

70049-9

70049-9

No. 70049-9-1

**IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

WILLIAM D. WAHL,

Appellant,

v.

MICHAEL L. AND HOROMI RITTER,

Respondents.

BRIEF OF APPELLANT

Attorneys for Appellant:

LIVENGOOD FITZGERALD
& ALSKOG, PLLC

Gregory A. McBroom, WSBA No. 33133
Timothy S. McCredie, WSBA No. 12739

121 Third Avenue,
P.O. Box 908
Kirkland, WA 98083-0908
Phone: (425) 822-9281

STATE OF WASHINGTON
2011 SEP 25 PM 1:34
30

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	4
III. STATEMENT OF THE CASE.....	10
A. STATEMENT OF FACTS	10
B. PROCEDURAL HISTORY.....	30
IV. ARGUMENT	31
A. Easement II Should be Interpreted to Recognize Wahl’s Express and Implied Rights, Giving Meaning and Effect to All Terms, Consistent with the Established Historical Use Since Wahl’s Driveway Was Built in 1979	32
B. The Ritters’ Concrete Patio and Deck that They Knowingly Designed and Built to Encroach Upon Wahl’s Property Without Telling Wahl and After Being Informed by the City that They Could Not Encroach Constitutes a Trespass and Violates the Terms of the Easement	43
C. The Ritters Have Exceeded the Scope of their Use Rights in Easement III by Permanently Mooring a Boat and Two Jet Skis and Attaching Three Lift Devices to the Dock.....	49

TABLE OF CONTENTS

	<u>Page</u>
D. The Ritters Have Exceeded the Scope of The Easement by Running Electrical Cords, Water Hoses, Power Lines and Solar Lights All the Way from Their House Across Wahl’s Property (through EA I, II and III) to the Dock.....	55
E. The Ritters Unilateral Decision to Have the Stairs in EA I Increased from Three to Five Feet Without the Consent of Wahl Violates the Easement.....	61
F. The Trial Court Erroneously Awarded Fees and Costs Under the Fee Shifting Provision for Small Claims in RCW 4.84.270.....	63
G. Appellant Wahl Should Be Awarded Attorneys’ Fees and Costs on Appeal as Allowed by the Trespass Statute	65
V. CONCLUSION.....	65
APPENDIX A.....	A-1
APPENDIX B.....	B-1

TABLE OF AUTHORITIES

Page

Washington Cases

<i>Arnold v. Melani,</i> 75 Wn.2d 143, 437 P.2d 908 (1968).....	45
<i>Bakke v. Columbia Valley Lumber Co.,</i> 49 Wn.2d 165, 298 P.2d 849 (1956).....	54
<i>Berg v. Ting,</i> 125 Wn.2d 544, 886 P.2d 564 (1995).....	57
<i>Berrocal v. Fernandez,</i> 155 Wn.2d 585, 121 P.3d 82 (2005).....	42
<i>Bradley v. American Smelting & Refining Co.,</i> 104 Wn.2d 677, 709 P.2d 782 (1985).....	47
<i>Broadacres, Inc. v. Nelsen,</i> 21 Wn. App. 11, 583 P.2d 651 (1978).....	38, 39
<i>Butler v. Craft Eng Const. Co., Inc.,</i> 67 Wn. App. 684, 843 P.2d 1071 (1992).....	37
<i>Castanza v. Wagner,</i> 43 Wn. App. 770, 719 P.2d 949 (1986).....	58

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Clevco, Inc. v. Municipality of Metropolitan Seattle,</i> 59 Wn. App. 536, 799 P.2d 1183 (1990).....	56
<i>Clipse v. Michels Pipeline Constr., Inc.,</i> 154 Wn. App. 573, 225 P.3d 492 (2010).....	45
<i>Cole v. Laverty,</i> 112 Wn. App. 180, 49 P.3d 924 (2002).....	36, 41
<i>Diamond B Constructors, Inc. v. Granite Falls Sch. Dist.,</i> 117 Wn. App. 157, 70 P.3d 966 (2003).....	32
<i>Hayward v. Mason,</i> 54 Wash. 649, 104 P. 139 (1909).....	38
<i>Heg v. Alldredge,</i> 157 Wn.2d 154, 137 P.3d 9 (2006).....	57
<i>Hollis v. Garwall, Inc.,</i> 137 Wn.2d 683, 974 P.2d 836 (1999).....	51
<i>Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Assoc.,</i> 156 Wn.2d 253, 126 P.3d 16 (2006).....	45

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Keystone Land & Dev. Co. v. Xerox Corp.</i> , 152 Wn.2d 171, 94 P.3d 945 (2004).....	59
<i>Kiely v. Graves</i> , 173 Wn.2d 926, 271 P.3d 226 (2012).....	43
<i>Littlefair v. Schulze</i> , 165 Wn. App. 659, 278 P.3d 218 (2012).....	42
<i>Lowe v. Double L Props.</i> , 105 Wn. App. 888, 20 P.3d 500 (2001).....	53
<i>Mielke v. Yellowstone Pipeline Co.</i> , 73 Wn. App. 621, 870 P.2d 1005 (1994).....	45
<i>Newport Yacht Basin Assoc. of Cond. Owners v. Supreme NW, Inc.</i> , 168 Wn. App. 56, 277 P.3d 18 (2012).....	32, 51
<i>Presidential Estates Apartment Associates v. Barrett</i> , 129 Wn.2d 320, 917 P.2d 100 (1996).....	57
<i>Proctor v. Huntington</i> , 169 Wn.2d 836, 192 P.3d 958 (2008).....	45

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Reynolds v. Hicks</i> , 134 Wn.2d 491, 951 P.2d 761 (1998).....	10, 64
<i>Sanders v. City of Seattle</i> , 160 Wn.2d 198, 156 P.3d 874 (2007).....	32, 45, 55
<i>Snyder v. Haynes</i> , 152 Wn. App. 774, 217 P.3d 787 (2009).....	52
<i>Standing Rock Homeowners Ass'n v. Misich</i> , 106 Wn. App. 231, 23 P.3d 520 (2001).....	45, 65
<i>State v. Hayden</i> , 28 Wn. App. 935, 627 P.2d 973 (1981).....	39
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003).....	31, 48, 51, 52, 53, 55, 56, 60, 61, 62, 63
<i>Thompson v. Smith</i> , 59 Wn.2d 397, 367 P.2d 798 (1962).....	36, 41
<i>Veach v. Culp</i> , 92 Wn.2d 570, 599 P.2d 526 (1979).....	38

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Winsten v. Prichard</i> , 23 Wn. App. 428, 597 P.2d 415 (1979).....	60
 <u>Washington Statutes</u> 	
RCW 4.84.010	10, 64
RCW 4.84.270	3, 10, 31, 63, 64
 <u>Treatises</u> 	
7 STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, THE AMERICAN LAW OF TORTS 641 (1990)	45
BLACK’S LAW DICTIONARY 607 (9th ed. 2009).....	45
RESTATEMENT (SECOND) OF TORTS § 158 (1965).....	47
Stoebuck and Weaver, 17 WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW, § 2.1 (2d ed. 2004 & 2012 supp.)	54
THOMPSON ON REAL PROPERTY, § 60.02(d).....	41

TABLE OF AUTHORITIES

Page

Out of State Cases

Mueller v. Hoblyn,

887 P.2d 500 (Wyo. 1994)..... 41

Federal Cases

Lingle v. Chevron U.S.A., Inc.,

544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005)..... 47

I. INTRODUCTION

This touchstone of this case involves the interpretation of an easement created in 1978 by Appellant Wahl (“Wahl”) and Tom Podl (the “Podls”), the predecessor in interest to the real property currently owned by Respondents Michael and Hiromi Ritter (the “Ritters”). Tr. Ex. 105 (easement).¹ Because this review primarily concerns the trial court’s legal conclusions eliminating Wahl’s express rights, the review is *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) (the legal consequences of the original parties intent is a question of law that the appellate court reviews *de novo*).

First, the trial court erred in concluding that Easement II grants exclusive rights to the Ritters over a strip of land along the north boundary of the Wahl parcel. The easement reserves to Wahl the right to use the area “for *ingress and egress* and landscape maintenance, *and such other non-recreational uses* that do not unreasonably interfere with [the Ritters’] priority use of this easement.” The trial court’s conclusion reads this out of existence. Since 1979, this strip of land has been used by Wahl for a driveway, occasional parking and other uses. The area is needed *to allow*

¹ “EA I,” “EA 2” and “EA 3” are used herein when referring to the geographical easement areas and “Easement I,” “Easement II” and “Easement III” are used when referring to the easement language. Appendix A is a copy of the easement survey (Tr. Ex. 2) with EA I, EA II and EA III color coded for ease of reference.

vehicles to navigate around a tight radius of the driveway that leads to a steep hill slope. The trial court also ordered that the Ritters could install four large 48” concrete obstruction barriers to block Wahl’s use, which they did. *See* App. B (current photo showing the blocking).

Second, the trial court erred in concluding that the Ritters’ patio and planter boxes encroached (trespassed) upon Wahl’s property, but then allowed the trespass because “the patio does not interfere with any other use of the property covered by the easement.” CP 637. The error is a wrongful taking of property Wahl pays taxes upon. In 2007, the City told the Ritters “*that [their patio and deck] will not be allowed to intrude on [Wahl’s] property.*” Tr. Ex. 32 (p. 3) (emphasis added). Nevertheless, the Ritters ignored the City and knowingly designed and built their patio and deck to encroach. The patio and deck are *not* part of the retaining structure in EA I; the remediation engineers designed the area to be final grade with *only* crushed rock (Tr. Exs. 103 & 104); and the patio and deck *can* be fully constructed on the Ritters’ property.

Third, the trial court erred in concluding that the easement allowed the Ritters to use the dock to permanently moor a boat and two jet skis with three lift devices attached to the dock, when the easement language unambiguously restricts the Ritters use to the permanent mooring of “not over two boats” and requires the consent from Wahl for any improvements

to the dock. The Ritters never obtained consent from Wahl before installing their lift devices to the dock and Wahl was clear that the Ritters' permanent mooring of the two jet skis violated the easement. Neither the jet skis nor the lift devices are allowed under the easement.

Fourth, the trial court erred in concluding that the easement permitted the Ritters to run electrical cords, water hoses and power lines all the way from their house (through EA I, II and II) to the dock. The trial court also failed to declare easement rights with respect to the solar lights randomly installed by the Ritters and the bricks, pavers, sand and other materials stored by the Ritters in EA II and III.

Fifth, the trial court erred in concluding that the Ritters had the right to unilaterally increase the width of the east stairs in EA I from three to five feet. The final design drawings agreed to by both Wahl and the Ritters show three-feet as the agreed upon width. Tr. Exs. 103 & 104. The Ritters never notified Wahl of the change. Both the remediation agreement and Easement I require the Ritters to obtain the consent from Wahl for any material changes to the area.

Finally, the trial court erred in awarding fees and costs to the Ritters under the statutory fee shifting provision for small claims, RCW 4.84.270, when it was based upon an inaccurate finding that Wahl pleaded an amount of \$10,000 or less in his complaint. Wahl pleaded treble

damages in an amount to be proven at trial in the complaint. The trial court did not support its award with findings or conclusions.

II. ASSIGNMENTS OF ERROR

A. Pertaining to Easement II — the North Strip of Wahl’s Land

Assignment of Error 1. The trial court erred by concluding that Easement II gives to the Ritters the exclusive rights to use the narrow strip of land on the north part of Wahl’s property by only recognizing the Ritters’ rights and disregarding Wahl’s express rights, their use since 1979 and their implied rights of a servient landowner. CP 636 (¶ 26).

