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A. ASSIGNMENTS OF ERROR

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B. ISSUES

1. Did the trial court abuse its discretion when, rather than the plain violation of a specific term in the easement, it found Mr. Jonassen in contempt for installing a curb that the

easement expressly granted him the right to install?

2. Did the trial court abuse its discretion when there was no evidence to support a finding that the curb: (a) was too high for a person to step over, (b) impeded the opening doors of cars parked on the driveway, or (c) created a hazard for users of the driveway?
3. Did the trial court abuse its discretion when it construed its easement in a manner that was inconsistent with the express terms, and which substantially increased the burden on the servient estate?

C. STATEMENT OF THE CASE

This appeal arises from a dispute over a property near Dash Point in northeast Tacoma. CP 51. The plaintiff and appellant in this matter is Tracy Jonassen. CP 51. Mr. Jonassen owns a farm near Marion, Texas, where he resides part of the year. See CP 157 and 161, par.s 10 and 19. In 1994, Jonassen's mother passed away, leaving him her home (at 6128 Hawthorne Terrace N.E.) and an adjacent vacant view property on Madrona Drive NE, not far from Dash Point Boulevard N.E. CP 52.

Mr. Jonassen's vacant Dash Point property is 75 feet wide along its

western boundary with Madrona Drive, and 120 feet deep. There is also a one foot “jog” in the northern boundary to accommodate the neighboring garage to the north. CP 52; see CP 5 (1949 survey of property to north); CP 117 (2004 survey of both properties); CP 196 (photo showing curb down property line, relative to garage).

The garage and property to the north belongs to defendant Marilyn I. Robbins (at 6123 Madrona Drive N.E.). CP 52; see CP 5 (1949 survey). Ms. Robbins is a 62-year old woman who enjoys kayaking. See CP 301, note 5; CP 211, lines 21-22. She moved into the neighborhood in 1990, four years before Mr. Jonassen’s mother passed away. CP 37. Ms. Robbins used a gravel driveway which leading from Madrona Drive along Mr. Jonassen’s northern boundary to the single car garage at the southeast corner of her property. There is no dispute that the property line runs adjacent to the edge of Ms. Robbins driveway. See CP 167 (photo showing driveway proximity to boundary).

In 2004, Mr. Jonassen built a fence along his northern property line (and Ms. Robbins’ driveway) to prevent the accumulation of debris from the neighboring property. CP 155, and CP 53; see CP 99 (photo of debris). Ms. Robbins confronted Mr. Robbins, claimed the property

belonged to her, and demanded removal of the fence. Mr. Jonassen reviewed the 1949 survey he had originally relied upon, and confirmed the boundary location through physical measurements which confirmed that the fence line did not encroach onto Ms. Robbins' legally described lot. See CP 53-54. Based on this careful review, Mr. Jonassen did not comply with Ms. Robbins' demands to remove his fence from his property.

A few weeks later, when Mr. Jonassen was gone, Ms. Robbins' son tore down the fence Mr. Jonassen had built. CP 54; CP 3, par. VI; CP 10, par. 3.8. Mr. Jonassen later discovered the destruction and reported it to the Pierce County Sheriff. He also paid for a new survey to confirm he was within his rights as an owner. The updated survey confirmed that Mr. Jonassen's fence had been installed on his own property. As a result, Mr. Jonassen began to reinstall his fence. CP 33, par.s 3 and 4.

Ms. Robbins witnessed the activity and became upset. She called her son Curtis Robbins for help. Curtis Robbins admits that he "rushed" to the aid of his mother, pulling into the end of the driveway with his car while Mr. Jonassen was working there. CP 202, par. 4(a). According to Mr. Jonassen, Curtis crossed the property line with his vehicle, heading down the line where Jonassen was reinstalling his destroyed fence. CP 54;

CP 202, lines 11-14; CP 155; CP 163-64, par. 22. Mr. Jonassen reported the incident to the Pierce County Sheriff, who arrived and directed Curtis Robbins to remove his vehicle. CP 202-203; CP 164, par. 22. Mr. Robbins acknowledges that when he was later represented by a public defender for his involvement in this event, there was no cost to his mother, Ms. Robbins. CP 203, lines 1-2.

The Quiet Title Action. In 2004, Mr. Jonassen sought to resolve the dispute through civilized means. He commenced an action to quiet title, and for trespass damages. CP 1-5. Ms. Robbins answered and counterclaimed with an adverse possession claim, and claims for trespass damages, ejectment and injunction. CP 6-16. Ms. Robbins included a claim that she owned the northern strip of Mr. Jonassen's through her expansive use of a driveway, and her act of driving vehicles up and down the northern strip of Mr. Jonassen's property. See, e.g., CP 9-31, par.s 3.6, 3.10 and 4.2; CP 37.

