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Extending the Benefit of an Easement: A Closer Look at a Classic Rule—Brown v. Voss, 105 Wn. 2d 366, 715 P.2d 514 (1986)

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EXTENDING THE BENEFIT OF AN EASEMENT: A CLOSER LOOK AT A CLASSIC RULE—*Brown v. Voss*, 105 Wn. 2d 366, 715 P.2d 514 (1986).

In *Brown v. Voss*[1] the Washington Supreme Court considered whether an easement may be extended to benefit a nondominant parcel. The court endorsed the classic property rule that the benefit of an easement may not be extended by the dominant parcel owner to benefit other parcels.[2] Furthermore, the court declared that any extension of an easement to benefit a nondominant parcel would be a misuse of the easement.[3] Nevertheless, after weighing the relative hardship to the parties, the court refused to enjoin the extension of the easement where the resulting hardship to the dominant parcel would greatly exceed the benefit to the servient parcel.[4]

Brown v. Voss illustrates the tendency of modern courts to avoid, on equitable grounds, the effect of the classic rule that limits the benefit of an easement to the dominant parcel. This Note demonstrates that although courts continue to recite the classic rule, they now commonly weigh the relative hardship and apply the rule strictly only when the remedy does not place an unreasonable hardship on the owner of the dominant parcel. The classic rule, this Note argues, should be applied as a bright line rule, as the language implies it will be. The bright line rule protects the servient owner, increases predictability, and reduces litigation. The equity powers of the court are best utilized to avoid the rule in extreme cases where there is a need to prevent a manifestly unfair result. Avoidance of the classic rule through equity is unnecessary in Washington, due to the availability of a statutory solution.

I. BACKGROUND

A. The Classic Rule

According to the classic rule, an easement may only be used to benefit the dominant parcel.[5] An easement may not be used to access an adjacent,

1. 105 Wn. 2d 366, 715 P.2d 514 (1986).
2. *Brown*, 105 Wn. 2d at 371, 715 P.2d at 517.
3. *Id.* at 372, 715 P.2d at 517.
4. *Id.* at 373, 715 P.2d at 518. A servient parcel is "a parcel of land burdened by an easement for the benefit of another parcel (dominant [parcel])." BLACK'S LAW DICTIONARY 1228 (5th ed. 1979). Throughout this Note, a nondominant parcel is a parcel owned or controlled in common with the dominant parcel but not independently entitled to the benefit of the easement.
5. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY 460 (1984) [hereinafter THE LAW OF PROPERTY]; *see also* Penn Bowling Recreation Center v. Hot Shoppes, 179 F.2d 64 (D.C.

nondominant parcel, nor may it benefit inseparable activities conducted in a building constructed astride the boundary common to the dominant and the nondominant parcels.[6] Under a strict interpretation of the classic rule, any extension of the benefit to another parcel is a misuse.[7] Because this interpretation is rigid, the extension of the benefit to the nondominant parcel need not result in a material increase in the burden to the servient parcel.[8] A misuse of an easement is a trespass,[9] and the only meaningful remedy to prevent a continued trespass is an injunction.[10] Furthermore, where the permitted use of an easement is inseparable from the prohibited use, the court may enjoin all use until circumstances have so changed that the permitted use may be allowed without affording opportunity for the prohibited use.[11]

A fundamental principle underlies the classic rule, as well as the other rules concerned with the scope of the easement.[12] The owner of the dominant parcel may not materially increase the burden, or impose a new or additional burden on the servient parcel.[13] The rule limiting the benefit of an easement to the dominant parcel is concerned with the rights of the

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Cir. 1949); National Lead Co. v. Kanawha Block Co., 288 F. Supp. 357 (S.D. W. Va. 1968), *aff'd*, 409 F.2d 1309 (4th Cir. 1969); Miller v. Weingart, 317 Ill. 179, 147 N.E. 804 (1925); Heritage Standard Bank & Trust Co. v. Trustees of Schools, 84 Ill. App. 3d 653, 405 N.E.2d 1196 (1980); Wetmore v. Ladies of Loretto, 73 Ill. App. 2d 454, 220 N.E.2d 491 (1966); *cf.* E. WASHBURN, TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES 87 (2d ed. 1867).

6. THE LAW OF PROPERTY, *supra* note 5, at 460.

7. Wetmore v. Ladies of Loretto, 73 Ill. App. 2d 454, 220 N.E.2d 491, 496 (1966); *see also* Kanefsky v. Dratch Constr. Co., 376 Pa. 188, 101 A.2d 923, 926 (1954); Robertson v. Robertson, 214 Va. 76, 197 S.E.2d 183, 187 (1973).

8. *But see* Ogle v. Trotter, 495 S.W.2d 558, 566 (Tenn. App. 1973).

9. Selvia v. Reitmeyer, 156 Ind. App. 203, 295 N.E.2d 869, 874 (1973).

10. Penn Bowling Recreation Center v. Hot Shoppes, 179 F.2d 64, 67 (D.C. Cir. 1949); *see also* Tamburo v. Murphy, 72 Misc. 2d 120, 339 N.Y.S.2d 693, 697 (1970), *aff'd*, 40 A.D.2d 947, 340 N.Y.S.2d 881 (1972); McCullough v. Broad Exch. Co., 101 A.D. 566, 92 N.Y.S. 533, 537 (1905), *aff'd*, 184 N.Y. 592, 77 N.E. 1191 (1906).

11. *See, e.g., Penn Bowling*, 179 F.2d at 66; *McCullough*, 92 N.Y.S. at 536; *see also* S.S. Kresge Co. v. Winkelman Realty Co., 260 Wis. 372, 50 N.W.2d 920, 922 (1952) (owner of servient parcel may bring suit when any increase is made to the burden and is not required to wait until additional rights are lost through prescription).

