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Division III
State of Washington

COA No. 34917-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOHN HARVEY CHAPMAN and SALLY CHAPMAN, a married couple; WAYNE EVANS, a single person; and JOHN CODELLA, JR., a single person;

Respondents,

v.

LESLIE CLOUGH, a single person,

Appellant.

BRIEF OF RESPONDENTS CHAPMAN and CODELLA

Kenneth H. Kato, WSBA # 6400
Attorney for Respondents
Chapman and Codella
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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I. COUNTER-STATEMENT OF ASSIGNMENTS OF ERROR

1. The trial court did not err by entering findings of fact 1-3, 5-17, 19-25, and 28-32.

2. The trial court did not err by entering conclusions of law 2-13 and 15-17.

3. The trial court did not err by entering judgment based on its findings and conclusions.

II. COUNTER-STATEMENT OF THE CASE

Although appellant Leslie Clough appears to challenge all but two of the trial court's findings of fact, she does not argue in her brief why those findings were erroneous. They are thus verities on appeal. *See* RAP 10.3(g). The court's findings are:

> 1. Plaintiffs are all owners of separate parcels of real property located in what is commonly known as Tunk Valley in Okanogan County, Washington. Mr. Chapman's statutory warranty deed is dated March 21, 2000; Mr. Codella's statutory warranty deed is dated June 28, 1979; Mr. Evans' statutory warranty deed is dated January 10, 2001. (See plaintiff's exhibits 12, 5 and 1 respectively.)
>
> 2. The legal descriptions in Codella and Evans' deeds contain a Declaration of Easement reserving a sixty (60) foot non-exclusive easement for ingress and egress as filed under Okanogan County auditor number 657611 filed June 4, 1979. (See plaintiff's exhibit 8). Access to their property under this Declaration, exists via the same easement that crosses other parcels, including defendant's.

3. The legal description in Chapman's deed contains "SUBJECT TO" provisions including "Lack of a recorded easement providing access[.] Access to his parcels is via the same easement as plaintiffs Codella and Evans across other parcels, including defendant's where the access route turns in a southerly direction just past Ms. Clough's residence and off of the established easement.

4. Plaintiff Chapman must travel a distance of less than one hundred feet south off of the easement right of way across Ms. Clough's property to the northern boundary of his property; otherwise, the easement right in the Declaration in exhibit 8 travels in a westerly direction away from his parcels. No written documentation expressly authorizes such an easement right for this short distance.

5. Mr. Chapman first traveled to his property in March of 2000. The road condition of the easement was such that he could easily drive his 2-wheel drive pickup over it and onto his property.

6. Mr. Codella purchases his parcel in 1979 but did not actually travel to view it until 15 years later in 1994. At that time the road was narrow with tree branches brushing both sides of his vehicle.

7. Mr. Evans first traveled the easement road when he was six (6) years old. Until 2003, he used it 40-50 times per year. As late as 2006, he used the road 20-25 times per year. The road was neve blocked on any of these trips to his property.

8. On October 4, 2006, defendant Ms. Clough acquired title to the parcel immediately north of Chapman's northern most parcel such that they share a common boundary. (See plaintiff's exhibits 6 and 24). She received a quit claim deed from Michael Sadowsky. This conveyance occurred between the couple as part of arrangements necessary for them to obtain financing to build on the property.

9. The Sadowsky-to-Clough deed, prepared by Mr. Sadowsky, does not contain the Declaration of Easement provision contained in Mr. Sadowsky's deed. (Plaintiff's exhibit 6). Even though their legal descriptions do not match, the evidence is undisputed and the Court finds it is the same parcel.

10. The route created by the Declaration of Easement in the Codella, Evans and Sadowsky deed also crosses a parcel of property to the west of the parties' properties where it connects with what is known as Knox Road. Schedule B, attached to and incorporated into the Declaration, establishes the route generally by a dashed line. (See plaintiff's exhibits 8 and 25).

11. Prior to purchasing her parcel, Ms. Clough traveled to the area multiple times, including with her realtor and Mr. Sadowsky. She walked to the parcel some number of times at first. Although they experienced difficulty initially accessing the easement route, Ms. Clough and her realtor were eventually able to drive to the property. There is no evidence Ms. Clough obtained express permission or otherwise had approval from the property owner, Carol Algie, for those initial travels over the road to her parcel. While agreeing that she didn't "know anything about easements," the defendant thought the term ingress and egress meant the road path was for use by "cows." The road she used is the same as set forth in the Declaration of Easement in exhibit 8.

12. Ms. Clough had her brother, George Conkle, draw a building site on the property, submit it to Okanogan County and obtain a building permit. The rough drawing shows a 75 foot setback from a "dirt road" which is confirmed in the county site analysis; it also shows a 200 foot distance that was the intended distance from the side of Ms. Clough's structure to the property line between Clough and Chapman. (See plaintiff's exhibit 18). The dirt road in the drawing is the same road established by the Declaration of Easement.

13. When Mr. Conkle began work on the residence in the fall of 2006, there were no obstacles to drive around on the road to his sister's property; no trees needed cutting. The road continued on past where the building site would be.

14. In helping his sister, Mr. Conkle summarized the process as "sort of a learning experience." This included him and the defendant not even talking about easements and his obtaining her signatures on at least two (2) documents without Ms. Clough ever reading exactly what the document was, e.g., the site analysis in exhibit 18 and the road naming application in exhibit 20. Ms. Clough agreed she was in a hurry to get her house done before winter and, due to the demands of her teaching job, simply signed things without reading them.

15. For financing purposes, Ms. Clough provided the address of 350 Knox Road. In March 2007, however, the county would not accept it. Ultimately, Ms. Clough completed the process required by the county and the road was named Evans Ranch Road.

