

No. 43288-9-II
DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

BART ADAMS,
Plaintiff-Appellant,
vs.
SHANE DEEN,
Defendant-Respondent.

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. Jeanette Dalton, Visiting Judge)

RESPONDENT'S BRIEF

Kennard M. Goodman,
WSBA No. 22823
BISHOP, WHITE, MARSHALL & WEIBEL, P.S.
720 Olive Way, Suite 1201
Seattle, WA 98101
Telephone: (206) 622-5306
Facsimile: (206) 622-0354

*Attorneys for Respondent
Shane Deen*

FILED
COURT OF APPEALS
DIVISION II
2012 OCT 11 AM 9:50
STATE OF WASHINGTON
BY 
DEPUTY

TABLE OF CONTENTS

<i>Table of Authorities</i>	ii
I. INTRODUCTION	1
II. STATEMENT OF ISSUES	2
III. STATEMENT OF THE CASE	2
A. Chain of Title	3
B. History of Use.....	9
C. Proceedings Below	12
IV. ARGUMENT	13
A. Standard of Review	14
B. Standard for Summary Judgment	14
C. The Declaration of Pattie Bacque Submitted by Adams Is Not Evidence In Admissible Form and, Therefore, Must Be Disregarded	15
D. Deen’s Property Is The Dominant Estate of an Express Easement Appurtenant	18
1. The Merger Doctrine Does Not Invalidate the Express Easement	19
2. The Various Deeds Do Not Establish the Grantors’ Intentions	31
E. Deen’s Property Is The Beneficiary of an Easement by Implication	34

F. Deen's Property Is The Beneficiary of an Easement of Necessity	40
V. CONCLUSION	44

TABLE OF AUTHORITIES

STATE AUTHORITIES

Cases

<i>Anderson v. Starr</i> , 159 Wash. 641, 294 P. 581 (1930)	20, 26
<i>Bailey v. Hennessey</i> , 112 Wash. 45, 191 P. 863 (1920)	37
<i>Ball v. Smith</i> , 87 Wn.2d 717, 556 P.2d 936 (1976)	17
<i>Beebe v. Swerda</i> , 58 Wn.App. 375, 793 P.2d 442, rev. denied, 115 Wn.2d 1025, 802 P.2d 126 (1990)	19, 22-25
<i>Coast Storage v. Schwartz</i> , 55 Wn.2d 848, 351 P.2d 520 (1960)	27-29
<i>Cowan v. Gladder</i> , 120 Wash. 144, 206 P. 923 (1922)	19
<i>Ford v. Smith</i> , 48 Wash. 398, 400, 93 P. 909 (1908)	32
<i>Hellberg v. Coffin Sheep Co.</i> , 66 Wn.2d 664, 404 P.2d 770 (1965)	41-42
<i>Kemmer v. Keiski</i> , 116 Wn.App. 924, 68 P.3d 1138 (2003)	41
<i>Key v. Young Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989)	14
<i>MacMeekin v. Low Income Housing Institute, Inc.</i> , 111 Wn.App. 188, 195-96, 570 (2002)	34
<i>M.K.K.I. v. Krueger</i> , 135 Wn.App. 647, 145 P.3d 411 (2006)	30
<i>Olson v. Trippel</i> , 77 Wn.App. 545, 893 P.2d 634 (1995)	19
<i>Puget Sound Mut. Sav. Bk. v. Lillions</i> , 50 Wn.2d 799, 314 P.2d 935 (1957), cert. denied, 357 U.S. 926, 78 S.Ct. 1373, 2 L.Ed.2d 1371 (1958)	35-36
<i>Radovich v. Nuzhat</i> , 104 Wn.App. 800, 16 P.3d 687 (2001)	21, 30-31
<i>Rogers v. Cation</i> , 9 Wn.2d 369, 115 P.2d 702 (1941)	37
<i>Schlager v. Bellport</i> , 118 Wn.App. 536, 76 P.3d 778 (2003)	27, 29-30

<i>Visser v. Craig</i> , 139 Wn.App. 152, 159 P.3d 453 (2007)	39, 41, 42, 44
<i>Young v. Savidge</i> , 155 Wn.App. 806, 230 P.2d 222 (2010)	14

Statutes

RCW 48.29.010(3)(c)	17
RCW 64.04.030	33
RCW 64.04.040	33

Rules

CR 56	14, 18
ER 201	15

OUT-OF-STATE AUTHORITIES

Cases

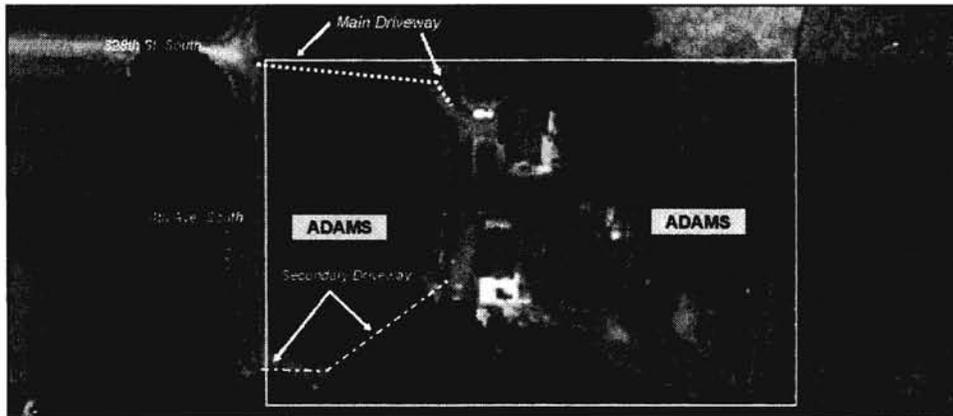
<i>First Alabama Bank of Tuscaloosa, N.A. v. Webb</i> , 373 So.2d 631 (Ala. 1979)	20
<i>Schwoyer v. Smith</i> , 388 Pa. 637, 131 A.2d 385 (Pa. 1957)	21

TREATISES

Stoebuck & Weaver, <i>Real Estate: Transactions</i> , 17 WASH. PRACTICE (2nd ed. 2004)	
§ 2.4	37
§ 7.2	33
§ 7.11	27
I WASHINGTON REAL PROPERTY DESKBOOK (3d ed. 1997)	
§ 10.3	18
§ 10.5	19, 31

I. INTRODUCTION

Deen purchased property in 2009 that is surrounded on three sides by land owned by Adams (boundary lines are approximate):



Deen's property and Adams's property used to be part of a single tract. Adams's land — which he acquired through foreclosure — is more or less undeveloped.¹ A single family residence and other buildings have been situated on Deen's property for about 34 years. Access to Deen's house is primarily over a driveway that has been in essentially the same location for several decades and travels over the north 30 feet of Adams's land from Fourth Avenue South to the northwest corner of Deen's property. In addition, there is a secondary driveway exiting from the southwest of Deen's property.²

¹ The eastern part of Adams's property has a corral, dog kennel, and garden area on it. The western portion of Adams's property is covered with trees. *See* CP 200.

² *See* CP 51-78, 101-23, 198-210.

Deen never met Adams or even saw him at the properties. Nonetheless, in October 2009, shortly after Deen moved into his new home, Adams served Deen with a summons and complaint alleging that Deen had no right to travel over Adams's property and seeking damages for trespass.³ In truth, Deen has a right in both law and equity to use the driveway that crosses Adams's property.

II. STATEMENT OF ISSUES

1. Is Deen entitled to summary judgment declaring that he has an express easement appurtenant for ingress and egress over the north 30 feet of Adams's property?

2. Is Deen entitled to summary judgment declaring that he has an easement appurtenant by implication for ingress and egress over Adams's property?

3. Is Deen entitled to summary judgment declaring that he has an easement appurtenant of necessity for ingress and egress over Adams's property?

