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Court of Appeals  
Division III  
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
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DIVISION III

STEVEN F. SCHROEDER

Appellant

v.

JEFFRY HORN AND KRISTINA HORN

Respondents

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APPELLANT'S REPLY BRIEF

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## Introduction

Appellant Steven Schroeder owns a 41.9 acre parcel in Stevens County, Washington which benefits from a 40' wide easement from Williams Lake road to his property, a distance of some The easement is shown in exhibit P28 looking east to the Schroeder property from Williams Lake Road. .

The easement was created as part of a real estate contract in 1983.

Schroeder used this easement from the time he acquired his property in 1988 (RP 435). The language of the easement is clear, stating that the property now owned by Schroeder benefits from a 40' wide easement part of which crosses property now owned by the Horns. The easement is non-exclusive for maintenance, ingress and egress. The easement was properly noted in the Horns deed when they purchased the property although the Horns stated they believed the easement was only for utilities.

The Horns erected gates on the property at two locations stating that they wanted the gates in case their horses got out of their fenced pasture and onto the easement. There was no evidence that that had occurred prior to trial in this matter.

The present litigation arose when the Horns filed a lawsuit against Schroeder seeking: (1) Declaratory relief regarding the parties rights and obligations in the easement, (2) an action for trespass to real property by Mr. Schroeder, and (3) Injunctive relief seeking prohibiting

further destruction to Horn's property (the easement, the destruction of which consisted removing gates, and limiting the traveled portion of the easement to what they alleged was the historic 8 feet, requiring Schroeder to restore existing fencing and gates and further enjoining Mr. Schroeder from removing Horns' gates or fences within the 40 foot easement and require that Schroeder replace soil form grading (CP 01-49).

Schroeder denied trespassing and alleged that he had the right to remove fences and gates as they interfered with his use of the 40' easement he was granted and that the Court affirm that Mr. Schroeder was entitled to all permitted uses and maintenance of the 40' easement. Mr., Schroeder also maintained that the easement should not be reduced by the Court. He also sought injunctive relief requiring Horn's cease their activity of building obstructions, fences and defacing the easement (CP 050-112)

After a three day bench trial the Court entered judgment as follows:

1. The easement shall be limited to the "historic" travelled easement of 12-14 feet which can be broadened to 40 feet when the Schroeder property at the end of the easement is formally divided for development.
2. The gates and fences shall be installed and erected by Steven Schroeder as they were when the Horn's acquired the property on

January 16, 2015. They shall be of the same quality as the originals and shall be of lightweight material so they can be easily opened and closed.

3. Schroeder shall be permanently enjoined from a) excavating within the 40 ft. easement b) removing any fencing and gates from the Horn property and c) harassing and contacting the Horn family.
4. The Horns shall be permanently enjoined from placing any obstructions on the property (CP 188-190).

The trial court found that historically only 12-14 ' of the easement was actually used and therefore Mr. Schroeder was only entitled to use that portion of the easement going forward until such time as he decided to develop his property. Mr. Schroeder disputes this finding since he used the entire easement for ingress, egress and maintenance specifically plowing and grading the easement. This finding is also immaterial since Mr. Schroeder is entitled to use the entire easement he relied on when acquiring the property regardless of historical use.

Respondent Horns own a 14.4 acre parcel of property which the easement crosses which they acquired in 2015. The easement was clearly reflected on the Horn's deed but Mr. Horn mistakenly believed at the time he purchased the property that the easement was limited to access and maintenance for utilities (RP 194). The easement runs from west to east

and a good part of it forms the northern border of the Horn's property (EX 4). Historically there were two gates located on the easement, one at the far eastern end of the easement at the entrance to Schroeder's property referred to during this litigation as gate 3, a gate at the western end of the easement, referred to as gate 2 and more recently a gate installed by the Horns when they acquired their property midway between Schroeder's property and Williams Lake Road. The gates must be opened to allow passage of vehicle on the easement. In order to use the easement, Mr. Schroeder and his tenants, guests, service drivers and others must exit their vehicles, open the gates, drive through and close the gates. Gate three at the edge of Mr. Schroeder's property is not at issue in this case. Mr. Schroeder removed gates 1 and 2 in order to freely access his property. Mr. Schroeder and his tenants have had difficulty with the gates. One of his tenants, Anthony Bell, is disabled and had a difficult time opening the gates. Also, the gates interfered with maintenance such as plowing and grading of the road. Horns' placed obstructions on the easements including chicken manure and debris on the easement. Another of Mr. Schroeder's tenants, Gordon Foster who was also disabled, attempted to clean up the debris placed on the easement by the Horns so he could get through, he fell and sustained serious injuries (RP 76-77), (RP 307-309).

