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No. ~~34610-9~~ 34610-9-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

HARVEY S. VISSER, a single man, and SHARON M. SNEDEKER, a single woman,

Respondents.

v.

RALPH CRAIG AND RAE CRAIG, husband and wife,

Petitioners,

RESPONDENTS' BRIEF

ORIGINAL

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I. STATEMENT OF THE CASE

Defendants Ralph and Rae Craig own adjoining parcels of land located in Clark County, Washington.[1] The parcels are accessible by the public SE Moffett Road that runs along the southern boundaries of these adjoining parcels.[2] Prior to July 1, 1999, the parcels totaled about 110 acres in area. On July 1, 1999, the Craigs conveyed a 13 acre segment forming the northeast portion of these parcels to Joan D. Westhusing, Trustee of the Joan D. Westhusing Trust (the "Property").[3] The Craigs retained and still currently own the remaining 97 acres that sit to the south and west of the Property (the "Craig Property").[4]

In January 2000, Kenneth B. Westhusing, Trustee of the Joan D. Westhusing Trust, conveyed an undivided one-half interest in the Property to Harvey J. Goodling and Patti L. Goodling, husband and wife, and an undivided one-half interest in the Property to himself and Janice Caday, husband and wife.[5]

When the Craigs conveyed the Property to the Westhusing Trust in July 1999, the Westhusing Trust owned a parcel adjoining the Property on

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[1] CP 167, ¶2.
[2] *See* CP 75, 221.
[3] CP 77, ¶3; 114-15. The Craigs allege that they intended their sale of the Property to the Westhusing Trust to be a boundary line adjustment. CP 55, ¶8. But in fact, the Craigs stated that Property was sold as a separate parcel rather than a boundary line adjustment. CP 56, ¶9.
[4] CP 77, ¶3; 167, ¶2.
[5] CP 13-16.

the Property's northwest boundary ("Tax Lot 58") and Harvey J. Goodling and Patti L. Goodling owned another parcel adjoining the Property on the Property's northeast boundary ("Tax Lot 4,19").[6] Tax Lots 58 and 4,19 are accessible by the private Nichols Hill Road.[7] The Craig Property is accessible by the public SE Moffett Road.[8] But neither the private Nichols Hill Road nor the public SE Moffett Road provided legal access to the Property at the time of conveyance.[9] The Property was, and continues to be, landlocked.[10] The map in Appendix A depicts all of these properties and roads.

Kenneth B. Westhusing and Janice Caday divorced in 2003 and as a part of that dissolution, title to Tax Lot 58 vested solely in Janice Caday.[11] Harvey J. Goodling and Patti L. Goodling also divorced and title

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[6] CP 77, ¶5; 221.

[7] CP 77, ¶6. The deed conveying the Property to the Westhusing Trust purports to reserve to the Craigs a right of way easement over the Property and Tax Lot 4,19 to provide the Craigs access to the private Nichols Road. CP 170, 172, 179-80. Because Nichols Hill Road is private, the Goodlings could not unilaterally grant an easement to the Craigs providing them access to Nichols Hill Road. *Brown v. Voss*, 105 Wn.2d 366, 371-72, 715 P.2d 514 (1986). The Craigs focus much of their discussion on the reservation of this easement, but as will be discussed below, this reservation is irrelevant in determining whether there was an easement implied by necessity (as opposed to easement implied from prior use) granted at the time the Craigs conveyed the Property.

[8] CP 75; 77, ¶6; 221.

[9] CP 62; 77, ¶6; 139.

[10] CP 18; 77, ¶6; 139.

[11] CP 77, ¶5; 125-27; 244-45.

to Tax Lot 4,19 eventually vested solely in Harvey J. Goodling.[12] Kenneth B. Westhusing and Patti L. Goodling, who are brother and sister, ultimately gained title to the Property through a series of conveyances.[13]

In December 2004, Harvey Visser and Sharon Snedeker loaned a substantial sum of money to the Westhusings and secured repayment with a Deed of Trust recorded against the Property.[14] Visser and Snedeker also simultaneously acquired an Option to Purchase the Property.[15] Until Visser and Snedeker acquire legal access to the Property, they will not be able to obtain an owners' title insurance policy insuring access.[16] At the closing of the loan, Visser and Snedeker obtained a lender's commitment for title insurance from First American Title Insurance Company.[17] The title company noted in this commitment that the Property has no legal access.[18]

To gain legal access to the Property, Visser and Snedeker filed a claim in January 2005 against the Craigs to quiet title in a way of necessity south over the eastern boundary of the Craig Property to the public SE

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[12] *See* CP 20; 77, ¶5; 129-32.
[13] CP 82, 108-09, 245, 247-54, 269-70; *see* Division II Ruling on Motion for Discretionary Review.
[14] CP 76, ¶2; 82.
[15] CP 76, ¶¶1 and 2; 82, 108.
[16] CP 77, ¶7.
[17] CP 134.
[18] CP 139.

