

NO. 42426-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EARLY DAWN ESTATES HOMEOWNERS ASSOCIATION,

Appellant,

vs.

FRANK FREDERICKS,

Respondent.

12 JAN -6 AM 9:21
STATE OF WASHINGTON
BY *em*

Casey, H. Jones
Type: Appellate

APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY

THE HONORABLE DIANE M. WOOLARD, JUDGE

BRIEF OF APPELLANTS

DENISE J. LUKINS
Attorney for Appellant
SALMON CREEK LAW OFFICES
1412 N.E. 134th Street, Suite 130
Vancouver, WA 98685
Telephone: (360) 576-5322

TABLE OF CONTENTS

	<u>Page</u>
ASSIGNMENTS OF ERROR	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
Issue No. 1	2, 4, 8-9, 19-24
Issue No. 2	2, 9, 21, 24, 27
Issue No. 3	2, 6-7, 19, 27
Issue No. 4	4, 28
Issue No. 5	2, 10-17, 30-35
Issue No. 6	7-9, 24-27
Issue No. 7	3, 17-18, 35-37
Issue No. 8	3, 18, 37-38
Issue No. 9	3, 18, 35-37
STATEMENT OF THE CASE	3
History	3
Costs	6
Scope of Easement – Issues regarding gate . . .	10
Scope of Easement – Business signs	17
Scope of Easement – Short Plat Sign	18
Scope of Easement – Operation of All Terrain Vehicles	18
ARGUMENT	18
CONCLUSION	38
APPENDIX	A-1

TABLE OF AUTHORITIES

<u>TABLE OF CASES</u>	<u>Page</u>
<u>Bushy v. Weldon</u> , 30 Wn.2d 266 (1948)	23
<u>Clippinger v. Birge</u> , 14 Wn. App. 976, 986 (1976)	36
<u>Colwell v. Etzell</u> , 119 Wn.App. 432 (2003)	30
<u>Cox v. O'Brien</u> , 150 Wn. App. 24 (2009)	25
<u>Dragt v. Dragt/DeTray, LLC</u> , 139 Wn. App. 560, 576, 161 P.3d 473 (2007)	25
<u>Landmark Dev., Inc. v. City of Roy</u> , 138 Wn.2d 561, 573 (1999)	19
<u>Lowe v. Double L. Properties, Inc.</u> , 105 Wn.App 888, 893 (2001) <i>rev. denied</i> , 145 Wn.2d 1008 (2001)	29
<u>Lowe v. Double L Properties</u> , 105 Wn. App. 888 (2001)	32
<u>Noel v. Cole</u> , 98 Wn.2d 375, 383, 655 P.2d 245 (1982)	26
<u>Nollette v. Christianson</u> , 115 Wn.2d 594, 599-600 (1990)	19
<u>Robel v. Roundup Corp.</u> , 148 Wn.2d 35, 42 (2002)	19
<u>Rupert v. Gunter</u> , 31 Wn. App. 27, 31(1982)	30
<u>Snyder v. Haynes</u> , 152 Wn. App 774 (2009)	37
<u>Standing Rock Homeowner's Ass'n v. Misch</u> , 106 Wn. App. 231, 240 (2001), <i>rev. denied</i> , 145 Wn.2d 1008 (2001)	29

<u>Veach v. Culp</u> , 92 Wn.2d 570, 573 (1979)	19
<u>Young v. Young</u> , 164 Wn.2d 477, 487 (2008).	26
<u>Brentwood Subdivision Road v. Cooper</u> , 461 N.W. 2d 340 (Iowa App. 1990)	22
<u>Okjobi Camp Owners Cooperative v. Carlson</u> , 578 N.W.2d 652, (Iowa 1998)	23

TABLE OF STATUTES AND CODES

Clark County Code 12.05A.770	20
Clark County Code 12.05A.770(7)	5
Clark County Code 12.05A.770(7)(e)	22
RCW Chapter 7.24	18
RCW 7.24.070	19

OTHER AUTHORITIES

<u>Restatement of Restitution</u> §§ 1, 2 (1937)	21
--	----

**RESTATEMENT (THIRD) OF RESTITUTION
AND UNJUST ENRICHMENT § 1**

(Discussion Draft 2000), review denied, 163 Wn.2d 1042 (2008)	25
CP 65, Finding No. 2 and 3	4
CP 65, Finding No. 4	3
CP 65, Finding No. 5	4
CP 65, Finding No. 6	12
CP 65, Finding No. 8	8
CP 65, Conclusion of Law 2	9, 21
CP 65, Conclusion of Law 2(a)	9, 21
CP 65, Conclusion of Law 2(b)	9, 21

EX 4	17
EX 8	5, 17, 28, 35
EX 9	4, 17
EX 14	8
EX 19	14
EX 21	15, 17
EX 22	15
EX 23	8, 9, 15
EX 29	12
EX 35	5
EX 39	8, 9
EX 40	12
EX 49	7
EX 50	6, 27
EX 52	3
EX 53	6, 27
EX 61	6, 27
EX 62	6, 27
RP 26	11
RP 29	11
RP 30 – 31	16
RP 47	17
RP 50 – 51	16
RP 63	17

RP 70	13
RP 73	13
RP 75	13
RP 78	18
RP 83 – 84	10
RP 91 – 92	15
RP 92	12
RP 93 – 94	12
RP 101	17
RP 103	18
RP 105 – 108	18
RP 117 – 118	12
RP 120	13
RP 120 – 123	17, 18
RP 124	15
RP 124 – 125	18
RP 130	18
RP 133	14
RP 134	17
RP 135 – 137	5
RP 136	9
RP 136 – 137	9
RP 156 – 158	10
RP 158	11

RP 158 – 159	11
RP 159 – 160	12
RP 161	10, 12
RP 162	12
RP 164	13
RP 164 – 167	14
RP 167 – 169	16
RP 172 – 173	6
RP 174 – 175	6
RP 177 – 178	6
RP 196	13
RP 208	13
RP 209 – 210	13
RP 211 – 212	16
RP 221 – 222	14
RP 222 – 223	16
RP 224	13
RP 224 – 225	14
RP 240	4
RP 243 – 244	10
RP 245 – 246	8
RP 246	4
RP 261	12
RP 271 – 272	6

RP 272	6, 7
RP 273	7
RP 274 – 275	7
RP 275	8
RP 281 – 283	6
RP 282 – 283	7, 27
RP 290 – 291	8
RP 294 – 295	7
RP 296 – 298	7
RP 301	14
RP 302 – 303	16
RP 303 – 304	16
RP 305 – 306	16
RP 309	11
RP 309 – 310	17
RP 311	12
RP 312	14
RP 312 – 313	13
RP 318 – 319	13
RP 321	35

INTRODUCTION

This appeal concerns two neighboring developments. Appellant in this matter is Early Dawn Estates (EDE), which is a rural subdivision consisting of thirty two 5 acre lots. EDE is served by a network of private roads. The primary road is NE 159th, which accesses the county road. Respondent in this matter is Frank Fredericks. He was the developer of a four lot short plat adjacent to EDE (the "Short Plat"). He has sold all of the lots, except one, which is his personal residence.

As a homeowner, Fredericks, along with the other lots in the Short Plat, have an easement on NE 159th. The issues in this case concern the scope of Fredericks' easement; whether EDE's maintenance of a gate on NE 159th is an unreasonable restriction on his easement; and Fredericks' responsibility for paying for maintenance of NE 159th. The procedural posture in this case is somewhat different than most of the precedent found because this case concerns a dispute regarding the responsibilities and rights of mutual dominant estate holders, rather than a dominant estate versus a servient estate holder.

