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No. 74631-6

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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ROBERT BOYD and MARGARET WEIDNER,  
husband and wife,

Appellants,

v.

SUNFLOWER PROPERTIES LLC,  
a Washington limited liability company,

Respondent.

2016 JUN 10 PM 2:52  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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APPEAL FROM THE SUPERIOR COURT  
FOR SAN JUAN COUNTY  
THE HONORABLE DONALD E. EATON

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BRIEF OF RESPONDENT/CROSS-APPELLANT

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## I. INTRODUCTION

Respondent Sunflower sold undeveloped, platted property to appellants Weidner. As is plain from the Plat and its legal description, the Weidner property has access from the south on a well-developed gravel road. In negotiating their purchase, Weidner asked for a boundary line adjustment that would also have given them access from the north over other property Sunflower owned. After Sunflower rejected the request, Weidner accepted Sunflower's offer for a significantly smaller boundary line adjustment that left the Weidner property with its historical express access from the south but without access from the north.

Seven years later, Weidner sued Sunflower claiming an "implied easement" to the north over the property owned by Sunflower, alleging they were entitled to the easement because their realtor had shown them the Weidner property by accessing it from the north and because the sale listing referenced a "driveway" that was over the Sunflower property. Weidner also claimed that it was more "convenient," and less expensive, for them to have access from the north.

The trial court properly dismissed the implied easement claim after concluding that Weidner could not prove that the parties

intended to convey an easement that was not included with the property sold to Weidner, because there was no evidence that Sunflower or its predecessors ever accessed the Weidner property from the north in an “apparent and continuous” manner. The trial court erred in denying Sunflower its attorney fees under the parties’ purchase and sale agreement, which provided that in any lawsuit “concerning this Agreement, the prevailing party is entitled to reasonable attorneys’ fees and expenses.” This Court should affirm the dismissal of the implied easement claim, reverse the denial of attorney fees in the superior court, and award attorney fees to Sunflower on appeal.

## **II. CROSS-APPEAL ASSIGNMENTS OF ERROR**

1. The trial court erred in denying respondent’s request for attorney fees under the parties’ purchase and sale agreement. (CP 767-70)

2. The trial court erred in entering its order denying reconsideration. (CP 955-59)

## **III. CROSS-APPEAL STATEMENT OF ISSUE**

The parties’ purchase and sale agreement provided that “if buyer or seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys’

fees and expenses.” Did the trial court err in denying the seller its attorney fees in successfully defending against the buyers’ claims that it was entitled to an easement over adjacent property the seller had retained?

#### **IV. RESTATEMENT OF FACTS**

Respondent recognizes that in reviewing an order on summary judgment, this Court views “all facts and reasonable inferences in the light most favorable to the nonmoving party.” *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 736, ¶ 12, 150 P.3d 633 (2007). But this Court need not consider appellants’ factual assertions “at face value;” the “facts” on which appellants rely must be more than “conclusory statements” in their affidavits, and cannot be based on “speculation.” *Seiber*, 136 Wn. App. at 736, ¶¶ 13, 14. “Mere allegations or conclusory statements of facts, unsupported by evidence” cannot defeat summary judgment. *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 562, ¶ 12, 242 P.3d 936 (2010).

The “facts” recited in the opening brief are rife with conclusory statements unsupported by evidence. This restatement of facts fairly sets out the undisputed evidence presented below.

**A. Identity of parties.**

Sean DeMerritt is the Managing Member of respondent/cross-appellant Sunflower Properties, LLC (“Sunflower”), which owns Lot 3 of Block 5 of Gailey’s First Addition to Eastsound, Orcas Island. (CP 57) Sunflower previously owned neighboring Lots 4 and 5. (CP 57)

In 2008, appellants/cross-respondents Margaret Weidner and Robert Boyd (“Weidner”) purchased Lots 4 and 5, as well as a small portion of Lot 3 by way of a boundary line adjustment to Lot 4, from Sunflower. (CP 61-62, 93, 95-109) The deed conveying modified Lot 4 and Lot 5 to Weidner did not include an easement over the portion of Lot 3 retained by Sunflower. (*See* CP 124-29) Instead, the only legal access to modified Lot 4 and Lot 5 is, and always has been, from the south. (CP 16, 59, 176)

In 2015, Weidner commenced this lawsuit claiming an “implied easement” over Lot 3 to obtain access to the north even though Sunflower, prior to closing, had specifically rejected Weidner’s request for a boundary line adjustment that would have granted them the access they seek in this litigation. (CP 4-8, 177)

**B. In 2001, Sunflower acquired property with established easements. Lots 3 through 8 had access from the south. An unplatted parcel north of the lots had access from the north.**

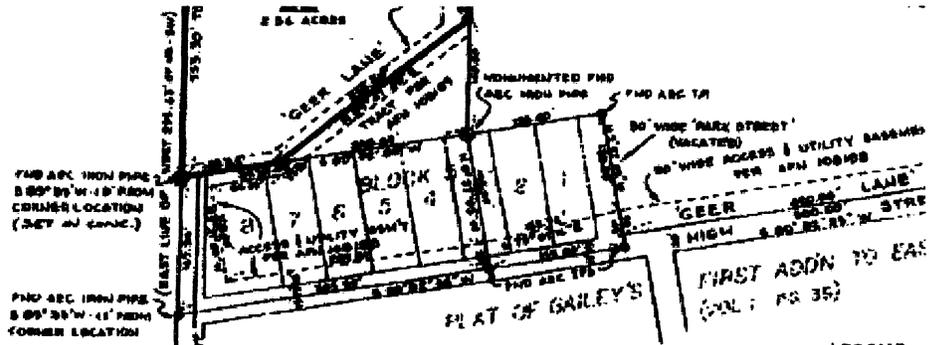
In 2001, Sunflower acquired half of what was then termed Lot 3 and Lots 4-8 of Block 5 of Gailey's First Addition to Eastsound, Orcas Island ("Block 5"). (CP 57) Sunflower also acquired an unplatted 1/3-acre triangular parcel north of Lots 3 through 7 (the "Geer Unplatted Parcel"). (CP 57) Both the Block 5 lots and the Geer Unplatted Parcel were owned by the same seller. (See CP 240-45)

The only legal access to a county road for Lots 3 through 8 was "lower Geer Lane," which bisects the lots near their southern boundary. (CP 16, 59, 176, 179; *see also* CP 224) The Geer Unplatted Parcel had separate access from "upper Geer Lane," as well as an easement over lower Geer Lane to the County Road.<sup>1</sup> (CP 16, 59; *see also* CP 224) Geer Lane is in fact a continuous road from the county road that traverses the southern portion of Block 5, turns north and

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<sup>1</sup> Appellants' claim that the Geer Unplatted Parcel was never benefitted by an express easement across lower Geer Lane (App. Br. 9) is untrue. The property is benefitted by two express easements – AFN 78427 (CP 181-85), giving it access from the County Road to an intersection with vacated High Street, and AFN 108188, giving it access across the south and west portions of Block 5 – lower Geer Lane – then north to the Geer Unplatted Parcel – upper Geer Lane. (CP 200-03)

northeast along the northeast border of the Geer Unplatted Parcel, and eventually terminates north of the Geer Unplatted Parcel:



