

FILED

SEP 23 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 314120

IN THE COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

LEONARD N. BROWNING, a single person and
BARBARA L. DRAKE, a single person

Appellants,

v.

DOTY FAMILY TRUST, FOREST C. DOTY and LIL DOTY, husband
and wife, and the marital community composed thereof;
CHARLES C. AMBURGEY, SR. and SANDRA R. AMBURGEY,
husband and wife, and the marital community composed
thereof, STEVE GREENE, a married man, SUSAN BEAMER
GREENE, a married woman, CHERITH FAMILY TRUST, and
JAMES GIBSON and SYLVIA GIBSON, husband and wife and
the marital community composed thereof,

Respondents.

BRIEF OF APPELLANT BARBARA L. DRAKE

ERIC R. SHUMAKER
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INTRODUCTION

The trial court's decision in this case resulted in a 95 acre parcel of land being landlocked.

Appellant Drake is requesting that the trial court's decision be reviewed, as the value of the parcel is severely compromised without some right of access. At the very least, the trial court should have found an easement by necessity over the defendants' real property and the pre-existing roadways.

ASSIGNMENTS OF ERROR

1. The trial court erred in failing to establish an easement by necessity for the Farm property.
2. The trial court erred in failing to recognize a reserved public right of way to, and through, the Farm property.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err in leaving the farm property landlocked?

(Assignment of Error #1)

2. Did the trial court err in finding that no claim had been made by plaintiffs for a private way of way of necessity?

(Assignment of Error #1)

3. Did the trial court err in finding that at no time has any pathway or roadway connected the Greene or Gibson properties to the farm property?

(Assignment of Error #2)

4. Did the trial court err in failing to recognize that the roadways within the Skookum Creek large lot segregation are existing public rights of way?

(Assignment of Error #2)

STATEMENT OF FACTS

Barbara Drake owns approximately 95 acres of land in Pend Oreille County, referred to hereafter as "the Farm".¹ Leonard Browning was a lessee with option to purchase the Farm.²

¹ Findings of Fact, 1.2, CP 176, page 3

² Findings of Fact, 1.1, CP 176, page 2

The Farm lies directly west of and abuts the west boundary of property in the Skookum Creek large lot segregation, hereafter referred to as "Skookum Creek".³

The defendants herein are all owners of parcels of real property located in Skookum Creek⁴. Barbara Drake also owns a parcel of land located in Skookum Creek⁵.

Defendant Forest Doty placed a gate across an access road near his home.⁶ At various times in the past, this same access, which also runs southwest and through the property of defendants Gibson and Greene, had been episodically used to provide access to the

³ Finding of Fact No. 1.1, CP 176, page 3

⁴ Forest Doty and Lil Doty own Lots 22-24. Charles Amburgey and Sandra Amburgey own Lots 17 and 18. Steve Greene and Susan Beamer Greene own lot 26. James Gibson and Susan Gibson (Cherith Family Trust) own Lot 25. Findings of Fact No. 1.3, 1.5 and 1.6, CP 176, pages 3-4

⁵ Barbara Drake owns Lot 21. Findings of Fact No. 1.2, CP 176, page 3

⁶ Findings of Fact No. 1.12, CP 176, page 6.

Farm property and other property lying west of the Farm property.⁷

In response to the placement of the gate, Plaintiff Leonard Browning filed, and later amended, a Complaint for Damages and Declaratory Judgment in the Pend Oreille County Superior Court. CP 49. Barbara Drake later joined in the action as a plaintiff. CP 59. The plaintiffs sought a declaratory judgment affirming the historic access to the Farm across Skookum Creek, and preventing the defendants from blocking their access. CP 49. A number of theories were set forth in the complaint, including the following:

1. The Farm is landlocked and cannot be legally accessed by any means other than on Skookum Meadows Drive and the blocked access. Plaintiff asserted an easement by necessity along the portion of Skookum Meadows Drive traversing Lots 23, 24, 25 and 26. CP 49

⁷ Findings of Fact No. 1.12, CP 176, page 6.

2. The access road and Skookum Meadows Drive constituted a public right of way. CP 49.
3. The access road and Skookum Meadows Drive constituted a prescriptive easement for the Farm owners and others. CP 49.
4. The access road and Skookum Meadows Drive constituted an implied easement for the Farm. CP 49.

After a lengthy trial, the trial judge dismissed the complaint and decreed that the plaintiffs do not have a right of access for the farm property which extends any further than the west edge of Lot 21, whether by adverse possession or implication. CP 177.

The court did not issue a ruling on the issue of easement by necessity because the court did not believe that an easement by necessity was sought by the plaintiffs.⁸ As a result of the trial court decision, the Farm is landlocked.

