

70454-1

70454-1

NO. 70454-1-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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R. LANCE HADDON

Appellant,

vs.

JOOST R. CLAEYS

Respondent.

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REPLY BRIEF OF APPELLANT'S

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I. **Introduction.**

As stated below, the Respondents Brief (Hereafter "Brief") fails to respond to the actual issue on appeal or to raise any credible issues challenging it.

II. **Correction of Respondents Introduction.**

The Respondents' Introduction sets the premises for their argument. There the Respondents state:

The trial court ruled that the easement became valid and binding once the prior owner sold Appellants their lot and, thereby, severed her common ownership of both the dominant and servient estates. Brief p. 1

This is not true and it demonstrates the Respondent's misunderstanding of the courts actual ruling and the law.

The court actually ruled:

**Although the easement was not valid when recorded in August, 2006 because Ms. Church owned both Lot 1 and Lot 3, the easement became valid when Ms. Church conveyed Lot 1 to the Plaintiff's "subject to" the easement. This act constituted a valid reservation of rights in the easement to Ms. Church, who owned Lot 3.** [Emphasis added] CP 210

The court's ruling was that the mere reference to the Easement in the "Subject To" attachment to the Deed was a "valid reservation" of the Easement. This was an error of law but was very different from the Respondent's understanding of the courts

action. The court did not rule that the separation caused the easement to become valid and had it done so, it would have been a clear, but different, error of law:

“When an easement has been extinguished by unity, the easement does not come into existence again merely by severance of the united estates....”<sup>1</sup>

Although the rule is the same, the Easement here was not extinguished by unity of title; **it was void from the outset** as “one cannot have an easement in his own property”.<sup>2</sup> It was *void ab initio*. As will be discussed *infra*, this is a very important distinction that the Respondent also fails to understand. Although there are similarities between an easement extinguished by merger and a void easement, they are not the same. A merged easement was initially valid. The easement here, being granted by the owner of one lot to herself across another of her lots for her benefit was not valid when made and that “Easement” could never be made valid. This was the essence of the court’s ruling:

**[T]he easement was not valid when recorded in August 2006 because Ms. Church owned both Lot 1 and Lot 3 ...”**

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<sup>1</sup> Radovich v. Nuzhat, 104 Wn.App. 800, 805, 16 P.3d 687 (2001) Citing Restatement of Property § 497, comment h.

<sup>2</sup> Coast Storage Co. v. Schwartz, 55 Wn.2d 848, 853, 351 P.2d 520 (1960).

For the Respondents to have an easement across the Appellants' lot 1, a new easement would have to be created.<sup>3</sup> The trial court ruled that that occurred when the easement was listed along with the other 11 "subject to's". That, as was shown in Appellants' Opening Brief and here, that was error.

### III. Correction of Respondents Statement of the Case.

Respondent claims that Ms. Church, the common grantor of the parties here, actually subdivided the original property into the 4 ultimate lots. Brief p.2. That is not true. The short plat was completed by Marilyn Anderson, in 1981, long before Ms. Church acquired her lots. CP 84-86.

Respondents' also claims that "Lots 3 and 4 [owned by the Respondents] are landlocked; neither has access to any street without crossing Lot 1 or Lot 2". Brief p.2. This is also not true. At the time of the creation of the Short Plat, a "Tract X" was created 30 feet in width running from N.E. 24 St. between Lots 1 and 2 and into Lots 3 and 4 which provided and provides legal access to Lots 3 and 4. "Tract X" is legally described in the Short Plat at CP 85

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<sup>3</sup> "When an easement has been extinguished by unity, the easement does not come into existence again merely by severance of the united estates.... Upon severance, a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise. If it does arise, however, it does so because it was newly created at the time of the severance." [Emphasis added] Radovich, *supra* at 805.

and is shown in the drawing at top of CP 86. The legal access to Lots 3 and 4 crosses Langlois Creek which presents issues but not significantly more or different than those the Respondents' would face in attempting to cross the Appellants' drainfield. See FF 23, 24 and 25. CP 238-9. The Court specifically acknowledged the difficulties of crossing the Appellants' septic drainfield:

The Court makes no findings as to the requirements of all the governmental agencies that would be involved in any process that would allow the placing of a road through the Easement area or their requirements except to note that the requirements appear to be substantial. FF 26, CP 239.

