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STATE OF WASHINGTON
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No. 1031203

SUPREME COURT
OF THE STATE OF WASHINGTON

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ANN R. DEUTSCHER and RANDALL BERG, both individually and as a marital community,

*Petitioners,*

v.

ALASKA NORTHWEST INDUSTRIES INC., a Washington corporation, and GARY J. LUNDGREN, TDL DEVELOPMENT, LLC a Washington limited liability company; ALASKA-NORTHWEST INDUSTRIES, INC., a Washington corporation, RONALD SHECKLER and JEAN SHECKLER, individually and as a marital community,

*Respondents*

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# ANSWER TO PETITION FOR REVIEW

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## I. IDENTITY OF RESPONDENTS AND COURT OF APPEALS DECISION

Respondents Alaska Northwest Industries, Inc., (collectively "ANWI") ask this Court to deny Petitioners' Randy Berg and Ann Deutscher-Berg ("the Bergs") petition for review of the unpublished Court of Appeals' decision in *Alaska Northwest Industries, Inc. et. al. v. Deutscher*, 2024 WL 799638 (Feb. 27, 2024) (attached as Appendix A to Petition for Review) ("Opinion").

The Opinion carefully reviewed the extensive record from the 8-day bench trial and substantial pre- and post-trial proceedings. The Petition should be denied since there was no error by the trial court, nor by Division II, which both applied settled law to the facts established at trial. The Bergs' unhappiness at not getting the result they wanted, but which was not warranted under the facts and the law, is not a basis for review.

## II. INTRODUCTION

It often is said that the Court of Appeals is an error correcting court[1] while the Supreme Court, as the highest policy-making judicial body in our state, is focused on the general state of the law and not on particular applications of it,[2] especially for unpublished appellate decisions like this which are not binding on anyone but the parties. *See* GR 14.1. The Petition here presents, at best, no more than a request for fact-specific error correction in this real property dispute based on factual assertions disassociated from how the trial court actually ruled or from the trial court's Findings of Fact (which the Bergs failed to challenge), coupled with assertions of the law that are contortions and mis-readings of the relevant statutes.

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[1] *See, e.g., Wade v. Rypien*, No. 39172-8-III, 2024 WL 488409, at *2 (Wash. Ct. App. Feb. 8, 2024) (persuasive authority per GR 14.1).

[2] *See* WASHINGTON APPELLATE PRACTICE DESKBOOK §27.11 (Wash. State Bar Assoc. 4th ed. 2016).

Nor does the unpublished Opinion run afoul of any substantial public interest. Petitioners have failed to meet their burden under any of the three bases upon which they seek review, RAP 13.4(1), (2), and (4). Review should be denied.

## III. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

**Issue A.** There is no basis in the record to support the Bergs' false assertions underlying Issue A. The trial court did ***not*** "consider settlement negotiations as evidence to establish liability for, and the amount of" attorney's fees awarded to ANWI. Instead, the trial court concluded that ANWI was the prevailing party entitled to its fees and costs (CP 3255) and then, five months later, the trial court determined the amount of fees and costs through Findings of Fact and Conclusions of Law ("FF/COL") on ANWI's fee petition. CP 4288-4295. Contrary to the false assertions in Bergs' Issue A, the trial court specifically struck those portions of ANWI's declaration in support of its fee petition "that disclosed settlement discussions." CP 4294. The trial court specifically stated that it

"**did not** consider facts presented [by ANWI] relating to unsuccessful settlement negotiations as such is not admissible in determining the amount of the fees requested." Opinion at 25, citing CP at 4290 n.1 (emphasis added).

Thus, the Court of Appeals correctly concluded that when determining the amount of fees to award, consideration of the time expended during settlement negotiations—unrelated to determining the entitlement to fees—is permissible under the "other purpose" language of ER 408. The claimed issue raised by the Bergs is from their imagination, not the record.