⁸ Findings of Fact No. 1.18, CP 176, page 8.

ARGUMENT

1. EASEMENT BY NECESSITY.

A. Browning and Drake claimed an easement by necessity in their amended complaint.

Plaintiffs claimed an easement by necessity in their Amended Complaint for Damages and Declaratory Judgment. CP 49.

"Plaintiff Leonard N. Browning has an easement by necessity along the portion of Skookum Meadows Drive traversing Lots 23 and 24-DT, 25-CT, and 26-G/B owned by the Doty Family Trust, the Cherith Trust, and Defendants Greene and Beemer."

CP 49, page 10, Section 3.33.

The trial judge failed to recognize that a claim for easement by necessity had been made at all.

"The farm property is landlocked, and no claim has been made for a private way of necessity pursuant to RCW 8.24."

Findings of Fact No. 1.18, CP 176, page 8.

It is clear from the Amended Complaint that the plaintiffs sought a confirmation of their right to access the Farm by any legal means, including easement by necessity.

"There is a necessity for the easement over Lots 23 and 24-DT, 25-CT and 26-B/B to secure and maintain the quiet enjoyment of the Farm."

CP 49, page 10, Section 3.34.

B. The statutory requirements for an easement by necessity were established.

RCW 8.24.010 provides:

"An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be. The term "private way of necessity," as used in this chapter, shall mean and include a right-of-way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried."

RCW 8.24.010.

The trial court acknowledged that the Farm is landlocked. Findings of Fact No. 1.18, CP 176, page 8.

The doctrine of easement by necessity is based on the policy that landlocked land may not be rendered useless and the landlocked landowner is entitled to the beneficial uses of the land. Hellberg v. Coffin Sheep Co., 66 Wn.2d 664, 666-67, 404 P.2d 770 (1965). The landlocked landowner is given the right to condemn a private way of necessity to allow ingress and egress onto the land. Hellberg, 66 Wn.2d at 666-67.

The only requirement is that the owner demonstrate a reasonable need for the easement for the use and enjoyment of his or her property. Kennedy v. Martin, 115 Wash.App. 866, 63 P.3d 866, as amended (2003). Wagle v. Williamson, 51 Wn.App. 312, 314, 754 P.2d 684 (1988), appeal after remand, 61 Wn.App.474 (1991).

Here, Barbara Drake demonstrated a reasonable need for the easement along Skookum Meadows Drive for the use and enjoyment of her property.

"Q. So, that property relies on Skookum Meadows Road.

A. Yes."

RP page 491, lines 17-18.

"Q. All right. And how did you get to the farm?

A. Generally, -- Well, I guess always, if I had a vehicle I went on Skookum Meadows Drive, up Watertower Lane, west along Lot 20 and 21, and there's a gate here in the northernmost corner of the farm, and then there's various (inaudible) in the farm.

Q Okay. Are there any other ways to access the farm to your knowledge?

A Yes. You can go along Skookum Meadows Drive and continue through Doty's, Gibson's, Greene's, and get through there onto the farm."

RP page 492, lines 15-25.

C. The trial court should have selected the best possible private route of necessity.

RCW 8.24.025 provides:

"If it is determined that an owner, or one entitled to the beneficial use of land, is entitled to a private way of necessity and it is determined that there is more than one

possible route for the private way of necessity, the selection of the route shall be guided by the following priorities in the following order:

(1) Nonagricultural and nonsilvicultural land shall be used if possible.

(2) The least-productive land shall be used if it is necessary to cross agricultural land.

(3) The relative benefits and burdens of the various possible routes shall be weighed to establish an equitable balance between the benefits to the land for which the private way of necessity is sought and the burdens to the land over which the private way of necessity is to run.

RCW 8.24.025.

Here, the trial court should have selected an access route to the Farm, using the criteria set forth in RCW 8.24.025.

In summary, a claim of easement by necessity was set forth in the Amended Complaint for Damages and Declaratory Judgment, but not resolved by the court.

Barbara Drake has a reasonable need to access the Farm property for its use and enjoyment. The trial court acknowledged that the Farm is landlocked, but failed to recognize a private easement by

necessity, or to select a route for said easement by necessity.

2. THE ROADWAYS LEADING TO THE FARM ARE RESERVED PUBLIC RIGHTS OF WAY.

A. A pathway or roadway connects the Greene and Gibson properties to the Farm.

The trial court found:

"At no time has any pathway or roadway connected the Greene or Gibson properties to the property of the plaintiff."

Findings of Fact No. 1.14, CP 176, page 6.

This finding was made in error, and is not supported by the evidence presented at trial. Numerous facts established at trial contradict this finding, including the sworn testimony:

1. Witness Lawrence Ashdown:

Q Okay. And when you use Skookum Meadows Road, did you ever get past where it indicates Lot 24? Did you ever go west of that?

