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No. 54038-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL TEFFT and ANGELA TEFFT, Husband and Wife, and
Washington Residents; and DAWN ALLEN, Washington Resident; and
JASON HAENKE, Washington Resident,

Respondents,

v.

RICHARD C. BARBER, Washington Resident; and
DEBRA L. CURTIS, Washington Resident,

Appellants.

BRIEF OF RESPONDENTS

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III. INTRODUCTION

The Appellants' Brief fails to address the *over-arching issue* that the Superior Court decided and certified for interlocutory review – the invalidity of the Easements.¹ The Appeal must be rejected.

Michael Tefft, Angela Tefft, Dawn Allen and Jason Haenke (together the “Property Owners”) won declaratory relief in Superior Court from three Easements that shattered the peace, privacy and security of their properties and the quiet enjoyment of their homes. All three Easements cover portions of both the Teffts' property and Dawn Allen and Jason Haenke's abutting property. Two of the Easements include a small cottage that straddles their common property line.

The Easements were purportedly granted (in whole or in part) from Debra Curtis, a previous owner of the Tefft's property, to Richard Barber, a previous owner of Dawn Allen's and Jason Haenke's property. After losing their properties to foreclosure, a forced sale in lieu of foreclosure and bankruptcy, Ms. Curtis and Mr. Barber used the Easements to holdover on the properties and lease the cottage. All four Property Owners have submitted detailed Declarations describing the harm they have suffered from Ms. Curtis', Mr. Barber's and their tenants' misuse of the Easements.

¹ First Cottage Easement (No. 200906260301), Access Easement (No. 200906260300) and Second Cottage Easement (No. 201007160586) (together the “Easements”).

The case before the Superior Court includes many issues clustered around various claims and counter-claims concerning the validity, type and nature of the Easements, and the rights they do and do not convey. First and foremost, whether the Easements were valid and, if not, whether the invalid Easements were binding or could be terminated, and whether Ms. Curtis and Mr. Barber had to vacate the invalid easement areas? If the Easements were valid, what type of Easements were they and to whom did they convey rights? If the Easements were valid and conveyed rights to some of the parties, what rights were retained by the other parties? Finally, if the Easements were valid, what were the responsibilities of the various parties with regard to the easement areas? The Court discerned that the “*over-arching issue*” cutting across all these claims was whether the Easements were valid.

Thusfar, the Superior Court has only decided that first claim on the over-arching issue of invalidity and has entered an Order Granting Partial Summary Judgment (the “Order”) to the Property Owners. The Court found the Easements invalid because Ms. Curtis *did not own* the property over which she purported to grant Easements, and Mr. Barber already *owned* the property over which he purportedly received Easements to merely use. The Court determined that the Property Owners were not bound by the invalid Easements and could terminate them, and that Ms.

Curtis and Mr. Barber had to vacate the invalid Easements. The Court also ordered Ms. Curtis and Mr. Barber to post a bond until they vacated, to prevent any further liability or property damage to the Property Owners.

The Superior Court certified its Order on the claim of invalidity, and retained jurisdiction over all of the other issues and claims pending the outcome of this interlocutory Appeal. At the August 16, 2019 Hearing on the Motion for Entry of Final Judgment, the Hon. Kathryn J. Nelson explained that other issues in the case “were not ripe to be ruled on because . . . [the invalidity of the Easements] is an over-arching issue that could decide everything.” RP Aug. 16, 2019 at 10.² *The “over-arching issue” concerning the invalidity of Easements, “if upheld, would bring finality to the case.”* RP Aug. 16, 2019 ay 9. If the Easements are invalid, it is irrelevant what type of Easements they are, what rights they convey to some parties, what rights are retained by other parties, or what responsibilities various parties have for the easement areas, etc. All those other claims, counter-claims and issues would be moot if Mr. Barber had no valid Easement interest. Accordingly, Judge Nelson did not decide any of the other issues, which she explained “may depend on factual matters that have not yet been fully adjudicated and, therefore, would not be proper . . . for interlocutory appeal.” RP Aug. 16, 2019 at 10.

² RP Aug 16, 2019 is attached at Appendix A, for ease of reference.

The Superior Court could not have made it any clearer that the interlocutory appeal would be limited to the invalidity claim.

Therefore, it is astounding that the Appellants' Brief fails to make a single argument concerning the over-arching issue of invalidity. *Nowhere* does the Appellants' Brief refute the Superior Court's decision that the Easements are invalid. *Nowhere* does the Appellants' Brief argue why the Court of Appeals should find the Easements valid. Instead, the Appellants' Brief presents a variety of inapt defenses and theories why, even though the Easements are invalid, the Property Owners nonetheless should be bound by them or should not be allowed to challenge them. The Appellants' Brief also goes on to present arguments on issues that have not yet been decided by the Superior Court and were not certified for appellate review – *issues that are still under the jurisdiction of the Superior Court*. Such arguments are wholly inappropriate here, and ineffective. The Appeal must be rejected.

IV. STATEMENT OF THE CASE

A. Substantive Facts.

The Record in the matter reflects the following substantive facts.

1. The Property Ownerships.

Angela and Michael Tefft own real property located 8609 SR 302 in Gig Harbor, WA 98329 (Parcel No. 0122221039). CP 35. Dawn Allen

and Jason Haenke own the abutting real property located at 8603 SR 302 in Gig Harbor, WA 98329 (Parcel No. 0122221023). CP 42. All four Property Owners have submitted detailed Declarations describing how their properties have been negatively impacted by Ms. Curtis' and Mr. Barber's misuse of the three Easements at issue in this case. CP 19-22, 132-138, 180-183, 223-226.

The Pierce County Assessor-Treasurer's records indicate that Ms. Curtis owned the Teffts' property (Parcel No. 0122221039) from August 3, 2006 to November 10, 2010. CP 35. The Pierce County Assessor-Treasurer's records indicate that Mr. Barber owned Dawn Allen's and Jason Haenke's abutting property (Parcel No. 0122221023) from April 18, 2006 to September 20, 2010. CP 42.

All three Easements were granted between June 25, 2009 and July 6, 2010, while Ms. Curtis and Mr. Barber owned these abutting properties. CP 44-50, 51-57, 58-65. Mr. Barber and Ms. Curtis also claim to have made improvements to the cottage in 2007, while they owned these abutting properties. Appellants' Brief at 4.

2. The Easements.

All three Easements were granted after Ms. Curtis and Mr. Barber signed an Agreement Prohibiting the Granting of Easements, on August 8, 2006, when Mr. Barber sold Parcel No. 0122221039 to Ms. Curtis. CP

122-126. That Agreement precluded Mr. Barber from granting any easements as long as it was in effect. CP 122. The Agreement expressly states that any easements granted while it was in effect would be “void.” CP 122.

The first Cottage Easement and associated Access Easement were granted before Mr. Barber filed for bankruptcy, on July 29, 2009. CP 76-121. The second Cottage Easement was granted before Mr. Barber’s property was foreclosed on September 20, 2010, and Ms. Curtis’ property was subject to a sale in lieu of foreclosure on November 10, 2010. CP 35, 42. After Ms. Curtis and Mr. Barber lost their properties to bankruptcy, foreclosure and forced sale in lieu of foreclosure, they used the Easements to holdover on the properties and to rent out the cottage. CP 127-128.

a. First Cottage Easement. The First Cottage Easement (No. 200906260301) was granted from: “Grantor: Richard C. Barber (Parcels A, C, E) and Debra Curtis (Parcel B),” to “Grantee: Richard C. Barber (Parcel E),” on June 25, 2009. CP 44. At that time Ms. Curtis owned Parcel B as shown on Exhibit B to the First Cottage Easement, (now the Teffts’ property (Parcel No. 0122221039)), and Richard Barber owned (among others) the abutting Parcel E (now Dawn Allen’s and Jason Haenke’s property (Parcel No. 0122221023)). CP 47.

b. Access Easement. Simultaneously with the granting of the First Cottage Easement, the Access Easement (No. 200906260300) was granted from “Grantor: Richard C. Barber (Parcel E) and Debra L. Curtis (Parcel B),” to “Grantee: Richard C. Barber (Parcels A and C),” on June 25, 2009. CP 51. At that time Mr. Barber owned Parcel E as shown on Exhibit B to the Access Easement, (now Dawn Allen’s and Jason Haenke’s property (Parcel No. 0122221023)), as well as Parcels A and C (Parcel No. 0122221060 and Parcel No. 0122232068) on the far side of the adjacent Tacoma Public Utilities corridor to the north. CP 54.

c. Second Cottage Easement. The Second Cottage Easement (No. 201007160586) was granted *solely* from Debra Curtis (Grantor), who is identified therein as the owner of Parcel B, to Richard Barber (Grantee), who is identified therein as the owner of the abutting Parcel E, on July 6, 2010. CP 58. At that time Debra Curtis still owned Parcel B as shown on Exhibit B to the Second Cottage Easement, (now the Teffts’ property (Parcel No. 0122221039)) and Richard Barber still owned the abutting Parcel E (now Dawn Allen’s and Jason Haenke’s property (Parcel No. 0122221023)). CP 60.

d. The Easement Areas.