Moffett Road.[19] The Craigs answered and filed counterclaims on March 17, 2005.[20] On April 15, 2005, Visser and Snedeker moved for partial summary judgment, arguing the July 1999 conveyance of the Property to the Westhusing Trust created an easement by necessity because the Property was otherwise legally landlocked.[21] The Craigs filed a cross-motion for summary judgment on May 3, 2005, arguing that the conveyance created no such easement because the parties did not intend to create such an easement.[22]

After oral argument on May 13, 2005, Judge Roger Bennett of the Clark County Superior Court granted Visser's and Snedeker's motion and denied the Craigs' cross-motion.[23] In a written ruling, Judge Bennett explained that although the Westhusings may have had practical access to the Property over Tax Lots 58 and 4,19 when the Craigs conveyed the Property in July 1999, that access was not legal.[24] Judge Bennett explained that in cases where a conveyance creates legally landlocked property, public policy requires that an easement is created by necessity to allow access to the legally landlocked property.[25] Judge Bennett

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[19] CP 1-6.
[20] CP 51-57.
[21] CP 59-70.
[22] CP 145-56.
[23] CP 225-28.
[24] CP 222-24.
[25] CP 223-24.

continued that the Craigs confused the concept of easements implied from pre-existing use and easements by necessity: where a court must seek to fulfill the parties' intent in determining whether a conveyance implied an easement from prior use, easements by necessity are created automatically, regardless of the parties' intent, when a conveyance creates legally landlocked property.[26]

The Craigs moved the trial court to reconsider, arguing in part that the July 1999 statutory warranty deed conveying the Property accomplished a "boundary line adjustment" and did not create a separate parcel, and that the Westhusings' divorce, not the July 1999 conveyance itself, legally landlocked the Property.[27] In his ruling denying the Craigs' motion for reconsideration, Judge Bennett emphasized that (1) under Washington law, whether the July 1999 conveyance accomplished a "boundary line adjustment" or whether it created a separate parcel is of no consequence, (2) in any event, the July 1999 statutory warranty deed conveying the Property unequivocally conveyed a separate parcel and that

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[26] CP 223-24.
[27] CP 232-236.

all Clark County maps indicated the same,[28] (3) that the July 1999 conveyance, not the Westhusings' divorce, landlocked the Property, and (4) the Craigs continued to confuse practical access with legal access.[29]

After Judge Bennett denied the Craigs' motion for reconsideration, they moved Division II of the Washington Court of Appeals for discretionary review.[30] The Court of Appeals granted the motion on June 23, 2006.[31]

II. STANDARD OF REVIEW

Appellate courts review summary judgment orders de novo, performing the same inquiry as the trial court.[32] Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[33] The appellate court

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[28] Judge Bennett also noted that the map the Craigs submitted as Clark County's map of the Property in support of their motion for reconsideration had been modified and did not match maps he obtained directly from Clark County. CP 288-89. Specifically, the map the Craigs submitted showed that a narrow isthmus connected Tax Lot 58 to the Property—thus creating one, contiguous property—while the map Visser and Snedeker submitted along with maps obtained directly from the Clark County Mapping Department illustrated that Tax Lot 58 and the Property were separate parcels. CP 288-89.

[29] CP 286-90.

[30] CP 286-97.

[31] *See* Division II Ruling Granting Review issued by Commissioner Skerlec.

[32] *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 230, 119 P.3d 325 (2004).

[33] CR 56(c).

considers all facts and reasonable inferences in the light most favorable to the nonmoving party.[34]

III. EASEMENTS BY NECESSITY AND EASEMENTS IMPLIED FROM PRIOR USE ARE DISTINCT LEGAL CREATURES AND CONTRARY TO THE CRAIGS' ARGUMENT, THE PARTIES' INTENT IS NOT A CONSIDERATION IN DETERMINING WHETHER A CONVEYANCE OF A LEGALLY LANDLOCKED PROPERTY CREATED AN EASEMENT BY NECESSITY

Easements by necessity and easements implied from prior use are distinct legal creatures.[35] Indeed, the Washington Supreme Court in *Hellberg*—Washington's leading case on both easements by necessity and easements implied from prior use—treated them separately, assigning them different names and requiring the satisfaction of different elements to create one as opposed to the other.[36]

Although both easements arise by implication, the implication regarding easements by necessity arises out of a different configuration of facts than do easements implied from prior use.[37] Easements by necessity arise when (1) a common grantor divides a single property, conveying part and retaining part, and (2) the conveyance results in the creation of a