Assignment of Error 2. The trial court erred by making a finding that the Ritters claimed “priority use” of their walking path when, in fact, they sought and were granted exclusive use. CP 632-33 (¶ 4).

Assignment of Error 3. The trial court erred by making a finding that Wahl’s need to use the area for navigating their driveway is “resolved in favor of Owner B’s scope of use, the recreational nature of the primary use, and Owner B’s privacy rights,” ignoring Wahl’s *express rights* under the easement and implied rights as a servient landowner. CP 633 (¶ 9).

Assignment of Error 4. The trial court erred by making a finding that defines the north area of EA II as “the easement path” when the easement contains no such language and the area had long been used for other purposes. CP 632 (defined at ¶ 4); 633; 636-37; 639-41.

Assignment of Error 5. The trial court erred by concluding that Easement II only pertains to a recreational easement without recognizing the express rights granted to Wahl. CP 636-41 (§ 26-28).

Issue 1. Under the plain language of the easement and/or Wahl's historical usage since 1979, should the Court declare that Wahl has non-recreational ingress and egress rights, including driving, parking and other uses that do not unreasonably interfere with Ritters use?

Issue 2. Should the Ritters be required to remove their four large concrete obstruction barriers; to restore the 22-foot radius of the Wahl driveway (to fix the area they wrongfully cut away in 2007); and to install two foot square pavers around the radiused driveway in like number (20) as shown in the preliminary landscape plan?

B. Pertaining to Easement I — the Patio and Deck

Assignment of Error 6. The trial court erred by concluding that the Ritters' concrete patio and deck encroachment (trespass) is permissible because "the patio does not interfere with any other use of the property covered by EA I." CP 637 (§ 30); CP 635 (§ 16)

Assignment of Error 7. The trial court erred when it found that the Ritters did not need to obtain consent from Wahl for material changes in EA I even though the easement expressly refers to § 6, requiring consent for material changes. CP 635, 637 (§§ 16, 17, 31).

Assignment of Error 8. The trial court erred by finding the encroachment permissible for safety or drainage when the contractor testified that the area was designed to be level grade with only crushed rock; that the patio and deck were not part of the retaining wall design (drainage or structural); and that the patio and deck can be moved entirely back onto the Ritters' property. CP 634 (§ 15).

Assignment of Error 9. The trial court erred when it found that there could "conceivably be a safety hazard" when there was no evidence to support it and the contractor testified that the patio and deck can be moved back entirely onto the Ritters' property. CP 634 (§ 15).

Issue 3. Should the found encroaching patio and deck be moved back onto the Ritters' property given that the contractor testified it *can* be moved back; that it is *not* part of the retaining wall design; that the Ritters *never* sought approval from Wahl; and that the City expressly told the Ritters *not* to build their patio and deck on Wahl's property?

C. Pertaining to Easement III — the Dock

Assignment of Error 10. The trial court erred in finding that the Bellevue Municipal Code classified two jet skis as one boat when it does not and in concluding "two jet skis equals one boat" is reasonable when the easement says "not more than two boats." CP 635-36 (§§ 19, 22).

Assignment of Error 11. The trial court erred by finding that a

boat lift is impliedly permitted even after finding that lift devices are not mentioned in the easement. CP 635 (¶ 21).

Assignment of Error 12. The trial court erred by finding that the parties intended Easement III to change over time for new methods and accessories without any showing of such intent. CP 636 (¶ 21).

Assignment of Error 13. The trial court erred by finding that any number of watercraft is permissible so long as the total length of all of them do not exceed 50 feet and even though the overuse eliminates Wahl's express right of occasional use of the dock. CP 636 (¶ 21).

Assignment of Error 14. The trial court erred in concluding two jet skis, a boat, and three boat lifts are allowed. CP 638 (¶¶ 33-34).

Issue 4. Under the plain language of Easement III, restricting the dock to "not over two boats" and allowing Wahl occasional use, is the Ritters' use of the dock to permanently moor a boat and two jet skis, and the attachment of three lift devices contrary to the easement?

D. Pertaining to Easements I, II & III — Electrical Cords, Water Hoses, Power Lines & Solar Lights

Assignment of Error 15. The trial court erred in concluding the easement allows the Ritters to run electrical cords, water hoses and power lines from their house (across EA I, II and III) to the dock. CP 637 (¶ 29).

Assignment of Error 16. The trial court erred by finding the

Podls and the Ritters sought consent for installation of water and electricity when Ms. Podl testified just the opposite and Wahl testified that he never received any such request. CP 634 (§ 11).

Assignment of Error 17. The trial court erred by finding that the Ritters have an “implied right” to run electrical cords and water hoses from their house to the dock. CP 634 (§§ 11 & 12).

Assignment of Error 18. The trial court erred by failing to declare rights concerning the Ritters unilateral installation of solar lights in EA I, II and III in random locations. CP 631-42.

Issue 5. Under the easement’s plain language, do the Ritters have the right to run electrical cords, water hoses and power lines from their house (all the way across EA I, II, and III) to the dock?

Issue 6. Do the Ritters have the right to install water pumps, boat lifts and electrical utilities in EA II and III for the sole purpose of raising and lifting Ritters’ boat or performing other watercraft activities?

Issue 7. Do the Ritters have the right to randomly install solar lights in EA I, II and III without Wahl’s consent?

E. Pertaining to Easement I — the Stairs

Assignment of Error 19. The trial court erred in concluding the stair width being permissible when the parties had previously agreed to three feet per the SES final design (Tr. Exs. 103 & 104) and the Ritters

never obtained the consent of Wahl. CP 637 (¶ 32).

Assignment of Error 20. The trial court erred in finding that the Ritters could make unilateral material changes in EA I without the consent of Wahl. CP 635 (¶ 18).

Assignment of Error 21. The trial court erred in finding that the Ritters unilateral increase in the width of the stairs from three to five feet did not interfere with any use by Wahl when the banister from the stairs extends into EA II and creates an obstacle. CP 635 (¶ 18).

Assignment of Error 22. The trial court erred in finding that the increased stair width was for “safety reasons” when the evidence established the City’s code requirement was three feet and three feet was SES’s final design width. CP 635, 637 (¶¶ 18).

Issue 8. Should the Ritters be required to modify the stairs to a three-foot width consistent with the final SES design drawings and what was explained to and agreed by both Wahl and the Ritters?

F. Pertaining to Easement II & III — Bricks and Other Materials

Assignment of Error 23. The trial court erred in failing to declare the rights concerning the Ritters’ storage of bricks, pavers, and other materials in EA II and III. CP 631-42.

Issue 9. Should the Court declare that the Ritters cannot store bricks, pavers, sand, or other materials in EA II and III?

G. Pertaining to Attorneys' Fees and Costs

Assignment of Error 24. The trial court erred in awarding the fees and costs under RCW 4.84.270 based upon an erroneous belief that Wahl pleaded damages equal to or less than \$10,000; in awarding costs outside of those allowed under RCW 4.84.010; and by not entering any findings and conclusions as required under *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). CP 1041, 1332, 1383, 1455-56.

Issue 10. Under *Reynolds v. Hicks*, 134 Wn.2d 491, 502, 951 P.2d 761 (1998), should the award of attorney fees and costs be reversed when Wahl pleaded “an award of *treble damages* caused by the wrongful acts of defendants *in an amount to be proven at trial*”? (italics added).

Issue 11. Should the award of fees and costs be reversed when the costs do not fall within any the categories in RCW 4.84.010 and when the fees are not supported by any finding or conclusions under *Mahler*?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The touchstone of this case is the interpretation of an easement created in 1978 by Mr. Wahl and Tom Podl, the predecessor in interest to the real property owned by the Ritters. Tr. Ex. 105 (easement). The new easement is divided into six areas, but this appeal concerns only EA I, II and III. See Tr. Ex. 2 (survey of areas) and Tr. Ex. 105, p. 23 (sketch of

areas).² Trial Exhibit 2 (*see* App. A) is a survey showing the boundaries of each easement area according to the legal descriptions, Tr. Ex. 105, Ex. C, and also showing certain structures existing on May 25, 2011. VRP 385, 555. These structures include the northern section of the Wahl driveway after the Ritters illegally removed a five-foot section in 2008, as further discussed below; the western portion of the Ritters' patio and deck designed and built to encroach upon Wahl's property; the stairs in EA I and II; and the dock area in EA III. *See* Tr. Ex. 2 & CP 637 (¶ 30).

Wahl's Driveway Property in EA II. In November 1976, Wahl purchased real property on Lake Washington. VRP 160. The property was subject to a prior easement benefitting the predecessor in interest to real property located behind the Wahl parcel — then owned by Tom and Audrey Podl and now owned by the Ritters. VRP 162-63.

In September 1977, Wahl obtained a building permit and in March 1978 their house was constructed. VRP 164-65. Before the 1979 driveway could be constructed and the property landscaped, a dispute arose concerning the location of Wahl's house and the Podls rights under a prior easement. *Id.* In October 1978, Mr. Wahl and Mr. Podl mutually

² The easement areas were rough sketched on a survey created about 10-years before Wahl purchased their property and this older survey did not show the radiused driveway. VRP 354. The pre-1979 driveway had a radius and did not end in a straight line, as confirmed by both Mr. Wahl and Ms. Podl. VRP 354, 623.

resolved their dispute by drafting a new easement, which replaced the earlier one.³ VRP 164-65; Tr. Ex. 105 (new easement).

Easement II states in relevant part, “Owner A [Wahl] shall have *the right to the use of Easement II for **ingress and egress** and landscape maintenance, **and such other non-recreational uses** which do not unreasonably interfere with Owner B’s [the Ritters] priority use of this easement.” Tr. Ex. 105 at 5 (easement) (emphasis and bold added). The easement further requires EA II to maintained “in accordance with paragraph 6,” which that the Ritters “*not materially change [the area] without [Wahl’s] consent.*” Tr. Ex. 105 at 8 (emphasis added).*

Since 1979, the strip of the Wahl land at issue is the northern five-foot area, which has been used by Wahl as a driveway, occasional parking and other uses and by the Podls and Ritters for a walking path. VRP 253-55, 430-31; Tr. Ex. 5 (1979 architect design). Trial Exhibit 9 is a 2004 survey showing the walking path and the edge of the Wahl driveway (the 2000 driveway). The easement walking path and Wahl’s driveway overlapped. Tr. Ex. 16, p.6 (photo). The disputed area is also shown on the more recent easement survey as “View B.”⁴ Tr. Ex. 2 & App. A.

³ Neither Ms. Wahl nor Ms. Podl participated in the drafting. VRP 165; 257-58.

⁴ View B shows the Ritters’ 2011 version of pavers, crushed rock and brick that they built after being ordered to remove the large railroad ties. CP 99; Tr. Ex. 18 (photos).

From 1979 to 2010, the lower portion of the old east stairs (the “east stairs”) on EA I leading to and from the Ritters’ house dropped off *entirely on* Wahl’s driveway outside of any easement rights — south of EA II. VRP 264, 549-50; Tr. Ex. 30; 825-26; Tr. Ex. 16 (pp. 5 & 7, photos of old east stairs). Compare the old east stairs, Tr. Ex. 30, with the new stairs, Tr. Ex. 2. The bottom of the old east stairs led to a location southerly and directly onto Wahl’s driveway and not onto any part of the easement. VRP 217 & Tr. Ex. 16, p.5 (photo).

