

NO. 47852-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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ALAN GERVAIS, a single man

Plaintiff/Appellant

vs.

BRAD L. MIEDERHOFF, a single man,  
and WELLS FARGO BANK, N.A.,

Defendants/Respondents

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE ROBERT LEWIS

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RESPONDENT MIEDERHOFF'S BRIEF

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## INTRODUCTION

This is a driveway easement dispute and the old adage “a picture is worth a thousand words” sums it up. The Trial Exhibits which include photographs of the purported easement and the applicable recorded documents for the lots affected tell the entire story. Trial Exhibit photos 94<sup>1</sup>, 96, 97, 98 & 108 show an overgrown and neglected logging trail that begins inside the west boundary of respondent Miederhoff’s lot and proceed into the east boundary of appellant Gervais’ lot. Trial Exhibits 7, 29, 43, 46 & 73 are the title and recorded documents for the Miederhoff lot. Gervais’ sued Miederhoff for quiet title and claimed that Miederhoff had constructive or inquiry notice of an express easement (by recorded plat and a Seller’s Disclosure Statement) and that Gervais had an implied driveway easement by prior use and necessity. Gervais claimed that Miederhoff should have known that Gervais intended to create a permanent driveway from the logging trail and use it for sole access to the top of the Gervais’ lot once he developed it.

At trial, Gervais argued that a driveway easement existed because Miederhoff had *express* knowledge that Gervais’ intended to construct a

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<sup>1</sup> Trial Exhibit 94 shows the north end of Miederhoff’s gravel driveway and the walkway leading east toward the front of Miederhoff’s house. The red truck was slightly inside where Gervais’s east boundary line begins.

permanent driveway on a logging trail once Gervais built on his lot. Gervais based that argument on the recorded Short Plat and the Seller's Disclosure Statement provided to Miederhoff when he purchased his lot in 2009 (Ex. 43). Miederhoff did not purchase his lot from Gervais, he purchased it from a third party (Rosenlund). (Ex. 46). But, neither the Short Plat or the Seller's Disclosure Statement contained anything about a permanent driveway easement over Miederhoff's Lot 3 for the benefit of Gervais' Lot 4.

At trial, Gervais also argued that an *implied* easement existed based on Gervais' prior use of the logging trail to get to the top of Gervais' Lot 4. Gervais also argued necessity because of the difficulty and expense of constructing a new driveway for Lot 4 off of the public road (Spurrel Road).

After 2 full days of trial and the testimony of 5 witnesses, the Trial Court ruled on April 10, 2015, against Gervais on every cause of action in his complaint (RP 4/10/2015, Pg. 12). On *express* easement, the Trial Court found that the Short Plat did not create any driveway easement over Lot 3 for the benefit of Lot 4 (RP 4/10/2015, Pg. 5). The Court found that Gervais understood the significance of including an easement on the Short Plat because Gervais had included a driveway easement for Lots 1 and 2, but he failed to do so for Lots 3 and 4 (RP 4/10/2015, Pg. 5). The Court

also found that the reference to “no easement” for Lot 3 contained in the Seller’s Disclosure Statement given to Miederhoff at the time of his purchase in 2009 was consistent with the contents of the Short Plat and would not have created any reason for Miederhoff to investigate further (RP 4/10/2015, Pg. 5-6).

On *implied* easement, the Trial Court found that Gervais’ use of the logging trail to get to the top of Lot 4 had been infrequent and was not the type of use that should have put Miederhoff on notice of Gervais’ intent to create a permanent driveway on the logging trail as the sole means of access to a future home site on the top of Lot 4 (RP 4/10/2015, Pg. 7-8). And, the Court found that Gervais did not make a sufficient showing of necessity based on the expense of creating a separate driveway on Lot 4. The Trial Court looked at existing case law in Washington on “implied easement” rather than “easement by reservation” and found that Gervais did not meet the heightened standard for necessity because Gervais failed to reserve a driveway easement for himself at the time he created the Short Plat (RP 4/10/2015, Pg. 9-12) or when Gervais’s common ownership interest of Lots 3 & 4 was severed.

## RESPONSE TO ASSIGNMENTS OF ERROR

### I. Findings of Fact & Conclusions of Law are Sufficient When Reviewed with The Court's Ruling of 4/10/2015.

The Findings of Fact and Conclusions of Law address all essential facts for the elements of each theory of easement plead by Gervais. And, the Trial Court's ruling on April 10<sup>th</sup> addressed each of the elements necessary to rule on the theories of easement contained in Gervais' complaint. More importantly, when the Findings of Fact & Conclusions of Law are reviewed *together with* the Trial Court's ruling on April 10th, the Trial Court's oral decision is comprehensive and satisfies the purposes of Civil Rule 52. Therefore, any error in failing to enter a written finding or conclusion is harmless and the Trial Court's ruling and entry of Findings of Fact and Conclusions of Law should be upheld.

“It is proper to resort to the court's oral opinion when the opinion is consistent with the findings for the purpose of better understanding them.” The oral opinion of a trial court may be considered on appeal in order to clarify its findings when the opinion and findings are consistent. *Thompson v. Thompson*, 9 Wn. App. 930, 934, 515 P.2d 1004 (1973). It has long been the rule that the purpose of findings is to enable the appellate court to review the questions upon appeal, and when it clearly appears what questions were decided by the trial court, and the

manner in which they were decided, we think that the requirements have been fully met. *Lyll v. DeYoung*, 42 Wn. App. 252, 711 P.2d 356.