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[34] *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001).
[35] *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 666-68, 404 P.2d 770 (1965); *see also* W. Stoebuck & J. Weaver, REAL ESTATE: PROPERTY LAW §§ 2.4, 2.5 (2d Ed. 2004).
[36] *See Hellberg*, 66 Wn.2d at 666-68.
[37] Stoebuck & Weaver, *supra*, § 2.5.

legally landlocked property that has no access to a public street or road.[38] In other words, the common grantor's division of property landlocks one of the newly created properties unless its owner is given implied access over the other newly created property.[39] An easement by necessity therefore arises because public policy will not permit property to be landlocked and rendered useless, not because the parties to a conveyance of landlocked property intended that one be created.[40]

Easements implied from prior use, in contrast, are often simply referred to as "implied easements," though the phrase "implied from prior use" more accurately distinguishes them from easements by necessity.[41] Easements implied from prior use may arise when (1) a common grantor divides a single property, conveying part and retaining part, (2) there was an apparent and continuous quasi easement existing for the benefit of one part of the property to the detriment of the other part before the property was divided, and (3) there is a reasonable necessity (as opposed to strict

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[38] *Hellberg*, 66 Wn.2d at 666-67; W. Stoebuck & D. Whitman, THE LAW OF PROPERTY § 8.5 (3d Ed. 2000).

[39] *Hellberg*, 66 Wn.2d at 666-67; Stoebuck & Whitman, *supra*, § 8.5.

[40] *Hellberg*, 66 Wn.2d at 666. When a conveyance creates a legally landlocked property, Washington courts give the owner of the landlocked property the right to condemn a private way of necessity for access. *Hellberg*, 66 Wn.2d at 666-67. But condemnation is unnecessary when the private way of necessity is over the land of the grantor of the landlocked property. *Hellberg*, 66 Wn.2d at 667. Here, Visser and Snedeker seek a private way of necessity over the Craigs' land. CP 1-6, 59-70. Because the Craigs are the grantors of the landlocked property, condemnation is unnecessary.

[41] Stoebuck & Whitman, *supra*, § 8.4

necessity) for the easement "in order to secure and maintain the quiet enjoyment of the dominant estate."[42]

Comparing easements by necessity and easements implied from prior use reveals important differences. First, as the respective elements above indicate, the primary difference between easements by necessity and easements implied from prior use is that the latter requires a pre-existing "quasi easement" over either the property the common grantor conveyed or retained when the grantor divided the property.[43] Second, easements implied from prior use generally do not emerge from conveyances that create legally landlocked properties.[44]

Finally, and most importantly in this case, easements by necessity do not require an analysis of the parties' intent; rather, they arise by operation of law and public policy when a common grantor divides a single property, conveying part and retaining part, and the conveyance results in the creation of a legally landlocked property that has no access to a public street or road.[45] Easements implied from prior use, on the other

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[42] *Hellberg*, 66 Wn.2d at 667-68; Stoebuck & Whitman, *supra*, § 8.4.

[43] *See Hellberg*, 66 Wn.2d at 667-68; Stoebuck & Weaver, *supra*, §§ 2.4, 2.5; Stoebuck & Whitman, *supra*, §§ 8.4, 8.5.

[44] *See, e.g., Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954); *Evich v. Kovacevich*, 33 Wn.2d 151, 204 P.2d 839 (1949); *Bailey v. Hennessey*, 112 Wn. 45, 191 P. 863 (1920). It is possible to have a case where both easement theories are appropriate, as when a conveyance will landlock a property unless a pre-existing easement over the other may be used. Stoebuck & Weaver, *supra*, § 2.5.

[45] *Hellberg*, 66 Wn.2d at 666-67; *see also* Stoebuck & Weaver, *supra*, § 2.5.

hand, do require an analysis of 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."[46] It is the second and third elements required to establish easements implied from prior use that necessitate this analysis of the parties' intent because those elements indicate that the parties actually contemplated the issue.[47] To illustrate, if there was a pre-existing quasi easement and if that easement is reasonably necessary to enjoy the dominant estate, then the parties must have contemplated its existence at the time of conveyance and the courts must therefore determine whether the parties intended to imply the easement from its prior use.] But courts do not analyze the parties' intent when determining whether a conveyance that results in a legally landlocked property creates an easement by necessity because law and public policy, not the parties' intent, implies the easement.[48]

The Craigs cite several cases to support their contention that the parties' intent governs all easements that arise by implication whether they are easements by necessity or easements implied from prior use.[49] *But none of those cases states or even implies that courts analyze the parties'*

