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DIVISION II

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STATE OF WASHINGTON
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NO. 48501-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

VIT NOVAK & ZDENKA NOVAK,

Appellants,

v.

WESLEY R. HANNIGAN,

Respondent.

BRIEF OF RESPONDENT WESLEY R. HANNIGAN

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PM 4/29/16

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INTRODUCTION

Judge Brian Altman's order quieting Respondent's title to the 20-foot wide easement running across Appellants' property, finding Appellants obstructed Respondent's use of that easement, and granting Respondent attorney's fees and costs for the removal of Appellants' obstructions, as well as other costs, should be upheld. There is substantial evidence in the record to support all decisions of the Trial Court, and Appellants raise no valid legal arguments indicating the Trial Court erred in any decision. The easement was properly created in Appellants' land purchase contract, Appellants did in fact obstruct Respondent's use of the easement, and the costs and attorney's fees awarded are supported by the law. As such, Judge Altman's rulings were proper and should be upheld.

STATEMENT OF THE CASE

In June of 1992, Respondent purchased Lot 8 in Maple View Acres, a neighborhood in Washougal, WA. At the time of Respondent's purchase of Lot 8 in June 1992, the access to Lot 8 was through a 60 foot main road easement and then a 30 foot driveway easement. (Transcript at 135.)

Shortly after Respondent's purchase, Respondent and sellers agreed that Respondent could construct a 20 foot wide

access road to Lot 8 across Lot 9, which offered a more topographically favorable access route to Lot 8. (Transcript at 136-137.) Respondent and sellers agreed that Respondent would have an easement that burdened Lot 9 and benefited Lot 8 for this 20 foot access roadway. (*Id.*) Prior to Appellants purchase of Lot 9, in 1993, Respondent in fact completed the 20 foot roadway and covered it with a gravel bed. (*Id.*, at 137-138 and 140.) Respondent used the 20 foot roadway almost exclusively for his access to Lot 8, since it allowed him to safely navigate his 36-foot motor home to Lot 8 and has done so consistently and continuously . (*Id.* at 47, 64, and 144.) Respondent has maintained the 20 foot access road, as well as the 30-foot and 60-foot easements since his purchase of Lot 8.

On or about January 18th, 1993, Appellants Vit and Zdenka Novak (hereinafter "Appellants") purchased Lot 9 of Maple View Acres. (Exhibit #22.) At the time of Appellants' purchase of Lot 9, Appellants signed a land purchase contract with the founders of Maple View Acres. (*Id.*) Paragraph 2 of Appellants' land purchase contract specifically subjects Lot 9 to the 20-foot easement for the benefit of Lot 8. (*Id.*) Paragraph 7 of Appellants' land purchase contract specifically references the Association's CC&Rs, road

maintenance agreement, and auditors file numbers 112990 and 112991. (*Id.*)

Appellants took possession of Lot 9 with actual and constructive notice of the 20-foot easement. (Transcript at 42, 44, 64, and 138.) Appellants observed Plaintiff using the 20-foot easement to access his property at the time Lot 9 was purchased. (*Id.*, at 44.) Appellant Vit Novak testified that he visited the property before purchasing Lot 9 and that he observed the 20-foot easement was a graveled roadway. (*Id.*, at 47 and 138.)

On or about June 28, 2010, without notice to Respondent, Appellants hired a contractor to begin construction of a turnaround, creating a large berm within Respondent's 20-foot easement for ingress and egress into Lot 8. (Transcript at 156.) On or around August 21, 2010, Respondent had extreme difficulty exiting his property with his 36-foot motor home without damaging it, due to Appellants' excavation of the 20-foot easement. (*Id.*) On or around August 30, 2010, upon re-entry to his property, Respondent suffered damage to the rain skirt of his 36-foot motorhome as a result of Appellants' ongoing excavation of the 20-foot easement. (*Id.*, at 156-157.)

On or about September 2, 2010, Appellant hired a contractor to continue grading the soil within the 20-foot easement boundaries creating a large berm, between 4 and 8 ft. high, which completely blocked Respondent's access to his property via the 20-foot easement and the 30-foot easement. (Transcript at 157.)

On September 10, 2010 Respondent, by and through his attorney Thomas J. Foley, filed suit against Appellants seeking an ex parte injunction, quiet title, and ejectment order. (CP at 1-9.)

The parties went to trial on April 30, 2015, and Judge Altman gave an oral ruling quieting Respondent's title to the 20-foot easement, granting Respondent an injunction prohibiting Appellants from interfering in any way with the 20-foot, 30-foot, and 60-foot easements, among other things, and granting Respondent reasonable attorneys' fees, costs, and some damages for loss of use of the easement. (Transcript, at 244-245.)

APPLICABLE STANDARDS OF REVIEW

The Trial Court's findings of fact are reviewed under a substantial evidence standard, defined as "a quantum of evidence sufficient to persuade a fair-minded person that the premise is true." (*Rainier View Court Homeowners Association, Inc. v. Zenker* (2010) 157 Wn.App. 710, 719.) The Trial Court's conslusions of law

are to be reviewed de novo. (*Id.*) The Trial Court's award of attorneys' fees should be reviewed for abuse of discretion. (*Animal Welfare Society v. UW* (1990) 114 Wn.2d 677, 688.)

ARGUMENT

I. The Trial Court did not Err if the Skamania District Trial Court Clerk and Deputy Prosecuting Attorney McGill Obstructed Justice by Hiding the *State of Washington vs. Hannigan* Stipulation from Appellants in September 2010

A. Appellants' Contention is not Supported by the Evidence, and Appellants have Alleged No Specific Prejudice

Appellants argue that the Trial Court committed reversible error when the Skamania District Trial Court Clerk and Deputy Prosecuting Attorney McGill hid the *State of Washington v. Hannigan* stipulation from Appellants in September of 2010 and this worked to their prejudice in this case. There is no evidence in the record indicating that this ever occurred. In fact, the stipulation and police report referred to are in the record on appeal, and Appellants submitted these documents to the Trial Court as an exhibit for one of their filings. (CP 384-391.) Therefore, it appears Appellants *did* have access to these documents. Furthermore, Appellants have not

alleged in any way how they were prejudiced in this case, even if certain Skamania County officials, in a wholly separate matter, did withhold these documents.

