

No. 34610-9-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

HARVEY S. VISSER, a single man, and SHARON M. SNEDEKER, a
single woman,

Respondents,

vs.

RALPH CRAIG AND RAE CRAIG, husband and wife; and
THONG TRINH AND NGA TRINH, husband and wife,

Petitioners.

PETITIONERS' OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

Assignments of Error

The Petitioners Ralph and Rae Craig and Thong and Nga Trinh¹ hereby assign error to the following:

1. The trial court's November 14, 2005 Order Granting Plaintiffs' Motion for Summary Judgment and denying Defendants' Cross Motion for Summary Judgment (CP 225).
2. The Trial Court's March 24, 2006 Order Denying Defendants' Motion for Reconsideration (CP 294).

Issues Pertaining to Assignments of Error

This case presents the following issues:

1. Does the common-law doctrine of easement by implication for construing deeds override the actual intent of the parties? (Assignment of Error 1 and 2.)
2. Can a trial judge impose an easement on a grantor's property without compensation or the grantor's consent when the undisputed evidence shows that the original parties specifically intended

¹ The Trinhs were added as party defendants by Agreed Order on May 9, 2006, and are copetitioners in this appeal.

not to create such an easement? (Assignment of Error 1 and 2.)

3. Must a grantor, under the easement by implication doctrine, provide access to a parcel that becomes landlocked through events that occur **after** the grantor has conveyed the property? (Assignment of Error 1 and 2.)

4. Can an easement serving an existing parcel be expanded to serve additional territory that has been added to the dominant estate by virtue of a boundary line adjustment? (Assignment of Error 1 and 2.)

5. Does a trial court commit error if it grants summary judgment finding that an easement has been misused without reviewing the actual terms or circumstances of that easement? (Assignment of Error 1 and 2.)

B. STATEMENT OF THE CASE

1. Statement of Facts

The Craigs owned two adjacent but separate agricultural parcels totaling approximately 110 acres. *Affidavit of Ralph Craig*, CP 168-69. In 1999, they agreed to convey 13 of their 110 acres (a portion from each of the two parcels) to their neighbors Kenneth and Janice Westhusing (the “Westhusings”). The Westhusings owned Parcel 58, north of one of the Craigs’ parcels. Janice Westhusing’s brother, Harvey Goodling

(“Goodling”), owned parcel “4,19”, which was directly north of the Craigs’ other parcel. *Id.* at CP 168-69. Goodling’s and the Westhusings’ parcels were served by Nichols Hill Road, which was a private road serving several parcels north of the Craigs’ properties.

It is undisputed² that the Westhusings and Goodling wanted the Craigs’ 13 acres to protect their views and provide some additional pasture land. *Id.*; *Affidavit of Dean Mills*, CP 159. The Craigs conveyed the 13 acres to the Westhusings by way of a boundary line adjustment. *Id.* The 13 acres was added to the Westhusings’ parcel (Parcel 58). *Mills Aff.*, CP 159, CP 163 (Ex. A, p.2, to *Mills Aff.*); *see also Affidavit of Leslie DeFrees*, CP 225-26; *Mills Aff.*, CP 158-60; *Craig Aff.*, CP 167-68. For ease of description, the following diagram depicts the various properties immediately after the Craigs’ boundary line adjustment:

² The essential facts related to the conveyance of the property are not in dispute.

utilities” in favor of the Craigs across the conveyed 13 acres. CP 179-80 (Ex. D, pp. 1-2). Simultaneously with the Deed, the Westhusings and Goodling executed nearly identical but separate Agreements to Convey Road Easements across their respective properties to the Craigs. *Mills Aff.*, CP 160; *Craig Aff.*, CP 170, CP 180 (Ex. D, p. 2, of *Craig Aff.*), CP 181-87 (Ex. E of *Craig Aff.*), CP 189-95 (Ex. F of *Craig Aff.*). These easements are depicted on the map.

