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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROMAINE C. CULPEPPER, et. al.,

Appellants/Cross-Respondents,

v.

MARSHA Y. CAMUS, et. al.,

Respondents/Cross-Appellants.

BRIEF OF APPELLANTS
CROSS-RESPONDENTS

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court inappropriately designated Findings of Fact 13, 21, 26, 27, 28, 29 as they are Conclusions of Law.
2. The trial court erroneously granted equitable relief to parties that had not shown actual and substantial injury.
3. The trial court erroneously granted equitable relief to parties that came before the court with unclean hands.
4. The trial court erred in its Conclusions of Law 3 as to the easement holder has the right to maintain, improve and repair their easement.
5. The trial court erred in Finding of Fact 8 which states the livestock unreasonably interferes with the use of the easement.
6. The trial court erred in Finding of Fact 10 as far as the statute requiring fencing.
7. The trial court erred in its Conclusion of Law 6 by prohibiting livestock on the easement and requiring lateral fencing along the easement.
8. The trial court erred in Findings of Fact 9, 10, 12, 21 and in refusal to allow additional Findings determining the removal of the gates as being beyond the scope of the easement.

9. The trial court erred in its Conclusion of Law 5 by giving Mr. Hurd responsibility for determining easement needs.
10. The court failed to provide just compensation, attorney fees, and expert witness costs to Appellants relating to its expansion of the scope of this farm road easement.
11. The trial court erred in its Conclusion of Law 12 by requiring an annual review and requiring the Findings of Fact and Conclusions of Law to be recorded.

Issues Pertaining to Assignments of Error

- 1) Did the trial court err in determining the scope of the easement?
(Assignment of Error 1, 2, 4, 6, 8, 9,11)
- 2) Is the trial court's injunctive relief untenable, manifestly unreasonable and/or an abuse of discretion? (Assignment of Error 3, 5, 7, 10)

B. STATEMENT OF CASE

There are six siblings in the Darrin family who inherited the family farm and property upon the demise of their parents. The property was owned by the parents who farmed the land in part and used the farm road that existed at that time for that purpose. (1-17-07 RP 4) All of the children were raised on the farm. (6-20-07 RP 163)

After seven years of litigation, the estate was settled and the inheritance was received on February 14, 1998. (1-17-07 RP 4; Ex 10-14) Ardith Christensen bought a parcel of land adjoining her inherited parcel from her brother Wayne Darrin, whom as a result no longer has a legal interest in the affected land. (6-20-07 RP 154) The easement interests were created by legal deeds upon stipulation of the five siblings in order to resolve the then pending estate litigation. (1-17-07 RP 4; Ex 10-14)

The easement was based on the existing farm road and expanded on the road to allow for the specific purpose of “ingress, egress and utilities” to all of the properties from the county road. (1-17-07 RP 6; Ex. 5, 10-14, 15)

The easement varied in width, depending upon location, but generally it measured fifteen feet (15’) from the centerline in each direction and the road has moved per the parties’ use. (Ex. 5, 10-14) The width also includes impassable geographic formations such as drop offs and mountainous walls. (1-18-07 RP 144-145)

Ardith Christensen owns the only home in the total property; this is the parties’ family home. It is an active farm on which she manages livestock. This has been her use since prior to the date of the easement being given. (6-20-07 RP 154-155, 191-192) Her sister, Delores Darrin, maintains livestock as well, but she uses Ardith’s fields and houses the livestock there as she does not live on the property. (6-20-07 RP 191-198)

Dennis Darrin and Marsha Camus have planted hay on their fields. They harvest this annually for the cattle they have at their separate residences which are not part of this land dispute. They do bring livestock to their land but do not regularly run livestock on their property. They do drive horses up the easement and allow guests to ride the easement on horses. (6-19-07 RP 38)

The parties disagreed as to the maintenance of the easement, fencing of the road, and also disagreed as to the use of the existing gates on the easement. (CP 36-50)

On July 26, 2006, Dennis and Marsha filed suit and set a hearing for a Motion for Temporary Restraining Order shortly after service of a summons and complaint that only named Romaine and Ardith. (CP 1-21) A temporary restraining order hearing was heard on August 14, 2006. (CP 25) Delores filed her Motion to Intervene on August 14, 2006. (CP 28-35) On that same date, temporary injunctions were granted and an order was entered setting a trial date for October 10, 2006. (CP 51)

An Order authorizing Delores to intervene in the case was entered August 14, 2006. (CP 51) Delores followed by filing her Answer and Counterclaim on September 18, 2006. (CP 84-94) Ardith filed her Answer and Counterclaim on September 8, 2006. (CP 65-72) Romaine filed her Answer and Counterclaim on September 13, 2006. (CP 76-83)

The case was tried to the court over seven (7) days from January to August 2007.

