

FILED

AUG 12 2010

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DIVISION III
STATE OF WASHINGTON
By: _____

NO. 289753

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STATE OF WASHINGTON**

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

Respondent.

vs.

JUAN GUTIERREZ and CHERRYL GUTIERREZ, husband and wife,

Appellants,

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal arises from the trial court's grant of summary judgment expanding use and easement rights in a private road known as Dickerman Lane. The roadway is a gravel private drive that has served rural farm properties for nearly a century. Respondents sought to expand the historic scope and use of the road and mandate removal of established improvements including designed to limit unauthorized access and protect existing improvements (irrigation lines and power poles). The roadway had been used in a neighborly manner and without incident for decades. Neighborhood harmony ended with Respondents' purchase of a former orchard property served by the road.

There are two (2) components relevant to use rights in the private roadway: (1) a 16-foot strip on the easterly portion of Appellant's property (within which the existing road is located); and (2) an additional unimproved 14-foot strip on the westerly portion of the existing roadway. There is no dispute as to historic use rights for the roadway. The sole question relates to rights for expansion and enlargement of the existing roadway. The trial court authorized the expansion of the easement in the absence of any recorded document establishing a portion of the easement and contrary to the uncontroverted intent of the original parties. The order mandated removal of existing improvements and authorized use of

producing orchard property. The determinations were made on summary judgment despite clear deficiencies in the record and the presence of genuine issues of material fact.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1:

Trial court erroneously granted summary judgment establishing easement rights in the “East 16-feet” of Appellants property and mandating removal of fence and improvements within the identified property.

Issues Pertaining to Assignment of Error No. 1:

1. Do Respondents have a valid easement for road purposes over the “East 16-feet” of Appellants’ property in the absence of a recorded easement complying with the statute of frauds?
2. Do genuine issues of material fact exist with respect to interpretation of nonconveyancing documents and expansion of the existing roadway?
3. Do genuine issues of material fact exist with regard to the reasonableness of servient owners’ use and restrictions placed on the servient estate?
4. Did trial court improperly order removal of fence and “other obstructions” in violation of third-party property rights?

Assignment of Error No. 2

Trial court erroneously granted summary judgment authorizing immediate use of the additional “14-foot easement” identified in Yakima County Auditor’s File No. 7334366.

Issues Pertaining to Assignment of Error No. 2:

1. Do genuine issues of material fact exist with respect to the original parties’ intent regarding the scope and conditions for use of the 14-foot road easement recorded under Yakima County Auditor’s File No. 7334366?

2. Do genuine issues of material fact exist with respect to the servient estates established orchard use of the easement area?

III. 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. Juan and Cherryl Gutierrez (“Appellants” or “Gutierrez”) are the owners of the servient property.¹ Joel K. Freudenthal and Debra S. Barnes (“Respondents” or “Freudenthal”) are the current owners of

¹ Gutierrez own and operate a 16-acre orchard located at 180 Dickerman Lane, Selah, Washington. (CP 342). The property was purchased on March 31, 2000, from Young Orchards. (CP 343 and 350-352). Juan Gutierrez was orchard manager for Young Orchards and farmed the property since 1974. (CP 342). Planted and producing orchard trees line the westerly edge of the Dickerman Lane. The trees have been in existence for decades. (*see e.g.*, 1947 aerial photograph – CP 244).

adjacent property served by the private gravel road.² Attachment A. (CP 384). The properties are located in rural Yakima County, Washington.

Dickerman Lane is a private gravel roadway that has been utilized to access rural farm properties for nearly one hundred (100) years. (CP 334). The roadway location has remained virtually unchanged from inception and extends from Speyers Road to property owned by Larson Orchards. The immediate area is characterized by fruit orchards and sparse residential housing. (*See e.g.*, aerial photographs 1947-2009, CP 306-315). Gutierrez operates a 16-acre orchard that borders Dickerman Lane on the west side. A Selah Naches Irrigation delivery line is located on the easterly edge of the roadway and has served adjacent properties for a century. (CP 51-52, 55-36 and 58-60). Power poles run the length of the gravel road on both the east and west side. In 2003, a fence was placed along the easterly edge of the road with the concurrence of all property owners for the purpose of preventing unauthorized access, protecting the fragile irrigation line, and recognizing historic property occupancy lines. (Sec CP 47-48 and 63-64).

² Freudenthal purchased their property from Angeline Olson on August 24, 2005. (CP 463-465). Angeline Olson (and her deceased husband) owned and farmed the property from 1975 to 2005. (CP 475). The initial ownership date was revised to 1965 in a subsequent declaration. (CP 79-81). The property was farmed until approximately 2001. At that time, the orchard was removed at that time and the property lay fallow for years. The Olson property was served by Dickerman Lane. The gravel road also continued along the easterly 16-feet of the Olson property for the benefit of other farm properties.

Gutierrez has maintained the road for more than thirty-five (35) years. (CP 331). Maintenance has included grading, application of gravel and snow removal in the winter months. (CP 331). Neither Freudenthal nor their predecessor contributed to the cost of road maintenance. The existing road has accommodated virtually all vehicles, including garbage and delivery trucks (Federal Express and UPS), as well as "... trucks and other vehicles necessary for farming operations." (CP 318 and 331).

The roadway had been used without incident for decades. That harmony was disrupted when Joel Fruedenthal and Debra Barnes ("Respondents" or "Freudenthal") purchased three (3) adjacent parcels owned by Angeline Olson. ("Olson Property" or "Freudenthal Property").³ The Olson property had been farmed as an orchard until

³ Freudenthal had significant confrontations with neighbors. One incident was related by William Gilman. (CP 42-48). Mr. Gilman provided the following declaration:

8. I am particularly concerned with issues of security. I have had very bad experiences with Joel Freudenthal. I frequently shoot bow and arrows with my teenage son at targets located adjacent to Dickerman Lane. We were shooting in an accustomed way on one occasion when confronted by Mr. Freudenthal. He told us in a profanity-laced dialogue that we were not allowed on his road. He then sped down the road in his truck and ran over our target, destroying both the target and arrows. He went to his house and we called the sheriff. The sheriff arrived and took our statements. He then went to the Freudenthal house. After interviewing Freudenthal, he came back and reported that it was a good decision that we did not further confront Mr. Freudenthal. He was angry and had a gun. The sheriff's department prosecuted Mr. Freudenthal.

