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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ROMAINE C. CULPEPPER, ARDITH L. CHRISTENSEN,  
and DOLORES J. DARRIN,  
Appellants,

vs.

MARSHA Y. CAMUS and DENNIS C. DARRIN,  
Respondents.

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REPLY BRIEF OF APPELLANTS

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ROBERT ERRHARDT, WSBA No. 35384  
Attorney for Appellant Darrin

VINI E. SAMUELS, WSBA No. 27186  
Attorney for Appellant Christensen

JEFFREY D. STIER, WSBA No. 6911  
Attorney for Appellant Culpepper

**ORIGINAL**

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## **I. Recap: Trial Court Actions**

The issues raised at trial court centered around the maintenance of the easement, lateral fencing of land adjacent to the easement, removal of gates, and claims for damages relating to interference with access (Respondents) and waste and trespass (both parties). CP 1-7, 65-72, 84-127.

The trial court found that livestock on the roadway unreasonably interfered with easement use by Respondents and affected merchantability of Respondents' property. Finding of Fact No.8, 25, 26; Conclusion of Law 6; CP 322, 324, 326. For those reasons the court ordered that the livestock should be kept off the easement by lateral fencing. Finding of Fact No. 27, 28; CP 324 The trial court designated Mr. Hurd, an expert called by Appellants, to determine areas that required fencing to prevent animals from wandering randomly on the easement. Finding of Fact No. 28, 29; Conclusion of Law 5; CP 324, 325.

Since the trial court felt that an obligation should exist to keep livestock off the easement by lateral fencing, it followed that there was no longer a need to retain gates,<sup>1</sup> even though it was undisputed that gates had pre-existed the death of the parties' father and mother. 6-19-07 RP 76. It also appears that the alleged inconvenience of opening and closing these gates

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<sup>1</sup> Even though the trial court called for a removal of the gates (8/1/07 RP 148), this was not set forth in the Findings of Fact and Conclusions of Law.

was considered by the trial court (Ex. 3), but that alleged “inconvenience” was also never mentioned in the Findings of Fact and Conclusions of Law.

The trial court ruled that the easement road should be sufficiently maintained to allow reasonable access to Respondents’ parcels and specifically cited sufficient maintenance to allow for logging of their parcels for any party that wants logging to be done. Finding of Fact No. 21; CP 324. The trial court found that when a party logs, he or she may move heavy equipment along the roadway, which may cause some damage and that the party who logs should be responsible for returning the road to as good or better condition than when the logging began. Finding of Fact Nos. 22, 23; CP 324.

The trial court designated Mr. Hurd, the expert called by Appellants, as the person to determine all future issues of maintenance and division of payment for such maintenance. Finding of Fact Nos. 28, 29; Conclusion of Law No. 5; CP 324, 325.

The trial court found that the Findings of Fact and Conclusion of Law would run with the land. Conclusion of Law No. 5; CP 326.

Finally, the trial court denied and dismissed any claims for judgment against any other party in this matter, including any

award of attorney fees and costs (Finding of Fact Nos. 18, 20; Conclusion of Law Nos. 7, 8, 9, 10; CP 324, 325, 326), reasoning that each of the parties was somewhat responsible for the present situation and had failed to prove every claim he or she alleged against any other party.

Appellants contend that the trial court imposed conditions upon the easement road that were outside the original use contemplated by the grantors. Essentially, the trial court changed the use for the easement from one for access to farm(s) to uses that would include recreation and development. Appellants contend that these conditions were not appropriate under the law and represent an unnecessary expansion of the scope of the easement.

In the alternative, appellants ask for a remand to determine necessity if necessity is found, for just compensation, reasonable attorney fees, and costs for this taking.

## **II. Reply Argument**

### **A. The trial court disregarded necessary prerequisites to a grant of equitable relief.**

Respondents originally requested injunctions against Appellants Culpepper and Christensen, and later extended that request to Appellant-Intervenor Dolores Darrin. CP 1-7. The trial court did enjoin Appellants from “using any portion of the easement right-of-way for livestock-related purposes...” Conclusion of Law No. 6; CP 326.

