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**NO. 64209-0-I**

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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

and

STEPHEN ROCKOW and JANE DOE ROCKOW, husband and wife,  
Appellants and Cross-Respondents.

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**BRIEF OF RESPONDENTS/CROSS APPELLANTS**

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## I. ASSIGNMENTS OF ERROR

Assignment of Error No. 1. The Trial Court erred in failing to make a finding of the intent of the original grantor of the subject Easement.

*Issues pertaining to Assignment of Error No. 1.*

1. Does the Doctrine of Equitable Limitations and the cases of Green v. Lupo and Rupert v. Gunter require a Court to make a finding of the intent of the original grantor of an easement before imposing a complete bar as to the use of that easement?

Assignment of Error No. 2. The Trial Court erred in finding that a complete bar to the use of the subject Easement was a “reasonable restriction” under the Doctrine of Equitable Limitations.

*Issues pertaining to Assignment of Error No. 2.*

1. Does the Doctrine of Equitable Limitations and the cases of Green v. Lupo and Rupert v. Gunter require a Court to consider all reasonable restrictions before imposing a complete bar on the use of an Easement?

2. Should the Trial Court have considered less onerous restrictions on the use of the Easement, such as building a buffer, oiling

the road to prevent dust, constructing a privacy fence along the road line, or berming the road?

Assignment of Error No. 3. The Trial Court erred in finding that a complete prohibition of the use of the Easement for ingress and egress by the Carsons does not unreasonably interfere with the use of the Carson's property.

*Issues pertaining to Assignment of Error No. 3.*

1. Does the fact that unrebutted testimony that re-routing the Easement Road would cost the dominant estate \$15,000-\$20,000, result in a road that is too steep for emergency vehicles, and too tight of a turn for large vehicles, rendering the property possibly unbuildable, unreasonably interfere with the use of the Carson's property?

2. Does substantial financial hardship imposed upon a property owner by restricting the use of an express grant of easement constitute a *de facto* interference with the property owner's ability to use the property?

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Assignment of Error No. 4. The Trial Court erred in finding that there is an ambiguity in this clearly written Easement, and in admitting extrinsic evidence to vary the express terms of the Easement.

*Issues related to Assignment of Error No. 4.*

1. When an Easement is not subject to two *reasonable* interpretations, is it ambiguous?
2. When an Easement is not ambiguous is extrinsic evidence admissible to vary its express terms?

## II. STATEMENT OF THE CASE

### (a) Carsons and Rockows Properties; Easement.

The Carsons own approximately 5 acres of undeveloped land in east King County (the “Carsons’ Property”). RP 36. The Carsons’ intend to build a home on their property. RP 36-37.

Defendants Stephen W. and Karen L. Rockow (the “Rockows”) are owners of an adjacent parcel (the “Rockows’ Property”). RP 36. EX 3 shows the orientation of the two properties. The south 30’ of the Carsons’ Property and the north 30’ of the Rockows’ Property are burdened by a Private Easement for Roads and Utilities (the “Easement”) EX 1, RP 41. The Easement is 60 feet wide, the center line being the boundary between the Carsons’ Property and the Rockows’ Property. *Id.*

The Carsons purchased their property in reliance upon the Easement giving them access to their property. RP 39-40. They obtained a survey and title insurance prior to purchasing to confirm the Easement, and their right to access. RP 38.

The Easement [EX 1] contains, *inter alia*, the following verbiage:

NOW, THEREFORE, in consideration of Grantees’ purchasing any or all of the above described property from Schrader, and for other valuable consideration, Schrader hereby grants and conveys to present and future owners of the above described property, and their successors in interest, and other Schrader assignees, a private, permanent, non-exclusive easement and right of way for ingress

and egress and utilities, over, across and on the following described areas:

[Description of properties, including The Carsons' Property and The Rockows' Property]

Together with the right to enter upon the above described right of way and maintain and repair any of said roads together with a right of way for the use, installation above or below ground, erection, maintenance, repair and operation of electric power lines, telephone lines, and water lines, including the right to erect poles and other transmission line structures, wires, cables, gas and water lines and all other utilities and any necessary appurtenances thereto . . . .