12. Throughout the Note the other rules will be referred to as "scope of the easement rules." The scope of the easement rules are concerned with changed conditions, changed uses, and subdivision of the dominant parcel. *See generally* THE LAW OF PROPERTY, *supra* note 5, § 8.9.

13. Adams v. Winnett, 25 Tenn. App. 276, 156 S.W.2d 353, 357 (1941); *see also* Ogle v. Trotter, 495 S.W.2d 558, 565 (Tenn. App. 1973); L. JONES, A TREATISE ON THE LAW OF EASEMENTS 288 (1898) [hereinafter JONES ON EASEMENTS]. An historic reason advanced for the bright line that developed in the rule concerning extension of the benefit is that "(e)xcept for this rule the burden upon the servient estate might be increased at the pleasure of the owner of the dominant estate." Howell v. King, 86 Eng. Rep. 821, 1 Mod. 191 (1686); *see also* D.M. Goodwillie Co. v. Commonwealth Elec. Co., 241 Ill. 42, 89 N.E. 272, 286 (1909); Shaver v. Edgell, 48 W. Va. 502, 37 S.E. 664, 666 (1900). *Cf.* E. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 384 (1974) (suggesting another reason is that allowing extension would change the easement appurtenant into an easement in gross).

respective parties, rather than the actual burden on the servient parcel.[14] In that context the burden on the servient parcel is by definition a new or additional one because it was not contemplated by the original agreement.[15] This classic rule is based on the principles that the use of an easement is limited to those purposes legitimately connected with the dominant parcel,[16] and that no one but an owner of the land may create an easement over it.[17]

B. The Practical Application of the Classic Rule

In many courts throughout the country, the classic rule has undergone unacknowledged change. Historically, courts protected the owner of the servient parcel from extension of the benefit of an easement to a nondominant parcel. Courts disregarded the hardship placed on the owner of the dominant parcel.[18] However, courts are increasingly inclined to consider the relative hardship and good faith of the parties and, therefore, reach their decisions on a case-by-case basis.[19]

1. Relative Hardship

Where there has been a material increase in the burden, and the hardship is clearly concentrated on the servient parcel, courts continue to apply the classic rule to protect the interests of the owner of the overburdened servient parcel.[20] Courts also may apply the classic rule strictly where the extension of the benefit is found in combination with another type of increase in the scope.[21] A substantial increase in the burden on the servient

14. National Lead Co. v. Kanawha Block Co., 288 F. Supp. 357, 364 (S.D. W. Va. 1968), *aff'd*, 409 F.2d 1309 (4th Cir. 1969).

15. *See* Knotts v. Summit Park Co., 146 Md. 234, 126 A. 280, 283 (1924).

16. *See* Miller v. Weingart, 317 Ill. 179, 147 N.E. 804, 805 (1925); Wood v. Woodley, 160 N.C. 17, 75 S.E. 719, 720 (1912) (quoting JONES ON EASEMENTS, *supra* note 13, § 28).

17. Waller v. Hildebrecht, 295 Ill. 116, 128 N.E. 807 (1920).

18. *See, e.g.*, *Howell*, 86 Eng. Rep. 821, 1 Mod. 191; Williams v. James, 2 L.R.-C.P. 577 (1867); Harris v. Flower, 74 L.J. Ch. 127 (1904); French v. Marstin, 24 N.H. 440, 57 Am. Dec. 294 (1855).

19. *See, e.g.*, National Lead Co. v. Kanawha Block Co., 288 F. Supp. 357 (S.D. W. Va. 1968), *aff'd*, 409 F.2d 1309 (4th Cir. 1969); Heritage Standard Bank & Trust Co. v. Trustees of Schools, 84 Ill. App. 3d 653, 405 N.E.2d 1196 (1980); Wetmore v. Ladies of Loretto, 73 Ill. App. 2d 454, 220 N.E.2d 491 (1966).

20. *See, e.g.*, Mancini v. Bard, 42 N.Y.2d 28, 364 N.E.2d 1313, 396 N.Y.S.2d 621 (1977) (limiting the easement to the express language of the original grant); College Inns of America, Inc. v. Cully, 254 Or. 375, 460 P.2d 360 (1969) (strictly applying the classic rule); Markley v. Lopresti, 280 Pa. Super. 484, 421 A.2d 825 (1980).

21. *See* Tamburo v. Murphy, 72 Misc. 2d 120, 339 N.Y.S.2d 693 (1970), *aff'd*, 40 A.D.2d 947, 340 N.Y.S.2d 881 (1972) (extension of the easement combined with changed use where the easement, which had been unused by the church that had previously owned the dominant parcel, was reopened and used by new owner to benefit business park on dominant and nondominant parcels).

parcel, such as dedication of the extended easement to public use, may be sufficient to justify extinguishment of the easement.[22]

On the other hand, when the actual increase in the burden on the servient parcel is slight or nonexistant, many courts will consider the hardship to the owner of the dominant parcel if the extension is denied. Where the hardship to the dominant parcel is significant, and outweighs the hardship to the servient parcel, courts have permited extension of the benefit.[23] One court, ignoring the express terms of the easement, permitted extension of the benefit to a landlocked parcel where the additional burden to the servient parcel was found to be minimal.[24] The contrary position is illustrated by a situation in which a court refused to allow the extension in spite of a significant investment made by the dominant parcel owner in developing the nondominant parcel.[25] The court found the servient parcel owner's property interests easily outweighed the dominant parcel owner's significant financial investment.[26]

2. *Good Faith and Other Equitable Defenses*

Where a misuse of an easement has been identified, courts have separately considered the good faith of both the servient and dominant parcel owners as well as other affirmative equitable defenses to determine whether

