

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ROMAINE C. CULPEPPER, et al.,

*Appellants/Cross-Respondents,*

v.

MARSHA Y. CAMUS, et al.,

*Respondents/Cross-Appellants*

FILED  
COURT OF APPEALS  
DIVISION II  
09 SEP 10 PM 12:11  
STATE OF WASHINGTON  
BY  DEPUTY

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AMENDED BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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BENJAMIN R. WINKELMAN  
WSBA #33539  
Attorney for Appellants  
P.O. Box 700  
813 Levee Street  
Hoquiam, Washington 98550  
Telephone (360) 532-5780

P M 9-9-09

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## I. COUNTERSTATEMENT OF THE CASE

RAP 10.3(a)(4) states that a brief should contain “a fair statement of the facts and procedure relevant to the issues presented for review, without argument.” Respondents Dennis and Marsha object to the following portions of the Statement of the Case that are contained in Brief of Appellants as either not being supported by the citation to the record on appeal to which the statement is attributed, or as argument which should not be included in the Statement of the Case.

### 1. *Objection, Brief of Appellants, Pages 2-5.*

On page 2 of the Brief of Appellant, the following statement is made:

“There are six siblings in the Darrin family who inherited the family farm and property upon the demise of their parents. The property was owned by the parents who farmed the land in part and used the farm road that existed at that time for that purpose. (1-17-07 RP 4)”

The citation to the report of proceedings is the opening statement for trial, is not evidence and is therefore not supported by the record on review. This statement is not a fair statement of the facts and constitutes argument as the terminology of identifying the road as a “farm road” is not present in the cited portion of the record, but rather that an old “logging road” was turned into the easement. (1-17-07, RP 4). The historical use

of the road was put at issue before the trial court. The countersuit of Delores alleges at paragraph 15.3 the easement was a continuous logging road that became the easement in dispute. (CP 89) Dennis and Marsha intended to log their property and Ardith, Delores and Romaine argued the historical use of the easement prior to creation did not include logging, and therefore suggested the scope of the easement was being unlawfully expanded which is contradictory to the factual allegations contained in Delores's countersuit. The record Ardith, Delores and Romaine rely upon is not evidence before the court on review is not a fair statement of the facts and is argumentative. Dennis and Marsha ask the Court to disregard the above-quoted portions of the Brief of Appellant, pursuant to RAP 10.7. The following sections of page 3 should be disregarded upon the same argument and pursuant to RAP 10.7.

“After seven years of litigation, the estate was settled and the inheritance was received on February 14, 1998. (1-17-07 RP 4; Ex 10-14)”

(Citation to record is absent of evidence of the length of litigation or settlement terms.)

“The easement interests were created by legal deeds upon stipulation of the five siblings in order to resolve the then pending estate litigation. (1-17-07 RP 4; Ex 10-14)”

(Citation to record is absent of evidence of stipulations or confirmed resolution of the estate litigation.)

“The easement was based on the existing farm road and expanded on the road to allow the specific purpose of “ingress, egress and utilities” to all of the properties from the county road. (1-17-07 RP 6; Ex 5, 10-14, 15)”

(Citation to record does not conclude a farm road was expanded to create the easement.)

The following sections of page 4 should be disregarded upon the same argument and pursuant to RAP 10.7.

“Dennis Darrin and Marsha Camus have planted hay in their fields. They harvest this annually for the cattle they have at their separate residences which are not part of this land dispute. They do bring livestock to their land but do not regularly run livestock on their property. They do drive horses up the easement and allow guests to ride the easement on horses. (6-19-07 RP 38)”

(Citation to record is absent of such evidence and this is the only assertion anyone planted hay and ignores evidence of historical harvest of hay from Dennis and Marsha’s property.)

The following sections of page 5 should be disregarded upon the same argument and pursuant to RAP 10.7.

“Prior to the court’s rulings the easement had always been used as a simple farm road. (1-17-07 RP 6).”

(Citation does not provide such evidence.) Much of the evidence in this case showed historical use of the easement road for logging purposes. (1-18-07 RP 54, 80. 1-19-07 RP 25 Ln. 5, 26. Ln. 21, 29-30) Ardith, Delores and Romaine refused to acknowledge historical use for logging (through counsel, but admitted historical logging at time of trial 1-30-08 RP 128). Dennis and Marsha ask the Court to disregard the above-quoted portions of the Brief of Appellant, pursuant to RAP 10.7.

Respondents Dennis and Marsha provide the following counterstatement of the case:

Dennis and Marsha brought suit seeking injunctive relief in relation to the easement to enjoin the defendants from interference with the easement area by refusing to allow maintenance, allowing livestock to interfere and using gates and other intentional acts to interfere with Marsha and Dennis and their guests. (CP 1-19) Ardith, Delores and Romaine countersued for (1) intentional infliction of emotional distress and harassment; (2) timber trespass; (3) ejectment and termination of the easement and damages.

