

COURT OF APPEALS  
DIVISION II

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No. 35372-5-II

STATE OF WASHINGTON

BY

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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HARRY MUÑOZ and VALERIE FYALKA-MUÑOZ, a married couple

Respondents,

v.

RANDALL CHOPP and MICHELL CHOPP, husband and wife, and  
PIERCE COUNTY, a Washington municipal corporation,

Appellants.

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RESPONDENTS' BRIEF

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**ORIGINAL**

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## I. INTRODUCTION

May a servient property owner who unilaterally relocates an access easement on his property for his own pecuniary benefit later prevent the beneficiary of the access easement from using the easement in its new location?

That is the fundamental question in this case. It is uncontested that the Respondents, Valerie and Harry Muñoz, have a road and utility easement across the property now owned by Appellants Randy and Michelle Chopp<sup>1</sup>. It is also uncontested that the prior owner of the Chopps property sought to relocate a portion of this easement starting in 1994.<sup>2</sup> And it can't be seriously contested that the Muñozs at all times agreed to this relocation. Nevertheless, when the Chopps purchased the property in 2004 – and after they had completed improvements that made it physically and legally impossible for the Muñozs to construct a road on the part of the recorded easement that was not coextensive with the new road – the Chopps barred the Muñozs from using the new road.

The trial court wisely ruled that the actions of the prior owner of the Chopps property and the Muñozs acquiescence amounted to an agreement to relocate the portions of the Muñozs' easements that were not co-extensive with the new road to the location of the new road that was

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<sup>1</sup> Finding of Fact 11.

<sup>2</sup> Finding of Fact 18.

necessary before the prior owner of the Chopps property could develop the property, and this agreement could not be revoked by the Chopps ten years after the fact. Moreover, principles of equity dictate that the Muñozs be allowed to use the new road given that building a road on the portion that is not co-extensive is, as the trial court noted, impractical at the very least. Finally, there are no grounds in Washington law – or, for that matter, the law of virtually any other jurisdiction – that justify forcing the Muñozs to pay for using their easements in the new location.

## II. STATEMENT OF FACTS

### A. Substantive History

In 1994 the Muñozs purchases 20 acres of undeveloped property overlooking the Carr Inlet on Kitsap Peninsula.<sup>3</sup> This property was accessed by a dirt and gravel road that began on Warren Drive and traversed more or less up the middle of the two lots that eventually became the Southview Plat.<sup>4</sup> The property was also the beneficiary of two side-by-side ten-foot road and utility easements across the Southview Plat that were recorded in 1976.<sup>5</sup> These recorded easements were modified by an 1987 easement in which the Muñozs' and Chopps' predecessors-in-

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<sup>3</sup> Harry Muñoz Decl. filed Oct. 7, 2004 (part of Respondents' Supplemental Designation of Clerks' Papers); Val. Muñoz Decl. filed Oct. 7, 2004 (part of Respondents' Supplemental Designation of Clerks' Papers).

<sup>4</sup> *Id.*

<sup>5</sup> Trial Exhibits 1 and 2.

interest granted access rights across the Southview Plat and Muñoz property to the 20-acre property lying to the east of the Muñozs' property (the "Tucker/Wilson Property").<sup>6</sup> The 1988 easement states that the road easement may meander from the center of the Plat for the southernmost 100 feet in order to accommodate the steep grade, and it expressly reserves to the grantors – including the Muñozs' predecessor-in-interest – "rights of use for ingress, egress, and utilities over, across and under said easement . . ."<sup>7</sup> The 1988 easement agreement also grants the right to use the existing dirt road for access until a new road was constructed as defined by the written easement.<sup>8</sup>

A couple of months after the Muñozs purchased their property, the then-owners of Southview obtained approval for a preliminary plat for an 11-lot subdivision.<sup>9</sup> The application included a proposed site plan that showed the owner of Southview would replace the existing dirt road with

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<sup>6</sup> Trial Exhibit 3.

<sup>7</sup> *Id.*

<sup>8</sup> Obviously, a property owner cannot grant what it does not own. By joining the Muñozs' predecessor-in-interest, Arthur Charles Roberts, in making the grant set forth in the 1988 easement, the Chopps' predecessors-in-interest, Florence Elmquist and Elsa Whitney, acknowledged or, to the extent it wasn't already, granted the Muñoz property both the right to use the existing road and the right to meander for the southern 100 feet. Moreover, under Washington law "easements may not be relocated absent mutual consent of the owners of the dominant and servient estates, regardless of how the easement was created." Crisp v. VanLaeken, 130 Wn. App. 320, 324, 122 P.3d 926 (2005). Accordingly, the consent of all parties was necessary before the easement could be relocated to allow for the 100-foot deviation.

<sup>9</sup> Dianne K. Conway Decl. filed Oct. 7, 2004, Ex. I (part of Respondents' Supplemental Designation of Clerks' Papers). The preliminary plat was filed for and approved before the restrictions of the Growth Management Act came into effect.

a 40-foot road and install various improvements.<sup>10</sup> The new road was largely, but not completely, co-extensive with the Muñoz and Tucker/Wilson recorded easements. The plan also provided for a 40-foot road reserve area to access the Muñoz property.<sup>11</sup> As noted by Pierce County in its Site Plan Review for Southview, “[b]oth the applicant and the Hearing Examiner acknowledged the plat’s preservation of access to the Muñozs’ property.”<sup>12</sup>

The development of the Southview Plat stumbled along for ten years. In 1999 the Tucker/Wilson property was purchased by Terry Wilson and his wife. They proceeded to construct a home on their property and used the dirt road to haul construction materials to their property.<sup>13</sup> Mr. Wilson saw the Muñozs up on their property “all the time” and testified that they also drove up old dirt road and, after it was constructed starting in approximately 2001, the new road.<sup>14</sup>

Not long after he bought the property, Mr. Wilson started to relocate and improve a large portion of the road to the location depicted on

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<sup>10</sup> Dianne K. Conway Decl. filed Oct. 7, 2004, Ex. H (part of Respondents’ Supplemental Designation of Clerks’ Papers).

<sup>11</sup> The final plat also contains these provisions. Trial Exhibit 6.

<sup>12</sup> Dianne K. Conway Decl. filed Oct. 7, 2004, Ex. G (part of Respondents’ Supplemental Designation of Clerks’ Papers).

<sup>13</sup> RP 22-23, 27-28.

