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DIVISION II  
OLYMPIA, WA  
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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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No. 36487-5-II

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Thuston Co. Superior Crt. No. 04-2-00305-6

CHRISTY A. GUNDERSON and JOHN DOE GUNDERSON,  
MICHAEL J. ROGERS and NANNETTE B. ROGERS, EAGLE HOME  
MORTGAGE, INC., HERITAGE SAVINGS BANK, and JAMES E.  
BRAZIL and JANE DOE BRAZIL

Respondents,

v.

AMEDEO NAPPI

Appellant.

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**BRIEF OF RESPONDENTS GUNDERSON**

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PM12-31-07

ORIGINAL

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## I. INTRODUCTION

This action was filed by Appellant pursuant to RCW 8.24, Private Ways of Necessity, in an attempt to gain access to his parcel through an existing driveway used by Respondents GUNDERSON and ROGERS. It is undisputed that whomever is the owner of the "NAPPI property", is the owner of an easement, albeit undeveloped, that runs along the northern thirty feet of the parcels owned by GUNDERSON and ROGERS. Appellant previously achieved access through the property now owned by Respondents BRAZIL, which was previously owned by Appellant and his ex-wife. Apparently, Appellant got half the property in the dissolution, but did not reserve for himself an easement.

As explained more thoroughly below, in two separate and prior causes of action, Appellant has already litigated whether he has a right to access his property through the pieces now owned by Respondents, or predecessor owners, except that undisputed easement.

Essentially, Appellant, by filing the present matter, attempted for a third time to gain a legal right to access his parcels through existing driveways/roads. As was discovered at the trial court level, there is even a question as to Appellant's actual ownership of the property, as it was conveyed to Appellant's partner at a Sheriff's sale. Still, GUNDERSON

prefers to argue the appeal on the merits, as the risk of a quit claim back to Appellant is high. CP 184, l. 14 -185, l. 14.

## II. ASSIGNMENTS OF ERROR

Appellant states three assignments of error, but also states a laundry list of “issues pertaining to assignments of error.” The assignments of error themselves are as follows:

1. The trial court erred in issuing an order denying appellant’s motion for reconsideration on May 8, 2007.
2. The trial court erred in issuing an orders (sic.) for summary judgment dismissing appellant’s petition on November 3, 2006.
3. The trial court erred in issuing orders for attorney fees against petitioner on November 3, 2006.

The laundry list of issues pertaining to the assignments of error is convoluted and repetitive, and Respondents GUNDERSON have elected to not answer the 21 “issues” individually. Essentially, this Court must determine only two issues: (1) whether the trial Court properly determined that the doctrine of res judicata barred the claims filed by Appellant, as a matter of law; and, if so, (2) in the light of such dismissal, whether the

Court had discretion to award attorney fees where Appellant was already enjoined from bringing such action.

### **III. STATEMENT OF THE CASE**

#### **A. Injunction against access on Rogerson (Rogers) Property.**

In 1985, a case was filed in Thurston County Superior Court (cause no. 85-2-00666-3) by Roger and Vickie Rogerson against Appellant and CHRISTINE NAPPI, Appellant's former wife, for trespass and damages. The trespass alleged to have occurred involved Rogerson's driveway, still used today by ROGERS and GUNDERSON. Appellant counterclaimed, alleging that a prescriptive easement had been established over the driveway. Respondents ROGERS in this action are the successors-in-interest to Rogersons.

The Rogerson cause of action went to a jury trial. In the Special Verdict Form, the jury answered the following questions as follows:

QUESTION NO. 1: Did Defendants trespass upon or encroach on Plaintiffs' property (not including the road)?

ANSWER: Yes

QUESTION NO. 4: Have the Defendants established a prescriptive easement over the land belonging to Plaintiffs?

ANSWER: No

CP 118. Pursuant to said jury verdict, an Order for Permanent Injunction was entered. It reads, in part:

The jury having returned a verdict that Amedeo Nappi and Christine Nappi have trespassed upon property belonging to Roger E. Rogerson and Vickie L. Rogerson and the jury having returned a verdict that Amedeo Nappi and Christine Nappi have not acquired a prescriptive easement to use there current road across the Rogersons' property, the Court will enjoin Defendants Nappi from entering upon the land of the Plaintiffs. Therefore, based upon the jury's verdict the Court hereby enjoins Amedeo Nappi and Christine Nappi from encroaching on, traveling on or placing any objects or property on the real property described above belonging to Roger E. Rogerson and Vickie L. Rogerson.

