IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL COHOON and JANICE PROUST; GARY WILLIAMS and RAELENE WILLIAMS, husband and wife, Respondents, v. JOHN B. CUNY and SHERL OUREN, Appellants.	No. 37987-2-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — After John Cuny threatened to remove landscaping located beside a private paved roadway within a dedicated easement, Michael Cohoon and his wife, Janice Proust, filed a complaint in Clallam County Superior Court for declaratory judgment and a permanent injunction against Cuny and his partner, Sherl Ouren. Cohoon's complaint alleged that the existing roadway was adequate for Cuny's ingress, egress, and utilities and sought to enjoin Cuny from disturbing property outside of the roadway. Cohoon's neighbors, Gary and Raelene Williams, intervened in the action. After a bench trial, the trial court enjoined Cuny from disturbing Cohoon's and the Williamses' property outside the existing roadway and awarded damages. Cuny appeals, asserting that the trial court erred when it found that (1) Clallam County and other property owners were not necessary parties, (2) he had abandoned his easement rights,

(3) the doctrine of equitable estoppel bound him to an agreement to use only the 20-foot-wide roadway, (4) he was limited to "reasonable" use of the roadway, and (5) he had no right to use any area on the Williamses' property outside of the roadway. Because substantial evidence supports the trial court's order enforcing Cuny's agreement to use the 20-foot-wide roadway for his ingress, egress, and utility access, we affirm.

FACTS

Background Facts

This case concerns parallel easements located on each side of a common boundary between two neighboring four-lot short plats that abut Greywolf Road in Clallam County, Washington. Cohoon and Proust own lot three in the Aleinikoff short plat. Cuny owns lot one in the Aleinikoff short plat. The Williamses own lot four in the Rindler short plat. The dedication for each short plat contains a 30-foot-wide easement for ingress, egress, and utilities. The dedicated easements are parallel with each other and run adjacent to the common boundary of the two short plats. The short plats' common boundary runs perpendicular to Greywolf Road.

In 1998, several of the property owners in the Aleinikoff and Rindler short plats agreed to build a single driveway to serve both short plats and to provide access from Greywolf Road. Owners of six of the eight lots comprising the Aleinikoff and Rindler short plats were parties to the agreement, including John Payne, the previous owner of Cohoon's lot, and John Stazel, the previous owner of the Williamses' lot.[1] Cuny proposed building a 20-foot-wide paved access road along the common boundary of what is now Cohoon's and the Williamses' lots. The

[1] The proposed roadway agreement would not have burdened or benefitted the two remaining lots.

property owners completed paving of the roadway in the summer of 2000.

Cohoon purchased his property sometime in 2005 or 2006. When Cohoon purchased his property, there was a landscaped area within the 30-foot-wide easement shown on the plat. On April 6, 2006, Cohoon received a letter from Cuny claiming that Cohoon's landscaping and motor home obstructed Cuny's easement. On July 12, 2006, Cohoon received a letter from Cuny's attorney claiming that Cohoon's landscaping, light post, and parked motor home obstructed his use of the easement. The July 12, 2006 letter also claimed that grass clippings were in the easement area or close to the easement area. Cohoon testified at trial that he never parked his motor home on the paved roadway and that the grass clippings were in the easement but not on the paved roadway. In an attempt to appease Cuny, Cohoon removed a light post and moved back some stones that were originally in the southeast corner of his property.

The Williamses purchased their property in December of 2005. The Williamses met Cuny for the first time on July 14, 2006. At this initial meeting, Cuny immediately began discussing the easement on Cohoon's property and indicated that he did not want to involve the Williamses in the dispute. Later, after learning that Cuny was threatening to remove Cohoon's landscaping to expand the driveway on Cohoon's property, Gary Williams told Cuny that if Cuny extended the driveway, he would deny him permission to drive on his side of the driveway. Soon thereafter, Cuny and his partner began driving their vehicles off the 20-foot-wide roadway and on the grass strip and landscaped areas on Cohoon's property. After they saw Cuny and his partner damaging Cohoon's landscaping, the Williamses had their attorney send a letter to Cuny stating that he had permission to use the full driveway.