Since acquiring the property and Schroeder utilized the entire easement for ingress, egress for himself, tenants and guests, grading and snow removal. It is Schroeder's position that Horns are not entitled to erect gates or fences or other impediments ion the easement.

## ARGUMENT

### I. The trial Court Erred by reducing the Easement from 14feet.

#### A. The Court's Finding that the use of the easement was limited to 12-14 feet was in error.

Respondents argue that Schroeder waived any challenge to the court's finding that actual use of the easement was limited to 12-14 ft. by not listing it as a challenged finding (Brief of Respondents pp11-12).

Where a finding is clearly addressed in briefing, the appellate court will consider it even though it is not listed as a challenged finding. Daughtry v. Jet Aeration Co. 91, Wn 2d 704,710 (1979), RAP 1.2(a) (strict adherence to the rules can be waived where justice so requires).

This finding was clearly addressed in Schroeder's briefing. Schroeder points out that when he needed to plow the easement in the winter he needed to plow the whole easement (Brief of Appellant, p.10). In his argument that Schroeder did not misunderstand the scope of his easement Schroeder maintained in his brief that he always believed that he was

entitled to use the entire 40 ft. easement. (Brief of Appellant, p10). One of Schroeder's main arguments was that the Court was in error in determining that his easement should be limited to 12-14 f brief of Appellant, p.5). It is clear that this finding is not supported by the facts.

The Court itself found that Schroeder removed gates which expanded the width of the easement from 12 to 14 'to 40'. Had he not done this, he would have opened himself up to the argument Horn is making, that the historical use of the easement was limited to 12-14'. Mr. Schroeder testified that in the winter, he would plow 36-37 feet wide to accommodate cars passing each other testified that this width was necessary to allow for the reduced width of the easement in the winter due to plowed snow on the sides of the roadway. RP 61-62. He also testified that he graded the road to this width so that in the winter, two cars could pass each other on the easement. RP id. Moreover it was the intent of the grantors of the easement that the easement be 40 ft., that it may be maintained and that it not be obstructed by gates or anything else.

Jeffrey Braucher one pf the parties who drafted the easement, testified that it was his intent and that of the family that the easement not be obstructed by gates or fences (RP 335-336) and that the owner of the dominant estate be permitted to grade and gravel the entire road if he saw

fit (RP 338).. It is clear that the Finding was challenged and not supported by the record.

Schroeder also challenges a related finding, that he was mistaken as to the scope of the easement. Respondent cited the finding that Schroeder and Horn both misunderstood the scope of the easement Brief of Respondent, p.6. There the Court found that Schroeder believed the easement to be 40 ft. irrespective of its actual use for the past “thirty-three years” and that The Horns believed that access to the road could be fenced and gated to accommodate livestock and horses “with little recognition of the established limits on their use of the easement...”, Mr. Horn thought the easement was for utilities. CP 183 ¶ N. Schroeder disagrees with this finding insofar as it states that Mr. Schroeder’s belief that he had a 40’ easement was mistaken.

B. The Court’s decision to limit the easement is in error.

Ancillary uses such as plowing and grading must be taken into consideration by the court in determining historic use. Littlefair v. Schulze, 169 Wash. App. 659, 698 278 P 3d 218 (2012).<sup>1</sup> In the present

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<sup>1</sup> The Littlefair Court did not need to remand for consideration of this issue by the trial court because a county ordinance prohibited structures within easements. In the present case the court did consider ancillary uses but incorrectly held that these uses did not require the court to permit full use of the 40’ easement by Mr. Schroeder.

case, the Court did not consider the Mr. Schroeder's right and responsibility to plow and otherwise maintain the entire easement including grading

