No. 92036-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARK F. & LINDA H. BRESSLER,
Plaintiffs / Appellants

Received
Washington State Supreme Court

OCT 02 2015

Ronald R. Carpenter
Clerk

v.

KEVIN F. & LINDA SULLIVAN,
Defendants / Respondents

v.

GMAC MORTGAGE, LLC &
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
Defendants

REPLY TO ANSWER
ON BEHALF OF KEVIN F. & LINDA SULLIVAN

G. Geoffrey Gibbs, WSBA No. 6146
Attorney for Respondents Sullivan

ANDERSON HUNTER LAW FIRM
2707 Colby Ave., Ste. 1001
Everett, Washington 98201
(425) 252-5161
ggibbs@andersonhunterlaw.com

TABLES

I. TABLE OF CONTENTS

A. Identify of Petitioner 1

B. Brief Statement of Case 2

C. Reply to Additional Issues Raised in Answer 5

1. While there existed "intentional acts" by the Sullivans in erecting a fence or mailbox in the easement, they were not permanent or inconsistent with the continued existence of the easement for its limited and stated purpose of launching a small boat. 5

2. Sullivans did not exhibit "bad faith" toward the Bresslers in their actions. Equitable relief is available and was property provided by the Trial court. 8

3. The Trial court was correct in finding the issue of negative personal interactions between the parties irrelevant to "abandonment" of an easement. Excluding hearsay police reports related to alleged hate speech by the Sullivans was a correct ruling. 9

D. Summary 12

II. TABLE OF CASES

Proctor v. Huntington,
169 Wn.2d 491, 238 P.3d 1117 (2010) 5, 9

Nickell v. Southview Homeowners Ass'n,
167 Wn.App. 42 (2012) 6

Heg. v. Alldredge,
157 Wn.2d 154, 137 P.3d 9 (2006) 11

Heg. v. Alldredge,
124 Wn.App. 297, 310, 99 P.3d 914 (2004) 10

Edmonds v. Williams
54 Wn.App. 632, 774 P.2d 1241 (1989) 7

Humphrey v. Jenks,
61 Wn.2d 565, 379 P.2d 366 (1963). 11

III. OTHER TREATISE OR AUTHORITIY CITED:

"Practical Guide to Disputes Between Adjoining Landowners – Easements", Backman & Thomas (1999) at § 1.01(2)(a). 7

A. IDENTITY OF PETITIONER

Kevin and Linda Sullivan (hereinafter referred to collectively as "Sullivans") petition the Supreme Court to accept review of the unpublished Court of Appeals decision in this matter terminating review as designated below.

B. BRIEF STATEMENT OF THE CASE

At issue herein is a "joint boat launch easement" which burdened both the property owned by Plaintiffs Bressler and Defendants Sullivan that is more fully described in Trial Exhibit 11. The Sullivans, when an issue arose concerning the easement, were misadvised that no easement existed by their attorney at that time (now disbarred). Counsel for the Bresslers worked with counsel for the Sullivans to draft a document formally extinguishing the easement. That document was never executed and eventually the Sullivans notifed the Bresslers that they did not intend to agree to an extinguishment.

The boat launch easement, just as its name implied, is an easement for the limited purpose of launching and retrieving a both through an opening in the seawall (or concrete retaining wall) located on the Bressler property. The Bresslers have never owned a boat and had no intention of purchasing one. RP 277-278. The Sullivans, in contrast, have always been boaters and obtained a boat that could be launched via the easement area.

Having erected a fence along the property line between the two homes, the Sullivans had impeded potential use of the easement although they later relocated and removed the fence and all other obstructions. CP At no time did the Bresslers ever seek to use the easement for its stated limited purpose.

Trial was held in Island County Superior Court over a number of days in front of the Hon. Vickie I. Churchill. Judge Churchill, in a 10-page letter ruling (CP 201) found the following facts essentially as undisputed:

(a) That the Sullivans had originally thought an easement existed between the two houses to facilitate getting boats to and from the beach, the only opening in the beach seawall wide enough for launching such boats being on the Bressler side of the properties. .

(b) The Court further found that after consulting an attorney, the Sullivans were advised incorrectly that an easement could not be located on the records of title and in reliance on such advice, constructed a fence on their side of the property line but nonetheless in the area covered by the easement.

(c) The Bresslers subsequently hired an attorney not to object to the location of the fence as they did not own or use boats but to obtain an agreement that the easement could be extinguished of record.

(d) When the Bressler's counsel contacted the attorney for the Sullivans in this regard, the Sullivans found out that an easement to launch boats did, in fact, exist. While it was the initial hope of the Sullivans that they might be able to create an opening and launch point in their own seawall, the costs and regulatory demands were simply prohibitive. The trial court found that the Bresslers were entitled to rely upon the representations and actions of Sullivans' attorney but any hardship to the Bresslers was compensable if their attorneys' fees to that point were reimbursed.

