

COURT OF APPEALS  
DIVISION II

NO. 41448-1-II

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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
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PETER T. LITTLEFAIR,

Appellant,

vs.

DAVID M. SCHULZE, ET AL.,

Respondents.

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RESPONDENTS' BRIEF

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## I. INTRODUCTION

The Respondents David and Elaine Schulze (Schulze) built a fence along side a private road (Gordon Road) that runs through their property. Although the fence does not interfere with his use of Gordon Road, Peter Littlefair (“Littlefair”) contends the fence must be torn down simply because it lies within a 40-foot-wide easement area. But because the fence does not interfere with the historical use of Gordon Road, the trial court’s decision should be upheld.

Littlefair also argues, for the first time on appeal, his right to use Gordon Road springs from a fee simple rather than from an easement interest. Littlefair contends this fee simple interest means he has an absolute right to use and occupy the entire 40-foot strip of land shown on the plat-map.

Littlefair and Schulze acquired their respective parcels in reference to a subdivision plat-map. This plat describes Gordon Road as a private road that runs across a portion of Schulze’s property. Neither the conveyance documents (the deeds) nor the plat describe Gordon Road as a separate parcel.<sup>1</sup> These instead show the developer intended to create an easement across the various parcels and not, as Littlefair contends, a fee

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<sup>1</sup> There is no homeowner’s association and the County has certainly never recognized this strip of land as a separate parcel.

simple interest in Gordon Road.

Littlefair also wants this Court to overturn the well-established law of easements that a servient estate owner may use an easement area for any purpose that does not interfere with the proper enjoyment of the easement. Littlefair instead wants this Court to rule that servient owners are absolutely prohibited from doing anything within an easement area, regardless of whether that use interferes with the dominant estate holder's use of the easement. This Court should reject Littlefair's invitation to change the law.

Finally, Littlefair contends that, under Skamania County's land-use code, any improvements within an easement area, even those that don't interfere with the use of the easement, constitute a nuisance *per se*. Under the law, a nuisance is defined as a substantial and unreasonable interference with the use and enjoyment of land. Because the Schulze's fence does not interfere with Littlefair's use of the easement, it cannot constitute a nuisance.

## II. STATEMENT OF ISSUES<sup>2</sup>

1. An appellant cannot raise issues on appeal that were not raised before the trial court. Littlefair argues on appeal that he has a fee

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<sup>2</sup> Littlefair has chosen to describe an almost unmanageable number of "Issues" and "Assignments of Error," especially considering the simple nature of this case. Schulze therefore consolidates their arguments to address the Appellant's myriad issues.

simple, rather than just an easement, interest in Gordon Road. He also argues that a local Ordinance required the road to have a 30-foot-wide surface and at least two (2) lanes. But he did not argue either of these claims before the trial court. Can Littlefair raise these new issues on appeal?

2. When one acquires a lot within a subdivision, he or she acquires an easement over those roads shown on the plat map. The developer recorded a plat showing Gordon Road as a “private road” that runs across certain lots within the subdivision. Does the Appellant have an easement or fee simple interest in Gordon Road?

3. Trial courts have broad discretion to determine whether a servient owner’s use of their property unreasonably interferes with the dominant owner’s easement rights. Judge Altman determined, after a trial that included a site visit, Schulze’s fence did not interfere with Littlefair’s use of Gordon Road. Did the trial court abuse its discretion?

4. Skamania County’s 1971 subdivision ordinance sets certain width, blacktop, and lane requirements for **public roads**. Do these public road standards apply to private roads and driveways?

5. Skamania County’s zoning ordinance prohibits the construction of improvements within “an easement.” Judge Altman found the Respondents’ fence did not encroach upon, or interfere with the use of,

Gordon Road. Did the trial court abuse its discretion when it found that the zoning ordinance did not require removal of Schulze's fence?

6. A nuisance is "an unreasonable interference" with another's use and enjoyment of their property. The trial court determined that Schulze's fence did not unreasonably interfere with Littlefair's ability to use Gordon Road. Did the trial court abuse its discretion when it found that the Respondents' fence did not constitute a nuisance?

### **III. STATEMENT OF THE CASE**

#### **A. Pleadings.**

Littlefair sued Schulze for ejectment and nuisance.<sup>3</sup> He alleged the Schulze's fence that was built alongside Gordon Road (on the north side of the road), was prohibited because it was within the 40-foot-wide "easement area" depicted on the Plat.<sup>4</sup> Littlefair also complained Schulze had used the opposite shoulder of the road (the south side) to park vehicles and to store a deck of logs.<sup>5</sup> He also alleged Mr. Schulze had damaged the road by using heavy equipment to grade and plow snow.<sup>6</sup> Littlefair asked for an injunction to require the Schulze to remove the fence and deck of logs, and for money damages, including the rental value of the disputed

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<sup>3</sup> CP 1-5.

<sup>4</sup> CP 3.

<sup>5</sup> CP 1-5.

<sup>6</sup> CP 4-5.

area.

