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COURT OF APPEALS NO. 72568-8

SNOHOMISH COUNTY CASE NO. 13-2-07974-5

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.

SUSAN SPRINGER'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

Defendant-Appellant Susan Springer ("Springer") and Plaintiffs-Appellees David and Adele Erbeck ("Erbecks") have been neighbors for 25 years. Springer owns two 5-acre parcels of property (Lots "C" and "D") that are separated by a 20' driveway owned by Erbecks. Springer has used the driveway for access to her properties since she purchased her properties in1988.

In October 2013, Erbecks sued Springer to prevent her from having access to her properties over the driveway. Springer counterclaimed for declaratory relief as to her express and prescriptive easement claims, and for injunctive relief to enjoin Erbecks from interfering with her access.

At trial, the trial court found that Springer had a prescriptive easement over the driveway for the benefit of Lot D, but that she had neither an express easement nor a prescriptive easement for Lot C.

The trial court also ruled that Springer could use only one acre of Lot D for residential purposes and 4 acres of Lot D for agricultural purposes. This essentially sub-divided Lot D and limited Springer's use of Lot D irrespective of her access.

Springer appeals because the trial court erred in its rulings.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred when it used parol evidence to interpret an unambiguous deed.

2. The Trial Court erred in concluding that Springer had not established a prescriptive easement over Erbeck's driveway for the benefit of Lot "C" because the trial court focused on specific uses instead of the overall type of usage.

3. The Trial Court erred by effectively subdividing Lot D into residential and agricultural parcels and then limiting Springer's use of the parcels.

4. The Trial Court erred in entering Finding of Fact #3 because it was improper parol evidence to interpret an unambiguous deed.

5. The Trial Court erred in entering Finding of Fact #4 because it used improper parol evidence to interpret an unambiguous deed.

6. The Trial Court erred in entering Finding of Fact #5 because the finding is unsupported by the evidence and improperly reinterprets the deed.

7. The Trial Court erred in entering Finding of Fact #6 because it improperly used parol evidence to reinterpret the deed.

8. The Trial Court erred in entering Finding of Fact #8 because it used improper parol evidence to interpret an unambiguous deed.

9. The Trial Court erred in entering Finding of Fact #14 to the extent that it found that Mathilde Kuester held no easement rights over Tract O for the benefit of Tract C.

10. The Trial Court erred in entering Finding of Fact #24 because the Trial Court failed to use the correct standard for evaluation of "continuous."

11. The Trial Court erred in entering Conclusion of Law #2 because Springer's deed includes express easement rights over Erbeck's Lot O.

12. The Trial Court erred in entering Conclusion of Law #6(a) to the extent that Springer's easement is limited to the west 132' of Springer's Lot D.

13. The Trial Court erred in entering Conclusion of Law #6(b) to the extent that Springer's easement is limited to the east 558' of Springer's Lot D and restricts Springer's use of Lot D.

14. The Trial Court erred in entering Conclusion of Law #7 because the Trial Court failed to use the correct standard for evaluation of "continuous."

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. ***Issues Pertaining to Assignment of Error #1:***

1. The Trial Court should not have used Dean Echelbarger's testimony to interpret the deed from E-K Partnership to the Keusters because the deed was unambiguous.

2. The Trial Court used an incorrect legal standard because it did not construe the deed from E-K Partnership to the Keusters against the grantors.

3. The Echelbarger to Keuster deed should have been interpreted as conveying the Keuster's property as a 20-acre parcel instead of four 5-acre parcels.

B. ***Issues Pertaining to Assignment of Error #2:***

1. The trial court erred in finding that Springer had not established a prescriptive easement over the driveway for Lot C because the court focused on the specific uses of Lot C instead of the overall type of use of Lot C.

2. The trial court used the incorrect legal standard when evaluating Springer's use of the driveway to access Lot C because the trial court focused on the specific use of cattle grazing while ignoring Springer's other agricultural uses of Lot C.

C. ***Issues Pertaining to Assignment of Error #3, 10 and 11:***

1. The trial court incorrectly focused on the use of Springer's Lot D instead of the use of the driveway for access to Lot D.

2. The trial court created a de-facto subdivision of Springer's Lot D instead of simply determining the scope of the easement over the driveway.

3. The trial court erred when it used the property tax designations of Lot D to divide Lot D into two parts and limit Springer's use of Lot D instead of simply determining the scope of the prescriptive easement.

4. The trial court erred when it limited Springer's rights to use Lot D to traverse the internal boundaries of Lot D irrespective of how she accesses the property.