“Where an oral opinion is consistent with and explains findings, it is proper to examine a trial court’s written findings in light of its oral opinion to resolve questions of whether and how the trial judge resolved a material issue”. *Lyll v. DeYoung*, 42 Wn. App. 252, 255 (1985). Statements contained in a trial court’s oral decision, when at variance with the findings, cannot be use to impeach the findings or judgment, although when consistent therewith, the findings and judgment may be read in their light. (Emphasis added) *Rutter v. Rutter*, 59 Wn. 2d 781, 784, 370 P.2d 862 (1962). And, when language would appear sufficiently definite to permit the trial court’s conclusion as to its intent, and no evidence appears in the records supportive of a different interpretation, the conclusion should stand. *Rutter v. Rutter*, 59 Wn.2d 781, 787 (1962).

## II. The Applicable Standard of Review Supports the Appellate Court Affirming the Trial Court.

“Appellate review is limited to determining whether the trial court’s findings of fact are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law.” *Willener v. Sweeting*, 107 Wash.2d 388, 393, 730 P.2d 45 (1986). The standard of review is “substantial evidence” or evidence which would convince a

reasonable person of the truth of the matter asserted. This is a deferential standard, because the court of appeals does not have to agree with the trial court's conclusions of fact to affirm. The appellate court just has to believe that those conclusions are not unreasonable. If there is conflicting evidence in the record on a point, the record is reviewed in the light most favorable to the party in whose favor the findings were entered.

“Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Cowich Canyon Conservancy v. Bosley*, 118 Wash.3d 801, 819, 828 P.2d 549 (1992). “The party challenging the finding bears the burden of showing that it is not supported by substantial evidence.” *Nordstrom Credit, Inc. v. Department of Rev.*, 120 Wash.2d 935, 939-40, 845 P.2d 1331 (1993). If no finding is entered as to a material issue, it is deemed to have been found against the party having the burden of proof. *Pacesetter Real Estate v. Fasules*, 53 Wn. App. 463, 465, 767 P.2d 961 (1989) (citing *Omni Group, Inc. v. Seattle First Nat'l Bank*, 32 Wn. App. 22, 28, 645 P.2d 727 (1982)).

## STATEMENT OF THE CASE

The important background facts are as follows: In 1991, when Gervais acquired the 15 acres, he created a logging trail to access the top of Lot 4 to remove timber. (RP 17) On February 18, 1992, Gervais divided the 15 acres and created a 4-lot Short Plat which included the Gervais' Lot 4, the Miederhoff's Lot 3, and two other lots directly east (Lot 1 and 2) (Ex. 7). On the face of the Short Plat, Gervais included a 20 foot driveway easement for Lot 1 through Lot 2 (Ex. 7). And, Gervais recorded a Joint Access Agreement for that 20 foot driveway easement for Lots 1 and 2 *only* at the same time he recorded the Short Plat (Ex. 73, pg. 25).

Gervais did not include any driveway easement through Lot 3 for the benefit of Lot 4 on the Short Plat, and Gervais did not record any joint access agreement for Lots 3 and 4. All of the recorded documents (Short Plat & Miederhoff's Preliminary Commitment for Title Insurance) for Lot 3 lacked anything evidencing a permanent driveway easement through Lot 3 for the benefit of Lot 4. (Ex. 73).

Instead, what did show on the face of the Short Plat was something very different for Lots 3 and 4 – from what Gervais had included for Lots 1 and 2. The face of the Short Plat points to the common southern boundary corner shared by Miederhoff's Lot 3 and Gervais' Lot 4. There

is nothing else contained on the Short Plat about joint access from Spurrel Road over Lot 3 for the benefit of Lot 4. (Ex. 7)

After the Short Plat was recorded by Gervais in 1992, Lots 1 and 2 were sold to third parties and homes were built on Lots 1 and 2. On November 29, 1996, Gervais quit claimed Lot 3 to his daughter Denise Gervais. (Ex. 24) On July 30, 2004, Denise Gervais sold Lot 3 to Rosenlunds who build a house on Lot 3 in 2004. (Ex. 25)

Gervais never built a home on Lot 4, and Lot 4 is still undeveloped. Lot 4 is wooded, steep and the only level area for a home site is at the top of the lot. All 4 of the lots in the Short Plat are in a very rural area of North Clark County. Gervais had no reason to go out to the property regularly and there was no consistent use of the logging trail created by Gervais in early 1990's.

Gervais later recorded a driveway easement for Lots 3 and 4 on October 4, 2010 – seven (7) months *after* Rosenlund had sold Lot 3 to Miederhoff in July 2009. At trial, Gervais alleged that he and Rosenlund had signed that driveway easement in October 30, 2004. The driveway easement signed by Gervais and Rosenlund and recorded after Rosenlund had already transferred title was an unlawful encumbrance on Lot 3, and in no way was binding on Miederhoff.

## ARGUMENT

GERVAIS' ASSIGNMENT OF ERROR NO. 1. The Trial Court Erred by Failing to Make Findings of Fact Concerning the Location and Configuration of the Roadway That Is the Focus on This Action.

GERVAIS' ASSIGNMENT OF ERROR NO. 2. The Trial Court Erred by Failing to Find That the Roadway That Is the Focus of This Action is Visible from Lot 3 As It Goes onto Lot 4.

