

72548-3

72548-3

No. 72548-3-I  
COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2019 JUN 14 PM 3:27

---

MARCELLUS BUCHHEIT and LISA BUCHHEIT-EKDAHL,

Respondents,

v.

CHRISTOPHER GEIGER

Appellant.

---

BRIEF OF APPELLANT

Michael B. Gillett, WSBA # 11038  
Attorney for ~~Respondent~~

The Gillett Law Firm  
12535 15<sup>th</sup> Avenue N.E., Suite 212  
Seattle, Washington 98125  
(206) 706-4692

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ASSIGNMENT OF ERROR .....	1
III.	STATEMENT OF THE CASE .....	2
IV.	SUMMARY OF ARGUMENT .....	7
V.	ARGUMENT .....	7
	1. There is no evidence of presence of any of the factors showing a course of conduct that lacks a legitimate or lawful purpose...	7
	2. The superior court lacked authority under RCW 10.14.080(8) to restrain Appellant from entering (or being within or going onto) Respondents' property because Appellant has a cognizable right to use the property.....	11
	a. The protective order in this case restrains Mr. Geiger from the use and enjoyment of real property.....	12
	b. Mr. Geiger has a cognizable claim to a right to use a portion of the Buchheit property to access Lake Stevens..	12
	i. A cognizable claim is one capable of being heard and determined in a separate action to determine title or possession of real property .....	13
	ii. Mr. Geiger's claim is cognizable because if, as he alleges, a scrivener's error resulted in the easement giving a mistaken description of the property subject to the easement, he is entitled to reform of the easement to reflect the true description .....	16
	c. Neither of the statutory exceptions apply here .....	18
	3. The superior court lacked authority under RCW 10.14.080(6) to restrain Appellant from entering or being within or going onto property which is neither Respondents' residence or workplace.....	19
VI.	CONCLUSION.....	20

## TABLE OF AUTHORITIES

### Cases

Becker v. Community Health Systems, Inc., 182 Wn.App. 935, 332 P.3d 1085 (2014).....	14
Halvorson v. Dahl, 89 Wn.2d 673, 574 P.2d 1190 (1978) .....	15
McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 233 P.3d 861 (2014) .....	15, 16
Parmalee v. O’Neel, 145 Wn.App. 223, 186 P.3d 1094 (2008) .....	15
Price v. Price, 174 Wn.App. 894, 301 P.3d 486 (2013) .....	12, 13, 19
Shaw v. Briggles, 193 Wash. 595, 76 P.2d 1011 (1938) .....	17
Snyder v. Peterson, 62 Wn.App. 522, 814 P.2d 1204 (1991).....	17
State Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 43 P.3d 4 (2002).....	13
State v. Noah, 103 Wn.App. 29, 9 P.3d 858 (2000) .....	20
Stewart v. U.S. Bancorp, 297 F.3d 953 (9 <sup>th</sup> Cir. 2002) .....	15
Tenco, Inc. v. Manning, 59 Wn.2d 479, 368 P.2d 372 (1962) .....	17
Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).....	15

### Statutes

RCW 10.14.020(2).....	2, 8
RCW 10.14.030 .....	2, 8
RCW 10.14.030(1).....	8
RCW 10.14.030(2).....	9
RCW 10.14.030(3).....	9
RCW 10.14.030(4).....	9, 10
RCW 10.14.030(5).....	10
RCW 10.14.030(6).....	11
RCW 10.14.080(6).....	2
RCW 10.14.080(6)(c) .....	19
RCW 10.14.080(8).....	passim

### Rules

CR 12(b)(6).....	14, 15
Fed. R. Civ. Proc. 12(b)(6) .....	15

## I. INTRODUCTION

This case involves a property dispute between neighbors. In 2013, Appellant Christopher Geiger bought a house in Lake Stevens, one lot up from the lake. The seller, who also owned the adjoining waterfront lot, agreed to grant an easement to Mr. Geiger giving him access to the lake over a portion of the waterfront lot. The easement was granted. A few weeks later, Respondents Marcellus Buchheit and Lisa Buchheit-Ekdahl purchased the waterfront lot. Approximately one year later, the Buchheits demanded that Mr. Geiger stop using their property to access the lake. Mr. Geiger did not comply with the Buchheits' demand. Efforts to resolve the dispute through legal counsel were unsuccessful. The next step, one might think, would be a lawsuit to resolve the property dispute. But that is not what happened. Instead, the Buchheits sought a protective order, claiming that Mr. Geiger's use of their property to access the lake constituted harassment. Despite the civil harassment statute's clear statement that it is not to be used to resolve property disputes, the court commissioner issued the protective order.

