No. 316815-III

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

WILLIAMS PLACE, LLC, a Washington limited liability company,

Appellant,

v.

THE STATE OF WASHINGTON, by and through the Department of Transportation,

Respondent.

APPEALED FROM WHITMAN COUNTY SUPERIOR COURT
CAUSE NO. 07-2-00244-6
THE HONORABLE DAVID FRAZIER

WILLIAMS PLACE'S BRIEF

KEVIN W. ROBERTS
ALEXANDRIA T. JOHN
Dunn Black & Roberts, P.S.
111 North Post Street, Ste. 300
Spokane, Washington 99201
(509) 455-8711
Attorneys for Williams Place, LLC

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I. INTRODUCTION

In September 2007, WSDOT landlocked property owned by Williams Place, LLC by having the Paradise Creek bridge, which connected the existing access connection to SR 270 and the Williams Place property, destroyed. It was undisputed this resulted in William Place being unable to access its property. Yet, WSDOT refused to leave the Paradise Creek bridge intact or to pay just compensation for the taking of the access. In this action, WSDOT took the legally and factually unsupportable position that Williams Place was landlocked by the vacation of a public road in 1935.

Since 1882, a bridge has existed at the SR 270 connection location, was part of the former Garrison Road route, and has been used to access the Williams Place property. Garrison Road was a public road constructed in 1882 and included a bridge across Paradise Creek in the SR 270 connection location at issue (identified as MP 6.9). Garrison Road crossed the later established railroad easement. WSDOT did not present any evidence disputing the fact the Garrison Road route was used to access Williams Place from 1882 – 2007 when WSDOT destroyed the Paradise Creek bridge.

Despite the fact that this access existed for 125 years and it was WSDOT's action that ended the access across the bridge, the Trial Court was misled by WSDOT with regard to the law and ignored the facts presented. As a result, the Trial Court committed err by granting summary judgment dismissing Williams Place's inverse condemnation action and denying Williams Place's Motion for Partial Summary Judgment on liability.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

1. The Trial Court erred by denying Williams Place's Motion for Partial Summary Judgment.

2. The Trial Court erred by denying Williams Place's Renewed Motion For Partial Summary Judgment.

3. The Trial Court erred by granting WSDOT's Motion for Summary Judgment.

B. ISSUES PRESENTED

1. Did WSDOT's removal of the Paradise Creek bridge prevent access to the Williams Place property by effectively eliminating the SR 270 access point?

2. Did WSDOT's removal of the Paradise Creek bridge constitute an unconstitutional taking and/or damaging of Williams Place private property interests?

3. Is Williams Place entitled to just compensation for the taking and/or damaging of its property interests?

4. Under Washington law, are property owners located adjacent to a vacated roadway entitled to retain the private right to use the former public access to their property?

5. Is WSDOT estopped from claiming that a right of access to Williams Place property does not exist?

6. Does WSDOT lack standing to raise claims of third-parties?

III. STATEMENT OF THE CASE

A. Background.

The Jorstad Family has owned the property at issue[1] since 1954 when it was purchased by Sig Jorstad. CP 92-95. For estate planning purposes, the Jorstad Family formed and transferred title to Williams Place, LLC in 2005.[2] CP 86-87. Sig Jorstad purchased the property from George and Ruby Williams in 1954 with the title transfer completed in 1961.[3] CP 104. The Williams Place property is located on a roadway that prior to being vacated was a public road known as Garrison Road. CP 87.

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[1] The property is located south of SR 270 between Pullman, WA and Moscow, ID at approximately Milepost 6.9.

[2] Williams Place, LLC is owned by the members of the Jorstad family.

[3] The Jorstad Family refers to the property as the "Williams Place" because it was bought from the "Williams".

B. Access To The Williams Place Property.

Garrison Road was constructed in 1882. From 1882 to 2007, the Williams Place property was accessed from Garrison Road. This was accomplished by crossing a bridge constructed on Garrison Road to cross Paradise Creek at the location near the SR 270 connection at issue and what is now milepost 6.9 ("Paradise Creek bridge"). CP 87.

In 1886, the original owner of the Williams Place property provided the Columbia and Palouse Railroad with a railroad easement. CP 297-299. The easement was for the purpose of building and maintaining a railroad. Id. Notably, the Garrison Road access did not change and since 1886 the Garrison Road route has continued to cross over the railroad easement.

In 1933, Whitman County began construction of a new road between Pullman and Moscow (Secondary Road No. 11). CP 116. At that time the Williams Place property was owned by Lewis Brosa. CP 104. The 1933 planning maps showed the Garrison Road route connecting Williams Place via the Paradise Creek bridge. See CP 111.

In 1935, after construction of SR No. 11, Whitman County vacated Garrison Road. CP 102-103. When this occurred, the Brosas continued to use the vacated Garrison Road, the Garrison Road route across the railway easement, and the Paradise Creek bridge to access the Williams Place property. CP 87; see also CP 326-327. In 1942, Brosa sold the property to the Williams. CP 104. After the sale, Williams ***continued*** to access the property by using the Paradise Creek bridge, the Garrison Road route across the railroad easement, and the former Garrison Road to access the Williams Place property. CP 87; see also CP 326-328.

In approximately 1950, the State of Washington began a construction project to improve the highway between Pullman and Moscow (Primary State Highway No. 3) and acquired property to widen the road and right-of-way. At this time, the State acquired property from Emerson, Williams (the predecessor to Sig Jorstad), and Farrand located between the highway and the railroad easement. Included in this property was the land on which the Paradise Creek bridge was located. The Deeds for this property were recorded in January 1951. CP 105-110; CP 161. After WSDOT's acquisition,

the access connection was left open and the Williams Place property continued to be accessed the same as it had since 1882, by using the Garrison Road route including the Paradise Creek bridge, the railroad crossing, and the former Garrison Road. See CP 87; see also CP 326-328.

