

**FILED**

NOV 25 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 31412-0-III

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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LEONARD N. BROWNING, a single person, and  
BARBARA L. DRAKE, a single person,

Appellants,

vs.

DOTY FAMILY TRUST, FOREST C. DOTY, and LIL DOTY, husband  
and wife, and the marital community composed thereof; CHARLES C.  
AMBURGEY, SR. and SANDRA R. AMBURGEY, husband and wife,  
and the marital community composed thereof; STEVE GREEN, a  
married man, SUSAN BEAMER GREENE, a married woman,  
CHERITH FAMILY TRUST, and JAMES GIBSON and SYLVIA  
GIBSON, husband and wife, and the marital community composed  
thereof,

Respondents.

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BRIEF OF RESPONDENTS DOTY FAMILY TRUST, FOREST C.  
DOTY, AND LIL DOTY

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NEIL E. HUMPHRIES  
WSBA #2737  
Attorney for Respondents Doty

421 W. Riverside Ave., Suite 830  
Spokane, WA 99201  
(509) 838-4148

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## **I. INTRODUCTION**

Appellants Barbara Drake and Leonard Browning seek to establish a public easement on a private road that, according to Pend Oreille County records, was never dedicated to the public. Appellants do so primarily by challenging several of the trial court's findings of fact, all of which are well-supported by the evidence presented at trial. Moreover, Appellants already have alternative access to their property, including through an easement granted to them by another property owner before trial. The trial court correctly found that Appellants have no claim to any easement across Respondents Dotys' property by implication, prescription, or necessity.

Appellant Browning also challenges the Dotys' well-supported claim that he knowingly committed a timber trespass on their property. Substantial evidence supports that ruling and the treble damages the trial court awarded to Respondents Doty.

Finally, Appellants challenge a number of the trial court's factual findings. Those findings are supported by substantial evidence and should not be disturbed on appeal.

## **II. RESTATEMENT OF ASSIGNMENTS OF ERROR**

Appellant Drake identifies two assignments of error and several issues relating to them. Respondents Doty disagree with the framing of those items and restate them here.

**A. Restatement of Assignments of Error**

1. The trial court properly declined to find Appellants were entitled to an easement by necessity.

2. Substantial evidence supports the trial court finding that there is no public right of way to the Farm property through the Skookum Creek Development.

**B. Restatement of Issues Pertaining to Assignments of Error**

**Assignment of Error #1**

1. Did the trial court correctly find that Appellants failed to request establishment of an easement by necessity?

2. Did the trial court correctly decline to find any easement that burdens any lots in Skookum Creek Development for the benefit of Appellants' Farm property?

**Assignment of Error #2**

3. Did substantial evidence support the trial court's finding that the roads within the Skookum Creek Development are not public rights of way?

### III. STATEMENT OF THE CASE

#### A. Background of Skookum Creek Development and the Farm property

Respondents each own one or more parcels of property in the Pend Oreille County area known as Skookum Creek Development (“Skookum Creek”). CP 220-221 (¶¶1.3-1.6, undisputed findings of fact).<sup>1</sup> Respondents Doty Family Trust, Forest and Lil Doty (collectively “Respondents Doty” or “the Dotys”) own lots 22, 23, 24 in Skookum Creek. CP 220-221 (¶1.3).

To the west of the Skookum Creek lie two parcels of land, known at trial as the “Farm property,” totaling approximately 100 acres. CP 219-220. Appellant Barbara Drake (“Appellant Drake” or “Ms. Drake”) owns the Farm property. CP 219-220. The Farm property borders the eastern edges of several Skookum Creek lots, including Lot 21, which Appellant Drake also owns. CP 221.

The Farm property and at least a portion of Skookum Creek were once commonly owned by Nor-Pac Land and Timber Co., Inc. CP \_\_\_\_\_<sup>2</sup> (Defendants’ Trial Exhibit 106). . On October 2, 1996, Nor-Pac sold the Farm property to Donald J. Day and Patricia L. Day “together with an easement for ingress, egress and utilities across the north half of

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<sup>1</sup> All “CP” notations refer to pages of the Clerk’s Papers.

the northwest quarter of the southeast quarter of Section 11, Township 32 North, Range 44 E.W.M.” CP \_\_\_\_\_ (Defendants’ Trial Exhibit 107).

At the time of this sale, a bridge provided access to the Farm property from the west or south, making access across what are now the Skookum Creek lots unnecessary. RP 179-181, 492-493.

The Days subsequently sold the Farm Property to Appellant Leonard Browning (“Appellant Browning” or “Mr. Browning), who later transferred it to Appellant Drake. CP \_\_\_\_\_ (Defendants’ Trial Exhibits 108 and 109). The warranty deed from the Days to Mr. Browning specified an easement across Skookum Creek Lot 21, but made no reference to any easement that included Skookum Meadow Drive. CP \_\_\_\_\_ (Defendants’ Trial Exhibit 108), RP 460-461.

Appellant Browning leased the Farm property from Ms. Drake with an option to buy. CP 219-220. The Farm property is not part of Skookum Creek Development. CP 219-220.

**B. Easement dispute between Appellants and Skookum Creek lot owners**

A Declaration of Protective Covenants and Easements, recorded August 8, 1972 (the “Declaration”), governs Skookum Creek. CP 69-72.

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<sup>2</sup> Clerk’s Papers citations without numbers refer to trial exhibits added by Respondents Dotys’ Supplemental Designation of Clerk’s Papers. Because they are not yet numbered, they are also identified by trial exhibit number, in parentheses.

