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COURT OF APPEALS NO. 72568-8
SNOHOMISH COUNTY CASE NO. 13-2-07974-5

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

DAVID H. ERBECK and E. ADELE ERBECK, husband and wife,

Plaintiffs/Respondents,

v.

DEBORAH S. SPRINGER and JOHN DOE SPRINGER, wife and
husband,

Defendants/Appellants.

APPELLANT SUSAN SPRINGER'S REPLY BRIEF

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I. REPLY ARGUMENT

A. *The Trial Court Erred by Using Extrinsic Evidence to Interpret the Deed to the Keusters*

The interpretation of the Deed from E-K Partnership to the Keusters (the “Deed”) (Tr. Ex 5) is important, because it determines whether or not the express easement in the Deed was later conveyed to Springer as part of her purchase of Lot C and Lot D. Each of the descriptions of the four “calls” in the Deed has the abbreviation “W.M.” a semicolon, and then “EXCEPT 99th Avenue N.E.”

In its simplest form, the Deed follows the following pattern:

Seller conveys to Buyer:
The property on the L.
The property on the R.
The property on the E.
The property on the S.;
And an Easement over Seller’s property

Erbeck essentially makes the “prior antecedent rule” argument that because the legal descriptions of the first three calls end with a “period,” and the fourth call ends with a “semicolon,” the Deed should be re-written and interpreted to limit the easement to only the five-acre lot immediately preceding the easement. Erbeck proposes re-writing the legal description

on the Deed to insert breaks and property identifiers where none exist. Respondents' Brief at 4-5.

However, even if the use of the semicolon and period were improper grammar, the substitution of a period for a semicolon does not create an ambiguity when reading the Deed as a whole. The punctuation simply creates a list of items and should be interpreted as such. Tolbert v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, No. 3:08-CV-1112-N, 2009 WL 9072606, at *4 (N.D. Tex. June 24, 2009) aff'd sub nom. Tolbert ex rel. Tolbert v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 657 F.3d 262 (5th Cir. 2011) (“While it is true that items in a series should be separated by semicolons when, as in this case, the items contain internal punctuation, *see* Chicago Manual ¶¶ 6.21, 6.60, the substitution of a period for a semicolon does not give rise to ambiguity in the DOCs when considered as a whole.”) Despite the incorrect punctuation, the easement’s location at the end of the list does not mean it does not apply to the whole list. “Once the list is complete, the use of semicolons to separate items on the list does not preclude subsequent clauses of the same sentence from applying to each member of the list.” Pilot v. Alesco Preferred Funding XV, Ltd., No. CIV.A. 13-0628-WS-M, 2014 WL 1900668, at *4 (S.D. Ala. May 13, 2014).

In this case, there is nothing in the in the four-corners of the Deed to indicate that the easement was intended to apply only to the last parcel in the list. In context, the Deed either conveys 1) a twenty acre parcel of land, and an easement, or 2) four separate parcels equaling twenty acres and an easement. Although the easement is the last item on the list, it is capitalized, starts on its own line, and makes no specific reference to the preceding item on the list. There is no functional difference between a period and a semicolon, and the final easement clause is not limited to modifying the preceding “call.”

In resolving a similar issue involving lists, the Tenth Circuit Court of Appeals identified several factors when deciding if the last item on the list modifies all items: 1) If the last item were to only modify the preceding one, one would expect a signal suggesting some connection between the last item and the preceding item; 2) the last item is set off in the same manner as the other items in the list; 3) the clause comes at the end of the list, where modifiers meant to address all of the preceding items are often found; and 4) the drafters could have stated things differently if they had not wanted the list to be construed as one. “After all, no airport that posted a sign prohibiting on airplanes ‘knives, explosives, rifles, other similar items, or any item that could be mistaken for any of the foregoing’

would think it had forbidden shotguns but not samurai swords. Shotguns are similar to rifles, just as samurai swords are similar to knives. By placing ‘other similar items’ after the examples, the airport sign clearly means to signal its disapproval of both.” Payless Shoesource, Inc. v. Travelers Companies, Inc., 585 F.3d 1366, 1370 (10th Cir. 2009). The same principle applies here: the easement applied to all of the property conveyed, not just a part.

Grammatically, the period at the end of each line in the Deed does not create an ambiguity. The period acts the same as a semicolon and acts as a separator of the items in a vertical list. Since there is nothing to suggest that the easement is intended to modify only the last parcel, it must be treated as a conveyance of a separate property right, or at least applying to all of the properties conveyed.

