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No. 64209-0-I

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

STEPHEN and KAREN ROCKOW, husband and wife,
Appellants and Cross-Respondents,

v.

DAVID and BERNADETTE CARSON, husband and wife,
Respondents and Cross-Appellants.

APPELLANTS' BRIEF

Ronald J. Meltzer, WSBA No. 1203
Lois K. Meltzer, WSBA No. 20541
Attorneys for Appellants

SINSHEIMER & MELTZER, INC., P.S.
1001 Fourth Avenue, Suite 2120
Seattle, WA 98154
Telephone: 206-340-4700

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TREATISE

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I. ASSIGNMENTS OF ERROR

Assignment of Error Number 1: The court erred in finding the Carsons did not trespass on the Rockows' property as a matter of law.

Issues relating to Assignment of Error Number 1:

1. Is there a trespass when the holder of an easement uses it in a manner that exceeds the scope of the easement?
2. When a court has found that the holder of the dominant estate has misused an easement when building a road across the servient estate, is there a trespass as a matter of law?

Assignment of Error Number 2: The court erred in denying the Rockows' claim for damages for the Carsons' removal of vegetation from the portion of the easement that is on the Rockows' property.

Issues relating to Assignment of Error Number 2:

1. Did the Carsons trespass on the Rockows' property by removing vegetation from within the easement in order to construct a road?
2. Are the Rockows entitled to treble damages under RCW 64.12.030?
3. Is the measure of damages the cost of replacing and restoring the vegetation removed?

Assignment of Error Number 3: The court erred in ordering the Rockows to remove the fence that had been constructed on the property line which ran down the center of the easement.

Issues relating to Assignment of Error Number 3:

1 Did the court fail to make any Findings of Fact or Conclusions of Law that would justify an order requiring removal of the fence?

2. Was there a lack of evidence the fence either obstructed the easement or violated the express terms of the grant of the easement?

II. STATEMENT OF THE CASE

The plaintiffs/respondents Carsons ("Carsons") and the defendants/appellants Rockows ("Rockows") own adjoining parcels in a private subdivision known as Snoqualmie Heights. The Snoqualmie Heights plat was created in the late 1970s and is subdivided into 20 lots. In 1976 the developer, the Snoqualmie Group, created an easement which contained the following language:

"Schroeder (the trustee for the developer) hereby grants and conveys to present and future owners of the above-described property . . . a private, permanent, non-exclusive right of way for ingress and egress and utilities [description of the properties including Carson's and Rockow's] together with the

right to enter upon the above described right-of-way and maintain and repair any of said roads."

The easement is 60 feet wide with the centerline being the boundary between the Rockow and Carson properties. (CP 211-212)

In 1977, shortly after creation of the easement, the common grantor executed a document entitled "Road Maintenance Agreement and Protective Covenants." This Agreement describes an approximately 20-foot wide dirt or gravel road within the easement. This 20-foot wide road has been, since the 1970s, the principal means of access to all of the lots in the subdivision. (CP 213-214)

The Rockows purchased their property in approximately 1993 and have resided on that property continuously since then.

In 2007 the Carsons purchased the undeveloped property abutting the northern boundary of the Rockow property. Soon thereafter the Carsons, without any prior notice or warning to the Rockows, cleared a 25-foot wide, approximately 70' long strip of trees and vegetation from the northern portion of the Rockow property within the easement to construct a new personal driveway for Carsons' property. Construction equipment entered the Rockow property to dump gravel on the new roadway. (CP 215)

In the 30 years the subdivision had been in existence no property owner in the 20 lot subdivision had ever claimed the existence of a common easement entitled an owner to use it to construct a personal driveway on property owned by another party. (CP 216) No property owner in the subdivision, other than the Carsons, has ever attempted to do so.

The Carsons could have constructed the personal driveway entirely on their own property, without entering Rockows' land or clear-cutting the vegetation; however it would have been more expensive to do so. (CP 215-216)

Undisputed evidence at trial put the cost of replacing the trees and vegetation and restoring the Rockow property to its original condition at approximately \$18,000. (RP 149)

The Rockows disputed Carsons' right to construct a road on the Rockow property. The Rockows also placed a fence on the new road. This fence, however, does not run *across* the easement, but rather follows the property line dividing the Rockow and Carson properties; a line which runs down the center of the easement. The fence does not block ingress and egress to the Carson property.

