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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THOMAS G. BOWDISH and CHARLENE P. BOWDISH LIVING
TRUST; and THOMAS G. BOWDISH and CHARLENE P.
BOWDISH, husband and wife

Appellants,

v.

KAREN K. DECARUFEL, as Trustee of the R & J FAMILY TRUST;
and ROGER RICKER and JEANNETTE RICKER, husband and
wife,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR JEFFERSON COUNTY
THE HONORABLE KEITH C. HARPER

BRIEF OF RESPONDENTS

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I. RESTATEMENT OF THE CASE

This case involves parcels of property within Seamount Estates, a development in Brinnon, Washington. The development was originally platted in 1977, Ex. 22, and replatted in 1979, Ex. 23. Bowdish owns Lots 9, 10 and 11. Ricker owns Lot 12. Bowdish purchased Lots 9 and 10 in 1976. Ex. 26-29. Bowdish purchased Lot 11 in 1988 from Pettitt. Ex. 30-31. Ricker purchased Lot 12 from Pettitt in 2003. Ex. 34-35. Lot 11 and Lot 12 are adjacent lots. Ex. 23. Lot 11 lies to the west of Lot 12. Ex. 23.

A. Access to Lot 12 and Boundary Between Lots 11 and 12

When Ricker purchased Lot 12 from Pettitt, the property was being accessed via a gravel driveway from Cirque Drive which traverses a small portion of Lot 11. RP 371. It is undisputed that the gravel driveway had been used by Pettitt as his sole means of accessing Lot 12 from the inception of Pettitt's ownership. RP 392. When the gravel driveway was constructed connecting Lot 12 to Cirque Drive, Pettitt owned both Lots 11 and 12. From the time Ricker purchased Lot 12 in 2003, the gravel driveway served as the sole means of access to Lot 12 in large part because of the actions of Bowdish described below.

Both the Plat and Replat of Seamount Estates depict an

access and utilities easement from Cirque Drive through Lots 5, 6, 7, 8, 9, 10, and 11, and terminating at the northeast corner of Lot 12. Ex. 22, 23. This easement is also referenced in the Protective Covenants of Seamount Estates. Ex. 7, 24. There is in fact a road from Cirque Drive through Lots 5, 6, 7, 8, 9, 10, and 11 which terminates at Lot 12. RP 377. That road is utilized by all of the lot owners except the Bowdishes to access their properties. RP 377-78. When Ricker purchased Lot 12, there was an asphalt driveway at the northeast corner of the lot in the precise location of the access and utilities easement depicted on the Plat and Replat. RP 372, 377, 432. The easement road is specifically referenced in the Protective Covenants for Seamount Estates recorded on September 6, 1977 under Auditor's File No 244457, Ex. 24, and re-filed on March 18, 1994 under Auditor's File No. 369847. Ex. 7. Paragraph 16 of the Protective Covenants provides as follows: "The lot owners or contract purchasers of Lots 5 through 12 are responsible for the upkeep of the access road serving their lots." Ex. 7, 24.

In addition, on August 4, 1978, Seamount Estates filed a Property Report. Ex. 45. The Property Report provides in Paragraph I.H. as follows:

ACCESS:

All lots, ***with the exception of lots 5 through 12***, are fronting on roads owned by Jefferson County which is responsible for their maintenance. The contract purchasers of lots 5 through 12 are responsible for the upkeep of the access road serving those lots. Lots 5 through 12 mentioned above are in Division IV.

Immediately before or soon after Ricker purchased Lot 12, Bowdish showed Ricker a survey stake which Bowdish claimed marked the northeast corner of Ricker's property. RP 373. Having no factual basis to dispute Bowdish's claim, Ricker accepted Bowdish's representation. Shortly thereafter, Bowdish built a four-panel fence which started at the survey stake he had shown Ricker and continued along the eastern side of Ricker's property. RP 374. Bowdish told Ricker that the fence delineated the boundary between Lots 11 and 12.

The fence erected by Bowdish blocked the existing asphalt driveway which could have provided access to the northeast corner of Lot 12. RP 374. Bowdish told Ricker that the driveway was installed by the County in error and that Ricker had no access to the northeast corner of Lot 12. RP 374-75.