Procedural Facts

On May 15, 2007, Cohoon filed a complaint for declaratory judgment and permanent injunction requesting that the trial court declare the existing roadway adequate for Cuny's ingress and egress and that the trial court enjoin Cuny from disturbing the land adjacent to the existing roadway. Cohoon also sought a temporary order restraining Cuny from disturbing property outside of the existing roadway. Cuny answered the complaint on May 31, 2007, and asserted as an affirmative defense Cohoon's failure to join indispensable parties, specifically Clallam County and the remaining property owners in the Aleinikoff and Rindler short plats. Cuny also asserted a counterclaim for damages and sought to quiet title to the 30-foot-wide easement. On June 1, 2007, the trial court granted Cohoon's application for a preliminary injunction against Cuny.

On August 22, 2007, the Williamses moved to intervene. The trial court granted the Williamses' motion to intervene on September 11, 2007.

A bench trial began on March 10, 2008. On the first day of trial, Cuny moved to dismiss the case based on Cohoon's failure to name all necessary parties. The trial court denied Cuny's motion and proceeded to trial.

At trial, Cuny testified that the existing roadway did not allow emergency vehicles to access his property. Cuny stated that a fire district official told him that the roadway did not provide adequate emergency vehicle access. Roger Moeder, the Assistant Fire Chief/Fire Marshall for Clallam County Fire District No. 3, rebutted Cuny's testimony. Moeder testified about a conversation he had with Cuny:

> Q And what was your purpose of meeting Mr. Cuny at his residence?
> A I had [sic] questioned by the County Fire Marshall, Leon Smith, about the access to the residence and I went out there and took a look as far as Fire District access for in event of emergencies and, you know, I talked with them about it.
> Q You talked to Mr. Cuny about it?

A Yes, and his wife.
Q Did you tell Mr. Cuny that in your opinion there would be a problem for emergency vehicles to reach his property given the current configuration of the access?
A None whatsoever and I wish that all of our residences in our Fire District had that good of access.
Q And then does that include, Sir, the access off of Greywolf Road that I'm indicating you described?
A Yes, it does.
Q And does that include the access from this drive along this surface of Mr. Cuny's property?
A Yes, it does.

Report of Proceedings (Mar. 12, 2008) at 23-24.

The trial court issued its memorandum opinion in favor of Cohoon and the Williamses on March 26, 2008. The trial court issued its findings of fact and conclusions of law on June 13, 2008. The trial court ordered Cuny to use only the existing roadway for ingress, egress, and utilities, enjoined Cuny from disturbing Cohoon's and the Williamses' properties, and awarded damages to both Cohoon and the Williamses.

On June 23, 2008, Cuny filed a motion for reconsideration of the trial court order, which the trial court denied on June 30, 2008. Cuny timely appeals.

ANALYSIS

Standard of Review

We review a trial court's findings of fact for substantial supporting evidence in the record and, if the evidence supports the findings, whether those findings support the trial court's conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Substantial evidence is evidence sufficient to persuade a rational fair-minded person that the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d

369 (2003). We review conclusions of law de novo. *Sunnyside Valley*, 149 Wn.2d at 880.

Necessary Parties

Cuny first contends that the trial court erred in finding that Clallam County was not a necessary party because the trial court could not amend the easements without following the county short platting procedure. But Cuny's contention lacks merit because the trial court order did no more than enforce Cuny's agreement establishing a single 20-foot-wide access road to serve both plats; it did not amend the easements.

