ORIGINAL

No. 36229-5 -II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

MARY A. KELLOGG, as Trustee for the MARY A. KELLOGG LIVINGTRUST, JOSEPH LEAS and JULIEANNE LEAS, husband and wife,

Appellants,

v.

ROBERT HARRINGTON, and LAURA HARRINGTON, husband and wife, ROBERT SOUREK, an individual, SHARRON BRAINARD, andthe Estate of KENNETH BRAINARD; MARK LASOF and JOANNA LASOF, husband and wife; DAVID INMAN and MARY INMAN, husband and wife, DON ELLERTSON and CHRISTY ELLERTSON, husband and wife, MICHAEL CHANGE and SUN CHANGE, husband and wife, ROSS BEAR and CHRISTINE BEAR, husband and wife; KATHY MARSHACK, an individual; and R.L JACOB, as Trustee for the R.L. JACOB LIVING TRUST,

Respondents.

FILED
COURT OF APPEALS
DIVISION II
08 MAR 28 PM 1:45
STATE OF WASHINGTON
BY
DEPUTY

RESPONDENT/CROSS APPELLANT KATHY MARSHACK'S BRIEF

Daniel Lorenz
Attorney at Law
521 SW Clay
Portland, OR 97201
(503)222-1161
Attorneys for Respondent Marshack

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II	ASSIGNMENT OF ERROR	1
	Assignment of Error. 1	1
	Assignment of Error. 2	2
	Assignment of Error. 3	3
	Assignment of Error. 4	3
II	ISSUE PRESENTED	4
IV	STATEMENT OF THE CASE	6
A.	Facts relating to Scope of Easement	7
B.	Facts relating to Use of Beach	10
C.	Facts relating to Circle Drive	15
V.	ARGUMENTS	18
A.	Standard of Review	18
B.	Location of Easement	19
C.	Scope of the Express Easement	19
D.	Public Trust Doctrine	23
E.	Prescriptive Easement	30
	E.2 Use of Circle Drive	34
VI.	CONCLUSION	37

TABLE OF AUTHORITIES

Page

CASES

Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972) 28
Brace and Hergert Mill Co. v. State, 49 Wn.326, 95 P. 278 (1908) 25
Brown v. Voss, 105 Wn.2d 366, 715 P.2d 514 (1986). 20
Caminiti v Committee for Public Shorelines Rights, 107 Wn.2d 662, 668, 732 P.2d 989(1987) 24,26,28
Chaplin, 100 Wn.2d 862, 676 P.2d 431 (1983) 32
Citizens For Responsible Wildlife Mgmt. v State, 124 Wn.App. 566,103 P.3d 2003 (2004) 28
City of New Whatcom v Fairhaven Land Co., 24 Wash. 493,499 64 P.735(1901) 26
City of Seattle v. Nazarenus et al, 60 Wn.2d 657, 374 P.2d 1014 (1962) 20
Double L. Properties, Inc. v. Crandall, 51 Wn.App. 149, 751 P.2d 1208 (1988) 32
Drake v Smersh, 122 Wn.App. 147 (2004) 35,36
Dunbar v. Heinrich, 95 Wn.2d 20, 622 P.2d 812 (1980) 31
Glass v Goeckel, 473 Mich. 667,703 N.W. 2d 58 (2005) 28
Great Northern R.R. Co. v Washington Electric Co., 197 Wash. 627, 86 P.2d 208 (1939) 25
Howard v. Kunto, 3 Wn.App. 393, 477 P.2d 210 (1970) 32

