The Honorable Johanna Bender
Hearing Date: September 30, 2021 @ 1:30 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHRISTOPHER A. NIEDERMAN and NICOLE L. NIEDERMAN, husband and wife, and the marital community composed thereof,

Plaintiffs,

v.

STEVE YANG and SOPHY YANG, husband and wife, and the marital community composed thereof; UMPQUA BANK, a foreign bank corporation.

Defendants.

NO. 20-2-08679-7 SEA

DEFENDANTS STEVE AND SOPHY YANG'S MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING ALL OF PLAINTIFFS' REMAINING CLAIMS

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I. RELIEF REQUESTED

In 2015, Plaintiffs Christopher and Nicole Niederman (collectively "the Niedermans") purchased the real property located at 6800 SE 96th Avenue, Mercer Island, Washington 98040 (the "Niederman Property"). By 2020, **after only 5 years of ownership**, the Niedermans filed the present lawsuit against Defendants Steve and Sophy Yang (collectively "the Yangs"), asserting, *inter alia,* prescriptive easement rights over the neighboring property located at 9668 SE 68th St, Mercer Island, Washington, 98040 (the "Yang Property").

As a matter of Washington law,[1] the Niedermans' claims to a prescriptive easement are barred when their access rights are governed by an express easement authorizing them to utilize the Yang Property, and Washington law otherwise prohibits an express easement from being unilaterally relocated and modified by the Niedermans.

Aside from these legal bars to the Niederman claims, the Niedermans' claims also fail when the Niedermans cannot present factual evidence to support their prescriptive easement claims. A claimant to a prescriptive easement must satisfy each element for 10 years.[2] Unfortunately for the Niedermans, their immediate predecessor-in-interest's[3] testimony eliminates any factual basis for a prescriptive easement claim, which the Niedermans cannot rebut when they have only owned their property since 2015.

The Yangs request summary judgment dismissal of all the Niedermans' remaining Causes of Action for the reasons cited herein.[4]

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[1] *Gamboa v. Clark*, 183 Wn.2d 38, 43, 348 P.3d 1214 (2015).
[2] *Id.*
[3] *See* Declaration of Carol Simons ("Simons Decl.").
[4] Upon dismissal of the Niedermans remaining causes of action, the remaining causes of action left for trial will be the Yangs' affirmative claims for damages, as well as declaratory and injunctive relief.

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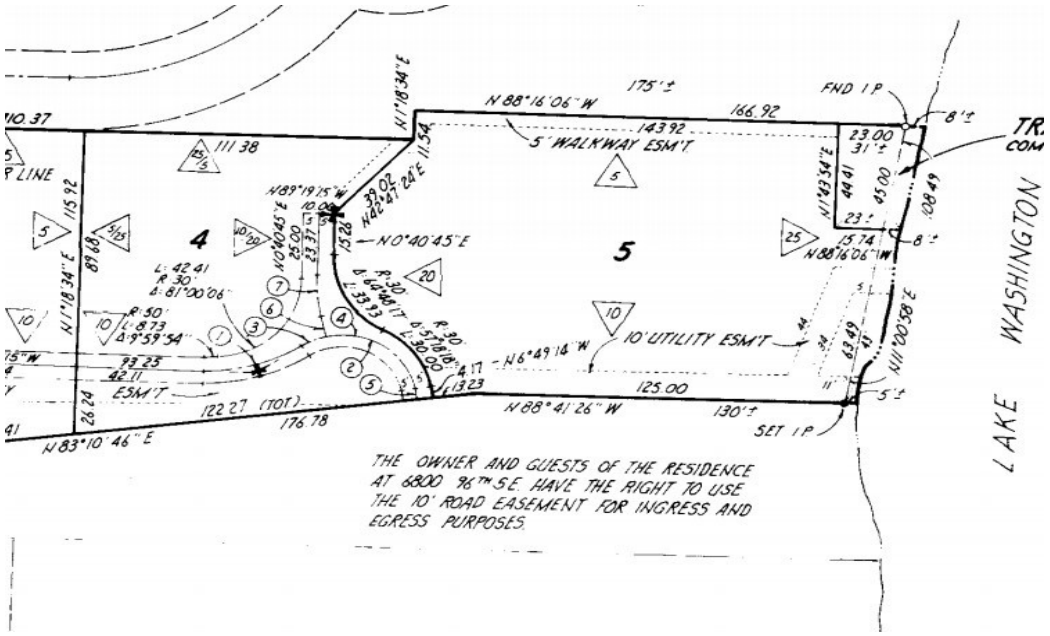
II. RELEVANT FACTS

