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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

NO. 43288-9-II

BY


DEPUTY

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

BART ADAMS,
Appellant,

v.

SHANE DEEN,
Respondents,

REPLY BRIEF OF APPELLANT
AND
DECLARATION OF MAILING

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TABLE OF CONTENTS

Table of Contents	ii
Table of Authorities	iii
I. ARGUMENT	
Merger Extinguished the Attempt to Create An Easement Claimed By Deen	1
Patty Bacque Declaration Is Relevant for Purposes of Notice	11
Deeds and Deeds of Trust Granted Do Establish Intent	12
Intent Necessary for Implied Easement Is Not Present	16
Easement By Necessity Fails For Lack Of Intent	18
Deen Does Not Contest That An Easement By Implication Or Necessity Would Be Limited To The Actual Width Used	20
IV. CONCLUSION	21

TABLE OF AUTHORITIES

CASES:

<u>Anderson v. Starr</u> , 159 Wash. 641, 643, 294 P.2d 581 (1930)	2, 3
<u>Barber v. Peringer</u> , 75 Wash.App. 248, 877 P.2d 233, (1994)	3
<u>Beebe v. Swerda</u> , 58 Wn.App. 375, 793 P.2d 442 (1990)	5, 6, 7
<u>Schlager v. Bellport</u> , 118 Wn.App. 536, 76 P.3d 778 (2003)	4
<u>Van Woerden v. Union IMP, Co.</u> , 156 Wash. 555 (1930)	3
<u>Visser v. Craig</u> , 139 Wash.App. 152, 159 P.3d 453 (2007)	16, 18, 19
<u>Witt v. Reavis</u> , 284 Or.503, 587 P.2d 1005 (1978)	4

OTHER AUTHORITIES

ER 801	11
RAP 2.5	11
Restatement 3rd of Property (Servitudes) § 7.5	4, 7
William B. Stoebeck & John W. Weaver, 18 Wash. Prac., Real Estate §18.29 (2d Ed) (2012)	2
WSBA Washington Real Property Deskbook §10.3(3)(B) Easements and Licenses 10-14 (1997)	18

ARGUMENT

MERGER EXTINGUISHED THE ATTEMPT TO CREATE AN EASEMENT CLAIMED BY DEEN

Deen argues that the doctrine of merger did not extinguish the express easement contained in the 1989 deed for two reasons. First, he argues that merger occurs only when there is unity of the entire legal and equitable states. Second, he argues, citing a Pennsylvania case, that the doctrine of merger is not applied in cases where an easement might be needed again at the time of severance. Neither argument has any merit under Washington law.

It is unclear why Mr. Deen makes the argument that in order for the attempt to create an easement in the 1989 deed to be extinguished by merger the legal and equitable estates in the property must be in one person. While he cites case law for that proposition, Mr. Deen does not argue, and there is no evidence in the record, that there was not unity of legal and equitable title in each of the owners who held both the Adams parcel and the Deen parcel between 1989 and 2005. Whether or not the merger occurred during common ownership of both parcels by Powers and Adams between 2005 through 2009 doesn't matter as the

easement was eliminated by merger prior to Powers acquiring both properties. Even if the law of merger as applicable to this case required unity of the legal and equitable estates, that test was met here in 1989 when both properties were transferred to a single owner. Merger occurred again 1998 when the both properties were transferred to a single owner. It happened again in 2003 when both properties were transferred to a single owner. There is no dispute that legal and equitable title was unified between 1989 and 2005. Whether or not the type of merger involved in this case requires unity of legal and equitable title is irrelevant as the test is met as to the mergers that occurred in 1989, 1998 and 2003.