The Court, after trial, ruled as follows:

> *"The third prong focuses on the injury the other party would suffer if the servient tenant, in this case the Sullivans, were allowed to contradict or repudiate their earlier admissions, statements or acts.*
>
> > *'An easement may be extinguished by conduct of the owner even though he had no intention to give up the easement. This is due to the general principle that the owner of an easement will not be permitted to change a position once taken by him if the change would cause undue hardship to the owner of the servient tenement.' Humphrey v. Jenks, 61 Wn.2d 565, 379 P.2d 366 (1963), quoting from 2 American*

Law of Property 305, §8.00).(Emphasis added [by the Court]).

"Obviously the Bresslers have incurred attorney fees in drafting the extinguishment agreement and attempting to have it executed. The Bresllers have also incurred ongoing attorney fees because of the continued encroachment by the Sullivans, even after those encroachments were called to the Sullivans' attention. Most of the encroachments had been removed by the time of trial, but the fence and landscaping encroachments remain. The continued presence of the fence in the easement area threatens the integrity of the Bresslers' reserve drainfield. However, the fence can be easily removed, as shown by the number of times the Sullivans moved their fence; and the landscaping can be removed.

"The Court finds that the Bresslers will suffer no undue hardship if the Sullivans are required to move the encumbrances found by the court to encroach on the easement and to pay the attorney fees incurred by the Bresslers. ***When the Bresslers bought their property, they knew it was encumbered by the boat launch declaration and that they would have to allow their neighbors to use it****. The fact that the neighbors are contentious is unfortunate." See Letter Ruling, CP 201 (emphasis added).*

It should be noted that the record reflects the Sullivans complied fully with the conditions set by the Court. See CP copies of pleadings filed as Sub. 174 and 175. The Court of Appeals essentially reversed the trial court. The nexus of their decision can be stated as follows:

"The trial court's ruling permitting the Sullivans to reinstate the easement after they abandoned it is without legal basis. Once an easement is extinguished by abandonment, or any other means, it no longer exists. Thus, it may only be 'reinstated' by creation of a new easement. . . .

"Once the court concluded the easement was abandoned, this was sufficient to extinguish the easement. The court's consideration of the equitable estoppel argument was unnecessary and

unwarranted. The court did not have the authority to order the reinstatement of the abandoned easement on a finding that the Bresslers would not suffer undue hardship if the Sullivans moved the encumbrances and paid the attorney fees ordered by the court. The trial court appears to have erroneously merged the requirements for abandonment and equitable estoppel and fashioned a remedy of 'reinstatement' of an abandoned easement based on the requirements of equitable estoppel." Bressler v. Sullivan, Unpublished Opinion in No. 72027-9-I.

C. REPLY TO ISSUES RAISED IN BRESSLERS' ANSWER

Contrary to the assertion in the Answer, we believe the trial court correctly balanced all the equities when it permitted reinstatement, contrary to the assertion in the Answer.

1. While there existed "intentional acts" by the Sullivans in erecting a fence or mailbox in the easement, they were not permanent or inconsistent with the continued existence of the easement for its limited and stated purpose of launching a small boat.

The Answer of Bressler, in raising new issues, relies heavily on *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010). But the rule in *Proctor* does not encompass the issue before the Court herein, abandonment of an easement or its reinstatement. *Proctor*, although setting forth an excellent historic discussion regarding the development of real property law specifically as it related to ejectment, was limited in its facts and ruling to "ejectment" of a home mistakenly built on another's property. See *Proctor, supra* at 501-502.

> *"The Trial Court's equitable approach in this case fits comfortably within the good-faith-mistake line of cases, including Arnold and Bufford, in which equity allows a court to apply a liability rule in lieu of rote application of a property rule."* Proctor, *supra* at 504

In the case at bar, the issue has nothing to do with ejectment of one property owner from the land of another. It is acknowledged that the 10' strip of land upon which the boat launch easement is located is owned one-half by each of the parties. That the Sullivans built a fence along the actual property line (and within the easement) and later upon legal challenge removed it to leave the easement open and accessible to both parties does not trigger ejectment of any kind. *Proctor* is not dispositive of any issue in this case. See also Nickell v. Southview:

> *"Second, Southview's reliance on Proctor is misplaced because, unlike the circumstances here, Proctor addresses only actual ejectment; "adverse possession and estoppel claims [were] not before [the Supreme Court] on review. Proctor, 169 Wn.2d at 495 n.2." Nickell v. Southview Homeowners Ass'n, 167 Wn. App. 42, 59 (2012).*

But seeking application of Proctor to the abandonment of an easement issue present herein in some ways supports the request that the Supreme Court accept this matter for review to clarify the very limited case law in this area.

