

NO. 47852-8-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ALAN GERVAIS, a single man,

Plaintiff/Appellant,

vs.

BRAD L. MIEDERHOFF, a single man,
And WELLS FARGO BANK, N.A.,

Defendants/Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE ROBERT LEWIS

BRIEF OF APPELLANT

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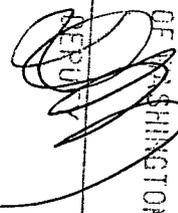
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INTRODUCTION

Alan Gervais bought land in rural Clark County in 1991. He built a roadway to afford access from the adjacent public thoroughfare, Spurrel Road. He then divided the parcel into four lots, all of which have some frontage on Spurrel Road. The short plat noted joint access for Lots 3 and 4 at a shared corner—the southeast corner of Lot 4 and the southwest corner of Lot 3. The roadway went over Lot 3 and then onto Lot 4. Mr. Gervais sold Lot 3 but retained Lot 4. He continued to use the roadway to get to Lot 4 for more than twenty years. His use ripened into an easement over the roadway for ingress and egress implied by prior use. In 2004, he entered into a Driveway Easement to memorialize his ability to go over Lot 3 to reach Lot 4 but did not record the document until 2010. Brad Miederhoff bought Lot 3 in 2009. The existence and configuration of the roadway along with the notation on the face of the short plat provided him with sufficient inquiry notice of the easement implied by prior use. Those factors and the Seller's Disclosure Statement that Mr. Miederhoff received were enough to give him inquiry notice of the Driveway Easement. For these reasons, Mr. Gervais is entitled to an easement for ingress and egress over Lot 3 for the benefit of Lot 4. The trial court erred by ruling to the contrary.

ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

ASSIGNMENT OF ERROR NO. 1: The Trial Court Erred by Failing to Make Findings of Fact Concerning the Location and Configuration of the Roadway That Is the Focus of This Action.

ASSIGNMENT OF ERROR NO. 2: The Trial Court Erred by Failing to Find That the Roadway That Is the Focus of This Action Is Visible from Lot 3 As It Goes onto Lot 4.

ASSIGNMENT OF ERROR NO. 3: The Trial Court Erred by Failing to Make Sufficient Findings Concerning the Sellers' Disclosure Statement Given by the Rosenlunds to Mr. Miederhoff.

ASSIGNMENT OF ERROR NO. 4: The Trial Court Erred by Failing to Make Findings on Mr. Miderhoff's Receipt and Review of the Preliminary Commitment for Title Insurance and the Documents Provided with It.

Issues Pertaining to the Assignments of Error Listed Above

Issue No. 1: Was the trial court required to make findings on these matters?

Issue No. 2: Can the appellate court consider the facts upon which no finding was made because they are undisputed?

Issue No. 3: Does the rule construing the absence of a finding of fact as a negative finding apply when the facts are undisputed?

Issue No. 4: Can the Court independently review documents?

ASSIGNMENT OF ERROR NO. 5: The Trial Court Erred by Entering the Findings of Fact and Conclusions of Law.

ASSIGNMENT OF ERROR NO. 6: The Trial Court Erred by Entering the Judgment in This Matter.

ASSIGNMENT OF ERROR NO. 7: The Trial Court Erred by Denying the Motion for Reconsideration.

Issues Pertaining to These Three Assignments of Error

Issue No. 1: Is the Driveway Easement entered into between Plaintiff and the Rosenlunds senior to Defendant's interest in Lot 3 because Defendant was on inquiry notice of its existence?

Issue No. 2: Is Plaintiff entitled to an easement implied by prior use over Lot 3?

Issue No. 3: Is the easement implied by prior use senior to Defendant's interest in Lot 3 because Defendant was on inquiry notice of its existence?

Issue No. 4: Did the trial court enter sufficient findings of fact to determine whether Plaintiff is entitled to an easement implied by prior use over Lot 3?

STATEMENT OF THE CASE

I. Operative Facts.

There is no serious dispute about the essential facts that underlay this dispute. Most of the facts are based on documents admitted into evidence.

In 1991, Plaintiff Alan Gervais bought approximately fifteen acres of undeveloped land in rural Clark County. (Ex. 2, 3) The property fronts on the north side of Spurrel Road. (Ex. 1) It inclines steeply to the north. (RP 12-13)

After he purchased the property, Mr. Gervais constructed a road from Spurrel Road to the north and put gravel on this road. (RP 18) The steepness of the grade required Mr. Gervais to construct at least two switchbacks. (RP 17)

In 1992, Mr. Gervais short platted the property. The short plat created four separate lots. (CP 42, FF 1)¹ Three of those lots, Lots 1, 2, and 3, each have an area of slightly more than 1.5 acres. (Ex. 52) Lot 4 takes up the remainder, a little more than ten acres. (Ex. 32; Ex. 52) All the lots have some frontage on Spurrel Road. Lot 3 has 224 feet of frontage, and Lot 4 has approximately 311 feet of frontage. (Ex 52)

¹ Where warranted, reference will be made to the trial court's findings of fact by number. The designation "FF" stands for "Finding of Fact."

The short plat has a note at the southeast corner of Lot 4 that says "Access to Lot 4." There is also a note at the southwest corner of Lot 3 that says "Access to Lot 3." (Ex. 52) The access point for both lots was this shared boundary corner. (CP 42; FF 4) The short plat is set out in the Appendix.

