

No. 43938-7-II

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

PHILIP BRENT PLATTNER, as Trustee of
the PHILIP BRENT PLATTNER TRUST,

Appellant,

v.

ROBERT K. BONNETT and JANET A. BONNETT,
husband and wife,

Respondents.

BRIEF OF APPELLANT

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A. INTRODUCTION

Dr. Philip Plattner, a semi-retired physician, purchased a piece of undeveloped waterfront property on Harstine Island in Mason County in the fall of 2006.¹ He intended to build a cabin there where he could relax and enjoy the serenity of the area. Unfortunately, that has not happened. Instead, he has become embroiled in an escalating dispute with his neighbors Robert and Janet Bonnett (collectively “the Bonnetts”) over a 30-ft. easement that provides access to their adjoining properties from South Island Drive.

Dr. Plattner eventually sued the Bonnetts, seeking a prescriptive easement, damages for their interference with his existing easement rights, and damages under RCW 4.24.630. The Bonnetts counterclaimed. Following a four-day bench trial, Judge Amber Finlay entered detailed findings of fact and conclusions of law deciding the case.

Dr. Plattner appeals, arguing that certain findings of fact are not supported by substantial evidence and do not support the conclusions reached. He also argues that the trial court ignored compelling evidence contradicting those findings. Accordingly, this Court should reverse the

¹ The Philip Brent Plattner Trust purchased the property. RP 18. Dr. Plattner serves as the Trustee of that trust. *Id.*

trial court's judgment only with respect to the issues raised on appeal and award Dr. Plattner his attorney fees and costs.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error²

1. The trial court erred by entering Finding of Fact No. 2(b).
2. The trial court erred by entering Finding of Fact No. 15.
3. The trial court erred by entering Finding of Fact No. 16.
4. The trial court erred by entering Finding of Fact No. 23.
5. The trial court erred by entering Finding of Fact No. 26.
6. The trial court erred by entering Conclusion of Law No. 1.
7. The trial court erred by entering Conclusion of Law No. 2.
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9. The trial court erred by entering Conclusion of Law No. 10(a).
10. The trial court erred by entering Conclusion of Law No. 10(d).
11. The trial court erred by entering Conclusion of Law No. 12.
12. The trial court erred by entering its judgment on June 1, 2012.

² Copies of the trial court's findings of fact, conclusions of law, judgment, and order denying reconsideration are in the Appendix.

13. The trial court erred by entering an order denying Dr. Plattner's motion for reconsideration on August 14, 2012.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err by misinterpreting an agreement modifying a road easement and by rewriting the road easement to limit the dominant estate owner's access to the width of a paved section of the road easement relocated by the later agreement? (Assignments of Error Nos. 2, 9, 11-13)

2. Did the trial court err by finding that the obstructions placed on a road easement by the servient estate owners were temporary and did not warrant the award of attorney fees and costs to the dominant estate owner under RCW 7.48.010 where the obstructions interfered with the dominant estate owner's use and enjoyment of the road easement and thus constituted actionable nuisances? (Assignments of Error Nos. 3, 5-7, 11-13)

3. Did the trial court err by finding that one of the servient estate owners who entered onto the dominant estate owner's property did not intend to damage the dominant estate owner's video camera and by refusing to apply RCW 4.24.630 to treble the dominant estate owner's damages and to permit him to recover attorney fees and costs where substantial evidence reflects that the servient estate owner entered the property and violently struck the video camera more than once after redirecting it? (Assignments of Error Nos. 4, 8, 11-13)

4. Did the trial court err by ordering a dominant estate owner to remove the southern-most post of a farm gate located entirely on his property where the parties did not file any pleadings or present any testimony concerning that post and the court's decision deprives the dominant estate owner of his right to due process of law and adversely impacts his property rights? (Assignments of Error Nos. 1, 10, 12-13)

C. STATEMENT OF THE CASE

John A. McCrory (“McCrory”) owned approximately five acres of waterfront property, including tidelands, on Harstine Island where he commercially harvests shellfish. RP 390, 392, 398. While he owned the property, a rudimentary road off of East South Island Drive provided him with access to the beach and an old barn where he stored his harvesting supplies. RP 392, 398.

In 1993, McCrory recorded a short plat dividing his property into two smaller lots. Ex. 1; CP 371-76; RP 390, 422. The plat described two 30-ft. easements: one for ingress, egress, drainage and utility purposes (“road easement”) on Lot 2 and one for roadway slopes and utilities alongside South Island Drive on Lot 2 and a portion of Lot 1. Ex. 1; CP 374-76; RP 422. For a substantial period of time during McCrory’s ownership of both properties, a graveled area extended southwest of the road easement. RP 28, 398.

On June 16, 2004, McCrory sold Lot 2 to the Bonnetts; however, he reserved the right to commercially harvest shellfish from the tidelands in front of and abutting the lot. CP 70, 378-82; RP 393-94. As a condition of the sale, McCrory and the Bonnetts were required to modify the road easement to improve sight distances for vehicles leaving the road easement and entering South Island Drive. CP 381; RP 394, 396, 408,

629. The Road Relocation (“Agreement”) was incorporated into the statutory warranty deed as exhibit B and stated:

The grantor and the Grantee hereby agree that due to the sight distance requirements of the South Island Drive County Road and the existing access easement to Lots 1 and 2 of Short Subdivision No. 2332, said access easement, as shown and described on Lots 1 and 2 of said Short Subdivision No. 2332, shall be relocated in a Northwesterly direction. This easement relocation will be completed by June 15, 2004. The relocated easement shall equal the “as built” dimensions and location of the road to be constructed and in use by June 15, 2004. At all times this road shall provide access to both Lots 1 and 2 of Short Subdivision No. 2332, and at all times shall have a sufficient road bed to allow for fire and other emergency vehicles to access both lots.

CP 381.

The Agreement thus moved a section of the road easement where it intersected with South Island Drive by shifting it to the northwest. CP 327, 350; RP 424. The remainder of the road easement was not moved. *Id.*; RP 773-75. The relocation occurred before the Bonnetts’ sale closed. RP 466.

In November 2006, McCrory sold Lot 1 to Dr. Plattner. CP 384; RP 17. Pursuant to the statutory warranty deed, Dr. Plattner was granted a 30-ft. wide private easement for ingress, egress, drainage and utility purposes over the Bonnetts’ property, as modified by the Agreement. CP 385. Exhibit B to the statutory warranty deed contained language

nearly identical to the language contained in the Bonnetts' statutory warranty deed:

The grantor and the Grantee hereby agree that due to the sight distance requirements of the South Island Drive County Road and existing access easement to Lots 1 and 2 of Short Subdivision No. 2332, said access easement, as shown and described on Lots 1 and 2 of said Short Subdivision No. 2332, was relocated in a Northwesterly direction. This easement relocation was completed on or about June 15, 2004. The relocated easement shall equal the "as built" dimensions and location of the road as constructed and now in use. At all times this road shall provide access to both Lots 1 and 2 of Short Subdivision No. 2332, and also to John A. McCrory IV for access regarding the aforescribed "SHELLFISH RESERVATION," and at all times shall have a sufficient road bed to allow for fire and other emergency vehicles to access both lots.

CP 386.

In October 2006, the Bonnetts paved a roadway over the entire road easement whose width varies from 10- to 12-ft. RP 683-84. They completed construction of their home in December 2006. RP 485.

For a time, the neighbors enjoyed a good relationship. RP 487-88, 633. Conflicts began to arise when Dr. Plattner started to develop his property. RP 28-29, 359, 490-91.

In early 2007, Robert Bonnett ("Robert") demanded that Dr. Plattner pay for one-half of the costs incurred to pave the road easement. RP 24. When Dr. Plattner requested a copy of the invoice,

Robert became angry and refused to provide the documentation. RP 25. Dr. Plattner eventually agreed to pay \$2,500 of the Bonnetts' paving costs. *Id.*

The Bonnetts used the road easement as a parking and storage area: they parked their car and their recreational vehicle and trailer on it, and stored their boat on it. Exs. 4, 14, 15, 19, 20; RP 133. They also installed a storage shed on it. Ex. 5. At one point, they even inserted metal fence posts along the sides of it to block access by large vehicles, which they removed and re-installed to suit their construction needs. RP 64-67; Exs. 26, 27, 29.

In February 2008, Dr. Plattner constructed a 20-ft. logging gate across his driveway where it branched off from the road easement. RP 32, 312; Ex. 10. He kept the gate closed and locked when he was not onsite. RP 344. Although he later obtained a survey that showed that the gate extended beyond the termination point of the road easement, the gate was in an area where the road had been in use since 1993 and was on his property. CP 71-72; RP 423, 436, 438, 499; Ex. 3. After learning of the survey, the Bonnetts extended an existing split-rail fence along the property line and the western boundary of the road easement. RP 39, 69, 499, 510; Exs. 10, 13. The extension narrowed the access to Dr. Plattner's property by more than 7-ft. RP 39; Exs. 9, 10, 11. The Bonnetts also

removed a portion of the existing gravel roadway, brought in soil, and planted trees and other vegetation in what had been the existing roadway onto Dr. Plattner's property. Ex. 13. The effect of the Bonnetts' activities was to substantially block a portion of the entrance onto Dr. Plattner's property. RP 39; Ex. 13.

Dr. Plattner sued the Bonnetts in the Mason County Superior Court on September 23, 2008, seeking a prescriptive easement to the area encumbered by the Bonnetts' split-rail fence, damages and equitable relief for their interference with his easement rights, and damages under RCW 4.24.630. CP 419-23, 398-412.³ The Bonnetts answered and asserted three counterclaims. CP 388-89, 390-96, 413-14, 415-18.

On July 12, 2010, Dr. Plattner installed a farm gate a short distance from South Island Drive on a section of the road easement that was on his property. CP 72. He installed this gate to prevent vandalism occurring on the property during his absence. RP 80, 322. The Bonnetts did not want the gate there. CP 72 (FF 17).

On December 22, 2010, Dr. Plattner had Dan Rubino ("Rubino") install a multi-camera security system on his property in an effort to curb the vandalism that kept occurring on the property. RP 87-89. Robert Bonnett watched the camera installation. RP 92. All of the cameras are

³ Dr. Plattner later withdrew his second cause of action alleged in his second amended complaint. CP 397.

motion-activated and set to record in real time. RP 88, 171-72. Rubino installed one of the cameras near Dr. Plattner's logging gate. RP 171. This camera was approximately 10-ft. from the ground and aimed downward at the logging gate at dead center view. *Id.* After that camera was installed, Dr. Plattner had Rubino redirect it away from the road easement to capture more of his property. *Id.* Dr. Plattner discovered in March 2011 that that camera had been vandalized with a pair of long-handled pruners less than 48-hrs. after it had been installed. RP 89-91; Exs. 33, 36, 197. The camera cost \$309, exclusive of sales tax. RP 174.

The trial court heard testimony from the parties and a number of witnesses during a four day bench trial held in May and June of 2011. CP 68. During the trial, licensed land surveyor Dan Holman ("Holman") testified that metal fence posts that the Bonnetts had installed on the road easement would prevent a large vehicle like a motorhome from accessing Dr. Plattner's property without damage to the posts or to the vehicle. RP 428-429. Holman had 35 years' of experience and was familiar with the road easement, having prepared the short plat for McCrory in 1993. RP 421. Brian Tucker ("Tucker"), a professional truck driver, testified that large trucks cannot enter Dr. Plattner's property if the drivers are limited to driving only on the paved portion of the roadway and that drivers routinely have to drive off of the paved portion of the roadway to

achieve an adequate turning radius.⁴ RP 166. Tucker had driven on the road easement while performing work for Dr. Plattner. RP 54, 160-61. Assistant Fire Chief David Salzer similarly testified that county fire trucks and other emergency vehicles would not be able to make the turn from the road easement onto Dr. Plattner's property in part because of the Bonnetts' split-rail fence. RP 782-84, 787; CP 71.

