NO. 45177-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT GUNN, a single man,

Respondent,

v.

TERRY L. RIELY and PETRA E. RIELY,
husband and wife,

Appellants

REPLY BRIEF OF APPELLANTS TERRY & PETRA RIELY

By: Curtis G. Johnson, WSBA #8675
Attorney for Appellants
230 E. 5th Street
Port Angeles, WA 98362
Telephone (360) 452-3895

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

STATUTES

OTHER AUTHORITY

I. ARGUMENT IN REPLY

A. The trial court should have dismissed the RCW 4.24.630(1) claim and adopted RCW 64.12.030 as the controlling damage statute in the absence of an implied easement.

By express operation of RCW 4.24.630 a defendant can only be liable for "waste" if the defendant acts "wrongfully" and commences an act that exceeds the scope of his or her authorization.[1] In this case, the Rileys' claimed that they possessed an easement, albeit an "implied easement" from a common grantor (Sisson/Goralski d/b/a Storm King Ranch) that gave them the right to use the grassy path diverging southwest from Sponberg Lane as access to their Parcel No. 2 across Gunn land (Parcel No. 1).[2] If the Rielys' do possess an implied easement, then under common law they are authorized to perform reasonable maintenance such as the cutting of foliage growing along the grassy path in order to keep the way of travel open and usable.[3] If so, the waste statute [RCW 4.24.630(1)] would not be applicable since such action would not be "wrongful".

---

[1] In general, acts that constitute "waste" is serious and more or less permanent harm done to land or to the objects affixed to it such as timber or buildings. 17 WAPRAC Sec. 1.27

[2] See CP-141; (Defendant's Answer to Amended Complaint and Affirmative Defenses); CP-157 (Defendant's Answer to Complaint and Affirmative Defenses). As an affirmative defense, the Riley's stated: "Defendants have certain easement rights for ingress and egress and obligations for maintenance and of a dirt road and a well in proximity of where Plaintiff claims a trespass occurred. Said trespass, if it occurred, was inadvertent and de minimus."

[3] Dreger v. Sullivan, 46 Wn. 2d 36, 278 P. 2d 647 (1955).

In the legislative history, when the Washington Senate was first debating the waste statute (later codified as RCW 4.24.630), Senator Owen explained that:

> "...the idea is to deal with the tremendous amount of damage that we are having with people coming in and shooting up signs, shooting up restrooms. In the case of forest lands, shooting up trees, taking four wheel drives and running them all over (agriculture) land and ripping up the ground. You know a variety of things like that is really what we are getting after in this situation." [4]

If there is any potential interplay between RCW 4.24.630 and RCW 64.12.030, it would appear to occur only if the specific factual situation of a case involved both (1) the cutting of trees on the property of another (a general timber trespass claim) and (2) associated damage to structures, fences, buildings, road damage to property such as four-wheeled vehicle digging up agricultural farmland, etc.

Therefore, in order to compare the potential interplay between the two statutes there has to be a separate analysis of what was the damage to the real property owned by Mr. Gunn. Because of the exclusionary clause in RCW 4.24.630(2), one must look to separate any discernable damages to the trees and any waste to land. If so, the two statutes could apply independently within each of their own realms and would then be harmonized.

---

[4] Senate Journal, 53 Leg. Reg. Session at 154 (Wn. 1994)

In this case, there was no evidence presented to the trial court by Mr. Gunn of any damage to the land (waste) apart from the cutting of the alder saplings along the grassy path (CP-19: Findings of Fact 1.24; 1.29; Conclusion of Law 2.28; CP-93 Exhibit 20). In cross-examination at trial, Mr. Gunn testified concerning his damages:

> Q: (By Mr. Johnson) Right. And the trees that were cut that were the basis of Tom Swanson's damage estimate were located along the grassy path, were they not?
>
> A: Correct.[5]

Therefore, there was a lack of substantial evidence to allow a claim of waste under RCW 4.24.630 since the cutting of the saplings was the only proof of any physical damage submitted at the time of trial.[6] Those physical damages would be the type of damages covered under RCW 64.12.030 for the cutting of the alder saplings. However, in the Respondent's brief, he admits the damage to the saplings was relatively minor stating, "The tree cutting was incidental and of little consequence to the actual damage to Gunn." [7] In his argument, Gunn has asserted that he was damaged by the

---

[5] See RP p. 124, ln. 24-25; RP p. 125, ln. 1-2)

[6] Physical damages at trial for the cutting of the saplings were stipulated to a value of $153.00 as determined by Plaintiff's expert witness (Tom Swanson). See Exhibit 20.