9. Several months later, we received a restitution check from Mr. Freudenthal. At that time, we had animals in our pasture adjoining Dickerman Lane. The animals included a family mule (owned for ten

approximately 2001.⁴ At that time the trees were removed and the property was left fallow. Freudenthal now raises hay on portions of the property. Gutierrez also maintained an “east-west road” serving both Olson and Gutierrez orchards since 1974. (CP 331).

Despite the clear and uninterrupted use of Dickerman Lane for decades, Freudenthal sought to expand and enlarge use rights with respect to the gravel road. The expansion of use rights would require the removal of the established fence and other purported obstructions. The fence was installed in 2003 with the consent of all neighbors (including Angeline Olson) and located to the east of the existing gravel roadway. The fence did not change, modify or reduce the size of the road or restrict historic usage. (CP 331). The fence was attached to existing power poles and

years) and several goats. Within weeks following the payment of the restitution money, we found our family mule and a goat dead in the pasture. They had green foam flowing from their mouths. The veterinarian looked at the animals and indicated that it appeared they had been poisoned. We don't know who poisoned the animals, but the timing was curious. The fact is that we are concerned about our security and the fence provides limited protection.

(CP 43-44). Freudenthal also placed wire barriers adjacent to the Gutierrez orchard in a manner that impeded historic farming practices; failed to care for his property with resulting damage to the Gutierrez orchard by cottling moth and pear psylla; cut down a pear tree; caused flooding of the Gutierrez property; and placed Gutierrez under constant surveillance. (CP 343).

⁴ Gary and Angeline Olson farmed the orchards from approximately 1965 until 2001. (CP 79 and 475-476). Prior to Olson's ownership, the property was owned and farmed by David and Mildred Shuman (CP 79 and 84-89). Aerial photographs show the presence of orchards on the Olson property from 1947 to 1999 (CP 306-310). The property in its current condition (without orchards) is depicted in aerial photographs (CP 311-315).

existing tree lines. (CP 331). The fence was installed to protect the existing irrigation system and limit unauthorized access to the road. (CP 331).

There are two components bearing on interests in Dickerman Lane: (1) purported rights with respect to a “16-foot road easement” located on the eastern perimeter of the Gutierrez property; and (2) the scope and use rights with respect to an adjacent strip of land fourteen (14) feet in width. Freudenthal asserted a full and unrestricted right to use the aggregate thirty (30) foot strip of land for purposes of ingress and egress.

A. Portion of Dickerman Lane Located within “East 16-Feet” of Gutierrez Property. The location and scope of Dickerman Lane is well established and has remained unchanged for decades. The road is located within the “east 16-feet” of the Gutierrez property, but does not utilize or require the full 16-feet. (CP 468 Details “D” through “H”). Selah-Naches Irrigation delivery line, telephone poles and rows of trees (poplar and arborvitae) are also located adjacent to the roadway and also within the “east 16-feet” of the property. NO RECORDED EASEMENT EXISTS FOR THE ROADWAY.⁵

⁵ A title history was provided to the court. (CP 256-279). Additional documents were provided regarding the Gutierrez purchase (CP 350-353); and the Freudenthal purchase (CP 463-465).

Gutierrez acknowledges the historic scope and use of Dickerman Lane. The objection and dispute relate to the requested expansion of the existing roadway to encompass and authorize the use of the entire “east 16-feet” of the Gutierrez property. Such expansion would require removal of a community fence and possible removal of established irrigation lines, power poles and trees. (See photographs – CP 49-64). The proposed expansion of the roadway is contrary to historic use and would infringe on property rights established by adjacent property owners over decades. (CP 65-67, 72-73 and 42-48). And the expansion is not necessary to provide reasonable ingress and egress to the Freudenthal property.

The basis of Freudenthal’s claim has been a moving target. Freudenthal’s Complaint did not identify the legal basis for the purported easement.⁶ 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).⁷ The “1967 agreement” is a road

⁶ Freudenthal’s Complaint for Trespass, Quiet Title, Injunction and Declaratory Judgment does not identify a legal basis for the asserted easement. The allegation was simply that “[a] 16-foot-wide easement exists along the east boundary of Defendant’s Property (‘Existing Easement’). The Existing Easement is for road purposes and provides access from Speyers Road, a county road, to Plaintiffs’ Property, as well as to other property.” (CP 519-520).

⁷ The motion for summary judgment was supported by the Declaration of Joel Freudenthal in Support of Plaintiffs’ Motion for Summary Judgment. (CP 454-474). Paragraph 13 of the declaration provides as follows:

maintenance agreement. (CP 471-474). The document references the existing roadway and states that "... all of the above parties are desirous that said roadway be maintained in good condition for road purposes." The original parties confirmed that "... the expense thereof to be borne equally by the above-described parties." (CP 473).⁸ The agreement is not a deed; fails to contain conveyancing or grant language; does not describe the scope, purpose or expansion rights with respect to the roadway. During the course of summary judgment argument and in recognition of the document deficiencies, Freudenthal attempted to identify other documents creating an easement.⁹ In the end, no easement was identified by Freudenthal that specifically created the purported easement. Gutierrez

The 16-foot easement benefits our property, as well as the Gutierrezes' property and others' property. *This beneficial right is evidence by a 1967 agreement recorded under Yakima County Auditor's File No. 2139267.* A copy of that agreement is attached as Exhibit E. That agreement, signed by our predecessors in interest, and by the Gutierrezes' predecessors in interest, states that the 16-foot easement "is used as a roadway by all of the above parties for ingress and egress to the respective properties." Our property is one of the properties described in that agreement. Dickerman Lane is located within the 16-foot easement.

(CP 456). (Italics added).

⁸ An uncontroverted fact is that Gutierrez has been the sole property owner, maintaining Dickerman Lane. (CP 331). The roadway has been graded, graveled, and maintained. Gutierrez have not been reimbursed or compensated for road maintenance. (CP 331).

⁹ Freudenthal later took the position that an easement was created by reference to a deed from Selah Valley Company to F.E. Reynolds, dated February 2, 1904. (CP 209 and 220). The deed does not include a defined easement, fails to identify benefitted parcels and was not identified by the court as a document creating the subject easement.

does not dispute the use of the existing roadway. They do, however, dispute the expanded use that takes additional property.

