

NO. 49802-2-II

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

PIERCE COUNTY, a political subdivision of the State of Washington,

Petitioner/Respondent

v.

LILLIAN E. AND TIM O. SMILY, wife and husband, et al.,

Respondents for property described in Ex. A/Respondents

v.

LILLIAN E. SMILEY AND TIM O. SMILEY, wife and husband,

Respondents for property described in Ex. B/Respondents

v.

JOSEPH D. VINES, as his separate estate; LILLIAN E. AND TIM O.
SMILEY, wife an husband; SUSAN L. VINES

Respondents for property described in Ex. C/Appellants

APPELLANT VINES' REPLY BRIEF

JOAN K. MELL, WSBA No. 21319
Attorney for Appellants Mr. and Mrs. Vines, et al.
III BRANCHES LAW, PLLC
1019 Regents Blvd. Ste. 204
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph

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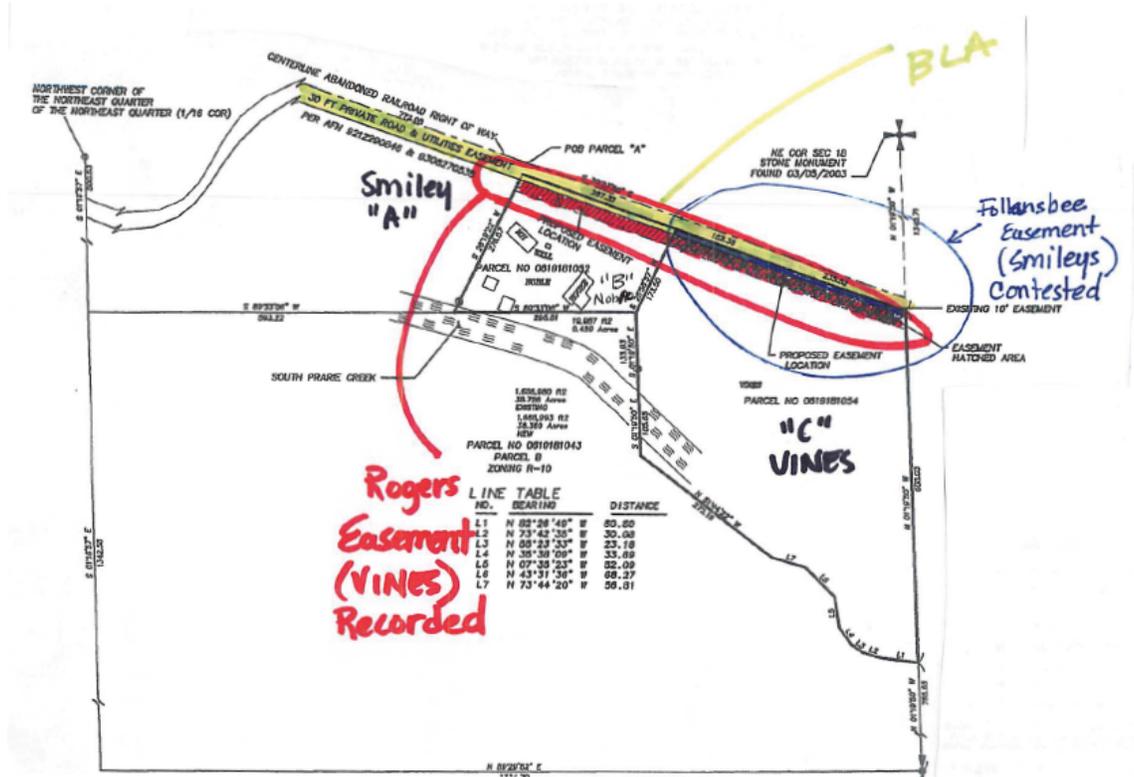
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I. FACTS

The following exhibit illustrates the easements at issue¹:



Undisputed Evidence of Overpayment

The Smileys' Response essentially concedes an \$18,700.00 excessive allocation to Smileys of the County's condemnation proceeds, which should be reversed and re-allocated to the Vines.

¹ CP 1084.

