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DIVISION II

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

STATE OF WASHINGTON
BY *cm*
DEPUTY

JOHN and GEORGIA HUBER,

Appellants,

v.

ANN C. and JOHN DOE SOUTHARD,

Respondents.

BRIEF OF RESPONDENT

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INTRODUCTION

Appellants Hubers' deed states that their lot is "[s]ubject to" an ingress and egress easement benefiting Southard's lot.¹ Ex 2. For the first time on appeal, the Hubers argue that no easement exists, or that any easement is limited to a pie-shaped piece of the Hubers' lot. The trial court correctly found that the Hubers were on notice that the ingress and egress easement encumbered their lot. The trial court's findings on this point are well supported, and this Court need not reach the issue in any event.

The trial court found that Southard's excavation for the purpose of improving ingress and egress was "a reasonable use within the terms of the easement over the Plaintiff's real property." F/F 3, CP 28.² The Hubers deny that any ingress and egress easement exists and so they do not argue the scope of the ingress and egress easement. They only argue that Southard exceeded the scope of the small pie-shaped easement, which misses the point. In any event, the evidence supports the trial court's findings. The prior driveway was extremely steep, Southard struggled to

¹ Ann Southard is the only respondent. She is not married. RP 81. There is no "John Doe Southard."

² A copy of the findings is attached as Appendix A.

even get her van to the top, and Southard felt uncomfortable using the driveway in winter weather.

The trial court correctly excluded repair cost estimates, where the estimates did not differentiate repairs to Southard's and the Hubers' lots. Any error is harmless in any event, where the exclusion of evidence did not affect the trial court's decision – the trial court ruled that it would have allowed additional damages evidence if it had ruled in the Hubers' favor on liability.

STATEMENT OF ISSUES³

1. Should this Court ignore argument and unsupported assertions in the statement of the case?
2. Does Southard have an ingress and egress easement over the Hubers' lot, where the Hubers' deed is "[s]ubject to . . . easement rights for ingress and egress" to Southard's lot, and where the Hubers both testified that Southard has an easement over their lot?
3. Did Southard act within the scope of her ingress and egress easement in resloping her driveway, where the historic driveway was so steep that Southard could barely get her van up the hill and

³ The Hubers' opening brief does not provide issue statements, so Southard offers these issue statements.

did not feel comfortable using it in snow and ice, and where the driveway does not intrude any further onto the Hubers' parcel than did the historic driveway?

4. Did the Huber's expert's testimony lack adequate foundation, where his repair cost estimates failed to differentiate between repairs to Southard's lot and repairs to the Hubers' lot? Is this issue moot, where the trial court ruled against the Hubers' on liability, making damages moot? Is the ruling harmless, where the trial court ruled that it would have allowed additional damages evidence if it had ruled in the Hubers' favor on liability?

5. Are damages correctly limited to the removal of the low decorative wall, where there is no trespass other than the wall, and where the Hubers' damages request is overreaching and unsupported in any event?⁴

RESTATEMENT OF CASE

A. Defining the "easement" in dispute.

As a threshold matter, the parties disagree about what easement exists. Appellants John and Georgia Huber claim that

⁴ The Hubers set forth a separate section of their brief addressing the trial court's findings. BA 23-27. This section is repetitive of the primary arguments, so Southard incorporates her response to this section in her statement of the case and her primary arguments.

the only easement is the pie-shaped slice of the Hubers' Lot over which Ann Southard's and her predecessor's driveway has always been located. BA 4, 19-20, 24-25. Respondent Southard, by contrast claims an easement for ingress and egress, created by the Hubers' predecessor in title, who conveyed title to Hubers "[s]ubject to . . . easement rights for ingress and egress to the adjacent owners at Lot 20 and 22." Ex 2 (attached as Appendix B); CP 28, F/F 1.

This disagreement significantly affects this appeal. When the Hubers discuss the scope of the easement, they are only talking about the pie-shaped easement. BA 19-20, 24-26. The Hubers never discuss the appropriate scope of the ingress/egress easement created by the Hubers' predecessor in title. *Id.* Nor did the Hubers ever discuss the appropriate scope of the ingress/egress easement at trial.

Southard and the Hubers are adjacent landowners in the Hillmont Terrace neighborhood of Montesano Washington. RP 2, 81; CP 21. Both lots are situated where Stephenson Drive, the only road accessing the properties, makes a sharp turn. Ex 8. A curb-cut on Stephenson Drive intersects the common property line. *Id.*

The Hubers purchased lot 21 in December 1995. Ex 2. Their statutory warranty deed, recorded in January 1996, provides that their property is “Subject to . . . easement rights for ingress and egress to the adjacent owners at Lot 20 and 22.” Ex 2; CP 28, F/F 1. The Hubers agree that the driveway for Lot 22 (now Southard’s lot⁵) has “historically” encroached on the pie-shaped corner of the Hubers’ lot starting at the curb-cut. BA 20-21, 24-25. The trial court found that the Hubers’ deed contained easement language burdening their lot and benefiting Southard’s lot, putting the Hubers on notice that Southard had the right to use their property for reasonable ingress and egress. CP 28, F/F 1.