Mr. Deen's argument that the type of merger at issue in this case requires unity of both legal and equitable title is raised and argued for the first time in Mr. Deen's responsive brief. In support of the argument he cites *Anderson v. Starr*, 159 Wash. 641, 643, 294 P.2d 581 (1930). (See Deen brief footnote 46). The term "merger" has different meanings in Washington law in different contexts. William B. Stoebeck & John W. Weaver, 18 Wash. Prac., Real Estate §18.29 (2d Ed.) (2012). It can mean, as applicable here, the merger of an easement into the title to real property when two

different parcels of property, the benefited and burdened parcels related to an easement come into single ownership. In another context merger can mean merger of the provisions of the real estate purchase and sale agreement into the statutory warranty deed given by a seller at closing of the sale of a single piece of property. *Barber v. Peringer*, 75 Wn. App. 248, 877 P.2d, 233, (1994). It can also mean the merger of a mortgage into a deed when a mortgagee receives a deed to a single piece of mortgaged property. *Van Woerden v. Union IMP. Co.*, 156 Wash. 555 (1930). By citing *Anderson, supra*, Mr. Deen applies the rules related to merger of a mortgage into title when title to a single parcel of real property and a mortgage on that property come into one person to the type of merger at issue here, where an easement across one parcel is extinguished by merger when the burdened parcel comes into common ownership with the benefited parcel. Whether or not the rules related to merger of a mortgage into a deed to the mortgaged property applies here doesn't matter as there were 3 mergers prior to 2005 that extinguish the easement.

Mr. Deen's real argument is that the easement, although extinguished by merger was re-created when it became necessary

to provide access to the Deen parcel. In support of that argument he cites law from Pennsylvania that has no application here. That argument is directly contrary to the Restatement of Property that has been adopted as the law of Washington. The Restatement 3rd of Property (Servitudes) §7.5 states:

A servitude is terminated when all the benefits and burdens come into a single ownership. Transfer of a previously benefited or burdened parcel into separate ownership does not revive a servitude terminated under the rule of this section. Revival requires re-creation under the rules stated in Chapter 2.

Schlager v. Bellport, 118 Wn.App. 375, 793 P.2d 442 (1990) adopted that restatement section as the law of Washington. The court should reject Mr. Deen's request to follow Pennsylvania law as cited in his brief when there is clear Washington authority on this issue. The Pennsylvania case cited by Mr. Deen for the proposition that a merged easement is re-created upon severance has been criticized as a minority rule that has little or no following from other jurisdictions. *Witt v. Reavis*, 284 Or. 503, 587 P.2d. 1005 (1978). The easement that Mr. Deen is claiming is in existence was extinguished by merger several times. It was not re-created when the parcels were severed in 2009. To the extent that the court's

decision below found that the easement attempted to be created in 1989 was not extinguished by merger that decision was error. This court should find that the express easement claimed by Mr. Deen was extinguished by merger and is no longer in existence.

Deen argues that *Beebe v. Swerda*, 58 Wn.App. 375, 793 P.2d 442 (1990) applies to this case. In *Beebe* the Court never considered the Doctrine of Merger and indeed the word "merger" cannot be found in the case. In *Beebe, supra*, the only issue before the Court was what language was necessary in the deeds of severance and subsequent deeds to establish the validity of an easement. In *Beebe*, the deed to defendant Swerda, who objected to the validity of the easement, claimed that language in his deed which described the easement with the following language, was insufficient to create an easement:

Subject to the following . . . EASEMENT RECORDED
UNDER AUDITOR'S FILE NUMBER 346332.

At issue in *Beebe, supra* was whether that "subject to" language in the deed was sufficient to create an easement. The court held that it was sufficient to create the easement. Swerda could not argue merger in that case because the language in the deed to Swerda

was sufficient to create an easement regardless of whether any prior deed in the chain of title had granted or attempted to grant an easement. Merger was neither argued nor discussed in the case.