A. Access to the Niederman Property Created by Express Easement

This matter arises from an access easement granted to the Niederman Property through the Evan's Addition Plat, recorded under King County Recording No. 7701260554 (the "Plat"). Declaration of Ryan Sternoff in Support of Motion for Partial Summary Judgment Dismissing All of Plaintiffs' Claims ("Sternoff Decl."), Ex. A. An image of the Plat granting the express easement is below:



Id. The language stating, "THE OWNER AND GUESTS OF THE RESIDENCE AT 6800 96th AVE S.E. HAVE THE RIGHT TO USE THE 10' ROAD EASEMENT FOR INGRESS AND EGRESS PURPOSES" operated to create the express access easement for the benefit of the Niederman Property (the "Access Easement"). *Id*.

The Plat contains the following covenant limiting the width of any ingress/egress access to 10 feet (the "10 Foot Road Covenant"):

Access to all lots shall be limited to the 10' private road easement

Id. (emphasis added).

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As indicated on the face of the Plat, the Access Easement originally passed through Lot 4 of the Plat to the Niederman Property. *Id.* Through a 1994 Boundary Line Adjustment, recorded under King County Recording No. 9412229001 (the "1994 BLA"), the Yangs acquired the fee interest to a portion of the Access Easement. Sternoff Decl., Ex. B. The 1994 BLA was subsequently amended in 2021 (the "2021 BLA"). Sternoff Decl., Ex. C. Neither the 1994 BLA nor the 2021 BLA altered the location of the Access Easement.

B. The Niedermans Acquired the Niederman Property in 2015 Subject to the Access Easement and Subsequently Admitted the Existence and Validity of the Access Easement

On March 17, 2015, the Niedermans acquired the Niederman Property via a quitclaim deed recorded under King County Recording No. 20150317001129 (the "Niederman Deed"). Sternoff Decl., Ex. D. The Niederman Deed expressly granted the Niedermans the Access Easement described as "Parcel B" as follows:

> PARCEL B:
>
> AN EASEMENT FOR INGRESS AND EGRESS AS DELINEATED ON THE PLAT OF EVAN'S ADDITION, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 101 OF PLATS, PAGES 91 AND 92, RECORDS OF KING COUNTY, WASHINGTON.
>
> SITUATE IN THE COUNTY OF KING, STATE OF WASHINGTON.

Id.

After acquiring the Property, the Niedermans acknowledged that their rights were subject to a 10-foot access easement, before shifting course to their positions now asserted in this litigation. This is evidenced through a February 2, 2019, email from Chris Niederman, sent when the Niedermans were undergoing their own major remodel, where he asked the owners within the Plat (now known as Maple Grove) to allow the Niedermans to reconnect their gas line to Maple Grove's main gas line on the Yang Property, which was discovered to have been previously connected without an easement. Declaration of Steve Yang in Support of Motion for Partial Summary Judgment Dismissing All of

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Plaintiffs' Claims ("Steve Yang Decl."), Ex. B. While the Maple Grove owners ultimately elected not to allow the Niedermans to hook up, Chris Niedermans' correspondence during this period reflects direct knowledge that the Niedermans were aware access was limited to the 10-foot Access Easement.

> Here's some additional info that may help…see attached for the Plat survey images showing PSE's 10' utility easement **that matches the width of the private lane from the top of the lane** all the way down to our property. The red arrow shows where the PSE main gas trunk line runs to which all are connected. Any new gas pipe needed to connect our property to the main trunk is 100% **contained within the existing 10' easement area** shared by all 5 Maple Grove neighbors as noted on the Plat map. All 5 neighbors currently have rights to this PSE owned utility easement, and PSE is simply seeking everyone's approval to allow us to use this same utility easement to which we were previously connected for over 40 years. **The existing easement area does not increase or change in any way.** Since it butts up to and runs against our property line, we only need a few feet of pipe to connect to the gas main trunk line from our property.

