

No. ~~49141-III~~ 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.

Brief of Appellant

Kevin Hochhalter
Attorney for Appellant

Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360-534-9183
WSBA # 43124

with

Jon E. Cushman
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360-534-9183

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1. Introduction

The acts of the State that gave rise to this action were, as one State employee described, “ethically and morally wrong.” 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. Without ever contacting Berschauer, the State recorded a deed that purported to grant the State fee interest in the entire vacated street, conveyed an easement over the street to PSE, and included the entire street 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.

Berschauer prevailed in obtaining adverse possession of the southernmost 17 feet of the vacated street, but not the remaining 8.4 feet of the southern half he believed he owned by virtue of the vacation of the street. The trial court found that the State had committed a trespass, but denied Berschauer’s claim for emotional distress as an element of damages. The trial court awarded Berschauer a fraction of his attorney’s fees, under

RCW 7.28.083(3), without conducting a lodestar analysis or entering findings to support its calculation.

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; and remand for a trial on emotional distress damages and for recalculation of the attorney fee award under the lodestar method.

2. Assignments of Error

Assignments of Error¹

1. The trial court erred in its order dated August 12, 2016, granting the State's motion for summary judgment regarding adverse possession, in that the trial court failed to find that Berschauer had adversely possessed up to the centerline of the vacated street.
2. The trial court erred in its order dated February 13, 2015, on cross-motions for partial summary judgment, in that the trial court failed to find that title to the vacated street went to the abutting owners, one half to each.

¹ Berschauer's Notice of Appeal designated ten orders for review. Berschauer hereby abandons review of the trial court's orders dated March 4, 2016; March 21, 2016; and April 16, 2016. Berschauer seeks review of only those issues expressly addressed in this brief. Issues arising from these three abandoned orders are immaterial to the issues Berschauer is asking the Court to review. The State did not cross-appeal.

3. The trial court erred in its order dated March 16, 2015, denying Berschauer's motion for reconsideration of the February 13, 2015, order.
4. The trial court erred in its order dated August 28, 2015, on cross-motions for partial summary judgment, in that the trial court dismissed Berschauer's claim of emotional distress as an element of damages for the State's intentional trespass.
5. The trial court erred in its order dated September 25, 2015, denying Berschauer's motion for reconsideration of the August 28, 2015, order.
6. The trial court erred in its order dated November 20, 2015, on cross-motions for partial summary judgment, dismissing any further claim of trespass and emotional distress.
7. The trial court abused its discretion in its order dated September 7, 2016, in failing to conduct a lodestar analysis, failing to make a record of its reasoning, and failing to award a reasonable fee.
8. The trial court erred in entering that portion of Finding #3 in the September 7, 2016, order that reads, "After considering the facts of the case and the fees requested by Berschauer, the Court concludes that the appropriate amount of an award in this case is \$10,000 in attorneys' fees and \$240 in costs."

Issues Pertaining to Assignments of Error

1. When an adverse possessor makes active physical use of a portion of land, a penumbral area of adverse possession may extend into adjacent areas that are little used. Berschauer and his predecessors, after vacating the street, took actual possession of a portion of the south half of the street. Does Berschauer's undisputed adverse possession of the first 17 feet create a constructive or "penumbral" area of possession

extending to the centerline of the vacated street?
(assignment of error 1)

2. When a street is vacated, title to the street goes to the abutting landowners, one-half to each, unless the circumstances of the original dedication clearly show a different intent on the part of the dedicator. Here, the circumstances lead to only one reasonable conclusion, that the original dedicators did not intend to retain any interest in the street. Did Berschauer's predecessor obtain title to the south half of the street as an abutting owner when the street was vacated? (assignments of error 2 and 3)
3. Emotional distress is an element of damages for any intentional tort. The intent required is not malice or desire to do harm, but rather acting with knowledge that consequences are substantially certain to result. 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? (assignments of error 4, 5, and 6)
4. The accepted method for calculating an award of reasonable attorney's fees to a prevailing party is the lodestar method. After finding that Berschauer was entitled to an award of reasonable attorney's fees under RCW 7.28.083(3), the trial court failed to conduct a lodestar analysis and failed to make findings on the record to indicate how the award was calculated. Did the trial court abuse its discretion in awarding less than one-sixth of the fees incurred on the applicable claims? (assignments of error 7 and 8)

3. Statement of the Case

3.1 Berschauer and his predecessors have owned and occupied the south half of 16th Avenue since it was vacated in 1961.

In 1958, Henry Berschauer (Steve Berschauer's father and predecessor in interest) became the owner of the real property located at 1604 East Cherry Street, in Olympia, Washington. CP 1995-96. In 1961, Henry petitioned the City of Olympia to vacate East 16th Avenue where it bordered on the north of his property. CP 1996. The City granted the petition and issued Ordinance No. 3205, which vacated "East 16th Avenue between South Cherry Street and the Freeway South-bound access road and/or Northern Pacific R/W being a distance of 383 feet more or less Eastward from South Cherry Street and 50.8 feet in width..." CP 1999.

Henry Berschauer believed that after the vacation, he owned to the centerline by operation of law. *See* CP 1737, 1741 ("together with the south half of that [illegible] vacated street adjoining said property on the north that would attach by operation of law"), 1742-43. The additional 25.4 feet that Henry Berschauer believed he obtained from the Vacated Street allowed for a more favorable building site, given the slope of the property and the required setbacks. CP 1714-15.

In 1965, Henry obtained a building permit from the City of Olympia to allow for construction of a duplex. CP 1087-88, 1101. Steve Berschauer, then in his early 20s, assisted in the construction and maintenance of the four-plex.² *Id.* A foundation wall extends north from the main building to almost exactly 20 feet from the centerline of the vacated street. CP 1456. At the time, Steve Berschauer understood that the four-plex was being built to a 20-foot setback required by the city. CP 441-42. The four-plex encroaches onto the vacated street, standing at the top of the gully that runs through the middle of the vacated street. *See, e.g.*, CP 620 (“wing wall” crosses the line labeled “top of bank”), 1455-56 (“the land was very steep with trees on both sides of a gully”).

The State acquired title to the undeveloped properties to the north of the Vacated Street in 1968 and 1969, and in 1970 quit claimed a portion of that property to Puget Power (now Puget Sound Energy). CP 343-46. Sometime between 1969 and 1970, Puget Power filled the gully and built a gravel roadway to provide access to its substation property over the northern half of the Vacated Street. CP 1088. In order to make the gravel roadway stable on Puget Power’s side of the centerline, it was necessary to fill and grade the Berschauer side as well. *Id.* The

² Although permitted as a duplex, it was built and rented out as a four-plex. Use as a four-plex was permitted in the 1980s. CP 1088.

work was done with Henry Berschauer's knowledge and consent. *Id.*; CP 440-41 ("My father just said go down there, see how they're doing down there."). Henry Berschauer had no reason to object, as the gravel roadway would be a benefit to his property as well. *See Id.*

Since the gully was filled, Berschauers, their tenants, and PSE have all made use of portions of the gravel roadway. *E.g.*, CP 1089. The State has made occasional use of the gravel roadway since the early 1980s. See CP 1373, 1376, 1396, 1771. Steve Berschauer acquired title to the four-plex property in 1996. CP 1995.