All three Easements have attached at Exhibit B, drawings prepared by Prizm Surveying in June of 2009, showing the easement areas. CP 47,

54, 60. The drawings show both the property that was owned at that time by Ms. Curtis (Parcel B (now the Teffts' property)), and the abutting property to the east that was owned at the time by Mr. Barber (Parcel E (now Dawn Allen's and Jason Haenke's property)). CP 47, 54, 60.

The drawings attached to all three Easements clearly show that the Easements cross *both* properties, Parcel B and Parcel E. CP 47, 54, 60. The easement areas extend from SR 302 along the southern frontage of the properties, to the Tacoma Public Utilities property to the north that abuts the rear property lines. *See* CP 47, 54, 60. The cottage is the small square shown straddling the property line, with the bulk of the cottage on Parcel B, and its southeast corner on Parcel E. *See* CP 47, 54, 60.

3. Harm Caused to the Property Owners by the Easements.

The Property Owners' Declarations stand in stark contrast to the Statement of the Case presented on pp. 5-10 of the Appellants' Brief. *See* CP 19-27, 132-138, 180-183, 223-226, 321-323, 325-327. The Property Owners' Declarations describe in detail the Appellants' misuse of the Easements, which shattered the Property Owners' peace and privacy and destroyed the quiet enjoyment of their homes. CP 19-27, 132-138, 180-183, 223-226, 321-323, 325-327.

Mr. Barber routinely yelled at the Teffts to get off "his" property. CP 23, 134-135. Ms. Curtis repeatedly yelled at the Property Owners that

she and her husband “owned” the cottage and that the Property Owners had no rights within the easement areas. CP 23, 134-135, 182, 225. One of Ms. Curtis’ loud outbursts, complete with yelling and cursing, was made during a barbeque the Teffts were hosting in their yard. CP 23, 135. Ms. Curtis’ abusive language embarrassed the Teffts in front of family, friends and Angela Teffts’ business colleagues. CP 23, 135. Another of Ms. Curtis’ loud outbursts took place at the Teffts’ front door, where Ms. Curtis banged on the door, rang the doorbell furiously, and then banged on a bell in the Teffts’ front yard. CP 23, 135. When the Teffts approached, Ms. Curtis yelled and cursed at Michael Tefft. CP 23, 135. Her behavior was so loud and erratic that Angela Tefft feared Ms. Curtis might be dangerous. CP 23, 135. The Teffts’ daughters were afraid to go outside in their yard. CP 23, 135.

Mr. Barber’s and Ms. Curtis’ misuse of the Easements jeopardized the Property Owners’ security. CP 24, 136, 182, 225, 322, 326. Mr. Barber rented the cottage out to tenants who were not vetted by the Property Owners, and the tenants invited guests onto the properties that were unknown to the Property Owners. CP 24, 135, 322, 326. Having no control over strangers coming and going on their land caused all of the Property Owners to worry about the security of their homes and yards. CP 24, 135-136, 322, 326. Angela Tefft was particularly concerned about her

safety, given the sensitive nature of her work, and the safety of her daughters. CP 24, 135-136, 322, 326. The Teffts were also worried about the safety of their dog, as they had no control over Mr. Barber's tenants' pets. CP 24, 136.

Mr. Barber, his tenants and their pets repeatedly trespassed on the Teffts' property, outside the easement areas. CP 24, 136. Mr. Barber's tenants blocked the driveway with trucks and other vehicles. CP 24, 136. Tenant mail and packages (including one very large television) were misdelivered to the Teffts, and tenant trash pick-up was mis-billed to the Teffts because there was no legal address to distinguish the cottage from the Teffts' home. CP 24, 136.

When Mr. Barber's tenants left, Mr. Barber and Ms. Curtis threatened to establish an Airbnb or a homeless shelter in the easement areas. CP 24, 134, 182, 225. The Property Owners feared such a use would further heighten privacy and security concerns for their homes. CP 24, 134, 182, 225. Dawn Allen and Jason Haenke feared it would also bring even more noise, traffic and disturbance onto their property. CP 182, 225.

Mr. Barber's and Ms. Curtis' misuse of the Easements damaged the Teffts' property. CP 24-25, 136. Ms. Curtis ran over driveway lighting fixtures with her vehicle. CP 24, 136. Ms. Curtis threatened to

remove the security gate the Teffts installed along their rear property line. CP 25, 136. Mr. Barber and Ms. Curtis drove across areas where Michael Tefft was trying to grow grass. CP 24. Ms. Curtis demanded that the Teffts remove landscaping on their property and along their driveway, outside the easement areas. CP 24-25. Mr. Barber and Ms. Curtis used the easement areas to illegally drive their vehicles onto the Tacoma Public Utilities (“TPU”) corridor behind the Teffts’ property, which risked police having to come onto the Teffts’ property. CP 135.

Mr. Barber’s and Ms. Curtis’ misuse of the Easements cost the Teffts money. CP 25. Mr. Barber failed to pay for the cottage water (despite repeatedly agreeing that he would do so), causing the Teffts to have to pay over \$2,300 on his behalf just to keep the water running to their own home. CP 25, 225. Mr. Barber’s water bill is still over \$2,050 in arrears to the Teffts. CP 25. Michael Tefft had to mow the grass and rake leaves in the easement areas to keep his property looking neat, because Mr. Barber and Ms. Curtis did not maintain the easement areas. CP 25, 225.

Mr. Barber’s and Ms. Curtis’ misuse of the Easements foisted additional liabilities onto the Property Owners. CP 25. Mr. Barber and Ms. Curtis did not carry sufficient insurance to cover liabilities related to tenants that occupied the property and their guests. CP 25. Therefore, the

Teffts had to carry additional insurance. CP 25. The Teffts lost sleep worrying about the potential liabilities they faced, for uses on their property over which they had no control. CP 25, 137.

Mr. Barber and Ms. Curtis asserted that they “owned” the cottage and that the Property Owners had no rights within the easement areas. CP 23-25, 134-136, 182, 225. However, Michael Tefft’s Angela Tefft’s, Dawn Allen’s and Jason Haenke’s ownership of the properties is a matter of public record, along with their responsibility for the attendant property taxes, etc. CP 35, 42.

In short, Mr. Barber’s and Ms. Curtis’ misuse of these Easements became intolerable for the Property Owners. CP 25, 137, 182, 225.

B. Procedural History.

On March 1, 2019 the Property Owners brought a Motion for Partial Summary Judgment on the first five of their fifteen issues: 1) whether the Easements are invalid; 2) whether the Easements are perpetual and run with the land; 3) whether the Easements are appurtenant or in gross; 4) whether the Easements can be terminated by the Plaintiffs, and; 5) if the Easements are terminated, whether the Defendants and their tenants must vacate the Easements. CP 294.

On March 28, 2019, the Superior Court entered its Order Granting Partial Summary Judgment to the Property Owners on the invalidity claim

(Issues 1, 4 and 5). CP 440-442. The Court did not reach a decision on Issues 2 or 3. CP 440-442. The Court found that the three Easements at issue in this case are invalid and, consequently, may be terminated by the Property Owners. CP 441-442. The Court ordered the Mr. Barber and Ms. Curtis to vacate the invalid Easements within 30 days, and to post a bond until they vacated in order to protect the Property Owners from further property damage and liabilities. CP 442.