Any analysis should be mindful that an "easement" is different than outright ownership of property. In the context of this case particularly, an easement is not an "ownership interest" per se. It is a legally granted privilege to use the land of another in a particular manner. In this case, the Sullivans have a legally granted privilege to use the southernmost 5 feet of the Bressler property and a portion on the east side for the limited purpose of launching and retrieving a small boat. The Bresslers have the same right on the nethermost 5 feet of the Sullivan

property. But the law still permits the Sullivans to erect a fence on the property line so long as it does not interfere with the Bresslers' rights under the easement. See Practical Guide to Disputes Between Adjoining Landowners – Easements", Backman & Thomas (1999) at § 1.01(2)(a).

The Court has held that the owner of land burdened by an easement may erect a fence across the easement blocking access or take other actions that do not do permanent damage to the future use of the easement and that such action does not ripen through the passage of time into extinguishment of the easement.

> *"Termination of easements is disfavored under the law. . . . The owner of the servient estate "has the right to use his land for purposes not inconsistent with its ultimate use for the reserved purpose". . . . In the same vein, it is not an inconsistent use to erect a fence across an unused express easement.*
>
> > *'[W]here an easement has been created but no occasion has arisen for its use, the owner of the servient tenement may fence his land and such use will not be deemed adverse to the existence of the easement until such time as (1) the need for the right of way arises, (2) a demand is made by the owner of the dominant tenement that the easement be opened and (3) the owner of the servient tenement refuses to do so.' (Italics ours.) Castle Assocs. v. Schwartz, 63 A.D.2d 481, 490, 407 N.Y.S.2d 717, 723 (1978). Accord, Annot., supra, 25 A.L.R.2d 1265, § 26, at 1325-30.*
>
> *"In this case the record does not reflect that any effort was made to use the parcel A access easement from the time the easement was created in 1969 until well after the City acquired parcel A. The only use of the easement area by Williams that could be considered obstructive to the easement was his construction and maintenance of a fence. This is not a sufficiently inconsistent use of the easement area to constitute adverse possession." Edmonds v. Williams, 54 Wn.App. 632, 636-637, 774 P.2d 1241 (1989).*

In this case, the trial court found that the Sullivans erected a fence and a mailbox in the area of the easement but also found that these could be (and were) easily removed thus freeing up the access to the easement. See CP 201. The Bresslers did not at any time own a boat, did not intend to purchase a boat and never demanded access to the easement area for the stated purpose. RP 277-278. Under all these circumstances, the trial court was justified and correct in applying equitable principles and not applying rote real property law regarding abandonment of the easement (as the Court of Appeals ruled it should).

2. Sullivans did not exhibit "bad faith" toward the Bresslers in their actions. Equitable relief is available and was property provided by the Trial court.

In their Answer, Bressler's argue the "clean hands" doctrine when equity is applied. Answer at pg .17-18. Bresslers argue that Sullivans proceeded in "bad faith" when they explored the option of creating their own boat launch and delayed in removing the fence on their property line but which blocked potential access by the Bresslers to launch a boat (a boat they did not have nor intended to acquire).

Bresslers allege bad faith of the Sullivans was demonstrated by the erection of a fence by the Sullivans after being supplied with a copy of the easement, claiming they then stalled negotiations toward a written extinguishment of the easement while they explored options to provide financial support for potentially creating a boat launch solely on their own property. These actions were not found to be in "bad faith" in the trial court and should not be so characterized on review.

3. The Trial court was correct in finding the issue of negative personal interactions between the parties irrelevant to "abandonment" of an easement. Excluding hearsay police reports related to alleged hate speech by the Sullivans was a correct ruling.

First, for the most party the Sullivans denied the allegations about making hateful remarks concerning their neighbors, the Sullivans. But as argued to the trial judge, the interactions between the parties in this regard was irrelevant to the issue of whether or not the easement had been abandoned by the Sullivans. During the trial, the Bresslers (plaintiffs) offered no evidence supporting any emotional damages, expert or otherwise.

But more importantly, to utilize a claim of "bad faith" actions by the Sullivans to prevent the application of equitable principles by the trial judge would have to relate to their actions erecting a fence, continuing negotiations regarding an extinguishment until they had more complete information on the cost of creating their boat launch, etc. That neighbors may speak in a manner that is disrespectful to the other party is not evidence of bad faith to defeat the application of equity under *Proctor v. Huntington, supra* (as claimed by the Bresslers in their Answer). As noted earlier, *Proctor* did not deal with an easement but rather ejectment where a house had mistakenly been built on the property of another. The Court in *Proctor* spoke to the enforcement of private property rights favoring one property owner over the other. In this case, the "extinguishment" of a very valuable property right is at issue. *Proctor, supra* at 504-505.