This injunction prohibits Amedeo Nappi and Christine Nappi from traveling on a road that crosses the Rogerson property, other than the legally described easement which is the thirty (30) foot wide easement that runs north on the easterly most boarder of the Rogersons' property.

CP 120-121. The injunction is dated the 18<sup>th</sup> day of June, 1987 and is signed by Judge Richard Strophy. Id.

**B. Disposition of real property in NAPPI divorce proceedings.**

Before his divorce decree in Thurston County Superior Court Cause Number 85-3-00258-1, Appellant and his then-wife owned the entire property now owned by Appellant and Respondents BRAZIL. Appellant retained ownership of the portion of property he now owns and Mrs. Nappi (then "Campany") retained ownership of the portion now

owned by the BRAZILS. See map at CP 139. Ms. Nappi (Campany) executed a Statutory Warranty Deed, wherein she conveyed her western portion to Defendant BRAZIL. CP 123-126. Appellant failed to reserve for himself an easement through Mrs. Nappi's property for access to Waddell Creek Road. Id.

**C. Litigation between NAPPI and BRAZIL.**

In Thurston County Superior Court Cause Number 00-2-01365-2, filed in July of 2000, Appellant filed suit against the BRAZILS, praying for relief in the form of an easement over BRAZILS' real property from Waddell Creek Road to his parcel. Nearly three years later, on January 10, 2003, an Order granting BRAZILS' Motion for Partial Summary Judgment was entered and signed by Judge Richard A. Strophy. CP 128-133. Among the findings made by the Court were:

12 At the time of purchase by Brazil, there was no directly observable easement that would give notice upon inspection of the property by Mr. Brazil or any other prospective purchaser that there was an implied easement for ingress and egress to the back five acres.

13. There was no continuous use at the time of severance of any easement across the front five acres to the back five acres.

14. There was no open or continuous use of any implied easement across the front five acres to the back five acres since the time of severance prior to the time of purchase by Brazil.

CP 130-131. Among the conclusions of law made by the court were:

1. The elements of implied easement were not met, therefore no implied easement was ever created. There was unity of title and subsequent separation of these two parcels but there was no servitude in use favoring the back five acres at the time of the severance.
2. There is no easement through the front five acres to the back five acres.
3. Even if it could be said that there may have been an implied easement for ingress and egress between Mr. Nappi and Ms. Campany, there was no constructive or actual notice to Brazil that the property he intended to purchase was impressed with such an easement by implication for ingress and egress in Nappi's favor.
4. There was no actual notice to Brazils that the property he intended to purchase from Campany was impressed with an easement by implication for ingress and egress, in Nappis favor.
5. The divorce decree between Nappi and Campany was not adequate to inform a prospective purchaser that there was an issue as to an easement for ingress and egress, given the character of the property and its condition at the time Brazil inspected it and made the decision to purchase.
6. There is no factual controversy regarding an enforceable grant of an oral easement.

CP 131-132. Thereafter, on page 5, it was ordered that "Plaintiffs claims as to an implied easement for ingress and egress are **dismissed with prejudice** as a matter of law." CP 132.

Pursuant to the partial summary judgment order, the ingress and egress issue was resolved, but there apparently was still an outstanding

issue related to rights to use of the well on the BRAZIL property. CP 135-137. As part of the resolution of that matter, Respondents BRAZIL apparently felt compelled to grant Appellant a small 30 foot by 30 foot easement in the Southeast corner of BRAZILS' property, (it should be noted this may have convinced Appellant to file this matter). CP 136. II. 23-33. The Court's Order & Judgment Quieting Title and Granting Easement ruled:

3. Except as provided herein, plaintiff Nappi and his successors in interest have no right to easement on defendant Brazil's property for any purpose.

CP 136.

**D. Location of GUNDERSON property.**

As clearly shown on the map shown in the Clerk's Papers (CP 139), access from Waddell Creek Road to Appellant's property cannot be had on the properties of the Respondents in this matter, in light of the previous litigation. GUNDERSONS' property is so situated that without first establishing access through ROGERS' or BRAZILS' properties, GUNDERSONS' parcel cannot be reached. As shown above, NAPPI's right to access on the ROGERS' and BRAZILS' property has already been litigated and adjudicated.