On April 19, 2019 the Superior Court heard Mr. Barber's and Ms. Curtis' Motion for Reconsideration of the Order. RP Apr. 19, 2019. The Court considered their arguments, but made no change to the Order. RP Apr. 19, 2019 at 19. The Court specifically upheld the bond requirement to mitigate any further liability and property damage suffered by the Property Owners. RP Apr. 19, 2019 at 19. Ms. Curtis and Mr. Barber never posted the required bond, however they did vacate the Easements on May 6, 2019. CP 510.

On August 16, 2019 – on Mr. Barber's and Ms. Curtis' Motion for Final Judgment – the Superior Court certified its Order for interlocutory appellate review and adopted the requisite Findings of Fact and Conclusions of Law (the "Findings"). CP 555-563, 564-566. The Court explained that the "over-arching issue" concerning the invalidity of Easements, "if upheld, would bring finality to the case." RP Aug. 16,

2019 at 9-10. Accordingly, the Court’s Findings specified the three issues that were decided by the Order – Property Owners’ Issues 1, 4 and 5 (the invalidity claim) – and, therefore, appropriate for interlocutory appellate review. CP 555-563, 564-566. The Court’s Findings also explained that it would retain jurisdiction over the other remaining issues, which had not yet been decided, and, therefore, were not appropriate for interlocutory appellate review. CP 555-563, 564-566.

Thus, the scope of this Appeal is thus limited to the invalidity claim. RP Aug. 16, 2019 at 9-10; CP 555-563, 564-566.

V. RESPONSE ARGUMENT

A. Standards of Review.

As discussed below, there are two different standards of review that apply in this Appeal.

1. Granting Partial Summary Judgment and Denying Reconsideration are Reviewed De Novo.

The Court of Appeals reviews an order granting partial summary judgment and a decision denying reconsideration order “de novo.” This means that the Appellate Court takes a fresh look at the decisions made by the Superior Court, without deference. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

2. Certification of Judgments and Retention of Jurisdiction are Reviewed for Abuse of Discretion.

The Court of Appeals reviews a decision whether to certify a judgment under CR 54(b), or conversely to retain jurisdiction, for abuse of discretion. *Gull Indus., Inc. v. State Farm Fire & Cas. Co.*, 181 Wn.App. at 481, 326 P.3d 782 (2014). This means that the Court of Appeals gives “**substantial deference**” to the Superior Court’s judgment whether or not to apply CR 54(b). *Nelbro Packing Co. v. Baypack Fisheries, LLC*, 101 Wn. App. 517, 525, 6 P.3d 22 (2000).

The Washington State Supreme Court has explained that “abuse of discretion” means “**no reasonable judge** would have ruled as the trial court did.” *State v. Arredondo*, 188 Wn.2d 244, 394 P.3d 348, (2017) (quoting *State v. Mason*, 160 Wn.2d 910, 934, 162 P.3d 396 (2007) and citing *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). “Put another way, to reverse we must find the decision is ‘**unreasonable or is based on untenable reasons or grounds.**’” *State v. Mason* at 922 (quoting *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003)). This is a *very* high bar.

B. Appellants' Brief Does Not Refute the Superior Court's Order Granting Partial Summary Judgment or Denial of Reconsideration on the Over-Archiving Invalidity Claim.

As discussed below, the Superior Court found the three Easements invalid (Property Owners' Issue 1). Accordingly, the Superior Court determined that the Property Owners were not bound by invalid Easements and could terminate them (Property Owners' Issue 4), and that Ms. Curtis and Mr. Barber had to vacate the invalid Easements (Property Owners' Issue 5). CP 440-442. Since Ms. Curtis could not grant Easements over property she did not own, and Mr. Barber could not be granted mere Easements to use property he did own, the Court of Appeals should reach the same conclusion on the invalidity claim.

1. The Easements Are Invalid – Property Owners' Issue 1.

At Section III.3 (p.1), the Appellants' Brief makes an assignment of error to the Superior Court's Order Granting Partial Summary Judgment to the Property Owners. However, in Section IV (pp. 1-2) the Brief does not identify a single issue concerning the invalidity of the Easements. At Section VI.D (pp. 21-22), where the heading alleges that the Court erred in granting partial summary judgment, it presents no arguments with regard to invalidity. Nowhere in this or any other Section of the Appellants' Brief do Mr. Barber and Ms. Curtis provide any arguments refuting the Superior Court's decision that the Easements are invalid. Nowhere do

they argue that the Easement grants are valid. *The Appellants' Brief fails to refute the over-arching issue of invalidity* - the *one* claim that the Superior Court decided and certified for interlocutory review. The Appeal must be rejected.

It is axiomatic that one cannot grant an interest in property that one does not own. The exclusive right to possess, use, exclude others and dispose of one's property are fundamental attributes of the ownership of real property. See e.g., *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1, (1993); *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183, (2000); *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 787 P.2d 907 (1990); *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992); *Robinson v. Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992).

It is also well settled law that one cannot grant oneself, or be granted, an easement to merely use property that one owns. *Coast Storage v. Schwatz*, 55 Wn.2d 848, 351 P.2d 520 (1960); *Perrin v. Derbyshire Scenic Acres Water Corp.*, 63 Wn.2d 716, 388 P.2d 949 (1964). An easement is a lesser right to merely use property, which is inherent within the greater right of property ownership. See *id.* Thus if one already owns property, one cannot have a valid easement to merely use it. See *id.* As discussed below, all three Easements violate both of these rules of law and, therefore, are invalid.

All three Easements have attached at Exhibit B, drawings showing the easement areas crossing over both Ms. Curtis' property (Parcel B), and Mr. Barber's property (Parcel E). CP 47, 54, 60. However, neither Ms. Curtis nor Mr. Barber had the authority to grant an easement over Parcel E to Mr. Barber. Ms. Curtis *never* owned Parcel E, so she *never* had any authority to grant an easement over Parcel E. CP 42. Mr. Barber *owned* Parcel E (CP 42), so he could not grant himself or be granted an Easement to merely use Parcel E. *Coast Storage*, 55 Wn.2d 848; *Perrin*, 63 Wn.2d 716. Thus the Easements are invalid.

The First Cottage Easement (No. 200906260301) was granted from: "Grantor: Richard C. Barber (Parcels A, C, E) and Debra Curtis (Parcel B)," to "Grantee: Richard C. Barber (Parcel E)." CP 44. Mr. Barber could not grant himself an easement across the parcel he owned (Parcel E). Nor could Ms. Curtis grant an easement across Mr. Barber's parcel (Parcel E) because she did not own it.

The Access Easement (No. 200906260300) also was granted from "Grantor: Richard C. Barber (Parcel E) and Debra L. Curtis (Parcel B)," to "Grantee: Richard C. Barber (Parcels A and C)." CP 51. Again, Mr. Barber could not grant himself an easement across the parcel he owned (Parcel E). Nor could Ms. Curtis grant an easement across Mr. Barber's parcel (Parcel E) because she did not own it.

The Second Cottage Easement (No. 201007160586) was granted *solely* from Debra Curtis, to Richard Barber. CP 58. Ms. Curtis could not grant an easement across Mr. Barber's parcel (Parcel E) because *she did not own it*. CP 42. Mr. Barber could not be granted a mere Easement to use property that he owned (Parcel E). CP 42.

In sum, none of the Grantor(s) could grant valid Easements to Mr. Barber over Parcel E. And, Mr. Barber could not be granted a valid Easement over Parcel E. The Appellants' Brief provides no argument or authority to refute this conclusion.

In Section VI.I (pp. 33-34), the Appellants' Brief argues that the remaining portions of the Easement on Parcel B are still viable, and that the Superior Court erred in denying reconsideration on this issue. However, their argument ignores the fact that all three Easements create a single easement area, which only serves the stated purpose of the Easement if the entire easement area can be utilized. The drawings prepared by Prizm Surveying in June of 2009, and attached to each of the Easements as Exhibit B, shows the easement areas cross over *both* properties, both Ms. Curtis' Parcel B, and Mr. Barber's Parcel E. CP 47, 54, 60, 656-658. All three Easements show the easement areas coming up the flagpole-shaped access to Parcel E, and clipping across the southwestern corner of the main flag-shaped area of Parcel E. *See* CP 47,

54, 60, 656-658. The First and Second Cottage Easements then show the easement areas continuing up the western edge of the main flag-shaped area of Parcel E. *See* CP 47, 60, 656, 658. All three Easements also show the southeastern corner of the cottage straddling the property line and resting partly on Parcel E. *See* CP 47, 54, 60, 656-658.

