

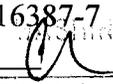
COURT OF APPEALS
DIVISION II

No. 41115-6-II

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On Appeal from Pierce County Superior Court Cause No. 09 2 16387-7

STATE OF WASHINGTON

BY  DEPUTY

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

RANDALL INGOLD TRUST, by and through its trustee,
BANK OF AMERICA, N.A.,

Respondent,

v.

STEPHANIE L. ARMOUR, DOES 1-5,

Appellant.

BRIEF OF APPELLANT STEPHANIE L. ADAMS

VANDEBERG JOHNSON & GANDARA, LLP

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Daniel C. Montopoli, WSBA # 26217
Lucy R. Clifthorne, WSBA # 27287
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I. INTRODUCTION

The Plaintiff, Randall Ingold Trust, and the Defendant, Stephanie Adams (formerly Stephanie Armour), own adjoining parcels of property. In 1962, the parties' common predecessor conveyed a "perpetual non-exclusive easement for road purposes" over the eastern 30 feet of what eventually became the Adams Property to benefit the estate that eventually became the Ingold Property. In 1991, a boundary line revision approximately doubled the size of what is now the Ingold Property, adding a parcel that lies to the east of the original Ingold Property and that was not included in the 1962 conveyance of the easement.

In 2009, the Plaintiff filed suit seeking to quiet title to the easement in favor of the expanded Ingold Property and to remove a fence originally constructed by Ms. Adams in 2000 to contain livestock that graze on her property. The trial court subsequently granted Plaintiff's motion for summary judgment, quieting title to the easement in favor of the expanded Ingold Property and holding that the fence obstructs use of the easement by the Ingold Trust. There are two reasons why the trial court erred in granting summary judgment.

First, the Washington Supreme Court has held that any expansion of an easement to benefit an additional parcel of land is a misuse of that easement. Because genuine issues of material fact exist as to whether the expansion of the easement to benefit the enlarged Ingold Property constitutes a misuse and overburdening of the easement, summary judgment should not have been granted.

Second, a servient estate owner like Ms. Adams is entitled to construct reasonable restraints over an easement, provided that these restraints do not unreasonably interfere with the rights of the dominant estate owner. Genuine issues of material fact exist as to whether the fence constructed by Ms. Adams unreasonably interferes with the easement granted in 1962. These issues include whether it was reasonable for Ms. Adams to construct the fence to contain her livestock and whether the fence unreasonably interferes with the use of the easement by the Ingold Trust considering that the Ingold Trust already has access to its property by a road that goes across the easement; that there is another road on the Ingold Property that runs parallel to the easement; that Ms. Adams has been grazing cattle on her property for nearly a decade; that the Ingold Trust has not put forth any definitive plans that would require the removal of the fence; and that a gate could alleviate any interference with an easement without requiring the removal of the fence. Because these genuine issues exist, the trial court erred in holding as a matter of law that the fence obstructs use of the easement.

Because genuine issues of material fact remain unresolved, the trial court erred in granting Plaintiff's summary judgment motion. Ms. Adams requests that this Court reverse the order granting summary judgment and that this matter be remanded for trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Plaintiff's summary judgment motion and quieting title in the easement in favor of the Plaintiff.

2. The trial court erred in granting Plaintiff's claim for ejectment and holding as a matter of law that Defendant's fence unreasonably obstructs Plaintiff's use of the easement.

