

No. 331598

**FILED**

AUG 05 2015

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

**COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON**

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MARK and JENNIFER HANNA, husband and wife,

Appellants,

v.

ALLAN and GINA MARGITAN, husband and wife, and HAROLD L.  
and PATRICIA CROWSTON, husband and wife, DAN R. BOND and  
JANE DOE BOND, husband and wife, DAN BOND and JANE DOE  
BOND, husband and wife, RYKEN LIVING TRUST 18 and Trustees Carl  
and Carole Ryken, STEVE and SHANNON MOSER, husband and wife,  
and AVISTA CORPORATION, INLAND POWER AND LIGHT CO.,

Respondents

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**REVISED BRIEF OF RESPONDENT AVISTA CORPORATION**

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## **I. INTRODUCTION**

Respondent Avista Corporation (“Avista”), recorded perpetual easements to store and overflow water beyond a certain high water mark on the properties in question, starting in 1929, with additional easements being recorded in 1938 and 1949.

About fifty years after the most recent water storage and overflow easement was recorded, the owner of the 16-acre property in question at the time sought to subdivide it into three smaller residential parcels for sale. That owner obtained approval for the subdivision from the land use authority in Spokane County in 2000. Since the subdivision did not implicate Avista or its recorded perpetual water storage and overflow easements, neither the owner at the time nor the local authorities provided notice to Avista of the subdivision process. The findings and conclusions entered by the land use authority in Spokane County pertaining to the subdivision did not mention Avista or its recorded easements, as such subject matter was not relevant, nor was it presented to the local authority.

After the subdivision, the three new parcels were sold in the following years: two to Appellants Mark and Jennifer Hanna (collectively “Hannas”); and one to Respondent Ryken. Those parties had a subsequent dispute over road easements, and suit between them was commenced in 2012.

In June, 2014, more than a decade after the subdivision approval, and 86 years since Avista first recorded its perpetual water storage and overflow easement, Hannas served an amended complaint on Avista, alleging that Avista's four recorded easements were "extinguished" by RCW 58.17.165.

RCW 58.17.165 does not discuss easements, does not use the word easement, does not provide for the extinguishment of easements without notice to the holder of the property right, and is not concerned with the subject matter of shorelines, water storage, water overflow, or recorded easements held by a dam-operating electrical utility for the same.

The trial court granted summary judgment to Avista, and further found that Hannas' claim as to Avista was frivolous pursuant to RCW 4.84.185, and awarded Avista its costs and attorney's fees.

On appeal, other than being listed on the title page of Appellants Brief, Avista is only mentioned one time in Hannas' Revised Brief, at page 9, and then only in passing. Hannas make no argument in their brief as to how RCW 58.17.165, or any other statute or case they cite, extinguished Avista's recorded water storage and overflow easements. Moreover, Hannas do not assign error to the order granting Avista its costs and attorney's fees, and make no argument in their Revised Brief as to how the trial court erred as to the award to Avista.

Hannas' claim as to Avista at the trial court was frivolous, and the trial court did not err in either dismissing the claim as to Avista or in awarding costs and attorney's fees pursuant to RCW 4.84.185.

Finally, the instant appeal as to Avista is likewise frivolous, as is evidenced by the lack of argumentation in Hannas' Revised Brief as to Avista. Consequently, Avista requests an award of costs and attorney's fees expended in responding to the instant appeal.

## **II. STATEMENT OF THE CASE**

### **A. Avista Recorded Perpetual Easements To Store The Waters Of Long Lake In 1929, 1938, And 1949.**

On April 3, 1929, Avista recorded a water overflow easement under number 381621A. (CP 475; 604) That easement provides:

And reserving to [Avista]...the right in perpetuity to impound the waters of Long Lake and The Spokane River and to Raise the same to the elevation of 1533 feet, still water measurement above mean sea level (referred to the U.S.G.S. Datum now in use at Long Lake Hydroelectric Power Station) and to inundate and overflow the above described property to said elevation of 1533 feet, still water measurement, above mean sea level, and to such higher elevations as may occur in times of freshet or flood, and reserving to [Avista]...the right in perpetuity to damage the above described land by wave wash, erosion, seepage, inundation or any similar cause as a result of holding the waters of Long Lake and the Spokane River up to said elevation of 1533 feet, still water measurement, above mean sea level, and such higher elevations as may occur in time of freshet or flood.