The easements granted hereinabove, shall be subject to the condition that no present or future owner of land in Section 36 as above described, shall have the right to erect any fences over or across the above described easement. . . .

The Easement benefits and burdens all of the homeowners in this Plat. EX 1, 2, 3. Constructed on the Easement is a road (the "Easement Road") which provides access to the beforementioned homeowners. EX 3. Before the Carsons bought their property, the Easement Road terminated in a crude cul de sac approximately 20' on to both of the Carsons' and the Rockows' Property. EX 3, 4, 6.<sup>1</sup>

The Carsons' Property is at the end of the road. There are no other lots served by the Easement beyond the Carsons' Property. RP 41.

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<sup>1</sup> The Easement Road is subject to a Road Maintenance Agreement and Protective Covenants (EX 2), which speaks to the maintenance of the road as follows: "[S]aid easement road shall be maintained to such standards as called for by the majority of owners of land in the above mentioned Short Subdivision." The Road Maintenance Agreement does not speak to the extension of the road on to the Carsons' Property.

The Rockows access their property from an entirely different areas of the Easement within the plat. RP 41.

The Easement Road runs along the southern edge of the Easement the entire length of the Easement, except for the last portion of the Easement where it crosses the Carsons' and Rockows' Properties, and culminates in the cul de sac. See EX 3).<sup>2</sup>

Before the Carsons purchased their property, they discussed with the Rockows their plans to build a house, and access it through extending the road along the Easement from the cul de sac to their building site. RP 42-45. Indeed, the Carsons changed the location of the road extension to minimize the impact on Rockow, at Rockow's request. RP 43.

Q. Tell me the discussion that you had before the survey with Mr. Rockow regarding where you were going to put your road?

A [Mr. Carson]. We determined that if we brought it back, closer towards the turn-around, we could basically leave all of the other vegetation that was in the easement, thus creating a more of a green belt that we would both appreciate and enjoy.

RP 43-44.

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<sup>2</sup> Rockows make a misstatement in their Brief [Appellants' Brief, Page 4]. They state that "... no property owner in the 20 lot subdivision has ever claimed the existence of a common easement entitled an owner to use it to construct a personal driveway on property owned by another person." This statement is inconsistent with the evidence at trial. The Carsons are the only lot at the end of the existing road. RP 41. This was not a "personal driveway," but a mere extension of the existing road upon which any lot owner could drive. RP 58-59. Every lot owner accesses their property from the Easement and the Easement Road. RP 203.

(b) Extension of Easement Road.

At the time the Carsons purchased their property, the cul de sac had been cleared (there was an electrical box on the cul de sac). RP 46. The Easement beyond the cul de sac had been logged a number of years ago, and it now contained “blackberry, small alder saplings, some other native growth, vine maple, the Oregon grape.” RP 46-47. There were no fir or cedar trees on that portion of the Easement that was eventually cleared. RP 48. The Easement also contained an old logging “skid road” that followed the natural topography of the land. RP.53, 113.

Shortly after purchasing their property, the Carsons had the road extended as shown by the hatched portion of EX 4. RP 48. While the Easement is 320 feet long,<sup>3</sup> the Carsons had only about 60 feet cleared to extend the road to access their property. RP 49. While the Easement is 60 feet wide, the Carsons only cleared about 15-20 feet for the road. Id. This was consistent with their prior discussions with the Rockows. Supra. and RP 43-44.

The road was extended along the Easement starting from the Rockows’ side of the Easement. It was done so because the hill slopes down such that substantial fill would be required to extend the road on the

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<sup>3</sup> The Easement is actually much longer, serving all of the lots in the subdivision. The 320 foot reference here is that portion that burdens the Carsons’ and the Rockows’ Properties.