Among other items, the Declaration describes easements for access to lots in Skookum Creek. CP 69-72. Section C.1 of the Declaration says:

Seller does hereby declare and reserve sixty (60) foot wide non-exclusive, private easements for ingress, egress, and utilities over and across the Real Property, said easements to be located as shown on the attached Schedule B. Centerline of each of said easements shall follow the centerline of each existing or proposed road as located on the attached Schedule B.

CP 70. The “Real Property” referenced is described and pictured in the attached Schedule B. CP 69, 72-73, 441. Schedule B shows the roads that cross the Skookum Creek lots. CP 72-73, 441. Though the Farm property lies directly west of the Skookum Creek lots shown on Schedule B, the Farm property itself is not shown on Schedule B. CP 72-73.

The Declaration also grants two-thirds of the Skookum Creek property owners the power to dedicate the easements for public use if they so choose. Section C.6 of the Declaration reads:

6. The owners of sixty-six (66) per cent or more in area of the Real Property shall have the right, power, and authority, by written declaration, to dedicate all or any part of any of the above-described easements to public use at any time.

CP 70.

Several roads run through the Skookum Creek lots, including Skookum Meadow Drive. CP 72, 441, \_\_\_\_\_ (Defendants’ Trial Exhibit 101). Skookum Meadow Drive runs through several lots in Skookum Creek, including lots 23 and 24, which the Dotys own. CP 72, 441,

\_\_\_\_\_ (Defendants' Trial Exhibit 101). Skookum Meadow Drive is a private road intended to serve the Skookum Creek lots and has never been dedicated for public use. CP 418-419, RP 628-629, 633.<sup>3</sup> Property owners in Skookum Creek understand the roads to be private easements intended to benefit only those who own lots in Skookum Creek. RP 788, 804.

The Dotys bought Skookum Creek Lot 24 in 1991 and lots 22 and 23 in 1998. RP 735. In 1992, after buying Lot 24, Mr. Doty installed a gate on the roadway leading through the property. RP 739. The Dotys kept this gate locked at all times. RP 739.

Mr. Doty has never allowed people to access the Farm property by crossing Lot 24. RP 739-40. Indeed, the road on Lot 24 is often impassable, making any access it provides unreliable at best. RP 739-40.

In 1998, after buying lots 22 and 23, Mr. Doty installed a gate on Skookum Meadow Drive on Lot 23. RP 738. The Dotys keep this gate locked and prevented Appellant from crossing his property. RP 744-45. The Dotys have never interfered with access to the Farm property through other means of access. RP 744.

The owners of the Farm property may access it without crossing the Dotys' lots. RP 492, 614, 618, 743-44. Appellant Browning

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<sup>3</sup> All "RP" notations refer to page numbers from the Verbatim Report of Proceedings.

conceded in his trial testimony that he has an easement across Skookum Creek Lot 21, which is owned by Appellant Drake, and that he uses Big Dog Lane to access the Farm property. RP 400-401, 448, 461-464, 480, 492, 618. Ms. Drake testified that she has never driven across the Dotys' property to reach the Farm property. CP 539-540.

Since the Dotys purchased their lots in Skookum Creek, Appellant Browning has attempted to claim access to the Farm property across the Dotys' lots and the lots of other Skookum Creek property owners. See, e.g., CP 20, 62-63. Mr. Browning has specifically sought to use Skookum Creek Drive to cross lots 23 and 24 on his way to the Farm property. CP 20, 62-63.

In 2006, Mr. Browning wrote a letter to the Dotys, claiming their gate blocked Mr. Browning's legal access to his property and giving them 48 hours to remove it. CP 20. In the letter, Mr. Browning conceded the Dotys had prevented access on the road through their property for "in excess of ten years." CP 20.

Before this matter was tried, Appellants Browning and Drake (collectively "Appellants") reached a settlement with the Monks, owners of Skookum Creek lots 19 and 20. RP 449, 480. The settlement

established an easement through Lot 20 and Lot 21<sup>4</sup> to the Farm property. RP 449, 480.

**C. Removal of trees from the Dotys' property**

In 2005 or 2006, Appellant Browning removed trees from the Doty property. RP 362, 638, 660, 672, 679, 682. The trial court heard evidence from expert witness Tim Kastning that 47 trees had been cut on the Dotys' side of the boundary between their property and the Farm property. RP 641-642, 672-673, 679. Mr. Browning admitted cutting the trees down. RP 465-466. The trial court considered the surveyed boundary between the Dotys' property and the Farm property to determine whose property the cut trees were on. RP 681-682, 888-890.

Mr. Browning cut the trees without the Dotys' permission. RP 362-364. Though Mr. Browning claimed he believed the trees were on his property, they were not. RP 672-673. This was not the first time Mr. Browning had removed trees from property that belonged to someone else; he had previously done the same on the Monks' property. RP 691-692, 694-700.

**D. Filing of action, trial, and appeal**

Appellant Browning filed this action in the Pend Oreille County Superior Court on August 7, 2006. CP 1-26. Appellant Browning asked

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<sup>4</sup> As noted previously, Appellant Barbara Drake owns Lot 21. CP 219-220.

the trial court to find an easement by prescription or implication that would provide access through Skookum Creek lots to the Farm property. CP 1-26. Appellant Drake later joined as a plaintiff, and plaintiffs filed an Amended Complaint. CP 50-79. In their Amended Complaint, Appellants failed to ask the trial court to declare an easement by necessity. CP 62-64.