A I'd been on that road since -- or, clear down to where it crosses the Skookum Creek near -- or, I mean, Leclerc Creek Road.

Q Okay. So that -- so you're saying that this road -- continues on past what's been marked as the Drake farm? And does this road keep going?

A It goes clear down to Leclerc Creek Road
RP page 179, lines 14-23.

2. Witness Barbara Price (previous owner of the Farm):

"Q All right. Now you see how that Skookum Meadows Drive comes in here?

A Yes.

Q All right. Are you familiar with that area at all?

A Yes.

Q Okay. Was that roadway in existence when you first purchased the property?

A. Yes."

RP page 223-224, lines 19-25, 1.

3. Witness Barbara Price (previous owner of the Farm):

"Q Was there tracks through on Skookum Meadows Drive where you could very easily see a road going clear out to -- to -- Skookum Creek?

A Yes. You could -- all those were visible as roads. They weren't trails; they were roads that somebody drove on them.

Q So--

A Somebody used them."

RP pages 234-235, lines 24-25, 1-6.

4. Witness Barbara Price (previous owner of the Farm):

"Q Okay. If you're on Skookum Meadow Drive headed west, to your left -- were you able to

drive clear through there and drive onto your 100 acres?

A Yes. (Inaudible). That's the way we drove--."

RP page 240, lines 21-24.

5. Witness Susan Greene:

"Q Okay. And does -- do any of those two little turnouts lead to the -- what's been commonly referred to as the farm?

A Well, it looks like there's like a deer path that goes out past that way -- to me."

RP 263, lines 20-23.

6. Witness Leonard Browning:

"Q Okay. Have you ever used that lower access since you owned it or sold it to Bobbi? The Skookum Creek Meadows Drive?

A Yeah, I've been in there several times."

RP 358, lines 2-4.

7. Witness Barbara Drake:

"Q Okay. And I believe you referenced that Skookum Meadows Road, as drawn on the map, actually extends beyond the Greene property?

A It shows it going across the boundary of the Skookum Creek development -- property description. It shows it continuing.

Q Okay. And how about in real life?

A In real life?

Q Yes.

A You mean, does the road actually go ton through?

Q Yes.

A Yes, it does.

Q Where does it go?

A It goes -- It goes here, onto what we call the farm, and then it continues going in a westerly direction, across -- Brandon True's property. I'm not sure; it might drop down a little bit, or it might go up -- I'm not sure exactly the track it takes way over there on the west. But I know it goes through both of the-

RP pages 514-515, lines 15-15, 1-8.

The nature and extent of roadway may be open to some debate, but the testimony of the witnesses, along with the maps of the area, clearly establish the existence of a pathway or roadway that connects the Greene and Gibson properties to the Farm.

Finding of Fact No. 1.14, CP 176, page 6, should be stricken, and replaced with a finding that a pathway and/or roadway connects the Green and Gibson properties to the Farm.

B. An easement for ingress and egress for the Farm was recognized in the Greene's chain of title.

The Greenes purchased their property from Jeanette Bergmann. Ex P-20. The Grantors (Bergmann and her predecessors in title) reserved a 60 foot

easement for unimpeded access over prior and existing roads for ingress and egress. Ex P-20 page 2. An earlier reference to this reserved easement was set forth in a Real Estate Contract between Bergmann and her predecessor in title, Bull Run Investment Group. Ex P-22. That Real Estate Contract provided:

"19. EASEMENTS, RESTRICTIONS, AND RESERVATIONS; Reservation by Grantors, their heirs, and/or assigns, of a 60 foot easement **for unimpeded access over prior and existing roads for ingress and egress to adjoining property**, and an easement over and through subject property for utilities and the right to assign said easements; granting to the Grantee, his heirs, and/or assigns, an easement for ingress and egress over and across all roads which the Grantor herein has the right to travel to reach subject property."

Ex P-22, page 5. (emphasis added)

These Reservations of easement are significant because the Greene's property adjoins the Farm on the farm's western boundary. To access the Greene property, the Greenes use Skookum Meadows Drive, and then pass through and over the Gibson property. The described reserved easement for unimpeded access over prior and existing roads for ingress and egress to

adjoining property, therefore, could only have been for access to the Farm and properties lying west of the Farm. Ex D-101. Ex P-15.

In short, an easement for ingress and egress for the Farm was recognized in the Greene's chain of title.

C. The Skookum Creek lots are subject to easements for ingress and egress over the existing roadways.

The individual transfer deeds of all of the Skookum Creek lots at issue herein are subject to the Skookum Creek Declaration of Protective Covenants and Easements, hereinafter referred to as "the Declaration", Ex P-3. Ex P-17, page 2. Ex P-19, page 2. Ex P-20, page 2.