Carsons' side of the Easement. RP 49-50. This also allowed the Carsons to save many mature trees from being cut on their property RP 50-52. It also prevented the Carsons from potentially having to fill in wet portions of their property. RP 51-52.

The Carsons' plan as shown on EX 4 also allowed the road to follow the natural topography of the land by following an old skid road that had already been cleared to log the properties and install an underground water main. RP 52-53, 113, 202.

As you walk the extension of the Easement Road, at no place can you see the Rockows' house (only the roof of the house). This is because there is a ridge between the road and the Rockows' house. RP 58.

(c) Rockows' block the Road Extension.

Shortly after the Carsons extended the Easement road to gain access to their Property, Rockow blocked the road with an old truck. RP 59. After the truck was moved, they blocked the road with a fence. RP 60.

(d) Possible Re-Routing Road Extension.

To extend the Easement Road such that it did not run across that portion of the Easement that burdens the Rockows' property would be impractical (as well as not mandated by the Easement). The Carsons called as a witness Mark Plog, a land surveyor and civil engineer. RP 96. Mr. Plog also "designs roads on a daily basis." RP 98. Mr. Plog analyzed

the topography of the Carsons' property, including possible other routings of the road extension. EX 7 and 12. Mr. Plog testified:

- The steepest portion of the Carsons' Property is just off the cul de sac, to the left of where the Easement road was extended. RP 103.

This is the only other possible routing of the extended road.

- There is an old skid road that runs across the easement along that portion that burdens the Rockows' property. RP 113. It was along 60' of this skid road that the Easement road was extended.

- To reroute the Easement Road in any other direction than as extended by the Carsons on to the old skid road would require mature cherry and alder trees to be removed. RP 105-106.

- To reroute the Easement Road in any other direction than as extended by the Carsons would result in a 13-19% road grade (steepness), which is more than the 10-12% maximum slope allowed by fire emergency equipment. RP 106-107.

- To reroute the Easement Road in any other direction than as extended by the Carsons would result in having to bring in as much as 233 cubic yards of fill. This is over 400 tons of fill. RP 109.

- To reroute the Easement Road in any other direction than as extended by the Carsons would result in a required turn that trucks, trailers and other long vehicles may be unable to make. RP 135.

- The cost to the Carsons of rerouting the Easement Road such that it did not run across that portion of the Easement which burdens Rockows' Property would be \$15,000 - \$20,000 more than the cost of the road as extended. RP 110.

*Mr. Plog's testimony was uncontested at trial.* The Rockows did not present testimony from an engineer or surveyor. The Rockows did present as an expert witness a contractor who builds roads, Rodney Churchill. Mr. Churchill confirmed that rerouting the Easement road such that it did not cross any portion of the Easement that burdened the Rockows property would require extra 194-233 cubic yards of extra fill (RP 159), that there would be tight corner at the bottom of the rerouted driveway (RP 159), and the costs of rerouting the road would be \$15,000 - \$20,000 (RP 160). Mr. Churchill also confirmed that he does not decide where to place a road, and he does not design roads. Placement and design is determined by an engineer, such as Mr. Plog. RP 161-162.

(e) Pretrial Decisions by Trial Court.

On June 6, 2008, the Trial Court on cross motions for summary judgment ruled that the permitted usage of the Easement required a review under the Doctrine of Equitable Limitations:

The Court finds that, under the doctrine of equitable limitations as articulated in *Green v. Lupo*, 32 Wn. App. 318, 324, 647 P.2d 525

(1982), there are genuine issues of material fact precluding summary judgment.

CP 33. The judge who heard the motions, Judge Ramsdell stated:

The defendants request that equitable limitations be imposed on any easement granted. 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, so long as such restraints do not unreasonably interfere with the dominant owner's use. *Rupert v. Gunter*, 31 Wash.App. 27, 640 P.2d 36 (1982). [Id.]

