 1975. Defendant's Exhibit # 6. On November 16, 1979, Janna Schultz transferred Parcel C to Jake and Celia Keller. Defendant's Exhibit # 8. Thus, from 1979 until the sale of Parcels A, B, and C to Williams in 2001 (*see* Defendant's Exhibit 12), the Kellers owned the Bowlby properties and the back parcels over which the disputed easement that benefits the Bowlby property lies.

As stated, Williams was the first purchaser and resident from outside the family. In 1989, Williams purchased the residence from Robert Keller. Defendants' Ex. 10. Robert Keller is Celia Keller's son. VRP 323:6-11. Interestingly, the home was transferred from Janna Schultz to Jake and Celia Keller by Quit Claim recorded October 21, 1977, under Auditor's Deed No. 2773193. The home was subsequently transferred from Jake and Celia Keller to Robert and Heidi Keller by Quit

Claim recorded July 29, 1982 under Auditor's No. 8207290230. Defendant's Ex. # 9. Thus, for a short period, Jake and Celia Keller owned what is now the Bowlby residence, the Williams residence, and the five-acre back parcel.

In 2001, Jake and Celia Keller sold to Williams the acreage behind the Williams residence, parcels A, B and C. Defendant's Exhibit 12. The Statutory Warranty Deed does not reference any easements burdening the property.

**B. USE OF THE EASEMENT**

The only express easement at issue, and which was intended to provide access to the Bowlby property, was recorded in September, 1969, under Pierce County Auditor's Recording No. 2314485. Defendants' Ex. 18. The easement established a 20-foot wide ingress, egress and utility easement. CP 197. Janna Schultz is identified as the grantor, with Joe and Lillian Keller and Jake and Celia Keller identified as grantees of the easement. Defendants' Ex. 18. The easement was clearly recorded prior to Celia and Jake Keller's ownership of the entire properties at issue in the case. On September 29, 1976, Janna Schultz and Jake and Celia Keller recorded the Road Maintenance Agreement under Auditor's No. 2691819, again prior to the time that Jake and Celia Keller owned all of the

properties currently at issue. See Road Maintenance Agreement, Defendant's Exhibit # 19.

The actual road bed, identified in the Findings of Fact and Conclusions of Law filed June 22, 2012, as the "Old Road," lies partly inside and partly outside the easement area. CP 378; Plaintiffs' Ex. 8. Use of any portion of the roadway outside the express easement was either by a single owner (Mr. and Mrs. Keller), amongst family, or by neighborly acquiescence until no sooner than 2007. In their Response, Bowlby states that "Jake and Celia Keller used the Old Road over Ms. Schultz's property as if it was their own from 1958 at the earliest and 1969 at the latest, until 1074 and 1979 respectively." Respondent's Brief p. 6. Bowlby nowhere identifies that Ms. Schultz was Celia Keller's mother, thus choosing to ignore what appears to be a close family relationship.

In October 2003, Jake and Celia Keller sold their residence to William and Michelle Bennison. Defendant's Exhibit 16. The deed does not refer to the express easement that is subject to this dispute, and instead only refers to the Road Maintenance Agreement recorded in 1976.<sup>1</sup> Mr. Bennison testified that he made a verbal agreement with Williams to extend and expand the roadway beyond that in use, in order to access the

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<sup>1</sup> Williams does not raise claims of merger of title, and no evidence was submitted regarding extinguishment of the express easement by unity of title.

back of his property. VRP 308:7-25; 313:16-25; 314:1-4. He also noted that the existing road was narrowly bound by woods where it enters his driveway. VRP 314. The nature of the road meant that he had to give permission to trucks making deliveries to drive on his lawn. VRP 315-16. Both Mr. Bennison and Williams had surveys started to define the locations and property lines. VRP 350:17-25.

