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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 314120

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

Leonard Browning, a single person )  
Barbara Drake, a single person )  
Appellants, )

vs. )

DOTY FAMILY TRUST, Forest C. )  
Doty and Lil Doty, husband and wife, )  
and the marital community composed )  
thereof; Charles C. Amburgey, Sr., )  
and Sandra R. Amburgey, husband )  
and wife, and the marital community )  
composed thereof; Steve Greene, )  
a single person, and Susan Beamer, )  
a single person; CHERITH FAMILY )  
TRUST, and James Gibson and Sylvia )  
Gibson, husband and wife, and the )  
marital community composed thereof, )

Respondents. )

AMENDED  
BRIEF OF  
APPELLANT  
BROWNING

## TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES	.....iv
STATEMENT OF THE CASE	..... 1
BROWNING'S CHALLENGES TO FINDINGS OF FACT AND ARGUMENT:	
FINDINGS OF FACT NO. 1.1 & 1.2	..... 4
FINDINGS OF FACT NO. 1.8	..... 8
FINDINGS OF FACT NO. 1.11	..... 17
FINDINGS OF FACT NO. 1.12	..... 20
FINDINGS OF FACT NO. 1.13	..... 23
FINDINGS OF FACT NO. 1.14	..... 24
FINDINGS OF FACT NO. 1.15	..... 28
FINDINGS OF FACT NO. 1.18	..... 29
FINDINGS OF FACT NO. 1.19	..... 31
A. THE QUESTION OF PROPERTY BOUNDARY	..... 32
B. DID BROWNING HAVE THE RIGHT TO REPAIR THE FENCE LINE?	..... 38

C. WERE DAMAGES PROVEN WITH WITH REASONABLE CERTAINTY? .....	41
D. TREBLE DAMAGES CLAIM .....	46
BROWNING'S OBJECTION TO EX-PARTE COMMUNICATION AT TRIAL .....	52
CONCLUSION .....	52

## TABLE OF CASES AND AUTHORITIES

<u>Bill v. Gattavara</u> , 24 Wash.2d 819, 835, 167 P.2d 434 (Wa. 03/28/1946)	51
<u>Berg v. Ting</u> , 125 Wn.2d 544, 551, 886 P.2d 564 (1995) (quoting RCW 64.04.010)	11
<u>Birchler v. Castello Land Co</u> , 942 P.2d 968, 133 Wash.2d 106 (Wash. 08/21/1997)	46
<u>Black's Law Dictionary</u> , Abridged Sixth Edition, 1991	18, 19, 50
<u>City of Spokane v. Catholic Bishop of Spokane</u> , 33 Wn.2d 496, 503, 504, 206 P.2d 277 (1949)	14
<u>DD&amp;L, Inc. v. Burgess</u> , 51 Wn.App. 329, 335, 753 P.2d 561 (1988)(alteration in original) (quoting <u>Rusha v. Little</u> , Me. 309 A.2d 867, 869 (1973))	32
<u>Danner v. Bartel</u> , 21 Wn. App. 213, 216, 584 P.2d 463 (1978), overruled on other grounds by <u>Chaplin</u> , 100 Wn. 2d at 861	34
See <u>Donald v. City of Vancouver</u> , 43 Wn.App. 880, 885, 719 P.2d 966 (1986)	10, 15
<u>Dorsey v. King County</u> , 51 Wn.App. 664, 668-69, 754 P.2d 1255 (1988)	31
<u>Goodman v. Darden, Damon and Stafford Assocs.</u> , 100 Wash.2d 476, 670 P.2d 648 (1983)	50

<u>Green v. Hooper</u> , 205 P.3d 134, 149 Wash.App. 627 (Wash.App.Div. 3 01/27/2009)	37
<u>Harris v. Ski Park Farms Inc.</u> , 120 Wash. 2d 727, 738, 844 P.2d 1006 (Wa. 02/11/1993), citing <u>Swan v. O'Leary</u> , 37 Wash. 2d 533, 225 P.2d 199 (1950)	13
<u>Hegwine v. Longview Fibre Co.</u> , 132 Wn.App. 546, 555, 132 P.3d 789 (2006), aff'd, 162 Wn. 2d 340, 172 P.3d 688 (2007)	39
<u>Hellberg v. Coffin Sheep Co.</u> , 66 Wash. 2d 664, 669, 404 P.2d 770 (Wa. 07/22/1965)	27
<u>Hill v. Cox</u> , 110 Wash.App. 394, 41 P.3d 495 (Wash.App.Div.3 02/26/2002), citing, <u>Fox v. Mahoney</u> , 106 Wn.App. 226, 230, 22 P.3d 839 (2001) (citing <u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971))	52
<u>In re Estate of Jones</u> , 152 Wn.2d 1, 93 P.3d 147 (2004)	50
<u>Kalinowski v. Jacobowske</u> , 8 Wn.App. 344, 506 P.2d 319 (1973)	11, 12
<u>Kemery v. Mylroie</u> , 8 Wn.App. 344, 506 P.2d 319 (1973)	11
<u>Kirk v. Tomulty</u> , 66 Wash.App. 231, 240, 241, 831 P.2d 792 (Wa.App. 06/29/1992)	22
<u>Potts v. Smith</u> , 113 Wash.App. 1051 (Wash.App.Div.1 09/30/2002)	12
<u>Queen City Farms, Inc. v. Central Nat'l Ins. Co.</u> , 126 Wn.2d 50, 882 P.2d 703 (1994)	42

<u>Qwest Corp. v. City of Bellevue</u> , 161 Wn.2d 353, 369, 166 P.3d 667 (2007)	47
<u>Robel v. Roundup Corp.</u> , 148 Wn.2d 35, 42, 59 P.3d 611 (2002)	6, 8, 21, 28, 30
<u>Scott v. Wallitner</u> , 49 Wn.2d 161, 299 P.2d 204 (1956)	12
<u>Seattle-First National Bank v. Brommers</u> , 89 Wash.2d 190, 570 P.2d 1035 (Wa. 10/27/1977)	47
<u>Sherrell v. Selfors</u> , 73 Wash. App. 596, 871 P.2d 168 (Wa.App. 04/05/1994), citing <u>Iverson v. Marine Bancorporation</u> , 86 Wash.2d 562, 546 P.2d 454 (1976)	42
<u>Soviano v. Westport Amusements, Inc.</u> , 144 Wn.App. 72, 78, 180 P.3d 874 (2008)	32
<u>State v. Williams</u> , 96 Wn.2d 215, 634 P.2d 868 (1981)	18, 25
<u>Sunnyside Valley Irrigation Dist. V. Dickie</u> , 149 Wn. 2d 873, 880, 73 P.3d 369 (2003)	32
<u>Sweeten v. Kauzlarich</u> , 38 Wn.App. 163, 166, 684 P.2d 789 (1984)	15
<u>Thompson v. Smith</u> , 59 Wash. 2d 397, 406, 367 P.2d 798 (Wa. 01/12/1962)	24
<u>Wheeler v. Bill</u> , 18 Wash.2d 196, 138 P.2d 857 (Wa. 06/16/1943)	45