Respondents' state that "Attachment 'A'" included a description of the recorded access easement in favor of Lots 3 and 4 ..." Brief p.5, citing CP 238. The Easement is not described and CP 238, the Findings of Fact, provides no support for this statement. Attachment "A" identifies the Easement along with the other 11 "Subject To's" in the attachment but the Easement is not described. CP 100.<sup>4</sup> Respondents' also claim Church "retained

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<sup>4</sup> The difference is significant. Compare the identification of the Easement in Attachment "A" with the description of the easement in *Radovich v. Nuzhat*, 104 Wn App 800, 806, 16 P3d 687 (2001) where the court found an easement was described and recreated. "Each deed clearly stated it conveyed an easement, stated the purpose and scope of the easement and gave the legal description of the servient estate. Appellants concede that the language in the deeds would be sufficient to create an easement if no merger had occurred." No such language appears in the Attachment "A" identification of the Easement. The standards for recreating an easement are the same as those for creating the easement and the mere identification at Attachment "A" is not sufficient. *Radovich* at

[the Easement] as her separate property.” again citing CP 238, the Findings of Fact. This is not correct and neither CP 238 nor any other Finding supports that claim.

Respondents attempt to claim that they acted reasonably and with necessity in removing several hundred feet of Appellants fence along the far west side of the easement. CP 240 is cited as support for this claim. There is no support for the claimed reasonableness of Respondents action in removing the fence at CP 240 or anywhere else in the record. In fact, the Court found otherwise and awarded Haddons Judgment against the Respondents for the \$3,502.98 costs to rebuild the fence unreasonably removed. CL 10, CP 240 and Judgment, CP 244.

**IV. Reply to Respondents stated issues.**

**A. Reply to Respondents Issue 1.**

The Respondents argue:

The decision of the trial court should be upheld because under Washington law a valid express easement across one parcel can be created in anticipation of sale, as was done here on August 21, 2006, while the same person still owned the burdened (servient) parcel and benefited the (dominate) parcel. Brief 11.

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806. Compare the substantial language of the *Radovich* deed at 803 with the Attachment “A” identification of the easement here. CP 99-100, 173-174.

Respondents' state the above issue but Respondent's provide no legal support or argument to support the claim. The only reference is the totally unsupported statement:

"While Dorothy Church did retain ownership of all three lots when she drafted and recorded the easement across Lot 1, Washington law does not prohibit creation of an easement under such circumstances in anticipation of sale of the property." [Emphasis in quote] Brief p.11.

Although the claim is not supported, an easement may be crested in anticipation of sale **if**, and only if, it is properly done but not as Church attempted here. An easement can be created as it was in the original short plat of the property when "Tract X" was created between Lots 1 and 2 allowing full legal access to Lots 3 and 4 and preventing them from being landlocked. See short plat CP 86. The legal access provided in the short plat to Lots 3 and 4 was presumably required to prevent the lots from being landlocked. This was adequate access to allow the short plat to be approved and was for the next 25 years following short plat approval. CP 84-87. A grantor may also reserve an easement over the property being conveyed by **properly** reserving the easement in the deed of conveyance. **Church did neither.** The failure to make a proper

reservation is the essence of Appellants' Opening Brief and is discussed at length at pages 14 – 25 there.

Although not referenced in the issue statement, the balance of the Issue I discussion is an argument that the easement is valid because of exceptions to the merger rule. The problem with that line of argument is that the trial court found that **"the easement was not valid when recorded in August 2006 because Ms. Church owned both Lot 1 and Lot 3"** because one cannot create an easement for themselves over their own property and not because of merger of the easement. CP 210. Although the Respondents' initially appealed that issue, they withdrew their appeal and that matter is not at issue here. The issue on appeal was simply stated at page 1 of Appellants' Opening Brief:

Did the trial court error in ruling that a void easement was "Reserved" as a result of being included among the 12 encumbrances listed in the Exhibit "A" "Subject To's" attached to the Statutory Warranty Deed?

The other problem with Respondents position is that the court was correct when it ruled **"the easement was not valid when recorded in August 2006 because Ms. Church owned both Lot 1 and Lot 3."** CP 210. **It was void when it when it was created.** It did not become a nullity as a result of a merger.