The Dotys counterclaimed for timber trespass. CP 105-106.

Other defendants also filed answers. CP 88-90, 97-99, 128-137.

Before trial, Appellants settled with Defendants and Skookum Creek property owners Monk. RP 449, 480. This settlement resulted in an easement across the Monks' and through Lot 21 to the Farm property. RP 449, 480.

The case was tried from August 24-29, 2012. RP 1-870. The trial court heard evidence relating to all of the items discussed above. See generally RP 1-870.

At a presentment hearing on January 3, 2013, the trial court entered Findings of Fact and Conclusions of law. CP 218-226, RP 871-897. Among other findings, the trial court found that the roads in Skookum Creek were private easements for the owners of Skookum Creek lots only. CP 222-223. The trial court concluded Appellants were

not entitled to any easement through the Skookum Creek lots to the Farm property and dismissed Appellants' complaint. CP 225, 230-231.

The trial court also entered judgment in favor of the Dotys on their counterclaim for timber trespass. CP 231. The trial court found Mr. Browning had knowingly and intentionally removed 47 trees from the Dotys' property without the Dotys' permission or any lawful authority. CP 225. The trial court's Judgment included treble damages for the value of the trees in the amount of \$49,350.00, plus costs and statutory attorneys' fees. CP 231.

Appellants moved the trial court to reconsider its Judgment, but the trial court denied this motion on January 31, 2013. CP 244-246. Appellants now seek review of the trial court's Judgment and its order denying reconsideration. CP 247-255.

#### **IV. SUMMARY OF ARGUMENT**

The trial found that the roads in Skookum Creek are private and have never been dedicated for public use. The trial court relied on evidence including the testimony of the Pend Oreille County Engineer and documents establishing that the roads are private. The trial court also considered Appellants' admissions that they were able to access the Farm property without crossing Respondents Dotys' property. Based on

this evidence, the trial court properly ruled that Appellants have no easement through Skookum Creek. The trial court's findings and conclusions are supported by substantial evidence and should not be disturbed.

The trial court also found a willful timber trespass by Appellant Browning onto the Dotys' property. The trial court considered evidence including expert testimony about the number of trees cut and their value, the survey of the boundary between Appellants' property and the Dotys', and Appellant Browning's admission that he cut the trees. Appellant Browning's claim that he acted in good faith does not negate the willfulness of his trespass. Substantial evidence support the trial court's findings and its legal conclusions. They should not be reversed.

## V. ARGUMENT

### A. Standards of Review

Appellants primarily challenge a number of the trial court's findings of facts. An appellate court may not overturn findings of fact if they are supported by substantial evidence in the record. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183, 186 (1959) ("The findings are amply sustained by the proofs. If we were of the opinion that the trial court should have resolved the factual dispute the

other way, the constitution does not authorize this court to substitute its findings for that of the trial court”); *Johansen v. Eddleman*, 54 Wn.2d 871, 875, 343 P.2d 737, 739 (1959); *Petters v. Williamson & Associates, Inc.*, 151 Wn. App. 154, 163-64, 210 P.3d 1048, 1053 (2009). This is particularly true where there is conflicting evidence on an issue in the trial court.

These issues are clearly questions of fact and the testimony thereon is in sharp dispute. The rule is well established under these circumstances that the court will not overturn the findings of fact of the trial court when there is substantial evidence in the record to support them on appeal.

*Johansen*, 54 Wn.2d at 875, 343 P.2d at 739. “Substantial evidence” is evidence that would persuade a fair-minded person of the truth of the declared premise.

“Where the trial court has weighed the evidence our review is limited to determining whether the findings are supported by substantial evidence and, if so, whether the findings in turn support the trial court's conclusions of law. ... Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978).

*Petters*, 151 Wn. App. at 163-64, 210 P.3d at 1053.

In those few cases where appellants challenge the trial court’s conclusions of law, this court may review those questions *de novo* to see if the trial court’s factual findings support them. *Petters*, 151 Wn. App. at 163-64, 210 P.3d at 1053.

Notably, Appellants did not appeal the trial court's Findings of Fact and Conclusions of Law, yet they challenge several of the trial court's factual findings. Even so, Respondents will address Appellants' challenges to the trial court's findings of fact, since all are supported by substantial evidence.

**B. The roadways in the Skookum Creek Development are private roads and not public rights of way, and they provide easements only for owners of Skookum Creek lots.**

**1. Substantial evidence supports the trial court's finding that the roads in Skookum Creek benefit only the property owners in that development, and they have never been dedicated for public use.**

Whether a road has been dedicated for public use is a factual issue. See, e.g., *Leonard v. Pierce County*, 116 Wn. App. 60, 65-66, 65 P.3d 28, 31 (2003); *Tsubota v. Gunkel*, 58 Wn.2d 586, 589, 364 P.2d 549, 551 (1961); *King County v. Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016, 1018 (1966).<sup>5</sup>

The Declaration describes easements for access to lots in Skookum Creek. CP 69-72. Section C.1 of the Declaration says:

Seller does hereby declare and reserve sixty (60) foot wide non-exclusive, private easements for ingress, egress, and utilities over and across the Real Property, said easements to be located as shown on the attached Schedule B. Centerline of each of said easements shall follow the centerline of each existing or proposed road as located on the attached Schedule B.