ASSIGNMENTS OF ERROR

- Issue 1: The trial court erred in entering Conclusion of Law No. 2
- Issue 2: The trial court erred in entering Conclusion of Law No. 2(b)
- Issue 3: The trial court erred in entering Conclusion of Law No. 2(d)

Issue 4: The trial court erred in entering Conclusion of Law No. 3

Issue 5: The trial court erred in entering Conclusion of Law No. 4

Issue 6: The trial court erred in entering Conclusion of Law No. 5

Issue 7: The trial court erred in entering Conclusion of Law No. 6

Issue 8: The trial court erred in entering Conclusion of Law No. 7

Issue 9: The trial court erred in entering Conclusion of Law No. 8

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should Fredericks be required to pay in advance an assessment for maintenance of a road he shares with EDE that is equal to the advance payments made by all other users, when all other users have agreed to pay a certain predetermined amount per year so that a fund is available for maintenance as needed; when all other lots in the Short Plat developed by Fredericks have agreed to pay an equal assessment as all other users; and where the assessment is kept relatively low because of the work efforts of EDE residents?

2. Is it an unreasonable restriction upon Fredericks' easement to impose restrictions upon leaving a security gate located upon a joint easement open and not providing him with a key to a locked electrical panel controlling the gate?

3. Does it exceed the scope of Fredericks' easement to allow him to place signs for businesses located in his home and for his Short Plat upon the easement?

4. Does it exceed the scope of Fredericks' easement to allow him to place a sign for his four lot short plat on the easement and did the court err in deciding this issue when it was not part of any pleading introduced prior to trial?

5. Does it exceed the scope of Fredericks' easement to allow him to operate an ATV on a joint easement when CC&Rs in the development where the easement is located prohibit ATV use, homeowners therein purchased with reference to those CC&Rs and with the expectation that ATVs would not use the road, and when the ATV is not being used for the purpose of ingress and egress?

STATEMENT OF THE CASE

History

Early Dawn Estates (EDE) is a 32 lot, gated, rural community, with an active homeowner's association. EX 52. (NOTE: Not all lots shown on Exhibit 20 are considered part of the EDE HOA). EDE was originally platted in 1978. CP 65, Finding No. 4. (The Findings of Fact and Conclusions of Law are included in the Appendix). The individual lots in EDE are serviced by a private gravel road that varies between

twelve and twenty feet in width. RP 240. A portion of that private gravel road is known as NE 159th Avenue (“159th”). Because 159th is private, the users of the road are responsible for its upkeep and maintenance.

Prior to the development of EDE, an easement for ingress, egress and utilities was granted to benefit adjoining property. 159th is located on that easement. That adjoining property was later short platted by Fredericks, who has sold all the lots in the Short Plat except the one on which he now resides. CP 65, Finding No. 2 and 3.

A road easement and maintenance agreement and a set of Restrictive Covenants were created for EDE in 1978. A modified Declaration of Covenants, Reservations and Restrictions for EDE was recorded in 1990, and together with the 1978 documents, provides for collection of an assessment to maintain roads within EDE, including 159th. EX 9. This annual assessment is currently \$250.00. In addition, special assessments for extraordinary projects are sometimes required. RP 246.

Fredericks purchased the adjoining property served by 159th in 2000. His short plat was approved in 2002, and his personal residence was constructed on a lot in the Short Plat in 2004 or 2005. CP 65, Finding No. 5. Therefore, he was both the developer of the Short Plat and is now the owner of a lot and resident therein.

Fredericks was required by Clark County, as part of his short plat approval, to make certain alterations to 159th. For one thing, he widened 159th in certain areas. In addition, as part of his conditions for development, Fredericks was required to build an “apron” or paved area where 159th meets the County Road. EX 35.

Also as part of his Short Plat approval, Fredericks was required to provide for maintenance of 159th. RP 135-137. EX 35 includes a statement that “[t]he applicant shall provide a private road maintenance agreement for NE 159th Avenue, as required in CCC 12.05A.770(7). This agreement must include the owners of Lots 1-4 among those responsible for the maintenance of this road.”

The Short Plat CC&Rs (EX 8) state that:

All property owners (Lots 1,2, 3, and 4) are responsible for maintenance of NE 159th Avenue to Gabriel Road. This maintenance can be accomplished as described above. After all the lots are sold, the property owners will vote a representative to handle the road maintenance.”

The methods of maintenance shown in the Short Plat CC&Rs are that the lot owners may (1) perform the maintenance themselves (2) obtain bids from subcontractors and pay to have the maintenance performed, or (3) pay association fees to have it maintained. EX 8.

Both EDE and the Short Plat access the county road by way of 159th. While EDE is also served by roads on which Fredericks does not

have an easement, 159th is the highest traffic and most used road. All lots in EDE and the Short Plat must use 159th to access the County road. 159th is wider than the other roads in the EDE development, and because of the higher traffic, it requires the most maintenance. RP 271-272. There are also additional features located on 159th, such as a mailbox and garbage area, a culvert and a gate, that require maintenance. RP 272.

Costs

Prior to the development of the Short Plat, EDE and its residents took all responsibility for the maintenance of the road. This maintenance was conducted both by collecting assessments and by residents of EDE organizing and conducting maintenance. EX 50. Don Wilmoth, a resident of EDE, testified that he personally spends a lot of time grading the road, spreading gravel, building crowns, cleaning ditches, filling potholes, removing snow and removing downed trees. RP 172-173. He testified that he spends about 100 hours per year working on the road, using a tractor he owns. RP 173. Most of this work takes place on 159th. RP 174-175.

These efforts on behalf of EDE residents keep the cost of maintenance much lower than it would be if someone was hired to maintain the roads. RP 281-283. Outside contractors would charge a substantial amount to do similar work. RP 177-178. EX 50, 53, 61 and 62.

Without the efforts of EDE residents, the cost of maintaining 159th to the same level as it is maintained now is approximately \$25,000.00 per year. RP 282-283.

In addition to performing actual physical maintenance, members of the EDE Home Owners Association board spend about two to three hundred hours of additional time per year coordinating the road maintenance and performing special projects related to the road. RP 273. Maintenance of 159th is carefully coordinated, since it is such a heavily traveled road, and the only access route to both EDE and the Short Plat. RP 274-275. In addition, when special issues arise, such as when a culvert needed to be repaired and an overflow culvert installed, it was members of the EDE Homeowners Association who made all the arrangements for permitting and engineering. RP 294-295.

EDE testified that roughly 80% of the out of pocket costs for road maintenance incurred by EDE are for 159th. RP 272, EX 49. In addition, utilities, mail boxes and other amenities were placed on 159th by the residents and developers of EDE. Fredericks, as the developer of the Short Plat, was able to utilize these various amenities for the benefit of the Short Plat without sharing in the cost. RP 296-298.

Because the owners of lots in the Short Plat were going to be using 159th, the EDE Home Owners Association felt that they should also

contribute to the cost of maintenance. Two members of the HOA were authorized to contact each lot owner in the Short Plat, as well as two other lot owners that used 159th but were not members of the EDE Home Owners Association, regarding contributing an equal amount as the EDE residents towards maintenance and upkeep of the road. EX 14. The HOA does not maintain a reserve account, so virtually all funds collected go towards maintenance of the road, with a disproportionate amount used for 159th. RP 245-246.