Here, unlike *Beebe*, merger is at issue in the case and to the extent the attempt at creating an easement in the 1989 deed was effective, the easement it created was extinguished by merger. Unfortunately for Mr. Deen, despite his attempt to argue contrary in footnote, none of the deeds in this case after 1998 attempted to revive the merged easement at issue here. The 2003 deed from Reed to Clothier does not identify the easement at issue. CP 72. The only language contained in that deed regarding any easement states:

SUBJECT TO EASEMENTS, RESERVATIONS,
COVENANTS, CONDITIONS, RESTRICTIONS AND
EASEMENTS OF RECORD, IF ANY, AS SET
FORTH IN THE COMMITMENT FOR TITLE
INSURANCE ISSUED BY Chicago Title UNDER
THEIR ORDER NUMBER 3039143.

Mr. Deen does not argue that the title commitment described the easement at issue here included an easement benefiting the Deen parcel across the Adams parcel and there is no evidence in the record from which this Court could find that the easement at issue

in this case is mentioned in that commitment for title insurance. Without any evidence to support a claim that there was an attempt to revive the easement in that conveyance, that 2003 deed terminated any easement when the benefited and burdened parcels related to that easement came into single ownership.

Mr. Deen's argument that under the Pennsylvania case he cited and under *Beebe, supra*, the merged easement is re-created by the severance of the Adams and Deen parcel would overrule decades of case law in Washington that support the doctrine of merger. Under his theory, merger of an easement into title when a single owner acquires both a benefited and burdened parcel does not apply if an easement is necessary upon severance of property. No Washington case has ever so held. That position is directly contrary to the Restatement 3rd of Property that has been adopted in Washington. This court should reject the Deen argument that merger does not apply if there's a need for an easement upon severance and reverse the trial court.

Mr. Deen argues that merger could not take place when Ms. Powers acquired both parcels and 2005 because legal and equitable title were not in the same party precluding merger.

Even if the law required both legal and equitable title to be in the same person for the type of merger that occurred here to apply, it is irrelevant whether or not merger took place in 2005. Even if the attempts to create an easement in 1989 and 1998 had been successful to create an easement that was not eliminated by merger, the 2003 deed to a single owner of both parcels did not include an easement across the Adams parcel benefiting the Deen parcel. Merger occurred when Clothier bought both parcels in 2003 with no attempt to re-create an easement. Since merged easements are not revived by later severance of the benefited and burdened parcels, whether or not merger occurred when common ownership of both parcels came into Powers and 2005 or Adams and 2008 is irrelevant. It is not disputed that nothing in those deeds attempted to create an easement. No easement existed when the bank foreclosed the property. It had no easement to grant to Mr. Deen.

Deen attempts to argue that the Powers deed of trust encumbering the Deen parcel granted her lender a deed of trust across the Adams parcel. To support that argument Deen cites

language in the deed of trust from Powers to the bank. That language, contained at CP 83 states:

TOGETHER WITH all of the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property.

The legal description contained in the deed of trust granted by Ms. Powers to the bank contains only a description of the Deen parcel. The legal description of the Adams parcel is not contained in the deed of trust. Whether or not that deed of trust granted to the Bank included as part of the bank's security an easement across the Adams parcel based upon the language in the deed of trust cited by Mr. Deen depends upon whether or not the Deen parcel was benefited by an easement across the Adams parcel at the time the deed of trust was granted in 2005. Since merger had rendered ineffective the attempts to create an easement that occurred in 1989 or 1998 and since the merger occurred in 2003 that extinguished any easements even had they been validly created, the Deen parcel was not benefited by an easement across the Adams parcel when it was acquired by Ms. Powers. The boilerplate language cited by Mr. Deen in the deed of trust from Ms. Powers to the bank did not create a new easement to replace the one

extinguished by merger. That language granted the bank only a deed of trust against any easements benefiting the Deen parcel that were in existence at that time. Merger had extinguished the easement before Ms. Powers gave the deed of trust to the bank and there was no easement that could be granted to the Bank as security for its loan. The Bank's deed of trust did not include security in an easement across the Adams parcel. When the bank foreclosed it owned no easement across the Adams parcel and had nothing to transfer to Deen. Deen has no express easement.

