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No. 54109-2-II

Court of Appeals, Div. II, of the State of Washington

Robert J. Conklin,

Appellant,

v.

Marcia Bentz,

Respondent.

Brief of Appellant

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1. Introduction

In this property dispute, the trial court improperly ignored the existence of a valid, express easement and instead supplanted it with an implied easement with different terms. Despite the fact that Conklin conceded Bentz's adverse possession claim, the trial court awarded Bentz over $20,000 in attorney's fees for needlessly litigating that claim. The trial court also erroneously awarded fees for a prescriptive easement claim when the statute does not authorize such fees.

This Court should reverse the trial court's final orders and judgment and remand for further proceedings consistent with the express easement and a proper fee award under RCW 7.28.083(3).

2. Assignments of Error

Assignments of Error

1. The trial court erred in awarding attorney's fees for a prescriptive easement claim under RCW 7.28.083(3).
2. The trial court abused its discretion in awarding attorney's fees for the adverse possession claim even though Conklin had conceded that claim from the beginning.
3. The trial court abused its discretion in awarding attorney's fees for the prescriptive easement claim even though Bentz's concession of implied easement rendered the prescriptive easement claim moot.
4. The trial court erred in implying an easement from past use when there was a valid, express easement that established a private septic system for Conklin.
5. The trial court erred in dismissing Conklin's nuisance claim.
6. The trial court erred in entering Finding 20, in particular the legal conclusion that "Bentz was an arms-length, good faith purchaser for value and is an innocent party in this dispute." CP 615.
7. The trial court erred in entering Finding 30, in particular the legal conclusion that "Conklin has not suffered actual and substantial injury to date." CP 616.

Issues Pertaining to Assignments of Error

1. RCW 7.28.083(3) authorizes an award of attorney's fees for an adverse possession claim but not for a prescriptive easement claim. **Did the trial court err in granting Bentz her attorney's fees for the prescriptive easement claim?** (assignment of error 1)

2. A trial court conducting a lodestar analysis must make a record of its decision and exclude from the award any hours that are wasteful or not necessary to the result. Bentz unnecessarily litigated the adverse possession claim after Conklin conceded it and unnecessarily litigated the prescriptive easement claim after her own concession rendered the claim moot. **Did the trial court abuse its discretion in granting attorney's fees for the adverse possession and prescriptive easement claims?** (assignments of error 2, 3)

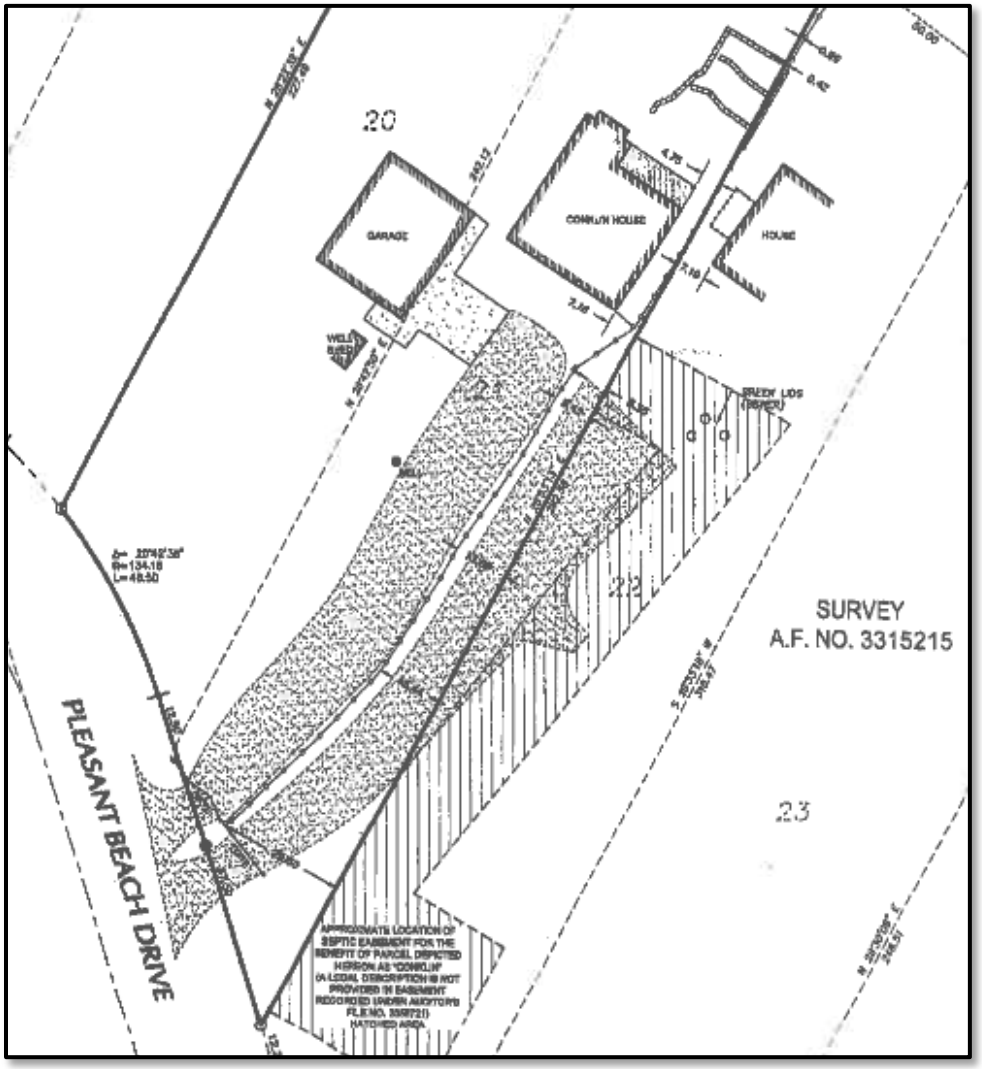
3. A court cannot create an implied easement when there is already a valid express easement. Here there was an express easement recorded by the prior owners. **Did the trial court err in supplanting the express easement with an implied easement with different terms?** (assignment of error 4)

