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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' REPLY BRIEF

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A. STATEMENT OF THE CASE IN REBUTTAL

Respondents' "Statement of the Case" contains some minor errors that need to be clarified.

The Craigs no longer own the two adjoining parcels of land referred to in Mr. Craig's Affidavit.¹ After the filing of this lawsuit, the Craigs sold one of the parcels to Thong and Nga Trinh (the "Trinhs").² The Trinhs have been joined as parties and co-petitioners.

The Respondents state that "neither the private Nichols Hill Road nor the public SE Moffett Road provided legal access to the Property (the 13 acres at issue) at the time the 13 acres was conveyed."³ This cuts at the heart of this dispute. This statement of fact is only true if: (a) the 13 acres conveyed by the Craigs is deemed a separate legal parcel of record (which it is not); and (b) the Nichols Hill Road Agreement is interpreted to preclude the enlargement of the Westhusings' Tax Lot 58.

Because the 13 acres was never divided from the Craigs' parcels before, or the Westhusings' parcel after, the 1999 conveyance, the 13 acres cannot be considered a legal lot of record. The 13 acres could only have been conveyed from the Craigs to the Westhusings by virtue of

¹ CP 167, ¶ 2.

² Br. of App. at 6.

³ Br. of Resp. at 2.

a boundary line adjustment and not as a separate parcel.⁴ Indeed, because the 13 acres has never been legally separated from the Westhusings' parcel, it still is not considered a separate lot of record under the Clark County Code.

The Vissers do not deny that the Craigs conveyed the parcel to the Westhusings for the purpose of expanding the Westhusings' pasture land and to protect the Westhusings' and Goodling's views.⁵ The Vissers also do not deny that neither the Westhusings nor the Craigs intended to create an easement across the Craigs' parcel to serve the conveyed 13 acres.

The Vissers further concede that they cannot obtain an owners' title insurance policy without proving legal access.⁶ Since the 13 acres have never been legally carved out from a parent property, it should not come as a surprise that a title company will not insure legal access to a parcel that does not exist.

⁴ CP 230; 255.

⁵ CP 159.

⁶ Br. of Resp. at 3. It is also telling that the Title Company's title report states that the Property is subject to the "[r]oad maintenance provisions, and the terms and conditions thereof, contained in instrument: Recording Information: 8507260136." CP 138, ¶ 5. How can a landlocked parcel be subject to road maintenance provisions and the terms and conditions thereof if it "lacks legal access?"

B. ARGUMENTS

1. The Craigs Did Not Convey A Separate Landlocked Parcel Nor Did Their Conveyance Render The 13 Acres Useless.

Both sides agree that the easement implied by necessity doctrine can only be considered if a common grantor conveys (or retains) a separate parcel that is (1) legally landlocked; and therefore (2) rendered “useless.” Thus, the threshold issue in this case is whether the 1999 conveyance from the Craigs to the Westhusings created a landlocked parcel and, if so, was the parcel rendered useless by the Craigs’ conveyance?

a. The Craigs conveyed the 13 acres by virtue of a boundary line adjustment; this did not create a separate landlocked parcel.

Both sides also agree that the court must determine the issue of necessity by focusing on the moment the property was conveyed.⁷ Since the conveyance was by boundary line adjustment, and no additional legal parcels were created by the conveyance, the Craigs did not, as required for the easements implied by necessity doctrine, divide their single property

⁷ Br. of Resp. at 16 (“Necessity for access must exist at the moment the common grantor divides the single property, and not at some prior or later time”) citing Granite Beach v. Natural Resources, 103 Wn. App. 186, 196 (2000).

into two separate parcels.⁸

The only evidence presented on this issue is undisputed. The Craigs conveyed the 13 acres to the Westhusings by virtue of a boundary line adjustment; no new lot was created. The Westhusings acquired the 13 acres to add additional pasture land to their Tax Lot 58 and to protect their and their brother-in-law's (Goodling – Tax Lot 4,19) views. The Clark County's Prosecuting Attorney stated in his Affidavit, it is undisputed that a deed cannot, by itself, create a new lot, parcel, or tract of land. It is also undisputed that the 13 acres was never legally divided. Consequently, the 13 acres was, and still is, considered a part of Tax Lot 58. As such, it cannot be considered a separate "landlocked parcel."

