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No. 74631-6-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ROBERT BOYD and MARGARET WEIDNER,
Appellants/Cross-Respondents,

v.

SUNFLOWER PROPERTIES, LLC,
Respondent/Cross-Appellant.

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**RESPONSE AND REPLY BRIEF OF
APPELLANTS/CROSS-RESPONDENTS**

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RESPONSE AND REPLY
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I. INTRODUCTION

Appellants/Cross Respondents Robert Boyd and Margaret Weidner (“Boyd/Weidner”) offer this response and reply to Respondent/Cross-Appellant Sunflower Properties, LLC’s (“Sunflower”) initial brief and response. Sunflower argues that they are entitled to attorneys’ fees because they were granted summary judgment by the trial court, dismissing Boyd/Weidner’s claim for an implied easement. The trial court properly ruled that because “the only claim set forth in [Boyd/Weidner’s] Complaint is for an implied easement” and “their claim for equitable relief

does not derive from the Purchase and Sale Agreement”, Sunflower was not entitled to recovery of fees.¹ A claim for an implied easement, as with all other claims in equity which do not arise from a contract, cannot form the basis for the recovery of attorneys’ fees.² Boyd/Weidner’s Complaint only contained a claim for an implied easement because they believed they were entitled, equitably, to the use of the Gravel Drive for access to their property after they discovered that they did not have a legal right to do so in the deed to their property.

Boyd/Weidner is entitled to an implied easement over the Gravel Drive as it is the only reasonable means of access to the portion of their property where they intend to build a home. Sunflower claims that they “specifically declined to grant” an easement over the Gravel Drive, which is untrue; the parties never negotiated or even discussed the means of access to the property. Boyd/Weidner reasonably assumed that they would continue to have use of the Gravel Drive after their purchase because it is the only point which has ever been used to access the northern, flat point of their property. Further, the evidence in this case shows that the parties could not have reasonably intended access from the southern portion of the lots, as no one has ever accessed these properties from that side.

¹ CP 765-766

² *Boguch v. Landover Corp.*, 153 Wash.App. 595, 615, 224 P.3d 795 (2009).

Southern access is not even realistically possible given the slope of the property.³

II. FACTUAL DISPUTES

A. Sunflower alleges that Boyd/Weidner was incorrect in stating that the Tract (as used in Appellants' Brief) or "Geer Unplatted Parcel" (as used in Respondent's Brief) was never benefitted by an express easement over lower Geer Lane. (App. Br. 5) Their brief cites to two easements which purportedly grant such access, AFN 78427⁴ and AFN 108188⁵. AFN 78427 is a real estate contract under which Edward and Ethel Simonson ("Simonson") granted certain property (the "Geer Lots") to Lester and Ruth Geer ("Geer"), subject to easements along what is now referred to as upper Geer Lane.⁶ The Geer Lots included Lot 1, Lot 2, and the triangular "Tract" directly below Lot 2, as shown on the Short Subdivision Map found at CP 224.

The second easement they reference, AFN 108188, is a grant of easement from Simonson and Albert Perry and Leslie Geer Perry ("Perry") to Geer on July 13, 1979, covering what is now known as lower

³ See, Appellant's Brief, Pages 15-18.

⁴ CP 181-185

⁵ CP 200-03

⁶ CP 181-185

Geer Lane.⁷ Only two minutes after that (at 10:06 a.m.), Geer and Simonson transferred the Tract to Perry by way of quit claim deed, recorded under AFN 108189.⁸ Gerry did not own the Tract or the Geer Lots outright until August 7, 1979, when the Warranty Fulfillment Deed was recorded after they had completed the 1972 real estate contract, and therefore they made the grant together with Simonson.⁹

Once the Tract was transferred to Perry, the easements granted under AFN 108188, which may have benefitted the Tract, merged with the deed because Perry (under real estate contract with Simonson) had an ownership interest in¹⁰ every segment (“tract”) described in that easement, except for half of tract D.¹¹ Perry and Simonson cannot have an easement over their own property. The only portion of this easement that would not have been extinguished by merger would have been the north half of tract D, which was owned by Simonson (and under real estate contract to Geer) at the time.

⁷ CP 200-03. According to the Auditor’s recording stamp at CP 200, this easement was filed for recording at 10:04 a.m. on July 13, 1979.

⁸ CP 205- 208. According to the Auditor’s recording stamp at CP 205, this quit claim deed was filed for recording at 10:06 a.m. on July 13, 1979.

