

No. 42221-2-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

PACIFIC NORTHWEST HOLDINGS, LLC, a Washington limited
liability company,

Respondent,

v.

JERROLD B. IRWIN, et al.,

Appellants.

APPELLANTS' OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

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2. Did the trial court err in awarding trespass and delay damages to Pacific Northwest Holdings, LLC (“PNH”) when PNH did not provide alternative access to the Irwins before filing suit, there was no evidence that PNH suffered specific damage as a result of trespass, and there was no evidence in the record that the Irwins proximately caused an unreasonable delay in PNH’s development of its property? (Assignments of Error 1-11.)

3. Did the trial court err in refusing to vacate the order of default entered against Charles Ice and Sheryl Ice (“Ices”) when notice of the motion for default was not served on the Irwins, who were represented by counsel, and counsel for the Irwins had appeared in the action? (Assignment of Error 12.)

III. STATEMENT OF THE CASE

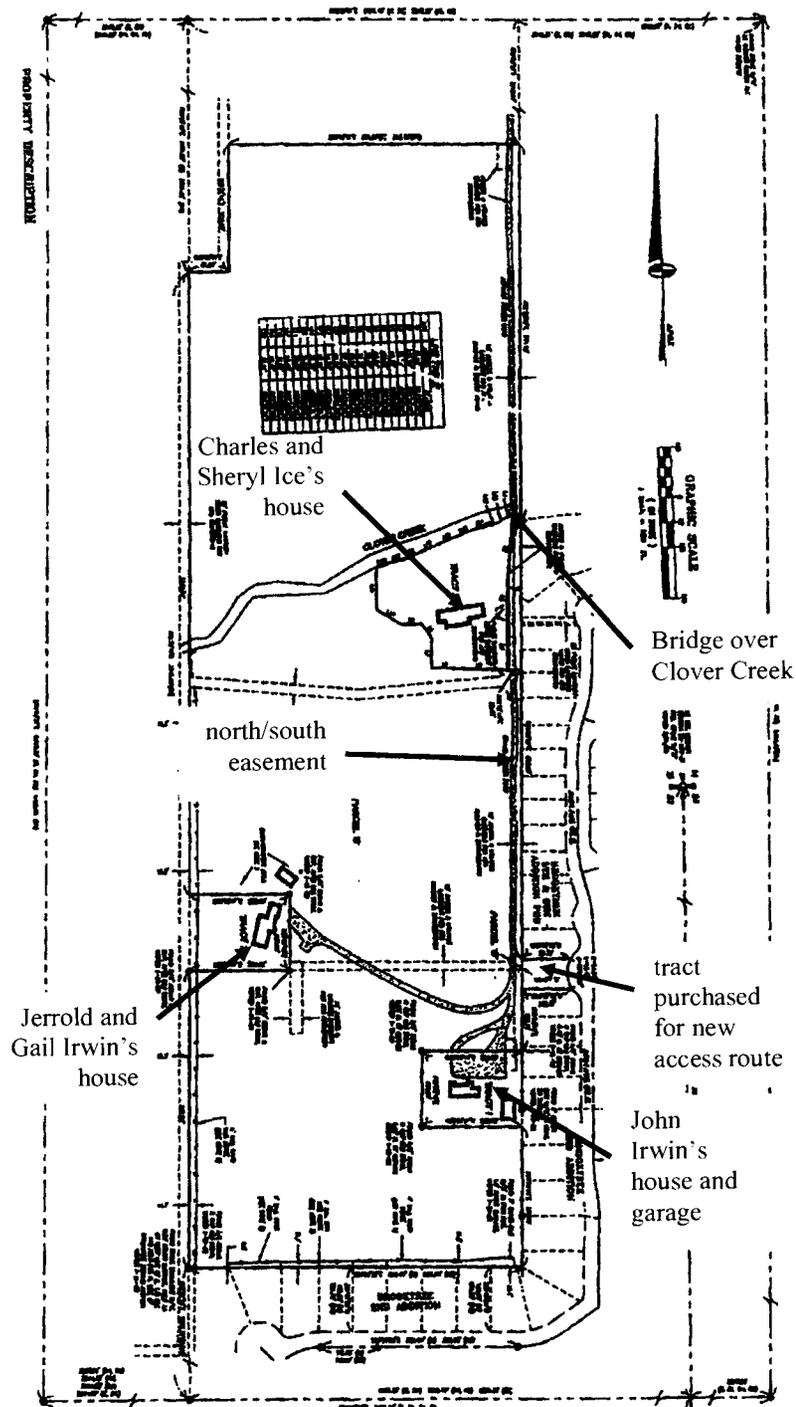
A. FACTUAL BACKGROUND

The parents of Jerrold and John Irwin and Cheryl Hunt originally owned about 30 acres that were crossed by Clover Creek. CP 109; RP 165:17 – 168:3. The parents’ home was on the south side of Clover

Creek, and the only access to the home was by means of a roadway, approximately 16' wide, that ran north/south along what was believed to be the east boundary of the property, across a bridge that had been built on Clover Creek, and through a trailer park to Brookdale County Road. CP 109. They believed their easterly boundary was marked by an existing fence of wires strung between wooden posts that ran alongside the road. RP 169:14 – 170:5.

In 1976, the parents gave John Irwin a lot on the easterly boundary of the property, south of their home, upon which John built his home. CP 110. In about 1977, they gave Jerrold Irwin a lot on the westerly boundary of the property, south of their home, upon which he built his home. *Id.* **Both of said lots were granted recorded easements over the existing roadways at the time of conveyance.** CP 79; RP 97:13-24.

The only access to Jerrold's home was by means of a driveway approximately 16' wide that went generally east (but not in a straight line) from his house to the easterly portion of his parents' property, and then north along the easterly boundary, then across Clover Creek to Brookdale Road. CP 79; CP 110. Access to John's house was generally north along the easterly boundary of the parents' property, then across Clover Creek to Brookdale Road. *Id.* However, the actual roadway as it approached



CP 79.

John's house was not in a straight line. CP 79.