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<sup>5</sup> Contrary to Appellant Browning's assertion on pages 17-18 of his brief, Finding of Fact No. 1.11 is not "a conclusion of law cloaked as a finding of fact." Amended Brief of Appellant Browning ("Browning Brief") at 17-18.

CP 70. The “Real Property” referenced is described and pictured in the attached Schedule B. CP 69, 72-73, 441. Schedule B shows the roads that cross the Skookum Creek lots. CP 72-73, 441. Though the Farm property lies directly west of the Skookum Creek lots shown on Schedule B, the Farm property itself is not shown on Schedule B. CP 72-73.

The Declaration also grants two-thirds of the Skookum Creek property owners the power to dedicate the easements for public use if they so choose. Section C.6 of the Declaration says:

6. The owners of sixty-six (66) per cent or more in area of the Real Property shall have the right, power, and authority, by written declaration, to dedicate all or any part of any of the above-described easements to public use at any time.

CP 70.

The trial court considered this evidence along with testimony and letters from Don Ramsey, the Pend Oreille County Engineer. Mr. Ramsey testified at trial that all roads in Skookum Creek are private and have never been dedicated for public use. RP 625-627, 633. The letters and documents he presented as exhibits, including an affidavit filed before trial, stated the same. CP 418-419, 442-443.

After considering all of this evidence, the trial court made the factual finding that the easements shown on Schedule B were intended to benefit only the owners of the Skookum Creek lots. CP 222-223. The

trial court found this to be true even though Schedule B shows one of the easement roads traveling outside the boundaries of Skookum Creek. CP 222-223. The trial court recorded these findings as Finding of Fact 1.11. CP 222-223.

Substantial evidence supports the trial court's factual findings. The testimony of the Pend Oreille County Engineer, the supporting documents he provided, and the language of the Declaration would all allow a reasonable person to conclude that the roads in Skookum Creek were intended to benefit only those who owned property within that development. See *Petters*, 151 Wn. App. at 163-64, 210 P.3d at 1053.

Appellants rely heavily on old documents, chain of title arguments, and testimony they claim shows use of Skookum Meadow Drive as a public easement in challenging the trial court's finding. Appellants contend the roadways in Skookum Creek, particularly Skookum Meadow Drive, are easements for public use. See Amended Brief of Appellant Browning ("Browning Brief") at 9-17; Brief of Appellant Barbara L. Drake ("Drake Brief") at 14-18. Mr. Browning claims this allegation "goes to the heart" of his Amended Complaint. Browning Brief at 9. Even if any of Appellants' claims raise a factual issue about whether the roads in Skookum Creek are public, which the Dotys strongly dispute, the trial court resolved the issue based on the

substantial evidence that the roads are not public. There is no basis for reversing the trial court's finding.

**2. The trial court properly found there was no easement by implication.**

The trial court dismissed Appellants' complaint with prejudice and ruled that Appellants lack a right of access to the Farm property extending any further than the west edge of Skookum Creek lot 21, which Appellant Drake owns. CP 222-223, 225, 230-231. The trial court further ruled Appellants have no right of access "whether by adverse possession or implication." CP 231. The trial court's rulings are supported by its factual findings and should be upheld.

Appellants do not assign error to the trial court's finding that Appellants have no easement by implication. Even so, Respondents Doty address the issue, since it overlaps with the other types of easements Appellants claim.

Establishment of an implied easement requires former unity of title and subsequent separation of the property, prior apparent and continuous use of a quasi-easement, and a reasonable necessity for continuing the easement.

The factors relevant to establishing an implied easement, either by grant or reservation, are (1) former unity of title and subsequent separation; (2) prior apparent and continuous quasi-easement<sup>3</sup> for the benefit of one part of the estate to the detriment

of another; and (3) a certain degree of necessity for the continuation of the easement.

*McPhaden v. Scott*, 95 Wn. App. 431, 437, 975 P.2d 1033, 1037 (1999)

(citing cases). The first factor is the only essential factor; the presence or absence of the other two factors is not conclusive.

The first factor is essential for creation of an implied easement. The presence or absence of the second and third factors is not necessarily conclusive. Rather, they are aids to determining the presumed intent of the parties as disclosed by the extent and character of the use, the nature of the property, and the relation of the separated parts to each other.

*McPhaden*, 95 Wn. App. at 437, 975 P.2d at 1037.

“A "quasi-easement" refers to the situation where one portion of property is burdened for the benefit of another portion, which would be a legal easement if different persons owned the two portions of property.”

*McPhaden*, 95 Wn. App. at 437, 975 P.2d at 1037. The “necessity” element requires only reasonable necessity, not absolute necessity.

*McPhaden*, 95 Wn. App. at 439, 975 P.2d at 1038. “The test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute.” *Id.* (quoting *Berlin v. Robbins*, 180 Wn. 176, 189, 38 P.2d 1047 (1934)).

“Necessity must exist at the date the common parcel is severed.” *Granite Beach Holdings, L.L.C., et al., v. Department of Natural Resources, et al.*, 103 Wn. App. 186, 196, 11 P.3d 847, 853 (2000).

The third factor, reasonable necessity, cannot be met because it is a moot issue. Appellants have already established access to the Farm property, and they concede they can reach it without crossing the Dotys' property. Before this matter was tried, Appellants reached a settlement with the Monks, owners of Skookum Creek lots 19 and 20, establishing an easement through Lot 20 and Lot 21 to the Farm property. RP 449, 480. In addition, Appellant Browning conceded in his trial testimony that he has an easement across Skookum Creek lot 21, which is owned by Appellant Drake, and that he uses Big Dog Lane to access the Farm property. RP 400-401, 448, 461-464, 480, 492, 618. None of these access routes cross the Dotys' lots in Skookum Creek. Indeed, Appellant Drake concedes Appellants can access the Farm property without crossing the Dotys' property, and that she personally has never driven across the Doty property despite owning the neighboring Farm property. RP 492. Necessity of access to the Farm property is a moot issue. There is no "reasonable necessity" for a court to establish an implied easement.

