

NO. ~~49141X~~ 355021-III

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STEVE L. BERSCHAUER,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF GENERAL
ADMINISTRATION and PSE SOUND ENERGY, INC., a Washington
State Public Utilities Corporation; FYI PROPERTIES, a Washington
nonprofit corporation; and THE BANK OF NEW YORK MELLON
TRUST COMPANY, NATIONAL ASSOCIATION, as Trustee Under
Indenture of Trust Dated as of August 1, 2009,

Respondents.

BRIEF OF RESPONDENT, STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

BRIAN V. FALLER
Assistant Attorney General
WSBA No. 18508
P.O. Box 40113
7141 Cleanwater Drive SW
Olympia, WA 98504-0113
(360) 753-0785
OID No. 91028

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I. INTRODUCTION

This case concerns ownership of a narrow strip of land (8.4 x 383 feet) that is part of an unimproved street segment that the City of Olympia (City) vacated in 1961. The disputed strip is north of Steve L. Berschauer's property and immediately south of the centerline of the vacated street. Between the disputed 8.4-foot strip and Berschauer's north property line is a 17 x 383-foot strip of the vacated street that the trial court held Berschauer adversely possessed after the State of Washington (State) conceded to that claim. However, the trial court also held that Berschauer's adverse possession did not include the next 8.4 feet to the street centerline. This Court should affirm because the 8.4-foot strip is not necessary for access to or operation of Berschauer's fourplex on his adjacent property, and Berschauer did not establish actual, exclusive, hostile, or uninterrupted use. In fact, the only area of the disputed strip that has been used is part of a gravel area that Puget Sound Energy (PSE)¹ created and regularly used, the public regularly used, and Berschauer used only occasionally for parking.

Nor could Berschauer show that he held title by abutting ownership to the entire south half of the vacated street because when the parcel from which Berschauer derives his title was created, no street in

¹ PSE refers to Puget Sound Energy and its predecessor Puget Sound Power & Light Company.

that location had been dedicated, platted, or constructed. Thus, case law supports the trial court's conclusion that his title did not include fee to the street and vacation of the public street easement could not "revert" any title back to the property.

Similarly, the trial court correctly dismissed Berschauer's claim for emotional distress damages allegedly suffered when a surveyor for the State committed a technical trespass by placing a stake on his property line. No evidence exists that the State acted willfully to damage or interfere with Berschauer's property, as required to support trespass damages for emotional distress. And in any event, Berschauer failed to satisfy the legal cause element of proximate cause because, among other things, he testified that his distress did not begin when he saw the survey stake, but six months later when he learned of the State's quit claim deed.

Finally, the trial court's ruling limiting Berschauer's attorney fees to \$10,000 should be upheld. The issue on which Berschauer prevailed—that he possessed the 17-foot strip of land abutting his property—was ultimately conceded by the State in the litigation, and Berschauer's counsel devoted only about two pages in pleadings and no oral argument to this issue.

II. STATEMENT OF THE ISSUES

1. Did the trial court err in ruling that under Washington case

law an abutting owner, like Berschauer, does not impliedly hold title to the centerline of a vacated street, if at the time the parcel from which the owner derives title was created, no street in that location had been dedicated or platted?

2. Did the trial court err in finding that Berschauer failed to show actual, exclusive, and hostile possession to the 8.4 x 383-foot strip that lies just south of the centerline of the vacated street when: (i) Berschauer admits none of the strip was reasonably necessary to operate or access his fourplex; (ii) the only portion of the strip Berschauer claims to have used (8.4 x 113 feet) is an undifferentiated part of a larger (34 x 113 feet) gravel area constructed in 1970 by PSE; (iii) since 1970 this gravel area has been frequently used by PSE, the public, and only occasionally used by Berschauer or his tenants; and (iv) Berschauer has presented no evidence of any use of the remainder of the strip?

3. Did the trial court err in ruling that emotional distress damages are not available for the technical trespass of placing a survey stake at the property corner of the vacated street that crossed the property line by approximately one-half inch, when no evidence exists that the State did so willfully to damage or interfere with Berschauer's property? Alternatively, may this ruling be affirmed because the legal cause element of proximate cause is not met?

4. Did the trial court abuse its discretion in concluding that an award of \$10,000 in attorneys' fees to Berschauer under RCW 7.28.083 is equitable and just when Berschauer's attorneys expended only a very small portion of their requested \$66,691.75 of fees on the narrow claim on which he prevailed?

III. STATEMENT OF THE CASE

To facilitate the Court's understanding of the facts presented below, we begin with a description of the property area which is illustrated on Appendix 1 (App. 1) (CP at 462) (all color appendices were originally filed in color with the trial court). The vacated 16th Avenue SE (formerly Park Street) runs east-west and is 50.8 feet wide and for simplicity, the

parties have assumed the vacated portion is approximately 383 feet long starting from Cherry Street going to the railroad right of way.² Appendix 1 shows: (i) the PSE parcel used for a substation, adjoining the State's parcel (Parcel 4) on the north side of the vacated street and Berschauer's parcel on the south side; (ii) the 34 x 113-foot gravel area that PSE constructed in 1970 marked with scatter dots; (iii) the disputed 8.4 x 383-foot strip between the blue line (the centerline) and the red line; (iv) the 17 x 383-foot strip that the State conceded to Berschauer between the red and yellow lines.

A. Vacation of 16th Avenue SE, Construction of the Fourplex, and Creation and Use of the Gravel Area

In 1961, based upon the petition of Appellant's father, Henry Berschauer, the City vacated the unimproved 16th Avenue SE right of way north of the Berschauer parcel. CP at 1999. In 1965, Appellant's father obtained a building permit and built a fourplex in the northwest area of his property fronting on Cherry Street. CP at 477. A corner of the fourplex overlaps the vacated street by 2 feet and a concrete wall extends several feet farther. CP at 1907, 1913-14; App. 1. At the time the fourplex

² The 1961 vacation ordinance described the length as 383 feet "more or less" from Cherry Street to the "Freeway South-bound access road and/or Northern Pacific R/W. . . ." CP at 1999. Since the railroad right of way diagonals south to north, the vacated road is a trapezoid and the length of the vacated street increases from south to north. An October 2014 survey the State had performed measured the south side of the vacated street bordering Berschauer's property to be about 276 feet based on recent maps from the City that located the railroad right of way. App. 1.

was built, the west end of the vacated street adjacent to the fourplex was an “unusable” gully (CP at 1294) in which “[y]ou couldn’t drive in there at all” CP at 399 (Dep. 30), 1089.³

In 1968 and 1969, the State purchased two parcels to the north of the vacated street. In 1969, to enable PSE to construct a substation for the State capitol campus, the State had fill placed in the gully on the vacated street and the adjacent hillside. CP at 196, 187-193, 629-31. In 1970, the State entered into an agreement with PSE and transferred one of the parcels to PSE in 1971. CP at 247-51, 345-46.

In 1969 or 1970, PSE apparently added gravel and improved the western end of the vacated street that the State had filled,⁴ creating an approximate 34 x 113-foot gravel area which extended approximately 8.4 feet south of the centerline (i.e., toward the Berschauer property) of the vacated street. App. 1. Berschauer testified that after the gravel area was constructed, PSE regularly used the entire gravel area for parking. CP at 448-49 (Dep. 59-61), 402 (Dep. 41-42). He also testified that from that time forward, “[t]here were [other-non PSE] people in there all the time parking there, doing this, doing that. . . . [i]t’s wide open.” CP at 449

³ Berschauer initially testified that the gravel area was built ca. 1980, but subsequently changed that date to 1969-1970. Appellant Br. at 6, 11, 24.

⁴ Berschauer indicates that the gravel road was constructed “ca. 1969” and from 1970 forward was in regular use. Appellant Br. at 24. This is consistent with the evidence that the State had the area filled for a PSE substation in 1969 (CP at 187-96) and entered an agreement with PSE relative to constructing the substation in 1970. CP at 247-51.

(Dep. 60). He also testified that the fourplex provided parking for tenants in carports and aprons where he and his tenants parked “the vast majority of time,” and he cannot recall he or his father ever informing tenants that they could park in the gravel area. CP at 442 (Dep. 34, 36), CP at 444 (Dep. 41, 43).

Over time, the Berschauers placed beauty bark, a drain pipe, and planted trees on the vacated street up to the gravel area, effectively creating a 17-foot strip for 113 feet along the gravel area just north of his property. App. 1. After the gravel ends at about 113 feet from Cherry Street, the area is relatively flat with natural vegetation until 132 feet, which is the top bank of a steep hill descending to the east. *Id.*, CP at 1744. Berschauer testified that he made no use of the east portion of the 17-foot strip (17 x 251 feet) adjacent to his property, starting from the top of the bank (132 feet from Cherry Street) and extending east 251 feet down to the railroad right of way. CP at 394 (Dep. 12), 412 (area labelled East Strip). He also has presented no specific evidence of his use of the east 8.4 x 251-foot portion of the 8.4 x 393-foot strip immediately north of the 17-foot strip.