John and Jerrold Irwin have lived in their homes continuously since they were built. CP 110. Their only access to Brookdale Road has been over the existing roadway that runs north along what they believed was the easterly boundary of their parents' property, then across the bridge on Clover Creek. *Id.*

After their parents both died, John and Jerrold Irwin and their sister, Cheryl Hunt, inherited all the property owned by the parents (which did not include the parcels to which John and Jerrold Irwin had received title in the 1970s) as tenants in common. CP 110. They could not agree on the total disposition of the property inherited from their parents, but they did agree to create a separate parcel for the parents' home, which parcel was supposed to have access to the roadway running north along the easterly boundary of the property. CP 112. Apex Engineering was hired to provide the legal description for that parcel, and ultimately that parcel was conveyed to Sheryl and Charles Ice, the daughter and son-in-law of John Irwin. CP 110.

The bridge across Clover Creek is non-conforming to county requirements, and only the three existing homes of the Irwins and Ices are entitled to use the bridge through grandfathered rights. RP 113:8-24.

When it became apparent that the remaining portion of the 30

acres, exclusive of the three houses held by the Irwins and Ices, was to be sold, and that a purchaser of the property, in order to properly develop the same would need an alternative access, the Irwins and Ices bought an undeveloped lot in the subdivision to the east for \$110,000 to use for access to the road system within that plat. CP 110-11. While the 16' wide road on the easterly portion of the property and the bridge across Clover Creek were adequate to service the existing three homes, the roadway and bridge were not wide enough to accommodate anything more than the three historic users of it, so the new access to the east was necessary for the use of any future residents of the undeveloped portion of the property.

Id.

When the Irwins and Cheryl Hunt could not agree upon a disposition of the remaining property, the Pierce County Superior Court appointed attorney Steven L. Larson as a referee to sell the same. Trial Ex. 6.

In Paragraph 8 of his first interim report to the trial court, Mr.

Larson recommended:

“I recommend perpetual, non exclusive easements for ingress and egress over both the existing easements and the newly acquired access be reserved for the three homes that require access across portions of the property even if that decreases the value of the property.” . . .

Well, this was consistent with what the judge wanted

because her order of partition said that I was to ensure that all three properties would have access.