### I. MIEDERHOFF'S RESPONSE– ASSIGNMENT OF ERROR 1 & 2

Finding of Fact No. 6 states: “On October 4, 2010, Gervais recorded a Driveway Easement signed by Gervais and Roselund regarding access through Lot 3 for the benefit of Lot 4, but it was not recorded until after Miederhoff purchased Lot 3 (“Gervais/Rosenlund Driveway Easement”). (Ex. 75)

There are 2 trial exhibits that described the dimensions of the driveway easement that Gervais sought to impose on Lot 3 for the benefit of Lot 4. The Gervais/Rosenlund Driveway Easement includes a legal description of the size and dimensions of the “location and configuration of the Roadway that is the focus of this action” on Miederhoff’s Lot 3 (Ex. 29)<sup>2</sup>. Also, Trial Exhibit 35 introduced by Gervais at trial contains a survey and legal description created by Grant & Associates on September 23, 2013, of the purported driveway on Miederhoff’s Lot 3 as it joins with the logging trail on Gervais’ Lot 4. (RP 68)

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<sup>2</sup> While the driveway easement (Ex. 29) was wrongfully recorded by Gervais 7 months after Roselund had already sold Lot 3 to Miederhoff, it still contains an adequate description of where the purported driveway was located.

GERVAIS' ASSIGNMENT OF ERROR NO. 3. The Trial Court Erred by Failing to Make Sufficient Findings Concerning the Seller's Disclosure Statement Given by the Rosenlunds to Mr. Miederhoff.

II. MIEDERHOFF'S RESPONSE – ASSIGNMENT OF ERROR NO. 3

Finding of Fact No. 5 states: “On July 13, 2009, Miederhoff purchased Lot 3 from Rosenlund, and the Seller's Disclosure Statement exchanged between Miederhoff's predecessor in interest Rosenlund (as seller) and Miederhoff (as purchaser) referred to access being available for Lot 3, but did not refer to Lot 4.”

This Finding of Fact No. 5 is consistent with the Trial Court's ruling on April 10th:

“There were some other indications presented that Mr. Miederhoff should have had notice that there was an express agreement; that being the seller's disclosure statement. The seller's disclosure statement has an answer of yes to the question: Is there a private road or easement agreement for access to the property? The property in question in that seller's disclosure statement as Lot 3, not Lot 4, so the answer yes on that particular claim would not provide anyone with notice that they should inquire about an express easement for the benefit of Lot 4 across Lot 3 because they weren't talking about Lot 4, there were talking about Lot 3. And, the inquiry wouldn't have revealed the express agreement.” (RP 4/10/2015, Pg. 5-6)

Finding of Fact No. 5 is definitive as to the Trial Court's determination of the legal effect of the Seller's Disclosure Statement. The Seller's Disclosure Statement gave information *about* Lot 3, not Lot 4. There is nothing contained in sellers' (Rosenlund) responses in the Disclosure Statement that would have put Miederhoff on inquiry notice about Lot 3 being burdened with an easement for the benefit of Lot 4. The

questions in the Disclosure Statement being asked are in the framework of what is *available* to Lot 3.

“I(1)(D) Is there a private road or easement agreement for access to the property?” “Yes”

“I(1)(E) Are there any rights-of-way, easements or access limitations that may affect Buyer’s use of the property?” “No”

“I(1)(F) Are there any written agreements for joint maintenance of an easement or right-of-way? “No”

(Ex. 43)

GERVAIS’ ASSIGNMENT OF ERROR NO. 4, 5 & 6. The Trial Court Erred by Failing to Make Findings on Mr. Miederhoff’s Receipt and Review of the Preliminary Commitment for Title Insurance and the Documents Provided with It.

III. MIEDERHOFF’S RESPONSE – ASSIGNMENT OF ERROR NO. 4, 5 & 6

Finding of Fact No. 2 states: “The Short Plat contemplated two (2) access points off of Spurrel Road for Lots 1, 2, 3 & 4.”

Finding of Fact No. 3 states: “The access point for Lot 3 and Lot 4 was shown as the shared boundary corner on the south off Spurrel Road. The Short Plat did not contain an easement over Lot 3 for the benefit of Lot 4, as was created for Lot 12 and Lot 2 on the Short Plat.”

The Trial Court’s ruling on April 10<sup>th</sup> is consistent with the evidence at trial:

Miederhoff’s Preliminary Commitment for Title Insurance contained two relevant facts (Ex. 73, pg. 6):

First, “8. Joint Access Agreement as imposed by instrument, including the terms and provisions thereof, recorded under

“Recorded: February 18, 1992  
Auditor’s File No. 9202180241  
Affects: **Lots 1 and 2**” (emphasis added)”

Second, Miederhoff’s Preliminary Commitment for Title Insurance also contained a copy of the Short Plat (Ex. 73, pg. 16) and attached a copy of the Joint Access Agreement for **Lots 1 and 2**, Auditor’s File No. 9202180241 (Ex. 73, pg. 25). Both of these references to recorded documents were consistent with each other, and neither of them related to Lots 3 and 4.

Both of those things on Miederhoff’s Preliminary Commitment for Title Insurance only referenced Lot 1 and 2, not 3 and 4. This information together with the face of the Short Plat showing a common access point for Lots 3 and 4 from Spurrel Road on a shared southern boundary corner is consistent. It is evidence of a lack of existence of a shared driveway for Lots 3 and would not have put Miederhoff on notice of any permanent driveway easement for Lot 4 through Lot 3

GERVAIS’ ASSIGNMENT OF ERROR NO. 7. The Trial Court Erred by Denying the Motion for Reconsideration.

#### IV. MIEDERHOFF’S RESPONSE – ASSIGNMENT OF ERROR NO. 7

This Assignment of Error to essentially re-launches everything

previously adjudicated at trial.

A. Gervais' Motion for Reconsideration was Not Filed Timely & Failed to Identify which Grounds for Relief Were Being Sought

Gervais' Motion for Reconsideration was not filed timely. It was denied by the Trial Court without hearing and should not be considered as part of this appeal. CR 59(b) requires that the motion shall be filed not later than 10 days after entry of the judgment, order, or other decision. The Trial Court issued its decision from the trial on April 10, 2015. Gervais' Motion for Reconsideration was filed on June 26, 2015. Gervais' Motion for Reconsideration failed to allege the grounds required under CR 59(a). Gervais does not allege whether the motion was based on CR 59(a) (7), (8) or (9).