Id. (emphasis added). Chris Niederman attached to his email an image of the 1994 BLA (showing the 10-foot Access Easement) together with a red arrow identifying the location of the existing gas line, as depicted below:

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Id.

In sum, at this point, the Niedermans acknowledged the fact that their property was subject to the 10-foot Access Easement. The Maple Grove owners' refusal to allow the Niedermans to connect to the gas line ultimately resulted in retaliation in the form of this litigation, as further described in Section II (e), below.

C. The Claims Asserted by the Niedermans

The Niedermans filed this lawsuit against the Yangs on May 11, 2020. Dkt. 1 ("Complaint"). The Niedermans asserted the following causes of action which remain pending in this dispute and are the subject of this Motion:

- First Cause of Action – Declaratory Relief ("Declaratory Relief Cause of Action");
- Second Cause of Action – Quiet Title to Easement ("Prescriptive Easement (Ingress/Egress) Cause of Action");
- Third Cause of Action – Quiet Title to Prescriptive Easement for Use of Vehicle Turn Around Easement ("Prescriptive Easement (Turnaround & Garbage Can) Cause of Action");
- Fifth Cause of Action – Private Nuisance ("Nuisance Cause of Action"); and
- Sixth Cause of Action – Injunctive Relief ("Injunction Cause of Action").

Id.[5]

All 5 causes of action are effectively premised on 3 distinct assertions by the Niedermans that they have alleged prescriptive easements rights to:

- Access the Niederman Property through the existing asphalted areas (the "Easement Relocation Claim"). Complaint, ¶ 5.1-5.9.
- Utilize an undefined portion of the Yang Property for Turnaround Purposes (the "Turnaround Claim"). Complaint, ¶ 6.1-6.12.
- Utilize the Yang Property for purposes of storing garbage and recycling cans for weekly pickup (the "Garbage Claim"). Complaint, ¶ 6.1-6.12.

[5] The Niedermans' Fourth Cause of Action (Negligent Infliction of Emotional Distress) was dismissed by this Court on August 18, 2021. Dkt. 29.

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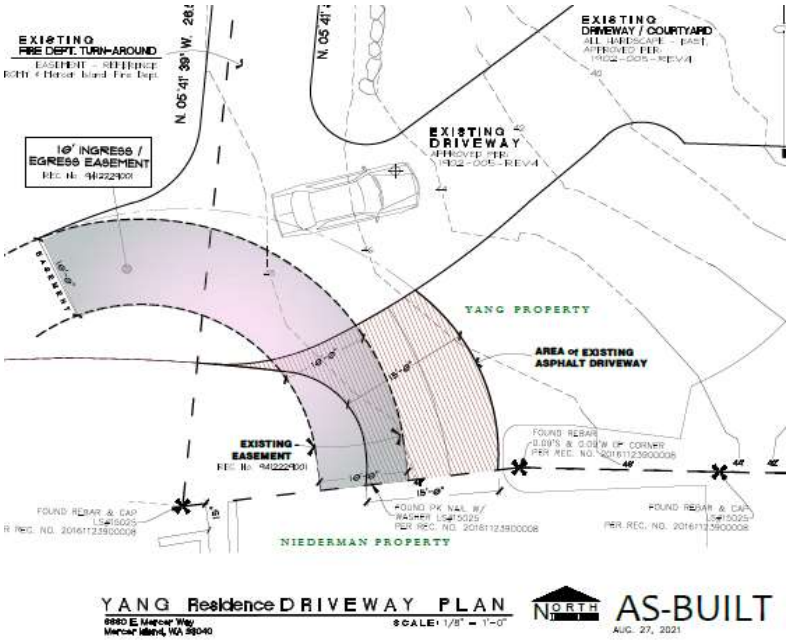
For the Court's understanding, the as-built drawing below shows: (a) the existing asphalt areas north of the Niederman Property that align with the driveway on the Niederman Property; and (b) the deeded Access Easement.



Declaration of Richard Fisher in Support of Motion for Summary Judgment Dismissing all of Plaintiffs' Claims ("Fisher Decl."), Ex. B. To further depict the present situation, a photograph showing the area in question is further reflected below:

Steve Yang Decl., Ex. A.