3. The trial court erred in granting Plaintiff's summary judgment motion and awarding costs and statutory attorneys fees to the Plaintiff.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in granting Plaintiff's summary judgment motion when there were genuine issues of material fact regarding whether a Plaintiff's use of its property constituted an overburdening of an easement, as in this case where Plaintiff sought to nearly double the property originally intended to be benefited by the easement. (Assignments of Error 1-3)

2. Whether the trial court erred in granting Plaintiff's claim for ejectment and holding as a matter of law that Defendant's fence unreasonably obstructs Plaintiff's use of the easement when Defendant is entitled to construct reasonable restraints to avoid a burden on the servient estate greater than originally contemplated and when such restraints do not unreasonably interfere with the dominant owner's use of the easement, as in this case where Plaintiff already has access to its property via a road

that goes across the easement, where Plaintiff has an available road that would obviate the need for the easement, and where Plaintiff has put forth no plans that would require it to further use the easement that was originally granted in 1962 and that has remained unused since that time. (Assignments of Error 1-3)

IV. STATEMENT OF THE CASE

The Plaintiff, Randall Ingold Trust, and the Defendant, Stephanie Adams (formerly Stephanie Armour), own adjoining parcels of property in Gig Harbor, Washington (respectively, the “Ingold Property” and the “Adams Property”). (CP 2, 18, 44) The Ingold Property and the Adams Property share a common predecessor-in-interest, Charles Sinding, in their chain of title. (CP 2, 18)

In 1962, Sinding sold a portion of his property to Durward Lowell via a statutory warranty deed. (CP 63) The deed also conveyed to Lowell a “perpetual non-exclusive easement for road purposes” over the East 30 feet of the eastern boundary of what eventually became the Adams Property. (CP 63) (A copy of the 1962 deed is attached as Appendix A.)

The property conveyed and benefitted by the easement in 1962 is approximately one-half of the property that now belongs to the Ingold Trust. In 1991, a boundary line revision approximately doubled the size of what is now the Ingold Property. (CP 57, 126-31) The property added by the boundary line revision is depicted in the Record of Survey attached as Appendix B to this brief. The eastern boundary of the property originally

conveyed in 1962 now dissects the middle of a house belonging to the Ingold Trust. (CP 171, 174) Thus, approximately one-half of the house is situated on the original property and the other half is on the property added by the boundary line revision.

This house did not exist in May 2000, when Ms. Adams and her then husband, Bradley Armour, purchased the Adams Property. (CP 171) The statutory warranty deed they received granted them title to their property subject to several “special exceptions,” which potentially included the easement conveyed in 1962. (CP 61, 170) The statutory warranty deed Ms. Adams received in May 2000 simply noted the existence of the document creating the 1962 easement.

Ms. Adams acquired her property so that she could have a place to maintain her horses and other livestock. (CP 171) Accordingly, she has used her property as a pasture for her horses and livestock since shortly after purchasing the property. To keep her horses and other livestock from wandering off her property and onto the Ingold Property, she has continuously maintained a fence along the eastern portion of her property. (CP 171-72) Originally, the fence meandered generally along the property line between the Adams and Ingold properties. (CP 171) (This fence is identified as the “hog wire fence” on the record of survey, CP 55, and attached to this brief as Appendix B.)

Plaintiff’s predecessors, Dr. and Mrs. Kirkwood, established a road to access the Ingold Trust property which goes through a portion of the easement. (CP 171) Subsequently that road was paved, and has been used

by the Ingolds and their predecessors to access the Ingold Property. (CP 171) (This road is shown on the Record of Survey attached as App. B.)

In 2008, Ms. Adams received a letter from the Plaintiff's attorney demanding that the meandering hog wire fence be moved. (CP 171) In response, Ms. Adams constructed a new fence that was entirely on Adams' side of the boundary with the Ingold Property. (CP 172) She installed an unlocked gate so that the Plaintiff could access the easement area. (Report of Proceeding at 8) The Ingold Trust then filed suit, seeking primarily an order quieting title in the easement and ordering that the fence be removed. (CP 1-5)

Prior to filing suit, the Plaintiff and their predecessors in interest constructed a road on their land that ran the entire length of the boundary between the Adams and Ingold properties. (CP 172) This road parallels the easement. (CP 172) After filing suit, however, the Plaintiff stopped using this road and allowed grass and weeds to grow over the road. (CP 172) In addition, Plaintiff has never informed Adams of any plans it might have to actually use the easement identified in the 1962 deed, other than the paved road historically used to access the Ingold Property. (CP 172)

