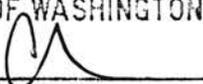


FILED
COURT OF APPEALS
DIVISION II

2012 SEP -7 PM 1:27

STATE OF WASHINGTON

BY 
DEPUTY

NO. 43288-9-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

BART ADAMS,
Appellant,

v.

SHANE DEEN,
Respondents,

AMENDED BRIEF OF APPELLANT

Bart Adams, Attorney for Bart Adams, Appellant
2626 N. Pearl
Tacoma, WA 98407
(253) 761-0141
WSBA #11297

TABLE OF CONTENTS

Table of Contents	i.
Table of Authorities	ii.
I. Assignments of Error	1
I. Issues Related to Assignments of Error	1
II. Statement of the Case	3
IV. Argument	8
Standard of Review	8
Summary Judgment Standard	8
Deen's Title Came From Foreclosure of a Deed of Trust That Did Not Encumber the Adams Parcel	11
Merger of Title Precludes Claim for Express Easement	13
Intent Necessary for Implied Easement Is Not Present	20
Easement by Necessity Also Fails For Lack Of Intent	24
Merged 30 Ft Easement Does Not Determine the Size of Any Easement Granted By Implication Or Necessity	25
IV. CONCLUSION	28

TABLE OF AUTHORITIES

CASES:

<u>Ashton v. Buell</u> , 149 Wash. 494, 271 P. 591 (1928)	23
<u>Bailey v. Hennessey</u> , 112 Wash. 45, 191 P. 863, 864 (1920)	23
<u>Bebe v. Swerda</u> , 58 Wn.App. 375, 793 P.2d 442 (1990)	17, 18 19
<u>Coast Storage v. Schwartz</u> , 55 Wn.2d 848, 351 P.2d 520 (1960)	15
<u>Evich v. Kovacevich</u> , 33 Wn.2d 151, 204 P.2d 839 (1949)	27
<u>Mayer v. Pierce County Medical Bureau</u> , 80 Wn.App 418, 909, P.2d 1323 (1995)	8
<u>Rogers v. Cation</u> , 9 Wn.2d 369, 115 P.2d 702 (1941)	23
<u>Schlager v. Bellport</u> , 118 Wn.App. 536, 76 P.3d 778 (2003)	13, 14
<u>Smith v. Safeco Insurance Co.</u> , 150 Wn.2d 478, 78 P.3d 1274 (2003)	8
<u>Visser v. Craig</u> , 139 Wn.App. 152, 159 P.3d 453 (2007)	10, 21 22, 24
<u>White v. Berg</u> , 19 Wn.2d. 284, 142 P.2d 260 (1943)	22

STATUTES:

RCW 64.04.010	12
---------------	----

OTHER AUTHORITIES

Restatement (Third) of Property (Servitudes) §7.5 (2000)	14
Restatement of Property §497 (1944)	14
Thompson on Real Property 2 nd Ed. §60.04(c)(2)	26
17 William Stoebuck, Wash, Prac., Real Estate Law § 2.12 at 118 (1995)	15
WSBA Washington Real Property Deskbook §10.3(3)(b) Easements and Licenses 10-14 (1997)	20
WSBA Washington Real Property Deskbook §10.3(3)(a) 3 rd Edition (1996)	20, 23

ASSIGNMENTS OF ERROR

- No. 1 The trial court erred in granting a summary judgment determining that the title obtained by Deutsche Bank in foreclosure of a Deed of Trust from Powers to its predecessor included an easement across the Adams parcel.
- No. 2 The trial court erred in ruling that the common ownership of the Adams parcel and the Deen parcel through 5 owners between 1989 and 2009 did not result in a merger of title extinguishing any attempt to create an easement benefiting the Deen parcel and burdening the Adams parcel.
- No. 3 The trial court erred in granting a summary judgment determining that the Deen parcel is benefited by a 30 foot easement across the Adams parcel.
- No. 4 The trial court erred in failing to grant the Adams' cross-motion for summary judgment that requested the Court to rule that the attempt to create an easement benefiting the Deen parcel across the Adams parcel was ineffective because of the doctrine of merger and any such easements were extinguished by the doctrine of merger.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

- No. 1 Could Deutsche Bank receive an easement across the Adams parcel benefiting the Deen parcel when the Deed of Trust was foreclosed granting the bank title did not grant the bank an easement across the Adams parcel?