The issues raised at trial court centered around the maintenance of the easement and removal of gates. The first part of the easement is traversed daily by Ardith Christensen and her family because that section of the easement is necessary to use in order to reach the driveway to her home. (CP 15) Ardith has no use for the easement beyond that section unless her fields—and thus her driveway—are flooded, in which case she uses the extended easement on the farm road to go the back route to her farm. (6-20-07 RP 169-170) Ardith uses her and Delores' land on the easement for grazing and for allowing the livestock to find shade and respite from flooding fields. (6-20-07 RP 164, 169-170)

The easement documents are silent with regard to the issue of maintenance. (Ex. 10-14) The easement documents are silent with regard to the issue of maintenance. (Ex. 10-14) Prior to the court's rulings, the easement had always been used as a simple farm road. (1-17-07 RP 6). The court designated Mr. Hurd, the expert called by Ardith, Romaine and Delores, as the person to determine all future issues of maintenance and division of payment for such maintenance. The court ordered that Mr. Hurd would have the responsibility to effectively manage the easement. (CP 324-325)

It is not disputed that the four gates had been on the property since the parents farmed the land and pre-dated the creation of the easement. (6-17-07 RP 125) The question of the gates and or their removal has dogged this case and while the trial court was explicit in its oral opinion that all but one of the gates should come down (8-1-07 RP 148), for some reason that issue escaped the Findings of Fact and Conclusions of Law.

The Findings of Fact, Conclusions of Law, and Judgment were entered on January 30, 2008. (CP 321-327, 345-347) Both parties sought reconsideration and both sets of reconsideration motions were denied without explanation or hearing by the court. (CP 361, 367)

A Motion for Stay was brought on by Delores, Ardith and Romaine asking that permanent fencing and removal of the gates not be allowed pending this appeal. (CP 416-421) The court allowed this Stay upon proof of a showing of insurance on Ardith's farm as it was concerned about cattle escaping and causing harm. (CP 447-448)

C. ARGUMENT

Standard of Review

Respondents Dennis and Marsha brought their suit seeking injunctive relief in relation to this easement to allow for (1) the removal of gates, (2) maintenance of the easement, (3) creating fencing requirements, and (4) disallowing cattle from feeding or using the easement. Dennis and Marsha's complaint was based legally on ejectment, trespass, nuisance and waste. (CP 1-19) Ardith, Delores and Romaine countersued for (1) malicious actions which rose to emotional distress and harassment; (2) timber trespass; (3) extinguishment of easement based on undue burden; and (4) trespass. (CP 65-72, 76-83, 84-94)

These claims were based solely on equitable principals. *Standing Rock Homeowners Ass'n v. Misch*, 106 Wn.App. 231, 240, 23 P.3d 520

(2001) *rev denied*, 145 Wn.2d 1008 (2001) (citing *Steury v. Johnson*, 90 Wn.App. 401, 405, 957 P.2d 772 (1998) (citation omitted); *Rupert v. Gunter*, 31 Wn.App. 27, 30, 640 P.2d 36 (1982)).

An equitable decision of a trial court is controlled by the circumstances of each case. *Lowe v. Double L Properties, Inc.*, 105 Wn.App. 888, 893, 20 P.3d 500 (2001) *rev. denied*, 145 Wn.2d 1008 (2001). An equitable decision by a trial court is given “great weight” by an appellate court unless that decision “is based on untenable grounds, is manifestly unreasonable or is arbitrary.” *Standing Rock*, 106 Wn.App. at 240-41 (citing *Steury*, 90 Wn.App. at 405; *Rupert*, 31 Wn.App. at 30). Even though great weight is given to [---a factual finding---] the decision by the trial court sitting in equity, appellate courts are not specifically bound to uphold such ruling if the facts are not supported by the law. *E.g., Colwell v. Ezzell*, 119 Wn.App. 432, 81 P.3d 895 (2003) (appellate court reversed trial court because servient estate did not interfere with easement); *see also Steury*, 90 Wn.App. at 407 (trial court abused its discretion by not considering the facts in relation to the law).