The Oral Ruling. The trial commenced on January 23, 2006 before the Honorable Kathryn J. Nelson. At the end of trial, Judge Nelson dismissed Ms. Robbins' claims of adverse possession, and quieted title in favor of Mr. Jonassen, subject to a "limited prescriptive easement" along

the south edge of Ms. Robbins' driveway. CP 268 (VRP, p. 3 (January 4, 2006)); CP 61, par.s II and III.

In her oral ruling, the court expressly recognized Mr. Jonassen's right to construct a curb on his own property, to define the boundary line. The court did not provide a precise height limitation, but discussed curb heights between six and ten inches:

I think that Mr. Jonassen should mark with a curb or something that is **not greater than ten to twelve inches** the boundary line of his property, except for the northwest corner.

CP 268 (VRP, p. 3 (January 3, 2006)) (emphasis supplied). At another point in the oral ruling, Judge Nelson indicated that Jonassen could install up to "six inches of curb, roughly speaking – I don't know what a curb exactly measures ...". CP 275 (VRP, p. 10 (January 3, 2006)). Later at the same hearing, Ms. Robbins' attorney sought clarification that the curb would be less than ten inches high:

"MR. STEINAKER: I'm sorry. One final question regarding the height of the curb. My client is concerned that perhaps 10 to 12 inches is too high to allow a car door to open.

THE COURT: Did I say 10 to 12? I thought I had said six. . . . I don't know how a curb – you might have to pour 12

inches of concrete because you bury
the bottom half or something. ...”

CP 276 (VRP, p. 11 (January 3, 2006)). In the absence of available curb specifications, Judge Nelson declined to specify a maximum curb height beyond the rough measurements described.

The Prescriptive Easement. The court’s prescriptive easement was reduced to a set of written Findings of Fact and Conclusions of Law, and a Judgment and Decree (hereafter, the “prescriptive easement”). CP 58-63, CP 64-67. On the adverse possession claims, the court quieted title in favor of Jonassen, “subject only to the prescriptive easements”. CP 61, Conclusions, par. III. With respect to the driveway the court found that Ms. Robbins had only established an easement by prescription for a two foot strip of property along the northern boundary of the Jonassen property. The easement was based upon Ms. Robbins’ specific use of the property:

Robbins use of this ... 2 foot strip has been for 10 years in such a way to allow for passengers and guests to enter or exit or go around vehicles parked in the Robbins driveway along with the wheeling of garbage cans to the street.

CP 60, Findings, par. V; Conclusion, par. V. Accordingly, the terms of the prescriptive easement allowed for the use so much of the two foot strip

“as is required to enter or exit or go around cars parked on the Robbins’ driveway and for the movement of garbage cans.” CP 62, Conclusions, par. VI; CP 66, par. 4. On its west end, the easement flared out with a small triangular section for vehicle access to Madrona. CP 66, par. 4.

On its east end the prescriptive easement narrowed against the base of an old retaining wall of railroad ties which continued parallel to the driveway, and then along the south edge of the garage. CP 66, par. 5. The easement granted Mr. Jonassen the right to construct a new retaining wall of similar size in the same location in the future. CP 66, par.5; CP 62, par. VII.

The Curb “Barrier”. Consistent with the oral ruling, the prescriptive easement expressly recognized Mr. Jonassen’s right to preserve the integrity of his property from the driveway (and its vehicles) through installation of a “ground level barrier” or “curb” immediately inside his north property line. CP 61, Conclusions, par. V. Specifically, the court recognized Jonassen’s “right”:

right to separate his property from Robbins property by erecting a ground level curb or other ground level barrier immediately inside his north property line of Madrona Drive N. E. and the Robbins garage.

CP 61, Conclusions, par. V. The court also gave a general standard for the curb height, consistent with the oral ruling:

The barrier must be low enough for a person to step over and may not impede the opening doors of cars parked on the driveway and may not create a hazard for users of the driveway.

CP 61, Conclusions, par. V; CP 65-66, Judgment and Decree, par. 3; see, e.g., CP 291 (surveyor Arne Riipinen's opinion regarding industry standard curb height); and CP 228, 230, 243 (Ms. Robbins' photos of the curb that Mr. Jonassen ultimately installed). Subject to this general standard (and the guidance of the oral ruling), the court's prescriptive easement contained no limitation on the height of the curb. The curb was required to flare out towards Madrona, so as not to block Ms. Robbins' vehicular access along the easement's triangular section. CP 65, par. 3, lines 23-24.

Ms. Robbins' Attempt To Expand Her Driveway. Only a few months after the court's ruling, Ms. Robbins hired "John John Concrete Construction" to pave and expand portions of her driveway up to two feet south of her property line, onto Mr. Jonassen's property. CP 198. Pursuant to plan, John John Concrete Construction set the forms two feet onto Mr. Jonassen's property, to cover portions of the prescriptive

easement strip, despite Mr. Jonassen's court recognized right to install a curb or other "ground level barrier" to separate his property from the threat of encroachment from Ms. Robbins' vehicles. See CP 159, par. 15.