- No. 2 Does the doctrine of merger of title extinguish an easement burdening one parcel and benefiting another when both parcels are owned by the same party?
- No. 3 If an easement is created by implication or necessity is the size and location of the easement of the easement governed by an the size of a written easement that was ineffective due to merger or by the use made at the time of the event causing an easement by implication or necessity?
- No. 4 Does an easement by implication or necessity arise where the parties intended that no easement arise at severance of two parcels of property?

STATEMENT OF THE CASE

This case arises out of a dispute about the existence of an easement across the northerly 30 feet of property of Appellant Adams benefiting Respondent Deen. The Adams and Deen parcels are contiguous. A map of the two parcels is attached as Appendix A. The Adams and Deen parcels were in common ownership at all times until 2009. They were one parcel until 1985 when the owner of the property created two parcels out of the larger tract of property (CP 51). The two parcels were then transferred together to new buyers by the following deeds:

Fiala to Pierce 1989 (CP 66)
Pierce to Reid 1998 (CP 69)
Reid to Clothier 2003 (CP 72)
Clothier to Powers 2005 (CP 74, 77)

The deed of both parcels from Fiala to Pierce in 1989 included language granting Pierce, the buyer of both parcels, an easement benefitting himself as owner of the Deen parcel and burdening himself as the owner of the Adams parcel. The transfers of the two parcels in 1989, 1998 and in 2003 each used one deed to transfer both parcels. In 2005 Powers obtained the Deen parcel and then the Adams parcel by separate deeds. (CP 74, 77). The deed from

Clothier to Powers of the Deen parcel did not include an easement benefiting it across the Adams parcel. (CP 74). The later deed from Clothier to Powers of the Adams parcel was a statutory warranty deed that warranted that there was not an easement across the Adams parcel benefiting the Deen parcel. (CP 77). When she acquired the two parcels in 2005 Ms. Powers financed the Deen parcel purchase with a first and second deed of trust (CP 80, CP 254) but paid cash to Pierce Commercial Bank for the Adams parcel. Ms. Powers structured the transaction so that the Deed of Trust to Pierce Commercial Bank did not grant the bank any security interest across the Adams parcel. (CP 80, 254). The deed to Powers to the Deen parcel was recorded first followed by the Deed of Trust from Powers to the bank encumbering the Deen property and last the deed to Powers to the Adams parcel. (CP 74, 77, 80, 254). The First Deed of Trust from Powers to Pierce Commercial Bank which is the deed of trust that was assigned to and foreclosed by Deutsche Bank did not include in its legal description the Adams parcel either by easement or otherwise. (CP 80).

In 2007, Powers borrowed \$75,000.00 from Adams. She granted Adams a Deed of Trust on both the Deen parcel and the Adams parcel. (CP 102). The Adams parcel was the primary security for the loan because it was unencumbered while the Deen parcel was subject to a first and second deed of trust and would not justify a loan. (CP 252). The Deed of Trust granted by Powers to Adams encumbering the Adams was not subject to any easement encumbering the property. (CP 102).

Powers defaulted in the payments to Adams and to Pierce Commercial Bank/Deutsche Bank. Adams foreclosed both the Adams parcel and the Deen parcel non-judicially in 2008. The Trustee's Deed to Adams of both parcels did not grant an easement in favor of the Deen parcel across the Adams parcel. (CP 262). From the time of the recording of the Trustee's Deed in 2008, Adams was the owner of the unencumbered Adams parcel and the owner of the Deen parcel, subject to the Deed of Trust originally granted by Powers to Pierce Commercial Bank that had been assigned to Deutsche Bank. (CP 252).

In late May, 2009 Deutsche Bank non-judicially foreclosed the Deen parcel. At the time of the foreclosure, the Deen parcel

was owned by Adams and was vacant. (CP 252). The bank bought the property at the foreclosure sale at the time of the foreclosure neither the Adams parcel or the Deen parcel was occupied. The recording of that deed created separate ownership of the Adams parcel and Deen parcel. The 2009 Trustees Deed when the bank foreclosed the Powers did not grant Deutsche Bank an easement across the Adams property because the Deed of Trust that had been given to Pierce Commercial Bank and assigned to Deutsche Bank had not granted the bank any security interest in the easement across the Adams parcel. (CP 116). The Trustee's Deed could not include an easement across the Adams parcel because the deed of trust foreclosed did not include an easement across the Adams parcel. (CP 80).

