No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 56633-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

RANDY BERG and ANN DEUTSCHER-BERG,

Petitioners,

v.

ALASKA NORTHWEST INDUSTRIES, INC., *et al.*,

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

The petitioners are Ann Deutscher-Berg and Randy Berg ("the Bergs"), appellants in the Court of Appeals.

II. COURT OF APPEALS DECISION

Petitioners seek review of the Court of Appeals' unpublished decision – *Alaska Nw. Indus. Inc. v. Deutscher*, No. 56633-8-II, 2024 WL 799638 (Wash. Ct. App. Feb. 27, 2024). The Court of Appeals affirmed the trial court's decision that the party with ***superior*** title was *not* the prevailing party under Chapter 7.28 RCW and awarding attorney fees to Respondents (hereinafter "ANWI") based on evidence of settlement negotiations; citations in this petition are to the opinion as attached in Appendix A. The Court of Appeals denied Petitioners' timely motion for reconsideration, and their motion to publish, on April 26, 2024. (App. B)

III. ISSUES PRESENTED FOR REVIEW

A. Whether it was error to consider settlement negotiations as evidence to establish liability for, and the amount of, attorneys' fees contrary to this Court's established precedent.

B. Whether under Chapter 7.28 RCW, as a matter of law, a party having superior title should be the prevailing party.

C. Whether it was error to deny prescriptive easement claims even though all elements were, as a matter of law, established.

IV. STATEMENT OF THE CASE

This case involves competing claims to title and use of real property on Ketron Island. The Court of Appeals' *Opinion* affirmed the trial court's award of $425,000.00 to ANWI – and approved the trial court's consideration of settlement negotiations as evidence for the liability and the amount thereof, and awarded attorneys' fees on appeal with respect to the attorneys' fees issue only (with ANWI requesting approximately $125,000.00 for appellate fees). *Opinion*, pp. 8, 23, 26-27.

ANWI filed their First Amended Complaint ("FAC") on June 24, 2020. ANWI alleged:

- "Plaintiff owns and holds title to real property on Ketron Island[, and the] property at issue ("Premises 1")[1] fronts the water, is on the northwest side of Ketron Island

[1] "Premises 1" is the subject ANWI property referenced by the Court of Appeals, and the trial court, as "Lot 006," and herein the reference to "Lot -006" is synonymous with "Premises 1."

on Morris Boulevard and has the following parcel identification number, 0119021006." CP 5-8 (¶ 1).

- ANWI further alleged, "[f]or a period of less than 10 years, Defendants have periodically trespassed upon the southern portion of Plaintiff's Premises 1. Among other things, Defendants periodically occupy a cabin on Premises 1, periodically drive upon Premises 1, periodically tear out and/or trim greenery on Premises 1[.]" *Id*. (¶ 5).

- ANWI "demand[ed] [Deutscher-Berg] to cease trespassing upon Premises 1." *Id*. (¶ 6). ANWI alleged they "own[]/hold[] title to Premises 1" in support of their ejectment claim. *Id*. (¶ 8).

- ANWI claimed entitlement to injunctive relief "requiring Defendants to keep off Premises 1." *Id*. (¶ 15).

The Bergs' Answer and Counterclaims (and affirmative defenses) were filed July 21, 2020, asserting among other things adverse possession and prescriptive easement claims. CP 9-48. ANWI, in its Answer to the Bergs' Counterclaims regarding adverse possession, "[d]en[ied] that any part of Premises 1 is possessed and owned by, and with title held by the Defendants [sic] property." CP 213 (emphasis added). In other words, ANWI denied any and all allegations and claims of adverse possession by the Bergs. CP 211-19. Over a year later, and after extensive discovery, ANWI filed a Second Amended Complaint

("SAC") on September 16, 2021. CP 1421-26. ANWI's SAC restated and persisted in claiming that the Bergs had *no* property interest in *any* part of Lot -006. ANWI never amended any of its claims regarding adverse possession in its pleadings. *Id*.

ANWI asserted in sworn statements and testimony that they owned the entirety of Lot -006, continuing to do so consistently in the fall of 2021 and until trial. CP 818-22 (¶ 5, 6, 9-11, and 18) (claiming the entirety of "Lot 006," including the "small cabin/shack also," and that the Bergs were "squatting" in the subject cabin, and that permission had not been granted); *see also* CP 1850-2015, and 2089-2175 (*Deposition Transcript of Tiffany Lundgren*, October 15 and 19, 2021, p. 49, ll. 24-25, p. 50, ll. 1-14, p. 91, l. 25, p. 92, ll. 1-19, p. 146, ll. 18-25, p. 183, ll. 24-25, p. 184, p. 202, ll. 22-25, and p. 203, ll. 1-9) (testimony asserting that ANWI held title to the entirety of Lot -006).

Almost a year into the litigation, Tiffany Lundgren, in her *personal* capacity, stated "Plaintiffs do not dispute that Defendants have adversely possessed the cabin." CP 819. Despite this one mention of the cabin only, ANWI never

amended its pleadings or walked-back any claims in the FAC and the SAC until after trial commenced.

In September 2021, the Bergs were successful in obtaining summary judgment securing title to the cabin itself by way of adverse possession. CP 1454-59; RP 147 (Trial Transcript, Volume 2, December 9, 2021) ("[T]he cabin, yes, that's resolved by summary judgement[sic]."); RP 12-13 (Hearing Transcript, Volume 2, September 24, 2021) ("As pertains to the cabin at issue in this matter on the claim of plat titled adverse possession under Chapter 7.28 RCW, [the Bergs have] prevailed.").

The trial court explicitly declined to resolve title to anything beyond the cabin *itself* on summary judgment. CP 1454-59; RP 11, 15-16 (Hearing Transcript, Volume 2, September 24, 2021) (The Bergs acquired title to the cabin by adverse possession on summary judgment, "[e]verything else is yet to be determined."). The trial court's own words were that the Bergs "have **prevailed** as far as the Court's concerned" on the adverse possession claim for the cabin. RP 43 (Hearing

Transcript, September 10, 2021 at ll. 6-7, 18-19), emphasis added.

ANWI even expressly asserted in their Trial Brief that "[a]side from the cabin itself, Defendants' adverse possession claim fails." CP 1713, 1722 (p. 3, ll. 15-18, 21-23; p. 12, ll. 17-18), emphasis added. ANWI's Trial Brief continued to assert the Bergs did not have use of the cabin property and adjoining, existing roadways for ten (10) years, and that their use was not open and notorious – fact elements only finally ***conceded at trial*** by ANWI. CP 1720, -22 (p. 10, ll. 17-18; p. 12, ll. 1-17).

On the second day of trial, ANWI's counsel finally made the first unequivocal statement conceding that the Bergs acquired title by adverse possession to some portion of land beyond the walls of the cabin. RP 146-49 (Trial Transcript, Volume 2, December 9, 2021).

The cabin was taxed as part of the Bergs' Lot -002,[2] with its size as 2.39 acres, by Pierce County since at least 1945.

[2] The Court of Appeals, and the trial court, referred to the Bergs' subject parcel as "Lot 002," and herein the Bergs' subject parcel is referred to as "Lot -002."

Exhibit 394. The size of the recorded description of the Bergs' Lot -002 is roughly 54,000 square feet, or just over 1.0 acre – as opposed to the taxed parcel size of 2.39. Exhibit 335; Exhibit 400. The cabin remained on the Pierce County tax rolls as part of the Bergs' Lot -002 for decades until ANWI made false representations to Pierce County to move the cabin improvement onto the tax roll for Lot -006 in 2020 – a day before ANWI filed suit. Exhibit 56.

ANWI conceded all elements of prescriptive easement except whether the use was legally hostile. RP 152-158 (Trial Transcript, Volume 3, December 9, 2021). However, ANWI did concede the facts associated with the Bergs' use being hostile for their simultaneous acquisition of title via adverse possession.

After ferry service to Ketron Island began in 1961, roadway access was used by the Bergs' predecessors-in-interest for passenger vehicles to get to the Bergs' Lot -002 and the cabin. The final approach always and only used by the Bergs and their predecessors for driving a passenger car to the subject cabin was

on both the "North Driveway" and "South Driveway" across Lot -006. Exhibit 400; Exhibit 336.

Concurrent with their adverse possession of the cabin and surrounding property out of Lot -006, the Bergs used the footbridge they constructed north of the cabin and did so for ingress and egress to the cabin from where they parked just north of the footbridge, and for accessing the footpath they customarily used to go to and from the beach, tidelands and shoreline. *Id*.; Exhibit 329. Despite law and conceded facts to the contrary, the Court of Appeals' *Opinion* affirmed the trial court's denial of the Bergs prescriptive easement claims. *Opinion*, pp. 12-18.

On the graphic below the red boundary and green angled line-area depict the boundary of title acquired by the Bergs from out of Lot -006. The blue "stick-person" is at the location of the footbridge built by the Bergs. The blue "car" is at the location of the "cabin Driveway."

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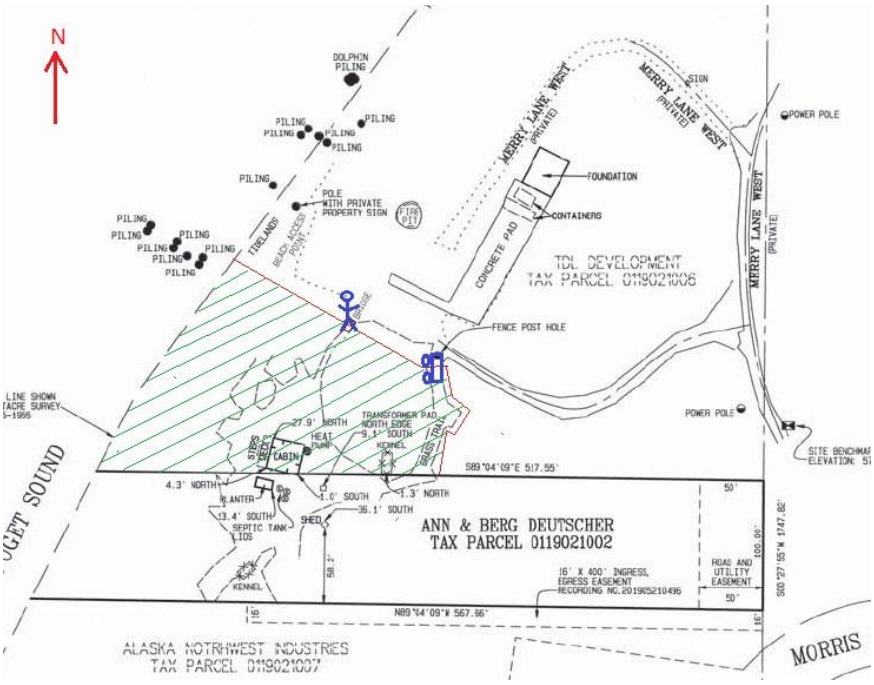

The Court of Appeals' *Opinion* splits the simultaneous use in these locations despite the facts admitted by ANWI that the use was hostile.

Based on their superior title, the trial court's judgment *awarded the Bergs* no less than approximately .75 acres (roughly 33,000 square feet, with 200 feet of waterfront) from out of Lot -006 by way of adverse possession. CP 3246 (at 1.30); Exhibit 400. This was a significant increase over the original size of the Bergs' Lot -002 being roughly 54,000 square feet, or just over 1.0 acre in size as recorded. Exhibit 335; Exhibit 400.