B. The Hubers acknowledged that Southard has an easement over their property. (F/F 1 and 2).

John Huber testified that the Hubers’ deed reflects Southard’s easement over the Hubers’ lot:

Q And that was on the face of your deed, specifically said that lots on either side of you have an easement across your property; is that correct?

A Yes.

Q And you were aware that back – clear back in ‘95 or ‘96?

⁵ Southard purchased lot 22 in June 2002. CP 28, F/F 2; RP 82.

A Yes, I was.

RP 16. And Georgia Huber also acknowledged that Southard had an easement, which the Hubers had “agreed with.” RP 50.

The Hubers argued that they had an easement over Southard’s lot. RP 17, 50. In fact their chief complaint seems to be that Southard’s resloped driveway has disrupted the Hubers’ access to their lot. BA 4, 50; RP 9, 17, 18-19, 21, 25-27, 50-51, 54, 55, 59. The Hubers did not produce any document purporting to encumber Southard’s lot (CP 28, F/F 2), and Southard has no easement on her lot other than a water easement for the City. RP 91. The Hubers do not challenge the trial court’s finding that the Hubers do not have an easement on Southard’s lot. BA 25; CP 28, F/F 2.

C. Southard resloped her driveway shortly after purchasing because it was too steep to provide adequate ingress and egress. (F/F 3).

When Southard purchased her lot, the driveway had a blacktop surface that was “not very well put in [and] looked sort of homemade.” RP 82. The driveway had an “extremely” steep slope – about a 50% grade. *Id.* The driveway was so steep that it was very difficult for Southard to drive her van up the driveway; the engine made noise and the van struggled to reach the top. *Id.*

Southard would not have been comfortable using the driveway in snow or ice. RP 82-83.

Southard had the driveway resloped to a 30% grade so that she could get her van up the hill. RP 86. She did not move the existing pad, but went “exactly” from the existing curb-cut straight to the area near the back of her lot where she intended to build a garage:

Q So they resloped all the way down from Stevenson Drive from here?

A They went exactly from this pad that initially existed. They did not – this pad was there. It has – it’s never been moved or anything. It went straight from that pad straight up to the garage to make – where the spot where the garage was going to be. I went straight up.

RP 86. Southard’s driveway does not encroach any further onto the Hubers’ lot than it did before she had it resloped (*id.*):

Q So the new driveway does not encroach any more onto Lot 21 than it did before?

A No. I – just only over to the house.

In order to reslope the driveway, Southard had to excavate the hillside. RP 83-87. Southard had “[n]o idea” that the excavation was encroaching onto the Hubers’ lot. RP 87.

The Hubers claim that Southard conceded that she “only obtained a permit for the construction of the garage and not for the

excavation.” BA 12 (citing RP 91). But at RP 91, Southard simply testified that she permitted the “property” and that “probably the permit is still up on the garage.” Southard testified that both the “driveway” and the “building” were permitted.⁶ RP 90-91.

The Hubers later claim that Southard did not obtain a permit for the garage. BA 13 (citing RP 58). The Hubers went to the Grays Harbor County Courthouse to check for a garage permit, but the lots are in the City of Montesano (RP 58) and Southard’s builder obtained all of the permits through the City. RP 90-91. Contrary to Hubers’ testimony (RP 50) City Inspector Mike Wensowitz inspected and approved the project. RP 91.

D. The evidence supports the trial court’s finding that there was no damage or erosion on the Hubers’ lot. (F/F 4).

The trial court found that after “[t]wo winters and a severe storm . . . there was no evidence presented of damage or problems with erosion” off of the Hubers’ lot. CP 28, F/F 4. The Hubers claim that Southard conceded that “soil came from Hubers’ property, lot 21.” BA 26 (citing RP 95). Southard corrected this misstatement at RP 95-96:

⁶ In any event, the Hubers’ expert testified that a lay person or builder who permitted the garage would “assume that everything was okay.” RP 38.

Q [Referring to the mudslide] Did that come off of the hillside from Lot 21 or did that come off from behind you?

A That came off from Lot 21 in the back side and I can't remedy that until I can get on to Lot 21 to redirect the drain.

Q So that's a water issue?

A That's a water issue.

Q But the earth moved off of –

A Behind me. So it actually moved onto my own property on to me.

