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APPELLATE  
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NO. 41041-9-II

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

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MICHAEL B. MCGRAW and CONNIE MCGRAW, husband and wife;  
AL DOUD and PATRICIA DOUD, husband and wife,

Plaintiffs,

vs.

JOSEPH M. BLACKWELL and CYNTHIA BLACKWELL, husband and  
wife; GREGG R. BIEBER and LYNNE M. BIEBER, husband and wife,

Defendants.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Barbara Johnson, Judge

Clark County Cause No. 05-2-06367-3

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**AMENDED** BRIEF OF PLAINTIFFS MICHAEL B. MCGRAW and  
CONNIE MCGRAW

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## **ASSIGNMENTS OF ERROR**

1. The Court erred when it denied the Appellants' request to expand the paved surface of the ingress and egress easement by applying an erroneous standard, placing the burden upon Appellants to show that the additional pavement would not unduly burden the servient estate.

2. The Court abused its discretion when it denied Plaintiffs' request to expand the paved surface of the ingress and egress easement by making a finding of harm to the neighbors opposing the paving, in light of the necessity of paving, and ignoring competent expert testimony while adopting the unsupported lay testimony of the neighbors.

## **ISSUES**

i. Whether the Court erred when it denied the Appellants' request to expand the paved surface of the ingress and egress easement by applying an erroneous standard, placing the burden upon Appellants to show that the additional pavement is reasonably necessary; and that the neighbors would be unduly burdened by the added pavement.

ii. Whether the Court abused its discretion when it denied Plaintiffs' request to expand the paved surface of the ingress and egress easement by making a finding of harm to the neighbors opposing the paving, by ignoring competent expert testimony while adopting the unsupported lay testimony of the neighbors.

## STATEMENT OF THE CASE

### SUMMARY AND BRIEF CASE HISTORY

This matter was originally tried before the Honorable Barbara Johnson on September 5, 2007 and November 8, 2007 on a number of issues. Plaintiffs appeal followed and the matter was remanded on two issues requiring additional testimony, among them the denial of Plaintiffs' request to expand the paved surface of the ingress and egress easement to the subdivision by adding a five foot by sixty foot strip of pavement to the western edge of the existing ingress and egress road.

The retrial on both issues was held on January 22, 2010, January 27, 2010 and March 12, 2010. The Superior Court issued a memorandum Opinion on May 19, 2010 which was incorporated into a Supplemental Judgment and Order on June 24, 2010.

Appellants appeal only the denial of their request to expand the paved surface of the ingress and egress easement.

FACTS (PRIOR TO FIRST TRIAL) *(all facts under this subheading are referenced to the Report of Proceedings filed under the first appeal in this matter)*

Appellants Michael and Connie McGraw (McGraw) are the owners of the property located at 13103 NW 35<sup>th</sup> Court, Vancouver, WA, known as

Lot 2 in the Chestnut II Subdivision in an area called Felida. (RP-14, Exh. 12). Lot 1, abutting the McGraw lot directly to the west, is occupied by the Biebers. (RP-14, 16, Exh. 12). Lot 3 abuts the McGraw lot to the north side and is occupied by the Blackwells. (RP-29, 30 Exh 12). At the northernmost end of the subdivision is the Douds, Lot 4. (RP-30, Exh .12). Developments and activities in the Subdivision are subject to the terms of Conditions, Covenants and Restrictions (CC&R's). Exh. 13.

The McGraws built their home in 1990. (RP-231, Exh. 12). The Blackwells moved onto their lot in 1997. (RP-72). Biebers purchased their lot in 1992 and constructed a home. (RP-44).

The homeowners in the subdivision enter and exit their residences through a privately maintained road built upon a forty foot wide easement dedicated in approximately 1990. (Exh. 12). Each of the landowners have a portion of their respective properties dedicated to the easement. (Exh. 12).

To accommodate accessing their lot with their new motorhome, detailed more fully below, on or about October 14, 2005, McGraw sent to Co-plaintiffs the Douds and Defendants correspondence entitled "Notice Regarding Paving," notifying each of their intent to pave an area of the designated easement on or after October 27, 2005. (Exh. 2). The proposed portion to be paved is a five foot by 60 foot strip of the easement which is unpaved and which serves as a host to annual wildflowers which are

allowed to die and dry up before being mowed and/or tilled under each year.  
(RP 75, 77, 78 Exhs. 2, 35, 36, 37, 38).