Wherrell v. Selfors, 73 Wash.App. 596, 871 P.2d 168  
(Wn.App. 04/05/1994), citing Henriksen v. Lyons,  
33 Wash.App. 123, 126, 652 P.2d 18 (1982),  
review denied, 99 Wash.2d 1001 (1983)

50

STATUTES:

RCW 64.04.010

11

RCW64.12.030

46

RCW 64.12.040

46

## STATEMENT OF THE CASE

The real property that is the subject of this suit is located in Sections 11, 12, and 14, of Township 32 North, Range 44 East, Willamette Meridian, Pend Oreille County, Washington. All of the parties to this suit own property located within Section 11, Township 32 North, Range 44 East, Willamette Meridian, Pend Oreille County, Washington. [CP 49 - Amended Complaint, Pgs. 4 - 6, Paragraphs 3.4 - 3.9] Plaintiff Browning's ownership of the property consists of a lease/option with Barbara Drake. [CP 49 - Amended Complaint, Pg. 4, Paragraphs 3.2 and 3.3]

Real property contained in the original land patent including, but not limited to the subject property of this lawsuit was deeded to Bradley Company, a Wisconsin corporation, in 1905 by Northern Pacific Railway Company. The grantor, without specifically describing any particular area, excepted and reserved from the transfer an easement in the public for any public road existing over and across any part of the property.

[Plaintiff's Ex. 5] In 1923, the Metsker Map company (Plaintiff's Ex. 6) printed a sportsman's map of Pend Oreille County containing "complete road and trail information." This map shows interconnecting inferior and dirt roads traversing portions of Sections 10, 11, 12, 13 and 14, Township 32 N. Range 44 E. Aerial photos taken in 1932 by the U.S. Forest Service depict these same roads. [Plaintiff's Ex. 7]

On July 28, 1972, the Skookum Creek Declaration of Protective Covenants and Easements was filed as Instrument No. 136116. The declaration was subsequently amended as Instrument No. 138351 on May 18, 1973. (Plaintiff's Ex. 3)

Defendants Doty acquired fee ownership of one-half of Lot 24 in 1991, and Lots 23 and 22 in 1998. (Plaintiff's Ex. 16, 17) In 1998, following their purchase of these properties, the Dotys installed a padlocked gate across the existing road right-of-way and easement designated Skookum Meadows Drive. (CP 35 – Doty's Answer and Counterclaim) This padlocked gate prohibits Plaintiffs from using their established access to their property

located in the SW ¼ of Section 11, referred to herein as “The Farm”, as well as denying all of the property owners within Skookum Creek Development the non-exclusive use of the easements as reserved for them in the Declaration. On June 19, 2006, Plaintiff Browning gave notice to Defendants Doty that the gate interfered with the right-of-way to “The Farm”. (CP 49, Ex. E)

In October, 1998, Defendant Cherith Trust (James and Sylvia Gibson) purchased Lot 25-CT, said property being adjacent to the Dotys’ property and accessed by the same existing road right-of-way and easement described in Skookum Creek Development’s “Schedule B”. (Plaintiff’s Ex. 19) In September, 2005, Defendants Greene and Beamer purchased Lot 26-G/B (Plaintiff’s Ex. 20), said property being adjacent to Lot 25-CT and accessed by the same existing road right-of-way and easement described in Skookum Creek Development’s Schedule B.

Sometime in 2003, Plaintiff Browning began to repair the boundary fence between the Farm property and the east side

of Skookum Creek Development. This entailed removing the old fence posts from the old fence line. (Tr. Vol.III-B, Pg. 615)

Doty Filed a Cross-Complaint with his Answer to the Amended Complaint charging Browning with timber trespass. CP35.

Browning challenges Finding No. 1.1 and 1.2 located on Pages 2 and 3 of the Findings of Fact and Conclusions of Law (CP 176, Pgs. 218-226):

1.1 Plaintiff Leonard Browning is a single person and a resident of the state of Idaho. At the outset of the case in August, 2006, Mr. Browning was a lessor with option to purchase certain real property owned by Barbara Drake, to-wit:

The East half of the Southwest quarter (E1 ½ of the SW ¼) of Section 11, and that part of the Northeast quarter of the Northwest quarter (NE ¼ of the NW ¼) of the North Half of the Northwest quarter of the Northeast quarter (N ½ of the NW ¼) of the NE ¼

of Section 14, lying North of the South Fork of Skookum Creek, all in Township 32 North, Range 44 East, W.M., in Pend Oreille County, Washington.

The above-described property is hereafter referred to as the “Farm Property,” and lies directly west of and abuts the west boundary of property in the Skookum Creek large lot segregation, as hereinafter described. By its terms, the Lease Purchase Agreement includes only the above-described farm property, and was executed February 1, 2008. The agreement provides for \$200 monthly payments, with the purchase price to be paid at the conclusion of its five year term. As of the date of trial, Mr. Browning had not exercised the option to purchase.

1.2 Plaintiff Barbara Drake is a single person and a resident of the State of Washington. She is the titled owner of the real property described in 1.1, above. In addition, Ms. Drake is also the owner of the following described property which is located within the Skookum Creek large lot segregation, and therefore subject to the Skookum Creek Declaration hereafter referenced:

The N ½ of the NW ¼ in Section 11, Township 32 North, Range 44 East, W.M., in Pend Oreille County, Washington.

The described property is identified as Lot 21 on the Skookum Creek large lot segregation.

Browning's challenge is made on the basis that these findings are somewhat inaccurate and because "Unchallenged findings are verities on appeal" Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002) Browning believes it is necessary to cure these inaccuracies. A review of Pages 4 and Ex.s A & B of the Amended Complaint (CP 49) will yield the necessary corrections.

They are as follows (the changes are underlined):

1.1 Plaintiff Leonard Browning is a single person and a resident of the State of Idaho. At the outset of the case in August, 2006, Mr. Browning was a lessor with option to purchase certain real property owned by Barbara Drake, to-wit:

The East half of the Southwest quarter (E ½ of the SW ¼) of Section 11, and that part of the Northeast quarter of the Northwest quarter (NE ¼ of the NW ¼) and the North half of the Northwest quarter of the Northeast quarter (N ½ of the NW ¼) of the NE ¼ of Section 14, lying North of the South Fork of

Skookum Creek, all in Township 32 North, Range 44 East, W.M., in Pend Oreille County, Washington.

The above-described property is hereafter referred to as the "Farm Property," and lies directly west of and abuts the west boundary of property in the Skookum Creek large lot segregation, as hereinafter described. By its terms, the Lease Purchase Agreement includes only the above-described farm property, and was executed February 1, 2004. The agreement provides for \$200 monthly payments, with the purchase price to be paid at the conclusion of its five year term. As of the date of trial, Mr. Browning had not exercised the option to purchase.

1.2 Plaintiff Barbara Drake is a single person and a resident of the state of Washington. She is the titled owner of the real property described in 1.1, above. In addition, Ms. Drake is also the owner of the following described property which is located within the Skookum Creek large lot segregation, and therefore subject to the Skookum Creek Declaration hereafter referenced:

The N  $\frac{1}{2}$  of the NW  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  in Section 11, Township 32 North, Range 44 East, W.M. in Pend Oreille County, Washington.