The road that Mr. Gervais constructed begins about ten feet east of the boundary between Lot 3 and Lot 4. It is about seventeen feet wide at its beginning. It then proceeds over Lot 3 in a northeasterly direction for approximately 115 feet.² The driveway to the home on Lot 3 intersects this roadway after it has gone about 86 feet from Spurrel Road. The road then turns west. It goes over Lot 3 for about another 87 feet. It then goes onto Lot 4 and up the hill. (Ex. 35) The road's route onto Lot 4 has been visible from Lot 3 at all material times. (RP 117-118; 121-22; 144-45; 259)

Mr. Gervais identified a building site on Lot 4. This site was north of and well above Spurrel Road. He put electrical utilities under the road and to that site. This work was completed by 1998. (CP 43; FF 8)

Mr. Gervais deeded Lot 3 to his daughter in 1996. (Ex. 24) The Lot was subsequently sold to Grant Rosenlund and Carey Rosenlund in

² The second page of Exhibit 35 is a surveyor's drawing of the description of the road as it goes over Lot 3. All distances have been calculated by using the scale on that drawing.

July 2004. (Ex. 25) The Rosenlunds subsequently built a home on the property. (RP 119; Ex. 27)

In October of 2004, the Rosenlunds entered into a Driveway Easement with Mr. Gervais. In the document, each party granted an easement to the other for ingress, egress, and utilities over the roadway that Mr. Gervais had built over Lots 3 and 4. They also agreed to share in the maintenance of the easement. The document was not recorded, however, until October of 2010. (Ex. 29) Both Mr. Gervais and the Rosenlunds believed that the roadway began on Lot 4 and went only slightly onto Lot 3 when it intersected with a driveway to the Rosenlunds' residence. (CP 43, FF 77; RP 94; RP 118-119; RP 131; Ex. 28)

In 2009, the Rosenlunds sold their residence to Brad Miederhoff. (Ex. 72) Prior to the sale, they delivered to Mr. Miederhoff a Sellers' Disclosure Statement as required by RCW 64.06. The relevant questions here are 1(D), 1(E), and 1(F). Those questions along with the answers the Rosenlunds gave are set out in the following chart:

| QUESTION | ANSWER |
|---|--------|
| 1(D) Is there a private road or easement agreement for access to the property? | Yes |
| 1(E) Are there any rights-of-way, easements, or access limitations that may affect Buyer's use of the property? | No |
| 1(F) Are there any agreements for joint maintenance of an easement or right of way? | No |

An asterisk is placed next to each of these questions on the form. The asterisk means the following as the form states:

If you answer "Yes" to a question with an asterisk (*), please explain your answer and attach documents, if available and not otherwise publicly recorded. If necessary, use an attached sheet.

(Ex. 43) The Rosenlunds did not explain their answer to question 1(D) as the form requested. They also attached no documents to the disclosure statement. (RP 214; Ex. 43) Their answering "yes" to question 1(D) was their attempt to alert Mr. Miederhoff to the Driveway Easement. (RP 123-24, 128) Mr. Miederhoff never talked to the Rosenlunds prior to closing and made no inquiry about the affirmative answer to question 1(D). (RP 127; RP 189; RP 208)

Prior to the sale, Mr. Miederhoff received a preliminary commitment for title insurance from Chicago Title Insurance Company. The document referred to the short plat as an exception to the coverage that would be given. Mr. Miederhoff was provided a copy of the short plat and took the time to examine it. (Ex. 73; RP 218-20; RP 259)

The Rosenlunds conveyed the property to Mr. Miederhoff by a statutory warranty deed. The deed's legal description contained the following language:

SUBJECT TO . . .

COVENANTS, CONDITIONS, RESTRICTIONS, EASEMENTS, NOTES, DEDICATIONS, BUFFERS AND SETBACKS, IF ANY, SET FORTH IN OR DELINEATED ON THE SHORT PLAT RECORDED UNDER BOOK 2 PAGE 638, RECORDS OF CLARK COUNTY, WASHINGTON³

(Ex. 72)

After he built the roadway, Mr. Gervais maintained it. He crossed the roadway on Lot 3 at least annually. (RP 61, 121)

II. Course of Proceedings.

On May 16, 2013, Mr. Gervais filed suit to quiet title to an easement for ingress, egress, and utilities on the road over Lot 3. He named Mr. Miederhoff and his lender, Wells Fargo Bank, N.A., as defendants. (CP 1-13) Defendants subsequently answered. (CP 14-18)

The matter came on for trial on January 20, 2015. (RP 1) John Van Vessem, a contractor, testified on behalf of Mr. Gervais. He noted that building another road would be difficult because of the steep slope. He indicated that the terrain would require building a much longer roadway than what currently existed. (RP 162-64) He stated that it would cost \$18,500.00 together with sales tax at 8% to build a road at a different access point on Lot 4. (RP 165, 168; Ex. 44) Mr. Gervais would also

³ This language was capitalized in the deed.

have to pay permitting and engineering fees totaling somewhere between \$10,000 and \$11,000. (RP 167-68) Mr. Miederhoff offered no countervailing testimony on this point.

After the Court ruled orally, Mr. Gervais filed a Motion for Reconsideration. (CP 19-40) The Court denied that motion. (CP 47-48)

On June 26, 2015, the Court entered Findings of Fact and Conclusions of Law and the Judgment. (CP 41-46) It confirmed Mr. Gervais' right to an easement for existing utilities over Lot 3. It also ruled that "Lot 4 has no driveway access across Lot 3 on the basis of express easement, prescriptive easement, easement implied from prior use (or constructive notice), or easement implied by necessity." (CP 46) This appeal followed.

ARGUMENT

ASSIGNMENT OF ERROR NO. 1: The Trial Court Erred by Failing to Make Findings of Fact Concerning the Location and Configuration of the Roadway That Is the Focus of This Action.

ASSIGNMENT OF ERROR NO. 2: The Trial Court Erred by Failing to Find That the Roadway That Is the Focus of This Action Is Visible from Lot 3 As It Goes onto Lot 4.