(f) Trial Court's Ruling.

The Trial Judge, the Honorable Michael Trickey, ruled that the Doctrine of Equitable Limitations bars the Carsons' use of the that portion of the Easement that crosses the Rockows' property for ingress and egress:

Defendants' counter-claims for declaratory judgment and breach of Easement and Road Maintenance Agreement are GRANTED to the extent that he court concludes that an equitable limitation should be imposed which invalidates Plaintiffs' expansion of the Easement Road and cul de sac in 2007. Plaintiffs must remove the gravel on Defendants' portion of the easement outside the pre-existing Easement Road by December 1, 2009.

CP 56B, Order ¶4.<sup>4</sup>

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<sup>4</sup> The parties privately stipulated to extend the December 1, 2009 deadline pending the outcome of this appeal.

### III. ARGUMENT [ON CROSS APPEAL]

#### 1. **The Trial Court went well past *Rupert and Green*, and misapplied the Doctrine of Equitable Limitations in this case.**

The Trial Court's has literally turned easement law in this State on its ear with its ruling. There is no precedent whatsoever for such a broad, overreaching ruling that completely and unconditionally invalidates an express grant of an easement. In essence the Trial Court's Ruling means that no holder of an easement in this State can rely on the validity of that easement if the servient estate objects thereto. The Ruling throws holders of dominant estates in to a quandary of whether an easement of record is really the grant of a valuable property right, or an illusory document that can be discarded by a court *without regard to the written word or intent of the Grantor*.

There are two cases in this State interpreting the Doctrine of Equitable Limitations. Rupert v. Gunter, 31 Wash.App. 27, 640 P.2d 36 (1982), and Green v. Lupo, 32 Wn. App. 318, 324, 647 P.2d 525 (1982).

Rupert involved the construction of a gate to prevent third parties from using an easement. The Court mandated the gate because the use *by the public* of the easement road imposed "a greater burden than that originally contemplated by the easement grant." 31 Wash.App. at 31. The Rupert Court made express findings whether less burdensome

restrictions were possible to accomplish the original grantor's intent, and in doing so, did NOT bar use of the easement road altogether, as in the instant case.

Green involved the use by neighbors of loud motorcycles. The Court *refused* to ban the motorcycles, instructing the Trial Court to “devise *reasonable restrictions* to assure that the easement shall not be used in such a manner as to create a dangerous nuisance.” 32 Wash.App. at 324-325 [emphasis supplied].

Neither Rupert nor Green *completely barred* the easement holder from use of the easement for the purpose stated in the easement (which in both cases was ingress and egress), as the Trial Court has done to the Carsons.

**2. The Trial Court failed to make the findings required by Rupert and Green under the Doctrine of Equitable Limitations.**

Rupert and Green set forth the elements of the Doctrine of Equitable Limitations, which were not followed by the Trial Court in this case:

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, so long as such restraints do not unreasonably interfere with the dominant owner's use. [citing *Rupert v. Gunter*, 31 Wash.App. 27, 640 P.2d 36 (1982)].

Green at 324.

When the owner of a servient estate is being subjected to a greater burden than that originally contemplated by the easement grant, the servient owner has the right to restrict such use and to maintain gates in a reasonable fashion necessary for his protection, as long as such gates do not unreasonably interfere with the dominant owner's use.

Rupert at 31. Green and Rupert are consistent in that they require 3 findings to be made before the Doctrine of Equitable Limitations can be applied to impose restrictions on a grant of easement. These required findings are that the restrictions must be:

- Reasonable; AND
- Avoid a greater burden on the servient owner's estate than that originally contemplated in the easement grant; AND
- Such restraints do not unreasonably interfere with the dominant owner's use.

The Trial Court failed dismally in applying Green and Rupert to the facts of this case, failing to make any of the above findings.

