

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

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BOBBI WOODWARD, as Personal Representative of the Estate of  
Johanna Elleanger, deceased, Appellant,

v.

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

NO. 42757-5-II

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BRIEF OF RESPONDENTS

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY Matthew D. Mills  
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**TABLE OF CONTENTS**

I. Introduction.....1

II. Counterstatement of Issues.....1

III. Statement of the Case.....2

IV. Argument.....6

A. Summary Judgment and Standard of Review.....6

B. Express Easement.....7

C. Implied Easement.....12

1. No Continuous and apparent quasi easement  
existed during unity of title.....13

2. No necessity for the quasi easement after  
severance.....16

D. Statutory Way of Necessity.....19

V. Conclusion.....21

**TABLE OF AUTHORITIES**

**Table of Cases**

*Adams v. Cullen*, 44 Wn.2d 502,  
268 P.2d 451 (1954).....12, 13, 14, 16

*Amalgamated Transit Union Local 587 v. State*,  
142 Wn.2d 183, 11 P.3d 762, 27 P.3d 608 (2000).....7

*Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003).....7

*Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355,  
753 P.2d 517 (1988).....7

*Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977).....6

*Kennedy v. Martin*, 115 Wn.App. 866, 63 P.3d 866 (2003).....20, 21

*Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345,  
588 P.2d 1346 (1979).....17, 18

*M.K.K.I., Inc. v. Krueger*, 135 Wn.App. 647,  
145 P.3d 411 (2006).....8

*Rainier View Court Homeowners Association, Inc. v. Zenker*,  
157 Wn.App. 710, 238 P.3d 1217 (2010).....10

*Selby v. Knudson*, 77 Wn.App. 189, 890 P.2d 514 (1995).....8

*Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873,  
73 P.3d 369 (2003).....8

*Vallandigham v. Clover Park Sch. Dist. No. 400*,  
154 Wn.2d 16, 109 P.3d 805 (2005).....6

*Visser v. Craig*, 139 Wn. App. 152, 159 P.2d 453 (2007).....14

**Table of Statutes**

RCW 8.24.010.....19  
RCW 8.24.025.....20  
RCW 58.17.165.....8  
Kitsap County Code 16.48.290.....9

**Rules and Regulations**

Civil Rule 56.....6, 7

## **I. INTRODUCTION**

Despite the fact that Appellant's property has road access, Appellant filed a suit against Respondents demanding access over Respondents' property under three distinct theories. Respondents previously prevailed on the three issues in their motion for partial summary judgment at the trial court which Appellant now appeals. Appellant offers only unsupported, conclusory statements by experts which do not address the fact that the experts' own maps show road access to Appellant's property.

The trial court recognized that the Appellant could not assert issues of fact that overcome the physical layout of the properties in question and the recorded documents which demonstrate that the Appellant has no right to use the Respondents' property to serve her own properties. Respondents ask that this Court affirm the order granting the partial summary judgment.

## **II. COUNTERSTATEMENT OF ISSUES**

A. Whether the Respondents are entitled to a judgment as a matter of law that Appellant is not entitled to an express road and utility easement

on the Appellant's parcel, when no reference is made to such an easement in the recorded property records.

B. Whether the Respondents are entitled to a judgment as a matter of law that an easement by implied reservation does not exist on the Respondents' parcel which benefits Appellant's parcels when no continuous and apparent quasi easement existed during unity of title and when there is no high degree of necessity for such an easement to exist.

C. Whether the Respondents are entitled to a judgment that as a matter of law that Appellant is not entitled to a private right of way over Respondents' parcels benefitting the Appellant's parcels where the Appellants' own evidence demonstrates road access, but does not demonstrate a necessity to burden Respondent's parcels.

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

This case arises from the Appellant's insistence that she has rights over the Respondents' property. Appellant, without benefit of an express easement, or a court awarded implied easement or condemnation, simply attempted to begin installing utilities across the property of the Respondents Lopez for the benefit of Appellant's parcels to the south. When the Respondents objected, Appellant filed the instant lawsuit to, in

part, attempt to obtain rights for ingress-egress and utilities to the Lopez parcel to benefit the Appellant's parcels to the south.