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[46] *Hellberg*, 66 Wn.2d at 668.
[47] *See Hellberg*, 66 Wn.2d at 668; Stoebuck & Weaver, *supra*, § 2.4.
[48] *Hellberg*, 66 Wn.2d at 666-67.
[49] *See* Br. of App. at 11-18.

intent when determining whether a conveyance creates an easement by necessity. For example, the Craigs mischaracterize *Hellberg*'s separate discussion of the different rules that apply to easements by necessity and easements implied from prior use by grouping quotes from the two separate discussions together, taking the court's opinion entirely out of context.[50] Specifically, they quote the court's recitation of the intent principle that applies only to easements implied from prior use—and appropriately discussed only in the portion of the *Hellberg* opinion discussing easements implied from prior use—as qualifying the *Hellberg* court's rule on easements by necessity.[51] In doing so, the Craigs inaccurately imply that the *Hellberg* court held that the intent principle applies to easements by necessity.[52] Indeed, when the *Hellberg* court stated that "[w]e are concerned in such cases with the presumed intention of the parties," it referred to "such cases" that address easements implied from prior use, not easements by necessity.[53]

Similarly, the court's discussion in *Roberts v. Smith*,[54] contrasted easements implied from prior use (or "implied easements" as the *Roberts* court referred to them) with easements by necessity. Where the

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[50] *See* Br. of App. at 17.
[51] *See* Br. of App. at 17.
[52] *See* Br. of App. at 17.
[53] *See Hellberg*, 66 Wn.2d at 667-68.
[54] 41 Wn. App. 861, 864-65, 707 P.2d 143 (1985).

pre-existing quasi easement and "reasonable necessity" requirements of easements implied from prior use aid in determining the actual intent of the parties, "the intent to create an access easement over grantor's land is implied when a grantor sells landlocked property."[55]

The Craigs cite *Voss* to support their contention that "[t]he doctrine of easement by implication only serves as a guide to assist the court to determining the true intent of the parties."[56] But *Voss* involved only an easement created by express grant and nowhere discussed easements implied from prior use or easements by necessity.[57]

The Craigs cite *Granite Beach, LLC v. Dep't of Natural Resources*,[58] to support their assertion that "easement by necessity requires evidence of grantor's intent."[59] But that citation is accurate only if the common grantor who creates the legally landlocked property is the federal government, not a private party, and only if the federal government, when it severs a single property, retains the legally landlocked property for itself as opposed to conveying it.[60]

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[55] *Roberts*, 41 Wn. App. at 865.
[56] Br. of App. at 12-13.
[57] *Voss*, 105 Wn.2d at 371.
[58] 103 Wn. App. 186, 11 P.3d 847 (2000).
[59] Br. of App. at 13.
[60] *See Granite Beach*, 103 Wn. App. at 196-99; *see also* Stoebuck & Weaver, *supra*, § 2.5 ("It seems that an exception to the [easement by necessity] doctrine exists when the Federal Government, in granting patents to federal lands, retains an interior parcel surrounded by other parcels it has granted.").

The remaining cases the Craigs cite did not discuss easements by necessity and did not involve landlocked properties. *Evich* addressed whether a homeowner had an easement implied from prior use over a concrete walkway that had previously been used by he and his neighbor as a common walkway to the public sidewalk in front of their homes.[61] Similarly, *Adams* addressed whether the owners of the dominant estate had an easement implied from prior use over a driveway that had been previously used by both the dominant and servient estates for decades.[62] The dominant estate in *Adams*, however, directly abutted a public road and had never been landlocked.[63] *Bailey* addressed whether a store owner had an easement implied from prior use over a rear alleyway entrance to his store building when he, his predecessors in interest, and other property owners had previously used the alleyway to access the rear entrances of their buildings.[64] Similar to the dominant estate in *Adams*, the store owner's property in *Bailey* had a front entrance that sat directly on a public road.[65] Finally, *Rogers v. Cation*[66], tackled whether property owners had

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[61] 33 Wn.2d at 153-56.
[62] 44 Wn.2d at 503-05.
[63] 44 Wn.2d at 503-05.
[64] 112 Wn. at 46-48.
[65] 112 Wn. at 46-47. Notably, Professors Stoebuck and Weaver discuss *Adams* and *Bailey* in his discussion on easements implied from prior use, not his discussion on easements by necessity. *See* Stoebuck & Weaver, *supra*, §§ 2.4, 2.5.
[66] 9 Wn.2d 369, 115 P.2d 702 (1941).

acquired easements implied from prior use to use the waters of a spring arising on a neighbor's land. The case nowhere discussed easements by necessity and did not involve an access easement.[67]

Visser and Snedeker were not seeking an easement implied from prior use; they were seeking an easement by necessity and as the above authority reveals, the distinction is significant as it relates to the importance of the parties' intent.

