

NO. 289753

COURT OF APPEALS - DIVISION III
STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

JOEL K. FREUDENTHAL and DEBRA S. BARNES,
husband and wife,

Respondent.

vs.

JUAN GUTIERREZ and CHERYL GUTIERREZ,
husband and wife,

Appellants,

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

This appeal arises from the trial court's grant of summary judgment expanding the historic and established use rights of a private road known as Dickerman Lane. The scope of use of the roadway has been consistent for over 100 years. Summary judgment was granted in the absence of any documented easement right and a record replete with factual issues. Also neglected was the joinder of parties necessary for determination of property rights in disputed use areas. Summary judgment was inappropriate.

II. SUPPLEMENTAL STATEMENT OF CASE

This is a dispute regarding the scope, nature and extent of private roadway use rights over a gravel road known as Dickerman Lane, Selah, Washington. Freudenthal asserted an unconditional right to utilize the "East 30-feet" of the Gutierrez property. This claim expands the historic use, location and area of the roadway. The asserted rights rest on two separate areas: (1) The East 16-Foot – the area on which the existing gravel road is located; and (2) an additional 14-foot area lying on the west side of the gravel roadway.

There are several undisputed facts. Dickerman Lane is a private gravel roadway that has been utilized to access rural farm properties for nearly 100 years. (CP 334). (See also, aerial photographs 1947-2009, CP

306-315). The roadway location has remained virtually unchanged from inception and extends in a north-south direction from Speyers Road to property owned by Larson Orchards (CP 66 and 306-315). The roadway is bordered on the east by parcels owned by James Dimick, Warren Ernst and William Gilman (CP 42, 65 and 72). All property lying east of the existing roadway has been maintained and possessed exclusively by the adjacent property owners. (CP 42, 66, 73). No portion of the property lying east of the existing fence has been utilized for roadway or easement purposes. (CP 71). Arborvitae and poplar trees border portions of the roadway (CP 42 and 66). The existing road has accommodated virtually all vehicles, (including garbage, delivery trucks, excavators, trucks for fruit harvest), as well as "... trucks and other vehicles necessary for farming operations". (CP 66-67, 318 and 331).¹

The disputed portion of Dickerman Lane was fenced upon agreement of all property owners (Gutierrez, Olson, Dimick, Ernst and Gilman) and recognized historic occupancy lines. (CP 43, 66, 71 and 73). A Selah-Naches Irrigation delivery line is located on the easterly edge of the gravel roadway and has served adjacent properties for a century. (CP

¹ Freudenthal claims that expanded use is required to "...bring a [hay] swather through" (CP 457 and Respondent's Brief 3-4). It is also asserted that "... the Freudenthal's would like to use the 14-foot Easement to locate some gravel turnouts on the Gutierrez property so that cars and trucks could pass on the narrow Dickerman Lane." (CP 460 and Respondent's Brief - 4). A clear factual dispute exists with respect to the adequacy of the existing gravel road to serve historic farming activities.

51-52, 55-56, 58-60, 66 and 73). Power poles run the length of the gravel road on both the east and west sides and limit the functional width of the useable road surface. (CP 57, 59, 61, and 63). The fence was placed along the easterly edge of the road for the purpose of preventing unauthorized access, protecting the fragile irrigation line, and recognizing historic property occupancy lines. (CP 43, 66, 71 and 73).

The trial court failed to identify the legal document creating purported easement rights in the "East 16-foot" of the Gutierrez property. (CP 31 and 38). ("... said road was recognized by Defendants Gutierrez and others in that certain easement recorded under Yakima County File No. 7334366, and the road was created at least by that date"). Freudenthal has had difficulty identifying the document or theory supporting a claim to unconditional use of the disputed area.² On appeal the focus has been on a 1904 Deed from Selah Valley Company to F.E. Reynolds (CP 220). (Attachment A). The deed does not convey an easement; fails to identify

² Freudenthal has continued to bounce from document to document in an effort to substantiate a use right for the entire 16-Foot area. Freudenthal's Complaint did not identify the legal basis for the purported easement. (CP 519-520). In their Motion for Summary Judgment, Freudenthal argued that "... [t]he 16-Foot Easement is described in the 1967 Agreement attached as Exhibit F" (CP 362). The "1967 Agreement" was a Road Maintenance Agreement. (CP 471-474). The document references the existing roadway (not easement) and states that "... all of the above parties are desirous that said roadway be maintained in good condition for road purposes." (CP 473). Freudenthal has also made reference to a deed from Selah Valley Company to F.E. Reynolds dated February 2, 1904. (CP 209 and 220). None of the documents create an easement benefitting the Freudenthal property.

the appurtenant or dominant estate; lacks any specific provision for scope, modification or expansion; and is not supported by any evidence of original intent of grantors.

