

No. ~~49414~~ 355021-III

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

Steve Berschauer,

Appellant,

v.

**State of Washington, Department of
Enterprise Services, et al.,**

Respondents.

Reply Brief of Appellant

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1. Introduction

The State's response makes a habit of missing the forest for the trees. The State myopically focuses on minute details, isolating them from a complete view of the case as a whole. The totality of the evidence and circumstances in this case demonstrates that Berschauer and his predecessors adversely possessed the entire south half of the vacated street starting in 1965 or obtained ownership of it by virtue of the vacation ordinance in 1961. The State intentionally took this land, conveyed an easement over it, and absorbed it into another parcel through a boundary line adjustment, despite knowing that Berschauer possessed, and likely owned, at least a portion of the vacated street. Berschauer suffered emotional distress that should be compensable as an element of damages for the State's intentional tort.

This Court should reverse the challenged orders of the trial court and grant Berschauer title to the entire south half of the vacated street, either by adverse possession or by virtue of the vacation of the street; hold that Berschauer is entitled to recover emotional distress as an element of damages; and remand for a trial on emotional distress damages and for a recalculation of the attorney fee award using the lodestar method.

2. Reply Argument

2.1 The trial court erred in not finding that Berschauer owns to the centerline by adverse possession.

2.1.1 The “penumbra” cases extend adverse possession beyond the land actually, physically possessed to include surrounding land reasonably necessary to carry out the adverse possessor’s objective.

Berschauer’s opening brief argued that the trial court should have concluded that Berschauer owns the final 8.4 feet to the centerline of the vacated street as a “penumbra” to his actual possession of the first 17 feet. Br. of App. at 15-28. Under the “penumbra” cases, the extent of possession goes beyond the land covered by the adverse possessor’s actual use and includes “a reasonable amount of the surrounding territory.” Br. of App. at 17-18 (quoting *Shelton v. Strickland*, 106 Wn.App. 45, 51, 21 P.3d 1179 (2001)). In the most illustrative case, *State v. Stockdale*, 34 Wn.2d 857, 210 P.2d 686 (1949), the court granted “penumbral possession” of nearly ten acres of land that it found was not actually possessed but was “reasonably needed to carry out [the adverse possessor’s] objective.” Br. of App. at 18-19 (quoting *Stockdale*, 34 Wn.2d at 863).

The importance of the adverse possessor’s objective in the “penumbra” analysis was not overruled by *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). Br. of App. at 19-21. The possessor’s objective can be discerned, at least in part, from

what the possessor had reason to believe he owned. Br. of App. at 21-22. Berschauer's predecessor reasonably believed he owned to the centerline of the vacated street, which was reasonably needed in order to allow for the most favorable placement of his four-plex. Br. of App. at 22-23. The trial court's original decision granting "penumbral possession" to the centerline was correct. Br. of App. at 23-28.

The State's argument that Berschauer relies on "a substantially different record" is incorrect. *See* Br. of Resp. at 17-18. Berschauer's argument relies upon the complete record, including the new evidence produced in the final summary judgment motion. Br. of App. at 15-24. Berschauer referred to Judge Price's original ruling to illustrate the correct application of "penumbral possession" in this case and to demonstrate that the new facts do not change the proper conclusion: that Berschauer's predecessors adversely possessed the last 8.4 feet to the centerline as a penumbra to their admitted, actual possession of the first 17 feet. Br. of App. at 23-28.¹

¹ The State claims, incorrectly, that Berschauer did not raise the argument of penumbral possession in the earlier summary judgment motion. Although Judge Price was the first to use the term "penumbra," RP, Nov. 6, 2015, at 47-48, Berschauer's summary judgment briefing had cited multiple cases for the same proposition: that an adverse possessor can obtain more ground than what is actually possessed, depending on the facts of the case and how a true

The State devotes an entire section of its response attempting to defeat an argument that Berschauer did not make. *See* Br. of Resp. at 18-19. Berschauer’s opening brief does not argue that adverse possession began with the 1961 vacation of the street. However, Henry Berschauer’s purpose in vacating the street and his reasonable understanding of ownership after vacation, are essential to the “penumbra” analysis of what land was “reasonably needed to carry out his objective.” *Stockdale*, 34 Wn.2d at 863; *see* Br. of App. at 21-23. The 10-year prescriptive period runs from the construction of the four-plex in 1965, but the analysis is necessarily informed by the vacation of the street in 1961.

