No. 64209-0-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

STEPHEN and KAREN ROCKOW, husband and wife,
Appellants and Cross-Respondents,

and

DAVID and BERNADETTE CARSON, husband and wife,
Respondents and Cross-Appellants.

APPELLANTS'/CROSS-RESPONDENTS' REPLY BRIEF

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I. LEGAL ARGUMENT IN RESPONSE TO CROSS APPEAL

A. The Court's Findings Support its Conclusion that Equitable Limitations be Placed on Carsons' Use of the Easement.

The Court has broad discretion in fashioning equitable remedies.

As stated in Rupert v. Gunter, 31 Wn.App. 27, 640 P.2d 36 (1982), a case involving equitable limitations on an easement:

> "We point out initially that a suit for an injunction is an equitable proceeding with considerable inherent discretion vested in the trial court. The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit particular facts, circumstances and equities of the case before it. Appellate courts are required to give great weight to the trial court's exercise of discretion in equitable cases; only if that discretion is abused will we interfere with the judgment."

Carson contends that, nevertheless, Rupert v. Gunter, supra, and Green v. Lupo, 32 Wn.App 318, 647 P.2d 51 (1982), set up strict criteria for imposing equitable limitations on easements, and apply a three-part test: that (1) the restraints be reasonable, (2) the restraints avoid a greater burden on the servient owner's estate than that originally contemplated in the easement grant, and (3) such restraints do not unreasonably interfere with the dominant owner's use. (Respondents'/Cross Appellants' Brief, p. 16.)

Given the court's broad discretion in matters of equity, the language Carson quotes from Rupert and Green, supra, are more properly viewed as describing the factors a court should consider in exercising its discretion, rather than as setting up a three-part test for applying the doctrine of equitable limitations.

However, even if there were such a test, the court's Findings sufficiently support its decision as to each of the three criteria Carson claims must be satisfied.

Contrary to Carsons' assertions, the court did make findings as to the intent of the original grantor and as to the scope of the easement, stating that:

> "The easement is ambiguous regarding ingress and egress. The terms are not defined or explained. The Court can consider extrinsic evidence in interpreting the Easement. The extrinsic evidence includes the 'Road Maintenance Agreement and Protective Covenants' executed subsequent to the Easement which specifically references the Easement. The Easement Road built at the time of the execution of the 'Road Maintenance Agreement' is 20 feet wide and not co-extensive with the 60 foot wide Easement. The extrinsic evidence also includes the fact that no other owner in the plat has extended the Easement Road . . . in the thirty year history of the plat . . . " (CP 217-218)
>
> * * *
>
> "The intent of the common grantor must be found in reading the Easement and the Road Maintenance Agreement together. It was not intended that the Easement Road and the Easement would be co-extensive. This construction of the two documents is

> supported by the conduct of the lot owners in the plat in the thirty years between 1977 and 2007." (CP 220)

The court found, therefore, the easement for ingress and egress did not include the entire 60 foot width of the easement.

Next, Carson argues the court had not placed a reasonable restriction on the use of the easement because it "completely barred" the use of the easement. This was not the court's actual ruling. The court did not bar Carsons' use of the easement, but rather required that Carson remove the gravel Carson had spread on the portion of the easement that was outside the original easement road and on Rockows' property. (CP 223) The court's decision did not prevent Carson from using the 30 feet of the easement on Carsons' own property, or from using that portion of unimproved 20-foot wide road in the center of the easement which is on Rockows' property

Finally, Carson complains the court did not consider the hardship to Carson of constructing a road solely on the Carsons' property.

The court however, in balancing the equities, did specifically consider the cost to the Carsons of constructing alternate routes, stating:

> "It is not equitable to impose a greater burden on the Defendants' property by extending the Easement Road

> and cul-de-sac because of the cost to Plaintiffs to build an alternate route for egress and ingress onto Plaintiff's property. Requiring Plaintiffs to construct an alternative route does not unreasonably interfere with Plaintiffs' use of their property." (CP 220, 221)

The trial court's reasonable balancing of the equities should not be disturbed on appeal absent a plain abuse of discretion. Carson, in order to save money, entered his neighbor's property, tore up vegetation, brought in noisy construction equipment and built a permanent road.

The Court's decision was a reasonable exercise of its discretion.

B. The Easement was Ambiguous.

Carson argues that the easement was not ambiguous because the court did not specifically find there were two possible interpretations. Nothing requires a court to make a specific finding that two interpretations are possible before finding that an easement is ambiguous. In this case, the ambiguity of the easement is apparent on its face.

The easement was for "ingress and egress." Other courts have found that an easement which states in general terms that it is for "ingress and egress," is subject to interpretation, particularly as to how much of the easement could be used for road purposes.

In Minogue v. Kaufman, 124 A.D.2d 791, 508 N.Y.S.2d 511 (1986), for instance, an easement provided for "ingress and egress over a 30-foot right of way." The court found this subject to interpretation and limited the use to a 12-foot paved roadway since that was consistent with the purpose of the grant.

