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COA No. 54109-2-II
COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

ROBERT J. CONKLIN,
Appellant,
vs.
MARCIA BENTZ,
Respondent,

RESPONDENT'S BRIEF

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COMES NOW the Respondent herein and submits for the Court's consideration this Response Brief:

I. INTRODUCTION

The Appellant simply argues issues of law below based on a very selective recitation of facts. It is almost as if Conklin wants this court to simply perform a new trial. Appellant provides almost no discussion of the appropriate standard of review. This case went through trial. Witnesses for both sides were presented. There is substantial evidence supporting Judge Dixon's decision.

However, what is again interesting...and this court can read the transcript and see this...is that a large majority of this case has been decided by this court recently and the Appellant simply refused to address such case. This present case relates to a Thurston County Health Department form that was filled out by an applicant arguably incorrectly. This case deals with an issue of merger. This case deals with implied easement. Division 2 has already addressed this issue in the case of Sandy Family Five, LLC v. Brown, 191 Wn. App. 1032 (2015)(unpublished), rev. denied 185 Wash. 2d 1031 (2016). Such case dealt with the same easement form. It dealt with the form being executed by a common owner of both involved property. It imposed an implied easement when the express easement failed. Frankly, it is about as close to a completely on point case up to and including the fact that Conklin's trial counsel was counsel in the Sandy Family Five case. However, the name of such case was never mentioned by Conklin's side below or in the appellate brief.

They simply won't touch the case like a vampire to a cross. While the Sandy Family Five is unpublished, the Supreme Court refused to review it and it is highly persuasive.

The point being, the trial court was on very firm legal ground for its decision. As will be shown in the statement of facts, there is adequate factual basis in the record supporting the trial courts findings of facts and conclusions of law.

As for the attorney fee issue, there is a division split. This court has given direction to trial judges of how to handle a division split – to anticipate what the Supreme Court will do. Judge Dixon did that and it is almost impossible to say that he somehow he abused his discretion in choosing the Division 1 approach versus the Division 2 approach as it is hard to say no reasonable judge could have reached such decision when three court of appeals judges reached the same decision. The issue as to the attorney fees is not if Division 1 or Division 2 is right – that is for the Supreme Court – the issue is the standard of review that should be employed (if any) of the trial court's decision.

II. RESPONSE TO ASSIGNMENT OF ERRORS

- a. The trial court appropriately exercised its discretion in deciding the attorney fee issue in light of the division split.
- b. The trial court properly awarded attorney fees for adverse possession when Conklin refused to stipulate to adverse possession, improperly conditioned its “concession” and retained

such issue as leverage in the litigation forcing Bentz to seek summary judgment.

- c. The trial court properly awarded fees for Bentz prevailing on the prescriptive easement claim as it was a fundamentally different claim than the implied easement as the former sought to exclude the Bentz cabin from the drain field and the latter was to confirm the historic use.
- d. The trial court properly implied an easement when the (1) written easement had merged, (2) the written easement area was not on the property with the actual drain field was located, and (3) the merged easement could not be reformed as reformation was long past the statute of limitations.
- e. The trial court properly dismissed the nuisance claim when Conklin testified at trial that he had suffered nothing adverse arising from the joint use and when Conklin's use of the drain field was exactly the same as Bentz's use – disposing of effluence.
- f. Substantial evidence supports the trial court finding that Bentz was an “innocent” purchaser as it relates to the fact that lack of permitting of the joint use of the drain field was never disclosed to her.
- g. Substantial evidence supports the trial court finding that Conklin had suffered no actual of substantial damage as Conklin could not identify any such damages under cross examination.

III. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

- a. Union Bank, N.A. v. Vanderhoek Associates, LLC, 191 Wn. App. 836, 848, 365 P.3d 223, 229 (Division 2 2015) directs that the trial court to “independently evaluate the conflicting precedent and conclude how our Supreme Court would resolve the conflict.” Judge Dixon did so in determining attorney fees when faced with a division split and his independent evaluation was well within his discretion and should not be disturbed. (Relates to Appellant’s Issues Pertaining to Assignment of Errors #1)
- b. Conklin has distorted the record by claiming to concede the issue of adverse possession when: (1) it opposed the trial court granting the motion without involvement of the Thurston County Health Department; (2) when the matter was not resolved in mediation; and (3) when counsel for Conklin refused to stipulate to adverse possession stating “[m]y client prefers to proceed to trial and final resolution as quickly as possible.” CP 465. Given such record, the trial court properly exercised its discretion in awarding attorney fees. (Relates to Appellant’s Issues Pertaining to Assignment of Errors #2)
- c. The trial court properly exercised its discretion when it equitably imposed an implied easement based on historic use when the written easement merged immediately upon execution due to common ownership of the affected property and because, per the language of

the written easement, the easement was on Conklin's parcel and not on Bentz' parcel where the drain field actually existed. (Relates to Appellant's Issues Pertaining to Assignment of Errors #3)

- d. The trial court properly followed the recent Division 2 case of Sandy Family Five which held that the same easement form merged based on common ownership and given the fact that the creators of the easement had no specific intent except to sign whatever forms were necessary to get a permit. (Relates to Appellant's Issues Pertaining to Assignment of Errors Nos. 3 and 4)
- e. Substantial evidence exists supporting the trial court's dismissal of the nuisance claim when Conklin could not identify as single incident of damage, lack of use, offensive odors and otherwise testify he had been rendered insecure. Further, given that Conklin's use of the drain field was for the same purpose (disposing effluence) and was more intense and Conklin was disposing on the Bentz property, it was incongruous that Bentz conduct was a nuisance and his conduct was not.
- f. The Appellant is raising issues never raised to the trial court in arguing reformation, novation and issues as to the Respondent's prayer for relief. (Relates to Appellant's Issues Pertaining to Assignment of Errors #5)
- g. This Court should award further attorney's fees to the Respondent if the Respondent prevails on appeal.

IV. STATEMENT OF THE CASE

As will be discussed below, the appropriate standard of review for most of the issues in this appeal is if substantial evidence supports the findings of facts and if the trial court appropriately exercised - as opposed to abused - its equitable power. With that in mind, the facts statement will highlight the factual basis that supports the trial court's decision.

A. Procedural History

On May 8, 2017 Conklin filed a First Amended Verified Complaint. CP 1-25 which asserted quiet title, nuisance and trespass, and "Removal of Cabin". The complaint was answered on June 28, 2017 which asserted counterclaims for adverse possession and quiet title/unjust enrichment. CP 38-61. A Second Amended Complaint was filed on July 19, 2018 which added a prescriptive easement claim and removed the "Removal of Cabin". CP 38-61.

In an oral ruling on dueling summary judgments, the trial court granted summary judgment as to Bentz adverse possession claim, dismissed Conklin's trespass claim and denied Conklin's summary judgment. 1 VR 38. The written order was delayed to get a legal description but was entered on November 25, 2019. CP 623-630.

The matter proceeded to a bench trial wherein four live witnesses testified and the deposition of Marshall Colvin was admitted. CP 612. After a two-day trial, the court entered the findings of facts, conclusion of laws and judgment which are subject to appeal.