**Issue B** also is not based on a fair reading of this record or the law as to who is a prevailing party under RCW 7.28.083(3) when the adverse possession claim is inextricably linked with the prescriptive easement claim. First the appellate court correctly rejected the Bergs' tortured interpretation of the statute that would permit absurd results,[3] including here where

[3] *See* Opinion at p. 21 (emphasis added):

*(Footnote continued next page)*

the 8-day bench trial yielded the Bergs virtually no relief not already obtained pre-trial, a disparity of effort and result they continue to ignore.[4]

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> It would be inconsistent to interpret prevailing party in RCW 7.28.083(3) as a party who acquires title in an adverse possession action, no matter how small, regardless of the scope of their claim. **Under that interpretation, parties could claim wide swaths of land via adverse possession, increasing litigation complexity and costs, prevail as to a relatively small section, and then be entitled to attorney fees. We reject such an interpretation.** Instead, we apply the substantially prevailing party framework to RCW 7.28.083(3).

[4] *See* Amended Brief of Respondents/Cross-Appellants:

> THE COURT: First of all, the prevailing party, and I just want to comment briefly on that. **Look, this case was not about so much the woods and the trees around Ms. Berg -- Ms. Berg's cabin, it was more about the use of the beach and flat area**. That's really the concern of the parties….Consequently, **that is where the real focus is in this case**.

Amended Brief at 63, quoting RP (4/29/22) 26:5-15 (emphasis added in the brief). *See also* Amended Brief at 64 (noting not only did the Bergs not achieve trial results on their primary focus, ANWI "defeated each and every claim" the Bergs presented at trial "and successfully ejected" them "from all of West Beach and the Driveways.").

Issue B also ignores the scope of the Bergs' claims against ANWI which involved *both* adverse possession *and* prescriptive easement. Because the Bergs' prescriptive easement claims were, as the Bergs have plainly acknowledged and described in their own briefing on appeal, inextricably linked[5] to their adverse possession claims, the Court of Appeals correctly concluded that it was proper for the trial court to consider the prescriptive easement claims when making a determination as to the prevailing party under RCW 7.28.083(3), relying on *Workman v. Klinkenberg*, 6 Wn.App. 2d 291, 430 P.3d 716 (2018) and *Southwest Suburban Sewer Dist. v. Fish*, 17 Wn.App.2d 833, 488 P.3d 839 (2021).

[5] Opinion at p. 14 (quoting Berg's own briefing which described their adverse possession and prescriptive easement claims as "inextricably linked"); and p. 23 (concluding that "the prescriptive easement claims are inextricably linked to the adverse possession claims….").

**Issue C.** The Bergs misleadingly imply they met their burden of proving the "open and hostile" use element for all their prescriptive easement claims. They did not come close.

The Bergs alleged claims for prescriptive easements over a large portion of ANWI's land: the North and South Driveways, the footbridge, the West Beach footpaths, the West Beach parking near the footbridge, the entirety of the "tidelands and shoreline" that make up West Beach, and the small portion of the cabin driveway that intersects with the South Driveway that the Bergs did not acquire via concession by ANWI. The Court of Appeals correctly concluded that ANWI's concession as to parts of the cabin driveway and the footbridge means only that the Bergs were relieved of their burden of proving "open and hostile" use as to that small portion of the cabin driveway. Based on the evidence and the trial court's unchallenged findings, the Bergs did ***not*** meet their burden of proving the "open and hostile" use element on their much larger land claims. Virtually all the Berg's efforts at trial were for naught.

## IV. FACTS RELEVANT TO ANSWER

ANWI and the Bergs own adjacent properties on Ketron Island in south Puget Sound. A cabin on the Bergs' property (the Berg property may be referred to herein as "Lot -002") has straddled the property line since it was built before 1940. Located exclusively on ANWI's property (the ANWI property may be referred to herein as Lot -006) are two driveways (the North and South Driveways) and the only low-bank beach on Ketron Island called "West Beach." To ANWI's dismay, in 2018 the Bergs claimed ownership and/or prescriptive easement rights in the Driveways and the entirety of West Beach. This forced ANWI to file this action to quiet title and eject the Bergs from Lot -006. The Bergs answered with seven counterclaims, including adverse possession and seeking to quiet title in themselves to not only the cabin but also to a significant portion of West Beach, to obtain prescriptive easements over the North and South Driveways, and to eject ANWI from said property.