The west side of the road is bordered by an established and producing apple orchard. (CP 332). Larson Fruit and Olson requested Gutierrez to grant an additional 14-feet on the west side of Dickerman Lane as necessary (and conditioned upon) subdivision of their properties (CP 317-318, 331-332). There is no factual dispute regarding the conditional easement among the original parties. The trial court ignored the uncontroverted statements of intent and purpose and authorized immediate use of the easement area. (CP 30 and 37).

III. ARGUMENT

The issues on appeal have focused upon three (3) primary considerations: (1) the failure to join necessary parties to the declaratory judgment; (2) determinations of property and use rights to the “East 16-foot” of the Gutierrez property; and (3) rights arising with respect to an additional conditional easement of 14-feet. It must be noted that the trial court decided these inherently factual issues on summary judgment.

A. The Trial Court Did Not Have Jurisdiction Over Freudenthal’s Claims Because Respondents Failed to Join Necessary Parties.

Freudenthal failed to join necessary parties and the court lacks jurisdiction to declare use rights with respect to Dickerman Lane. RCW 7.24.110 and CR 19.³ Property owners William Gilman, James Dimick and Warren Ernst (hereinafter collectively “Adjacent Property Owners”) have an uncontroverted interest in the 16 foot strip of land over which Freudenthal claims an easement. (CP 42-48, 65-69, 71 and 72-76).

1. Failure to Join Necessary Parties is a Jurisdictional Defense That May be Raised at Any Time.

Prior to entry of the summary judgment order, Gutierrez raised the issue by orally notifying the court of the property owners’ interest and by submitting written declarations establishing the conflicting interests in the East 16-feet of the Gutierrez property. (CP 42-76).⁴ The trial court ignored the jurisdictional issue on the assumption that joinder of necessary parties is waived if not plead as an affirmative defense.

³ Plaintiffs’ failure to join these necessary parties deprives the court of jurisdiction over (1) Plaintiffs’ claim for injunctive relief to remove the fence within the 16 foot strip (Sixth Cause of Action, CP 500-01), (2) Plaintiffs’ request to define the scope of the purported easement within the 16 foot strip; (Fifth Cause of Action, CP 500-01); (3) Plaintiffs’ claim that the irrigation line within the 16 foot strip constitutes a trespass (Third Cause of Action, CP 500) and (4) Plaintiffs’ request for quiet title of the property on which the irrigation line is located (Third Cause of Action, CP 500). Any claim relating to the 16 foot strip implicates the rights of every abutting property owner.

⁴ This court confirmed that the “declarations of the adjacent property owners were ‘called to the attention of the trial court.’” (Commissioner’s Ruling on Motion to Rewrite Brief, May 2, 2011). A party does not need to extensively argue the issue of failure to join an indispensable party below for the issue to be heard on appeal. *Burt v. Wash. State Dept. of Corrections*, 168 Wn.2d 828, 834, 231 P.3d 191 (2010) (mentioning joinder in caption of a motion and citing CR 19 in a reply memo sufficient for review under RAP 2.5(a)).

RAP 2.5(a) recognizes that lack of trial court jurisdiction may be raised for the first time on appeal. *See Williams v. Paulsbo Rural Telephone Assoc.*, 87 Wn.2d 636, 643, 555 P.2d 1173 (1976), *overruled on other grounds by Chemical Bank v. Wash. Public Power Supply Sys.*, 102 Wn.2d 874, 691 P.2d 524 (1984) (“Arguments relating to the jurisdiction of the trial court will be considered for the first time on appeal.”). A trial court has no jurisdiction over a matter if all necessary parties are not joined. *DeLong v. Parmalle*, 157 Wn. App. 119, 165, 236 P.3d 936 (2010); *Bainbridge Citizens United v. Wash. State Dept. of Nat. Resources*, 147 Wn. App. 365, 371, 198 P.3d 1033 (2008); *Treyz v. Pierce County*, 118 Wn. App. 458, 462, 76 P.3d 292 (2003), *rev. denied*, 151 Wn.2d 1022, 91 P.3d 94 (2004). Freudenthal’s argument that the law is undecided on this issue is incorrect. In *Williams*, the Supreme Court held that “the failure to include an affected party . . . in the action for declaratory judgment relates directly to the jurisdiction of the trial court.” 102 Wn.2d at 643. “Because failure to join a necessary party ‘relates directly to the trial court’s jurisdiction,’ a party may raise this issue for the first time on appeal.” *Treyz*, 118 Wn. App. at 462 (citation omitted) (declaratory judgment action); *see also DeLong*, 157 Wn. App. at 165 (issue of whether necessary party should have been joined under CR 19 “is