RP 137:1-12 (emphasis added).

When the trial court entered its “Order Authorizing Sale at Auction” it provided in Paragraph 8:

In conveying title to the property to the high bidder at closing, **the referee shall reserve perpetual, 16’ wide, non-exclusive easements for ingress and egress for the three homes** that require access across portions of the property over (i) the route of not more than one existing access easement to a home and (ii) from the terminus of the newly acquired access easement on the east line of the subject property to a home. **The easements to be reserved are located as shown on Exhibit A attached hereto.**

Trial Ex. 1, p. 3 (emphasis added).

Exhibit A which was attached to that report clearly shows the 16’ “current access” running north along the easterly boundary of the property across Clover Creek to Brookdale Road. *Id.* at p. 4 (map).

The property, including the lot in the subdivision to the east, which had been purchased for new access, was sold by the referee to PNH on February 6, 2008. CP 120; RP 45:6-12. The deed reserved to John Irwin not only access over the access area purchased in the subdivision to the east, but also “perpetual, non exclusive easements sixteen (16) feet in width for ingress, egress and utilities to Tract 1 from parcels B and C, said easements being located as shown on the map attached hereto as Exhibit

B.” CP 120. The exact same reservation was made for Jerrold Irwin and the parcel owned by the Ices regarding both easements. CP 120. The exhibits to the deed show that the Jerrold Irwin home and John Irwin home were to have access along the easterly boundary of the property going north across the bridge on Clover Creek to Brookdale Road. CP 125-27.

The exact location of the easements that ran from the easterly 16’ of the property to the homes of Jerrold Irwin and John Irwin **were never surveyed nor specifically described by the referee.** CP 112; RP 140:13-15; RP 143:13-21. The referee simply drew in those easements **in their general vicinity.** CP 112; RP 153:23 – 154:19. It was always understood and agreed by not only Jerrold and John Irwin, but also by the referee and PNH, that the exact location of the driveways to the Jerrold Irwin house and the John Irwin house could be relocated anywhere as long as they connected those homes to the road along the easterly 16’ of the property so that they could access the northerly route across the bridge on Clover Creek to Brookdale Road, as well as to the newly purchased access on the east that had yet to be built. CP 112; RP 79:14-18.

The former home of the parents, which had been acquired by the Ices, was also granted the same easement so that they could continue to travel north over Clover Creek to Brookdale Road, or to the south along

the easterly 16' of the property to get to the newly purchased access on the east. *Id.*

PNH hired Apex Engineering to draw up its preliminary plat for a residential subdivision named "Nicolina Meadows." RP 92:3-18. One of the things PNH and Apex discovered was that the existing wire fence was not on the easterly boundary, but several feet west of the easterly boundary, meaning that the existing roadway was not totally within the easterly 16' of the property. RP 54:12-16; RP 55:24 – 56:1; RP 83:12-16; RP 112:1-10. Likewise, the bridge across Clover Creek was not entirely within the easterly 16' of the property. RP 113:8-12.

The first preliminary plat for Nicolina Meadows was completed on about December 18, 2008. RP 105:21 – 106:11; RP 109: 21-25; CP Ex. 3. The preliminary plat relocated the access between Jerrold Irwin's house and the easterly boundary, which location was satisfactory with him, but PNH/Apex had apparently forgotten about his right to access the 16' wide roadway running to the north across Clover Creek. CP 113. The preliminary plat effectively landlocked his property and John Irwin's property from going north along the easterly boundary of the property, and limited them to the newly acquired but as yet undeveloped access through the subdivision on the east. *Id.* See also RP 110:5-17. At the same time, the property owned by the Ices was limited to going north along the

easterly boundary of the property across the bridge, but was cut off from the new but yet undeveloped access through the neighboring subdivision on the east. CP 113.

The Irwins objected to the preliminary plat because it denied them portions of the access that they had reserved. CP 114.

PNH did not submit a preliminary plat to Pierce County for approval until 2009. RP 115:5-9. The proposed plat that was submitted at that time had been redrawn to show John and Jerrold Irwin having access to the bridge across Clover Creek as well as the new access, and the Ices having access to the new but undeveloped access easement to the east. CP Ex. 15. This version of the preliminary plat located the road running from the easterly boundary to Jerrold Irwin's house in such a place as to make it impossible for him to access his existing garage. RP 117:21 – 118:2.