Each of the five parties are siblings, who at one time or another, acquired their respective interests in the easement. (CP 322) Each of the five parties holds an interest in the easement, of varying lengths, which

corresponds to the distance from the county road through the end of each respective party's property. (CP 322; Ex. 10-14) The easement interests were created by legal deeds on or about February 14, 1998. Each of the parties' deeds specifies the purpose of the easement interest to be for "ingress, egress, and utilities." (CP 322, Ex. 10-14) Prior to the creation of the easement, the road and property, where the parents operated a farm to some extent, were owned by a single, common owner who was able to utilize the road and surrounding property without restriction. (CP 322) The easement is thirty or sixty feet in width, depending on location and terrain, which is measured equidistant from the centerline of the road as it existed when surveyed to ascertain the legal description of the easement. (Ex. 10-14) Ardith Christensen (Ardith) and Delores Darrin (Delores) maintain livestock, primarily cattle, on Ardith's fields. (CP 322) Ardith's and Delores's livestock have been found at times on the easement road, which interferes with use of said road by other easement holders and their guests. The trial court found livestock upon the road unreasonably interfere with the use of the easement by other easement holders and affects the merchantability of the land owned by other easement holders. (CP 322; 1-17-07 RP 16, 42; 1-18-07 RP 106-08, 115, 117, 125, 131; 1-19-07 R 166) the trial court found there are four existing gates across the easement road. The gates have served various purposes, including

discouraging access by uninvited users and/or trespassers, and, more recently containing the livestock of Christensen and Delores Darrin on that portion of the easement between gate numbers three and four. (CP 322, 323; 1-17-07 RP 16, 42; 1-18-07 RP 106-08, 115, 117, 125, 131.) The trial court found plaintiffs have requested removal of those gates used by Ardith, Delores and Romaine for livestock containment, and have offered to share the cost of constructing fences in accordance with RCW 16.60.030 and .040. (CP 323; Ex. 1, 4, 18.) All of the parties agree that discouraging access by uninvited users and/or trespassers is a common goal. (CP 323, Finding of Fact No. 11) The gate nearest the county road would discourage uninvited users and/or trespassers from gaining access for the greatest distance along the easement, and has historically been used for that purpose during hunting and fishing seasons. (CP 323.)

Vegetation, including briars, bushes, and trees have increasingly grown into and encroached upon the easement road over the years. The court has appointed Mr. Hurd or his successor or assigns to evaluate the easement and make sure that in the future it shall be appropriately maintained so that all anticipated uses can continue without damage to vehicles. (CP 323)

Christensen has occasionally mown the vegetation along the road, to the extent of her easement interest, without seeking permission of all of the easement owners. Mike Toy, a brother-in-law to all of the parties, has

occasionally provided various maintenance services along the easement. (CP 323) Dennis Darrin has occasionally attempted to provide various maintenance services along the easement, without seeking permission of all easement owners. Dennis Darrin's efforts generally consisted of driving a backhoe down the road and pushing saplings, branches, and/or dirt away from the traveled portion of the roadway, but not removing the same. Defendant's expert testified any such trees were of no monetary value. (CP 323.) Often when Dennis Darrin attempted to maintain the easement road, he met with some form of objection from one or more of the defendants. On one such occasion a gunshot was fired in an attempt to scare and intimidate Dennis Darrin. (CP 323.) The express language of the easement is silent as to maintenance. (CP 323) A high level of animosity presently exists between each of the Plaintiffs and each of the Defendants. The Plaintiffs are aligned as one faction, and the Defendants are aligned as a separate faction. The two factions of the family are not on speaking terms, and are not even able to effectively communicate through other extended family members. (CP 323-24; 1-19-08 RP 140-143)

Marsha Camus (Marsha) did not hold a gathering on her property during the summer of 2006 because she believed the vegetation encroaching on the easement road prevented large recreational vehicles from traversing the road without damage, and the parties were unable to reach any

agreement for maintenance. (CP 324) Each of the parties has experienced a reasonably anticipatable amount of anger, discomfort, and emotional distress as a result of this dispute. (CP 324)

The court found the road should be kept open for all reasonable purposes, which includes occasional logging for any party that wants logging to be done as the easement had historically been used for logging. (CP 324; 1-18-07 RP 54, 80; 1-19-07 RP 25, 26; 1-19-07 RP 168.) The court also found that when a party logs, he or she may move heavy equipment along the roadway, which may cause some damage. The party who logs should be responsible for returning the road to as good or better condition than when the logging began. The history of the farm indicates that at the time the land was owned by the parents of these parties, it was one piece of land. The current status of the property is that there are five pieces of land that should be merchantable. (CP 324)