ASSIGNMENT OF ERROR NO. 3: The Trial Court Erred by Failing to Make Sufficient Findings Concerning the Sellers' Disclosure Statement Given by the Rosenlunds to Mr. Miederhoff.

ASSIGNMENT OF ERROR NO. 4: The Trial Court Erred by Failing to Make Findings on Mr. Miderhoff's Receipt and Review of the Preliminary Commitment for Title Insurance and the Documents Provided with It.

I. Standard of Review.

Findings of fact must be sufficiently detailed to allow for meaningful review. *In re LaBelle*, 107 Wn.2d 196, 218, 728 P.2d 138 (1986) Whether the findings are sufficient is therefore left to the Court for determination.

When confronted with the absence of or deficiency in findings of fact that have been entered, the appellate court may remand the matter for additional findings or for a new trial. See *Bowman v. Webster*, 42 Wn.2d 129, 253 P.2d 934 (1953); *Daughtry v. Jet Aeration Co.* 91 Wn.2d 704, 707, 592 P.2d 631 (1979).

As will be discussed below, the trial court did not make findings on a number of necessary matters. However, the facts that the trial court did not find are not disputed. Therefore, the appellate Court may also choose to review the substantive issue presented.

II. The Trial Court Did Not Make Necessary Findings of Fact.

a. Issues upon Which Findings of Fact Must Be Made.

A trial court's findings of fact must be made on matters necessary to establish the existence or non-existence of determinative factual matters upon which a decision is based. The findings must show what questions the trial court considered and what decisions were made. *Daughtry v. Jet Aeration Co., supra*, 91 Wn.2d at 707; *In re La Belle, supra*, 107 Wn.2d at 218-19. Stated another way, the trial court must make factual findings on all matters upon which the litigation depends. *Wold v. Wold*, 7 Wn.App. 872, 875, 503 P.2d 118 (1972)

b. The Trial Court Erred by Not Making Findings of Fact Concerning the Roadway and Its Visibility.

The trial court's findings of fact were not sufficient because they omitted facts necessary to an understanding of this case and the issues that the parties raised. The issue in this case is whether Mr. Gervais, the owner of Lot 4, can go to and from his property to Spurrel Road over the roadway that is partially on Lot 3. The findings of fact do not describe the road and its configuration. Specifically, there is no mention in the findings of fact that Mr. Gervais constructed the roadway in 1992. There is also nothing in the findings of fact about the following undisputed features of the roadway:

1. The roadway begins on Spurrel Road approximately ten feet east of the boundary line between Lots 3 and 4.
2. The roadway is approximately seventeen feet wide at its beginning.
3. The roadway proceeds in a northeasterly direction for approximately 115 feet.
4. The driveway to the home on Lot 3 runs into the roadway at after it has gone approximately 86 feet from Spurrel Road.
5. The roadway then turns in a westerly direction. It runs over Lot 3 for nearly another 87 feet.
6. The roadway then proceeds onto Lot 4 and up the hill.
7. There is no similar road beginning on frontage of Spurrel Road and Lot 4.

The findings of fact also do not address one other critical aspect of the road. As all agree, the road as it goes on Lot 4 is visible from Lot 3.

Mr. Gervais is claiming rights to ingress and egress over Lot 3 on the basis of both an easement implied by prior use and the Driveway Easement. He asserts that Mr. Miederhoof had sufficient notice of both before he bought Lot 3. Therefore, Mr. Gervais' easement rights

are senior to Mr. Miederhoff's interest in Lot 3. As will be discussed below, these undisputed facts are critical to both those claims.

As noted above, the sufficiency of findings of fact is measured by whether the appellate court can engage in meaningful review. The facts concerning the roadway and its visibility are uncontroverted. Findings of fact are not necessary when the material facts are undisputed. *Westburg v. All-Purpose Structures, Inc.*, 86 Wn.App. 405, 411, 936 P.2d 1175 (1997). On review, the Court will consider these uncontested facts and will not apply the rule that the absence of a finding on these matters is construed against the party having the burden of proof. *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn.App. 881, 887, 658 P.2d 1267 (1983); *Primark Inc. v. Burien Gardens Associates*, 63 Wn.App. 900, 910, 823 P.2d 1116 (1992). For that reason, Assignments of Error Nos. 1-2 may be unnecessary. Nonetheless, they are advanced out of an abundance of caution.

In conclusion, the trial court erred by failing to make findings of fact on the location and configuration of the roadway at issue in this case and also on the fact that the roadway as it goes onto Lot 4 is visible from Lot 3. These facts are not disputed. The Court could remand for the making of findings of fact on these issues. Alternatively, the Court can determine that findings of fact on these issues are not necessary since

they are not disputed. The Court would then consider these matters in deciding this appeal.

c. The Trial Court Failed to Make Findings Concerning Mr. Miederhoff's Receipt of the Preliminary Commitment for Title Insurance.

Mr. Miederhoff received a preliminary commitment for title insurance. It disclosed the existence of the short plat. He was also supplied with a copy of the short plat. These facts are material to the question of whether Mr. Miederhoff had inquiry notice of the Driveway Easement. The trial court, therefore, should have made factual findings on these matters.

Once again, the Court can review based on these facts because Mr. Miederhoff's receipt of the short plat and the preliminary commitment for title insurance are undisputed.

d. The Trial Court Made Insufficient Findings Concerning the Seller's Disclosure Statement.

In Finding of Fact No. 5, the Court stated:

On July 13, 2009, Miederhoff purchased Lot 3 from Rosenlund, and the Seller's Disclosure Statement exchanged between Miederhoff's predecessor in interest Rosenlund (as seller) and Miederhoof (as purchaser) referred to access being available for Lot 3 but did not refer to Lot 4.

(CP 42) This finding of fact is correct as far as it goes. There is no verbiage in the Seller's Disclosure Statement that mentions Lot 4. There is also nothing in the Seller's Disclosure Statement to the effect that there might be problems with access to Spurrel Road.