3.2 The State seized the south half of the street in 2010 to support the "Wheeler project," a large-scale office building and data center.

In 2009, the State was working with the City of Olympia on a boundary line adjustment and site plan for the "Wheeler Project," a large office building on the Capitol Campus in the vicinity of 16th Avenue SE. CP 1904. The City required the State to demonstrate that it owned legal access to parcels located behind the proposed 1500 Jefferson building that could only be accessed through the Vacated Street. *Id.* The State needed at least a 28-foot wide access; the north half of the Vacated Street is only 25.4 feet wide. CP 842. The State recognized that time

was of the essence in acquiring title or an easement over a portion of the south half of the vacated street. CP 1712-13.

The State was aware that Berschauer claimed to own the south half of the vacated street and that Berschauer was in present possession of that land. *See* CP 1687. Yet the State never contacted Berschauer about the land. CP 1715-16. Instead, the State devised and implemented a scheme whereby it hoped to obtain title to the entirety of the vacated street by quit claim deed. *See, generally*, CP 1904-07, 1916-18. Although the Property & Acquisition Specialist for GA, Stefanie Fuller, initially stated that it would be “ethically and morally wrong” to seek to acquire Berschauer’s land without negotiating with him, GA was eventually persuaded to go forward with the quit claim plan by DIS, Cassou, and Assistant Attorney General Brian Faller. *See* CP 1684-87, 1917.

The State located an individual it thought was the sole heir of the McKennys, the original dedicators of 16th Street, and paid \$2,500 for a Quit Claim Deed for the entire width of the vacated street. CP 1906-07. The State then, without any notice to Berschauer, recorded the Quit Claim Deed, surveyed the boundaries of the vacated street, and placed stakes on Berschauer’s property. *See* CP 1907. The State included the full width of the vacated street in its boundary line adjustment application to the City of Olympia, claiming to be the owner. *Id.*:

CP 366. The State also conveyed an easement over the eastern portion of the vacated street to Defendant Puget Sound Energy. CP 352.

The first notice Berschauer had that the State was taking his property was in 2010 or 2011, when two survey technicians came to the Berschauer property on behalf of the State, without notice or permission, and located and staked the west and north corners of the Vacated Street, one of which was located on the west side of the Berschauer property. CP 1715, 1907. The property line represented by this stake cut off a wide strip from the northern end of the Berschauer property, including landscaping, vegetation, and the north wall of Berschauer's four-plex. CP 412, 1715. The State's surprise land-grab caused Berschauer great stress leading to hospitalization. CP 1715. The State never contacted Berschauer about his 50-year possession of the south half of the vacated street until after Berschauer filed a tort claim against the State in 2013. *See* CP 426.

3.3 Berschauer sued to quiet title and to recover damages for the taking and emotional distress.

Berschauer sued to quiet title and to recover damages for the State's taking of his land and for emotional distress. CP 2019-23. The litigation of this matter has been long and complex, involving three major issues: 1) Berschauer's claim of

title by virtue of vacation of the street; 2) The parties' claims of prescriptive rights to the south half of the vacated street—Berschauer seeking title by adverse possession and other theories and the State and PSE seeking prescriptive easements; and 3) Berschauer's claims for damages, including trespass, slander of title, inverse condemnation, and entitlement to emotional distress damages.

3.4 In a series of cross-motions for summary judgment, the trial court denied most of Berschauer's claims but granted him title to the south half of the street by adverse possession.

After the initial investigation, pleadings, and discovery, the parties engaged in a series of five sets of summary judgment motions and cross-motions. The first set of motions addressed Berschauer's claims of title through vacation of the street and through adverse possession. *See, e.g.*, CP 1983. The trial court, Judge Erik Price, determined that Berschauer did not obtain title through vacation and that there were material issues of fact on the adverse possession claim. RP, Feb. 13, 2015, at 34-35, 37; CP 18-21. Berschauer filed a motion for reconsideration, which the trial court denied. CP 22-24.

The second summary judgment motion addressed Berschauer's claims of trespass and entitlement to emotional distress damages. *See* CP 1553, 1619. The Court granted

summary judgment to Berschauer for a nominal trespass, but held that Berschauer was not entitled to recover emotional distress damages. RP, Aug. 7, 2015, at 30-31, 35-37; CP 25-27. Berschauer filed a motion for reconsideration as to emotional distress damages, which the trial court denied. CP 28-29.

The third summary judgment motions addressed adverse possession. CP 1380, 1430. Berschauer's motion also included issues relating to trespass and title through vacation that the court had declined to address in previous motions. CP 1380. The trial court held that Berschauer adversely possessed the entire south half of the vacated street as a "penumbral" area of possession. RP, Nov. 6, 2015, at 47-48, 51-53; CP 30-34.

After the November 6 hearing, Berschauer located old files related to the four-plex, including receipts and invoices showing that the building was constructed in 1965. CP 438, 1262. Berschauer had previously argued that the four-plex was built in the early 1980s. *See, e.g.*, CP 1379, 1385-86. Berschauer immediately sent the documents to the State as a supplemental discovery response. CP 1262-63. The newly discovered documents refreshed Berschauer's memory sufficiently that he was able to correct his testimony of the timeline of events. *See* CP 374, 437-38, 1087-88. Berschauer requested the trial court include the 1965 construction date in its order on summary judgment, but the trial court declined. RP, Nov. 20, 2015, at 4-5.

3.5 After a change of judge, the trial court vacated the adverse possession order and subsequently limited Berschauer's adverse possession to eight feet short of the centerline.

The fourth summary judgment motions addressed the State and PSE's counterclaims for prescriptive easement and Berschauer's claim of inverse condemnation. *See* CP 1184. The trial court, now in the person of Judge Anne Hirsch, dismissed the prescriptive easement counterclaims and Berschauer's inverse condemnation claim. RP, Feb. 12, 2016, at 40-42; CP 35-39. The court also held that Berschauer's new evidence and revised testimony necessitated reopening of discovery and rehearing of the adverse possession issue, framing this decision as a discovery sanction. RP, Feb. 12, 2016, at 27-29; CP 40-54. Berschauer moved for reconsideration, which the court denied. CP 55-56.