III. STATEMENT OF THE CASE

Deen's claim to an easement is based upon the alternative theories of an express easement, an implied easement, and an easement of

³ See CP 200.

necessity. Accordingly, both the recorded chain of title and the properties' historical use must be reviewed.

A. CHAIN OF TITLE

Deen's property is situated in the North half of the South half of the Southeast quarter of the Northwest quarter of Section 16, Township 17 North, Range 3 East of the W.M. That land was last conveyed as a single parcel in 1989 by statutory warranty deed in fulfillment of a real-estate contract. The property was conveyed by Floyd and Eloise Corbin to Ralph and Ann Fiala.⁴

Fiala entered into two boundary line adjustments ("BLA") with their northern neighbor, Richard Raymond. The first BLA, in 1984, transferred the east half of Fiala's property to Raymond; no land appears to have been conveyed from Raymond to Fiala. The second BLA occurred in 1985, but, in this instance, no land was actually transferred between Raymond and Fiala. Instead, the only change was to create two lots out of Fiala's property: (1) the West half of the North half except the East 150 feet of the West 330 feet of the North half, less the North 30 feet

⁴ See CP 51, 55-57.

thereof (“Adams Property”); and (2) the East 150 feet of the West 330 feet of the North half, less the North 30 feet thereof (“Deen Property”).⁵

Fiala conveyed the two lots in a single deed to Edward and June Pierce in 1989.⁶ The deed contains the following language in the legal description of the estates being conveyed:

PARCEL A:

The west half of the North half of the South half of the Southeast quarter of the Northwest quarter, Section 16, Township 17 North, Range 3 East, W.M.

EXCEPT the East 150 feet of the West 330 feet of the North half of the South half of the Southeast quarter of the Northwest quarter of Section 16, Township 17 North, Range 3 East, W.M., less the North 30 feet thereof.

TOGETHER with a non-exclusive easement for ingress, egress and utilities over, under and across the following Parcels C, D, E, F and G.

Situate in the County of Pierce, State of Washington.

PARCEL B:

The East 150 feet of the West 330 feet of the North half of the South half of the Southeast quarter of the Northwest quarter of Section 16, Township 17 North, Range 3 East, W.M., less the North 30 feet thereof.

TOGETHER with a non-exclusive easement for ingress, egress and utilities over, under and across the following Parcels C, D, E, F and G.

⁵ See CP 51, 58-64. We refer to the two parcels as the “Adams Property” and “Deen Property” throughout this brief to minimize confusion. Of course, Adams and Deen did not actually come into title to their respective properties until much later.

⁶ CP 51, 65-67.

Situate in the County of Pierce, State of Washington.

PARCEL G:

The North 30 feet of the West 330 feet of the North half of the South half of the Southeast quarter of the Northwest quarter of Section 16, Township 17 North, Range 3 East of the Willamette Meridian.

Situate in the County of Pierce, State of Washington.

Parcel A in the Pierce deed is the Adams Property, and Parcel B is the Deen Property. Parcel G describes the north 30 feet of the Adams Property from 4th Avenue South to a point even with the east boundary line of the Deen Property.⁷

Pierce conveyed the two lots to David Reed and Marcia Barnett (collectively, "Reed") by a single deed in 1998. Reed's deed included the easements described in the deed given by Fiala to Pierce.⁸

Reed conveyed the two lots to Jill and Timothy Clothier by a single deed in 2003. That deed does not expressly refer to the easements described in the earlier deeds. The deed, however, states the conveyance is "subject to easements, reservations, covenants, conditions, restrictions

⁷ See CP 51.

⁸ See CP 51-52, 68-70. There is a minor discrepancy between the two deeds: The deed to the Pierces state that the easement is for "ingress, egress, and utilities," but the deed to Reed mentions only "ingress and egress." This presumably is a scrivener's error as the utilities were already in place by 1998 and the residence would have no access to utilities without the easement.

and agreements of record, if any, as set forth in the commitment for title insurance issued by Chicago Title under their Order No. 3039143.”⁹

The Clothiers conveyed the Adams Property and Deen Property to Patricia Powers, a married woman, as her separate property in 2005. This time, however, each lot was conveyed by a separate warranty deed. Neither deed includes an express conveyance of any easement. Each deed contains exceptions for the same three specific recordings, none of which are the easement at issue here. Powers’s husband executed a deed quitclaiming any interest in the Deen Property at the same time Powers acquired the property. This presumably was done in conjunction with a loan Powers obtained from Pierce Commercial Bank, which was secured by a deed of trust against the Deen Property only and recorded on July 29, 2005. The deed of trust provides:

Borrower irrevocably grants and conveys to Trustee in trust, with power of sale, the following described property ...

TOGETHER WITH ... all easements, appurtenances, and fixtures now or hereafter a part of the property.¹⁰

⁹ See CP 56, 71-72. In the trial court, Adams asserted that none of the deeds after Fiala’s 1989 deed to the Pierces referred to the easement. See CP 247. Adams apparently has abandoned that argument here, presumably because all of the intervening deeds up to the conveyance to Powers demonstrably include some reference to easements.

¹⁰ CP 82-83; see also CP 254. Adams claims that: “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)” and “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).” Appellant’s Amended Brief, p. 4. This is
(cont’d on following page)

The note and deed of trust given by Powers to Pierce Commercial Bank were eventually assigned to Washington Mutual, with Deutsche Bank, as trustee. In July 2007, Deutsche Bank, as Trustee, entered into a loan modification with Powers to add outstanding arrears to the loan's principal; the loan modification was recorded on July 3, 2007.¹¹

In April 2007, Powers and her husband obtained a loan from Adams, an attorney. Powers secured the loan with a deed of trust on the Adams Property and the Deen Property.¹²

Powers defaulted on the loan, Adams foreclosed, and he obtained title to both parcels through a Trustee's Deed recorded on December 18, 2008. Because the Deutsche Bank deed of trust (if not the modification) was recorded before Adams's deed of trust, Adams's title to the Deen Property was subject to the bank's senior security interest.¹³ Adams concedes the junior position of his security interest in the Adams Property.¹⁴

(footnote cont'd from previous page)

contradicted by the deed of trust itself, which expressly includes a grant of easements. CP 82-83.

¹¹ See CP 52, 73-98.

¹² CP 102-11.

¹³ See CP 53, 101-14.

¹⁴ See Appellant's Amended Brief, 5.

Powers also defaulted on the Deutsche Bank loan. The bank obtained title to the Deen Property through a trustee's deed recorded on May 19, 2009. The foreclosure eliminated Adams's interest in the Deen Property.¹⁵ Deutsche Bank conveyed title to Deen by "Special/Limited Warranty Deed" recorded on October 2, 2009.¹⁶

Neither the trustee's deed to Adams nor the trustee's deed to Deutsche Bank included an express grant of easement. Deutsche Bank's deed to Deen, however, expressly includes the grant of easement that had appeared in the earlier deeds to Reed and Reed's predecessors-in-interest. Adams asserts — without any citation to the record — that Deen knew no easement existed when he bought his property, an assertion Adams also made in the trial court.¹⁷ In fact, Deen expressly stated that he was not aware of any issues concerning his use of the existing driveway when he bought the property; furthermore, Adams's unsupported allegation could not be based on any admissions by Deen because the two had never had

¹⁵ See CP 53, 115-17.

¹⁶ See CP 198, 202-06.

¹⁷ See Appellant's Amended Brief, pp. 7, 22. On page 7, Adams describes a conversation he purportedly had with Deen's real estate agent (whom Adams has never identified) and refers this Court to CP 252. While that page in the record does include Adams's testimony about the purported conversation, nowhere does it include any statement to support the conclusion that *Deen knew* there was no access to his property.