An understanding of the history and logistics of the parcels in question is important to the issues at hand. In 1976, Florence W. Ford subdivided two parcels of property under short subdivision application 431, Kitsap County Auditor No. 1160324, and short subdivision application 432, Kitsap County Auditor No. 1135950. *Supp. CP – (Mills Decl. Ex. 1, 2)*. Respondents Lopez are the current owners in fee of Lot C of the 431 subdivision (hereinafter "the Lopez parcel"), having purchased it in 1996. *Supp. CP – (Mills Decl. Ex. 3)*. At the time the Lopezes purchased their parcel, a barbed wire fence ran along the southern boundary of the parcel. *Supp. CP – (Mills Decl. Ex. 9, 10)*.

No portions of any of the parcels comprising short subdivision 431 abut any portion of the parcels which comprise short subdivision 432. *Supp. CP – (Mills Decl. Ex. 4)*. The short plats are separated by a parcel of property that is currently owned in fee simple by the Defendant Neda Herbert. *Supp. CP – (Mills Decl. Ex. 5)*. A thirty foot wide road, running the entire north-south length of the Herbert parcel (hereinafter "the thirty foot road") was retained by Ms. Ford when she originally conveyed the Herbert parcel in 1946, some thirty years before the division of the 431 and 432 subdivisions. *Supp. CP – (Mills Decl. Ex. 6)*. Ms.

Ford's estate eventually conveyed whatever rights she still had in the road in 2000, after originally omitting the thirty foot road when conveying Ms. Ford's remaining interest in the 431 and 432 subdivision parcels in 1999. *Supp. CP – (Mills Decl. Ex. 7, 8).*

However, the original legal descriptions of the parcels of the 432 subdivision did not include or refer to the road. *Supp. CP – (Mills Decl. Ex. 4).* The entire northern and southern boundary of the Herbert parcel, including the northern and southern terminus of the thirty foot road, was fenced from, at the latest, 1964 until at least 1998. *Supp. CP – (Mills Decl. Ex. 9).*

Short subdivision application 432 did not provide for ingress or egress through any other parcels. Each of the parcels comprising short plat 432 extends between Bethel-Burley Road (State Highway 14) on the west and State Route 16 on the east; all four of the property descriptions indicate those roads as boundaries of the parcels. *Supp. CP – (Mills Decl. Ex. 2).* Item number 12 of the application for short subdivision 432, requires that "legal descriptions must include reference to ingress or and egress for all proposed parcels not having street frontage," but there is no reference to an ingress - egress easement, or any other easement, in the legal description for the parcels of short subdivision 432, nor does the

accompanying map reference any easements. *Supp. CP – (Mills Decl. Ex. 2.)*

The short subdivision application for short plat 431 does identify, in a sketch of the parcels, a road and utility easement which runs through the eastern 60 feet of the Lopez parcel, as well as Parcel B owned by the Plaintiff and Parcel A owned by a third party. *Supp. CP – (Mills Decl. Ex. 1).* That easement provides a road and utility access for Lots A, B, and C of the subdivision, which would otherwise be landlocked. *Supp. CP – Mills Decl. Ex. 1).* The sketch only includes the parcels of the 431 subdivision, and does not identify the thirty foot road on the Herbert parcel or any of the parcels of subdivision 432. *Supp. CP – (Mills Decl Ex. 1.)*

In 2007 Johanna Ellwanger obtained title to the 432 subdivision parcels, as well as whatever rights the Ford estate had to the thirty foot road. *CP 51-54.* Ms. Ellwanger eventually filed the instant lawsuit in part in order to obtain rights over the Lopez parcel under one of three theories. Appellants moved for summary judgment on the issues of the Ellwanger estate's rights to an easement or right-of-way over the Lopez parcel. *CP 1-10.*

Appellant offered a declaration from one Vaughn Everitt as a part of her response to Respondents' motion for summary judgment. *CP 34-*

42. Mr. Everitt's declaration contains two maps which both indicate existing access to the 432 parcels via Bethel-Burley Road. *CP 40, 42.*

The trial court granted Respondents' motion for partial summary judgment and subsequently denied Appellant's motion for reconsideration. Appellant now appeals those rulings by the trial court. *CP 58-59, 72-73.*

### III. ARGUMENT

#### A. Summary Judgment and Standard of Review

Civil Rule 56 provides that summary judgment is appropriate where the pleadings, affidavits, or other documentation demonstrate that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). Summary judgment is a procedure available to avoid unnecessary trials where formal issues cannot be factually supported and cannot lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial on an issue if only questions of law remain for resolution. On appeal, summary judgment is reviewed de novo. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

The standard for a summary judgment motion is that the moving party has the burden to demonstrate that there is no genuine issue as to material fact and that, as a matter of law, summary judgment is proper.

*Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 206, 11 P.3d 762, 27 P.3d 608 (2000). In deciding the motion for summary judgment, the court views the evidence in the light most favorable to the non-moving party, and draws all reasonable inferences in that party's favor. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126 (2003).

The non-moving party must set forth specific facts showing that there is a genuine issue for trial with respect to each element of its claim in order to defeat a motion for summary judgment. CR56(e) (emphasis added). The facts set forth to defeat summary judgment must be made from personal knowledge and be admissible as evidence; ultimate facts, conclusions of fact, or conclusory statements of fact are not sufficient to raise a question of fact. *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-360, 753 P.2d 517 (1988).

#### B. Express Easement

Respondents moved for summary judgment on the issue of whether an express easement exists on the Lopez parcel in favor of Appellant's 432 parcels. Appellant devoted very little time in her responses at the trial level or in her opening appeal brief to the issue, however appears to have included it in her appeal. Therefore it is

necessary to demonstrate that there are no questions of material fact that exist as to whether such an express easement exists.

The interpretation of an easement is a mixed question of law and fact. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). What the original parties intended is a question of fact and the legal consequence of that intent is a question of law. *Id.* A party may create a private easement by including the grant in a plat. RCW 58.17.165; *M.K.K.I., Inc. v. Krueger*, 135 Wn.App. 647, 653, 145 P.3d 411 (2006), *review denied*, 161 Wn.2d 1012, 166 P.3d 1217 (2007). The intent of the plat applicant determines whether a plat grants an easement. *Selby v. Knudson*, 77 Wn.App. 189, 194, 890 P.2d 514 (1995). If possible, the intent of the applicant is ascertained from the plat itself. *Id.* When a plat is ambiguous, the applicant's intention may be determined by considering the surrounding circumstances. *Id.* When the terms of a written instrument are uncertain or capable of being understood as having more than one meaning, the instrument is ambiguous. *Id.* at 194-195.

In the case at hand, the intention of the plat applicant is clear on its face; there is no indication that the easement on the properties of short plat 431 was intended to benefit properties of short plat 432. *Supp CP – (Mills Decl. Ex.1)*. The short plat application, signed by Florence Ford, the subdividing owner of both short plat 431 and 432, did not include ingress-

egress easements in the legal description of the properties of short plat 432 when instructed to do so on the application. *Supp CP – (Mills Decl. Ex.2)*. The plat application unambiguously demonstrates Ms. Ford's intent that the properties of subdivision 432 not benefit from the easement on the properties of subdivision 431.

The application for subdivision 431 grants an easement, but only to benefit the other properties within the same subdivision. The easement on each of the parcels of short plat 431 is granted "per sketch." The sketch does not depict the thirty foot road, and it does not depict any portion of subdivision 432. The contention that the easement depicted on the approved short plat application benefits property to the south which is not depicted on the sketch would effectively be an amendment to both of the short plats contrary to the amendment procedures required by Kitsap County Code 16.48.290, which provides, in part that:

[a] short subdivision which has been approved and recorded may be amended upon application of the owners of all lots which are being affected by the amendment. Actions that require an amendment may include, but are not limited to, creating, modifying or extinguishing access easements or reconfiguring or removing buffer areas or open space.

Attempting to circumvent the short plat amendment process is unfair to those, such as the Respondents Lopez, that have purchased parcels of the short plat under the terms of the short plat as approved.

Contrast the case at hand with *Rainier View Court Homeowners Association, Inc. v. Zenker*, 157 Wn.App. 710, 719-720, 238 P.3d 1217 (2010). In that Division 2 case, the court found an easement for a park granted on one plat benefited two other plats subdivided by a common owner. However, the court found ambiguities in the plat in question in *Rainier View* that do not exist in our case. The easement grant in *Rainier View* specifically conveyed easement rights to “future lot owners of existing and future phases of the Plat of Rainier View Court for all purposes not inconsistent with the use of a private road and utilities easement.” *Id* at 716. The court found that the “future lot owners of... future phases of the Plat of Rainier View Court...” language along with the designation of a “park” on the plat map was an ambiguity that allowed the court to look to extrinsic evidence to determine the developer’s intent. *Id* at 721.

