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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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

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**No. 48367-0-II**  
**(formerly No. 48697-1-II)**

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David K. Bowers and Kathryn E. Bowers, husband and wife;  
Robert Cobb and Debra A. Cobb, husband and wife; and  
Anthony L. Beltrame and Maggie Beltrame, husband and wife,

Respondents,

v.

James W. Dunn, dealing with his separate property  
and "Jane Doe" Dunn,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

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REPLY BRIEF OF APPELLANT JAMES W. DUNN

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## Argument

### 1. Findings of fact not supported by the record should be reversed, not remanded to the trial court for clarification.

Findings of fact 1.1 and 1.7 in the Order Regarding Rights and Responsibilities entered December 9, 2015, should be reversed because they are not supported by substantial evidence. *Griffin v. Thurston County*, 165 Wn.2d 50, 196 P.3d 141 (2008); *Mood v. Banchemo*, 67 Wn.2d 835, 838, 410 P.2d 776 (1966). Respondents admit these findings of fact are erroneous but argue the case should be remanded to “revise” or “clarify” these findings. Brief of Respondents, pp. 3-5. Where the parties agree the findings of fact are in error, there is no reason to prolong the case by remanding it to revise or clarify what the trial court meant. The trial court was already asked to correct these errors in the motion for reconsideration and chose not to. CP 119-150.

The trial court’s orders are not confusing, ambiguous, or imperfect. Respondents argue the case should be remanded so the trial court can clarify its intent regarding Findings of Fact 1.1 and 1.7. But the clarifications suggested by respondents do more than simply clarify any confusing or misunderstood trial court intent. Respondents’ proposed changes to the findings say the opposite of what the trial court found. For example, in Finding of Fact 1.1 the trial court found the Jones parcel (Parcel #0520177110) uses the road. CP 115. Respondents propose inserting the word “except” to say the Jones parcel does not use

the road. Brief of Respondents, p. 3. This revision completely changes the meaning of the court order.

Similarly, respondents propose changing the language of the order to “clarify” that it only binds parties, arguing that is what the trial court intended all along. Brief of Respondents, pp. 4-5. While Mr. Dunn agrees the order should not extend to non-parties, respondents’ argument that is what the trial court intended is not supported by the record. First, this error was not inadvertent. It was an error invited by respondents themselves. Respondents argued the Lewises and Mr. Jones were consulted and agreed with the order, therefore Mr. Dunn was not prejudiced by their inclusion. CP 152:7-12. Second, the trial court knew its order applied to non-parties, specifically rejecting Mr. Dunn’s argument it should not. RP (1/29/16) 23:25-24:9. When Mr. Dunn asked the trial court to reconsider, the court stated:

Now, as to the new landowners, I don’t think either party here has the authority to speak for them pro or con. And if they have a problem with these requirements, and these requirements, really, I think -- not only do I not think they rewrite the short plat, I think all they do is incorporate some pretty fundamental common law notions and certainly fall within the ethical authority of the court. So for now, until I hear from these parties, I’m going to keep that portion of the order in effect.

*Id.*

All parties agree Findings of Fact 1.1 and 1.7 are not supported by the record. The parties also agree the order should not apply to non-parties. Therefore, the trial court should be reversed. *Griffin v. Thurston*

*County*, 165 Wn.2d 50, 196 P.3d 141 (2008). There is no reason to remand for revision or clarification.

**2. The Order Regarding Rights and Responsibilities should be vacated because it goes beyond declaring the rights and responsibilities of the parties and imposes a covenant upon the land and non-parties.**

The Order Regarding Rights and Responsibilities imposed covenants upon the land and future obligations among the property owners, including property owners who are not parties to the litigation. These obligations exceed the scope of the existing covenants on the land. By doing this, the court went beyond declaring the rights and responsibilities of the parties and imposed an agreement upon them.

In *Buck Mountain*, appellant argued the, “trial court’s judgment went well beyond determining the parties’ respective financial obligations related to road maintenance ... [by] formally encumber[ing] the ... property.” *Buck Mountain Owner’s Ass’n. v. Prestwich*, 174 Wn. App. 702, 727, 308 P.3d 644 (2013). The court’s order did so by requiring payment of assessments, allowing liens for unpaid assessments, and imposing a covenant running with the land. *Id.* When reversing, the appellate court expressed concern about the trial court imposing a covenant running with the land. *Id.*

In its oral ruling on the motion for reconsideration in the present case, the trial court restated the limited scope of the original controversy at trial:

Now, when this came before me, it was on the issues concerning the maintenance of an easement. I ruled

regarding the speed bumps and the speed that people could drive. And the order that we are here talking about, I made it expressly clear that it was not my intention in any way for the order that we're discussing today to change in any way or deviate from that prior order. At that early case, the parties objected or the plaintiffs objected to the number of speed bumps and how they were constructed.

RP (1/29/16) 20:17-21:1. This description of the limited scope of the original dispute between the parties (installing speed bumps to regulate speed) is supported by the final order entered by the court after trial. CP 57-58. When the trial court entered this order, it ruled on the dispute before it, declaring the parties' respective rights and responsibilities.

But when the trial court entered the Order Regarding Rights and Responsibilities in December 2015, the court went further than declaring the rights and responsibilities of the parties arising from an existing dispute. Instead, the court adopted a set of rules, running with the land, binding landowners who were not parties to the litigation, and benefitting non-party landowners who were not previously benefitted by the easement road. As the trial court explained, it was adopting an order meant to place the parties in the same position they would have been had they been able to reach an agreement. CP 111.

In the present case, the trial court did the same thing as the trial court in *Buck Mountain*. The only difference is the trial court in the present case signed the document itself instead of compelling the parties to do so. The fact the court signed the document instead of the parties should not matter. By entering the Order Regarding Rights and Responsibilities, the court went beyond settling an existing dispute and

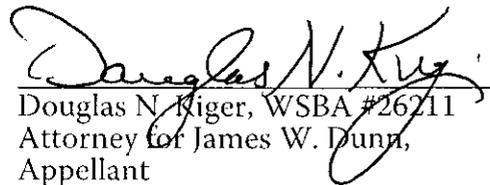
adopted a covenant running with the land addressing road repairs, a speed limit, street signs, and dispute resolution, then extended the covenants to non-parties and lots not previously benefitted by the road. CP 114-118. The trial court acknowledged it went beyond settling a pending dispute when it said the order, “place[s] the parties in the same position as would have been had they been willing to agree.” CP 111. The fact the court signed the agreement instead of the parties is a distinction without a difference. Therefore, the trial court should be reversed and the Order Regarding Rights and Responsibilities should be vacated.

#### **Conclusion**

The Order Regarding Rights and Responsibilities entered December 9, 2015, should be vacated because it was based upon erroneous facts, and imposes an agreement upon both parties and non-parties.

Respectfully submitted this 7th day of July, 2016.

**BLADO KIGER BOLAN, P.S.**

  
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Attorney for James W. Dunn,  
Appellant

**Certificate of Service**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 7th day of July, 2016, she placed with ABC Legal Messengers, Inc. an original Reply Brief of Respondent and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

Shannon Kraft and William F. Wright  
The Kraft Law Group  
18275 SR 410 East, Suite 103  
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via U.S. Mail, first class, postage pre-paid, and email to Shannon@kraftlawgroup.com, and Wwright@kraftlawgroup.com.

Dated this 7th day of July, 2016, at Tacoma, Washington.

**BLADO KIGER BOLAN, P.S.**

  
Heather D. Alderson  
Paralegal

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