FILED
Court of Appeals
Division II
State of Washington
10/18/2019 4:41 PM

NO. 53757-5-II

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

PENSCO TRUST COMPANY, TRUSTEE FOR ED WAITE IRA,

Plaintiff/Appellant

vs.

J.G JOHNSON AND JANET JOHSON,
a married couple, DOES 1 through 10
inclusive

Defendants/Respondents

APPEAL FROM THE SUPERIOR COURT

THE HONORABLE STEPHEN WARNING

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred by granting the Order Granting Partial Summary Judgement and Quieting Title to an Implied Easement for Water Supply.

Assignment of Error No. 2: The trial court erred by entering the Judgment & Order Dismissing Nuisance and Trespass Claims, and for Sanction and not entering the order proposed on behalf of Plaintiff.

Assignment of Error No. 3: The trial court erred by entering the Judgement on Sanction.

ISSUES PRESENTED

1. Are Defendants Johnson entitled to an easement implied by prior use across land owned by Plaintiff?

2. Are Defendants Johnson entitled to an easement implied by necessity over land owned by Plaintiff?

3. Is Plaintiff's interest in his land superior to that of the Johnsons?

4. Does an issue of fact exist as to whether any interest that the Johnson might have in Plaintiff's property has been foreclosed?

5. Assuming that Defendants Johnson have a valid easement over Plaintiff's property, did the trial court err by not requiring a legal description for the easement and by not allowing relocation of the water line?

6. Were any sanctions authorized by either CR 11 or RC 4.84.185?

7. Assuming sanctions were warranted, did the trial court err in setting the amount?

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STATEMENT OF THE CASE

I. Operative Facts.

a. The Participants and the Property.

Morrall Olson and Wendi Olson were governors of M. J. Olson Enterprises, Co., a Washington corporation formed in 1993 and rendered inactive as of May 1, 2012. (CP 39) In 2002, that corporation purchased certain real estate in Cowlitz County, Washington, from Vernon L. Richards and Melba L. Richards; Lloyd L. Groat and Netta E. Groat; and trusts in which the Groats had an interest (the Spencer Creek property). (CP 36-38) At least a portion of this property is located northwest of Spencer Creek Road. (CP 46)

In December of 2006, Morrall J. Olson and Wendi Olson—as opposed to M.J. Olson Enterprises, Co.—sold certain real property in Cowlitz County, Washington, to Richard C. Wise and Lisa L. Wise. The deed was rerecorded in May of 2007 to correct the legal description. (CP 40; CP 52-55) This property has had the address of 625 Nectarine Drive, Kalama. (CP 47)

The deed from the Olsons to the Wises describes an easement as Parcel B to the legal description. There has been no showing that this easement encumbers the Spencer Creek property.

In May of 2011, First Independent Bank as trustee for the Ed Waite IRA (Mr. Waite)[1] purchased approximately eleven acres of land in the Kalama area. Parcel B of the legal description of that deed is identical to Parcel B on the legal description of the deed from the

[1] Plaintiff Pensco Trust Company succeeded First Independent Bank and has been trustee since this suit was filed. Pensco and Ed Waite will both be referred to as Mr. Waite for the sake of simplicity.

Richardses, the Groats, and the Groat Trusts to M.J. Olson Enterprises Co., Inc.[2] (CP 36-38; CP 115-119) The property consists of seven defined lots. (CP 8-14; CP 111)

There has been no showing that Mr. Waite's property is contiguous to that conveyed to the Wises in 2006. There has also been no showing that the two parcels were part of a larger piece of land.

The Wises took out a loan with Toyota Financial Savings Bank in August of 2009. They executed a deed of trust that pledged the 625 Nectarine Drive property as security. They subsequently defaulted on the loan. Non-judicial foreclosure proceedings were initiated, and a Trustee's Deed was issued to Toyota Financial Savings Bank in May of 2011. (CP 50-51) Defendants J. G. and Janet Johnson (the Johnsons) purchased the property from Toyota Financial Savings Bank in July of 2011. (CP 56-58)

b. Construction of the Water Line.

In 2007-2008, M. J. Olson Construction company, or Mr. Olson personally, was in the process of building a home for the Wises at 625 Nectarine Drive. The residence needed a water supply in order to be occupied. (CP 46) A Water Service Order for water from the City of Kalama was obtained on July 15, 2007. (CP 44) In the summer of 2008, Dennis Wood of Spencer Creek Construction, Inc., was engaged to install a temporary two-inch water line from 625 Nectarine Drive to a water source or meter available through the City of Kalama and located at the southern end of Mr. Waite's property. (CP 46) Installation was complete on August 11, 2008. (CP 44) The line was hooked up to a covered water meter at the south end of Mr. Waite's property. (CP 42; CP 111) The line has been used to supply water to 625 Nectarine Drive. (CP 42)

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[2] The record contains no explanation of the differences between the legal descriptions of the two deeds.

Mr. Wood installed no tracer wire because the line was meant to be temporary. Tracer wire is installed with underground pipes so that the pipes can be located if there is a need for repair. (CP 122-23) For his part, Mr. Olson intended to put an eight-inch water main in Spencer Creek Road and connect the water line to 625 Nectarine Drive off of that eight-inch line. (CP 123)

Mr. Waite, of course, had no knowledge of the water line when he purchased the property in 2011. He obtained a policy of title insurance that did not disclose any encumbrance based on the location of the water line. (CP 111)

When Mr. Waite looked at the property prior to purchasing it in 2011, he did not see the City of Kalama water meter. The Johnsons' property is located approximately 1,500 feet from the meter. There was nothing to alert him that a property this far distant might have water service through the property he was going to buy. (CP 111; CP 190) There was nothing on the surface that would suggest the presence of an underground water line to serve 625 Nectarine Drive. The water meter was not visible to inspection because it was covered with several feet of brush. (CP 111, 190)

Mr. Waite also met with Carl McCrary, then Public Works Director of the City of Kalama. Their discussion focused on utility location and boundary line adjustment to revise the size and location of the home sites. Mr. McCrary never mentioned the installation of a water line over the eleven acres that Mr. Waite intended to buy. (CP 190-91)

At some later date, probably in 2015, Mr. Wood walked the property with Mr. Waite to show him the water meter and the approximate path of the temporary water line. (CP 46; CP 190)

Prior to being contacted about the issue by Mr. Waite, the Johnsons had no knowledge of the location of the water line. (CP 48)

There is no evidence of any grant of an easement for this water line over and across Mr. Waite's property. The record contains no evidence of any contract or agreement, written or oral, between the Wises on the one hand and Mr. Olson or any of his companies on the other concerning the water line, or for that matter, anything else. Neither side produced a declaration from either Mr. Olson or either of the Wises concerning any aspect of this case.

c. Impact of the Water Line at Its Current Location.

The parties do not know the precise location of the water line because no legal description has ever been provided. The location disclosed by Mr. Wood to the best of his recollection has and will wreak havoc with the further development of seven lots and the eleven acres. It will require reconfiguration of lots. This will significantly increase development costs. (CP 113) An encumbrance over the property will naturally decrease the value of these lots. It will inhibit building on the property because heavy equipment could damage the water line at its current location. There is also a question of access for repairs. (CP 111; CP 187-88) These problems could be avoided or minimized, of course, if the line was moved to another location.

For their part, the Johnsons have never indicated any opposition to moving the water line or given any reason why it should not be moved. (CP 47-49; CP 163-65)

d. Events Prior to Suit.

When Mr. Waite learned of the water line, he contacted the Johnsons to begin a dialog. The parties exchanged e-mails on the subject. (CP 59-98)

They also met with Kelly Rasmussen, Director of Public Works for the City of Kalam, on June 12, 2015. Mr. Rasmussen informed them that 625 Nectarine could not be

serviced through another water main located on Nectarine Drive. He also mentioned that there was no line along Spencer Creek Road that could serve the Johnson property, and that the City had no plans to install one. (CP 41-44)

At the suggestion of Pensco, Mr. Waite suggested a delay of one year to come up with alternatives. An agreement was presented to the Johnsons. It was not acceptable. (CP 201-206) Therefore, this action was filed on August 3, 2015. (CP 3)

II. Procedural Facts.

The Complaint filed on behalf of Mr. Waite sought to quiet title in his property free from any claims made by the Johnsons. It also alleged that the two-inch water line amounted to a trespass and a nuisance. It sought injunctive relief allowing for the removal of the water lines. (CP 3-15) The Johnsons answered and counterclaimed to quiet title alleging the presence of an implied easement. (CP 17-22)

On September 17, 2018, the Johnsons filed the Motion and Memorandum for Partial Summary Judgment.. Their briefing urged the Court to find an easement implied by necessity or implied by prior use. (CP 23-31) The motion was supported by, among other things, a declaration from Mr. Rasmussen. The declaration set out the events and ended with the following paragraph:

> The City is in favor of development inside the City limits. If Mr. Waite develops his property and needs to install a water main dedicated to the City of Kalama, with the capacity to serve all of his lots as well as the Johnson property, I see no issue in moving of the Johnsons meter to clear the development area of Mr. Waite's property. If this is the case, then a private utility easement should be written on the plat for the Johnson's service line in the interim during development.