On or about October 17, 2005, McGraw received from the Blackwells correspondence objecting to McGraw's proposal. (Exh 5). Negotiations ensued but were to no avail. As a result, McGraw filed a Complaint to institute this lawsuit to, among other requests, establish finally the rights of the dominant estate holder with regard to the easement.

Following filing of the suit, Defendants moved to add the fourth and final Chestnut II residents, the Douds, to join the suit as necessary parties. (CP-11). The Court ordered that the Douds be added. (CP-19). The Douds chose to join the McGraws as Plaintiffs. (CP-21).

#### FIRST TRIAL - EVIDENCE REGARDING PROPOSED PAVING

The circumstances which precipitated this lawsuit arose when the McGraws traded up to a larger motorhome. For several years, the McGraws owned a 36 foot motor home which they were able to maneuver in and out of their yard and cul de sac and store at home in their RV garage. (RP-240). In 2005, the McGraws replaced the 36 foot model with a 40 foot model which is 102 inches wide. (RP-240, 252). Though two sizes (five feet) shorter than the largest models made, the new motor home was too long and wide to maneuver easily and safely into and out of the McGraw lot. (RP-241). The new motorhome can be driven to the McGraw home, but

requires a person on the ground guiding the driver, and a great deal of jockeying, caution and risk of damage. (RP-21). This difficulty persists in spite of the fact that the driveway opening to the McGraw lot is wider than it was prior to the retaining wall and fence construction. (RP-254).

McGraws are now forced to store the motorhome offsite at a storage facility and are unable to conveniently and safely move the motorhome onto their property for cleaning and loading for their travels. (RP-241, 274).

Mike McGraw has learned that by swinging wider, onto several feet of the unpaved portion of the ingress and egress easement, he is able to bring the motor home forward through his driveway, at a straight angle, and safely onto his lot. (RP-241). In order to support the weight and path of his motorhome, Mike McGraw requested that he be allowed, at his own expense, to pave a five foot wide by 60 foot long strip adjacent to the paved surface; the portion of the easement currently covered by a seasonal wildflower patch at one of several unmonitored stages of growth, drying and decaying. (RP-242).

At trial, Lynne Bieber expressed no objection to the additional paving proposed by the Plaintiffs, aside from costs, and indicated that she would not be harmed by it. (RP-15).

Gregg Bieber testified that he had no authority to agree or disagree with the proposed paving as the property is deeded to the Blackwells. (RP

49). He did speculate, and without foundation, however, that allowing the paving might bring upon the Subdivision problems of biblical number and proportions. (RP-49, 50)

Cynthia Blackwell testified that her only objection to the paving was the initial cost and the cost of maintenance. (RP-30). She testified that she did not object to vehicles being driven upon the unpaved portion of the ingress and egress easement. (RP-37, 8)

Joe Blackwell testified that he planted the wildflowers each year, and, when so inclined, places metal posts along the paved area to keep individuals from driving onto the dried wildflower patch. (RP-76). His objection to the paving was that it was not “necessary” in his opinion. (RP-81). He based this opinion in part on the fact that he had seen big trucks go in and out of the McGraw property during an earlier remodel. (RP-92). He otherwise did not feel that it would affect him in any way. (RP 82). Gregg Bieber also testified that he had seen big trucks go into and out of the McGraw lot, but not a motorhome. (RP-328, 331).

#### FIRST TRIAL FINDINGS AND ORDER REGARDING PAVING

The Court found that McGraws are forced to use the “assistance of a second “ground” person and some jockeying” in order to maneuver their new motorhome onto their lot, but concluded that they failed to establish “reasonable necessity for expanding the paved surface”, under the

reasoning of *Butler v. Craft Eng. Constr. Co.*, 67 Wn.App. 684, 843 P.2d 1071 (1992), and *Standing Rock Homeowners Assoc., v. Misich*, 106 Wn.App 231, 23 P.3d 520 (2001). (CP-82,4). The Court, therefore, denied Plaintiff's request to expand the paved area as requested. (CP-83, 1).

