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COURT OF APPEALS

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NO. 35238-9-II

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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LAURA L. HENDRICKS,

Appellant,

vs.

ANTONIUK FAMILY TRUST, a Washington trust; NEWTON  
ANTONIUK and CHRISTINE ANTONIUK, husband and wife,

Respondents.

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**BRIEF OF APPELLANT**

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**ORIGINAL**

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I.  
**ASSIGNMENTS OF ERROR**

Appellant Laura Hendricks (hereafter “Hendricks”) assigns the following errors to the Trial Court’s Order on Motion to Enforce Judgment and for Injunction entered on July 21, 2006:

1. The Trial Court erred by granting the respondents Antoniuk Family Trust, Newton Antoniuk and Christine Antoniuk (hereinafter collectively referred to as the “Antoniuks”) relief on a claim that the Antoniuks failed to assert at trial and thus is barred by the doctrine of res judicata.
2. The Trial Court erred by making determinations of fact on a post trial motion on a claim not litigated at trial without conducting a fact finding hearing or taking any testimony.
3. The Trial Court erred in its determination that “as a matter of law, the Antoniuks’ access to the drainfield is undefined by the recorded documents.”
4. The Trial Court erred in its determination that “requiring the Antoniuks to access the drainfield easement by following the transport easement up the North property line of their property and the Hendricks property is unreasonable, inconvenient and unsuitable for the purposes of access to the drainfield easement

and that use of that route would incur unreasonable and unnecessary costs.”

5. The Court erred in ordering that the “Antoniuks may use the Hendricks’ existing driveway and then the most direct route...to access the drainfield easement for the purposes authorized.”

## II.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the Trial Court err in granting the Antoniuks relief regarding a cause of action that both could have been and should have been brought and litigated at trial?

2. Did the Trial Court err in it made determinations of fact on a post trial motion on a claim not litigated at trial without conducting a fact finding hearing or taking any testimony?

3. Did the Trial Court err in its determination that as a matter of law, the Antoniuks’ access to the drainfield is undefined by the recorded documents?

4. Did the Trial Court err in its determination that “requiring the Antoniuks to access the drainfield easement by following the transport easement up the North property line of their property and the Hendricks property is unreasonable, inconvenient and

unsuitable for the purposes of access to the drainfield easement and that use of that route would incur unreasonable and unnecessary costs”?

5. Did the Trial Court err in ordering that the Antoniuks may use the Hendricks’ existing driveway and then the most direct route to access the drainfield easement?

**III.**  
**STATEMENT OF THE CASE**

1. Procedural History.

On December 30, 2002, Hendricks filed her complaint against the Antoniuks. The issues raised in Hendricks’ complaint were resolved by settlement of the parties prior to trial.

On June 5, 2003 the Antoniuks filed their answer and counterclaims. The counterclaims included a number of tort claims against Hendricks as well as a claim that Hendricks was violating the terms of a Septic Easement benefiting their property (CP 1-13). Hendricks filed her answer to the Antoniuks’ counterclaims on August 23, 2003. (CP 14-18).

On February 20, 2004 the Trial Court dismissed the Antoniuks’ tort claims against Hendricks on Hendricks’ motion for summary judgment. The Antoniuks’ violation of easement claim

was tried on June 18, 2004 before Judge Pro Tem Donald Thompson. At trial Mr. Antoniuk testified that he wanted access across Hendricks' driveway. (CP 108). However, despite having actually raised the issue at trial, the Antoniuks did not obtain a judgment providing them with access other than that provided by the easement document.

The Trial Court entered its Judgment on August 16, 2004. (CP 19-21). The Trial Court's judgment did not grant the Antoniuks' a right to cross over any portion of the Hendricks' property outside of the specifically described easement area.

On October 12, 2005, the Antoniuks filed a motion claiming to seek to "enforce judgment", but in reality seeking an order granting them access to their easement across the Hendricks' driveway. (CP 22-62). On October 26, 2005 Hendricks' filed her response to the motion, which included declarations from a professional septic designer and a licensed septic installer. (CP 63-88). After receiving Hendricks' response, the Antoniuks' struck their scheduled hearing date.