22. Crimmins v. Gould, 149 Cal. App. 2d 383, 308 P.2d 786 (1957) (easement extinguished where owner of dominant parcel subdivided dominant parcel, extended the easement to benefit lots on subdivided nondominant parcel, and dedicated the extended easement to public use); *see also* Knotts v. Summit Park Co., 146 Md. 234, 126 A. 280, 283 (1924) ("the necessarily increased burden upon the servient estate brought about by the development of the entire tract, of which the dominant tenement formed a small part, worked an abandonment"). However, the extinguishment of an easement is an increasingly unlikely result. *See* Penn Bowling Recreation Center v. Hot Shoppes, 179 F.2d 64, 66 (D.C. Cir. 1949) ("Misuse of an easement right is not sufficient to constitute a forfeiture . . . ."); McCullough v. Broad Exch. Co., 101 A.D. 566, 92 N.Y.S. 533, 536 (1905), *aff'd*, 184 N.Y. 592, 77 N.E. 1191 (1906) ("it is difficult to see upon what principle of law the court is authorized to declare [the easement] . . . forfeited and extinguished").

23. *See, e.g.*, Wetmore v. Ladies of Loretto, 73 Ill. App. 2d 454, 220 N.E.2d 491 (1966); Ogle V. Trotter, 495 S.W.2d 558 (Tenn. App. 1973); National Lead Co. v. Kanawha Block Co., 288 F. Supp. 357 (S.D. W. Va. 1968), *aff'd*, 409 F.2d 1309 (4th Cir. 1969).

24. *National Lead*, 288 F. Supp. at 364. See text accompanying note 27, concerning possible relevance of laches, and use of the compliant as leverage. *See also* Ogle v. Trotter, 495 S.W.2d 558 (Tenn. App. 1973). Modifications, effected by the dominant parcel owners, in the access to the easement by the tenants on the dominant parcel had materially decreased the burden on the servient parcel. The court stated that the reason for the classic rule was to prevent an increase in the burden or impose a new or additional burden, and where the reason did not exist the rule did not apply. *Id.* at 566.

25. Kanefsky v. Dratch Constr. Co., 376 Pa. 188, 101 A.2d 923 (1954). Contrasted with *Brown*, this case also illustrates the facility with which courts may manipulate relative hardships to justify their decisions.

26. *Id.*, 101 A.2d at 926. "Since, however, [servient parcel owners] have a right of property it makes no difference that the right may be insignificant in value to them as compared with the advantages that would accrue to [dominant parcel owners]." *Id.*

equitable relief is justified. For example, one court was skeptical of a servient owner who ignored the prohibited extension of the benefit for several years before requesting an injunction. The request for an injunction, when finally made, was in fact secondary to an attempt to have the easement extinguished on other grounds.[27]

Related to lack of good faith is the doctrine that the relative hardship defense is reserved for the innocent who proceed without notice.[28] Under the doctrine, any hardship resulting from a person's own negligent or intentional acts would be entitled to significantly less weight in equity.[29] A New York court denied extension of the benefit of an easement to a landlocked, nondominant parcel where the owner had expressly relinquished the right to alternate access when the second parcel was acquired.[30] Another New York court enjoined all use of an easement until the permitted uses could be allowed without allowing the prohibited uses.[31] Questioning the good faith of the owners of the dominant parcel, the court noted that their hardship was due to their own questionable acts in constructing a building on the common boundary between the dominant and nondominant parcels.[32]

The issue raised by inseparable uses, as where a building is constructed astride the boundary common to the dominant and nondominant parcels, is similar to the issue of creating one's own hardship. Where the permitted and prohibited uses are inseparable, courts have traditionally invoked the classic rule and enjoined all use of the easement until such time as conditions change or the uses are separated.[33] When the use benefitted by the easement to the dominant parcel is separable from the use to be benefitted on the nondominant parcel, courts have limited the benefit to the

27. *National Lead*, 288 F. Supp. at 357. In *National Lead*, the extension of the easement to a landlocked parcel was permitted and an injunction refused in spite of the fact that the express terms of the easement prohibited extension of the benefit. Although unwilling to find the servient parcel owners guilty of laches, the court pointed out that the misuse of the easement was apparently not an irritant to them until they sought extinguishment of the easement on other grounds. Denying the injunction despite the apparent misuse, the court noted the benefits to the servient parcel owners would be minimal compared to the hardship to the dominant parcel owners if the injunction were granted. *Id.* at 364; *see also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.4, at 52 (1973) [hereinafter DOBBS, REMEDIES] (poor ethical standing of the party seeking relief may force him to accept reduced remedy or no remedy).

28. City of Dunsmuir v. Silva, 154 Cal. App. 2d 825, 317 P.2d 653 (1957); *see also* DOBBS, REMEDIES, *supra* note 27, § 2.4, at 52.

29. Bach v. Sarich, 74 Wn. 2d 575, 582, 445 P.2d 648, 653 (1968); *see also* RESTATEMENT (SECOND) OF TORTS § 941 comment b (1979).

30. Mancini v. Bard, 42 N.Y.2d 28, 364 N.E.2d 1313, 396 N.Y.S.2d 621, 622 (1977).

31. McCullough v. Broad Exch. Co., 101 A.D. 566, 92 N.Y.S. 533, 537 (1905), *aff'd*, 184 N.Y. 592, 77 N.E. 1191 (1906).

32. *Id.*

33. *See supra* note 11.

dominant parcel.[34] In a case sometimes cited as authority for the classic rule, the alleged misuse involved a building that straddled the common boundary and was connected to other structures on the dominant parcel by a passageway.[35] The court denied an injunction, however, based in part on its declaration that the uses involved were separable.[36] The relative hardship and the lack of good faith by the owner of the servient parcel apparently influenced the court to avoid the effects of a strict application of the classic rule.