Animals need to be kept off the easement. (CP 322, 324; 1-17-07 RP 16, 42; 1-18-07 RP 106-08, 115, 117, 125, 131). The parties who own animals should fence off their land from the easement and keep the animals on their own property. (CP 324) The court found the properties will be fenced as recommended by Mr. Hurd to prevent animals from wandering randomly on the easement. Mr. Hurd is not required to

recommend fencing those portions of the easement which have a true and natural barrier which precludes animals from accessing the easement. The animals may be moved across the easement in a controlled and supervised fashion from one fenced area to another, so long as the crossing is controlled, temporary and supervised. (CP 324.) If any activity occurs on the easement that Mr. Hurd determines is beyond usual wear and tear from routine driving on the easement, that party shall be responsible for repair to the roadway in the same manner as described herein for the logging operation. (CP 325)

The court concluded that since there is no express maintenance agreement or provision, each easement holder would usually have the right and obligation to maintain, improve, and repair his or her easement, at his or her own expense, to the full extent allowed by the Laws of the State of Washington. (CP 325) The court also concluded that in this case the Court must exercise equitable powers to control the easement area and that where the parties hold concurrent easement interests, since they are unable to reach any agreement, it is necessary for the Court to appoint a third party to make decisions. Henceforth, all decisions as to what maintenance, fencing, repairs, or improvements are necessary on all areas of concurrent easement herein, and who should perform or pay for those maintenance, fencing, repairs, or improvements, shall be decided by Don

Hurd, or his duly appointed successor, at the expense of the parties, or their subsequent purchasers or assigns. Where no party is being unreasonable or is particularly at fault, expenses shall ordinarily be divided pro rata based upon the length of each party's concurrent easement interest. In the event Mr. Hurd determines that one or more of the parties, but not all parties, should bear responsibility for maintenance, repairs, or improvements, or his services in determining the outcome of a non-meritorious complaint, Mr. Hurd may assess responsibility, financial or otherwise, as he deems appropriate. Mr. Hurd shall conduct an assessment of necessary maintenance, repairs, and improvements no later than March 31<sup>st</sup> of each year, or whenever an emergency situation might arise. If there is an objection to Mr. Hurd's assessments, such party shall move the court for review. (CP 325) Each easement holder is restrained and precluded from using any portion of the easement right-of-way for livestock-related purposes, other than prompt and supervised ingress and egress. Any easement holder wishing to have livestock on his or her own land shall immediately erect appropriate fencing on his or her own property, along the easement boundaries, to prevent livestock from entering any portion of the easement area. Pursuant to RCW 16.60.030 and .040, all easement holders benefiting from such fencing shall share equally in the labor and/or cost of the fencing. (CP 326) The court then

made the following conclusions of law which are not assigned error on appeal: “...

7. No timber trespass has been committed by any party, as any trees which might have been pushed over were non-merchantable and were left on premises for salvage by the lawful owners. Said claims are denied and dismissed.
8. There is no evidence of any intentional infliction of emotional distress by or upon any party sufficient to give rise to any tort claim for damages. Said claims are denied and dismissed.
9. There is no evidence sufficient to support any other peripheral claim raised herein by any party, so all other claims for relief are denied and dismissed.
10. Each of the parties being at least somewhat responsible for the present situation, and each of the parties having failed to prove every claim he or she alleged, each party shall be responsible for his or her own attorney fees and costs of suit. No party is awarded a monetary judgment against any other party.
11. The parties are prohibited from stopping on the easement for any purpose other than ingress and egress and opening or closing a gate, unless the vehicle is stopped for mechanical problems or other legitimate reasons.”

The court concluded that the issue shall be reviewed by the Court on an annual basis after the spring review of necessary maintenance, and repairs, and improvements has been conducted. Any party may note the review for hearing. The Court hopes at some future date the parties or subsequent owners can act like adults and proceed without court intervention and ordered the findings of fact and conclusions of law shall be recorded and run with the land. (CP 326)

Other than the noted objections and counterstatements made above, the Appellant’s Statement of the Case is accepted.

## II. CROSS APPELLANTS' ASSIGNMENTS OF ERROR

1. The trial court erred by failing to award damages, attorneys fees and costs to plaintiffs relating to defendants' intentional interference with plaintiffs' use of the easement, which acts constitute trespass pursuant to RCW 4.24.630.
2. The trial court erred by failing to award damages, attorneys fees and costs to plaintiffs relating to defendants' cattle unreasonably interfering with plaintiffs' and plaintiffs' guests' use of the easement and for the affect on the merchantability of the land.
3. The trial court erred by placing restrictions on the easement holder's rights to maintain the easement area where the deeds were silent as to maintenance of the easement area.