After additional discovery, the fifth summary judgment motion once again addressed adverse possession. *See* CP 368-69. The trial court ruled that Berschauer was unable to prove exclusive possession of the entire south half of the street. RP, Aug. 12, 2016, at 26-29. The court quieted title in Berschauer to the southern 17 feet, and quieted title to the northern 8.4 feet in the State. CP 60. The court's order resolved the last remaining claims in the case. *Id.*

3.6 The trial court awarded Berschauer \$10,000 in attorneys' fees under RCW 7.28.083(3) without conducting a lodestar analysis.

Berschauer brought a post-judgment motion for attorneys' fees under RCW 7.28.083(3). CP 172-81. Berschauer requested the trial court conduct a lodestar analysis and segregate the fees to award only those reasonable fees incurred in pursuing prescriptive claims. CP 178. Berschauer requested an award of \$66,691.75 in fees and \$2,474.13 in costs. CP 180. The State opposed the motion for fees on multiple grounds, including an argument that the amount of any fee award should be based on equitable considerations, not on the proposed lodestar fee. CP 284-86.

The trial court found that Berschauer was the substantially prevailing party and that an award of fees would be just and equitable. RP, Sept. 2, 2016, at 26, 28. Without conducting a lodestar analysis on the record, the trial court awarded Berschauer \$10,000 in fees:

Given everything that I can see in the record, including the motion practice, what happened and when, when agreements were made, when concessions were made, I think an award of \$10,000 in attorney fees is appropriate, and I am going to award that to Mr. Berschauer.

RP, Sept. 2, 2016, at 28.

4. Summary of Argument

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; and remand for a trial on emotional distress damages and for recalculation of the attorney fee award under the lodestar method.

Part 5.1, below, will demonstrate that Berschauer's actual possession of the first 17 feet of the vacated street created a "penumbral" area of possession that included the entire south half of the vacated street. In the event this Court disagrees, Part 5.2 will demonstrate that Berschauer's predecessors obtained title to the south half of the vacated street by virtue of the vacation of the street. Either way, this Court should reverse the judgment and quiet title in Berschauer to the entire south half of the street.

Part 5.3 will show that the State's trespass against Berschauer's ownership or possessory interest in the south half of the street was an intentional tort, entitling Berschauer to prove emotional distress as an element of damages. Finally, Part 5.4 will demonstrate that the trial court abused its discretion in calculating the attorney fee award without a lodestar analysis or any other reasoning on the record, resulting in an amount that was unreasonably low.

5. Argument

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

Berschauer argued that his predecessors had adversely possessed the entire south half of the vacated street as a “penumbra” to their actual possession of the first 17 feet for the four-plex and landscaping. CP 368. The State conceded that Berschauer’s predecessors actually possessed the first 17 feet in a manner that met the elements of adverse possession, but contested Berschauer’s claim to the last 8.4 feet to the centerline of the vacated street. CP 650, 2066. The trial court agreed with the State, holding that Berschauer did not exclusively possess the last 8.4 feet and that the last 8.4 feet were not reasonably necessary to support the four-plex. RP, Aug. 12, 2016, at 27-29.

The trial court, Judge Anne Hirsch, misapplied the law on penumbral possession. The entire south half of the vacated street was reasonably necessary to accomplish the objective of the actual possession of the first 17 feet. Even considering the new evidence, the reasoning of Judge Erik Price on this issue was correct. This Court should reverse and grant Berschauer adverse possession of the entire south half of the street.

5.1.1 This issue should be reviewed de novo.

The trial court decided this issue in the final motion for summary judgment. CP 57-61; RP, Aug. 12, 2016, at 26-29. This

court reviews summary judgment orders de novo and engages in the same inquiry as the trial court. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court views the facts in a light favorable to the nonmoving party, but the motion should be granted if the evidence supports only one reasonable conclusion. *Failla*, 181 Wn.2d at 649.

Adverse possession is a mixed question of law and fact: whether the essential facts exist is for the trier of fact, but whether the facts constitute adverse possession is for the court to determine as a matter of law. *Herrin v. O'Hern*, 168 Wn. App. 305, 311, 275 P.3d 1231 (2012). Where the facts are not in dispute, the court can determine adverse possession on summary judgment. *Shelton v. Strickland*, 106 Wn. App. 45, 50, 21 P.3d 1179 (2001).

5.1.2 Adverse possession can include a “penumbra” of land outside of the land actually possessed.

The purpose of the doctrine of adverse possession “is to make legal boundaries conform to boundaries that are long maintained on the ground even if it means depriving an owner of title.” *Shelton*, 106 Wn. App. at 47. Adverse possession permits a party to acquire legal title to another’s land by

possessing the property for at least 10 years in a manner that is “(1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile.” *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Title vests automatically in the adverse possessor the moment all the elements are fulfilled throughout the statutory period, without any action by the court. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 72, 283 P.3d 1082 (2012).

An adverse possessor is not required to present direct evidence of actual use of every square foot of property in order to obtain title. Actual occupation, cultivation or residence of the land is not necessary in order to prove possession. *Campbell v. Reed*, 134 Wn. App. 349, 362, 139 P.3d 419 (2006). “Possession is established if it is of such a character as a true owner would exhibit considering the nature and location of the land in question.” *Shelton*, 106 Wn. App. at 50.

Courts may extrapolate between or beyond objects actually possessed in determining the extent of possessory dominion exercised by the adverse possessor. *See Riley v. Andres*, 107 Wn. App. 391, 396-97, 27 P.3d 618 (2001). The placement of structures on another’s land amounts to possession not only of the land covered by the structure but of a reasonable amount of the surrounding territory.” *Shelton*, 106 Wn. App. at

51. Professor William Stoebuck describes this extended area of possessory dominion as a “penumbra” of adverse possession:

[W]hen the adverse possessor has objects on the ground that constitute actual possession, he may be in possession of a certain penumbra of ground around them if that is “reasonably necessary to carry out his objective.”

William B. Stoebuck & John W. Weaver, 17 Washington Practice: Real Estate: Property Law, § 8.9.

5.1.2.1 *State v. Stockdale* best illustrates “penumbral possession.”

The best illustration of this “penumbral possession” principle is *State v. Stockdale*, 34 Wn.2d 857, 210 P.2d 686 (1949). In *Stockdale*, the State purchased a tract of land, which it believed contained some ten acres more than was actually included in the legal description. *Stockdale*, 34 Wn.2d at 858. In the ten-acre disputed area, the State constructed some park buildings, a walkway, guard rail, and enclosed vista overlooking the Columbia River. *Id.* at 859. The trial court determined that the State had acquired the entire ten acres by adverse possession. *Id.* at 861.