Despite having full access to its property with a paved road and a road running the full length of its property which exactly parallels the easement created in 1962, and despite having no plans to actually use the easement, the Plaintiff filed suit and moved for summary judgment. The trial court granted the summary judgment motion, quieted title to the easement in the Plaintiff, granted Plaintiff's claim for ejectment, and

awarded costs and statutory attorneys fees to the Plaintiff. (CP 196-97, 214-16) The trial court's order stated that the fence must be removed upon thirty days notice that the Plaintiff intends to use the easement. (CP 216) Ms. Adams then timely filed her appeal. (CP 198-201, 210-17)

V. ARGUMENT

A. Standards for Review

An appellate court reviews de novo a summary judgment order and engages in the same inquiry as the trial court. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475, 21 P.3d 707 (2001). Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005). To defeat summary judgment, the nonmoving party must come forward with specific, admissible evidence to sufficiently rebut the moving party's contentions and support all necessary elements of the party's claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Summary judgment should be granted only where reasonable minds could reach but one conclusion based on the facts. *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

The interpretation of an easement is a mixed question of law and fact. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73

P.3d 369 (2003). What the original parties intended is a question of fact and the legal consequence of that intent is a question of law. *Sunnyside Valley*, 149 Wn.2d at 880. Whether the use of an easement is reasonable is generally a question of fact. *Logan v. Broderick*, 29 Wn. App. 796, 800, 631 P.2d 429 (1981).

Finally, the granting of an injunction is an equitable remedy subject to the abuse of discretion standard. *Federal Way Family Physicians, Inc. v. Tacoma Stands Up For Life*, 106 Wn.2d 261, 264, 721 P.2d 946 (1986); *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36 (1982). Under this standard, the granting of an injunction will be reversed if it is based on untenable grounds, is manifestly unreasonable or is arbitrary. *See Federal Way*, 106 Wn.2d at 264; *Rupert*, 31 Wn. App. at 30.

B. Genuine Issues of Material Fact Regarding Whether the Plaintiff's Expansion of Its Property Constitutes an Overburdening and Misuse of the Easement Preclude Summary Judgment.

When easements are created by express grant, the extent of the right granted is “determined from the terms of the grant properly construed to give effect to the intentions of the parties.” *Brown v. Voss*, 105 Wn.2d 366, 371, 715 P.2d 514 (1986). In addition to the intent of the parties, the scope of the easement is determined by the nature and situation of the property subject to the easement and the way the easement has been used and occupied. *Logan v. Broderick*, 29 Wn. App. 796, 799, 631 P.2d 429 (1981). What the parties intended by the grant of the easement is generally a question of fact. *Sunnyside Valley*, 149 Wn.2d at 880.

In general, courts assume that the original parties “had in mind the natural development of the dominant estate.” *Logan*, 29 Wn. App. at 800. As the *Logan* court stated: “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.*

However, an easement can be expanded only if the express terms of the easement show a clear intent by the original parties to modify the scope of an easement based on future demands. *Sunnyside Valley*, 149 Wn.2d at 884. “The face of the easement must manifest this clear intent” to ensure that subsequent purchasers have notice that their property is encumbered based on a future demand. *Id.*

Moreover, any expansion of an easement to benefit additional parcels of land is a misuse of that easement: “If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement.” *Brown*, 105 Wn.2d at 372. This misuse occurs regardless of whether there is any evidence of an increased burden to the servient estate. *Id.*

The court in *Brown* was faced with facts similar to the case at hand: the predecessor owners of parcel B had a driveway easement over parcel A for ingress and egress from parcel B. *Id.* at 369. The plaintiffs then purchased parcel B and an adjoining property, parcel C, which was not subject to the original easement and which was on the side opposite to parcel A. *Id.* The plaintiffs then developed their property so that a house

could sit astride the B-C property line. *Id.* Thus, usage of the easement would benefit parcel C in addition to the dominant estate, parcel B.