From 1954 until 2007, Sig Jorstad and his family continued to access the property south of SR 3 (now known as SR 270) by using the Garrison Road route, including the Paradise Creek bridge. CP 88. Throughout this time, the Jorstads repaired, maintained, and used the Paradise Creek bridge to access their property. CP 87. The undisputed evidence in the record confirmed that the Garrison Road route continued to be used to access the Williams Place property through the decades. This included using the Garrison Road route to cross the former railroad easement. Aerial photographs from 1968 confirm this fact and clearly show the Garrison Road route and the Paradise Creek bridge. See below.

CP 364 (1968).

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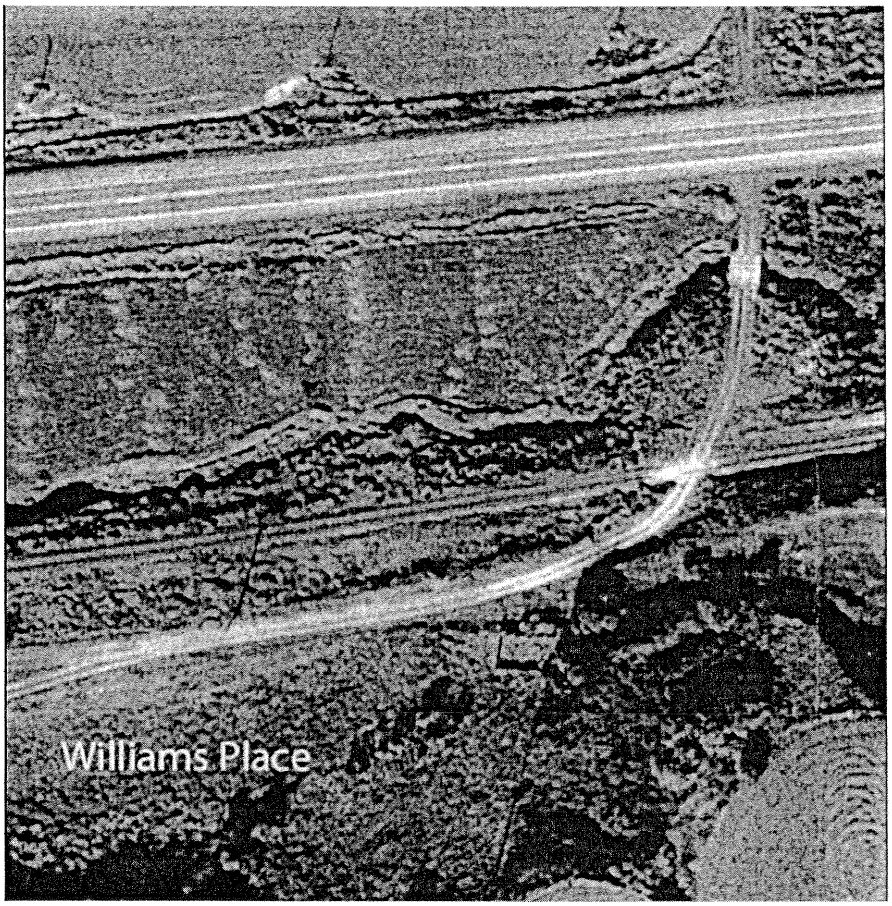
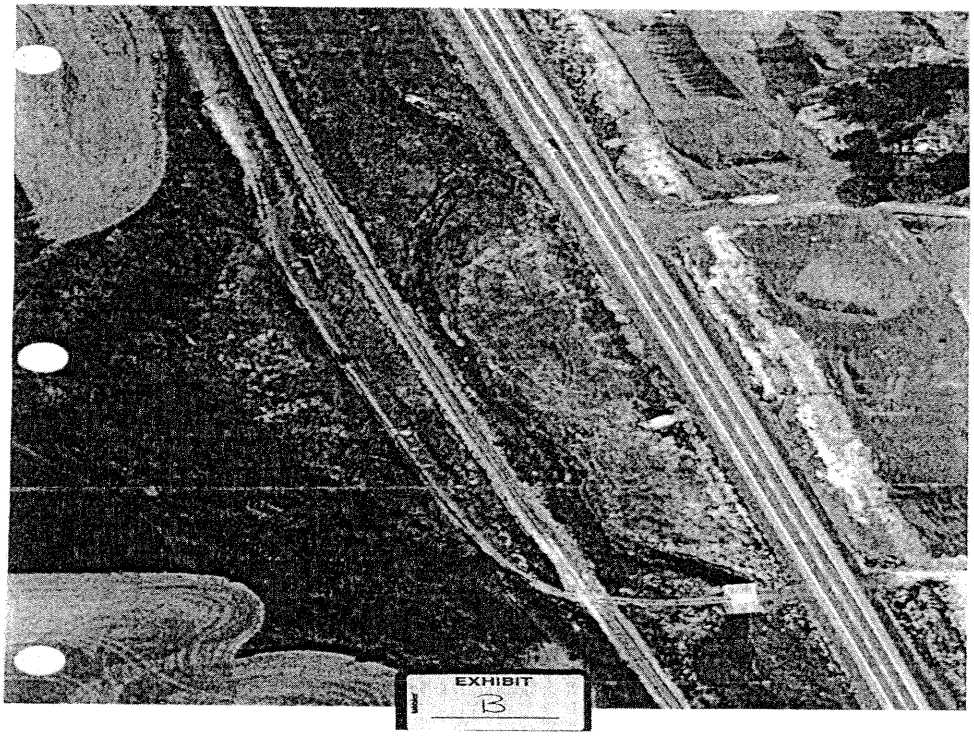


CP 364.[4]

Another aerial photograph shows that nearly 20 years later (1987) the Garrison Road route and the Paradise Creek bridge were still the access to the Williams Place property.