The true owner argued on appeal that the area of adverse possession should have been limited to the areas of actual possession, such as where the buildings and improvements were located. *Stockdale*, 34 Wn.2d at 862. The court rejected that

argument, holding that the State's purpose of possession included a general park plan that necessarily included the entire ten acres. *Id.* at 863. "When adverse possession is taken and maintained for such purposes, such possession is not only of the area actually occupied by buildings and improvements, but such additional area as the possessor intended to and has occupied and which was reasonably needed to carry out his objective." *Id.*

5.1.2.2 The principle of penumbral possession remains good law after *Chaplin v. Sanders*.

The trial court discounted *Stockdale* on the theory that the *Stockdale* court improperly relied on the adverse possessor's subjective intent. *See* RP, Aug. 12, 2016, at 11-14, 25-27. The trial court's concern with *Stockdale* arose from the later case of *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984), in which prior adverse possession cases, including *Stockdale*, were overruled "to the extent that they are inconsistent with this opinion." *Id.* at 861 n.2. However, *Chaplin* did not overrule *Stockdale* on this issue.

Chaplin specifically addressed the "hostility/claim of right" element of adverse possession. *Chaplin*, 100 Wn.2d at 860-61. Prior to *Chaplin*, Washington courts looked to the subjective belief and intent of the adverse claimant in determining hostility. *Id.* at 860. The claimant was alternately

required to take possession in “good faith” and also not recognize any superior interest in the true owner. *Id.* The court held,

The “hostility/claim of right” element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination [of hostility].

Id. at 860-61. The court later confirmed that *Chaplin* and its overruling of prior cases was limited to the issue of hostility. *E.g.*, *Gamboa v. Clark*, 183 Wn.2d 38, 44, 348 P.3d 1214 (2015) (noting that *Chaplin* “abandon[ed] a subjective intent requirement to establish hostility”); *Itt Rayonier v. Bell*, 112 Wn.2d 754, 760-62, 774 P.2d 6 (1989).

Stockdale involved two issues: hostility and the extent of possession. *Stockdale*, 34 Wn.2d at 861-62 (appellant argued first that the State recognized a superior title in the true owner, defeating hostility; and second that possession should be limited to the location of the improvements). *Chaplin* thus overruled *Stockdale* on the hostility issue, but not on the issue of the extent of possession. *Stockdale* is still good law on the issue of penumbral possession. Adverse possession includes “not only ... the area actually occupied by buildings and improvements, but

such additional area as the possessor intended to and has occupied and which was reasonably needed to carry out his objective.” *Stockdale*, 34 Wn.2d at 863.

5.1.2.3 Penumbral possession can include land to which the claimant reasonably believes he has title.

Penumbral possession is also identified by principles similar to possession by color of title. In *Stockdale*, the court placed some significance on the fact that the State believed it had purchased the entire ten-acre disputed area:

When the description of the land was inserted in the deed, the grantor intended to convey, and the grantee intended to acquire, the tract of land in question, but it was not included in the description. ... It was assumed by all parties that the boundary line of the property acquired coincided approximately with the edge of the cliff, but a subsequent survey demonstrated that the legal subdivision line was a short distance from this point. The tract in dispute lies between the true subdivision line and the edge of the cliff.

Stockdale, 34 Wn.2d at 858. These circumstances informed the court’s analysis of the purpose and extent of the adverse possession. *Id.* at 862-63. This is similar to when land is adversely possessed under color of title, where the area of adverse possession is co-extensive with the claimant’s color of title. RCW 7.28.070. While the deed in *Stockdale* did not create true color of title, the circumstances of the sale gave the State

reason to believe that it had purchased the entire 10-acre tract. Similarly, Henry Berschauer's vacation of the street gave him reason to believe that he owned the entire south half of the street. This reasonable belief can inform the Court's analysis of penumbral possession.

5.1.3 Berschauer's actual possession of the first 17 feet created a "penumbral" area of adverse possession extending to the centerline of the vacated street.

The State conceded that Berschauer actually possessed the first 17 feet in a manner that met all of the elements of adverse possession. The question before the trial court was, "What is the extent of that possession?" As demonstrated above, the answer depends on the nature of the land and the nature and purpose of Berschauer's occupation of the land.

Just as the State's purpose of possession in *Stockdale* included a general park plan that necessarily included the entire ten acres, *Stockdale*, 34 Wn.2d at 863, Berschauer's purpose included a development plan that necessarily included the entire south half of the vacated street. Henry Berschauer petitioned for vacation of the street with the specific purpose to add enough property to the Berschauer parcel to enable him to build the four-plex further to the north. CP 1714-15.

The law in effect at the time provided that when any street in an incorporated city is vacated, the property within the

limits of the street “shall belong to the abutting property owners, one-half to each.” CP 364-65. The plain language of the vacation ordinance (CP 1999) and the statute, even if not color of title, at least gave rise to a reasonable belief that Henry Berschauer owned to the centerline. Evidence in the record demonstrates that the State, PSE, and others all assumed or believed that Berschauer had acquired title. *See* CP 352, 357, 358, 1741-43, 1746.

Henry Berschauer built the four-plex to a 20-foot setback from the centerline of the vacated street. CP 441-42, 1456. The four-plex physically encroached onto the vacated street, objectively manifesting on the ground that Berschauer was taking possession of the portion of the street he had vacated. Just as in *Stockdale*, Berschauer’s purpose necessarily included possession of the entire south half of the vacated street, which he reasonably believed he owned and which he treated in the manner of a true owner. Under these facts, Berschauer’s actual use of the first 17 feet of the vacated street created a penumbral area of possession up to the centerline of the vacated street.

5.1.4 Even considering the revised timeline of events, Judge Price’s earlier ruling granting adverse possession to the centerline was still correct.

Judge Erik Price correctly applied the “penumbra” rule when he granted Berschauer adverse possession of the entire

south half of the vacated street. After that ruling, the parties discovered a corrected timeline of events, but even considering the revised timeline, Judge Price’s earlier ruling was still correct.

The material events in the timeline are as follows:

1961	Henry Berschauer vacated East 16th Avenue
1965	Henry Berschauer constructed the four-plex
ca. 1969	PSE filled the gully and constructed a gravel road
1970s to present	Berschauer and PSE share use of the gravel road
1980s to present	First evidence of the State using the gravel road
2010	The State acquires quitclaim deed to the underlying fee

Judge Price correctly noted that the question was not whether adverse possession had been established—the State had already conceded that Berschauer adversely possessed the first 17-feet of the strip. The question before the court was “whether that possession extended to the center line another eight feet.” RP, Nov. 6, 2015, at 51. Judge Price reasoned that the answer to that question would be found in “whether or not the nature of this land was such that the type of use that was made of it that we have evidence for constitutes adverse

possession.” RP, Nov. 6, 2015, at 46. Judge Price explained the legal principles that would apply to that question:

I will cite to Professor Stoebuck from the Washington Practice Real Estate § 8.9. ... “The best general test of actual possession, subscribed to by a number of Washington decisions is this: Considering the nature of the land and the area where it is situated, were the claimant’s acts on the ground the kind of use a true owner would make of such land?” ...