Under CR 19(a), a trial court must determine which parties are "necessary" for a just adjudication. A party is necessary if that party's absence "would prevent the trial court from affording complete relief to existing parties to the action or if the party's absence would either impair that party's interest or subject any existing party to inconsistent or multiple liability." *Coastal Bldg. Corp. v. City of Seattle*, 65 Wn. App. 1, 5, 828 P.2d 7, *review denied*, 119 Wn.2d 1024 (1992). If a necessary party is absent, the trial court must determine whether joinder is feasible. CR 19(a). If a necessary party cannot be joined, the trial court must decide whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." CR 19(b).

Cuny relies on *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 145 P.3d 411 (2006), *review denied*, 161 Wn.2d 1012 (2007), to support his contention that the trial court erred in finding Clallam County was not an indispensable party. In *M.K.K.I.*, property owners executed a quitclaim deed to themselves in an attempt to extinguish an easement. 135 Wn. App. at 651. Division Three of this court held that the quitclaim deeds were void because the easements in the short plat could be amended only by following the county code. *M.K.K.I.*, 135 Wn. App. at 658-60. The *M.K.K.I.* court also determined that Yakima County was a proper plaintiff because,

under RCW 58.17.010, the county shared the state's interest in "'regulat[ing] the subdivision of land and . . . promot[ing] the public health, safety and general welfare.'" 135 Wn. App. at 661 (quoting RCW 58.17.010).

Cuny asserts that *M.K.K.I* implies that a county is a necessary party to an action that seeks to amend an easement in a short plat. But here, unlike in *M.K.K.I*., Clallam County was not an indispensible party because Cohoon and the Williamses did not seek to amend the easement. Instead, they sought an order declaring the respective rights of the parties as to the existing easement and sought to enforce the parties' agreement to use the paved roadway for ingress, egress, and utilities.

In finding that Clallam County was not an indispensable party, the trial court noted:

> The flaw in the Defendant's argument is that the Plaintiffs' claim does not seek to amend the short plats, either directly or indirectly. The Plaintiffs are seeking to enforce an agreement allegedly made between the parties and their predecessors that designed, located and constructed a private roadway for ingress, egress and utilities.

Clerk's Papers (CP) at 26.

The trial court's order did not amend the easement and did not extinguish Cuny's easement rights over the unpaved portion of the easement. Rather, the trial court enforced Cuny's voluntary agreement to the location of the roadway and found that the existing roadway provided Cuny with adequate access to serve his easement rights. Because Clallam County does not have an interest in these private landowners' agreement as to the location of a roadway within the dedicated easement, the trial court could provide Cohoon and the Williamses with their requested relief without impairing the county's interest. *Coastal Bldg.*, 65 Wn. App. at 5. Accordingly, the trial court did not err in finding that Clallam County was not an indispensible

party.[2]

Abandonment of the Platted Easement

Next, Cuny argues that the evidence did not support a finding that he abandoned the platted easement. But the trial court agreed with Cuny that he had not abandoned this easement. The trial court stated in its memorandum opinion:

> This is not a case of abandonment or unilateral nonuse but one of agreement between owners within adjoining short plats who reasonably and logically agreed to the design and location of the roadway within their adjoining plats. The Court, however, is not convinced from the evidence that the Defendant intended to totally abandon his rights to the platted easement. As stated in *Heg v. Alldredge*, 157 Wn.2d 154, 161[, 137 P.3d 9] (2006),
>
> > "Acts evidencing abandonment of an easement must be unequivocal and decisive and inconsistent with the continued existence of the easement."
>
> While the Defendant has agreed to the access in question, there may come a time when adherence to the agreement is no longer a reasonable possibility. The Defendant has not abandoned that possibility.

CP at 28-29.

Equitable Estoppel

Next, Cuny asserts that the trial court erred by applying the doctrine of equitable estoppel to bind him to an agreement to use the 20-foot-wide paved roadway for ingress, egress, and utilities. We disagree.