Q Moved off of your own property on to you, it did not come [off] the 21 at all?

A Yes.

On cross examination, Southard again misspoke – confusing the lot numbers – but again clarified that the mud came from her lot, not the Hubers' lot (RP 107):

Q . . . And looking at the survey, um, you were saying that you thought that – did I understand you correctly when you testified in response to your attorney's question, that most of the mud that was involved there came off of Lot 21?

A All of the mud came off of Lot 21.

Q And, which direction did the mud come from?

A Excuse me, excuse me. I said that wrong. I take that back. None of the mud came off of Lot 21. All of it came off my lot, which is Lot 22. Nothing has come off of Lot 21. It has not moved one bit.

The Hubers' expert David Strong agreed that the earth movement came off of Southard's lot, but testified that the Hubers' lot "contributed," explaining that the water that caused the landslide came in part from the Hubers' lot. RP 35-36. Strong specifically testified that the excavation of the Hubers' lot did not cause the landslide (RP 36):

Q So the excavation into Lot 21 was no way a contributing factor to that slide, was it?

A Not on the back side.

E. Procedural History.

The Hubers sued Southard for trespass, seeking \$117,519-\$158,330 damages. CP 2. Southard felt very badly when the Hubers filed suit, and wanted to offer to buy their property, so she checked to see what comparable undeveloped lots in the neighborhood had recently sold for. RP 93-94. The Hubers did not look into the value of their lot. RP 57. Three lots had recently sold for between \$10,000 and \$12,000. RP 94. Southard counterclaimed to establish her easement rights over the Hubers' parcel. CP 14.

Strong testified that replacing the excavated dirt would cost approximately \$20,000 and that building a retaining wall would cost at least \$100,000. RP 41. But Strong, an engineering geologist

(RP 28), typically “input[s] information to the design engineer,” who estimates the repair costs. RP 40. Strong agreed that it would be better to ask a design engineer, not Strong, about repair costs. RP 41.

The Hubers called Ryan Moore to estimate the cost of building two different types of retaining walls. RP 65, 68-69. Moore did not have a survey when he calculated a construction cost estimate, but was going by “eye ball.” RP 67. He conceded, however, that to give an opinion regarding stabilizing the property, he would need a survey “in hand.” RP 68. The trial court sustained Southard’s objection to Moore’s testimony and report, where there was “no indication that [Moore] knew where the survey boundary was and if there was even an encroachment.” RP 68.

When the Hubers again asked Moore to “outline” construction solutions, Southard again objected that Moore’s testimony lacked adequate foundation:

Same objection, Your Honor. He certainly can design fixes for the problem, but he is making it based on assumptions as to property lines and room availability, and he did that without a survey. And he has testified you can’t do that without a survey in hand. So I believe that precludes him from now speculating as to how you can fix this problem based around a property line. He doesn’t know where the property line is.

RP 69. The trial court sustained the objection, but gave the Hubers an opportunity to lay foundation. RP 70. Moore explained that he could provide a “common engineers estimate” without a survey, which would be “professionally accepted in engineering circles.” RP 72. He would, however, need a survey for a more complete estimate. RP 69-72, 74. The trial court again sustained the objection, explaining that the objection did not go to whether Moore could provide estimates without a survey, but went to whether Moore’s repair estimates went to damages on the Hubers’ parcel or on both parcels (RP 72):

THE COURT: As I understand the objection and the testimony that’s in the record up to this point, [counsel], I don’t believe the problem is with the ability of Mr. Moore to provide the opinions you are attempting to illicit [*sic*] from him. I think the objection goes to whether or not the repairs he is providing cost estimates for – address damage that occurred on [the Hubers’] property, or on [Southard’s] property. That it hasn’t been established, that the damage he is proposing to remediate is on your client’s side of the property line. That’s why I am sustaining the objections.

After additional efforts to lay foundation, the trial court again clarified that Moore’s testimony was inadmissible because he could not provide an estimate as to the damages to the Hubers’ property alone (RP 74-75):

The rule for establishing damages of this nature requires showing that the cost of the remediation is reasonable, and

also that the remediation is necessary to repair damage that occurred to the property of the plaintiffs. . . . where I see the problem [counsel] is this witness can't testify whether the repairs are being performed to [Southard's] property, or [the Hubers'] property. So I think we are still at the same obstacle.

The Hubers argue – in their facts – that the “trial court incorrectly assumed that Mr. Moore couldn't testify whether the repairs were being performed to fix damages on Southard's property or the Hubers' property, which is incorrect.” BA 10. Moore conceded that he did not know which property his estimated repairs pertained to (RP 75):

Q Are the estimates you made on this property for repairs that you made to the property at Lot 22 which is the [Southard's] property?