B. Claims of Additional 14-Foot Easement.

Freudenthal also sought to establish an unconditional right to utilize an additional 14-feet located on the west side of the existing Dickerman Lane. (CP 489-505 – Fifth Cause of Action). The area was denominated as “Additional Easement” or “14-foot Easement”. The Additional Easement area was not part of the existing road; is planted to orchard trees; and has been farmed as an orchard for nearly 80 years. ((CP 344). Power lines run the entire western perimeter of the gravel road and border the orchard. (CP 496).

The Additional Easement was created by a document entitled Easement for Ingress/Egress and Utilities, recorded under Auditor’s File No. 7334366. (CP 389-397). The easement was prepared in anticipation of potential subdivision of benefitted parcels.¹⁰ The easement document contains the following acknowledgement:

THE GRANTOR(S) acknowledge that it is the intent of the Grantee(s), if possible, to subdivide their respective parcels of real property and that the easements granted herein shall be for the benefit of not only the existing parcels of real property owned by Grantee(s) but any portion or portions there of that may be created in the future as a result of subdivision.

¹⁰ Adopted development standards in Yakima County require that access to subdivided parcel be over access roads of at least thirty (30) feet in width.

(CP 384). The purpose of the language was to confirm "... the subdivision purpose and recognize that subdivision would add additional parcels to the benefitted properties." (CP 282). Each of the original parties to the agreement recognized and confirmed that the purpose and intent of the easement was to provide additional area for a road in the event that benefitted properties were subdivided at a later point in time. (CP 282-Hordan; 331-332-Gutierrez; and 317-318-Walkenhauer). The easement grant was conditional and authorized only in the event of subdivision. No evidence was presented that contravened this clear statement of intent.

The language and easement were drafted at the direction of Bill Hordan of Hordan Planning Services. (CP 282). Hordan's represented Angeline Olson and Larson Orchards. He provided the following declaration:

3. A portion of the rezone application was denied by Yakima County. Larson and a large portion of the Olson properties remain agricultural. A portion of the Olson properties (residence and adjacent and smaller parcel) and Gutierrez properties were rezoned to Valley Rural and Rural Self-Sufficient. Following such determination, the parties involved in the application discussed the potential of expanding the roadway for Dickerman Lane. 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.

4. Larson Fruit and Angeline Olson were interested in potential subdivision of their properties. The widening of Dickerman Lane to a thirty foot road easement would require the grant of additional roadway easement by Juan and Cherryl Gutierrez. The additional area was part of an existing orchard and trees were located within the proposed easement area. *It was recognized that a future expansion of the roadway would require removal of existing producing trees. Gutierrez was concerned about the removal of any trees from their producing orchard and were initially opposed to the proposal.*

5. *Larson Fruit and Angeline Olson requested that Gutierrez grant an additional easement for future roadway.* I was present during several discussions regarding the additional easement area. *The request specifically recognized that the roadway would be expanded only if necessary for future subdivision of benefitted parcels.* Gutierrez would continue to farm the area until such time as needed to finalize the subdivision properties. I participated in the communications of this proposal to Juan and Cherryl Gutierrez.

6. 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 feet of property to Gutierrez to replace the loss production area. Both of these conditions were acceptable and agreed to by Olson and Larson Fruit. The additional property was transferred from the northerly boundary of the Olson property...

8. An Easement for Ingress/Egress and Utilities was prepared by Reed C. Pell. A true and correct copy of the executed easement is attached as Exhibit B. *The intent and understanding of the parties was that the additional 14-foot easement was to be utilized in conjunction with the prospective subdivision of properties. Each party to the easement confirmed this fact to me.* The easement document contained the following language:

The Grantors acknowledge that it was the intent of the Grantee(s), if possible, to subdivide their respective parcels of real property and that the easements granted herein shall be for the benefit of not only the existing parcels of real property owned by Grantee(s) but any portion or portions thereof that may be created in the future as a result of the subdivision.

The purpose of this language was to confirm the subdivision purpose and recognize that subdivision would add additional parcels to the benefitted properties.

(CP 281-282). (Italics added). The intent was confirmed by Barbara Walkenhauer, President of Larson Orchards, Inc. (CP 316-329). No evidence was presented to contravene the clear statements of intent of the original parties.

C. Cross-Motions for Summary Judgment and Trial Court Order. The parties filed cross-motions for summary judgment.¹¹ The trial

¹¹ Freudenthal filed an initial Motion for Partial Summary Judgment requesting (1) an order determining the Freudenthal's have a right to use a 14-foot wide easement located on the Gutierrezes' property; and (2) an order requiring the Gutierrez to remove the fence they installed down the center of a 16-foot wide access easement that serves the Freudenthals' property. (CP 483-484). Gutierrez filed a Cross-Motion for Summary

court granted summary judgment and allowed Freudenthal the right to utilize the full width of the “16-foot road” as well as the Additional Easement (14-feet).¹² (CP 29-33 and 34-41). The court also ordered the removal of the common fence (and other obstructions) and authorized the placement of turnouts within the Additional Easement. (CP 30-31).

1. 16-Foot Road Easement. In its order authorizing use of the east 16-feet of Gutierrez property, the court acknowledged that there was no legal document creating the easement but made the following finding:

Regarding the 16-foot road legally described below, there are no genuine issues of material fact and plaintiffs’ motion for partial summary judgment on this issue is granted and defendants’ Gutierrez motion for summary judgment on this issue is denied. The 16-foot road is legally described as follows:

The East 16 feet of the South half of the Northwest quarter of the Southwest quarter and the East 16 feet of the North ¼ of the Southwest quarter of the Southwest quarter

Judgment which requested, in pertinent part, that there be a (1) declaration that the use of the east 16-feet of Dickerman Lane is limited in scope to historic use and location; and (2) declaration that 14-foot easement is limited and may be utilized only in conjunction with subdivision of appurtenant properties. (CP 354-355). The summary judgment motions incorporated a number of other issues and claims that are not before the Appellate Court. This brief will focus only on those aspects of summary judgment that relate to the appellate issues.

¹² The underlying action also included issues with respect to an “East-West Road”. The trial court found that “... genuine issues of material fact exist that prevent summary judgment ...” and has reserved for trial determination of rights with respect to such easement roadway. (CP 38-39). The issues in this appellate proceeding are being reviewed on an interlocutory basis pursuant to this Court’s authorization.

of Section 27, Township 14 North, Range
16, E.W.M., Yakima County, State of
Washington.

