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NO. 42221-2-II

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

**PACIFIC NORTHWEST HOLDINGS, LLC, a Washington limited
liability company, Respondent/Cross-Appellant,**

vs.

JERROLD B. IRWIN, et al., Appellant/Cross-Respondent.

**RESPONDENT'S BRIEF AND
CROSS-APPEAL**

Martin Burns
McFerran, Burns & Stovall, P.S.
3906 South 74th Street
Tacoma, WA 98409
(253) 471-1200
Attorneys for Respondent/Cross-Appellant

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I. CROSS-APPEAL ASSIGNMENTS OF ERROR

1. Did the trial court err in construing the "Boundary Line Easement" to deviate from the east 16 feet over the bridge? (Findings of Fact 34; Conclusions of Law 13; Judgment 1). CP 171-176.

2. Did the trial court err in requiring respondent to accommodate Jerrold Irwin's garage? (Findings of Fact 39; Conclusions of Law 19; Judgment 3). CP 171-176.

II. ISSUES PERTAINING TO THE CROSS-CLAIM ASSIGNMENT OF ERRORS

1. Did the trial court err in concluding that to honor the intent of the parties, the Boundary Line Easement, that was clearly delineated, should deviate from the east 16 feet of the subject property and to allow reasonable approaches as the easement passed over a bridge that were not within the area set forth in the Deed containing the Easement and Diagrams attached thereto? (Cross-Claim Assignment of Error 1).

2. Did the court err in concluding and granting judgment that the Pacific Northwest Holdings, LLC ("PNH") has to accommodate Jerrold Irwin's driveway when Jerrold Irwin did not plead such a case, no claim for reformation was made, and the problem was created due to Jerrold Irwin and with no fault of PNH? (Cross-Claim Assignment of Error 2).

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The Appellant, John Irwin, obtained property in 1975 from his father which had an easement on the east 16 feet of the property (Ex. 5). John Irwin's property was surveyed in 2007 showing the 16 foot easement running on the easterly boundary (Ex. 4). Appellant Jerrold Irwin obtained his property in 1977. RP 166. The Irwin's sister, Cheryl Hunt, was parceled out her property in about 2003. RP 200. Hunt transferred her interest to John and Sheryl Ice ("Ice") in 2007 (Ex. 8). The remainder of the parents' property was held in tenancy in common between John Irwin, Jerrold Irwin, and Cheryl Hunt (for ease of reference, when dealing with Defendants as a whole, they will simply be called "Irwin"). RP 200-1. The Irwin tenancy in common got into a partition action under Pierce County Superior Court No. 04-2-11681-9 and Attorney Steve Larson was appointed receiver. RP 135. In his recommendation to the court, he advised the Irwins to get a survey (Ex. 14). Despite having three and one-half years during the partition action, Jerrold Irwin chose not to have the survey. RP 193. Thereafter, the remaining tenancy in common property was put up for sale and sold to PNH in January 2008 (Ex. 10). In negotiations, neither the Irwins nor Steve Larson spoke to any of the agents of PNH regarding the easements and boundary lines. RP 148; RP 199-200. The Receiver's Special Warranty Deed ("Deed") was drawn by Mr. Larson without any discussions with PNH agents as to the Irwins' easements or the PNH agents' intentions thereto. RP 149. The Deed attached exhibits that diagram three easements for each of the Irwin tenants in common (Ex. 1). Steve Larson and Jerrold Irwin agreed that the

Deed diagrams crosshatching the Boundary Line Easement was on the easterly boundary line. RP 164; RP 207. Mr. Larson agreed that nothing in the Deed provided the easements as written were to depict the existing roads. RP 150.