## III. QUESTIONS PRESENTED

1. Whether the trial court erred in designating Findings of Fact 13, 21, 26, 27, 28, 29 rather than Conclusions of Law and whether Findings of Fact Nos. 8, 9, 10, 12 and 21 are supported by substantial evidence? (Ardith, Delores and Romaine's Assignment of Error No. 1, 5, 6 and 8)
2. Whether the Findings of Fact support Conclusions of Law Nos. 3, 5, 6, and 12? (Ardith, Delores and Romaine's Assignment of Error No. 4, 7, 9 and 11)

3. Whether the trial court abused its discretion in granting equitable relief to Dennis and Marsha where there is no finding Dennis or Marsha had unclean hands and the court found actual and substantial injury to Dennis and Marsha? (Ardith, Delores and Romaine's Assignment of Error Nos. 2 and 3.)
4. Whether the trial court erred in refusing to provide compensation, attorney fees and expert witness costs to Appellants where the court made no findings the scope of the easement was expanded. (Ardith, Delores and Romaine's Assignment of Error No. 10.)
5. Whether the trial court erred in restricting Dennis and Marsha's rights and responsibilities to maintain the easement area. (Cross Appellants' Assignment of Error No. 3.)
6. Whether the trial court must award damages, attorneys' fees and costs of litigation when finding the defendants intentionally interfered with plaintiffs' use of the easement. (Cross Appellants Assignment of Error No. 1)
7. Whether the trial court must award plaintiffs damages, including attorneys fees and costs when the court finds defendants' cattle unreasonably interfered with the plaintiffs' and plaintiffs' guests' use of the easement and said interference affects the merchantability of plaintiffs' property. (Cross Appellants' Assignment of Error No. 2.)

#### IV. STANDARD OF REVIEW

Ardith, Delores and Romaine allege in the brief or appellants that all claims were based solely on equitable principals and rely upon *Standing Rock Homeowners Ass'n v. Misch*, 106 Wn.App. 231, 240, 23 P.3d 520 (2001) and *Rupert v. Gunter*, 31 Wn.App. 27, 30, 640 P.2d 36 (1982). Any findings not assigned error, are verities on appeal. *See Green v. Lupo*, 32 Wash.App. 318, 322-23, 647 P.2d 51 (1982) (construing

easement grant). A distinction must be made between the case at hand and *Standing Rock Homeowners Ass'n* in that Ardith, Delores and Romaine assign error to many of the trial court's findings of fact, unlike the appellants in *Standing Rock Homeowners Ass'n* where the unchallenged findings of fact became verities on appeal. *Standing Rock Homeowners Ass'n* at 241.

A suit for injunction is an equitable proceeding addressed to the trial court's sound discretion, which it exercises on a case-by-case basis. *Standing Rock Homeowners Ass'n* at 240. The appellate court must give great deference to the trial court, interfering in its decision only where it bases its ruling on unreasonable or untenable grounds. *Lowe v. Double L Props., Inc.*, 105 Wn.App. 888, 893, 20 P.3d 500 (2001).

In addressing a challenge to the trial court's factual findings and conclusions of law, the appellate court must limit its review to determining whether substantial evidence supports its findings and whether those findings, in turn, support its legal conclusions. *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn.App. 422, 425, 10 P.3d 417 (2000). Substantial evidence exists where there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the finding's truth. *Panorama Vill.*, 102 Wn.App. at 425.

1. The Substantial Evidence Rule applies to Ardith, Delores and Romaine's Assignments of Error Nos. 1, 5, 6, and 8 which allege error in the trial court's findings of fact.

Ardith, Delores and Romaine challenging the findings of fact, assert that the findings are entitled to weight, but the ultimate determination of facts rest with the appellate court. As succinctly noted by the court in *Harbor Enterprises, Inc. v. Gunnar Gudjonsson*, 116 Wash.2d 283, 803 P.2d 798 (1991), this is an absolutely erroneous statement as the courts rely upon precedence set in *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash.2d 570, 343 P.2d 183 (1959) and its hundreds of progeny.

In a civil case, the trial court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence. The rule is based upon the notion that the trier of fact is in the best position to decide factual issues. *See Id.* Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true; if the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wash. 2d 873, 73 P.3d 369 (2003); *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986); *Nejin v. City of Seattle*, 40 Wash. App. 414, 698 P.2d 615 (Div. 1 1985). Where the trial court has weighed the evidence, the reviewing court's role is simply to

determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court's conclusions of law. An appellate court will not substitute its judgment for the trial courts, weigh the evidence, or adjudge witness credibility. *Greene v. Greene*, 97 Wash. App. 708, 986 P.2d 144 (Div. 2 1999). It is not the role of the appellate court to weigh and evaluate conflicting evidence. *Burnside v. Simpson Paper Co.*, 66 Wash. App. 510, 832 P.2d 537 (Div. 1 1992), *aff'd*, 123 Wash. 2d 93, 864 P.2d 937 (1994). “The appellate function should, and does, begin and end with ascertaining whether or not there is substantial evidence supporting the facts as found.” *Bland v. Mentor*, 63 Wash.2d 150, 154, 385 P.2d 727 (1963). On appeal, review of findings of fact and conclusions of law is restricted to determining whether findings are supported by substantial evidence and, if so, whether findings support the trial court's conclusions of law and judgment. *Robblee v. Robblee*, 68 Wash. App. 69, 841 P.2d 1289 (Div. 1 1992).

