

No. 35372-5-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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HARRY MUNOZ AND VALERIE FYALKA-MUNOZ, a married couple

Respondents.

v.

RANDALL CHOPP and MICHELL CHOPP, husband and wife, and PIERCE  
COUNTY, Washington municipal corporation,

Appellants,

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**REPLY BRIEF OF APPELLANTS**

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Mark R. Roberts  
WSBA No. 18811  
Attorneys for Appellants,  
RANDALL CHOPP and MICHELLE CHOPP

DAVIS ROBERTS & JOHNS, PLLC  
7525 Pioneer Way, Suite 202  
Gig Harbor, Washington 98335  
Telephone No. (253) 858-8606  
Facsimile No. (253) 858-8646

BY: [Signature]  
STATE OF WASHINGTON  
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COURT OF APPEALS, DIVISION II

**ORIGINAL**

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I.  
**OBJECTION TO RESPONDENTS USE OF DECLARATIONS**  
**NOT CONSIDERED BY THE COURT AT TRIAL**

The Appellants, Randy and Michelle Chopp (Chopp) object to the use by Respondents, Harry and Valerie Munoz (Munoz) of declarations regarding motions considered by the trial court prior to trial. The trial court's decisions on those motions is not the subject of this appeal. Moreover, none of the declarations were considered by the trial court as evidence at trial. Consequently, pursuant to Title 9 of the Rules of Appellate Procedure, the Munozes are barred from using those documents to support the trial court's findings of fact and conclusions of law.

The declarations and pleadings are also irrelevant to any of the issues on appeal. The Munozes argued at their motion for summary judgment that their easement should be reformed or, alternatively, that they had a prescriptive easement over the original dirt road that was removed prior to the Chopps' purchase of the property. CP 169-178. The Munozes abandoned that claim at summary judgment when they realized that there was no basis for reforming the easement and it was impossible to show all of the necessary elements to obtain a prescriptive easement and because the old dirt road was in a different location than the present

serpentine road. CP 257-273. Since the Munozes did not pursue a claim for reformation or a prescriptive easement at trial, they cannot resurrect that claim on appeal. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 617 P.2d 704 (1980); *Barnes v. Seattle School Dist. 1*, 88 Wn.2d 483, 563 P.2d 199 (1977); *Fuqua v. Fuqua*, 88 Wn.2d 100, 558 P.2d 801 (1977) (Issues not raised in the trial court will not be considered for the first time on appeal).

## II. SUMMARY STATEMENT

This appeal is predicated on the trial court's finding that the Munozes and Chopps agreed to relocate the Munozes' easement. Findings of Fact Nos. 8, 21, 22. The Chopps demonstrated in their opening brief that there was no evidence to support the trial court's finding that there was an agreement. Rather than attempt to provide any evidentiary support for that finding, which they cannot do, the Munozes ignore the actual issue on appeal and simply make the statement that the Chopps "unilaterally relocated" the Munozes access easement and then prevented the Munozes from using that relocated easement. See Respondents' Brief at 1. Since the Munozes have failed to provide any evidence that the Chopps ever agreed to relocate the easement, let alone substantial

evidence as required on appeal, all of the arguments flowing from that proposition fail. For that reason, and the other reasons outlined in this brief, this Court should reverse the trial court's decision and direct that the Munozes' claims be dismissed.

### **III. ARGUMENT**

#### **A. The Munozes Rely Upon The Wrong Standard Of Review.**

The Munozes assert under their Standard of Review section that the trial court exercised its equitable powers in fashioning the relief in this case. See Respondents' Brief at 12-14. Consequently, the Munozes conclude that this Court should use the abuse of discretion standard in reviewing the trial court decision. The Munozes ignore the fact that the trial court expressly applied a contract theory and not an equitable theory by finding as follows:

8. After construction of the new road was complete, the Chopps offered to provide a road easement over the new road at no cost to the Muñozs if they would execute a certain road maintenance agreement. The Muñozs did not sign the road maintenance agreement, and the Chopps ultimately barred the Muñozs from using the new road.

21. The parties both testified that the Muñozs agreed to the relocation of the easement. The Muñozes didn't mind utilizing the new road that the Chopps built. They just didn't want to have to pay for the privilege or pay to have it maintained.

22. The Chopps always indicated they wanted to adopt the relocation, so there is no dispute about the agreement to relocate. It's a dispute about money and what should happen as a result of this relocation.

CP 120, 122.

Moreover, the trial court also understood and agreed that Washington law prevented the court from exercising any equitable powers to resolve this matter, making the following Conclusions of Law:

1. Washington law provides that an easement cannot be relocated absent the agreement of the parties. Washington law is built on the policy that you can't take somebody's property right without their agreement and you can't force someone to pay compensation if they don't want to pay compensation. Consequently, there is no basis in the law for the Chopps to be compensated in this case.

2. The Muñozs' road easement has been relocated to ten (10) feet on either side of the centerline of the new road that crosses the Southview Plat.

CP 123.

Since the trial court did not exercise any equitable powers in this case, and since the trial court expressly understood that it was prohibited from exercising equitable powers to relocate an easement, neither the abuse of discretion standard nor any equitable theories are applicable to this case. See *Crisp v. VanLaeken*, 130 Wn.App. 320, 122 P.3d 926 (2005) and *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn.App. 188 (2002).