Deen argues that Ms. Powers owned the Adams parcel at the time she granted the bank a deed of trust against the Deen parcel. He argues that the fact that the Powers deed to the Deen parcel and deed of trust to the bank were both recorded before the Powers deed to the Adams parcel was recorded is irrelevant to whether or not Ms. Powers owned the Adams parcel at the time she granted a deed of trust to the bank. Deen cites no authority for that proposition. The issue is, however, moot. The deed of trust from Ms. Powers to the bank did not grant the Bank as part of the bank's security, a deed of trust encumbering an easement benefiting the Deen parcel across the Adams parcel. Whether Ms.

Powers had the ability to include in the deed of trust as part of the bank's security an easement across the Adams parcel or not is irrelevant because the deed of trust did not do so.

**PATTY BACQUE DECLARATION IS RELEVANT FOR
PURPOSES OF NOTICE**

Mr. Deen argues that the court below should have stricken the declaration of Patty Bacque. The court made no ruling upon the admissibility of the declaration of Patty Bacque because, although mentioned in the Deen reply to the motion for summary judgment, Mr. Deen never presented a motion or order to strike her declaration. Mr. Deen's failure to make a motion to strike or to ever request an order requesting that her declaration be stricken precludes the relief he asked for now. RAP 2.5.

More importantly, the declaration of Ms. Bacque was presented to the trial court not to prove the law regarding merger but to show that Mr. Deen had notice that when he purchased the Deen parcel that he did not have legal access to it or an easement across the Adams parcel. Since it was offered to prove notice, it is not hearsay. ER 801. Ms. Bacque properly testified that Fidelity Title refused to insure access to the Deen parcel. There is

substantial evidence from which the court had to infer based upon the summary judgment standard that Mr. Deen knew he had no easement when he purchased the property. Before the transaction closed Mr. Deen attempted to obtain an easement by having his real estate agent call Adams and request an easement because the property was landlocked. (CP 252). Deen and the bank who sold him the property switched title companies when Fidelity Title refused to insure title. The deed that Mr. Deen accepted expressly disclaims any warranty regarding title or access. (CP 230). Ms. Bacque's testimony does not establish any of the elements of the merger of title that occurred here. It only establishes Mr. Deen's notice that he did not have access to the property when he purchased it. It is admissible for that purpose.

DEEDS AND DEEDS OF TRUST GRANTED DUE ESTABLISH INTENT

In an argument that completely misunderstands the facts that occurred in this case Mr. Deen argues that the deeds do not establish the grantor's intentions. First, he argues that existing easements are conveyed in a deed even if they are not mentioned. Unfortunately for Mr. Deen, there was no easement benefiting the

Deen parcel that could pass without being mentioned because the only easement benefiting that parcel was extinguished by merger.

Next Mr. Deen argues that Adams argument that the lack of inclusion of the easement benefiting the Deen parcel in the deeds to Powers does not demonstrate an intent that no such easement exists. Deen argues that lack of reference to an easement in a warranty deed to the dominant parcel is irrelevant to the intent but admits that the lack of an exception in a warranty deed for any easement burdening the servient estate would show an intent that that no such easement exists. Apparently Mr. Deen does not know that the warranty deed from Clothier to Powers of the Adams parcel warrants that the Adams parcel is not encumbered by an easement benefiting the Deen parcel.(CP 77). The only easement that is excepted from that warranty of the deed deed is an easement to the city of Tacoma for its power lines. Mr. Deen's admission that a warranty deed to the servient parcel that does not mention an easement demonstrates an intent that no easement exists is exactly what Adams argues. The fact that the seller of the Adams parcel to Powers warranted that there was no easement benefiting the Deen parcel across the Adams parcel at the time of sale is

conclusive evidence that the parties intended in the Powers transaction that there was no easement across the Adams parcel benefiting the Deen parcel.

