

No. 49802-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

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 and B/Respondents

v.

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

Respondents for property described in Ex. C, Respondents

v.

JOSEPH D. VINES, as his separate estate,

Respondent for property described in Ex. C, Respondent/Appellant

**RESPONDENTS LILLIAN E. SMILEY AND TIM O. SMILEY'S
OPENING BRIEF**

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I. INTRODUCTION

Respondents Lillian E. Smiley and Tim O. Smiley (the “Smileys”) hereby appear and submit their Opening Brief in opposition to the Opening Brief of Appellant Joseph Vines in the above-captioned action. The original lawsuit concerned Pierce County’s condemnation of three parcels of real estate. The Smileys were condemnation respondents for their interest in all three parcels, referred to by the lawsuit as Exhibits A, B, and C. Joseph Vines was only a condemnation respondent for his interests in the parcel referred to as Exhibit C. No party has appealed the total just compensation amounts paid by Pierce County for each parcel. Joseph Vines has appealed the award or partial apportionment of just compensation to the Smileys.

II. STATEMENT OF THE CASE

Background – The property of Rebecca Vines’ estate was divided through a December 29, 1992, estate settlement agreement and declaration of boundary line revision. CP 319-329. Heirs Joseph Vines, Dorwin Vines, and Lillian Smiley utilized those documents to create two real estate parcels for Joseph Vines, one parcel for Dorwin Vines, and one parcel for Lillian Smiley, as well as a thirty-foot wide common easement.¹ Joseph Vines later unified his two parcels into one. CP 374, 389, and 395.

The easement was for the benefit of Joseph Vines’, Dorwin Vines’, and Lillian Smiley’s parcels.² There is no language in the estate settlement

¹ CP 319-329, esp 328

² *Id.*

agreement or the declaration of boundary line revision indicating that any monetary sums are due to Joseph Vines for the easement or that any party to the estate settlement agreement is responsible for perfecting the easement. CP 319-329.

The estate settlement agreement states that no “oral representations regarding any aspect of the covenants and terms ... herein shall not be binding.” CP 321. The estate settlement agreement and boundary line revision declaration were recorded with the Pierce County Auditor’s Office (“County Auditor”) on December 29, 1992. CP 319-329.

The Smiley parcel is the westernmost of the four parcels that were created. CP 328, 374, 389, and 395. The Dorwin Vines’ parcel, now owned by Nathan Noble, is in the middle. *Id.* The Joseph Vines’ parcel, which was created by unifying his original two parcels, is to the east. *Id.*

The eastern edge of the Joseph Vines’ parcel abuts a private drivable surface known as 262nd Avenue East or Cascade Cross Road hereinafter 262nd. CP 328, 374, 389, and 395. The easement across the Dorwin Vines’ parcel, now owned by successor-in-interest Nathan Noble, and the Joseph Vines parcel provides the Smiley parcel with its only legal access to 262nd. *Id.* All three of the above-mentioned property owners rely on 262nd, as their only means of access to a public right-of-way. *Id.*

The December 29, 1992, documents filed with the County Auditor include an “Exhibit Map B” to the declaration of boundary line revision. CP 328. Exhibit Map B depicts and describes the common easement as a “30 foot

private road and utilities easement” that runs along the northern edge of the Joseph Vines’ property, (marked as Parcels “C” and “D”) and the Dorwin Vines’ property, (marked as Parcel “B”). CP 328.

The common easement was acknowledged in a 1993 Road Maintenance Agreement filed with the County Auditor.”³ The 1993 Road Maintenance Agreement (“RMA”) specifically provides for use of the “[a]ccess road delineated on [the 1992 declaration of] Boundary Line Revision” and states the “right and obligation set forth herein shall inure to and be binding upon the heirs, successors or assigns of the parties hereto and shall continue a covenant running with the parcels of real estate affected hereby.” CP 334.

The RMA goes on to state that the road “... shall be maintained in perpetuity within its present boundary ... [and] ... maintained so as to allow free and reasonable passage of such vehicular traffic as may be reasonable and necessary in order that all parties may enjoy full and free use of the parcels of real property affected thereby.”⁴ The parties to the 1993 Road Maintenance Agreement are Joseph Vines and his spouse Susan Vines, Dorwin Vines, and Lillian Smiley and her spouse Tim Smiley. CP 334 – 337.

The Smileys’ surveyor testified that the pre-condemnation 30-foot wide common road and utilities easement was established to his satisfaction as a licensed surveyor based on his review of the 1992 documents and a 2004

³ CP 332-337

⁴ CP 333

boundary line adjustment document. 10/11/16 VRP, 22:22 - 23:12 and CP 533-537, esp 534.

The Pierce County Condemnation Action - On June 30, 2015, Pierce County filed a lawsuit to condemn and acquire property owned by appellants Joseph and Susan Vines, (the “Vines”), and appellees Tim and Lillian Smiley, (the “Smileys”). CP 1-18 and CP 492-510. Pierce County did not file any lawsuit to acquire any property of Nathan Noble.