The award of title to property out of Lot -006 more than

doubled the Bergs' waterfront and approached a doubling of their title acreage. Despite this significant acquisition of property (both in size and value) by the Bergs because of *superior* title, the Court of Appeals' *Opinion* affirmed the trial court determination that ANWI prevailed under Chapter 7.28 RCW. CP 3255-56; *Opinion*, pp. 20-23.

V. WHY THIS COURT SHOULD GRANT REVIEW

Review should be accepted here because the Court of Appeals' *Opinion* clearly conflicts with decisions of this Court, decisions of the Court of Appeals, and presents issues of substantial public interest this Court should decide. *In re Coats*, 173 Wn.2d 123, 132–33 (2011); RAP 13.4.

A. The Court of Appeals' *Opinion* Conflicts With This Court's Decisions Regarding Consideration of Settlement Communication as Evidence, Is an Issue of Substantial Public Interest, and Caused a Denial of Due Process. (RAP 13.4(b)(1), (3) and (4))

The Court of Appeals' *Opinion* affirming consideration of settlement and negotiation communications in determining liability for attorneys' fees conflicts with this Court's decisions. CP 4289, 4293; RP 28 (Hearing Transcript, April 29, 2022).

Under Chapter 7.07 RCW and ER 408, settlement communications should not be considered in any respect in determining any part of a party's liability for attorneys' fees. *Svea Fire & Life Ins. Co. v. Spokane, P. & S. Ry. Co.*, 175 Wn. 622, 627 (1933). It contradicts this Court's decisions to consider these communications in any way as evidence in deciding liability for attorneys' fees or the amount of an award:

> *Reversal of the attorney fee award . . . is also warranted. . . . Evidence of conduct in settlement negotiations, however, is inadmissible to prove liability for or invalidity of the claim or its amount.*

Humphrey Indus., Ltd. v. Clay St. Assocs., LLC, 170 Wn.2d 495, 507–08 (2010), emphasis added. The Court of Appeals has also affirmed the same standard:

> *Evidence of conduct or statements made in negotiations is not admissible to prove the validity of the claim or its amount. ER 408. [A Party's]* ***settlement conduct is not admissible****, so the trial court did not abuse its discretion by not factoring it into the lodestar calculation.*

Ewing v. Glogowski, 198 Wn. App. 515, 522–23 (2017), (emphasis added); and see *State Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 751 (2012) (trial court did not err in striking declaration exhibit purporting to show rejection of

settlement counter-proposal because it "was inadmissible under ER 408").

This Court in *Humphrey* left no doubt that in determining liability for, or the amount of, attorneys' fees, "[e]vidence of conduct in settlement negotiations, however, is inadmissible to prove liability for or invalidity of the claim or its amount." In *Humphrey* the court clearly held that evidence relating to settlement conduct or statements was inadmissible for any purpose in determining liability for, or the amount of, an award of attorneys' fees. 170 Wn.2d at 507-09. The failure to follow controlling legal authority is clear error. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578 (2006).

Where an opposing party and their counsel intentionally disclose the settlement communications they believe favor them, the ability to prevent disclosure is lost. The Bergs did not contradict the false and misleading statements presented by ANWI because it would have required them to submit information which is not allowed to be disclosed under Chapter 7.07 RCW, ER 408 and the parties' agreement to keep settlement

communications confidential. Recourse against the party violating the privilege, related prohibitions and protections is limited. Here the trial court provided no recourse, and instead admitted and considered the one-sided settlement information in support of the attorneys' fees awarded to ANWI.

The trial court struck and sealed an inadmissible *Declaration* by ANWIs' counsel filed April 28, 2021 in an *Order Granting Motion to Strike*, entered May 19, 2021, because it wrongfully included information about settlement negotiations. Nonetheless, the trial court in post-trial proceedings (in front of a different judge than the one that entered the May 19, 2021 *Order*) directly contradicted this earlier *Order* by considering settlement and negotiation communications – even worse, they were considered as part of determining liability for, and the amount of, an award of attorneys' fees.

In the alternative, even if settlement negotiations are admissible, then it is a clear violation of due process for only one party to be able to present a biased, one-sided version of settlement negotiations without the opposing party having any

opportunity to respond. The Bergs could not both challenge the inclusion of settlement negotiations, maintain the protections associated with those protected communications, and litigate the issue with submission of their own countervailing information. Thus, they were denied due process in contravention of Article I, section 3 of the Washington Constitution – "[n]o person shall be deprived of life, liberty, or property, without due process of law." *Yim v. City of Seattle*, 194 Wn.2d 682, 688–89 (2019).

B. The Court of Appeals' *Opinion* Conflicts with the Decisions of this Court Regarding Statutory Interpretation and Construction, and Disregards Separation of Powers. (RAP 13.4(b)(1), (3) and (4))

The Court of Appeals' *Opinion* conflicts with the decisions of this Court and contradicts the intent of the Legislature. This Court has made clear there is a "vital separation of powers doctrine." *Brown v. Owen*, 165 Wn.2d 706, 718 (2009). Courts must give effect to the plain meaning of a statute as an expression of legislative intent, and carry out that intent. *Jametsky v. Olsen*, 179 Wn.2d 756, 762 (2014); *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 393 (2014) (a statute must be considered "within the context of the entire

statutory scheme"). It is also an abuse of discretion to award fees based on untenable grounds. *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 538 (2007).

The Court of Appeals should not have added language or otherwise rewritten an unambiguous statute, even if it disliked the statutory language or its necessary effect. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201 (2006); . A "court must not add words where the legislature has chosen not to include them[,]" and must also construe statutes in a manner giving effect to all language and ensure no portion is rendered meaningless or superfluous. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682 (2003). A court must pay "particular attention to the legislative purpose behind attorney fee provisions." *Guillen v. Contreras*, 169 Wn.2d 769, 777 (2010).

Here, the Court of Appeals' *Opinion* ignores plain, controlling language, and reads language into Chapter 7.28 RCW. RCW 7.28.083 must be read consistent with the ***entirety*** of Chapter 7.28 RCW. An adverse possession claim is provided under RCW 7.28.010, whereby the party with superior title may

have judgment in such action awarding possession and ownership.

RCW 7.28.120 provides that the "superior title … ***shall prevail***." *Finch v. Matthews*, 74 Wn.2d 161, 166 (1968), emphasis added. The Bergs established the superior title and "shall prevail." The Court of Appeals' *Opinion* conflicts with this Court's holding in *Finch*, and the plain language of the statute.

The Court of Appeals' *Opinion* also fails to account for the language of RCW 7.28.083(1) which also contains language informing what "prevail" means: "[a] party who ***prevails*** *against the holder of record title* ***at the time*** *an action asserting title to real property by adverse possession* ***was filed***, …, may be required to" reimburse the title holder and pay taxes. The Bergs acquired title from the record title holder, ANWI, as measured by the record title "at the time" the action "was filed" by ANWI; thus, the Bergs should have prevailed as a matter of law, and it contravened the statute to conclude otherwise.

RCW 7.28.083(2), which is not mentioned in the Court's *Opinion*, references subpart (1) and thus connects "prevails" with the party that "acquired by adverse possession" property from out of the "property retained by the titleholder." Subpart (2) of this statutory framework reinforces and further establishes the intent of the Legislature to have the prevailing party determined by whether a party acquired title or lost title to anything more than a nominal amount of real property.

The Legislature's intent, and the language of the statute, leads to a predictable and objective method for determining a prevailing party. The outcome of any other claims (*e.g.*, prescriptive easement) outside of title claims cannot be used to answer the "shall prevail," "prevails" and "prevailing party" issue under Chapter 7.28 RCW. *See* RCW 7.28.010, .120 and .083. The Court of Appeals' *Opinion* contravenes the statute and conflicts with this Court's decisions.

Moreover, the Legislature did <u>not</u> use the term "substantially" in conjunction with the term "prevail," "prevails" or "prevailing party" in Chapter 7.28 RCW. Reading

"substantially" into RCW 7.28.083(3) conflicts with this Court's decisions and is improper based on the plain language in RCW 7.28.120 and RCW 7.28.083(1) and (2). The statutory scheme, and proper deference to Legislative intent, prohibits the proportional analysis created by the Court of Appeals.

Had the Legislature intended for a proportional, "substantially prevailing"-standard it would have used that term – as it has explicitly shown it will when intending for there to be a proportional standard. *See*, *e.g.*, RCW 69.50.505(6); RCW 4.84.370; RCW 7.71.035; RCW 64.35.115; RCW 9A.88.150(6). Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent. *Guillen*, 169 Wn. 2d at 776 (2010). Based on the language of Chapter 7.28 RCW, "quantitative comparison is inappropriate" when the statute does not call for "balancing the comparative success of two parties with an equal statutory interest in attorney fees[,]" especially because it does not "fit with the language of the statute." *Id*.

"The prevailing party in a lawsuit is that party in whose favor judgment is entered." *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 865 (1973); *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 706 (2000) (a prevailing party is one against whom no affirmative judgment is entered). By this standard, the Court of Appeals' *Opinion* is in obvious conflict with this Court's decisions, other decisions of the Courts of Appeals, and the plain language of the statute.

ANWI cannot be considered the prevailing party for purposes of attorneys' fees under Chapter 7.28 RCW – the only basis to award attorneys' fees in this case. The judgment in this case awarded title to the Bergs to land that ANWI sought to eject the Bergs from – and no affirmative judgment was awarded against the Bergs. *Osborn v. Grant Cnty. By & Through Grant Cnty. Comm'rs*, 130 Wn.2d 615, 630 (1996).

Consistent with fees under RCW 7.28.083 being strictly for a claim of title by adverse possession, and this being the primary issue (ejectment from ANWI's parcel, and to include the

cabin per ANWI's claims), it conflicts with the statute at issue, and existing precedent, to classify ANWI as the prevailing party.

C. The Court of Appeals' *Opinion* Conflicts With Published Decisions of the Court of Appeals Relating to Prevailing Parties and Attorneys' Fees. (RAP 13.4(b)(2))

The Court of Appeals' *Opinion* affirming the trial court award of attorneys' fees relating to *all* claims presented below conflicts with the plain language of Chapter 7.28 RCW, and decisions by the Court of Appeals.

Chapter 7.28 RCW requires that the party acquiring title under a claim for adverse possession, having superior title, ***shall*** be the prevailing party. RCW 7.28.010; RCW 7.28.120; RCW 7.28.083. By affirming the trial court, the Court of Appeals' *Opinion* is in conflict with the holding in *Workman v. Klinkenberg*, 6 Wn. App. 2d 291, 305–09 (2018). In *Workman*, the plaintiff/appellant "filed a complaint . . . alleging adverse possession, acquiescence, estoppel in pais, and common grantor doctrine, and seeking adjustment of the boundary line." *Id.* at 295. The plaintiff/appellant later amended the complaint "to add claims for a prescriptive easement and easement by estoppel

over the disputed area." *Id*. "[O]n summary judgment, the trial court summarily dismissed [plaintiff's/] claims on adverse possession (with the exception of a small area encompassed by a railroad tie planter)[.]" *Id*.

In *Workman* the plaintiff/appellant did acquire nominal title to the railroad tie "planter" by adverse possession; however, the defendant/respondent was deemed the prevailing party and awarded attorneys' fees. *Id*. "The trial court found that had [plaintiff] prevailed, 'the [defendants] would have lost seven feet of their fifty feet of water frontage, a substantial loss of valuable property.'" *Workman*, 6 Wn. App. 2d at 307. Here, the Bergs were awarded a substantial gain of valuable property and ANWI had a substantial loss of valuable property; thus, under *Workman*, the Bergs should have prevailed. The Court of Appeals' *Opinion* here reaches the opposite result – a direct conflict which should be resolved by this Court.