[7] See page 13, first sentence of Brief of Respondent Robert Gunn.

Rileys' use of the grassy path and is now attempting to put the case in the posture that the lawsuit was to prevent or thwart future trespasses.[8] However, no injunction to bar use of the grassy path was pursued or awarded by the trial court. (CP-19, Conclusion of Law 2.6).

The "plain meaning" doctrine must apply to RCW 4.24.630(2) because the exception defaults to RCW 64.12.030 if liability for damages is provided under the timber trespass statute. In this case, the trial judge analyzed the first section of RCW 4.24.630 and determined that the while the alder saplings were cut, they were not removed. Furthermore, no crops, minerals, or other valuable property were removed from Mr. Gunn's land. (CP-19, Finding of Fact 1.24; 1.25; Conclusion of Law 2.10). Additionally, there was no evidence submitted or findings of fact entered concerning any injury to personal property or improvements to real estate on the land. (CP-19, Conclusion of Law 2.12). In his analysis, the trial judge felt that the only available avenue under RCW 4.24.630 was the separate element of "wrongfully causes waste or injury to the land." (CP-19, Conclusion of Law 2.11; 2.13) But the only evidence presented at trial of any physical injury to the land was the cutting of the alder saplings along the grassy path. (CP-

[8] See 2nd paragraph of Respondent's Brief at page 12. "After listening to the evidence the court found that Appellant's intentional act was not to cut the trees, or timber trespass, but to open up a roadway that Appellants had no right to use. This was the focus of the suit, not the cutting of saplings".

19, Conclusion of Law 2.28). There were no other findings of fact entered by the court or other evidence admitted in trial documenting any other "waste" or "injury to the land" that would not be encompassed within the timber trespass statute of RCW 64.12.030.

In all reported cases in Washington in which RCW 4.24.630 has been applied to award damages, the cutting of trees or timber on the land of another has been a consistently absent factor! For instance, see *Clipse v. Michels Pipeline Construction, Inc.*, 154 Wn. App. 573, 225 P. 3d 492 (2010). In that case, the defendant Pipe Experts, LLC, (drainage subcontractor) on a public sewer project, entered on and damaged the plaintiff's property through waste water that backed up into the basement of the Clipse home. The parties disagreed as to whether the drainage subcontractor had permission to enter the property. *Clipse*, 154 Wn. App. at 575-576.[9] The court noted that there was no way to read "wrongfully" as the mere act of coming onto the land. *Clipse* at 578. However, *Clipse* did confirm that the "knowing" or "reasonable lack of authorization" addressed in RCW 4.24.630(1) did not apply where liability is provided under certain other statutes (RCW 64.12.030). "Bolstering this conclusion is that both

[9] Since the purpose of the King County's project was to rehabilitate side sewer pipes on private property, although not explicitly stated in the opinion, one can deduce that King County had an underlying legal right, such as a recorded right of way, to enter on private property to refurbish the sewer lines in the first place.

sections specifically provide that *they do not apply* where liability is provided under certain other statutes, each of which imposes treble damages for removal of valuable materials from various types of land *without authorization." Clipse at 579.*

Likewise, in *Borden v. City of Olympia*, 113 Wn. App. 359, 53 P. 3d 1020 (2002), the property owner brought an action for statutory waste under RCW 4.24.630(1) against the city for damages caused by the flooding of their land that damaged their basement and shop. Their yard "developed standing ponds some feet in depth," and some "decorative cedar trees approximately 10-12 years old" died due to "soil saturation." *Borden at p. 364*[10]

At page 10 of the Respondent's Brief, Mr. Gunn questioned whether RCW 64.12.030 was even subject to the "plain meaning" rule? Gunn erroneously cites to *Broughton Lumber Co v. BNSF Railway Co.* 174 Wn. 2d 619, 278 P. 3rd 173 (2012) as support for his position. However, the holding of that case does not assist him in that endeavor. In its decision, the Washington Supreme Court in *Broughton* at pages 636-37 summarized several cases specifically construing the timber trespass statute (RCW 64.12.030):

[10] The evidence did not support an inference that the City intentionally, as opposed to negligently, caused waste or injury to the Bordens' land. Accordingly, the appellate court found that the trial court did not err by dismissing that claim.

