IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RANDALL INGOLD TRUST, by and through its trustee, BANK OF AMERICA, N.A., Respondent, v. STEPHANIE L. ARMOUR,[†] DOES 1-5, Appellant.	No. 41115-6-II UNPUBLISHED OPINION

Johanson, J. — Stephanie Adams appeals the grant of partial[1] summary judgment in favor of the Randall Ingold Trust. The trial court granted summary judgment on Ingold's claim to quiet title in the easement and ejectment of Adams's fence. Adams appeals, arguing that issues of material fact exist. We affirm in part and reverse in part. We affirm the trial court's (1)

[†] Stephanie L. Armour is now known as Stephanie L. Adams. We refer to her as Adams throughout this opinion.

[1] After entry of the partial summary judgment, the parties stipulated to the dismissal of Ingold Trust's remaining claims, without prejudice. Although entitled "Partial Summary Judgment," the order constituted a final judgment. Clerk's Papers (CP) at 198 n.1.

acknowledgment of a perpetual, nonexclusive easement, in favor of the Ingolds; (2) determination that Ingold has not expanded or overburdened the easement; and (3) determination that Adams's fence unreasonably interferes with Ingold's easement. But we reverse the trial court's order ejecting Adams's entire fence because that determination was not ripe for judicial determination.

FACTS

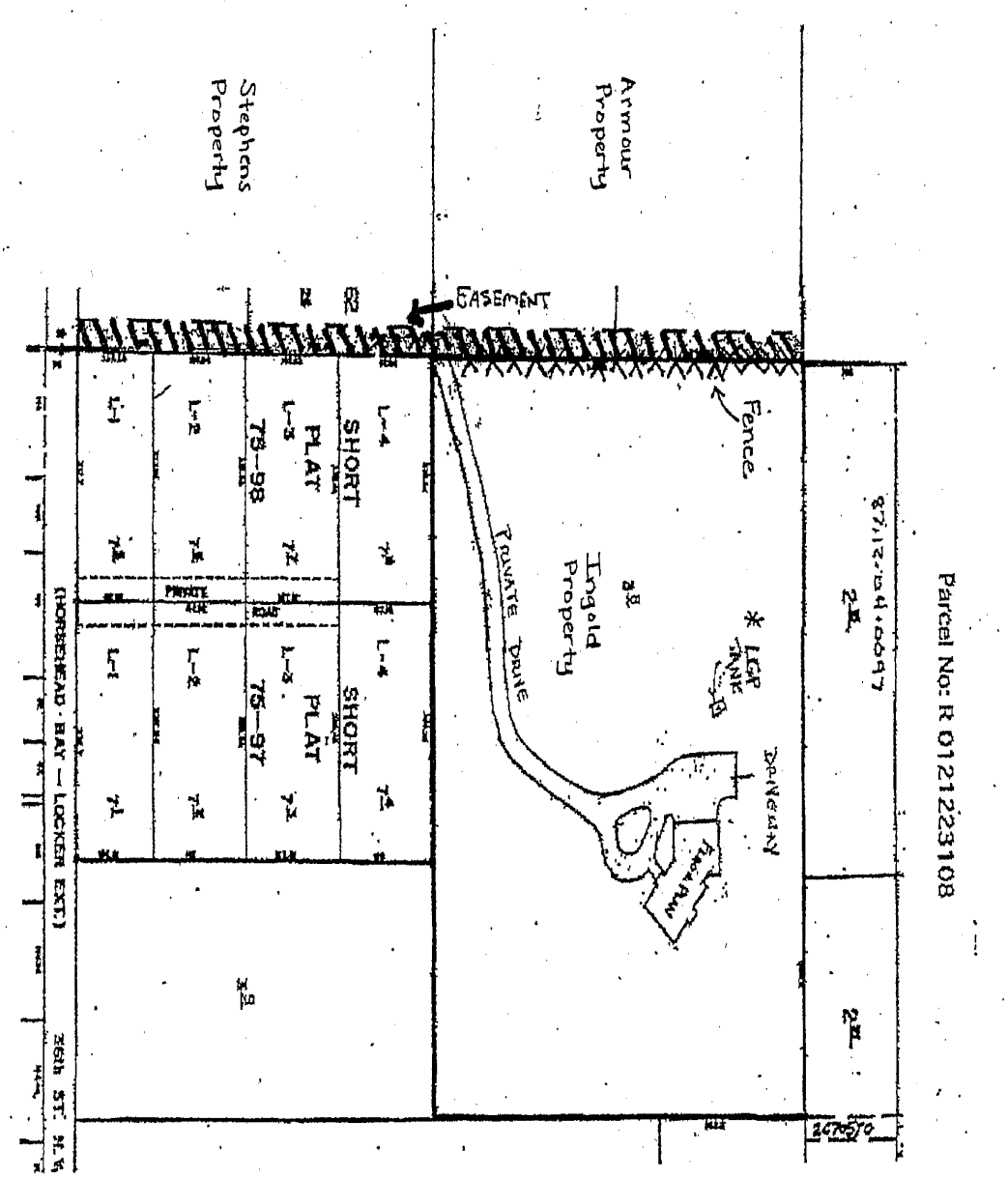
Ingold and Adams own adjoining parcels of real estate. They share a common predecessor in interest, Charles Sinding. In 1962, Sinding sold a portion of his property along with the following express easement:

> GRANTING to the Purchasers, his heirs, successors and assigns, a perpetual non-exclusive easement for road purposes, over, through and across the East 30 feet of the Northeast quarter of the Southeast quarter of Section 21, Township 21 North, Range 1 East of the Willamette Meridian.

Clerk's Papers (CP) at 63.

Ingold currently owns the property that the easement benefits, and Adams currently owns the property that the easement burdens. The easement begins at a public road and heads north, running along the entire eastern property boundary that Adams shares with Ingold. Ingold currently uses a minimal section of the easement at the southeast corner of Adams's property, to access his driveway and his home. The following map is helpful:[2]

[2] The southern half of this map shows a separate property, owned by Jeffrey and Melissa Stephens. The Stephenses are not parties to this appeal and the easement encumbering their servient property is not an issue on appeal.



CP at 35.

In 1991, the prior owners of Ingold's property adjusted the eastern boundary line further east. This adjustment increased the property in size from approximately 10 acres to 15 acres. The map shows the "new" (1991) eastern boundary; the former boundary is evident by the eastern

boundary lines to the north and to the south of the Ingold property. The Ingold home straddles the old eastern boundary line of the Ingold property.

Adams keeps horses and livestock on her property and uses the easement for pasture. In 2008, Ingold asked Adams to remove a hog wire fence that meandered through the easement north of Ingold's driveway. Adams refused. But in 2009, she removed that fence and built a permanent fence directly along the property line she shares with Ingold. This new fence abuts Adams's boundary with Ingold; it starts north of Ingold's driveway and runs along the entire boundary line to the northwest corner of Ingold's property. The southern end of the fence has a gate. The gate provides access to the easement and to Adams's property but it does not allow access from the easement to Ingold's property. Once inside the gate, Adams's fence completely blocks access from the easement to Ingold's property because the fence does not have another gate or any other exit.

When Adams refused to acknowledge the easement and refused to remove her encroachments, Ingold filed a complaint for quiet title, ejectment, declaratory judgment, and damages. Ingold moved for partial summary judgment on its quiet title and ejectment claims. The trial court granted Ingold's motion. The court found:

> [T]he easement is very clear. I don't think there's any doubt about what it means and what the purpose is. I don't think there's a need for trial. I think it's the 30 feet between the two parcels of property for ingress, egress and utilities.

Report of Proceedings (RP) at 11-12. Although the trial court found that Adams's fence obstructed the easement and granted ejectment, the trial court did not require Adams to remove

her fence immediately but only upon Ingold's 30-days' written notice that it intends to use the easement for its stated purposes.

The parties stipulated to dismissal of Ingold's remaining claims without prejudice. The court entered final judgment in favor of Ingold and awarded Ingold statutory attorney fees and costs.

ANALYSIS

Adams argues that the trial court improperly granted Ingold's summary judgment motion because material issues of genuine fact exist regarding (1) whether Ingold's property expansion unduly burdens the easement and (2) whether Adams's fence along the length of the shared border unreasonably interferes with Ingold's use of the easement. Ingold responds that the trial court properly granted summary judgment because Adams does not dispute (1) the existence or validity of the express easement or (2) that her fence completely blocks access to Ingold's property from the easement. We agree with the trial court and Ingold regarding (1) the existence and validity of the easement, (2) that Ingold's property expansion does not overburden the easement, and (3) that it is unreasonable for Adams's fence to block all access to Ingold's property from the easement. But the issue of ejecting Adams's fence, and whether the whole fence or merely portions must be removed, was not ripe for determination.