3. Remedies

When application of the classic rule serves the purposes of the court, the classic rule is applied with little or no comment regarding the equities. A common example of this is where alternate access to the nondominant parcel alleviates the hardship to the dominant parcel.[37] Remedies granted when the classic rule is applied include permanent injunctions limiting the benefit to the dominant parcel,[38] temporary injunctions against all use until the benefit can be limited to the dominant parcel,[39] and (rarely) extinguishment of the easement.[40]

Alternatively, when courts have been inclined to avoid the bright line effect of the rule, they have done so through their discretionary powers in equity.[41] As a result, courts have occasionally shaped creative remedies.

34. *See, e.g.*, Beloit Foundry Co. v. Ryan, 28 Ill. 2d 379, 192 N.E.2d 384 (1963); Miller v. Weingart, 317 Ill. 179, 147 N.E. 804 (1925); Selvia v. Reitmeyer, 156 Ind. App. 203, 295 N.E.2d 869 (1973); Mancini v. Bard, 42 N.Y.2d 28, 364 N.E.2d 1313, 396 N.Y.S.2d 621 (1977); Markley v. Lopresti, 280 Pa. Super. 484, 421 A.2d 825 (1980); Robertson v. Robertson, 214 Va. 76, 197 S.E.2d 183 (1973).

35. Wetmore v. Ladies of Loretto, 73 Ill. App. 2d 454, 220 N.E.2d 491 (1966).

36. *Id.* The dispute in *Ladies of Loretto* concerned a building that straddled the boundary between the dominant and nondominant parcels. The building, which was accessible without use of the easement, was also physically connected to other structures on the dominant parcel by a passageway. The court nevertheless declared the uses to be separable and denied the requested injunction. *Id.* at 494. Furthermore, the court stated it could find no reason to restrict the use of the easement to the dominant parcel. Factors influencing the court's decision included the substantial decrease in traffic over the disputed easement, the aggressive behavior of the owner of the servient parcel, and the amount of control he had in bringing about the dispute. *Id.* at 497.

37. *See supra* note 20.

38. *See, e.g.*, Mancini v. Bard, 42 N.Y.2d 28, 364 N.E.2d 1313, 396 N.Y.S.2d 621, 622 (1977); College Inns of America, Inc. v. Cully, 254 Or. 375, 460 P.2d 360, 361 (1969); Markley v. Lopresti, 280 Pa. Super. 484, 421 A.2d 825, 826 (1980).

39. *See, e.g.*, Penn Bowling Recreation Center v. Hot Shoppes, 179 F.2d 64, 67 (D.C. Cir. 1949).

40. *See supra* note 22.

41. *See, e.g.*, National Lead Co. v. Kanawha Block Co., 288 F. Supp. 357 (S.D. W. Va. 1968), *aff'd*, 409 F.2d 1309 (4th Cir. 1969). The court declared that while the degree to which the burden on the servient parcel increased was immaterial to the question whether there had been a misuse, it was material to the question whether equitable relief was justified. *Id.* at 364. *See supra* note 27; *see also* Chafin v. Gay Coal & Coke Co., 109 W. Va. 453, 156 S.E. 47 (1930).

One court limited the use of an easement to the owner of the dominant parcel personally, until conditions changed so that use by others could be limited to uses connected with the dominant parcel.[42] Another court refused to enjoin the extension, but required that access be across the dominant parcel, and not directly from the easement to the nondominant parcel.[43]

When a court denies a servient parcel owner an equitable remedy, such as an injunction, the court does not necessarily deny all legal rights[44] or remedies.[45] Legal remedies for the misuse of an easement could include damages. One court that denied equitable relief specifically left open the option of a legal remedy.[46] For the servient parcel owner, however, this option may only raise the issue of whether the remedy is adequate.[47] A legal remedy in an easement case may be nominal where it is based on the diminution of the value of the servient parcel caused by the increased burden.[48] Thus, a legal remedy alone may not provide meaningful relief to the servient parcel owner.[49]

II. *BROWN v. VOSS*

A. Facts

In *Brown v. Voss* the Washington Supreme Court for the first time considered whether an easement may be extended to benefit a nondominant parcel.[50] The dispute in *Brown* involved three adjoining lots located along a limited access highway.[51] Lot *A*, the servient parcel, was owned by the Vosses, while lot *B*, the dominant parcel, was owned by the Browns.[52]

42. Tamburo v. Murphy, 72 Misc. 2d 120, 339 N.Y.S.2d 693, 697 (1970), *aff'd*, 40 A.D.2d 947, 340 N.Y.S.2d 881 (1972) (use of the easement expressly limited to the owner of the dominant parcel or his individual grantee).

43. Ogle v. Trotter, 495 S.W.2d 558 (Tenn. App. 1973). The easement was adjacent to both the dominant and nondominant parcels. The court permitted extension of the benefit to the nondominant parcel, yet required that access be via the dominant parcel. Permission to extend the benefit was granted only so long as the owner of the dominant and nondominant parcels continued to own the dominant parcel and provided such use did not impose a burden greater than that originally imposed upon the servient parcel. *Id.* at 566.

44. *See generally* DOBBS, REMEDIES, *supra* note 27, § 1.2 (rights are closely identified with the availabilty of remedies).

45. *Id.* § 2.4, at 45.

46. National Lead Co. v. Kanawha Block Co., 288 F. Supp. 357, 365 (S.D. W. Va. 1968).

47. DOBBS, REMEDIES, *supra* note 27, § 2.5.

48. *See generally id.* § 3.2.

49. *See supra* notes 9, 10 and accompanying text.

50. 105 Wn. 2d 366, 715 P.2d 514 (1986).