#### APPEAL OF COURT'S FIRST TRIAL ORDER

Appellants appealed a number of issues in the Court's order and Respondents cross appealed as well. The matter was remanded for retrial of the requirement that Appellants necessarily use brick to reface the neighbor's side of the retaining wall; and of the Court's denial of Plaintiffs' request to pave. The paving issue is the only one remaining for this appeal.

With regard to the paving issue, the Court of Appeals reversed the Superior Court saying that the Court "should have looked to the alleged *harm* to the Blackwells rather than the McGraws' need." See Unpublished Opinion, *McGraw, et al v. Blackwell, et al*, No 37472-2-II (July 7, 2009).

RETRIAL OF PAVEMENT ISSUE (*all facts under this subheading are referenced to the Report of Proceedings filed under this second appeal*)

On remand, Appellants provided the expert testimony of Douglas Lee, a Professional Landscape Architect. RP 5.

Lee testified that he made two visits to the proposed pavement site and spent approximately five to six hours evaluating the site, and measuring

horizontal distances as well as elevations. RP 10. Lee presented and explained three diagrams he had made which showed the dimensions of the proposed expansion as well as elevations. Exh.s 56, 57, 58.

Lee testified that the western edge of the existing pavement was “unraveling, and that the additional 5’x 60’ paved strip would shore up and improve the function and life of the existing paved surface. RP 16, 17, 31, 32, 76, Exh.s 62, 63.

With regard to water runoff, Lee said that all water falling to the west of the paved surface centerline would flow west and north, only, to a “low point or swale” and then to an existing catch basin. RP 18, 19, 21. Lee also testified that the added pavement, which would total add only 7.7 % to the total paved surface of the ingress and egress easement, would help “facilitate” the flow of water to the catch basin and would “prevent erosion”. RP 20, 27, 29, 30.

Lee opined that the additional paving would not result in any kind of “harm” to the neighbors. RP 22.

Lee further confirmed that the 60 foot length of the proposed pavement was a reasonable length to accommodate Appellants’ 40 foot long recreational vehicle. RP 24 – 26.

On cross examination, Lee confirmed that he had rejected the Respondent’s attorney’s invitation to testify for their side as the attorney

had characterized the situation simply as one neighbor paving across another neighbor's property line. RP.51. Lee also confirmed that Appellant's attorney had served as his company's registered agent and that he and Appellant's had once rented space in the same office building for a brief period of time, but stated that this relationship did not affect his opinion regarding the present matter. RP 52 – 54, 74.

Respondent's attorney also established through Lee that the original 40 foot easement width requirement exhibited the original contemplation that the subdivision's private road may someday become a wider, public road. RP 61, 62.

While Lee also agreed on cross examination that the added pavement would technically increase the amount of runoff water to the catch basin, he stated that the added amount would not be significant. RP 65, 75.

Lee agreed on cross that the existing 16 foot paved surface of the easement was a minimum requirement by county code and that the Short Plat Map for the neighborhood indicated that the easement was "forty foot wide", and "for ingress, egress and utilities". RP 61.

Appellant Michael McGraw testified that he had obtained an estimate for the proposed paving for less than \$1,500.00, that he would cover the entire cost of the improvement, including any sawcutting,

engineering or permits which may be required, and that he would indemnify all other neighbors in the subdivision, in perpetuity via amendment to the CC&R's, against any future costs of the pavement surface repair due to the added paved surface area. RP 78, 79.

McGraw also testified that the sixty foot length of the additional pavement was needed in order to allow him to safely move his recreational vehicle onto his property without a person on the ground guiding him, and without jockeying the vehicle back and forth to make the turn safely. RP 80, 81. McGraw said that he based this information upon his experience of actually operating the vehicle on the subdivision road surface. RP 82, 83.

Respondent Joseph Blackwell testified that he opposed the additional pavement as it is "not necessary" and that it provided no "benefit" to him. RP 117. Blackwell further testified that he believed that the additional pavement would generate additional surface rainwater, and that the newer portion of the pavement will appear darker than the older portion. RP 119.