An applicant for an injunction must show actual and substantial injury. *Brown v. Voss*, 105 Wn.2d 366, 372-73, 715 P.2d 514 (1986). Respondents were not able to make sufficient showing of any actual/substantial injury (physical or financial) caused by the Appellants. In fact, the trial court specifically ruled that there was insufficient evidence of waste, trespass, or in support of any other “peripheral claim” to justify any award of damages to Respondents. Conclusions of Law Nos. 7, 8, 9, and 10; CP 326.<sup>2</sup> It follows that the trial court itself found that actual and substantial injury was not sufficiently established to allow for injunctive relief. See Assignment of Error No. 2.

Respondents claimed that the gates and cows interfered with their access to their property (Conclusions of Law Nos. 7, 8, 9, and 10; CP 326). However, at trial they never once testified that they were unable to access their property. Never once did they testify that they could not open and close the gates. Instead, Respondents contended that it was inconvenient for them to open and close the gates. Ex. 3 Mere inconvenience does not constitute unreasonable interference. See *Steury v. Johnson*, 90 Wash.App. 401, 406, 957 P.2d 772 (1998); *see also Rupert v. Gunter*, 31

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<sup>2</sup> Without conceding that the trial court made its rulings in favor of Appellants for all the right reasons, Appellants feel that the essence of these rulings was correct. A person cannot commit waste or trespass on their own property. See *Colwell v. Ezzell*, 119 Wash.App. 432, 439, 81 P.3d 895 (2003); *see also Standing Rock Homeowners Ass’n v. Misich*, 106 Wash.App. 231, 241-242, 23 P.3d 520 (2003) *review denied* 145 Wn.2d 1008 (2001). Here, the servient estates owned the property.

Wash.App. 27, 32, 640 P.2d 36 (1982). Consequently, Respondent's mere inconvenience does not constitute substantial injury as required to prevail on an injunctive suit. *Id.*

Respondents also claimed interference due to a lack of maintenance. Not only did testimony show that Appellant Christensen and others mowed the vegetation and cut back the other flora that would encroach on the easement (1/19/07 RP 5, 19), Respondents never showed that the vegetation prevented them from accessing their properties and therefore showed no substantial injury. Impact upon guests and their RVs was never contemplated within the original scope of the easement as an access farm road. Even the husband of Respondent Camus admitted that a gathering of more than a few people (as opposed to 100-200 at a family reunion) was unprecedented for their property. 1/19/07 RP 121.

Once again, the servient estate owns the property over which the easement traverses. *Colwell v. Etzell*, 119 Wash.App. 432, 439, 81 P.3d 895 (2003). The servient owners can also use their property as they see fit provided that use does not unreasonably interfere with the dominant estate's rights as stated in the deed. *Standing Rock*, 106 Wn.App. at 241; *Rupert*, 31 Wn.App. at 31. The trial court ruled that insufficient evidence was presented to establish that Appellants "wrongfully committed unreasonable

acts” that impacted the dominant easement in a substantial or material way. Conclusions of Law Nos. 7, 8, 9, and 10; CP 326.

In addition, the trial court did not consider Respondents prior inequitable conduct which should have barred it from granting equitable relief to Respondents. A person “must come to equity court with clean hands[.]” or that person may be excluded from an equitable remedy. *Income Investors v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940).

Considerable evidence of inequitable conduct by Respondents existed:

i. Respondents failed to include an indispensable party in their original lawsuit despite their knowledge that Delores Darrin owned property that the easement traversed. Delores Darrin had to intervene in order to protect her rights; otherwise any litigation affecting the easement could very well estop her in future litigation regarding her interests. CP 26-27.

ii. The evidence showed that Respondents committed both waste and trespass by destroying vegetation and moving dirt on the easement to the detriment of the servient estates. Even Respondent Darrin admitted that he moved dirt and vegetation on easement frontage to Appellants’ parcels. 1/18/09 RP 126, 129, 130, 131, 150. While Dennis and Marsha may have had the right to use the easement for ingress and egress, that did not allow them to commit

waste and/or trespass to the servient estates *Fradkin v. Northshore Utility Dist.*, 96 Wn.App. 118, 123, 977 P.2d 1265 (1999).