Specifically, Visser and Snedeker claim that the July 1999 conveyance compelled an easement by necessity because that conveyance created a legally landlocked property. Visser and Snedeker are not attempting to "trump the parties' actual intent" or obtain something from the Craigs without providing them just compensation. They are merely trying to gain legal access to property that they are purchasing through Washington's established easement by necessity law.[68] A common grantor (the Craigs) divided a single property, conveying part (the Property) and retaining part (the Craig Property).[69] This conveyance resulted in a legally landlocked property. An easement by necessity therefore arose because public policy will not permit property to be landlocked and rendered useless, not because the Craigs and Westhusings intended that one be

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[67] *Cation*, 9 Wn.2d at 371-79.
[68] *See Hellberg*, 66 Wn.2d at 666-67.
[69] CP 77, ¶3; 114-15; 167, ¶2.

created.[70] Washington courts do not analyze the parties' intent when determining whether a conveyance that results in a legally landlocked property creates an easement by necessity because law and public policy, not the parties' intent, implies the easement.[71]

Employing the word "necessity" to describe the type of easement in this case underscores the argument that the parties' intent is irrelevant in determining whether an easement by necessity exists. Even if the Craigs and the Westhusing Trust did not intend to create an easement across the Craig's Property with the July 1999 conveyance of the Property, subsequent purchasers of the Property need the certainty of legal access. Equity, therefore, dictates that legal access should be recognized across the property of the parties who created the legally landlocked property. This access is necessary to serve the Property into perpetuity.[72]

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[70] *See Hellberg*, 66 Wn.2d at 666.

[71] *Hellberg*, 66 Wn.2d at 666-67.

[72] In the Ruling Granting Review, page 3, Commissioner Skerlec mentioned that no court found the existence of an easement by necessity where it would serve property that would not require an easement. First, there is no evidence in the record that the Westhusing Trust agreed to limit the uses on the Property. Second, all uses require access. Finally, an easement by necessity also protects subsequent purchasers and ensures that landlocked property can be accessed and put to reasonable use.

IV. THE CRAIGS' JULY 1999 CONVEYANCE OF THE PROPERTY CREATED AN EASEMENT BY NECESSITY OVER THE CRAIG PROPERTY TO SE MOFFETT ROAD BECAUSE THE CONVEYANCE CREATED A LEGALLY LANDLOCKED PROPERTY WITH NO ACCESS TO A PUBLIC STREET OR ROAD

There is no dispute that a common grantor, the Craigs, divided a single property, conveying part (the Property) and retaining part (the Craig Property).[73] There is a dispute, however, regarding whether the July 1999 conveyance created a legally landlocked property, thus compelling an easement by necessity.

Necessity for access must exist at the moment the common grantor divides the single property, and not at some prior or later time.[74] When the Craigs conveyed the Property in July 1999, they created a legally landlocked property with no access to a public street or road, namely SE Moffett Road.[75] Similarly, at the time of the July 1999 conveyance, the Property had no legal access to the private Nichols Hill Road.[76] Thus, at the time of the July 1999 conveyance, there was an immediate necessity for access to the Property.

The Craigs assert that the Westhusings had access to the Property through Tax Lot 58 at the time of conveyance and that the Property did not

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[73] CP 77, ¶3; 114-15; 167, ¶2.
[74] *Granite Beach*, 103 Wn. App. at 196 (citing *Hellberg*, 66 Wn.2d at 667); Stoebuck & Weaver, *supra*, § 2.5.
[75] *See* CP 18, 114-15.
[76] *See* CP 18, 114-15.

become landlocked until "long after [the Craigs] had conveyed the property."[77] And because necessity must exist at the time the common grantor's parcel is severed, the Craigs contend, no easement by necessity was created.[78]

But the Craigs confuse practical access with legal access. Although the Westhusings may have had practical access to the Property through Tax Lot 58, that access was not legal in light of the Washington Supreme Court's decision in *Brown v. Voss*.[79] In *Voss*, the Supreme Court held that 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.[80] Any extension of an easement by an owner of a dominant estate to other properties is a misuse of the easement even if the extension does not increase the actual burden on the easement.[81]

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[77] Br. of App. at 22-24.
[78] Br. of App. at 22-24.
[79] 105 Wn.2d 366, 371-72, 715 P.2d 514 (1986). On page 4 of the Ruling Granting Review, Commissioner Skerlec also makes this error by assuming that because the Property was adjacent to a lot that had legal access to the private Nichols Hill Road, the Property had legal access as well. This conclusion is directly contrary to the ruling in *Voss*. Commissioner Skerlec continues by stating that there was no evidence that anyone with a right to use Nichols Hill Road objected to it serving the Property. But the absence of an objection does not equate to a legal, transferable right.
[80] 105 Wn.2d at 371.
[81] *Voss*, 105 Wn.2d at 372.