Because easements are interests in land, they must be conveyed by a deed complying with the statute of frauds. RCW 64.04.010; *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). But an instrument may be taken out of operation of the statute of frauds through the doctrine of

[2] Cuny also assigns error to the trial court's determination that the remaining property owners were not necessary parties to this litigation. But Cuny does not support this claimed error with any argument or citations to legal authority. And contentions unsupported by argument or citation of authority will not be considered on appeal. RAP 10.3(a)(6).

equitable estoppel. *Tiegs v. Watts*, 135 Wn.2d 1, 15-16, 954 P.2d 877 (1998). The doctrine of equitable estoppel is based on the principle that "'a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.'" *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (quoting *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975)).

Equitable estoppel requires the claimant to prove (1) a party's admission, statement, or act inconsistent with its later claim; (2) 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*, 122 Wn.2d at 743. 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) (quoting *Sorenson v. Pyeatt*, 158 Wn.2d 523, 539, 146 P.3d 1172 (2006)), *review granted*, 165 Wn.2d 1041 (2009).

Here, the trial court found that Cuny "agreed on the location of the combined access route from Greywolf Road," and that Cohoon and the Williamses "installed landscaping and made other improvements to their property in reliance to [Cuny's] action in agreeing to location of the driveways." CP at 20. Based on these findings, the trial court concluded:

> The evidence clearly, cogently and convincingly proved that [Cuny's] present claims were inconsistent with [his] earlier acts and statements regarding the design, location and construction of the driveways and locations of utilities within the plats. [Cohoon, the Williamses], and their predecessors, relied on [Cuny's] acts and statements. [Cohoon and the Williamses] would be injured if [Cuny was] allowed to contradict or repudiate [his] prior acts and statements. Contradiction or repudiation may only be allowed upon prior proof of reasonable necessity to the Court by [Cuny].

CP at 22.

Substantial evidence supports the trial court's findings. Here, Cohoon and the Williamses presented a map, which Cuny had proposed and had drafted, that showed his proposal for a common roadway. The map shows a 20-foot-wide roadway along the common border of the two plats. Trial testimony established that Cuny was one of the prime proponents of the roadway agreement. Cuny testified that the property owners agreed to a 20-foot-wide roadway to provide access from Greywolf Road. The evidence at trial also showed that Cohoon and the Williamses, or their predecessors, installed landscaping after construction of the agreed-upon roadway and that allowing Cuny to repudiate the agreement would result in damage to the landscaping. Cohoon and the Williamses met their burden to prove equitable estoppel and the trial court properly found that Cuny is bound to his agreement to use the existing 20-foot-wide paved driveway for his ingress, egress, and utilities.

Necessity

Next, Cuny appears to argue that the trial court erred by limiting him to a "reasonable" use of his easement over Cohoon's and the Williamses' properties. We disagree.

In *Thompson v. Smith*, 59 Wn.2d 397, 367 P.2d 798 (1962), our Supreme Court recognized that, in the context of an easement dispute, the respective rights of the owners of the servient estate and the dominant estate are not absolute and that their respective rights "must be construed to permit a due and reasonable enjoyment of both interests so long as that is possible." 59 Wn.2d at 408-09. The *Thompson* court stated:

> Mere nonuse, 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 reserved purpose

> during the period of nonuse. 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.
>
> 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.

59 Wn.2d at 407-08 (citations omitted).

Although the *Thompson* court did not expressly hold that an easement owner's rights are limited to reasonable use of his easement, inherent in our Supreme Court's recognition that courts must construe an easement holder's and servient property owner's respective rights to permit due and reasonable enjoyment of both interests is a limitation on the easement holder's right to use his easement in a reasonable manner. Without this limitation, a servient property owner could not enforce her right to use her property "for any purpose that does not interfere with the proper enjoyment of the easement." *Thompson*, 59 Wn.2d at 407-08. Accordingly, it follows that an easement holder is limited to reasonable use of his easement.