Ricker accepted and relied on Bowdish's representations that (1) the fence marked the boundary between Lots 11 and 12; RP 375, and (2) there was no access to the northeast corner of Lot 12. RP

375. In reliance on those representations, Ricker continued to use the gravel driveway to access his property and maintained the property up to the fence Bowdish had erected. RP 383. After the fence was erected, Bowdish did not use, occupy or maintain any portion of the property west of the fence line. RP 386, 390.

In 2007, Ricker removed the existing mobile home on his property and began construction of a new home which was substantially completed in 2010. RP 390-91. Ricker sited the new house based on Bowdish's representations with respect to the property line and a lack of access to the northeast corner of Lot 12. RP 392-94. If Ricker had known he had access to the northeast corner of Lot 12, Ricker would have built the house further south on Lot 12 and would have built a garage on the northern part of the lot which could have been accessed via the existing asphalt driveway. RP 394.

During the building process, Ricker excavated up to the fence line and Bowdish never objected. RP 391-92, 395. Ricker also built a patio lined by manor blocks which came within inches of the Bowdish fence. Bowdish never objected to the location of the patio. RP 91-92.

With respect to the gravel driveway from Cirque Drive to Lot

12, Ricker lined the driveway with a single row of manor blocks to delineate its location. RP 383-84. At Bowdish's request, Ricker raised the height of the manor blocks to accommodate a shared planting area which both Bowdish and Ricker maintained. RP 381, 384-85. The width of the gravel driveway has remained substantially unchanged throughout Ricker's ownership of Lot 12. RP 453.

In 2014, Bowdish decided to clear cut Lot 11. In preparation therefore, Bowdish hired Holman to survey Lot 11. Holman's survey showed that the northeast corner of Lot 12 was actually 42 inches to the west of the fence Bowdish had erected 11 years earlier. Ex. 3. Holman conducted a second survey in 2015. Ex. 36. The 2015 Holman survey showed that a portion of Ricker's patio and the manor block wall containing the patio were encroaching on Bowdish's property. Ex. 36.

Shortly after Holman completed his 2015 survey, Bowdish started removing the four-panel fence, one panel at a time. RP 426. Although Bowdish testified at trial that Ricker had damaged the fence with his excavator and that the fence was deteriorating, the trial court specifically found that there was no evidence that the fence had been damaged or was deteriorating. After Bowdish removed the fence, he placed a large pile of rocks to continue blocking Ricker's access to

the northeast corner of Lot 12. RP 427.

B. Easement Through Lot 12 from Cirque Drive to Lot 11

After Petitt sold Lot 11 to Bowdish, but before he sold Lot 12 to Ricker, Petitt granted Bowdish an easement through what is essentially the rear of Lot 12 to access the rear of Lot 11. Ex. 21. The easement is described as "a 12-foot easement along an existing road." Ex. 21. Ricker never disputed the existence and validity of this easement.

Prior to 2014, Bowdish rarely used the easement. RP 409-09. When he clear cut Lot 11, however, he used the easement extensively to remove the logs from Lot 11. Unfortunately, the logging trucks were too large to successfully navigate the 12-foot easement which at one point has a sharp turn to the left when exiting. RP 410, 412. As a consequence, the logging trucks caused significant damage, hitting stumps while attempting to navigate the sharp turn and damaging a County culvert. Ricker attempted to minimize the damage to his property by erecting stakes delineating the location and width of the easement, RP 410-11, but Bowdish simply removed the stakes and continued his unfettered use of the easement road. RP 411-12. At trial, Bowdish testified that Ricker interfered with his use of the easement road by placing stakes along

the easement route, by placing a plastic shed which encroached onto the easement by an inch, and by putting rocks and gravel on the easement, narrowing its useable width. Bowdish also complained that Ricker had cut a few feet off the width of a gate at the entrance of the easement and replaced the existing lock with his own. It was undisputed that Ricker provided Bowdish with a key to the new lock.

C. Easement for Utilities

On August 4, 1975, the owners of the property which would later become Seamount Estates executed a Plat of Seamount Estates, Division No. 4 which was subsequently recorded on August 22, 1977 as Jefferson County Auditor's File No. 244177. Ex. 22. The Plat contained the following language: "An easement for utility installation and maintenance to a standard width of 2 ½ feet along interior lot lines and 5 feet along front lot lines is reserved for each lot in the Plat." Ex. 22.

On April 8, 1977, the owners of the Seamount Estates property quit claimed "[a]ny and all interest grantors, as developers, may have in platted easements, county roads, and all platted lots of Division No. 4, Seamount Estates, according to the plat thereof recorded in the office of the Auditor of Jefferson County." Ex. 40. As of April 8, 1977, the Plat of Seamount Estates had not been filed with

the Auditor's Office. Ex. 22.