#### IV. ARGUMENT

##### A. Standard on Review.

As this Court is well aware, on review of a Summary Judgment, the Appellate Court engages in the same inquiring as the trial court. City of Sequim v. Malkasian, 138 P.3d 943, 157 Wn.2d 251 (2006).

The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of material fact. LaPlante v. State, 531 P.2d 299, 85 Wn.2d 154, 158 (1975). Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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). A material fact is one upon which the outcome of the case depends. Cox v. Malcolm, 808 P.2d 758, 60 Wn. App. 895, 897 (1991). The motion can only be granted when, after all facts and inferences are submitted and evaluated, reasonable persons could only reach one conclusion. Olson v. Siverling, 758 P.2d 991, 52 Wn. App. 221, 224 (1988). All inferences must be made in favor of the non-moving party. Turngren v. King County, 705 P.2d 258, 104 Wn.2d 293, 312 (1985). The burden of demonstrating the absence of material facts rests with the moving party.

Once the moving party establishes the absence of a genuine issue of material fact the non-moving party may not rest on mere allegations or denials in its pleadings, but must respond by affidavit or other proper method setting forth specific facts showing there is a genuine issue for trial. McGough v. Edmonds, 460 P.2d 302, 1 Wn. App. 164, 168 (1969). If no genuine issue of material fact exists, it must then be determined whether the moving party is entitled to judgment as a matter of law. CR 56.

The trial Court properly granted the Summary Judgment Motion. Appellant was enjoined and estopped from, asserting a right to an easement on any of the Respondents' properties. BRAZILS were only proper parties if ROGERS and GUNDERSON were, so their inclusion in the summary judgment proceedings helped show the whole picture.

In addition, because Appellant was barred from bringing this action, attorney fees were appropriate on the trial court level, as well as fees reasonably incurred on appeal.

**B. It is important to recognize that this matter has never been an action to obtain use of the legally described easement.**

As mentioned above, there is apparently a legally described and recorded easement located on the edge of the ROGERS and GUNDERSON properties. CP 139. Purportedly, again on appeal,

Appellant argues that somehow, that easement transformed into the existing driveway that benefits the ROGERS and GUNDERSONS. The existing driveway does not even reach Appellant's property. Again, on appeal, Appellant argues that there exists some sort of case law supporting the issue, but again cites nothing.

“Appellant's brief is absolutely confusing as to how, apparently, Appellant could actually claim that this action was for a prescriptive easement on an already existing easement. If one owns a recorded, written, valid easement, no rights by prescription are needed through the easement.”

As quoted in Appellant's Brief, pp. 25-26, quoting the trial Court's transcript:

The court: So this case is about your right to use the existing driveway?

Mr. Nappi: Right. As I said, I did further research into the case. I'm not a lawyer, but I had some issue about easement by prescription, and since that easement has been there and not used, it is still on record, but the other one now, which they created in '71 and they have used since '87 they move there, which is documented y (sic) the affidavits and few things in the record.

I see some cases (sic) law that says you can use an existing easement, and I'm saying that that became the actual legal easement because it was used for a period of time, which would quality (sic) it.

....

The court: But you were restrained from using an easement on the Rogers property in another case.

Mr. Nappi: No, I wasn't restrained from using the easement. The original easement I can use.

The court: I'm not talking about the one on that map. I'm talking about the driveway that the Rogers and the Gundersons were using, you were restrained from that.

Appellant goes on to, purportedly, argue that since ROGERS and GUNDERSON did not own the property when the prior litigation occurred, despite the clear law cited in GUNDERSON's Memorandum to the contrary ("This first element of res judicata requires that "both causes of action have identity in persons and parties." Pedersen v. Potter, 11 P.3d 833, 103 Wn. App. 62, 67 (2000). Persons and parties include persons in privity with a party to the former action, such as ROGERS is to Rogersons in this matter. See In re Coday, 130 P.3d 809, 156 Wn.2d 485, 504 (2006) [Privity includes "mutual or successive relationship to the same right or property."])

Appellant cites no case law supporting the idea that the easement somehow moved when a driveway was built to benefit the GUNDERSON/ROGERS properties. Instead, he plainly asserts that he has seen such case law. The Court properly determined, considering the law provided to the Court by the parties, that judgment as a matter of law was appropriate. Whether such case law exists is surely a question of law, and none has been proved.