*Said road was recognized by Defendant's Gutierrez and others in that certain easement recorded under Yakima County File No. 7334366, and the road was created at least by that date.

The legal description does not describe the existing road but rather describes the "East 16-feet" of the Gutierrez property. The roadway lies within a portion of the described area but is bordered on the east by existing irrigation lines, telephone and power poles and fencing. The order seems to be based on some unarticulated theory of estoppel ("... the road was created at least by that date.").

The trial court also directed Gutierrez to remove the fence (which belonged to others) and declared that "... the entire width of said 16-foot road benefits and is appurtenant to plaintiff's property ... and defendants Gutierrez shall not take any action to impede plaintiffs use of the full width of said 16-foot road, or assist others or give permission to others to take actions that will impede plaintiff's use of the full width of said 16-foot road. (CP 30 and 38).

2. Summary Judgment Regarding Rights in Additional Easement. The trial court rejected the original parties' uncontroverted

statements of intent and purpose for the easement; found the document unambiguous; and authorized the immediate expansion of Dickerman Lane (construction of vehicle turnouts) with resultant damage to a producing orchard. The court specifically ordered as follows:

1. At any time, but solely at plaintiff's cost and expense, plaintiffs may place gravel turnouts within the 14-foot easement recorded under Yakima County Auditor's File No. 7334366. Plaintiffs have a right to maintain those turnouts, including, but not limited to, plowing those turnouts during the winter.

2. The easement recorded under Yakima County Auditor's File No. 7334366 is not ambiguous and is subject to no conditions to its present use and enforceability. Said easement is currently enforceable and benefits and is appurtenant to the real property legally described on Exhibit A hereto, and defendants Gutierrez shall not take any action to impede plaintiffs' use of said easement or assist others or give permission to others to take actions that will impede plaintiffs' use of said easement.

(CP 30). The court's order directly impacts the current crop and orchard operations. It is significant that the court entered the order without a view of the property, road or existing improvements.

Gutierrez filed a timely interlocutory appeal. (CP 11-28). Commissioner Wasson determined that the summary judgment was appealable pursuant to RAP 2.2(d).

IV. ARGUMENT

A. Appellate Review of Summary Judgment. An order granting summary judgment is reviewed de novo. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 610, 220 P.3d 1214 (2009); *Go 2 Net, Inc. v. Freeyellow.Com., Inc.*, 158 Wn.2d 247, 252, 143 P.3d 590 (2006). The court views the facts and all reasonable inferences from those facts in a light most favorable to the non-moving party. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)); *Alhadeff*, 167 Wn.2d at 611. 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); CR 56(c). The moving party has the burden of establishing the absence of an issue of material fact. *Alhadeff*, 167 Wn.2d at 611; *SAS Am., Inc. v. Inada*, 71 Wn. App. 261, 263, 857 P.2d 1047 (1993). 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); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

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

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

The East 16 feet of the South half of Northwest quarter of the Southwest quarter and the East 16 feet 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 30-31 and 38). Gutierrez was ordered to remove a fence located within the described area and refrain from any action impeding the use of the full width of the said 16-foot road.¹³ Despite a request from counsel, the trial court could not or would not identify a recorded document granting the purported easement. The court's sole reference and determination with respect to documentation of the easement was as follows:

**Said road was recognized by Defendant's Gutierrez and others in that certain easement recorded under Yakima*

¹³ The fence is owned by adjacent property owners. (CP 43, 67, 71 and 73). An irrigation line and telephone poles were also located within the described easement area. (CP 49-64) (Photographs of roadway, fence, irrigation lines and risers, and telephone poles). A row of poplar trees have existed for decades with the 16-foot area and adjacent to the roadway surface. (CP 42-43). The improvements have been in place for decades and have not impaired or limited use of the roadway for purposes of ingress and egress. (CP 66-67). The location of such improvements is depicted on survey prepared by Bell & Upton Land Surveying. (CP 468-469).

County File No. 7334366, *and the road was created by that date.*

(Italics Added). (CP 19 and 38).¹⁴ The trial court’s language suggests an estoppel theory but such theory or argument was not presented to the court.¹⁵

1. Identified Easement was not Created by Document Complying with Statute of Frauds. The trial court found that Freudenthal was entitled to utilize the “entire width of the said 16-foot road” and Gutierrez “... shall take no action to impede Plaintiffs’ use of the full width of said 16-foot road ...”.¹⁶ The existing roadway occupies only a

¹⁴ Freudenthal took the position that the easement was created by reference to a deed from Selah Valley Company to F.E. Reynolds, dated February 2, 1904. (CP 209 and 220). The deed describes real property being conveyed and contains the following parenthetical reference – “. . . (except a strip of land 16-feet wide off the E. line for road purposes). . . .” (CP 220). The document does not identify benefited properties or establish an easement. The area is excepted from the legal description without reference to easements, appurtenant properties or other defining terms and conditions. The trial court apparently found this reference to be unpersuasive.

¹⁵ Freudenthal did not present or argue a use right based upon estoppel. A real property conveyance may be taken out of the operation of the statute of frauds through the doctrine of equitable estoppel. *Tiegs v. Watts*, 135 Wn.2d 1, 15-16, 954 P.2d 877 (1998). Equitable estoppel requires the claimant to prove (1) a party’s admission, statement, or act inconsistent with its later claim; (2) an action by another party in reliance on the first party’s act, statement, or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission. *Kramarevcky v. Department of Social and Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). The party asserting equitable estoppel must prove these elements by “very clear and cogent evidence.” *Proctor v. Huntington*, 146 Wn. App. 836, 845, 192 P.3d 958 (2008). Equitable estoppel is inherently a factual determination and inappropriate for summary judgment.

¹⁶ There is even a legal question as to whether the “East 16-feet” is owned by Gutierrez. Gutierrez purchased the property from Young Orchards and received a Statutory Warranty Deed, dated March 30, 2000. (CP 350-353). The legal description contains a mates and bounds description with the following – “. . . EXCEPT the East 16-feet thereof

portion of the “East 16-feet” of the Gutierrez property (CP 127-128; 468-469 and 49-64). The described area also includes a fence adjacent to the existing roadway. (CP 43, 67, 71 and 73); and an irrigation delivery line, telephone poles and a row of poplar trees. (CP 331, 49-64, 43, 66, and 73). Each of these third-party interests were impacted by the court’s decision. The trial court simply ignored the impact of its order on substantiated third party interests.