Condemned Property Described as Exhibits A, B, and C – One part of Pierce County’s lawsuit condemned the northern twenty feet of the Smileys’ residential parcel. CP 1-18, 492-510, and 362-363. The lawsuit’s legal description of the northern twenty feet of the Smiley residential parcel is referred to as Exhibit A. CP 1-18 and 492-510. The Smileys were the only named trial court respondents for Exhibit A. *Id.*

The Pierce County lawsuit also condemned the Smileys’ interest in the northern twenty feet of the pre-condemnation thirty-foot wide common easement where it crosses Nathan Noble’s residential parcel. *Id.* The lawsuit’s legal description of this property is referred to as Exhibit B. *Id.* The Smileys were the only named trial court respondents for Exhibit B. *Id.*

Finally, the Pierce County lawsuit condemned the property interests of the Smileys and the Vines in the northern twenty feet of the Joseph Vines’ residential parcel. *Id.* The lawsuit’s legal description of the northern twenty feet of the Joseph Vines’ parcel is referred to as Exhibit C. *Id.* The condemned interests in Exhibit C include the Smileys’ easement interests in

Exhibit C. *Id.* Vines and the Smileys were the only named trial court respondents for Exhibit C. *Id.*

Conveyance of the Exhibit C Property – On February 19, 2016, the Vines executed an agreement with Pierce County. CP 1020-1023. The February 19, 2016 agreement included a promise from Pierce County to the Vines that \$51,900 would be the amount on offer for the just compensation for all of the condemnation respondents’ interests in Exhibit C “no matter how that [\$51,900] sum is thereafter divided among the ... respondents.” CP 1020-1023, esp CP 1021, para 6. In return, the Vines agreed to the following:

... the amount of Fifty One Thousand Nine Hundred and No/100 Dollars...is full, complete, and final just compensation for Pierce County’s taking...⁵

... Pierce County agrees to pay the sum...and Vines agrees to accept its court-disbursed share of that sum ...⁶

The sum...includes any damage or recovery...including any claims for damages purported (sic) caused to Vines or to other Respondents by Pierce County’s acquisition...⁷

The parties agree that title will transfer to Pierce County upon Pierce County’s payment of the sum...into the...Court registry, no matter how that sum is thereafter divided among the ... respondents... Not all of those respondents are parties to this settlement...⁸

...the Parties recognize and agree that not all the respondents from whom signatures are required [to sign the Decree of Appropriation and Stipulated Judgment] are parties to this settlement.⁹

⁵ CP 1020 Paragraph 1

⁶ *Id.*

⁷ CP 1020 Paragraph 2

⁸ CP 1021 Paragraph 6

⁹ CP 1021 Paragraph 7

...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 Smileys and Noble]...and for the benefit of those [owners'] 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.¹⁰

...[while] Vines may plan to use some of the sum...to [permit and construct a new well] ... the Parties agree that no matter how much of that sum is disbursed to Vines or when it is disbursed, permitting and constructing the well is solely Vines's responsibility...¹¹

On July, 14, 2016, a letter was sent to the Smileys from Pierce County with a courtesy copy to the Vines. CP 424-425. It does not indicate that any portion of its offer of just compensation is obligated to either the Vines or the Smileys. *Id.* If fact, it states the opposite. CP 424.

The July 14, 2016, letter states the offer therein is for “the taking from and/or damaging of *all* property in the above-entitled matter ... In addition, please note that Pierce County is offering to deposit this amount into the Superior Court’s registry as compensation to *all* respondents holding any interest in the property. Any respondent will be able to seek disbursement of those funds, based on that respondent’s corresponding interest in the property.” CP 424. (Emphasis in original letter.)

On July 25, 2016, the Smileys, the Vines, and Pierce County agreed, in a stipulated judgment and decree of appropriation, that \$51,900 would be

¹⁰ CP 1021 Paragraph 8

¹¹ CP 1021 Paragraph 9

the total just compensation to be paid by Pierce County for “the taking and/or damaging” of all of the trial court respondents’ property interests from the condemnation of Exhibit C.¹²

In executing the stipulated judgment and decree of appropriation conveying the Exhibit C property, the Vines confirmed, in writing, that they, separately, had previously signed the February 19, 2016, agreement with Pierce County “as part of the essential mutual consideration supporting the stipulated judgment” and that the February 19, 2016 agreement’s terms would “survive entry of [the Exhibit C] judgment.”¹³

In executing the stipulated judgment and decree of appropriation conveying the Exhibit C property, the Vines also agreed, in writing, that the entry of the decree for Exhibit C did not terminate any “proceedings that may be necessary to determine entitlement to [the Exhibit C] funds and any orders necessary to disburse the funds pursuant to RCW 8.08.080.” CP 1028.

Finally, the Vines agreed, in executing the stipulated judgment and decree of appropriation conveying Exhibit C, that the “[j]udgment [for Exhibit C] does not terminate litigation regarding the property described as Exhibits ‘A’ and ‘B’ to the Condemnation Petition.” CP 1028.

Conveyance of the Exhibit A and Exhibit B Property - On July 25, 2016, the Smileys, the only condemnation respondents named for Exhibit A property and Exhibit B property, entered into a stipulated judgment and decree of appropriation with Pierce County to accept \$72,750 as the total just

¹² CP 1025-1030, esp CP 1027.

¹³ CP 1029

compensation award for conveying their property interests in Exhibit A and Exhibit B to Pierce County.¹⁴ The stipulated judgment and decree of appropriation for the Exhibit A and B property was executed 10 days after the stipulated judgment and decree of appropriation for the Exhibit C property.¹⁵

Striking of the Trial Date – On August 10, 2016, sixteen days after the stipulated judgments and decrees of appropriation were filed, an agreed order was entered to strike the trial date. CP 1333-1336. Also, on August 10, 2016, the court, *sua sponte*, set a hearing for September 16, 2016 to decide disbursement issues. CP 694-695 and 1332 - 1336. The hearing was re-set, several times, via email, by the trial court. CP 694-695. The hearing actually occurred on October 11, 2016. CP 1344-1345 and 1353.