The standard this Court applies when reviewing findings of fact is to determine if they are supported by substantial evidence. See *Doe v. Boeing Co.*, 121 Wn.2d 8, 846 P.2d 531 (1993) and *Henry v. Bitar*, 102 Wn.App. 137, 142, 5 P.3d 1277 (2000). Since, as discussed in more detail below, the Munozes have failed to provide any evidence to support the trial court's findings, this case must be reversed with instructions to dismiss the Munozes' claims.

**B. The Munozes Fail To Provide Any Evidence That There Was An Agreement To Relocate Their Easement.**

In their response brief, the Munozes completely ignored their obligation to demonstrate that there is substantial evidence in the record to support the challenged findings of fact, specifically that the Chopps and the Munozes agreed to relocate the Munozes easement, as determined by the trial court. Instead, the Munozes argue a completely different theory, one never presented to the trial court, that since the Chopps' "predecessors-in-interest undertook to relocate the original road and utility easements benefiting the Munozes property", the Chopps "adopted their predecessors' relocation of the road and utility easements." *Id.* at 16-18. This argument was not presented to the trial court and is not supported by the evidence, the trial court's findings or Washington law.

The trial court specifically found that the Munozes and Chopps agreed to relocate the Munozes easement. See Findings of Fact 21 and 22; CP 120, 122. The trial court did not find that there was an agreement between the Chopps' predecessors and the Munozes that the Chopps subsequently adopted. Moreover, even if there had been an agreement between the Munozes and the Chopps' predecessors, the trial court found that the Chopps had no involvement in any such agreement, such that the Chopps are bona fide purchasers for value and cannot be bound by it. RP 180; Finding of Fact No. 18; CP 122. See *Berg v. Ting*, 125 Wn.2d 544, 555, 886 P.2d 564 (1995); *Baird v. Knutzen*, 49 Wn.2d 308, 311, 301 P.2d 375 (1956). The Munozes' argument is also barred by the statute of frauds as provided below.

Lastly, the Munozes argue for the first time that the Chopps' "consent [to the relocated easement] may be shown by implication"<sup>1</sup>

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<sup>1</sup> The elements to establish an implied easement are (1) unity of title and subsequent separation by grant of the dominant estate; (2) apparent and continuous use; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate. *MacMeekin*, 111 Wn.App. at 195. Unity of title and subsequent separation is an absolute requirement. *Id.* The Munozes offer no citation to the record to support any of these elements.

or acquiescence<sup>2</sup>". Respondents' Brief at 15. Both theories are inapplicable to this case. The trial court found that there was an agreement between the Munozes and the Chopps. The elements necessary to form an agreement are offer, acceptance and consideration. The party asserting the existence of an agreement bears the burden of proving the essential elements of an agreement. See *Bogle & Gates, P.L.L.C. v. Holly Mountain Res.*, 108 Wn.App. 557, 560, 32 P.3d 1002 (2001).

The testimony of the parties was clear: The Chopps offered to grant an easement to the Munozes, for free, if they signed the Road Maintenance Agreement. RP 34-35, 53-54, 126-127, 169; Exhibit 8. The Munozes refused and demanded that the Chopps pay them \$50,000 thus rejecting the offer and any agreement. RP 126-129, 138; Exhibit 10; See *Sea-Van Investments Associates v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994); See also

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<sup>2</sup> In Washington, the theory of acquiescence relates solely to the recognition of property lines and not easements. See e.g. *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967). Foreign jurisdictions have discussed instances where a party's consent to a change in the location of an easement may be inferred from his acts and conduct and characterized that as acquiescence. See F.M. English, *Relocation of Easements (other than those arising by necessity); Rights Between Private Parties*, 80 A.L.R. 2d 743 § 8 (2007). Even if that were the law in Washington, the record is devoid of anything to suggest either the Chopps or the Munozes acted in a way that could be characterized as acquiescence.

*Blue Mt. Construction Co. v. Grant County, School District 150-204*, 49 Wn.2d 685, 688, 306 P.2d 209 (1957). Since there is no evidence to support the finding of an agreement, this Court must reverse the trial court with instructions to dismiss the Munozes claims.

**C. The Munozes' Claim Is Barred By The Statute Of Frauds.**

The Munozes recognize that even if their unsupported proposition that the Munozes and Chopps had orally agreed to relocate the easement, the statute of frauds bars their claim. Consequently, the Munozes argue that the statute of frauds cannot be applied in this case solely because it was not expressly plead by the Chopps as an affirmative defense<sup>3</sup>. Respondents' Brief at 19. They further state that the Chopps never raised the argument before the trial court. The pleadings on file as well as the trial transcript demonstrate otherwise.

The Chopps provided in their trial brief that RCW 64.04.010, which states "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any

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<sup>3</sup> The Munozes complaint only alleged a quiet title claim and did not include any contract claims. CP 1-19. Consequently, the Chopps had no reason to believe that the statute of frauds would be relevant as an affirmative defense.

encumbrance upon real estate, shall be by deed” requires the grant of an easement to be in writing. CP 100. The Chopps also argued that point to the trial court as follows:

MR. ROBERTS: . . . We know from the law that the easement can't be relocated.

THE COURT: Why do you say that? It can be relocated by agreement of the parties; can it not?

MR. ROBERTS: Except by agreement of the parties, and we have no agreement of the parties. And the only way to have agreement of the parties is to do so in writing, meeting all the prerequisites to a deed.

THE COURT: Where do you find authority for that proposition?