Important to this appeal, long before trial ANWI conceded title to the cabin that straddled ANWI's property. But the Bergs persisted in proceeding to trial, seeking even more property (i.e., West Beach and the Driveways), property to which they were not entitled. Just before trial, ANWI conceded a small amount of additional property immediately adjacent to the cabin (the "curtilage" on one side) described by the trial court as a "generous boundary line proposed by ANWI."[6]

The Bergs proceeded to trial believing they were entitled to a much larger portion of Lot -006, including title to a large swath of West Beach that stretched far north of the curtilage around the Berg cabin, the Driveways, and/or prescriptive easements over the entirety of West Beach and the Driveways. *See* CP 1591-1592 (Bergs' Trial Brief claiming title to portions of Lot-006 that had allegedly been used for parking, recreation

[6] *See also*, FOF 1.20 (indicating the stipulation as to "curtilage somewhat close to the cabin….would not likely be supported by evidence that the defendants or the predecessor in interest acquired ownership in via adverse possession.").

and beach access); CP 641 (Ex. A, graphical depiction showing the portions of West Beach Bergs sought (unsuccessfully) to quiet title in); and RP (12/20/21) 962-967 and Tr. Exs. 400-B and 594-A (other exhibits depicting the vast portions of Lot -006 Bergs claimed by adverse possession). This resulted in a trial where the Bergs achieved nothing more than had already been agreed to by ANWI before trial. In contrast, ANWI successfully defeated the Bergs' adverse possession and interrelated prescriptive easement claims, ejected the Bergs from West Beach and successfully quieted title in the North and South Driveways.

Based on these results, the trial court concluded that ANWI was the substantially prevailing party and that ANWI was entitled to its fees and costs pursuant to RCW 7.28.083(3), the amount of which would be determined later. After the parties resolved the remaining boundary line issues, the trial court determined the amount of fees and costs to award ANWI.

## V. REASONS THIS COURT SHOULD DENY REVIEW

### A. The Bergs Do Not Acknowledge That They Failed to Preserve Error and Therefore All of the Trial Court's Findings of Fact are Verities on Appeal.

This was a substantial evidence appeal by the Bergs after an 8-day bench trial where the court heard from 16 witnesses and reviewed over 100 exhibits. In their Petition for Review, the Bergs do not acknowledge that they failed to preserve error as to any of the trial court's FOF/CL except FF 1.9. Opinion 9-10. Due to their failure to "develop their argument as to any finding or explain why any finding is not supported by the record," all the findings of fact below are verities[7] *except* FOF 1.9, which the Court of Appeals found to be irrelevant to any issues raised by the Bergs. Opinion 10. The Bergs fail to acknowledge their failure to preserve error and that all of the FOF (CP 3241-3258; 4288-4295) are verities, supported by

[7] Unchallenged findings are verities on appeal. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). "Without argument or authority to support it, an assignment of error is waived." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

substantial evidence, which defeated not only their appeal, but also now their Petition for Review. Key FOF include, but are not limited to, the following:

- Much of the land ANWI stipulated had been acquired by Berg would not likely be supported by evidence. CP 3246 (FF: 1.20). Activities in these areas of thick vegetation was not readily visible or actually hostile to ANWI's ownership interest in Lot -006. CP 3246-47 (FF: 1.31; 1.33).

- Berg did not construct or maintain any fencing or boundary markers indicating assertion of hostile and exclusive possession of the disputed property. CP 3247-48; 3251-52 (FF: 1.34, 1.35).

- The Bergs' general use of West Beach (understood to be the *only* area on Ketron Island with low lying beach access) including parking and general recreation, and use of the access Driveways was consistent with and similar to the use of everyone who owned property on Ketron Island. Prior to 2018, ANWI and its predecessors in interest welcomed all who owned property on Ketron Island and their guests to access and use West Beach uninhibited for gatherings, barbeques, fishing, camping and vehicle property. Any person with connections to Ketron Islanders had historically been permitted and encouraged by the owners of Lot -006 to enjoy West Beach without any overt permission as a neighborly accommodation. CP 3248 (FF: 1.36 - 1.39)

## B. The Opinion Does Not Conflict With Any Decisions in Either This Court or the Courts of Appeal. The Trial Court did not Consider Settlement Negotiations as Evidence in Determining the Amount of Attorney Fees to Award ANWI.