No Actual Loss of Easement - Smiley's Made Whole By Substitute Right-of-Way and Allocation of \$72,750.00 To Them

Smileys' award of \$18,700.00 is in fact excessive because Smileys undisputedly did not lose any right-of-way.² They gained a recorded interest in the right-of-way they were actually using by making the County purchase it for them for a mere \$8,450.00.³ The Vines timely recorded on October 18, 2016 an actual easement across Parcels B and C that correctly described the twenty-foot historically used by Smileys to access their property on the roadway.⁴ Smileys have always had access to Parcel A across Parcel C, the Vines' property and Parcel B.⁵ They suffered no losses as to Parcel C.⁶ They have never suffered the loss of any actual right-of-way, although their briefing misled the trial court in this regard.⁷

² See Vines Dec. CP 514; Vines Dec. CP 1092; and Exhibit A photos at CP 1094 to 1097 that show Smileys accessed their property over the road way, not the twenty feet condemned by Pierce County, which is overgrown and impassable trees and brush depicted to the right; and CP 935.

³ CP 937 - 938 (Rogers Dec); CP 718 (Order Granting Motion for Easement...); CP 714 (Crt's FOF).

⁴ CP 927 - 933 (Oct. 18, 2016 Recorded Easement and Road Maintenance Agmt.)

⁵ CP 514 (Vines Dec.).

⁶ CP 401 (Vines Dec.).

⁷ CP 973, 979 (Memorandum In Support of Motion to Set Alternative Security); CP 1008 (Hunter Dec. Market Value of Parcel A); CP 1099-1100 (Order Granting Notice of Supersedeas...); Resp. Br. at 10 - 11. Smileys omit the fact that they never used the condemned twenty feet to access their property. Smileys used the Vines' road with Vines' consent without any legal right to do so.

Smileys' Response is similarly disingenuous. The court should reject their claims.

No Evidence Appraising 20 feet (.17 Acres) At \$37,400.00

An award to Smileys of \$18,700.00, or half of the \$37,400.00 they claim is the "likely" value of the 20 feet the County condemned, is also excessive because the record does not support an appraised value of \$37,400.00 for the twenty feet or .17 acre of Parcel C that was condemned.⁸ The County paid the Smileys the \$72,750.00 that Smileys negotiated.⁹ The \$72,750.00 amount was necessarily inclusive of the condemned twenty feet of right-of-way on Parcel C. Any actual right of way depended upon the inclusion of Parcel C.¹⁰ Pierce County did not pay \$72,750.00 for twenty feet of impassable land. Smileys unconvincingly urge this court to believe that the \$72,750.00 excludes compensation for the twenty feet of access across Parcel C, and pertained only to Parcels A & B.¹¹ The Smileys cite to their own self serving findings of fact that are not supported by any factual evidence in the record because there is no

⁸ CP 712 (Crts FOF "Likely value of the 20 foot common easement width acquired by Pierce County through condemnation: \$37,400.00."); RP 10/11/116 at .

⁹ CP 260 (Stipulated Judgment and Decree of Appropriation...).

¹⁰ RP 10/11/16 at 46 - 47.

¹¹ Resp. Br. at 7 - 8.

testimony as to the value of the entire easement that necessarily included parcel C.¹² The rationale used to separate the values among all three parcels is not in the record, even though Vines tried to get this evidence into the record.¹³

The factual evidence does not support a value of \$37,400.00 for just .17 acres from Parcel C. The Smileys' entire acreage of Parcel A with buildings was appraised at no more than \$250,000.00 based on the presumption that the property was accessible via Parcel C.¹⁴ \$37,400.00 represents a disproportionate percentage of the whole acreage where Smileys' expert Sidor assumed a per acre value of \$17,000.00.

\$37,400.00 is well over the appraised value of the entire abandoned proposed right of way described in the boundary line adjustment. Everyone agreed that the raw land was valued based upon a presumed per acre price of \$17,000.00 for raw land.¹⁵

¹² “The trial court’s October 11, 2016, findings of fact and conclusions of law stated that the easement value of the 20-foot width taken by the County from Exhibit C was \$37,400, based on the appraiser’s testimony. CP 706-715, esp 712 and 714.” Resp. Br. at 11. The findings describe a 20 foot common easement across all three parcels valued at \$37,500.00, without limit to Parcel C only. CP 795 - 796, 800.