The general rule is that to **create an easement** appurtenant there must be two estates in existence at the time of creation of the alleged easement: a dominant tenement and a servient tenement. [Citations omitted] [Emphasis added]<sup>5</sup>

A merger occurs when there is a valid easement existing and the owner of the dominate estate and the servient estate come into common ownership. Here, if Church had owned Lot 1 but not lots 3 and 4, she could have granted an easement across Lot 1 to the owners of Lots 3 and 4. That would have been a valid easement because it satisfied the requirement that the servient and dominate estates be in separate ownership.<sup>6</sup> If Church then acquired Lots 3 and 4, a merger of the titles would occur and extinguish the easement, as one does not need an easement over their own property.<sup>7</sup>

Respondents criticized Appellant for not dealing with the exceptions to the merger doctrine citing *Radovich v. Nuzhat*, 104 Wn App 800, 16 P 3d 687 (2001). The reason the exceptions were not discussed is because the case at bar is not a merger case and

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<sup>5</sup> Roggow v. Haggerty, 27 Wn. App. 908, 911, 621 P.2d 195 (1980)

<sup>6</sup> Roggow, *supra*, at 911.

<sup>7</sup> “They did not need, indeed, they could not acquire, an easement over their own property.” *Butler v. Craft Eng Const. Co., Inc.*, 67 Wn App 684, 699, 843 P 2d 1071 (1992)

any exceptions to the merger doctrine are simply not relevant.<sup>8</sup> The easement Church attempted to create was never valid; it was void when created as the trial court found. No matter Church's intent, she could not legally give herself an easement for her own benefit over her own property as she attempted here. It required two separate entities. She could not grant herself an easement as she attempted any more than she could legally give herself a gift, rent property to or from herself or grant herself a mortgage on her own property.<sup>9</sup> She could create the documentation to evidence her intent but it would not create the legal relationship required to allow the intent to become effective. Church could intend to give herself a gift, she could wrap it and actual hand it from her right hand to her left but no legal gift would be created. That was what Church did here and that is why the easement was void from the beginning as found by the court.

Respondent also places great significance on the claimed intention of Dorothy Church to create an Easement. In fact, however, we do not know what Church's actual intent was in

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<sup>8</sup> This was noted in Appellants Opening Brief at Note 14 at page 14. *Radovich* was cited there for the proposition that "When an easement has been extinguished by unity, the easement does not come into existence again merely by severance of the united estates. *Radovich*, at 805. That proposition is even stronger here as to the void Church easement."

<sup>9</sup> "It is true that a person cannot be both a landlord and a tenant." *Mobley v. Harkins*, 14 Wn 2d 276, 281, 128 P 2d 289 (1942).

attempting to create the easement as she was not a party to the litigation, did not testify at trial and no evidence was ever presented by or for her as to actual intent<sup>10</sup>. However, assuming that there was conclusive proof that church intended the easement to be effective in every way as Respondents claim, it would not change the result. As with the gift, lease and mortgage examples above, intent cannot make a void action effective. Intent to create an void easement as here, in fact and as found by the court, even documenting that intent by preparing and recording documents, is not sufficient to create an easement. For intent to matter, the intent must be in furtherance of a legally effective act.

**To the extent that either or both may have had any such intent, the 1952 Grant of Easement is legally insufficient to accomplish such a result.** Rantz and Harp conveyed no estate in land in that document, thus, each retained his respective undivided fee interest in the roadway. They did not need, indeed, they could not acquire, an easement over their own property.<sup>11</sup>

#### **B. Reply to Respondents Issue 2.**

At their issue 2, Respondents' mischaracterize Haddons argument on appeal by claiming:

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<sup>10</sup> We do know that deed was prepared by escrow and not Church and that her intent in the drafting of the deed is truly unknown. She probably had no input whatsoever.

<sup>11</sup> Butler v. Craft Eng. Const., Inc., 67 Wn App 684, 698-9, 843 P 2d 1071 (1992).

"Haddon argues this court should overturn the decision of the trial court on summary judgment based in the erroneous assertion that an easement could only have been created in the deed from Church to him by using the **special** words "excepting" or "reserving". Brief 17. [Emphasis in text].

That was not and is not Haddons argument.

In most cases, and in the case of the Church to Haddon Deed here, the use of the words "Subject to" and the listing of the exceptions identified in the Title Report Commitment is intended to exclude those listed items from the Warranty Against Encumbrances otherwise part of every Statutory Warranty Deed and not to reduce the quantity of the estate conveyed. See Appellants' Opening Brief 18 – 25.