**FIRST**, the Trial Court failed to make any finding whatsoever as to what was “contemplated by the easement grant.” It made no attempt at determining the intent of the *original grantor*. While the Court did consider later actions by property owners, these are not the actions of the *original grantor*. “A court should construe and enforce an express easement in accordance with the intention of the parties to the grant.”

Brown v. Voss 38 Wash.App. 777, 780 (1984).

The Easement grant is clear . . . it is for “ingress, egress and utilities.” EX 1. There is nothing that qualifies those terms. The road maintenance agreement (EX 2) merely speaks to the maintenance of the existing road, and does not even discuss the terms “ingress or egress.” If the grantor (Schrader) did not intend the easement to be for ingress and egress, why did he include those words in the grant, and why did he extend the easement to the far end of the property line? The answer is he must have intended the Easement be used for the use referenced therein . . . “ingress, egress and utilities.”

The Trial Court’s failure to make a finding as to the intent of the *original grantor* means the Trial Court has erred as a matter of law in applying the Doctrine of Equitable Limitations.

**SECOND**, the Trial Court failed to make a finding as required by Rupert and Green that a *complete bar* of the Easement for ingress and egress by the Carsons is a “reasonable restriction.” Indeed, the Trial Court *failed to consider any other restriction*, such as building a buffer, oiling the road to prevent dust, constructing a privacy fence along the road line, or berming the road. Instead, the Trial Court jumped to *the most restrictive use possible*, denying the Carsons complete use of the easement for ingress and egress.

This was even after the testimony that the Carsons themselves used best efforts to minimize the impact of the extension of the Easement Road on the Rockows. RP 43-44. Instead the Trial Court came to the *unsupported conclusion* that the 60' of extended road is a burden on the Rockows, despite the *undisputed* fact that the Carsons only used 60' of the 320' long easement, despite *undisputed* evidence that the road is 100's of feet from the Rockows' residence, and despite the *undisputed* evidence that one can not even see the road from the Rockows' residence (other than the roof) because of a ridge between the road and the residence. The Trial Court conclusion was despite the fact it will now cost the Carsons \$15,000 - \$20,000 to move the road 20' to the west, if the road can even be moved. See below.

**THIRD**, the Trial Court's finding that a complete prohibition of the use of the easement for ingress and egress by the Carsons does not unreasonably interfere with the use of the Carson's property is directly contrary to the *unrebutted* evidence. Plaintiff's engineer Mark Plog testified that it would cost an extra \$15,000-\$20,000 to build a road other than across the easement. This was confirmed by the Rockows' own expert. There is no case law that supports a finding that economic hardship is not to be considered when a Court rules in equity.

Even if one were to disregard the substantial economic hardship imposed on the Carsons by the Trial Court, the Trial Court failed to consider the *uncontroverted testimony* that moving the road off of the easement would result in a road that is too steep for emergency vehicles, and too tight of a turn for large vehicles. This means that the Trial Court has likely left the Carsons with property that can not practically be accessed by emergency vehicles, and thus unbuildable.

**3. There is no ambiguity in the recorded documents.**

The Trial Court's finding that the easement and the road maintenance agreement are ambiguous is not supported by the wording of those documents. A contract is "ambiguous only when 'fairly susceptible to two different interpretations, *both of which are reasonable.*'" Michak v. Transnation Title Ins. Co. 108 Wash.App. 412, 424, 31 P.3d 20, 25 (2001)(emphasis original).

The Easement expressly grants an unqualified and unconditional right to ingress and egress. The road maintenance agreement does not address ingress and egress, much less qualify or condition it. Simply because the road had not been extended by the original grantor does not create an ambiguity, particularly when there is no finding that the *original grantor* did not intend the Easement to be for ingress and egress [a finding

that would be impossible because the Easement expressly provides for ingress and egress].

Tellingly, the Trial Court failed to propose “two different interpretations, both of which are reasonable” of the easement [Michak, id.], instead making broad unsupported statements that it feels the Easement is ambiguous, to attempt to support its inept attempt at “equity.”