On September 6, 1977, Protective Covenants for Seamount Estates were filed under Auditor's File No. 244457. Ex. 24. The Protective Covenants provide in Paragraph 7 as follows: "A ten (10) foot easement, parallel to and adjacent to all lot lines five (5) feet on either side of each lot line for water pipes, storm sewers, and utilities, including maintenance is hereby reserved." The Protective Covenants were subsequently re-recorded on March 18, 1994 under Auditor's File No. 369847 and contained the same language with respect to the utilities easement. Ex. 7.

On June 28, 1979, a Replat of Seamount Estates Division No. 4 was recorded under Auditor's File No. 258842. The Replat contains no reference to an easement for utilities. Ex. 2, 22.

The first reference to Bowdish's claim that these documents somehow granted him a five-foot easement on Ricker's property to install utilities is contained in a letter from Bowdish's attorney to Ricker dated January 6, 2015. Ex. 4. The claim was later re-asserted in a letter dated May 6, 2016. Ex. 6. Bowdish also made a vague reference to the purported easement in his Complaint. CP 3.

The Statutory Warranty Deed conveying Lot 11 to Bowdish does not contain a grant of a utilities easement. Ex. 31. Neither the

Real Estate Contract, Ex. 34, nor the Statutory Warranty Deed conveying Lot 12 to Ricker, Ex. 35, indicates that Lot 12 is subject to an utilities easement in favor of Bowdish.

At trial, board members of Seamount Estates testified that the utilities easement was intended for the use of the homeowners' association, not individual lot owners, who are expected to install private utilities within their own lot lines. RP 238.

D. Trespass onto Ricker's Property

After the 2014 Holman survey, Bowdish repeatedly came onto Ricker's property and caused damage. He moved or removed manor blocks; RP 454, he spray painted Ricker's patio area, fence, flower beds, and manor stone walls; he killed ground cover vegetation using Roundup; RP 321, he damaged Ricker's split rail fence; and he deliberately damaged Ricker's street number sign. Bowdish did not dispute at trial that he did all these things, although he testified that damaging Ricker's street number sign was an "accident." The trial court found that Bowdish's acts were intentional and wrongful as defined by RCW 4.24.630. CP 12.

E. Trespass onto Bowdish's Property

At some point during Ricker's ownership of his property, he accidentally obliterated a survey marker while excavating near the

north side of his property. The court found that the destroying the survey was accidental, rather than intentional, and awarded Bowdish \$750 in damages to replace the survey marker. CP 13.

F. Award of Attorney's Fees

Based on its finding that Bowdish had trespassed upon Ricker's property and caused damage, the trial court awarded Ricker his attorney's fees and costs pursuant to RCW 4.24.630(1). CP 13. Ricker's attorney submitted a Declaration of Counsel Re: Legal Fees. CP 104-133. The Declaration stated that Ricker expended \$18,969.67 defending the claims asserted by and the counterclaims against Bowdish. CP 104. The trial court determined that only three of the seven issues litigated at trial involved trespass onto Ricker's property and awarded Ricker only 3/7th of the total amount of legal fees expended, or \$8,100. RP 611-12. Judgment was entered against Bowdish for that amount, less the \$750 Bowdish was awarded for damage to his survey marker. RP 612, CP 151.

II. ARGUMENT

- A. Bowdish failed to assign error to any of the trial court's extensive findings of fact as set forth in its Memorandum Opinion and Order. These findings of fact are therefore verities on appeal.**

On February 26, 2018, the trial court issued its Memorandum

Opinion and Order setting forth detailed findings of fact based on the evidence presented at trial. CP 89-103. The trial court acknowledged that “[s]ome of the testimony of the witnesses was contradictory” and, as a consequence, “the Court has had to determine what is most credible in the circumstances.” CP 89. In resolving the issues before it, the court further stated:

As mentioned above, key parts of testimony between Plaintiff Bowdish and Defendant Ricker conflicted. The credibility of the witnesses is important to resolution of this case.

CP 8. Throughout its Memorandum Opinion and Order, the trial found that Bowdish’s testimony was simply not credible. CP 8, 9, 10, and 11. In a subsequent hearing held on April 4, 2018 to enter Findings of Fact, Conclusions of Law, and Judgment, the trial reiterated its finding that “Mr. Bowdish [is] not credible in a lot of respects.” RP 607-08. The trial court then went on to identify the many specific instances in which it found Bowdish to be not credible. RP 608-611.

