

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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Court of Appeals No. 42221-II

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 CHERYL ICE, husband and wife,

Defendants/Appellants.

REPLY OF CROSS-APPELLANT

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

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COMES NOW the Cross-Appellant herein, and submit for the Court's consideration this Reply:

I. APPELLANTS IRWINS' AND ICES' EASEMENT RIGHTS WERE NOT RELOCATED.

In their response, the Irwins and the Ices claim that their easement rights were relocated. This is simply wrong. For example and as set forth more fully herein, everyone agrees that Jerrold Irwin's old snaking driveway was never going to remain. The trial court at summary judgment disposed of that issue. CP 129-131. The question became "where is Jerrold Irwins' easement?"

The answer is quite simple as to Jerrold Irwin— it is exactly where the deed showed it to me – running from the southeast corner of Jerrold Irwin's lot to the east boundary line of the subject property and being 16 feet in width. Exhibit 1. *See* Summary Judgment Order. CP 130. Not only is this what was found by Judge van Dorninck at summary judgment, it was reaffirmed by Judge Grant in the trial court's Findings of Facts and Conclusions of Law and Judgment. CP 153. As to the issue of the easement diagramed on the east 16 feet of the property, no one is disputing that is what the deed shows.

The problem in this case is that the Appellants simply do not like the easements that they retained. They are distorting the record. Throughout the Appellants' reply brief they continuously misrepresent that the Irwins' easements are being "relocated." This is not the case.

Finding of Fact 14 provides:

The easement that is diagrammed on all maps attached to the deed running North from where Jerrold and John Irwin exclusive easements intersect, i.e. the common easement out towards Brookdale Road is the central dispute of this case (Disputed Easement). (CP 168).

Finding of Fact 15 provides:

The Disputed Easement is diagrammed on all of the Deed maps and is drawn with its easterly line on the eastern boundary line of the subject parcel. The western line runs of the easement runs parallel to the boundary line. (CP 169).

Finding of Fact 30 provides:

Dr. Foto and Mr. Omolade reasonably construed the deed to indicate that the disputed easement ran on the east boundary line. (CP 171).

Finding of Fact 31 provides:

The cause of the differing intent was the Irwins in not having the easements legally described. (CP 171).

Finding of Fact 32 provides:

The notion that the plaintiff should have been aware that the roadway out to Brookdale was inside or outside the east 16 feet is unreasonable as the Irwins testified to their ignorance of such fact despite having been on the property for decades. (CP 171).

Finding of Fact 33 is clear that the relocation relates to the roadways – not the easement:

The relocation of the roadways will create a substantial burden on the Irwins. However, not requiring the driveways to be moved, relocating the will create a

substantial hardship on the Plaintiff in decreased plat lots. (CP 171).

The trial court was absolutely right in Conclusion of Law 6:

Courts are allowed to decide where an easement is located, but once located, courts are not allowed to move easements. (CP 173).¹

It was further correct in Conclusion of Law 7:

If an easement incorporates a map, the map and the deed are construed together and the map becomes part of the description. To the extent there are ambiguities, the map should control. (CP 173).²

The trial court concluded correctly as to the easement running along the easterly boundary line in Conclusion of Law 12:

Notwithstanding that, the court concludes that the placement of the easement on the map is not ambiguous – it runs along the eastern boundary line but allows passage over the bridge. There is no delineation of an existing road so the absence of such marking does not make the map unclear. Again the court declares that which is written – not what was intended. The location of the bridge, as opposed to the easement, as marked on the map is somewhat ambiguous but the intents were clear and Defendants should be allowed continued use of the bridge. (CP 174).³

¹ *Crisp v. VanLaecken*, discussed *infra*; *Mac Meekin v. Low Income Housing Inst.*, 111 Wn. App. 188, 45 P.3d 570 (2002).

² Such authority is found at *Saterlie v. Lineberry*, 92 Wn. App. 624, 962 P.2d 863 (1998), and the cases internally cited therein.

³ Such authority is set forth in *Lehrer v. State DSHS*, 101 Wn.2d 509, 515, 5 P.3d 722 (2000); *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 571, 919 P.2d 594 (1996).

And the trial court concluded correctly as to the east 16 feet in
Conclusion of Law 13:

Based on the Map as drawn, the binding precedent that deeds are construed against the drafter, and the facts of this case, the court concludes legally that the easement to Brookdale Road runs on the east 16' of the subject property except for the bridge and reasonable approaches to the bridge to be determined by Plaintiff's engineers. The court should retain jurisdiction if a dispute arises as to such approaches. (CP 174).⁴

The trial court declared where the easement was – it did not relocate the easement (Conclusion of Law 19). (CP 175).

The only real reference to "relocating easements" is in Conclusion of Law 20 which really should better read "relocating the driveway" as it deals with the particularities of moving the power poles, the bridge maintenance, the grading and surfacing. CP 175. Such responsibility has nothing to do with where the easement is. It has everything to do with how a driveway is put in.

The judgment again uses the "easement" when it should say "driveway" but the court's oral ruling when discussing the move shows that it is clearly related to the roads.