16. Ms. Clough subsequently attempted to get the county to change the name of the road past her residence; however, this never happened. (Plaintiff's exhibit's 19).

17. Although the Declaration of Easement does not mention them by name, the properties of Chapman, Codella, Evans, and Clough are all subject to and benefitting from the road known as Evans Ranch Road.

18. After purchasing her property in 2006, Ms. Clough initially allowed Chapman and Evans to use the road across her property. She thought she was doing so only as a good neighbor.

19. Over time, Ms. Clough attempted to limit access to plaintiffs Chapman, Evans, and others they granted

permission to for travel to their property. These limitations included threats of harm, suggesting plaintiffs pay a fee for crossing the defendant's property and attempts to block the roadway.

20. In response to increased dust, noise, hunting and threats from unknown third parties, Ms. Clough in August of 2010 installed a lock on the gate across Evans Ranch Road between her and Mr. Chapman's property. Further, defendant felled a tree across the road, landscaped and fenced into the roadway and planted trees and bushes over some length of it.

21. Defendant has effectively precluded and prevented plaintiffs from using their easement rights. To access their property, Chapman and Evans now have to drive some three additional miles across a route that requires four-wheel drive vehicles and for which they have no express or implied right of usage.

22. Defendant's completed house sits well short of the 75 foot setback called for in the site plan. The edge of the house is 2.8 feet from the northern edge of the easement right of way. (See plaintiff's exhibit 26). The Court expressly finds this occurred due to Mr. Conkle's failure to accurately locate the edge of the easement roadway and measure distances from it. Instead of using a tape measure or other means of accurate measurement, Mr. Conkle paced some unknown distance from an unknown, arbitrary start point and located the corner of the defendant's house at that point.

23. Schedule B to the Declaration of Easement (Exhibit 8) and the map attached to the county letter of October 31 (Exhibit 20) show generally the location of the relevant roadway in question.

The survey in Exhibit 26 best shows the actual location in proximity to defendant's residence. Exhibits 15 and 16 establish the road (easement) as far back as 1995 and 1996.

24. There is adequate distance between Ms. Clough's residence and her property line with plaintiff Chapman such that the easement can be properly, sufficiently and entirely relocated on her parcel.

25. All of the plaintiffs sustained fire damage in 2015. All were unable to access their property, with necessary equipment, to attempt any salvage logging of burned trees. Plaintiff chapman had timber with a pre-fire stumpage value of $74, 135.00; post-fire the stumpage value was $27,348.00. Because of easement blockage it was impossible for logging equipment to get to the timber. Plaintiff Codella presented no evidence regarding stumpage value; rather, only that any logging would have cost an extra $1714.00 in road improvements to access his property via some other route. (See plaintiff's exhibits 22 and 23). Plaintiff Evans presented no evidence of timber value.

26. Although plaintiffs expressed a desire and interest in salvaging burned timber from their property, none of them presented evidence of specific logging-related contracts or other identified efforts, beyond determination of timber value, to undertake logging operations after the 2015 fire. Plaintiff's Chapman and Codella's evidence of value isn't dated until June 2016 – after the wood was no longer salvageable. (See plaintiff's exhibit 22).

27. The cost of road repairs to the easement over to Mr. Chapman's property was estimated at $87,020.50. (See plaintiff's exhibit 17). This

> amount is greater than the salvage value of Chapman's timber prior to any fire loss.
>
> 28. Other access routes existed to plaintiffs' properties, however, they would involve easement rights not currently owned or held by them. Such routes are not practical, feasible or required alternatives as access to plaintiff's properties. Specifically, Pine Ridge Road is not an acceptable alternate route.
>
> 29. Various unknown individuals have used the easement to defendant's property for improper purposes, including firing shots from firearms, using profanities, driving in a manner inappropriate to road conditions and otherwise making threats to Ms. Clough and occupants of her residence. The evidence does not sufficiently establish who the people were or that they acted at the request or direction of any of the plaintiffs.
>
> 30. Actual contact with various individuals on defendant's property is unavoidable given the effective road block created by Ms. Clough. Persons traveling on Evans Ranch Road cannot continue past her residence; rather, they must stop and turn around virtually in her yard.
>
> 31. There is no evidence that defendant's attorney fees in this or any related matters are the fault of the plaintiffs.
>
> 32. Any finding of fact above that is more properly characterized as a conclusion of law shall be treated as such. (CP 3-9).

From those findings, the court made the following conclusions of law:

1. This Court has jurisdiction in the matter given the real property-related issues and because the property is in Okanogan County.

2. Plaintiffs Codella and Evans hold express easement rights, for ingress and egress, to their property over the property of Ms. Clough.

3. Defendant has no right to revoke plaintiffs' Codella and Evans usage under theories of neighborly accommodation, adverse possession or otherwise.

4. Plaintiff Chapman holds an express easement right, for ingress and egress to his property over the property of Ms. Clough under the Description of Easements set forth in Exhibit 6. Language "lack of a recorded easement providing access" sufficiently identifies the then-existing roadway and easement right at the time of execution of his deed in 2000. (Exhibit 5).

5. Even if the deed language is not clear, Chapman holds an implied easement to travel over defendant's property and, additionally, over the short, less than one-hundred foot distance from the existing easement to the fenced and gated boundary line between he and Ms. Clough that currently exists. The Declaration of Easement establishes former unity of title for the relevant parcels and clear intent to grant benefit and detriment to those parcels contained in Schedule B of the Declaration. It is necessary that Chapman have the easement right in order to access his property, especially since no other legal access exists for him otherwise.

6. Even if there is no express or implied easement, plaintiff Chapman still has a prescriptive easement right over and access to defendant's property. He has owned and used the easement for over ten years; used it continuously prior to Ms. Clough

blocking it in 2010. His usage had been over the same route and with the knowledge of the owners – both Ms. Clough and those prior to her.