If an easement is ambiguous, a Court *can* look beyond its wording at the intent of the parties. If an easement is NOT ambiguous, a court *cannot* look beyond the wording of the easement, nor will it read terms into an agreement. Heath Northwest, Inc. v. Peterson, 67 Wash.2d 582, 584 (1965); Pederson v. Peters, 6 Wash.App. 908, 910 (1972)(parol or other extrinsic evidence is generally not admissible to add to, subtract from, vary or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and are not affected by accident, fraud, or mistake). Thus, the Doctrine of Equitable Limitations applies ONLY if an easement is ambiguous. The Easement is not ambiguous, and the Trial Court erred as a matter of law by even applying the Doctrine of Equitable Limitations.

#### **4. Conclusion.**

The Trial Court attempted “equity.” It did so in a misguided manner that is entirely inconsistent with existing case law and the express

grant of Easement in this case. The Trial Court went well beyond the Doctrine of Equitable Limitations and Rupert and Green. The Trial Court's ruling deprives the Carsons of a valuable property right, very likely making their property inaccessible by emergency vehicles, and thus worthless. **By removing a slight burden imposed by the Easement on the Rockows, it has imposed a overwhelming burden on the Carsons.** The Trial Court's ruling ignores the evidence, and fails to make findings required by Rupert and Green. This Court should reverse the Trial Court, quiet title to the Easement in the Carsons, and issue an injunction prohibiting the Rockows from obstructing the Easement.

An owner of an easement may protect his interest by means of an action to quiet title, Bushby v. Weldon, 30 Wn.2d 266 (1948) and by an injunction against obstruction of the easement. Evich v. Kovacevich, 33 Wn.2d 151 (1949).

#### IV. ARGUMENT [RESPONSE TO APPELLANT'S BRIEF].

1. **The Carsons did not exceed the scope of the easement in clearing the scrub brush to extend the road. The Court later limited the scope under the Doctrine of Equitable Limitations.**

The Easement expressly grants the Carsons "a private, permanent, non-exclusive easement and right of way for ingress and egress and utilities, over, across and on the following described areas: [Description of

properties, including the Carsons' Property and the Rockows' Property]. The Easement expressly contemplates roads, in that it also gives the parties the right to "enter upon the above described right of way and maintain and repair any of said roads." EX 1.

A party is privileged to use another's land to the extent expressly allowed by the easement. Mielke v. Yellowstone Pipeline Co., 73 Wash.App. 621, 622, 870 P.2d 1005 (1994). This is exactly what the Carsons did. If they had constructed a structure, or dug a "30-foot deep ditch" (CP 362), they would have overburdened the Easement because such uses were not specified therein. But they did neither, using only 60' of the 320' long easement (and 15-20' of the 60' width of the Easement) to access their property, minimally impacting the Rockows' side of the Easement.

An action for trespass exists when there is an intentional or negligent intrusion onto or into the property of another. Restatement (Second) of Torts, §§ 158, 165, 166 (1965). While the Trial Court did rule that the Doctrine of Equitable Limitations *later* limited a road being installed on the Easement, such a ruling was not in effect at the time of the construction of the road, and the Carsons', indeed any reasonable person, would read the Easement and believe they had the right to build a road under its terms. There was thus no "intentional or negligent intrusion onto

or into the property of another” [id.] but merely the use of the Easement in a manner that was *later* restricted by this Court.

If the Carsons were to build a road after the Trial Court’s ruling, there may be “an intentional or negligent intrusion.” Id. But at the time they built the road, there was no negligent or intentional intrusion as required by law.

This position is further supported by the fact that the Easement itself does not limit its usage to one side or the other.

Where the grant of an easement does not state a width, our Supreme Court has stated “[a] right of way by grant, which is not limited in the grant itself, ... is bounded by the line of reasonable enjoyment.” *Van De Vanter v. Flaherty*, 37 Wash. 218, 222, 79 P. 794 (1905).