The testimony as to this fence from Steve Rockow was as follows:

Question: Now there has also been some testimony regarding some fences.

Answer: Right.

Q. Is there currently a fence in place on your property?

A. Yes.

Q: Can you tell the court when I say on your property, the portion we are speaking about? Can you, using exhibit six, indicate to the court where that fence line is?

A: . . . the fence comes down to the property line between the Carsons and the Rockows then runs east and west from that point.

Q: Does the fence interfere - if someone wanted to drive on this roadway does the fence interfere with their ability to drive on that roadway?

A: The one that the Carsons installed?

Q: Yes.

A: It doesn't interfere with it.

Q: To your knowledge is the fence within the 30 feet of your property that is subject to the access and egress easement?

A: Yes, it is on the property line.

Q: When you say, the property line, do you mean the property line that divides the property, or the property line that divides the 30 foot easement from the rest of your property?

A: The property line between the Rockows and the Carsons.

(RP 192-193)

Mr. Carson also testified the fence ran down the centerline of the easement. (RP 61) Carson did not claim that the fence blocked ingress and egress, but rather:

Question: How does that (fence) impact you?

Answer: Essentially when we go to at that point into our water, it is going to be in the way of that. That is based upon the meter being where the line is being

there, where I say that it is, in the center line. We won't have access there. Power is up above. (RP 61)

Procedural History.

The Carsons filed a complaint against the Rockows seeking (1) a declaratory judgment approving their personal driveway across the Rockow property; (2) an injunction against trespass on their property; and (3) damages for interference with an easement. (CP 1-8)

The Rockows counterclaimed, asking the court to (1) declare the easement and the road maintenance agreement did not entitle the Carsons to unilaterally construct a driveway across the Rockow property; (2) to enjoin the Carsons from making any further attempts to place a driveway on the Rockow property; and (3) for treble damages for the Carsons' removal of vegetation. (CP 9-23)

The case was tried before the Honorable Michael Trickey on May 4, 2009.

The court's Findings of Fact were substantially as described above: that the Carsons had constructed the road on the Rockow property and had cleared vegetation from within the easement. (CP 214-216)

The court quoted Green v. Lupo, 32 Wn.App 318, 647 P2d 51 (1982), regarding the doctrine of equitable limitations:

"[A] servient owner is entitled to impose reasonable restraints on a right of way to avoid a greater burden on the servient owner's estate than that originally contemplated in the easement grant . . ."

and concluded:

"It was not equitable to impose a greater burden on the defendants' property by extending the easement road, because of the cost to plaintiffs to build an alternate route for egress and ingress onto plaintiff's property." (CP 219-220)

The court denied the Carsons' claim for a declaratory judgment that they had a right to construct the enlarged easement road and required them to remove the gravel on the Rockows' portion of the easement outside the pre-existing easement road. (CP 222-223)

The court granted the Rockows' counterclaim for declaratory judgment and breach of easement "to the extent that the Court concludes that an equitable limitation should be imposed which invalidates plaintiff's expansion of the easement road ... in 2007." (CP 223)

However, as to the Rockows' claims for trespass and removal of vegetation, the court held:

"Plaintiff's extension of the easement road . . . did not rise to trespass as a matter of law," (CP 221)

and:

"Plaintiffs removed vegetation and plants only from within the easement. RCW 64.12.030, the treble damages statute, does not apply where a party clears vegetation and plants from a portion of an easement which benefits that party." (CP 221)

The court denied the Rockows' counterclaims for injury to trees and for trespass.

The court made no findings of fact or conclusions of law regarding the Rockows' fence, but nevertheless ordered the Rockows to remove all fences within the easement. (RP 222)

This appeal followed. (CP 244-248).

III. LEGAL ARGUMENT

A. Standard of Review.

This appeal involves issues of law and the court's conclusions are reviewed de novo.

B. The Owner of an Easement Trespasses if the Owner Misuses or Overburdens an Existing Easement.

The court held there was no trespass as a matter of law. However it is well established in Washington that the owner of an easement is liable as a trespasser if the owner misuses, overburdens or deviates from an existing easement. Olympic Pipeline vs. Thoeny, 124

Wn.App 381, 101 P.3d 430 (2004), Mielke v. Yellowstone Pipeline, 73 Wn.App. 621, 870 P.2d 1005 (1994). "An easement does not shield the holder from an action for trespass where there is evidence of misuse, overburdening or deviation from the easement." Fradkin v. Northshore Utility District, 96 Wn.App. 118, 977 P.2d 1265 (1999).