Appellants also failed to offer evidence that the necessity for an easement existed on the date the Farm property was severed from Skookum Creek. To the contrary, the bridge that once provided access to the property likely still existed on that date. RP 179-181, 492-493. No need for an easement existed on the date the properties were severed.

Appellants also failed to show evidence of the second factor, apparent and continuous use of the claimed easement. The Farm property and a portion of Skookum Creek were last commonly owned in 1996. Appellants produced no evidence that the common owner, Nor-Pac Land and Timber Co., Inc., used Skookum Meadow Drive to access the Farm property. Moreover, Respondent Forest Doty's testimony that the condition of Skookum Meadow Drive was too poor to provide access contradicts any claim of prior use. RP 739-40.

Appellants failed to contest the trial court's finding that no implied easement existed, but even if they had, two of the three requirements for an implied easement are not met. This Court should uphold the trial court's finding.

**3. The trial court properly found there was no easement by prescription.**

Prescriptive easements are not favored in the law. *Granite Beach Holdings*, 103 Wn. App. at 200, 11 P.3d at 855. To prove one exists, the claimant bears the burden to show open, notorious, and continuous for 10 years over a uniform route adverse to the owner.

Prescriptive rights are not favored in the law, and the burden of proof is upon the one who claims such a right. *Todd v. Sterling*, 45 Wn.2d 40, 42, 273 P.2d 245 (1954). The claimant must prove that his use of the land has been open, notorious, continuous, and uninterrupted for 10 years over a uniform route adverse to the owner. *Id.* at 42-43. The claimant has the burden to prove all of

the required elements. *N.W. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 84, 123 P.2d 771 (1942).

*Granite Beach Holdings*, 103 Wn. App. at 200, 11 P.3d at 855. “The use need not be constant, but it must be continuous for a 10-year period such that the landowner would be on notice that a potential claim exists.”

*Granite Beach Holdings*, 103 Wn. App. at 201, 11 P.3d at 856.

Appellants failed to offer any evidence of open, notorious, and continuous use of the claimed easement across the Dotys’ property over a period of 10 years. Moreover, they conceded the opposite. Ms. Drake testified she had never driven over the Doty property to reach the Farm property. CP 539-540. Mr. Browning conceded in 2006 that the Dotys’ gate prevented his access across the Dotys’ property for more than 10 years. CP 20. Even if Appellants had been crossing the Dotys’ property openly and continuously since 2006, which they have not, only seven years have passed since then. Given this evidence, the trial court correctly found the road had never been used openly, notoriously, continuously, or in a hostile manner. CP 223. The trial court’s factual finding on this issue supported its conclusion that Appellants have no prescriptive easement over the Dotys’ property. CP 225, 231. There is no basis for reversal.

4. **Even if Appellants once had an easement across the Dotys’ property, the Dotys extinguished it by adverse possession.**

A property owner can extinguish an existing easement under the same standards that allow another to establish a prescriptive easement.

An easement can be extinguished through adverse use by the owner of the servient estate. *Howell v. King Cy.*, 16 Wn.2d 557, 559-60, 134 P.2d 80, 150 A.L.R. 640 (1943); *Lewis v. Seattle*, 174 Wash. 219, 223-25, 24 P.2d 427, 27 P.2d 1119 (1933). Generally, whether an easement is extinguished by adverse use is determined by applying the principles that govern acquisition of title by adverse possession and acquisition of an easement by prescription. Annot., *Loss of Private Easement by Nonuser or Adverse Possession*, 25 A.L.R.2d 1265, § 2, at 1274-75 (1952); 1 Washington State Bar Ass'n, *Real Property Deskbook* § 15.48 (2d ed. 1986).

*Edmonds v. Williams*, 54 Wn. App. 632, 634, 774 P.2d 1241, 1242-43 (1989).

As explained above, Appellants have never had an easement across the Dotys' property. Even if they had, their own testimony and writings concede the Dotys extinguished it by adverse possession. CP 20, 539-540. If any easement ever existed on the Dotys' property, it no longer does.

**C. Appellants failed to request establishment of an easement by necessity and, even if they had, the trial court would have been correct to decline such a request.**

**1. Appellants failed to request that the trial court establish an easement by necessity.**

RCW 8.24.010 governs easements by necessity, allowing a property owner to establish a necessary easement through condemnation

of another's property. RCW 8.24.010. Condemnation of private property implicates a constitutional right of the property owner against whom condemnation is sought, and it therefore cannot be done simply for the convenience of the property owner seeking condemnation.

*Dreger v. Sullivan*, 46 Wn.2d 36, 38, 278 P.2d 647, 648 (1955).

Appellants' Amended Complaint failed to make a statutory condemnation claim or to ask the trial court to declare an easement by necessity. The relevant portions of Appellants' prayer for relief in their Amended Complaint read as follows:

#### IV. RELIEF REQUESTED

...

4.4 For declaratory judgment declaring plaintiff Leonard N. Browning has an easement by prescription over Lots 23 and 24-DT, 25-CT, and 26-G/B, as well as over Lot 20-M.