[4] This is a portion of CP 364 blown up and with "Williams Place" interlineated.



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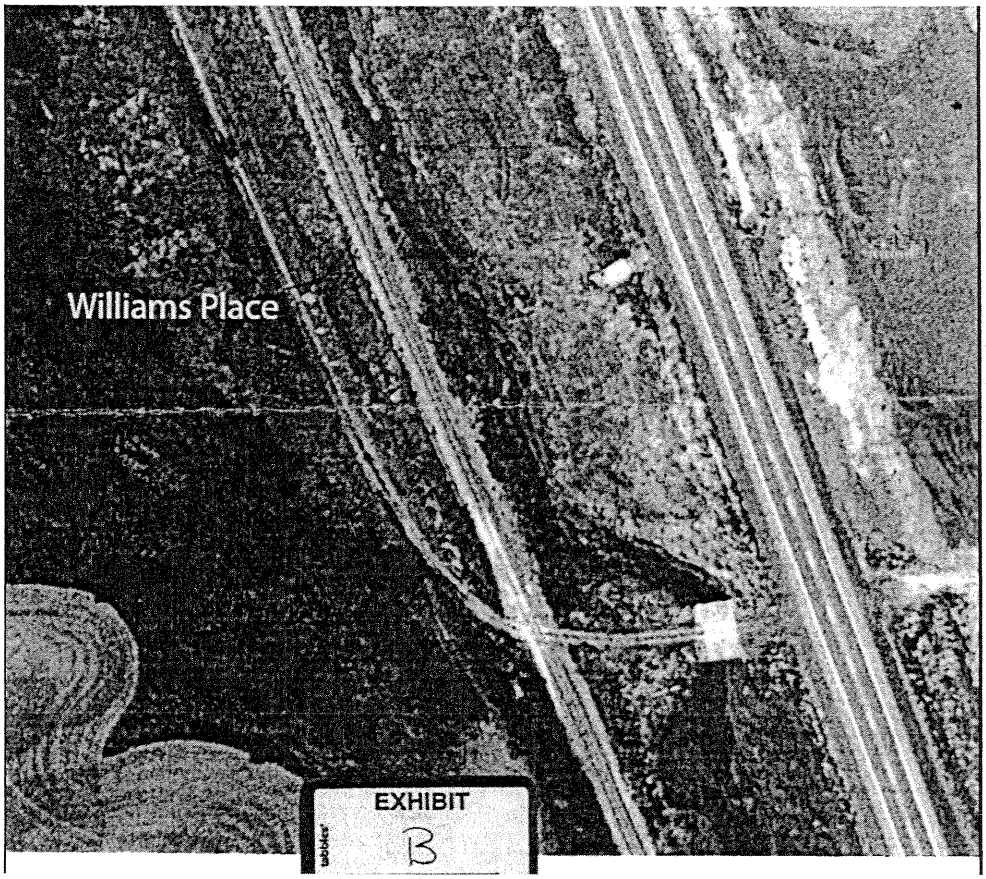

CP 365.[5]

In 2001, without providing any notice to Williams Place, WSDOT granted the Williams Place neighbor to the east, the Motleys, an access connection permit at milepost 6.9 to upgrade the existing connection to allow use for commercial purposes. CP 151-158; see also CP 87. The existing connection had existed since approximately 1935. WSDOT allowed Motley, Inc. to improve the

[5] This is a portion of CP 365 blown up and with "Williams Place" interlineated.

Paradise Creek bridge by constructing a new commercial quality bridge on the Garrison Road route at the location William Place used to access it property. The Williams Place property continued to be accessed by the Garrison Road route and crossing via the new Paradise Creek bridge just as it had using the prior bridge.

In 2001, WSDOT also had approved construction plans for SR 270 that acknowledged Williams Place's access rights by providing for a frontage road to maintain access to the Williams Place property. See CP 169-170; see also CP 48.[6] However, in 2004, WSDOT changed its plans for State Route 270 and eliminated this proposed frontage road. CP 162. Without the frontage road, the new plan eliminated any access to the Williams Place property. The 2004 plans would leave the Williams Place property landlocked. CP 88. WSDOT ignored Williams Place when this was pointed out and refuse to change the project.

In September 2007, again without notice to Williams Place, WSDOT landlocked the Williams Place property when it directed Motley to destroy the bridge located at milepost 6.900. WSDOT

[6] Indeed, historical maps and plans consistently show the bridge and the former Garrison Road route as connecting the Williams Place property to SR 270.

ordered this destruction without providing any provision for the restoration of the pre-existing Paradise Creek bridge access which was destroyed for the construction of Motley's new Paradise Creek bridge in anticipation of the original plan to create the frontage road. CP 151-158. WSDOT did not provide for any alternate access by way of a frontage road or an alternative to crossing Paradise Creek to access the Garrison Road route. As a result, WSDOT eliminated the reasonable, adequate and commercially practicable access to the Williams Place property via the Garrison Road route and the Paradise Creek bridge, which had been used from 1882 – 2007 to access the Williams Place property. CP 86-88; CP 326-328.

