

82326-0

No. 36087-0-II

FILED
COURT OF APPEALS
DIVISION II

08 MAR 13 PM 1:37

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

DEPUTY

NOEL PROCTOR,

Appellant,

vs.

ROBERT "FORD" HUNTINGTON and CHRISTINA HUNTINGTON,
husband and wife, and the marital community therein,

Respondents.

ROBERT "FORD" HUNTINGTON and CHRISTINA HUNTINGTON,
husband and wife, and the marital community therein,

Respondents,

vs.

NOEL PROCTOR,

Appellant.

RESPONDENTS' REPLY BRIEF

Bradley W. Andersen, WSBA No. 20640

Phillip J. Haberthur, WSBA No. 38038

Attorneys for Respondents

Schwabe, Williamson & Wyatt, P.C.
700 Washington Street, Suite 701
Vancouver, WA 98660
(360) 694-7551

PM 3-11-08

TABLE OF CONTENTS

	<u>Page</u>
A. INTRODUCTION.....	1
B. STATEMENT OF THE CASE IN REBUTTAL.....	2
C. ARGUMENTS.....	3
1. The Huntingtons Proved Estoppel <i>in Pais</i> By Clear and Convincing Evidence.....	3
a. Proctor's Admissions, Statements, and Acts are Inconsistent With His Claim Afterwards Asserted.....	7
b. Action by the Other Party on the Faith of Such Admission, Statement, or Act.....	12
c. Injury to Such Other Party Resulting From Allowing the First Party to Contradict or Repudiate Such Admission, Statement, or Action.....	13
2. Trial Court Erred By Ruling That The Huntingtons Did Not Have An Easement For Their Driveway.....	14
a. Huntingtons Proved Part Performance of the Parties' Agreement, Requiring Enforcement of Their Agreement.....	15
b. The Huntingtons Acquired an Easement by Estoppel for Their Driveway.....	17
i. Easement by Estoppel Is a Recognized Doctrine in Washington.....	17
ii. Huntingtons Acquired Easement Over Driveway by Estoppel.....	19

c. Proctor's Request for Attorneys' Fees Should
be Denied.21

D. CONCLUSION.....23

TABLE OF AUTHORITIES

	<u>Page</u>
Table of Cases	
<i>Berg v. Ting</i> , 125 Wn.2d 544, 886 P.2d 544 (1995).....	15
<i>Burkey v. Baker</i> , 6 Wn. App. 243, 492 P.2d 563 (1971).....	7
<i>Canterbury Shores Associates v. Lakeshore Properties, Inc.</i> , 18 Wn. App. 825, 572 P.2d 742 (1977).....	18, 19
<i>In Re Disciplinary Proceeding Against Turco</i> , 137 Wn.2d 227, 970 P.2d 731 (1999).....	6
<i>Knudsen v. Patton</i> , 26 Wn. App. 134, 611 P.2d 1354 (1980).....	18
<i>Ormiston v. Boast</i> , 68 Wn.2d 548, 413 P.2d 969 (1966).....	18
<i>Thomas v. Harlan</i> , 27 Wn.2d 512, 178 P.2d 965 (1947).....	4, 7
<i>Tiffany Family Trust v. City of Kent</i> , 155 Wn.2d 225, 119 P.3d 325 (2005) <i>citing</i> <i>Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.</i> , 107 Wn.2d 427, 730 P.2d 653 (1986) (<i>quoting</i> <i>Boyles v. Dep't of Ret. Sys.</i> , 105 Wn.2d 499, 716 P.2d 869 (1980).....	22

OTHER AUTHORITIES

17 William B. Stoebuck and John W. Weaver, <i>Washington Practice Series</i> , Real Estate: Property Law § 2.8 (Creation by Estoppel or Part Performance).....	17, 19
---	--------

A. INTRODUCTION.

The Appellant, Noel Proctor, wants the Court to use its equitable powers to force the Huntingtons from their home for what turned out to be an innocent mistake made by both parties. Fortunately, the Court has broad equitable powers to prevent such an unjust result.