"And in each of our cases construing the statute over the last 142 years, the defendant entered the plaintiff's property and committed a direct trespass against the plaintiff's timber, trees, or shrubs, causing immediate, not collateral, injury. Examples include: *Birchler,* 133 Wash.2d at 106, 942 P.2d 968 (1997), where the defendant encroached on plaintiffs' properties and removed trees and shrubbery; *Guay,* 62 Wash.2d at 473, 383 P.2d 296 (1963), where the defendants cut a swath on plaintiff's property, destroyed trees, brush, and shrubs, and denuded the strip; *Mullally v. Parks,* 29 Wash.2d 899, 190 P.2d 107 (1948), where the defendants entered a disputed area and destroyed trees; *Luedinghaus v. Pederson,* 100 Wash. 580, 171 P. 530 (1918), where the defendant trespassed upon plaintiff's land and removed standing timber; *Gardner,* 27 Wash. 356, 67 P. 615, where the defendants entered plaintiff's land, cut down and converted into shingle bolts and removed plaintiff's cedar trees; and *Maier v. Giske,* 154 Wash.App. 6, 21, 223 P.3d 1265 (2010), where the defendant entered a disputed area and destroyed trees and plants...In sum, our canons and case law suggest that the legislature used the phrase "otherwise injure" to describe direct trespasses that are comparable to cutting down, girdling, and carrying off, and intended the statute to apply in the absence of physical trespass to a plaintiff's land. Our cases demonstrate that the statute applies only when a defendant commits a direct trespass causing immediate injury to a plaintiff's trees, timber, or shrubs.....Further, our canons and case law strongly suggest that the legislature intended the timber trespass statute (RCW 64.12.030) to apply only when a defendant commits a direct trespass that immediately injures a plaintiff's trees. See *Broughton Lumber Co.* supra, at 640.

These cases demonstrate that the RCW 64.12.030 applies when a defendant commits a direct trespass causing immediate injury to a plaintiff's trees, timber, or shrubs. As such, the discussion of the "plain meaning doctrine" addressed in the Appellant Riley's Brief focused on the meaning of exception provision set forth at RCW 4.24.630(2). The language used in subsection (2) of the waste to land statute must lead one to an analysis as to whether or not the physical damages to trees would be allowed under RCW

64.12.030. If they are, then that portion of the tree/timber/shrub damages would be subject to the timber trespass statute of RCW 64.12.030. If not, then further analysis would be required to determine whether or not something other than the cutting of a tree/timber/shrub has occurred on the Gunn property allowing a potential recovery under RCW 4.24.630(1).

Furthermore, contrary to Gunn's arguments, RCW 64.12.030 is not limited to *commercial cutting and harvesting operations*.[11] Gunn's reading of *Bircher v. Costello Land Company, Inc*, 113 Wn. 2d 106, 942 P. 2d 968 (1997) at p. 112 is not accurate. In *Birchler*, the issue granted for review was whether emotional distress damages were recoverable under a timber trespass action based on RCW 64.12.030. In that case, the landowners sued a land company and grading company. The damages resulted from the grading company's intentional encroachment on neighboring property and removal of vegetation during the grading and filling operation that destroyed the trees and vegetation of various homeowners. Despite blueprints showing the proper boundaries of the respective properties, the defendant's personnel at the jobsite intentionally encroached on a homeowner's property (Wilson) during the grading and filling operation,

[11] See Brief of Respondent Gunn, the fourth paragraph at page 12, and the first paragraph of page 14. The argument there made concluded "Therefore, if the damaged timber is not merchantable, it is not compensable under RCW 64.12.030." The rationale of this argument is dispelled by the holding in *Guay v. Washington Natural Gas Co.*, 62 Wn. 2d 473, 477-78, 383 P. 2d 296 (1963).

resulting in the removal of vegetation, destruction of her fence, and the placement and grading of fill. To make the grading consistent, the grading contractor (Hayes) later encroached on the properties of Birchler and the Langs to a similar extent. Defendants were found liable by the jury at trial for the damages, which were trebled by the trial court pursuant to RCW 64.12.030. In its analysis or RCW 64.12.030 in the *Birchler* decision, the Washington Supreme Court stated at p. 110-111:

> "RCW 64.12.030 creates a punitive damages remedy, trebling damages for injury to, or removal of, trees, timber, or shrubs, when a person trespasses on the land of another. This treble damage remedy is available when the trespass is "willful," because if the trespass is "casual or involuntary" or based on a mistaken belief of ownership of the land, treble damages are not available. RCW 64.12.040. As befits a penal statute, Washington court decisions have interpreted this punitive damages provision narrowly. *Grays Harbor County v. Bay City Lumber Co., 47 Wash.2d 879, 886, 289 P.2d 975 (1955); Bailey v. Hayden, 65 Wash. 57, 61, 117 P. 720 (1911)*. At the same time, Washington cases have been cognizant of the purpose of RCW 64.12.030: to punish trespassers, to prevent careless or intentional removal of trees and vegetation from property, and to roughly compensate landowners for their losses. *Pearce v. G.R. Kirk Co., 92 Wash.2d 869, 602 P.2d 357 (1979); Guay v. Washington Natural Gas Co., 62 Wash.2d 473, 383 P.2d 296 (1963)*....Our cases have generally confined the treble damages remedy to injury to, or removal of vegetation, although the measure of damages has varied by the type of vegetation affected." (emphasis added).