It is undisputed that the Craigs, the Westhusings, and Goodling never intended for the conveyance of the Deed to include the Craigs granting an easement across their remaining parcels to serve the conveyed 13-acre parcel. In fact, the undisputed evidence shows that the parties intended only to create an easement in favor of the Craigs across the 13 acres and across the Westhusing parcel to permit the Craigs to have access to Nichols Hill Road.

The Westhusings divorced after the conveyance of the 13 acres. *Declaration of Phil Haberthur*, CP 244-45. In the divorce, Mr. Westhusing was awarded the 13 acres while Mrs. Westhusing (now Janice Caday) was awarded the original Parcel 58. *Id.* The Clark County Planning Office stated that the only legal way to subdivide the Westhusings’ property, including the additional 13 acres, would be

through a subdivision application. *Id.*, p. 245. As the Plaintiffs admitted in their Motion for Summary Judgment, Clark County deems the 13 acres an illegal lot. *Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment*, CP 69, ll. 2-4, n.4; *see also Clark County Deputy Prosecuting Attorney Bronson Potter's Affidavit*, CP 230-31.

On December 8, 2004, Respondents Harvey Visser and Sharon Snedeker (the "Vissers") acquired an option to purchase the 13 acres from the Westhusings. Wishing to convert the 13 acres from agricultural to residential, the Vissers sued the Craigs to acquire an easement across the Craigs' agricultural land. No such road has ever existed on the Craigs' parcel. The Vissers chose not to join the Westhusings or Ms. Caday as parties. The Vissers have since exercised their option to purchase the property.

On February 15, 2006, the Craigs sold one of their two parcels, identified by Assessor's Tax Parcel Number 129595-000 (commonly referred to as Tax Lot 3 in the pleadings), to Thong Trinh and Nga Trinh (the "Trinhs").

2. Procedural History

a. Complaint

The Vissers sued the Craigs for an easement, either by implication or by condemnation. *Complaint*, CP 1-50. They alleged that “when the Craigs conveyed the property to the Westhusings, an **easement by necessity was implied** in the conveyance” (emphasis added). CP 4, ¶ 4.2. The Vissers alternatively sought to condemn an easement across the Craigs’ parcel under RCW Ch. 8.24. CP 4, ¶ 4.9. The Craigs filed their Answer and Counterclaims on March 17, 2005. CP 51-58.

b. Cross-Motions for Summary Judgment

The Vissers filed for partial summary judgment on their claim of easement by implication. CP 59-60, CP 61-70. The Craigs also sought summary judgment. CP 145-57. Neither party introduced the Nichols Hill Road Easement or the circumstances surrounding its use.

3. Trial Court’s Rulings

The trial court granted the Plaintiffs’ Motion for Summary Judgment by holding that the doctrine of easement by implication trumped the parties’ actual intent. The trial judge wrote:

“Defendants argue, therefore, that an easement by implication arises only as a tool to accomplish the intent of the parties and that because the original

intent of the parties was to grant no easement, one cannot arise by implication.

.....

“Plaintiffs seek establishment of an easement by necessity an easement forced upon the grantor, by the law, due to the public policy against creation of landlocked parcels. An easement by necessity is implied in a grant of land under circumstances where the grantee is left without access, **regardless of the intent of the parties**. Maybe, if both parties expressly agree, and the conveying instrument so provides, a conveyance can be structured to expressly landlock a parcel, despite the public policy against it, but that is not the case here.”

Judge Roger A. Bennett’s June 22, 2005 Ruling, CP 224.

The Craigs therefore sought Reconsideration. CP 229. They submitted Affidavits to further demonstrate that failure to comply with the requirements for a subdivision rendered the 13 acres an illegal lot of record and therefore still a part of Parcel 58. *Potter Aff.*, CP 230-31; *Haberthur Decl.*, CP 224-54. Judge Bennett denied the Craigs’ Motion for Reconsideration (CP 294-95) and ruled that the 13 acres was landlocked because expansion of the easement for Nichols Hill Road would constitute a misuse of the Nichols Hill Road Easement. *Ruling on Defendants’ Motion for Reconsideration*, CP 286-93.