Hearing to Enforce the Easement Grant – On September, 29, 2016, the Smileys filed a motion to enforce the February 19, 2016 settlement agreement as part of the disbursement proceedings. CP 538-539. A brief and a surveyor's declaration with his legal description and survey map of the easement described in the settlement agreement were submitted in support. CP 527-663 and 690-699.

On October 3 and October 5, 2016, the Vines filed responsive briefings labeled “Response- Dispersement [sic] of Funds” and “Response to Smiley’s Motion to Enforce Settlement Agreement as to Grant of

¹⁴ CP 146-153, esp 148

¹⁵ *Id.*

Easement.” CP 664-670 and 673-689. The responsive briefings were not delivered to the Smileys until October 6, 2016. CP 700-701.

The Smileys filed reply briefing, reply exhibits, and authenticity, hearsay, relevance, and ER 904 objections to Vines’ proffered response evidence. CP 599-663 and 671-672 and 690-699. The evidentiary objections were also based, in part, on a trial court direction to maintain the scheduling deadlines it had previously imposed. *Id.* and CP 694-695

The hearing on the motion for enforcement of the settlement agreement took place on October 11, 2016. CP 1349-1351. The Smileys’ motion for enforcement was granted. CP 717-719.

Hearing to Determine the Distribution of Funds - After the motion to enforce the settlement agreement was granted, a hearing was conducted on October 11, 2016, to determine the distribution of the funds paid into the trial court registry by Pierce County. CP 1344-1345, 1349-1351, and 10/11/16 VRP 19-76. Live testimony was presented from the Smileys’ surveyor, David Follansbee, regarding the boundaries of the pre-condemnation 30-foot wide easement and the new 30-foot wide easement across the Vines’ parcel, (composed of the remaining 10-foot pre-condemnation width, plus the 20 feet in additional easement width promised by the February 19, 2016 settlement agreement). CP 716 and 10/11/16 VRP, 21:15-25, 22:22 – 23:12, 24:7 - 26:18, and 27:1 - 28:25.¹⁶ In addition, Mr. Follansbee’s survey map and legal description of the boundaries of the new common easement were

¹⁶ This testimony was repeated, in declaration form, at the second hearing on December 9, 2016.

entered into evidence at the hearing. CP 1344-1345 and 10/11/16 VRP, 10/11/16 VRP, 21:12-19, 22:1-9, and 72:14-15.¹⁷

Mr. Follansbee testified that his legal descriptions for the new 30-foot wide easement and his survey map were “of record,” meaning they were filed with the County Auditor and prepared in accordance with the filing requirements of the County Auditor’s Office. 10/11/16 VRP, 22:5-17.

In addition, the Smileys presented testimony from a licensed appraiser, Stan Sidor, concerning the fair market value of each of the condemnation interests and damages related to the Exhibit C condemnation, i.e., the amount a party in the market would likely accept for their interests or damages and the amount a potential buyer in the market would typically pay for them. 10/11/16 VRP, 40:21 - 60:15.

Sidor’s testimony included his conclusions that the damage from the Exhibit C condemnation was \$11,600 for the cost of building a fence to preserve the privacy of the Vines’ remainder land, \$2,900 for the fair market value of the raw land taken, and \$37,400 for the value of the easement interests in the condemned raw land because the easement width provided an access corridor, i.e., a total of \$51,900. 10/11/16 VRP 48:16 – 57:9, esp. 53:22 - 57:9. The appraiser concluded that the twenty foot width taken by Pierce County had “significant value to the Smileys” because “it would have a significantly detrimental impact on the marketability, the usability and the value of their property ... because if a property has no access, it’s unlikely a

¹⁷ They were also subsequently admitted at the December 9, 2016, hearing. CP 1104-1168.

purchaser is going to want to acquire the property ...” 10/11/16 VRP, 49:24. The Vines did not present any declaration or live testimony at the October 11, 2016 hearing. 10/11/16 VRP, 60:20-24.

The trial court’s October 11, 2016, findings of fact and conclusions of law stated that the easement value of the 20-foot width taken by the County from Exhibit C was \$37,400, based on the appraiser’s testimony. CP 706-715, esp 712 and 714. The findings of fact and conclusions of law also stated the Smileys were entitled to one-half of the easement value, i.e., \$18,700, and the Vines were entitled to the other half of the easement value. *Id.*

On October 13, 2016, the Court entered a superceding order for disbursement of \$33,200 of the \$51,900 just compensation amount to the Vines. CP 720-723, esp 721. It awarded \$33,200 of the \$51,900 to the Vines for the \$11,600 cost of building a privacy fence, the raw land value of \$2,900, and \$18,700 for one half of the value of the twenty foot easement width across the raw land. CP 721. The other half of the easement width value, i.e., \$18,700, was awarded to the Smileys. CP 721.

A motion for reconsideration was filed by the Vines on October 20, 2016, but it contained no explanation as to why the evidence or arguments in the motion for reconsideration could not have been provided to the trial court at the October 11, 2016, hearing. CP 723-726. That motion was denied. CP 810.

Hearing to Set Easement Boundaries – At the conclusion of the October 11, 2016, hearing, the trial court set a mandatory review hearing for December 9, 2016. CP 1348. On November 1, 2016, the Smileys’ noted a later rescheduled motion to set easement boundaries. CP 1352-1355. The easement boundary hearing occurred on December 9, 2016. CP 1356-1357.

