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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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STATE OF WASHINGTON
By _____

NO. 349080-III

STEVEN F. SCHROEDER

Appellant,

vs.

JEFFREY HORN and KRISTINA HORN,

Respondents.

BRIEF OF RESPONDENTS

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I. ASSIGNMENTS OF ERROR AND ISSUES

The Appellant did not assign error to any finding of fact entered by the trial court. Unchallenged findings of fact become verities on appeal.

Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 123, 615 P.2d 1279 (1980). The Appellant raises two primary issues:

ISSUE ONE: Did the trial court err by limiting Appellant's use of the 40-foot easement to 12-14 feet until such time as the Appellant formally plats his appurtenant acreage for development?

ISSUE TWO: Did the trial court err by ordering the Appellant to reinstall gates and fencing he had removed from the easement?

II. STATEMENT OF THE CASE

The following statement of the case is, in large part, taken from the trial court's findings of fact.¹

The Braucher family owned and farmed 300 acres in the Williams Lake Road area of Stevens County in the 1980's. In 1982 farming was

¹ It should be noted that the trial court's Findings of Fact twice refer to Exhibit 25A. CP 182, ¶¶ G and H. Exhibit 25A is an aerial diagram of the property which is the subject of this litigation. The Respondents' Designation of Exhibits, filed December 4, 2017, requested filing in this Court of "all exhibits admitted" in the trial. The trial court judge apparently believed that Exhibit 25A had been admitted and accordingly relied on it in formulating his Findings of Fact, Conclusions and Decision. Examination of the Exhibits file in this Court reveals that Exhibit 25A is not part of the record on appeal.

stopped when the owner, John W. Braucher, was killed in an industrial accident. Thereafter the Braucher siblings sold the family property in 20 and 40-acre parcels, including what is now owned by Steven F. Schroeder ("Schroeder") and Jeffrey Horn and Kristina Horn ("Horns"). CP 179, ¶ A.

Schroeder has title to 41.9 acres immediately to the east of the Horns. In January 2015 the Horns acquired title to 14.4 acres from Raymond and Sally Hedrick. CP 15. This parcel lies immediately to the west of Schroeder. CP 179, ¶¶ B and C. Hedricks acquired title in 2008 from Tim Kunka and Dr. Kathryn Kunka, who had used the property to raise horses, and had put in a horse arena. CP 180, ¶ C.

The Schroeder property is accessed by way of a 40-foot easement for ingress, egress and utilities that was created in a July, 1983 Real Estate Contract with the Braucher siblings, including Jeffrey Braucher, as sellers and a Dale and Cynthia Bonner as purchasers. See exhibit D-105. That easement is described as follows:

TOGETHER WITH a perpetual, nonexclusive forty (40) foot easement for ingress, egress and utilities, and the right to maintain same, commencing at Williams Lake Road, thence in an Easterly direction over and across the now existing road on the North forty (40) feet of Government Lot 2, in the SE ¼ NW ¼ of Section 30, Township 37 N., Range 39 E., WM.

The easement language expressly provided for ingress, egress and maintenance, was non-exclusive, and was made appurtenant to

Schroeder's Tax Parcel 233-9200. The Horns took their property subject to this 40 foot easement. CP 180, ¶ D.

The Brauchers, through their attorney, intended to provide access to what is now parcel 233-9200, across what is now the Horns' parcel 233-9250, from Williams Lake Rd., East to the Schroeder parcel. The easement was intended to provide access to the "North back property" which otherwise would have been land-locked. It was intended to make development "to do so" or "not to do so" as future owners decided. CP 180, ¶ E; RP 334, 337, 341.

The Schroeder property is the dominant estate, and has primarily been used for camping and recreation on a seasonal basis over the past 33 years. Schroeder presently has two tenants on the North 40 acres. Anthony Bell has lived in a cabin on the property for about five years. Gordon Foster, who is confined to a wheelchair, has lived there in a fifth-wheel, on a seasonal basis, for the past three years. CP 181, ¶ F.