Respondent is correct however that no specific words are required to reserve an easement and that the issue is resolved on the apparent intent of the parties as expressed in the deed.<sup>12</sup> It is not simplify the use of the words "Subject to" but the deed itself that leads to the conclusion that the purpose of listing the 12 exceptions to the title report commitment was simply to avoid the Warranty

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<sup>12</sup> That attempt here is somewhat of a fantasy as Church was not a party to the litigation and did not submit any evidence at all in the litigation. Further, Church did not prepare the deed herself as it was prepared by escrow and was probably not even seen by Church until closing.

Against Encumbrances otherwise implied in every Statutory Warranty Deed. RCW 64.04.030.

Here, the easement was void when initially recorded because “One cannot have an easement in his own property”.<sup>13</sup> A void or extinguished easement does not come back into existence simply as a result of separation.<sup>14</sup> For an easement to come back into existence, a new easement must be created.<sup>15</sup> In our case, Church had only recently recorded the easement to herself that she must have believed was a valid act although the law was otherwise and the easement was void.<sup>16</sup> CP 210. Having recently recorded the easement, it is unlikely Church would have felt a need to recreate the easement less than six months later in the Church to Haddon deed. CP 95 and 97. If Church had understood that there was a need to create or recreate an easement, she would have evidenced some special intent to do. She did not. She treated the easement exactly the same as she did all the other 11 exceptions

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<sup>13</sup> Coast Storage Co. Palzer, 107 Wn 2d 225, 229, 728 P 2d 135 (1986). “An essential element of an easement is that it be in the land in possession of another.” CJS 28A Easements § 5 Essential Qualities.

<sup>14</sup> Radovich v. Nuzhat, 104 Wn.App. 800, 805, 16 P.3d 687 (2001)

<sup>15</sup> “When an easement has been extinguished by unity, the easement does not come into existence again merely by severance of the united estates.... Upon severance, a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise. If it does arise, however, it does so because it was newly created at the time of the severance.” Radovich v. Nuzhat, supra, at 805.

<sup>16</sup> Churches intent here, to do a void and ineffective act is irrelevant. Zunino v. Rajewski, 140 Wn App 215, 222, 165 P.3d 57 (2007).

listed on the Title Policy Commitment. She merely **identified** the title report the exception, whether it be the easement or the grants in favor of the state of Washington that she could not reserve or the Sellers Notices that would only apply to the owner of Lot 1 and she could not and would not want to reserve. CP 99-101. She did not describe the easement indicating it was at all special or different from the rest of the 11 “Subject to’s”. She treated all 12 of the “Subject to’s” exactly the same indicating a similar intent as to each of them. **The only common intent in listing the 12 “Subject to’s” was to avoid the Warranty Against Encumbrances as to each of them.** RCW 64.04.030, Appellants’ Opening Brief pp. 18-25. No other purpose can reasonably be implied.

Respondent claims the case of *Beebe v. Swerda*, 58 Wn App 375, 793 P2d 442 (1990), supports their position. Brief p.17. Respondent is wrong. An analysis of *Beebe* shows that it is factually very different from our case and does not support Respondents position. It does, however, provide a comparison and demonstrates why the easement here at issue was not reserved and why the *Beebe* easement was.

The court in *Beebe* was asked to determine if the following language with its “Subject to” preface could evidence intent to

reserve an easement.<sup>17</sup> The court found the following language in

*Beebe* was a reservation:

SUBJECT to an easement for road purposes for the use and benefit of the public and for the use and benefit of the property herein conveyed, measuring Fifteen Feet (15') on each side of the west line of the East half (E 1/2) of the Northeast Quarter (NE 1/4) of the Northwest Quarter (NW 1/4) of the Northwest Quarter (NW 1/4) of said Section 34, Township 25 North, Range 6 E.W.M., and measuring Fifteen Feet (15') on the west side of the east property line of the West one-half (W 1/2) of the Southeast Quarter (SE 1/4) of the Northwest Quarter (NW 1/4) of the Northwest Quarter (NW 1/4) of said section, township and range, and said easement shall constitute a covenant running with the land. [Emphasis added] *Beebe* at 377.

The court's decision was that despite the use of the words "Subject to", the grantor's intent was to reserve an easement. The *Beebe* language above identifies the specific location of the easement, granted it to the public<sup>18</sup> and other benefited properties and included language specifically intending the easement to be a "covenant running with the land". A reasonable reading of the language used was that an easement was intended to be created and continue in existence after the conveyance. An analysis of the

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<sup>17</sup> "No Washington case has decided whether the words "subject to" in a deed conveying land are sufficient to create an easement" *Beebe* at 380.