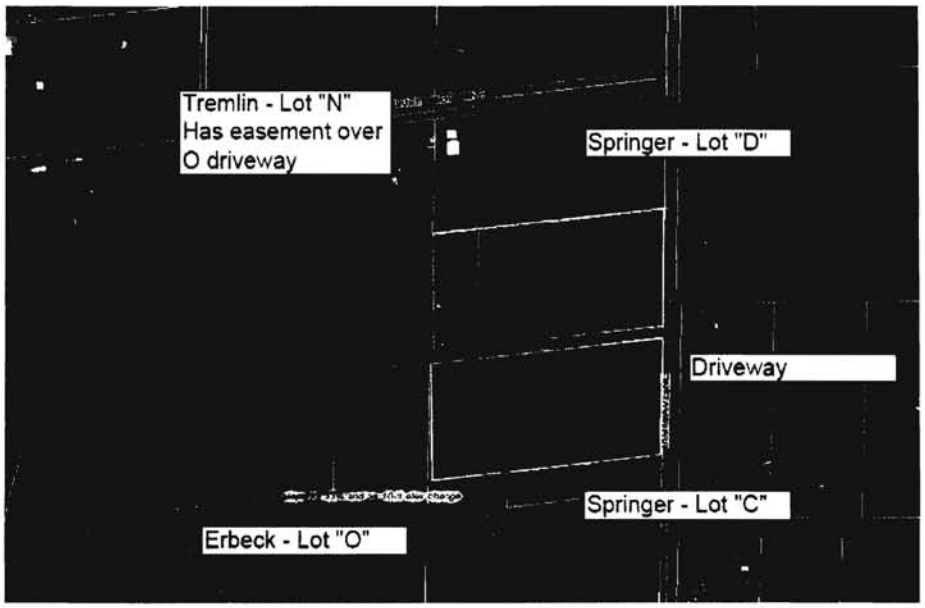
D. ***Issues Pertaining to all Assignments of Error***

1. In calculating the "continuous" requirement of prescriptive easements, the Trial Court used the incorrect legal standard because it focused on the specific uses of the property and ignored the general use of the property.

IV. STATEMENT OF THE CASE

Maps showing the properties at issue in this case are shown on Trial Exhibits 2-4[1]. Ex 3 is reproduced below:

[1] Trial exhibits will be referred to as "Ex." Clerk's Papers will be referred to as "CP." Trial transcripts are included as part of Springer's Motion for Reconsideration and are identified as a part of the clerk's papers.



Springer owns Lot C and Lot D, both of which are 5-acre parcels. CP at 6-7, 13. Lot D was segregated into two tax lots for property tax calculation purposes, but is otherwise one 5-acre parcel. CP at 201. Lots C and D are separated by a 20' driveway which is part of Erbeck's Lot O.

Erbecks own Lot O. Lot O has a long "panhandle" with the driveway that extends from Erbeck's house to 99th Avenue on the east. CP at 6-7, 94-95.

All of Erbecks and Springers' property was originally part of an approximately 60 acre parcel owned by the Echelbarger-Keeler Partnership (the "E-K Partnership"). CP at 6, Ex. 1. In 1972, the E-K Partnership subdivided the 60 acre parcel in to 16 separate lots delineated

as Lots "A" through "P." Ex. 1. The segregation plat was not recorded in the public records as a subdivision, but it was approved by the Snohomish County planning department. Ex. 1.

On January 17, 1974, the E-K Partnership conveyed 20 acres of property to Fritz and Mathilde Keuster by warranty deed. Ex. 5. The deed from E-K Partnership to Keusters conveyed the property with the following legal description:

> The East 690 feet of the South 330 feet of the North 1730 feet of Section 24, Township 30 North, Range 5 East, W.M.;
> EXCEPT 99th Avenue N. E.
> The East 690 feet of the South 330 feet of the North 1380 feet of Section 24, Township 30 North, Range 5 East, W.M.;
> EXCEPT 99th Avenue N. E.
> The East 690 feet of the South 330 feet of the North 1050 feet of Section 24, Township 30 North, Range 5 East, W M.;
> EXCEPT 99th Avenue N. E.
> The South 330 feet of the North 1380 feet of the West 660 feet of the East 1350 feet of Section 24, Township 30 North, Range 5 East, W.M.;
> TOGETHER WITH an easement over the South 20 feet of the North 1400 feet of the East 1350 feet of Section 24, Township 30 North, Range 5 East, W.M.

The deed did not refer to the segregation plat or identify particular lots being conveyed; however the conveyed property corresponds with Lots C, D, E and N of the segregation plat.