With regard to costs associated with the added pavement, Blackwell conceded that McGraw's payment of all associated costs would satisfy his financial concern about the improvement. RP 125, 126

Respondent Gregg Bieber testified that he "really [did not] want and need that additional paved surface". RP 13. Bieber further testified that he

did not want the additional financial burden associated with the paving and that he felt that the “gradation” from the old pavement to the new pavement would be “offensive” and “annoying”. RP 132, 133.

Bieber also testified that he had to “power wash” the road in the past during which experience he learned that the water flowed from the road centerline to the western edge and then to the catch basin. RP 137, 138.

Bieber further did not “know whether or not – you know, the county will accept additional runoff into that drain”. RP 138.

On cross examination, Bieber confirmed that McGraw was not allowed to drive off of the paved surface and onto the adjoining dirt area to the west where Bieber and Blackwell sprinkled wildflower seed mix in the Spring. RP 145. Bieber acknowledged that he would be able to continue sprinkling wildflower seed mix on the remaining dirt area adjacent to the proposed paved strip. RP 146.

Respondents offered no expert testimony on the issue of the proposed paving.

Following trial, the Superior Court judge issued a Memorandum Opinion wherein she placed the burden on the Appellants, McGraws, to “establish the proposed expansion does not unduly burden the servient estate.” Exh. 128. The Court equated the undue burden to an “excessive or unreasonable” burden. Exh. 128. In order to ascertain whether the burden

was unreasonable or excessive, the court again performed a “reasonable necessity” evaluation of the McGraws’ request and decided that McGraw’s desire to expand the paved surface of the easement by five feet in width to accommodate the McGraws’ recreational vehicle, did not meet their burden to establish that the additional paving would not unduly burden the neighbors. Id.

## ARGUMENT

*i. The Court erred when it denied the Appellants’ request to expand the paved surface of the ingress and egress easement by applying an erroneous standard, placing the burden upon Appellants to show that the additional pavement is reasonably necessary; and that the neighbors would be unduly burdened by the added pavement.*

When an easement is created by express language, of course we look to the language to determine the permitted uses... When language is broad, eg., “for ingress and egress” then the easement holder may not make a use that is beyond the parties’ intended uses ... If the creating language defines the uses only generally or broadly, the permitted uses are capable of gradual change over time. The best statement one can make is that the permitted uses change

gradually, to keep pace with the normal changes in the activities carried on upon the dominant tenement ...

Washington Practice Series, Vol. 17, Real Estate: Property Law, 2d ed., § 2.9.

Washington State law recognizes that the scope of an easement may change over time to “keep pace with ‘evolutionary’, but not ‘revolutionary’ growth”. Washington Practice Series, Vol. 17, Real Estate: Property Law, 2d ed., § 2.9, citing W. Stoebuck & D. Whitman, *The Law of Property* §8.9 (3d ed. 2000).

With regard to the intent of the parties at the time of the creation of an express easement, “[i]t can be assumed the parties had in mind the natural development of the dominant estate. Accordingly, the degree of use may be affected by development of the dominant estate.” *See* W. Burby, *Real Property* § 32 (3d ed. 1965). “The law assumes parties to an easement contemplated a normal development under conditions which may be different from those existing at the time of the grant.” Restatement of Property § 484 (1944); see also *Cameron v. Barton*, 272 S.W.2d 40, 41 (Ky. Ct. App. 1954). 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. *Id.* Quoting *Michaelson v. Nemetz*, 4 Mass. App. 806, 346 N.E.2d 925, 926 (1976).

“The question of reasonable use or unreasonable deviation is one of fact ... [and] the servient owner ... bears the burden of misuse.” *Logan v. Broderick*, 29 Wn. App. 796, 800, 631 P.2d 429 (1981).

Claimed errors of law of the trial court are reviewed de novo. *Meadow Valley Owners Ass’n v. Meadow Valley, LLC*, 137 Wn.App 810, 816, 156 P.3d 240 (2007).

Just as it had in the first trial, the Court found that McGraws had not established reasonable necessity under the circumstances for expanding the paved surface. In this trial, however, the Court went beyond that standard and charged McGraws with the burden of showing that the owners of the servient estate would suffer no harm. This was error.