As a threshold matter in a case of this nature, the court must first ascertain the scope of the original easement. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). The court must identify

what the easement is before it can decide how it seeks to remedy the alleged issue(s). *Id.*

The determination of the scope of an easement is “a mixed question of law and fact.” *Sunnyside*, 149 Wn.2d at 880. The parties’ intent regarding the scope of an easement is a question of fact and the legal application of those facts is a question of law. *Id.* “Questions of law and conclusions of law are reviewed de novo and findings of fact are reviewed by a substantial evidence standard which is “evidence sufficient to persuade a rational fair-minded person” of its truth. *Id.*

The Court Erred by Considering Matters Outside the Scope of the Unambiguous Deed.

It is well-settled law that the scope of an easement is determined by the deed’s language. *Hayward v. Mason*, 54 Wash. 649, 651, 104 P. 139 (1909); *City of Seattle v. Nazareus*, 60 Wash.2d 657, 665, 374 P.2d 1014 (1962). In construing the deed’s language to determine the scope of an easement, the court looks for the intent of the parties at the time of the deed’s creation. *Nazareus*, 60 Wn.2d at 665; *Beebe v. Swerda*, 58 Wn.App. 375, 380-81, 793 P.2d 442 (1990); *Green v. Lupo*, 32 Wn.App. 318, 321, 647 P.2d 51 (1982). If the language is unambiguous, “other matters may not be considered...” *Nazareus*, 60 Wn.2d at 665; *Green*, 32 Wn.App. at 321.

A deed is ambiguous if the terms are uncertain or could have more than one meaning. *Green*, 32 Wn.App. at 322. If the deed is ambiguous or silent as to a certain issue, then “the situation of the property, the parties and the surrounding circumstances” should be examined. *Standing Rock*, 106 Wn.App. at 241 (citing *Rupert*, 31 Wn.App. at 31); *Steury*, 90 Wn.App. at 405 (citing *Rupert*, 31 Wn.App. at 31 and *Nazarenius*, 60 Wn.2d at 663).

In the case at bar there can be no dispute that each party involved was granted an easement when the estate was settled. (1-17-07 RP 4) It is also undisputed that the easement deed was granted for “ingress, egress, and utilities.” (Ex. 10-14) No facts were elicited at trial to contradict the limitation of the original intent to create an easement only for ingress, egress, and utilities. Further, neither Dennis nor Marsha were able to point to any incident where such ingress or egress was denied.

The meaning of the terms of the deeds was clear and unambiguous. As such, the inquiry into the original scope of the easement¹ should have ended there resulting in denial of all claims of Dennis and Marsha. *Nazarenius*, 60 Wn.2d at 665; *Green*, 32 Wn.App. at 321.

Despite this rule of law, it is clear that the trial court considered facts outside the scope of the unambiguous deed, including the situation of

¹ With the exception of maintenance responsibilities.

the property, and the easement's prior use in order to reach its decision affecting gates, maintenance, fences, and cattle. This was improper. *See Nazarenius*, 60 Wn.2d at 665.

The only exception to the controlling status of the deed may be in the area of maintenance. The deeds creating the easement were silent as to maintenance thus opening the door into factual inquiry on that issue. (Ex 10-14) Within that context, there is no evidence whatsoever that the intent of the grantor at the time of creation of this easement was other than to maintain the farm as used historically raising cattle. The general uses of the properties by all parties have remained the same from points in time prior to the creation of the easement, at the point of creation, and to this date. All that has changed is that Dennis and Marsha seek an expansion of the easement to allow for development and social entertaining, and to avoid the inconvenience of encountering livestock on the road.

The court's action in considering a change in scope of the easement to prohibit livestock from the road, to require fencing alongside the road, possibly to remove gates, and to appoint Mr. Hurd to supervise the implementation of its decision and the future maintenance of the road was erroneous.

In the Alternative, if it was Proper for the Court to Consider Facts Extraneous to the Unambiguous Deed, then the Court Erred as to the Legal Implication of those Facts.

In the alternative, if the trial court could inquire outside the clear and unambiguous terms of the deeds, then the “nature and situation of the property subject to the easement, and the manner in which the way has been used and occupied[.]” should be considered. *Evich*, 33 Wn.2d at 162; *Standing Rock*, 106 Wn.App. at 241(citing *Rupert*, 31 Wn.App. at 30-31).

The intent of the grantor in creating this easement was to allow the heirs to access their property. (Ex 10-14) The properties over which the easement runs originally belonged to a farm. (1-17-07 RP 4) The property been used continuously as a farm from the mid 1950s to present. (6-20-07 RP 4) The farm had cows and horses that historically had access to the easement area. (6-20-07 RP 65, 164, CP 161-163).