After taking careful steps to verify their boundaries, including checking with Proctor, the Respondents, Ford and Christina Huntington, built their home on what everyone believed was their property. Proctor should now be estopped from seeking to change his position.

The trial court found that the Huntingtons had proven the elements of estoppel *in pais*. It erred, however, when it found that the evidence showing Proctor's knowledge of the 16th pin did not rise to clear and convincing evidence. The trial court's conclusion of law does not match its findings of fact and ignores the overwhelming evidence presented in this case.

The trial court also erred when it found that Proctor did not intend for the Huntingtons to have a permanent driveway across his property. While the parties may have never used the word "easement" in their discussions, the facts make it clear that they intended for the Huntingtons to have a permanent right of way. Permitting Proctor to have the

unfettered power to terminate this right of way would be unjust.

B. STATEMENT OF THE CASE IN REBUTTAL.

Proctor's Response to the Huntingtons' Statement of the Case more resembles argument than a "fair statement of the facts."¹ The Huntingtons supplement their Statement of the Case as follows:

1. The surveyor for the parties' properties, Dennis Peoples, did not have accurate dates for when he placed the survey markers. RP 525. The trial court, without any support in the testimony, found that the 16th pin was set on May 23, 1995.² CP 225. However, Mr. Peoples testified that he set the 16th pin three years before he set the Huntingtons' northwest corner pin (the pin marking their true boundary). RP 500, 564. Mr. Peoples also admitted that he must have set the pin before his surveyor's certificate expired in 1994.³ This means that the 16th pin was the only pin that had been set when: 1) Proctor and the Huntingtons purchased their respective properties; 2) the Huntingtons built their road;

¹ RAP 10.3(a)(4). The Statement of the Case must be a "fair statement of the facts and procedures relevant to the issues presented for review, without argument." (Emphasis added). The Court should disregard Proctor's improper arguments in his Statement of the Case.

² Respondents have challenged this finding in their First Assignment of Error.

³ Although Mr. Peoples offered inconsistent testimony as to when the 16th pin was set, he finally reached the conclusion that it must have been before May 5, 1994 because, as shown on Ex. 88, his certificate was set to expire on that date. RP 563, 677.

and 3) the Huntingtons chose their building site.

2. Mr. Huntington did not see the need for a formal survey of his property because he confirmed his northwest corner with the very person who had surveyed the properties for the developer, Mr. Peoples. RP 212. Mr. Peoples walked Mr. Huntington to the 16th pin and unequivocally stated that it marked his northwest corner. RP 75; 212, 858. The survey pin was still marked with the same metal t-post that Mr. Peoples had previously set. RP 77.

3. Proctor did not have his property surveyed before building his house, despite testifying that he did not know where his northeast corner was located. RP 837-38. Proctor also testified that he did not believe the Huntingtons were reckless in not surveying their property before they built their house. RP 837-38.

C. ARGUMENTS.

1. The Huntingtons Proved Estoppel in Pais By Clear and Convincing Evidence.

Courts should encourage the steps that the Huntingtons took in this case to verify their understanding of the boundary lines with their neighbors before beginning construction. It would be unjust to permit Mr. Proctor to now, eight years later, change his position and deny that the 16th pin marks the parties' common boundary.

In *Thomas v. Harlan*, the Court stated the elements of the estoppel *in pais* doctrine as follows: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.” 27 Wn.2d 512, 518, 178 P.2d 965 (1947).

The factual findings found by the trial court show that the Huntingtons proved estoppel *in pais* by clear and convincing evidence and not just by a preponderance of the evidence. CP 228. The trial court explained its conclusion in its oral ruling stating that the Huntingtons did not prove estoppel *in pais* by clear and convincing evidence because they did not prove that Proctor saw the 16th pin by clear and convincing evidence.⁴ RP 932.

In trying to explain his ruling, the trial court stated as follows:

However, since the taking of a person's property without compensation – and if I find estoppel *in pais* I would have to grant the property to the Huntingtons without any

⁴ Proctor spends two pages in his Response Brief arguing that the Huntingtons “invited” the trial court’s error in not explaining this aspect of the court’s ruling. Br. of App., pp. 18-19. In fact, Proctor’s counsel clarified this portion of the trial court’s ruling, making it unnecessary for the Huntingtons to question the trial court on this issue.

compensation, and that requires evidence by clear and convincing evidence. CP 925.