I. Standard of Review

We review an order granting summary judgment de novo and engage in the same inquiry as the trial court. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). A trial court properly grants summary judgment "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Visser v. Craig*, 139 Wn. App. 152, 157, 159 P.3d 453 (2007). We view the facts and any reasonable inferences from those facts in the light most favorable to the nonmoving party; we will affirm summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ranger*, 164 Wn.2d at 552. Although the trier of fact usually decides questions of fact, when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law. *Steury v. Johnson*, 90 Wn. App. 401, 405, 957 P.2d 772 (1998).

II. No Overburdening of Easement

Adams relies on *Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986) and *Visser*, 139 Wn. App. at 159. She argues that (1) a 1991 boundary adjustment to Ingold's property, which increased the property size, overburdened the easement beyond the scope of the original grantor's intent and (2) the trial court should have conducted a balancing test to determine the appropriate remedy.[3] Ingold replies that this case is distinguishable from *Brown* and *Visser* because this dispute does not involve use of the easement to access property not originally benefitted by the easement. We agree with Ingold.

[3] Adams also argues in passing, that the trial court erroneously granted summary judgment because Ingold "has no need for the remainder of its easement." Br. of Appellant at 11. She does not cite authority to support her assertion. RAP 10.3(a)(6). Contrary to her argument, Division Three of this court held, "Generally, the dimensions of an easement do not contract merely because the holder fails to use the entire easement area." *810 Props. v. Jump*, 141 Wn. App. 688, 699, 170 P.3d 1209 (2007).

In determining the permissible scope of an easement, we look at the parties' intent in the original creation of the easement, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied. *Logan v. Brodrick*, 29 Wn. App. 796, 799, 631 P.2d 429 (1981). We examine the deed as a whole to determine the original parties' intent concerning an easement. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). But if "the plain language is unambiguous, extrinsic evidence will not be considered." *Sunnyside Valley*, 149 Wn.2d at 880. We determine the extent of the right acquired by an express easement from its terms. *810 Props. v. Jump*, 141 Wn. App. 668, 695, 170 P.3d 1209 (2007).

The easement in question here grants "a perpetual non-exclusive easement for road purposes, over, through and across the East 30 feet of the [Adams property]." CP at 63. Adams argues that genuine issues of material fact concerning the original owners' intent exist because the easement does not contain any language suggesting it would be appropriate to expand the easement.[4] But Adams's argument incorrectly assumes that the increase to Ingold's property, from approximately 10 acres to 15 acres, corresponds to a per se expansion of the easement.

To support her argument, Adams relies on our Supreme Court's observations in *Brown*:

> As a general rule, an easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant. . . .
>
> . . . If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement.

[4] Importantly, Adams does not challenge the existence, validity, or benefiting party of the easement described in the 1962 deed. Further, Adams does not allege that the plain language of the easement is generally ambiguous.

Brown, 105 Wn.2d at 371-72. Despite stating that rule, however, the *Brown* court affirmed the trial court's decision, which refused to grant an injunction. The *Brown* court reasoned that because of the particularities of the case, the proceeding was equitable and therefore, the trial court had broad discretion to shape appropriate relief based on fundamental equitable principles. *Brown*, 105 Wn.2d at 372-73.

Despite some similarities to *Brown*,[5] this case is crucially different because in *Brown*, the easement holder of the dominant estate sought to traverse the servient estate to reach not only the original benefited property, but also the subsequently acquired parcel. *Brown*, 105 Wn.2d at 368. In contrast, here, the express easement is appurtenant to Ingold's parcel all along Ingold's western boundary. Ingold's 1991 expansion of his *eastern* border does not extinguish the express easement appurtenant to his *western* border. Because Ingold does not extend the easement to tracts of land to which the easement is not appurtenant, neither *Brown* nor *Visser* dictate that Ingold expanded or overburdened his easement. *See Brown*, 105 Wn.2d at 371; *Visser*, 139 Wn. App. at 159 (quoting *Brown*).

Adams argues that here, the trial court should have balanced the same equitable relief factors that the *Brown* court considered to determine the easement's scope. But Adams's argument blurs the distinction between the easement rule and equitable relief. In *Brown*, our Supreme Court articulated the easement rule but refused to apply it despite the dominant estate having "misuse[d]" the easement. *Brown*, 105 Wn.2d at 372. Instead, the *Brown* court affirmed

[5] In *Brown*, as here, an express grant created a private road easement and the dominant estate subsequently acquired another parcel not benefited by the original grant of easement. *Brown*, 105 Wn.2d at 368, 371.

the trial court's equitable remedy in favor of the dominant estate because of the particularities of the case. *Brown*, 105 Wn.2d at 372-73. In this case, the trial court did not need to balance the equitable relief factors because Ingold sought access only to property covered by the original grant of easement (the northwest portion of the original parcel), to which the easement expressly granted access in plain unambiguous language. Because the scope of the easement is clear from its terms, the trial court properly did not consider extrinsic evidence. *Sunnyside Valley*, 149 Wn.2d at 880; *810 Props.*, 141 Wn. App. at 695. Further, Adams has not argued that equitable relief (rather than a property rule) compels a different analysis; nor has she indicated what those equitable considerations would be.