The described property is identified as Lot 21 on the Skookum Creek large lot segregation. At the outset of the case in August, 2006, Mr. Browning was a lessor with option to purchase the above described Lot 21 of the Skookum Creek large lot segregation. By its terms, the Lease Purchase agreement includes only the above described Lot 21 property, and was executed November 2, 2004. The agreement provides for \$50 monthly payments, with the purchase price to be paid at the conclusion of its five year term. As of the date of trial, Mr. Browning had not exercised the option to purchase.

Browning challenges the first sentence of Finding No. 1.8 located on Page 5 of the findings of Fact and Conclusions of Law (CP 176, Pgs. 218-226):

1.8 Article C, Section 1 of the Declaration reserves a 60 foot wide, non-exclusive private easement for ingress, egress and utilities to each property subject to the Declaration.

Browning's challenge is made on the basis that the first sentence of Finding No. 1.8 incorrectly rephrases Article C – Easements and Reservations, Section 1, of the Skookum Creek Declaration of Covenants and Easements, a publicly recorded document.

Again, “unchallenged findings are verities on appeal”. *Id.* The following is the verbatim rendition of Article C, Section 1, as it appears in the recorded document:

**ARTICLE C – EASEMENTS AND RESERVATIONS** 1. Seller does hereby declare and reserve sixty (60) foot wide non-exclusive, private easements for ingress, egress, and utilities over and across the Real Property, said easements to be located as shown on the attached Schedule B.

Centerline of each of said easements shall follow the centerline of each existing or proposed road as located on the attached Schedule B.

The importance of an accurate rendition of the actual wording contained in Article C goes to the heart of Browning's allegation in his Amended Complaint – that Skookum Meadows Drive is a public road right-of-way. (See CP 49, Pg. 57, PP 3.14; Pg. 58, PP3.18, 3.19, 3.20, 3.22; Pg. 59, PP3.23, 3.25, 3.26; Pg. 60, PP3.27; Pg. 64, PP4.2) By its rephrasing of Section 1 of Article C to eliminate any reference to “existing roads”, the trial court has effectively erased a public road right-of-way claim as alleged in Plaintiff's Amended Complaint. Plaintiff has proof that Skookum Meadows Drive from its departure from Conklin Meadows Drive through the Skookum Creek Development and the Farm property to LeClerc Road is a deeded, public road existing and in use prior to 1923 to the present.

Skookum Meadows Drive, as depicted on Schedule B of the Skookum Creek Declaration of Protective Covenants and Easements, was dedicated as a public road as early as 1905 when

the Northern Pacific Railway Company deeded real property consisting of over 59,628 acres, including property located in Sections 1, 11 and 13, Township 32 North, Range 4 E.W.M., formerly in Stevens County, Washington, by Special Warranty Deed to Bradley Company “subject to an easement in the public” for any public road(s) established and existing. [See Exhibit Plaintiff’s Ex. 5, testified to by B. Drake Tr., Vol. III-A, Pg. 517] “[A] dedication is generally defined as the devotion of property to a public use by an unequivocal act of the owner, manifesting an intention that it shall be accepted and used presently or in the future. The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication. . . . [A] dedication may . . . exist at common law.” See Donald v. City of Vancouver, 43 Wn.App. 880, 885, 719 P.2d 966 (1986).

Because easements are interests in land, an express easement is a conveyance that must comply with the Statute of Frauds, which requires that “every conveyance of real estate, or

any interest therein, and every contract creating or evidencing any encumbrance upon real estate shall be by deed . . .” Berg v. Ting, 125 Wn.2d 544, 551, 886 P.2d 564 (1995) (quoting RCW 64.04.010). The grantor does not have to use any particular words as long as the intent to convey an easement is communicated and the deed is written, signed by the parties bound, and notarized. Kalinowski v. Jacobowske, 8 Wn.App. 344, 506 P.2d 319 (1973).

The crucial inquiry and decisive factor in the creation of an easement hinge upon the intentions of the parties. Among the factors to be considered is the construction of the language. Kemery v. Mylroie, 8 Wn.App. 344, 506 P.2d 319 (1973). Here, the parties clearly state their intention to create an easement in the public by excepting out from the property conveyance warranty deeds any public road(s) “now existing over and across any part of said described land”.

Generally, the words ‘subject to’ are included in a deed to denote restrictions of record that the grantor intends to exclude from warranty of title. 7 George

W. Thompson on Real Property, sec. 60.03(a)(7)(1994) . . . In Beebe, the court construed a deed conveying property “SUBJECT to an easement for road purposes . . . and said easement shall constitute a covenant running with {the} land.” Beebe, 58 Wn.App. at 377-78. . . . Beebe therefore stands for the proposition that the words ‘subject to,’ when accompanied by additional relevant language and circumstances, may indicate an intent to create an express easement.

Potts v. Smith, 113 Wash.App. 1051 (Wash.App.Div.1 09/30/2002).

As in Kalinowski, *supra*, and Scott v. Wallitner, 49 Wn.2d 161, 299 P.2d 204 (1956), another factor to be considered in determining the parties’ intentions, is the subsequent acts of the parties. Historically, in the property transfers involving Section 11 herein, the language used in each deed of conveyance, transfers the property **subject to an easement in the public**. Whether the grantor is a private entity, a corporation, or a governmental entity; whether the transfers involve thousands of acres, or only a portion of Section 11, the excepting language pertaining to any public roads in existence is always a part of the

deed. In a study of the history of the land transfers applicable to Section 11, it becomes apparent that the intent of each of the successor grantors clearly stated in each of these deeds, is to maintain an easement in the public. “[T]he intention of the parties to the conveyance is of paramount importance and must ultimately prevail in a given case.” Harris v. Ski Park Farms Inc., 120 Wash. 2d 727, 738, 844 P.2d 1006 (Wa. 02/11/1993), citing Swan v. O’Leary, 37 Wash. 2d 533, 225 P.2d 199 (1950).

As early as 1923, what is now known as “Skookum Meadows Drive” was depicted on a “Sportsman’s Map” of the area copyrighted by Chas. F. Metsker [Plaintiff’s Ex. 6], and in 1932 the same roads that were depicted on the Metsker map, are revealed in aerial photographs taken by the U.S. Forest Service [Plaintiff’s Ex. 7]. [Note: The original copy of this photo was submitted as Exhibit E to Plaintiff’s Memorandum in Support of Motion for Partial Summary Judgment – CP 71 – and is much clearer to decipher than the subsequent copies.] The Metsker map and the aerial photographs are evidence that Skookum

Meadows Drive in its entirety from LeClerc Road to Conklin Meadows Road, is and was an existing road “over and across” Section 11. Plaintiff Browning and Defendants have provided additional aerial photos and maps taken throughout the years, and they all reveal that what is now known as “Skookum Meadows Drive”, has existed for all intents and purposes, in its present course without variation for nearly 100 years. [See Plaintiff’s Exhibits D, E, I, J, M, and N to Plaintiff’s Memorandum in Support of Motion for Partial Summary Judgment – CP 71, as well as Exhibit E of Defendant Amburgey’s Declaration –CP 21.]