Before the concrete could be poured, Mr. Jonassen discovered and removed the forms. CP 159, CP 199, par. 3. After communication with Mr. Jonassen's then attorney and Ms. Robbins' attorney, Ms. Robbins abandoned her effort to pave over the entire prescriptive area and had her contractor relocate the forms in the vicinity of the property line but still over it. CP 199; CP 159, par. 15.

Jonassen Replaces the Rotting Retaining Wall. In 2008, Mr. Jonassen was proceeding with construction of a residence on his vacant lot. He contracted with Todd Larson of Parthenon Construction for improvements to the property. One such improvement was removal and replacement of the rotting railroad tie retaining wall with a modern wall of interlocking CMU blocks. CP 179-182, 156, 173; CP 133 and 228 (photos of CMU wall). Before the work began, Jonassen provided the contractor with a copy of the court's decree, and specific instructions to install the new wall exactly where the former wall was. CP 179-180; CP 156, par.s 8 and 9. The contractor and his employees complied with the

court decree with as much precision as possible. See CP 173-174; 176-177; 178-184. First, they removed the original stair stepped railroad ties. CP 180. Then, with supervision and consultation with Robbins and Robbins family members, they installed the CMU wall system further back on plaintiffs' property, in an effort to avoid any further confrontation with Robbins or her son. CP 173-174; 176-177; 178-184.

During the wall project Mr. Jonassen was out of the country. CP 157, par. 10. When he returned to his farm in Texas he discovered a voice mail from his former attorney, Steve Larson. CP 157, par. 10. The former attorney, Mr. Larson, had also forwarded a letter dated May 16, 2008 from Robbins' attorney. CP 157-58. By that date the wall had already been installed and, in Mr. Jonassen's view, the wall was clearly consistent with the court's order allowing a new replacement wall in the same location. CP 158. Accordingly, Mr. Jonassen took no action in response to the demand letter, and for more than a year Ms. Robbins made no further complaint about the wall's location.¹ CP 158, par. 12.

1 Later, in August of 2009, Mr. Jonassen heard that Ms. Robbins was intending to renew her complaints about the wall. See CP 182, par. 14. To minimize conflict Mr. Jonassen expedited a planned relocation of the wall, in order to allow room for water lines on his side of the boundary. CP 158, par. 11. Ms. Robbins had no complaint regarding the relocation of the wall.

The Hay Bales. During construction of Mr. Jonassen's new home, Parthenon Construction also installed the required erosion control measures around the perimeter of the property. At the northern boundary with Ms. Robbins lot, Parthenon used hay bales. CP 183, par. 17; CP 138 (photo). Parthenon installed the hay bales in good faith, to fulfill erosion control requirements for retaining storm water and sediment on the project construction site.² CP 160, par. 15; CP 183, par. 17. Mr. Jonassen did not participate in the location of the hay bales, and had no knowledge of any encroachment. Ms. Robbins did complain to Todd Larson (Parthenon's owner) about the bales' location. Upon hearing Ms. Robbins' complaints, Mr. Larson immediately moved the bales further back into Jonassen's property. CP 183, par. 17; CP 160. After doing so, Ms. Robbins stopped complaining and nothing more was heard from her for the rest of the year. CP 183. Parthenon maintained the bales along the boundary during construction, as required for erosion control. CP 183-84, par. 17.

Relocation of the Wall, Removal of Bales, and Installation of the Curb. On or about August 3, 2009, Mr. Jonassen learned that Ms.

² Mr. Jonassen's property slopes down hill to the north, towards Ms. Robbins' property. CP 192, par. 7(a). Ms. Robbins' expert confirmed that the difference in grade made the area "conductive to soil erosion". CP 192, par. 7(a).

Robbins was threatening additional legal action. Mr. Jonassen called his contractor Todd Larson, of Parthenon Construction, and told him to proceed with the relocation of the retaining wall. The relocation was necessary for pipe trenching along the perimeter of his property, and might also alleviate the concerns that had apparently resurfaced for Ms. Robbins. CP 182, par. 14. Mr. Jonassen also directed Parthenon to replace the apparently still offensive hay bales with a 7.5 inch curb on the inside of his property line, as allowed by the prescriptive easement. See CP 182, par. 14. Under the agreement with Mr. Jonassen, Parthenon Construction understood that it's scope of work was:

to construct a curb **in accordance with the judgment.**
The curb was supposed to be ground level but not so high that people could not step over it and they had to be able to open a car door.

CP 182, par. 14 (emphasis supplied). Mr. Jonassen had given Parthenon a copy of the Judgment and Decree, and Parthenon understood the importance of compliance. See CP 179, par. 7.