In Brown v. Voss, 38 Wn.App. 777, 689 P.2d 1111 (1984), Brown, the owner of the dominant tenement, attempted to extend an existing easement over Voss' land to a new parcel, resulting in substantially more traffic over the easement. The court held the misuse of an easement is a trespass to real property.¹

In Sanders v. City of Seattle, 160 Wn.2d 198, 156 P.3d 874 (2007) the court stated at page 125, "[t]respass occurs upon the misuse or overburdening of an easement."

Here, the court found the Carsons' construction of the new road overburdened the easement and ordered the removal of the road. Its subsequent finding this activity did not constitute a trespass is contrary to established Washington law and inconsistent with its decision the easement had been over burdened.

¹ Brown v. Voss was reversed on other grounds, holding at 105 W.2d 366, 715 P.2d 514, the holders of an easement could traverse the servient estate to reach a subsequently acquired parcel provided there was no increase in the use of the easement. (Emphasis added)

C. The Carsons were Liable for Treble Damages under RCW 64.12.030 for Removing Plants and Shrubs from the Rockow Property.

RCW 64.12.030 provides in relevant part:

[W]henver any person shall cut down . . . or otherwise injure, or carry off any tree, timber, or shrub on the land of another person . . . without lawful authority, in an action by the person . . . against the person committing the trespasses or any of them, any judgment for the plaintiff shall be treble the amount of damages claimed or assessed.

The court refused to assess damages for the removal of the vegetation.

The court's sole reason for this was the vegetation removed had been within the easement. However, there is no authority for holding that when vegetation is removed from within an easement, there is no trespass and the damages provisions of RCW 64.12.030 do not apply. If vegetation could be removed simply because it lies within an easement then, in theory, every one of the 20 lot holders in the Snoqualmie Heights subdivision could go on to any neighbor's land and carry off any tree or shrub, no matter how valuable, that happened to lie within the common easement. This would be an absurd result.

In support of its conclusion, the trial court cited Tatum v. R&R Cable, 30 Wn.App. 580, 636 P.2d 508 (1981). (CP 221) The Tatum

case, however, does not hold that vegetation within an easement may be removed, with impunity.

If anything, Tatum supports the Rockows' claim for damages.

In the Tatum case, a utility company had substantially deviated from the location and width of the easement. The utility company, like the Carsons, claimed it had substantially complied with the easement because it chose a less expensive route and destroyed less valuable trees than it would have had it chosen to follow the actual line of the easement. The court held when the utility company deviated from the easement, without first asking permission, it had trespassed, and was liable for treble damages for the removal of vegetation.

Similarly, here, the Carsons trespassed when they exceeded the scope of the easement. As a trespasser, they had no right to remove vegetation.

In general, the right to an easement does not include the right to remove anything from the easement.

[T]he grant of a right of way over the land of the grantor confers only the right of passing over it ... no rights other than those of this character are conveyed.
Accordingly one owning a passageway easement only over a strip of land belonging to another has no rental rights therein, nor is he entitled to abstract physical property therefrom. 28 CJS at page 756.

(Emphasis added)

If the construction of the road could not be justified because of the Carsons' easement, neither could the Carsons' removal of vegetation to build that road.

D. The Value of the Vegetation was Established by Undisputed Evidence at Trial.

The Rockows' expert, Nels Melgaard, estimated the restoration and replacement cost for the vegetation destroyed by the Carsons at approximately \$18,000. (RP 149) The measure of damages for loss of trees is the restoration or replacement cost. Hill v. Cox, 110 Wn.App. 394, 41 P.d3d 495 (2002). The measure of damages for damage to ornamental greenery on residential property is for restoration and replacement cost. Birchler v. Castello Land Company, Inc., 81 Wn.App. 603, 915 P.2d 564 (1996).

The trial court was obligated to assess damages in the amount established by defendants' expert.

E. The Rockows Are Entitled to Treble Damages as a Matter of Law.

A trespasser who damages or removes trees is liable for mandatory statutory treble damages unless he alleges and proves a

statutory mitigating factor; treble damages are not left to the discretion of the court. Happy Bunch LLC v. Grandview North, LLC, 142 Wn.App. 81, 173 P.3d 959 (2007).