B. Lots C and D Both Had Benefit of the Express Easement.

If the Deed conveyed a 20-acre parcel and an express easement for the entire 20 acres, then the express easement continued to benefit the entire 20 acres even after the property was subdivided and conveyed as smaller lots. When Springer purchased her property from the Keusters, the easement ran with the land and continued to benefit Lots C and D even if

the easement was not expressly conveyed in the deed. Since the Keusters included an express easement as part of the legal description for Lot C, it is apparent that the Keusters believed they had received express easement rights when they purchased the 20 acres. The express easement ran with the land for the benefit of both Lot C and Lot D, even if the express easement wasn't listed in the deed from Keusters to Springer. Green v. Lupo, 32 Wash. App. 318, 322, 647 P.2d 51, 53 (1982).

C. The Court Did Not Use the Proper Legal Standard for Prescriptive Easements.

Erbeck suggests that Springer did not substantiate her argument that the trial court erred when it focused on cattle grazing as the only factor in its denial of a prescriptive easement for Lot C. Respondents Brief at 21. Erbeck is incorrect. Springer's argument is set forth in her opening brief at page 15 and cites to Lee v. Lozier, 88 Wash. App. 176, 187, 945 P.2d 214, 220 (1997) which discusses "continuous use" in detail. Under Lee v. Lozier, an easement is not limited to *specific* uses. A prescriptive easement is defined by the overall *type* of use. The trial court's failure to consider the overall *type of use*, as opposed to focusing on *specific uses*, was an error.

The trial court erred by focusing on cattle grazing while ignoring all of Springer's other agricultural uses. Springer testified that she used the driveway to access Lot C for things other than cattle grazing. She testified that she used the driveway to access Lot C for fencing, planting of trees, placement of materials for building a barn, maintaining fences. CP at 169-173. All of these uses are consistent with the agricultural nature of the property. However, the trial court focused only on the specific use of cattle grazing. This was in error. The trial court should have considered *all* of Springer's agricultural uses, not just cattle grazing.

Further problematic is that the trial court made a finding that the Erbecks exclusively used Lot C to graze cattle for 17 years. CP at 203. This finding is unsupported by the evidence. Erbeck testified that Springer permitted him to have cattle on Lot C starting in 1994, and then Erbeck sold some of the cattle to Springer and then some to Lopez. CP at 147-148. Contrary to the court's finding, Erbeck did not testify that he had exclusive use of Lot C to raise cattle or that Springer never used the roadway for access to Lot C. Springer testified that she and her husband raised up to 14 cattle at a time on Lot C from 1990-2007, and that their only access to Lot C was via the driveway and gate near the watering trough. CP at 161-163; 186-191. The trial court's finding that Erbeck

exclusively raised cattle on Lot C during those 17 years was not supported by the evidence.

D. The court erred in Subdividing Lot D based on Springer's Use.

Finally, the trial court's subdivision and restriction of Springer's use of Lot D is an erroneous application of property law. The trial court acknowledged that Lot D is an undivided 5 acre parcel. CP at 25-27. The court also acknowledged that Lot D could not be divided ("I don't see any legal way to divide Lot D in terms of the prescriptive easement.") CP at 27. Yet, despite acknowledging that there was no legal way to divide Lot D, the trial court divided Lot D into a one-acre residential parcel (Tax Parcel A) and a four-acre agricultural parcel (Tax Parcel B) and limited Springer's use of each of those new parcels. CP at 27.

In its oral ruling, the trial court stated that:

The Court also finds that there has been open, notorious, continuous use of the roadway for the purpose of raising cattle, growing hay, and other similar pursuits not inconsistent with Tax Parcel B and the rest of Lot D limited for those purposes. The prescriptive easement only allows for access to Tax Parcel B for agricultural, cattle raising, haying pursuits.

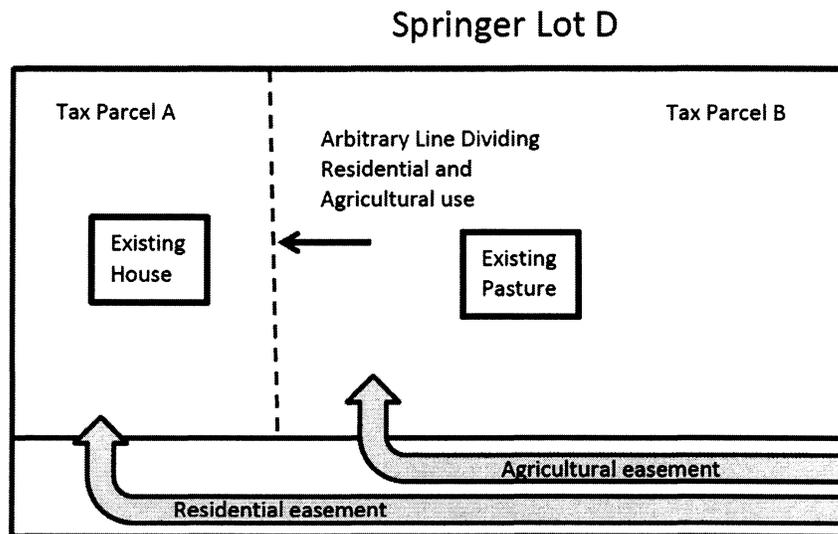
CP at 203.