Similarly, Adams's unsupported contention (Appellant's Amended Brief, p. 22) that the price paid by Deen in 2009 is attributable to the lack of an easement — without any mention of the collapse in the real estate market or that the parcel was part of a lender's foreclosed-property portfolio — must be treated as pure speculation.

any communications with each other.¹⁸ Thus, the uncontroverted evidence is that Deen purchased his home believing he had a right of access over the unimproved Adams Property.

B. HISTORY OF USE

Deen's property contains a single-family residence, a shop building, and a stable. The residence was built in 1976.¹⁹

Access to Deen's property is made primarily via a driveway at the north end. The driveway starts at 4th Avenue South near that road's intersection with 328th Street East, at the northwest corner of Adams's property. The driveway proceeds easterly through the north 30 feet of Adams's property and more or less parallel to the north boundary line until the driveway curves south to enter Deen's property. The driveway averages about 20 feet in width.²⁰

¹⁸ CP 331.

¹⁹ See CP 198, 207-08.

²⁰ See CP 199, 209-10.



Upon entering Deen's property, the driveway continues more or less due south past the residence and other buildings for about 170 feet. At that point, the driveway curves west and crosses over the southern portion of Adams's property to connect with 4th Avenue South. Deen uses this southern leg when he brings large equipment or a trailer onto his property and it is easier to exit by continuing through the "U" rather than turning the vehicle around; otherwise, Deen always uses the main entrance at the north for driving both in and out of his home.²¹

Historical photographs of the area dating back to 1990 show both the northern and southern entrances were well-established by 1990. They remain visible in the photographs through later years all the way to April 2009.²²

Utilities serving Deen's house are also located in the north 30 feet of the Adams Property. Utility poles run along the Adams Property's north boundary behind a line of tall trees to a point near Deen's house. Deen's well is located inside the 30-foot strip, and a water spigot connect to the well lies south of the driveway. All of these improvements were present when Deen bought his property.²³

²¹ See CP 200.

²² See CP 127-28, 192-97,

²³ CP 331-45.

C. PROCEEDINGS BELOW

Adams commenced this lawsuit against Deen seeking damages for trespass and declaratory judgment that no easement existed. Adams served his complaint in October 2009 without filing it until January 2010.²⁴

Deen filed his motion for summary judgment on September 23, 2011, seeking a declaration that he is the beneficiary of an easement over Adams's property for ingress, egress, and utilities on the alternative theories of express easement, implied easement, and easement of necessity.²⁵ Adams opposed Deen's motion and filed his own cross-motion for summary judgment on October 17, 2011.²⁶ The motions were heard by Honorable Jeanette Dalton, sitting as a Visiting Judge from Kitsap County Superior Court on December 19, 2011. At the end of argument, Judge Dalton took the matter under advisement.

Judge Dalton signed an order granting Deen's motion for summary judgment and denying Adams's cross-motion on February 29, 2012; the order was filed on March 2, 2012.²⁷ Judge Dalton's order does not state on what grounds she was granting Deen's motion.

²⁴ CP 1-2.

²⁵ CP 20-34.

²⁶ CP 235-50.

²⁷ CP 346-52.

Final judgment declaring Deen's easement rights was entered on May 23, 2012.²⁸ The judgment is also silent as to the grounds on which Judge Dalton found an easement exists.

IV. ARGUMENT

Two facts are central to this lawsuit, and neither is controverted. First, Adams's and Deen's properties originally were both part of the same parcel. Second, Deen's property is landlocked. Washington does not allow land to remain unused in such circumstances. Thus, the issue raised by this lawsuit is not *whether* Deen has a right to travel over Adams's property, but only which legal or equitable theories provide the basis for Deen's right.

Adams states that "[t]he trial court ... held that Deen has a 30' express easement across the Adams parcel."²⁹ In fact, Judge Dalton ruled "the property owned by Shane Deen ... is the beneficiary of an easement for ingress, egress, and utilities ... over the servient estate owned by Bart Adams" without specifying whether the easement is express, implied, or of necessity.³⁰

²⁸ CP 363-66.

²⁹ Appellant's Amended Brief, p. 7.

³⁰ See CP 365.

A. STANDARD OF REVIEW

In reviewing an appeal from a motion granting summary judgment, the Court of Appeals engages in the same inquiry as the trial court and conducts a *de novo* review of the motion.³¹

B. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if there are no material issues of fact and the moving party is entitled to judgment as a matter of law. The Court construes the facts and all reasonable inferences in favor of the non-moving party. The moving party has the burden to show the absence of any material facts. A fact is material if it would affect the outcome of the lawsuit. The non-moving party cannot rely on mere allegations to establish an issue of fact: evidence in admissible form must be submitted to the Court.³²

If the moving party makes a *prima facie* showing that summary judgment should be granted, then the non-moving party must come forward with evidence to establish any matters on which it has the burden of proof in order to defeat the motion.³³

³¹ See *Young v. Savidge*, 155 Wn.App. 806, 814, 230 P.2d 222 (2010).

³² See *id.*; see also CR 56.

³³ See *Key v. Young Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

**C. THE DECLARATION OF PATTIE BACQUE SUBMITTED
BY ADAMS IS NOT EVIDENCE IN ADMISSIBLE FORM
AND, THEREFORE, MUST BE DISREGARDED**

Adams relies on a declaration from Pattie Bacque in support of allegations that a title company examined the easement issue and concluded that Deen did not have access to the property he was going to purchase.³⁴ As Deen demonstrated to the trial court, Bacque's declaration is entirely inadmissible: she provided no foundation for her statements and, at best, her testimony is entirely hearsay.

Other than stating that she is a title officer for Fidelity National Title, Bacque gave no information about her education, experience, or the basis for any of her purported "knowledge." She did not state that she is a lawyer (who, at least, would be nominally qualified to give a legal opinion, regardless of her experience).³⁵ She did not inform the Court how long she has been a title officer, so there was no way to know whether she has the requisite experience as a non-lawyer to qualify to give opinion testimony about the state of a property's title. She did not declare that she is a custodian of records for Fidelity; indeed, and, perhaps most

³⁴ See Appellant's Amended Brief, pp. 6-7.

³⁵ A search for "Bacque" in the Washington State Bar Association's Lawyer Directory does not yield any results. Deen notes that this is not in the record, but submits that this Court may take judicial notice of this fact. See ER 201.

critically, she did not even declare that she had reviewed any of Fidelity's records. Consequently, there is no foundation for her testimony.

Bacque stated that she was serving as a witness because "Paul Chatterton recently had surgery and is on an extended leave from the company." Bacque did not identify who Chatterton is, or what connection he had with anything related to this lawsuit.³⁶ At best, the Court could infer that Bacque's declaration is repeating information told to her by Chatterton — that, of course, would be inadmissible hearsay.

Next, Bacque testified about a title search conducted "in our capacity as title company" and the opinion about title that was reached by "our company." She did not identify who performed the search. She did not provide any documents — authenticated or otherwise — describing the title search or setting forth the "company's" conclusions. The best evidence reflecting what the title company found in examining the chain of title and reported to any buyer or lender before closing would be a copy of the preliminary commitment, but Bacque did not provide such a document. Thus, when Bacque declared, "[W]e would not insure access

³⁶ In fact, Chatterton was identified as an *expert* witness — and not a *fact* witness — in Adams's List of Proposed Primary Witnesses. See CP 285, 313-15. As Deen argued below, this designation supports a conclusion that Chatterton himself had no first-hand knowledge about any of the transactions concerning the Adams and Deen Properties. CP 270-71. Adams did not dispute this conclusion.

to the [Deen] property,” she does so without personal knowledge or any contemporaneous writing to substantiate the truth of what she says.³⁷

Bacque also offered a legal opinion on the effectiveness of the recorded documents to create an easement. First, because she is not a lawyer, she is not qualified to provide a legal opinion. As a title officer, Bacque admittedly *might* qualify to provide expert testimony on the interpretation of deeds and easements if she could show sufficient experience and responsibility, but we do not know whether she has been analyzing title documents for 30 years, 30 months, or 30 days, so the Court has no foundation to deem Bacque an expert. Finally, and most importantly, it is the Court’s province to determine the legal effect of a instrument conveying an interest in real property: expert testimony on this subject is improper.³⁸

Affidavits submitted a motion for summary judgment must meet prescribed minimal standards:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in

³⁷ Furthermore, it must also be emphasized that a preliminary commitment is not an abstract of title, but only an offer to provide title insurance on certain terms. *See* RCW 48.29.010(3)(c). Consequently, a title officer can no more rely on a preliminary commitment as a basis for opining on the condition of a property’s title as can a potential purchaser desiring to know the condition of title. If admissible, Bacque’s statements could establish nothing more than that her employer made a business decision to not assume the risk that the Deen Parcel is landlocked.