Mielke v. Yellowstone Pipeline Co. 73 Wash.App. 621, 625 (1994).

Under Mielke, because the Easement does not say the road could be constructed only on the Carsons’ side of the Easement, the Carsons were reasonable in their believe that it could be constructed within the Easement and limited by their “reasonable enjoyment.” Id.

The cases cited by the Rockows in their brief are distinguishable. Each and every case addressed misuse or overburdening of an easement based on the then current wording of the easement. [Olympic Pipe Line Co. v. Thoeny 124 Wash.App. 381, 395 (2004)(trespass damages denied on other grounds, but easement was never later modified); Mielke v.

Yellowstone Pipeline Co. 73 Wash.App. 621, 625 (1994)(The “bounds of reasonable enjoyment” of the right of way present a material issue of fact. Easement not modified by Court); Fradkin v. Northshore Utility Dist. 96 Wash.App. 118 (1999)(not an Easement case); Brown v. Voss 38 Wash.App. 777, 780 (1984)(Easement not modified by Court, overburdening clear by express language of Easement); Sanders v. City of Seattle 160 Wash.2d 198, 225 (2007)(not and Easement case).

Here, the Easement was later modified by the Doctrine of Equitable Limitations. *At the time of the clearing of the Easement* there would not have been any misuse or overburdening.

Because the Carsons were within their rights under the Easement *as of the date of the clearing*, there was no “intentional or negligent intrusion,” and there was thus no trespass.

**2. The evidence was that any vegetation on the Easement was scrub brush, with no real value. The Court discarded the outlandish testimony of Appellant’s expert, and found no value. Treble nothing is nothing.**

Rockow claims \$18,000 quoted by their expert to restore the small portion of the Easement cleared by Carsons to extend the Easement Road was undisputed. *Appellant’s Brief, Page 4.* This is not the case. The clear evidence was that the ground covering on this previously cleared

skid road was scrub brush, blackberry vines, alder saplings and the like, with no real value. RP 47, 114.

Rockows' expert, a social friend [RP 147], based his estimate on a drawing prepared by Rockow, EX 11, RP 143, that showed fir and alder trees were not on the 60' x 15-20' section of the easement that was cleared. See RP 47 and 114, describing what was actually on the portion cleared. Indeed, the expert confirmed that the blackberry vines on the Easement are an invasive species that would have killed off all other ground covering (including the ferns and salal that are in the bid for replacement). RP 150.

Appellant's expert had no credibility. He proposed spending \$18,000 to refurbish a 60' x 15-20' section of land that was an overgrown skid road with no trees, and with blackberry vines that had overgrown the native ground covering. The Court very clearly discarded his testimony, and believed the testimony that only scrub was cleared, with no tangible value.

**3. The Timber Trespass Statute does not apply.**

RCW 64.12.030 states in relevant part:

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree . . . *without lawful authority*, in an action by the person, city, or town against the person committing the trespasses or any of them, any judgment for the plaintiff shall be

for treble the amount of damages claimed or assessed [emphasis supplied].

At the time of the clearing of the Easement to extend the Road for ingress and egress, the Carsons had every right to clear the Easement pursuant to the terms of the Easement. An easement is a privilege to use the land of another. The grantee of an easement has the right to develop the easement such that the grantee may enjoy the intended use of the easement. Shorett v. Blue Ridge Club, Inc., 22 Wn.2d 487 (1945).

In determining the permissible scope of an easement, we look to the intentions of the parties connected with the original creation of the easement, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied. *Evich v. Kovacevich*, 33 Wash.2d 151, 157, 204 P.2d 839 (1949). It can be assumed the parties had in mind the natural development of the dominant estate. The law assumes parties to an easement contemplated a normal development under conditions which may be different from those existing at the time of the grant. Restatement, Property, §484 (1944); see also *Cameron v. Barton*, 272 S.W.2d 40, 41 (Ky. 1954). Normal changes in the manner of use and resulting needs will not, without adequate showing, constitute an unreasonable deviation from the original grant of the easement.