Four months after conveying the 20-acres to Keusters, the E-K Partnership conveyed what is now known as Lot O to the Erbecks. CP 97-100.

The Erbecks and Keusters began building houses on their respective properties about the same time in 1974. CP 99-101.From the time the Keusters purchased their property in 1974 until they sold it to Springer in 1988, Keusters used the driveway to access their property.

Erbecks were aware of the Keusters' use of the driveway and were concerned about it, but never took any action to stop or prevent it. Findings of Fact #22, CP at 11; CP at 130-137.

The Keusters eventually conveyed Lot E and Lot N to other parties.

On March 15, 1988, the Keusters conveyed Parcel D to Springer. Ex 9. Four days later, the Keusters conveyed Parcel C to Springer. Ex 6, 7. The transaction was done in two parts because Springer financed the parcel with the house (Lot D) with a bank loan and the Keusters carried a contract for the vacant parcel (Lot C). CP at 153-154. The deed for Lot C contained an express easement over Erbeck's driveway. Ex 6.The deed for Lot D did not contain an express easement. Ex 9. Springer believed that she had an express easement for both Lot C and Lot D. CP at 154.

Thereafter, Springer used the driveway nearly every day for over 25 years to access her home. CP at 155. She also used the driveway to access both of her properties to move cattle, mow hay, plant and maintain trees

and an orchard, build a barn, maintain fences, build corrals and bulldoze blackberries. CP at 160-173.

At trial, Erbecks acknowledged that Springer had a prescriptive easement over the driveway for access to her house on Lot D. CP at 201. However, Erbecks then argued that Springer's Lot D should be divided into two separate parcels: a one-acre parcel with the residence on it, and a four-acre agricultural parcel. CP at 229-231. Erbecks argued that since Lot D had been separated into two lots for tax purposes, the trial court should use those tax lots to differentiate Springer's access rights.

Despite acknowledging that Springer's Lot D was a single 5 acre parcel (Finding #18, CP at 10; CP at 201-202), the trial court ordered that Lot D be divided into two parcels for access purposes: a one-acre lot with the house, and a four-acre agricultural lot. CP at 201-202; CP at 3; CP at 14. The court then ruled that Springer could only use the new one-acre lot for residential purposes and could only use the new 4-acre lot for agricultural purposes. (CP at 202-203; Conclusion of Law 6, CP at 14; Judgment #3, 4 CP at 3).

The trial court found that Springer had not continuously grazed cattle on Lot C for 10 years and denied Springer any access to Lot C at all. (CP at 202-203; Judgment #6, CP at 4; Finding #23, CP at 11). The trial court

did not consider Springer's use of the driveway to access Lot C for other agricultural uses.

V. ARGUMENT

A. *Standards of Review*

1. **Interpretation of a Deed is a question of law, subject to de novo review.**

The question of whether a Deed is ambiguous is a question of law, subject to de novo review. *Carlstrom v. Hanline,* 98 Wn. App. 780, 785-86, 990 P.2d 986 (2000) ("Whether a written instrument is ambiguous is a question of law for the court.") Because the Deed is not ambiguous, its construction is also a question of law subject to de novo review. Stranberg v. Lasz, 115 Wash. App. 396, 402, 63 P.3d 809, 812 (2003).

2. **The trial Court's denial of the prescriptive easement for Lot C is subject to de novo review because the trial court used the incorrect legal standard.**

The trial court's ruling that denied Springer a prescriptive easement is subject to denovo review because the trial court used the wrong legal standard in deciding whether use was "continuous." "When we review whether a trial court applied an incorrect legal standard, we review de

novo the choice of law and its application to the facts in the case." State v. Corona, 164 Wash. App. 76, 79, 261 P.3d 680, 682 (2011).

3. The trial court's subdivision of Lot D to provide separate access and limitations on the use is subject to de novo review.

The trial court's division of Lot D into a residential lot and an agricultural lot, and limiting Springer's use of Lot D is an error of law and subject to de novo review. To the extent that this involves interpretation of the scope of an express easement, it is a mixed question of law and fact. Wilson & Son Ranch, LLC v. Hintz, 162 Wash. App. 297, 305, 253 P.3d 470, 474 (2011).

B. *Arguments as to Assignments of Error*

1. The Trial Court should not have used parol evidence to interpret the meaning of an unambiguous deed.

The trial court should not have used parol evidence to interpret the meaning of the deeds because they were not ambiguous. "The pivotal issue in deciding the propriety of admitting parol evidence is whether the written instrument is ambiguous. A written instrument is ambiguous when its terms are uncertain or capable of being understood as having more than

one meaning." Green v. Lupo, 32 Wash. App. 318, 322, 647 P.2d 51, 53 (1982).