Because of where the old east stairs dropped off, the Podls and Ritters had to walk across Wahl’s driveway outside of any easement rights to access Lake Washington. VRP 264, 431-33, 549-50. This was the most direct route because the bottom of the east stairs was aligned with the stairs on the opposite side of the Wahl driveway (the “west stairs”) that led to the dock area. *Id.*; Tr. Ex. 16, p. 2; Tr. Ex. 99, p. 7. Also because of where the old east stairs dropped off, Wahl would occasionally park cars north of the old east stairs, allowing anyone from the Ritters coming down the stairs to walk directly to Lake Washington. Tr. Ex. 99 (showing four photos of cars parked in relation to the old east stairs).

The legal description for EA II grants to the Ritters the right to use a five-foot section on the north side of the Wahl property as a walking path. VRP 259, 551; Tr. Ex. 2. It provides the Ritters with pedestrian

access to the grassy area on the west side of EA II and the dock on EA III. VRP 551. At the same time, Wahl has used the five foot area of his land for their driveway, occasional parking, and some gardening (in the areas of EA II north of the driveway). VRP 255, 551, 430-31. The Podls never complained about Wahl's use of his land in EA II. *Id.* Ms. Podl testified consistently that neither she nor her husband had any issues with Wahl's use after the new easement was created. VRP 618.

The minimum five-foot width dimension for the easement added to the legal description (as shown by the different font) because the City required there to be a five-foot wide connection between the waterfront and the Podls' house. VRP 168; Tr. Ex. 105 (Ex. C, p. 2). The five-foot dimension provided the minimum width of EA II, but the legal description for the easement says nothing about restricting Wahl's non-recreational ingress and egress rights. VRP 541; Tr. Ex. 105 (p. 5 & Ex. C, p. 2).

The 20-foot radius in the legal description for EA II closely matches Wahl's 1979 driveway radius. VRP 466, 541. Trial Exhibit 27, p. 8 shows the arc of a 20 foot radius. VRP 552-53. Mr. Wahl testified that if the 20-foot radius was extended over the five-foot section of driveway wrongly removed by the Ritters in 2008, then the resulting driveway would closely match the radius of his 1979 driveway. *Id.* The radius of the 1979 Wahl driveway was located about a foot from the fence

on Wahl's north property line, which is overwhelmingly supported by the contemporaneous documentary evidence and testimony. *Id.*

Mr. Wahl testified that the intent of providing for non-recreational ingress and egress use was to make clear that Wahl retained the right to drive, park, and do other things that did not unreasonably interfere with the Podls' use. VRP 253-55; Tr. Ex. 105 (p. 5). It was essential because Wahl's driveway was located in EA II and vehicles need to be able to navigate around the driveway's tight radius. *Id.* He explained that the language of Easement II was never intended to restrict non-recreational ingress and egress rights. VRP 255-56, 540-42, 553-54, 645. *Compare* Tr. Ex. 105 at 4 (limiting the use of Easement I to "pedestrian only" and "not parking") *with* Tr. Ex. 105 at 5-6 (reserving the right of Wahl to use their property in EA II for non-recreational ingress and egress).

A preliminary negotiation letter from Podl to Wahl dated October 6, 1978 (near the time the easement was executed), stated that Wahl and the Podls "have agreed in principle upon a general approach" and discussed a "master landscaping plan" that would need to be developed and agreed upon. VRP 331-32; Tr. Ex. 4 at 1. It indicated that the parties would need to come to an agreement on the details of a final landscaping plan; that there were some preliminary discussions about on-site lighting; and that any agreement reached by Wahl and the Podls would be attached.

Tr. Ex. 4. The skeletal draft agreement outlined in the letter was never finalized. VRP 331, 525, 657-58; Tr. Ex. 4.

There is also a preliminary landscape plan created shortly after the easement showing a conceptual design. VRP 215-16, 270, 482, 582-85; Tr. Ex. 3 (plan). The landscape designer testified that her plan was not consistent with the easement survey (Tr. Ex. 2). VRP 679-80. The plan is also not consistent with the scaled architect drawing (Tr. Ex. 5). Mr. Wahl testified that the plan was not to scale with the 1979 driveway and not to scale with anything that had been installed. VRP 464, 482. The architect drawing shows one to two feet between the 1979 driveway and the Wahl north boundary. Tr. Ex. 5 (architect drawing with scale). The easement surveyor testified that a 22-foot driveway radius as shown on the plan would have extended *to the Wahl north boundary line* and that a 20-foot radius would have extended *within two feet*. VRP 339, 1031. Earlier surveys from 2004 showed the same. Tr. Exs. 9 (p.2) & 10.

The landscaping installed by Wahl and the Podls was significantly different than the preliminary landscape plan. VRP 323-26, 474; 482-84, 545, 582-85; 630-32, 635, 638. The Wahl driveway with the 22-foot radius extended close to the northern boundary line; the east stairs were constructed in a different location (more to the south); neither the bench nor pavers were installed; the turf was replaced with grass; and the trees

and shrubs were changed in type, quantity, and location. *Id.*

Since the driveway was built in 1979, Wahl had used the area of their property in EA II as a driveway. VRP 260-61, 429. Mr. Wahl, Doctor Patricia Wahl, and Gretchen Baneyx testified that the 1979 driveway radius came to within about a foot of the north boundary of Wahl's property. VRP 188-89, 262, 327, 389, 552-53; Tr. Ex. 5. Ms. Podl recalled that the driveway had a radius, but could not recall where it was located. VRP 622-24, 633. Mr. Wahl, Doctor Wahl, and Ms. Baneyx each testified that the area was especially important for vehicles leaving the Wahl property because they needed to back into EA II to swing their front end around to navigate around the tight radius leading to a steep slope. VRP 187, 317-19; Tr. Ex. 24 (photo of driveway radius).

Mr. Wahl testified that he and Mr. Podl put the priority language in Easement II to resolve simultaneous usage conflicts. For example, “[Wahl] wouldn't come down and start a barbecue fire at the same time that [the Podls] were attempting to do a barbecue fire.” VRP 251. Paragraph 6 was included in Easement I and II to ensure that no material changes were made to the area without Wahl's consent. VRP 252. The strip of Wahl's land in EA II is also *not in use most of the time* by the Ritters because it is only intended to be their walking path to the lake. VRP 551-52; Tr. Ex. 28 (photo of grassy landscaped area).

In 1979, Wahl paid for several improvements, including the construction of their new driveway and dock and the installation of new landscaping. VRP 218 & 238-39; Ex. 105 (¶ 4). The 1979 driveway extended close to the existing fence to the north. VRP 228. Tr. Exs. 12-14 (photos showing the imprint of the 1979 driveway during its removal in 2000). The original 1979 architect drawing shows a radiused driveway extending within two feet of the property line. Tr. Ex. 5; VRP 218.

In December 1999, the Podls sold their home to the Ritters. VRP 700. That same month, Wahl provided a copy of the easement to the Ritters and went through it with them line by line. VRP 547. The Ritters understood at that time that Easement II allowed Wahl to use the area for driving, occasional parking and other uses. VRP 547.

In January 2000, Wahl discovered a large amount of oil seeping onto their property that caused sheen on the surface of Lake Washington. VRP 702-05. An oil tank on the Ritters' property ruptured and caused extensive soil contamination on the Wahl property. *Id.* A large scale remediation effort had to be undertaken on Wahl's property, which included replacement of Wahl's 1979 driveway. *Id.*; VRP 206.

In November 2000, the contractor originally hired to perform the soils and groundwater remediation (TerraSolve) removed and replaced Wahl's 1979 driveway. VRP 207-08.; Tr. Exs. 12-16 (photos). Although

TerraSolve did not survey the old driveway (VRP 206) before replacing it, photos of the 1979 driveway removal show the footprint of the 1979 driveway extending close to Wahl's north boundary line. Tr. Exs. 12-14 (photos); VRP 417-19. The pre-remediation topography map created before the replacement of the driveway also shows the 1979 driveway radius being close to the property line. Tr. Ex. 11.

Wahl and the Ritters had agreed to the 2000 driveway configuration. VRP 228, 456; Tr. Ex. 16 (photo of 2000 driveway). The new configuration is depicted in Tr. Ex. 9 and has a slightly different shape than the 1979 driveway. VRP 219-20, 537; Tr. Ex. 9, p. 2 (survey of 2000 driveway); Tr. Ex. 16 (photos). As shown in the photos, inside EA II, the width in the "east/west" direction was enlarged. VRP 389-91, 398-99, 544-45; Tr. Exs. 9 & 16. But, the distance between the 2000 driveway and Wahl's north property line remained unchanged.⁵ *Id.* Outside of EA II, and the west side of the driveway was reduced in width. *Id.* Like the 1979 driveway, the 2000 driveway was located in EA II and about a foot away from the fence line. VRP 119-20.

In February 2004, the Department of Ecology would not approve the clean-up work performed by TerraSolve. VRP 115. The Ritters'

⁵ Compare the 1979 architect design (Tr. Ex. 5) and photos of the 1979 driveway replacement (Tr. Ex. 12-15) with the new 2000 configuration (Tr. Exs. 9 & 16).

insurance company then verified continuing soil issues and retained Sound Environmental Strategies (“SES”) to continue with the soils and groundwater remediation. VRP 114. SES provided the oversight responsibilities for the remediation and subcontracted with Jacobs Engineering for the geotechnical engineering and with Wyser Construction for the remediation construction work. VRP 115-17. It was about this same time in 2004 that the Ritters began complaining about Wahl using the area for driving or parking. VRP 448-49.

Dr. Patricia Wahl lived at the Wahl house from 1979-85 and continues to visit. VRP 317, 320. She explained the difficulties of navigating cars around the tight radius and to Wahl’s regular use of EA II for occasional parking and driving. VRP 317-19. She recalled annually planting tomato plants in the area between the 1979 driveway and the north fence and estimated the distance between the fence and driveway to be about six inches at the narrowest point. VRP 327. At that time, the laurel hedge to the north was trimmed back and not overgrown. VRP 321.

Ms. Baneyx lived in the house for a few years after 1979 and also continues to visit. VRP 186. As to the 1979 driveway, she stated, “you had to back the car up in just the right angle, flip the front around so it was facing directly up so that you didn’t run over the embankment which had rocks and stuff in it, the inner circle, you know, the inner radius, and then

go out ... So yeah, I used all that driveway, and I needed all of it.” VRP 187. She said many cars had difficulty navigating the tight radius. VRP 188-89. “[G]etting out was always a problem. Turning the -- turning the car, doing that -- backing it up and flipping the front around so that you could actually head straight up.” VRP 190. Ms. Baneyx testified that there was about a foot between the edge of the driveway and the north fence. VRP 188-89. She also recalled that her mother used to plant a garden in the area between the fence and driveway. VRP 191, 197-98.

Ms. Podl testified that she moved out of her house in 1984. VRP 629. She testified that she believed the distance between the north fence and the radius on Wahl’s 1979 driveway was more than six inches, but could not recall the distance. VRP 624. She believed the 1979 driveway had a large radius. VRP 633. She said there were some flagstone pavers installed in the pathway, but could not recall where. VRP 630.

In July and August 2004, the Ritters had the area surveyed. Tr. Exs. 9 & 10. The survey shows the 2000 Wahl driveway located one to two feet from the Wahl northern boundary line. Tr. Exs. 9 & 10. Mr. Wahl testified that the radius shown in these surveys is similar to the radius on his 1979 driveway. VRP 536-37. These surveys also confirm that a 22-foot driveway radius would extend to the Wahl north property line and that a 20-foot driveway radius would extend to about one to two

feet from the Wahl north boundary line. Tr. Ex. 9 & 10.