**C. The doctrine of res judicata bars NAPPI's condemnation claim.**

“Res judicata, or claim preclusion, prohibits the relitigation of claims and issues that **were litigated, or could have been litigated**, in a prior action.” Pedersen v. Potter, 11 P.3d 833, 103 Wn. App. 62, 67 (2000), citing Loveridge v. Fred Meyer, Inc., 887 P.2d 898, 125 Wn.2d 759, 763 (1995) (emphasis added). It “is a judicially created doctrine designed to prevent relitigation and to curtail multiplicity of actions by parties, participants or **privies** who have had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction.” Corbin v. Madison, 529 P.2d 1145, 12 Wn. App. 318, 323 (1974), citing Bordeaux v. Ingersoll Rand Co., 429 P.2d 207, 71 Wash.2d 392, 395 (1967).

“Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. Pedersen, supra., citing Schoeman v. New York Life Ins. Co., 726 P.2d 1, 106 Wn.2d 855, 860 (1986); State v. Drake, 558 P.2d 828, 16 Wn. App. 559, 563-64 (1976). Each of these elements is discussed below.

**1. Persons and parties.**

This first element of res judicata requires that “both causes of action have identity in persons and parties.” Pederson, supra. Persons and parties include persons in privity with a party to the former action, such as ROGERS and GUNDERSON are to Rogersons in this matter. See In re Coday, Supra at 504 (2006) (Privity includes “mutual or successive relationship to the same right or property.”).

Regarding Respondents, GUNDERSON, access to their property from Waddell Creek road cannot be achieved except through ROGERS’ property. CP 139. Therefore, res judicata bars Appellant’s entire scheme.

**2. Cause of action.**

“Res judicata also requires identity in cause of action.” Pederson, supra, at 72. The following factors are considered:

(1) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. Kulman v. Thomas, 897 P.2d 365, 78 Wn. App. 115, 122 (1995).

Pederson, Id. Each element is discussed below.

(1) In the Rogerson v. NAPPI action, a Permanent Injunction was entered that permanently prohibits NAPPI from traveling on the

current driveway on the, now, ROGERS property. CP 120-121. In this action, NAPPI seeks access on that road. Granting him such access would destroy said Injunction. In the NAPPI versus BRAZIL action, NAPPI's claims regarding an easement over the BRAZIL property were dismissed with prejudice. CP 128-133. An order favoring access through BRAZIL's property would destroy the rights already established.

(2) The prior actions involved the same access ways on the same properties. CP 120-121; 123-126; 128-133. Access has already been denied, with prejudice. Id. The same type of evidence would be presented in this action if it were to, again, go to trial.

(3) Both of the prior suits involved infringement of the same rights at issue here – Appellant's rights of access over the same properties.

(4) Both of the prior actions and this action arose out of the same transactional nucleus of facts, as they all involve access to the same portion of Appellant's property.

Accordingly, there is identity of cause of action.

### **3. Same subject matter.**

The third element of res judicata requires identity of subject matter. Both of the prior actions involve the same parcels and accessways on such parcels. Thus, there is identity of subject matter.

**4. Quality of persons.**

This element of res judicata refers to situations in which, for example, a member of a previously sued organization is sued in a subsequent suit. See Rains v. State, 674 P.2d 165, 100 Wn.2d 660, 664 (1983). Here, ROGERS and BRAZILS are either parties to the same suit or successors thereto. Access on GUNDERSONS' property is dependant on right of access on ROGERS' and/or BRAZILS' properties. This element was also satisfied in the trial court.

**D. The doctrine of collateral estoppel bars NAPPI's cause of action.**

The doctrine of collateral estoppel differs from res judicata in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted. Rains v. State, supra at 665 (1983), quoting Seattle-First Nat'l Bank v. Kawachi, 588 P.2d 725, 91 Wn.2d 223, 225-26 (1978).

In order for the doctrine of collateral estoppel to be invoked, the following questions must be answered affirmatively:

- (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?
- (2) Was there a final judgment on the merits?
- (3) Was the party against whom the plea is asserted a party in privity with a party to the prior adjudication?
- (4) Will the application of

the doctrine not work an injustice on the party against whom the doctrine is applied?

Rains, supra. Each question is answered below.

**1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?**

In both of the prior matters, the issue involved Appellant's right to access on the BRAZIL and Rogersons (now ROGERS) properties. CP 118; 120-121; 123-126; 128-133. In the Rogerson litigation, Appellant asserted this right through counterclaim. CP 118. The BRAZIL litigation was filed for the sole purpose of obtaining access on the BRAZIL property. CP 128-133. The issues are identical.