In late 2009 the bank sold the Deen parcel to Mr. Deen. Originally, the parties selected Fidelity Title to serve as both the title company and the escrow company for the sale from the bank to Mr. Deen. (CP 228). Fidelity Title did a title search of the property. It determined there was not legal access to the parcel being purchased by Mr. Deen because prior the attempts to create an easement were barred by the doctrine of merger and the bank had

no interest in the Adams parcel. (CP 228). Mr. Deen then went ahead with the purchase of the Deen parcel receiving a special limited warranty deed that states:

Seller makes no representations or warranties, of any kind of nature whatsoever, whether express or implied by law, or otherwise, concerning the condition of the title to the property. (CP 230).

Before that transaction closed Mr. Deen attempted to obtain an easement across the property from Adams. (CP 252). His real estate agent called Adams and requested that an easement be granted to provide access to the property that Mr. Deen knew was landlocked. Mr. Deen's request was for an easement to be granted without consideration. The request was denied. (CP 252).

Mr. Deen paid \$244,500.00 for the Deen parcel. (CP 230). He paid a lesser price because of the condition of title and the fact that he received no warranty of access to the property. Patricia Powers had paid \$410,000.00 for the Deen parcel in 2005. (CP 74)

After closing, Mr. Deen began driving across the Adams parcel. Adams commenced this suit for trespass and an injunction. Deen counterclaimed claiming an express easement and an easement by implication. Both parties moved for summary

judgment. The trial court granted Deen's motion for summary judgment and held that Deen has a 30' express easement across the Adams parcel. This appeal followed.

ARGUMENT
STANDARD OF REVIEW

The trial court below decided this case on cross-motions for summary judgment. The standard of review of an order for summary judgment is de novo review by the Appellate Court and the Appellate Court performs the same inquiry as the trial court. *Smith v. Safeco Insurance Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003). The review by this court is de novo based upon the evidence presented below.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only if, after viewing the pleadings and record and drawing all reasonable inferences in favor of the non-moving party that the other party's entitled to a judgment as a matter of law. *Mayer v. Pierce County Medical Bureau*, 80 Wn. App. 418, 909, P.2d 1323 (1995). As to the claim of an express easement there are no disputed facts and a judgment can be determined as a matter of law. It is not disputed

that there was an attempt to create an easement in 1989 in the deed to both parcels from Fiala to Pierce. It is not disputed that from the time that deed was granted in 1989, until May 2009 when the Deen parcel was foreclosed by the bank both parcels were in common ownership at all times except for the time between the delivery and recording of the two deeds from Clothier to Powers that happened the same day. It is undisputed that Powers acquired the Deen parcel first, and that the deed she received for the Deen parcel did not contain an easement across the Adams parcel benefitting the Deen parcel. It is undisputed that the deed of trust granted to Deutsche Bank's predecessor did not grant the bank a deed of trust encumbering the Adams parcel. It is undisputed that the deed to Powers from Clothier of the Adams parcel was a statutory warranty deed that warranted that there was no easement against the Adams parcel benefitting the Deen parcel. It is undisputed that the bank deed of trust against the Deen parcel did not grant the bank an interest in the Deen parcel and that the Trustee's deed to both parcels in the Adams foreclosure and the trustee's deed to the bank in the bank's foreclosure did not grant any easement benefitting the Deen parcel. Based on those

undisputed facts, whether or not the bank's title received in a foreclosure of its deed of trust included an easement and the effect of doctrine of merger of title on the validity of attempt to create the easement can be determined as a matter of law on summary judgment.

The Deen claims for an easement by implication or necessity are subject to summary in Adams favor but the converse is not true. The intent of the parties necessary to create an implied easement or an easement by necessity a question of fact. *Visser v. Craig*, 139 Wn. App. 152, 159 P.3d 453 (2007). There the court said, at page 171:

Moreover, the use of an easement implied from a prior use is a question of fact and depends on the party's intent, the nature of the property, and the manner in which the parties use the easement.

In *Visser, supra*, the court reversed the decision of the trial court granting summary judgment based upon the fact that one of the parties' claimed that there was no intent to create an easement. In the summary judgment record Adams presented the records from the 2005 Powers purchase and the subsequent transfers all of which unequivocally deny the existence of an easement in favor of

the Deen property across the Adams parcel and show an intent that there be no easement. Deen presented no evidence of the intent of the parties at the time of either the 2005 Powers acquisition, or at the time of the subsequent transfers, to rebut the clear import of those documents. It is appropriate to grant Adams motion for summary judgment because all documents related to the property transfers from the 2005 Powers purchase through the Deen purchase show a clear intent that there is no easement in favor of the Deen parcel. If this court does not hold that Adams is entitled to summary judgment determining that Deen does not have an easement by implication or necessity, the evidence of the intent of the parties in the property transfers and the deed of trust precludes summary judgment in favor of Deen.