B. Gervais' Motion for Reconsideration Attempted to Introduce Evidence Not Introduced at Trial, is Hearsay and Not Admissible.

At trial, Gervais' contractor John Van Vessem testified that the cost of constructing a new driveway on Gervais' Lot 4 would be approximately \$18,500 (RP 165) (Ex. 44). The Trial Court took that evidence into consideration when it ruled that while more costly to construct a driveway on Lot 4, it was not cost prohibitive. Gervais' attempt to have the Trial Court consider engineering analysis from AKS Engineering *after conclusion of the trial* is absurd. Miederhoff had no opportunity to conduct discovery, cross examine or argue at trial regarding

any evidence offered *after conclusion of the trial* and the AKS

Engineering evidence submitted in Gervais' Motion for Reconsideration should not be considered by this Appellate Court.

C. The Trial Court's Ruling Found Gervais' Claims for Express Easement, Implied Easement by Prior Use and Easement by Necessity Failed for Lack of Evidence.

1. Express Easement (Short Plat, Preliminary Commitment for Title Insurance and Seller's Disclosure Statement)

Trial Court's ruling April 10<sup>th</sup>, pg. 4 -5, stated:

"The 1992 short plat...significantly, it shows the same access point for Lot 1 and 2 over on the west side of Lot 2 and a common access point for Lots 3 and 4 on either side of the border here between Lot 3 and Lot 4, so two access points were contemplated."

"While Lot 1 has a specific easement reserved over to the common access point on Lot – the other side of Lot 2 and so it shows that Mr. Gervais certainly knew how to designate an express easement if he wanted to because he did that with regard to Lot 1 and 2, the plat and its documentation does not show an easement across Lot 3 for the benefit of Lot 4. Instead, it shows a common access point on their border without delineating that any portion of the roadway would need to go on to Lot 3 in order to service Lot 4. So there's nothing in the plat description or the plat map which provides an express easement for the benefit of Lot 4 across Lot 3. The access point as indicated does not indicate to the parties that, in fact, an easement would have to go across Lot 3 for Lot 4's benefit, so there's no record notice of an express easement on the plat."

The trial court's ruling on April 10th is consistent with the evidence that the Short Plat created no express easement. Gervais hired a

team of real estate professionals and created the Short Plat (Ex. 2, 3 & 4). Gervais included a shared driveway for Lots 1 and 2 on the face of the Short Plat, but did not include a shared driveway for Lots 3 and 4 on the Short Plat (Ex. 7). And, Gervais recorded a separate Joint Access Agreement for Lots 1 and 2 at the same time he recorded the Short Plat, but did not record anything for Lots 3 and 4.

Miederhoff's Preliminary Commitment for Title Insurance (Ex. 73) contained the very same references for a shared driveway for Lots 1 and 2 and lacked the same references for anything similar for Lots 3 and 4. Therefore, Miederhoff had no notice (express or constructive) of a purported driveway easement across Lot 3 for the benefit of Lot 4.

The trial court's ruling on April 10<sup>th</sup> is consistent with the law on actual and constructive notice for express easements in the State of Washington. RCW 65.08.070 protects a purchaser unless there is *notice* of a title defect, *actual* or *constructive*. This rationale of adhering to the statutory rule has existed in Washington for decades. The courts have found to hold otherwise would create insuperable impediments to the free exchange of negotiable paper, an indispensable part of modern business. *North Western Mortgage Investors Corp. v. Slumkoski*, 3 Wn. App. 971, 478 P2d 748 (1970).

The law recognizes the importance of determining who has the superior interest. In discussing the bona fide purchaser doctrine, 8 G. Thompson, *Real Property* § 4290, at 222-23 (1963 repl.), states the purpose of the doctrine as follows:

“The land law has seen its years of progress marked by a continual struggle between one who had legal title to, or an equity or interest in or claim against real estate and one who in good faith parts with consideration in the honest belief that he is acquiring title from another. The law has long recognized that the massive public policy in favor of stimulation of commerce demands the fullest possible protection to a good faith purchaser for value. The bona fide purchaser for value without notice is the favored creature of the law.”

The Short Plat (Ex. 7), Miederhoff’s Preliminary Commitment for Title Insurance (Ex. 73) and Miederhoff’s statutory warranty deed (Ex. 72) included nothing that would have put Miederhoff on actual or constructive notice to inquire further about Lot 4 having a driveway easement over Lot 3.

## 2. Implied Easement (Prior Use)

Trial Court’s ruling April 10th, pg. 9/11, stated:

“I found that the use was not apparent and continuous enough to allow the establishment by the evidence of an easement by implication of prior use. And, I’ve already gone over the facts that led me to that decision.”

The factors the Trial Court was referring to appear in RP 4/10/2015, pg. 8:

“While the road is apparent, the evidence does not suggest that its use was apparent. The use that was established by the evidence was the opening of the roadway for logging and for the initial installation of a home site in about 1992-93...

“There was some work on Lot 4 in 1997 and 1998 and apparently the property was accessed by the road during that occasion. Except for those few things and the testimony that on some years a person, either Mr. Gervais or someone on their behalf, might drive up the roadway once or twice a year, there was no proof of apparent or continuous or active use of the driveway for most of the time up to 2010.”