Gates. As previously stated, it is undisputed that the cows and horses historically exhibited a tendency to come onto the access road so all four (4) of the subject gates were erected long before the property was distributed to these heirs. The gates provided a dual purpose: 1) to restrict the movement of the cows and horses among the various sections of the farm; and, 2) to prevent trespassers from entering the property.

The gates provided a dual purpose: 1) to restrict the movement of the cows and horses among the various sections of the farm; and, 2) to prevent trespassers from entering the property.

As stated above, the question of the gates and or their removal has dogged this case and while the trial court was explicit in its oral opinion that all but one of the gates should come down (8-1-07 RP 148), for some reason that issue escaped the Findings of Fact and Conclusions of Law. Only Finding of Fact 12 addresses any of the gates directly indicating that the lower gate (gate 1) was sufficient to deter trespassers. (CP 323) Perhaps that Finding of Fact was calculated to imply that the other, interior gates were not necessary? The answer to that question is unknown. However, it is clear that the court never formally ordered that the gates be removed, despite its clear oral expression of intent on the subject. In light of the court's expression of oral intent on this subject, Appellants are compelled to argue as if the Findings and/or Conclusions properly captured the court's intention on this subject.

The owner of the servient estate has the right to use its own property as it desires, as long as that use does not unreasonably interfere with the dominate estate's deeded use. *Standing Rock*, 106 Wn.App. at 241; *Rupert*, 31 Wn.App. at 31. Furthermore, the servient estate cannot be subjected to a greater burden than originally contemplated in the deed. *Id.* Clearly the function of Mr. Hurd is a significant and improper burden upon the owners of the servient estates.

Washington has long held that the owner of the land over which an easement runs “may erect and maintain fences, bars, or gates across or along the easement way” based on the intention of the parties creating the easement. *Standing Rock*, 106 Wn.App. at 241(citing *Rupert*, 31 Wn.App. at 30-31; *Evich v. Kovacevich*, 33 Wn.2d 151, 162, 204 P.2d 839 (1949).

It is well established that a servient estate may install gates, fences, or bars as long as those gates, fences, or bars do not unreasonably interfere with the dominant estate’s right to use the easement within its scope. *Standing Rock*, 106 Wn.App. at 241; *Rupert*, 31 Wn.App. at 31. Here it is not even a question regarding the propriety of installing gates; rather it is a question of whether gates that pre-existed the creation of the easement should be removed. By removing the gates the servient estates would be subjected to a greater burden than originally contemplated when the easement was created.

Ardith and Delores have cows on their properties and Romaine does not care if the cows go upon her property. (6-20-07 RP 65, 164) By removing gates, Ardith, Delores, or Romaine would be unable to restrict the cows to a desired area and the cows no longer would be able to escape the flooding pastures or use the easement road for additional grazing area. In the summer, they would no longer have access to the shade available on Romaine’s property. (6-20-07 RP 164, 169-170)

It also cannot now be contested that all the parties agree that trespassers need to be discouraged. Leaving the gates in their original locations would continue to discourage trespassers, perhaps even more than the potential solution of removal of two (2) of the gates-i.e.by removal of those two (2) gates, the burden of ingress and egress on the trespasser is lessened as opposed to when there are three gates to control access. This issue impacts Ardith to a greater extent as she is the only resident on the properties. During the pendency of this matter at the Superior Court level, in recognition of the trespass problem, Dennis and Marsha constructed a new gate past gate 4 on their land with a sign indicating “no trespass;” however, this gate only protects the section of the road on their properties. (1-19-07 RP 106)

Leaving the gates in the same locations and configurations as they were at the time of distribution would not create any unreasonable interference for the dominant estates beyond that clearly contemplated at the time of creation of this easement. There are no facts that would support the court’s modification of historical usage and its ruling was an abuse of discretion.

Maintenance. As stated above, the issue of maintenance was not addressed in the easement. Maintenance was done in part by all of three

sisters, Ardith, Romaine and Delores² but primarily Ardith as to the three (3) properties. 8-1-07 RP 31-32 Mr. Hurd testified that the lay of the road and the condition of the road in the summers of 2006 and 2007 was pretty much the same as it was upon creation of the easement. (6/21/07 RP 85) He testified that it was a “fair weather” farm road. (6/21/07 RP 35-36) Mr. Hurd also testified that he never had to engage his 4 wheel drive to get up the road, a medium size RV would be able to negotiate the road, he saw evidence of digging on the toe of an uphill slope that was not advisable, and he saw evidence that saplings and brush were simply pushed back from the right of way (both acts allegedly performed by Dennis according to the Appellants). (6/21/07 RP 38-42, 88). In other words, the need for the maintenance contemplated by Dennis and Marsha relating to the original scope of the easement was nonexistent.