On November 1, 2016, the Smileys noted a motion to set the new easement boundaries so that enforcement of promises within the February 19, 2016, Pierce County – Vines agreement and the July 25, 2016 stipulated judgment and decree of appropriation, as well as the trial court’s October 11, 2016 order, could occur.¹⁸ Evidence was presented, again, as to Vines’ promise to provide the easement and the boundaries of the easement. CP 833-879, esp 843-847 and 871-874. The trial court granted the order to set the new easement boundaries in accordance with the only surveyor testimony presented, i.e., that of the Smileys, and found “that the testimony of the expert on behalf of the Smiley[s] supports the boundaries to be set as the [Smileys] request.” 12/9/16 VRP, 89:23-25 and CP 887-902.

The order setting the new easement boundaries required the Vines to sign an easement grant with a legal description identical to the one that the Smileys’ surveyor, David Follansbee, provided for the new easement. CP 758-762 and 887-902, esp 888. The trial court also ordered that the provisions of the 1993 Road Maintenance Agreement would apply to the

¹⁸ CP 750-775, esp 774-775

new easement. CP 887-902, esp 888.¹⁹ The trial court ordered the Vines to execute the easement grant attached to the order. 1107-1122, esp. 1112-1114.

On February 24, 2017, the Vines executed the easement grant, but handwrote the words “under protest and without waiving rights on appeal” on the easement grant. CP 1163. The Smileys’ made a non-judicial request for the Vines to execute a clean copy of the easement grant and warned that judicial action would follow a refusal, but the Vines refused to execute a clean copy. CP 1104-1105 and 1165-1166. As a result, the Smileys filed a motion to have a clean version of the grant executed and/or for the Vines to show why they were not in contempt for failing to execute the grant as previously ordered.²⁰

The Smileys’ motion for an order to show cause relied on: (1) the October 11, 2016, and December 9, 2016, trial court orders, (2) proof that the \$8,450 price for the easement had been deposited into the trial court registry on December 9, 2016, by the Smileys, (3) the prior testimony of the Smileys’ surveyor, (4) the easement grant with handwritten comments that was signed by the Vines, and (5) communications from the Smileys’ counsel indicating that, in the absence of a clean version being executed, a contempt

¹⁹ As previously noted, the February 19, 2016, agreement between the Vines and Pierce County stated 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 Smileys and Noble]...and for the benefit of those [owners’] parcels. The offered easement must be for the same purposes and of the same scope and duration as the existing easement.” CP 1021, para. 8

²⁰ CP 1165-1166

action would follow. CP 1106-1166 and CP 1237. The Vines, through their attorney, opposed the show cause motion. CP 1241-1287.

The Smileys filed a motion for CR 11 sanctions against the Vines and their counsel for the attorney's fees incurred in moving for the show cause order.²¹ The Smileys' attorney testified that the fees incurred by the Smileys for his initial motion and memorandum in support of a show cause order totaled \$3,119.46 and he anticipated that another \$1,085 in attorney's fees would be incurred by the Smileys in reply briefing and oral argument. CP 1238-1240. After reply briefing was finished, the Smileys' attorney testified that the actual amounts incurred for briefing were \$3,119.46 for the motion and \$1,929.75 for the reply briefing. CP 1294-1295. Both the reply and declaration in support indicated additional attorney's fees would be incurred for an appearance at the motions' calendar. CP 1238-1240 and 1294-1295.

At the end of an April 14, 2017, hearing for a show cause order and CR 11 sanctions, the trial court ordered the Vines to execute a clean copy of the easement grant attached to its December 9, 2016, order. CP 1315:2-6 and 1318:8-11. The trial court also found the Vines in contempt for their failure to show cause why they should be excused from complying with the Court's December 9, 2016, order. CP 1315:2-6 and 1318:3-4.

The only factual allegation offered by the Vines as to why the trial court should not issue CR 11 terms was the Vines' attorney's testimony that

²¹ CP 1288-1293 and 1298-1299

CR 11 terms were improper because Smiley's counsel had not responded to an email from Vines' counsel about an alleged telephone conversation between them. CP 1305-1309.

Two orders granting CR 11 terms for part of the fees incurred by the Smileys, \$2,524.60, were entered by the trial court jointly and severally against the Vines and their attorney.²² The trial court found that the Vines had failed to either comply with the trial court's December 9, 2016 order or show cause as to why they should be excused from complying with it. CP 1318:1-4.

In issuing CR 11 terms, the trial court considered the Smileys' motion, memorandum in support, and declaration for contempt, the Vines response declaration and response briefing, and the reply briefing of the Smileys, including the declaration testimony that \$1,929.75 in attorney's fees were incurred by the Smileys to draft a reply to the Vines' and additional time would be required, and billed, for oral argument.²³

No penalty for the Vines' contempt was issued because the trial court directed, in its two April 14, 2017 orders, that the Vines cure their contempt by executing the same easement grant ordered executed by the trial court on December 9, 2016, without their previous handwritten notations "or any notation whatsoever," CP 1316 and 1318, and the Vines complied with those orders.

²² CP 1316:9-12 and 1318:4-7

²³ CP 1295:3-16 and 1314-1315.

