

Court of Appeals Cause No. 70454-1-1

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

R. LANCE HADDON and CAROL
A. PUTNAM, husband and wife,
Appellants,

v.

JOOST R. CLAEYS and AMY K.
PREZBINDOWSKI, husband and
wife; and SHELDON HAY, a
married individual,
Respondents.

RESPONDENT'S BRIEF

Terry R. Marston II, WSBA # 14440
Attorney for Respondents

MARSTON LEGAL, PLLC
11400 98TH AVE. NE, STE. 201
KIRKLAND, WA 98033-4306
PHONE: 425.861.5700
FAX: 425.861.6969

Handwritten initials
44:44
NOV 15 PM 4:44
MARSTON LEGAL
11400 98TH AVE NE
KIRKLAND WA 98033

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION | 1 |
| II. | ISSUES PRESENTED | 1 |
| III. | STATEMENT OF THE CASE..... | 2 |
| | The Parties and Facts | 2 |
| | Dorothy Church’s Four Lots | 2 |
| | Church Records Access Easement Across Lot 1 Lots 3 and 4..... | 2 |
| | Church Deeds Lot 1 to Haddon Subject to Easement..... | 4 |
| | Church Deeds Lots 3 and 4 to Claeys | 6 |
| | Procedural History | 6 |
| IV. | ARGUMENT AND AUTHORITY | 8 |
| | Standards of Review | 8 |
| | Summary of Argument..... | 8 |
| | <i>Issue 1:</i> 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 owns the burdened (servient) parcel and the benefited (dominant) parcel..... | 11 |
| | <i>Issue 2:</i> The decision of the trial court should be upheld because under Washington law an easement can be created by a deed stating that title to property being conveyed would be “subject to” an easement described in an attachment to the deed, as was done here, rather than by having to use either the word “reserving” or the word “excepting.” | 17 |
| | <i>Issue 3:</i> The decision of the trial court should be upheld because under Washington law the language of the deed from Church to Haddon can only be reasonably construed as a limitation on the scope of the rights conveyed by the deed, rather than as a disclaimer of warranty as Haddon contends | 19 |
| | <i>Issue 4:</i> 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 unity of title, subsequent | |

separation and a reasonable degree of necessity for the easement after
severance, as was the case here. 23

V. CONCLUSION..... 25

APPENDIX A – Lot Diagram

APPENDIX B – Access & Utility Easement

APPENDIX C – Haddon Warranty Deed

APPENDIX D – Exhibit “A” Attached to Warranty Deed

TABLE OF AUTHORITIES

CASES

| | |
|---|---------------|
| <i>Adams v. Cullen</i> , 44 Wash.2d 502, 268 P.2d 451 (1954) | 24 |
| <i>Beebe v. Swerda</i> , 58 Wn.App. 375, 793 P.2d 442 (Div. 1, 1990) | 12, 17, 18 |
| <i>Berg v. Hudesman</i> , 115 Wash.2d 657, 801 P.2d 222 (1990) | 13, 21, 22 |
| <i>Brown v. McAnally</i> , 97 Wn.2d 360, 644 P.2d 1153 (1982) | 25 |
| <i>Cameron v. Perkins</i> , 76 Wn.2d 7, 454 P.2d 834 (1969) | 24 |
| <i>Coast Storage Co. v. Schwartz</i> , 55 Wn.2d 848, 351 P.2d 520 (1960) | 12 |
| <i>Fossum Orchards v. Pugsley</i> , 77 Wash.App. 447, 892 P.2d 1095 (1995) | 23 |
| <i>Hellberg v. Coffin Sheep Co.</i> , 66 Wn.2d 664, 404 P.2d 770 (1965) | 24 |
| <i>Leighton v. Leonard</i> , 22 Wash.App. 136, 589 P.2d 279 (1978) | 13 |
| <i>McPhaden v. Scott</i> , 95 Wn.App. 431, 975 P.2d 1033 (Div. 2, 1999) | 23 |
| <i>Mobley v. Harkins</i> , 14 Wash.2d 276, 128 P.2d 289 (1942) | 12 |
| <i>Pulcino v. Fed. Express Corp.</i> , 141 Wash.2d 629, 9 P.3d 787 (2000) | 8 |
| <i>Queen City Savings and Loan Association v. Mechem</i> , 14 Wn.App. 470, 543 P.2d 355 (1975) | 18 |
| <i>Radovich v. Nuzhat</i> , 104 Wash. App. 800, 16 P.3d 687 (Div. 1, 2001) .. | 12, 15, 16 |
| <i>Roberts v. Smith</i> , 41 Wash.App. 862, 707 P.2d 143 (1985) | 23, 24 |

STATUTES

| | |
|--------------------|----|
| RCW 8.24.010 | 25 |
|--------------------|----|

OTHER AUTHORITIES

| | |
|---|----|
| <i>Black's Law Dictionary</i> , 1278 (5th ed. 1979) | 19 |
|---|----|

TREATISES

| | |
|--|----|
| 2 G. Thompson, Real Property § 320, (1980 repl.) | 17 |
| 25 Am.Jur.2d Easements & Licenses § 20 (1966) | 17 |
| 28 C.J.S. Easements § 24 (1941) | 17 |

WASHINGTON CONSTITUTIONAL PROVISIONS

| | |
|---------------------------|----|
| Const. art. 1, § 16 | 25 |
|---------------------------|----|

I. INTRODUCTION

This appeal arises out of a dispute over the validity of an easement between adjacent landowners who both acquired their lots from a common prior owner. The trial court granted summary judgment in favor of Respondents, the owners of two landlocked lots, ruling that they had acquired a valid access easement across Appellants' lot from the prior owner who had recorded an easement for this purpose in favor of Respondents' lots. 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.