For whatever reason, the trial court clearly felt that the road needed additional maintenance to be supervised by Mr. Hurd. (8-21-07 RP 139-150, CP 325) In addition, the court ruled that the properties had reduced merchantability so long as livestock was present on the road. (CP 322) That ruling was not supported by the evidence. Mr. Hurd testified that he

² Dennis and Marsha also provided maintenance but the value of that maintenance is disputed as their “maintenance” caused waste of trees

never had a problem with the livestock in his multiple trips up the road.
(6/21/07 RP 64-65).

The road was never intended to be anything more than a farm road in the condition of a farm road and the maintenance “solution” imposed by the court was clearly an expansion of the scope of the easement and the burden upon the servient estates.

The case of *Lowe v. Double L Properties, Inc.*, 105 Wn.App. 888 (2001) addresses comparable maintenance issues. Despite the fact that maintenance obligations had been established in a prior suit, the trial court modified that maintenance ruling. *Id.* at 896. That decision was reversed for “abuse of discretion” in modifying maintenance conditions without finding any facts to support the modification. *Id.* at 896.

Here, as in *Lowe*, the trial court imposed a substantial burden on the servient estates by imposing its ruling regarding Mr. Hurd to determine easement maintenance, repair and allocation of costs. There were no facts to substantiate this ruling other than Dennis and Marsha’s desire to perform easement maintenance and repair and their erroneous belief that maintenance on the easement was their right.

In *Colwell v. Etzell*, 119 Wn.App. 432, 81 P.3d 895 (2003) plaintiffs filed suit claiming that Etzell interfered with their easement by repairing the easement road. The court found that Etzell owned the land

upon which the easement was located. *Id.* at 439. In making its ruling, the court cited the boilerplate principle that the owner of the land that the easement transverses, the servient estate, can use and maintain the land for whatever purpose so long as that use does not interfere with the easement owners rights. *See Id.* at 439-40. The court also found that since the easement deed did not mention maintenance, Etzell could perform maintenance on the easement to protect his property. *Id.* at 440.

Here, as in *Etzell*, Appellants have the right to protect their property. Ardith did perform maintenance along the easement by cutting back the blackberry bushes and other limbs that would grow out into the road. (8-1-07 RP 31-32) Romaine and Delores actually requested that Ardith perform maintenance along their easement frontages. (6-20-07 RP 31) None of the Appellants ever gave Dennis permission to perform maintenance along their sections of the easement, largely due to the fact that Dennis destroyed trees on the edge of the easement and beyond the easement on the private property of the parties.

In addition, there was no evidence presented on behalf of Dennis and Marsha that showed any lack of maintenance prevented them from accessing their properties.

Once again, the trial court's ruling requiring Mr. Hurd to assess the maintenance needs and then assign financial costs to the parties is beyond

the scope of the original easement, and is manifestly unreasonable and untenable.

Fences and Cows. Fences and cows also were not mentioned in the original deed-despite (or more likely because of) the fact that cows had been run throughout the property prior to the creation of the easement. (Ex. 10-14) As stated above, this property historically was a farm with cattle and horses. Fences, in conjunction with the gates, were used to restrict the movement of animals to specific areas, one area being the easement road.

It was error of law for the court to contradict the unambiguous deed in constricting the use of their land by the servient estate owners by requiring lateral fencing along the easement frontage.

RCW 16.60.030 and .040 speak to fences between landowners. An easement holder is not a landowner and the status of an easement never rises to the status of fee ownership. *See Hayward v. Mason*, 54 Wash 649, 104 P. 139 (1909). Therefore, the trial court committed error of law by concluding that the easement should be fenced to keep the cattle off the easement.

In addition, it was an abuse of discretion to impose fencing obligations upon the servient estate owners when that requirement was not compatible with the historical use of the easement; where there was

minimal evidence that the cattle unreasonably interfered with the dominant estate's use of the easement; and where fencing obligations would create a greater burden on the servient estates than originally contemplated. *See Thompson v. Smith*, 59 Wn.2d 397, 411, 367 P.2d 798 (1962) (Mallery, J. dissenting – common practice to pasture stock in easements does not interfere with the easement because those uses are compatible as a matter of fact).

Error to Expand the Scope of this Easement without Requiring Payment of Just Compensation.

RCW 8.24.010 gives an adjacent property owner the right to “condemn” a “private way of necessity” as necessary for the “proper use and enjoyment” of the condemnor’s land. This statute has been used to expand the scope of an easement. *Brown v McAnally*, 97 Wn.2nd 360, 644 P.2d 1153 (1982) RCW 8.24.030 provides that “just compensation [and] reasonable attorneys’ fees and expert witness fees” be paid to the condemnee by the condemnor.