4. The merger rule only applies when the owner intends it to. Here, the Colvins intended their written, express easement to protect the interests of the owner of the house they built on Lots 20 & 21, not to immediately merge away. **Did the express easement continue in existence and not merge?** (assignments of error 4, 6)

5. A nuisance is any act or omission that renders other persons insecure in life, or in the use of property. Bentz's improper connection to Conklin's septic system has rendered him insecure in his property. **Did the trial court err in dismissing Conklin's nuisance claim?** (assignments of error 5, 7)

3. Statement of the Case

This dispute is over the septic drainfield easement in the figure below. Conklin owns lots 20 & 21. Bentz owns lot 22.



Conklin's house is on lot 21 (center). Bentz's cabin is partially shown, as "house," on lot 22 (right). The septic system and drainfield are located approximately in the cross-hatched area on lot 22. The textured areas are the driveways for the two homes, separated by a fence. (The image is from CP 122.)

Lots 20, 21, and 22 were all previously owned by Marshall and Evelyn Colvin. CP 613. When Colvins purchased the lots, the only structure was an abandoned cabin with no water and only an outhouse. CP 614; 2 RP 144.[1] Colvins improved the cabin and connected it to public water. CP 614; 2 RP 62.

Colvins planned to build a three-bedroom house on lots 20 & 21. As part of Thurston County's approval process for the septic system for the three-bedroom house, Colvins executed a "Drainfield Easement Agreement." CP 94-95, 614. The easement was mandated by the County, to ensure that the owner of the house on lots 20 & 21 would always have legal access for operation, maintenance, and repair of the system located on lot 22. CP 614; 2 RP 102-03. (The system could not be located on lots 20 or 21 because of a well on those lots. CP 613.) The County approved the system and it was installed. CP 614.

While the three-bedroom house was under construction, Colvins connected the cabin on lot 22 to the septic system. CP

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[1] There are four volumes of VRPs in this appeal. The VRPs are not numbered by volume or consecutively paginated. This brief will refer to the VRPs using the following volume numbers:

Jan. 11, 2019	Summary Judgment Hearing	Vol. 1
Aug. 26, 2019	Trial Day 1	Vol. 2
Aug. 27, 2019	Trial Day 2	Vol. 3
Nov. 1, 2019	Hearing on Presentation and Attorney's Fees	Vol. 4

614. They did not obtain a permit from the County for this connection. CP 614. The house was also connected to the system. CP 614. The cabin was never disconnected. *See* CP 615. The County considers the connection noncompliant. CP 615.

Colvins got divorced, and Marshall conveyed the lots to Evelyn. CP 613. Evelyn sold lot 22 to Bentz in September 2004. CP 613. Before closing the sale, Bentz knew that both the house and the cabin were connected to the septic system located on lot 22. CP 615. The deed to Bentz did not reference the recorded easement agreement, but Bentz was aware of it prior to closing. CP 614-15.

Colvin sold lots 20 & 21 to Conklin in October 2005. CP 613. Colvin told Conklin that it was a private septic system, not shared. CP 615. She did not disclose that the cabin was also connected to the system. CP 615. Conklin believed the system was exclusive for the house he was buying. 2 RP 174.

In 2013, the system backed up into the cabin, causing extensive damage. CP 615. Conklin's house was not damaged. CP 615. This was the first time Conklin learned that the cabin was connected to his system. 2 RP 176-77. Bentz refused to disconnect. CP 615. When Bentz began asserting that Conklin was the one who should not be connected, Conklin filed this action in hopes of resolving the conflict. *See* CP 453-54.

Conklin's Second Amended Complaint raised three claims. Conklin sought a decree that the written Drainfield Easement Agreement was valid and exclusive for use by the Conklin property. CP 43. In the alternative in the event the court found that the written easement did not benefit Conklin, he sought a prescriptive easement to allow him to continue using the system. CP 44. He also sought an injunction against Bentz's use of the system, as a nuisance, requiring her to disconnect. CP 43-44.

Bentz raised counterclaims. She asserted title by adverse possession to a portion of lot 21 on her side of the fence that runs between the parties' driveways. CP 32. She sought a decree that Conklin had no right to use the system and requiring him to disconnect. CP 33.

Conklin did not contest the adverse possession claim. He never filed an answer or reply to the counterclaims. In response to requests for admissions, Conklin admitted the elements of the adverse possession claim. CP 605.

The parties filed cross-motions for summary judgment. Bentz sought summary judgment on the adverse possession claim. CP 102. Conklin responded that he did not dispute the adverse possession claim but requested that Bentz be required to obtain a boundary line adjustment from the County as a condition of granting adverse possession. CP 661-62. The trial

court granted partial summary judgment on the adverse possession claim. 1 RP 38-39. Conklin did not dispute that the fence was the proper boundary. 1 RP 39.