The Court of Appeals' *Opinion* here, finding it proper to consider prescriptive easement claims when determining the prevailing party under Chapter 7.28 RCW, is also in direct

conflict with the holding and the result in *McColl v. Anderson*, 6 Wn. App. 2d 88, 92 (2018) (fees cannot be awarded for claims not asserting title); see also *Sw. Suburban Sewer Dist. v. Fish*, 17 Wn. App.2d 833, 841 (2021). The conflict and confusion exposed here by the Court of Appeals' *Opinion*, is also reflected in a host of unpublished cases. See, *e.g.*, *Conklin v. Bentz*, 17 Wn. App.2d 1064 (2021), *Wohlleben v. Jahnsen*, 25 Wn. App.2d 1056 (2023), *Milner v. Carpenter Grp., LLC*, 14 Wn. App.2d 1063 (2020).

The Court of Appeals' *Opinion* here applying a proportionality approach to an award of fees under RCW 7.28.083 is also in conflict with the Division Three decision in *Hertz v. Riebe*, 86 Wn. App. 102, 105–06 (1997).

D. The Court of Appeals' *Opinion* Conflicts With A Decision of This Court and Decisions of the Court of Appeals Regarding Prescriptive Easement Claims. (RAP 13.4(b)(1) and (2))

The Court of Appeals' *Opinion* affirming denial of the Bergs' prescriptive easement claim is in conflict with *Gamboa v. Clark*, 183 Wn.2d 38, 51–52 (2015), because ANWI

admitted and conceded facts establishing, as a matter of law, the Bergs' use of Lot -006 was legally adverse and hostile.

A ***stipulated, conceded or admitted fact on a material element will establish the fact, satisfy the element and relieve a party's burden of proof***. *State v. Humphries*, 181 Wn.2d 708, 716 (2014). The Court of Appeals' reliance on *In re Pullman*, 167 Wn.2d 205, 212 (2009), was clearly misplaced here because ANWI conceded facts.

As a matter of law, the Bergs overcame any presumption of permissive use relating to their prescriptive easement claim because ANWI admitted the facts that the Bergs were legally hostile users of Lot -006 on the entire cabin driveway and the entire footbridge, and all other associated routes of travel. RP 379-81 (Trial Transcript, Volume 4, December 13, 2021); CP 3246 ("grant the defendants' title to the land under the short vehicular driveway that the defendants' [sic] constructed to the [sic] connect Lot 002 to the West Beach South Driveway"); RP 1072, 1082 (Trial Transcript, Volume 9, December 21, 2021); RP 770-71 (Trial Transcript, Volume 7,

December 16, 2021; RP 805-8 (Trial Transcript, Volume 7, December 16, 2021). The "cabin driveway" is the only roadway connecting to the "North Driveway" and "South Driveway," and the only access by passenger car to the cabin. *Id*.; Exhibit 400.

The Court of Appeals' *Opinion* is also in conflict with decisions from the Court of Appeals, including the following: *Lee v. Lozier*, 88 Wn. App. 176, 182 (1997); see also *Drake v. Smersh*, 122 Wn. App. 147, 155 (2004); and see *Lingvall v. Bartmess*, 97 Wn. App. 245, 252–53 (1999); and *Tiller v. Lackey*, 6 Wn. App. 2d 470 (2018); and *Kunkel v. Fisher*, 106 Wn. App. 599, 604 (2001).

The Court of Appeals' *Opinion* inexplicably fails to reconcile the facts establishing that the Bergs cannot, as a matter of law, be simultaneously a permissive user and a hostile user of Lot -006. *See* CP 3252 (at 2.3). By conceding the adverse use of the so-called "cabin driveway" and other contiguous land at trial, ANWI also conceded, as a matter of law, adverse use of the existing roadways on Lot -006

connecting to the "cabin driveway." The trial court awarded the Bergs a majority of, though inexplicably and improperly bisected, the "cabin driveway" they constructed by way of adverse possession. The use of the roadways connecting to the "cabin driveway" (which is contiguous) cannot be characterized under law as "neighborly acquiescence." *Gamboa*, 183 Wn.2d at 51; and see CP 3246, -51-52, -55-58; CP 3611-14. The facts here make this case clearly distinguishable from the facts in *Gamboa*, unlike here, the party failing to establish a prescriptive easement in that case used a contested road to get to, and then use only, their own parcel – and did not concurrently acquire title via adverse possession like the Bergs. 183 Wn.2d at 41.

Here, the Bergs used the roadways to effect the legally hostile use of Lot -006, and adverse possession. The roadways are physically connected, as are the parking and the footbridge, providing access inextricably linked to the Bergs' use of the cabin driveway and the cabin property. Notably, the adverse possession of the "cabin driveway" took place

after the Bergs acquired their subject parcel in 2002. *See*, *e.g.*, CP 3246. The unresolved dispute raised in 2002 and 2003 between the parties, and related encroachment and property use, leads to the inescapable legal conclusion that the Bergs' uses of Lot -006 were neither "welcome" nor comparable to any other party's use. CP 3248 (at 1.36, 1.37).

Thus, as a matter of law, it was error for the trial court to illogically "split" the Bergs' conduct between their adverse possession and prescriptive easement claims.

VI. CONCLUSION

This Court should accept review, and reverse the Court of Appeals and the trial court's decision.

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VII. APPENDIX

A. *Alaska Nw. Indus. Inc. v. Deutscher*, No. 56633-8-II, 2024 WL 799638 (Wash. Ct. App. Feb. 27, 2024), filed February 27, 2024;

B. *Order Denying Motion for Reconsideration and Motion to Publish*, entered April 26, 2024; and

C. Chapter 7.28 RCW.

Respectfully submitted this 28th day of May, 2024.

Pursuant to RAP 18.17(b) and (c)(10), the undersigned certifies the number of words contained in this document is 4,485, or otherwise does not exceed 5,000.

SMITH KNOWLES, P.C.

/s/Ryan D. Poole
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DECLARATION OF SERVICE

I, RYAN D. POOLE, make this declaration under penalty of perjury under the laws of the State of Washington:

1. I am over the age of 18, and competent to testify to the matters herein and have personal knowledge of the same.

2. On this 28th day of May, 2024, I caused to be served the foregoing on the individuals named below via the Washington appellate courts' portal to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of May, 2024, at Ogden, Utah.

/s/Ryan D. Poole
RYAN D. POOLE

APPENDIX

A

Filed
Washington State
Court of Appeals
Division Two

February 27, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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, Respondents/Cross-Appellants, v. ANN R. DEUTSCHER and RANDALL BERG, both individually and as a marital community, Appellants/Cross Respondents,	No. 56633-8-II UNPUBLISHED OPINION
ANN R. DEUTSCHER and RANDALL BERG, both individually and as a marital community, Appellants/Cross Respondents, v. TIFFANY LUNDGREN, individually, and RONALD SHECKLER and JEAN SHECKLER, individually and as a marital community, Respondents/Cross-Appellants.	

CHE, J. — Ann Deutscher-Berg and Randall Berg (Bergs) appeal the denial of their prescriptive easement claims and the grant of attorney fees. Alaska Northwest Industries, Inc., Gary Lundgren, TDL Development, LLC, and Alaska-Northwest Industries, Inc. (collectively, ANWI) filed a conditional cross-appeal regarding attorney fee issues.

ANWI sought to eject the Bergs from ANWI's lot on Ketron Island. The Bergs counterclaimed, arguing they had adversely possessed a large portion of ANWI's lot and acquired prescriptive easements. ANWI conceded that the Bergs adversely possessed the cabin the Bergs were occasionally residing in, as well as surrounding curtilage. After a bench trial, the trial court granted the Bergs all of the land ANWI conceded and denied the Bergs' remaining claims. The trial court determined that ANWI was the prevailing party and awarded attorney fees.

We hold (1) substantial evidence supports the finding that the Bergs constructed the cabin driveway, but to the extent that finding of fact (FOF) 1.32 could be interpreted as finding that ANWI drew a boundary line running predominately north-south to grant the Bergs the entire cabin driveway, we hold that such an interpretation is not supported by substantial evidence, (2) the Bergs failed to establish any prescriptive easements, (3) the trial court did not violate CR 54(d)(2) by considering ANWI's request to establish the amount of attorney fees, (4) the trial court properly determined that ANWI was the prevailing party, and (5) the trial court did not err in considering compromise negotiations solely to determine the amount of time ANWI expended in the settlement process. As we do not reverse on any of the attorney fee issues, we decline to consider ANWI's cross-appeal. Thus, we affirm. As ANWI prevails on appeal, we grant ANWI reasonable appellate attorney fees regarding adverse possession.[1]

[1] The Bergs did not appeal the adverse possession determination directly. But the Bergs appealed the trial court attorney fee order, which implicates the adverse possession determination below.

FACTS

I. BACKGROUND

Ketron Island is a small island located southwest of Steilacoom. ANWI owns approximately 90 parcels of real property on Ketron Island—about 70 percent of the island. The Bergs own a neighboring parcel to an ANWI parcel. ANWI seemed to own what the trial court termed Lot 006, and the Bergs owned Lot 002. Disagreements over the boundaries of those parcels gave rise to the present litigation.

Generally, Ketron Island residents used their homes sporadically, for summering or vacationing. West Beach is the only easily accessible beach on the island. Lot 006 contains the entirety of West Beach. ANWI and its predecessors in interest allowed any Ketron Island resident and their guests to use West Beach at any time without seeking overt permission.

The residents and their guests used this area for social gatherings, fishing, camping, and vehicle parking—including parking for boats, cars, and other recreational vehicles. ANWI and its predecessors in interest also allowed any resident to use the North and South Driveways to access West Beach to facilitate neighborly use of the beach. Prior to 2018, ANWI had never restricted anyone's access to the driveways.

Lot 002 is a largely rectangular plot immediately to the south of Lot 006. Lot 002 is also bordered to the east by Lot 006. There is a general access road to the east of Lot 002 known as Merry Lane. On the south end, Lot 002 is bordered by another of ANWI's parcels, Lot 007. There is a cabin that is located mostly within the boundaries of Lot 006.

There are two driveways that provide access to West Beach from Merry Lane. One of the driveways enters through the north end of the east boundary of Lot 006, which is called

North Driveway. The other enters further to the south, which is called South Driveway. Both of the driveways are entirely on Lot 006. One way to access the cabin is by traveling on the South Driveway and making a sharp left turn onto a mixed grass and gravel road. We refer to that road as the cabin driveway.

The present dispute has its roots in 1926. That year, YLA—an entity comprised of local high school alumni—acquired Lot 002. YLA built a small, rustic cabin in the 1930s, which the members used for occasional social gatherings. Importantly, YLA constructed a cabin on the northern border of Lot 002 such that most of the cabin resided on Lot 006. The Branchflower family acquired Lot 002 and the cabin in 1997 and continued to use it sparingly.

The Branchflowers sold Lot 002 and the cabin to Ann Deutscher in October 2002. In December of that year, Deutscher's lawyer sent a letter to ANWI maintaining that Ann owned the portion of Lot 006 that her cabin encroached upon. It is unclear if ANWI responded. The following year, Deutscher's lawyer sent another letter to the attorney who represented Gary Lundgren around 2002—proposing that Deutscher receive property 40 feet north of the cabin running parallel to the east-west boundary line between Lot 002 and 006, and a nonexclusive permanent easement at the southeast corner of Lot 006. Deutscher married Randall Berg in 2008.