. . .

A The repairs, I don't – which property that's on. I can't tell from the documentation I have at this point . . .

When testimony closed, the Hubers moved to bifurcate damages from liability:

. . . because we did not expect Mr. Moore to indicate that he did not do a thorough job on this case, we would like the opportunity to present evidence along those lines. . . . Like I said, we hoped to have that today, but, Mr. Moore, by his own testimony, indicated that he could not provide that estimate, and we had believed that that information would be available today.

RP 116-17. Southard objected to bifurcation and argued that damages should be limited to the diminution of value or the fair market value of the Hubers' lot. RP 131-32; *see also* CP 23-24.

The trial court denied the motion to bifurcate because it did not reach damages, instead ruling that Southard's actions were within the scope of her ingress and egress easement. RP 143. The trial court stated that it would have granted the motion and allowed more damages evidence if it had not concluded that Southard's use of her easement was reasonable. RP 143-44. The trial court did not need to reach the proper measure of damages, finding instead that Southard was not liable. CP 28-29.

ARGUMENT

A. Standard of Review.

This Court will review the trial court's evidentiary ruling rejecting Moore's testimony for an abuse of discretion. ***Lewis v. Simpson Timber Co.***, 145 Wn. App. 302, 328, 189 P.3d 178 (2008). The trial court abuses its discretion only if its "decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." ***Lewis***, 145 Wn. App. at 328. The Hubers have the burden of showing an abuse of discretion. *Id.*

This Court will review the trial court's findings of fact under a substantial evidence standard, "defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." ***Sunnyside Valley Irrigation Dist. v. Dickie***, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). If that standard is met, then this Court "will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently." ***Sunnyside***, 149 Wn.2d at 880. This Court reviews questions of law *de novo*. *Id.*

Whether Southard has an easement and the interpretation of her easement are mixed questions of law and fact. *Id.*; ***Veach v. Culp***, 92 Wn.2d 570, 573, 599 P.2d 526 (1979). The original parties' intent in creating the easement is a question of fact and the legal consequence of that intent is a question of law. ***Sunnyside***, 149 Wn.2d at 880. The permissible scope of Southard's easement is also a fact question. ***Logan v. Brodrick***, 29 Wn. App. 796, 800, 631 P.2d 429 (1981).

B. This Court should disregard improper arguments in the Hubers' statement of the case.

The Hubers' statement of the case is replete with improper argument, particularly regarding their discussion of Moore's

testimony. BA 8-11, 14. While the Hubers accuse the trial court of “ignor[ing]” testimony (BA 11) and making “incorrect[] assum[ptions]” (BA 10), they neglect to mention that the trial court cured any alleged error when it stated that it would have allowed additional damages evidence if it were ruling in the Hubers’ favor on liability. RP 143. The Court should disregard the arguments in the Hubers’ statement of the case. RAP 10.3(a)(5).

The Hubers also rely on some of counsel’s statements in closing argument, at the same time challenging others. BA 12-14. Counsel’s remarks are not evidence. **State v. Smith**, 155 Wn.2d 496, 505, 120 P.3d 559 (2005). The Court should disregard factual assertions without any support other than citation to closing argument. RAP 10.3(a)(5); BA 12-14.

C. Southard has an ingress and egress easement over the Hubers’ parcel, as stated in their deed and conceded at trial. BA 17-18, 24.

The Hubers’ signed, notarized and recorded deed unequivocally states that the Hubers’ parcel is “[s]ubject to . . . easement rights for ingress and egress” to Southard’s lot. Ex 2. This language is sufficient to create an ingress and egress easement under **Beebe v. Swerda**, the only authority upon which the Hubers rely. BA 17 (citing **Beebe v. Swerda**, 58 Wn. App. 375,

379-83, 793 P.2d 442, *rev. denied*, 115 Wn.2d 1025 (1990) (holding that a statutory warranty deed conveying property subject to an easement creates an easement)). In any event, the Hubers cannot now claim for the first time on appeal that there is no easement or only a prescriptive easement. RAP 2.5(a).

The Hubers readily acknowledge that their “deed recorded on January 11, 1996 contains [the] language ‘Subject to: . . . **unrecorded easement rights for ingress and egress to the adjacent owners at Lot 20 and Lot 22.**” BA 3-4 (citing CP 21, *emphasis theirs*). Although indirectly, the Hubers suggest that some document other than their written, signed and recorded deed is required to put the Hubers on notice of Southard’s ingress and egress easement:

Here, there was no recorded easement. . . . The “easement” was not signed by the grantor, the Hubers’ [*sic*] or their predecessors. Further, the easement was not in writing.