At the end of this bench trial, both parties sought their attorney fees and costs. CP 3255-56 (FOF 2.14). The court exercised its discretion and determined that ANWI was the substantially prevailing party and would be entitled to its fees but that the amount of those fees would be determined at a later date due, in part, to the need for the parties to submit briefing and argument about the amount of the fees. *Id*. Five months later, after the parties had worked on the language describing the new boundary line and new legal descriptions for the properties[8], and submitted briefing on the fees issue, the trial court entered Findings of Fact and Conclusions of Law on ANWI's fee petition. CP 4288-4295.

[8] This process took over three months to complete, from January 21, 2022 through April 7, 2022. CP 3396-3614.

As part of its fee petition, ANWI submitted a supporting declaration that included substantive settlement discussions. CP 3644-3947. The trial court granted the Bergs' motion to strike (CP 3998-4005) those portions of the ANWI declaration that included substantive settlement discussions as inadmissible under ER 408 and refused to consider such evidence in fixing the amount of ANWI's fee award. The trial court explained that, under ER 408, it could not consider the content or nature of specific settlement communications in ruling on ANWI's fee petition. RP (4/29/22) 32:5-17; RP (6/3/22) 17:5-10; 16:8-18 ("….the content of the settlement discussion, that was not considered by the Court….") *Id.* 17:5-7; CP 4294.

Despite this background, the Bergs persist in claiming that the trial court considered the stricken settlement discussions in determining whether ANWI was *entitled* to fees – which is patently false since the trial court had determined that ANWI was entitled to its fees five months before ANWI submitted its declaration in support of fees. The Bergs also

continue to insist that even where the trial court granted their motion to strike the offending portions of the ANWI declaration, the trial court disregarded its own order and considered the offending portions of the declaration when determining the amount of fees to award ANWI. It did not.

Further, even though Issue A is not supported by any evidence, the Bergs also assert, without basis, that the Opinion is contrary to *Humphrey Industries, Ltd. v. Clay Street Associates, LLC*, 170 Wn.2d 495, 242 P.3d 846 (2010) and *Ewing v. Glogowski*, 198 Wn. App. 515, 394 P.3d 418 (2017). It is not.

This case is nothing like *Humphrey* where the trial court there determined which party was liable for fees (*i.e.*, the entitlement to fees) expressly based, in part, on settlement conduct: a specific finding of fact that the plaintiff had rejected a pretrial settlement offer and a CR 68 Offer of Judgment. *Id*. at 508. Here, the trial court did ***not*** determine that ANWI was the prevailing party and would be awarded its attorney fees and

did not fix the amount of ANWI's fee award based on ***any*** substantive settlement negotiations or conduct. Instead, months after determining that ANWI was the prevailing party and would be entitled to its fees, as part of determining the amount of fees to award, the trial court considered "the time, effort, and resources expended in making [settlement] offers in an attempt to resolve this case." This is permissible under the "other purpose" of ER 408.

Likewise, the present case is nothing like *Ewing* where the trial court considered unreasonable conduct during the settlement negotiations to reduce the fee award. In other words, settlement conduct in *Ewing* was considered by that trial court to determine eligibility for fees. Here, the trial court struck the evidence of conduct during settlement negotiations on the Bergs' motion.

The Opinion correctly applied the law set forth in *Humphrey*, *Ewing*, and ER 408. Review is not warranted on Issue A.

### C. The Opinion Accurately Applies RCW 7.28.083. The Bergs' Argument to the Contrary Requires a Strained Interpretation of RCW 7.28.083 and Ignores both the Scope of Their Claims Against ANWI and the Extent of Relief Afforded to ANWI.

The Bergs argue that they acquired "superior title" and are therefore entitled to be deemed the prevailing party under RCW 7.28.083; and further, that any other conclusion is contrary to that statute. This argument is incorrect and does not support review for two reasons.