Schulze admitted Gordon Road was a 12-to-14-foot-wide private road located within a 40-foot-wide easement that ran across their property as shown on the Foster's Addition plat. They also admitted that Littlefair had a right under the easement to use the road to access his two parcels.<sup>7</sup> The Schulze denied, however, that they had damaged or interfered with Littlefair's use of Gordon Road.<sup>8</sup> Schulze also counterclaimed that Littlefair had missed the easement.

**B. Trial.**

Judge Brian Altman held a two-day trial, which included a view of the properties, and gave his oral ruling on August 12, 2010.<sup>9</sup> He permitted Schulze to keep the fence but ordered that the south shoulder be cleared of any personal property. He denied the remainder of Littlefair's and Schulze's counterclaims. His decision was converted into formal Findings of Fact and Conclusions of Law on October 14, 2010.<sup>10</sup>

**C. Foster Addition Subdivision.**

The "Plat of Foster Addition" subdivision was created in 1977.<sup>11</sup>

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<sup>7</sup> CP 6-28.

<sup>8</sup> CP 9.

<sup>9</sup> RP 1-2; 25.

<sup>10</sup> CP 60-65.

<sup>11</sup> Ex. 1.



The subdivision is served by Gordon Road, which is shown as a private road that runs across the southern 40 feet of Lots 3 through 11.<sup>14</sup> The purpose of the easement is for ingress, egress, and utilities for the various lots.<sup>15</sup>

Gordon Road was a single lane gravel road in 1980 when the Schulzes purchased Lot 8.<sup>16</sup> Schulze cleared the brush from alongside Gordon Road and regularly maintained the road in that condition.<sup>17</sup> Only two parcels exist beyond the Schulze parcel which means less traffic crosses over that portion of the road than crosses over their parcel.

Those portions of Gordon Road (*i.e.*, the portion of the road that was actually graveled, travelled, and used) that run across the Schulze's parcels (Lots 8 and 9) have always been approximately 12 to 14 feet wide.<sup>18</sup> While two vehicles can pass one another, Gordon Road has historically only been a one-lane roadway, especially when it crosses over the Schulze's parcels.<sup>19</sup> Jacob Allen (Allen) testified that he lived on

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<sup>14</sup> Ex. 1.

<sup>15</sup> *Id.*

<sup>16</sup> RP 135.

<sup>17</sup> *Id.* Exhibit 44 is a picture taken in August of 1994 that depicts the width of Gordon Road as it crosses the Schulze's property.

<sup>18</sup> RP 141.

<sup>19</sup> RP 139-141. Judge Altman specifically found that the road provided sufficient room

Gordon Road for approximately ten years, from 1999 through 2009.<sup>20</sup>

During that time, Allen testified that Gordon Road was never a big road and was “a little wider than one lane.”<sup>21</sup> Allen further testified that the width of the road never changed while he lived there.<sup>22</sup>

The Schulze built a fence along the north side of Gordon Road in order to fence in their pasture.<sup>23</sup> Although the fence is within the 40-foot easement area, it does not project into the travelled portions or shoulder of Gordon Road.<sup>24</sup> Indeed, Judge Altman specifically found that the fence did not interfere with the “historical use” of the road.<sup>25</sup> Further, the utilities are located south of the fence, adjacent to Gordon Road.<sup>26</sup>

The fence installed by the Schulze in 2007 replaced a fence that had been there for many years.<sup>27</sup> The new fence was placed about four (4) to five (5) feet closer to Gordon Road.<sup>28</sup> In fact, Mr. Schulze testified that

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for cars to pass one another. CP 62.

<sup>20</sup> CP 35-36.

<sup>21</sup> CP 36.

<sup>22</sup> CP 38.

<sup>23</sup> RP 142.

<sup>24</sup> RP 141-142.

<sup>25</sup> CP 62.

<sup>26</sup> RP 144.

<sup>27</sup> RP 168.

<sup>28</sup> *Id.*

he removed trees when he installed the new fence.<sup>29</sup> In other words, Schulze simply put the new fence where trees had been growing alongside Gordon Road.

The Schulze were the only parties that performed maintenance on the road – including adding gravel and removing snow during the winter for the benefit of the entire subdivision.<sup>30</sup> And, Schulze testified, there was no crown on the road and that the ruts are caused by “frost upheaval.”<sup>31</sup> Allen, a former neighbor, testified that he actually encouraged Mr. Schulze to plow the road.<sup>32</sup>

The Schulze had stored some logs along the south shoulder of Gordon Road.<sup>33</sup> Judge Altman found that because this “log deck” prevented two (2) cars from passing each other, the logs did interfere with the easement.<sup>34</sup> Judge Altman therefore ordered the Schulze to not store any logs or personal property, or otherwise park any vehicles, along the south side of Gordon Road.<sup>35</sup> Judge Altman determined that this was

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<sup>29</sup> *Id.*

<sup>30</sup> CP 137-140; CP 173-174.