In both of the previous actions, Appellant's claim was that he had a prescriptive easement, or a private way of necessity, through the BRAZIL and ROGERS' property. Such rights are afforded by Art. I § 16 of the Washington Constitution. ("Private property shall not be taken for private use, except for private ways of necessity . . ."). The legislature codified, or "implemented [this section] by RCWA Chapter 8.24." 17 WAPRAC, Real Estate § 2.5. In this matter, Appellant sought to have these same rights, or lack thereof, relitigated.

**2. Was there a final judgment on the merits?**

In the Rogerson matter, the jury determined that NAPPI did not meet his burden of proving right of access on the Rogerson property. CP

118. An Order of Permanent Injunction was entered, which, permanently “prohibits Amedeo Nappi...from traveling on a road that crosses the Rogerson property, other than the legally described easement which is the thirty (30) foot wide easement that runs north on the easterly most border of the Rogersons; property.” CP 120-121. This cause of action does not concern the thirty foot easement. Rather, NAPPI is, again, attempting to gain access on the already-built driveway used by ROGERS and GUNDERSON. This permanent injunction represents the Court’s final resolution of the issue.

Regarding the BRAZIL property, the issue regarding access was resolved by the Order on Motion for Summary Judgment. CP 128-133. It states therein: “Plaintiffs claims as to an implied easement for ingress and egress are **dismissed with prejudice** as a matter of law.” Id. at 5. Thereafter, the parties entered into a Settlement Agreement, and an Order & Judgment Quieting Title and Granting Easement, which determined: “Plaintiffs claims as to an implied easement for ingress and egress are **dismissed with prejudice** as a matter of law.” CP 140-144.

This was a final judgment.

**3. Was the party against whom the plea is asserted a party privy with a party to the prior adjudication?**

See II. C. 1 above; Corbin, supra; Boudeaux, supra.

**4. Will the allegation of the doctrine not work an injustice on the party against whom the doctrine is applied?**

An injustice would more likely occur if Appellant, in at least his third attempt, were to get his way. As stated in the Affidavit of Cristy A. Gunderson-Meadows filed in the trial court on February 25, 2004, “[t]he existing right-of-way described in the Petition is our driveway and we adamantly oppose its use by others as an easement,” CP 17, paragraph 4. “8. The Petitioner should not be allowed to condemn our land when there is an existing albeit undeveloped, easement which can be developed.” Id. Appellant is simply seeking the easy way out. There is absolutely no law that allows Appellant to choose the path to which he wants access simply because someone else developed it.

**E. An award of attorneys fees was appropriate in this matter.**

RCW 4.84.185 provides:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the

nonprevailing party was frivolous and advanced without reasonable cause....

“An action is frivolous if it cannot be supported by any rational argument on the law or facts.” Jeckle v. Crotty, 120 Wn.App. 374, 387, 85 P.3d 931, 938 (2004), quoting Clarke v. Equinox Holdings, Ltd., 56 Wn. App. 125 (1989). RCW 4.84.185 “was enacted to discourage abuse of the legal system.” Suarez Newquist, 70 Wn. App. 827, 832 (1993). Importantly here, “[t]he decision to award attorney fees as a sanction for a frivolous action is left to the discretion of the trial court, and the court's decision will not be disturbed absent a showing of abuse of discretion.”

As shown above, Appellant was barred from asserted his theories pursuant to the doctrine of res judicata, the trial Court properly found that Appellant already had his chance to litigate these issues. Because of this bar from relitigating these issues, Appellant's argument cannot be supported by any rational argument. By no means did the trial Court abuse its discretion. Accordingly, Respondents GUNDERSON were properly awarded judgment in the amount of their costs and reasonably incurred attorney fees.

**F. Respondents GUNDERSON are also entitled to attorney fees on appeal.**

“Generally, attorney fees are awarded on appeal, if allowed by applicable law, *e.g.*, by statute, contract, or a recognized ground of

equity.” 17 WAPRAC, Methods of Practice § 15.27. As shown in the section above, a ground of equity permits attorney fees and costs to be awarded. GUNDERSON should be entitled to file a cost bill within 10 days of the Court of Appeals, regarding its fees and costs reasonably incurred on appeal.