Gary Lundgren's daughter, Tiffany Lundgren, began spending more time on the island around 2018. In August 2019, Tiffany, acting on behalf of ANWI, sent a letter to the Bergs revoking their access to use West Beach and the South and North Driveways. Contemporaneously, ANWI granted a roadway easement to the Bergs on Lot 007 to provide effective access to their parcel.

In June 2020, ANWI filed a lawsuit against the Bergs for quiet title and trespassing. ANWI sought title to the entirety of Lot 006, including the Bergs' cabin. In response, the Bergs counterclaimed for, among other things, adverse possession of the southern parts of Lot 006 and prescriptive easement.

The following year, ANWI conceded that the Bergs owned the cabin via adverse possession. The Bergs moved for partial summary judgment on their adverse possession and prescriptive easement claims, among other things. The trial court granted partial summary judgment quieting title of the cabin to the Bergs but denying their other claims.

In ANWI's trial brief, it conceded that the Bergs had acquired by adverse possession more of Lot 006, which it characterized as manicured curtilage. Specifically, ANWI conceded that the Berg's new north boundary should be just north of the tree line, and the new east boundary should be just east of the manicured curtilage—or the cabin driveway. ANWI attached an exhibit to their trial brief depicting this conceded boundary with a yellow line. That concession did not include a small portion of the cabin driveway—outside of the tree line—right before the cabin driveway intersects with the South Driveway.

The Bergs argued they were entitled, via adverse possession, to land substantially north of the tree line, including parking and a portion of West Beach, and land substantially east of the cabin driveway. The Bergs also argued that they were entitled to prescriptive easements regarding the aforementioned parking, a footbridge that the Bergs would use to access their cabin after parking on West Beach, the North and South Driveway, and footpaths from the footbridge going down to West Beach, and the cabin driveway.

We describe the trial court's factual findings relevant to the prescriptive easement issues below.[2]

A. *North and South Driveway*

The Bergs used the North and South driveways to access their cabin. The trial court found that maybe the Bergs used these driveways more than others due to the proximity of their cabin, but their use was not different from others in character.

B. *Parking on West Beach, Footbridge, Beach Pathways, and General West Beach Use*

North of the tree line on West Beach, the Bergs would park their vehicles when they stayed at the cabin. To cross through the tree line to their cabin, the Bergs would use a small footbridge running over a creek feature. The Bergs reconstructed this small footbridge when they acquired the cabin. Just north of the tree line, the Bergs would use a footpath running east to west to access West Beach and the adjacent waterfront.

Near the east-west tree line, the Bergs constructed two sections of fencing that either fell or were taken down. Neither section existed more than five years. And the trial court found the fences were not constructed or maintained in a hostile manner.

The trial court found, "Prior to 2018 [ANWI] and its predecessors in interest welcomed all those who owned property on Ketron Island and their guests to use West Beach. Such uninhibited use by nonowners of Lot 006 was open, anytime access to anywhere on West Beach." Clerk's Papers (CP) at 3248. And residents used the beach for a myriad of recreational

[2] Of note, the trial court found that "Lot 002 consists of 2.39 acres." Clerk's Papers at 3243. The Bergs used to pay taxes on 2.39 acres for Lot 002. The Bergs submitted a declaration that alleged that Lot 002 plus the land they claimed via adverse possession equals 2.39 acres in total.

activities like beach combing. Residents also parked cars and recreational vehicles on West Beach.

C. *Cabin Driveway*

The trial court found, "The segment of the yellow line that runs predominately north-south was drawn by the [ANWI] to grant the [Bergs] title to the land under the short vehicular driveway that the [Bergs'] constructed to . . . connect Lot 002 to the West Beach South Driveway." CP at 3246 (referencing CP at 1730).

Relevantly, but not contained in the findings, Thomas Palmer testified that the cabin driveway did not exist when he installed the utilities at the cabin for the Branchflowers, and the cabin driveway did not exist during the Branchflowers' ownership of the cabin. Randall Berg testified that he would apply gravel to the cabin driveway as needed. Randall also testified that it may have been six years since he last applied gravel to the cabin driveway. But Randall testified that he maintained the driveway on an annual basis by bolstering certain areas. And he would sometimes use the cabin driveway to unload his vehicle closer to the cabin.

II. RULING AND POST-TRIAL MATTERS

In January 2022, the trial court determined that the Bergs acquired only the portion of Lot 006 that ANWI conceded in their trial brief by adverse possession, but no more. The trial court determined that the Bergs' use of the North and South Driveways, the footbridge and related pathways, and parking on West Beach were permissive neighborly accommodations until 2018. The trial court denied all of the Bergs' prescriptive easement claims, including the claim related to the cabin driveway.

The trial court noted that both parties had requested attorney fees, and that it may award costs and attorney fees in both adverse possession and prescriptive easement actions. The trial court awarded attorney fees to ANWI as the prevailing party under RCW 7.28.083(3)—the amount of which was to be determined at a later date under CR 54(d). Finally, the trial court ordered the parties to cooperate and create a legal description of the new boundary.

On April 7, 2022, the trial court entered an order establishing a new boundary based on the parties' agreement. That order shows that the Bergs now own most of the cabin driveway, but not the small portion just before the cabin driveway intersects with the South Driveway.

On April 15, 2022, ANWI moved to establish the amount of the attorney fee award. In their motion, ANWI extensively discussed settlement negotiations with the Bergs. ANWI attached the Declaration of Scott Weaver in support, which included extensive documentation of the settlement negotiations. The Bergs moved to strike ANWI's motion and the related declaration for violating ER 408 and the Uniform Meditation Act, chapter 7.07 RCW. In a separate filing, the Bergs also argued that the motion to establish the amount of attorney fees was not timely under CR 54(d).

The trial court granted the motion to strike the Weaver declaration in part, found ANWI's motion timely, awarded $425,000 in attorney fees to ANWI, and considered the settlement offers "only for the purpose of considering the time, effort, and resources expended in making such offers in an attempt to resolve this case." CP at 4293-94. The trial court specified that it "did not consider facts presented in the Weaver Declaration relating to unsuccessful settlement negotiations and/or allegedly unreasonable conduct relating to settlement negotiations as such is not admissible in determining the amount of the fees requested." CP at 4290 n.1.

The Bergs appeal the trial court's prescriptive easement ruling and the grant of attorney fees. ANWI conditionally cross-appeals in the event we remand for any of the attorney fee issues.

ANALYSIS

I. ASSIGNMENTS OF ERROR

The Bergs assign error to numerous factual findings. ANWI assigns error to FOF 1.32.[3]

The trial court's findings in adverse possession cases present mixed questions of law and fact. *Harris v. Urell*, 133 Wn. App. 130, 137, 135 P.3d 530 (2006). We review the trial court's findings for substantial evidence. *Id*. Where there is enough evidence to persuade an impartial rational person of the truth of the finding, substantial evidence exists to support that finding. *Id.* If the findings are supported, we then review whether the findings support the conclusions of law. *Id*. Unchallenged findings are verities on appeal. *Id*.

Under RAP 10.3(a)(4), a party's brief should contain "[a] separate concise statement of each error a party contends was made by the trial court." Each challenged FOF requires "a separate assignment of error." RAP 10.3(g). We "will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." RAP 10.3(g). "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).

Aside from FOF 1.9, the Bergs fail to mention any findings after enumerating their assignments of error. The Bergs do not develop their argument as to any finding or explain why

[3] A respondent may properly assign error to a factual finding without having to file a cross-appeal of the underlying order. *State v. Kindsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870 (2003).

any finding is not supported by the record. For its part, ANWI assigns error to FOF 1.32. The other FOF are verities on appeal.

A. *FOF 1.9*

FOF 1.9 provides, in part, "Lot 002 consists of 2.39 acres." CP at 3243. The Bergs argue that the original size is roughly 54,000 feet, which would have been around one acre. It does not appear that the Lot 002 was originally 2.39 acres, so the finding appears unsupported. Instead, the amount of property the Bergs claimed by adverse possession was 2.39 acres.

But the significance of the error with FOF 1.9 is unclear. The Bergs do not argue that a conclusion of law is erroneous because the finding about the original lot size is unsupported, nor do the Bergs seeks reversal on this basis. And the original size of Lot 002 is not relevant to the prescriptive easement claims and attorney fee issues that the Bergs raise on appeal. Thus, this unsupported finding is not grounds for reversal.[4]

B. *FOF 1.32*

FOF 1.32, in part, provides,

> The segment of the yellow line that runs predominately north-south was drawn by [ANWI] to grant the [Bergs'] title to the land *under* the short vehicular driveway that the [Bergs] constructed to . . . connect Lot 002 to the West Beach South Driveway.

CP at 3246 (emphasis added). ANWI argues that there is not substantial evidence to show (1) the Bergs constructed this driveway, and (2) ANWI drew this yellow line to grant the Bergs this driveway.

[4] When a finding is unsupported by substantial evidence but does not ultimately affect the conclusions of law, that error does not warrant reversal. *State v. CLA Estate Servs., Inc.*, 23 Wn. App. 2d 279, 290, 515 P.3d 1012 (2022), *review denied sub nom. State v. CLA Estate Servs.*, 200 Wn.2d 1028 (2023), and *cert. denied*, 23-29, 2024 WL 71910 (U.S. Jan. 8, 2024).

First, substantial evidence supports the finding that that the Bergs constructed the cabin driveway. The Bergs point us to Palmer's testimony. Palmer testified that the cabin driveway did not exist when he installed the utilities at the cabin for the Branchflowers, and the cabin driveway did not exist during the Branchflowers' ownership of the cabin. As the Bergs were the owners following the Branchflowers, the inference is that the Bergs constructed the cabin driveway. This is sufficient.

Next, FOF 1.32 states, the yellow line was "drawn by [ANWI] to grant the [Bergs'] title to the land *under* the short vehicular driveway that the [Bergs] constructed . . ." CP at 3246 (emphasis added). Rephrased, FOF 1.32 states that ANWI drew the segment of yellow line running predominately north-south to grant the Bergs title to the land under the cabin driveway. It is unclear what the trial meant by using the term "under" in this context.

To the extent FOF 1.32 could be interpreted as ANWI drew the segment of yellow line running predominately north-south to grant the Bergs the entire cabin driveway, we agree with ANWI that such an interpretation is not supported by substantial evidence. ANWI submitted an exhibit showing the bounds of their concession. ANWI drew the yellow line to recognize the new boundary—"east of the cabin, the new boundary should be adjusted to just east of the manicured curtilage." CP at 1713. That concession does not appear include a small portion of the cabin driveway right before it intersects with the South Driveway.

Moreover, that small portion of the cabin driveway is outside of the tree line. To the extent FOF 1.32 could be interpreted as ANWI drew the segment of yellow line running predominately north-south to grant the Bergs the entire cabin driveway, we hold that substantial

evidence does not support that FOF. Rather, ANWI drew the yellow line to define the scope of its concession.[5]

II. PRESCRIPTIVE EASEMENTS

The Bergs argue that the trial court erred by determining that the hostile use element of their prescriptive easement claims was not established as to the North and South Driveways, the footbridge, the West Beach footpaths, the West Beach parking near the footbridge, the "tidelands and shoreline,"[6] and the small portion of the cabin driveway that intersects with the South Driveway that they did not acquire via concession. Br. of Appellants at 18. We disagree.

