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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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43723-6-II

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

JEFF BOWLBY and STEFANIE PLOWMAN ,

Respondents,

v.

SCOTT and DONNA WILLIAMS,

Appellants.

BRIEF OF APPELLANTS

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COME NOW Appellants, Scott and Donna Williams, by and through their attorneys of record, SMITH ALLING, P.S. and Kelly DeLaat-Maher, and submit appellants' brief on appeal as follows:

I. ASSIGNMENTS OF ERROR

A. Errors in Findings of Fact entered June 22, 2012.

The trial court erred in the following Findings of Fact entered June 22, 2012:

7. Bowlby, Plowman, and the prior owners of the Bowlby Property have used an old gravel road (the "Old Road") to access the home on the Bowlby Property from South 52nd Street for a period in excess of 10 years. The Old Road lies partly inside and partly outside the easement area described in the Recorded Easement. The location of the Old Road is as located by Gary Proctor, L.S. #38980, on the survey map recorded on March 30, 2010, under Pierce County Survey recording no. 201003305005, Plaintiffs' Exhibit 8 (the "2010 Survey"). (CP 378)
8. Bowlby, Plowman and the prior owners of the Bowlby Property have together used the Old Road as shown in the 2010 Survey to access the Bowlby Property along a uniform route, openly, notoriously, continuously and with a claim of right that was hostile to the owners of the servient estate for a period of over 10 years creating a prescriptive easement over those portions of the Old Road that lie outside the easement area described in the Recorded Easement and that lie south of the north end of the concrete driveway and sidewalk on the Bowlby Property, as shown on Plaintiffs' Exhibits 8 and 3. (CP 378)
9. The gate on the Old Road nearest to South 52nd Street (the "First Gate") was placed on the Old Road by Janna Keller-Porter who resides in the home directly south of the Bowlby Property and who has used the Old Road to access her home for many years. Subject to the terms and

conditions regarding the use of the First Gate as set forth in the Conclusions of Law below, the First Gate places reasonable burdens and limitations on the owners of the Bowlby Property and reasonably helps to protect the affected properties from unwanted intruders. (CP 379)

12. With actual knowledge of the location of the Recorded Easement and actual knowledge of the location of the Old Road as shown on the 2008 and 2010 Surveys, the Williams constructed an alternative easement road (the Bypass Road) which the Williams intended Bowlby and Plowman to use as an alternative to a portion of the Old Road that lay within the area of the Recorded Easement. The location of the Bypass road is shown on Plaintiffs' Exhibit 3. (CP 379)
13. Bowlby and Plowman did not consent or agree to the construction of the Bypass Road. Bowlby and Plowman did not consent or agree to use the Bypass Road as an alternative to either the Old Road or the Recorded Easement. (CP 380)
15. After the completion of the Bypass Road, and with actual knowledge of the location of the Old Road and the Recorded Easement as shown in the 2008 and 2010 Surveys, Mr. and Mrs. Williams intentionally constructed a fence and gate (the "Second Gate") across the Old Road approximately 120 feet north of South 52nd Street. After completion of the Second Gate, Mr. and Mrs. Williams placed large piles of dirt and wooden debris on and across the Old Road and the area of the Recorded Easement behind the Second Gate completely blocking vehicular use of the Old Road between the north and south ends of the Bypass Road. Mr. and Mrs. Williams also placed numerous piles of dirt and debris on other locations within the Old Road and/or the area described in the Recorded Easement as shown on plaintiffs' Exhibit 3, including but not limited to at the boundary line between the Bowlby and Williams Properties near the center of the Bowlby concrete driveway and sidewalk. (CP 380)

17. Mr. and Mrs. Williams' intent in placing piles of dirt and wooden debris across the Old Road behind the Second Gate was to prevent Bowlby and Plowman from using the Old Road including the portion of the Old Road lying within the easement described in the Recorded Easement. Mr. and Mrs. Williams knew or had reason to know that Bowlby and Plowman had easement rights pursuant to the Recorded Easement in the portion of the Old Road that they obstructed. (CP 381)
18. Mr. and Mrs. Williams' intent in placing piles of dirt, wooden debris and steel fence posts in other portions of the Old Road was to prevent Bowlby and Plowman from using portions of the Old Road and portions of the area described in the Recorded Easement. (CP 381)
20. Mr. and Mrs. Williams intentionally committed acts of waste or injury to Bowlby and Plowman's real property interests as described in the Recorded Easement. The acts of waste or injury committed by Mr. and Mrs. Williams to the real property interests of Bowlby and Plowman were unreasonable. Mr. and Mrs. Williams knew or had reason to know that they lacked authority to commit the acts of waste and injury to the real property interests of Bowlby and Plowman. (CP 382)

B. Errors in Conclusions of Law Entered June 22, 2012.

The trial court erred in the following Conclusions of Law entered on June 22, 2012:

3. This court should enter a declaratory judgment that the Bowlby Property, the owners thereof and their successors and assigns, have a prescriptive easement for ingress and egress over all portions of the Old Road on the Williams Property between South 52nd Street and the Bowlby Property that lie outside the area described in the Recorded Easement and south of the north end of the concrete driveway and sidewalk on the Bowlby Property. The "Old Road" is defined as the actual roadway as shown on the survey map prepared by Gary Proctor and recorded on

March 30, 2010, under Pierce County recording no. 201003305005, excluding those portions of the Old Road north of the north end of the concrete driveway and sidewalk on the Bowlby Property. The Old Road, as described herein, shall not be less than 15 feet in width in any location, and shall be not be less than 20 feet in width at the apron to the concrete driveway and sidewalk on the Bowlby Property. If there is any dispute regarding the physical location of the Old Road as defined herein, the location shall be established by land surveyor Gary Proctor pursuant to the terms hereof. (CP 383)