The deed from E-K Partners to Keuster contained the entire legal description of the property being conveyed with four "calls," plus the granting of an easement. That legal description is complete in itself. The deed from E-K Partners to Keuster did not refer to the plat map to identify the property being conveyed. The only evidence the court should have considered in interpreting the deed from E-K Partnership to the Keusters is the deed itself. Since the deed unambiguously conveyed 20 acres of land with an easement, the trial court erred by using extrinsic evidence of the plat map and the declaration of Dean Echelbarger to re-interpret the deed to mean a conveyance of four separate parcels.

2. The Express Easement Benefitted the entirety of the Keuster's property, and Keusters had the ability to convey the express easement to Springer.

The trial court erred because it found that the Keuster's easement only benefitted part of the Keuster property instead of the entire 20 acres. An easement granted to one property continues to benefit that property, even if it is subdivided. "Easements appurtenant become part of the realty which they benefit. Unless limited by the terms of creation or transfer, appurtenant easements follow possession of the dominant estate through

successive transfers. The rule applies even when the dominant estate is subdivided into parcels, with each parcel continuing to enjoy the use of the servient tenement." Green v. Lupo, 32 Wash. App. 318, 323, 647 P.2d 51, 54 (1982). "Ordinarily, such an easement is appurtenant not only to the dominant tract as a whole, but also to each and every part thereof, and is not extinguished by a division of the dominant estate but thereafter inures to the benefit of the owners of these several parts." Heritage Standard Bank & Trust Co. v. Trustees of Sch. of Twp. No. 37 N., Range 12, E. of Third Principal Meridian in Cook Cnty., 84 Ill. App. 3d 653, 657, 405 N.E.2d 1196, 1199 (1980).

Even if the grant of the easement only referenced one parcel, the grant of an easement to owners of adjacent land evidences the intent that the easement benefit the adjacent land as well. "The grant of an easement for ingress, egress and utilities to the owners of adjacent land is evidence of an intent that the easement benefit the grantees' adjacent land." Green v. Lupo, 32 Wash. App. 318, 322, 647 P.2d 51, 53 (1982). Since the easement from E-K Partners to Keusters benefitted the Keusters entire property, the Keusters had the right to convey that easement when they eventually sold the smaller parcels.

There is no evidence that the Keusters intended the parcels to be separate lots at the time of their purchase. When the E-K Partnership conveyed the 20 acres to the Keusters, the E-K Partnership still owned Erbeck's property, so it had the authority to grant the easement for the benefit of the full 20 acres. There was no limitation in the deed to suggest that the easement was intended to benefit only one parcel. Indeed, that interpretation would mean that the Keusters intentionally purchased property without access, despite them all being contiguous. That certainly could not have been the Keuster's intent.

When the E-K Deed is properly interpreted as a conveyance of 20 acres plus an easement, there is no question that the Keusters had an easement over Erbeck's driveway for the benefit of the entire 20 acres. If the Keusters still owned the 20- acre parcel, the entire 20 acres would still be entitled to use the easement for the entire 20 acres.

The trial court erred because it did not treat the unambiguous 20-acre purchase as one conveyance with an easement for the entire parcel. Instead, the court treated the single deed as four separate conveyances based on the extrinsic evidence of the plat map.

3. The easement runs with the land even if not separately listed in the deed.

An easement runs with the dominant land even if it is not separately conveyed. "Significantly, an appurtenant easement passes to the successor in interest of the dominant estate *even if the easement is not mentioned in the instrument of transfer*." M.K.K.I., Inc. v. Krueger, 135 Wash. App. 647, 655, 145 P.3d 411, 416 (2006) (emphasis added).

First, when the Keusters conveyed Lot C to Springer, they included the express easement over the driveway as part of the conveyance. Therefore, the easement over the Erbeck's driveway for Lot C was also conveyed to Springer. The trial court therefore erred when it concluded that Springer had no express easement for Lot C.

Second, regardless of whether it was specifically stated in the deed, the express easement passed to Springer as a matter of law as part of the dominant estate for Lot D, even though it was not separately identified in Springer's deed for Lot D.