The trial judge voiced concern that if he found in favor of the Huntingtons on their claim for estoppel *in pais* that Proctor would be deprived property without just compensation. This is not an appropriate basis for a court to determine whether the Huntingtons have satisfied their burden of proof.

In this case, the parties mutually believed, and acted as though, the 16th pin was their mutual boundary. CP 228. There is substantial evidence to support the trial court's conclusion of law that the Huntingtons relied upon Proctor's shared but mistaken belief that their proposed building location was well within their boundaries. CP 227-28.

The original surveyor and the common grantor had indicated that the 16th pin marked the property corner. CP 228. While the Huntingtons had completed some initial work to clear out the brush for their proposed homesite, they did not decide to move forward with their plans until after they had obtained Proctor's consensus that the 16th pin marked their common boundary. *Id.*

Proctor concedes that the Huntingtons have satisfied the third element. Comb. Br. of App., 20-24. The issue then is whether there is sufficient evidence to prove by clear and convincing evidence that Proctor

saw the 16th pin, was aware of its exact location, and acknowledged that it marked his northeast corner through his statements and actions. In his oral ruling, the trial court stated:

I did find there was evidence that [Proctor] saw the 16th pin, but again I found that by a preponderance. I couldn't find it by proof of clear and convincing evidence. That's why I didn't base my opinion on the estoppel argument. CP 931-32.

The burden for proving estoppel is clear and convincing, or, put another way, evidence sufficient to convince the trier of fact "that the fact in issue is 'highly probable.'" *In re Disciplinary Proceeding Against Turco*, 137 Wn.2d 227, 255, 970 P.2d 731 (1999). The trial court appeared to be applying a reasonable doubt standard in his ruling. CP 925-26 (That's evidence that's almost to the level of proof beyond a reasonable doubt but not quite, but it's very, very high level of finding."). The trial court erred in not finding that the Huntingtons proved estoppel by clear and convincing evidence because there is overwhelming evidence of Proctor's actions in reliance on the 16th pin as the parties' boundary. The trial court placed too much weight on Proctor's denials and ignored the old adage that "actions speak louder than words."

///

///

a. Proctor's Admissions, Statements, and Acts are Inconsistent With His Claim Afterwards Asserted.

In *Thomas v. Harlan*, the Court said that representation as to the location of the boundary may be in the form of “acts” and not in spoken or written form. 27 Wn.2d 512, 518, 178 P.2d 965 (1947). Moreover, the person charged with the “acts” need not know the true location of the boundary line. *Burkey v. Baker*, 6 Wn. App. 243, 492 P.2d 563 (1971).

Proctor, after first stating that the trial court’s findings are amply supported by the record, attacks those very findings by arguing that he did not know about the 16th pin and therefore could not have made any representations as to whether it marked the boundary line. Proctor’s position is difficult to reconcile. The Huntingtons assert that the findings are supported by the record and further support the Huntingtons’ claim of estoppel *in pais* by clear and convincing evidence.

The trial court found that Proctor, as well as the Huntingtons, “believed that the 16th pin was the northwest corner of the Huntingtons’ property.” RP 924. The trial court found that Mr. Huntington and Proctor met at the 16th pin before the Huntingtons built their home for the purpose of confirming the 16th pin as their boundary. CP 226. Proctor did not dispute that the 16th pin marked the parties’ boundary line. CP 227. In

reliance on Proctor's actions, the Huntingtons built their home on what turned out to be Proctor's land. CP 227; RP 781, 788, 818-19.

Even if this Court were to ignore Mr. Huntington's direct testimony about the meeting he and Mr. Proctor had at the pin, there is overwhelming direct and circumstantial evidence to show that Proctor acted as though the 16th pin marked his northeast corner.

First, Proctor testified that he did not know the actual location of his northeast corner, although he admits he did walk the property with the developer before purchasing the property. RP 834, 838. Proctor apparently wanted the court to believe that he built his house and driveway, logged trees, installed a logging/sawmill area, and gave permission for someone else to use a portion of his property without first attempting to learn where his northeast corner was located.