⁹ CP 184.

¹⁰ Perry owned Lots 4, 5, 6, 7, 8 and the west half of Lot 3 all in Block 5, Gailey’s First Addition to Eastsound, according to the plat thereof recorded in Volume 1 of Plats, page 39, records of San Juan County, Washington, under a real estate contract from Simonson recorded under AFN 91116 (corrected).

¹¹ “As a general rule, one cannot have an easement in one’s own property. Where the dominant and servient estates of an easement come into common ownership, the easement is extinguished.” *Radovich v. Nuzhat*, 104 Wash.App. 800, 805, 16 P.3d 687 (2001), citing, Restatement of Property § 497, comment a.

Boyd/Weidner's brief stated that the Tract was "never benefitted" by an easement over lower Geer Lane, which is technically inaccurate. The Tract did have a valid easement over lower Geer Lane for two minutes on July 13, 1979, after which the easements were extinguished by merger and never re-granted to subsequent parties. Even if Simonson's interest in the Perry property somehow negated the merger at that time (which is not supported by case law), at the very latest the easements were extinguished by merger on May 8, 1981, when Simonson recorded the warranty fulfillment deed transferring full title to the Gailey's Lots to Perry.¹²

B. Sunflower argues that the Gravel Drive was not used by Sunflower or prior owners, yet provides evidence that it was used, and also claims that the Gravel Drive is solely located on Sunflower's Lot 3, which is not supported by the evidence. "The prior owners had accessed the Geer Unplatted Parcel from upper Geer Lane to install a transformer... (Resp. Br. 6)" and "This gravel area did not extend to any of the lots acquired by Sunflower, including what was then Lot 3, or Lots 4 and 5... (Resp. Br. 7)" and "Weidner was aware that the gravel area of Lot 3 was not part of Lots 4 and 5... (Resp. Br. 12)."

¹² CP 197.

Sunflower's reference to prior owners' access of the Unplatted Parcel from upper Geer Lane means that they accessed it by way of the Gravel Drive; that is the only access point in existence along Geer Lane.¹³ Sunflower also admitted that when they purchased the property, the Gravel Drive (or an early version thereof) was in existence. From the Declaration of Sean DeMerritt at CP 58: "At the time I purchase the Property in 2001, the Geer Unplatted Parcel portion had a very rough gravel area that had been placed by a prior owner... part of the area may have been used infrequently as a parking pad." Further Sean DeMerritt testified in his deposition that the driveway was already in place when he purchased the properties in 2001.¹⁴ Thereafter, Sunflower used the Gravel Drive for access, storage, and parking, which they still do to this day.¹⁵

The argument that the Gravel Drive is purely located within property owned by Sunflower is patently untrue and not supported by evidence. As seen in the aerial photograph at CP 377 from the San Juan County Treasurer's Website, the Gravel Drive is located on Lot 3, Lot 6, Lot 5, and the adjusted Lot 4. It terminates at the intersection of Lot 5, Lot 4, and Sunflower's Lot 3. The Google Maps photographs at CP 619 and

13 See CP 619. The Boyd/Weidner property is in the middle of the right hand curve of Geer Lane, and most of Sunflower's Lot 3 is to the east of it.

14 CP 527, ln. 13 -17, Q: "Did you install of punch in that little road?" A: "No" Q: "Was that there when you bought?" A: "Yes."

15 CP 407 - 409; CP 635 and CP 660 - 663, photographs taken by Margaret Weidner showing the storage of materials and trailers by Sunflower.

CP 620 also shows that the Gravel Drive extends into Boyd/Weidner's Lot 5 and under the adjusted and curved portion of Lot 4.

The parties never discussed Boyd/Weidner having access (or not having access) to their property using the Gravel Drive. Sunflower doesn't even claim that it was discussed or negotiated. They claim that access was "expressly rejected" (Resp. Br. 14) when Sunflower denied Boyd/Weidner's request to purchase a larger portion of Lot 3, however, the use of the Gravel Drive was not the reason that Boyd/Weidner wanted the additional land; it was for a larger flat building area.¹⁶ Boyd/Weidner never even considered that they would not have access using the Gravel Drive, with or without the purchase of land from Lot 3.¹⁷

