NO. 96948-5

COA NO. 76620-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

DAVID TILLER and THUY TILLER,
Plaintiffs/Respondents/Cross-Appellants,
v.
STEVEN LACKEY and SALLY LACKEY, husband and wife; and
CASEY O'KEEFE and KAREN O'KEEFE, husband and wife,
Defendants/Appellants/Cross-Respondents.

APPEAL FROM THE SUPERIOR COURT OF WHATCOM COUNTY
HONORABLE CHARLES R. SNYDER, PRESIDING

APPELLANTS' PETITION FOR REVIEW

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III. INDENTITIES OF PETITIONERS

Petitioners, Steve and Sally Lackey and Casey and Karen O'Keefe, ask this Court to grant review of the Court of Appeals' decision designated in Part IV.

IV. RELIEF REQUESTED

Petitioners move the Court pursuant to RAP 13.3 (a) (1), RAP 13.4 to grant review of the Court of Appeals' decision filed December 10, 2018, a copy of which is attached as Appendix 1.

V. ISSUES PRESENTED FOR REVIEW

1. By recognizing an implied easement without addressing the express statement of intent on the face of the Plat of Georgia Point restricting the use of Lakeview Street to the owners of the lots in the plat, does the Court of Appeals' decision thereby conflict with *Visser v. Craig*, 139 Wn. App. 152, 164-65, 159 P. 3d 453 (2007), which recognizes the majority view such an easement cannot be imposed despite the parties' contrary intent?

2. By failing to address the express statement of intent on the face of the Plat of Georgia Point restricting the use of Lakeview Street to the owners of the lots in the plat, does the Court of Appeals' decision thereby conflict with rules of construction for plats recognized in *Cummins v. King County*, 72 Wn. 2d 624, 627, 434 P. 2d 588 (1967), *Selby v. Knudson*, 77

Wn. App. 189, 194, 890 P. 2d 914 (1995), and *Wilson v. Howard*, 5 Wn. App. 169, 176, 486 P. 2d 1172 (1971)?

3. Do Washington courts follow the majority view and decline to recognize an implied easement contrary to the express intent of the original grantors, the Provanches?

4. By recognizing an implied easement in this case, is the Court of Appeals' decision in conflict with *MacMeekin v. Low Income Hous. Inst., Inc.*, 111 Wash. App. 188, 196, 45 P.3d 570 (2002) and *Boyd v. Sunflower Properties, LLC,* 197 Wn. App.137, 389 P. 3d 326 (2016), which recognize easements by implication are not favored because they are in derogation of the rule written instruments speak for themselves?

5. By relying upon the trial court's Findings 26 and 47 regarding the cabin lot easement as an "e*asement to nowhere*" to support its recognition of an implied easement, does the Court of Appeals' decision conflict with *Brown v. Voss*, 105 Wn. 2d 366, 372, 715 P. 2d 514 (1986)?

6. Was the Court of Appeals' reliance upon Provanches' reservation of the cabin lot easement a few years after recording of the plat a sufficient basis to establish Provanches' intent to reserve to themselves an access easement to the remaining portion of their property, or does the Court of Appeals' decision conflict with *Selby v. Knudson*, 77 Wn. App. 189, 194,

890 P. 2d 914 (1995), prohibiting consideration of parol evidence to contradict the unambiguous statement of the grantors' intent?

7. By failing to address the portion of the trial court's finding of fact 29, that there is now an adequate, though not fully convenient, egress and ingress to respondents' lot from Northshore Road, does the Court of Appeals' decision conflict with the rule recognized in *Valley Construction Co. v. Lake Hills Sewer District,* 67 Wn. 2d 910, 918, 410 P. 2d 796 (1965) and *Henriot v. Lewis*, 35 Wn. App. 496, 501, 668 P. 2d 589 (1983), that an appellate court may not disregard findings of fact supported by substantial evidence?

8. By failing to address the portion of the trial court's finding of fact 29, that there is now an adequate, though not fully convenient, egress and ingress to respondents' lot from Northshore Road, does the Court of Appeals' decision conflict with *Roediger v. Cullen*, 26 Wn. 2d 690,175 Wn. 2d 669 (1946)?

VI. STATEMENT OF THE CASE

On July 2, 1943, Noel J. Provanche and Eileen M. Provanche (the Provanches) purchased from Archie and Belle Shiels their entire property within Government Lot 6 in section 25 of township 38 north, of range 3 east in Whatcom County, Washington. RP V, p. 673; p. 798-799; EX 158. On the property purchased by Provanches was a residence constructed by

Shiels on the southeast corner, along with a driveway from Northshore Road, which crossed the railroad tracks to their residence at a prominent location on Lake Whatcom known as Georgia Point. RP V, p. 673; p. 798-799; EX 158.

On June 27, 1945, Provanches recorded the Plat of Georgia Point (the Plat) from the larger parcel of property they had obtained from Shiels in 1943. RP V, p. 807; EX 1, 185, 186, 188. The Plat consists of 10 lots (Lots 1-10) and a parcel of real property abutting and spanning the 10 lots which was dedicated by Provanches as Lakeview Street "*as a private street reserved for the use of the owners of the Lots within the boundaries of this plat. Title to any lot will include an undivided one tenth interest in the street ....*" EX 186.

The Lackeys own Lot 10 within the Plat located at 2173 Northshore Road. EX 191, 192. Per the Plat, Lackeys also own a one-tenth undivided interest in Lakeview Street. EX 186. Lot 10 was acquired by a corporation owned by the Lackey family on September 25, 2002. EX 191. That corporation conveyed title to Lot 10 to Lackeys on October 15, 2009. EX 192. O'Keefes acquired Lot 9 on September 13, 2005. EX 194.

All of the lots in the Plat were owned by Provanches until they were sold. Lot 6 was the last lot sold within the Plat on June 18, 1947.

EX 187. After that date, Provanches held no ownership within the Plat, including no ownership of the land dedicated as Lakeview Street.

Two years after all of the lots in the Plat were sold, Provanches created and deeded another lot within their remaining parcel, known as the "Cabin Lot." RP I; p. 22, l. 15-16; EX 8. The Cabin Lot is located immediately east of the Plaintiffs'(Tillers') property and 100 feet east of the Plat. EX 181. The Cabin Lot was created, deeded and sold by Provanches on July 21, 1949. EX 9. The deed contained a written description of an easement on property east of the Plat for access to the Cabin Lot. EX 10. It did not contain an easement on any part of the Plat. EX 9. The Cabin Lot deed was recorded on December 5, 1949. EX 9.

Tillers' lot was created and deeded by Provanches to Jackson Fraser on July 1, 1953. EX 10. That deed reserved an easement on the property to provide ingress and egress to the Cabin Lot, using the same description of the easement as that contained in the Cabin Lot deed. EX 9, 10. There was no easement of any kind that provided access to or otherwise benefitted Tillers' property when it was first separately deeded in 1953. EX 10.

When the Plat was recorded, a railroad right of way ran between the northern boundary of the Plat and North Shore Road. EX 181. In 1976, the Burlington Northern Railroad, then the owner of the right of

way, having abandoned use of the railroad line, quitclaimed its right of way in individual parcels to the owners of abutting properties along its route. RP VI, p. 928; EX 159. The then-current owner of each lot in the Plat thus acquired a parcel of property located between Northshore Road and Lakeview Street. RP VI, p. 928; EX 159. Likewise, Hendricks, the then-current owner of Tillers' lot, acquired a parcel between Northshore Road and their property. EX 5; EX 159. Similarly, Pitt, the then- current owner of the Cabin Lot, acquired a parcel between Northshore Road and his property. EX 159.

A dispute arose between Tillers and Lackeys at the end of 2009, which resulted in Lackeys giving notice on May 1, 2014, Tillers' use of Lakeview Street would be terminated on July 1, 2014. RP V, p. 784: EX 22. Tillers' lawsuit naming as defendants Lackeys and O'Keefes followed on July 25, 2014, claiming they had a prescriptive easement on Lakeview Street. CP 7-35. On March 1, 2017, following trial, the trial court entered Findings of Fact, Conclusions of Law, and Judgment. CP 825-848. The trial court recognized Tillers had a prescriptive easement over Lakeview Street. CP 845. The trial court concluded there was no implied easement by prior use or necessity allowing the use of Lakeview Street by Tillers. CP 844.

On appeal, Division I of the Court of Appeals reversed the judgment granting Tillers a prescriptive easement. *Tiller v. Lackey,* --Wn. 2d --, 431 P. 3d 524, 531-38 (2018). The Court of Appeals reversed the trial court's denial of an implied easement and concluded the trial court's findings supported such an easement. 431 P. 3d 538-542. The Court of Appeals denied Lackeys and O'Keefes' motion for reconsideration. App. 2.

VII. ARGUMENT

A. The Court of Appeals' decision merits review under RAP 13.4 (b) (1).

In *Cummins v. King County*, 72 Wn. 2d 624, 627, 434 P. 2d 588 (1967), this Court announced the following rule of construction of a plat:

> Plats by which dedications are made are to be * * * (interpreted) by the court as any other writing would be, * * *. They are to be construed as a whole in order that the intention of the party may be ascertained, and every part of the instrument be given effect; no part of the plats is to be rejected as * * * meaningless, if it can be avoided, and lines as well as words are to be considered. (Footnotes omitted.) (*Quoting* 26 C.J.S. Dedication, s 49 at 519-20).

This rule is also followed in *Frye v. King* County, 151 Wash. 179, 183, 275 P. 547 (1929), *Selby v. Knudson*, 77 Wn. App. 189, 194, 890 P. 2d 914 (1995), and *Wilson v. Howard*, 5 Wn. App. 169, 176, 486 P. 2d 1172 (1971). By failing to address to address the grantors' expression of intent

on the face of the plat the Court of Appeals' decision conflicts with *Cummins, Frye, Selby and Howard.*

Washington courts reject an interpretation of a plat that does not give effect to every part thereof. *Ditty v. Freeman*, 55 Wn. 2d 306, 309, 347 P. 2d 870 (1959); *Mueller v. City of Seattle,* 167 Wash. 67, 73, 8 P.2d 994 (1932). By failing to address Provanches' expression of intent on the face of the plat the Court of Appeals' decision also conflicts with *Ditty v. Freeman* and *Mueller v. City of Seattle.*

The Court of Appeals' construction of the plat leaves Provanches' reservation of the road parcel to the lot owners a meaningless appendage. This is not permitted. *Cummins, supra.* Instead, under *Cummins,* a more reasonable construction of the Plat of Georgia Point is one that construes the lines designating the boundaries of Lakeview Street consistently with the language of the dedication limiting the use of Lakeview Street to the owners of the lots within the plat.