(CP 43)

The Johnsons' Reply to Plaintiff's Opposition to Summary Judgment was filed after Mr. Waite responded to the summary judgment motion. It stated that the Johnsons were claiming only an easement by necessity and not an easement by implication. (CP 126-27)

On November 14, 2018, the trial court orally granted the motion for partial summary judgment on the basis that the Johnsons had an easement by implication. (CP 130; RP 6). The parties met again on December 19, 2018, to enter a written order. The Order Granting Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply entered on that day stated that the Johnsons "have acquired an implied easement to the current water line as and where it traverses Plaintiff's property as described in Exhibit 1 to the complaint; and summary judgment quieting title in such easement is granted." (CP 133) In formulating its order, the trial court explicitly did not address the issues of nuisance and trespass since it did not consider these matters to have been before it. (RP 6) The order did not contain any indication that it was a final judgment for the purposes of CR 54(b) or RAP 2.2(d). (CP 131-33)

The Johnsons then moved to dismiss the nuisance and trespass claims and for sanctions under CR 11. (CP 134-44) A response was filed on behalf of Mr. Waite along with a declaration from counsel and from Mr. Waite. (CP 170-213) Its content will be discussed below.

The trial court heard the motion on March 27, 2019. The trial court concluded that sanctions were warranted under CR 11 to consist of attorney's fees incurred after January 18, 2019. It then stated that a legal description of the easement would have to be provided before any final judgment could be entered. It observed that the burden of providing the description would likely be on the Johnsons. (RP 20-21)

The Johnsons submitted a cost bill for claimed fees on April 26, 2019. (CP 232-34) Its substance will be discussed below.

The parties appeared for entry of orders on May 22, 2019. Competing provisions were discussed and submitted. The trial court asked the parties to submit their "last best" proposals and it would sign one or the other. (RP 28) Mr. Waite sent a proposed order the content of which will be discussed below: (CP 251-54) The trial court entered the Johnsons' proposed orders on May 29, 2019. These were the Judgment & Order Dismissing Nuisance and Trespass Claims, and for Sanction and the Judgement on Sanction. (CP 269-74)

Mr. Waite then appealed. The Johnsons have not cross appealed.

ARGUMENT

Assignment of Error No. 1: The trial court erred by granting the Order Granting Partial Summary Judgement and Quieting Title to an Implied Easement for Water Supply.

I. Introduction.

The trial court granted summary judgment to the Johnsons quieting title to an implied easement over Mr. Waite's property. The basis for its ruling is confusing because the Johnsons had stated that they were not claiming an easement implied from prior use and because the trial court stated that it did not find an easement implied from necessity. This state of affairs by itself requires reversal of the Order Granting Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply. It also requires reversal of the Judgment & Order Dismissing Nuisance and Trespass Claims, and for Sanction and the Judgement on Sanction since the viability of those orders is dependent on the propriety of the Order Granting Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply.

In any event, the discussion below will demonstrate that neither is available to the Johnsons and, at best for the Johnsons, the evidence shows a genuine issue of material fact as to whether an easement implied by necessity could possibly exist.

II. Standard of Review.

The trial court's decision on the Johnsons' summary judgment motion is subject to *de novo* review. The appellate court applies the same standard as the trial court. It reviews the facts and all reasonable inferences from those facts in the light most favorable to the non-moving party. *Woods v. H.O. Sports Co., Inc,* 183 Wn.App. 145, 149, 333 P.3d 455 (2014) Summary judgment is appropriate only if (1) the pleadings, declarations, affidavits, depositions, answers to interrogatories, and admissions on file viewed in the light most favorable to the nonmoving party show that there is no genuine issue as to any material fact, and (2) and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *DeVeny v. Hadaller,* 139 Wn.App. 605, 616, 161 P.3d (2007) In this context, a material fact is one that affects the outcome of the litigation. *Owen v. Burlington Northern & Santa Fee Railroad,* 150 Wn.2d 780, 789, 103 P.3d 1220 (2005) A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Sutton v. Tacoma School District No. 10,* 180 Wn.App. 859, 864, 324 P.3d 763 (2014)

The trial court's summary judgment order purports to make findings of fact. These are considered superfluous and are not considered by the appellate court on review. *Duckworth v. Bonney Lake,* 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978); *Donald v. Vancouver,* 43 Wn.App. 880, 883, 719 P.2d 966 (1986); *State v. Grocery Manufacturers' Association,* 5 Wn.App.2d 169, 185-86, 425 P.3d 927 (2018)

Finally, when the facts are clear, summary judgment may be entered on behalf of the non-moving party. *Impecoven v. Department of Revenue,* 120 Wn.2d 357, 365,841 P.2d 752 (1992)

The facts will show that the Johnsons are not entitled to any implied easement. The Court should so rule. Alternatively, an issue of fact exists. For these reasons, the trial court should not have granted summary judgment to the Johnsons.

III. General Considerations.

The implied easements that the Johnsons claim are not favored, especially when, as here, there are written agreements that provide for easements. As the Court stated in *Boyd v. Sunflower Properties, LLC,* 197 Wn.App. 137, 149, 389 P.3d 626 (2016)

> Equitable remedies, such as the implied easement that Boyd/Weidner seek, do not exist to circumvent written agreements. See *Chandler v. Washington Toll Bridge Authority,* 17 Wn.2d 591 604, 137 P.2d 97 (1943) ("A party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract."). Moreover, where parties have reduced an agreement to a writing, which in light of its completeness and specificity reasonably appears to be a complete agreement, it is presumed that such writing is the final expression of the parties. *Restatement (Second) of Contracts* 209(3) (Am. Law. Inst. 1981). Accordingly, implied easements are not favored by the courts, as they are "in derogation of the rule that written instruments speak for themselves." 1 Wash. State Bar Ass'n, Washington Real Property Deskbook Series: Real Estate Essentials § 7.5(1), at 7-15 (4th ed. 2014).

In our case, the deed from the Olsons to the Wises provides for an easement for, among other things, utilities. There is no showing that this easement encumbers Mr. Waite's property. There is also evidence that Mr. Olson or perhaps one of his entities agreed to construct a home for the Wises on 625 Nectarine Drive. But there is no evidence of any grant of an easement in connection with that transaction. The Johnsons, as the successors to the Wises, cannot circumvent whatever agreement existed between the Wises and the Olsons or M.J. Olson Enterprises, Co. by imposing an implied easement on Mr. Waite's property.

IV. There Is No Easement Implied by Prior Use.

a. General Requirements.

In order to establish an easement implied by prior use, the party claiming that such an easement exists must prove (1) a former unity of title, during which time the right of permanent user was, by obvious and manifest use, impressed upon one part of the estate in favor of another part; (2) a separation by a grant of the dominant tenement; and (3) a reasonable necessity for the easement in order to secure and maintain the quiet enjoyment of the dominant estate. The first two elements, unity of title and subsequent separation, are absolute requirements. The third is an aid to construction in determining the cardinal consideration—the presumed intention of the parties as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other. *Adams v. Cullen,* 44 Wn.2d 502, 505, 268 P.2d 451 (1954); *Hellberg v. Coffin Sheep Co,* 66 Wn.2d 664, 668, 404 P.2d 770 (1965)

b. There Is No Unity of Title.