2.1.2 The State’s formulation of the “penumbra” analysis is inconsistent with the analysis actually conducted in the “penumbra” cases.

The bulk of the State’s argument consists of transforming the “penumbra” analysis into a strict test that is not supported by the case law. Even the facts of *Stockdale* would fail to meet the State’s proposed test. The State’s proposed test has two elements: 1) “actually occupied” (Br. of Resp. at 20-21) and

owner would use the land at issue. *E.g.*, CP 1293-95, 1384-86 (citing *Campbell v. Reed*, 134 Wn. App. 349, 139 P.3d 419 (2006); *Riley v. Andres*, 107 Wn. App. 391, 27 P.3d 618 (2001); *Shelton v. Strickland*, 106 Wn. App. 45, 21 P.3d 1179 (2001); *Lingvall v. Bartmess*, 97 Wn. App. 245, 982 P.2d 690 (1999)). To say that Judge Price did not have any briefing from the parties on the issue is simply not true.

2) “reasonably necessary to operate or access the [encroaching] improvements” (Br. of Resp. at 24). As to the second element, the State would require actual necessity, not mere convenience. Br. of Resp. at 23. The State’s test is inconsistent with what the *Stockdale* court actually decided.

2.1.2.1 The “penumbra” cases are based on constructive possession, not actual occupation of the penumbral area.

The State’s first element directly contradicts the foundational premise of the “penumbra” cases, which is that the penumbral area was **not actually, physically possessed**. Instead, it is **constructively** possessed, as determined by the court based on the adverse possessor’s objective, the nature of the land, the extent of the adverse possessor’s reasonable belief of ownership, and the extent to which the adverse possessor treated the land in the manner of a true owner.

In *Stockdale*, the area in dispute was a roughly ten-acre tract: the part of the south half of the northeast quarter of the northeast quarter section lying west of the Columbia River. *See Stockdale*, 34 Wn.2d at 858. This subdivision had been inadvertently left out of the deed by which the State acquired the land for Ginkgo State Park. *Id.* at 858-59. On the east side of the disputed ten-acre tract, the State built a museum with a viewing area overlooking the river, and a laboratory shop,

garage, office, and caretaker residence. *Id.* at 859. There is nothing in the opinion to suggest that the remainder of the ten acres was ever occupied, developed, or used. *See Id.*

Given this fact, the court’s phrase, “such additional area as the possessor intended to and has occupied,” cannot mean “actually occupied,” as the State would have this Court believe. The *Stockdale* court makes this abundantly clear by stating, in the same sentence, “possession is not only of the area actually occupied,” but also of the penumbral area, which, by simple logic, must be land that was **not actually occupied**. *Id.* at 863.

In *Stockdale*, the State had not actually occupied anything but the area immediately surrounding the improvements. *Id.* at 863. If the court had intended to require actual occupation, it would not have granted adverse possession of the entire ten-acre tract, most of which was never occupied.

Because the court did grant adverse possession of the entire tract, it is evident that the phrase, “intended to and has occupied” was meant to convey some meaning other than “actually occupied.” The court’s decision is most consistent with a finding that the penumbral area was **constructively occupied**, based on the adverse possessor’s objective, the nature of the land, the extent of the adverse possessor’s reasonable belief of ownership, and the extent to which the adverse possessor treated the land in the manner of a true owner.

The *Stockdale* court directly called attention to the significance of the adverse possessor's objective in this analysis. The State had a "general park plan" that included the entire ten-acre parcel. *Stockdale*, 34 Wn.2d at 863. That plan included all of the land that the grantor had intended to convey and the State had intended to acquire, despite the lack of legal title. *Id.* at 858. Although the State developed only a small portion of the tract, it treated the entire tract in the manner of a true owner seeking to accomplish its objective. *Id.* at 859, 863. Under these facts, it was appropriate for the court to conclude that the State had constructively occupied the entire ten-acre parcel.

The State's reliance on *Skoog v. Seymour*, 29 Wn.2d 355, 187 P.2d 304 (1947), is misplaced. *Skoog* is not based on a penumbra theory, but rather on the existence of a boundary wall, 7 ½ feet tall on the east end and shrinking down to a line of stones to the west in the vicinity of the garage. *Id.* at 357-59. The court noted that the appellants had actually possessed all of the land north of the line of the wall and stones: "The appellants and their predecessors in interest had cultivated and cared for everything north of that line and had done everything that anyone would do with property of that character, short of building a fence, to indicate that they claimed title to that line." *Id.* at 360-61. Because the land was actually possessed, *Skoog* is not helpful here.