4.5 For declaratory judgment declaring plaintiff Leonard N. Browning has an easement by implication over Lots 23 and 24-DT, 25-CT, and 26-G/B, as well as over Lot 20-M.

CP 63 (emphasis added). Appellants allege no claim for condemnation under RCW 8.24.010. See generally CP 50-64. Moreover, no portion of the "Relief Requested" section of the Amended Complaint so much as asks the trial court to declare an easement by necessity. CP 62-64.

Appellants now claim they requested an easement by necessity, but cite excerpts from their "Facts and Allegations" in an attempt to

establish this request. Drake Brief at 6-7; see also CP 10, ¶¶3.33 and 3.34. Those allegations state, as fact, that “Plaintiff Leonard N. Browning has an easement by necessity” and “There is a necessity for the easement over Lots 23 and 24-DT, 25-CT and 26-G/B.” CP 10, ¶¶3.33 and 3.34. Allegations of factual matters do not place a court on notice that plaintiff is making a statutory condemnation claim that affects the Dotys’ constitutional rights. Moreover, Appellants make no reference at all to RCW 8.24.010. Instead, Appellants specifically asked the trial court to declare an easement by implication or by prescription—both common law remedies. CP 63. This record fully supports the trial court’s finding that “no claim has been made for a private way of necessity pursuant to RCW 8.24.” CP 225. Appellants may not now advance a new legal theory upon which to base their claimed easement.

**2. Even if Appellants had requested it, the trial court would have been correct to decline to establish an easement by necessity to the Farm property through the Skookum Creek Development.**

RCW 8.24.010 allows a property owner to establish an easement by necessity through condemnation of another’s property. It provides:

An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and

maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be. The term "private way of necessity," as used in this chapter, shall mean and include a right-of-way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried.

RCW 8.24.010. Because condemnation of private property involves the constitutional rights of the property owner against whom condemnation is sought, it cannot be done simply for the convenience of the property owner seeking condemnation. *Dreger*, 46 Wn.2d at 38, 278 P.2d at 648 (condemnation of easement not reasonably necessary where plaintiffs had other access to property but sought a more convenient route).

Even if Appellants had asked the trial court for statutory condemnation, the trial court would have been correct to dismiss such a claim. Appellants have no need of an easement since, before trial, they reached a settlement with the Monks establishing an easement through Lot 20 and Lot 21 to the Farm property. RP 449, 480. Moreover, as detailed previously, Appellants concede they can reach the Farm property without crossing the Dotys' property and have done so frequently. RP 400-401, 448, 461-464, 492.

Necessity of access to the Farm property is a moot issue. There is no "reasonable necessity" for a court to establish an implied easement.

Though Appellants never presented the trial court with a statutory condemnation claim, even if they had, the trial court would have been correct to reject it.<sup>6</sup>

**D. The trial court’s judgment for timber trespass damages against Appellant Browning was correct and supported by substantial evidence.**

**1. The trial court’s determination of the boundary between the Dotys’ property and the Farm property was supported by substantial evidence.**

The trial court determined the boundary between the Dotys’ property and the Farm property based on the surveyed boundary between the two properties as identified by Doty Exhibit No. 121. CP 231, RP 889-890. Appellant Browning objects because the trial court initially declined to determine the property boundary. CP 888-890. On further review of the evidence, however, the trial court determined that the surveyed boundary provided sufficient evidence to determine the line between the two properties. CP 889.

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<sup>6</sup> Given the lack of necessity for an easement, the trial court would never have reached the question of choosing the most convenient route pursuant to RCW 8.24.025, as Appellant Drake claims. Drake Brief at 9-11. That statute assumes condemnation of an easement is first deemed necessary:

If it is determined that an owner, or one entitled to the beneficial use of land, is entitled to a private way of necessity and it is determined that there is more than one possible route for the private way of necessity, the selection of the route shall be guided by the following priorities in the following order:...

RCW 8.24.025 (emphasis added). Since Appellants have no reasonable necessity for condemnation of an easement, choosing a convenient route is not an issue. Moreover, Appellant Drake’s argument about the “best possible route” highlights Appellants’

The trial court's finding was supported by substantial evidence—namely, the surveyed boundary. Appellant Browning claims the trial court's decision to determine the boundary was unfair surprise, but it was not, and even if it was, it does not constitute error.<sup>7</sup> The survey was introduced at trial as Doty Exhibit No. 121. RP 681-682. The trial court had the surveyed boundary before it and relied upon it in making its judgment. so there was no surprise to Appellant Browning. He had a fair opportunity to contest the location of the boundary. There is no basis for reversal.

**2. The award of damages to the Dotys for timber trespass was proven with reasonable certainty and was supported by substantial evidence.**

In a timber trespass case, “the question of whether one acted “willfully” for purposes of trebling damages is a factual issue for the trier of fact, and the court's factual findings as to willfulness will not be disturbed if based on substantial evidence.” *Sherrell v. Selfors*, 73 Wn. App. 596, 604, 871 P.2d 168, 173-74 (Div. III 1994). “Conflicting evidence is substantial if that evidence reasonably substantiates the finding even though there are other reasonable interpretations.” *Sherrell*, 73 Wn. App. at 600-01, 871 P.2d at 171. Damages must be supported by

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search not for a necessary easement, but simply for an access route more convenient than those they already have.

competent evidence in the record, and should not be denied simply because they cannot be determined with mathematical precision. *Sherrell*, 73 Wn. App. at 601, 871 P.2d at 172. The evidence must simply “afford a reasonable basis for estimating losses.” *Sherrell*, 73 Wn. App. at 601, 871 P.2d at 172.