As stated, the trial court granted equitable relief in favor of Respondents despite their unclean hands. Respondents counter that “An easement holder has the right to maintain, improve and repair an easement when the recorded easement is silent to the issue.” Response Brief at 22. There were no formal Finding of Fact or Conclusion of Law that specifically addressed this issue and the fact is that an easement-holder must avoid “negligent intrusion onto the property of another that interferes with the other's right to exclusive possession . . .” *Fradkin*, 96 Wn.App. at 123. Here Respondent Darrin admitted that he “maintained the easement” on servient estate lands (1/18/07 RP 129, 130, 131, 151) and substantial evidence was introduced regarding the tortious effect of his work. *See* Exs. 6, 7, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 53, 55, 56, 62, 63, and 64.

**B. The trial court actions went beyond the scope of original easement by allowing collateral evidence.**

Appellants’ Assignments of Error 5 through 7 all relate to the fact that the trial court’s decision erroneously considered factors extraneous to the easement deed in providing for lateral fencing to keep livestock off the access road. Findings of Fact No. 8; 26, 27, 28; Conclusion of Law No. 6; CP 322, 324, 326. In the case at bar, there is no doubt that the deeds were silent as to

maintenance so that issue is not addressed here. However, the deeds were not silent as to the intended scope of the easement as being for “ingress, egress, and utilities.” Exs. 10-14. Nothing was contained within those deeds that indicated that livestock should, or should not, be on the roadway.

It is well-settled law that the scope of an easement is determined by the deed’s language. *Hayward v. Mason*, 54 Wash. 649, 651, 104 P. 139 (1909); *City of Seattle v. Nazarenius*, 60 Wash.2d 657, 665, 374 P.2d 1014 (1962). If the language is unambiguous, “other matters may not be considered...” *Nazarenius*, 60 Wn.2d at 665; *Green v. Lupo*, 32 Wn.App. 318, 321, 647 P.2d 51 (1982).

A deed is ambiguous if the terms are uncertain or could have more than one meaning. *Green*, 32 Wn.App. at 322. If the deed is ambiguous or silent as to a certain issue, then “the situation of the property, the parties and the surrounding circumstances” should be examined. *Standing Rock*, 106 Wn.App. at 241 (citing *Rupert*, 31 Wn.App. at 31); *Steury*, 90 Wn.App. at 405 (citing *Rupert*, 31 Wn.App. at 31 and *Nazarenius*, 60 Wn. 2d at 663).

No facts were elicited at trial to contradict the limitation of the original intent to create an easement only for ingress, egress, and utilities. Further, Respondents could not establish that access had been denied. Conclusion of Law No. 9.

If it was improper to expand the scope of the easement beyond that considered at the time of creation of the easement, then it was also improper to bind all by having that expansion run with the land. Assignment of Error No. 11.

**C. In the alternative, even if it was appropriate to consider facts beyond the four corners of the deed, the trial court improperly failed to consider the historical scope of the easement.**

As stated in ¶II.B above, the meaning of the terms of the deeds was clear and unambiguous. As such, the inquiry into the original scope of the easement<sup>3</sup> should have ended there resulting in denial of all claims of Respondents. Despite this rule of law, it is clear that the trial court considered facts outside the scope of the unambiguous deed, including the situation of the property and the easement's prior use, in order to reach its decisions calculated to keep livestock off the access road. Conclusive evidence of this can be found in the Response Brief where Respondents claim that the Substantial Evidence Rule applies which is a concession that the trial court looked beyond the four corners of the deed to make its determinations in this case.

