

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 41041-9-II

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

MICHAEL B. McGRAW and CONNIE McGRAW, AL DOUD and
PATRICIA DOUD,

Appellants,

v.

JOSEPH M. BLACKWELL and CYNTHIA BLACKWELL, GREGG R.
BIEBER and LYNNE M. BIEBER,

Respondents.

RESPONDENTS' OPENING BRIEF

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Butler v. Craft Eng. Constr. Co., 67 Wn.App. 684, 843 P.2d 1071 (1992)

Chem. Bank v. Wash. Pub. Power Supply Sys., 102 Wn.2d 874, 894, 691 P.2d 524 (1984), *cert. denied sub nom. Haberman v. Chem. Bank*, 471 U.S. 1065, and *sub nom. Chem. Bank v. PUD No. 1*, 471 U.S. 1075 (1985)

Dumas v. Gagner, 137 Wn.2d 268, 280, 971 P.2d 17 (1999)

Mains Farm v. Worthington, 64 Wn.App. 171, 824 P.2d 495 (1992).

Mielke v. Yellowstone Pipeline Co., 73 Wn.App. 621, 870 P.2d 1005 (1994)

Morgan v. Prudential Ins. Co. of America, 86 Wn.2d 432, 545 P.2d 1193 (1976).

Standing Rock Homeowners Assoc. v. Misich, 106 Wn.App. 231, 23 P.3d 520 (2001)

State v. Williams, 96 Wn.2d 215, 220, 634 P.2d 868 (1981)

Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959)

Little-Wetsel Co. v. Lincoln, 101 Wn. 435, 445, 172 P. 746 (1918)

STATUTES: N/A

I. Response to Assignment of Errors

- A. The trial court did not err when it denied the Appellants' request to expand the paved surface of the driveway and did not apply an erroneous legal standard.
- B. The trial court did not abuse its discretion when it denied Appellants' request to expand the paved surface over Respondents' property

II. Standard(s) of review on Assignment of Errors

Findings of fact are reviewed under the substantial evidence rule of *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). Conclusions of law are subject to de novo review by the appellate court. *State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981); *see Dumas v. Gagner*, 137 Wn.2d 268, 280, 971 P.2d 17 (1999).

The meaning of a contract has been held to be an issue of law. *Chem. Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 894, 691 P.2d 524 (1984), *cert. denied sub nom. Haberman v. Chem. Bank*, 471 U.S. 1065, *and sub nom. Chem. Bank v. PUD No. 1*, 471 U.S. 1075 (1985). When interpreting a restrictive covenant, a court must give clear and unambiguous

language its plain and obvious meaning. *Mains Farm v. Worthington*, 64 Wn.App. 171, 824 P.2d 495 (1992). However, if the interpretation of the contract depends on resolving the credibility of extrinsic evidence or inferences to be drawn from extrinsic evidence, however, the meaning of a contract has been held to be a question of fact. *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990).

III. Statement of the Case

The parties to this case are neighbors within a four-lot subdivision in the Felida area of Clark County, Washington known as Chestnut II. Chestnut II is governed by a set of covenants, conditions, and restrictions (hereinafter “CC&Rs”) of record (Exh. 1).

Chestnut II was developed in approximately 1990. At the time, the developer was required to comply with conditions set forth by Clark County’s building department, which included standards for a 16’ wide paved road on a 40’ dedicated road easement and cul-de-sac known as NW 35th Court. (Exh. 15). The final plat contains said conditions, *inter alia* (Exh. 12). For ease of reference on said plat map, Appellants McGraw own Lot 2, Respondents Blackwell own Lot 3, and Respondents Bieber own Lot 1. As can be seen

from the plat, McGraws' access to their lot depends upon an easement for ingress/egress over and across the Blackwell lot.