The defendant in a timber trespass action bears the burden to show mitigating factors that would avoid trebling of damages. *Sherrell*, 73 Wn. App. at 604, 871 P.2d at 173. “It is not a mitigating factor for the trespasser to be acting in good faith.” *Sherrell*, 73 Wn. App. at 604, 871 P.2d at 173. Where no reasonable effort is made to establish the property line, a defendant may have failed to mitigate and a finding of willfulness may be supported by substantial evidence.

The burden of proving mitigating circumstances was on Selfors and they failed to do so. *Ventoza*, at 894; *Tatum*, at 584. The property line was clearly marked with pins and white stakes next to the pins, no survey was done, no neighbors or others familiar with the property were contacted, Sherrells were not notified, and the Pineloch manager had no authority to establish boundaries. In short, Sherrells contend no reasonable efforts were made to locate the property line.

*Sherrell*, 73 Wn. App. at 604, 871 P.2d at 173 (substantial evidence supported a finding of willful trespass).

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<sup>7</sup> Appellant Browning also claims the trial court “in effect amended the pleadings after judgment.” Browning Brief at 37-38. The trial court did no such thing; it simply determined an issue of fact.

The trial court found that Appellant Browning cut down 47 trees on the Dotys' property in 2005 or 2006 and found the trees' value to be \$16,450. CP 225. The trial court heard evidence from expert witness Tim Kastning, the Dotys' expert, that 47 trees had been cut on the Dotys' side of the boundary between their property and the Farm property. RP 641-642, 672-673, 679. Mr. Kastning provided the only evidence of the trees' value. RP 641-642. Mr. Browning admitted cutting the trees down. RP 465-466. The trial court also considered the surveyed boundary between the Dotys' property and the Farm property in determining whose property the cut trees were on. RP 681-682, 888-890.

There was no dispute that Mr. Browning had no lawful authority to cut down trees on the Dotys' property without their permission, nor that Mr. Browning did not have the Dotys' permission. The trial court also considered evidence that Mr. Browning had previously, and knowingly, cut down trees on others' property without their permission. RP 362-364, 465-466, 372-673, 681-682, 888-890. The trial court thus had substantial evidence upon which to base its finding of timber trespass and trebling of damages.

In contesting the trial court's finding of timber trespass and award of treble damages, Appellant Browning fails to show any evidence of mitigation. Relying largely on his own testimony, he claims he cut the

trees in good faith and quarrels with Mr. Kastning's uncertainty about the property boundary. See Browning Brief at 41-52. Mr. Browning completely ignores the surveyed boundary line upon which the trial court relied in determining the property boundary, which he could have obtained as easily as any other property owner. He did not, and made no reasonable attempt to locate the proper boundary line. Even without Mr. Kastning's certainty about the property boundary, the trial court found a timber trespass based on the surveyed boundary, which Mr. Browning could easily have determined. Mr. Browning's failure to do so, and resultant cutting of trees that did not belong to him, provide substantial evidence for the trial court to find a timber trespass and to justify treble damages. This Court should not disturb the trial court's ruling on appeal.

**E. Appellant Browning's allegation of "ex parte communications" provides no ground for reversal.**

Appellant Browning contends the trial court's "ex parte" communication compromised his right to a fair trial. Browning Brief at 52. As detailed by the affidavit of counsel in response to Browning's Motion for Reconsideration, the trial court merely discussed procedural matters in this exchange, did not discuss the merits of the case, and did not disparage any pro se parties. CP 242. Browning provided no contrary evidence justifying his claim that these communications

compromised his right to a fair trial. Appellant's objection affords no ground for reversal.

**F. The trial court's findings of fact were supported by substantial evidence.**

Appellant Browning (also "Appellant" below) disputes several specific factual findings of the trial court. All were supported by substantial evidence, and none provides grounds for reversal.

**1. Findings of fact 1.1 and 1.2 were supported by substantial evidence and, aside from two typographical errors, are accurate.**

Respondents have no objection to Appellant Browning's proposed edits to Finding of Fact 1.1, which consist of two apparently typographical errors. Appellant's proposed addition to the end of Finding of Fact 1.2, however, is not necessary. Appellant does not dispute that Finding of Fact 1.2 is accurate as it is; he simply wishes to add material to it. Appellant fails to explain why this material is necessary. The finding is accurate as it is, and the additional material is not necessary to support the trial court's judgment.

**2. Finding of fact 1.8 was supported by substantial evidence.**

Finding of Fact 1.8 is accurate and supported by the Declaration of Protective Covenants and Easements. The portion to which Appellant objects states:

1.8 Article C, Section 1 of the Declaration reserves a 60 foot wide, non-exclusive private easement for ingress, egress and utilities to each property subject to the Declaration.

CP 222. This finding paraphrases an excerpt from the Declaration which reads:

ARTICLE C – EASEMENTS AND RESERVATIONS

1. Seller does hereby declare and reserve sixty (60) foot wide non-exclusive, private easements for ingress, egress, and utilities over and across the Real Property, said easements to be located as shown on the attached Schedule B. Centerline of each of said easements shall follow the centerline of each existing or proposed road as located on the attached Schedule B.

CP 70. “Real Property” refers to all real property described on Schedule B, attached to the Declaration. CP 69. Schedule B shows the Skookum Creek Development but not the Farm property. CP 72.