The undisputed fact is that no recorded easement deed exists establishing the purported easement rights and interests. Easements are interests in land. *Zunino v. Rajewski*, 140 Wn. App. 215, 221-222. As such, express easements must comply with the statute of frauds, which requires that “[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed[.]” RCW 64.04.010; *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995); and *Kesinger v. Logan*, 113 Wn.2d 320, 326, 779 P.2d 263 (1989). A deed of easement is required to convey an easement that encumbrances a specific servient estate. *Zunino*, 140 Wn.

and the North 20-feet thereof for roads.” The court in *Queen City Savings & Loan Assoc. v. Mechem*, 14 Wn. App. 470, 543 P.2d 355 (1975), construed similar language (“ . . . and EXCEPT a strip of land 60-feet in width along the westerly margin for road”) and concluded that the language established an easement. The determination of intent is a factual question. *Id.* At 475. The court noted the difference between an exception and a reservation. *Id.* at 473-474. The court recognized that parole evidence concerning surrounding circumstances may be considered in aid of construction of such provisions. *Id.* at 474.

App. at 221. The courts have noted that "... [a] deed of easement is not required to establish the actual location of an easement but is required to convey an easement which encumbrances a specific servient estate". *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). The court in *Zunino* elaborated upon the document language as follows:

"No particular words are necessary to constitute a grant and any words which clearly show the intention to give an easement are sufficient." *Id.* At 379, 793 P.2d 442. In general, deeds are construed to give effect to the intentions of the parties, and particular attention is given to the intent of the grantor when discerning the meaning of the entire document. *Carr v. Burlington N. Inc.*, 23 Wn. App. 386, 390-91, 597 P.2d 409 (1979). However, any doubt as to words used in a deed will be construed against the grantor and in favor of the grantee. *Id.* at 391, 597 P.2d 409.

Zunino, 140 Wn. App. at 222. The trial court holding was based upon a determination that "... said road was recognized by defendants Gutierrez and others in that certain easement recorded under Yakima County File No. 7334366," (CP 31). No easement deed was identified by the trial court.

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).¹⁷ The referenced document simply recites that "... a 16-

¹⁷ The recorded document is entitled "Easement for Ingress/Egress and Utilities". (CP 389-397). The document is an easement with respect to creation of a 14-foot area for

foot wide road presently exists pursuant to an Agreement dated June 13, 1967”¹⁸ (CP 391). The fact is that the road has existed for decades in its present location. The document does not change or expand use rights. The only interference to be drawn from the document is that the parties acknowledged that “... a 16-foot wide road presently exists” Freudenthal failed to identify a recorded document that grants or conveys the easement interest in the East 16-feet of the Gutierrez property. An easement interest must be conveyed in a manner that complies with the statute of frauds. RCW 64.04.010 and *Zunino*, 140 Wn. App. at 221. The absence of conveyancing document is fatal to the asserted legal right.¹⁹ As the record establishes, Gutierrez should have been granted summary judgment limiting to scope of road use to the existing roadway.

purposes of ingress/egress and utilities. It does not, however, include conveyancing language with respect to the “16-foot easement”.

¹⁸ Auditor’s File No. 7334366 contains appropriate conveyancing language with respect to the establishment of “... a 14-foot easement for the purposes of ingress/egress and utilities, ...” over identified properties. (CP 392-393). The conveyancing language, however, is not included with respect to the “east 16-feet” of the affected properties. The parties intended to create a conditional easement for the “west 14-feet” but the absence of conveyancing language related to the “east 16-feet” is significant and recognizes that such document is not a deed with respect to the latter roadway area.

¹⁹ The facts in this proceeding are similar to those presented in *Zunino v. Rajewski*, 140 Wn. App. 215, 165 P.3d 57 (2007). In *Zunino*, there were not conveyancing documents that either granted or reserved an easement with respect to identified parcels. The common grantor had filed and recorded “Private Road and Utility Easements” with respect to each parcel created through an exempt subdivision process. In several instances, the recorded “Private Road and Utility Easements” were identified and taken “subject to” such recordings. The court found that the “Private Road and Utility Easements” were “. . . not deeds, because they do not convey an interest in property.” *Zunino*, 140 Wn. App. at 223; *see also* RCW 64.04.020.

Second, the identified document (Auditor's File No. 7334366) references and incorporates a prior road maintenance agreement – “Agreement dated June 13, 1967”. (CP 402-405). The Road Maintenance Agreement acknowledges that an area within the 16-feet is “... used as a roadway by all of the above parties for ingress and egress to their respective properties ... and all of the above parties are desirous that said roadway be maintained in good condition for road purposes.” (CP 403). The Road Maintenance Agreement is not a deed; contains no conveyancing language; and, certainly does not authorize the expansion or modification of historic road location or usage. The document simply confirms the existence of the established road and provides for maintenance and cost sharing. It is clear that the parties to the Road Maintenance Agreement did not intend or authorize the expansion of the existing road. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981) (“... the court’s duty to endeavor to arrive at and enforce the intention of the parties.”). The parties’ course of dealing recognized that the use rights were limited to the existing roadway. *Id.* At 560; and *Sunnyside Valley Irrigation District v. Dickie*, 149 W.2d 873, 880, 73 P.3d 369 (2003). The fact is that, at the time of the 1967 Agreement, the roadway could not be expanded because of the existence of irrigation lines and rows of trees bordering the east edge of the road.

Third, the referenced documents refer to an “existing roadway”. The uncontroverted facts were that the “existing roadway” had been in place for decades and the parties were in agreement with respect to use and location of the existing roadway. The parties’ prior conduct and actions establish or confirm intent with respect to scope of easement. *Sunnyside Valley Irrigation District*, 149 Wn.2d at 880. Freudenthal’s contentions are in direct conflict with the practical interpretation established by the parties’ prior conduct. *City of Seattle v. Nazarenius*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962).

Fourth, the language of the documents must be construed in a manner to permit a due and reasonable enjoyment of both the servient and dominant estates. *Thompson v. Smith*, 59 Wn.2d 397, 408-409, 367 P.2d 798 (1962). A simple and clear reading of the documents reflects that the parties’ intent was to recognize use of the existing roadway and provide for road maintenance. The intent was not to allow for the expansion of the roadway and require removal of existing and long-standing improvements.