## V. ARGUMENT

1. The trial court may consider matters outside of the written terms of an ambiguous or silent deed and has broad discretion to find remedies in equity. (Re Ardith, Delores and Romaine's Assignment of Error Nos. 1-12, inclusive.)

The scope of the easement was not before the trial court in this case and the findings of fact and conclusions of law do not expand the scope of the easement. As is admitted and argued in Ardith, Delores and Romaine's Brief of Appellants at Page 9; if a deed is ambiguous or silent as to a certain issues, then "the situation of the property, the parties and the surrounding circumstances" should be examined. It is undisputed the easements of the parties were granted for "ingress, egress, and utilities. (Ex. 10-14.) Ardith, Delores and Romaine allege Dennis and Marsha were not able to point to incidents where ingress and egress was denied, however this is simply untrue as the witnesses testified about many such occasions. (Ex. 7, 25, 27-53 and 55-64; 1-17-07 RP 16, 42; 1-18-07 RP 106-08, 115, 117, 125, 131; 6-19-07 36-37.)

Ardith, Delores and Romaine attempt to argue the case on appeal as if the trial court had not already considered the same arguments on the same facts. The appellants allege there is no evidence of the intent of the grantors at the time the easement was created was anything other than to

maintain the farm as historically used for raising cattle however, substantial evidence of prior use as a logging road and to harvest and remove hay was presented at the time of trial, as was history of recreational uses, some of which was actually hosted by the appellants. (1-30-08 RP 109, 122, 128; 6-21-07 RP 36; 1-19-07 RP 25, 26, 168.) The court has not changed the scope of the easement by prohibiting livestock from the easement or requiring fencing along the road. The court acting in equity has broad discretion to consider the facts and circumstances and to form equitable remedies. The equitable remedies provided by the court do not expand the scope of the easement. The easement user has no rights that did exist as a matter of law prior to the trial court's ruling and the described easement is the same width, length and described use as existed prior to the trial. Granting the injunctive relief does not change the scope of the easement and does not abuse discretion as it is supported by the findings of fact.

2. If the trial court erroneously designated Findings of Fact 13, 21, 26, 27, 28, 29 as such, rather than conclusions of law the error is harmless and the finding is treated as a conclusion of law.

The fact that a court designates its determination as a "finding" does not make it so if it is in reality a conclusion of law. Under Washington practice, a conclusion of law mislabeled as a finding, will be

treated as a conclusion. *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.* 21 Wash.App. 194, 584 P.2d 968 (1978) (citing *McClendon v. Callahan*, 46 Wash.2d 733, 284 P.2d 323 (1955); *Hauser v. Arness*, 44 Wash.2d 358, 267 P.2d 691 (1954)). Conversely, Washington courts have determined that statements of fact included within conclusions of law will be treated as findings of fact. *Ferree v. Doric Co.*, 62 Wash.2d 561, 567, 383 P.2d 900 (1963). Simply stated any error here is harmless and the appellants made no allegation these assigned errors had Constitutional implications.

3. Substantial evidence supports the findings of fact and the findings of fact in turn support the conclusions of law.

Finding No. 8 reads as follows:

“Christensen’s and Delores Darrin’s livestock have been found at times on the easement road, which interferes with use of said road by the easement holders and their guests. Livestock upon the road unreasonably interferes with the use of the easement by other easement holders and affects the merchantability of the land owned by other holders.” (CP 322.)

The trial court considered testimony of several witnesses and viewed dozens of exhibits showing evidence of cattle, gates and fences along and across the easement area. Many witnesses testified about cattle unreasonably interfering with the use of the easement and even attacking and harming persons and property.

4. Assignment of Error No. 8 is vague and the court on appeal is not required to search the record for error.

Assignments of error which recited that the trial court erred in making findings of fact which were referred to by number only, were insufficient in view of the rule requiring that on appeal from an action tried to a court without a jury, appellant must point out by number and description the findings of fact upon which appellant predicates error, otherwise such findings will be accepted as established facts in case. *Corbett v. Ticktin*, 43 Wash.2d 248, 260 P.2d 895 (1953). The current RAP 10.3 requires the same content of the appellate brief. Appellate courts may decline to review a claimed error when the assignment of error is so vague as to require a search of the record. *Pederson v. Pederson*, 41 Wash.2d 368, 249 P.2d 385 (1952). The Washington Supreme Court has noted that "[i]t is not our function or duty to search the record for errors, but only to rule as to errors specifically claimed." *Malnati v. Ramstead*, 50 Wash.2d 105, 107, 309 P.2d 754 (1957) (quoting *Knatvold v. Rydman*, 28 Wash.2d 178, 183, 182 P.2d 9 (1947)). Ardith, Delores and Romaine assign error to Findings of Fact Nos. 13, 21, 26, 27, 28, 29 simply because they allege they are Conclusion of Law, which is harmless error and no Constitutional claims are made by the appellants as argued supra, not to mention the Findings are supported by substantial evidence. Under

Assignment of Error No. 8 Ardith, Delores and Romaine simply assign error by citation to number in such a vague manner this court would be required to search the volumes of this appellate record for errors. These Findings of Fact should be considered verities on appeal and are supported by substantial evidence. *Infra*.