On the other hand, the Craigs' boundary line conveyance of the 13 acres did expand the size of the Westhusings' parcel. The 13 acres became a part of the Westhusings' parcel. Indeed, for approximately five (5) years, the Westhusings used the property for its intended purpose (i.e. pasture land and to preserve their views). The issue of gaining vehicular access to the 13 acres across the Craigs' parcel did not arise until after the Westhusings' divorce and the Vissers' attempt to acquire the 13 acres as a separate parcel.

⁸ Granite Beach, 103 Wn. App. at 196.

- b. The Westhusings had sufficient legal access to accomplish the purpose of the conveyance of the 13 acres, and therefore, the 13 acres was not rendered useless by the conveyance.

Up to this point, the analysis has been limited to whether the 1999 conveyance created a separate landlocked parcel, or merely expanded the Westhusings' existing parcel. Regardless of the outcome on that issue, the Vissers must also prove that the Westhusings did not, at the time of the 1999 conveyance, have legal access to the 13 acres. They cannot meet this burden.

The undisputed evidence shows that the Westhusings had (and still have) legal and sufficient access to use the 13 acres for its intended purposes. They have maintained their horses on the property, and their views have been protected as intended. The access needed for these purposes has been and continues to be, without question, legally sufficient. No one has questioned the Westhusings' ability to access the 13 acres. The property has not been rendered useless simply because the Vissers may not be able to convert the property into a residential subdivision.

2. **The Trial Court Improperly Applied *Brown v. Voss* To Conclude That The Additional 13 Acres Was Legally Landlocked.**

To decide whether an easement should be implied by reason of necessity, the court must focus on what existed or resulted at the moment the conveyance was made.⁹

In support of their contention that the additional 13 acres cannot be served by Nichols Hill Road, the Vissers rely upon Brown v. Voss.¹⁰ The trial court erred when it held, under Brown v. Voss, that an easement cannot be expanded to serve additional land added onto the dominant parcel through a boundary line adjustment. The trial court also erred by failing to review or consider the express terms of the Nichols Hill Road Agreement before reaching this conclusion. Indeed, the Nichols Hill Road Agreement was never submitted as evidence or considered by the court.

- a. *Brown v. Voss* does not prevent an easement to be used to serve property acquired by virtue of a boundary line adjustment.

Judge Bennett erred when he ruled that, under Brown v. Voss, the Westhusings were barred from using Nichols Hill Road to access the additional 13 acres. The court in Brown v. Voss did state that “an

⁹ See Br. of Resp. at 16.

¹⁰ 105 Wn.2d 366 (1986).

easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant.”¹¹ However, key to the court’s determination in Voss was the court’s determination that there were two separate parcels involved, rather than, as in this case, one parcel whose territory was expanded by virtue of a boundary line adjustment. The trial court in this case failed to make that distinction.

In Voss, the plaintiff attempted to expand an easement granted to serve Parcel B (“the dominant estate”) by Parcel A (“the servient estate”) to serve Parcel C, acquired by the plaintiff at a later date. Although Parcel C was landlocked, it was considered a separate parcel and therefore not served by the easement.¹² While the court eventually permitted the expansion of the easement upon equitable grounds, it did find that an easement cannot normally be expanded to serve separate legal parcels.

Voss, however, did not address whether the expansion of the dominant parcel by virtue of a boundary line adjustment would constitute an unlawful extension of the easement. Voss is not applicable in this case.

¹¹ Br. of Resp. at 17.

¹² Voss, 105 Wn.2d at 368-71.

Unlike in Voss, the current situation does not involve three (3) separate parcels, or even two (2) separate parcels. The 1999 conveyance resulted in the Westhusings adding the 13 acres to their Tax Lot 58; the Westhusings did not, as the Vissers wish to imply, acquire the 13 acres as a separate parcel. The easement serving Tax Lot 58 was therefore not being extended by the 1999 conveyance to serve any additional parcels.