“...The existence of a roadway is not the same thing as the existence of an easement. A roadway can exist because someone put it there. I think we all know that there are parts of the Oregon Trail that are still visible across parts of the state because it has where a roadway once was is not the same thing as saying that a person is using that roadway in a way which would allow prescriptive use.”

The Trial Court’s ruling on April 10th is consistent with the evidence at trial:

Trial Exhibits 94, 96, 97 & 98: The photos show a neglected and overgrown logging trail not much wider than a small truck. Miederhoff purchased Lot 3 in July 2009 and the vegetation would have been full at that time and the logging trail obscured from view, not providing Miederhoff with notice of any regular or permanent access to the top of Lot 4 (RP 206). Gervais did not enter any evidence that the logging trail was in any other condition but obscured at the time Miederhoff purchased

Lot 3 as can be seen in the Trial Exhibits 96 & 97 photos. Gervais' occasional use of a logging trail for access to the top of undeveloped Lot 4 is very different than asking the court to grant Gervais a permanent driveway easement that would be used by vehicles on a daily basis once a residence was built on Lot 4.

At trial, Gervais lacked evidence that he had done ongoing work or maintenance on Lot 4, thereby putting anyone on notice that Lot 4 was being regularly accessed through Lot 3. In spite of being offered by Gervais as evidence of recent and ongoing work performed on Lot 4, Trial Exhibit 11 clearly related to work done on Lots 1 & 2. Trial Exhibits 13 & 14 were disregarded by the Trial Court because they did not identify which property they pertained to. And, Trial Exhibits 15, 16, 17, 18 & 19 referenced work done in 1997-1998, shortly after Gervais' completed the Short Plat and 20 years before Miederhoff purchased Lot 3.

Arguably, any "usage" which was "apparent" was that of a logging trail only – not a permanent driveway used as sole access to the top of Lot 4. Gervais testified that Lot 4 had been logged in 1991 at the time he purchased it (RP 17). Nothing else had been done to change the original logging trail since 1991. It may have been in Gervais' "contemplation" that he was going to use the logging trail as a permanent driveway if he

built a home site at the top of Lot 4, but that intention certainly was not apparent by observation by anyone else looking at access for Lot 4 because any prior use was infrequent and as a logging trail. Gervais' lawsuit to change a logging trail created in 1991 into a permanent driveway serving Lot 4, running within a few feet of the front of Miederhoff's house, is an increased burden on Miederhoff and a completely different usage than Gervais had ever made of that logging trail.

The Trial Court's ruling on April 10th and evidence relied upon by the Court is consistent with the law on implied easements – especially where the necessity of easement is caused by the grantor. An implied easement is one which the law imposes by inferring the parties to a transaction intended that result, although they did not express it. “In order to establish an easement by implication, one must prove three essentials. They are, generally, (1) unity of title and subsequent separation by grant of the dominant tenement, (2) apparent and continuous user, and (3) the easement must be reasonably necessary to the property enjoyment of the dominant tenement.” *Wreggit v. Porterfield*, 36 Wn.2d 638, 639, 219 P.2d 589 (1950).

The case of *Adams v. Cullen*, 44 Wn.2d 502, 508-509, 268 P.2d 451 (1954) goes through a lengthy discussion about the greater need of necessity when the situation requesting an implied easement is caused by

the grantor. And, the court makes clear that unless prior use of the actual type of easement is apparent, the degree of necessity will be much stricter. The Trial Court found Gervais failed to meet that greater degree of necessity. (RP 4/10/2015, Pg. 10-12)

### 3. Implied Easement (Necessity)

Trial Court's Ruling on April 10th, on Easement by Necessity (RP 4/10/2015, pg 9-12):

“An easement implied by necessity under the common law requires, first, that the dominant and servient lots be owned jointly at one point. They clearly were here. At some point, they became severed and that happened here by the servient estate being severed, so its an implied reservation across the servient estate after it being conveyed. And the cases indicate that that shows some greater need of the dominant estate to prove the remaining factors.”

“Second, the Court considers an apparent or continuous quasi- easement. And, in that case, actual continuous use is not as necessary – it's not absolutely necessary. Here the fact that there is some existence of a roadway and some evidence of past use has some bearing, even though it wouldn't be enough to show a prescriptive easement.”

“A third element is necessity; that basically if a person owns the dominant estate an conveys the servient estate without reserving to themselves an easement, that they want to come back and now have an implied easement, they have to show that it's reasonably necessary, not absolutely necessary, that there's no other way to get to the property, but that there is no reasonable alternative; that either all the other driveway or access points would be prohibited – I think in one case because of wetlands or because of rivers or moats or things that that -- or that it would be infeasible to use a different route because it would be cost prohibitive to do so.”

“The fact that it’s more expensive than just using the existing road is not enough. It has to be cost prohibitive or substantially cost prohibitive, again, using reasonableness as the test.”

“After weighing all of the evidence and the factors, I do not find that the plaintiff has established that they’re entitled to an implied easement by necessity. It may be that switchbacking from another point on Lot 4 up to the existing road on Lot 4 without crossing Lot 3 would be more expensive than just going up Lot 3 – the driveway on Lot 3 and then crossing over to Lot 4, but the fact that it’s more expensive does not mean that it’s not – that it’s reasonably necessary to do so.”

“The evidence showed that it was possible that switchbacking from another point could occur and that the County, under certain circumstances, if it was engineered properly and came out and met sight distance and other requirements, could, in fact, do it. At least that was my reading of the evidence. I did not find the proof – the proof rose to the level necessary to show that no other alternative was feasible”.