Plaintiff has also argued that the actual land received in an adverse possession claim goes beyond the land actually occupied. There’s some support for that, too. We turn again to Professor Stoebuck. He refers to—I love this word—the “penumbral” area of usage.

To quote him, he says, “When the adverse possessor has objects on the ground that constitute actual possession, he may be in possession ... of a certain penumbra of ground around them if that is ‘reasonably necessary’ to carry out his objective.”

RP, Nov. 6, 2015, at 46-47. Judge Price also cited multiple cases in support of Stoebuck, including *Stockdale*, 34 Wn.2d 857, and *Hunt v. Matthews*, 8 Wn. App. 233, 505 P.2d 819 (1973).

Judge Price applied these legal principles to the facts of the case:

[T]he plaintiff is persuasive that Mr. Henry Berschauer had no real reason to doubt his ownership in 1961 after vacation of the street [even though the Court ruled in this case that his belief had been legally incorrect]. ... There is also no

reason to disbelieve that both the father and son thought they owned to the center line because of that and that they used their land consistently with that belief throughout.

... [T]here is no reason to doubt that that's what they thought as seen by the vacation in '61 and the setback of the construction.

... I find that ... at least by the construction of the 4-plex in the early '80s, there was sufficient notice of an exertion of ownership over half of the vacated street. The scope of that ownership is established by combining the principles of the Stockdale case and the Hunt case for my decision that the additional eight feet constitutes the penumbral extension necessary to "reasonably carry out the objective" of gaining the ground for the 4-plex.

... Whether those setback distances are actually legally 20 feet or something less than that is irrelevant...

... What is relevant under these circumstances is that plaintiff and his father made as much use as a true owner reasonably would have thought they could have if they had owned to the center line.

RP Nov. 6, 2015, at 50-53.

The facts that were material to Judge Price's decision were 1) that Henry Berschauer petitioned for vacation of the street in 1961; and 2) that Henry Berschauer made as much use as a true owner reasonably would if they owned to the center line. The new timeline did not change these facts.

Judge Price found that the actual legal setback distances were immaterial; it made no difference to his analysis whether the actual setback was ten feet or twenty (both numbers had been presented to him).

Judge Price found that the presence of PSE's gravel road was immaterial. If the road was insufficient to defeat Berschauer's adverse possession when it was thought to be present over the whole ten year period (under the old timeline, the gravel road was built before the four-plex), there is no reason to conclude that it could defeat Berschauer's adverse possession when it was actually present for only half of that period.

Judge Price found that the State's occasional use of the road from the early '80s on was immaterial. If the State's use of the road during the ten year period was insufficient to defeat Berschauer's adverse possession, there is no reason to conclude that PSE's occasional use of the road during the new ten year period (1965-75) could defeat Berschauer's adverse possession (and certainly the State's occasional use could not because there is no evidence the State used the road until after the ten year period had already run).

There was no new evidence that would call into question Judge Price's reasoning and conclusion that Berschauer adversely possessed the entire south half of the vacated street. The trial court's subsequent order granting Berschauer adverse

possession of only the first 17 feet and denying penumbral possession to the centerline was error. This Court should reverse and quiet title in Berschauer to the entire south half of the vacated street.

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

In the alternative, Berschauer has title to the south half of the vacated street as an abutting owner. Henry Berschauer believed that after he vacated the street in 1961, he owned to the centerline by operation of law. The trial court disagreed, holding that title reverted to the heirs of the original dedicators. This Court should reverse.

5.2.1 This issue should be reviewed de novo.

The trial court decided this issue in the first cross-motions for partial summary judgment. CP 18-21; RP, Feb 13, 2015, at 34-35, 37. As noted in Part 5.1.1, this court reviews summary judgment orders de novo. *Failla*, 181 Wn.2d at 649.

5.2.2 The default rule is that upon vacation of a street, title belongs to the abutting owners, one half to each.

At the time of the vacation of the street, title to the land within a vacated street was determined under Laws of 1901, ch. 84 §§ 3, 4 (later codified as RCW 35.79.040 and .050):

Sec. 3. That when any street, alley or public way in any incorporated city or town in this state has heretofore been or may hereafter be vacated by the council or legislative body of said city or town, the property within the limits of any such street, alley or public way so vacated **shall belong to the abutting property owners, one-half to each**, unless within six months after the taking effect of this act, any person or corporation, who may feel himself or itself aggrieved by such a division, may commence an action in the proper courts of this state to determine the title to any such street, alley or public way so vacated.

Sec. 4. No vested rights shall be affected by the provisions of this act.

CP 1454 (emphasis added).

The statute and its analogous common law rule are based on a presumption that the dedicator of a street would have intended to convey the fee interest underlying the street along with and as a part of the conveyance of the abutting land.

Christian v. Purdy, 60 Wn. App. 798, 801, 808 P.2d 164 (1991). Although this default rule “is qualified when the circumstances of the particular case demand it,” *Hagen v. Bolcom Mills, Inc.*, 74 Wash. 462, 465, 133 P. 1000 (1913), “[t]he intention of the owner is the very essence of every dedication,” *Kiely v. Graves*, 173 Wn.2d 926, 933, 271 P.3d 226 (2012). The dedicator “will never be presumed” to intend to sever and retain the underlying fee interest. *Christian*, 60 Wn. App. at 802. An intent to retain the fee under the street must clearly appear from the terms of

the deed, interpreted in the light of the surrounding circumstances. *Id.*

This default rule applies equally to public streets created by statutory dedication, by parol dedication, or by prescriptive easement. *See Humphrey v. Krutz*, 77 Wash. 152, 137 P. 806 (1913). It even applies to the fee interest in private streets not dedicated to the public:

We see no reason to treat fee ownership in public and private roads differently. We join the majority of jurisdictions in holding the better rule is that if there is nothing in the deed or surrounding circumstances to show a contrary intention, a conveyance of land bounded by a private road carries title to the center of the road.

McConiga v. Riches, 40 Wn. App. 532, 539, 700 P.2d 331 (1985).

Under this default rule, when the street was vacated, full title to the south half of the street reverted to Berschauer, the owner of the abutting property to the south. In order to overcome the default rule, the State bore the burden of showing that the original dedicator had, in fact, severed and retained the underlying fee interest, as shown by the deeds, interpreted in the light of the surrounding circumstances. But the circumstances lead to only one reasonable conclusion: that the original dedicators did not intend to retain the underlying fee.

5.2.3 The State failed to demonstrate, as an exception to the default rule, that the original dedicator retained the whole fee interest in the street.