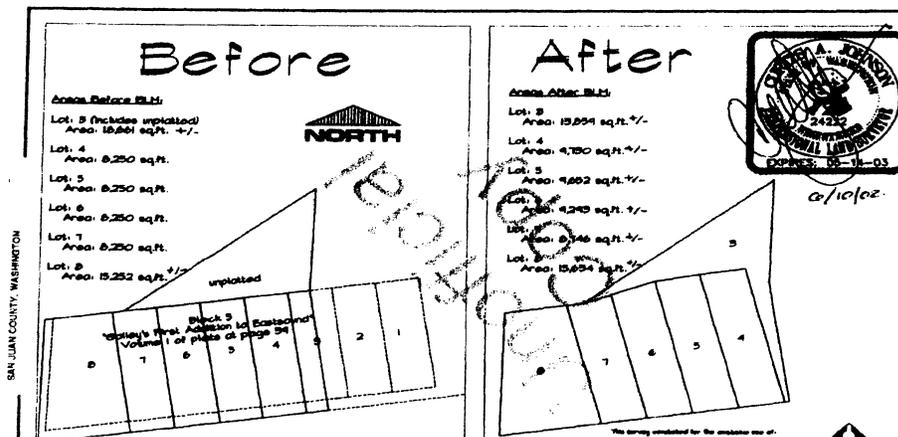
(CP 224) (Full plat attached as Appendix A, highlighted to show Geer Lane)

**C. The unplatted parcel had a rough gravel area when Sunflower acquired it. In 2002, Sunflower merged the unplatted parcel with Lot 3, giving only Lot 3 access from the north.**

None of the lots were developed when Sunflower acquired them; there was a “very rough gravel area” and the “beginnings of a rock wall that was semi-circular in shape” on the Geer Unplatted Parcel. (CP 58) The prior owners had accessed the Geer Unplatted Parcel from upper Geer Lane to install a transformer, water hose bib, and telephone pedestal that were all located solely on the unplatted parcel. (CP 58) In the opening brief, Weidner refers to the portion of the gravel area that extends to upper Geer Lane as the “Gravel

Drive” or “driveway.”<sup>2</sup> 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, which were at the time “overgrown and largely in their natural state.” (CP 58) There was no evidence that there had been “any continuous vehicle traffic” over this gravel area, and the managing member of Sunflower never saw any traffic in and out of the gravel area on the many occasions he travelled past it before Sunflower purchased it. (CP 58)

In 2002, Sunflower modified the boundary line for the lots it owned in Block 5 to merge Lot 3 with the Geer Unplatted Parcel:



<sup>2</sup> In their complaint, Weidner provided a legal description of the “gravel drive.” (CP 5) This description was prepared in 2015 after Weidner purchased their property and does not exist in any recorded document to date. (See CP 495)

(CP 58, 248) As a result, Lot 3 now included the gravel area on the Geer Unplatted Parcel and had access from upper Geer Lane. (CP 58) While smaller portions of the Geer Unplatted Parcel also merged into the other lots, those lots, including Lots 4 and 5, retained lower Geer Lane as their only legal access. (See CP 58-59, 247-51)

In the opening brief Weidner claims that Sunflower “subdivided” the properties it purchased in 2001. (See App. Br. 7, 10) In fact, as evidenced throughout the record, Sunflower adjusted the boundary for Lot 3 – once in 2002 and later in 2008 when Weidner purchased their property – but never “subdivided” its property. (CP 58, 247, 259, 301)

Weidner also falsely claims in the opening brief that before and after this boundary adjustment, the gravel area “existed across those parcels [Lots 4 and 5], providing access to the main road known as [upper] Geer Lane.” (App. Br. 7) Weidner does not cite any support in the record for this claim, and there is none. Weidner’s further claim that Sunflower had been using the gravel area of modified Lot 3 to access the other lots since 2001 also is not supported by the record; the portion of the record to which Weidner cites to support this claim is the statutory warranty deed conveying the property to Sunflower in 2001. (App. Br. 2, *citing* CP 240-45)

Contrary to Weidner's claims, there is no evidence that prior owners ever used the gravel area to access the Block 5 lots. Instead, the evidence is to the contrary. (See CP 58, 527, 750)

**D. Sunflower intended to build houses with driveways from the south on Lots 4 through 8. By 2008, Sunflower had not yet developed these lots, but had laid additional gravel on modified Lot 3, which it intended to retain for its own use.**

Sunflower intended to build homes for resale on Lots 4 through 8, and to retain modified Lot 3 for itself. (CP 59) Sunflower never intended for any of the other Block 5 lots to access upper Geer Lane over the gravel area of Lot 3. (See CP 59) Instead, it planned to build driveways from the lots' legal access points on lower Geer Lane to the center portion of each lot, where it would build a garage and a house uphill. (CP 59) When Weidner commenced this lawsuit, Sunflower had started construction on Lots 7 and 8 using this plan, building houses with views of the water. (CP 59)

By 2008, Sunflower decided to sell Lots 4 and 5 due to the economic downturn. (CP 60) At that point, little or no work had been done to develop Lots 4 and 5 from their original natural state. (CP 529-31) The only work done on the properties acquired by Sunflower in 2001 was to modified Lot 3, where Sunflower had reinforced the stone retaining wall and added a load or two of gravel

to the previously existing gravel area. (CP 531) Sunflower intended to build a home on Lot 3 for its managing member, but in the meantime used the lot for storage. (CP 60-61)

In the opening brief, Weidner claims that “Sunflower partially cleared and leveled the flat area on Lot 3, Lot 4, and Lot 5” as part of its development of the properties. (App. Br. 10) The only support provided for this claim is a 1972 real estate contract between Sunflower’s predecessors-in-interest and two photographs that the trial court struck from the summary judgment record because the individual whose declaration the photographs were attached to had no personal knowledge of the photographs.<sup>3</sup> (App. Br. 10, *citing* CP 181-85, 369-70; *see* CP 776) Sunflower’s managing member denied clearing Lots 4 and 5, with the possible exception of one or two windblown trees, and stated that any other clearing on those lots was by Weidner after they purchased their property. (CP 529)

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<sup>3</sup> The first photograph was taken of Lot 6 in 2013. (CP 369, 473) The second photograph appears to be of Lot 3, since it includes the rock retaining wall that had been on Lot 3 before Weidner’s purchase. (CP 370, 473) Weidner has neither assigned error nor argued that the trial court erred in striking either photograph.