B. Factual History

1. FACTUAL HISTORY OF THE PROPERTIES

Marshall and Evelyn Colvin were deeded all three lots – Lots 20, 21 and 22 by way of a warranty deed recorded on September 24, 1999. Exhibit 3. The Colvins recorded a “Drainfield Easement Agreement” on May 30, 2001. Exhibit 6, 7. The Colvins were both the grantor and grantee. Id. The easement actually was listed as being “across, in, upon, and under...(Tax Parcel#) 69000102000 (legal description Tracts 20,21,22....” Id. Such easement was “non-exclusive”. Id. Tax parcel 690001022000 corresponds to the Lot sold to Conklin. Exhibit 22. Colvin submitted a drain field design dated December 11, 1999 and stamped by [Thurston County] Environmental Health on May 31, 2001 – a day after the easement was recorded. Exhibit 7 and 10. On the submitted design it reads “Existing cabin is for use while proposed residence is being constructed. When the new house construction is complete. [sic] The existing cabin needs to be removed. Well site is not acceptable for two party use. The well can only be approved for single family use.” Exhibit 10. The removal note relates to the well – not the drain field. However, the cabin was hooked to public water when the neighbor, Mr. Dodge, also hooked to public water in “around 2001”. 3 RP 9.¹ The Colvins built the

¹ Respondent will follow Appellant’s format. “1 RP” will be the 1/11/19 Summary Judgment transcript. “2 RP” will be the 8/26/19 first day of trial transcript. “3 RP” will be the 8/27/19 second day of trial transcript. “4 RP” is the 11/1/19 Presentation transcript.

Conklin House which got its Certificate of Final Inspection on July 25, 2004. Exhibit 12. Prior to the Conklin House being complete, the septic system was installed. Exhibit 118 Dep. M. Colvin p 28. Mr. Colvin had the Cabin hooked to the drain field. Id. He did so without permits. Id. at 44. He took no steps to remove the Cabin from the drain field after the house passed its final inspection and when he left for Missouri. Id. at 45-46. Marshall Colvin quitclaimed the Cabin lot to Evelyn on September 15, 2004. Exhibit 13. Evelyn Conklin then quitclaimed the Cabin Lot to Marcia Bentz on September 25, 2004 in a deed recorded on November 19, 2004. Exhibit 14. Bentz paid “just under of hundred thousand” dollars for the lot and cabin. 3 RP 24. The cabin is fairly substantial sits above a lake as can be seen in Exhibits 103 and 104. In a deed nominally dated December 28, 2004 but notarized on January 4, 2005 and recorded on January 14, 2005, Marshall Colvin quitclaimed Lots 220 and 21 (the eventual Conklin property) to Evelyn Colvin. Exhibit 16. Evelyn Colvin sold to Appellant by warranty deed dated October 21, 2005 and recorded on October 31, 2005. Exhibit 22.

2. THE SALE OF THE PROPERTY TO BENTZ

Marcia Bentz testified that when she purchased the property from Evelyn Colvin, they “had a document that showed three tanks, and Evelyn had that, she pointed in the direction of the mound of beauty bark and there’s three tanks. One is yours, one is for the other property, and then both of them filter into the pump” in the third tank. 3 RP 12. After the backup event discussed below, Bentz learned Evelyn Colvin was wrong

and there was not a tank for each house but rather a system of settling tanks for both structures that pumped out to the drain field. 3 RP 12. The quitclaim deed from Evelyn Colvin to Bentz had no mention of any drain field easement. Exhibit 14.

Evelyn Colvin testified at trial that she knew the cabin had been connected to the septic, that she didn't recall how it got hooked up and that she had not applied for such a permit. 2 RP 46-47. When asked if she could have got a septic company to disconnect the cabin she answered "I would imagine. I never thought of it." 2 RP 63. Evelyn Colvin testified to telling Marcia Bentz about the cabin being hooked to "the new house sewer." 2 RP 64. However, Evelyn Colvin did not tell Bentz there was anything wrong with such connection. Id. No one from Thurston County ever told Evelyn Conklin the cabin needed to be removed from the drain field. 2 RP 79.

3. THE SALE OF THE PROPERTY TO CONKLIN

Evelyn Colvin testified that when she sold the property to Conklin, that she had filled out papers with her broker that said the property had a shared drain field. 2 RP 69, Exhibit 109. In her real estate broker's "Residential Agent Detail Report" it said "shared septic". 2 RP 70, Exhibit 110. Bentz, a licensed broker, also examined historical property listing and testified to seeing two disclosures that the Conklin Property was on a shared drain field. 3 VR 20-21. Evelyn Colvin was at the home when Mr. Conklin had his home inspection. 2 RP 72. Despite the fact the septic alarm being on the cabin and the power to the septic pump being

from the cabin, no one asked Evelyn Colvin about that. 2 RP 73. The septic was inspected without any note of a problem. 2 RP 76-77, Exhibit 111. The septic alarm box on the cabin is clearly visible from the septic tank. 2 RP 78. The deed from Evelyn Colvin to Conklin was “subject to” the drainfield easement agreement executed by the Colvins.

4. THE BACK-UP EVENT

In December of 2013 there was a backup event into the cabin that had backed up into the bathtub, into the sheetrock and into the flooring. 3 RP 13. The stench was so bad Bentz got sick. Id. Fortunately, there was insurance to cover the damage. 3 RP 13-14. In the course of getting the tanks pumped after the backup, Mr. Conklin was told of the backup and that the system would be off for five minutes to have a check-valve installed. 3 RP 14. It took four to five months to repair the cabin. Id. It was only after the backup in December of 2013 that Bentz ever learned there was any possible problem with the shared drain field system. 3 RP 17-18.

5. CONKLIN’S EFFORTS TO FORCE BENTZ TO DISCONNECT OR SELL TO HIM

After the backup event, Bentz and Conklin discussed the matter and they tried to get help from the health department and the septic designer, Eric Russell. 3 RP 16. In letters between lawyers thereafter, Bentz learned that Conklin wanted Bentz to disconnect her cabin from the drain field. 3 RP 23-24. At trial, the cabin was estimated by Bentz to be worth \$275,000 to \$300,000. 3 RP 17. Without the drain field it would

essentially be just a vacant lot that could not be built upon. 3 RP 17. In the course of the demands to disconnect, Conklin then offered to purchase the cabin for \$60,000 or he would litigate. 3 RP 24. Conklin had previously wrote an email in 2016 to his real estate broker referencing his and his neighbor's property - when he was trying to force the cabin removal and/or disconnection – saying as to his neighbor Bentz: “Now her circumstances seem to be substantially changing which may facilitate my acquiring her property.” Exhibit 116, 2 VR 205-207. Conklin engaged governmental agencies to try to have the cabin torn down based on the note on the septic plan to have the cabin removed after the house was built because the well was not suitable for a two-party system. See. Ex. 10 and 3 RP 26. Such request was denied as the cabin was connected to public water. 3 RP 26, Exhibit 106. Conklin approached both the health department and the water department to have the Cabin removed from the septic system. 2 RP 183.