## II. ASSIGNMENT OF ERROR

### *Assignment of Error*

No. 1: The superior court erred in entering the order of August 26, 2014, restraining respondent below from entering or being within or going

onto petitioners' property, restraining respondent below from contact with petitioners and their children, awarding attorneys fees to petitioners, and ordering a copy of the protective order to be entered into the Washington Crime Information Center.

***Issues Pertaining to Assignments of Error***

No. 1: Did the superior court lack authority under RCW 10.14.020(2) and RCW 10.14.030 to enter a protective order where the conduct by the respondent below was for legitimate and lawful purposes? (Assignments of Error 1.)

No. 2: Did the superior court lack authority under RCW 10.14.080(8) to restrain respondent below from entering or being within or going onto petitioners' property where respondent has a cognizable right to use that property? (Assignment of Error 1.)

No. 3: Did the superior court lack authority under RCW 10.14.080(6) to restrain respondent below from entering or being within or going onto property which is neither petitioners' residence or workplace? (Assignment of Error 1.)

**III. STATEMENT OF THE CASE**

1. On or about February 4, 2013, Mr. Geiger entered into a purchase and sale agreement with Kenneth and Laurie Withrow to

purchase 11112 Vernon Road, Lake Stevens, Washington.<sup>1</sup> This included an agreement for an “ingress/egress easement from the easterly property line including the easterly bulk head and the boat ramp for shared access between lots 1 & 2.” CP 32.

2. On or about February 27, 2013, the transaction closed, and the Withrows conveyed the property to Mr. Geiger, “subject to covenants, conditions, restrictions and easements, if any, affecting title, which may appear in the public record, including those shown on any recorded plat or survey.” CP 27-28. The Withrows, who also owned the waterfront property (Lot 2), granted the easement that had been agreed to in the purchase and sale agreement. CP 14. As pertinent here, the easement reads as follows:

1. Easement Upon, Over and Across the Servient Tenement.<sup>2</sup> Declarant hereby grants for the benefit of the Dominant Tenement<sup>3</sup> and every person, firm or corporation presently owning or hereafter owning the Dominant Tenement or any portion thereof or interest therein (including but not limited to as a lessee thereof), an easement over the following described real property, to wit:

The easterly twenty-three (23) feet of the following described real property, to wit:

---

<sup>1</sup> The property is Lot 1 of City of Lake Stevens Short Plat No. ZP 2006-16. CP 13, 27.

<sup>2</sup> The easement defines the Servient Tenement as Lot 2 of City of Lake Stevens Short Plat ZP – 2006-16. CP 34-35. Lot 2 is the property now owned by the Buchheits. CP 14.

<sup>3</sup> The Dominant Tenement is defined as Lot 1 of City of Lake Stevens Short Plat ZP – 2006-16. CP 35. Lot 1 is the property owned by Mr. Geiger. CP 13.

Lot 1 of City of Lake Stevens Short Plat  
recorded under Snohomish County  
Auditor's File No. 200808265003

1.1. Purpose of Easement. The easement granted herein shall be: (i) a non-exclusive easement for vehicular and pedestrian access, ingress, egress, turnaround maneuvering, parking and other driveway and related purposes upon, over and across the real property above described; and (ii) an easement to perform any and all maintenance, repairs, replacements and other work as reasonably necessary in connection with the ownership, operation, management, maintenance, repair, and replacement of the easement. The easements and rights granted herein are for the benefit of the owner or owners from time to time of the fee title to all or any part of the Dominant Tenement and their tenants, agents, employees, contractors, invitees, licensees, customers or patrons (hereinafter collectively referred to as "Grantees").<sup>4</sup> Except for those rights herein expressly established for the benefit of the Grantee, and provided that the exercise of any such reserved right by Grantor<sup>5</sup> shall not interfere with the exercise by the Grantees of any easement right or rights granted to them hereunder, Declarant hereby reserves for itself, its successors and assigns, all rights and privileges of ownership of the Servient Tenement, including rights of access, ingress and egress and other rights over and across said Servient Tenement commensurate and equal to those established herein for the benefit of the Grantee, and the right to grant additional easements therein.