The *Birchler* court noted that "A claim for damages from emotional distress is not an alternate or cumulative remedy for timber trespass that one may elect in lieu of a common-law remedy or the statutory remedy, but

merely another item of damages for a wrong committed as a result of the timber trespass." *Bircher*, supra at 112-113.

Also, in the Respondent's Brief, Gunn has argued that Rielys' statutory interpretation of RCW 64.12.030 would make the term "timber" in RCW 4.24.630(1) superfluous and "that any tree cut, no matter the value, would limit an injured party to just three times its value. As such, any tree blocking the neighbors' million dollar view is at risk. The neighbor would simply value the tree, cut it without permission and pay treble damages knowing the victim would not be entitled to any other damages or attorney's fees." [12]

Gunn's argument is that the exception set out in RCW 4.24.630(2) only precludes an award of damages to timber if those damages are provided under RCW 64.12.030 and are generally associated with commercial forestry or other tree-related "for profit" logging operations. However, this is not a correct interpretation of legislative intent surrounding RCW

---

[12] See Brief of Respondent Gunn at p. 11-12. This argument was also dispelled by *Guay v. Washington Natural Gas Co.*, 62 Wn. 2d 473, 476, 383 P. 2d 296 (1963) quoting to *Mullally v. Parks*, 29 Wn. 2d 899, 190 P. 2d 107 (1948). In *Mullally*, at page 911, the court stated, "It is clear from the evidence that the trespass committed by appellant F. J. Schroeder was not casual nor involuntary, but deliberate, definite, and intentional, his expressed purpose being to provide his own property with a better view." The *Guay* court also cited to *Harold v. Toomey*, 92 Wash. 297, 158 Pac. 986 (1916) and stated, "...we are aware of the statute's third and additional purpose: To discourage persons from carelessly or intentionally removing another's merchantable shrubs or trees on the gamble that the enterprise will be profitable if actual damages only are incurred." *Guay* at 476.

64.12.030. A close reading of RCW 64.12.030 does in fact cover Gunn's hypothetical example.

RCW 64.12.030 clearly states that:

> "Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree. ... timber, or shrub on the land of another person, or on a street, highway in front of any person's house....without lawful authority, in any action by the person....against the person committing the trespass... any judgment for the plaintiff shall be for the treble of the amount of damages claimed or assessed."

RCW 64.12.030 contemplates both commercial and residential circumstances that may cause the loss under the application of the timber trespass statute. The timber trespass statute covers both the cutting down, injuring or girdling of a single tree (such as in front of any person's house...or city lot...or cultivated grounds) and also contemplates a stand of trees by inclusion of the term "timber". By definition, to girdle a tree is to cut away the bark and cambium in a ring around (a plant or tree) usually to kill by interrupting the circulation of water and nutrients.[13] It is unlikely that the girdling of a tree would be related to a "profit" logging operation. The statutory language pertaining to girdling would appear to be more directed to an act of vandalism against a neighbor's tree such as one that may block the "million-dollar" view as used in the Gunn example above.

[13] "girdle" Merriam-Webster.com. Merriam-Webster Dictionary, Web. 25 March 2014.

For instance, again see *Mullally v. Parks*, 29 Wn. 2d 899, 911, 190 P. 2d 107 (1948).

Nevertheless, such an act is still subject to damages provisions under RCW 64.12.030 and not RCW 4.24.630(1) because of the application of the exclusionary provision set forth in RCW 4.24.630(2).

Mr. Gunn also erroneously concludes that if the damaged timber is not merchantable-ready for sale it is not compensable under RCW 64.12.030.[14] The *Bircher* court in fact recognized in its analysis of RCW 64.12.030, that vegetation would have different values. Therefore, the mere fact that the alder saplings in this case were valued at $153.00 is not controlling and does not cause the elimination of RCW 64.12.030 from application in this case or the use and transference to RCW 4.24.630(1).