6. FACTS SUPPORTING IMPLIED EASEMENT

As discussed below, an implied easement requires unity of title, some degree of necessity and continuous and apparent use. Unity of title was discussed above in the property history section. Bentz testified the lack of a drain field would reduce the cabin in value from \$300,000 to that of an unbuildable vacant lot. 3 RP 17. Bentz testified that without the drain field, she could not use the cabin. 3 RP 17. Both briefs discuss the joint use that has been ongoing since 2004. As discussed in above in the sale to Conklin, the shared septic was disclosed in broker data forms, the

power to the septic pump came from the cabin and the septic alarm was on the cabin, not the house. 2 RP 78. In addition, Conklin, a former lawyer, had received a deed that was “subject to” an easement listing all lots being subject to the easement. Exhibit 7, 22, 2 VR 196. Moreover, Conklin testified to knowing his drain field was on the Bentz property and he knew that the Bentz property was not served by a drain field on his property and expressed a lack of knowledge of what system Bentz was utilizing. 2 VR 212.

7. CONKLIN’S TESTIMONY RELATED TO NUISANCE

Conklin confirmed his house has never suffered physical damage because of the septic system. 2 VR 181. The septic system has functioned fine for his entire ownership as related to his house. 2 VR 181. The shared system has not impacted his ability to use any of the plumbing in his house. 2 VR 187-8. Conklin had not seen any surfacing sewage or experienced foul odors. 2 RP 187. Mr. Conklin had not attempted to sell his home. 2 RP 187.

8. FACTS RELATED TO THE ATTORNEY FEE AWARD

Numerous of the facts are brought up in the argument below and will not be repeated here. However, in considering the fee award the consider there is a complete absence in the record of any objection to the undersigned’s rate and there is not a single objection to a specific time entry on the submitted bills. See CP 571-608. Rather, the objections are based on legal points and that some group of fee entries are not easily susceptible to absolute segregation. CP 576. To reduce costs, and given

that Mr. Conklin's position were pretty much established in pleadings, the undersigned did very little discovery. CP 519. Conklin took depositions not used at trial or minimally used. CP 519. Conklin twice filed motions in limine in a bench trial. CP 519. Conklin filed an amended and second amended complaint. CP 1-25, 38-61. The undersigned wrote off many billing entries and gave \$1000 in credit to the Bentz to help keep the bills down. CP 520-521. The undersigned carefully submitted the time, discussed the time, allocated the time by color coding entire and discussed the allocation. CP 516-570. The trial court "very carefully" reviewed the billings and awarded 83% of the amount requested and 43% of the total billings. 4 RP 22.

V. ARGUMENT

This response brief will address the arguments generally in the order presented in the Appellant's opening brief.

a. Standard of review.

The standard of review in this case is interesting. In the assignment of errors, appellant only takes exception with Findings of Fact 20 and 30. "An appellate court reviews a trial court's findings of fact for substantial evidence in support of the findings. *In re Marriage of Schweitzer*, 132 Wash.2d 318, 329, 937 P.2d 1062 (1997). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. *Bering v. SHARE*, 106 Wash.2d 212, 220, 721 P.2d

918 (1986). A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. *In re Marriage of Lutz*, 74 Wash.App. 356, 370, 873 P.2d 566 (1994). Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wash.2d 35, 42, 59 P.3d 611 (2002).” *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162, 164 (2010). Appellate tribunals “are not entitled to weigh either the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard. The trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. It is more capable of resolving questions touching upon both weight and credibility than we are. *In re Palmer*, 81 Wash.2d 604, 606, 503 P.2d 464 (1972).” *In re Sego*, 82 Wn.2d 736, 739–40, 513 P.2d 831, 833 (1973).

Conclusions of law are reviewed de novo. *Weyerhaeuser Co. v. Calloway Ross, Inc.*, 133 Wn. App. 621, 624, 137 P.3d 879, 880 (2006).

Now, the trial court also formed an equitable remedy in imposing and implied easement. “Second, trial courts have broad discretionary power to fashion equitable remedies. *Sac Downtown Ltd. Partnership v. Kahn*, 123 Wash.2d 197, 204, 867 P.2d 605 (1994)(award of restitution). A trial court has great flexibility in awarding equitable relief. *Friend v. Friend*, 92 Wash.App. 799, 803, 964 P.2d 1219 (1998)(partition), *review*

denied, 137 Wash.2d 1030 (1999). An appellate court reviews the authority of a trial court to fashion such remedies for an abuse of discretion. *Sac Downtown Ltd. Partnership*, 123 Wash.2d at 204, 867 P.2d 605.” *Rabey v. Dep’t of Labor & Indus. of State of Wash.*, 101 Wn. App. 390, 396–97, 3 P.3d 217, 220 (2000).

The interesting issue in this case is how a court of appeals reviews – if at all – the decision of the trial court to award attorney fees in the face of a division split. As will be discussed below, the Court of Appeals has directed that a trial court is to “independently evaluate” the split and anticipate what the Supreme Court would do. As such, this court should not review that which it delegated to the trial court to “independently evaluate” and when it would be impossible to say a trial court abused its discretion when it chose to follow one three judge panel of appellate court judges over three other. Put otherwise, this court would have to call the other panel of this one Court of Appeal unreasonable – which is not a position this court should be put into – or to assume.

Accordingly, this court should not review if the fee award was proper in principal. However, as to the amount of the award: “An appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion.” *Berryman v. Metcalf*, 177 Wn. App. 644, 656–57, 312 P.3d 745, 753 (2013).

b. The trial court did not abuse its discretion in awarding attorney fees for Bentz prevailing on Conklin's prescriptive easement claim under RCW 7.28.083.

As of the writing of this brief there is a division split on this issue between Division 1 and Division 2. Simply put, Division 1 said that given the similarity of prescriptive easements to adverse possession, it applied RCW 7.28.083(3) which facially only mentions adverse possession to prescriptive easement claims and resulting attorney fee awards. Workman v. Klinkenberg, 430 P.3d 716 (Wash. Ct. App. 2018). Division 2 noted differences between the two doctrine and the facial language of the statute and refused to expand the statute to apply to prescriptive easements. McColl v. Anderson, 429 P.3d 1113 (Wash. Ct. App. 2018). No other appellate decisions have taken on the issue directly and the Supreme Court has not weighed in on the issue.

The division split fundamentally changes the analysis on review. The issue is not if Division 1 or Division 2 is right on the issue. If that were the standard, the Division 2 panel reviewing this would seemingly be an interested party in all of this and should kick the analysis to Division 3 as Division 1 would have the similar bias. But that is not what this court (and this division) has said should happen. It is not an matter of a lower court or a coequal court branch of the court throwing rocks at the other branch. "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.” Union Bank, N.A. v. Vanderhoek Associates, LLC, at 847. So what is a trial judge supposed to do? In the Vanderhoek case noted another split between Divisions 1 and 2 – that time related to deficiency judgments under the deed of trust act. Faced with such split, Pierce County Superior Court Judge Susan Serko sided with Division 1 (which was eventually affirmed by the Supreme Court) and Division 2 affirmed Judge Serko’s decision saying her decision was “tenable” given the divisional split and “that the trial court did not abuse its discretion.” Id. at 848. More fully set forth:

It is without question that the trial court was required to follow *Cornerstone* when it existed as the only appellate court decision on point. But once Division One issued *Gentry*, which expressly disagreed with our decision in *Cornerstone*, the trial court faced a quandary. The appellate courts have given trial courts no guidance in how to proceed in the face of a divisional split. See Mark DeForrest, *In the Groove or in A Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 Gonz. L. Rev.. 455, 491–511 (2013) (discussing possible resolutions to the dilemma faced by trial court judges). One approach would be to mandate a trial court to follow the division in which it geographically sits. Another approach would be to allow the trial courts to independently evaluate the conflicting precedent and conclude how our Supreme Court would resolve the conflict. Professor DeForrest favors the latter

approach, as do we. DeForrest, 48 Gonz. L. Rev.. at 491–513. Here, the trial court appears to have followed this approach and it correctly anticipated that Division One's resolution of *Gentry* would be favored by our Supreme Court. Given the dearth of guidance on this topic, the trial court's decision to vacate its January 31 judgment based on its own evaluation of the divisional split caused by *Gentry* was tenable.