C. Sunflower did partially clear and grade the level area located in the previous Lot 3 and now the adjusted Lot 4. Appellants' Brief at Page 10 cited to CP 181 – 185 for footnotes 30 and 31 in error. The Deed contained in CP 181 – 185 is not applicable to the evidence cited. The reference should have been made to the Deposition of Sean DeMerritt at CP 406, ln. 2-4; CP 529, ln. 8-9; CP 530 ln. 1-3; and CP 531, ln 7 – 14 and ln. 20 – 23. Sean DeMerritt testified that Sunflower improved the existing retaining wall which previously existed on Lot 3¹⁸ and removed fallen

16 CP 451, Paragraph 6.

17 CP 451, Paragraph 5.

18 CP 406, ln. 2-4; and CP 531, ln. 7-14.

trees.¹⁹ He also testified that he “weed whacked”²⁰ the area annually, and that they may have “taken two or three trees out”.²¹ DeMerritt also testified that they added a load or two of gravel to the area.²² The purchase and sale agreement addendum offered by Sunflower to counter Boyd/Weidner’s request to purchase a portion of Lot 3 even reads, “Seller, at Sellers [sic] expense, will submit application to San Juan County for a Boundary Line Modification (BLM) which will incorporate **the graded area** North of lots 4 & 5 up to and including the stone wall defining this area.”²³

The photographs offered in the opening brief under CP 369 and CP 370 were not stricken from the record, however they were misidentified under the Declaration of Christina Cowin. The Court struck certain portions of the Declaration of Christina Cowin²⁴ and Margaret Weidner²⁵. Supplemental Declarations of Cowin and Weidner were submitted, which Sunflower also moved to strike. The Court did not strike Exhibit 2 to the Supp. Dec. of Margaret Weidner at CP 663, which is the photo also attached at CP 369. The photograph at CP 370 is part of Exhibit 1 to the

19 CP 531, ln. 11-14.

20 CP 530 ln. 1-3.

21 CP 531, ln. 11-14.

22 CP 531, ln. 22-23.

23 CP 390 [emphasis added].

24 Full Declaration of Christina Cowin found at CP 362 – 449.

25 Full Declaration of Margaret Weidner found at CP 450 – 454.

Supp. Decl. of Margaret Weidner at CP 648, which was also not stricken. As seen in CP 771-777, the Court declined to strike the Supp. Decl. of Margaret Weidner except two sentences in Paragraphs 12 and 13.

Counsel for Boyd/Weidner will gladly resubmit an amended Page 10 with corrected footnotes for above reference errors to the Court if they request it.

III. REPLY TO SUNFLOWER'S RESPONSE ARGUMENTS

A. When Sunflower “expressly rejected” Boyd/Weidner’s offer to purchase more of Lot 3, it was not contemplated by either party that said rejection would result in Boyd/Weidner not having use or access by way of the Gravel Drive.

Sunflower repeatedly asserts that when they denied Boyd/Weidner’s request to purchase the entire portion of Lot 3 lying to the north and west of Lot 4 and 5, that Sunflower’s intent (and Boyd/Weidner’s understanding) was that said denial also contemplated Boyd/Weidner’s future access to Lots 4 and 5. However, that is entirely incorrect. Boyd/Weidner testified that they offered to purchase more of the Lot 3 because they wanted additional flat ground for building and more privacy.²⁶ On their original offer to purchase additional land from Lot 3, Boyd/Weidner merely drew a triangle area which encompassed all of the land to the north and west of Lot 4 and Lot 5 (and even extends over Lot

²⁶ CP 451, Paragraph 6.

6).²⁷ As you can see, this was hand drawn and is the simplest offer for Boyd/Weidner to make to purchase the additional land they wanted without breaking Lot 3 up into multiple pieces.

Nothing on the offer addendum mentions anything about the Gravel Drive or access.²⁸ Sunflower countered that offer the next day agreeing to a boundary line modification which would “incorporate the graded area North of lots 4 and 5 up to and including the stone was defining this area.”²⁹ Again, the addendum does not mention that the parties addressed or even considered access issues in relation to this boundary line modification.

As Boyd/Weidner has previously testified, they did not consider that they could not use the Gravel Drive, or that it was not included in one of the many easements contained in their deed.³⁰ The Gravel Drive *feeds directly into* their property. Sunflower does not offer any evidence that they had discussed access with Boyd/Weidner or made it clear that they would not be able to access the lots using the Gravel Drive; they merely offer circular reasoning that, because Boyd/Weidner originally requested more of Lot 3, Sunflower’s refusal equates to a refusal for them to use the Gravel Drive. Sunflower even acknowledges that they kept the area for

²⁷ CP 388.