Without these critical easement areas over Parcel E, the Easements no longer serve their stated purpose of providing access to the cottage. The cottage itself is located partially on the invalid easement areas on Parcel E. *See* CP 47, 54, 60, 656-658. The other portions of the cottage on Parcel B cannot be reached without crossing the invalid easement areas on Parcel E. *See* CP 47, 54, 60, 656-658. One simply cannot get to, or occupy, the cottage without using the invalid easement areas on Parcel E. One cannot come up the pipe-stem of Parcel E, cross the southwestern corner of Parcel E, or use the southeastern corner of the cottage. *See* CP 47, 54, 60, 656-658. Without the invalid easement areas over Parcel E, there is no access to the easement areas on Parcel B for anyone except the **current** owners of Parcel B (Michael Tefft and Angela Tefft) and Parcel E (Dawn Allen and Jason Haenke).

Moreover, each of the Easements identifies in Exhibit B one single combined easement area (CP 47, 54, 60), and provides in Exhibit A one single combined legal description of the easement area (CP 46, 53, 59).

There is nothing in the Easements that breaks the easement areas down into smaller components, or provides separate legal descriptions for portions that fall on Parcel E and Parcel B. Without the easement areas on Parcel E, the drawings of the easement areas are no longer valid, and the legal descriptions of the easement areas is no longer valid. And, without those elements, the Easements no longer satisfy the Statute of Frauds. No portions remain viable. The Easements are invalid.

2. The Invalid Easements are not Binding and may be Terminated – Property Owners’ Issue 4.

In Section VI.F (p. 29), the Appellants’ Brief argues that the Superior Court erred ruling the invalid Easements could be terminated. This is incorrect. Again, it is axiomatic that one cannot legally bind the property of another with an invalid instrument. Ms. Curtis never owned Parcel E, so she could not grant a valid Easement over it. Accordingly, the Superior Court determined that the Property Owners were not bound by the invalid Easements and could terminated them.

The Appellants’ Brief provides no authority to refute the Superior Court’s decision. Instead, the Brief invites this Court down the slippery slope of ruling that one can establish a legal right over their neighbor’s property simply by recording an invalid document that subsequently shows up on an innocent purchaser’s deed. This is preposterous. It invites

fraud. One cannot convey a legal interest in property that one does not own.

3. Ms. Curtis and Mr. Barber Must Vacate Invalid Easements – Property Owners’ Issue 5.

The Declaratory Judgments Act provides direct authority to the courts to enforce declaratory judgments. RCW 7.24.080; 7.24.190. Accordingly, having determined that the Easements were invalid and not binding, the Superior Court ordered Ms. Barber and Ms. Curtis and their tenants to vacate the invalid easement areas within 30 days. CP 442. In the interim, until Mr. Barber and Ms. Curtis removed their personal effects and vacated the easement areas, the Court also ordered they post a bond to protect the Property Owners from liabilities and further property damage as had occurred in the past. CP 442.

The Appellants never did post the required bond. However, they did remove their personal property and vacate the invalid easement areas on May 6, 2019. CP 510. In Section VI.M (pp.37-38), the Appellants’ Brief claims that the bond was not necessary because they carried liability insurance. However, any such insurance would only have covered the insured – i.e. Mr. Barber – not the Property Owners. Moreover, the Superior Court’s bond requirement was also designed to protect the Property Owners from further property damage, as had occurred in the

past. Liability insurance would not cover such damages to the Property Owners.

4. Appellants' Brief Provides no Effective Counters to the Invalidity Claim.

Nowhere does the Appellants' Brief refute the Superior Court's conclusions on the invalidity claim. The Brief only counters with inapt defenses and theories why, even though the Easements are invalid, the Property Owners should nonetheless be bound by them or should not be allowed to challenge them. As discussed below, each of these theories fail.

a. The Property Owners Have Standing.

The only argument offered in Section VI.D (pp. 21-22) of the Appellants' Brief why the Superior Court erred in granting partial summary judgment, is an allegation that the Teffts' lack standing to challenge the validity of the Easements. However, the Brief expressly acknowledges on page 21 that standing can be demonstrated by establishing a property right in the subject property. All four of the owners of the two real properties affected by the Easements – Mike Tefft, Angela Tefft, Dawn Allen and Jason Haenke – are Parties to this Appeal and the underlying action in Superior Court. CP 2-16.

Washington courts apply a two-part test to determine whether a party has standing: (1) whether the interest asserted is within the zone of

interests protected by the applicable statute, and (2) whether that interest has suffered an injury in fact. *See, e.g., Tacoma Auto Mall, Inc. v. Nissan North America, Inc.*, 169 Wn. App. 111, 119, 279 P.3d 487 (2012); *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 186, 157 P.3d 847 (2007); *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). In this case, the Declaratory Judgments Act broadly confers standing on any person whose rights are “*affected by*” a written instrument like an easement to seek the court’s judgment with regard to its validity. RCW 7.24.020.

All four “Property Owners” brought this action precisely because their properties have been negatively affected by the Easements – *as a whole*. CP 19-27, 132-138, 180-183, 223-226, 321-323, 325-327. All four Property Owners have suffered the loss of peace, privacy, security and the quiet use and enjoyment of their homes because of the Easements. CP 19-27, 132-138, 180-183, 223-226, 321-323, 325-327. All four Property Owners have submitted sworn Declarations asserting how they have been aggrieved by Mr. Barber’s and Ms. Curtis’ misuse of the Easements. CP 19-27, 132-138, 180-183, 223-226, 321-323, 325-327.

The Appellants’ Brief does not contest that Dawn Allen and Jason Haenke have standing. Instead, it singles out the Teffts and contests their standing to challenge portions of the Easements that cross Dawn Allen and

Jason Haenke's property (Parcel E). There can be no question that the Teffts' real property rights are affected by the Easements, or that they have suffered grave injury to their property rights from Mr. Barber's and Ms. Curtis' misuse of the Easements. *See* CP 23-26, 134-137, 322, 326. The argument on page 22 of the Appellants' Brief ignores the fact the Easements *as a whole* gravely impact the Teffts' property (Parcel B). Access across Dawn Allen's and Jason Haenke's property is what brings strangers, vehicles, noise, etc. onto Mike and Angela Tefft's property. The Tefft's Declarations describe in detail how their peace, privacy, security and the quiet use and enjoyment of their homes is harmed by the Mr. Barber's and Ms. Curtis' misuse of the Easements as a whole.

The grave injury the Teffts have suffered from Mr. Barber's and Ms. Curtis' misuse of the Easements, has included: disturbing the Property Owners' peace and quiet enjoyment of their homes with loud, frightening confrontations; shattering the Teffts' privacy by using loud, abusive language in front of family members, friends and colleagues; intimidating the Teffts from accessing their own property within the easement areas; making slurs against Michael Tefft in front of family and neighbors; and disturbing the Teffts' quiet enjoyment of their homes and yards by bringing unwanted noise, traffic and disturbances onto their property. CP 23-25, 134-137.

The injury has also included: jeopardizing the Teffts' security by renting the cottage out to other individuals, unknown to and unvetted by the Teffts; allowing tenants to invite strangers onto their property; threatening to cause greater disturbances and security risks by establishing an Airbnb or homeless shelter on their property; trespassing on the Teffts' land outside the easement areas; endangering the Teffts' dog by allowing tenants' pets to roam outside the easement areas and failing to clean up pet waste; damaging the Teffts' driveway lighting and lawn; threatening to remove the Teffts' security gate; demanding the Teffts remove their landscaping; disturbing the Teffts' privacy with mis-deliveries to the cottage and mis-billings for trash services for the cottage; costing the Teffts monetary damages by shirking their responsibility to pay for water utilities attributable to the cottage and Easement areas; etc. CP 23-25, 134-137.