II. ISSUES PRESENTED

Issue 1: 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 owns the burdened (servient) parcel and the benefited (dominant) parcel.

Issue 2: The decision of the trial court should be upheld because under Washington law a valid express easement can be created by any deed using language reasonably expressing an intent to create an easement, including use of the phrase "subject to" as was done here on February 16, 2007.

Issue 3: The decision of the trial court should be upheld because under Washington law the language in the deed of Lot 1 from Church to Haddon subjecting the property to an easement in favor of Lots 2 and 3 cannot be reasonably construed as a mere disclaimer of warranty as Appellants argue.

Issue 4: In the alternative, the decision of the trial court must be upheld under Washington law as an implied easement where, as here, there was

once unity of title, a subsequent separation, and a reasonable degree of necessity for an easement after severance.

III. STATEMENT OF THE CASE

The Parties and Facts

The Appellants here are R. Lance Haddon and Carol A. Putnam (collectively “Haddon”). The Respondents are Joost R. Claeys, Amy K. Prezbindowski and Sheldon Hay (collectively “Claeys”).¹

Dorothy Church’s Four Lots

Dorothy Church owned land near Carnation in King County, Washington.² She subdivided the land into four lots numbered 1 through 4. (See Lot Configuration, Appendix A here). Lot 1 is west of Lot 2 and both have direct access to N.E. 24th Street along their northern boundaries. Lot 3 is west of Lot 4. Lot 3 and Lot 4 are directly south of Lots 1 and 2, respectively. Both Lots 3 and 4 are landlocked; neither has access to any street without crossing Lot 1 or Lot 2.

Church Records Access Easement Across Lot 1 Lots 3 and 4

Church would eventually convey title to each of these four lots to others.³ Lot 1 was deeded to Haddon.⁴ Lot 2 was deeded to the Greef Family Trust (which is not involved in this litigation). Lots 3 and 4 were

¹ CP 1.

² CP 235-36.

³ CP 237-238.

⁴ CP 237.

deeded to Claeys.⁵ Prior to conveying it, Church had a 30' wide easement drawn up along the western boundary of Lot 1 to provide access between Lots 3 and 4 and N.E. 24th Street on the opposite side of Lot 1 (See Recorded Easement, Appendix B here.)⁶ The access easement reads:

ACCESS AND UTILITY EASEMENT

AND

JOINT MAINTENANCE AGREEMENT

The Grantor, Dorothy Church, as the owner the Lot 1 of King County Short Plat No. 980005R, Recording No. 8106190609, in King County, Washington, tax parcel no. 272505-9049, does hereby grant to Dorothy Church, her heirs, successors and assigns, an easement for ingress, egress, and utilities over, under, and across the following described property:

The West thirty (30) feet of said Lot 1.

For the use and benefit of the following described property and/or any portion thereof:

Lots 3 and 4 said King County Short Plat No. 980005R, Recording No, 8106190609, tax parcel nos. 272505-9050 and 272605-9051.

And the Grantor, for herself, her heirs, successors and assigns, hereby covenants with the Grantee, her heirs, successors and assigns, that until said easement is publicly maintained, maintenance costs shall be divided equally among "using" ownerships, their heirs, successors and assigns benefited by said easement, EXCEPT that repair costs caused by above normal use by one ownership (such as caused by construction equipment) should be borne by the causing user. A majority vote of "using" ownerships will be required to entail maintenance costs, with an allocation of one vote per "using" property owner. Pro-

⁵ CP 238.

⁶ CP 237.

rated maintenance costs shall be a lien against each respective property. Owners refusing to pay such costs within a reasonable time after due notice shall be liable for costs of such including the reasonable attorneys' fees in addition to lien amount. This agreement shall constitute a covenant running with the land. ("Using" ownership is defined herein as one that causes more than occasional use of a road on said easement.) ⁷Church's access easement was in writing. It specified the dominant and servient estates. It specified its location and dimensions. It specified its purpose. And it was duly filed with the King County Recorder's office. ⁸

Church Deeds Lot 1 to Haddon Subject to Easement

After drafting and recording the access easement across Lot 1, Church conveyed Lot 1 to Haddon by statutory warranty deed. (See Warranty Deed to Haddon, Appendix C here.) ⁹The statutory warranty deed stated expressly that the conveyance to Haddon was being made "SUBJECT TO" specific recorded interests in the property described in an attached "Exhibit A" to the deed:

THE GRANTOR Dorothy Church, an unmarried individual for and in consideration of TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION in hand paid, conveys and warrants to R. Lance Haddon and Carol A. Putnam, husband and wife, the following described real estate, situated in the County of King, State of Washington.

Lot 1 of King County Short Plat No. 980005, recorded under Recording No. 8106190609, records of King County, Washington.

⁷ CP 237.

⁸ CP 237.

⁹ CP 238.