CP 35-36. The easement was recorded on February 8, 2013. CP 34.

3. On March 8, 2013, the Buchheits purchased the property located at 11116 Vernon Road, Lake Stevens, Washington. CP 45. The

---

<sup>4</sup> The Grantees are defined as the owners in fee simple title to Lot 1. CP 35. Mr. Geiger is the owner of Lot 1. CP 13.

<sup>5</sup> The Grantors are defined as the owners in fee simple title to Lot 2. CP 34-35. The Buchheits are the owners of Lot 2. CP 14.

Buchheit property is Lot 2 of City of Lake Stevens Short Plat No. ZP 2006-16. CP 14.

4. For nearly 15 months, the record is devoid of any reference to difficulties between Mr. Geiger and the Buchheits. On May 31, 2014, however, while Mr. Geiger and a guest were walking to and from the lake, Ms. Buchheit-Ekdahl told them they were trespassing. Mr. Geiger told her that he had an access easement, which Ms. Buchheit-Ekdahl disputed. CP 79. Over the following couple of months, Mr. Geiger continued to use the Buchheits' property to access the lake, and was increasingly confronted by the Buchheits, who objected to such use. CP 15-19.

5. On August 4, 2014, the Buchheits filed a petition for a protective order under the civil harassment statute, chapter 10.14 RCW. CP 88. According to the petition, the Buchheits considered Mr. Geiger to have harassed them based on their observations, from late May to late July 2014, of him crossing their property to reach the Lake Stevens waterfront and to use the lake for recreational purposes. They describe some verbal arguments, but admit that after May 2014 they had minimal to no conversations with Mr. Geiger. CP 90-94. The only overt threat they allege was on July 13, 2014, when a friend of Mr. Geiger (*not* Mr. Geiger

himself) responding to Mr. Buchheit kicking his dog,<sup>6</sup> allegedly said, “If you kick my dog again, I will smash your face!” CP 94.

6. On August 26, 2014, the superior court issued a protective order. The order restrained Mr. Geiger “from entering or being within onto [sic] premises of petitioner’s property located at 11116 Vernon Rd, Lake Stevens WA”, or “from making any attempts to contact petitioner and any [named] minors ....” It also awarded the Buchheits \$770.00 in attorney fees. Finally, the order directed the clerk of the court to forward a copy of the order to the Lake Stevens Police Department for entry into the Washington Crime Information Center. CP 9.

7. When the court issued the protective order, it stated:

[I]t seems to me the pivotal issue right now is how does this easement, if there is one, question get resolved. And at this point it is not clear that the respondent, in my opinion, has an easement. I mean it is contradictory, it is internally inconsistent and I cannot interpret it in this forum, in this context and make a ruling one way or the other. Other than to say, it doesn’t appear to grant Mr. Geiger access across petitioner’s property. I am going to grant the unlawful harassment protection order pointing that there is an accurate course of conduct directed at particular people and seriously in no way alarm, threaten to harm them or harm them and not for a lawful purpose. Now, I would preserve his right to come back to court if this easement matter is resolved in his favor and he has this matter reviewed. At this point, he has no right to use their property.

RP (8/26/2014) p 13. The order includes a provision stating: “In the event

---

<sup>6</sup> The dog was a 20 pound cocker/King Charles spaniel cavalier mix. CP 20.

that Respondent establishes his legal right to an easement over Petitioners' property for access to and from Lake Stevens, this Court will entertain a motion by Respondent to vacate this order. CP 11.

#### IV. SUMMARY OF ARGUMENT

As the court below said, the pivotal issue in this case is the easement. Although the court acknowledged that the easement could not be interpreted "in this forum," it went on to conclude that the easement does not appear to grant Mr. Geiger access across the Buchheits' property; therefore, it granted the petition for a protective order. In doing so, the court exceeded its authority. A show cause hearing for a protective order is not the proper forum for resolving a property dispute, which is why RCW 10.14.080(8) prohibits it from being used for that purpose. Mr. Geiger did not harass the Buchheits. What was going on between the parties over the months leading up to the petition was nothing more or less than the unpleasant interactions that are, unfortunately, common between neighbors who have conflicting views of their property rights.