The trial court’s paraphrasing of the Declaration accurately reflects its meaning. The Declaration does indeed reserve a “private easement” for those properties subject to it—namely, the Skookum Creek lots shown on Schedule B. Appellant’s contention that Finding of Fact 1.8 “erases” a public road right-of-way claim is without merit, especially since the Declaration specifically denotes a “private easement.” The trial court committed no error here.

The remainder of Appellant’s argument, that the Skookum Creek roads are public rights-of-way, has been addressed above. Substantial

evidence supports the trial court's finding that the roads in Skookum Creek are private roads which have never been dedicated for public use.

**3. Finding of fact 1.11 was supported by substantial evidence.**

Respondents have addressed this argument above. In finding that the easement roads are private and meant to benefit only the owners of Skookum Creek lots, the trial court considered testimony by the Pend Oreille County Engineer and other documents establishing the roads' private nature. Contrary to Appellant's claim, whether a road is private or public is a factual question, not a question of law. See, e.g., *Leonard*, 116 Wn. App. at 65-66, 65 P.3d at 31, *Tsubota*, 58 Wn.2d at 589, 364 P.2d at 551, *King County*, 68 Wn.2d at 690, 414 P.2d at 1018. The evidence amply supports the trial court's finding.

**4. Finding of fact 1.12 was supported by substantial evidence.**

Appellant objects to the lack of reference to a gate the Dotys installed in 1998 and to the finding that there has never been open, notorious, continuous or hostile use of the Skookum Creek access roads by owners of the Farm property. Appellant cites testimony he claims shows such use.

As detailed above, the trial court considered ample evidence that there was no open, notorious, continuous or hostile use of the Skookum

Creek access roads by owners of the Farm property. For example, Ms. Drake testified she had never driven over the Doty property to reach the Farm property. CP 539-540. Mr. Browning conceded in 2006 that the Dotys' gate prevented his access across the Dotys' property for more than 10 years. CP 20. This and other evidence provide solid ground for the trial court's ruling. The lack of mention of the 1998 gate does not render the finding incorrect.

Appellant argues that conflicting evidence negates the trial court's finding, but the trial court was the fact finder and based its finding on substantial evidence. This Court should not disturb the trial court's finding.

**5. Finding of fact 1.13 was supported by substantial evidence.**

Appellant concedes this finding is accurate if Skookum Meadow Drive is a private. That is precisely what the trial court found and, as detailed above, substantial evidence supported that finding. According to Appellant's own statement, therefore, Finding of Fact 1.13 is also accurate.

**6. Finding of fact 1.14 was supported by substantial evidence.**

Appellant challenges the finding that "there is no implied easement in favor of plaintiff which would allow access through

Skookum Meadows to any county road.” Respondents have already explained that this finding is supported by substantial evidence.

**7. Finding of fact 1.15 was supported by substantial evidence.**

Appellant fails to reference any evidence that disproves this finding. In addition, he appears to rely on a document “not entered into evidence.” There is no basis for reversing this finding.

**8. Finding of fact 1.18 was supported by substantial evidence.**

Appellant has conceded they can access the Farm property using Big Dog Drive. RP 400-401, 448, 461-464. Appellants’ own admission provides substantial evidence for this finding.

**9. Finding of fact 1.19 was supported by substantial evidence.**

The evidence supporting the trial court’s finding of timber trespass by Appellant and its award of damages to the Dotys has been addressed above.

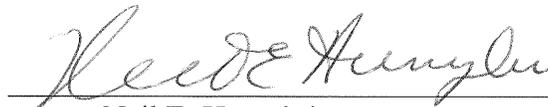
## **VI. CONCLUSION**

The trial court committed no error in ruling that the roads in Skookum Creek are private, serve only owners of property in that development, and have never been dedicated for public use. Substantial evidence, including testimony by the Pend Oreille County Engineer,

documentation of the roads in the development, and the admissions of Appellants, support these factual findings, which in turn supported the trial court's legal conclusion. Likewise, the trial court relied on expert testimony and the admissions of Appellant Browning in awarding Respondents Doty treble damages for Browning's timber trespass. The trial court committed no error. This Court should uphold its judgment.

Dated: November 25, 2013

Respectfully submitted,  
NEIL E. HUMPHRIES

A handwritten signature in cursive script, reading "Neil E. Humphries", written over a horizontal line.

Neil E. Humphries  
WSBA #2737  
Attorney for Respondents Doty

DECLARATION OF SERVICE

I, Neil E. Humphries, declare as follows:

I am a resident of the City of Spokane and County of Spokane, Washington. I am over the age of eighteen years and not a party to the within cause.

On the 25<sup>th</sup> day of November, 2013, I mailed by U.S. Mail, First Class, postage prepaid, a true and correct copy of the BRIEF OF RESPONDENTS DOTY FAMILY TRUST, FOREST C. DOTY AND LIL DOTY to the following:

1. Leonard Browning, PO Box 9, Priest River, ID 83856
2. Eric R. Shumaker, Attorney at Law, 113 E Baldwin Ave., Spokane, WA 99207
3. Steve and Susan Green, 7501 S Greens Ferry Rd., Coeur d'Alene, ID 83814
4. James and Sylvia Gibson, Cherith Family Trust, PO Box 2208 Priest River, ID 83856
5. Michael J. McLaughlin, Attorney at Law, 312 S Washington Ave., Newport, WA 99156



Neil E. Humphries