BA 18 (*emphasis omitted*). They alternatively argue that if an easement exists, it is limited to the pie-shaped piece that has always encroached on their property. BA 19-20.

The Hubers argument ignores the holding in **Beebe** (their only authority) that the language “subject to” is sufficient to create an easement in a statutory warranty deed conveying the servient

parcel. 58 Wn. App. at 377. Under **Beebe**, the Hubers' deed is more than sufficient notice of Southard's easement. *Id.*

In **Beebe**, the Elkens conveyed real property to the Putnams by statutory warranty deed. 58 Wn. App. at 377. The deed stated that the parcel was "subject to" an easement for a road to benefit the public and the real property conveyed by the deed. *Id.* The property was subsequently subdivided and changed hands numerous times. *Id.* A lawsuit arose between subsequent owners Beebe and Swerda when Swerda attempted to block Beebe's use of the easement. *Id.* at 379.

The trial court ruled in Beebe's favor, finding a valid easement over Swerda's parcel. *Id.* The appellate court affirmed, rejecting Swerda's argument that the Elkens/Putnam deed conveying property "subject to" an easement was insufficient to create an easement benefiting Beebe. *Id.* The **Beebe** court explained:

No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, providing the language is sufficiently definite and certain in its terms.

58 Wn. App. at 379. The court concluded that conveying property “subject to an easement” is sufficiently clear to establish the easement. 58 Wn. App. at 381-82.

Like the deed in **Beebe**, the Hubers’ deed unequivocally states that the Hubers’ parcel is subject to an ingress and egress easement. *Compare Ex 2 with 58 Wn. App. at 377-78.* The Hubers’ deed is in writing, signed by the Hubers’ predecessor in interest, properly notarized and recorded. Ex 2. Under **Beebe**, the Hubers’ deed is more than sufficient to create an ingress and egress easement. 58 Wn. App. at 379-83.

Further, it is no defense that the easement was created by the parties’ predecessors in interest:

. . . a successor in interest to the servient estate takes the estate subject to the easements if the successor had actual, constructive, or implied notice of the easement.

810 Props. v. Jump, 141 Wn. App. 688, 699, 170 P.3d 1209 (2007). The Hubers’ deed gave them actual notice of the easement, as John Huber openly acknowledged. Ex 2; RP 16.

The Court need not consider this issue in any event, where the Hubers raise the issue for the first time on appeal. RAP 2.5(a); **Heg v. Alldrege**, 157 Wn.2d 154, 162, 137 P.3d 9 (2006). At trial, John Huber acknowledged that the deed creates an easement (RP

16) and Georgia Huber stated that the Hubers had “agreed” to an easement. RP 50. Counsel argued that the easement was a “red herring” (RP 117), but never suggested that no easement exists, or that it is limited to the pie-shaped piece (RP 119):

So, that’s how I would address the easement issue. I don’t think it is an issue.

For the first time on appeal, the Hubers claim that there is no written ingress and egress easement and that any easement is limited to the prescriptive use of the pie-shaped piece that has historically encroached on the Hubers’ lot. BA 18-21. The Court should reject this argument raised for the first time on appeal. 2.5(a); *Heg*, 157 Wn.2d at 162.

In short, the Hubers admit that Southard has an easement over their parcel and the language in their deed is sufficient to create an easement under *Beebe*, *supra*.

D. The evidence supports the trial court’s Finding of Fact 3 that Southard’s excavation “was a reasonable use within the terms of the easement over the Plaintiff’s real property.” BA 20-21, 25-26.

The trial court found that Southard’s excavation for her driveway encroached onto the Hubers’ Lot. CP 28, F/F 3. The court also found that this “was a reasonable use within the terms of the easement over the Plaintiff’s real property.” *Id.* Based on this

finding, the trial court concluded, “[t]hat in excavating and re-aligning the driveway including work on Plaintiff’s Lot 21, the Defendant, Ann C. Southard, acted within the scope of her easement rights.” CP 29, C/L 2.

The evidence supports F/F 3 and C/L 2, as discussed below. But the court need not reach this issue because the Hubers never even argue that Southard exceeded the scope of her ingress and egress easement. Rather, the Hubers only argue that Southard exceeded the scope of the small pie-shaped easement at the mouth of the driveway, not the ingress and egress easement found in the Hubers’ deed. BA 20-21. The Hubers’ only argument about the ingress and egress easement was that it did not exist, but that is wrong as discussed above. Nonetheless, out of an abundance of caution, Southard now shows that the law and the evidence support the trial court’s finding and conclusion that Southard did not exceed the scope of her ingress and egress easement.