The easement grant in the instant case contains no such ambiguities. As was pointed out above, there is nothing on the easement map or the language of the short plat that indicates the 431 easement was meant to benefit the non-adjoining 432 parcels.

Even if the Court needs to look to extrinsic evidence, Ms. Ford's intention that short plat 432 not benefit from an easement on short plat 431 is further demonstrated by the fact that no easement was granted to Lots B, C, and D of short plat 432 for ingress, egress, or utilities across Lot A of short plat 432. Appellants maintain in their complaint that Ms. Ford intended that all of the parcels in question have access through the Lopez and Herbert parcels by way of the thirty foot road and the easement on short plat 431. It is curious, then, that short plat 431 would explicitly have easements delineated on it for the benefit of the other parcels on the short plat, but that short plat 432, executed on the same day, would not grant easements on the parcels for the benefit of the more southerly parcels.

Finally, neither short plat 431 nor short plat 432 mentions or depicts the thirty foot road. *Supp CP – (Mills Decl. Ex.1,2)*. If Ms. Ford had intended the easement scheme that Plaintiffs propose, she would have safeguarded it at the time of the creation of the short plats by including it in either or both of the short plat applications. It is more likely that the three-decade old strip was forgotten about, rather than it being an important piece in a subdivision scheme that was somehow not mentioned in two subdividing documents. Not even the estate of Florence Ford seemed to be aware of this road in 1999, as evidenced by the need to issue a corrected personal representative's deed almost a year after the original

deed to include the road when settling of Ms. Ford's estate. *Supp CP – (Mills Decl. Ex.7,8)*.

### C. Implied Easement

An implied easement (either by grant or reservation) may arise (1) when there has been unity of title and subsequent separation; (2) when there has been an apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title; and (3) when there is a certain degree of necessity that the quasi easement exist after severance. *Adams v. Cullen*, 44 Wn.2d 502, 505, 268 P.2d 451 (1954). Intent to create an easement is “the cardinal consideration” in determining an implied easement. *Id* at 505. For an implied reservation to exist, a “higher degree” of necessity is needed than is needed for an easement by implied grant. *Id* at 508. The higher standard required for an implied reservation is due to the fact that an implied reservation “is in derogation of the deed and its covenants, and stands upon narrower ground than a grant.” *Id*.

The Appellant claims in her complaint that an implied reservation exists which grants them the right to use the easement on the short plat 431 parcels for ingress-egress and utility access for the 432 parcels.

However, the claim fails the second and third prong of the three prong test laid out by the Supreme Court in *Adams*.

1. *No continuous and apparent quasi easement existed during unity of title.*

In order to establish an easement by implied reservation, the plaintiff needs to demonstrate continuous and apparent use of a quasi-easement benefitting the 432 parcels to the detriment of the 431 parcels during the period Frances Ford or her estate had unity of title of all the 431 and 432 parcels. Such an easement would necessarily have to utilize the thirty foot road or otherwise traverse the north-south length of the Herbert parcel. Even assuming that the Plaintiff maintains title to the thirty foot road, there had not been continuous, apparent use of such a quasi-easement for at least a period of over three decades prior to the Lopez purchase of Lot C of short plat 431.

Neda Herbert testified in a deposition conducted by the Plaintiff that the northern and southern boundaries of her parcel, including the northern and southern terminus of the thirty foot road, had been fenced in by a barbed wire fence from at least 1964 until 1998, two years after the Defendants Lopez purchased their parcel. *Mills Decl. Ex.9*. Because of that fence, there was clearly no continuous or apparent quasi-easement

allowing ingress and egress to and from the 432 parcels by way of the 431 parcels for a period of at least 31 years prior to the Lopez purchase of their parcel.

Appellant relies on Ms. Ford's alleged use of the 30 foot "road" and the existence of the road to demonstrate Ms. Ford's intent that an easement serving the 432 subdivision run across the Lopez parcel. While Mr. Kegel offers a statement that Mrs. Ford accessed her properties via the 30 foot strip, by Mr. Kegel's own testimony he did not meet Mrs. Ford until sometime between 1978 and 1980. By that time Mrs. Ford no longer had unity of title between the Lopez Parcel and the rest of her parcel, as demonstrated by a water agreement executed by the owners of Lot A and Lot C of the 431 subdivision in 1977. *Supp CP – (Declaration of Matthew D. Mills in Support of Reply to Motion for Reconsideration, Paragraph 2)*.