B. Appellants' Argument is Without Support

In support of their argument Appellants cite only to *Wallace v. Kato* (2007) 549 U.S. 384. Appellants make no effort to link this case to their argument, and such an effort would be a pointless exercise. This case has nothing to do with Appellants' allegation, and therefore their argument that all or a portion of the Trial Court's decision should be overturned because certain Skamania County judicial officials allegedly failed to provide them with a document of public record, which has little to no bearing on the issues at trial, is wholly without support or merit.

II. The Trial Court did not Err in Failing to Dismiss the Case after Respondent Filed the *Declaration of Wesley Hannigan Regarding Status Report* on April 26, 2013

Appellants contend that because the status report sent to the Trial Court in response to a notice sent pursuant to CR 41(b)(2)(A) (CP 112-114) was not served upon Appellant, the Trial Court lost jurisdiction and the Trial Court's holding should be overturned. (Appellate Brief, at 11.)

A. The Status Report was not Required to be Served

Contrary to Appellants' contention, the Status Report did not need to be served on them. CR 41, discussing the involuntary dismissal of cases by the court clerk and the status report at issue, makes no mention of any service requirement. Furthermore, CR 5, which discusses the required service of pleadings and other papers, only requires the service of "every pleading subsequent to the original complaint..., every paper relating to discovery..., every written motion..., and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper[s]..." The status report contemplated by CR 41(b)(2)(A) does not fall into any of the categories of documents required to be served upon opposing parties listed in CR 5. Furthermore, Appellants point to no other court rule, statute, or rule of law which requires service of the status report on them. Therefore, the Trial Court did not err in failing to dismiss the case.

B. Even if the Status Report was Required to be Served, This Err is not within the Scope of the Review

RAP 2.4(a) sets out the scope of the appellate court's review; that scope includes "the decision or parts of the decision designated in the notice of appeal..." The notice of appeal in this

matter concerns only "the Amended Judgment and Order." The decision of the clerk's office, if it can even be called a decision, to not dismiss the case for want of prosecution is not part of the "Amended Judgment and Order," and is thus outside the scope of the appellate court's review.

RAP 2.4(b) sets out the test for determining whether a decision outside of the scope of RAP 2.4(a) is within the scope of review. RAP 2.4(b) states, in part: "The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review." In this case, the clerk's office's failure to dismiss this case for want of prosecution had no effect on the eventual decision and order included in the notice of appeal. Therefore, the decision and order was not prejudiced, and RAP 2.4(b) does not apply.

Appellants have pointed to no other court rule, statute, or rule of law which places the decision of the clerk's office to not dismiss this case for want of prosecution, and therefore the appellate court should not disturb it.

C. Even if the Status Report was Required to be Served, the Failure of the Clerk's Office to Dismiss this Case for Want of Prosecution is not a Decision Subject to Review

The decision of the clerk's office to not dismiss the case for lack of prosecution, if it can even be called a decision, is not appealable. RAP 2.2 lists the actions by a Trial Court which are subject to appeal—a failure of the Trial Court to dismiss a case for want of prosecution is not a final judgment or any of the other listed actions. A "final judgment" is "a final determination of the rights of the parties in [an] action." (*Seattle-First Nat'l Bank v. Marshall* (1976) 16 Wash.App. 503, 507.) A refusal to dismiss a party involved in an action does not constitute a final and appealable decision. (*Glass v. Stahl Specialty Company* (1982) 97 Wn.2d 880, 883.) Therefore, this Court should not overturn the Trial Court's decision because the clerk's office did not dismiss this case for want of prosecution.

III. The Trial Court did not Err in Denying Appellants' Motion for CR 11 Sanctions on the April 30, 2015 Hearing Date

Appellants argue that their motion for sanctions under CR 11 was improperly denied by the Trial Court because (1) the status report filed by Respondent on April 26, 2013 (CP 112-114), filed in

response to the notice from the Court sent pursuant to CR 41(b)(2)(A), was not signed by the Respondent's attorney; (2) the status report was not served on Appellants; (3) the signature of Lori Mattsen, assistant for Respondent's attorney Thomas Foley, on the status report constitutes the illegal practice of law; and (4) allowing Respondent to continue to pursue his case against Appellants would constitute a criminal benefitting from his crimes. As will be discussed below, these claims are completely without merit.

A. The Status Report Filed by Respondent on April 30, 2015 was not Required to be Signed by Respondent's Attorney

CR 11 requires only that "every pleading, motion, and legal memorandum of a party represented by an attorney be dated and signed by at least one attorney of record." The document at issue is a status report, submitted pursuant to the terms of CR 41(b)(2)(A). That status report is not a pleading[1], motion, or legal memorandum, and is, thus, not required to be signed by an attorney of record pursuant to CR 11. Furthermore, nothing in CR 41 requires the

[1] CR 7(a) lists the pleadings allowed to be submitted to a trial court; these documents include: a complaint, answer, reply to a counterclaim, and an answer to a cross claim. As a status report is not included in CR 7(a)'s list of authorized pleadings, but is a document that is authorized to be filed pursuant to CR 41, the status report does not constitute a pleading.

status report to be signed by an attorney of record. Therefore, this argument of Appellants' is without merit.

B. The Status Report Filed by Respondent on April 30, 2015 was not Required to be Served on Appellant

See argument in Section II(A) of this brief.