(CP 475, 604; *see also* CP 563-67, 592)

On March 2, 1938, Avista recorded a water overflow easement under number 327412A, which provides, in pertinent part:

In Favor of: [Avista]

For: A perpetual right and easement to store, impound, increase, diminish, divert, or otherwise control or use the waters of the Spokane River which flow by, over, upon or are appurtenant to that property of the party of the first part, all of that party of the ... land in Spokane County which lies below 1533 feet above the mean sea level.

(CP 476)

On June 23, 1949, Avista recorded easement number 886792A, which provides a “perpetual right and easement to back and hold water upon and to flood and overflow with water” the Properties to the elevation of 1536 feet above mean sea level. (CP 477)

On August 16, 1949, Avista recorded easement number 896931A, which provides a “perpetual right and easement to back and hold water upon and to flood and overflow with water” the Properties to the elevation of 1536 feet above mean sea level. (CP 477, 604; *see also* CP 563-67, 592)

**B.** The Properties' Previous Owner Subdivided Into Three Parcels In 2000; The Subdivision Did Not Purport To Affect Avista's Water Overflow Easements.

On May 12, 2000, Marion Bond, owner of the Properties in question at the time, sought and received approval of the Spokane County Division of Planning to subdivide 16.53 acres into three tracts for single family residences, of 5.21, 5.30, and 6.03 acres. (CP 364)

Spokane County's approval of the proposed short plat did not discuss Avista's water overflow easements. (CP 364-71) Notice of the County's decision was not served upon Avista. (CP 371)

**C.** Hannas Were Aware of Avista's Water Overflow Easements When They Purchased the Properties.

When Hannas purchased their parcels of property after the previous owner subdivided pursuant to the short plat, they received a copy of a title report which listed, *inter alia*, Avista's water overflow easements. (See CP 566) Hannas expected those easements to remain on the properties when they were purchased. (Id.)

**D.** Hannas Commenced The Instant Lawsuit In 2012, But Did Not Include Avista Or Claims As To Avista's Water Overflow Easements.

On October 12, 2012, Hannas commenced suit against Respondents Margitan. (CP 1-15) The Complaint does not mention Avista, nor does it mention Avista's water overflow easements. (Id.)

E. Hannas Brought Suit Against Avista in June, 2014, Claiming Three of Avista's Four Recorded Water Overflow Easements "Do Not Exist".

In June, 2014, Hannas served upon Avista an Amended Complaint. (CP 316-331) The Amended Complaint identifies three of Avista's four recorded easements for water overflow. (CP 322-23) The Amended Complaint then asserts that the easements "do not exist" by operation of RCW 58.17.165. (CP 323-331)

F. Avista Was Granted Summary Judgment.

On December 12, 2014, Avista moved for summary judgment, arguing that the prior owner's subdivision of the property into three parcels utilizing Spokane County's short plat process did not extinguish Avista's pre-existing recorded water overflow easements as a matter of law. (CP 579-582; 568-78; 557-567) Avista also joined Respondent Inland Power & Light's summary judgment motion. (CP 583-86)

Hannas filed a response (captioned "Reply to Defendants Motions for Summary Judgments"), and designated this pleading as part of the Clerk's Papers (*see* Hannas' Designation of Clerk's Papers, designating Docket No. 314, filed 1-5-2015, "Reply to Def Motion for Sum Judgmt"), though it does not appear this pleading was included in the Index to Clerk's Papers.

Avista replied (CP 795-802), and after a hearing, the trial court granted Avista's summary judgment motion. (CP 819-26)

**G. The Trial Court Granted Avista's Motion For Costs And Attorney's Fees.**

Avista joined the other parties' motions for costs and fees pursuant to RCW 4.84.185. (CP 877-80)

Hannas responded (CP 983-89), though the response is largely a re-argument of their underlying 'LUPA easement extinguishment' theory. Hannas' response did not use the word "Avista", or describe a response to Avista's fees request. (Id.)