DEEN'S TITLE CAME FROM FORECLOSURE OF A DEED OF TRUST THAT DID NOT ENCUMBER THE ADAMS PARCEL

The Deen claim to an express easement fails because the Deed of Trust granted to the bank by Patricia Powers, from which the bank acquired its title through a non-judicial foreclosure that it transferred to Deen, did not contain an easement encumbering the Adams parcel. Patricia Powers did not own the Adams parcel at

the time that Deed of Trust was granted and could not have granted an easement across the Adams parcel to the bank. Transfers of an interest in property have to be in writing in the form of a deed. RCW 64.04.010. Powers structured her acquisition and her loan from the bank so that the bank's deed of trust did not include any interest in the Adams parcel and the bank never received any interest in that parcel. Powers kept the Adams parcel unencumbered by any lien or easement. The title that was obtained by the bank when it bought the Deen property at the Trustee's sale of and did not include an easement encumbering the Adams property because the bank's deed of trust that was foreclosed did not grant the bank a security interest in the Adams property. The bank also did not receive an easement across Adams property in the Trustees Deed that gave title to the bank before it sold the property to Deen. The Defendants have failed to explain how or provide any authority to show how Mr. Deen has an express easement across the Adams property when he got title from the bank that never had any easement across the Adams parcel. There was no express easement across the Adams property for the bank to grant to Deen and his express easement

claim fails. This court should reverse the trial court's summary judgment order granting Deen an express easement across Adams property and grant Adams summary judgment motion determining that Deen does not have an express easement.

**MERGER OF TITLE PRECLUDES CLAIM FOR EXPRESS
EASEMENT**

No Washington case has ever held that where ownership of servient property that is subject to an easement and the dominant parcel of property that benefits from the easement come into title in the same person in the same capacity that merger of title does not occur to extinguish the easement. Washington has followed the broadest form of the merger doctrine recognized in this country. The strength of the merger doctrine in Washington is best described in *Schlager v. Bellport*, 118 Wn. App. 536, 76 P.3d 778 (2003). At issue in that case was whether a view covenant that benefitted two parcels and burdened one parcel was partially extinguished as to one of the benefitted parcels when the burdened parcel and that benefitted parcel came into the same ownership. The court held that Washington follows the Restatement of Property and it applied the doctrine of merger extinguish the

covenant as to the benefitted parcel that had been in common ownership with the burdened parcel after the view easement was created. In so holding the courts' analysis began by stating that Washington follows the rule from the Restatement (Third) of Property (Servitudes) § 7.5 (2000) that common ownership of both the benefitted and burdened parcel of an easement extinguishes the easement, stating at page 539:

The doctrine of merger recognizes the principle that "one cannot have an easement in one's own property." The *Restatement* sets forth the principle as follows:

When the burdens and the benefits [of a covenant or servitude] are united in a single person, or group of persons, the servitude ceases to serve any function. Because no one else has an interest in enforcing the servitude, the servitude terminates.

The court in *Schlager, supra*, went on to extend the merger doctrine in Washington to adopt the broadest partial merger doctrine from the Restatement of Property Section § 497 (1944) by extending the merger doctrine to include partial merger.

Numerous other authorities in Washington demonstrate that merger occurred in this case. Washington has long recognized that when one party owns both the dominant and serviant property

involved in an easement, the easement is extinguished. *Coast Storage v. Schwartz*, 55 Wn. 2d. 848, 351 P.2d 520 (1960). There, the court, in determining that merger existed said, at page 853:

When all of the property which had been retained by Jannsen in 1949 and lying west of the vacated street and the property conveyed to the Golden Bear Oil Company passed into the common ownership of the plaintiffs, the easement originally reserved by Jannsen terminated. One cannot have an easement in his own property.