Accordingly, we hold that the trial court did not abuse its discretion in vacating its January 31 summary judgment order and affirm.

(footnotes omitted) Union Bank, N.A. v. Vanderhoek Associates, LLC, at 847–48. This is the answer in this case. The court of appeals should look to see if the trial court's decision was “tenable” and review it under an “abuse of discretion” analysis. It is basically unfathomable that a reviewing court could say that a trial court acted untenably when it has to pick between precedent of two co-equal courts. The undersigned understands and respects the decisions of both Divisions. Each makes good points. The question is not which Division is right – that is probably for the Supreme Court – the question is if the trial court abused its discretion and it cannot possibly be so argued. The only way the trial court really could have abused its discretion would have to ignored both decision and gone off on a judicial frolic and ruling completely differently. This court charged Judge Dixon to “independently evaluate” the precedent. The briefing before the trial court raised the divisional split

and the judge followed one of the two decisions. The trial court decision should not be set aside.

c. **The trial court did not abuse its discretion in awarding attorney fees for adverse possession as adverse possession was not conceded.**

Respondent simply fundamentally disagrees that Conklin conceded adverse possession. A review of such “concession” was in the Responsive Brief only after the summary judgment was filed. Such “concession” was after a failed mediation. CP 262. Such “concession” ignores that in the very response in opposition to summary judgment supposedly conceding the issue argued: “In addition, the Court should condition the granting of any such relief by way of adverse possession upon Marcia Bentz’s application to Thurston County for approval of a boundary line adjustment.” CP 248-9, 1 VR 29-31. Such position essentially attempted to limit the superior court’s authority to quiet title to that which a bureaucrat in the local planning department might allow. Obviously, there was not authority provided for such a proposition. However, it is illustrative of such concession was not really a concession. As set forth above in the section related to Conklin trying to force the removal of the cabin through the water and health departments, Conklin had a history of lobbying governmental officials to try to thwart Bentz. Such “concession”

would have simply moved the fight from the court room to the planning department.

As for the requests for admission wherein Conklin supposedly concedes – just look at them. CP 604-6. They do not deal with exclusivity. They do not deal with hostility. They do not deal with continuous use. They do not ask for an admission of “the application of law to fact” as allowed under CR 36.

The argument as to CR 8(d) and Conklin not answering the counterclaim was never raised to the trial court. Besides, the Washington Supreme Court has already ruled against appellant on such point. “When the parties went to trial on a record wherein the counterclaim was not answered, defendant might have relied on Rule of Pleading, Practice and Procedure 8(d) (now CR 8(d)), and claimed the averments of the counterclaim were admitted, but when the trial was conducted entirely on the issues of the account, all such admissions were deemed waived and the trial court properly treated the case as if a general denial were in the record, thus putting at issue all of the material facts of the counterclaim. *Spangler v. Glover*, 50 Wash.2d 473, 313 P.2d 354 (1957).” *Card v. W. Farmers Ass'n*, 72 Wn.2d 45, 48, 431 P.2d 206, 208 (1967). See also, *Matter of The Bernice K. Price-Cameron Tr.*, 79328-4-I, 2020 WL 2114344, at *10 (Wash. Ct. App. May 4, 2020)(unpublished)(“Here, as in

Card, any admissions were waived when Antoinette failed to argue that they were admitted. The trial court properly treated the case as if a general denial were in the record.”).

The appellant tried this whole “I conceded” the issue before the trial court which wasn’t buying what Conklin was selling. Given the factual record as to this so-call “concession” the trial court did not manifestly abuse its discretion in awarding fees for the successful summary judgment motion. Conklin’s refused to stipulate to adverse possession and his counsel responded: “My client prefers to proceed to trial and final resolution as quickly as possible.” CP 465. Respondent would have then gone to trial on such point, brought in surveyors, different evidence.... The cost would be even more. Recall, one of the purposes of summary judgment is to narrow the issues for trial. City of Seattle v. State, Dep’t of Labor & Indus., 136 Wn.2d 693, 697, 965 P.2d 619, 621 (1998).

Conklin did not concede and demanded the matters be tried. Bentz properly moved for summary judgment and the trial court properly granted the motion and narrowed the issues. This is a problem of Conklin’s own making...he should have just accepted the offer to stipulate. This court should not reward Conklin for an issue he created.

Contrary to Conklin's assertions, the implied easement claim did not render Conklin's prescriptive easement claim moot. Read the trial brief from Conklin starting at page 19 where arguments are made for a prescriptive easement. CP 303-304. In the Conklin's trial brief it argues "Conklin has established each of the elements of an easement by prescription. CP 203. Conklin's trial brief argues "...Marcia Bentz is not entitled to use the septic system to dispose of effluent from the cabin, and should be ordered to disconnect her cabin from the septic system." CP 304. Look at the closing arguments of Conklin's attorney:

But as an alternative we've also pointed out that Mr. Conklin has actually used the drainfield easement as permitted or as authorized by the Thurston County permit for more than ten years. In order to have a prescriptive easement, you got to satisfy three requirements: The easement has to be open and notorious, it has to be continuous and uninterrupted, and it has to be adverse. So I'll talk about each of those.

2 VR p.5 l. Such argument continued and concluded:

So I'm done with the first issue. In sum, the court should find that Mr. Conklin is beneficiary of the -- of an express easement. It should also find that he's the beneficiary of an easement by prescription, and either way the court should hold that Mr. Conklin is entitled to continue to use the septic system to dispose of the effluent generated by his use and occupancy of his house.

Now I'm turning to the second issue which is is Marcia Bentz entitled to keep her cabin on her property connected to the septic system. And the answer to that question is no.

2VR 59-60. If the prescriptive easement was rendered moot by Bentz advocating an implied easement – someone should have told Conklin's trial counsel. The truth is that Conklin wanted to kick Bentz off the drain field and an implied easement – which is based on historic use as discussed below – would have continued joint use. However, the fact that Conklin is advocating that the prescriptive easement was moot when it was argued through closing arguments is inconsistent at the least.

d. The record well supports the trial court's decision on attorney fees.

The record has an extensive declaration of counsel for Bentz that appends the billings in this case from all involved attorneys. CP 516-570. Case law discusses how: "The determination of a fee award should not become an unduly burdensome proceeding for the court or the parties.