Many Washington courts recognize the cardinal consideration upon the question of easement by implication is the presumed intention of the parties concerned. *Evich v. Kovacevich*, 33 Wn. 2d 151, 157, 204 P. 2d 839 (1949), *Rogers v. Cation*, 9 Wn. 2d 369, 115 P. 3d 702 (1941), *Adams v. Cullen*, 44 Wn. 2d 502, 505-06, 268 P. 2d 451 (1951), *Hellberg v. Coffin Sheep Co.,* 66 Wn. 2d 664, 668, 404 P. 2d 770 (1955), *MacMeekin*

v. Low Income Housing Institute, Inc., 111 Wn. App. 188, 195-96, 45 P. 3d 570 (2003). In a case as this, however, no issue of presumed intention of the grantor arises, as the intent of the parties is evident on the face of the plat. To the extent *Evich*, *Rogers*, *Adams*, *Hellberg*, and *MacMeekin* have application here, they require adherence to the intent of the parties. By failing to address Provanches' expression of intent on the face of the plat the Court of Appeals' decision therefore conflicts with *Evich*, *Rogers*, *Adams*, *Hellberg*, and *MacMeekin.*

In paragraph 57 of its decision, the Court of Appeals relied in part on the trial court's Finding of Facts 26 and 47 to support its conclusion Provanches intended to reserve an access to that portion of their remaining property via the street parcel. 431 P. 3d 540-41. In Findings 26 and 47, the trial court found the cabin lot easement an "*easement to nowhere*" and in Finding 47, it found the cabin lot easement was of no value without Lakeview Street. CP 838; App. 1. The Court of Appeals did not attempt to reconcile those findings with *Brown v. Voss*, 105 Wn. 2d 366, 815 P. 2d 514 (1986). In *Brown*, this Court followed the rule "*If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement.*" 105 Wn. 2d 372. By allowing respondents to use the cabin lot easement to access Lakeview Street, the

Court of Appeals' decision is irreconcilably in conflict with *Brown v. Voss*.

In paragraph 64 of its decision, the Court of Appeals relied upon an excerpt of Finding of Fact 29 to support its conclusion necessity still exists for the implied easement. 431 P. 3d 542. Inexplicably, the Court of Appeals omitted the following clause of Finding 29 from its discussion: "*...Nonetheless, there is now an adequate, though not fully convenient, egress and ingress to Plaintiffs' lot from Northshore Road....Most likely, the current driveway would be deemed adequate under the law if the Court were addressing the issue of necessity.*" CP 833; App. 1. By omitting this portion of Finding 29 from its discussion, the Court of Appeals stood Finding 29 on its head. The Court of Appeals failed to identify any legal principle that allows it to selectively edit the trial court's findings to achieve a desired result.

Washington decisions do not allow an appellate court such unfettered leeway when interpreting a trial court's findings. The Court's treatment of Finding 29 cannot be reconciled with *Valley Construction Co. v. Lake Hills Sewer District,* 67 Wn. 2d 910, 918, 410 P. 2d 796 (1965) or *Henriot v. Lewis*, 35 Wn. App. 496, 501, 668 P. 2d 589 (1983).

In *Valley Construction,* the Court recognized it was bound to follow the trial court's findings:

> ...Respondents further asserted the trial court's determination and judgment upon conflicting evidence is decisive and the appellate court cannot substitute its findings in lieu of those of the trial court. This court is bound by such findings if supported by substantial evidence. *Delegan v. White*, 59 Wash.2d 510, 368 P.2d 682 (1962).

67 Wn. 2d 918.

Similarly, in *Henriot v. Lewis*, the Court of Appeals recognized it did not have authority to disregard the trial court's findings. "*Certainly we cannot disregard findings supported by substantial evidence....*" 35 Wn. App. 501. By selectively editing its consideration of Finding 29, the Court of Appeals' decision is in conflict with *Valley Construction* and *Henriot v. Lewis.*

By failing to address the portion of the trial court's finding of fact 29, that there is now an adequate, though not fully convenient, egress and ingress to respondents' lot from Northshore Road, the Court of Appeals' decision also conflicts with *Roediger v. Cullen*, 26 Wn. 2d 690, 175 Wn. 2d 669 (1946). Finding 29 in its entirety negates the continued existence of the element of necessity. In *Roediger v. Cullen*, the court adopted the rule an easement of necessity continues only while necessity exists. 26 Wn. 2d 696. Therefore, by failing to address Finding 29 in its entirety, the Court of Appeals' decision is in conflict with *Roediger v. Cullen.*

Further, in paragraph 63 of its decision, the Court of Appeals considered Provanches reservation of the cabin lot easement as evidence of their intent to reserve themselves an easement to the western side of their remaining property at the time they severed their interest in the plat. 431 P. 3d 541-42. The Court of Appeals' consideration of Provanches' reservation of the cabin lot easement as evidence of intent to reserve access to their remaining property is directly contrary to Finding 24, wherein the trial court found the later creation of the cabin lot and Tillers' lot ***was not*** evidence of a plan to reserve access from Lakeview Street at the time of the severance of the title. CP 832; App. 1. Thus, the Court of Appeals again disregarded the trial court's findings, contrary to *Valley Construction* and *Henriot v. Lewis, supra.*

In Paragraph 62, the Court of Appeals concluded the trial court's findings establish, at the time of severance, use of the easement would have been reasonably necessary to access the "physically land locked" portion of the remaining Provanche property east of the plat. 431 P. 3d 541. Paragraph 62 cannot be reconciled with Finding 25, which found necessity existed for access across Lakeview Street upon the ***creation*** of the cabin lot in 1949, which landlocked both it and Tillers' lot. CP 832; App. 1. The cabin lot was not created until 1949, whereas Provanches separated themselves from the plat with the sale of the last lot in the

Georgia Point development in 1947. CP 828; App. 1. Nor can paragraph 62 be reconciled with Finding 33, wherein the trial court found the use of Lakeview Street to reach the Tiller or cabin lots was not evident until 1949, two years after separation. CP 834; App. 1. Thus, the Court of Appeals once again disregarded the trial court's findings, contrary to *Valley Construction* and *Henriot v. Lewis, supra.*

Moreover, in neither Paragraph 62 of its decision or elsewhere did the Court of Appeals identify any finding of the trial court that necessity existed at the time of severance in 1947. No such finding was ever made by the trial court. Necessity must exist at the moment of severance. *Bailey v. Hennessey*, 112 Wash. 45, 48-49, 191 P. 863 (1920); *Granite Beach Holdings, LLC v. Department of Natural Resources,* 103 Wn. App. 186, 190, 11 P. 3d 847 (2000). Therefore, the absence of a finding of necessity at the time of severance creates an implied negative finding against Tillers on that issue. *Ellerman v. Centerpoint Prepress, Inc.,* 143 Wn. 2d 514, 524, 22 P. 3d 795 (2001). Because no finding of necessity at severance was made, the Court of Appeals' decision is in conflict with *Bailey v. Hennessey*, and *Granite Beach Holdings.*

The Court should therefore undertake review of the Court of Appeals' decision to resolve these conflicts.

B. The Court of Appeals' decision merits review under RAP 13.4 (b) (2).

The Court of Appeals, decision regarding an implied easement presents conflicts with *Visser v. Craig,* 139 Wn. App. 152, 159 P. 3d 453 (2007). In *Visser*, the Court of Appeals identified the majority rule on recognizing an implied easement in the face of contrary intent of the parties:

> Most jurisdictions do not allow an easement by necessity to arise if there is clear evidence of the parties' contrary intent, and the majority view on easements by necessity, which originated from the common law, militates against the conclusion that an easement by necessity can be imposed despite the parties' contrary intent. (footnote omitted).

139 Wn. App. 164-65.

In this case, no clearer evidence of such intent can be found than in the dedication signed by the Provanches on the face of the plat of Georgia Point, wherein they expressly dedicated Lakeview Street "*as a private street reserved for the use of the owners of the Lots within the boundaries of this plat.*" EX 186.

Respondents acknowledge the dedication on the Plat of Georgia Point contains an expression of Provanches' intent as to who had the right to use Lakeview Street, and the dedication contains no reference to use of

Lakeview Street by anyone other than the lot owners of Georgia Point. RP 672 l. 9-21.

By imposing an implied easement upon Lakeview Street in favor of strangers to the plat of Georgia Point, and in defiance of the express intent of the grantors enshrined on the face of the plat, the Court of Appeals' decision is in conflict with the decision of Division II of the Court of Appeals in *Visser v. Craig.* Petitioners ask the Court to undertake review of the Court of Appeals decision and resolve this conflict.

Further, by recognizing an implied easement in this case, the Court of Appeals' decision is in conflict with *MacMeekin v. Low Income Hous. Inst., Inc.*, 111 Wash. App. 188, 196, 45 P.3d 570 (2002) and *Boyd v. Sunflower Properties, LLC*, 197 Wn. App.137, 144, 389 P. 3d 326 (2016), both of which recognize easements by implication are not favored because they are in derogation of the rule written instruments speak for themselves. Here, contrary to both *MacMeekin* and *Boyd,* by ignoring the written expression of the grantors' intent on the face of the plat, the Court of Appeals favors recognition of an easement by implication where it is not supported by the facts.

In Paragraph 63 of its opinion, the Court of Appeals relied upon events occurring subsequent to the recording of the Plat of Georgia Point, specifically the creation of the cabin lot a few years after recording of the

plat, to support its conclusion Provanches intended to reserve themselves an easement for access to the "landlocked" portion of their remaining property at the time they severed their interest in the plat. 431 P. 3d 541-42. The Court of Appeals opinion thereby conflicts with *Selby v. Knudson*, 77 Wn. App. 189, 890 P. 2d 514 (1995). In *Selby*, the Court of Appeals, citing *Olson Land Co. v. Seattle*, 76 Wash. 142, 136 P. 118 (1913), concluded it could not consider subsequent deeds from the dedicators of the plat in that case to establish it was not the dedicators intent to create a plug at the end of a street in the plat. The Court concluded since the plat was unambiguous, the intent of the dedicators cannot be contradicted by parol evidence, including a later deed. 77 Wn. App. 195.

The same conclusion is warranted here as in *Selby*. As the intent of Provanches to confer exclusive rights to use Lakeview Street to only the lot owners in the plat is unambiguous, it was error for the Court of Appeals to consider the deed to the cabin lot easement in determining their intent.

The Court should therefore undertake review of the Court of Appeals' decision to resolve these conflicts.

C. The Court of Appeals' decision merits review under RAP 13.4 (b) (4).

RAP 13.4 (b) (4) allows review if the petition involves an issue of substantial public interest that should be determined by the Court. An easement of necessity is an expression of a public policy that will not permit property to be landlocked and rendered useless. *Hellberg v. Coffin Sheep Co.*, 66 Wn. 2d 670; *Visser v. Craig*, 139 Wn. App. 159.

The public interest will also be served by consideration whether, as discussed in *Visser v. Craig*, Washington courts follow the majority rule and decline to recognize an implied easement in the face of contrary intent of the parties.

Numerous cases from other jurisdictions follow the majority rule and decline to recognize an implied easement contrary to the parties' intent. In *Jackson v. Nash*, 109 Nev. 1202, 866 P. 2d 262 (1993), the trial court's judgment that no implied easement existed over the defendants' property was affirmed on appeal. The court concluded there was no evidence in the record to show the original grantor and grantee intended to reserve an access easement over the defendants' property. 866 P. 2d 271.

In *White v. Landerdahl*, 191 Mont. 554, 625 P. 2d 1145 (1981), judgment for defendants in an action brought by plaintiffs to establish an implied easement over the defendants' land was affirmed on appeal. The

Montana Supreme Court affirmed, citing the trial court's memorandum that explained the evidence disclosed the parties did not intend to provide for an easement. 525 P. 2d 1147.

In *Koestel v. Buena Vista Public Service Corporation*, 138 Ariz. 578, 676 P. 2d 6 (1984), the Arizona Court of Appeals reversed summary judgment in a quiet title action brought by plaintiffs to establish an implied easement over land held by the defendant trust, finding issues of fact whether the plaintiff intended there be another method of supply water to his lots other than an existing pipeline. 676 P. 2d 9.