<sup>14</sup> RP 27-28.

the preliminary plat for Southview.<sup>15</sup> Working with the prior owner (and original developer) of the Southview Plat, Tom Greetham, Mr. Wilson straightened out the northern 650 feet of the 800 dirt road so that it conformed with the new road shown on preliminary plat.<sup>16</sup> The new road was largely stubbed in by approximately 2001.<sup>17</sup>

Following the Mr. Muñoz's recommendation, Respondents Chopp started investigating purchasing Southview.<sup>18</sup> In late 2003 Mr. Chopp told Mr. Wilson – who described their relations at that time as “excellent”<sup>19</sup> – that the Chopps were in the process of buying the Southview Plat and that soon the Wilsons would no longer have to maintain the dirt and gravel road but would instead “have a beautiful road that we'd be able to get access to our property on.”<sup>20</sup> Mr. Chopp said nothing about charging the Wilsons for the road.<sup>21</sup> Respondents Chopp ultimately purchased Southview in the summer of 2004 and finished construction of the new road.

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<sup>15</sup> RP 25. The part he worked on was also co-extensive with the recorded easements. Mr. Wilson testified that he concerned about compacting soils in the area with the homes and drainfields would be built. *Id.*

<sup>16</sup> RP 29.

<sup>17</sup> RP 110.

<sup>18</sup> RP 111. Mr. Chopp and Mr. Muñoz were close friends at the time. RP 109.

<sup>19</sup> RP 32.

<sup>20</sup> RP 31.

<sup>21</sup> RP 32.

The Wilsons entered into an agreement to sell their property in August 2004.<sup>22</sup> While the sale was pending, Mr. Chopp asked the Wilsons to sign a road-maintenance agreement.<sup>23</sup> Since the property was under contract, Mr. Wilson checked with the buyers, who agreed they would sign it.<sup>24</sup> Shortly thereafter, the Chopps gave the Wilsons' real estate agent letter stating that the Wilsons had no easement and therefore could not use the road.<sup>25</sup> Ultimately, the Chopps demanded that the Wilsons pay them \$40,000 to use the new road but refused to provide the Wilsons any documentation of road costs or, for that matter, a copy of the road-maintenance easement they wanted the Wilsons to sign.<sup>26</sup> Concerned about being sued by the buyer, who was determined to follow through with the purchase, the Wilsons reluctantly paid.<sup>27</sup>

Despite the friendship between Mr. Chopp and Mr. Muñoz, the Chopps then turned their sights on the Muñozs. As with the Wilsons, Mr. Chopp demanded that the Muñozs sign a road-maintenance agreement.<sup>28</sup>

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<sup>22</sup> RP 33-34.

<sup>23</sup> RP 34.

<sup>24</sup> RP 36.

<sup>25</sup> RP 39.

<sup>26</sup> RP 42.

<sup>27</sup> RP 43-44.

<sup>28</sup> The Pierce County Code requires that a road-maintenance agreement be signed by all users of a plat's road before a final plat will be approved, so this presumably was the impetus behind the Chopps request. Ultimately, though, Pierce County approved the final plat for Southview even though the Muñozs had not signed the road-maintenance agreement. This was an issue on the LUPA appeal.

The Muñozs were concerned about signing the agreement because of threatened litigation over stormwater problems caused by the development of Southview from property owners south of the plat as well as because the agreement given to them by Mr. Chopp stated that they had 20-feet of road and the actual width of the paved road was 24 feet, leaving them to question where they were supposed to drive.<sup>29</sup> They were also perplexed by why Mr. Chopp was telling them they could get a “free easement” if they signed the document given that they already had an easement. As noted by Mr. Muñoz, “I have been traveling this road over 10 years, and all of a sudden, he comes in with this fancy road and wants everything to be his way or the highway. . . .”<sup>30</sup> The Muñozs put off dealing with the issue due to family medical issues and visitors from Europe.<sup>31</sup> But after successfully obtaining money from the Wilsons, Mr. Chopp suddenly demanded that the Muñozs pay him \$42,000.<sup>32</sup> After receiving an unsatisfactory response,<sup>33</sup> the Choppes withdrew any “offer” to the Muñozs to let them use the road.<sup>34</sup>

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<sup>29</sup> RP 112, 115.

<sup>30</sup> RP 118. *See also* 139.

<sup>31</sup> RP 119.

<sup>32</sup> RP 119.

<sup>33</sup> Stunned by Mr. Chopp’s demand and angry about what the Choppes had done to the Wilsons – which they thought was completely unethical – the Muñozs demanded the Choppes pay them \$50,000 instead. RP 120, 128-129. They never seriously thought the Choppes would pay it. RP 129.

<sup>34</sup> RP 122.

## **B. Procedural History**

The County approved the final plat for Southview in July 2005. Shortly thereafter, the Muñozs filed the complaint that has resulted in this appeal.<sup>35</sup> The Muñozs' Complaint plead causes of action for both quiet title and damages for interference with their easement rights and asked the trial court to quiet title to an easement across the existing road; bar the Chopps from interfering with their use of the existing road; award damages for the interference with the Muñozs' easement rights; award attorney fees and costs; and grant such other relief as the Court deemed just and equitable.<sup>36</sup>

The Chopps filed counterclaims for declaratory relief and tortious interference with a business expectancy.<sup>37</sup> Regarding the former, the Chopps sought a declaration that the Muñozs' road and utility easement, if any, be limited to the areas described in the recorded easements and the Muñozs barred from using any portion of the new road located outside of those areas.<sup>38</sup> In the alternative, they asked for an award of compensation of road construction costs if the Muñozs were allowed to use the road.<sup>39</sup>

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<sup>35</sup> CP 1-19. The Muñozs also contemporaneously filed a land use petition that challenged Pierce County's approval of the final plat for Southview given the bizarre, intersecting and inherently unsafe road scheme proposed by the Chopps. The petition had nothing to do with whether or not the Muñozs were entitled to use the new road and is not a subject of this appeal.

<sup>36</sup> CP 1-19.

<sup>37</sup> CP 22-27.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

In October 2005 the Muñozs filed a motion for summary judgment of their quiet-title claim. Although it declined to determine its ultimate location, at the November hearing the trial court ruled that the Muñozs do own an easement:

The one thing that's clear is that the Muñozs have an easement. And it seems to me that the first switchback is covered by the original easement because it allows for a meander area during the first 100 feet. The difficulties start to arrive when you get to the second switchback, because the case law says the court has very limited power to adjust easements to fit the needs of the parties in the circumstances, but it appears the court has some authority to exercise its equitable powers to approve the easement as it now exists. So the first question is, does the court have the authority to adjust this. I'm going to assume for the sake of argument here that the court does. But where I get hung up is, should the court exercise its equitable powers.