#### V. ARGUMENT

**1. There is no evidence of presence of any of the factors showing a course of conduct that lacks a legitimate or lawful purpose**

The court below found that Mr. Geiger committed unlawful harassment. CP 8. "Unlawful harassment" is defined as "a knowing and willful course of conduct directed at a specific person which seriously

alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose.” RCW 10.14.020(2).

The statute lists six factors that should be used by a court “[i]n determining whether the course of conduct serves any legitimate or lawful purpose ....” RCW 10.14.030. Applying these factors to this case makes it overwhelmingly clear that Mr. Geiger’s actions were legitimate and lawful, and did not constitute harassment.

First, it should be considered whether “[a]ny current contact between the parties was initiated by the respondent only or was initiated by both parties ....” RCW 10.14.030(1). Here, the Buchheits allege that contact often was initiated by them. On May 26, 2014, Ms. Ekdahl-Buchheit claims that she approached Mr. Geiger to tell him not to empty bilge water<sup>7</sup> from his boat on the Buchheit property. CP 93. On May 31, 2014, Ms. Ekdahl-Buchheit states that she initiated a conversation with Mr. Geiger and a guest, telling them that they were trespassing. CP 94-95. On July 27, 2014, Ms. Ekdahl-Buchheit claims that she called out to Mr. Geiger and a guest that they were trespassing, but that they ignored her. CP 90.

---

<sup>7</sup> Mr. Geiger’s declaration points out that the water was not bilge water, but was clean water being run through the boat motor. CP 16.

Second, the court should consider whether “[t]he respondent has been given clear notice that all further contact with the petitioner is unwanted ....” RCW 10.14.030(2). There is no allegation, nothing in the record at all, that the Buchheits ever told Mr. Geiger that they did not want any contact with him. Indeed, as discussed above, they initiated contact on several occasions.

Third, it should be considered whether “[t]he respondent’s course of conduct appears designed to alarm, annoy, or harass the petitioner ....” RCW 10.14.030(3). Other than using the easement that he claims to hold, the only so-called course of conduct alleged by the Buchheits is that he once told Ms. Ekdahl-Buchheit that their lot was unbuildable, and that he allegedly said he would be very angry if they blocked his view. CP 92-93. He also once told Mr. Buchheit some people he did not know had broken the boat lines on the Buchheits’ dock. CP 91-92. Apparently, the Buchheits also believe that Mr. Geiger’s dog may have left its “calling card” on their property. CP 93. To some extent, these may be the interactions of neighbors who do not get on well with one another; but they hardly constitute, in any objective sense, a course of conduct appears designed to alarm, annoy, or harass.

Fourth to be considered is whether “[t]he respondent is acting pursuant to any statutory authority ....” RCW 10.14.030(4). This includes

“acts which are reasonably necessary to ... [p]rotect property or liberty interests ....” *Id.* Although Mr. Geiger does not cite to statutory authority, in light of the Buchheits affirmative efforts to exclude him from their property, his actions to continue to exercise his easement rights were reasonably necessary to preclude the commencement of adverse possession that ultimately could deprive him of his rights.

The fifth factor is whether “[t]he respondent’s course of conduct has the purpose or effect of unreasonably interfering with the petitioner’s privacy or the purpose or effect of creating an intimidating, hostile, or offensive living environment for the petitioner ....” RCW 10.14.030(5). The Buchheits’ property is not used as a residence; indeed, there is no residential structure present. CP 15. At best, the Buchheits’ expectation of privacy on those occasions when they visit the vacant property is minimal, and there is no evidence that their privacy was interfered with, nor could there be a finding of an intimidating, hostile or offensive living environment inasmuch as they do not live at the property. The Buchheits had claimed that on July 4, 2014, Mr. Geiger and his guests stood on Mr. Geiger’s balcony “watching us and our guests and taking photographs of us while we were on the Buchheit Property.” CP 80. They asked that Mr. Geiger be restrained from so-called surveillance of them. CP 97. But, as counsel for Mr. Geiger pointed out to the court below: “There’s been no

evidence of surveillance. He takes pictures of the lake. He takes pictures of the sunset.” RP (8/26/2014) p. 14. The court agreed, and did not include any surveillance provision in the order. CP 9; RP (8/26/2014) p. 15. Even the Buchheits’ counsel admitted that the surveillance allegations are “not really important.” RP (8/26/2014) p. 14.