Avista submitted an affidavit of costs and fees, seeking \$19,793.60. (CP 1071-83) The trial court granted the motion as to Avista (CP 1108-1111), and entered the requested judgment on Avista's behalf. (CP 1112-15)

The trial court's order provides:

1. Good cause exists for approval of Defendants' Motion for Attorney Fees and Costs pursuant to RCW 4.84.185 for Defendant Avista Corporation, d/b/a Avista Utilities ("Avista").
2. Plaintiffs' cause of action and pursuit of alleged claims had no basis in law or fact as required by statute and established Washington case law.
3. A reasonable inquiry by Plaintiffs' counsel into the facts and proper law regarding the Land Use Protection Act ("LUPA") and the short plat at issue would have prevented the pursuit of

any claim against Defendant Avista in the above-captioned matter.

(CP 1109)

### III. ARGUMENT

#### A. Standard of Review.

Summary judgment orders are reviewed *de novo*. See *Camicia v. Howards. Wright Constr. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014).

The Court performs the same inquiry as the trial court, reviewing the evidence in the light most favorable to the nonmoving party, and drawing all reasonable inferences in the nonmoving party's favor. See *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013).

The meaning of a statute is a question of law reviewed *de novo*. *Jongeward v. BNSF Ry.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012) (internal citations omitted).

#### B. A Previous Owner's Subdivision Of A Property Into Three Parcels Had No Legal Effect On Avista's Recorded Water Overflow Easements.

"Easements are interests in land." *Rainier View Court Homeowners Ass'n, Inc. v. Zenker*, 157 Wn.App. 710, 719, 238 P.3d 1217 (2010) (internal citation omitted).

"Property" is best described as certain rights pertaining to a thing, not the thing itself. Property is often analogized to a bundle of sticks representing the right to use, possess, exclude, alienate, etc. An easement provides the right to use real property of another without owning it.

*Kiely v. Graves*, 173 Wn.2d 926, 937, 271 P.3d 226 (2012) (internal citations omitted).

“[T]he law disfavors termination of easements[.]” *Littlefair v. Schulze*, 169 Wn. App. 659, 665-66, 278 P.3d 218 (2012). “[A]n easement can only be extinguished only in some mode recognized by law.” 1 Wash. Real Property Deskbook, § 10.6(2), at 10-27 (3d. Ed. 1997) (citation omitted). “Unless the instrument that creates the easement so provides, an easement may not be terminated without the consent of the owner of the easement. *Id.* (citing *Cowan v. Gladder*, 120 Wn. 144, 145, 206 P. 923 (1922)). “The extent and duration of the easement is to be determined from the terms of the grant.” *Zobrist v. Culp*, 95 Wn.2d 556, 561, 627 P.2d 1308 (1981). Subdivision of a property generally does not extinguish a pre-existing easement on the property. *See Schwab v. City of Seattle*, 64 Wn. App. 742, 746, 826 P.2d 1089 (1992).

In the present case, there is no dispute that Avista holds four recorded easements for the storage and overflow of water along the properties’ shoreline. There is likewise no dispute that the short plat subdivision process engaged in by the properties’ previous owner did not involve Avista, did not discuss Avista’s easement rights, and did not purport to expressly terminate Avista’s recorded water overflow

easements. It is undisputed Avista received no notice of the short plat process as to these properties. Finally, it is undisputed that Hannas testified that they were not seeking the elimination of Avista's easements.

Hannas' sole claim as to Avista is that RCW 58.17.165 extinguished Avista's recorded water overflow easements. RCW 58.17.165, entitled "Certificate giving description and statement of owners must accompany final plat — Dedication, certificate requirements if plat contains — Waiver", provides:

Every final plat or short plat of a subdivision or short subdivision filed for record must contain a certificate giving a full and correct description of the lands divided as they appear on the plat or short plat, including a statement that the subdivision or short subdivision has been made with the free consent and in accordance with the desires of the owner or owners.