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So if you want summary judgment, I'll give you very limited summary judgment, and that is that there is an easement. But the exact configuration of that easement and whether or not there needs to be some compensation is still up for grabs . . .<sup>40</sup>

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<sup>40</sup> Dianne K. Conway Decl. filed May 25, 2006, Ex, A (part of Respondents' Supplemental Designation of Clerks' Papers). A transcript of the Court's oral ruling was also attached as Exhibit A to the Muñozs' Amended Trial Brief but, based on the pagination provided by the Clerk's Office, it does not appear to have been included in the official Clerk's Papers.

Despite the Court's ruling that it had not decided the exact configuration of the Muñozs' easement, in March 2006 the Chopps granted a septic-drainfield easement to a third party across the most highly disputed part of the Muñozs' road easement.<sup>41</sup> Local health department regulations prohibit the construction of a road across a drainfield.<sup>42</sup>

Trial on the issue of the location of the Muñozs' easement was held July 10-11, 2006.<sup>43</sup> Following the conclusion of the plaintiffs' case, the trial court observed that the Chopps' position was contrary to Washington law:

. . . [T]he whole policy behind the MacMeekin<sup>44</sup> case is, you can't take somebody else's property right. You just can't take it. Even if it's economically sensible to do it, even if it might work an inequity on you not to take it, you can't take somebody else's property right, and you can't force them to compensate you if you do.<sup>45</sup>

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<sup>41</sup> Trial Ex. 11.

<sup>42</sup> RP 194.

<sup>43</sup> Despite explicit discovery requests asking for information about the Chopps alleged road-construction costs, the Chopps never produced any documents or answered the interrogatories. On May 26, 2006, the trial court entered an order ruling that the issue of whether or not the Chopps were entitled to damages would be decided at trial but, if the Court held that some amount of damages was owed to the Chopps, additional discovery on that issue would be allowed and the matter set for a hearing at a later date.

<sup>44</sup> The trial court is referring to MacMeekin v. Low Income Housing Institute, Inc., 111 Wn. App. 188, 201, 45 P.3d 570 (2002).

<sup>45</sup> RP 157.

[T]he law says, as Mr. Muñoz testified, I had an easement. It may not have been a great easement; it may not have been the best road in the world. It may have been even impassable at certain times of the year, but it was okay for my purposes, and I don't have to improve it, and I don't have to pay for somebody that wants to improve it.

That's the law. That's the ruling of the MacMeekin case. That may be antiquated, that may be narrow, and that may be heavily property-rights oriented, but that is the law of this state, and Mr. Chopp's position is not well taken.<sup>46</sup>

Following the conclusion of all testimony, the trial court held that the Muñozs' easement had been relocated by the agreement of the property owners:

What I find in this case . . . is that there has been an agreement to relocate. Clearly, on the defendant's side, they've undertaken to relocate the easement. They've paved over the better portion of the original easement. They've set out S-curves that don't exactly conform with the original easement, true, but given the fact that they've paved over the greater portion of the original easement, it's now totally impractical to suggest that there's any other reasonable alternative left to the Muñozes other than to use the reconfigured easement, and that's what they've indicated they want to do. They've always indicated they wanted to adopt the relocation, so there's no dispute about the agreement to relocate. . . So, I find that the

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<sup>46</sup> RP 157-58.

easement has been relocated, which is permissible under Washington law, if done by agreement.<sup>47</sup>

The Court also held that under Washington law the Muñozs were not required to pay the Chopps for “an easement that they already had and that the Chopps [and their predecessors] voluntarily chose to relocate and improve.”<sup>48</sup>

### III. ANALYSIS

#### A. Standard of Review

The Washington Constitution vests in the trial court the authority to make factual findings:

Factual disputes are to be resolved by the trial court. The Washington constitution, by Art. IV, § 6, vests that power exclusively in the trial court. The power of this court is appellate only, which does not include a retrial here but is limited to ascertaining whether the findings are supported by substantial evidence or not. If we were so disposed, but we are not, we are not authorized to substitute our judgment for that of the trial court.<sup>49</sup>

Accordingly, an appellate court reviews the trial court's findings of fact to see if they are supported by substantial evidence in the record.<sup>50</sup> The

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<sup>47</sup> RP 229-30.

<sup>48</sup> RP 231.

<sup>49</sup> *Stringfellow v. Stringfellow* 56 Wn.2d 957, 959, 350 P.2d 1003, 353 P.2d 671 (1960). *Accord*, *Ormiston v. Boast*, 68 Wn.2d 548, 413 P.2d 969 (1966).

<sup>50</sup> *Nordstrom Credit, Inc. v. Dept. of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993).

findings must be upheld unless they are shown to be against the weight of the evidence.<sup>51</sup>

Appellate courts review questions of law *de novo*.<sup>52</sup> In matters of equity, however, trial courts have broad discretionary power to fashion equitable remedies. “Once a court of equity has properly acquired jurisdiction over a controversy, such a court can and will grant whatever relief the facts warrant.”<sup>53</sup>

A quiet-title action,<sup>54</sup> such as that filed by the Muñozs, is unequivocally equitable in nature.<sup>55</sup> Accordingly, courts have extensive authority when fashioning relief in a quiet title action:

[Q]uiet title . . . proceedings are brought in equity, and when equity jurisdiction attaches, it extends to the entire controversy

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<sup>51</sup> Westland Constr. Co. v. Chris Berg, Inc., 35 Wn.2d 824, 832, 215 P.2d 683 (1950).

<sup>52</sup> Multicare Med. Ctr. v. Dept. of Social & Health Servs., 114 Wn.2d 572, 582 n.15, 790 P.2d 124 (1990).

<sup>53</sup> Brazil v. City of Auburn, 93 Wn.2d 484, 610 P. 2d 909 (1980). *See also* Zastrow v. W.G. Platts, 57 Wn. 347, 350, 357 P. 2d 162 (1960) (“The obvious purpose of this rule [the courts have broad power in equity] is to avoid a needless multiplicity of litigation.”)