<sup>31</sup> CP 173-74; 155-56.

<sup>32</sup> CP 44 (He testified that he provided the Schulze with a fruit basket to express his appreciation).

<sup>33</sup> RP 147-148; 151-52.

<sup>34</sup> CP 63.

<sup>35</sup> CP 64.

sufficient to allow Littlefair full use of Gordon Road.<sup>36</sup> Surprisingly, there was testimony about other neighbors keeping logs in the road but Littlefair has never objected to their storage.<sup>37</sup>

Judge Altman also found that the Schulze had not abused or damaged Gordon Road by plowing or scraping the roadway and seemed to reject both side's claim that the other was driving too fast.<sup>38</sup>

#### IV. ARGUMENTS

##### A. Standard of Review---Abuse of Discretion/Substantial Evidence.

Appellate review of a trial court's findings of fact is reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true.<sup>39</sup> Under that standard, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently.<sup>40</sup> The only question is whether substantial evidence supports the trial court's finding.<sup>41</sup> Accordingly, appellate courts must accept the trial court's "views regarding the credibility of witnesses

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<sup>36</sup> CP 63-65.

<sup>37</sup> CP 152.

<sup>38</sup> CP 63-65.

<sup>39</sup> *Rogers Potato Serv., LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004).

<sup>40</sup> *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-90, 73 P.3d 369 (2003).

and the weight to be given reasonable but competing inferences.”<sup>42</sup> This is just not a counting of the witnesses—a trial court’s finding will be upheld if there is evidence to support the conclusion.

The following issues were questions of fact for which the trial court can only be overturned if there is no evidence to support the findings:

1. The original grantor intended to create an “easement” rather than a fee simple interest in Gordon Road;
2. The Schulze’s use of the easement area (building a fence or storing a deck of logs) unreasonably interferes with Littlefair’s use of Gordon Road;
3. The Schulze’s fence constitutes a nuisance; or
4. The Schulze unreasonably damaged Gordon Road.

On the other hand, conclusions of law and questions of law are reviewed *de novo*.<sup>43</sup> However, an appellate court may affirm or correct a trial court judgment on any theory, even if the trial court reached its result on some improper basis.<sup>44</sup> In other words, the trial court may be correct, but for the wrong legal reason.

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<sup>41</sup> *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997).

<sup>42</sup> *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993) (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)).

<sup>43</sup> *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d (1979); see also *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (appellate court reviews findings for sufficiency of the evidence, and conclusions *de novo*, regardless of how they are designated).

<sup>44</sup> *Olson v. Scholes*, 17 Wn. App. 383, 391, 563 P.2d 1275 (1977) citing *Fischnaller v.*

Finally, because “a court in equity has broad discretion to fashion a remedy to do substantial justice and end litigation”<sup>45</sup> a trial judge’s equity applications are reviewed for an abuse of discretion.<sup>46</sup> A trial court’s grant or denial of equitable relief (or combination thereof), such as quiet title or ejectment, will therefore only be overturned if it was granted or denied on untenable grounds.<sup>47</sup>

Applied here, Judge Altman’s decision to require the Schulze to remove the log deck, and to not park vehicles on the south side of Gordon Road – but to allow them to maintain the fence outside the historically used portions of the road--should only be overturned if this Court finds that Judge Altman abused his discretion.

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*Sumner*, 53 Wn.2d 332, 333 P.2d 636 (1959).

<sup>45</sup> *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003).

<sup>46</sup> *See Willener v. Sweeting*, 107 Wn.2d 388, 397, 730 P.2d 45 (1986).

<sup>47</sup> *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *See also Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (1968) (“[W]hen an equitable power of the court is invoked, to enforce a right, the court must grant equity in a meaningful manner, not blindly.” A court granting equitable relief is to look at the totality of the circumstances when fashioning a remedy, including denying a legal right when it is equitable to do so. *See Id.* at 152 (“There is no question but that equity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable.”)).

**B. Littlefair Cannot Raise New Issues on Appeal.**

In his appeal, Littlefair has abandoned his original theory of the case – that Gordon Road is an easement – and now, for the first time, wants to argue that Gordon Road is a separate parcel and that each of the lot owners has a divided fee simple interest in the Road.<sup>48</sup> He also argues, for the first time on appeal, that Skamania County Ordinance 1971 required all private roads to have a minimum roadway width of 30 feet and to be at least two (2) lanes.<sup>49</sup> But he can't raise these issues on appeal—he waived them when he did not raise them at trial.

With limited exceptions, RAP 2.5 permits an appellate court to not review claims unless they were raised before the trial court.

“A contention not advanced below cannot be urged for the first time on appeal for the purpose of reversing the judgment appealed from. The trial court is the proper forum for the initial assertion of all the contentions of the parties so that the parties may, in light of the contentions advanced, make their record and so that the trial court may have an opportunity to rule upon the contentions advanced.”<sup>50</sup>

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<sup>48</sup> Appellant's Rev. Br., pp. 23-27.