MR. ROBERTS: It's under the statute, as well as it's cited in my brief.

THE COURT: Show me the statutory provision.

MR. ROBERTS: The first cite is RCW 64.04.010, which says, “Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed,” and that's on page 7 of my brief.

RP 218-219.

At no time did the Munozes object to either the brief or the arguments. Consequently, the Chopps did properly raise the statute of frauds.

The Munozes then argue that the statute of frauds does not apply since the Munozes have an easement over the Chopps'

property and the “location or relocation of that easement is not subject to the statute of frauds” citing to *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995) (citing *Smith v. King*, 27 Wn.App. 869, 871, 620 P.2d 542 (1980)). Respondents’ Brief at 20.

In both *Berg* and *Smith*, the Court stated that the statute of frauds applies to easements, stating that “a ‘*deed [ of easement ]*’ is not required to *establish the actual location* of an easement, but *is required to convey an easement’ which encumbrances a specific servient estate.*” (Italics in the original). *Berg*, 125 Wn.2d at 551; *Smith*, 27 Wn.App. at 871. Neither case suggests that the statute of frauds is inapplicable to an agreement to relocate an easement, nor was that the holding in either case. More importantly, the statute of frauds clearly does apply to the relocation of an easement by agreement.

As the Washington Supreme Court stated in *Key Design Inc. v. Moser*, 138 Wn.2d 875, 887, 983 P.2d 653 (1999), “[t]he statute of frauds in general provides a channeling function, as well as the evidentiary function just discussed. *Restatement (Second) of Contracts* § 110, at 286 (1981). The formal requirements of the statute for land contracts helps to create a climate in which parties often regard their agreements as tentative until there is a signed

writing.” Thus, no agreement affecting real property is effective in Washington until it is reduced to writing. Any agreement that fails to meet that requirement violates the statute of frauds and is therefore unenforceable. *Id.*

Since the Chopps and the Munozes never executed a deed, the purported oral agreement would be violative of the statute of frauds and thus unenforceable.

Lastly, the Munozes argue that partial performance removes the agreement from the statute of frauds. Respondents’ Brief at 20. Although part performance may remove an agreement from the statute of frauds, the Munozes argue that the Chopps’ performance of moving the road fulfills this argument. However, it was not the Chopps, but their predecessors, who moved the road. RP 64-65, 110, 141, 175; Exs. 7 and 12; Finding of Fact No. 5. Similarly, the law requires the party advancing this exception, the Munozes, to show that they performed and therefore the Chopps should be estopped from denying the agreement. Since the Munozes did not perform anything, this argument is inapplicable.

**D. The Munozes Failed To Prove That Their Express Easement Could Have Been Developed In The Absence Of The New Road.**

The Munozes again argue that the Chopps' plat prohibits them from developing their easement. And again the Munozes ignore the fact that they failed to prove that their easement could have been developed in the absence of the Chopps' plat. They even argue that their own expert witness, Mr. Diamond, was not competent when he expressed the opinion that even in the absence of the plat, the Munoz easement could not be developed. RP 94. Clearly the Munozes only want to pick and choose what opinions to hear. In this case, their own expert confirmed their argument had no merit.

**E. The Munozes' Easement Cannot Be Reformed.**

On November 21, 2005 and shortly before trial, the Munozes moved to amend their complaint to include a claim for reformation. CP 28-39. At oral argument on the motion, the Munozes withdrew the motion and thus the theory of reformation was not argued at trial. See Appendix A, Page 16, Lines 8-9.<sup>4</sup> Now the Munozes

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<sup>4</sup> Appellants have submitted a Supplemental Statement of Arrangements to have the transcript provided to the Court. For the convenience of the Court, Appellants attached the transcript as Appendix A.

seek to present the argument they intentionally withdrew, stating that the Chopps' predecessors intended to grant an easement different from what they received such that their easement should be reformed. The Munozes barred themselves from making that claim. Even if they had amended their complaint and argued reformation as a theory, it is inapplicable.

In *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 63 P.3d 125 (2003) the court explained reformation as follows:

A party may seek reformation of a contract if (1) the parties made a mutual mistake or (2) one of them made a mistake and the other engaged in inequitable conduct. *Hedreen*, 125 Wash.2d at 525, 886 P.2d 1121. "However, reformation is justified only if the parties' intentions were identical at the time of the transaction." *SPEEA*, 139 Wash.2d at 832-33, 991 P.2d 1126. The party seeking reformation must prove the facts supporting it by clear, cogent and convincing evidence. *Akers*, 37 Wash.2d at 703, 226 P.2d 225; *Kaufmann v. Woodard*, 24 Wash.2d 264, 269, 163 P.2d 606 (1945).

In order for the theory of reformation to apply, there must first be an agreement. As this appeal demonstrates, there is no evidence to support any agreement and therefore there cannot be any reformation. Nor is there any evidence of mutual mistake regarding the non-existent agreement. Additionally, the Munozes

again fail to provide any citation to the record to support the applicability of reformation.

If the Munozes are arguing that the original easement conveyed in 1976 (see Exhibits 1 and 2) or the 1988 easement (see Exhibit 3) should be reformed, which is not clear from their argument, it is important to note that the Munozes purchased their property in 1994 and well after the original parties to those documents had sold. Consequently, the Munozes knew from the clear and unambiguous language of those documents exactly what they were getting. Moreover, there is no evidence to suggest any of the original parties to those documents made a mistake. For all of those reasons, reformation is not a remedy in this case.