The State failed to meet its burden. The dedication contains no language retaining any interest in the street, and the surrounding circumstances demonstrate that the dedicators did not intend to retain any interest in the street. Regardless of whether the streets were private or dedicated to the public at the time the abutting parcels were conveyed, those conveyances carried with them title to the center of the street.

The street was originally dedicated by T.I. and C.A. McKenny in the early years of the City of Olympia. CP 1774-76. Olympia was originally platted in 1850 by Edmund Sylvester, laid out in a grid pattern with uniform blocks, streets, and alleys.³ As more land was developed, the owners followed the grid pattern established by Sylvester's original plat.⁴ McKennys did the same when they divided and sold their land.

McKennys acquired the property in September 1883. They then split off four parcels by metes and bounds, leaving two perfectly formed, straight, intersecting strips between the parcels to serve as public streets that would fit within the

³ City of Olympia, *History of Olympia, Washington*, available at <http://olympiawa.gov/community/about-olympia/history-of-olympia-washington.aspx> (last visited January 25, 2017); CP 1682 (unofficial plat of North Olympia obtained from the State Archives).

⁴ *E.g.*, CP 1955 (Offut Add'n to Olympia).

growing town grid. *See* CP 1791. McKennys conveyed the northwest quadrant in November 1883 (CP 1665-68);⁵ the northeast quadrant to Craig in January 1884 (CP 1775, 1793-94); and the southwest and southeast quadrants to Hinchcliffe in January 1884 (CP 1775, 1799-1800). These parcels would have been landlocked without access through the remaining streets, whether public or private.

McKennys formalized the streets in June 1892 when they filed a plat for Park Street and Cherry Street, dedicating the streets, “to the public for the public use forever as highways.” CP 1776, 1962. The dedication does not contain any language retaining a fee or any reversionary interest. *Id.*; CP 1698-99. There is no evidence that McKennys had anything at all to do with the land after the dedication.

There is no evidence that McKennys intended to retain any interest in the streets. The surrounding circumstances all point to a conclusion that McKennys intended only to create blocks and streets matching the city plat. McKennys may have done things in the “wrong” order—conveying the lots before

⁵ McKennys originally attempted to convey this land in two separate parcels to Craig and McCollum in November 1883, but made an error in the description in the deeds. After Craig and McCollum attempted to convey their parcels to Riley, the error was detected and the parcel re-conveyed by McKennys to Riley with a corrected legal description in March 1885.

dedicating the streets—but they were not alone in this practice. *See* CP 1738, 1748-53 (identifying six other instances in Olympia in the same time period where parcels were conveyed prior to dedication of the remaining streets). That they conveyed the parcels prior to formally dedicating the streets does not suggest that McKennys intended to retain the underlying fee.

There is no evidence that McKennys or any of their heirs or devisees knew about any retained interest. None of the wills make any mention of any interest in the streets. *See* CP 1650-51 (T.I. McKenny will), 1820 (C.A. McKenny will), 1822-25 (Margaret McKenny will). The inventory of the Margaret McKenny estate does not mention any interest in the vacated street. CP 1848-51. If McKennys had intended to retain the underlying fee, surely they would have done something to keep track of their ownership. In the 50 years since the street was vacated, no heir or devisee of the McKennys has stepped forward to claim any interest in the vacated street.

The only reasonable inference from the surrounding circumstances is that McKennys did not intend to retain any interest in the streets. The facts of *Humphrey v. Krutz*, 77 Wash. 152, 137 P. 806 (1913), are strikingly similar to the present case:

The evidence shows that, in 1888, one Turner and wife, who then owned the entire block, fenced all of the west side of the block up to the west side of the alley in controversy, in one tract, and the thirty-foot

strip east of it in another tract, leaving the land in controversy uninclosed. They then sold all the property abutting upon both sides of the strip in controversy by metes and bounds, retaining the legal title to the ten-foot strip. After the death of Turner, and in October, 1905, the widow conveyed the legal title to the ten-foot strip to respondent Harry Krutz, by a quitclaim deed.

Humphrey, 77 Wash. at 154.

Krutz, like the State here, claimed fee ownership of the entire alley. *Id.* The court found that Turners had, in effect, dedicated the alley to the public, either by parole dedication or by prescriptive use by the public. *Id.* at 155. The court then invoked the default rule discussed in Part 5.2.2, above: “The fee of streets and alleys is in the abutting owners, except in rare instances not present in this case.” *Id.* Having conveyed away all of the abutting property, the Turners had no remaining interest in the dedicated alley, even if the dedication (by prescriptive use) did not ripen until many years after the conveyances. *See Id.* The court emphasized that the abutting owners would prevail over Krutz in a suit to quiet title to the underlying fee. *Id.* at 157. The interest of the abutting owners in the underlying fee was superior to Krutz’s interest under the quitclaim deed.

Similarly, the interest of Berschauer, as an abutting owner, in the underlying fee to the south half of the vacated street is superior to the State’s interest under its quitclaim deed

obtained from alleged heirs of the McKennys. Like Turners, the McKennys conveyed away the abutting parcels by metes and bounds. Like Turners, McKennys retained legal title to the streets (at least on paper). But, also like Turners, McKennys dedicated the streets to the public, whether by parole dedication, prescriptive use, or the 1892 plat. Even if the dedication was “late,” the interest of abutting owners should be superior to the interest of a remote heir to a dedicator who did not intend to retain any interest at all.

McConiga, 40 Wn. App. 532, requires the same result. At the time McKennys conveyed the parcels in 1884, Park and Cherry Streets would have been private roads, having not yet been formally dedicated. The same default rule applies to both public and private roads. *Id.* at 539. Because there is nothing in the deeds or the surrounding circumstances to show an intention to retain the underlying fee, McKennys’ conveyance of the abutting parcels carried with it title to the center of the road. When the road was vacated in 1961, Berschauer regained full title to the south half of the street.

As noted in *McConiga*,

The seller of land can ordinarily have no object in retaining a narrow strip along a line of his grant, particularly a strip subject to the rights of others. The strip is of no value when separated from

adjoining property. The grantor's use of and concern for it ends with his conveyance.

Id. at 539. There is no evidence of any value or use that McKennys or their heirs could have derived from retaining the underlying fee interest.

In *Hagen v. Bolcom Mills, Inc.*, 74 Wash. 462, 133 P. 1000 (1913), the court expressed the policy reasons behind the default rule granting the fee to the abutting owner:

The owner of the land platted usually becomes entirely disassociated with the title to the land sold and has neither a proximate interest in nor a practical use for the qualified fee in the street. The interest of the vendee therein is immediate. It has direct and substantial value to him. Indeed, ... the lots would be "comparatively useless" without the implication of conveyance to the middle of the street. ... It is much more reasonable to vest that fee in him than in the usually remote party who originally platted the land. To allow the vendor to retain the fee would be a serious embarrassment to alienation and improvement of property which it consists with public policy to favor.