In *Murphy v. Burch*, 46 Cal. 4th 157, 92 Cal Rptr. 3d 381, 205 P. 3d 289 (2009), the California Supreme Court affirmed the reversal by the California Court of Appeals of a trial court judgment quieting title to an access road on the grounds of an easement by necessity. Both of the parties' properties had been acquired from the federal government. In affirming reversal of the trial court's judgment, the California Supreme Court adhered to the rule implication of an easement will not be made if shown to be contrary to the parties' intentions. 205 P. 3d 293.

In *Tschagenny v. Union Pacific Land Resources Corp.,* 555 P. 2d 777 (Ut. 1976), the Utah Supreme Court affirmed judgment for defendants in an action brought by plaintiff to establish an implied easement over a lot owned by defendants. The court acknowledged the doctrine of easement

by necessity was subject to the qualification it would not apply if it clearly appears that the parties to the conveyance did not intend such an easement. 555 P. 2d 281.

The foregoing decisions provide persuasive authority that an implied easement will not be recognized if it is contrary to the intent of the parties. The Court should apply that rule here, as the dedication of the plat contains the grantors' unambiguous statement of intent Lakeview Street is a private street reserved for the use of the owners of the lots within the boundaries of the plat.

D. The Court of Appeals erred in denying Appellant's motion for reconsideration.

Lackeys and O'Keefes assign error to the Court of Appeals' order denying their motion for reconsideration. App. 2. Lackeys and O'Keefes incorporate their arguments and authorities in paragraphs VII A through C, above.

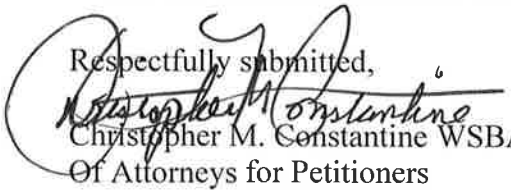
E. Petitioners request an award of costs on appeal.

In the event the Court grants review and if they prevail before the Court, Lackeys and O'Keefes request an award of costs on appeal if they prevail pursuant to RAP 14.2, 14.3, 14.4. If Lackeys and O'Keefes prevail before the Court, they request and award of costs in accordance with *Maytown Sand & Gravel, LLC v. Thurston County*, 191 Wn. 2d 392, 423 P. 3d 223 (2018).

VIII. CONCLUSION

The Court should undertake review of the Court of Appeals' decision to resolve the issues and conflicts discussed above.

Respectfully submitted,



Christopher M. Constantine WSBA 11650
Of Attorneys for Petitioners

IX. APPENDICES

1. Court of Appeals' decision, 431 P. 3d 534 (2018)

2. Order Denying Reconsideration

431 P.3d 524
Court of Appeals of Washington, Division 1.

David TILLER and Thuy Tiller, Husband and Wife, Respondents/Cross-Appellants,
v.
Steven LACKEY and Sally Lackey, Husband and Wife; and Casey O'Keefe and Karen O'Keefe, Husband and Wife, Appellants/Cross-Respondents.

No. 76620-1-I
|
FILED: December 10, 2018

Synopsis

Background: Lakefront property owner brought quiet title action against his neighbor claiming a prescriptive easement to continue using a private road burdening neighbor's property, as well as an easement implied by prior use and necessity. After a trial, the Superior Court, Whatcom County, No. 14-2-01678-2, Charles Russell Snyder, J., concluded that property owner established a prescriptive easement, but failed to meet the requirements for an implied easement. Neighbor appealed, and property owner cross appealed.

Holdings: The Court of Appeals, Smith, J., held that:

[1] trial court had subject matter jurisdiction over quiet title action;

[2] presumption of permissive use applied;

[3] property owner failed to establish that his use of private road was adverse, as required to establish prescriptive easement;

[4] fact that the property owner's lot did not exist as a separate and distinct parcel at the time the common grantors severed the plat from their remaining property did not preclude the implication of an easement; and

[5] property owner was entitled to implied easement by necessity over private road.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Judgment.

West Headnotes (40)

[1] **Appeal and Error**
Subject-matter jurisdiction

Whether a court has subject matter jurisdiction is a question of law reviewed de novo.

Cases that cite this headnote

[2] **Appeal and Error**
Organization and Jurisdiction of Lower Court

The trial court's lack of subject matter jurisdiction may be raised for the first time on appeal. Wash. R. App. P. 2.5(a)(1).

Cases that cite this headnote

[3] **Quieting Title**
Jurisdiction and venue

Trial court had subject matter jurisdiction over quiet title action brought by lakefront property owner against neighbor seeking to establish owner's easement burdening neighbor's property; property owner's purported failure to follow plat amendment procedures and then to appeal any adverse determination under Washington's Land Use Petition Act did not deprive the court of subject matter jurisdiction. Wash. Const. art. 4, § 6; Wash. Rev. Code Ann. §§ 36.70C.005 et seq., 58.17.215.

Cases that cite this headnote

[4] **Appeal and Error**
Necessity of presentation in general

Appeal and Error
Jurisdiction and venue

Court of Appeals would decline to address neighbor's assertion that property owner was required to submit an application to impose a prescriptive easement, rather than seek to quiet title; neighbor failed to raise issue below, and any alleged failure to file application did not deprive trial court of subject matter jurisdiction. Wash. Rev. Code Ann. § 58.17.215; Wash. R. App. P. 2.5(a).

Cases that cite this headnote

[5] **Adverse Possession**
Nature and grounds of prescription

Prescriptive rights are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons.

Cases that cite this headnote

[6] **Easements**
Prescription

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

Cases that cite this headnote

[7] **Easements**
Questions for jury

Whether a claimant has established a prescriptive easement is a mixed question of law and fact.

Cases that cite this headnote

[8] **Appeal and Error**
Inferences and Conclusions Drawn from Evidence
Appeal and Error
What constitutes substantial evidence

The appellate court reviews the trial court's findings of fact following a bench trial to determine whether they are supported by substantial evidence, and then reviews whether those findings support the trial court's conclusions of law.

Cases that cite this headnote

[9] **Easements**
Use by permission or agreement

As element of prescriptive easements, "adverse use" generally means that the claimant's use was not permissive.

Cases that cite this headnote

[10] **Easements**
Adverse Character of Use

In establishing a prescriptive easement, whether use is adverse is to be measured by an objective standard; that is, by the objectively observable acts of the user and the rightful owner.

Cases that cite this headnote

[11] **Easements**
Presumptions and burden of proof

In evaluating whether use was adverse versus permissive, for purposes of establishing a prescriptive easement, a presumption of permissive use applies in certain factual scenarios, including cases involving vacant and unenclosed land, and developed land cases when there is a reasonable inference of neighborly sufferance or acquiescence.

Cases that cite this headnote

[12] **Easements**
Presumptions and burden of proof

Presumption of permissive use applied in quiet title action brought by lakefront property owner against neighbor alleging the existence of a prescriptive easement over private road on neighbor's property; evidence supported finding that property owner and his other neighbors in plat—as well as their respective predecessors—all used the private road for their own purposes and in conjunction with each other without incident until the instant dispute arose, and evidence that first owners of burdened lot did not complete construction of residence prior to road's use by owner's predecessor did not preclude application of presumption.

Cases that cite this headnote

[13] **Appeal and Error**
Defects, objections, and amendments

A minor technical violation of rule governing assignments of error in briefs will not bar review where the nature of the challenge is clear and the challenged ruling is set forth and fully discussed in the appellate brief. Wash. R. App. P. 10.3(g).

Cases that cite this headnote

[14] **Easements**
Adverse Character of Use

The existence of friendship, however close, does not in and of itself conclusively establish acquiescence in a claim for a prescriptive easement, but it does support a reasonable inference of neighborly sufferance or acquiescence.

Cases that cite this headnote

[15] **Easements**
Presumptions and burden of proof

Fact that no permission was requested or received does not preclude applying a presumption of permissive use in a claim for a prescriptive easement.

Cases that cite this headnote

[16] **Easements**
Presumptions and burden of proof

Once a presumption of permissive use is established in a claim for a prescriptive easement, it can be defeated when the facts and circumstances are such as to show that the user was adverse and hostile to the rights of the owner, or that the owner has indicated by some act his admission that the claimant has a right of easement.

Cases that cite this headnote

[17] **Easements**
Presumptions and burden of proof

For a claimant of a presumptive easement to show that land use is adverse and hostile to the rights of the owner, in the context of defeating a presumption of permissive use, the claimant must put forth evidence that he or she interfered with the owner's use of the land in some

manner.

Cases that cite this headnote

[18] **Easements**
Presumptions and burden of proof

Lakeshore property owner failed to establish that his use of private road across neighboring property was adverse, as required to defeat presumption of permissive use and establish prescriptive easement; subjective belief of owners within plat regarding owner's right to use the road was not relevant to the inquiry of adversity, nor was fact that the owners within the plat did not make a concerted effort to restrict others from using the private road, and unfairness to a third party was not part of the inquiry.

Cases that cite this headnote

[19] **Private Roads**
Vacation or abandonment

One who quietly acquiesces in the use of a private road ought not to be held to have thereby lost his rights.

Cases that cite this headnote

[20] **Easements**
Acquisition of Rights of Way

Fact that easement benefiting lot east of subject property was recorded and litigated did not make subject property owner's use of private road abutting western end of easement adverse, for purposes of establishing prescriptive easement over private road; owners of private road had no duty to search for recorded documents outside their own respective chains of title, and thus could not be charged with constructive knowledge of existing easement.

Cases that cite this headnote

[21] **Easements**
Presumptions and burden of proof

Where a presumption of permissive use applies in the context of prescriptive easements, a showing that the claimant used the disputed property as a true owner would is not enough to rebut that presumption.

Cases that cite this headnote

[22] **Easements**
Weight and sufficiency

When permissive use is implied or presumed, the level of proof required for the claimant to establish adversity sufficient to establish a prescriptive easement is heightened and requires more than a showing that the claimant used the disputed property as his own.

Cases that cite this headnote

[23] **Easements**
Presumptions and burden of proof

Property owner's contribution of labor and materials to private road did not make owner's use of the road adverse, as required to defeat presumption of permissive use and establish prescriptive easement; there was no evidence that owner's contribution of labor and materials to the shared project interfered with neighbor's use of the private road.

Cases that cite this headnote

[24] **Easements**
Implication

Implied easements come into existence by implication of law from the facts.

Cases that cite this headnote

[25] **Appeal and Error**
Easements

On review of an order denying an implied easement, the appellate court reviews the trial court's findings of fact to determine whether they were supported by substantial evidence, and then reviews whether those findings support the trial court's legal conclusion that no easement should be implied.

Cases that cite this headnote

[26] **Easements**
Ways of Necessity

An implied easement is an expression of a public policy that will not permit property to be landlocked and rendered useless.

Cases that cite this headnote

[27] **Easements**
Implication
Easements
Severance of ownership of dominant and servient tenements

An easement may be implied (1) when there has been unity of title and subsequent separation; (2) when there has been an apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title; and (3) when there is a certain degree of necessity that the quasi easement exist after severance.

Cases that cite this headnote

[28] **Easements**
Implication

A "quasi easement" is one which may arise between two pieces of land owned by the same person, when the enjoyment by one piece of a right in the other would be a legal easement, were the pieces owned by different persons.