**F. The Munozes' Only Viable Claim Would Have Been A Private Right Of Condemnation.**

The Munozes dedicate a significant portion of their brief to the argument that the Chopps are not entitled to any compensation for the Munozes' use of the new, improved road. See Respondents' Brief 25-30. This argument presupposes that the Munozes have an easement to use the new road. As provided above, the Munozes do not. Consequently, the question of compensation is presently irrelevant, because the Munozes chose

not to pursue an easement by necessity pursuant to chapter 8.24 RCW. In that regard, the Munozes argue that there is no basis for an easement by necessity.

The Chopps are not encouraging the Munozes to seek an easement by necessity and thus see little reason to argue that the Munozes have such a right. However, if the Munozes' original easement is insufficient to provide access, since no road can be constructed up a cliff, they are fundamentally without an easement. The significance of this fact is that the Munozes have a remedy to obtain access under chapter 8.24 RCW and they have intentionally decided not to pursue that remedy.

**G. There are No Equities To Balance In This Case.**

The Munozes argue that this Court should not consider “the relative hardships to the [Chopps] when fashioning relief.” See Respondents' Brief at 31. Balancing equities only applies where the Court is granting equitable relief, such as reformation. See *Wilhelm v. Beyersdorf*, 100 Wn.App. 836, 847, 999 P.2d 54 (2000). Since the trial court did not reform the easement and since reformation is inapplicable to this case, there are no equities to be balanced.

#### **IV. CONCLUSION**

In response to the Chopps' appeal, the Munozes provided an extensive brief, with extensive citations to case law. However, the Munozes failed to answer the only relevant issue in this case: What substantial evidence supports the trial court's finding that the Munozes and the Chopps agreed to relocate the easement? The Munozes failed to provide any citation to any evidence to support the finding that the parties agreed to relocate the easement.

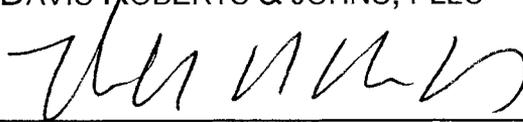
Instead, the Munozes attempt to apply several unrelated legal propositions, such as easements by implication or acquiescence, never before advanced in this case. They dispute the competency of their own expert's opinion that their easement was never developable irregardless of the Chopps' plat. They ask that an unspecified agreement, for which they have failed to provide any factual support, should be reformed to grant them an easement over the new road. And lastly, they argue that the one applicable remedy, an easement by necessity pursuant to chapter 8.24 RCW, does not apply.

Since the Munozes have failed to provide any citation to the record demonstrating that the relevant findings are supported by

substantial evidence, and since none of the Munozes' arguments support the trial court's decision, the Chopps respectfully request that this Court reverse and remand this case back to the Trial Court with instructions to dismiss the Munozes' claims.

Respectfully submitted this 9<sup>th</sup> day May, 2007.

DAVIS ROBERTS & JOHNS, PLLC

A handwritten signature in black ink, appearing to read 'Mark R. Roberts', written over a horizontal line.

MARK R. ROBERTS, WSBA #18811  
Attorneys for Appellants Chopp

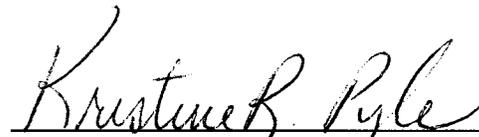
**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of May, 2007, I caused to be served the foregoing REPLY BRIEF OF APPELLANTS on the following individual in the manner indicated:

Dianne K. Conway  
GORDON THOMAS HONEYWELL  
1201 Pacific Avenue Suite 2200  
Tacoma, Washington 98401-1157

(X) Via Hand Delivery (ABC Legal Messengers)

SIGNED this 9<sup>th</sup> day of May, 2007, at Gig Harbor,  
Washington.

  
Kristine R. Pyle

OT 11:11-0  
STATE OF  
BY \_\_\_\_\_  
MAY 10 2007  
11:11 AM  
2007-05-10 11:11 AM  
OT 11:11-0

# APPENDIX A

Byers & Anderson, Inc.  
Court Reporters & Video

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

HARRY MU-OZ and VALERIE FYALKA- )  
MU-OZ, a married couple, )  
 )  
 Petitioners/Plaintiffs, )  
 )  
 vs. ) No. 05-2-10364-2  
 )  
 )  
 RANDALL CHOPP and MICHELLE CHOPP, )  
 husband and wife; and PIERCE COUNTY, )  
 a Washington municipal corporation, )  
 )  
 Respondents/Defendants. )

VERBATIM RECORD OF PROCEEDINGS  
December 2, 2005  
Tacoma, Washington

BYERS & ANDERSON - COURT REPORTERS & VIDEO  
2208 North 30th Street One Union Square  
Suite 202 600 University Street  
Tacoma, WA 98403-3351 Suite 2300  
(253) 627-6401 Seattle, WA 98101-4112  
Fax: (253) 383-4884 (206) 340-1316  
(800) 649-2034  
Scheduling@byersanderson.com

1

1 BE IT REMEMBERED that on Friday,  
2 December 2, 2005, in Courtroom 833 at 930 Tacoma Avenue  
3 South, Tacoma, Washington, before The Honorable Thomas J.  
4 Felnagle, the following proceedings were had, to wit:

6 <<<<<< >>>>>>

8 THE COURT: Next is Muoz vs. Chopp.  
9 And what a surprise. This is a motion to amend the  
10 complaint.

11 MS. CONWAY: This has been a very  
12 educational morning for me. But my name is Diane Conway.  
13 I'm here for the plaintiffs, Harry and Valerie Muoz, in  
14 Pierce County Cause No. 05-2-10364-2.