An appellate court defers to the findings of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Poling*, 128 Wash.App. 659, 667, 116 P.3d 1054, 1058 (2005) (*citing State v. Walton*, 64 Wash.App. 410, 415-

16, 824 P.2d 533, *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992)).

More importantly, though, Bowdish did not assign error to any of trial court's findings of fact. When a party fails to assign error to a trial court's findings of fact, those findings of fact are verities on appeal. *Standing Rock Homeowners Assn. v. Misich*, 106 Wash.App. 231, 239 23 P.3d 520 (2001). *See also Harris v. Urell*, 133 Wash.App. 130, 137, 135 P.3d 530 (2006) (unchallenged findings of fact are verities on appeal). Moreover, RAP 10.3(g) specifically mandates that, in the brief's "assignment of error" section, the appellant must pinpoint the findings of fact that the trial court allegedly entered erroneously. RAP 10.3(G)

Despite not having assigned error to any of the trial court's findings of fact, Bowdish repeatedly asserts facts in his Statement of the Case that were not found by the trial court, expressly discredited by the trial court, or not based on the record. On review, the court should disregard all factual assertions contained in Bowdish's Opening Brief which were not found by the court, as well as any and all argument based on those factual assertions.

B. The trial court did not err in concluding that Ricker acquired title to the property west of Bowdish's fence, extending south to the southwest corner of Lot 11 and the

southeast corner of Lot 12

The trial court concluded that Ricker has established title to the property west of the four-panel fence erected by Bowdish extending to the southeast corner of Lot 12 on two legal bases. The court did not err in reaching this conclusion on either basis.

The first legal basis for the court's conclusion was estoppel in pais which requires that the claimant establish: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to the party if the other party is allowed to contradict or repudiate such admission, statement, or act. *Thomas v. Harlan*, 27 Wash.2d 512, 518, 178 P.2d 965 (1947); *Nickell v. Southview Homeowners Assn.*, 167 Wash.App. 42, 53, 271 P.3d 973 (2012). Each of the elements must have existed for ten years. *Nickell*, 167 Wash.App. at 52.

To support its legal conclusion that Ricker has established title to the property west of the four-panel fence on the basis of estoppel in pais, the trial court made extensive findings of facts to which Bowdish did not assign error. These findings include the following:

- At the time Ricker purchased Lot 12, Bowdish showed Ricker what Bowdish believed were the corners of Lots 11 and 12.

In particular, Bowdish pointed out a survey marker which he described as the northeast corner of Lot 11. CP 96.

- Bowdish built the fence for two reasons (1) to block Ricker's ability to use the access easement depicted on the Plat and Re-plat; and (2) to mark what he thought was his boundary at the time. CP 96.
- Ricker relied on Bowdish's representations in siting his house. CP 97.
- Ricker would be significantly injured if Bowdish's claim that the fence was not the boundary line was sustained. CP 97.

Secondarily, the trial court concluded that all of the elements of adverse possession had been established. To support a claim for adverse possession, the claimant must demonstrate that his possession of the disputed area has been (1) exclusive; (2) actual and uninterrupted; (3) open and notorious; and (4) hostile for the statutory period of ten years. *Chaplin v. Sanders*, 100 Wash.2d 853, 857, 676 P.2d 431 (1984); *Nickell v. Southview Homeowners Assn.*, 167 Wash.App. 42, 50, 271 P.3d 973 (2012); *Lingvall v. Bartmess*, 97 Wash.App. 245, 253, 982 P.2d 690 (1999).

Again, to support its legal conclusion that Ricker has established title to the property west of the four-panel fence on the

basis of adverse possession, the trial court made extensive findings of facts to which Bowdish did not assign error. These findings include the following:

- After Bowdish built the four-panel fence in 2003, Bowdish never used, occupied, or maintained any portion of the property west of the fence. CP 10.
- Ricker treated the property west of the fence as though it were his own and did so openly and notoriously. CP 10.
- Ricker's use of the property was exclusive. CP 10.
- Ricker's possession of the property was for at least ten years from the date it was built in 2003 until Bowdish removed it in 2015. CP 10.