Cases that cite this headnote

[29] **Easements**
Severance of ownership of dominant and servient tenements

First of elements for establishing an implied easement—unity of title and subsequent separation, i.e., that a common owner sells part of his land and retains part, usually an adjoining parcel—is an absolute requirement.

Cases that cite this headnote

[30] **Easements**
Implication

The second and third elements of an implied easement, whether there has been an apparent and continuous quasi easement and a certain degree of necessity, are aids to construction in determining the cardinal consideration—the presumed intention of the parties as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other.

Cases that cite this headnote

[31] **Easements**
Implication

The presence or absence of either an apparent and continuous quasi easement during unity of title, or a certain degree of necessity after severance, or both of these requirements is not necessarily conclusive in establishing an implied easement.

Cases that cite this headnote

[32] **Easements**
Implication

An easement may be implied on the basis of unity, severance, and necessity alone if the subject land cannot be used without disproportionate effort or expense.

Cases that cite this headnote

[33] **Easements**
Severance of ownership of dominant and servient tenements

The necessity for an implied easement must exist at the moment of severance.

Cases that cite this headnote

[34] **Easements**
Severance of ownership of dominant and servient tenements

Fact that the property owner's lot did not exist as a separate and distinct parcel at the time the common grantors severed the plat from their remaining property did not preclude the implication of an easement burdening the plat in favor of the lot. Restatement (Third) of Property: Servitudes § 2.15 cmt. d.

Cases that cite this headnote

[35] **Easements**
Implied reservation

Where the claim is that an implied easement was reserved by the grantor in favor of the property retained, as opposed to granted by the grantor in favor of the property sold, a higher degree of necessity is required to imply an easement if no prior use can be shown.

Cases that cite this headnote

[36] **Easements**
Implication

Although policy considerations favor implying easements so that property will not be rendered landlocked or useless, easements by implication are not favored by the courts because they are in derogation of the rule that written instruments speak for themselves.

Cases that cite this headnote

[37] **Easements**
Implication

The cardinal consideration—indeed, the prime factor—in analyzing whether an easement should be implied is the presumed intention of the parties.

Cases that cite this headnote

[38] **Easements**
Implied reservation

Property owner was entitled to implied easement by necessity over private road to the west that had been laid out as part of plat burdening dominant estate; dominant estate had been landlocked for decades before then-owners acquired abandoned right-of-way, and owner's lot was burdened by easement benefiting lot to the east, indicating that common grantors intended to reserve an access to that portion of their remaining property via the private road at the time they severed their interest in the plat.

Cases that cite this headnote

[39] **Easements**
Weight and sufficiency
Easements
Evidence

Findings regarding present-day physical realities of the dominant estate were relevant, in action seeking to establish implied easement, to the extent that these same realities existed at the time of severance, and they were also relevant in determining the scope of the easement that would be implied.

Cases that cite this headnote

[40] **Easements**
By implication

Although the scope of an implied easement is initially defined by the necessity existing at the time of severance, similarly to a granted easement of general access, its permitted scope is capable of gradual change to keep pace with reasonable changes in uses of the dominant tenement.

Cases that cite this headnote

***528** Appeal from Whatcom County Superior Court, Docket No: 14-2-01678-2, Honorable Charles Russell Snyder, Judge

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PUBLISHED OPINION

Smith, J.

¶ 1 Steven and Sally Lackey and Casey and Karen O'Keefe (collectively Lackey) appeal the trial court order awarding their neighbors David and Thuy Tiller (collectively Tiller) a prescriptive easement over a section of a private road owned by Lackey and others. Lackey argues the trial court lacked subject matter jurisdiction over the dispute and erred by concluding the requirements of a prescriptive easement had been satisfied. Tiller argues the trial court erred by refusing to recognize an easement by necessity over the road. We hold that the court had subject matter jurisdiction and that the trial court erred by concluding the requirements of a prescriptive easement were satisfied but the requirements of an implied easement by necessity were not. We conclude the trial court's findings support recognizing an implied easement by necessity. We remand to the trial court for entry of revised conclusions of law consistent with this opinion and a revised judgment that specifies the easement is an implied easement rather than a prescriptive easement.

*529 FACTS

¶ 2 In June 1945, Noel and Eileen Provanche recorded the Plat of Georgia Point (plat), which the Provanches created from part of a larger parcel of property they owned on the north end of Lake Whatcom. The plat consisted of 10 contiguous waterfront lots, with lot 1 at the west end of the plat and lot 10 at the east end. The plat also included an additional parcel (street parcel), which was dedicated as a "private street reserved for the use of the owners of the Lots within the boundaries of [the] plat," solely for street purposes. The owner of each lot within the plat holds an undivided one-tenth interest in the street parcel, which consists of a 30-foot-wide strip of land that abuts the northern boundaries of lots 1 through 10. The street parcel spans the entire width of the plat, so that its western end extends west to, and is flush with, the western boundary of lot 1, and its eastern end extends east to, and is flush with, the eastern boundary of lot 10. When the plat was recorded, an active railroad right-of-way separated the northern boundary of the street parcel from North Shore Road, the main road along that part of Lake Whatcom.

¶ 3 Appellants Steven and Sally Lackey now own lot 10 (the easternmost lot) of the plat. Appellants Casey and Karen O'Keefe own lot 9.

¶ 4 In July 1949, the Provanches "carved out" and sold a piece of property (cabin lot) from their remaining property to the east of the plat. The cabin lot is not contiguous to the plat, and the Provanches retained ownership of the land separating the plat from the cabin lot. A ravine and seasonal stream separated the cabin lot from the Provanches' remaining property to the east of the cabin lot, and there is no evidence that the cabin lot has ever been accessed from the east.

¶ 5 When the Provanches sold the cabin lot, they granted and recorded an easement (cabin lot easement) across the property they retained between the plat and the cabin lot. This property is now owned by David and Thuy Tiller and is referred to herein as the "Tiller lot." The cabin lot easement burdened the Tiller lot in favor of the cabin lot "for road purposes" for access to the cabin lot. The original cabin lot easement abutted the street parcel to the west at the eastern boundary of the plat and mirrored the street parcel's 30 foot width and its path. In other words, the original cabin lot easement, if drawn on a map, appears as a continuation of the street parcel from the eastern boundary of lot 10, across the Tiller lot, to the western boundary of the cabin lot. In 1959, the width of the cabin lot easement was reduced from its original 30 feet to 12 feet as the result of a lawsuit between the then-owners of the Tiller lot and the cabin lot.

¶ 6 By 1947, a railroad crossing from North Shore Road to the plat (crossing) had been installed at approximately the boundary between lots 8 and 9. The extent of road installation within the street parcel at that time is unclear. However, there is evidence that by 1950, a road (Lakeview Street) had been installed within the street parcel. From the south end of the crossing, Lakeview Street branched off both west, toward lot 1, and east, toward lots 9 and 10 and the cabin lot. Figure 1 below depicts, for illustrative purposes, the plat (including the street parcel), the railroad right-of-way, North Shore Road, the Tiller lot, the cabin lot, and the cabin lot easement.[1] Figure 1 also depicts the approximate location of the crossing, as well as another railroad crossing to the east that was used to access the Provanches' remaining property to the east of the cabin lot.

*530

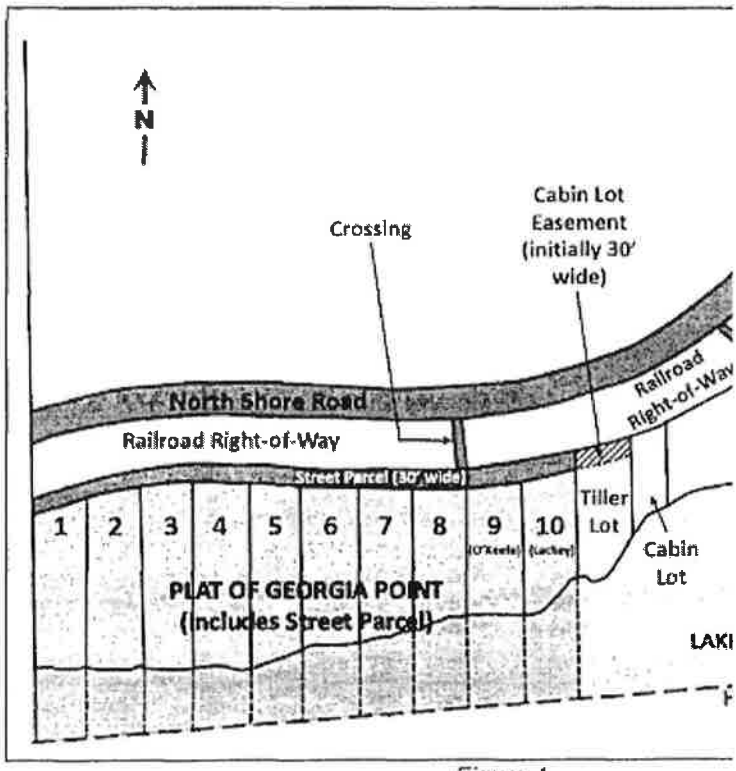

Figure 1

¶ 7 By 1976, the railroad right-of-way had been abandoned, and in August 1976, the then-owners of the lots within the plat purchased the right-of-way that had separated the street parcel from North Shore Road. The then-owners of the cabin lot and the Tiller lot did the same. Over time, some lot owners within the plat have installed crossings from their lots directly to North Shore Road across this abandoned railroad right-of-way.

However, up until the time that Tiller purchased the Tiller lot in 2004, together with the portion of the abandoned railroad right-of-way between the Tiller lot from North Shore Road, the only vehicular access to the Tiller lot and the cabin lot was via Lakeview Street.

¶ 8 At some point before selling the Tiller lot to Tiller, Tiller's immediate predecessors opened a path directly to North Shore Road from the Tiller lot, but it was not passable for an ordinary vehicle, nor was it ever formally approved by the county or used as a primary access to the Tiller lot. After acquiring the Tiller lot in 2004, Tiller continued using the crossing and Lakeview Street to access the Tiller lot from North Shore Road.

¶ 9 In July 2014, Lackey notified Tiller that Lackey intended to terminate Tiller's use of Lakeview Street. Tiller filed a quiet title action on July 25, 2014, claiming a prescriptive easement to continue using Lakeview Street to access the Tiller lot. Tiller later amended the complaint to add claims for easement implied by prior use and easement implied from necessity.

¶ 10 At trial, multiple witnesses who once lived in or around the plat testified that Lakeview Street was the only route ever used to access the Tiller lot and the cabin lot from North Shore Road. Witnesses also testified that they were not aware of any owners of those lots ever asking, or needing to ask, permission to use Lakeview Street to access the Tiller lot or the cabin lot. Connie Myrhe, who lived on lot 9 from 1963 to approximately 1989, testified that permission was "just assumed." Karen Walter, who once lived on the Tiller lot, testified that she did not recall ever having any discussion in the neighborhood about a need to obtain permission to use Lakeview Street, saying, "[N]obody cared. It was just the way it was." Another witness testified about the direct access to North Shore Road that had been installed by Tiller's immediate predecessors, stating that ***531** he did not believe even his four-wheel-drive pickup would be able to drive that access to the bottom (south) portion of the Tiller lot. This witness also testified that the grade from the abandoned railroad right-of-way portion of the property to the bottom portion of the Tiller lot is fairly steep.

