

Court of Appeals No. 42221-II

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

PACIFIC NORTHWEST HOLDINGS, LLC,

Plaintiff/Respondent,

v.

JERROLD B. IRWIN and GAIL IRWIN, husband and wife; JOHN D.
IRWIN; and CHARLES ICE and SHERYL ICE, husband and wife,

Defendants/Appellants.

REPLY AND CROSS-RESPONSE OF APPELLANTS

Appeal from the Superior Court of Pierce County,
Cause No. 09-2-16602-7
The Honorable Beverly G. Grant, Presiding Judge

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COME NOW the Appellants herein, and submit for the Court's consideration this Reply and Cross-Response:

I. PNH FAILS TO PROVIDE ANY FACTS OR LEGAL AUTHORITY TO CONTRADICT THE IRWINS' ARGUMENTS.

A. PNH DOES NOT DISPUTE THAT IT HAS LEFT THE IRWINS AND ICES LANDLOCKED.

“Under the traditional approach, the holder of the servient estate **must purchase the right to relocate the easement if he is to have it at all.**” *Crisp v. VanLaecken*, 130 Wn. App. 320, 325, 122 P.3d 926 (2005), citing *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App 188, 205-06, 45 P.3d 570 (2002) (emphasis added). PHN fails to cite any authorities contradicting the above rule.

In its response brief, PNH does not dispute that the Irwins and Ices held easement rights that were **not** extinguished by the sale of the subject property; rather, the parties intended that the easements would be relocated within the street network of PNH's development. Respondent's Brief at 7; RP 137:1-12; RP 142:18-25; RP 146:4-9; RP 150:17-22; RP 155:6-23; RP 72:15-25; RP 79:14-18; RP 94:20 – 96:3; Trial Ex. 15; CP 145 (Finding of Fact 12); CP 145-147 (Findings of Fact 13-25).

PNH also does not dispute that by excluding the Irwins and Ices from the original easement roads without providing actual alternatives on

the ground, PNH left the Irwins and Ices landlocked. CP 113-114; RP 254:9-12; RP 256:24 – 257:4; RP 257 12-17. PNH's failure to provide alternative access was compounded by the trial court's ruling that the Irwins and Ices should be financially responsible for relocating their easements, as well as trespass damages. *See* CP 152-54.

It is because the Irwins and Ices have been excluded from the original easement roads without provision of any alternatives, and because they must now pay to exercise their easement rights, that the Irwins argue that the trial court's Conclusion of Law 20 and Judgment 2 have essentially extinguished those rights. The trial court's rulings have bestowed on PNH the right to relocate the Irwins' and Ices' easements without any "purchase," in violation of the rule set forth in *Crisp* and *MacMeekin, supra*.

PNH's only retort is to argue in a factual vacuum that "the legal access is there if the Irwins want to use it." Respondent's Brief at 9. **But having the legal right to use something that does not actually exist is no right at all.** To restore and preserve the Irwins' and Ices' easement rights, the Irwins respectfully request that the Court strike Conclusion of Law 20, reverse the second paragraph of the Judgment, and require that PNH pay all costs associated with relocating the easements.

B. PNH DOES NOT DISPUTE THAT IT OFFERED NO EVIDENCE OF PROXIMATE CAUSE AT TRIAL.

PNH posits that the trial court was correct in awarding delay and trespass damages. Respondent's Brief at 9. Yet PNH does not dispute that it failed to present evidence that its alleged losses were **proximately caused** by the Irwins and/or Ices. PNH's failure is fatal to its damage claims.

The evidence in the record establishes that any losses PNH suffered were proximately caused by its own failure to have the property surveyed (RP 54:12-18; RP 55:17 – 56:1; RP 83:12-16; RP 53:11-22; RP 57:11-17), and to include the Irwins' and Ices' easement rights in its preliminary plat (RP 40:24 – 41:5; RP 75:24 – 76:7; RP 94:20 – 95:8; RP 86:2-9).

At trial PNH acknowledged that the Irwins **did not have to agree with its proposed plat**. RP 88:1-12. Significantly, PNH's engineer testified that the Irwins did not do anything to delay platting with Pierce County:

Q. All right. Did the Irwins have anything to do with the fact that the plat has not yet been approved? I mean, other than their disagreement with the original drawing that was going to eliminate their use of the access road going north across the bridge, other than their objection to that are you aware of anything that they did that impeded the developer's process for getting this plat approved?