Respondents are essentially taking the absurd position that under Brown v. Voss, no changes can ever be made to the dominant estate without rendering the easement serving that parcel invalid, at least as to the extent of the land added to the dominant parcel. What a bizarre concept. Under their theory, no boundary lot adjustments would be allowed if the effect of the adjustment would be to add any additional or different territory to the dominant parcel, no matter how slight the addition. Moreover, under the Respondents' theory, a property owner who acquires additional land by virtue of adverse possession or other boundary line doctrines would also be out of luck from using their easement to access this additional territory. This simply makes no sense and is beyond what the court meant to accomplish in Voss.

- b. The trial court should have considered the Nichols Hill Road Agreement before ruling that the easement could not be expanded to serve the additional 13 acres.

The trial court also erred when it presumed, without analyzing the exact terms of the Nichols Hill Road Agreement, that the easement could not be expanded to serve the additional 13 acres.

In Voss, the court stated that the first step to determine whether an easement can be expanded to serve additional territory is to review the language of the actual instrument creating the easement.¹³ In this case, the Vissers never introduced the Nichols Hill Road Agreement. Accordingly, the trial court, which was required to consider all facts and reasonable inferences in the light most favorable to the nonmoving party, erred by not reviewing the express terms of the Agreement.¹⁴ The trial court erred when it simply assumed that the Nichols Hill Road Agreement did not allow for an expansion of the easement to serve the additional 13 acres of pasture land.¹⁵ Contrary to what the Vissers assert, an easement may be expanded to serve other parcels if the instrument creating the easement so

¹³ Id. at 371.

¹⁴ CR 56(c).

¹⁵ City of Lakewood v. Pierce County, 144 Wn.2d 118, 125 (2001).

provides.¹⁶ Further, the Vissers' failure to produce this evidence, without satisfactory explanation, raises the inference that the evidence would have been unfavorable to them.¹⁷

The Vissers also attempt to distinguish both the Logan and Sunnyside Valley cases from the case at hand on the basis that those two cases did not involve geographic expansions of an easement.¹⁸

First, Logan did involve the increased volume of use and its effects on an easement; however, the court in Logan did not narrowly tailor its holding to apply only to increased volume as the Vissers contend.¹⁹ Furthermore, the court in Logan stated that the “servient owner [] has the burden of proving misuse.”²⁰ Here, the servient owner (Highland Meadows Home Owners Association) has remained silent for well over seven (7) years since the 1999 conveyance to the Westhusings.²¹ There is simply no evidence that Highland Meadows Home Owners Association has any objection to the current use of the easement serving the 13 acres.

¹⁶ Sunnyside Valley Irrigation Dist. V. Dickie, 149 Wn.2d 873, 883 (2003). (“[E]asements 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. The face of the easement must manifest this clear intent.”).

¹⁷ Lynott v. Nat'l Union Fire Ins. Co., 123 Wn.2d 678, 689 (1994).

¹⁸ Br. of Resp. at 20; Logan v. Brodrick, 29 Wn. App 796, 800 (1981)

¹⁹ Logan, 29 Wn. App. At 800.

²⁰ Id. at 800.

²¹ Commissioner Skerlec also noted this point in her Ruling Granting Review at 4.

Second, the Sunnyside Valley case involved the physical expansion of the easement and not merely “increased volume of use.”²² In Sunnyside Valley, the Sunnyside Valley Irrigation District sought to increase the actual physical width of the easement to accommodate new equipment that would save significant amounts of time spent cleaning irrigation ditches.²³ The facts in the present matter are different in that the actual size of the dominant parcel is being expanded and not just the easement; however, Sunnyside Valley supports the principle that the scope of an easement may be expanded under certain conditions. Here, the scope of the Nichols Hill Road easement was expanded without violating the rule in Voss. The Westhusings’ use of the 13 acres to expand their pasture land and to protect their scenic views could not, under any circumstance, be deemed an unlawful expansion of the scope of the easement. This did not, as the Vissers wish to contend here, constitute an increase in the actual burden of the easement serving the Westhusings’ parcel.

At the moment the Craigs conveyed their 13 acres to the Westhusings, the Westhusings had sufficient legal access to the property. Prior to the Vissers’ involvement, no one ever denied or questioned the

²² Sunnyside Valley, 149 Wn.2d at 876 (“The issue is whether the parties intended widening of the easement to accommodate increased irrigation demands and the use of more efficient maintenance equipment.”) (emphasis added); Br. of Resp. at 21.

