IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOEL K. FREUDENTHAL and DEBRA S. BARNES, husband and wife,	)	**No. 28975-3-III**
Respondents,	)	
v.	)	
	)	**Division Three**
JUAN GUTIERREZ and CHERRYL GUTIERREZ, husband and wife,	)	
Appellants,	)	
ANGELINE OLSON,	)	
	)	**UNPUBLISHED OPINION**
Defendant.	)	

Sweeney, J. — This appeal follows disputes over two pieces of real property, one 16 feet wide and the other 14 feet wide. The respondents, the owners of the dominant estate, claim that both properties are properly dedicated easements that they are entitled to use. The appellants, the owners of the servient estate, claim that the 16-foot strip was never dedicated and therefore the only "easement" that the appellants were entitled to was an 8-foot gravel road called Dickerman Lane, located within the larger 16-foot strip.

Dickerman Lane had been used for a long time. And the appellants' claim that the 14-foot-wide strip (which is adjacent to the 16-foot strip) was granted as part of a subdivision that was never developed and therefore that easement never came into existence. The disputes over each piece implicate different facts and the application of different legal principles. We conclude that the 16-foot strip was properly reserved as an easement from an earlier conveyance of a larger parcel. And we conclude that the development of a subdivision was not a condition precedent to the 14-foot easement and was properly dedicated. We therefore affirm the summary judgment of the superior court in favor of the dominant estate holder.

FACTS

Juan and Cherryl Gutierrez (Gutierrezes) own a 16-acre orchard in Yakima County. Joel K. Freudenthal and Debra S. Barnes (Freudenthals) own contiguous property to the south and west of the Gutierrez property. A private gravel road called "Dickerman Lane" runs north and south along the easterly lines of both properties. The road is located within the Gutierrez property, but is only 8 feet wide. An irrigation line runs directly along the east edge of the road and serves property owners who abut both Freudenthal and Gutierrez to the east. Power poles and trees are also located adjacent to the road on both sides and within the east 16 feet of the property. Dickerman Lane

ultimately connects to a county road (Speyers Road) to the north. The properties and the road are shown on this map.

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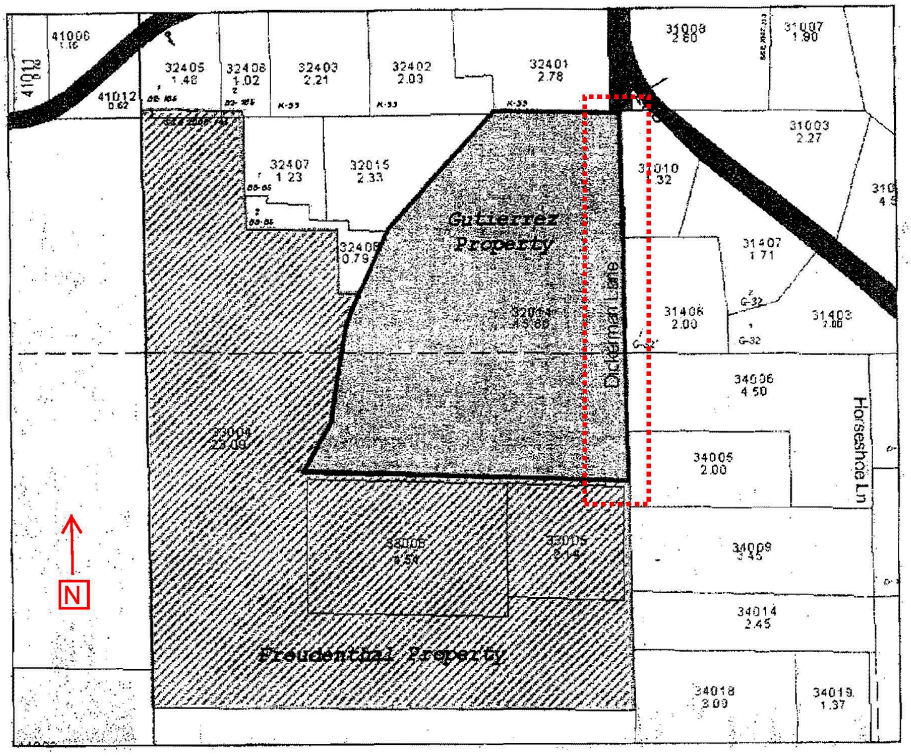

Clerk's Papers (CP) at 461.