**E. In 2008, Sunflower sold Lots 4 and 5 to Weidner. Prior to conveyance, Sunflower adjusted the boundary of Lot 4 to include a small portion of Lot 3, after rejecting Weidner's request for a greater portion that would have granted north access.**

Sunflower listed undeveloped Lots 4 and 5 with Windermere Realty Orcas. (CP 60) Listings for Lots 4 and 5 gave directions to the property by way of Geer Lane and referred to a "driveway to property." (See CP 639, 646, 653, 654) These listings specifically state that while the information is "reliable" it is "not guaranteed." (See CP 639, 646, 653, 654) Sunflower did not prepare any of these listings; the "listing input sheet" it prepared and gave to Windermere accurately states that the property was "on the right" of Geer Lane – that is, from its legal access point on lower Geer Lane. (CP 82, 86) Sunflower did not reference a "driveway." (CP 82, 86) Sunflower's Seller Disclosure Statement (Form 17), also does not mention a "driveway." (CP 415-19) Prior to listing, Sunflower advised Windermere that the properties had legal access from the south, using lower Geer Lane. (CP 60, 63) Sunflower provided no photographs to Windermere to market the property. (CP 63)

Weidner's broker (not the listing agent retained by Sunflower) apparently showed Lots 4 and 5 to Weidner by accessing Lot 3 from upper Geer Lane, using its gravel area as a "driveway." (CP 451)

Weidner was aware that the gravel area of Lot 3 was not part of Lots 4 and 5, however, because their initial offer to purchase was contingent on a boundary line modification or plat alteration “encompassing the level area between the north boundary line of the properties being conveyed here in and [upper] Geer Lane as indicated by the heavy lines on the below and the sharp triangle property currently to the east of Lot 4.” (CP 60-61, 89)

The modification Weidner sought would have enlarged Lot 4 to include a large portion of the gravel area of Lot 3 up to its boundary with upper Geer Lane, giving Lot 4 access from the north. (CP 177, 274) Weidner stated their reason for seeking a portion of Lot 3 was because it was “the flattest area of any of the lots.” (CP 451)

Sunflower rejected Weidner’s proposed boundary line adjustment because it wanted to exclusively retain Lot 3 to build on and for continued storage. (CP 61) Sunflower instead offered a much smaller semicircular portion of the gravel area, up to and including the pre-existing rock wall but without access to upper Geer Lane. (CP 61, 93) This offer was represented in a rough drawing overlapping Weidner’s original boundary line adjustment proposal. In the drawing, Weidner’s proposal is represented by a heavy black line and

Sunflower's counter-offer is represented by the lighter semi-circular line, which clearly does not intersect upper Geer Lane:



(CP 93)

Weidner accepted Sunflower's counter offer. (RP 61-62) An agreed Boundary Line Modification was prepared and approved by San Juan County. (CP 259-65) As a result, Lot 4 gained an additional .08 acre, or less than 3,500 square feet of property. (See CP 261)

Although Lot 4 now included a portion of the gravel area, Sunflower did not grant any easement rights over its retained Lot 3 to upper Geer Lane. (CP 62-63) If the parties had intended to provide Lots 4 and 5 with an easement to upper Geer Lane, San Juan County Code 18.70.030 (C)(3)(D) would have required that it be shown on the map submitted for approval at the same time as the proposed boundary modification. (CP 177; CP 286: applications for

boundary line adjustments must include “existing or proposed easements for access, drainage, utilities, or sensitive areas”)

Even though Sunflower had expressly rejected Weidner’s proposal that would have provided access from upper Geer Lane to Lot 4, Weidner later claimed that “we never even considered that this driveway was not ours to use if we bought the lots from Sunflower.” (CP 451) Weidner admitted that they had not been told by Sunflower, Sunflower’s agent, or anyone else that they had an easement over Lot 3. (CP 535-36, 542-44) Instead, Weidner claimed to rely on the Seller Disclosure Statement accurately describing a “private road” for access to Lots 4 and 5, and the listings, which provided driving directions that described a “driveway to property,” and a reference under “road info” to “gravel, privately maintained, recorded maint. agreement.” (See CP 415, 634, 639, 646, 653, 654) Lower Geer Lane, from which Lots 4 and 5 have access, is in fact a “gravel” road that is “privately maintained” and subject to a recorded maintenance agreement. (See CP 223, 592)

Before the sale closed, Weidner had a 30-day feasibility period to determine “the suitability of the property for the buyer’s intended purpose, including but not limited to, whether the property can be platted, developed and/or built on.” (CP 109) Further, under the

purchase and sale agreement “if the Property does not have direct access to a public road, this offer is contingent on Buyer’s independent verification during the Inspection Contingency period that access to the Property is provided by an insurable non-exclusive easement for ingress, egress, and utilities.” (CP 107) Even though the property did not have direct access to a public road - Geer Lane is a private road - Weidner admitted that they did not consult with a lawyer or land surveyor during this period to determine the easements available to Lots 4 and 5. (CP 542-46) In the meantime, Weidner requested, and Sunflower granted, a view easement over the lots owned by Sunflower. (CP 430-33, 484, 489)<sup>4</sup>

The sale closed on August 29, 2008. (CP 124) The statutory warranty deed conveying the property to Weidner included the legal description setting out all of the relevant easements, none of which included access to the north. (See CP 124- 29)

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<sup>4</sup> Weidner’s claim that Sunflower used the view easement as part of the “marketing of the property” also is untrue. (App. Br. 18) It is not mentioned in any of the listings. (CP 639, 946, 653, 654) The view easement was granted at Weidner’s request before the sale closed. (CP 489)

**F. In 2011, Weidner “discovered” that Lots 4 and 5 did not have access from the north, but proceeded with plans to build a house presuming northern access.**

Weidner began planning development of Lots 4 and 5 in 2011 and retained land surveyor Curtis Johnson to prepare a topographic survey of the property. (CP 16) Based on his review, Johnson concluded that “the ‘driveway’ over the area of adjacent Lot 3 retained by Sunflower, had not been included in the legal description of the property Sunflower conveyed to Boyd/Weidner.” (CP 16-17) Johnson submitted his survey to Weidner in May 2011, noting that “driveway use over this area appears to be without the benefit of easement rights.” (CP 17) According to Johnson, he and Weidner had several conversations regarding the lack of easement rights over Lot 3 from upper Geer Lane after providing them with his survey. (CP 17; *see also* CP 54) Weidner asked Johnson to further investigate their easements rights over Lot 3. (CP 17)

In September 2011, after learning that Weidner was interested in an easement over Lot 3, Sunflower offered to sell all of Lot 3 to Weidner. (CP 63, 64, 135) During these discussions, Sunflower confirmed to Weidner that there was no easement over Lot 3. (CP 64) Weidner conceded there was nothing in writing confirming their right to an easement over Lot 3, but claimed that they “believe[d] that

the easement should have been included in our purchase of Lots 4 and 5. It appears most likely its registration got lost in the paper work at the time.” (CP 64, 139) The parties never reached an agreement on the purchase of Lot 3.

Even though they knew there was no easement over Lot 3 by 2011, Weidner proceeded in the fall of 2014 with their plan presuming access from upper Geer Lane over Lot 3. (*See* CP 436-37, 452) Sunflower once again told Weidner that they did not have a “legal binding easement” over Lot 3 and reminded them that “legal access to [their] property” was from lower Geer Lane. (CP 141)

In the opening brief, Weidner claims that their property is “landlocked” without an easement over Lot 3 (App. Br. 15), but cite nothing in the record to support this claim, which is untrue. Similarly, Weidner’s claim that “there is not currently, nor has there ever been, an access drive from the southern portion of the Boyd/Weidner property” is unsupported by the citation provided, which is Margaret Weidner’s declaration. (App. Br. 17-18, *citing* CP 452) The undisputed evidence is that the parcel currently has, and always had, access from the south. (CP 16, 176, 224) In fact, by 2015, Weidner had erected an entrance gate from lower Geer Lane that opens to a large cleared area. (CP 485, 491) Southern access from

lower Geer Lane to the Weidner property can also clearly be seen on the Google map attached as Exhibit B to the opening brief. (CP 151)

Weidner claims it would be “prohibitively expensive” to construct a driveway from the south. (App. Br. 15) Once again, Weidner’s citations to the record do not support this claim. (App. Br. 15, *citing* CP 452-53, 636-37) Although Weidner attempted to offer hearsay evidence regarding the possible expense in these portions of the record, the trial court struck those statements, in an order that is not challenged on appeal. (CP 471, 775, 776; *see also* 11/13 RP 34-35) The only competent evidence of cost was presented by Sunflower, whose managing member stated that it would cost “no more than \$10,000-\$15,000” to put in a driveway from the south to Lots 4 and 5 and excavate the foundation, based on his experience constructing homes on neighboring Lots 7 and 8. (CP 60)

Weidner now claims that a driveway from the south would not comply with the San Juan County Code (App. Br. 15-17), but they presented no evidence of this below. In any event, the portion of the code that they attached as Exhibit C to their brief does not apply here. SJCC 18.60.100 deals solely with “private roads serving more than two parcels, except for roads requiring less than 1,000 cubic yards of grading, and to all new subdivision and short subdivision roads.”