The platting process takes 12 to 18 months. RP 115:14-18. The undisputed testimony was that the Irwins did nothing to delay the platting process.

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).

B. PROCEDURAL BACKGROUND

PNH filed its original Complaint for Damage, Injunctive Relief and Declaratory Judgment against just the Irwins on December 22, 2009. CP 1-17. The Irwins answered the complaint on February 1, 2010. CP 18-21.

PNH then filed, by stipulation, its Amended Complaint for Damages, Injunctive Relief and Declaratory Judgment against the Irwins and Ices on June 25, 2010. CP 22-25. PNH's first cause of action was for trespass, alleging that the Irwins and Ices were traveling on roads outside of their legally described areas. CP 24. PNH's second cause of action was for a declaratory judgment that the Irwins' and Ices' retained easement was invalid. *Id.* PNH's prayer was for a judgment declaring the Irwins' and Ices' easement void, or, in the alternative, limiting it to the

area diagramed in the deed given to PNH; for injunctive relief prohibiting the Irwins and Ices from continuing to trespass outside of the easement area; and for judgment for damages for trespass, together with PNH's attorney's fees and costs. CP 25.

On July 21, 2010, PNH filed a motion for default against the Ices, and on that same day obtained an order of default without notice to the Irwins or their counsel of record. CP 26-29; RP 3:9 – 15:18.

On July 30, 2010, PNH, again without notice, filed a motion for and entered a “default judgment of permanent injunction” against the Ices. CP 84-108. The permanent injunction restrained the Ices from using any area outside the 16' easement which runs along a portion of the easternmost 16' of PNH's property as shown on the deed. CP 98.

On August 20, 2010, the trial court (Judge Van Doorninck) granted PNH's motion for summary judgment. CP 129-131. Said summary judgment held that the 16' easement running to the home of Jerrold and Gail Irwin runs in a straight line that would parallel the southerly 16' of the parcel owned by Jerrold and Gail Irwin. CP 130. The order also specifically 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 130-131 (emphasis added).

The matter came on for trial on April 11, 2011, before the Honorable Beverly Grant. RP 1. At that time, the Ices moved to vacate the default and judgment of permanent injunction against them, which motion was denied. CP 136-41; RP 3:9 – 15:18.

The trial concluded on April 22, 2011, and findings and fact, conclusions of law and a judgment were entered on May 13, 2011. RP 254; CP 142-62. The judgment provided that the Irwins' easement on the east boundary would be relocated to the easterly 16' of the property, except where it crossed the existing bridge across Clover Creek. CP 151.

The judgment further ordered the Irwins to relocate their easement at their sole expense and effort, including obtaining any necessary permitting and removal of power poles belonging to the power utility company. CP 152. In giving its oral ruling, the trial court explained:

THE COURT: . . . Well, here is where I am on this. It appears to me that the overall intention of this family and the negotiations that they had with the plaintiff was to make sure they had proper egress and ingress. . . .

MR. BURNS: Does he have to pay something for this land that he's taking, I mean, my people paid him.

THE COURT: No. I think that the overall intent of all of the parties was that their peace and enjoyment was not going to end up getting disturbed by replatting or the

designation of where they could enter and exit from. . . .

And so what I'm saying is, when you say, 'Do they have to pay for this property?' In essence they have already paid. They were on the property. The father deeded the property. **It was their property to sell to you, and they did sell it to you on the condition that they would have egress and ingress. They don't have that. So I am just trying to make that whole. . . .**

RP 254:9-12; 256:24 – 257:4; 257:12-17 (emphasis added). In spite of its explanation, the trial court required the Irwins to pay for the relocation of the easement:

So are there any questions? With regards to any negotiations that you have that's between the two of you, but I think the onus is on the defendants to pay for the removal of those utility poles.

MR. KRILICH: You just said defendants now and plaintiffs before.

MR. BURNS: No.

THE COURT: It's going to be his responsibility.