Tax Parcel Number(s): 272507-9049-07

SUBJECT TO: SEE ATTACHED EXHIBIT "A"

The covenants implied in this Statutory Warranty Deed **are limited as follows:** Title to the Property shall be marketable at the time of this conveyance. The following shall not cause the title to be unmarketable: **rights, reservations, covenants, conditions and restrictions, presently of record** and general to the area; **easements** and encroachments, not materially affecting the value of or unduly interfering the Grantee's reasonable use of the Property; and reserved oil and or/or mining rights. Grantee does not take title subject to any monetary encumbrances of Grantor which Grantee has not expressly assumed in this deed.

(Emphasis and reduction in font size of final paragraph in original).¹⁰

Attachment A included a description of the recorded access easement in favor of Lots 3 and 4 which Church retained as her separate property.¹¹ The easement across Lot 1, by which she retained street access to Lots 3 and 4, was expressly identified within Attachment A to her deed to Haddon. (See Attachment A to Warranty Deed to Haddon, Appendix D here.) The language referring to the easement in Attachment A reads as follows:

Exhibit "A"

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 |

¹⁰ CP 74.

¹¹ CP 238.

Church Deeds Lots 3 and 4 to Claeys

After transferring Lot 1 to Haddon, Church subsequently quit-claimed her interests in Lots 3 and 4 to Claeys.¹² To develop Lots 3 and 4, Claeys would have to build a driveway from N.E. 24th Street over the easement on Lot 1 to his lots. There was a fence around Lot 1 which would have to be partially removed to access the easement. Claeys contacted Haddon to coordinate removal of the fence and installation of the driveway. Haddon refused to allow Claeys to use the easement to access his landlocked property.¹³ Claeys, having no access to his Lots 3 and 4 without the easement was left to remove the fence himself over Haddon's objection.¹⁴ Claeys proceeded to disassemble the portion of Haddon's fence blocking access to the easement to construct his driveway at which point Haddon filed suit.¹⁵

Procedural History

Haddon filed suit seeking, among other things, a declaration that the easement Church had recorded over Lot 1 was invalid and that Claeys, therefore, had no right to construct a driveway.¹⁶ The parties filed cross-motions for partial summary judgment to determine the validity of the

¹² CP 238.

¹³ CP 240.

¹⁴ CP 240.

¹⁵ CP 240.

¹⁶ CP 7-8.

easement (while reserving for trial issues over what the easement could be used for).¹⁷ Haddon argued that Church could not *legally* have created an easement across Lot 1 (the servient estate) in favor of Lots 3 and 4 (the dominant estates) at a time when she owned each of them.¹⁸ Claeys disputed Haddon's contentions regarding the express easement and also argued that an implied easement over Lot 1 in favor of landlocked Lots 3 and 4 would have arisen by implication in the absence of an express easement under the theory of "implied easement upon conveyance."¹⁹

The trial court granted Claeys' motion for partial summary judgment and denied Haddon's.²⁰ The court ruled that even if Haddon's argument (that an easement could not be created when both parcels were under common ownership) were correct, the defect was corrected when Church later conveyed Lot 1 to Haddon (with notice of the easement) while retaining ownership of Lots 3 and 4.²¹ The case then proceeded to trial where issues regarding the scope of the easement were resolved.²²

¹⁷ CP 39, 111.

¹⁸ CP 114-19.

¹⁹ CP 206-08.

²⁰ CP 209-11.

²¹ CP 210.

²² CP 234.

On this appeal, the only issues presented pertain to whether the trial court properly ruled on summary judgment that a valid easement across Lot 1 existed at the time Haddon obtained title to Lot 1.

IV. ARGUMENT AND AUTHORITY

Standards of Review

An appellate court reviewing an order of summary judgment conducts the same inquiry as the trial court.²³ Summary judgment is proper if the pleadings and evidence, viewed in a light most favorable to the nonmoving party show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Summary of Argument

Under the law of Washington any language reasonably expressing an intent to create an easement²⁴ will effectively do so, provided that it is in a written deed,²⁵ identifies the dominant estate and servient estates,²⁶ the location of the easement, and the purpose of the easement.²⁷

The courts of this state occasionally refer to an old common law rule that an individual cannot create an easement across one parcel of land

²³ *Pulcino v. Fed. Express Corp.*, 141 Wash.2d 629, 639, 9 P.3d 787 (2000).

²⁴ *Beebe v. Swerda*, 58 Wn.App. 375, 379, 793 P.2d 442 (Div. 1, 1990) (“any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose”).

²⁵ RCW 64.04.010 (1929) and RCW 64.04.020 (1929).

²⁶ *Berg v. Ting*, 125 Wn.2d 544, 549, 866 P.2d 564 (1995).

²⁷ *Radovich v. Nuzhat*, 104 Wn.App. 800, 806, 16 P.3d 687 (2001).

in favor of another while retaining ownership of both.²⁸ However, that rule is said to be “disfavored”²⁹ and our courts have repeatedly disregarded it when doing otherwise would contradict the grantor’s intent or result in some other inequity.³⁰

The old rule effectively creates a legal presumption that a property owner intended to void an easement even where no such intent was expressed, either in word or deed. The rule is in fact an anachronism,³¹ it conflicts with modern understanding of the nature of *property* as articulated by this State’s highest court.³² As such, it will someday (if not now) be expressly overruled in favor of a rule that maintains the status quo - the continuing validity of easements – unless evidence is presented that the grantor actually took actions demonstrating a contrary intent.