<sup>18</sup> "In every instance of a private easement, that is an easement not enjoyed by the public, there exists the characteristic feature of two distinct tenements, one dominate and the other servient." CJS 28A Easements § 5 Essential qualities.

language used in the Church to Haddon Deed here shows no such intention.

The language in the Haddon to Church is as follows:

“SUBJECT TO: SEE ATTACHED EXHIBIT “A””

The attached “Exhibit “A” is set out below:

Exhibit "A"

[21] Easement and the terms and conditions thereof:

Grantee:	Dorothy Church
Purpose:	Access, utilities, and joint maintenance
Area affected:	the west 30 feet of Lot 1
Recorded:	August 21, 2006
Recording No.:	20060821000487 [CP 100]

There is no description of the Easement in Haddon but only an identification in the exact same way the other 11 “Subject to’s” were identified; with reference to the Title Policy Commitment only. There is no evidence of any intent to create a new easement as there was in *Beebe* where the easement was dedicated for the public and other benefited properties and with the stated intention that the “easement shall constitute a covenant running with the land”. Clearly the intent in *Beebe* was to create a new easement while there is no such intent in the case at bar.

Respondents continue to claim that their property is landlocked while it is clearly not. Lots 3 and 4 have legal access

across "Tract X" identified on the short plat. CP 86. It is significant that the court made no finding that the property was landlocked as the Respondents claim here. "No finding as to a material fact constitutes a negative finding unless there is undisputed evidence which an appellate court can hold compels a contrary finding."<sup>19</sup>

### **C. Reply to Respondents Issue 3.**

Respondents argue if "there was no easement to reserve... why would Church even need to disclaim liability for an easement she supposedly was not trying to create and would not otherwise exist?" Brief 20. The answer is that Church did not know the easement she had attempted to create six months earlier was void and more importantly, the Title Policy Commitment listed the Easement as an exception and good deed drafting practice dictated making the conveyance subject to all the exceptions listed there [CP 189-190], whether valid or not, to avoid the Warranty Against Encumbrances otherwise applicable to all Statutory Deeds.

Unless excluded, the grantor will be liable for a breach of warranty, even though the matters are of record and beyond grantor's control to cure. *Fagan v. Walters*, 115 Wash. 454, 197 P. 635 (1921). **These exclusions are commonly placed in the "subject**

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<sup>19</sup> Penberthy Electromelt Intern. Inc. v. U.S. Gypsum Co., 38 Wn App 514, 519, 686 P.2d 1138 (1984)

**to" clause in the body of the conveyance.**  
[Emphasis added]<sup>20</sup>

The most common exclusions are: (i) taxes not yet due or payable; (ii) visible easements and underground easements of record; (iii) covenants, conditions and restrictions of record; (iv) monetary liens (such as mortgages) which are to be assumed by the grantee or which grantee will take title "subject to" (if the grantor is to continue to pay such liens, the deed should so state); and (v) reservations in federal or state patents. **If known, each exclusion should normally be listed with a reference to its recorded document number (e.g., easement for ingress and egress recorded as document no. 9505191234).**  
[Emphasis added]<sup>21</sup>

*The Real Property Deskbook*, §.32.3(2), offers the following suggestion to anyone preparing a Statutory Warranty Deed:

***Practice Tip:* When drafting a warranty deed, the best practice is to specifically list all liens, encumbrances, and other matters to which title will be taken subject.**<sup>22</sup>

The Respondent argues that deeds are to be construed to effectuate the intent of the drafter. Brief p.21. The truth is that Church did not testify or present any evidence in this case as to her intent and Church did not draft the deed, escrow did and their presumed intent would be consistent with the practice tip above.

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<sup>20</sup> WSBA Real Property Deskbook §32.7(3).

<sup>21</sup> WSBA Real Property Deskbook §32.7(3) Exclusions.