51. *Brown*, 105 Wn. 2d at 368, 715 P.2d at 515.

52. *Id.* at 369, 715 P.2d at 515.

Previous owners of lot *A* had granted an easement for ingress and egress to previous owners of lot *B*. Shortly after acquiring lot *B*, the Browns purchased lot *C*. Previous owners of lot *C* were not parties to the easement grant, and as a result lot *C* was landlocked.[53] When the Browns acquired their lots, a single-family dwelling was located on lot *B*, while lot *C* was undeveloped.[54] In preparation for construction of a new single-family dwelling, to be located astride the boundary line common to lots *B* and *C*, the Browns began regrading the lots. Responding to the increased traffic, the Vosses attempted to obstruct the easement.[55] The Browns brought an action for removal of the obstruction and for damages, and the Vosses counterclaimed for damages and an injunction to prevent the extension of the easement to benefit lot *C*, the nondominant parcel.[56]

B. Opinion of the Court

The Washington Supreme Court held that the Browns had misused the easement by extending the benefit to a nondominant parcel, and rejected their contention that there could be no misuse without an increase in the burden.[57] The court noted that, under the express terms of the easement, the benefit was limited to Lot *B*. Nonetheless, the court agreed with the trial court that, in this case, the misuse was merely technical. The court held that while the Browns were technically trespassing, their use of the easement was not unreasonable and affirmed the trial court's decision that injunctive relief in equity was not justified.[58]

According to the court, the burden on lot *A* was the same whether the single-family dwelling was located on lot *B* or on lot *C*.[59] Weighing the relative hardship an injunction would place on the Browns, the court found that without the extension of the easement lot *C* would be landlocked. The Browns would be unable to make full use of their property, and would not be able to build the new single-family residence on the site most benefitted by the view. Conversely, the court found denial of the requested injunction would impose no appreciable hardship or damage upon the Vosses.[60] The court also agreed with the trial court that it was relevant that the Vosses had

53. *Id.*
54. *Id.*
55. *Id.* at 369, 715 P.2d at 516.
56. *Id.*
57. *Id.* at 371–72, 715 P.2d at 517.
58. *Id.*
59. *Id.* at 373, 715 P.2d at 518.
60. *Id.*

waited to assert their claim, and in fact had only asserted it to gain leverage against the Browns' claim.[61]

Declaring the trial court had based its decision on sufficiently supported findings, and therefore had acted within its discretion, the supreme court, with two dissenters,[62] reversed the decision of the court of appeals,[63] and affirmed the trial court. Consequently, the supreme court denied the injunction requested by the Vosses, and granted the Browns the right to use the easement for the benefit of both lots, upon the express condition that the development of the combined lots be limited to the use which had previously been enjoyed by lot *B* alone.[64]

III. ANALYSIS

If the classic property rule—that a misuse occurs when the benefit of an easement is extended to a nondominant parcel—had been applied strictly to the facts in *Brown,* the servient owner would have been granted an injunction prohibiting the extension of the easement to benefit the subsequently acquired, nondominant parcel.[65] The supreme court recited the classic rule, but chose to avoid its strict application by resorting to equity. In effect, the court applied a bifurcated analysis. As a result, the court aknowledged that a misuse had ocurred, but denied the servient parcel owners a meaningful remedy. The court's action decreases predictable application of the rule, with the potential result of increased litigation. The use of equity powers to avoid the bright line application of the classic rule should be reserved for

61. *Id.*

62. Justice Dore wrote a dissenting opinion in which Justice Goodloe concurred. *Id.*

63. 38 Wn. App. 777, 689 P.2d 1111 (1984). Noting the effect of the trial court's decision was to rewrite the easement, *id.* at 780, 689 P.2d at 1113, the court of appeals reversed and remanded for an order enjoining the Browns from using the easement to construct or gain access to a residence located partially on lot *C. Id.* at 784, 689 P.2d at 1115. Applying the classic rule, the court held that the Browns had overburdened and misused the easement. Further, the court anticipated continued misuse if the Browns used the easement to access a residence partially on lot *C. Id.* at 782, 689 P.2d at 1114. The court next considered whether the trial court had acted within its discretion in refusing to grant an injunction to the Vosses, and concluded that the trial court's denial of an injunction was based on untenable grounds. *Id.* at 785, 689 P.2d at 1115. Weighing the relative hardship, the court of appeals found the hardship to the Browns' was outweighed by the Vosses' property interests. The court also noted that the defense of relative hardship, which is reserved for the innocent, should not be available to the Browns' who knew when they acquired lot *C* that it was not benefitted by the easement. *Id.* The court pointed out that other means were available to the Browns to alleviate their hardship, including an action for a private way of necessity, under WASH. REV. CODE § 8.24.010 (1985). *Brown,* 38 Wn. App. at 783, 689 P.2d at 1114.

64. *Brown,* 105 Wn. 2d at 373, 715 P.2d at 518.

65. This result was advocated by Justice Dore in his dissent, 105 Wn. 2d at 373, 715 P.2d at 518, and reflects the conclusion of court of appeals, 38 Wn. App. 777, 785, 689 P.2d 1111, 1115 (1984). *See supra* note 63.

extreme cases, and is especially unnecessary where a reasonable solution to the conflict is available through other means.[66]

A. Brown *Followed the Trend to Bifurcate the Analysis*

Although *Brown v. Voss* represents a case of first impression in Washington, the analysis utilized and the conclusion reached follow a trend established in other jurisdictions.[67] Courts are moving away from the emphasis originally placed on protecting the rights of the servient parcel owners and toward an avoidance of unreasonable hardship to the dominant parcel owners. This is especially true when the dominant parcel owner acts reasonably and in good faith. The factors expressly relied on in *Brown* echo factors singled out by other courts. These factors fall into two general areas: first, the relative hardship to the parties if a remedy is permitted;[68] and second, whether the parties acted reasonably and in good faith.[69]