MR. KRILICH: The defendants to remove the utility –

THE WITNESS: Right. They are going to remove the utility poles and give you the additional land to be able to do the turnaround.

RP 258:1-12.

The judgment went on to further confirm the summary judgment regarding the location of the 16' easement to the property of Jerrold and

Gail Irwin, except to the extent that PNH was required to relocate it such that the Irwins could have access to their garage. *Id.* Finally, a monetary judgment against the Irwins in the amount of \$20,000 for trespass and delay damages was entered. CP 152-54.

Notice of appeal and cross appeal were timely filed. CP 163-94.

IV. ARGUMENT

This Court reviews findings of fact and conclusions of law in two steps. *Landmark Dev. Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). First, the Court considers whether substantial evidence supports the findings; if it does, the Court next considers whether the findings support the conclusions of law. *Id.*

A. THE TRIAL COURT ERRED IN MAKING THE IRWINS FINANCIALLY RESPONSIBLE FOR RELOCATING THEIR EASEMENT BECAUSE PNH WAS LEGALLY REQUIRED TO PAY FOR THE RIGHT TO RELOCATE.

An easement is “a right, distinct from ownership, to use in some way the land of another, without compensation.” *Crisp v. VanLaecken*, 130 Wn. App. 320, 323, 122 P.3d 926 (2005). “[E]asements, however created, are property rights, and as such are not subject to relocation absent the consent of both parties.” *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App. 188, 207, 45 P.3d 570 (2002). *See also Crisp*, 130 Wn. App. at 324-25. “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.** *Id.* at 325, citing *MacMeekin*, 111 Wn. App. at 205-06 (emphasis added).

Here, PNH purchased its property from a referee, who testified that he was directed by the trial court to ensure that the Irwins and Ices would still have “access” after the property was sold. RP 137:1-12.

Q. Tell us what your understanding was of how access would be preserved for those two structures?

A. My understanding of what Judge Lee wanted was that the access from these three homes over the bridge through the mobile home court on easements that had been purchased years and years ago, that **that access for these three properties would be retained and that they also should receive access over what subsequently became Tract E.**

RP 142:18-25 (emphasis added). The referee also wanted to have the roads leave as much contiguous development property as possible, and therefore did not specifically grant easements over the existing roadways. RP 146:4-9; 150:17-22. The referee testified that he anticipated that some, and possibly all, of the existing roadways would be relocated to maximize the amount of contiguous developable space. RP 155:6-23.

PNH’s managing partner, Walter Foto, testified that his understanding was that all of the existing easements would be moved during the development process, but **access would always be provided to**

the Irwins and Ices. RP 72:15-25; RP 7914-18.

PNH's engineer, James Kirkebo, testified that the final rendition of PNH's preliminary plat relocated the Irwins' easements **into the internal street network of the development.** RP 94:20 – 96:3; Trial Ex. 15.

Not surprisingly, the trial court found that “Pacific Northwest Holdings, LLC was intended to be allowed to relocate such easements to the interior plat roads.” CP 145 (Finding of Fact 12). *See also* CP 145-147 (Findings of Fact 13-25). The Irwins do not dispute these findings of fact.

The Irwins do dispute the trial court's conclusions based on its findings of fact. Specifically, if there was consent to relocate the easements, then **under Washington law PNH was required to “pay” for the right to relocate.** *Crisp*, 130 Wn. App. at 325, citing *MacMeekin*, 111 Wn. App. at 205-06. While it is true that the Irwins have never requested a specific cash amount for the right to relocate, at the same time, they never expected that they would be financially responsible for creating new access routes when PNH removed the old ones. If PNH were to remove the existing roadways, then by virtue of Judge Lee's order it follows that PNH, not the Irwins, should have to pay for any relocation costs, especially if the Irwins' easements were incorporated into the internal street network of PNH's development. RP 137:1-12; Trial Ex. 1,

p. 3.

Thus, when the trial court ordered the Irwins to take sole financial responsibility for relocation, **the practical effect was to bestow a right on PNH without requiring it to compensate the Irwins.**¹ See Conclusion of Law 20; Judgment 2. Furthermore, by allowing PNH to remove the existing roadways without paying for replacements, the trial court essentially extinguished the prior easement rights that the Irwins had acquired through their parents, and which Judge Lee had attempted to preserve in her ruling. *Cf.* RP 257:12-17.