The McGraws bought their lot/home in 1992 (RP 248). The Blackwells bought their home in 1996 or 1997, and constructed a landscaped "island" near the completion of construction. Said island was placed up to the edge of the paved roadway surface, which at trial was determined to be 4-5' into the 25' paved portion of the 30' easement radius described on the plat (RP 251). During that time, the private roadway served adequately for all needs of the neighborhood, including multiple vehicles owned by the McGraws and also a 34' Airstream Land Yacht recreational vehicle [hereinafter "RV"]. (RP 252). McGraws claim that the private roadway and turning radius became insufficient for their needs starting in 2003 when they constructed a large addition and remodel on their home, as well as acquiring a new 39.5' x 102" motor home (RP 252). The addition to the home includes 2,300 square foot garage/showroom which has the capacity to store eighteen vehicles (RP 254-255). However, undisputed testimony at trial established that even the newer, larger RV was maneuverable by Mr. McGraw as long as he had the assistance

of someone giving guidance outside the vehicle—a so-called “ground person” (RP 255).

Appellants commenced this action on December 12, 2005 seeking relief against Respondents under the provisions of the CC&Rs including, *inter alia*, a court order allowing expansion of the paved portion of the shared private roadway to accommodate outside radius maneuvering of their newly acquired 39' recreational vehicle (hereinafter “the paving claim”).

Respondents answered by denying Appellants’ claims and counterclaimed seeking relief against Respondents, including a request for a judgment/order declaring Appellants’ fence to be in violation of the CC&Rs provisions regarding height (hereinafter the “fence height claim”) and composition (hereinafter the “fence composition claim”) (CP 6).

After a bench trial held on September 5, November 8, and December 6, 2007, the court entered Findings of Fact and Conclusions of Law and a Judgment and Order on February 22, 2008 (CP 82, 83). The bench trial included an on-site visit by the trial court judge on December 6, 2007.

Appellants then appealed the trial court's decision on several grounds. The Court of Appeals affirmed most of the trial court on appeal, but the matter of the paving request was remanded for retrial with clarification as to the appropriate legal standard to be applied.

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

IV. Summary of Arguments

- A. The trial court did not err in applying the proper legal standard for Appellants' request for an order expanding the paved surface over Respondents' property.
- B. The trial court did not abuse its discretion when it concluded that Appellants' had not met their burden to compel a court order for expansion of the paved surface over Respondents' property.

V. Argument

- A. The trial court did not err in applying the proper legal standard for Appellants' request for an order expanding the paved surface over Respondents' property.

The Court of Appeals' opinion was clear in its direction to the trial court on remand, found at pages 5-6:

“The owner of the dominant estate, here the McGraws, cannot enlarge or alter their use of the easement character in a way that increases the burden on the servient estate. *Little-Wetsel Co. v. Lincoln*, 101 Wn. 435, 445, 172 P. 746 (1918). Therefore, in determining whether the McGraws' proposed use would go beyond the scope of the easement, the trial court should have looked to the alleged *harm* to the Blackwells rather than the McGraws' *need*.... Because the trial court erred in requiring the McGraws to prove that paving was a “reasonable necessity” instead of requiring them to prove that the paving would not unduly burden the neighbors, we reverse and remand for the trial court to consider the issue under the proper test.”

Said language from the Court of Appeals' unpublished opinion was recited verbatim in the trial court's Memorandum Opinion dated May 19, 2010, and the analysis follows precisely the standard ordered by the Court of Appeals on the remand. In fact, the trial court went to great lengths to seek legal authority defining “undue burden,” which it concluded meant “excessive or unreasonable.” Therefore, Appellants' bald assertion in their brief that the trial court erroneously required them “.....to show that the additional paving is

reasonably necessary; and that the neighbors would suffer no harm as a result of the added pavement” is completely without merit.