The defendants in *Brown* placed a fence within the easement, and the plaintiffs sued. *Id.* Subsequently, the trial court entered findings of fact stating that there would not be an unreasonable burden on the servient estate, provided that the easement be used solely to benefit a single family residence. *Id.*

On appeal, the Washington Supreme Court held that *any* expansion of the easement to benefit parcel C was a misuse of the easement. *Id.* at 372. Nevertheless, *Brown* upheld the trial court's refusal to enjoin the use of the easement because the trial court limited the plaintiffs to constructing a single family home and because *substantial evidence* supported the trial court's balancing of the equities in favor of the plaintiffs:

The trial court found as facts, **upon substantial evidence**, that plaintiffs have acted reasonably in the development of their property, that there is and was no damage to the defendants from plaintiffs' use of the easement, that there was no increase in the volume of travel on the easement, that there was no increase in the burden on the servient estate, that defendants sat by for more than a year while plaintiffs expended more than \$11,000 on their project, and that defendants' counterclaim was an effort to gain "leverage" against plaintiffs' claim. In addition, **the court found from the evidence** that plaintiffs would suffer considerable hardship if the injunction were granted whereas no appreciable hardship or damages would flow to defendants from its denial. Finally, the court limited plaintiffs' use of the combined parcels solely to the same purpose for which the original parcel was used—i.e., for a single family residence.

Brown, 105 Wn.2d at 373 (emphasis added).

Here, the trial court did not issue *any* findings of fact to support its holding that “Defendant’s existing wood log fence that runs along her eastern property line obstructs use of the easement.” (CP 216) Nor did the trial court conduct any balancing of the equities to ascertain if nearly doubling the size of the dominant estate would overburden the easement. Nor did the trial court limit the Plaintiffs’ use of the easement to a single family residence, or in any other way, unlike the court in *Brown*.

Furthermore, the 1962 deed granting an easement for the benefit of the Ingold Property states that it is “for road purposes.” (CP 63) Presumably, this easement is to provide access to the Ingold property. However, there is already a road that goes across the Adams Property through the easement, and provides access to the Ingold property. And there is another road that runs along the western boundary of the Ingold Property that also provides access. (CP 171). In addition, the 1962 deed establishing the easement does not contain any language suggesting it would be appropriate to expand the easement.

The “normal development” of the easement would most likely be limited to road improvements, such as widening or straightening the road. The Ingold Trust has no need for the remainder of its easement, and improvements could be accomplished without removing the fence.

Thus, the trial court’s granting of the Plaintiffs’ summary judgment motion, without conducting a trial or evidentiary hearing of any kind, is reversible error. *See Visser v. Craig*, 139 Wn. App. 152, 159 P.3d 453

(2007). In *Visser*, the appellate court held that genuine issues of material fact as to the type, scope, or terms of the easement, and the ability to expand use of the easement at a later date prohibited summary judgment. *Id.* at 161-62.

Here, genuine issues of material fact exist that preclude summary judgment:

(1) Did the predecessors in title to the Adams and Ingold Properties intend to create an easement benefiting all of the Ingold Property as currently constituted, or only the original portion of the Ingold Property described in the 1962 easement?

(2) Did the original property owners intend to expand the easement?

(3) What is the “natural development of the property” contemplated by the original grantors?

(4) Does the roadway constructed by the Kirkwoods and using the easement to access the Ingold Property provide sufficient access to the Ingold Property, or should the roadway be expanded?

(5) Is the road that runs along the western boundary of the Ingold Property sufficient to provide the Ingold Trust with the access it needs to its property?

(6) Is it reasonable to require Ms. Adams to remove her fence along her horse pasture?