Second, Proctor testified that he walked the property in 1995 and noticed the Huntingtons camping on what he later claimed as his property. RP 607, 818. Proctor was aware that the Huntingtons were treating this property as their own and did nothing to question their use. RP 607, 609.

Third, Proctor testified in his deposition that he spoke with Mr. Peoples (the surveyor) before purchasing his property. RP 839. However, Proctor changed his testimony at trial and stated that he did not

actually speak to Mr. Peoples but that he probably spoke with the developer who then spoke with Mr. Peoples. RP 840. Regardless of who he spoke with, Proctor satisfied himself with respect to the boundaries of his property because he purchased the property and never saw the need to have the property surveyed.

Fourth, Proctor visited the Huntingtons' homesite well before any construction on the house occurred and never said a word about them building on what he now claims as his own property. RP 785-86, 818-19.

Fifth, Proctor testified that he believed the Huntingtons had built their home and driveway on their property. RP 788. This admission suggests that he must have had some idea of the 16th pin or at least where the Huntingtons believed the pin was located because why else would he believe that they had built on their property?

Sixth, and perhaps most compelling, is Proctor's admission that he and Mr. Huntington agreed on how the trees that were to be harvested for the construction of the driveway would be distributed once they were harvested.⁵ The road builder gave all of the trees harvested west of the 16th pin to Proctor and all of the trees east of the 16th pin to the

⁵ Proctor testified "I did ask 'em [sic] to save the timber that was on my land." RP 781. Mr. Oglesby stacked the trees on Proctor's land, right above the fork in the road where Proctor's and Huntingtons' driveway split. *Id.*

Huntingtons. RP 284, 781, 787. At no time did Proctor lay claim to any trees cut east of the 16th pin. *Id.* How could Proctor agree to such a distribution unless he knew the location of his boundary line? The truth is that Mr. Proctor was aware of the 16th pin (it was marked with a t-post) and used that marker to determine which logs he was entitled to keep.

Seventh, and perhaps equally revealing of Proctor's knowledge of the 16th pin, was his decision to install his sawmill and landing just west of the pin in 2001/2002. RP 318-19, 327.

Eighth, Proctor made affirmative representations to the Building Department that the Huntingtons' home and driveway were not located on his property. RP 837, Ex. 76. Around January of 2004, Proctor applied for a building permit for his barn. RP 835-6, Ex. 76. Proctor was first required to submit a drawing to the Building Department indicating the approximate location of his house, driveway, and other structures.

RP 837. Exhibit 76 was prepared by Proctor with reference to the 16th pin marking his northeast corner/shared boundary with the Huntingtons. This exhibit clearly reflects that Proctor believed that the 16th pin marked his boundary. How would he have known that unless someone had shown him this survey marker?

Ninth, Proctor offered inconsistent testimony in his deposition and at trial regarding his knowledge of the 16th pin. At trial, Proctor admitted seeing multiple pins and multiple flags on the 30-acre piece when he walked it with the developer in 1994-1995. RP 834. Proctor was asked, “[a]nd Mr. Moss [the developer] did point out where he thought the property lines were?” *Id.* Proctor responded, “[w]ell, we looked at, you know, that hillside [referring to the northeast corner of the 30 acres, next to the 16th pin] that afternoon....” *Id.*

Based on Proctor’s representations, the Huntingtons built their home and made permanent improvements to the property that Proctor now claims as his own. Proctor’s denial that he met Mr. Huntington at the pin, or that he did not know of its existence, does not mean that the Huntingtons failed to prove their case by clear and convincing evidence.

The trial court’s application of the clear and convincing standard creates too high of a burden and reflects more on the court’s desire to avoid a “takings” than a proper consideration of the evidence presented at trial. The trial court’s reliance on a direct statement from Proctor as to whether he saw the 16th pin is an articulation of a reasonable doubt standard rather than a “high probability” that Proctor was aware of the 16th pin and treated it as his boundary. As set forth above, the

circumstantial evidence supports Mr. Huntington's account of the discussions he had with Proctor before the house was built. Proctor knew of the pin and, just like the Huntingtons, truly believed that it marked the common boundary. He cannot claim otherwise to avoid what he views to be an unfavorable result.

b. Action by the Other Party on the Faith of Such Admission, Statement, or Act.