The court interprets an easement as a mixed question of law and fact Littlefair, id at p. 664 citing Sunnyside Valley Irrigation District v Dickie, 149 Wn 2d 873, 880 73 P2d 369 (2003). The intent of the party who created the easement is a question of fact and the legal consequence of that intent is a question of law. To determine the parties' original intent, the court looks to the language of the conveying instrument as a whole. If the plain language of the instrument is unambiguous, the court need not look beyond the document. Littlefair, Dickie, id. It is undisputed that the easement (EX D105) provides for an exclusive forty foot right of way "for ingress, egress, utilities and the right to maintain same ..." The easement was made appurtenant to Schroeder's land and as the trial court found, was intended to allow for development of the Schroeder property if the court so decided. The trial court acknowledged the legal principle that the dimensions of an easement do not contract "merely because the dominant estate fails to use the entire easement area" citing 810 Properties v. Jump 141 Wn. App 688,699, 170 P3d 1209 (2007) CP 179-80 (where existing roadway is 15 ft. of 40 foot easement, dominant estate owner

entitled to deeded 40 ft. easement).<sup>2</sup>, The trial court held erroneously that the dimensions of the easement should be reduced until Mr. Schroeder or his successors decided to develop and divide the property CP 82 ¶2. It makes no difference what the historic use is Mr. Schroeder bought property that benefited from a 40' easement not property with a 12 to 14' easement. The reduction of the easement by the court deprives Mr. Schroeder of a right in land without compensation. The Horns, on the other hand or at least Mr. Horn bought their property under the erroneous assumption that there was an easement limited to utilities despite the fact that the easement was clearly reflected in their deed. When Mr. Schroeder graded the easement the Horns complained and sought damages from Schroeder for the damage to the easement. The Easement itself never specified a 12-14 ft. width.

II. Gates on the easement constitute an undue burden on the Schroeder property.

In Littlefair, the court reversed a trial court order permitting construction of a fence on the easement by the servient property owner. The Court held that the fence constituted an undue burden on

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<sup>2</sup> See also Littlefair at 169 Wn. App at 668, Thompson v. Smith, 59 Wash.2d 397, 407, 367 P.2d 798 .

the dominant estate as the dominant property owner had to drive around it and the lack of use of the fenced portion of the easement by the dominant owner could give rise to a claim of abandonment and adverse possession by the owner of the servient estate. Similarly, in the present case, Mr. Schroeder, his tenants, and guests must stop at each of the two gates and open them before proceeding to the property. One of Mr. Schroeder's tenants, Anthony bell is disabled. Also, the gates interfere with Mr. Schroeder's right under the terms of the easement to maintain the easement by grading to prevent it from being overgrown and would interfere with his ability to plow snow on the easement, See argument, Appellant's brief and infra. The Court is referred to Mr. Schroeder's opening brief beginning at p 11 for the principal argument on this issue. Respondent has attempted to distinguish Littlefair by arguing that Littlefair while discussing the undue burden rationale, primarily relies on a county ordinance which prohibits structures including fences on the easement Brief of Resp. p. 15. This is not the case, the court specifically held that the fence constitutes an unreasonable burden but it would not need to remand for findings and conclusions because the fence constituted a nuisance under the county ordinance. Littlefair, id at 169 Wn app 671. The Court's holding is thus applicable to the present case.

The Court's ruling that fences shall be constructed and placed on the easement by Mr., Schroeder is therefore incorrect and must be reversed.

### CONCLUSION

The language if the easement is clear and unambiguous. Mr., Schroeder has the right to use and maintain a 40ft. easement to access his property. The Court's findings and conclusions based on use of only a portion of the easement. Schroeder and his tenants are not supported by the record. The Court, as did the Trial court in Littlefair, failed to consider maintenance and snow removal. Even if only a portion of the easement was used by Schroeder, an easement cannot be reduced merely by s lack of use by the easement holder. The maintaining of gates and other structures or obstacles by the Horns constitutes an undue burden on the easement and should be prohibited.

Dated this 26<sup>th</sup> day of April, 2018



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John C. Perry WSBA 16041  
Attorney for Petitioner

CERTIFICATE OF SERVICE

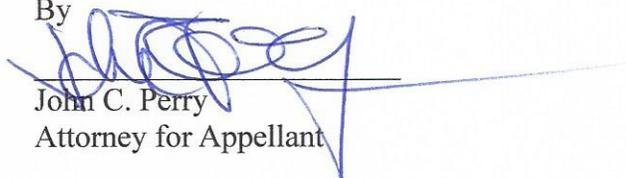
John C. Perry certifies as follows:

On April 26, 2018, I served the attached Appellant's Reply Brief through the court's electronic portal and by email as follows:

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Dated this 26<sup>th</sup> day of April, 2018

By



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**JOHN C. PERRY P.S.**

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