

NO. 49802-2-II

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

PIERCE COUNTY, a political subdivision of the State of Washington,

Petitioner/Respondent

v.

LILLIAN E. AND TIM O. SMILEY, wife and husband, et al.,

Respondents for property described in Ex. A/Respondents

v.

LILLIAN AND TIM O. SMILEY, wife and husband,

Respondents for property described in Ex. B/Respondents

v.

JOSEPH D. VINES, as his separate estate; LILLIAN E. AND TIM O.
SMILEY, wife and husband; SUSAN L. VINES,

Respondents for property described in Ex. C.
Respondents/Appellants

APPELLANT VINES' OPENING BRIEF

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I. INTRODUCTION

II. ASSIGNMENTS OF ERROR - Issue Statements

- A. Did the trial court err when granting Smileys' motion to quiet title to a new easement?¹
1. May a trial court quiet title to a right-of-way without a petition to quiet title served on all parties to the proposed right-of-way, including both Vines and Noble?
 2. May a trial court involuntarily compel Vines to relocate a previously unrecorded easement in part across their land?
 3. May a trial court establish an easement for the benefit of third party Smileys that is wider and shorter than the easement contemplated, but not adequately described, in the Vines' Settlement Agreement with Pierce County?
 4. May a trial court convey to a proposed third party beneficiary like Smileys the benefits and burdens of a Road Maintenance Agreement that is not contemplated in the Vines' Settlement Agreement with Pierce County?
- B. Did the trial court enter erroneous findings of fact and conclusions of law?²
1. Did the trial court err when refusing expert testimony that Smileys suffered no losses when the court ordered the easement relocated?
 2. Did the trial court enter facts not supported by substantial evidence?

¹ CP 717 (Order Enforcing Settlement Agreement as to Grant of Easement.)

² CP 706 (Court's Findings of Fact and Conclusions of Law.)

3. Did the trial court enter unsupportable legal conclusions?
- C. Did the trial court err when granting Smileys' motion for a partial easement?³
1. May a trial court judicially create a partial right-of-way that is not described in any settlement agreement or other document?
 2. Where there is no unity of title in a common grantor could the court find an easement by implication?
- D. Did the trial court err when ordering disbursement of funds?⁴
1. Did Smileys suffer any loss of interest?
 2. Was the trial court's distribution arbitrary?
 3. Did the trial court fail to consider substantial evidence showing Smileys were made whole from the County's distribution to them?
- E. Did the trial court err in denying Vines' Motion for Reconsideration?⁵
- F. Did the trial court err when setting the supersedeas bond?⁶
1. Is a supersedeas bond needed where Vines already recorded a right-of-way to Smileys? Was the easement an adequate bond?

³ CP 887 (Order Granting Motion of Respondents Smiley to Set Boundaries for Easement.)

⁴ CP 704 (Order of Disbursement of Funds Held In The Registry of The Court.); CP 720 (Amended Order of Disbursement of Funds Held In The Registry of the Court.)

⁵ CP 810 (Order Denying Respondents Vines' Motion for Reconsideration.)

⁶ CP 1098 (Order Granting [sic] Notice of Supersedeas Staying the Court's Orders Pending Appeal and Setting Bond.)

2. Was a bond needed to contest the distribution of proceeds, including the easement allocation?
 3. Was the bond amount excessive where the trial court set it at the price of the entire property rather than the value of the easement?
- G. Did the trial court err when ordering contempt sanctions against Vines?⁷
1. Did Vines comply with the court's order when executing the easement "under protest w/out waiving rights on appeal?"
 2. Should the trial court have considered Vines to have cured the contempt without imposing sanctions?
- H. Did the trial court err when ordering CR 11 sanctions against Vines' attorney?⁸
1. Did the trial court fail to find any frivolous statement in the pleadings filed with the court?
 2. Was it legally or factually supportable for counsel to argue Vines were in conformance with the court's order when executing the easement with a reservation of rights?
 3. Is the fact that the court granted the Vines the reservation of rights they requested in the court's order indicative that their Response had merit?
- I. Should Smileys pay Vines' costs and attorney's fees on appeal?
1. Are Vines entitled to their attorney's fees and costs under

⁷ CP 1314 (Order Granting Smiley's Motion to Hold Vines in Contempt.)

⁸ CP 1317 (Order Granting Smiley's Motion for CR 11 Terms To Be Assessed Against Vines' Attorney.)

RCW 8.24.030, the statute benefitting condemnees like Vines in an action to quiet title to an easement by necessity?

2. Did Smileys engage in bad faith conduct?
3. Did Smileys violate CR 11?

III. STATEMENT OF THE CASE

Pierce County commenced these proceedings to condemn a twenty foot strip of land for its Buckley Foothills Linear Park Trail project.⁹ The County named two of the three property owners.¹⁰ The middle parcel owner Noble resolved his claims before suit. The outside parcel owners did not. Lillian and Tim Smiley owned Parcel A and a potential easement interest across the portion Pierce County took from Noble's parcel B and Vines' parcel C.¹¹ Joseph and Susan Vines owned Parcel C.¹²

Joseph Vines and Lillian Smiley are brother and sister.¹³ They became neighbors back in 1992 when Lillian acquired Parcel A from her mother's estate.¹⁴ The 1992 estate settlement agreement referenced a boundary line revision that described an easement across Parcels A, B,

⁹ CP 2 (Petition for Condemnation.)

¹⁰ CP 3-4 (Petition for Condemnation.)

¹¹ CP 123 (Amended Condemnation Petition.)

¹² CP 98 (Motion to Amend Petition.)

¹³ CP 319 (1992 Estate Settlement Agreement.)

¹⁴ *Id.*

C.¹⁵ The proposed easement was thirty feet wide near the abandoned Burlington Northern Railroad right-of-way, running across the northern tip of parcels A, B, and C.¹⁶ Paragraph 7 of the 1992 Estate Settlement Agreement included terms for Smiley to pay Vines the cost associated with perfecting the easement.¹⁷ She never paid her brother, and he never perfected the right-of-way.¹⁸ There is no recorded deed describing nor perfecting the thirty foot right-of-way. Smileys never utilized or maintained the thirty feet either.¹⁹ They did not use it to access their parcel, they used a gravel road Vines had on their property.²⁰

Pierce County chose to condemn twenty feet of this unrecorded proposed easement treating it as if Smileys and Vines had perfected interests. After filing, Pierce County offered an all-inclusive price of \$124,650.00, to cover all claims and all interests in parcels A, B, and C.²¹ Pierce County offered that total price after negotiating two separate settlement agreements: one with Vines and one with Smileys. This appeal does not challenge Pierce County's conduct or any orders entered

¹⁵ CP 319 at ¶ 1 (1992 Estate Settlement Agreement) and 324-329 (Boundary Line Agreement.)

¹⁶ CP 325 (Revised Description from Boundary Line Agreement.)

¹⁷ CP 321 (1992 Estate Settlement Agreement.)

¹⁸ CP 403-404 (Joseph Vines' Dec.)

¹⁹ CP 404 (Joseph Vines' Dec.) and CP 432 (Photos 7a,b,c.)

²⁰ CP 432 (Photo 7b) and CP 1283-1287 (Photos.)

²¹ CP 424 (County's 30 day offer letter.)

condemning the twenty feet it took. This matter concerns the orders entered subsequently upon motions filed by Smileys against Vines that were never properly before the court.²² The Vines challenge the various orders entered by the court involuntarily taking his property without just compensation and in a manner that burdens their property with a partial easement that is ineffective and inadequately described.²³ The Vines also challenge the distribution of condemnation proceeds to the Smileys over and above the monies they negotiated with Pierce County.

Vines' Settlement Agreement

The Vines negotiated with Pierce County a Settlement Agreement on February 19, 2016 in the amount of \$51,900.00.²⁴ Joseph Vines negotiated the amount to include compensation to him for relocating a hammerhead turn around, private fencing, and relocating a water well.²⁵ He fully expected the Smileys to negotiate their own compensation with Pierce County, and did not expect them to take any portion of the sum he agreed upon.²⁶ He included a provision in his Settlement Agreement to address the condemned twenty feet as follows:

²² Second Amended Notice of Appeal.

²³ CP 396 - 407 (Joseph Vines' Dec.)

²⁴ CP 339 - 341 (Vines' Settlement Agreement.)

²⁵ CP 400 (Joseph Vines' Dec.)

²⁶ CP 402 (Joseph Vines' Dec.)

“8. In addition, the Parties agree that Vines will offer to convey an additional 20-foot wide perpetual and non-exclusive easement located immediately south of the existing easement to the owners of the two parcels to the west of tax parcel 0619181054 and for the benefit of those parcels. The offered easement must be for the same purposes and of the same scope and duration as the existing easement. The parties further agree that if the offer is accepted, Vines will convey the additional 20-foot wide easement upon payment of a total of \$8,450.00, whether paid by one property owner or some combination.”

Vines set the value for relocating the proposed easement or rather for creating a new actual right-of-way at \$8,450.00 because that was the exact amount Smileys took from the \$16,500.00 Pierce County advanced to take immediate possession of the twenty feet it condemned on Parcel C.²⁷ Smileys would pay none of their own money to Vines to perfect an actual right-of-way never previously recorded.