Absher Constr. Co. v. Kent Sch. Dist. No. 415, 79 Wash.App. 841, 848, 917 P.2d 1086 (1995). Documentation ‘need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (*i.e.*, senior partner, associate, etc.).’ *Bowers*, 100 Wash.2d at 597, 675 P.2d 193.” 224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wash. App. 700, 740, 281 P.3d 693, 714 (2012). Below, Conklin never raised the issue that there was an insufficient submission from Bentz for the court to award attorney fees. Conklin spends the bulk of his opening brief arguing that the trial court acted improperly when it awarded \$26,765 of fees and costs \$2,149.68 for a total of \$28,914.68 of the \$34,818.17 of total fees and costs requested. *Brief of Appellant* p. 10-24. Still, that has to be viewed in light the undersigned had already done a detailed segregation wherein out of a total of \$67,083.43 (CP 516-570) in total fees and costs, \$34,818.17 was requested. The court awarded only 43% of the total fees and costs incurred by Bentz in this lawsuit (\$28,914.68/\$67,083.43). Consider also that Conklin brought claims for trespass, nuisance, establishment of a prescriptive easement, reformation, violation of health code and injunction. None of which were successful. On the other hand, Bentz

asserted adverse possession and at trial asserted a continuing right to use the drain field by way of implied easement.

All of the billing records were before the very court which had heard every motion, tried the case and had made every ruling in the case.

The court entered specific findings that:

2. The court has reviewed the attorney fee affidavit and supporting documentation submitted by Attorney Martin Burns;

3. The court has reviewed a response re attorney's fees from the Plaintiff, as well as their supporting documentation;

4. The court finds that the attorney fees and costs that were incurred by Burns Law, PLLC, on behalf of the prevailing Defendant to be reasonable and in accordance with community norms;

CP 610. The trial court discussed its award at the presentation:

The Court finds that Mr. Burns' attorney's fees are reasonable, both in terms of their rate, which I think was 280 bucks an hour or something like that, \$300 or --

MR. BURNS: 285.

THE COURT: 285. The Court has reviewed Mr. Burns' billings to his client. The Court is going to award attorney's fees in the amount of 26,765. 26,765. And, I looked at that issue very carefully, costs in the amount of 2,149.68, 2,149.68.

4 RP 22. Appellant cites to Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998), order corrected on denial of reconsideration, 966 P.2d 305 (Wash. 1998). However, such case says: “Courts should not simply accept unquestioningly fee affidavits from counsel. *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 744, 733 P.2d 208 (1987).” Mahler v. Szucs, at 434–35. But Judge Dixon did not simply accept the undersigned’s declaration. He went over it “very carefully” and reduced it by 17%. “The court must also determine the reasonableness of the hourly rate of counsel at the time the lawyer actually billed the client for the services.” (citation omitted) Mahler at 434. The trial court, as shown above, made written and oral findings of such rate (\$285 for a lawyer of 26 years). Notable, the materials submitted by Conklin in opposition never challenged such rate. See CP 571 to 608. The Mahler court complained that “affidavits from four different counsel or firms who represented Mahler. We cannot discern from the record if the trial court thought the services of four different sets of attorneys were reasonable or essential to the successful outcome. We do not know if the trial court considered if there were any duplicative or unnecessary services. We do not know if the hourly rates were reasonable.” Id. at 435. There was no such problem here. The bulk of Bentz’s fees were from the undersigned at a rate no one objected to. There were some fees from the undersigned’s

predecessor counsel, Jean Bouffard (WSBA 20457 admitted 6/3/1991), who charged \$325 – and to which Conklin never challenged as to the rate.

The odd part of this situation is that often the complaint is when a trial court awards too little without explaining why. “Specifically, “[a]n award of substantially less than the amount requested should indicate at least approximately how the court arrived at the final numbers, and explain why discounts were applied.” *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wash.App. 841, 848, 917 P.2d 1086 (1995).” Peiffer v. Pro-Cut Concrete Cutting & Breaking Inc., 431 P.3d 1018, 1033 (Wash. Ct. App. 2018), review denied, 193 Wn.2d 1006, 438 P.3d 115 (2019)(unpublished). But Bentz is not appealing the reduced fees. In Peiffer, the prevailing party had requested for \$73,395.50 in fees and \$9,778.82 in costs and the trial court just issued a rounded award of \$50,000 of attorney fees and dropped costs to \$5,503.13 without explanation. Id. at 815. That is not what happened here.

This court also needs to look at the complete record below as to what really was at issue before the trial court related to attorney fees. Conklin was arguing that Bentz was not the prevailing party. CP 572-3. Conklin was arguing that fees should not be awarded for the prescriptive easement defense. CP 578-581. Conklin was arguing that he had conceded the adverse possession issue. CP 574. There is no requirement

that the findings must be extensive. “As discussed above, the trial court here entered written findings and conclusions stating the award was reasonable and necessary. The trial court also indicated it based its review on the documentation Ames provided. The trial court acted well within its discretion when it granted Ames’ motion for attorney fees and costs.” Dalsing v. Pierce Cty., 190 Wn. App. 251, 272, 357 P.3d 80, 91 (2015). The order in the present case states the court considered the record and had reviewed the undersigned’s billings to Bentz. CP 609.

At no place in the record did Conklin ever complain of the adequacy of the record or sufficiency of the form of the order. See, 4 VR 16-21.

Paulite argues that the trial court's March 2013 award of attorney fees must be reversed because (1) Dahlgren was not a prevailing party, where a final judgment had not yet been entered at the time of the award and (2) the attorney fees were not reasonable under a lodestar analysis and included fees for work that was unrelated, unnecessary, and unproductive. But Paulite did not make these arguments below. Generally, this court does not consider arguments that are raised for the first time on appeal. *Karlbera v. Otten*, 167 Wn.App. 522, 531, 280 P.3d 1123 (2012); see also RAP 2.5(a); *Draper Mach. Works, Inc. v. Hagberg*, 34 Wn.App. 483, 488, 663 P.2d 141 (1983) (refusing to consider for first time on appeal whether trial court improperly determined amount of attorney fees awarded). Nor does Paulite explain why she may raise these objections for the first time on appeal. Furthermore, she does not argue that the trial court erred in its October 2011 or January 2013 orders, which awarded Dahlgren all of his attorney fees as administrative costs and expenses.

(footnotes omitted) Dahlgren v. Nw. Tr. Servs., Inc., 182 Wn. App. 1044 (2014)(unpublished). The trial court appropriate dealt with the record and objections before it and this court should not find any abuse of discretion.

e. The trial court properly imposed an implied easement as there was not a valid, express easement over the area wherein the actual drain field existed.

There are all sorts of reasons to uphold Judge Dixon's ruling. The notion of there being a "valid, express easement" simply ignores the facts of the situation. Let's start with merger. The Drain filed easement was executed by the Colvins on May 29, 2001.

DRAINFIELD EASEMENT AGREEMENT

This Agreement is made this 29 day of MAY, 2001,
between: MARSHALL V. COLVIN, EVELYN L. COLVIN, herein referred to as "GRANTOR"
and MARSHALL V. COLVIN, EVELYN L. COLVIN, herein referred to as "GRANTEE".

CP 7. It is undisputed that at such time, the Colvins owned all three lots at issue as Bentz did not buy until 2004 and to Conklin in 2005. App. Brief p. 5-6. This exact issue arose on the exact same easement form and this court affirmed a trial court that found merger:

An easement is a right in the property of another, not in one's own land. An easement is the right to use land, and the easement must serve a beneficial use. *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 853, 351 P.2d 520 (1960). Therefore, "[o]ne cannot have an easement in his own property." *Coast Storage*, 55 Wn.2d at 853. More specifically, a property owner cannot have and does not need an easement in land he owns. *Butler v. Craft Eng Constr., Inc.*, 67 Wn.App. 684, 698, 843 P.2d 1071 (1992). An easement requires both a dominant and a servient estate.