On February 8, 2017, the Vines filed a notice of supersedeas to stay trial court enforcement of its orders and, alternatively, a notice of motion to set an appeal bond at \$8,450. CP 909. In response, the Smileys presented the trial court with evidence that staying enforcement of the easement grant would leave the Smileys without legal access to their property from the only drivable surface leading to 262nd Avenue East, i.e., their means of accessing a public right-of-way. CP 984-1080, esp 1007- 1008, 1036 – 1041, and 1070-1080. Additional evidence was provided by the Smileys that their parcel, (the Exhibit A property), as of March 15, 2016, was valued by a professional appraiser at \$250,000, and that the value of real property in Pierce County had risen at an average of approximately 10% in the time since the March 15, 2016, valuation of their parcel. *Id.* The Smileys argued that an additional 10% escalation should be made part of security due to the increase in value expected in the roughly 12 month appeal period following the February 8, 2017, hearing. CP 1076:5-10. Bond was set in the amount of \$302,500. CP 1098-1100.

II. ARGUMENT

The apportionment of the just compensation amount was performed in accordance with Washington condemnation law.

The compensation portion of Washington's condemnation scheme has two trial court stages. *State v Spencer*, 90 Wn2d 415, 419-20, 583 P.2d 1201 (1978). In the first stage, the object is to ascertain a lump sum that the condemning agency must pay in exchange for taking all of the property interests in the condemned land. RCW 8.08.050 and .060 and *Spencer*,

supra. All parties owning interests in the property may participate, but the property is initially valued as if it is “but one estate,” without regard to the subdivision of interests among varied individuals. *Long v. Superior Court for Lewis County*, 80 Wn 417, 420-21, 141 P.906 (1914).

The sole statutory issue for the trier-of-fact in a condemnation case is the total amount of just compensation to be paid by the condemning agency. *Lange v State*, 86 Wn2d 585, 590, 547 P.2d 282 (1976), *Brazil v City of Auburn*, 93 Wn2d 484, 496-97, 610 P2d 484 (1980), and *Municipality of Metropolitan Seattle v Kenmore Properties, Inc.*, 67 Wn2d 923, 931, 410 P2d 790 (1966). The just compensation amount is the total value of all of the owners’ interests. RCW 8.08.050 and .060, *Peel v Clausen*, 94 Wn.166, 169, 162 P. 1 (1917) and *Long* at 421. Once the condemning agency pays the total value, it is vested with title and has no further role in the process unless the amount of total just compensation is appealed. RCW 8.08.080, *Peel* at 169, and *Long* at 421.

In the second stage of the trial court process, the total compensation amount is apportioned between each of the individual owners of the property interests so that each is compensated fairly for the value of the interest taken by the condemning agency. *Long* at 421. At this stage, the trial court has equity and statutory ministerial power over the distribution of registry funds. See RCW 8.08.060 and *Pacific National Bank of Seattle v Bremerton Bridge Co.*, 2 Wn2d 52, 60, 97 P2d 162 (1939).

... where a judgment in eminent domain proceedings is for the full value of the land appropriated, and the amount is paid into

court, the apportionment of the fund between rival claimants not only flows from the statute but is a matter of general equity without reference to the statute. *Bremerton Bridge* at 60.

Under this scenario, the court can review what facts and circumstances, including the land's use or potential use, that reasonable buyers and sellers would consider in determining price. *Shields v Garrison*, 91 Wn.App 381, 385, 957 P.2d 805 (Div. 2, 1998) and *Lange v State*, 86 Wn2d 585, 590, 547 P.2d 282 (1976).²⁴ In addition, at this stage, the trial court had equity power to grant the easement width promised to the Smileys because the trial court, in a condemnation case, acquires "jurisdiction of that action and all matters arising therefrom"²⁵ and, once acquired, equity power allows the trial court to "grant whatever relief the facts warrant."²⁶ See also *Lange, infra*, at 590. Therefore, courts have historically recognized that just compensation must be calculated from the standpoint of what each owner loses by having his or her individual interests taken. *Id.* Loss of access, specifically, is compensable.²⁷

The value of the Smileys' interest in the easement width taken by Pierce County was made explicit by the uncontroverted testimony of the Smileys' professional appraiser, Stan Sidor, who testified that the pre-

²⁴ Ownership in property is recognized as a complex of rights, including the right to use and enjoy whatever property interest one owns. *Lange v State*, 86 Wn2d at 590.

²⁵ *Pelley v King County*, 63 WnApp, 638, 641, 821 P2d 536 (Div. 1, 1991), citing *State v Shain*, 2 WnApp 656, 659-60, 469 P2d 214 (Div. 3, 1970)

²⁶ *Zastrow v W.G. Platts, Inc.*, 57 Wn2d 347, 350, 357 P2d 162 (1960), *opinion amended on other grounds on denial of rehearing*, 360 P2d 354.

²⁷ *Keiffer v King County*, 89 Wn2d 369, 372, 572 P2d 408 (1977).

condemnation easement within Exhibit C had significant market value to the Smileys as the sole corridor from the Smileys' property to the only road leading to a public right-of-way. As such, Sidor testified that the 20 feet in easement width taken by Pierce County caused significant damage to the Smileys because the condemnation of their easement interest significantly narrowed their only corridor to ten feet.

The Smileys presented the only admissible evidence of the value of the easement.

The court of appeals can take Sidor's testimony at face value, *City of Medina v Cook*, 69 Wn2d 574, 578-79, 418 P.2d 1020 (1966), and should because it is the only expert valuation testimony in the record. *Washington Beef, Inc. v County of Yakima*, 143 Wn.App. 165, 180, 177 P.3d 162 (Div. 3, 2008). As such, it must be given great weight. *Id.*, citing *Boise Cascade Corp. v Pierce County*, 84 Wn.2d 667, 678, 529 P.2d 9 (1974), (superseded by statute in other grounds).