While he initially paid the \$250.00 assessment for two years, Fredericks then refused to pay the annual assessment or any special assessments, although all the other lots in his Short Plat and all other non EDE users had agreed to pay. RP 275, EX 39. Fredericks argued that the improvements he undertook on the road, including work he had done on a gate located on the road, should represent his lot's sole contribution to the maintenance of 159th. CP 65, Finding No. 8. He has also argued that these improvements undertaken as developer of the short plat should be "set off" against any maintenance assessment requirement he has for the road as a lot owner. One of these improvements was construction of an apron where 159th meets the County road. EDE has since had to tear out and replace this apron after it failed and broke up, at the expense of all the other road users. RP 290-291. EX 23.

As to the requirements contained in the Short Plat CC&Rs, Fredericks indicated in his trial testimony that the intent was that each of the owners in his Short Plat “put in a hundred and fifty dollars per year and that would go towards either dropping gravel on 159th or doing the gate or doing something to participate,” RP 136. This is not, however, what the recorded document states. A Road Maintenance agreement was required in order for his Short Plat to be approved, and also to obtain bank financing. RP 136-137. The other lot owners in the Short Plat have since agreed to pay the same road assessment paid by EDE residents. EX 23, 39.

When Fredericks brought suit regarding against EDE, EDE counterclaimed that Fredericks should be required to pay an equal amount as all other users of the road for maintenance of 159th. The trial court found that Fredericks cannot be required to pay an assessment but he is legally required to pay a “proportionate share of the expenses incurred by EDE” for the road and gate. CP 65, Conclusion of Law 2. These expenses are to be billed monthly, and provide supporting documentation. CP 65, Conclusion of Law 2(a). In the case of a special assessment, EDE must expend the funds for the work, and then bill Fredericks for his pro rate share. CP 65, Conclusion of Law 2(b).

Scope of Easement-Issues regarding gate

The developer of EDE installed a motorized gate on 159th for security purposes in the very early 1990's, long before the 2002 development of the Fredericks' short plat. No evidence was introduced suggesting that the prior owner of the property that became the Short Plat objected to the installation of the gate.

Prior to the installation of the gate, nonresidents frequently trespassed on EDE, damaging the roads and leaving garbage. RP 156-158. These problems have occasionally resurfaced over the years when the gate was left open or when unknown persons discovered a method of disabling the gate mechanism through the electrical box. RP 161. Fredericks, however, believes that the gate simply provides a false sense of security. RP 83-84.

In addition to the actual physical work on the road, the Board of EDE also makes sure the gate is functioning, checks it when it is left open for no known reason, and coordinates the maintenance on the road. RP 243-244.

The owners of lots in the Short Plat, including Mr. Fredericks, must also use this gate to access their property. The gate is electronic and may be accessed in several ways, all of which have been made available to lot owners of both EDE and the Short Plat.

All owners of lots utilizing the gate have been provided with the necessary key pad access codes and methods to open the gate directly. First, owners may open the gate by using a coded garage door remote or similar device built into their cars. RP 158. Second, visitors to the Short Plat and EDE can contact a resident to open the gate by using the two digit telephone listing of lot owners on a key pad by the gate, which is clearly lit and visible. The lot owner may then remotely open the gate from their home telephone, should they choose to do so. Third, each lot owner is issued a four digit code which can be entered utilizing the gate key pad, thereby allowing entry without contacting the lot owner by the telephone entry system. This code can be provided to third parties, such as contractors. The code can be changed at the resident's request. RP 158-159. At Fredericks' request, his code has been changed five times. RP 309.

These methods of access have been used successfully by members of EDE and the Short Plat to access their respective properties. Scott Hendrickson, a regular visitor to the Fredericks' property, testified that he has been able to access 159th by using the key pad and contacting Fredericks. RP 26. He indicated that Mr. Fredericks had not provided him with a code to open the gate without contacting Fredericks. RP 29. Fredericks also testified that he currently was granting access to his

property to workers by giving them the code. RP 92. While he testified that he was not comfortable giving strangers his code (RP 93-94; RP 117-118), testimony also showed that the code can easily be changed. RP 118.

The residents of EDE installed a device on the gate in 1999 or early 2000 that causes the gate to open and stay open in the event of a power failure. Because of this device, when a breaker is shut off at the power box for the gate, the gate will also open and remain open. RP 159-160, EX 40. Unfortunately, the mechanism was misused by certain parties either for the purposes of trespassing or to leave the gate open for other reasons. RP 161. To prevent this, the residents of EDE installed a lock on the electrical box. RP 161, EX 29. Several Bakelite covers were broken off the electrical box, so in 2008, the members of EDE installed a metal cover that would be harder to break off. RP 162, 261 and 311. This metal cover was then locked with a keyed lock. CP 65, Finding of Fact 6. Fredericks demanded a key to this lock, and was denied.

If the breaker is switched off in the power box, then the gate opens and remains open. When Fredericks was developing his short plat, the power box was evidently unlocked. Therefore, despite the security concerns of his neighbors, Fredericks frequently left the gate open by switching off the breaker while developing his Short Plat and constructing his home. CP 65, FF 6. For example, while doing infrastructure for the

Short Plat, Fredericks would leave the gate open all day long. RP 70 and 73. When this happened, other road users had no way of knowing whether the gate was simply malfunctioning, or had been deliberately left open. This was inconvenient, as well as a compromise of security.

EDE HOA limited distribution of keys to the electrical box to certain residents of EDE. RP 164. The distribution was limited because EDE was concerned about the effect that switching the electrical box on and off has on the gate; because it interferes with the other neighbors' security (RP 312-313) and safety concerns. RP 318-319.

The gated nature of the community is significant to the residents. Don Wilmoth testified that the gate gives him a sense of security about his property. RP 196. Another resident, Daphne Hayworth also testified that the main reason they purchased their property was because of the security offered by the gate. RP 208. Prior to the installation of the metal cover and lock and the limitation of distribution of the keys, Ms. Hayworth was the victim of an attempted home invasion. RP 209-210. Sonny Long, a former resident, also testified that the security offered by the gate was an important consideration to him. RP 224. Fredericks himself testified that when he was on vacation in 2003 or 2004, equipment located on his property was vandalized. RP 75; RP 120. He also testified that when he

sold the lots in the Short Plat, he advertised it as a gated community. RP 133.

In addition to the fact that the gate failed to provide security when it was left open, EDE had concerns about the safety aspects of using the breaker to open the gate, as well as concerns about wear and tear on the gate itself. One of the residents of EDE, who had a background in the electrical field, Don Wilmoth, testified there are safety concerns about people freely accessing the electrical panel. The panel was not designed as “switching duty” and was not intended to be switched on and off. RP 164-167. The locked cover protects the switches from being repetitively and indiscriminately switched on and off. RP 301, 312.

EDE has developed a policy wherein the gate may be left open during certain events, such as family reunions, upon notice and request. EX 19. Signs were made that said “Event”, so that if a resident found gate was open, he would know that the gate was not malfunctioning. RP 221-222 and 224-225. For security purposes, the policy asks that lot owners limit such events during regular working hours, when other residents are at work. EX 19.

Fredericks complained to the HOA about not being able to leave the gate open at will and demanded a key to the electrical box. When his demand for a key was denied, he alternatively demanded that the gate be

left open Monday through Friday, nine to five. RP 124. EX 21 and 23. He claimed that leaving the gate open was necessary because of various businesses located on his property and in case the gate malfunctioned.