7. Defendant has no right to revoke Chapman's use under theories of neighborly accommodation, adverse possession or otherwise. Defendant Clough has no right to lock the existing gate between her and Chapman's parcels.

8. None of the plaintiffs abandoned their easement right over Ms. Clough's property. To the contrary, only defendant's actions directly prevented plaintiffs from the use and enjoyment of their right. She is estopped from any claim plaintiffs gave up usage of their rights since only her acts forced them to find alternative routes.

9. That alternative routes to the Plaintiffs' properties might be available is irrelevant. Plaintiffs are entitled to cross Ms. Clough's property and need not seek permission or rights from other property owners.

11. Plaintiffs are entitled to judgment quieting title to their easement right and a permanent injunction prohibiting defendant from limiting or attempting to limit their non-exclusive rights of ingress or egress as set forth in the Declaration of Easement.

12. Since defendant has effectively blocked the previously-existing right of way, she is fully liable for replacement of a similar right of way parallel to Mr. Chapman's boundary line but otherwise entirely through, over and upon defendant's property. This new right of way shall be completed within sixty (60) days of entry of judgment.

13. In the event defendant fails to replace the right of way as set forth in conclusion 12 plaintiffs may move the Court for other relief as necessary, including a monetary amount for costs associated

with construction of a new roadway. The Court expressly reserves the right to reconsider this remedy in the event defendant fails to adequately comply.

14. Plaintiffs fail to establish by a preponderance, their claims for damages related to loss of timber. While evidence did establish timber value and road blockage, nothing showed any effort to actually contract with a logging provider or otherwise take any timely steps toward a salvage operation. Further, the evidence establishes that the cost of road repairs would have exceeded even the pre-fire value of any timber; it would have made no sense economically to log the property. It is overly speculative to conclude plaintiffs would have actually proceeded with any logging efforts.

15. Defendant's claim that others (for example Okanogan County) are responsible for her decisions or lack of understanding of various legal issues is without merit; this fails as an affirmative defense. Further, plaintiffs are not liable for Ms. Clough's lack of knowledge about easement law or the location of her house in relation to the easement right of way. Likewise it is not an affirmative defense to claim that Okanogan County failed to adequately notify her of the easement or improper location of the house.

16. Defendant's counterclaims fail for lack of evidence. It is clear Ms. Clough suffered emotional and physical distress over events involved in this case; however, the evidence is not by a preponderance that any named plaintiffs were the actors in any harassment or or infliction of emotional distress or that they directed others to act on their behalf. Likewise, there is no evidence upon which to hold plaintiffs responsible for Ms. Clough's incurring unspecified damages or attorney fees somehow

related to this case.

17. Any Conclusion of Law more properly considered as a Finding of Fact shall be treated as such. (CP 9-12).

The court entered an order as well:

It is regrettable that the defendant is not able to realize the benefits of quiet living on her property as she anticipated. But it is not the fault of the plaintiffs that Ms. Clough failed to notice, read or understand the terms and meaning of the easement across her property. In fact, as counsel for plaintiffs pointed out on cross-examination of Ms. Clough, it is the very easement that she uses to access her property that gives plaintiffs the right to cross hers. And for the same reason – without it she, and therefore plaintiffs, couldn't get to their property. Ms. Clough has no legal right to limit, restrict or otherwise prevent plaintiffs from crossing her property as allowed by the Declaration of Easements. There is no basis for requiring plaintiffs to use some other route or means to access their property. This lawsuit stems from Ms. Clough's improper acts and the evidence is sufficient to hold her responsible.

Counsel for plaintiffs Chapman and Codella is directed to prepare an appropriate judgment. It shall award them, and plaintiff Evans, quiet title to the easement right set forth in the Declaration of Easements recorded June 4, 1979 and recorded under Auditor's number 657611. Since usage of the original easement right of way is not practical, the judgment shall require defendant to relocate a comparable and similar right of way, parallel to plaintiff Chapman's common boundary with Ms. Clough and include a permanent injunction preventing defendant from limiting, restricting or otherwise

> preventing plaintiffs from exercising rights under the original Declaration. The new right of way shall run generally in a manner consistent with the survey as shown in Exhibit 26 and entirely over and on Ms. Clough's property; it will be solely at her expense. Finally, the judgment will deny all other claims of the plaintiffs and the defendant's counterclaims, including attorney fees. Plaintiff shall be entitled their costs as allowed by statute. (CP 12-13).

Judgement was accordingly entered on November 8, 2016, as noted in Ms. Clough's notice of appeal. (CP 1). It appears, however, that she did not include the judgment in her designation of clerk's papers and is not in the appellate record. A copy of the judgment is attached as Appendix A.

II. ARGUMENT

A. Ms. Clough's challenge to the trial court's findings has been waived or the findings are supported by substantial evidence in any event.

RAP 10.3(g) provides in relevant part:

> . . . A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

Ms. Clough assigned error to certain findings of fact by number, but she failed to present any argument why those challenged findings were erroneous. When there is neither any reference to the record nor any citation of authority, assignments of error to the findings will not be considered. *McKee v. American Home Prods., Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989). Indeed, when error is assigned to any finding of fact and there is no argument on any claimed assignment, the assignment of error is waived. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). The findings are thus accepted as verities and the issues on review are limited to whether those findings of fact support the conclusions of law. *McIntyre v. Fort Vancouver Plywood Co.*, 24 Wn. App. 120, 123, 600 P.2d 619 (1979).