C. Lori Mattsen was not Engaging in the Illegal Practice of Law

The status report at issue was submitted to the Trial Court via fax. GR 17 contains the procedure for filing a document via fax. GR 17(a)(2) states, in part: "the person responsible for the filing must attach an original affidavit as the last page of the document. The affidavit must bear the name of the court, case caption, case number, the name of the document to be filed, and a statement that the individual signing the affidavit has examined the document, determined that it consists of a stated number of pages, including the affidavit page, and that it is complete and legible." In this case, Ms. Mattsen was simply filling out an affidavit that complied with the terms of GR 17(a)(2). (CP 114.) Filing such an affidavit pursuant to GR 17 does not constitute the illegal practice of law. Therefore, this argument of Appellants' is without merit.

D. The Trial Court was not Allowing Respondent to Benefit from His Crimes by Failing to Dismiss the Case for Want of Prosecution

Simply put, Respondent did not benefit in any way, shape, or form, and certainly not in the case at hand, from any crime he is alleged to have committed. The crimes Appellants assert were committed by Respondent, and which allegedly helped him win this lawsuit, are assault with a bulldozer and trespass. (Appellants Brief at 39.) These alleged crimes, or the effects of these alleged crimes, had no impact on the Trial Court's decision, and Appelants' brief contains no analysis linking the Trial Court's decision to these alleged crimes. Respondent, in fact, has never been convicted of assault or trespass; Appellants' claims that these crimes were committed are false and not supported by the evidence.

Appellants' claim here is completely unsupported. Appellants pair their baseless allegations simply with the citation of a legal maxim from Black's Law Dictionary and two century-old cases from the state of New York. (Appellant Brief at 38-39.) These cases are not relevant, or at all comparable, to even the alleged crimes. The first of these *Riggs v. Palmer* (1889) 115 NY 506, involved a man who murdered his grandfather in order to take advantage of certain

provisions in his grandfather's will to the benefit of himself. The second of these, *Van Alstyne v. Tuffy* (1918) 103 Misc. 455 concerns the execution of the will of a man who murdered his wife; in that case the Court prevented the heirs of the man from inheriting the property that had once been held by the marital community. The facts of those cases are a clear and far cry from the facts of the case at hand, have not been linked through any analysis, by Appellants, to the facts of the case at hand, and are clearly irrelevant.

E. Review of the Trial Court's Decision on Appellants' CR 11 Motion is Outside the Scope of Review

See argument in Section II(B) of this brief. The Trial Court's decision on the Appellants' CR 11 motion was not designated in the notice of appeal, and therefore, under RAP 2.4(a) that decision is not appealable. Furthermore, RAP 2.4(b) would not bring this decision within the appellate court's scope of review, as the decision did not prejudicially affect the decision in the notice of review—Appellants' CR 11 motion sought only sanctions for Respondent's attorney and attorneys' fees, which would have had no effect on the decision in the notice of appeal had they been granted.

F. The Trial Court's Denial of Appellants' CR 11 Motion is not an Appealable Decision

See argument in Section II(C) of this brief. A ruling on a CR 11 motion is not one of the enumerated appealable decisions set out in RAP 2.2. Furthermore, the decision is not a "final judgment". The denial of Appellants' CR 11 motion only prevented Respondent's attorney from being sanctioned, a matter wholly removed from the rights of the parties fought over in the matter. Therefore, the denial of the Appellants' CR 11 motion is not an appealable decision.

IV. The Trial Court did not Err in not Striking Respondent's Response to Appellants' Motion for CR 11 Sanctions

Appellants argue the Trial Court erred because Respondent's response to Appellants' motion for CR 11 sanctions was not served on Appellants. See argument in Section II(A) of this brief. A response to a motion is not required to be served on the opposing party under CR 5. Furthermore, Respondent's response did not contain any evidence which can be stricken, and did not contain any arguments that could not have come up at oral argument without a written response. Therefore, the Trial Court did

not err by failing to strike Respondent's response to Appellants' motion for CR 11 sanctions.

V. The Trial Court did not Err in Entering It's Order Regarding Appellants' Motion for CR 11 Sanctions on May 28, 2015

Appellants argue that the Trial Court erred in entering its order on Appellants' motion for CR 11 sanctions because (1) Respondent's motion was not properly served on the opposing parties; (2) Respondent hand delivered his motion to the judge without serving it on all parties; and (3) Respondent's attorney hand delivered a letter to the Trial Judge in court, and this violated the Judicial Rules of Conduct and WSBA Rules of Professional Conduct. These claims are completely without merit, as will be discussed below.

A. Respondent did not File any Motion which was the Subject of the Trial Court's Order Filed on May 28, 2015

Contrary to Appellants' claim, Respondent did not file any motion that was heard by the Trial Court and ruled upon in the Order filed on May 28, 2015. Appellants are likely referring to Respondent's response to Appellants' motion for CR 11 sanctions.

B. Respondent's Response to Appellants' Motion for CR 11 Sanctions did not Need to be Served on Appellants

See argument in Section II(A) of this brief. A response to a motion is not required to be served on the opposing party under CR 5.

C. Even if Respondent's Reply to Appellants' Motion for CR 11 Sanctions did Need to be Served on Appellants, Appellants have Waived their Argument by not Citing to an Authority

Appellants did not, and cannot, point to any rule of law stating that failure to serve a party with a reply to their motion constitutes reversible error to an order subsequently entered denying the relief requested in the motion. No such rule exists. An appellant waives an assignment of error where they fail to cite any authority supporting their logic. (*Lodis v. Corbis Holdings, Inc.* (2015) 192 Wn.App. 30, 64 at fn. 17; *Skagit County Pub. Hosp. Dist. No. 1 v. Dep't of* Revenue (2010) 158 Wn.App. 426, 440.) Therefore, the Appellants have not shown that any failure of service constitutes reversible error, and have waived their argument.