Fredericks was accommodated by EDE on at least one occasion, and the gate was left open from 9 to 5, one day. However, his ongoing demand to leave the gate open was denied, since it did not appear he had anyone even accessing his property during the time that the gate was left open, because of the security concerns of the residents of EDE and the Short Plat. EX 22.

He argued, and the court found, that failure to provide him with a key, and attempting to control when the gate could be left open, was an unreasonable restriction on his use of his easement. Fredericks testified that he wanted to be able to leave the gate open at his discretion, and that he wanted to be able to leave the gate open when he and his significant other were outside, not near the phone, which would be mostly in the spring and summer. RP 91-92. EX 21 and 23.

Fredericks could only testify about one incident where his use of the easement was interfered with because of a gate malfunction. Christopher Galyon, a former lot owner in the Fredericks Short Plat, who continues to access the property occasionally to visit Fredericks, testified that he had only experienced problems with the gate “once or twice”. RP

30-31. Kimberle Main, who resides with Fredericks, indicated that she also had a problem with the gate, on one occasion. RP 50-51. This was the same incident that Galyon testified about. Stuart Reeder also testified about this incident for EDE, and indicated that the problem was fixed and the gate open in about fifteen minutes. RP 303-304. He further indicated that a key to the electrical box would not have helped during the particular incident that Fredericks provided testimony about, since the problem was unrelated to the electrical system. RP 305-306.

Don Wilmoth, who has lived in EDE since before the gate was installed, testified that he has never had any problem with guests accessing his home through the gate, as long as they entered the code correctly. RP 167-169. Daphne Hayworth also testified that she frequently has guests access her home and they have never had an issue with the gate not opening or not being able to access the Hayworth property. RP 211-212. Charles Long, a former resident of EDE, testified that he never had difficulty accessing his property through the gate. RP 222-223. Stuart Reeder also testified that none of his guests or contractors have had an issue with the gate. RP 302-303.

In addition, Fredericks claimed he wanted a key so that the gate could be left open if emergency vehicles needed to access the property.

However, the County EMT and fire department all have a code to come through the gate. RP 309-310.

The court found that failure to provide Fredericks with a key, and attempting to limit his discretion as to when the gate was left open was an unreasonable interference with his easement.

Scope of Easement – Business signs

Plaintiff operates two businesses, a realty business and an adult family home, on his property. The adult family home has never had any residents, other than Fredericks' own father. RP 47 and 63. Fredericks testified that clients did not access the realty business on his property. RP 134.

Nevertheless, Fredericks demanded that the names of these businesses be placed on the reader board for the gate, RP 101, or, alternatively, that he be allowed to place signs for these businesses on the gate post. EX 21. However, both the Short Plat CC&Rs and the EDE CC&Rs prohibit the posting of signs, with limited exceptions, within their respective boundaries. EX 8, EX 9. The easement granted to Fredericks is silent as to his right to put signs advertising his business on the easement, referring only to ingress, egress and utilities. EX 4.

Fredericks testified that he believed the names should be on the reader board, whether or not anyone was going to access them. RP 120-

123; RP 124-125. Although he originally asserted that the state required the name of his business be on the reader board, the regulation that had previously required this had been rescinded. RP 130. Nevertheless, he argued that not allowing him to place these names on the reader board was an unreasonable restriction on the scope of his easement.

Scope of Easement – Short Plat Sign

For the first time at the trial, Fredericks also demanded to be allowed to place a sign for this Short Plat in the mailbox area, which is located on the easement for 159th. RP 103. A sign is located there for EDE. RP 78. The grant of Fredericks’ easement is silent as to his right to place signs on 159th. Nevertheless, the court granted him this relief.

Scope of Easement – Operation of All Terrain Vehicles

All Terrain Vehicle (“ATV”) use is prohibited within EDE. Nevertheless, Fredericks has driven his ATV within the boundaries of EDE, including areas outside of his easement. The court found that it was an unreasonable limitation upon the scope of his easement to prevent his use of an ATV on 159th. RP 105-108.

**ARGUMENT
Standard of Review**

This matter was brought as a Declaratory Judgment action under RCW Chapter 7.24. Ordinary rules of appellate procedure apply to an

appeal from a declaratory judgment. *Nollette v. Christianson*, 115 Wn.2d 594, 599-600 (1990). In a declaratory judgment action, "[a]ll orders, judgments and decrees . . . may be reviewed as other orders, judgments and decrees." *Id.* at 599 (quoting RCW 7.24.070). The appellate court determines if the trial court's findings of fact were supported by substantial evidence in the record. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573 (1999). If so, this court next decides whether those findings of fact support the trial court's conclusions of law. *Id.*

Questions of law and conclusions of law are reviewed de novo. *Veach v. Culp*, 92 Wn.2d 570, 573 (1979). The interpretation of an easement is a mixed question of law and fact. *Id.* What the original parties intended is a question of fact and the legal consequence of that intent is a question of law. *Id.*

In this case, EDE is not appealing any of the findings of fact, so they are verities on appeal. See *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42 (2002). However, the findings and the evidence and testimony at trial do not support the court's conclusions of law.

Fredericks should be required to pay in advance an equal assessment for maintenance of a road he shares with EDE as all other users, when all other users have agreed to pay a certain predetermined amount per year so that a fund is available for maintenance as needed; when all other lots in the Short Plat developed by Fredericks have agreed to pay an equal assessment as all other users; and where the assessment is kept relatively low because of the work done by EDE residents.

Fredericks is undoubtedly responsible for a portion of the cost of maintaining 159th. In part, this responsibility arises from the Clark County Code under which the Short Plat was approved. The Short Plat was subject to the requirements of Clark County Code 12.05A.770. This code requires, in pertinent part, that a private road maintenance covenant be recorded stating that “[a]ll private roads shall be maintained by the owners of the property served by them and kept in good repair at all times.” Such covenants are supposed to “set out the terms and conditions of responsibility for maintenance, maintenance methods, standards, distribution of expenses, remedies for noncompliance with the terms of the agreement, right of use easements and other considerations.”

In addition, the Short Plat Declaration provides that the owners within the Short Plat are responsible for maintenance of 159th. The Short Plat declaration provides that “all property owners [within the Short Plat] are responsible for maintenance of NE 159th Avenue to Gabriel Road.”

Nevertheless, Fredericks initially argued that he had no responsibility to pay for maintenance of 159th because of alleged improvements he had made to 159th in his role as developer of the Short Plat. The court took the position that making these improvements absolved him of his past obligations to pay for maintenance of 159th. Because Fredericks also has declared bankruptcy, precluding collection of

past assessments, EDE does not challenge this part of the court's decision.

The court did find that Fredericks had an obligation, commencing in 2011, to pay a share of maintenance of 159th. The court found that this obligation would be met by the other users of the road, acting through EDE, paying for maintenance, and then billing Fredericks on a periodic basis. In other words, all other users of the road will pay \$250 annually. Money from this account is used to pay for maintenance and repairs. Then, EDE is required to send an itemized bill to Fredericks for his portion of these expenses. CP 65, Conclusions of Law 2, 2(a) and 2(b).

According to the Restatement of Restitution, if a person or organization acts to confer benefits on another in a setting in which the actor is not acting officiously, the benefited party may be required to make restitution to the actor. *Restatement of Restitution* §§ 1, 2 (1937). The Restatement defines "benefit" as:

A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word "benefit," therefore, denotes any form of advantage.

Id. § 1, at 12. “Officiousness” is defined by the Restatement as “interference in the affairs of others not justified by the circumstances under which the interference takes place.” *Id.* § 2, at 15.