Mr. Kegel can offer no testimony regarding the use of the quasi-easement during unity of title, nor does he refute the evidence offered that any easement was not apparent as required by *Adams v. Cullen*, 44 Wn.2d. at 505. While under *Visser v. Craig*, 139 Wn. App. 152, 159 P.2d 453 (2007), evidence offered of continuous and apparent use during unity of title may create a question of fact, no such evidence has been offered.

Rather, Mr. Kegel's declaration demonstrates that Mrs. Ford had no intention of creating an easement across the Lopez parcel that served the 432 subdivision. Mr. Kegel's personal observations were that Mrs. Ford was knowledgeable about the importance of maintaining rights to access where necessary. Appellant, however, is asking that the Court make a contradictory inference and infer that Mrs. Ford neglected to reserve easement rights in her deed to the Lopez's predecessor in interest, or on the short plats for the 431 and 432 subdivisions. Only a speculation not made from personal knowledge is offered by Mr. Kegel for the absence of the easements in the 432 short plat which would be required to make the scheme of access to 432 by the 30-foot strip work.

The only tangible evidence Mr. Kegel relies upon to demonstrate Mrs. Ford's intent that the parcels of Short Plat 431 are servient estates to the parcels of Short Plat 432 are the "reservations" in the conveyances of Lots A and C of Short Plat 431. *CP 43-44*. However, those reservations that are in addition to the reservations outlined on Short Plat 431 are for "the right to repair, replace, and remove the existing water lines" and a water agreement with a neighboring lot. *Supp. CP – (Declaration of Matthew D. Mills, Ex. 3; Second Declaration of Matthew D. Mills, Ex. 1)*. Those reservations do not grant any rights for ingress, egress, or utilities other than existing water utilities.

Mr. Kegel has only offered competent evidence that Mrs. Ford did not intend to create an easement. Appellant has not offered any competent evidence to create a question of fact to the contrary.

2. *No necessity for the quasi easement after severance.*

Each parcel of the 432 subdivision abuts Bethel-Burley Road. Ingress and egress as well as utility access is available by way of the frontage, as was envisioned by Ms. Ford and the county when the short plat application was applied for and approved.

While ingress, egress, and utility access by way of the 431 parcels may possibly be more convenient and cost-effective for the Plaintiff, simple convenience and economy does not rise to the “higher degree of necessity” standard which is required under the theory of an easement by implied reservation. The *Adams* court required a evidence that a “great cost” would result for ingress and egress by a different route in order to find that an implied reservation existed. *Adams*, 44 Wn.2d at 510.

Appellant offered expert an opinion of ultimate fact from Vaughn Everitt, a wetlands specialist, that accessing the Plaintiff’s property from Bethel-Burley Road would be prohibitively expensive in order to attempt to show a question of fact for both the theory that there is a necessity for an implied easement. However, Mr. Everitt does not offer even a rough

estimate of the actual costs that would be incurred by the Appellant. In turn, there is no testimony offered from the landowner Appellant or someone else familiar with the development plans that the estimated expense would be prohibitive for whatever development is being planned.

Mr. Everitt's declaration is long on quantitative factors which invite a calculation of what the Appellant's expense could be, but which is never made. The closest Mr. Everitt comes is comes to making an estimate is that of a general cost per acre of mitigation. However, neither the Appellant nor Mr. Everitt estimates how much acreage would be impacted by accessing one or more of the southern subdivision properties from Bethel-Burley Road. Instead the declaration merely ends with a conclusion that the cost would be prohibitive, despite the fact that Mr. Everitt never establishes that he has any knowledge of the scope or development budget for the subdivision beyond stating that it appears there is room for one residence per plot.

Plaintiff relies on *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 588 P.2d 1346 (1979), to support her position that the opinion from Mr. Everitt, not backed by calculations specific to the subject property, establishes a question of fact. However, the facts and circumstances in *Lamon* sharply contrast with those in the case at hand.