<sup>49</sup> Appellant's Rev. Br., pp. 28-30.

<sup>50</sup> *Stratton v. United States Bulk Carriers*, 3 Wn. App. 790, 793-94, 478 P.2d 253 (1970).

Put simply, “[Courts] will not review an issue, theory, argument, or claim of error not presented at the trial court level.”<sup>51</sup>

Littlefair alleged in his Complaint that he had an “easement” to cross Gordon Road.<sup>52</sup> At trial, he argued the Schulze had unreasonably interfered with his use of the “easement.” Littlefair never argued, as he does now, that he actually owns a divided fee simple, rather than an easement, interest in Gordon Road. He also never alleged or argued that Skamania County Ordinance 1971 required Gordon Road to be at least two lanes. This Court should not consider these new arguments or theories on appeal.

**C. Gordon Road Is an Easement.**

Littlefair argues that he (and all of the other lot owners) has a fee simple, and not just an easement, interest in Gordon Road. This unique argument is not only a radical departure from his position before the trial court, it does not find any support in the facts of this case, or the law.

In a wild attempt to convert his easement into a fee simple interest, Littlefair tortures the analysis of several cases. He ignores the well established doctrine that private roads depicted on a plat map, and incorporated into a deed, are considered easements and do not create a fee

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<sup>51</sup> *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001).

<sup>52</sup> Littlefair’s trial brief states that Gordon Road is a gravel roadway located within a 40-foot easement for ingress and egress. CP 46.

simple interest.

“An easement is a property right separate from ownership that allows the use of another’s land without compensation. No particular words are required to constitute a grant; instead, any words which clearly show an intention to give an easement are sufficient.”<sup>53</sup>

Further, “[t]he intent of the plat applicant determines whether a plat grants an easement.”<sup>54</sup>

The deeds in this case incorporate the subdivision plat map.<sup>55</sup>

Easements created by reference to a plat have long been recognized in Washington. Under *Van Buren v. Trumbull*, the intent of the plat applicant must control as evidenced by the plat.

In this case, there is no dispute that the original developer intended for Gordon Road to provide access for the various lots depicted on the plat map. The fact that the Plat depicts both a private road (Gordon Road), and a county road (Foster Road), evidence that the original platter knew exactly what he was doing when he labeled Gordon Road as a private road.

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<sup>53</sup> *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 654, 145 P.3d 411 (2006).

<sup>54</sup> *Id.*, citing *Selby v. Knudson*, 77 Wn. App. 189, 194, 890 P.2d 514 (1995).

<sup>55</sup> 92 Wn. 691, 159 P.2d 891 (1916).

Also, the fact that the developer referred to the easements as a “roadway” or “road” rather than an “easement” is of no legal consequence. Easements created by plat do not require any “magic words” provided the intent of the creator is clear.<sup>56</sup>

Perhaps the most obvious sign of the original developer’s intent is his depiction of Gordon Road as running *through* the various lots. In other words, the parcels (the bold lines on the plat map) do not end at the north edge of what is shown as Gordon Road, they extend through to the south side of the road. The developer did not create a “common area” or show any intent to create a separate parcel for Gordon Road.

All of this runs contrary to any argument that the developer intended to create a fee simple interest in Gordon Road, or that the 40-foot strip of land was intended to be a separate parcel.

The case cited by Littlefair, *Butler v. Craft Eng Construction*, is factually and legally distinguishable as that case involved a fee conveyance of an “undivided one-third fee interest,” and did not include an easement by plat.<sup>57</sup> And *Meresse v. Stelma* actually supports the trial court’s ruling as it relied upon *Thompson v. Smith*, discussed *infra*.<sup>58</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> 67 Wn. App. 684, 688, 843 P.2d 1071 (1992).

<sup>58</sup> 100 Wn. App. 857, 868, 999 P.2d 1267 (2000).

Gordon Road is depicted on the Plat as “private” and is shown to create a means for ingress and egress to the various lots. The face of the map shows Gordon Road running across the various lots – not as a separate parcel of property in which each of the lot owners has a fee interest.

Because the intent of the plat applicant determines whether an easement is granted, and because that intent is obvious from the face of the plat map, the trial court did not err when it found that Gordon Road was an easement. No other interpretation makes sense as there is absolutely no evidence that the original developer intended to create a separate lot out of Gordon Road, or that each of the property owners were to own a fractional fee simple interest in the road.

**D. Schulze’s Fence Does Not Unreasonably Interfere with Littlefair’s Use of Gordon Road.**

1. A servient owner can use the easement area provided his or her use does not interfere with the dominant owner’s use of the easement.

After a full trial, including a site visit, Judge Altman held the Schulze’s fence does not unreasonably interfere with Littlefair’s use of the easement. Littlefair seems to argue that anything that projects onto, or that is found within, the 40-foot-wide easement area must automatically be considered a nuisance. This is contrary to Washington law.