Throughout the course of its existence, “Skookum Meadows Drive” has been used as a public road by the public as a right and without seeking permission. See the testimony of Lawrence Ashdown, Tr., Vol. I-B, Pg.s. 181, 185, 188; John Provo, Tr., Vol. II-A, Pgs. 291, 295; Leonard Browning, Tr. Vol. II-B, Pg. 380. The road is clearly defined on its course through Sections 10, 11, 12, and 13 in the various aerial photographs and maps of the area obtained by Plaintiff. Plaintiff has evidence

acquired from his personal experiences of traveling on the road in the past. The use of the road by the public over the years as a right, coupled with the language granting an easement in the public each time the property changed hands, clearly demonstrates the necessary elements qualifying Skookum Meadows Drive as a publicly dedicated road. A dedication may be accomplished under statute or at common law. "Dedication is a mixed question of law and fact. Although an owner's intent to dedicate is a factual question, whether a common law dedication has occurred is a legal issue." Sweeten v. Kauzlarich, 38 Wn.App. 163, 166, 684 P.2d 789 (1984). The two necessary elements of a complete dedication are (1) intention of the owner to dedicate and (2) acceptance by the public. Donald v. City of Vancouver, 43 Wn.App. 880, 885, 719 P.2d 966 (1986)(citing chapter 58.17 RCW; 11 E. McQuillin, Municipal Corporations sec. 33.03, at 640 (3d ed.rev. 1983)) The first element is clearly met by the language in the various deeds excepting out of the warranted conveyance, the existing road as an easement in the

public. The second element is proved by implication as the public has used the property for the purposes for which it was dedicated. It is unnecessary to show that the dedicated property has been used by any certain number of persons for any set period of time; rather, it requires merely a showing “that those persons who might naturally be expected to enjoy it have used it to their pleasure or advantage.” City of Spokane v. Catholic Bishop of Spokane, 33 Wn.2d 496, 503, 504, 206 P.2d 277 (1949). “[A]llowing the public to travel freely over the area asserted to have been dedicated is evidence of intent to dedicate.” Id.

When, in 1941 [Plaintiff’s Ex. 9] Diamond Match deeded the SW ¼ of Section 11 to the United States of America, “subject to an easement in the public for any public roads . . . now existing over and across any part of the premises”, “Skookum Meadows Drive” became a public road across federal government property. And when, in 1950, the United States of America transferred title of properties located in Section 11, including, but not limited to

the SW ¼ and the W ½ SE ¼ , to Pend Oreille County [Plaintiff's Ex. 12], this transfer was done "subject to easements for public highway and roads". At this point, "Skookum Meadows Drive", in its course through Section 11, became a public road across Pend Oreille County public property. And when in 1959 and 1968, Pend Oreille County transferred these portions of Section 11 to private parties [Plaintiff's Ex. 13 and 14], the property was transferred subject to existing public roads. Finally, in the Skookum Creek Declaration, Skookum Meadows Drive is referred to as an "existing" road.

Browning challenges Finding No. 1.11 located on Pages 5 and 6 of the Findings of Fact and Conclusions of Law (CP 176, Pgs. 218-226):

1.11 All easements shown on Schedule B were intended to benefit only the owners subject to the Declaration. Thus, while Schedule B shows one of the easement roads as traveling outside the boundaries of the property subject to the Declaration on the southwest, there is no intent that the easements and/or roads benefit anyone other than the owners of the property subject to the Declaration.

Browning asserts that the trial court has interjected a conclusion of law cloaked as a finding of fact in this fact paragraph. To assert that “there is no intent that the easements and/or roads benefit anyone other than the owners of the property subject to the declaration”, is a conclusion of law. “Conclusions of law cannot be shielded from review by denominating them findings of fact.” State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981). “Intent” in an instrument must be examined under the Four Corners Rule: “intention of the parties, especially that of the grantor, is to be gathered from the instrument as a whole and not from isolated parts thereof.” Black’s Law Dictionary, Abridged Sixth Edition, 1991. In the preamble of the Declaration of Protective Covenants and Easements (Plaintiff’s Ex. 3) Trans-West Company, the “Seller”, states that the purpose of the declaration “is to establish certain protective covenants and easements to promote the orderly use and enjoyment of all of said real property for said purposes, to protect and increase the

property value thereof and otherwise to **generally benefit all owners of said real property and the community at large.**”

[Emphasis added.] In addition, to enlarge the finding regarding the granting of easements to include the “roads”, the existing roads as shown on Schedule B of the Declaration is without foundation. The sellers of the real property subject to the Declaration, no matter what their intention may have been, have no ownership interest in a public road that has been reserved in the public since the first transfer deed in 1905. Black’s Law Dictionary, Id. at 923, defines **Road** as “A highway; an open way or public passage; a line of travel or communication extending from one place to another; a strip of land appropriated and used for purposes of travel or communication between different places.” There are many references throughout the Declaration to “existing roads”. Trans-West Company made use of these existing roads for the easements to their properties, but the actual ownership of these public easement roads has historically been reserved for the public prior to Trans-West ever acquiring an

ownership interest in any of the property subject to the terms of the Declaration.

Browning challenges Finding No. 1.12 located on Page 6 of the Findings of Fact and Conclusions of Law (CP 176, Pgs. 218-226):

1.12 In 1991 or 1992, defendant Forest Doty placed a gate across an access near his home on Lot 24. At various times in the past, this same access, which also runs southwest and through the property of defendants Gibson and Green, had been episodically used to provide access to the farm property and other property lying west of the farm property. The access leading to the Gibson and Green properties remains a seasonal access, given the watery soil conditions. At no time has there been open, notorious, continuous or hostile use of any access or roads within the Skookum Creek Declaration by the owners of the farm property or any other owners of property lying west of the farm property.

In addition to placing a gate across the access to Doty's home in 1991 or 1992, Doty also installed a gate in 1998 restricting the use of Skookum Meadows Drive over and across the Gibson, Greene and Farm properties. The fact that this second gate was

installed across Skookum Meadows Drive in 1998 is undisputed in trial and is a material fact. It is inaccurate to make reference to only one of the gates that are the subject of this lawsuit. This inaccuracy must be corrected due to the fact that “Unchallenged findings are verities on appeal”. Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002). In addition, there is no foundation or substantial evidence to support the finding that there has never been any open, notorious, continuous or hostile use of any access or roads within the Skookum Creek Declaration by the owners of any property west of the Development. It is an established fact that the road currently designated “Skookum Meadows Drive” has been in existence since 1923 (See Plaintiff’s Ex. 6). Schedule B of the Declaration (Plaintiff’s Ex. 3) clearly shows Skookum Meadows Drive running from Conklin Meadows Road through various properties included in the Skookum Creek Development and various properties not included in the development, and onto the farm property. In addition, Schedule B also shows Watertower Lane exiting

Skookum Meadows Drive and serving additional properties within the development to the north of Skookum Meadows Drive. Skookum Meadows Drive is currently the only access the owners of the farm property have. Testimony at trial from Browning, Drake, True and Price all indicate that they use Skookum Meadows Drive to access their properties to the west of the development.