1. Brown *Weighed the Relative Hardship*

With the *Brown* decision, Washington becomes another jurisdiction that examines relative hardship in determining whether to grant a remedy for improper extension of an easement. In *Brown,* the court assessed the hardship that would result from failure to grant permission to extend the easement.[70] The hardship to the dominant parcel owner included a landlocked parcel, loss of the opportunity to the make the best use of the view, and the economic waste of the investment in preparing for construction of the single-family dwelling.[71] Finding no comparable hardship to the servient parcel, the court ignored the terms of the easement and permitted the extension of the benefit.[72]

66. *Brown,* 105 Wn. 2d at 375–76, 715 P.2d at 519 (Dore, J., dissenting). One possible way for the owners of the dominant parcel to acquire access to the nondominant parcel is through an action for a private way of necessity. Under Washington law, landowners may condemn rights of way over the lands of others by showing that such access is necessary for the proper use and enjoyment of their land. WASH. REV. CODE § 8.24.010 (1985). Payment of just compensation to the owner of the servient parcel is required. *Id.* § 8.24.030; *see* Brown v. McAnally, 97 Wn. 2d 360, 644 P.2d 1153 (1982) (condemnation may be authorized where only reasonable necessity is shown); Leinweber v. Gallaugher, 2 Wn. 2d 388, 98 P.2d 311 (1940) (owner of landlocked parcel not entitled to private way of necessity without paying).

67. *But see* Castanza v. Wagner, 43 Wn. App. 770, 719 P.2d 949, 954 (1986) (Williams, J., concurring) (citing *Brown* as supporting the classic rule).

68. *See supra* notes 20–26 and accompanying text.

69. *See supra* notes 27–32 and accompanying text.

70. *Brown,* 105 Wn. 2d at 373, 715 P.2d at 518.

71. *Id.* at 370, 715 P.2d at 516.

72. *Id.* at 373, 715 P.2d at 518.

The supreme court confirmed the trial court's finding that there would be no actual increase in the burden on the servient parcel where the use of the combined parcels was limited to one single-family dwelling.[73] The court then concluded that "actual and substantial injury" to the party seeking relief was essential to the question of equitable remedy.[74] Contrary to the trend followed by *Brown,* the classic rule suggests, and some courts have held, that overburdening the easement is inherent in any extension of the benefit.[75] Injury beyond the misuse need not be shown.

The court in *Brown,* following courts in other jursidictions, refused to grant a remedy where no actual increase in the burden on the servient parcel was shown.[76] One court, after bifurcating the analysis, declared that an increase in the burden is immaterial to whether a misuse occurred, but material to whether an injunction could be justified.[77] This two-step analysis is not contemplated by the rule itself. In a similar dispute concerning a single-family residence, another court permitted extension of the benefit of an easement. The court noted that changes in the use, affected by the dominant parcel owners, had caused a material decrease in the burden on the servient parcel, in spite of the extension.[78]

2. Brown's *Treatment of Good Faith and Other Equitable Defenses*

Using broad, discretionary powers in equity, courts have considered good faith and other equitable defenses when resolving disputes concerning the extension of the benefit of an easement.[79] In *Brown,* the supreme court gave some weight to the fact that the Vosses did not assert their legal claim until the Browns had spent a considerable amount of money preparing for construction of the new residence.[80] Indeed, the claim

73. *Id.* at 370, 715 P.2d at 516.

74. *Id.* at 372, 715 P.2d at 517.

75. *See supra* note 7 and accompanying text.

76. *See supra* note 23 and accompanying text.

77. *See supra* note 41 and accompanying text.

78. Ogle v. Trotter, 495 S.W.2d 558 (Tenn. App. 1973). The easement had previously benefitted two dwellings and was subject to occasional use by the public. Owners blocked the easement to limit its benefit to part of the dominant parcel and their residence on the nondominant parcel. The court declared that without an increase in the burden on the servient parcel the reason for the rule did not exist and therefore the rule did not apply. *Id.* at 565–66; *see also* Wetmore v. Ladies of Loretto, 73 Ill. App. 2d 454, 220 N.E.2d 491, 497 (1966) (due to the efforts of the holder of the easement to reroute visitors to an alternate access, use had decreased to only five cars per day).

79. *See supra* notes 27–32 and accompanying text.

80. *Brown,* 105 Wn. 2d at 373, 715 P.2d at 518.

> Laches is an equity doctrine to the effect that unreasonable delay will bar a claim if the delay is a prejudice to the defendant. It was developed partly because at one time no statute of limitations applied to bar equity claims . . . . [D]octrines . . . developed primarily in the light of the

was admittedly presented as leverage to settle the suit initiated by the Browns.[81]

The supreme court in *Brown,* however, ignored equitable considerations that would have favored the owners of the servient parcel. According to the court of appeals, the Browns created their own hardship when they acquired Lot *C,* which they knew, or should have known, was not benefitted by the easement to Lot *B*.[82] The supreme court did not address this issue.[83] The supreme court also failed to discuss the issue of inseparable uses. Under the classic rule, where the permitted and prohibited uses are inseparable, equitable relief generally has been granted to the servient parcel owner.[84] In *Brown* the easement was extended to serve a single-family residence straddling the common boundary. The use on the dominant parcel could not be separated from the use on the nondominant parcel; yet the injunction to prohibit the extension was denied.