The trial court also heard testimony from David Bayley ("Bayley"). RP 755-777. Bayley is a licensed attorney with more than 30 years' experience as a real estate practitioner, which includes the drafting of real estate documents and the supervision of work performed by others. RP 755-57. He also owns a title company. RP 755-57. During the trial, Bayley discussed the closing documents that he prepared for the McCrory-Bonnett sale and the Agreement that he prepared for McCrory to relocate a small section of the road easement to improve the sight distances. RP 759, 770, 773. He specifically testified that the relocated section of the road easement had to be wide enough to meet fire code and emergency passage and that he only drafted easements that met or exceeded that code, which was 20-ft. RP 771, 773. He also testified that

⁴ Examples of this can be seen in exhibits 17, 18, 22, 23, and 29. Exhibits 17 and 23 show where large vehicles and trucks had to swing wide to make the turn onto Dr. Plattner's property because of the Bonnetts' extended split-rail fence.

the Agreement did not have any impact on the section of the road easement that was not relocated. RP 773-75.

The trial court issued an oral ruling deciding the case on July 18, 2011. RP II:3-20.⁵ The court ruled, among other things, that Dr. Plattner had an implied easement by prior use over the area in front of his logging gate and that the paved roadway needed to be between 14- and 20-ft. wide. RP II:6. It also ruled that Robert damaged Dr. Plattner's video camera, which entitled Dr. Plattner to \$309 in damages. RP II:11. It did not award attorney fees and costs to either party. RP II:18. Dr. Plattner moved to clarify the ruling to address a number of issues, including the impact of the Agreement on the road easement. CP 294-311. While the Bonnetts objected to most of Dr. Plattner's requested clarifications, they agreed that the trial court needed to make a more definitive ruling about the width of the roadway. CP 251. The trial court gave the parties permission to attempt to agree on the precise location of the relocated easement. CP 155-56, 185.

The Bonnetts submitted proposed findings of fact and conclusions of law. CP 206-27. Dr. Plattner objected, noting that many of the proposed findings included subjects not contained in the pleadings or the

⁵ "RP II" refers to the verbatim report of proceedings from the trial court's oral ruling on July 18, 2011.

testimony and not argued by the parties or contained in the trial court's oral ruling. CP 195-205, 292-93.

The trial court ruled on all of the issues except the actual location and width of the relocated easement on March 5, 2012. CP 15. It permitted the parties to submit additional briefing on that issue. CP 107-194. Dr. Plattner submitted additional testimony from Tucker, who is a professional truck driver familiar with the road easement. CP 112-15, 191-94. The Bonnetts did not submit any evidence or documentation to support their position. CP 155-73. They merely stated what they wanted the easement to be. CP 156-58, 189.

The trial court entered contested findings of fact and conclusions of law and the judgment on June 1, 2012. CP 51-52, 68-77. Dr. Plattner moved for reconsideration, asking the trial court to amend the findings and conclusions to conform to the evidence adduced at trial. CP 14-50. He also formally objected to the trial court's findings and conclusions. CP 51-52. The trial court denied the motion for reconsideration on August 12, 2012. CP 7-8. Dr. Plattner's timely appeal followed. CP 5-11.

D. SUMMARY OF ARGUMENT

An easement grants the right to use in some way the land of another, without compensation. In determining the nature of an easement, courts look to the language of the plat dedication itself. Here, the

language of the road easement is unambiguous: it grants Dr. Plattner a 30-ft. easement for “ingress, egress, drainage and utility purposes” over the Bonnetts’ property. The language of the Agreement is unambiguous: it relocates only a small section of the road easement to improve sight distances. It does not affect the remaining section of the road easement.

Even if the language in the Agreement is ambiguous, the situation and the circumstances at the time of the grant confirm the purpose behind it. That Dr. Plattner or McCrory may have historically used only a portion of the unaltered 30-ft. easement or that the Bonnetts eventually paved a roadway less than 30-ft. wide is immaterial. As a matter of law, Dr. Plattner has the right to an access easement of 30-ft on that section of the road easement that was not relocated by the Agreement. The trial court erred by rewriting the entire road easement to shrink Dr. Plattner’s access with a few exceptions to the width of the improved roadway.

A nuisance is a substantial and unreasonable interference with the use and enjoyment of land. An obstruction that interferes with the free use of property is an actionable nuisance. Here, the Bonnetts unreasonably interfered with Dr. Plattner’s use and enjoyment of the road easement by using it for parking and by obstructing it with, among other things, a shed, a boat shelter, and an extended split-rail fence. These obstructions were not temporary. Even if they were, they were actionable. That the

Bonnetts may have removed or abated some of the obstructions prior to trial does not prejudice Dr. Plattner's right to recover damages for their past existence. The trial court's decision with respect to Dr. Plattner's nuisance claims was erroneous and should be reversed.

A trespass is an intrusion onto the land of another than interferes with the owner's right to exclusive possession. Where an intentional trespass results in injury, a successful plaintiff is entitled to recover treble damages and attorney fees pursuant to RCW 4.24.630. Here, the evidence clearly shows that Robert entered onto Dr. Plattner's property and intentionally and unreasonably damaged one of Dr. Plattner's video cameras by striking it two times with a pruning tool. His actions were not inadvertent or unintentional. The trial court erred by refusing to treble Dr. Plattner's damages and by failing to award attorney fees and costs.

Dr. Plattner installed a farm gate on a sloped area of his property outside of the road easement. Despite the lack of testimony or evidence about the farm gate or its posts blocking access to the road easement, the trial court ordered Dr. Plattner to remove the gate and the southern-most post. This was error and violated Dr. Plattner's right to due process of law. The trial court erred by requiring Dr. Plattner to remove the southern-most farm gate post.

Dr. Plattner is entitled to his attorney fees and costs on appeal because his recovery of those fees is specifically authorized by statute.

E. ARGUMENT

(1) Standard of Review

This Court reviews findings of fact entered after a bench trial to determine if they are supported by substantial evidence and, if so, whether those findings support the trial court's conclusions of law.⁶ See, e.g., *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) (citing *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986)); *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). If that standard is satisfied, this Court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). The Court reviews questions of law and conclusions of law de novo. *Id.* at 880. Here, the trial court's findings of fact are not supported by substantial evidence and do not support its conclusions of law.

⁶ "Substantial evidence" is evidence that would persuade a reasonable fact finder of the truth of the declared premise. See, e.g., *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991), cert. denied, 503 U.S. 986 (1992).

(2) The Trial Court Misinterpreted the Agreement and Erred By Effectively Rewriting the Entire Road Easement⁷

Two of the major issues at trial were the impact of the Agreement on the original road easement and the size of the relocated roadway. Dr. Plattner argued that the Agreement did not alter the entire 30-ft. road easement, but merely relocated and modified a small section of it. The Bonnetts responded that the Agreement modified the original road easement by limiting the width of the entire easement to the “as built” or paved dimensions of the roadway, which varies between 10- and 12-ft.⁸ Although the trial court found that the “as built” language in the Agreement referred to the relocated section of the road easement and that only a portion of the roadway was relocated, CP 70-71 (FF 5, 8), it also found that the easement did not need to be 30-ft. wide. CP 72 (FF 15); RP II:8. In making that finding, the trial court misinterpreted the

⁷ If this Court does not correct the trial court’s error of law, then it should remedy an inconsistency in the trial court’s ruling. The trial court granted Dr. Plattner an implied easement in the area in front of his logging gate and ordered the Bonnetts to remove the plantings and the split-rail fence that they constructed in that area. CP 10, 75-76 (CL 4, 10(b)). But the diagram and survey map incorporated into the trial court’s findings and conclusions do not encompass the entire area of the implied easement that the trial court granted to Dr. Plattner. CP 16, 23, 79-89. This should be corrected.

⁸ Robert admitted during the trial that the relocated section of the road easement joined up with the original road easement. RP 468. While the newer section was approximately 10-ft. wide or so, the older section had remained its original width. *Id.* This testimony was consistent with a 2007 email he sent to Dr. Plattner in which he agreed that the road easement remained 30-ft. wide where it had not been relocated. Ex. 51.

Agreement and erred by altering the width of the road easement in the section that was improved, but not relocated.

An easement is a right, distinct from ownership, to use in some way the land of another, without compensation. *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986) (quoting *Kutschinski v. Thompson*, 101 N.J. Eq. 649, 656, 138 A. 569 (1927)). An easement will be construed to accommodate the reasonable use of the dominant estate, not the servient estate.⁹ *Logan v. Brodrick*, 29 Wn. App. 796, 800, 631 P.2d 429 (1981). However, the servient owner retains the use of the easement so long as that use does not materially interfere with the dominant estate. *Harris v. Ski Park Farms*, 120 Wn.2d 727, 739, 844 P.2d 1006 (1993), *cert. denied*, 510 U.S. 1047 (1994).

Because easements are “encumbrance[s] upon real estate,” any contract creating or evidencing one must be in writing and comply with the statute of frauds set forth in RCW 64.04.010.¹⁰ *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995); *Ormiston v. Boast*, 68 Wn.2d 548, 550, 413 P.2d 969 (1966). The scope of an easement is generally a

⁹ The dominant tenement is the tenement that enjoys the easement and to which the easement is attached. The servient tenement is the estate upon which the easement rests or is imposed. WASHINGTON REAL PROPERTY DESKBOOK at 10-5, § 10.2(4) (Washington State Bar Ass’n 3d ed. 1997).

¹⁰ Under RCW 64.04.010, “[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed” Every deed “shall be in writing, signed by the party bound thereby, and acknowledged” RCW 64.04.020.

question of fact. *Broadacres, Inc. v. Nelsen*, 21 Wn. App. 11, 15, 583 P.2d 651 (1978), *review denied*, 92 Wn.2d 1006 (1979). But where the facts are undisputed, it is a question of law. *Lingvall v. Bartmess*, 97 Wn. App. 245, 250, 982 P.2d 690 (1999).

In determining the nature of an easement, the courts look to the language of the plat dedication itself:

It was the duty of the court in construing the instrument which created the easement to ascertain and give effect to the intention of the parties. The intention of the parties is determined by a proper construction of the language of the instrument. Where the language is unambiguous other matters may not be considered; but where the language is ambiguous the court may consider the situation of the property and of the parties, and the surrounding circumstances at the time the instrument was executed, and the practical construction of the instrument given by the parties by their conduct or admissions.

Green v. Lupo, 32 Wn. App. 318, 321, 647 P.2d 51 (1982). The intention of the parties governs, as determined from the language of the whole grant, and, if any ambiguity exists, the courts should consider the situation and circumstances of the parties at the time of the grant. *Schwab v. City of Seattle*, 64 Wn. App. 742, 751, 826 P.2d 1089 (1992); *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981). In *Castanza v. Wagner*, 43 Wn. App. 770, 777, 719 P.2d 749, *review denied*, 107 Wn.2d 1004 (1986), for example, the Court of Appeals, Division I declined to allow installation of utility lines over an easement “for road purposes.”

Here, the language of the road easement is unambiguous. The plat unequivocally states that a 30-ft. easement for “ingress, egress, drainage and utility purposes” exists on Lot 2 (now owned by the Bonnetts) for the benefit of Lot 1 (now owned by Dr. Plattner). Ex. 1. It is difficult to envision a more unambiguously created permanent road easement than this one.