(7) Is it necessary to require Ms. Adams to remove the entire fence or would the use of gates allow Ms. Adams to continue to use her property as a cattle pasture while providing reasonable access to the Ingold property?

(8) Should the Ingold Trust's use of the easement be limited in any way?

Because these genuine issues of material fact remain unresolved, summary judgment should not have been granted.

C. Genuine Issues of Material Fact Exist Regarding Whether the Use of the Easement by Ms. Adams Unreasonably Interferes with the Use by the Plaintiff.

A servient estate owner like Ms. Adams is entitled to use the easement area in a manner that does not unreasonably interfere with the rights of the dominant estate owner. *See, e.g., Steury v. Johnson*, 90 Wn. App. 401, 406, 957 P.2d 772 (1998). Consistent with this use, courts have allowed servient estate owners to construct fences and gates across easements to avoid a burden on the servient estate not originally contemplated. *Id.*; *Rupert*, 31 Wn. App. at 30-31.

As the *Rupert* court explained, whether a servient owner will be allowed to construct a fence across the easement depends upon several factors:

Whether or not the owner of land, over which an easement exists, may erect and maintain fences, bars, or gates across or along an easement way, depends upon the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case; the

nature and situation of the property subject to the easement;
and the manner in which the way has been used and
occupied.

Rupert, 31 Wn. App. at 30-31. If the easement is ambiguous or silent on the construction of fences or gates, then “the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances.” *Id.* at 31.

When the servient estate owner is being subjected to a greater burden than originally contemplated, then the servient estate owner has the right to construct restrictions, provided that the restrictions do not unreasonably interfere with the dominant owner’s use of the easement. *Rupert*, 31 Wn. App. at 31-32; *Steury*, 90 Wn. App. at 406; *Green v. Lupo*, 32 Wn. App. 318, 324, 647 P.2d 51 (1982). For example, in *Lowe v. Double Properties, Inc.*, 105 Wn. App. 888, 20 P.3d 500 (2001), the court allowed a servient owner to construct a gate to keep livestock from wandering off of the servient estate.

Furthermore, whether changed circumstances or the balancing of interests between the servient and dominant estates warrant the use of a fence are questions of fact:

The determination of the change in the circumstances of the easement and the balancing of the servient owner's burden with the dominant owner's inconvenience are fact-driven inquiries.

Steury, 90 Wn. App. at 406. Because the trial court failed to engage in this balancing test, the *Steury* court reversed the trial court’s grant of summary judgment:

[T]he trial court did not weigh the relative burdens of the dominant and servient estates. Instead, the court appears to find that any interference with the easement right of way is prohibited as a matter of law. . . .

Clearly, the balancing test of *Rupert* and *Green* might allow the gate to stand. . . . The trial court abused its discretion in imposing a summary injunction without proper consideration of the *Rupert* balancing test.

Steury, 90 Wn. App. at 407.

Like the trial court in *Steury*, the trial court here failed to engage in the *Rupert* balancing test. Like the trial court in *Steury*, the trial court here simply assumed that any interference with the easement, whether it be reasonable or not, is prohibited as a matter of law:

As far as the easement, I think the easement is very clear. I don't think there's any doubt about what it means and what the purpose is. I don't think there's a need for trial. I think it's the 30 feet between the two parcels of property for ingress, egress and utilities. So I'll grant your motion.