In August 2004, without any notice to Wahl, the Ritters consulted with a contractor to unilaterally remove a portion Wahl's 2000 driveway. VRP 279-80, 424-25, 545-46; Tr. Ex. 7. Wahl later discovered the improper activity and did not allow the work to proceed. *Id.* Wahl then wrote a letter to inform the Ritters that they were not to make any changes to the 2000 driveway that they had agreed upon. Tr. Ex. 7.

However, in late summer 2008, while Wahl was out of town, the Ritters hired a contractor to trespass onto Wahl's property and remove the northern five feet of the 2000 Wahl driveway. VRP 226-28, 428, 546, 835; Tr. Ex. 17. The Ritters did not consult with Wahl or SES before taking this unilateral action and has never offered to put Wahl's 2000 driveway back. VRP 155, 267-68, 545-46, 835. The Ritters' insurance company stated, "We are not involved with Mr. Ritter's removal of the driveway on the north end. This was done by Mr. Ritter at no direction of SES or State Farm." Tr. Ex. 38, p.16. This unauthorized action made it extremely difficult for cars to navigate around the tight driveway radius. VRP 265; Tr. Ex. 24 (photo of cars trying to navigate the tight radius).

In July 2009, SES began the large scale cleanup of the soils. This was an extensive undertaking and required massive soil removal from the Wahl site. Tr. Ex. 25, p.1 (photo of excavation). In May 2010, without

Wahl's consent, the Ritters installed yards of sand, concrete pavers, bushes and lights in EA II and Wahl told the Ritters this was not allowed. VRP 281. On May 14, 2010, the permit for the remediation work became final. VRP 72. In August 2010, Wahl wrote a letter to the Ritters detailing the several easement violations and requesting compliance. VRP 281; Tr. Ex. 8. The Ritters never responded. *Id.*

In March 2011, again without any notice, the Ritters unilaterally installed large railroad ties in the area to block any use of the land by Wahl. VRP 230, 264-65; Tr. Ex. 18 (photos). The Ritters conducted this activity over Wahl's heavy objections. *Id.* Wahl asked the Ritters to stop this construction, but they refused. *Id.*

The Ritters' Concrete Patio and Deck. In May 2010, without obtaining any consent from Wahl and purely for personal convenience completely separate from the soils and groundwater remediation effort, the Ritters purposely and knowingly built a large concrete patio and block planters to encroach on Wahl's property. VRP 126 & 129 & 138-39; VRP 281-88; VRP 297; Tr. Ex. 2 (survey showing encroachment); Tr. Ex. 38 at 14 (City's photo of encroaching areas); Tr. Ex. 42 (post-remediation survey dated June 2010 showing encroachment). As shown on the survey (Tr. Ex. 2), the encroachment takes away 138 square feet of real property from Wahl; real property that Wahl pays taxes on. VRP 292. Dr. Patricia

Wahl used to have a terraced garden in the area where the Ritters have now located their concrete patio and deck. VRP 318, 321-22.

Upon discovery, Wahl objected and asked for its removal, which was widely known to the Ritters, their insurance carrier, and the City. VRP 281-82; VRP 293; Tr. Ex. 38. The Ritters refused. *Id.*; Tr. Ex. 8 (letter from Wahl to the Ritters in August 2010).

The deck and patio subcontractor (Mr. Reynolds) hired independently by the Ritters confirmed that the patio and deck were not part of the soils remediation. VRP 1071. Mr. Reynolds said the Ritters knowingly designed the patio and deck to encroach. VRP 1076. The Ritters even knew Wahl would be upset about the encroachment. *Id.* Mr. Reynolds further verified that the patio and planter boxes can be moved back entirely onto the Ritters' property to eliminate the encroachment. VRP 1076-78, 1080. He also verified that the patio and planter boxes were not needed for any safety reasons; a simple railing would suffice. VRP 1078. Mr. Reynolds said several optional designs were available to the Ritters for building it on their property. VRP 1075, 1079-80.

Although hired independently by the Ritters, Mr. Reynolds was also the contractor hired by SES to do the remediation construction. VRP 143, 1071. He confirmed that SES had designed the area to be final grade with only crushed rock. VRP 1072-73, 1076-77. He said the patio and

planter boxes were not part of the retaining wall design and they are set back at least 12 inches from the retaining wall. VRP 1072-73, 1075. He confirmed that the patio and deck were not connected to the retaining wall and not part of the remediation design (neither structural nor drainage). *Id.* He said the old retaining wall did not have any drainage and the new retaining wall was much stronger and had its own drainage. VRP 1074.

SES similarly testified that the Ritters' patio and deck were not part of the remediation design. VRP 125. The Ritters contracted with Wyser Construction separate from any of the remediation work. VRP 143. The remediation drawings were finalized before the Ritters even hired a contractor to build the patio and deck. *Id.* SES stated that it "was not involved with the finishing of that upper terrace. At the time that we created the building -- the design plans for the excavation, if you note in the original building permit and even on our final as-built survey, we show that upper terrace as being left as a final grade, crushed rock." VRP 125, 136; Tr. Ex. 103 (final site grading plan with revisions to the building permit); Tr. Ex. 104 (original final site grading plan, dated August 1, 2008). SES was aware Wahl had tried to get the matter resolved during the construction, but the Ritters would not listen. VRP 127.

The Ritters' insurance company responsible for the remediation likewise stated, "[t]he Ritters had the cement patio and planter boxes

installed per their direction and at their cost. State Farm and SES were not involved nor did we authorize this work.” Tr. Ex. 38, p.17.

Wahl contacted the City immediately after discovering the encroachment. Tr. Ex. 38, pp. 4-14. The City stated, “any work being pursued by Ritter is now done at his own election and expense and is not part of the soil remediation project” Tr. Ex. 38 (p. 12).

In 2007, the Ritters were even on notice from the City that their deck *could not* encroach upon Wahl’s property; in fact, the City informed the Ritters that their new deck needed to be built *entirely on their own property*. VRP 58-59; Tr. Ex. 31 (City’s request for compliance); Tr. Ex. 32, p.3 (“[t]he City will allow Mr. Ritter to rebuild the deck in its exact location with a building permit, except that it will not be allowed to intrude on to the neighboring property.”) (italics and underline added).

The concrete patio and planter boxes are not part of Easement I, which is expressly limited to “*ingress and egress* (pedestrian only and shall not include parking or storage of anything), and *to permit view control* by Owner B and safety of their property *by installing rockeries, like retaining devices and steps and paths.*” Tr. Ex. 105, p. 4 (italics added). The Ritters must also obtain consent from Wahl for any material changes in EA I. Tr. Ex. 105 (¶ 6). Here, Wahl received *no notice* and gave *no permission* for the encroaching patio and planter boxes. As the

City explained, nothing grants to the Ritters the right to build a patio and deck for their own pleasure on the Wahl property. Tr. Ex. 32.

Dock Use and Lift Attachments. In 2000, the Ritters attached a boat lift to the dock without Wahl's consent. VRP 239, 298, 301-05, 496-97; Tr. Ex. 46 (photo). Also without consent, the Ritters ran two water hoses from their home all the way across Wahl's property (through EA I, II and III) all the way to the dock for the purpose of hydraulically raising and lowering their boat lift. VRP 548; Tr. Ex. 17 (photo of water hose). Easement III states in relevant part that the Ritters' use is limited to "*the permanent mooring of not over two boats* belonging to Owner B [the Ritters], neither of which shall exceed 50 feet." Tr. Ex. 105 at 6-7 (emphasis added). It further provides that "Owner A [Wahl] shall have the right to use Easement III for ingress and egress, *short-term or occasional boat moorage* (on a space available basis) . . ." *Id.* (emphasis added). Finally, it states that "[a]ny additional improvements to the New Dock *shall be as mutually agreed* by Owners A and B." Tr. Ex. 105 (¶ 4, identified in Easement III) (emphasis added).

In March 2002, the Ritters installed two jet ski lifts for permanently mooring two jet skis on Wahl's dock again without any consent from Wahl. VRP 239. The two lifts are installed in separate locations and *bolted directly to the dock*. Tr. Ex. 46. Wahl wrote a letter

to the Ritters explaining that their actions were “outside of the easement rights,” but that he would grant permission for their two jet skis and lift devices. VRP 298-99, 502, 555-56; Tr. Ex. 44. Wahl wrote the letter with the intent of making clear that although the use was outside of the scope of the rights granted in the easement, he would grant permission for the unauthorized actions by the Ritters. VRP 555-56.

In August 2010, Wahl revoked his permission and requested that the Ritters remove the boat lift and two jet ski lifts. VRP 299-300, 498; Tr. Ex. 8. The Ritters’ actions violated the “permanent mooring of not over two boats” provision and eliminated Wahl’s ability to use the dock for “short term or occasional moorage.” VRP 303. The Ritters never sought Wahl’s consent as required under ¶ 4 of the easement. VRP 305-06. In April 2011, Wahl sent another letter to the Ritters confirming the revocation and again requesting the removal. VRP 300; Tr. Ex. 45. The Ritters never responded. *Id.*

Extension Cords, Water Hoses and Power Lines. The Ritters commonly leave electrical extension cords and water hoses that run from their home all the way across Wahl’s property (through EA I, II and III) to the dock. VRP 229, 548; Tr. Ex. 17 (photo of water hose). The Ritters use water hoses to hydraulically raise and lower their boat. VRP 548. Nothing in Easement I, II or III grants rights for running electrical cords,

water hoses or power lines to lift the Ritters' boat or jet skis. VRP 525-26; Tr. Ex. 105 at 4-8. Easement I and II requires the Ritters to "not materially change [the areas] without [Wahl's] consent, which will not be reasonably [sic] withheld." Tr. Ex. 105 at 8. Wahl asked the Ritters to remove the water hoses, but they never responded. Tr. Ex. 8.

Stair Width. The Ritters and Wahl agreed that the east stairs in EA I would be three feet in width per the SES remediation design drawings. VRP 120, 1045-56; Tr. Exs. 33, 36, 103 & 104. The three-foot dimension met the City's code requirement. VRP 121. Nevertheless, unbeknownst to Wahl and without any change in the final design drawings (Tr. Exs. 103 & 104), the Ritters had the width changed from three to five feet. VRP 120; 153; 226; 237. The Ritters also had a banister installed protruding into EA II, interfering with Wahl's ingress and egress rights. Tr. Ex. 18, p. 10. The remediation engineer confirmed that the Ritters directed the change of width. VRP 828. Easement I requires the Ritters to obtain consent from Wahl for any material changes. Tr. Ex. 105, ¶ 6. Wahl was even told by the Ritters' insurance company that he would be notified of any changes to the plans, but he was not. Tr. Ex. 34.

When Wahl informed the City of the Ritters' action, he was informed it was considered "a civil matter." VRP 124; Tr. Ex. 38, pp. 3, 6 & 12-13. The Ritters' insurance carrier stated, "[t]he widening of the

stairs from 3' to 5' was not part of the original construction drawing or budget. Mr. Ritter chose to widen the stairs and contracted and paid Wyser directly to complete this task.” Tr. Ex. 39, p.2.