one that can be raised for the first time on appeal; a trial court lacks jurisdiction if all necessary parties are not joined.”).

2. Adjacent Property Owners Were Not Joined as Required By RCW 7.24.110 and CR 19(a).

Joining a necessary party is particularly important in a declaratory judgment action. Under RCW 7.24.110, all persons who have a claim or interest that would be affected by a declaration must be joined as a party. When a judgment leaves a party in a “position in which it must sue to enforce its rights,” the party is a party with an “affected interest” under RCW 7.24.110. *Henry v. Town of Oakville*, 30 Wn. App. 240, 245, 633 P.2d 892 (1981). The joinder of necessary parties is supplemented by CR 19(a).⁵ Thus, the party must be joined or the trial court has no jurisdiction over the matter. RCW 7.24.110; *Henry*, 30 Wn. App. at 243.

⁵ The property owners are also necessary parties to Plaintiffs’ remaining claims under CR 19(a). CR 19(a) provides:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If the party has not been joined, “the court shall order that he be made a party.” CR 19(a).

First, the adjacent property owners have an uncontroverted property interest in the area lying east of the existing roadway, i.e. the area sought for expanded easement rights. (CP 42, 65-66, 71 and 73). The area has been fenced at a location “consistent with recognized property lines” (CP 66, 71 and 73); contains irrigation lines and delivery systems serving adjacent properties (CP 42-76); and contains trees and other improvements owned by neighboring property owners. The trial court’s summary judgment order declared that Freudenthal was entitled to utilize the “entire width of said 16-foot road” and Gutierrez “... shall take no action to impede Plaintiff’s use of the full width of said 16-foot road” (CP 30-31). The judgment also provided that Gutierrez shall not “... assist others or give permission to others to take actions that will impede Plaintiff’s full use of the full width of said 16-foot road.” (CP 31).

Second, the adjacent property owners own portions of the 16 foot strip through adverse possession. Each property owners’ parcel abuts the 16 foot strip, and each property owner has exclusively possessed the disputed area for over ten years. (CP 42-76). Adverse possession “permits acquisition of legal title to private land without the owner’s consent” when the claimant has possession for 10 years that is actual, open and notorious, hostile, continuous, and exclusive. *Gorman v. City of Woodinville*, 160 Wn. App. 759, 762, 249 P.3d 1040 (2011). Each

adjacent property owner confirmed exclusive possession of the disputed area (i.e. area lying east of existing Dickerman Lane) (CP 42-43, 66, 71 and 73).

If this Court upholds the trial court's order, the property owners will have to sue the Plaintiffs and the Gutierrezes to enforce their property rights. Consequently, they have an affected interest in the Plaintiffs claims and must be joined as defendants to Plaintiffs' declaratory judgment claims under RCW 7.24.110 and CR 19(a). *See Henry*, 30 Wn. App. 240; and *Burt v. Dept. of Corrections*, 168 Wn.2d 828, 833, 231 P.3d 191 (2010). The court cannot make a determination as to who owns the 16 foot strip, whether an easement exists over the 16 foot strip, or the scope of the easement, without joining all parties claiming an interest in that piece of land.

3. Freudenthal Incorrectly Maintains that it is the Gutierrez's Obligation to Join Necessary Parties and That Joinder is Moot.

Freudenthal implicitly argues that the Gutierrezes have an obligation to join any necessary party by claiming that the Gutierrezes "never once attempted to bring in the neighbors as necessary parties." (Respondent's Brief at p. 48). Respondents do not appear to understand the doctrine of joining necessary parties. It is a defense. CR 12(b)(7). It

is Freudenthal's responsibility to join all necessary defendants; it is not a defendant's obligation.

Second, the issue of joinder is not moot. The trial court ordered the Gutierrezes to remove the fence in its summary judgment order, which is a determination currently being appealed by the Gutierrezes. (CP 30-31). Significantly, after the Gutierrezes removed the fence, it was replaced again by those property owners who have yet to be joined as parties. Thus, the fence issue is not moot.