On June 23, 2006, Court Commissioner Ernetta Skerlec granted the Petitioners’ Motion for Discretionary Review.

C. SUMMARY OF ARGUMENTS

The Craigs believe the trial court erred in finding that the doctrine of easement by implication must be applied to override the parties' actual intent. This holding threatens to interfere with a party's freedom to contract. The ruling rewrote the terms of the parties' actual agreement resulting in the Craigs having to suffer an easement across their property without just compensation. The trial court's creation of an easement when one was clearly not intended by the original grantors and grantees also violates the statute of frauds.

The trial court also erred when it determined that the Craigs, and not the Westhusings, "land locked" the 13 acres. The issue of whether a parcel has been landlocked by a grantor must be determined at the time of the conveyance. The property only became landlocked after the Westhusings conveyed the 13 acres to the Plaintiffs.

Also, because they purchased an illegal lot, and a lot which they knew did not include an easement across the Craigs' property, the Plaintiffs are estopped from claiming an easement over the Craigs' or Trinhs' properties, at least without going through a private condemnation action.

The trial court also erred by finding that expansion of the Nichols Hill Road Easement would be a misuse of the Easement without first reviewing the actual terms of that Easement.

Finally, even if the trial court's decision is overturned and the Vissers can prove that the 13 acres is a legal lot of record, the Plaintiffs still have several available remedies. They can claim an easement by necessity from the Westhusings or, if that fails, they can seek to condemn an easement across one of their neighbors' properties under RCW Chapter 8.24.

D. ARGUMENTS

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). The court on review will perform the same inquiry on summary judgment as the trial judge. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The standard of review is *de novo* and all facts are considered in the light most favorable to the nonmoving party. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). In this case, the trial court erred when it granted

Plaintiff's Motion for Summary Judgment. The trial court further erred when it did not find in the Defendants' favor on their Cross Motion for Summary Judgment.

1. **The Doctrine Of Easement By Implication does not Trump the Parties' Actual Intent**

Reversal is appropriate because Judge Bennett's ruling—that an easement may be implied by necessity regardless of the actual intent of the parties—finds no support in Washington law and is contrary to the weight of authority throughout the United States. *See New Meadows Holding Co. v. Wash. Water Power Co.*, 34 Wn. App. 25, 659 P.2d 1113 (1983).

a. **Easements by implication**

Does the doctrine of easement implied by necessity override or trump the actual undisputed intent of the parties to a deed? Should a trial court blindly apply the doctrine without any regard to the parties' true intent? The courts have uniformly held that the purpose of the doctrine (the "cardinal consideration") is to ascertain the parties' actual intent. There are no cases to support the trial judge's ruling that the doctrine was intended to trump the parties' actual intent. Indeed, the cases support just the opposite.

Although there are three different types of theories for asserting an implied easement: 1) easements implied from prior use; 2) easements implied by necessity; and 3) easements implied from plat (*See Stoebuck Real Estate: Property Law*, §§ 2.4, 2.5, 2.6 (1995)), the only purpose of the doctrine is to guide the courts on how to construe the grantor's and grantee's actual intent when a deed is silent. Simply stated, when applicable, the doctrine of easements by implication creates, at most, a presumption that the original parties must have intended to include an easement even though they have not so expressed. Roberts v. Smith, 41 Wn. App. 861, 707 P.2d 143 (1985) (“**Easements by implication** arise by **intent** of the **parties**, which is shown by facts and circumstances surrounding the conveyance); quoting Evich v. Kovacevich, 33 Wn.2d 151, 204 P.2d 839 (1949).