Proctor next argues that the Huntingtons failed to prove estoppel *in pais* because they had already decided, before they met with Proctor, the location of their common boundary. Proctor appears to attack the trial court's ruling that the Huntingtons' relied on Proctor's acts and conduct.

In its ruling, the trial court stated:

Proctor's actions of recognizing the 16th pin as the boundary led [the Huntingtons] to believe that the building was on their land. They had camped on the disputed property with the full knowledge of Mr. Proctor. They had known that Mr. Proctor was aware of where there [sic] house would be located and Mr. Proctor never indicated that they may be trespassing. Relying on Proctor's acquiescence they built their house. CP 925.

Proctor argues that he took no affirmative action that could have led the Huntingtons to believe that the 16th pin marked their common boundary. Comb. Br. of App. at 23. Proctor's argument ignores the

obvious facts. Proctor knew the Huntingtons were camping on what he would later claim as his property (Proctor's own testimony); he met Mr. Huntington at the 16th pin and offered no protest as to it marking the parties' common boundary (Mr. Huntington's testimony); he knew the exact location of the Huntingtons' future homesite (Proctor's testimony); and, he only claimed those trees located west of the 16th pin (Proctor's testimony). These facts overwhelmingly support the Huntingtons' claim of estoppel *in pais* by clear and convincing evidence.

Moreover, this is not, as Proctor suggests, a case where the Huntingtons threw caution to the wind and went about building their home without doing their homework. Both the developer and surveyor physically showed Mr. Huntington the corners of his property, including the post at what is now known as the 16th pin. The Huntingtons further verified their understanding of the boundary line with Proctor before making their final decision on where to build their home.

c. Injury to Such Other Party Resulting From
Allowing the First Party to Contradict or Repudiate
Such Admission, Statement, or Action.

Proctor fails to address this final element of estoppel, apparently conceding that the Huntingtons have satisfied this element by clear and convincing evidence. Suffice it to say that the Huntingtons spent

considerable amount of time and money to build their dream home on property that everyone believed belonged to them.

2. **Trial Court Erred By Ruling That The Huntingtons Did Not Have An Easement For Their Driveway.**

Simply stated, one cannot promise to allow another to build a “permanent driveway” and then sit back and watch them spend substantial time and money to construct the driveway, and, once the road is complete, claim that the person’s right to use the driveway was only temporary. Proctor will be unjustly enriched if he is allowed to deny that a permanent easement exists because he will acquire a very well constructed road built by the Huntingtons for their permanent use.

The trial court found that the Huntingtons asked Proctor for permission to construct a driveway across his property and that the parties understood that this driveway would provide a better and cheaper route than a road built across the Huntingtons’ property. CP 226. The court also found that the Huntingtons had to agree to construct a gate and to assist in maintaining the main road. *Id.* Despite these findings, the court concluded that Proctor merely granted the Huntingtons a license to use the road that they had built. CP 228. The court’s findings of fact do not support its conclusion of law.

a. Huntingtons Proved Part Performance of the Parties' Agreement, Requiring Enforcement of Their Agreement.

A court examines three factors to determine if there has been part performance of the agreement so as to take it out of the statute of frauds: “(1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract.” *Berg*, 125 Wn.2d 544, 556, 886 P.2d 544 (1995). All three of the factors are not required to be present for a Court to find part performance.⁶ *Id.* at 557-59.⁷

Proctor spends little time addressing the facts to support the trial court's erroneous conclusion that the Huntingtons only acquired a license. Contrast this to the Huntingtons' citations to the record. The evidence shows that Proctor granted to the Huntingtons the right to build their “permanent driveway” across his property to access Summit View Road. RP 205-06. In consideration of being allowed to build their driveway

⁶ In addition, “the party relying on the part performance doctrine must prove by clear and unequivocal evidence the existence and all the terms of the contract. However, that proof is in addition to establishing that there has been part performance.” *Berg*, 125 Wn.2d at 561.