If the plat or short plat is subject to a dedication, the certificate or a separate written instrument shall contain the dedication of all streets and other areas to the public, and individual or individuals, religious society or societies or to any corporation, public or private as shown on the plat or short plat and a waiver of all claims for damages against any governmental authority which may be occasioned to the adjacent land by the established construction, drainage and maintenance of said road. Said certificate or instrument of dedication shall be signed and acknowledged before a notary public by all parties having any ownership interest in the lands subdivided and recorded as part of the final plat.

Every plat and short plat containing a dedication filed for record must be accompanied

by a title report confirming that the title of the lands as described and shown on said plat is in the name of the owners signing the certificate or instrument of dedication.

An offer of dedication may include a waiver of right of direct access to any street from any property, and if the dedication is accepted, any such waiver is effective. Such waiver may be required by local authorities as a condition of approval. Roads not dedicated to the public must be clearly marked on the face of the plat. Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid.

This statute makes no mention of easements, nor their extinguishment or termination. The statute does not provide that recorded water overflow easements can be terminated through this process, either with or without notice to the easement holder. As held by the trial court, the statute provides no legal basis for the claim Hannas brought against Avista.

Further, related statutes contradict Hannas' theory. RCW 58.17.218 provides that the "alteration of a subdivision is subject to RCW 64.04.175"; that statute provides that "[e]asements established by a dedication are property rights that cannot be extinguished or altered without the approval of the easement owner or owners[.]"

Avista's four recorded easements for water overflow are property rights held by Avista, are part of the chain of title, and were known to exist by Hannas at the time they purchased their property. RCW 58.17.165 provides no legal basis for the claim that Avista's recorded easements were terminated without notice to Avista as part of a routine residential subdivision. The trial court did not err in dismissing the claim against Avista.

C. The Trial Court Properly Awarded Fees To Avista, And Appellants Do Not Dispute The Fees Awarded To Avista.

As noted *supra*, Avista sought its costs and fees from Hannas at the trial court, pursuant to RCW 4.84.185. (CP 877-90, 1071-83) Hannas' response memorandum re-argued Hannas' summary judgment argument, though the response memorandum never mentioned Avista, nor did it address the issue as to Avista concerning recorded water storage and overflow easements. (CP 983-89)

In granting the motion as to Avista, the trial court entered the following findings:

1. Good cause exists for approval of Defendants' Motion for Attorney Fees and Costs pursuant to RCW 4.84.185 for Defendant Avista Corporation, d/b/a Avista Utilities ("Avista").
2. Plaintiffs' cause of action and pursuit of alleged claims had no basis in law or fact as required by statute and established Washington case law.

3. A reasonable inquiry by Plaintiffs' counsel into the facts and proper law regarding the Land Use Protection Act ("LUPA") and the short plat at issue would have prevented the pursuit of any claim against Defendant Avista in the above-captioned matter.

(CP 1109)

On appeal, Hannas do not assign error to the trial court's award of costs and fees to Avista. (*See Rev. Br. App.*, pp. 13-15) Moreover, on appeal, Hannas do not present any argument as to why the trial court erred in granting costs and fees to Avista pursuant to RCW 4.84.185. (*See Rev. Br. App.*, pp. 43-49) Significantly, Hannas never mention Avista in their argument as to costs and attorney's fees in their Revised Brief. (*See Rev. Br. App.*, pp. 43-49)

RCW 4.84.185 provides:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the

position of the nonprevailing party was frivolous and advanced without reasonable cause.

When a suit involves multiple parties, but all of the claims against a particular defendant are frivolous, that defendant may recover costs and attorney's fees from the plaintiff pursuant to RCW 4.84.185, notwithstanding whether any claims against other defendants were colorable. *Eller v. East Sprague Motors*, 159 Wn. App. 180, 244 P.3d 447 (2010).