Roggow v. Hagerty, 27 Wn.App. 908, 911, 621 P.2d 195 (1980). When one person owns both the dominant and servient estates, an easement is terminated. *Coast Storage*, 55 Wn.2d at 853.

Here, the 2005 drain field easements purported to grant easements encumbering one of the Cokeleys' parcels in favor of another. As owner of both parcels, however, the Cokeleys had no need for an easement, and could not create such an interest in their own favor on their own property. No express easement was created by the drain field easements, so the Brown property does not have an express easement over the Sandy property.

Sandy Family Five, LLC v. Brown, 191 Wn. App. 1032 (2015)(unpublished). It is hard to fathom how this court could find the trial court got the law wrong or somehow abused its discretion when it followed a very recent and very on-point case. So this court must reject the notion that there was a valid express easement.

Appellant's citation to Boyd v. Sunflower Properties, LLC, 197 Wn. App. 137, 149, 389 P.3d 626, 632 (2016) is such case discusses how equity will not intervene to "circumvent written agreements." But appellant ignores what the Colvin easement actually says. The easement is not on Bentz's property...it is on Conklin's property.

(Tax Parcel #) 69000102000 (Legal Description) TRACTS 20, 21, 22
BLOCK 1 OF PLEASANT BEACH AS RECORDED IN VOLUME 11 OF
PLATS, PAGE 51,
T.N. THURSTON COUNTY WASHINGTON

in consideration of one and no/100th Dollars (\$1.00), and other good and valuable consideration in hand paid, receipt of which is hereby acknowledged, GRANTOR hereby conveys and warrants to GRANTEE the following easements:

A non-exclusive perpetual easement across, along, in, upon, and under GRANTOR'S real estate situated in Thurston County, State of Washington (Tax Parcel #) 69000102000  LOTS 20, 21, 22,

Block 1 OF PLEASANT BEACH AS RECORDED IN VOLUME
11 OF PLATS, PAGE 51,
T.N. THURSTON COUNTY WASHINGTON

And by this reference made apart hereof for the purpose of installing, constructing, operating, maintaining, inspecting, removing, repairing, replacing, and using a residential septic tank and soil absorption system (hereafter residential septic system); TOGETHER WITH the non-exclusive right of ingress to and egress from said property for the foregoing purposes.

Exhibit 7. Such parcel # 69000102000 relates to Conklin's property as shown in Conklin's deed:

Legal Description (abbreviated): LOTS 20 & 21, Blk 1  Pleasant Beach
Additional Legal on page:
Assessor's Tax Parcel ID#: 69000102000
Reference: 7018C448-201-314

TRANSACTION TITLE

STATUTORY WARRANTY DEED

THE GRANTOR(S) Evelyn L. Colvin, a single woman, for and in consideration of Ten (\$10.00) Dollars and other good and valuable consideration in hand paid, conveys and warrants to Robert J. Conklin, a single person the following described real estate, situated in the County of Thurston, State of Washington:

LOTS 20 AND 21 IN BLOCK 1 OF PLEASANT BEACH, AS PER PLAT RECORDED IN VOLUME 11 OF PLATS, PAGE 51, RECORDS OF THURSTON COUNTY ANDITOR;

SITUATE IN THE COUNTY OF THURSTON, STATE OF WASHINGTON.

Subject to: These items specifically set forth on Exhibit "A" attached hereto.

Dated: October 21, 2005
SELLER:


Evelyn L. Colvin

Exhibit 22. It is notable that the "subject to" exhibit to Conklin's deed includes the drain field easement. Conklin wanted the trial court to amend the drain field to reform it to be on Bentz' property. The problem with that is that such remedy was barred by the statute of limitation. Division 2 has made clear: "We affirm, holding that the three-year statute of

limitations is appropriate in a reformation action where the plaintiff seeks to use parol evidence to modify a material term.” Browning v. Howerton, 92 Wash. App. 644, 645–46, 966 P.2d 367, 368 (1998). While this is not a contract discovery rule matter, such discovery rule would not apply anyways. “The discovery rule does not require knowledge of the existence of a legal cause of action.” Reichelt v. Johns-Manville Corp., 107 Wash. 2d 761, 769, 733 P.2d 530, 534–35 (1987). Mr. Conklin accepted his deed “subject to” the easement. He had knowledge. Still, as the drain field easement is a recorded document, and the statute of limitation runs from the recording of the document as discussed in fraud cases:

When an instrument involving real property is properly recorded, it becomes notice to all the world of its contents. *Allen v. Graaf*, 1934, 179 Wash. 431, 38 P.2d 236. See *Dowgialla v. Knevage*, 1956, 48 Wash.2d 326, 294 P.2d 393. When the facts upon which the fraud is predicated are contained in a written instrument which is placed on the public record, there is constructive notice of its contents, and the statute of limitations begins to run at the date of the recording of the instrument. *Davis v. Rogers*, 1924, 128 Wash. 231, 222 P. 499; *Irwin v. Holbrook*, 1903, 32 Wash. 349, 73 P. 360.

Strong v. Clark, 56 Wash. 2d 230, 232, 352 P.2d 183, 184 (1960). More recently the Court of Appeals opined on such issue:

One instance in which actual discovery will be inferred is where the facts constituting the fraud were a matter of public record. As our Supreme Court explained in *Davis v. Rogers*, 128 Wash. 231, 236, 222 P. 499 (1924), where facts constituting fraudulent acts were matters of public record, and thus “easily ascertainable,” the public record serves as “constructive notice to all the world of its contents.” “[T]he defrauded party cannot be heard to say that he has not

discovered the facts showing the fraud within the limit of the statute if the facts should have been discovered prior to that time by anyone exercising a reasonable amount of diligence.” *Id.* at 235–36, 222 P. 499.

Shepard v. Holmes, 185 Wash. App. 730, 740, 345 P.3d 786, 790 (2014).

The point is, the express easement – to the extent not merged – is not on the Bentz property and the notion of reformation is barred. Judge Dixon did not err in not reforming such drain field easement given the merger and the statute of limitation. Rather, he followed the Sandy Family Five case and did not abuse his discretion in equitably imposing an implied easement. “We look to three factors when considering whether an implied easement exists: (1) former unity of title and subsequent separation, (2) prior apparent and continuous use of a quasi-easement benefiting one part of the estate to the detriment of another, and (3) some degree of necessity that the easement exist.” (citation omitted) Sandy Family Five, LLC v. Brown, 191 Wn. App. 1032 (2015). The court can probably take judicial notice that there is “some degree of necessity” disposal of residential effluence. Bentz testified the lack thereof would reduce the cabin value from \$300,000 to that of an unbuildable vacant lot. 3 RP 224. Bentz testified that without the drain field, she could not use the cabin. 3 RP 17. Both briefs discuss the joint use that has been ongoing since 2004. The

unity of chain of title with all lots vested in the Colvins is also briefed by both sides.