The Declaration was drafted to generally benefit all owners of said real property **and the community at large**. Ex P-3, lines 9-11. (emphasis added.) In the Declaration, the Seller reserved easement for ingress, egress, and utilities over and across real property. Ex P-3, page 2, Article C, paragraph 1.

The easement placement was set forth on an attached map, referred to as Schedule B. The location of the reserved easements was the centerline of each existing or proposed road as located on Schedule B. Ex P-3, page 2, Article C, paragraph 1.

The reservation of easements contained in the Declaration is significant for three (3) reasons:

1. All of the lot owners were notified in writing, on their title, of the existence of easements for ingress and egress.
2. The easements reserved in the Declaration followed the centerline of the "existing roads". The Declaration acknowledged that there were existing roadways running through the Skookum Creek area.
3. Schedule B shows the existing easement roads travelling outside the western boundary of the Skookum Creek area, and onto the Farm. Skookum Meadows Drive is depicted on Schedule B as an "existing road". Ex P-15.

The trial court found no evidence that any lot subject to the Skookum Creek Declaration had an express easement to travel along Skookum Meadow Drive to its intersection with Conklin Meadows Road.

Finding of Fact 1.18, CP 176, page 7-8, lines 25, 1-2.

The Declaration is dated July 28, 1972. Exhibit P-3, page 6. Since that time, all of the litigants herein, and their predecessors, have been using Skookum Meadows Drive for ingress and egress to their respective properties without express easement. The defendants' own actions have established a right of way along the existing Skookum Meadow Drive roadway.

CONCLUSION

It is clear from the Amended Complaint that the plaintiffs sought a confirmation of their right to access the Farm by any legal means, including easement by necessity. The trial court left the subject property landlocked, and didn't make a ruling on the issue of easement by necessity.

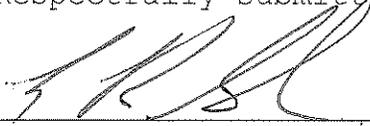
Barbara Drake demonstrated a reasonable need for the easement along Skookum Meadows Drive for the use and enjoyment of her property. The trial court should have selected the best possible private route of necessity, according to statute, instead of leaving the property landlocked.

The court's finding that no pathway or roadway connects the Greene and Gibson properties to the Farm is not supported by the evidence presented at trial. The testimony of the witnesses, and the map of the area, establishes the existence of a road that connects the Greene property to the Farm.

None of the parties have an express easement to use Skookum Meadows Drive. All of the parties have been using the existing roadways, including Skookum Meadows Drive, to access their respective properties for the past 40+ years. It is wrong to single out the Farm for exclusion from use of Skookum Meadows Drive, while all of the other parcels in the area have no higher claim for use of the existing roadways.

September 23, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'E. Shumaker', written over a horizontal line.

ERIC R. SHUMAKER WSBA #22231

Attorney for Appellant

BARBARA L. DRAKE

DECLARATION OF SERVICE

I, Eric R. Shumaker, declare as follows:

I am a resident of the City and County of Spokane, Washington. I am over the age of eighteen years and not a party to the within cause; my business address is 113 E. Baldwin Avenue, Spokane, Washington, 99207. On September 23, 2013, I mailed, by U.S. Mail, 1st class, postage prepaid, a true and correct copy of the

BRIEF OF APPELLANT

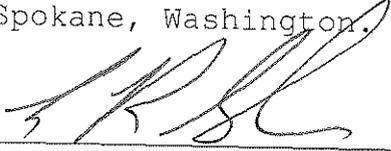
to the interested parties in this action as follows:

1. Neil Humphries, Attorney of record for Doty Family Trust, Forest C. Doty and Lil Doty, 421 W. Riverside Avenue, Ste. 1555, Spokane, WA 99201-0402.
2. Steve & Susan Greene, 7501 S. Greenes Ferry Rd., Coeur d'Alene, ID 83814
3. James & Sylvia Gibson, Cherith Family Trust, P.O. Box 2208, Priest River, ID 83856
4. Michael McLaughlin, Attorney of record for Charles C. Amburgey, Sr. and Sandra R. Amburgey, 312 S. Washington Ave., Newport, WA 99156
5. Leonard N. Browning, pro se plaintiff, P.O. Box 9 Priest River, ID 83856

I declare under penalty of perjury under the laws of the State of Washington that the foregoing

is true and correct.

Executed this 23th day of September, 2013, at
Spokane, Washington.

A handwritten signature in black ink, appearing to read 'E. R. Shumaker', written over a horizontal line.

ERIC R. SHUMAKER WSBA #22231
Attorney for Appellant Barbara
L. Drake