Black's Law Dictionary defines “implication” to mean “intendment or inference, as distinguished from the actual expression of a thing in words.” It then defines “implied” as “where the intention in regard to the subject matter is not manifested by explicit and direct words, but is gathered by implication or necessary deductions from the circumstances, the general language, or the conduct of the parties.” *Black's Law Dictionary* 384 (5th ed. 1983). The doctrine of easement by

implication only serves as a guide to assist the court to determining the true intent of the parties. See Brown v. Voss, 105 Wn.2d 366, 371, 715 P.2d 514 (1986) (“[T]he extent of the right acquired is to be determined from the terms of the grant properly construed to give effect to the intention of the parties.”) (emphasis added). The doctrine was never intended to be used as a substitute for the parties’ actual intent.

The cases in Washington support the Craigs’ position. When applying the easement by implication doctrine, the courts have uniformly stated that their paramount duty (“cardinal consideration”) is to determine the parties’ intent. See Granite Beach v. Department of Natural Resources, 103 Wn. App. 186; 11 P.3d 847 (2000) (easement by necessity requires evidence of grantor’s intent); see also Adams v. Cullin, 44 Wn.2d at 505-06 (“the cardinal consideration upon the question of easement by implication is the presumed intention of the parties concerned”); Rogers v. Cation, 9 Wn.2d 369, 379, 115 P.2d 702 (1941) (“the presumed intention of the parties, is the prime factor in determining whether an easement by implication has been created”). This intent is to be found from the facts and circumstances of the conveyance. Roberts v. Smith, 41 Wn. App. 861, 864, 707 P.2d 143 (1985) citing Evich v. Kovacevich, 33 Wn.2d 151, 204 P.2d 839 (1949) (“[e]asements by implication arise by intent of the

parties, which is shown by the facts and circumstances surrounding the conveyance”). Accordingly, the purpose of the doctrine is simply to serve as an aid for the courts to ascertain the true intent of the original parties to a conveyance.

The best that can be said about the doctrine of easement by implication is that it provides the parties and the courts some general rules or presumptions for seeking to ascertain what the parties actually meant. *Id.* (“[t]he 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”). *Id. citing* 3 Tiffany, Real Property (3d ed.), 253, 254, § 780; Bailey v. Hennessey, 112 Wash. 45, 191 P. 863 (1920). However, the doctrine cannot be applied blindly when, as here, it is undisputed that the original parties did not intend to include an easement over the grantors’ property to serve the property that was conveyed and the evidence is clear that the parties considered the issue of easements; the doctrine is intended to fill the gaps, not to replace or thwart the parties’ actual intent.

In this case, there is no dispute of facts. The Craigs (the grantors) and the Westhusings (grantees) specifically addressed the issue of easements and agreed that the Craigs would not be burdened with an

easement across their property to provide access to the 13 acres. In fact, the parties negotiated an easement across the 13 acres and the Goodling property to serve the Craigs' remaining parcels. Since there is no dispute regarding the parties' actual intent, the trial court erred when it used the easement by implication doctrine to override the undisputed intent of the parties.

2. **The Trial Court Erred When It Ignored The Parties'**

Actual Intent

Judge Bennett determined that the intent of the original grantor and grantee was not relevant:

“Plaintiffs seek establishment of an easement by necessity, an easement forced upon the grantor, by the law, due to the public policy against creation of landlocked parcels. An easement by necessity is implied in a grant of land under circumstances where the grantee is left without access, **regardless of the intent of the parties.**”

Id. (emphasis in original).

Perhaps realizing the novelty of his conclusion, Judge Bennett noted in his opinion instances when the parties' actual intent could override the doctrine of easement by implication:

“if both parties expressly agree, and the conveying instrument so provides, a conveyance can be structured to expressly land lock a parcel, despite

the public policy against it, but that is not the case here.”

Id.