The appellate court should reject Gunn's argument attempting to distinguish the use of RCW 64.12.030 and further find that the trial court's analysis of RCW 4.24.630(2) is erroneous as a matter of law.

B. The Trial Courts Grant of a Motion in Limine and its Conclusion that the Riley's were Trespassers without consideration of an Implied Easement was Erroneous.

[14] See first paragraph of page 14 of the Brief of Respondent Gunn.

Before testimony commenced, Mr. Gunn's attorney argued for a motion in limine on the issue of the implied easement, stating to the trial court:

> "But I would point out if the Defendant's are planning to introduce evidence of a history establishing easement, I would say that's irrelevant because this case is about whether or not they committed trespass, not whether or not they had an easement."[15]

Following discussion regarding the Defendant's affirmative defense on the issue of the nature of the easement, the trial court stated:

> "I'm not going to prohibit your clients from showing what they knew or didn't know or thought or believed or didn't think or believed about the existence of an easement which would give them a right to do certain things. What I'm not going to do is allow them to establish an easement legally in this case because it's not pled, and I do not see that there's express or implied consent by the parties to have that issue treated as a claim."[16]

Respondent Gunn now states that the real basis of this case is to bar Rielys' use of Gunn's property (i.e. the grassy path).[17] No injunction to bar such use was pursued at the trial and there was no entry of any finding of fact or award of any injunction in favor of Mr. Gunn on this issue. (CP-19; Conclusion of Law 2.36) However, there remains a serious issue of law that involves consideration of whether or not an easement, albeit an "implied easement" was in existence and available to the Rileys for their

---

[15] RP p. 7, ln. 3-8.
[16] RP p. 11, ln. 7-15.
[17] See second paragraph at page 12 of Brief of Respondent Gunn.

use of the grassy path. The evidence established that the grassy path existed prior to the acqusition of the adjacent parcels of land by both Gunn and the Rielys. (See CP-19: Findings of Fact 1.7; 1.8; 1.9; 1.10; 1.19 See also Exhibit-12-sequence of aerial photographs). In fact, the "grassy path" was in existence prior to Sisson and Goralski (developers of Storm King Ranch Subdivision) purchasing a portion of the old Sponberg property. (Testimony of Joel Sisson at RP p. 150, ln. 12-23; RP p. 151, ln. 11-21; RP p. 152, ln. 5-25; RP p. 153, ln. 1-8)

Whether there is an implied easement is a matter of de novo review since that is an issue of law to be determined by the Court. Joel Sisson, one of the developers of a portion of the large Sponberg Farm testified that it was always the developer's intention of the Storm King Subdivision that the purchasers of Parcel 2 and Parcel 3 would have access to their property from the "grassy path". (RP p. 153, ln. 21-25; RP p. 154, ln. 1-25). In fact, the use of the grassy path was written up in the deed for the Trerises (owners of Parcel No. 3) but inadvertently omitted for Parcel No. 2 (purchased by the Rileys). (CP-93, Ex. 10). Gunn eventually obtained a quit claim deed from the Trerises releasing their easement and use of the grassy path. The following testimony occurred: (Robert Gunn direct testimony at RP p. 77, ln. 12-25; RP p. 78, ln. 1-2, in reference to Exhibit 8 admitted at trial).

Questioning by Mr. Mullins:

Q: Can you tell us what that is (Exhibit 8)?

A: It is an easement release deed.

Q: From?

A. From Burt and Lynn Treerise....

Q: That's the one where they gave you back the easement?

A: That's correct.

At trial, Terry Riely testified that forty years earlier he had hunted on the property with Andy Sponberg, a childhood friend (whose parents then owned the 800 acre dairy farm). At that time grassy path (then considered a logging road) was existence. (RP-p. 167, ln. 15-25; RP 168, ln. 1-25). Following his purchase of Parcel No. 2 in the year 2000, Riley testified that he used the grassy path several times a year to transport water in the summer months to newly planted trees and young berry bushes. (RP p. 173, ln. 19-25, p. 174, ln. 1-6).

At trial, Mr. Gunn further testified that before purchasing Parcel No. 1 in 1999, he observed the grassy path with Joel Sisson and saw that it lead down from Parcel No. 1 to Parcels No. 2 (at that time unowned) and No. 3 (owned by the Treerises). (RP p. 121, ln. 8-12; RP p. 122 ln. 4-12).

On page 16 of the Respondent's Brief, Gunn erroneously concludes that the mere establishment of a subdivision terminates the grassy path as

an implied easement if in fact the Storm King Ranch developers did not reserve an easement over the grassy path.