Hughes v State, 67 Wn.2d 799, 410 P.2d 20 (1966) (*reversed on other*

grounds, Hughes v Washington,
389 U.S. 290, 88 S. Ct. 38 19 L.E.d.2d 530(1967) 23,25,26
Illinois Central R.R. v Illinois,
46 U.S. 387, 13 S.Ct 110, 36 L.E.d.1018 (1892). 24
Kunkel v Fisher,
106 Wn.App. 599, 23 P. 3rd 1128 (2001) 30,34,35
Landmark Dev., Inc. v. City of Roy, 138 Wn.2d
561, 980 P.2d 1234 (1999) 18
Lee v. Lozier, 88 Wn.App.176, 945 P.2d 214 (1997) 30,31,32
Matthews v Bay Head Improv. Assoc.,
95 N.J. 316, 471 A.2d 355, 360(1984) 26,27
Phillips Petroleum Co. v Mississippi,
484 U.S. 469, 108 S.Ct.791, 98 L.E.d.2d 877 (1988) . . . 29
Properties v. Jump, 141 Wn.App. 688, 700 (2007) 31
Standing Rock Homeowners Assoc. v Misich,
106 Wn.App 231, 23 P.3d. 520 (Div. 3, 2001) 36
State v. Collins, 121 Wn.2d 168, 847 P.2d 919 (1993). 19
State v. Echeverria, 85 Wn.App. 777, 934 P.2d
1214 (1997) 19
State v. Longshore,
141 Wn.2d 414, 5 P.3d 1256 (2000) 26
Sunnyside Valley Irrigation Dist. v. Dickie, 111 Wn.App.
209, 43 P.3d 1277 affirmed 149 Wn.2d 873 (2002) 20
Van-Siclen v Muir, 46 Wash. 38 89 P188 (1907) 25
Wilbour v Gallagher, 77 Wn.2d 306, 462 P.2d 232(1969). . 25,28
Zobrist v. Culp, 95 Wn.2d 556, 627 P.2d 1308 (1981) 20
810 Malnati v. Ramstead, 50 Wn.2d 105, 309 P.2d 754(1957)31,32

Constitution

Const. Art. XVII Section 1 23

Rules

RAP 9.6(a) 11

I. INTRODUCTION/IDENTIFICATION OF PARTIES

Respondent/Cross Appellant accepts the introduction of fellow Respondents Harrington, Brainard, Lassof, Ellertson, Bear and Jacob.

This Response/Cross Appeal Brief is filed on behalf of Respondent/Cross Appellant, Kathy Marshack, one of the original defendants who prevailed at trial on the primary issues, but has cross appealed with respect to the Court's limitation of the easement to pedestrian use, and the Court's failure to find in favor of Marshack regarding the prescriptive easement issues relative to the "Circle Drive" described herein, as well as access to the beach beyond the "Steamboat Landing", also described herein. The remaining Defendants/Respondents are represented by Zach Stoumbos, and a brief on their behalf has been previously filed with respect to the appeal of Joseph and Julianne Leas. The Plaintiffs in the underlying action were Mary Kellogg as trustee of her trust ("Kellogg Trust"), and Joseph and Julianne Leas ("Leas"). The Kellogg Trust has not appealed; only the Leas are appellants herein.

II. ASSIGNMENTS OF ERROR

Assignment of Error. 1

The Court erred in determining that the scope of the

Express Easement as defined in the judgment is for non-motorized vehicles and that the Easement does not include vehicular use.

Assignment of Error 1.A

The Court thus erred in the Court's Finding of Fact No.102[1].

Assignment of Error 1.B.

The Court thus erred in the resulting Definition of Scope of Easement in the Court's Conclusions of Law No. 113.

Assignment of Error 1.C.

The Court thus erred in the resulting Definition of Scope of Easement in the Court's Conclusions of Law No. 116.

Assignment of Error 1.D.

The Court thus erred in the resulting Definition of Scope of Easement in the Court's Conclusions of Law No. 117.

Assignment of Error. 2

The Court erred in finding that Kathy Marshack does not have a right under the Public Trust Doctrine to walk on, or use, the tidelands below the private tidelands of the Kellogg Trust.

---

[1]The Trial Court Findings of Fact will be referenced as "Finding No." and the Conclusions of Law as "Conclusion No." The complete Findings and Conclusions are attached as an Appendix to the Leas' (Appellant's) Brief.

Assignment of Error 2.A

The Court thus erred in the Court's Findings of Facts No. 105.

easement based on the demonstrated adverse use of the private Circle Drive.

IV. STATEMENT OF THE CASE

Respondent/Cross Appellant Marshack accepts the Statement of the Case, including the Procedural History, as set forth by fellow Respondents as regards the issues raised by Appellant in the direct appeal.

Two notices of Cross Appeal were filed, one by Marshack and one by the remaining defendants. The Cross Appeal by the other defendants was withdrawn, and only that of Marshack remains. Although Joseph and Julianne Leas did not provide a transcript of proceedings, Marshack was allowed to supplement the record with a transcript of the entire trial testimony, which has now been filed. The Leas appeal only an issue of law. Marshack appeals both issues of law and fact.