But the court's findings of fact are nevertheless supported by substantial evidence. *Shelcon Constr. Grp., LLC v. Haymond*, 187 Wn. App. 878, 890-91, 351 P.3d 895 (2015). The respective findings of fact and their supporting evidence are:

1. Finding 1 is supported by plaintiff's exhibits 1, 5, and 12.

2. Finding 2 is supported by plaintiff's exhibit 8, including the Declaration of Easement.

3. Finding 3 is supported by plaintiff's exhibit 5 and the testimony of Mr. Chapman at RP 126-27, 130-31, and 134.

4. No error is assigned to finding 4.

5. Finding 5 is supported by the testimony of Mr. Chapman at RP 125-27.

6. Finding 6 is supported by the testimony of Mr. Codella at RP 82-83 and 86-87.

7. Finding 7 is support4d by the testimony of Mr. Evans at RP 238 and 242-43.

8. Finding 8 is supported by the testimony of Ms. Clough at RP 292-95.

9. Finding 9 is supported by plaintiff's exhibit 6.

10. Finding 10 is supported by plaintiff's exhibits 8 and 25.

11. Finding 11 is supported by the testimony of Ms. Clough at RP 284-91 and 294.

12. Finding 12 is supported by the testimony of Ms. Clough at RP 300-09.

13. Finding 13 is supported by the testimony of Mr. Conkle at RP 108-09, 117, and 122.

14. Finding 14 is supported by the testimony of Mr. Conkle at RP 106-07 and the testimony of Ms. Clough at RP 301 and 304-09.

15. Finding 15 is supported by the testimony of Ms. Clough at RP 311-20.

16. Finding 16 is supported by the testimony of Ms. Clough at RP 318 and 320.

17. Finding 17 is supported by plaintiff's exhibits 1, 5, 8, 12, and 25.

18. No error is assigned to finding 18.

19. Finding 19 is supported by the testimony of Ms. Clough at RP 326, 341-43, 380 and 414; the testimony of Mr. Codella at RP 93-95; and the testimony of Mr. Chapman at RP 130-31.

20. Finding 20 is supported by the testimony of Mr. Chapman at RP 130 and 131; the testimony of Mr. Evans at RP 243 and 245; and the testimony of Ms. Clough at RP 314-26, 380 and 476.

21. Finding 21 is supported the testimony of Mr. Codella at RP 95; the testimony of Mr. Chapman at RP 129, 131-33 and 149; and the testimony of Mr. Evans at RP 243, 245, 248 and 250.

22. Finding 22 is supported by the testimony of Mr. Conkle at RP 109-16.

23. Finding 23 is supported by the plaintiff's exhibits 8, 15, 16, 20, and 26.

24. Finding 24 is supported by the testimony of Ms. Clough at RP 470.

25. Finding 25 is supported by the testimony of Mr. Codella at RP 84, 93-95 and 97-99 and the testimony of consulting forester William Berrigan at RP 161-74.

26. No error is assigned to finding 26.

27. No error is assigned to finding 27.

28. Finding 28 is supported by the testimony of Mr. Chapman at 131-33 and the testimony of Mr. Evans at RP 248-50.

29. Finding 29 is supported by the testimony of Ms. Clough at RP 324, 343-44, 433, and 436-37.

30. Finding 31 is supported by the testimony of Ms. Clough at RP 326, 380, 414, 433-38 and 449 and the testimony of Mr. Chapman at RP 247 and 276.

31. Finding 31 is supported by the record as it shows that no evidence was presented by Ms. Clough on the issue.

32. Although she assigns error to finding 32, it is not a finding of fact but rather a correct statement of applicable law.

The record contains ample evidence supporting each of the findings sought to be challenged by Ms. Clough. *Shelcon Constr.*, *supra*. To the extent she argues the evidence was not believable, credibility determinations are solely the province of the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Thus, the only issue is whether the court's findings support its conclusions. *McIntyre*, 24 Wn. App. at 123. Review of the court's conclusions of law is de novo. *Gormley v. Robertson*, 120 Wn. App. 31, 36, 83 P.3d 1042 (2004).

B. The trial court's conclusions of law are supported by its findings.

The court concluded Mr. Codella and Mr. Evans had express easement rights, for ingress and egress, to their property over Ms. Clough's property. (Conclusion of Law 2, CP 9). The Declaration of Easements states:

> 1. Seller does hereby declare and reserve a 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 (which is incorporated herein by reference). Centerline of each of said easements shall follow the centerline

> of such existing or proposed road as located on the attached Schedule B. (CP 181, 266).

The findings of fact support this express easement right held by Mr. Codella and Mr. Evans over Evans Ranch Road as shown by the Declaration of Easements and Schedule B. (CP 181, 185). There is no statutory time-bar for asserting this express easement right as claimed by Ms. Clough as RCW 4.16.020 is inapplicable by its very terms and the plaintiffs' action was filed within 10 years of her 2010 blocking of the easement even if it did apply. The court did not err by determining Mr. Codella and Mr. Evans held an express easement right over Ms. Clough's property.

The court further concluded she had no right to revoke their usage under her theories of neighborly accommodation, adverse possession or otherwise. (Conclusion of Law 3, CP 9). Mr. Codella and Mr. Evans held express easement rights over Ms. Clough's property and her theories are thus inapplicable. She claimed no adverse possession of Evans Ranch Road. After buying her property in 2006, she may have thought she was allowing Mr. Codella and Mr. Evans to use the road as a good neighbor. (Finding of Fact 18, CP 6). But they had an express easement so there was no neighborly accommodation as they had the right to

use it. Her actions in blocking the road were certainly not evidence of a reasonable inference of such accommodation, but rather showed an intent to the contrary. *Gamboa v. Clark*, 183 Wn.2d 38, 49, 348 P.3d 1214 (2015). The findings again support the court's conclusion; there is no error in law.