The Vines executed an agreement and a stipulated judgment and a decree of appropriation granting the Smileys an easement and cannot escape that obligation.

An easement is the right of a person to use another person's land in connection with a definite purpose of one's own. *Bushy v Weldon*, 30 Wn.2d 266,269, 191 P.2d 302 (1948). An easement interest is considered a property interest. *Id.* There was no issue of fact concerning whether the easement was granted to the Smileys because the interpretation or construction of a written contract is a question of law for the court and not a question of fact. See *In re Estate of Larson*, 71 Wn.2d 349, 354, 428 P.2d 558 (1967), *Gen'l*

Tel Co. on Northwest Inc. v. C-3 Associates, 32 Wn.App 550, 554, 648 P.2d 491 (Div. 1, 1982), and *Fancher Cattle Co. v. Cascade Packing Inc.*, 26 WnApp 407 409, 613 P.2d 178 (Div. 3, 1980).²⁸

A contracting party is liable to perform on a promise to take an action to benefit a third party if the language of the contract directs the contracting party to undertake such an obligation. *Lonsdale v Chesterfield*, 99 Wn.2d 353, 360-62, 662 P.2d 385 (1983). A third party's power to enforce a contract if he or she is a beneficiary is unquestioned in Washington law, regardless of whether the third party beneficiary executed the contract. *Id.* and *First National Bank & Trust of Minneapolis v U.S. Trust Co.*, 184 Wn. 212, 220-222, 50 P.2d 904 (1935). This obligation is doubly enforceable where the intention of the contracting parties is to ensure that interests in real property will all, eventually, be conveyed to only one of the contracting parties. *First National Bank* at 220-222.²⁹

The motives behind the promise, and the fact that the third party was not involved in the contract's formation is irrelevant. *Lonsdale* at 360-62.

The 'intent' which is a prerequisite of the beneficiary's right to sue is 'not a desire or purpose to confer a particular benefit upon him,' nor a desire to advance his interests, but an intent that the promisor

²⁸ See esp., *Fancher Cattle* at 408-09, (where the terms of a contract are plain and unambiguous, the meaning of the contract is to be deduced from its language alone and it is unnecessary for a court to resort to any aids in construction).

²⁹ In *First National Bank*, the third party benefit was the agreement of one brother to have his estate pay one-half of the promissory note obligations of another brother to their common sister in order to allow for eventual unification of all property interests in the brother who issued the promissory note. Similarly, in the above-captioned case, the Vines entered into an agreement with Pierce County which intended to unify ownership of all interests in Exhibit C in Pierce County.

shall assume a direct obligation to him.” *Lonsdale* at 361, citing *Vikingstad v Baggott*, 46 Wn.2d 494, 496-97, 282 P.2d 824 (1955).

As a result, it is reversible error for a trial court to fail to enforce a promised benefit to a third party regardless of why the promise exists. *Lonsdale* at 362, citing *Vikingstad* at 497.

In addition to the straightforward logic of *Lonsdale*, *First National Bank*, and *Vikingstad*, there is an additional reason why the Smileys were entitled to a portion of the easement value. In conditioning the just compensation price on the provision of an additional easement width to Smiley, Pierce County and Vines plainly planned to obtain some economic gain, or reduction of risk, because offering to replace the width that the Smileys formerly had limited the Smileys’ ability to argue for a larger just compensation share or the adequacy of the just compensation amount. Therefore, a different set of arguments on how to divide any just compensation amount, and a trial for Pierce County on the issue of the total just compensation amount, would have ensued if Pierce County had simply performed a straightforward acquisition of 20 feet of corridor width. As a result, the Vines’ citations to *Visser v. Craig* do not assist the Vines in arguing that they should have received a greater just compensation share and a full-blown trial because there were no genuine issues of material fact or intent regarding the type, scope, or terms of the common easement that Vines agreed to provide to Smiley and it was a bargain for which consideration was actually received.

Judgment as a matter of law was appropriate because the Vines did not present any testimony on material issues of fact.

The Vines signed an agreement and a stipulated judgment and decree of appropriation that stated the Vines would convey an additional 20 feet in easement width to the Smileys. This is the sole evidence concerning the Vines' intentions. Therefore, there were no disputed issues of fact.

The Vines cannot meet their burden on appeal because the Smileys presented substantial evidence in favor of the trial court's finding of value and boundaries, which was not rebutted by the Vines.

The trial court's findings of fact as to the value of the Smileys' interest in the easement width taken and the boundaries of the replacement easement width promised must be upheld because they were based on undisputed testimony. Appellate review is limited to determining whether substantial evidence supports trial court findings, and if so, whether the findings support the trial court's conclusions of law and judgment. *Ridgeview Properties v. Starbuck*, 96 Wash.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence was entered by only one party and, as such, an appellate court cannot substitute its judgment for that of the trial court. *Beeson v. Atlantic-Richfield Co.*, 88 Wash.2d 499, 503, 563 P.2d 822 (1977) and *Ridgeview Properties, infra*. Therefore, the trial court's findings of fact, conclusions of law and judgments must be upheld.

Granting the easement promised to the Smileys was not an abuse of trial court discretion.

It was not an abuse of the trial court's discretion to order and enforce the grant of the easement or the distribution of the just compensation in

accordance with the testimony of Smileys' experts. In terms of the order of specific performance concerning the easement grant, the *Washington Practice* series is instructive.