Applying the *Voss* rule here, the Westhusings could not legally access the Property through Tax Lot 58 because such access would expand the dominant estate of the private Nichols Hill Road easement.[82] The *Voss* rule specifically disallowed the Westhusings from unilaterally expanding the dominant estate of the Nichols Hill Road easement.[83]

Thus, the July 1999 conveyance, not any subsequent event or events, legally landlocked the Property. The necessity for access to the Property, therefore, existed at the time of that conveyance.

V. PARTIES MAY NOT CONVEY LANDLOCKED PROPERTIES

The Craigs argue that parties may choose to convey landlocked properties without providing access.[84] But the Craigs cite no law supporting their contention.[85] Rather, the Craigs merely recite the easement by necessity rule outlined in *Hellberg*, then baldly assert without

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[82] *See* 105 Wn.2d at 371-72; *see also* CP 18. This conclusion does not change whether the Craigs conveyed the Property as a boundary line adjustment or as a separate parcel. In either case, the Westhusings would have been expanding the dominant estate (Tax Lot 58) in violation of the rule outlined in *Voss*, 105 Wn.2d at 371-72. There is no support for the proposition that property must be a separate, legal parcel before it can be landlocked and in need of access. In any event, Visser and Snedeker presented argument to the trial court that the Property is a separate, legal lot. CP 261-64.

[83] *See* 105 Wn.2d at 371-72.

[84] Br. of App. at 18-19.

[85] *See* Br. of App. at 18-19.

citation to authority that "[u]nder the law, parties can choose to convey a parcel without providing access."[86]

The Craigs do not cite authority for their assertion because there is no legal authority supporting it. The *Hellberg* easement by necessity rule is clear and without qualification. Where land is conveyed that has not outlet, the grantor by implication of law grants ingress and egress over the property that the grantor retains, enabling the purchaser to have access to her newly acquired property.[87] This easement by necessity rule "is an expression of a public policy that will not permit property to be landlocked and rendered useless."[88]

VI. THE TRIAL COURT PROPERLY APPLIED THE *VOSS* RULE

The Craigs argue that the trial court improperly applied the *Voss* rule by not considering the terms of the private Nichols Hill Road easement.[89] They argue that the trial court could not have determined that adding the Property's area to Tax Lot 58 expanded the easement's dominant estate without first consulting the terms of the private Nichols Hill Road easement.[90] During briefing and oral argument, however, the

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[86] Br. of App. at 18-19. "An appellate court will not consider arguments unsupported by citations to authority..." *Olivine v. United Capitol Ins. Co.*, 105 Wn. App. 194, 201, 19 P.3d 1089 (2001).
[87] *Hellberg*, 66 Wn.2d at 667.
[88] *Hellberg*, 66 Wn.2d at 666.
[89] Br. of App. at 25-27.
[90] Br. of App. at 25-27.

Craigs never argued that the terms of the Nichols Hill Road easement allowed the Westhusings to expand the dominant estate by their unilateral decision. When Visser and Snedeker presented the *Voss* rule—that an owner of a dominant estate may not expand the size of that dominant estate even if that expansion does not increase the actual burden on the easement[91]—the Craigs never responded that the terms of the Nichols Hill Road easement allowed such expansion. If the Craigs felt that the terms of the easement allowed the Westhusings to unilaterally expand the dominant estate of the Nichols Hill Road easement, the burden was theirs to raise that argument with the trial court and to submit evidence supporting it.

The Craigs also contend that whether expansion of a dominant estate to allow access to land not originally benefited by an easement would be a misuse of the easement is a question of fact.[92] But those cases did not involve and did not discuss the geographic expansion of the dominant estate of an easement, the issue presented in *Voss* and here; indeed, the dominant estates discussed in both *Logan* and *Sunnyside Valley* never expanded geographically.[93] Rather, *Logan* and *Sunnyside*

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[91] 105 Wn.2d at 371-72.

[92] Br. of App. at 26. They cite *Logan v. Brodrick*, 29 Wn. App. 796, 631 P.2d 429 (1981), and *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003), to support their contention.

[93] *See Sunnyside Valley*, 149 Wn.2d at 876-79; *Logan*, 29 Wn. App. at 797-98.