As an initial matter, Gordon Road does not traverse the entire easement area, and never did. As found by the trial court, Gordon Road was initially built to approximately 12 to 14 feet wide as it traverses the Schulze's property. So even though the entire easement area is 40 feet wide, the road itself has never been more than about 12 to 14 feet wide.

There is also substantial evidence that this portion of Gordon Road was always about the same width as it was at the time of trial.<sup>59</sup> There has been no significant change in the use or width of the road since it was initially constructed.

Littlefair argues, without legal authority, that he has the ultimate right to use the entire 40-foot strip of land, and not just the actual or historical roadway. His position is contrary to Washington law and therefore was properly rejected by the trial court.

Washington law states that “[a]bsent actual injury, the court may allow the servient estate holder to intrude into a roadway easement.”<sup>60</sup> The *Thompson* court summarized cases from other jurisdictions and stated that “it is the law that the owner of the property has the right to use his land for purposes not inconsistent with its ultimate use for the reserved

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<sup>59</sup> RP 135; 141. *Rogers Potato Serv., LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004).

<sup>60</sup> *Thompson v. Smith*, 59 Wn.2d 397, 407, 367 P.2d 798 (1962) (where no showing of actual injury, servient estate holder allowed to maintain concrete slab for his cars across a roadway easement).

purpose during the period of nonuse.”<sup>61</sup>

“The rule is that where a right of way is established by reservation, the land remains the property of the owner of the servient estate and he is entitled to use it for any purpose that does not interfere with the proper enjoyment of the easement.”<sup>62</sup>

In *Thompson*, the Court of Appeals ruled that a concrete slab installed by the servient estate owner that was within the easement did not interfere with the use of the road, which was narrower than the actual easement.<sup>63</sup> Because there was no actual interference with the travelled portion of the road, the Court held that the concrete slab could remain until such time as the underlying easement area needed to be used for a road.<sup>64</sup>

So provided Schulze’s use does not unreasonably interfere with the dominant estate’s rights under the easement, he has the right to make use of the entire easement area, including building a fence.

2. The County’s 1971 Road Standards only applied to public roads---it did not govern private roads.

Littlefair also argues that Skamania County’s 1971 Ordinance required all private roads to have a 30-foot-wide paved surface and at least

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<sup>61</sup> *Id.* at 407-08.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 407.

<sup>64</sup> *Id.* at 409.

two (2) lanes.<sup>65</sup> A simple review of the 1971 Ordinance reveals the flaw in Littlefair's argument.

Section 12 provided the general "design standards" for subdivisions until 1981.<sup>66</sup> Sections 12.21 and 12.22 regulated "Subdivision Roads." However, these sections do not purport to regulate the traveled portions of the road, other than they have to be sufficient to provide ready access for fire and emergency vehicles. These sections do not, as Littlefair contends, require a minimum of two (2) lanes or 30 feet of "roadway."

So how does Littlefair get to this point? He skips to the next chapter (Chapter 12.24) of the Ordinance, entitled "County Road Design Standards," and cites to a Table that is only intended to govern public roads.<sup>67</sup>

This chapter plainly applies to "COUNTY ROAD DESIGN STANDARDS" as opposed to private roads addressed in the previous chapter.

A simple review of the Table in Section 12.24 shows that those requirements were never intended to apply to private roads. For example,

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<sup>65</sup> Even Littlefair admits that this argument was not raised before the trial court. Appellant's Rev. Br., p. 28 ("Although never cited by anybody until now...."). This Court should therefore disallow this new argument under RAP 2.5.

<sup>66</sup> See App-7 to Appellant's Rev. Br. (Design Standards for Private Roads).

the Table describes “Local Access” roads (serving under 250 “Average Daily Traffic” or “ADT”), “Secondary and Collector” roads (serving 250 to 400 ADT) and “Major Arterial” roads (serving 200 to 400 ADT). The Table also requires a “Pavement width” of at least 22 feet and a total roadway width of at least 30 feet. It also describes engineering standards only found on roads that are generally used by the public—not private driveways or roads.

Section 12.24 of the 1971 Ordinance was never intended to apply to private roads. To accept Littlefair’s argument would be to require all private roads, regardless of the number of homes or properties it serves, to meet the County Design Standards of having 22 feet of pavement and 30 feet of roadway. This is beyond what Skamania County intended when it adopted “County Road Design Standards.”<sup>68</sup>

3. Judge Altman did not abuse his discretion when he found that the fence does not interfere with Littlefair’s use of Gordon Road.

Sufficient evidence supports Judge Altman’s finding that the portion of Gordon Road that crossed the Schulze’s property was historically limited to a 12 to 14-foot road surface with plenty of room for vehicles to pass each other. After taking testimony, reviewing

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<sup>67</sup> See App-8 to Appellant’s Rev. Br. (County Road Design Standards).