Storage of Bricks, Pavers, Sand and Other Materials. The Ritters have regularly stored bricks and other materials on Wahl’s property (not in any easement areas) and in EA II. VRP 273-74; Tr. Ex. 27-29 (photos of bricks on Wahl’s property); Tr. Ex. 18 & 19 (storage of sand other materials in EA II); Tr. Exs. 28-29 (storage of bricks); and Appendix B (photo of deck materials and other materials in EA II). Easement II only permits the temporary storage of small equipment used for recreational activities and only “so long as it does not detract from the aesthetics of the landscaping.” Tr. Ex. 105 at 5. Easement II expressly prohibits items such as “storage of boats, trailers, automobiles, etc.” *Id.*

B. PROCEDURAL HISTORY

In April 2011, the trial court entered a preliminary injunction requiring the Ritters to remove the railroad ties they constructed to block Wahl’s use. CP 99; Tr. Ex. 18. The Ritters were ordered to “return the easement to level grade with the driveway with square pavers like those shown in the original landscape plan.” *Id.* The Ritters, however, installed two tightly spaced rows of pavers in loose sand, neither level grade nor consistent with the landscape plan. VRP 242-43; Tr. Ex. 27, pp. 809

(photos). They also installed reflectors, solar lights, plants and bricks to block Wahl's use. VRP 278-79, 543-44; Tr. Ex. 99 (pp. 23 & 30).

Later, the Ritters were ordered to return Wahl's driveway "to a radius" and to install "concrete paver set in concrete or pavers set in solid material as shown in the preliminary landscape plan." CP 540. The Ritters, however, changed the design to make it "three rows" of tightly spaced pavers set in loose sand and still not level grade and not returning Wahl's driveway to a radius. VRP 459, 553; Tr. Exs. 20-21 (photos).

After a bench trial, the trial court issued its decision (CP 631-42). The Ritters then added four large concrete planter barriers. *See* App. B. The trial court also awarded fees and costs under the small claims statute, RCW 4.84.270, based upon its finding that Wahl pleaded an amount of \$10,000 or less in his complaint. CP 1041, 1043-1167; 1306-19; 1322-23. Wahl, however, pleaded treble damages in an amount to be proven at trial. CP 1333. The trial court then entered judgment for fees and costs without entering any findings or conclusions. CP 1455-56.

IV. ARGUMENT

The interpretation of an easement is a mixed question of law and fact. *Sunnyside Valley*, 149 Wn.2d at 880. "What the original parties intended is a question of fact and the legal consequence of that intent is a question of law." *Id.* Findings of fact are reviewed under the "substantial

evidence” standard. *Id.* Questions of law and conclusions of law are reviewed *de novo*. *Id.* “The intent of the original parties to an easement is determined from the deed as a whole.” *Sunnyside Valley*, 149 Wn.2d at 880. Easements must be “construed strictly” according to their plain terms to give effect to the intentions of the parties. *Sanders v. City of Seattle*, 160 Wn.2d 198, 214-215, 156 P.3d 874 (2007). A party may use another’s land only to the extent expressed in the easement. *Id.*

A. Easement II Should be Interpreted to Recognize Wahl’s Express and Implied Rights, Giving Meaning and Effect to All Terms, Consistent with the Established Historical Use Since Wahl’s Driveway Was Built in 1979.

Easement II reserves to Wahl “*ingress and egress and landscape maintenance, and such other non-recreational uses which do not unreasonably interfere with [the Ritters’] priority use of this easement*” Tr. Ex. 105, p. 5 (emphasis added). The trial court erred by reading Wahl’s broad reservation of right completely out of existence by giving meaning and effect to only some of the language and ignoring the extensive evidence of driveway, parking and other uses since 1979. *See Newport Yacht Basin Assoc. of Cond. Owners v. Supreme NW, Inc.*, 168 Wn. App. 56, 64, 277 P.3d 18 (2012); *Diamond B Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003).

The evidence establishes that the north section of EA II was historically used by Wahl since 1979 for their driveway, occasional

parking and other uses, and of critical importance, and as found by the trial court (CP 633, ¶ 9), Wahl needs to use this area to navigate cars around their driveway's tight radius, as testified consistently by Mr. Wahl, Doctor Patricia Wahl and Ms. Baneyx.

Based upon a strained interpretation favoring *only* the Ritters and disregarding historical use, the trial court found “the use of the easement path in EA II cannot be used by motor vehicles for ingress or egress, or for parking for any period of time.” CP 627 (p. 3, ll. 5-6). It concluded “[t]he easement path in Easement Area II is five feet wide at its narrowest point and is for non-vehicular traffic only” CP 637 (¶ 28, ll. 7-9).

Here, not only did the trial court prohibit all “vehicle traffic in EA II,” Order ¶ 40 at p. 9, the court also authorized the Ritters to install “vehicle/safety barriers” to “prevent vehicles from going on to the easement path.” CP 640 (Order ¶ 43 at p. 9). A photograph showing the four large 48” intrusive concrete barriers is shown in Appendix B. These barriers prevent Wahl from exercising any meaningful rights of “ingress and egress and ... other non-recreational uses.” Tr. Ex. 105 (p. 5).

Easement II also states, “Owner B [the Ritters] shall have the responsibility and authority for the maintenance of landscaping, rockeries, etc. on Easement II *in accordance with paragraph 6.*” Tr. Ex. 105, p. 5. (emphasis added). Paragraph 6 of the easement states, “[t]he parties have

agreed in good faith to finalize and implement such [landscaping] plan, *and not materially change the same without the other's consent*, which will not be [un]reasonably withheld.” Tr. Ex. 105 (p. 8) (emphasis added). Paragraph 6 was purposely referenced in Easement II to ensure mutual consent before any material changes were made. VRP 252. The trial court should not have granted the Ritters the right to install these barriers when Easement II does not grant them this right and specifically disclaims any such right in Paragraph 2 of the easement, which states “Owner B” (the Ritters) has no right to claim any use or possession that is not “specifically granted in this Agreement.” Tr. Ex. 105, p. 2.

The drafters knew how to say “pedestrian only” and “no parking” when that was their intent as evidenced by the language in other easement areas. For example, in Easement I (Tr. Ex. 105, p. 4), the Ritters were granted “ingress and egress (pedestrian only and shall not include parking or storage of anything).” In Easement IV, “Owner B shall have the unlimited right of ingress and egress, but not parking or storage.” (Tr. Ex. 105, p. 6). Compare that language to Wahl’s reserved right in Easement II for “ingress and egress . . . and other non-recreational uses,” which does not contain any similar limitation against vehicles or parking.

In a similar case, adjoining residential neighbors created a mutual easement seven and a half feet wide “for the primary purpose of ingress

and egress for vehicular deliveries of fuel to the basements of both properties,” but it was also occasionally used for parking of automobiles and boats during the period from 1929 to 1960. *York v. Cooper*, 60 Wn.2d 283, 373 P.2d 493 (1962). One neighbor (Cooper) protested that parking in the easement was a nuisance that left only 6 to 12 inches remaining between parked cars and the residences, and cars caused noxious fumes and noise that created a health hazard. The Coopers claimed that car and boat parking in the easement was “never intended,” and built a fence on their boundary line to block any vehicular use. *Id.*

The trial court found the easement had been used for parking purposes for limited periods of time and with the historical use established, ordered Coopers to remove the fence, and allowed use of the easement for parking purposes to a 12-hour period. The Coopers appealed, claiming the trial court erred for not prohibiting all parking. Washington’s Supreme Court affirmed, stating “[t]he intent of a donor in granting an easement must be established by the evidence. Both parties used the property for ingress and egress and for parking of vehicles. *The use to which an easement is put is evidence of the intent of the parties in establishing it.*” *York*, 60 Wn.2d at 285 (emphasis added).

As in *York*, the continuous use of EA II by Wahl for ingress, egress and occasional parking from 1978 to the filing establishes that the intent of

the parties was to allow Wahl (“Owner A”) to use that area for such purposes.⁶ Wahl never received a complaint from the Podls and the Ritters did not make a complaint until 2004 — that’s 25 years of use without a complaint. There is *no evidence* of nuisance or hazard, and the trial court made no such findings. CP 638-39 (Order at ¶¶ 39 & 40).

Even if “unrestrained” vehicular parking could be deemed a nuisance or hazard, the proper remedy, as in *York*, would be to limit the manner or duration of parking. See *Cole v. Laverty*, 112 Wn. App. 180, 185, 49 P.3d 924 (2002) (where there is “established use of an easement right of way, obstruction of that use clearly interferes with the proper enjoyment of the easement”); *Thompson v. Smith*, 59 Wn.2d 397, 409, 367 P.2d 798 (1962) (easement rights “are not absolute, but must be construed to permit a due and reasonable enjoyment of both interests...”).

The court also created the term “easement path,” a phrase not found in Easement II and not intended by the original parties. See CP 626-27. Nowhere did the original parties provide for EA II to be maintained as an “easement path” solely for pedestrian use. While the trial court made findings and conclusions of “pedestrian access” and

⁶ Four separate photos show Wahl’s tenants or guests parking in EA II, establishing historical use. Tr. Ex. 99 (pp. 1-14, many duplicates). The photos were taken prior to 2008 as evidenced by the fact that they show the original 2000 driveway (before the Ritters wrongfully cut-away a five-foot section of the driveway).

“pedestrian use” (CP 633, 636-37), the term “pedestrian” *does not appear in Easement II*, but only in Easement I (“ingress and egress...pedestrian only and shall not include parking...”). Easement I shows the parties knew how to say “pedestrian only” and “no parking” when intended.

Unlike Easement I, which allows Owner B to maintain “steps and paths” for Owner B’s “pedestrian only” usage, Easement II does not limit access to “pedestrian use.” The legal description of EA II refers to “a minimum dimension of five (5) feet southerly from the northerly line.” Tr. Ex. 105, Ex. C. This sets the boundary of EA II and does not restrict Wahl’s reserved non-recreational ingress and egress rights in any manner whatsoever. It is clear that the trial court misinterpreted Easement II as if its language were identical to Easement I.

The trial court ruled the Ritters have a right to exclude Wahl from any vehicular use in EA II, even though Easement II places no such restriction on Wahl. Easement II does not grant any right to exclude Wahl from any meaningful use. *See, e.g., Butler v. Craft Eng Const. Co., Inc.*, 67 Wn. App. 684, 690, 843 P.2d 1071 (1992) (“There is no language in the easement indicating that it was to be an exclusive easement or which would affirmatively restrict the rights of the owners and purchasers of the undivided fee interest in the roadway to continue to utilize the roadway ‘for road purposes’....”); *Veach v. Culp*, 92 Wn.2d 570, 575, 599 P.2d 526

(1979) (since servient owner has legal right to use easement in manner that does not materially interfere with use by dominant owner, in the absence of express language in the easement, servient owner does not have right to exclude dominant owner unless “actual use being made of this easement” demonstrates history of exclusion); *Broadacres, Inc. v. Nelsen*, 21 Wn. App. 11, 14, 583 P.2d 651 (1978) (easement for road purposes held “nonexclusive” because lack of exclusion language in the deed; 30 years of joint use with only two conflicting incidents demonstrated both parties rights to use roadway were intended to be joint, general and unrestricted); *Hayward v. Mason*, 54 Wash. 649, 651-52, 104 P. 139 (1909) (servient owner may use his property in any manner that does not materially impair or unreasonably interfere with easement since “[t]here is nothing in the deed, or in the circumstances existing at the time it was made, to indicate that the right of way granted was an exclusive one”).

Here, the trial court made no finding that Wahl’s use of EA II materially impaired or unreasonably interfered with the Ritters’ use. Depending on “the extent and mode of use of the particular easement,” a periodic interference with the dominant owner’s enjoyment of the easement is not grounds to exclude the servient owner. *Broadacres*, 21 Wn. App. at 15. Mere inconvenience of the dominant owner is not grounds to exclude the servient owner where the original parties to the

easement intended joint use. *Broadacres*, 21 Wn. App. at 15-16. Joint use (when exclusive rights are not granted by the terms of the easement) means that in some instances of conflicting use, the dominant owner must “give way” to the servient owner, and in other instances, the servient owner must “give way” to the dominant owner. *See Broadacres*, 21 Wn. App. at 13-14 (trial court ordered both parties to accommodate each other’s respective uses within the easement area).