Smileys' Settlement Agreement

Much later, the Smileys finally negotiated their own settlement with Pierce County on July 18, 2016 in the amount of \$72,750.00.²⁸ The Smileys executed their Settlement Agreement that included a waiver and acknowledgment that the sum negotiated was all inclusive of “any damages or recovery other than just compensation for the property

²⁷ CP 75 (Motion and Declaration for Order for Disbursement of Funds from Court Registry); CP 219 (Stipulated Judgment and Decree of Appropriation for Property Described In Exhibit C of the Petition.)

²⁸ CP 467-469 (Smileys' Settlement Agreement.)

acquired and damaged, including any claims for damages purportedly caused to Smiley or to other Respondents by Pierce County' acquisition or road improvement project.²⁹ The parties entered a judgment and decree of appropriation for the Smileys' interests on July 25, 2016.³⁰ The judgment expressly stated that "the entry of this decree terminates all further litigation in this matter related to the property described in Exhibits "A" and "B", except as for any proceedings that may be necessary to determine entitlement to these funds and any orders necessary to disburse the funds pursuant to RCW 8.08.060."³¹ The court then ordered the full amount to be paid to Smileys and the lien holder bank.³² The Vines did not contest this distribution believing Smileys were then made whole. Surprisingly, they then asked for more.

Smileys' Motion Claiming Third Party Beneficiary Status to Easement

Without filing a petition to condemn the Vines' and Noble's property by private right-of-way by necessity, Smileys filed a motion claiming they were third party beneficiaries to the Vines' Settlement Agreement, specifically Paragraph 8 above, setting terms for Vines to

²⁹ CP 468 (Smileys' Settlement Agreement.)

³⁰ CP 146 (Stipulated Judgment and Decree of Appropriation For Property Described in Exhibits A and B of the Petition.)

³¹ CP 149-150 (Id.)

³² CP 273-274 (Order for Disbursement of Funds from Court Registry.)

offer to convey twenty feet of his land to Smileys so that they could continue to access their property over his roadway.³³ The trial court granted their motion over Vines objections.³⁴ Later, the trial court set the boundaries, creating judicially a partial easement over just the Vines' parcel.³⁵

Distribution of Proceeds

The trial court entered Findings of Fact and Conclusions of Law after taking testimony from Smileys' two witnesses, a surveyor and a property appraiser.³⁶ The hearing was confusing. The transcript evidences this wherein the parties do not proceed in the typical trial format beginning with opening statements. The court repeatedly restates the supposed purpose, and at one point describes the proceedings as "at best, a lengthy oral argument, not an evidentiary hearing."³⁷ If the court was confused as to the matters before it, certainly pro se Vines was too. Smileys had been directing the proceedings through their attorney ever since Pierce County resolved its interests. Smileys never filed for affirmative relief in a format

³³ CP 527 (Respondent Smiley's Memorandum In Support of Motion to Enforce Settlement Agreement.)

³⁴ CP 673-676 (Vines' Response to Smiley's Motion to Enforce Settlement Agreement As to Grant of Easement); CP 717 (Order Granting Motion for Enforcement of Settlement Agreement As to Easement.)

³⁵ CP 887-890 (Order to Set Easement Boundaries.)

³⁶ CP 706-715; RP 10/11/16 at 19 and 40.

³⁷ RP 10/11/16.

that the court should have required given the disputed interests at stake and the absence of the Nobles from the proceedings when their property interests were implicated by the relief Smileys asserted.

Ultimately the court awarded a substantial portion of the sum negotiated by Vines to Smileys. In addition to the \$72,750.00 the Smileys already had taken from Pierce County, the court awarded Smileys \$18,700.00 from the \$51,900.00 negotiated by Vines to settle their claims against Pierce County. The Vines received \$33,200.00 and additionally had to convey a new easement to Smileys across their land, and a Road Maintenance Agreement that gave Smileys the right to demand upgrades and maintenance to the roadway the Vines paid to create. Smileys received a total of \$91,450.00, that equals a windfall of approximately \$58,250.00 over and above what the Vines received for Pierce County condemning the same twenty feet. And, Smileys took more of the Vines' property when Smileys never paid to perfect their unused interest in the first place.

The courts' orders are not just, and they are not legally supportable. Both sides should take their respective proceeds from the settlements they each negotiated with Pierce County. As to any easement, those orders should be vacated. Smileys may seek affirmative relief to

quiet title if needed with both Vines and Nobles represented to protect their interests.

IV. ARGUMENT

A. De Novo Standard of Review

Whether the trial court has the authority to order equitable relief is a question of law reviewed de novo.³⁸ The orders challenged here are reviewable de novo as errors of law.

B. Settlement Agreements and Boundary Line Revisions Do NOT Effectuate A Right-of-Way as a Matter of Law

The statute of frauds applies to the grant of an easement.³⁹ Every conveyance of an interest in real estate, or creating or evidencing any encumbrance upon real estate shall be by deed.⁴⁰ Every deed shall be in writing, signed by the party bound, and acknowledged by the party before some person authorized to take acknowledgments of deeds.⁴¹ The only deed conveying an easement to Smileys is the one the Vines recorded after the court ordered them to upon Smileys' Motion, which Smileys rejected.⁴² Smileys were never party to any deed to support the court's

³⁸ *Kave v. McIntosh Ridge Primary Road Association*, No. 48779-9-II, __ Wn. 2d __, __ P. 3d. __, 2017 WL 1650186.

³⁹ *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995).

⁴⁰ RCW 64.04.010.

⁴¹ RCW 64.04.020.

⁴² CP 751 (Respondents Smiley's Memorandum in Support of Motion to Set Easement Boundaries.)

ordered easement.⁴³ The Vines' Settlement Agreement was not signed by Smileys.⁴⁴ The Vines signed it, but no one authorized to take acknowledgments of deeds witnessed the execution of the Vines' Settlement Agreement with Pierce County.⁴⁵ The Vines' Settlement Agreement is not notarized. The Vines' Settlement Agreement with Pierce County is not an enforceable deed. A trial court has no authority to order the relocation of an easement without the express consent of the owners of both the dominant and servient estates.⁴⁶ The court should not have found an enforceable easement in the Vines' Settlement Agreement where the servient and dominant estates were not in agreement, and there was no existing recorded deed with a legal description matching the easement ordered by the court over the Vines' objections.

Easements must be recorded.⁴⁷ In order to be recorded, the writing conveying the interest must describe the location of the easement specific to the servient estate.⁴⁸ The writing purporting to convey an easement may not rely upon other unrecorded descriptors to meet the specificity

⁴³ CP 404 (Joseph Vines' Dec.);

⁴⁴ CP 339 - 341 (Vines' Settlement Agreement.)

⁴⁵ *Id.*

⁴⁶ *Kave*, citing *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App. 188, 45 P.3d 570 (2002).

⁴⁷ RCW 64.04.030(1).

⁴⁸ *Id.* and *Berg*, 125 Wn. 2d at 551.

requirement.⁴⁹ This includes reliance upon a boundary line revision. A boundary line adjustment does not create an enforceable easement.⁵⁰ The Smileys surveyor agreed that a deed is required to perfect legal title to an easement.⁵¹ The Vines' Settlement Agreement does not describe with the necessary specificity the boundaries of the servient estates. There is no legal description in the Vines' Settlement Agreement with Pierce County. To quiet title to an easement, a legal description is needed.⁵² There is a reference to "the existing easement to the owners of the **two parcels** to the west of tax parcel..."; however there was never a recorded easement nor deed binding the servient estate.⁵³ The Smileys selected an end point at the Vines' parcel, rather than at the end of the easement contemplated by the boundary line adjustment described in the 1992 Estate Settlement Agreement.⁵⁴ Additionally, the Smileys sought a new road maintenance agreement, when the prior road maintenance agreement was never enforced previously and had long since been abandoned because the roadway was not in the easement, it was below it.⁵⁵ The actual easement

⁴⁹ *Id.*

⁵⁰ PCC 18F.70.030(C)(2).

⁵¹ RP 10/11/16 at 31.

⁵² *Kave v. McIntosh Ridge Primary Road Association*, Case No. 48779-9-II, ___ Wn. 2d ___, __ P. 3d. ___, 2017 WL 1650186.

⁵³ CP 428 (Vines' Settlement Agreement.)(Emphasis added.)

⁵⁴ CP 414 (Diagram from 1992.)

⁵⁵ CP 404 (Joseph Vines' Dec.)

was never maintained as a right-of-way. The factual issues surrounding unrecorded deeds as to the scope and intent of the parties are inconsistent with the clarity needed to find a third party beneficiary interest in an easement.⁵⁶ Smileys never cited to nor relied upon any case holding in favor of a third party beneficiary to an easement. Vines has not identified any. Implied easements require unity of title in a common grantor and severance of the dominant estate.⁵⁷ There was no unity of title in 2016 to create an easement by implication. The court's orders to effectuate a new twenty foot easement and road maintenance agreement without the Vines consent is invalid and unenforceable. The Court's orders compelling Vines to execute Smileys' proposed easement and setting the boundaries of the easement should be reversed.