The Trial Court’s ruling on April 10<sup>th</sup> is consistent with the evidence at trial that Gervais conveyed Lot 3 to his daughter Denise Gervais via a statutory warranty deed in 1996 (RP 39) (Ex. 25) None of the vesting deeds previously transferring Lot 3 to its respective owners referenced any driveway easement through Lot 3 for the benefit of Lot 4<sup>3</sup>. And, the necessity required for an *implied reservation* of easement by Gervais had not been met under the evidence submitted by Gervais at trial (RP 165) (Ex. 44)

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<sup>3</sup> Alan Gervais to Denise Gervais Ex. 24), and Denise Gervais to Miederhoff’s predecessor Rosenlund (Ex. 25), and Rosenlund to Miederhoff (Ex. 46)

The evidence submitted by Gervais at trial regarding the cost associated with constructing his own driveway on Lot (excluding any new evidence Gervais sought to introduce through his Motion for Reconsideration), was that it would cost about \$18,500 (RP 165) (Ex. 44). The trial court acknowledged that it was an extra expense for Gervais – but not an unreasonable expense.

This is consistent with the law on implied easements by necessity where grantor seeks to impose the implied easement after the servient estate is severed first – as is the case with Gervais’ severing of Lot 3 first, by conveying it to his daughter Denise in 1996 and retaining Lot 4 for himself.

“There is a well-recognized distinction between an *implied grant* and an *implied reservation*, and this has been recognized in Washington... In the case of severance of the servient estate, an easement will, ordinarily, not be reserved since grantor cannot derogate from his own grant... If the dominant estate is severed first, all such continuous and apparent quasi easements, as are reasonably necessary to the enjoyment of the property, will pass to the grantee.” *Wreggitt v. Porterfield*, 36 Wn.2d 638, 639-640, 219 P.2d 589 (1950).

Because an *implied reservation* is, by definition, in derogation of the grantor’s deed and its covenants, it “stands upon narrower ground than a grant.” *Schumacher v. Brand*, 72 Wash. 543, 547, 130 P. 1145, 1147 (1913). “In order to give rise to the presumption of a reservation of an

existing easement or quasi easement, where the deed is silent upon the subject, the necessity must be of such a nature as to leave no room for doubt of the intention of the parties. This necessity cannot be deemed to exist if a similar privilege can be secured by reasonable trouble and expense.” *Wreggitt v. Porterfield*, 36 Wn.2d 638, 640, 219 P.2d 589 (1950). Therefore, the prior use required of the grantor of an estate with an *implied reservation* must be greater than that for prior use for an *implied grant* so that the easement is clearly apparent to both parties upon conveyance.

### CONCLUSION

Respondent Miederhoff submits that the record on appeal, including the Trial Court’s ruling read in conjunction with the Findings of Fact and Conclusions of Law and evidence entered at trial is more than sufficient for the Appellate Court to deny this appeal and affirm the Trial Court’s ruling. Accordingly, respondent Miederhoff requests attorney fees and costs pursuant to RAP 18.12 to be submitted upon further ruling of this Court on the appeal.

Dated:

2/29/16



CASSIE N. CRAWFORD, WSB#26241

Attorney for Defendant/Respondent Miederhoff

**APPENDIX**

Trial Court's ruling April 10, 2015 (attached)

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

ALAN GERVAIS, a single man,	)	
	)	
Plaintiff,	)	SUPERIOR COURT CAUSE
(Appellant),	)	NO. 13-2-01722-9
	)	
vs.	)	COURT OF APPEALS CAUSE
	)	NO. 47852-8-II
BRAD L. MIEDERHOFF, a single man,	)	
WELLS FARGO BANK, N.A.,	)	
	)	
Defendants.	)	
(Respondent).	)	

COURT'S ORAL RULINGS

TAKEN BEFORE: THE HONORABLE ROBERT LEWIS

DATE: April 10, 2015  
 TIME: 10:02 a.m.  
 PLACE: Clark County Superior Court  
 Vancouver, Washington

Transcribed by: Michael R. King, OR CSR No. 90-162

## APPEARANCES

FOR THE PLAINTIFF: Mr. Peter K. Jackson  
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P-R-O-C-E-E-D-I-N-G-S

THE COURT: Thank you. Please be seated.

All right. We'll take matter then of Item 8, that's the matter of -- excuse me, I have the number here -- Item 13, Gervais versus Miederhoff.

Are you two all right to sit together or you want me to kick these people out over there?

MS. CRAWFORD: No, we're fine.

MR. JACKSON: We're okay.

THE COURT: All right. This matter is on today for the Court's announcement of a decision following the non-jury trial that I conducted over a couple of different days. And I appreciate the opportunity to review the briefing and the exhibits in some detail, along with the testimony and the cases that were cited by counsel, a number of cases on especially implied easement, which is not something that the Court deals with on a regular basis. So I had the opportunity to do that.

I'll be entering written findings and conclusions at a later date, but I wanted to provide the information to the parties and rule specifically on the plaintiff's various contentions regarding the existence of an easement over Lot 3, owned by the defendant, in favor of Lot 4, both for ingress and egress and, also,

1 for utilities.

2 I would point out by way of preliminary recall,  
3 although, I'm sure the parties are aware of it, that all  
4 four lots were -- all four pieces of property that are  
5 at issue here were part of a 1992 short plat. And I  
6 have here, and will return to the party that gave it to  
7 me, the illustrative exhibit of that short plat, which  
8 shows the three lots here and the fourth lot, the larger  
9 leftover lot that's owned by the plaintiff.

10 The plaintiff originally owned all of the  
11 property involved -- that's somewhat significant on the  
12 issues that I am dealing with -- and created the short  
13 plat and the documentation that went with it.

14 Dealing first with the contention that the  
15 short plat creates an express easement for the benefit  
16 of Lot 4 over a portion of Lot 3 by the written  
17 instruments that were related to the short plat, I find  
18 in favor of the defendant on that contention.