B. Pre-litigation Events

In November 2009, as part of a lot reconfiguration resulting from the construction of a state office building, the City required the State to

demonstrate it had access to a new parcel that the State sought to create north of the vacated street. CP at 1916-18. Although State employees had assumed that the State could provide such access through the north half of the vacated street, the State's property consultant advised that the State most likely lacked access through the vacated street because neither the State nor Berschauer owned the vacated street as abutting owners. *Id.* CP at 1904-07. After receiving review of an assistant attorney general confirming the consultant's advice, the State identified and located the persons believed to hold the interest in the vacated street (the heirs of the McKennys) and acquired in 2010 a quit claim deed from them for the vacated street. *Id.*

In November 2011, the State had a surveyor mark the corners on the ground of the property described in the State's quit claim deed for the purpose of confirming that the legal description was consistent with the parcel envisioned. CP at 1907. The surveyor placed a rebar stake with a little orange cap flush to the ground at the corner of Berschauer's property and the south east corner of the vacated street. CP at 396 (Dep. 19), 401 (Dep. 37-39), 1636, Suppl. CP at 2129.⁵ If accurately placed, the capped stake overlapped Berschauer's property line by approximately one-half inch, and that small overlap is the basis of the technical trespass from

⁵ Suppl. CP at 2129 shows the location of the stake with the orange cap that Berschauer marked in his deposition. *See* CP at 401 (Dep. 37-39).

which Berschauer seeks emotional distress damages. CP at 27; RP 37, Aug. 7, 2015.

The State used the quit claim deed to the vacated street to provide a 28-foot access easement for the new parcel that the City approved through a boundary line adjustment. CP at 842. At the time this occurred, the State did not contact Berschauer. However, the State has never sought to displace Berschauer from any land on the vacated street he has occupied or interfere with his use of it.⁶ CP at 1918. Once the State became aware of Berschauer's concerns through a tort claim he filed, the State sought to resolve the property issue. Prior to litigation in October 2013, the State wrote Berschauer's attorney, indicating a willingness to enter settlement discussions and proposing some settlement concepts, which included conceding to Berschauer's ownership of the beauty bark strip next to his lot where his fourplex overlapped the vacated street. CP at 730-31, 745-47. Although Berschauer's counsel indicated that the parties may be able to reach an agreement on "land configuration," he was not willing to engage in settlement talks unless the State agreed to pay thousands of dollars as damages for trespass. *Id.*, CP at 292-93.

⁶ Berschauer's claims asserting interference through slander of title and inverse condemnation were dismissed on summary judgment and he has not appealed those dismissals. CP at 20, 38.

IV. ARGUMENT

A. The Trial Court Correctly Ruled That Berschauer Does Not Have Title by Abutting Ownership Because Berschauer's Title Derives From a Conveyance That Occurred When No Abutting Street Had Been Dedicated or Platted

The trial court ruled that Berschauer did not have title to the vacated street by abutting ownership because at the time that the parcel from which he draws title was created in 1884, no abutting street had been dedicated, platted, or referenced in the deed. CP at 20; RP 34-37, Feb. 13, 2015. This ruling was correct and should be affirmed.

The title to Berschauer's parcel traces back to Hinchcliff, who acquired the property in 1884 from the McKennys by a metes and bounds deed⁷ that did not reference any street. CP at 1775, 1797-1800. The McKennys' parcel included the land that would later become Park Street as well as the lands to the north and south of the future street. CP at 1774-75, 1790-1791. As far as the parties are aware, no recorded plat existed in 1884 of a street abutting the Hinchcliff parcel, and until 1970, the area of the later dedicated street was an unusable gully in which, “[y]ou couldn't drive in there at all” CP at 399 (Dep. 30), 1089, 1294; Appellant Br. at 24.

⁷ Metes and bounds deeds describe property by measurements of each parcel boundary in relation to certain monuments, whereas deeds based on recorded plats describe the parcel by the lot numbers on the recorded map.

In 1892, eight years after the McKennys sold the parcel to Hinchcliff, the McKennys dedicated a strip of land north of the Hinchcliff parcel to the City, which the City designated as Park Street. CP at 1776, 1795-96. The dedication recited that the McKennys were “owners in fee simple” of the dedicated land, indicating that the 1884 conveyance to Hinchcliff had not conveyed the fee to the dedicated strip. CP at 1776.

Vested rights to the fee of a street are created in an abutting owner by a conveyance that impliedly or expressly confers fee title. Vacation of a street does not change or confer fee title, but merely removes a public use easement. *Holmquist v. King Cty.*, 182 Wn. App. 200, 211-12, 328 P.3d 1000 (2014). *Rowe v. James*, 71 Wash. 267, 271, 128 P. 539 (1912) (abutter’s ownership arises “as an incident to their acquisition of” the fee in the abutting property).

Washington statutes recognize a presumption that abutting landowners impliedly obtain ownership to the center of streets (RCW 35.79.040⁸), *except* where vested rights exist in other parties such as the dedicator of the street (RCW 35.79.050⁹). In particular, Washington courts recognize vested rights to the fee exist in the grantor if at the time the grantor conveyed the abutting lands, an abutting street was not

⁸ “If any street or alley in any city or town is vacated by the city or town council, the property within the limits so vacated shall belong to the abutting property owners, one-half to each.”

⁹ “No vested rights shall be affected by the provisions of this chapter.”

dedicated or platted. In *London v. City of Seattle*, 93 Wn.2d 657, 611 P.2d 781 (1980), London, as an abutting owner, asserted she possessed an implied fee to the center of East James Street in Seattle, after the street was vacated. The court rejected that claim stating:

Here, London never possessed the underlying fee to any part of East James Street. *She acquired her property before this portion of East James Street was dedicated by PMC in 1963.* RCW 35.79.050 mandates that vested rights are not to be affected upon street vacation. Here, the evidence is that the fee to the entire width of East James Street rested in PMC.

Id. at 666-67 (emphasis added) (citation omitted). Here, similarly, Hinchcliff acquired what is now the Berschauer parcel before Park Street/16th Avenue SE was dedicated, and thus, Berschauer has no implied fee.

In *Hagen v. Bolcom Mills*, 74 Wash. 462, 473-74, 133 P. 1000 (1913), *reh'g denied*, 134 P. 1051 (1913), the court concluded that when the plaintiff contracted to buy the property, he could not impliedly own out to the middle of the street because there was no street as it had been vacated. *Hagen* also specifically speaks to and rejects any distinction between a vacated street and one that had not been platted:

The case would be the same as if no street had ever existed, and, instead of being designated as 'street,' the tract had been marked 'sand hole,' or 'mound,' or any other name, or had had no name. The land which had been a street assumed exactly the same legal status as any other land

which had not been impressed with a public easement. There is neither mystery nor magic in the word 'street.' The easement of use is the significant fact.

Id. at 469. (emphasis added) (quoting *Kimball v. City of Kenosha*, 4 Wis. 321, 331 (1855)). Here, the tract that would later become the street “had no name” and was not impressed with a public easement when the 1884 Hinchcliff conveyance occurred.¹⁰

The court reaffirmed *Hagen* nineteen years later in *Raleigh-Hayward Co. v. Hull*, 167 Wash. 39, 8 P.2d 988 (1932), holding that the sale of platted lots did not convey fee to the original adjacent street because the vacated street no longer existed as a platted street at the time of the sales. The court repeated the “no name” quote from above. *Id.* at 45.

As noted above, a dedicated or platted street did not exist when Hinchcliff, the person from whom Berschauer draws title, acquired the parcel from the McKennys in 1884, and thus under *London*, *Hagen*, and *Raleigh*, Berschauer acquired no fee title to the street. *See also Rowe*, 71 Wash. at 271 (no fee in abutter who was not able to trace its title back to a conveyance in which the owner of the area of the street sold the

¹⁰ Berschauer quotes from *Hagen* regarding the rationale for the presumption of abutting ownership of a street, but neglects to state that the court did not find rationale applicable when a street in fact did not exist at the time of conveyance. *Hagen*, 74 Wash. at 467.

abutting parcel at a time that a dedicated street existed); *Roeder Co. v. Burlington N., Inc.*, 105 Wn.2d 567, 575-77, 716 P.2d 855 (1986) (presumption of implied ownership to the center of right of way did not apply to metes and bound deed); and *Holmquist*, 182 Wn. App. at 211-12 (court recognized holding of *Hagen* and *Raleigh* that no implied ownership exists if the street was not platted or dedicated at the time of conveyance).

Berschauer cites to *Christian v. Purdy*, 60 Wn. App. 798, 801-02, 808 P.2d 164 (1991), for the proposition that unless a deed of conveyance has an express exclusion of title to the abutting street, such title is presumed to be conveyed. However, *Christian* is distinguishable because it did not involve the exception that applies when a street dedication or plat does not exist at the time of a conveyance. One could hardly include in a deed the exclusion of an abutting street when the street was not yet in existence. And the Christians' predecessor had in fact acquired the abutting lot from the owner of the right of way after the street had been dedicated. *Id.* at 802.

Berschauer also argues that no evidence exists that the McKennys intended to retain any interest in the street or that they or their heirs knew of a retained interest. Appellant Br. at 32-33. While the fact that the dedication states that the McKennys are owners in fee of the right of way

is a clear indication of their intent to retain the fee, such a showing of intent is not relevant under the exception. *See Raleigh*, 167 Wash. at 44 (“it is not necessary to determine what the intention [of the grantor] may have been, for the rule does not apply that purchasers acquire the fee to a platted street when, as a matter of fact, at the time of the purchase there was no platted street.”).¹¹

Berschauer relies on *McConiga v. Riches*, 40 Wn. App. 532, 539, 700 P.2d 331 (1985) for the proposition that abutting owners can obtain fee to a private road that had not yet been dedicated. Appellant Br. at 30. However, *McConiga* is distinguishable because the road there and the lots surrounding it had been platted and recorded before the lots were sold, and sales were by lot numbers shown on the plat and not by metes and bounds. *Id.* at 534-35. By contrast, the McKennys had not recorded a plat of lots and a road when they sold to Hinchcliff, and the deed to Hinchcliff was by metes and bounds and did not refer to any plat.