³⁸ *See Ball v. Smith*, 87 Wn.2d 717, 722-23, 556 P.2d 936 (1976).

evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.³⁹

Bacque's declaration does not meet any of these standards. Furthermore, Adams relied on Bacque's declaration in support of his cross-motion and Deen raised all of the above objections in response, but Adams submitted nothing in reply to either rebut Deen's arguments or to rehabilitate his witness. Moreover, although knowing that Deen would renew his objections if Adams relied on Bacque's declaration on appeal, Adams has still failed to present any argument why Bacque's declaration is admissible. Accordingly, the Court should reject Bacque's declaration in its entirety.⁴⁰

D. DEEN'S PROPERTY IS THE DOMINANT ESTATE OF AN EXPRESS EASEMENT APPURTENANT

The recorded documents described above create an express easement for ingress and egress to Deen's property over the north 30 feet of Adams's property. The easement remains valid and in effect today.

An express easement is one created by a writing in compliance with the law governing the conveyance of interests in land.⁴¹

³⁹ CR 56(c).

⁴⁰ Deen also objected to Adams's testimony because Adams refused to provide discovery or to participate in a CR 26(i) discovery conference. CP 269-70, 283-84, 286-312. Deen renews his objection here.

⁴¹ See I WASHINGTON REAL PROPERTY DESKBOOK, § 10.3(1)(b) (3d ed. 1997).

An express conveyance of an easement, by grant or reservation, must be made by written deed. RCW 64.04.010. No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, providing the language is sufficiently definite and certain in its terms. 28 C.J.S. *Easements* § 24 (1941); 25 Am.Jur.2d *Easements & Licenses* § 20 (1966); 2 G. Thompson, *Real Property* § 320, at 47 (1980 repl.).⁴²

An easement appurtenant attaches to the dominant estate and passes to subsequent successors-in-interest.⁴³

Easements appurtenant to the dominant estate serve the estate and are thus part of it. Therefore, unless limited by the terms of their creation and transfer, they are conveyed with the estate as an appurtenance *regardless of whether specifically mentioned in the instrument of transfer*. *Loose v. Locke*, 25 Wn.2d 599, 171 P.2d 849 (1946); *Cowan v. Gladder*, 120 Wash. 144; *Clippinger v. Birge*, 14 Wn.App. 976, 547 P.2d 871 (1976).⁴⁴

The easement appurtenant passes even if the conveyance is involuntary.⁴⁵

1. The Merger Doctrine Does Not Invalidate The Express Easement

Adams argues that no express easement exists because either: (a) the easement never came into existence because an owner cannot create an easement over his own property to benefit himself; or (b) if the easement

⁴² *Beebe v. Swerda*, 58 Wn.App. 375, 379, 793 P.2d 442, *rev. denied*, 115 Wn.2d 1025, 802 P.2d 126 (1990).

⁴³ See *Cowan v. Gladder*, 120 Wash. 144, 206 P. 923 (1922); I WASHINGTON REAL PROPERTY DESKBOOK, § 10.5(1)(a), *supra*.

⁴⁴ I WASHINGTON REAL PROPERTY DESKBOOK, § 10.5(1)(b), *supra* (emphasis added); see also *Olson v. Trippel*, 77 Wn.App. 545, 552-53, 893 P.2d 634 (1995).

⁴⁵ See I WASHINGTON REAL PROPERTY DESKBOOK, § 10.5(1)(b), *supra*.

was properly created, it terminated upon the merger of the two estates into a single ownership in subsequent transactions. This argument is not persuasive.

Adams's argument relies on the doctrine of merger, which serves to eliminate property interests when different estates come into common ownership. More than the mere vesting of legal title is required, however, to trigger merger.

A merger ordinarily occurs when the fee and a charge or mortgage thereon vest in the possession of one person. The doctrine of merger arises from the fact that when the *entire legal and equitable estates are united* in one person there can be no occasion to keep them distinct; but if there is an outstanding intervening title, the foundation of the merger does not exist as a matter of law.⁴⁶

Thus, it is not until a single party holds all legal and equitable interests that merger can occur. "The equitable interest merges into the legal interest and 'absolute ownership ensues, without any division into legal and equitable interests.'"⁴⁷

As a general rule, one cannot have an easement in one's own property. Where the dominant and servient estates of an easement come into common ownership, the easement is extinguished. This is the rule in Washington. However, *the doctrine of merger is disfavored both at law and in equity*, and there are exceptions to its application.

⁴⁶ *Anderson v. Starr*, 159 Wash. 641, 643, 294 P. 581 (1930) (emphasis added).

⁴⁷ *First Alabama Bank v. Webb*, 373 So.2d 631, 634 (Ala. 1979), quoting Bogert, TRUSTS AND TRUSTEES (2nd ed.) § 129.

Consequently, the courts will not compel a merger of estates where the party in whom the two interests are vested does not intend such a merger to take place, or where it would be inimical to the interest of the party in whom the several estates have united, *nor will they recognize a claim of merger where to do so would prejudice the rights of innocent third persons.*⁴⁸

The Pennsylvania Supreme Court provides a cogent and similar discussion of the merger doctrine in the easement context:

Early in the common law an easement was held to be extinguished when title to the dominant and servient lands came into the hands of the same person. ‘No man,’ it was said, ‘can have an easement in his own land’, and the easement was deemed to have been swallowed up in a ‘merger’ of the two estates. However, ‘merger is a technical rule at best and so, even though two rights become united in one person, a court in equity will keep them separated if that is required by an outstanding claim of a third party, or is necessary in view of the proprietor’s own situation.’ In short, ‘If there is no reason for keeping. * * * (the outstanding interest now acquired), then equity in the absence of any declaration of (the owner’s) intention, will destroy it, but if there is any reason for keeping it alive, such as the existence of another encumbrance, equity will not destroy it.’ Accordingly, Pennsylvania has long held to the doctrine that an easement may remain unaffected by unity of estates, or viewed differently, revive upon separation, if a ‘valid and legitimate purpose’ will be subserved thereby.⁴⁹

⁴⁸ *Radovich v. Nuzhat*, 104 Wn.App. 800, 805, 16 P.3d 687 (2001), quoting *Mobley v. Harkins*, 14 Wn.2d 276, 282, 128 P.2d 289 (1942) (emphasis added; footnotes omitted).

⁴⁹ *Schwoyer v. Smith*, 388 Pa. 637, 640-41, 131 A.2d 385 (Pa. 1957) (ellipsis in original; citations omitted).