Lastly, factor number six asks whether “[c]ontact by the respondent with the petitioner or the petitioner’s family has been limited in any manner by any previous court order.” RCW 10.14.030(6). The Buchheits admit that no such order had ever been sought or issued. CP 96.

**2. THE SUPERIOR COURT LACKED AUTHORITY UNDER RCW 10.14.080(8) TO RESTRAIN APPELLANT FROM ENTERING (OR BEING WITHIN OR GOING ONTO) RESPONDENTS’ PROPERTY BECAUSE APPELLANT HAS A COGNIZABLE RIGHT TO USE THE PROPERTY**

The civil harassment statute provides:

The court in granting ... a civil antiharassment protection order shall not prohibit the respondent from the use or enjoyment of real property to which the respondent has a cognizable claim unless that order is issued under chapter 26.09 RCW or under a separate action commenced with a summons and complaint to determine title or possession of real property.

RCW 10.14.080(8).

In other words, a protective order shall not: (1) prohibit a person from the use or enjoyment of real property, (2) to which that person has a cognizable claim, unless (3) one of two express exceptions applies. Under

these circumstances, “the superior court lacked authority under RCW 10.14.080(8) to enter these restraint provisions in ... its final civil anti-harassment protection order.” *Price v. Price*, 174 Wn.App. 894, 905, 301 P.3d 486 (2013). Such a protective order is “invalid and must be vacated.” *Id.* As this part of the Appellant’s Brief will show, RCW 10.14.080(8) renders the protective order in this case invalid.

**a. The protective order in this case restrains Mr. Geiger from the use and enjoyment of real property**

The first question is easily answered. On its face, the protective order prohibits Mr. Geiger from the use and enjoyment of real property. It expressly restrains him “from entering or being within onto [sic] premises of [the Buchheits’] property located at 11116 Vernon Rd, Lake Stevens WA.” CP 9. The property so described is real property, as is evident from the fact that it is described by means of a street address. The order prohibits Mr. Geiger from the use and enjoyment of that property by prohibiting him from entering, being within, or going onto the property. CP 9. Therefore, the protection order prohibits Mr. Geiger from the use and enjoyment of real property.

**b. Mr. Geiger has a cognizable claim to a right to use a portion of the Buchheit property to access Lake Stevens**

Mr. Geiger claims that the Buchheits’ predecessors-in-interest (who were also Mr. Geiger’s predecessors), granted Mr. Geiger an access

easement over the eastern 23 feet of their property. CP 35-36. If Mr. Geiger's claim is a cognizable claim, then the protective order is invalid (unless one of the statutory exceptions, discussed in part c below, applies).

**i. A cognizable claim is one capable of being heard and determined in a separate action to determine title or possession of real property**

Under RCW 10.14.080(8), what constitutes "a cognizable claim?"

This matter of statutory interpretation is a question of law, and is subject to de novo review by this court. *State Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In ascertaining the meaning of a statute, "[t]he court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10 (citations and internal quotation marks omitted). "[T]he plain meaning ... is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11.

One thing that is plain from the text of RCW 10.14.080(8) is that a cognizable claim is not necessarily an undisputed claim.<sup>8</sup> Under the statute, a protective order may restrain a person's use of property, even

---

<sup>8</sup> In the *Price* case, the validity of the appellant's property interest was not in dispute. *Price v. Price*, 174 Wn.App. at 904. The court, in reaching its decision, had no need to construe the phrase "a cognizable claim," and did not do so.

where the person has a cognizable claim, if the order is issued in connection with “a separate action commenced with a summons and complaint to determine title or possession of real property.” RCW 10.14.080(8). Thus, a person’s “cognizable claim” to use real property may be disputed in such an action, and the court in that action may restrain such use.