Finally, Berschauer argues that *Humphrey v. Krutz*, 77 Wash. 152, 137 P. 806 (1913) supports finding abutting ownership here. However, in *Humphrey*, the court found that a road existed at the time of conveyance by common law dedication or prescription. There, the original grantors

¹¹ Berschauer points to six other dedication deeds in Thurston County (Appellant Br. at 33) but provides no deeds of any of the parcels sold before the dedications, and no evidence that plats were not recorded prior to the dedication. Regardless, the possibility that other abutting owners may not hold fee to the street does not change the existing law.

had in fact created an alley and allowed it to be put into public use in 1888 *prior to* selling the lots to the abutting owners. *Id.* at 154. The court stated that the alley could be considered a public street either by common law dedication or a prescriptive easement created by public use over a period of 20 years. *Id.*

Here, the dedication occurred eight years *after* the parcel was conveyed. While Berschauer's brief mentions the possibility of a common law dedication, it presents *no* argument or authority on the elements of such a claim. Appellant Br. at 35.¹²

Even if a claim of common law dedication had been properly argued, the facts do not support the two essential elements for such a claim: (1) an intention on the part of the owner to devote his land, or an easement in it, to a public use, followed by some act or acts clearly and unmistakably evidencing such intention; and (2) an acceptance of the offer by the public. *Knudsen v. Patton*, 26 Wn. App. 134, 611 P.2d 1354 (1980), *review denied*, 94 Wn.2d 1008 (1980). The record reveals no evidence of (1) "acts clearly and unmistakably" evidencing intent of the McKennys to dedicate the road prior to the 1892 dedication and (2) acceptance by the public of such a prior dedication at that earlier time. In fact, public

¹² Berschauer's failure to provide argument and authority for a common law dedication in his opening brief precludes his attempting to do so in his reply. *See, e.g., Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967).

acceptance by use before 1892 is precluded here because the right of way was not improved, usable as a road, or drivable until 1969-1970. CP at 399 (Dep. 30), 1089; Appellant Br. at 24. Berschauer's "claim" to common law dedication should be rejected. *See McConiga*, 40 Wn. App. at 537-38 (common law dedication dismissed for lack of proof).¹³

In summary, the case law in Washington solidly establishes the exception that a conveyance of land by metes and bounds to abutting owners does not include a conveyance of fee to a street if such a street had not been dedicated or platted at the time of the conveyance.

B. The Trial Court Correctly Dismissed Berschauer's Claim To Adverse Possession of the Disputed Strip

Berschauer asserts he owns, by adverse possession, a strip 8.4 feet x 383 feet that lies immediately south of the centerline of the vacated street.

Appendix 1 shows this disputed 8.4-foot gravel strip as the area *between* the blue line (the centerline of the vacated street) and the red line. The only part of the disputed strip for which Berschauer has produced evidence of actual use is a gravel area at its far west end that is 8.4 x 113 feet. The east portion of the disputed strip (8.4 x 251 feet) is a steep

¹³ Similarly, Berschauer also fails to present any argument or authority to show that a prescriptive public easement existed prior to 1892, and thus, his claim thereto must be dismissed. Further, the fact that Berschauer asserts that the right of way was not improved or usable for a road until 1970 precludes that argument.

naturally vegetated hill to which Berschauer has submitted no evidence of any use. CP at 1920, 1744-45.

The gravel area of the disputed strip is part of a larger gravel parking area (34 x 113 feet) which the State and PSE constructed in 1969-1970. CP at 187-96, 629-31; Appellant Br. at 24. As shown in Appendices 2-4 (CP at 500, 502, 651), the 8.4-foot gravel area of the disputed strip is undifferentiated from the larger gravel area and bounded by the 17-foot strip of beauty bark and vegetation to the south.

Much of Berschauer's argument focuses on the trial court's first ruling on adverse possession that was withdrawn to allow further discovery after Berschauer belatedly submitted: (i) numerous documents in his own possession showing that the fourplex was built in 1965 rather than 1980, as he had testified; (ii) new testimony in which he alleged to have discussions with the contractors who built the gravel area and which sought to cure a number of prior hearsay objections; and, (iii) a copy of the 1965 building permit that showed the side yard setback to be 10 feet, not the 20 feet he had claimed. CP at 43-50.

The discovery that the court allowed in response to Berschauer's belated submission of evidence resulted in a substantially different record on the final motion for summary judgment. In addition to Berschauer's new evidence, the new record included: (i) Berschauer's third deposition

in which he recanted the conversations with the contractors and made numerous admissions of his minimal use of the disputed area and lack of knowledge regarding it; (ii) a declaration of the City's Principal Planner confirming that the 1965 setback was 10 feet under the effective 1961 ordinance; and, (iii) survey records and correspondence showing that the vacated street was first improved in 1969 by the State, which filled and graded it, after which PSE added the gravel. CP at 182-251, 282-83 n.(iv), 384-541, 588-649, 2046-2053. Additionally, on the prior motions, the trial court did not have before it any briefing from the parties on the specific issue of penumbral possession, since Berschauer did not raise that argument; the trial court raised it *sua sponte* during the bench ruling. RP 47-49, Nov. 6, 2015. The analysis the State presents here is based upon the record before the trial court on the final motion for summary judgment.

1. Adverse possession of the disputed strip did not arise from Henry Berschauer's 1961 petition for vacation

"Prescriptive rights are not favored in the law, and the burden of proof is upon the one who claims such a right." *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 238, 23 P.3d 520 (2001). To establish a claim for adverse possession, the claimant must prove that his possession of the property was: (1) actual and uninterrupted;

(2) open and notorious; (3) exclusive; (4) hostile; and, (5) continuously for a period exceeding ten years. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). The party claiming ownership by adverse possession bears the burden of proving each element by clear, cogent, and convincing evidence. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

Berschauer alleges that his possession of the disputed strip began in 1961 when his father filed a petition to vacate the 16th Avenue SE right of way. However, the petition to vacate is not an act of possession and does not satisfy any of the elements for adverse possession, starting with the actual use:

To be adverse, the possession of another's land must be 'actual': it is not possible to be in adverse possession without physical occupation. Unless there is the requisite degree of physical possession, no amount of verbal claims, no amount of documents, no kind of acts off the ground will put the claimant in adverse possession.

17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 8.9 (2d ed. 2004).

A vacation petition is a paper act "off the ground." *Id.* Moreover, the vacation petition as a paper act provides no form of possession to support the elements of open-notorious, exclusive, hostile, and continuous.

2. Adverse possession of the disputed strip cannot be based on penumbral possession after 1965

Berschauer argues that when his father built the fourplex in 1965 into the right of way and later planted trees and placed beauty bark to delineate a strip approximately 17 feet from his property line, his father also established penumbral possession of the adjacent disputed 8.4-foot strip that ends at the centerline of the vacated street. Washington courts have recognized possession may extend beyond areas actually possessed if the claimant meets the elements for penumbral possession as set forth in *State v. Stockdale*, 34 Wn.2d 857, 863, 210 P.2d 686 (1949), *overruled on other grounds by Chaplin*, 100 Wn.2d 853. There the court found the State had adversely possessed an area of Ginkgo State Park that extended beyond encroaching buildings to a cliff, stating, “[w]hen 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.* at 863.

In *Stockdale*, the State met the above test because (1) the State had “occupied” the additional disputed cliff area by, among other things, its use of a museum for viewing the Columbia River over the cliff and of a walk and guard rail along the cliff overlooking the river (*id.* at 859) and

(2) the cliff area was “reasonably needed to carry out [the] objective” of the park plan which included a view amenity from the museum, walk, and guard rail. *Id.* at 863.

In *Skoog v. Seymour*, 29 Wn.2d 355, 187 P.2d 304 (1947), *overruled in part by Chaplin*, 100 Wn.2d 853, the court also found penumbral possession of an area (1) actually occupied that was (2) reasonably necessary for access. There the claimant had adversely possessed a 16-inch area where a garage overlapped the neighbor’s land and had also established possession of an adjoining 3.5-foot strip. The court stated the adjacent strip was, “necessary to the convenient use and access [to the garage and house], especially where . . .” (*id.* at 361) the claimant and its predecessors had established dominion over the adjacent strip by gardening and maintaining the strip, demarcating a boundary line of loose stones, and in fact used a 2-3-foot “passageway [adjacent to the garage] at all times . . .” *Id.* at 358-59.

Similarly, in *Shelton v. Strickland*, 106 Wn. App. 45, 49, 51, 21 P.3d 1179 (2001), the court stated that a structure, “encroaching partially 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” and applied the rule to approve “an exclusive easement of two

feet around the perimeter of the [shed] for maintenance purposes.”
Id. at 49.

On the facts here, Berschauer’s penumbra theory fails to establish adverse possession of the disputed 8.4-foot strip for two reasons. First, Berschauer does not meet the critical reasonable necessity test for penumbral possession.¹⁴ Second, even if he could show penumbral possession, he has failed to meet the other elements of adverse possession, most notably exclusivity, hostility, and uninterrupted use.

a. Berschauer fails the reasonable necessity test for penumbral possession

By Berschauer’s own admission, the disputed strip was not “reasonably necessary” for him to possess in order to develop or operate the fourplex. He stated in two summary judgment briefs, “[t]he area was not necessary for access or development of the fourplex” CP at 1330, 1385. Further, Berschauer concedes that his father operated the fourplex from 1965 to 1970 without making any use of the disputed strip, confirming the area was not reasonably necessary to operate the fourplex.
Id.; Appellant Br. at 24.