[W]ithin the context of the statute and given the purpose of RCW 4.84.185, the only reasonable reading of the statute is that a defendant drawn into an action without reasonable cause and subjected to claims against it that, considered as a whole, are frivolous, may be awarded expenses under RCW 4.84.185, regardless of the merit of the plaintiff's claims against other defendants.

*Id.* at 194.

Here, it was undisputed that Avista had four recorded easements for water storage and overflow dating back as far as 1929. Avista was not a party to this lawsuit initially, and was brought in two years later via an amended complaint which does not state a cognizable claim against Avista. Hannas have never articulated how either a local administrative board, or RCW 58.17.165, which does not concern easements generally, or water overflow easements specifically, could have terminated or

extinguished Avista's recorded easements, particularly without notice to Avista.

The trial court properly awarded Avista its costs and fees pursuant to RCW 4.84.185, and entered findings explaining its decision. On appeal, Hannas have neither assigned error to the order granting Avista costs and fees, nor do they supply argument as to how the trial court erred as to Avista. The trial court's award of costs and fees to Avista should be affirmed.

**D. Avista Should Be Awarded Fees On Appeal.**

RAP 18.1 authorizes an award of costs and fees to a prevailing party on appeal, if authorized by applicable law. As described *supra*, RCW 4.84.185 authorizes an award of costs and attorney's fees where the position advanced was frivolous. RAP 18.9 authorizes the Court to order a party who files a frivolous appeal to pay terms to the party harmed by the frivolous appeal.

Here, other than being named on the title page of Hannas' Brief, Avista is only mentioned one time, in passing. (*See Rev. App. Br.*, p. 9) Moreover, the issue as to Avista concerned four recorded easements for the storage and overflow of water. Hannas' Brief devotes itself to argument concerning roads, pathways, dedications, and "private easements". Hannas' Brief never discusses the easements held by Avista,

nor articulates how Hannas' theory that a statute, RCW 58.17.165, which discusses "dedications" and "roads" could have any affect on perpetual water storage and overflow easements.

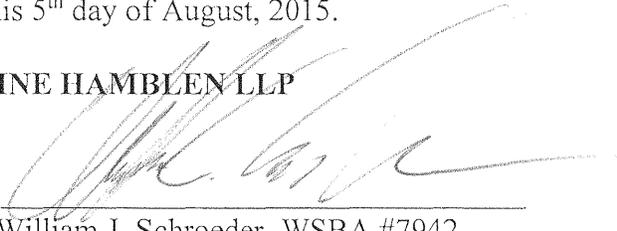
By failing to discuss their claim against Avista, and to provide argument as to how their analysis either applies to Avista or provides a basis to reverse the trial court, Hannas' appeal as to Avista, as demonstrated by their Revised Brief, is frivolous. Avista should be awarded its costs and fees on appeal for defending against an appeal which makes only cursory mention of Avista, and does not address the legal issues presented as to Avista.

#### **IV. CONCLUSION**

Hannas' contentions as to Avista, and their reliance upon RCW 58.17.165 for the proposition that a local land use authority had extinguished Avista's recorded water storage and overflow easements, without notice to Avista, and without that local land use authority taking any action as to Avista's recorded water storage and overflow easements, is without legal merit. The trial court did not err in dismissing the claim against Avista and awarding fees pursuant to RCW 4.84.185. Further, as the instant appeal is frivolous as to Avista, costs and attorney's fees expended in responding to the instant appeal are requested as well.

Respectfully submitted, this 5<sup>th</sup> day of August, 2015.

**PAINE HAMBLEN LLP**

By: 

William J. Schroeder, WSBA #7942

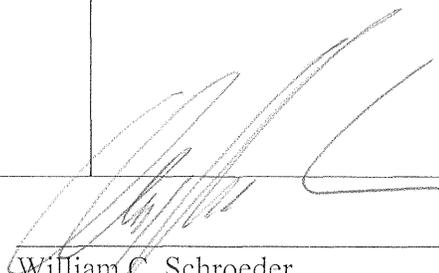
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of August, 2015, I caused to be served the foregoing REVISED BRIEF OF RESPONDENT AVISTA CORPORATION, by the method indicated below to the following counsel of record:

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