In *Beebe v. Swerda*,⁵⁰ Elken conveyed to Putnam property consisting of two tax lots, lying north and south of each other; Elken included in the deed a road easement to the south parcel, which would have been landlocked but for the common ownership by Putnam and the existence of the easement. Through various conveyances, Swerda eventually came into title to the north parcel and Beebe became owner of the south parcel. Swerda contended that Beebe could not use the road easement for access to his property and sued to quiet title. The Superior Court ruled in favor of Beebe, and the Court of Appeals affirmed:

In the case *sub judice*, the reservation of an easement makes specific reference to the intended beneficiaries of the easement by the provision “for the use and benefit of the public and for the use and benefit of the property herein conveyed.” As in *Queen City [Sav. & Loan Ass'n v. Mechem]*, 14 Wn.App. 470, 543 P.2d 355 (1975), the necessity for an easement was unclear at the time of the conveyance because Putnam would not need an easement over his own property. Furthermore, nothing more than an easement in gross could exist at the time of the conveyance because there was only one estate. By definition, two estates are required for an appurtenant easement. An easement is generally defined as:

A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.

Black's Law Dictionary 599 (rev. 4th ed. 1968). See also *State ex rel. Shorett v. Blue Ridge Club, Inc.*, 22 Wn.2d 487, 494, 156 P.2d 667 (1945). An appurtenant easement is “[o]ne

⁵⁰ 58 Wn.App. 375, *supra*.

which is attached to and passes with the dominant tenement as an appurtenance thereof.” Black's Law Dictionary 599 (rev. 4th ed. 1968).

A dominant and a servient estate were not identifiable at the time of the conveyance involved in *Queen City*. However, it is clear that the *Queen City* court relied upon the trial court's finding that the intent of the parties to the original conveyance was to create an easement to benefit the lands being conveyed. The same intent is manifestly clear in the Elken deed. The language used, the precise description of the location and extent of the easement, and the provision that “said easement shall constitute a covenant running with the land” are all consistent with an intent to create an easement. *Furthermore, the necessity for an easement to serve the property now owned by Beebe is compelling. Without the easement, Beebe's property is landlocked. It took the passage of time and several conveyances to reach the point where a servient estate and a dominant estate in separate ownerships came into existence. They are in existence now.*

Easements in gross can become appurtenant easements where that result is consistent with the intent of the parties. The rule is stated in *Roggow v. Hagerty*, 27 Wash.App. 908, 911, 621 P.2d 195 (1980) as follows:

When an instrument purports to create an easement in favor of a grantee to facilitate some other parcel of land which the grantee does not presently own but subsequently acquires, the easement is an easement in gross until the land is acquired, at which time it becomes an easement appurtenant. 3 H. Tiffany, Real Property § 759 (3d ed. 1939 & Supp.1980).

In *Kalinowski v. Jacobowski*, 52 Wash. 359, 366, 100 P. 852 (1909), the court stated:

So far as we are able to ascertain, it has always been the law that where a servitude, such as a right of way, has been granted by an instrument in writing, the fact that the dominant tenement has not been acquired at the date

of the instrument cannot, after it has been actually acquired, prevent the servitude becoming a legal accessory to the dominant tenement, provided the servitude was so used as to give reasonable notice of the burden to any person in whom the property of the land might subsequently become vested.⁵¹

Applying the *Beebe* analysis to the facts here yields the same result as in *Beebe*.⁵² Fiala's conveyance of the two parcels to Pierce included an easement for ingress, egress, and utilities across the Adams Property for the benefit of the Deen Property. Because both parcels were in common ownership, only an easement in gross was created at the time. Other conveyances of the two parcels occurred, but both parcels always remained in common ownership until, finally, Deutsche Bank foreclosed on the Deen Property, while Adams remained in title to the other, servient estate. The intent to benefit the Deen Property with an easement for access and utilities is clear from the original conveyance. And, to paraphrase *Beebe*,

⁵¹ *Beebe v. Swerda*, 58 Wn.App. at 381-82, *supra* (emphasis added).

⁵² As he did in the trial court, Adams erroneously asserts that "there was no merger issue raised or argued in" *Beebe v. Swerda*, 58 Wn.App. 375, *supra*, and "[t]he Court did not discuss the Doctrine of Merger at all." Appellant's Amended Brief, p. 18. In the opinion's section titled "Creation of Easement," *Beebe* notes "the necessity for an easement was unclear at the time of the conveyance because Putnam would not need an *easement over his own property*" and observes "[b]y definition, two estates are required for an appurtenant easement." *Beebe v. Swerda*, 58 Wn.App. at 381, *supra* (emphasis added). The Court of Appeals may not have used the term "merger of title" in its opinion, but it manifestly was addressing that doctrine in its analysis of the creation of the easement in *Beebe*.

Furthermore, the necessity for an easement to serve the property now owned by [Deen] is compelling. Without the easement, [Deen's] property is landlocked. It took the passage of time and several conveyances to reach the point where a servient estate and a dominant estate in separate ownerships came into existence. They are in existence now.⁵³

Adams asserts that the facts in *Beebe* “are completely different than the instant case ... the Deeds of Trust executed by Patricia Powers [did not include] in the description of the property any easement across the Adams parcel.”⁵⁴ That assertion, of course, is untrue. When Powers executed the deed of trust for the benefit of Pierce Commercial Bank, she expressly conveyed the land “together with ... all easements ... now or hereafter a part of the property.”⁵⁵ Powers signed the deed of trust on the same day the deeds to her were signed by her sellers.⁵⁶ Escrow's delivery of the deeds to Powers and delivery of the deed of trust to Pierce Commercial Bank essentially occurred simultaneously. In delivering the deed of trust, Powers retained possessory rights to the Deen Property, but she also surrendered legal and equitable rights to the trustee and the bank that would eventually create a landlocked property in the event of foreclosure. Consequently, the parties having legal and equitable interests

⁵³ *Beebe v. Swerda*, 58 Wn.App. at 382, *supra*.

⁵⁴ Appellant's Amended Brief, p. 19.

⁵⁵ CP 83.

⁵⁶ See CP 74-75, 77-78, 94-95.

in the Deen Property were not the same as those having interests in the Adams Property, and no merger of title occurred.

Adams's assertion that he also merged title upon his foreclosure also fails. He admits that he acquired his interest in the Deen Property subject to Deutsche Bank's deed of trust. Consequently, Adams's legal and equitable interests in the Adams Parcel and the Deen Parcel were not coextensive and, hence, no merger occurred.⁵⁷

Adams makes the further assertion that Powers could not include an easement in the deed of trust to Pierce Commercial Bank because she "did not own the Adams parcel at the time the Deed of Trust was granted."⁵⁸ Adams's brief to this Court does not explain his rationale, but he made the same argument to the Superior Court based on the order in which the various instruments were *recorded*.⁵⁹ This is ludicrous. The deeds to Powers for both parcels are dated July 20, 2005. The deed of trust from Powers to Pierce Commercial Bank is also dated July 20, 2005. All three instruments were recorded on July 29, 2005: the deed for the Deen Property bears Recording No. 200907290129; the deed of trust, Recording No. 200907290130; and the deed for the Adams Property,

⁵⁷ See *Anderson v. Starr*, 159 Wash. 641, *supra*.

⁵⁸ Appellant's Amended Brief, pp. 11-12.

⁵⁹ See CP 236 (¶ 3), 243.

Recording No. 200907290132.⁶⁰ Only delivery and acceptance of a deed are required to validly convey title; recording is not a prerequisite.⁶¹ Consequently, it is irrelevant that the deed to Powers for the Adams Property was recorded after her deed of trust to Pierce Commercial Bank — she had received the deeds for both properties and, thus, clearly held title to both properties when the deed of trust was recorded.⁶²

Adams relies on *Coast Storage v. Schwartz*⁶³ and *Schlager v. Bellport*⁶⁴ to argue that the express easement created in 1989 by Fiala no longer benefits the Deen Property. *Coast Storage* is distinguishable because it addresses *extinguishing* a valid easement when, after the easement became operative, the dominant and servient estates were recombined into common ownership. The present case addresses when an inchoate easement finally becomes effective upon the initial severance of estates. *Schlager* appears to be a one-off decision that has not been

⁶⁰ See CP 126, 147-72.