¹⁴ Berschauer acknowledges that his predecessor did not in any way satisfy the “occupy” element of penumbral possession until 1970, claiming that until then the area was “unusable.” Appellant Br. at 24; CP at 1294. As discussed below, Berschauer’s claimed “occupancy” of the disputed gravel area beginning in 1970 was so minimal it would not satisfy the exclusivity, hostility, and uninterrupted-use elements of adverse possession.

Moreover, the lack of any reasonable necessity to use the disputed strip to operate the fourplex is confirmed by the minimal and occasional uses that Berschauer claims from 1970 after the gravel area of the disputed strip was constructed by PSE. Berschauer alleges uses of the gravel area of the disputed strip only for occasional parking, pothole filling, and litter pickup. CP at 1089, 442 (Dep. 34-36), 444-47 (Dep. 42-43, 45-53), 449 (Dep. 61). None of these uses were necessary for operation of the fourplex, but rather merely handy and convenient.¹⁵ See *Hunt v. Matthews*, 8 Wn. App. 233, 238, 505 P.2d 819 (1973), *overruled on other grounds by Chaplin*, 100 Wn.2d 853 (“[t]he property must be used beyond the use it would receive because it was handy and convenient . . .”).

Berschauer’s alleged belief that a “20 feet setback” applied to the fourplex is clearly mistaken and does not furnish any basis for reasonable necessity to own to the centerline.¹⁶ Berschauer admits that Cherry Street, not the vacated street, is the front of his lot. CP at 441-42 (Dep. 30-33). As stated in the 1965 building permit for the “duplex,” under the then effective 1961 City code, the setback for side yards on flanking streets,

¹⁵ The fourplex provides parking for tenants in a carport and apron where they park the “vast majority” of the time, and Berschauer cannot recall he or his father ever informing tenants they may park in the disputed gravel strip. CP at 442 (Dep. 34, 36), 444 (Dep. 41, 43).

¹⁶ Even if his belief about the setback were not mistaken, no court of which we are aware has held that a setback would determine the extent of adverse possession. For example, the court in *Skoog* did not consider the setback when determining the 3.5-foot area adjacent to the encroaching garage was necessary for use and access. *Skoog*, 29 Wn.2d at 361.

which the City considered the vacated street to be, was only 10 feet. CP at 2046-53. In light of the explicit 10 foot setback in the building permit, Berschauer's stated belief that a 20 foot setback applied to the fourplex is clearly unreasonable. CP at 2047.

Berschauer does not contest that the disputed area is not reasonably necessary to access or operate the fourplex. Instead, he argues that the disputed area is reasonably necessary to achieve his father's and his "reasonable belief" that they owned to the centerline of the road by virtue of the 1961 street vacation. Appellant Br. at 22. Berschauer, however, misapplies the "reasonable necessity" test for penumbral possession. The test looks at whether the adjacent area was reasonably necessary to operate or access the improvements within the adverse possession area, not whether the adjacent area was necessary to achieve the "reasonable belief" of the claimant that he owned that area. For example, in *Stockdale*, the reasonable necessity to possess the cliff area was to complete the park plan by, among other things, supporting the functions of the encroaching museum, walk, and guard rail to provide a view of the Columbia River basin. *Stockdale*, 34 Wn.2d at 862-63. The reasonable necessity was not, analogous to Berschauer's claim here, to achieve the State's "belief" that it owned to the cliff edge. In *Skoog*, the reasonable necessity for the 3.5-foot walkway was to provide access to the encroaching garage and house, not

to realize the claimants' belief that they owned this area. *Skoog*, 29 Wn.2d at 361.

Berschauer's argument substitutes the claimant's "reasonable belief" of ownership for the objective standard of accessing or operating the encroaching improvements. Such substitution is not only contrary to the penumbra cases, but also would inject a new test of subjective intent into adverse possession analysis.

The court in *Chaplin* eliminated the use of a subjective belief of ownership from the test for hostility in part because courts have had considerable difficulty determining intention in adverse possession cases.¹⁷ *Chaplin*, 100 Wn.2d at 859. In lieu of looking to the state of the claimant's mind on ownership to determine the nature of possession, the court stated, "[t]he 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." *Id.* at 861. Similarly, penumbral possession is determined under the governing cases on the objective basis of whether the adjacent area is reasonably necessary to access or operate the encroaching improvements, not on whether the

¹⁷ *Chaplin* concerned the element of "hostility," but the court's concern for the considerable difficulty of proving intention in adverse possession cases is not unique to hostility and exists for other elements such as actual possession and exclusivity.

claimant “reasonably believed” he owned the area.

Finally, Berschauer’s expansion of adverse possession to include possession by “reasonable belief” runs contrary to the doctrine quoted above that prescriptive rights are not favored in the law. Such an expansion would work a major change in the law akin to the Legislature’s creation of a seven-year period for adverse possession by color of title and payment of taxes (RCW 7.28.070). The decision whether to adopt such expansion is properly left to the Legislature.

b. Even if penumbral actual possession were present, that would not overcome the lack of exclusive, hostile, and/or uninterrupted possession

Exclusive possession is a separate element of adverse possession from the element of actual possession, which is the subject of penumbral possession. Berschauer identifies no case holding that penumbral actual possession would automatically overcome a lack of exclusive use where others used the penumbral area during the period of adverse possession at levels similar to or higher than that of the claimant.¹⁸

The undisputed evidence shows the use of the disputed gravel area by PSE, its contractors, and other unidentified entities and persons was more

¹⁸ In *Stockdale*, the facts did not indicate that anyone but the state park and its visitors used the penumbral area. In *Skoog*, 29 Wn.2d at 357, the claimants appear to be the exclusive users of the penumbral area (“[t]here is no evidence that the respondents or their predecessors in interest have ever used the strip north of wall . . .”).

intensive than Berschauer's occasional use or, at the very least, similar. Berschauer admits that since 1970, PSE has and continues to regularly use the disputed area for parking. CP at 448-49 (Dep. 60-61), 402 (Dep. 41-42). He also admits that since 1970, "[t]here were [other non-PSE] people in there all the time parking there, doing this, doing that." "[I]t's wide open." CP at 448-49 (Dep. 59-61), and that his tenants parked the vast majority of the time at the fourplex and he could not recall he or his father ever informing tenants that they may park in the gravel strip. CP at 442 (Dep. 34, 36), CP at 444 (Dep. 41, 43).

Even similar levels of shared use defeat claims of adverse possession. See *ITT Rayonier, Inc.*, 112 Wn.2d at 758-60 (summary judgment granted dismissing claim for adverse possession due to lack of exclusive use where adverse claimant and other non-owners made similar use of the land for mooring boats and sanitation); *Thompson v. Schlittenhart*, 47 Wn. App. 209, 212, 734 P.2d 48 (1987) (no exclusive possession where owner's use level was similar to claimant's); and *cf. Crites v. Koch*, 49 Wn. App. 171, 175 n.1, 741 P.2d 1005 (1987) (exclusive use shown where claimant's use was substantially greater than owner's "slight and occasional use", citing *Paul v. Mead*, 234 Iowa 1, 11 N.W.2d 706 (1943)) (no exclusive use where owner and adverse claimant made similar use of disputed strip for pasture and access).

Similarly, “hostility” and “uninterrupted use” are separate elements from actual use. “The most useful general test of hostility is: ‘Considering the character of possession and the locale of the land, is the possession of such a nature as would normally be objectionable to owners of the land.’ ” 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 8.12 (2d ed. 2004).

Berschauer’s use of the disputed strip from 1970 forward for occasional parking is not the type of use an owner of land in this locale would find objectionable. The disputed strip is an out-of-the-way side area at the end of a large open gravel area, and, as just noted, it has been routinely used over time by PSE and the general public. A reasonable owner would not find Berschauer’s use for occasional parking in addition to that of others to be objectionable. *Crites*, 49 Wn. App. at 175-76 (“occasional parking of equipment and crossing—was a type of use permitted by the community as a neighborly courtesy”); *cf. Hunt*, 8 Wn. App. at 238 (“few owners would object to use of his unimproved lot by those who might plant a garden, erect a chicken run, or pile wood upon it.”).

Courts have repeatedly dismissed claims based on such occasional and minimal use as failing to show hostile and/or uninterrupted use. *See Smith v. Chambers*, 112 Wash. 600, 192 P. 891 (1920) (use of lot for

piling wood, mowed hay, grass, and raising vegetables; such acts are not of that character which, if persisted in for sufficient time, would ripen into title); *Harkins v. Del Pozzi*, 50 Wn.2d 237, 310 P.2d 532 (1957) (use for occasional picnic and posting of beach danger warning sign did not satisfy elements of hostility and actual use); *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 773-74, 613 P.2d 1128 (1980), *overruled on other grounds by Chaplin*, 100 Wn.2d 853 (occasional mooring of boats and the dredging of a channel was not continuous enough possession to be uninterrupted).