4. This court should enter a mandatory injunction requiring the defendants, Mr. and Mrs. Williams, at their sole cost and expense and on or before June 30, 2012, to remove the Second Gate and all structures, personal property, fencing, fence posts, dirt piles, brush piles, berms, obstacles or any other impediment to travel constructed or placed within either the easement area described in the Recorded Easement or within the Old Road as defined herein, excluding only the First Gate. The Old Road, both inside and outside the Recorded Easement, shall be restored to the condition that existed on or about January 1, 2010. The steel fence post and wood debris pile placed immediately in front of the Bowlby concrete driveway and sidewalk and the steel fence posts placed 20' east of the Bowlby concrete driveway and sidewalk shall be removed. Any boundary markers place by the Williams in that general location shall be (1) placed outside of the Old Road as described herein, and (2) made of plastic. (CP 384)
5. This court should enter a declaratory judgment that the First Gate shall remain in place and shall be operated pursuant to the terms set for herein. The First Gate shall remain open during day light hours. Any party may close the First Gate after dark if they so desire, but they shall not be required to do so, and if closed shall remain closed during the hours of darkness. Upon the agreement of all parties in writing, the parties may modify the gate to ease the opening and shutting of the gate. (CP 384)

7. Defendants have knowingly and intentionally caused unreasonable waste and injury to the plaintiffs' real property interests in violation of RCW 4.24.630(1). Judgment should be entered against the defendants and in favor of the plaintiffs for the plaintiffs' costs, investigative costs, reasonable attorneys' fees and other litigation-related costs as provided in RCW 4.24.630(1) & RCW 4.84.185. (CP 384-85)

C. The trial court erred in the following Findings of Fact entered on July 13, 2012:

11. The position taken by the defendants in this matter was frivolous and was advanced without reasonable cause. The defendants' actions cannot be justified or supported by any rational argument. Defendants did not present any issues over which reasonable minds could differ. (CP 397)

D. The trial court erred in the following Conclusions of Law entered on July 13, 2012:

1. Defendants knowingly and intentionally caused unreasonable waste and injury to the plaintiffs' real property interests in violation of RCW 4.24.630(1). Judgment should be entered against the defendants and in favor of the plaintiffs for the plaintiffs' costs, investigative costs, reasonable attorneys' fees and other litigation-related costs as provided in RCW 4.24.630(1). (CP 398)
2. The defendants' counterclaim and defense in this action was frivolous and advanced without reasonable cause. The plaintiffs are the prevailing parties. The defendants should pay the plaintiffs' reasonable expenses, including fees of attorneys, incurred in opposing the counterclaim and the defense. Defendants are liable to plaintiff under RCW 4.84.185 for plaintiffs' costs and reasonable attorneys' fees. (CP 398)
4. Plaintiffs should be awarded a judgment against defendants for their reasonable attorney's fees in the amount of \$36,746, plus their reasonable investigative costs, litigation

expenses, and court costs in the total amount of \$7,424.57.
(CP 398)

II. ISSUES PRESENTED

A. Does the record reveal sufficient evidence to support the trial court's Findings of Fact and Conclusions of Law that a prescriptive easement exists along those portions of the Old Road that are not contained within the Recorded Easement? (Assignments of Error A (7) and (8); B (3) and (4)).

B. Did the Court err in its determination that the First Gate, subject to the restrictions outlined in the Conclusions of Law, constitute a sufficient reasonable restriction on use of the easement in order to prevent unwanted trespassers and users of the easement? (Assignments of Error A (9) and B(5)).

C. Did the Court abuse its discretion in awarding attorney's fees under RCW 4.24.630(1) when all acts complained of were on the Williams property? Assignments of Error A (12), (13), (15), (17), (18) and (20); B (4) and (7); D(1) and (4).

D. Did the court abuse its discretion in awarding attorney's fees under RCW 4.84.185 when the Defendants' successfully defeated Plaintiffs' claims for the tort of outrage and the intentional infliction of emotional distress, and further presented debatable argument that allowed

the matter to proceed to trial on Plaintiff's remaining claims?
Assignments of Error B (7); D (2) and (4).

III. STATEMENT OF FACTS

A. FACTUAL BACKGROUND

Appellants Scott and Donna Williams (hereinafter "Williams") are the owners of property located at 4403 52nd Street in Tacoma. The property consists of a residence and five-and-a-half acres. CP 110. The residence, Pierce County Assessor's Tax Parcel No. 0220242224, was initially purchased from Robert Keller and Heidi Steinbeck (formerly "Keller") by Real Estate Contract recorded under Pierce County Auditor's Recording No. 8909120194 on September 12, 1989. Defendants' Ex. 10. The back five acres of the property, Pierce County Assessor's Tax Parcel No. 0220242275, were purchased from Jake Keller and Celia Keller by Statutory Warranty Deed recorded June 8, 2001 under Pierce County Auditor's Recording No. 200106080686. Defendants' Ex. 12. Jake and Celia Keller obtained the back parcel in three separate transactions from 1974 to 1979. Defendants' Ex. 5, 6, and 8. Robert Keller, from whom the Williams purchased their home, was Jake and Celia Keller's son. VRP 323:6-15.

A portion of the five-acre parcel is located to the east of the property owned by Jeff Bowlby and Stephanie Plowman, commonly

known as 4507 South 52nd St. in Tacoma, Pierce County Assessor's Tax Parcel No. 0220242130. Plaintiff's Ex. 4. The Williams property extends from South 52nd St. on its south side, to a point where the northwest corner of the Williams property meets the northeast corner of the property owned by Jeff Bowlby and Stephanie Plowman, the Plaintiffs herein (hereinafter collectively referred to as "Bowlby"). CP 110; Plaintiffs' Ex. 4.