As indicated unity of title is an absolute requirement of an implied easement. Conversely, there can be no implied easement where unity of title is absent. *Landberg v. Carlson,* 108 Wn.App. 749, 758, 33 P.3d 406 (2001) In that case, Mr. Landberg acquired three adjoining parcels in Pend Oreille County. His sister, Ms. Landberg, later obtained a fourth which was adjacent to her brother's three. She borrowed money from Mr. Carlson and pledged her parcel as security. When she defaulted, Mr. Carlson obtained the property through non-judicial foreclosure. Mr. Landberg sued to obtain an easement implied by prior use over Mr. Carlson's newly acquired property. He conceded that he never had any interest in his sister's parcel. On that basis, the Court ruled that he was not entitled to an easement implied from prior use.

The Johnsons have not demonstrated unity of title. To the contrary, the evidence submitted shows that unity of title is absent. Morrall Olson and Wendi Olson owned the 625

Nectarine Drive property and conveyed it to the Wises in 2006. By contrast, the Richardses, the Groats, and the Groat trusts, sold Mr. Waite's property to M. J. Olson Enterprises, Co., a Washington corporation, in 2002. Regardless of whether the Olsons were or were not shareholders of M. J. Olson Enterprises, Co., the corporation is simply not the same entity as its shareholders. As has been stated:

> . . .a corporation exists as an organization distinct from the personality of its shareholders. This separate organization, with its distinctive privileges and liabilities, is a legal fact, and not a fiction to be disregarded when convenient. The concentration of its ownership in the hands of one or two principal shareholders does not, ipso jure, dispel those corporate characteristics of the organization.

State v. Northwest Magnesite, 28 Wn.2d 1, 41, 182 P.2d 643 (1947) Furthermore:

> . . .a corporation's separate legal identity is not lost merely because all of its stock is held by members of a single family or by one person.

State v. Chase, 1 Wn.App.2d 799, 805, 407 P.3d 1178 (2017), quoting *Grayson v. Nordic Construction Co.* 92 Wn.2d 548, 552, 599 P.2d 1271 (1979); See also, *State v. Brelvis Consulting, LLC,* 7 Wn.App.2d 207, 215, 436 P.3d 818 (2018) The Georgia Court of Appeals used this reasoning to hold that implied easements were absent due to a lack of unity of title in *Emson Investment Properties, LLC, v. JHJ Jodeco 65, LLC,* 349 Ga.App. 644,648, 824 S.E.2d 113 (2019). It came to this conclusion despite the fact that the land in question was owned by corporations who had one common shareholder.

The Johnsons cannot rely on notions of piercing the corporate veil. In Washington, that relief is available to allow a corporation's creditor to render a shareholder liable for a corporate debt. The doctrine is available only to prevent a fraud or a manifest injustice. Furthermore, some intentional conduct must be proven in the form of fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit

and creditor's detriment. *Meisel v. M & N Modern Hydraulic Press Co.,* 97 Wn.2d 403, 410, 645 P2d 689 (1982); *Truckweld Equipment Company v. Olson,* 26 Wn.App. 638, 644, 618 P.2d 1017 (1980) There is no creditor in our scenario. There is also no evidence of any fraud or manipulation of the corporate form here. That is so because there is no evidence concerning the interactions between Mr. Olson on the one hand and the Wises on the other. What we do know is that the Wises did not obtain an agreement allowing an easement or a license that has been recorded. We also know that the Johnsons did not know what the water source was prior to 2015. That means that they bought 625 Nectarine Drive without determining its water source. There can be no manifest injustice when persons in the position of the Wises and the Johnsons did not take action that could have secured their rights and imparted notice to others.

The evidence presented shows that at least part of Mr. Waite's property was at one time owned by M.J. Olson Enterprises, Co. There is no evidence that the property at 625 Nectarine Drive has ever been owned by that corporation. Conversely, Morrall Olson and Wendi Olson owned 625 Nectarine Drive because they conveyed it to the Wises. There is no evidence that the corporation ever owned 625 Nectarine Drive. Since different people and entities owned the two properties, there is no unity of title and, therefore, there can be no easement implied from prior use.

c. There Was No Sufficient Use During Any Unity of Title.

Assuming that unity of title is present—which it is not—the requirement of a sufficient prior use during such unity of title is not met for two reasons. First, the water line was not present before 625 Nectarine Drive was conveyed to the Wiese in 2006. Secondly, the water line was not sufficiently permanent, obvious, and manifest.

When there is no use during unity of title, there can be no easement implied from prior use. For example, in *Rogers v. Cation,* 9 Wn.2d 369, 115 P.2d 702 (1941), Mr. Cornwell's real property was divided into two parcels through his probate in 1902. At some point, thereafter, water was pumped from one of the parcels to a residence on the other. The Court ruled that there could be no easement implied from prior use because the water had not been pumped before the division in 1902. And in *Perrin v. Derbyshire Scenic Acres Water Corporation,* 63 Wn.2d 716, 388 P.2d 949 (1964), the defendant corporation owned and operated a well and water system in a subdivision. The plaintiff sued to hook up to the system after the corporation denied his request to do so. He claimed that he had an easement implied from prior use. The Court rejected that argument in a relatively few words. It said:

> Insofar as the plaintiffs' contentions concerning their theory of an implied easement are concerned, suffice it to say that at least one of the elements necessary to establish the existence of such an easement is not present. The rule is that there must be a former unity of title during which time a permanent user is impressed, by obvious and manifest use upon one part of the estate in favor of another; a separation by grant of the dominant tenement; and a reasonable necessity for the easement in order to secure and maintain the quiet enjoyment of the dominant estate. . . (Citation omitted). No water was used on the plaintiffs' tract prior to the time they acquired it, consequently the doctrine has no application.

63 Wn.2d at 721

In our case, 625 Nectarine Drive was conveyed to the Wises in 2006. The water line was not put in place until 2008. Therefore, there could be no use impressed on Mr. Waite's property during any period of unity of title.

The Johnsons cannot rely on the holding of *Fossum Orchards v. Pugsley,* 77 Wn.App. 447, 892 P.2d 1095 (1995). In that case, land was divided into three parcels. Each was served by underground irrigation piping prior to severance. But the irrigation system had not been used to irrigate one of the three lots. Plaintiff, the owner of the lot that had not been

irrigated, sought an easement implied from prior use. The Court allowed the easement stating that the presence of the system prior to severance was sufficient evidence of a prior use. Our case is obviously different. The water line was not present on Mr. Waite's property before 625 Nectarine was conveyed to the Wises.

Furthermore, the existence of the water line was not obvious and manifest. Once again, there was no tracer wire. The only item above ground was a water meter. However, it was covered with brush and not visible when Mr. Waite looked at the property prior to purchase. Neither the Johnsons nor Mr. Waite knew of its presence in 2011 when each bought the properties that are the subject of this dispute.

When a use is not visible, it is not sufficient to create the necessary obvious and manifest use. In *Wreggit v. Porterfield,* 36 Wn.2d 638, 640, 219 P.2d 589 (1950), the Court ruled that underground sewer lines that were not visible to either party did not satisfy the requirement of the obvious and manifest use.

As noted above, the existence of the prior use is an aid to determining the presumed intent of the parties. The temporary nature of the pipe that was placed creates at least an issue of fact as to whether an easement was intended. The distinction between a temporary use and a fixed use was critical to the Court's decision finding an easement implied by prior use in *Bailey v. Hennessey*, 112 Wash. 45, 191 P. 863 (1920) In describing the use in question and its sufficiency to make out an easement implied by prior use, the Court said:

> . . .Mrs. Ramsey, during her ownership, erected buildings upon both portions of the property; their erection being with a view to the use of the alley way, and the testimony shows that such use could not have been intended as a temporary convenience, but that the servitude impressed was intended to be of a permanent character, and was notorious and plainly visible. . .

112 Wash at 50

As discussed above, the critical inquiry as to whether an easement implied by prior use exists is the presumed intentions of the parties. The absence of any written easement encumbering Mr. Waite's property coupled with an easement for utilities among other things in the deed to the Wises also creates at least an issue of fact as to what the Olsons and the Wises intended. According to Mr. Wood, the existing pipe was intended to be temporary. Mr. Olson intended "to put an 8" water main in the road headed toward the Wise property (now the Johnsons' property) and then connect the water line off the end of the 8" line." (CP 123) Given the temporary nature of the installation shown by the absence of any tracer wire and Mr. Olson's intentions as discussed by Mr. Wood, it can reasonably be inferred that the existing arrangement was intended to be temporary until Mr. Waite's property was developed and not a permanent easement.