First, the Bergs refuse to acknowledge that the term "prevailing party" is not defined in RCW 7.28.083 or anywhere else in the adverse possession statute. Instead, the Bergs have created their own so-called "superior title" definition under which they are the prevailing party as a matter of law because they acquired title to some portions of Lot -006—***despite the fact*** that ANWI *prevailed* in quieting title to the ***entirety*** of West Beach and the Driveways. *See* fn. 4, *supra*, re scope of relief obtained by Bergs. In making this argument, the Bergs misstate isolated portions of RCW 7.28.083(1), RCW 7.28.120,

and *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968), and read into the statute a strained definition of "prevailing party" that simply does not exist. Notably, neither the *Finch* case, nor RCW 7.28.120 were ever litigated—or mentioned—below. Moreover, nothing in *Finch*, .083(1), or .120 sets forth a definition or standard to determine the prevailing party for purposes of awarding fees under .083(3) where *both* parties prevail to some extent.[9]

RCW 7.28.120 sets forth how to plead a case for quiet title and ejectment and establishes that in such a case, superior title, whether legal or equitable, prevails. It says nothing about how to determine, where two parties partially prevail on their competing quiet title actions, which of the two is the prevailing party for purposes of a fee award under .083(3). Likewise, the Bergs misleadingly suggest the facts and holding of *Finch*

[9] As explained below, this is precisely why the Court of Appeals concluded that the "substantially prevailing party" framework, which is consistent with the *Workman* case, was appropriate to apply in this case.

(which, tellingly, the Bergs do not even bother to articulate), support their position. To the contrary, *Finch* has nothing to do with the determination of the prevailing party under such circumstances. Rather, *Finch* stands for the proposition that equitable title alone can establish a sufficient interest to maintain and prevail in a quiet title action. *Finch*, 74 Wn.2d at 167 (affirming judgment quieting title in plaintiff where "the overwhelming equities" led court to conclude city must be estopped from asserting a claim that its title was superior to plaintiff's).

Nor is RCW 7.28.083(1) a legislative definition of the term "prevailing party." The Bergs have not cited any case that interprets .083(1) to mean that the Bergs are automatically entitled to prevailing party status for purposes of .083(3) because they acquired title to a portion of Lot -006. A crucial tenet of statutory interpretation is that courts must avoid interpreting a statute that would lead to absurd results. *Hum. Rights Comm'n v. Hous. Auth of City of Seattle*, 21 Wn. App,

2d 978, 985, 509 P.3d 319 (2022). The Court of Appeals rejected the Berg's statutory construction arguments for, among other things, that exact reason, as noted *supra,* fn. 3.

Because the plain language of the adverse possession statute does not define "prevailing party," the Court of Appeals properly applied the "substantially prevailing" framework to RCW 7.28.083(3). Indeed, *Emerick v. Cardiac Study Ctr., Inc., P.S.*, 189 Wn. App. 711, 732, 357 P.3d 696 (2015). When neither party wholly prevails (as was the case here), the determination of who is a prevailing party depends on who is the substantially prevailing party, which requires an evaluation of "the extent of the relief afforded the parties." *Id*. The Bergs' argument in support of review is fatally flawed because it ignores "the extent of the relief afforded to"[10] ANWI and the resulting fact that the Bergs were, as the Court of Appeals recognized, largely unsuccessful (like the adverse possession

[10] *Emerick v. Cardiac Study Ctr., Inc., P.S., 189 Wn. App. 711, 732, 357 P.3d 696 (2015).*

claimant in *Workman*) with respect to their adverse possession and interrelated prescriptive easement, trespass, and nuisance claims. RP (4/29/22) 25-26; 28-29; Opinion 22-23.

While the Bergs successfully acquired title to *a portion* of Lot -006, they were unsuccessful in their attempt to acquire title by adverse possession, by the trial, to additional *significant portions* of West Beach that stretched far beyond the densely wooded area surrounding their cabin. At the hearing on ANWI's fee petition, the trial court considered that although the Bergs acquired some portion of land beyond their cabin (mostly thick, dense and unusable vegetation), such was not the primary focus of the case, and not of particular import in evaluating the

extent of the relief afforded the parties at trial.[11] *See* fn. 4, *supra*.