B. Trial Court Erroneously Authorized Use of Entire East 16-Foot of Gutierrez Property in the Absence of Recorded Easement Deed.

The second area of focus in this appeal relates to the "East 16-feet" of the Gutierrez property. There is no dispute that Freudenthal is entitled to use the *existing* gravel roadway. The question is whether there is a legal basis for expansion of the historic use right to additional portions of the "East 16-feet" of the Gutierrez property.

The trial court entered summary judgment and declared that Freudenthal was entitled to use the entire width of a 16-foot strip of land legally described as follows:

The East 16-Foot of the South half of the Northwest quarter of the Southwest Quarter of the East 16-Foot of the North $\frac{3}{4}$ of the Southwest quarter of the Southwest quarter of Section 27, Township 14 North, Range 16, E.W.M., Yakima County, State of Washington.

(CP 31 and 38). An additional clarification is appropriate at the outset. Freudenthal has loosely referred to this area as the “16-foot Easement.” There is no easement. A gravel road has existed on a portion of the “east 16-feet” of the Gutierrez property but roadway use has been limited for more than 100 years to the actual travel surface. (CP 127-128; 468-469; and 49-64). The disputed portion of the property (i.e. within the “east 16-foot”) has never been used for roadway purposes and has been improved with telephone and utility poles, trees, irrigation lines and water delivery systems. It has also been exclusively possessed by the adjacent property owners for decades. (CP 331, 49-64, 43, 66 and 73).

Throughout this proceeding, Gutierrez has requested that Freudenthal identify the legal document giving rise to the claimed easement. The reason for the request is simple – an easement is an interest in real property subject to the statute of frauds. *Beebe v. Swerda*, 58 Wn. App. 375, 379, 793 P.2d 442 (1990) (“An express conveyance of an easement by grant or reservation, ‘must be made by written deed.’”) In the absence of a document complying with the statute of frauds, no real property interest has been established. *Zunino v. Rajewski*, 140 Wn. App. 215, 221-222, 165 P.3d 57 (2007). Freudenthal now asserts that the “easement” was created by the 1904 Deed from Selah Valley Company to F.E. Reynolds. (CP 220 and Respondent’s Brief 22-30).

1. The 1904 Deed From Selah Valley Canal to Reynolds Does Not Create an Easement and Use Interpretations Depend Upon Genuine Issues of Material Fact.

Freudenthal contends that easement rights were created by a 1904 deed from Selah Valley Company to F.E. and Katie Reynolds (CP 220). (“1904 Deed”). (Attachment A). That deed contains the following language:

N $\frac{1}{2}$ of N $\frac{1}{2}$ of SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ and S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$, (except a strip of land 16 feet wide off of the E. line for road purposes) of Sec. 27-14-18 E.W.M. containing 30 acres more or less.

(CP 220). The 1904 Deed contains an *exception* of an identified strip of land;⁶ lacks conveyancing language regarding an easement; fails to identify benefitted/appurtenant properties; and provides no authorization

⁶ The word utilized in the 1904 Deed constitutes an “exception” to the legal description. The courts of Washington have discussed the distinction between an “exception” and a “reservation” in deeds. *Queen City Savings & Loan Association v. Mechem*, 14 Wn. App. 470, 473-74, 543 P.2d 355 (1975). (Construing similar language- “. . . EXCEPT a strip of land 60’ in width along the westerly margin for road.”) In discussing the distinction between “exception” and “reservation”, the court stated:

An exception is a clause in a deed which withdraws from its operation some part of the thing granted, and which would otherwise have passed to the grantee under the general description. The part excepted is in existence at the time of the grant, and remains in the grantor unaffected by the conveyance. A reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant” But frequently the words exception and reservation are used as synonymous, and the term exception will be held to mean reservation whenever it may be necessary to effectuate the intention of the parties to the instrument.

Id. 14 Wn. App. at 474. The court recognized that interpretation of such language is an inherently factual determination based upon circumstances and actions that time of document execution and delivery. *Id.* 14 Wn. App. at 474.

for expansion, location or scope of “road purposes.” The deed simply reserves an area for the grantor.