The Respondent's member and agent, Dr. Walter Foto and Royallade Omolade, respectively, testified that the first time they saw the Deed was at escrow and saw that the Easement ran on the east 16 feet of the demised property which acceptable and thus closed the transaction and that PNH had no role in drafting the Deed. RP 35; RP 56; RP 71. Steve Larson testified he specifically did not intend to grant easements over the existing roads. RP 150. Steve Larson testified that he wished to maximize the contiguous land for development. RP 155-6. Without having a survey done, Steve Larson testified he "did the best he could." RP 153. John Irwin's property borders a portion of the easterly boundary line and the 2007 survey depicted the 16-foot easement as being in the east 16 feet of the PNH property later purchased by PNH (Ex. 4). Still, Jerrold Irwin testified and provided pictures into evidence that the existing road was set back from an existing fence line but did not investigate it further (Ex. 16-21). Jerrold Irwin also testified to seeing a fence on the adjoining development next to the Subject Property stopping several feet short of the established driveway but did not investigate it (Ex. 21). RP 198-199. A survey parceling off the Ice property showed the Ice property being set back the east property line up to 28 feet (Ex. 11, last page).

At trial, Jerrold Irwin complained that his easterly boundary line that abuts the PNH property did not provide him adequate access into his garage. RP 207-208. Jerrold Irwin agreed that PNH was not at fault – he just did not know exactly where his easterly boundary line was on his property when PNH bought the property. RP 191-193; RP 202. Neither Jerrold Irwin nor any of the Defendants ever counterclaimed for reformation (Findings of Fact 40). CP 172. See also Amended Answer. CP 132-135. PNH's managing member testified that PNH had nothing to do with any mistakes as to Jerrold Irwin's property line. RP 74-5. Despite being raised first at trial, without any proof of mistake involving PNH, the trial court required PNH to accommodate Jerrold Irwin's driveway near his garage. CP 153.

B. PROCEDURAL HISTORY

PNH filed a complaint on December 22, 2009, for trespass/injunctive relief and declaratory relief as to the easements against John and Jerrold Irwin. CP 1-17. Defendant answered and pleaded, in narrative form unspecified affirmative defenses largely setting forth the historic use of the property. CP 18-21 and 132-5. The Defendants asserted no counterclaims. *Id.* On June 25, 2010, PNH amended its complaint to include John and Cheryl Ice as the Deed included an easement that would affect the Ice property. CP 22-25. No lawyer appeared for the Ices so the Respondent defaulted the Ices on July 21, 2010 and obtained a default judgment against the Ices on July 28, 2010. CP 28-9; CP 97-108. Then, one day before trial, Appellants' attorney

appeared for the Ices and moved to set aside the default. CP 136-9. On April 12, 2011, the morning of trial, Judge Grant denied such motion which was later memorialized in a pleading. RP 15; CP 140-1.

IV. ARGUMENT

The argument sections will mirror in order of the Appellants' brief and set forth the cross-appeal argument thereafter.

A. THE TRIAL COURT DID NOT ERR IN MAKING THE IRWINS FINANCIALLY RESPONSIBLE FOR RELOCATING THEIR DRIVEWAY BECAUSE PNH WAS NOT LEGALLY REQUIRED TO PAY FOR THE IRWINS EXERCISE OF THEIR EASEMENT RIGHTS.

As discussed herein, the obvious flaw in the Appellants' argument is that the court did not relocate an easement. It declared where the easement was and found that the existing driveway was outside of the easement.

The Deed to PNH is silent as to the relocation costs related to the then existing driveways (Ex. 1). The purchase and sale agreement is silent as to the costs of moving any of the driveways (Ex. 10). In Findings of Fact No. 13, the trial court found no expectation that John Irwin's driveway would have been retained. CP 145. In summary judgment, the court prohibited Jerrold Irwin's use of the PNH land outside the other retained easement which run from Jerrold Irwin's lots southeast corner to the easterly boundary line where it intercepts the Boundary Line Easement. CP 129-131. Steve Larson testified Jerrold Irwin's driveway would not remain. RP 146. The court found at Findings of Fact 23 that

the principals of PNH had no expectation the roads would remain as it is was PNH's intent to log and bulldoze the property. CP 146-7. The court found nothing in the purchase and sale agreement retaining as easements the existing driveway as they lie on the ground (Findings of Fact 25). CP 147.