The Motion for Contempt. On August 4, 2009, the day after Mr. Jonassen's telephone call to Parthenon Construction, Ms. Robbins' attorney filed a motion to enforce the decree and enter an order of contempt against Mr. Jonassen. CP 69-79. The motion focused

exclusively on Jonassen's construction of the retaining wall, and the location of the hay bales – matters that had been previously addressed with Parthenon, and for which no complaint had been heard for one year. See CP 72, lines 1-16. The motion was based in part on Robbins' professed fear that the new retaining wall was not properly constructed, and could cause harm to her, her guests and her property. CP 82. Ms. Robbins also complained that temporary hay bales located on the property for construction purposes were violating her easement rights by interfering with the two foot easement adjacent to her driveway. CP 82; see CP 138 (photo).

Notice to Jonassen. Ms. Robbins noted a hearing and mailed the motion papers to a "pro se" Jonassen at a post office in Marion, Texas. Jonassen did not receive notice of any pending legal action until August 13, 2009, when a neighbor in Texas brought him an improperly addressed letter from the court, indicating there was a court hearing scheduled for the very next day. CP 160-162. At that time, Mr. Jonassen was not represented by counsel. Mr. Jonassen contacted Ms. Robbins' attorney, explained that he was not evading service, and arranged to have the hearing rescheduled so that he could have an opportunity to consider

negotiations and/or obtaining counsel.

By August 13, 2009, Parthenon had already completed relocation of the retaining wall, had removed the hay bales, and was preparing forms for the installation of the curb. CP 183, par. 15. About that time, Mr. Jonassen was still in Texas and learned of a pending hearing set for the next day, August 14, 2009. He called Parthenon to confirm that they had moved the wall, relocated the hay bales and were proceeding with installation of the curb. CP 183, par. 15. The next day Mr. Jonassen called again and instructed Parthenon to hold the concrete crew back from the work, as he would be getting a plane ticket. CP 183, par. 15.

By August 19, 2009, Mr. Jonassen had retained his new attorney, Shannon Jones, who filed a response to the motion for contempt, explaining that: (1) the retaining wall was constructed one year ago in the presence of Ms. Robbins, in a manner consistent with the terms of the court's order; (2) the retaining wall was more recently re-located further back into plaintiff's property, to allow for the trenching for water lines; (3) the hay bales were temporarily placed by contractors to control storm water and sediment, and were immediately moved back after defendant complained of their location; and (4) after relocation of the hay bales,

Robbins made no further complaint for one year. CP 141-148; CP 154-184 (supporting declarations). Mr. Jonassen's attorney further explained that an order of contempt was not supported given Mr. Jonassen's good faith, and the lack of any actual damage to Ms. Robbins. CP 147-148.

On August 21, 2009, Mr. Jonassen gave the concrete crew approval to complete the curb that had been specifically designed to comply with the court's easement. During the curb work, Erik Robbins (Ms. Robbins' son) arrived and attempted to stop the construction. Erik Robbins complained that his mother Ms. Robbins "was away on a kayaking trip and unreachable". CP 211, par. 6(b) (Decl. of Erik Robbins). He also notified the contractor that there would be a court hearing to address alleged violations of the prescriptive easement. Erik Robbins indicated he would have to call the police. CP 211, par. 6(b).

The contractor advised Erik Robbins that the concrete truck had already been ordered and paid for. CP 211-212. Later that day Mr. Jonassen arrived at his property and, after communicating with an officer on site, supervised as the crew completed the curb. CP 212. The curb work was performed in good faith and in a manner consistent with the general specifications of the court's prescriptive easement. CP 183, par.

15; CP 291 (Arne Riipinen's expert opinion that curb was within industry standard). As completed, the curb provided an effective ground level barrier to demarcate the property line and also controlled the risk of erosion and storm water from Mr. Jonassen's uphill property. See CP 192, par. 8; CP 196 (photo). The curb also fulfilled the traditional function of providing a barrier to vehicle encroachment from the adjacent street (driveway). See CP 228, 230, 243 (Ms. Robbins' photos of the curb that Mr. Jonassen ultimately installed); CP 291, par. 9. As a curb of standard height, the curb was consistent with the court's requirement that it not prevent ingress or egress from vehicles parked on the driveway. The curb also provided Mr. Jonassen with an opportunity to show to the court that he had cleaned up the project site, finished his curb, and resolved all pending concerns regarding the prescriptive easement: a further set back retaining wall, the removal of offending hay bales, and a 7.5 inch industry standard curb that did not interfere with Ms. Robbins' use of the easement.

Ms. Robbins' motion was noted for hearing on September 18, 2009. CP 185-186; VRP (September 18, 2009). Robbins did not supplement the motion with any analysis, factual or legal, regarding the

recent installation of the curb until the day before the hearing. On September 17, 2009, Robbins' attorney filed and fax-served a 59-page packet of papers, most of which dealt with issues that had since been resolved. CP 190-249.