<sup>22</sup> This appears to be the practice, in fact. "Waldron said that in drafting the statutory warranty deed, she typically lists the property's legal description, drafts the conveyance language, and **then writes "subject to:" and lists the easements, covenants, conditions, and restrictions expressed in the preliminary title commitment.**" *Ross v. Ticor Title Ins. Co.*, 135 Wn App. 182, Note 3, 143 P.3d 885 (2006).[Emphasis added]

Respondent also confuses the intent to be examined to determine the meaning of the deed. Respondent relies on Churches presumed intent to create an easement as evidenced by her actually recording an easement in favor of her Lots 3 and 4 while owning Lot 1. The court found that Easement to have been void when recorded. CP 210. Church apparently intended to convey an Easement to herself but her action was ineffective and the easement itself was void. Churches intent there, to do a void and ineffective act, was and is irrelevant.<sup>23</sup>

The deed on its face lists the Easement along with the other 11 "Subject to's" and that intent was to disclaim the Warranty Against Encumbrances as to those items listed in the title policy commitment. That is the only intent that is material.

The Respondent apparently argues that the limitation on the Warranty of Marketable Title in the deed somehow negated the need to limit the Warranty Against Encumbrances. That is not correct. The language in the deed relating to the Marketable Title Warranty is as follows:

The covenants implied in this Statutory Warranty Deed are limited as follows: Title to the property shall

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<sup>23</sup> Zunino v. Rajewski, 140 Wn App 215, 222, 165 P.3d 57 (2007).

be marketable at the time of the conveyance. The following shall not cause the title to be unmarketable: ... easements and encroachments, not materially affecting the value of or unduly interfering with grantees reasonable use of the Property; ...”

The Warranty of Marketable Title is different from the other implied warranties in a Statutory Warranty Deed under RCW 64.04.030 and the above language only related to the Marketable Title Warranty and did not in any way negate the Warranty Against Encumbrances that would have to separately limited, as was done here, by the listing of the 12 “Subject to’s”. RCW 64.04.030.<sup>24</sup>

#### **D. Reply to Respondents Issue 4.**

The Respondent claims the trial court decision should be upheld as follows:

The decision of the trial court should be upheld because under Washington law an implied easement will be found even absent an express easement when there was a unity of title, subsequent separation and a reasonable necessity for the easement after separation, as was the case here. Brief 23.

The respondent’s position is not well taken as the court did not find an implied easement and their argument in favor of an implied easement here is not applicable to the facts of our case.

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<sup>24</sup> The Court concluded that the easement that Respondents’ requested that would allow unlimited auto traffic over the Haddons drainfield would be contrary to Church’s requirement to deliver marketable title. C L 7, CP 241.

The Respondent's claim that "[T]he intent to create an access easement is implied when a grantor sells landlocked property". Brief p. 24. That, of course, is not what happened here. The first problem is that Lots 3 and 4 are not landlocked. They have access by way of "Tract X" created at the time of the short plat for that very purpose. CP 86. The other problem is that Church did not "sell [the claimed] landlocked property"; she retained it, selling Lot 1 and retaining Lots 3 and 4.

If Lots 3 and 4 were landlocked, an implied easement may arise:

(1) when there has been unity of title and subsequent separation; (2) when there has been an apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title; and (3) when there is a certain degree of necessity that the quasi easement exist after severance.<sup>25</sup>

Easements by implication are, by their nature, neither written nor recorded. They are inferred from circumstances. Accordingly, the possibility of an implied easement creates uncertainty in

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<sup>25</sup> Unity of title and subsequent separation is an absolute requirement. The second and third characteristics are aids 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 503, 505-6, 268 P 2d 451 (1954).

conveyances and land titles, and is contrary to the policies underlying both the Statute of Frauds and the Recording Act: "Easements by implication are not favored by the courts because they are in derogation of the rule that written instruments speak for themselves."<sup>26</sup> Moreover, "by their nature, [implied easements] burden land ownership, impede development and create land problems."<sup>27</sup> For all of these reasons, Washington courts disfavor implied easements. The doctrine of implied easements "should be constrained rather than expanded."<sup>28</sup>

There are two types of implied easements, an implied grant and an implied reservation, and the burden of proof necessary to prove the latter is much higher than the former. The Respondent argues the former but the requested easement is the latter.

If the dominant estate was first conveyed ... the easement would have arisen by implied grant .... If the servient estate was first conveyed, then the easement would have arisen by implied reservation ....<sup>29</sup>

The Respondent's claim here is for an implied easement **by reservation.**

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<sup>26</sup> WSBA Real Property Deskbook, § 10.3(3)(A) (1997, as supplemented).