Despite the Irwin's subjective belief that the driveway was in the east 16 feet, the court found that there was no evidence that the Irwin's or Mr. Larson's understanding was conveyed to PNH's agents (Findings of Fact 29). CP 148. Any such confusion was because the Irwins did not have the easements legally described (Findings of Fact 31). CP 148. The court found that the principals of PNH acted reasonably in construing the easements as being in the east 16 feet (Findings of Fact 30). CP 148. The court did find hardship to the Irwins in relocating their driveways, but also found hardship to PNH if the driveways were not moved (Findings of Fact 33). CP 148.

The above-referenced items are Findings of Facts. Such Findings are not to be disturbed if they are supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 573, 43 P.2d 183 (1959). "The Constitution does not authorize this court to substitute its findings for that of the trial court." *Id.* at 575. The Appellants' brief is unclear as to which findings are actually incorrect. Citing to a finding that PNH intended to relocate Jerrold Irwin's access to the interior plat roads is not the same as making the leap that PNH is required to pay to specifically move the Irwin's driveway unrelated to the plat within the east 16 feet.

The notion that PNH intended to let Jerrold Irwin use the planned plat road surrounding his home (that PNH was putting in anyways) is not the same as paying to relocate his driveway. The Appellants cite to the Receiver saying that the Appellants would have "access." (Appellant Brief 17). But at trial, Steve Larson testified that the Plaintiff had two accesses – one being what is referred to as Tract E out through a neighboring development and the other being the east 16 feet of the subject property. RP 142. The Appellant tries to equate "access" to "existing driveway." Ironically, on Appeal, the Irwins do not claim to not have "access." The Irwins just do not want to pay for the relocation of their driveway into the access easement – the east 16 feet. (Appellants Brief p.18). Appellants resort to arguing "[Appellants] never expected they would be financial responsible for creating new access routes when PNH removed the old ones." *Id.* This is hardly a legal argument.

Understand, the trial court did not "relocate" the easement – the court declared where the easement was in the first place. (Conclusions of Law 6-10; 12-13). CP 150-1. The Appellants' brief cites to *Crisp v. VanLaecken*, 130 Wn. App. 320, 323, 122 P.3d 926 (2005). However, *Crisp* cites a basic legal principal that an easement gives one a right to use the land of another without compensation. Appellants misconstrue what rights they have versus what they want. Appellants have the right to use the east 16 feet. There is no law or contract that says that PNH has to pay for the Irwins to use or develop their retained easement.

Returning to the notion of "substantial evidence", the obvious point is that there is no evidence for Appellants' position. There is no citation to any contractual provision in the record on appeal to shift such costs. There is no citation to any testimony of anyone saying that it was intended that PNH would pay to move the Irwins' driveway. Letting the Irwins use proposed internal plat roads that would be installed regardless is a far cry from moving hundreds of feet of a private driveway which does not benefit the plat. The Appellants citation to *MacMeekin v. Low Income Hous. Inst., Inc.*, 111 Wash. App. 188, 197, 45 P.3d 570, 574 (2002) is completely out of context. In such case, the trial court's summary judgment was reversed as the Appellate Court found factual issues as to whether or not an implied easement existed but the decision rejected the idea of a court relocating existing easements. *Id.* at 199. *MacMeekin's* internal citations to foreign authority note "[f]or example, in *Adair v. Kona Co.*, 51 Haw. 104, 452 P.2d 449, 455 (Haw.1969), the court held that it can only exercise its equitable power to locate an easement where it is not definitively located in the grant and the parties fail to agree on its location." *MacMeekin* at 199.