¹³ RP 10.11.16 at 57 - 59, and CP 399.

¹⁴ CP 1008 (Sidor Appraisal Smiley Property).

¹⁵ RP 10/11/16 at 54.

Pierce County and the Vines negotiated the \$51,900.00, the price the County allocated to Parcel C, based upon a raw land value of \$2,900.00 for the involved twenty-foot (.17 acres total) of Parcel C.¹⁶ Smileys' appraiser Sidor agreed that the raw land (.17 acres) was properly valued at \$2,900.00.¹⁷ Sidor then testified that \$37,400.00 is the value for an easement that passes from Parcel C all the way to Parcel A without any factual foundation to support such testimony:

Q. And then I have listed underneath value of raw land and easement an easement value of \$37,400.00.

A. Yes.

Q. Is that within the range of what you would expect that 20 - foot - wide easement over the north edge of Mr. Vines' and to go for on the open market similar situation similar parties, i.e., Mr. Vines has the land underneath the 20-foot-wide easement and the Smileys need to use that 25-foot-wide easement to go from 262nd Ave East to their property?

A. Correct.¹⁸

Based on this testimony, the easement value includes actually accessing Parcel A. Thus, the entire right-of-way to get from the road to Parcel A possibly has a value of \$37,400.00, but it is impossible to reach

¹⁶ CP 351 (McDonald Dec. Ex. 7 Evaluation).

¹⁷ RP 10/11/16 at 54.

¹⁸ RP 10/11/16 at 55 - 56.

such a conclusion without the supporting market data or factual basis for Sidor's number.

If \$37,400.00 is for access, then the .17 portion on Parcel C would have nor more than a third of the total value. That would amount to a number closer to twelve thousand than eighteen thousand. Smileys received too much.

The alternative theory that \$37,400.00 is the proportionate value for just the .17 part of Parcel C results in an even greater windfall to Smileys. For instance two parcels, B & C, must be accessed to reach Parcel A. Two times \$37,400.00 is \$74,800.00. The County already paid Smileys \$72,750.00. The difference of \$2,050.00 from the \$18,700.00 the court allocated to them proves a windfall to Smileys of \$16,650.00.

Alternatively, Smileys should have been paid a mere \$2,900.00 for A and another \$2,900.00 for B or some sum close to it depending upon total acreage for Parcels A & B. There is no testimony in the record that the land actually condemned had a value of \$72,750.00 for A & B plus \$37,400.00 for C because that width was completely obstructed and

impassable over all parcels.¹⁹ Smileys abandoned it as a right-of-way long ago. No one was passing from Parcel C to Parcel A over the land actually condemned. Therefore, the Smileys should have been paid the raw land value only, which proves they received a windfall of \$66,950.00.

If the easement value per parcel really was \$37,400.00 then the Vines did not get a sufficient allocation of the County's resources to the Smileys' substitute easement. Smileys were actually passing over the roadway below the condemned twenty-feet.²⁰ Therefore, Smileys should have paid Vines \$37,400.00 for perfecting a substitute actual right-of-way. The Smileys never paid for perfection of any easement. Smiley's surveyor did NOT testify that the easement contemplated by the boundary line adjustment was perfected legally, and to the extent what he did say could be so interpreted the surveyor is wrong about the legal effect of recording a boundary line revision.²¹ An easement requires a separate recording because legally a boundary line revision is an insufficient recording to create a valid easement.²² Smileys were ordered to deduct only \$8,450.00

¹⁹ See ftnt. 2.

²⁰ *Id.*

²¹ RP 10/11/16 at 22.

²² PCC 18F.70.030(C)(2).

from the County allocation, leaving a windfall to Smileys of at least \$28,950.00.²³

Smileys were made whole when the County paid them full value for any loss of an easement interest across all three parcels A, B, and C when the County paid Smileys the sum Smileys negotiated for their theoretical loss of easement when resolving separately their claims. The trial court refused to consider the appropriate offset values for the substitute easement.²⁴ Smiley's argument ignores the \$72,750.00 they received from the County already as well as the recorded access over the roadway via a substitute easement is inequitable, if not plain deceptive, and should be rejected.