THE COURT: I want to make sure that whatever configuration of that road is they can still use that bridge. And you know, I am not an engineer but you folks have expertise on that. The bottom line is they are going to be responsible for repaving or removing and aligning the road

⁴ Such authority is found at *Carr v. Burlington Northern, Inc.*, 23 Wn. App. 386, 597 P.2d 409 (1979).

consistent with this. The defendants are also going to be responsible, Jerry right, he is the defendant, is also going to be responsible for the removal of the utility poles. (RP 260-261)

As shown above, the court said it was not relocating easements. It was declaring where the easements were in the first place. CP 150. It's oral ruling, the court clearly showed it was talking about the expenses of moving the road into the defined easement.

The Appellants' citation to *Crisp v. VanLaecken*, 130 Wn. App. 320, 122 P.3d 926 (2005) simply does not apply. In such case, the easements were well defined. VanLaecken's easement was granted in 1969 and read that it was "for road purposes as the same is presently laid on the property above accepted, which easement gives access to the public road on the south line of said excepted property to the property herein conveyed." *Crisp* footnote 1. In such case, the court was looking at an easement some 30 years later which had a longstanding history of use based upon a written easement. This is completely unlike the current situation where we are dealing with a recent conveyance and a diagramming of new easements.

In the present case, the actual easement described, prior to the Pacific Northwest Holding deed, is in the east 16 feet of the subject property as described in the John Irwin survey in 2007 which puts the easement in the east 16 feet. Exhibit 4. The Pacific Northwest Holding deed runs the line against the easterly boundary line. Exhibit 1. The easement being in the east is 16 feet also reflected in a 1974 quitclaim

deed (Exhibit 5), and a 2007 Statutory Warranty Deed (Exhibit 8 (Parcel C)). The actual easement is well defined. Unlike *Crisp*, the Irwins' use is not within the easement area. Had the Irwins got a survey and had the access ways legally described as the receiver, Steve Larson, had recommended, this may not be an issue. However, the Irwins completely gloss over where the easement is in the first place. The Irwins treat the existing roads as easements without any citation to the record. The record is quite to the contrary. Jerrold Irwin agreed that the deed showed the easements running along the east line.

Q. Would you agree with me that just looking at the document [the deed to Pacific Northwest Holding] that the easement that runs out to Brookdale runs along the east boundary?

A. Presumably, yes.

Q. Well, that's what it shows?

A. That's what it's intended to show.

RP 207; 7-11.

Jerrold Irwin then testified that he was simply mistaken as to where the actual boundary line was with regards to where the road was.

Q. Okay. Similarly, you thought the road running out over the bridge out to Brookdale was in the east 16 feet of the property, correct?

A. According to the fence line, yes.

Q. Yes. And you were wrong?

A. Unbeknownst to me I was wrong.

Q. Yeah. I'm not saying it was a malicious wrong. You were just wrong, correct?

A. Correct.

RP 193:18 – 194:1. Irwin bears the risk of such mistaken assumption.⁵

Jerrold Irwin testified that he fully expected other portions of his driveway would not remain:

Q. Now, is it fair to say that you knew in referencing Exhibit No. 2 [Boundary and Topographic Exhibit] that your driveway was not going to remain in that sort of snaky fashion after the development began?

A. I fully anticipated that.

RP 191; 1-5.

Jerrold Irwin had clues to the fact that a driveway did not run within the east 16 feet of the boundary line. In questioning before the trial

⁵ "It is similarly agreed that a party bears the risk of mistake when, at the time the contract is made, the party is aware of limited knowledge with respect to the facts to which the mistake relates but treats such limited knowledge as sufficient. Restatement (Second) of Contracts § 154 (1981); *see also* *Bailey v. Ewing*, 105 Idaho 636, 671 P.2d 1099 (Ct.App.1983); *Covich v. Chambers*, 8 Mass.App.Ct. 740, 397 N.E.2d 1115 (1979). It is said in such a situation that there is no mistake; instead, there is an awareness of uncertainty, a conscious ignorance of the future. 3 A. Corbin, *Contracts* § 598 (1960)" as cited in *Pub. Util. Dist. No. 1 of Lewis County v. Washington Pub. Power Supply Sys.*, 104 Wn.2d 353, 362, 705 P.2d 1195, 1203 (1985) modified, 713 P.2d 1109 (Wash. 1986).

Such decision was further reinforced:

"A party bears the risk of a mistake when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient". Restatement (Second) of Contracts § 154(b) (1981). *See also* *PUD 1*, at 362, 705 P.2d 1195; *Armco, Inc. v. Southern Rock, Inc.*, 696 F.2d 410, 412-13 (5th Cir.1983); *United States v. McBride*, 571 F.Supp. 596, 610 (S.D.Tex.1983); *Covich v. Chambers*, 8 Mass.App.Ct. 740, 749, 397 N.E.2d 1115 (1979). In such a situation there is no mistake. Instead, there is an awareness of uncertainty or conscious ignorance of the future. *PUD 1*, 104 Wash.2d at 362, 705 P.2d 1195, *see also* Restatement (Second) of Contracts § 154, comment *c* (1981)" as cited in *Bennett v. Shinoda Floral, Inc.*, 108 Wash. 2d 386, 396, 739 P.2d 648, 653-54 (1987).

court Jerrold Irwin was asked about the fences that lie to the east of the subject property that had been put in by a developer who had platted the adjacent property. The developers names were Edwards and Scott. In such questioning, there is reference to Exhibit 21, which is a photograph where there is a cedar fence running perpendicular to the east boundary line of the subject property.