It is the Easements – *as a whole* – that give rise to these injuries to the Teffts. Each of the Easements establish a single easement area that covers portions of both the Teffts property and Dawn Allen's and Jason Haenke's property. The injuries the Teffts suffered from the Easements on their property (Parcel B) literally arose from people coming across the easement areas on Dawn Allen's and Jason Haenke's property (Parcel E)

and onto their property (Parcel B). Thus, the Teffts' property is clearly *affected by* these Easements – as a whole.

It would controvert the purpose of the broad standing accorded by the Declaratory Judgments Act to parse out portions of the Easements on Parcel E in order to shield them from the Teffts' ability to address the source of the harm that affects their property. And, even if one were to do that, it would in no way diminish Dawn Allen's and Jason Haenke's standing to challenge the validity of those portions of the Easements that affect their property (Parcel E). Even if one were to assume *arguendo* that the Teffts only had standing to challenge the validity of the Easements on their property (Parcel B), Dawn Allen and Jason Haenke would still have standing to challenge the validity of the Easements on their property (Parcel E).

For all these reasons, Mr. Barber's and Ms. Curtis' standing argument fails.

b. There is No Valid Easement Right to be Revived.

In Sections VI.G and VI.H (pp. 30-32), and again in Section VI.J (pp. 34-35), the Appellants' Brief argues that even though Richard Barber could not be granted a valid Easement over the parcel he owned (Parcel E), the Property Owners are nonetheless bound by the easement areas on Parcel E by virtue of the notations of the Second Cottage Easement on

their deeds. The Brief mistakenly argues that Mr. Barber's interests in the Second Cottage Easement never merged with his ownership of Parcel E. The Brief also argues, that even if Mr. Barber's Easement interests did merge, and were thusly extinguished, the Easement interests were "revived" by the notation on subsequent owners' deeds.

Setting aside the fact that Mr. Barber lost Parcel E to foreclosure and bankruptcy, this argument misses the fact that there are two aspects of invalidity that occurred here. Not only could Mr. Barber not be granted a mere Easement to use property that he owned (Parcel E) – those interests merged under *Coast Storage*, 55 Wn.2d 848; *Perrin*, 63 Wn.2d 716 – but also, Ms. Curtis could not grant any Easement over property that she did not own. ***Ms. Curtis had no legal authority to grant the Second Cottage Easement over Parcel E.*** The notations on the Property Owners' deeds cannot transform Ms. Curtis' invalid grant of the Second Cottage Easement into a valid one. Ms. Curtis was the *sole* Grantor of the Second Cottage Easement and, having *no* ownership of Parcel E she had *no* legal authority to grant any rights to anyone over Parcel E. Mr. Barber's interest in the Second Cottage Easement cannot have been "revived," as there was never a valid grant of an Easement right to begin with.

The Appellants' Brief cites no authority for the proposition that an invalid grant of an Easement over someone else's property is legally

binding. The *Radovich* case cited in the Brief is not on point as it did not involve an invalid Easement grant. See *Radovich v. Nuzhat*, 104 Wn. App. 800, 16 P.3d 687 (Div. 1 2001). None of the cases cited in the Brief concern invalid Easements. The notations on the Property Owners' deeds only identify the existence of the Second Cottage Easement; they bestow no legality on the grant Ms. Curtis had no right make in the first place. Mr. Barber was not legally granted a right by the Second Cottage Easement, therefore there was no right to be revived by subsequent notations on deeds.

c. Property Owners Are Not Estopped from Challenging Invalid Easements.

In Section VI.K (pp. 35-36), the Appellants' Brief argues that the Property Owners should be estopped from questioning the validity of the Easements. This argument again ignores the broad recourse granted under the Declaratory Judgments Act to any person affected by an instrument like an easement to have the courts review its validity. Ch. 7.24 RCW. All four Property Owners have submitted sworn Declarations asserting how their properties have been negatively affected by the Easements. CP 19-27, 132-138, 180-183, 223-226, 321-323, 325-327. Moreover, the equities here cut the other way. Mr. Barber and Ms. Curtis cannot credibly claim they held any reasonable belief they would be permitted to

remain on the Easement areas, when they themselves recount in their Declarations how often the Property Owners insisted they leave. CP 372.

The Teffts have always maintained that Ms. Curtis and Mr. Barber had no right to be on their property, and Ms. Curtis and Mr. Barber have long been aware that they had no right to the Easements. In a letter to the Teffts dated July 21, 2016, Ms. Curtis and Mr. Barber wrote “we know you [the Teffts] have the right to take it and the lot 2 owners [now Dawn Allen and Jason Haenke] to use it.” CP 128. In that same letter, Mr. Barber and Ms. Curtis promised to vacate the easement areas within 19 months (after Ms. Curtis qualified for social security). CP 128. When the time came, however, they refused to leave, instead claiming that they “owned” the cottage. CP 22-23.

If estoppel applies here, it precludes Ms. Curtis and Mr. Barber from taking a different position with regard to the Easements than they asserted in their letter of July 21, 2016. Any injustice here is of Mr. Barber’s and Ms. Curtis’ own making.

d. There is No Right to an Easement by Necessity.

In Section VI.L (pp. 36-37), the Appellants’ Brief appears to ask the Court of Appeals to imply an easement by necessity over Parcel. E. Mr. Barber and Ms. Curtis raised this issue for the first time in their Motion for Reconsideration. They have not made the required showings

for an easement by necessity or even brought a condemnation claim before the Superior Court.

The Appellants' Brief attempts to jump over those steps here in the Court of Appeals. The Brief asserts this issue as one "pertaining to an assignment of error" (Section IV.9, p. 2) regarding the denial of their Motion for Reconsideration. The Brief then argues that having found that Ms. Curtis and Mr. Barber had no right to grant or receive valid Easements over Parcel E in the first place, the Court erred by not simply bestowing upon them the right they never had to begin with. The circularity of this argument astounds.

Easements by necessity are designed to prevent landlocked property from be rendered unusable. *Visser v. Craig*, 139 Wn. App. 152, 159 P.3d 453 (2007). There is no danger of the easement areas becoming useless here, as the rightful Property Owners have full access to and use of their underlying properties (Parcels B and E). *See* CP 47, 60. Easements by necessity require a showing that there was unity of title and necessity for easement access at the time of severance. *Leinweber v. Gallagher*, 2 Wn.2d 388, 98 P.2d 311 (1940); *Visser*, 139 Wn. App. at 159. Mr. Barber and Ms. Curtis have made no showing of necessity at the time Mr. Barber sold Parcel B to Ms. Curtis. Nor can they – as, at that time, Mr. Barber

had unfettered access across Parcel E to the cottage and easement areas on Parcel B by virtue of his ownership of Parcel E. *See* CP 60.

In fact, when the Easements were created Ms. Curtis could have granted Mr. Barber access to the cottage across her own property (Parcel B), which has plenty of frontage along SR302. *See* CP 60. She chose not to do so. Instead, she purported to provide access across Mr. Barber's property (Parcel E), which she had no legal authority to do. *See* CP 60.

Further, there is no acknowledgement by Mr. Barber and Ms. Curtis of the process or just compensation that is required by Washington law for the condemnation of a private way of necessity across another's property. Ch. 8.24 RCW. If Mr. Barber and Ms. Curtis had brought this issue properly before the Superior Court, if they had adjudicated the pertinent facts, if they had demonstrated that they had a valid right, if they had made the requisite showing for an easement by necessity, and if they had followed the process laid out in Ch. 8.24 RCW, they would have had to *pay* for the use of Dawn Allen's and Jason Haenke's property as set forth in the statute.

Mr. Barber and Ms. Curtis have done none of these things. The Superior Court has adjudicated none of the facts or issues to establish an easement by necessity. Mr. Barber and Ms. Curtis are not "*entitled*" to an easement by necessity as they claim.

In summary, all of Mr. Barber's and Ms. Curtis' defenses and theories why the Property Owners should be bound by invalid Easements or should not be allowed to challenge invalid Easements fail. None of the defenses or theories raised in the Appellants' Brief refute the Superior Court's ruling on the over-arching issue, that the Easements are invalid. Therefore, the Order Granting Partial Summary Judgment to the Property Owners must be upheld.

C. Appellants' Brief Shows No Abuse of Discretion in Superior Court's Certification of Invalidity Claim, Retention of Jurisdiction or Entry of Required Findings.