Bentz argued in the summary judgment motion and again in her trial brief for an implied easement for shared use of the system based on historic use. CP 114-15, 319-20. In doing so, she abandoned any attempt to block Conklin's use of the system. *E.g.,* CP 320 ("Bentz has no problem with Conklin having an easement that conforms to the historic joint use.").

After a bench trial on the remaining issues, the trial court entered findings of fact and conclusions of law. The trial court concluded that there was an implied easement established by the shared use of the system that was in place when Colvin conveyed the lots to Bentz and to Conklin. CP 617-18. The trial court dismissed Conklin's claims, without ever ruling on the effect of the written easement. CP 617-18; 3 RP 115.

Bentz requested an award of attorney's fees under RCW 7.28.083(3) for both the adverse possession and prescriptive easement claims. CP 511. Conklin argued that he should not be liable for fees for the adverse possession claim because he never contested it. CP 574-75. Conklin argued that the statute does not authorize fees for a prescriptive easement claim, and even if it did, Bentz obviated any need to litigate that

claim when she conceded that Conklin should have an implied easement based on historic use. CP 578-80.

The trial court concluded that the statute authorized an award of fees for prescriptive easement claims. 4 RP 22. The trial court awarded most of the requested fees. CP 610; 4 RP 22. The trial court did not put its analysis on the record. CP 610; 4 RP 22.

4. Argument

The trial court's decision was in error. An implied easement cannot supplant an express easement. Bentz's unpermitted connection is a nuisance. The trial court erred in awarding attorney's fees under RCW 7.28.083(3).

This brief will first address the attorney fee issue, arguing that this Court should follow Division II's precedent in holding that the statute does not authorize an award of fees for a prescriptive easement claim. Even if such an award is authorized, the trial court abused its discretion in determining the amount of the award. This Court should reverse and vacate the attorney fee award and remand for a re-determination of the fee award.

The brief will then discuss the trial court's error in finding an implied easement despite the existence of a valid, written express easement of record. The trial court did not make any

ruling that would avoid the express easement. The valid express easement established exclusive use of the septic system for the benefit of the Conklin residence. This Court should reverse and vacate the implied easement and remand for the trial court to enter a decree confirming the validity of the express easement.

Lastly, the brief will demonstrate that Bentz's unpermitted connection to the septic system is a nuisance under the statutory definition. This Court should reverse the trial court's dismissal of the nuisance claim and remand for further proceedings.

4.1 The trial court erred in awarding Bentz her attorney's fees.

The trial court erred in awarding Bentz her attorney's fees under RCW 7.28.083(3). Contrary to the trial court's decision, the statute does not authorize an award of fees for prescriptive easement claims. Even if it does, the trial court's award was based on untenable grounds where Bentz's adverse possession claim was never contested and Conklin's prescriptive easement claim was superfluous when Bentz conceded that Conklin could continue to use the septic system. Additionally, to the extent the trial court failed to make a sufficient record of its fee determination for review by this Court, the issue must be remanded back to the trial court.

The question of whether the trial court has authority to award attorney's fees is reviewed de novo. ***McColl v. Anderson***, 6 Wn. App. 2d 88, 91, 429 P.3d 1113 (2018). Interpretation of the applicable statute is a question of law also reviewed de novo. ***Id.*** at 90-91. When the statute authorizes an award of fees, this Court reviews the trial court's fee award for abuse of discretion. ***Workman v. Klinkenberg***, 6 Wn. App. 2d 291, 305, 430 P.3d 716 (2018). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. ***Id.***

4.1.1 RCW 7.28.083(3) does not authorize an award of attorney's fees for prescriptive easement claims.

The trial court erroneously awarded Bentz her attorney's fees for litigating Conklin's prescriptive easement claim. The plain language of the statute, RCW 7.28.083(3), authorizes trial courts to award reasonable attorney's fees for an adverse possession claim, but not for a prescriptive easement claim. There is currently a split in the decisions of this Court on this issue. Division I held in *Workman* that prescriptive easement is sufficiently close to adverse possession to permit an award of fees under the statute. ***Workman***, 6 Wn. App. 2d at 305-06. Division II provided a more rigorous analysis in holding that the statute does not apply to a prescriptive easement claim because

and easement claim does not assert title to real property under the statutory language. ***McColl***, 6 Wn. App. 2d at 91-93. This Court should follow the sound reasoning of Division II and hold that the statute does not authorize an award of fees for a prescriptive easement claim.

The purpose of statutory interpretation is to determine and give effect to the legislature's intent. ***State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.***, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The court determines legislative intent from the plain language of the statute in the context of the statute, related provisions, and the statutory scheme as a whole. ***Id.*** at 11-12. The court gives the words their usual and ordinary meaning. ***Burton v. Lehman***, 153 Wn.2d 416, 422–23, 103 P.3d 1230 (2005). The court may not read words into a statute when the legislature has chosen not to include that language. ***State v. Dennis***, 191 Wn.2d 169, 173, 421 P.3d 944 (2018).

The statute provides,

> (3) The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

RCW 7.28.083(3). The first two subsections of the statute relate to the allocation of responsibility for payment of taxes or

assessments levied on real property that is acquired through a claim of title by adverse possession. **RCW 7.28.083(1)** and **(2)**. The statute is located in Chapter 7.28 RCW, dealing with quiet title and ejectment actions, among other sections dealing specifically with claims of title by adverse possession. *E.g.,* **RCW 7.28.070** and **.080** (adverse possession under color of title and payment of taxes); **RCW 7.28.085** (additional requirements for adverse possession of forestland).