3. Brown's *Treatment of Remedies*

As have other courts,[85] the court in *Brown* avoided a strict application of the classic rule and denied a meaningful remedy. By granting permission to extend the benefit of the easement subject to specific conditions, however, the decision in *Brown* indicates that Washington is following the trend to shape creative remedies on a case-by-case basis.[86] Although willing to acknowledge that the easement had been misused and a trespass had occurred, the court in *Brown* did not grant an injunction to remedy the situation.[87] The decision in *Brown* effectively confirms a right, but denies a remedy to protect that right.[88]

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equitable purpose to avoid detriment to one because of the conduct of another. These doctrines have worked in form as defenses, but in fact they afforded rights where none existed before.

DOBBS, REMEDIES, *supra* note 27, § 2.3, at 43, 44. "Thus if one party has been guilty of some misleading conduct, this may be considered even if it does not in itself amount to an estoppel." *Id.* § 2.4, at 52; *see also supra* note 27.

81. *Brown,* 105 Wn. 2d at 373, 715 P.2d at 518.

82. Brown v. Voss, 38 Wn. App. 777, 783, 689 P.2d 1111, 1114 (1984).

83. *Brown,* 105 Wn. 2d at 372, 715 P.2d at 517. Principles fundamental to a request for equity include: (1) the proceeding is equitable, and addressed to the discretion of the trial court; (2) the trial court has broad discretion to shape injunctive relief on a case-by-case basis; and (3) actual and substantial injury, to the party seeking the injunction, is essential. *Id.*

84. *See supra* note 11 and accompanying text.

85. *See supra* note 41 and accompanying text.

86. *See supra* notes 41–43 and accompanying text.

87. *Brown,* 105 Wn. 2d at 372–73, 715 P.2d at 517–18. The Vosses received only nominal damages for another trespass not related to the technical trespass that resulted from the extension of the benefit of the easement. *Id.* at 369, 715 P.2d at 516.

88. The court, however, did limit the use of the combined lots to the use originally enjoyed by lot *B* alone. *Id.* at 373, 715 P.2d at 518.

The right without a remedy result is especially unnecessary in Washington easement disputes where parties have available an action for a private way of necessity.[89] The Browns' nondominant parcel was landlocked.[90] Washington statutory law provides a means to obtain easements to landlocked parcels, and also provides for just compensation to servient parcel owners.[91] This statutory solution considers rights as well as hardships, attempting to bring the parties into reasonable balance. Since *Brown* allows extension of an easement without compensation, one party is benefitted at the expense of the other.

B. An Argument for the Bright Line Rule

In misuse cases that do not involve extension of the benefit of the easement to a nondominant parcel,[92] a two-part analysis is used. Once misuse is found, the question is whether the misuse is sufficiently unreasonable to justify an injunction.[93] Only on the issue of extending the benefit of an easement to a nondominant parcel, and only under the classic rule, is the solution traditionally reached without consideration of the reasonableness of the action.[94]

In cases involving the extension of the benefit of the easement, courts seem to have the best of both worlds. When the classic rule fits the circumstances, courts apply it as a bright line rule.[95] If courts wish to avoid the bright line rule, they may do so under their discretionary powers in equity.[96] This is particularly unfair, however, to the property owners who see the authority seemingly apparent in the rule as recited, and rely on the implication of a bright line limit to the burden imposed by the easement.

1. The Reasonableness Test Diminishes the Rights of Servient Owners

One commentator has argued that the bright line character of the classic rule should be abandoned and the reasonableness test alone remain.[97] A

89. WASH. REV. CODE § 8.24.010 (1985); *see supra* note 66 and accompanying text.

90. *See supra* note 53 and accompanying text.

91. *See, e.g.*, Brown v. McAnally, 97 Wn. 2d 360, 644 P.2d 1153 (1982); *see also* WASH. REV. CODE § 8.24.010 (1985).

92. *See supra* note 12.

93. It is for the court to consider the relative hardship, intent of the parties, and natural evolution of uses in order to arrive at a solution. *See generally* THE LAW OF PROPERTY, *supra* note 5, § 8.9.

94. *But see* Williams v. James, 2 L.R.-C.P. 577 (1867) (whether use of easement, which permitted the removal of hay from a field, was reasonable and legitimate when the easement holder stacked hay from a neighboring field on the field and then removed it via the easement).

95. *See supra* note 20 and accompanying text.

96. *See supra* note 22 and accompanying text.

97. Kratovil, *Easement Law and Service of Non-Dominant Tenements: Time for a Change*, 24 SANTA CLARA L. REV. 649 (1984).

reasonableness test brings the rule in line with the other scope of the easement rules.[98] A fundamental distinction, however, makes such a change inappropriate. The other rules are concerned with the effect on the servient parcel of activities that take place within the boundaries of the dominant parcel. The tension is between the servient parcel owners's right to be protected from an unreasonable increase in the burden and the dominant parcel owners's right to make full and reasonable use of the easement.[99] Courts attempt to balance these interests. The emphasis, however, is on the rights of the dominant parcel owner.

On the other hand, the classic rule limiting the benefit of the easement to the dominant parcel accentuates the rights of the servient parcel owner. The bright line defines the maximum physical limits of "full and reasonable use." Extension of the benefit to a nondominant parcel is by definition an uncontemplated and not bargained for increase of the burden on the servient parcel, and thus a misuse. Balancing the reasonableness of the misuse where it involves an additional parcel is fundamentally offensive to the rights of the servient owner.

2. *Failure to Apply the Classic Rule as a Bright Line Increases Litigation and Uncertainty*

The change to a reasonableness test requires that each case be decided on its own facts and equities, using considerations courts commonly apply to the other scope of the easement questions.[100] Courts would avoid economic waste and ensure use of each parcel was to its fullest value.[101] The possibility of extortion by servient owners in exchange for permitting the extension would be mitigated.[102] It has also been suggested that a reasonableness test decreases litigation.[103] However, if extension of the benefit were to be permitted or enjoined based on a court's definition of a "reasonable increase in the burden," there would be more litigation, not less. More landowners would find it necessary to seek the elusive definition.[104] In

98. *Id.* at 659. Professor Kratovil also argued that a change to the reasonableness test would put an end to extortion suits, enhance the efficient utilization of property, and protect lawyers from malpractice suits.