Both Mr. Bell and Mr. Foster use the access easement, and they have visitors and friends and delivery trucks on a regular basis. The limited traffic is shown by the observable grass on the approximately eastern one-third of the access road, running east after the Horns' driveway branches off to the southeast. See exhibit P-25B. The first two-thirds of the access road, which is used by both the Horns and Mr. Bell

and Mr. Foster, has been 12 feet to 14 feet in width, including room for maintenance. Schroeder has plans to divide his 41.9 acres in 25-acre parcels -- at some point in the future. CP 181, ¶ G.

The Horns' property, over at least the past 19 years, has been devoted mostly to pasturing horses. Long time neighbor Steven Myers observed the Horns' acreage was a "field with horses." In that time, the owners, namely, Timothy and Dr. Kathryn Kunka, and the Horns, erected external fences around the property, and also a series of internal fences. See red and purple X's on Exhibits 4A and P-25B. The external fences keep the horses in, and off Williams Lake Road. The Horns purchased their property because it was ideal for their needs: The parents and their son ride horses, and their son competes and equestrian events. They presently own five horses. CP 181, ¶ H.

The access road has been gated at three points over the years. Gate 3 has been located at the eastern end of the access road as it enters Schroeder's property. It is actually on the Schroeder property. Since 1985, Schroeder has used Gate 3 to keep his cattle in. Its location is shown on Exhibit P25B. Gate 1 has been located approximately midway between Williams Lake Road and the Schroeder property. Its location is shown on exhibit P-25B a blue dash. This gate was first installed in the summer of 2015 by the Horns to keep the horses from getting out onto Williams Lake

Road. Gate 1 was up for a few months when, in July 2015, Schroeder, or his tenant, Anthony Bell, drove through it. The grill of Schroeder's pickup was found in the wreckage of the gate. The twisted wreckage was left in the Horns' pasture. See Exhibits P-26 and P-27. Starting in July 2015, the Horns struggled to keep a wire replacement gate up, while Schroeder and Anthony Bell struggled to tear it down. CP 181-182, ¶ I.

Gate 2 is just east of where the Horns' driveway branches to the southeast at a 45° angle, again shown by a blue dash. See Exhibit P-25B. This gate has been in place for a number of years. It was first installed by Timothy Kunka and Dr. Kunka. In that time, Schroeder has had to open and close Gate 2. Gate 2 has been a bone of contention between Schroeder and the Horns. At this time, the Horns have erected two large posts with large cross-boards in the middle of the 40-foot easement where Gate 2 had been located. CP 182, ¶ J.

On February 20, 2015, Schroeder abruptly removed Gates 2 and 3 and moved the fence that ran parallel to the access road, some 20 feet to the south, parallel to the access road. This served to cut off a 20-foot swath of the Horns' horse pasture. CP 182, ¶ K.

The gates were removed, and the parallel fence moved, so Schroeder could grade the access road, expanding its width from 12 feet to 14 feet, to nearly 40 feet. See Exhibit P-29 looking West, and Exhibit P-

30 looking east. The relocated fence is to the left in exhibit P-29 and to the right in exhibit P-30. CP 183, ¶ L. Schroeder's grading involved removal of surface grass in some spots and soil to a depth of 12 inches in others, which the trial court characterized as "reckless excessive grading of the roadway." RP 40; CP 183, ¶ M.

The quantifiable damages caused by the removal of the gates, the relocation of the parallel fence 20 feet to the south, and excessive grading of the roadway is \$309.99 for the destruction of Gate 3. No damage amounts were put forward for the other gate, the fence removal, or the destruction of pasture. CP 183, ¶ M.

Schroeder and the Horns misunderstood the scope of the access easement. Schroeder believed it to be 40 feet, irrespective of its actual use for the past 33 years. In fact, the roadway has received limited use, and actual use has been 12 feet to 14 feet in width, with the servient estate making use of the remaining area as pasture. CP 181, ¶ G.

The Horns, in turn, believed the access road could be fenced and gated to accommodate their horses and livestock, with little recognition of the established limits on their use of the easement. Mr. Horn thought the easement was only for utilities. RP 190. These misunderstandings caused hard feelings and confrontations. CP 183, ¶ N.

As noted above, the Horns purchased their property in January 2015. Over the next nine months, misunderstandings led to confrontations. On September 1, 2015 Horns obtained an anti-harassment order against Schroeder. CP 183, ¶¶ N and O.