⁷ Proctor argues that this Court may not rely on *Berg* because that court “did not reach the part performance issue...” Comb. Br. of App. at 27, n. 5. Proctor must not have reviewed the opinion or has confused part performance with specific performance. The *Berg* court squarely addressed the doctrine of part performance. 125 Wn.2d at 571.

across his property, Proctor required the Huntingtons to put up a gate, maintain the road, help maintain the common road, and to clear the brush in and around their driveway. *Id.*, CP 226. Proctor also made repeated promises that he would sign an easement, until the current dispute arose. RP 209-10. In reliance upon Proctor's promise, the Huntingtons' constructed and have maintained their driveway. CP 226. They completed their obligations under the agreement and are therefore entitled to a permanent easement to enjoy their driveway.

Finally, Proctor argues that the agreement is void because it does not contain specific terms, such as duration of use. Comb. Br. of App. at 28. The oral agreement does not contain any limits on the length of time that the private driveway could be used because the parties intended for the Huntingtons to have a permanent right to use the driveway. RP 205. The location of the easement was determined by its actual construction. The only thing left to do was for Proctor to sign an easement incorporating the parties' agreement.

///

///

///

b. The Huntingtons Acquired an Easement by Estoppel for Their Driveway.

i. Easement by Estoppel Is a Recognized Doctrine in Washington.

Proctor argues, for the first time on appeal, that “no Washington case allows for easements by estoppel.” Comb. Br. of App. at 29, 34. He ironically cites to Professor Stoebuck in a footnote to argue that Washington only recognizes three distinct judicial doctrines by which easements may arise by implication. *Id.*

Again, Proctor has not carefully reviewed the authorities cited to this Court. Professor Stoebuck actually states that there are two doctrines in the law of real property where informal conveyances of land may be saved from the statute of frauds: “estoppel” and “part performance.” 17 William B. Stoebuck and John W. Weaver, *Washington Practice Series*, Real Estate: Property Law § 2.8 (Creation by Estoppel or Part Performance).

Stoebuck states the reason behind the estoppel doctrine is that “the transferee has detrimentally relied upon the informal conveyance, so that the transferor is estopped to deny its legal efficacy.” *Id.* Stoebuck states if “courts save the informal transfer of estates in land upon the estoppel or part performance doctrine, it should come as no surprise that they will also

save the informal transfer of easements and profits, which are less substantial interests than estates.” *Id.*

Washington courts have discussed and/or analyzed easements by estoppel in several cases. In *Ormiston v. Boast*, a case cited by Proctor, the Supreme Court recognized the doctrine of easement by estoppel and examined whether the facts supported such a claim. 68 Wn.2d 548, 552, 413 P.2d 969 (1966) (finding that the plaintiff failed to establish an easement by estoppel). See *Knudsen v. Patton*, 26 Wn. App. 134, 142, 611 P.2d 1354 (1980) (expressing surprise that the plaintiff did not allege easement by estoppel as one of its claims for relief). Washington courts clearly recognize the doctrine of easement by estoppel under appropriate circumstances.

In *Canterbury Shores Associates v. Lakeshore Properties, Inc.*, the trial court ordered that the plaintiffs were awarded an easement by estoppel for that portion of their property that encroached on the defendant’s land. 18 Wn. App. 825, 827, 572 P.2d 742 (1977). The Court of Appeals affirmed on different grounds (part performance), but it did not reject the trial court’s application of the easement by estoppel doctrine. *Id.* at 829-30. In fact, the Appellate Court noted that the trial court’s ruling

accomplished the same result as the doctrine of part performance.⁸ *Id.*

Moreover, the Court in *Canterbury* noted that “the circumstances relevant to the construction of the driveway [] were such that, if no legal theory would support the [plaintiff’s] claim, equity should intervene to deny [defendant] what would clearly be an unjust enrichment.” *Id.*

The same is true here, equity should intervene to deny Proctor what would clearly be an unjust enrichment if the Huntingtons were forced to abandon the road. While Proctor now denies knowing of the Huntingtons’ long-term plans with the road, it simply defies logic to believe that they would have expended over \$12,000 on a “temporary” road when they could have built a road over their property. CP 226.

ii. Huntingtons Acquired Easement Over Driveway by Estoppel.