15 As Your Honor may recall, we were before you a couple  
16 weeks ago in a hearing for motion for summary judgment, and  
17 the conclusion of that hearing was -- your ruling was that  
18 my clients did have an easement, but you weren't going to  
19 make any decision at that time regarding whether it should  
20 be moved coexistent with the road that's been constructed by  
21 the defendants, so that's where we left it at that hearing.

22 There was also discussion you had some concerns about  
23 whether or not my clients in equity would have to --

24 THE COURT: Compensate.

25 MS. CONWAY: -- yeah, compensate the

1 APPEARANCES

2 For Petitioners/Plaintiffs:

3 Dianne K. Conway  
4 Gordon, Thomas, Honeywell  
5 1201 Pacific Avenue  
6 Suite 2100  
7 Tacoma, Washington 98402-4314  
8 253.620.6500  
9 253.620.6565 Fax  
10 dconway@gth-law.com

11 For Respondents/Defendants:

12 Mark R. Roberts  
13 Davis Roberts & Johns  
14 7525 Pioneer Way  
15 Suite 202  
16 Gig Harbor, Washington 98335-1166  
17 253.858.8606  
18 253.858.8646 Fax  
19 mark@drj-law.com

1 defendants in any manner whatsoever, and I briefed some of  
2 that in my briefing anticipating that question, and -- but  
3 that question was still left open presumably for trial.

4 At that -- we had a discussion at that time about  
5 possibly extending the trial date because if that was going  
6 to be a new issue, it would entail discovery and what have  
7 you.

8 It came to my attention later, though, after that  
9 hearing that, in fact, the defendants had put in their --  
10 one of their counterclaims an in-the-alternative request for  
11 compensation, so they do actually have -- do have that claim  
12 in their counterclaim, and I, in fact, had asked for  
13 discovery on that issue, and they had responded to that  
14 discovery request saying that they were assembling  
15 information about the road costs, et cetera, and they would  
16 provide it to me at a later date.

17 Well, they never did, so as I understand the law,  
18 they're precluded now -- since they never responded to the  
19 discovery request in a timely fashion within the discovery  
20 period, they're precluded from making the arguments on that  
21 matter, so there was no need to move the trial date to allow  
22 discovery on that matter, at least from my clients'  
23 standpoint.

24 However, as you may also recall, they made the claim  
25 that the -- had to actually have a reformation claim as part

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1 of our complaint. We, quite frankly, disagree. We think  
2 the quiet title gets to the exact same result and through  
3 the -- essentially the -- that same means, but we thought,  
4 Well, to be careful, let's go ahead and amend the complaint.  
5 Now they've protested on a number of grounds, and -- that I  
6 don't think have any water. As somebody this morning  
7 already mentioned, the touchstone of this is prejudice.  
8 They don't have to prove or disprove anything more with a  
9 reformation claim than they do with a quiet title action.  
10 And to the extent that the Court may disagree, we would  
11 then withdraw our motion to amend the complaint and just go  
12 to trial on Tuesday because we have a situation where the  
13 other side hasn't produced discovery, and so they can't,  
14 therefore, bring in information about the cost of the road,  
15 and that claim is essentially done, which, of course, is to  
16 my clients' benefit.  
17 THE COURT: Okay. Mr. Roberts?  
18 MR. ROBERTS: Your Honor, the problem  
19 with this motion is it highlights the fact that what they've  
20 asked for originally and what they're trying to do today are  
21 two radically different things. For example, the only way  
22 we know what they want in terms of this quiet title action  
23 is what's predicated in their prayer for relief, for what  
24 they're asking for is fee simple title. Now, fee simple  
25 title is very different from an easement.

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1 When we were here before you last, one of the things  
2 that the petitioners represented to you is that you would  
3 have the equitable authority to move a written easement from  
4 one location to another. Now, the issue only came up  
5 because counsel had submitted two cases to you by letter a  
6 couple of days prior to our hearing. It hadn't been  
7 briefed; it hadn't been argued.  
8 I had the opportunity after that hearing to look at  
9 those cases and others which very clearly state that,  
10 unfortunately, the Court does not have the equitable  
11 authority to move the easement, and there were a number of  
12 policy reasons why.  
13 The reason why we oppose this amendment is because  
14 among other things, it doesn't accomplish any of the things  
15 that you had requested, which is putting all the issues on  
16 the table, because the only way to put the issue of moving  
17 this easement on the table is for the petitioners to seek a  
18 private right of necessity.  
19 Now, I'm not in any way advocating that they do that  
20 from the standpoint that it certainly is their discretion to  
21 do whatever they want, but I point that out because if none  
22 of the other claims prevail, then they will be collaterally  
23 estopped from raising this new claim now: Oh, we need an  
24 easement by necessity.  
25 Also, the issues of reformation and the equitable