In *Lamon*, the issue in question was whether a hatch cover on an aircraft as designed and installed was “safe” or not, a decidedly qualitative question. The plaintiff’s expert was able to point to other hatch alternatives in similar aircraft which he deemed safe. The Court held that the plaintiff’s expert’s ultimate conclusion that the hatch was unsafe created a question of fact that defeated the defendant’s motion for summary judgment because the Court could draw a reasonable inference that the alternative hatch design was a more safe option.

In the case at hand, the Plaintiff’s wetlands expert could have offered a quantitative estimate of costs for access via Bethel-Burley Road. The Plaintiff, or someone else familiar with the development plans, could have then offered testimony that the estimated cost is prohibitively expensive. The Plaintiff failed to do so and leaves an estimate of costs conspicuously absent. Instead she urges the Court to draw inferences from general statements offered by Mr. Everitt to come to the conclusion that Bethel-Burley Road access is cost prohibitive to the level of a high degree necessity required for an easement by implied reservation. The Plaintiff has offered the Court too little factual information to draw such an inference.

Further, Mr. Everitt never explains why what is labeled on his own maps as “existing” access to Bethel-Burley Road does not constitute

access to Bethel-Burley Road. It is puzzling that the Appellant or her experts do not address the existence of this road access in any way; rather they apparently she simply hopes no one will notice it or give its existence on her expert's own maps any weight. The existence of that existing access defeats any argument for an implied easement, and clearly demonstrates that there is no question of material fact remaining as to the determination that Appellant is not entitled to an implied easement.

D. Statutory way of Necessity

Appellant claims in her original complaint that if express or implied easements do not provide access for the 432 parcels over and across the Lopez properties, then the Plaintiff is entitled to a private way of necessity under RCW 8.24 because the property is landlocked. The statute does provide for private ways of necessity under certain conditions, providing:

an owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be.

RCW 8.24.010.

However, the Plaintiff's 432 parcels are not landlocked. The 432 parcels have street frontage at Burley-Bethel Road. Mr. Eviritt's maps show access. Mrs. Ford, when subdividing the property, did not provide for ingress-egress easements as required for landlocked parcels in the subdivision application because she understood the parcels were not landlocked. The Plaintiff does not allege in her complaint that the necessity for a private way of necessity arises from anything other than an incorrect statement that the parcels are landlocked. There is no justification for a private way of necessity to be granted to the 432 parcels when the parcels all have street frontage.

Under the statutes, in the selection of any route granted by private way of necessity "[t]he relative benefits and burdens of the various possible routes shall be weighed to establish an equitable balance between the benefits to the land for which the private way of necessity is sought and the burdens to the land over which the private way of necessity is to run." RCW 8.24.025. "Under this statute [RCW 8.24.025], the condemnor has the burden to show that a private way of necessity exists and that the route selected is the most reasonable alternative." *Kennedy v. Martin*, 115 Wn.App. 866, 869-870, 63 P.3d 866 (2003).

In fact, under *Kennedy*, the Appellant runs into the same problems described in Section C above: No expert demonstrates a quantitative cost which would necessitate a private condemnation and the existing access to the 432 properties is ignored. There is simply no facts set forth by the Appellant that create a question as to whether the access to Bethel-Burley Road, as envisioned by Mrs. Ford and as indicated on Mr. Everitt's maps, is the most reasonable access to the 432 parcels.

#### IV. CONCLUSION

Appellant's claim to an express easement is unsupported by the recorded property records. Appellant's claim to an implied easement or a private way of necessity is inconsistent with the physical layout of the property and the existence of access to Bethel-Burley Road.

Therefore, Respondents respectfully request that this Court affirm the ruling of the trial court granting Respondent's motion for partial summary judgment.

Respectfully submitted this 19<sup>th</sup> day of March 2012.

  
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*Appellant*

v.

HECTOR LOPEZ, et ux, et al.  
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No. 42757-5-II

Declaration of Service

STATE OF WASHINGTON  
BY MD  
DEPUTY

12 MAR 19 AM 11:48

COURT OF APPEALS  
DIVISION II

Matthew D. Mills, under penalty of perjury under the laws of the State of Washington Declares as follows:

On March 19, 2012, I served to Mr. Joseph Tall, via e-mail to joetalllaw@gmail.com, a copy of Respondents' Brief, along with a copy of this Declaration.

Signed this 19th day of March at Bremerton, WA.

  
Matthew D. Mills