2. Interpretation of Easement is a Mixed Question of Law and Fact and Summary Judgment is Impermissible in this Proceeding. The trial court made loose reference to recorded documents that it viewed as establishing an easement. While the referenced documents do not include the required conveyancing language, the trial court’s decision fails for a

second reason – interpretation of an easement presents a mixed question of fact and law. Genuine issues of material fact exist with respect to interpretation of the referenced documents.

The courts of Washington have clearly recognized 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) (interpretation of easement with respect to enlargement and maintenance of irrigation lateral); *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979) (conveyance of right-of-way to a railroad presented mixed question of fact and law). The intent of the parties presents a factual question. *Veach v. Culp*, 92 Wn.2d at 573. (“It is a factual question to determine the intent of the parties.”) And the courts interpret grants to give effect “. . . to the parties original intent.” *Snyder v. Haynes*, 152 Wn. App. 774, 779, 217 P.3d 787 (2009) (ATV and ORV use of access road not contemplated by original agreement); and *Brown v. Voss*, 105 Wn.2d 366, 371, 715 P.2d 514 (1986).

The intent of the original parties is to be initially ascertained from the documents giving rise to the purported easement. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981). The documents referenced by the

trial court clearly reflect that use rights exist with respect to the “existing road.” No language is present that suggests or authorizes the expansion of the existing roadway. The trial court’s interpretation is in clear conflict with the unambiguous intent reflected in the referenced documents.

Second, extrinsic evidence is to be considered in the construction of ambiguous documents. The court in *Sunnyside Valley Irrigation District* set forth the general rule as follows:

If ambiguity exists, extrinsic evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties’ prior conduct for admissions.

Sunnyside Valley Irrigation District v. Dickie, 149 Wn.2d at 880. The original parties’ intent and conduct was uncontroverted and uncontradicted. The roadway was utilized in the same manner for more than one hundred (100) years. It was well defined and maintained. Irrigation lines were installed and maintained, as well as a row of poplar trees. Telephone lines were in place and limited the expansion of the roadway. The original parties to the referenced agreement (Olson, Larson Orchards, Miller and Gutierrez) all agreed to installation of a fence adjacent to the easterly edge of the “existing road.” The intentions of the original parties, as evidenced by prior conduct and admissions, recognize

that use was limited to the existing roadway and that expansion of the roadway is inconsistent with the intent of the original parties. A corollary of this analysis is the judicial recognition that any possessory interest in property, including easements, can be extinguished through adverse use. *City of Edmonds v. Williams*, 54 Wn. App. 632, 634, 774 P.2d 1241 (1989) (“An easement can be extinguished through adverse use by the owner of the servient estate.”); and *Cole v. Lavery*, 112 Wn. App. 180, 184-85, 49 P.3d 924 (2002). These issues are factual determinations and not appropriate for summary judgment.

Third, an easement defined in general terms, without a definite location or description, is classified as a floating or roving easement (floating easement). See *Berg v. Ting*, 125 Wn.2d 544, 552, 886 P.2d 564 (1995); *Sunnyside Valley Irrigation District*, 149 Wn.2d at 880. The court in *Sunnyside Valley Irrigation District* set forth the following rules:

Generally, a floating easement becomes fixed after construction and cannot thereafter be changed. *Rhoades v. Barnes*, 54 Wash. 145, 149, 102 P. 884 (1909). If the floating easement has an undefined width, it is bounded by the doctrine of reasonable enjoyment. *Everett Water Co. v. Powers*, 37 Wash. 143, 152, 79 P. 617 (1905). Under the doctrine of reasonable enjoyment, the width is restricted to that which is reasonably necessary and convenient to effectuate the original purpose for granting the easement. *Id.* An easement may only “. . . be expanded over time if the expressed terms of the easement manifest a clear intention by the original parties to modify the initial scope

based on future demands. The face of the easement must manifest this clear intent.”

Sunnyside Valley Irrigation District, 149 Wn.2d at 884. The easement location became fixed with the construction of the roadway. That location did not change over the years and all parties acquiesced in the location and scope of use. And there is no language or conduct to suggest that the parties intended or authorized the expansion of the existing roadway.

Finally, a factual question exists with respect to interpretation of the documents with respect to the expansion of existing road use and location. The referenced documents acknowledge only the present existence of a 16-foot wide road (not easement); the existing roadway is provided for “ingress and egress” and shall be “... maintained in good condition for road purposes ...” (CP 403). The document contains no language authorizing the expansion or enlargement of the existing roadway. 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. Prior conduct recognized the existing roadway; acknowledged historic use for irrigation and power/telephone lines; and provided for the installation of the subject fence. Freudenthals purchased their property subject to rights-of-way and interests “... visible by inspection.” (CP 464). A clear factual dispute

exists with respect to the respective rights in the “east 16-feet” held by the servient and dominant properties.

3. A Servient Owner is Entitled to Reasonable Use of Its Property and Trial Court Improperly Ordered Removal of Fence and other Purported Obstructions Adjacent to Existing Roadway. The trial court ordered the removal of the fence and “other obstructions” from the “East 16-feet” of the Gutierrez property. The court failed to give due consideration to the servient (and other parties’) reasonable use rights to areas adjacent to the roadway. The fence was installed with the consent of all road users and was designed to limit unauthorized access and protect existing utility lines (irrigation and telephone poles). The installation of the fence was reasonable and did not limit historic use of the gravel roadway.

The trial court specifically ordered Gutierrez to remove a fence and other obstructions from the “East 16-feet” of their property. The order was as follows:

3. Defendants Gutierrez *shall, within thirty (30) days of the date of this Judgment, remove the fence they installed within the following described 16-foot road, including, without limitation, all posts, fencing material and gates:*

The East 16-feet of the South half of the Northwest quarter of the Southwest quarter and the East 16-feet 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, Yakima County, State of Washington.

Defendants Gutierrez shall also, within said time, remove all obstructions they have installed or assisted others to install within the above-described 16-foot road. For purposes of determining whether the fence is within the above-described 16-foot road, the survey prepared by Bell & Upton Land Surveying, dated January 16, 2009, Job No. 05175, a copy of which was attached to the Order as Exhibit A, shall control. The fence to be removed includes, but is not limited to, the fence shown on said survey beginning at the south end of the tree line on Detail "D" and continuing to the easterly point of the portion of the fence marked "8 'fence jog'" on Detail "F."