On the other hand, ANWI was largely successful in defending against the Bergs claims. It ultimately defeated each and every claim the Bergs presented at trial, and successfully ejected the Bergs from all of West Beach and the Driveways. Had the Bergs prevailed, ANWI would have lost title to half of West Beach and the Bergs would have had prescriptive easement rights in the Driveways and over the entirety of West Beach, "a substantial loss of valuable property." *Workman*, 6 Wn.App.2d at 307. The Court of Appeals correctly affirmed the trial court's conclusion that ANWI was the prevailing party for purposes of awarding fees under RCW 7.28.083.

[11] In addition, the trial court properly considered the partial relief obtained by Berg and, for that reason, reduced ANWI's presumptive Lodestar figure accordingly. This is precisely what was affirmed in *Workman*, 6 Wn.App.2d at 307 (considering non-prevailing party's partial relief on his adverse possession claim and reducing prevailing party's fee award accordingly).

### D. The Opinion is not Contrary to *Workman* or any Other Washington Case Determining the Prevailing Party Where the Claims of Prescriptive Easements are Inextricably Linked to Adverse Possession Claims.

The Bergs suggest that because they acquired the cabin and surrounding curtilage, they were awarded "a substantial gain of valuable property" and under *Workman*, the Bergs should have prevailed. Again, the Bergs ignore that while both parties prevailed to some extent,

> . . . the Bergs failed to acquire large portions of Lot 006 that they claimed. Specifically, the Bergs sought a large portion of West Beach, including the footpaths and the footbridge, which they failed to acquire. The Bergs also sought a large portion of Lot 006 east of the cabin driveway, which they failed to acquire. Finally, the Bergs also claimed prescriptive easements for use of the footpaths, footbridge, cabin driveway, North and South Driveways, shoreline, and parking on West Beach, all of which they failed to acquire.

Opinion at 23.

The Court of Appeals correctly affirmed that ANWI substantially prevailed. The Opinion is entirely consistent with *Workman*—a case where an adverse possession claimant acquired title to property, and yet was still deemed the non-

prevailing party[12]—and other Washington law that compels the conclusion that ANWI was entitled to an award of fees incurred defending against the Bergs' adverse possession claims *and* the other closely related, and inextricably linked claims, including the Bergs' prescriptive easement claims. *Southwest Suburban Sewer District v. Fish*, 17 Wn. App. 2d 833, 488 P.3d 839 (2021) (upholding fee award under RCW 7.28.083(3) where party claimed both adverse possession and prescriptive easement); *Martin v. Orvold*, 16 Wn.App. 2d 1065 (2021) (Unreported, persuasive authority per GR 14.1) (affirming award of fees under RCW 7.28.083(3) for adverse possession claim and related claims for which there was no express grant of fees given claims relied on same common core of facts and same evidence).

[12] *Workman*, 6 Wn.App.2d at 305-307.

## E. The Opinion is Entirely Consistent With Washington Cases Analyzing Prescriptive Easement Claims. The Bergs Argument to the Contrary Again Ignores the Unchallenged Findings of Fact.

The Bergs discuss their claims for prescriptive easement as though it was a single claim covering a single portion of the property at issue. It was not. The Court of Appeals correctly concluded that the Bergs did not meet their burden of proving the "open and hostile" use element for the large majority of the property for which they claimed a prescriptive easement.

The Bergs alleged claims for prescriptive easements over a large portion of ANWI's land: the North and South Driveways, the footbridge, the West Beach footpaths, the West Beach parking near the footbridge, the "tidelands and shoreline," and the *small* portion of the cabin driveway that intersects with the South Driveway that the Bergs did not acquire via concession by ANWI. Opinion 12. The Court of Appeals correctly concluded that ANWI's concession as to parts of the cabin driveway and the footbridge means only that the Bergs were relieved of their burden of proving "open and

hostile" use as to that small portion of the cabin driveway and based on the evidence, that the Bergs did not meet their burden of proving the "open and hostile" use element on their much larger land claims. *See* CP 3252, FOF 2.5: "Thus, defendants did not establish a right to a prescriptive easement in any of the subject property as the evidence failed to establish their use was adverse." This finding is a verity and the Bergs' attempt to raise an issue by citing to testimony from the trial should be rejected.