On August 18, Mr. Horn and his friends menaced Schroeder and his tenant, Anthony Bell, by scoping the hillside in the direction of Mr. Schroeder and Mr. Bell, using a rifle scope. On August 20, in response to the Horns installing an unlocked gate on the access road. Schroeder took to cursing and threatening the Horns, including their 10-year-old son, Jordan. “I’m going to kill you, the kid, and horses” and “I’ll run you out of this country.” On August 21, 2015, Schroeder remained angry toward the Horns and also their seller, 73-year-old Raymond Hedrick, and went onto Hedricks’ property and cursed and threatened Mr. Hedrick. CP 184, ¶ O.

On August 28, 2015, Horns’ attorney filed the present action. CP 3.

Schroeder reacted on September 7, 2015, and thereafter, by destroying the wire gates. It was near this time that Gordon Foster, Schroeder’s disabled tenant, had to stop his vehicle on the easement to move tree limbs that had been placed across the road. Mr. Foster had limited use of his legs and fell as he bent over. He was transported to the hospital by ambulance. CP 184, ¶ O.

On October 20, 2015, Schroeder removed Gate 2, and moved the parallel fence and graded nearly the entire 40-foot easement. See Exhibits P-29 and P-37. Schroeder believed Timothy Kunka had wrongly removed the parallel fence years before, and that the gate was actually his. Mr. Horn believed there was not an express access easement, as it was not on his deed from the Hedricks. CP 183, ¶ O.

Around this time the Horns took steps to clutter and impede passage on Schroeder's easement. They dumped litter, chicken waste and horse manure on the access road, put tree limbs across the road, and installed wire gates across the road. Kristina Horn openly placed tree limbs on the road. CP 184, ¶ O; see also, Exhibits D-106 and D-107.

The trial court ruled that the historic use of the traveled easement road is 12 feet to 14 feet, and that until such time as Schroeder formally plats his property for development, the travelled easement, subject to Schroeder's right to maintain, will be 12 feet to 14 feet, not 40 feet. CP 188, ¶ 2.

Additionally, the trial court ordered Schroeder to re-install gates and fences, of at least the same quality, as they existed and were located when the Horns acquired their property in 2015. The court further specified that the gates be of light aluminum construction and open easily and in either direction. CP 188, ¶ 3.

Finally, the trial court enjoined Schroeder from (1) excavating within the 40-foot easement other than allowed by the court's ruling, (2) removing fencing and/or gates on the Horns' property, and (3) enjoined Mr. and Mrs. Horn from placing any obstructions on the easement. CP 188-189.

III. SUMMARY OF ARGUMENT

Respondents sued the Appellant, requesting that the trial court (1) enjoin the Appellant's excavation and use of the full 40-foot wide easement, limiting such use to a width of 12 to 14 feet, (2) enjoin Appellant from removing gates installed on the easement and fencing alongside the easement, and (3) require the Appellant to replace gates and fencing that he had removed from the easement.

The trial court granted Respondents' requested relief, ruling that (1) until such time as Appellant formally plats his parcel for development, his use of the 40-foot wide easement shall be limited to 12 to 14 feet, (2) Appellant is enjoined from removing gates from and fencing alongside the easement, and (3) Appellant must restore gates and fencing he removed to the condition existing when Respondents bought their property in July of 2015.

As discussed below, the trial court's ruling is supported by the trial court's findings of fact and applicable case law.

IV. ARGUMENT

1. Standard of Review

Appellate courts review a trial court's decision following a bench trial to determine whether the findings of fact are supported by substantial evidence and whether those findings support the court's conclusions of law. Unchallenged findings of facts are verities on appeal. Appellate courts review conclusions of law de novo. *Zunino v. Rajewski*, 140 Wn. App. 215, 220, 165 P.3d 57 (2007).

The Appellant did not assign error to any of the trial court's findings of fact. Unchallenged findings of fact are verities on appeal. *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). Thus, it appears the Appellant is challenging only the trial court's conclusions of law, disagreeing with the court's disposition of the case.