A. Well, the first rendition was somewhat tossed, I guess you could say. So when you do that to a reviewing agency it takes additional time because you are reviewing a new layout. So there is some time lost there associated with a new layout. There was also some time that my client was working with the Irwins. But to answer your question. **Directly with Pierce County, no, there really wasn't any direct loss of time attributable because the second layout showed the potential of those easements.** So it was just a private discussion at that point.

RP 115:19 – 116:9 (emphasis added). *See also* RP 45:14-18.

With regard to the trespass damages, PNH again failed to present any evidence that the Irwins' and Ices' use of the original easement roadways (at a time when they were otherwise landlocked) proximately caused PNH to experience specific damages. *See Voorde Poorte v. Evans*, 66 Wn. App. 358, 363, 832 P.2d 105 (1992) ("A trespasser, however, cannot be held liable for more than nominal damage, unless specific damage is **proximately caused** by the trespasser's conduct.") (emphasis added). **No PNH witnesses provided testimony on this issue.** PNH's arguments regarding the nature of a trespass claim and the amount of damages awarded are of no moment.

Based on the utter lack of evidence establishing proximate cause, Finding of Fact 30, 32, 36, and 37; Conclusion of Law 14, 15, 17, and 21; and Judgment 4 are all erroneous.

C. PNH DOES NOT ADDRESS THE FAILURE TO PROVIDE THE IRWINS WITH NOTICE OF THE MOTION FOR DEFAULT.

Although the issue that the Irwins raised on appeal was the failure of PNH to provide notice of its motion for default judgment to the **Irwins**, PNH's response brief addresses failure to provide notice to the **Ices**. As such, PNH's arguments are irrelevant and its cited cases unpersuasive.

PNH does not cite to any Washington authority supporting the proposition that it did not need to provide notice of its motion to the Irwins. PNH ignores the clear language of CR 55, which provides that **“[a]ny party who has appeared in the action for any purpose shall be served with a written notice** of motion for default and the supporting affidavit at least 5 days before the hearing on the motion.” CR 55(a)(3) (emphasis added). While cases from other jurisdictions may hold differently, Washington's CR 55 clearly required that PNH give notice of its motion for default to the Irwins, who had already appeared in the action and were represented by counsel. RP 4:24 – 5:5.

Because PNH failed to follow this bright line rule, the trial court erred in refusing to vacate the default judgment against the Ices.

PNH argues that the Irwins did not explain the prejudice they suffered as a result of the default. However, as the Irwins argued in their opening brief, they were deprived of the opportunity to respond to PNH's

motion. Due to the nature and location of the family's easements, the Irwins' and Ices' defenses were closely related. Any judgment against the Ices impacted the Irwins, who used the same easements as the Ices. As a result of the default judgment taken against the Ices, the Ices (and anyone trying to leave their property, including the Irwins) lost access to the southern portion of the property where the Irwins' homes are located, and as well as the bridge over Clover Creek to the north. CP 79; 137-39.

PNH argues that the Irwins failed to satisfy a four-prong test to vacate the default judgment. However, the test described by PNH applies only to the defaulting party (in this case, the Ices), not other parties (such as the Irwins). *See Sacotte Const., Inc. v. National Fire & Marine Insurance Co.*, 143 Wn. App. 410, 418, 177 P.3d 1147 (2008). Furthermore, the test is conditioned on **notice** being provided of the default judgment; yet here, there is no question that the Irwins were never provided notice. *Id.* *See also* RP 5:10-16. PNH's test is inapplicable under these circumstances.

Based on the foregoing, the Irwins respectfully request that the Court reverse the trial court's denial of the motion to vacate and remand this matter for further proceedings with the Ices included as parties.

II. THE TRIAL COURT DID NOT ERR IN ATTEMPTING TO PRESERVE THE IRWINS' AND ICES' EASEMENT RIGHTS.

A. THE TRIAL COURT CORRECTLY REQUIRED PNH TO ALLOW JERROLD IRWIN CONTINUED ACCESS TO HIS GARAGE.

While agreeing that the Irwins and Ices held easement rights that were not extinguished by the sale of the subject property, and while acknowledging that the original easement roads can no longer be used by the Irwins and Ices, PNH nevertheless argues that its should not have been required to provide alternative easement access to the Irwins and Ices. Such a conclusion is not supported by fact, law, or equity.

Because PNH has obtained the right to relocate the Irwins and Ices' existing easements, PNH needs to provide compensation to the Irwins and Ices. *Crisp v. VanLaecken*, 130 Wn. App. 320, 325, 122 P.3d 926 (2005), citing *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App 188, 205-06, 45 P.3d 570 (2002). The trial court, based on testimony from the parties and the referee, determined that PNH's compensation would take the form of providing alternative access routes to the Irwins and Ices which would eventually be incorporated into the internal street network of PNH's development. Because the alternative access routes were intended to replace the Irwins' and Ices' already established easement roadways, PNH's providing "access" in an area where there were no usable roadways was insufficient. Likewise, providing "access" in an area that did not allow Jerrold Irwin to use his

garage was also insufficient. PNH cannot simply bulldoze the Irwins' and Ices' access routes without providing functional alternatives.