[T] fact that the easement was described as extending to the [western] boundary of the subdivision is consistent only with an intent that it serve the adjacent property. If it were intended merely for access to the lots within the subdivision, there would be no reason for it to extend to the boundary of [Lot 26's] property. We therefore conclude that the [defendants] had "knowledge of facts sufficient to excite inquiry". . . This is sufficient to charge [defendants] with notice of the easement. The easement was thus effectively conveyed.

Kirk v. Tomulty, 66 Wash.App. 231, 240, 241, 831 P.2d 792 (Wa.App. 06/29/1992).

Again, to say that the properties to the west of the Development do not use any of the roads within the Declaration as a right, not as a privilege, is without foundation or substantial evidence, but

there is a plethora of competent, substantial evidence to the contrary.

Browning challenges Finding No. 1.13 located on Page 6 of the Findings of Fact and Conclusions of Law (CP 176, Pgs. 218-226):

1.13 As any access from the Doty property to the Gibson and Greene properties is described as private and divisible, the Court finds that the benefit of the access provided by the easement/pathway to the Gibson and Greene properties is exclusive to them, and not to any other owner of property subject to the Declaration. Because the road easements shown on Schedule B of the Declaration run with the land, no owner has the right to deny Gibson or Green access to their properties. Gibson and Green have permitted Doty to maintain a gate precluding access to their properties by any other persons, including other owners subject to the Declaration.

Browning contends that, if Skookum Meadows Drive were not a public road granted by deed before Trans-West Company ever purchased the property subject to the Declaration, then the content of this finding would be accurate and complete.

However, the easement/pathway to the Greens and Gibsons is

not exclusive to them. Throughout the years, the uses the public has made of “Skookum Meadows Drive” are various, and are not limited to ingress and egress to a dominant estate. In “such prescriptive public road cases as *Gray v. McDonald* (1955), 46 Wash. 2d 574, 283 P.2d 135; *Gray v. McDonald* (1958), 52 Wash. 2d 822, 329 P.2d 478; and *King County v. Hagen* (1948), 30 Wash. 2d 847, 194 P.2d 357, . . . the public had used for the prescriptive period the road or way to get some place other than the property of those who had a right to the use of the road as a private way.” *Thompson v. Smith*, 59 Wash. 2d 397, 406, 367 P.2d 798 (Wa. 01/12/1962). To conclude that the plaintiffs do not have a right of access for the farm property through Skookum Meadows Drive is erroneous.

Browning challenges Finding No. 1.14 of the findings of Fact and Conclusions of Law (CP 176, Pgs. 218-226):

1.14 At no time has any pathway or roadway connected the Greene or Gibson properties to the property of the plaintiff. There is no implied

easement in favor of plaintiff which would allow access through Skookum Meadows to any county road.

This finding as entered by the trial court has no foundation.

There is no substantial or competent evidence supporting this statement, but there is a large quantity of competent and substantial evidence to the contrary. The statement that “there is no implied easement in favor of plaintiff” is a conclusion of law and “cannot be shielded from review by denominating [it] a finding of fact.” State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981).

Skookum Meadows Drive, is the only way for the property owners within Section 11 to access their properties. The fact that, even as early as 1923, the road was clearly established is obvious from the Metsker map (Plaintiff's Ex. 6). Additionally, the aerial photographs (Plaintiff's Ex. 7) from 1932 and the Metsker Map of 1957 (Plaintiff's Ex. 11), clearly show the same road running along an identical course through Section 11 even after the passage of more than thirty years, and successive

landowners. As to the nature of the property, Section 11 is bordered on the south and the west by the South Fork of Skookum Creek – a year around creek – on the north by tributaries of Skookum Creek – a year around creek - , and on the west, northwest, by Skookum Peak [See the two Metsker Maps, Exhibits 6 and 11. The only reasonable/practicable avenue for ingress and egress to and from Section 11 at the time of separation of title in 1959 (Plaintiff's Ex. 13) was the road currently designated as Skookum Meadows Drive. In fact, what is now known as Skookum Meadows Drive was the **only existing road** providing ingress and egress to and from all of Section 11 at the time of severance – a fact clearly established by reference to the maps and aerial photos above referenced. As far as the relation of each of the separated parts to each other, due to the geographic character of the land in Section 11 – it is relatively flat – and the surrounding natural obstacles to travel created by the South Fork of Skookum Creek and the steeper elevations of Skookum Peak located to the northwest, it is obvious that in

order to access the only county maintained road in the area and to secure and maintain the quiet enjoyment of the dominant estate, an easement for ingress and egress is necessary.

The theory of the common law is that where land is sold . . . that has no outlet, the vendor . . . by implication of law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser . . . to have access to his property.

Hellberg v. Coffin Sheep Co., Supra at 667, citing State ex rel. Mountain Timber Co. v. Superior Court, 77 Wash. 585, 588, 137 P. 994 (1914). “The test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute.” In the situation existing in 1940 when Panhandle Lumber sold a portion of Section 11 to Diamond Match, the only way for Diamond Match to access its own property, was to continue to utilize the quasi easement road already in existence through that portion of Section 11 retained by Panhandle Lumber.

Browning challenges Finding No. 1.15 located on Page 7 of the Findings of Fact and Conclusions of Law (CP 176, Pgs. 218-226:

1.15 Plaintiff Drake's predecessor in interest was also an owner of Lot 21 and provided easement access for the farm property to Lot 21. Such access has since been extended along the north thirty (30) feet of Lot 21 to its intersection with Water Tower Lane. The extension of the road to Water Tower Lane was not allowed for nor did it grant use to plaintiff Drake for the use of Watertower Lane, nor any other roadway within the Skookum Creek Declaration.

This finding is totally inaccurate and without foundation. It deals with an issue that was settled prior to trial and was not litigated at trial. "Unchallenged findings are verities on appeal." Robel, *supra* at 42. It is true that an easement was granted from Lot 21 through the Farm by previous property owners, however that

easement was never extended to Water Tower Lane on Lot 21 because Lot 21 does not intersect with Water Tower Lane. Drake owns Lot 21, a lot included in the Skookum Creek Development, and as such is granted easement to Water Tower Lane by virtue of her ownership of Lot 21 and that certain easement through Lot 20 specifically granted to the owners of Lot 21 by the owners of Lot 20 – an easement document not entered into evidence - an easement document that does not include any reference to the Farm. This finding is erroneous.

Browning challenges Finding No. 1.18 located on Pages 7 and 8 of the Findings of Fact and Conclusions of Law (CP 176, Pgs. 218-220).

1.18 There is no express easement allowing the farm property access to any easement roadway shown within the Skookum Creek Declaration, other than the modified Big Dog Drive. For that matter, there is no evidence that any lot subject to the

Skookum Creek Declaration has an express easement to travel along Skookum Meadow Drive to its intersection with Conklin Meadows Road. The farm property is landlocked, and no claim has been made for a private way of necessity pursuant to RCW 8.24.