As a beginning proposition, the interpretation of an easement (express or reserved) presents a mixed question of law and fact. *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979). Summary judgment is inappropriate with respect to determinations regarding construction of the purported conveyancing document, identification of appurtenant parcels, scope of use and expansion rights and impacts of third party interests.⁷

The 1904 Deed does not create an easement appurtenant. It simply reserves to grantor an area for “road purposes.” An easement is either “in gross” or “appurtenant”.⁸ *Olson v. Trippel*, 77 Wn. App. 545, 554, 893 P.2d 634, *review denied*, 127 Wn.2d 1013 (1995). An “appurtenant

⁷ The court views the facts and all reasonable inferences from those facts in a light most favorable to the non-moving party. CR 56(c); *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Summary judgment is proper only where there are no genuine issues of material fact and the non-moving party is entitled to judgment as a matter of law. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 206, 11 P.3d 762 (2000). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

⁸ The courts have distinguished “in gross” and “appurtenant” easements as follows: “An easement in gross directly benefits one person, and easement appurtenant benefits a particular piece of property.” *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 655, 145 P.3d 411 (2006), *review denied* 161 Wn. 2d 1012, 166 P.3d 1217 (2007). As such, an easement appurtenant necessarily requires a dominate estate which benefits from the easement and a servient estate which is burdened by the easement. *Roggow v. Hagerty*, 127 Wn. App. 908, 911, 621 P.2d 195 (1980).

easement” benefits property, referred to as the dominant estate. *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 655, 145 P.3d 411 (2006). “... [A]n easement appurtenant necessarily requires a dominant estate which benefits from the easement and a servient estate which is burdened by the easement.” *M.K.K.I., Inc.*, 135 Wn. App. at 655; *Beebe v. Swerda*, 58 Wn. App. 375, 381, 793 P.2d 442 (1990) (“By definition, two estates are required for an appurtenant easement.”) The 1904 Deed does not identify the “servient estate” and is not an “appurtenant easement”.

The court construed similar language in *Queen City Savings and Loan Association v. Meachem*, 14 Wn. App. 470, 543 P.2d 355 (1975) (“... EXCEPT a strip of land 60 feet in width along the westerly margin for road”). In determining the intent of the original grantor, the court in *Queen City Savings* recognized that interpretation is inherently factual with consideration of all evidence necessary for declaration of rights:

Washington is also in agreement with the generally accepted rule that parol evidence concerning surrounding circumstances may be considered in aid of construction if the intent of the parties has not clearly and unambiguously expressed in the deed. [citation omitted]. Also, in *Delano v. Luedinghaus*, 70 Wash. 573, 575, 127 P. 197 (1912), it is stated that “[i]n each case the equities of all the parties must be considered in arriving at the intent of the” and that ... the general rule is now stated ...:

A reasonable construction should be given to a reservation or exception according to the intention of the parties, ascertained from the entire

instrument. There should be considered, when necessary and proper, the force of the language used, the ordinary meaning of the words, the meaning of specific words, the context, the recitals, the subject matter, the object, purpose, and nature of the reservation or exception and the intended facts and surrounding circumstances before the parties at the time of making the deed.

The court in *Moe v. Kagle*, 62 Wn.2d 935, 938, 385 P.2d 56 (1963) listed the circumstances to be considered in construing the scope of an easement:

With respect to the scope of easements, five types of circumstances have frequent importance, namely, (a) whether the easement was created by grant or by reservation; (b) whether the conveyance was, or was not, gratuitous; (c) the use of the servient tenement prior to the conveyance; (d) the parties' practical construction of the easement's scope; and (e) the purpose for which the easement was acquired.

The only facts contained in the record are that the gravel road was constructed and maintained for 100 years in its present location and condition (CP 331); Dickerman Lane (as constructed and maintained) has adequately served all residential and farming purposes (CP 318); and expansion of the existing roadway to include the full East 16-feet is precluded by existing irrigation lines, utility poles and trees (CP 318 and 331).

Second, the language of the 1904 Deed may at best be characterized as creating an implied easement. An implied easement

appurtenant to land was described by the court in *Hellberg v. Coffin Sheep Company*, 66 Wn.2d 664, 667, 404 P.2d 770 (1965) as follows:

Easements by implication arise where a property has been held in a unified title, and during such time an open and notorious servitude has apparently been impressed upon one part of the estate in favor of another part, in such servitude, at the time that the unity of title has been dissolved by a division of the property or a severance of the title, has been in use and is reasonably necessary for the fair enjoyment of the portion benefited by such use. The rule then is that upon such severance there arises, by implication of law, a grant of the right to continue such use.