D. The Testimony from Niedermans' Predecessor Defeats the Niedermans' Claims

The Niedermans' predecessor-in-interest, Carol Simons, rejects everything the Niedermans assert with respect to the claim for prescriptive easement rights. *See* Simons Decl. Simons testified via her declaration that during her time residing at the Niederman Property, Simons and her now ex-husband were aware of the 10-foot Access Easement for ingress/egress purposes on the Yang Property. *Id.*, ¶ 6. The Simons never knew the exact location of the easement, but they believed it aligned with their driveway. Simons Decl., ¶7.

The Simons never used the Yang Property for turnaround purposes or to store their garbage and recycling bins for weekly pickup. *Id.,* ¶ 13. If there was ever any use outside of the Access Easement, Simons testified it was a neighborly accommodation. *Id.,* ¶ 9, 14.

E. The Niedermans' Former Counsel Invented the Prescriptive Easement Claim After the Maple Grove Owners Refused to Allow the Gas Line Connection

On April 30, 2019, after the Maple Grove owners refused to allow the Niedermans to connect to the gas line, the Niedermans decided to retaliate. Through counsel, the Niedermans wrote the City of Mercer Island in connection with the Yangs' pending construction project demanding, *inter alia*, that the Yangs widen the entire access road to 20 feet to meet current Mercer Island City Code requirements. Sternoff Decl., Ex. E. While this letter was inappropriate and incorrect for a number it reasons, it did admit that "[c]urrent measurement **of the private access road shows a width of 10 *feet* or less**." *Id.* (emphasis added). This letter was sent before the Niedermans poured their current concrete driveway, and the Niedermans had every opportunity to modify their plans to line up with

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the existing easement. At that time, the Niedermans had not asserted any prescriptive easement rights.

Seeking to deescalate the dispute, on August 27, 2019, the Yangs, through their architect, offered to move the 10-foot easement over slightly to align with the location that the Niedermans desired to pour their driveway. Fisher Decl., Ex. B. On September 11, 2019, the Niedermans' then-counsel – **who was apparently unaware of the prohibition on unilateral easement relocation in Washington** – wrote the Yangs asserting, for the first time, that the Niedermans had a prescriptive easement. Sternoff Decl., Ex. F.

By November 2019, the Niedermans ignored the Yangs' proposal that the parties both consent to move the 10-foot easement so that it would align with the Niedermans' desired driveway location and proceeded to pour a new driveway where they saw fit. See Sternoff Decl, Ex. G. The Niedermans have continued to wrongfully use the Yang Property for their benefit, as discussed in more detail below.

To this day, the Yangs remain willing to consent to move the 10-foot Access Easement to align with the Niedermans' driveway, but under Washington law, no easement can be moved unilaterally without the consent of both parties. Thus, the Yangs are forced to move to dismiss the Niedermans' untenable claims.

III. EVIDENCE RELIED UPON

The Steve Yang Declaration, the Sophy Yang Declaration, the Ryan Sternoff Declaration, the Carol Simons Declaration, the Richard Fisher Declaration, the exhibits attached thereto, and the pleadings and files on record.

IV. ISSUE PRESENTED

1. Whether the Niedermans Prescriptive Easement Claims must be dismissed when their rights are governed by an express easement and Washington law prohibits unilateral relocation of an express easement?

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2. Whether the Niedermans' Prescriptive Easement Claims must be Dismissed when they Cannot Establish the Necessary Elements for A Prescriptive Easement for the Statutory Period; and

3. Whether the Niedermans' Claim for Private Nuisance Must be Dismissed when Predicated on Dismissed Prescriptive Easement Claims and when the Niedermans Fail to Provide any Evidence.

V. ARGUMENT AND AUTHORITY

A. Summary Judgment Standard

This court may grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, establish that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). A "material fact" is a fact upon which the outcome of the litigation depends, in whole or in part. *Collins v. Juergens Chiropractic, PLLC*, 13 Wn. App. 2d 782, 792, 467 P.3d 126 (2020).

Initially, the moving party bears the burden of showing that there is no genuine issue of material fact. *Id.* If the moving party meets this initial showing, the inquiry shifts to the nonmoving party to make a showing sufficient to establish the existence of the elements essential to their case on which they will bear the burden of proof at trial. *Id*.