C. No Fact Finding to Support Court's Findings of Fact and Conclusions of Law

It is reversible error for a trial court to enter factual findings unsupported by the record, to reach erroneous legal conclusions.⁵⁸ The trial court did not try this case when it knew there were competing

⁵⁶ *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 215 P.3d 990 (2009).

⁵⁷ *Granite Beach Holdings, LLC v. State ex rel. DNR*, 103 Wn. App. 186, 11 P.3d 847 (2000).

⁵⁸ *In re Marriage of Littlefield*, 133 WN, 2d 39, 940 P.2d 1362 (1997); *In re Marriage of Bowen*, 168 Wn.App. 581, 279 P.3d 885 (2012); *Fowler v. Johnson*, 167 Wn.App. 596, 273 P.3d 1042 (2012); *DeFelice v. State Emp't Sec. Dep't*, 187 Wn.App. 779, 351 P.3d 197 (2015).

interests to the condemnation proceeds.⁵⁹ The trial court held a “lengthy oral argument, not an evidentiary hearing.”⁶⁰ Despite the court describing the proceedings as a lengthy oral argument, the court entered findings of fact and conclusions of law, after taking testimony from two witnesses offered by Smileys. Smileys presented findings that contain erroneous legal conclusions. There is no factual evidence to support a finding that the 1992 estate settlement agreement and boundary line revision established an easement.⁶¹ The easement described in the 1992 estate settlement agreement and boundary line revision were never recorded by a deed, which would have perfected the easement interest. Additionally, there was no evidence taken wherein the Smileys offered proof that they actually paid any consideration to acquire a right-of-way across the Vines’ property. They never paid the costs to record a deed to the easement contemplated by the 1992 Estate Settlement Agreement.⁶² Yet, the trial court entered a finding that Smileys paid consideration, when they did not.⁶³ Additionally, the court concluded the Smileys were entitled to \$18,700.00 representing a 50% interest in a lost right-of-way that they

⁵⁹ RP 10/11/16.

⁶⁰ RP 10/11/16 at 14.

⁶¹ CP 708.

⁶² CP 404 (Joseph Vines’ Dec.)

⁶³ CP 713.

never lost.⁶⁴ They continued uninterrupted their use of the roadway, and never used the easement that they had a contractual interest only in perfecting.

D. No Jurisdictional Authority to Compel Vines to Involuntarily Execute An Easement or to Set Partial Easement Boundaries Via Motion

The scant authority Smileys relied upon does not support their motion claiming third party beneficiary status nor the relief granted:

1. *Vikingstad*.⁶⁵

Vikingstad was not a condemnation case like this case. *Vikingstad* pled a complaint for affirmative relief against real estate broker Baggot. *Vikingstad*'s theory was that he was "a third party donee beneficiary" to an oral contract for \$1,000.00 in earnest money. The premise was that *Vikingstad* would relinquish his claim to property he put interest money down on with Baggot if another purchaser bought the property and *Vikingstad* would get his earnest money deposit back. A third party agreed to buy the property if Baggot would return the earnest money to *Vikingstad*. Baggot orally agreed to do so, but never followed through. Baggot was obligated to pay the \$1,000.00 even though the third party did not subjectively intend to benefit *Vikingstad* when contracting with

⁶⁴ CP 714.

⁶⁵ *Vikingstad v. Baggot*, 46 Wn. 2d 494, 282 P.2d 824 (1955).

Baggot. The case was tried, and the testimony of the parties heard by the trier of fact to resolve the disputed issues.

a. Improper Form - No Legitimate Claim for Affirmative Relief

In this case, the Smileys never initiated any complaint, counterclaim, nor cross claim for affirmative relief of any kind.⁶⁶ The Vines had no notice that the proceedings would include affirmative relief against them specific to conveyance of a new easement taking more of their property than proposed in the County's condemnation petition.⁶⁷ The law clearly identifies the proper procedure for obtaining a private way of necessity.⁶⁸ A landowner may not be involuntarily divested of the landowner's property interests without the adverse party properly invoking the jurisdictional authority of the court to to condemn property and quiet title in the other property owner's favor.

b. No Meeting of Minds On Boundaries of Easement

A condemnation petition for a private right-of-way includes express authority to name the surrounding property owners.⁶⁹ Here there were no surrounding property owners named as parties to this action.

⁶⁶ App. A. (Linx Docket at https://linxonline.co.pierce.wa.us/linxweb/Case/CivilCase.cfm?cause_num=15-2-09830-1.)

⁶⁷ CP 667-668 (Joseph Vines' Dec.)

⁶⁸ RCW 8.24.

⁶⁹ RCW 8.24.015.

Critically, the property owners Noble who own the property between the Vines and the Smileys over which the existing roadway passes was not present. As a result, there was no jurisdictional authority to bind the Noble's property. Smileys avoided this problem by requesting a partial easement, which was ineffective as a right-of-way to their property. The conveyance of a partial easement clouds title without finally resolving the access issue, necessitating further action later on.⁷⁰ Taking action unilaterally without Noble's participation was never contemplated by the Settlement Agreement. Instead, Smileys requested relief conflicts with the express contract language that references an offer to "the owners of the two parcels." The plural reference obviously means both servient properties, Vines and Noble, vis a vis the dominant property owner, Smileys. Vines offer had to be accepted by Smileys and Nobles. Upon their mutual acceptance of his offer, not the Smileys, then Vines agreed to convey the easement for \$8,450.00 whether one or both of the property owners paid the Vines.⁷¹ The Smileys rejected the easement Vines offered to them and to Noble. Thus, there was no obligation on Vines to convey the additional twenty foot easement to Smileys in part. All three had to

⁷⁰ CP 939 (Rogers Dec.)

⁷¹ CP 1021.

agree. The conditions precedent to invoke the terms of the Settlement Agreement as a beneficial third party were never present.

c. Noble An Indispensable Party

Noble was not just a necessary party to a right-of-way action over the adjacent properties, he was an indispensable party to effectuate the right-of-way contemplated by the Vines' Settlement Agreement with Pierce County. As is evident from the plain language of the contract, Pierce County and the Vines intended to convey a complete right-of-way to ensure the Smileys parcel was accessible via the actual roadway. However, the court ordered easement is merely a partial easement, which was never contemplated by Pierce County or the Vines. Both servient parcels, Vines and Nobel, were to be party to the right-of-way. The Vines were prejudicial effected by the court's ordered partial easement because their property became encumbered over their objections without achieving the underlying legal purpose for taking their property. There was no meeting of the minds as to a partial easement in any contract. To have ordered the Vines to execute an easement without the Noble's participation was in error, and should be reversed.

d. Disputed Issues of Material Fact Without Fact Finding

Although the material facts were in dispute, there was no fact finding on the merits.⁷² Smileys moved for and were granted their motion to strike their requested jury trial in August.⁷³ Smileys prepared a trial brief that makes no mention of their claimed status as third party beneficiaries under the Vines' Settlement Agreement with Pierce County.⁷⁴ Smileys presented a "Neutral Statement of The Case" for the October 11, 2016 hearing on disbursement of the condemnation proceeds. Their statement did not contain any notice to the Vines that the "fact finding" hearing was to include any offer of proof on the third party beneficiary motion.⁷⁵

Four days prior to the October 11th hearing to disburse condemnation proceeds, Smileys noted on the regular Friday motion calendar their Motion to Enforce Settlement Agreement as to Grant of Easement.⁷⁶ This was the first notice to the Vines that Smileys intended to take their property, in addition to taking more of the settlement proceeds negotiated by Vines. Smileys' motion does not provide any notice to the

⁷² RP 10/11/16.

⁷³ CP 270-271 (August 4, 2016 Motion to Strike Trial Date.)

⁷⁴ CP 283-291 (August 9, 2016 Trial Brief of Respondents Smiley.)

⁷⁵ CP 702 (Neutral Statement of the Case.)

⁷⁶ CP 538 (Motion to Enforce Settlement Agreement as to Grant of Easement.)

Vines of any fact finding hearing to resolve the disputed facts on this issue.

Even the court was confused about the contested nature of the issues before it on October 11, 2016.⁷⁷ The court incorrectly initially thought the Smileys and Vines had reached a settlement as to the easement between them, when in fact the only settlement agreement was between Pierce County and the Vines and Smileys and Pierce County.⁷⁸ The Vines expressly opposed and did not consent to Smileys requested relief.⁷⁹ The court proceeded to hear argument on the motion, but did not take any testimony. The Smileys' attorney made a highly irregular offer of payment for the easement on the motion docket where there was no mutually agreed upon consideration.⁸⁰ There was no contract between them. Vines did not accept Smileys' offer of payment at the hearing.⁸¹ Instead, Mr. Vines responded pointing out the underlying flaws in Smileys taking his property when there was no established easement because none was ever recorded.⁸² He identified the legally correct rule of law that the only

⁷⁷ RP 10/11/16 at 5.

⁷⁸ RP 10/11/16 at 5: "Well, you either have a settlement or you don't. And you just —."

⁷⁹ CP 674-675. (Vines Response to Smiley's Motion to Enforce Settlement Agreement As To Grant of Easement.)

⁸⁰ RP 10/11/16 at 8.

⁸¹ RP 10/11/16 at 8-9.