And the ability to transit the easement to launch a boat related to waterfront property on Puget Sound is a matter of huge value, particularly since there is no other public launch facility anywhere close to the properties involved.

Previously, in one of the very few Washington cases on "abandonment of an easement", the clear inference was that even when abandonment has been proven, revival or reinstatement can be shown and serve to maintain the legal existence of the easement. See Heg v. Alldredge. The Division I opinion clearly recognized the right of a party, even after a finding of abandonment of an easement, could seek revival absent application of principles of equitable estoppel.

> *"An easement may be extinguished by conduct of the owner of it even though he had no intention to give up the easement. This is due to the general principle that the owner of an easement will not be permitted to change a position once taken by him if the change would cause undue hardship to the owner of the servient tenement. Humphrey v. Jenks, 61 Wn.2d 565, 567-68, 379 P.2d 366 (1963) (quoting 2 AMERICAN LAW OF PROPERTY § 8.99, at 305) (1952)". Heg v. Alldredge, 124 Wn. App. 297, 310 (Wash. Ct. App. 2004)*

While the Supreme Court reversed the Court of Appeals, it did so based upon lack of evidence supporting abandonment of the easement. The alternative application of equitable estoppel by the Court of Appeals was not overturned by the Supreme Court in its later review.

"However, the court found the Alldredges presented a viable claim of equitable estoppel with respect to the second claim and remanded for trial. Id. at 313. In so holding, the court relied on Humphrey v. Jenks, 61 Wn.2d 565, 379 P.2d 366 (1963) for the proposition the conduct of a party's predecessors may bar the enforcement of easement rights.

"Ms. Heg argues she cannot be estopped from enforcing her easement rights based on the alleged conduct of her predecessors in interest, and that the Alldredges did not allege "justifiable reliance" upon such conduct. The Alldredges assert the Court of Appeals correctly construed Humphrey because otherwise the estopped party could resurrect a barred claim by transferring title to a third party. <u>In Humphrey we never reached that question</u> because the party asserting estoppel did not establish reasonable reliance. Humphrey, 65 Wn.2d at 570. Alldredges' argument that Heg's predecessors' conduct bars her from enforcing estoppel rights cannot be squared with the language requiring "the party to be estopped" to have acted or made statements inconsistent with his or her later claim, Walbrook, 115 Wn.2d at 347. Because the record contains no evidence of any acts or statements by Heg inconsistent with her claim of easement rights, Alldredges' second estoppel claim is without merit. <u>Heg v. Alldredge</u>, 157 Wn.2d 154, 166-167 (2006)

In this regard, see also the Jenks decision in which this court found that an easement could continue in force and effect in light of equitable considerations (e.g., no undue hardship) despite a barrier having been erected in the easement area. *<u>Humphrey v. Jenks</u>, 61 Wn.2d 565, 568 (Wash. 1963)*

D. SUMMARY

As noted in the Petition for Review, there is a clear conflict between the decisions of the Supreme Court (at least recognizing the ability to apply "equitable estoppel" doctrines to abandonment of an easement), an earlier decision of the Court of Appeals clearly recognizing that equitable estoppel could so apply and their conflicting decision in the instant case. Resolving this conflict is a matter of significant public interest and is a matter of significant importance to the parties herein.

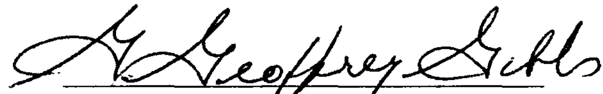
In the context of adverse possession, an individual puts up a fence, waits 10 years and has an expectation that the property within the fence belongs to the fencer. But with respect to "abandonment" of an easement, the outcome is far from certain and the course of ownership can be changed mid-stream. As the cases cited to the court reflect, under the law relating to abandonment of an easement, mere "non-use" does not constitute abandonment. Utilizing a different corridor other than the easement for access does not constitute abandonment. Placing an obstruction or fence across an easement does not in and of itself constitute abandonment. In these situations, a party can take subsequent actions to restore the easement to usefulness and avoid having the easement declared abandoned.

When faced with this situation, our trial judges should be allowed to utilize the equitable theories to preserve what the parties in fact bargained for, an easement.

We ask the Court to accept review of the decision by the Court of Appeals in this matter and to reverse that decision, reinstating the decision of the trial court.

Respectfully submitted this 1st day of October, 2015.

Anderson Hunter Law Firm



G. Geoffrey Gibbs, WSBA No. 6146
2707 Colby Ave., Ste. 1001
Everett, WA 98201
425-252-5161
425-258-3345 (fax)
ggibbs@andersonhunterlaw.com