Like the Williams parcels, the Bowlby property was also initially owned by the Keller family. CP 111. On December 30, 1958, a Quit Claim Deed transferring the Bowlby parcel from John and Janna Schultz to Jake and Celia Keller was recorded under Pierce County Auditor's Recording No. 1840133. Defendants' Ex. 16. Jake and Celia Keller transferred the parcel to William and Michelle Bennison by Statutory Warranty Deed recorded under Pierce County Auditor's Recording No. 200310141485. *Id.* William and Michelle Bennison subsequently sold the parcel to Donald and Marie Pike by Statutory Warranty Deed recorded on July 27, 2007 under Pierce County Auditor's No. *Id.* Bowlby purchased the property following a foreclosure in 2009 by a Bargain and Sale Deed recorded under Pierce County Auditor's Recording No. 200912210256. *Id.*

The Bowlby property is accessed by an easement road that runs along the western boundary of the Williams property, which easement

benefits three parcels that include the Williams' back five acres, the Bowlby parcel, and a parcel owned by Jana Keller-Porter, Pierce County Assessor's Tax Parcel No. 0220242090. CP 197; Plaintiffs' Ex. 4. Ms. Porter obtained her parcel by Real Estate Contract from Janna Shultz recorded under Pierce County Auditor's Recording No. 9005170457 on May 17, 1990. Defendants' Ex. 13. A statutory fulfillment deed was later recorded on October 23, 1995, from Celia Keller, as the Personal Representative of the Estate of Janna Schultz, to Jana Marie Keller-Porter and Richard Porter, husband and wife, under Pierce County Auditor's Recording No. 9510230383. Defendants' Ex. 14. Ms. Porter is Celia and Jake Keller's daughter. VRP 322:5-6. Ms. Porter was not a party to this action.

The easement referenced above, the only express easement between the parties and their predecessors, was recorded in September, 1967, under Pierce County Auditor's Recording No. 2314485. Defendants' Ex. 18. The easement established a 20-foot wide ingress, egress and utility easement. CP 197. Neither of the current parties to the dispute was the grantor or grantee of the easement. Defendants' Ex. 18. The actual road bed, identified in the Findings of Fact and Conclusions of Law filed June 22, 2012, as the "Old Road," lies partly inside and partly outside the easement area. CP 378; Plaintiffs' Ex. 8. The Williams' and

Bowlby's predecessors (which, up until 2003, included Jake and Celia Keller, who transferred the servient estate to Williams in 2001) used the Old Road to access their respective parcels without any discord.

It is important to note in considering the ownership of the parcels, that all of the properties along the easement and Old Road were largely kept in the same family, until the Williams purchased their residence in 1989. Indeed, Celia Keller testified that the properties at issue had been in her family since 1936. VRP 320:19-25; 321:1-4. In 2001, when the Williams purchased the back larger parcel from Jake and Celia Keller, the Kellers continued to live in the parcel now owned by Bowlby until 2003. VRP 319:22-15; 320 1-5. During the period Jake and Celia Keller owned the back parcel now owned by the Williams and the Bowlby property, there clearly was no issue in use of the Old Road, as they crossed their own parcel to reach their home. Jana Keller-Porter, who also lives on the property accessed by the easement and Old Road, is Celia and Jake Keller's daughter. VRP 322:5-6. As for use of the road outside of the defined express easement, Mr. Williams testified that there was an agreement between him, Bowlby and their predecessors for that use. VRP 364. Even the court, in questioning Mr. Williams, identified the use as neighborly up until the dispute with Bowlby. VRP 364:20.

This neighborly acquiesce referred to by Mr. Williams is bolstered by testimony from William Bennison. Mr. Bennison testified that he had a discussion with Mr. Williams to increase the graveled area around his driveway in order to allow access to a garage located further onto his property. VRP 308. He described obtaining Mr. Williams's agreement to do so. *Id.* Indeed, Mr. Williams testified as to a "friendly banter" with Mr. Bennison in relation to the property line, which then led to him obtaining a survey. VRP 350:15-22. Neither Mr. Bennison nor Ms. Keller, both of whom resided at the Bowlby property, identified any issues with use of the roadway following the time Mr. and Mrs. Williams purchased the back parcel. Indeed, it was only in 2007 or 2008 that Mr. Williams identified any attempts to distinguish the Old Road from the actual easement. Mr. Williams testified to placing fence posts to define the 20-foot easement during Mr. Pike's ownership for purposes of preventing guests from using his property. VRP 301:10-24. Thus, use of the road outside of the easement was permissive between the owners up until, at the earliest, 2007, which was the first attempt by any owner to prevent access to any portion of the Old Road.

In 1976, the then-owners of each of the parcels identified above entered into a road maintenance agreement recorded under Pierce County Auditor's No. 2691819. CP 198; Defendants' Ex. 19. The road

maintenance agreement provided a mechanism for the parties to make decisions concerning the road surface maintenance, and the method of obtaining payment for maintenance. CP 198; Defendants' Ex. 19. The document further provides that the roadway shall be maintained within its present boundaries or such other boundaries as may be agreed to by the parties. Defendants' Ex. 19. Neither the express written agreement nor the road maintenance agreement refers to or prohibits the placement of a gate or gates across the easement road.

In the summer of 2007, Jana Keller-Porter and her husband installed a gate across the easement where it turns off 52nd Street. VRP 332. This was done with the agreement and consultation of the Williams. VRP 332. Indeed, Mr. Williams testified at trial that he was in favor of the installation of the gate. VR 349. Ms. Porter testified that the gate was installed in order to deter crime, as well as trespassers. VRP 332:9-15. Mr. Williams testified at length in relation to crimes and trespassers in the area. VRP 346-348; 349:4-6. When the gate was installed in 2007, the owners of the Bowlby property, Mr. and Mrs. Pike, also agreed to the installation. VR 350:8-15. Mr. Williams testified that he believed it was important to have a gate in order to provide security and seclusion. VRP 360:11-19. When Bowlby purchased their property in 2009, it was gated. CP 198. Indeed, prior to purchase, it was advertised as "Welcome home

to this big family home at the end of the gated road. . . .Private a a [sic] very quiet atmosphere.” Defendant’s Exhibit 20. When Bowlby moved into his home in early 2010, he removed the gate, without obtaining approval from either Ms. Porter or the Williams. CP 111; VRP 333, 351. Unfortunately, this led to several unpleasant encounters between the parties.