The trial court's Conclusion of Law 20 is contrary to the rules set forth in *Crisp* and *MacMeekin, supra*, and is not supported by its findings of fact.² The trial court should have required PNH to pay any costs associated with relocating the easements so that the Irwins would not lose the very access rights upon which the sale to PNH was conditioned.

Accordingly, the Irwins respectfully request that the Court strike

¹ PNH may argue that it paid for the right to relocate when it tendered the full purchase price of the property. However, the purchase price necessarily reflected Judge Lee's requirement that the Irwins and Ices **retain access**; thus, PNH cannot argue on the one hand that it was permitted to remove the existing roadways, but argue on the other hand that it did not have to provide the Irwins and Ices with alternative means of access.

² The court's conclusion was also not consistent with Judge Van Doorninck's summary judgment order, which provided that "**Plaintiff** may develop the area within the Easement Area in a manner not inconsistent with Defendants' easement rights." CP 131 (emphasis added). Obviously, the Irwins should not be required to pay for portions of PNH's development.

the trial court's Conclusion of Law 20, reverse the second paragraph of the trial court's judgment, and require that PNH pay all costs associated with relocation of the easements.

B. THE TRIAL COURT ERRED IN AWARDING TRESPASS AND DELAY DAMAGES TO PNH BECAUSE PNH WAS UNWILLING TO RECOGNIZE THE IRWINS' EASEMENT RIGHTS.

At trial, PNH's witnesses admitted that PNH did not have the property surveyed prior to purchasing from the referee. RP 54:12-18. At the time of the sale, PNH did not know where the eastern boundary line of the property was. RP 55:17 – 56:1; 83:12-16. PNH did not learn that the Irwins' north/south easement was partially outside the eastern 16' of the property until after the sale, and after PNH had completed its first preliminary plat. RP 53:11-22; 57:11-17.

PNH's witnesses also admitted that PNH's first preliminary plat **did not reflect the Irwins' easement rights.** RP 40:24 – 41:5; 75:24 – 76:7; 94:20 – 95:8. PNH admitted that the failure to provide access for the Irwins "wasn't a concern to us." RP 53:18. PNH "did not care" if the Ices and Irwins had access or not. RP 58:13 – 59:17.

Q. So isn't it true that if you were to confine these people to the easterly 16 feet they wouldn't be able to use this road because the bridge wouldn't fit within that 16 feet?

A. Really at the end of the day we didn't care about

that bridge. We never care on that bridge. So it wasn't a particular issue. We never, you know, go to that.

RP 62:1-6.

At the time PNH filed its preliminary plat with Pierce County, the easement issues with the Irwins **had not been resolved**. RP 86:2-9. The reason the platting process is still not complete is because nothing can be done until the easement issues are "clear." RP 30:3-15.

Understandably, the Irwins objected when they saw the first version of PNH's plat, which did not provide them any access to the road north across the bridge. CP 114; RP 53:11-22. PNH acknowledged that the Irwins did not have to agree with its proposed plat.³ RP 88:1-12.

PNH's engineer testified that the platting process can take up to 18 months under normal circumstances. RP 45:14-18. The engineer confirmed 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,

³ It would have been contrary to state law for PNH to try to silence the Irwins' objections had they been raised during a public hearing. See RCW 4.24.510; *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 384-85, 46 P.3d 789 (2002) (citizens' groups which made statements against development at public meetings were entitled to immunity; defamation suit brought by developer dismissed). The Irwins should not be punished for voicing their objections directly to PNH.

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).

On cross-examination, PNH's managing partner admitted that the basis for PNH's claim that the Irwins delayed platting was the fact that the Irwins tried to negotiate additional compensation for the loss of their easement rights:

- Q. Now, is it your contention that the Irwins are somehow responsible for that delay in trial?
- A. No, but we've had prior negotiations that they seemed to agree to it, and then they renege on negotiations, and then we come back again over, and over, and over.

RP 84:15-19.