In this case the scope of an easement for a farm road has been expanded to exclude livestock that have historically roamed the easement, to remove gates that have historically been upon the easement-all for the purpose of enhancing Darrin and Marsha’s contemplated usages of their properties for logging, development, and recreational pursuits. Expansion

of the scope of this easement without payment of just compensation, attorney fees and expert witness costs was improper and a complete denial of statutory rights.

Error to Grant an Injunction without a Showing of Actual and Substantial Injury.

Marsha and Dennis originally sued for an injunction. (CP 1-19) In order to prevail on injunction, plaintiff must show actual and substantial injury. *Brown v. Voss*, 105 Wn.2d 366, 372-73, 715 P.2d 514 (1986). Marsh and Dennis claimed that Ardith and Romaine interfered with the easement, committed waste on the easement, and trespassed on the easement. (CP 1-19) These allegations were extended to Delores upon the motion to intervene. (CP 51) Darrin and Marsha cannot show an actual and substantial injury as to interference, waste, or trespass.

Darrin and Marsha claimed that the gates and cows interfered with their access to their property. However, at trial they never once testified that they were unable to access their property. Never once did they testify that they could not open and close the gates. They only contended that it was inconvenient for them to open and close the gates (which were present on the road before the easement was created). Mere inconvenience does not constitute unreasonable interference. *See Steury*, 90 Wn.App. at 406; *see also Rupert*, 31 Wn.App. at 32. Consequently, Respondent's mere

inconvenience does not constitute substantial injury as required to prevail on an injunctive suit. *Id.*

Darrin and Marsha further claimed interference due to a lack of maintenance. Once again, the servient estate owns the property over which the easement traverses. *Colwell*, 119 W.App. at 439. The servient owners can also use their property as they see fit provided that use does not unreasonably interfere with the dominant estate's rights as stated in the deed. *Standing Rock*, 106 Wn.App. at 241; *Rupert*, 31 Wn.App. at 31. Not only did testimony showed that Ardith and others mowed the vegetation and cut back the other flora that would encroach on the easement, Dennis and Marsha never showed that the vegetation prevented them from accessing their properties and therefore showed no substantial injury. Impact upon guests and their RVs was never contemplated within the original scope of the easement as an access farm road.

Dennis and Marsha claimed that their sisters were committing waste and trespass on the easement. The applicable statute, RCW 4.24.630, contains three elements necessary to establish waste and trespass: 1) going onto the land of another, 2) wrongfully committing unreasonable acts, and 3) that cause waste or injury to the land or other property. RCW 4.24.630(1); *Colwell*, 119 Wn.App. at 437-42 (discussing RCW 4.24.630). Here, the servient estates owned the property. A person

cannot commit waste or trespass on their property. *See Colwell*, 119 Wn.App. at 439; *see also Standing Rock*, 106 Wn.App. at 241-42;

Trespass is “intentional or negligent intrusion onto or into the property of another.” *Mielke v. Yellowstone Pipeline Co.*, 73 Wn.App. 621, 624, 870 P.2d 1005 (1994). This intrusion encompasses misuse, overburdening, or deviation from the terms of an easement. *Id.* Again, the servient estate owns the property over which the easement runs, so it is not possible for the owners of the servient estates to commit waste and/or trespass upon the easement.

Further, no evidence was presented that Ardith, Delores, or Romaine “wrongfully committed unreasonable acts” that impacted the dominant easement in a substantial or material way-especially when the historical usage of the easement is considered.

Error to Grant an Injunction to a Party Coming Before the Court with Unclean Hands.

An injunction is an equitable proceeding. *See Brown v. Voss*, 105 Wn.2d at 372. It is a long standing and well known maxim that a person “must come to equity court with clean hands[.]” or that person may be excluded from an equitable remedy. *Income Investors v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940).

Marsha and Dennis failed to include all necessary parties in their original lawsuit-Delores Darrin. The estate division gave the siblings certain property and an easement to access their property. Dennis Darrin, one of the original estate administrators, and Marsha Camus both knew Delores Darrin owned property that the easement traversed. In addition, Dennis actually wrote letters to all of the Appellants stating he was going to perform maintenance on the easement and demanding the removal of gates and obviously knew of the interest and standing of Dolores. (Ex. 1-4, 18) Despite these facts, Delores Darrin had to intervene in order to protect her rights; otherwise any litigation affecting the easement could very well estop her in future litigation regarding her interests.