The code provision does not govern a driveway to a combined two-parcel property as is present here. Nor is the proposed driveway a “new subdivision” or “short subdivision” road. To the extent the code references “driveways,” it is those driveways off a county road. See SJCC 18.60.100(7) (Figure 6.1) A driveway from the south to the Weidner property would be from lower Geer Lane – a private road.

The only competent evidence presented regarding the feasibility of constructing a driveway from the south was from Sunflower’s managing member, who has been building homes on Orcas Island for almost 20 years, and has owned and operated an excavator and graded for 15 homes in the general area of the Weidner property. (CP 59-60) The managing member testified that driveways can be constructed from lower Geer Lane, and Sunflower had already started construction on neighboring Lots 7 and 8, with similar topography to Lots 4 and 5, building view homes and driveways based on access from lower Geer Lane. (CP 60, 65, 151)

**G. In 2015, Weidner sued Sunflower alleging an “implied easement” over Lot 3. The trial court dismissed the claim after concluding there was never any intent to grant an easement.**

On February 26, 2015, Weidner sued Sunflower claiming an “implied easement” over Lot 3. (CP 4) Weidner alleged that they were led to believe that they had access over Lot 3 as a result of the

“listing” documents when they purchased Lots 4 and 5. (CP 6) Weidner also claimed that using the legal easement to which their property was entitled would be “substantially less convenient and prohibitively expensive” than an easement over Lot 3. (CP 7)

On October 16, 2015, Sunflower moved to dismiss. (CP 324) Sunflower also asked for an award of its attorney fees under the purchase and sale agreement. (CP 347; CP 98) Meanwhile, Weidner moved for summary judgment, claiming that this was a “classic case of implied easement from prior use,” and they were entitled to relief as a matter of law. (CP 352, 361)

Both motions were heard by San Juan County Superior Court Judge Donald Eaton (“the trial court”) on December 21, 2015. The trial court dismissed Weidner’s claim after concluding there was no basis for an implied easement. (CP 767-70) The trial court concluded that Weidner “provided no evidence whatsoever” concerning how the gravel area of Lot 3 was used prior to Sunflower’s acquisition. (CP 765) At best, Weidner merely “suggest[ed] it would be reasonable to presume that previous owners used it to access the properties adjacent to it.” (CP 765) The trial court noted that “in the absence of any competent evidence to show that the gravel area was actually used for access to Lots 4 or 5, either before or after [Sunflower]

acquired the properties,” Weidner could not prove an implied easement. (CP 766) Because there was no evidence of prior use, the trial court declined to consider whether an implied easement was a reasonable necessity. (CP 766)

The trial court dismissed Weidner’s claim for an implied easement with prejudice. (CP 770) The trial court denied Sunflower’s request for attorney fees under the purchase and sale agreement after finding that Weidner’s claim for equitable relief “does not derive from the purchase and sale agreement.” (CP 766, 770) The trial court denied Sunflower’s motion for reconsideration. (CP 955-58)

Weidner appeals the dismissal of their implied easement claim. Sunflower cross-appeals the denial of attorney fees.

## V. RESPONSE ARGUMENT

### A. **Weidner cannot rely on the implied easement doctrine to obtain an easement that was not conveyed to them, and that Sunflower specifically declined to grant.**

Weidner does not have an easement – implied or otherwise – over Lot 3. Sunflower expressly rejected Weidner’s request for a boundary line adjustment that would have provided them with access from the north. Instead, Sunflower sold property to Weidner at a price based on the legal access that the property already had –

from the south. Sunflower indisputably made no additional promises to Weidner beyond what it guaranteed to convey under the purchase and sale agreement. Sunflower relied on Weidner to confirm that they knew what they bargained for under the purchase sale agreement, including whether the property had all of the necessary easements (CP 107) for how they wished to build on the property. (CP 109)

Seven years after they entered the purchase and sale agreement, the only basis for Weidner's belief that their property included an easement over Lot 3 (despite all documentary evidence to the contrary) was that they had viewed the property by accessing it over Lot 3, and the listing agreement referred to a "driveway." (*See* CP 451, 634) Weidner admitted that no one told them the property included an easement over Lot 3, and they simply assumed it to be the case. (CP 451, 535-36, 542-44)

The deed conveying the parcel to Weidner, and the agreed boundary modification map, show no easement was granted over Lot 3. (*See* CP 124-29, 247-51) As purchasers, Weidner had constructive knowledge of the legal description of the property they sought to purchase, including the easements that serviced it. "If a person exercising reasonable care could have known a fact, he or she is

deemed to have had knowledge of that fact.” *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 667, 63 P.3d 125 (2003).

Weidner acknowledged that “our deed has several easements on it, and even more in the attached Exhibit A.” (CP 451) The fact that Weidner “assumed” an easement over Lot 3 was “covered under one of the over 10 easements associated with our lots” (CP 451) does not entitle appellant to more than what Sunflower was willing to convey when it sold the property to them. *Denaxas*, 148 Wn.2d at 667 (purchaser had constructive knowledge of the correct square footage of the property conveyed in deed and could not rely on “mistake” to reform the deed to conform with the description in the purchase and sale agreement).

Before purchasing the property, Weidner knew where they wanted to build their house and knew that they preferred access from the north. (CP 451, 452, 634) Weidner’s failure to confirm the “suitability of the Property for [their] intended purpose” (CP 109), including whether “access to the Property is provided by an insurable non-exclusive easement for ingress, egress, and utilities” (CP 107), as they were entitled to do under the purchase and sale agreement, does not now entitle them to an “implied easement” that Sunflower specifically declined to convey. “Allowing Purchaser to avoid its

contractual promises here would be rewarding selective ignorance.”

*Denaxas*, 148 Wn.2d at 667.