As discussed below, the Superior Court properly exercised its discretion in certifying its Order Granting Partial Summary Judgment on the over-arching invalidity claim, retaining jurisdiction over the other undecided issues and claims, and supporting its certification with required findings of fact.

1. The Superior Court Properly Exercised Its Discretion In Certifying The Over-Arching Claim of Invalidity.

In Section VI.B (pp. 18-20), the Appellants' Brief argues that the Superior Court erred in limiting certification to the issues that were decided in its Order Granting Partial Summary Judgment. As discussed below, the Superior Court was well within its discretion to certify the

over-arching issue of invalidity and to retain jurisdiction over the remaining issues.

CR 54(b) provides authority for the trial court to direct the entry of a final judgment as to fewer than all claims or parties “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.” CR 54(b) applies in situations where it would be unjust to delay entry of a judgment on a distinct claim until the entire case has been finally adjudicated. *Schiffman v. Hanson Excavating Co.*, 82 Wn.2d 681, 513 P.2d 29 (1973). Here, the Superior Court was well within its discretion to enter a final judgment with regard to the invalidity claim, as there was no just reason to delay resolution of an over-arching issue that could moot the remaining issues in the case.

The Appellants’ Brief (p. 19) makes much of the reference in CR 54(b) to “claims” rather than “issues.” However, their brief fails to analyze the two terms or apply them to the action taken by the Superior Court. Washington courts analyze the extent to which issues turn on distinct facts in order to differentiate between claims. *See Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn.App. 665, 692, 82 P.3d 1199, (2004); *Nelbro Packing Co.*, 101 Wn. App. at 525. Here, the over-arching issue of invalidity turned on a

discrete set of uncontested facts concerning the ownership authority of the Grantor(s) and the Grantee. The Court did not have to adjudicate other contested facts concerning the intentions of the Parties, their actions, their conflicting statements, their rights and responsibilities, etc. The Superior Court was well within its discretion to certify the invalidity claim, which turned on separate facts than other issues and claims in the case.

Also, contrary to the Appellants' Brief, the Court did not just resolve the issue of invalidity, it also decided the related issues of whether the invalid Easements could be terminated and whether Ms. Curtis and Mr. Barber had to vacate the invalid easement areas. CP 441-442. In other words, the Superior Court resolved that whole invalidity claim.

The Report of Proceedings from the August 16, 2019 Hearing on the Motion for Entry of Final Judgment shows that the Superior Court considered the relationship between the various adjudicated and unadjudicated issues and claims, and the potential of the over-arching invalidity claim to moot other unadjudicated issues thus reducing and simplifying the issues remaining to be resolved (RP Aug. 16, 2019 at 9-10). *Schiffman*, 82 Wn.2d 681; *accord Gull Indus.*, 181 Wn. App. at 480; *Hulbert v. Port of Everett*, 159 Wn.App. 389, 406, 245 P.3d 779, (2011); *Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766, 772, 657 P.2d 804 (1983).

At the Hearing, the Appellants' Counsel argued to expand the issues subject to interlocutory appellate review. RP Aug. 16, 2019 at 9-10. However, the Court explained that only the limited set of issues actually decided in its Order – that the Easements are invalid, and, consequently, may be terminated by the Property Owners and must be vacated by the Defendants – were ripe for interlocutory appellate review. RP Aug. 16, 2019 at 9-10. The Court explained that other issues regarding what type of Easements these are and what rights they convey (including whether they are appurtenant or in gross, whether they are perpetual, whether they run with the land, whether they merged or were revived, etc.), “were not ripe to be ruled on because . . . [the invalidity of the Easements] was an *over-arching issue* that could decide everything.” RP Aug. 16, 2019 at 9-10.

The Court went on to explain, that “the Court’s analysis and attention was not fully posed to those [other issues],” because of the existence of the “over-arching issue”³ of invalidity. RP Aug. 16, 2019 at 9-10. The Court explained that *the “over-arching issue” concerning the invalidity of Easements, “if upheld, would bring finality to the case.”* Accordingly, the Court did not reach a decision with regard to any of the other issues, which “may depend on factual matters that have not yet been

³ *Id.*

fully adjudicated and, therefore, would not be proper . . . for interlocutory appeal.” RP Aug. 16, 2019 at 9-10.

It is for the Superior Court to adjudicate such factual questions that remain relevant following this Appeal, not the Court of Appeals as the Appellants’ Brief invites. Thus, if the Court of Appeals were to decide that additional issues need to be reviewed, the case should be remanded back the Superior Court for further adjudication.

2. The Superior Court Properly Exercised its Discretion in Retaining Jurisdiction Over the Other Undecided Issues and Claims.

The Superior Court also was well within its discretion to retain jurisdiction over the other unadjudicated issues, pending the outcome of this interlocutory appeal on the over-arching invalidity claim. CR 54(b). Despite the Superior Court’s express direction with regard to the issues it was certifying and the issues over which it was retaining jurisdiction, the Appellants’ Brief improperly addresses issues that have not yet been decided by the Superior Court and were not certified for interlocutory review. Such arguments are improper and must be rejected.

In particular, in Section VI.E (pp. 22-29), the Appellants’ Brief seeks to address the issue of whether the Easements are easements in gross or easements appurtenant. This is an issue over which the Superior Court expressly retained jurisdiction. RP Aug. 16, 2019 at 9-10; CP 562-563,

565. What type of Easements they are is irrelevant, if the Easements are invalid. Therefore, the Court did not decide or certify this issue for review. On the contrary, the Court expressly retained jurisdiction over this issue in the event that its ruling on invalidity is overturned. RP Aug. 16, 2019 at 9-10; CP 562-563, 565. The Court was well within its discretion to do so, under CR 54(b). The Property Owners object to this briefing on an easement in gross (Section VI.E (pp. 22-29)) as it is outside the scope of this interlocutory appeal.⁴ RP Aug. 16, 2019 at 9-10.

As discussed above, at Section VI.L (pp. 36-37), the Appellants' Brief also seeks to address the issue of an easement by necessity. This issue has not been decided by the Superior Court and is outside the scope of its certification for this interlocutory appeal. RP Aug. 16, 2019 at 9-10; CP 562-563, 565. Therefore, the Property Owners object to the briefing in Section VI.l (pp. 36-37) as well.

⁴ We note that the Appellants' Brief at p. 28 mischaracterizes the Property Owners' argument with regard to easements in gross. CP 305. The Property Owner's Motion for Partial Summary Judgment argued that under Washington case law, there is a "very strong presumption" that an easement is appurtenant rather than in gross. *Olson v. Trippel*, 77 Wn. App. 545, 554-555, 893 P.2d 634 (1995) (citing *Pioneer Sand & Gravel Co. v. Seattle Const. & Dry Dock Co.*, 102 Wn. 608, 618, 173 P. 508 (1918); *Green v. Lupo*, 32 Wn. App. 318, 323, 647 P.2d 51 (1982); *Roggow v. Haggerty*, 27 Wn. App. 908, 912, 621 P.2d 195 (1980); *Winsten v. Pritchard*, 23 Wn. App. 428, 430, 597 P.2d 415 (1979); *Kemery v. Mylroie*, 8 Wn. App. 344, 346, 506 P.2d 319 (1973); see *Kirk v. Tomulty*, 66 Wn. App. 231, 239, 831 P.2d 792 (1992). CP 305. Easements in gross are not favored under Washington law. *Id.*; *Pioneer Sand & Gravel*, 102 Wn. at 618; *Green*, 32 Wn. App. at 323; *Roggow*, 27 Wn. App. at 912, *Winsten*, 23 Wn. App. at 430; *Kemery*, 8 Wn. App. at 346. CP 305.

On pages 4-5, the Appellants' Brief brings in contested facts with regard to Mr. Barber's and Ms. Curtis' costs for improving the cottage in 2007. These facts have not been fully adjudicated, are irrelevant to the invalidity claim, and have no place in this Appeal. RP Aug. 16, 2019 at 9-10. The Superior Court has made no determination: whether the costs were \$29,000, as Ms. Curtis and Mr. Barber wrote to the Teffts on July 21, 2016 (CP 128), or the \$49,400 they declare now; whether the costs that were incurred when Mr. Barber and Ms. Curtis owned the underlying property, were accounted for when their properties went through foreclosure, forced sale in lieu of foreclosure and bankruptcy processes, and subsequent sales; whether the costs were offset by rents received while Br. Barber and Ms. Curtis occupied the invalid Easements; whether the costs should be offset by the damages, utility fees, maintenance fees and property taxes paid by the Property Owners for the invalid easement areas; etc. The Superior Court was well within its discretion *not* to reach these questions as they may be mooted by the fact that Mr. Barber and Ms. Curtis had no right to the invalid Easements in the first place.