⁶¹ See Stoebeck & Weaver, *Real Estate: Transactions*, 17 WASH. PRACTICE § 7.11 (2nd ed. 2004).

⁶² Indeed, if Adams's analysis on this point were correct, then his argument that title also merged in Powers must fail: her title in the Deen Property was subject to the Pierce Commercial Bank deed of trust before her deed to the Adams Property was recorded and, according to Adams, thereby came into title to that property; therefore, she never simultaneously held all of the legal and equitable interests in both properties, which prevents any merger from arising.

⁶³ 55 Wn.2d 848, 351 P.2d 520 (1960).

⁶⁴ 118 Wn.App. 536, 76 P.3d 778 (2003).

followed by any other Washington court and misapprehended key factors in the lawsuit.

In *Coast Storage, supra*, Jannsen owned five tracts of land in a platted subdivision. He sold a portion of one tract to Golden Bear Oil Company, at which time Jannsen reserved an easement to himself for access to his other property surrounding the Golden Bear property. That surrounding property was later sold to Coast Storage, which eventually purchased the Golden Bear property, as well. An adjacent property was owned by Schwartz, which still retained an easement across the former Golden Bear property, although Schwartz had no need to use that easement. When Coast Storage sued to extinguish the easement, it then owned the servient estate and the only dominant estate that might have any actual use for the easement. The Court of Appeals affirmed a judgment quieting title and extinguishing the easement:

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 [Coast Storage], the easement originally reserved by Jannsen terminated. One cannot have an easement in his own property. The easement no longer serves the property north and west of the Golden Bear tract now owned by the plaintiffs; nor does the easement now beneficially serve tract 66 to the east owned by defendants Schwartz. *There is no longer any reason or necessity to go from defendants Schwartz' parcel east of the abandoned street to those north and west of the tract first acquired by Golden Bear. An easement is a use interest, and to exist as an*

appurtenance to land, must serve some beneficial use. The strip now ends in the middle of plaintiffs' property. It does not lead anywhere, truly a dead-end roadway.⁶⁵

In *Coast Storage*, then, the easement was created when common ownership of the dominant and servient estates was severed, and the question was whether the now-common owner of the servient and *some* of the dominant estates could have judgment extinguishing the easement. *Coast Storage* did not address whether an express easement created when the estates were in common ownership, and which consistently remained in common ownership through multiple conveyances, becomes effective when the common ownership is finally – *and first* – severed.

*Schlager v. Bellport*⁶⁶ concerned a view easement burdening “Lot 1” in favor of “Lot 2” and “Lot 5.” The view easement — which restricted the height of any building on Lot 1 — was created at the same time as the common owner of all three lots conveyed Lots 1 and 5 to a single grantee in 1971. Lots 1 and 5 remained in common title through another conveyance in 1983, but then were subsequently conveyed separately and remained under continuously separate ownership. Schlager acquired title to Lot 5 in 1999; Bellport acquired Lot 1 in 2001. The Court of Appeals held that merger of title had extinguished Lot 5’s right to

⁶⁵ *Coast Storage v. Schwartz*, 55 Wn.2d at 853, *supra* (emphasis added).

⁶⁶ 118 Wn.App. 536, *supra*.

restrict the height of buildings on Lot 1 as soon as Lots 1 and 2 were sold in 1971. In reaching this conclusion, the Court of Appeals glossed over the fact that the height restriction was included in Bellport's 2001 deed.⁶⁷ The Court also noted that "Schlager does not rebut Bellport's assertion that his roof has exceeded the 25-foot limit since construction of the house in 1983."⁶⁸ This is meaningless, however, because the height restriction burdened only Lot 1, not Lot 5.⁶⁹ *Schlager*, therefore, appears to have been wrongly decided. Schlager apparently did not seek review by the Supreme Court, and the decision has been cited in only one reported Washington case, which did not apply the merger doctrine.⁷⁰ *Schlager* simply is not persuasive.

*Radovich v. Nuzhat*⁷¹ supports Deen's position. In that case, the Court of Appeals had no problem finding that the common owner of the dominant and servient estates could create an easement. The fact that the easement was re-created in subsequent conveyances was important because common title to the two estates was separated and reunited on several occasions. That is distinctly different from the situation here,

⁶⁷ See *Schlager*, 118 Wn.App. at 542 n.14; cf., *Radovich v. Nuzhat*, 104 Wn.App. 800, 805, 16 P.3d 687 (2001) (easement extinguished by merger can be re-created in subsequent conveyances).

⁶⁸ *Schlager*, 118 Wn.App. at 542 n.14.

⁶⁹ See *id.*, at 539.

⁷⁰ See *M.K.K.I. v. Krueger*, 135 Wn.App. 647, 659, 145 P.3d 411 (2006).

⁷¹ 104 Wn.App. 800, *supra*.

where no severance in legal title to the Adams Property and the Deen Property occurred from the time the easement was created in 1989 until Deutsche Bank foreclosed in 2009. Adams's reliance on *Radovich* is misplaced.

2. The Various Deeds Do Not Establish The Grantors' Intentions

Adams places great emphasis on the form of deed used in the various conveyances and whether the instruments referred to an easement to argue that the grantor did not intend to convey an easement or subject the property to an easement.⁷² His argument, however, is flawed for several reasons.

First, in all of Adams's argument, he never addresses the rule of law that an easement appurtenant is "conveyed with the estate as an appurtenance regardless of whether [it is] specifically mentioned in the instrument of transfer."⁷³ If the easement right is deemed conveyed even if it is not mentioned, then, logically, more than an omission from the deed is required to establish that no easement has been conveyed. In other

⁷² Adams asserts that "it was represented to [him] that title was unencumbered by the easement claimed to benefit the Deen property" in a context that indicates Ms. Powers made that representation. See Appellant's Amended Brief, 21-22. Adams provides no citation to the record to support this fundamentally critical allegation. The omission is understandable: in his declaration, Adams never described any such communication with Ms. Powers. See CP 251-53. This unsupported, and belated, version of events should not be given any credence.

⁷³ I WASHINGTON REAL PROPERTY DESKBOOK, § 10.5(1)(b), *supra*.

words, the easement is *presumed* to have been included with the conveyance; therefore, anyone disputing that the grantee did not receive an easement must present more evidence to establish the grantor's intent than just the fact that the easement is not mentioned in the deed.

Second, Adams conflates “warranty” with “representation,” but these are distinct legal concepts: a breach of warranty occurs regardless of whether the party giving the warranty is aware of its falsity, while an action for false representation requires a showing of *scienter*.⁷⁴ Consequently, a warranty deed stating the property is subject to an easement is not indicative in itself of whether the grantor actually knows whether such an easement exists. As a corollary, without evidence of the grantor's actual knowledge — or, at least, belief — of the easement's existence, no conclusion can be drawn about the grantor's intent in signing a warranty deed that does not mention the easement.

Third, even assuming for the sake of argument that some inference of intent could be drawn from omitting a reference to an easement in a warranty deed, that inference would be applicable only to a deed conveying the servient estate. A statutory warranty deed warrants that, among other things, the property is free of encumbrances at the time of

⁷⁴ See *Ford v. Smith*, 48 Wash. 398, 400, 93 P. 909 (1908).

conveyance.⁷⁵ Thus, a deed conveying the *dominant* estate can omit a reference to easement rights without running afoul of the statutory warranties because the easement benefits, and does not encumber, that property.

Finally, Adams's attack based on the trustees' deeds is misguided. The trustees who foreclosed Adams's deed of trust and the Bank's deed of trust each used a form of bargain-and-sale deed.⁷⁶ This form provides warranties "only against the acts of the grantor, not as to title defects that may have arisen during the ownership of previous owners."⁷⁷ "Thus, the bargain and sale form is designed to be given by fiduciaries, such as trustees and administrators."⁷⁸

Adams acquired title to his property through foreclosure and after the northern driveway over the access easement had been visibly in use for at least 18 years. Deen acquired title by purchase from Deutsche Bank through a deed that expressly states he has a non-exclusive easement over the north 30 feet of Adams's property, which is precisely where the northern driveway is located. The intent to create an access easement

⁷⁵ See RCW 64.04.030.