**B. Weidner cannot prove an implied easement when there is no evidence that Sunflower or the prior owners intended for the southern lots to have access from the north.**

Weidner attempts to claim an easement by implication. However, “easements by implication are not favored by the courts because they are in derogation of the rule that written instruments speak for themselves.” *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App. 188, 196, 45 P.3d 570 (2002) (citing 1 WSBA Washington Real Property Deskbook § 10.3(3)(b) (3d ed. 1997)). Courts grant implied easements only in unique circumstances, and when considering when to do so, the “prime factor” and “cardinal consideration” is the presumed intention of the parties. *Rogers v. Cation*, 9 Wn.2d 369, 379, 115 P.2d 702 (1941); *Adams v. Cullen*, 44 Wn.2d 502, 505-06, 268 P.2d 451 (1954). The trial court properly concluded that Weidner presented no competent evidence that Sunflower or its predecessors intended to grant an easement over Lot 3 for the southern lots. (CP 764-65)

Even assuming it was Sunflower’s listing agent who provided the driving directions to Lots 4 and 5, describing a “driveway to the property on right hand side” over Lot 3, the trial court correctly noted

that the information was provided to the Weidner broker, not to Weidner, and was not evidence that Sunflower intended to grant a permanent easement over Lot 3. (CP 765) This is particularly true when Sunflower specifically rejected Weidner's request for a boundary adjustment that would have given them direct access from upper Geer Lane – the exact relief they seek in this action. (CP 177)

After first considering whether the evidence as a whole showed any intent to convey an easement, the trial court then considered the three elements of implied easements to further ascertain intent: “(1) unity of title and subsequent separation by grant of the dominant estate; (2) apparent and continuous use, and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate.” *Silver v. Strohm*, 39 Wn.2d 1, 5, 234 P.2d 481 (1951). While the first element of unity of title and subsequent separation are an “absolute requirement,” the presence or absence of either or both of the other two elements is not necessarily conclusive. *Adams*, 44 Wn.2d at 505-06.

The elements of “apparent and prior continuous use” and “reasonable necessity” are merely aids “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. Presuming the first element was met, the trial court properly concluded an implied easement did not arise under these elements because there was no evidence of prior apparent and continuous use of Lot 3 to access Lots 4 and 5. Further (although the trial court did not reach this factor), there was no reasonable necessity for an implied easement.

- 1. Weidner failed to show a “prior apparent and continuous use” of Lot 3 to access their property that would imply an intent to continue such use.**

Weidner failed to present “any competent evidence to show that the gravel area was actually used for access to Lots 4 or 5, either before or after [Sunflower] acquired the properties,” as the trial court properly concluded. (CP 766) As the court acknowledged, “the fact that there is a man-made level surface on Lot 3, presumably suitable for vehicular traffic is not evidence there has been continuous use of the gravel area for access to Lot 4 or Lot 5 – or even to Lot 3. The area could as likely have served some other purposes – such as storage.” (CP 766) Weidner in fact concedes as much when submitting as “evidence of prior use” their claim that Sunflower purportedly had used the gravel area to “do some clearing, lay down

gravel, shore up the retaining wall, to store materials and trailers, to park, to take listing photographs, and more.” (App. Br. 29-30)

Weidner presented no evidence to support the claim that “Sunflower owned all of the Lots at issue in this case and accessed them using the Gravel Drive and Geer Lane, as did the previous owners of the Lots.” (App. Br. 28) The only support Weidner provides for this claim are copies of photographs they “took in the spring of 2013 showing the entrance to the Gravel Drive from Geer Lane,” which they purport show use of the gravel area by Sunflower and the new owner of Lot 6. (App. Br. 28, *citing* CP 635, 658, 660-63) But the fact that Sunflower was using the gravel area that it owns 5 years after it conveyed Lots 4 and 5 to Weidner does not evidence an intent to convey an easement to Weidner based on “prior continuous use.” Further, Weidner’s allegation that the new owner of Lot 6 also used the gravel area in 2013 is not only unsupported by the record (*see* CP 635, 658), but is irrelevant to the question whether Sunflower or any of the prior owners used Lot 3 to access Lots 4 and 5 before Weidner purchased those properties in 2008.<sup>5</sup>

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<sup>5</sup> Weidner also attempted to argue below that Lot 6’s purported use of Lot 3 entitled them to an implied easement. The trial court properly acknowledged that Weidner “did not identify any specific evidence in the record to support that assertion.” (CP 765)

The driving directions in the listings referencing a “driveway” to Lots 4 and 5, which would have been over Lot 3, are also not evidence of “prior apparent and continuous use.” (App. Br. 29) While the driving directions may have lead Weidner to believe that they could access Lots 4 and 5 over Lot 3, this does not warrant granting them an implied easement to do so permanently. The test is “prior apparent and continuous use,” not simply “apparent” use one time. *See McPhaden v. Scott*, 95 Wn. App. 431, 975 P.2d 1033, *rev. denied*, 138 Wn.2d 1017 (1999).

In *McPhaden*, the map for property plaintiff had purchased depicted an “access road” that connected the property to a county road over a neighboring lot. After the court determined that the map did not create an express easement over the neighboring lot, the plaintiff claimed an implied easement. The appellate court affirmed the trial court’s dismissal of the implied easement claim because the plaintiff could not prove “prior apparent and continuous use of the road.” Although the plaintiff presented evidence that a road had been installed, had been used more than 30 years earlier, and was apparent on the map, the court concluded plaintiff could not prove “prior continuous use” because there was no evidence “the road had

been recently used, and if it had, by whom, and for how long.”  
*McPhaden*, 95 Wn. App. at 438.

Likewise here, there is no evidence of “prior continuous use” of Lot 3 to access Lots 4 and 5. At best, Weidner could show that before they purchased the property, *they* used Lot 3 to access Lots 4 and 5 with their broker. This is not evidence that Sunflower or the prior owners used Lot 3 to access Lots 4 and 5 in a “prior apparent and continuous” manner.

“Temporary or casual” use is not sufficient to warrant granting an implied easement. Restatement (Third) of Property (Servitudes) § 2.12 (2000) (the kind of use required to prove a claim for an implied easement must not be “merely temporary or casual”). In those cases where the courts have found an easement was implicated by “prior apparent and continuous use,” it was based on evidence far greater than was presented here. *See e.g. MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App. 188, 45 P.3d 570 (2002) (driveway was used to access property for 6 years before it was conveyed to the grantee, and then for an additional 43 years thereafter); *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954) (driveway used to access the property “has been in existence and use since the horse and carriage days of an earlier era”); *Evich v.*

*Kovacevich*, 33 Wn.2d 151, 204 P.2d 839 (1949) (walkway had been used to access property for nearly 30 year before defendants sought to prevent plaintiff's use); *Bushy v. Weldon*, 30 Wn.2d 266, 191 P.2d 302 (1948) (joint driveway was used continuously by various owners as access to property for over 15 years before an action was filed).

Further, "the mere existence of the driveway itself" does not prove that Sunflower or its predecessors intended to use it to access Lots 4 and 5. (App. Br. 31) The fact that the purported "driveway" would be "favorable" to Lots 4 and 5 (App. Br. 30) as access does not warrant imposing an implied easement over Lot 3 when one was never intended. Nor does Weidner's citation to *Bailey v. Hennessey*, 112 Wash. 45, 191 P. 863 (1920) (App. Br. 30) support this claim.

In *Bailey*, the original owner of a lot erected two store buildings and a hotel 10 feet from the lot's northern boundary, and a 10-foot driveway that ran long the entire northern boundary. The driveway was used by the occupants of the buildings and owner to reach the rear entrances of the buildings. The lot was subsequently divided, with a portion sold to the plaintiff's predecessor and the balance to the defendant's predecessor. Until the defendant sought to prevent plaintiff's use, the parties and their predecessors used the driveway to access the buildings for 14 years.