Mr. Cleverley: Is the Court differentiating between Lot A and Lot B, that there is somehow a legal segregation there?

The Court: There is a fence separating the two pieces. They have been used differently. Other than that, there is a difference in use, but there is no legal segregation. They are differentiated under different tax parcels. For instance, if she wanted to move her residence over to the other portion, that would cause a problem.

CP at 205.

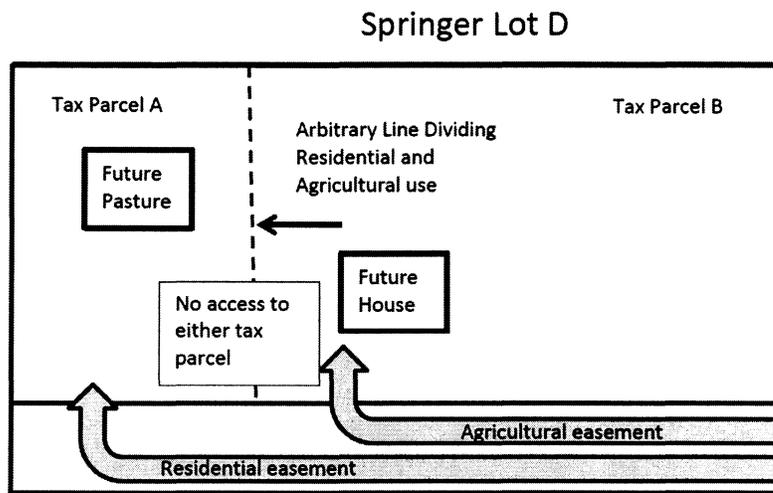
A diagram showing the court's ruling on the two easements separated by the arbitrary line is shown below:



Permitted Access to House over Driveway to Tax Lot A for residential use

The trial court's ruling creates an access conundrum. If Springer wanted to swap her existing house and pasture across the arbitrary boundary from Tax Lot A to Tax Lot B, Springer would never be able to access either one. Springer would not be able to use the prescriptive easement to Tax Lot A because the trial court has impeded Springer's

right to access Tax Lot B from Tax Lot A for residential purposes. Springer would also be unable to access the house from Lot A because the trial court restricted the use of Tax Lot B to agricultural use. So, despite Lot D being one single 5-acre parcel, the trial court created a situation where Springer cannot move within the interior boundaries of her own property, regardless of the fact that she has established prescriptive rights to access the entire 5 acres. The result of the trial court's ruling is shown below:



The Trial Court's ruling erroneously impedes Springer's right to use Lot D regardless of the access point.

The trial court should have focused on Springer's use of the roadway instead of the use of her property. Whether Springer puts her house on Tax Lot A or Tax Lot B should make no difference – she should still have the right to use the entire driveway for access to her property. The trial court's decision to arbitrarily limit Springer's internal use of Lot D was in error.

II. ATTORNEY FEES

Erbeck requests attorney fees under RCW 7.28.083(3) and RAP 18.1. However, Erbeck did not claim attorney fees under that statute at trial. At trial, Erbeck and Springer each prevailed on some of their claims, and both were prevailing parties. The trial court declined to either party any fees or costs. CP at 1-2; 4; 14. No fees or costs should be awarded to any party on appeal.

III. CONCLUSION

The trial court erred in its findings and in applying the law to the facts. This Court should review the trial court's decision de novo. When it does, this court should find that Springer has an express easement for both Lot C and Lot D. Even if she does not have an express easement for both lots, Springer established prescriptive rights for both Lot C and Lot D. And

finally, the trial court's division of Lot D into two parcels and the limitations on Springer's use of her property should be vacated.

Dated: March 25, 2015



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CERTIFICATE OF SERVICE

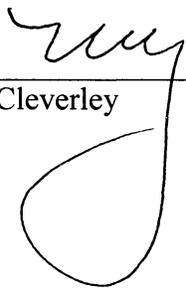
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing document on the following individual in the manner indicated:

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<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Dated: March 25, 2015



Matthew Cleverley