Haddon has acknowledged that Dorothy Church, in the months just prior to her selling them Lot 1, *intended* to create an easement across Lot 1 to provide her with street access to her otherwise landlocked Lots 3 and 4

²⁸ *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 853, 351 P.2d 520 (1960).

²⁹ *Radovich v. Nuzhat*, 104 Wn.App. 800, 16 P.3d 687, 690 (2001).

³⁰ *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 790, 466 P.2d 515 (1970).

³¹ The rule as sometimes stated appears as a substantive rule of law rather than a guide to interpreting a grantor’s intent (cf., rules of statutory construction). To the extent the rule is deemed merely an advisory guide to construction, rather than a compulsory substantive rule, it may retain some future value.

³² See *Manufactured Housing Communities v. State*, 13 P.3d 183, 142 Wash.2d 347 (2000) (“property” is used to describe a corporeal object that is the subject of ownership and the aggregate rights that an owner possesses relating to that corporeal object. One of the several distinct rights includes the right to assign of some of those other rights).

that she retained.³³ There is also no dispute that Church complied with all legal requirements to create her easement at the time she recorded it on August 21, 2006 other than Haddon's contention that the law barred her from creating an easement while she retained ownership of both the dominant and servient estates.³⁴ Therefore, the questions to be answered by this court under Washington law are as follows:

(1) Whether a valid express easement across one parcel can be created in anticipation of its sale, as was done here on August 21, 2006, while the same person still owns the burdened (servient) parcel and the benefited (dominant) parcel.

(2) Whether a valid express easement can be created by any deed using language reasonably expressing an intent to create an easement, including use of the phrase "subject to" as was done here on February 16, 2007.

(3): Whether the language in the deed of Lot 1 from Church to Haddon subjecting the property to an easement in favor of Lots 2 and 3 cannot be reasonably construed as a mere disclaimer of warranty.

³³ Appellants' Brief at 16: "Ms. Church created the Easement on August 18, 2006 and it was recorded three days later on August 21, 2006. CP 95. As Ms. Church went to the effort to create the Easement and to the expense and effort to record it, she must have understood it to be valid. No other explanation is reasonable. Church conveyed Lot 1 to the Haddons only six (6) months later. CP 97. "

³⁴ Appellants in their opening Brief nowhere argue any deficiency in the formalities of the original recorded easement beyond Ms. Church's ownership of all three lots at the time she recorded the easement.

(4) Whether, in the alternative, the ruling of the trial court must be upheld as an implied easement where, as here, there was once unity of title, a subsequent separation, and a reasonable degree of necessity for an easement after severance.

Argument

Issue 1: 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 owns the burdened (servient) parcel and the benefited (dominant) parcel.

Appellant Haddon contends that the otherwise valid easement across his Lot 1 that Dorothy Church recorded on August 21, 2006 was invalid because she retained ownership of all three lots (Lot 1, the servient estate, and Lots 3 and 4, the dominant estates) at the time she recorded the easement.³⁵ 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 a subsequent sale of the property.

Haddon references the rule that one cannot create an easement across one parcel in favor of another while the retaining ownership of both

³⁵ Appellant's Brief at 3.

(sometimes referred to as the doctrine of *merger*).³⁶ In support of this proposition, Haddon cites *Radovich v. Nuzhat*,³⁷ but inexplicably fails to mention the three *exceptions* to that rule identified in the same case:

As a general rule, one cannot have an easement in one's own property. Where the dominant and servient estates of an easement come into common ownership, the easement is extinguished. This is the rule in Washington. *However, the doctrine of merger is disfavored both at law and in equity, and there are exceptions to its application.*

Consequently, *the courts will not compel a merger of estates* [1] where the party in whom the two interests are vested does not intend such a merger to take place, or [2] where it would be inimical to the interest of the party in whom the several estates have united, nor will they recognize a claim of merger [3] where to do so would prejudice the rights of innocent third persons.³⁸

All three of the exceptions noted are applicable to the facts of the present case and, when applied, dictate the conclusion that the easement as originally recorded by Dorothy Church on August 21, 2006 was valid from the outset.

The first *Radovich* exception, applicable “where the party in whom the two interests are vested does not intend such a merger to take place,” is applicable to the facts of the present case because Dorothy Church

³⁶ *Radovich v. Nuzhat*, 104 Wash. App. 800, 16 P.3d 687 (Div. 1, 2001); *see also, Beebe v. Swerda*, 58 Wn.App. 375, 381, 793 P.2d 442 (Div. 1, 1990) and *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 351 P.2d 520 (1960).

³⁷ *Id.*

³⁸ *Radovich at 690* citing *Mobley v. Harkins*, 14 Wash.2d 276, 282, 128 P.2d 289 (1942) (emphasis and numbering added).

recorded her easement just a few months prior to conveying Lot 1 to Haddon while retaining ownership of Lots 3 and 4. If Church had not created the easement, she would have left herself with ownership of the two landlocked Lots 3 and 4 that she should would have no access to. A reasonable person could only conclude that Dorothy Church was *intending*³⁹ to avoid such a result by drafting and recording her express easement prior to selling her only lot with street access while retaining two others that had none. No rational person could reach the conclusion necessitated by Haddon's argument that Dorothy Church intended a merger, which would have rendered her recording of an easement a useless act and would have left her with two landlocked and, equally, useless properties.