In *McColl*, Division II took note of the specific, qualifying statutory language, "in an action asserting title to real property by adverse possession," and asked whether a claim of prescriptive easement was an "action asserting title." ***McColl***, 6 Wn. App. 2d at 91. The Court noted the significant differences between a prescriptive easement and title to property. ***Id.*** at 92. An easement is a non-possessory right to use the land of another. ***Id.*** The easement holder's interest in using the land is separate from ownership of the land. ***Id.*** An easement grants a right to **use** land, but it does not grant **title** to the land. ***Id.***

The court held that the plain language of the statute "allows an award of attorney fees only in an action asserting title to real property, not in an action asserting a property interest but no title." ***McColl***, 6 Wn. App. 2d at 92. Because the only claim at issue was for a prescriptive easement, not for title

by adverse possession, the court reversed the trial court's award of attorney's fees. ***Id.*** at 93.

Division I's analysis in *Workman* was less rigorous, and ultimately incorrect. *See* ***Workman***, 6 Wn. App. 2d at 305-06. In *Workman* there were claims for adverse possession and, in the alternative, prescriptive easement over the same disputed area. ***Id.*** at 295. The *Workman* court reasoned that because prescriptive easement and adverse possession are often treated as equivalent doctrines and their elements "are the same," RCW 7.28.083(3) must also allow for recovery of fees for prescriptive easement claims. ***Workman***, 6 Wn. App. 2d at 305-06.

The *Workman* analysis is wrong. Although the two doctrines are closely related and often **treated** as equivalents, still they are not the same. Indeed, the very case that the *Workman* court cites for the equivalence goes to great lengths to demonstrate the significant differences:

> Although adverse possession and easements by prescription are often treated as equivalent doctrines, they have different histories and arise for different reasons. Adverse possession promotes the maximum use of the land, encourages the rejection of stale claims to land and, most importantly, quiets title in land. Easements by prescription do not necessarily further those same goals. Their principal purpose is to protect long-established positions. Easements by prescription are disfavored in the law because they effect a loss or forfeiture of the rights of the owner. On the other hand, adverse

> possession is not disfavored. The differences in the historical origins and rationales behind prescriptive easement and adverse possession have resulted in a single but important difference in how they are applied.

Kunkel v. Fisher, 106 Wn. App. 599, 603, 23 P.3d 1128 (2001). The most significant differences—highlighted by the *McColl* court—are succinctly stated by Stoebuck & Weaver, 17 Wash. Prac.: Real Estate § 2.7 (2d ed.): "The main difference between the doctrines is that prescription involves the **use** of another's land and gives **easement rights**, whereas adverse possession involves the **possession** of another's land and gives **title**." (emphasis added).

As noted by the *McColl* court, despite any other similarities in the doctrines, a prescriptive easement claim does not assert **title** to real property, and therefore does not fall under the plain language of the statute. ***McColl***, 6 Wn. App. 2d at 92. Following the *Workman* analysis would require this Court to improperly add words to the statute that the legislature did not choose to use. *See* ***State v. Dennis***, 191 Wn.2d 169, 173, 421 P.3d 944 (2018). The legislature did not say "in an action asserting title *or easement rights*." The legislature did not say "by adverse possession *or prescriptive easement.*" The legislature can be presumed to understand the difference between title and an easement. If the legislature had wanted to include prescriptive

easements, it could easily have done so. It did not. This Court cannot add words that the legislature chose not to include.

The context of the statute adds weight to the *McColl* court's focus on "asserting title" as opposed to an easement. The attorney fee provision is just one subsection of **RCW 7.28.083**, which as a whole deals with questions that a trial court must address when a party prevails in asserting title to property by adverse possession. The statute instructs trial courts to determine whether the prevailing party should be required to pay part or all of any taxes or assessments levied on the real property during the adverse possession period. **RCW 7.28.083(1)**. It instructs the court to allocate the taxes and assessments "between the property acquired by adverse possession and the property retained by the title holder." **RCW 7.28.083(2)**.

These are concerns exclusive to a change in title by adverse possession. A party acquiring a prescriptive easement has no responsibility for taxes or assessments because the easement is not title. It is in this context of issues exclusive to adverse possession that the legislature enacted the attorney fee provision at issue, using the specific language, "in an action asserting title to real property by adverse possession." **RCW 7.28.083(3)**. This context is significant in determining the meaning of the statutory language. *See* ***Dep't of Ecology***, 146

Wn.2d at 11-12. The statute is dealing only with adverse possession, not prescriptive easements.

Both Divisions I and II agree that a panel of the Court of Appeals is free to disagree with a prior decision of another panel. ***Grisby v. Herzog***, 190 Wn. App. 786, 809-10, 362 P.3d 763 (Div. I, 2015) ("When one of our panels concludes that a previous Court of Appeals decision used a faulty legal analysis or has been undermined by some new development in the law, the opinion will usually state simply that the panel 'disagrees with,' 'departs from,' or 'declines to follow' the other opinion."); *see* ***Union Bank, N.A. v. Vanderhoek Associates, LLC***, 191 Wn. App. 836, 847, 365 P.3d 223 (Div. II, 2015) ("We hold that to the extent a conflict between the divisions emerges, there is a change in the law, but not because one division's opinions are superior to another's. The three divisions of the Court of Appeals of the State of Washington are coequal and part of one court."). As demonstrated above, the *McColl* decision provides the correct interpretation. This Court should respectfully disagree with *Workman*, follow the superior reasoning in *McColl*, and hold that RCW 7.28.083(3) does not allow an award of attorney's fees for a prescriptive easement claim.