Report of Proceeding at 11-12. The trial court's final judgment, simply stating the fence "obstructs use of the easement," underscores the trial court's failure to apply the *Rupert* balancing test. (CP 216)

As in *Steury*, genuine issues remain here as to whether the *Rupert* balancing test would allow the fence to stand, or whether a gate could be constructed that would allow Ms. Adams to continue to graze her livestock across the easement. Resolution of these issues would address whether the fence interferes unreasonably with Plaintiff's use of its property, considering that the Plaintiff already has ingress and egress over the easement to its property and that it already has an available road running

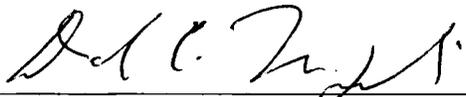
the full length of its property that obviates the need for further use of the easement. Resolution of these issues would also contrast the use of the easement for almost a decade by Ms. Adams for grazing her livestock with Plaintiff failing to put forth any plans that would require it to make further use of the easement, an easement that was originally granted in 1962 and that has remained unused since that time. Should the trial court conclude that the fence obstructs use of the easement, then the court could consider whether installation of a gate would alleviate any obstruction while allowing the fence to remain standing.

VI. CONCLUSION

Summary judgment should not have been granted because genuine issues of material fact exist as to whether expansion of the easement to benefit the enlarged Ingold Property is an overburdening of the easement and whether the fence constructed by Ms. Adams unreasonably interferes with the Ingold Trust's use of the easement. For these reasons, Ms. Adams requests that the summary judgment and ejectment orders be reversed and that this matter be remanded for trial.

DATED this 3rd day of January, 2011.

VANDEBERG JOHNSON & GANDARA, LLP

By 
Daniel C. Montopoli, WSBA # 26217
James A. Krueger, WSBA # 3408
Lucy R. Clifthorne, WSBA # 27287
Attorneys for Appellant

APPENDICES

- Appendix A: The 1962 Statutory Warranty Deed conveying property
from Charles Sinding to Durward M. Lowell II, recorded as
Pierce County Auditor's No. 1959704 (CP 63-64)
- Appendix B: Record of Survey depicting Ingold Property and the ingress
and egress easement (CP 55)

APPENDIX A

GENERAL INFORMATION: This form is to be used for recording a deed.

REAL ESTATE CONVEYANCE

1959704

Statutory Warranty Deed

172/44

WARRANTY
Doris Nelson
Chester

RECORD REAL ESTATE
P. O. Box 11
WILSON, WASH.
Send Tax Statement to
Durward M. Lowell II

Statutory Warranty Deed

THE GRANTOR CHARLES E. SINDING, as his separate property

for and in consideration of TEN DOLLARS (\$10.00) and other valuable considerations

in hand paid, conveyed and conveyed to DURWARD M. LOWELL II, a single man.

the following described real estate, situated in the County of Pierce Washington:

The Northwest quarter of the Northwest quarter of the Southwest quarter of Section 22, Township 21 North, Range 1 East of the Willamette Meridian, GRANTING to the Purchaser, his heirs, successors and assigns, a perpetual non-exclusive easement for road purposes, over, through and across the East 30 feet of the Northeast quarter of the Southeast quarter of Section 21, Township 21 North, Range 1 East of the Willamette Meridian.

RCDF TAX PAID \$ 16.00
REC. NO. 149475
L. R. JOHNSON, Pierce Co. Trust
W. R. Johnson



230
2
Deed this 14th day of March, 1962

Charles E. Sinding

STATE OF WASHINGTON,
County of Pierce

On this day personally appeared before me Charles E. Sinding
to me known to be the individual described in and who executed the within and foregoing instrument, and

21-21-18
21-21-18
21-21-18
21-21-18
21-21-18

Exhibit B

Subject to: Terms, covenants, conditions and/or provisions contained in
easement recorded under AFN 9102040327; Terms and conditions of Notice of
Moratorium on Non-Forestry Use of Land recorded Under AFN 9710140622

APPENDIX B

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

CERTIFICATE OF SERVICE BY _____
DEPUTY

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandenberg Johnson & Gandara. On the 13th day of January, 2011, I caused to be delivered via legal messenger a copy of the Brief of Appellant Stephanie Adams to counsel for respondent at:

Rodrick J. Dembowski, Esq.
Adrian Urquhart Winder, Esq.
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

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

Dated this 13th day of January, 2011, at Tacoma, Washington.



Mark L. Gannett