See also, *Fossom Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995). Genuine issues of material fact with respect to the existence of an implied easement preclude summary judgment. *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App. 188, 199, 45 P.3d 570 (2002). It is also significant that severance (i.e. the 1902 Deeds – CP 214-15, 217) predated the 1904 Deed and did not include a grant of easement.

Third, the 1904 Deed simply refers to an exception for “road purposes”. An easement defined in general terms, without a definite location or description, is classified a floating easement. See e.g. *Berg v. Timm*, 125 Wn.2d 544, 552, 886 P.2d 564 (1995). Floating easements consider parol evidence to establish their location on the servient estate. *Smith v King*, 27 Wn. App. 869, 870-71, 620 P.2d 542 (1980). Once the roadway is located on the property, the location is fixed by the original

parties and may not be relocated by the servient property owner. *Rhoades v. Barnes*, 54 Wash. 145, 102 P. 884 (1909) (the initial location of an easement under a grant from the dominant owner was held to prevail over an attempt at relocation by the servient grantee); *Smith v. King*, 27 Wn. App. 869, 871, 620 P.2d 542 (1980) (“ . . . the grantee does not acquire a right thereby to use the servient estate other than as first designated by the grantor and the location cannot be changed thereafter by the grantee”). The gravel roadway was located and utilized for more than 100 years.

Fourth, an established floating easement may not be expanded in the absence of express language in the conveyancing document. The face of the document must manifest a clear intent to allow expansion of an existing easement right. *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d at 884. (“An easement may only “... be expanded over time if the express terms of the easement manifest a clear intention by the original parties to modify the initial scope based on future demands.”) The 1904 Deed contains no authorization to expand the historic roadway.

Finally, the trial court failed to give due consideration to the reasonable use rights to areas adjacent to the roadway held by the servient estate. In construing the scope and extent of easement rights, the courts have recognized that both the easement holder and servient owner have reasonable use rights in the easement property. *Thompson v. Smith*, 59

Wn.2d 397, 403-09, 367 P.2d 798 (1962) (Supreme Court recognizing that in the context of an easement dispute, neither the rights of the servient estate nor the dominant estate are absolute and that the interests "... must be construed to permit a due and reasonable joinder of both interests so long as that is possible.") Such determination "... is a question of fact and depends largely on the extent and mode of use of a particular easement." *Thompson v. Smith*, 59 Wn.2d at 408.

2. Easement is Not Established by Either 1967 Road Maintenance Agreement or 2003 Easement for Ingress/Egress and Utilities. (CP 388-97).

Freudenthal also makes an estoppel argument with respect to the existence of an easement. That argument is based upon two (2) documents: (1) a Road Maintenance Agreement dated June 13, 1967 and recorded under Yakima County Auditor's File No. 2139267; and (2) a 2003 Easement for Ingress/Egress and Utilities (CP 388-97). Neither document created an easement over the East 16-Foot of the Gutierrez property.⁹

First, the document referenced by the trial court – document recorded under Auditor's File No. 7334366 – is not an easement deed which conveys an interest in the east 16-feet of the Gutierrez property. (CP 388-397). The referenced document simply recites that "... a 16-foot

⁹ Gutierrez addressed these two documents in greater detail in Brief of Appellant 21-24.

wide road presently exists pursuant to an agreement dated June 13, 1967" (CP 391). Freudenthal does not dispute this argument. (Respondent's Brief – 28-29) ("True, the document does not have any granting language.") It is acknowledged that the trial court's basis for summary judgment lacks legal foundation.

Second, Freudenthal offers an "estoppel" argument based on the 2003 Easement for Ingress/Egress and Utilities. (Respondent's Brief – 29-30). A clear factual dispute exists with respect to the intent, interpretation and application of the 2003 agreement. The uncontroverted language referenced a conditional arrangement "... to widen the existing 16-foot wide road" Reference is made to the "road" and not to the additional undeveloped areas; the document lacks required conveyancing language; and interpretation presents factual questions. The courts of Washington clearly recognize that "... [t]he interpretation of an (expressed) easement is a mixed question of law and fact. What the original parties intended is a question of fact and the legal consequence of that intent is a question of law." *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

3. Freudenthals Do Not Have an Easement under Color of Title.

Freudenthal asserts for the first time on appeal that it holds a “prescriptive easement under color of title, covering the entire 16-foot Easement.” (Respondent’s Brief - 30-33). The argument fails for several reasons.