C. WSDOT Has Consistently Recognized Williams Place Right of Access.

WSDOT did not dispute that the Garrison Road route provided the access to the Williams Place property for 125 years. Indeed, prior to 2007, WSDOT also consistently recognized that the Paradise Creek bridge connection provided the legal access to the Williams Place property. In 1970, WSDOT granted Northwest Paving, Inc./W.D. Poppie the right to increase the existing Paradise Creek bridge access from a farm access to a "*business approach.*"

WSDOT identified that the "*abutters to the west*" [Williams Place] had an existing access and that Northwest Paving would have to share the access. See CP 122-137; see also CP 145. WSDOT's inclusion of a frontage road to provide access to William Place in the original plans for the SR 270 work further confirmed that WSDOT recognized that Williams Place had access rights across the Paradise Creek bridge railroad easement and could not be left land-locked. See CP 169-170; see also CP 48.[7]

Furthermore, when WSDOT appraised multiple properties owned by the Jorstad Family, including the Williams Place property, it admitted that the property at issue had an existing farm access. "*The portion of* ***the ownership on the right, south of SR-270 also has farm access***". CP 138-140 (emphasis added). Finally, in a 2007 draft letter, WSDOT admitted Williams Place had what it called "*informal access*". CP 146-148.

D. Procedural History.

- On September 7, 2007, Plaintiff Williams Place commenced this action alleging an inverse condemnation had occurred. CP 1-9.

[7] Notably, WSDOT's construction plans also confirm that a bridge existed at that location. CP 48.

- On February 22, 2008, Plaintiff Williams Place moved for partial summary judgment on its claims. CP 173-184. In response, WSDOT brought a cross motion for summary judgment. CP 197-210.

- On July 23, 2008, the Superior Court, County of Whitman granted a portion of Williams Place's Motion by ruling "*WSDOT owned the property where the Paradise Creek and the adjoining connection to SR 270 was located, and that the bridge was removed in 2001 through state action by WSDOT.*" The Court denied summary judgment on all remaining issues and denied WSDOT's motion. CP 427-437.[8]

- Plaintiff renewed its Motion for Partial Summary Judgment on October 26, 2012, and Defendant WSDOT again moved for Cross-Summary Judgment. CP 448-464; CP 468-480.

- Both motions were heard on December 6, 2012. This appeal arises out of the Superior Court's April 25, 2013 Memorandum Decision and May 13, 2013 Order granting Defendant's Motion and denying Plaintiff's Motion for Partial Summary Judgment. CP 914-923.

IV. ARGUMENT

A. Standard Of Review.

A Trial Court's summary judgment decision is reviewed de novo. Huff v. Budbill, 141 Wn.2d 1, 7 (2000). Summary judgment should only be granted if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); see also Safeco Ins. Co. of Am. V. Butler, 118 Wn.2d 383,

[8] The portions of the Summary Judgment Motion that were granted in Williams Place's favor have not been appealed.

394 (1992). "*A material fact is one upon which the outcome of the litigation depends, in whole or in part.*" Barrie v. Hosts Of Am., Inc., 94 Wn.2d 640, 642 (1980).

The moving party must prove by uncontroverted facts that there are no genuine issues of material fact. Jacobsen v. State, 89 Wn.2d 104, 108 (1977). The facts submitted and all reasonable inferences from those facts are considered in the light most favorable to the non-moving party. See Sec. State Bank v. Burk, 100 Wash. App. 94, 97, 995 P.2d 1272, 1275 (2000). Here, the facts are construed in the light most favorable to Williams Place. Id.; see also Visser v. Craig, 139 Wn. App. 152, 165 (2007) ("... *as the trial court noted,* ***there is no direct evidence that the parties expressly agreed to exclude an easement by necessity****. Thus, viewing the evidence in a light most favorable to Visser, the nonmoving party, the trial court properly denied the Craigs' cross-motion for summary judgment,* ***leaving the issue for the fact-finder to resolve****.*") (emphasis added).

The question of whether a non-abutting property owner's *"reasonable means of access"* is obstructed is a factual issue. See

Union Elevator & Warehouse Co., Inc. v. State ex. rel, 95 Wn. App. 288, 296 (1999). In ruling on a motion for summary judgment, the Court's function is to determine whether a genuine issue of fact exists, not to resolve any factual issues on their merits. Balise v. Underwood, 62 Wn.2d 195, 199 (1963). The summary judgment procedure may not be used to try an issue of fact. Thoma v. C.J. Montag & Sons, Inc., 54 Wn.2d 20, 26 (1959). The purpose of CR 56 is not to cut litigants off from their right to a jury trial. Burback v. Bucher, 56 Wn.2d 875, 877 (1960).

B. WSDOT's Destruction Of The Paradise Bridge Eliminated The SR 270 Connection and Destroyed The Reasonable, Adequate, And Commercially Practicable Access To The Williams Place Property.

By denying Williams Place's Motion for Partial Summary Judgment, the Trial Court ignored the one thing that resulted in Williams Place becoming unable to access its property - WSDOT's destruction of the Paradise Creek bridge eliminating the connection to SR 270. It was undisputed that the day before the bridge was removed the Williams Place property was accessed by using the SR 270 connection and crossing the Paradise Creek bridge using the former Garrison Road route. Indeed, it was undisputed that the

Williams Place property had been accessed by that same roadway since 1882. CP 87. It was only the action of WSDOT in 2007 that destroyed Williams Place's ability to use this historical access.

> *... No private property shall be* ***taken or damaged*** *for public or private use without just compensation having been first made, or paid into court for the owner... .*

Washington State Const., Art. I, § 16 (emphasis added). An *"inverse condemnation"* occurs when the government takes or damages property without the formal exercise of the power of eminent domain. Dickgeiser v. State, 153 Wn.2d 530, 535-536, 105 P.3d 26 (2005).

> *The elements required to establish inverse condemnation are: (1) a taking or damaging (2) of private property (3) for public use (4) by a governmental entity that has not instituted formal proceedings.*

Id. at 536 citing Phillips v. King County, 136 Wn.2d 946, 957 (1998). ***"Any governmental activity that invades or interferes with the right to use and enjoy property is a taking."*** Showalter v. City of Cheney, 188 Wn. App. 543, 549 (2003)(emphasis added) citing Pruitt v. Douglas County, 116 Wn. App. 547, 559 (2003). Access is a recognized property right. WPI 151.01 and 151.02.