4.1.2 The trial court's award of fees was based on untenable grounds because Conklin never contested the adverse possession claim and because Bentz conceded that Conklin could use the system, rendering his prescriptive easement claim moot.

In addition to awarding impermissible fees for the prescriptive easement claim, the trial court also abused its discretion in awarding fees for Bentz's adverse possession claim, which Conklin never contested. Similarly, even if a fee award is permissible for the prescriptive easement claim, the trial court abused its discretion in awarding such fees when the claim was rendered moot by Bentz's concession that Conklin could continue to use the septic system under a theory of implied easement.

Courts should be guided by the lodestar method in determining an award of attorney's fees. ***Mahler v. Szucs***, 135 Wn.2d 398, 433, 957 P.2d 632 (1998). As part of the lodestar method, the court must determine the reasonable number of hours counsel expended "in securing a successful recovery for the client." ***Id.*** at 434. "Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims." ***Id.***

Here, the trial court failed to exclude wasteful hours expended by Bentz in pursuing claims that did not need to be pursued. From the very beginning, Conklin did not contest

Bentz's adverse possession claim to the fence line. Bentz raised the adverse possession claim in her answer and counterclaims. CP 32. Conklin never answered or replied to the counterclaim. *See* CP 574. Having failed to deny the counterclaim, Conklin admitted it by operation of **CR 8(d)**.

Under **CR 8(d)**, "Averments in a pleading to which a responsive pleading is required … are admitted when not denied in the responsive pleading." A reply in response to a counterclaim is required. **CR 12(a)**. By not denying the averments in Bentz's adverse possession claim, Conklin admitted those averments and the validity of the adverse possession claim.

Bentz's prior counsel sent a set of requests for admissions to "lock Conklin in" to the fact he was not disputing Bentz's adverse possession claim. *See* CP 574. Conklin answered all in the affirmative, admitting that the fence and driveway for Bentz's property had been in the same location (crossing over onto Conklin's lot 21) since before Conklin purchased lots 20 & 21 (a period of over 10 years). CP 605. Thus Conklin had admitted, no later than November 2017, either expressly or by implication, all of the elements of the adverse possession claim.

Given Conklin's admissions, there was no need, in April 2018, for Bentz's new attorney to start drafting a declaration and summary judgment motion seeking to prove the claim that

Conklin had already admitted. *See* CP 523 (attorney's time records); CP 102, 105-10 (motion for summary judgment addressing adverse possession and common grantor, without any reference to Conklin's admissions); CP 150-56 (declaration of Bentz seeking to prove the long-standing location of the driveway and fence). Most, if not all, of the hours expended on this summary judgment motion were wasteful and unnecessary to achieving the successful result that Conklin had already conceded: the fence line was the correct boundary. The trial court abused its discretion in failing to exclude these wasteful hours from its lodestar analysis.

In addition, the statute permits the court to award fees for adverse possession only if it is "equitable and just" to do so. **RCW 7.28.083(3)**. The purpose of the statute is to encourage adjoining property owners to resolve adverse possession claims without costly litigation, on peril of having to pay the other side's attorney's fees. Conklin took that purpose to heart and did not contest Bentz's claim. Conklin knew that, under the facts, Bentz would prevail on the claim, so he never contested it. It is not "equitable and just" to order Conklin to pay Bentz's attorney's fees for a claim that Conklin conceded from the beginning. The trial court abused its discretion. This Court should reverse the fee award.

Similarly, the hours expended by Bentz's attorney in litigating Conklin's prescriptive easement claim were wasteful and unnecessary and should have been excluded from the lodestar analysis (assuming for the sake of argument that this portion of the award was even authorized under the statute).

Conklin's prescriptive easement claim was an alternative theory raised in an attempt to preserve his right to continue to use the septic system. Conklin's primary claims were to validate the express easement and exclude Bentz from the system. *See* CP 5-6. Bentz's answer and counterclaims asserted that Conklin had no right to use the septic system. CP 33. She sought a decree forever barring Conklin from using the septic system on lot 22. CP 34.

Recognizing that his own right to use the system was now at stake, Conklin amended his complaint to add the alternative claim that he had obtained a prescriptive easement to use the system. *See* CP 44. The Second Amended Complaint stated, "In the alternative, even if the Court were to find that Robert Conklin and his property are not the beneficiaries of the Drainfield Easement Agreement recorded by the Colvins, the Court should find that Mr. Conklin is nevertheless entitled to continue to make use of the septic system…" CP 44. Conklin alleged that his use of the system over the years satisfied all the elements required "to give rise to a prescriptive easement

entitling Mr. Conklin to use the septic system." CP 44. In other words, this alternative claim did not seek to exclude Bentz; it only sought to preserve Conklin's right to continue to use the system. *See also* CP 304 (Conklin's trial brief: "Mr. Conklin has in any event acquired by his long use of the septic system a prescriptive right to continue to use the septic system to dispose of effluent generated by his use of the three-bedroom residence located on Lots 20-21.").

By the time she filed her summary judgment motion, Bentz had changed her tune. She was no longer seeking to exclude Conklin from the system. Bentz argued in the summary judgment motion and again in her trial brief for an implied easement for shared use of the system based on historic use. CP 114-15 (summary judgment motion), 319-20 (trial brief). In doing so, Bentz abandoned any attempt to block Conklin's use of the system. *E.g.,* CP 320 ("Bentz has no problem with Conklin having an easement that conforms to the historic joint use.").