Substantial evidence supports the trial court's finding that Cuny's proposed use of the easement was unnecessary and unreasonable. Here, several property owners in the Aleinikoff and Rindler short plats testified that the existing 20-foot-wide roadway provided adequate access to serve the easement's purpose. Although Cuny testified that he needed to extend the roadway to provide for emergency vehicle access, Moeder, a Clallam County Assistant Fire Chief/Fire Marshal, refuted his testimony when he testified that the roadway was adequate for use by emergency vehicles. Credibility determinations such as these are for the finder of fact and are not subject to our review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Cuny's Easement Rights Over the Williamses' Property

Last, Cuny asserts that the trial court erred when it found that Cuny had no easement rights over the Williamses' property. Cuny argues that Clallam County Ordinance 292 was in effect at the time the adjacent short plats were filed and that Ordinance 292 required a 60-foot wide road. The Williamses counter that the Aleinikoff and Rindler short plats were filed separately with Clallam County and, thus, the 30-foot-wide dedicated easements were intended only to serve the lots in each respective short plat.

The interpretation of an easement is a mixed question of law and fact. *Sunnyside Valley*, 149 Wn.2d at 880. What the original parties intended is a question of fact and the legal consequence of that intent is a question of law. *Sunnyside Valley*, 149 Wn.2d at 880. We review a trial court's findings of fact under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). We review questions of law and conclusions of law de novo. *Sunnywide Valley*, 149 Wn.2d at 880 (citing *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979)).

The intent of the original parties to an easement is determined from the instrument as a whole. *Sunnyside Valley*, 149 Wn.2d at 880. If the plain language of the instrument is unambiguous, we will not consider extrinsic evidence. *Sunnyside Valley*, 149 Wn.2d at 880 (citing *City of Seattle v. Nazarenus*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962)). If an ambiguity exists, we may review extrinsic evidence to show the intention 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. *Sunnyside Valley*, 149 Wn.2d at 880 (citing *Nazarenus*, 60 Wn.2d at 665).

Here the trial court found that "[Cuny had] no easement rights in the Rindler short plat, and [had] no right to expand the existing paved surface further into any portion of the Rindler short plat." CP at 21. The trial court concluded, "[Cuny had] no easement rights across any portion of the Rindler short plat, including any portion of [the Williamses'] property, except for the existing roadway that was the subject of the parties' mutual agreement." CP at 23. Substantial evidence supports the trial court's finding that the party creating the easement intended only a 30-foot-wide easement for the benefit of lot owners in the Rindler short plat.

The Rindler short plat map depicts a 30-foot-wide easement running along the western boundary of lot four, the Williamses' lot. The Rindler short plat further states, "[the] owner of the land hereby platted, hereby declare[s] this short subdivision and grant[s] to lot owners the non-exclusive right to use easements as platted as a means of ingress, egress and utilities." Ex. 6. The Rindler short plat does not reference the neighboring Aleinikoff short plat and the Rindler short plat map only depicts the four lots within the Rindler short plat. The Aleinikoff short plat similarly does not reference the Rindler short plat.

Cuny appears to concede that the language of the short plats do not provide for a shared 60-foot-wide right-of-way for the benefit of lot owners in both short plats. But he asserts that the trial court erred in not finding that a 60-foot-wide right-of-way existed for the benefit of lot owners in both short plats because the Clallam County ordinance in effect at the time both plats were filed required a 60-foot-wide right-of-way. But even if we were to accept Cuny's assertion that the county required a 60-foot-wide right-of-way, the Rindler short plat unambiguously created a 30-foot-wide right-of-way for the benefit of the Rindler short plat lot owners only and makes no reference to lot owners in the neighboring Aleinikoff short plat. And we need not

examine extrinsic evidence of the parties' intent in determining the scope of the Rindler short plat easement. *Sunnyside Valley*, 149 Wn.2d at 880. Accordingly, we affirm the trial court's

order enforcing the agreement Cuny initially proposed and limiting his (Cuny's) unwarranted expanded use of the easement absent further court order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

VAN DEREN, C.J.