2.1.2.2 The “penumbra” cases require the penumbral area to be reasonably needed to carry out the adverse possessor’s objective, not actually necessary to operate or access the actual encroachment.

The State’s second proposed element, actual necessity for operating or accessing the actual encroachment, would also have required a different result in *Stockdale*. The *Stockdale* court based its decision on the penumbral area being “reasonably needed to carry out the [adverse possessor’s] objective.” *Stockdale*, 34 Wn.2d at 863. It strains credulity to think that ten acres of open land could ever be **essential** to the operations of or access to the museum, caretaker’s residence, and other improvements at the edge of the cliff. On the other hand, it is easy to understand how the expanse of open land could be **reasonably necessary** to carry out the State’s general park plan.

Had the *Stockdale* court intended the strict necessity rule that the State advocates here, it would have limited the area of adverse possession to only that part immediately surrounding the actual improvements. Because the *Stockdale* court affirmed the trial court’s finding of adverse possession of **the entire ten-acre tract**, *Stockdale*, 34 Wn.2d at 861, 863, it is evident that the “penumbra” analysis is not nearly so strict as the State would have this Court believe.

2.2 Alternately, Berschauer owns to the centerline as a result of the vacation of the street.

Berschauer’s opening brief argued in the alternative that Berschauer owns to the centerline because, upon vacation of a public street, title belongs to the abutting owners, one half to each. Br. of App. at 28-37. The default rule at the time of the vacation was that the vacated land “shall belong to the abutting property owners, one-half to each.” Br. of App. at 28-29 (quoting Laws of 1901, ch. 84 § 3 (CP 1454)). Exceptions to this rule exist where a contrary intent clearly appears in the terms of the deed and the surrounding circumstances. Br. of App. at 29-30.

The State failed to prove that the McKennys, the original dedicators, intended to retain fee title to the street rather than allow it to run with the abutting land. Br. of App. at 31-37. Because the surrounding circumstances lead to only one reasonable conclusion—that McKennys intended to entirely disassociate themselves from the land—the default rule applies. Br. of App. at 36-37. Berschauer’s predecessor obtained title up to the centerline at the time the street was vacated. *Id.*

The State’s response ignores the totality of the circumstances, instead elevating the form of each step in the process over the substance of the McKennys’ overall plan. Instead of the dedicators’ intent, which “is the very essence of every dedication,” *Kiely v. Graves*, 173 Wn.2d 926, 933, 271 P.3d

226 (2012), the State would have the Court focus on technicalities: whether the parcels were platted or conveyed by metes and bounds, the timing of the dedication relative to the sale of the parcels, etc. The State is so busy examining each individual tree that it fails to notice there is an entire forest surrounding it.

The truth is that people don't always organize their transactions in the way a lawyer would. They may do things in the wrong order. They may miss a step, then come back and do their best to fix it later. The McKennys made their share of mistakes in dealing with this land—for example, they conveyed two parcels with the wrong legal descriptions and had to come back and fix the deeds two years later. But the law doesn't necessarily hold people to every technical mistake they may make. Instead, the law attempts to interpret the transactions in a manner that gives effect to the intent of the parties.

Humphrey v. Krutz is an excellent example of this. In *Humphrey*, the Turners did not formally dedicate the alley to the public before conveying the abutting parcels by metes and bounds. *Humphrey*, 77 Wash. at 154. Nevertheless, viewing the totality of the circumstances, the court concluded that after conveying the abutting parcels, the Turners had no remaining interest in the alley, even if the dedication by way of prescriptive use by the public had not ripened until years after the

conveyance of the parcels. *See Id.* at 155. Just as in *Humphrey*, the interest of Berschauer as an abutting owner is superior to the remote interest of McKennys, who intended to dissociate themselves entirely from the property.

Here, the surrounding circumstances lead to only one reasonable inference: that McKennys did not intend to retain any interest in the streets. In conveying the parcels, McKennys intentionally carved out streets that would fit the growing city grid of Olympia. Without a right of access across these streets, the parcels would have been landlocked. McKennys formalized the streets by dedicating them “for the public use forever,” without including any retaining or reversionary language. The streets were not included in the McKennys’ wills or in the wills of any of their descendants. There is no evidence that McKennys or their heirs knew about or intended any retained interest in the streets. Rather, the circumstances all point to the conclusion that McKennys intended to entirely divest themselves of any interest in the streets.