After Bentz conceded that Conklin could have an easement to continue to use the system consistent with historic use, there was no longer any reason to litigate Conklin's prescriptive easement claim. The prescriptive easement claim was not seeking anything more than what Bentz had conceded: an ongoing right for Conklin to continue to use the system as he had in the past.

And yet, Bentz's counsel requested one-third of his pre-trial and trial hours (highlighted in pink) be credited to the prescriptive easement claim and awarded to Bentz. CP 520 (counsel's explanation), 552, 556 (time records). All of these hours were unnecessary to achieve the result. Indeed, the result was not even successful. Even though the trial court formally dismissed the prescriptive easement claim, Conklin still walked away with the easement rights he sought through that claim. Bentz conceded that Conklin could continue to use the system. None of the attorney fees claimed for the prescriptive easement claim were necessary to obtain that result. Bentz's concession achieved that result at zero cost.

The trial court abused its discretion in not excluding these wasteful and unnecessary fees from the lodestar analysis. Additionally, it is not "equitable and just" to order Conklin to pay Bentz's attorney to litigate the prescriptive easement claim after Bentz had already rendered that claim moot through her concession. This Court should reverse the attorney fee award.

4.1.3 The trial court failed to make a sufficient record for this Court to review the attorney fee award.

In making an award of attorney's fees, a trial court must provide findings of fact and conclusions of law sufficient to enable this Court to review the fee award. ***Mahler***, 135 Wn.2d at

435. In the absence of an adequate record, this Court should remand to the trial court to develop a record. ***Id.***

The trial court did not provide adequate written findings of fact or conclusions of law to support the attorney fee award. CP 610. The trial court made a reduction in the requested amount of fees but did not make any record of its analysis that would allow this Court to review the appropriateness of the trial court's decision. CP 610; 4 RP 22. It is clear that the trial court did not make the exclusions discussed above in Part 4.1.2, but it is not at all clear what fees the trial court did exclude.

The record is sufficient to show that the trial court felt it was appropriate to award fees for the adverse possession and prescriptive easement claims despite both having been, in effect, resolved prior to most of the fees being incurred. This decision was, itself, an abuse of discretion as argued above. Beyond that, the record is insufficient to review the reasonableness of the award. This Court should reverse and remand for a redetermination of the fee award, or at least for entry of findings.

4.2 The trial court erred in declaring an implied easement when there was a valid, written express easement of record.

Easements can arise in various ways. The clearest example is an easement by written, express grant. *See* ***Boyd v.***

Sunflower Properties, LLC, 197 Wn. App. 137, 143, 389 P.3d 626 (2016). Another is an easement implied from prior use (or simply "implied easement"). ***Id.*** at 144. An implied easement, as the name suggests, is an easement that has not been expressly granted in writing, but is implied by a court from the surrounding facts of a conveyance of land. ***See Id.*** at 143-44.

A court cannot create an implied easement to circumvent a written, express easement. ***Boyd***, 197 Wn. App. at 149. Where there is an express easement that covers the desired use, courts cannot use the equitable doctrine of implied easement to supplement or replace a legal express easement. ***Id.*** A trial court has no equitable authority to modify an express easement without the express consent of the owners of both the dominant and servient estates. ***Kave v. McIntosh Ridge Primary Road Ass'n***, 198 Wn. App. 812, 820, 394 P.3d 446 (2017).

The trial court erred in implying an easement for **joint use** of the septic system when there was a valid, written, express easement that granted Conklin **exclusive use** of the system. Although the trial court's result was equitable, equity cannot supplant the express easement that existed at law. The trial court's legal conclusions on these issues are reviewed de novo. ***Pelly v. Panasyuk***, 2 Wn. App. 2d 848, 865, 413 P.3d 619 (2018).

4.2.1 The trial court did not find merger or any other theory to avoid the express easement.

The trial court did not find a merger or any other theory that would have avoided the express easement. Without such a ruling, the express easement necessarily remained valid and in place. Even if the trial court had avoided the express easement, such a ruling would have been error.

Bentz argued, erroneously, that the express easement was void on the day it was executed, under the theory of merger. The general rule that "one cannot have an easement in one's own property" is an expression of the merger doctrine. ***Radovich v. Nuzhat***, 104 Wn. App. 800, 805, 16 P.3d 687 (2001).[2] But merger is disfavored: "Equity does not favor the doctrine of merger; and though two or more rights or estates are united in one person, equity will keep them distinct where it appears from the intention of the person, either express or implied, that he wishes them to be so kept .... and this person will be presumed to intend that which is most to his advantage." ***In re Trustee's Sale of Real Property of Ball***, 179 Wn. App. 559, 564, 319 P.3d 844 (2014).

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[2] The *Radovich* court did not address whether merger occurred in that case, because subsequent conveyances of the properties clearly referenced the prior, express easement. ***Radovich***, 104 Wn. App. at 805-06. In the present case, the conveyances did not expressly reference, reserve, or grant the Drainfield Easement, so the question of merger must be addressed. If there was no merger, the Drainfield Easement was still valid and ran with the conveyance of the lots.

Similarly, "Courts will not compel a merger of estates where the party in whom the two interests are vested does not intend such a merger to take place, or where it would be inimical to the interest of the party in whom the several estates have united, nor will they recognize a claim of merger where to do so would prejudice the rights of innocent third persons." ***Mobley v. Harkins***, 14 Wn.2d 276, 282, 128 P.2d 289 (1942).