The Contempt Hearing. During the hearing, Ms. Robbins attempted to advance complaints made to the contractor the year before regarding the retaining wall (which had since been relocated) and the hay bales (which had since been removed). See CP 72, lines 1-16; CP 222-226 (various photos of hay bales and the retaining wall at various stages of construction). The court interrupted Ms. Robbins attorney and directed him to focus on the sole issue before it – the curb. VRP, pp. 4-5 (Court: “... let’s just talk about what’s at issue now.”) (September 18, 2009). Accordingly, Ms. Robbins argued that Mr. Jonassen’s curb presented a trip hazard. As support for the trip hazard argument, Ms. Robbins presented photographs of the incomplete excavated area to the south of the curb. See, e.g., CP 239-245. With the motion, Ms. Robbins sought an order finding Mr. Jonassen in contempt, directing his removal of the curb, and awarding \$2,500 as fees and costs. VRP pp. 7-9 (September 18, 2009).

In support of the trip hazard argument, Ms. Robbins' attorney emphasized the advancing age of his client (who had just returned from her kayak trip), and also indicated that the prescriptive easement on Mr. Jonassen's property should be interpreted to provide special ingress and egress rights for elderly frail guests. VRP, p. 20, lines 4-6 (September 18, 2009) ("[S]he's 60-plus years old. Her guests are older ..."); see CP 301, note 5 (discussing the problem of a curb for Ms. Robbins' wheelchair bound guests). Ms. Robbins' attorney essentially argued that the existence of **any curb at all** would violate the judgment and decree:

If there's a curb there, this whole easement, you know, whether or not the garbage cans are allowed to be transported up and down the two feet, the exiting and entering cars, **the whole purpose would be defeated**, and I don't think that was the intent, and **I think that's pretty clear in the judgment and decree that it wasn't intended.**

VRP, p. 20, lines 13-18 (September 18, 2009) (emphasis supplied); compare CP 65-66, par. 3 of Judgment and Decree (discussing "right" to erect a "curb" or other "ground level barrier").

Mr. Jonassen's attorney noted that, for purposes of sanctions, Ms. Robbins had failed to timely provide any factual support or analysis pertaining to sanctions related to the concrete curb. VRP, 12, lines 1-10.

At the conclusion of the hearing the court found Mr. Jonassen in contempt based solely on his decision to install an industry-standard curb in advance of the hearing.³ VRP at p. 15 (“... we’re talking about a curb.”) and p. 24 (“I find the timing of the placement of the curb and the height of the curb to be spiteful.”) (September 18, 2009). The court ordered the removal of the curb. The court also ordered Mr. Jonassen to pay \$2,500 in legal fees and costs. VRP, p. 24 (September 18, 2009). Given the circumstances, Mr. Jonassen sought clarification regarding the type of curb the court would allow without a finding of contempt. The court declined to identify a specific height for the curb, instead indicating that Mr. Jonassen should first attempt to negotiate with Ms. Robbins. VRP, p. 24-25 (September 18, 2009).

The Motion for Reconsideration. The negotiations with Ms. Robbins did not succeed and, on September 28, 2009, Mr. Jonassen moved for reconsideration. First, Mr. Jonassen asked the court to retract its order to remove the curb. In support, Mr. Jonassen pointed out that

³ During the hearing, the court emphasized that the retaining wall issue was not relevant. See VRP, pp. 4-5, 12, 14-15 (September 18, 2009). “I’ve already indicated I’m not going to hear about the retaining wall, so I don’t want to hear about it.” VRP, 12, lines 1-3 (September 18, 2009); see also CP 298, footnote 2.

completion of the industry-standard curb project, with a level backfill, would no longer present a trip hazard and would be completely consistent with the court's original prescriptive easement. See CP 289-295 (declaration of surveyor Arne Riipinen, regarding curb with backfill). Second, and alternatively, Mr. Jonassen requested clarification on what the court would allow as a "curb" or "barrier", to avoid the risk of additional contempt findings under the terms of the prescriptive easement. CP 260-261.

In response to the motion, Ms. Robbins' attorney first criticized Mr. Jonassen for replacing the hay bales with a curb when he (the attorney) verbally ordered Mr. Jonassen to cease construction until a hearing on a motion for contempt. CP 299-300 and note 4. Next, with respect to the trip hazard issue, Ms. Robbins concluded (without specific evidentiary support) that even a back-filled industry-standard curb presents a hazard because guests who open car doors would still need to "step over" a curb:

While the current location and dimension of the curb does allow for the opening of car doors, it still must be stepped over by passengers in order to enter and exit vehicles. This creates a "trip hazard" ...

CP 301. In an apparent effort to support this "stepping-over hazard", Ms.

Robbins' attorney explained that: (1) many of Ms. Robbins' guests are of such an advanced and frail age that stepping over a curb of any significance could lead to "serious potential injury"; and (2) many of Ms. Robbins guests "are wheelchair bound" and "cannot safely enter and exit their vehicles" at all (!). CP 301, note 5.