The Gutierrezes had maintained Dickerman Lane for more than 35 years. Sometime around 2003, the Gutierrezes paid for and installed a wire fence along the easterly edge of the road to prevent unauthorized access and to protect the fragile irrigation line. Adjacent property owners, including the Freudenthals' predecessors in interest, apparently agreed to the installation of the fence. The Freudenthals started growing hay on their property. They needed to use a hay swather to cut the hay. The fence made Dickerman Lane too narrow to bring a swather through.

In 2009, the Freudenthals sued for trespass, to quiet title, for an injunction, and for declaratory judgment to secure use of the full 16-foot easement together with another adjacent 14-foot easement that had been granted in 2003. The Freudenthals ultimately claimed an unrestricted right to use the aggregate 30-foot strip for ingress and egress. The expanded use required the removal of the fence and other obstructions.

The Freudenthals moved for summary judgment and for an order to remove the fence along Dickerman Lane. The Gutierrezes also moved for summary judgment to declare that Freudenthals' right to access was limited to the well established 8-foot width of Dickerman Lane (the historic location), and that use of the 14-foot easement was conditioned on subdivision of the appurtenant properties (a condition that was never met).

The trial court granted summary judgment for the Freudenthals. The court ordered the removal of the fence and other obstructions and authorized construction of turnouts:

> Regarding the 16 foot road legally described below, there are no genuine issues of material fact and [Freudenthals'] motion for partial summary judgment on this issue is granted and [Gutierrezes'] 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 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.
>
> Said road was recognized by [Gutierrezes] and others in that certain easement recorded under Yakima County File No. 7334366, and the road was created at least by that date.

CP at 38. On the 14-foot-easement claim, the court concluded the 2003 easement was unambiguous and authorized the expansion of Dickerman Lane:

> 1. At any time, but solely at [Freudenthals'] cost and expense, [Freudenthals] may place gravel turnouts within the 14 foot easement recorded under Yakima County Auditor's File No. 7334366. [Freudenthals] 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 [Gutierrezes] shall not take any action to impede [Freudenthals'] use of the said easement, or assist others or give permission to others to take actions that will impede [Freudenthals'] use of the said easement.

CP at 30.

The lawyers appeared to present and argue entry of the order on summary judgment. The Gutierrezes then offered the declarations of William Gilman, Cherryl Gutierrez, James Dimick, Juan Gutierrez, and Warren D. Ernst. The declarations were all calculated to show that others had an interest in the fence and the easement. The trial court ruled that the five declarations were not before the court for the summary judgment motions because they were filed late, but allowed the declarations to be filed for other purposes. The Gutierrezes appealed the summary judgment.

The Freudenthals moved in this court to require the Gutierrezes to correct or replace their appellate brief because it referenced the five late-filed declarations. We denied the motion and the trial court supplemented the record to indicate that the declarations "were called to the attention of the trial court before the order on summary judgment was entered." CP at 560.

DISCUSSION

We review the grant of a summary judgment de novo and therefore engage in the same inquiry as the trial court. *Visser v. Craig*, 139 Wn. App. 152, 157, 159 P.3d 453 (2007).

Express Easement

An easement is an interest in land. *Kesinger v. Logan*, 113 Wn.2d 320, 325-26, 779 P.2d 263 (1989). That means express easements must comply with the statute of frauds. *Ormiston v. Boast*, 68 Wn.2d 548, 550, 413 P.2d 969 (1966). It 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. No particular words are necessary to create an easement so long as the language used shows an intent to grant one. *Zunino v. Rajewski*, 140 Wn. App. 215, 222-23, 165 P.3d 57 (2007). We determine the parties' intent to create or reserve an easement from the instrument as a whole. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

The Gutierrezes contend that the court's decision is legally unsupported, and unsupportable, because (1) there is no recorded conveyance of any 16-foot easement over the east portion of the Gutierrez property, and (2) the 14-foot adjacent easement was conditioned specifically on the development of a subdivision that never took place. The Freudenthals respond that there are four documents that either create or clearly show the existence of a 16-foot easement: a 1904 deed, a 1967 deed, a 1967 road maintenance agreement, and a 2003 easement document. And the 2003 14-foot easement, while anticipated to be part of a development, was not ultimately conditioned on that

development.

16-foot Easement over the Gutierrez Property

The Gutierrezes contend that there is no recorded easement over the easterly portion of their property. The record suggests otherwise. The Freudenthal property and the Gutierrez property are located within Section 27, Township 14 North, Range 18 East, W.M. In 1888 and 1898, the Selah Valley Company received two deeds conveying to it the entirety of Section 27. In June 1902, the Selah Valley Company deeded the south portion of what is now the Freudenthal property to P. O'Neal. There is no mention of an easement to a county road in the 1902 deed but then there was no county road at that time either. The county road (Speyers Road) was not built until October 1902.