Prescriptive easements are not favored by law. *Gamboa v. Clark*, 183 Wn.2d 38, 43, 348 P.3d 1214 (2015).

> To establish a prescriptive easement, the person claiming the easement must use another person's land for a period of 10 years and show that (1) he or she used the land in an "open" and "notorious" manner, (2) the use was "continuous" or "uninterrupted," (3) the use occurred over "a uniform route," (4) the use was "adverse" to the landowner, and (5) the use occurred "with the knowledge of such owner at a time when he was able in law to assert and enforce his rights."

Id. (quoting *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 85, 123 P.2d 771 (1942)). The party asserting the prescriptive easement bears the burden of establishing the elements. *Id*.

Adverse use generally means the land use occurred without the owner's permission. *Id*. at 44. But we presume that someone enters another's land with the owner's permission in three

[5] While we agree with ANWI on this part of their substantial evidence argument as to FOF 1.32, we note that ANWI is not seeking affirmative relief. As such, the error in FOF 1.32 is not grounds for reversal—but a fact we consider while engaging in our analysis of the other issues.

[6] The Bergs argue on appeal that they established a prescriptive easement as to "tidelands and shoreline." Br. of Appellant at 17-18. The Bergs don't define what they are referencing in other portions of their brief. We construe this claim as arguing for a prescriptive easement for general access to areas near the shore on West Beach.

circumstances: (1) cases involving unenclosed land, (2) when one can reasonably infer that the land use was permitted by neighborly acquiescence, or (3) when the owner created or maintained a road that their neighbor used in a noninterfering manner. *Id.*

It is a low bar to establish a reasonable inference of neighborly acquiescence. *Id.* at 51. It may occur when the claimant uses a private footpath through the neighbor-owner's beachfront property without express permission in conjunction with the owner and others and without incident. *Id.*

In *Gamboa*, the Gamboas used their neighbors' road as a driveway to access their home. *Id.* In contrast, their neighbors used the road to farm grapes. *Id.* Our Supreme Court held that there was a reasonable inference of neighborly acquiescence as the parties used the road for their own reasons, contemporaneously, and without conflict. *Id.*

The permissive use presumption can be overcome by presenting facts to show that the user was adverse and hostile to the owner's rights, or if the owner implied by their actions that the user has an easement right. *Id.* at 51-52. To show the former, the claimant must present evidence they "interfered" with the owner's land use. *Id.* For example, the *Gamboa* court cited *Nw. Cities Gas* wherein the claimant interfered with the owner's land use by creating and maintaining a defined road across another's premises. *Id.* (citing 13 Wn.2d at 90-91). To that end, evidence that the claimant constructed the road for their exclusive use supports a hostile use determination. *Cuillier v. Coffin*, 57 Wn.2d 624, 627, 358 P.2d 958 (1961).

When the use arises from mutual neighborly acquiescence or from an express grant of permission, the use is "'permissive in its inception,'" which creates a higher burden. *Gamboa*, 183 Wn.2d at 45 (quoting *Roediger v. Cullen*, 26 Wn.2d 690, 713, 175 P.2d 669 (1946)). To

overcome this higher burden, the claimant must show a distinct and positive assertion of a claim of right. *Id*. at 45-46.

A. *North Driveway, South Driveway, West Beach Parking, West Beach Footpaths, and West Beach Shoreline and Tidelands*

Based on the trial court's findings, the Bergs' use of the North Driveway, South Driveway, West Beach parking, West Beach footpaths, and West Beach shoreline and tidelands was permitted by neighborly acquiescence. ANWI and its predecessors welcomed all property owners on the island to use West Beach at any time without seeking overt permission. Likewise, ANWI and its predecessors allowed all property owners to use the North and South Driveways to access the beach without comment.

And property owners used the beach for various social gatherings and parking of all sorts. While the Bergs may have used the driveways more than other property owners, there is no evidence that such use interfered with ANWI's use. Because the use of the North and South Driveways, parking, related footpaths, and shoreline was permitted by neighborly acquiescence, the Bergs must show a distinct and positive assertion of a claim of right to overcome the permissive in its inception presumption.

To that end, the Bergs make several arguments: (1) the 2002 and 2003 letters to ANWI and their legal counsel established hostile use of all of Lot 006, (2) the Bergs cannot be a hostile user as to some parts of Lot 006 and permissive as to other parts, and (3) because the use of all the claimed prescriptive easements are "inextricably linked" to the adversely possessed cabin, the hostile use element is satisfied as to every prescriptive easement claim. Br. of Appellants at 35.

First, we note that our review is based on whether the factual findings support the conclusions of law. *Harris*, 133 Wn. App. at 137. The trial court did not make factual findings about the 2002 and 2003 letters. The Bergs do not argue that the trial court's findings are inadequate; rather, they merely assign error to a myriad of findings and fail to develop many of those arguments. Even considering the letters, they do not change the aforementioned determination.

The 2002 letter referenced only the cabin and clarification of the boundary. The 2003 letter again references the cabin and also a driveway that is no longer maintained on the south east corner of Lot 006. That letter also *proposes* a new boundary 40 feet north of the cabin. Neither letter even mentions the North and South Driveways, the footpaths, the footbridge, the cabin driveway, the parking, nor the shoreline. As such, those letters are largely irrelevant to these issues.

Next, the Bergs do not provide authority to support their argument that they cannot be a hostile user as to some parts of Lot 006 and permissive as to other parts. We assume that there is no authority to support this proposition as counsel has failed to cite any, and we are not are required to search out supporting authority. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). As such, we find this argument unpersuasive. We similarly reject the Bergs' related argument that they established adversity as to all the claimed prescriptive easements because such use was inextricably linked to the adversely possessed cabin.

The Bergs cannot show a distinct and positive assertion of right as to any of the aforementioned claims. Therefore, we hold that the Bergs' use of the North and South

Driveways, West Beach footpaths, West Beach parking, and West Beach shoreline and tidelands was not adverse to ANWI.

B. *Cabin Driveway and Footbridge*

The Bergs argue that the trial court improperly bisected the cabin driveway and the footbridge because the Bergs cannot be simultaneously hostile and permissive users to the same pieces of infrastructure. To that end, the Bergs rely on ANWI's concessions to show that that they met all the elements of prescriptive easements as to parts of the cabin driveway and the footbridge.

The fact that ANWI conceded some of the cabin driveway does not establish that the Bergs adversely possessed all of the cabin driveway. Indeed, because ANWI conceded some of the cabin driveway, the Bergs were relieved of their burden of proof as to that portion of the cabin driveway.[7] Additionally, it is not clear that ANWI conceded the footbridge based on their pretrial concession.[8] The Bergs still bear the burden of establishing adversity as to these two pieces of infrastructure, especially where the Bergs later agreed to a new boundary with ANWI that did not include the entire footbridge.

There is no evidence to suggest that the use of the cabin driveway and footbridge arose from neighborly acquiescence. ANWI and its predecessors' general grant of permission extended to West Beach and its access roads. There is no evidence to suggest that ANWI and its

[7] Moreover, a concession on a question of law is not binding on us. *In re Pers. Restraint of Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

[8] The trial court ruled that the Bergs did not acquire a prescriptive easement for the footbridge. But the trial court granted the Bergs the portion of Lot 006 ANWI conceded and ordered the parties cooperate to create a legal description of the new boundary. The parties agreed to a new boundary, which the court enforced. Apparently, this new boundary bisects the footbridge.

predecessor allowed anyone to use property south of the tree line where the cabin resided. Nor is there evidence that anyone other than the Bergs used either of these pieces of infrastructure.

Nevertheless, these claims involve unenclosed land. And so, the Bergs must overcome the general presumption of permissive use by presenting evidence that their use was adverse and hostile to the owner's rights. *Nw. Cities Gas Co.*, 13 Wn.2d at 87. The nature and location of the claimant's use are important considerations. *Id*. at 88.

In *Nw. Cities Gas*, the claimant company laid out a defined road across the unenclosed premises of another. *Id*. at 90. The claimant annually improved the road and regularly used the road for transportation of heavy materials for industrial purposes. *Id*. at 90-91. The claimant also encouraged the public to use the road to access their property. *Id*. Our Supreme Court held that the evidence was sufficient to overcome the presumption of permissive use. *Id*.

In *Mountaineers v. Wymer*, the claimant used a 200 feet long road across the unenclosed land of another for accessing cottages, camping facilities, and a theater. 56 Wn.2d 721-22, 355 P.2d 341 (1960). The claimant posted a roadway entrance sign with the claimant's name and no trespassing signs. *Id*. Moreover, the claimant also maintained a gate at the road's entrance and occasionally locked said gate. *Id*. Our Supreme Court held that the evidence was sufficient to overcome the presumption of permissive use. *Id*. at 724.

The present facts are clearly distinguishable from the aforementioned cases. As to the footbridge, the trial court's findings merely show that after parking on West Beach, the Bergs would use a small footbridge, they reconstructed, to cross over a creek feature and through the tree line.

Likewise, the findings show that the Bergs constructed the cabin driveway. The record establishes that the Bergs would apply gravel to the cabin driveway as needed. While Randall testified he maintained the driveway on an annual basis by bolstering certain areas, he also testified that it may have been six years since he last applied gravel to the cabin driveway. Randall also testified that he would sometimes use the cabin driveway to unload his vehicle closer to the cabin.

The location of these uses adjoins land that ANWI allowed any Ketron Island property owner to enjoy as a neighborly accommodation—West Beach and the access driveways to West Beach. The character of the Bergs' use was variable and not continuous as the cabin was not used as a full-time residence. Under these circumstances, we hold that the Bergs have failed to present sufficient evidence to overcome the permissive use presumption. In summary, all of the Bergs' arguments related to prescriptive easement fail.

III. ATTORNEY FEES

The Bergs argue that the trial court erred by awarding attorney fees to ANWI because (1) ANWI's motion for attorney fees was months late, (2) ANWI was not the prevailing party, and (3) the trial court erroneously considered settlement communications in making its award. We disagree.

A. *Timeliness*

We review the interpretation of a court rule de novo. *N. Coast Elec. Co. v. Signal Elec., Inc.*, 193 Wn. App. 566, 571, 373 P.3d 296 (2016). We interpret court rules in the same manner as statutes—giving effect to the plain meaning of the rule as a means of enforcing the drafter's intent. *Id*. "Where a court rule is ambiguous, we look to the drafter's intent by 'reading the rule

as a whole, harmonizing its provisions, and using related rules to help identify the legislative intent embodied in the rule.'" *Id*. (internal quotation marks omitted) (quoting *Jafar v. Webb*, 177 Wn.2d 520, 526-27, 303 P.3d 1042 (2013)).

In pertinent part, CR 54 provides,

> **(a) Definitions.**
>
> (1) *Judgment.* A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.
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> (2) *Order.* Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.
>
> . . . .
>
> **(d) Costs, Disbursements, Attorneys' Fees, and Expenses.**
>
> . . . .
>
> (2) *Attorneys' Fees and Expenses.* Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

In *N. Coast Elec. Co.*, in August 2014, North Coast requested costs and attorney fees in its summary judgment motion with the amount to be determined at a later date. 193 Wn. App. at 569. In December, the trial court granted North Coast's summary judgment. *Id* at 570. In February, North Coast filed a motion for an award of costs and fees specifying the amount of costs and attorney fees requested with supporting documentation. *Id*. We held that the August 2014 request in the summary judgment motion complied with the plain language of CR 54(d)(2) "because it claimed attorney fees and expenses, was made by motion, and provided the facts and

law necessary for a court to make a determination, and the motion was filed no later than 10 days after judgment was entered." *Id.* at 573.

