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NO. 35238-9-II

STATE OF WASHINGTON  
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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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LAURA L. HENDRICKS,

Appellant,

vs.

ANTONIUK FAMILY TRUST, a Washington trust; NEWTON  
ANTONIUK and CHRISTINE ANTONIUK, husband and wife,

Respondents.

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**REPLY BRIEF OF APPELLANT**

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**ORIGINAL**

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Appellant Laura Hendricks (hereafter “Hendricks”) submits this Reply Brief in response to the “Appellees’ Responsive Brief”.

## I. ARGUMENT

### 1. The Antoniuk Right of Way Is Limited To The Bounds Of The Easement Area.

In their Responsive Brief, the respondents Antoniuk Family Trust, Newton Antoniuk and Christine Antoniuk (hereinafter collectively referred to as the “Antoniuks”) assert that Hendricks “cherry-picked” language from the septic easement in an attempt to convince this Court that the Antoniuks may only use that portion of the Hendricks’ property subject to their easement to access their drainfield. They assert that a full reading of the easement demonstrates that there is no limitation placed on where or how they can access their drainfield.

The Antoniuks cite to no case law or other authority to support their claim that their easement is either undefined or runs over the entire Hendricks property. The clear language of the easement itself limits their “perpetual easement and **right of way**” to the “easement area” as depicted on the Exhibit “A” attached to the easement document. (CP 11-13) Thus, while their easement and right of way does indeed run “under, through and across” the

Hendricks' property, it does so only within, and is expressly limited to, the boundaries of the easement area.

As noted in Hendricks' Appellate Brief,

[A] contract will be given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective."

Washington Public Utility Dist's Utilities System v. Public Utilit., 112 Wn.2d 1, 18-19, 771 P.2d 701 (1989). The Antoniuks' proposed "interpretation" of the septic easement would render the document nonsensical and ineffective, as literally the entire Hendricks' property would be subject to their easement, including the area on which Hendricks' home is located. Such a result would be absurd.

The septic easement clearly defines the "easement area" and provides that the Antoniuks' right of way is located within that easement area. The easement area and right of way run from the Antoniuk property, along the north boundary of the Hendricks' property, to the drainfield area. The terms of the septic easement are crystal clear and neither the Antoniuks nor the Trial Court are entitled to ignore those clear terms to grant the Antoniuks the right to use additional areas of Hendricks' property as a right of way to the drainfield area.

2. Res Judicata Bars The Antoniuks' Belated Claim.

“Res judicata, or claim preclusion, prohibits the relitigation of claims and issues that were litigated, **or could have been litigated**, in a prior action.” Pederson v. Potter, 103 Wn.App. 62, 67, 11 P.3d 833 (2000)(emphasis added). The Antoniuks’ counterclaim (excluding the tort claims dismissed prior to trial) sought only a determination that Hendricks was violating the terms of the septic easement by allowing certain vegetation to grow within the drainfield area. (CP 1-13). The counterclaim contained absolutely no claim that the right of way defined by the easement was insufficient or needed to be further defined.

Nonetheless, Newton Antoniuk testified at trial that he wanted to be able to use the most convenient access for his contractors to access his drainfield. (CP 108). Thus, though the Antoniuks had not asserted a separate claim to obtain a right of way outside the boundaries of their septic easement, they not only were aware of their desire for such an easement, they actually raised, though they did not litigate, the issue at trial.

Because the Antoniuks had neither raised the issue in their counterclaim nor litigated it at trial, the Trial Judge made no findings or conclusions on the issue and did not modify or expand the septic

easement right of way in its judgment. Nor did the Antoniuks ever ask the Trial Judge to reconsider or modify the judgment he entered. Instead, well over a year after entry of the judgment they brought a motion to enforce the judgment before first a court commissioner, and then a different judge.