Bowdish did not assign error to these findings of fact. Instead, Bowdish argues that Ricker's claim must fail because the area in dispute lacked a well-defined line and that neither the pleadings nor the evidence gave Bowdish sufficient information about the area being claimed by adverse possession. Opening Brief of Appellants, pages 29-33. In support of this argument that the area in dispute lacks a well-defined line, Bowdish cites *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953), *overruled on other grounds by Chaplin v. Sanders*, 100 Wash.2d 853, 862 n. 2, 676 P.2d 431 (1984). The

was discussed in *Merriman v. Cokely*, 168 Wash.2d 627, 230 P.3d 162 (2010) which made clear that the existence of a fence would most assuredly meet the requirement of a well-defined boundary. *Merriman*, 168 Wash.2d at 631. Moreover, Ricker's counterclaim specifically identified the area being claimed as "that portion of [Bowdish's] property west of the location of the former boundary fence." CP 11. There was never any uncertainty about the area being claimed by adverse possession.

C. The trial court did not err in concluding that Ricker has established an easement from the gravel driveway on Lot 12 over a portion of Lot 11 to connect to Cirque Drive

The trial court concluded that Ricker established an easement from the gravel driveway on Lot 12 over a portion of Lot 11 connecting to Cirque Drive on three legal bases. The court did not err in reaching this conclusion.

First, the court concluded that the gravel driveway was included within the access easement granted in the Plat and Replat of Seamount Estates. CP 98. Whether or not the trial court is correct in its conclusion that the easement area extends south from the dotted line on the Plat and Replat is immaterial as the trial court based its conclusion on two other bases.

The trial court also concluded that Ricker established a

prescriptive easement from Lot 12 to Cirque Drive. The elements necessary to establish a prescriptive easement are: (1) open and notorious use of the easement area; (2) continuous and uninterrupted use over a uniform route for a ten-year period; (3) use adverse to the owner; and (4) knowledge of the owner. *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wash.2d 75, 85, 123 P.2d 771 (1942); *Kunkel v. Fisher*, 106 Wash.App. 599, 602, 23 P.3d 1128 (2001); *Gamboa v. Clark*, 183 Wash.2d 38, 43, 348 P.3d 1214 (2015); *Lingvall v. Bartmess*, 97 Wash.App. 245, 249-50, 982 P.2d 690 (1999); *Roediger v. Cullen*, 26 Wash.2d 690, 706, 175 P.2d 669 (1946).

The trial court made findings of fact to support its conclusion that Ricker had established a prescriptive easement. Those findings are:

- Ricker, and prior to that, Pettit, used the gravel driveway from Lot 12 to Cirque Drive. CP 98.
- Ricker's use was continuous and uninterrupted. CP 98.
- Ricker's use was notorious and open for everyone, including Bowdish, to observe. CP 98.
- Despite Bowdish's testimony to the contrary, the location and width of the driveway has remained substantially unchanged.

CP 98.

Bowdish did not assign error to the trial court's findings of fact. Instead, Bowdish argues that Ricker has not rebutted the presumption that Ricker's use of the easement was permissive. Bowdish relies on *Gamboa v. Clark*, 183 Wash.2d 38, 348 P.3d 1214 (2015), which stands for the proposition that (1) prescriptive rights are not favored in the law; and (2) an initial entry onto the land of another is presumed permissive in three situations. Those situations are:

1. The land is unenclosed land;
2. There is a reasonable inference that the use was permitted by neighborly sufferance or acquiescence; or
3. The landowner created or maintained the road and the neighbor used it in a noninterfering way.

Gamboa, 183 Wash.2d at 44. But this case presents none of these situations. It is undisputed that this case does not involve unenclosed or undeveloped land. There is no question that the initial entry on the land was not permitted by neighborly sufferance or acquiescence. Pettit did not need Bowdish's "neighborly sufferance or acquiescence" when he constructed the gravel road across Lot 11 **because he owned Lot 11**. Finally, there has been no suggestion

that Bowdish created or maintained the gravel driveway providing access to Lot 12 from Cirque Drive. Instead, it is more reasonable to conclude that Pettit built the gravel driveway when he owned Lots 11 and 12. No other explanation has been offered, and no other explanation is reasonable. Clearly, Bowdish would have had no reason to build a driveway from a lot he did not own across another lot he did not own.

Finally, the court concluded that Ricker has an implied easement over the gravel driveway on Lot 11. CP 99.

An implied easement (either by grant or reservation) may arise (1) when there has been unity of title and subsequent separation; (2) when there has been an apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during unity of title; and (3) when there is a certain degree of necessity (which we will discuss later) that the quasi easement exist after severance.