Valley involved disputes over the actual burden on easements as it pertains to increased volume of use.[94]

The issue here, in contrast, deals exclusively with the geographic expansion of Tax Lot 58, the dominant estate, not the increase on the actual burden of the private Nichols Hill Road easement. *Voss* established the rule that controls this issue, stating that an owner of a dominant estate may not expand the size of that dominant estate even if that expansion does not increase the actual burden on the easement.[95] The Westhusings could not unilaterally expand the dominant estate of the Nichols Hill Road easement without violating the *Voss* rule and the trial court properly recognized this fact in its ruling.

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[94] *See* 149 Wn.2d 29 Wn. App. at 797-99. Specifically, *Logan* addressed whether the owner's operation of a resort on the dominant estate and the increased volume of traffic that resulted constituted a misuse of the easement. 29 Wn. App. at 797-99. Similarly, *Sunnyside Valley* involved a dispute surrounding the widening of an easement to accommodate increased irrigation demands. 149 Wn.2d at 876.

[95] 105 Wn.2d at 371-72.

VII. THE CREATION OF AN EASEMENT BY NECESSITY HERE WOULD NOT VIOLATE THE STATUTE OF FRAUDS, WOULD NOT INTERFERE WITH THE FREEDOM TO CONTRACT, AND WOULD NOT CONSTITUTE A TAKING[96]

The Craigs contend that creating an easement when the parties to a conveyance did not intend one violates the Statute of Frauds.[97] According to this contention, however, easements implied from prior use, easements by necessity, and easements implied from plat, would all violate the Statute of Frauds because they do not arise out of the language of a written conveyance.[98] Thus, the Statute of Frauds does not apply.[99]

The Craigs also briefly assert, without citation to authority, that the easement by necessity compelled in this case interferes with the parties' freedom to contract.[100] Appellate courts will not consider arguments unsupported by citations to authority or adequate briefing.[101] More importantly, though, parties to a conveyance that will result in a legally landlocked property are ostensibly aware during negotiation that public policy will not permit property to be landlocked and that an easement by necessity arises by operation of law over the landlocked property. The

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[96] The Craigs have raised all three of these issues for the first time on appeal. "In general, issues not raised in the trial court may not be raised on appeal." *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 834 (2005).
[97] Br. of App. at 28-29.
[98] *See* Stoebuck & Weaver, *supra*, § 2.4.
[99] Stoebuck & Weaver, *supra*, § 2.4.
[100] Br. of App. at 28.
[101] *Bowles v. Dep't of Retirement Sys.*, 121 Wn.2d 52, 80, 847 P.2d 440 (1993); *Olivine*, 105 Wn. App. at 201, 19 P.3d 1089 (2001).

Craigs' assertion suggests that any rule of contract law that prevents parties from negotiating terms with consequences contrary to public policy or other law infringes on the freedom to contract.

Finally, the Craigs assert without elaboration that the trial court's ruling constitutes a taking under both the Washington and U.S. Constitutions.[102] But the Craigs do not explain in any way how the trial court's ruling constitutes a taking.[103] Appellate courts will not address constitutional arguments that are not supported by adequate briefing.[104]

VIII. VISSER AND SNEDEKER MUST SEEK AN EASEMENT BY NECESSITY BEFORE PURSUING CONDEMNATION

The Craigs argue that Visser and Snedeker may pursue other remedies, implying that they do not need to seek an easement by necessity.[105] But at least one court has ruled that before a party can pursue an alternative remedy such as private condemnation, that party must first prove the absence of an easement by implication.[106]

IX. CONCLUSION

Based on the foregoing reasons, Visser and Snedeker respectfully request that Division II of the Washington Court of Appeals affirm the trial court's granting of Visser's and Snedeker's motion for partial

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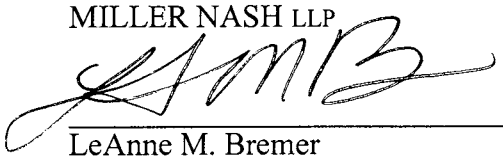
[102] Br. of App. at 28.
[103] Br. of App. at 28.
[104] *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994).
[105] *See* Br. of App. at 29-30.
[106] *Roberts*, 41 Wn. App. at 862, 864.

summary judgment because the Craigs created an easement by necessity when they carved out of their holdings a legally landlocked property and sold it to the Westhusing Trust.

DATED this 12 day of October, 2006.

MILLER NASH LLP



LeAnne M. Bremer
WSB No. 19129

Attorney for Respondents

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DIVISION II

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STATE OF WASHINGTON
BY_____
DEPUTY

I hereby certify that I served the foregoing RESPONDENTS' BRIEF on:

Bradley W. Andersen
Schwabe Williamson Wyatt, P.C.
700 Washington Street, Suite 701
Vancouver, Washington 98660

by the following indicated method or methods:

☒ by **mailing** full, true, and correct copies thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Vancouver, Washington, on the date set forth below.