To defeat the default rule, “to the abutting owners, one-half to each,” an intent to retain the underlying fee must clearly appear from the terms of the deed, interpreted in the light of the surrounding circumstances. *Christian v. Purdy*, 60 Wn. App. 798, 802, 808 P.2d 164 (1991). Here, no such intent clearly appears, certainly not in light of the surrounding circumstances.

Where the original dedicators have, in effect, abandoned the dedicated streets, it is just and equitable, and “much more reasonable,” to vest the interest in the abutting owners under the default rule. *Hagen v. Bolcom Mills, Inc.*, 74 Wash. 462, 468, 133 P. 1000 (1913). This Court should reverse the trial court and hold that Berschauer’s predecessor gained full title to the centerline of the street upon vacation in 1961.

2.3 The State’s acts claiming a strip of Berschauer’s property constitute an intentional tort for which Berschauer is entitled to recover emotional distress damages.

Regardless of the ownership of the final 8.4 feet of the vacated street, Berschauer argued that the conduct of the State amounted to an intentional tort for which Berschauer is entitled to recover emotional distress damages. Br. of App. at 37-44.

Berschauer’s opening brief described the State’s tortious conduct:

For 50 years, Steve Berschauer and his predecessors had possessed the south half of vacated East 16th Avenue. Suddenly, in 2010, the State laid claim to Berschauer’s south half and placed survey stakes indicating a boundary that cut through Berschauer’s four-plex. The State recorded its deed, conveyed an easement to PSE over Berschauer’s land, and included Berschauer’s land in a boundary line adjustment application with the City of Olympia, all without a single word to Berschauer about what the State was doing with

the land it knew he and his predecessors had possessed for 50 years.

Br. of App. at 37. In short, the State intentionally invaded Berschauer's ownership and possessory interests in his portion of the vacated street.

A plaintiff is entitled to recover emotional distress damages when the defendant commits some volitional act with knowledge of the likely result, where that result would "invade the interests of another in a way that the law will not sanction." Br. of App. at 40-41 (quoting *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 683, 709 P.2d 782 (1985)). Here, the State knew that Berschauer possessed at least a portion of the vacated street and that the State's acts would violate Berschauer's rights of possession or ownership. Br. of App. at 42-44. The State's conduct was "ethically and morally wrong," and Berschauer was entitled to recover for emotional distress as an element of damages for the State's intentional tort. *Id.* (quoting CP 1687).

The State entirely ignores the nature of Berschauer's claim. Instead, hoping to avoid the reality of its conduct, the State attempts to limit the claim to a one-inch encroachment by a survey stake. This is the very error that Berschauer is challenging on appeal. Br. of App. at 3-4.² The State's failure to

² Assignments of Error 4-6 assert the trial court erred in its rulings on summary judgment and reconsideration that limited the trespass claim to the survey stake. Issue 3, addressing those assigned errors,

address Berschauer's arguments is nothing more than an attempt to distract the Court from the issues at hand. This Court should not allow the State to hide behind its survey stake. The State's secret land grab was intentional and inexcusable. It is not surprising that Berschauer would be emotionally distressed when he discovered that the State was stealing his land. He should be entitled to recover for that emotional distress as an element of damages for the State's intentional tort.

The State argues that emotional distress damages are only available for a "willful trespassory act" that causes "actual damage or interference" giving rise to emotional distress. Br. of Resp. at 31. Even if this were the correct standard, it would be met here. Just as the defendant in *Pendergrast v. Matichuk*, 186 Wn.2d 556, 379 P.3d 96 (2016), the State knew that Berschauer had a claim to the south half of the vacated street, yet defied that claim and invaded Berschauer's interest by claiming ownership, conveying an interest in Berschauer's land to PSE, and absorbing Berschauer's land into another parcel by way of a boundary line adjustment. Just as in *Birchler v. Castello Land Co.*, 133 Wn2d 106, 942 P.2d 968 (1997), the

states, "The State invaded and claimed ownership over the south half of the vacated street, despite its knowledge that Berschauer and his predecessors had possessed the land for 50 years. Was the State's trespass an intentional tort entitling Berschauer to emotional distress damages?"