5. The trial court did not abuse its authority to act in equity by granting relief to Dennis and Marsha where there is no evidence of unclean hands and there are findings of actual injury, which are supported by substantial evidence.

Any equitable relief granted was supported by findings of actual and substantial injury. The merchantability of the property was altered due to the interference. The court considered days of testimony and viewed dozens of photographs. The Findings challenged are supported as set forth *infra* and were entered only after the trial court considered numerous days of live testimony and hundreds of exhibits.

“Often when Dennis Darrin attempted to maintain the easement road, he met with some form of objection from one or more of the defendants. On one such occasion a gunshot was fired in an attempt to scare and intimidate Dennis Darrin.” (CP 323; 1-18-07 RP 126.)

The trial court granted Darrin/Camus equitable relief to address the unreasonable interference with use of the road by livestock, vegetation and

confrontations by appellants. The trial court found the merchantability of the land was affected by the unreasonable interference with use of the easement. An easement holder has the right to maintain, improve and repair an easement when the recorded easement is silent to the issue.

*Infra.* Also the court did not find any maintenance occurred outside of the easement area and concluded Dennis and Marsha did not trespass on timber or property of Ardith, Delores or Romaine. There were no findings to suggest otherwise. Findings by the trial court on disputed evidence are binding on the appellate court even when the court is acting in equity.

*Jansen Agency, Inc. v. Winkel*, 63 Wash.2d 771, 388 P.2d 920 (1964).

Whether the livestock unreasonably interfere with the easement was of much dispute and the court considered declaration on pre trial motion, testimony over many days of trial, numerous photographs and exhibits from each of the parties and therefore the finding is supported by substantial evidence. The appellate court will not review issues of fact, where findings of the trial court are sustained by substantial evidence.

*Morris v. Rosenberg*, 64 Wash.2d 404, 391 P.2d 975 (1964). The appellate court will not substitute its findings for those of trial court made on substantial conflicting evidence. *Altman v. Sigurdson*, 63 Wash.2d 347, 387 P.2d 375 (1963); *Harris v. Rivard*, 64 Wash.2d 173, 390 P.2d 1004 (1964).

In appellant's assignment of error no. 8 it is suggested the conclusion of law is not supported by findings of fact however findings of fact nos. 8, 9, 26 and 27 support such legal conclusion. More fully addressed supra. Appellants suggest removal of the gates went beyond the scope of the easement. Findings of fact no. 9 finds gates have contained livestock on the roadway and the trial court found such livestock unreasonable interferes with easement use and affects merchantability of the property (Finding of Fact No.8) and No. 26 finds animals should be kept off the easement while No. 27 states parties who own animals should fence their land from the easement and keep their animals off the easement. When a conclusion of law is not found or is inconsistent with findings of fact the findings of fact are controlling as is set forth more fully supra. The court exercised its equitable authority to attempt to resolve ongoing issues between the parties and protect legal rights of all parties.

6. Where the trial court finds the gates unreasonably interfere with the use of the easement the court may order the gates removed as an equitable remedy.

The appellants continue to cite case law wherein the court has found the gates at issue do NOT unreasonably interfere with the easement holder's right to use the easement. In the case at hand the court found the

gates DO unreasonably interfered with Dennis and Marsha's use of the easement by keeping livestock contained in the easement area.

7. The court erred in preventing Dennis and Marsha from maintaining the easement when they have such right and obligation as a matter of law. (Re Cross Appellants' Assignment of Error No.3.)

Marsha and Dennis are the owners of the "dominant estate" in that their easement passes through and extends beyond the "servient estates" of Ardith, Delores and Romaine. Any attempt to maintain the easement is met with violent opposition by Ardith, Delores and Romaine, who even used "warning shots" from a firearm to intimidate Dennis. 1-18-07 RP 126.

It is long settled hornbook law and Washington law that owners of dominant estates have absolute rights and obligations to maintain the easement. Maintenance and repair is the duty of the owner of the dominant tenement. See *Dreger v. Sullivan*, 46 W.2d 36, 40, 278 P.2d 647 (1955) (citing *State ex rel. Carlson v. Superior Court*, 107 Wash. 228, 234, 181 P. 689 (1919))..."It is not only the right but the duty of the owner of an easement to keep it in repair; the owner of the servient tenement is under no duty to maintain or repair it, in the absence of an agreement therefore." 25 Am. Jur.2d, Easements and Licenses sec. 94, at 666-67." The trial court erroneously imposed numerous conditions and

restrictions upon the rights of the easement holders. See Conclusions of Law Nos. 5, 6, 11 and 12. CP 325-26.