2. Injunctive Relief: Broad Trial Court Discretion

A suit for an injunction is an equitable proceeding addressed to the sound discretion of the trial court, to be exercised according to the circumstances of each case. *Steury v. Johnson*, 90 Wn. App. 401, 405, 957 P.2d 772 (1998). Appellate courts must give great weight to the trial

court's decision, interfering only if it is based on untenable grounds, is manifestly unreasonable or is arbitrary. *Steury, supra*, 90 Wn. App. at 405., 957 P.2d 772. The foregoing principles apply to each of the trial courts rulings in this case, which rulings reflect the trial court's effort to shape a remedy accommodating the competing interest of the parties.

3. Trial Court Properly Limited Appellant's Use Of The Easement

Where an express easement is silent or ambiguous on such things as fences and gates, rules of construction call for an examination of the intention of the parties when creating the easement, the nature of the situation of the property subject to the easement and, most importantly here, the manner in which the easement has been used or occupied. *Rupert v. Hunter*, 31 Wn. App. 27, 30-31, 640 P.2d 36 (1982); *Northwest Property Brokers v. Early Dawn Estates Homeowners Association*, 173 Wn. App. 778, 792-793, 295 P.3d 314 (2013). CP 186, ¶ C.

The Appellant argues that he is entitled to use the entire 40-foot easement as he wishes, because that is what was intended by those who created the easement. Appellant's Brief, p. 10; RP 48-49; RP 59. The Appellant is mistaken in at least two respects.

First, the trial court determined that historic use of the subject easement over the last 33 years involved the use of 12 to 14 feet of the 40-

foot easement. CP 181, ¶ G. The Appellant did not assign error to this finding of fact. As noted above, “the manner in which the easement has been used or occupied” is a significant factor to consider where, as here, an express easement does not address particular issues arising between dominant and servient easement owners.

Relying on *Thompson v. Smith*, 59 Wn.2d 397, 409, 367 P.2d 798 (1962), the trial court further determined that the servient owners, here the Horns, are entitled to make use of the property not being used by Schroeder for ingress, egress and utilities. *Thompson*, at 407-08 (concrete slab installed in easement allowed, since not interfering with present use of the easement, and subject to removal if use of easement expanded in the future). Further, the trial court ruled the Horns cannot build fences or gates on the easement *if* the fences and gates would, pursuant to adverse possession principles, deny Schroeder his right to future expanded use of the easement. *Littlefair v. Schultz*, 169 Wn. App. 659, 666-668, 278 P.3d 218 (2012). CP 8, ¶ 5.3.

In short, the trial court’s decision conditionally limiting Schroeder’s use of the easement was based on a finding of fact that Appellant has not challenged, and case law that is well established.

Second, the creators of the easement, i.e., the Braucher siblings, intended nothing more than to create an easement allowing for ingress and

egress to preclude Schroeder's parcel from being landlocked, provide for utilities to that parcel and maintenance of the easement itself. CP 180, ¶ E; RP 334, 337, 341.

Next the Appellant argues that the trial court's ruling invites Respondents' possible acquisition of Appellant's easement rights by adverse possession. Appellant's Opening Brief, p. 11. However, the trial court specifically addressed that issue, and limited the 12 to 14-foot restriction, stating:

The 12' to 14' traveled easement road, running from Williams Lake Road to the Schroeder property, Tax Parcel 2339200, can be broadened to up to 40' when the 41.9 acres presently owned by Steven F. Schroeder is developed -- when the property is formally divided.

CP 188, ¶ 2. Thus, the Appellant sought and obtained from the trial court an express recognition of his 40-foot easement, and his right to use all 40 feet if and when "the property is formally divided." *Id.* Appellant's stated concerns regarding loss of his easement rights through adverse possession are without merit. Additionally, the dimensions of an easement do not diminish merely because the dominant estate fails to use the entire easement area. *Properties v. Jump*, 141 Wn. App. 688, 170 P.3d 1209 (2007).²

² In his "Assignments of Error" the Appellant mentions that "non-use" of the easement by the dominant owner "does not extinguish the easement owner's right to the easement." Non-use is merely mentioned, but not discussed, in the body of Appellant's Brief.