Over eight months later, on June 28, 2006, the Antoniuks filed a supplemental memorandum in support of their renewed motion to "enforce judgment", again seeking an order granting them

the right to cross over the Hendricks' drainfield. (CP 89-93). Hendricks' filed her response to the renewed motion on June 30, 2006. (CP 100-108). On July 21, 2006, after hearing argument of counsel but without any trial, the Court granted the Antoniuks' motion and entered its Order on Motion to Enforce Judgment and for Injunction. (CP 109-112).

Hendricks filed her notice of appeal on August 17, 2006.

2. Statement of Facts.

Hendricks and the Antoniuks own adjoining real property located in Pierce County. Hendricks' property and the Antoniuks' property were originally joined as one lot. In 1995 the property was subdivided by a previous owner. As part of that subdivision, on November 24, 1998 the previous owner recorded a septic easement encumbering Hendricks' property in favor of the Antoniuks' property. (CP 11-13). The specific terms of the septic easement give the Antoniuks

A perpetual easement and right-of-way over the "easement area", as described below and on the attached Exhibit "A", under, through, and across [the plaintiff's property].

The Exhibit "A" referenced above is a map depicting the exact boundaries of the "easement area". A portion of the "easement

area” is contiguous with the defendants’ property and provides access to the balance of the easement, so the defendants’ drainfield is not landlocked. (CP 11-13).

In 2002 and 2003 Hendricks and the Antoniuks disputed what type of plants should be allowed within the easement area over the Antoniuks’ drain field. As a result, the Antoniuks asserted a counterclaim seeking to establish their right to access the easement to clear the existing plants and re-plant the area over their drainfield. (CP 1-7). After a trial, the Trial Court entered a judgment granting the Antoniuks’ request. The judgment gives them the right, upon prior written notice, to access their easement to clear and re-plant the area over the drain field. (CP 19-21).

No portion of the Antoniuks’ counterclaims complained that their easement was insufficient to provide access to their drainfield. (CP 1-7). More importantly, although Mr. Antoniuk testified at trial that the Antoniuks desired to have access across the Hendricks’ driveway, the Trial Court’s judgment does not grant the Antoniuks any right to use any portion of Hendricks’ property outside of the easement area, much less to use Hendricks’ driveway. (CP 19-21).

Over a year after the judgment was entered, however, the Antoniuks filed their motion to “enforce judgment”, in which they

claimed that they could not reasonably use the area designated in the septic easement, as well as the additional area adjacent to it made available to them by Hendricks', to access their drainfield. (CP 22-62). They thus sought to obtain an order granting them the right to cross over Hendricks' driveway to access their easement.

In response to the motion, Hendricks filed three declarations, including those of a septic designer and a septic installer. In these declarations Hendricks' presented evidence that the area designated in the septic easement was and is adequate to access the drainfield for the purposes set forth in the easement, and further that accessing the drainfield via Hendricks' driveway posed grave risks to Hendricks' own drainfield. (CP 71-88).

The Antoniuks' struck their motion after receiving Hendricks' response pleadings. Eight months later, on June 28, 2006, the Antoniuks' renewed their motion and submitted a declaration from their own professional consultants to dispute the assertions of Hendricks' expert witnesses. (CP 94-99).

Despite the fact that the Antoniuks had not obtained the relief they presently sought at trial, and despite the fact that Hendricks had provided ample evidence disputing the merits of the

Antoniuks' claims through declarations, the Trial Court made "findings of fact" and entered an order granting the Antoniuks the right to use Hendricks' driveway, without conducting any fact finding hearing or hearing testimony. (CP 109-112).

#### IV. ARGUMENT

**1. The Trial Court erred in granting the Antoniuks relief regarding a cause of action that both could have been and should have been brought and litigated at trial.**

"Res judicata, or claim preclusion, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action." Pederson v. Potter, 103 Wn.App. 62, 67, 11 P.3d 833 (2000). Res judicata requires a concurrence of identity of four elements: (1) cause of action; (2) subject matter; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made, as well as a final judgment on the merits. Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 858, 726 P.2d 1 (1986).