⁸² RP 9-10; CP 708 (Exhibits at CP 565-569 and 571-576.)

recorded document was a boundary line adjustment, and a boundary line adjustment does not effectuate a contemplated easement.⁸³ There was an estate settlement agreement that described the purported easement.⁸⁴ That document included specific terms, including payment to Vines for perfecting the easement.⁸⁵ Smileys never paid the costs associated with preparing and recording the easement to Vines.⁸⁶ Smileys only paid the agreed purchase price for the land.⁸⁷ Smileys were not acting in good faith, nor with “clean hands.” Furthermore, Smileys were seeking to double dip, requesting additional compensation when they had already been made whole.⁸⁸ Pierce County’s payment to them earlier in the proceedings fully satisfied their interests.⁸⁹ They suffered no loss of easement.

The court did not allow Mr. Vines to complete his argument, but rather summarily narrowed the issue to whether the Smileys were entitled

⁸³ PCC 18F.70.030(C)(2); RP 9. (10/11/16); CP 136 at L 25-30; CP 134 L 44 - 47.

⁸⁴ CP 440 (Declaration of Boundary Line Revision.)

⁸⁵ CP 451 (1992 Estate Settlement Agreement.)

⁸⁶ CP 404 (Joseph Vines’ Dec.)

⁸⁷ CP 959 (Joetta Smith Dec.)

⁸⁸ RP 10/11/16 at 70; and at 66 (“The questions that were submitted by Mr. Vines in terms of what it’s worth if there’s a replacement offered, different deal. That’s a contract between Vines and the county to do something for the Smileys, and the Smileys didn’t sign that agreement. That question is solely about enforcement of the contract. It’s not about the value of the easement.”)

⁸⁹ Smiley’s received double the price their appraiser calculated for the value of the entire right-of-way across all three parcels from their Settlement Agreement alone when they did not actual lose any access to their property.

to “payment consideration, as determined already,” which was inadequate.⁹⁰

e. Inadequate Consideration

There was never a meeting of the minds as to the price because the Smileys changed the terms of the consideration after the Vines entered into the Settlement Agreement with Pierce County by asking for more of the money. As to the price, Mr. Vines argued that the Smileys’ Motion contravened the consideration contemplated when entering the Agreement with the County.⁹¹ Vines negotiated a Settlement Agreement with Pierce County with the understanding that Smileys were doing the same as to the proceeds they expected to receive.⁹² Both Smileys and Vines had entered into Settlement Agreements with Pierce County for their respective distributions before Smileys filed their motion to enforce the settlement agreement on September 29, 2016.⁹³ Believing the Smileys would take what they negotiated and Vines would take what they negotiated, Vines

⁹⁰ RP 10/11/16 at 9 (“The County has taken the 20-foot easement, and you’ve entered into an agreement. The real question is whether or not the Smileys are entitled for payment consideration, as determined already, to compensate you for the 20-foot easement that would go on your property.”)

⁹¹ RP 10/11/16 at 9.

⁹² CP 211, 260, CP 709-710.

⁹³ CP 578 (Vines’ Settlement Agreement 02/19/16) CP CP 468 (Smileys’ Settlement Agreement 07/18/16); and CP 149 (“the entry of this decree terminates all further litigation in this matter related to the property described in Exhibits “A” and “B”, except for any proceedings that may be necessary to determine entitlement to these funds and any orders necessary to disburse the funds pursuant to RCW 8.08.060.”)

did not object to the distribution of the settlement proceeds to Smileys from the portion Smileys negotiated. Then to Vines' surprise, Smileys decided after the fact to take more than their negotiated share. They then pursued more money out of the proceeds the Vines agreed to accept from Pierce County, which substantively altered the consideration supporting the Settlement Agreement with Pierce County, to include the \$8,450.00 sum referenced specific to the easement.⁹⁴ The Vines were getting less money overall, when Mr. Vines had relied upon his calculations and the sum he negotiated to cover the expenses he would incur moving the water well, and mitigating other impacts.⁹⁵ The court did not enter any factual findings evidencing an offer, acceptance, or consideration that would support the conveyance.⁹⁶

The Vines never had the opportunity to retain counsel to protect their interests as to any condemnation action by the Smileys. It was not equitable, nor legally supportable, for the court to have ordered the partial easement on a motion over the Vines' objections without fact-finding to resolve the disputed issues after adequate notice based on a proper petition being served on the Vines.

⁹⁴ CP 400 (Joseph Vines' Declaration.)

⁹⁵ CP 1021 at ¶ 9 (Vines' Settlement Agreement.)

⁹⁶ CP 706 - 715 (Court's Findings of Fact and Conclusions of Law.)

2. *McDonald Construction Co.*⁹⁷

The *McDonald* case is the only case other than *Vikingstad* that the Smileys cited in their motion to claim third party beneficiary status to an easement. The *McDonald* case similarly does not support their motion or the ruling of the court. In the *McDonald* case, Queen Anne News claimed a third party beneficiary status to a construction contract when the contractor did not complete the repairs to the rental property on time, affecting Queen Anne's occupancy. The court found no third party beneficiary status. Queen Anne's remedy was against the landlord under the terms and conditions of lease between them, which the court considered an "intervening tenancy agreement." Queen Anne's only relationship to the transaction was as a prospective tenant for the premises the contractor was developing.⁹⁸

The trial court should have similarly rejected the Smileys claim for relief like Division I held in *McDonald*. Here too there is an intervening pre-existing contractual relationship between Smileys and Vines from which the easement rights arose dating back to the original conveyance of the land to the Smileys.⁹⁹ There were outstanding commitments under

⁹⁷ *McDonald Construction Co. v. Murray*, 5 Wn.App. 68, 485 P.2d 626 (1971).

⁹⁸ *McDonald*, 5 Wn.App. at 70.

⁹⁹ CP 319-330 (1992 Estate Settlement Agreement w/attachments.)

that contract that the court disregarded and disrupted because the existing rights between the parties were not properly before it. The intervening contract should have predominated as the controlling covenant to enforce between the parties, and the court should have directed Smileys to pursue their contractual rights to an easement separately from Pierce County's condemnation action.

Like Queen Anne, the Smileys were merely potential dominate estate owners to a prospective right-of-way. They had their own remedies they could pursue under the 1992 Estate Settlement Agreement and under RCW 8.24, the statute that provides for private ways of necessity. The Smileys had no reason to invoke the court's equity powers. They had expressly agreed to no further litigation of their property rights in the County's condemnation proceedings in July when taking their \$72,750.00 from Pierce County.¹⁰⁰ The Smileys' interests were fully satisfied.¹⁰¹ Their motion as third party beneficiary contravenes this express promise. Smileys only standing to claim third party beneficiary status to the Vines'

¹⁰⁰ CP 185 - 187 (Stipulated Judgment and Decree of Appropriation for Property Described in Exhibits A and B of the Petition.)("(\$72,750) includes just compensation for the taking and/or damaging of the property and/or property rights as described in Exhibits "A" and "B," including any damage to the remainder of Respondents' real property not acquired in this action...")

¹⁰¹ CP 703 (Neutral Statement of the Case.); CP 518 (Joseph Vines' Dec.); CP 275 -280 (Stipulated Judgment and Decree of Appropriation for Property Described in Exhibits A And B of the Petition); CP 197 - 198 (Stipulation for Order of Distribution - Smiley.)

Settlement Agreement with Pierce County derived from their status as the property owners of parcel A. The Smileys did not express any reservations as to parcel C or as to any additional twenty foot right-of-way across parcel C, the Vines' property. The Vines' Settlement Agreement with Pierce County pre-dated the Smileys' Stipulated Judgment by approximately six months. The Smileys had no good faith basis to bring a motion claiming to be a third party beneficiary at the end of September in Pierce County's condemnation case. The only issue properly before the court was presentation of a final order of distribution to the Vines of the proceeds payable to them.¹⁰² The Smileys had already been fully compensated by Pierce County for its taking.

If Smileys thought they were entitled to a new easement, they should have filed for affirmative relief separately in their own action. An action on the legal merits between all proper parties would have avoided the untenable result here where the Vines' property is now burdened with a partial easement that is not effective and is inadequately described.¹⁰³ Additionally, the Vines have not received the consideration promised when the original easement was formulated in the 1992 Agreement, but

¹⁰² CP 924-925 (Pierce County's 30 Offer Ltr.)

¹⁰³ CP 761 (Follansbee Map); CP 1084 (Vines Reply to Their Notice of Supersedeas...); CP 936 - 939 (Rogers' Dec.)

never finally recorded nor paid for by Smileys.¹⁰⁴ And, Smileys have profited from the County's condemnation proceedings where they have acquired title to a right-of-way without paying the associated expenses, having taken monies Vines negotiated to cover their losses.

E. Smileys' Motion To Set Easement Boundaries Created Triable Issues of Fact - Precluding Entry of the Court's Order

In an action to quiet title to an easement, the court determines the extent of the right acquired by the terms of an express easement.¹⁰⁵ Extrinsic evidence, like testimony from a surveyor, is not considered where the plain language of the easement is unambiguous.¹⁰⁶ Here there is no express agreement creating the ordered easement between Smileys (Parcel A), Noble (Parcel B), and Vines (Parcel C). The Agreement Smileys purport to be enforcing is the Vines' Settlement Agreement with Pierce County, which does not contemplate a partial easement at all and it makes no mention of any road maintenance agreement. Smileys created additional ambiguity as to boundaries of the easement by offering its own proposed boundaries via the declaration of its surveyor on a motion challenging the Vines' recorded easement as unclear. However, the trial court did not conduct any fact finding to resolve this apparent dispute as to

¹⁰⁴ CP 321 at ¶ 7 (1992 Estate Settlement Agreement.)