Irwin argues that the trial court's decision is a relocation without compensation. However, to require PNH to "relocate" a long driveway (as opposed to simply providing the access easement for which the Irwin's can develop as they please) adds an expense and obligation to PNH never bargained for in the purchase and sale agreement. "[C]ourts do not have the power, under the guise of interpretation, to rewrite contracts the parties

have deliberately made for themselves. *Clements v. Olsen*, 46 Wash.2d 445, 448, 282 P.2d 266 (1955)." *McCormick v. Dunn & Black, P.S.*, 140 Wash. App. 873, 891, 167 P.3d 610, 619 (2007).

Appellants' argument tries to confuse "driveway" with "access." In fact, the Appellants have two legal accesses. Appellants convolute "existing driveway" with "easement." Not a single case is cited that there is a common law duty for a servient estate to pay for the dominant estate's costs to utilize the easement. A myriad of problems could easily be imagined such as the quality of the road, the dimension of the road, the repairs and maintenance of the road, the bonding and permitting of the roads, and all other obligations. The point is, the legal access is there if the Irwins want to use it. However, it is their obligation to develop their access into a driveway of their choosing consistent with their easement rights.

B. THE TRIAL COURT DID NOT ERR IN AWARDING TRESPASS AND DELAY DAMAGES TO PACIFIC NORTHWEST HOLDINGS, LLC.

The Appellants' argument takes incomplete snippets of the records and tries to create confusion. Findings of Fact 36 found that the Irwins refusing to vacate delayed the development for one-half year. CP 148-9. There is substantial evidence to such effect. Dr. Foto testified to paying \$1,100,000 and being delayed two years. RP 70; RP 76. Royallade Omolade testified to being "stuck" on the plat until the easements are resolved. RP 30. Mr. Omolade testified to a loss of ability to log and sell

timber at \$300,000.00 to where it was valued at trial, \$120,000.00. RP 46. Dr. Foto testified to continuing to have to make real property tax payments. RP 76.

Contrary to Appellants' expansive view of James Kirkebo's testimony, he simply testified regarding time loss on drafting a new plat layout, "[D]irectly with Pierce County, no, there really wasn't any direct loss attributed because the second layout showed the potential for these easements." RP 116. He did not testify that there was no delay at all – just not on the redraft. It is odd that Appellants' position seems to be that their use of the development property would have no impact. Jerrold Irwin acknowledged ignoring the court's summary judgment order and did not cease using the PNH land as ordered. RP 190.¹

The Irwins made a conscientious choice to continue to use the property when they knew such use was in dispute. The Irwins made a conscientious choice to violate the summary judgment order. The Irwins could have relinquished control and pursued their legal rights but did not. Trespass requires (1) entry on the land in possession of another; (2) remaining on the land; or (3) failing to remove from the land the thing that he has the duty to remove. WPI 120.01 derived from *Winter v. Mackner*, 68 Wash. 2d 943, 416 P.2d 453 (1966). "A negligent intrusion may give

¹ Contrary to Appellants' innuendo, first raised on appeal, that Respondent tried to silence the Irwins contrary to RCW 4.25.510, no cause of action or pleading is referenced, nor is there testimony in the Report of Proceedings, except as solicited by questions from Appellants' counsel, wherein PNH complains of Irwin's conduct in front of any governmental agency.

rise to an action for trespass. The intrusion may include misuse, overbearing, or derivation from an existing easement." 16 Wn. Prac. § 13.31 citing *Mielke v. Yellowstone Pipeline Co.*, 73 Wn. App. 621, 870 P.2d 1005 (1994). A continuing trespass is defined as "an unprivileged remaining on land in another's possession." Restatement 2nd of Torts §158, comment M, as cited in 16 Wash. Prac. 13.31. Trespass is not a strict liability tort. *Bradley v. Asarco*, 104 Wn.2d 677, 709 P.2d 782 (1985) citing Restatement 2nd of Torts §8(a), comment B thereto. Trespass is not dependent on the notion of bad faith or maliciousness. *Id.* Trespass lies when an actor understood that the trespass could be occurring but continues to act despite such knowledge. *Id.* Substantial evidence supports the existence of a trespass.