The Antoniuks' counterclaim did not assert any cause of action seeking to use any portion of Hendricks' property outside of the defined easement area to access their drainfield. Nonetheless, at trial Mr. Antoniuk raised the issue, stating that he wanted to be able to use Hendricks' driveway in order to access the drainfield

easement. The Antoniuks did not further pursue the issue at trial, and the Trial Court made no findings or conclusions on the issue and did not grant any such right to the Antoniuks in its judgment.

The Antoniuks' claim for a right of way other than that within the easement area could and should have been litigated at the trial, the precise subject of which was the Antoniuks' septic easement. Final judgment was entered on the merits and did not provide the additional relief the Antoniuks later sought to obtain. The Antoniuks did not seek and had no grounds to reopen the judgment under CR 59 or to seek relief from the judgment under CR 60. Their post trial motion was in any event brought far too late to qualify for relief under either of these rules.

Res Judicata thus barred the Antoniuks' subsequent claim and the Trial Court erred in granting the Antoniuks additional relief nearly two years after the Judgment was entered.

**2. The Trial Court erred in making determinations of fact on a post trial motion on a claim not litigated at trial without conducting a fact finding hearing and taking testimony.**

It is inappropriate for a trial court to make findings of fact on a motion for summary judgment. Hemenway v. Miller, 116 Wn.2d 725, 731, 807 P.2d 863 (1991). Instead, in considering a motion for summary judgment the evidence and all reasonable inferences

therefrom is considered in the light most favorable to the nonmoving party. Young v. Key Pharmaceuticals, Inc., 112 Wash.2d 216, 225-226, 770 P.2d 182 (1989). This is because a trial court cannot resolve disputed questions of fact in the absence of a trial, to which each litigant is entitled.

Thus, had the Antoniuks sought to obtain a right to cross over Hendricks' driveway prior to trial, the Trial Court could not have granted them that right in the face of the declarations submitted by Hendricks' experts, because those declarations would have had to have been considered in a light most favorable to Hendricks. By raising issues of material fact in those declarations, Hendricks would have established her right to have those issues resolved at trial.

Yet not only did the Antoniuks fail to seek summary judgment, they did not even at trial assert that their septic easement failed to describe a means of access and that they needed to obtain the right to use Hendricks' driveway to access their easement. Only more than a year after the trial did they raise the issue. Clearly, however, even if that claim was not barred by Res Judicata, Hendricks would still be entitled to have disputed

issues of fact resolved at a trial. The Antoniuks cannot avoid the rules of civil procedure by wholly failing to assert a claim until after trial and thus obtain relief without the need to meet the burdens of proof they would have had to meet prior to or at trial.

The Trial Court erred by determining questions of material fact without conducting a trial of those issues.

**3. The Trial Court erred in its determination that as a matter of law, the Antoniuks' access to the drainfield is undefined by the recorded documents.**

Express easements grant contractual rights to the owner of the dominant estate to use some portion of the servient estate.

[A] contract will be given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective.”

Washington Public Utility Dist's Utilities System v. Public Utilit., 112 Wn.2d 1, 18-19, 771 P.2d 701 (1989).

The septic easement explicitly defines the boundaries of the “easement area”, stating that the Antoniuks have

A perpetual easement and **right-of-way over the “easement area”**, as described below and on the attached Exhibit “A”, under, through, and across [the plaintiff's property], “the premises”. (emphasis added)

The right of way is specifically set forth as being over the

easement area. The boundaries of the easement area are set forth in the map attached as Exhibit "A" to the easement document. A portion of the easement area is labeled as the transport line portion of the easement and is five feet in width from the Antoniuk property to the second portion of the easement, the much wider drainfield portion of the easement. The Antoniuks thus have a right of way over this particularly defined "easement area" from their property to every portion of the "easement area".

As the septic easement specifically provides for a right of way from the Antoniuk property to the drainfield, the Trial Court erred in concluding that such access was "undefined" by the septic easement.