99. 2 AMERICAN LAW OF PROPERTY § 8.1 (A. Casner ed. 1952) [hereinafter AMERICAN LAW OF PROPERTY].

100. Kratovil, *supra* note 97, at 657.

101. Similar protection is also available, however, where an action for a private way of necessity is available. *See supra* note 66.

102. DOBBS, REMEDIES, *supra* note 27, § 5.6.

103. Kratovil, *supra* note 97, at 649.

104. If the parties have specific reasons to absolutely limit the benefit of the easement to the dominant parcel, then the grant can be so worded. *Id.* at 659. *But see* National Lead Co. v. Kanawha Block Co., 288 F. Supp. 357, 365 (S.D. W. Va. 1968), *aff'd*, 409 F.2d 1309 (4th Cir. 1969); *Brown*, 105

addition, predictability would be further impaired, not improved.[105] Courts already differ radically on the question of what constitutes an unreasonable increase in burden.[106]

Strict application of the classic rule, on the other hand, reduces litigation.[107] The bright line drawn by the rule limits the burden on the servient parcel by restricting the encumbrance of the easement to those reasonable uses that take place entirely on the dominant parcel.[108] There is, however, no interference with the dominant parcel owner's right to make full, reasonable use of the easement to benefit the dominant parcel. Nevertheless, if inflexibly applied, the classic rule could threaten economic waste and bestow substantial and unequal power on the owner of the servient parcel.[109] It is this extreme situation for which the equity powers of the court should be reserved. Furthermore, in Washington, where an action for a private way of necessity is available,[110] a manifestly unfair result can be avoided without the transition to equity.

3. *Bright Line Application of the Classic Rule Protects Legitimate Expectations and Property Rights*

Under the classic rule courts are not asked to determine the reasonableness of the extension of the benefit. The question is answered before it is raised: any extension is unreasonable and is a misuse.[111] Thus, while the burden of the easement may expand as conditions change, as the use of the dominant parcel changes, or in the event the dominant parcel is subdivided, the scope of the easement is ultimately limited to the physical boundaries of the dominant parcel. Under the bright line rule, the servient owners may be forced to tolerate the subdivision of the dominant parcel, which they could have contemplated.[112] It cannot be projected, however, that they

Wn. 2d at 372, 715 P.2d at 517 (extension of the easements permitted despite express language in the easement grants limiting the benefits to the dominant parcels).

105. Results are less predictable when courts look beyond the separable or inseparable uses and consider the relative hardship in equity, where the court may apply broad discretion.

106. Conceding this point, Professor Kratovil notes, "The decisions, however, do not always agree as to what constitutes an unreasonable increase of burden." Kratovil, *supra* note 97, at 653.

107. This, coupled with a desire not to cloud title, may explain in part why there are relatively few extension of the benefit cases.

108. *See supra* note 16.

109. In a worst case scenerio, the servient parcel owner could demand exhorbitant compensation for the extension of an easement to benefit a landlocked parcel. The dominant parcel owner would be faced with a choice between the inability to make full use of the parcel or payment of the required compensation. This result would also be contrary to the public's interest in seeing land fully and efficiently developed.

110. *See supra* note 66 and accompanying text.

111. *See supra* note 7.

112. RESTATEMENT OF PROPERTY § 484 (1944): "In the absence of language specifically negativing it, it will be assumed that the parties contemplated changes in the use of the tenement made necessary by

contemplated the annexation of a nondominant parcel with its increased burden.

The operation of the classic rule protects the servient parcel owner's property value and right to negotiate for just compensation for the grant of an easement, and does not inhibit the alienation of land. An easement is a marketable interest.[113] On the facts in *Brown,* if lot *C* had been purchased by third parties, they would have been expected to negotiate with the Vosses, as well as the Browns, for use of the easement. Application of the classic rule simply ensures that access to each parcel be negotiated for separately, even where there is common ownership. This is essential to the preservation of the bargain conveying the original grant of an easement. In addition, the classic rule makes alienation of the servient parcel easier. Because the parties can anticipate and plan for a limit to the expansion of the burden, the value of the land is not clouded by lack of clarity regarding the ultimate scope of encumbering easements.

IV. CONCLUSION

In *Brown v. Voss* the Washington Supreme Court addressed the extension of an easement to benefit a nondominant parcel. The court declared the extension of the easement to be a misuse, yet denied the requested injunction where actual injury to the servient parcel was not shown. In doing so, the court followed the trend in other jurisdictions to recite the classic rule, and then avoid its strict application when the hardship to the dominant parcel outweighs the relative hardship to the servient parcel.

The classic rule, that an easement may not be extended to benefit a nondominant parcel, prohibits any extension clearly and firmly. The bright line fades, however, when courts use their discretionary powers in equity to avoid the rule and shape remedies on a case-by-case basis. This evasion denies the reason behind the rule: to prevent overburdening of the servient parcel. The court in *Brown* adopted a method employing balancing of the hardship to the parties. The rights and interests of property owners would be better served by a strict application of the classic rule. This is particularly true where avoidance of the bright line effect of the classic rule is not necessary due to the availability of a statutory alternative to alleviate the hardship to the dominant parcel owner.

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the normal development of the dominant tenement." *But see* AMERICAN LAW OF PROPERTY, *supra* note 101, § 8.69 (due to its prospective nature, an easement created by conveyance should not be assumed to have been intended to accommodate future needs).

113. AMERICAN LAW OF PROPERTY, *supra* note 101, § 8.15.