As to the damages, Judge Grant granted very little despite Dr. Foto testifying to a \$1,100,000 investment and loss of such money at a rate of 4-6 percent. RP 70; RP 76. For a half year delay, this puts the range of damages between \$22,000.00 and \$33,000.00. The trial judge actually went to the very low end of the range of damages. "Mathematical certainty is not required, and a fact finder has discretion to award damages that are within the range of competent evidence in the record. Generally, '[a]n appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice.'" *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wash. App. 728, 737, 253 P.3d 101,

106 (2011). Damages for “a temporary invasion or trespass are the cost of restoration and **the loss of use.** *Keesling v. City of Seattle*, 52 Wash.2d 247, 253, 324 P.2d 806 (1958).” (emphasis added) *Olympic Pipe Line Co. v. Thoeny*, 124 Wash. App. 381, 393-94, 101 P.3d 430, 437 (2004). Substantial evidence in the present case equates the loss of use to the delay and loss on investment.

Irwins argue the Respondent “did not care” regarding the access by the bridge as if that excuses a trespass. The PNH witnesses testified truthfully that due to wetlands, the bridge area was practically unusable in the residential lot area. Still, as testified by Royallade Omolade and Dr. Walter Foto, the Irwins attempt to claim additional land for the existing driveway which impacted not only the area by the bridge but also where the plat roads, sidewalks, and curbs would be. CP 120. The Irwins do not argue that they were not trespassing. The Irwins do not really argue that the court erred in granting damages except to misstate the record and state that they had no other access thus excusing the trespass (Appellants Brief at 25). Appellants cite no case that a victim of trespass has an obligation to find alternate access for the perpetrator.

C. THE TRIAL COURT DID NOT ERR IN REFUSING TO VACATE THE ORDER OF DEFAULT AGAINST THE ICES.

The motion to vacate the default was correctly denied and was well within the discretion of the trial court. First, the motion to vacate was procedurally flawed. Second, PNH properly took a default and default

judgment. Third, the Appellant Ice did not establish the four requirements to set aside a default.

The standard on appeal is whether the trial court abused its discretion. *Little v. King*, 160 Wash. 2d 696, 703, 161 P.3d 345 (2007). “Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. *Coggle v. Snow*, 56 Wash.App. 499, 507, 784 P.2d 554 (1990).” *Boss Logger, Inc. v. Aetna Cas. & Sur. Co.*, 93 Wash. App. 682, 684-85, 970 P.2d 755, 756 (1998). If the trial court's decision is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld. *Lindgren v. Lindgren*, 58 Wash.App. 588, 595, 794 P.2d 526 (1990). *Boss Logger* at 685.

1. Respondent’s motion to vacate was procedurally flawed.

Recall, trial started on April 12, 2011. The Ices' motion was dated April 11, 2011, and filed on the morning of trial. CP 136. The response argued that none of the Civil Rule 60(e) processes were observed for setting aside a judgment – there was no required notice, show cause order, or service. RP 10; CP 198-9. Division II ruled when such procedure is disregarded, "the motion to vacate was not properly before the court." *Allen v. Allen*, 12 Wn. App. 795, 797, 532 P.2d 623 (1975). Moreover, Ice’s very pleadings were in error as they did not seek leave of the court to plead after entry of a default. CR 55(a)(2).

2. Respondent acted properly in obtaining the default judgment.

The entire gist of the Appellants' argument relates to notice (or lack thereof) to the Irwins without any complaint of the notice to the Ices. The Washington cases vacating defaults due to lack of notice regarding taking of a default relate exclusively to arguments brought by the defaulted party.² The undersigned could find no Washington cases (nor are any cited by Appellants) that a lack of notice to a nondefaulted party could serve as a basis to set aside a default judgment. Foreign cases reject this proposition.³ Irwin does not explain the prejudice it suffered from Ice being defaulted. Ice does not explain why additional procedural protection should be afforded them simply because they happen to have co-defendants.