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1 theory are so undefined, yet seem to be present in this  
2 case, we haven't had any opportunity to do any discovery on  
3 it whatsoever. Reformation, in general, arises out of a  
4 circumstance where you have a contract in which there has  
5 either been a mutual mistake of fact or a unilateral mistake  
6 of fact coupled with some kind of inequitable conduct.  
7 The only contracts that we can think of are these  
8 easements that were granted 20 years ago that aren't between  
9 any of the parties who are present in this lawsuit, so that  
10 particular cause of action wouldn't apply, but we don't know  
11 if that's what they mean by reformation or if they mean  
12 something else. The same thing is true with this equitable  
13 theory. What we're assuming, just based on the little bit  
14 of information we have, is that they're suggesting the Court  
15 has the equitable authority to move this easement while at  
16 the same time the very cases they cite specifically says the  
17 Court doesn't.  
18 And so, Your Honor, we can only oppose this from the  
19 standpoint that we have no idea, frankly, what it is they're  
20 pleading, what their theories are. And, in fact, under  
21 those claims, what they do is recite the same four  
22 paragraphs they had recited before, and yet when we look  
23 through there, they don't tie any of it together. They  
24 don't provide anything in the prayer for relief. There's no  
25 way for us to know.

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1 What we're stuck with is the potential that at trial,  
2 we're going to have to deal with all kinds of issues that  
3 were never pled, but which the petitioners are going to  
4 complain, "Well, Judge, you ought to conform the pleadings  
5 to the proof." We don't want to be ambushed by that. We  
6 want to know what the issues are and what the basis is for  
7 those issues before we have to go to trial on this.  
8 MS. CONWAY: Your Honor, it's  
9 disingenuous for them to say that we don't know what we  
10 want. We want -- my clients want access to their property.  
11 Even the defendants say that we do have these easements to  
12 our property. The dispute -- well, to the extent it is  
13 one -- is how we use them to get to the property.  
14 Now, the road that they constructed, as we went over at  
15 the summary judgment hearing, is about 90 percent on top --  
16 or within the easement area described by the modified  
17 easement that was recorded in 1988. They don't want us to  
18 use the remaining part that's not -- they want to forbid us  
19 from using the part that's not coexistent with that.  
20 Well, if that's the case, then we have a right -- even  
21 they said we have a right to use the easement as it was  
22 originally described, which means their whole plat has to  
23 get voided because it goes right through an area that the  
24 plat that they approved by the County says is open space and  
25 there can be -- or some type of buffer, and there can't be

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1 any construction or moving of dirt of any kind within those  
2 areas.  
3 And so we are sort of making their argument that the  
4 logical equitable remedy here -- and these are all equitable  
5 claims -- is to just, well, relocate the easement, quiet  
6 title to the easement, on top of where the road is  
7 constructed. It's the exact same result with any of these  
8 claims, and it's all in equity, and there's plenty of case  
9 law, and they are incorrect about the cases, not -- that I  
10 cited to the Court before, not supporting moving an easement  
11 or reforming an easement in cases where equity dictates that  
12 it should be.

13 In this case, they've had a plat approved. They're  
14 building houses. It would have to be presumably demolished  
15 to a certain extent or they would have to redo the plat if  
16 we don't -- if we were given the easement exactly where it  
17 was originally described. They appear to want to go down  
18 that road. I don't understand why, but, I mean, I'm not  
19 here to make their arguments for them.

20 In the end, as far as this motion, we think that the  
21 claims have identical results. They have identical proofs,  
22 if you will, to the extent that there's any roof. I mean,  
23 what's before the Court now at trial as I understand it is  
24 whether the easement should be moved over to where the --  
25 the ten percent of the easement should be moved over to

1 It's not a fee simple property right, but they know exactly  
2 what we're asking for.

3 THE COURT: I can see the difficulties  
4 already from my perspective, not worrying so much about your  
5 perspective, and I'm going to get in trouble either way  
6 because if I just leave this as it is, what's going to  
7 happen is the defense is going to say, "Well, what you would  
8 like to do, Your Honor, you can't do, because they didn't  
9 plead it."

10 And if I allow it, what's going to happen is the  
11 plaintiffs are going to be asking for all sorts of relief  
12 that's not clearly defined because now reformation and  
13 declaratory judgment become these sort of vague theories  
14 that encompass who knows what. I don't even know to begin  
15 with whether or not -- can a party seek to reform an  
16 agreement that they weren't part of initially? I don't know  
17 whether they can or can't, so we are adding some different  
18 thoughts.

19 On the third hand, this all comes about because of the  
20 compressed time frame we have with the companion LUPA  
21 action, and normally we would have a trial date that would  
22 be out a year, and the parties could kind of refine their  
23 theories as the discovery process goes along, but here we're  
24 trying to get it done quickly.

25 I'm not still quite sure what the plaintiff is saying.

1 where the road is not coexistent with the written easement.

2 I'm not sure how we're going to put down proof about  
3 that except to say, "Well, here it is, and here's the road,  
4 and here are the options," but be that as it may, we think  
5 it's prudent to go ahead and add these claims as they've  
6 raised the issue, and we're -- but to the extent that they  
7 think it's going to create new discovery, et cetera, we'll  
8 just say, "No. Never mind." We won't amend the complaint.  
9 We'll just go to trial on Tuesday on the quiet title action,  
10 and again, they have -- by not producing discovery as  
11 requested, have waived the right to make any compensation  
12 claims.

13 MR. ROBERTS: Your Honor, if all we're  
14 going to go to trial on is whether or not they're entitled  
15 to an easement in fee simple, we have no problem with that,  
16 but if they want to go beyond that, we're going to have a  
17 big problem, so if counsel is representing that all we're  
18 going to do is go to trial on what they've pled in the  
19 complaint, which is a fee simple right, no problem, but if  
20 we're going to bring in all these equitable claims, whatever  
21 they are, which we don't know what they are, we're obviously  
22 going to have a problem.