The original easement, dedicated in 1990 allowed for a 40 foot wide easement for ingress and egress and for placement and maintenance of utilities. The plain language of the easement sets forth the permitted uses of the easement. The additional 24 foot width of the easement and Plat Map serves as an indication of the intent of the easement; that the paved surface would likely be widened in the future.

The 16 foot wide paved surface was a minimum requirement to satisfy county code requirements. From Mr. Lee's testimony, it also appears that future accommodation of a much wider road was contemplated by the drafters of the Plat Map and the CC&R's. This evidence was elicited by Respondent's attorney and was not challenged.

It is common knowledge that since 1990, recreational vehicles have become steadily larger and more luxurious. The widening of the paved surface of an ingress and egress easement in a subdivision is a normal evolution of the road surface width and does not exceed the express scope of the original easement.

***2. The Court abused its discretion when it denied Plaintiffs' request to expand the paved surface of the ingress and egress easement by making a finding of harm to the neighbors opposing the paving, by ignoring competent expert testimony while adopting the unsupported lay testimony of the neighbors.***

Respondents' concerns regarding added cost are without basis as McGraws have agreed to bear all present and future costs associated with the added pavement.

As for concerns about newer asphalt appearing darker than older asphalt, there was no evidence offered by the Respondent's which would support the nature and extent of such a possibility.

Similarly, the fear of excessive groundwater is unfounded. Expert witness, Lee, testified that the 300 square feet of additional pavement represented only a 7.7% increase in paved surface and that the added pavement would, if anything, facilitate the flow of water to the catch basin.

The Court abused its discretion by ignoring the expert testimony in this matter, adopting instead the unsupported and speculative lay opinions of the neighbors.

### **CONCLUSION**

The owner of a servient estate bears the burden of establishing that an undue harm would result from a modification of an easement which is within the scope of the original easement. The Court erred in this case by placing the burden upon the owner of the dominant estate.

The types of harm offered by the owners of the servient estate were accepted by the Court without proper foundation and were not supported by sufficient evidence. The Court further erred by ignoring expert testimony which established that changes by the owner of the dominant estate would be negligible and would cause no harm to the owners of the servient estate.

DATED this 29 day of April, 2011.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'B. Walker', written over a horizontal line.

BRIAN A. WALKER, WSBA # 27391  
Of Attorneys for Appellants McGraw



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NO. 41041-9-II  
Clark County Superior Court  
Cause No. 05-2-06367-3

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON )

: ss.

County of Clark )

The undersigned, being first duly sworn on oath, deposes and says: I am now  
and, during all the time hereinafter mentioned, was over the age of eighteen years; I am  
not an interested party in the above-entitled action and I am competent to be a witness in  
the action; I served the following document(s) in Clark County, State of Washington, as  
follows:

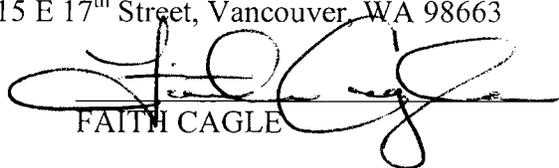
Documents Served: Amended Brief of Plaintiffs Michael B. McGraw and Connie McGraw

BY DELIVERING TO AND LEAVING WITH: Receptionist at David Gregerson's  
office

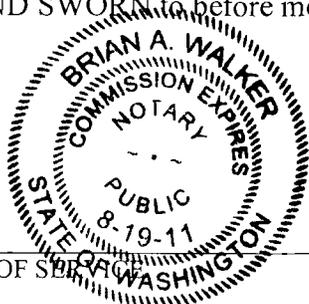
Place Served: Gregerson & Langsdorf, PS, 415 E 17<sup>th</sup> Street, Vancouver, WA 98663

Date Served: April 29, 2011.

Time Served: 4:05 pm

  
FAITH CAGLE

SIGNED AND SWORN to before me on April 29, 2011, by FAITH CAGLE



NOTARY PUBLIC  
Residing at Vancouver, WA.  
My Appointment Expires: 8/19/11

AFFIDAVIT OF SERVICE