The language of the Agreement is likewise unambiguous. The Agreement altered a small section of the road easement to improve sight distances by *relocating* only the section closest to the county road in a northwesterly direction. Ex. 1; CP 350. The term “relocate” is a verb meaning “to locate again: establish or lay out in a new place.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY at 1052 (11th ed.). In other words, a 135- to 150-ft. long section of the original road easement was relocated, *i.e.*, moved to a new location, to improve sight distances. CP 350; RP 424. The rest of the road easement, from the intersection of the relocation point to its original terminus, remained where it had been depicted on the short plat. *Id.*

Even if the language in the Agreement were somehow ambiguous, the situation and circumstances at the time of the grant confirm the purpose behind it. *Schwab*, 64 Wn. App. at 751. McCrory, the original property owner, testified that the sole purpose for the Agreement was to

shift the section of the road easement where it intersected with South Island Drive to the northwest to improve sight distances and to reduce the danger for vehicles attempting to merge onto the county road. RP 394, 396-97. He did not want or intend to decrease the width of the easement because he needed a large turning radius to be able to drive his truck and trailer onto the beach to harvest shellfish. RP 400. He wanted to maintain exactly what he had had before, which is why he hired Bayley to draft the Agreement. *Id.*

Bayley worked with the Bonnetts on the language to be included in the Agreement. RP 475, 770-71. As an experienced real estate attorney, he was mindful of the requirements for the proper drafting of an easement and the need to have an adequate width for emergency vehicles. RP 755, 771. He was also aware, having drafted such agreements, that it was possible to extinguish an existing easement. RP 774. He testified at trial that the Agreement at issue here only applied to the section of the road easement that was relocated and did not apply to the section that was not relocated. RP 773. In other words, the Agreement did not, and was not intended to, terminate or extinguish the unrelocated section of the road easement. RP 774.

Despite the unambiguous language of both the plat and the Agreement and the testimony from Bayley and McCrory concerning, the

trial court found that the roadway did not need to be 30-ft. wide. CP 72 (FF 15). It ultimately rewrote the entire road easement to shrink Dr. Plattner's access with a few exceptions to the width of the improved roadway. CP 75 (CL 10(a)). This conclusion is erroneous because it ignores well-established case law confirming Dr. Plattner's right to the entire 30-ft. of the unaltered road easement regardless of its historical use.

810 Properties v. Jump, 141 Wn. App. 688, 170 P.3d 1209 (2007), is dispositive. There, the dispute centered on a roadway that ran through Janeice Jump's ("Jump") property. Neighbors with adjoining property to the south historically used the road through Jump's property to truck cattle to grazing areas, access springs, and repair fences. *Id.* at 691. Jump blocked access to the roadway with apple bins and removed a fence along her southern boundary, effectively precluding the neighbors from grazing cattle on their property. *Id.* at 692. The neighbors brought an action to establish a right-of-way easement over Jump's property. *Id.* The trial court concluded express and prescriptive easements burdened Jump's property and ordered her to remove the barriers and pay damages for lost grazing rights. *Id.* at 693.

Jump appealed, challenging the trial court's conclusions that the easements ran through her property and that the neighbors did not retain grazing rights. Jump argued, at least in part, that one neighbor's access to

the disputed roadway should be limited to 15-ft. because the existing roadway was 15-ft. wide. *Id.* at 699. The Court of Appeals, Division III rejected Jump's argument, stating:

Generally, the dimensions of an easement do not contract merely because the holder fails to use the entire easement area. When one enters upon land under color of title, and possesses only part of the land, he or she will be deemed to have possession of the entire tract.

Id. (citation omitted). In that case, the relevant deeds specifically delineated 40 and 30-ft. easements. *Id.* at 692, 698-99. Accordingly, the neighbors had a right to access easements of those respective widths regardless of the width of the existing roadway. *Id.* at 699.

In this case, the 1993 short plat specifically delineated a 30-ft. wide road easement subsequently modified by the 2004 Agreement; however, the Agreement did not alter the *entire* road easement. It altered *only* a 130 to 150-ft. section, which was the section that was relocated. That Dr. Plattner may have historically used only a portion of the remaining unaltered 30-ft. easement to access Lot 1 or that the Bonnetts paved a roadway less than 30-ft. wide is immaterial. *As a matter of law*, Dr. Plattner has the right to an access easement of 30-ft. regardless of the width of the road surface. *See Jump*, 141 Wn. App. at 699. Finding 15 is therefore erroneous and does not support conclusion 10(a), which effectively rewrites the entire road easement and shrinks Dr. Plattner's

access rights. This Court should reverse the trial court's judgment on this issue.

(3) The Trial Court Erred By Finding that the Obstructions that the Bonnetts Placed on the Road Easement Were Temporary and Did Not Warrant the Award of Attorney Fees and Costs to Dr. Plattner

Another key issue at trial revolved around the Bonnetts' efforts to interfere with Dr. Plattner's use and enjoyment of the road easement. Dr. Plattner argued that the Bonnetts consistently interfered with his use and enjoyment of the road easement and that their actions constituted actionable nuisances under RCW 7.48.010 for which he was entitled to recover damages and attorney fees.¹¹ The trial court essentially agreed, finding that the Bonnetts had obstructed his access to the easement. CP 10, 71-72, 74 (FF 11, 16, 26). But it also found that the obstructions were temporary and concluded that they did not constitute actionable nuisances. CP 10, 71, 74 (FF 11, 26; CL 2). The trial court's finding that the obstructions were temporary is contradicted by the evidence and does not support the conclusion that they were not actionable nuisances warranting an award of attorney fees and costs to Dr. Plattner.

¹¹ RCW 7.48.010 states:

The . . . obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

A nuisance is “a substantial and unreasonable interference with the use and enjoyment of land.” *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005) (citation omitted). RCW 7.48.120 defines nuisance as “unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others . . . or in any way renders other persons insecure in life, or in the use of property.” A nuisance that affects equally the rights of an entire community or neighborhood is a public nuisance. *Grundy*, 155 Wn.2d at 6-7. All other nuisances are private. RCW 7.48.150.

To be actionable, a nuisance must be “injuriously to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property.” *Grundy*, 155 Wn.2d at 7 (quoting RCW 7.48.010). The essence of a nuisance action “is whether the use to which the property is put is reasonable or unreasonable.” *Morin v. Johnson*, 49 Wn.2d 275, 280, 300 P.2d 569 (1956).

Here, the 1993 short plat expressly created a 30-ft. access easement over a portion of the Bonnetts’ property. Ex. 1. As the owner of the servient tenement, the Bonnetts had an ongoing duty to refrain from interfering with Dr. Plattner’s reasonable use and enjoyment of that easement. *Loose v. Locke*, 25 Wn.2d 599, 605, 171 P.2d 849 (1946)

(noting dominant owners had the right to insist that the easement be kept open and free from any obstruction whatsoever). Accordingly, they did not have the unilateral right to obstruct the road easement with a shed or a boat shelter, RP 29; Exs. 4, 5, or to use it for parking purposes. Exs. 19, 20. They also did not have the right to block Dr. Plattner's logging gate or to place metal fence posts along the edge of the common roadway to block access by large vehicles. RP 64; Exs. 26, 27, 80. *See, e.g.*, 25 Am. Jur. 2d *Easements & Licenses* § 87 (noting a permanent physical obstruction placed in an easement, in the absence of an agreement, interferes as a matter of law with the dominant tenement owner's right to the use of all of the easement); *810 Properties*, 141 Wn. App. at 695 (servient property owner required to remove apple bin barriers from easement). But for more than five years, the Bonnetts interfered with Dr. Plattner's use of the easement and refused to remove many of their obstructions until ordered to do so by the trial court. CP 72, 76. Their obstructions were not temporary. But even if they were, their temporary nature is immaterial to the question of whether they constituted actionable nuisances.

The Bonnetts' obstructions were actionable nuisances because they unreasonably interfered with Dr. Plattner's use and enjoyment of the road

easement.¹² RCW 7.48.010; RCW 7.48.120. The trial court essentially acknowledged as much by requiring the Bonnetts to remove the split-rail fence and the plantings in front of Dr. Plattner's logging gate and any metal fence rail posts that remained along the shared roadway. CP 10, 76 (CL 10(b)). Its earlier finding that the Bonnetts' obstructions did not constitute actionable nuisances is contradicted by the evidence and inconsistent with the removal order. The trial court erred by rejecting Dr. Plattner's nuisance claims where the findings are not supported by substantial evidence.

Although the trial court ordered the Bonnetts to remove the existing obstructions, it declined to award damages or attorney fees to Dr. Plattner. CP 76 (CL 12). This conclusion is not supported by the findings. Where Dr. Plattner succeeded on his nuisance claims by obtaining an order requiring the Bonnetts to remove their obstructions, the trial court erred by concluding that he was not entitled to attorney fees and costs under RCW 7.48.010. That the Bonnetts may have removed or abated some of their nuisances prior to trial does not prejudice Dr. Plattner's right to recover damages for their past existence.

¹² For example, a truck driver attempting to enter Dr. Plattner's property from the road easement struck and damaged Dr. Plattner's logging gate when he was unable to swing wide enough to enter the property because of the Bonnetts' parked recreational vehicle. RP 45-46; Ex. 15.

RCW 7.48.130; *Vance v. XXXL Develop., LLC*, 150 Wn. App. 39, 45, 206 P.3d 679 (2009).

Where the trial court's findings of fact are not supported by substantial evidence and fail to support the conclusions of law, the court's decision as it relates to Dr. Plattner's nuisance claims is erroneous. This Court should therefore reverse that portion of the trial court's judgment.

- (4) The Trial Court Erred by Finding that Robert Bonnett Did Not Intentionally Damage Dr. Plattner's Video Camera and by Concluding that Dr. Plattner Was Not Entitled to Treble Damages or to His Attorney Fees and Costs under RCW 4.24.630(1)

Dr. Plattner argued at trial that Robert trespassed onto his property and damaged the video camera he had installed near his logging gate. CP 73; RP 181. The trial court agreed to a certain extent, finding that Robert redirected Dr. Plattner's camera and damaged the lens based on a preponderance of the evidence. CP 73 (FF 23). But the trial court also found that Robert did not mean to damage the lens and that his actions were the result of his frustration at being videotaped. *Id.*; RP II:11. The trial court concluded that Dr. Plattner was entitled to \$309 in damages from the Bonnetts, but not to treble damages or to his attorney fees and costs. CP 75-76 (CL 9, 12). The trial court's findings are not supported by substantial evidence and do not support the conclusions reached.

A trespass is an intrusion onto the property of another that interferes with the other's right to exclusive possession. *Phillips v. King County*, 136 Wn. 2d 946, 957 n.4, 968 P.2d 871, 876 (1998). One who intentionally enters onto the land of another is liable for damages caused thereby. *Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985) (quoting *Restatement (Second) of Torts* § 158 (1965)). Where an intentional trespass results in waste or injury to the land, the successful plaintiff is entitled to recover treble damages and attorney fees pursuant to RCW 4.24.630.¹³ *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 213 P.3d 619 (2009) (trial court erroneously awarded attorney fees where plaintiff failed to establish that trespass was intentional or wrongful).

To establish a claim for treble damages for wrongful trespass under RCW 4.24.630(1), Dr. Plattner was thus required to show that Robert

¹³ RCW 4.24.630(1) states, in pertinent part:

Every person who goes onto the land of another and . . . 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 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.

intentionally and unreasonably committed one or more acts and knew or had reason to know that he lacked authorization. *Cclipse v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573, 580, 225 P.3d 492 (2010). He was also required to prove his damages. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 244-45, 23 P.3d 520, *review denied*, 145 Wnd.2d 1008 (2001) (noting RCW 4.24.630 requires a showing of wrongful (intentional and unreasonable) conduct resulting in some dollar amount of damages).