¹⁰⁵ *810 Props. v. Jump*, 141 Wn. App. 668, 695, 170 P.3d 1209 (2007).

¹⁰⁶ *Sunnyside Valley Irrigation Distr. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

what was intended, what boundaries were appropriate given the purported use, and scope of the easement. The parties intent when created, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied are all material to a determination that will effectively bind the landowners.¹⁰⁷

Where there are genuine issues of material fact regarding the type, scope, or terms of an access right-of-way, the trial court may not decide the matter on summary judgment.¹⁰⁸ In *Visser*, this court reversed the trial court's creation of a right-of-way on summary judgment, explaining the court left "complicated and material issues of fact unresolved" that concern the actual use of the purported right-of-way and the intent of the parties. An easement imputed or implied from a third party contract requires proof of intent.¹⁰⁹ Here the record shows the parties had irreconcilable intentions. The record is absent of any fact-finding to adequately resolve the disputed issues as to intent and scope of the easement, as well as any road maintenance agreement.

After the trial court ruled on the Smileys' third party beneficiary motion on October 11, 2016, Mr. Vines recorded a twenty foot easement

¹⁰⁷ *Logan v. Brodrick*, 29 Wn.App. 796, 799, 631 P.2d 429 (1981); *Woodward v. Lopez*, 174 Wn. App. 460, 300 P.3d 417 (2013).

¹⁰⁸ *Visser v. Craig*, 139 Wn.App. 152, 159 P.3d 453 (2007).

¹⁰⁹ *Visser*, 139 Wn.App. at 163.

on October 18, 2016 with the assistance of Delta Survey and Engineers.¹¹⁰ On November 1, 2016, the Smileys challenged that recording and filed a motion to set the easement boundaries at thirty feet, rather than the twenty feet previously ordered and recorded. Smileys claimed the Vines were obligated to record the easement with a survey or testimony from a surveyor without citation to any such authority:

“On October 20, 2016, Vines filed a motion for reconsideration of the Court’s October 20, 2016 orders. It contains an October 18, 2016 document which purports to deed an easement. The October 18, 2016 document presented by Vines has no survey or record attached or testimony from a surveyor about the legal description of the area within the 30 foot wide common easement compelled by the Court’s prior order.”¹¹¹

Smileys intended to quiet title to a thirty foot partial easement, when the Settlement Agreement was not intended to quiet title to the additional ten feet, nor was a partial easement considered. The Vines did not propose to quiet title to the ten foot portion the County did not take. The Smileys sought to quiet title to the additional ten feet not condemned by the County, which Smileys never effectively paid for nor recorded prior to the County petitioning to condemn twenty feet of the thirty feet reflected in the survey map attached to the boundary line adjustment. This additional ten feet was not described nor included in the payment calculation in the

¹¹⁰ CP 812-813.

¹¹¹ CP 751; *See also*, Reply at 825-832.

Vines' Settlement Agreement with Pierce County.¹¹² The Smileys took more land than Vines agreed to offer when the Vines settled with Pierce County. Additionally, Smileys proposed to terminate the easement at the Vines' property line, which was not what Pierce County and the Vines contemplated in their Agreement. The right-of-way originally contemplated in the 1992 boundary line adjustment described in the Estate Settlement Agreement and in the Vines' Settlement Agreement with Pierce County ran across the Noble parcel (Parcel B) and across the Smileys' parcel (Parcel A) to effectuate an actual right-of-way to Parcel A. Smileys offered no evidence to support a partial easement or road maintenance agreement. Smileys offered no evidence as to the necessity to set the boundaries where their surveyor set the boundaries. The right-of-way they proposed and had ordered does not in fact give them access to their parcel.

Smileys raised several material issues of disputed facts by their motion that precluded resolution by the court on the record before it. Smileys requested and obtained relief that actually conflicted with the trial court's earlier order wherein the court denied the Smileys the very relief they later requested in their Motion to Set Boundaries for Easement. CP

¹¹² CP 400 (Joseph Vines' Dec.); and CP 427 - 429 (Vines' Settlement Agreement.)

718 shows the trial court struck the content the Smileys added back in to their order setting easement boundaries at CP 888.

The court compelled the Vines to record a mutual maintenance agreement that would allow Smileys to demand upgrades or improvements to the roadway over the Vines' property without Vines' consent. The Vines did not consent to a mutual maintenance agreement. In fact, the Vines expressly opposed it to avoid further future conflict with the Smileys.¹¹³ The Vines agreed with Noble that they would maintain the roadway without obligating the Smileys to share in those expenditures. The Vines feared Smileys would continue to disrupt them with interferences on the right-of-way and with monetary demands to upgrade the actual roadway to which they had no prior established right-of-way or easement interests.¹¹⁴ The previously condemned right-of-way was overgrown unused land next to a long since abandoned railroad tracks.¹¹⁵

The Vines adequately opposed the motion, pointing out the inequities and improprieties of substituting a full easement with a partial easement.¹¹⁶

¹¹³ CP 405 (Joseph Vines' Dec.)

¹¹⁴ *Id.*

¹¹⁵ CP 432 (Ex. 7 a,b,c Photos); CP 1282 - 1287 (Photos.)

¹¹⁶ CP 813.

The record cannot and does not support the orders entered. The court's Order Enforcing the Settlement Agreement As to Grant of Easement and Order Granting Motion of Respondents Smiley to Boundaries for Easement should be invalidated and reversed.

F. Smileys Overcompensated

The county condemnation statute authorizes the court to decide compensation and damages to be paid all parties interested in the property interest sought to be appropriated for the taking, together with the injury, if any, caused by such taking to the remainder of the land, after offsetting against any and all such compensation and damages, or special benefits, accruing to such remainder.¹¹⁷ The amount to be calculated should reflect the fair and full value of the property interest taken.¹¹⁸ Where there are conflicting claims to the distribution of the proceeds, the court may require an action be commenced to determine the conflicting claims to the proceeds.¹¹⁹ An owner who makes the bargain with the condemning agency should "reap the benefit of it", and if too low, the owners "share the disappointment."¹²⁰ In order to achieve a legally correct and equitable

¹¹⁷ RCW 8.08.040.

¹¹⁸ RCW 808.050.

¹¹⁹ RCW 8.04.140.

¹²⁰ *State v. Spencer*, 16 Wn.App. 841, 559 P.2d 1360 (1977), *affm'd State v. Spencer*, 90 Wn. 2d 415, 583 P.2d 1201 (1978).

result, the court must ascertain the fair market value of each interest in the property and distribute each owner the owner's proportionate share of the available proceeds.¹²¹

The court ordered distribution was erroneous for multiple reasons.

1. No Proper Action Commenced for Affirmative Relief

First, the court never required an action be commenced to resolve the disputed interests in the property. Vines understood Smileys would take the proceeds from their settlement with the County, and Vines would take the proceeds from their settlement with the County. Vines did not nor could they have anticipated the Smileys taking settlement proceeds from both settlements, particularly once the thirty foot easement was reinstated over the actual right-of-way. The court proceeded without the middle property owners, the Nobles, present when clearly the Nobles had a vested interest in the right-of-way.¹²² The Vines disputed Smileys ever actually acquired a perfected easement. Vines offered proof that there was no deed. Smileys never paid to record a deed. The easement identified in the boundary line adjustment never used as the actual right-of-way, but rather had been abandoned and was covered with overgrown brush. Smileys

¹²¹ *Id.* at 845.

¹²² CP 1021 at ¶6.

were accessing their property by driving down the road, which was below the easement contemplated by the boundary line adjustment.

2. Failure to Offset Compensation Paid Already to Smileys

The second reason the distribution fails as a matter of law and equity is because the court failed to consider the proceeds already allocated to Smileys from their settlement. The Smileys settlement with Pierce County expressly foreclosed any further claims by Smileys to additional proceeds. Smileys do not have a separate ownership interest in Parcel C that is segregable from their interests as owners of Parcel A. Their only interest in Parcel C was to the right-of-way to access Parcel A.

3. Smileys Suffered NO Lost Easement

The court ordered Vines to convey a new easement to Smileys prior to distributing the \$51,900.00 allocated for its condemnation of the easement on Parcel C, the Vines' property.¹²³ However the court did not account for that conveyance when allocating the condemnation distribution. Mr. Vines correctly cross examined Smileys expert to account for the "re-conveyance", but the court refused the evidence on "relevance" grounds. The court erred when it sustained Smileys' objection to Mr. Vines' question to Smileys' expert: If the Smileys claimed that they

¹²³ RP 10/11/16 at 12-13.

lost whatever value for a loss of easement, if that easement was restored, would they still have a loss?¹²⁴ Smileys objected on relevance grounds. The court sustained the objection.¹²⁵ Mr. Vines' question was relevant. The answer would prove Smileys suffered no loss of any interest. The Smileys expert testified to losses presuming that the Smileys actually incurred the loss of an easement, without factoring in the value of the easement actually acquired.¹²⁶ Yet, Smileys received a new thirty foot right-of-way far superior to their prior unrecorded interest because the court ordered a new easement that actually passed over the roadway they were already using. The award to Smileys was necessarily excessive, and unjustifiable legally and equitably because Smileys never lost access to their property.