If the trial court inquired outside the clear and unambiguous terms of the deed, then the “nature and situation of the property subject to the easement, and the manner in which the way has been used and occupied[.]” should have been considered.

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<sup>3</sup> With the exception of maintenance responsibilities.

*Evich v. Kovacevich*, 33 Wn.2d 151, 162, 204 P.2d 839 (1949); *Standing Rock*, 106 Wn.App. at 241( citing *Rupert*, 31 Wn.App. at 30-31). In construing the deed's language to determine the scope of an easement, the court looks for the intent of the parties at the time of the deed's creation. *Nazarenius*, 60 Wn.2d at 665; *Beebe v. Swerda*, 58 Wn.App. 375, 380-81, 793 P.2d 442 (1990); *Green*, 32 Wn.App. at 321.

In the case at bar there can be no dispute that each party involved was granted an easement when the estate was settled. Exs 10-14. The properties over which the easement ran originally belonged to a farm that had been a farm from the mid 1950s until, at least, the date of the grantor's death. 1-19-07 RP 78, 95. The original farm ran cows and horses. 1-18-07 RP 10, 29.

However, there was a distinct split in testimony regarding the question whether, at the time of the grantor's death, lateral fencing between gates three (3) and four (4) existed to bar livestock from coming upon the roadway. Respondents contended that it did (6/19/07 RP 58) and Appellants testified that livestock could come on the roadway back then. 6/20/07 RP 25, 26, 27, 53. Despite that split on such a critical issue, the trial court never determined, one way or the other, whether livestock could, or could not, historically access the roadway. Not only did the trial court go outside the unambiguous deed to bar livestock from the

roadway, it never determined the historical context of-i.e. it never determined whether the intent of the original grantor was to allow or bar livestock access to the roadway. This was error.

Further, the trial court changed the very nature of the easement itself. This also was improper. *See Nazarenius*, 60 Wn.2d at 665. Apparently, restricting livestock from the easement related to a perceived need to meet an enhanced goal of “merchantability.” Findings of Fact Nos. 8, 25; CP 322, 25. Unfortunately, the Findings of Fact and Conclusions of Law do not shed much light on what “merchantability is.” The oral decision of the trial court also doesn’t shed much light on what merchantability is, but it explicitly defined what it wasn’t:

When this farm was historically being operated by the parents, it was one piece of land, operated the way that one land owner wanted to operate it, and they could do whatever they wanted. Now we have five pieces of land that should be merchantable. If they want to sell their property to someone else, I have to think, how is this land going to be in a situation where if one or more of them decide to move, is somebody going to want to buy land where cows are roaming across the easement and doing their damage and doing their stuff on the easement? I think that would create real problems and more litigation down the road. Animals need to be kept off the easement, and that's going to require fencing.

8/1/07 RP 146-147.

The trial court defined “merchantable” as marketability of the five (5) parcels individually and not as

one single farm. In essence this means that the trial court created something that did not exist at the time of devise.

There is another indication from the oral opinion of the trial court that it authorized a change in scope of the access road:

I anticipate this easement being kept open, and Mr. Hurd -- can be conveyed to him that it should be open wide enough so that all sorts of RVs, log trucks, hay trucks, everything can get through there without there being a canopy overhead.

8/1/07 RP 149.

There is no doubt that RV access, and removal of a vegetative canopy, is something that was not something contemplated by the parties' father and mother at devise.

The existing status (i.e. "current merchantability") of the land should be sufficient if the use of the land did not change beyond what was the scope of the easement was at devise. The trial court determined that scope:

Prior to the creation of the easement, the road and property, where the parents operated a farm to some extent, were owned by a single, common owner who was able to utilize the road and surrounding properties without restriction.

Finding of Fact No. 5; CP 322. Even the trial court found that the original context of the road had changed. "Merchantability" for recreation and development was not within the context of the

road when the parties' mother died in 1993, or when the easement was created in 1998. *See* Ex. 2.