Here, the trial court by implication had to have found that Robert entered Dr. Plattner's property when it also found that he moved the video camera and damaged the lens. CP 73 (FF 23). It then found that Robert "did not mean to damage the lens but was frustrated at being videotaped[.]" *Id.* Contrary to that finding, substantial evidence confirms that Robert trespassed onto Dr. Plattner's property *and* that his actions with respect to the camera were intentional. The video camera, which was motion activated, captured Robert photographing the camera from the road easement. Ex. 197; RP 88. A few minutes later, the camera is purposely redirected away from the ground. RP 88, 107. According to Rubino, it would have been impossible for the camera to have redirected itself upward because of the force such movement would have required. RP 173. After a brief delay, the camera is struck violently two times with a

pair of long-handled pruners. RP 89-91; Exs. 37, 197. Exhibit 197 confirms that Robert did not intend to simply redirect the camera, but that he also intended to damage it because he struck it violently and more than once. Exhibit 36 confirms the damage that he caused. Where substantial evidence contradicts the trial court's findings, the trial court erred by finding that the damage to Dr. Plattner's camera was inadvertent. CP 73 (FF 23).

The trial court's erroneous findings do not support its conclusion to award Dr. Plattner only \$309 in damages and to reject his request for treble damages and attorney fees. CP 75-76 (CL 9, 12).

Under RCW 4.24.630(1), a defendant who wrongfully injures personal property on the land "is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury." Damages recoverable under this section include, but are not limited to, damages for the market value of the property injured. *Id.* The injured party is also entitled to attorney fees and other litigation-related costs. *Id.*

Here, Dr. Plattner presented undisputed evidence that his damaged video camera was worth \$309, exclusive of taxes. RP 174. Yet the trial court refused to treble his damages or to award him attorney fees and costs as authorized by RCW 4.24.630(1). Where the evidence clearly established Dr. Plattner's damages, the trial court erred by failing to

properly apply RCW 4.24.630. Dr. Plattner was entitled to treble damages and his attorney fees and costs. This Court should reverse and remand for further proceedings on this issue.

(5) The Trial Court Erred By Requiring Dr. Plattner to Remove His Southern-Most Farm Gate Post

As part of their second counterclaim, the Bonnetts asked the trial court to issue an injunction preventing Dr. Plattner from blocking their driveway with his farm gate. CP 392. They did not, however, refer to the gate *posts* in that counterclaim. *Id.* Nevertheless, the trial court specifically found that the Bonnetts' second counterclaim sought an injunction prohibiting Dr. Plattner from blocking their driveway with a gate *and* posts or any other structure or thing. CP 69 (FF 2(b)). It then ordered Dr. Plattner to remove the farm gate and the southern-most post. CP 10, 76 (CL 10(d)). The trial court's finding with respect to the southern-most gate post is erroneous and contradicted by the evidence. Moreover, it fails to support the conclusion reached.

Dr. Plattner installed the farm gate on a sloped area of his property outside of the road easement. RP 82, 521-22. He installed the southern-most post of the gate in October 2008 to display his property address at the county road, as required by county regulations. RP 80, 536. This post was completely on his property and did not itself block the road easement.

RP 80. While Janet Bonnett testified at trial that she had trouble opening the farm gate, she never testified that the *posts* blocked or otherwise interfered with her access to the road easement. RP 641-42; CP 208. In fact, neither one of the Bonnetts testified that the gate posts interfered with their access to the road easement. They did not file any pleadings with the trial court arguing about the posts and did not present any evidence at trial concerning the posts. Consequently, Dr. Plattner did not submit any evidence to address the gate posts. Despite the lack of testimony or evidence about the posts, however, the trial court ordered Dr. Plattner to remove the southern-most post.

The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. As far back as 1914, the U.S. Supreme Court has stated that the “fundamental requisite of due process of law is the opportunity to be heard.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L.Ed. 1363 (1914)). But Dr. Plattner did not receive that opportunity here because the trial court ruled on an issue that was never presented to it and for which no evidence was produced by either party at trial.

The trial court's decision to order Dr. Plattner to remove the southern-most farm gate post deprives him of his right to due process of law and adversely impacts his property rights. Accordingly, this Court should reverse that portion of the judgment that requires Dr. Plattner to remove that post.

(6) Dr. Plattner Is Entitled to His Attorney Fees and Costs on Appeal

RAP 18.1(a) permits an award of attorney fees and costs on appeal if granted by applicable law. Washington courts have consistently followed the American Rule regarding attorney fees, which provides that attorney fees are not recoverable as costs of litigation unless such fees are specifically provided by contract, statute, or some recognized ground of equity. See, e.g., *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 143, 930 P.2d 288 (1997); *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941).

Here, Dr. Plattner is entitled to attorney fees and costs on appeal where his recovery of those fees is specifically authorized by statute. RCW 7.48.010 provides that a plaintiff who successfully prosecutes a nuisance claim is entitled to damages and "further relief." Likewise, RCW 4.24.630(1) allows recovery for damages and "reasonable costs," including attorney fees, investigative costs and other litigation expenses.

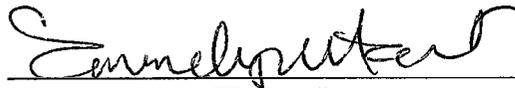
Where Dr. Plattner prevails on appeal, he is entitled to recover his attorney fees and costs.

F. CONCLUSION

Where the trial court's findings of fact are not supported by substantial evidence and fail to support the conclusions of law, the court's decision is erroneous. Accordingly, this Court should reverse the trial court's judgment with respect to the issues raised herein and remand for further proceedings consistent with the Court's opinion. The Court should also award Dr. Plattner his attorney fees and costs on appeal.

DATED this 2nd day of February, 2013.

Respectfully submitted,



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APPENDIX

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PAT SWARTOS, Clerk of the Superior Court of Mason Co. Wash.

PAT SWARTOS, Clerk of the Superior Court of Mason Co. Wash.

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR MASON COUNTY

PHILIP BRENT PLATTNER, as Trustee of the PHILIP BRENT PLATTNER TRUST,

NO. 08-2-00983-5

Plaintiff,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

v.

[Clerk's Action Required]

ROBERT K. BONNETT and JANET A. BONNETT, husband and wife,

Defendants.

This case, which was tried to the Court on May 17, 18, 19 and June 2, 2011, involves a dispute between neighbors on Harstine Island about the scope of easement rights, various tort claims, and requests for injunctive relief. The Court makes the following findings of fact and conclusions of law.

A. FINDINGS OF FACT

1. Plaintiff Philip Plattner as Trustee of the Philip Brent Plattner Trust ("Plattner") filed this lawsuit on September 23, 2008 seeking a prescriptive easement to the area encumbered by Defendant Robert and Janet Bonnetts' ("the Bonnetts") split-rail fence; damages and equitable relief for the Bonnetts' interference with his easement rights; and damages under RCW 4.24.630. Plattner amended his Complaint on April 8, 2009 and again on July 12, 2010. Plattner's claims at trial were as follows:

103

- 1 a) The Court should quiet title to the road easement as set forth on the 1993
shortplat on the basis of grant, reasonable enjoyment, shifting easement,
equitable relocation, and/or balancing of the equities.
- 3 b) The Court should grant Plaintiff an easement by implication to property in the
4 vicinity of the logging gate on Lot 1.
- 5 c) Damages for making improvements within the easement and obstructing the
6 easement.
- 7 d) Damages for trespass and damage to property.
- 8 e) Damages for nuisance.
- 9 f) Damages for outrage and negligent/ intentional infliction of emotional distress.
- 10 g) Damages for harassment.
- 11 h) Damages for spite fences.
- 12 i) Damages under RCW 4.24.630.
- 13 j) Injunctive relief preventing continued interference, harassment, etc.
- 14 k) Damages for placing a surveillance camera pointed directly at Plaintiff's house.
- 15 l) Removal of spite fences

16 2. The Bonnetts asserted three counterclaims against Plattner:

- 17 a) A request that the Court quiet title to the easement as relocated by the two
18 statutory warranty deeds and eject any improvements installed by Plaintiff that
19 interfere with its use, including the gate along South Island Drive.
- 20 b) A request that the Court issue declaratory judgment that the Bonnetts have
21 easement rights that entitled them to cut back the slope on a portion of
22 Plaintiff's property to improve sight-distances along South Island Drive; that
23 Plaintiff may not block the Bonnetts' driveway with a gate and posts or any
24 other structure or thing; that the gate constructed by Plattner on South Island
25 Drive improperly interferes with the Bonnetts' easement rights; and any other
26 appropriate relief.
- c) That the Court issue an injunction enjoining Plattner from contacting them by
any means except through counsel or another individual designated by them;
ordering Plaintiff to remove or relocate any cameras directed at the Bonnetts'
property and removing any lighting that unreasonably interferes with the

1 Bonnetts' use and enjoyment of their property; ordering Plattner to remove all
2 encroachments on the Bonnetts' property and easement; enjoining Plattner
3 from blocking the Bonnetts' driveway with a gate or any other structure or
4 thing; and any other relief the Court deems appropriate.

5 3. On September 22, 1993 the two lots now owned by the Parties were
6 created by the short subdivision of a larger lot. As part of this short subdivision, a 30-foot
7 easement for ingress, egress, drainage and utility purposes was created on Lot 2 of the
8 shortplat. A 30-foot easement for roadway slopes and utilities alongside South Island
9 Drive was also created on Lot 2 and a portion of Lot 1.

10 4. On June 16, 2004, John A. McCrory – the owner of both lots created by the
11 1993 shortplat – sold Lot 2 of the shortplat to Defendants Robert and Janet Bonnett
12 (“Bonnetts”). As part of the sale, a Road Relocation Agreement was recorded as part of
13 Exhibit B to the statutory warranty deed. This Agreement stated that the road easement
14 would be relocated and would the as-built dimensions of the location of the road to be
15 constructed and in use by June 15th, 2004. This Agreement further provided that at all
16 times the road must provide access to both Lots 1 and 2 of short subdivision No. 2332
17 and at all times must have sufficient roadbed to allow for fire and other emergency
18 vehicles to access both lots.

19 5. The as-built portion language of the Road Relocation Agreement refers to
20 the relocated portion of the easement. The language in the deeds is clear that, at a
21 minimum, the road must be sufficient for emergency vehicles to travel down.

22 6. In November 2006 Mr. McCrory sold Lot 1 of Short Subdivision No. 2332 to
23 Plaintiff Philip Plattner as Trustee of the Philip Brent Plattner Trust (“Plattner”). The
24 statutory warranty deed from Mr. McCrory to Plattner included nearly identical language
25 modifying the location and scope of the access easement as that set forth in the statutory
26 warranty deed to the Bonnetts.

1 7. The Bonnetts finished construction of their home in December 2006 and
have resided there since. Plattner's home is under construction.

3 8. A portion of the road in question was relocated before the closing of the
4 sale to the Bonnetts after obtaining a permit from the County. Following the relocation,
5 the road started on Lot 1 but shortly thereafter crossed onto Lot 2. Approximately a third
6 of the distance down Lot 2 a separate road to Lot 1 split off immediately before the
7 western end of the easement. The road was paved by the Bonnetts. The current width
8 of the road varies between ten to twelve feet. Before the Bonnetts paved it, the road was
9 narrower.
10

11 9. Some witnesses at trial testified that several large trucks could not travel to
12 Plattner's property without traveling onto the nonpaved portion adjacent to the curved
13 portion of the road. The curved portion of the road leading into the Plattner property is
14 the most problematic part of the road.