²³ Sunnyside Valley, 149 Wn.2d at 876-79.

Westhusings' right to access their 13 acres, or claimed that they had unreasonably expanded the scope of the Nichols Hill Road easement. In fact, this issue was not raised until the Vissers sought to acquire the 13 acres as a separate parcel and proposed to convert the property to residential use.²⁴

In summary, the Vissers have failed to prove, at the moment the Craigs conveyed the property, that the 13 acres: (1) was a separate landlocked parcel; or (2) did not have adequate legal access for its intended purposes (i.e. agricultural or as a scenic buffer); or (3) was rendered useless by conveying the property without providing access over the grantors' remaining parcel. The Vissers' claim for easement implied by necessity should therefore be denied.

3. **The Parties' Actual Intent Must Be The Court's Chief Consideration When Construing A Deed.**

- a. Just like with any other contract, the court must attempt to ascertain the intent of the parties when construing a deed.

It is axiomatic that “[w]hen construing a deed, the intent of the

²⁴ Presumably, one of the legal barriers facing the Vissers in this case is the fact that Clark County will not permit the Westhusings to divide out the 13 acres as a separate parcel. One of the conditions of any short-plat or subdivision is to demonstrate legal access.

parties is of paramount importance” to the courts.²⁵ In fact, the Washington Supreme Court has stated that the “principal aim is to effect and enforce the intent of the parties.”²⁶

Although absent so far in this case, the court’s paramount duty when called upon to construe the terms of a conveyance is to give meaning and effect to the parties’ “mutual intent.”²⁷ Although the easement by implication doctrine, in all three of its forms, permits the court to read into the deed omitted words, the doctrine was never intended to be a substitute for the parties’ actual intent. It is merely a tool to assist the court to determine the parties’ presumed intent under certain and limited circumstances, and only when their intent is not clearly stated.

- b. The doctrine of easements implied by necessity is designed to assist the court in determining the parties’ implied intent and should not be used as a substitute for their actual intent.

Easements by necessity, easements by reference to plat, and easements implied from prior use are all different theories for finding the existence of an easement that was not expressly included in a deed. They

²⁵ Brown v. State, 130 Wn.2d 430, 437 (1996).

²⁶ Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass’n, 156 Wn.2d 253, 262 (2006).

²⁷ The intent to create an access easement is implied when one of the parcels is landlocked after the severance. Roberts, 41 Wn. App. at 865, 707 P.2d 143; State ex rel. Carlson v. Superior Court, 107 Wash. 228, 232, 181 P. 689 (1919).

are each subspecies of the broader doctrine of implied easements.²⁸

The Vissers concede that under an easement implied by prior use, the court's "cardinal consideration" is to determine the grantor's actual intent.²⁹ However, the Vissers contend that when applying the easement implied by necessity doctrine, the court is to ignore the parties' actual intent. The Craigs see no reason that justifies this distinction.

Professor Stoebuck summarizes the theories of easements by implication and notes that, "[e]ssentially, the difference between easements implied from necessity and easements implied from prior use is that, with those implied from necessity, there need be no pre-existing use."³⁰ Professor Stoebuck did not state that there is no intent element involved with an easement implied by necessity, nor did he state that Washington law held that an easement by necessity arises automatically with conveyance of a landlocked parcel.³¹

The Vissers try hard to distinguish the present case from previous Washington cases.³² They also argue that the court in Hellberg determined that the parties' actual intent is not relevant when applying the

²⁸ W. Stoebuck & J. Weaver, REAL ESTATE: PROPERTY LAW § 2.5, p. 93 (2d ed. 2005).

²⁹ Br. of Resp. at 9.

³⁰ Id.

³¹ Indeed, a law review article discussing the two (2) types of easements at issue stated that the presumption in favor of an easement by necessity may be rebutted by proof of the parties' actual intent. Comment, The Implied Easement and Way of Necessity in Washington, 26 Wash. L. Rev. 125 (1951).

