

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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REPLY BRIEF OF RESPONDENTS/CROSS APPELLANTS

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Michael J. Warren, Esq.  
Washington State Bar No. 14177  
Attorney for Respondents and  
Cross Appellants

PIVOTAL LAW GROUP, PLLC  
600 University St., Suite 1730  
Seattle, Washington 98101

Telephone: (206) 340-2008

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## REPLY IN SUPPORT OF CROSS APPEAL

1. The elements under *Rupert* and *Green* are not mere guidelines as the Rockows would have this Court believe.

It is understandable that the Rockows would want to divert this Court's attention from *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), as the Trial Court failed dismally in following the holdings of those cases. But for this Court to hold that the elements of the Doctrine of Equitable Limitations adopted in *Rupert* and *Green* are now mere "criteria" that may be readily discarded by a trial court would interject mayhem in the law of easements, and is directly contrary to the wording of *Rupert* and *Green*.

The *Rupert* and *Green* courts adopted a narrow doctrine that would allow a trial court to adjust the terms of written easement under certain circumstances. Neither *Rupert* nor *Green* stand for the proposition that a trial court can modify or void an easement whenever it wants, under the guise of its equitable powers. While the Doctrine of Equitable Limitations has its roots in a trial court's equitable powers, any modification or voiding of an easement must be done under the identified elements of the Doctrine. Any ruling to the contrary would mean a trial court could adopt any standard it wished to modify or void an easement,

interjecting uncertainty that would paralyze any easement holder or its title insurer.

The Trial Court in this case ignored the elements of the Doctrine that were required to be followed by Rupert and Green. It may have cloaked its flawed ruling in equity, but it failed to follow the required elements of Rupert and Green in rendering that ruling. This is the fundamental error in the Trial Court's ruling.

2. Rockows' arguments that the Trial Court did follow the elements of the Doctrine of Equitable Limitations are not persuasive.

The Court's language at CP 217-220 and CP 220, cited by Rockow (Reply Brief, pg. 2-3), is not a finding of "the intent of the original grantor" of the Easement. The cited portions of the ruling are mere recitations that the easement is "ambiguous" because the terms "ingress and egress . . . are not defined or explained." While incredulous that the Court could not define "ingress and egress" this does not shed light on the intent of the grantor. Likewise, the fact that the road Maintenance Agreement is not co-extensive with the Easement is not an attempt to determine the intent of the grantor, but merely a factual statement. The Court does say "the intent of the common grantor must be found in reading the Easement and the Road Maintenance Agreement together" but then it fails to make a single attempt at determining that intent through the

reading of the two agreements. By way of example, if the original grantor did not intend for the Easement to be for ingress and egress, why did the original grantor include those express words in the easement grant, and extend the easement to the end of the property line? None of this was even considered by the Trial Court, and nowhere do the Rockows point to any wording or finding to the contrary.

Opposite to the Rockows' statements, merely using the word "intent" in a sentence is not a *de facto* finding of intent, as required by the Doctrine of Equitable Limitations and case law. See, e.g., Brown v. Voss 38 Wash.App. 777, 780 (1984)(A court should construe and enforce an express easement in accordance with the intention of the parties to the grant); Rupert and Green ("When the owner of a servient estate is being subjected to a greater burden *than that originally contemplated by the easement grant*" . . . the Court may consider the Doctrine of Equitable Limitations).

Of course, one of the Carsons' Assignments of Error is the Trial Court's finding that the Easement is ambiguous. There is nothing ambiguous on the face of the words "ingress, egress and utilities."

Similarly, nowhere does the Trial Court consider any other restriction on the use of the Easement other than a complete bar for ingress and egress by the Carsons. Both Rupert and Green carefully reviewed all

reasonable restrictions when coming up with their carefully fashioned (and limited) restrictions on the use of their easements. The Rockows do not even argue in their brief that other restrictions were considered, instead merely saying the Carsons can use the Easement on their side of the property line. This is nonsensical, because (i) the Carsons own that land and do not need an easement; and (ii) the evidence was clear that the property drops off dramatically, and is unusable for ingress and egress without extensive, costly and maybe impossible changes. See below. Instead, the Trial Court jumped to *the most restrictive use possible*, denying the Carsons complete use of the easement for ingress and egress.

Finally, the Rockows' arguments that the Trial Court "balanced equities" in barring the Carsons from using the Easement plays entirely into the errors of law committed by the Trial Court. The finding that the Trial Court *should have made* is whether the "restraint . . . unreasonably interfere[s] with the dominant owner's use." Rupert and Green. There is NO evidence the Trial Court considered (i) the extra \$15,000-\$20,000 it would take to reroute the access road; or (ii) the fact that the rerouted access road would be steep for emergency vehicles, and too tight of a turn for large vehicles. RP 106-107, 135. This latter factor means the Carsons' property is likely unbuildable, which would be the greatest possible interference with the Carsons' use of their property.