15 10. According to the testimony of Assistant Chief Salzer, the County fire truck
16 was blocked from entering Lot 1.
17

18 11. On or about February 27, 2008, Plattner constructed on his property an
19 approximately 20-foot logging gate across the driveway to his property that branches off
20 of the main road easement. Plattner later obtained a survey that showed that this gate
21 extends beyond the termination point of the recorded road easement. The Bonnetts
22 eventually installed a split-rail fence along the property line and western boundary of the
23 easement and installed plantings in this area. The result is that a portion of Plattner's
24 logging gate is blocked by this fence.

25 12. The Bonnetts' well is within the original 30-foot road and utility easement.
26

1 13. Although Plattner's logging gate is outside the road easement, it is in an
2 area where the road has been and used since 1993.

3 14. Plattner has a right to a reasonable use of his property, and the road
4 easement will not be useful for him if emergency vehicles or large trucks cannot access
5 his house.

6 15. The road does not need to be 30 feet wide in the curved area or at any
7 point.

8 16. The Bonnetts installed metal fence posts alongside the road. Some of the
9 fence posts still remain. These posts do not meet the criteria for a nuisance.

10 17. In 2010 Plattner installed a farm gate a short distance from South Island
11 Drive on the section of the road that is on his property. The gate was not contemplated
12 as part of the road easement. The Bonnetts do not want the farm gate there, and there
13 previously was never a gate used during the period that the Bonnetts have resided on the
14 property. Many friends of the Bonnetts who visit them have difficulty with the farm gate,
15 especially when it rains, as does Mrs. Bonnett.

16 18. Throughout construction of his home, Plattner accused the Bonnetts of
17 interfering with its construction. Starting in January 2009, Plattner also filed a total of 13
18 police reports with the Mason County Sheriff's Office complaining of various acts of
19 vandalism and trespass. The acts complained of by Plattner included the alleged cutting
20 of twine holding down two tarps; "messaging" with a tarp; planting of plants on Plattner's
21 property; breaking of a wooden stake; bending of a metal fencepost; moving of a public
22 notice sign; trespass; harassment; damages to property improvements; theft; and threats
23 to Plattner's life.
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1 19. From about 2008 onward, the parties were not getting along. There were
constant e-mails back and forth. The Bonnetts eventually asked Plattner not to contact
3 them, and Plattner's response was that he had a right to contact them. This engendered
4 more frustration on the part of the Bonnetts.
5

6 20. Mrs. Bonnett was concerned and at times a little frightened by Plattner's
7 behavior.

8 21. Plattner installed lights and video cameras on his property that were
9 directed at the road easement that accessed the Bonnetts' home in addition to recording
10 a portion of the Plattner logging gate. Plattner testified that the need for the lights and
11 camera was to protect his home from vandalism.

12 22. There is no reason for the lights and camera on Plattner's property to be
13 directed at the road easement unless both parties agree to them. Plattner can have
14 lights and a camera directed at his property but not on the easement itself or the Bonnett
15 property generally. There is no justification for the Bonnetts being videotaped going to
16 their own home by any camera on the road easement or on Plattner's property.
17

18 23. The evidence shows that the video camera that recorded the area of the
19 road easement that the Bonnetts use to access their property was moved by a stick of
20 some sort and inadvertently damaged. Given that the burden of proof is a
21 preponderance of the evidence and given the totality of the circumstances, the Court
22 finds that Mr. Bonnett probably moved the camera and damaged the lens. The Court
23 further finds that Mr. Bonnett did not mean to damage the lens but was frustrated at
24 being videotaped while going to and from his home.

25 24. Although there was potentially one trespass by Mr. Bonnett with someone
26 from the County on Plattner's property on in October 2007, there were no associated

1 damages. There are also no damages associated with any planting and maintaining of
2 ferns by the Bonnetts on Plattner's property, which is a minimal issue.

3 25. The Bonnetts never harassed Plattner.

4 26. Any obstruction of the road easement by the Bonnetts was temporary.

5 27. The Bonnetts' split rail fence was not put up as a result of malice or done
6 solely to annoy Plattner. Rather, it was constructed in response to the survey obtained by
7 Plattner. Its purpose was to protect the easement. It cannot be said that it served no
8 useful purpose at the time.

9 29. The testimony regarding damage to tarps, a survey nail, and sticks was
10 inconclusive.

11 30. The trees planted along the property line by the Bonnetts were not put up
12 as result of malice or done solely to annoy Plattner and do not currently encroach on
13 Plattner's property. Nor are they meant to harass Plattner. There is not any privacy to the
14 Bonnetts' property given the number of windows on the Plattner home that is under
15 construction.

16 31. The easement for slopes is still in effect. Plattner's drainfield encroaches
17 approximately five feet into this easement.

18 32. Plattner's behavior towards the Bonnetts was aggressive but not mean
19 spirited, in the sense that he persisted in contacting them after they asked him not to.
20 This is a little disturbing. Similarly, the continued picture-taking by Plattner only served to
21 set up bad feelings and potential fear. This was aggravated by the presence of Plattner's
22 video camera, which made the Bonnetts feel like they were being watched. The Bonnetts
23 apprehension about the adverse results of direct contact with Plattner is reasonable
24
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1 under the circumstances. Accordingly, no contact between the parties is appropriate
2 under the circumstances.

3
4 B. CONCLUSIONS OF LAW

5 1. The Bonnetts' split rail fence is not a spite fence or a nuisance.

6 2. The metal fence posts installed by the Bonnets are not a spite fence or a
7 nuisance.

8 3. The trees planted by the Bonnetts along the property line are not a spite
9 fence, nuisance, or trespass, and they do not need to be removed.

10 4. Plattner has an implied easement by prior use for ingress and egress over
11 the area in front of his logging gate that is blocked by the Bonnetts' split rail fence.

12 5. The easement right allowing the cut back of slopes on Plattner's property
13 set forth in the September 22, 1993 short subdivision remains in effect, and the
14 Bonnetts may exercise this right. Both parties have the right to maintain the area
15 encumbered by the easement.

16 6. The Bonnetts' well does not interfere with any easement rights and may
17 remain in its current location.

18 7. The Bonnetts have not harassed Plattner or committed the torts of outrage
19 or negligent/ intentional infliction of emotional distress.

20 8. Plattner's farm gate interferes with the Bonnetts' easement rights.

21 9. The Bonnetts will pay Plattner \$309 for damage to Plattner's video-camera.

22 10. Injunctive and declaratory relief is warranted in this matter as follows:

23 (a) The width of the road easement described in the September 22,
24 1993 short plat and amended by the Road Relocation Agreement will be
25 as depicted on Exhibits A and B to these Findings and Conclusions.

26 *EXCEPT that the west boundary of the easement will be the property
line between points 9 and the NE end of the Split Rail Fence 0.87 South, 0.87
East of Lot Corner (between Points 6 and 7).*

Neither par., will obstruct the easement or interfere with the other party's use of the easement. *etc*

(b) The Bonnetts will remove the split rail fence and any plantings from the area in front of Plattner's logging gate where this Court has found Plattner has an implied easement by prior use.

(c) The Bonnetts will remove any remaining metal fence rail posts that they installed alongside the road.

(d) Plattner will remove his farm gate, including the southernmost post.

(e) Plattner will remove or redirect his light so that it is focused solely on his property, not on the shared easement or other portions of the Bonnetts' property.

(f) Plattner will remove or redirect his video-camera so that it is focused solely on his property, not on the shared easement or other portions of the Bonnetts' property.

11. Additionally, an injunction is issued enjoining Plattner from contacting the Bonnetts by any means except through counsel or another individual designated by them. The Bonnetts will also contact Plattner only through counsel or another individual designated by him.

12. Neither party is entitled to recovery of attorney fees or costs.

ENTERED this 1 day of June 2012.

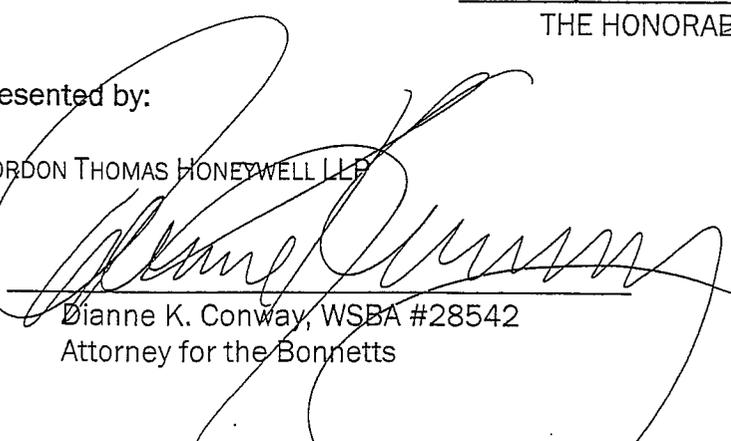


THE HONORABLE AMBER L. FINLAY

Presented by:

GORDON THOMAS HONEYWELL LLP

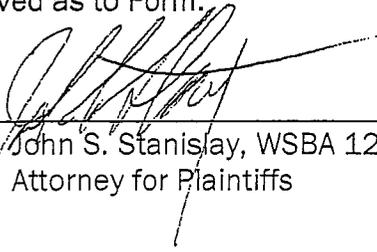
By



Dianne K. Conway, WSBA #28542
Attorney for the Bonnetts

1 Approved as to Form:

3 By


John S. Stanislay, WSBA 12174
Attorney for Plaintiffs

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EXHIBIT A



SOUTH ISLAND DRIVE

EASEMENT

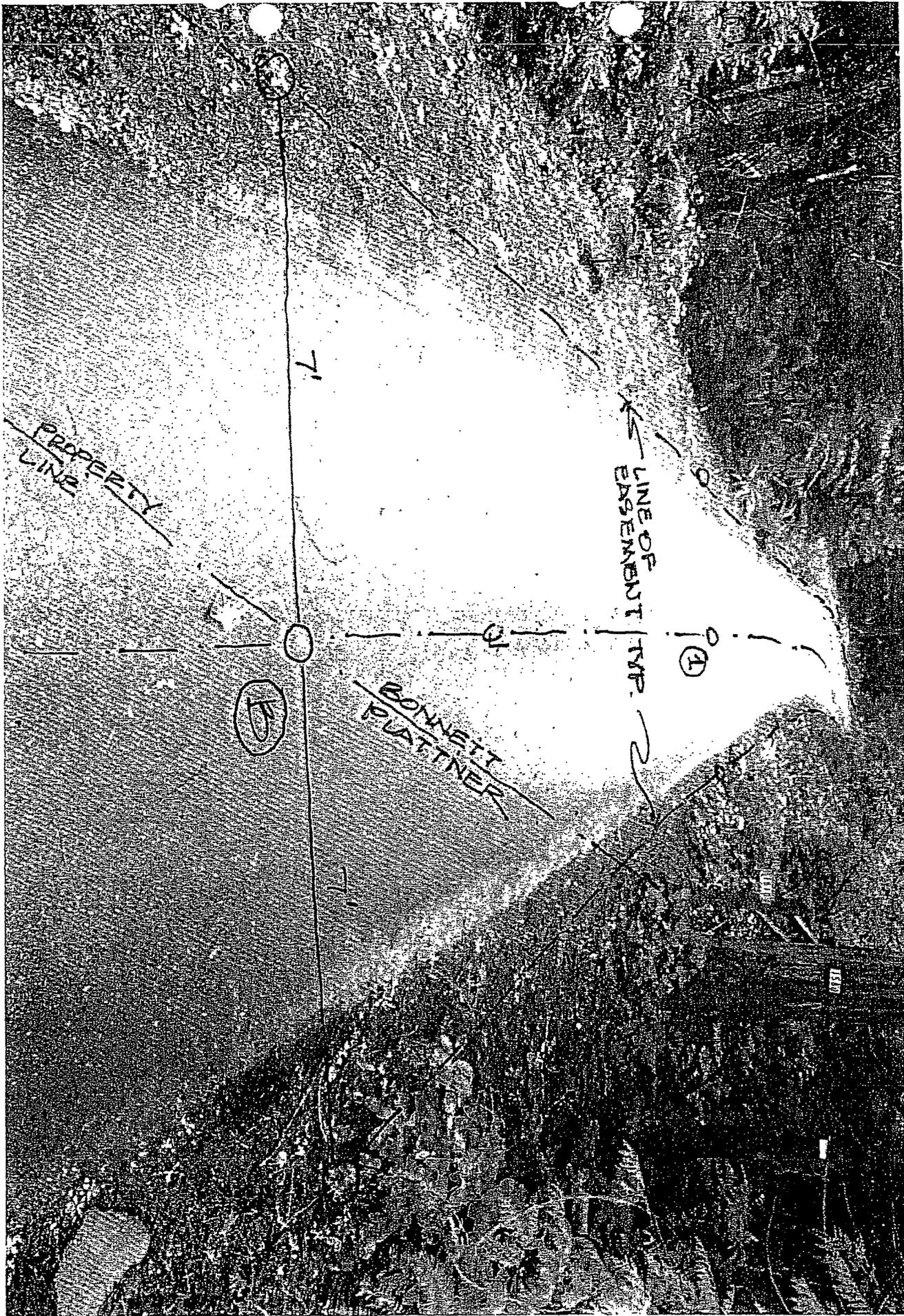
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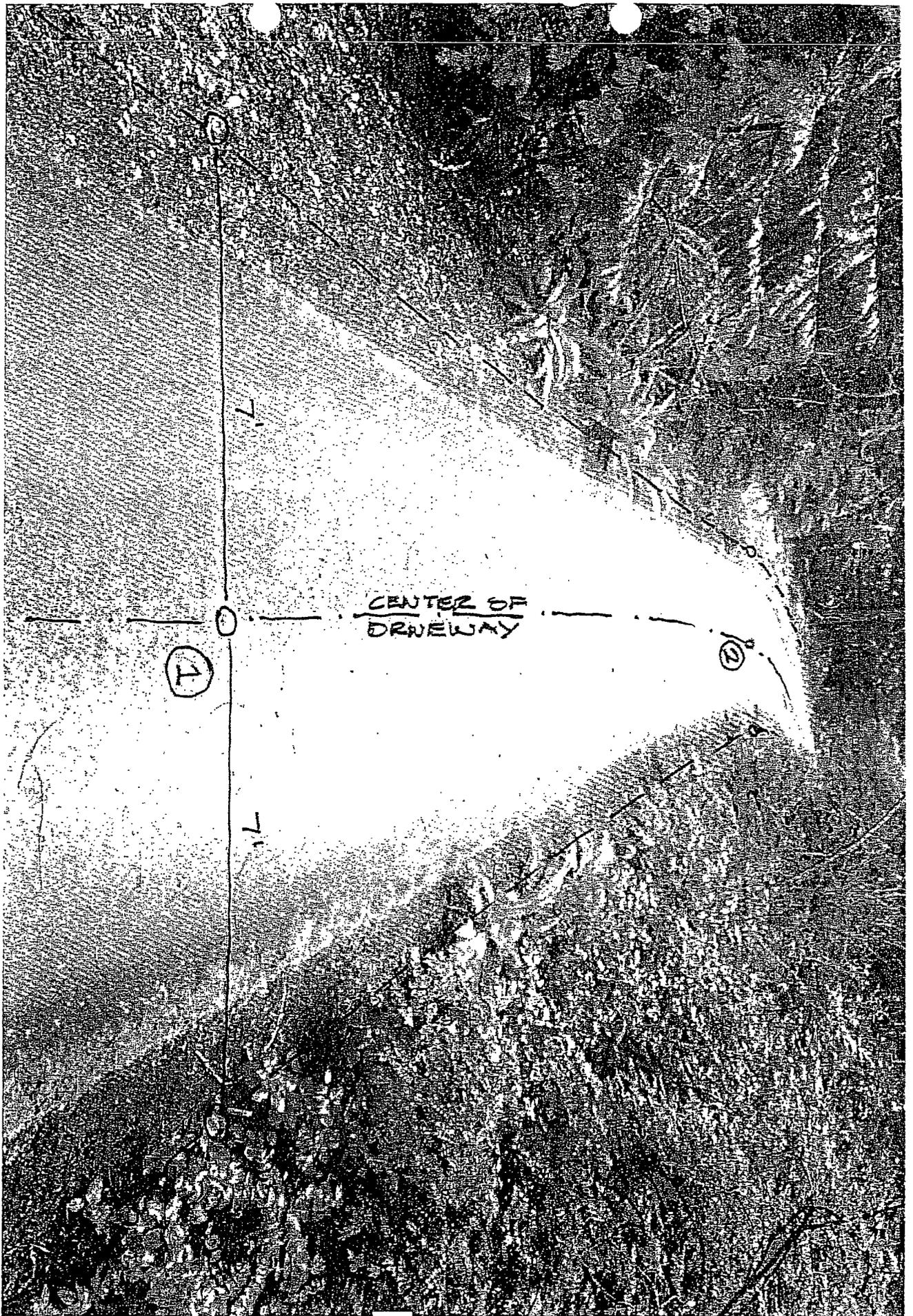
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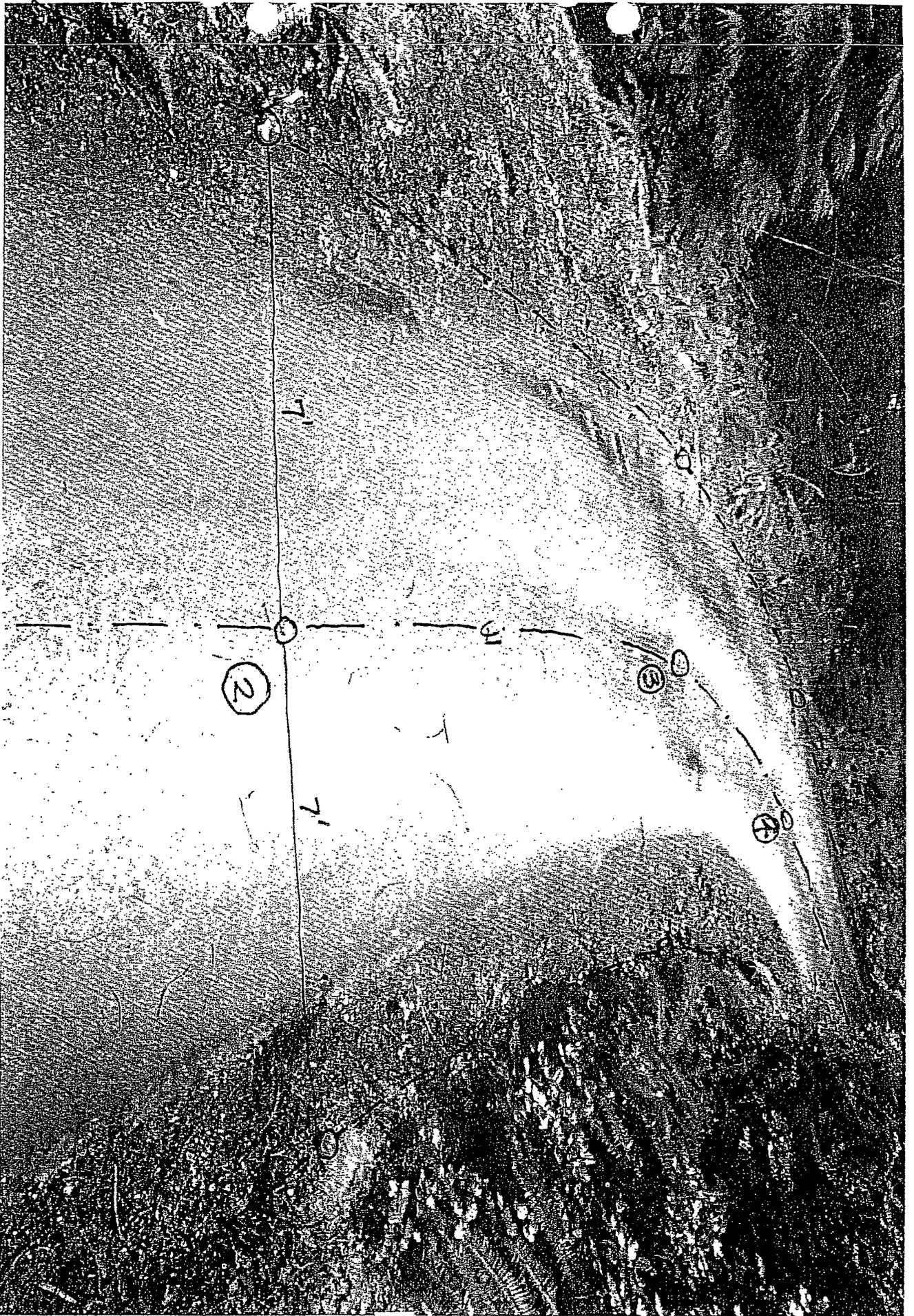
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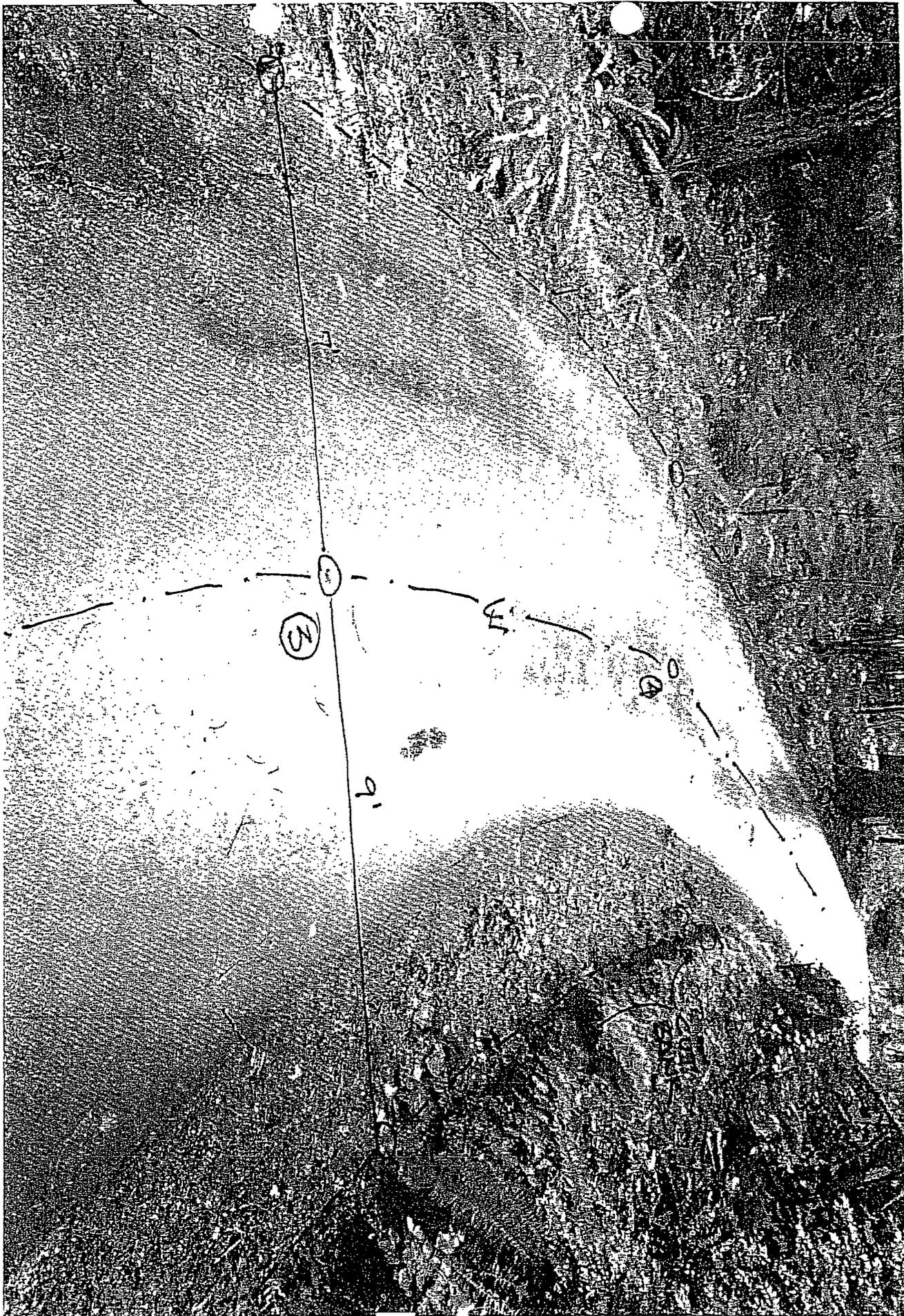
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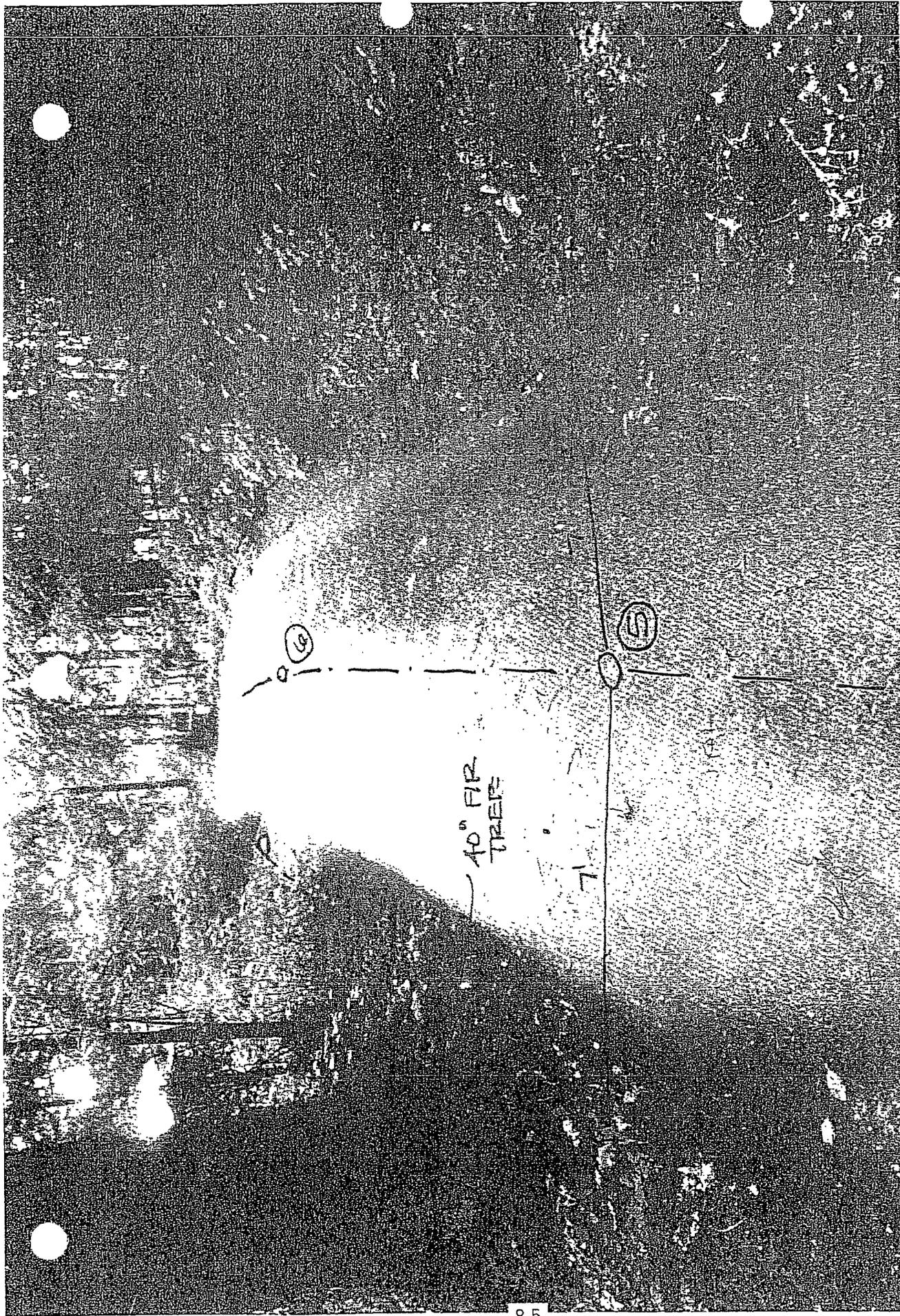
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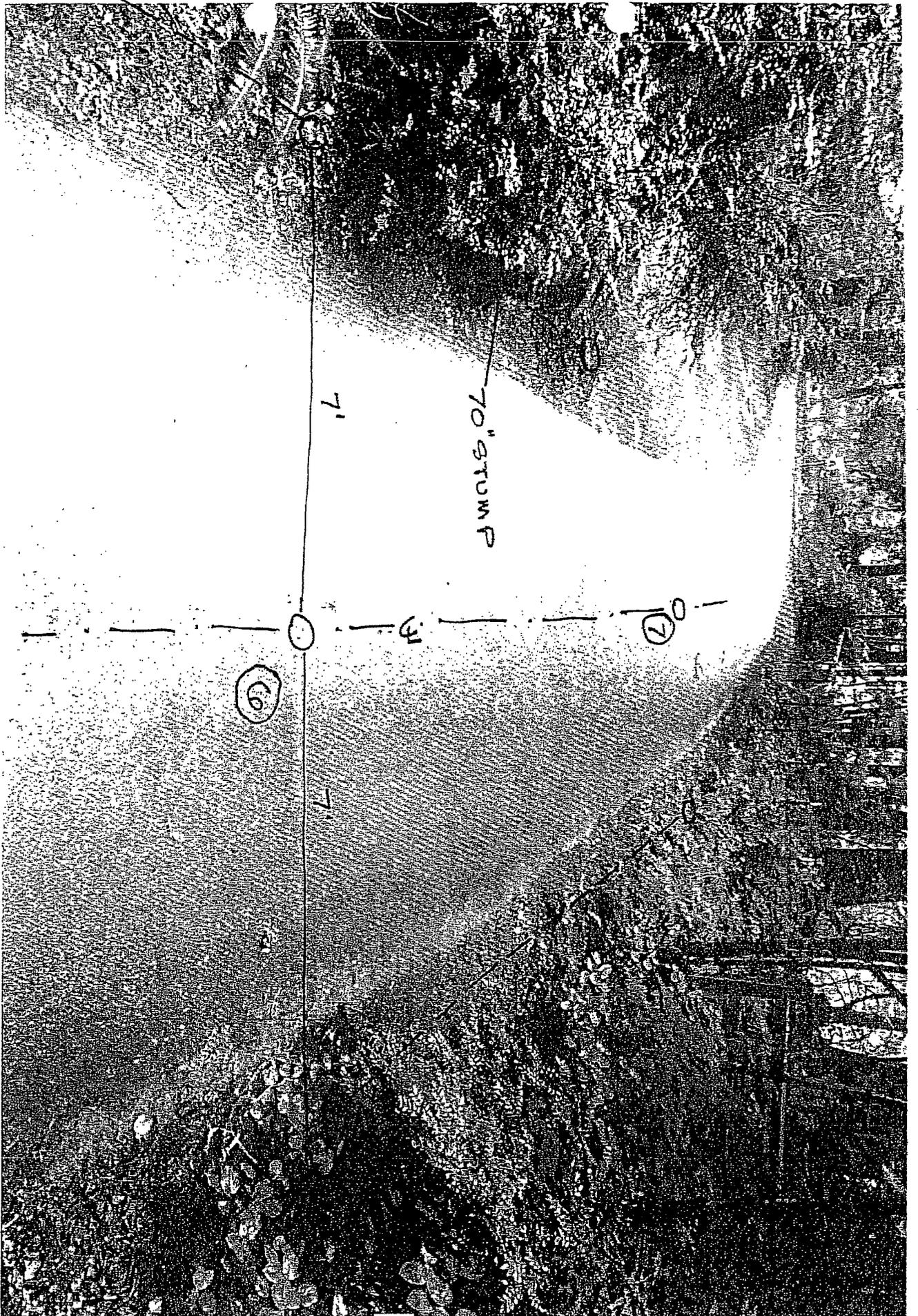