23 MS. CONWAY: Your Honor, there was a  
24 typo when we did the complaint. We're asking for quiet  
25 title to an easement. An easement is a property right.

1 Are you saying you're willing to go to trial with your quiet  
2 title theory, or do you want me to consider these new causes  
3 of action?

4 MS. CONWAY: We think it gets to exactly  
5 the same place. If you quiet title to an easement -- this  
6 is all in equity. Remember, it's not like there's  
7 necessarily proofs.

8 THE COURT: Okay. But you don't really  
9 need to argue your theories to me.

10 MS. CONWAY: All right.

11 THE COURT: You just need to tell me  
12 whether or not --

13 MS. CONWAY: Okay.

14 THE COURT: -- you want to -- you want  
15 to --

16 MS. CONWAY: We think it is --

17 THE COURT: -- amend or not.

18 MS. CONWAY: Okay. Yes, Your Honor. We  
19 think -- we would want to go to trial on Tuesday and just  
20 because since they have failed to do -- provide discovery on  
21 this counterclaim of theirs, they've effectively -- I mean,  
22 it's too much to my clients' advantage not to go to trial on  
23 this issue on Tuesday because they had basically waived that  
24 claim by failing to provide the discovery that we requested,  
25 and so yes, we would want to go to trial on Tuesday on the

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1 quiet title.  
2 THE COURT: Does that mean yes, you want  
3 to amend the complaint as you suggested?  
4 MS. CONWAY: I would -- I would like to  
5 do both. I would like to amend the complaint as we  
6 suggested and then go to trial on Tuesday. We think  
7 there's -- there's no prejudice to the defendants, despite  
8 their claims, by adding these new claims and going to trial  
9 on Tuesday, but if the Court disagrees and thinks that there  
10 may be some prejudice to them, then we will forgo amending  
11 the complaint and just go to trial on the quiet title  
12 action.  
13 THE COURT: Well, I don't have any  
14 problem with amending the complaint. I haven't heard from  
15 the defense whether they're interested in going to trial if  
16 the complaint is amended or they want to have this  
17 continued. I don't know what their position is, but I don't  
18 have a problem with amending the complaint. Like I say, the  
19 time frame has been compressed. It's consistent with  
20 the facts of the case, doesn't raise any new factual issues  
21 that we would have to deal with. It adds a different legal  
22 look at this --  
23 MS. CONWAY: Uh-huh.  
24 THE COURT: -- but I don't think that's  
25 significant at this point.

1 explore what course you want to take now with the new  
2 theories, and you ought to be able to bring summary judgment  
3 or any other motion you want to bring in response to this,  
4 maybe a motion to make more definite and certain and maybe  
5 more discovery. All of that is reasonable. And so are you  
6 asking for a continuance --  
7 MR. ROBERTS: If you're inclined --  
8 THE COURT: -- or are you anticipating  
9 asking for a continuance?  
10 MR. ROBERTS: If you're inclined to  
11 amend, Your Honor, then we're asking for a continuance.  
12 THE COURT: I have already indicated I  
13 am inclined to do that.  
14 MR. ROBERTS: Then we will need a  
15 continuance to respond to these.  
16 THE COURT: Now, I am receptive to that.  
17 Now, does that then change your position so that -- such  
18 that you don't want to amend? You want to withdraw the --  
19 MS. CONWAY: Yes, that's what I was  
20 attempting to say earlier. To the extent you want to --  
21 well, let me put it this way: To the extent that Your Honor  
22 is willing to extend the discovery period regarding their  
23 counterclaims as opposed to just these new claims, I mean,  
24 if they only want to do discovery regarding our new claims,  
25 that and move the trial date accordingly for those, that's

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1 Now, that, however, doesn't preclude you from saying,  
2 "Well, we'd like to knock these out, and we need time to do  
3 that," so I don't know where the defense is.  
4 What is your response, Mr. Roberts?  
5 MR. ROBERTS: Well, for one, we don't  
6 think we've waived any of our counterclaims, and we  
7 certainly intend to pursue those on a number of different  
8 bases, so I want to make it clear that even if we go to  
9 trial just on the complaint the way it is, without any  
10 amendment, we're going to limit to the only claim that's  
11 pled, and we do have defenses to that.  
12 Having said that, we certainly need more time because  
13 we do think that there are additional facts that need to be  
14 determined. We need to know what are you basing this theory  
15 on, and, frankly, it's unclear to us what theory it is that  
16 they're advancing. If you say this is a quiet title action,  
17 but you want to shift to something different, it would be  
18 like pleading, "Well, this is a property rights case. Now  
19 guess which theory we're going to pursue under that, and  
20 guess which facts might apply to whichever theory we  
21 pursue."  
22 There's just no way for us to be able to properly  
23 prepare for that.  
24 THE COURT: Okay. Well, I don't  
25 disagree at all. I do think you ought to be entitled to