Hagen, 74 Wash. at 468 (citations omitted). This Court should favor the title of the abutting owners over any remote interest the State may have acquired from the McKenny heirs over one hundred years after McKennys entirely dissociated themselves from the land in 1892.

The State failed to demonstrate that the McKennys intended to retain the underlying fee. The surrounding

circumstances point to one reasonable conclusion: that McKennys intended to entirely dissociate themselves from the land. The default rule should apply. McKennys' conveyances of the parcels carried with them title to the center of the street. Upon vacation of the street in 1961, Berschauer regained full title to the south half of the street. This Court should reverse the trial court's summary judgment orders and grant summary judgment in favor of Berschauer, quieting title in him to the south half of the vacated street.

5.3 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.

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. When Berschauer recognized that the survey stakes represented the

State claiming to own his land, he was emotionally distraught, leading to hospitalization.

In this litigation, Berschauer alternatively characterized the State's actions as a trespass, slander of title, or inverse condemnation. *See* CP 2022 (lines 18-20 and 28). However, the traditional elements of these torts did not fit well to the State's misconduct. Berschauer's slander of title claim was dismissed because he had not been damaged in the form of losing an opportunity to sell the land. *See* CP 1764-65; RP, Feb. 13, 2015, at 37-38. His inverse condemnation claim was dismissed because there was not a lost sale or physical damage to the property. RP, Feb. 12, 2016, at 40. And although the trial court granted summary judgment in favor of Berschauer on the trespass claim, the court held that it was a "technical trespass" for which only nominal damages—and no emotional distress damages—could be recovered. RP, Aug. 7, 2015, at 30-31, 35-37; CP 25-27.

Washington courts liberally allow plaintiffs to recover emotional distress damages as an element of damage for an intentional tort. *Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 483, 805 P.2d 800 (1991); *Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 916, 726 P.2d 434 (1986). The State's trespass and taking of Berschauer's portion of the vacated street was an intentional tort. This Court should reverse the trial court's dismissal of

Berschauer's emotional distress claims and remand for a trial on damages.

5.3.1 This issue should be reviewed de novo.

The trial court addressed this issue in the second and third cross-motions for partial summary judgment. CP 25-34; RP, Aug. 7, 2015, at 31-36; RP, Nov. 6, 2015, at 39-40. As noted in Part 5.1.1, this court reviews summary judgment orders de novo. *Failla*, 181 Wn.2d at 649.

5.3.2 The intent required to support emotional distress as an element of damages for an intentional tort is acting with knowledge that consequences are substantially certain to result.

The trial court dismissed Berschauer's emotional distress claim on the grounds that trespass is not a typical "intentional tort" and that the State's trespass here did not have the required level of "willfulness" to support emotional distress damages. RP, Aug. 7, 2015, at 36.

However, under *Cagle* and *Nord*, a plaintiff is entitled to recover emotional distress damages merely upon "proof of 'an intentional tort.'" *Cagle*, 106 Wn.2d at 916. The culpability required to establish an intentional tort, and therefore qualify for emotional distress damages, is not "willfulness," malice, hostility, or an intent to cause harm.

The required culpability is described in *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985). The *Bradley* court quoted favorably from the Restatement (Second) of Torts § 8A and its comments:

The word “intent” is used ... to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it. ... Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

Bradley, 104 Wn.2d at 682. The court also quoted Prosser’s treatise on Torts:

The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction.

Bradley, 104 Wn.2d at 683. Finally, the court concluded that these statements are consistent with the law in Washington: The intent required for an intentional tort is the intent to commit some “volitional act” with knowledge that certain consequences are substantially certain to result. *Id.* The court held that the defendant smelting company committed intentional trespass because it “acted on its own volition and

had to appreciate with substantial certainty that the law of gravity would visit the effluence upon someone, somewhere.” *Id.*

The defendant in *Bradley* was akin to the hypothetical gunman firing into a crowd, described by Prosser. *See Id.* The gunman may not intend to hit any particular person or any person at all. But because the gunman had to know that the bullet was substantially certain to hit someone, the gunman is treated by the law as if they intended to hit the person who in fact was hit.

The extensive analysis in *Bradley* demonstrates that the intent required is not a hostile intent or a desire to do any harm; rather, it is the intent to commit some “volitional act” with knowledge that consequences are substantially certain to result. *Id.* at 683. The resulting, compensable emotional distress does not need to be intended or even reasonably foreseeable by the defendant. *Cagle*, 106 Wn.2d at 920. Emotional distress is compensable even when the intentional tort does not cause an actual, physical injury. *Nordgren v. Lawrence*, 74 Wash. 305, 308, 133 P. 436 (1913) (“In this state mental suffering may be taken into consideration in assessing damages, where the same is a result of a wrongful act, even though there be no actual physical injury.”)

5.3.3 The State acted intentionally under this standard, having knowledge that its actions were substantially certain to violate Berschauer’s rights of ownership or possession.

Here, the State’s actions met the standard of an intentional tort. The State knew that Berschauer owned, or at least possessed, the southern half of the Vacated Street. *See* CP 1687. The State even admitted that Berschauer adversely possessed at the very least a portion of that land. *See, e.g.*, CP 2013. Even though the State asserted a claim of title, the State also knew that Berschauer had a claim of title and had present possession. The State took its volitional acts with knowledge that those acts were substantially certain to violate Berschauer’s rights of possession or ownership in the south half of the street. Before the State acted, its Property and Acquisition Specialist for the project, Stefanie Fuller, described the plan to take the property without negotiating with Berschauer as “ethically and morally wrong.” CP 1687.

The State knew that its volitional acts were substantially certain to violate Berschauer’s rights, yet it acted anyway. The State’s trespass was, therefore, an intentional tort with the full intent required to support emotional distress as an element of damages.

It is no excuse that the State may have had an innocent motive (or “standard business practice”). Malice is not required.

All that is required is the State's knowledge of the likely consequences of its actions. *See Garratt v. Dailey*, 46 Wn.2d 197, 202-04, 279 P.2d 1091 (1955) (holding a child would be liable for intentional battery if he knew with substantial certainty that the plaintiff was likely to attempt to sit down where the chair had been before the child moved it, regardless of the child's actual motive).

It is no excuse that the State believed that it was the true owner of Berschauer's south half of the street. Where a party knows of a bona fide boundary dispute and enters upon the land anyway, the act is not negligent or reckless, it is intentional. *See, e.g., Sparks v. Douglas County*, 39 Wn. App. 714, 719-20, 695 P.2d 588 (1985). In such situations, emotional distress damages are properly awarded. *E.g., Pendergrast v. Matichuk*, 186 Wn.2d 556, 561-63, 379 P.3d 96 (2016) (plaintiff awarded \$75,000 for emotional distress for intentional trespass where defendant removed a fence and took possession of a disputed strip with knowledge of plaintiff's present possession and claim of ownership); *Nordgren*, 74 Wash. at 308 (plaintiff awarded emotional distress for intentional trespass where landlord trespassed upon tenant's possession, even though landlord argued the lease had terminated).