<sup>68</sup> For further evidence of the County’s intent, Skamania County Ordinance 1981-05 and 1986-02 clearly state that “Skamania County does not provide standards for design”).

photographs of the trees alongside the road before the fence was built, and the current configuration that includes the fence, and after conducting his own site visit, Judge Altman determined that Gordon Road had historically been used as a one-lane roadway with sufficient room for cars to pass one another on the road.<sup>69</sup> Judge Altman further determined that Gordon Road was sufficient to serve the purposes of the Easement – to provide vehicular and utility access to Littlefair’s two parcels.<sup>70</sup>

The Court correctly concluded that Littlefair failed to show that the Schulze’s fence interfered with the purposes of the easement. These findings are supported by substantial evidence.

On the other hand, the court did find that the Schulze needed to clear the south edge of Gordon Road. So while the Schulze were allowed to maintain their fence, they were ordered to keep the south side of Gordon Road clear to allow Littlefair reasonable use of the easement. This balanced approach shows the trial court’s careful consideration of the facts and his attempt to provide the parties a meaningful remedy.

The issue is not, as Littlefair contends, whether the fence interfered with the easement area, but whether it *unreasonably* interfered with the use of Gordon Road. The trial court found that the log decks and parking

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<sup>69</sup> CP 62.

<sup>70</sup> *Id.*

of vehicles on the south side of Gordon Road did interfere with the roadway because it limited where two cars could pass, and inhibited snow plowing in the winter.<sup>71</sup> This shows that the trial court balanced the Schulze's reasonable use of their property with Littlefair's right to use the easement. The trial court did not abuse its discretion when it found that the fence does not unreasonably interfere with the roadway.

Littlefair also argues that the utility easement is designed to include a drainage ditch. This argument is totally without merit. The face of the plat expressly states that the five-foot easement is a P.U.D. easement. "P.U.D.", of course, stands for Public Utility District—it does not include a drainage ditch. The trial court properly ruled that the fence does not interfere with the utilities already in place.

But even if the easement includes a drainage ditch, there is sufficient evidence to support Judge Altman's decision that the fence did not interfere with the flow of surface water, or that the south side of the road was not sufficient to meet the drainage problems.

E. **The Trial Court Properly Ruled That the Fence Does Not Constitute a Nuisance.**

The trial court ruled that, because it did not unreasonably interfere with the easement area, the fence did not need to be torn down. Based

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<sup>71</sup> CP 63.

upon this, the trial court concluded that the fence cannot be the basis for an action for damages under the nuisance statute.<sup>72</sup>

Littlefair makes multiple arguments that really boil down to one argument: The fence must be a nuisance because it is located within the 40-foot easement area. As discussed *supra*, the Schulze are allowed to erect a fence within the easement area itself so long as it does not unreasonably interfere with Littlefair's use of the easement. In this case, the question is whether the fence unreasonably interferes with Littlefair's use of Gordon Road.

RCW 7.48 contains the general definition of a nuisance. The statute distinguishes between private and public nuisances. Public nuisances, defined as one which "affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal, are individually listed."<sup>73</sup> Private nuisances are defined by statute as any nuisance that is not enumerated as a public nuisance.<sup>74</sup>

Littlefair alleges that the Schulze have committed a public nuisance, enumerated as RCW 7.48.140(4): "To obstruct or encroach upon public highway, private ways, streets, alleys, commons, landing

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<sup>72</sup> CP 64.

<sup>73</sup> RCW 7.48.130.

<sup>74</sup> RCW 7.48.150.

places and ways to burying places....” RCW 7.48.210 provides that “a private person may maintain a civil action for a public nuisance, if it is specifically injurious to himself but not otherwise.”

Again, in this case, Littlefair asks this Court to assume that the road occupies the entire 40-foot easement area – meaning that nothing can be located within the easement area at all – regardless of whether it interferes with the actual roadway. Such a ruling would require this Court to overrule the Washington Supreme Court’s Opinion in *Thompson v. Smith*. This would not only constitute a substantial change in the law, but would also create an unlimited number of claims.

For example, could grass grow in the easement area, but not on the actual roadway? Could shrubs be planted alongside, but away from, the roadway? Could a drainage ditch be installed alongside the roadway to keep it from washing out? Could one maintain a post office or newspaper box or post a sign marking the address within the easement area? Could one build a bus shelter for kids that was well off the side of the road? Would a fire hydrant installed alongside the road, but within the easement area, be considered a nuisance? Under Littlefair’s argument, all of these would be considered nuisances because they are found within the easement area, regardless of whether they actually interfere with the dominant estate owner’s actual use of the easement.

Moreover, Littlefair's interpretation of the law would have the effect of enlarging or altering the easement in a way that burdens the Schulze's property. The trial court clearly found, and there is no dispute, that the travelled portion of the road does not take up (and never has taken up) the entire 40-foot easement area. In fact, the evidence shows that the Schulze simply replaced the trees that were alongside Gordon Road with a fence, leaving the same area of travel that had historically existed. There is no evidence that the fence changed the width or ability to use Gordon Road.