4. Distribution Failed to Account For Water Well
and Turn Around Relocates

The trial court failed to account for the damages incurred by Vines to relocate the water well and hammerhead turn around. The Settlement Agreement expressly stated the water well damages were part of the consideration supporting the amount the County paid.¹²⁷ The court's

¹²⁴ RP 10/11/16 at 59-60.

¹²⁵ RP 10/11/16 at 59-60.

¹²⁶ RP 10/11/16 at 59.

¹²⁷ CP 730.

distribution shorted the Vines monies due and owing to them to move the water well and turn around. The record shows this amount to be \$15,000.00 for the water well.¹²⁸

5. No Fair Market Value Determination

Fifth, the trial court never determined the fair market value of each party's interest. Smileys' expert testified that a twenty foot strip of raw land in Pierce County has a market value of approximately \$2,900.00.¹²⁹ Smileys did not object to the Vines getting \$2,900.00 from the Pierce County proceeds. Smileys further conceded that \$11,600.00 would equal the price of a privacy fence to compensate for the public using the condemned property as a walking and biking trail.¹³⁰ Smileys did not object to Vines getting money for loss of their privacy. Finally, the Smileys offered their appraiser's testimony that the market value of an easement to cross over the Vines' property so that Smileys could access their property would be \$37,500.00.¹³¹ The proceeds balance after deducting the raw land value and the privacy fence was \$37,400.00. Smileys offered no testimony specific to the 20 feet that was actually condemned. Smileys offered no testimony to counter the fact that the 20

¹²⁸ CP 724, 734; RP 10/11/16 at 72; CP 1021 at ¶9.

¹²⁹ RP 10/11/16 at 54.

¹³⁰ RP 10/11/16 at 55.

¹³¹ RP 10/11/16 at 57.

feet condemned was over grown with shrubs, and had never been utilized to access their property.¹³² Smileys never offered any relevant evidence specific to the actual interest they had, which was an abandoned contemplated easement. Furthermore, Smileys proposed easement did not give them access to their property, which means their expert's value was too high for a the partial easement they wanted recorded.¹³³ The evidence Smileys offered and the evidence in the record shows that Smileys received a windfall of at least \$10,500.00 for a right-of-way to their property valued at \$37,500.00, which the court granted to them for a mere \$8,450.00.¹³⁴ Smileys did not pay the \$8,450.00, the County paid it.¹³⁵ Additionally, Smileys received entirely the proceeds from their settlement agreement in the amount of \$72,750.00, which was inclusive of all their property rights, to include any damages caused from taking twenty feet of the same right-of-way to their property.¹³⁶ The trial court erroneously sustained an objection when Vines tried to elicit testimony from Smileys' appraiser to show the same amount of land was at issue in Smileys' settlement for which they had already been compensated at full value.¹³⁷

¹³² CP 1282-1287.

¹³³ CP 945.

¹³⁴ RP 10/11/16 at 72.

¹³⁵ RP 10/11/16 at 75.

¹³⁶ CP 147-149.

¹³⁷ RP 10/11/16 at 59.

Smileys never actually suffered any taking of their right-of-way, which shows Smileys in actuality received far in excess of the \$10,500.00 windfall than did not correlate to any fair market value.

The Court did not distribute the proceeds proportionate with the fair market value of the interests each party held. Smileys asked the court to split the \$37,400.00 balance without any rational basis to support the Smileys taking any of this balance. The court made this arbitrary split of the balance of proceeds that do not correlate to any losses or damages the Vines actually incurred. The court took \$18,700.00 (1/2 of \$37,400.00) and deducted \$8,450.00 to pay Vines to convey the new right-of-way, leaving \$10,250.00 the court ordered distributed to the Smileys.¹³⁸

The distribution was excessive to Smileys and should be reversed. The full \$51,900.00 should have gone to the Vines. The Smileys got the \$72,750.00 they negotiated, which more than fully compensated them for the County's condemnation action. They had not legitimate basis to take more.

G. Court Ordered Bond Excessive

A supersedeas bond is intended to preserve the status quo between the parties.¹³⁹ Where the issue to be bonded concerns property, the

¹³⁸ CP 705.

¹³⁹ *Guest v. Lange*, 195 Wn.App. 330, 381 P.3d 130 (2016).

property itself may fully or partially secure any loss.¹⁴⁰ Here the trial court did not factor in the existing recorded right-of-way that Smileys were using that was the status quo mitigating against Smileys being landlocked during the appeal process. Smileys argued for and were granted an excessive bond amount based upon their erroneous claim that staying the court ordered easement would leave them landlocked.¹⁴¹ A stay of the court ordered easement did not leave them landlocked because Vines had already recorded a right-of-way to Smileys' benefit across the Vines' property using the same roadway they historically had been driving on. A supersedeas bond that is \$1000.00 over the \$5,000.00 amount involved in the action is not excessive where such overage accounts in part for attorney's fees of \$500.00.¹⁴² Here the trial court set the supersedeas bond at full market value of the property, \$302,500.00, when Smileys expert testified the market value of the easement at issue was only \$37,500.00.¹⁴³ The supersedeas bond more than doubled the property value at risk, which is far in excess of the value required where a monetary judgment is at issue.¹⁴⁴ An excessive bond impairs a parties rights on appeal wherein the

¹⁴⁰ RAP 8.1(c)(2).

¹⁴¹ CP 1086: "The appraisal does not value the property with the presently recorded October 18, 2016 easement..."

¹⁴² *Clemson v. Best*, 174 Wash. 601, 25 P.2d 1032 (1933).

¹⁴³ CP 1100; RP 10/11/16 at 56.

¹⁴⁴ *Graham v. American Sur. Co.*, 28 Wash. 735, 69 P. 365 (1902).

court places at risk more than was at issue, prejudicing the Vines who risk having to purchase Smileys' entire property to assert their absolute right to appeal the orders affecting their land.¹⁴⁵ A party should not be advantaged on appeal by setting an improper supersedeas amount.¹⁴⁶ Similarly they should not be deterred from asserting their appellate rights by increasing the stakes beyond the property value at issue. Preserving the status quo did not necessitate a bond at all because Vines had already recorded a right-of-way across their parcel.¹⁴⁷ Thus, the status quo would have been preserved on appeal by securing the judgment with the existing easement. There was no basis to bond the Vines' appeal of the distribution of condemnation proceeds because statutorily there is no bond required.¹⁴⁸ The bond the court imposed was excessive and the order should be reversed.

H. Vines Not In Contempt

Contempt requires an intentional disobedience of a lawful court order.¹⁴⁹ The Vines did not violate any lawful court order. The order was not valid for all the reasons previously argued, and the reservation of

¹⁴⁵ RAP 8.1.

¹⁴⁶ *State v. Kelly*, 117 Wash. 142, 201 P. 7 (1921).

¹⁴⁷ CP 936 - 939, 1084, 1091-1097.

¹⁴⁸ RCW 8.08.080.

¹⁴⁹ RCW 7.21.010.

rights did not violate the order. The court found Vines in contempt for executing the court ordered Access and Utility Easement with the notation “under protest and w/out waiving rights on appeal.” The court failed to provide any rationale for finding the reservation of rights a violation of the court’s order to execute the Access and Utility Easement.¹⁵⁰ It did not violate the court’s order, as there was no restriction on their right to protect their interests expressly.

The court manifestly abuses its discretion when ordering payment of a monetary penalty where the grounds for any possible contempt have been mitigated. An opportunity to mitigate and cure any contempt is essential, and the failure to provide an opportunity to cure the contempt is reversible error.¹⁵¹ Any remedial civil contempt order must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt.¹⁵²

The trial court held the Vines in contempt of court without affording them the opportunity to mitigate or purge the contempt prior to the court imposing contempt sanctions.¹⁵³ The trial court erred when holding Vines and their attorney in contempt on a show cause motion.

¹⁵⁰ CP 888.

¹⁵¹ *State v. Jordan*, 146 Wn.App. 395, 190 P.3d 516 (2008).

¹⁵² *In re Marriage of Didier*, 134 Wn.App. 490, 140 P.3d 607 (2006).

¹⁵³ CP 1314-1316.

The Vines cured the alleged contempt immediately upon the court entry of its order reserving their rights on appeal by signing the court ordered easement without expressly reserving their rights on the document.

Smileys' contempt motion is wholly unsupportable because the document they prepared was defective from its inception on technical grounds.¹⁵⁴ The document contained a scrivener's error that Smileys made, not the Vines. Thus, the Vines reservation of rights on an imperfect easement did not cause the document to be unrecordable. It was unrecordable as written and as ordered to be executed.

The court's ordered sanctions should be reversed and the monies returned to III Branches Law, PLLC, with interest.