3. Appellants fail to establish four-prong test to vacate default judgments.

² Washington cases on vacating defaults are voluminous and an example is given: "Generally, due process allows entry of a default judgment without further notice to a properly served defendant because the complaint provides him with sufficient notice to make an intelligent decision to appear or default. *R.R. Gable, Inc. v. Burrows*, 32 Wash.App. 749, 753, 649 P.2d 177 (1982)." *Conner v. Universal Utilities*, 105 Wash. 2d 168, 172, 712 P.2d 849, 851-52 (1986)

³ "Rule 55, Rules of Civil Procedure, 16 A.R.S., specifies the notice required in a default situation, and in our opinion it does not require that notice be given to parties not being defaulted. Therefore, we hold that in the case before us plaintiffs were not required to give notice of the default hearing or of entry of the default judgment to the defendant mortgagors or their counsel." *Edwards v. Van Voorhis*, 11 Ariz. App. 216, 220, 463 P.2d 111, 115 (1970). See also, *Evans v. Fed. Sav. & Loan Ins. Co.*, 11 Ariz. App. 421, 464 P.2d 1008 (1970); *Card v. Polito*, 55 A.D.2d 123, 389 N.Y.S.2d 696 (1976).

When considering whether to vacate a default judgment, courts consider whether the default party has shown (1) that there is substantial evidence to support at least a prima facie defense to the claim asserted, (2) that its failure to appear was occasioned by mistake, inadvertence, surprise, excusable neglect, or that there was irregularity in obtaining the judgment, (3) that the party acted with due diligence after receiving notice that the default judgment was entered, **and** (4) whether substantial hardship would result to the plaintiff if the judgment were set aside.

(emphasis added) *Sacotte Const., Inc. v. Nat'l Fire & Marine Ins. Co.*, 143 Wash. App. 410, 418, 177 P.3d 1147, 1151 (2008).

As to the first prong, the only sworn pleading from Ice before the trial court is a three-page declaration of Charles Ice that tries to explain the nonappearance and his misunderstanding as to the nature of the lawsuit.⁴ CP 137-9. However it sets forth no defenses. The Ices' motion is simple two short paragraphs incorporating the Declaration of Charles Ice with no defenses raised. CP 136.

The second prong is actually destroyed by Charles Ice's own declaration where he admits getting the complaint, speaking with counsel and receiving a letter from the undersigned telling him exactly the

⁴ Such arguments are also not proper for setting aside a default: "On appeal, McMahill asserts that she was upset at the time she read the summons, stating that "[s]he simply did not read the papers carefully enough to ascertain that she had to respond by a certain date, and did not know how to respond." But McMahill has a high school education, and does not claim she cannot read. While McMahill may have been too upset or impatient to read the eviction papers when served, that does not address why she could not have taken steps to read the papers and respond in the twelve days between the time of service of the summons and complaint and the entry of the default judgment." *Hwang v. McMahill*, 103 Wash. App. 945, 952, 15 P.3d 172, 176 (2000).

consequences of the default about 10 months prior to the Ices' motion to vacate. CP 202-3.

The third prong is again rebutted by the Ice Declaration. Ice met with Appellants' attorney when he decided to not seek representation. CP 138. Ice was served the default judgment on August 3, 2010 and the undersigned's letter telling Ice to stop using anything outside the east 16 feet. CP 139; CP 202-203. Appellants' counsel only appeared the day of trial on April 12, 2011. RP 8; RP 13-14. Division 2 has previously held: "As there was no excusable neglect and three months is not within a reasonable time to respond to an order of default, the trial court did not abuse its discretion in denying Curtis' motion to vacate." *In re Estate of Stevens*, 94 Wash. App. 20, 35, 971 P.2d 58, 65-66 (1999).

The fourth prong fails as the Respondent set forth prejudice in the inability to properly conduct discovery and trial preparation to a re-inserted party at the last minute. CP 200. The trial had already once been bumped and the PNH principals had testified to the delay damages.