In July, 2007, William and Michelle Bennison sold the property to Donald and Marie Pike. Defendant's Ex. 16. Bowlby purchased the property following a foreclosure by the Pike's lender in 2009. *Id.* Mr. Williams testified that he did not extend his agreement for use of the road onto his property with the Pikes, although Mr. Bennison had advised them at the time of purchase that the extended property was not theirs. VRP 308, 351. Because the Bennisons and Pikes allowed visitors to park off-site, Williams placed fence posts during 2008 to more clearly define the property and easement area. VRP 301, 351:1-10, 357:14-25; 358:1-9. This is the first and only evidence that use of the express easement past its defined borders was anything but permissive.

From the survey drafts obtained during the time the Bennisons owned the Bowlby property, Williams determined that the actual road location and easement description did not overlay. VRP 350:17-24. The Statutory Warranty Deed selling parcels "A", "B" and "C" from Keller to

Williams did not contain the easement description. Defendant's Ex. 12 Mr. Williams testified that upon his purchase of both his home and the back parcels, he was in fact uncertain as to the location of the actual easement. VRP 260:18-25. This created uncertainty regarding the location of the actual easement, which was the genesis of Mr. Williams' intention to create the bypass road, upon the agreement with the other residents on the easement and road location. VRP 277:17-25; 278:1-10. Construction of the bypass road was not done, pursuant to Mr. Williams's testimony, in response to Bowlby's intention to operate an adult family home, contrary to Bowlby's argument.

Talks between Williams, Porter-Keller, and Pike to resolve the problem regarding the road location were in progress when the Pikes defaulted on their loan and left the property vacant. Beginning in September and through the fall and winter of 2009, Williams began clearing brush in the area described by the road maintenance agreement to realign the road based on those discussions. VRP 277:17-25; 278:1-10. Ms. Keller Porter in fact testified that Mr. Williams had discussed construction of the bypass road with her prior to beginning construction on the road. VRP 337:3-13.

The uncertainty of the easement location was corroborated by Bowlby's own witness. Bowlby's surveyor, Ray Harries, also described

finding two easement descriptions and the difficulty reading the descriptions due to mathematic errors. VRP 74-76. Thus, Mr. Williams was not unreasonable in his attempts to define the road according to the easement, or his attempts to relocate it.

At trial, Grant Middleton, a licensed professional engineer with Larson and Associates, testified as to the first 100 feet of the easement off 52<sup>nd</sup> Street. VRP 382:24-25. The first 100 feet of easement is built along a bank with a steep incline and held with a landscaped rockery wall that is not structural. VRP 388. Mr. Middleton's site survey revealed that the roadway was only 10½ feet wide through that section bounded by the rock wall. VRP 387:6-9. *See also* Defendant's Ex. 33. In order to meet current codes for single family home construction or fire truck use, the first 100 feet of the easement would require extensive reconstruction to bring it to code, including the possibility of requiring expansion or purchasing property to have wider than a 20-foot easement in this segment to accommodate a safe roadway. Defendant's Ex. 33, VRP 386-390.

### **C. RELATIONSHIP BETWEEN BOWLBY AND WILLIAMS**

Contact and communication between the Williams, Bowlby and Plowman unfortunately is best characterized as miscommunication and adversarial, although the parties met several times to try to resolve the easement issues besides those times they met in confrontation. The

uncertainty by both parties over the actual location contributed to the confrontational nature of the problem. An additional problem arose due to Bowlby's belief that the road was in fact a public road. On one occasion when the police were called to the dispute, Mr. Bowlby advised that he believed the street was public, even though the real estate listings had identified a private road and a steel gate. VRP 200:9-13, Defendant's Exhibit # 20. Additional issues arose when Bowlby removed the gate and thereafter failed to close it. CP 111; VRP 333, 351.

Following an altercation, Mr. Williams, believing Mr. Bowlby had agreed to the bypass road, continued to establish the roadway along the western property edge that was used by all parties from April 2010 until June 2011 when they initiated this lawsuit. VRP 280-284, 398-402. This bypass roadway included a second gate, intended to replace the original gate, but now located farther down the road and closed to resemble a fence. CP 199. The bypass road allowed vehicles to drive to the Bowlby residence without having to open or close any gate. CP 111-112.