The court determined Mr. Chapman had an express easement right, for ingress and egress, to his property over Ms. Clough's property under the Description of Easements set forth in exhibit 6. There was language stating "lack of a recorded easement providing access," but the court decided it nonetheless identified the then-existing roadway and easement right at the time of execution of his deed in 2000. (Conclusion of Law 4, CP 9). The court did not err because its findings support this conclusion. *Willener v. Sweeting*, 107 Wn.2d 388, 343, 730 P.2d 45 (1986).

Despite this language, there was indeed a recorded easement providing access to Mr. Chapman's property and he used what is now known as Evans Ranch Road to access it. (CP 181, 185; RP 124, 126, 128, 134, 136). The only exception for which there was no recorded easement was the 100-foot distance south of the express easement. (Finding of fact 4, CP 3). Mr. Chapman visited his investment property 6-7 times a year for site

visits. (RP 128). The access road was usable and "fine." (RP 127). Ms. Clough herself used the road to get to her property. (RP 284-87). The access road was easily identified and used at the time of execution of his deed in 2000. (*Id*.). The court did not err.

Even if the deed language was unclear, the court further concluded Mr. Chapman held an implied easement to travel over Ms. Clough's property and over the "short, less than one hundred foot distance from the existing easement to the fenced and gated boundary line between he and Ms. Clough that currently exists." (Conclusion of Law 5, CP 10). The Declaration of Easements established former unity of title for the relevant parcels and clear intent to grant benefit and detriment to the parcels in Schedule B. (CP 181, 185). The court had made a finding it was necessary that Mr. Chapman have the easement right to access his property as there was no other legal access for him. (Finding of Fact 4, CP 3; Finding of Fact 10, CP 4; Finding of Fact 21, CP 7; Finding of Fact 28, CP 8).

The factors to be considered in establishing an implied easement are (1) former unity of title and subsequent separation; (2) prior apparent and continuous quasi-easement for the benefit of one part of the estate to the detriment of another; and (3) a certain

degree of necessity for the continuation of the easement. *MacMeekin v. Low Income Hous. Inst., Inc.*, 111 Wn. App. 188, 195, 45 P.3d 570 (2002). The only absolute requirement is unity of title and subsequent separation. *Roberts v. Smith,* 41 Wn. App. 861, 864, 707 P.2d 143 (1985). It has been met. (Finding of Fact 1, CP 3; Conclusion of Law 5, CP 10; plaintiff's exhibits 1, 5, 8, 12).

The other two factors are viewed as aids to construction in determining the prime consideration – the presumed intention of the parties as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other. *Adams v. Cullen*, 44 Wn.2d 502, 505-06, 268 P.2d 451 (1954). From its findings of fact, the court concluded each of these factors weighed in favor of an implied easement. (Findings of Fact 5, 9, 10, 17, 23, 28; CP 4, 5, 6, 7, 8; Conclusion of Law 5, CP 10). Moreover, a claimant need not show that alternative means of ingress or egress are impossible as impracticality is enough. *Adams*, 44 Wn.2d at 510. The court recognized this in conclusion of law 9 that the availability of alternative routes to their properties was irrelevant. (CP 9). The court did not err when it concluded Mr. Chapman held an implied easement to travel over Ms. Clough's property and the short one-hundred foot distance from the existing

easement to the currently existing fenced and gated Chapman-Clough boundary. *Adams*, *supra*.

The court also concluded that even if there was no express or implied easement, Mr. Chapman still had a prescriptive easement right over and across Ms. Clough's property. (Conclusion of Law 6, CP 10). To establish a prescriptive easement, a claimant need only prove that his use of the right has been, for a period of ten years, open, notorious, continuous, uninterrupted, over a uniform route, adverse to the owner and with knowledge of such owner at a time when she was able to assert and enforce her rights. *Gamboa*, 183 Wn.2d at 43-44. Whether a claimant has established these elements is a mixed question of law and fact. *Id*. at 44. A trial court's findings of fact are reviewed for abuse of discretion and its conclusions of law are reviewed de novo. *Lee v. Lozier*, 88 Wn. App. 176, 181, 945 P.2d 214 (1997).

The court found Mr. Chapman had used the easement for over ten years and used it continuously prior to Ms. Clough's blocking it in 2010. His usage had been over the same route and with the knowledge of the owners – both Ms. Clough and those prior to her. (Conclusion of Law 6, CP 10). These findings were supported by substantial evidence and the court did not abuse its

discretion by making them. *State ex rel.Carroll v. Junker*, 79 Wn.2d 12, 27, 482 P.2d 775 (1971). Accordingly, its conclusion that Mr. Chapman held a prescriptive easement flowed from the findings that supported the elements for such an easement. *Gamboa*, *supra*. In addition, Ms. Clough had no legal right to revoke his use of the easement under her theories of neighborly accommodation, adverse possession or otherwise and no right to lock the existing gate between their parcels. *Id*.

By the same token, Mr. Chapman and Mr. Codella did not abandon their easement over Ms. Clough's property. Rather, it was her own improper actions in blocking Evans Ranch Road in 2010 that prevented use of the easement to access their property. The facts do not support a finding of abandonment of the easement. The court also correctly determined in conclusion of law 8 that Ms. Clough "was estopped from any claim plaintiffs gave up usage of their rights since only her acts forced them to find alternative routes." *Schuster v. Prestige Senior Mgmt., LLC*, 193 Wn. App. 616, 631, 376 P.3d 412 (2016).

Conclusions of law 11, 12, and 13 flow from the court's findings and result in an equitable remedy permitting Ms. Clough to relocate the easement on her property rather than forcing her to

make the previously-existing right of way, some 2.8 feet from her bedroom window, passable again. Moreover, Ms. Clough again fails to provide argument or cite authority in her brief on the issue. This assignment of error need not be considered and is waived. *See Smith*, 106 Wn.2d at 451-52; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

In conclusion of law 15, the court decided Ms. Clough's claim that other persons were responsible for her decisions or lack of understanding of legal issues was without merit and the plaintiffs were not liable for her lack of knowledge about easement law or the location of her house in relation to the right of way. (CP 11, 12). She did not argue her challenge to this conclusion in her brief so the issue need not be considered and is waived. *Cowiche Canyon Conservancy*, 118 Wn.2d at 809.