The Bergs improperly characterize ANWI's April 15, 2022 motion to establish the amount of the attorney fee award as an untimely motion requesting attorney fees under CR 54(d). ANWI merely sought to establish the amount of the fees in that motion.

In the judgment entered on January 3, 2022, the trial court found that both parties asked the court to award them attorney fees and costs. And the trial court determined that ANWI was entitled to fees as the prevailing party, but deferred ruling on the amount of the fee award. Where the court already determined that a party was entitled to attorney fees, CR 54(d)(2) does not prevent the trial court from considering a motion to establish the amount of the attorney fee award filed more than 10 days after the court entered the judgment. As such, we hold that the trial court was not prevented from considering the motion to establish the amount of the attorney fees.

B. *Attorney Fee Awards under RCW 7.28.083(3)*

i. *Statutory Construction*

The Bergs argue that a party may not prevail within the meaning of RCW 7.28.083 if they lose title to some portion of property by adverse possession. We disagree.

When engaging in statutory interpretation, we seek to ascertain and enforce the intent of the legislature. *Hum. Rights Comm'n v. Hous. Auth. of City of Seattle*, 21 Wn. App. 2d 978, 985, 509 P.3d 319 (2022). We first examine the plain meaning of the text, considering the context of the statute and the relevant statutory scheme. *Id.* In doing so, we seek to avoid interpreting the statute in such a way as to lead to absurd results. *Id.*

We must give effect to all of the text of the statute and not add any words. *Id*. If the statute is unambiguous—not subject to two or more reasonable interpretations—after engaging in the aforementioned analysis, our inquiry ends. *Id*. RCW 7.28.083(3) provides,

> The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

That provision does not define prevailing party. The prevailing party is generally the party who receives judgment in their favor. *Emerick v. Cardiac Study Ctr., Inc., P.S.*, 189 Wn. App. 711, 732, 357 P.3d 696 (2015). We note that "if both parties prevail on major issues, both parties bear their own costs and fees." *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 783, 275 P.3d 339 (2012).

In certain attorney fee situations where neither party wholly prevailed, state courts have employed the substantially prevailing party analysis. *See Peterson v. Koester*, 122 Wn. App. 351, 364, 92 P.3d 780 (2004). Under that framework, when neither party completely prevails, the court must determine who the substantially prevailing party is by examining the extent of the relief afforded to the parties. *Emerick*, 189 Wn. App. at 732.

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).

ii. *Prevailing Party Determination*

The Bergs argue that ANWI was not the prevailing party because it lost title to substantial portions of Lot 006 through concessions and the prescriptive easement claims should not have been considered in the prevailing party determination. We disagree.

The prevailing party determination is a mixed question of law and fact that we review under an error of law standard. *Emerick*, 189 Wn. App. at 732. We have previously held that RCW 7.28.083(3) did not apply to prescriptive easement claims as they are not actions asserting title to real property. *McColl v. Anderson*, 6 Wn. App. 2d 88, 93, 429 P.3d 1113 (2018). Shortly thereafter, Division One included dicta in an opinion suggested that a party could recover attorney fees incurred on prescriptive easement claims under RCW 7.28.083(3) because prescriptive easements and adverse possession were often treated as equivalents and the elements were the same. *Workman v. Klinkenberg*, 6 Wn. App. 2d 291, 305-06, 430 P.3d 716 (2018).

Division One later "limit[ed] the holding in *Workman* to the facts of that case—when claims involving prescriptive easement also involve claims of adverse possession." *Sw. Suburban Sewer Dist. v. Fish*, 17 Wn. App. 2d 833, 840-41, 488 P.3d 839 (2021). We note that in *Workman* the claimant sought a prescriptive easement over the exact same space that the claimant sought to adversely possess. 6 Wn. App. 2d at 295. Additionally, Division One held, consistent with *McColl*, that a party who asserts solely a prescriptive easement claim is not entitled to attorney fees under that statute. *Sw. Suburban Sewer Dist.*, 17 Wn. App. 2d at 841. We agree with Division One's holding in *Southwest Suburban Sewer District v. Fish*.

Here, the Bergs' "claims involving prescriptive easement also involve claims of adverse possession." *Id.* at 840-41. The Bergs asserted title to a large portion of Lot 006 via adverse

possession. This portion appears to include the footbridge, related footpaths, the cabin driveway, and some of the shoreline, which the Bergs now argue that they have a prescriptive easement over.

And all of the prescriptive easement claims stem from the Bergs' use of the cabin and the surrounding curtilage. Indeed, the Bergs contend, on appeal, that the driveways, parking, and the footbridge are "inextricably linked" to the use of the cabin property. Br. of Appellants at 35. Because the prescriptive easements claims are inextricably linked to the adverse possession claims, we hold that the trial court could properly consider the prescriptive easement claims when making its prevailing party determination under RCW 7.28.083(3).

Next, while both parties prevailed to some extent during this action, ANWI substantially prevailed in this action. While the Bergs acquired the cabin and surrounding curtilage, 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. While the amount the Bergs acquired is certainly not insignificant, under these circumstances, we hold that the trial court did not err in determining that ANWI was the prevailing party—as it substantially prevailed.

C. *Settlement Communications*

The Bergs argue that the trial court erred by considering compromise negotiations in determining the Bergs' liability in violation of the Uniform Meditation Act and ER 408. We disagree.

We review evidentiary rulings for an abuse of discretion. *Brothers v. Pub. Sch. Emps. of Wash.*, 88 Wn. App. 398, 406, 945 P.2d 208 (1997). ER 408 provides as follows:

> In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

In *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, the trial court awarded attorney fees against a party for bad faith conduct for, in part, rejecting a pretrial settlement offer and a CR 68 offer of judgment. 170 Wn.2d 495, 508, 242 P.3d 846 (2010). Holding that evidence of conduct in settlement negotiations "is inadmissible to prove liability for or invalidity of the claim or its amount," our Supreme Court reversed. *Id.* Relying on *Humphrey*, Division One rejected the argument that a fee award should be reduced based on unreasonable conduct during settlement, holding "[e]vidence of settlement negotiations of an underlying claim are not admissible as to proving attorney fees for that claim." *Ewing v. Glogowski*, 198 Wn. App. 515, 522, 394 P.3d 418 (2017).

RCW 7.07.030(1) provides that mediation communications are not subject to discovery or admissible in evidence. "'Mediation communication' means a statement, whether oral or in a

record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." RCW 7.07.010(2). And "'Mediation' means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." RCW 7.07.010(1). These statutes are part of the Uniform Mediation Act, which has a limited scope. RCW 7.07.020. To that end, the party asserting a privilege always bears the burden of establishing the privilege applies in the given situation. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 418, 161 P.3d 406 (2007).

First, the Bergs failed to establish the mediation privilege applies here. The Bergs only mention the relevant statutes in two paragraphs. They do not cite the record to challenge specific communications. Nor do the Bergs explain whether the unspecified communications fall within the scope of the Uniform Mediation Act. Thus, they have failed to show that the privilege applies here.

Second, in both *Humphrey* and *Ewing*, the courts were considering the underlying conduct for reasonableness or bad faith. Here, the Bergs moved to strike the Weaver declaration containing the compromise negotiations. The trial court granted that motion in part.

In the trial court's attorney fee order, it specified, "This Court did not consider facts presented in the Weaver declaration relating to unsuccessful settlement negotiations and/or allegedly unreasonable conduct relating to settlement negotiations as such is not admissible in determining the amount of the fees requested." CP at 4290 n.1. But the trial court did consider the settlement offers "for the purpose of considering the time, effort, and resources expended in

making such offers in an attempt to resolve this case." CP at 4293. This is distinguishable from *Humphrey* and *Ewing*. The trial court considered the settlement offers solely for considering the time expended during the settlement negotiations, which is permissible under the "other purpose" language in ER 408.

Accordingly, we hold the trial court did not abuse its discretion.

IV. CONDITIONAL CROSS-APPEAL

ANWI argues that if we remand to the trial court regarding any of the attorney fee issues, we should instruct the trial court to consider the substantive settlement discussions in making its post-judgment fee award. Because ANWI's cross-appeal is conditioned on us ordering remand for attorney fees issues, and we do not do so, we decline to address the ANWI's arguments.

V. ATTORNEY FEES ON APPEAL

Both parties request attorney fees on appeal under RCW 7.28.083.

We may award fees on appeal under RAP 18.1(a)-(b) if "applicable law grants to a party the right to recover reasonable attorney fees or expenses on review" and the party properly requests it. We may award reasonable appellate attorney fees regarding the adverse possession claim—which on appeal essentially is limited to the attorney fee issue—under RCW 7.28.083(3) in this case. ANWI is the prevailing party on appeal regarding trial court attorney fees.

Determining such an award is equitable and just, we award ANWI reasonable appellate attorney fees regarding the adverse possession issue only, subject to their compliance with RAP 18.1. While the express adverse possession determination was not appealed, the appeal of the attorney fee order implicates the adverse possession determination below.

However, ANWI is not entitled to attorney fees regarding the prescriptive easement issues addressed on appeal under *Sw. Suburban Sewer Dist.*, 17 Wn. App. 2d at 841, and *McColl*, 6 Wn. App. 2d at 93.

CONCLUSION

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Maxa, J.

Cruser, A.C.J.

APPENDIX

B

Filed
Washington State
Court of Appeals
Division Two
April 26, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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, Respondents/Cross-Appellants, v. ANN R. DEUTSCHER and RANDALL BERG, both individually and as a marital community, Appellants/Cross Respondents,	No. 56633-8-II ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH
ANN R. DEUTSCHER and RANDALL BERG, both individually and as a marital community, Appellants/Cross Respondents, v. TIFFANY LUNDGREN, individually, and RONALD SHECKLER and JEAN SHECKLER, individually and as a marital community, Respondents/Cross-Appellants.	

Appellants/Cross Respondents, Ann Deutscher and Randy Berg, filed a motion (1) for reconsideration of the court's February 27, 2024 unpublished opinion, and (2) to publish. After consideration, the court denies both motions. Accordingly, it is

SO ORDERED

PANEL: Jj. Maxa, Cruser, Che

FOR THE COURT:

Che, J.

APPENDIX

C

Chapter 7.28 RCW
EJECTMENT, QUIETING TITLE

Sections

Forcible and unlawful entry, detainer: Chapters 59.12, 59.16 RCW.

Liens: Title 60 RCW.

Real property: Title 64 RCW.

Rent default, less than forty dollars: Chapter 59.08 RCW.

Tenancies: Chapter 59.04 RCW.