But Finding of Fact No. 5 simply doesn't address the critical aspect of the Seller's Disclosure Statement. In response to Question 1(D), the Rosenlunds answered "yes" to the following question:

Is there a private road or easement agreement for access to the property?

In fact, there was such an agreement for access to the property—but it was for access by Mr. Gervais as the owner of Lot 4 over Lot 3, not for access to Lot 3. The Rosenlunds confirmed this by their negative answer to Lot 1(E) which reads as follows:

Are there any rights-of-way, easements, or access limitations that may affect Buyer's use of the property?

Furthermore, the Rosenlunds gave no explanation to their answer as the form requires.

The Rosenlunds gave the affirmative answer to Question 1(D) to alert Mr. Miederhoff to the Driveway Easement. Obviously, he would have learned of the Driveway Easement if he had asked the Rosenlunds to give more information about their answer to Question 1(D) as the Seller's Disclosure Statement requires. These matters are not

disputed. Once again, the findings of fact are not sufficient because they do not address these issues.

Once again, the sufficiency of the findings of fact is determined by the ability of the Court to conduct a meaningful review of the trial court's decision. The facts here are not disputed. Therefore, the Court can consider them as discussed above, and should not construe the absence of a finding of fact as a negative finding. Furthermore, an appellate court may independently review evidence consisting of documents and make the required findings. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992); *Lobdell v. Sugar 'N Spice, Inc., supra*, 33 Wn.App. at 887. Therefore, the Court can and should review the Seller's Disclosure Statement and independently determine its import. It should also consider the undisputed facts as to the Rosenlunds' intentions by giving an affirmative answer to Question 1(D).

e. Conclusion.

The trial court failed to make findings of fact on issues that were critical to its decision, were undisputed, and required review of documents. Because the facts are undisputed and also because the content of documents are at issue, the Court can consider these factual matters and can also independently review the documents at issue—primarily the

Seller's Disclosure Statement. Alternatively, the Court may remand to the trial court for entry of further findings of fact on these matters.

ASSIGNMENT OF ERROR NO. 5: The Trial Court Erred by Entering the Findings of Fact and Conclusions of Law.

ASSIGNMENT OF ERROR NO. 6: The Trial Court Erred by Entering the Judgment in This Matter.

ASSIGNMENT OF ERROR NO. 7: The Trial Court Erred by Denying the Motion for Reconsideration.

I. Introduction.

In Conclusion of Law No. 1, the trial court stated:

The Short Plat, Rosenlund/Miederhoff Seller's Disclosure Statement and Rosenlund/Gervais Driveway Easement did not provide record notice of Gervais' use of the driveway on Lot 3 to access Lot 4 prior to Miederhoff's purchase of Lot 3 in order to create an express easement.

(CP 43) The Judgment also provides:

Lot 4 has no driveway access across Lot 3 on the basis of express easement, prescriptive easement, easement implied from prior use (or constructive notice), or easement implied by necessity.

(CP 46) These rulings amounted to error for the following two

reasons:

1. Mr. Miederhoff was on inquiry notice of easements for use of the roadway both express and implied; and

2. Lot 3 was and is encumbered by an easement implied through prior use.

II. Standard of Review.

This matter was tried to the court. On review, the appellate court determines whether the trial court's findings of fact are supported by substantial evidence and whether the findings of fact support the conclusions of law and the evidence. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991); *Shelcon Construction Group, LLC, v. Haymond*, 187 Wn.App. 878, 889, 351 P.3d 895 (2015)

Mr. Gervais also filed a motion for reconsideration on this issue which the trial court denied. The trial court understood the motion to be based on part on CR 59(a)(7) and/or CR 59(a)(8). These rules provide as follows:

On the motion of the party aggrieved. . .any. . . decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following cause materially affecting the substantial rights of the parties:

- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
- (8) Error in law occurring at the trial and objected to at the time by the party making the application. . .

The relevant points in the Motion for Reconsideration involve issues of law. The grant or denial of a motion for reconsideration based on issues of law is subject to *de novo* review. *Schneider v. City of Seattle*, 24 Wn.App. 251, 255, 600 P.2d 666 (1979)

The undisputed facts as discussed above require the conclusion that an easement implied from prior use allows access to Lot 4 over Lot 3. Mr. Miederhoff's interest in Lot 3 is junior both to that implied easement and the Driveway Easement because he was on "inquiry notice" that both existed. Finally, the findings of fact that the trial court entered are not sufficient to determine whether Mr. Gervais is entitled to an easement implied from prior use over Lot 3.

III. The Easements in Favor of Lot 4 Are Senior to Mr. Miederhoff's Interest in Lot 3 Because He Was on "Inquiry Notice" That the Easements Existed.

a. Introduction.

Mr. Gervais entered into the Driveway Easement with the Rosenlunds in 2004. An easement implied from prior use also existed as will be discussed below. Prior to his purchase of Lot 3, Mr. Miederhoff had received sufficient information to put him on inquiry notice of both. Therefore, both easements are senior to his interest in Lot 3.

b. A Party Is Junior to Unrecorded Matters of Which the Party Has Notice.

Washington addresses the priority of documents recorded in RCW 65.08.070. That statute reads as follows in pertinent part:

A conveyance of real property. . . may be recorded in the office of the recording officer where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded.

A subsequent purchaser is “in good faith” if he or she has no notice of the other party’s interest. The quantum of notice required is referred to as “inquiry notice” in the following terms:

Notice to the purchaser of real estate that parties other than the seller. . . have a claim of interest in the property need not be actual nor amount to full knowledge, but it should be such information as would excite apprehension in the ordinary mind and prompt a person of average prudence to make inquiry; however a circumstance which would lead a person to inquire is only notice of what a reasonable inquiry would reveal.