19 The 1992 short plat shows an access point for  
20 each lot to the common -- to the road which fronts the  
21 four properties. Significantly, it shows the same  
22 access point for Lot 1 and 2 over on the west side of  
23 Lot 2 and a common access point for Lots 3 and 4 on  
24 either side of the border here between Lot 3 and Lot 4,  
25 so two access points were contemplated.

1           While Lot 1 has a specific easement reserved  
2 over to the common access point on Lot -- the other side  
3 of Lot 2 and so it shows that Mr. Gervais certainly knew  
4 how to designate an express easement if he wanted to  
5 because he did that with regard to Lot 1 and 2, the plat  
6 and its documentation does not show an easement across  
7 Lot 3 for the benefit of Lot 4. Instead, it shows a  
8 common access point on their border without delineating  
9 that any portion of the roadway would need to go on to  
10 Lot 3 in order to service Lot 4. So there's nothing in  
11 the plat description or the plat map which provides an  
12 express easement for the benefit of Lot 4 across Lot 3.  
13 The access point as indicated does not indicate to the  
14 parties that, in fact, an easement would have to go  
15 across Lot 3 for Lot 4's benefit, so there's no record  
16 notice of an express easement on the plat.

17           There were some other indications presented  
18 that Mr. Miederhoff should have had notice that there  
19 was an express agreement; that being the seller's  
20 disclosure statement. The seller's disclosure statement  
21 has an answer of yes to the question: Is there a  
22 private road or easement agreement for access to the  
23 property? The property in question in that seller's  
24 disclosure statement was Lot 3, not Lot 4, so the answer  
25 yes on that particular claim would not provide anyone

1 with notice that they should inquire about an express  
2 easement for the benefit of Lot 4 across Lot 3 because  
3 they weren't talking about Lot 4, they were talking  
4 about Lot 3. And the inquiry wouldn't have revealed the  
5 express agreement.

6 Finally, an express agreement was entered  
7 between Mr. Gervais and the Rosenlunds, the predecessors  
8 in interest for Mr. Miederhoff, in 2004; however, Mr.  
9 Miederhoff, the evidence shows, did not know about that  
10 easement and he had no reason to know about it because  
11 it wasn't actually recorded until 2010, after the  
12 Miederhoffs -- after Mr. Miederhoff purchased Lot 3. So  
13 although it existed in 2004, it was not recorded until  
14 2010, so he had no constructive or actual notice of its  
15 existence.

16 And I would finally point out that the actual  
17 point of access for Lots 3 and 4 clearly did not provide  
18 notice of the possibility of an easement across Lot 3  
19 because the evidence was that until some surveying and  
20 things were done, the parties assumed that the access --  
21 in fact, the actual access, in fact, was not on Lot 3;  
22 that it was on Lot 4. So nothing about the character of  
23 the physical access point itself would put a person on  
24 notice that Lot 3 was being the servient estate to Lot  
25 4.

1           Unfortunately for Mr. Gervais, he, having in  
2 his complete control the ability to create an express  
3 easement to service Lot 4, for whatever reason, did not  
4 create one. I think the reason was that because he  
5 assumed that the boundary was somewhere else. He and  
6 the other people involved all assumed that the access  
7 point was actually on Lot 4 and part of the road was on  
8 Lot 4 and that only a very small portion of it went over  
9 to Lot 3.

10           In fact, the evidence established that the  
11 access that's currently in existence begins on Lot 3 and  
12 continues up to the residence on Lot 3 until it turns  
13 into what was described as either a trail or a driveway  
14 or a logging road or a number of different ways it was  
15 described that goes onto Lot 4 at some point. So I find  
16 that on the claim of express easement that the defendant  
17 should prevail.

18           The other types of easements that were  
19 suggested I'm to deal with, first of all, a prescriptive  
20 use. I find again for the defendant on that claim as to  
21 the driveway. The character of ownership throughout the  
22 years did not allow a period of 10 years of apparent  
23 hostile use for a driveway servicing Lot 4 across Lot 3.

24           While the road is apparent, the evidence does  
25 not suggest that its use was apparent. The use that was

1 established by the evidence was the opening of the  
2 roadway for logging and for the initial installation of  
3 a home site in about 1992-93. That's about the time the  
4 plat was set into place and that's where the existing  
5 current driveway to Lot 3 and the older road goes up to  
6 Lot 3, across Lot 3 to Lot 4.

7           There was some work on Lot 4 in 1997 and 1998  
8 and apparently the property was accessed by the road  
9 during that occasion. Except for those two things and  
10 the testimony that on some years a person, either Mr.  
11 Gervais or someone on their behalf, might drive up the  
12 roadway once or twice a year, there was no proof of  
13 apparent or continuous or active use of the driveway for  
14 most of the time up to about 2010.

15           And as I mentioned in my questions to counsel  
16 at the beginning, the existence of a roadway is not the  
17 same thing as the existence of an easement. A roadway  
18 can exist because someone put it there. I think we all  
19 know that there are parts of The Oregon Trail that are  
20 still visible across parts of the state because it has  
21 been used continuously. But the fact that you can see  
22 where a roadway once was is not the same thing as saying  
23 that a person is using that roadway in a way which would  
24 allow prescriptive use.

25           So on the claim of a prescriptive easement, I

1 find for the defendant as to the driveway. However,  
2 utilities were put in place underground in the area and  
3 I find that the plaintiff has a prescriptive easement  
4 for those utilities which are currently in place and  
5 which cross portions of Lot 3 before they go into Lot 4.  
6 He does not have a prescriptive easement with regard to  
7 any new utilities, but to maintain and to keep the  
8 existing utilities, I find a prescriptive easement on  
9 behalf of the plaintiff.