<sup>54</sup> A quiet-title action allows a person who claims a right to possession *or use* of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination. Kobza v. Tripp, 105 Wn. App. 90, 95, 18 P. 3d 621 (2001). Quiet-title actions are a statutory cause of action in Washington. Statutory authority is set forth in RCW 7.28.010, which also authorizes actions for ejectment. Quiet-title actions are frequently used to resolve disputes involving easement rights. *See, e.g.* Drake v. Smersh, 122 Wn. App. 147, 89 P. 2d 726 (2004) (action to quiet title to prescriptive easement); Heg v. Alldredge, 124 Wn. App. 297, 99 P. 3d 914 (2004) (property owner brought action to quiet title to easement that had been recorded but never opened); Cowell v. Etzell, 119 Wn. App. 432, 81 P. 3d 895 (2003) (owner of dominant estate brought action to quiet title to easement allegedly interfered with by defendant).

<sup>55</sup> Durrah v. Wright, 115 Wn. App. 634, 638-40, 63 P. 2d 184 (2003) (Division II case discussing history of quiet-title actions); Kobza, 105 Wn. App. at 96.

and whatever relief the facts warrant will be granted.<sup>56</sup>

Hence, appellate courts review the authority of a trial court to fashion equitable remedies under the abuse of discretion standard.<sup>57</sup>

Notably, a court may treat an action begun as a quiet title action as an ejectment action if it appears the plaintiff's remedy should be recovery of possession.<sup>58</sup> Moreover, the court may even cancel deeds and issue orders to parties to do acts and to execute documents necessary to implement the decree.<sup>59</sup> Indeed, in Robinson v. Khan,<sup>60</sup> the Court of Appeals held that a judge who entered an order holding that a recorded document did not affect title and should not have been recorded committed error by not also ordering the removal of the document from the county records.

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<sup>56</sup> Eichorn v. Lunn, 63 Wn. App. 73, 80, 816 P. 2d 1226 (1991) (citing Haueter v. Rancich, 39 Wn.App. 328, 331, 693 P.2d 168 (1984)).

<sup>57</sup> Rupert v. Gunter, 31 Wn. App. 27, 30, 640 P.2d 36 (1982); Blair v. Wash. St. Univ., 108 Wn.2d 558, 564, 740 P.2d 1379 (1987); Willener v. Sweeting, 107 Wn.2d 388, 397, 730 P.2d 45 (1986); Wilhelm v. Beyersdorf, 100 Wn. App. 836, 848, 999 P.2d 54 (2000).

<sup>58</sup> Petsch v. Willman, 29 Wn.2d 136, 185 P. 2d 992 (1947) (action brought in "guise" of quiet title treated as ejectment); Garvey v. Garvey, 52 Wash. 516, 101 P. 45 (1909) (court both quieted title and granted possession in action brought to quiet title); Sofie v. Kane, 32 Wn. App. 889, 650 P. 2d 1124 (1982) (ejectment granted in quiet title action).

<sup>59</sup> Stoebuck & Weaver, 18 Wash. Prac. § 11.10.

<sup>60</sup> 89 Wn. App. 418, 948 P. 2d (1998).

## **B. The Muñozs' Easement Has Been Relocated**

### **1. The Uncontested Testimony Supports the Trial Court's Finding that the Muñozs and Owners of Southview Agreed to the Relocation of the Muñozs' Easements**

There is no question that under Washington law an easement may be relocated by the mutual consent of the owners of the dominant and servient estates.<sup>61</sup> And while no published Washington case addresses how consent to relocate an easement may be given, there are a plethora of court decisions from other jurisdictions that recognize that consent may be shown by implication or acquiescence.

[A]n agreement to relocate may be implied from the parties' actions, such as when an easement holder uses a new location established by the owner of the servient estate or when a landowner stands by while the easement holder utilizes a different route.<sup>62</sup>

The relocation of easements by implication or acquiescence typically occurs when one party relocates the easement, often at considerable cost, and the other party fails to object. In Ericsson v. Braukman,<sup>63</sup> for instance, the court held that the defendants had implicitly agreed to the relocation of an easement by failing to protest the plaintiffs

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<sup>61</sup> Crisp v. VanLaeken, 130 Wn. App. 320, 325, 122 P.3d 926 (2005); Macmeekin v. Low Income Housing Institute, Inc., 111 Wn. App. 188, 201, 45 P.3d 570 (2002) (citing Coast Storage Co. v. Schwartz, 55 Wn.2d 848, 854-55, 351 P.2d 520 (1960)).

<sup>62</sup> BRUCE, LAW OF EASEMENTS AND LICENSES IN LAND, § 7.03(1)(c) (1988) (footnotes omitted).

<sup>63</sup> 824 P. 2d 1174 (Or. App. 1992).

grading, ditching, and graveling of the new route until after it was completed.<sup>64</sup> Similarly, in Proulx v. D'Urso<sup>65</sup> the court held that the defendant had agreed to the relocation of the easement through his actions:

[T]he original easement may be deemed relocated when the conduct of the parties is such as to permit a conclusion that a different easement had “been substituted for the way mentioned in the deeds” because the evidence reflects “a tacit understanding or an implied agreement” manifested by the dominant owner’s “acquiescence” in the use of the different easement in lieu of the original for a number of years.<sup>66</sup>

And in Eidlitz v. French<sup>67</sup> the court held that the defendants had acquiesced to the relocation of their easement by failing to object to its relocation by the plaintiff until six months after the plaintiff had relocated the easement and made associated improvements.<sup>68</sup> A treatise in the A.L.R. 2d contains literally dozens of additional examples of the relocation of express easements by implication and acquiescence.<sup>69</sup>

Here, the Chopps do not challenge the trial court’s finding that their predecessors-in-interest undertook to relocate the original road and

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<sup>64</sup> *Id.* at 1177.

<sup>65</sup> 805 N.E. 2d 994 (Mass. App. 2004).

<sup>66</sup> *Id.* at 997 (quoting Anderson v. DeVries, 93 N.E. 2d 251 (Mass. 1950)).

<sup>67</sup> 173 N.Y.S. 646 (1918).

<sup>68</sup> *Id.* at 647.

<sup>69</sup> F.M. English, *Relocation of Easements (other than those arising by necessity); Rights Between Private Parties*, 80 A.L.R. 2d 743, § 8 (2007).

utility easements benefiting the Muñozs property,<sup>70</sup> so that factual finding is a verity on appeal. It also cannot be seriously contested that the Muñozs agreed to the relocation of the easements. According to Mr. Muñoz’s rebutted testimony, he always understood that they would be able to use the new road once it was constructed,<sup>71</sup> and none of the earlier developers had ever told the Muñozs that they would have to pay a portion of the road-construction costs.<sup>72</sup> While the Muñozs didn’t mind their neighbor developing his property, they certainly didn’t need a “big, fancy road.”<sup>73</sup> Similarly, Mr. Wilson, whose property was benefited by the same easements, testified that he understood that the new road took the place of his easements and the prior owners of the Southview Plat never indicated they expected him to pay for any of the construction costs.<sup>74</sup> In other words, the Muñozs’ and Wilson’s acquiescence to the relocation of a portion of their recorded easements was conditioned on their ability to use the new road. They didn’t interfere with the elimination of the old dirt road and the construction of the new road that was not completely co-extensive with their easement because they understood – based on the

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<sup>70</sup> Finding of Fact 18.