¶ 11 David Tiller testified that when he and his wife purchased the Tiller lot, they initially planned to develop direct access from North Shore Road to the bottom portion of the property, where they planned to construct a new residence. But they later abandoned that plan due to impracticality resulting from the steepness of the slope, as well as a 2007 lawsuit by the owners of the cabin lot to keep the cabin lot easement open. Tiller later constructed a garage on the former railroad right-of-way portion of the property with direct access to North Shore Road. But access to the lower part of the Tiller lot remained via the crossing and Lakeview Street.

¶ 12 The trial court entered extensive findings of fact and conclusions of law. The court concluded that Tiller had established a prescriptive easement for ingress and egress via Lakeview Street to the western boundary of the Tiller lot, but that the requirements of an implied easement had not been met. Lackey appeals. Tiller cross appeals.

ANALYSIS

1. Subject Matter Jurisdiction

[1] [2]¶ 13 Whether a court has subject matter jurisdiction is a question of law reviewed de novo. Dougherty v. Dep't of Labor & Indus., 150 Wash.2d 310, 314, 76 P.3d 1183 (2003). The trial court's lack of subject matter jurisdiction may be raised for the first time on appeal. RAP 2.5(a)(1).

[3]¶ 14 Lackey asserts that Tiller's failure to follow the plat amendment procedures set forth in RCW 58.17.215 and then to appeal any adverse determination under Washington's Land Use Petition Act, chapter 36.70C RCW, deprived the court of subject matter jurisdiction. We disagree.

¶ 15 Subject matter jurisdiction over cases involving the title to or possession of real property is expressly granted by the state constitution and has not been "vested exclusively in some other court." WASH. CONST. art. IV, § 6. Accordingly, the trial court had subject matter jurisdiction over this dispute.

[4]¶ 16 Because the trial court had subject matter jurisdiction, Lackey's argument that Tiller should have followed statutory plat amendment procedures fails. See MHM&F, LLC v. Pryor, 168 Wash. App. 451, 460, 277 P.3d 62 (2012) (where superior court's subject matter jurisdiction is granted by the constitution, "it is incorrect to say that the court acquires subject matter jurisdiction from an action taken by a party or that it loses subject matter jurisdiction as the result of a party's failure to act"); Hous. Auth. v. Bin, 163 Wash. App. 367, 376, 260 P.3d 900 (2011) ("[I]mprecise use of the term 'subject matter jurisdiction' should be avoided because to

misclassify an issue as 'jurisdictional' transforms it into one that may be raised belatedly and opens the way to making judgments vulnerable to delayed attack.").

¶ 17 Whether RCW 58.17.215 required Tiller to submit an application to Whatcom County to impose a prescriptive easement within the plat is a nonjurisdictional issue that Lackey could have raised below. Accordingly, we decline to address this issue on appeal. See RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."). We also decline to consider the alternative argument that Tiller's claim for a prescriptive easement fails to state facts on which relief can be granted. Lackey did not provide specific argument on this point, and "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Holland v. City of Tacoma, 90 Wash. App. 533, 538, 954 P.2d 290 (1998) (citing State v. Johnson, 119 Wash.2d 167, 171, 829 P.2d 1082 (1992)); see also RAP 10.3(a)(6).

II. Prescriptive Easement

¶ 18 Lackey asserts that the trial court erred by concluding that Tiller established the elements of a prescriptive easement. We agree.

*532 [5] [6] [7] [8]¶ 19 " 'Prescriptive rights ... are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons.' " Gamboa v. Clark, 183 Wash.2d 38, 43, 348 P.3d 1214 (2015) (alteration in original) (quoting Nw. Cities Gas Co. v. W. Fuel Co., 13 Wash.2d 75, 83, 123 P.2d 771 (1942)). To establish a prescriptive easement, the person claiming the easement must use another person's land for a period of 10 years in a manner that was: (1) " 'open' " and " 'notorious' "; (2) " 'continuous' " or " 'uninterrupted' "; (3) over " 'a uniform route' "; (4) " 'adverse' " to the landowner; and (5) " 'with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.' " Gamboa, 183 Wash.2d at 43, 348 P.3d 1214 (quoting Nw. Cities, 13 Wash.2d at 83, 85, 123 P.2d 771). Whether a claimant has established a prescriptive easement is a mixed question of law and fact. Id. at 43-44, 348 P.3d 1214 (citing Petersen v. Port of Seattle, 94 Wash.2d 479, 485, 618 P.2d 67 (1980)). We review the trial court's findings of fact following a bench trial to determine whether they are supported by substantial evidence, and we then review whether those findings support the trial court's conclusions of law. Hegwine v. Longview Fibre Co., 132 Wash. App. 546, 555, 132 P.3d 789 (2006) (citing Keever & Assocs. v. Randall, 129 Wash. App. 733, 737, 119 P.3d 926 (2005)), aff'd, 162 Wash.2d 340, 172 P.3d 688 (2007).

¶ 20 Here, the only issues in dispute are whether Tiller's use of Lakeview Street was "adverse" and whether that adverse use continued over the required period of 10 years.

[9] [10] [11]¶ 21 "Adverse use" generally means that the claimant's use was not permissive. Gamboa, 183 Wash.2d at 44, 348 P.3d 1214. Whether use is adverse "is to be measured by an objective standard; that is, by the objectively observable acts of the user and the rightful owner." Dunbar v. Heinrich, 95 Wash.2d 20, 27, 622 P.2d 812 (1980); see also Chaplin v. Sanders, 100 Wash.2d 853, 861, 676 P.2d 431 (1984) ("The nature of [the claimant's] possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land ... is irrelevant."). In evaluating whether use was adverse versus permissive, a presumption of permissive use applies in certain factual scenarios, including cases involving vacant and unenclosed land, and developed land cases when there is "a reasonable inference of neighborly sufferance or acquiescence." Gamboa, 183 Wash.2d at 44, 50-51, 348 P.3d 1214.

(A) The trial court properly applied a presumption of permissive use

[12] [13]¶ 22 Lackey argues that the trial court erred by not addressing whether to apply a presumption of permissive use under Gamboa, in which our Supreme Court clarified the presumptions applicable in prescriptive easement cases. But the trial court did address this presumption, writing that, under Gamboa, "if there is a reasonable inference of neighborly sufferance or acquiescence, then the presumption of permissive use arises, *and that presumption applies in this case.*" (Emphasis added.) Tiller argues that the trial court erred by applying this presumption. Specifically, Tiller contends that the trial court's finding of a reasonable inference of neighborly sufferance or acquiescence was not supported by the evidence.[2] For the reasons set forth below, we conclude that the trial court properly applied a presumption of permissive use under Gamboa.

¶ 23 In Gamboa, the Gamboas and the Clarks owned adjoining parcels of land separated by a gravel road.

Gamboa, 183 Wash.2d at 40, 348 P.3d 1214. Since 1992, when the Gamboas purchased their parcel, the Gamboas and the Clarks each used the gravel road to access their respective properties. Id. at 41, 348 P.3d 1214. They did so with mutual awareness and without incident until a dispute arose in 2008. Id. A survey later revealed that most of the gravel road was on the Clarks' property, and the Gamboas sued to establish their right to use the road. Id. The trial court in Gamboa applied a presumption ***533** that the Gamboas' use was adverse and ruled in favor of the Gamboas. Id. at 42, 348 P.3d 1214. Division Three of this court reversed, concluding that the trial court should have applied a presumption that the use was permissive. Id.

¶ 24 The Supreme Court accepted review to clarify when an initial presumption of permissive use should be applied in prescriptive easement cases. Id. at 45, 348 P.3d 1214 (observing that there was a split in the Court of Appeals on this issue). The court observed that in Drake v. Smersh, 122 Wash. App. 147, 89 P.3d 726 (2004), Division One had strictly limited the presumption of permissive use to vacant and unenclosed land cases—whereas in enclosed and developed land cases, courts could *infer* permission, but *only* if the record supported a reasonable inference of permissive use. Gamboa, 183 Wash.2d at 45, 348 P.3d 1214; Drake, 122 Wash. App. at 154, 89 P.3d 726.

¶ 25 The Supreme Court confirmed that in the context of prescriptive easements, an initial presumption of permissive use *does* apply in enclosed and developed land cases when there is a "reasonable inference of neighborly sufferance or acquiescence." Gamboa, 183 Wash.2d at 50-51, 348 P.3d 1214. The court cited the following example of a neighborly accommodation: " 'persons travel[ing] the private road of a neighbor in conjunction with such neighbor and other persons, nothing further appearing.' " Id. at 51, 348 P.3d 1214 (alteration in original) (internal quotation marks omitted) (quoting Roediger v. Cullen, 26 Wash.2d 690, 711, 175 P.2d 669 (1946)). The Supreme Court concluded that a presumption of permissive use applied under the facts of Gamboa, where, just as in the foregoing example, "the Gamboas and Clarks [were] neighbors and they used the road for their own purposes in conjunction with each other without incident." Id.

¶ 26 Here, substantial evidence in the record supports the trial court's findings that the owners of the Tiller lot used Lakeview Street to access the Tiller lot, that the lot owners in the plat also used Lakeview Street, and that these uses occurred with mutual knowledge and without discussion. In short, like the Gamboas and the Clarks, Tiller and Tiller's neighbors in the plat—as well as their respective predecessors—all used Lakeview Street for their own purposes and in conjunction with each other without incident until the instant dispute arose. Accordingly, the trial court properly applied a presumption of permissive use under Gamboa.

¶ 27 Tiller relies heavily on Drake and makes no attempt to distinguish Gamboa in their briefing. As discussed. Gamboa, not Drake, controls. In Drake, the court analyzed adverse use in developed land cases and stated a court should infer permissive use only when there was evidence in the record supporting a reasonable inference that the use *was permitted.* Drake, 122 Wash. App. at 154, 89 P.3d 726 ("We now consider whether there is any evidence in this record supporting a reasonable inference *of permissive use.* We conclude there is no basis on which a court could reasonably infer that [the claimant's] use *was permitted* by neighborly sufferance or acquiescence.") (emphasis added). But in the absence of such facts, neither an inference nor a presumption of permissive use would apply. Because Drake was a developed land case, we declined to infer permissive use, observing that permission was neither requested nor received and that the record showed *no* relationship between the claimant and the true owner. Id. at 154, 89 P.3d 726. We contrasted cases where courts had inferred permissive use based on a close, friendly, or family relationship. Id. at 154-55 n.21, 89 P.3d 726.

[14]¶ 28 Here, the trial court made an express finding that "the owners along Lakeview Street were friendly, neighborly, and some were fairly close-knit." This finding is supported by substantial evidence. We agree with the trial court's observation that "[t]he existence of friendship, however close, does not in and of itself conclusively establish acquiescence." But it does support a reasonable inference of neighborly sufferance or acquiescence, in turn supporting the trial court's application of a presumption of permissive use under Gamboa.