The treble damages statute is a strict liability statute modified by RCW 64.12.040 which provides for mitigating factors, stating:

if upon trial of such action it shall appear that the trespass was casual or involuntary or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, judgment shall only be given for single damages.

The Carsons did not present any testimony to support the statutory criteria for mitigating factors or assert any mitigating factors as an affirmative defense. On the contrary, the evidence established they made no effort to contact the Rockows, or any other owner in the subdivision, before building their road. It should have been apparent from the layout of the subdivision itself that no other landowner in 30 years had interpreted the easement as permitting a private driveway.

F. The Court's Findings, or Lack of Findings, do not Support its Order that the Fence Should be Removed.

The grant of easement here contains the following language:

"The easement granted hereinabove, shall be subject to the condition that no present or future owner of land as above described, shall have the right to erect any fences over or across the above described easement." (CP 212)

Both Mr. Rockow and Mr. Carson testified the fence did not run over and across the width of the easement, but rather it ran along the property line between the Carson and Rockow properties, which happened to be located within the easement. The fence does not prevent the use of the easement for its principal purpose, that is, for ingress and egress. It was, by all accounts, a fence marking the border between the two properties.

"Whether or not the owner of land over which an easement exists may erect and maintain fences across or along an easement way depends upon the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case, the nature and situation of the property subject to the easement and the manner in which the way has been used and occupied." Standing Rock Homeowner's Assn v. Misich, 106 Wn.App. 231, 23 P.3d 520 (2001).

No reasonable interpretation of the easement, given the surrounding circumstances, would conclude the language regarding fences could preclude an owner from marking the boundaries of his property with a fence, when that fence did not interfere in any way with the use of the easement for its stated purpose; that is for ingress and egress.

In any case, the court made no Findings of Fact, or Conclusion of Law, as to whether the maintenance of a fence in the easement violated the terms of the grant of easement.

The Findings of Fact must support the judgment in the sense the Findings must cover the facts essential to the judgment given applicable substantive law. American Nursery Products v. Indian Wells Orchards, 115 Wn.2d 217, 797 P.2d 477 (1990).

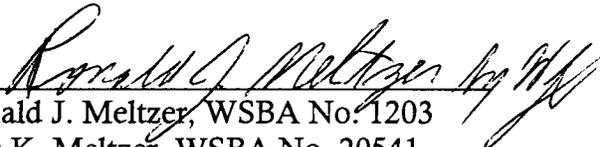
No findings would be possible on the state of the evidence which would justify the removal of a simple boundary fence

IV. CONCLUSION

The court's decision denying damages for trespass, and treble damages for removal of vegetation, should be reversed and judgment should be entered for the damages proved by the Rockows at trial trebled under RCW 64.12.030. The court's order requiring the removal of the Rockow fence in the easement should be reversed.

RESPECTFULLY submitted this 5th day of February, 2010.

SINSHEIMER & MELTZER, INC., P.S.

By: 
Ronald J. Meltzer, WSBA No. 1203
Lois K. Meltzer, WSBA No. 20541
Attorneys for Appellants

No. 64209-0-I

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PROOF OF SERVICE

Ronald J. Meltzer, WSBA No. 1203
Lois K. Meltzer, WSBA No. 20541
Attorney for Appellants and Cross-
Respondents

SINSHEIMER & MELTZER, INC. P.S.
1001 Fourth Avenue, Suite 2120
Seattle, WA 98154

Telephone: 206-340-4700

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I, Marci Umatum, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein.

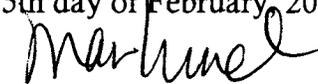
On February 5, 2010 I caused a copy of the following documents to be served on the interested party below:

1. Appellant's Brief

Michael Warren
Warren & Duggan, P.L.L.C.
401 Second Avenue So., Suite 600
Seattle, WA 98104

- By causing a full, true and correct copy thereof to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last known address for Mr. Grundstein, and deposited with the U.S. Postal Service on the date set forth below;
- By causing a true and correct copy thereof to be DELIVERED VIA ABC LEGAL MESSENGER to the party at the address listed above, which is the last-known address for the party, on the date set forth below;
- By causing a full, true and correct copy thereof to be FAXED to the party at the facsimile number shown above, which is the last known facsimile number for the party, on the date set forth below.

DATED this 5th day of February, 2010.



Marci Umatum