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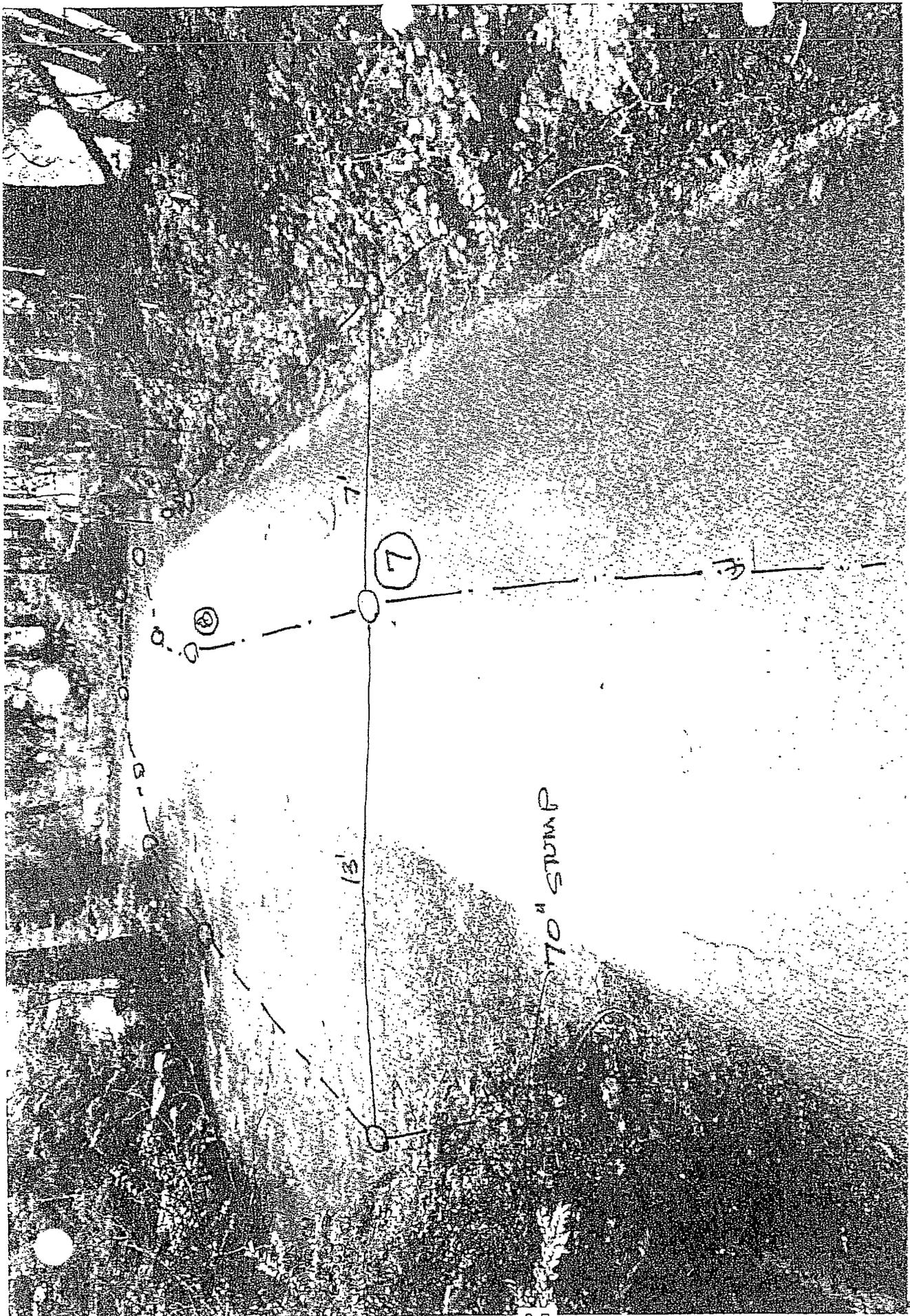