The second *Radovich* exception, applicable "where [finding a merger] would be inimical to the interest of the party in whom the several estates have united," is also applicable to the facts of the present case utilizing the same analysis as above, but without consideration of what Church's 'intent' was in recording the express easement. Irrespective of whether Dorothy Church had been the person who had recorded the

³⁹ A court's primary job in interpreting a restrictive covenant or easement is to ascertain the intent of the parties. *See Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990); *Leighton v. Leonard*, 22 Wash.App. 136, 141, 589 P.2d 279 (1978).

easement and irrespective of what an alternative grantor's intent may have been in doing so, anyone in the position of Church at the time of selling Lot 1 and retaining the landlocked Lots 3 and 4 would have had her interests in Lots 3 and 4 severely undermined by releasing the easement. Under facts such as these, where releasing the easement would be so inimical to her interests, the court in *Radovich* stated that such an intent could not be inferred under Washington law.

The third *Radovich* exception, applicable “where [finding a merger] would prejudice the rights of innocent third persons,” is applicable to the facts here because the interests of Respondent Claeys, an innocent third person to whom Dorothy Church later conveyed Lots 3 and 4, would be prejudiced by being left with two landlocked lots despite having obtained title with the reasonable understanding that the recorded easement of his grantor Dorothy Church would provide him with access to the properties he acquired.

The *Radovich* case itself involved adjacent properties, one occupied by an office building⁴⁰ and the other vacant land. The owner of the office building property, Horbach, obtained an easement for parking over the vacant lot owned by another. From the court's description,

⁴⁰ The case actually involved three properties of which two were dominant and one was servient. Discussion of the insolvent of the second dominant property will be omitted here for simplicity's sake as the analysis is the same.

Horbach obtained title to the vacant lot as well as the grant of the easement *on the same day*,⁴¹ resulting in his owning both the dominant and servient properties from the outset of the easement. A succession of later conveyances to others took place over the next ten years. In the course of these multiple exchanges, the two parcels came in and out of common ownership no less than four times. Therefore, under the merger rule, the easement should have been extinguished no less than four times. However, the court in *Radovich* reached the same ruling as that of the trial court below and upheld the existence of the easement notwithstanding the merger doctrine in order to comply with the apparent intent of the parties:

It is not necessary to reach the issue of whether the parking easement was previously extinguished by merger. We hold that, even if merger occurred, the easement was recreated by subsequent conveyances.

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. *Such a new creation may result, as in other cases of severance, [1] from an express stipulation in the conveyance by which the*

⁴¹ *Radovich* at 689 (“On October 24, 1986, the same day that the parking easement was recorded, Seventh Avenue Corporation conveyed its interest in the Vacant Land to Horbach.”)

severance is made or [2] from the implications of the circumstances of the severance.⁴²

Thus, in *Radovich* the Court of Appeals ruled that, whether or not the existing easement was valid under the merger doctrine, one would have arisen each time the properties were subsequently reconveyed. Furthermore, this would be the case whether the grantor's intent to create an easement arose from an "express stipulation" or by "implication" from the facts.⁴³ Dorothy Church *expressly stipulated* to the easement by conveying the property to Haddon "subject to" the recorded easement. But, additionally, the "implications of the circumstances of the severance" – namely Church's deliberate recordation of an easement before conveying to Haddon the lot across which the easement lay and her retaining ownership of two otherwise landlocked lots – unequivocally supported the inference that the easement had been "newly created." Either way, the easement was valid and binding upon Haddon.

⁴² *Id.* at 690-91 (emphasis in original; numbering supplied).

⁴³ *Id.*

Issue 2: The decision of the trial court should be upheld because under Washington law an easement can be created by a deed stating that title to property being conveyed would be “subject to” an easement described in an attachment to the deed, as was done here, rather than by having to use either the word “reserving” or the word “excepting.”

Under Washington Law, any words clearly showing the intention to create an easement, including the words “Subject To,” are sufficient to accomplish that purpose...”⁴⁴ Nevertheless, Haddon argues this court should overturn the decision of the trial court on summary judgment based on his erroneous assertion that an easement could only have been created in the deed from Church to him by her using the *special* words “excepting” or “reserving.”

Haddon’s argument mirrors the defendants’ unsuccessful argument in *Beebe v. Swerda* that no easement can be created by a deed that only uses the language, “subject to an easement.”⁴⁵ However, the court in *Beebe* upheld the easement and ruled that no particular words are necessary to constitute a grant.⁴⁶ “In construing a deed, the court is required to carry out *the intention of the parties*” and the intention of the parties “must be determined from the language used.”⁴⁷ The *Beebe* Court

⁴⁴ *Beebe v. Swerda*, 58 Wn.App. 375, 379, 793 P.2d 442, (Wash. App., 1990). 28 C.J.S. Easements § 24 (1941); 25 Am.Jur.2d Easements & Licenses § 20 (1966); 2 G. Thompson, Real Property § 320, at 47 (1980 repl.).

⁴⁵ *Beebe* at 379.