4. The entire width of the above-described 16-foot road benefits and is appurtenant to the real property legally described on Exhibit A hereto. *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, and Defendants Gutierrez shall not take any action to impede Plaintiff's use of the full width of said 16-foot road, or assist others or give permission to others to take actions that will impede Plaintiff's use of the full width of said 16-foot road.

(CP 30-31). The order was erroneous for two primary reasons: (1) the scope of reasonable and permissible use of an easement area (assuming it legally exists) by a servient tenant is a factual determination; and (2) the trial court's order directs actions that violate property rights and interests of third-parties.

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. In *Thompson v. Smith*, 59 Wn.2d 397, 403-09, 367 P.2d 798 (1962), our Supreme Court recognized 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 enjoyment of both interests so long as that is possible.” *Id.* at 59 Wn.2d at 408-409. The “intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties as the prior conduct or admissions,” lead to the clear conclusion that the intent was to limit the use of the roadway to its original configuration. The court in *Thompson* set forth the following general rule:

Mere non-use, for no matter how long a period, would not extinguish the easement. However, it is also the law that the owner of the property has the right to use his land for purposes not inconsistent with its ultimate use for the reserve purpose during the period of non-use. The rule is that where a right-of-way is established by reservation, the land remains the property of the owner of the servient estate, and he is entitled to use it for any purpose that does not interfere with the proper enjoyment of the easement. [Citations omitted.]

Ordinarily, what may be considered a proper use by the owner of the fee is a question of fact and depends largely on the extent and mode of use of the particular easement.

Thompson v. Smith, 59 Wn.2d at 408; *see also Logan v. Brodrick*, 29 Wn. App. 796, 800, 631 P.2d 429 (1981) (“The question of reasonable use...is one of fact”). A factual question exists with respect to the remedy ordered by the court. Expansion of the roadway is not required for reasonable farm use or ingress and egress. *See e.g.*, Declaration of Barbara Walkenhauer. (CP 316-318, existing road adequate for all farm vehicles and operations).

Second, courts have also recognized that a servient owner may gate or fence a roadway easement. “When the owner of a servient estate is being subjected to a greater burden than that originally contemplated by the easement grant, the servient owner has the right to restrict such use.” *Rupert v. Gunter*, 31 Wn. App. 27, 31, 640 P.2d 36 (1982) (servient owner allowed to install and maintain gates for roadway). The court in *Rupert* stated:

Whether or not the owner of land, over which an easement exists, may erect and maintain fences, bars, or gates across or along an easement way, depends upon the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case, the nature and situation of the property subject to the easement, and the manner in which the way has been used and occupied.

Rupert v. Gunter, 31 Wn. App. at 30-31 (citing, *Evich v. Kovacevich*, 33 Wn.2d 151, 162, 204 P.2d 389 (1949)). *See also Brown v. Voss*, 105

Wn.2d 366, 371, 715 P.2d 514 (1986) (scope of an easement is controlled by the intent of the parties at the creation of the easement). Gates and fences may be installed to address problems of trespass and/or vandalism to properties. *Standing Rock Homeowners Ass'n. v. Misich*, 106 Wn. App. 231, 241-242, 23 P.3d 520 (2001); and *Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888, 894-95, 20 P.3d 500 (2001) (gate allowed). Installations of the fence, irrigation line, power poles and trees predated the execution of documents relied upon by the trial court and are reasonable restrictions exercised with respect to the existing roadway easement. The placement of the fence was reasonable. Or at least a factual question exists with respect to placement of the fence.

4. Compliance with Court's Order Will Violate Property Rights of Third Parties. Finally, and perhaps most significant, is that the trial court ordered Gutierrez to take action that would directly violate property interests and rights held by third parties. *City of Seattle v. Nazarenius*, 60 Wn.2d 657, 669, 374 P.2d 1014 (1962) (interests of third parties and public to be considered in formulating remedy). The fence was installed and maintained jointly by adjoining landowners (including Freudenthal's predecessor). The fence protected existed irrigation lines, prevented trespass on private property, and limited access to the roadway. (CP 43-44, 66-67, 72-73). Property lying to the east of the existing

roadway had been exclusively possessed and maintained by adjacent property owners. (CP 42-43, 66-67, and 73). The irrigation line had existed for nearly 100 years. (CP 66 and 73).

The trial court ordered and allowed use of the areas owned by third-parties. Those property owners were not made a party to the litigation and clearly have interests adversely affected by the final decision. *See* Declaration of William Gilman (CP 42-48); Declaration of James Dimick (CP 65-69); Third Declaration of Juan Gutierrez (CP 70-71); and Declaration of Warren D. Ernst (CP 72-76). Juan Gutierrez specifically advised the court of this concern:

3. I have no authority or right to remove the fence. The fence belongs collectively to all of the neighbors and serves specific purposes for each neighboring property. I would violate those neighbors' interests in the fence by removing the fence. I would also be exposed to liability for damages related to the removal of the fence and its protective aspects.

4. The fence was installed at the collective request of neighbors. Those neighbors included Warren and Pamela Ernst, James Dimick, Michael Amos, and William Gilman. The fence precludes access to their property from Dickerman Lane and also protects the existing Selah-Naches Irrigation line.

(CP 70-71). The court ignored the clear interests of adjacent property owners and placed Gutierrez in the impossible position of either (1) violating a court order, or (2) exposing himself to liability for violation of

third-party property interests. All of this was done in the context of an uncertain and unclear record of title and interests.