In the first trial, Respondents presented evidence that the paved driveway had been constructed according to the dimension set out in the plat map for Chestnut II in approximately 1990, and that said driveway had served the reasonable residential needs of all lots within the subdivision since that time, including the “island” in its present configuration. (RP 37, 90) The paving claim arose when Mr. McGraw purchased a new 39' recreational vehicle, combined with an installation of a luxurious brick pillared gate into his driveway, which narrowed his access and maneuvering room. He testified that even with the new larger recreational vehicle, he was able to maneuver it in and out of his driveway with the assistance of a ground person giving him guidance and direction (RP 240-241). Gregg Bieber testified that on at least one occasion, a fire truck was able to maneuver in and out of the McGraw driveway without difficulty or incident, and that vehicles were historically able to use the private roadway without incident (RP 327, 337-338).

The documentation from the planning department of Clark County, plus the plat map, demonstrate that the 40' road easement was required as a

condition of plat approval of the subdivision and private road, which required at least 16' width of paved surface, and 25' paved radius on a 30' easement radius for the cul-de-sac. (Exhs. 12, 15).

Because of the foregoing, as well as the additional testimony provided at the trial on remand, Appellants failed to establish that their proposed expansion of the paved surface of the private roadway over and on the Blackwell lot would not unduly burden them, considering the factors in *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). The trial court enjoys considerable latitude in the exercise of its equitable powers of enforcement, including in fixing reasonable widths for easements depending on their nature. *Mielke v. Yellowstone Pipeline Co.*, 73 Wn.App. 621, 870 P.2d 1005 (1994).

- B. The trial court did not abuse its discretion when it concluded that Appellants' had not met their burden to compel a court order for expansion of the paved surface over Respondents' property.

A trial court is given wide latitude to make decisions regarding reasonableness, and the standard on appeal is abuse of discretion. The reasons

are obvious—a trial judge is in the best position to make factual determinations, can weigh credibility of witnesses, and in this case had the advantage of making an on-site visit to the neighborhood in question. The interpretation and enforcement of CC&Rs are classically based in equity, and the concept of reasonableness permeates throughout. The question is not whether Appellants, or their attorney, or a reviewing court disagree with the court's findings and conclusions *a/k/a* discretion, but whether such discretion was *abused* by the trial court.

The Memorandum Opinion of the trial court provides detailed explanation of the burdens which would have been imposed by the Appellants' proposed expansion of the pavement.

- 1) Loss of open space which was used for over a decade for wildflowers;
- 2) Change in the aesthetics created by additional new paving seamed to older paving;
- 3) The creation of additional runoff from the impervious paved surface;
- 4) The increased financial burden of maintenance by adding a common element for which all properties within the subject CC&Rs would be obligated.

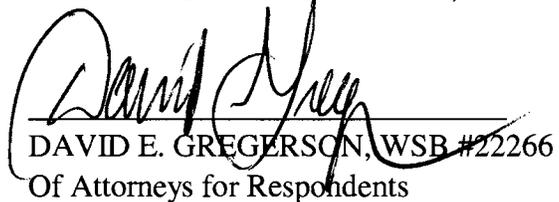
All of said findings are supported by substantial evidence in the form of testimony of the witnesses, and the court found that the totality represented an undue burden which would arise from the proposed paving. Where a trial court has weighed the evidence, review is limited to ascertaining whether the findings of fact are support by substantial evidence and, if so, whether the findings support the conclusions of law and the judgment. *Morgan v. Prudential Ins. Co. of America*, 86 Wn.2d 432, 545 P.2d 1193 (1976). Appellants fail to demonstrate either a lack of substantial evidence or an abuse of discretion.

VI. Conclusion

For the reasons stated above, this Court should affirm the trial court's Judgment and Order with respect to the request paving from Appellants.

Dated this 29 day of June, 2011.

GREGERSON & LANGSDORF, P.S.


DAVID E. GREGERSON, WSB #22266
Of Attorneys for Respondents

CERTIFICATE OF SERVICE

On the 2nd day of June, 2011, I certify that I served the foregoing Respondents' Brief on the attorney of record for Respondent by sending a copy by first-class mail to:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Place: Vancouver, WA

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