Now, this should resolve this argument. Out of an abundance of caution, it is noted that Conklin argues that the drain field easement was an "exclusive" easement. Putting aside the other issue, the written document clearly says the easement is "nonexclusive":

A non-exclusive perpetual easement across, along, in, upon, and under GRANTOR'S real estate situated in Thurston County, State of Washington, to wit:
(Tax Parcel #) 69000103000 (Legal Description) TRACTS 20, 21, 22,

Exhibit 7. Additionally, the same document says the easement is for use of "Tracts 20, 21, 22" and Lot [tract] 22 is the Bentz property. So it is unreasonable to argue that the written document creates an exclusive easement.

To counter the language of the document and to challenge the notion of merger, Conklin tries to argue Marshall Colvin's intent. However, what Mr. Colvin testified to and what he did do not support such claimed intent.

Q. (By Mr. Edwards) Why did you complete and record this document?

A. I had to in order to comply, and I had to -- I wanted to proceed to build this house. I had no choice. I wouldn't have had -- I wouldn't have went through all of this if I couldn't have built the house.

Exhibit 118 Dep. M. Colvin p 24. Ms. Colvin just signed the documents
her husband asked:

Q Did you apply to Thurston County for the permit to build
the septic?

A Not me.

Q So that was Mr. Colvin?

A Yeah. I tagged along and followed along. There's a
contentious situation you guys don't know about, and I
didn't really want to air it in court, but I just stood
behind him, and I signed papers just to get the heck out

of the courthouse.

Q So he was taking the lead in terms of doing all this
development of the property?

A Mm-hm. Yes. Sorry. Yeah. I just --

Q Thurston County required you and your husband to report a
drain field easement agreement in order to get the septic
permit; is that correct?

A I'm assuming.

2 RP 44-45. The actual drainfield plan talked of removing the cabin as
there was an insufficient well for two houses. Exhibit 10. But Marshall
Colvin had no intent of removing the cabin:

Q. Perhaps -- perhaps nothing. It sounds to me -- and correct me if I'm wrong -- that if you had stuck around, you wanted to keep the cabin?

A. That was my intentions, bud. I said already I was going to fight them with it about it since there were two different water sources. And, you know, if you could have got it approved, you could have still got a cabin out of the deal. I don't know about a legit bedroom, but it says three bedroom. As long as the cabin didn't have a bedroom, that would still make it a three-bedroom house. The only thing is you're sharing a toilet in a different location. So with two water sources, one from the main waterline, one from the wellhead, I don't see where there would have been a problem.

Exhibit 118 Dep. M. Colvin p. 52. So the notion of what was in writing was not really what was the "intent" of Marshall Colvin. The trial court did not abuse its discretion in not adopting Bentz's version of the impact of such testimony.

Also, given the easement was invalid from its inception, the Respondent questions why it makes any difference whatsoever whether Ms. Bentz was a bona fide purchaser for value or not. "A vendee of an executory real estate contract who has **no notice of competing interests** in the property at issue and who properly records the executory contract

may acquire the status of bona fide purchaser.” (Footnote omitted). Tomlinson v. Clarke, 60 Wash. App. 344, 350–51, 803 P.2d 828, 831 (1991), affd, 118 Wash. 2d 498, 825 P.2d 706 (1992). Bentz did not hook the Cabin to the drainfield...Colvin did. The Respondent bought the subject property believing the drainfield was shared and has acted accordingly ever since. Bentz was completely innocent and had no idea there was any problem until about 2014. Ms. Benz did know that it was a shared drainfield. However, the Appellant’s assertion that “although Bentz was told that it was a share septic system, CP 615, she was aware of the recorded Drainfield Easement Agreement. CP 614-615 is a non-sequitur and not in line with the Findings of Fact and Conclusions of Law.” *Brief of Appellant* p. 29. Knowing about the specifics of an easement does not directly follow from her knowledge of the shared drainfield. Judge Dixon rightly noted that Ms. Bentz had no competing or adverse interest when purchasing the home when he found that:

“Given Bentz purchased understanding there was a share[d] [sic] drainfield, and given the shared drainfield is beneficial to herself and her property, **the use of the drainfield by Conklin was expected and not adverse.**”

CP 617. Ms. Bentz had no competing interest in purchasing the property and therefore there is no reason that Ms. Bentz should not be considered an innocent and bona fide purchaser for value. Furthermore, it was

Ms. Bentz's testimony that before the backup, she was unaware the two systems we piped into a "Y" two-pipe to one-pipe connection rather than having a separate tank for the house and cabin as she was told by Ms. Colvin. 3 RP 12. The trial court rightly decided that Ms. Bentz "purchased her property from Ms. Colvin knowing of the existence of that drainfield, notwithstanding the quitclaim deed and whatever it was she was able to uncover in her record search which was apparently next to nothing. But she acquiesced. She knew based upon her discussions with Ms. Colvin of the existence of the drainfield located on her property including, but not limited to, the three tanks that have been referenced in the testimony during this trial. So the court denies the request for a prescriptive easement." 3 RP 110. There is no reason to overturn this decision and no evidence that Ms. Bentz was not a bona fide purchaser.

f. **The trial court properly dismissed Conklin's nuisance claim as the Appellant's property has not been damaged and he has suffered no interference in its use.**

The trial court properly interpreted that "an actionable nuisance is as an act or omission that injures the plaintiffs' property or unreasonably interferes with their enjoyment of the property," *Tiegs v. Watts*, 135 Wash.2d 1, 13, 954 P.2d 877 (1998)." *Asche v. Bloomquist*, 132 Wn. App. 784, 800, 133 P.3d 475, 482 (2006), as amended (Apr. 4, 2006) in ruling that "the plaintiff has failed to establish his burden with respect to

the claim of nuisance.” 3 RP 109. During his cross exam, Mr. Conklin could provide no evidence of any injury to his property nor any interference with his enjoyment of it:

Q. And would you agree with me that there is not a single receipt or bill for any repairs related to the damage to your house from the septic system?

A Correct.

Q Okay. And your house has never suffered damage because of the septic system?

A Physical damage?

Q Correct.

A No.

Q And from a functional standpoint, as related to your house, it has functioned fine now for 14 years?

A Yes.

2 RP 182.

Q In your stack of exhibits there, do you have any documents showing that the drain field is not properly functioning today?

A Just functioning regardless of legal issues?

Q Yeah.

A No. I have no -

Q Okay. And, to your knowledge, there is no sewage surfacing over on Lot 22; correct?

A That would be my knowledge at this point, yeah.

Q And certainly there's no sewage coming back onto Lots 21 and 20; correct?

A Correct.

Q And I've not seen anywhere where you've complained of any foul odors coming from the septic system?

A That's correct.

Q And you've continued to live in this house for 14 years; correct?

A Yes.

2 RP 186-7. Conklin has never had a disruption of his system, a backup or a repair. Other than the one backup event in 2014 which damaged Bentz' cabin (not Conklin's house), the two properties have successfully shared the septic system for about 14 years.

“Nuisance” is “an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life and property.” RCW 7.48.010. “In order to recover for nuisance, a plaintiff must show substantial interference with the use and enjoyment of his land.” *Bradley*, 635 F.Supp. at 1157.

City of Moses Lake v. United States, 430 F. Supp. 2d 1164, 1184 (E.D. Wash. 2006). Presently, there is no interference with Conklin's use of the drainfield. The closest cases deal with sewage and garbage disposal but focus on foul odors and health concerns, which the Conklin admits to not suffering. Nuisance just does not fit in this case and the dismissal of the such claim was justified and must be upheld.