Bowlby alleges that the Williams actions caused them to carry their garbage a long distance for pick up at the front of the easement. However, contrary to this allegation, the Williams had experienced an issue with the garbage truck on the first portion of the easement prior to Bowlby's ownership. Mr. Williams testified to an instance where the

truck ran off the road, damaging the rock wall and the mailboxes. VRP 355. Garbage service down a portion of the easement continued, but ultimately ended due to the nature of the road. VRP 355:13-16.

## **II. ARGUMENT**

### **A. A PRESCRIPTIVE EASEMENT WAS NOT ESTABLISHED**

In their reply, Bowlby argues that they provided the court with sufficient evidence to support the court's finding of a prescriptive easement. Bowlby's assertion in this regard, and the court's findings, are in error, as the evidence unequivocally support use by permission and neighborly acquiescence.

Prescriptive rights are not favored by the law. *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 83, 123 P.2d 771 (1942). To establish a prescriptive easement, the claimant must show that his or her use of the servient land was "(1) open and notorious, (2) over a uniform route, (3) continuous and uninterrupted for 10 years, (4) adverse to the owner of the land sought to be subjected, and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights." *Kunkel v. Fisher*, 106 Wn.App. 599, 602, 23 P.3d 1128 (2001). The claimant has the burden of establishing the existence of each element. *Nw. Cities Gas*, at 84.

Bowlby relies significantly on *Drake v. Smersh*, 122 Wn.App. 147, 89 P.3d 726 (2004), in support of their argument that the easement use was hostile. In that case, the Masseys bought a parcel of vacant land on Lummi Island and bulldozed an extended driveway from the Wallens neighboring parcel, over which a driveway already existed. *Id.* at 149. There was no evidence Massey or his successors asked for or received permission for use of the extended driveway. *Id.* at 155. The court stated there was no relationship between the parties under which permissive use could be inferred. *Id.* Finally, the court stated that Massey and his successors used the property as if they owned it, without permission, for the requisite period of time. *Id.*

However, the case should not be read in a vacuum, as Bowlby seems to suggest. In developed land cases, an inference of permissive use applies when a court can reasonably infer that the use was permitted by neighborly sufferance or accommodation. *Drake*, at 154. A finding of permissive use is supported by evidence of a close, friendly relationship or a family relationship between the claimant and the property owner. *Granston v. Callahan*, 52 Wn. App. 288, 294, 759 P.2d 462, 465 (1988). A use that is permissive at its inception cannot ripen into a prescriptive right, no matter how long the use 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.” *Nw. Cities Gas*, 13 Wn.2d at 84, 123 P.2d 771.

Washington case law provides that mere use without permission may not be sufficient to establish adverse use. *Cuillier v. Coffin*, 57 Wn.2d 624, 628, 358 P.2d 958 (1961). In *Cuillier*, the claimants asserted a prescriptive easement to use an orchard road owned and used by their neighbors. The claimants did not ask permission and established use for the prescriptive period. The court concluded, however, that unchallenged use was but one circumstance from which an inference of adverse use might be drawn. *Id.* at 627. Importantly, the court also concluded that the identity of the person who made and used the road was another consideration to be examined. *Id.* The court explained that where the owner shares use of the road with the claimant, there is an inference of neighborly accommodation. *Id.* Significantly, the court held that “[t]he 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.” *Id.* The court concluded that even though the claimants used the road, no easement had been established because the record was devoid of evidence demonstrating a purpose to impose a separate servitude on the owner's property. *Id.* at 628.

In *Kunkel v. Fisher*, 106 Wn.App. 599, 23 P.3d 1128 (2001), upon which Williams relied in their opening brief, the fact that the plaintiff's trucks had traversed a gravel road over the defendant's land for 20 years was found insufficient to overcome the presumption of permission. *Id.* at 605. In that case, the claimant established that (1) he used the road for the relevant time period, (2) successive owners were aware of the claimant's use, (3) no one ever objected, (4) the claimant brought and spread gravel on one occasion, and (5) the claimant had been assured that his use of the road was not a problem. *Id.* at 604–05, 23 P.3d 1128.