Moreover, there is no evidence that the Trial Court considered any other restriction whatsoever beyond a complete bar to use of the Easement. For instance, the Trial Court did not consider the construction of a buffer, oiling the road to prevent dust, building a privacy fence along the road line, or berming the road, all of which would be reasonable accommodations to the Rockows privacy concerns (even though the Rockows cannot see the easement road from their house), and all of which would minimally interfere with the Carsons' use of the Easement to access their property.

3. Rockows' cited cases do not support the Trial Court's misapplication of the Doctrine of Equitable Limitations.

The Rockows cite three cases to try to sidestep the Doctrine of Equitable Limitations. None of the cases are persuasive, and indeed the support the Carsons' position on appeal.

The New York case of Minogue v. Kaufman, 124 A.D.2d 791, 791-792 (1986) held:

Where the grantor expressly states that the creation of an easement is to provide a right-of-way for ingress to and egress from the grantee's property, then the grantee may only use the easement in such manner as is reasonably necessary and convenient for that purpose (*see, Dalton v. Levy*, 258 NY 161, 167; *Grafton v. Moir*, 130 NY 465, 470-471).

In this case, the trial court properly concluded that the easement contained in the plaintiffs' deed, providing for "ingress and egress over a 30-foot right of way" over a portion of the defendant's

property should be limited to the 12-foot paved roadway, since the plaintiffs failed to establish that roadway was inadequate for the expressly stated purpose intended by the grantee in creating the easement. . . .

While Minogue of course did not deal with the Washington Doctrine of Equitable Limitations, it is instructive on the third element of the Doctrine, i.e., that a restraint does not “unreasonably interfere[s] with the dominant owner's use.” The Carsons in this case have clearly shown that the restrictions (complete bar of the use of the Easement for ingress and egress) make the Easement “inadequate for the expressly stated purpose intended by the grantee in creating the easement.” Id. The Carsons have shown that the restrictions will result in an access road would be steep for emergency vehicles, and too tight of a turn for large vehicles, likely rendering their property unbuildable. RP 106-107, 135.

In Pleasure Bluff Dock Club, Inc. v. Poston, 294 Ga. App. 318, 670 S.E.2d 128, 130 (Ga. Ct. App. 2008), the court held that a 100 foot easement could be restricted to the existing 9.2 foot road because “Pleasure Bluff residents admittedly did not need the full expanse” and “the narrow dirt road was “perfectly adequate” to provide ingress and egress.” Id. at 320-21. Again, this is akin to the “unreasonable restriction” element of the Doctrine of Equitable Limitations, and the Carsons have established that rerouting the easement road would result in

an access road would be steep for emergency vehicles, and too tight of a turn for large vehicles, likely rendering their property unbuildable. RP 106-107, 135. The Carsons thus definitely need the Rockows' side of the Easement to salvage their property.

Finally, the Washington case of 810 Properties v. Jump, 141 Wash. App. 688, 696-697, 170 P.3d 1209, 1214 (2007), stands for the proposition that the "law assumes parties to an easement contemplated changes in the use of the easement that may have not existed at the time of the grant." Id. at 697. *Accord* Logan v. Brodrick, 29 Wn.App. 796, 799-800 (1981). This is exactly on point in this case, in that the easement road had not been extended because no one had ever built on the Carsons' Property, and the property was at the end of the Easement. 810 Properties supports a finding that the original grantor contemplated the road to be built later (as the Carsons did) to access their property, because the words ingress and egress were expressly included in the Easement language.

#### 4. Conclusion.

The Trial Court misapplied the Doctrine of Equitable Limitations, failing dismally in making any of the required findings thereunder. If the Trial Court's broad and overreaching ruling is allowed to stand, no holder of an easement in this State can rely on the validity of that easement if the servient estate objects thereto. This would interject an unreasonable

element of uncertainty into each and every easement in this state, throwing into a quandary the question 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*.

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.

DATED this 27<sup>th</sup> day of May, 2010.

PIVOTAL LAW GROUP, PLLC



By

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

NO. 64209-0-I

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**DECLARATION OF SERVICE**

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Michael J. Warren, Esq.  
Washington State Bar No. 14177  
Attorney for Respondents and  
Cross Appellants

PIVOTAL LAW GROUP, PLLC  
600 University St., Suite 1730  
Seattle, Washington 98101

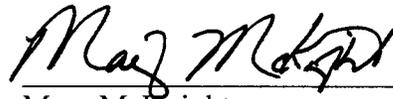
Telephone: (206) 340-2008

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I, Mary McKnight, served true and correct copies of REPLY BRIEF OF  
RESPONDENTS/CROSS APPELLANTS, in the above captioned matter, via ABC  
Messenger, on this 27<sup>th</sup> day of May, 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 27<sup>th</sup> day of May, 2010.



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Mary McKnight