Had Dennis and Marsha conducted a reasonable inquiry into the law of easements, they would have known that servient estates own the property and that they can install (or maintain) gates to protect their property. *Standing Rock*, 106 Wn.App. at 241; *Rupert*, 31 Wn.App. at 31. This was specifically communicated to them by Frank Fransicovich the attorney for the Estate. (Ex. 2.)

Further, the parties here were all raised on the farm. They were experienced as to the farm road and how to interact with livestock. It seems apparent that Dennis and Marsha did not conduct a reasonable inquiry here and consequently the inference of unclean hands arises.

Further, due to the letters between Dennis and Mr. Franciscovich, Dennis and Marsha should have known that they could not perform maintenance on the road. (Ex. 2)

The evidence shows that Dennis and Marsha were the ones that committed both waste and trespass. The testimony showed that Dennis Darrin pushed over saplings, brush, and even a tree that were on the easement and that easement is situated on the servient estates. The testimony also showed that he moved dirt on the easement. The testimony shows that Marsha Camus was present while Dennis Darrin was accomplishing these acts. While Dennis and Marsha may have had the right to use the easement for ingress and egress, that does not protect them from committing waste and/or trespass to the holders of the servient estates underlying the easement. *Fradkin v. Northshore Utility Dist.*, 96 Wn.App. 118, 123, 977 P.2d 1265 (1999). Dennis and Marsha's actions show unclean hands and are obvious violations of RCW 4.24.630.

In addition, the lack of Marsha and Dennis' good faith is demonstrated by their clear violation of the timber trespass statute. RCW 64.12.030 states that a person may not go on the land of another and cut, girdle, or injure trees, timber, or bushes. While most claims under RCW 64.12.030 involve valuable timber, other causes of action such as damage to shrubs, other vegetation, and emotional distress are compensable. *See*

id. Here Dennis and Marsha damaged shrubs and trees on the servient estates. There can be no argument Dennis and Marsha violated RCW 64.12.030-even if proof of damages is problematical. The statute is punitive in nature. *Birchler v. Castello Land Co., Inc.*, 122 Wn.2d 106, 110, 942 P.2d 968 (1997).

At the very least, timber trespass by Dennis and Marsha is additional evidence of their unclean hands and lack of good faith in bringing their complaint.

Error to Allow the Considerable Burdens set forth in the Findings of Fact and Conclusions of Law to Run with the Land.

The trial court ordered that the Findings of Fact and Conclusion of Law would run with the land. (CP 345-347) The burdens imposed by the court as to maintenance through a third party with court oversight, fencing, restrictions on livestock, and presumed removal of gates will exist in 50 years when the parties of this case no longer are on the land.

The error in this is two-fold as it impacts the current merchantability of the land and the future use of the land. Ardith, Delores, Romaine are disproportionately impacted by the change in the deed as their servient land bears the restrictions. It was described how important the use the land was to the farm. (6-20-07 RP 191-199) This will decrease the value of the land as to farming as the Order's expanded

easement impacts the owner financially. As previously described in this brief, this is a form of taking without compensation.

It also creates a substantial burden on future owners which is unnecessary and well beyond the scope of equitable relief. The trial court appears to have fashioned a remedy based on the interpretation of an unhappy familial connection (321-327). However, this assumption will not last beyond these owners creating a large cost for future owners.

ATTORNEY FEES

Generally, a party must (1) prevail on appeal and qualify for an award under a (2) contract, (3) statute, or (4) recognized ground in equity. Washington State Bar: Appellate Practice Deskbook (2005), Chapt. 26 “Attorney Fees and Sanctions on Review”, page 26-2

There is no contract between the parties. The Court should allow fees under both statutory and equitable relief. See above pages 19-20 for statutory basis.

CONCLUSION

The trial court’s conclusions of law are manifestly unreasonable and untenable. Based on the facts of this case and the law of easements, the trial court should have found that the plain language of the easement deed is controlling. As such, the dominant estate only has the rights of ingress, egress, and utilities.

Even considering other matters outside the four corners of the easement deed, the court should have come to the same conclusion. Any other finding creates an undue burden on the servient estates. Therefore, the gates should remain and be used as historically shown, the cows should be allowed to roam as historically shown, no fences should be required along the easement, and the servient estate owners should perform the maintenance.

Furthermore, the trial court's conclusions of law regarding Mr. Hurd create an undue burden on the servient estates not contemplated at the time of the easement grants. Closely following that argument is the point that the trial court's decision in this matter essentially modified and expanded the scope of the original easement and ignored the requirements that just compensation be paid, as well as attorney fees and expert witness costs, as required under Ch. 8.24 RCW.