Summary judgment is appropriate when the nonmoving party lacks competent evidence on an essential element for which they bear the burden of proof. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615, 224 P.3d 795 (2009). Speculation and conjecture are not sufficient to survive summary judgment, and the responding party may not rely on argumentative assertions that unresolved factual issues remain. *Modumetal, Inc. v. Xtalic Corp*., 4 Wn. App. 2d 810, 822, 425 P.3d 871 (2018).

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B. The Niedermans' Claims are Barred by Washington Prescriptive Easement Law as Applied to the Undisputed Material Facts of this Case

The Niedermans claim easement ownership of portions of the Yang Property based on acquisition of a prescriptive easement. "Prescriptive rights are not favored in the law, and the burden of proof is upon the one who claims such a right." *Granite Beach Holdings, LLC v. State ex rel. Dep't of Nat. Res.*, 103 Wn. App. 186, 200, 11 P.3d 847 (2000) (*citing Todd v. Sterling,* 45 Wn.2d 40, 42, 273 P.2d 245 (1954)). "Easements by prescription are disfavored in the law because they effect a loss or forfeiture of the rights of the owner." *Kunkel v. Fisher*, 106 Wn. App. 599, 603, 23 P.3d 1128 (2001) (distinguishing prescriptive easements from adverse possession, which is favored); *see also Gamboa*, 183 Wn.2d at 43.

Because of the disfavored status, Washington courts have required "clear proof" of the prescriptive easement – greater than a preponderance of the evidence standard. *Lee v. Lozier*, 88 Wn. App. 176, 185, 945 P.2d 214 (1997) ("Lozier correctly contends that each of the neighbors bore the burden of establishing by clear proof that they or their predecessors in interest used the Lot 10 portions of the dock continuously and in an uninterrupted fashion for at least 10 years.").

As the party claiming a prescriptive easement, the Niedermans bear the burden of clear proof to establish its existence. The Niedermans must establish each element of a prescriptive easement in regard to the Yang Property: that (1) the Niedermans used the land in an open and notorious manner; (2) the Niedermans' use was continuous and uninterrupted; (3) the Niedermans' use occurred over a uniform route, (4) the Niedermans' use was adverse to the Yangs, and (5) the Niedermans' use occurred with the Yangs' knowledge at a time when the Yangs were able in law to assert and enforce their rights. *Gamboa*, 183 Wn.2d at 43. Each element must concurrently exist for a period of 10 years. *Id.*

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Each of the Niedermans' Causes of Action, which the Yangs' seek to dismiss through this Motion, are based on the Niedermans' assertion that they have established prescriptive rights supporting: (a) the Easement Relocation Claim; (b) the Vehicle Turnaround Claim; and (c) the Garbage Claim, as identified in the statement of facts above. The Niedermans cannot meet their heightened burden to demonstrate genuine issues of material facts to support their claims, and each cause of action should be dismissed for the reasons set forth below.

1. The Easement Relocation Claim and Associated Causes of Action Should be Dismissed as a Matter of Law

The Easement Relocation Claim is primarily asserted through the Prescriptive Easement (Ingress/Egress) Cause of Action, and relief with respect to the claim is further sought through the Declaratory Relief Cause of Action, the Injunction Cause of Action, and the Nuisance Cause of Action. For the reasons set forth below, the Easement Relocation Claim and the associated causes of action should be dismissed.

a. Washington Law Prohibits Unilateral Easement Relocation

Relocation of existing easements is not allowed at common law without consent from both parties. The purpose behind this rule is explained in a leading treatise:

> As a general rule, **once the location of an easement has been established, neither the servient estate owner nor the easement holder may unilaterally relocate the servitude.** As the Supreme Court of Arizona has noted: "The reason for this rule is that treating the location as variable **would incite litigation and depreciate the value** and discourage the improvement of the land upon which the easement is charged." The no-unilateral-relocation general rule also protects the easement holder from such developments as capricious adjustments of the easement route by the servient estate owner.

§ 7:13. Relocation—General rule, The Law of Easements & Licenses in Land § 7:13 (emphasis added).

Washington courts have repeatedly reaffirmed the application of no-unilateral relocation rule in this state. *See Kave v. McIntosh Ridge Primary Rd. Ass'n*, 198 Wn. App.