It is not just the Clothier to Powers deeds that show that there was no intent that the Deen parcel be benefited by an easement across the Adams parcel. After 1998 there was no reference to an easement benefiting the Deen parcel across the Adams parcel in any of the following documents:

1. The Deed of both parcels to Clothier in 2003. (CP 72).
2. The Deed of the Deen property to Powers in 2005. (CP 74).
3. The Deed of Trust from Powers to Pierce commercial bank encumbering the Deen parcel in 2005. (CP 80).
4. The Deed of the Adams parcel to Powers in 2005. (CP 77).
5. The Quitclaim Deed from Charles Powers to Patricia Powers of the Deen parcel in 2005. (CP 100).
6. The Deed of Trust from Powers to Adams encumbering the Adams parcel in 2005. (CP 102).
7. The Trustee's Deed to Adams of the Adams parcel. (CP 113).
8. The Trustee's Deed to Deutsche Bank as successor To Pierce Commercial Bank of the Deen parcel. (CP 116).

Although Deen claims, based on his misunderstanding of the facts, that there is no support in the record for a claim that Powers represented to Adams that there was no easement across the property she granted to him as security for her loan, the deed of trust to Adams represented to him that the property securing the Adams loan is not encumbered by any easement in favor of the Deen parcel.

There is no evidence in the record to support an argument that any party after 1998 intended that the Adams parcel was encumbered by an easement in favor of the Deen parcel. The documents starting with the Clothier deeds to Powers all unequivocally demonstrate an intent that no such easement exists. The trial court erred in finding that it was intended that the Deen parcel be benefited by an easement across the Adams parcel. This court should rule that as a matter of law the the easement was extinguished by merger and all parties who granted or received deeds or deeds of trust after 1998 intended that there be no easement burdening the Adams parcel.

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INTENT NECESSARY FOR IMPLIED EASEMENT IS NOT PRESENT

Deen's argument that an implied easement exists ignores the primary issue that the court must determine in ruling on an implied easement which is the intent of the parties regarding establishment of an easement. The court looks at the elements of an implied easement cited by Mr. Deen to determine intent only where intent cannot be established by direct evidence. *Visser v. Craig*, 139 Wash. App 152, 159 P.3d. 453 (2007). Mr. Deen's analysis of the implied easement ignores the parties' actual intention and asks the court to decide the implied easement based upon the parties presumed intention instead of their actual intention. In the instant case, the intent that no easement exists benefiting the Deen parcel across the Adams parcel from the time of the Clothier purchase in 2003 to the Bank's sale to Deen is clear from the documents that provide direct evidence of the parties intention. Since the evidence unequivocally demonstrates that all of the parties to every transaction related to the Adams parcel and the Deen parcel intended that there be no easement across the Adams

parcel benefiting the Deen parcel, Deen's request for an easement by implication fails.

Deen attempts to argue that the fact that the trustee's deed to the Deen parcel in the foreclosure did not grant to the bank an easement across the Adams parcel is irrelevant because the form of the deed used is a bargain and sale deed and not a warranty deed. That argument is nonsense. Whether or not the grantor of that deed warrants that the Deen parcel has an easement across the Adams parcel has nothing to do with whether or not the grantor intended to pass to the purchaser at the foreclosure sale any existing easement across the Adams parcel. The trustee's deed from which the bank acquired the title it sold to Mr. Deen failed to include in the property sold at the trustee sale an easement benefiting the Deen parcel across the Adams parcel because the deed of trust being foreclosed did not include as part of the security for the loan an easement across the Adams parcel. The fact that the trustee's deed did not include an easement across the Adams parcel establishes that at the time of severance there was no intent for the purchaser of the Deen parcel to have an easement across the Adams parcel. The easement by implication fails.