²⁸ *Id.*

²⁹ CP 389.

³⁰ CP 451.

parking and storage³¹, which are not inconsistent with the Gravel Drive also being used by Boyd/Weidner for ingress and egress.

Sunflower uses the words “expressly rejected” to describe their counter to Boyd/Weidner over the purchase of a portion of Lot 3, and then they tack on “that would have provided access from upper Geer Lane” but that is misleading. “Express” means “clearly and unmistakably communicated; stated with directness and clarity.”³² Sunflower’s “rejection” was actually in the form of a counteroffer which made the area purchased by Boyd/Weidner smaller. The language used in their brief implies that the use of the Gravel Drive was somehow “expressly rejected” by their counteroffer, however there is no evidence to support that.

Yes, if Sunflower had sold Boyd/Weidner the entire portion of Lot 3 they originally offered to buy, this case would not exist. However, the fact that they did not still does not negate Boyd/Weidner’s claim. Boyd/Weidner reasonably believed that access to the property was by way of the Gravel Drive *whether or not* they purchased a portion of Lot 3.³³ The evidence shows that this issue wasn’t even raised until discussions

31 CP 420, ln. 16-25; CP 421, ln. 1-25; CP 422, ln. 1-15.

32 Black’s Law Dictionary (10th ed. 2014), express

33 CP 451.

between the parties in 2012, wherein Sunflower offered to sell Boyd/Weidner the remainder of Lot 3.³⁴

B. Intent to provide access from the north is implied by the location of the Gravel Drive, Sunflower's past and current use, and the advertisement of the lots for sale.

Sunflower's brief conflates the idea of "intention" for purposes of finding an implied easement, with the requirement that Sunflower actually expressly granted said easement to Boyd/Weidner. The whole reason that the cause of action for an implied easement even exists is because the grantor of certain property fails to grant access to the grantee, *and then deprives said grantee of access* over that easement area.³⁵ If the grantors allowed access over these implied easement areas, or had specifically granted an easement, these cases wouldn't even exist. "Intention" for purposes of an implied easement is always an assumption based on the facts of the case; "it is assumed that the parties intended the easement to

³⁴ CP 452.

³⁵ See, for example, *Hellberg v. Coffin Sheep, Co.*, 66 Wash.2d 664, 665, 404 P.2d 770 (1965), "The present litigation stems from Coffin padlocking a gate across the old Coffin road at its intersection with PSH 8. Hellberg brought this action to restrain any interference with the use of the old Coffin road...."; *Roberts v. Smith*, 41 Wash.App. 861, 863, 707 P.2d 143 (1985), "Some of the defendants objected to the Robertses' use of their easement, at one point placing an obstruction in the roadway to block them from using it."; *Bailey v. Hennessey*, 112 Wash. 45, 47, 191 P. 863 (1920), "...when the defendant constructed a fence and obstruction across said alleyway, immediately following which this action was instituted to restrain the defendant from interfering with the use of said alley way as such alley."

be created.”³⁶ The Supreme Court in *Bailey v. Hennessey* summarizes that the analysis of the facts looks to determine, in part, “what must have been the **real intent** of the parties.”³⁷

[T]here shall be held to have been included in the conveyances all the rights and privileges which were incident and necessary to the reasonable enjoyment of the thing granted, practically in the same condition in which the entire property was received from the grantor... Other courts have based the right upon the presumption that the parties have made and received the conveyance, having in view the condition of the property as it actually was at the time of the sale, and that therefore neither, without the consent of the other, can change the open and apparent condition to the detriment of the other.³⁸

Sunflower attempts to argue that, because they did not grant an express easement over the Gravel Drive, it proves that they did not intend for these lots to have access over it. However, the failure to expressly grant an easement is exactly why a claim for implied easement even exists. It is a claim in equity, designed to allow a purchaser of property the right to enjoy the land they bought in the manner it “actually was at the time of the sale”.³⁹

³⁶ *Adams v. Cullen*, 44 Wash.2d 502, 509, 268 P.2d 451 (1954).

³⁷ *Bailey v. Hennessey*, 112 Wash. 45, 49, 191 P. 863 (1920)[emphasis added].