Although this factual scenario appears to be a matter of first impression in Washington, an Iowa case, *Brentwood Subdivision Road v. Cooper*, 461 N.W. 2d 340 (Iowa App. 1990) addressed a similar situation. In that case, a network of private roads existed in a subdivision and the residents were responsible for their upkeep. In 1983, most of the lot owners entered into an agreement establishing a road association. The road association collected an annual assessment and provided road maintenance, repairs, insurance and other amenities to the road.

The Coopers were residents who refused to sign the agreement and pay the assessments, although they used the streets in the subdivision for ingress and egress. Iowa law provides that all property owners using private roads are required to contribute equally to the maintenance of the roads. *Brentwood* at 342. While Washington law is not so clear cut, the lot owners in the Short Plat were required, as part of the Short Plat approval, to also contribute to the upkeep of 159th. In addition, CCC 12.05A.770(7)(e) requires that road maintenance covenants provide for “assessing maintenance and repair costs equitably to property owners served by the private road.”

Washington case law also supports the equal division of maintenance requirements for the road. In *Bushy v. Weldon*, 30 Wn.2d 266 (1948), the court found an easement by implication was created between two neighboring property owners. As part of this finding, the court required each party to pay half the expenses of maintaining the driveway located on the easement. The appellate court found that “[t]he court's decree concerning the upkeep of the driveway was made in the interests of both parties. It applied a proper rule of simple justice, and precludes litigation in the future.” *Bushy* at 272.

In *Brentwood*, the appellate court upheld the trial court’s decision that the Coopers should be required to pay the same assessment as all other road users, even though the Coopers were not part of the road association. This decision was supported by general equity principles and under quasi contract, because the Coopers were being unjustly enriched at the expense of the other lot owners. A similar decision was reached in another Iowa case, *Okjobi Camp Owners Cooperative v. Carlson*, 578 N.W.2d 652, (Iowa 1998).

EDE performs services beneficial to Fredericks by managing and maintaining the road. This also relieves Fredericks of the duty imposed upon him as a condition of the Short Plat approval and under his own

CC&Rs to maintain 159th. In doing so, EDE has saved Fredericks from the expense and effort of maintaining 159th himself.

Under the law as stated by the Restatement, and based on the responsibilities imposed upon Fredericks as conditions of his short plat approval, the court erred as a matter of law by requiring that EDE pay for repairs and maintenance through assessments, but that Fredericks only be required to reimburse for these expenses after the fact. This arrangement creates more administrative problems for EDE, and creates the possibility that the other road users will end up subsidizing Fredericks' share should he fail to pay. It is particularly worrisome if a large repair or improvement is required for 159th. It also forces the other road users back to court for a determination every time Fredericks asserts that a particular cost is not allowable or if he simply refuses to pay. No legal basis exists for placing this burden on the other road users and it conflicts with the County requirement that Fredericks be "among" those responsible for maintenance of 159th. It also conflicts with the provisions included in the Short Plat CC&Rs that Fredericks himself prepared.

The court's decision allowing Fredericks to pay for only expenses associated with 159th, rather than charging him an equal amount as all other users, also results in his unjust enrichment.

In *Cox v. O'Brien*, 150 Wn. App. 24 (2009), the court described

unjust enrichment:

Restatement (Third) of Restitution explains that a person who is unjustly enriched at the expense of another is liable in restitution to the other. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473 (2007) (quoting RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (Discussion Draft 2000)), review denied, 163 Wn.2d 1042 (2008)). A person has been unjustly enriched when he has profited or enriched himself at another's expense, contrary to equity. But enrichment alone will not trigger the doctrine; rather, the enrichment must be unjust under the circumstances and as between the two parties to the transaction. *Id.*

To establish unjust enrichment, the claimant must meet three elements: (1) one party must have conferred a benefit to the other, (2) the party receiving the benefit must have knowledge of that benefit, and (3) the party receiving the benefit must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value. *Id.*

Here, Fredericks has received and continues to receive the benefit of a well maintained road, a security gate (an amenity which he used to market his short plat), mailboxes, and a garbage area. This has benefited Fredericks both as a lot owner and as the developer of the Short Plat. Undoubtedly, Fredericks is aware of the benefit.

Allowing Fredericks to accept the benefit of all other road users maintaining the road, while he pays a reduced maintenance requirement, is inequitable under the circumstances. His Short Plat was approved with the understanding that the lot owners in the Short Plat would be responsible for maintenance on 159th. His Short Plat CC&Rs also impose maintenance requirements upon him as a landowner. The trial judge's decision allows him to escape both. In affect, EDE has shouldered the burden of maintaining 159th placed upon Fredericks by the County in approving the Short Plat and in his own CC&Rs.

In restitution, the "measure of recovery is the reasonable value of the benefit received by the defendant." *Noel v. Cole*, 98 Wn.2d 375, 383, 655 P.2d 245 (1982). In an unjust enrichment case, the measure of recovery is either "the amount which the benefit conferred would have cost the defendant had it obtained the benefit from some other person in the plaintiff's position" or "the extent to which the other party's property has been increased in value or his other interests advanced." *Young v. Young*, 164 Wn.2d 477, 487 (2008). In any case, the benefit of services provided to Fredericks is far more than the \$250.00 per year (as well as assessments for special projects) that EDE requested at trial.

Evidence was introduced regarding the cost of obtaining similar services from outside contractors as are provided by EDE and its residents. Just the regular maintenance of the road alone at its current standard would cost approximately \$25,000.00, or \$675.00 per year, per lot. EX 50, 53, 61 and 62, RP 282-283. Therefore, the court erred as a matter of law by not taking into account the value of services provided by EDE.

In addition, testimony was introduced regarding the administrative time put in by members of the EDE board for such things as receiving approval from various agencies for culvert repairs. The court's decision placed an additional administrative burden on the EDE board to account for and bill Fredericks on a periodic basis, as opposed to him paying an equal share as everyone else using the road. In short, the trial court's decision requires EDE to provide more services to Fredericks than they already have been providing.

Under principals of restitution and equity, Fredericks should be required to pay the same assessment as all other users of the road. This is equitable and Fredericks receives far more value than is reflected in the cost of the assessment, since EDE's coordination and efforts keep the cost of maintenance artificially low.

The court also erred in finding that EDE was not selected as the “road representative” of the Short Plat. The Short Plat declaration (Exhibit 8) prepared by Fredericks provided that “all property owners (Lots 1, 2, 3 and 4) are responsible for maintenance of NE 159th Avenue to Gabriel Road.” Fredericks, in his role as an owner of a lot is therefore responsible. Exhibit 8 goes on to state that “[a]fter all lots are sold, the property owners will vote a representative to handle the road maintenance.”

The residents of the short plat apparently never elected such a representative among themselves. However, three out of four of the Short Plat lot owners, and Mr. Fredericks himself on two occasions, have elected to pay assessments to EDE as their share of the maintenance of 159th and have allowed EDE to conduct and manage the maintenance. In the absence of the vote required by the Short Plat Declaration, EDE has been appointed the representative to handle the road maintenance, and should have been recognized as such by the court.

As the designated road representative, EDE has the right, with the participation of all road users, to determine the appropriate amount of assessment required to maintain the road and assess the users accordingly.

Under the circumstances, the trial court’s decision allows Fredericks to escape the responsibilities required by the County and under

the Short Plat CC&Rs by shifting the responsibility to EDE. Fredericks is allowed to pay a minimal amount that does not reflect the true value of the services received. The appellate court should find, as a matter of law, that Fredericks is required to pay the same amount annually as all other users of the road mutually decide, which at present is \$250.00, as well as an equal amount, in advance, of special assessment required for special projects on the road that are required to maintain it in good condition.