The position from *Coast Storage, supra*, is clearly enunciated in 17 William Stoebuck, Wash, Prac., Real Estate Law § 2.12 at 118 (1995). There, referring to *Coast Storage*, the author states:

By authority from Washington and other jurisdictions, an easement is terminated when its holder acquires title to the serviant tenement. Courts speak of a merger of the easement into title, though all that needs to be said is that an owner, whose title encompasses all rights included within the easement, simply cannot own the same rights twice.

Applying the doctrine of merger to the instant case, the original attempt to create an easement in 1989 failed because the easement was contained in a Statutory Warranty Deed that deeded to the buyer both the Adams property and the Deen property. Any

attempt to create an easement was barred by the doctrine of merger.

Merger happened again in 1998 when both the Adams parcel and the Deen parcel were transferred to a new owner in one deed in April 1998. Even if there had been an easement created previously it was extinguished by the doctrine of merger when one owner bought both parcels.

Merger happened again in 2003 when both the Adams parcel and the Deen parcel were transferred to a new owner in one deed in April 2003. Even if there had been an easement created previously it was extinguished by the doctrine of merger when one owner bought both parcels.

Merger occurred again when the two parcels were conveyed to Patricia Powers by separate deeds in 2005. The first of those deeds to Powers was for the Deen parcel and it did not grant the Deen parcel an easement over the Adams parcel. The second deed to Powers was a warranty deed for the Adams parcel that warranted that there was no easement across the Adams parcel in favor of the Deen parcel. Even if those deeds had attempted to create an easement it would have been extinguished by merger.

Finally, even if there had ever been an easement effectively burdening the Adams parcel prior to Adams coming into title to both parcels in 2008 it would have been extinguished by merger when he became owner of both parcels in December 2008. The Deen claim for an express easement should have been dismissed by the trial court on Adams motion for summary judgment. This court should hold that the claimed easement attempted by the 1989 deed never became valid due to merger of title and if it was valid it was extinguished by merger.

In the trial court Mr. Deen cited *Beebe v. Swerda*, 58 Wn. App. 375, 793 P.2d 442 (1990) arguing that that case supports this court finding an easement to exist. Defendant's reliance on that case is misplaced. In *Beebe v. Swerda, supra*, a transferor of two parcels at issue in the lawsuit transferred both parcels to a single buyer retaining an easement for the public and for the grantor 30 feet in width, being 15 feet on the west side of the east parcel and 15 feet on the east side of the west parcel. Five years later, the party who has bought those two parcels transferred them to a new buyer subject to the existing easements back to the original seller and the public. That buyer subdivided the property and sold the

north burdened property subject to that easement. All further sales included the easement as an encumbrance on the title including the sale to the Plaintiff. Since all of the deeds continued to recognize the easement in favor of the original grantor, the only issue in the case was what type of language was necessary in the deeds to transfer the easement. The court identified the issue at page 380 as follows:

No Washington case has decided whether the words "subject to" in the deed conveying land are sufficient to create an easement. In other jurisdictions there is a split of authority on the issue.

In holding that the easement was valid the court construed the language of the original easement and the language contained in all of the documents demonstrating an intent that the easement be in place even though the benefited property was not identified in the original document.

Beebe, supra, supports Adams. First, there was no merger issue raised or argued in the appellate court in *Beebe, supra*. The court did not discuss the Doctrine of Merger at all. Instead, the court, based upon the fact that all of the deeds subsequent to the original grant were subject to the easement that was created in the

original grant and because the Deed to the Plaintiff who sued to extinguish the easement specifically stated it was subject to the easement recorded under Auditor's File No. 3463320, the easement at issue in the case, the court found that the easement encumbered the Plaintiff's property.

Those facts are completely different than the instant case. In the instant case neither the deeds received by Powers nor the Deeds of Trust executed by Patricia Powers included in the description of the property any easement across the Adams parcel. The Trustees Deed in the foreclosure of the Deen parcel by the bank did not include an easement. *Beebe, supra*, supports the Plaintiff because the lack of inclusion of the legal description of the easement in any of the documents in the Powers purchase and subsequent to that purchase demonstrates a clear intent that the easement was merged and did not exist. This court should find as matter of law that merger or title extinguished the attempt to create an easement across the Adams parcel and reverse the summary judgment where the court found the existence of an express easement in favor of Deen. It should also and grant Adams motion

for summary judgment determining that Deen has no express easement in the Adams parcel.

