

COURT OF APPEALS
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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

BOBBI WOODWARD, as Personal Representative of the
Estate of Johanna Ellwanger, deceased, appellant,

vs.

HECTOR LOPEZ, *et ux.*, *et al.*, Respbdants.

NO. 42757-5

BRIEF OF APPELLANT WOODWARD

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A. Assignments of Error

1. The lower court erred in granting respondents Lopez motion for summary judgment motion dated August 19, 2011.

2. The lower court erred in denying appellant's motion for reconsideration dated September 23, 2011.

B. Issues Pertaining to Assignments of Error.

1. Did respondents Lopez fail to establish a *prima facie* case that they were entitled to a summary judgment? (Assignment of Error 1).

2. Did the appellant demonstrate genuine issues of material fact sufficient to preclude the granting of a summary judgment? (Assignment of Error 1).

3. Did the lower court err in refusing to grant the reconsideration of the summary judgment?
(Assignment of Error 2).

C. Statement of the Case.

The plaintiff Johanna Ellwanger brought this case due

to the defendants below Herbert and Lopez blocking her access to her 30 foot wide strip of land while she was laying utilities to develop her property. The 30 foot strip is not an easement, but was owned outright by plaintiff. Mrs. Ellwanger died on September 10, 2009. On October 2, 2009, Mrs. Ellwanger's last will was admitted to probate in Pierce County under Pierce County Cause Number 09-4-01466-6 and Bobbi A. Woodward was appointed the Personal Representative. For purposes of clarity, Mrs. Ellwanger's properties will be referred to as the Ellwanger properties.

Florence W. Ford originally owned all of the properties now owned by the parties. On August 31, 1946, she sold the property now owned by defendant Neda J. Herbert but excepted a road 30 feet in width across the property connecting her remaining properties to the north and south. CP 45 at ¶9. Mrs. Ford had been using this road to gain access to her lots and with the intention of providing

ingress, egress, and utilities to all her lots. CP 44 at ¶6.

On February 2, 1976 Mrs. Ford filed two short subdivision applications to subdivide her remaining property into eight lots, the parcel lying north of the Herbert property as Short Plat No. 431 and Short Plat No. 432.

Johanna Ellwanger acquired Lots A, B, C, and D of Mrs. Ford's Short Plat No. 432 and Lot B of Ford Short Plat No. 431 on April 27, 2007. CP 48.

The Ellwanger deed expressly provided for appellant's fee title ownership of a thirty (30) foot road across the Herbert property.

Defendants Lopez acquired their property on August 1, 1996. The Lopez property is Lot C of Ford Short Plat No. 431. The Lopez deed contains an express sixty (60) foot easement in favor of Ellwanger's lot B SP 431 property for purposes of ingress, egress, and utilities.

The co-defendant in the proceedings below, Neda J. Herbert and her late husband, bought their property on an

installment sales contract dated May 1, 1969, and obtained a fulfillment deed recorded April 4, 1978. CP 48. The Neda J. Herbert deed expressly provided for an exception to the grant of the thirty feet in width strip of land across her property as well as a fifteen (15) foot strip along her eastern boundary.

Therefore, following the granting of the Hebert property, Mrs. Ford owned two large parcels of land, joined and connected by a 30 foot by 165 foot strip of property.

Ellwanger's properties lying to the south of the Herbert parcel are situated such that there is no ingress to or egress from the lots except by over and across the 30 foot road of Plaintiff and the 60 foot easement over the Lopez property. CP 36 at ¶4. Although these lots front along the Bethel-Burley Road, wetlands exist on the western portion of the lots that prevent access or utilities from being placed there. CP 36 at ¶4, and CP 39 at ¶14. Without access over and across the 60 foot easement and 30 foot strip, the

Ellwanger parcels are landlocked. Id.

It was the intent of the original developer (Mrs. Ford) of all the parcels of property owned by the parties herein that the Ford properties (now the Ellwanger properties) have access over and across the road and easement, both expressly and by implied reservation. CP 45 at ¶5.

D. Argument

1. **Summary Judgment.** An appeal from summary judgment is reviewed de novo. *CLEAN v. City of Spokane*, 133 Wn.2d 455, 462, 947 P.2d 1169 (1997). Summary judgment is not appropriate if there exists any genuine issue of material fact. CR 56. A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Summary judgment is appropriate only where the moving party demonstrates by evidence that would be admissible in court an absence of

any issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). “If a genuine issue as to any material fact exists, a trial is not useless and such a motion should not be granted. The burden is on the moving party ...to establish the absence of any genuine issue of material fact.” *Id.* Only after the moving party meets its burden of either producing factual evidence showing that it is entitled to judgment as a matter of law, does the burden shift to the nonmoving party. *Kennedy v. Sea-Land Service*, 62 Wn. App. 839, 816 P.2d 75 (1991).

A trial “is absolutely necessary” if there is a genuine issue as to ANY material fact. *Jacobsen v. State of Washington*, 89 Wn.2d 104, 569 P.2d 1152 (1977). A “material fact” is one upon which the outcome of the litigation depends. *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974).