**G. BRAZILS did not appeal the attorney fee issue, and their request for attorney fees against GUNDERSON is improper.**

As outlined above, the decision to award summary judgment was based on the fact that previous litigation between Appellant and surrounding landowners precluded Appellant from, once again, bringing this action. If GUNDERSONS had been found proper parties in this matter, so too would have BRAZILS. The trial Court properly determined that none of the parties, GUNDERSONS, BRAZILS, or ROGERS, were proper parties to the litigation. It was necessary to complete the story. As Appellant quotes in his brief:

R3, page 25, lines 14-25: “This court, in considering the motion to continue the trial, considered implicitly a motion to join the Brazils, as well, although my recollection is that the Gundersons had not specifically made that motion, but I was persuaded, in looking at the case and hearing that there had been the possibility of other litigation, that the only way that this court could grant complete relief to the parties would be to join the Brazils. So I take some responsibility for the fact that the BRAZILS are here \$1,285 later.”

Access through all related properties was barred through prior litigation for all Defendants.

The Court found joinder proper per RCW 8.24.015. It states, in part:

In any proceeding for the condemnation of land for a private way of necessity, the owner of any land surrounding and contiguous to the property which land **might** contain a site for the private way of necessity *may* be joined as a party.

If summary judgment were not successful, then an access way through BRAZILS property **might** be as proper as the access way through the ROGERS and GUNDERSON properties. After all, each matter had already been litigated.

The case cited by BRAZILS on Motion in the trial Court, and in their brief in this appeal, Kennedy v. Martin, 65 P.3d 866, 115 Wn. App. 866, (2003), is easily distinguishable. In that matter, the Court determined that an easement by necessity was established through the property owned by persons who sought joinder. This is not the case here. Rather, the Court determined that prior litigation barred this action altogether, against all parties. Litigation regarding a private way of necessity through the GUNDERSON or ROGERS parcels was just as unreasonable as regarding the BRAZIL parcel.

V. CONCLUSION

These matters have already been litigated, and Appellant has had his day(s) in Court. A jury determined he had no private way of necessity through the ROGERS property. A Permanent Injunction was entered enjoining such further activity. A Judgment was entered redirecting Appellant's access through the BRAZIL property. The easement by necessity claim was dismissed with prejudice. Since he cannot access the GUNDERSON property from Waddell Creek Road without first accessing RODGERS' or BRAZILS' properties, GUNDERSONS are entitled to judgment as a matter of law. There are no genuine issues of material fact remaining.

Finally, because this action was brought despite the prior proceedings, Injunction, and dismissed with prejudice, GUNDERSONS are entitled to an award of attorney fees for defending their property rights, on appeal as well as at the trial court level.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of December, 2007.

DITLEVSON RODGERS DIXON, P.S.



Daniel R. Tiffany, WSBA No. 34917  
Attorney for Respondents GUNDERSON

COURT OF APPEALS  
 DIVISION II  
 03 JUN -2 PM 2:06  
 STATE OF WASHINGTON  
 BY: *[Signature]*  
 DEPUTY

COURT OF APPEALS  
 DIVISION II  
 OF THE STATE OF WASHINGTON

AMEDEO NAPPI,	)	No. 36487-5-II
	)	
Appellant,	)	(T.C. Superior Court
	)	No. 04-2-00305-6)
v.	)	
	)	AFFIDAVIT OF MAILING
CRISTY GUNDERSON	)	
And JOHN DOE GUNDERSON,	)	
ET AL	)	
	)	
Respondents.	)	
_____	)	

STATE OF WASHINGTON )  
 ) ss.  
 COUNTY OF THURSTON )

Daniel R. Tiffany, being first duly sworn on oath, deposes and states:

On the 31<sup>st</sup> day of December, 2007, I caused to be deposited in the United States mail at Olympia, Thurston County, Washington, with first class postage prepaid, addressed to the parties as follows:

Michael Rogers  
 Nannette Rogers  
 11700 Waddell Creek Road SW  
 Olympia, WA 98512

Amedeo Nappi  
 P.O. Box 11761  
 Olympia, WA 98508

ORIGINAL

Mary Ann Strickler  
Taylor & Berg  
6510 Capitol Blvd. SE  
Tumwater, WA 98501

a copy of the **Brief of Respondents Gunderson.**

  
\_\_\_\_\_  
Daniel R. Tiffany

SUBSCRIBED AND SWORN TO before me this 31<sup>st</sup> day of December,  
2007.

*K. Tiffany*

NOTARY PUBLIC in and for the State of  
Washington, residing at Lacey WA.  
My commission expires: 8/28/11.