In 1904, the Selah Valley Company deeded most of what is now the Gutierrez property to F.E. Reynolds. The description in the deed read:

> N ½ of N ½ of SW ¼ of SW ¼ and S ½ of NW ¼ of SW ¼ (*except a strip of land 16 feet wide off the E. line for road purposes*) of section 27.

CP at 220 (emphasis added). The strip of land reserved in this deed provided access to the newly created county road to the north. The Gutierrezes maintain that the 1904 deed simply reserved the strip of land for the grantor (Selah Valley Company) and did not grant an easement. But easements can be created by either grant or reservation. *Winsten v. Prichard*, 23 Wn. App. 428, 430, 597 P.2d 415 (1979). Whether an easement was created turns on the expressed intent of the

parties. *Queen City Sav. & Loan Ass'n v. Mechem*, 14 Wn. App. 470, 473, 543 P.2d 355 (1975). An easement "in gross" is one that benefits an individual, whether or not he owns another tract of land. The easement is appurtenant if the benefit of the easement is to another tract of land, regardless of who owns it. *Winsten*, 23 Wn. App. at 430 (citing 2 G. Thompson, Commentaries on the Modern Law of Real Property § 321, at 57 (J. Grimes repl. 1961)). But easements in gross are not favored and therefore "a very strong presumption exists in favor of construing easements as appurtenant." *Id.*

In *Queen City*, the court took up the question of easements created by exception rather than conveyance. There Ms. Mechem had blocked access to an existing road from property owned by Queen City. *Queen City*, 14 Wn. App. at 471. There was a common grantor in the chain of title to Ms. Mechem's and Queen City's property. *Id.* at 471-72. The court held that the phrase "'and EXCEPT a strip of land 60 feet in width along the westerly margin for road'" showed the intent of the parties to create an access easement appurtenant to the lands acquired by Queen City's predecessor, even though a dominant and servient estate were not identified at the time of conveyance. *Id.* at 472, 475.

Again in *Beebe v. Swerda*, the earlier conveyance of property was "'SUBJECT to an easement for road purposes.'" 58 Wn. App. 375, 377, 793 P.2d 442 (1990). The court held that this language was consistent with the intent to create an easement. *Id.* at

382. The necessity for the easement was unclear at the time of conveyance, but a dominant and a servient estate with separate ownerships arose over time, and the parcel owned by Beebe would have been landlocked without the easement. *Id.* at 381-82.

The lessons of *Queen City* and *Bebee* are helpful here. The language used in the 1904 deed creates an easement for a road to benefit the lands being conveyed. The exception in the deed makes specific reference to the location, size, and purpose of the easement. The grantor (Selah Valley Company) was the same grantor that conveyed the lands to the south of what is now the Gutierrez property. The easement terminates in the south at those same lands previously conveyed. *See Kirk v. Tomulty*, 66 Wn. App. 231, 240, 831 P.2d 792 (1992) (an easement that extends to the end of the servient property is consistent with an intent to serve the adjacent property). Like *Queen City*, a servient and dominant estate were not specifically identified here. But the servient estate and the dominant estate now clearly exist and the 16-foot easement reserved from the earlier conveyance now benefits the Freudenthal property, the dominant estate.

The Freudenthals also rely on an earlier 1967 deed that conveyed an easement identical to the 16-foot easement to a predecessor. But easements appurtenant are transferred to the owner of the dominant estate with title to the property even if not mentioned in the deed. *See 810 Props. v. Jump*, 141 Wn. App. 688, 698, 170 P.3d 1209

(2007). So the 1967 deed is helpful only in that it shows an identical 16-foot easement happened to be in existence some 63 years later:

> EXCEPT right of way for road along the East 16 feet and the North 12 feet thereof, TOGETHER with easement for ingress and egress over the East 16 feet of the South half of the Northwest quarter of the Southwest quarter and the East 16 feet of the North ¾ of the Southwest quarter of the Southwest quarter of Section 27, Township 14 North, Range 18, E.W.M.

CP at 84.

The Freudenthals also call our attention to a 1967 road maintenance agreement filed with the Yakima County Auditor that describes the 16-foot-wide strip that crosses the Gutierrez property:

> [I]s used as a roadway by all the above parties for ingress and egress to the respective properties above described and all of the above parties are desirous that said roadway be maintained in good condition for road purposes.

CP at 403. Again, it confirms the 16-foot easement.