This analysis turns the normal rules of drafting and construction on its head. The effect of this ruling would be to impose new and awkward burdens on parties (and those who draft agreements) to express what they do not intend (negative expression) in their deeds and contracts. Parties to a deed would be required to state everything they did not intend to avoid a court later fabricating an intent that did not exist. Although the doctrine of easement by implication is a good rule of construction, it cannot be used to replace the parties’ actual intent.

Fortunately, this unique approach to writing deeds does not find any support in law. This Court should therefore reject this novel approach for construing contracts and instead rule consistent with existing case law that the parties’ actual intent must control and that the doctrine of easement by implication is only to be used as an aid to the court in trying to determine the parties’ actual intent.

- a. The “cardinal consideration” in construing any deed is to ascertain the parties’ actual intent

The trial court’s ruling is not consistent with the Washington

Supreme Court's decision in Hellberg v. Coffin Sheep Co., 66 Wn.2d 664, 667, 404 P.2d 770 (1965). In that case, the Court stated that "[w]e are concerned in such cases with 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." 66 Wn.2d at 668.

The Court there stated the common-law rule that "where land [] is sold that has no outlet, the vendor [] by implication of law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser [] to have access to his property." *Id.* at 667, *citing* State ex rel. Mountain Timber Co. v. Superior Court, 77 Wash. 585, 588, 137 P. 994 (1914). However, the Court also stated that "[w]e are concerned in such cases with the presumed intention of the parties...." *Id.* at 668. Thus, it seems obvious that the overarching objective for the courts is to ascertain the parties' actual intent. The doctrine has never been used to override the parties' actual intent.

In the 41 years following the Hellberg ruling, no court has expressed a contrary position. Nothing in the law suggests that the doctrine of easement by implication, regardless of which of the three theories is pled, can be used to trump the actual intent of the parties.

Instead of creating a rebuttable presumption, Judge Bennett’s decision creates an irrebuttable presumption that is impossible to overcome.

Moreover, this ruling, if allowed, will essentially overrule the seminal cases of Hellberg v. Coffin, Brown v. Voss, Adams v. Cullen, Rogers v. Cation, and State ex rel. Mountain Timber Co. v. Superior Court by finding that the parties’ intent is to be ignored when construing a grant or conveyance.

b. Parties may choose to convey a landlocked parcel

The easement implied by necessity doctrine is designed to prevent the creation of landlocked parcels by presuming that “a party who conveys property intends to convey whatever is necessary for the beneficial use of that property....” 25 AM. JUR. 2d *Easements and Licenses in Real Property* § 31 (2006); see *Disputes Between Adjoining Landowners* § 2.02(1) (2005) (“... a court is effectuating the unexpressed intent of the grantor and grantee as indicated by the facts of the case.”); cf. Hellberg v. Coffin, 66 Wn.2d 664, 666, 404 P.2d 770 (1965) (where land is sold that has no outlet, the grantor by implication “grants ingress and egress over the parcel to which he retains ownership”). However, the doctrine only creates a presumption; there is no rule that prevents isolated parcels.

Under the law, parties can choose to convey a parcel without providing access. Even Judge Bennett noted this in his opinion. While the public policy may presume that parties do not intend to create such a result, it is only an aid to determine the parties' actual intent.

The undisputed evidence in this case shows that the parties intended for access to the 13 acres to be provided through means other than the Craigs' parcels. Even if the parties did not intend to create a landlocked parcel, they certainly did not intend to burden the Craigs with an easement across their parcel. If they had, the Craigs presumably would have requested more compensation.

- c. The majority common-law view holds that the easement by implication doctrine will not override the parties' actual intent

The courts in Washington use the doctrine of implied easement to try and ascertain the parties' intent. This is consistent with the majority rule in the other states. *See 4 Powell on Real Property* § 34.07 (2006); *Restatement (Third) of the Law Property*, § 2.15 (2000); *Disputes Between Adjoining Landowners-Easements* § 2.02(1) (2005).