An intentional tort does not require an evil state of mind, or a purpose to violate rights of another. Rather it simply

requires a volitional act that is substantially certain to lead to a result. Here, the State's volitional acts were substantially certain to result in the State entering and occupying land in violation of Berschauer's present possession or ownership. The trespass was an intentional tort. Emotional distress is an element of damage for that intentional tort. This Court should reverse the trial court's dismissal of Berschauer's emotional distress claims and remand for trial on damages, including emotional distress damages, resulting from the State's trespass.

5.4 The trial court abused its discretion in calculating its award of attorneys' fees to Berschauer under RCW 7.28.083(3).

5.4.1 Attorney fee awards are reviewed for abuse of discretion.

Appellate courts review a trial court's award of attorney fees for an abuse of discretion. *White v. Clark Cty.*, 188 Wn. App. 622, 639, 354 P.3d 38 (2015). A trial court abuses its discretion regarding the amount of attorney fees when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Id.*

For any attorney fees award, the trial court must articulate the grounds for the award, making a record sufficient to permit a reviewing court to determine why the trial court awarded the amount in question. *White*, 188 Wn. App.

at 639; *see Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). If the trial court record is insufficient, the preferred remedy is to remand to the trial court for entry of proper findings and conclusions. *Id.*

5.4.2 The trial court abused its discretion by failing to conduct a lodestar analysis.

The starting point for any attorney fee award is the lodestar analysis. *Mahler*, 135 Wn.2d at 433. “The lodestar methodology affords trial courts a clear and simple formula for deciding the reasonableness of attorney fees in civil cases and gives appellate courts a clear record upon which to decide if a fee decision was appropriately made.” *Id.* Courts and litigants must “rigorously adhere” to the lodestar methodology. *Id.* at 434.

Attorney’s fees are awardable only when provided by contract, statute, or a recognized ground in equity. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 783, 275 P.3d 339 (2012). Although a fee award based on a recognized ground in equity does not absolutely require a lodestar analysis, the lodestar method **is** the proper method of calculating the amount of reasonable attorney’s fees to award to a prevailing party under a contract or statute. *In re Guardianship of Decker, Costco Wholesale Corp.*, 128 Wn. App. 760, 773, 115 P.3d 349 (2005) (“In the absence of a predetermined method set forth in the contract itself, the proper method for the calculation of a

reasonable fee award is the lodestar method.”); *Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.3d 995 (2009) (wage rebate statute, RCW 49.52.070); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 596-97, 675 P.2d 193 (1983) (consumer protection act, RCW 19.86.090); *Wash. State Comm’n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 219, 293 P.3d 413 (2013) (law against discrimination, RCW 49.60.030); *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 54 Wn. App. 180, 187, 773 P.2d 114 (1989) (public records act, RCW 42.56.550).

Berschauer requested a lodestar analysis and provided the information necessary for the trial court to conduct the analysis. CP 115-20, 141-71, 178. Despite finding that Berschauer was the substantially prevailing party and that an award of fees would be just and equitable under the statute, the trial court did not conduct a lodestar analysis. RP, Sept. 2, 2016, at 26, 28. Berschauer’s requested lodestar fee was \$66,691.75, but the trial court awarded only \$10,000 as the “appropriate” amount. The trial court’s failure to conduct a lodestar analysis to determine the reasonable fees under the statute was an abuse of discretion. This Court should reverse.

5.4.3 Alternately, the trial court abused its discretion in concluding, without analysis on the record, that an award of only \$10,000 was equitable and just.

Even if a lodestar analysis is not required for an attorney fee award under RCW 7.28.083(3), the trial court abused its discretion in concluding an award of only \$10,000 was “appropriate.” The trial court provided no analysis on the record that would provide any insight into why the trial court chose that particular amount. This alone is grounds for remand.

White, 188 Wn. App. at 639.

Additionally, in view of the State’s inequitable conduct that gave rise to this litigation, the trial court’s decision to award less than one-sixth of the proposed lodestar fee was manifestly unreasonable. In addition to the statutory grounds, bad faith prelitigation misconduct is an equitable ground for an attorney fee award. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 784, 275 P.3d 339 (2012). “Prelitigation misconduct refers to obdurate or obstinate conduct that necessitates legal action to enforce a clearly valid claim or right.” *Id.*

The State should be held responsible for its prelitigation misconduct. Berschauer would not have had to incur the costs and stresses of litigation but for the State’s unilateral and underhanded taking of his land. The State came to the court with unclean hands; Berschauer was an innocent victim.

The State's surprise land grab caused Berschauer extreme emotional distress and left him no option but this litigation in order to vindicate his ownership. The State claimed to have had no intention of taking land that Berschauer occupied, but the State's actions proved this 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 BLA 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. This litigation was the only way for Berschauer to clear his title to property that he and his predecessors had possessed for 50 years.

After the litigation commenced, the State forced Berschauer to continue to litigate over prescriptive claims for over two years. Berschauer ultimately prevailed, but only after incurring \$66,691.75 in fees related to the prescriptive claims. Where the litigation was necessitated by the State's bad faith pre-litigation conduct, it is only equitable that Berschauer

should be made whole for those reasonable fees he incurred. The trial court's award of only \$10,000 was manifestly unreasonable. This Court should reverse and award Berschauer his reasonable fees.

5.5 Berschauer requests attorney fees on appeal.

If this Court grants Berschauer adverse possession of the south half of the vacated street, Berschauer will be the prevailing party on appeal under RCW 7.28.083(3). The trial court already determined that an award of attorney's fees in Berschauer's favor is equitable and just under the statute. If Berschauer prevails, the Court should award him attorney's fees on appeal.

6. 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; and remand for a trial on emotional distress damages and for recalculation of the attorney fee award under the lodestar method.

Respectfully submitted this 13th day of February, 2017.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevinhochhalter@cushmanlaw.com
924 Capitol Way S.
Olympia, WA 98501

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on February 13, 2017, I caused the original of the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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Courtney L. Seim Summit Law Group courtneys@summitlaw.com laurenc@summitlaw.com karenl@summitlaw.com	<input type="checkbox"/> U. S. Mail <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail

DATED this 13th day of February, 2017.

/s/ Rhonda Davidson
 Rhonda Davidson, Legal Assistant
rdavidson@cushmanlaw.com
 924 Capitol Way S.
 Olympia, WA 98501
 360-534-9183

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