³⁸ *Id.*

³⁹ *Id.*

The Gravel Drive existed at the time of sale. It is visible in the marketing photographs used by Sunflower.⁴⁰ The listing input sheet references a “driveway to property on right” as the point of access to view them⁴¹, which Boyd/Weidner used.⁴² While Sunflower attempts to claim that they cannot be held responsible for the directions provided by their listing broker, this information was still used in the advertisement of the sale, and made it seem to reasonable buyers and their brokers that the driveway “to the property” was the Gravel Drive. Further, this information was publically provided, not just to Boyd/Weidner’s broker as claim by Sunflower (Resp. Br. 25). Marketing flyers were created for potential buyers, which included these same driving instructions.⁴³

Sunflower admitted to accessing the former Lot 3 area, now part of Lot 4, after their purchase and before the property was sold to Boyd/Weidner, to remove trees, bolster the retaining wall, weed whack, take the above mentioned photographs, and store materials, at a minimum.⁴⁴ They had to use the Gravel Drive to do so, as it is the only means of access currently in existence.⁴⁵ The previous owners used it to

40 CP 648.

41 CP 639.

42 CP 451.

43 CP 625-655.

44 See, Page 8, above.

45 CP 619 – 620.

install a transformer, water hose bib, and telephone pedestal.⁴⁶ It was also most likely used for parking.⁴⁷ These activities all constitute prior uses which are consistent with the vacant and unoccupied nature of the lots at that time. Sunflower claims that they never saw any “traffic” coming off of the Gravel Drive⁴⁸, but there would not be any “traffic” on that driveway when the lots were undeveloped and unoccupied. That does not mean that the driveway was not installed and used for access to those properties, it just means that the use of the properties was infrequent prior to Sunflower’s purchase. It goes without saying that developed properties with homes on them will necessitate more use of an access driveway than when the land was vacant.

C. Necessity of the easement is enough to require only some prior use thereof.

The intent of the parties is inferred from analyzing the necessity of the easement weighed against the prior use thereof.⁴⁹ As Boyd/Weidner’s brief explains, the necessity of the easement for the enjoyment of the property they purchased, to access the buildable site at the north from the Gravel Drive which was the advertised method to reach the properties, is such that the evidence of some prior use is sufficient to prove intent.

⁴⁶ CP 58.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Adams v. Cullen*, at 505-506, 268 P.2d 451 (1954).

“[N]ecessity alone justifies the inference of an easement without regard to other circumstances.”⁵⁰ The “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.”⁵¹

Sunflower even acknowledges that if they had kept the property, they intended access to that flat area on Lot 3 to be from the north because otherwise one would have to “climb up” the property to access the most logical building site. “I’d be using the southern only to bring in materials that – sporadically, once a month let’s say, but I’d be accessing from the north. Because of the design idea I had, I want to walk in at floor level, which is up from the north. Here, if I came in at the south, then I’d have to, you know, climb up.”⁵² Mr. DeMerritt also acknowledged that the Boyd/Weidner properties were more valuable with northern access and less valuable with southern access.⁵³

The degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. **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.**⁵⁴

⁵⁰ *Adams*, at 509.

⁵¹ *Bailey*, at 51.

⁵² CP 420, ln. 3-8.

⁵³ CP 413, ln. 2-9. “Q: Is [Boyd/Weidner’ Property] worth more if there’s access from the north through the subject driveway? A: Yes, likely. Q: ...Is [Boyd/Weidner’ Property] worth less if the only access is from the South? A: yes, depending on how they develop it.”

⁵⁴ *Bushy v. Weldon*, 30 Wash.2d 266, 270, 191 P.2d 302 (1984)[emphasis added].

The decreased value of the property (without northern access), the convenience of access from the north, and inconvenience of having to create an access drive running up the property from the south, is more than enough to meet the burden of “reasonable necessity” required in an implied easement claim.⁵⁵ Sunflower’s argument that it is Boyd/Weidner’s “choice” to build at the northern end of the property contradicts the fact that they also testified that the only flat area on the lot was at the north, and that is approximately where they would build a residence if they had kept the property.⁵⁶ Also, because this is a claim in equity, the Court can consider the marketing of the property and how the photographs and descriptions in the listing materials would lead a reasonable buyer to believe that Sunflower intended future owners to have access over the Gravel Drive, or were otherwise misleading.