1 fine. But if they want to get in what they have already not  
2 gotten in under the current discovery period, we would say  
3 no, and we'll just go to trial on the quiet title action.  
4 THE COURT: I'm going to allow an  
5 extended discovery period on everything in this case --  
6 MS. CONWAY: Okay.  
7 THE COURT: -- quite frankly.  
8 MS. CONWAY: In that case, we will  
9 withdraw the motion to amend the complaint.  
10 THE COURT: Okay. So we are back to  
11 where we started, which was a trial set for Tuesday.  
12 MS. CONWAY: Yes.  
13 Now, one question for Your Honor: As I started out  
14 saying, the issue as it was left on the easement is whether  
15 or not -- you said they had an easement in your own ruling,  
16 and you said the question was whether or not it should be  
17 moved or where it was, basically, and the part where it  
18 wasn't coexistent with the road, is what I understand. Is  
19 that --  
20 THE COURT: Well, I don't want to be  
21 bound by anything I said that wasn't strictly holding. And  
22 all I really was doing was indicating my response to a  
23 motion for summary judgment, so I don't want to suggest that  
24 I've already decided or I'm going to decide whether or not  
25 this easement ought to be moved or there is some other

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1 theory by which they get an easement different than what the  
2 paperwork set out. Nor do I want to be bound by the fact  
3 that there is a right to compensation or not a right to  
4 compensation or a theory that supports compensation here.

5 All I've done so far is make a ruling on summary  
6 judgment and then tried to give you the benefit of my  
7 thinking so that you can be prepared to meet some of the  
8 questions that are likely to arise in my mind when we try  
9 this case, which is: What is the theory to rework the  
10 easement, if there is one? How do we get to that point?  
11 And if we get to that point, is there some right to  
12 compensation?

13 Because the cases seemed to suggest you don't very  
14 readily change the easement over. There are circumstances  
15 apparently when you can do that, but it's limited and you're  
16 taking a property right, so if you do it, you'd better be  
17 prepared to compensate, but I'm not sure -- I'm not sure  
18 about the theories --

19 MS. CONWAY: Right.

20 THE COURT: -- in this case.

21 MS. CONWAY: Yeah. Well, the cases are  
22 consistent that the -- when a servient estate owner moves --  
23 relocates an easement, that the dominant estate owner does  
24 not pay for any of it.

25 THE COURT: But there was a suggestion

1 MR. ROBERTS: Well, as long as what  
2 we're limiting it to is their claim for quiet title in fee  
3 simple, we don't have a problem, but if the issues of  
4 reformation or other equitable theories are going to come up  
5 that they want to present --

6 THE COURT: I don't doubt for a second  
7 that we're going to be right here arguing that very point  
8 because you're going to want to argue equitable grounds.

9 MS. CONWAY: Well, it's all --

10 THE COURT: I'm not going to be  
11 surprised by that.

12 MS. CONWAY: Right. And our point is  
13 whether you call it "reformation" or "quiet title," you're  
14 asking for an easement to be located on the existing road,  
15 and whatever you call it, it's the same thing.

16 THE COURT: And I perceive that your  
17 position is quite different, that there's not any equitable  
18 leeway here: This is a legal call. Either they have an  
19 easement or they don't have an easement. You can either  
20 quiet title to it or you can't. And we don't go into any  
21 equitable consideration.

22 So we have a big disconnect to begin with here which  
23 I'm not prepared to resolve right here in argument because  
24 we've got other people waiting.

25 MS. CONWAY: Okay.

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1 in some of the case law you cited that indicated that there  
2 was some equitable leeway the Court had, and I have no idea  
3 under what circumstances that leeway is to be exercised and  
4 to what extent it's to be.

5 MS. CONWAY: Okay. So it seems to me,  
6 at trial, we are sort of going to be just arguing legal  
7 theories more than bringing in new facts. Is that -- I  
8 don't know.

9 THE COURT: I don't know. This is your  
10 lawsuit. I'm just responding to it. I'm not trying to  
11 drive it.

12 MR. ROBERTS: It seems to me, Your  
13 Honor --

14 THE COURT: The points I'm going to need  
15 the most help on are certainly the legal aspects of it.  
16 There is no question about that. Now, I do need to know  
17 some of the factual setting. I have an imperfect idea of  
18 what the original easement looked like in relation to what  
19 the road now actually looks like and what the \$750,000 worth  
20 of expenses entail and how --

21 MS. CONWAY: We don't know either  
22 because they didn't just respond to our discovery.

23 THE COURT: So it may be a short factual  
24 presentation and a long look at the law.

25 MS. CONWAY: All right.

1 THE COURT: So we'll have to take it up  
2 on Tuesday, unfortunately.

3 MS. CONWAY: All right. Thank you.

4 MR. ROBERTS: Thank you, Your Honor.

5 THE COURT: Thanks.

6 (Proceedings concluded.)  
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SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

HARRY MU-OZ and VALERIE FYALKA- )  
MU-OZ, a married couple. )

)  
Petitioners/Plaintiffs. )

)  
vs. ) No. 05-2-10364-2

)  
RANDALL CHOPP and MICHELLE CHOPP, )  
husband and wife; and PIERCE COUNTY, )  
a Washington municipal corporation. )

)  
Respondents/Defendants. )

CERTIFICATE

STATE OF WASHINGTON )  
) ss  
COUNTY OF PIERCE )

I, JOHN M.S. BOTELHO, Certified Court Reporter in the  
State of Washington, County of Pierce, do hereby certify  
that the foregoing transcript is a full, true, and accurate  
transcript of the proceedings and testimony taken in the  
matter of the above-entitled cause.

Dated this    day of    , 2005.

JOHN M.S. BOTELHO  
Certified Court Reporter  
CCR #2976