Deen does not respond to the argument that easements by implication are not favored because they are in derogation of the rule that written instruments speak for themselves. WSBA Washington Real Property Deskbook §10.3(3)(B) Easements and Licenses 10 – 14 (1997). The parties written documents in this case from 2003 through the deed from the Trustee in the bank's foreclosure of the clearly demonstrate the intent that no easement exists. There is no need to apply tests used by the court to determine the parties' intention regarding establishment of an easement because the intent that there be no easement is clearly established by direct evidence. This court should hold that Deen does not have an easement by implication across the Adams parcel.

EASEMENT BY NECESSITY FAILS FOR LACK OF INTENT

Deen's argument in support of an easement by necessity fails to understand the holding in *Visser, supra*. *Visser* adopts the majority rule that an easement by necessity will not be granted if there is clear evidence of a contrary intent. In the instant case, the fact that the Powers deed of trust to the bank at the time of her 2005 loan did not grant the bank as part of its security for the loan,

an easement across the Adams parcel is clear intent that the Bank would not at foreclosure, have an easement across the Adams parcel. Deen argues that there is no evidence in the record to show that the bank agreed that the Deen parcel would not have an easement across the Adams parcel. That Ms. Powers and the bank intended that the Bank not have an easement across the Adams parcel as part of its security is clearly demonstrated by the terms of the documents embodying the agreement between the bank and Ms. Powers. Those documents unequivocally demonstrate that the bank was not granted as part of its security for the loan an easement across the Adams parcel. That intent is also clear from the deed of trust granted by Powers to Adams. That deed of trust indicates that Adams first lien position is not subject to an easement benefiting the Deen parcel. Deen's request that the court ignore the parties actual intention, as shown by the documents comprising the agreement of the parties that excludes from the bank's security a deed of trust across the Adams parcel and find an easement by necessity is contrary to the majority rule regarding easements by necessity and *Visser, supra*. This court should grant

the Adams motion for summary judgment determining that there is no easement by necessity across the Adams parcel.

**DEEN DOES NOT CONTEST THAT AN EASEMENT BY
IMPLICATION OR NECESSITY WOULD BE LIMITED TO THE
ACTUAL WIDTH USED**

Mr. Deen does not address in his brief the size or location of any easement for ingress and egress by implication or necessity if the court is to find that there is no express easement but grants an easement for ingress and egress by implication or necessity. Apparently he does not dispute that the size of such an easement is determined by the use at the time of severance and that location is determined by the owner of the burdened property and can be either located at the existing use or at another location selected by the burdened property owner. The law regarding the size of such an easement is set forth in the Adams opening brief at pages 25 to 27. Mr. Deen does not contest the law cited by Adams. It is undisputed that the access to the Deen parcel that was in use until March 2009 is to ruts in the dirt 9 feet wide extending from an opening in the fence 10.5 feet wide. (CP 253). If the court grants Deen an easement for ingress and egress by implication or

necessity be with of the easement is 9 feet and its location may be determined by Adams.

CONCLUSION

The attempt in the 1989 and 1998 deeds of the Adams and Deen parcels to a single buyer to create an easement across the Adams parcel benefiting the Deen parcel failed due to merger of the easement into the title of the Adams parcel. Even if a valid easement had been created by those deeds, merger occurred in 2003 when Clothier bought parcels in one deed that did not include as part of the description an easement across the Adams parcel. No document after that date granted a new easement to the Deen parcel across the Adams parcel. This court should rule that the Deen parcel is not benefited by an express easement across the Adams parcel and grant Adams summary judgment on that issue.

Deen's argument that an easement by implication or necessity arose upon the severance of the parcels in the 2009 bank foreclosure fails because all of the documents related to the Powers acquisition, and the Powers loan from Pierce Commercial Bank demonstrate that the parties intended that the Adams parcel be free of any easement benefiting the Deen parcel. This court

should grant Adams summary judgment motion determining that there is no easement by implication or necessity.

If the court rules that there is no express easement but there is an easement by implication or necessity for ingress and egress the court should find that such easement is 9 feet wide and shall be located at a location selected by Adams.

RESPECTFULLY SUBMITTED this 10 day of
December, 2012.



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