So, the Appellants' arguments fail all four parts of a conjunctive test. Legally, factually, and equitably, the trial court made the right decision. Granting the Ice's motion probably would have been the true error. Given all of the defects in the Ices' motion and given the binding law, it is impossible to say that the trial court abused its discretion.

V. CROSS-APPEAL

A. THE TRIAL COURT ERRED IN FORCING PACIFIC NORTHWEST HOLDINGS, LLC TO ACCOMMODATE JERROLD IRWIN'S EXISTING GARAGE ACCESS.

The trial court found it "was obvious from prior use that Jerrold Irwin did not intend to give up access to his garage and Plaintiff has not testified it expected Jerrold Irwin to lose his garage access...." (Findings of Fact 39). CP 14. The court then concluded that PNH had to accommodate Jerrold Irwin so "that Jerold Irwin may back out, turn and drive forward down his driveway to the plat roads." (Conclusions of Law 19). CP 152. And then entered judgment regarding designing the plat, "[i]n doing so, the Plaintiff shall provide for Jerrold Irwin's ability to drive into his garage, have the ability to back out of his garage, turn around and drive down the driveway to the internal plat roads." (Judgment 3). CP 153.

Respondent does not challenge the Findings in such regards. It is just that one cannot get from such Findings to legally concluding that PNH should be forced to relinquish additional land to Jerrold Irwin beyond that which he reserved for his easement and which he reserved for his lot. The trial court essentially reformed the Receiver's Deed, revised its summary judgment order, and included additional land to be added to the access easement in favor of Jerrold Irwin. The reasons this is an error include:

1. Jerrold Irwin never pleaded reformation;

2. Jerrold Irwin caused the problem by not getting the property surveyed prior to selling the property;

3. Jerrold Irwin testified he was aware that the line was near where it turned out to be;

4. The trial court explicitly found no prescriptive easement as Jerrold Irwin was a tenant in common and did not need an easement to cross his own land prior to the Receiver's Deed to the respondent (Conclusions of Law 10). CP 150.

5. The trial court further found no showing of necessity and that legal access existed (Conclusions of Law 9). CP 150.

While the trial court is correct in such factual regards, there is no legal support in the record for requiring PNH to grant a larger easement to Jerrold Irwin which Jerrold Irwin did not have the foresight to reserve unto himself. While the trial court tried to be fair, there is no legal basis, other than reformation, to alter a deed. Reformation was not pleaded (Findings of Fact 40). CP 149. As such, reformation is waived under Civil Rule 8(a). Further, the law requires for reformation a (1) mutual mistake or (2) unilateral mistake coupled with inequitable conduct of the other party. *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 843, 999 P.2d 54, 59 (2000). The trial court record is devoid of any mistake of PNH. Next, the case is not sufficiently clear (or clear at all) as to the intent of the parties with regards to the Jerrold Irwin lot which is required in reformation cases.

"Where any doubt exists as to the intent of the parties, reformation will not be granted." (Citations omitted) *John Hancock Mutual Life*

Insurance Co. v. Agnew, 1 Wn.2d 165, 95 P.2d 386 (1939). Jerrold Irwin just had an incorrect assumption that legally bears such risk of an erroneous assumption.

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).

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).

Further, the Irwins brought this on themselves by ignoring the receiver's written recommendation to get a survey.

Finally, the judgment contradicts the partial summary judgment as PNH's rights to develop its land, ignores the prior order for John Irwin to cease using PNH's land outside the easement area, and finally, essentially rewards a trespasser with an easement. Ironically, the use by Jerrold Irwin actually violates his warranties of quiet enjoyment under the statutory warranty deed.

The problem with the court's ruling is that it went too far trying to be equitable. There is no factual or legal basis for the court to, at the costs

of an innocent party, fix Jerrold Irwin's problem that Jerrold Irwin created. The undersigned could find no law supporting what the trial court did.