10 The next suggestion was that there was an  
11 easement by implication of prior use. Again, I found  
12 that the use was not apparent and continuous enough to  
13 allow the establishment by the evidence of an easement  
14 by implication of prior use. And I've already gone over  
15 the factors that led me to that decision.

16 So the final suggestion is that there's an  
17 easement implied by necessity; that reasonable necessity  
18 requires that this road that's in existence be the road  
19 that is involved. I will indicate that I am not, for  
20 the record, ruling one way or the other on any question  
21 about condemnation of a way of necessity under RCW 8.24  
22 because that specifically was not pleaded and the  
23 plaintiff indicated they were not seeking to condemn a  
24 statutory private way of necessity under that section.  
25 Instead, relying on common law cases, they claimed that

1 there is already an easement implied by necessity  
2 because of the facts on the ground.

3 An easement implied by necessity under the  
4 common law requires, first, that the dominant and  
5 servient lots be owned jointly at one point. They  
6 clearly were here. At some point, they become severed  
7 and that happened here by the servient estate being  
8 severed, so it's an implied reservation across the  
9 servient estate after it being conveyed. And the cases  
10 indicate that that shows some greater need of the  
11 dominant estate to prove the remaining factors.

12 Second, the Court considers an apparent or  
13 continuous quasi-easement. And, in that case, actual  
14 continuous use is not as necessary -- it's not  
15 absolutely necessary. Here the fact that there is some  
16 existence of a roadway and some evidence of past use has  
17 some bearing, even though it wouldn't be enough to show  
18 a prescriptive easement.

19 A third element is necessity; that basically if  
20 a person owns the dominant estate and conveys the  
21 servient estate without reserving to themselves an  
22 easement, that they want to come back and now have an  
23 implied easement, they have to show that it's reasonably  
24 necessary, not absolutely necessary, that there's no  
25 other way to get to the property, but that there is no

1 reasonable alternative; that either all the other  
2 driveway or access points would be prohibited -- I think  
3 in one case because of wetlands or because of rivers or  
4 moats or things like that -- or that it would be  
5 infeasible to use a different route because it would be  
6 cost prohibitive to do so.

7           The fact that it's more expensive than just  
8 using the existing road is not enough. It has to be  
9 cost prohibitive or substantially cost prohibitive,  
10 again, using reasonableness as the test.

11           After weighing all of the evidence and the  
12 factors, I do not find that the plaintiff has  
13 established that they're entitled to an implied easement  
14 by necessity. It may be that switchbacking from another  
15 point on Lot 4 up to the existing roadway on Lot 4  
16 without crossing Lot 3 would be more expensive than just  
17 going up Lot 3 -- the driveway on Lot 3 and then  
18 crossing over to Lot 4, but the fact that it's more  
19 expensive does not mean that it's not -- that it's  
20 reasonably necessary to do so.

21           The evidence showed that it was possible that  
22 switchbacking from another point could occur and that  
23 the County, under certain circumstances, if it was  
24 engineered properly and came out and met sight distance  
25 and other requirements, could, in fact, do it. At least

1 that was my reading of the evidence. I did not find the  
2 proof -- the proof rose to the level necessary to show  
3 that no other alternative was feasible.

4 I'm not sure that that really, as an aside,  
5 helps Mr. Miederhoff because if his concern, as he  
6 expressed, is privacy rather than just trying to make it  
7 tougher for Mr. Gervais to get to his property, the  
8 switchbacking that will need to be done will bring  
9 his -- will bring Mr. Gervais' driveway pretty close to  
10 Lot 3. It won't be on it, but it'll be pretty close to  
11 it.

12 So if the parties want to work out some  
13 alternative arrangement that doesn't require that and  
14 that addresses their concern, they're certainly welcome  
15 to do it. But if I have to decide, I have to find that  
16 the plaintiff has not met its burden. And so with  
17 regard to all of these claims for an easement for access  
18 across Lot 3, I find for the defendant.

19 All right. I will allow the parties to prepare  
20 the judgment. I'll do the findings and conclusions.

21 Do you want it on for May 1 at 9:00, the  
22 presentation of the judgment?

23 MR. JACKSON: That would be fine. You're  
24 preparing the findings, Judge?

25 THE COURT: I will do the findings and

1 conclusion.

2 MS. CRAWFORD: Okay. Thank you, Your Honor.

3 THE COURT: Any questions about the Court's  
4 rulings?

5 MR. JACKSON: No.

6 THE COURT: All right. Thank you.

7 MR. JACKSON: Thank you, Your Honor.

8 (HEARING CONCLUDED.)

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CERTIFICATE

State of Oregon        )  
                          :  ss.  
County of Multnomah )

I, Michael R. King, a Certified Shorthand Reporter for Oregon, hereby certify that pursuant to the Washington Rules of Civil Procedure, I reported in stenotypy from an audio CD all testimony adduced and other oral proceedings had in the foregoing matter; that thereafter my notes were reduced to typewriting under my direction; and the foregoing transcript, pages 3 to 13, both inclusive, constitutes a full, true and correct record of such testimony adduced and oral proceedings had and of the whole thereof.

Witness my hand at Corbett, Oregon, this 20th day of January 2016.

\_\_\_\_\_  
Michael R. King, C.S.R.  
C.S.R. No. 90-162

CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2016, I delivered a true and correct copy of the foregoing Respondent's Brief by depositing in the U.S. Mail, postage prepaid to the following persons(s) at the addresses listed below:

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Cassie N. Crawford