For all these reasons, the element of a permanent user impressed "by obvious and manifest use" on the property during the period of unity of title is absent.

d. An Issue of Fact Remains as to Necessity.

The Johnsons have not shown sufficient necessity because they have not demonstrated that they cannot site a well on their property.

In *Berlin v. Robbins,* 180 Wash. 176, 38 P.2d 1047 (1934), Mr. Berlin claimed an easement implied from prior use based upon a piping system that had been used to convey water to his land for many years. The Court announced the test for necessity—whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute. 180 Wash. at 189 It then related the facts that caused it to conclude that no necessity existed:

> The evidence discloses that the closest point of the water system of the city of Kent is approximately one-half mile distant from respondent's property. It appears

> from a map introduced in evidence that, to make connection of pipe line on respondent's property with the city's water system, it would be necessary for respondent to go on land belonging to other persons. There was also evidence that there were no wells in the immediate vicinity of respondent's property, and it was doubtful whether good water could be obtained from wells dug on respondent's property. There was controverting testimony by appellant's witnesses.

180 Wash. at 187 In short, the feasibility of obtaining water from a well is part of the calculus in determining necessity in this context.

The Johnsons' failure to produce evidence concerning the feasibility of drilling a well on 625 Nectarine Drive would allow any reasonable trier of fact to conclude that the Johnsons had not proven necessity. When the proof is insufficient, a genuine issue of material fact exists and summary judgment must be denied. See *Ranger Insurance v. Pierce County,* 164 Wn.2d 545, 553-56, 192 P.3d 886 (2007)

e. An Issue of Fact Remains Concerning the Parties' Intentions.

As noted above, the cardinal consideration in determining whether an easement implied by prior use exists is the intentions of the parties. The facts here give rise to at least a genuine issue of material fact as to whether an easement at the water line's current location was intended by Mr. Olson and the Wises.

First and foremost, there is no written, recorded grant of easement. Secondly, the easement contained in the deed between the Olsons and the Wises does not refer to an easement over Mr. Waite's property. Third, the water line was not intended to be permanent as Mr. Woods has told us. This is best demonstrated by the absence of any tracer wire. This would allow a reasonable trier of fact to conclude that the parties did not intend to create any permanent easement, especially an easement in the current location of the water line.

f. Conclusion.

The facts show that an easement implied through prior use does not exist. First, there is no unity of title. Second, no use existed before 625 Nectarine Drive was conveyed to the Wises. Furthermore, issues of fact exist as to the obviousness of any use, whether the Johnsons have shown necessity and what the parties' intentions may have been. The trial court should have ruled as a matter of law that no easement implied through prior use existed. It erred by finding the existence of such an easement.

V. There Is No Easement Implied Through Necessity.

a. General Considerations.

As noted above, the trial court did not conclude that an easement implied by necessity existed. It also did not determine as a matter of law that such an easement did not exist. (RP 6) The failure to grant summary judgment on the basis of an easement implied by necessity was correct. As will be discussed below, the evidence is clear that no such easement could exist.

An easement implied from necessity arises where a grantor conveys part of his or her land and retains part and, after the conveyance, it is necessary to cross the grantor's parcel to reach a street or road from the conveyed parcel. The necessity must exist at the date the common parcel is severed, not at some prior or later time. Unity of title and subsequent separation are absolute requirements for such an easement. The element of necessity is an aid in determining intent to create an implied easement. *Visser v. Craig,* 139 Wn.App. 152, 158-59, 159 P.3d 453 (2007) Furthermore, strict necessity as opposed to reasonable necessity is required. And no easement will be implied contrary to the parties' intent. *Visser v. Craig, supra,* 139 Wn.App. at 164-65; *Boyd v. Sunflower Properties, LLC, supra,* 197 Wn.App. at 144. Finally, the easement

implied from necessity may exist only between parcels of land that were once one parcel and were severed. Stoebuck and Weaver, *Real Estate: Property Law,* 17 Wash.Prac. 2.5 at 94-95

These elements have not been met.

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b. There Is No Unity of Title.

For the reasons stated above, there is no unity of title. Furthermore, there is no showing that the two parcels were ever part of one parcel that was later severed. Therefore, there can be no easement implied by necessity.

c. There Is at Least a Genuine Issue of Material Fact Concerning Necessity.

As noted above, strict necessity—as opposed to reasonable necessity required for the imposition of an easement implied by prior use—must be shown to obtain an easement implied by necessity. And necessity must be evaluated as of the time of severance. The evidence leaves at least factual issues on this question.

First, necessity must be reckoned based on the situation as it existed in 2006 when the Olsons conveyed 625 Nectarine Drive to the Wises. The Johnsons presented the declaration of Kelly Rasmussen to establish necessity. But he only discusses availability of water from the City of Kalama in 2015. We do not know whether the City of Kalama intended in 2006 to bring water to the area that could serve 625 Nectarine Drive.

Also, there is no showing that the Johnsons could not access the meter at the south of Mr. Waite's property as Mr. Woods tells us that Mr. Olson intended---over Spencer Creek Road—and what the cost of doing so might be.

Critically, however, there is no evidence as to whether the Johnsons could obtain a suitable supply of water from a well dug on their own property and the cost of doing so. If the feasibility of a well is part of the calculus in the Court's finding of necessity for an easement implied from prior use—a more relaxed standard than the requirement of strict necessity here—then consideration of the availability of well water must be taken into consideration here. Once again, the absence of evidence here at least makes out a genuine issue of material fact.

In short, there is a genuine issue of material fact on necessity.

d. An Issue of Fact Remains Concerning the Parties' Intentions.

As discussed above, there can be no easement implied by necessity that is contrary to the parties' intentions. Dennis Wood supplies the only evidence of the intention of Morrall Olson. Mr. Wood tells us that the installed line was temporary as evidenced by its size and the absence of any tracer wire. He also mentions that Mr. Olson intended to connect it to an eight-inch water main along Spencer Creek Road. (CP 122-23) There is no evidence about the Wises' intentions. This supports an inference that they did not know the source of the water for their home or that there was a line connected across Mr. Waite's property connected to a water meter at the south end. And there is no written agreement of any kind, much less a recorded easement, showing what the parties' intentions were. There is also no evidence about any oral understanding between the Olsons and the Wises on this issue. The temporary nature of the water line together with the absence of any evidence of an understanding between the Wises and the Olsons creates an issue of fact as to exactly what the parties' intentions were and that an easement at the current location of the water line may not have been intended.

e. Conclusion.

There can be no easement implied by necessity because there is no unity of title and also because there is no showing that 625 Nectarine Drive and Mr. Waite's property were ever part of the same parcel. The trial court was therefore correct when it declined to find that an easement implied by necessity existed. It should have ruled, however, that no such easement could exist. At any rate, issues of fact exist concerning the presence of sufficient necessity and the intentions of the parties.

VI. Mr. Waite's Interest in His Property Is Superior to the of the Johnsons.

There is no recorded grant of easement to the Wises or to the Johnsons. Therefore, Mr. Waite's interest in his property is superior to that of the Johnsons. Conversely, any conveyance of an easement is void against him.

This issue is governed by RCW 65.08.070 which reads as follows:

> A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

Under this statute, any unrecorded conveyance is void as against a good faith purchaser. The rule applies to easements. A bona fide purchaser of land who has no actual or constructive knowledge of an easement takes title free of the burden of the easement. *Wilhelm v. Beyersdorf,* 100 Wn.App. 836, 846, 999 P.2d 54 (2000)

This rule applies to implied easements. In *Roe v. Walsh*, 76 Wash 148, 135 P 1031 (1913), the Winquists owned two adjacent lots. They built a building on the south lot. They conveyed each lot to different grantees. The owners of the north lot claimed an implied

easement for light and air. The Court ruled that the facts were not sufficient to demonstrate an easement by implication in favor of the owner of the north lot. It then stated that - the owners of the south lot had no notice that any easement for light and air would be claimed and also had a right to assume that no easements were granted over their lot which were not of record except those which an inspection of the property would disclose. 76 Wash. at 156 A similar result was reached in *Ashton v. Buell,* 149 Wash. 494, 499, 271 P. 591 (1928) In that case, Ms. Haas owned two adjoining lots. She sold one of the two lots to the Buells. The deed for that transaction was recorded after a later conveyance to the Ashtons. A survey showed that a portion of a sidewalk leading to the Buell residence was on the Ashton's property. The Buells claimed an implied easement to use the sidewalk to access an entrance to their home. The trial court ruled in favor of the Ashtons, and the Court affirmed. It stated that the recording statutes justified the trial court's conclusion while also noting that the elements of an easement implied by prior use had not been met. 149 Wash. at 499[3]

At least one commentator confirms that a bona fide purchaser without notice takes free from an easement implied from prior use. 4 *Powell on Real Property* § 34.21(2) Cases from other jurisdictions confirm this rule. See, e.g. *Hunter v. Goldstein,* 257 N.Y. 401, 175 N.E. 671 (1931); *Renner v. Johnson,* 2 Ohio.St.2d 195, 207 N.E.2d 751 (1965) In the latter case, the Court refused to enforce a claimed implied easement for underground sewer and water lines against a purchaser without knowledge. In doing so, the Court stated that a person who believed that he or she had an implied easement could request and then record a deed of easement from the owner of the servient parcel and sue to establish the easement if the written grant was not forthcoming. Doing so would impart notice to any purchaser of the servient parcel. 2 Ohio.St.2d

[3] There is dictum in *Fossum Orchards v. Pugsley, supra,* to the effect that no Washington case has determined whether a bona fide purchaser takes free of an implied easement. These two cases suggest otherwise.