[15]¶ 29 Furthermore, under Gamboa, the fact that no permission was requested or received does not preclude applying a presumption ***534** of permissive use. Indeed, in Gamboa, as here, each party was aware of the other's use of the disputed roadway, no one objected until a dispute arose, and the true owners gave neither express nor implied permission to use the roadway. Nonetheless, the Supreme Court inferred neighborly sufferance or acquiescence, explaining that "[w]hat constitutes a reasonable inference of neighborly sufferance or

acquiescence is a fairly low bar." Gamboa, 183 Wash.2d at 51, 348 P.3d 1214. The Supreme Court also explained the policy considerations favoring a presumption of permissive use:

> The law should, and does[,] encourage acts of neighborly courtesy; a landowner *who quietly acquiesces* in the use of a path, or road, across his uncultivated land, resulting in no injury to him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights. It is only when the use of the path or road is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the landowner is called upon to go to law to protect his rights.
>
> Applying a presumption of permissive use incentivizes landowners to allow neighbors to use their roads for the neighbors' convenience. We do not want to require a landowner "to adopt a dog-in-the-manger attitude in order to protect his title to his property." Not applying a presumption of permissive use in these circumstances punishes a courteous neighbor by taking away his or her property right.

Id. at 48-49, 348 P.3d 1214 (alteration in original) (citations omitted) (internal quotation marks omitted) (quoting Roediger, 26 Wash.2d at 690-709, 175 P.2d 669; State ex rel. Shorett v. Blue Ridge Club, Inc., 22 Wash.2d 487, 495-96, 156 P.2d 667 (1945)).[3]

¶ 30 Tiller also argues that there could not have been any neighborly accommodation because there is evidence suggesting that a residence had been established on the cabin lot by 1949, before lots 9 and 10 were developed. Even assuming this were true,[4] it is undisputed that several lots (including lots 9 and 10) in the plat were sold before 1949. Nothing in Gamboa suggests that the first owners of those lots must in fact have completed construction of their residences in the plat for a presumption of permissive use to arise. See Gamboa, 183 Wash.2d at 51, 348 P.3d 1214 ("What constitutes a reasonable inference of neighborly sufferance or acquiescence is a fairly low bar."). Furthermore, one witness testified that the Hawleys, who purchased lots 2 and 3 of the plat in June 1945 (and therefore would also have been neighbors of the then-owner of the cabin lot, as well as two-tenth undivided owners of the street parcel), had one of the first houses in the area. That witness also testified that the residents in and around the plat, including the owner of the cabin lot, were friendly with one another even then. Tiller's argument against applying the presumption of permissive use is not persuasive.

(B) The trial court erred in concluding that the presumption was rebutted

[16] [17]¶ 31 Once a presumption of permissive use is established, it can be defeated " 'when the facts and circumstances are such as to show that the user was adverse and hostile to the rights of the owner, or that the owner has indicated by some act his admission that the claimant has a right of easement.' " Gamboa, 183 Wash.2d at 44-45, 348 P.3d 1214 (quoting Nw. Cities, 13 Wash.2d at 87, 123 P.2d 771). "For a claimant to show that land use is 'adverse and hostile to the rights of the owner' in this context, the claimant must put forth evidence that he or she interfered with the owner's use of the land in some manner." Id. at 52, 348 P.3d 1214.

¶ 32 Gamboa did not elaborate on the meaning of "interfered" in this context but provides guidance by citing Northwest Cities. In Northwest Cities, there was evidence that ***535** the claimant's predecessor had, without permission from the owner, installed a roadway across a portion of the owner's property that was previously used as an artificial pond. Nw. Cities, 13 Wash.2d at 79, 123 P.2d 771. The claimant's predecessor had also hauled in cinders to make the roadway passable for trucks, improved the roadway, and made repairs to it from year to year. Id. at 79, 90-91, 123 P.2d 771. Additionally, when the last two owners of the servient estate had conveyed the property, they expressly excluded from the conveyance " 'rights of way for roads.' " Id. at 91, 123 P.2d 771. And when the claimant's access via the roadway was to be affected by the installation of a fence, the owner of the servient estate notified the claimant and added that an access would be left open for the claimant. Id. at 80-81, 123 P.2d 771. Under those facts, our Supreme Court concluded that adversity had been established. Id. at 91, 123 P.2d 771.

¶ 33 The Gamboa court also discussed Roediger. In that case, a group of claimants sought a prescriptive easement to use a beachfront footpath on Vashon Island that they had used for around 30 years. Roediger, 26 Wash.2d at 691, 697-98, 175 P.2d 669. No users of the path had ever asked the lot owners for permission to cross their lots. Id. at 697, 175 P.2d 669. After concluding that a presumption of permissive use applied, the court explained what proof was necessary to rebut the presumption: " '[N]o adverse user can arise until a distinct and positive assertion of a right hostile to the owner, and brought home to him, can transform a

subordinate and friendly holding into one of an opposite nature.' " Id. at 714, 175 P.2d 669 (internal quotation marks omitted) (quoting Schulenbarger v. Johnstone, 64 Wash. 202, 206, 116 P. 843 (1911)). Then, finding that there was "no evidence to the effect that any [user] ever made a positive assertion to the defendants or to any other lot owner that he claimed to use the path as of right" until certain lot owners posted a notice that the path would be closed, the court concluded that no adverse use was established. Id.

[18]¶ 34 Here, as in Roediger, there was no finding that Tiller or any of Tiller's predecessors ever made a positive assertion to the owners within the plat that they claimed to use Lakeview Street as a matter of right. Additionally, the trial court made no finding that Tiller interfered with the true owners' use of the street parcel, which, unlike the disputed property in Northwest Cities, was expressly dedicated solely for use as a road. Indeed, a number of witnesses who once lived in the plat testified that no one who owned the Tiller lot ever interfered with others' use of Lakeview Street, and the parties ultimately stipulated at trial that none of the owners of the Tiller lot or the cabin lot ever blocked or interfered with anyone else's use of Lakeview Street. Furthermore, the trial court's findings point to no act by the owners within the plat that rises to an admission that Tiller or Tiller's predecessors had a right of easement.

¶ 35 Nevertheless, the trial court concluded that Tiller established the element of adversity. The trial court arrived at this conclusion based on finding that (a) the owners of the plat, as a group and individually, subjectively believed that the use of Lakeview Street by those who owned the cabin lot and the Tiller lot was a matter of right; (b) there was no evidence of a concerted effort by the owners within the plat to restrict others from using Lakeview Street; (c) Tiller intended to continue to use Lakeview Street following construction of the Tiller residence, as evidenced by a 2006 entry in a Whatcom County permit application document, stating that "the site has an existing access via easement (Lakeview St.)," and by Tiller's construction of a garage on the upper part of the property without installing access to the lower part of the Tiller lot; and (d) termination of access via Lakeview Street would "de facto" terminate the cabin lot easement, which the trial court concluded would be unfair to the owner of the cabin lot.

[19]¶ 36 Although the trial court's findings are supported by substantial evidence, none of the court's findings establish an act by the owners of the plat that would amount to an admission that Tiller or Tiller's predecessors had a right of easement, and none constitute " 'a distinct and positive assertion' " by any owner of the Tiller lot of " 'a right hostile to the owner, and brought home ***536** to him.' " Roediger, 26 Wash.2d at 714, 175 P.2d 669 (internal quotation marks omitted) (quoting Schulenbarger, 64 Wash. at 206, 116 P. 843). First, the subjective belief of owners within the plat regarding the right to use Lakeview Street is not relevant to the inquiry of adversity. Dunbar, 95 Wash.2d at 27, 622 P.2d 812 ("[A]dversity is to be measured by an objective standard; that is, *by the objectively observable acts of the user and the rightful owner.*") (emphasis added). Also irrelevant to that inquiry is the fact that the owners within the plat did not make a concerted effort to restrict others from using Lakeview Street, because one who " 'quietly acquiesces' " in the use of a road " 'ought not to be held to have thereby lost his rights.' " Gamboa, 183 Wash.2d at 48, 348 P.3d 1214 (internal quotation marks omitted) (quoting Roediger, 26 Wash.2d at 709, 175 P.2d 669). Tiller's subjective intent to use Lakeview Street also does not determine whether the presumption has been rebutted. Dunbar, 95 Wash.2d at 27, 622 P.2d 812. Even if the 2006 entry in the Whatcom County permit records or Tiller's garage construction (which the record indicates began in May 2007) were relevant, the 10-year prescriptive period would not have elapsed between either of those occurrences and July 2014, when Tiller filed this lawsuit. Finally, unfairness to a third party (here, the owner of the cabin lot) is not part of the inquiry under Gamboa.

[20]¶ 37 The trial court also found that the creation of the Tiller lot and the cabin lot, and the recordation of the cabin lot easement, "put all on notice that there could be a right of access for property owners to the east." This finding, which charges the owners of lots within the plat with constructive notice of the creation of the cabin lot and recordation of the cabin lot easement, is actually a conclusion of law, and we review it as such. See BLACK'S LAW DICTIONARY 1227 (10th ed. 2014) (defining "constructive notice" as "[n]otice arising *by presumption of law* from the existence of facts and circumstances that a party had a duty to take notice of, such as registered deed or a pending lawsuit; notice *presumed by law* to have been acquired by a person and thus imputed to that person") (emphasis added); Willener v. Sweeting, 107 Wash.2d 388, 394, 730 P.2d 45 (1986) ("A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law.").

¶ 38 Because the owners within the plat had no duty to search for recorded documents outside their own respective chains of title, the trial court erred by charging

Lackey and Lackey's predecessors with constructive knowledge of the creation of the Tiller lot and the cabin lot, and recordation of the cabin lot easement. Koch v. Swanson, 4 Wash. App. 456, 459, 481 P.2d 915 (1971) ("[O]ne searching the index has a right to rely upon what the index and recorded document discloses and is not bound to search the record outside the chain of title of the property presently being conveyed."). Furthermore, creation of the Tiller lot and the cabin lot, and recordation of the cabin lot easement, suggest, at most, a subjective intent to use Lakeview Street for access to the Tiller lot and the cabin lot. But, as discussed, the claimant's subjective intent is not relevant. These activities do not rebut the presumption of permissive use.

¶ 39 Tiller, in an attempt to further justify the trial court's conclusion about adversity, argues that the fact that there were two lawsuits involving the cabin lot easement—one in 1959 and another in 2007—should favor rebutting the presumption. Tiller cites Shumate v. Ashley, 46 Wash.2d 156, 278 P.2d 787 (1955), in support of this proposition. But Shumate was a probate case, where the issue was whether an estate creditor properly followed the procedures for filing a claim. Id. at 157, 278 P.2d 787. The court mentioned in passing that the clerk's file is the court record and is notice to the world of what it contains, but notice was not the issue in that case. Id. Tiller's argument is not persuasive.

[21]¶ 40 Tiller also argues that by contributing labor and materials to improve Lakeview Street, Tiller treated Lakeview Street "as an owner would," and that adversity should be established on this basis. Tiller relies on Kunkel v. Fisher, 106 Wash. App. 599, 23 P.3d 1128 (2001), for the proposition that the test for adversity is whether the claimant uses the property as the true owner would. This reliance is misplaced. The court ***537** in Kunkel did state that, in the law of prescriptive easements, using the disputed property as the true owner would is part of the test for adversity, just as it is in the law of adverse possession. Id. at 602, 23 P.3d 1128. However, the court went on to explain that there are differences in how the two doctrines originated and that these differences "have resulted in a single but important difference in how they are applied:"

> In a claim for a prescriptive easement there is a presumption that the servient property was used with the permission of, and in subordination to, the title of the true owner. If the use is initially permissive, it may ripen into a prescriptive easement *only if the user makes a distinct, positive assertion of a right adverse to the property owner.*

Id. at 603-04, 23 P.3d 1128 (emphasis added) (footnote omitted). In other words, Kunkel confirms that where, as here, a presumption of permissive use applies in the context of prescriptive easements, a showing that the claimant used the disputed property as a true owner would is not enough to rebut that presumption.