In determining whether merger occurred, the Court must consider the intent of Colvins when they executed the Drainfield Easement, their interests at the time, and whether merger would prejudice the rights of an innocent third party.

Colvins executed the Drainfield Easement in order to build the three-bedroom house on lots 20 & 21. Marshall Colvin testified that his initial purpose in executing the easement agreement was to comply with the County's requirement so he could build the house. 3 RP 75. The County mandated execution and recording of the Drainfield Easement to ensure that the owner of the house on lots 20 & 21 would always have legal access for operation, maintenance, and repair of the system located on lot 22. CP 614; 2 RP 102-03. In seeking to comply with the County's requirement, Colvins also necessarily intended the same result that the County intended: to create a perpetual easement that would ensure that the owner of the house would always have the right to access the system even if

Lot 22 was sold to another party. The very fact that Colvins executed the Drainfield Easement at all is evidence that they did not want it to merge—they should not be presumed to have performed a futile act. Colvins did not intend the easement to merge away; they intended it to continue for the benefit of the house they were building.

It was also in Colvins' interest for the Drainfield Easement not to merge. The Drainfield Easement was designed to protect the value and usefulness of the house by ensuring that the owner of the house would always be able to legally access the septic system and drainfield for maintenance and repairs, regardless of who might later come to own Lot 22. The Drainfield Easement protected the system and drainfield from interference by the owner of Lot 22. It was in Colvins' interest for the Drainfield Easement to remain in effect and not merge.

Merger of the Drainfield Easement would have prejudiced the rights of any future owner of the house on Lots 20 & 21. If the Drainfield Easement had merged away, there would be nothing to protect the owner's ability to use the septic system. As the trial court's decision here demonstrates, the doctrine of implied easement was not sufficient to protect the exclusivity of the septic system. The County's regulations and code enforcement were also not sufficient to protect that exclusivity. Conklin was an innocent third party in his purchase of Lots 20

& 21—he had every reason to believe that he had an exclusive, private septic system. CP 615; 2 RP 176. The trial court agreed that Conklin was rightfully concerned about the effect of the unpermitted shared septic system on the future use and value of his property. CP 616; 3 RP 109. Merger of the Drainfield Easement would prejudice Conklin. This Court should hold that there was no merger.

In this analysis, it is also of note that, contrary to the trial court's conclusion in "finding" 20, Bentz was not an innocent third party in her purchase of Lot 22 and her continued use of the septic system. *See* CP 615. Although Bentz was told that it was a shared septic system, CP 615, she was aware of the recorded Drainfield Easement Agreement. CP 614-15.

Although "a bona fide purchaser[3] of land who has no actual or constructive knowledge of an easement generally takes title free of the burden of the easement," Bentz was not a bona fide purchaser without knowledge. ***Wilhelm v. Beyersdorf***, 100 Wn. App. 836, 846, 999 P.2d 54 (2000). She knew about the recorded Drainfield Easement. "If the purchaser had knowledge of facts sufficient to excite inquiry, however, we presume the purchaser had constructive knowledge of all that the inquiry would have discovered." ***Id.*** Inquiry goes beyond simply

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[3] Alternative terminology for the trial court's "good faith purchaser for value."

searching the title records. ***Id.*** As will be demonstrated below in Part 4.2.2, inquiry would have revealed that the Drainfield Easement provided for the exclusive use of the septic system by the owner of the house located on Lots 20 & 21. Having at least constructive knowledge of the exclusivity of the septic system and the existence of the Drainfield Easement, Bentz cannot have been a bona fide purchaser. Her purchase of Lot 22 was subject to the Drainfield Easement for the exclusive benefit of Lots 20 & 21.

The trial court erred in implying an easement to supplant the express, recorded Drainfield Easement. The merger doctrine does not apply here because the Colvins' intent and interest at the time of execution of the Drainfield Easement was that it would continue in perpetuity to protect the owner of the house they built on Lots 20 & 21. Bentz is not a bona fide purchaser and cannot avoid the Drainfield Easement. This Court should reverse the trial court's decision and hold that the Drainfield Easement remains in force.

4.2.2 The express easement established exclusive use of the system for the Conklin house.

The Drainfield Easement Agreement is sufficient on its face to establish exclusive use of the septic system for the benefit

of the house on Lots 20 & 21. The context of the execution of the Drainfield Easement further supports this result.

The rules of contract interpretation apply to easements. ***Pelly v. Panasyuk***, 2 Wn. App. 2d 848, 864, 413 P.3d 619 (2018). The touchstone of interpretation is the parties' intent, discerned through the objective manifestations in the agreement and the circumstances surrounding execution of the agreement. ***Id.*** at 865. Courts must also consider any documents incorporated by reference in the agreement. ***West. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.***, 102 Wn. App. 488, 494-95, 7 P.3d 861 (2000). Under the statute of frauds, an express easement does not have to establish the easement's actual location. ***Wilhelm***, 100 Wn. App. at 842. It must only sufficiently describe the servient estate. ***Id.***

The Drainfield Easement Agreement reveals the parties' intent to create an easement for a septic system on Lot 22 for the exclusive use of the house that was to be built on Lots 20 & 21. *See* CP 94-96. The Drainfield Easement identifies the servient estate as Tracts 20, 21, 22. CP 94. It also notes at that point, "See Attachment A." CP 94. Attachment A is a design schematic for the septic system, showing the proposed drainfield on Lot 22 (and the existing cabin on that lot) and a transport line running across Lot 22 to connect the drainfield to the proposed three-bedroom house on Lots 20 & 21. CP 96. This

sufficiently locates the easement on Lot 22 as the servient estate with Lots 20 & 21 as the dominant estate.