B. DID THE TRIAL COURT ERROR IN ALLOWING THE NORTH SOUTH EASEMENT TO DEVIATE OUT OF THE EAST 16 FEET?

The court found the Easement was 16 feet (Findings of Fact 11). CP 145. As previously cited, the witnesses testified that the north south Easement, as depicted in the Receiver's Deed, abutted the easterly boundary line of the property purchases by PNH. The trial court explicitly found this to be the case (Findings of Fact 15). CP 146. The Jerrold Irwin testified they were mistaken as to the location of the existing road vis-à-vis the east 16 feet. RP 193. PNH made no such assumption and was looking primarily at the developable area (Findings of Fact 23). CP 147; RP 55. The Findings of Fact make clear that PNH had nothing to do with the deed drafting (Findings of Fact 20-22). CP 146. Only Jerrold Irwin and Steve Larson testified as to the intent of the bridge use (Findings of Fact 24). CP 147. PNH's witness testified that due to wetlands the bridge was essentially irrelevant to them. The court then found Irwin and Steve Larson did not express their intent to PNH as to the bridge with PNH (Findings of Fact 29). CP 148.

Again, harking back to the prior counterclaim and assignment of error, there is no legal basis for the trial court to have jumped from: (1) the deed is clear that the map shows a 16-foot easement on the east property line and (2) the receiver and Irwin had unexpressed intentions to

essentially reforming the Receiver's Deed to relocate the easement outside of the east 16 feet.

The court's rationale was essentially "since the bridge is in the wetland and PNH cannot develop it, we will let a non-owner use it." While there is some pragmatic appeal to the decision – the law does not support such a proposition. The trial court ignores liability issues, maintenance issues, environmental issues that could arise and could impose obligations back to PNH. The Findings of Fact have the easement in the east 16 feet abutting the easterly boundary line. The Conclusions of Law inexplicitly holds that the court will enforce that which is written (Conclusions of Law 4) and the deeds are construed in favor of the grantee, PNH (Conclusions of Law 15) but still the court deviates outside of the east 16 feet clearly marked on the easements diagramed in the Receiver's Deed to construe the bridge portion in favor of the Irwins. The only rationale is because the PNH principals testified truthfully that PNH could not develop near the bridge. Just because regulations render development of a portion of property impractical does not mean a court can essentially give the property away to someone else. The court had the law and the facts correct until it tried to rectify a problem (which the Irwins caused) in favor of the Irwins. The Judgment paragraph 1 is illustrative of this non-legal, fairness approach wherein the easement is not able to be set but the trial court has to defer to the engineer to set reasonable approaches to the bridge. While the court's remedy does have pragmatic appeal, it has no basis in law.

No doubt the Irwin's will regale the court with claims of hardship, but the court should be aware that the Irwin's did not lift a finger to prevent this outcome prior to a sale and they will still have the same access as the proposed platted properties. While it may not be the access that the Irwin's wanted or subjectively intended – to do otherwise would harm PNH who did not cause this problem.

VI. CONCLUSION

PNH is an innocent purchaser who just wants the property as purchased. Legally, it is entitled to its land. The Irwins have not provided the legal or factual basis to support their appeal. Except to the extent challenged in the cross-appeal, the Judgment should be affirmed.

RESPECTFULLY SUBMITTED this 5 day of December, 2011.



MARTIN BURNS
Attorney for Respondent/Cross-Appellant
WSBA No. 23412

CERTIFICATE OF SERVICE

I certify that on the 5th day of December, 2011, I caused a true and correct copy of this Response Brief to be served on the following via U.S. Mail and email to:

Thomas Krilich (xx) U.S. Mail and email
Krilich, LaPorte, West & Lockner, P.S.
524 Tacoma Avenue South
Tacoma, WA 98402
krilich@524law.com

DATED this 5th day of December, 2011.

McFERRAN, BURNS & STOVALL, P.S.



Sheila Gerlach, Paralegal to
Martin Burns

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