³² Curiously, the Respondents fail to address the fact that the Craigs' position is supported by the majority of other states that have addressed this issue.

easement implied by necessity theory of implied easements.³³ However, as pointed out by the Craigs and confirmed by Commissioner Skerlec, no Washington court has considered whether the intent of the parties can affect the right to an easement of necessity.³⁴ There is, quite frankly, no reason to distinguish easement by necessity from easement implied from prior use; both doctrines are intended to determine the presumed intent of the parties.

The Vissers, without any legal authority, boldly argue that “the parties’ intent is not a consideration” for the court when applying the easement implied by necessity doctrine.³⁵ This turns the court’s normal function in a contract dispute on its head.

The Vissers argue that an easement by necessity “arises automatically,” a point not mentioned in any of the cases cited by Vissers, by any Washington court, or, for that matter, a majority of the states that have addressed the issue. In Hellberg, the Court recognized at the outset of its opinion that both easements by necessity and easements by prior use are easements implied by law.³⁶ The court then discussed both theories for implying easements but never made clear which doctrine it applied to

³³ Hellberg v. Coffin Sheep Co., 66 Wn.2d 664 (1965).

³⁴ The Craigs discussed that the majority rule in the United States and supported by the leading treatises is that the easement by necessity doctrine will not be used to contravene the intent of the parties. Br. of App. at 18-22.

³⁵ Br. of Resp. at 14.

³⁶ Hellberg, 66 Wn.2d at 667-669.

find in favor of the Plaintiff.³⁷

The Vissers argue that the language in the opinion, which addresses the intent of the parties, only applies to easements by implication and not easements by necessity.³⁸ The opinion is, at best, vague on this point. This view has certainly never been endorsed or even used by any subsequent opinions. Indeed, as pointed out in our Opening Brief, the majority view in America shows that the court's paramount duty, or "cardinal consideration," is to determine the parties' actual intent. While guided by sound public policy, no court has ever held that the doctrine of easements by implication, no matter the theory, be used to defeat the parties' actual intent.

Both sides agree that it is possible to have a case where both an easement by necessity and an easement implied from prior use could be applied to create an easement.³⁹ Accordingly, if the Vissers are correct that easements by necessity do not require an analysis of the parties' intent, the outcome of a particular case would then depend solely upon which theory the court chose to apply first. If the intent of the parties was

³⁷ Id. at 669.

³⁸ Br. of Resp. at 11.

³⁹ Hellberg, 66 Wn.2d at 666 ("We are satisfied from the record that Hellberg is entitled to access to his property over the old Coffin road, either on the basis of a way of necessity or on the basis of an implied easement appurtenant to the land..."); CP 1-4; Br. of Resp. at 9, n.44 ("It is possible to have a case where both easement theories are appropriate..."); see also Stoebuck & Weaver, supra, § 2.5.

undisputed, but the court applied the easement by prior use doctrine first, then the outcome would depend upon the “cardinal consideration,” the parties’ actual intent. On the other hand, if that same court, using the Respondents’ argument, applied the easement implied by necessity doctrine first, then the court would reach a different conclusion. There is no rational basis to explain this distinction or to justify the different outcomes.

Despite Respondents’ contention to the contrary, the court’s opinion in Roberts v. Smith discussed both easements implied from prior use and easements by necessity.⁴⁰ The Vissers’ analysis of this case is simply flawed. In actuality, the case supports the Craigs’ argument. In Roberts, the court stated that “the intent to create an access easement over grantor’s land is implied when a grantor sells landlocked property. The intent arises out of contract and is based on estoppel.”⁴¹

The Court’s ruling in Granite Beach lends further support to the Craigs’ position. Although the case addressed property that was once owned by the federal government, the court did require that there be evidence of the grantor’s intent when it applied the easement by necessity doctrine.⁴² Key in Granite Beach is the fact that the court considered the

⁴⁰ 41 Wn. App. 861, 864-65 (1985).

⁴¹ Id. at 865.

⁴² Granite Beach, 103 Wn. App. at 199.

public policy arguments and found that the intent of the granting party was more important than the dilemma created by permitting a landlocked parcel. Although there is a strong public policy against permitting parties to create landlocked parcels, the policy of construing the actual intent of the parties was more important.