<sup>71</sup> RP 113.

<sup>72</sup> RP 111. Mr. Chopp also acknowledged that Mr. Muñoz never offered to pay for the road. RP 164.

<sup>73</sup> RP 115.

<sup>74</sup> RP 65.

actions and representations of the prior owners of the Southview – that they would be able to use the road.

By buying the plat with the road already mostly constructed and subject to the design scheme set forth on the preliminary plat – which, of course, ensured continued access to the Muñoz property – the Chopps adopted their predecessors’ relocation of the road and utility easements.<sup>75</sup> Once the original dirt road was removed and the S-curves were put in by the prior developer, any chance of using original route was completely gone.<sup>76</sup> Moreover, Mr. Chopp even acknowledged “ask[ing] [Mrs. Muñoz] to relocate her easement, [and] extinguish the old easement in lieu of this new better easement.”<sup>77</sup> He also represented to Mr. Wilson that he would be able to use the road.<sup>78</sup>

In sum, the trial court’s ruling that the Muñozs’ road and utility easements were relocated by mutual agreement to the location of the new road is firmly supported by the uncontested testimony during the trial. The Chopps’ attempt to circumvent the trial court’s finding by claiming that any agreement was contingent on the Muñozs signing a road-maintenance agreement and therefore there was never a meeting of the minds. As an initial matter, the agreement to relocate had already

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<sup>75</sup> Conclusion of Law 2.

<sup>76</sup> RP 64-65.

<sup>77</sup> RP 116.

<sup>78</sup> RP 31.

occurred, and the Muñozs had justifiably relied on it. The Chopps could not renege on the agreement, especially after the construction of the new road made it impossible to develop the recorded easements. Moreover, this claim is contrary to the facts: the Chopps demanded that the Muñozs and Wilsons not only sign the road-maintenance agreement but also pay tens of thousands of dollars for the ability to use the new road.

## **2. The Statute of Frauds Does Not Apply**

The Chopps argue that the Court's ruling violates the statute of frauds.<sup>79</sup> But CR 8 requires that affirmative defenses and any matter that might otherwise constitute an avoidance of a claim be raised in a party's answer to a complaint or reply to a counterclaim.<sup>80</sup> The rule specifically identifies 21 defenses that must be affirmatively plead, one of which is the "statute of frauds."<sup>81</sup> These defenses are waived if they are not plead unless the parties have expressly or implicitly consented to try the affirmative defense or avoidance.<sup>82</sup>

Here, the Chopps never raised statute of frauds as an affirmative defense in their pleadings,<sup>83</sup> nor did they raise the argument in motion practice or in argument before the Trial Court. Therefore, the statute of

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<sup>79</sup> Opening Brief of Appellants at 1.

<sup>80</sup> CR 8(c).

<sup>81</sup> *Id.*

<sup>82</sup> Farmers Ins. Co. v. Miller, 87 Wn.2d 70, 76, 549 P.2d 9 (1976).

<sup>83</sup> CP 22-27.

frauds defense could not have been expressly or implicitly consented to through argument. Accordingly, the statute of frauds defense is waived and should not be considered by this Court on appeal.

Moreover, the statute of frauds is strictly construed<sup>84</sup> and may not be applied to “cases that are not squarely within its terms.”<sup>85</sup> And although an express grant of an easement is a conveyance that must be accomplished through a deed and is subject to the statute of frauds,<sup>86</sup> where an easement already encumbers a specific servient estate, an agreement that establishes the location or relocation of that easement is not subject to the statute of frauds.<sup>87</sup> Literally dozens of cases allow relocation of an easement by oral agreement or, as noted above, implication of acquiescence.<sup>88</sup>

Finally, “[f]ull performance by one party removes a contract from that statute [of frauds].”<sup>89</sup> In the current case, the Muñozs had a clear right to a 20-foot easement over the Chopps’ property. The Chopps and their predecessors-in-interest wished to construct a road to access portions of

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<sup>84</sup> See Sherwood B. Korssjoen v. Heiman, 52 Wn. App. 843, 852, 765 P.2d 301 (1988) (interpreting RCW 19.36.010, the counterpart of RCW 64.04).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See Berg v. Ting, 125 Wn.2d 544, 551, 886 P. 2d 564 (1995) (citing Smith v. King, 27 Wn. App. 869, 871, 620 P.2d 542 (1980) (“a deed is not required to *establish the actual location* of an easement, but is required to *convey* an easement.”)).

<sup>88</sup> F.M. English, *Relocation of Easements (other than those arising by necessity); Rights Between Private Parties*, 80 A.L.R. 2d 743, §§ 7-8 (2007).

<sup>89</sup> Rutcosky v. Tracy, 89 Wn.2d 606, 611, 574 P.2d 382 (1978) (citing Becker v. Lagerquist Bros., Inc., 55 Wn.2d 425, 434, 348 P.2d 423 (1960)).

the servient estate. They preferred to locate of the road in the middle of the property in a manner that would take it directly over and through the Muñozs' easement. The trial court made specific findings supported by substantial evidence that the parties agreed to relocate the Muñozs' easement to allow the Chopps and their predecessors to construct a road in the preferred location. The Chopps completely performed the agreement by constructing the road in its current location. Accordingly, the Chopps full performance of the oral agreement removes it from the statute of frauds.<sup>90</sup>

**C. The Muñozs' Easements Were Developable**

**1. The New Road, Not the Easements Themselves, Made the Muñozs' Easements Undevelopable**

The Chopps insist that the Muñozs must develop their 20-foot easement as described in the 1976 easements – i.e. straight down the middle of the plat and without the 100-foot deviation allowed by the 1987 easement. Essentially, the Chopps claim that the Muñozs must construct a separate road that would crisscross and overlay the road for the Southview Plat.