Prior to Bowlby’s purchase of the property, Mr. Williams testified to beginning construction of an alternate bypass road that was an alternative to the old road. VRP 277:17-25; 278:1-19. Mr. Williams believed that the old road and easement didn’t align, and the bypass road was intended to correct that. *Id.* Construction of the bypass began in the summer of 2009, and was completed in February, 2010, after Bowlby’s purchase. VRP 278. Ms. Porter testified that Mr. Williams had discussed installation of the bypass road with her prior to construction, to which she had no objection. VRP 337:3-13.

Mr. Williams testified to having a conversation with Mr. Bowlby in relation to the bypass road. VRP 278. He further testified to a belief that he and Mr. Bowlby had an agreement to use the bypass road. VRP 279:17-20. He further believed that Mr. Bowlby agreed to allow Mr. and Mrs. Williams to place a second gate at the beginning of the bypass road to replace the first gate Mr. Bowlby had removed. VRP 279:22-25; 280-

282. Visually, when standing on South 52nd Street and looking down the easement, placement of the second gate would make it appear as if the road was gated, whereas when the easement was traveled, the bypass road allowed a party to transverse the road to the Bowlby property. CP 199. Mr. Williams believed that Mr. Bowlby agreed to the road in a conversation that took place after Mr. Williams requested that Mr. Bowlby close or replace the gate he removed. VRP 274:22-23.

Bowlby continued to use the bypass road without further incident until 2011, at which time this action was filed.

B. PROCEDURAL HISTORY

Bowlby filed this action by a Complaint filed on June 28, 2011. CP 1-14. Bowlby subsequently filed an Amended Complaint on July 1, 2011. CP 15-25. Neither the complaint nor the amended complaint seek establishment of a prescriptive easement.

Bowlby subsequently filed a Motion for Preliminary Injunction, seeking an Order precluding the Williams from obstructing the easement and removing the structures and berms that were placed in the easement and Old Road. CP 26-36. Following the submission of briefing and argument, the Court issued an Order Granting the Preliminary Injunction on September 13, 2011. CP 144-147. The Order required the first gate that predated the Bowlby's purchase be replaced on its hinges and left

closed except for ingress and egress. CP 146. The order further required that the second gate installed by the Williams be removed and left open. CP 146-147. Finally, the court ordered bond in the amount of \$500.

Bond was apparently not posted. Thus, the second gate was not removed, nor were the berms placed on the Old Roadway immediately removed following issuance of the Order. Up until the time of trial, Bowlby, along with Porter, continued to access their property by the bypass road.

The Williams filed an Answer, Affirmative Defenses, and Counterclaim on April 9, 2012. CP 148-154. Therein, they raised a counterclaim seeking a declaratory judgment. Specifically, Williams asserted that the area within the easement other than the actually used roadway was abandoned, and that the easement has been modified to coordinate with the roadbed. CP 152-153. Bowlby filed an Answer and Affirmative Defense on May 16, 2012, less than two weeks before the commencement of trial. CP 155-158. For the first time, in their request for relief, they asked that a prescriptive easement in the roadbed be issued. CP 158.

Trial was held May 24, 29, and 30. Following testimony of the parties and presentation of the evidence, the court issued an oral ruling in Bowlby's favor, granting a prescriptive easement over the portion of the

Old Road located outside of the express easement, and awarding attorney's fees under RCW 4.24.630(1).

Bowlby subsequently brought a motion for an award of attorney's fees and for presentation of Findings of Fact and Conclusions of Law. CP 283-304. Findings of Fact and Conclusions of Law were entered on June 22, 2012. CP 376-385. In its conclusions of law, the Court additionally based its award of attorney's fees under RCW 4.84.185. CP 385. The court entered a judgment on that same date. CP 386-393. The court entered a second Findings of Fact and Conclusions of Law regarding the award of attorney's fees on July 13, 2012. CP 394-399. In its findings, the court indicated as follows:

The position taken by Defendants in this matter was frivolous and was advanced without reasonable cause. The defendant's actions cannot be justified or supported by any rational argument. Defendants did not present any issues over which reasonable minds could differ.

CP 397, Findings of Fact # 12. In its conclusions, the court went on to find a violation under RCW 4.24.630(1), and award fees under that statute as well as under RCW 4.84.185. CP 398.

Williams timely filed this appeal on July 20, 2012.

IV. ARGUMENT

A. STANDARD OF REVIEW

A suit for an injunction is an equitable proceeding with considerable inherent discretion vested in the trial court. *Tradewell Stores, Inc. v. T. B. & M., Inc.*, 7 Wn.App. 424, 500 P.2d 1290 (1972). The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit particular facts, circumstances, and equities of the case before it. *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36, 39 (1982) (citing to 43A C.J.S., Injunctions s 235, at 512 (1978)). Appellate courts are thus required to give great weight to the trial court's exercise of discretion in equitable cases. *Id.* As such, the appellate court will interfere in the judgment only if that discretion is abused. *Id.* In addressing a challenge to the trial court's factual findings and conclusions of law, the appellate court will 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. *Id.* at 425.