Moreover, the Bergs do not explain how the Opinion is inconsistent with *Gamboa v. Clark*, 183 Wn.2d 38, 348 P.3d 1214 (2015). On the contrary, the Opinion is entirely consistent with the holding in *Gamboa* that where the use arises from mutual neighborly acquiescence, as it did here, the use is "permissive in its inception" which creates a higher burden on the Bergs. *Gamboa* , 183 Wn.2d at 45.

The Opinion correctly concluded, as did the trial court, that the Bergs failed to overcome this higher burden as to the

North and South driveways, the West Beach parking, the West Beach footpaths and the West Beach shoreline and tidelands. As to the cabin driveway and the footbridge, because these are unenclosed land and because the character of the Bergs' use was variable and not continuous, the Bergs failed to meet their burden of proving that their use of these two areas was "open and hostile." Opinion 17-18; *see also* CP 3247-48 (FF: 1.31; and 1.33 - 1.39). Review is not warranted for this fact-specific allegation which, in any event, is wrong.

### F. The Court Should Disregard the "Graphic" Improperly Introduced in the Petition for Review.

The Bergs have inserted what they call a "graphic" into their Petition for Review at p. 9. There is no record citation for this graphic because it was not part of the record at trial, nor was it part of the record on review. It appears to have been created for purposes of supporting the Bergs' Petition for Review. Even if it had been part of the trial court record, which it was not, the Bergs did not seek to supplement the record in this Court pursuant to RAP 9.11. Nor does the "graphic" fit the

criteria for this Court to take judicial notice under ER 201. ANWI requests that the Court disregard the graphic and any reference to it and any argument based upon it in the Petition for Review.

## VI. ANWI REQUESTS FEES FOR ANSWERING THE BERGS' PETITION FOR REVIEW

Pursuant to RAP 18.1(a) and (j), ANWI respectfully requests the Court exercise its discretion and award ANWI its reasonable attorneys' fees and costs in answering this Petition. A prevailing party is entitled to attorneys' fees and costs in responding to a petition for review if requested in the party's answer and if "applicable law grants to a party the right to recovery." RAP 18.1(a) and (j). RCW 7.28.083(3) provides the basis for awarding fees to ANWI.

Should the Court grant ANWI's request, ANWI will file an affidavit detailing the fees and costs incurred. RAP 18.1(d).

## VII. CONCLUSION

Respondent ANWI respectfully requests that the Court deny review and award it its fees for responding to the petition.

This document contains 4,832 words, excluding the parts exempted from the word count by RAP 18.17.

Respectfully submitted this 27th day of June, 2024.

CARNEY BADLEY SPELLMAN, P.S.

By */s/ Linda B. Clapham*

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## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ E-file and e-serve, to the following:

| | |
|---|---|
| ***Attorneys for Appellants***<br>Ryan D. Poole, WSBA # 39848<br>SMITH KNOWLES P.C.<br>2225 Washington Blvd., Suite 200<br>Ogden, Utah 84401<br>rpoole@smithknowles.com | ***Attorneys for Appellants***<br>Ann T. Wilson, WSBA # 18213<br>LAW OFFICES OF ANN T. WILSON<br>1420 5th Ave Ste 3000<br>Seattle WA 98101-2393<br>ann@atwlegal.com |

DATED this 27th day of June, 2024.

S/ Allie M. Keihn
Allie M. Keihn, Legal Assistant

# CARNEY BADLEY SPELLMAN

## June 27, 2024 - 2:50 PM

## Transmittal Information

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|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 103,120-3 |
| **Appellate Court Case Title:** | Alaska NW Industries, Inc., et al. v. Ann R. Deutscher, et al. |
| **Superior Court Case Number:** | 20-2-06634-1 |

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