This finding lacks foundation and is without substantial evidence to support it. There is no access easement from the Farm property to Big Dog Drive. This statement is clearly erroneous. “Unchallenged findings are verities on appeal”. Rober, supra at 42. In addition, Plaintiff Drake introduced and testified to several deeds expressly reserving the existing roads located in Section 11 for the public. (See Plaintiff’s Ex.s 5, 8, 9, 10, 13, 14) The Skookum Creek Declaration itself provides an express easement to travel along Skookum Meadow Drive. The statements included within this finding are without foundation or substantial evidence and are erroneous.

Browning challenges Finding No. 1.19 located on Page 8 of the Findings of Fact and Conclusions of Law (CP 176, Pgs. 218-226):

1.19 On or between 2005 and 2006, plaintiff Browning removed forty-seven (47) trees from the Doty property. The removal of the trees was done intentionally, without lawful authority, without probable cause to believe the property belonged to him, and without the permission of the Dotys. The reasonable value of the trees is \$16,450.

Browning's challenge is made on the basis that there is insufficient evidence to substantiate a finding that trees were removed from Doty's property, nor is there substantial, competent evidence to establish the quantity of trees alleged to have been taken from Doty's property.

The scope of review of a decision following a bench trial is whether the findings of fact are supported by substantial evidence and whether those findings support the conclusions of law.

Dorsey v. King County, 51 Wn.App. 664, 668-69, 754 P.2d 1255 (1988).

When a court enters findings of fact and conclusions of law following a bench trial, our review is limited to determining whether substantial evidence

supports the findings and, if so, whether they support the trial court's conclusions of law and judgment.

Soviano v. Westport Amusements, Inc., 144 Wn.App. 72, 78, 180 P.3d 874 (2008).

A. Before we can address the issue of the alleged timber trespass, we must first address the issue of the property boundary between the Doty property and the Farm property.

“[W]hat are the boundaries is a question of law, and where the boundaries are is a question of fact.” DD&L, Inc. v. Burgess, 51 Wn.App. 329, 335, 753 P.2d 561 (1988)(alteration in original) (quoting Rusha v. Little, Me. 309 A.2d 867, 869 (1973)) “We review de novo issues of law and a trial court's conclusions of law.” Sunnyside Valley Irrigation Dist. V. Dickie, 149 Wn. 2d 873, 880, 73 P.3d 369 (2003).

Doty's counterclaim alleges that Browning “removed an existing fence line between” the Doty property and the Farm. CP 34, Pgs. 29-34. Nearly all of the parties and witnesses testified to

the fact that a barbed wire line fence existed along the boundary of the properties. Lawrence Ashdown (an elderly gentleman who has lived in close proximity to the properties in question since he moved here in 1931) testified that it was a “line fence” that Proctor (a previous owner of the Farm property) had installed all along Section 11, Tr., Vol. I-B, Pgs. 187-188, and that it had been there “before he could remember”. Barbara Price, a previous owner of the Farm, testified that Chantry (a previous owner of several lots in the Skookum Creek Development) had logged along the fence line, and had fallen and drug two cedar trees from Price’s property over to his property (Lot 22) across the fence line. Tr., Vol. I-B, Pgs. 187-188. She also noticed trees having been cut down along the fence line on the northern portion of the property near Big Dog Drive. Tracy Monk, a neighbor in Skookum Meadows Development and former Defendant herein, testified that he had worked on Proctor’s land as a young man and maintained the Proctor barbed wire fence from north to south between Proctor’s land and what is now the

Skookum Creek Development. He stated that the fence started in South Skookum Creek and went north past what is now Greene, Gibson, Doty, and Drake/Browning properties, until it met with other fences to the north of Proctor's cattle ranch. Tr., Vol. III-B, Pgs. 685-686. Not only was the old barbed wire fence a boundary fence, but it had been built by a previous owner of the farm property who maintained it and utilized it to keep his cattle on his property. A fence is a "clear assertion of possession and dominion." Danner v. Bartel, 21 Wn. App. 213, 216, 584 P.2d 463 (1978), overruled on other grounds by Chaplin, 100 Wn. 2d at 861. Each of the current property owners and parties to this action have recognized and mutually accepted the old fence line as the property boundary line between the farm and the Skookum Creek Development properties, and testified to the same at trial. Doty (Tr., Vol. II-A, Pgs. 348; Vol. IV, Pg. 741, 754) testified that when he purchased his property in 1998, there was a fence along the west boundary that continued on down south along Greene's property and into the creek where he found the

“markers”. He also testified that if he discovered that the fence was damaged, he would repair it. Gibson testified that he understood that fence line to be the property line. (Tr., Vol. IV, Pg. 806.) Mr. Greene testified that he found the brass cap that marked the southwest corner of his property and that he ran “T” posts along the old fence line in a northerly direction to the marker that indicated his northwest corner. (Tr., Vol. IV, Pgs. 767, 768.)

There is certainly adequate substantial evidence in the record to establish the fact that the old fence line, that has been in place for at least 40 or 50 years is the accepted boundary line between the properties. There is no testimony that the boundary line is anywhere other than the old fence line. When Doty was testifying (Tr., Vol. IV, Pg. 753), and because he had prayed for the cost of replacing the old fence in his counterclaim, he was asked where he would suggest the replacement fence be located. At this point, the court interjected with a query as to the relevancy of the question, stating that no one had “asked the

court to determine the boundary line. . . That's not before the court, near as I can tell". And, again on the final day of trial, the court stated (Tr., Vol. IV, Pg. 866) "There's a number of issues that aren't properly before the court – For example, the true boundary line on the east edge of the farm property and the west edge of the Skookum Creek property. . . not properly before the court. Nobody said 'determine that.' . . . So I say, well, there won't be a determination from me." Contrary to these prior statements, the Court entered judgment as follows:

3. That it is further ordered, adjudged and decreed that the property line between the farm and westerly boundary of the defendants' property shall be as set forth in the survey identified as Doty Exhibit No. 121 and as recorded under Auditor's No. 2006-0288768 on September 5, 2006, at Book 7, Page 9 of Surveys.

(CP 177, Pg. 5)

On Pg. 2 of his Motion for Reconsideration (CP 178, Pgs. 234-237), Browning objected to the court establishing the boundary on the surveyed line in its Judgment. The trial testimony focused on the legal question of "what are the

boundaries”, not on the factual question of “where are the boundaries”. At the hearing on the Motion for Reconsideration (Tr., Supplemental Report of Proceedings, Pg. 14), the Court reversed its previous position without additional testimony in regard to the establishment of a boundary by ruling that “the boundary was at issue from the time of the counter-claim for timber trespass”. This is clear error by the Court.

A trial court may amend the pleadings to include an unpleaded claim, as was done here. “However, amendment under CR 15(b) cannot be allowed if actual notice of the unpleaded issue is not given, if there is no adequate opportunity to cure surprise that might result from the change in the pleadings, or if the issues have not in fact been litigated with the consent of the parties.”

Green v. Hooper, 205 P.3d 134, 149 Wash.App. 627 (Wash.App.Div. 3 01/27/2009)

Under CR15(b), a trial court on its own motion may amend pleadings to conform to the evidence and issues actually litigated before the court. . .

Id., citing Harding v. Will, 81 Wn.2d 132, 136, 500 P.2d 91 (1972).