An experts opinion on an ultimate issue of fact is sufficient to defeat a motion for summary judgment. *Eriks*

v. Denver, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992) (citing *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1976)). This court must take the facts and all reasonable inferences from them in the light most favorable to the nonmoving party. *Id.* at 456 (*emphasis added*).

In *Visser v. Craig*, 139 Wn. App. 152, 159 P.2d 453 (2007), the court reversed a summary judgment involving an implied easement and way of necessity similar to the matter at bar holding “the use of an easement implied from prior use is a question of fact and depends on the parties’ intent, the nature of the properties, and the manner in which the parties used the easement.” *Visser*, 139 Wn. App. at 161 (*citations omitted*).

2. Without the ability to use the 60 foot easement for ingress, egress, and utilities, all four of the southerly lots of appellant’s are effectively landlocked and cannot be developed, as they all contain wetlands over which the county will not allow construction. CP 36 at ¶4. Plaintiff’s

expert has determined the only reasonable access is over the 60 foot easement that crosses the Lopez property to connect with the 30 foot strip of land expressly reserved for that purpose that crosses the Herbert property. CP 36 at ¶4.

There exists a genuine issue of material fact as to whether an implied easement exists over the Lopez property serving the southern Ellwanger lots. Johanna Ellwanger owned the property adjacent to the Lopez property on the north, and there it is not disputed that she has equal easement rights with the respondents Lopez regarding that lot. However, respondent argues the four Ellwanger lots adjacent to the Lopez property on the south may not use the express Lopez easement, nor use that area as an implied easement, not as a way of necessity.

2. **An implied easement.** Washington law is clear as to the requirements to establish an implied easement, either by grant or reservation. *McPhaden v. Scott*, 95 Wn. App. 431, 975 P.2d 1033 (1999). A plaintiff must demonstrate (1)

former unity of title and subsequent separation; (2) prior apparent and continuous quasi easement for the benefit of one part of the estate to the detriment of another; and (3) a certain degree of necessity for the continuation of the easement. *McPhaden*, 95 Wn. App. at 437 (citing *Adams v. Cullen*, 44 Wn.2d 502, 505, 268 P.2d 451 (1954); *Fossum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995)).

The first factor is essential for creation of an implied easement. Here, there is no dispute that Florence Ford owned all the lots in question here. However, the presence or absence of the second and third factors is not necessarily conclusive. Rather, they are aids to determining the presumed intent of the parties as disclosed by the extent and character of the use, the nature of the property, and the relation of the separated parts to each other. *Id.* (citing *Adams*, 44 Wn.2d at 505-06; *Fossum Orchards*, 77 Wn. App. at 451; *Roberts v. Smith*, 41 Wn. App. 861, 865, 707

P.2d 143 (1985)).

Although the existence of an apparent and continuous quasi easement, and necessity for continuation of the easement, are considered in determining whether there was an intent to create an implied easement, these elements are not necessary. *Fossum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995) (citing *Roberts v. Smith*, 41 Wn. App. at 865. “Although prior use is a circumstance contributing to the implication of an easement, if the land cannot be used without the easement without disproportionate expense, an easement may be implied on the basis of necessity alone.” *Id.* (citing *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954)). Also, “the elements of apparent and continuous quasi easement and necessity are merely aids in determining intent to create an implied easement and the presence or absence of either or both of these elements is not necessarily conclusive.” *Roberts v. Smith*, 41 Wn. App. at 865.

Element 1, unity of title and separation is agreed to. Element 2 is merely an aid to determine whether an easement was implied, and necessity is established by the wetlands preventing access from the Bethel-Burley road. Is there a genuine issue of material fact? Frederick Kegel testifies Mrs. Ford wanted to retain access to her southerly lots from the north. CP 45 at ¶¶5 and 9.

The fact that Mrs. Ford created two short plats connected by a 30 foot road easement itself demonstrates she intended both parcels to have access over the northern parcels. Otherwise, this court must come to the absurd conclusion that Mrs. Ford intended to cut off access to the 30 foot strip of land from both short plats, creating a 30 by 165 foot piece of land cutting the Herbert property in two.

Factor 2 has been demonstrated in that Mrs. Ford did access her properties to the south via the Lopez easement to the 30 foot strip. CP 45 at ¶6. This factual statement made on the personal knowledge of Mr. Kegel shows the prior use

as well as the intent of Mrs. Ford to reserve an easement across her property to the north of defendants Lopez. Mrs. Ford actually used the Lopez easement to cross the Herbert property to get to her southern properties.

In fact, if this Court rules the 30 by 165 foot road dividing the Herbert lot is not accessible from the north over the Lopez easement or from the south short platted lots, then this Court is creating a landlocked parcel, for which a private way of necessity must then be condemned.