Notwithstanding, when interpreting both statutes and civil rules of procedure, the court applies the same standard rules. *State v. West*, 64

Wn. App. 541, 544, 824 P.2d. 1266 (1992). The language of either statute or rule, including common terms, is interpreted according to the plain or usual meaning. *Absher Const. v. Kent School Dist.*, 77 Wn. App. 137, 148, 890 P.2d 1071 (1995). The primary goal of interpretation is to effectuate legislative intent. *City of Seattle v. St. John*, 166 Wn.2d 941, 947, 215 P.3d 194 (2009). A statute granting attorney fees to a prevailing party, if ambiguous, will be applied in a manner consistent with such intent. *Brand v. Dept. of Labor & Industries*, 139 Wn.2d 659, 667, 989 P.2d 1111 (1999). The appropriate standard of review regarding sanctions under RCW 4.84.185 or Civil Rule 11 is abuse of discretion. *Tiger Oil Corp. v. Department of Licensing*, 88 Wn.App. 925, 937-39, 946 P.2d 1235 (1997); *Fluke Capital & Management Servs. Co. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986); *State ex rel. Quick-Ruben v. Verharen*, 136 Wn. 2d 888, 903, 969 P.2d 64, 72 (1998)

B. THE TRIAL COURT ERRED IN DETERMINING BOWLBY PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A PRESCRIPTIVE EASEMENT

The burden of proving the existence of a prescriptive right always rests upon the one benefited by the easement. *Anderson v. Secret Harbor Farms, Inc.*, 47 Wn.2d 490, 288 P.2d 252 (1955). The court must always start with the presumption that the use of another's property is permissive. *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001). Further,

prescriptive rights are not favored. *Roediger v. Cullen*, 26 Wn.2d 690, 706, 175 P.2d 669 (1946). Prescriptive use is disfavored in law because it effects a loss or forfeiture of the rights of the owner. *Granite Beach Holdings, LLC v. Dep't of Natural Res.*, 103 Wn.App. 186, 11 P.3d 847 (2000). This is historically different from adverse possession, which is not disfavored. *Kunkel*, at 603. Adverse possession is distinguished from prescriptive easements in that a claim for adverse possession “promotes the maximum use of the land, encourages the rejection of stale claims to land, and most importantly, quiets title in land.” *Id.*

The person benefited by the prescriptive right must prove: (1) use adverse to the owner of the servient land; (2) use that is open, notorious, continuous, and uninterrupted for 10 years; and (3) knowledge of such use by the owner at a time when he was able to assert and enforce his rights. *Mood v. Banchemo*, 67 Wn.2d 835, 841, 410 P.2d 776 (1966); *Mountaineers v. Wymer*, 56 Wn.2d 721, 722, 355 P.2d 341 (1960). A trial court's findings on the elements of prescriptive easements are mixed questions of law and fact. *Crites v. Koch*, 49 Wn. App. 171, 176, 741 P.2d 1005 (1987).

Possession is adverse if the claimant uses the property as if it were his own, without regard for the claims of others, without asking permission, and under a claim of right. *Malnati v. Ramstead*, 50 Wn.2d

105, 108, 309 P.2d 754 (1957). "Hostile use of real property by an occupant or user does not import ill will, but imports that the claimant is possessing or using it as owner, in contradistinction to possessing or using the real property in recognition of or subordinate to the title of the true owner." *Id.*

Under the doctrines of both prescriptive easement and adverse possession, a use is not adverse if it is permissive. *Miller v. Anderson*, 91 Wn. App. 822, 828, 964 P.2d 365 (1998). Permissive use is not hostile and does not commence the running of the prescriptive period. *Washburn v. Esser*, 9 Wn.App. 169, 171, 511 P.2d 1387 (1973). Use that is permissive in its inception cannot ripen into a prescriptive right unless the claimant has made a distinct and positive assertion of a right hostile to the owner. *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 84, 123 P.2d 771 (1942), *modified on other grounds by Cuillier v. Coffin*, 57 Wn.2d 624, 358 P.2d 958 (1961).

In addition, use of property, at its inception, is presumed to be permissive. *Petersen v. Port of Seattle*, 94 Wn.2d at 486, 618 P.2d 67. A variety of circumstances are relevant to the question of whether use was hostile or permissive. *See generally Miller v. Jarman*, 2 Wn.App. 994, 471 P.2d 704, *review denied*, 78 Wn.2d 995 (1970). Permissive use may be implied in "any situation where it is reasonable to infer that the use was

permitted by neighborly sufferance or acquiescence.” *Roediger v. Cullen*, 26 Wn.2d 690, 707, 175 P.2d 669 (1946); *Miller v. Anderson*, 91 Wn. App. 822, 828-29, 964 P.2d 365 (1998) (recognizing that permission may be inferred in adverse possession); *Cuillier v. Coffin*, 57 Wn.2d 624, 627, 358 P.2d 958 (1961). Washington courts have also held that neighborly permission exists where the use occurred on neighboring parcels of land; mutual use of a driveway; the land is vacant, open, unenclosed and unimproved; or where a claimant uses a roadway that has been used first by the owner of the property who continues to use it for the owner's own purposes. *Lingvall v. Bartmess*, 97 Wn. App. 245, 250-51, 982 P.2d 690 (1999); *Cuiller*, 57 Wn.2d at 627.

The facts of this case bear some similarity to that of *Kunkel v. Fisher*, 106 Wn.App. 599, 23 P.3d 1128 (2001). Therein, the Kunkel's traversed the adjacent property, owned by Fisher, to reach the back of his property, upon which he parked large trucks associated with his business. *Id.* at 600. The lot was apparently large, half gravel and half asphalt, and the successive owners were aware of the Kunkel's use. *Id.* at 604. Neither Fisher nor any of his predecessors objected to or interfered with the use. *Id.* at 600. Indeed, Kunkel had discussions with his use of the property with Fisher's predecessors to ensure that his use was not a problem for the owner. *Id.* at 604. However, when Fisher attempted to

reach an agreement regarding the use of the property, the Kunkels filed suit. *Id.* In reviewing the evidence and applying the standard that there is a presumption of prescriptive use, the appellate court determined that the trial court erred when it failed to apply the presumption that the Kunkel's use was permissive. *Id.* It stated that the evidence was insufficient to overcome the presumption of permission. *Id.*

The record here is devoid of any evidence establishing that the use of the Old Road outside of the easement was anything other than permissive, until approximately 2007 when Mr. Williams placed fence posts to delineate the easement area on the Pike property. Prior to that, neither Mr. Bennison nor Ms. Keller identified any hostile use or use that is other than permissive or neighborly. This is indeed compounded by the fact that Ms. Keller owned the property over which the Old Road travels prior to selling it in 2001 to the Williams. Prior to 2001, Ms. Keller and her husband owned both parcels, and thus the element of hostility is entirely missing up until that point. Following the sale of the property to Mr. Bennison, testimony was presented regarding an agreement for use of the property, even to the point of joking between Mr. Williams and Mr. Bennison.