[22]¶ 41 Tiller's attempt to distinguish Granston v. Callahan, 52 Wash. App. 288, 759 P.2d 462 (1988), where the court concluded that the claimant's use was permissive, is similarly unpersuasive. In Granston, the court observed that when a claimant's use is permissive at its inception, it follows that the claimant will use the disputed property as a true owner. Id. at 293, 759 P.2d 462. Accordingly, the use-as-a-true-owner test "appear[s] to have very little practical application in cases ... where the commencement of the use was clearly permissive." Id. Thus, the court concluded that "a use which is initially permissive cannot ripen into a prescriptive right unless the claimant makes a distinct and positive assertion of a right hostile to the owner." Id. at 294, 759 P.2d 462. Granston, like Kunkel, simply confirms that when permissive use is implied, or, under Gamboa, presumed, the level of proof required for the claimant to establish adversity is heightened and requires more than a showing that the claimant used the disputed property as his own.

¶ 42 Tiller also attempts to distinguish Imrie v. Kelley, 160 Wash. App. 1, 250 P.3d 1045 (2010). Tiller asserts that the Imrie opinion, in which the court concluded the use was permissive, "contains no mention of neighborly accommodation" and that there was no indication in Imrie that the road over the servient property provided the only access to the dominant property. But the Imrie court did in fact observe that a portion of the claimant's property was accessible only through the true owner's property and nevertheless concluded that the trial court's findings supported "an inference of neighborly accommodation." Id. Tiller misrepresents Imrie.

[23]¶ 43 Finally, Tiller argues that David Tiller's contribution of labor and materials to a shared project involving Lakeview Street further rebuts the presumption

of permissive use. However, the Washington cases on which Tiller relies only indicate that maintenance is likely necessary, but not sufficient, to rebut the presumption. In Anderson v. Hudak, 80 Wash. App. 398, 907 P.2d 305 (1995), the issue was whether the claimant had adversely possessed a row of trees, and after finding that the claimant had produced no evidence that she even sporadically maintained and cultivated the disputed trees, the court remarked that a person claiming adverse possession "must and would take some steps to care for the trees." Id. at 404, 907 P.2d 305. And as discussed, Drake is inapposite because there was no presumption applied in that case. Therefore, there was no presumption to rebut. Finally, even in Gamboa, where the presumption of permissive use did apply, the court concluded that the presumption had not been rebutted by the Gamboas' maintenance because "[t]he Gamboas' occasional blading of the road did not interfere with the Clarks' use of the road in any manner." Gamboa, 183 Wash.2d at 40, 52, 348 P.3d 1214. Here, as in Gamboa, there is no evidence that David Tiller's contribution of labor and materials to the shared project interfered with Lackey's use of Lakeview Street.

¶ 44 The trial court's findings of fact do not support a legal conclusion that Tiller rebutted the presumption of permissive use. ***538** Therefore, we reverse the trial court's conclusion that Tiller established adverse use and that Tiller established a prescriptive easement. And because Tiller has not established adverse use, we need not consider whether adverse use occurred continuously for the requisite 10-year period.[5]

III. Easement Implied by Necessity

¶ 45 In Tiller's cross appeal, Tiller argues that the trial court erred by concluding that no implied easement in favor of the Tiller lot arose by necessity. We agree.

[24] [25]¶ 46 Preliminarily, Lackey claims that whether an implied easement arose is a finding of fact. However, implied easements "come[ ] into existence *by implication of law* from the facts." Adams v. Cullen, 44 Wash.2d 502, 504, 268 P.2d 451 (1954) (emphasis added). Accordingly, we review the trial court's findings of fact to determine whether they were supported by substantial evidence, and we then review whether those findings support the trial court's legal conclusion that no easement should be implied. Hegwine, 132 Wash. App. at 555, 132 P.3d 789.

[26] [27] [28] [29] [30] [31] [32]¶ 47 An implied easement "is an expression of a public policy that will not permit property to be landlocked and rendered useless." Hellberg v. Coffin Sheep Co., 66 Wash.2d 664, 666, 404 P.2d 770 (1965). In furtherance of this policy, an easement may be implied

> "(1) when there has been unity of title and subsequent separation; (2) when there has been an apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title; and (3) when there is a certain degree of necessity ... that the quasi easement exist after severance."

Id. at 668, 404 P.2d 770 (quoting Adams, 44 Wash.2d at 505, 268 P.2d 451).[6] The first of the foregoing elements—unity of title and subsequent separation, i.e., that a common owner sells part of his land and retains part, usually an adjoining parcel—" 'is an absolute requirement.' " Hellberg, 66 Wash.2d at 668, 404 P.2d 770 (quoting Adams, 44 Wash.2d at 505, 268 P.2d 451). The second and third are " 'aids to construction in determining the cardinal consideration—the presumed intention of the parties as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other.' " Id. (quoting Adams, 44 Wash.2d at 505, 268 P.2d 451). " '[T]he presence or absence of either or both of these requirements is not necessarily conclusive.' " Id. (quoting Adams, 44 Wash.2d at 505, 268 P.2d 451). Accordingly, an easement may be implied on the basis of unity, severance, and necessity alone if the subject land cannot be used " 'without disproportionate effort or expense.' " Adams, 44 Wash.2d at 509, 268 P.2d 451 (quoting RESTATEMENT OF PROPERTY: SERVITUDES § 476 cmt. g at 2983 (AM. LAW INST. 1944)).

[33]¶ 48 The necessity for the easement must exist at the moment of severance. Bailey v. Hennessey, 112 Wash. 45, 48-49, 191 P. 863 (1920); Granite Beach Holdings, LLC v. Dep't of Nat. Res., 103 Wash.App. 186, 190, 11 P.3d 847 (2000); see also WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 8.5, at 449 (3d ed. 2000) ("Necessity for the easement must exist at the moment of severance; a necessity arising later will have no effect.").

[34]¶ 49 Here, the trial court first analyzed whether an easement should be implied based on the necessity existing when the Provanches created the cabin lot in

1949 and when they first sold the Tiller lot in 1953. The trial court concluded that access via the street parcel to these otherwise landlocked lots was necessary in 1949 and 1953. But the trial court concluded that the unity-and-severance element was not satisfied at those ***539** times because the Provanches had already severed their interest in the plat, including the street parcel, by the time they created the cabin lot in 1949. In other words, by 1949, there was no unity of title between the street parcel and the Provanches' remaining property to the east of the plat. Accordingly, the trial court concluded, no easement burdening the street parcel could have arisen by implication as of 1949 or 1953.

¶ 50 Although this analysis would be correct if 1949 and 1953 were the relevant foci for the inquiry, they are not. Instead, the proper focus for the implied easement analysis is June 27, 1947. This is the date on which the Provanches sold the last lot in the plat and thereby severed the unity of title between the plat, including the street parcel, and their remaining property to the east of the plat.[7]

¶ 51 To this end, the trial court did conduct an implied easement analysis as of June 27, 1947, and acknowledged that unity of title as between the plat and the Provanches' remaining property was severed on that date. But the trial court concluded that the necessity element of the implied easement analysis was not satisfied at that time because the Tiller lot and the cabin lot did not exist as independent or separate lots within the Provanches' remaining property to the east of the plat. In other words, although there was unity followed by a subsequent severance between the plat (including the street parcel) and the Provanches' remaining property on June 27, 1947, the trial court concluded that no easement could be implied, *solely* because the land that now comprises the Tiller lot and the cabin lot was still part of a larger parcel of property owned by the Provanches at that time.

¶ 52 Lackey cites no Washington authority to support the trial court's conclusion that an easement may not be implied for ingress and egress to a portion of a larger parcel of property to which some access exists after severance. But in Evich v. Kovacevich, 33 Wash.2d 151, 204 P.2d 839 (1949), the Washington Supreme Court decided that an easement may be implied so long as there is "a *reasonable necessity* for the easement in order to secure and maintain the quiet enjoyment of the dominant estate." Id. at 157, 204 P.2d 839 (emphasis added). And in the analogous context of private condemnation actions, where the court must analyze whether a private way of necessity is necessary for the "proper use and enjoyment" of the condemnor's land, RCW 8.24.010, we have observed that "access to one portion of a condemnor's property does not necessarily preclude his obtaining a vehicular access to other parts of his property not reasonably available without encroaching upon his neighbor's property." Beeson v. Phillips, 41 Wash. App. 183, 188, 702 P.2d 1244 (1985) (citing State ex. rel. Huntoon v. Superior Ct., 145 Wash. 307, 260 P. 527 (1927)).

¶ 53 Furthermore, the Restatement (Third) of Property states, in pertinent part:

> To support implication of a servitude [by necessity], the rights claimed must be necessary to the *reasonable enjoyment of the property.* "Necessary" rights are not limited to those essential to enjoyment of the property, but include those which are *reasonably required to make effective use of the property.* If the property cannot otherwise be used without disproportionate effort or expense, the rights are necessary within the meaning of this section. *Reasonable enjoyment of the property means use of all the normally useable parts of the property for uses that would normally be made of that type of property.*

RESTATEMENT (THIRD) OF PROPERTY § 2.15 cmt. d (2000) (emphasis added). Consistent with the Restatement (Third) of Property, Professors William Stoebuck and Dale Whitman observed most courts do not require strict necessity to imply an easement:

> If the claimant has free access to some part of his land, he cannot make out a way of necessity to another part just because it would be more convenient. *However, while some courts may insist on the land's being* ***540** *landlocked, most recognize a degree of flexibility.* Sometimes it is said the claimant is entitled to sufficient

> access to make "effective use" of his land.

STOEBUCK & WHITMAN § 8.5, at 448 (emphasis added) (footnote omitted).

¶ 54 We conclude the fact that the Tiller lot did not exist as a separate and distinct parcel at the time the Provanches severed the plat from their remaining property does not preclude the implication of an easement burdening the plat, and more specifically the street parcel, in favor of the Tiller lot.

[35] [36] [37] [38]¶ 55 Next we consider whether the trial court's findings support the implication of an easement. Specifically, we consider whether at the time of severance, there was a reasonable necessity for an easement burdening the street parcel to secure and maintain the quiet enjoyment of the portion of the Provanches' property now comprising the Tiller lot and the cabin lot. We are cognizant that where, as here, the claim is that an implied easement was *reserved* by the grantor (here, the Provanches) in favor of the property retained (as opposed to *granted* by the grantor in favor of the property sold), a higher degree of necessity is required to imply an easement if no prior use can be shown. Adams, 44 Wash.2d at 509, 268 P.2d 451. Additionally, although policy considerations favor implying easements so that property will not be rendered landlocked or useless, Hellberg, 66 Wash.2d at 666, 404 P.2d 770, " '[e]asements by implication are not favored by the courts because they are in derogation of the rule that written instruments speak for themselves.' " MacMeekin v. Low Income Hous. Inst., Inc., 111 Wash. App. 188, 196, 45 P.3d 570 (2002) (quoting 1 WASH. STATE BAR ASS'N, WASHINGTON REAL PROPERTY DESKBOOK § 10.3(3)(b) (3d ed. 1997)). The "cardinal consideration"—indeed, the "prime factor"—in analyzing whether an easement should be implied is "the presumed intention of the parties." Evich, 33 Wash.2d at 157, 204 P.2d 839; Rogers v. Cation, 9 Wash.2d 369, 379, 115 P.2d 702 (1941).