Finally, a derivative result of the lateral fencing requirement is the issue of gate removal. First of all, even though the trial court clearly contemplated that gates would be removed in its oral decision (8/1/07 RP 148) no Finding of Fact or Conclusion of Law ever required removal of any gate(s). Arguably, gates do not have to be removed,<sup>4</sup> or there should be a remand for additional findings on that issue.

Beyond that, it is clear that the gates have been on the access road since the 1990s. 1/18/07 RP 50; *Also see* Ex. 2. If gate removal is required, this is further evidence that the trial court departed from the original scope of the easement.

In addition, gate removal can only relate to the conclusion of the trial court that lateral fencing was required and the inconvenience to Respondents of opening and closing gates three (3) and four (4). *See* Ex. 3. Appellants reiterate their contention that the original deeds were unambiguous and there was no basis to go beyond the four corners of those deeds to require lateral fencing. *See* ¶II.B above, Beyond that, appellants refer to the immediately preceding argument that the trial court never determined the basis for its departure from the historical context of the easement.

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<sup>4</sup> That certainly was the opinion of the Estate's attorney. *See* Ex. 2.

Whatever evidence there was that the cattle unreasonably interfered with the dominant estate's use of the easement<sup>5</sup> the fact remains that this easement was originally for a farm road and it was not contrary to the original scope of the deed to pasture livestock in the easement. *See Thompson v. Smith*, 59 Wn.2d 397, 411, 367 P.2d 798 (1962) (Mallery, J. dissenting – pasture of stock in the easement does not interfere with the easement because those uses are compatible as a matter of fact).

The owner of the servient estate cannot be subjected to a greater burden than originally contemplated in the deed. *Rupert*, 31 Wn.App. at 31. It is well established that a servient estate may install gates, fences, or bars as long as those gates, fences, or bars do not unreasonably interfere with the dominant estate's right to use the easement within its scope. *Standing Rock*, 106 Wn.App. at 241; *Rupert*, 31 Wn.App. at 31.

There are no facts that would support the court's modification of historical usage and its ruling was error. If it was improper to expand the easement, then it was also improper to bind all by having that expansion run with the land. Assignment of Error No. 11.

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<sup>5</sup> And the trial court determined that the evidence was insufficient to support Respondents' interference with easement claims. Conclusion of Law No. 9; CP 326.

**D. The trial court actions on maintenance issues were beyond the scope of original easement.**

Appellants' Assignments of Error 4 and 9 relate to the trial court's decisions to allow Respondents to conduct heightened maintenance on the road as allowed by a third party "special master," Mr. Hurd. Appellants contend that there was error in expanding duties and benefits beyond that necessary to maintain the road for the intended scope of the easement to make sure that "ingress, egress, and utilities" could occur. (Ex. 10-14) Maintenance was done in part by all of Appellants. 8-1-07 RP 31-32. Respondents could not establish that access had been denied by a failure of maintenance or otherwise.

In fact, maintenance had obviously occurred within the scope of the original farm easement. Mr. Hurd testified that the lay of the road and the condition of the road in the summers of 2006 and 2007 was pretty much the same as it was upon creation of the easement. 6/21/07 RP 85. He testified that it was a "fair weather" farm road. 6/21/07 RP 35-36.

Despite these facts, the trial court's ruling imposed new and heightened maintenance obligations related to uses that clearly exceeded the scope of the original farm access easement and related to the revised and expanded scope of the access easement created by the trial court.

In the case of *Lowe v. Double L Properties, Inc.*, 105 Wn.App. 888 (2001) the decision of the trial court was reversed for “abuse of discretion” in modifying maintenance conditions without finding any facts to support the modification. *Id.* at 896.

Here, as in *Lowe*, the trial court imposed a substantial burden on the servient estates by imposing its ruling regarding Mr. Hurd to determine easement maintenance, repair and allocation of costs.

If it was improper to expand the maintenance obligations for the easement, then it was also improper to bind all by having that expansion run with the land. Assignment of Error No. 11.