⁴⁶ *Id.*

⁴⁷ *Id.* at 379-80. (emphasis added).

was convinced that the language of the deed manifested the parties' intent to create an easement because it: (1) included the word "easement," (2) contained a precise description of the location and extent of the easement, and (3) expressed a desire that the easement run with the land.⁴⁸

The same type of language appears in the Church to Haddon deed that, therefore, must similarly manifest an intent to create an easement. There is no requirement to use particular words such as "reserve" or "except" when creating an easement or a right of way:

While it is true that there is a technical legal distinction between an exception and a reservation, it is also true that whether a particular clause in a deed will be considered an exception or a reservation depends not so much upon the words used as upon the nature of the right or thing excepted or reserved."

* * *

A reasonable construction should be given to a reservation or exception *according to the intention of the parties*, ascertained from the entire instrument. There should be considered, when necessary and proper, the force of the language used, the ordinary meaning of words, the meaning of specific words, the context, the recitals, the subject matter, the object, purpose, and nature of the reservation or exception and the *attendant facts and surrounding circumstances* before the parties at the time of making the deed.⁴⁹

⁴⁸ *Id.* at 381-382. The court also found compelling the fact that, like the facts of the case here, the property would be landlocked without the easement.

⁴⁹ *Queen City Savings and Loan Association v. Mechem*, 14 Wn.App. 470, 474-75, 543 P.2d 355 (1975) (emphasis added).

Any emphasis on formulaic language to be used when creating an easement is misplaced, especially when the *intent of the parties* is readily ascertainable from the language of the deed.

The Church to Haddon deed identified the property and then immediately following the Tax Parcel Number noted that the property was “SUBJECT TO: SEE ATTACHED EXHIBIT A.” The phrase, “subject to” is defined as follows: “liable, subordinate, *subservient*, inferior, obedient to; *governed or effected by*; provided that; provided, answerable for.”⁵⁰ The attached Exhibit A used the words, “subject to” at the top of both pages in the exhibit that listed, among other things, the easement. By identifying the property and then plainly noting that the grant of title was “subject to” the easement in the attachment, it follows that Church intended to subject the Haddon property to the easement referenced. By referencing the easement, Church unmistakably manifested her intent to reserve the easement she recorded on August 21, 2006.

Issue 3: The decision of the trial court should be upheld because under Washington law the language of the deed from Church to Haddon can only be reasonably construed as a limitation on the scope of the rights conveyed by the deed, rather than as a disclaimer of warranty as Haddon contends.

Haddon argues that the wording used by Dorothy Church in her deed of Lot 1 – conveying the property *subject to* the easement identified

⁵⁰ *Black's Law Dictionary*, 1278 (5th ed. 1979) (emphasis added).

in the attached Exhibit A – should be read as a limitation of liability for an easement and not a reservation of an easement because, under his theory, there was no easement to reserve. But, if that was so, why would Church even need to disclaim liability for an easement she supposedly was not trying to create and would not otherwise exist? This argument is without merit.

Church’s deed to Haddon can be viewed in three parts. Part one, in the first paragraph, conveys the property. Part two, separated from and following the first paragraph, states that the property conveyed shall remain “subject to” each of the encumbrances identified in the deeds in the attached Exhibit A, which included the access easement for Lots 3 and 4. Part three, separated from and following the second part, includes express limitations of liability language, unlike the second part:

The covenants implied in this Statutory Warranty Deed **are limited as follows**: Title to the Property shall be marketable at the time of this conveyance. The following shall not cause title to be unmarketable: ... (emphasis added).

Therefore, the “subject to” provisions noted in part two are distinguishable from the subsequent limitation of liability provisions listed in part three. Parts two and three are also clearly distinguished in the agreement in other ways. Part two is printed in all caps; part three is not. Part two is printed in bold face; part three is not. Part two is printed in 12-point type; part three

is printed in 10-point type. The evident intent of parts two and three were different and the markedly different presentation of the wording of each was doubtless intended to emphasize this distinction.

Under Washington law, deeds are to be construed to effectuate the drafter's intent.⁵¹ The proper construction of deeds is governed by the same "context rule" of interpretation governing the construction of other types of documents.⁵² The context of this case includes the fact that Lots 3 and 4 are landlocked and the only access is across Lot 1. All three lots were formerly owned by Church. Church actually drafted and recorded an easement across Lot 1 with the undeniable intent to provide a means of access to Lots 3 and 4. Church subsequently sold Lot 1 to Haddon, but kept Lots 3 and 4 with the knowledge that she would need to preserve access to them. Church's deed to Haddon stated in bold face and all caps that the property was being sold "subject to" each item identified in Exhibit A and the easement and its terms were expressly identified within Exhibit A. Reasonable minds could not differ that Dorothy Church was intending to reserve an access easement to her Lots 3 & 4 in deeding Lot 1 to Haddons.

⁵¹ *Berg v. Hudesman*, 115 Wash.2d 657, 801 P.2d 222 (1990).

⁵² *Id.*

Haddon asserts, “[w]hen a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation.”⁵³ As stated above, there is only one reasonable construction of the clause making the conveyance “subject to” the recorded easement and that is as a reservation of an easement, not a disclaimer of liability. However, even under the rule of construction cited by Haddon, the only reasonable and just interpretation would be one favoring the creation of the easement by Church.