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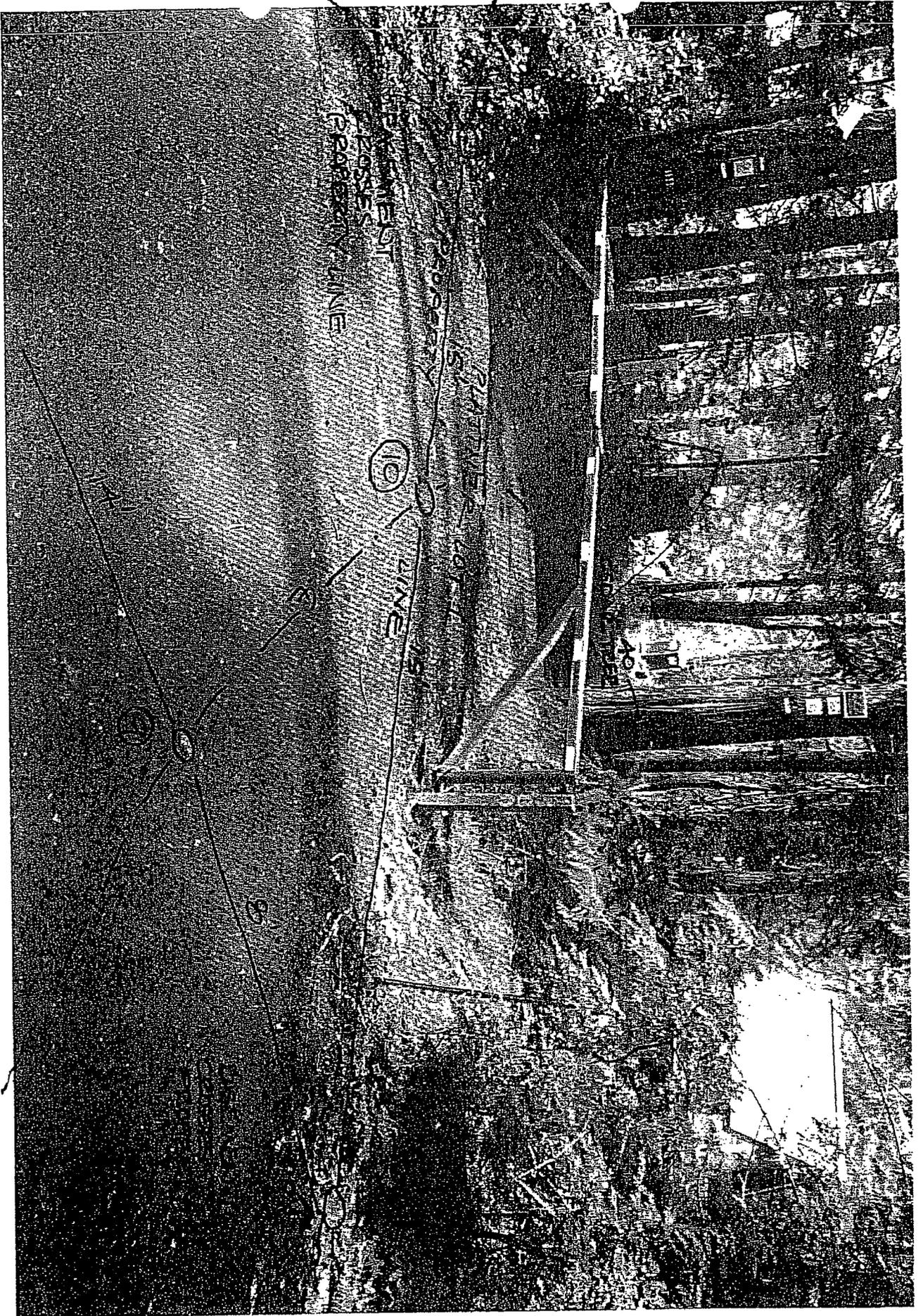




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PAT SWARTOS, Clerk of the
Superior Court of Mason Co. Wash.

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR MASON COUNTY

PHILIP BRENT PLATTNER, as Trustee of the
PHILIP BRENT PLATTNER TRUST,

Plaintiff,

v.

ROBERT K. BONNETT and JANET A. BONNETT,
husband and wife,

Defendants.

NO. 08-2-00983-5

JUDGMENT

[Clerk's Action Required]

12-9-474-P

JUDGMENT SUMMARY

- | | | |
|----|--|---|
| 1. | Judgment Creditors: | Philip Brent Plattner, as Trustee of the
Philip Brent Plattner Trust |
| 2. | Judgment Debtor: | Robert K. Bonnett and Janet A. Bonnett |
| 3. | Principal Judgment Amount | \$309 |
| 4. | Costs: | \$0 |
| 5. | Attorneys Fees: | \$0 |
| 6. | Total Judgment | \$309 |
| 7. | All Judgment Amounts Shall Bear
Interest at 12% Per Annum | |
| 8. | Attorney for Judgment Creditor: | John R. Stanislav |
| 9. | Attorney Judgment Debtor: | Dianne K. Conway |

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ORDER

The trial of this matter took place May 17, 18, 19 and June 2, 2011, and the Court's oral ruling was issued July 18, 2011. It is now, therefore, ORDERED, ADJUDGED AND DECREED that the above judgment is entered. It is further ORDERED that:

- (a) The width of the road easement described in the September 22, 1993 short plat and amended by the Road Relocation Agreement will be as depicted on Exhibits A and B to the Findings of Fact and Conclusions of Law. *EXCEPT that the West boundary of the easement will be the property line between Point 9 and the NE end of the split rail fence 0.37 South, 0.87 East of Lot corner (between Points 1 and 2). Neither party will obstruct the easement or*
- (b) The Bonnetts will remove the split rail fence and any plantings from the area in front of Plattner's logging gate where this Court has found Plattner has an implied easement by prior use.
- (c) The Bonnetts will remove any remaining metal fence rail posts that they installed alongside the road.
- (d) Plattner will remove his farm gate, including the southernmost post.
- (e) Plattner will remove or redirect his light so that it is focused solely on his property, not on the shared easement or other portions of the Bonnetts' property.
- (f) Plattner will remove or redirect his video-camera so that it is focused solely on his property, not on the shared easement or other portions of the Bonnetts' property.
- (g) Plattner may not contact the Bonnetts by any means except through counsel or another individual designated by them. The Bonnetts may not contact Plattner except through counsel or another individual designated by him.

OK
[Signature]

interfere with the other party's use of the easement

DONE IN OPEN COURT this 1 day of June 2012.

[Signature]

THE HONORABLE AMBER L. FINLAY

REC'D & FILED
MASON CO. WA.

2012 AUG 14 P 3:02

PAT SWARTOS, CO. CLERK

BY cy 2 DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR MASON COUNTY

PHILIP BRENT PLATTNER, as Trustee of the
PHILIP BRENT PLATTNER TRUST,

Plaintiff,

v.

ROBERT K. BONNETT and JANET A. BONNETT,
husband and wife,

Defendants.

NO. 08-2-00983-5

ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION

THIS MATTER came on regularly for hearing on Plaintiff's Motion for Reconsideration, the Court having reviewed the records and files herein, including:

1. Plaintiff's Motion for Reconsideration;
2. Memorandum in Support of Motion for Reconsideration;
3. Defendants' Response to Plaintiff's Motion for Reconsideration; and
4. Reply to Defendants' Response to Plaintiff's Motion for Reconsideration

The Court, having heard the argument of counsel, and being otherwise fully advised in the premises, it is now, therefore

ORDER DENYING PLAINTIFF'S MOTION FOR
RECONSIDERATION - 1 of 2
(08-2-00983-5)
(100047113.docx)

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
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TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

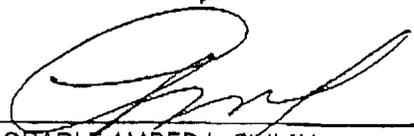
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ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Reconsideration shall be, and hereby is, DENIED.

DONE IN OPEN COURT Dated this 19 day of Aug 2012.

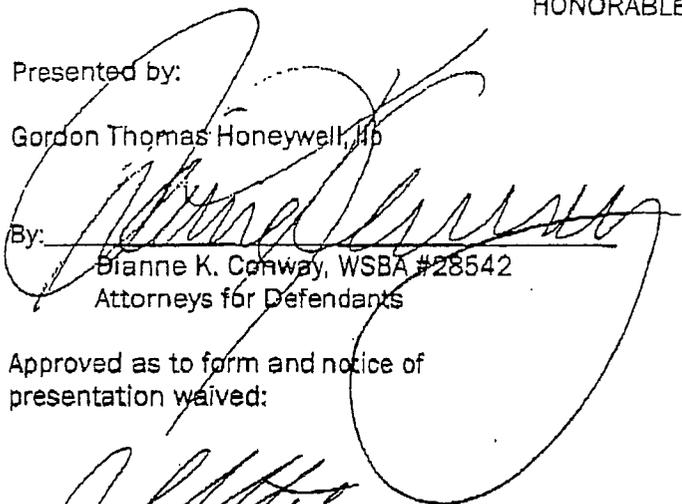

HONORABLE AMBER L. FINLAY

Presented by:

AMBER L. FINLAY

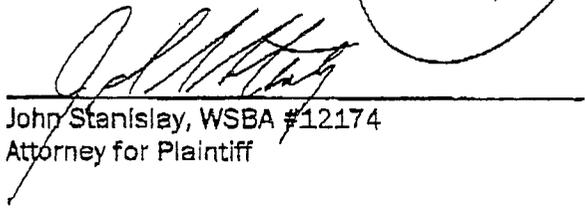
Gordon Thomas Honeywell, II

By:



Dianne K. Conway, WSBA #28542
Attorneys for Defendants

Approved as to form and notice of presentation waived:


John Stanislay, WSBA #12174
Attorney for Plaintiff

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of the Brief of Appellant in Court of Appeals Cause No. 43938-7-II to the following parties:

Dianne K. Conway
Law Offices of Gordon Thomas Honeywell, LLP
PO Box 1157
Tacoma, WA 98401-1157

John Stanislay
Attorney at Law
PO Box 2476
Shelton, WA 98584

Original efiled with:

Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 22nd day of February, 2013, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick

TALMADGE FITZPATRICK LAW

February 22, 2013 - 1:26 PM

Transmittal Letter

Document Uploaded: 439387-Appellant's Brief.pdf

Case Name: Philip Brent Plattner, et al. v. Robert K. Bonnett, et al.

Court of Appeals Case Number: 43938-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Paula Chapler - Email: paula@tal-fitzlaw.com