Under these facts, the *Bailey* Court held that the plaintiffs proved a basis for an implied easement. In reaching that conclusion, the Court noted that “if the owner of land has artificially created upon the property a condition which is favorable to one portion of his property, and then sells that portion, the grantee will take it with the right to have that favorable condition continued. Upon the severance of the heritage a grant will be implied of all those continuous and apparent easements, which had in fact been used by the owner during unity.” *Bailey*, 112 Wash. at 49-50 (citations omitted).

This case is nothing like *Bailey*. Here, there was no evidence that any “favorable condition” was created by the prior owners of Lot 3 for the benefit of Lots 4 and 5, or “had in fact been used by the owner during unity.” Instead the only evidence was that the gravel area was placed by the prior owners to install a transformer, water hose bib, and telephone pedestal on what is now Lot 3. (CP 58)

**2. The boundary line adjustment providing Lot 4 with a small portion Lot 3 did not create an implied easement.**

The fact that Lot 4 now includes a small portion of Lot 3 as a result of the boundary line modification does not warrant imposing an easement over the portion of Lot 3 retained by Sunflower. Sunflower’s Lot 3, comprised largely of the original Unplatted Geer

Parcel, is the only parcel that has, and always had, legal access from upper Geer Lane. Sunflower could not extend its Lot 3 easement rights to modified Lot 4 and Lot 5, because as “a general rule, an easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant.” *Snyder v. Haynes*, 152 Wn. App. 774, 780, ¶ 12, 217 P.3d 787 (2009) (citations omitted).

In *Snyder*, the defendants owned property that had access directly off the highway. The defendants obtained a portion of neighboring property by way of a boundary line adjustment. The neighboring property was benefited by a mutual easement agreement that gave it access over an easement road. The defendants claimed by virtue of the boundary line adjustment that they too were now entitled to use the easement road for their original property.

The Court of Appeals affirmed the trial court’s determination that the boundary line adjustment did not entitle the defendants to use of the easement road. The court held that to allow the defendants to use the easement road to access their original property would be a “misuse of the easement.” *Snyder*, 152 Wn. App. at 780, ¶ 12. The court held that “if an easement is appurtenant to a particular parcel

of land, any extension thereof is a misuse of the easement.” *Snyder*, 152 Wn. App. at 780, ¶ 12.

Similarly, in *Brown v. Voss*, 105 Wn.2d 366, 715 P.2d 514 (1986), the plaintiffs acquired a parcel (B) that was subject to a private road easement agreement allowing it access over the south parcel (A). The plaintiffs later acquired the parcel north (C) of Parcel B, which was not subject to the private easement agreement between Parcels B and A. The plaintiffs began developing the property, intending to construct a residence that straddled Parcels B and C, with the intention of accessing the property over Parcel A. The trial court granted the plaintiffs the right to use the easement for access to both Parcels B and C.

The Supreme Court reversed, holding that because Parcel C was not benefitted by the easement, use of the easement to access Parcel C would be a “misuse of the easement.” *Brown*, 105 Wn.2d 372. The Court reasoned that even if there is no evidence of an increase in the burden on the servient estate and “perhaps no more than a technical misuse of the easement, we concluded that it is misuse nonetheless.” *Brown*, 105 Wn.2d at 372.

Likewise here, modified Lot 4 and Lot 5 are not entitled to use upper Geer Lane for access solely because there was a boundary line

modification that added a small portion of Lot 3 to Lot 4. To hold otherwise would be a misuse of the easement. After concluding that Sunflower never intended to grant an easement over Lot 3 to Weidner, and that there had been no “prior apparent and continuous use” of Lot 3 to access the Weidner property, the trial court properly dismissed the implied easement claim.

**3. Weidner could not prove adequate necessity to warrant implying an easement in light of the lack of evidence of any previous use of Lot 3 as an easement.**

The trial court properly declined to consider whether there was “reasonable necessity” for access over Lot 3 to Lots 4 and 5 after concluding the record was devoid of any evidence that Sunflower intended to grant an easement or that there had been “prior apparent and continued use” of Lot 3 to access Lots 4 and 5. (CP 766) Even if there were a “reasonable necessity” for Weidner to access their parcel over Lot 3 (and there is not), that alone does not implicate an easement in light of the lack of other evidence showing intent.

The “presence or absence” of reasonable necessity is “not necessarily conclusive;” it is merely an “aid in determining the cardinal consideration—the presumed intention of the parties.” *Adams*, 44 Wn.2d at 505-06. When all of the other evidence leads to the conclusion that there was no intent to allow the owners of Lots 4

and 5 to access their property over Lot 3, the trial court properly determined it was unnecessary to consider whether there was reasonable necessity for an easement.

In any event, Weidner already has access to their property from the south, therefore this is not a “special situation” where an easement may still be implied even if there is no evidence of prior apparent and continuous use. *See Roberts v. Smith*, 41 Wn. App. 861, 865, 707 P.2d 143 (1985) (“a special situation exists when a grantor sells a portion of property that has no ingress or egress” that would imply an easement even if evidence does not establish the existence of prior apparent and continuous use). Contrary to Weidner’s claims in their opening brief (App. Br. 15), their property is not “landlocked.” Nor is it true that “there has never been any other access point” to their property other than over Lot 3. (App. Br. 22) There is no necessity (reasonable or otherwise) for an implied easement because the deeds, the plat, and the photographs clearly show the Weidner property already has, and has had, legal access from the south over an express easement to a county road since at least 1979. (*See e.g.* CP 151, 176, 224)

Even if the trial court should have considered whether it was a “reasonable necessity” for Weidner to access their property over

Lot 3, Weidner still had to prove that the necessity was “great enough” to implicate an easement absent evidence of prior use. (App. Br. 21: “[I]f the necessity is great enough, use does not even have to be a factor.”) On a scale, “a constantly decreasing degree of necessity will require a constantly increasing clearness of implication from the nature of the prior use.” *Adam*, 44 Wn.2d at 509 (citations omitted). Thus, in this case where there is no evidence of prior use, Weidner must prove a higher degree of necessity to establish an implied easement.

When a “party claiming the right [of an implied easement] can, at reasonable cost, on his own estate, and without trespassing on this neighbors, create a substitute,” no reasonable necessity exists. *Adams*, 44 Wn.2d at 507 (citations omitted). That it would be more convenient, or less expensive, for Weidner to use Lot 3 to access their property from the north is insufficient to show necessity. *Silver v. Strohm*, 39 Wn.2d 1, 234 P.2d 481 (1951).

In *Silver*, appellant acquired property that had used two different roads as access to the property (Tracts 3 and 5). However, when the property was conveyed to appellant, the seller only granted legal access over Tract 3, and not Tract 5. Nevertheless, appellant continued to use Tract 5 for access because it was a more direct route,

and because Tract 3 was muddy in the winter. Appellant later sought an implied easement over Tract 5.

The trial court rejected the claim after finding that at the time the property was conveyed to appellant there was no reasonable necessity for him to use Tract 5. The Supreme Court affirmed, noting that “the conveyance of Tract 3, even though some labor and expense would be necessary to make it a more suitable way of travel, did away with any reasonable necessity to use Tract 5 as a road to or from appellant's property. The fact that it would be more convenient to use that road than to use the other one is not sufficient to establish that such use was reasonably necessary to the proper enjoyment of appellant's property.” *Silver*, 39 Wn.2d at 6.