Haddon’s interpretation proposes that the King County easement record on August 21, 2006 was invalid due to Church’s ownership of all three properties. Months later, at the time of conveyance, Church listed the same recorded easement in an attachment to the deed to avoid any resulting liability had she failed to do so. In spite of the evident distinctions in the form and substance of parts two and three of the Haddon deed, Haddon would invite this court to conclude that parts two and three are indistinguishable. Thus, Haddon invites the court to conclude that Church successfully (and repeatedly) disclaimed liability for an easement that did not exist, while making no effort to avoid leaving her Lots 3 & 4 landlocked. The position thus asserted by Haddon would

⁵³ *Id.* at 672 (citation omitted).

“make the contract unreasonable and imprudent and the other [Claeys’] ... would make it reasonable and just,” the Court must adopt the Claeys interpretation

Weighing the proposed interpretations and the resultant outcomes, it can only be reasonable and just to consider part two to be a valid “subject to” clause and part three to be a disclaimer of warranties. The result would be to uphold the validity of the easement.

Issue 4: 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 unity of title, subsequent separation and a reasonable degree of necessity for the easement after severance, as was the case here.

Under Washington law an *implied easement* will be found when there was once unity of title, subsequent separation, and a reasonable degree of necessity for an easement after severance, as was the case here:

The factors relevant to establishing an implied easement, either by grant or reservation, are (1) former unity of title and subsequent separation; (2) prior apparent and continuous **quasi easement** for the benefit of one part of the estate to the detriment of another; and (3) a certain degree of necessity for the continuation of the easement.⁵⁴

A “quasi easement” refers to the situation where one portion of property is burdened for the benefit of another

⁵⁴ *McPhaden v. Scott*, 95 Wn.App. 431, 975 P.2d 1033, 1037 (Div. 2, 1999). See also *Fossum Orchards v. Pugsley*, 77 Wash.App. 447, 451, 892 P.2d 1095 (1995); *Roberts v. Smith*, 41 Wash.App. 862, 864, 707 P.2d 143 (1985) (enumerating factors establishing easement by implication).

portion, which would be a legal easement *if different persons owned the two portions of property.*⁵⁵

“[T]he creation of the easement does not depend upon the use of a particular form of instrument”⁵⁶ and the presumed intention of the parties is the cardinal consideration.⁵⁷ “[T]he intent to create an access easement is *implied* when a grantor sells landlocked property.”⁵⁸ Only unity of title and subsequent separation are absolute requirements⁵⁹ and “the elements of necessity are merely aids in determining intent to create an implied easement.”⁶⁰

Here, all of the enumerated factors point towards the creation of an implied easement:

- (1) Church was the owner of both lots, Lots 1 and 3;
- (2) The unity of ownership was severed when she conveyed Lot 1 to Haddon and the intended easement benefited one part of Church’s property, Lot 3, to the detriment of another part of her property, Lot 1;
- (3) A reasonable degree of necessity exists to enable access to the landlocked parcels and it is implied that Church intended to preserve that access when she sold the landlocked parcels.

⁵⁵ *Adams v. Cullen*, 44 Wash.2d 502, 504, 268 P.2d 451 (1954) (emphasis added).

⁵⁶ *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 666, 404 P.2d 770 (1965).

⁵⁷ *Adams* at 505; *see also Cameron v. Perkins*, 76 Wn.2d 7, 454 P.2d 834 (1969) (intent of parties is cardinal consideration in construing contracts).

⁵⁸ *Roberts* at 865 (emphasis added).

⁵⁹ *Adams* at 505.

⁶⁰ *Roberts* at 865.

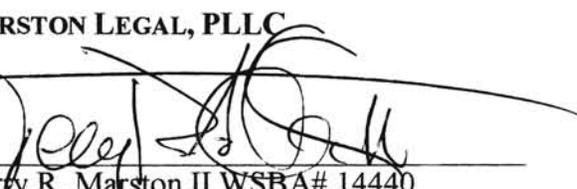
Additionally, “Washington maintains a strong public policy that will not permit property to be landlocked and rendered useless.”⁶¹ Lots 3 and 4 will be inaccessible without recognizing an easement for ingress and egress. If the express easement is considered an invalid reservation then an implied easement was undeniably created as a matter of law through the sequence of conveyances.

V. CONCLUSION

For the foregoing reasons, Respondents Claeys, Prezbindowski and Hay respectfully request that the appeal of R. Lance Haddon and Carol A. Putnam be denied.

DATED this 15th day of January, 2014.

MARSTON LEGAL, PLLC

By 
Terry R. Marston II WSBA# 14440
Attorneys for Respondents Claeys, Prezbindowski, and Hay

⁶¹ *Brown v. McAnally*, 97 Wn.2d 360, 367, 644 P.2d 1153 (1982); Const. art. 1, § 16 (“SECTION 16 EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity”); and RCW 8.24.010 (1913) (“An owner ... of land which is so situate[d] with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity ... across, over or through the land of such other ... may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity.... The term "private way of necessity," as used in this chapter, shall mean and include a right-of-way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads ... over and through which timber, stone, minerals or other valuable materials and products may be transported and carried.”)