3. The Superior Court Properly Exercised its Discretion in Entering Findings of Fact to Support its Certification.

In Section VI.C (pp. 20-21)), the Appellants' Brief argues that the Superior Court erred in adopting Findings of Fact and Conclusions of Law

("Findings"). As discussed below, the Superior Court also was well within its discretion to adopt Findings in support of its certification of the over-arching invalidity claim and its retention of jurisdiction over the other undecided issues and claims. CR54(b) *requires* the Superior Court to enter such findings when certifying a final judgment for interlocutory review.

CR54(b) provides that courts must enter written findings that there is no just reason for delay when certifying judgments for interlocutory review. Accordingly, courts weigh: "(1) the relationship between the adjudicated and the unadjudicated claims, (2) whether questions which would be reviewed on appeal are still before the trial court for determination in the unadjudicated portion of the case, (3) whether it is likely that the need for review may be mooted by future developments in the trial court, (4) whether an immediate appeal will delay the trial of the unadjudicated matters without gaining any offsetting advantage in terms of the simplification and facilitation of that trial, and (5) the practical effects of allowing an immediate appeal." *Schiffman*, 82 Wn.2d 681; *Gull Indus.*, 181 Wn. App. at 480; *Hulbert*, 159 Wn. App. at 406; *Lindsay Credit Corp.*, 33 Wn. App. at 772 (1983).

The Superior Court requested and considered proposed findings of fact and conclusions of law from Counsel for all Parties. RP Aug. 16,

2019 at 3. The Court found there was no just reason to delay appellate review of the issues decided in its Order; and, that certification did not prejudice the remaining claims, but rather helped to narrow the issues remaining for the Court to resolve. RP Aug. 19. 2019 at 9-10. Accordingly, the Court adopted Findings confirming that there was no just reason to delay review of its Order, as required by CR54(b). CP 542-550, 564-566.

The Superior Court was well within its discretion to adopt the Findings of Fact and Conclusions of Law.

VI. CONCLUSION

In conclusion, the Appellants' Brief fails to refute the *one and only* claim that the Superior Court decided and certified for interlocutory review – the over-arching claim concerning the invalidity of the Easements. The Court of Appeals should uphold the Superior Court Order Granting Partial Summary Judgment to the Property Owners on the invalidity claim.

The Appellants' Brief shows no abuse of discretion by the Superior Court in certifying the over-arching invalidity claim for interlocutory review, retaining jurisdiction over the other unadjudicated issues and adopting the findings required by CR 54(b). Therefore, the Court of Appeals should uphold the Superior Court's certification.

The Appeal must be rejected.

RESPECTFULLY SUBMITTED this 16th day of March, 2020.

LAW OFFICES OF CYNTHIA ANNE
KENNEDY, PLLC

A handwritten signature in black ink, appearing to read 'Cynthia Kennedy', written in a cursive style.

By
Cynthia Kennedy, WSBA #28212
Attorneys for Respondents, Michael
Tefft, Angela Tefft, Dawn Allen
and Jason Haenke

VII. APPENDIX

A. RP Aug. 16, 2019.

FILED
Court of Appeals
Division II
State of Washington
12/12/2019 3:38 PM

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IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON

MICHAEL TEFFT & ANGELA TEFFT,)
Husband and Wife, and)
Washington Residents, and)
DAWN ALLEN & JASON HAENKE,)
Washington Residents,)
Plaintiffs,)

vs.

No. 18-2-13441-8
COA No. 54038-0-II

RICHARD C. BARBER & DEBRA L.)
CURTIS, Washington Residents,)
Respondents.)

VERBATIM REPORT OF PROCEEDINGS

August 16, 2019
Pierce County Courthouse
Tacoma, Washington
before the

HONORABLE KATHRYN J. NELSON

Carla J. Higgins, CCR
Official Court Reporter
930 Tacoma Avenue South
334 County-City Building
Department 13
Tacoma, Washington 98402

A P P E A R A N C E S

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For the Plaintiffs: MS. CYNTHIA ANNE KENNEDY
Attorney at Law
PO Box 1477
Gig Harbor, Washington 98335

For the Respondents: MR. CHRISTOPHER M. CONSTANTINE
Attorney at Law
PO Box 7125
Tacoma, Washington 98417

1 BE IT REMEMBERED that on the 16th day
 2 of August, 2019, the above-mentioned cause came on duly for
 3 hearing before the HONORABLE KATHRYN J. NELSON, Superior
 4 Court Judge in and for the County of Pierce, State of
 5 Washington; the following proceedings were had, to-wit:

6 * * * * *

7 AUGUST 16, 2019

8 MOTION

9 THE COURT: Cause No. 18-2-13441-8.

10 We were just working on the form of the 54(b) appeal
 11 order.

12 MR. CONSTANTINE: Good morning.

13 That's correct, Your Honor.

14 We have both Findings and Conclusions and the order
 15 itself.

16 THE COURT: And are there differences that --

17 MR. CONSTANTINE: Yes.

18 THE COURT: -- I need to resolve?

19 MR. CONSTANTINE: Yes, Your Honor.

20 THE COURT: Okay.

21 MR. CONSTANTINE: For the record, I'm Chris
 22 Constantine, and this is Tefft versus Barber, Cause No.
 23 18-2-13441-8.

24 The Plaintiffs do not oppose entry of the order
 25 finality, rather they advocate limitations placed on the

1 issues that go -- that are mentioned in the order. And we
2 take issue with that for a number of reasons.

3 They want to restrict the issues going to the Court
4 of Appeals to two issues that the Court signed off on, on
5 the Order for Summary Judgment.

6 We maintain that there's no language in Rule 54(b)
7 that authorizes the Court to make such limitations. If you
8 look at 54(b), the word "issues" isn't there.

9 Similarly, in the Schiffman case, which they cite,
10 there's no discussion of the authority of a court to limit
11 issues on a Rule 54(b) Motion. So their authority isn't
12 there.

13 There are a number of other additional problems with
14 the limitations that they propose. The order gets reviewed
15 by the Court of Appeals. They make their own independent
16 determination of finality. So that if the Court limits
17 issues going to the Court of Appeals, the Court of Appeals
18 may take a second view of that.

19 Secondly, it will substantially prejudice the
20 Defendants' appeal. We put in our motion, Opposition to
21 their Motion for Summary Judgment, five issues. We spent
22 five pages arguing about whether or not the Cottage
23 Easement was an easement in gross and not an easement of
24 pertinent. Their order would restrict us from raising that
25 issue.

1 In effect, they are getting a veto on the content of
2 our appeal to the Court of Appeals. And there's just no
3 authority for that and it's just not fair.

4 What should happen is the Court sign the Order for
5 Summary Judgment. And as we go to the Court of Appeals, we
6 get to present to the Court of Appeals all of the issues
7 that we raised in our opposition. They get to raise all of
8 the issues that they raise, even the ones that the Court
9 didn't rule on here. Because the Court will allow the
10 Plaintiffs to raise those issues in support of this Court's
11 order in the Court of Appeals.

12 I don't understand why they want the limitation. It
13 will hurt their clients, rather than help them.

14 So for all of those reasons, we would ask the Court
15 to refrain from restricting its order limiting the issues
16 going to the Court of Appeals.

17 And as for their proposed Findings, we presented
18 proposed Findings. I think it's one page of Findings that
19 address, specifically, the elements that have to be in an
20 order under Rule 54(b).

21 In contrast, they have got eight pages of Findings
22 that address a whole variety of things that have nothing to
23 do with 54(b). And, in essence, what they are doing is
24 attempting to write Findings to support the Court's Order
25 on Summary Judgment. Which is a useless exercise because

1 on appeal, the Court of Appeals will not consider Findings
2 in support of an Order for Summary Judgment.