**E. In the alternative, the trial court’s restrictions on Respondents’ maintenance rights were appropriate.**

The trial court required each servient property owner to perform heightened maintenance related to the expanded scope of this easement. Findings of Fact Nos. 28, 29; Conclusions of Law No. 5; CP 324, 325. Appellants have argued above that the trial court erred in expanding the scope of the easement to allow for enhanced maintenance. See ¶II.D. On the other hand, Respondents apparently contend that the trial court did not go far enough, and they should be able to come upon Appellants’ land to perform their own

maintenance. See Counterassignment of Error No. 3 and supporting argument.

Without waiving objections to expansion of the scope of this easement, Appellants disagree with Respondents' contention that owners of dominant estates have absolute rights and obligations to maintain the easement. Respondents' reliance upon *Dreger v. Sullivan*, 46 W.2d 36, 40, 278 P.2d 647 (1955) is misplaced. In fact, the *Dreger* court ruled that there was *no necessity* for the easement, so easement maintenance could not be an issue in that case.

The fact remains that the servient estates are owned by Appellants. A dominant easement-holder must conduct itself to avoid "negligent intrusion onto the property of another that interferes with the other's right to exclusive possession . . ." *Fradkin*, 96 Wn.App. at 123. This should mean, at least, permission should be requested to perform maintenance and maintenance should not damage abutting property of the servient owners. The trial court correctly rejected Respondents' request for unlimited rights to come upon Appellants' land to perform their own maintenance.

**F. In the alternative, remand is appropriate to determine whether necessity exists for easement expansion and, if so, what amount of just compensation should be paid under RCW 8.24.030.**

Appellants' argue above that the trial court improperly expanded the scope of the original easement and that action should be reversed. In the alternative, the issue should at least be remanded for consideration under Ch. 8.24 RCW (Private condemnation of a way of necessity). *Dreger* does frame the proper procedure that should have been used for expansion of a way of necessity. First there should have been a determination of necessity for the expansion (*Dreger*, 46 W.2d at 37) and, if so, there should have been a determination of the amount of just compensation, attorney fees, and costs that should have been paid for that expansion. RCW 8.24.030. See Assignment of Error No. 10 and supporting argument in Opening Brief at 19-20.

RCW 8.24.010 gives an adjacent property owner the right to "condemn" a "private way of necessity" as necessary for the "proper use and enjoyment" of the condemnor's land. This is required under the Washington State Constitution, Article I, §16, that states:

Private property shall not be taken for private use,  
except for private ways of necessity . . .

Ch. 8.24 RCW can be used to expand the scope of an easement. *Brown v McAnally*, 97 Wn.2d 360, 367-368, 644 P.2d

1153 (1982). In this case the scope of the easement for a farm road has been expanded to exclude livestock that have historically roamed the easement, require lateral fencing, remove gates that have historically been upon the easement, allow for enhanced maintenance supervised by Mr. Hurd and, if necessary, the trial court-all for the purpose of enhancing Respondents' contemplated expanded usages of their properties for development, and recreational pursuits-i.e. "merchantability."

If normal farming no longer was an attractive feature for the new use that Respondents proposed for their land, then it is reasonable that they pay just compensation for any expansion of the easement to allow for expanded uses. Expansion of the scope of this easement without payment of just compensation was improper and a complete denial of Appellants' constitutional and statutory rights.

Despite the fact that the just compensation issue was raised by Appellants' Assignment of Error 10 and their opening brief, the only response presented by Respondents, within the context of their attorney fee argument, was simply that the issue did not exist because the trial court made no specific ". . . findings or conclusions of law changing or expanding the scope of the easement to justify compensation to the appellants . . ."

The question is not how the trial court described its actions, rather the question is what the trial court actually did. Here, there is no doubt that the trial court altered the scope of an easement to the detriment of servient estates without considering just compensation to, or attorney fees for, the servient estate-owners.