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812, 823, 394 P.3d 446 (2017) (opining *inter alia* that "the trial court did not have authority to quiet title in McIntosh to an easement based on the existing location of the trail to the extent that the existing location differed from the easement's legal description"); *MacMeekin v. Low Income Hous. Inst., Inc.*, 111 Wn. App. 188, 203, 45 P.3d 570 (2002); *Crisp v. VanLaecken*, 130 Wn. App. 320, 325, 122 P.3d 926 (2005). "[T]he consent of all interested parties is prerequisite to the relocation of an easement." *Coast Storage Co. v. Schwartz*, 55 Wn. 2d 848, 854, 351 P.2d 520 (1960); *see also State ex rel. Northwestern Elec. Co. v. Clark County Superior Court*, 28 Wn.2d 476, 488, 183 P.2d 802 (1947) (an easement right, once granted and exercised, cannot be changed "at the pleasure of the grantee").

In reiterating the application of the no unilateral relocation rule, Washington courts have explicitly rejected a contrary rule from the citing Restatement (Third) of Property (Servitudes) § 4.83 (2000), which would allow the servient owner (the Yangs) to make reasonable changes in the location or dimensions of the easement. *MacMeekin*, 11 Wn. App. at 190 ("[w]e decline to adopt the Restatement (Third) approach, and **adhere to the traditional rule that easements may not be relocated absent mutual consent of the owners of the dominant and servient estates**, regardless of how the easement was created.") (emphasis added).

Consistent with this rule, Washington law generally prohibits the expansion of easement, unless the easement states on its face it is subject to future expansion. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn. 2d 873, 884, 73 P.3d 369 (2003) (the easement must "manifest a clear intention by the original parties to modify the initial scope based on future demands."). Here, there is no such statement of intent on the Access Easement, and the Plat unequivocally indicates "**Access to all lots shall be limited to the 10' private road easement."** Sternoff Decl., Ex. A.

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Consent by owners of both the servient and the dominant estate is the only way an easement may be moved. *See MacMeekin*, 11 Wn. App. at 190. The Yangs have offered their consent to move the 10-foot easement, which would have prevented this litigation, but they cannot force the Niedermans to agree. *See* Fisher Decl., Ex. A.

Any claim by the Niedermans that the existing 10-foot Access Easement can be unilaterally relocated onto portions of the Niederman Property is not supported by current Washington law and must fail.

b. The Presence of an Express Easement Negates the Adverse Element Required for a Prescriptive Easement

"Possession is adverse if a claimant uses property as if it were his own, entirely disregards the claims of others, asks permission from nobody, and uses the property under a claim of right." *Lee*, 88 Wn. App. at 182. Courts interpret adverse use as "meaning that the land use was *without* the landowner's permission." *Gamboa*, 183 Wn.2d at 44.

Courts presume that use of another's land is by permission and is not adverse. *Gamboa*, 183 Wn.2d at 44. Our Supreme Court clarified in *Gamboa* that there are specific circumstances in which this presumption applies: (1) unenclosed land; (2) where the land has been developed or enclosed, when "it is reasonable to infer that the use was permitted by neighborly sufferance of acquiescence," and (3) where "evidence demonstrates that the owner of the property created or maintained a road and his or her neighbor used the road in a noninterfering manner." 183 Wn.2d at 44. "**What constitutes a reasonable inference of neighborly sufferance or acquiescence is a fairly low bar**." *Gamboa*, 183 Wn.2d at 51 (emphasis added).

Here, the Niedermans' right to utilize the Yang Property was granted through the deeded Access Easement. Any instances where the Niedermans' predecessors used the Yang Property outside of the Access Easement is presumed under Washington law to be a

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neighborly accommodation and was confirmed as such by the Niedermans' predecessor, based on the existence of the deeded Access Easement. The Niedermans' uses only began in 2015 and are not relevant.

In sum, the express Access Easement negates any claim that the Niedermans were using the Yang Property in an adverse manner. This use establishes that the Niedermans' and the Niedermans' predecessors' respective use of the Yang Property has always been permissive, and the Niedermans cannot meet the burden of proof to overcome the presumption of permissive use to negate the adverse manner.

c. The Niedermans Cannot Show the "Distinct and Positive Assertion" of an Adverse Right Required when a Use is Permissive at Inception

The Washington Supreme Court in *Gamboa* analyzed Washington law, including its own authority in *Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669 (1946), and explained the **even greater presumption in favor of the servient estate owner** (the Yangs) when a use is "permissive at its inception." 183 Wn.2d at 45.