As a preliminary matter, this Court should refuse to review this issue because it was raised for the first time in Freudenthal’s response brief. Freudenthals did not allege that they obtained the easement by color of title in their complaint or before the trial court. (CP 491-504). *Wilson Son Ranch, LLC v. Hintz*, _____ Wn. App. ____, 253 P.3d 470 (2011) (court refused to entertain new theory on appeal regarding “shifting easement”). The purpose of requiring parties to make arguments at the trial court level is that the parties must have a “full and fair opportunity to develop facts relevant to the [trial court’s] decision.” *Bernal v. American Honda Motor Co., Inc.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1975).

With respect to the substantive claim of prescriptive right under color of title, the claim fails for several reasons. First, there is not a title document to Freudenthal that give rise to “color of title.”¹⁰ *See e.g. Yakima Valley Canal Company v. Walker*, 76 Wn.2d 90, 455 P.2d 372 (1969) (color of title created by defective conveyancing deed delivered by

¹⁰ Joel Freudenthal and Debra Barnes took title pursuant to Statutory Warranty Deed dated August 24, 2005. (Auditor’s File No. 7469881) (CP 463-465). The conveyancing deed does not include a grant or conveyance of specific easement rights in Dickerman Lane

partial owner). The purported document giving rise to the claim was the 1904 Deed which was neither referenced nor incorporated in the deed to Freudenthal. A party claiming an interest in property under color of title must come into possession by reason of a title document. *Yakima Valley Canal Company*, 76 Wn.2d at 93.

Second, the instrument Freudenthal purports to establish color of title is insufficient. “[A]n instrument insufficiently describing property is not color of title.” *Wingard v. Heinkel*, 1 Wn. App. 822, 823-24, 464 P.2d 446 (1970). The instrument must properly “describe and purport to convey the land in controversy; it cannot be aided by parol evidence.” *Nicholas v. Cousins*, 1 Wn. App. 133, 136, 459 P.2d 970 (1969).

Third, Freudenthal has failed to sufficiently plead, and the record does not support, that they acquired an easement through color of title. Color of title is akin to adverse possession. See RCW 7.28.070. Under Washington’s color of title statute, a party may obtain an easement by color of title if he or she has “actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith . . .” for seven successive and continuous years and, during that time, the party paid all taxes assessed on the land or tenement. RCW 7.28.070. Freudenthal purchased their property in 2005. (CP 463-465). They did not (1) possess, occupy or use the disputed portion of the “East 16-feet” of

the Gutierrez property; or (2) pay taxes on the disputed property. In fact, Freudenthal (and their predecessors) has never contributed to cost of maintaining or improving Dickerman Lane (CP 331).

Finally, *Yakima Valley Canal Co. v. Walker*, 76 Wn.2d 90, 455 P.2d 372 (1969) does not support Freudenthal's argument. There, the plaintiffs established their right in an easement by color of title. *Id.* The issue before the court was the lateral scope of that easement. *Id.* at 93. The easement right arose from a defective deed (granted only by party holding an undivided one-half interest). The deed fully described the easement and grantee relied on the conveyance to construct an irrigation canal. *Id.* 76 Wn.2d at 93. The court noted the following legal principle:

When one seeks to acquire an easement by prescription under a claim of right, user and possession govern the extent of the easement acquired. It is established only to the extent necessary to accomplish the purpose for which the easement is claimed. *Northwest Cities Gas Co. v. Western Fuel Co.*, 17 Wn.2d 482, 135 P.2d 867 (1943).

Use of Dickerman Lane was established more than 100 years ago. The extent of use rights are limited to the actual roadway established over the years. There is no basis for expansion of the use right in the absence of a conveyancing document.

C. A Genuine Issue of Material Fact Exists with Respect to the Scope, Intent and Conditions Related to Use of the Additional (14-Foot) Easement.

Freudenthal requested a declaration regarding the use of the Additional (14-foot) Easement for road widening, turnouts and other uses purportedly necessitated by their farming business. (CP 496). Any easement rights exist pursuant to Easement for Ingress/Egress and Utilities, as recorded under Auditor's File No. 7334366 (CP 389-397). Each of the parties (as well as the consultant preparing the document) confirmed that the use of the easement is conditioned upon subdivision of the servient estates. (CP 280-315, 316-329 and 330-332). Freudenthal acknowledged the uncontroverted testimony:

It is true that the Freudenthals have provided no facts, outside of the language of the document itself, regarding the intent of the easement. However, the language of the document is clear and unambiguous. The 14-foot Easement provides a present, unconditional grant of easement.

