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COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
2009 JUL 27 PM 4:10

No. 62618-3

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COURT OF APPEALS DIVISION 1  
STATE OF WASHINGTON

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VICTOR H. ROWE,

Appellant,

v.

FREDERICK C. COLLINS and ALICE M. COLLINS, husband and  
wife, individually and as a marital community,

Respondent.

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REPLY BRIEF

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ORIGINAL

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## ARGUMENT

### A. The Issue Of Constructive Notice Was Implicitly Raised By The Pleadings And The Parties' Briefs.

Collins contends that Rowe cannot argue the issue of constructive notice on appeal because it was not raised as a distinct issue at trial.

However, if an issue raised for the first time on appeal is arguably related to issues raised in the trial court, a court may exercise its discretion to consider newly articulated theories for the first time on appeal. Lunsford v. Saberhagen Holdings, Inc., 139 Wash.App. 334, 160 P.3d 1089 (2007).

In Bort v. Parker, 110 Wash.App. 561, 42 P.3d 980 (2002), for instance, a contractor filed a complaint for breach of contract, but raised theories of unjust enrichment and *quantum meruit* for the first time on appeal. The court held that even though the issues were not raised in the trial court, they were fairly implied and so could be considered on appeal.

In this case the parties, in their pleadings and briefs, referred to the fact that the easement in the deed delivered from Collin's predecessor to Collins had been crossed out and initialed, though the deed of record showed the easement. The issue of constructive notice

was implicitly raised by pleading the recorded deeds in the chain of title showing the easement.

B. Rowe Did Not Need To Assign Error To Finding Of Fact 17, Since That Finding Only Referred To Actual Notice.

Collins contends that, because Rowe did not specifically assign error to Finding of Fact Number 17, “Collins does not have knowledge of the easement until the very end of the construction process,” that the issue of Collins' knowledge becomes a verity on appeal.

There are two responses to this. First, the Finding of Fact in question plainly referred only to Collins' actual knowledge, not to their constructive knowledge. The Court's oral ruling on which this Finding of Fact is based first recapitulated all of the evidence relating to Collins' actual knowledge of the easement:

"It appears that the first time the subject came up is when Mr. Rowe had a conversation with Ms. Jane Hovde, one of the daughters of the Collins' . . . A critical question however is when did this conversation take place? Were the Collins on notice before the construction began, after it was completed or sometime during the construction?"

“This Court concludes the conversation took place in late August or early September 2002 . . . so we now have to place the

conversation between Mr. Rowe and Ms. Hovde within the time frame of the construction period and the undisputed testimony is that final grading on the driveway was completed in November 2001, approximately nine to 10 months before this conversation took place.” (RP 7/10/08, pp 8, 9)

If there had been a failure to assign error to the relevant finding, the Appellate Court may excuse a party’s failure to assign error where the briefing makes the nature of the challenge clear and the challenged finding is argued in the text of the brief. Noble v. Lubrin, 114 Wash.App. 812, 60 P.3d 1224 (2003), Alpental Community Club Inc. v. Seattle Gymnastic Society, 121 Wash.App. 491, 86 P.3d 784 (2004). The real question is whether the brief adequately apprised the court and the opposing party of the issues. "Although a party did not specifically assign error to trial court's findings of fact and conclusions of law, it was clear from party's brief what conclusions it contended were error, and thus Court of Appeals could consider whether those conclusions were erroneous." All Star Gas, Inc., of Washington v. Bechard, 100 Wash.App. 732, 998 P.2d 367 (2000).

In any case, even if the Court had made a finding as to constructive notice, it would be not a Finding of Fact, but a Conclusion of Law. The facts as to the recorded easement were

undisputed; the question of what Conclusion of Law should have been drawn from them is an issue of law and reviewed de novo.

C. ER 411 Does Not Bar Evidence of Insurance Where Equity Requires Balancing of Hardships.

Collins, in their brief, correctly state the purpose of ER 411:

"The chief reason for preventing reception of the evidence of insurance is the supposed inclination of jurors to make the insurance company bear the loss because it has been paid to take the risk, it is well able to pay and will spread the loss among its policyholders."

23 Wright Federal Practice & Procedure, § 5362.

They also describe the purpose behind the collateral source rule, which is to prevent the fact finder from inferring the claimant is receiving a windfall and nullify the defendant's responsibility.

These purposes do not apply in this situation, where the court is required to balance the hardships to the parties in determining whether to issue an injunction.

The factors the court considers in balancing the equities include "the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied." Radach v. Gunderson, 39 Wash.App. 392, 695 P.2d 128 (1985).

"Hardship" encompasses financial hardship. While there was no evidence as to the cost of returning the driveway to its condition

*status quo ante*, the fact that that cost might be borne by the title insurer was relevant to considerations of equity.

D. An Encroachment Includes Any Violation Of Another's Property Rights.

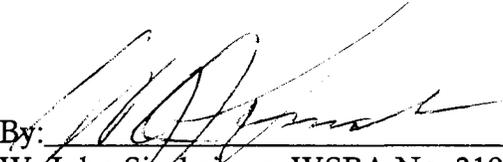
Collins argues that only a physical encroachment is subject to the rule that where there is an encroachment on another's property, five criteria must be met before the Court will deny a mandatory injunction.

This is too narrow an understanding of the term. Black's Law Dictionary defines encroachment as: (1) an infringement of another's rights; or (2) interference with or intrusion on another's property.

In this sense, Collins' change of the driveway grade constituted an encroachment on, and interference with, Rowe's easement.

RESPECTFULLY SUBMITTED this 27th day of July, 2009.

SINSHEIMER & MELTZER, INC., P.S.

By:   
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Attorneys for Appellant

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PROOF OF SERVICE

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ORIGINAL

I, Marci Umatum, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein.

On July 27, 2009 I caused a copy of the following documents to be served on the interested party below:

1. *Appellant's Reply Brief*

Luke M. LaRiviere  
Dean G. von Kallenbach  
Young deNormandie  
1191 2<sup>nd</sup> Ave., Suite 1901  
Seattle, WA 98101

By causing a full, true and correct copy thereof to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last known address for Mr. Grundstein, and deposited with the U.S. Postal Service on the date set forth below;

By causing a true and correct copy thereof to be DELIVERED VIA ABC LEGAL MESSENGER to the party at the address listed above, which is the last-known address for the party, on the date set forth below;

By causing a full, true and correct copy thereof to be FAXED to the party at the facsimile number shown above, which is the last known facsimile number for the party, on the date set forth below.

DATED this 27<sup>th</sup> day of July 2009.



\_\_\_\_\_  
Marci Umatum