In this case, WSDOT did not present any evidence disputing the fact that for the 125 years prior to the Paradise Creek bridge being removed, Williams Place had access to its property by means of the Garrison Road route and the Paradise Creek bridge via the SR 270 connection. It also was undisputed that WSDOT ordered the Paradise Creek bridge to be destroyed as part of a public works project. Thus, the fact WSDOT's conduct was for a public use was never in dispute. CP 427-437. Finally, it was undisputed that WSDOT did not institute formal proceedings to take Williams Place's access and did not pay just compensation for this taking. Accordingly, the only element that WSDOT even attempted to argue was whether there was a taking or damaging of Williams Place private property rights. However, as a matter of law, since 1882 Williams Place had a legal right of access. Infra.

Access cannot be destroyed where it will result in the land-locking of property. See Keiffer v. King County, 89 Wn.2d 369, 373 (1977). The Trial Court erroneously ignored the relevant and undisputed facts demonstrating that it was WSDOT's actions that landlocked the Williams Place property. Instead, WSDOT

incorrectly convinced the Trial Court to focus on whether the Williams Place property abutted the highway. However, regardless of whether Williams Place is considered abutting or non-abutting, it is entitled to reasonable, adequate and commercially practicable access. Union Elevator & Warehouse v. State, 96 Wn. App. 288, 296 (1999). In Washington, non-abutting land-owners are entitled to reasonable access. Id. See also RCW 47.50.010(3)(b). Furthermore, Washington law prohibits government action from land-locking private property.

> *It must show its right of access was either eliminated or substantially impaired. Keiffer v. King County, 89 Wn.2d 369, 373, 74, 572 P.2d 408 (1977). In other words, its reasonable means of access must be obstructed. Capitol Hill Methodist Church v. City of Seattle, 52 Wn.2d 359, 366, 324 P.2d 1113 (1958).*

Id. The Trial Court committed err by determining that only abutting landowners have a right to access.

Not only is that conclusion legally incorrect, even if it were, Williams Place should also be considered an "abutting" landowner. When the Railroad ceased to use its easement for a railroad, not only would the historical right to cross remain but the legal effect was that the property reverted back to the Jorstad Family. Hanson v.

County of Spokane, 114 Wn. App. 523, 535, 58 P.3d 910 (2002)(Court held that *"Right of Way"* deeds create only a railroad easement that *"automatically revert"* back to the prior ownership when the property is no longer used as a railway). The fact is the evidence shows that since 1888 the Jorstad Family Property has been an abutting land entitled to access to SR 270 through the crossing that was created by Garrison Road. It is undisputed that after the destruction of the bridge, access no longer exists.

Here, the undisputed evidence was that the day before WSDOT took action, Williams Place had access and the day after it did not. Therefore, the Trial Court erred as a matter of law by denying Williams Place's Motion for Partial Summary Judgment on liability.

C. The Trial Court Misapplied The Law And Ignored Genuine Issues Of Fact By Granting WSDOT's Motion.

Unable to dispute its own actions and the results from them, WSDOT convinced the Trial Court to ignore Washington law and the facts of this case by attempting to claim the 125 year access route did not really exist. WSDOT convinced the Trial Court to ignore the fact that Williams Place obtained an easement when Garrison Road

was created in 1882. The only evidence in the record unequivocally established that since 1882 the Garrison Road route was the legal access to Williams Place. However, as a matter of law, the right to continue the use of the easement was not extinguished when Garrison road was vacated in 1935.

1. When Garrison Road Was Vacated, Williams Place Retained A Private Easement.

The Trial Court ignored Washington law with regard to the effect of a road vacation. It is well established that when a road is vacated, only the public aspect of the easement is eliminated. See Howell v. King County, 134 P.2d 80 (1943). If the road is used to access property adjacent to it, the vacation does not eliminate the private easement necessary for the use and benefit of the adjacent property. Id. at 2. This is because the owner of property abutting a public thoroughfare has a right to free and convenient access. Walker v. State, 48 Wn.2d 587, 589-90 (1956). As a result, while the vacation of the roadway eliminates the public easement across the roadway, it does not eliminate the private easement necessary for access. See also, Curtis v. Zuck, 65 Wn. App. 377 (1992).

In other words, if access exists based on a roadway, the vacation of that roadway does not eliminate the access to the adjacent properties and does not result in the property becoming land-locked because of a vacation. Indeed, this legal premise makes sense. Otherwise, our state would be littered with land-locked property. Here, in 1882, Williams Place abutted Garrison Road, a public county road. Garrison Road provided the access to Williams Place both before and after 1935. As a result, when Garrison Road was vacated, as an abutting property to Garrison Road, Williams Place retained a private easement across the old Garrison Road route. Supra.

2. Williams Place Also Has An Implied Easement.

Furthermore, where severance of a roadway results in the reversion of sections of that roadway to abutting landowners, prior use of the roadway before severance also creates an implied easement to continue use of the roadway after severance if reasonably necessary. See Roe v. Walsh, 76 Wn. 148 (1913). This is because an easement can be implied from prior use: where a common parcel is divided into two parcels of property; prior to

severance there was an apparent and continuous use of a *"quasi easement"* for the benefit of a parcel; and after severance continued use of the easement was reasonably necessary. Landberg v. Carlson, 108 Wn. App. 749, 757 (2001).