C. **Private way of necessity.** The Ellwanger properties are landlocked and may only be accessed over the Lopez property easement. RCW 8.24.010 authorizes private condemnation of land for purposes of ingress, egress, and placing utilities upon the showing of reasonable necessity for a private way of necessity. *Beeson v. Phillips*, 41 Wn. App. 183, 702 P.2d 1244 (1985) notes the general rule that one “is entitled to sufficient access to make ‘effective use’ of his land.” *Beeson*, 41 Wn. App. at 187. The condemnor has

the burden of proving the reasonable necessity for a private way of necessity, including the absence of a feasible alternative. *State ex rel. Schleif v. Superior Court*, 119 Wash. 372, 205 P. 1046 (1922). RCW 8.24.010 authorizes private condemnation of land for utilities. Without access to customary utilities, landlocked residential property is rendered useless. *Sorenson v. Czinger*, 70 Wn. App. 270, 278, 852 P.2d 1124, (1993).

Respondents Lopez have submitted no factual statement or expert opinion that the Ellwanger properties are not landlocked. Rather, the only statement supporting the claim is found in the motion itself that because the properties have street frontage of Bethel-Burley Road, they are not landlocked. Respondents Lopez have not met their burden required by CR 56, and thus, the motion for partial summary judgment as to the Lopez property not being subject to a way of necessity should be denied.

“The test of necessity is whether the party claiming the

right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute.” *Adams v. Cullen*, 44 Wn.2d 502, 507, 268 P.2d 451 (1954). Assuming *arguendo* respondents Lopez have met their initial burden under CR 56, appellant’s expert Vaughn Everitt removes all doubt the subject parcels are indeed landlocked and a way of necessity the only reasonable access when he states “it is my expert opinion that the only reasonable access to the subject properties is over the 30 foot road that crosses the Herbert property and the easement that crosses the Lopez property.” CP 36 at ¶4.

Mr. Everitt is a Kitsap County certified wetlands specialist with over 14 years experience in the field of wetland determination, delineation, and functional values assessment. CP 34 at ¶2. Mr. Everitt states it would be prohibitively expense to construct a road and lay utilities across the wetlands, which must be done unless access is obtained across the Lopez property easement and 30 foot

road. CP 39 at ¶14.

This expert opinion is based on undisputed facts as follows:

i. Currently there are no existing access roads to any of the parcels and it wetland fill will be necessary to achieve access and to construct single family homes. CP 36 at ¶5. This fact goes to demonstrating lack of access to the Ellwanger properties.

ii. Wetland fill and mitigation is the last option for such a project, so in order to gain access to the lots it must be determined that there are no other alternatives to obtaining access to these lots. Id. This fact goes to demonstrating necessity and lack of access.

iii. There is no access to these parcels from Bethel Burley Road. CP 37 at ¶9. This is a factual statement of the Ellwanger properties being landlocked.

iv. Because there is no access available to these properties, the only option is to construct a road across the

wetland and create onsite buffer unless an alternative is found. *Id.* This statement demonstrates the requirement that without use of the Lopez easement, the Ellwanger properties can only be accessed over and through wetland areas.

v. The 60 foot easement currently existing across the Lopez property and connecting with the 30 foot road serving the subject lots will provide access, ingress, egress, and utility service without crossing any wetlands. Therefore, it is certainly the most preferable means of access to the subject lots. CP 38 at ¶13. This expert opinion is based on Mr. Everitt's professional experience in the field of wetland determination, delineation, and functional values assessment. On this ultimate issue of fact, it is sufficient to defeat a motion for summary judgment. *Eriks v. Denver*, 118 Wn.2d 451, 457.

The two elements of reasonable necessity and lack of a feasible alternative have been demonstrated through the

testimony of Vaughn Everitt. “It appears that there is sufficient area on each parcel for construction of a single family home but there is no apparent access to these parcels from Bethel Burley Road. Because there is no access available to these properties, the only option is to construct a road across the wetland and create onsite buffer unless an alternative is found.” CP 37 at ¶9. “It would be prohibitively expensive to construct a road and lay utilities across the wetlands, which must be done unless access is obtained across the Lopez property easement and 30 foot road.” CP 39 at ¶14.

Without the availability of the easement that crosses the Lopez property, the Ellwanger properties to the south remain unbuildable. This is against public policy and the law of this state.

D. Conclusion

The facts and expert opinions set forth above demonstrate genuine issues of material fact the preclude

summary judgment. Simply put, there was no basis for the lower court's granting of Respondents' motion for summary judgment. That motion was unsupported and unsupportable by legal authority whatsoever. Therefore, Appellant requests this Court reverse and vacate the lower court's order granting partial summary judgment.

DATED: January 31, 2012.

A handwritten signature in black ink, appearing to read "Joe Tall", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day he caused to be served in the manner noted below a true and accurate copy of the foregoing by the method indicated below and addressed to the following:

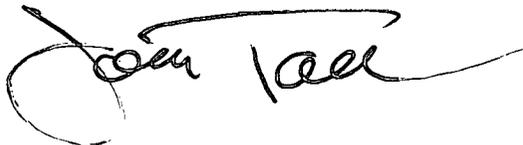
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