<sup>27</sup> Bruce & Ely, *The Law of Easements and Licenses in Land*, §4:22 (2001, as supplemented).

<sup>28</sup> *Ashton v. Buell*, 149 Wash. 494, 498, 271 P. 591 (1928).

<sup>29</sup> *Adams v. Cullen*, 44 Wn 2d 503, 505, 268 P 2d 451 (1954).

The courts generally hold that there is a difference between an implied reservation of an easement and the grant of an easement by implication. The distinction is put upon the ground that the former is in derogation of the deed and its covenants, and stands upon narrower ground than a grant.<sup>30</sup>

It is not difficult to state that there must be 'reasonable' necessity for the existence of an easement by implied grant and **'strict' necessity for the existence of an easement by implied reservation.** [Emphasis added]<sup>31</sup>

The facts and the law do not allow the easement by implied grant the respondent's request. Lots 3 and 4 are not landlocked. There was no "apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title."<sup>32</sup> The claimed "implied easement" was never used. The Court specifically found: "There was no apparent use of the easement area at the time it was granted or at any time since. No vehicular traffic has ever crossed the easement area." FF 14, CP 237.

There is no need for the implied grant of the easement. Lots 3 and 4 have legal access across "Tract X" created in the original short plat over 25 years ago and that access remains. CP 84. The

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<sup>30</sup> Schumacher v. Brand, 1913, 72 Wash 543, 547, 130 P 1145, (1913), quoted in *Adams* at 508.

<sup>31</sup> *Adams, supra*, at 508.

<sup>32</sup> *Adams, supra*, at 505.

court made no finding that Lots 3 and 4 were landlocked because they are not.<sup>33</sup> Further, **Lots 3 and 4 are identified on the short plat as “Nonbuilding Lot[s]”**. Only very limited access is required to access a non buildable lot. “Tract X” crosses a stream but the requested implied easement is no better in that it crosses the Haddons drainfield and without enormous efforts and many agencies strict regulation compliance, the easement will remain limited for foot traffic. See FF 24-26, CP 238-9, CL 7, CP 241. The easement is not necessary, much less, strictly necessary.

Even the equities do not favor the Respondents. “Both Claeys and Hay were aware that the Haddon’s questioned the validity of the easement and objected to vehicular traffic crossing the easement significantly before they formed the Joint Venture and before Claeys took title to Lots 3 and 4.” FF 22, CP 238. If “Strict necessity” is required to prove Respondents claim, how can that burden be met when the property is not, in fact, landlocked, the lots Respondents seek to reach are designated “Nonbuilding Lots” on the plat, any easement allowed across the Haddon property would

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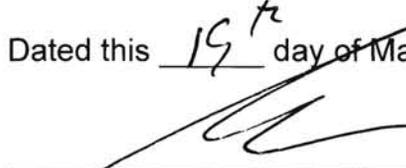
<sup>33</sup> “**No finding as to a material fact constitutes a negative finding** unless there is undisputed evidence which an appellate court can hold compels a contrary finding.” *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn App 881, 887, 658 P.2d 1267 (1983)

most likely never allow for vehicular traffic, and at the worst, the "Tract X" access allows that and the Respondents knew of the claimed limitations **before** they took title to the property. If an implied grant would be difficult for Church to obtain, it should be double difficult for the Respondents who knew of the difficulties and the objections and limitations to the easement prior to their purchase. They took with the notice of the problems and now want to improve the value of their property at the expense of the Haddons who took title "subject to" an apparent void easement.

**V. Conclusion**

This court should reverse the trial court and hold that the Easement remained void and was not reserved when it was merely identified among the 12 "Subject to's" attachment to the Deed. The case should be remanded to determine the Haddon's damages for Respondents trespass that could not be tried because of the courts finding of a valid easement. CP 7.

Dated this 19<sup>th</sup> day of March, 2014

  
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## CERTIFICATE OF SERVICE

I, Gary M. Abolofia, declare under penalty of perjury that on March 19<sup>th</sup>, 2014, I caused to be served upon the below listed party by first class mail, postage pre-paid a true copy of this document to attorney for the Respondents:

Terry Marston  
MARSTON LEGAL, PLLC  
F&A Plaza, Ste. 201  
11400 98<sup>th</sup> Ave NE  
Kirkland, WA 98033

And by email, by agreement, to

Terry@marstonlegal.com,  
Tricia@marstonlegal.com,  
Mackenzie@marstonlegal.com,



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