The grassy path meets the preexisting use requirement for proving an easement by implication. Joel Sisson testified that the easement was necessary for the reasonable enjoyment of Parcel 2 (Riley's ownership) and to access the view location which would have been the logical building site. (RP p. 152, ln. 9-22; RP p. 153, ln. 2-8). It was also located near to where the community water well was located. Sisson testified that to get to the view area one would have to build a road across high bank and a ditch and the road would have to cross the field to get into the Riley property to the view building site. (RP p. 162, ln. 6-24).

Without the implied easement over the grassy path, the evidence and testimony established that Rielys essentially have no reasonable access to the view building site and well-site unless they built an expensive road to the vantage point where the well was installed which were also be across and therefore damage their fields. For example of the expense, before he sold off certain sections of the Storm King Ranch, Joel Sisson testified that concerning adjacent Parcel No. 8 of the Storm King Ranch Development, he was required to hire Danny Hokum to build a road up beneath the pond in 1998 or 1999 at a cost of approximately $9,400.00. (RP 163, ln. 4-15). Sisson testified that there was really no good access to Parcel No. 2 stating

"Well, it's surrounded by the Eden Valley Road, but it's a high bank and a ditch." (RP p. 149, ln. 18-25).

Although he acquired title while the grassy path was obvious for the use as an access to Parcel No. 2 and No. 3, Mr. Gunn claims that the use should cease. When he made an examination of Parcel No. 1 with Joel Sisson, Gunn's own testimony was that upon observation, he was not concerned as to the purpose of the grassy path prior to the time of his purchase. He did not ask Mr. Sisson how that path had been in existence and he was not interested in what the path was for. (Robert Gunn testimony at RP p. 121, ln. 8-12; RP p. 122 ln. 4-22).

Implied easement is an equitable doctrine. The mere fact of a subdivision plan does not necessarily extinguish an implied easement. *Schlager v. Belport* 118 Wn. App. 536, 539, 76 P. 3 778 (2003) as cited by Mr. Gunn at page 18 of the Respondent's Brief is not applicable under the circumstances. The appellate court stated in *Schlager,*

"While easements are usually created expressly in a written instrument, the law also recognizes implied easements in some situations. (Citations omitted). "Easements by implication arise by intent of the parties, which is shown by facts and circumstances surrounding the conveyance." *Roberts v. Smith, 41 Wn.App. 861, 864, 707 P.2d 143 (1985).* The factors relevant to establishing an implied easement are (1) former unity of title and subsequent separation, (2) prior apparent and continuous quasi easement for the benefit of one part of the estate to the detriment of another, and (3) a certain degree of necessity for the continuation of the easement. *Adams v. Cullen, 44 Wn.2d 502, 505, 268 P.2d 451 (1954); MacMeekin v. Low Income Hous. Inst., Inc., 111 Wn.App. 188, 195, 45 P.3d 570 (2002).* Unity of title and

subsequent separation is the only absolute requirement. *Roberts, 41 Wn.App. at 865.* The other two factors are merely "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." *Adams, 44 Wn.2d at 505–06. In Rogers v. Cation, 9 Wn.2d 369, 376, 115 P .2d 702 (1941)*, our Supreme Court held, "[T]he presumed intention of the parties, is the prime factor in determining whether an easement by implication has been created." "[W]e pointed out that the rule is not a hard and fast one, and that the presence or absence of either or both of these requirements is not necessarily conclusive." *Adams, 44 Wn.2d at 505 (citing Rogers, 9 Wn.2d at 376).*

A "quasi easement" refers to the situation where one portion of property is burdened for the benefit of another portion, which would be a legal easement if different persons owned the two portions of property. *Adams, 44 Wn.2d at 504.*

"[B]efore the conveyance, there was a usage existing between the parcel conveyed and the parcel retained that, had the two parts then been separately owned, could have been an easement appurtenant to one part." (Citation omitted). This element is also referred to as "prior continuous use." *McPhaden v. Scott,* 95 Wn.App. 431, 438, 975 P.2d 1033 (1999). The purpose of the "apparent" requirement is to show the easement was within the grantor and grantee's contemplation. (citation omitted).

In the action at hand, unity of title and subsequent separation was met. Both the evidence established and Mr. Gunn acknowledged that the two parcels were formerly joined and then separated by Joel Sisson and Donald Goralski as the developers of the Storm King Ranch. (CP-19; Findings of Fact 1.2; 1.7; 1.8; Ex. 5; Ex. 6).