As set forth in the leading treatises on real property, the doctrine of easement by implication, although rooted in public policy, still requires

the court to ascertain the actual intent of the original parties to the conveyance. 4 *Powell on Real Property* § 34.07 (2006). This is what the courts in this state have coined the “cardinal consideration.” Where there is no dispute about the parties’ intent, the doctrine has no application. “Unless a contrary intent is inescapably manifested, the conveyee is found to have a right-of-way across the retained land of the conveyor for ingress to, and egress from, the landlocked parcel.” 4 *Powell on Real Property* § 34.07 (2006) (from chapter entitled “Easements Can Be Created by (Implied From) Necessity”) (emphasis added); *Restatement (Third) of the Law Property*, § 2.15 (2000) “[T]he presumed intent of the parties is still the prevailing rationale expressed in the cases.” *Id.* at § 2.15 cmt. a; *see also Disputes Between Adjoining Landowners-Easements* § 2.02(1) (2005), *supra*, 2.a. *American Jurisprudence*, in discussing easements by necessity, states that:

“A way of necessity results from the application of the presumption that a party who conveys property intends to convey whatever is necessary for the beneficial use of that property and to retain whatever is necessary for the beneficial use of land he or she still possesses. Such a way is of common-law origin, and is presumed to have been intended by the parties.”

25 AM. JUR. 2d *Easements and Licenses in Real Property* § 31 (2006).

The courts in California have addressed this exact issue extensively and have routinely followed the majority rule expressed in the above quoted treatises to hold that “an easement by necessity will not be imposed contrary to the actual intent of the parties.” Hewitt v. Meaney, 226 Cal. Rptr. 349, 351 (1986) (“the presumption of an intent to create an easement is one affecting the burden of proof, because it serves the public policy of freeing land for use”). Also, “[a]n easement by implication will not be found absent clear evidence that it was intended by the parties.” Tusher v. Gabrielsen, 80 Cal. Rptr. 2d 126 (1998).

The prevailing view here and in other states is that while an easement by implication can be used to presume that an easement exists, it cannot be used to trump the parties’ actual intent. This is especially true where, as here, the undisputed evidence shows that the parties actually considered the issue of access to the affected parcels and specifically chose not to burden the Craigs’ parcel with an easement.

The Craigs’ property is agriculture. There is no driveway. The Craigs did not intend for their pasture to be used to provide access to the 13 acres. Also, based on the contemporaneous conveyance of the other easements reserved, negotiated, and entered into by the original parties, it seems incongruent that the Craigs and the Westhusings would have simply

overlooked providing an easement in the Deed.

In this case, the Craigs conveyed the 13 acres to the Westhusings because the Westhusings wanted additional pasture land for their horses and cows, and to protect their views. At the time, the parties believed the Westhusings had sufficient access, at least for those purposes, to the 13 acres across the Westhusings' property that adjoined Nichols Hill Road. Considering the undisputed fact that the parties to the Deed (the Craigs and the Westhusings) were careful to expressly create other easements to provide access to the Craigs' remaining parcels, it seems absurd to conclude that the parties simply forgot to include the easement over the Craigs' parcel. If the trial court's ruling stands, the Craigs will be forced to endure an easement across their land without just compensation. In essence, the Vissers will have received something for nothing at the Craigs' expense.

3. **Necessity Must Be Considered As Of The Time Of The Conveyance**

The Craigs also contend the trial court ignored the fact that the 13 acres became landlocked from events that occurred outside their control and long after they had conveyed the property. The 13 acres conveyed by the Craigs became part of the Westhusings' parcel by virtue

Court need only consider *which* party in this case is now claiming necessity and *how long* after the conveyance it took for the necessity to be claimed. The original grantee (Westhusing) has never claimed necessity; it is the purchasers (Vissers) from the original grantee that are claiming an easement, five years after the conveyance. Since necessity did not exist at the time of the 1999 conveyance, the Vissers are not entitled to an easement by implication from the Craigs.