**INTENT NECESSARY FOR IMPLIED EASEMENT IS NOT
PRESENT**

While the trial court granted the Deen motion for summary judgment on the basis of an express easement, it should have not only granted the Adams motion for summary judgment dismissing the counterclaim for an express easement, it should have granted summary judgment to Adams on the implied easement theory. Implied easements are not favored by the courts because they are in derogation of written instruments where parties can expressly convey their intent. That position is clearly stated in the Washington State Bar Association Real Property Deskbook:

Easements by implication are not favored by the courts because they are in derogation of the rule that written instruments speak for themselves." WSBA Washington Real Property Deskbook § 10.3(3)(b) Easements and Licenses 10-14 (1997).

The crucial issue for the court to resolve is to what the intent of the parties regarding establishment of an easement. Washington State Bar Association Real Property Deskbook §10.3(3)(a) 3rd Edition (1996) says:

The primary determination in a case involving an alleged easement implied from prior use is the intention of the parties.

Whether or not an easement arises by implication depends on the intent of the parties that is a question of fact. *Visser v. Craig*, 139 Wash. App 152, 159, P. 3d 453 (2007). In the instant case, it is clear from every event that happened from the 2005 sale until this suit was filed that all parties intended that no easement exist. The 2005 deed to Patricia Powers of the Deen parcel that was recorded on the same day but before Ms. Powers received a deed to the Adams property did not include an easement across the Adams property. The deed she received for the Adams parcel was a warranty deed that warranted that the easement claimed by Mr. Deen did not exist. Neither the first deed of trust granted by Ms. Powers to the bank at the time of her acquisition of the property nor the second deed of trust granted to the bank at the same time included an easement benefitting the bank. The trustee's deed from the foreclosure of the Deen property did not include an easement. The deed of trust granted by Ms. Powers to Plaintiff did not list as an exception to clear title an easement across the

property and it was represented to Plaintiff that title was unencumbered by the easement claimed to benefit the Deen property. The Trustee's Deed from the foreclosure of the Adams deed of trust against both parcels did not include an easement in favor of the Deen property. At the time of severance of the two parcels neither the bank nor Plaintiff intended that the Plaintiff's parcel would be encumbered by an easement. At the time of the sale to Mr. Deen the bank did not warrant the easement and Mr. Deen knew it did not exist. He paid a reduced price for the property because of the lack of an easement and accepted a deed that disclaimed any warranty that the property had access. Washington law is clear that the terms of a sale and price paid can be used to show an intent that the easement did not exist. *White v. Berg*, 19 Wn.2d 284, 142 P.2d 260 (1943). Since the intent of the parties regarding the easement is clear there is no need to go beyond those facts to deny an easement by implication.

If but only if the intent of the parties to create an easement cannot be established by direct evidence the court can look at other factors to determine the implied intent. *Visser, supra*. Where intent is not otherwise determinable from the facts, in order for an

implied easement to arise, during the period of unity of title the owner must prove obvious and manifest use, impressing a degree of servitude upon the quasi-servient tenement in favor of the quasi-dominant tenement. *Bailey v. Hennessey*, 112 Wash. 45, 191 P. 863, 864 (1920). The use of the "quasi-easement" must exist at the time of the transfer of the title of the dominant estate. *Rogers v. Cation*, 9 Wn. 2d. 369, 115 P.2d 702 (1941). The use must also be continuous, Washington State Bar Association Real Property Deskbook § 10.3(3)(a) 3rd Edition (1996). In the instant case, there was no use of any quasi-easement at the time of severance. At the time of severance the Adams owned the property. The property was vacant. The use of a quasi-easement had terminated months before title to both parcels was severed. The continuous use requirement is not met. *Ashton v. Buell*, 149 Wash. 494, 271 P. 591 (1928). The quasi-easement fails to meet either the requirement that it was in place at severance or that it was continuous. The easement by implication therefore fails. All of the factors point to an intention that no easement be implied at the time of the severance of the property from the property currently owned by the Adams. It is not disputed that at severance Adams did not

intend that an easement by implication be granted. Mr. Deen cannot claim that the bank intended that the easement was created by severance because the bank knew it did not have an easement as evidenced by the deed it received from the trustee at the non-judicial sale and the deed it gave Mr. Deen that disclaimed the existence of an easement. The Adams summary judgment motion determining that there is no easement by implication in favor of Deen should have been granted. This court should grant that motion in this appeal.