In fact, the term has a well-established meaning in the present context. Merriam-Webster defines “cognizable” as “capable of being judicially heard and determined <a *cognizable* claim> <http://www.merriam-webster.com/dictionary/cognizable> (last visited Nov. 5, 2014). Other dictionaries are similar. The American Heritage Dictionary defines it as “[c]apable of being tried before a particular court.” <https://ahdictionary.com/word/search.html?q=cognizable&submit.x=46&submit.y=29> (last visited Nov. 5, 2014). And the Oxford Dictionary Online defines it as “[w]ithin the jurisdiction of a court.” [http://www.oxforddictionaries.com/us/definition/american\\_english/cognizable](http://www.oxforddictionaries.com/us/definition/american_english/cognizable) (last visited Nov. 5, 2014). These definitions suggest that a cognizable claim is one that would survive a motion to dismiss under CR 12(b)(6), and, indeed, courts have used the term in that respect. *See, Becker v. Community Health Systems, Inc.*, 182 Wn.App. 935, 332 P.3d 1085, 1088 (2014) (referring to a CR 12(b)(6) motion as one to dismiss

“for failure to state a cognizable claim for relief”); *Parmalee v. O’Neel*, 145 Wn.App. 223, 247-48, 186 P.3d 1094 (2008) (holding that the trial court erred in dismissing a retaliation claim under CR 12(b)(6) where the plaintiff “established a cognizable retaliation claim in his pleadings”), reversed in part, on other grounds, 168 Wn.2d 515 (2010). Similarly, federal courts have used the term “cognizable claim” to describe the standard for Fed. R. Civ. Proc. 12(b)(6). *See, Stewart v. U.S. Bancorp*, 297 F.3d 953, 957 (9<sup>th</sup> Cir. 2002) (“Rule 12(b)(6) dismissals are granted based on a plaintiff’s failure to plead a cognizable claim. Using this yardstick, a district court analyzes the facts and legal claims in the complaint to determine if the plaintiff has alleged a cause of action.”) *See, also, Village of Willowbrook v. Olech*, 528 U.S. 562, 563, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).

A claim survives a CR 12(b)(6) motion to dismiss “if it is *possible* that facts could be established to support the allegations in the complaint.” *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233 P.3d 861 (2014) (emphasis by the Court). Such a motion “must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim.” *Id.*, quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). Although the U.S. Supreme Court has recently modified the federal standard to effectively

require that the plaintiff state a plausible claim, the Washington Supreme Court has expressly declined to adopt such a plausibility element under the state rule. *Id.* at 101-03.

Thus, Mr. Geiger's claim that he has the right under the easement to use a portion of the Buchheit's property is cognizable if it is possible that facts could be established to support his claim. In other words, Mr. Geiger's claim is cognizable if it is possible that, in a separate property action, he could establish facts that would support his claim.

**ii. Mr. Geiger's claim is cognizable because if, as he alleges, a scrivener's error resulted in the easement giving a mistaken description of the property subject to the easement, he is entitled to reform of the easement to reflect the true description**

The easement granted by the Withrows is an "Easement Upon, Over and Across the Servient Tenement ... for the benefit of the Dominant Tenement" and persons owning the Dominant Tenement. CP 35. In other words, it describes itself as an easement upon, over and across Lot 2 (the servient tenement), now owned by the Buchheits for the benefit of Lot 1 (the dominant tenement), and Mr. Geiger who owns Lot 1. But then it goes on to describe the portion of the servient tenement (Lot 2) that is subject to the easement as the eastern 23 feet of *Lot 1*.

This description of Lot 1, owned by Mr. Geiger, as the property subject to an easement in favor of the owner of Lot 1 (i.e., the owner of

the dominant estate) is an obvious error. The owner of Lot 1 has no need for an easement over Lot 1. That an error occurred in the drafting of the easement is patently clear.

It is Mr. Geiger's claim that the mistake resulting from the scrivener's error was a mutual one by both the Withrows, who granted the easement, and himself. RP (Aug. 26, 2014) p. 9. He claims that both parties intended that the description of the burdened property was to be the eastern 23 feet of Lot 2, that is, the eastern 23 feet of the Servient Tenement which is now owned by the Buchheits. RP (Aug. 26, 2014) p. 9. These facts, if true, would entitle Mr. Geiger to reformation of the easement to correctly state the parties' mutual intent. *Tenco, Inc. v. Manning*, 59 Wn.2d 479, 486, 368 P.2d 372 (1962); *see also, Snyder v. Peterson*, 62 Wn.App. 522, 526, 814 P.2d 1204 (1991) (a mistake resulting from a scrivener's error in describing the property is subject to reform).