In determining an easement’s permissible scope, a court will consider the parties’ intent surrounding the easement’s original creation, the dominant and servient properties’ nature and situation, and the easement’s use and occupation. *Logan*, 29 Wn. App. at 800. The Court will assume that the parties “had in mind the

natural development of the dominant estate” and that the parties contemplated “normal development” (*id.*):

Normal changes in the manner of use and resulting needs will not, without adequate showing, constitute an unreasonable deviation from the original grant of the easement.

The purpose of Southard’s easement is plain – to provide ingress and egress. Ex 2; ***Sunnyside***, 149 Wn.2d at 880 (“The intent of the original parties to an easement is determined from the deed as a whole”). That is precisely how the easement has been historically used – there was a driveway on the easement when Southard purchased her lot (RP 82) and John Huber agreed that it has “always” been there. RP 16.

But the existing driveway did not provide reasonable ingress and egress. The driveway was in poor condition and had an “extremely steep” slope. RP 82. In fact, the driveway was so steep that Southard’s van struggled to even reach the top. *Id.* Southard was uncomfortable with the idea of using the driveway in winter weather. RP 82-83.

Southard resloped the driveway so that she could get her van up the hill. RP 86. The new driveway extends “exactly” from the existing curb-cut straight to Southard’s garage. RP 86.

Southard's driveway does not encroach any further onto the Hubers' lot than it did before she had it resloped. *Id.*

The Hubers' theory seems to be that Southard could not excavate any dirt from the Hubers' lot. RP 117; BA 21. But the Hubers' argument ignores the fact that Southard has an easement for ingress and egress. The easement gave Southard the right to use the Hubers' property as reasonably necessary for ingress and egress. Southard "used" the Hubers' property by excavating a slope so that Southard could have a reasonable driveway that was not so steep. The evidence supports the trial court's finding that this was reasonable and within the scope of the ingress and egress easement. CP 28, F/F 3.

The Hubers also ignore the rule that easements can change with the development of the dominant estate and that our courts will "assume" that the parties had such development in mind. **Logan**, 29 Wn. App. at 799-800. The driveway as it existed when Southard purchased her lot did not provide reasonable ingress and egress (RP 82-86), so was not satisfying the purpose for which the easement was granted. Ex 2. The trial court correctly found that Southard acted within the scope of her easement in resloping her driveway to achieve reasonable ingress and egress. CP 28, F/F 3.

In short, resloping her driveway was a reasonable use of Southard's ingress and egress easement, the Hubers do not address this point, and the Court should affirm.

E. Moore's testimony on damages is irrelevant given the trial court's decision that Southard acted within the scope of her easement, the trial court did not err in rejecting it in any event, and remedied any possible error. BA 15-17, 27.

As discussed above, the trial court correctly ruled that Southard was acting within the scope of her ingress and egress easement. Moore's testimony went to damages only, not liability, as the trial court correctly noted. RP 143-44. As such, his testimony is irrelevant and this Court should not reach this issue. In any event, the trial court correctly rejected Moore's testimony, where Moore did not have a survey when preparing his estimates and admitted that he could not differentiate the property to which his estimates pertained. RP 75. Moreover, any error is harmless; the trial court cured the alleged error, stating that he would have granted the Hubers' motion to bifurcate and put on additional damages evidence if he had ruled in the Hubers' favor on liability. RP 143-44. As such, if this Court reverses and remands on liability, then the trial court will take additional damages evidence. Again, the Court need not reach this issue.

As discussed in detail above, Moore did not have a survey when he prepared his estimates, and conceded that he could not say the property to which his damages estimates pertained. RP 75; Statement of the Case § D, *supra*. In other words, while the Hubers argue that the proper measure of damages is the cost to repair their parcel, Moore could not provide a repair estimate for the Huber's parcel, but estimated repairs to both parcels. *Id.* The trial court was well within its broad discretion in rejecting Moore's testimony for inadequate foundation.

The Hubers confuse the issue, arguing that Moore was qualified to give expert testimony under ER 703 because he testified that it is "common practice" for engineers to give construction estimates without knowing the boundary line. BA 15-17. This argument misses the point. The trial court rejected Moore's estimates on the ground that his estimates were not limited to the cost to repair damages to the Hubers' parcel, not on the ground that Moore's methodology is not commonly accepted in his profession. *Compare* RP 75 *with* BA 15-17. The trial court accepted that Moore could estimate the cost to put in a retaining wall without knowing the boundary line's location. *Compare* RP 75 *with* BA 15-17. But the Hubers are not entitled to the cost to fix

their parcel *and* Southard's parcel and Moore conceded that his estimates did not differentiate between the two parcels. RP 75.