Based on these arguments, the court stood firm in its order of contempt, and directing Mr. Jonassen to remove the curb. The court further specified that the curb originally authorized under the 2006 decree "shall be a maximum height of 1 ½ inches above defendant's driveway grade and backfilled in the easement area to provide a level surface." CP 306. The court then acknowledged that this low-level lip presented its own "trip hazard". The court ordered Mr. Jonassen to maintain the concrete lip in a color "distinguishable from defendant's driveway so as to alert defendant and her guests to its existence and not present a trip hazard". CP 307. That being said, Mr. Jonassen was prohibited from using any colors "to present a nuisance or to be unsightly, like yellow or orange." CP 307.

Mr. Jonassen has timely appealed from the order of contempt and the order on reconsideration. CP 308-314.

D. STANDARD OF REVIEW

A contempt order is reviewed on appeal for an abuse of discretion. Schuster v. Schuster, 90 Wn.2d 626, 630, 585 P.2d 130 (1978). An abuse of discretion will be found where the trial court's ruling is manifestly unreasonable or based on untenable reasons or grounds. Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995); In re M.B., 101 Wn. App. 425, 454, 3 P.3d 780 (2000).

In contempt proceedings discretion is also abused if: (1) the findings are not supported by the record, (2) if the findings do not support the conclusions, or (3) if the decision is based on an incorrect standard of law. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). In the review of findings and conclusions, the appellate court determines whether the trial court's findings of fact are supported by substantial evidence, and if so, whether those findings support the trial court's conclusions of law. Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Substantial evidence is a "sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation." Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). An absence of findings will be taken as a

negative finding on the issue. Peoples Nat. Bank of Washington v. Birney's Enterprises, Inc., 54 Wn. App. 668, 670, 775 P.2d 466 (1989). Questions of law are reviewed de novo. In re M.B., 101 Wn. App. at 454.

E. SUMMARY OF ARGUMENT

This case involves Tracy Jonassen's undisputed right under a prescriptive easement to install a "curb". The curb was to serve as a protective barrier against Ms. Robbins, who had an admitted history of encroachment onto Mr. Jonassen's property with her adjacent driveway and vehicles. Before a hearing on Ms. Robbins' contempt motion, Mr. Jonassen took expedited steps to address Ms. Robbins' concerns. Mr. Jonassen moved back a retaining wall, and replaced an offending set of hay bales with a curb that was expressly authorized by the decree.

The trial court abused its discretion by finding Mr. Jonassen in contempt for installing this curb, ordering its removal, imposing greater restrictions on the property, and awarding fees and costs. The governing legal standards for contempt under a prescriptive easement require proof of a "plain violation" of a specific term in the easement. Here, the court abused its discretion by ordering removal of the curb, despite undisputed proof that his curb was consistent with the easement and industry

standards. In addition, the findings that Mr. Jonassen disobeyed an express order, and created a hazardous curb are not supported by the evidence. Mr. Jonassen respectfully asks that this court reverse the order of contempt, and affirm his right to build a safe, curb-like barrier against encroachment.

F. ARGUMENT

1. The Trial Court Abused Its Discretion When It Found Mr. Jonassen In Contempt For A Curb Plainly Authorized By The Easement.

In ruling on Ms. Robbins' motion for contempt, the court was required to strictly construe its prescriptive easement and look for a "plain violation" of a specific term. Instead, the trial court created a new and unwritten definition for a curb that was inconsistent with its own written decree. The court then found that Mr. Jonassen "disobeyed" the new unwritten standard, holding him in contempt for doing something he was plainly authorized to do. This was an abuse of discretion.

In Washington, the court's resolution of a motion for contempt is addressed under Chapter 7.21 RCW. RCW 7.21.030(3). Under RCW 7.21.010(1)(b), contempt is defined as "[d]isobedience of any lawful judgment, decree, order, or process of the court."

When deciding whether the party accused of contempt has disobeyed an order or decree, the court must strictly construe the order and determine whether the facts constitute a plain violation. See Johnston v. Beneficial Mgmt. Corp., 96 Wn.2d 708, 713, 638 P.2d 1201 (1982); State v. International Typographical Union, 57 Wn.2d 151, 158, 356 P.2d 6 (1960); In Re Humphreys, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995).

The purpose of this “strict construction rule” is to protect parties from contempt proceedings based on violation of orders that are ambiguous or unclear. See Graves v. Duerden, 51 Wn. App. 642, 647-48, 754 P.2d 1027 (1988); *see also* Trummel, 156 Wn.2d at 274 (vacating a contempt finding after noting that nothing in the order specifically prohibited contemnor from speaking with friends and posting information from those friends on the Internet). This legal standard is particularly important in cases such as this, where an order expressly authorized installation of a “curb” low enough to step over, and where the parties specifically contemplated curbs as high as 9 inches at the hearing where the easement was created. The trial court abused its discretion when, instead of a “plain violation” of a specific term, it held Mr. Jonassen in contempt for an act that was plainly authorized by the easement’s terms.