D. Respondent's Hand Delivery of Their Reply to the Trial Judge, as Well as a Cover Letter, does not Constitute a Violation of any Rules of Professional Conduct

CJC Rule 2.9 states, in part: "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge *outside the presence of the parties or their lawyers*, concerning a pending or impending matter, before that judge's court...(emphasis added)". Respondent's reply to Appellant's Motion for CR 11 sanctions was filed with the Court, and was thus a document of public record. (CP at 137.) Furthermore, as can be told by the fact that Appellants know what was written in the letter, the communication was made within their presence, and they were aware of the contents. (*See* Appellants Brief at 13 and 21.) Therefore, CJC Rule 2.9 Was not violated, and the Appellants' argument is without merit.

VI. The Trial Court did not Err in Denying the Appellants' Response to Respondent's Notice for Trial and Statement of Arbitrability on May 28, 2015

Appellants make no clear or coherent arguments in their assertion that the Trial Court erred in denying their response to

Respondent's notice to set for trial and statement of arbitrability. Appellants' response to Respondent's notice for trial and statement of arbitrability (entitled "Defendants' response to notice to set trial" on the actual filing) (CP 144-154) is a rather peculiar and unnecessary filing containing little to no coherent legal arguments. This Court should find that the Trial Court did not err in denying this filing for the reasons set forth below.

A. The Trial Court's Denial of Appellants' Response to Respondent's Notice for Trial and Statement of Arbitrability is not Within the Scope of Review

See argument in Sections II(B) of this brief. The Trial Court's decision to deny Appellants' response to Respondent's notice for trial and statement of arbitrability, if it can even be called a denial or a decision, was not included in the notice of appeal and would, therefore, be outside the scope of review under RAP 2.4(a). Furthermore, Trial Court's decision to deny Appellants' response to Respondent's notice for trial and statement of arbitrability, if it can even be called a denial or a decision, would be outside the scope of review under RAP 2.4(b) because its denial did not prejudice Appellant because it was a peculiar filing with no legal effect.

B. The Trial Court's Denial of Appellants' Response to Respondent's Notice for Trial and Statement of Arbitrability is not an Appealable Decision

See argument in Section II(C) of this brief. An order denying a response, if it can even be called a denial, to a notice for trial and statement of arbitrability is not one of the enumerated appealable decisions in RAP 2.2. Furthermore, the Trial Court's decision, if it can even be called that, denying Appellants' response to Respondent's notice for trial and statement of arbitrability is not in any sense a final judgment, as it did not determine any rights of either party. Therefore, this Court should decline to review this decision, if it can even be called that, of the Trial Court.

VII. The Trial Court did not Err in Denying Appellants' Objections to Respondent's ER 904 Submissions on August 13, 2015

Appellants argue that the Trial Court erred in denying their objections to Respondent's ER 904 submissions because (1) the Trial Court never reviewed the objections and (2) Respondent did not bring his response to Appellants' objections to the hearing, and therefore the ER 904 evidence should be stricken from the record "in fairness".

A. Appellants' Claim that the Trial Court Never Reviewed Their Objections is Unfounded

Appellants have provided no evidence that the Court never reviewed their objections regarding Respondent's ER 904 submissions. Nothing in the record suggests Appellants' filing was never reviewed by the Trial Judge. The record merely shows that the Court heard the Appellants' objections then reserved on them for trial. (*See* CP 287.) A review of the trial transcript will show that Appellants did not properly bring these objections at trial, which suggests that the objections contained in their filing were made in bad faith, solely for the purpose of wasting the Trial Court's and Respondent's time and money.

B. Respondent was not Required to Respond to Appellant's Objections to his ER 904 Evidence

Appellant cites no court rule, statute, or other rule of law requiring Respondent to file a written response to their ER 904 objections, and nor can they. The contention that because a written response was not filed the evidence contained in Respondent's ER 904 submission should be stricken is unfounded and completely without merit.

C. The Trial Court Never Denied Appellants' Objections to the ER 904 Evidence, No Evidence was Ever Even Admitted Under ER 904, and the Reservation of the Objections for Trial is Not an Appealable Decision

See argument in Section II(C) of this brief. A decision of the trial court reserving objections to an ER 904 submission is not one of the enumerated decisions in RAP 2.2. Furthermore, the Trial Court's decision to reserve Appellants' objections to Respondent's ER 904 submissions until trial is not a final judgment in any sense, as no rights of the parties were determined—no evidence was even admitted under ER 904. (*See* Transcript at 225-226.)

VIII. The Trial Court did not Err by Denying Appellants' Right to Present Witnesses at the August 13, 2015 Trial

Appellant was not denied his right to present witnesses at trial. The record is very clear on this issue. Appellants called their first and only witness, Jeff Weissert, and that witness was sworn in. (Transcript at 206-207.) When it became clear that the only purpose of the witness was the proof of a fact immaterial to any issue at trial, the pulling of the surveyors stakes (as will be discussed below), the Trial Court made a factual finding in favor of the Appellants and dismissed the witness. (*Id.*, at 207-208 and

214.) Appellants are not only asserting something occurred which did not, they are also complaining about something which could not have gone better for him.

IX. The Trial Court did not Err by Allowing Respondent to Commit Perjury at the August 13, 2015 Trial

The Appellants claim that Respondent perjured himself at trial. However, Appellants cite to nowhere in the trial transcript where the perjury took place, or even state what the statement constituting perjury was. Appellants do, however, later claim that Respondent committed perjury in response to their interrogatories, by stating Appellant Vit Novak pulled the survey pins and that Respondent never assaulted the Appellants or trespassed on the Appellants' poroperty. These claims are made in bad faith, are extremely inflammatory, and, most importantly, are false.