Glaser v. Holdorf, 56 Wn.2d 204, 215, 352 P.2d 212 (1960). See also, *Paganelli v. Swendsen*, 50 Wn.2d 304, 308, 311 P.2d 676 (1957) Stated another way:

It is a well settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man on inquiry, and the inquiry if

followed with reasonable diligence, would lead to the discovery of defects in the title or equitable rights affecting the rights of others in the property in question, the purchaser will be held chargeable with the knowledge thereof and will not be heard to say that he did not actually know of them. In other words, knowledge of facts to excite inquiry is constructive notice of all that inquiry would have disclosed.

Miebach v. Colasurdo, 102 Wn.2d 170, 175-76. 685 P.2d 1074

(1984)

This doctrine applies where easements are concerned. *Kirk v. Tomulty*, 66 Wn.App. 231, 831 P.2d 792 (1992)

It specifically applies to easements that are not express but are implied from prior use. *Berlin v. Robbins*, 180 Wash. 176, 186-87, 38 P.2d 1047 (1934)

c. Mr. Miederhoff Was on Notice of the Driveway Easement.

Mr. Miederhoff had several obvious clues that would have led him to discovering the Driveway Easement that the Rosenlunds had entered into with Mr. Gervais.

The first and clearest was the presence of the roadway itself. It began at Spurrel Road, went over Lot 3 for approximately 115 feet, and then went onto Lot 4. Its route onto Lot 4 from Lot 3 can be seen by anyone who looks, as all agree. Conversely, there is and was no roadway on the Spurrel Road frontage of Lot 4. This should have been

enough to suggest to Mr. Miederhoff that the owner of Lot 4 used this roadway to access that parcel. While each case must necessarily depend on its own facts, the presence of a road or way in and of itself has been held to be sufficient to impart inquiry notice. See *Kalinowski v. Jacobowski*, 52 Wash. 359, 368, 100 P. 852 (1909); *Oliver v. McEachran*, 149 Wash. 433, 436, 271 P. 93 (1928)

The second clue was the short plat. As the trial court found, it referred to joint access at the southwest corner of Lot 3 and the southeast corner of Lot 4. This would have and should have suggested to him that the road—which was quite close to that shared corner—was to be used by both Lots 3 and 4 for the access.

The final piece of evidence was the Seller's Disclosure Statement given by Mr. Rosenlund. In Question I(E), Mr. Miederhoff was told that there were no easements that would affect his use of the property. Then in Question 1(D), he learned that there was a private road or easement for access to the property. But he was not given any explanation or shown any documents as the Seller's Disclosure statement requires. If nothing else, Mr. Miederhoff should have followed up on this question because his Sellers, the Rosenlunds, had not given him a complete disclosure under the terms of the statement because they had not given an explanation to their affirmative answer. The purpose of the Seller's

Disclosure Statement is the disclosure to buyers of real estate what the seller knows about the property. *Svendsen v. Stock*, 143 Wn.2d 546, 550, 23 P.3d 455 (2001) By giving an affirmative answer to Question 1(D), the Rosenlunds were telling Mr. Miederhoff that they knew something about the property. But by not giving an explanation or supplying documents, they were not telling him what they knew. Every similarly situated and reasonable buyer should follow up with the seller under the circumstances or be held to what could have been learned had the inquiry been made. Stated another way, it would take no great effort for a buyer to make such an inquiry. For that reason, Mr. Miederhoff is chargeable with what he would have learned had he bothered to ask.

Mr. Miederhoff may argue that he was told in the response to Question 1(F) that there was no maintenance agreement. In fact, there was such an agreement because the Driveway Easement contains a joint maintenance provision. But he simply cannot get around the fact that he did not follow up on the incomplete answer that he received to Question 1(D) and that he would have learned of the Driveway Easement if he had simply asked for the complete answer to which he was entitled under the terms of the Seller's Disclosure Statement.

All of these matters, taken separately or together, were sufficient to spark an inquiry by Mr. Miederhoff. In fact, if he had he

asked Mr. Rosenlund to tell him more about the affirmative answer to Question 1(D), he would have learned of the Driveway Easement. Therefore, he was on notice of that easement notwithstanding the fact that it was not recorded until three months after he purchased Lot 3.

d. Mr. Miederhoff Was on Notice of the Easement Implied from Prior Use.

As will be discussed below, an easement implied from prior use has existed over Lot 3 for the benefit of Lot 4. The location and configuration of the roadway was sufficient to put Mr. Miederhoff on notice of this easement. The short plat, with its reference to shared access at the southeast corner of Lot 4 and the southwest corner of Lot 3, provided additional evidence.

As stated in Restatement (Third) of Property: Servitudes § 7.14:

The benefit of an unrecorded servitude, including a servitude created by . . . implication, is subject to extinguishment under an applicable recording act, except, unless the statute requires a different result, the following servitude benefits are not subject to extinguishment. . .

(3) a servitude that would be discovered by reasonable inspection or inquiry.

This rule was expressed in *Berlin v. Robbins, supra*. The Restatement indicates that the presence of a roadway is sufficient notice of the existence of an implied easement in Illustration 7 as follows:

At the time Able purchased Whiteacre, a dirt road led from the public highway across Whiteacre to a locked gate on Blackacre. The road was built when Whiteacre and Blackacre were held in common ownership by Xerces and was used to provide access to the portion of the parcel later conveyed as Blackacre. Neither the conveyance that severed title nor any subsequent conveyance of Whiteacre mentioned an easement. In the absence of other facts or circumstances, the conclusion would be justified that Able took title subject to the easement because it would have been discovered by a reasonable inspection or inquiry.