Based upon the lack of evidence establishing a prescriptive easement, the determination of a prescriptive easement should be

overturned and remanded to the court for a determination of the rights under the express easement that burdens the Williams parcels.

C. THE WILLIAMS HAVE A RIGHT TO A CLOSED GATE AS A REASONABLE RESTRAINT ON THE EASEMENT

At trial, the Williams asked the court to make a determination as to whether the second unlocked gate and themed display constituted an unreasonable restriction on the easement, or whether the first gate should be replaced and kept closed. CP 199. In its Judgment entered June 22, 2012, the Court stated that the first gate erected in 2007 by Jana Keller-Porter was to remain in place and open during the daylight hours. In the evening, the gate could be closed if desired, although it was not required to be closed. If it was closed, it was to remain closed during the hours of darkness. CP 392. Although this ruling appears to recognize the gate as a reasonable restraint, the restraint imposed is not enough to ward against the issues for which the gate was initially placed. As such, the Williams request that the issues be remanded to the trial court for a determination that a closed, unlocked gate during all hours of the day, as previously maintained, is a reasonable restriction.

In determining whether a land owner may maintain a fence across an easement, the trial court looks at the parties' intent as demonstrated by the case circumstances, the nature and situation of the property subject to the easement, and the manner in which the easement has been used and

occupied. *Standing Rock Homeowner's Ass'n v. Misich*, 106 Wn.App. 231, 241, 23 P.3d 520 (2001). In *Rupert v. Gunter*, 31 Wn.App. 27, 640 P.2d 36 (1982), the court of appeals determined that there was no abuse of discretion in allowing a gate across an easement. Similar to the present case, there was no mention in the express easement as to whether or not a party was prohibited from erecting a gate. The court stated as follows:

Whether or not the owner of land, over which an easement exists, may erect and maintain fences, bars, or gates across or along an easement way, depends upon the intention of the parties connected with the original creation of the easement as shown by the circumstances of the case; the nature and situation of the property subject to the easement; and the manner in which the way has been used and occupied.

Id. at 30-31. Similarly, if the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances. *Seattle v. Nazarenes*, 60 Wn.2d 657, 374 P.2d 1014 (1962).

When the owner of a servient estate is being subjected to a greater burden than that originally contemplated by the easement grant, the servient owner has the right to restrict such use and to maintain gates in a reasonable fashion necessary for his protection, as long as such gates do not unreasonably interfere with the dominant owner's use. *Rupert*, at 31 (citing to *United States v. Johnson*, 4 F.Supp. 77 (W.D.Wash.1933)). See

also 28 C.J.S., Easements s 98(b), at 781 (1941)); *Standing Rock*, at 241-242. In *Standing Rock*, the appellate court affirmed the trial court's determination that gates were a reasonable restriction on an easement when the gates prevented trespass, vandalism and wear and tear to the servient estates, and decreased traffic along the easement. *Id.*

Similarly, in *Rupert*, the appellate court affirmed maintenance of a closed gate in order to prevent the general public from using and speeding down the easement. *Id.* at 31. The court reasoned that the parties to the original easement did not intend for the public to speed along the easement way. *Id.* at 31. The court further stated that given the physical situation of the property and the attending circumstances, the proposed gate would hinder the general public from driving down the lane, make speeding less likely, and serve to protect defendants and the servient estate owners and their children from speeding cars. *Id.* at 31-32.

Washington courts have approved gates as a reasonable restriction on easements on several occasions. As stated above, in *Standing Rock*, the court affirmed that the servient owner could install unlocked gates to prevent unauthorized persons from using the easement road. *Standing Rock Homeowner's Ass'n v. Misich*, 106 Wn.App. 231, 241, 23 P.3d 520 (2001). In *Lowe v. Double L Properties, Inc.*, the court determined that the owner of the servient estate could install additional gates that were

necessary to keep cattle in, although they could not be difficult to open. *Lowe v. Double L Properties, Inc*, 105 Wn.App. 888, 20 P.3d 500 (2000). Finally, in another similar case, the court determined that a gate was necessary to prevent unauthorized access to the easement by members of the public. *Steury v. Johnson*, 90 Wn.App. 401, 957 P.2d 772 (1998).

Here, both Jana Porter and Scott Williams testified to trespassers, both intentional and unintentional, along the easement prior to installation of the gate. Testimony was also submitted by Ms. Porter in relation to abatement of trespassers after installation of the gate. She specifically testified that the undesirable activity stopped after she installed her gate. VRP 334:6-7. When Bowlby removed the gate prior to this dispute in 2010, Ms. Porter testified to having trespassers once again. VRP 334:8-15.

A closed but not locked gate is a reasonable restriction, and the issue should be remanded to the trial court for entry of a judgment reflecting that reasonable restriction. Leaving the gate open during the day, and then only closed at night if a party actually closes it, is not allowing for a reasonable restriction on the easement designed to prevent trespassers and unwanted guests.

D. THE COURT ERRED IN AWARDING ATTORNEY'S FEES UNDER RCW 4.24.630 AND RCW 4.84.185

An award of attorney's fees is reviewed for whether or not the trial court abused its discretion. Here, the court awarded attorney's fees under RCW 4.24.630(1), as well as RCW 4.84.185. The court abused its discretion in awarding fees under either statute.