3 Recently, Division II in Gates vs. Port of Kalama,
4 152 Wn. App 82 at 86, footnote 6, had this to say about
5 Findings on an Order of Summary Judgment: It said, "The
6 trial court made Findings of Fact on the Order Denying
7 Summary Judgment. But Findings of Fact entered in Summary
8 Judgment proceedings are merely superfluous and of no
9 prejudice to the Defendants."

10 So it would do them no good to take eight pages of
11 Findings and attach them to this order going to the Court
12 of Appeals. The Court of Appeals won't consider them
13 anyway.

14 So we would ask the Court to sign the order that we
15 have presented and the one-page Findings that we have also
16 presented.

17 THE COURT: Thank you.

18 Response?

19 MS. KENNEDY: Good morning, Your Honor. I'm Cynthia
20 Kennedy, representing the Plaintiffs.

21 The Plaintiffs do not oppose certification of the
22 order granting partial Summary Judgment in their favor. We
23 agree that there may be efficiencies to be achieved in
24 terms of time and resources for all of the parties, as well
25 as for the Court by certification of the Court's order for

1 interlocutory review. This could greatly narrow the issues
2 moving forward.

3 However, we understand that the order that was
4 issued is not a final judgment in this case. But rather
5 certification of the order will make the issues decided
6 therein final for purposes of appeal, and that the other
7 issues will remain under this Court's jurisdiction pending
8 the outcome of the appeal.

9 The Defendants' motion over reaches by attempting to
10 sweep in issues that have not been decided by this Court.
11 Particularly, Plaintiffs' issue concerning whether the
12 easements are pertinent or in gross is irrelevant to the
13 question that was decided, which is that the easements are
14 invalid.

15 The Defendants' proposed Findings mischaracterize
16 the Plaintiffs' remaining issues, which include six
17 alternative grounds for terminating the easements.

18 Should the Court of Appeals uphold the order, this
19 Court may not have to reach those issues. But should the
20 Court of Appeals take a different view, the Plaintiffs
21 reserve the right to adjudicate those issues here in
22 Superior Court.

23 The Defendants' proposed order is vague with regard
24 to which issues would go up on appeal and which would
25 remain under this Court's jurisdiction to resolve, pending

1 the outcome of that appeal.

2 We respectfully request that the Court clarify, as
3 this litigation progresses, to avoid confusion.

4 Accordingly, the Plaintiffs respectfully request
5 that the Court's certification confirm the issues that will
6 be subject to the appeal and those that will remain under
7 this Court's jurisdiction.

8 And toward that end, we have submitted proposed
9 Findings of Facts and Conclusions of Law, including
10 Findings and Conclusions with regard to Rule 54(b), and
11 have prepared a proposed order for the Court's
12 consideration.

13 Thank you, Your Honor.

14 THE COURT: Yeah. I will hear a reply, if any.

15 MR. CONSTANTINE: There isn't any authority in 54(b)
16 for the Court to limit the issues. It doesn't -- it
17 doesn't address that, neither in 54(b) nor in RAP 2.2(d).
18 So there simply isn't any authority to do this.

19 But also, let's consider what the Court of Appeals
20 does with an order granting Summary Judgment. They engage
21 in a de novo review. To -- so to severely restrict the
22 issues going to the Court of Appeals will inhibit the
23 Court's ability to conduct a de novo review. They will do
24 it on such a truncated record that it won't look anything
25 like it did down here.

1 I don't think that's a wise approach. I think the
2 Court should simply sign the order that we're asking for.
3 We get to take the issues that we raised in front of the
4 Court on Summary Judgment, present them to the Court of
5 Appeals. They get to take their issues, even the ones that
6 this Court didn't rule on, and advocate those to support
7 the Court's order.

8 That's what I call a fair fight and that's what I
9 ask the Court to do.

10 THE COURT: Okay. Well, it's this Court's
11 understanding of 54(b) that it's an interlocutory appeal of
12 a judgment of the Court that, if upheld, would bring
13 finality to the case. And, therefore, it shouldn't be
14 delayed until an entire case, or all the issues in the
15 case, have been adjudicated.

16 So I support the order and the Findings and
17 Conclusions addressing the issue that I did decide.

18 The other issues were not decided and may not be
19 susceptible to being decided upon Summary Judgment because
20 they may depend on factual matters that have not yet been
21 fully adjudicated and therefore would not be proper, I
22 think, for an interlocutory appeal.

23 MR. CONSTANTINE: What do we do with the five issues
24 that we raised in front of this Court on Summary Judgment
25 that the Court -- we addressed them, but the Court did not

1 rule on them.

2 THE COURT: No. I did not feel they were ripe to be
3 ruled on because I felt there was an over-arching issue
4 that would decide everything, and so the Court's attention
5 and analysis was not fully posed to those.

6 MR. CONSTANTINE: Well, why --

7 THE COURT: So if I had decided all of those issues,
8 they would have gone up as well, but I didn't.

9 MR. CONSTANTINE: Why should we be prejudiced in
10 going to the --

11 THE COURT: You're not prejudiced. You have your
12 rights and they have their rights to an adjudication at my
13 level, at the Superior Court level.

14 I'm going to sign that order.

15 Thank you.

16 MR. CONSTANTINE: There were also Findings, Your
17 Honor; are you going to sign the Findings?

18 THE COURT: Yep.

19 MS. KENNEDY: Thank you, Your Honor.

20 THE COURT: These should be signed by you before
21 they are entered, indicating that you were present at the
22 time of the ruling of the Court.

23 MR. CONSTANTINE: Okay.

24 THE COURT: Your Brief is here. We don't want your
25 Brief, I don't think.

1 MS. KENNEDY: It's referenced in the order as being
2 the attached proposed Findings and Conclusions.

3 THE COURT: Oh, okay. There we go.

4 (Adjourned.)

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SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF PIERCE

DEPARTMENT NO. 13

HON. KATHRYN J. NELSON, JUDGE

MICHAEL TEFFT & ANGELA TEFFT,)
Husband and Wife, and)
Washington Residents, and)
DAWN ALLEN & JASON HAENKE,)
Washington Residents,)
Plaintiffs,)

vs.

No. 18-2-13441-8
COA No. 54038-0-II

RICHARD C. BARBER & DEBRA L.)
CURTIS, Washington Residents,)
Respondents.)

STATE OF WASHINGTON)
) ss
COUNTY OF PIERCE)

I, Carla J. Higgins, Official Reporter of the
Superior Court of the State of Washington, County of
Pierce, do hereby certify that the foregoing comprises a
true and correct transcript of the proceedings held in the
above-entitled matter.

Dated this day of 2019.

Carla J. Higgins, CSR
Official Reporter

PIERCE COUNTY SUPERIOR COURT

December 12, 2019 - 3:38 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54038-0
Appellate Court Case Title: Michael Tefft, et al, Respondents v. Richard Barber, et al, Appellants
Superior Court Case Number: 18-2-13441-8

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Report of Proceedings - Volume 1, Pages 1 to 12, Hearing Date(s): 08/16/2019 *Report of Proceedings*
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RICHARD C. BARBER,
and DEBRA L. CURTIS,
Washington Residents,

Appellants.

v.

MICHAEL TEFFT and
ANGELA TEFFT, Husband
and Wife, and Washington
Residents,

and

DAWN ALLEN and
JASON HAENKE,
Washington Residents,

Respondents.

No. 54038-0-II

DECLARATION
OF SERVICE

I, Robert Wells, declare under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of twenty-one years old, not a party to the above-captioned matter and competent to be a witness therein.

I certify that on the 16th day of March, 2020, I electronically filed with the Court of Appeals, Division II, the following document in the above-captioned matter:

- BRIEF OF RESPONDENTS, WITH APPENDICES

and caused service of the above-referenced document to be effected electronically on Counsel for the Appellants:

Mr. Christopher M. Constantine
Of Counsel, Inc. P.S.
P.O. Box 7125
Tacoma, WA 98417-0125
*Attorney for Appellants Richard C. Barber
and Debra L. Curtis*

EXECUTED in Gig Harbor, WA on this 16^h day of March, 2020.



Robert Wells

LAW OFFICES OF CYNTHIA ANNE KENNEDY PLLC

March 16, 2020 - 2:49 PM

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LAW OFFICES OF CYNTHIA ANNE KENNEDY PLLC

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