It is not an unreasonable restriction upon Fredericks' easement to impose restrictions upon leaving a security gate located upon a joint easement open and not providing him to a key to a locked electrical panel controlling the gate

Although this matter was characterized as a declaratory judgment, the court decided this issue based on equitable principals. An equitable decision of a trial court is controlled by the circumstances of each case. *Lowe v. Double L. Properties, Inc.*, 105 Wn.App 888, 893 (2001) *rev. denied*, 145 Wn.2d 1008 (2001). An equitable decision by a trial court is given "great weight" by an appellate court unless the decision "is based on untenable grounds, is manifestly unreasonable, or is arbitrary." *Standing Rock Homeowner's Ass'n v. Misch*, 106 Wn. App. 231, 240 (2001), *rev. denied*, 145 Wn.2d 1008 (2001).

Even though great weight is given to the decision of the trial court, appellate courts are not bound to uphold these rulings if the facts are not

supported by the law. See *Colwell v. Etzell*, 119 Wn.App. 432 (2003) (appellate court reversed because the servient estate did not interfere with the easement).

Further, in order to be granted injunctive relief, the requesting party must show a substantial injury.

The document creating Fredericks' easement and the document creating EDE's easement are silent on the subject of gates. "If the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances." *Rupert v. Gunter*, 31 Wn. App. 27, 31(1982). Further:

When the owner of a servient estate is being subjected to a greater burden than that originally contemplated by the easement grant, the servient owner has the right to restrict such use and to maintain gates in a reasonable fashion necessary for his protection, as long as such gates do not unreasonably interfere with the dominant owner's use.

Id.

In *Rupert*, the gate was installed for the purpose of preventing "the general public from entering and speeding down the lane." *Id.* at 29. The gate in that case was awkward and difficult to open and close, and caused great inconvenience for the plaintiff. For this reason, the trial court forbade a gate across the easement unless it was a lightweight aluminum gate that was easy to open. The appellate court upheld the decision,

finding that while even a lightweight gate would cause some inconvenience, this was a reasonable restriction on the use of the easement. While the court did not directly address the question of whether the gate could be simply left open by the dominant estate holder, the case does indicate that a minor inconvenience is not an unreasonable restriction.

Here, the gate was installed for the purpose of providing security to the rural properties that are part of EDE. Fredericks does not contend that the gate itself is interfering with his use of his easement or that the gate is not contemplated within the terms of his original easement. In fact, he used the gate as a selling point for his Short Plat lots. Therefore, the gate is presumptively a reasonable restriction on the easement.

Instead, Fredericks contends that not being provided a key to the electrical panel, even though access to the electrical panel is not necessary for access to 159th, is an unreasonable interference with his rights. In addition, he asserts a right to leave the gate open whenever and for however long he chooses, without regard to the security concerns of his neighbors.

Prior to the installation of the gate, EDE was subject to vandalism and trespass. After the installation of the device that caused the gate to remain open in the event of a power failure, these issues once again arose,

because people, including Fredericks, took advantage of the device to leave the gate open. Since this compromised the security provided by the gate, this amounted to a “greater burdens” upon the servient estate than was originally intended.

EDE reacted to these burdens by installing the lock on the electrical panel, limiting the keys to certain residents, and imposing restrictions on leaving the gate open to certain, preapproved, situations. Fredericks is not entitled to a key because restricting the ability to leave the gate open at will is not an unreasonable restriction on the use of his easement.

The courts in Washington have determined that a gate intended to restrain livestock is not an unreasonable restriction on the use of an easement. See, for example, *Lowe v. Double L Properties*, 105 Wn. App. 888 (2001). Obviously, a gate that is open does not provide security, just as leaving a gate intended to contain livestock open does not serve that purpose.

The gate in the instant case was installed to provide security. Imposing restrictions on leaving the gate open at will furthers its intended purpose. Although Fredericks perhaps showed he suffered some minor inconvenience by not being allowed to leave the gate open at will, he did not show any unreasonable interference with his use of the easement. The

gate may be easily opened, without leaving one's car, by a variety of methods. Further, a safety device has been installed that causes the gate to open in the event of a power failure.

Fredericks could only provide one instance where his ability to freely use his easement was interfered with by the gate, and in that instance, the testimony showed that a key to the electrical box would not have alleviated the problem. Therefore, the ability to open the gate when it is malfunctioning is not a valid reason to require that he be given a key.

Further, no testimony indicated that tradesman and other invitees were unable to access Fredericks' property by using the code or other methods to opening the gate. In fact, the testimony introduced indicated that such parties were able to access the property freely.

Therefore, the sole reason for providing him with a key was so he could leave the gate open on the off chance that a visitor without the code would need entry. However, such a visitor can always contact Fredericks by punching in his number in the gate keypad which contacts him by telephone. Expected guests can be provided the access code, as Fredericks and others have done in the past.

Limiting opening of the gate does not interfere with Frederick's home businesses either. The realty business cannot and does not receive clients and the adult family home has no residents. In addition, the court

failed to take into account the concerns about “wear and tear” on the gate by constantly switching the breakers and potential liability and safety concerns.

Simply allowing one user of the gate to leave it open at will makes as little sense as allowing a user of a gate intended to contain livestock to do so. If the gate in this case is a reasonable restriction on the easement, then so are restrictions on simply leaving the gate open.

EDE contends that restricting access to the electrical panel is using and maintaining the gate “in a reasonable fashion”, within the meaning of *Rupert*. If all users of the gate were entitled to a key to the electrical panel, the security provided by the gate would be compromised. Failure to limit access to the electrical panel negates the purpose of the gate and is not reasonable.

As for the second consideration in *Rupert*, there is no interference to Fredericks’ use of his easement for free access to his property. The gate is designed to allow such access, even in the event of a power failure. While the gate admittedly malfunctions on occasion, these malfunctions are often caused by human error or are unrelated to the electrical panel. Visitors to Fredericks’ property, both expected and unexpected, have adequate methods of admission to his property.

The trial court's decision to allow Fredericks a key and allowing him to leave the gate open at his discretion should be overturned.

The scope of Fredericks' easement is exceeded by allowing him to place signs for businesses located in his home and for his Short Plat upon the easement

Fredericks sought a declaratory judgment determining his right to place the names of his home businesses in the call box for the gate. The trial court granted him this relief. However, the trial court was incorrect as a matter of law because both Fredericks' and EDE's CC&Rs preclude business signs, the easement is, in essence, an extension of the Short Plat; and because signs for his businesses exceed the scope of his easement.

The inclusion of the business names in the call box are signs, despite the fact that they are admittedly small ones. RP 321. The Random House Dictionary of the English Language - The Unabridged Edition, defines a sign as: "a means of conveying information, as a name, direction, warning or advertisement, that is prominently displayed for public view and that consists of letters or symbols inscribed or mounted on wood, metal, paper, or other material: a traffic sign; a store sign; a danger sign."

Signs, except those advertising a property for sale or rent, are precluded from all lots in the Short Plat. The CC&Rs from the Short Plat (Ex 8) state that "no sign will be erected, maintained, or displayed on any lot, except signs advertising the property for sale or rent, or any type of

ornamental name plate.” Therefore, Fredericks could not advertise his businesses on his own lot. The easement is appurtenant to these lots, and therefore part of it. “Easements appurtenant become a part of the realty which they benefit.” *Clippinger v. Birge*, 14 Wn. App. 976, 986 (1976). It is nonsensical for Fredericks to argue, therefore, that he can do something on an easement appurtenant to his lot that he could not do on the lot itself. He is essentially arguing that he has a right to do something on property within EDE that he could not do within his own Short Plat. That argument means that a lot owner in the Short Plat would have the right to place signs on other lots within the Short Plat, as long as he had an easement, even though he could not place such a sign on his own lot. Such a result is contrary to law.