Despite this, Littlefair asks this Court to put limitations on Schulze's use of the easement area while allowing Littlefair unfettered use of the entire 40-foot-wide easement area. This is contrary to Washington law and would constitute an unreasonable interpretation of what the original developer intended when he depicted a private road across the various lots.

It is also well settled that the owner of the dominant estate (Littlefair) cannot, absent a change in circumstances, enlarge or alter his or her use of the easement in a way that increases the burden on the servient estate.<sup>75</sup> Thus, in determining whether Littlefair's proposed uses would go beyond the scope of the easement, the trial court properly balanced the

parties' respective interests in the disputed area.

Accordingly, because the Schulze's fence did not interfere with Littlefair's actual use of the road, and because Littlefair failed to prove any basis for expanding the scope of the easement beyond what had historically been used, this Court should affirm the dismissal of Littlefair's nuisance claim.

**F. The Fence is Not a Nuisance Per Se as the Trial Court Properly Ruled that the Fence Does Not Violate Skamania County Code.**

Littlefair next alleges the trial court erred in ruling that the fence is a legal fence. Littlefair argues that because it violates Skamania County Code ("SCC") 21.32.050(D)(3) – which purports to prohibit fences within easements – the fence is illegal and must be removed.

Whether the fence is illegal because it violates a county zoning code is not relevant to whether the fence unreasonably interferes with Littlefair's use of Gordon Road.

As Littlefair concedes, zoning ordinances are in derogation of common law and are therefore narrowly construed so as to realize the highest utility of private property.<sup>75</sup> The trial court found that the SCC did not apply, but even if it did, the zoning law was in derogation of the

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<sup>75</sup> *Little-Wetsel Co. v. Lincoln*, 101 Wash. 435, 445, 172 P. 746 (1918).

<sup>76</sup> *Hauser v. Arness*, 44 Wn.2d 358, 370, 267 P.2d 692 (1954).

common law and prevented the Schulze from making the highest and best use of their property. This is because a servient owner still has the right to use the easement area provided his or her use does not interfere with the dominant owner's reasonable use of the easement.

Littlefair recycles the same arguments and states that there is no room for utilities, despite the fact that utilities are already installed, and that the fence prohibits Littlefair from making full use of the easement area. As explained *supra*, this last argument is completely without merit.

As to the County Code's apparent prohibition against any improvements within an easement, the code section does expressly prohibit building and structures from being located within any easement.<sup>77</sup> And SCC 21.08.010(84) defines a "structure" to include "buildings, mobile homes, walls, and fences."

However, the trial court ruled that SCC 21.32.050(D)(3) does not apply because "fences and other structures may exist within easements and Skamania County is laced with easements that have structures on them."<sup>78</sup> While the trial court is correct, there are other good reasons why the ordinance does not apply in this case to prevent the Schulze from maintaining the fence within the easement area.

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<sup>77</sup> SCC 21.32.050(D)(3) states: "No building or structure may be located within any easement."

If taken literally, the County Ordinance would purport to prevent anyone, including the easement holder, from putting a gate across a private road, which courts have long allowed in Washington.<sup>79</sup> Accepting Littlefair's interpretation of the County Ordinance would result in property owners or easement holders not being able to install fences for livestock, fences for driveways, or fences around public property such as pump stations and wells that are designed to protect the public from injury.

Or, what about an easement for a water right? Under Littlefair's argument, a person with an easement to access water on an adjoining property would not be able to build a well, pump house, or even the water lines to access their water rights. Is this really the result intended by Skamania County? Or was it designed to prevent private parties from interfering with the County's right of ways to protect the public?

Counties typically do not regulate private easements or attempt to pass laws that govern private disputes between feuding neighbors over private property rights. While perhaps poorly crafted, the intent was to prohibit private parties from interfering with a public easement, such as a county road or street. In other words, Skamania County intended to prevent adjoining property owners from placing improvements within

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<sup>78</sup> CP 64.

public rights of way to protect the public and county employees from hazards. It cannot mean what Littlefair seeks to argue in this case, that no improvements can be placed within easement areas. Such a result would completely turn on its head what the Washington Supreme Court has held to be the rights of a servient owner.

Reaching a different result would literally result in chaos. People would suddenly be required to remove all improvements within an easement area even though they have never interfered with the use of that easement. This would also create a situation that would be injurious to the public's health, safety, and welfare.

Judge Altman therefore properly ruled that the code section should not apply. His decision should be upheld.

**G. The Fence Does Not Violate the Nuisance Provision in the Foster's Additions Conditions and Restrictions.**

The Foster's Addition Covenants and Restrictions ("CC&Rs") regarding nuisance are extraordinarily broad—so broad in fact that the trial court refused to apply them or find them enforceable. The provision that Littlefair relied upon to try and force the fence to be removed provides that "[n]o noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may or may become an

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<sup>79</sup> *Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888, 894, 20 P.3d 500, *rev. den.*, 145 Wn.2d 1008 (2001).

annoyance or nuisance to the neighborhood.”<sup>80</sup>

Because Judge Altman ruled that the fence does not interfere with Gordon Road, there was no justifiable basis for the Court to find that the fence somehow constituted a noxious or offensive activity, or an annoyance or nuisance to the neighborhood.<sup>81</sup>

The record clearly shows that the fence did not interfere with the dominant estate’s use of the easement. The fence certainly did not rise to the level of being a “noxious or offensive” use of the Schulze’s property, especially when you consider that the Schulze are responsible for, and have paid, the real property taxes for the entire parcel, including the easement area.