IV. RESPONSE TO SUNFLOWER’S APPEAL ARGUMENTS

A. Boyd/Weidner’s claim is for an implied easement; not for reformation of the contract.

Boyd/Weidner’s Complaint is entitled “Complaint for Implied Easement” and only has one cause of action contained therein: for the

⁵⁵ *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 404 P.2d 770 (1965). Additionally, reasonable necessity under *Hellberg* only needs to extend the “portion benefitted by such use” and not the entire parcel.

⁵⁶ CP 420, ln. 3-8; CP 406, ln. 2 – 22.

establishment of an implied easement over the Gravel Drive.⁵⁷ Boyd/Weidner also generally seeks damages and any such other relief the trial court deems appropriate.⁵⁸ Sunflower dedicated considerable argument in their summary judgment and response to Boyd/Weidner's motion for summary judgment, trying to convince the trial court that what Boyd/Weidner were really seeking was the reformation of the contract between the parties, despite the fact that such a cause of action was never pleaded in this matter. The trial court was, appropriately, not convinced by their arguments to this effect.

Judge Eaton sent a letter to the parties, dated December 23, 2015, outlining the Court's decision, which stated, "As the Court stated at the conclusion of the hearing, the only claim set forth in Boyd/Weidner's Complaint is for an implied easement."⁵⁹ While the Court did not rule in favor of Boyd/Weidner on their motion, they dismissed the implied easement claim based on the Court's analysis of that cause of action and the elements of that claim as provided in the common law.⁶⁰ Sunflower's victory on their Motion for Summary Judgment was based on this reasoning only; the Court did not analyze Sunflower's baseless argument about contract reformation.

⁵⁷ See, CP 4-8.

⁵⁸ See, CP 7-8.

⁵⁹ CP 764.

⁶⁰ CP 764-766

Sunflower requested reconsideration of the court's denial of attorneys' fees. The court denied their motion for reconsideration and again provided a lengthy letter which outlined their reasoning. Judge Eaton states that, "The Court finds [Sunflower's cited cases] inapposite because an implied easement claim does not arise from, and in that sense is not dependent upon, the existence of an agreement between the parties. Implied easement claims are entirely independent causes of action."⁶¹ As such, the trial court again denied Sunflower's request for fees.

A claim for contract reformation essentially seeks to prove that the contract as written fails to conform to the parties' agreement.⁶² However, the parties' written agreement does not mention, nor did it contemplate use of the Gravel Drive. Boyd/Weidner sought an implied easement *because* the contract between the parties did not address the issue of access over this area.

This argument is in the same vein as the one made regarding Sunflower's alleged "express rejection" of Boyd/Weidner's original offer to buy a portion of Lot 3. The contract between the parties never discusses, never referenced, and never contemplated access over the Gravel Drive. There is no evidence that it was even brought up by either

⁶¹ CP 942.

⁶² 18 Wash. Prac., Real Estate § 16.10 (2d ed.) "Reformation"

party until 2012.⁶³ The purpose of contract reformation is to correct “a mutual mistake or one party is mistaken and the other party engaged in fraud or inequitable conduct.”⁶⁴ There was not a mutual mistake in the purchase and sale agreement, and while Boyd/Weidner may believe that Sunflower retained the portion of Lot 3 that they did in order to leverage Boyd/Weidner into buying the whole lot at a later date, they have not alleged that Sunflower’s actions are fraudulent.

B. Sunflower is not entitled to an award of attorneys’ fees under an equitable claim.

Sunflower did not prevail on a claim arising out of any contract between the parties. They prevailed in defeating Boyd/Weidner’s equitable claim. As such, they were not entitled to a recovery of attorneys’ fees under any contract between the parties. The Court of Appeals in the case of *Boguch v. Landover Corp.* was plain in their ruling that common law claims which do not arise from a contract cannot form the basis for the recovery of attorneys’ fees.

A prevailing party may recover attorney fees under a contractual fee-shifting provision such as the one at issue herein **only** if a party brings a “claim on the contract,” that is, only if a party seeks to recover under a specific contractual provision. If a party alleges breach of a duty imposed by an external source, such as a statute **or the common law**, the party does not bring an action on the

⁶³ CP 452.

⁶⁴ *Washington Mut. Sav. Bank v. Hedreen*, 125 Wash.2d 521, 525, 886 P.2d 1121 (1994).

contract, even if the duty would not exist in the absence of a contractual relationship.⁶⁵

While the parties to this current case were brought together because of the purchase and sale of the subject property, Boyd/Weidner's claim for an implied easement is derived from equitable principles found only in the common law which do not relate to the contract.