State's interference with Berschauer's property interests entitle Berschauer to emotional distress damages. *See Id.* at 116.

The State then moves to a "level of fault" argument, positing that emotional distress damages are only available when the tortious conduct was "intended to harm or was morally wrong" or "contravenes a clear mandate of public policy." Br. of Resp. at 34. Ironically enough, it was a State employee working on the project who first observed that the State's plan to acquire Berschauer's property without so much as contacting him was "ethically and morally wrong." The State's land grab also contravenes the clear mandate of the Washington Constitution, art. I, § 16, which prohibits the taking of land without just compensation. Even under the State's own standard, Berschauer should be entitled to recover emotional distress damages.

As Berschauer explained in his opening brief, the mental state required for an intentional tort triggering emotional distress as an element of damages is not an intent to do harm, but merely "an intent to bring about a result which will invade the interests of another in a way that the law will not sanction." Br. of App. at 40 (quoting *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 683, 709 P.2d 782 (1985)). The State's intent here was to take ownership of the full width of the vacated street without having to deal with Berschauer for the portion the State knew that Berschauer owned or possessed. This intent

could only be accomplished by invading Berschauer's interests "in a way that the law [should] not sanction." The State's intent was sufficient to entitle Berschauer to emotional distress damages. Berschauer's emotional distress is compensable even without an actual, physical injury. *Nordgren v. Lawrence*, 74 Wash. 305, 308, 133 P. 436 (1913).

The State claims that it never intended to take any land that Berschauer owned or had adversely possessed. Yet it never saw fit to communicate this to Berschauer. The State's actions prove its claim untrue. The State, knowing of Berschauer's presence on the south half of the vacated street, never contacted Berschauer in 2009 while it was determining how to obtain access over the vacated street; never contacted Berschauer in 2010 when it obtained the quitclaim deed for the vacated street and surveyed the corners, revealing a line cutting through Berschauer's four-plex; never contacted Berschauer in 2011 when it claimed full ownership of the entire vacated street in its boundary line adjustment with the City of Olympia. In fact, the State never contacted Berschauer about his possession of the south half of the vacated street **until after Berschauer filed his tort claim in 2013**, a full four years after the State hatched its plan to take the land. The State's acts were intentional and understandably caused Berschauer emotional distress.

The State argues, as alternative grounds, that the emotional distress claim can be dismissed for lack of proximate cause. However, this argument is premised entirely on the false notion that the State's only wrong was in placing a survey stake. The State argues that the placement of the stake was too remote from Berschauer's emotional distress because his distress did not arise until Berschauer learned of the State's quitclaim deed—in other words, when he learned that the State was stealing his land, including a portion of the four-plex itself! When the totality of the State's tortious conduct is considered, Berschauer's emotional distress was immediate and directly connected to the State's deplorable acts. There is no lack of proximate cause.

This Court should reverse the trial court's orders on this issue and hold that Berschauer is entitled to recover for his emotional distress as an element of damages for the State's intentional tort. This Court should remand for trial on emotional distress damages.

2.4 The trial court abused its discretion in calculating its award of attorneys' fees to Berschauer.

Berschauer's opening brief argued that the trial court abused its discretion in the manner in which it calculated its award of attorneys' fees to Berschauer. Br. of App. at 44-49. Under RCW 7.28.083(3), a court may award costs and attorneys'

fees to the prevailing party in an adverse possession action if the court determines that an award of costs and fees is equitable and just. The trial court determined that Berschauer was the prevailing party and that an award of costs and fees was equitable and just, but failed to conduct a lodestar analysis to determine the amount of the award. RP, Sept. 2, 2016, at 26, 28.

Because a lodestar analysis is the proper starting point for any statutory fee award, the trial court abused its discretion. Br. of App. at 45-46.³ Even if a lodestar analysis was not required, the trial court's award of only one-sixth of the proposed lodestar fee was manifestly unreasonable and was not supported by any reasoning on the record. Br. of App. at 47-49.