Next the Appellant argues that the trial court erred by failing to address Schroeder's right to "ancillary uses" of the easement, which includes "grading and snow removal." Appellant's Brief, p. 9. This argument is without merit, for two reasons.

First, nowhere in the trial court's ruling is the Appellant precluded from maintaining the easement, either generally or, for that matter, specifically as to grading the surface.

Second, nowhere in the trial court's ruling is the Appellant precluded from performing snow removal. Additionally, although the word "snow" appears in the Report of Proceedings 11 times, nowhere is there testimony stating that snow removal by the Appellant would be hindered due to the easement being 12 to 14 feet wide.

In summary, the trial court's ruling limiting the easement to 12 to 14 feet is supported by unchallenged findings of fact, as well as applicable case law.

4. No Undue Interference With Easement

Citing *Littlefair v. Schulze*, 169 Wn. App. 659, 278 P.3d 218 (2012) and *Rupert v. Gunter*, 31 Wn. App. 27, 30-31 (1982), the

Appellant's Brief, p. 10. And, extinguishment of Mr. Schroeder's easement rights did not occur. Accordingly, those matters are not discussed herein.

Appellant contends that the trial court erred by allowing gates on the easement, in that they constitute an undue interference with its use.

In *Littlefair*, the owner of the servient estate built a fence on the easement that provided access to Schulze's property. Schulze sued, seeking removal of the fence. Additionally, a county ordinance prohibited building structures on easements.

The trial court denied Schulze relief, holding that the fence was not an unreasonable interference, and violation of the ordinance was inconsequential.

On appeal, the court ruled that the fence was sufficiently permanent to create a threat of adverse possession. The ultimate point of decision, however, was that the fence violated the ordinance, and therefore constituted a nuisance which had to be removed. *Littlefair*, at 671.

Littlefair is inapplicable to the present case, having been decided on the bases of violation of an ordinance and resulting nuisance.

In *Rupert*, the trial court balanced the relative inconvenience to Rupert by Gunter's placement of gates on the easement, against

Gunter's desire to remove the danger of vehicles speeding on the easement. The trial court established functional specifications for the gates, in order to minimize inconvenience to Rupert. *Rupert*, at 32. On appeal, the court affirmed, finding that the trial court had reasonably exercised its discretion.

As noted above, a court has wide latitude in fashioning equitable remedies. *Steury v. Johnson*, 90 Wn. App. 401, 405, 957 P.2d 772 (1998).

The trial court found that prior to the Horns' purchase of their property it had been used to pasture and raise horses for over 19 years, and the property was ideal for them, in that they own five horses, and both Mr. and Mrs. Horn ride horses, and their son competes in equestrian contests. CP 181, ¶ H. The primary purpose of the internal and external fences was to pasture horses and keep them from going onto Williams Lake Road. *Id.*

The trial court further found that when Horns purchased the property there were two gates on the easement, referred to as Gate 2, near Williams Lake Road, and Gate 3, located at the east end of the easement, at Schroeder's property line. CP 181-182, ¶¶ I and J.

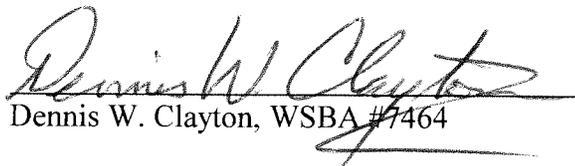
While the Appellant may disagree with the trial court's exercise of discretion, the facts underlying it have not been challenged, and it was not an abuse of discretion.

V. **CONCLUSION**

The trial court should be affirmed.

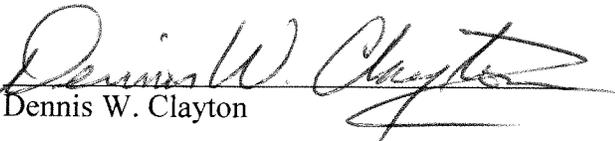
DATED this 1st day of February, 2018.

Respectfully submitted,


Dennis W. Clayton, WSBA #7464

CERTIFICATE OF SERVICE

I, Dennis W. Clayton, hereby certify that a true and correct copy of the foregoing Reply was served on John Perry by email on February 1, 2018, sent to jcperry@gmail.com.


Dennis W. Clayton