2. The Court Abused Its Discretion By Basing Its Order On A Flawed Legal Standard For Prescriptive Easements.

The trial court's expansive interpretation of the easement beyond its plain meaning was also inconsistent with the legal standards that govern prescriptive easements. A prescriptive easement is a property right that allows the use of another's land without compensation. See City of Olympia v. Palzer, 107 Wn.2d 225, 229, 728 P.2d 135 (1986). Prescriptive rights are not favored, and the grant of a prescriptive easement is contrary to the presumption that the use of another's property is permissive. 810 Properties v. Jump, 141 Wn. App. 688, 700, 170 P.3d 1209 (2007) (citations omitted).

The scope of prescriptive easements is determined by the nature of use during the prescriptive period. 17 William B. Stoebuck, *Washington Prac., Real Estate and Property Law* sec. 2.9, at 110 (1995), *citing Mahon v. Hass*, 2 Wn. App. 560, 563, 468 P.2d 713 (1970). The extent of the rights acquired through prescriptive use is determined by the uses through which the right originated. 810 Properties v. Jump, 141 Wn. App. 688, 703, 170 P.3d 1209 (2007), *citing Northwest Cities Gas Co. v. Western Fuel Co.*, 17 Wn.2d 482, 486, 135 P.2d 867 (1943); Restatement of Property § 477, at 2992 (1944). The easement acquired extends only to

the uses necessary to accomplish the purpose for which the easement was claimed. 810 Properties v. Jump, 141 Wn. App. 688, 703, 170 P.3d 1209 (2007), *citing* Yakima Valley Canal Co. v. Walker, 76 Wn.2d 90, 94, 455 P.2d 372 (1969).

The servient owner retains the use of an easement to the extent that the use does not materially interfere with the dominant estate. Harris v. Ski Park Farms, 120 Wn.2d 727, 739, 844 P.2d 1006 (1993); Veach v. Culp, 92 Wn.2d 570, 575, 599 P.2d 526 (1979). Once a prescriptive easement has been established, an increased burden on the servient estate through greater physical encroachment is generally prohibited. *See, e.g.*, Lee v. Lozier, 88 Wn. App. 176, 187-88, 945 P.2d 214 (1997) (noting the fundamental difference between an increased intensity in use, and a greater physical encroachment); MacMeekin v. Low Income Housing Institute, Inc., 111 Wn. App. 188, 200, 45 P.3d 570 (2002) (adopting rule that a court cannot order the relocation of a prescriptive easement without the express consent of both parties).

In this case, the court abused its discretion by misapplying the standards for prescriptive easements, and increasing the encroachment of a preexisting easement without proper proof, or the consent of the parties.

When Mr. Jonassen asked what type of “curb” or “barrier” might be allowed by the easement, the court indicated that it wasn’t going to allow a curb or barrier at all. Instead, the court further burdened Mr. Jonassen’s property by limiting his installation to a 1 ½ inch lip of pavement. Then, to address the obvious trip hazard, the court further burdened Mr. Jonassen’s servient estate with a special “paint color” obligation. The end result of the court’s ruling was a dramatic increase in Ms. Robbins’ physical encroachment on Mr. Jonassen’s property. The court unilaterally extinguished Mr. Jonassen’s right to install a curb or barrier, relegating him to a 1 ½ inch lip of pavement insufficient to stop the encroaching behavior that had characterized Ms. Robbins’ ownership for years previously.

Rather than a curb, the court reduced Mr. Jonassen’s right to the installation of a hazardous lip of pavement, with an affirmative obligation to paint that lip a distinguishing color. CP 313-314. Rather than a barrier to encroachment, the court made it possible for Ms. Robbins to freely drive her tires across Mr. Jonassen’s property line without physical constraint or concern. This increased burden was not justified by court ruling, and was contrary to the principle that prescriptive easements are

disfavored, and should not be expanded without express agreement of the parties. MacMeekin, 111 Wn. App. at 200. This provides an additional basis for reversing the contempt order.

3. There Is No Evidence To Support A Finding That Mr. Jonassen Disobeyed An Order, Or That His Curb Presented A “Hazard”.

The court’s finding of contempt was not supported by substantial evidence. As explained above, an order of contempt requires evidence sufficient to show the “plain violation” of an order or decree:

In determining whether the facts support a finding of contempt, the court must strictly construe the order alleged to have been violated, and the facts must constitute a plain violation of the order.

In Re Humphreys, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995); see RCW 7.21.010(b). In this case, there is no evidence of disobedience of any term in any order.