A. Respondent did not Commit Perjury by Stating Appellant pulled the Survey Pins

The elements of perjury in the state of Washington are: (1) a materially false statement; (2) made under oath; and (3) where the speaker knows the statement is false and under oath. (RCW 9A.72.020(1).) Respondent never committed perjury. The instance

regarding the survey pins in which Appellant alleges perjury was committed was:

> "Interrogatory/Request: Which, when (provide a time-frame) and by whom (provide their first and last names) were the survey markers obliterated."
>
> Response: Investigation suggests that Vit Novak obliterated the survey markers shortly after the survey was made." (CP at 288.)

This statement was not perjury for two reasons. First, the statement made wasn't made with knowledge of falsity. The pins had been buried and this had occurred five years prior to Respondent making that statement. (Transcript 97-100.) Furthermore, Respondent had no idea Vit Novak was out of town at the time; they had been in dispute over the easement and it made sense that he was the one to hide the pins within days of their placement. Additionally, the pins are to this day missing or covered up. Under these circumstance, Respondent may have been mistaken as to his statement, but it was not made with knowledge of its falsity.

Second, the reason this statement does not amount to perjury, is that who pulled, or hid, or obliterated the pins is not a

material fact. As was made clear by the trial judge (Transcript at 207-208 and 214 [finding that Vit Novak did not pull the surveyors pins and that Respondent did not have enough evidence to prove this point]), whether a party pulls surveyors pins has no bearing on a quite title and ejectment action as to an easement. Therefore, this statement did not amount to perjury.

B. Respondent did not Commit Perjury by Stating He did not Tresspass on the Appellants' Property or Assault the Appellants

See argument in Section IX(A) of this brief for elements of perjury. The comments referred to by Appellants in this matter regarding the denial of assault on the Appellants and trespass on their property (CP at 290) are not perjury because they are both not false and not material. Appellants claim that Respondent "stipulated to that fact that he assaulted Mr. Novak in State of Washington vs. Hannigan;" this is false. Respondent was charged with disorderly conduct and conditionally stipulated to the admissibility of the facts in the police report should the stay of prosecution be revoked, but nowhere in that police report does it say Respondent assaulted Mr. Novak or trespassed on Appellants' property (CP at 385-391); Appellants' claim is a complete fabrication. It should be noted,

however, that in that police report Appellant Vit Novak admits to the reporting officer that Respondent has an easement through his property (CP at 390 ["Vit stated his neighbor, Hannigan, who had a driveway easement through the property, did not like the work being performed."].) Furthermore, whether Respondent assaulted Appellants or trespassed on their property is not material to whether he has an easement over their property, or whether Appellants have been interfering with that easement. Therefore, these statements do not constitute perjury.

X. The Trial Court did not Err in entering its Judgment and Order on December 3, 2015, and Denying Appellants' Response to Respondent's Proposed Findings of Fact and Conclusions of Law, Filed on November 30, 2015

Appellants claim that the Trial Court erred in entering its judgment and order on December 3, 2015 because: (1) Greg Brown testified that the survey monuments were not obliterated; (2) because Respondent lied while answering their interrogatories as to the assault of Appellants, trespass on the Appellants property, and the fact that the easement was blocked, and this constitutes perjury; and (3) Respondent cannot recover on the strength of his own title. (Appellants Brief at 42-43.)

A. The Fact that Greg Brown Testified that the Survey Monuments were not Obliterated does not Make the Entry of the Order and Judgment on December 3, 2015 Improper

See argument in Section IX(A) of this brief. The statement did not constitute perjury. Furthermore, the Trial Court's judgment and order and finding of facts and conclusions of law are consistent with Greg Brown's testimony. Appellants have not cited to any rule of law, and cannot do so, under which Greg Brown's testimony would make the entry of the Trial Court's judgment and order improper.

B. Respondent's Statements that He Never Assaulted Appellants, that he Never Trespassed on Appellants' property, and that Access was Blocked on the Easement do not Constitute Perjury

See argument in Section IX(B) of this brief for a discussion of Respondent's statements denying assaulting Appellants and trespassing on Appellants' property. The Appellants' argument regarding comments that the easement was blocked are equally without merit. Respondent stipulated to the fact that a police officer could use the easement with his patrol car on June 28, 2010. (CP

at 387.) At issue, however, was the driving of a 36-foot motor home over the easement, and not a patrol car. (CP at 415.) Furthermore, Appellants excavated the easement, hindering access further, in September 2010, after the officer was able to drive his patrol car over the easement. (*Id.*) The fact that this second excavation prevented use of the easement was testified to by two different non-party witnesses at trial. (Transcript at 79 and 104.) Therefore, Respondent's comments regarding the easement being blocked do not constitute perjury and are supported by the record.

C. <u>The Easement at Issue was Properly Created for the Benefit of Respondent</u>

An express conveyance or reservation of an easement must be made by deed. (*Zunino v. Rajewski* (2007) 140 Wn.App. 215, at ¶ 27, citing RCW 64.04.010.) The elements of a valid transfer by deed are (1) that the deed be in writing, (2) signed by the party bound by the deed, and (3) the deed must be acknowledged. (*Id.*) "The agreement to the easement by the servient estate is a vital element in the creation of the easement." (*Id.*) "No particular words are necessary to constitute a grant and any words which clearly show the intention to give an easement are sufficient." (*Id.*, at ¶ 28.) "In general, deeds are construed to give effect to the intentions of

the parties, and particular attention is given to the intent of the grantor when discerning the meaning of the entire document." (*Id.*) The easement was created by a written deed, signed by the burdened party, and that deed was acknowledged

In the case at hand, all elements necessary to create an easement are met, the owner of the subservient estate specifically agreed to the easement, and the grantor's intent was clearly to create an easement for the benefit of Respondent and Lot 8. The deed was written, signed by Appellants (owners of the servient estate), and acknowledged. (Exhibit #22.) Paragraph 2 of the deed contains language creating an easement, specifically for the benefit of Lot 8, in unambiguous metes and bounds language. (*Id.*) Furthermore, Appellant, Vit Novak, testified that he read and understood the deed, and thought it burdened his estate with the 20-foot easement. (Transcript at 42-44 and 63-64.) Considering the language in the deed itself, and testimony at trial, furthermore, it is clear that the intent of the grantor was to create the easement for the benefit of Lot 8 and Respondent. (Exhibit #22; Transcript at 136-138.) Therefore, the Trial Court's findings of fact that the factors necessary to create an easement were met are supported by substantial evidence, and the Trial Court's finding of law that the

easement was so created for the benefit of Respondent and Lot 8 should not be overturned on review.