Finally, an "Easement for Ingress/Egress and Utilities" (the 14-foot easement we take up next) recorded in 2003 also references the 16-foot easement that benefits the Freudenthal property:

> WHEREAS, a 16 foot wide road presently exists pursuant to an Agreement dated June 13, 1967 and recorded under Yakima Auditor's File Number 2139267, Vol. 693, Pg. 145, and 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 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.
>
> WHEREAS, said 16 foot road is presently for the benefit of Parcels A, B, C, D, E, F and H as indicated above, and said owner's [sic] desire to include parcel G.
>
> WHEREAS, all of the Owners described above desire that an Easement be created to widen the existing 16-foot wide road to a total of 30 feet in width (16 foot wide road plus 14 foot wide easement granted herein; equaling 30 feet).

CP at 391.

In sum, an express easement exists over at least a portion of the east 16 feet of the Gutierrez property.

Additional 14-foot Easement

The Gutierrezes next contend that the additional 14-foot easement, claimed by the Freudenthals for ingress and egress, never came into existence because the intent was that it would be part of and benefit an adjacent subdivision that was never developed. The Gutierrezes argue that at a minimum their submittals raise questions of fact that should not have been resolved in the summary judgment proceeding.

Again, we try to identify intent to create an easement from the instrument read as a whole. *Sunnyside Valley*, 149 Wn.2d at 880. Evidence extrinsic to the instrument does not create an ambiguity when none exists in the original document of conveyance. *Id.* Extrinsic evidence should only be offered to clarify an already existing ambiguity in the

language creating the easement. *Id.*

Here, the Gutierrezes and others created and recorded an "Easement for Ingress/Egress and Utilities" in 2003. The easement is 14 feet wide and west to the 16-foot easement described above. The easement states:

> WHEREAS, all of the Owners described above desire that an Easement be created to widen the existing 16 foot wide road to a total of 30 feet in width (16 foot wide road plus 14 foot wide easement granted herein; equaling 30 feet).

CP at 391. The easement goes on to state that each party "HEREBY, grants and conveys . . . a 14 foot easement for the purposes of ingress/egress and utilities." CP at 392-97. The Gutierrezes rely on a paragraph in the conveyance that talks about subdivision to argue that the 14-foot easement is conditioned on future development:

> 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 thereof that may be created in the future as a result of subdivision.

CP at 394. The mention of the subdivision here does not condition the grant of the 14-foot easement.

Jurisdiction

The Gutierrezes next contend that the court's order to remove the fence and other obstructions affects the property rights and interests of third parties who were not joined in the suit and the court therefore did not

have authority to enter the order.

We review the court's application of court rules de novo. *State v. Robinson*, 153 Wn.2d 689, 693, 107 P.3d 90 (2005). A party may raise the issue of a failure to join a necessary party for the first time on appeal because it relates directly to the trial court's jurisdiction. *Henry v. Town of Oakville*, 30 Wn. App. 240, 243, 633 P.2d 892 (1981).

Civil Rule 19 addresses mandatory joinder: "A person . . . shall be joined as a party in the action if . . . he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest." CR 19(a)(2)(A). Our analysis of the question is in two steps. *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 494-95, 145 P.3d 1196 (2006).

We must first decide whether a party is necessary for just adjudication. "To determine whether a party is necessary, CR 19 requires the potentially necessary party to have an interest relating to the subject of the action." *Burt v. Dep't of Corr.*, 168 Wn.2d 828, 833, 231 P.3d 191 (2010). Once that interest is shown, the party must be "so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest." CR 19(a)(2)(A). The second part of the inquiry requires the court to determine whether in equity and good conscience an

action should proceed without a necessary party when joinder is impossible. *Burt*, 168 Wn.2d at 834.

Here, the Gutierrezes contend that joinder of the neighbors who owned property adjacent to the 16-foot easement was mandatory. *See* RCW 7.24.110; CR 19(a); *Henry*, 30 Wn. App. at 243-45. The Gutierrezes argue that the neighbors are necessary parties because they participated in the decision to install the fence and now have an interest in the property along the fence through adverse possession. But even accepting the affidavits at face, these property owners are not foreclosed from further proceedings to assert whatever claim they may have to this property. *See Gildon*, 158 Wn.2d at 495 (court must consider whether judgment rendered in parties absence will be prejudicial). The essential point of our holding here is that the 16-foot easement was legally reserved and the 14-foot easement was legally granted. The superior court did not decide, and we do not pass on, whether these other landowners may have acquired some interest by adverse possession.

The trial court had authority to adjudicate the easement rights; the adjacent landowners were not necessary parties.

We affirm the judgment of the superior court.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to

RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

_____
Korsmo, A.C.J.

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Brown, J.