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Cases from other jurisdictions indicate that a bona fide purchaser without notice also takes from an easement implied by necessity. See, e.g., *Mesmer v. Uharriet,* 174 Cal. 110, 116-17, 162 P. 104 (2016); *Hawley v. McCabe,* 117 Conn. 558, 563-64, 169 A. 192 (1933); *Bakhausen v. Mayer,* 204 Wis. 286, 291-92, 234 N.W. 904 (1931) A reading of these decisions shows that the rule announced is based on a healthy respect for recording statutes together with the absence of any sufficient notice to the purchaser of the encumbered estate that any necessity may exist.

In any event, cases dealing with this issue turn on whether there was sufficient evidence on the ground or in general community knowledge to alert a subsequent purchaser to the presence of the use. The best example of this approach is *Fossum Orchards v. Pugsley, supra,* 77 Wn.App. at 452. In that case, the Court affirmed the grant of an easement implied by prior use for an underground irrigation pipe over the land of a subsequent purchaser who knew of the use when he purchased his property.

Mr. Waite is a purchaser in good faith and for a valuable consideration. He purchased the property in 2011 from the Federal Deposit Insurance Corporation. The face of the deed shows that $1,024.00 was paid in real estate excise tax. That means that Mr. Waite paid money for the property. (CP 115) In order to be a purchaser in good faith, he must have no knowledge of any interest of the Wises or the Johnsons in his property, and there must be nothing apparent on the ground to suggest further inquiry. *Paganelli v. Svendsen,* 50 Wn.2d 304, 308, 311 P.2d 676 (1957) The burden is on the Johnsons to prove that Mr. Waite had knowledge of their interest. *Glaser v. Holdorf,* 56 Wn.2d 204, 209, 352 P.2d 212 (1960) Mr. Waite had no knowledge of the water line. The only item on the property that would give any notice of

anything is the water meter on its south corner. However, as Mr. Waite has stated, this was covered with vegetation and not visible. Therefore, there was nothing apparent to eliminate his status as a purchaser in good faith. At the very least, there is a genuine issue of material fact on this issue.

The Johnsons have no complaint here. There is no evidence that they attempted to learn the source of their water before they purchased. Had they done so, they would have learned that Mr. Waite had purchased his property approximately one and one half months earlier. This would have allowed them either to make appropriate arrangements with Mr. Waite or not to buy 625 Nectarine Drive.

On that basis, Mr. Waite's interest in his property is superior to any interest that the Johnsons might claim. At very least, the evidence creates a genuine issue of material fact on that issue.

VII. There Is an Issue of Fact as to Whether the Johnsons' Interest Has Been Foreclosed.

The evidence supports a reasonable inference that the interests of the Wises and/or the Johnsons in Mr. Waite's property were foreclosed. Mr. Waite's property was sold to M.J. Olson Enterprises Co., Inc., in 2002. The Federal Deposit Insurance Corporation as receiver for Cowlitz Bank sold Mr. Waite his property in 2011.

Mr. Waite's deed makes it clear that Cowlitz Bank acquired the property at some point between 2002 and 2010. It is reasonable to infer that the acquisition was done through nonjudicial foreclosure of a loan made by Cowlitz Bank to the corporation prior to the installation of the water line. In that event, the foreclosure would have the effect of eliminating

the Wise/Johnson interest because it was junior to that of Cowlitz Bank. *In re Trustee's Sale,* 102 Wn.App. 220, 224, 6 P.3d 1231 (2000)

Neither the Wises nor the Johnsons could or can avert this conclusion by arguing that notice of the foreclosure sale was not provided to them. They were not entitled to notice since their interest was not recorded and only parties with recorded interests are entitled to notice. As RCW 61.24.040(1)(b) provides in pertinent part:

> (1) At least ninety days before the sale . . .the trustee shall:
>
> > (b) To the extent the trustee elects to foreclose its lien or interest . . . and if their addresses are stated in a recorded instrument evidencing their interest, lien, or claim of lien, or an amendment thereto, or are otherwise known to the trustee, cause a copy of the notice of sale described in subsection (2) of this section to be transmitted by both first-class and either certified or registered mail, return receipt requested, to the following persons or their legal representatives, if any, at such address. . .
> >
> > > (iii) . . . the holder of any conveyances of any interest or estate in any portion or all of the property described in such notice, if that contract, lease, or conveyance of such interest or estate, or a memorandum or other notice thereof, was recorded after the recordation of the deed of trust being foreclosed and before the recordation of the notice of sale;

In short, an issue of fact exists to the effect that any interest that the Johnsons may have had in Mr. Waite's property was foreclosed.

VIII. <u>The Form of the Order Amounted to Error.</u>

The Order Granting Partial Summary Judgment and Quieting Title to an implied Easement for Water Supply contains the following language:

> That Defendants Johnson and their property, described in Exhibit 2 to the complaint in this matter, have acquired an implied easement to the current water line as and whether it traverses Plaintiff's property as described in Exhibit 1 to the complaint. . .

(CP 133) This form of the order amounted to error because it did not spell out the legal description of the claimed easement even though it was the Johnsons' burden to show entitlement to any implied easement. *Veach v. Culp,* 21 Wn.App. 454, 459, 585 P.2d 818 (1979), reversed on other grounds 92 W.n.2d 570, 599 P.2d 526 (1979) Without a legal description, a genuine issue of material fact remains as to exactly where the easement is. This issue will be discussed in more detail below as it relates to Assignment of Error No. 2.

IX. Conclusion.

The trial court erred by granting summary judgment to the Johnsons on their claim that an implied easement existed. Due to the absence of unity of title, no implied easement can exist. Furthermore, an easement implied from prior use also cannot exist because the water line was not in place before the Olsons sold 625 Nectarine Drive to the Wises. Even if the Johnsons could surmount these hurdles, issues of fact remain on the other elements of these implied easements; whether Mr. Waite's interest in his property is superior to that of the Johnsons; and whether whatever interest the Johnsons may have has been foreclosed. This order must therefore be reversed.

Assignment of Error No. 2: The trial court erred by entering the Judgment & Order Dismissing Nuisance and Trespass Claims, and for Sanction and not entering the order proposed on behalf of Plaintiff.

Assignment of Error No. 3: The trial court erred by entering the Judgement on Sanction.

I. Introduction.

These two assignments of error are related and will be discussed together.

In the Judgment & Order Dismissing Nuisance and Trespass Claims, and For Sanction (the Second Order), the trial court made the following statement referred to as a finding:

> No party appealed this court's previous Order and the findings in such Order entered herein on December 19, 2018, within the statutory period therefor, and all such finding s and conclusions are therefore final and constitute the law of this case.

(CP 270) It determined that the presence of the water line did not amount to a nuisance or a trespass. It also stated:

> The court notes that although by previous order, it has quieted title in an easement "where is and as is," such easement has not been legal described and shall not be perfected until surveyed and legal described for the record.