1. The Court Abused its Discretion in Awarding Fees Under RCW 4.24.630(1).

Attorney's fees were awarded under RCW 4.24.630(1). That section provides as follows:

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). In *Clipse v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573, 577-78, 225 P.3d 492, 494 (2010), the court outlined the types of conduct for which liability under the statute is imposed. "The statute

establishes liability for three types of conduct occurring upon the land of another: (1) removing valuable property from the land, (2) wrongfully causing waste or injury to the land, and (3) wrongfully injuring personal property or real estate improvements on the land. *Id.* at 577-578 “By its express terms, the statute requires wrongfulness only with respect to the latter two alternatives. **Presence on the land is required for all three.**” *Id.* at 578 (emphasis added).

The court in *Clipse* further reviewed the required *wrongful* elements under RCW 4.24.630(1). “By RCW 4.24.630's plain terms, a claimant must show that the defendant ‘wrongfully’ caused waste or injury to land, and a defendant acts ‘wrongfully’ only if he or she acts ‘intentionally.’” *Id.* at 580. “A person acts ‘wrongfully’ if he or she intentionally and unreasonably commits an act while knowing or having reason to know that he or she lacks authority to so act.” *Id.* at 579-80. Here, Mr. Williams testified to having an understanding that there was an agreement to use the Bypass road, and therefore his actions were not wrongful per se. Notwithstanding whether or not the Williams’ actions were wrongful, the statute does not specifically recognize alleged trespass in a property interest versus trespass on actual property belonging to the claimant.

Very few published cases have been decided interpreting the statute in relation to an easement. *Standing Rock Homeowner's Assoc. v. Misich*, 106 Wn.App. 231 (2001), and *Colwell v. Etzell*, 119 Wn.App. 432 (2003), are the only two published cases dealing with this issue. Both are instructive in determining that fees should not be awarded under RCW 4.24.630(1).

In *Standing Rock*, the court awarded attorney's fees to the Association for the defendant's actions in coming onto land other than his own to remove gates, which the court deemed were reasonable restrictions on use of the easement. *Standing Rock*, at 247. Interestingly, the gates the Defendant removed were not located on either the Defendant's property, or even on the servient estate. *Id.* The court specifically determined that the Plaintiff in that case was entitled to damages under RCW 4.24.630(1) as follows:

Although the Standing Rock gate was situated on the land of a non-party, Mr. Pearson, the gate was installed, maintained, and replaced repeatedly at Standing Rock's expense. Therefore, Standing Rock was an injured party under RCW 4.24.630(1). Accordingly, the trial court did not err in finding Mr. Misich liable as a joint tortfeasor under RCW 4.24.630(1).

Id. at 247. Thus, based upon the damages associated with replacing the personal property of the gates on numerous occasions, the court awarded attorney's fees under RCW 4.24.630(1) as well.

The situation presented here is diametrically opposed to that of *Standing Rock*. First, the Williams did not go onto the land of any other person, nor was there any testimony alleging that they went onto the Bowlby property or any other person to commit waste or injury to land or personal property. Second, there was no permanent damage amounting to removal, waste or injury to property for which damages were awarded. Unlike the facts in *Standing Rock*, Bowlby expended no funds in repairing or replacing the easement. Bowlby was not excluded from access to his property at any time. Simply put, the facts presented here do not comport with the requirements under RCW 4.24.630 that require a physical trespass onto the land of another to do damage.

By contrast, the court in *Colwell* overturned an award of attorney's fees under RCW 4.24.630(1) when it determined there was no wrongful invasion or physical trespass upon another's property when the Defendant's actions were solely on his own property, and were also deemed unintentional. *Colwell v. Ezzell*, 119 Wn.App. 432, 81 P.3d 895 (2003). In that case, Mr. Ezzell, the owner of the servient estate, ditched and positioned five culverts along the easement road in an effort to repair drainage issues on the property, after which Mr. Colwell claimed he was not able to use the easement. *Id* at 435-436.

In initially awarding fees to Colwell, the trial court relied upon the decision in *Standing Rock* to determine that it was not so much an entry upon or trespass on land of another that was the important factor, but rather the wrongful invasion of a property interest of another in that land that triggered a violation of RCW 4.24.630(1), and therefore an award of fees. *Id.* at 438. The appellate court, upon examination of the *Standing Rock* decision, disagreed:

While recognizing factual differences between *Standing Rock* and the present case, the trial court dismissed these differences as immaterial. We do not agree. In *Standing Rock*, the plaintiff, an association of property owners in a Chelan County development, had placed a number of gates on an easement passing through its property, as well as on the land of an adjoining nonparty, to deter trespass and vandalism. *Id.* at 236, 23 P.3d 520. The holder of the easement repeatedly entered onto the *Standing Rock* land and destroyed the gates. *Id.* at 242, 23 P.3d 520. The court held that the gates were reasonable burdens on the easement and that the defendant holder of the easement was liable for all the damages caused by his actions.

In the current case, the trial court reasoned that *Standing Rock* “supports the idea that it is not so much the ‘trespass’ or ‘entry upon the land of another,’ but the (wrongful) invasion of a right *in* land that is protected by RCW 4.24.630.” CP at 72. The trial court’s analysis was supported by its determination that the decision in *Standing Rock* did not turn upon the entry upon the land of another, but instead “upon the wrongful invasion of the real property interest held by the plaintiffs [*Standing Rock*] in not having the easement leading to *their* [whose?] property overburdened, which easement happened to be located on others’ land.” CP at 72 (emphasis added). A careful reading of the facts in *Standing Rock* refutes this reasoning. The

easement was not leading to Standing Rock's property; it was located on Standing Rock's property and not located on another's land. The defendant wrongfully invaded Standing Rock's property (trespass) and repeatedly destroyed Standing Rock's gates on the easement he held, because he felt the gates were overburdening the easement leading to his land. **The statute's premise is that the defendant physically trespasses on the plaintiff's land. There was no physical trespass in the present case.**

Id. at 438-39 (emphasis added).