Likewise here, even though it might be more convenient for Weidner to access their parcel over Lot 3, they already have access from the south, and “with some labor and expense” suitable access can be made to the property. Weidner claims “it would no doubt be expensive” to install a driveway from the south. (App. Br. 22) But they presented no competent evidence of cost, and Sunflower presented evidence that it would cost “no more than \$10,000-\$15,000” to construct a driveway from the south and excavate for a

foundation to the center of the lot. (CP 60) Weidner presented no evidence that the Sunflower cost estimate was unreasonable.

The cases on which Weidner rely to claim that access from the south is no “suitable substitute” to access from the north are inapt. In each, not only was there evidence of a significantly greater need, but there was also evidence of prior apparent and continuous use. For instance, in *Bushy v. Weldon*, 30 Wn.2d 266, 191 P.2d 302 (1948) (App. Br. 25), the original owner of two neighboring lots constructed a house on each lot and a concrete driveway astride the common boundary. Over the next 15 years, different owners of the houses used the common driveway to access their respective homes until the plaintiff sued to quiet title to the driveway to prevent the defendant from using it.

In affirming the trial court’s decision granting defendant an implied easement, the Supreme Court rejected plaintiff’s claim that the defendant could at reasonable cost construct a new driveway. The Court acknowledged that to construct a new driveway, the defendant would have to destroy trees and flower beds, relocate the existing garage, pour concrete for a new garage, build a retaining wall, and open the curb to lay down a 140 foot driveway to the rear of her house. In affirming the trial court’s decision, the Court

acknowledged the “financial burden” on the defendant, the “irreparable damage [that would be caused] to the appearance of her house,” and the resulting reduction in value, made an implied easement a reasonable necessity. *Bushy*, 30 Wn.2d at 271.

The necessity for an implied easement was even greater in *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 404 P.2d 770 (1965) (App. Br. 27), where the property of the plaintiff seeking an implied easement was landlocked and the only access was over property owned by the grantor. Contrary to Weidner’s representation, the Supreme Court did not affirm the determination that there was an implied easement “despite the fact that the property could be technically accessed from a different location.” (App. Br. 27) While the grantor had claimed there was another access road, the Supreme Court concluded that evidence supported the trial court’s finding that the plaintiff “has no access from his leased land to any highway” except over the defendant’s property. *Hellberg*, 66 Wn.2d at 667.

The purported necessity shown by Weidner here is nowhere near that proved in *Bushy* or *Hellberg*. Weidner has access to their property from the south. At the time of conveyance, there was no reasonable necessity for Weidner to access the property from the north. Weidner’s claim that they would need to construct a driveway

to “span 150 vertical feet” if required to use their legal access point (App. Br. 26) is patently false. As shown on Exhibit A to the opening brief, lower Geer Lane is at just under 210 feet in elevation and the most northern portion of their property is at 250 feet. A driveway from the south would thus only need to rise approximately 40 feet – not “150 vertical feet.”

In any event, a longer vertical driveway is only necessary if Weidner chooses to build on the northernmost part of their property. In buying undeveloped property on a “sloped, wooded lot,” Weidner assumed the responsibility of developing the property in a way that fits within the confines of its topography and the easements granted to them. Thus, if Weidner chooses to build a home at the top of the slope, then they will need to construct a longer driveway that starts at the bottom of the slope where there is legal access. If Weidner prefers to not have such a long driveway, they could easily build their view home in the center of their property – just as houses with views are being constructed on the neighboring Lots 7 and 8, as shown in Exhibit B to the opening brief. (CP 151)

Finally, Weidner claims necessity because their property “was more valuable with access to the north and less valuable with access from the south.” (App. Br. 26) But the value of the property when

conveyed to them presumed southern access. Weidner should not be given more than what was bargained for when they purchased the property. To the extent they claim the property is worth less with southern access, they rely on deposition testimony from Sunflower's managing member that it could be worth less "depending on how they develop it." (CP 413) Thus, it is only worth less if Weidner chooses to develop it in a way that would decrease its value.

The trial court properly dismissed Weidner's implied easement claim when there was no evidence of prior apparent continuous use over Lot 3 to access their property, and Weidner already had access to their property from the south. To the extent the court should have addressed whether Weidner had reasonable necessity before dismissing the implied easement claim, this Court should nevertheless affirm because Weidner failed to present sufficient evidence of necessity to warrant implicating an easement.

## **VI. CROSS-APPEAL ARGUMENT**

### **A. The trial court erred in denying fees to Sunflower; Weidner's implied easement claim was an attempt to reform the purchase and sale agreement to include an easement that had not been conveyed.**

This case depends upon what Sunflower intended to convey under the purchase and sale agreement for modified Lot 4 and Lot 5, and what Weidner expected to receive. The purchase and sale

agreement provides that if “buyer or seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to attorneys’ fees and expenses.” (CP 98) Here, Weidner’s purported implied easement claim “concerns this Agreement” because it is premised on their claim that they “assumed” an easement over Lot 3 was included in the conveyance. Because Sunflower prevailed, it was entitled to an award of attorney fees as the prevailing party.

In denying attorney fees, the trial court asserted that Weidner’s “claim for equitable relief does not derive from the Purchase and Sale Agreement.” (CP 766; *see also* CP 940-42) But whether Weidner was entitled to an easement for the benefit of Lots 4 and 5 clearly “concerns” the purchase and sale agreement. It is irrelevant that Weidner brought their claim as one for an “implied easement.” The guiding principle in determining whether attorney fees should be awarded under a contractual attorney fee provision is whether “the action arose out of the contract and if the contract is central to the dispute.” *Brown v. Johnson*, 109 Wn. App. 56, 34 P.3d 1233 (2001).

In *Brown*, the buyer purchased a home from seller under a purchase and sale agreement that allowed for an award of attorney fees to the prevailing party in a “suit concerning this Agreement.”

After moving in, the buyer found several defects including water leaks and a second story addition that was built without permits making the house structurally unsound. The buyer sued seller for misrepresentation and prevailed.

The trial court limited buyer's attorney fees to only those incurred related to misrepresentations about the septic system. This Court reversed, holding that buyer was entitled to *all* of her attorney fees because the "action for misrepresentation arises out of the parties' agreement to transfer ownership of [seller]'s house to [buyer]. Moreover, the purchase and sale agreement was central to her claims." *Brown*, 109 Wn. App. at 59 (citations omitted).

In *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 942 P.2d 1072 (1997), *rev. denied*, 134 Wn.2d 1027 (1998), the plaintiff signed a buyer/broker agreement with her real estate agent. The plaintiff then signed an earnest money agreement for the purchase of a house. The sale fell through and the agent refused to refund the plaintiff's earnest money. The plaintiff then sued the agent for breach of fiduciary duty and negligence claims and prevailed. The agent claimed plaintiff was not entitled to attorney fees under either the earnest money agreement or buyer/broker

agreement because the plaintiff's claims arose in tort and were not contract claims.

This Court affirmed an award of attorney fees, noting that the negligence claim was based on the agent's drafting of the agreement and the breach of duty claim arose from the manner in which the agent negotiated the purchase and the release of the earnest money, and those duties were created under the buyer/broker agreement and earnest money agreement. *Edmonds*, 87 Wn. App. at 855-56. The "terms of the earnest money agreement and the contractual relationship created by the agreement are central to these claims, rendering them claims 'on a contract' and an award of attorney fees was warranted. *Edmonds*, 87 Wn. App. at 856.