(CP 271) It also addressed the Johnsons' request for sanctions under CR 11 in their Motion to Dismiss Trespass and Nuisance Claims Against Defendants Johnson and for Sanction under CR 11 as follows:

> Defendants are entitled, under RCW 4.84.185 and CR 11 of the Rules of Superior Court, to reasonable attorney fees and costs in the sum of $3,778.50 in defending this action from January 18, 2019, when the prior order became final, trough scheduled entry of the judgment on May 8, 2019, because of plaintiff's meritless and frivolous written filed and oral opposition, on December 19, 2018, and thereafter, to entry of dismissal on nuisance and trespass claims after the court ordered that defendants had an implied easement for the current water line as and where it traverses plaintiffs' property.

(CP 272) It then entered the Judgment on Sanction in the amount of $3,778,50.

The proposed order submitted on behalf of Mr. Waite allowed for the water line to be moved in the following language:

> 3. Defendants' Johnson will agree to execute a(sic) deliver a quit claim deed to plaintiff releasing all right title and interest in the existing water line legal described on Exhibit "1" ("Existing Water Line) within 7 days of the following:

A. Plaintiff's installation of a water line through plaintiff's property which connects the existing water service to defendants' Johnson's property ("Replacement Water Line"). The installation of the Replacement Water Line shall be done in a commercially reasonable fashion and in a manner designed to minimize the disruption of water service to the property of defendants' Johnson during installation. Notice of installation shall be given by plaintiff's counsel to defendants' counsel.

B. Plaintiff's execution and delivery to defendants' Johnson of an easement for the Replacement Water Line, including a legal description of such water line with a width dimension of a few inches, matching the size of the waterline) for the length of the water line.

C. After installation of the Replacement Water Line, defendant' Johnson shall be responsible for maintenance and repair of such water line without damages to plaintiff's property.

(CP 252-53) The trial court chose not to incorporate this language into its order.

The propriety of the orders the trial court entered is dependent on the propriety of the Order Granting Partial Summary Judgement and Quieting Title to an Implied Easement for Water Supply. Since the trial court erred when it entered that order, it also erred when it entered these two orders. In other words, if there is no valid easement, the water line amounts to both a trespass and a nuisance and there can be no sanctions.

Furthermore, even if an easement was present, the trial court erred by entering these orders. It should have required a legal description; it should have allowed for the movement of the waterline; and it should not have assessed sanctions. These issues will be discussed below.

II. The Order Granting Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply Was Not a Final Order.

As noted, the trial court purported to find that the Order Granting Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply had become

final because no one had filed a notice of appeal within thirty days of its entry. Such a finding is superfluous and not subject to consideration by the appellate court as pointed out on page 9 above. In any event, the statement was incorrect.

An order is not final for purposes of beginning the time for appeal unless the trial court enters findings that there is no just reason for delay and directs entry of the order as a final judgment. As CR 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The time for appeal does not run in the absence of such a certification as RAP 2.2(d) states in the following terms:

> (d) Multiple Parties or Multiple Claims or Counts. In any case with multiple parties or multiple claims for relief, or in a criminal case with multiple counts, an appeal may be taken from a final judgment that does not dispose of all the claims or counts as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. The time for filing notice of appeal begins to run from the entry of the required findings. In the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties.

The purpose of these rules is to avoid piecemeal appeals. *Doerflinger v. New York Life Insurance Company,* 88 Wn.2d 878, 882, 567 P.2d 230 (1977) In the absence of the findings and certification required by CR 54(b), a partial summary judgment is not a final judgment subject to appeal as a matter of right. *Surrey Downs Community Club v. City of Bellevue,* 14 Wn.App. 801, 545 P.2d 24 (1976)

The Johnsons moved for partial summary judgment. That motion did not address Mr. Waite's claims for trespass and nuisance. It also did not discuss the Johnsons' claims for "such terms and sanctions for filing a lawsuit without reasonable inquiry as the court may find reasonable and just." (CP 22). They obtained an order entitled Order Granting Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply. The order was "partial" because it did not address the Johnsons claims for relief under CR 11 and RCW 4.84.185 based on the initial filing of the complaint. They then moved for precisely that relief. (CP 134-44) .

In short, Order Granting Partial Summary Judgment and Quieting Title did not resolve all claims of the parties. No findings were ever entered to the effect that there was no just reason to delay its entry as a final judgment. Therefore, it was not a final judgment, and the time for appeal did not commence on its entry.

III. Since No Easement Exists, the Trespass and Nuisance Claims Are Not Subject to Dismissal.

A person trespasses on another's property when he or she intentionally (1) enters or causes another person or a thing to enter land in the possession of another or (2) remains on the land or (3) fails to remove from the land a thing that he or she is under a duty to remove. *Brutsche v. City of Kent,* 164 Wn.2d 673, 193 P.3d 110 (2008) A nuisance is defined in RCW 7.48.010 as an "obstruction to free use of property so as to essentially interfere with the

comfortable enjoyment of the life and property." The two theories are not inconsistent with each other. *Bradley v. American Smelting and Refining Company,* 104 Wn.2d 677, 689, 709 P.2d 782 (1985)

Since the trial court erred by ruling that the Johnsons have an easement implied by prior use and did not determine that an easement implied by necessity exists, the Johnson have no right to maintain the water line on Mr. Waite's property. Since they haven't removed it, they are guilty of trespass.

The presence of the water line also represents a nuisance. It clearly interferes with Mr. Waite's use of the property. It inhibits his ability to sell lots because it limits where home and related infrastructure can be built. As he has stated, he will have to make financial concessions to buyers if the water line is allowed to stay where it is. Since the trial court erred in its decision, that the Johnsons have an easement implied by prior use and did not rule that an easement implied by necessity exists, there is at least an issue of fact as to whether the water line represents a nuisance.

To conclude, since the trial court erred in concluding that an easement exists, it also erred in ruling that Mr. Waite had no claims either for trespass or nuisance.

IV. Assuming an Easement Existed, the Trial Court Erred by Failing to Require the Johnsons to Submit a Legal Description of the Easement.

a. General Considerations.

Both sides sought to quiet title to their respective property interests. Such actions are equitable in nature. When equity jurisdiction attaches, it extends to the whole controversy and whatever relief the facts warrant will be granted. The trial court may fashion broad remedies to do substantial justice to the parties and put an end to litigation. *Haueter v. Rancich,* 39 Wn.App.

328, 331, 693 P.2d 168 (1984); *Eichorn v. Lunn,* 63 Wn.App. 73, 80, 816 P.2d 1226 (1991) This may include a grant of specific relief—ordering a party to do or not to do a specific thing. Stoebuck and Weaver, *Real Estate Transactions,* 18 Wash.Prac. 15 § 11.10 at 15 (2004)

b. Standard of Review.

The appellate court reviews the trial court's decision in this area for abuse of discretion. *Haueter v. Rancich, supra* A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. A trial court necessarily abuses its discretion if it based its ruling on an erroneous view of the law. *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation,* 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) In this case, the trial court abused its discretion by not requiring the Johnsons to provide a legal description.

c. The Trial Court Should Have Required the Provision of a Legal Description.

At the end of the hearing on March 27, 2019, the trial court stated:

> Ms. Crawford is correct in one respect and that is we don't have an easement of record until we've got a legal description of the easement. It's not just where the guy says he put it seven years ago as best he recalls. Whatever steps have to be taken in order to get a legal description of the easement still need to be taken...We can't complete the case until we've got either a ruling on here's the correct legal description or an agreement on here's the correct legal description.

(RP 20) Given this recognition by the trial court, its failure to require the Johnsons to provide a legal description is puzzling and amounts to an abuse of discretion.

This issue is governed by *Restatement (Third) of Property: Servitudes,* § 4.10, entitled "Use Rights Conferred by a Servitude" states:

> Except as limited by the terms of the servitude determined under § 4.1, the holder of an easement or profit as defined in § 1.2 is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the

> servitude. The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude. Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.[4]

(Emphasis added) Comments *b* and *d* to this rule flesh out how it should be applied as follows:

> b. *Application of public policy favoring productive land use*. In resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude beneficiary and the servient estate. Socially productive uses of land include maintaining stable neighborhoods, conserving agricultural lands and open space, and preservation of historic sites, as well as development for residential, commercial, recreational, and industrial uses. Aggregate utility is generally produced by interpreting an easement to strike a balance that maximizes its utility while minimizing the impact on the servient estate.
>
> g. *Unreasonable damage to servient estate*. Unless the parties have agreed otherwise, the holder of an easement is not entitled to cause unreasonable damage to the servient estate. Because the holder of an easement is generally entitled to enter the servient estate to make improvements and construct improvements, a certain amount of damage or inconvenience to the servient estate may be within the contemplation of the parties. However, under the rule stated in this section, the servitude owner is not entitled to cause any greater damage than that contemplated by the parties, or reasonably necessary to accomplish the purposes of the servitude. Unless clearly contemplated by the parties, it is not assumed that the servient owner intends to permit the easement owner to remove existing structures or terminate existing uses of the servient estate.