RCW 7.28.010 Who may maintain actions—Service on nonresident defendant. Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title; an action to quiet title may be brought by the known heirs of any deceased person, or of any person presumed in law to be deceased, or by the successors in interest of such known heirs against the unknown heirs of such deceased person or against such person presumed to be deceased and his or her unknown heirs, and if it shall be made to appear in such action that the plaintiffs are heirs of the deceased person, or the person presumed in law to be deceased, or the successors in interest of such heirs, and have been in possession of the real property involved in such action for ten years preceding the time of the commencement of such action, and that during said time no person other than the plaintiff in the action or his or her grantors has claimed or asserted any right or title or interest in said property, the court may adjudge and decree the plaintiff or plaintiffs in such action to be the owners of such real property, free from all claims of any unknown heirs of such deceased person, or person presumed in law to be deceased; and an action to quiet title may be maintained by any person in the actual possession of real property against the unknown heirs of a person known to be dead, or against any person where it is not known whether such person is dead or not, and against the unknown heirs of such person, and if it shall thereafter transpire that such person was at the time of commencing such action dead the judgment or decree in such action shall be as binding and conclusive on the heirs of such person as though they had been known and named; and in all actions, under this section, to quiet or remove a cloud from the title to real property, if the defendant be absent or a nonresident of this state, or cannot, after due diligence, be found within the state, or conceals himself or herself to avoid the service of summons, service may be made upon such defendant by publication of summons as provided by law; and the court may appoint a trustee for such absent or nonresident defendant, to make or cancel any deed or conveyance of whatsoever nature, or do any other act to carry into effect the judgment or the decree of the court. [2011 c 336 § 170; 1911 c 83 § 1; 1890 c 72 § 1; Code 1881 § 536; 1879 p 134 § 1; 1877 p 112 § 540; 1869 p 128 § 488; 1854 p 205 § 398; RRS § 785. Formerly RCW 7.28.010, 7.28.020, 7.28.030, and 7.28.040.]

Process, publication, etc.: Chapter 4.28 RCW.

Publication of legal notices: Chapter 65.16 RCW.

RCW 7.28.050 Limitation of actions for recovery of real property—Adverse possession under title deducible of record. That all actions brought for the recovery of any lands, tenements or

hereditaments of which any person may be possessed by actual, open and notorious possession for seven successive years, having a connected title in law or equity deducible of record from this state or the United States, or from any public officer, or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid, but when the possessor shall acquire title after taking such possession, the limitation shall begin to run from the time of acquiring title. [1893 c 11 § 1; RRS § 786.]

RCW 7.28.060 Rights inhere to heirs, devisees and assigns. The heirs, devisees and assigns of the person having such title and possession shall have the same benefit of RCW 7.28.050 as the person from whom the possession is derived. [1893 c 11 § 2; RRS § 787.]

RCW 7.28.070 Adverse possession under claim and color of title—Payment of taxes. Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section. [1893 c 11 § 3; RRS § 788.]

RCW 7.28.080 Color of title to vacant and unoccupied land. Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. All persons holding under such taxpayer, by purchase, devise or descent, before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of said taxes for the term aforesaid, shall be entitled to the benefit of this section: PROVIDED, HOWEVER, If any person having a better paper title to said vacant and unoccupied land shall, during the said term of seven years, pay the taxes as assessed on said land for any one or more years of said term of seven years, then and in that case such taxpayer, his heirs or assigns, shall not be entitled to the benefit of this section. [1893 c 11 § 4; RRS § 789.]

RCW 7.28.083 Adverse possession—Reimbursement of taxes or assessments—Payment of unpaid taxes or assessments—Awarding of costs and attorneys' fees. (1) A party who prevails against the holder of

record title at the time an action asserting title to real property by adverse possession was filed, or against a subsequent purchaser from such holder, may be required to:

(a) Reimburse such holder or purchaser for part or all of any taxes or assessments levied on the real property during the period the prevailing party was in possession of the real property in question and which are proven by competent evidence to have been paid by such holder or purchaser; and

(b) Pay to the treasurer of the county in which the real property is located part or all of any taxes or assessments levied on the real property after the filing of the adverse possession claim and which are due and remain unpaid at the time judgment on the claim is entered.

(2) If the court orders reimbursement for taxes or assessments paid or payment of taxes or assessments due under subsection (1) of this section, the court shall determine how to allocate taxes or assessments between the property acquired by adverse possession and the property retained by the titleholder. In making its determination, the court shall consider all the facts and shall order such reimbursement or payment as appears equitable and just.

(3) The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just. [2011 c 255 § 1.]

Application—2011 c 255: "This act applies to actions filed on or after July 1, 2012." [2011 c 255 § 2.]

RCW 7.28.085 Adverse possession—Forestland—Additional requirements—Exceptions. (1) In any action seeking to establish an adverse claimant as the legal owner of a fee or other interest in forestland based on a claim of adverse possession, and in any defense to an action brought by the holder of record title for recovery of title to or possession of a fee or other interest in forestland where such defense is based on a claim of adverse possession, the adverse claimant shall not be deemed to have established open and notorious possession of the forestlands at issue unless, as a minimum requirement, the adverse claimant establishes by clear and convincing evidence that the adverse claimant has made or erected substantial improvements, which improvements have remained entirely or partially on such lands for at least ten years. If the interests of justice so require, the making, erecting, and continuous presence of substantial improvements on the lands at issue, in the absence of additional acts by the adverse claimant, may be found insufficient to establish open and notorious possession.

(2) This section shall not apply to any adverse claimant who establishes by clear and convincing evidence that the adverse claimant occupied the lands at issue and made continuous use thereof for at least ten years in good faith reliance on location stakes or other boundary markers set by a registered land surveyor purporting to establish the boundaries of property to which the adverse claimant has record title.

(3) For purposes of this section:

(a) "Adverse claimant" means any person, other than the holder of record title, occupying the lands at issue together with any prior occupants of the land in privity with such person by purchase, devise, or decent [descent];

(b) "Claim of adverse possession" does not include a claim asserted under RCW 7.28.050, 7.28.070, or 7.28.080;

(c) "Forestland" has the meaning given in *RCW 84.33.100; and

(d) "Substantial improvement" means a permanent or semipermanent structure or enclosure for which the costs of construction exceeded fifty thousand dollars.

(4) This section shall not apply to any adverse claimant who, before June 11, 1998, acquired title to the lands in question by adverse possession under the law then in effect.

(5) This section shall not apply to any adverse claimant who seeks to assert a claim or defense of adverse possession in an action against any person who, at the time such action is commenced, owns less than twenty acres of forestland in the state of Washington. [1998 c 57 § 1.]

***Reviser's note:** RCW 84.33.100 was repealed by 2001 c 249 § 16.

RCW 7.28.090 Adverse possession—Public lands—Adverse title in minors, persons under guardianship or conservatorship. RCW 7.28.070 and 7.28.080 shall not extend to lands or tenements owned by the United States or this state, nor to school lands, nor to lands held for any public purpose. Nor shall they extend to lands or tenements when there shall be an adverse title to such lands or tenements, and the holder of such adverse title is a person under eighteen years of age, or has been placed under a guardianship under RCW 11.130.265 or has been placed under a conservatorship under RCW 11.130.360. However, such persons as aforesaid shall commence an action to recover such lands or tenements so possessed as aforesaid, within three years after the several disabilities herein enumerated shall cease to exist, and shall prosecute such action to judgment, or in case of vacant and unoccupied land shall, within the time last aforesaid, pay to the person or persons who have paid the same for his or her betterments, and the taxes, with interest on said taxes at the legal rate per annum that have been paid on said vacant and unimproved land. [2020 c 312 § 703; 1977 ex.s. c 80 § 7; 1971 ex.s. c 292 § 7; 1893 c 11 § 5; RRS § 790.]

Effective dates—2020 c 312: See note following RCW 11.130.915.

Purpose—Intent—Severability—1977 ex.s. c 80: See notes following RCW 4.16.190.

Severability—1971 ex.s. c 292: See note following RCW 26.28.010.

RCW 7.28.100 Construction. That the provisions of RCW 7.28.050 through 7.28.100 shall be liberally construed for the purposes set forth in those sections. [1893 c 11 § 6; RRS § 791.]

RCW 7.28.110 Substitution of landlord in action against tenant. A defendant who is in actual possession may, for answer, plead that he

or she is in possession only as a tenant of another, naming him or her and his or her place of residence, and thereupon the landlord, if he or she applies therefor, shall be made defendant in place of the tenant, and the action shall proceed in all respects as if originally commenced against him or her. If the landlord does not apply to be made defendant within the time the tenant is allowed to answer, thereafter he or she shall not be allowed to, but he or she shall be made defendant if the plaintiff require it. If the landlord be made defendant on motion of the plaintiff he or she shall be required to appear and answer within ten days from notice of the pendency of the action and the order making him or her defendant, or such further notice as the court or judge thereof may prescribe. [2011 c 336 § 171; Code 1881 § 537; 1877 p 112 § 541; 1869 p 128 § 489; RRS § 792.]

RCW 7.28.120 Pleadings—Superior title prevails. The plaintiff in such action shall set forth in his or her complaint the nature of his or her estate, claim, or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and the superior title, whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had. [2011 c 336 § 172; Code 1881 § 538; 1879 p 134 § 2; 1877 p 113 § 542; 1869 p 128 § 490; RRS § 793.]

RCW 7.28.130 Defendant must plead nature of his or her estate or right to possession. The defendant shall not be allowed to give in evidence any estate in himself, herself, or another in the property, or any license or right to the possession thereof unless the same be pleaded in his or her answer. If so pleaded, the nature and duration of such estate, or license or right to the possession, shall be set forth with the certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he or she shall specify for what particular part he or she does defend. In an action against a tenant, the judgment shall be conclusive against a landlord who has been made defendant in place of the tenant, to the same extent as if the action had been originally commenced against him or her. [2011 c 336 § 173; Code 1881 § 539; 1877 p 113 § 543; 1869 p 129 § 491; RRS § 794.]

RCW 7.28.140 Verdict of jury. The jury by their verdict shall find as follows:

(1) If the verdict be for the plaintiff, that he or she is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his or her estate in such property, part thereof, or undivided share or interest, in either, as the case may be.

(2) If the verdict be for the defendant, that the plaintiff is not entitled to the possession of the property described in the complaint, or to such part thereof as the defendant defends for, and the estate in such property or part thereof, or license, or right to the possession of either established on the trial by the defendant, if

any, in effect as the same is required to be pleaded. [2011 c 336 § 174; Code 1881 § 540; 1877 p 113 § 544; 1869 p 129 § 492; RRS § 795.]

Rules of court: *CR 49.*

General, special verdicts: RCW 4.44.410 through 4.44.440.

RCW 7.28.150 Damages—Limitation—Permanent improvements. The plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and for any period that may elapse from such commencement, to the time of giving a verdict therein, exclusive of the use of permanent improvements made by the defendant. When permanent improvements have been made upon the property by the defendant, or those under whom he or she claims holding under color of title adversely to the claim of the plaintiff, in good faith, the value thereof at the time of trial shall be allowed as a setoff against such damages. [2011 c 336 § 175; Code 1881 § 541; 1877 p 113 § 545; 1869 p 129 § 493; RRS § 796.]

Reviser's note: Compare the last sentence of this section with RCW 7.28.160 through 7.28.180.

RCW 7.28.160 Defendant's counterclaim for permanent improvements and taxes paid. In an action for the recovery of real property upon which permanent improvements have been made or general or special taxes or local assessments have been paid by a defendant, or those under whom he or she claims, holding in good faith under color or claim of title adversely to the claim of plaintiff, the value of such improvements and the amount of such taxes or assessments with interest thereon from date of payment must be allowed as a counterclaim to the defendant. [2011 c 336 § 176; 1903 c 137 § 1; RRS § 797.]

RCW 7.28.170 Defendant's counterclaim for permanent improvements and taxes paid—Pleadings, issues and trial on counterclaim. The counterclaim shall set forth the value of the land apart from the improvements, and the nature and value of the improvements apart from the land and the amount of said taxes and assessments so paid, and the date of payment. Issues shall be joined and tried as in other actions, and the value of the land and the amount of said taxes and assessments apart from the improvements, and the value of the improvements apart from the land must be specifically found by the verdict of the jury, report of the referee, or findings of the court as the case may be. [1903 c 137 § 2; RRS § 798.]