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, turn-outs and other uses purportedly necessitated by their farming business. (CP 496).²⁰ Any easement rights exist pursuant to Easement for Ingress/Egress and Utilities, as recorded under Auditor's File No. 7334366. (CP 389-397). The use of the Additional 14-foot Easement is limited and may be exercised only in conjunction with subdivision of a benefitted appurtenant

²⁰ Freudenthal requested "... a declaratory judgment ruling that they may use the Additional Easement for purposes of ingress/egress and utilities." (CP 495-496-5th Cause of Action). The use of the area was for the purpose of placing "some turnouts" and to "make other improvements to Dickerman Lane." The purported purpose of the turnouts is to allow a vehicle to turnout and allow another vehicle to pass. (CP 460). These claims were countered by declarations setting forth the following: (1) James Dimick declared that he had observed road use for forty (40) years and "... never witnessed a problem with access or width of the existing roadway" - (CP 66); (2) Barbara Walkenhauer (President of Larson Orchards, Inc.) declared that "... [t]he roadway has been of sufficient size and condition to allow for ingress and egress of all farm vehicles and equipment as well as areas for all attendant farming activities. Trucks and other vehicles necessary for farming operations have utilized the roadway without incident or problem for decades." (CP 318); and (3) Cheryl Gutierrez declared that "... Dickerman Lane has been adequate for all residential and orchard uses. Farm implements and trucks have utilized the roadway for deliveries, harvest and all associated activities. The roadway has been sufficient for use by garbage and delivery trucks (Federal Express and UPS). Any physical limitations and the use of the road result from the existence of utility poles. Those poles, however, do not create significant problems." (CP 331). The record contains a significant factual conflict regarding the adequacy of the existing roadway. Determinations with respect to reasonable use and adequacy of the roadway are factual in nature and inappropriate for summary judgment.

estate. The original parties' intentions were clearly established before the trial court.

The interpretation of an express easement is a mixed question of law and fact. *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). 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 and contracts is the intent of the parties. *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d at 880; *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). The intent of the parties to a particular agreement may be determined from the language of the agreement, the contract as a whole, the 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*, 115 Wn.2d at 667. See also *Sunnyside Valley Irrigation District*, 149 Wn.2d at 880 (“... extrinsic evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions.”). The original parties' intent and subsequent actions are clear and uncontroverted – the easement was for the purpose of facilitating

subsequent subdivision of appurtenant property; the servient owner would continue to farm the easement area until required for subdivision activities; and the existing roadway was adequate for reasonable residential and agricultural use.

The intent of the original parties was clear and uncontroverted. The purpose of the "14-foot easement" was to allow for the expansion of the existing road in the event of subdivision of adjacent parcels. Barbara Walkenhauer, president of Larson Orchards, Inc., requested the easement and described the parties' intent as follows:

5. We understood that any future subdivision or residential development of our property may require an expansion of Dickerman Lane to a thirty (30) foot easement if traffic levels become too heavy. The existing roadway did not meet county subdivision standards. Since we covered all expenses for the land use proceeding, *we requested an expanded easement from Gutierrez and Olson.* The expansion was to be fourteen (14) feet, with a resulting roadway width for Dickerman Lane of thirty (30) feet. We made this request of both parties.

6. Gutierrez were initially opposed to the grant of additional right-of-way. Any expansion of the road would result in the loss of producing apples trees that are part of their orchard. As orchardists, we were sensitive to this loss. Angeline Olson agreed to deed fifteen (15) feet of her land to Gutierrez as replacement property in the event the future expansion of Dickerman Lane was necessary for subdivision of our properties. This concept was acceptable to all parties.

7. *An easement document was prepared to implement our understandings and agreements. The attached*

Easement for Ingress/Egress and Utilities was prepared and signed by the parties (Exhibit A). Bill Hordon assisted in this process.

8. The easement specifically references future subdivision of the properties. *The sole purpose of the easement was to provide roadway access in order to accommodate and facilitate future subdivision or residential development of our property.* The intention and agreement of the parties was that the fourteen (14) foot easement would be utilized only if necessary for the subdivision of benefited parcels. The easement was not intended to allow use of the fourteen (14) foot easement area for any other purpose. We all recognized and agreed that Gutierrez would be allowed to continue farming of the area until such time as was necessary for the subdivision of the benefited parcels.

(CP 317-329). The intent was confirmed by Cheryl Gutierrez (CP 331-332) and William P. Hordon (CP 280-283). “What the original parties intended is a question of fact.” *Sunnyside Valley Irrigation District*, 149 Wn.2d at 880. Freudenthal presented no evidence to controvert the statements of the original parties to the agreement.

The trial court interpreted the easement in a manner that directly contradicts the uncontroverted intentions of the parties to the agreement. It is congruous to apply adopted rules of contract interpretation – i.e. such rules designed to determine the original parties’ intent – in a manner that ignores or destroys the uncontroverted intent established by the actual original parties. It is also illogical to conclude that the document is “not ambiguous” when the interpretation is in direct conflict with declarations filed

by the actual parties to the agreement. And at a minimum, there is at least a factual question present for determination in a trial.

The trial court also failed to consider the established legal principle that the interests of servient and dominant estates in easement areas are not absolute and their respective rights "... must be construed to permit a due and reasonable enjoyment of both interests so long as that is possible." *Thompson v. Smith*, 59 Wn.2d at 408-409. The reasonable and/or required use of the Additional (14-foot) Easement presents a factual question. Gutierrez provided evidence that the existing roadway was adequate for all anticipated residential and agricultural usage. Existing telephone and power lines presented the only impediment and such lines were out of the control of any parties. The original parties recognized by both agreement and conduct that the easement area would continue to be farmed for orchard purposes until such time as it was necessary for subdivision of adjacent properties. The trial court erroneously limited Gutierrez' use of the easement area when it declared that "... Gutierrez shall not take any action to impede Plaintiffs' use of the said easement, or assist others or give permission to others to take actions that will impede Plaintiff's use of the said easement." (CP 30). Gutierrez has the right to reasonable use of the area in a manner that does not "unreasonably interfere" with the purpose of the easement.

V. CONCLUSION

Gutierrez requests the following:

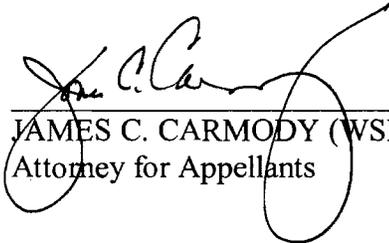
- (1) That the court reverse the trial court's order authorizing use of the full width of the east 16-feet of the Gutierrez property and requiring removal of fence;

(2) Reverse and enter an order that no easement rights exist with respect to the “east 16-feet of the Gutierrez property” and use is limited to the existing gravel roadway;

(3) That genuine issues of material fact exist with respect to the intent, scope and reasonable use of the Additional (14-foot) Easement and that the matter be remanded for trial.

DATED this 11th day of August, 2010.

VELIKANJE HALVERSON P.C.



JAMES C. CARMODY (WSBA #5205)
Attorney for Appellants

Attachment A

EXHIBIT A

Configuration of the Freudenthal and Gutierrezes' Properties