Littlefair has full access to his property, including full access to Gordon Road as it has always existed. Thus, the fence cannot be the basis of a nuisance violation under the CC&Rs.

**H. Schulze’s Maintenance of the Road and Storage of Log Decks Did Not Cause Littlefair any economic Damages.**

It is obvious that Littlefair had an ax to grind with the Schulze and wanted to annoy them even though they were the only ones who had

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<sup>80</sup> Article VIII, Nuisances, p. 4 of Foster’s Additions Conditions and Restrictions.

<sup>81</sup> *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999) (“When interpreting a restrictive covenant, [courts] give clear and unambiguous language its plain and obvious meaning.”<sup>81</sup> “Restrictive covenants are designed to make residential subdivisions more attractive for residential purposes and are enforceable by injunctive relief if the claimant shows (1) a clear legal or equitable right and (2) a well-grounded

maintained the road for the entire neighborhood's benefit. Ordinary road maintenance for the benefit of the neighborhood is not a nuisance and Littlefair's claim was properly rejected by the trial court.

Second, the trial court determined that the log decks could interfere with cars passing along the road or cause an interference with snow plowing in the wintertime and therefore ordered that they be removed. Judge Altman further determined that clearing the south side of the road would adequately address Littlefair's concerns about his ability to use the road. But there was no evidence of damages to support Littlefair's claim for a loss in use which made it impossible for the trial court to award money damages.

The trial court instead used its equitable powers to order that the log deck be removed and that the Schulze not stop personal property on that side of the road. Seems like a well reasoned and thoughtful approach to the conflict.

**I. The Schulze are Entitled to Attorneys' Fees and Costs on Appeal.**

Littlefair has sued the Schulzes alleging a violation of the nuisance provision in the Declaration of Conditions and Restrictions of Foster Subdivision. Article XVI of the Conditions and Restrictions contains an

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fear of immediate invasion of that right.”

attorney fee provision that provides for attorney fees to any owner that files suit seeking to enforce or to restrain any violation of the Conditions. The attorney fee provision is not reciprocal; however, under RCW 4.84.330, the Schulze are entitled to their attorney fees.<sup>82</sup>

While the Conditions are dated August 2, 1977, before RCW 4.84.330 took effect, the Conditions did not actually go into effect until the lots were sold, which was after the effective date.

RCW 4.84.330 states that it applies to all contracts entered into after September 21, 1977. While the Conditions were recorded with Skamania County in August 1977, they did not go into effect until the developer sold the lots.

Littlefair and Schulze did not become parties to the contract until after September 21, 1977. For these reasons, RCW 4.84.330's<sup>83</sup> reciprocal requirements apply and entitle the Schulzes to recover their fees on appeal under RAP 18.1.

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<sup>82</sup> RCW 4.84.330 provides in part that “[i]n any action on a contract...entered into after September 21, 1977, where such contract...specifically provides that attorney’s fees and costs, which are incurred to enforce the provisions of such contract..., shall be awarded to one of the parties, the prevailing party, whether he is the prevailing party specified in the contract or lease or not, shall be entitled to reasonable attorney’s fees in addition to costs and necessary disbursements.”

<sup>83</sup> While Schulze cannot locate any case where Division II has addressed this issue, Division III has seemingly ruled that the date when the CC&Rs were filed governs whether the statute applies or not. *Schlager v. Bellport*, 118 Wn. App. 536, 76 P.3d 778 (2003) But since the statute is a remedial statute, and because the parties in this case did not enter into the “contract” until they purchased their lots from the developer after September 21, 1977, the Schulze should be permitted to recover their fees.

## V. CONCLUSION

Under the well established law of easements, a servient estate owner may use an easement area for any purpose that does not unreasonably interfere with the proper enjoyment of the easement by the dominant estate owner. Because Schulze's fence does not interfere with the historical use of Gordon Road, this Court should uphold Judge Altman's decision. And because the CC&Rs went into effect after September 21, 1977, the Court should also award Schulze their attorneys' fees and costs.

Dated: June 29, 2011

S CHWABE, WILLIAMSON & WYATT, P.C.

By: 

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**CERTIFICATE OF SERVICE**

STATE OF WASHINGTON

BY *ca*

I hereby certify that on the 29th day of June, 2011, I caused to be served the foregoing **RESPONDENTS' BRIEF** on the following party at the following address:

George A. Kolin  
PO Box 173  
Washougal, WA 98671-0173

by:

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*Phillip J. Haberthur*  
 Phillip J. Haberthur  
*Bradley W. Anderson*