The Hubers also incorrectly suggest that Strong's testimony that "the excavation was on the Hubers' property and not Southard, [*sic*] according to the survey" provided an adequate foundation for Moore's testimony. BA 17 (without citation). This argument overstates Strong's testimony. *Compare* BA 17 *with* RP 30. Strong simply indicates that at least some of the excavation took place on the Hubers' lot, affirmatively answering the question "[d]id you observe any excavation that had taken place" on the Hubers' lot. RP 30.

The Hubers also exaggerate Strong's testimony in their statement of the case, stating that Strong testified that the cut was "mainly on the Hubers' property." BA 8 (citing RP 32). But at Report of Proceeding 32, Strong says nothing about where the excavation occurred. Again, Strong does not quantify the excavation that occurred on the Hubers' parcel. RP 30. Southard, however, testified that the "vast majority" of the excavation was on her lot. RP 108-09. But even supposing that Strong quantified the excavation on the Hubers' parcel, Strong's testimony could not lay foundation for Moore's opinions – Moore's estimates did not

differentiate between the two parcels regardless of whether Strong's testimony would have enabled him to do so. RP 75.

In any event, the trial court cured the alleged error, ruling that it would bifurcate and allow additional damages evidence if it were ruling in the Hubers' favor on liability.

[I]f I believed that this soil removal that occurred was an unreasonable use of the easement rights, I would grant your request to bifurcate this trial and allow to you come back and present other evidence. I don't want you or your clients to believe that the inability of Mr. Moore to express his opinions today has affected the outcome of this trial. It has not.

RP 143. The alleged error is harmless in two regards: because (1) the exclusion of Moore's testimony did not affect the trial court's decision; and (2) if this Court reverses, then the trial court will consider additional damages evidence. *Id.*

Any error is harmless for the additional reason that the proper measure of damages is the value of the Hubers' lot, not repair costs. ***Pepper v. J.J. Welcome Constr. Co.***, 73 Wn. App. 523, 545-46, 871 P.2d 601 (1994) (affirming a trial court order limiting damages to the pre-injury value of the plaintiff's property), discussed Argument § F, *infra*. Since the repair costs far exceed the Hubers' parcel's fair market value, the repair costs are irrelevant.

In sum, the Court need not consider this issue. Moore's testimony is relevant only if this Court reverses and remands, in which case the trial court will allow additional damages evidence.

F. The trial court correctly limited damages to removal of the low decorative wall, properly concluding that there was no trespass other than the wall. BA 22, 27.

The trial court concluded that the excavation was not a trespass, but concluded that the low decorative wall was a trespass, ordering Southard to remove the wall. CP 28-29, C/L 3-5. The Hubers do not argue that they are entitled to monetary damages for the trespassing decorative wall.⁷ BA 22.

The Hubers argue that the trial court should have awarded them at least \$20,000 and as much as \$100,000 from the excavation. BA 22-23. This argument assumes that the excavation exceeded the scope of Southard's easement, so it is relevant only if this Court reverses and remands on that issue. *Id.*

The evidence does not support the Hubers' argument. BA 23. This argument is based on Strong's testimony (BA 22), but

⁷ The Hubers challenge the trial court's finding that the low decorative wall did not unreasonably block their access to their property. BA 27; CP 29, F/F 6. The Hubers had no right to use Southard's lot to access their property. CP 28, F/F 2. This issue is irrelevant in any event – the trial court ordered Southard to remove the wall. CP 29.

Strong readily agreed that he does not normally estimate construction costs, instead providing information to a design engineer who provides estimates. RP 40-41. The trial court should not be bound by Strong's estimates.

In any event, damages cannot exceed the fair market value of the Hubers' parcel. *Pepper*, 73 Wn. App. at 545-46. An injured party may recover the cost to repair his real property only if the repair costs do not exceed the real property's pre-injury value:

[T]he plaintiff may recover cost of repairs in excess of the diminished value of the property, *so long as the repair costs are less than the total preinjury value of the property*. It would be anomalous for the plaintiff to recover more in damages than he could recover for complete destruction of the property.

Pepper, 73 Wn. App. at 545-46 (*emphasis supplied*). Under *Pepper*, the Huber's damages would be capped at their property's pre-excavation fair market value.

In short, the Hubers are not entitled to damages other than the removal of the low decorative wall because there was no trespass other than the low decorative wall. Moreover, the Hubers requested damages are unsupported and far overreaching.

CONCLUSION

This Court should affirm. The Hubers' deed and their own admissions show that Southard owns an ingress and egress easement over the Hubers' lot. Southard acted within the scope of her easement in expanding her driveway to provide reasonable ingress and egress. The trial court properly excluded Moore's testimony and its admissibility is moot in any event.

DATED this 24 day of September, 2008.

Wiggins & Masters, P.L.L.C.