Finally, requiring that the Findings of Fact and Conclusions of Law be filed directly affects the merchantability of the properties. It creates uncertainty regarding future transactions. This is in direct opposition to the concept of free alienation of land.

The Appellants, Delores Darrin, Ardith Christensen, and Romaine Culpepper respectfully request that this court reverse the Superior Court's

judgment, remand with directions to follow its opinion, and award the appellants attorney fees and costs at trial, on appeal and on remand.

Dated: April 17, 2009

Respectfully Submitted,

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Attorney for Appellant/Defendant Intervenor Delores Darrin

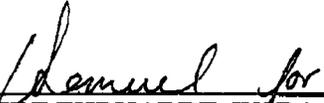
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

1 ROMAINE C.CULPEPPER, et al,
2 Appellants, Cross - Respondents,

3 vs.

4 MARSHA Y CAMUS, et al,
Respondent, Cross – Appellants.

NO. 37441-1-II

CERTIFICATE OF SERVICE

5 I certify that on the 17th day of April, 2009 I caused a true and correct copy of the
6 following documents

7 Trial Brief
8 Verbatim Report of Proceedings
August 14, 2006
9 January 17-19, 2007 April 19, 2007
June 19-21, 2007 August 1, 2007
10 January 30, 2008 April 24, 2008

11 to be personally served upon the following:

12 Counsel for Respondent / Cross Appellant
13 Benjamin Winkelman
14 Parker, Johnson, & Parker, P.S.
813 Levee Street
PO Box 700
Hoquiam WA 98550

15 Signed at Montesano, Washington on April 17, 2009.

16 

VINI E. SAMUEL, WSBA #27186

CERTIFICATE OF SERVICE

VINI ELIZABETH SAMUEL
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STATE OF WASHINGTON

BY _____

COURT OF APPEALS NO. 37441-2-II

**DECLARATION RE SIGNATURE ON
BRIEF**

ROMAINE C. CULPEPPER, et. al.,
Appellants/Cross-Respondents,
vs
MARSHA Y. CAMUS, et. al.,
Respondents/Cross-Appellants.

I, Jeffrey D. Stier, am over the age of eighteen (18) years and I am competent to make the following Declaration to my best information and belief:

1. I am the attorney for Romaine Culpepper, an Appellant in this case.
2. I submit this Declaration to clarify my intent regarding my signature on Appellants' Brief filed in this matter on April 17, 2009.
3. As all Appellants were authorized to file a single brief, substantial coordination was necessary to obtain three (3) attorneys' input on the substance and form of the brief. This matter was complicated by the fact that two (2) attorneys worked out of Montesano and I work out of Olympia. A substantial amount of coordination was carried out by e-mail.
4. Final tasks were divided as follows: Vini Samuel would send me final brief on April 17, 2009. I would sign for all counsel and travel to Tacoma to file the brief that day. Ms. Samuel would effect service of the brief on opposing counsel on April 17, 2009.

DECLARATION RE SIGNATURE ON BRIEF

Page 1

ORIGINAL

5. Although I left for Tacoma in plenty of time to get the brief filed well before 5pm, I ran into a traffic jam due to two (2) overturned trucks at the Tacoma Dome and it took me one and a half (1 ½) hours to get from Olympia to Tacoma.

6. Knowing that I would not get to Tacoma in time to file the brief by 5 PM I asked Ms. Samuel to e-mail the brief to my Tacoma office and filing would be effected by Tacoma staff. As no attorney was present in that office when I called, I called Ms. Samuel to call the Court of Appeals to make arrangements for her to sign the final brief for all counsel. She made those arrangements and apparently faxed the signature page to the Court on April 17.

7. I certify that I gave Ms. Samuel full authority to sign for me on this brief. We communicated closely about the brief in its development and I was aware of all revisions prior to finalization. I adopt her signature for me on this brief.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of April, 2009.

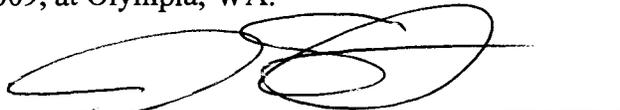


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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I mailed a copy of the attached document by depositing the same in the U.S. Mail, Postage Prepaid, addressed to the following attorney of record in this matter. On this date I e-mailed a copy of this document to co-counsel, Vini Samuel and Robert Ehrhardt.

DATED this 18th day of April, 2009, at Olympia, WA.



JEFFREY D. STIER, WSBA No. 6911

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