In his concurrence, Justice Sweeney agreed that fees were not awardable under RCW 4.24.630. He stated as follows: “The plain language of the statute requires a trespass (“[e]very person who goes onto the land of another”). RCW 4.24.630(1).” *Id.* at 444. He further agreed with how the majority distinguished *Standing Rock*. “There, we applied RCW 4.24.630 where the easement holder entered onto the servient estate (the land of another) and removed gates (personal property). Here, the owner of the servient estate was on his own land.” *Id.*

In the case at hand, the trial court premised the award of fees on RCW 4.24.630(1). Finding of Fact #20 entered on June 22, 2012 specifically states that Mr. and Mrs. Williams intentionally committed acts of waste or injury to Bowlby and Plowman’s real property interests, those acts were unreasonable, and they lacked authority to do so. Based upon the careful method in which the *Colwell* case interpreted the statute and the law cited in *Standing Rock*, it is simply not enough that the Williams,

whether intentional or unintentional, interfered with a property **interest**. The unambiguous language of the statute requires that they **go onto the land of another**. Without that act of trespass, of which the record is devoid, RCW 4.24.630(1) cannot be a basis for attorney's fees.

2. The Court Abused Its Discretion in Awarding Fees under RCW 4.84.185

The court further premised its award of attorney's fees under RCW 4.84.185. In its Finding of Fact #12 entered July 13, 2012, it is stated that "[t]he position taken by defendants is frivolous and advanced without reasonable cause. The defendant's actions cannot be justified or supported by any rational argument. Defendants did not present any issues over which reasonable minds could differ." CP 297. Similarly, in the Conclusions of Law entered that same date, Conclusion # 3 states that the defendants' counterclaim and defense was frivolous and advanced without reasonable cause, and thus Defendants are liable for fees under RCW 4.84.185. CP 398. The award under RCW 4.84.185 was an abuse of the court's discretion and should be reversed.

RCW 4.84.185 provides as follows:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the no prevailing party to pay the prevailing party the reasonable

expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the no prevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

RCW 4.84.185. An action is frivolous if it cannot be supported by any rational argument on the law or facts. *Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931 (2004).

Essentially, the statute requires a finding that a party's defense was frivolous and not advanced with reasonable cause. It also must specifically find that the party's position, in its **entirety**, must have been frivolous and advanced without cause. *State ex rel. Quick-Ruben v. Verharen*, 136 Wash.2d 888, 903, 969 P.2d 64 (1998). Accordingly, "if any claims advance to trial, a trial court's award of fees under RCW 4.84.185 cannot be sustained." *Id.* at 904; see also *Wright v. Dave Johnson Ins. Inc.*, 167 Wn. App. 758, 787, 275 P.3d 339, 355, *review denied*, 175 Wn. 2d 1008, 285 P.3d 885 (2012). To further this point, the court in *Biggs v. Vail* stated as follows:

Thus, the intent of the Legislature is clear. The action or lawsuit is to be interpreted as a whole. If that action as a whole, or in its entirety, is determined to be frivolous and advanced without reasonable cause, then fees and costs may be awarded to the prevailing party. Under RCW 4.84.185, the trial court is not empowered to sort through the lawsuit, search for abandoned frivolous claims and then award fees based solely on such isolated claims.

Biggs v. Vail, 119 Wn. 2d 129, 136, 830 P.2d 350, 354 (1992).

Since the Williams' defense advanced to trial, the law announced in *State ex rel Quick-Ruben* mandates that an award under RCW 4.84.185 cannot be sustained. Further, an award under this basis should not be supported since the Williams actually prevailed in defense of Bowlby's tort/outrage claim. CP 382, Finding of Fact 21; CP 384, Conclusion of Law 6. As such, Bowlby cannot claim that the Williams' entire defense was frivolous and advanced without reasonable cause. Further, the Williams presented debatable issues in defense of Bowlby's claims for prescriptive easement, and further raised debatable issues as to whether their actions constituted an effort to place a reasonable restriction on the easement, for which the first gate, with limitation subject to this appeal, was determined to be.

E. WILLIAMS IS ENTITLED TO FEES ON APPEAL

Bowlby was awarded statutory fees on two grounds by the trial court, which Williams appeals. In the event that award is reversed,

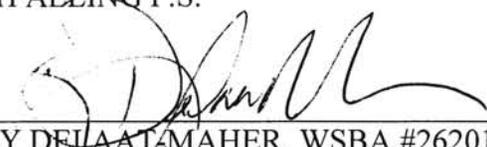
Williams are entitled to fees on appeal pursuant to RAP 18.1.

V. CONCLUSION

Sufficient evidence was not presented supporting the trial court's conclusions that a prescriptive easement exists between the parties. Additionally, sufficient evidence was presented supporting installation of a closed gate on the easement. The court's limitations on that gate were not sufficient to prevent the use of the easement beyond which it was intended. Finally, the court abused its discretion in awarding attorney's fees under RCW 4.24.630(1), as no physical trespass onto Bowlby's property occurred. The plain, unambiguous language of the statute requires a trespass onto the land of another, not the invasion of a property interest. Finally, because Williams prevailed on the Bowlby's tort/outrage claims, and otherwise presented debatable triable issues, fees under RCW 4.84.185 should be reversed.

RESPECTFULLY SUBMITTED this 14th day of January, 2013.

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2013 JAN 14 PM 4:00

STATE OF WASHINGTON

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 2013, I caused to be served a true and correct copy of [this] Brief of Appellant upon counsel of record, via the methods noted below, properly addressed as follows:

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