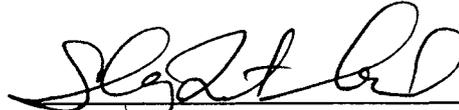
Charles K. Wiggins, WSBA 6948
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF RESPONDENT postage prepaid, via U.S. mail on the 24 day of September 2008, to the following counsel of record at the following addresses:

Jon E. Cushman
Ryan W. Gunn
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

FILED
COURT OF APPEALS
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STATE OF WASHINGTON
BY sm
DEPUTY



Shelby R. Frost Lemmel, WSBA 33099
Attorney for Respondent

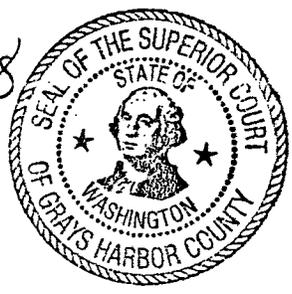
Certificate of Clerk of the Superior Court of Washington in and for Grays Harbor County. above is a true and correct copy of the original instrument which is on file or of record in this court.

COPY

FILED IN THE OFFICE OF COUNTY CLERK GRAYS HARBOR COUNTY WA

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Done this 30 day of January, 2008 Cheryl Brown, Clerk By [Signature] Deputy Clerk



CHERYL BROWN COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR GRAYS HARBOR COUNTY

JOHN and GEORGIA HUBER,)
)
 Plaintiffs,)
 vs.)
 ANN C. and JOHN DOE SOUTHARD,)
)
 Defendants.)

No. 06-2-873-8
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
and judgment
[Signature]

THIS CAUSE coming on regularly for trial on January 2, 2008 before Judge David L. Edwards of the above entitled Court; notice of which trial setting had been given to all parties by the Court Administrator. Plaintiffs, John Huber and Georgia Huber, appearing and being represented by their attorney, Nathan Dysart, and Defendant, Ann C. Southard, appearing and being represented by her attorney, William J. Stewart of Stewart & Stewart. No other parties appearing or communicating reasons for their absence. The Court having reviewed the file, verified pleadings and hearing testimony and reviewing evidence herein; and the Court having considered the files and records herein and being fully advised in the premises, now makes and enters the following:

APPENDIX A

Findings & Conclusions

21

FINDINGS OF FACT

1
2 1. The Plaintiffs, John Huber and Georgia Huber, husband and
3 wife, purchased real property known as Lot 21 of Hillmont Terrace
4 in Montesano, Grays Harbor County, State of Washington in December
5 of 1995 on a Statutory Warranty Deed from Earl Kiel. The deed
6 contained easement language which burdened Huber's Lot 21 to the
7 benefit of Lots 20 and 22 lot owners. Although "vague", easement
8 rights were specifically identified adequate to put Huber on
9 notice that Lot 20 and 22 owners could use Huber's property for
10 reasonable ingress and egress.

11 2. Defendant, Ann C. Southard, a single woman, acquired real
12 property known as Lot 22 of Hillmont Terrace in Montesano, Grays
13 Harbor County, State of Washington with the benefit of an ingress
14 and egress easement over Lot 21. No evidence was presented of any
15 easement to Hubers for use of Lot 22. There is no easement
16 burdening Lot 22 for the benefit of Lot 21.

17 3. Defendant, Ann C. Southard should have obtained a survey
18 prior to excavation, but did not. The excavation done was for the
19 purpose of improving ingress and egress access to the real
20 property. That portion of the excavation which encroached onto
21 Lot 21 was a reasonable use within the terms of the easement over
22 the Plaintiff's real property.

23 4. Two winters and a severe storm have occurred since
24 Defendant's excavation and there was no evidence presented of
25 damage or problems with erosion or wasting of soil off the cut
26 bank on Lot 21.

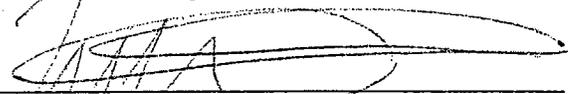
APPENDIX A

1 6. That each party will bear their own attorney's fees and
2 costs incurred in bringing and defending this action.

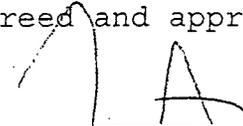
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4 DATED: January 14, 2008.

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JUDGE

Presented by:


WILLIAM S. STEWART/WSBA 12843
STEWART & STEWART LAW OFFICE
Attorney for Defendant

Agreed and approved by:


NATHAN DYSART/WSBA 15065
Attorney for Plaintiffs

ND
ND
7. Plaintiffs are awarded
attorney fees and their costs
totaling \$4400.

8. Defendant shall remove the low
decorative wall and shrubbery
prior to August 1, 08.

APPENDIX A