In *Adams v. Cullen, 44 Wn.2d 502, 505, 268 P.2d 451 (1954),* it was held that an implied easement by reservation arises when the servient estate is severed and conveyed first (and, thus, the original common owner retains

an easement for the benefit of the dominant estate retained by him). For example, In *Adams,* Cullen asserted an implied easement over Adams's property. The Adams and Cullen properties were originally one parcel, with the "Strahorn" residence located on what later became the Adams property and the carriage house to the Strahorn residence located on what later became the Cullen property. At the time of trial, the two buildings had become the "Strahorn Apartments" and the "Cullen Apartments," respectively. Access to the Cullen Apartments consisted of a driveway located on the Adams property. The evidence showed that the driveway over the Adams property had been used for access to the Cullen property since the driveway was built, and no evidence showed that any other driveway had ever existed. Although it was possible for the Cullen property to gain its own access by building another driveway, the evidence showed that the cost to do so was significant and it would not be a satisfactory substitute for the existing driveway. See *Adams, 44 Wn.2d at 510.*

For an implied easement to exist, there must also be a "reasonable necessity". In the case of *Fossum Orchards v. Pugsley, 77 Wn.App. 447, 892 P.2d 1095 (1995),* Division Three of this court applied a "reasonable necessity" or "certain degree of necessity" standard in addressing an easement implied by reservation. *Fossum* involved a five-acre parcel of land originally owned by Delva and Ora Mae Harris. The southern end of the

property contained a ditch and a weir box for delivering water to the Harris property. In 1978, the Harrises split the land into three lots. In 1983, they installed pipe the entire length of the property to delivery water from the weir. In 1985, they sold the southernmost lot (lot 1), which contained the weir, to a new owner. The Harrises sold lot 2 in 1986. The new owner discovered that the water pipe continued north onto lot 3 and disconnected it. The Harrises sold the remaining lot (lot 3) in 1988. Through another transaction, Fossum Orchards obtained title to lot 3. None of the deeds referred to any reserved easement across lots 1 and 2 for the benefit of lot 3. *Fossum, 77 Wn.App. at 450–51.* Although lot 3 had been used as a cherry orchard in the early 1970s, no evidence showed it had been irrigated since that time. Fossum began planting an orchard on lot 3 and asked the owner of lot 1 for permission to connect to the water system. Lot 1's owner refused, and Fossum sued, claiming an implied easement. The trial court found an implied easement in favor of lot 3 across lots 1 and 2 for access to the irrigation system located on lot 1.

On appeal, the appellate court referred to the necessity element as "a certain degree of necessity" and "reasonable necessity." *Fossum, 77 Wn.App. at 451.* The court affirmed the trial court's determination that the Harrises and their purchasers intended to create an implied easement for the benefit of lot 3, noting that (1) the weir box and pipe for conveying water

to the Harris property existed at the time the Harrises severed the property and conveyed lots 1 and 2, (2) no alternative source of water was reasonably available, and (3) **the failure to record or reference the easement in subsequent conveyance documents did not extinguish the easement because *the purchasers had sufficient notice to be charged with knowledge of the easement.*** (emphasis added).

In this case, Mr. Gunn had actual notice of the grassy path both by observation when shown the property by Joel Sisson and by reference in his deed that an express easement for use was reserved in favor of the Trerises's ownership of Parcel No. 3 and burdened Parcel No. 1.[18]

Although 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. See *Woodward v. Lopez* 174 Wash.App. 460, 300 P.3d 417 (2013).

Gunn essentially argues that because the deeds from the developers of Storm King Ranch to Riley concerning Parcel No. 2 does not *expressly* mention an easement, the parties must have intended to extinguish the right-

[18] Robert Gunn testimony at RP p. 77, ln. 12-25; RP p. 78, ln. 1-2, in reference to Exhibit 8 admitted at trial; RP p. 121, ln. 8-12; RP p. 122 ln. 4-22).

of-way over the Gunn parcel. In this regard, his argument and the finding of the trial court are incorrect.[19] Gunn fails to account for the fact that, whether mentioned in the deed or not, the common owner of both parcels accessed the southern parcels via the grassy path over the Gunn parcel. The testimony of Joel Sisson indicated that it was shear error or oversight that the Gunn deed did not include a reservation of easement at to the Parcel No. 2 (the Riley parcel) when it was clearly established in favor of Parcel No. 3 (the Trerise ownership). (CP-19, Finding of Fact 1.30; RP p. 154, ln. 6-21; RP p. 157, ln. 16-21; RP. 158, ln. 3-8). Sisson was not aware of the omission until approximately four years earlier (from the trial date) when Gunn and Riley were having confrontations over the use of the grassy path. (RP p. 154, ln. 21-25). When determining whether intent exists supporting an easement implied by prior use, courts look to the intent of the original grantor and the use made before severance. *See, e.g., Bushy v. Weldon,* 30 Wn.2d 266, 270–71, 191 P.2d 302 (1948).