Here, even ignoring the law that Williams Place private easement was not extinguished by vacating Garrison Road, under WSDOT's arguments the Garrison Road is the common parcel that was divided when it was vacated. Prior to Garrison Road being severed, WSDOT did not dispute there was an actual easement arising from the roadway and that the property was accessed via the roadway. There is no dispute that prior to vacation unity of title to Garrison Road was vested in Whitman County.

Nor is it disputed that after severance, Williams Place and its predecessors continued to use the roadway for access across the same route after severance as it had before. If this were not the case, Williams Place's property would have been land-locked in 1935. As the record shows, based on the continuous use of the Garrison Road route and the Paradise Creek bridge after 1935 that simply is not the case. See CP 364-365. Therefore, at the very least there was

evidence of an easement by implication based on Williams Place's prior use of the Garrison Road route. The Trial Court's dismissal incorrectly ignores these facts and law.

3. Admissible Evidence Also Supports a Prescriptive Easement or Easement By Necessity.

Likewise, the evidence also supported an easement by prescription based on more than *70* years of use adverse to the owners of the adjoining severed parcels. See Mood v. Banchero, 67 Wn.2d 835 (1966). At the very least, an easement would be implied by necessity due to the fact that after severance use of the road and crossing over the railroad right of way remained the sole means of ingress and egress from the property. See Dawson v. Greenfield, 118 Wn. 454 (1922). The fact a railroad was involved does not change the analysis. See Gorman v. Woodinville, 175 Wn.2d 68 (2012)(property rights acquired by adverse possession prior to the government obtaining title can be enforced).

Despite the fact WSDOT presented only conclusory assumptions in support of its theory that Williams Place's 125 years of use was "permissive", the Trial Court incorrectly weighed the evidence and erred by dismissing the case. Viewing the facts in the

light most favorable to the nonmoving party, WSDOT's unsupported assertions and failure to put forth any evidence supporting permissive use is insufficient to establish that Williams Place lacked an enforceable property right in the access route it had used since 1882. As a result, the Trial Court erred in holding as a matter of law that Williams Place's use was merely permissive.

In 1950, when WSDOT acquired additional right-of-way, it did not eliminate the access to SR 270. The record establishes that from 1950 – 2007, the connection to SR 270 continued to provide access to the Jorstad Family Property via the former Garrison Road route. From 2001-2007, nothing had changed relative to the access connection. Like the 1970 Poppie permit, WSDOT merely allowed Motley to increase the existing farm access to a commercial access. Notably, the fact WSDOT issued this increased permit also confirms that there was an existing private crossing over the railroad right-of-way prior to issuance. Indeed, Motley's drawings confirm the *"existing bridge"* to Williams Place. CR 59. Otherwise, WSDOT would not have issued a commercial permit to Motley for this location.

A review of the maps and the documents in this case confirms that the Trial Court agreeing with WSDOT that the Jorstad Family Property was legally *"land-locked in 1935 or 1950"* subject only to *"permissive use"* of an access route used previously and continuously dating back to the 1882 is a conclusion that simply cannot be decided as a matter of law. This is especially true since none of the third-parties whose rights WSDOT seeks to invoke have ever taken that position. WSDOT simply cannot avoid liability by making a claim based on alleged rights of third parties when those third-parties have never taken that position.

Despite WSDOT's red-herrings, the issue WSDOT raised was whether a right to cross the railroad easement existed to provide access to the Williams Place property. As explained above, even though not properly before the Court[9] this issue is resolved by looking at Washington law, the Garrison Road route, and its use. The undisputed evidence is that since 1882, the Garrison Road route crossed, and was used by Williams Place to cross, the railroad

[9] Infra.

easement providing access to the property. As a result, the Trial Court erred.

D. WSDOT Is Estopped from Claiming Williams Place Did Not Have An Access Right.

After being taken to task for its Constitutional violation, WSDOT took a position contrary to its assertions over the past 37 years. WSDOT had repeatedly acknowledged and confirmed the existence and use of the access by Williams Place.

A party is equitably estopped from asserting a position different to one taken in the past where that party made statements, admissions, or engaged in acts inconsistent with its later claim, another party acted in reliance on these statements, admissions, or acts, and allowing the first party to "*contradict or repudiate the prior act, statement or admission*" would result in injury to the relying party. Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wash. 2d 738, 743-44 (1993). This doctrine applies to statements, admissions, or acts of the government where estoppel is "*necessary to prevent a manifest injustice, and the exercise of governmental functions [will] not be impaired as a result of the estoppel.*" Id.

In 1970, when WSDOT issued a *"business type approach"* permit that would allow the connection to increase from farm access to business, WSDOT explicitly recognized that the Jorstad Family Property had an interest in the access – *"This approach is for joint use with the abutters to the west."* CP 122-137; see also CP 145. WSDOT also recognized the existing bridge was used for such access. See CP 133 - *"existing bridge"* abutments. In the 2000's, WSDOT also recognized in an appraisal that Williams Place had a right of access. *"The portion of the ownership on the right, south of SR-270 also has farm access."* CP 140. In 2007, WSDOT recognized that the 1970 permit confirmed the right to a *"shared access"* that WSDOT staff was *"unaware of"*. CP 145. WSDOT's employee explained the problem with trying to take a contrary position that ignored 125 years of access, *"I was in the problematic position of trying to establish a "null" state of access and needed the copies to bolster my opinion that the asserted access right did not exist."* CP 150. In other words, despite the evidence of 125 years of access, WSDOT was grasping at straws to try to *"nullify"* that access right.

Most importantly, in 2007, WSDOT acknowledged Williams Place's right to access as evidenced by its initial plan providing for the creation of a frontage road to ensure continued access. See CP 48. If, as WSDOT now asserts, Williams Place never had a right to access as an abutting landowner, there would have been no need for the planned frontage road which WSDOT ultimately abandoned.