I. CR 11 Sanctions Unsupportable

CR 11 sanctions apply to a pleading, motion, or legal memorandum signed by an attorney.¹⁵⁵ CR 11 is an extraordinary remedy to be exercised with extreme caution.¹⁵⁶ The imposition of CR 11 sanctions requires specific factual findings that identify sanctionable conduct in the court's order.¹⁵⁷ CR 11 is intended to deter baseless claims as well as the chilling effect CR 11 sanctions may have on those seeking to

¹⁵⁴ CP 1319-1320.

¹⁵⁵ CR 11.

¹⁵⁶ *Bryant v. Joseph Tree, Inc.*, 57 Wn.App. 107, 791 P.2d 537 (1990).

¹⁵⁷ *Id.*

advance meritorious claims.¹⁵⁸ Filings that have merit are not sanctionable. A pleading has merit where it can be factually or legally justified.¹⁵⁹ A court may not be swayed by the benefit of hindsight, and should avoid imposing sanctions except when it is patently clear that the claim has absolutely no chance of success.¹⁶⁰

The trial court's CR 11 sanction order does not identify any frivolous content in any pleading signed by counsel.¹⁶¹ Vines did not sign any of the pleadings at issue, and they may not be sanctioned under CR 11. The court erroneously used CR 11 as a fee-shifting mechanism, awarding a sum calculated based on Smileys attorney's fees, which is improper where there is no statutory fee shifting authority.¹⁶² The Vines' Response to Smileys' Motion for Contempt had merit as evidenced by the court entering an order with the relief the Vines requested.¹⁶³ The Vines' Response attested that execution of the court ordered easement by Vines complied with the court's order even though Vines expressly reserved their appellate rights by signing "under protest, w/out waiving rights on

¹⁵⁸ *Id.*

¹⁵⁹ *MacDonald v. Korum Ford*, 80 Wn.App. 877, 912 P.2d 1052 (1996).

¹⁶⁰ *Id.*

¹⁶¹ CP 1319-1321.

¹⁶² *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994).

¹⁶³ CP 1316.

appeal.”¹⁶⁴ Vines expressly reserved their rights on the easement document to ensure Smileys understood they were not waiving their rights by executing the easement when they had not filed a supersedeas bond.¹⁶⁵ Smileys argued that Vines had no appellate rights to challenge the court ordered easement, and that it was frivolous for counsel to argue the reservation of rights did not violate the court’s order.¹⁶⁶ Counsel for Vines asked Smileys to concede that executing the court ordered easement without an express waiver of rights would not constitute a waiver of their rights on appeal.¹⁶⁷ Smileys refused, still insisting the Vines had no appellate rights to challenge the court ordered easement.¹⁶⁸ The Vines asked the court to preserve their right to challenge the court ordered easement. The court agreed and provided them such relief in its order.¹⁶⁹ Counsel did not violate CR 11, and she should not have been sanctioned.

The sanction order should be reversed and the Smileys ordered to return \$2,524.60 to III Branches Law, plus interest.

I. Vines Entitled to Attorney’s Fees and Costs On Appeal

¹⁶⁴ CP 1274.

¹⁶⁵ CP 1246, 1271, 1301; *See Murphree v. Rawlings*, 3 Wn. App. 880, 479 P.2d 139 (1970).

¹⁶⁶ CP 1311.

¹⁶⁷ CP 1309.

¹⁶⁸ CP 1267, 1311-1312.

¹⁶⁹ CP 1316.

The Vines request an award of attorney's fees and costs under RCW 8.24.030, which allows a condemnee to recover attorney's fees and costs incurred where their land is condemned for a private way of necessity. Smileys took action in these proceedings to condemn Vines' land for purposes of a private way of necessity. Although procedurally Smileys failed to properly petition the court for such relief under RCW 8.24, in effect Smileys motion to enforce the settlement agreement and motion to set easement boundaries served the same purpose. Smileys albeit erroneously, took a private way of necessity from the Vines, and Smileys should have to pay the associated attorney's fees and costs in obtaining that property interest from Vines.

The Vines request an award of appellate fees and costs because the Smileys' contempt motion and motion for CR 11 sanctions were frivolous in violation of CR 11. Smileys prepared a technically and legally flawed easement.¹⁷⁰ The Vines' execution of that easement under protest was not contemptuous and was not without merit.

The Vines further request an award of attorney's fees and costs for Smileys procedural and substantive bad faith wherein Smileys abused the processes of the court to divest an unrepresented party of assets without

¹⁷⁰ CP 1319.

legitimate grounds for doing so. Procedural and substantive bad faith are equitable grounds for awarding attorney's fees to the prevailing party.¹⁷¹ Procedural bad faith involves vexatious conduct and substantive bad faith is the intentional assertion of a claims with an improper motive. Bad faith litigation is a proper basis for an award of attorney's fees.¹⁷²

Here Smileys failed to file a petition or counterclaim for affirmative relief to adequately notify Vines that the Vines' interests were at risk. Vines had inadequate notice that Smileys intended to take an additional easement from Vines as well as taking monies for a loss of an easement the Smileys did not actually suffer. Smileys lodged an erroneous objection wherein its appraiser was not permitted to opine that Smileys suffered no losses when the court ordered a right-of-way across Vines property. Vines were denied the opportunity to get relevant evidence before the court. Smileys illegitimately took monies from Vines when Smileys suffered no actual harm. Then when Vines sought to preserve their rights on appeal, Smileys repeatedly sought contempt and CR 11 sanctions against them without any legitimate basis for doing so other than to harass them. Smileys have never contributed financially to the creation of the easements at issue, placing the family at odds. The Smileys

¹⁷¹ *Dave Johnson Ins., Inc. v. Wright*, 167 Wn.App. 758, 275 P.3d 339 (2012).

¹⁷² *Matter of Pearsall-Stipek*, 136 Wn.2d 255, 961 P.2d 343 (1998).

apparent animus towards Vines is communicated in their substantive and procedural badgering to take more from Vines than they were entitled. Bad faith provides a legitimate equitable basis for an awarding appellate attorney's fees and costs to the Vines.

V. CONCLUSION

The trial court's orders and findings of fact listed in the Vines' Second Amended Notice of Appeal should be reversed and the case remanded to the trial court for entry of orders vacating the partial easement and awarding to the Vines the settlement proceeds they negotiated with Pierce County. Vines were not in contempt, and their attorney did not file any frivolous pleadings. Smileys should be ordered to pay Vines' attorney's fees and costs on appeal.

Respectfully submitted,

III BRANCHES LAW, PLLC



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CERTIFICATE OF SERVICE

I, Joseph A. Fonseca, certify as follows:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On the 30th day of May, 2017, I caused to be filed and served true and correct copies of the above Appellant Vines' Opening Brief, and this Certificate of Service; on all parties or their counsel of record, as follows:

Via E-service

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I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Dated this 30th day of May, 2017 at Fircrest, WA.



Joseph A. Fonseca, Paralegal

Appendix A

PCSC Docket

Pierce County Superior Court Civil Case 15-2-09830-1

Case Title: PIERCE COUNTY VS. LILLIAN E SMILEY
 Case Type: Condemnation
 Access: Public
 Track Assignment: Standard
 Jury Size: 12
 Estimated Trial Length:
 Dept Judge: **11 G. HELEN WHITENER**
 Resolution: 07/25/2016 Parties Settled/AJ Pre-Trial
 Completion: 07/25/2016 Judgment/Order/Decree Filed

Litigants

Name	Type	Status
PIERCE COUNTY	Petitioner	
Attorney for PIERCE COUNTY	Type	Bar Number
<u>Ian A. Northrip</u>	Atty for Plaintiff/Petitioner	21105
SMILEY, LILLIAN E	Respondent	
Attorneys for SMILEY, LILLIAN E	Type	Bar Number
<u>Loren Dee Combs</u>	Atty for Respondent	7164
<u>Gregory Francis Amann</u>	Atty for Respondent	24172
<u>F. Hunter MacDonald</u>	Atty for Respondent	22857
SMILEY, TIM O	Respondent	
Attorneys for SMILEY, TIM O	Type	Bar Number
<u>Loren Dee Combs</u>	Atty for Respondent	7164
<u>Gregory Francis Amann</u>	Atty for Respondent	24172
<u>F. Hunter MacDonald</u>	Atty for Respondent	22857
JP MORGAN CHASE BANK NA	Respondent	
Attorney for JP MORGAN CHASE BANK NA	Type	Bar Number
<u>LANCE E. OLSEN</u>	Atty for Respondent	25130
FIDELITY NATIONAL TITLE COMPANY	Respondent	DISMISSED
Attorney for FIDELITY NATIONAL TITLE COMPANY	Type	Bar Number
<u>Janis G White</u>	Atty for Respondent	29158
VINES, JOSEPH D	Respondent	
Attorney for VINES, JOSEPH D	Type	Bar Number
<u>JOAN KRISTINE MELL</u>	Atty for Respondent	21319
VINES, SUSAN L	Respondent	