D. Respondent can Recover on the Strength of his own Title

Appellants are misunderstanding and misapplying the maxim they cite in *Seymour v. Dufur* (1909) 53 Wash. 646 (hereinafter "*Seymour*"). *Seymour* does not stand for the proposition that Respondent must have the easement in the title document to his property that is to be benefitted. In this case, Respondent is recovering on his own title that was negotiated and granted to him by the previous owner of Appellants' property and recorded in Appellants purchase agreement in explicit language and using specific metes and bounds language. (CP at 408; Exhibit #22; Transcript at 42-44, 101-102, 134, and 136-138.)

The facts of *Seymour* are not analogous to those of the case at hand. In *Seymour*, both parties had deeds to the same pieces of property—the Plaintiff's deed was signed and recorded before Defendant's deed, but Defendant had an intermediary deed that was transferred to the grantor of their deed prior to the date Plaintiff's was signed. (*Seymour*, at 647-648.) Therefore, Defendants had a chain of title showing they were the true owners

of the property at issue. Plaintiffs argued, and the Trial Court agreed, however, that there was impropriety in Defendant's chain of title. (*Id.*, at 649.) The *Seymour* Court disagreed, citing the maxim Appellants rely on that "the respondent must recover, if at all, upon the strength of her own title and not the weakness of her adversary's". (*Id.*, at 649-650.) These cases are different, because in *Seymour* there were conflicting chains of title, and the Defendant's was stronger. In this case, there is no argument over the chain of title—the parties are just interpreting the chain of title differently. Therefore, *Seymour* is inapplicable and Respondent is recovering on the strength of his own title.

E. Even if the Court Finds the Easement was not Properly Created for the Benefit of Respondent, There is Sufficient Evidence in the Record to Show Respondent Established a Prescriptive Easement

"[A] prescriptive easement can be established by showing: 'use adverse to the right of the servient owner, (2) open, notorious, continuous, and uninterrupted use for the entire prescriptive period, and (3) knowledge of such use by the owner at a time when he was able to assert and enforce his rights." (*Lingvall v. Bartmess* (1999) 97 Wn.App. 245, 249-250, quoting *Dunbar v. Heinrich* (1980) 95

Wn.2d 20.) The prescriptive period in Washington is ten years. (*Id.*, at 250.) "Adverse use does not import 'ill will' but means 'use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one, and using the property under a claim of right." (*Id.*)

In this case, the Appellant, Vit Novak, admitted to all of these elements at trial. Mr. Novak admitted that he had personal knowledge that Respondent had used the easement continuously, "almost every weekend," for approximately seventeen years. (Transcript at 47 and 64.) He also admitted that Respondent had improved the easement with a gravel roadway. (*Id.*, at 47.) Mr. Novak also stated he thought Respondent had a right to use the easement, otherwise he would have prevented that use. (*Id.*) These admissions show that Respondent used the easement adversely to Appellants' interests, in a continuous and uninterrupted manner, and that Appellants had knowledge of this use, for a period of time well over the statutory prescription period. Therefore, there is sufficient evidence in the record to conclude that even if the transfer of the easement to Respondent was ineffective, he has established a prescriptive easement over the Appellants' property.

XI. The Trial Court did not Err in Denying Appellants' Motion to Prove Jurisdiction, Filed on November 30, 2015

Appellants assert the Trial Court erred in denying their motion to prove jurisdiction, filed on November 30, 2015, because it took longer than 90 days to make a decision in this matter. The Appellants' claim is false. The Trial Court decided the case on the day of trial. (Transcript at 235-245.) Therefore, the Trial Court's ruling was made in compliance with RCW 2.08.240 and CR 52(e), and the Trial Court did not err in denying Appellants' motion to prove jurisdiction.

XII. The Trial Court did not Err by Lying to the Appellants About Court Records on December 29, 2015

Appellants argue the Trial Court erred by failing to inform the Appellants, when they contacted the Trial Court on December 21 and 29, 2015, that Respondent had filed a motion for order to show cause: contempt and a motion to supplement findings and judgment on December 21, 2015. (Appellants Brief at 27.) Appellants' claim is made in bad faith—both of these motions were denied, with the exception of entering the specific amount of surveying costs which was a reserved issue from trial. (Transcript at 245 and 259.) Appellants were not at all prejudiced by any failure

of the Trial Court, even if there were such a failure, to inform them of Respondent's filings. Furthermore, this is not an appealable decision, or even a decision, and was not discussed in the notice of appeal, so is outside the scope of appeal. Appellants have not, and cannot, show that this action in any way led to, or contributed to, an adverse decision affecting their rights. Therefore, this Court should find that the Trial Court did not commit reversible error when the clerk failed to inform Appellants that there had been additional filings by Respondent which were ultimately denied.