An action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and **if the contract is central to the dispute.** Stated differently, an action "sounds in contract when the act complained of is a breach of a specific term of the contract, without reference to the legal duties imposed by law on that relationship. If the tortious breach of a duty, rather than a breach of a contract, gives rise to the cause of action, the claim is not properly characterized as breach of contract."⁶⁶

Boguch also distinguished itself from the cases of *Brown v. Johnson*⁶⁷ and *Edmonds v. John L. Scott*⁶⁸ [cases which awarded attorneys' fees for tort claims which arose out of a contract] by stating that, "The same facts do not obtain here. *Boguch* does not claim that *Landover*, by posting an inaccurate depiction of the property boundary on the Internet, breached a particular provision of the contract or failed to perform its obligation to advertise his property for sale. He contends only

⁶⁵ *Boguch v. Landover Corp.*, 153 Wash.App. 595, 615, 224 P.3d 795 (2009) [internal citations omitted](emphasis added).

⁶⁶ *Boguch v. Landover Corp.*, at 615-616, 224 P.3d 795 (2009) [internal citations omitted](emphasis added).

⁶⁷ *Brown v. Johnson*, 109 Wash.App. 56, 34 P.3d 1233 (2001).

⁶⁸ *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wash.App. 834, 942 P.2d 1072 (1997).

that Landover breached the duty of care it owed to him under statute and the common law.”⁶⁹ Further, “[t]he determination of whether Landover breached this duty does not require examination of the listing agreement, **making the contract ancillary to the dispute.** The contractual relationship may have given rise to the realtors' duties to Boguch, but their duties are defined by the common law and by statute, not by the contract. Therefore, Boguch's negligence claims are not ‘on the contract.’”⁷⁰

In the current case, Boyd/Weidner does not claim that Sunflower failed to perform some contractual duty, or that the easement in question somehow comes from the contract; their claim is that they are entitled, in equity, to an implied easement over a piece of property *not covered* by the contract between the parties. There is no need to even review the purchase and sale agreement in order to decide Boyd/Weidner’s implied easement claim (and the trial court did not use that agreement in rendering their decision in this matter) other than to perhaps verify that the easement was not contemplated thereunder.

The language in the contract between the parties is also a more limited fee-offset provision which states that, “if Buyer or Seller institutes suit against the other **concerning this Agreement** the prevailing party is

⁶⁹ *Boguch v. Landover Corp.*, at 618.

⁷⁰ *Id.*, at 619 [emphasis added].

entitle to reasonable attorneys' fees and expenses."⁷¹ Boyd/Weidner's claims are not "concerning" the purchase and sale agreement at all. There was no mention within the agreement concerning an easement or use of the Gravel Drive; Boyd/Weidner's claim was for an implied easement to use the Gravel Drive which connects the building lot on their property to the main road **precisely because it was not a part of the contract.**

Sunflower does not cite to a single case where the underlying facts or claims are one for an implied easement. Sunflower cites to *Brown v. Johnson* as the basis for their award of fees. However, in *Brown v. Johnson* the Court awarded fees because Johnson's misrepresentations concerning concealed defects in the home were central to the underlying contract between the parties. Further that "[i]f an action **in tort** is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees."⁷² The same is true for *Edmonds v. John L. Scott and Deep Water Brewing*; every case cited by Sunflower is a tort case. The *Deep Water Brewing* case states that fees were awarded because "enforcement of the agreements and claims that followed their breach is the essence of the tortious interference... claim."⁷³ That reasoning is inapplicable to the case at hand. Boyd/Weidner do not allege a breach of

⁷¹ CP 384, Paragraph p.

⁷² *Brown v. Johnson*, 109 Wash.App. 56, 58, 34 P.3d 1233 (2001).

⁷³ *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wash. App. 229, 279, 215 P.3d 990 (2009).

contract with Sunflower, nor do they even allege a breach of duty which arises out of or is related to the contract. This is why the foregoing cases are inapposite; the tort claims contained therein arise out of duties which are ancillary to the contract itself.