With respect to this curb, the following facts are beyond dispute:

(1) Mr. Jonassen directed his contractors to comply with the express terms of the easement (CP 182, par. 14); (2) the contractors understood the easement terms as part of their scope of work (CP 182, par. 14); (3) the contractor’s built the curb to the same industry standards governing safe curb construction on city streets (CP 291, par. 9); (4) per the easement’s

term, the curb was “low enough for a person to step over” and “did not impede the opening doors of cars parked on the driveway” (CP 65-66, par. 3); (5) the curb was significantly lower than the “ten to twelve” inch maximum identified by Ms. Robbins’ own attorney when the easement was created (CP 276 (VRP, p. 11 (January 3, 2006))); and (6) the curb would be backfilled to allow safer ingress and egress along the driveway (CP 291, par. 9). In sum, Mr. Jonassen’s act of installing an industry-standard curb was expressly authorized by the court’s prescriptive easement, was undisputably consistent with the only written standard given by the court, and was lower than the maximum curb height identified by Ms. Robbins’ attorney.

Ms. Robbins also failed to provide any evidentiary support for a finding that the backfilled curb presented an unreasonable trip hazard. See CP 300-301. Instead, Ms. Robbins offered the illogical theory that simply opening a car door and stepping over the adjacent curb is a hazard:

While the current location and dimension of the curb does allow for the opening of car doors, it still must be stepped over by passengers in order to enter and exit vehicles. This creates a “trip hazard” ...

CP 301. This, of course, is absurd. The act of opening a door and stepping onto a curb is not a hazard – it is an act that takes place

continuously throughout the world every day – people park cars next to curbs, open their doors, and step “over the curb” and onto the adjacent sidewalk (or other backfilled area). There was no evidence to support the finding that Mr. Jonassen’s industry-standard curb somehow violated the very court order that authorized him to install it.

Surveyor Arne Riipinen confirmed, without dispute, that the curb when backfilled would be consistent with curbs on city streets, “with a street on one side and the sidewalk on the other.” CP 291, par. 9. He confirmed that, consistent with the court’s order and oral ruling, curbs are “typically 6 to 8 inches in height”. CP 291, par. 9. His sworn statement is confirmed by published legal authority. *See, e.g., Curreri v. City and County of San Francisco*, 262 Cal.App.2d 603, 605 and 609, 69 Cal.Rptr. 20, 22 and 25 (1968) (curbs less than 6 inches violated standard specifications and safe streets); *Dalmo Sales of Wheaton, Inc. v. Steinberg*, 43 Md.App. 659, 667-68, 407 A.2d 339, 344 (1979) (if curb had been built to minimum “standard” of six inches, injury may have been prevented). Vehicles routinely park adjacent to curbs of this height, without impeding safe ingress or egress. See CP 230 (Robbins photo showing relationship of curb to vehicle, without backfill). Passengers

routinely open doors over street curbs, and step onto sidewalks without tripping.

The only plausible safety hazard was the lack of backfilling to the south of the curb. However, on reconsideration, Mr. Jonassen provided undisputed evidence that this was a temporary condition reflecting not contempt, but the fact that Mr. Jonassen had not yet completed the backfilling before the hearing. CP 289-295. This evidence provided to the court was necessary to achieve substantial justice, under circumstances where the court's basis for contempt was not reasonably anticipated, given the timing of the proceedings and the late filed materials by Ms. Robbins. See CP 258; CR 59(a)(1), (4) and (9). Based on the motion, the court should have reconsidered its order to remove the curb, and allowed Mr. Jonassen to complete a safe backfilled curb installation consistent with industry standards, as expressly allowed by the prescriptive easement.

**4. The Award of Fees and Costs Should Be Reversed,
With A Return Of Fees And Costs To Mr. Jonassen.**

For reasons discussed above, Mr. Jonassen's act of installing a curb of reasonable height did not support a finding of contempt. Accordingly, it was an abuse of discretion for the court to order payment of \$2,500 in fees and costs under RCW 7.21.030(3). As a party prevailing on an appeal in

which fees are at issue, Mr. Jonassen will seek a return of amounts paid, in addition to his own reasonable costs and fees as a prevailing party on appeal.

F. CONCLUSION

The Appellant, Tracy Jonassen respectfully asks that this Court reverse the trial court, reinstate the original prescriptive easement, and affirm his right to maintain his original curb without the stigma of a contempt finding and without the award of fees and costs.

RESPECTFULLY SUBMITTED this 4th day of February, 2010.



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That she placed and affixed proper postage to the said envelopes,
sealed the same, and placed it in a receptacle maintained by the United
States Post Office for the deposit of letters for mailing in the City of
Puyallup, County of Pierce, State of Washington, and that she mailed the
envelopes first class, postage prepaid.


MICHELLE A. LEA

SUBSCRIBED AND SWORN to before me this 5th day of
February




Printed Name: M. Y. Lenandowski
NOTARY PUBLIC in and for the State of
Washington residing at Puyallup
My commission expires: 10/15/12