In *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 215 P.3d 990 (2009), *rev. denied*, 168 Wn.2d 1024 (2010), the trial court concluded that defendants tortiously interfered with an agreement that provided for attorney fees to the prevailing party in an action "relating to the agreement." 152 Wn. App. at 278-79, ¶¶ 131, 132. The defendants argued that they could not be liable for attorney fees under the agreement since they had been dismissed from the contract claims. The court held that the defendants were still liable for fees under the agreement because "enforcement of the

agreements and the claims that followed their breach is the essence of the [ ] tortious interference with contract claim.” *Deep Water*, 152 Wn. App. at 279, ¶ 132.

In *Hill v. Cox*, 110 Wn. App. 394, 412, 41 P.3d 495, *rev. denied*, 147 Wn.2d 1024 (2002), the parties entered into an agreement for the sale of wooded real property that reserved certain logging rights to the seller, but none within 100 feet of the cabin on the property. The agreement provided that “in the event either party hereto institutes, defends, or is involved with any action to enforce the provisions of this contract, the prevailing party in such action shall be entitled to reimbursement by the losing party for its court costs and reasonable attorneys' costs and fees.” When the seller cut trees within the proscribed limit, the buyer sued.

The buyer brought an action under the statutory timber trespass statute, rather than suing for breach of the agreement, presumably because the statute allows for treble damages. RCW 64.12.030. Nevertheless, the appellate court awarded attorney fees to the seller under the agreement. The court noted that “there would not have been a timber trespass if the parties had not contracted that the trees within 100 feet of the cabin were not to be cut. Hence, Mr. Hill's action arose out of the contract and the contract was central to

the dispute. Therefore, Mr. Hill, as the prevailing party, is entitled to attorney fees for this appeal.” *Hill*, 110 Wn. App. at 411.

Here, Sunflower was entitled to its fees under the purchase and sale agreement. Weidner’s claim for an implied easement “arose out of” the purchase and sale agreement, which was “central to the dispute.” Weidner would have no claim for an implied easement if Sunflower had not agreed to sell, and Weidner agreed to purchase, Lots 4 and 5, which was the subject of the agreement. Regardless of the form of the action brought by Weidner, Sunflower is entitled to attorney fees as the prevailing party.

The trial court misplaced its reliance on *Boguch v. Landover Corp.*, 153 Wn. App. 595, 224 P.3d 795 (2009) to deny fees on the grounds that the purchase and sale agreement was only “ancillary to the dispute,” which could “be resolved without reference to the specific terms of the [ ] agreement.” (CP 942) In *Boguch*, a seller sued his former real estate agents alleging negligence and breach of duty under RCW ch. 18.86, because they incorrectly depicted the boundary lines in the listing, which he claimed resulted in selling the property for less than he might have otherwise received. The trial court dismissed the action on summary judgment, and awarded attorney fees to the real estate agents under the provision in the

parties' listing agreement that provided "in the event either party employs an attorney to enforce any terms of this Agreement and is successful, the other party agrees to pay reasonable attorneys' fees." *Boguch*, 153 Wn. App. at 607, ¶ 18.

This Court reversed because the agreement only provided for attorney fees to "enforce" the agreement, and while the agreement gave rise to statutory and common law duties of care that the agents owed to the seller, "the contract is not the basis of recovery for [the seller]'s claims." *Boguch*, 153 Wn. App. at 620, ¶ 45. This Court reasoned that in order for a contract to be "central" to a dispute, "the act complained of is a breach of a specific term of the contract." *Boguch*, 153 Wn. App. at 616, ¶ 35. Therefore, in holding that the seller was not entitled to fees, this Court concluded that the seller's claims "may be resolved without reference to the specific terms of the listing agreement." *Boguch*, 153 Wn. App. at 620, ¶ 45.

Here, however, Weidner's claim could not be resolved without reference to the purchase and sale agreement. Weidner claimed an easement that they asserted "should have been included in our purchase of lot 4 and 5" (CP 139), and that they had "assumed" was included (CP 451), under the purchase and sale agreement. Sunflower's defense of the implied easement claim was premised on

enforcing the purchase and sale agreement as it was executed – without an easement over Lot 3.

Specifically, Weidner relied on the Seller’s Disclosure in Form 17, which is specifically referenced in the purchase and sale agreement (CP 95, 99), to claim that “it completely misrepresents the access to the property and it was the duty of Sunflower, as the seller, to properly disclose this material issue to potential buyers.” (CP 458; *see also* CP 355, 634) Sunflower’s defense was in part premised on the purchase and sale agreement, which made it Weidner’s responsibility to independently verify “that access to the property is provided by an insurable non-exclusive easement for ingress and egress.” (*See* CP 107; *see also* CP 109)

Weidner cannot avoid paying attorney fees under the purchase and sale agreement by bringing their claim under a purported separate action. Although Weidner brought this action for an “implied easement,” their allegations clearly show that their true action was one to reform the purchase and sale agreement. For instance, Weidner asserted that they were somehow “tricked into buying the property” based on how it was “marketed” and the listing detail reports and Seller Disclosure Statement that they purportedly relied on when they purchased the property. (CP 453, 634) Weidner

in essence claimed that the omission of an easement over Lot 3 when Lots 4 and 5 were sold to them was a mistake due to inequitable conduct by Sunflower that caused them to execute the purchase and sale agreement, and that they were entitled to reform the purchase and sale agreement to include the omitted easement. *See e.g. Kincaid v. Baker*, 66 Wn.2d 550, 403 P.2d 888 (1965) (in an action to reform a deed, the plaintiff must prove a unilateral mistake on her part and inequitable conduct on the part of the defendant).

Because Sunflower was the prevailing party in Weidner's action concerning the purchase and sale agreement, the trial court erred in denying attorney fees.

**B. This Court should award attorney fees incurred on appeal to Sunflower.**

A prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. *Wiley v. Rehak*, 143 Wn.2d 339, 348, 20 P.3d 404 (2001). Here, the purchase and sale agreement contains a fee provision. This Court should award Sunflower attorney fees under the purchase and sale agreement for having to defend this appeal and pursue the cross appeal. RCW 4.84.330 (prevailing party entitled to attorney fees if provided for under a contract); RAP 18.1.

**VII. CONCLUSION**

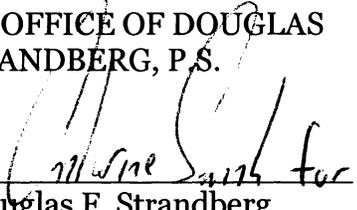
This Court should affirm the dismissal of the implied easement claim, reverse the denial of attorney fees in the superior court with directions on remand to award the fees Sunflower incurred defending the implied easement claim, and award attorney fees to Sunflower on appeal.

Dated this 10<sup>th</sup> day of June, 2016.

SMITH GOODFRIEND, P.S.

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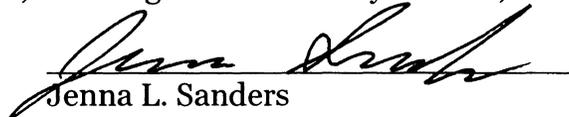
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 10, 2016, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 10<sup>th</sup> day of June, 2016.

  
Jenna L. Sanders