8. The court made no findings or conclusions of law changing or expanding the scope of the easement to justify compensation to the appellants for attorney fees and expert witness costs.

The court should not award Ardith , Delores or Romaine fees, as no basis for fees was presented on appeal and the court did not find condemnation by expansion of an easement. *Brown v. McAnally*, 97 Wn.2d 360, 644 P.2d 1153 (1982). The only basis Ardith, Delores and Romaine argued for attorney fees is not supported by the findings of fact, conclusions of law, or other evidence in the record on appeal.

9. The court must award damages, including loss of use and diminished value of the property where the court finds unreasonable interference with the use of the easement affects the merchantability of the property and shall run with the land; said findings and conclusion establish statutory trespass and require an award of attorneys' fees and costs.

The owner of an easement may recover damages from interference with the easement by the servient owner. A claim for damages is appropriately stated when the value of the property would be substantially and disproportionately reduced due to the interference with the easement. An award of damages may result from intentional obstruction or interference of an easement. Awardable damages for obstructing an

easement compensate the plaintiff for loss of use of the easement and the diminished value of the property it benefited.

The trial court's finding of *intentional* interference relies solely on its interpretation of RCW 4.24.630, rather than on the information contained in affidavits, depositions, and arguments of the parties. *Colwell v. Etzell*, 119 Wash.App. 432, 81 P.3d 895 (2003). Substantial evidence was presented showing that Ardith, Delores and Romaine were seeking to intentionally, unreasonably and permanently interfere with or terminate Dennis and Marsha's easement. The court found:

“Often when Dennis Darrin attempted to maintain the easement road, he met with some form of objection from one or more of the defendants. On one such occasion a gunshot was fired *in an attempt to scare and intimidate Dennis Darin.*”

Emphasis added; see Finding of Fact No.15 (CP 323).

The trial court found this intentional interference with the reasonable use of the easement along with the intentional use of gates to keep cattle on the easement unreasonably interfered with Dennis and Marsha's reasonable use and quiet enjoyment of the easement.

RCW 4.24.630 provides:

“(1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or *wrongfully injures personal property or improvements to real estate on the land*, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury.

For purposes of this section, a person acts “wrongfully” if the person *intentionally and unreasonably* commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.” –Emphasis added.

It is a verity on appeal that Ardith and Delores used gates to contain livestock on the easement thereby knowingly interfering with Dennis and Marsha’s use of the easement. The appellants did not deny the act of firing a gun to scare and intimidate Dennis Darrin. Surely the appellants do not believe they had authority to take such action as was evidenced by the repeated letters and disputes between the parties, not to mention the consideration and display of complete and total disregard for the safety of others when firing a gun in the vicinity of another person in an effort to scare and intimidate them. The trial court made findings to support the legal conclusion that the appellants trespassed against improvements to the land (the easement) by such intentional acts. Based upon the trial court’s findings the trial court should have concluded the appellants trespassed pursuant to RCW 4.24.630 and therefore should have awarded damages to Dennis and Marsha, including damages for the market value of the

property injured and injury to the land, including the costs of restoration. The trial court should have found appellants were liable for reimbursing Dennis and Marsha for their reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs. RCW 4.24.360.

Damages for a temporary invasion or trespass are generally the cost of restoration and the loss of use. *Olympic Pipe Line Co. v. Thoeny*, 124 Wn.App. 381, 393-94, 101 P.3d 430 (2004). Whereas under the 'American Rule,' compensation for attorney fees and costs may be awarded only if authorized by contract, statute, or recognized ground in equity. *In re Impoundment of Chevrolet Truck, WA License # A00125A v. State*, 148 Wn.2d 145, 160, 60 P.3d 53 (2002). Dennis and Marsha are entitled to treble damages, attorney fees and litigation-related costs under RCW 4.24.630. RCW 4.24.630 permits treble damages, to include litigation-related costs and fees, for an intentional trespass where the tortfeasor 'wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land.' RCW 4.24.630(1) (emphasis added). The record supports that Dennis and Marsha have been restrained from exercising reasonable maintenance upon the easement and Ardith, Delores and Romaine have caused waste to the land in addition to the above mentioned intentional trespass.

10. Dennis and Marsha should be awarded attorneys fees and costs at the trial court and on appeal.

Dennis and Marsha are entitled to recover attorneys' fees and costs of litigation for trespass at the trial court pursuant to RCW 4.24.630 and other laws of equity for claims relating to nuisance and intentional trespass. Dennis and Marsha request attorneys' fees and costs on appeal. 'A party may recover attorney fees and costs on appeal when granted by applicable law.' *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405, 418, 36 P.3d 1065 (2001); RAP 18.1(a). RCW 4.24.630(1) provides for attorney fees and costs and Dennis and Marsha seek attorney fees and costs on appeal.