Adams v. Cullen, 44 Wash.2d 502, 505, 268 P.2d 451 (1954). With respect to the degree of necessity required, the *Adams* court stated:

While there is some conflict in the cases as to the degree of necessity required to create an easement by implied grant, the prevailing rule, and the one adopted by this court, is that the creation of such an easement does not require absolute necessity, but only reasonable necessity.

Adams v. Cullen, 44 Wash. 2d at 507.

The undisputed facts are, and the court found:

- Petitt owned Lots 11 and 12; CP 99
- Petitt constructed the gravel driveway over a small portion of Lot 11 to access Cirque Drive from Lot 12; CP 99
- Petitt continued to use the gravel driveway after he sold Lot 11 to Bowdish; CP 99
- Ricker continued to use gravel driveway after he purchased Lot 12 from Pettit with no complaint from Bowdish; CP 99
- Bowdish in effect encouraged the use of the gravel driveway by blocking Ricker's platted easement to the northeast corner of Lot 12, first with a fence, then with a pile of rocks; CP 99
- The topography of the land south of the driveway on Lot 12 is such that it would be at some substantial cost, inconvenient, and an unsatisfactory substitute to create an access road from Cirque Drive to Lot 12. CP 99, RP 458-59.

None of these facts were disputed and Bowdish did not assign error to any of the court's findings. Bowdish complains that Ricker "never pled, nor briefed, a claim for an implied easement yet the court determined they had established one." Opening Brief of Appellant, page 17. But Bowdish has offered no legal authority for the proposition that a litigant must plead and/or brief all theories upon which recovery can be based.

D. The trial court did not err in concluding that Bowdish is liable to Ricker for attorney's fees and costs under RCW 4.24.630 for trespassing upon and causing damage to Ricker's property.

After Bowdish learned through the Holman survey that his property line was east of the fence he had built in 2003, he began an unrelenting campaign of harassment against Ricker. RP 433. Bowdish damaged Ricker's plants; RP 433, he sought to have Ricker removed from the Board of Seamount Estates; RP 434, he lodged a complaint against Ricker with the County concerning Ricker's building setbacks; RP 434, he painted white lines across Ricker's patio, manor blocks, and landscaping. RP 435. Bowdish also intentionally ran over Ricker's house number sign and sprayed Roundup on Ricker's ground cover to kill it. RP 451.

Bowdish's son and daughter-in-law, presumably at Bowdish's instruction, came onto to Ricker's property and began removing manor blocks from Ricker's wall along the north side of his property. RP 454-56.

RCW 4.24.60 provides in relevant part:

(1) Every person who goes onto the land of another and . . . wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party 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 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 attorney's fees and other litigation related costs.

The trial court concluded that the evidence established that the acts were "wrongful" as contemplated by the statute. CP 100. In his Opening Brief, Bowdish disputes the court's finding that his damage to the street number sign was intentional; he argues that Ricker had notice that he was going to trespass upon his land to install utilities; and he contends that the white paint he sprayed on Ricker's patio and manor blocks was only "temporary," although the white paint still existed at the time of the trial. Opening Brief of Appellant, page 43-44.

Bowdish also argues, without legal authority, that the attorney's fees should be segregated because, at some point during the litigation, the trust in which Lot 12 was titled was revoked and title to the property was conveyed to Ricker. There is no dispute that at all times during the course of this dispute Ricker was the beneficial owner of Lot 12, whether titled in the trust or to him personally. Further, the judgment creditor was identified in the Judgment Quieting Title to Real Property, Awarding Attorney's Fees, and Granting Additional Relief was both the R & J Family Trust, as well

as Ricker and his spouse. Nothing substantive would be accomplished by segregating the award of attorney's fees between these parties as they are essentially one and the same.