Advertising of business on Fredericks’ easement on 159th also exceeds the scope of the easement. The easement is for ingress, egress and utilities, and makes no mention of signs. “If the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances.” *Rupert v. Gunter*, 31 Wn. App. 27, 31(1982). In this case, these factors include that both the Short Plat and EDE are residential properties, both of which have CC&Rs precluding the posting of signs.

Business signs are in no way related to the use of the easement for ingress, egress and utilities.

The scope of Fredericks' easement is exceeded by allowing him to place a sign for his four lot short plat on the easement

The trial court also granted Fredericks the right to post a sign advertising the existence of his Short Plat in the easement. Such a sign similarly violates Fredericks' own CC&Rs and exceeds the scope of his easement for ingress, egress and utilities.

It exceeds the scope of Fredericks' easement to allow him to operate an ATV on the joint easement

The trial court held that EDE could not restrict Fredericks from operating ATVs on 159th. EDE's CC&Rs preclude the use of ATVs within EDE, but the court concluded that the CC&Rs could not prevent Fredericks' use, since his property was not bound by them. EDE asserts that restrictions on ATV use is a reasonable restriction on the easement, and that Fredericks' use exceeds the scope of the easement.

Fredericks' easement is limited to ingress, egress and utilities, not recreational use. ATVs are not permitted on the County road, so when using his ATV, he is engaging in recreational use, not ingress and egress.

In *Snyder v. Haynes*, 152 Wn. App 774 (2009), Haynes was the dominant estate holder for an easement located on the Snyder property. The easement in that case was similarly for ingress and egress to a county

road. Snyder became concerned about ATV use on the easement, and filed suit, in part, for injunctive relief preventing ATV use. The court granted that relief, and the appellate court upheld the decision, noting that:

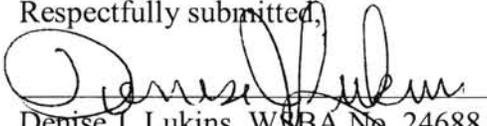
Notably, the mutual easement was created for ingress and egress. Since ATVs, ORVs, and other unlicensed vehicles cannot legally travel beyond the easement road onto a public road, these types of vehicles were not contemplated by the parties The trial court found the ATV and ORV use was nonconforming recreational touring. While increased use of an easement by a dominant estate holder is acceptable, a changed use by a dominant estate holder is unacceptable.

Snyder at 781.

CONCLUSION

The trial court improperly found that Fredericks did not have the same obligation to pay an assessment as all other users as the road. The trial court also improperly altered the scope of Fredericks' easement in determining he had discretion to leave the gate open at will and that EDE was required to provide him a key; that he was entitled to place various signs on the easement; and that ATV use is permitted under the scope of the easement.

DATED this 5 day of January, 2012.

Respectfully submitted,

Denise J. Lukins, WSBA No. 24688
Attorney for Appellant

APPENDIX

FILED

2011 JUN 21 PM 4: 22

SCOTT G. WEBER, CLERK
CLARK COUNTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

FRANK FREDERICKS,)	
)	NO. 10-2-01132-7
Plaintiff,)	
)	FINDINGS OF FACT AND CONCLUSIONS
vs.)	OF LAW
)	
EARLY DAWN ESTATES)	
HOMEOWNER'S ASSOCIATION,)	
)	
Defendant.)	

THIS MATTER was tried to the Court, without a jury, on February 14 and March 22, 2011. The undersigned Judge presided at trial. The claims presented at trial for adjudication were the claims of plaintiff Frank Fredericks for a declaratory judgment and the counterclaims of defendant Early Dawn Estates Homeowner's Association ("EDE") for unjust enrichment, declaratory relief, and trespass.

Plaintiff appeared at trial through its attorney of record, Stephen G. Leatham of Heurlin, Potter, Jahn, Leatham & Holtmann. Defendant appeared at trial through its attorney of record, Denise J. Lukins of Salmon Creek Law Offices. The witnesses who testified at trial for plaintiff were: Frank Fredericks, Kimberle Main, Chris Galyon, and Scott Hendrickson. The witnesses who testified at trial for defendant were: Don Wilmoth, Daphne Haworth, Zia Schwager, Sunny Long, Stu Reeder, and Michael Harris. The exhibits which were offered, admitted into evidence, and considered by the Court are set forth in the list on file with the Clerk of the Court.

Based on the evidence presented at trial, the Court makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

Heurlin, Potter, Jahn, Leatham & Holtmann, P.S.
211 E. McLoughlin Boulevard, Suite 100
PO Box 611
Vancouver, WA 98666-0611
(360) 750-7547

1 **FINDINGS OF FACT**

2 1. Early Dawn Estates subdivision is a residential community off Gabriel Road in
3 Yacolt, Washington. The Early Dawn Estates homeowners have entered into a road maintenance
4 agreement for the roads located within its boundaries. The road maintenance agreement is
5 administered by defendant EDE.

6 2. Plaintiff resides within the Fredericks short plat, a subdivision consisting of four
7 homeowners. The Fredericks short plat is not part of Early Dawn Estates. However, access to the
8 Fredericks short plat is over NE 159th Avenue, which is one of the roads within Early Dawn
9 Estates.

10 3. Plaintiff holds a nonexclusive easement over NE 159th Avenue in order to provide
11 access to and from his property.

12 4. Early Dawn Estates was originally created in 1978. EDE installed a gate to limit
13 access to Early Dawn Estates in the early 1990's, for security and aesthetic reasons. In order to
14 open the gate, homeowners must utilize a coded remote device from their cars or punch in a four
15 digit code at the key pad located at the gate. For visitors to access the premises, they must reach
16 a homeowner by telephone by dialing a two digit code into the key pad, which rings at the
17 telephone of the homeowner's choice. The homeowner can then remotely open the gate for
18 them, or they must have been given the four digit code by a homeowner.

19 5. Plaintiff purchased the property that became the subject short plat in September
20 2000. This short plat was approved in 2002. Plaintiff constructed his home on the property in
21 2004 or 2005.

22 6. During the time plaintiff purchased his property and constructed his home, the
23 access gate was frequently left in an open position, which could be done by triggering a switch
24 within an electrical panel located near the gate. In 2008, for safety and security reasons, EDE
25 installed a metal door and lock on this cover, preventing access to the electrical panel. The only

1 persons with access to the electrical panel were those who had been issued keys by EDE.
2 Plaintiff was not issued a key.

3 7. Disputes began to arise between EDE and plaintiff in 2009-10. Plaintiff objected
4 to not being able to leave the access gate open at his discretion. EDE insisted that only its board
5 of directors or other authorized representative could authorize leaving the gate open, in its sole
6 discretion, and only when an "Event" sign had been placed at the gate so that the owner
7 homeowners would know that the gate was left open for an event and was not malfunctioning.

8 8. Another dispute concerned whether plaintiff was obligated to pay the same
9 amount as EDE members paid for road maintenance assessments by EDE. Plaintiff felt that he
10 was not obligated to pay such assessments, both because he was not a party to Early Dawn
11 Estates' road maintenance agreement and because he had done work on the roads and gate in the
12 past that he felt represented more than adequate contributions. EDE believed that plaintiff should
13 pay the same road assessments as were paid by the parties to the road maintenance agreement
14 and by other road users, given plaintiff's use of the gate and of NE 159th Avenue.