Here, Bowlby cannot overcome the presumption of permissive use when any use outside of the prescriptive easement was permissive at its inception, due to the close familial relationships of the predecessors in title to both Williams and Bowlby. In *Drake*, upon which Bowlby relies, the court pointed to the lack of the relationship between the parties as an important element in finding a prescriptive easement. Here, the creators and users of the easement for more than 30 years were all members of the same family. Nothing in the record demonstrates a distinct and hostile use by the owners of the Bowlby property to remove the permissive nature of the use after the servient estate was purchased by the Williams in 2001. Indeed, both Scott Williams and William Bennison testified to an agreement about permissive extended use of the property following

Bennison's purchase of the dominant estate in 2003. See VRP 308; VRP 364:7-10.

Quite simply, the record does not support a finding of prescriptive easement. During any period of ownership by the Keller or Schultz families, the use was permissive. Thereafter, nothing in the record demonstrates a distinct intent by the dominant estate owner of an adverse and hostile use, until the present issues leading to this suit are considered.

**B. THE WILLIAMS HAVE A RIGHT TO A CLOSED GATE AS A REASONABLE RESTRAINT ON THE EASEMENT**

A trial court's decision to grant injunctive relief and the terms of the relief are reviewed for an abuse of discretion. *Snyder v. Haynes*, 152 Wn.App. 774, 780-81, 217 P.3d 787 (2009). Trial courts have broad discretionary power to fashion injunctive relief to fit the particular circumstances of the case before it. *Rupert v. Gunter*, 31 Wn.App. 27, 30, 640 P.2d 36 (1982). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In determining whether a land owner may maintain a fence across an easement, the trial court looks at the parties' intent as demonstrated by the case circumstances, the nature and situation of the property subject to

the easement, and the manner in which the easement has been used and occupied. *Standing Rock Homeowner's Ass'n v. Misich*, 106 Wn. App. 231, 241, 23 P.3d 520 (2001). In *Rupert v. Gunter*, 31 Wn.App. 27, 640 P.2d 36 (1982), the court of appeals determined that there was no abuse of discretion in allowing a gate across an easement. Similar to the present case, there was no mention in the express easement as to whether or not a party was prohibited from erecting a gate. The court stated as follows:

Whether or not the owner of land, over which an easement exists, may erect and maintain fences, bars, or gates across or along an easement way, depends upon the intention of the parties connected with the original creation of the easement as shown by the circumstances of the case; the nature and situation of the property subject to the easement; and the manner in which the way has been used and occupied.

*Id.* at 30-31. Similarly, if the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances. *Seattle v. Nazarenes*, 60 Wn.2d 657, 374 P.2d 1014 (1962).

Bowlby does not challenge the determination that a gate is a reasonable restriction on the easement. Thus, the only issue is the court's determination on how and when the gate is to be used. Both Jana Keller-Porter and Scott Williams testified to trespassers, both intentional and unintentional, along the easement prior to installation of the gate.

Testimony was also submitted by Ms. Porter in relation to abatement of trespassers after installation of the gate. She specifically testified that the undesirable activity stopped after she installed her gate. VRP 334:6-7. When Bowlby removed the gate prior to this dispute in 2010, Ms. Porter testified to having trespassers once again. VRP 334:8-15.

A closed but not locked gate is a reasonable restriction, and the issue should be remanded to the trial court for entry of a judgment reflecting that reasonable restriction. Leaving the gate open during the day, and then only closed at night if a party actually closes it, is not allowing for a reasonable restriction on the easement designed to prevent trespassers and unwanted guests. Further, the court's Conclusion that the gate remain closed during the hours of darkness once it has been closed leaves the determination of when it can be closed open to interpretation. CP 384.

**C. THE AWARD OF FEES WAS IN ERROR**

Williams agrees with Bowlby that the appellate court engages in a two-part analysis in reviewing a trial court's award of attorney's fees. In *Gander v. Yeager*, 167 Wn. App. 638, 282 P.3d 1100 (2012), the court stated as follows:

Thus, we apply a two-part review to awards or denials of attorney fees: (1) we review de novo whether there is a legal basis for awarding attorney fees by statute, under

contract, or in equity and (2) we review a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion.