(Respondent's Brief 10-11). Despite this acknowledgment, Freudenthal continues to argue that the document is unambiguous and the court should not consider the stated intent of the original parties.

The intent of the original parties to an easement is determined from the deed as a whole. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981). The touchstone of interpretation of easements in contracts is the intent of the parties. *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn. 2d at 880. The intent of the parties to a particular agreement may be

determined from the language of the agreement, the contract as a whole, subject matter and objective of the contract, the circumstances surrounding the making of the contract, the subsequent conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties. *Berg v. Hudesman*, 115 Wn. 2d 657, 663, 801 P.2d 222 (1990). The original parties intent and subsequent actions are clear and uncontroverted - the easement was for the purpose of facilitating the subsequent subdivision of the appurtenant property; the servient owner would continue to farm the easement area until required for subdivision activity; and the existing roadway was adequate for reasonable residential and agricultural use. Freudenthal's argument is illogical. In essence, it is argued that the court should ignore the uncontroverted testimony of the original parties and apply an interpretation that is inconsistent with the original intent.

The Easement for Ingress/Egress and Utilities contains the specific acknowledgment “. . . that it is the intent of the Grantees(s) if possible, to subdivide their respective parcels of real property . . .” with easement benefiting any subsequently created parcels. The land use planner explained the purpose of the document:

The existing roadway was a 16-foot strip lying on the east side of properties owned by Gutierrez, Olson and Douglas R. and Robin F. Miller. We did not have an actual

easement document but referenced a "16-foot roadway." The access easement did not meet current road standards required for subdivisions. Subdivision of any of the properties would require a roadway access of at least thirty (30) feet in width.

...

After discussions, Gutierrez accepted the proposal to grant the additional easement area upon two (2) conditions: (1) that the easement be utilized only as necessary for future subdivision of appurtenant properties; and (2) that Angeline Olson deed an additional fifteen' of property Gutierrez to replace to lost production area. The conditions were acceptable and agreed to by Olson and Larson Fruit.

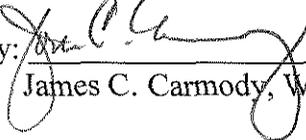
(CP 280-283). Hordan acknowledged that the purpose of the referenced language was to confirm his subdivision purpose and recognized the subdivision would add additional parcels to the benefited properties. (CP 282). A genuine issue of material fact was created with respect to the purpose, intent and scope of the referenced document.

IV. CONCLUSION

Gutierrez requests that the court reverse the trial court's order authorizing full use of the East 16-Foot of the Gutierrez Property; enter order that there are no expanded easement rights to the disputed area; remand for trial on disputed facts regarding Additional 14-feet; and direct joinder of necessary parties.

RESPECTFULLY SUBMITTED this 15th day of August, 2011.

VELIKANJE HALVERSON P.C.
Attorneys for Appellants

By: 
James C. Carmody, WSBA 5205

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Attachment A

"1904 Deed"

8-9

SELMAH VALLEY COMPANY, a corporation.

DATED. Feb. 2-1904
FILED Feb. 23-1904 at 3:40 P.M.
\$10. & other good and Val. Con.

-to-

F. E. Reynolds

Bargain, Sell and convey.

Witnesses.....4

SELMAH VALLEY COMPANY.
By H. G. Clay. Pres.
(C.E.) By Alm. E. Underhill. Sec.

F. E. REYNOLDS
MRS. KATIE REYNOLDS.

ACKNOWLEDGED:
Feb. 10-1904 by H. G. Clay Pres. and Alm. E. Underhill. Sec. of the S. V. Co.
before Mary Marshall N.P. res. at Ossining, N.Y. (SEAL)
Feb. 23-1904 by F. E. Reynolds and Katie Reynolds, husband and wife before
Ira P. Englehart, residing at North Yakima, Wash. (Seal)

DESCRIPTION:
N $\frac{1}{2}$ of N $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ and S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ (except a strip of land
16 feet wide off the E. line for road purposes) of Sec. 27-14-18 E.W.M containing
30 acres more or less.

.....
Together with the perpetual right to the use of water, etc. (Same as page 1)
3/16 cubic foot of water.
.....

WARRANT AND DEFECT, except taxes and assessments since Jan, 2-1901

85

28975 3-000000220