More over, at the time of the 1999 conveyance, the 13 acres was intended and used to graze horses and cattle, and to protect the grantee's and Goodling's views. The Westhusings had no desire or intent to build homes on the property. It is undisputed that, at the time of the conveyance, the grantees had adequate and legal access to use the property for those purposes.

The fact that the Vissers have now purchased the property to build houses does not change the fact that, at the time of the 1999 conveyance, access to the property was sufficient; the property was not landlocked for its intended purpose. The Craigs should not be caused to suffer from these changes in circumstances, or be forced to carry the burden of providing access due to events occurring outside their control.

4. **Trial Court Erred By Holding That *Brown v. Voss***
Applied And Nichols Hill Road Cannot Be Burdened
With An Easement

The intent of the original parties to a conveyance cannot be thwarted by applying the doctrine of easement implied by necessity. However, assuming *arguendo*, that this Court believes the trial court was free to ignore the actual intent of the parties, the trial court still erred by finding that “Nichols Hill Road, being a private road, is not burdened with a right of access to users of the subject parcel.” *Ruling in Plaintiffs’ and Defendants’ Motions for Summary Judgment*. CP 222. There simply was no evidence in the record to show that the trial court ever considered the terms or circumstances of the Nichols Hill Road Easement. Without this consideration, there is no evidence to support the trial court’s conclusion that the Easement could not be used to serve the additional 13 acres.

As explained by the Washington State Supreme Court in Brown v. Voss, the first step in determining the scope of an easement is to consult the express grant of the easement. 105 Wn.2d at 371, 715 P.2d 514 (1986). In this case, the trial court totally failed to consult the grant of the easement for the Westhusing/Caday property, the dominant parcel, thus leaving a genuine issue of material fact and making summary judgment

improper. CR 56. At minimum, this Court should remand the case back to Judge Bennett to determine if in fact the Vissers are prohibited from using the Nichols Hill Road Easement.

As argued above, the 13 acres had legal access at the time it was conveyed in 1999 because it was attached to a parcel that had access to Nichols Hill Road. However, the trial court ruled that extending the Easement to serve the attached 13 acres would be a “misuse” of the Easement. It therefore ruled that the 13 acres was landlocked.

Determining whether expansion of the dominant parcel to allow access to land not originally benefited by an easement would be a misuse of the easement is a question of fact. Logan v. Brodrick, 29 Wn. App. 796, 799-800, 631 P.2d 429 (1981) (“In determining the permissible scope of an easement, we look to the intentions of the parties connected with the original creation of the easement, the nature of the situation of the properties subject to the easement, and the manner in which the easement has been used and occupied.”). The court held there that “The question of reasonable use or unreasonable deviation is one of fact” which cannot be resolved through summary judgment. *Id.* at 800.

In this case, and without reviewing the Deed and the circumstances surrounding the Nichols Hill Road Easement, the trial court concluded

that:

“Nichols Hill Road is a private easement across several subservient properties, allowing access to Tax Lot 58, the dominant parcel. Expansion of the dominant parcel, to allow access to land not originally benefited by the easement, is a misuse of the easement. Brown v. Voss, 105 Wn.2d 366, 715 P.2d 514 (1986). Furthermore, my conclusion is that, even if the 13 acres were acquired by boundary adjustment as opposed to separate conveyance, the principle of Brown v. Voss would apply.”

Ruling on Defendants' Motion for Reconsideration. CP 284-90.

This ruling is in error because it is contrary to Washington law which states that “an easement can be expanded over time if the express terms of the easement manifest a clear intention by the original parties to modify the initial scope based on future demands.” Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 884, 73 P.3d 369 (2003). The trial court blindly applied Brown v. Voss to the facts of this case without taking the requisite step of reviewing the Road Easement Deed for the Nichols Hill Subdivision and/or the circumstances surrounding the Easement. There is no record the trial judge even considered the terms of the Nichols Hill Road Easement in this case. Regardless, since the question of whether expansion of the Nichols Hill Road Easement would be a “misuse of the easement” is a question of fact, summary judgment

should not have been granted to the Vissers.⁴

5. The Trial Court's Ruling Interferes With The Freedom To Contract

The trial court's ruling also threatens to interfere with a party's freedom to contract. Finding that an easement exists when the undisputed evidence shows that no such easement was intended unfairly infringes upon a person's ability to contract. It also forces a property owner to endure the burdens of an undesired easement running through their property, especially if that burden is taken without due compensation.