The absence of a legal description harms Mr. Waite. He intends to develop seven lots for homes on his property. Without precision as to the location of the water line, no one can know exactly where to install sewer connections and/or septic to comply with local setback

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[4] *Restatement (Third) of Property: Servitudes* § 4.1 provides as follows:

(1) A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.

(2) Unless the purpose for which the servitude is created violates public policy, and unless contrary to the intent of the parties, a servitude should be interpreted to avoid violating public policy. Among reasonable interpretations, that which is more consonant with public policy should be preferred.

ordinances. (CP 187) And development of homes cannot proceed without sewer and/or septic facilities. On the other side of the equation, the Johnsons have no interest in not having a legal description for their easement. The absence of a precise location both impairs development contrary to comment *a* of *Restatement (Third) of Property: Servitudes* § 4.10 and unreasonably harms the servient estate in violation of comment *g* of *Restatement (Third) of Property: Servitudes* § 4.10 by inhibiting development without any corresponding benefit to the Johnsons.

By not requiring a legal description, the trial court's order does not put an end to litigation because it does not deal with all issues. The most basic issue is exactly where the water line is. If the parties are not given a precise location, disputes will arise in the future. For example, if maintenance to the water line is necessary, the parties need to know exactly where it is. Without such certainty, there will be litigation over where people can go to effectuate the maintenance. The Johnsons may also take issue with where improvements are situated. This may cause additional litigation because the parties have no precise description of where the water line is.

Stating that the absence of a legal description means that the easement is not "perfected" places the parties in limbo. Does this mean that the Johnsons do or do not have a valid easement that Mr. Waite is obliged to respect? Does it mean that they have no rights until a legal description is recorded? This is another issue that must be litigated.

The Johnsons must bear the expense of locating the water line seeing to the preparation of the legal description. This obligation follows from the fact that they have the burden of proving the existence of an easement implied from prior use or from necessity. *Veach v. Culp, supra*

In light of these considerations, the trial court's failure to require the Johnsons to prepare a legal description for the easement was manifestly unreasonable. It also amounted to an error of law since it did not take into consideration the fact that they bear the burden of proof. The Second Order therefore amounted to an abuse of discretion.

V. The Trial Court Erred by Failing to Allow for Relocation of the Water Line.

a. Standard of Review.

Once again, the standard of review is abuse of discretion. See p. 29-30 above. In this case, the trial court abused its discretion by apparently basing its decision on a misperception of the law.

b. Under the Circumstances Presented the Water Line Can Be Moved.

Relocation of an easement to promote development is allowed by *Restatement (Third) Property Servitudes* § 4.8 in the following terms:

> Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows:
>
> (1) The owner of the servient estate has the right within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude.
>
> (2) The dimensions are those reasonably necessary for enjoyment of the servitude.
>
> (3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
>
> (a) significantly lessen the utility of the easement,
>
> (b) increase the burdens on the owner of the easement in its use and enjoyment, or
>
> (c) frustrate the purpose for which the easement was created.

As stated in comment *f,* the rule is designed to permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder.

The Court of Appeals rejected the Restatement rule as applied to a prescriptive easement in *MacMeekin v. Low Income Housing Institute,* 111 Wn.App. 188, 45 P.3d 570 (2002), and as applied to an express easement in *Crisp v. Van Laeken,* 130 Wn.App. 320, 122 P.3d 926 (2005) Language in *MacMeekin v. Low Income Housing Institute, supra*, suggests that the Court would also reject the rule where implied easements are concerned. 111 Wn.App. at 207

The Court in *MacMeeking v. Low Income Housing Institute, supra,* was concerned about what might happen if the Restatement rule was adopted as follows:

> Clearly, the debate between those who would adhere to the traditional rule (of not allowing relocation without the consent of the owner of the dominant estate) and those who favor the (Restatement) approach involves serious questions of competing policy. The traditional approach favors uniformity, stability, predictability and property rights. The Restatement (Third) approach favors flexibility, and the development potential of the servient estate. Under the traditional approach, the holder of the servient estate must purchase the right to relocate the easement if he is to have it at all. Under the Restatement (Third) approach, relocation may be forced upon the holder of the dominant estate against his will. To use the example suggested by this case, under Restatement (Third) a court might order relocation of an easement based on its determination that (1) a zig-zag course through the parking lot of an adjacent apartment complex is not significantly different from a straight driveway that has existed for half a century, because both eventually arrive at the same public street, and, therefore, such relocation will not significantly lessen the utility of the easement; (2) even though such relocation might make it difficult for visitors, delivery people, postal authorities, firefighters, bus drivers or others to locate the street address of the dominant estate, this is merely an inconvenience that does not sufficiently increase the burdens on the owner of the easement in its use and enjoyment to justify denial of relocation; and (3) because the easement was created for the purpose of providing ingress, egress and utilities, all of which can still be provided, though perhaps not as conveniently as before, there has been no frustration of purpose.

> Under the Restatement (Third) approach, one who purchases property in reliance on an existing easement, however created--by express grant, by implication or by prescription--must bargain for a clause prohibiting relocation of the easement, or accept the possibility that the easement may be relocated for purposes that benefit the servient estate, at some time in the future. . .

111 Wn.App. at 205-206

The concerns the Court expressed simply do not exist here. First, it is uncontested that the placement of the water line was not intended to be permanent. As Mr. Wood has stated, Mr. Olson intended to move it upon further development of what has become Mr. Waite's property. Second, the Johnsons could not possibly have relied on an existing easement when they purchased the property. The Johnsons did not know that the water that supplied their house came through a line over Mr. Waite's property. The situation was also not apparent since the water line was underground and not visible.[5]

Most importantly, the Johnsons have not shown or even suggested how they would be harmed by relocating the water line and any easement for it. There is simply nothing in their papers suggesting that they would suffer any material harm. By contrast, the development of Mr. Waite's parcel will be harmed if the water line cannot be moved.

Under these circumstances, there is no reason to follow a blanket rule prohibiting relocation of an easement to serve development of the servient parcel. Rather, the Restatement rule should be adopted. As indicated, that rule allows relocation unless the relocation significantly lessens the utility of the easement; increases the burden on the Johnsons in using the easement; or frustrates the purposes for which the easement was created. Relocation would not lessen the utility of the easement or frustrate the purpose for which the easement was created because the Johnsons would have water coming from the same source. The burden on the

Johnsons would not be increased for the same reasons. Therefore, relocation is warranted under the uncontested facts.

The trial court appeared to believe that it had no authority to allow relocation of the water line. (RP 17) This amounted to a misperception of the law because relocation is warranted under the facts of this case. The trial court's rejection of relocation as proposed by Mr. Waite therefore amounted to an abuse of discretion.

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VI. The Trial Court Erred by Finding a Violation of RCW 4.84.185.

a. Standard of Review.

The trial court found a violation of both RCW 4.84.185 and CR 11 and imposed sanctions. As to CR 4.84.185, the standard of review is abuse of discretion, examining the trial court's decision whether a case, taken as a whole, is advanced without reasonable cause its decision is reviewable for an abuse of discretion. *Entertainment Industry Coalition v. Tacoma-Pierce County Health Department,* 153 Wn.2d 657, 666-67, 105 P.3d 985 (2005) *Biggs v. Vail,* 124 Wn.2d 193, 197, 876 P.2d 448 (1994) As with other matters, a trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. A trial court would necessarily abuses its discretion if it based its ruling on an erroneous view of the law. *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation, supra,* 122 Wn.2d at 339 As will be discussed below, the trial court abused its discretion.

b. There Was No Violation of RCW 4.84.185.

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[5] These considerations preclude the existence of an easement implied by prior use as discussed above.