15 9. Another dispute concerned plaintiff's request that the name of his business,
16 Northwest Properties Brokers Network, Inc. be placed on the reader board located at the access
17 gate. He also requested that the name of Kimberle Main's home business, The Lodge Adult
18 Family Home, be placed on the reader board. Ms. Main lives with plaintiff and is his significant
19 other. EDE declined these requests. Plaintiff subsequently requested that Ms. Main's name be
20 listed at the reader board, and EDE complied with this request.

21 10. Finally, EDE objected to plaintiff operating an all terrain vehicle anywhere within
22 Early Dawn Estates, whether on plaintiff's access easement or otherwise. Plaintiff felt that he
23 had the right to operate an ATV at least within the scope of his easement. EDE also objected to
24 the use of NE 159th Avenue for business purposes.

CONCLUSIONS OF LAW

1
2 1. This case presents justiciable controversies that are appropriately the subject of
3 declaratory relief.

4 2. Because plaintiff is not a resident of Early Dawn Estates or a party to Early Dawn
5 Estates' road maintenance agreement, he is not legally required to pay the annual or special road
6 maintenance assessments that EDE imposes or that Early Dawn Estates residents or other users
7 pay. However, ~~as a matter of fairness and equity~~ ^{legally} plaintiff is responsible to pay a proportionate
8 share of the expenses incurred by EDE to repair and maintain plaintiff's easement road and to
9 repair, operate, and maintain the access gate. Through the year 2010, plaintiff satisfied this
10 obligation by providing labor and materials toward work performed on the road and gate. For the
11 year 2011 and into the future, plaintiff is responsible to pay a pro rata share of the documented
12 expenses incurred by EDE to maintain and repair NE 159th Avenue, as well as for the
13 documented expenses EDE incurs to maintain, operate, and repair the access gate ^{, including utilities, mailbox area, and garbage area,} Early Dawn
14 Estates consists of 31 lots. Six other lots utilize the gate and NE 159th Avenue. Accordingly,
15 plaintiff's pro rata share for the above-referenced expenditures is 1/37th of the annual amounts
16 expended for the purposes set forth above.

17 3. Contribution to EDE road maintenance by three of the four lots in the Fredricks
18 short plat does not constitute the election of EDE as the Fredericks Plat maintenance
19 representative for NE 159th Avenue, as described in the Fredricks Plat CC&R's.

20 4. For the same reason, plaintiff is not subject to EDE's Event Security Guidelines
21 as to how and when the access gate may be opened or left open. Requiring plaintiff to secure the
22 approval of EDE in order to leave the access gate open is an unreasonable restriction on his
23 rights as an access easement holder. EDE must therefore provide plaintiff with a key to the metal
24 cover at the electrical panel and an "Event" sign. Plaintiff must place the Event sign at the gate
25 when he leaves it open. Plaintiff is entitled to leave the access gate open as he deems reasonably

P2(a). EDE shall bill plaintiff monthly for the above-referenced expenses. The bill shall including supporting documentation. The bill is payable within 15 days. If not so paid, it shall accrue interest at the rate of 1.5% simple interest per month.

P2(b). In the event of a special assessment, when EDE expends funds for the contractor or other third party, it may bill plaintiff for his pro rata share of that expenditure, payable in 15 days or less and subject to the above interest rate.

P2(c) EDE shall provide plaintiff with notice of any general meeting in which the topics include any of the items that plaintiff is to pay a pro rata share. Plaintiff is entitled to attend and vote on those topics.

P2(d) No monetary value or obligation shall be attributed to work performed voluntarily by either party. ~~XXXXXXXXXX~~

~~DONE this _____ day of _____.~~

~~Attorney for _____~~

~~ORDER _____~~

~~JUDGE/COMMISSIONER _____~~

~~Attorney for _____~~

SAL [Signature]

FINDINGS - 4(A)

1 necessary. If EDE should replace or change the lock or cover at the electrical panel, it shall
2 promptly provide plaintiff with a functioning key for the new lock or cover.

3 5. Plaintiff has not been unjustly enriched by EDE's maintenance of the road and
4 other amenities.

5 6. The names of plaintiff, Ms. Main, and their respective home businesses shall
6 continue to be displayed on the reader board at the access gate. Should the names of the
7 businesses change, or should the identity or name of a resident at plaintiff's home change in the
8 future, the information on the reader board shall be updated by EDE on plaintiff's written
9 request.

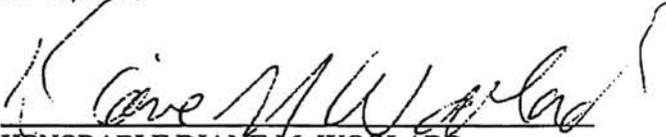
10 7. EDE may not restrict plaintiff or his invitees from operating all terrain vehicles
11 within the scope of plaintiff's easement. On the other hand, plaintiff and his invitees may not
12 operate ATV's within Early Dawn Estates in areas that are not within the scope of plaintiff's
13 easement.

14 8. Given that Early Dawn Estates has reinstalled a sign behind the mailbox area at
15 the entrance to the subdivision, identifying Early Dawn Estates, plaintiff is similarly allowed to
16 install a reasonable sign at the mailbox area, identifying that the gate also serves as the access to
17 the Fredericks short plat.

18 9. Defendant's counterclaims are dismissed, with the exception of the claim
19 regarding ATV use within EDE outside of NE 159th Avenue.

20 10. As the prevailing party, plaintiff is entitled to an award of taxable costs and
21 statutory attorney fees.

22 SO ORDERED this 21 day of June, 2011.

23
24 
25 HONORABLE DIANE M. WOOLARD

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 5

Heurlin, Potter, Jahn, Leatham & Holtmann, P.S.
211 E. McLoughlin Boulevard, Suite 100
PO Box 611
Vancouver, WA 98666-0611
(360) 750-7547

1 PRESENTED BY:

2 HEURLIN, POTTER, JAHN,
3 LEATHAM & HOLTMANN, P.S.

4 

5 Stephen G. Leatham, WSBA #15572
Of Attorneys for Plaintiff

6 APPROVED AS TO FORM; COPY RECEIVED;
7 NOTICE OF PRESENTATION WAIVED

8 SALMON CREEK LAW OFFICE

9 

10 Denise J. Lukins, WSBA #24688
11 Of Attorneys for Defendant

12
13
14
15
16
17
18
19
20
21
22
23
24
25

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 6

Heurlin, Potter, Jahn, Leatham & Holtmann, P.S.
211 E. McLoughlin Boulevard, Suite 100
PO Box 611
Vancouver, WA 98666-0611
(360) 750-7547

DECLARATION OF SERVICE

12 JAN -6 AM 9:21

On the 6th day of January, 2012, I caused a true and correct copy of the following document: Brief of Appellants Early Dawn Estates Homeowners Association in Court of Appeals Cause No. 42426-6-II, to be hand-delivered to the following:

Stephen G. Leatham
Huerlin Potter Jahn Leatham & Holtmann
211 E. McLoughlin Blvd., Ste. 100
PO Box 611
Vancouver, WA 98666-0611

Original filed with:
Court of Appeals, Division II
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 5, 2012, at Vancouver, Washington.

Carrie Foster

Carrie Foster, Legal Assistant
Salmon Creek Law Offices