4. Parties May Convey Landlocked Properties.

The Vissers argue that under no circumstances can a grantor create a landlocked parcel. They argue that the policy against creating landlocked parcels is so strong that it is legally impossible for the parties to convey a parcel without providing access.

Even Judge Bennett was unwilling to go that far. He wrote that the parties could expressly agree to convey a landlocked parcel.⁴³ However, Judge Bennett determined that this intent would have to be clearly expressed in the parties' written conveyance.

The Vissers offer no legal authority for their argument that parties cannot, under any circumstance, create a landlocked parcel. In a move that can only be described as "the pot calling the kettle black," the Vissers assert that the Craigs' proposition is without merit because the Craigs do not cite to any authority. The Vissers then turn around and assert, without

⁴³ CP 224.

any legal authority, that “parties may not convey landlocked property.”⁴⁴

The Respondents’ contention that parties cannot agree to convey a parcel without providing vehicle access defies common sense and regular practice. Some simple examples will reveal the flaw in their argument and make apparent why the court’s paramount duty in cases involving the conveyance of real property should always be to simply ascertain and construe the parties’ actual intent.

Assume that “A” owns Blackacre, a large parcel used for grazing cattle. Blackacre has full access to a public road for ingress and egress. “A” later determines that he could make more money by dividing the property and selling the back lot, what is now called Whiteacre, a landlocked parcel, to “B” for \$100,000. “A” conveys Whiteacre to “B” but does not expressly include an easement for ingress and egress to the conveyed property. In this example, the parties simply forgot to include the easement in the conveyance documents (or “A” purposely, but unilaterally, decided to exclude the easement in the conveyance). The court would be fully justified to impose an easement and find in favor of “B” under the easement implied by necessity doctrine.

Now assume the same facts, except that this time “B” wants to buy Whiteacre for wetland mitigation or to have additional territory for his

⁴⁴ Br. of Resp. at 18.

adjoining farm. “A” conveys the property to “B” as a boundary line adjustment; no new parcels are created. The parties agree that the conveyance will not include a right of easement across “A’s” existing farm. Assume further that there is a large canyon separating “B’s” existing farm from the conveyed property which will effectively prevent “B” from having vehicular access to the acquired parcel. “B” wants the parcel to graze his cattle and/or for mitigation. The parties therefore negotiate a reduced price for the parcel because it does not include an easement across “A’s” remaining parcel. In this example, the intent of the parties not to provide an easement is clear and undisputed. Should the easement by necessity doctrine still apply when there is no doubt that the parties did not intend to grant an easement? A great injustice would result if “B” was awarded an easement across “A’s” property when the parties expressly negotiated a price that contemplated a landlocked parcel. Of course, “B” can always sue under Chapter 8.24 RCW to condemn a private right-of-way, provided he pays “A” fair market value for the property and shows a reasonable degree of necessity.

Finally, let’s assume that “B” subsequently conveys Whiteacre to “C”. In this example, assume that the zoning code has changed and now “C” can construct a single-family residence on the property provided he can show legal vehicular access. Should “C” now be able to obtain an

easement by necessity from “A” when the original undisputed intent of “A” and “B” was to not include an easement in the conveyance? The better conclusion is that “C” can seek to condemn a private right-of-way under Chapter 8.24 RCW.

5. **The Vissers Have Other Remedies That Would Be More Equitable Than Imposing An Easement Contrary To The Craigs’ Bargained-For Conveyance.**

The Vissers argue that the court must apply the doctrine to allow for the perpetual use of the 13 acres. Even assuming the County ultimately recognizes the 13 acres as a separate parcel, the Vissers have plenty of other remedies available to them. Rather than allowing the Vissers to steal an easement from the Craigs, the court should require the Vissers to exhaust their other remedies.

For instance, the Vissers could examine and determine whether they are entitled to use the Nichols Hill Road easement. If not, then the Vissers can attempt to negotiate an easement from the Craigs or the Highland Meadows Home Owners Association. If all else fails, the Vissers can certainly, under Chapter 8.24 RCW, seek to condemn an easement from their neighbors. Indeed, as the court discussed in Granite

Beach,⁴⁵ the Vissers can seek to condemn a person's rights in an easement.

Of course, as with any other person under the same circumstances, the Vissers would need to prove the most suitable route for their right-of-way and pay fair market value for the right to condemn an easement.