> When a court finds a use "is permissive in its inception," it "cannot ripen into a prescriptive right, no matter how long it may continue, **unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate**." A land use is "permissive in its inception" when a landowner actually gives a claimant permission to use the land—the claimant's license to use the land can never ripen into a prescriptive right **unless the user distinctly asserts that he or she is using the land as of right**. Additionally, we have held that when "the use of [a] pathway [*arises*] *out* of mutual neighborly acquiescence," the use is deemed "permissive in its inception." **This presumption is more difficult for claimants to rebut because it requires them to distinctly and positively assert a claim of right.**

Gamboa, 183 Wn.2d at 45-46 (emphasis added) (internal citations omitted). This results in "**a stronger presumption of permissive use than would be typical in neighbor accommodation cases**." *Gamboa*, 183 Wn.2d at 49 (emphasis added). The Niedermans cannot present any evidence of "distinct and positive assertion" of such a right by their

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predecessors that has continued for the 10-year statutory period. Their claims to prescriptive easement are barred as a matter of Washington law.

d. The Niedermans Cannot Show a 15-Foot Wide "Uniform Route" When Passenger Vehicles Are Never Wider than the 10-Foot Deeded Easement

There is no evidence that the Niedermans have used a "uniform route" on the Yang Property, as required to establish a prescriptive easement. *See Gamboa*, 183 Wn.2d at 43. The Niedermans and their predecessors have never attempted to drive any vehicle that was wider than the 10-foot express Access Easement onto the Yang Property. Accordingly, the Niedermans are unable to establish a "uniform route." With the width of standard passenger vehicles being approximately 6 to 6.5 feet[6] (and the legally allowable limit for any vehicle, including commercial vehicles, being 8.5 feet pursuant to RCW 46.44.010 and federal law[7]), it can unequivocally be concluded that neither the Niedermans nor their predecessors have used an area wider than 10 feet on the Yang Property for any extended duration over the past 40 years.

Because the Niedermans cannot establish the elements for a prescriptive element, this Court should dismiss their Easement Relocation Claim and related causes of action with prejudice.

2. The Vehicle Turn Around Claim and Associated Causes of Action Should be Dismissed as a Matter of Law

The Vehicle Turn Around Claim is primarily asserted through the Prescriptive Easement (Turnaround & Garbage Can) Cause of Action, and relief with respect to the claim is further sought through the Declaratory Relief Cause of Action, the Injunction Cause of Action, and the Nuisance Cause of Action.

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[6] *What is the Width and Length of the Average Car,* REFERENCE, May 27, 2020, https://www.reference.com/world-view/width-length-average-car-9eb7b00283fb1bd8.

[7] 23 CFR § 658.15(a).

The Vehicle Turnaround Claim is nothing more than an assertion by the Niedermans that they can use the Yang Property for any use they like. They can present no material evidence that the area on the Yang Property at issue has been used in a manner they are asserting over the 10-year statutory period. Specifically, there is no evidence of: (a) utilization of a uniform route; (b) continues and uninterrupted use, (c) that the use is not simply an expansion and relocation of the deeded Access Easement. Furthermore, nothing overcomes the presumption that the any uses outside the Access Easement were permissive and a neighborly accommodation from its inception.

The Niedermans' predecessor-in-interest testified that there was never any regular use of the vehicle turnaround area. *See* Simons Decl. Accordingly, the Niedermans cannot establish the 10-year statutory period. Simons' testimony directly conflicts with the notion that the Niedermans' or their predecessors use' of the Yang Property met any of the elements necessary for a prescriptive easement.

Simons further testified that any periodic use was a neighborly accommodation. *See* Simons Decl. She testified that she and her ex-husband only rarely used the Yang Property to turn vehicles around, and they never believed they had any prescriptive easement to the Yang. Where there are no enclosures and the Niedermans have made no improvements on the Yang Property, the Niedermans have offered nothing to overcome the presumption of permissive use. *See Gamboa*, 183 Wn.2d at 49.