XIII. The Trial Court did not Err in Entering the Amended Judgment and Order of January 14, 2016, Denying Appellants' Response to Respondent's Motion to Supplement Findings and Conclusions of Law and Money Judgment

Appellants argue that the Trial Court erred in entering the amended order and judgment of January 14, 2016, and denying Appellants' response to Respondent's motion to supplement findings and conclusions of law and money judgment because it was filed more than 10 days after entry of judgment, and thus violated CR 52(b). The Trial Court denied all of Respondent's requests in those documents, under the grounds asserted by Appellants, other than the surveying costs to be awarded to

Respondent; unfortunately the transcript before the Court does not include this hearing and the Clerk's notes for this hearing are not in the record.[2] The issue of surveying costs was specifically reserved to be determined at a later date by the Trial Judge. (Transcript at 245 and 259.) Therefore, Rule 52(b) does not apply to this issue, and the Trial Court did not err in supplementing the judgment on that issue.

XIV. The Trial Court did not Err in Awarding Respondent Attorneys' Fees

Appellants argue that the Trial Court erred in granting Respondent attorneys' fees because "the ejectment theory states cannot get attorneys' fees—along with the fact that for relief in equity attorney costs are typically not given [sic]." (Appellants Brief at 40.) In support of their assertion, Appellants cite two cases—*Kobza v. Tripp* (2001) 105 Wn.App. 90 (hereinafter "*Kozba*"); and *Haueter v. Rancich* (1984) 39 Wash.App. 328 (hereinafter "*Haueter*"). Both of these cases are inapplicable to the case at

[2] "The appellant bears the burden of complying with the Rules of Appellate Procedure and perfecting his record on appeal so the reviewing court has before it all the evidence relevant to deciding the issues before it. The court may decline to reach the merits of an issue if this burden is not met." (*Lodis v. Corbis Holdings, Inc., supra,* at 192 Wn.App. 63, fn. 15.)

issue. Furthermore, the Attorney's fees granted by the Trial Court are authorized on both statutory and equitable grounds.

A. Neither *Kozba* nor *Haueter* Support the Appellants' Contention

Attorney's fees were not at issue in *Hauterer*. In fact, in *Hauteuer* the appellant was granted attorney's fees, and the judgment was affirmed in whole. (*Haueter*, at 332.)

Kozba is likewise distinguishable, but in that case attorney's fees were at issue. In *Kozba*, the plaintiff asserted only a claim for quiet title and demanded only that title be quieted and for the court to fashion an injunction removing the defendants from their property. (*Kozba*, at 92.) The *Kozba* Court noted that "a quiet title action is a claim for equitable relief, [and] damages are not ordinarily allowed." (*Id.*, at 95.) The *Kozba* Court then went onto note that this was an error in the pleading, stating:

> Because a quiet title action is a claim for equitable relief, damages are ordinarily not allowed. [Citations.] The relief is spelled out in the statute. The plaintiff 'may have judgment in such action quieting or removing a cloud from plaintiffs title.' RCW 7.28.010. *And for that reason, quiet title actions are frequently*

coupled with other legal causes of action such as ejectment, unlawful detainer, or [...] slander of title. (*Id.*, at 95-96 [emphasis added].)

Unlike the plaintiffs in *Kozba*, Respondent specifically pleaded a cause of action in ejectment, and prayed for damages, the costs of restoring the easement, and attorney's fees. (CP at 3-4.) Therefore, *Kozba* does not stand for the proposition that the Trial Court erred in granting Respondent attorney's fees, but rather supports that decision.[3]

B. The Attorney's Fees are Authorized Under RCW 4.24.630

RCW 4.24.630 states, in part: "Every person who goes onto the land of another and who [...] 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 damages caused by the removal, waste, or injury...Damages recoverable under this section include...the costs of restoration. In addition, the person is liable for reimbursing the

[3] Although the legislature has not adopted a statute specifically authorizing attorney's fees and costs for the interference with a ground easement, RCW 64.04.170 authorizes the trial court to grant actual damages related to the interference as well as attorney's fees and costs. Respondent is at a loss for any justification as to why this would not also apply to wrongful interference with a ground easement.

injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs." In the case at hand, the Trial Court had ample evidence to find Appellants entered the Respondent's easement, with the knowledge that Respondent had an easement, and damaged the road and prevented its use by their multiple excavations. Therefore, attorneys' fees and costs were authorized by this section and the Trial Court did not abuse its discretion in granting them.

C. The Attorneys' Fees are Authorized Due to the Bad Faith and Wantonness of Appellants

In Washington, a court may award attorneys' fees if the losing party's conduct constitutes bad faith or wantonness. (*Hsu Ying Li v. Tang* (1976) 87 Wn.2d 796, 798 (hereinafter "*Tang*"); See also *Snyder v. Tompkins* (1978) 20 Wn.App. 167; See also *PUD v. Kottsick* (1976) 86 Wn.2d 388; See also *Clark v. Horse Racing Commission* (1986) 106 Wn.2d 84.) The court's authority stems from their inherent equitable powers, and it is at liberty to set the boundaries of the exercise of that power. (*Tang*, at 799, quoting *Weiss v. Bruno* (1974) 83 Wn.2d 911, 914.) In this case, Appellants

have acted in extreme bad faith and with wantonness, and evidence of this is strewn throughout the record.

Appellants have admitted, within the record, that Respondent has an easement through their property, and that there is a 20-foot easement running through their property. In the police report which Appellants discussed at length, and completely mischaracterized, Appellants admit Respondent has an easement running through their property, which was the subject of the dispute. The responding officer wrote in that report, "Vit stated his neighbor, Hannigan, who has a driveway easement through his property, did not like the work being performed." (CP at 390.) Furthermore, at trial, during examination, Appellant Vit Novak admitted his property is burdened with the 20-foot easement owned by Respondent, but claims that he is the owner. (Transcript at 42-44.) Clearly, one cannot own an easement running through their property as it would confer no additional rights. Mr. Novak's assertion at trial defies logic and was clearly made in bad faith. Mr. Novak made clear, minutes later, that he knew Respondent had a right to use the easement when he stateted that an easement is a right of ingress and egress, and defended himself asserting "I have not affected the right of ingress and egress." (*Id.*, at 46.)