*Id.* at 647. The court reviews issues of statutory interpretation de novo. *State v. Alvarado*, 164 Wn.2d 556, 561, 192 P.3d 345 (2008).

Here, the court awarded attorney's fees under RCW 4.24.630(1), as well as RCW 4.84.185. The court erred in awarding fees under either statute.

#### **1. The Award under RCW 4.24.630(1) Was in Error.**

Attorney's fees are not warranted under RCW 4.24.630(1), as that statute should be narrowly applied. That section provides as follows:

**Every person who goes onto the land of another** and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

RCW 4.24.630(1) (emphasis added).

Bowbly relies upon *Saddle Mountain Minerals, LLC v. Santiago Homes, Inc.*, 146 Wn.App. 69, 78-79, 189 P.3d 821 (2008), in support of his argument that fees can be awarded under RCW 4.24.630(1). That case deals with an owner's interference with another's mineral rights when the minerals were removed from the property by the surface owner. *Id.* The mineral rights were expressly reserved in a Statutory Warranty Deed transferring the property. *Id.* at 72-73. Indeed, the court stated that the mineral rights owner owned the minerals, sand and gravel in, around and under the surface of the property, pursuant to the deed. *Id.* at 75. The case does not address the issue of easements at all; the property rights discussed in the case are quite distinct from an easement. Therefore, *Saddle Mountain Minerals*, supra, is not controlling. Further, the court determined that the trial court did not err in failing to grant summary judgment to the mineral right's owner on the issue of statutory trespass under RCW 4.24.630(1). *Id.* at 78-79. The case was remanded for further proceedings. *Id.* at 80. Because the facts are easily distinguishable, the case is not controlling to the situation presented in this appeal.

Instead, the court should consider the more recent decision of *Clype v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573, 225 P.3d 492, 494 (2010). Therein, the court outlined the types of conduct for which liability under the statute is imposed. "The statute establishes liability for

three types of conduct occurring upon the land of another: (1) removing valuable property from the land, (2) wrongfully causing waste or injury to the land, and (3) wrongfully injuring personal property or real estate improvements on the land.” *Id.* at 577-78. “By its express terms, the statute requires wrongfulness only with respect to the latter two alternatives. **Presence on the land is required for all three.**” *Id.* at 578 (emphasis added).

Here, there was no allegation nor evidence that Mr. or Mrs. Williams actions were ever undertaken on any property that was not their own. Thus, Bowlby’s claims fail to meet the requirement of the very first sentence of the statute, which requires that a person goes onto the land of another. See RCW 4.24.630(1). Because there was no trespass on Bowlby’s land, no further analysis should be required.

In *Colwell v. Ezzell*, 119 Wn.App. 432, 81 P.3d 895 (2003), the court was very clear in stating that RCW 4.24.630(1)’s premise is that the “defendant physically trespasses on the plaintiff’s land.” *Id.* at 439. The court goes on to point out that in that case, there was no physical trespass, as Mr. Colwell’s actions in alleged interference with Ezzell’s easement rights were all taken on his own land. *Id.* Bowlby attempts to diminish this very clear statement requiring physical trespass by focusing on the court’s lengthier analysis as to whether Mr. Colwell’s actions were

wrongful. This analysis as to Mr. Colwell's conduct does not remove the requirement of physical trespass.<sup>2</sup>

As stated, the Williams did not go onto the land of any other person, nor was there any testimony alleging that they went onto the property of Bowlby or any other person to commit waste or injury to land or personal property. Second, there was no permanent damage amounting to removal, waste or injury to property for which damages were awarded. Bowlby was not excluded from access to his property at any time. Simply put, the facts presented here do not comport with the requirements under RCW 4.24.630 that require a physical trespass onto the land of another to do damage. A strained reading of *Colwell* does not change that requirement.