Bowdish also argues that Ricker did not segregate the fees expended in establishing the trespass (the basis upon which fees could be awarded) and those expended addressing the remaining issues raised in the litigation. Opening Brief of Appellant's, page 41. In support of his argument, Bowdish cites a single case, *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now*, 119 Wash.App. 665, 82 P.3d 1199 (2004). The *Loeffelholz* case, however, supports Ricker's position, not Bowdish's position. In the *Loeffelholz* case, as in this case, there were causes of action for which attorney's fees could be awarded and causes of action for which attorney's fees were not authorized by statute or contract. *Loeffelholz*, 119 Wash.2d at 687-88. Initially, the prevailing party requested an award of \$98,105.50 for all of its attorney's fees. *Id.* at 689. The trial court instructed the prevailing party to segregate the fees between the claims for which fees could be awarded and those for which fees could not be awarded. *Id.* The prevailing party attempted to do so, but the trial court was unsatisfied with the segregation. *Id.* Despite being unsatisfied with the segregation, the

trial court nevertheless awarded the prevailing party \$50,000 in attorney's fees. *Id.*

On appeal, the court stated that a trial court's award of attorney's fees is reviewed for abuse of discretion. *Id.* at 690. Abuse occurs when a trial court's decision is manifestly unreasonable or based upon untenable grounds. *Id.* Most importantly, "[t]he trial court must create an adequate record for review of the fee award decisions, which means in part that the record must show a tenable basis for the award." *Id.*

The *Loeffelholz* court recognized that an exception to the requirement that legal fees be segregated exists if "no reasonable segregation can be made" because of the overlapping or interrelated nature of the claims. *Id.* In such a case, the trial court has the discretion to independently decide what represents a reasonable amount of attorney's fees, "provided it shows, *on the record*, a rational basis for its decision." *Id.* at 693. At the hearing on attorney's fees, Ricker's counsel represented to the court that she had no reasonable basis upon which to segregate fees, that she worked on the whole case in its entirety whenever she spent time on the case. RP 594. She admitted that any segregation of fees "after the fact" would be arbitrary. RP 594.

In this case, the trial court created a record of its award of attorney's fees and set forth a tenable basis for that award of fees. RP 611. The trial court determined that three of the seven issues litigated at trial involved Ricker's claim of trespass by Bowdish. RP 611. The trial court therefore awarded Ricker 3/7th of the total amount of attorney's fees expended, or \$8,100. RP 611. In doing so, the trial court exercised its discretion, did not abuse its discretion, and created a record setting forth the basis of its decision.

E. The trial court did not err in concluding that Ricker has an access easement over Lots 9, 10, 11 to Lot 12, as shown on the Seamount Estates Plat and Replat.

Both the Plat and Replat of Seamount Estates unambiguously created an easement for access and utilities from Cirque Drive over Lots 5 through 12. Private easements may be created by including the grant in a plat. *Rainier View Court Homeowners Assn., Inc. v. Zenker*, 157 Wash.App. 710, 238 P.3d 1217 (2010) (citing RCW 58.17.165). See also *M.K.K.I., Inc. v. Krueger*, 135 Wash.App. 647, 145 P.3d 411 (2006) ("No particular words are required to constitute a grant, instead, any words which clearly show an intention to give an easement are sufficient."). It is further undisputed that the Plat of Seamount Estates was approved by the County and properly recorded as required by RCW 58.17.165.

Bowdish argues that the access and utilities easement was intended to benefit the homeowners' association. In support of that argument, Bowdish relies on the Quit Claim Deed executed by the developers in 1977. In making this argument, however, Bowdish ignores the fact that the Protective Covenants initially recorded in 1979 and later re-recorded in 1994 assign responsibility for maintaining the easement road to Lots 5 through 12.

Bowdish also ignores the Property Report filed in 1978, Ex. 45, which specifically states that Lots 5 through 12 have no access to a public road, i.e. Cirque Drive, and assigns responsibility for maintaining the access road to those lots. Ex. 45.

It makes absolutely no sense that the easement was intended to benefit the homeowners' association where, as here, the responsibility for maintaining the easement was assigned to lots which were specifically identified as having no access to a public road.

Furthermore, no testimony was offered suggesting that the easement road was used for any purpose other than to provide Lots 5 through 12 access to Cirque Drive. The fact that Bowdish elected to install his own driveway that directly accesses Cirque Drive does not negate the fact that the developers intended that his access,

along with the owners of Lots 5- 12, would be via the easement road.

F. The trial court did not err in concluding that Ricker did not unreasonably interfere with Bowdish's 12-foot wide easement over the southern portion of Lot 12.

In his Opening Brief, Bowdish did not assign error to the findings of fact and conclusions of law of the trial with respect to Bowdish's claim that Ricker unreasonably interfered with Bowdish's use of his easement on the rear of Ricker's property. Ricker therefore assumes that Bowdish agrees that Ricker did not unreasonably interfere with Bowdish's use of his easement by placing a tent shed which encroached one inch onto the easement, placing a few easily removeable stakes and a few logs along the ground to delineate the easement, and temporarily placing dirt and rocks along the slope adjacent to the easement. CP 101.