Bootstrapping a vague, unarticulated privacy right in favor of the Ritters in EA II, the trial court extrapolates an implied right to exclude Wahl, which is a backwards approach to the determination of rights. Normally, a privacy expectation arises by virtue of the right to exclude others as expressed in the instrument. As one court stated, “[o]ne of the main rights attaching to property is the right to exclude others ... and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.” *State v. Hayden*, 28 Wn. App. 935, 940, 627 P.2d 973 (1981).

Here, there is nothing in Easement II or the instrument generally that gives the Ritters the right to exclude Wahl from *his own property*, which is near his house. The easement specifically confirms Wahl’s right to use EA II “for ingress and egress and . . . other non-recreational uses which do not unreasonably interfere with Owner B’s priority use of this

easement.” The priority issue was meant to prevent simultaneous usage (*i.e.*, if the Podls were having a barbecue, Wahl would not also run down and have a barbecue at the same time). VRP 251.

The easement does not state the entirety of Wahl’s usage rights in Easement II, but merely some of them. The language goes so far as to permit “other non-recreational uses which do not unreasonably interfere with Owner B’s priority use of this easement.” In addition, Easement II specifically states that Easement II is “[the Ritters] private area, *to the extent provided herein.*” Tr. Ex. 105, p. 6 (emphasis added). The plain language meaning and common legal use of the phrase, “to the extent provided herein” refers to the entirety of the easement.

The trial court’s reliance upon the phrase “privacy of each is of ‘paramount importance’ is entirely misguided. CP 637 (§ 27). The preamble to the easement states, “[P]rivacy is of paramount importance and intend that this instrument be construed so as to preserve and maintain the privacy of each *in the use of their respective properties.*” Tr. Ex. 105 (p. 2) (emphasis added). Privacy is limited to the context of enjoying “their respective properties,” *i.e.*, Wahl’s privacy right to enjoy their residence, and Ritters’ privacy right to enjoy their residence — not privacy while sharing the easement where both parties have mutual rights.

In only a few places does the easement refer to privacy. Easement

II provides in part, “[i]t is intended that the use of this Easement does not unreasonably interfere with the privacy of Owner A [Wahl] in the enjoyment of his residence.” Wahl's house is within 20’ – 60’ of EA II and at the same elevation. With only his driveway between him and the easement area, there are no barriers or fences to shield the house from the EA II. This privacy language in Easement II, therefore, is not for the protection of the Ritters, but only Wahl. Therefore, the trial court erred in relying upon the general “privacy... is of paramount importance” phrase to support its conclusion that the Ritters have exclusive rights.

The walking path through EA II is not in use most of the time. VRP 551-52; Tr. Ex. 28. Under established Washington law, Wahl has the right to use his land during any periods of nonuse by the Ritters. *See Cole*, 112 Wn. App. at 185 (“During the period of nonuse, the servient estate may use the land subject to the easement in any way that does not permanently interfere with the easement's future use.”). “Thus if the easement holder has the right to cross over the land of another at a certain point, *the owner of the underlying property ordinarily has the right to use the exact same part of the property* in any way that does not prevent the easement holder from the actions which the easement grants.” *Mueller v. Hoblyn*, 887 P.2d 500, 504 (Wyo. 1994), *quoting 7 Thompson on Real Property*, § 60.02(d) at 394 (Thomas ed. 1994) (emphasis added).

Because no definition of the phrase “priority use” is found in Easement II, the reference can be viewed as a restatement of earlier language in Easement II providing that Wahl’s non-recreational uses will not “unreasonably interfere” with Ritters’ recreational uses, which is little more than what the law already provides. *See Littlefair v. Schulze*, 165 Wn. App. 659, 665, 278 P.3d 218 (2012).

The trial court also erroneously interpreted “ingress and egress” with the limitation twelve words later that it “not unreasonably interfere with Owner B’s priority use of this easement,” when in fact that limitation only applies to its antecedent phrase — “and such other non-recreational uses which do not unreasonably interfere with Owner B’s priority use of this easement” — to modify the “other non-recreational uses” but not the “ingress and egress” clause. Under the “last antecedent” rule, unless a contrary intention appears, qualifying words and phrases refer to the last antecedent—the last word, phrase or clause that can reasonably be made an antecedent without impairing the meaning of the sentence and grammatically fit with all relative clauses. *Berrocal v. Fernandez*, 155 Wn.2d 585, 593-94, 121 P.3d 82 (2005).

Here, the qualifying words “which do not unreasonably interfere with Owner B’s priority use” modify the antecedent clause “other non-recreational uses.” The trial court did not apply to this sentence the plain

meaning of the words. Even if the “unreasonably interfere” clause also applies to the other relative clauses “ingress and egress” and “landscape maintenance,” a reasonable inference could be made that these sorts of temporary, transient and impermanent uses were already considered presumptively as not unreasonably interfering with Owner B’s use of EA II. Moreover, the trial court emphasized that “the pedestrian use of the easement path [by the Ritters]...could occur at any time, night or day, rain or shine,” a fact that was clearly known and assumable by the original parties when the easement was granted in 1978, and yet no restrictions were placed on Wahl’s rights of “ingress and egress” in EA II.

Here, the court altered the balance of rights and restrictions set forth in the easement and changed the deal by taking property “sticks” away from Wahl and giving them to Ritter without compensation. See *Kiely v. Graves*, 173 Wn.2d 926, 936, 271 P.3d 226 (2012) (“Property is often analogized to a bundle of sticks representing the right to use, possess, exclude, alienate, etc.”).

B. The Ritters’ Concrete Patio and Deck that They Knowingly Designed and Built to Encroach Upon Wahl’s Property Without Telling Wahl and After Being Informed by the City that They Could Not Encroach Constitutes a Trespass and Violates the Terms of the Easement.

The trial court concluded that the Ritters’ concrete patio and planter boxes that encroached into EA I were permissible, even though

these additions increased the usable living area of the Ritters house, even though it permanently took away 138 square feet (Tr. Ex. 2) of Wahl's valuable lake view property, and even though it was constructed without Wahl's consent or any compensation. The Ritters' building contractor testified that "the patio and the drainage could have been constructed without encroaching on the easement" and that there were many other options available to the Ritters. CP 634 (§ 15). Mr. Ritter even testified that the concrete patio and planter boxes could be built entirely on their property. VRP 858. He also testified that they could have just installed a railing; that they knowingly designed the patio and deck to encroach; and that they knew Wahl would not approve it. VRP 859, 866, 902.

Finding that moving the patio and planters "could conceivably be a safety hazard...at the top edge of a steep slope," CP 634, the trial court misinterpreted Easement I as giving the Ritters plenary power to build this encroaching extension of their home under the easement. But, Easement I expressly states "[t]his Easement shall be for ingress and egress...and to permit view control by Owner B and safety of their property by installing and maintaining rockeries, like retaining devices and steps and paths." Tr. Ex. 105 (underline added). By the express terms, it does not allow the Ritters to install a patio and deck for their own pleasure. Easement I also requires the area to be maintained "in accordance with paragraph 6 in a

manner agreeable to Owner B and Owner A....” Tr. Ex. 105, p. 5.

Paragraph 6 of the easement requires consent from Wahl.

The court’s finding that “it is clear that the patio does encroach into EA I,” proves an unlawful trespass.⁷ CP 634 (§ 13). Encroachment occurs when one builds a structure on another’s land; it is a form of trespass. BLACK’S LAW DICTIONARY 607 (9th ed. 2009). An owner has an absolute right to eject trespassers and to require them to remove encroaching structures, even if the trespassers believed in good faith the land was theirs. *See* 7 STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, THE AMERICAN LAW OF TORTS 641, 646-47 (1990). Washington courts “generally will order an encroacher on another’s property to remove the encroaching structures” *Proctor v. Huntington*, 169 Wn.2d 836, 846, 192 P.3d 958 (2008).

Here, the encroaching patio and deck constitutes an unlawful

⁷ Common law trespass is as an intentional or negligent intrusion on another’s property. *Mielke v. Yellowstone Pipeline Co.*, 73 Wn. App. 621, 624, 870 P.2d 1005 (1994). Trespass may occur upon the misuse or overburdening of an easement. *See Sanders*, 160 Wn.2d at 215. Statutory trespass is defined in RCW 4.24.630(1) and “requires a showing that the defendant intentionally and unreasonably committed one or more acts and knew or had reason to know that he or she lacked authorization.” *Clype v. Michels Pipeline Constr., Inc.*, 154 Wn. App. 573, 580, 225 P.3d 492 (2010); *Standing Rock Homeowners Ass’n v. Misich*, 106 Wn. App. 231, 246, 23 P.3d 520 (2001). Even a slight encroachment involving “a positive invasion of the land of another” constitutes a trespass. *Arnold v. Melani*, 75 Wn.2d 143, 148, 437 P.2d 908 (1968). “[I]ncidental use” is not an excuse, even if “[i]t certainly is possible that no additional burden will be imposed ... and only nominal if any damages would be found.” *Kershaw Sunnyside v. Interurban Lines*, 156 Wn.2d 253, 277, 126 P.3d 16 (2006).

trespass and an unauthorized action under the easement — it is not for the safety of their property such “rockeries, like retaining devices and steps and paths.” Furthermore, the City even told the Ritters that they could not build an encroaching deck. Tr. Ex. 32 (pp. 3-4) (“[t]he City will allow Mr. Ritter to rebuild the deck in it’s [sic] exact location with a building permit, except that it will not be allowed to intrude on the neighboring property.” (emphasis and underline added).

The cement patio and planter boxes were installed at the Ritters’ direction, and neither State Farm nor SES was involved. Tr. Ex. 38 (p. 17). In the email dated March 1, 2010 SES states, “The planter boxes that were constructed are not part of SES’s scope of work or part of the permitted construction design drawings.” Tr. Ex. 38 (p. 10).

The October 6, 1978 letter also states nothing about the Podls having rights to install their patio and deck on the Wahl’s property. Tr. Ex. 4. Also, the SES design drawings that Wahl and Ritters agreed to only called for the upper terrace to be a final grade, crushed rock, and not a concrete patio or planter boxes. VRP 125, 136; Tr. Exs. 103 & 104.

Even disregarding the lack of consent, the concrete patio and planter boxes do not reasonably fall within the “rockeries, like retaining devices and steps and paths” easement language. “Landscaping and rockeries” means a collection of rocks or plants, not a finished living area

adjunct to a residence. See *Merriam-Webster Online Dictionary* (“rockery” means a rock garden “laid out among rocks or decorated with rocks and adapted for the growth of particular kinds of plants”; “landscaping” refers to “an area landscaped with flowering shrubs and trees”) (last viewed August 2, 2103). A concrete patio and planter boxes cannot reasonably be considered “steps and paths” either.

The trial court found “the encroachment does not interfere with any other use of the property covered by EA I.” CP 635, 637 (¶¶ 16, 30). Interference with another use, however, is irrelevant. See *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985). Ms. Wahl, however, testified that they have used that for a terraced garden. VRP 318, 321-22. The installation of 138 square feet of concrete adjacent to Ritters’ home is a continuous trespass that necessarily interferes with Wahl’s right to use their land. Cf., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (“A permanent physical invasion ... eviscerates the owner's right to exclude others from entering and using her property.”). Easement I impliedly reserves to Wahl the maximum extent of reserved rights to use his land for any purpose, except for the limited circumstance of installing a fence or gate, which Owner B must consent to.