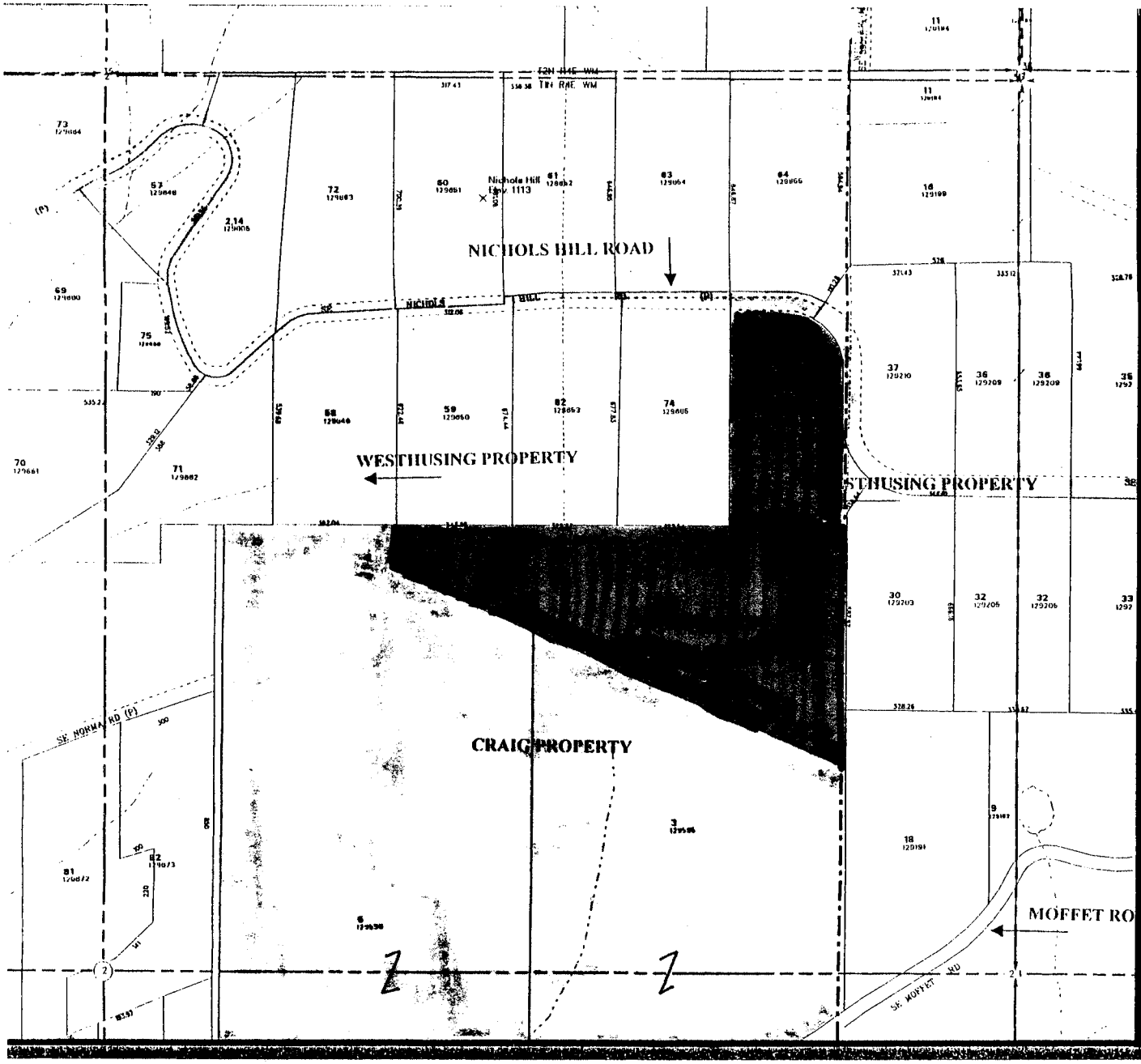
Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Vancouver, Washington, this 12 day of October, 2006.

LeAnne M. Bremer

Attorney for Respondents,
Harvey S. Visser and
Sharon M. Snedeker

APPENDIX A



Clark County Washington

NE Qtr of Section 02 T1N R4E WM

Explanation

- Streams
- Subdiv Lines
- Tax Code
- Easements
- Donation Land Claim
- Control Lines
- History Lines
- City Boundaries
- Road Right of Way Actual Road May Not Exist
- Water
- Marsh

Scale 1:3600

0 100 200 300 400 500 600 Feet

Department of Assessment and GIS

June 12, 2004

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