Even assuming that the Muñozs easement does not have a 100-foot deviation – which, of course, it does – the final plat submitted by the Chopps and ultimately approved by the County burdened the areas where

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<sup>90</sup> *Id.*

the 1976 easements are not coexistent with the new road with buffer zones.<sup>91</sup> And, as set forth page 3 of the Southview Final Plat, construction, grading, and filling are forbidden within such areas:

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14. "Natural Buffer Area" (N.B.A.). No building, clearing, filling or grading is permitted within this area.<sup>92</sup>

Plaintiffs' expert witness Bill Diamond, the former head of the Pierce County development engineering supervisor, testified that the Southview Plat's restrictions, which were approved by Pierce County, did not allow a road to be constructed in the natural buffer areas.<sup>93</sup> The 20-foot Muñoz easement crossed two such areas.<sup>94</sup> Mr. Diamond also testified that approving a road on the easements as the Chopps proposed would violate minimum site distances required by the Pierce County Code,<sup>95</sup> violate Code requirements for intersections,<sup>96</sup> and violate the first and foremost finding that the County must make when approving a final plat, namely that it is for the safety and welfare of the public.<sup>97</sup> Overall,

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<sup>91</sup> Trial Exhibit 6.

<sup>92</sup> *Id.*

<sup>93</sup> RP 72, 77-78.

<sup>94</sup> RP 80.

<sup>95</sup> RP 85-87.

<sup>96</sup> RP 99.

<sup>97</sup> RP 80-82.

given the restrictions, Mr. Diamond testified that the Muñozs could not build a road straight up the middle of the plat as the Chopps state they must do.<sup>98</sup>

Accordingly, the Chopps' argument that the Muñozs can develop a road as set forth on the written easement is patently false. Nor, given the buffer restrictions in particular, could it be constructed even with a 100-foot deviation. Rather, as noted by the trial court in multiple findings, the installation of the new road – which involved removing huge chunk of the hill and turning much of the hillside into a massive rock wall<sup>99</sup> – make this entirely impractical.<sup>100</sup>

The Chopps' attempt to argue, despite offering no expert witnesses on the issue, that the Muñozs' easements were never developable in the first place. Again, this argument completely ignores the fact that the Muñozs routinely drove up the dirt road across Southview and the fact they their road easement has an allowance for a 100-foot deviation. Instead, the Chopps rely on a statement by Plaintiffs' expert, Bill Diamond, that was speculative and made after a very confusing line of questioning by the Chopps' attorney about issues he was not asked to review or testify about regarding the construction of road in straight line

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<sup>98</sup> RP 82.

<sup>99</sup> RP 49, 149.

<sup>100</sup> Findings of Fact 15, 16, 20.

with no deviation as allowed by the 1988 easement.<sup>101</sup> Moreover, Mr. Diamond had no basis for any opinion on the matter given that he had no idea what the topography of the area looked like before the Chopps and their predecessors had extensively regarded and contoured the area in question.<sup>102</sup> In any event, Pierce County Code 17B.10.090 allows for deviations from the road requirements, including grade requirements if certain criteria can be met.

## **2. If Necessary, the Muñozs Easements Could have Been Reformed**

Reformation is an equitable remedy designed to bring into writing that which is materially at variance with the parties' agreement in order to conform that agreement to reflect the intent of the parties.<sup>103</sup> The purpose of reformation is to adequately express the agreement the parties made.<sup>104</sup>

A party may seek reformation where the parties made a mutual mistake.<sup>105</sup> Mutual mistake occurs when both parties are mistaken as to the underlying basis of the agreement and when the mistake is discovered, the essence of the agreement is destroyed.<sup>106</sup> The test for mutual mistake is whether the agreement would have been entered into had there been no

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<sup>101</sup> RP 91-96. The Muñozs counsel objected to this line of testimony to no avail. *Id.*

<sup>102</sup> RP 93

<sup>103</sup> Denaxas v. Sandstone Court of Bellevue, 148 Wn.2d 654, 669, 63 P.3d 125 (2003).

<sup>104</sup> Childers v. Alexander, 18 Wn. App. 706, 710, 571 P.2d 591 (1977).

<sup>105</sup> Denaxas, 148 Wn.2d at 669.

<sup>106</sup> Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co., 139 Wn.2d 824, 832, 991 P.2d 1126 (2000)

mistake.<sup>107</sup> Reformation is justified if the parties' intentions were identical at the time of the transaction.<sup>108</sup>

The grant of an easement for ingress, egress and utilities to the owners of adjacent land is evidence of an intent that the easement benefit the grantees' adjacent land.<sup>109</sup> Here, the former owners of Southview plainly meant to give the former owner of the Muñoz property an easement that could actually be used to access the Muñoz property. Accordingly, to the extent the easements that were granted were insufficient, it should be reformed to allow such access.

**D. The Chopps Are Not Entitled to Any Compensation of Road Construction Costs**

**1. A Party to an Easement is Not Required to Pay for Improvements Unilaterally Made By Another Party**

Despite the broad authority given a court in equity, Washington courts have consistently held that monetary damages are not allowed in a quiet-title action.<sup>110</sup>

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<sup>107</sup> Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 190, 840 P.2d 851 (1992).

<sup>108</sup> Denaxas, 148 Wn.2d at 669.

<sup>109</sup> Winsten v. Prichard, 23 Wn. App. 428, 597 P.2d 415 (1979).

<sup>110</sup> Kobza v. Tripp, 105 Wn. App. 90, 95, 18 P.3d 621 (2001); Haueter v. Rancich, 39 Wn.App. 328, 331, 693 P.2d 168 (1984) (quiet title is an action in equity); Jack B. Parson Cos. v. Nield, 751 P.2d 1131, 1133 (Utah 1988) (quiet title actions are statutory in nature, and damages are unavailable if not authorized by statute); Pampell Interests, Inc. v. Wolle, 797 S.W.2d 392, 395 (Tex. Ct. App. 1990) (damages are unavailable for quiet title actions).

Moreover, compensation is not justified as a matter of law. Although a party to a road easement may have a duty to help pay for repairs to a road under certain circumstances, she is *not* required to pay for improvements. In Court of Common Pleas of Pennsylvania, Bucks County v. Continental Assocs.,<sup>111</sup> for instance, the court rejected a servient estate owner's attempt to compel the dominant estate to pay for half of a road repair necessitated by the servient estate owner's decision to improve the road:

It is clear . . . that if the lane in question were still dirt and stone, respondent would be under no duty to participate in paving the same. Yet that, in effect, is exactly what petitioner wants by these proceedings. She does not desire merely the "repair" of the present surface, which the evidence indicates could feasibly be accomplished by patching. To the contrary, she contemplates not only that work, but the further improvement of the land by an entirely new and different surfacing of the whole thereof .