## V. CONCLUSION

Substantial evidence supports the trial court's findings, which in turn supported its conclusions of law, but for the assignments of err set forth by Dennis and Marsha. The trial court properly concluded that, it could exercise its equitable power to form a remedy based upon the findings of facts in this case. The court heard many hours of testimony and considered hundreds of photos, exhibits and video of the easement area and the allegations of the parties. The court did not abuse its discretion in determining the parties could not adequately communicate to protect the property rights of all of the parties. The appellants are trying to

re-litigate the same issues on the same grounds argued at the trial level as they are simply not satisfied with the trial court's ruling. The finding that Mr. Darrin had actually been shot at in an effort to scare and intimidate him from using the easement surely supports the court's reason to appoint an independent third party to address future maintenance, though Dennis and Marsha should be compensated for the court's restriction against their legal right to maintain the easement consistent with its use.

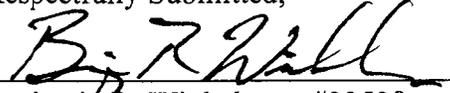
The findings of fact without assignment of error become verities on appeal. The findings that the gates, livestock and growth of trees and shrubs all inhibited the reasonable use of the easement were well supported by live testimony of many witnesses, hundreds of pictures and video traversing the easement area and days of live testimony. Only after considering all of the evidence over many days of trial did the court make its findings of fact. The court held numerous lengthy hearings in preparing the findings of fact and conclusions of law. The findings of fact are supported by substantial evidence and said findings support the legal conclusions of the court. Ardith, Delores and Romaine assign multiple errors to the trial court where there was none. The trial court did however err by restricting Dennis and Marsha from reasonably maintaining the easement where there is no finding said maintenance unreasonably interfered with Ardith, Delores or Romaine's use of their land as servient

estates. The trial court also erred by failing to award judgment to Dennis and Marsha for the appellants' intentional and malicious interference with Dennis and Marsha's reasonable use of the easement. The trial court should have concluded the findings satisfy the statutory requirements of trespass as defined by RCW 4.24.630 and awarded Marsha and Dennis judgment for trebled damages for the loss of use of the easement due to interference, actual damage to property and for the diminished value of the property. Attorneys' fees and costs of litigation should have also been awarded pursuant to RCW 4.24.630 and other equitable remedies plead by Dennis and Marsha for nuisance, waste and trespass. The court made findings of fact consistent with such result but erred by concluding there should be no award of fees and costs although the facts establish a clear case of trespass and intentional interference with Dennis and Marsha's quiet enjoyment and reasonable use of the easement. The facts support the award of damages in particular since the trial court finds such conditions affect merchantability of the easement holder's land and such imposed conditions should run with the land. The alleged errors of appellants should be dismissed and this matter should be sent on remand for entry of judgment against appellants for an award of damages, including Dennis and Marsha's attorneys' fees and costs of litigation. The maintenance

restrictions upon the easement holders should be removed as a matter of law.

Dated: September 8, 2009

Respectfully Submitted,



Benjamin R. Winkelman, #33539  
Attorney for Respondents, Dennis  
Darrin and Marsha Camus  
P. O. Box 700, 813 Levee Street  
Hoquiam, WA 98550 360-532-5780

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STATE OF WASHINGTON  
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DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

ROMAINE C. CULPEPPER, et. al.,

Appellants/Cross-Respondents,

Vs.

MARSHA Y. CAMUS, et. al.,

Respondents/Cross-Appellants.

NO. 37441-2-II

CERTIFICATE OF SERVICE

I certify that on the 8<sup>th</sup> day of September, 2009 I caused a true and correct copy of the following documents be filed with the Clerk of the Court by U.S. Mail and served:

Amended Trial Brief of Respondent/Cross Appellants

Certificate of Service

By depositing a copy of the Amended Trial Brief of Respondents/Cross-Appellants with said Certificate of Service in the U.S. Mail, Postage Prepaid, addressed to Mr. Jeffrey D. Stier, attorney for Appellants/Cross-Respondent Romaine Culpepper, Westhill Office Park, Bldg. 15, 1800 Cooper Pt. Rd. SW, Olympia, WA 98502; Robert Ehrhardt, attorney for Appellant/Cross-Respondent Delores Darrin, P. O. Box 41, Montesano, WA 98563; and to Counsel for Appellants/Cross-Respondent Romaine Culpepper, Vini E. Samuel, 114A N. River Street, Montesano, WA 98550.

Signed at Hoquiam, Washington on September 8, 2009.



Benjamin R. Winkelman, WSBA #33539  
Attorney for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE -1

PARKER, JOHNSON & PARKER, PS  
A PROFESSIONAL SERVICE CORPORATION  
813 LEVEE STREET  
P.O. BOX 700  
HOQUIAM, WA 98550  
FAX (360) 532-5788  
TEL (360) 532-5780