Here, according to the testimony of Joel Sisson, (a co-developer of Storm King Ranch Subdivision) he clearly intended to establish an easement for ingress and egress along the grassy path. It had been done for the Trerises (owners of Parcel No. 3) but inadvertently overlooked in the

[19] CP-19, Findings of Fact 1.31.

reservation of the Gunn deed as to Parcel No. 2 and not mentioned in the Riely deed.

Under *Evich v Kovacevich*, 33 Wn. 2d 151, 156-158, 204 P. 2d 839 (1949), the rule is that upon severance, there arises by implication of law, a grant of the right to continue the use. The use being only reasonable necessity and that degree of necessity is sufficient which merely renders the easement essential to the convenient or comfortable enjoyment of the property as it existed when the severance took place. "It is sufficient if full enjoyment of the property cannot be had without the easement, or if it materially adds to the value of the land." *Evich at page 158 (citing to Bushy v. Weldon, 30 Wn. 2d 266, 191 P. 2d 302 (1948).*

The trial court's grant of the motion in limine concerning the exclusion of the issue of implied easement was erroneous. The appellate court should remand for re-trial on the issue of implied easement or for entry of findings of fact and conclusions of law that the Riley parcel is served by an easement implied by prior use burdening the Gunn parcel.

III.

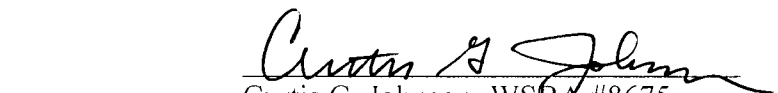
CONCLUSION

The appellate court should conclude if there is no implied easement, then the damage award to the Gunn property is controlled by the application of RCW 64.12.030 and not RCW 4.24.630(1) due to the exception set forth in

subsection (2) of that statute. If so, the trial court improperly awarded surveying costs and attorney's fees to Mr. Gunn on the basis of that statute. If there is an implied easement, then consideration should be made whether the Rileys had the right of maintenance of the grassy path to remove the alder saplings growing along the grassy path. If such a right existed, then no damage would have occurred, since the action could not be considered "wrongful". If other tree cutting did occur to portions on the Gunn property off the grassy path due to Riley's possession of an implied easement, then consideration of the application of RCW 64.12.040 comes in to determine whether treble damages would be appropriate in this case (assuming this case is controlled by RCW 64.12.030). This court should reverse the decision of the trial court and also determine or remand for a determination of the prevailing party on the basis of RCW 4.84.250 and RCW 4.84.270 in accordance with the Defendant's offer of judgment pursuant to CR 68 and offer of settlement.

Respectfully submitted this 31st day of March, 2014.

Law Office of Curtis G. Johnson, P.S.



Curtis G. Johnson, WSBA #8675
Attorney for Appellants Riely

COURT OF APPEALS DIVISION II, STATE OF WASHINGTON

ROBERT GUNN, a single man, Respondent, v. TERRY L. RIELY and PETRA E. RIELY, husband and wife, Appellants.	NO. 45177-8-II PROOF OF SERVICE

I hereby certify that on the 2nd t day of April, 2014, I served the foregoing amended ***Appellate Reply Brief (Riley)*** and ***Proof of Service*** on the following person/party, at the following address, by the following means:

Federal Express (Next Day Delivery) to:

David C. Ponzoha, Court Clerk
Washington State Court of Appeals II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

A copy by U.S. First Class Mail (postage prepaid) of just the Amended Cover Sheet to:

W. Jeff Davis
Bell & Davis, PLLC.
P.O. Box 510
Sequim, WA. 98382

///

///

CURTIS G. JOHNSON, P.S.
Attorney at Law
230 East Fifth Street
Port Angeles, WA 98362
(360) 452-3895 / (360) 457-3379 FAX

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

DATED this 2nd day of April, 2014, at Port Angeles, Washington

Law Office of Curtis G. Johnson, P.S.

Sharon R. Rhoads-Warren

CURTIS G. JOHNSON, P.S.
Attorney at Law
230 East Fifth Street
Port Angeles, WA 98362
(360) 452-3895 / (360) 457-3379 FAX