As stated in Wa. Prac. Series, Real Estate, § 21.26:

Despite the lack of an express holding, there is no doubt that in a proper case the purchaser may have specific performance. Since a parcel of land is regarded as unique, specific performance of the vendor's promise to convey a certain parcel is proper in theory. The remedy is generally available to purchasers in American courts. Citing *Hallauer v Certain*, 19 WnApp 372, 575 P2d 732 (1978) and *Hoyt v Rothe*, 95 Wn 369, 163 P 925 (1917).

In explaining the right of a potential property buyer to enforce the promises of a seller who refuses specific performance, the authors of *Washington Practice* compare the situation to that of a landowner who had a future option to purchase a grandstand at a nominal price of \$5,000.00, as opposed to its actual value of approximately \$103,000. *McFerran v Heroux*, 44 Wn2d 631, 640-43, 269 P2d 815 (1954). When the future sale was rendered impossible because the grandstand's owner refused to rebuild the grandstand following a fire, the Washington Supreme Court ruled that the potential buyer was entitled to immediately sue and recover the value of that contract, i.e., \$98,000, rather than waiting for the date when the rebuilding deadline expired. *Id.*

The Vines' argument that the easement granted by the trial court was imperfect is frivolous because that issue cannot be reviewed on appeal.

The Vines have not presented any legal argument why any argument concerning the adequacy or inadequacy of an easement or proposed

easement over the Nathan Noble property can even be considered on appeal and that portion of Vines' appeal is frivolous. The Vines move for sanctions to be assessed against the Vines for this section of their briefing and the Smileys' costs in responding to it. No lawsuit or claim was ever filed against, or on behalf of, Nathan Noble's property interests. As such, there is no trial court record to consider on the issue of the perfection or imperfection of any easement concerning Nathan Noble and that issue cannot be considered.

Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); RAP 2.5(a). The party seeking review, has the burden to perfect the record so that the reviewing court has before it all of the relevant evidence. *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn.App. 522, 525, 864 P.2d 996, 998 (1994). Here, there is no record and the Smileys should be entitled to reasonable costs and attorney's fees for defending against that claim pursuant to RAP 18.9(a).

Vines has frivolously argued that RCW 8.04 applies and RCW 8.24 applies.

Likewise, Smiley moves for reasonable costs and attorney's fees to be assessed against Vines for the necessity of responding to Vines' citations to RCW 8.04 et. seq. because those citations are inapposite.³⁰ RCW 8.04 et. seq. concerns state agency condemnations. This action arises from a county condemnation. As such, RCW 8.08 et. seq. applies, not RCW 8.04.

³⁰ See Vines' RCW 8.04 citations at fn 119 of Vines' brief and elsewhere.

In addition, Smiley moves for reasonable costs and attorney's fees to be assessed against Vines for the necessity of responding to Vines' citations to RCW 8.24 et. seq. To the extent that Vines brief, at page 46 or elsewhere, cites RCW 8.24 et. seq., those citations are inapposite. RCW 8.24 et. seq. concerns condemnations by private parties for ways of necessity or for certain other items, but there is no private party condemnation here because no private party condemnation petition was filed under RCW 8.24.030 and its conjunctive procedural statute, RCW 8.20.140. The Smileys' simply moved the trial court to utilize its equity power to enforce an obligation which the trial court found Vines was required to perform in order to receive the consideration he bargained for in the settlement agreement.

CR 11 Terms were properly assessed against the Vines.

The Vines' argument that they are entitled to a reversal of the trial court orders finding them in contempt and granting CR 11 sanctions is plainly wrong. The trial court is entitled to enforce compliance with its orders and to issue CR 11 terms against a party who has not shown any fact or legal reason why placing handwritten comments into a court-ordered easement grant and refusing to execute a clean copy is not contempt. Simply put, Vines' attorney did not present any legally recognized, or cognizable, basis, for Vines to refuse to follow the written directions within a Superior Court order. This type of behavior is the exact reason why CR 11, and terms, exist.³¹

³¹ Under CR 11, a pleading lacks a factual or legal basis if it is both baseless and signed without reasonable inquiry. *Madden v Foley*, 83 WnApp 385, 389-90, 922 P.2d 1364

There was no error, therefore, in the trial court issuing CR 11 sanctions against Vines and Vines' counsel because the trial court reviewed the evidence and arguments of all parties and found nothing in Vines' response briefing or testimony that provided any proof that the Vines were in compliance with the December 9, 2016, order or had an excuse for non-compliance. The trial court appropriately awarded attorneys' fees to the Smileys for the costs of their reply briefing and their attorney's appearance on the April 14, 2016, calendar for oral argument and this trial court decision should be upheld.

In addition, there was simply no legal or factual reason why the Vines and their attorney could have believed that they needed to preserve their appellate rights by marking up the easement grant. RAP 2.4 clearly provides, by rule, a recognized and explicit mechanism to correct prejudicial errors committed in lower court proceedings. As such, there is no need, or right, to enter handwritten reservations on a clean copy of a document that a litigant is ordered to execute.