**4. The Trial Court erred in its determination that requiring the Antoniuks to access the drainfield easement by following the right of way provided in the septic easement is unreasonable.**

Even if the septic easement did not define the Antoniuks' right of way to access the drain field, the parties agree that when an access right of way is not defined in the grant of an easement, the owner of the servient estate may identify the right of way subject to the rule of reasonableness. 24 A.L.R. 1053, "Location of Easement of Way Created by Grant Which Does Not Specify Location", states:

Where an easement of way has been created in general terms which do not fix its location, several courts have held in general terms that the owner of the servient estate has the right in the first instance to designate the location of the way...Several courts have stated that the right of the servient owner to select the way is subject to qualifications, such as reasonableness, convenience, and suitability for the purposes of a granted right-of-way.

Hendricks informed the Antoniuks that they were welcome to use not only the five feet specifically described in the septic easement, but also an additional are adjacent to the septic easement, to access their drain field. (CP 71-77). Septic designer Bob Goodman and septic installer Andrew Gunia both testified by declaration that the designated area was more than adequate to provide access to the drainfield with the equipment necessary to conduct the work to be done. (CP 78-88). Moreover, Mr. Goodman testified that using Hendricks' driveway to access the Anroniuks' drain field would pose grave risks to Hendricks' own drain field, which is an old system located very near the driveway and between it and the Antoniuk drain field. (CP 81).

While the Antoniuks and their consultant clearly disagree with Hendricks as to what is the most suitable route to use to access the drain field, Hendricks as the owner of the servient estate has the right to determine the route. Though that right is subject to

a reasonableness test, the testimony of Messrs. Goodman and Gunia clearly established that the route she designated was reasonable, and further that her refusal to instead allow use of her driveway was also reasonable.

The Trial Court therefore erred in determining that the route designated by Hendricks was unreasonable.

## V.

### **CONCLUSION**

The Antoniuks did not plead any cause of action seeking the right to obtain access to their drain filed over any portion of Hendricks' property outside of the defined easement area. Though Mr. Antoniuk nonetheless raised the issue at trial, the Trial Court did not grant the Antoniuks the right to use any portion of Hendricks' property outside of the easement. The Antoniuks' subsequent claim, asserted over a year after entry of judgment, to a right to use Hendricks' driveway, was thus barred by the doctrine of Res Judicata.

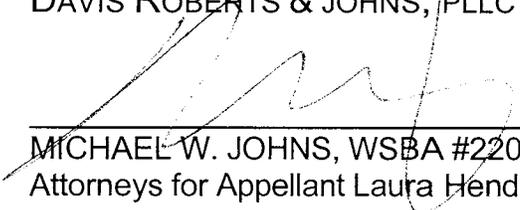
Even if the Antoniuks' claim was not barred by Res Judicata, the Trial Court erred in granting the Antoniuks' motion when there were disputed issues of material fact without first conducting a trial

to take testimony. The Trial Court further erred in determining that the septic easement does not define a route to access the drain field, as the easement specifically defines a route of way over the easement area extending from the Antoniuk property to the drain field. The Trial Court also erred in determining that the route designated by Hendricks' - which included not just the defined right of way but also an additional area adjacent to it - was unreasonable.

The Trial Court therefore erred in entering its order granting the Antoniuks the right to use Hendricks' driveway to access their drain field. For all of these reasons, the Order entered July 21, 2006 should vacated.

Respectfully submitted this 30<sup>a</sup> day November, 2006.

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REPLY

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Respondents.

NO. 35238-9-II

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON )

County of Pierce

) ss.  
)

PAMELA M. GIBSON, being first duly sworn on oath, deposes  
and says:

That on the 1st day of December, 2006, she sent *via ABC Legal  
Messenger* to:

ORIGINAL

James A. Cathcart  
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a copy of Appellant's Brief.

  
PAMELA M. GIBSON

SIGNED AND SWORN to before me this 1st day of  
~~November~~, 2006.  
December

  
Kristine R. Pyle  
Kristine R. Pyle

(Print Name)

NOTARY PUBLIC in and for the State of  
Washington, residing at Yelm, WA  
My Commission Expires: 9-4-09