The fact that the Buchheits were not parties to the instrument, but rather are the Withrows' successors-in-interest, does not preclude reformation. Reformation will be granted even against a subsequent purchaser who obtained title with notice of the mistake. *Shaw v. Briggie*, 193 Wash. 595, 598, 76 P.2d 1011 (1938). The easement was recorded. CP 14. The Buchheits were aware of the existence of the easement, and

even produced a copy of the easement to the lower court. CP 114-120. That the easement contains a mistake is clear on the face of the document, and the Buchheits' notice, knowledge, and possession of the easement is sufficient to allow a trier of fact to determine that they knew, or should have known, of that clear mistake.

It is not necessary for this Court to decide the merits of Mr. Geiger's claim to hold an easement over the Buchheits' property, nor was that the job of the lower court. It is enough that Mr. Geiger has a cognizable claim – that it is possible that, in a separate property action, he could establish facts that would support his claim. For that reason, the lower court lacked authority to restrain Mr. Geiger from the use and enjoyment of that property right. The protection order, therefore, is invalid and should be vacated, unless one of the two statutory exceptions applies. This is addressed in part c below.

**c. Neither of the statutory exceptions apply here**

Under two circumstances, a protective order may restrain a person from the use and enjoyment of real property to which he or she has a cognizable claim. Neither of these exceptions applies to this case.

First, an order issued under chapter 26.09 RCW may restrain a person from the use and enjoyment of real property. RCW 10.14.080(8) This statute addresses marital dissolution, which is not involved here.

Second, such a restraint may be included in an order issued under an action commenced with a summons and complaint to determine title or possession of real property. RCW 10.14.080(8). This exception is likewise inapplicable to this case because the action below was not commenced with a summons and complaint; it was commenced with a show cause order issued ex parte. Nor was the action below one brought to determine the title or possession of real property.

Neither exception applies. Therefore, the protective order is invalid and must be vacated. *Price v. Price*, 174 Wn.App. at 905.

**3. THE SUPERIOR COURT LACKED AUTHORITY UNDER RCW 10.14.080(6) TO RESTRAIN APPELLANT FROM ENTERING OR BEING WITHIN OR GOING ONTO PROPERTY WHICH IS NEITHER RESPONDENTS' RESIDENCE OR WORKPLACE**

Even if Mr. Geiger did not have a cognizable claim to a property right, the court below exceeded its authority by issuing a protective order that prohibits him from entering property that is neither the home nor the workplace of the Buchheits.

In issuing a protective order under the civil harassment statute, the court is authorized to “requir[e] the respondent to stay a stated distance from the petitioner’s residence and workplace ....” RCW 10.14.080(6)(c). Nothing is said of other types of locations, whether private or public property. Although the court has “broad discretion to grant such relief as

the court deems proper,” this discretion appears, in this context, to relate primarily to how much distance is enough. *State v. Noah*, 103 Wn.App. 29, 43, 9 P.3d 858 (2000).

In this case, the petition filed by the Buchheits asserted that they and their children live in Snohomish County and that Mr. Geiger’s alleged actions caused them to leave their Snohomish County residence. CP 89. In particular, they identify their property – allegedly their residence – as 11116 Vernon Road, Lake Stevens, Washington. CP 90. But, in fact, the property is not their residence, as their counsel admitted to the court below. RP (8/26/2014) p. 8. In fact, there is no residential structure on the property. CP 15. At most, it is a place where they intend to place a manufactured home. CP 45.

The court should not expand on the statutory provision allowing an order to require a person to stay a stated distance from a residence or workplace. The order issued by the court below prohibits Mr. Geiger from entry on vacant land that is neither a residence or workplace, much less that of the Buchheits. The court should therefore vacate the order.

## **VI. CONCLUSION**

This is not a case of harassment. It is a familiar-enough property dispute. When relations between neighbors break down over such property disputes, RCW 10.14.080(8) does not allow one of them to run to the

courts seeking protective orders. The appropriate course of action is to file a complaint and issue a summons, commencing a civil lawsuit where evidence may be presented and a trier-of-fact determine the property rights between the parties.

The protective order is invalid. The matter should be remanded to the superior court with directions to vacate the order, require the Buchheits to return the attorneys fee award, and to expunge the record of the order from the Washington Crime Information Center.

DATED this 13<sup>th</sup> day of January, 2015.

THE GILLETT LAW FIRM

A handwritten signature in black ink, appearing to read "Michael B. Gillett", written over a horizontal line.

Michael B. Gillett  
Attorney for Appellant