**G. Respondents' request for reversal of the trial court's decision on its damage claims should be denied.**

Respondents' contend that the trial court erred by not awarding damages relating to defendants' intentional interference with plaintiffs' use of the easement, which acts constitute trespass pursuant to RCW 4.24.630 (Counterassignment of Error No. 1) and cattle unreasonably interfering with Respondents' and their guests' use of the easement and for the affect on the merchantability of the land (Counterassignment of Error No. 2).

Respondent's arguments claim unreasonable interference with the use of the easement which "affects the merchantability of the property." First of all, the merchantability argument was brought up by the trial court as a basis for expanding the easement, and cannot support a claim of intentional trespass to that unestablished right prior to the trial.

Apparently, Respondents still believe that they can claim damages for interference with their easement rights under RCW 4.24.630 that states:

Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury.

Respondents cite the following in support of their claims for damages under RCW 4.24.630:

1. Appellants' use of gates to contain livestock on the easement. This was a historical situation since the easement was first created and, even under the best case for Respondents, was the status of the property until entry of the trial court's orders.<sup>6</sup>

2. Appellants' discharge of a firearm to "scare and intimidate" Respondent Darrin. Although this issue somehow made it into Finding of Fact No.15 (CP 323), it was strenuously contested by Appellants. The fact is, there is no evidence in the record that indicates that anybody pointed a gun at, or shot at, Respondent Darrin. There is absolutely no evidence, substantial or otherwise, to support this Finding of Fact. However, even if that Finding of Fact is upheld, it is not the basis for an award of damages under RCW 4.24.630 which only allows damages for removal of timber, crops, minerals, or other similar valuable property from the land, or wrongful waste or injury to the land or to personal property or improvements to real estate on the land.

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<sup>6</sup> Even though the issue of gates somehow never even made it into the Findings of Fact or conclusions of Law.

None of these elements remotely applies to an intimidation claim.

Further, Respondents cited affidavits, depositions, and arguments of the parties as forming “substantial evidence” that appellants were seeking to intentionally, unreasonably and permanently interfere with or terminate Respondent's easement. Response Brief at 26. Even if Respondents can somehow establish that interference with their easement is something contemplated under RCW 4.24.630, “affidavits, depositions, and arguments of the parties” are not evidence in the case unless admitted at trial and there has not been any indication that this was done.

The trial court dismissed all of these claims<sup>7</sup> indicating insufficient proof to warrant a finding under RCW 4.24.630, or otherwise. Conclusion of Law Nos. 7, 8, and 9; CP 326. Appellants have not challenged those Conclusions, but apparently Respondents have challenged them. Suffice it to say that Respondents were never able to show one instance of where access was restricted by the intentional (or unintentional) act of Appellant(s).

Finally, Respondents contend that their damages should be measured by “. . . loss of use of the easement and the

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<sup>7</sup> Including the reciprocal claims of Appellants for trespass damages.

diminished value of the property it benefited.” Response Brief at 25. Respondents never produced one iota of evidence quantifying these damages.

In addition, if Respondents were not entitled to damages under RCW 4.24.630, they were not entitled to an award of attorney fees and costs under that same statute.

**H. Respondents’ arguments regarding errors in factual citations are irrelevant.**

Respondents allege that several citations in the Opening Brief were to argument, not evidence in the case.

The pertinent objections boil down to the following points:

1. Respondents’ object to a cite on pages 2 and 5 of the Opening Brief to the easement road as a farm road, apparently to be contrasted to a logging road. This is an odd criticism, as the record is replete with testimony that established that the easement road was always a farm road that secondarily was used for logging. See testimony of Respondent Darrin, 1/19/07 RP 29.

Respondents go on to say that Ardith, Delores and Romaine argued the historical use of the easement prior to creation did not include logging. The allegation is patently false and there is nothing in the record to support it. All parties agree that the access road has been used for logging and that is not an element that represents a change in scope.