Even so, Ms. Clough is responsible for her own action/inaction and for her lack of knowledge of the easement and its location. The Declaration of Easements was of record and she testified she did not read the relevant documents. Ms. Clough had the opportunity to read what she should have read and her failure to do so is no defense. *Wash. Fed. Sav. & Loan Ass'n v. Alsager*,

165 Wn. App. 10, 17, 266 P.3d 905 (2011), *review denied*, 173 Wn.2d 1025 (2012).

In conclusion of law 16, the court determined Ms. Clough's counterclaims failed for lack of evidence. (CP 12). Findings of fact 20, 29 and 30 are supported by substantial evidence and establish she failed to show by a preponderance of evidence that any named plaintiffs were the actors in any harassment or infliction of emotional distress or they directed others to act on their behalf. *Shelcon Constr.*, *supra*. The court did not err.

C. The court properly entered the November 8, 2016 judgment.

Because the court's findings of fact and conclusions of law were not erroneous, the judgment based on them and subsequently entered on November 8, 2016, was proper. (App. A).

D. The court did not abuse its discretion in making evidentiary rulings.

Throughout her brief, Ms. Clough complains about the admission of unreliable evidence, biased testimony, and the refusal to admit hearsay letters supporting her position. Deciding the credibility of witnesses and their bias or unreliability are matters for the trier of fact to determine and are not subject to review on

appeal. *Morse*, 149 Wn.2d at 574. As to the hearsay letters saying the easement was abandoned, they were clearly sought to be admitted for the purpose of proving the truth of the matter asserted and was barred as hearsay. ER 801.

Ms. Clough further protests the court's allowing into evidence surveys that were not provided until just before trial. She had been informed by counsel they would not be available until then. The court nevertheless asked her if she wanted a continuance so she could prepare to rebut the surveys. (RP 40-42). Ms. Clough declined and said she was ready to proceed. (RP 43). There is no error and the trial court took the surveys into consideration as illustrative in any event. (RP 99).

The admission of exhibits is a matter for the trial court's discretion. *State v. Williamson*, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000). There was no such abuse because its decisions on admissibility of exhibits were based on tenable grounds and for tenable reasons. *Junker*, 79 Wn.2d at 27.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Chapman and Mr. Codella respectfully urge this Court to affirm the decision of the trial court.

DATED this 18th day of October, 2017.

Respectfully submitted,

Kenneth H. Kato, WSBA #6400
Attorney for Respondents
Chapman and Codella
1020 N. Washington
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on October 18, 2017, I served a copy of the Brief of Respondents by USPS on Wayne Evans, 304 S. Main, Omak, WA 98841; and Leslie Clough, PO Box 324, Riverside, WA 98849.

APPENDIX A

FILED

2016 NOV -8 AM 9:51

CHARLEEN GROOMES
OKANOGAN COUNTY CLERK

SUPERIOR COURT OF WASHINGTON

COUNTY OF OKANOGAN

JOHN HARVEY CHAPMAN, and SALLY CHAPMAN, a married couple; and WAYNE EVANS, a single person, and JOHN CODELLA, Jr., a single person, **Plaintiffs,** **vs.** **LESLIE CLOUGH, a single person,** **Defendant.**	**NO. 14-2-00393-7** **JUDGMENT** **(Clerk's Action Required)**

JUDGMENT SUMMARY

1. Judgment Creditor and Judgment Creditor's Attorney: JOHN HARVEY CHAPMAN, and SALLY CHAPMAN, and JOHN CODELLA, Jr., represented by Dale L. Crandall, Attorney at Law WSBA #32168, and WAYNE EVANS, *pro se*.

2. Judgment Debtor:	LESLIE CLOUGH
3. Amount of Judgment:	Costs only
4. Interest Owed to Date of Judgment:	$0
5. Total of Taxable Costs:	$ 230.00

This matter came before the Court for non-jury trial on July 12, 13, and 14 and concluded with a site visit on July 18, 2016. Mr. Dale Crandall, Attorney at Law represented Plaintiffs Chapman and Codella, while Plaintiff Evans acted *pro se*. That Defendant Leslie Clough, also acted *pro se*. On August 23, 2016, this Court entered the filed the Court's Findings of Fact and

Conclusions of Law from Trial; Order. Upon the Court's Findings of Fact and Conclusions of Law from Trial,

JUDGMENT

is hereby given and entered as follows.

1. Plaintiffs John H. Chapman and Sally Chapman, a married couple; John Codella, Jr., a single person, and Wayne Evans, a single person, are hereby awarded judgment and quiet title to the easement right set forth in the Declaration of Easements recorded June 4, 1979 and recorded under Auditor's File Number 657611. This Court having determined that the original easement right of way is not practical, the Defendant Leslie Clough shall, within 60 days, relocate a comparable and similar right of way, parallel to the Plaintiff Chapman's common boundary line with Ms. Clough, running generally in a manner consistent with the survey shown in Exhibit Number 26, and attached hereto as Exhibit A to this Judgment, entirely over and on the Defendant Leslie Clough's property, and solely at the expense of the Defendant Leslie Clough. The relocated easement shall be permanent, running with the land, and for the benefit of the Plaintiffs' respective real property as described on Exhibit B attached to this Judgment.