**EASEMENT BY NECESSITY ALSO FAILS FOR LACK OF
INTENT**

Defendant's claim for an easement by necessity fails for the same reasons. An easement by necessity is virtually identical to an implied easement. The issue of the court is to determine the party's actual intention at the time of a transfer from which an implied easement is alleged. *Visser v. Craig*, 139 Wn.App. 152, 159, P.3d 453 (2007). There the court made it clear that the party's actual intent will be determinative of an easement by necessity. Washington law does not allow an easement by necessity if there is clear evidence of a contrary intent. It is only where there is no evidence of the party's actual intention in the record that the

implied intention of the parties granted an easement to avoid a landlocked parcel can be imposed. In the instant case, there is substantial evidence that there was no intent to grant an easement by necessity at any time. The bank did not include an easement in its deed of trust or the trustees' deed of foreclosure and it expressly disclaimed any warranty of an easement in its sale of the property. Adams denied the existence of an easement at all times. The intent of all parties was clear. No easement by necessity was created when the property was foreclosed by the bank and sold to Deen. Summary judgment should have been granted for Adams on the easement by necessity theory presented by Mr. Deen. This court should dismiss that claim.

**MERGED 30 FT EASEMENT DOES NOT DETERMINE THE SIZE
OF ANY EASEMENT GRANTED BY IMPLICATION OR
NECESSITY**

Even if the trial court had properly found an easement by implication or by necessity, it was error to make the easement 30 feet in width when only observable use made of the Adams parcel from which an easement by implication could be granted is two ruts in the dirt 9 feet wide meandering from a 10.5 foot opening in the fence around the Adams property. If an easement by necessity or

implication was granted it would be the use that observable at severance, a nine foot path in the dirt and not the 30 foot express easement that the court granted. Thompson on Real Property 2nd Edition §60.04(c)(2) clearly identifies that where there is an easement created by implication or by necessity the size of the easement is determined by the use at the time of severance and the location of the easement granted is either based upon the prior use or the desires of the owner of the burdened property. There the author states:

Since one must have an established and visible quasi-easement in use for a considerable time prior to severance, the location of an easement implied from prior use is necessarily established at its creation. There do not seem to be any special rules governing relocation of this type of easement, once established. If a way of necessity has been determined to exist, if there was a way in use at the time of separation, "plainly visible and known to the parties, the plainly visible and known way will be held to be the location of the way granted unless it is not reasonable and convenient for both parties." The right to select the location of the easement "belongs initially to the owner of the servient estate at the time the dominant estate is created," a right to be exercised "in a reasonable matter, having due regard for the rights and interests of the dominant estate owner"; if the servient owner fails to do so, the dominant owner may, with the same concern for the convenience of the parties. In some jurisdictions, the court may place the easement absent agreement of the parties. Once

the easement has been located, it will not be changed without the consent of both parties, "even though the use of the easement where located become detrimental to the use of the servient estate."

Washington law follows the same general rule *Evich v. Kovacevich*, 33 Wn. 2d. 151, 204 P.2d 839 (1949).

In the instant case, the area used for ingress and egress to the Deen property is two ruts in the dirt approximately nine feet wide meandering south from the opening in the fence near the north end of the Adams property. The path itself is not straight and is poorly located to the detriment of the Adams parcel. It was reversible error for the court to grant an easement by implication or necessity 30 feet wide when there was no use being made of the Adams property at severance and when the widest use made at any time prior to severance was nine feet. It was also reversible error to grant an easement not in the location requested by Adams which was at the south end of his property. Even if this court were to uphold the grant an easement to Deen under the theory of implication or necessity it should rule that the easement for ingress and egress is limited to the nine foot width supported by the record.

////

CONCLUSION

This Court should reverse the trial court decision finding that the Adams property is encumbered by an express easement in favor of the Deen property and grant Adams' motion for summary judgment determining that there is no express easement in favor of the Deen property across the Adams property.

This Court should also find that, at the time of segregation of the parcels, there was not an intent to grant an easement in favor of the bank and grant the Adams' motion for summary judgment determining that there is not an easement across his property. If the Court does not dismiss the implied easement and easement by necessity claims, it should find that there are material factual disputes related to the intent of the parties and remand the matter for trial.

Finally, if the Court finds that an easement exists by implication or necessity, it should find that the ingress and egress easement is nine (9) feet wide in the location of the existing two (2)

////

////

ruts across the road and is subject to being moved by Adams to another location at his request.

RESPECTFULLY SUBMITTED this 7 day of September, 2012.



BART L. ADAMS, WSBA #11297
Attorney for Appellant