C. The Trial Court Correctly Dismissed Berschauer's Claim for Emotional Distress From the Technical Trespass of Placing a Survey Stake at the Property Corner

The trial court found that the State committed a technical trespass when the State's surveyor placed a survey stake at the corner where the public right of way on Cherry Street, Berschauer's parcel, and the vacated street meet. CP at 27; RP 37, Aug. 7, 2015.¹⁹ The stake (rebar with a cap) appeared as a little (approximately one inch) orange cap flush to the ground. CP at 396 (Dep. 19), 401 (Dep. 37-39), Suppl. CP at 2129. Assuming the stake was accurately placed, the one-inch, capped stake

¹⁹ Berschauer variously describes the trespass to be the placement of "stakes" and a number of other "volitional acts," such as obtaining a quit claim deed and boundary line adjustment "[knowing]" that Berschauer possessed "at the very least a portion of that land." Appellant Br. at 37, 42. However, the sole trespass that the trial court found was the placement of a single survey stake, and it expressly rejected Berschauer's later motion to expand the trespass beyond the stake without an amendment to his complaint. CP at 27, 1298-99, 1316-18; RP 37, Aug. 7, 2015; RP 39-40, Nov. 6, 2015. When asked to mark the survey stakes he saw, Berschauer marked only one stake that touched his parcel. CP at 396 (Dep. 17-18), 412.

bridged the property line of Berschauer's parcel by about one-half inch and a similar amount on the Cherry Street right of way. The surveyor placed the stake in November 2011 at the southwest corner of the vacated street to confirm that the legal description in the quit claim deed made sense on the ground. CP at 1907.

The trial court found this minor encroachment to be a technical trespass for which only nominal damages are available, as Berschauer did not allege any actual and substantial damages to his property. CP at 27.

Berschauer alleges that the placement of this survey stake caused him emotional distress resulting in multiple hospitalizations. The trial court dismissed this claim because the trespass did not involve any willful or wrongful act. RP 32-36, Aug. 7, 2015.

1. Washington case law supports dismissal of emotional distress claims based upon a technical trespass where no evidence exists of willful intent to cause harm to or interfere with property interests

As the trial court observed, the “intentional” act involved with a trespass is unlike other intentional torts that allow emotional distress damages. RP 32-36, Aug. 7, 2015. Those torts require a clear, wrongful or willful act (e.g., assault, battery, wrongful termination, discrimination), whereas trespass does not. For the intentional tort of trespass to occur one need only have an intent to “enter” another’s property regardless of how

small or unobtrusive the entry, without any showing of a wrongful or willful act to cause damage or interfere. *See Keesling v. City of Seattle*, 52 Wn.2d 247, 253, 324 P.2d 806 (1958) (nominal damages available for wire that temporarily trespassed the air space). “Trespass is a strict-liability tort, so that even entry under a belief that the intruder owned the premises may constitute a trespass.” 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 10.2 (2d ed. 2004).

The Washington cases in which trespass damages have been awarded for emotional distress have all involved (1) a *willful* trespassory act to cause damage to property or interfere with the owner’s use of the property and (2) actual damage or interference from which the owner’s emotional distress arose. For example, in *Pendergrast v. Matichuk*, 186 Wn.2d 556, 561-63, 379 P.3d 96 (2016), the defendant acted willfully by defying the plaintiff attorneys’ claim of “common boundary by grantor” and removing a fence and a “venerable” cherry tree containing a tree house. The jury awarded compensatory damages and non-economic damages for both trespass (removal of the fence) and timber trespass (removal of the cherry tree and tree house).

Similarly, in *Nordgren v. Lawrence*, 74 Wash. 305, 308, 133 P. 436 (1913), the defendant willfully forced open a door to a rental

home he owned, invaded a bedroom of a young tenant girl who was undressed, forced his way through a window against the protests of other tenants, started removing light bulbs, turning off gas and water, and left only at the suggestion of a police officer. The court allowed emotional distress damages to compensate the plaintiff as “a result of a wrongful act,” which consisted of interfering with her lawful use of the rental premises. *Id.* at 308.

In *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 109-10, 942 P.2d 968 (1997), the jury found that the defendant had not acted casually or involuntarily but had willfully and wantonly removed the homeowners’ trees and shrubbery. The jury awarded damages of \$141,750 for removal of the trees and shrubs under the timber trespass statute and \$2,000 to each plaintiff for emotional distress that the removal had caused. *Id.* The court held that emotional distress damages were available for a trespass involving “intentional interference with property interests such as trees and vegetation,” as contrasted with casual intentional entry onto property that causes no interference. *Id.* at 116. The damages for emotional distress arose directly from the actual and substantial damages to the trees and shrubs. “As a result of the injury to the trees and shrubs, the jury found the homeowners suffered emotional distress.” *Id.* at 117.

The trial court relied on *White River Estates v. Hiltbruner*,

134 Wn.2d 761, 953 P.2d 796 (1998), and *Birchler* to reach the conclusion that a “willful” trespassory act to cause damages or interference that is “not casual or involuntary” is necessary to award emotional distress damages for trespass. RP 32-37, Aug. 7, 2015. *White River* describes *Birchler* as holding that emotional distress damages were available for timber trespass because “RCW 64.12.030 requires proof that a person has ‘willfully’ trespassed and damaged the property of another person.” *White River*, 134 Wn.2d at 767. A “willful” trespass is not “casual or involuntary” and requires intentional interference with property interests. *Birchler*, 133 Wn.2d at 110, n.2. Based on its review of both statutory and common law torts that allow emotional distress damages, *White River* identified “level of fault” as the critical factor that the Court of Appeals had overlooked when it improperly concluded that emotional distress damages were allowed under the Mobile Home Landlord-Tenant Act. *White River*, 134 Wn.2d at 768.

One of the cases *White River* cited for the importance of level of fault was *Cagle v. Burns and Roe, Inc.*, 106 Wn.2d 911, 726 P.2d 434 (1986) (quoting *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 231-32, 685 P.2d 1081 (1984)). In *Cagle*, the court addressed whether the common law tort for wrongful discharge would allow emotional distress damages. Although an intentional act is always involved with that tort (the

employer intentionally terminates the employment), the court identified the most significant factor to be that the act of wrongful termination “contravenes a clear mandate of public policy.” *Id.* at 917. Here the placement of a survey stake to mark a property corner unquestionably did not “contravene a clear mandate of public policy.” To the contrary, placing such stakes is common and necessary commercial practice done dozens, if not hundreds, of times a day in Washington. CP at 1635-36.

Other court decisions confirm that a high level of fault is a critical factor in determining the availability of emotional distress damages. For example, *Kloepfel* describes the high level of fault required to state a claim for the tort of intentional infliction of emotional distress: the claimant must show conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.” *Kloepfel v. Bokor*, 149 Wn.2d 192, 196, 66 P.3d 630 (2003) (internal citations omitted). *Kloepfel* explained that the courts allow emotional distress damages for intentional torts but not negligence torts because of a “definite tendency to impose greater responsibility upon a defendant whose conduct was intended to harm, or was morally wrong.” *Id.* at 200 (citation omitted). The court also quoted *Schurk v. Christensen*, 80 Wn.2d 652, 655, 497 P.2d 937 (1972) for the rule: “[b]y a long line of decisions in this state, we

have, as a general rule, denied recovery for mental anguish and distress in cases not involving malice or wrongful intent, unless there has been a direct invasion of a plaintiff's security, or a direct possibility thereof." *Kloepfel*, 149 Wn.2d at 201. See also *Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 481-85, 805 P.2d 800 (1991) (the court refers to the conduct required to award emotional distress damages for fraud as "a wrongful act intentionally done," "intentional wrongdoing," and "intentional wrongful conduct").

Here as the trial court found (RP 36, Aug. 7, 2015), no evidence exists that placing the stake at the parcel corner was a willful or wrongful act to damage or interfere with Berschauer's interests in the property, or otherwise contravened clear public policy. In particular, no evidence exists the stake was placed to defy any instruction from Berschauer not to place a stake on the boundary, or to otherwise disturb Berschauer. To the contrary, the evidence indicates that the surveyor placed the stake simply to mark a parcel corner, a common and legitimate commercial purpose that is fully supported, not contravened, by public policy. CP at 1907, 1635-36.

2. This Court may alternatively affirm the dismissal of the claim for emotional distress damages on the ground of proximate cause

Although the trial court did not rule on the legal cause element of

proximate cause,²⁰ this Court may affirm on any ground supported by the record. Berschauer’s claim for emotional distress damages is based on his claim of trespass which in Washington is subject to the proximate cause test.²¹ *Haase v. Helgeson*, 57 Wn.2d 863, 867, 360 P.2d 339 (1961) (“[e]xcept where liability is imputed to a trespasser, he cannot be held liable for more than nominal damage unless specific damage, proximately caused by his conduct is proved.”); 87 C.J.S. *Trespass* §§ 88, 112 (2017). *Pendergrast*, 186 Wn.2d at 562-63 (jury instructed that non-economic damages from trespass must be proximately caused); *Voorde Poorte v. Evans*, 66 Wn. App. 358, 363-65, 832 P.2d 105 (1992) (stating proximate cause applies to trespass but is “relaxed” citing only W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser on Torts* § 13 (5th ed. 1984)) (holding but for causation was issue of fact for the jury because “all possible causes of the fire were eliminated, except electrical [uses by the trespasser], and no alternative explanation was presented.”). Therefore, Berschauer’s claim for emotional distress damages is subject to the proximate cause test.

²⁰ The trial court stated that it seemed that there is “no legal cause that can be traced to the placing of the stake,” but did not rule on that point because legal causation had not been specifically briefed to him. RP 37, Aug. 7, 2015.