In Pleasure Bluff Dock Club v. Poston, 670 S.E.2d 128, 294 Ga.App. 318 (2008), the court interpreted an easement for "ingress and egress" along a 100-foot wide strip of land as allowing ingress and egress only over the existing nine foot wide dirt road that was actually used.

In 810 Properties v. Jump, 141 Wn.App. 688, 170 P.3d 1209 (2007), a deed created a reservation for a right of way of 40 feet for a roadway for means of "ingress and egress." A dispute arose over whether this grant of easement included an offshoot road constructed later. The court found it necessary to interpret the meaning of this easement for ingress/egress and held, "[i]n determining the scope of express easements we look to he deed's language, the intention of the parties connected with the original easement, the circumstances surrounding the deed's execution and the manner in which the easement has been used."

The language of the Carson/Rockow easement, which similarly merely provides for ingress and egress, does not resolve the question of the width of the easement, nor whether the easement implies a right to build a road over a neighbor's property.

II. REPLY TO CARSON'S ARGUMENT IN RESPONSE TO APPELLANT'S BRIEF

A. The Authorities Cited by Carson do not Support Carsons' Argument that there was no Trespass.

Carson argues there was no trespass because Carson reasonably interpreted the easement as permitting Carson to construct a road across its width, citing Mielke v. Yellowstone Pipeline Co., 73 Wn.App. 621, 870 P.2d 1005 (1994).

The holding in Mielke, supra, does not support this argument.

The Mielke case held there is a trespass when there is an intentional or negligent intrusion on to the property of another, and that this includes misuse, overburdening or deviation from an existing easement.

In Mielke, the easement had not specified a width and the question was whether a pipeline could be installed anywhere within a possible right-of-way. It is in this context the court used the language quoted by Carson to the effect that "[w]here the grant of an easement does not state a width our Supreme Court has stated 'a right of way by

grant which is not limited by the grant itself is bounded by the line of reasonable enjoyment'."

In this case, by contrast, the court found the easement for road purposes was the 20-foot width specified in the Road Maintenance Agreement. There was no question of the "line of reasonable enjoyment," and if there were, it is implicit in the court's findings that that line was the 20-foot width of the existing road.

Carson argues there was no limitation on the use of the easement until the court applied the doctrine of equitable limitations, and therefore there was no intentional or negligent invasion of Rockows' property.

Carson cites no case which holds there cannot be a trespass until a court finds an easement has, in fact, been exceeded.

On the contrary, courts have found a trespass where the extent of an easement was subject to dispute and that dispute was not resolved until the court ruled on a trespass claim.

In Tatum v. R&R Cable, 30 Wn.App. 580, 636 P.2d 508 (1981), for instance, the holder of a utility easement was held liable for a trespass (and treble damages for the removal of shrubbery), where the defendant had, in fact, exceeded the scope of an easement,

although the precise scope of that easement was not determined until the plaintiff brought an action for trespass.

B. Carson Did Not Have the Right to Clear the Vegetation.

Carson claims the timber trespass statute does not apply because (a) the vegetation had no value, and (b) the grant of the easement implied a right to clear shrubbery on an adjoining owner's land for purposes of building a road.

As to the first contention, the court never made any findings on damages because the court erroneously found there was no timber trespass as a matter of law.

In any case, since Carson failed to introduce any evidence as to the value of the vegetation, Carson may not make this argument on appeal.

A similar argument to Carsons' was made in Tatum, supra, that the vegetation destroyed was of no value. However, as here, the defendant had failed to introduce any evidence to establish the cost of restoration or the value of the shrubs destroyed. The court rejected the defendant's argument on those grounds alone.

Rockow presented testimony as to the cost of restoration and replacement. Carson presented none. Rockow should be awarded the undisputed replacement cost.

III. CONCLUSION

The decision of the trial court should be affirmed as to the issues raised in Carsons' cross appeal.

RESPECTFULLY SUBMITTED this 13th day of May, 2010.

SINSHEIMER & MELTZER, INC., P.S.

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RK

I, Marci Umatum, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein.

On May 14, 2010 I caused a copy of the following documents to be served on the interested party below:

1. Appellants'/Cross-Respondents' Reply Brief

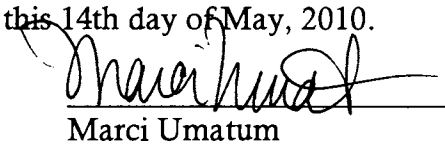
Michael Warren
Pivotal Law Group
600 University Street, Suite 1730
Seattle, WA 98101

[ ] By causing a full, true and correct copy thereof to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last known address for Mr. Grundstein, and deposited with the U.S. Postal Service on the date set forth below;

[X] By causing a true and correct copy thereof to be DELIVERED VIA ABC LEGAL MESSENGER to the party at the address listed above, which is the last-known address for the party, on the date set forth below;

[ ] By causing a full, true and correct copy thereof to be FAXED to the party at the facsimile number shown above, which is the last known facsimile number for the party, on the date set forth below.

DATED this 14th day of May, 2010.



Marci Umatum