The trial court failed to correctly interpret the original parties’

intention that “retaining devices and steps and paths” be installed and maintained “in a manner agreeable to Owner B and Owner A [Wahl].” Tr. Ex. 105 (p. 5) (emphasis added). The language allowing Owner B “control over the landscaping and rockeries” did not eliminate Owner A’s right of review and prior approval, but was expressly limited by Owner A’s consent. It is absurd to interpret Easement I to allow Owner B the absolute right to unilaterally construct whatever landscaping, rockeries, or other structures he wants on Owner A’s property without Owner A’s consent, but then Owner B must obtain Owner A’s consent only regarding “maintain[ing] the same.” The mutual consent requirement can only reasonably apply to both construction and maintenance.

The cross-reference in Easement I to paragraph 6, reveals the original parties’ intention that improvements to or additions made to any easement area be by mutual consent and agreement of both parties. See Tr. Ex. 105 (¶ 6) (landscaping plan “agreed in principle” regarding easement areas and other common interest areas). Paragraph 6 provides: “The parties have agreed in good faith to finalize and implement such plan, and not materially change the same without the other’s consent, which will not be unreasonably withheld.” (emphasis added). Required to give effect to every word of Easement I, the trial court disregarded the mutual consent requirement. *Sunnyside Valley*, 149 Wn.2d at 880.

Here, the original parties intended to prohibit any uses that were not specifically provided for explicitly within the four corners of the easement document. Paragraph 2 of the easement, states “Neither Podl nor anyone under whom Podl has or claims any right, license or interest in, to, over or on Parcel A or any part thereof (*except as specifically granted in this Agreement*) by way of adverse possession, use or otherwise.” This language could not be more clear and unambiguous: Owner B has no easement rights or uses beyond those *specifically granted* in the easement document. The trial court’s ruling compels Wahl to accept any unilateral changes in EA I. The Ritters do not pay property taxes on this property, Wahl does. These habitation and home uses do not fall within the limited purposes in Easement I — ingress and egress, view control and safety “like retaining walls, steps and paths.”

C. The Ritters Have Exceeded the Scope of their Use Rights in Easement III by Permanently Mooring a Boat and Two Jet Skis and Attaching Three Lift Devices to the Dock.

Easement III allows Owner B “recreational use, including...use of the dock, for *the permanent mooring of not over two boats* belonging to Owner B, neither of which shall exceed 50 feet.” Tr. Ex. 105 (p. 6). This language is plain and unambiguous and should be enforced.

It is undisputed that the Ritters now permanently moor a boat and two jet skis and that they have installed three lift devices attached directly

to the dock. Tr. Ex. 46 (photos). Mr. Ritter testified that after he received the letter from Wahl informing him that the jet skis did not comply with Easement III, he never contacted Wahl. VRP 950-51. He testified that he did not need to obtain *any consent* because “I had consent through the easement agreement.” VRP 951. He claimed that because the easement provides for priority usage rights, he has the authority to attach anything to the dock without any need to get Wahl’s consent. VRP 952.

Equating jet skis with boats and without any competent authority source, the trial court ruled that “jet skis” count as “one-half boat” because the City of Bellevue counts them that way. CP 636. “Interpreting EA III, the Court is persuaded that *two jet skis can be one boat* for the purposes of the vessel limitation of Easement III, in part due to their smaller size.” CP 638. This conclusion was based entirely on subjective hearsay testimony from Mr. Ritter, who argued that he did not believe he was exceeding the two boat maximum in EA III based on discussions he allegedly had with the City’s staff that “two jet skis equal one boat.” VRP 945. Not only does the Bellevue Municipal Code not state this, the code defines a “jet ski” as “vehicle” rather than a boat. *See* Bellevue Municipal Code 20.50.052 V definitions – vehicle (defining “jet ski” and “small watercraft” as a “vehicle,” not a boat), available at <http://www.codepublishing.com/wa/bellevue/> (viewed Aug. 15, 2013).

The trial court's reliance on extrinsic evidence — how the City purportedly counts jet skis — was manifest legal error. The intent is determined from the “deed as a whole” when the language is plain and unambiguous. *Sunnyside Valley*, 149 Wn.2d at 880. Even if it were ambiguous, a proper legal analysis would evaluate the circumstances of the property “when the easement was conveyed” and “practical interpretation given the parties prior conduct.” *Id.* “Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written.” *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 697, 974 P.2d 836 (1999). Subjective interpretations as to the meaning of terms or phrases are not admissible. *Hollis*, 137 Wn.2d at 695-96. Extrinsic evidence “that would vary, contradict or modify the written word” is inadmissible. *Hollis*, 137 Wn.2d at 695; *Newport Yacht Basin*, 168 Wn. App. at 70.

Here, there was no ambiguity: both Wahl and Podl agreed that jet skis are not “boats” allowed to be moored on the dock in EA III. The trial court, however, held that “[t]he EA III easement was manifestly for *the purpose of mooring large (up to 50') boats.*” CP 635. In addition, jet skis would not even fit the trial court's definition because jet skis are not large boats or even boats at all, but normally smaller vessels.

Disregarding the unambiguous intention of the parties, the trial court impermissibly interpreted the easement according to its own notions

of reasonableness. The only factor the trial court looked at was “size.” Ruling that the “half-boat” character of jet skis being dispositive, the trial court erred by failing to consider the intention of the original parties, the easement language, circumstances surrounding the grant, the nature and situation of the properties subject to the easement, the manner in which the easement had been used and occupied, or whether any expansion was reasonable. *See Sunnyside Valley*, 149 Wn.2d at 886.

The dispositive factor noted but disregarded by the trial court was its express finding and conclusion that “[t]he use of jet skis was obviously not contemplated when this easement was granted” CP 636, 638 (emphasis and underline added). *See Snyder v. Haynes*, 152 Wn. App. 774, 781, 217 P.3d 787 (2009) (enjoining use of all-terrain vehicles, off-road vehicles and other unlicensed vehicles in road easement for “ingress egress and utilities” as nonconforming recreational touring that not only increased use of easement by dominant estate, but impermissibly changed use and overburdened easement by causing dust and flying gravel).

As in *Snyder*, the Ritters’ use of jet skis was clearly not contemplated by the parties. It impermissibly changed the use and overburdened the easement in a way that should have been prohibited.

Separate from the issue of intention (even assuming “boats” as used in Easement III includes jet skis), the trial court erred by failing to

evaluate whether the jet skis, regardless of number or size, impermissibly changed the use and overburdened the use rights. *See Lowe v. Double L Props.*, 105 Wn. App. 888, 893, 20 P.3d 500 (2001) (dominant estate may not compel change in use on servient estate who may properly resist any attempted change in use by dominant owner). An easement can be expanded over time if and only “if the express terms of the easement manifest a clear intention by the original parties to modify the initial scope based on future needs.” *Sunnyside Valley*, 149 Wn.2d at 884.

Unlike *Sunnyside Valley*, here the original parties expressly *intended to prohibit uses that were not specifically provided for explicitly within the four corners of the easement document.* *See* Easement, Paragraph 2 (“Neither Podl nor anyone under whom Podl has or claims any right, license or interest in, to, over or on *Parcel A or any part thereof (except as specifically granted in this Agreement)* by way of adverse possession, use or otherwise.”). Again, this language could not be more clear: Owner B has no easement rights or uses beyond those *specifically granted* in the easement document. No language authorizes personal watercraft, a technology not even around in 1978 when the easement was granted. Jet skis are not “boats” or “half-boats” and a proper legal analysis interprets “not over two boats” as exactly what it says.

Boat Lift. Nor does Easement III authorize Ritters to unilaterally install boat or jet ski lifts on the dock without the express agreement from Mr. Wahl. “[A]ny additional improvements to the New Dock [located within EA III] should be as mutually agreed by Owners A and B.” Tr. Ex. 105, p. 7 at §4. The boat lift is an “improvement to the New Dock” that required Wahl’s agreement. When Wahl permitted the Ritters to keep jet skis and lifts, he did so by license (expressly making clear that the Ritters’ use was outside of the easement), which he later revoked as he had a legal right to do. *See Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956) (license is a privilege existing at the will of the landowner who authorizes the doing of some act on his land without passing an estate in the land, and differs from easement in that it is revocable at will and non-assignable).

Similarly, the trial court’s interpretation of Easement III to permit lift devices is not based on the intention of the original parties. The court stated, “...[t]he boat lift, though not specifically mentioned in the easement . . . EA I does not specify all the details of mooring, nor would it be expected to be able to when it is likely that new methods and accessories are constantly changing.” CP 635-36 (italics added). Finding “[t]he boat lift [is] not specifically mentioned in the easement,” should have been dispositive, given that easement paragraph 2 states that rights

and uses “in, to, over or on Parcel A or any part thereof” not “specifically granted in this Agreement” are not permitted. Tr. Ex. 105 (p. 2).

In sum, there was no evidence offered at trial that in 1978 *the original parties* intended and contemplated that a “boat lift...is a recognized aspect of mooring boats,” as found by the trial court (the court does not explain the evidence it based its conclusion upon). Since the original parties intended an easement strictly limited to its express terms, and not providing for future expansion into new uses (or “new methods and accessories” – as phrased by the trial court) not specifically mentioned in the easement, the trial court erred by expanding the scope of Easement III to include boat lifts. *See Sunnyside Valley*, 149 Wn.2d at 884.

D. The Ritters Have Exceeded the Scope of The Easement by Running Electrical Cords, Water Hoses, Power Lines and Solar Lights All the Way from Their House Across Wahl’s Property (through EA I, II and III) to the Dock.

The trial court ruled that the Ritters have the right to lay electrical power lines and water hoses across EA II and III because “water and electricity [are] required to operate the boat lifts at the dock in EA III, and to charge the batteries of the boats moored there.” CP634. The court reasoned that “[i]f Owner B cannot install the utilities needed...and cannot run water and electricity across EA II, he is effectively deprived of the full use of EA III, and the dock. This would be an absurd result.” *Id.*

The trial court did not interpret the easement’s plain terms. *See*

Sanders, 160 Wn.2d at 214-15 (extent of easement rights is fixed by language of instrument granting the right and must be construed strictly and only to extent expressly allowed its terms in an effort to give effect to the parties intentions); *Brown*, 105 Wn.2d at 371-72 (easement by express grant may not be expanded in scope beyond the terms of the grant, even though expansion would not increase burden on servient estate); *Sunnyside Valley*, 149 Wn.2d at 884 (easement can only be expanded over time “if the express terms of the easement manifest a clear intention by the original parties to modify the initial scope based on future needs”).

Disregarding the intention of the parties, the trial court rewrites the easement to provide the Ritters with an easement for “utilities” when no such intention was expressed or implied. As restated by the trial court, the easement has been changed to provide “[t]he [Ritters] and their successors/assigns shall have permanent access to electricity and water at the dock in Easement Area III and to the area southerly of the easement path in Easement Area II...[with the right to] install, construct, lay and/or maintain whatever electrical and/or water service is necessary to provide electricity and water to the dock in EA III (including but not limited to water hoses, extension cords, or power lines....” CP 640.

The trial court specifically made a finding that the water hoses and power lines constitute “utilities.” CP 634; *cf.*, *Clevco, Inc. v. Municipality*

of Metropolitan Seattle, 59 Wn. App. 536, 539-540, 799 P.2d 1183 (1990) (term “utilities” includes water and electricity service lines). Here, nothing in Easement I, II or III authorizes “utilities.” The term is not mentioned *anywhere*, nor is there any mention of water or electricity. When parties intend to permit the running of utilities across an easement, they commonly use the term “utilities.” See, e.g., *Heg v. Alldredge*, 157 Wn.2d 154, 158, 137 P.3d 9 (2006) (easement for “ingress, egress and utilities”); *Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d 320, 322, 917 P.2d 100 (1996) (easement for “ingress and egress and for utilities”); *Berg v. Ting*, 125 Wn.2d 544, 548, 886 P.2d 564 (1995) (easement “to provide ingress and egress and for utilities”).