The Niedermans cannot meet the statutory 10-year period required for a prescriptive easement because their predecessor explicitly testified that she did not use the Yang Property in a manner asserted by the Niedermans. And their predecessor testified that any infrequent use was permissive and a neighborly accommodation. Accordingly, the Niedermans cannot establish a prescriptive easement for the purpose of turning their vehicles around.

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3. The Garbage Claim and Associated Causes of Action Should be Dismissed as a Matter of Law

As part of Prescriptive Easement (Turnaround & Garbage Can) Cause of Action, the Niedermans' claim that they have an easement for the purpose of placing their garbage, recycling, and yard waste bins is unsupported by the evidence. The Garbage Claim is nothing short of factually and legally frivolous.

The Niedermans' predecessor testified that she never used the Yang Property to store their garbage or recycling bins. Simons Decl., ¶ 13. All the evidence establishes that this use never occurred prior to 2015, and any use afterwards has been a neighborly accommodation. Simons Decl., ¶ 9, 14.

While the neighborly accommodations the Yangs have given the Niedermans since 2015 are not material when the requisite 10 years have not passed, the text messages exchanged by Sophy Yang and Nicole Niederman in 2015, 2016, and 2018 unequivocally demonstrate that there is no basis for the Niedermans to claim any adverse use. *See* Declaration of Sophy Yang in Support of Motion for Summary Judgment Dismissing all of Plaintiffs' Claims, Ex. A.

The Garbage Claim is a baseless expansion of the scope of the Deeded Easement (for ingress and egress), and the Niedermans have invented this claim to attempt to expand the use of the Yang Property.

4. The Niedermans Cannot Establish Nuisance

The Niedermans' fifth cause of action, for private nuisance under RCW ch. 7.48, also must be dismissed on summary judgment. Nuisance is defined as "an obstruction of the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property." RCW 7.48.010.

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a. The Nuisance Claim Fails When Predicated on Interference with Non-Existent Prescriptive Easement Rights

A person cannot have a claim for nuisance if he or she does not have a legally recognized right in that property. *Mustoe v. Ma*, 193 Wn. App. 151, 169, 371 P.3d 544 (2016) (holding that the claimant had no legal cause for nuisance when she did not have a legal right to the property at issue). The Niedermans' claim is predicated on an interference with their claimed prescriptive easement. *See* Complaint at 9, ¶ 3.33. As discussed above, the Niedermans have no legal right or interest in the Yang Property outside the express Access Easement. They cannot claim a nuisance to property to which they have no legal right. *See Mustoe*, 193 Wn. App. at 169. The Niedermans have not asserted in any way that the Yangs have intruded or interfered with the Niederman Property.

b. There is no Evidence of an Unlawful Act

"In a nuisance case, the fundamental inquiry concerns whether the use of certain land can be considered reasonable in relation to all the facts and circumstances." *Id.*

Even if the Niedermans have a right to the Yang Property through an easement, they have presented no evidence of an unlawful act. These claims are predicated on the temporary parking of construction vehicles while the Yangs were constructing their home. This does not rise to the level of a private nuisance.

In *Lund v. St. Paul, M&M. Ry. Co.* 31 Wn. 286, 290, 71 P. 1032 (1903), our Supreme Court held that a railroad company's obstruction of a city street during construction was not a nuisance so long as it was not maintained for more than a reasonable time. Similarly here, the Niedermans have presented no evidence that the temporary blocking of their driveway was unreasonable given the circumstances. Even if the Niedermans had a prescriptive easement right, it was never an exclusive right. And the Niedermans have never been physically blocked from entering their property.

Accordingly, the fifth cause of action should be dismissed.

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VI. CONCLUSION

For the forgoing reasons, the Niedermans' remaining causes of action should be dismissed on summary judgment. The remaining causes of action left for trial will be the Yangs' claims regarding trespass and related damages, as well as injunctive relief. The Yangs remain prepared to move the 10-foot Access Easement to line up with the Niedermans' driveway to fully resolve this litigation, but the Yangs cannot do so without the Niedermans' consent.

RESPECTFULLY SUBMITTED: This 2nd day of September, 2021.

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I certify that this memorandum contains 5,085 words in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below I caused the foregoing document to be served upon the following counsel by **mandatory electronic service through the King County Superior Court Clerk's eFiling application pursuant to LGR 30**.

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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 2nd day of September, 2021, at Federal Way, Washington.

/s/ Sarah King
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