The facts of Illustration 7 are the same as in our case, except, of course, there is no locked gate. The presence of the roadway going from Spurrel Road across Lot 3 and onto Lot 4 therefore provided notice to Mr. Miederhoff of the easement implied from prior use.

IV. Mr. Gervais Is Entitled to an Easement Implied from Prior Use.

The trial court entered Finding of Fact No. 11 as follows:

Gervais established that a method of switch-backing for installation of a driveway on Lot 4 from Spurrel Road may be more expensive but could be achieved.

(CP 43) It then made the following Conclusion of Law No. 5:

Gervais established that the creation of a driveway on Lot 4 from Spurrel Road may be more expensive than use of the

existing driveway on Lot 3, but it is feasible. Therefore, Gervais did not establish an easement by necessity.

(CP 44) In the Judgment, the trial court said:

Lot 4 has no driveway access across Lot 3 on the basis of . . .
. . . easement applied by necessity.

(CP 46) Mr. Gervais raised this issue in great detail in his Motion for Reconsideration. (CP 29-31) The Court denied the motion.

(CP 47-48) On this point, the trial court's findings of fact do not support the conclusions of law it made primarily because the trial court applied the wrong test. The Court's decision therefore amount to error and must be reversed.

The requirements for the imposition of an easement implied from prior use are the following:

1. There has been unity of title and subsequent separation;
2. 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. 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) Under either formulation, the unity of title and subsequent separation are absolute requirements. The key issue, however, is the presumed intention of the

parties as disclosed by the extent and character of the use; the nature of the property; and the relationship of the separated parts to each other. *Evich v. Kovacevich*, 33 Wn.2d 151, 157-58, 204 P.2d 839 (1949); *Adams v. Cullen*, *supra*, 44 Wn.2d at 505-506 Professors Stoebuck and Weaver have divided what may be considered joined elements as follows:

1. A landowner conveys part of his land;
2. the owner also retains part, usually, an adjoining parcel;
3. before the conveyance, there was a usage existing between the parcel conveyed and the parcel retained that, had the two parts then been separately owned, could have been an easement appurtenant to one part;
4. the usage is apparent; and
5. the usage is reasonably necessary to the use of the part to which it would have been appurtenant.

Stoebuck & Weaver *Real Estate: Property Law* 17 Wash.Prac. § 2.4 Under either formulation, Lot 4 is entitled to an easement for ingress and egress over Lot 3 implied by prior use.

The unity of title and subsequent separation are made out based on the undisputed facts and Finding of Fact No. 1 (CP 42) Mr. Gervais owned both Lots 3 and 4. He conveyed Lot 3 to his daughter while retaining Lot 4.

There has also been an apparent use of the roadway over Lot 3 for the benefit of Lot 4. This use has been in existence ever since the land

was platted. Mr. Gervais has used the roadway to get from Spurrel Road to Lot 4. The usage was apparent to anyone who wanted to look. All agree that the road's going onto Lot 4 is visible from Lot 3. As Professors Stoebuck and Weaver have noted, "(The element requiring an apparent use that could have been an easement) should cause no problem when the claimed easement is for something visible on the surface of the earth such as a driveway or roadway." *Id.* at p. 92

There is a suggestion in some cases that the use must be both apparent and continuous. This only means that the use would have been continuous enough to be the subject of an easement, which is implied in the third element above. *Stoebuck & Weaver, Id.*, at p. 90 That element is satisfied in this case. The Restatement (Third) *Property: Servitudes* § 2.12 suggests a similar requirement, that the use not be temporary or casual. The following illustration from that section, which is quite close to our facts, indicates that the roadway would not be a temporary or casual use:

O, the owner of Blackacre, built a rough road through the length of Blackacre. The road was used intermittently while O was logging Blackacre. O later subdivided Blackacre into four parcels. The parcels were not landlocked, but alternative access would have been expensive to construct. The logging road ran through all four parcels, connecting them to a public highway abutting the fourth parcel. O conveyed the first two parcels without mention of an easement. Implication of easements to use the existing road would be justified even though prior use of the road was

intermittent. The prior use was neither temporary nor casual.

Restatement (Third) *Property: Servitudes* § 2.12, Illustration 3

The trial court appears to have denied the existence of this easement solely on the basis that building another access route from Spurrel Road was not impossible. That, however, is not the correct test. Only a “reasonable necessity” is required—one that merely renders the easement essential to the convenient or comfortable enjoyment of the property as it existed when the severance took place. *Bailey v. Hennessy*, 112 Wash. 45, 48-49, 191 P. 863 (1920)⁴ In fact, the term “necessity” may be a misnomer in this context. In *Berlin v. Robbins, supra*, 180 Wash. at 188, the Court adopted the following analysis of the “necessity” element:

The degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. It is sufficient if full enjoyment of the property cannot be had without the easement, or if it materially adds to the value of the land. It has been contended that the use of the word ‘necessary’ in these cases is misleading; that the so-called ‘necessity’ upon which the judges rely is in fact no necessity at all, but a mere beneficial and valuable convenience. Certainly such use of the word must be distinguished from the sense in which it is employed in

⁴ In that case, an easement implied by prior use was made out by a long established utilization of a rear alley for truck deliveries of hay, grain, and feed although the owner of purported servient parcel had street access at the front of his building. The Court stated that what amounted to business convenience was sufficient to make out the element of reasonable necessity. 112 Wash. at 51.

designating ways of necessity. Some courts have adopted as the test, whether the easement is one for which a substitute can be furnished by reasonable labor and expense; while others adopt the rule that the presence of no degree of necessity is requisite in order that the easement shall pass, that if an apparent and continuous quasi easement forms a part of the tenement conveyed, and adds to the value for use, it becomes an easement and passes with the conveyance.