Here, the easement does not grant the Ritters the right to run *utilities* across EA I, II and III. A plain reading indicates this was *not* what the parties intended when the easement was created. EA I, nearest to the Ritter house, only provides for pedestrian “ingress and egress” and specifically prohibits “parking or storage of anything.” Easement II is limited to “recreational use” that includes “access...ingress and egress,” but does not mention “utilities.” Easement III merely provides for “recreational use” that includes “use of the dock” and “access,...ingress, egress...,” but also does not mention “utilities.”

An easement for utilities cannot be implied from an easement for

“ingress and egress.” See *Castanza v. Wagner*, 43 Wn. App. 770, 776-777, 719 P.2d 949 (1986) (express grant of “easement of right of way for road purposes” authorizes ingress and egress, but in the absence of express grant of right to use for “utilities” does not include right to utilities or placement of utility lines). As in *Castanza*, “[u]se of the easement for placement of utilities is not mentioned and [the party] cites no authority, and we know of none, which would permit the interpretation that ‘road purposes’ [or recreational use, access, or ingress and egress] includes the right to place utilities.” *Castanza*, 43 Wn. App. at 776.

The trial court failed to recognize that what it characterized as an absurd result was precisely the expressed result intended by the original parties. Not only did the parties limit Owner B’s uses to those “specifically granted in this [1978] Agreement,” (Easement, p. 2, ¶2), the same easement provides: “Any additional improvements to the New Dock [located within EA III] should be as *mutually agreed* by Owners A and B.” Tr. Ex. 105 (¶ 4) (emphasis added).

Even with the express limiting easement language, the trial court ordered that the Ritters should have sweeping new rights to (1) “permanent access to electricity and water at the dock in EA III and to the area southerly of the easement path in Easement Area II,” (2) Ritters “may install, construct, lay and/or maintain whatever electrical and/or water

service is necessary to provide electricity and water to the dock in EA III (including but not limited to water hoses, extension cords, or power lines); (3) if Wahl (Owner A) refuses to approve Ritters' plan for installing water or electrical utilities, Ritters have the right to proceed with installation on the grounds that Wahl is "unreasonably withholding approval;" (4) Ritters and their contractors have the right to use Wahl's driveway (not covered by any easement) to install utilities in the easement areas and Wahl has no right to "refuse or otherwise interfere" with this driveway use; and (5) the court retains jurisdiction to enforce Ritters' utility rights through proceedings for contempt or other sanctions. CP 640.

While the easement requires "mutual agreement" to improvements to the New Dock in EA III, and limits Ritters' rights to only those "specifically granted herein," the trial court created a new utilities easement that has no limits other than what the Ritters determine are "reasonable," which effectively removes Wahl's ownership and control over their property and transfers ownership.⁸

Although here the easement provides no right to utilities, the trial court reasoned that Ritters need water and electricity to service their boats

⁸ No easement language "requires" Wahl to agree to *add utilities* in EA II or III. In fact, Easement III requires "mutual agreement" and does not include an "unreasonably withhold consent" clause. Thus, the original parties intended that Wahl could withhold consent. *See Keystone Land v. Xerox*, 152 Wn.2d 171, 175-76, 94 P.3d 945 (2004).

in EA III as a matter of personal convenience. CP 634. But the boats are personal property, not real property. *See Winsten v. Prichard*, 23 Wn. App. 428, 430-431, 597 P.2d 415 (1979) (“Here, the easement reserved was for “ingress, egress and utilities.” Ingress, egress and utilities are purposes which are normally associated with land use rather than personal convenience. Especially is this true of an easement for “utilities.”). Therefore, it was error for the court to expand the easement scope to include utilities for a personal convenience to the Ritters in servicing their boat. *See Sunnyside Valley*, 149 Wn.2d at 884.

Here, the original parties expressly intended *limited* easement rights that did not include utility lines. Failure to specifically mention “utilities” in the easement necessarily precludes expansion of the easement to include utilities. The parties intended to prohibit any uses that were not specifically provided. *See Easement*, Paragraph 2.

With the strict and narrow grant of rights confirmed by Paragraph 2 of the 1978 easement, to expand their rights and uses in areas owned by Wahl, the Ritters must negotiate for Wahl’s consent to the change and offer consideration. Contrary to the intention of the original parties, the law does not permit the Ritters to go to court to expand their rights by judicial fiat based upon convenience and whim just because they would prefer not to negotiate with Wahl or go around Wahl if he declines.

The same arguments above against electricity and water lines also apply to Wahl's objection to the Ritters' random installation of solar powered lights in EA I, II and III. The Ritters have no right to install solar lights on Wahl's property (including on the dock in EA III) without Wahl's consent. Solar powered lights using photovoltaic (PV) technology in solar panels convert the sun's radiant energy directly to electricity, a kind of utility. *See* Solar Energy Development Programmatic EIS Information Center, "Utility-Scale Solar Energy" available at <http://solareis.anl.gov/guide/solar/> (last viewed August 13, 2013).

E. The Ritters Unilateral Decision to Have the Stairs in EA I Increased from Three to Five Feet Without the Consent of Wahl Violates the Easement.

The trial court erred by ruling that Ritters have a right under Easement I to expand the width of constructed wood steps from 3 feet to 5 feet under Owner B's authority to install and maintain "steps and paths," and because Wahl's use was not "interfered with or impaired." CP 635. The parties, however, had agreed upon three feet under the final SES design drawings. Tr. Ex. 103 & 104 (showing the width of steps).

Since the original parties intended an easement strictly limited to its express terms, and not providing for future expansion into new areas or uses not specifically mentioned, the trial court erred by allowing the Ritters to unilaterally expand the steps from 3 feet to 5 feet. *See*

Sunnyside Valley, 149 Wn.2d at 884 (easement can only be expanded over time “if the express terms of the easement manifest a clear intention by the original parties to modify the initial scope based on future needs”).

Unlike *Sunnyside Valley*, here the original parties *intended to prohibit uses or possessions that were not specifically provided for explicitly within the four corners of the easement document*. See Tr. Ex. 105, ¶ 2 (“Neither Podl nor anyone under whom Podl has or claims any right, license or interest in, to, over or on Parcel A or any part thereof (*except as specifically granted in this Agreement*) by way of adverse possession, use or otherwise. By way of confirmation Podl hereby waives and releases any rights, claims, license or interest in, to, over or on Parcel A or any part thereof *except as specifically granted herein...*”).

Unlike *Sunnyside Valley*, Easement I does not allow unilateral for “enlargement” of the steps. See *Sunnyside Valley*, 142 Wn.2d at 884 (where grant provided “the right and permission to enter upon said land for the ... enlargement and repair of said ... laterals, ... and to ... maintain and repair the same,” Court held “this language manifests a clear intent to enlarge the lateral and its maintenance area based upon future demands”).

The trial court also failed to correctly interpret the intention of the original parties that “steps and paths” be installed and maintained “in a manner agreeable to Owner B and Owner A [Mr. Wahl].” Tr. Ex. 105, p.

5. The language allowing Owner B “control over the landscaping and rockeries” did not eliminate Owner A’s right of prior approval, but was limited by a requirement that Owner A consent to changes.

The mutual consent requirement can only reasonably apply to both construction and maintenance. The cross-reference in Easement I to Paragraph 6 reveals the original parties’ intention that improvements to or additions made to any of the easement areas be by mutual consent of both parties. See Tr. Ex. 105, ¶ 6 (landscaping plan “agreed in principle” regarding easement areas and other common interest areas). ¶ 6 provides: “The parties have agreed in good faith to finalize and implement such plan, and not materially change the same without the other’s consent, which will not be unreasonably withheld.” ¶ 6 was referenced in Easement I to ensure that there was mutual consent before any material changes were made. VRP 252 (Wahl testimony). Required to give effect to every word of Easement I, the trial court disregarded the mutual consent requirement. See *Sunnyside Valley*, 149 Wn.2d at 880.

F. The Trial Court Erroneously Awarded Fees and Costs Under the Fee Shifting Provision for Small Claims in RCW 4.84.270.

Based on an erroneous finding that Mr. Wahl included in his complaint a demand for damages of less than \$10,000, the trial court invoked RCW 4.84.270 to award attorney’s fees and costs. CP 1041; see also CP 1043-1167; 1306-19; 1322-23. The trial court also awarded

expenses that do not fall within any of the categories of compensable costs under RCW 4.84.010. CP 1457-61. Defendants requested 20% of all expenses (\$6,880) which amounted to (\$1386), CP 1170, which the trial court granted without reviewing the actual underlying costs). CP 1383. The trial court then erroneously entered a fee award, CP 1455-56, without supporting it with any findings or conclusions to provide an adequate record for review. *Mahler v. Szucs*, 135 Wn.2d at 435.

In the complaint, Wahl pleaded “an award of treble damages caused by the wrongful acts of defendants *in an amount to be proven at trial.*” CP 1332 (emphasis added). Wahl never pleaded an amount less than or equal to \$10,000. Under the plain language of RCW 4.84.270 and well established precedent, a party may only recover under the fee shifting statute if the other party has “pleaded” an amount exclusive of costs of \$10,000 or less. RCW 4.84.270; *Reynolds v. Hicks*, 134 Wn.2d 491, 502, 951 P.2d 761 (1998) (“Plaintiffs did not seek an award of \$10,000 or less. *No specific amount was pleaded in the complaint; rather, the amount was set to be proven at trial.* Thus, the Plaintiffs did not limit their award and based on their claim for damages and relief could have received well above \$10,000 in damages.”) (emphasis added). In addition, the actual amount sought by Wahl (whether trebled or not) also exceeded the statutory threshold. *See* CP 1043-1167; 1306-19; 1322-23

G. Appellant Wahl Should Be Awarded Attorneys' Fees and Costs on Appeal as Allowed by the Trespass Statute.

Attorneys' fees and costs on appeal should be awarded to Wahl under RAP 18.1 because the trespass statute provides for fees and costs to the prevailing party. RCW 4.24.630(1); *Standing Rock*, 106 Wn. App. at 247 (servient owner who prevailed against dominant easement holder on claim alleging destruction of gates across road easement entitled to statutory award of fees and costs). Wahl has a right to attorneys' fees and costs for the obvious trespass of Ritters' concrete patio and deck.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's decision and remand for further proceedings.

Dated this 24th day of September, 2013

LIVENGOOD, FITZGERALD
& ALSKOG, PLLC



Gregory A. McBroom, WSBA No. 33133
Timothy S. McCredie, WSBA No. 12739
Attorneys for Appellant William D. Wahl

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

Clerk of the Court of Appeals, Division I 600 University St. One Union Square Seattle, WA 98101-1176 Phone: (206) 464-7750	Messenger Service <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>
Alfred Donohue William Sean Hornbrook Wilson Smith Cochran Dickerson 901 5th Ave Ste 1700 Seattle, WA 98164-2050 Phone: (206) 623-4100	Messenger Service <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>

DATED: September 25, 2013, at Kirkland, Washington


Karen H. Suggs

APPENDIX A

Trial Exhibit 2 with Easement Areas I, II and II
Color Coded for Ease of Reference

APPENDIX B

Photo of 48-Inch Concrete
Barriers Installed in Easement II