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Similarly, in Holland v. Braun,<sup>113</sup> the court rejected the attempt of a road-easement owner to recover from co-easement owners the costs he incurred cutting trees, installing culverts, and re-grading, widening, and

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<sup>111</sup> 20 Pa. D. & C. 2d 551 (June 22, 1956).

<sup>112</sup> *Id.* at 558.

<sup>113</sup> 139 Cal. App. 626, 294 P. 2d 51 (1956).

paving the easement. The court held that paving a dirt road was not maintaining the road or repair; rather, the actions by the easement owner constituted improvements to the easement. And in McManus v. Sequoyah Land Assocs.,<sup>114</sup> the court concluded that, absent a contractual obligation providing to the contrary, the dominant estate holder could not be compelled to contribute without its consent to the costs of major improvements such as the construction of a roadway.

Here, the Chopps unilaterally made major improvements to the existing road for their own pecuniary benefit. The scope of these improvements far exceeds any routine maintenance and repair that the Muñozs might be obligated to help pay for. Surely, if the Muñozs would not be required to pay for improvements under the best of circumstances, they should not be made to pay for them after the Chopps have deliberately and unilaterally interfered with their ability to access their property.

Public-policy considerations also weigh against any award of compensation to the Chopps. If the owner of a servient estate were allowed to unilaterally improve an easement and then be entitled to compensation from the owner of the dominant estate, owners of servient

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<sup>114</sup> 240 Cal. App. 2d 348, 49 Cal. Rptr. 592 (1966).

estates could effectively force less wealthy owners of dominant estates to sell their property and/or incur unexpected monetary burden. Suppose, for instance, that a road easement crosses over one property to serve another property worth \$200,000 and owned by retirees living on fixed-income. The owner of the servient estate on his own spends \$200,000 to construct a state-of-the-art road on this easement. Should the owner of the servient estate be allowed to force the owners of the dominant estate to pay him \$100,000? Of course not.

Finally, cases discussing relocation of easements when equitable considerations warrant are also informative. In these cases, the factual situation is virtually always the same: the owner of a dominant estate refuses to allow the owner of the servient estate to relocate the easement, and the owner of the servient estate then files a claim seeking to relocate the easement.<sup>115</sup> Although unilateral relocation of easements is frowned on by most courts – including those in Washington<sup>116</sup> – courts in other

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<sup>115</sup> See, e.g., Crisp v. VanLaeken, 130 Wn. App. 320, 122 P. 3d 926 (2005) (owner of dominant estate refused to agree to relocation of easement and owner of servient estate sued seeking relocation); MacMeekin v. Low Income Housing Inst., Inc., 111 Wn. App. 188, 45 P. 3d 570 (2002) (owner of dominant estate brought quiet-title action to quiet title in an easement and owner of servient estate counterclaimed seeking relocation of the easement); Enos v. Casey Mountain, 532 So. 2d 703 (Fla. Dist. Ct. App. 1988) (dominant owner filed action to quiet title to express easement and the servient owner counterclaimed for relocation of the easement); Schnuck Markets, Inc. v. Soffer, 572 N.E. 2d 1169 (Ill. App. 1991) (dominant owner brought action to bar servient owner from interfering with easement and servient owner counterclaimed for relocation of easement); Soderberg v. Weisel, 687 A. 2d 839 (Pa. Super. 1997) (dominant owner refused to agree to relocation of easement and servient owner brought action for relocation).

<sup>116</sup> See generally Crisp, 130 Wn. App. 320; MacMeekin, 111 Wn. App. 188.

jurisdictions that have allowed such relocation when equitable considerations so require do *not* require that the owner of the dominant estate pay for any costs related to the relocation.<sup>117</sup> Hence, in Soderberg v. Weisel, the court upheld the lower court's relocation of an easement that "advance[d] the interests of justice" but struck down the lower court's ruling that the easement beneficiary had to share in the expense.<sup>118</sup>

In sum, if the Muñozs refused to allow the Chopps to relocate the easement and the Chopps were successful in convincing the Court to relocate it due to equitable considerations (e.g. the existence of a final plat and construction of houses and other improvements in accordance with that plat), the Muñozs would not have to pay for any costs associated with that relocation. Accordingly, there is no conceivable justification for forcing them to pay when they are willing to agree to the easement's relocation.

On a final note, any suggestion that the Muñozs have received some sort of freebie or windfall by being able to use the road is spurious at

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<sup>117</sup> See, e.g., Millson v. Laughlin, 142 A. 2d 810, 813-16 (Md. 1958) (allowing relocation of easement but ordering servient owner to pay all expense of relocation); Kruvant v. 12-22 Woodland Ave. Corp., 350 A. 2d 102, 118-19 (N.J. Super. 1975) (allowing relocation of bridle trail at servient owner's expense subject to approval of easement holder), *aff'd*, 376 A. 2d 188 (N.J. App. 1977); Lewis v. Young, 705 N.E. 2d 649, 653-54 (N.Y. Ct. App. 1998) (permitting relocation of a right of way "so long as the landowner bears the expense of the relocation, and so long as the change does not frustrate the parties' intent or object in creating the right of way, does not increase the burden on the easement holder, and does not significantly lessen the utility of the right of way.")

<sup>118</sup> 687 A. 2d at 842-45.

best. As set for above, under Washington law the Muñozs could have prevented the entire plat from being approved by refusing to relocate the dirt road and/ or their easements. They didn't, preferring instead to allow their neighbor to develop his property with amenities, including a new road that was far more than they needed or desired. Accordingly, allowing the Muñozs to use the new road now that the actions of the Chopps and their predecessors have made development of the easement impossible is a very small price to pay.

## **2. There is No Basis for a Condemnation Claim**

The Chopps argued that the Muñozs only sustainable cause of action is to condemn an easement by necessity. But the Muñozs don't need to create an easement by necessity – as the Court ruled in the hearing on the Muñozs summary-judgment hearing – and as the Chopps do not contest – the Muñozs already have one. The Muñozs have been unable to find a single case where a court required a party to condemn an easement under RCW ch. 8.24 when the party needing access already had an easement.

To the extent the condemnation claim has any validity, at most the Muñozs would be responsible for paying their proportionate (1/13<sup>th</sup>) share of the approximately 10% of the new road that does not overlay their

recorded easements. And even that amount would be have to be divided by at least two, given that the road is 40-foot wide.