The State argues that a small award of fees is equitable for the "small amount of effort" Berschauer incurred on the prescriptive claims. The State appears to misunderstand the applicable analysis under RCW 7.28.083(3). The statute requires a three-step analysis: 1) determine the prevailing party; 2) determine whether an award of costs and fees is equitable and just, considering all the facts; and 3) determine the amount

³ The State is incorrect when it claims that Berschauer acknowledges that the lodestar method is not absolutely required. Berschauer acknowledged that the lodestar method might not be absolutely required when a fee award is based on a recognized ground in equity, but the award here is based on a **statute**. The lodestar method is universally applied to statutory fee awards. Br. of App. at 45-46.

of the award, through the lodestar method. Here, the trial court made the first two determinations in favor of Berschauer. The trial court and the State err in reasoning that the amount can be further limited on equitable grounds.

The statutory language, “The court may award all or a portion of costs and reasonable attorneys’ fees,” does not excuse the court from engaging in a lodestar analysis. Indeed, the phrase “a portion of” implies that the trial court must first have a handle on the total amount of fees—by way of a lodestar analysis—before making any adjustments that the lodestar method would allow.

Here, the trial court not only failed to conduct a lodestar analysis, but failed to provide any reasoning on the record to support whatever analysis it may have conducted to arrive at the award amount of \$10,000. The State attempts to construct some reasoning for the court, but the State cannot make up for what the trial court failed to do. Without some reasoning on the record to review, this Court must remand for a new determination of fees and entry of appropriate findings

The State attempts to minimize Berschauer’s efforts incurred on the prescriptive claims under the guise of an equitable analysis. However, Berschauer already accounted for his efforts by segregating the fees incurred on the prescriptive claims from those fees incurred on other claims. CP 178-80. The

State did not object to Berschauer’s segregation of the fees, but instead argued that the fees should be nominal because the State ultimately conceded most of the land Berschauer obtained. CP 284-85; Br. of Resp. at 41-42. This is nothing but a “prevailing party” argument (*i.e.*, arguing that Berschauer didn’t really prevail because the State conceded). The trial court decided that issue in Berschauer’s favor. The State did not appeal. This argument has been waived.

The State attempts to argue that the paper record that was before the trial court is a sufficient record to review the fee award. This argument asks this Court to conduct a *de novo* review, instead of the abuse of discretion review that is the standard for fee awards. In order to conduct an abuse of discretion review, this Court must have a record, not of the underlying facts, but of the trial court’s **reasoning**, set forth in written findings and conclusions. *See White v. Clark Cty.*, 188 Wn. App. 622, 639, 354 P.3d 38 (2015). Without knowing the trial court’s reasons for making the award it did, this Court must remand for entry of appropriate findings and conclusions. In doing so, this Court should instruct the trial court to conduct a lodestar analysis.

2.5 This Court should grant Berschauer’s request for attorney fees on appeal and deny the State’s request.

Berschauer requested an award of attorney’s fees on appeal, as the prevailing party under RCW 7.28.083(3) at both the trial court and this Court. Br. of App. at 49. Berschauer’s request noted that he meets the requirements of the statute—he would be the prevailing party and an award of fees would be equitable and just. The State did not respond to this argument.

The State did attempt to request an award of its own fees on appeal, but fell far short of the standard. In requesting an award of attorney fees on appeal, a party must devote a section of its brief to the request. RAP 18.1. A bald request for fees, without argument, is insufficient. *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 677, 303 P.3d 1065 (2013). The State’s request was a single sentence, devoid of any analysis or argument under the statute. This Court should deny the request as insufficient.

Additionally, the State cannot meet the statutory requirements. The trial court found that Berschauer, not the State, was the prevailing party. Even if Berschauer does not prevail on appeal, he remains, overall, the substantially prevailing party. Due to the State’s prelitigation misconduct, which the State itself knows was “ethically and morally wrong,” requiring Berschauer to litigate to retain his rights in the

property, an award of fees to the State would not be equitable and just. Further, he who seeks equity must first do equity. The State has unclean hands. The State cannot meet the standard of the statute. This Court should deny the State's request for fees.

3. Conclusion

This Court should reverse the erroneous orders of the trial court and grant Berschauer title to the entire south half of the vacated street, either by adverse possession or by virtue of the vacation of the street; hold that Berschauer is entitled to recover emotional distress as an element of damages for the State's intentional tort; and remand for a trial on emotional distress damages and for a recalculation of the attorney fee award using the lodestar method.

Respectfully submitted this 5th day of June, 2017.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 5, 2017, I caused the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49414-1
Appellate Court Case Title: Steve L. Berschauer, Appellant v. Dept. of General Admin., State of Washington, et al., Respondents
Superior Court Case Number: 13-2-02519-9

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