The trial court found that Proctor gave permission to the Huntingtons to build a driveway across his property. CP 226. Proctor knew the Huntingtons would spend a lot of money to build a permanent driveway to connect to Summit View Road (Proctor’s driveway

⁸ Professor Stoebuck states that the doctrines of easements by estoppel and part performance are often confused “because they arise out of essentially the same fact pattern and usually may be used interchangeably.” *Washington Practice Series*, Real Estate: Property Law § 2.8.

connecting to public road) because he had just paid to have his road installed by the same contractor. CP 226, RP 205, 786.

At trial, Proctor attempted to feign ignorance of an easement by testifying that “there was never any long-term discussion of the future of that driveway.” RP 826. Proctor stated that he “formed the impression” that the Huntingtons’ driveway was supposed to be a temporary road. RP 826-27. In his deposition, however, Proctor testified that Mr. Huntington asked to use Proctor’s driveway because he “wanted to save a lot of money so in subsequent conversations, after the Oglesby conversation, he indicated that it would have been a lot of an expense to build a driveway up from below to complete his original driveway.” RP 829. Again, how would the Huntingtons “save a lot of money” by building only a temporary road that they would be forced to abandon if Proctor ever withdrew his permission? Moreover, why would Proctor put conditions on the use of a temporary road?

Proctor explained his position by testifying that he did not give the Huntingtons an easement because he “thought they were acting fishy.” RP 831. However, Proctor did not form this impression until several years after he initially promised to allow them to build their permanent driveway. *Id.*

These acts and admissions prove the elements for estoppel by clear and convincing evidence and the trial court erred in denying the Huntingtons an easement across Proctor's property for their permanent driveway.

c. Proctor's Request for Attorneys' Fees Should be Denied.

Proctor asks this Court to award him all of his attorneys' fees on appeal because he argues that the Huntingtons' cross-appeal, "at least to their claim for an easement by estoppel," is frivolous. Comb. Br. of App. at 32. Proctor states that the Huntingtons brought their cross-claim despite the fact that "Washington does not recognize an easement by estoppel and there is no clear case law supporting their arguments." *Id.* Proctor failed to raise this issue with the trial court and now only raises it for the first time on appeal. Moreover, Proctor ignores Washington case law directly on point despite having cited to the same case that discusses the easement by estoppel doctrine. Proctor also ignores portions of the very same treatise discussing easements by estoppel in Washington that he uses to support his position that Washington does not recognize easements by estoppel.

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and

compensatory damages, Courts are guided by the following considerations: “(1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Tiffany Family Trust v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005) citing *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986) (quoting *Boyles v. Dep't of Ret. Sys.*, 105 Wn.2d 499, 509, 716 P.2d 869 (1980)).

As discussed previously, the Huntingtons' argument for an easement by estoppel is squarely supported by Washington case law and one of the leading scholars on Washington real property law. Proctor's request for sanctions should be denied.

///

///

///

D. CONCLUSION.

The Huntingtons ask the court to overturn the trial judge's denial of their claims for quiet title and declaratory judgment, and award costs to them as the prevailing party.

Dated this 11th day of March 2008.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: 
Phillip J. Haberthur, WSBA #38038
Bradley W. Andersen, WSBA #20640
Attorneys for Respondents

CERTIFICATE OF FILING

I hereby certify that on the 11th day of March 2008 I caused to be filed the original and one copy of the foregoing RESPONDENTS' REPLY BRIEF with the State Court Administrator at this address:

David Ponzoha, Clerk/Administrator
Court of Appeals, Division II
950 Broadway
Suite 300 MS TB-06
Tacoma, WA 98402-4454

by First Class Mail.



Phillip J. Haberthur, WSBA #38038
Bradley W. Andersen, WSBA #20640
Attorneys for Respondents,
Robert "Ford" Huntington and
Christina Huntington