²¹ Other intentional torts apply proximate cause. *Turner v. Enders*, 15 Wn. App. 875, 880, 552 P.2d 694 (1976) (damages for intentional fraud requires proximate cause); *Leingang v. Pierce Cty. Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997) (tortious interference requires proof of “damages proximately caused by the defendant’s interference.”), WPI 352.01, Tortious Interference with Contract-Burden of Proof (“conduct of [defendant] was a proximate cause of damages to [plaintiff]”).

Proximate cause has two elements: cause in fact and legal cause. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Cause in fact refers to the “but for” consequences of an act—the physical connection between an act and an injury. *Id.* at 778. Legal cause “is grounded in policy determinations as to how far the consequences of a defendant’s acts should extend.” *Crowe v. Gaston*, 134 Wn.2d 509, 518, 951 P.2d 1118 (1998).

Here Berschauer testified that the stake did not concern him when he saw it and that he did not experience emotional distress until about six months after he saw the stake, when he contacted a surveyor and then a title agent, who apparently informed him that the State had obtained and recorded a quit claim deed to the vacated street. CP at 1604-5 (Dep. 20, 24, 25), 396 (Dep. 19), 400 (Dep. 33-34). His apparent theory why the stake caused his emotional distress is that the stake led him to inquire about his property six months later, which in turn led him to talk to others and find out about the State’s quit claim deed, which in turn caused him emotional distress.

Assuming this theory is sufficient to get to a jury on cause in fact, it fails to establish legal causation on the facts here. Legal causation “is grounded in policy determinations as to how far the consequences of a defendant’s acts should extend.” *Crowe*, 134 Wn.2d at 518. The court

decides whether a defendant's breach of duty is too remote or insubstantial to trigger liability as a matter of legal cause, by considering "mixed considerations of logic, common sense, justice, policy, and precedent." *Hartley*, 103 Wn.2d at 777.

For four reasons, the act of placing the corner stake is both too remote and too insubstantial to trigger legal causation for emotional distress considering logic, common sense, justice, policy, and precedent.

First, placement of the stake was remote in time by six months from the onset of the alleged emotional distress, which didn't arise until Berschauer's knowledge of the quit claim deed occurred. Further, Berschauer's later knowledge about the quit claim deed, not the presence of the stake, is what directly led to his alleged emotional distress. CP at 1604 (Dep. 20, 24, 25), 400 (Dep. 33-34). He would presumably have had the same distress if he learned of the State's quit claim deed by some other means. These facts bear upon considerations of logic and common sense to find the connection of the stake to the alleged distress is "attenuated." *See Hartley*, 103 Wn.2d at 785. ("[t]he [State's] failure to revoke Johnson's license . . . is too attenuated a causal connection to impose legal liability.")

Second, the act of trespass itself (placement of the stake one-half inch on Berschauer's property) should not be considered a legal cause

because if the stake had been placed one inch back from the property line, no trespass would have occurred, but the stake would have had the same effect on Berschauer to prompt his later inquiry. In *Mossman v. Rowley*, 154 Wn. App. 735, 229 P.3d 812 (2009), the defendant argued that the plaintiff's speeding (negligence) was a cause of the accident because the plaintiff would not have been in the exact place of the accident but for the speeding. However, the court granted summary judgment for lack of legal causation because the speeding did not increase the risk of the accident happening.²² Here the risk of injury would have been the same if the stake were placed just west of the boundary entirely in the Cherry Street right of way. These facts directly implicate considerations of precedent, logic, and common sense in favor of finding no legal cause.

Third, the placement of the corner stake was only a minor technical trespass, done for a proper commercial purpose, and was, as discussed above, in no way intended to harm or interfere with Berschauer's interests in his property. These facts bear on the consideration of justice in favor of finding no legal causation. *See Colla v. Mandella*, 1 Wis. 2d 594, 598-99, 85 N.W.2d 345 (1957) (legal causation may be found lacking because liability would be " 'wholly out of proportion to the culpability of the . . .

²² *See also Claar ex rel. Claar v. Auburn Sch. Dist. No. 408*, 126 Wn. App. 897, 903, 110 P.3d 767 (2005) (failure to drop off student at official bus stop was a cause in fact but not a legal cause because the unofficial bus stop was not less safe than the official one).

tort-feasor' . . . or be too likely to open the way to fraudulent claims, or would 'enter a field that has no sensible or just stopping point.' ”).

Fourth, the placement of corner stakes is a common commercial practice (CP at 1635-36) that serves a valuable public policy to promote the location of parcel corners and boundaries to avoid land disputes and maintain neighborly relations. To hold the hundreds, of surveyors who daily place stakes on a property line potentially liable for emotional distress damages would significantly subvert that commercial purpose. Berschauer has provided no supporting case and our extensive search of the law throughout Washington and the country was unable to identify any case where trespass liability or emotional distress liability was predicated on the placement of a corner or boundary stake. Here again considerations of policy, precedent, logic, and common sense favor no legal cause.

D. The Trial Court Did Not Abuse Its Discretion in Concluding That a Reduced Award of \$10,000 in Attorneys' Fees Under RCW 7.28.083 Was Equitable and Just

RCW 7.28.083(3) states:

The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

This statute grants broad discretion to the trial court regarding an award of attorneys' fees. First, unlike many attorneys' fees statutes, it does

not grant the prevailing party a *right* to costs and fees, but rather states the court “may award” instead of “shall award.” *Id.* Second, it grants the court discretion to award only “a portion of costs and reasonable attorneys’ fees, . . . if, after considering all the facts, the court determines such an award is equitable and just.” *Id.*

The trial court found that Berschauer was the prevailing party on adverse possession because the trial court had granted him adverse possession to the first 17 feet of the 25.4 feet of the vacated street he claimed, and awarded him \$10,000 as an equitable and just portion of the \$66,691.75 of attorneys’ fees he sought for that possession.²³ RP 24-28, Sept. 2, 2016.

1. The Court’s award is equitable and just in light of the minimal efforts Berschauer spent on litigating the 17-foot strip and the substantial grounds which led the State not to initially concede the entire strip

As detailed below, the court’s award of \$10,000 in fees reflected the fact that Berschauer’s attorneys devoted their efforts on prescription almost exclusively to proving adverse possession to the centerline of vacated street, and spent only about two pages in their pleadings and no

²³ The State asserted below that it was the prevailing party on adverse possession or neither side prevailed, in light of the fact that the State had initially conceded some and later all of Berschauer’s claim for the 17-foot strip upon which he ultimately won and the fact that the State prevailed on the only claim in which the parties substantially contested the 8.4-foot strip. However, because the award of fees was relatively small and reflected that Berschauer expended only a small portion of his efforts on the 17-foot strip, the State opted not to appeal that ruling.

oral argument specifically to proving adverse possession of the 17-foot strip, which the State initially conceded partially in its Answer and later entirely in a brief. CP at 2013, 1430-31.²⁴

Berschauer's first motion for partial summary judgment assumed in light of the concession in the State's Answer that the State contested only the area *north* of the "north edge of the garden beds" which were later surveyed to end the 17-foot line. CP at 1977.²⁵ Thus, given Berschauer's initial understanding that only the area north of the garden beds was in dispute, his initial brief and the supporting declarations were directed to contest the 8.4-foot strip north of the garden beds, not the 17 x 383-foot strip which it assumed was conceded.

Berschauer's response/reply on the first motion did in fact respond to the clarification in the State's response that it was only conceding the 17 x 120-foot portion of the 17-foot strip on which Berschauer had placed beauty bark, plants, and the fourplex overlapped.²⁶ However, his pleading

²⁴ The State's Answer conceded that Berschauer and his predecessor had adversely possessed "a strip on the south edge of a portion of the vacated right of way that is in the approximate location of the current in [sic] beauty bark and has several trees on it that were planted." CP at 2013.

²⁵ Berschauer's brief for this motion devotes one paragraph to adverse possession in the statement of facts (CP at 1977) and about 1.4 pages to his argument for adverse possession to the centerline. CP at 1992-94.

²⁶ After conducting a survey, the State excluded from the conceded area (i) the east portion (17 x 251 feet) of the 17-foot strip which was a steep, naturally-vegetated decline and which Berschauer later testified he in fact had never used, and (ii) the west corner (17 x 12 feet) which was graveled, open to and used by the public (especially big

focused predominately on his abutting ownership claim (in the first 13 pages, approximately one sentence relates to adverse possession). CP at 1717-29. The adverse possession discussion section of the brief covers approximately 2.25 pages and is entitled “There Is A Dispute Of Material Fact Regarding The Amount Of Land Mr. Berschauer Adversely Possessed.” CP at 1730-32. Only approximately one page of those 2.25 pages might be considered in part responsive to the issue whether Berschauer possessed the entire 17-foot strip rather than only the 17 x 120-foot conceded portion, as that page discussed cases where a line is projected from one area of use to another. CP at 1730-31.

Prior to oral argument on the motions, the parties agreed that factual issues existed regarding adverse possession and thus neither party devoted any oral argument to the issue. RP 7, 37, Feb. 13, 2015.

Plaintiff’s Motion for Partial Summary Judgment Re Adverse Possession again focused on proving adverse possession to the centerline. CP at 1377-94. One sentence in his motion states, “[t]he State argues that Berschauer did not possess the property beyond the now-existing landscaping, but this argument fails as a matter of law.” CP at 1384. The discussion that followed (CP at 1384-86) was not specific to the 17-foot strip but focused on ownership to the centerline. One seven-line paragraph

trucks) and had a PSE power pole on it. CP at 394 (Dep. 11-12), 412, 445-46 (Dep. 47-49), 1907-08, 1919.

in a new declaration submitted with the motion addressed the west corner of the 17-foot strip, but none addressed the east portion of the strip. CP at 1716. Aside from the above, nothing in his motion indicates that the motion would have changed in any material respect if the State had previously conceded ownership of the entire 17-foot strip.