In the case at hand, the trial court, in effect, amended the pleadings after judgment, contrary to the evidence and issues

litigated before the court, and after refusing to allow any fact finding at trial regarding the placement of a boundary line, and when there was no adequate opportunity to cure the surprise that resulted from this change. The court arbitrarily established the boundary as a matter of law in the Judgment without support of facts or other authority. Browning argues that the Court manifestly abused its discretion by basing its judgment on excluded evidence and violating Browning/Drake's constitutional due process and fair trial rights.

B. Did Browning have the right to repair and maintain the old fence line without being accused of trespassing?

Doty, by way of counterclaim (CP 35, Pgs. 29-34), charges Browning with taking down the old fence.

The issue to be addressed in this regard is a conclusion of law. There is substantial evidence in the record to support the fact that Browning did "take down the old fence". However, there is also substantial evidence in the record to support the fact

that Browning was careful to maintain enough vestiges of the old fence line so that he could reconstruct a new fence along the exact same old fence line. Browning has previously argued herein that whether or not the boundary is pursuant to the survey or the old fence line, is a question of law. “We review challenged conclusions of law to determine whether they are supported by the findings of fact.” Hegwine v. Longview Fibre Co., 132 Wn.App. 546, 555, 132 P.3d 789 (2006), *aff’d*, 162 Wn. 2d 340, 172 P.3d 688 (2007).

Browning, in his testimony (Tr., Vol. II-B, Pgs. 420, 421, 422), stated that he “cleared [the trees and brush] out so I could fix the fence that was in bad state of repair. . . [The trees] were right on where the fence is; they were growing up between the fence. And I couldn’t repair – put a new fence up with all these trees there. I had to clear them out in order to get a straight line – the same line that the old fence was on – and put in fence posts. You can’t put fence posts in where there’s a bunch of brush and second growth trees like that.” In order to keep the line of the old

fence, "I cut the posts off at the ground rather than pull them out". And on Pg. 422, Greene, who was cross-examining Browning, asked if Browning remembered that Greene had installed "T" posts and put the fence back to where he viewed as the original property line, where the fence posts were cut off, and Browning acknowledged that he did remember.

When Gibson was cross-examining Browning in regard to the fence line on Gibson's property, (Tr., Vol. II-B, Pgs. 431, 432) Browning stated that he had put up a temporary fence with the expectation that this matter would be rapidly resolved. Browning also stated that he had left some of the old fence posts so that people could identify where the old fence line was. "And all these little trees that are cut along here, they're my trees, they're in my fence line." During recross (Tr., Vol. II-B, Pg. 465), Browning again stated that the trees that he had cut were right on the fence line, where the brush was growing up past the fence posts and through whatever was left of the barbed wire. And again, on page 466, Browning stated that he had cut all of

the trees that grew up in the fence line, and some of the posts, but left one every once in a while to make sure that he did not remove all evidence of the established fence.

Tim Kastning, Doty's expert witness, (Tr., Vol. III-B, Pgs. 677, 678) testified that many of the stumps that he inventoried were right on the fence line, and when asked if the trees that were cut would have had any log value, he replied in the negative, and stated that he didn't "believe that was the purpose."

There is also testimony from Doty (Tr., Vol. IV, Pg. 742) to the effect that the surveyors had put the pegs "underground where they wouldn't be removed". Browning, therefore, had no way of knowing where the surveyed line was if the identifying pegs were hidden. Browning was acting in good faith in his efforts to repair the old fence, without an intent to trespass.

There is nothing in the record to the contrary.

C. The report and testimony of Doty's expert witness upon whom he relied to assess the alleged damages, failed to

adequately establish with reasonable certainty that Browning had removed trees from Doty's property.

Damages must be proven with reasonable certainty or be supported by competent evidence in the record. Sherrell v. Selfors, 73 Wash. App. 596, 871 P.2d 168 (Wa.App. 04/05/1994), citing, Iverson v. Marine Bancorporation, 86 Wash.2d 562, 546 P.2d 454 (1976).

Although Mr. Kastning, Doty's expert witness, is no doubt competent to inventory and appraise various species of trees and shrubs, but by his own admission, he is not competent to establish their location on a property. "Insurance underwriter . . . although he may have been an expert as to the underwriting practices of his own syndicate, was not qualified to testify as to the policies at issue and whether misrepresentations were material." Queen City Farms, Inc. v. Central Nat'l Ins. Co., 126 Wn.2d 50, 882 P.2d 703 (1994). His report that was offered in evidence as Defendants' Ex. D120 contains photos of 75 tree stumps, but offers no key to their location. During cross-examination, he admitted that he could not identify the location of any of the 75 stumps he had listed in the report without

returning to the property. He would have to return to the property with the photos to identify them. (Tr., Vol. III-B, Pg. 644) His report also contains assorted landscape views, but again offers no key to their location or their relevancy to the proceedings. About two photos in his report, he stated that they were “just some tra[p]s” and had nothing to do with stumps being cut. On page 654 of his testimony, he identified a photo from his report showing some stumps that he stated were included in his survey. Upon close inspection and comparison with Gibson’s Ex. D501-B (a photo showing Gibson standing on his own property), it becomes obvious that this particular photo was taken on Gibson’s property and the inventoried stumps are located on Gibson’s property – not Doty’s. In addition, in response to Browning’s questions, Kastning stated that some of the stumps were directly “on the old fence line, some 6 inches, maybe a foot, maybe 18 inches, maybe 24 inches”. When asked if he really knew for sure, he stated: “I did not put a tape measure on each stump.” When asked if he had put the “questionable” stumps in

the survey, including those directly on the old fence line, he stated: “that stump very well would have been put into the survey.” He also stated several different times in his testimony that the old fence line did not show in his photographs, that there was no indication of where the old fence line was located. In fact, he admitted that he did not know if he was on Doty’s property or not for several of the photos. On page 659 he admitted that he did not lay a string along the old fence line to better determine the exact location of the stumps. On page 661, Kastning was asked about a picture of a fence post on the ground, and he admitted that it had no relevancy to the inventory, but that he “just took a picture of a fence post.” Kastning did not independently verify the parameters of Doty’s property, but relied solely on Doty to tell him where he was. (Pg. 666)

Although he stated that he did not “establish property lines”, he did admit that when he was logging, he “flagged” property lines; however for this inventory he did not place a string along the old fence line for accuracy. The Kastning report, Ex.D120, is not

scientific. It does not meet the standards required to prove damage to Doty's property with "reasonable certainty". Nor is Doty's claim for damages supported by competent testimony in the record. Kastning did not know where he was on the property, he failed to mark the old fence line for accuracy, he did not identify the location of the inventoried stumps, he admitted that several of the inventoried stumps were directly in the old fence line, he included miscellaneous irrelevant photographs in his report for no apparent reason. Kastning's testimony and report do not competently nor substantially support the Court's finding that 47 trees were taken from the Doty property. In Wheeler v. Bill, 18 Wash.2d 196, 138 P.2d 857 (Wa. 06/16/1943), the Supreme Court, in a triple damages claim for timber trespass, upheld the trial court's dismissal for the reason "that your have not established definitely that this wood or timber was taken from your land and taken by the defendant. Furthermore, you have not established the quantity of timber taken."