- Q. (By Mr. Burns) In Exhibit 21 do you see the big cedar fence?
- A. Yes.
- Q. It was a cedar fence that was put up by Edwards, was it not?
- A. Correct.
- Q. It was put up as part of his boundary fences for his plat; is that correct?
- A. I believe that's supposed to be the separation point between Edwards and Scott.
- Q. So it's a boundary fence?
- A. I think so, yeah.
- Q. And do you notice that fence doesn't come anywhere near the edge of your road?
- A. You are right.
- Q. In fact, it's, what, probably 16 feet from the road, 12 to 16 feet from the road?
- A. That could be.
- Q. That fence has been there for awhile too hasn't it?
- A. That fence was put in I believe during the -- when they first started building homes on that senior development.
- Q. So was that six or seven years ago?
- A. No -- I'm going to say that is probably in the ballpark, I yeah.
- Q. Did it ever cross your mind, why doesn't the developers' fence line come all the way down to the property line to your property line?
- A. It never bothered me.
- Q. Did you think the developer was just going to give you that extra space?

A. No. Knowing Edwards, no.

RP 198:10 – 199:14.

The Irwins' position tries to make mind readers out of the Pacific Northwest Holdings principals. They seem to allege that the Pacific Northwest Holdings principals should have looked at the deed and instantly known that Jerrold Irwin's subjective intention was that some of his driveway, woodshed and basketball court would be bulldozed under, but other parts of the driveway would stay as built.⁶ This is an absurd position. The correct position is to say that the deed accurately reflected the easement as being straight out of the Jerrold Irwin property to the east line and then along the east 16 feet of the subject property.

The trial court correctly declared where the easements were, however, the ruling then impermissibly went further to try to accommodate the Irwins' garages and fence.

In reply, the respondent confuses the Ices and the Irwins. The default judgment deals with the Ices. CP 97-108. The Findings of Facts and Conclusions of Law and Judgment deals with the Irwins. CP 142-162. There is reference in the Findings, Conclusions, and Judgment that the Ices situation has already been resolved. CP 143. The trial court did not exclude the Irwins from the easements they retained. The trial court stated where the easements were. CP 152-3. As cited above, Jerrold Irwin had

⁶ Case law discusses problems with "intent" in interpreting deeds and how a court is to derive intent from the entire document. *Harris v. Ski Parks, Inc.*, 120 Wn.2d 727, 739, 844 P.2d 1006 (1993).

no intent of retaining a large portion of the existing road – he fully expected the "snaky" road would be moved. It is just that there are other portions that he would like to retain despite no legal basis:

Q. All right. You talked about what you would like. In reference to Exhibit No. 15, you would like more area to the east of your house, correct?

A. And agreed to overrun my basketball court. I don't care about the woodshed. The woodshed can go away.

Q. Would you agree with me it was no one's intent there would be an additional 16 feet east of your property, immediately east of your property? Any 16-foot easement that we are talking about in the deed would have been up near the east boundary line, correct?

A. Correct, and we -- I can't say that.

Q. Well, the thing of it is that no one was contemplating outside of settlement negotiations, there were no contractual writings that you're getting another 16 feet?

A. No.

Q. It's just something you want?

A. You're right.

RP 207:18 – 208:9.

The record is actually quite clear. The deed is quite clear. All Pacific Northwest Holdings is requesting is what its deed shows. The trial court got 90 percent of the decision right. However, when the trial court tried to relieve the Irwins from their own lack of planning, foresight and compliance with the recommendations of the receiver, that it committed error. The error caused Pacific Northwest Holdings to give up land to Jerrold Irwin in a manner not contemplated in the Pacific Northwest Holdings purchase of the property or in the deed to Pacific Northwest Holdings. The trial court essentially reformed the deed without a legal

basis and without the Irwins even pleading reformation.⁷ In doing so, the court committed error.

II. CONCLUSION.

The court should dismiss the Appellants' appeal and grant the Respondent's cross-appeal and remand to the trial court to enter Judgment confining the Irwin's access only to the easements as reflected in the deed to Pacific Northwest Holdings.

RESPECTFULLY SUBMITTED this 29 day of February, 2012.



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⁷ At trial, the Respondent pointed out how a reformation claim is an independent cause of action and how failure to assert it should bar such remedy. See *Browning v. Howerton*, 92 Wn. App. 644, 966 P.2d 36 (2006); CR 8(a). The trial court found at Finding No. 40 that such cause of action was not pleaded. CP 172.

CERTIFICATE OF SERVICE

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I certify that on the 29th day of February, 2012, I caused a true and correct copy of this Response Brief to be served on the following via U.S.

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