Logan v. Brodrick, 29 Wash.App. 796, 799-800 (1981). *Accord* 810 Properties v. Jump, 141 Wash.App. 688, 696 (2007) (Cf. 28 CJS cited at page 11 of Appellant's Brief, which is contrary to Washington law). The Logan court cited with approval Restatement, Property, §484 (1944), which states:

In ascertaining, in the case of an easement appurtenant created by conveyance, whether additional or different uses of the servient tenement required by changes in the character of the use of the dominant tenement are permitted, the interpreter is warranted in assuming that the parties to the conveyance contemplated a normal development of the use of the dominant tenement.

Logan at 800. It is disingenuous to believe that an easement for ingress, egress and utilities does not carry with in its scope the right to clear the easement. Clearing of the easement would be the “contemplated normal development of the use of the” easement. Logan at 800. How can one ingress, egress or place utilities without clearing the easement?

Thus, at the time of the clearing of the Easement, the Carsons were under the “lawful authority” of the Easement as contemplated by RCW 64.12.030. It was only the Trial Court which erroneously applied to the Doctrine of Equitable Limitations *after the fact* to “modify” that lawful authority. The Carsons should not be held liable for a later modification of the Easement, when they acted strictly in accordance with the express terms of the Easement.

**4. Fences are expressly prohibited by the terms of the Easement.**

The Rockows complain of the Trial Court’s Order that they have to remove the fences they constructed within the Easement. The Easement contains the following language:

The easements granted hereinabove, shall be subject to the condition that no present or future owner of land in Section 36 as above described, shall have the right to erect any fences over or across the above described easement. . . .

EX 1. The property line between the Carsons' property and the Rockows' property is exactly the center of the Easement, so concededly, Rockows' fences are within the Easement. The fences are not bordering the Easement, but situated squarely in the middle of the Easement.

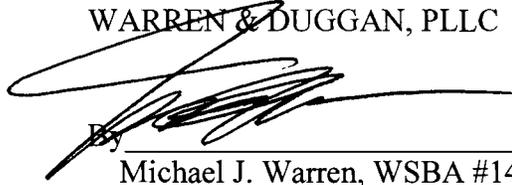
Standing Rock Homeowners' Assn. v. Misich, 106 Wn.App. 231 (2001) cited by Appellants simply does not apply because of the express wording of the Easement.

#### **V. CONCLUSION.**

The Carsons ask this Court to reverse the Trial Court, find the Easement unambiguous, and grant the Carsons' claim for Declaratory Relief that they have the right to extend the Easement road for the purposes of ingress and egress and utilities to their property. Because the Easement is unambiguous, this Court should find that the Doctrine of Equitable Limitations should not have been applied in this case.

DATED this 21<sup>st</sup> day of March, 2010.

WARREN & DUGGAN, PLLC

A handwritten signature in black ink, appearing to read "Michael J. Warren", is written over a horizontal line. The signature is stylized and cursive.

By \_\_\_\_\_  
Michael J. Warren, WSBA #14177  
Attorney for Respondent/Cross Appellant

**NO. 64209-0-I**

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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

and

STEPHEN ROCKOW and JANE DOE ROCKOW, husband and wife,  
Appellants and Cross-Respondents.

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**DECLARATION OF SERVICE**

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2009 MAR 25 11:04 AM  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

I, Mary McKnight, served true and correct copies of BRIEF OF  
RESPONDENTS/CROSS APPELLANTS, in the above captioned matter, via ABC  
Messenger, on this 24<sup>th</sup> day of March, 2010, addressed as follows:

Mr. Ron Meltzer  
Sinsheimer & Meltzer, Inc., PS  
1001 – 4<sup>th</sup> Ave, Suite 2120  
Seattle, WA 98154-1109

Dated this 24<sup>th</sup> day of March, 2010.

  
Mary McKnight