Ironically, the Vissers espouse "equity" in their Brief, but fail to point out the inequity of their position. The Craigs conveyed their 13 acres to their neighbor to allow them to have more pasture land and to permit them to protect their views from future development. The parties to that conveyance agreed that the Craigs would not be required to provide an easement to the 13 acres. The purchase price reflected this bargain. In a bizarre twist, the Vissers now seek to acquire an easement to cross the Craigs' property to convert the 13 acres into residential use. Why should the Vissers be permitted to assert a right that the Westhusings could not assert?

The Craigs did not create the landlocked parcel or render the 13 acres useless. Therefore, they should not be burdened with providing an easement across their property. Then, to add insult to injury, the Vissers want to deny the Craigs fair compensation for providing an easement across their property. This, to coin the Respondents' words, would be an inequitable result, a result that is contrary to the court's

⁴⁵ 103 Wn. App. At 202-03.

paramount duty to effectuate the parties' actual intent.

6. **Since The Creation Of An Easement By Implication Is Contrary To The Statute Of Frauds, The Court Should Be Careful To Determine The Parties' Actual Intent.**

The Vissers state that the doctrine of implied easements does not violate the statute of frauds even though the doctrine creates a property right not expressly provided in writing.⁴⁶ The Vissers misunderstand the Craigs' point in raising the statute of frauds.

By imposing an easement where the deed is silent, and the evidence shows that no easement was intended by the parties, the court would be essentially rewriting the terms of the deed by adding rights and obligations. Any attempt to add to the written deed by finding an implied easement is in derogation of the statute of frauds and must be applied in only the narrowest of circumstances. While the Craigs acknowledge that the courts can certainly find an easement by necessity absent language in a deed, the public policy of requiring the intent of the parties to be expressed in writing is equally important in Washington as born out by the fact that the legislature has adopted the statute of frauds. The doctrine should therefore only be applied when there is absolute certainty concerning the original parties' intent.

⁴⁶ Coincidentally, Vissers and Snedeker omitted any citation to authority for this point.

Here, where the parole evidence indisputably shows the parties' intent, the court's imposition of an easement would be contrary to the public policy of requiring conveyances of property to be in writing.

For the same reasons, imposing an easement where the parties clearly contemplated and decided not to include such an easement is in violation of the parties' freedom to contract. Public policy must not interfere with that freedom, except for good reason.⁴⁷ In this case, the Craigs and the Westhusings negotiated an agreement in which the Craigs conveyed the 13 acres for a price that the parties believed was fair. These same parties understood that the price did not include the right to impose an easement across the Craigs' remaining parcels.

The later-coming Vissers should not be permitted to run roughshod over or trump the agreement reached between the Craigs and the Westhusings. To do otherwise would cause violence to the right of the parties to freely contract. Moreover, permitting the Vissers to acquire an easement from the Craigs without having to pay them or anyone else fair compensation for the value of the property would run contrary to the requirements of the private condemnation statute.⁴⁸

⁴⁷ McCutcheon v. United Homes Corp., 79 Wn.2d 443 (1971); Northwest Airlines V. Hughes Air Corp., 37 Wn. App. 344 (1984).

⁴⁸ Curiously missing from this entire dispute is the Westhusings. Who knows? Perhaps the Vissers have also not paid the Westhusings fair market value for the 13 acres because of the problems of access, or the fact that it is not recognized as a legal lot record.

In summary, the court should not impose an easement when the undisputed evidence shows that the parties considered and specifically rejected the idea of having their conveyance include an easement across the Craigs' parcel. If the Vissers want an easement, they must pay just like any other similarly situated persons. Any other outcome will cause the Craigs (and now the Trinh)s to suffer a great inequity.

C. 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 17th day of November, 2006.

SCHWABE, WILLIAMSON & WYATT,
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CERTIFICATE OF FILING

I hereby certify that on the 14th day of November, 2006, I caused to be filed the original and one copy of the foregoing PETITIONERS' REPLY 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 14th day of November, 2006, I served one correct copy of the foregoing PETITIONERS' REPL BRIEF by depositing it with Federal Express to be shipped via overnight service to:

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