Boyd/Weidner's claim is not an action in tort. An implied easement does not arise out of the contract itself, nor a breach of any duty contained therein. Misrepresentation claims and the duties to disclose defects arise out of the contract between the parties. Tortious interference duties arise out of the contractual relationship between the parties. These are not claims in equity. In fact, all published cases which award attorneys' fees for claims "arising out of" a contract (which are not claims for a breach thereof) are *limited to torts only*. There is no precedent for extending this line of cases to equitable claims.

An implied easement sought after the closing of a real estate transaction does not "arise out of the contract" and is not based on contractually created duties, as is the case in *Hill v. Cox*.⁷⁴ The reason that Hill was able to bring her claim for timber trespass, **which again is a tort**, is because the contract with Cox the parties explicitly created a duty not to cut down certain trees.⁷⁵ Cox violated that duty, which is timber trespass in addition to a breach of the contract, and therefore fees under the

⁷⁴ *Hill v. Cox*, 110 Wash.App. 394, 41 P.3d 495 (2002).

⁷⁵ *Id.*

contract were awarded. A claim for implied easement only exists because the easement was not a part of the contract or deed to begin with. An implied easement is not central to a purchase and sale agreement.

In fact, Sunflower and their counsel entirely failed to consider a seminal case dealing with exactly this issue where the Court of Appeals overturned the trial court's grant of attorneys' fees on an implied easement claim.

Because the [plaintiffs] have not shown that unity of title existed between parcels 3 and 4, they cannot establish a prima facie element of an easement by implication. Accordingly, the trial court did not err in granting summary judgment to [defendant]. The trial court awarded [defendant] attorney fees. In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. If such fees are allowable at trial, the prevailing party may recover fees on appeal as well. [Defendant] contends he is entitled to attorney fees under the deed of trust. We disagree. The deed of trust is irrelevant to the [Plaintiff]'s easement claim.... Further, we can discern no basis in law or equity for the trial court's fee award. Accordingly, we vacate the trial court's fee award....⁷⁶

All of the cases Sunflower cites in their brief concern the granting fees for negligence or breaches of duty which actually did arise out of the underlying contracts; a claim for implied easement exists because an easement was not included in the contract itself therefore the only relief for the plaintiffs is found in equity.

⁷⁶ *Landberg v. Carlson*, 108 Wash.App. 749, 758-759, 33 P.3d 406 (2001).

C. Sunflower is not entitled to attorneys' fees on appeal.

Sunflower is not entitled to recover attorneys' fees on appeal just as they were not entitled to recover attorneys' fees on summary judgment. As Sunflower cited in their brief, fees are only recoverable if authorized by statute, equitable principles, or agreement between the parties.⁷⁷ As the trial court correctly noted, Boyd/Weidner's claim is one in equity which is not derived from any contract between the parties.

If Boyd/Weidner is successful on their claim for an implied easement they are not seeking recovery of fees, because they are not recoverable for an implied easement claim. Sunflower was not entitled to a recovery of fees from the lower Court and they are not entitled to a recovery of fees even if Boyd/Weidner is unsuccessful on their appeal.

V. CONCLUSION

Boyd/Weidner is entitled to an implied easement over the Gravel Drive in order to access the building lot on their property. Sunflower cannot recharacterize Boyd/Weidner's complaint, and the only claim contained therein, just so that they can recoup attorneys' fees. An implied easement claim is a claim in equity, where recovery of fees for either party is not authorized. There are no cases in the State of Washington which

⁷⁷ *Wiley v. Rehak*, 143 Wash. 2d 339, 348, 20 P.3d 404 (2001).

allow the recovery of fees based on a contractual provision when the cause of action in front of the Court is in equity. The cases cited by Sunflower are all tort cases, and therefore inapplicable. Boyd/Weidner does not allege any failure of duty or breach of a provision in the contract with Sunflower. Even if, *arugendo*, Boyd/Weidner is ultimately unsuccessful on appeal, Sunflower is still not entitled to attorneys' fees and costs under any established theory of recovery.

Dated this 11th day of July, 2016.

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DECLARATION OF SERVICE

I, Linda Fierro state:

On this day I caused the foregoing Response and Reply Brief of Appellants/Cross-Respondents to be delivered by ABC Legal Messengers for delivery no later than July 11, 2016 to the Court of Appeals Division I.

On this day I also caused the foregoing to be delivered via email and US Mail to:

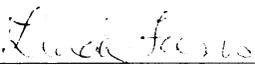
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STATE OF WASHINGTON

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11th day of July, 2016 at Seattle, Washington.



Linda Fierro