C. *The trial court erred in concluding that Springer had not proven a prescriptive easement over Erbeck's Driveway for the Benefit of Lot C because the court focused on specific uses instead of the overall type of use.*

Even if Springer did not have an express easement for Lot C, the trial court erred when it found that Springer did not have prescriptive rights for Lot C because she had not established continuous use for more than 10 years. However, the trial court used the incorrect legal standard. "Continuous and interrupted use" does not require Springer to prove constant use of the driveway. She need only demonstrate use of the same character that a true owner might make of the property considering its nature and location. Lee v. Lozier, 88 Wash. App. 176, 185, 945 P.2d 214, 219 (1997):

> The "purpose" for which the easement was claimed by the neighbors was that of recreation. Lozier cites no authority for the proposition that an easement must be specifically limited to the individual activities that each of the claimants proved they engaged in in the past, and we know of none. Instead, as stated in the *Yakima Valley* case, the easement extends to uses necessary to achieve the *purpose* of the easement.
>
> Lee v. Lozier, 88 Wash. App. 176, 187, 945 P.2d 214, 220 (1997).

Here, the trial court looked only at whether Springer had used the roadway for access to Lot C for *cattle grazing*. The trial court ignored testimony as to the overall nature and location of the property and whether

the uses Springer testified to (ie. grazing and transporting cows, mowing, haying, caring for trees, caring for fences, and placing wood for the building of a pole barn) were consistent with the overall purpose of such an easement. Since the trial court focused on the single use of cattle grazing and did not look at the overall nature and character of the property, it used the wrong legal standard.

Springer testified that the purpose of using the driveway to access Lot C was for agricultural purposes. Her use was not limited to the specific activity of grazing cattle on a daily basis, but for the overall purpose of accessing her property for any agricultural use. The trial erred when it failed to evaluate all of Springer's uses of Lot C to determine whether those uses were consistent with prescriptive use of the driveway for agricultural purposes.

D. *The court erred in concluding that Springer's use of Lot "D" is limited by the nature of the prescriptive easement and in subdividing the 5 acre parcel into two separate parcels with separate uses.*

Lot D is one single 5-acre parcel. Although the Keusters had obtained an administrative segregation of Lot D into two tax parcels for property tax assessment purposes, that designation did not subdivide the property.

The trial court erred when it ordered the division of the 5-acre Lot D into a one-acre residential use parcel and a 4-acre agricultural use parcel.

Under the court's ruling, Ms. Springer can access the western 1-acre of Lot D for residential purposes but she is prohibited from accessing the eastern 4-acres unless it is for agricultural purposes, *even if she is accessing it from inside the property boundary*. In other words, Ms. Springer can access the western 132 feet of the property for residential purposes, but she is now prohibited from crossing an invisible boundary between the eastern and western portions of her property if the use is different. This is an illogical result and contrary to traditional legal concepts related to the ownership of land. It makes no sense to say that the western 1 acre of Lot D can be used only for residential purposes and the eastern part of Lot D can be used only for agricultural purposes. It's the same undivided 5-acre parcel of property.

The trial court should not have divided and limited Springer's use of Lot D. She has a prescriptive easement to access Lot D for residential purposes. She has a prescriptive easement to access Lot D for agricultural purposes. At the very most, the court could have said that Springer's use of the *driveway* might be limited to historic use. For example, the court could have said that Springer can use the driveway for farm equipment up

to the corral gates, but that farm equipment may not go past the corral gates because they have not historically done so. However, once Springer is on Lot D, she should not be subject to use restrictions *within* the 5 acres itself. The court improperly focused on Springer's use of *her property* instead of her rights of use of *the driveway*.

VI. ATTORNEY FEES

There are no contractual or statutory bases for the award of attorney fees to any party in this proceeding and they are not at issue.

VII. CONCLUSIONS

1. The trial court erred as a matter of law in finding that the Deed from Echelbarger to Keuster was ambiguous and that the deed did not convey an express easement over the driveway for the benefit of Lot C and D. The Court should remand for entry of judgment in Springer's favor granting her an express easement for both Lots C and D.

2. The trial court erred in finding that Springer had not established a prescriptive easement for Lot C. The Court should remand for entry of a judgment in Springer's favor granting her a prescriptive easement over the driveway for the benefit of Lot C.

3. The trial court erred in finding that Springer's prescriptive easement for Lot D limits her usage rights of Lot D. The court should remand for entry of a judgment that Springer is entitled to prescriptive use of the entire driveway for residential purposes, and that Springer is entitled to prescriptive use of the portion of the driveway from the road to the gates for agricultural purposes. The portion of the judgment limiting Springer's use of her single 5-acre parcel should not be limited by the prescriptive easement over the driveway.

Dated: January 5, 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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Dated: January 5, 2015

Kristen Linton