Finally, the Vines are not entitled to reversal of the CR 11 terms and the finding of contempt because there was no Superior Court ruling on whether

(1996). To this end, the rule is interpreted broadly so that a court can fashion a penalty that deters litigation abuses effectively and allows the court to impose monetary penalties. *Madden v. Foley* at 389-90. At its very core, CR 11 requires parties to "stop, think and investigate more carefully before serving and filing papers." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). When a motion is signed in violation of CR 11, the Court may impose an appropriate sanction. CR 11. An appropriate sanction includes an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the responsive pleading, including a reasonable attorneys' fee. *Id.*

a perfect or imperfect easement was created by the easement grant and that issue is not reviewable, regardless, because appellate jurisdiction in condemnation cases, under the condemnation statute for county actions, RCW 8.08.080, is limited to the propriety and the justness of the amount of damages. RCW 8.08.080.³² *Eastvold v Superior Court for Snohomish County*, 48 Wn2d 417, 419-20, 294 P2d 418 (1956)³³ and *State ex rel Northwestern Elec Co v Superior Court for Clark County* 27 Wn 2d 694, 703-05, 179 P2d 510 (1947).³⁴

There is no language in the statute ... which even by implication grants any right of appeal ... We agree with counsel for relators that the statute does not does not require or admit of such construction, and reason and practice do not recommend it. *Northwestern Elec Co.* at 705.

The Vines err in alleging that an appeal bond should not have been set in the amount of \$302,500.

An appeal bond is to be set in an amount equal to that described in RAP 8.1(c)(2). RAP 8.1(c)(2) states that in a decision affecting property, the supersedeas amount, in accordance with RAP 801(c)(2), shall be the amount of:

ANY MONEY JUDGMENT, PLUS INTEREST LIKELY TO ACCRUE DURING THE PENDENCY OF APPEAL AND ATTORNEY'S FEES, COSTS AND EXPENSES LIKELY TO BE AWARDED ON APPEAL ENTERED BY THE TRIAL COURT PLUS THE AMOUNT OF THE

³² RCW 8.08.080 provides that: "Either party may seek appellate review of the judgment for compensation of the damages awarded in the superior court within thirty days after the entry of judgment as aforesaid, and such review shall bring before the supreme court or the court of appeals the propriety and justice of the amount of damage in respect to the parties to the review ..." (emphasis added by the author of this brief)

³³ Interpreting the same wording in the then-existing condemnation statute for State actions.

³⁴ Interpreting the same wording in the then-existing condemnation statute for State actions regarding an order of public use and necessity. Note that RAP 2.2(a)(4) now provides for appeal of an order of public use and necessity although the Washington Supreme Court's ruling stating otherwise in *Northwestern Elec Co.* has never been reversed, overruled, or superceded.

LOSS WHICH THE PREVAILING PARTY IN THE TRIAL COURT WOULD INCUR AS A RESULT OF THE PARTY'S INABILITY TO ENFORCE THE JUDGMENT DURING REVIEW.

RAP 7.2 required that a bond or cash surety be posted because:

In a civil case, except to the extent enforcement of a judgment or decision has been stayed as provided in [RAP] 8.1 or 8.3, the trial court has authority to enforce any decision of the trial court and a party may execute on any judgment of the trial court.” RAP 7.2(c).^{35 36}

The \$302,500 amount was appropriate because RAP 8.1(b)(2) requires a bond equal to the value of the Smiley residence, if the trial court order granting the easement width was stayed, the Smileys would have been deprived of a drivable surface to their residential parcel and of any ability to use or convey that residential parcel.

No bond waiver was applicable because RCW 8.08.080 does not apply to the trial court order granting, and enforcing creation of, a new easement. The statutory bond waiver within RCW 8.08.080 is limited to appeals of a judgment for legal damages to be paid by counties. Specifically, it states that “[e]ither party [without posting bond] may seek appellate review of the judgment for compensation of the damages awarded in superior court and the propriety and justice of the amount of damages in respect to the parties to the review.” RCW 8.08.080.

³⁵ In addition, any person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed as provided in [RAP] 8.1 or 8.3. RAP 7.2(c).

³⁶ A bond is likewise required for stay requests which utilize RAP 8.3, but RAP 8.3 only concerns orders from the appellate court for injunctive relief.

The bond amount of \$302,500 was properly set by the trial court because if the Smileys had been dispossessed of access during the pendency of the appeal, their damages would have been equal to the value of the Smiley's residence and its increase in value during the pendency of the appeal because "[t]he substantial value of property lies in its use." *Lange* at 190.³⁷ "If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right." *Id.* In addition, increase in damages, due to delay in payment, over the period of the appeal is an appropriate consideration in the setting of a bond. *Municipality of Metropolitan Seattle v Kenmore Properties* at 67 Wn2d 923, 932-33, 410 P2d 790 (1966). See also. *Keiffer v King County*, 89 Wn2d 369, 372 572 P2d 408 (1977), (loss of access is compensable).

III. CONCLUSION

The primary factor to be considered in determining the meaning of the contract is the intention of the parties. These are normally to be ascertained largely from the language employed in the contract, itself. *Fancher Cattle* at 408-09. Where the terms of a contract, taken as a whole, are plain and unambiguous, the meaning of the contract is to be deduced from its language alone and it is unnecessary for a court to resort to any aids in construction. *Id.*

³⁷ Access specifically is compensable, *Keiffer v King County*, 89 Wn2d 369, 372, 572 P2d 408 (1977),

The terms of the agreement and the stipulated judgment and decree of appropriation that the Vines executed were clear. They required the grant of 20 feet in additional easement width to the Smileys and determined the boundaries, as later perfected by survey, of the easement width. There was no guarantee of the apportionment of just compensation, as between the Vines and the Smileys just a total agreed amount. The Vines received the benefits of their bargains. They should be held to them.

DATED this 14th day of July, 2017.

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I certify that on the 14th day of July, 2017, I caused a true and correct copy of this *Respondents Lillian E. And Tim O. Smiley's Opening Brief* and attachments to be served on the following in the manner indicated below:

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