- Q. All right. And so, once again, is it your contention that because the Irwins objected to your plat that they have unduly delayed you?

A. It's not an objection to the plat but an objection to the negotiations that would then facilitate the plat to exist.

RP 86:10-14.

Ultimately, PNH had to recognize the Irwins' easement rights.

Q. Now, previously you had submitted a plat which is Exhibit No. 3 that didn't have the straight easements from either Jarrold Irwin's house or John Irwin's house.

What happened when you proposed that? ...

Q. What happened when you proposed that to the Irwins?

A. They, at least my understanding, they didn't like it.

Q. So did you abandon that?

A. Yeah. We had to get easement.

RP 75:24 – 76:7.

In addition to claiming that the Irwins delayed platting, PNH also claimed that the Irwins committed trespass for continuing to use the existing roadways after it was discovered that the roadways were outside of the easement areas identified in the deed, even though without the existing roadways the Irwins were landlocked. RP 224:18-22. However, other than the mere argument of PNH's counsel, there is no support for PNH's claim in the record. **Not a single witness testified that PNH suffered specific damages as the proximate result of trespass.** *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.”).

Based on the foregoing, it was error for the trial court to find that Walter Foto and his project manager, Royallade Omolade, reasonably construed the deed. *See* Finding of Fact 30. Judge Lee’s ruling should have made it perfectly clear that PNH could not exclude the Irwins from the existing roadways without first providing alternative means of access. It was also error for the trial court to blame the Irwins for PNH’s failure to recognize their easement rights in its first preliminary plat (Finding of Fact 32). Because any delay that PNH experienced could have been avoided if it had included the Irwins’ easement rights in its preliminary plat and provided alternative means of access to the Irwins and Ices, the trial court erred in finding that the Irwins caused any delay (Finding of Fact 36).⁴ For the same reasons, and because PNH presented no evidence that it was damaged by trespass, the trial court erred in finding that \$20,000 in damages were reasonable (Finding of Fact 37).

⁴ Again, the Irwins should not be penalized for making statements to PNH privately that would have been protected if made during a public meeting. *See* RCW 4.24.510; *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 384-85, 46 P.3d 789 (2002).

Because the above Findings of Fact were erroneous, the trial court's conclusions based on those findings are also erroneous. Specifically, the trial court erred in concluding that the Irwins' continued use of the existing roadways, **when no other means of access had been provided**, constituted trespass (Conclusions of Law 14 and 17). Similarly, the trial court erred in concluding that the Irwins interfered with PNH's right to develop the property and that judgment should be entered against the Irwins in the amount of \$20,000 (Conclusions of Law 14 and 15, Judgment 4). Because PNH has still not provided any alternative means of access to the Irwins, the trial court erred in concluding that PNH should not be further delayed in obtaining preliminary plat approval based on the Irwins' easements (Conclusion of Law 21).

The Irwins respectfully request that the Court strike the Findings of Fact and Conclusions of Law identified above, reverse the fourth paragraph of the judgment, and remand this matter for further proceedings consistent with the Court's opinion.

C. THE TRIAL COURT ERRED IN REFUSING TO VACATE THE ORDER OF DEFAULT AGAINST THE ICES WHEN IT WAS NOT PROPERLY SERVED ON THE IRWINS OR THEIR COUNSEL.

This Court reviews a trial court's ruling on a motion to vacate a default judgment for an abuse of discretion. *Showalter v. Wild Oats*, 124

Wn. App. 506, 510, 101 P.3d 867 (2004). A trial court abuses its discretion by issuing a manifestly unreasonable or untenable decision. *Id.* The primary concern is that a trial court's decision on a motion to vacate a default judgment is just and equitable. *Id.* The trial court must balance the requirement that each party follow procedural rules with a party's interest in a trial on the merits. *Id.*

CR 55, which governs default, provides in pertinent part:

Any 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. Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion

....

CR 55(a)(3) (emphasis added). CR 54(f)(2) also requires advance notice to opposing counsel before a judgment is signed or entered. Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits.

Showalter, 124 Wn. App. at 510.