Accord, *Bushy v. Weldon*, 30 Wn.2d 266, 270, 191 P.2d 302 (1948); *Evich v. Kovacevich*, *supra*, 33 Wn.2d at 157

Mr. Miederhoff may suggest a distinction on the basis that this would be an easement implied by reservation because the easement is for the benefit of Lot 4, the lot that Mr. Gervais retained. Easements from implication by prior use can be for the benefit of the property the grantor retains—implied by reservation—as well as the property the grantor conveys—implied by grant. *Adams v. Cullen*, *supra*, 44 Wn.2d at 505, There is a suggestion in *Adams v. Cullen*, *supra*, to the effect that the grantor must show a higher level of necessity *in the absence of other considerations* to obtain an easement implied by reservation. (Emphasis in the original) 44 Wn.2d at 508. The Court quoted from Restatement *Property* § 476, comment *g*, on this point as follows:

Not only may the implication arise in favor of the conveyor when a prior use has been made, but it may arise even though no use of the land corresponding to the use claimed had ever been made prior to the conveyance. The fact that the use claimed does correspond to a prior use is a

circumstance contributing to the implication of the easement. . . If land can be used without an easement, but cannot be used without disproportionate effort and expense, an easement may still be implied in favor of either the conveyor or the conveyee on the basis of necessity alone without reference to prior use. . .

If some use may be made, or if an alternative to the easement which might otherwise be implied can be secured, the implication becomes subject to control by other circumstances. Thus, the expense and effort necessary to secure a substitute by the conveyor may not be so disproportionate but that it may be assumed he was intended to suffer it, while like expense to the conveyee may warrant the inference that he was not intended to suffer it. While necessity alone justifies the inference of an easement without regard to other circumstances if the land cannot be used without it, *as necessity decreases a point is reached where necessity without reference to any prior use may justify the implication of an easement in favor of the conveyee though a like necessity would not justify an implication in favor of the conveyor.* Eventually, without its being possible to draw any precise line, necessity will not be sufficiently great to justify the implication except as it is strengthened by reference to a prior use of the land. In the different situations that may appear, a constantly decreasing degree of necessity will require a constantly increasing clearness of implication from the nature of the prior use. Accordingly, no precise definition of necessity can be made.

(Emphasis in the original) 44 Wn.2d at 509 This statement preserves the notion that the property need not be otherwise landlocked for there to be an easement implied by prior use. There are two key issues. First of all, the easement will be implied if the alternative requires disproportionate effort or expense. Secondly, necessity can be implied without any prior

use. However, the required degree of necessity and the clarity of the existing use have an inverse relationship. A clearer use will require less necessity to qualify as an implied easement. By contrast, the necessity must be greater if the use is less apparent.

In our case, the prior use is clear. The roadway's going onto Lot 4 from Lot 3 has been visible at all times. Anyone looking at the short plat could—and frankly should—conclude that the roadway serves as access for Lot 4. This would flow from the notation on the plat that access to Lots 3 and 4 was to be a shared point at the southern adjoining corners together with the absence of any other roadway from Spurrel Road to give access to Lot 4. That means that the level of necessity is reduced.

Nonetheless, there is a clear level of necessity made out by the disproportionate cost of substitute access for Lot 4. The undisputed facts in this case, as testified to by Mr. Van Vessem, show that it will cost a total of about \$20,000 to build the road (\$18,500 together with approximately 8% of that sum in sales tax); about \$6,000.00 for engineering; and another \$4,000.00 to \$5,000.00 for permits. That yields a total of roughly \$30,000.00 to \$31,000.00. The property has an assessed value of \$83,843.00. (Ex. 32) The cost would be, therefore, approximately 37% of the property's value. An owner should not have to spend 37% of the value

existing roadway for more than twenty years and when the existing roadway is about ten feet to the east of the boundary between Lots 3 and 4.

The undisputed facts show that Mr. Gervais is entitled to an easement implied by prior use so that he can use the roadway for ingress and egress as it goes over Lot 3. At very least, the matter should be remanded back to the trial court for necessary findings of fact.