On the same day Berschauer's motion was filed, the State filed its cross-motion conceding to Berschauer's claim of adverse possession to the entire 17-foot strip, including the east portion and west corner. CP at 1430-31. The State made this concession after determining that it had no need of the east portion or west corner and in hopes the concession might simplify or resolve the litigation. RP 15, Sept. 2, 2016. Thus, following the State's complete concession of the entire 17-foot strip, *none* of the briefs that Berschauer subsequently filed addressed the issue whether he had adversely possessed the entire 17-foot strip.

In summary, Berschauer can be fairly said to have devoted only about two pages collectively in his pleadings and none of his oral arguments to the specific issue of whether he had adversely possessed the entire 17-foot strip. Berschauer's central objective was always to obtain title beyond the 17-foot strip to the centerline, such that if the State had earlier conceded the entire 17-foot strip, Berschauer would have done the same research, preparation, discovery, and filed the same pleadings and

motions regarding adverse possession to the centerline that in fact occurred.

Additionally, the reduced award was also equitable because the State had a substantial and well-founded basis for not conceding to Berschauer the entire 17 x 383-foot strip, since (1) Berschauer testified he had not used any of the east portion (17 x 251 feet) which was a steep, naturally-vegetated decline where no evidence existed that the property had ever been used by anyone, and (2) the west corner (17 x 12 feet) was graveled, open to and used by the public (especially big trucks) and had a PSE power pole on it. CP at 394 (Dep. 11-12), 412, 445-46 (Dep. 47-49), 1907-08, 1919.

The trial court awarded attorneys' fees to Berschauer for only "*the* adverse possession claim" (CP at 63 (emphasis added)) and did not award attorneys' fees or costs to Berschauer for dismissal of the State's prescriptive easement claim, to which dismissal the State consented. RP 26, 29-30, Sept. 2, 2016, CP at 2054.²⁷ Berschauer's brief does not specifically argue that decision and thus, such argument is deemed waived foreclosing him from arguing the correctness of the decision for the first

²⁷ The trial court also rejected Berschauer's request for attorneys' fees and costs against PSE for its voluntary dismissal of PSE's prescriptive easement claim to the disputed area. *See* RP 23-24, Sept. 2, 2016. The State filed its consent to dismissal of its prescriptive easement claim on January 15, 2016 (CP at 2054), before PSE filed its motion for voluntary dismissal on February 1, 2016.

time in his reply.

Even if it were not waived, the trial court did not abuse its discretion in refusing fees for this dismissal to which the State voluntarily consented since equity would not support such an award in light of the fact the State ultimately succeeded in having title quieted to it for the area to which it claimed a prescriptive easement²⁸ and that ruling was delayed on account of Berschauer's untimely disclosure of key documents and change in testimony. CP at 43-50. If, at the time of the trial court's first ruling on adverse possession, the trial court had that information and briefing before it present on the final motion for summary judgment, the State would have prevailed at that time and the prescriptive easement claim would have been moot and unnecessary for the trial court to reach. Further, if this Court affirms the trial court's ruling that Berschauer lacks any ownership interest in the disputed area, he would have lacked standing to seek dismissal of the prescriptive easement.

2. No basis exists to award fees for "prelitigation misconduct"

Berschauer argues that the trial court should have awarded him the \$66,691.75 he sought for attorneys' fees because of the State's

²⁸ In its original 2014 Answer, the State assumed that the gravel area ended about 15 feet south of the centerline and thus identified the easement to be a strip approximately 15 feet below the centerline (CP at 2015), whereas the survey which occurred later that year placed the edge of the gravel area and start of the beauty bark strip at 8.4 feet from the centerline rather than 15 feet. App. 1.

“pre-litigation misconduct.” However, the trial court did not find any misconduct, but rather that the State acted in a lawful manner but its failure to engage with Berschauer upfront was “not the best business judgment.” RP 25, Sept. 2, 2016. The trial court did not abuse its discretion in determining these facts.

In November 2009, as part of a lot reconfiguration, the State needed to demonstrate to the City it had access to a new parcel it sought to create to the north. CP at 1916. The State’s property consultant and assistant attorney general advised that the State most likely lacked access through the vacated street because neither the State nor Berschauer owned the vacated street as abutting owners. CP at 1916-17, 1904-06. Thus, the State proceeded to find the persons who held the interest in the vacated street and to acquire a quit claim deed for the vacated street, and following that to obtain a boundary line adjustment for the new parcels that recognized a 28-foot easement on the vacated street, which crossed the 25.4-foot centerline by 2.6 feet. *Id.*; CP at 842. In fact, the State has never sought to displace Berschauer from any land he has occupied or interfere with his use of it. CP at 1918. Once the issue surfaced after Berschauer filed a tort claim, the State forthrightly sought to resolve the property issue prior to litigation, and in the litigation initially conceded to Berschauer’s adverse possession from the McKennys to the beauty bark strip and

ultimately to the entire 17-foot strip.²⁹ CP at 730-31, CP at 745-47.

3. The trial court’s findings and conclusions in light of the record provide a sufficient basis for review, and if this Court finds otherwise, the remedy is to remand for more specific findings and conclusions

Berschauer argues that the trial court erred by failing to apply the lodestar analysis to explain the basis for its \$10,000 fee calculation so that it may be meaningfully reviewed on appeal. Appellant Br. at 49. Although Berschauer appears to acknowledge that the lodestar method (reasonable fees times hours with any appropriate adjustments) is not absolutely required, the State agrees that the case law requires a sufficient record to permit meaningful review. A sufficient record generally means that the trial court “must supply findings of fact and conclusions of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question.” *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014).

Here, the trial court stated that it adjusted the \$66,691.75 of fees

²⁹ Berschauer repeatedly points to a statement of Ms. Fuller where she stated, “[t]o file a Quiet Title Action in order to secure this property is ethically and morally wrong. If DIS wants GA to secure that portion of the property then GA should approach the owner and ask if he is willing to sell the property to us at fair market value or provide an easement.” CP at 1687. As Ms. Fuller has explained, at the time she made that statement she erroneously believed that both the State and Berschauer owned to the centerline of the vacated street. She subsequently obtained legal review from the assistant attorney general who informed her that the abutting landowners most likely did not hold title and the trial court agreed. CP at 733. She also had erroneously believed that Berschauer would not get notice if a quiet title were filed. *Id.* As the trial court stated: “[s]he appears to have said that without a full understanding of what the circumstances were.” RP 27, Sept. 2, 2016.

downward based upon its review of “the record, including the motion practice, what happened and when, when agreements were made, when concessions [relative to the 17-foot strip] were made” RP 28, Sept. 2, 2016. This case was decided on paper submissions on multiple motions for summary judgment, and the record is equally available for review by both the trial court and appellate court. Above, the State presented specific items from the record showing “what happened” and “when concessions were made” regarding the 17-foot strip. Those record documents provide a firm and compelling basis for the trial court’s downward adjustment and for this Court to conclude that the award was not “manifestly unreasonable, based on untenable grounds, or made for untenable reasons.” *White v. Clark Cty.*, 188 Wn. App. 622, 639, 354 P.3d 38 (2015) (citation omitted). The trial court, therefore, did not abuse its discretion.

Further, as noted above, RCW 7.28.083(3) gives the trial court broad discretion in determining whether to award attorneys’ fees, and if so, whether to award some or only a portion of the fees based on what the court determines is “equitable and just.” The strength of support in this record for such reduction shows that the trial court was not manifestly unreasonable in using its discretion to determine the \$10,000 reduced award was “equitable and just.”

If, however, this Court finds that the trial court's reliance on the record, motion practice and concessions, relative to the award for the 17-foot strip was insufficient for meaningful review, the remedy would be for this Court to remand to the trial court for the entry of more specific findings and conclusions. *See White*, 188 Wn. App. at 640.

V. THE STATE REQUESTS ATTORNEY FEES ON APPEAL

The State requests attorneys' fees as the prevailing party on appeal under RCW 7.28.083(3) if this Court affirms the trial court's ruling on adverse possession.

VI. CONCLUSION

For the foregoing reasons, the State requests that this court affirm the decisions of the trial court.

RESPECTFULLY SUBMITTED this 21st day of April, 2017.