The Antoniuks now, at page 7 of their Appellees' Responsive Brief, make the novel assertion that their "motion to enforce" was actually a motion to "clarify" the August 2004 judgment. But not only was the motion not termed a motion to clarify, it was brought before Judge Vicki Hogan, not Judge Pro Tem Donald Thompson, the Trial Judge. Judge Hogan could not "clarify" what Judge Pro Tem Thompson intended, nor did the Antoniuks ever intend that she do so, because there was nothing for Judge Hogan to clarify. The Antoniuks' counterclaim asserted no claim to relocate or define their right of way, and the issue, though raised by Mr. Antoniuk, was not litigated at trial, so the judgment in no way addressed the issue. Instead, the Antoniuks sought in their "motion to enforce" to obtain wholly new relief, beyond that provided to them in the judgment.

The Antoniuks' belated attempt, more than a year after the entry of judgment, to litigate their claim that their easement does

not define a right of way was and is clearly barred by res judicata, and thus the Trial Court's July 21, 2006 order was in error and must be reversed.

### **CONCLUSION**

The Antoniuks' shifting kaleidoscope of arguments before the Trial Court and this court dramatically illustrates that they have ignored the rules of civil procedure in making their belated claim for a right of way outside of the boundaries of their express easement. They argue res judicata should apply to them, despite not only having had the opportunity to raise the issue at trial, but Mr. Antoniuk actually having raised their desire for convenient access to their drainfield at trial. They further believe they should be entitled to obtain a substantial revision of the August 2004 judgment, complete with new findings of fact and conclusions of law, without even addressing, let alone meeting, the requirements of CRs 59 and 60 governing such post trial relief.

At the same time, however, the Antoniuks assert that their "motion to enforce judgment" was really a "motion to clarify", because they claim they sought only clarification of the previously entered judgment, not any further substantive relief, despite the

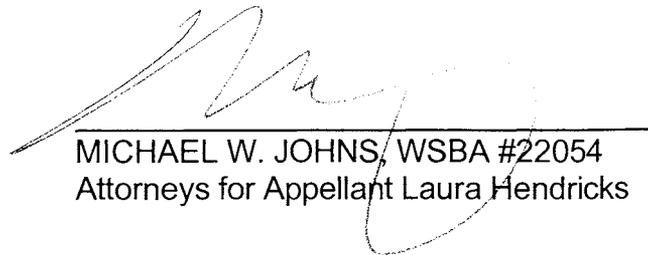
numerous new findings of fact and conclusions of law required to support the Trial Court's July 21, 2006 post trial order.

But the septic easement specifically defines the bounds of their easement, within which the Antoniuk right of way is expressly located. Even if this were not so, the Antoniuks are barred from raising the issue over a year after trial, where it should have been litigated. The Trial Court thus erred in subjecting the remaining portions of the Hendricks' property located outside of the boundaries of the septic easement to the burdens of that easement.

For all of these reasons, the Order on Motion to Enforce Judgment entered July 21, 2006 should be vacated.

Respectfully submitted this 14<sup>th</sup> day March, 2007.

DAVIS ROBERTS & JOHNS, PLLC



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Attorneys for Appellant Laura Hendricks

APPELLANT'S AFFIDAVIT OF SERVICE  
OTHER LEGAL PROCESS  
STATE OF WASHINGTON  
BY Chm  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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NO. 35238-9-II

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON )  
County of Pierce ) ss.

PAMELA M. GIBSON, being first duly sworn on oath, deposes  
and says:

That on the 16th day of March, 2007, she sent *via ABC Legal  
Messenger* to:

ORIGINAL

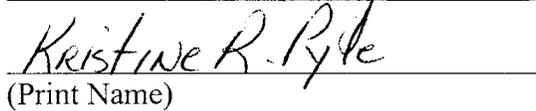
James A. Cathcart  
Morton McGoldrick  
820 "A" St., Suite 600  
P.O. Box 1533  
Tacoma, WA 98401

a copy of **Reply Brief of Appellant** and this **Affidavit of Service**.

  
PAMELA M. GIBSON

SIGNED AND SWORN to before me this 15<sup>th</sup> day of March,  
2007.



(Print Name)

NOTARY PUBLIC in and for the State of  
Washington, residing at Yelm, WA  
My Commission Expires: 9-4-09