Smiley's argument that they are entitled to a compelled partial easement or right-of-way up to Parcel B contravenes a good faith interpretation of the Vines' negotiated settlement with Pierce County. An incomplete easement clouds the title, and should have been rejected by the trial court.

²³ CP 705 (Disbursement Order).

²⁴ RP 10/11/16 at 59 - 60.

Smileys should be ordered to return to the Vines \$18,700.00 in condemnation proceeds allocated to Parcel C.

Additionally, Smileys should be ordered to return the \$2,524.60 paid to them by Vines' attorney because the Vines and their attorney did not engage in any sanctionable conduct. Smileys claim the trial court entered two orders on CR 11 sanctions.²⁵ This is incorrect. Both orders are entitled orders on contempt.²⁶ Smileys claim the court found both Vines and their attorney violated CR 11. However, the trial court did not find the Smileys or their attorney filed any frivolous documents. They did not. They correctly expressed their signatures were under protest without waiving their rights on appeal. The trial court granted Vines the relief they requested, which was to expressly preserve their rights on appeal in its order showing the merits of the reservation.²⁷

The orders appealed should be reversed and the case remanded to the trial court.

²⁵ Resp. Br. at 15.

²⁶ CP 1315 - 1316 (Order Granting Smiley's Motion to Hold Vines In Contempt); CP 1317 - 1318 (Order on Motion for Contempt).

²⁷ CP 1316 (Order Granting Smiley's Motion To Hold Vines In Contempt)(The Vines execution of the "access and utility easement" as ordered by the court is without prejudice to the Vines appellate rights, and may not be interpreted as a waiver of their rights on appeal to challenge the underlying order and easement.").

II. LEGAL ARGUMENT

A. Smileys Erroneously Argue Abuse of Discretion Standard On Errors of Law

Smileys apply the wrong legal standard on appeal. Smileys argue the trial court did not abuse its discretion when compelling Vines to execute an imperfect easement.²⁸ The orders on appeal in this case are properly reviewed by this court de novo as errors of law.²⁹ The trial court did not as a matter of law have jurisdiction over the non-condemned property or parties to compel a new easement over the Vines objections.

B. No Jurisdiction To Invoke Equity Authority Over Property Not Condemned.

Smileys fail to cite any controlling authority to extend jurisdiction of the trial court over the substitute easement that encumbered property that was never identified in the condemnation petition. The exclusive authority of the trial court, absent a counterclaim for affirmative relief by the Smileys, was to resolve the eminent domain issue before it and compensate the parties accordingly. The court entered a stipulated

²⁸ Resp. Br. at 22.

²⁹ *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995).

judgment that should have foreclosed the Smileys' subsequent motion to grant them a new easement:

“the entry of this decree terminates all further litigation in this matter related to the property described in Exhibit “C”, except for any proceedings that may be necessary to determine entitlement to these funds and any orders necessary to disburse the funds pursuant to RCW 8.08.060.”³⁰

The statutes governing condemnation are mandatory, which includes the mandate for a private party to seek a right of access via the statutory pre-requisites of RCW 8.24 for private ways of necessity.³¹ Smileys disregarded these statutory mandates.

Smileys cite *Pelley* as authoritative on the court's ability to resolve all matters related to the condemned property. The *Pelley* case does not control the outcome here because the related issues in that case and the *Shain* case cited therein involved the governmental entity and the land condemned. Corrollary expenditure issues over relocating a river could be decided, but not title rights to property that was never subject to the condemnation authority of the court. Here a dispute arose among private parties over title to land that was not condemned. There was no statutory

³⁰ CP 1028.