⁷⁶ See RCW 64.04.040.

⁷⁷ Stoebuck & Weaver, *Real Estate: Transactions*, 17 WASH. PRACTICE § 7.2, at 471, *supra*.

⁷⁸ *Id.*

benefiting the Deen Property over the Adams Property is clear from the earlier conveyances. Without that easement, the Deen Property is landlocked. Accordingly, the Deen Property is the dominant estate of an express easement.

E. DEEN’S PROPERTY IS THE BENEFICIARY OF AN EASEMENT BY IMPLICATION

Should the Court determine that an express easement benefiting the Deen Property does not exist, Deen is entitled to access over the Adams Property by virtue of an “easement by implication,” also referred to as an “implied easement.”

The party seeking to establish an easement implied from prior use generally must establish three key elements: (1) unity of title and subsequent separation by grant of the dominant estate; (2) apparent and continuous use; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate. *Silver v. Strohm*, 39 Wn.2d 1, 5, 234 P.2d 481 (1951); *Bushy v. Weldon*, 30 Wn.2d 266, 269, 191 P.2d 302 (1948). The underlying principle is that a grant of land is impliedly accompanied by all things necessary to its reasonable use and enjoyment. *Id.*

Unity of title and subsequent separation is an absolute requirement. The second and third characteristics are aids to construction in determining the cardinal consideration — the presumed intention of the parties as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other.⁷⁹

⁷⁹ *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn.App. 188, 195-96, 570 (2002).

Deen establishes all three elements for an easement by implication. The original unity of title is undisputed: it is the crux of Adams's argument that no valid easement was ever created. The subsequent separation is incontrovertible: Adams owns one parcel; Deen owns the second.

Apparent and continuous use is not open to serious debate. The aerial photographs dating back to 1990 demonstrate the main driveway's consistent presence and, inferentially, its continuous use.

Last, the easement is reasonably necessary to the proper enjoyment of the dominant estate. The Deen Property is landlocked and, without the driveway, it has no means of ingress, egress, or obtaining utilities.

That the subsequent separation in title occurred as a result of foreclosure does not alter the outcome. In *Puget Sound Mut. Sav. Bk. v. Lillions*,⁸⁰ the plaintiff foreclosed upon property that was completely surrounded by other land owned by the debtors. Access to the foreclosed property was by an "established driveway" that crossed over the debtors' other land; utilities were brought into the foreclosed property via poles placed along the driveway; and water was obtained from a spring located

⁸⁰ 50 Wn.2d 799, 314 P.2d 935 (1957), *cert. denied*, 357 U.S. 926, 78 S.Ct. 1373, 2 L.Ed.2d 1371 (1958).

on the debtors' property.⁸¹ The Washington Supreme Court held that an implied easement for ingress, egress, utilities, and water existed, regardless of whether the separation of title was voluntary or the result of a judicial foreclosure.⁸²

Two leading commentators have described the easement implied from prior use as follows:

The present section discusses what will here be called "easements implied from prior use," though often they are called simply "implied easements." Elements that are required for the doctrine to operate are: (1) a landowner conveys part of his land and (2) retains part, usually an adjoining parcel; (3) before the conveyance, there was a usage existing between the parcel conveyed and the parcel retained that, had the two parts then been separately owned, could have been an easement appurtenant to one part; (4) this usage is reasonably necessary to the use of the part to which it would have been appurtenant; and (5) the usage is "apparent." Decisions from Washington and elsewhere sometimes mention a sixth element, that the usage must have been "continuous," though this really means only that it have been continuous enough to have been the subject of an easement, which is implied in element 3 above. If the above elements are present, then an easement may exist by implication in favor of the parcel that the usage serves. Certainly, this is true, upon proof of the elements as listed, when the easement is appurtenant to the parcel that was conveyed – the so-called implied easement by "grant." . . .

To explain how easements arise by implication from prior usage, courts have traditionally said the easement was there before the severance of the parcels and was transferred by implication in the conveyance. This creates a logical problem, for how could the grantor have an easement across his own

⁸¹ See *Puget Sound Bank*, 50 Wn.2d at 804-05, *supra*.

⁸² See *id.* at 804-05.

land when he owned it all. To explain their way out of this dilemma, courts then say the pre-existing easement was not a true easement but only a “quasi-easement,” a palpable bit of fictionalization. The whole fiction is quite unnecessary, as some authorities have pointed out. *When an easement is created by express grant in a deed, no one finds it necessary to reason that there was a pre-existing easement; the easement is simply created in the act of granting by deed. The same thing may be said of an implied easement; it is created, not expressly, but by implication as a new easement.*⁸³

No material issue of fact exists to controvert the presence of all five elements described by Stoebuck and Weaver. Adams musters a fallacious argument that use of the driveway was not “continuous” because it was not used from March 2009, when Powers moved out, and October 2009, when Deen moved in — a total of about five months out of the 35 years since Deen’s residence was constructed and access and utilities were located in the north 30 feet of Adams’s property. As Stoebuck and Weaver explain, “continuous” means only that the usage “have been continuous enough to have been the subject of an easement.”⁸⁴ Adams himself admits the prior usage by Powers. The temporary break in

⁸³ Stoebuck & Weaver, *Real Estate: Transactions*, 17 WASH. PRACTICE § 2.4 at 90-91, *supra* (emphasis in original; footnotes omitted).

Accordingly, *Rogers v. Cation*, 9 Wn.2d 369, 115 P.2d 702 (1941), and *Bailey v. Hennessey*, 112 Wash. 45, 191 P. 863 (1920), cited by Adams (Responding Memorandum, p. 12) and which engage in the quasi-easement analysis, are not persuasive.

⁸⁴ Stoebuck & Weaver, *Real Estate: Transactions*, 17 WASH. PRACTICE § 2.4 at 90, *supra*.

usage *while Deen's property was vacant after foreclosure* is not material so as to prevent finding an implied easement based on prior usage.

Adams also attempts to argue that there is a material issue of fact as to the previous sellers' intent. He reasons that, because the warranty deeds used by prior owners did not mention an easement, then they must not have intended to grant an easement. Adams, however, can make this argument only by contradicting his own position that the doctrine of merger of title prevented the original creation of the easement in 1989 from being effective. If Adams is correct about the 1989 conveyance, then the subsequent owners who conveyed both parcels simultaneously would have been engaged in a futile act if they attempted to recreate the easement in subsequent conveyances. Furthermore, Adams presents no evidence whatsoever as to why the prior owners did not mention the easement in their warranty deeds, either as part of the conveyance or as an exception to the warranty. The presumption is that owners do not intend to create landlocked properties, which violate public policy: if Adams wanted to counter that presumption, it was incumbent upon him to present admissible evidence to the contrary, and he failed to do so.

Adams's argument on intent based on what does, or does not, appear in the warranty deeds demonstrates a misunderstanding of the nature of implied easements. In essence, he argues that the Court cannot

find an implied easement because the deeds do not mention the easement. But, the whole point of an implied easement is that it is an equitable remedy for a situation where one owner needs an easement over another owner's property and there has been no written conveyance. Under Adams's approach, the very circumstance creating a need for an implied easement — the absence of an express easement — would automatically serve to prevent finding an implied easement on summary judgment.

Nor does *Visser v. Craig*⁸⁵ support Adams's position that an issue of fact exists to prevent this Court from entering summary judgment for an implied easement based on prior use.