CONCLUSION

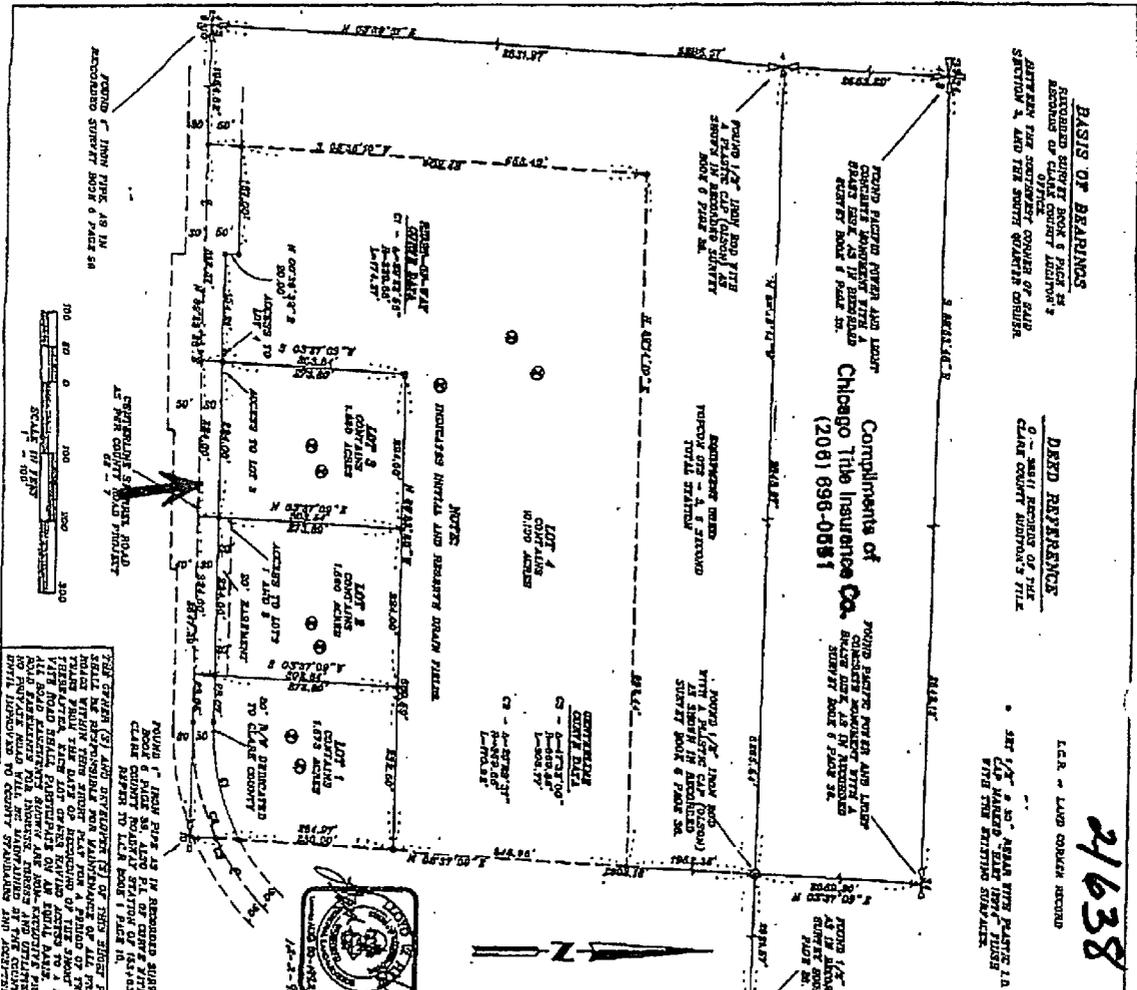
The trial court's decisions in this case amounted to error for the reasons indicated above. The Court should reverse the judgment based on the undisputed facts and the documents that have been produced. The Court should rule that an easement implied by prior use exists over Lot 3 for ingress and egress and for the benefit of Lot 4. The Court should also rule that the easement implied by prior use and the Driveway Easement are superior to Mr. Miederhoff's interest in Lot 3. Alternatively, the Court should remand the matter for entry of additional findings of fact.

Dated this 24 day of November, 2015.



BEN SHAFTON WSB#6280
Of Attorneys for Plaintiff/Appellant

APPENDIX



BASIS OF BEARINGS
 BEARING AND DISTANCE FROM THE
 RECORD OF PLAT BOOK 6 PAGE 58
 OFFICE
 CHICAGO THE INSURANCE CO.
 SECTION 1, AND THE SOUTH QUARTER CORNER

DEED REFERENCES
 0 - 2nd RECORD OF THE
 CLARK COUNTY AUDITOR'S TITLE
 1 - 1st RECORD OF THE
 CLARK COUNTY AUDITOR'S TITLE

COMPLIMENTS OF
 Chicago Title Insurance Co.
 (206) 696-0881

21638

SHORT PLAT

PLAT NO. _____

SECTION _____

DATE _____

APPROVED _____

PLAT ENGINEER _____

DATE _____

ASSESSOR _____

DATE _____

AUDITOR _____

DATE _____

SUBDIVISION _____

DATE _____

SPECIAL CONDITIONS OF SHORT PLAT APPROVAL

1. ENGINEERING SHALL BE SUBMITTED AWAY FROM THE BUILDING CORNER PLAIN SURFACE.
2. THE REGULATIONS FOR SHALL BE OBTAINED FROM THE CLARK COUNTY AUDITOR'S OFFICE.
3. THE REGULATIONS FOR SHALL BE OBTAINED FROM THE CLARK COUNTY AUDITOR'S OFFICE.
4. NO LOT SHALL BE FORWARDED ON UNLESS ALL THE LOTS ARE FORWARDED.
5. ALL ASSESSMENTS AND NON-ASSESSMENTS OF THE LOTS SHALL BE FORWARDED AT THE SAME TIME AND PLACE.
6. THE REGULATIONS FOR SHALL BE OBTAINED FROM THE CLARK COUNTY AUDITOR'S OFFICE.
7. THE REGULATIONS FOR SHALL BE OBTAINED FROM THE CLARK COUNTY AUDITOR'S OFFICE.
8. A VALIDATION MAP OF THE SHORT PLAT SHALL BE FORWARDED WITH THE SHORT PLAT.

BOOK 2 PAGE 638

NO. 47852-8-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ALAN GERVAIS, a single man,

Plaintiff/Appellant,

vs.

BRAD L. MIEDERHOFF, a single man,
And WELLS FARGO BANK, N.A.,

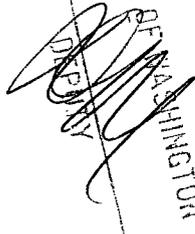
Defendants/Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE ROBERT LEWIS

DECLARATION OF MAILING

BEN SHAFTON
Attorney for Plaintiff/Appellant
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900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

FILED
COURT OF APPEALS
DIVISION II
2015 NOV 30 AM 11:42
STATE OF WASHINGTON
BY  DEPT

COMES NOW Ben Shafton and declares as follows:

1. My name is Ben Shafton. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On November 24, 2015, I caused to be deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the Brief of Appellant to the following person(s):

Cassie N. Crawford
P.O Box 61448
Vancouver, WA 98666

Bradley B. Jones
P.O. Box 726
Vashon, WA 98070

I DECLARE UNDER PENALTY OF PERJURY AND THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED at Vancouver, Washington, this 24 day of Nov.
_____, 2015.



BEN SHAFTON WSB#6280