PNH argues that the trial court erred because reformation of the deed was not pleaded. However, that argument is a red herring. Reformation of a deed can occur when there is clear, cogent, and convincing evidence showing a mutual mistake as to the property description. *Tenco, Inc. v. Manning*, 59 Wn.2d 479, 486, 368 P.2d 372 (1962). In the present case, because the referee did not provide a specific description of the location of the easements (CP 112, RP 140:13-15; RP 143:13-21), but simply drew a diagram of their general vicinity (RP 153:23 – 154:19), and because the parties both intended to relocate the easements to incorporate them into the internal street network of PNH's development, **there was no mutual mistake**. No reformation of the deed is necessary; PNH just needs to provide proper compensation to the Irwins and Ices.

PNH argues that the trial court's judgment contradicts the earlier summary judgment order. However, that order provided:

Plaintiff may use and develop the property outside of the Easement Area in paragraph 2 unrestricted by Defendants, in conformity with all appropriate use and permitting. Plaintiff may develop the area **within the Easement Area** in a manner **not inconsistent with Defendants' easement rights**.

CP 130-31 (emphasis added). Thus, the Irwins' and Ices' easement rights were preserved at the time of summary judgment, and PNH was not permitted to interfere with those rights. The trial court's later judgment requiring PNH to provide the Irwins and Ices with alternative access does not conflict with the early summary judgment; rather, the two are entirely consistent.

PNH fails to establish any basis for overruling the trial court on this point. The Court should affirm the trial court's Finding of Fact 39, Conclusion of Law 19, and Judgment 3.

B. THE TRIAL COURT CORRECTLY REQUIRED PNH TO ALLOW THE IRWINS AND ICES TO CONTINUE TO USE THE BRIDGE.

PNH argues that the trial court should not have permitted the Irwins and Ices to continue using the bridge because it was outside of the general easement area approximated by the referee.

Again, as explained above, the referee did not specifically describe the location of the easements, but merely drew a diagram of their general vicinity. CP 112, RP 140:13-15; RP 143:13-21; RP 153:23 – 154:19. Additionally, the parties intended to relocate the easements within the street network of PNH's development. Thus, there was no mutual mistake and there is no basis for reformation of the deed in this case. The trial court did not err in allowing the Irwins and Ices to continue using the

bridge because the trial court was attempting to preserve the Irwins' and Ices' relocated easements, consistent with prior rulings and the testimony of the parties and referee. *Crisp v. VanLaecken*, 130 Wn. App. 320, 325, 122 P.3d 926 (2005), citing *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App 188, 205-06, 45 P.3d 570 (2002).

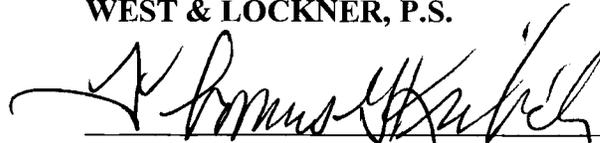
Again, PNH fails to establish any basis for overturning the trial court. The Court should affirm the trial court's Finding of Fact 34, Conclusion of Law 13, and Judgment 1.

III. CONCLUSION

PNH states that it "just wants the property it purchased." What PNH has failed to recognize is that the property it purchased is burdened by the easement rights of the Irwins and Ices. PNH is not "legally entitled" destroy those easement rights without providing compensation. Accordingly, the Court should grant the relief requested by the Irwins and deny PNH's cross-appeal.

Respectfully submitted this 27th day of January, 2012.

**KRILICH, LA PORTE,
WEST & LOCKNER, P.S.**



THOMAS G. KRILICH, WSBA # 2973
Of Attorneys for Irwins

DECLARATION OF SERVICE

12 JAN 27 PM 3: 14

STATE OF WASHINGTON

I, Sally J. Favors, hereby certify under penalty of perjury under the

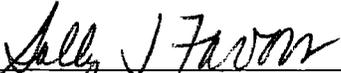
DEPUTY

laws of the state of Washington, that the following is true and correct:

On January 27, 2012, I served a true and accurate copy of the foregoing document via regular mail to:

Martin Burns
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3906 South 74th Street
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DATED: January 27, 2012, at Tacoma, Washington.


Sally J. Favors