G. The trial court did not err in concluding that Ricker did not trespass upon Bowdish's property contrary to RCW 4.24.630.

Bowdish's claim of trespass consisted of two elements. First, Bowdish alleged that Ricker trespassed upon his property by using, occupying and placing improvements west of the fence Bowdish built. Second, Bowdish alleged that Ricker trespassed upon his property when he obliterated Bowdish's survey marker while excavating along the property line.

The first element was resolved by the trial court's conclusion that Ricker has acquired title to the property west of the fence; therefore, any use, occupation or improvements by Ricker in that area are not trespass which applies to a "person who goes onto the land of another." RCW 4.24.630(1). Because the trial court determined that Ricker in effect owned the land onto which Bowdish claimed Ricker trespassed, the trespass claim necessarily fails.

The second element was resolved by the court's finding that Ricker did in fact cover up Bowdish's survey marker, but that Ricker's actions were not intentional or "wrongful" as contemplated by RCW 4.24.630(1). Ricker does not assign error to the trial court's finding, nor the trial court's award of \$750 to Bowdish to replace the survey marker.

H. The trial court did not err in concluding that Bowdish does not have a 10-foot utilities easement, 5 feet on either side of the boundary between Lot 11 and Lot 12.

The 10-foot utilities easement, 5 feet on either side of the boundary line of each lot in Seamount Estates, was first referenced in the Protective Covenants dated January 20, 1977 and initially recorded on September 6, 1997. The Quit Claim Deed from the developers to Seamount Estates Community Club was dated April 8, 1977 and recorded on May 2, 1977. Ex. 40. The Protective

Covenants were subsequently re-recorded by Seamount Estates on March 18, 1994. Ex. 7. Both sets of Protective Covenants state that the easement is "reserved," rather than "granted." The second set of Protective Covenants was executed and recorded 17 years after the developers executed the Quit Claim Deed conveying their interest in the property to the Seamount Estates Community Club. None of the various deeds which were entered into evidence, including Bowdish's deeds, indicate that the property is being conveyed "together with" a 5-foot easement along both sides of the neighboring lots. Instead, to the extent there is any reference in any of those deeds to an easement, the reference is "subject to" the Protective Covenants.

The testimony offered by the members of the Board of the Seamount Estates Community Club indicated that in the 40 years since the development was established no homeowner has requested to install or has installed utilities serving only his or her own property on a neighbor's property. In the view of the Board members, the easement was intended solely for the use of the Seamount Estates Community Club if and to the extent it installed utilities serving more than one lot owner. Individual lot owners are expected to install utilities on their own lots.

On the basis of this undisputed testimony and the recorded documents, the trial court correctly concluded that the utilities easement was intended to benefit the Seamount Estates Community Club, rather than individual lot owners, specifically Bowdish. CP 102.

Bowdish delegitimizes the testimony of the members of the Board of Seamount Estates Community Club by characterizing the testimony as “self-serving and [coming] from an entity which allowed Roger Ricker to illegally be a board member.” Opening Brief of Appellant, page 9-10. Bowdish’s argument is that because Lot 12 was owned by the R & J Family Trust, rather than by Ricker himself, Ricker was therefore disqualified from being a Board member and the Board acted “illegally” in allowing him to so serve. Bowdish has offered no legal authority for the proposition that a beneficial owner of property is prohibited from serving on the Board and no rationale basis for discrediting the testimony of the Board members on that basis.

I. Ricker was properly awarded his attorney’s fees at trial and should be awarded his attorney’s fees on appeal.

Ricker was properly awarded his attorney’s fees at trial pursuant to RCW 4.24.630(1). Ricker is therefore requesting an award of attorney’s fees on appeal pursuant to RAP 18.1. Ricker

further argues that an award of attorney's fees on appeal is appropriate given Bowdish's failure to assign error to any of the trial court's findings of fact.

III. CONCLUSION

This Court should affirm the trial court's conclusions of law with respect to each of the issues raised at trial and award Ricker his attorney's fees on appeal.

Respectfully submitted this 6th day of November, 2018.



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 6, 2018, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

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DATED at Port Townsend, Washington this 6th day of November, 2018.


Sherry L. Bulliman

PEGGY ANN BIERBAUM, PS

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