**E. The Chopps' Are Not Entitled to Any Balancing of Equities**

When acting in equity, a court may consider the relative hardships to the defendant when fashioning relief.<sup>119</sup> But this balancing of hardships is only available to the innocent defendant who proceeds without knowledge or warning that his activities will likely encroach on the property rights of others.<sup>120</sup> In Wilhelm v. Beyersdorf,<sup>121</sup> for instance, the Court of Appeals held that the defendants were not entitled to a balancing of the equities when they had actual or constructive notice of an easement across their property and nevertheless built a well on the easement.<sup>122</sup> Similarly, in Mahon v. Haas,<sup>123</sup> the court refused to balance the equities where a party knew about a claimed prescriptive easement and constructed a \$5,000 commercial greenhouse on the easement.<sup>124</sup> Finally, in Foster v. Nehls,<sup>125</sup> the court refused to balance the equities when ordering a

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<sup>119</sup> See, e.g., Harbor Water Co. v. Page, 8 Wn. App. 600, 603, 508 P. 2d 628 (1973).

<sup>120</sup> Bach v. Sarich, 74 Wn.2d 575, 582, 445 P. 2d 648 (1968) (“The benefit of the doctrine of balancing of the equities, or relative hardship, is reserved for the innocent defendant who proceeds without knowledge or warning that [his activity] encroaches upon another’s property or property rights.”)

<sup>121</sup> 100 Wn. App. 836, 999 P. 2d 54 (2000).

<sup>122</sup> *Id.* at 847.

<sup>123</sup> 2 Wn. App. 560, 561, 468 P. 2d 713 (1970).

<sup>124</sup> *Id.* at 563.

<sup>125</sup> 15 Wn. App. 749, 754, 551 P. 2d 768 (1976), *review denied*, 88 Wn.2d 1001 (1977).

property owner to remove a story of his newly constructed house, finding that the property owner knew of the restrictive covenant claim and was hence not an innocent party entitled to a balancing of the equities.<sup>126</sup>

In sum, balancing of the equities is a privilege, not a right. Here, the Chopps were well aware of the Muñozs easement rights. They nevertheless intentionally encroached on these rights. Accordingly, they are not innocent parties and are not entitled to any favorable consideration or compensation by this Court.

**F. There is no Basis for the Chopps' Claim Regarding Tortious Interference with a Business Expectancy**

The Chopps assign error the trial court's conclusion of law that they are not entitled to any damages for tortious interference with a business expectancy. But they fail to brief the issue, so it is difficult to know on what basis they think that this conclusion was incorrect. Moreover, the Chopps do not assign error to trial court's finding that the Muñozs did not act with improper intent or for an improper purpose and that the Chopps failed to quantify any damages associated with their claim for tortious interference with a business expectancy.<sup>127</sup> Accordingly, these

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<sup>126</sup> *Id.* at 753-54.

<sup>127</sup> Finding of Fact 25.

findings are verities on appeal<sup>128</sup> and make the Chopps' claim entirely unsustainable.

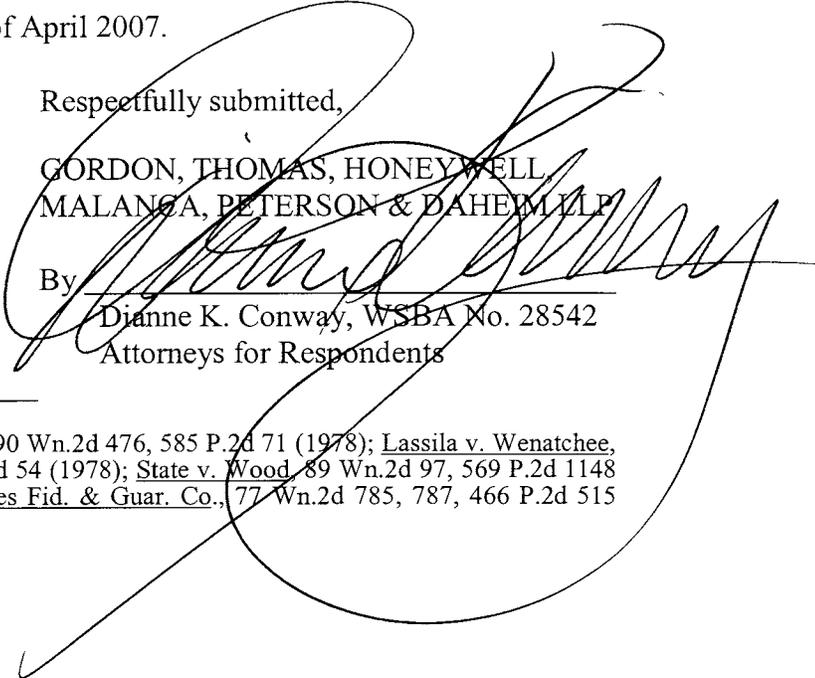
#### IV. CONCLUSION

Since at least the filing of the application for the Southview preliminary plat in 1994, the Muñozs and the owners of the Southview property proceeded with the understanding that the Muñozs were going to use – at not cost – the new road that replaced the old dirt road and overlay up to 90% of the Muñozs' recorded easements. The Chopps cannot renege on this agreement, especially now that the final plat is recorded and the new road is constructed such that it is legally and physically impossible to construct the Muñozs' easements as recorded. Accordingly, the trial court's decision quieting title to the Muñozs' road and utility easement in its new location should be upheld.

Dated this 9<sup>th</sup> day of April 2007.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,  
MALANCA, PETERSON & DAHEIM LLP

By 

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Attorneys for Respondents

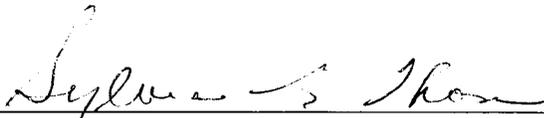
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<sup>128</sup> Seattle Sch. Dist. 1 v. State, 90 Wn.2d 476, 585 P.2d 71 (1978); Lassila v. Wenatchee, 89 Wn.2d 804, 809-10, 576 P.2d 54 (1978); State v. Wood, 89 Wn.2d 97, 569 P.2d 1148 (1977); Dickson v. United States Fid. & Guar. Co., 77 Wn.2d 785, 787, 466 P.2d 515 (1970).

**CERTIFICATE OF SERVICE**

I certify that I served via email and first class mail on the 9<sup>th</sup> day of April, 2007, a true copy of the RESPONDENTS' BRIEF to the following:

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Sylvia I. Thomas