In granting summary judgment, the trial court correctly found that the "easement is very clear" and that there is not "any doubt what it means and what the purpose is." RP at 11-12. Adams's argument presumes, without attempting an explanation, that Ingold overburdens the easement; the record before us does not support this argument. Therefore, Adams fails to show that questions of material fact exist that preclude summary judgment. We hold that the trial court did not err either in acknowledging Ingold's easement or in determining that Ingold has not overburdened the easement.

III. Ejectment of Fence

Adams argues that whether her fence unreasonably interferes with Ingold's use of the easement is an issue of material fact, which should have precluded summary judgment. Specifically, Adams argues that the trial court failed to weigh relative burdens of the dominant and servient estates and incorrectly ruled, as a matter of law, that the fence "obstructs use of the

easement." Br. of Appellant at 15 (quoting Final Judgment, CP at 208). Ingold responds that the trial court did not err because it is undisputed that Adams's fence completely obstructs access to Ingold's property from the fenced portion of the easement. We hold that the fence does unreasonably interfere with Ingold's use of the easement because it completely blocks Ingold's access. But whether Adams's fence should be completely ejected[6] is not ripe for judicial resolution.

Servient owners have a right to use their land "for purposes not inconsistent with its ultimate use for the reserved purpose." *Thompson v. Smith*, 59 Wn.2d 397, 407, 367 P.2d 798 (1962). If the easement is ambiguous or silent on the construction of fences or gates, then we examine the situation, parties, and surrounding circumstances. *Rupert v. Gunter*, 31 Wn. App. 27, 31, 640 P.2d 36 (1982). But under the doctrine of ripeness, we limit rendering judgment to justiciable controversies, which require:

> [A]n actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement . . . [and] which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic.

Lakewood Racquet Club, Inc. v. Jensen, 156 Wn. App. 215, 223, 232 P.3d 1147 (2010) (comparing the Uniform Declaratory Judgment Act to traditional limiting doctrines). Adams argues that the trial court must balance the servient owner's burden with the dominant owner's inconvenience before determining that her fence obstructs the easement. We note that the case

[6] The ejectment order does not require Adams to remove her fence immediately but upon 30–days' written notice from Ingold of his intent to use the easement.

law on which Adams relies is inapposite because it involves changed circumstances (i.e., increased and unauthorized use of the easement) and Adams does not suffer from an increased or unauthorized use of the easement.[7] *See Rupert*, 31 Wn. App. at 29-31; *Steury*, 90 Wn. App. at 403-05. But because Ingold did not show his actual or intended use of the easement, the trial court's ejectment of the entire fence was premature. Once Ingold's intended use is known, it may not be necessary for Adams to remove the entire fence; but perhaps Adams needs to remove only a portion of the fence, or simply install gates. We limit rendering judgment to actual and existing circumstances and refrain from rendering judgment when the dispute, as is the case here, remains hypothetical or speculative. *Lakewood Racquet Club, Inc.*, 156 Wn. App. at 223. Therefore, because this issue was not ripe for judicial determination, we reverse the trial court's order to eject Adams's fence upon 30-days' notice from Ingold.

ATTORNEY FEES

Ingold requests attorney fees for this appeal on the basis that it is frivolous. RAP 18.9(a); "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 [is] no reasonable possibility of reversal." *State ex rel. Quick-Rueben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998) (internal quotations omitted). Here, debatable issues existed, thus we deny Ingold's request for attorney fees under RAP 18.9(a).

[7] In fact, Adams highlights that Ingold has not used that portion of the easement, implying that his disuse extinguishes the easement. Adams is mistaken; a servient estate cannot adversely possess or extinguish an express easement. *See Beebe v. Swerda*, 58 Wn. App. 375, 384, 793 P.2d 442 (servient owner's use of easement during periods of non-use by dominant owner properly characterized as privileged rather than adverse), *review denied*, 115 Wn.2d 1025 (1990).

We affirm in part and reverse in part.

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 in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Hunt, P.J.

Van Deren, J.