D. The trial court's findings in regard to the treble damage claim under RCW 64.12.030 are not supported by substantial evidence, are woefully inadequate, and are unsupported by the record.

RCW 64.12.030 creates a punitive damages remedy, trebling damages for injury to, or removal of trees, timber, or shrubs, when a person trespasses on the land of another. This treble damage remedy is available when the trespass is 'willful', because if the trespass is 'casual or involuntary' or based on a mistaken belief of ownership of the land, treble damages are not available. RCW 61.12.040.

Birchler v. Castello Land Co, 942 P.2d 968, 133 Wash.2d 106 (Wash. 08/21/1997)

If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, . . . judgment shall only be given for single damages."

RCW 64.12.040 – Mitigating circumstances – Damages.

"We have interpreted RCW 64.12.030 to require 'willful' trespass." Birchler v. Castello Land Co., 942 P.2d 968, 133 Wash.2d 106, fn.5 (Wash. 08/21/1997).

Once the plaintiff has proven the trespass and the damages, the burden shifts to the defendant to show

the trespass was casual or involuntary or was done with probable cause to believe the land was his own . . . , so that single damages only would be awarded to the plaintiff.

Seattle-First National Bank v. Brommers, 89 Wash.2d 190, 570 P.2d 1035 (Wa. 10/27/1977).

In the case at hand, Browning contends that Doty has failed to prove trespass or damages. The record does not support a trespass claim, nor has Doty proven a damages claim with competent evidence. In addition, Browning claims that any possible trespass was involuntary and was done with probable cause to believe the land was his own. The trial court's findings are singularly lacking in providing the basis in fact upon which the court arrived at its conclusions. "A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds." Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 369, 166 P.3d 667 (2007). Browning's position is well founded and substantially supported by the record.

Not only Browning, but all parties, as well as all of the witnesses who testified in relation to the old fence line, believed that the old

fence line was the boundary line between the properties. It was well established through testimony that a previous owner of the farm property by the name of Proctor installed the fence sometime in the 1940's as a line fence and as an enclosure for his cattle.

The record documents Browning's good faith belief that the old fence not only served as a boundary, but was his property for the purpose of enclosing his livestock due to the fact that he was the owner of the fence by succession. See Tr., Vol. II-A, Pg. 362 – "I did remove small trees that were in the old existing fence line so I could rebuild the fence."; Tr., Vol. II-B, Pg. 420, 421 – "I cleared that out so I could fix the fence that was in a bad state of repair. . . . [The trees] were right on where the fence is; they were growing up between the fence. And I couldn't repair – put a new fence up with all those trees there. . . You can't put fence posts in where there's a bunch of brush and second growth trees like that." Gibson's Ex. D501-B, a photo of Gibson's boundary with the Farm, clearly reveals that Browning was

attempting to repair, reinstall, update his fence line. The testimony he gave in regard to this exhibit supports his good faith belief that he had a right to cut the trees along the boundary fence line. Tr., Vol.II-B, Pg. 432 – “[S]ee all these little stumps along here, and back behind you you’ll see the – some of the old fence posts. I left those posts in for a reason, so that a person could see where the old fence line was. And all these little trees that were cut along here, they’re my trees, they’re in my fence line. And I cut those fence posts down; they’re my fence posts. I cut them down so I could replace them with those taller, newer, better posts that you see piled up on the ground.” There are numerous other similar references in the record (too numerous to list here) to the fact that Browning believed the old fence line was not only a boundary line, but was traditionally his fence for the purpose of containing his livestock. There is no evidence on the record to the contrary, especially none that qualifies as substantial evidence supporting the court’s finding that the timber trespass was intentional.

“[T]he question of whether one acted ‘willfully’ for purposes of trebling damages is a factual issue for the trier of fact, and the court’s factual findings as to willfulness will not be disturbed **if based on substantial evidence.**” Wherrell v. Selfors, 73 Wash.App. 596, 871 P.2d 168 (Wn.App. 04/05/1994), citing Henriksen v. Lyons, 33 Wash.App. 123, 126, 652 P.2d 18 (1982), review denied, 99 Wash.2d 1001 (1983). [Emphasis added.] “Substantial evidence is evidence sufficient to persuade a rational, fair-minded person of the truth of the finding.” In re Estate of Jones, 152 Wn.2d 1, 93 P.3d 147 (2004). “Review of a trial court’s findings regarding the intent of the parties is limited to determining whether the finding is supported by substantial evidence and whether the findings in turn support the Conclusions of Law.” Goodman v. Darden, Damon and Stafford Assocs., 100 Wash.2d 476, 670 P.2d 648 (1983).

Black’s Law Dictionary, Abridged Sixth Edition, 1991, defines intent as follows: “When used with reference to civil and criminal responsibility, a person who contemplates any result, as

not unlikely to follow from a deliberate act of his own, may be said to intent that result, whether he desires it or not.” There is no evidence in the record supporting a finding of intent on Browning’s part. There is nothing in the record to indicate that Browning acted with any intent to evade the statutes of this state. In Bill v. Gattavara, 24 Wash.2d 819, 835, 167 P.2d 434 (Wa. 03/28/1946), the court states: “We have great respect for the ability and judgment of the trial court, but we have been unable to find in the record competent evidence to justify the findings of fact upon which the judgment entered is based.” The court then opined that the respondents’ failure to absolutely prove their allegations, was fatal to a recovery against appellants. The court then ruled: “We do not, however, rest our decision upon the fact that there was a fatal variation between the pleadings and the proof, but upon the fact that, in our opinion, the evidence preponderates against the findings of the trial court. . .”

It would appear that the case at hand is similarly parallel in nature. “A court abuses its discretion when no tenable grounds

exist for its decision.” Hill v. Cox, 110 Wash.App. 394, 41 P.3d 495 (Wash.App.Div.3 02/26/2002), citing, Fox v. Mahoney, 106 Wn.App. 226, 230, 22 P.3d 839 (2001) (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Browning hereby challenges the fact that Browning had a fair trial due to the fact that the trial court had ex-parte communication with Drake’s, Dotys’, and Amburgeys’ attorneys.

Browning made a formal objection in his Motion for Reconsideration filed January 14, 2013 (CP 178) and at the hearing on said motion (Tr., Supplemental Report of Proceedings, Pg. 5)

#### CONCLUSION

Due to the inaccuracies of the facts supporting the trial court’s judgments and conclusions of law, and the fact that the

trial court freely admitted having ex-parte communication about the case, thereby exhibiting his contempt and prejudice against pro se parties, a fair trial was not had by any of the parties.

Therefore, I pray the Hon. Appellate Court to rule the entire trial a mistrial. In the alternative, Browning requests that the Appellate Court determine that the facts support Browning and Drake's position that there is a public road over, through and across the defendants' properties. Also, the property boundary has not been properly established with fact or law, and therefore the question of timber trespass is mute. Browning also requests that the Appellate Court makes its ruling within the parameters of the cited authorities as presented in this brief. Browning believes that failure to do so would certainly be a contempt of the higher court's rulings.

Respectfully submitted this 23<sup>rd</sup> day of September, 2013.

  
Leonard N. Browning