RCW 4.84.185 allows the trial court to award the prevailing party reasonable attorney's fees if it determines that the losing party's claim was advanced without reasonable cause. As noted above, the action as a whole must have been advanced without reasonable cause for relief to be granted under the statute. In order to be advanced without reasonable cause or frivolous, the suit as a whole cannot be supported by any rational argument on the law or facts. It cannot present debatable issues. It must be frivolous in its entirety. If any of the asserted claims are not frivolous, the action is not frivolous. *Skimming v Boxer,* 119 Wn.App. 748, 756, 757, 82 P.3d 707 (2004)

Mr. Waite's suit was not frivolous. There was no recorded easement encumbering his property. The existence of any implied easement has always been at least subject to question. This is best demonstrated by the arguments above. The trial court's decision also contradicts any notion that the action might reach the high bar required by RCW 4.84.185. The trial court did not find that the whole action was frivolous. It concerned itself only with the period from January 18, 2019, through May 8, 2019.

In short, the trial court's reliance on RCW 4.84.185 to award attorney's fees amounted to an abuse of discretion because it involved an error of law.

c. There Was No Violation of CR 11.

The trial court found a violation of CR 11 against Mr. Waite and his attorney. The trial court abused its discretion and committed error in doing so.

We begin with CR 11(a). It provides as follows:

> The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading ... and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (and) (2) it is warranted by existing law or a good faith argument for the extension,

> modification, or reversal of existing law or the establishment of new law … . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

This rule requires that attorneys not submit "baseless" filings. A filing is baseless when it is either not "well grounded in fact" or not "warranted by existing law or a good faith argument" for its alteration. A filing is not baseless because the proponent did not prevail. Rather, it must be patently clear that the position taken has no chance of prevailing. *Skimming v. Boxer, supra,* 119 Wn.App. at 755 A filing is not sanctionable merely because it is baseless. As the words of the rule make plain, the trial court must also find that the filing attorney failed to conduct a reasonable inquiry into the pleading's factual or legal basis. CR 11 is "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories," or else "wrongs would go uncompensated." The rule is not meant to act as a fee shifting mechanism. The party seeking CR 11 sanctions bears the burden to prove they are appropriate. The rule addresses baseless filings. Therefore, the violation is complete upon the filing of an offending pleading. Finally, attorney's fees that may be assessed are limited to those incurred to respond to the offending pleading. *Bryant v Joseph Tree, Inc.,* 119 Wn.2d 210, 219-20, 829 P.2 1099 (1992); *Biggs v. Vail, supra,* 124 Wn.2d at 197- 202

The trial court ruled that there was a violation of CR 11 after January 18, 2019. The only pleadings filed on behalf of Mr. Waite after that date was Plaintiff's Opposition to Defendants' Second Motion for Summary Judgment (the Response) supported by declarations from Mr. Waite and from counsel. (CP 170-213) As will be discussed below these filings were not baseless.

We begin with the context. Mr. Waite's complaint sought to quiet title in his property free of any claims made by the Johnsons. It also alleged that the Johnsons' maintenance of the water line amounted to a nuisance and a trespass. (CP 3-6) The Johnsons moved for summary judgment to quiet title to an implied easement. Their motion did not address the trespass and nuisance claims. (CP 23-31) In colloquy after the grant of the motion the trial court observed that the trespass and nuisance claims had not been before it in the summary judgment motion. (RP 6)

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The Johnsons then moved to dismiss the trespass and nuisance claims. Counsel for Mr. Waite filed the Response on March 18, 2019. It conceded that the trial court's summary judgment ruling negated the trespass claim. (CP 172) It argued (1) that the motion to dismiss was really one for summary judgment because facts were involved (CP 173); (2) that the complaint was not frivolous when it was filed (CP 174-76); (3) that the nuisance claim had not been resolved because there was no legal description for the easement and because the water line was not permanent when it was placed (CP 176-79); (4) that the Court should use its equitable powers to define the scope of the easement so that the parties would know and understand their rights, once again indicating that the water line was not permanent (CP 179-180); and (5) that CR 11 sanctions were not warranted. (CP 181-83) The arguments were supported by Mr. Waite's declaration.

A good faith argument was made on each of these points. The Johnsons can hardly doubt that their motion should be treated as a summary judgment motion since facts were involved. See CR 12(b). Furthermore, the trial court obviously did not believe that the suit was

baseless when it was filed. Otherwise, it would not have limited its sanctions to matters occurring after it entered its summary judgment order. The discussion in the briefs submitted to the trial court as well as the arguments set out in this brief show that the Johnsons' entitlement to any implied easement is questionable at best and debatable at least. Hopefully, the Johnsons do not dispute that the response contained a good faith argument that they were not entitled to CR 11 relief.

The remainder of the arguments were made in good faith. The response first defined nuisance in the terms of the nuisance statute, RCW 7.48.010, as ". . .an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance. . ." It then asked the trial court to determine the scope of the easement and to authorize the moving of a water line to a location where it would not interfere with the development of Mr. Waite's property. This request was premised on the fact that the current installation was not meant to be permanent and that it was not opposed by the City of Kalama. It could have also been based on the lack of knowledge of both Mr. Waite and the Johnsons that the waterline for 625 Nectarine Drive went through Mr. Waite's property; that neither Mr. Waite nor the Johnsons knew where the water line was when each acquired his or her property nor saw any above-ground evidence that the water line even existed; the Johnsons' failing to state any opposition to moving the water line and, for that matter, the lack of any argument made on the Johnsons' behalf that the water line should not be moved.

In short, the response submitted on behalf of Mr. Waite did not rise to the level of a baseless filing justifying sanctions under CR 11. The trial court abused its discretion by ruling to the contrary.

d. Assuming that the Response Violated CR 11, the Amount of Fees Was Not Justified.

As noted above, CR 11 is violated when an offending pleading is filed. Furthermore, the amount of attorney's fees that can be awarded is limited to the amount necessary to respond to that pleading. Judging from the Second Order, the pleading in question can only be Plaintiff's Opposition to Defendants' Second Motion for Summary Judgment filed March 18, 2019. That means the only fees that can be awarded are those that were incurred after March 18, 2019. The trial court awarded a total of $3,778.50. This included fees and expenses incurred prior to March 18, 2019. This amounted to an abuse of discretion because, as a matter of law, fees are limited to those incurred to respond to the offending pleading filed on March 18, 2019.

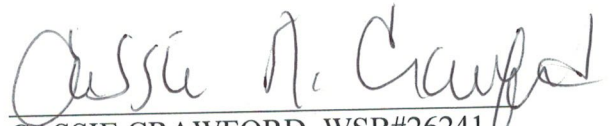
A Cost Bill was submitted on behalf of the Johnsons. It sets out a total of 13.4 attorney hours. Of these, only 7.9 were incurred after March 21, 2019. Of these, it is unclear how many hours were spent responding to the March 18, 2019, filing and how many were devoted to the CR 11 motion. The Cost Bill also shows expenses. Assuming that all of these are valid and not simple overhead,[6] the expenses total $304.55 after March 18, 2019. The most, then, that could be ordered is $1,975.00 in attorney's fees and $304.55 in expenses for a total of $2,279.55.

The trial court erred in finding any violation of CR 11. It also erred in calculating the amount of fees. The Second Order and the Judgment on Sanction must be reversed for that reason.

CONCLUSION

The Johnsons were not entitled to an easement implied by prior use as a matter of law. The trial court erred by ruling that such an easement encumbered Mr. Waite's property. Assuming that such an easement exists, the trial court erred by not requiring the Johnsons to prepare a legal description of their easement and by not allowing for relocation of the water line. The trial court also erred by assessing any sanctions. For all these reasons, the Order Grating Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply, the Judgment & Order Dismissing Nuisance and Trespass Claims and for Sanction, and the Judgment on Sanction must be reversed, and the matter must be remanded to the Superior Court for further proceedings.

DATED this 18 day of October, 2019.



CASSIE CRAWFORD, WSB#26241
Of Attorneys for Plaintiff.

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[6] The Cost Bill includes paralegal time without any indication as to what the paralegal did, whether it amounts to legal work as opposed to clerical work, and what the paralegal's training might be. *Absher v. Kent School District*, 79 Wn.App. 841, 846-48, 917 P.2d 1086 (1995)

APPENDIX

RCW 4.84.185

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

VANCOUVER LAND LAW

October 18, 2019 - 4:41 PM

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Appellate Court Case Title:	Pensco Trust Company, Appellant v. J.G. Johnson and Janet Johnson, et al, Respondents
Superior Court Case Number:	15-2-00897-9

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