The Appellants brief states that “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.” (Bold added). *Brief of Appellant* p. 35. Nuisance claims cannot be based on speculative damage. Dempsie v. Darling, 39 Wash. 125, 127, 81 P. 152 (1905) (Nuisance claim by owner of vacant lot next to house of prostitution dismissed as possible devaluation of property too

speculative). The cross examination of Conklin further elucidates the speculative nature of this nuisance claim at 2 VR 187:

Q. Have you ever tried to sell it since 2013?

A **Nope.**

Q Okay. Have you ever tried to take a shower there since 2013?

A Yes.

Q Every time you've tried to take a shower, has the water gone down the bottom and out?

A Yes.

Q Every time you flush the toilet, has everything headed out?

A Yes.

Q Has it -- have all your appliances worked?

A Yes.

Q So is there anything that you haven't been able to do that you're actually doing with that house that you did before the backup event that you can't do now?

A Again, we're talking purely practical application?

Q Yeah.

A Not legal issues?

Q Not talking legal.

A Okay. I would concur with that.

Q You're basically able to use it in the same fashion both pre-backup, post-backup?

A Correct.

The record does not reflect that Conklin has attempted to sell his property and can provide no firm evidence that Bentz's use of the drainfield qualifies as a nuisance under the definition provided by the statute RCW 7.48.010. Conklin presented no evidence of any adverse effect on his house's value. The trial court properly concluded that while Mr. Conklin legitimate concerns they were "not a concern that rises to the level of a

nuisance.” 3 VR 109. It is notable that the trial court agreed with Bentz affirming the “case law is clear that in order to recover for nuisance a plaintiff must show substantial interference with the use and enjoyment of land. And as the plaintiff, Mr. Conklin has the burden to establish substantial interference with the use and enjoyment of land.” 3 VR 109. As shown through Conklin’s cross examination, he has not established sufficient evidence to prevail upon a nuisance claim as his enjoyment of his property has been, admittedly, unaffected. Now, as the Appellant, Conklin continues to provide insufficient evidence showing any such interference as he has used his property without any hindrances throughout the time the septic has been shared with Ms. Bentz.

Conklin’s nuisance claim is also barred by the statute of limitations. While Conklin should have known of this claim at the start of his ownership as (1) the power to the septic pump was from the cabin, (2) the septic alarms were on the cabin, and (3) the cabin was occupied and obviously putting its effluence somewhere – Conklin knew of the issue shortly after the December 2013 backup event. This action was filed in 2017. “Plaintiffs have two years from the time a nuisance action accrues to file a lawsuit. RCW 4.16.130; *Bradley*, 104 Wash.2d at 684, 709 P.2d 782 (citing *Weller*, 155 Wash. at 531–32, 285 P. 446); *Mayer*, 102 Wash.App. at 75–76, 10 P.3d 408.” *Wallace v. Lewis Cty.*, 134 Wn. App.

1, 19, 137 P.3d 101, 110 (2006), as corrected (Aug. 15, 2006). While appellant may claim to try to call it a continuing nuisance and hence the statute of limitation would bar damages prior to two years, the action was filed well beyond the statute of limitation. “A nuisance cause of action accrues when the plaintiff initially suffers some actual and appreciable harm or when the plaintiff should have discovered the basis for a nuisance action. *Mayer*, 102 Wash.App. at 76, 10 P.3d 408”. Wallace at 19. The “nuisance” – using that word very liberally – can’t be the drainfield as Conklin wants to keep and use the septic system. It can only be the cabin’s connection thereto of the cabin – that occurred nearly two decades ago and Conklin has known about since 2013, at least. It is barred by the statute of limitation, by laches, by traditional notions of vested rights. Put otherwise, Conklin has known about the cabin being connected since at least 2014. He could have sued to abate such connection at any point in the following two years. He is time barred from suing as to such damages (the claimed illegal hookup). If he had suffered some other form of damage within the last two years (say, a backup) then arguably such damage would have been within the statute of limitation. However, Conklin testified he never suffered any actual damage caused by the jointly connected system.

g. Bentz should be awarded attorney fees on appeal.

The argument for fees is much the same before this court as it was before the trial court with a couple of twists. There is no doubt that fees are awardable for adverse possession claims under RCW 7.28.083. Conklin spends significant time in his brief challenging the award of the fees below based upon adverse possession claiming, unpersuasively to the trial court, that Conklin had conceded adverse possession. This was discussed above. Division 1 recently allowed fees related to a counterclaim when adverse possession was argued on summary judgment and appeal – similar to this scenario. “The parties briefed and argued the adverse possession issue both below, on summary judgment, and on appeal. Because the adverse possession counterclaim was asserted as a theory supporting a claim of title to real property, we conclude that RCW 7.28.083(3) supports an award of reasonable attorney fees to LPI on appeal. However, we limit the award to fees reasonably incurred only on the adverse possession issue.” Lingering Pine Investments, LLC v. Khendry, 11 Wn. App. 2d 1019, review denied, 195 Wn.2d 1010, 460 P.3d 182 (2020)(unpublished).

Now the prescriptive easement defense component is interesting. As briefed above, given the division split about fees on prescriptive easement/adverse possession interplay, the question is not “is Division 2

right?” it is “did trial judge abuse his discretion?” Since this court should affirm the trial court it should also award fee award as it would be inconsistent and illogical to not consistently apply the law throughout the entirety of the case. The trial court applied Workman v. Klinkenberg, 6 Wn. App. 2d 291, 309, 430 P.3d 716, 725 (2018) which awarded attorney fees under RAP 18.1 and RCW 7.28.083(3): “As described above, RCW 7.28.083(3) provides such a basis. Because the Klinkenbergs are the prevailing party on appeal, we grant the Klinkenbergs their reasonable appellate attorney fees, subject to their compliance with RAP 18.1.”

Finally, the fact that much of the appeal attacked the basis and amount of the fees awarded, the time spent defending the fee award should similarly be awarded on appeal. In affirming an attack on a trial court’s award of attorney fees, the Court of Appeals found the trial court “gave an appropriate level of scrutiny to the claim for attorney fees and Zurich’s objections to it...” and awarded fees on appeal. Singh v. Zurich Am. Ins. Co., 5 Wn. App. 2d 739, 764, 428 P.3d 1237, 1251(2018).

Accordingly, subject to compliance with RAP 18.1, the court should award fees on appeal for, *inter alia*, the adverse possession portions of the briefing, the prescriptive easement portions of the briefing, the portions that deal with defending the previously awarded attorney fees as well as for future preparation and oral arguments.

VI. CONCLUSION

The trial court did not abuse its discretion in any manner. It followed a remarkably similar case dealing with the exact same easement form. The facts support the implied easement. The law supported the denial of the Appellant's various causes of action and the awarding of the fees to the Bentz. This court should affirm.

RESPECTFULLY SUBMITTED this 10th day of September, 2020.


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CERTIFICATE OF SERVICE

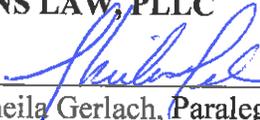
I certify that on the 11th day of September, 2020, I caused a true and correct copy of *Respondent's Brief* to be served on the following to:

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DATED this 11th day of September, 2020, at Tacoma, Washington.

BURNS LAW, PLLC

By: 
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