During the course of the dispute leading up to the trial, Appellants threatened Respondent with a gun, made false allegations to the police regarding Respondent's behavior, and menaced Respondent's teenage daughter. In the confrontation which ultimately lead to the police coming to the property in dispute, Appellant, Zdenka Novak, threatened Respondent with a gun. (CP at 390). Furthermore, Appellants have made a number of damaging accusations against Respondent related to that incident, including that Respondent assaulted Appellants and trespassed on their property—the police report makes clear that none of this happened. (*Id.*, at 390-391.) This outrageous behavior is not limited to this one incident. Appellant, Vit Novak, at one point stopped and harassed Respondent's teenage daughter for riding a quad in an area that is permitted by the community's CC&Rs. (Transcript at 186-188.)

Throughout the course of the litigation, Appellants have used litigation, the threat of litigation, and bizarre and judicially uncognizable filings to get their way, amass legal expenses for those who stand up to them, and waste everybody's time. Appellants have on multiple occasions threatened to sue members of the community to keep them from standing up to them. (Transcript at 182 and 237.) Throughout the course of the trial,

Appellants have taken every opportunity to file documents with the court containing spurious legal arguments that the Court and Respondent have had to respond to and pay for with time and money. (*Id.*, at 237.) In this way Appellants have used the judicial process in a bad faith manner, and treated the act of litigation like a game.

Every administrative officer, attorney, and judge who has been involved in this case has been the subject of attacks on their livelihood and honor. Every attorney who has gotten involved in this case has been the subject of unfounded Bar complaints by Appellants. (Transcript at 182; CP at 287.) Respondent's attorney, Mr. Foley, and the Trial Judge, the Honorable Judge Altman, have been the subject of allegations of unethical conduct. (CP at 280-281 and 287; Appellants Brief at 44-45.) In their trial brief, Appellants made spurious claims against one of the witnesses, Greg Brown, which could have resulted in criminal prosecution and the revocation of his surveyor's license if proven. (*See* Transcript at 204; CP at 317-318.) Yet, at trial, Appellants did not raise a single question in cross examination regarding these allegations with that witness. (*Id.*, at 204-205 and 113-126.) Appellants have accused the Skamania County Court Clerk and Deputy Prosecutor of

withholding evidence and public information, a very serious offense. (Appellants Brief at 7, 9-10, 18, and 45-46.) Appellants have even gone so far as to accuse Mr. Foley's assistant, Lori Mattsen, of practicing law without a license. (CP at 128, Appellants Brief at 37.) The number of serious accusations thrown about by Appellants demonstrates bad faith and wantonness on their part over the course of this litigation.

Considering the facts that Appellants have argued against Respondent's ownership of the easement, despite on multiple occasions admitting he has an easement, harassing Respondent, his family, and the rest of their community, making spurious filings which waste the Court's and Respondent's time and money, and the serious and baseless accusations made against Respondent (discussed above in other sections), Respondent's attorney and his staff, the Trial Court Judge, and other Skamania County officials, it is clear that the Trial Judge had ample evidence to find that Appellants have engaged in bad faith and wantonness during litigation and in the events leading up to litigation. Therefore, the award of attorneys' fees was appropriate on the grounds of bad faith and wantonness on the part of Appellants, and the Trial Judge did not abuse his discretion in granting them.

D. If the Court Finds that Respondent Acquired a Prescriptive Easement, Attorney's Fees are Authorized by RCW 7.28.083(3)

RCW 7.28.083(3) states, "The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such award is equitable and just." Although RCW 7.28.083(3) refers to adverse possession, it applies to actions for prescriptive easements because the two doctrines "are often treated as equivalent[s]," and the elements required to establish adverse possession and prescriptive easements are the same. (*Kunkel v. Fisher* (2001) 106 Wn.App. 599, 602-603.) Therefore, if the Court finds that the Trial Court could have found that Respondent established a prescriptive easement, the award of attorneys' fees would be proper under RCW 7.28.083(3).

XV. Respondent Should be Awarded Attorney's Fees for Defending the Trial Court's Judgment on Appeal

If Respondent is the prevailing party on appeal, Respondent should be granted reasonable attorney's fees pursuant to RCW

4.24.630, RCW 7.28.083(3), and/or due to the bad faith and wantonness of Appellants.

CONCLUSION

The Trial Court, after hearing extensive argument and reviewing extensive briefing and pages of documents and exhibits, determined that Respondent, Wesley Hannigan, was the legal owner of a 20-foot wide easement crossing Appellants' property. Despite this being clear in their land purchase contract, Appellants have sought to use the court system to harass Respondent, obstruct the use of his property, and waste his time and money. Appellants have submitted no evidence that such an easement was not created or does not exist, and have not put forward any legal theory indicating the trial court erred in its decision. The Trial Court order ruling that a valid easement was created for the benefit of Respondent, that Appellants interfered with Respondent's use of his easement, and that Respondent was entitled to attorney's fees, was proper and should be upheld.

RESPECTFULLY SUBMITTED this 29th day of April, 2016.

THOMAS J. FOLEY, WSBA No. 17054
Attorney for Respondent Wesley Hannigan

CERTIFICATE OF SERVICE

I certify that I caused the foregoing BRIEF OF RESPONDENT WESLEY R. HANNIGAN to be served on the following:

Vit and Zdenka Novak
1041 Wildlife Drive
Washougal, WA 98671
Appellants Appearing Pro Se

by mailing, by U.S. Mail, First-Class postage prepaid, a true copy to the foregoing on the 29th day of April, 2016.

Lori Mattsen

LORI MATTSEN, Office Manager
Thomas J. Foley P.C.