In the present case, PNH filed a motion for default against the Ices on July 21, 2010. CP 26-27. **No notice** was provided to the Irwins or their counsel, even though the Irwins had already appeared and answered the complaint. RP 4:24 – 5:5; CP 18-21. On the same day that the motion for default was filed, PNH appeared *ex parte* and obtained an order of

default against the Ices, again **without any notice** to the Irwins. CP 28-29.

On July 30, 2010, PNH filed a motion for a default judgment against the Ices, **without any notice** to the Irwins. CP 84-96; RP 5:10-16. That same day, a default judgment was entered *ex parte*, **without notice** to the Irwins. CP 97-108.

On April 12, 2011, the Ices filed a motion to vacate the default judgment. CP 136-39. After hearing oral argument on the motion, during which counsel for the Irwins made clear that he had not been served with either of PNH's motions or the default judgment, the trial court denied the Ices' motion. CP 140-41; RP 3:9 – 15:18.

Under CR 54 and 55, *supra*, there is no question that the Irwins should have received notice before PNH took a default against the Ices. The Irwins were parties, and they had already appeared prior to the motion for default being filed. PNH simply did not follow a bright line rule.⁵

As a result of PNH not providing the required notice, the Irwins

⁵ At oral argument, PNH relied on four cases: *Hazeltine v. Rockey*, 90 Wn. 248, 155 P. 1056 (1916); *Johnson v. Cash*, 116 Wn. App. 833, 68 P.3d 1099 (2003); *Hwang v. McMahill*, 103 Wn. App. 945, 15 P.3d 172 (2000); and *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 777 P.2d 1056 (1989). The first three of these cases did not involve represented parties who had appeared in the action not getting proper notice, and are inapplicable. The last case, which did involve multiple parties, did not discuss the issue of notice to non-defaulting parties, and the case was decided under CR 60 rather than CR 54 or 55. PNH did not provide the trial court with any legal authority that would have excused PNH's failure to provide proper notice of its motions.

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 would have impacted the Irwins. As a result of the default judgment taken against the Ices, the Ices (and anyone trying to leave their property) lost access to the southern portion of the property where the Irwins' homes are located, as well as the bridge over Clover Creek to the north. CP 79; 137-39.

The trial court's refusal to vacate the default, in spite of PNH's blatant rule violation, was manifestly unreasonable and untenable. The result of the trial court's refusal was not equitable or fair to the Irwins, whose interests were aligned with the Ices, or to the Ices, whose property became landlocked. The trial court failed to balance the requirement that PNH provide notice and the Irwins' and Ices' interest in a trial on the merits. In short, the trial court abused its discretion.

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.

V. CONCLUSION

There is no dispute that the Irwins' existing roadways would be relocated as a part of PNH's development of the subject property. However, there is also no dispute that the Irwins were to retain their access

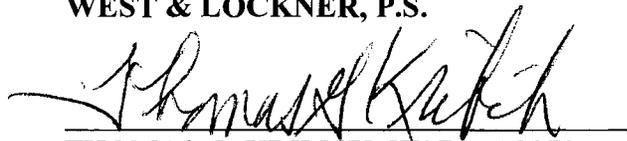
rights, even if the existing roadways were removed and/or relocated. PNH should therefore have provided the Irwins with alternative access before excluding the Irwins from the existing roadways. Because PNH did not provide the Irwins with alternative access, the trial court erred in holding the Irwins financially responsible for relocating their easement roads and requiring the Irwins to pay PNH damages.

The trial court also erred in failing to vacate the default judgment taken against the Ices.

The Irwins respectfully request the Court to grant the relief requested herein so that they can once again enjoy their full property rights, including their easements.

Respectfully submitted this 3Rd day of November, 2011.

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



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

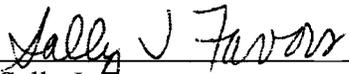
DECLARATION OF SERVICE

I, Sally J. Favors, hereby certify under penalty of perjury under the laws of the state of Washington, that the following is true and correct:

On November 3, 2011, I served a true and accurate copy of the foregoing document via regular mail to:

Martin Burns
Attorney for Plaintiff/Respondent
3906 South 74th Street
Tacoma, WA 98409-1001

DATED: November 3, 2011, at Tacoma, Washington.



Sally J. Favors