Filings		Access	Pages	Microfilm
Filing Date	Filing			
06/30/2015	FILING FEE RECEIVED \$240.00	Public	0	
06/30/2015	[e] CASE INFORMATION COVER SHEET	Public	1	
06/30/2015	[e] ORDER SETTING ORIGINAL CASE SCHEDULE	Public	1	
06/30/2015	[e] CONDEMNATION PETITION	Public	18	
07/06/2015	[e] REASSIGNMENT LETTER	Public	1	
07/21/2015	[e] NOTE FOR JUDGES MOTION CALENDAR	Public	2	
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07/22/2015	[e] DECLARATION OF JERRY BRYANT IN SUPPORT OF MOTION	Public	22	
07/24/2015	[e] AFFIDAVIT/DECLARATION OF SERVICE	Public	2	
07/29/2015	[e] NOTICE OF APPEARANCE	Public	2	
07/29/2015	[e] CERTIFICATE OF SERVICE	Public	2	
07/29/2015	[e] AFFIDAVIT/DECLARATION OF SERVICE	Public	2	
07/30/2015	[e] AFFIDAVIT/DECLARATION OF SERVICE	Public	2	
07/30/2015	[e] AFFIDAVIT/DECLARATION OF SERVICE	Public	2	
07/30/2015	[e] AFFIDAVIT/DECLARATION OF SERVICE	Public	2	
08/10/2015	[e] NOTICE OF APPEARANCE	Public	1	

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01/03/2017	<u>DECLARATION OF ATTORNEY MACDONALD</u>	Public 43
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01/03/2017	<u>MEMORANDUM IN SUPPORT</u>	Public 4
01/04/2017	<u>DECLARATION OF DAVID FOLLANSBEE</u>	Public 6
01/20/2017	<u>REASSIGNMENT LETTER</u>	Public 1
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02/16/2017	e <u>DECLARATION OF JOSEPH VINES IN SUPPORT OF REPLY</u>	Public 7
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04/04/2017	e <u>SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS</u>	Public 3
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04/05/2017	p <u>REQUEST FOR CD COPY OF CLERK'S PAPERS</u>	Public 1
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04/14/2017	p <u>CLERK'S MINUTE ENTRY</u>	Public 2
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04/17/2017	p <u>CLERK'S PAPERS PREPARED</u>	Public 4
04/27/2017	p <u>ORDER ON SCRIVENERS ERROR</u>	Public 8
05/01/2017	e <u>CLERK'S PAPERS SENT</u>	Public 1
05/02/2017	e <u>NOTICE OF APPEAL TO COURT OF APPEALS SECOND AMENDED</u>	Public 64
05/04/2017	e <u>TRANSMITTAL LETTER COPY FILED</u>	Public 1
05/05/2017	e <u>SECOND SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS</u>	Public 5
05/18/2017	CLERK'S PAPERS PREPARED	Public



PURCHASE COPIES

Proceedings

Date	Calendar	Outcome
08/14/2015	JUDGE HOGAN (Rm. 2-E) Confirmed 9:00 Motion(Other: MEMORANDUM SUPPORTING ORDER ADJUDICATING PUBLIC USE AND NECESSITY)	Cancelled/Stricken
Scheduled By: Dayna Willingham		
08/21/2015	JUDGE HOGAN (Rm. 2-E) Confirmed 9:00 Motion(Other: REQUEST FOR ORDER ADJUDICATING PUBLIC USE AND NECESSITY)	Motion Held
Scheduled By: Eloise Pimentel		
10/28/2015	C4 - EXPARTE CALENDAR (Rm. 105) Confirmed 10:52 Exparte Action	Held
11/24/2015	JUDGE HOGAN (Rm. 2-E) Unconfirmed 12:00 Status Conference	Cancelled/Stricken
04/01/2016	JUDGE HOGAN (Rm. 2-E) Confirmed 9:00 Motion - Adjust Trial Date	Motion Held <u>Working Copies Provided</u>
Scheduled By: Gregory Amann		

06/14/2016 JUDGE HOGAN (Rm. 2-E) Unconfirmed 12:00 Pretrial Conference	Cancelled/Stricken
06/28/2016 JUDGE HOGAN (Rm. 2-E) Confirmed 9:00 Trial	Continued
07/01/2016 JUDGE HOGAN (Rm. 2-E) Unconfirmed 9:00 Motion - Adjust Trial Date Scheduled By: Gregory Amann	Cancelled/Stricken <u>Working Copies Provided</u>
07/25/2016 C4 - EXPARTE CALENDAR (Rm. 105) Confirmed 9:18 Exparte Action	Held
07/27/2016 C4 - EXPARTE CALENDAR (Rm. 105) Confirmed 10:57 Exparte Action	Held
08/04/2016 C4 - EXPARTE CALENDAR (Rm. 105) Confirmed 10:36 Exparte Action	Held
08/12/2016 JUDGE HOGAN (Rm. 2-E) Confirmed 9:00 Motion - Adjust Trial Date Scheduled By: F. MacDonald	Cancelled/Stricken <u>Working Copies Provided</u>
08/16/2016 JUDGE HOGAN (Rm. 2-E) Confirmed 9:00 Trial	Cancelled/Stricken <u>Working Copies Provided</u>
09/16/2016 JUDGE HOGAN (Rm. 2-E) Confirmed 2:00 Hearing	Continued <u>Working Copies Provided</u>
10/07/2016 JUDGE HOGAN (Rm. 2-E) Confirmed 9:00 Motion(Other: MOTION TO ENFORCE SETTLEMENT AGREEMENT) Scheduled By: F. MacDonald	Continued <u>Working Copies Provided</u>
10/11/2016 JUDGE HOGAN (Rm. 2-E) Confirmed 1:30 Hearing	Held
10/11/2016 JUDGE HOGAN (Rm. 2-E) Confirmed 1:30 Motion	Motion Held <u>Working Copies Provided</u>
11/10/2016 JUDGE HOGAN (Rm. 2-E) Confirmed 9:00 Motion - Reconsideration	Cancelled/Stricken
11/10/2016 JUDGE HOGAN (Rm. 2-E) Confirmed 9:00 Motion(Other: TO SET EASEMENT BOUNDARIES) Scheduled By: Gregory Amann	Continued
11/10/2016 JUDGE HOGAN (Rm. 2-E) Confirmed 9:00 Motion(Other: CR11 SANCTIONS) Scheduled By: Gregory Amann	Continued <u>Working Copies Provided</u>
12/09/2016 JUDGE HOGAN (Rm. 2-E) Confirmed 9:00 Mandatory - Court Review Hrg	Cancelled/Stricken
12/09/2016 JUDGE HOGAN (Rm. 2-E) Confirmed 9:00 Motion(Other: MOTION TO SET EASEMENT BOUNDARIES AND MOTION FOR CR11 TERMS) Scheduled By: F. MacDonald	Motion Held <u>Working Copies Provided</u>

02/03/2017 DEPT 05 - JUDGE SPEIR (Rm. 2-D)

Unconfirmed 9:00 Motion(Other: ORDER TO SHOW CAUSE, CONTEMPT, AND SANCTIONS AGAINST RESPONDENTS VINES FOR FEES AND COST)

Continued
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Scheduled By: F. MacDonald

02/17/2017 DEPT 11 - JUDGE WHITENER (Rm. 202A)

Confirmed 9:00 Motion

Cancelled/Stricken
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02/17/2017 DEPT 11 - JUDGE WHITENER (Rm. 202A)

Confirmed 9:00 Motion(Other: SUPERSEDEAS AND MOTION TO SET BOND OR OTHER SECURITY)

Motion Held
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Scheduled By: JOAN MELL

04/07/2017 DEPT 11 - JUDGE WHITENER (Rm. 202A)

Unconfirmed 9:00 Motion(Other: MOTION FOR CONTEMPT)

Cancel via Web-Rescheduled

Scheduled By: Gregory Amann

04/14/2017 DEPT 11 - JUDGE WHITENER (Rm. 202A)

Confirmed 9:00 Motion(Other: CR11 SANCTIONS)

Motion Held
Working Copies Provided

Scheduled By: Gregory Amann

04/14/2017 DEPT 11 - JUDGE WHITENER (Rm. 202A)

Confirmed 9:00 Motion(Other: MOTION FOR CONTEMPT)

Motion Held
Working Copies Provided

Scheduled By: Gregory Amann

04/27/2017 C4 - EXPARTE CALENDAR (Rm. 105)

Confirmed 2:15 Exparte Action

Held

Original Case Schedule Items

Event	Schedule Date			
Judgments				
Cause #	Status	Signed	Effective	Filed
<u>16-9-06192-4</u>	OPEN as of 07/25/2016	COMMISSIONER PRO TEM on 07/25/2016	07/25/2016	07/25/2016

This calendar lists Confirmed and Unconfirmed Proceedings. Attorneys may **obtain access rights** to confirm/strike selected proceedings. Currently, any proceedings for the Commissioners' calendars can be stricken, but only Show Cause proceedings for the Commissioners' calendars can be confirmed.

Unconfirmed Proceedings will not be heard unless confirmed as required by **the Local Rules of the Superior Court for Pierce County** .

- Hearing and location information displayed in this calendar is subject to change without notice. Any changes to this information after the creation date and time may not display in current version.
- Confidential cases and Juvenile Offender proceeding information is not displayed on this calendar. Confidential case types are: Adoption, Paternity, Involuntary Commitment, Dependency, and Truancy.
- The names provided in this calendar cannot be associated with any particular individuals without individual case research.
- Neither the court nor clerk makes any representation as to the accuracy and completeness of the data except for court purposes.

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Motion: _____

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Brief: Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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