2. Respondents' object to an allegation on page 3 of the Opening Brief that the estate was settled after seven years of litigation. Again, this is an odd objection as the status of the estate as being hotly litigated from 1993 (the death of the parties' mother) until 2000, at least, was a major component of Respondent Darrin's testimony. 1/18/07 RP 128, 137, 159; 1/19/07 RP 70. Specifically, Respondent Darrin testified that the easement language was stipulated by the heirs in 1998 after "just about open warfare." 1/19/07 RP 70.

3. Respondents' object to a cite on page 4 of the Opening Brief to what Respondents contend was a statement that Appellants ignored other heirs planting of hay and evidence of historical harvest of hay from Dennis and Marsha's property. Nothing on page 4 of the Brief of Appellant addressed activities of other heirs on their land. In addition, the whole point of the cite to the record on page 4 of the Brief of Appellant was to emphasize the historical harvest of hay from Dennis and Marsha's property. This fact was supported by the testimony of Michael Toy and Robert Camus for Respondents. 1/17/07 RP 31; 1/19/07 RP 113.

### **III. Conclusion**

Appellants contend that the trial court imposed conditions upon the easement road that were outside the original use

contemplated by the grantors. Essentially, the trial court changed the use for the easement from one for access to farm(s) to uses that would include recreation and development. Appellants contend that these conditions were not appropriate under the law and represent an unnecessary expansion of the scope of the easement. Expanding maintenance obligations to dovetail with the expanded scope of the easement was also error.

In the alternative, appellants ask for a remand to determine necessity if necessity is found, for just compensation, reasonable attorney fees, and costs for this taking.

Finally, Respondents should not be entitled to damages relating to Appellants alleged intentional or unintentional interference with Respondents use of the easement; for the affect on the merchantability of the land, and for trespass upon appellants' own land.

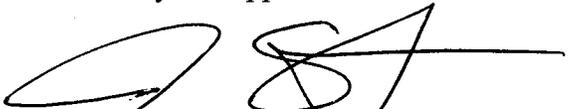
Respectfully submitted this 3rd day of November, 2009.

  
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ROBERT EHRHARDT, WSBA No. 35384

Attorney for Appellant/Defendant-Intervenor Delores Darrin

  
\_\_\_\_\_  
VINI E. SAMUEL, WSBA No.#27186

Attorney for Appellant/Defendant Ardith Christensen

  
\_\_\_\_\_  
JEFFREY D. STIER, WSBA No. 6911

Attorney for Appellant/Defendant Romaine Culpepper

WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO AT TACOMA, WASHINGTON

ROMAINE C. CULPEPPER, et. al.,

Appellants/Cross-Respondents,

vs

MARSHA Y. CAMUS, et. al.,

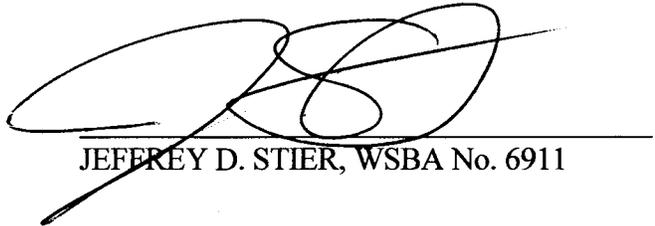
Respondents/Cross-Appellants.

COURT OF APPEALS NO. 37441-2-II

CERTIFICATE OF SERVICE OF  
REPLY BRIEF

I certify under penalty of perjury under the laws of the State of Washington that on this date I deposited a copy of the Appellants' Reply Brief in the U.S. Mail, Postage Prepaid, addressed to Mr. Benjamin Winkelman, attorney for Respondents/Cross-Appellants in this matter.

DATED this 3rd day of November, 2009, at Olympia, WA.



JEFEREY D. STIER, WSBA No. 6911

Copy Mailed to:

Mr. Benjamin Winkelman  
Parker, Johnson & Parker, PS  
Attorneys at Law  
813 Levee Street  
PO Box 700  
Hoquiam, WA 98550

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