ROBERT W. FERGUSON
Attorney General

s/Brian Faller
BRIAN V. FALLER
Assistant Attorney General
WSBA No. 18508
Attorneys for Respondent
State of Washington

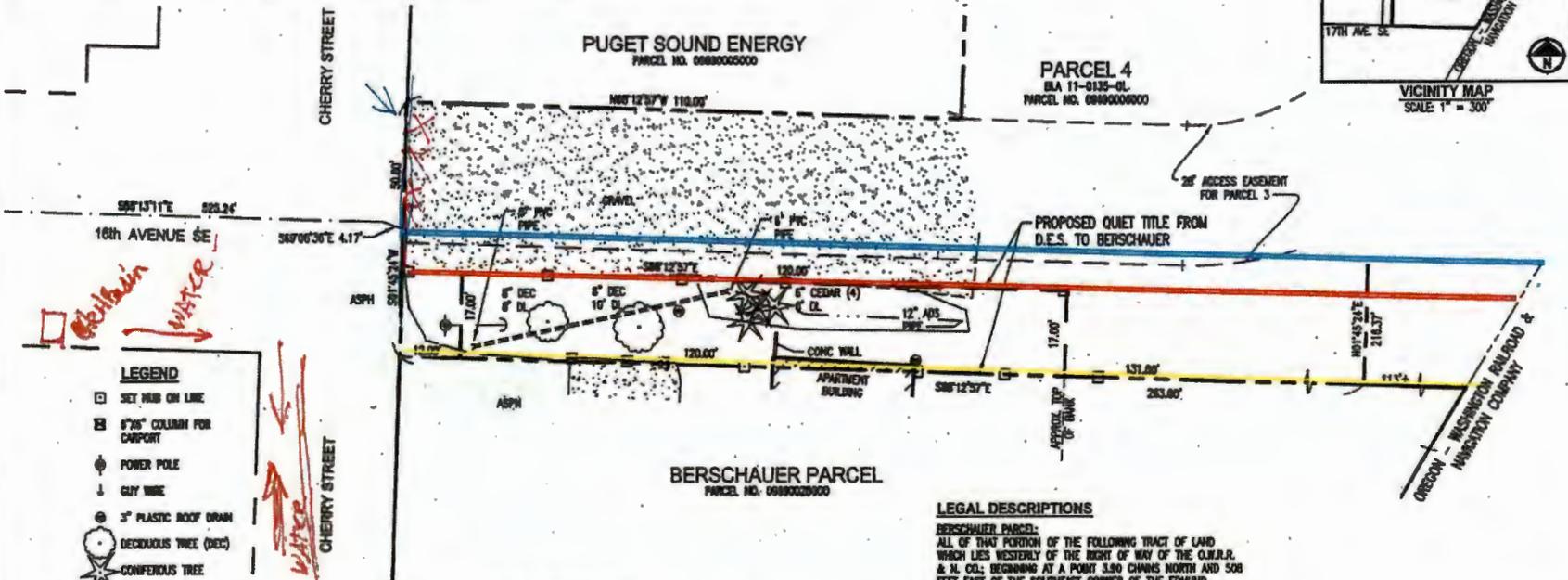
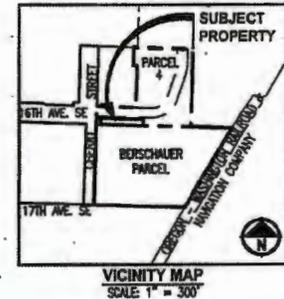
VII. APPENDIX

Color Clerk's Paper 462	A-1
Color Clerk's Paper 500	A-2
Color Clerk's Paper 502	A-3
Color Clerk's Paper 651	A-4

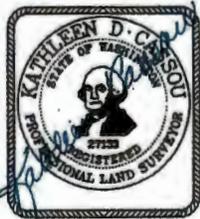
PROPERTY EXHIBIT

LOCATED IN THE SW¼ OF THE NE¼ OF SECTION 23, T.18N., R.2.W., W.M.
CITY OF OLYMPIA, THURSTON COUNTY, WASHINGTON

PARCEL	PARCEL AREAS	
	SQ. FT. BEFORE CONVEYANCE	SQ. FT. AFTER CONVEYANCE
4	38,221	37,183
TOTAL CONVEYANCE	2,038	



- LEGEND**
- SET MARK ON LINE
 - 6"X6" COLUMN FOR CARPORT
 - POWER POLE
 - GUY WIRE
 - 3" PLASTIC ROOF DRAIN
 - DECIDUOUS TREE (DEC)
 - CONIFEROUS TREE
 - BUILDING LINE
 - DITCH
 - - - EDGE OF GRAVEL
 - - - UNDERGROUND STORM DRAIN
 - GRAVE BREAK
 - CONCRETE
 - GRAVEL
 - ASPHALT
 - DRIP LINE



BASIS OF BEARINGS
WASHINGTON STATE COORDINATE SYSTEM WMS83/81, SOUTH ZONE BASED ON GPS BENCH MARK NO. 506 AT THE INTERSECTION OF JEFFERSON AND 12TH AVE. AND NSDOT CONTROL POINT GP34065-7 = SOUTH 38°32'36" EAST.

SURVEY'S CERTIFICATE
THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION AT THE REQUEST OF THE WASHINGTON STATE DEPARTMENT OF ENTERPRISE SERVICES.
IN OCTOBER 2014
Kathleen Cassou 11/24/14
KATHLEEN D. CASSOU, P.L.S. #27133 DATE

LEGAL DESCRIPTIONS
BERSCHAUER PARCEL:
ALL OF THAT PORTION OF THE FOLLOWING TRACT OF LAND WHICH LIES WESTERLY OF THE RIGHT OF WAY OF THE O.M.R.R. & N. CO.; BEGINNING AT A POINT 3.90 CHAINS NORTH AND 508 FEET EAST OF THE SOUTHEAST CORNER OF THE EDWARD SYLVESTER DONATION CLAIM; BEARING THENCE EAST 383 FEET; THENCE NORTH 224 FEET; THENCE WEST 383 FEET; THENCE SOUTH 224 FEET TO THE POINT OF BEGINNING, SITUATE IN THURSTON COUNTY, WASHINGTON.

DEPARTMENT OF ENTERPRISE SERVICES PARCEL:
PARCEL 4, BOUNDARY LINE ADJUSTMENT NO. BIA 11-0135-0L, RECORDED UNDER AUDITOR'S FILE NO. 4243334, RECORDS OF THURSTON COUNTY, WASHINGTON.

PROPOSED QUIET TITLE AREA:
THE SOUTH 17 FEET OF THE EAST 120 FEET OF THE WEST 132 FEET OF PARCEL 4, BOUNDARY LINE ADJUSTMENT NO. 11-0135-0L, AS RECORDED UNDER AUDITOR'S FILE NO. 4243334, RECORDS OF THURSTON COUNTY, WASHINGTON, AS MEASURED PERPENDICULAR FROM THE MOST SOUTHERLY AND WESTERLY LINES OF SAID PARCEL 4.

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DESIGNED	0	1"	2"
DRAWN	TWO INCHES AT FULL SCALE IF NOT SCALE ACCORDINGLY		
CHECKED	SCALE 1"=20'		
APPROVED	DATE	11/24/2014	

Exhibit 2 Date 11/24/14
Witness Rebecca S. Lindauer
Rebecca S. Lindauer, CCR, RPR

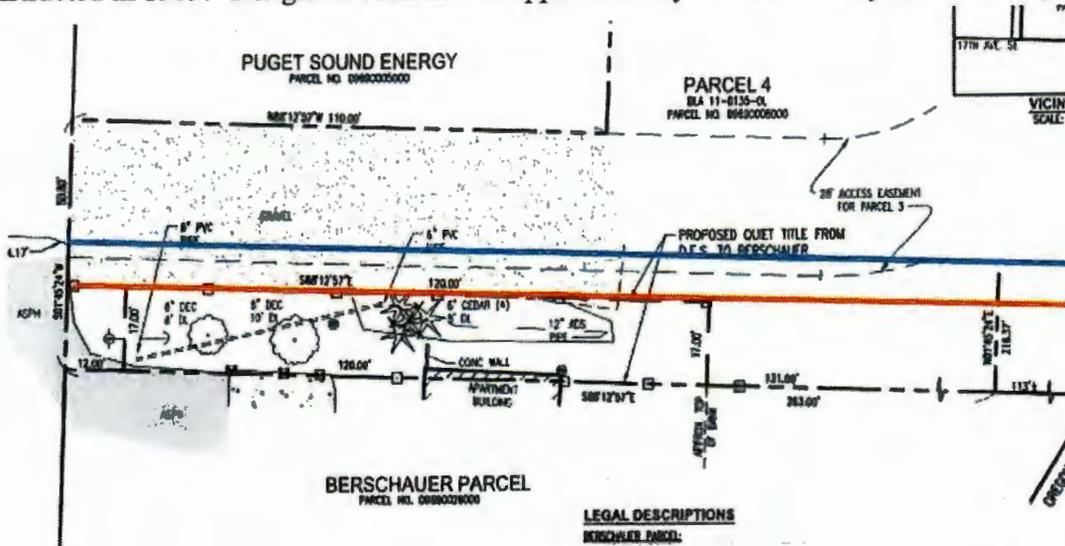
APPENDIX 1 (A-1)
Page 1 of 1





2014/03/31

1 constructed in 1969. The gravel road area is approximately 34 feet wide by 113 feet long.



11

12 As shown by the photograph below,² the gravel strip is an undifferentiated part of the

13 larger gravel area that PSE constructed and is distinctly separate from the vegetation area that

14 Mr. Berschauer and his predecessors have actually possessed since the construction of the

15 fourplex in 1965.



22

23 Mr. Berschauer bears the burden of demonstrating that each of the five elements of

24 adverse possession are met: possession that is (1) open and notorious; (2) actual and

25 ² The first photo, labeled 2014, was provided to the State by the plaintiff. Fuller Decl. at 2. The second

26 was taken in October 2014, during the State's survey of the vegetation strip. It is attached to the Fuller Declaration, Ex. 4, photo 4.

WASHINGTON STATE ATTORNEY GENERAL
April 21, 2017 - 3:22 PM
Transmittal Letter

Document Uploaded: 1-494141-Respondent's Brief.pdf

Case Name: Berschauer v. State of Washington et al

Court of Appeals Case Number: 49414-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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