RCW 7.28.180 Defendant's counterclaim for permanent improvements and taxes paid—Judgment on counterclaim—Payment. If the judgment be in favor of the plaintiff for the recovery of the realty, and of the defendant upon the counterclaim, the plaintiff shall be entitled to recover such damages as he or she may be found to have suffered through the withholding of the premises and waste committed thereupon by the defendant or those under whom he or she claims, but against this recovery shall be offset pro tanto the value of the permanent

improvements and the amount of said taxes and assessments with interest found as above provided. Should the value of improvements or taxes or assessments with interest exceed the recovery for damages, the plaintiff, shall, within two months, pay to the defendant the difference between the two sums and upon proof, after notice, to the defendant, that this has been done, the court shall make an order declaring that fact, and that title to the improvements is vested in him or her. Should the plaintiff fail to make such payment, the defendant may at any time within two months after the time limited for such payment to be made, pay to the plaintiff the value of the land apart from the improvements, and the amount of the damages awarded against him or her, and he or she thereupon shall be vested with title to the land, and, after notice to the plaintiff, the court shall make an order reciting the fact and adjudging title to be in him or her. Should neither party make the payment above provided, within the specified time, they shall be deemed to be tenants in common of the premises, including the improvements, each holding an interest proportionate to the value of his or her property determined in the manner specified in RCW 7.28.170: PROVIDED, That the interest of the owner of the improvements shall be the difference between the value of the improvements and the amount of damages recovered against him or her by the plaintiff. [2011 c 336 § 177; 1903 c 137 § 3; RRS § 799.]

RCW 7.28.190 Verdict where plaintiff's right to possession expires before trial. If the right of the plaintiff to the possession of the property expire, after the commencement of the action and before the trial, the verdict shall be given according to the fact, and judgment shall be given only for the damages. [Code 1881 § 542; 1877 p 114 § 546; 1869 p 130 § 494; RRS § 800.]

RCW 7.28.200 Order for survey of property. The court or judge thereof, on motion, and after notice to the adverse party, may, for cause shown, grant an order allowing the party applying therefor to enter upon the property in controversy and make survey and admeasurement thereof, for the purposes of the action. [Code 1881 § 543; 1877 p 114 § 547; 1869 p 130 § 495; RRS § 801.]

RCW 7.28.210 Order for survey of property—Contents of order—Service. The order shall describe the property, and a copy thereof shall be served upon the defendant, and thereupon the party may enter upon the property and make such survey and admeasurement; but if any unnecessary injury be done to the premises, he or she shall be liable therefor. [2011 c 336 § 178; Code 1881 § 544; 1877 p 114 § 548; 1869 p 130 § 496; RRS § 802.]

RCW 7.28.220 Alienation by defendant, effect of. An action for the recovery of the possession of real property against a person in possession, cannot be prejudiced by any alienation made by such person either before or after the commencement of the action; but if such alienation be made after the commencement of the action, and the defendant do not satisfy the judgment recovered for damages for withholding the possession, such damages may be recovered by action

against the purchaser. [Code 1881 § 545; 1877 p 114 § 549; 1869 p 130 § 497; RRS § 803.]

RCW 7.28.230 Mortgagee cannot maintain action for possession—Possession to collect mortgaged, pledged, or assigned rents and profits—Perfection of security interest. (1) A mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law: PROVIDED, That nothing in this section shall be construed as any limitation upon the right of the owner of real property to mortgage, pledge or assign the rents and profits thereof, nor as prohibiting the mortgagee, pledgee or assignee of such rents and profits, or any trustee under a mortgage or trust deed either contemporaneously or upon the happening of a future event of default, from entering into possession of any real property, other than farmlands or the homestead of the mortgagor or his or her successor in interest, for the purpose of collecting the rents and profits thereof for application in accordance with the provisions of the mortgage or trust deed or other instrument creating the lien, nor as any limitation upon the power of a court of equity to appoint a receiver to take charge of such real property and collect such rents and profits thereof for application in accordance with the terms of such mortgage, trust deed, or assignment.

(2) Until paid, the rents and profits of real property constitute real property for the purposes of mortgages, trust deeds, or assignments whether or not said rents and profits have accrued. The provisions of RCW 65.08.070 as now or hereafter amended shall be applicable to such rents and profits, and such rents and profits are excluded from *Article 62A.9 RCW.

(3) The recording of an assignment, mortgage, or pledge of unpaid rents and profits of real property, intended as security, in accordance with RCW 65.08.070, shall immediately perfect the security interest in the assignee, mortgagee, or pledgee and shall not require any further action by the holder of the security interest to be perfected as to any subsequent purchaser, mortgagee, or assignee. Any lien created by such assignment, mortgage, or pledge shall, when recorded, be deemed specific, perfected, and choate even if recorded prior to July 23, 1989. [2011 c 336 § 179; 1991 c 188 § 1; 1989 c 73 § 1; 1969 ex.s. c 122 § 1; Code 1881 § 546; 1877 p 114 § 550; 1869 p 130 § 498; RRS § 804.]

***Reviser's note:** Article 62A.9 RCW was repealed in its entirety by 2000 c 250 § 9A-901, effective July 1, 2001. For later enactment, see Article 62A.9A RCW.

RCW 7.28.240 Action between cotenants. In an action by a tenant in common, or a joint tenant of real property against his or her cotenant, the plaintiff must show, in addition to his or her evidence of right, that the defendant either denied the plaintiff's right or did some act amounting to such denial. [2011 c 336 § 180; Code 1881 § 547; 1877 p 114 § 551; 1869 p 130 § 499; RRS § 805.]

RCW 7.28.250 Action against tenant on failure to pay rent. When in the case of a lease of real property and the failure of tenant to

pay rent, the landlord has a subsisting right to reenter for such failure; he or she may bring an action to recover the possession of such property, and such action is equivalent to a demand of the rent and a reentry upon the property. But if at any time before the judgment in such action, the lessee or his or her successor in interest as to the whole or a part of the property, pay to the plaintiff, or bring into court the amount of rent then in arrear, with interest and cost of action, and perform the other covenants or agreements on the part of the lessee, he or she shall be entitled to continue in the possession according to the terms of the lease. [2011 c 336 § 181; Code 1881 § 548; 1877 p 114 § 552; 1869 p 131 § 500; No RRS.]

Forcible entry, detainer: Chapter 59.12 RCW.

Rent default, less than forty dollars: Chapter 59.08 RCW.

Tenancies: Chapter 59.04 RCW.

RCW 7.28.260 Effect of judgment—Lis pendens—Vacation. In an action to recover possession of real property, the judgment rendered therein shall be conclusive as to the estate in such property and the right of possession thereof, so far as the same is thereby determined, upon all persons claiming by, through, or under the party against whom the judgment is rendered, by title or interest passing after the commencement of the action, if the party in whose favor the judgment is rendered shall have filed a notice of the pendency of the action as required by RCW 4.28.320. When service of the notice is made by publication, and judgment is given for failure to answer, at any time within two years from the entry thereof, the defendant or his or her successor in interest as to the whole or any part of the property, shall, upon application to the court or judge thereof, be entitled to an order, vacating the judgment and granting him or her a new trial, upon the payment of the costs of the action. [2011 c 336 § 182; 1909 c 35 § 1; Code 1881 § 549; 1877 p 114 § 553; 1869 p 131 § 501; RRS § 806.]

Rules of court: *Cf. CR 58, 60(e).*

New trials: Chapter 4.76 RCW.

Vacation of judgments: Chapter 4.72 RCW.

RCW 7.28.270 Effect of vacation of judgment. If the plaintiff has taken possession of the property before the judgment is set aside and a new trial granted, as provided in RCW 7.28.260, such possession shall not be thereby affected in any way; and if judgment be given for defendant in the new trial, he or she shall be entitled to restitution by execution in the same manner as if he or she were plaintiff. [2011 c 336 § 183; Code 1881 § 550; 1877 p 115 § 554; 1869 p 131 § 502; RRS § 807.]

Rules of court: *Cf. CR 58, 60(e).*

RCW 7.28.280 Conflicting claims, donation law, generally—Joinder of parties. In an action at law, for the recovery of the possession of real property, if either party claims the property as a donee of the United States, and under the act of congress approved September 27th, 1850, commonly called the "Donation law," or the acts amendatory thereof, such party, from the date of his or her settlement thereon, as provided in said act, shall be deemed to have a legal estate in fee, in such property, to continue upon condition that he or she perform the conditions required by such acts, which estate is unconditional and indefeasible after the performance of such conditions. In such action, if both plaintiff and defendant claim title to the same real property, by virtue of settlement, under such acts, such settlement and performance of the subsequent condition shall be prima facie presumed in favor of the party having or claiming under the elder certificate, or patent, as the case may be, unless it appears upon the face of such certificate or patent that the same is absolutely void. Any person in possession, by himself or herself or his or her tenant, of real property, and any private or municipal corporation in possession by itself or its tenant of any real property, or when such real property is not in the actual possession of anyone, any person or private or municipal corporation claiming title to any real property under a patent from the United States, or during his, her, or its claim of title to such real property under a patent from the United States for such real estate, may maintain a civil action against any person or persons, corporations, or associations claiming an interest in said real property or any part thereof, or any right thereto adverse to him, her, them, or it, for the purpose of determining such claim, estate, or interest; and where several persons, or private or municipal corporations are in possession of, or claim as aforesaid, separate parcels of real property, and an adverse interest is claimed or claim made in or to any such parcels, by any other person, persons, corporations, or associations, arising out of a question, conveyance, statute, grant, or other matter common to all such parcels of real estate, all or any portion of such persons or corporations so in possession, or claiming such parcel of real property may unite as plaintiffs in such suit to determine such adverse claim or interest against all persons, corporations, or associations claiming such adverse interest. [2011 c 336 § 184; Code 1881 § 551; 1877 p 116 § 556; 1869 p 132 § 504; RRS §§ 808, 809. Formerly RCW 7.28.280 and 7.28.290.]

RCW 7.28.300 Quieting title against outlawed mortgage or deed of trust. The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien. [1998 c 295 § 17; 1937 c 124 § 1; RRS § 785-1.]

Limitation of actions, generally: Chapter 4.16 RCW.

Real estate mortgages, foreclosure: Chapter 61.12 RCW.

RCW 7.28.310 Quieting title to personal property. Any person or corporation claiming to be the owner of or interested in any tangible or intangible personal property may institute and maintain a suit against any person or corporation also claiming title to or any interest in such property for the purpose of adjudicating the title of the plaintiff to such property, or any interest therein, against any and all adverse claims; removing all such adverse claims as clouds upon the title of the plaintiff and quieting the title of the plaintiff against any and all such adverse claims. [1929 c 100 § 1; RRS § 809-1.]

RCW 7.28.320 Possession no defense. The fact that any person or corporation against whom such action may be brought is in the possession of such property, or evidence of title to such property, shall not prevent the maintenance of such suit. [1929 c 100 § 2; RRS § 809-2.]

SMITH KNOWLES P.C.

May 28, 2024 - 4:07 PM

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Appellate Court Case Number:	56633-8
Appellate Court Case Title:	Alaska NW Industries, Inc., et al, Resp/Cross-App v. Ann R. Deutscher, et al, App/Cross-Resps
Superior Court Case Number:	20-2-06634-1

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