2. The Defendant Leslie Clough and her successors in interest to her property are permanently enjoined from limiting, restricting or otherwise preventing Plaintiffs from exercising their rights under the original Declaration of Easements recorded June 4, 1979 and recorded under Auditor's File Number 657611, as established over and across her property on the route shown generally on Exhibit A, as relocated according this Judgment.

3. In the event the Defendant Leslie Clough fails to replace the easement right of way roadway as provided herein, within 60 days from the date of entry of the Judgment, the Plaintiffs may move the Court for other relief as necessary, including a monetary amount for costs

associated with construction of a new roadway. The Court expressly reserved the right to reconsider this remedy in the event the Defendant fails to adequately comply.

4. All the other claims of the Plaintiffs are hereby DENIED and DISMISSED with prejudice;

5. All the Defendant's counter claims are hereby DENIED and DISMISSED with prejudice;

6. Parties respective claims to attorney's fees are hereby DENIED and DISMISSED with prejudice;

7. Plaintiffs are granted judgment against Defendant Leslie Clough for plaintiff's costs herein in the amount of $ 230.00 .

Dated this 8th day of November 2016

Superior Court Judge

Respectfully submitted,

Dale L. Crandall, WSBA #32168
Attorney for Plaintiffs Chapman & Codella

Approved as to form; Notice of Presentation Waived:

Plaintiff Wayne Evans, *pro se*

Approved as to form; Notice of Presentation Waived:

Defendant Leslie Clough, *pro se*

NW Land Surveying, LLC
Land Use Planning

EXHIBIT "A"
CENTERLINE DESCRIPTION

An Easement for the purposes of ingress, egress, utilities, and maintenance of an existing roadway. Said roadway being over and across portions of the Northwest Quarter of the Southwest Quarter (NW 4-SW4) of Section 29, and of the Northeast Quarter of the Southeast Quarter (NE4-SE4) of Section 30, all being located in Township 35 North, Range 28 East, W.M., Okanogan County, Washington. Said easement being 60.00 feet wide, 30.00 feet on each side of the following described centerline:

Commencing at the Quarter Corner common to said Sections 29 and 30, a Found ¾" Iron Pipe with Surveyors Cap; Thence N 88°31'18" E, along the northerly boundary line of said NW4-SW4 of Section 29, for a distance of 778.45 feet, more or less, to a point on the centerline of an existing roadway; Thence leaving said boundary line, along said centerline, S 26°39'24" W, for a distance of 19.05 feet; Thence S 38°23'22" W, for a distance of 57.09 feet to a point of intersection with an existing roadway heading to the right (West); Thence continuing S 38°23'22" W, along said centerline, for a distance of 97.90 feet; Thence S 37°31'29" W, for a distance of 306.66 feet; Thence along a curve to the left having a radius of 600.00 feet, a delta angle of 16°56'12", for an arc length of 177.36 feet; Thence S 20°35'17" W, for a distance of 129.63 feet; Thence along a curve to the left having a radius of 200.00 feet, a delta angle of 23°51'52", for an arc length of 83.30 feet; Thence S 03°16'35" E, for a distance of 62.64 feet; Thence along a curve to the right having a radius of 190.00 feet, a delta angle of 56°46'28", for an arc length of 188.27 feet; Thence S 53°29'53" W, for a distance of 141.60 feet; Thence along a curve to the right having a radius of 200.00 feet, a delta angle of 43°06'44", for an arc length of 150.49 feet, more or less, to a point on the easterly boundary line of said NE4-SE4 of Section 30 and the TRUE POINT OF BEGINNING; Thence continuing along said centerline, along said curve to the right, through a delta angle of 01°46'40", for an arc length of 6.21 feet; Thence N 81°36'43" W, for a distance of 70.09 feet; Thence along a curve to the left having a radius of 125.00 feet, a delta angle of 71°10'20", for an arc length of 155.27 feet; Thence S 27°12'58" W, for a distance of 87.95 feet; Thence along a curve to the right having a radius of 105.00 feet, a delta angle of 78°12'47", for an arc length of 143.33 feet; Thence N 74°34'15" W, for a distance of 23.30 feet; Thence along a curve to the left having a radius of 300.00 feet, a delta angle of 25°32'02", for an arc length of 133.70 feet; Thence S 79°53'43" W, for a distance of 74.71 feet; Thence S 72°58'54" W, for a distance of 70.32 feet; Thence S 81°12'26" W, for a distance of 71.91 feet; Thence S 86°20'18" W, for a distance of 94.02 feet; Thence S 80°31'21" W, for a distance of 72.58 feet; Thence S 89°03'27" W, for a distance of 65.92 feet; Thence along a curve to the left having a radius of 30.00 feet, a delta angle of 60°37'09", for an arc length of 31.74 feet; Thence S 28°26'18" W, for a distance of 28.09 feet, more or less, to a point on the southerly boundary line of said NE4-SE4, and the terminus of said centerline.

The sidelines of said easement to be lengthened or shortened to begin on the Easterly boundary line of said NE4-SE4 of said Section 30, to meet at all angle points and points of curvature and tangency, and to terminate on the Southerly boundary line of said NE4-SE4.