The Drainfield Easement provides that the easement is "for the purpose of installing, constructing, operating, maintaining, inspecting, removing, repairing, replacing, and using a residential septic tank and soil absorption system." CP 94. "The easement described herein is for the sole use of the GRANTEE, its heirs and assigns, for the residence now or hereafter located upon [the dominant estate]." CP 94. "This easement and the rights and obligations herein shall run with the land and shall be binding upon and inure to the benefit of the parties and their heirs, successors and assigns." CP 95.

The Grantee—that is, the dominant estate, Lots 20 & 21—bears responsibility for all costs of the septic system and must construct and maintain it according to the County's standards and the approved plans for the system. CP 94. The Grantor—that is, the servient estate, Lot 22—retains "the right to occupy the easement area: provided, that use of the easement area by GRANTOR does not in any fashion hinder, disrupt or interfere with the use or proper functioning of the residential septic system." CP 94.

These provisions are only compatible with a conclusion that the Colvins intended to create an easement on Lot 22 for the exclusive benefit of the house on Lots 20 & 21 for a private

septic system to serve that house. Uses of the term, "non-exclusive" refer to the fact that the owner of Lot 22 is not entirely excluded from the easement area, being allowed to use that land but only in a manner that protects the dominant estate's use of the septic system. Nothing in the terms of the Drainfield Easement suggests that Lot 22 has any right to make use of the septic system. To the contrary, the approved plan in Attachment A clearly shows that only the house on Lots 20 & 21 is connected to the system, and the Drainfield Easement requires the system to be constructed and maintained in accordance with the approved plan.

The context of the execution of the Drainfield Easement bolsters the conclusion that this is a private septic system for the exclusive use of the house on Lots 20 & 21. The trial court found as fact, "The drainfield application was for the three bedroom house that was on Lots 20 and 21." CP 614. "The drainfield easement was drafted as it was required by the Health Department and was being done in conjunction with the planning for building the house on Lots 20-21." CP 614.

The County mandates the easement agreement as a condition of issuing a permit for the septic system, for the purpose of ensuring that the owner of the house served by the system will always have legal access for proper operation and maintenance of the system. 2 RP 102-03. In this case, the

County wanted the public record to reflect that the septic system on Lot 22 was to serve the three-bedroom house on Lots 20 & 21. 2 RP 103-04. Colvins executed the agreement to fulfill this requirement.

The Drainfield Easement Agreement created a valid easement. It did not merge away and was not avoided by Bentz. The Drainfield Easement established a recorded, express easement over Lot 22 for the purpose of building, operating, and maintaining an exclusive, private septic system for the benefit of the house built on Lots 20 & 21. Bentz took Lot 22 subject to this easement of record.

The trial court erred in implying an easement when this express easement was in existence. This Court should reverse the trial court decision, hold that the Drainfield Easement, which excludes Bentz from the septic system, controls the outcome of this case, and remand for further proceedings consistent with that holding.

4.3 The trial court erred in dismissing Conklin's nuisance claim where Bentz's nonconforming connection impairs Conklin's use of his own property.

The trial court erred in holding that Conklin had not suffered any damage cognizable as a nuisance. The statutory definition of nuisance is broad: "Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or

omission … in any way renders other persons insecure in life, or in the use of property." **RCW 7.48.120**. Courts have also said that a nuisance is something that "interferes unreasonably with other persons' use and enjoyment of their property." ***Tiegs v. Watts***, 135 Wn.2d 1, 13, 954 P.2d 877 (1998).

As the trial court found, "Thurston County deems the present two party connection in violation of the original permit and hence, the system is presently noncompliant with the county sanitary code." CP 615-16. "Conklin expressed legitimate concerns regarding future enforcement and possible effect of the noncompliance with a future sale." CP 616. Due to the nonconforming status, the County will deny any applications for building permits or land use development. 2 RP 113. If Conklin tries to sell, he would have to provide any buyer with a report that would disclose the nonconforming connection, which could impact his ability to sell and at what price. 2 RP 112, 131-32.

Conklin has been rendered insecure in the use of his property as a result of the unpermitted connection. At any time the County could take enforcement action that could cost him money or require him to vacate the premises. He cannot improve the property because he cannot get a building permit. He cannot sell the property for its highest and best value because he has to disclose the nonconforming status. There is nothing in the record to suggest that Bentz will ever do anything to remedy her

improper connection, especially now that it has been blessed by the trial court's erroneous implied easement.

Even if there are not measurable money damages, the improper connection unreasonably interferes with Conklin's use and enjoyment of his property. He should be entitled to abate the nuisance by terminating Bentz's connection to the septic system. The trial court erred in concluding otherwise. This Court should reverse.

5. Conclusion

The trial court's decisions in this case were error. An implied easement cannot supplant an express easement. The express easement controls and excludes Bentz from using the septic system. Bentz's unpermitted connection is an abatable nuisance. The trial court erred in awarding attorney's fees for the prescriptive easement claim and abused its discretion in determining the amount of fees under RCW 7.28.083(3).

This Court should reverse the trial court's final orders and remand for further proceedings consistent with the exclusive, express easement. Even if the Court affirms the substantive issues, the Court should reverse the award of attorney's fees.

Respectfully submitted this 14th day of July, 2020.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on July 14, 2020 (after 5pm), I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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