VI. Appendices

APPENDIX A –LOT CONFIGURATION

APPENDIX B –RECORDED EASEMENT

APPENDIX C –WARRANTY DEED TO HADDON

APPENDIX D –ATTACHMENT A TO WARRANTY DEED TO HADDON

Appendix A

Appendix B

Return to: Dorothy Church
24621 SE 224 St.
Maple Valley Wa 98038



20060821000487
 TESTUARE EAS 65.00
 PAGE 01 OF 002
 08/21/2006 10:40
 KING COUNTY, WA

ACCESS and UTILITY EASEMENT and JOINT MAINTENANCE AGREEMENT

The Grantor, Dorothy Church, as owner of the Lot 1 of King County Short Plat No. 980005R, Recording No. 8106190609, in King County, Washington, tax parcel no. 272505-9049, does hereby grant to Dorothy Church, her heirs, successors and assigns,

an easement for ingress, egress and utilities over, under, and across the following described property:

The West thirty (30) feet of said Lot 1.

for the use and benefit of the following described property and/or any portion thereof:
Lots 3 and 4 of said King County Short Plat No. 980005R, Recording No. 8106190609, tax parcel nos. 272505-9050 and 272605-9051.

And the Grantor, for herself, her heirs, successors and assigns, hereby covenants with the Grantee, her heirs, successors and assigns, that until said easement is publicly maintained, maintenance costs shall be divided equally among "using" ownerships; their heirs, successors and assigns benefited by said easement, EXCEPT that repair costs caused by above normal use by one ownership (such as caused by construction equipment) shall be borne by the causing user. A majority vote of "using" ownerships will be required to entail maintenance costs, with an allocation of one vote per "using" property owner. Pro-rated maintenance costs shall be a lien against each respective property. Owners who refuse to pay such costs within a reasonable time after due notice shall be liable for costs of suit, including reasonable attorney's fees, in addition to lien amount. This agreement shall constitute a covenant running with the land. ("Using" ownership is defined herein as one that causes more than occasional use of a road on said easement.)

Dated this 14 day of August, 2006

Dorothy Church
Page 18

Appendix B

State of Washington)
County of King) ss

I certify that I know or have satisfactory evidence that Dorothy Church signed this instrument and acknowledge it to be her free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated 8/18/06

Tyson Vance Woodruff
Notary Public in and for the State of Washington
Residing at Maple Valley
My appointment expires 10/1/08



Appendix C

AFTER RECORDING MAIL TO:
Mr. and Ms. Russell Lance Haddon
33609 NE 24th Street
Carnation, WA 98014



20070227002222

RAINIER TITLE LD 35.00
PAGE001 OF 004
02/27/2007 13:28
KING COUNTY, WA

Filed for Record at Request of
Escrow Professionals of Washington
Escrow Number: 1-9771-KSmb

E2267770

02/27/2007 13:28
KING COUNTY, WA
TAX \$8,538.00
SALE \$485,000.00 PAGE001 OF 001

Statutory Warranty Deed

THE GRANTOR Dorothy Church, an unmarried individual

for and in consideration of TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION in hand paid, conveys and warrants to **R. Lance Haddon and Carol A. Putnam, husband and wife** the following described real estate, situated in the County of King, State of Washington.

Lot 1 of King County Short Plat No. 980005, recorded under Recording NO. 8106190609, records of King County, Washington.
Tax Parcel Number(s): 272507-9049-07

SUBJECT TO: SEE ATTACHED EXHIBIT "A"

The covenants implied in this Statutory Warranty Deed are limited as follows: Title to the Property shall be marketable at the time of this conveyance. The following shall not cause the title to be unmarketable: rights, reservations, covenants, conditions and restrictions, presently of record and general to the area; easements and encroachments, not materially affecting the value of or unduly interfering with Grantee's reasonable use of the Property; and reserved oil and/or mining rights. Grantee does not take title subject to any monetary encumbrances of Grantor which Grantee has not expressly assumed in this deed.

Dated February 16, 2007


Dorothy Church

RECORDED BY 3674
RAINIER TITLE
3891683-E

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LPB-10

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STATE OF Washington
COUNTY OF King) SS:

I certify that I know or have satisfactory evidence that **Dorothy Church**
is the person(s) who appeared before me, and said person(s) acknowledged that he/she/they
signed this instrument and acknowledge it to be his/her/their free and voluntary act for the
uses and purposes mentioned in this instrument.

Dated: Feb 23 2007



[Signature]

Notary Public in and for the State of Washington
Residing at Burien
My appointment expires 5/21/09

Appendix D

1-9771-KSmb

Exhibit "A"

Subject to:

Any restrictions on the use of any portion of the land subject to submergence that derive from the rights of the public and riparian owners to use any waters which may cover that portion.

Rights and easements of the public for commerce, navigation, recreation and fisheries.

Any prohibition of or limitation of use, occupancy or improvement of the land resulting from the rights of the public or riparian owners to use any portion which is now, or has formerly been, covered by water.

Easement and the terms and conditions thereof:

| | |
|----------------|--|
| Grantee: | Dorothy Church |
| Purpose: | Access, utility, and joint maintenance |
| Area affected: | the west 30 feet of Lot 1 |
| Recorded: | August 21, 2006 |
| Recording No.: | 20060821000487 |



Notice of On-Site Sewage System Operation and Maintenance Requirements, and any terms and conditions thereof:

Recorded: February 1, 2007
Recording No.: 20070201001178