## **2. The Award Under RCW 4.84.185 Was in Error**

The court's award of fees under RCW 4.84.185 was not warranted and should be reversed. The court found that "[t]he position taken by defendants is frivolous and advanced without reasonable cause. The defendant's actions cannot be justified or supported by any rational

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<sup>2</sup> This reading of *Colwell* is consistent with an unpublished case, *Camus v. Culpepper*, 157 Wn.App. 1046 (2010). In interpreting *Colwell*, the *Camus* court stated "[i]n fact, only physical invasion on the property itself is protected. Camus, as an easement holder, only owns a right to use the land, not the land itself. Only physical invasion on the property, not a right in the land, is protected under RCW 4.24.630.

argument. Defendants did not present any issues over which reasonable minds could differ.” CP 297. Similarly, the court concluded that the defendants’ counterclaim and defense was frivolous and advanced without reasonable cause, and thus Defendants are liable for fees under RCW 4.84.185. CP 398. This award must be reversed.

RCW 4.84.185 requires a finding that a party’s defense was frivolous and not advanced with reasonable cause. It also must specifically find that the party’s position, in its **entirety**, must have been frivolous and advanced without cause. *State ex rel. Quick–Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998). Accordingly, “if any claims advance to trial, a trial court’s award of fees under RCW 4.84.185 cannot be sustained.” *Id.* at 904; see also *Wright v. Dave Johnson Ins. Inc.*, 167 Wn. App. 758, 787, 275 P.3d 339, 355, *review denied*, 175 Wn.2d 1008, 285 P.3d 885 (2012).

Since the Williams’ defense advanced to trial, the law announced in *State ex rel. Quick-Ruben*, *supra*, mandates that an award under RCW 4.84.185 cannot be sustained. Further, an award under this basis should not be supported since the Williams actually prevailed in defense of Bowlby’s tort/outrage claim. CP 382, Finding of Fact 21; CP 384, Conclusion of Law 6. Bowlby nonsensically states that even though “the trial court found that Williams’ conduct did not rise to the level of outrage,

the trial court found that Williams' defense as a whole was frivolous and advanced without reasonable cause." Respondent's Brief p. 27. If the Williams prevailed on Bowlby's claim of outrage, then their defense as a whole was not frivolous and advanced without reasonable cause.

Further, as outlined clearly by this appeal, the Williams presented debatable issues in defense of Bowlby's claims for prescriptive easement, and further raised debatable issues as to whether their actions constituted an effort to place a reasonable restriction on the easement, for which the first gate, with limitation subject to this appeal, was determined to be.

### **III. CONCLUSION**

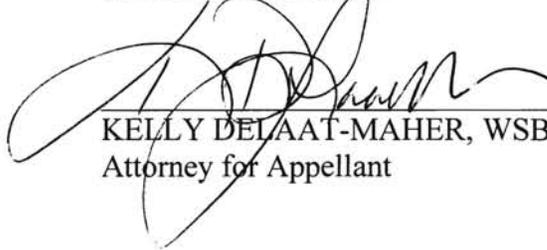
As outlined in William's opening brief on appeal, sufficient evidence was not presented supporting the trial court's conclusions that a prescriptive easement exists between the parties. Additionally, sufficient evidence was presented supporting installation of a closed gate on the easement, not limited to the court's restriction that the gate only be closed during the hours of darkness, which can be left open to interpretation.

Finally, the award of fees under RCW 4.24.630(1) was an abuse of discretion as no physical trespass occurred. Similarly, no basis for fees exists under RCW 4.84.185, as debatable issues are presented in relation to prescriptive easement claims, and Williams prevailed on Bowlby's tort/outrage claims.

Based upon the above, Williams requests this court to reverse the award of fees in its entirety, reverse the finding of a prescriptive easement, and remand for judgment to place a closed gate for all hours of the day as a reasonable restriction on use of the easement.

RESPECTFULLY SUBMITTED this 22nd day of March, 2013.

SMITH ALLING P.S.

A handwritten signature in black ink, appearing to read 'K. Delaat-Maher', is written over a horizontal line.

KELLY DELAAT-MAHER, WSBA #26201  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of March, 2013, I caused to be served a true and correct copy of [this] Reply Brief of Appellants upon counsel of record, via the methods noted below, properly addressed as follows:

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DATED this 22nd day of March, 2013.



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Joseph M. Salonga, Legal Assistant

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