As a result of these admissions, the Trial Court erred by not finding WSDOT was estopped from taking a contrary position.

E. WSDOT Lacks Standing For Its Arguments.

Unable to dispute that its direction to demolish the bridge in 2007 land-locked the Williams Place property, WSDOT attempted to assert claims of the County and/or other third parties that have never been raised or asserted since 1935, when WSDOT claims an issue regarding Williams Place's rights of access would have arisen. Not only would there be a serious Laches issue if these third-parties attempted to assert rights from 1935, but more importantly, WSDOT lacks standing to create an issue where one does not exist based on purported rights of third parties that WSDOT cannot enforce.

> ***Like any litigant, the State lacks standing to assert rights not its own.*** *See Powers v. Ohio, 499 U.S. 400, -*

> *---, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991) ("litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief premised on the legal rights or interests of third parties") (quoting United States Dep't of Labor v. Triplett, 494 U.S. 715, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990)); Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); Rakas v. Illinois, 439 U.S. 128, 132, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Thus, it cannot assert the rights of Anderson or Sampson, and this argument fails.*

State v. Anderson, 72 Wn. App. 253, 258-59 (1993)(emphasis added). In this case, for more than 77 years following vacation of Garrison Road, the County, adjacent landowners, and the Railroad recognized the former Garrison Road route as the access to the Williams Place property. None of these entities have ever disputed that the easement created by the Garrison Road continued to exist and provide access. As a matter of law, WSDOT does not have standing to assert purported rights of third-parties to create an issue where one does not exist. The Trial Court erred in considering these arguments and ruling on an issue not properly before it.

Furthermore, even if implied easements were not created based on Williams Place's use, under Washington law the Rail Road Right of Way Deed conveyed at most only an easement to the

railroad to begin with. As a result, Williams Place had a right of reversion in the property. See Hanson Industries, 114 Wn. App. at 536. As explained by the Hanson Court, in Washington, the grant of a railroad right-of-way conveys an easement only unless there is express language to the contrary. Id. at 527.

> *[G]eneral rules of deed interpretation are not dispositive in determining the interest intended by the grantor. Instead, Washington decisions have consistently interpreted deeds granting a strip of land for a railroad right-of-way as conveying an easement, even in the face of traditional factors signifying a fee. Thus, if the words "right-of-way" appear in the granting clause, the interest conveyed is an easement, even if the deed is in statutory warranty clause form, uses the words "fee simple," contains covenants of warranty, a habdendum clause conveying the land "forever," and other indicia of a fee simple.*

Hanson, 114 Wn. App. at 528.

In this case, the Right of Way Deed at issue is very similar to the one in Hanson. First, the deed specifically states it is for *"Right of Way"*. See CP 687-688. Second, the parties did not use a statutory warranty deed. Third, the granting clause provides that the strip of land is for *"the purpose of building and maintaining a Railroad thereon..."* Id. Fourth, there is no Habendum clause. Fifth, there is no metes and bounds description. Sixth, the amount of

consideration ($60) is nominal. As a result, like the deed in Hanson, it resulted in an easement and when the use as a railroad ceased was subject to reversion.

The importance of this fact illustrates why WSDOT lacks standing to make a claim that the County has not made relative to the former railroad right-of-way. It is well established that in cases like this one (where there is a reversion), the conversion to a trail results in a taking. See e.g. Hash v. United States, 403 F.3d 1308 (Fed. Cir. 2005). In this case, when the former railroad right-of-way was converted to a trail, the county did not take the position that the right to cross (i.e. the access across the trail) was being eliminated. Indeed, to date the County has not taken that position and recently confirmed the right to a continued easement. As explained above, it appears that WSDOT wants to argue that the County has the right to take the access. However, as explained in Hash, that would result in a taking by the County. Unlike WSDOT, the County decided not to take the access right. As a result, there is no *"preemption"* issue. Thus, this is no defense to WSDOT's taking of the connection that abuts the former railroad right-of-way. WSDOT's attempt to force

Williams Place to litigate its rights against a third party that has never contested those rights does not create a genuine issue of material fact as to Williams Place's property right in the railroad right of way in this case.

Furthermore, in order to allow the trail to continue, Williams Place agreed to reduce to its property right in the former Railroad Right of Way from its Reversionary Fee Simple Interest to an access easement. This maintained Williams Place's *"full and free right and liberty to use the easement for all purposes connected with the use and enjoyment of Grantee's property."* CP 442-447. Thus, the easement entered into on June 18, 2012, further confirms that WSDOT's red-herring with regard to the Rail Road Right of Way fails as a matter of fact. CP 442-447. The fact is that Williams Place no longer has reasonable, adequate and commercially practicable access only due to the WSDOT. Access across the former Railroad Easement was not and is not an issue. WSDOT's actions are the sole reason that Williams Place is presently denied the full and free use and enjoyment of its property and accompanying property rights.

V. ATTORNEY FEES

Pursuant to RAP 18.1; RCW 8.25.070; and RCW 8.25.075, Plaintiff Williams Place requests that this Court award Williams Place reasonable attorney fees and costs.

VI. CONCLUSION

Based upon the foregoing, Plaintiff Williams Place respectfully requests this Court reverse the Trial Court's decision granting WSDOT's Motion for Summary Judgment and either grant Williams Place's Motion for Partial Summary Judgment or remand the matter for trial.

DATED this 4th day of November, 2013.

DUNN BLACK & ROBERTS, P.S.