We have no evidence in the record before us about the usage of the Craigs' easement across the 13 acres and the Goodlings' property since 1999. And it appears that the Westhusings enjoyed the 13 acres for over five years without complaining of the necessity to have access to SE Moffet Road, the public road on the south side of the Craig and Trinh properties.⁸⁶

In stark contrast to *Visser*, the record here is replete with evidence that the Deen Property has used the north 30 feet of the Adams Property for ingress, egress, and utilities for many years. Indeed, the record here includes *Adams's own testimony* that “the path [*i.e.*, driveway] now being used is in the same location as the path used prior to the property being

⁸⁵ 139 Wn.App. 152, 159 P.3d 453 (2007).

⁸⁶ *Id.* at 161-62 (emphasis added).

vacated by Mr. and Ms. Powers.”⁸⁷ Deen’s evidence, combined with Adams’s admission that Deen’s current use coincides with the Powers’ usage and with Adams’s failure in discovery to identify any other location for the driveway, eliminates any argument that there is a material issue of fact concerning Deen’s claim to an implied easement based on prior usage.

Consequently, Deen is entitled to judgment declaring his property is the dominant estate holding an implied easement for ingress, egress, and utilities over the north 30 feet of the Adams Property.

F. DEEN’S PROPERTY IS THE BENEFICIARY OF AN EASEMENT OF NECESSITY

As a second alternative to finding an express easement, Deen claims an easement of necessity over the Adams Property.

An easement of necessity is an expression of a public policy that will not permit property to be landlocked and rendered useless. In furtherance of that public policy, we give the owner, or one entitled to the beneficial use of landlocked property, the right to condemn a private way of necessity for ingress and egress. RCW 8.24.010.

Condemnation, however, is not necessary where the private way of necessity is over the land of the grantor or lessor of the landlocked property.

The theory of the common law is that where land is sold (or leased) that has no outlet, the vendor (or lessor) by implication of law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser (or lessee) to have access to his property. *State ex rel. Mountain Timber*

⁸⁷ CP 253.

Co. v. Superior Court of Cowlitz County, 77 Wash. 585, 588, 137 P. 994 (1914).

Under the findings of the trial court, Hellberg has no access from his leased land to any highway except over the land of Coffin, the lessor, by way of the old Coffin road. The right of the landlocked tenant to ingress and egress over his lessor's property cannot be gainsaid.⁸⁸

An easement of necessity can be invoked against a successor to the original grantor.⁸⁹

The Deen Property without an easement is landlocked. Deen requires a way of necessity to prevent his property from being useless. The proper — and existing — way is over the main driveway along the northern portion of the Adams Property.

Adams again relies on *Visser* to argue that summary judgment cannot be granted here because there exists a material issue of fact as to intent. In *Visser*, however, a primary issue was whether an existing express easement could be extended to additional property that was not appurtenant to the original grant. If it could, then the property at issue would not be landlocked and there would be no need for an implied easement of necessity.⁹⁰

Adams asserts that, under *Visser*:

⁸⁸ *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 666-67, 404 P.2d 770 (1965).

⁸⁹ *See, e.g., Kemmer v. Keiski*, 116 Wn.App. 924, 68 P.3d 1138 (2003).

⁹⁰ *See Visser*, 139 Wn.App. at 159-60, *supra*.

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.⁹¹

Frankly, Adams's proposition is unclear. In the first sentence, he seems to be stating that Washington recognizes a rebuttable presumption that a landlocked property is entitled to an easement of necessity. Deen agrees with that proposition. The second sentence may be consistent with that proposition, or it may be asserting that no presumption is available to the landlocked property.

In any event, Adams has overstated the holding in *Visser*. There, the grantors opposing the implied easement of necessity claimed they had an *express agreement* with the grantees that the grantors' property would never be burdened by an easement. In opposing a motion for summary judgment, the grantors presented some indirect evidence of such an agreement and thereby demonstrated the existence of a material issue of fact.⁹²

The critical transaction here is when Powers granted the deed of trust that encumbered the Deen Property only and that was eventually

⁹¹ Appellant's Amended Brief, pp. 24-25.

⁹² See *Visser*, 139 Wn.App. at 163-65, *supra*.

foreclosed by Deutsche Bank.⁹³ The record is devoid of any evidence that Powers and her lender discussed, much less agreed, that the Deen Property would have absolutely no right to continue using the existing driveway and utilities located on the Adams Property in the event of a foreclosure.⁹⁴ In short, Adams's theory requires the Court to conclude — with no supporting evidence — that a lender accepted a deed of trust on property that would be landlocked in the event of a default. It defies all reason to think that a lender would agree to make a loan under those circumstances.

The doctrine allowing an easement of necessity serves the public policy of keeping land productive. Merely creating the landlocked parcel alone is sufficient to trigger the “implication of law” that the parties intended to allow ingress and egress over the servient estate. Thus, the easement of necessity is a presumption adopted by the courts to protect public policy. The presumption is subject to rebuttal by the submission of admissible evidence; therefore, opposing the presumption is an affirmative defense on which Adams has the burden of proof. It was incumbent upon

⁹³ What Adams intended Deutsche Bank would receive at the time of foreclosure is irrelevant. *See* Appellant's Amended Brief, p. 22. Adams admits his interest in the properties was junior to the Bank's deed of trust; therefore, his “intent” could not affect Deutsche Bank's rights unless Deutsche Bank expressly agreed to subordinate its interests to Adams's.

⁹⁴ Indeed, the deed of trust included a conveyance of all easements. Assuming for the sake of argument that that provision is not sufficient to create an express easement, it certainly is evidence of Powers's intent to allow the Deen Property to continue using the existing driveway on the Adams Property.

Adams to present admissible evidence that the prior owners intended to create a landlocked property. It was incumbent upon Adams to present admissible evidence that would at least support a reasonable inference that Powers and the lender expressly agreed the Deen Property would be landlocked in the event of foreclosure.⁹⁵ Adams did not meet his burden of coming forward with such evidence in either case. Accordingly, Deen is entitled to summary judgment granting an implied easement by necessity.

V. CONCLUSION

For the foregoing reasons, Respondent Shane Deen respectfully requests that this Court affirm the judgment entered below.

RESPECTFULLY SUBMITTED this 10th day of October, 2012.

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.


Kennard M. Goodman, WSBA #22823

⁹⁵ Cf. *Visser v. Craig*, 139 Wn.App. at 163-65, *supra*.

No. 43288-9-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

BART ADAMS,
Plaintiff-Appellant,
vs.
SHANE DEEN,
Defendant-Respondent.

FILED
COURT OF APPEALS
DIVISION II
2012 OCT 11 AM 9:50
STATE OF WASHINGTON
BY _____
DEPUTY

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. Jeanette Dalton, Visiting Judge)

**CERTIFICATE OF SERVICE OF
RESPONDENT'S BRIEF**

Kennard M. Goodman
WSBA No. 22823
BISHOP, WHITE, MARSHALL & WEIBEL, P.S.
720 Olive Way, Suite 1201
Seattle, WA 98101
Telephone: (206) 622-5306
Facsimile: (206) 622-0354

*Attorneys for Respondent
Shane Deen*

The undersigned, under penalty of perjury, under the laws of the State of Washington, hereby declares as follows:

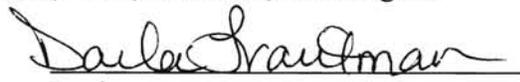
1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Bishop White Marshall & Weibel, P.S. My business and mailing address are 720 Olive Way, Suite 1201, Seattle, WA 98101.

3. On October 10, 2012, I caused to be served Respondent's Brief and this Certificate of Service on counsel of record as follows:

Bart Adams Adams & Adams Law, P.S. 2626 North Pearl Street Tacoma, WA 98407	<input type="checkbox"/> By First Class Mail <input checked="" type="checkbox"/> By Federal Express <input type="checkbox"/> By Email <input type="checkbox"/> By Facsimile
--	--

Dated this 10th day of October, 2012, at Seattle, Washington.


Darla Trautman