³¹ *Pelley v. King County*, 63 Wn. App. 638, 641, 821 P.2d 536 (1991).

condemnation authority invoked for the court to enter orders quieting title to a new easement. Similarly in the *Zastrow* case cited for the court's equity powers, the pre-requisite to such equitable authority was invocation of the court's jurisdictional authority first by filing a complaint that brought the proper parties and subject matter before the court: calculation of damages on a suit for specific performance of a real-estate contract.³² The trial court erred as a matter of law when compelling Vines to grant a substitute imperfect easement over their objections.

C. No Factual Foundation to Support \$37,400.00 Market Value

Smileys argue Sidor's testimony must be the exclusive testimony controlling the allocation. Smileys cite to *City of Medina v. Cook* for this argument, which is a case that contravenes their position.³³ First, the *Medina* court held the trial court did consider all the evidence, not just the expert testimony.³⁴ Second, the expert testimony in *Medina* was supported with comparable sales evaluations and other data to support the experts' calculations. Here Sidor's testimony was very brief. Smileys did not admit any appraisal report for the substitute easement, or for the inflated

³² *Zastrow v. W.G. Platts, Inc.*, 57 Wn.2d 347, 357 P.2d 162 (1960).

³³ Resp. Br. at 19. *City of Medina v. Cook*, 69 Wn.2d 574, 418 P.2d 1020 (1966).

³⁴ *Id.*

value of an easement.³⁵ There was no testimony regarding market conditions. And, there was no factual foundation to understand what the number related to, or how it compared to actual sales of easements of comparable size or distance. There was no evidence of any comparable. In fact the order characterizes the number as a “likely” value. The record is wholly ambiguous as to what the \$37,400.00 actually means. Finally, the court arbitrarily just split the number in half without any factual basis to do so that would support its allocation. The distribution is totally arbitrary and capricious and should be reversed.

D. Substantial Evidence Shows Partial Easement Never Contemplated

Smileys incorrectly claim there were no disputed issues of fact over the easement they demanded. The plain language of the provision Smileys want enforced shows their error. A partial easement up to but excluding Parcel B was never contemplated.³⁶ Smileys' desired partial easement is wholly erroneous and has no foundation in any negotiated agreement with Pierce County. Smileys have no legitimate argument

³⁵ RP 10/11/16 at 3.

³⁶ CP 340 (Vines' Settlement Agreement)(“[to] the owners of the two parcels to the west ...”).

about its imperfect easement, and choose instead to make unwarranted accusations of frivolousness against Vines.³⁷ Smileys concede the Nobles were not party to the condemnation proceedings.³⁸ This is the valid factual and legal point Vines makes.³⁹ Nobles were an indispensable party to the creation of a substitute easement.

Smileys' proposed partial easement conflicts with its argument that Pierce County wanted to avoid suit over the value of landlocked property with the substitute easement provision in the Settlement Agreement with Vines. The easement Smileys demanded left them landlocked at Parcel B. Smileys' arguments are logically inconsistent and should be rejected.

E. Condemnation Chapters Contain Persuasive Authority

Smileys make silly frivolousness arguments that should be flatly rejected. For example, its contention that the state condemnation statutes have no persuasive authority for interpreting the county condemnation statutes, or private ways of necessity. The case law holds just the opposite. There is an interplay between the condemnation chapters that

³⁷ Resp. Br. at 23.

³⁸ Resp. Br. at 24.

³⁹ App. Br. at 19; CP 912 (Notice of Supersedeas and Alternative Motion to Set Bond...).

may be relied upon as authoritative as to state and local proceedings.⁴⁰

Smileys' sanctions arguments are unsupported.

F. Smileys Conflate CR 11 Sanctions With A Contempt That Did Not Exist, No Frivolous Pleadings Were Ever Filed

Smileys erroneously accused Vines of contempt for reserving their rights on appeal.⁴¹ Their reservation was not contemptuous conduct.⁴² They did not violate the express nor implied terms of any valid order.⁴³ Smileys cite no authority for the proposition that a party is in contempt when expressly reserving his or her rights on appeal.

Furthermore, the Vines' reservation was not sanctionable under CR 11 because they never filed the easement. It was not a pleading. CR 11 applies to pleadings. The court's sanction orders were wholly erroneous and should be reversed. Smileys should return the monies to Vines' attorney with interest.