This is especially true in this case where no road currently exists and the easement will have the effect of disturbing agricultural land. Indeed, the trial court's ruling, if left intact, will constitute a "taking" of real property rights in violation of State and Federal Constitutions. *See* U.S. Const. art. V, art. XIV; *see also* Wash. Const. art. I, § 16.

6. Creating An Easement When The Parties Did Not Intend One Violates The Statute Of Frauds

RCW 64.04.010 requires that all conveyances of "real estate and

⁴ Coincidentally, the Washington Supreme Court departed from the general rule in *Brown* and held that the plaintiffs had "acted reasonably in the development of their property, that there [was] no damage to the defendants from plaintiffs' use of the easement..." and found that the general rule did not apply. *Id.* at 373.

any interest or encumbrance on real estate” be by “written deed, signed and acknowledged.” As stated in Berg v. Ting, 125 Wn.2d 544, 551, 886 P.2d 564 (1995) (“[t]he statute of frauds requires that any conveyance of an interest in land, including an easement, must contain a description of the land sufficient to locate it without oral testimony (or it must refer to another instrument that does contain a sufficient description)).” Wilhelm v. Beyersdorf, 100 Wn. App. 836, 842, 999 P.2d 54 (2000). Since an easement is an interest in real property, it must also be created in conformance with the statute of frauds.

It is undisputed in this case that the parties did not intend for the conveyance to include an easement over the Craigs’ parcel. Without a written deed, how then can an easement be created or, for that matter, located?

7. Remedy Is Available For Respondents

The Vissers are not without a remedy. If they truly are unable to obtain legal access to their property (which the Craigs contest), they can certainly proceed on a claim against their grantors (the Westhusings). If that fails, they can, perhaps, try and condemn a private way of necessity against their neighbors. However, this will require a showing of necessity (i.e., that they cannot use Nichols Hill Road), payment of fair market value

to the burdened property owner for the land to be condemned, and sufficient proof of the most suitable route.⁵ The Vissers can also seek to rescind their transaction with the Westhusings, seek to re-divide the parcels, and/or try and negotiate an easement to access the 13 acres.

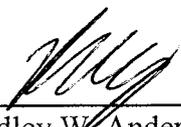
However, if the trial court's ruling is left undisturbed, the Vissers will receive a significant and substantial windfall, at the Craigs' expense. They will have acquired an easement that was never intended to exist without having to pay just compensation.

E. **CONCLUSION**

Based on the above, the Petitioners hereby request the Court to overturn the trial court's granting of the Plaintiffs' Motion for Summary Judgment and to grant Defendants' Cross- Motion for Summary Judgment.

Dated this 13th day of September, 2006.

SCHWABE, WILLIAMSON & WYATT,
P.C.

By: 


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⁵ See RCW 8.24.025 where the court must try to avoid agricultural land when selecting a route under the private condemnation statute.

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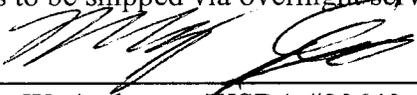
STATE OF WASHINGTON

CERTIFICATE OF FILING

I hereby certify that on the 13th day of September, 2006, I caused to
be filed the original and one copy of the foregoing PETITIONERS'
OPENING BRIEF with the State Court Administrator at this address:

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by depositing it with Federal Express to be shipped via overnight service.



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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2006, I served one
correct copy of the foregoing PETITIONERS' OPENING BRIEF by
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