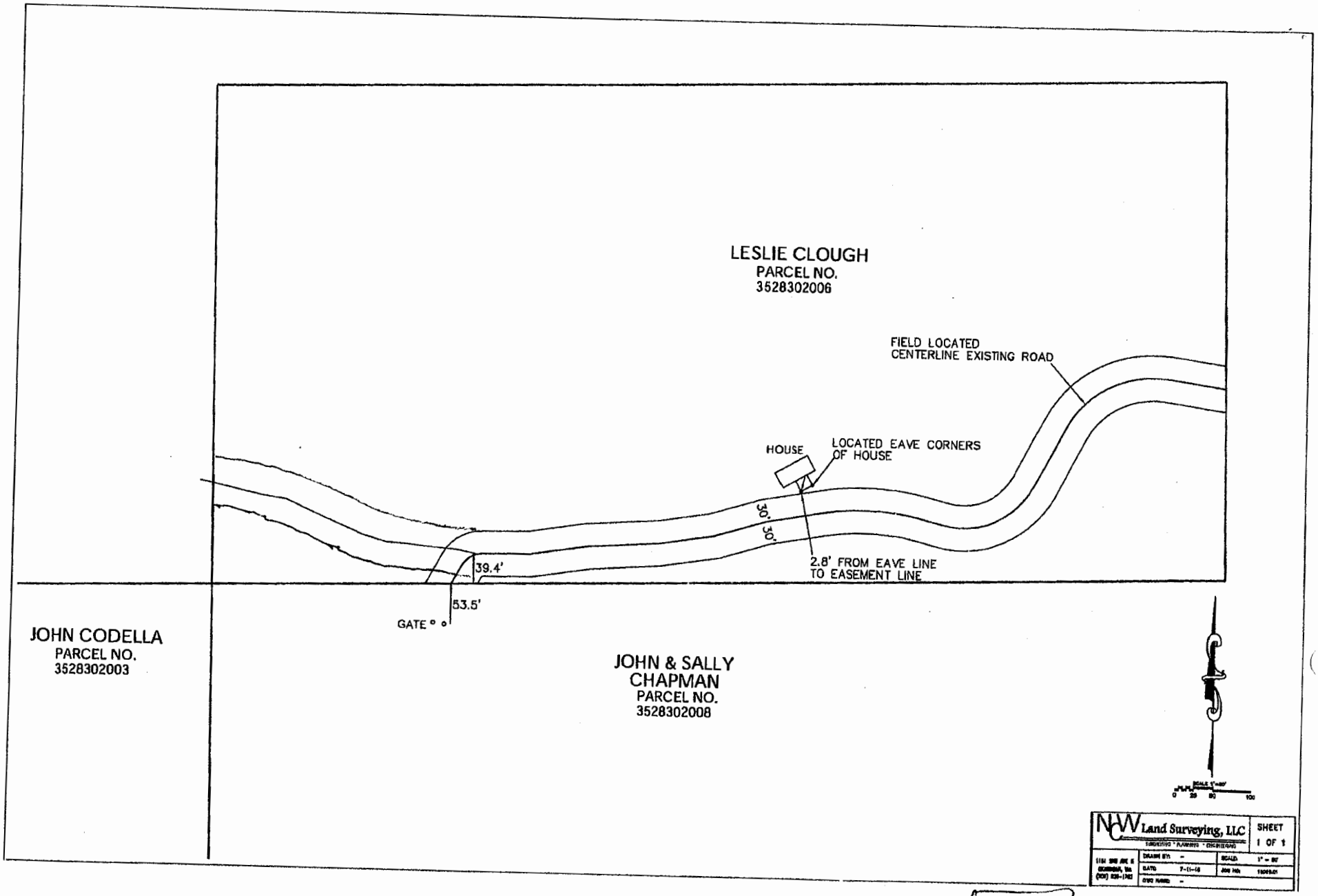
1151 2nd Ave. N., Suite A
Okanogan, WA 98840
509.826.1763 / Fax: 509.826.1827

Subject To, and Together With, any and all Covenants, Easements or Restrictions of Record.

The Basis of Bearings for this description is the Washington State Plane Coordinate system, North Zone. The distances described herein are grid distances per the North American Datum of 1983/2007 adjustment, with a combined grid factor of 0.99982397. To obtain ground distances and areas, multiply values by 1.00017606.

Prepared by: Gary W. Erickson, PLS
Checked by: Bryan E. Boesel
Date: 07/11/2016

1151 2nd Ave. N., Suite A
Okanogan, WA 98840
509.826.1763 / Fax: 509.826.1827


LESLIE CLOUGH
PARCEL NO.
3528302006
FIELD LOCATED
CENTERLINE EXISTING ROAD
HOUSE
LOCATED EAVE CORNERS
OF HOUSE
30'
30'
2.8' FROM EAVE LINE
TO EASEMENT LINE
39.4'
53.5'
GATE
JOHN CODELLA
PARCEL NO.
3528302003
JOHN & SALLY
CHAPMAN
PARCEL NO.
3528302008
0 25 50 100
NCW Land Surveying, LLC
SURVEYING • PLANNING • ENGINEERING
SHEET
1 OF 1
DRAWN BY: --
SCALE: 1" = 50'
DATE: 7-11-16
JOB NO:
DWG NAME: --

26

EXHIBIT B

To Judgment in Okanogan County Superior Case No. 14-2-00393-7

Property of John H. Chapman and Sally Chapman, a married couple:

The Southeast Quarter of the Northwest Quarter; Government Lot 2; and the Southeast Quarter of the Southeast Quarter of Section 30; The East half of the Northeast Quarter and the Southwest Quarter of the Northeast Quarter of Section 31. All in Township 35 North, Range 28 East, W.M., in Okanogan County, Washington.

Property of John Codella, Jr. a single person:

The Southwest Quarter of the Southeast Quarter of Section 30, Township 35 North, Range 28 East, W.M., Okanogan County, Washington.

Property of Wayne Evans, a single person:

The East Third of the Northwest Quarter of the Northeast Quarter of Section 31, Township 35 North, Range 28 East, W.M.; AND, the West two-thirds LESS the West one-third of the Northwest quarter of the Northeast quarter of Section 31, Township 35 North, Range 28 East, W.M., in Okanogan County, Washington,

October 18, 2017 - 11:48 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34917-9
Appellate Court Case Title:	John Harvey Chapman & Sally Chapman, et al v Leslie Clough
Superior Court Case Number:	14-2-00393-7

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