KEVIN W. ROBERTS, WSBA #29473
ALEXANDRIA T. JOHN, WSBA #45188
Attorneys for Appellant Williams Place, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of November, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

☒ HAND DELIVERY ☐ U.S. MAIL ☐ OVERNIGHT MAIL ☐ FAX TRANSMISSION ☐ EMAIL	Frank Hruban Assistant Attorney General 1116 W. Riverside Ave. Spokane, WA 99201
☐ HAND DELIVERY ☒ U.S. MAIL ☐ OVERNIGHT MAIL ☐ FAX TRANSMISSION ☐ EMAIL	David J. Groesbeck Groesbeck Ewers, P.S. 313 West Riverside Avenue Spokane, WA 99201-0209

KEVIN W. ROBERTS

RCW 47.50.010
Findings — Access.

(1) The legislature finds that:

(a) Regulation of access to the state highway system is necessary in order to protect the public health, safety, and welfare, to preserve the functional integrity of the state highway system, and to promote the safe and efficient movement of people and goods within the state;

(b) The development of an access management program, in accordance with this chapter, which coordinates land use planning decisions by local governments and investments in the state highway system, will serve to control the proliferation of connections and other access approaches to and from the state highway system. Without such a program, the health, safety, and welfare of the residents of this state are at risk, due to the fact that uncontrolled access to the state highway system is a significant contributing factor to the congestion and functional deterioration of the system; and

(c) The development of an access management program in accordance with this chapter will enhance the development of an effective transportation system and increase the traffic-carrying capacity of the state highway system and thereby reduce the incidences of traffic accidents, personal injury, and property damage or loss; mitigate environmental degradation; promote sound economic growth and the growth management goals of the state; reduce highway maintenance costs and the necessity for costly traffic operations measures; lengthen the effective life of transportation facilities in the state, thus preserving the public investment in such facilities; and shorten response time for emergency vehicles.

(2) In furtherance of these findings, all state highways are hereby declared to be controlled access facilities as defined in RCW 47.50.020, except those highways that are defined as limited access facilities in chapter 47.52 RCW.

(3) It is the policy of the legislature that:

(a) The access rights of an owner of property abutting the state highway system are subordinate to the public's right and interest in a safe and efficient highway system; and

(b) Every owner of property which abuts a state highway has a right to reasonable access to that highway, unless such access has been acquired pursuant to chapter 47.52 RCW, but may not have the right of a particular means of access. The right of access to the state highway may be restricted if, pursuant to local regulation, reasonable access can be provided to another public road which abuts the property.

(4) The legislature declares that it is the purpose of this chapter to provide a coordinated planning process for the permitting of access points on the state highway system to effectuate the findings and policies under this section.

(5) Nothing in this chapter shall affect the right to full compensation under section 16, Article I of the state Constitution.

[1991 c 202 § 1.]

RCW 8.25.070
Award of attorney's fees and witness fees to condemnee — Conditions to award.

(1) Except as otherwise provided in subsection (3) of this section, if a trial is held for the fixing of the amount of compensation to be awarded to the owner or party having an interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

(a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to commencement of said trial; or

(b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial.

(2) The attorney general or other attorney representing a condemnor in effecting a settlement of an eminent domain proceeding may allow to the condemnee reasonable attorney fees.

(3) Reasonable attorney fees and reasonable expert witness fees authorized by this section shall be awarded only if the condemnee stipulates, if requested to do so in writing by the condemnor, to an order of immediate possession and use of the property being condemned within thirty days after receipt of the written request, or within fifteen days after the entry of an order adjudicating public use whichever is later and thereafter delivers possession of the property to the condemnor upon the deposit in court of a warrant sufficient to pay the amount offered as provided by law. In the event, however, the condemnor does not request the condemnee to stipulate to an order of immediate possession and use prior to trial, the condemnee shall be entitled to an award of reasonable attorney fees and reasonable expert witness fees as authorized by subsections (1) and (2) of this section.

(4) Reasonable attorney fees as authorized in this section shall not exceed the general trial rate, per day customarily charged for general trial work by the condemnee's attorney for actual trial time and his or her hourly rate for preparation. Reasonable expert witness fees as authorized in this section shall not exceed the customary rates obtaining in the county by the hour for investigation and research and by the day or half day for trial attendance.

(5) In no event may any offer in settlement be referred to or used during the trial for any purpose in determining the amount of compensation to be paid for the property.

[1984 c 129 § 1; 1971 ex.s. c 39 § 3; 1967 ex.s. c 137 § 3.]

APPENDIX B

RCW 8.25.075
Costs — Award to condemnee or plaintiff — Conditions.

(1) A superior court having jurisdiction of a proceeding instituted by a condemnor to acquire real property shall award the condemnee costs including reasonable attorney fees and reasonable expert witness fees if:

(a) There is a final adjudication that the condemnor cannot acquire the real property by condemnation; or

(b) The proceeding is abandoned by the condemnor.

(2) In effecting a settlement of any claim or proceeding in which a claimant seeks an award from an acquiring agency for the payment of compensation for the taking or damaging of real property for public use without just compensation having first been made to the owner, the attorney general or other attorney representing the acquiring agency may include in the settlement amount, when appropriate, costs incurred by the claimant, including reasonable attorneys' fees and reasonable expert witness fees.

(3) A superior court rendering a judgment for the plaintiff awarding compensation for the taking or damaging of real property for public use without just compensation having first been made to the owner shall award or allow to such plaintiff costs including reasonable attorney fees and reasonable expert witness fees, but only if the judgment awarded to the plaintiff as a result of trial exceeds by ten percent or more the highest written offer of settlement submitted by the acquiring agency to the plaintiff at least thirty days prior to trial.

(4) Reasonable attorney fees and expert witness fees as authorized in this section shall be subject to the provisions of subsection (4) of RCW 8.25.070 as now or hereafter amended.

[1977 ex.s. c 72 § 1; 1971 ex.s. c 240 § 21.]

APPENDIX C