G. Attorney's Fees and Costs On Appeal

⁴⁰ *King County v. Thellman*, 59 Wn.2d 586, 369 P.2d 503 (1962).

⁴¹ CP 1315 - 1316 (Order Granting Smiley's Motion to Hold Vines In Contempt); CP 1317 - 1318 (Order on Motion for Contempt).

⁴² CP 1274 (Access and Utilities Easement, Signatures w/reservation); CP 1267 (Mell Dec.).

⁴³ CP 888 (Order to Set Easement Boundaries).

Vines should be awarded their attorney's fees and costs under RCW 8.24.030, which affords a condemnee the costs and fees associated with taking of his property like Smileys achieved here. Smileys have never paid the associated costs or attorney's fees for their substitute easement. They took Vines' property without paying for it, a proposition that is not authorized under the condemnation statutes or the common law.

Smileys make no argument and therefore concede to the propriety of an award of fees and costs to Vines for Smileys' bad faith conduct under CR 11 or equity common law grounds. A fee and cost award to Vines is proper under both CR 11 and common law equity principles governing bad faith. Smileys have in bad faith claimed they lost access to their property when they did not. They claimed an entitlement to settlement proceeds negotiated by Vines when Smileys had already been made whole. They failed to properly invoke the jurisdiction of the court to take adverse action against Vines by failing to file for affirmative relief via a complaint or counterclaim. Smileys engaged in bad faith conduct that harmed the Vines. Smileys took Vines property without paying any of the costs or attorney's fees Smileys would ordinarily be required to pay to

Vines for taking a right-of-way of necessity from the Vines' property. Smileys should pay Vines attorney's fees and costs on appeal.

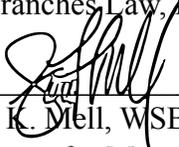
III. CONCLUSION

The trial court's order on distribution of the condemnation proceeds must be reversed and \$18,700.00 redirected to Vines. Smileys were made whole without any distribution from the \$51,900.00 Vines agreed to accept from Pierce County. Vines recorded a substitute easement on October 18, 2016 that ensured Smileys access to their property. Pierce County gave Smileys \$72,750.00, which necessarily included compensation to Smileys for the loss of the abandoned right-of-way that was condemned. The orders compelling execution of a partial easement across Parcel C must be reversed because the court had no jurisdiction over the land or the necessary parties, and a partial easement was never contemplated by Pierce County and Vines in their Settlement Agreement. A partial easement clouds title to Parcel C. Vines' reservation of rights was not a violation of any court order. CR 11 sanctions were improper and should be vacated and an order entered against Smileys to

return the money plus interest to Vines' attorney. Vines should be awarded their attorney's fees and costs on appeal.

Dated this 14th day of August, 2017 at Fircrest, WA.

III Branches Law, PLLC



Joan K. Mell, WSBA #21319
Attorney for Mr. and Mrs. Vines

CERTIFICATE OF SERVICE

I, Joseph A. Fonseca, certify as follows:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On the 14th day of August, 2017, I caused to be filed and served true and correct copies of the above Appellant Vines' Reply Brief, and this Certificate of Service; on all parties or their counsel of record, as follows:

Via E-service

Ian Northrip, WSBA #21105
Elise Hays
Pierce County Prosecutor's Office
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160
inorthr@co.pierce.wa.us
ehays@co.pierce.wa.us

Hunter MacDonald, WSBA #22857
Loren Combs, WSBA #7164
Greg Amann, WSBA #24172
VSI Law Group, PLLC
225 Tacoma Avenue South
Tacoma, WA 98402
hunter@vsilawgroup.com
ldc@vsilawgroup.com
gfa@vsilawgroup.com

Lance Olsen, WSBA #25130
108 First Avenue South, Suite 300
Seattle, WA 98104-2104
LOlsen@McCarthyHolthus.com

///

///

Original E-filed with:
Court of Appeals, Division II
coa2filings@courts.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Dated this 14th day of August, 2017 at Fircrest, WA.



Joseph A. Fonseca, Paralegal

III BRANCHES LAW, PLLC

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