¶ 56 We conclude that under the unique circumstances presented here, an implied easement should be granted in Tiller's favor. First, substantial evidence in the record supports the trial court's finding that before 1976 (when the then-owners of the Tiller lot and the cabin lot acquired the abandoned right-of-way between their parcels and Northshore Road), the property comprising the Tiller lot and the cabin lot was landlocked by the plat to the west, the railroad to the north, a stream and ravine to the east, and Lake Whatcom to the south. Specifically, the trial court found

> there was necessity for access across Lakeview Street to the [Tiller lot], and to the cabin lot, and that existed because of the fact that, with the cabin lot creation, it was fully landlocked. In fact, the [Tiller] lot now owned by the [Tillers] was also at that point in time probably landlocked as well. Prior to 1976, access to Northshore Road was not available and not likely to be granted due to the railroad which was in active use. There was no access to the east. The stream and its ravine on the east side of the cabin lot prevented it. There was no evidence of access from the east at any time.

¶ 57 The trial court also noted, in unchallenged findings, that the Tiller lot "may have also been technically landlocked if there was no right to access it via Lakeview Street" and that although the creation of the cabin lot easement did not itself convey any right to use Lakeview Street, "without such use the easement is meaningless. It would be an 'easement to nowhere.' " Furthermore, and significantly, the Provanches could have terminated the street parcel at the western boundary of lot 10 had they intended the street parcel to serve only the plat. But they chose to extend the street parcel, which, again, was reserved for use solely for street purposes, all the way *across* the northern boundary of lot 10 to its boundary with what is now the Tiller lot. Although the trial court concluded that this choice by the Provanches did not create a presumption that the Provanches intended to create separate and distinct lots from the portion of their remaining property now comprising the Tiller lot and the cabin lot, this choice—together with the fact that that portion of their property was landlocked in 1947—does indicate that the ***541** Provanches intended to reserve an access to that portion of their remaining property via the street parcel.

¶ 58 The facts of this case are closely analogous to Fossum Orchards v. Pugsley, 77 Wash. App. 447, 892 P.2d 1095 (1995). In Fossum Orchards, Delva and Ora Mae Harris originally owned a five acre parcel in Yakima County. Id. In 1978, the Harrises divided the property into

three lots, and in 1983, the Harrises installed a pipe the entire length of the property to deliver water from a weir located on the southernmost lot. Id. at 449-50, 892 P.2d 1095. The southernmost lot (lot 1) was sold by the Harrises to George Arthur in 1985. Id. at 450, 892 P.2d 1095. In 1986, the Harrises sold lot 2, the lot immediately north of lot 1, to Daniel Pugsley Jr. Id. And in 1988, the Harrises sold the remaining lot, lot 3, to Gregory Williams, who later conveyed it to Fossum Orchards. Id. At that time, there was no evidence that the pipe installed in 1983 had ever been used to irrigate lot 3, and Pugsley Jr. had previously disconnected it while repairing the portion of the pipe on lot 2. Id. After Pugsley Jr. refused to allow Fossum Orchards to reconnect to the pipe, Fossum Orchards sued for an implied easement by necessity. Id. at 451, 892 P.2d 1095.

¶ 59 In Fossum Orchards, we affirmed the trial court's conclusion that an easement by necessity would be implied. Id. at 449, 892 P.2d 1095. In doing so, we acknowledged that there was no evidence at the time of severance that the pipe was ever used to deliver water to lot 3. See id. at 451, 892 P.2d 1095. However, the pipe itself was in existence at that time, no alternative source of water was reasonably available, and "[a]lthough prior use is a circumstance contributing to the implication of an easement, if the land cannot be used without the easement without disproportionate expense, an easement may be implied on the basis of necessity alone." Id. at 451-52, 892 P.2d 1095.

¶ 60 Here, the street parcel is analogous to the pipe in Fossum Orchards, and Lakeview Street is analogous to water flowing within it. Although Lakeview Street may not yet have been installed within the street parcel at the time of severance, neither was there evidence that the pipe in Fossum Orchards had ever been used. Furthermore, like the pipe in Fossum Orchards, the street parcel was in existence at the time of severance: It had been dedicated as a separate parcel specifically for street purposes, and its location had been fixed on the recorded plat. And again, the street parcel extends completely across the northern boundary of lot 10, when it could have ended *at* lot 10 had lot 10 been its intended terminus.

¶ 61 Lackey relies on McPhaden v. Scott, 95 Wash. App. 431, 975 P.2d 1033 (1999), to argue that the trial court correctly declined to imply an easement. In McPhaden, we affirmed the trial court's directed verdict that no implied easement existed because the claimant had failed to establish prior use or necessity. Id. at 439, 975 P.2d 1033. However, in McPhaden, the road at issue—although recorded at the time of severance—was an easement road, and the claimant's own testimony that a driveway could be installed established that use of the disputed road was not reasonably necessary to access his property. Id. at 433, 438-39, 975 P.2d 1033.

¶ 62 Here, unlike in McPhaden, the road at issue is not just an easement road over someone's parcel, but a road installed within a separate and distinct parcel dedicated solely for use as a road. Furthermore, the trial court's unchallenged findings establish that, at the time of severance, use of the easement would have been reasonably necessary to access a physically landlocked portion of the remaining Provanche property east of the plat.

¶ 63 In sum, the Provanches reserved the cabin lot easement only a few years after recording the plat. The Provanches also extended the street parcel—which, again, was dedicated specifically for street purposes—completely *across* the northern boundary of lot 10. Furthermore, the portion of the Provanches' property just east of the plat was landlocked. These unique circumstances together support a conclusion that the Provanches intended to reserve to themselves an easement for access to the landlocked portion of their remaining property at the time they severed their interest in the plat. We conclude ***542** that the elements of an implied easement have been satisfied.

[39] [40]¶ 64 In Tiller's cross appeal, Tiller also challenges finding of fact 29. Finding of fact 29 includes a number of observations regarding the present-day necessity of an access to the Tiller lot via Lakeview Street. Tiller challenges only the court's observation that it "need not decide if there is a requirement of direct access to the house instead of the garage building" and that "[m]ost likely, the current driveway would be deemed adequate under the law if the Court were addressing the issue of necessity." The trial court then states in finding of fact 30 that because there is no legal basis for an implied easement by necessity, "any evidence or legal theories regarding the physical realities on the [Tiller] lot ... are essentially irrelevant." We agree with this finding inasmuch as it states that necessity must be evaluated at the time of severance. But we disagree that present-day conditions on the Tiller lot are irrelevant. The findings regarding present-day physical realities of the Tiller lot are relevant to the extent that these same realities existed at the time of severance, and they are also relevant in determining the scope of the easement that will be implied. Specifically, although the scope of an implied easement is "initially defined by the necessity ... existing [at the time of severance], ... similarly to a granted easement of general access, its permitted scope is capable

of gradual change to keep pace with reasonable changes in uses of the dominant tenement." STOEBUCK & WHITMAN, § 8.5, at 449. Here, in an unchallenged finding, the trial court observed that Tiller is still

> limited by topography, by the need to honor the [cabin lot] easement in favor of the cabin lot, by the placement of utilities such as transformer, gas line, and fire hydrant. Therefore, ... the need is a greater one than just one of convenience, as there are significant physical and cost restraints on building a direct driveway from Northshore Road to the Tiller house site.

This finding confirms that necessity still exists, even though the scope of the implied easement may have changed overtime.

¶ 65 To that end, because the trial court's award of an easement to Tiller takes into account changes in the physical realities of the Tiller lot since 1947, we affirm that award, including those portions of the trial court's judgment specifying the width and location thereof and the restrictions placed by the trial court on use of Lakeview Street by Tiller and the owners of lots 9 and 10.

¶ 66 We also affirm the trial court's award of $1,340 in costs to Tiller because although Lackey assigned error to this award, Lackey did not provide specific argument. Holland, 90 Wash. App. at 538, 954 P.2d 290 ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.") (citing Johnson, 119 Wash.2d at 171, 829 P.2d 1082).

CONCLUSION

¶ 67 We hold that the court had subject matter jurisdiction and that the trial court erred by concluding the requirements of a prescriptive easement were satisfied but the requirements of an implied easement by necessity were not. We conclude the trial court's findings support recognizing an implied easement by necessity. We remand to the trial court for entry of revised conclusions of law consistent with this opinion and a revised judgment that specifies the easement is an implied easement rather than a prescriptive easement.

WE CONCUR:

Schindler, J.

Becker, J.

All Citations

431 P.3d 524

Footnotes

1 Figure 1 is not part of the record and is included only for illustrative purposes. It is based on exhibit 181, which was admitted at trial for illustrative purposes.

2 Tiller did not assign error to this finding in Tiller's notice of cross appeal. But a minor technical violation of RAP 10.3(g) will not bar review where the nature of the challenge is clear and the challenged ruling is set forth and fully discussed in the appellate brief. Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co., 143 Wash. App. 753, 774, 189 P.3d 777 (2008).

3 A "dog in the manger" describes a person who spitefully stops other people from using something that he or she has no use for.

4 The trial court made no express finding that a residence was established on the cabin lot before lots 9 and 10 were developed. Furthermore, Tiller's arguments are based in large part on information from the Whatcom County Assessor's records, and testimony in the record indicates that those records were not always reliable.

5 For the same reason, we also need not consider Lackey's arguments that the period of adverse use was interrupted either by Steven Lackey's actions in early July 2014 or by Tiller's predecessors' concurrent ownership of both the Tiller lot and an undivided

one-tenth interest in the street parcel.

6 A "quasi easement" is "one which may arise between two pieces of land owned by the same person, when the enjoyment by one piece of a right in the other would be a legal easement, were the pieces owned by different persons." Adams, 44 Wash.2d at 504, 268 P.2d 451.

7 The parties do not dispute that this was the date of severance as between the plat and the Provanches' remaining property. Accordingly, we need not consider whether severance actually occurred when the Provanches sold the first lot in the plat (such that the Provanches no longer owned the entire interest in the street parcel).

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DAVID TILLER and THUY TILLER, husband and wife,	)	No. 76620-1-I
Respondents/ Cross-Appellants,	)	ORDER DENYING MOTION FOR RECONSIDERATION
v.	)	
STEVEN LACKEY and SALLY LACKEY, husband and wife; and CASEY O'KEEFE and KAREN O'KEEFE, husband and wife,	)	
Appellants/ Cross-Respondents.	)	

Appellants/cross-respondents Steven and Sally Lackey and Casey and Karen O'Keefe have filed a motion for reconsideration of the opinion filed on December 10, 2018. Respondents/cross-appellants David and Thuy Tiller have filed an answer to appellants/cross-respondents' motion for reconsideration. The court has determined that appellants/cross-respondents' motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that appellants/cross-respondents' motion for reconsideration is denied.

FOR THE COURT:

Judge

X. CERTIFICATE OF MAILING

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be delivered the foregoing PETITION FOR REVIEW to the Court and to Respondents through the following counsel:

VIA Washington State Appellate Courts Filing Portal
Clerk
Court of Appeals
State of Washington
Division I

Scott M. Ellerby WSB 16277
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DATED this 13th day of March 2019.

Of Counsel, Inc., P.S.

Christopher M. Constantine

OF COUNSEL INC PS

March 13, 2019 - 11:14 AM

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