

original

No. 35238-9-II

THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

LAURA L. HENDRICKS
Appellant

and

ANTONIUK FAMILY TRUST, A Washington Trust; NEWTON
ANTONIUK and CHRISTINE ANTONIUK, husband and wife,
Appellees

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY
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ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Pierce County Cause No. 02-2-14249-0

~~APPELLEES' RESPONSIVE BRIEF~~

Respondents

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A. APPELLANT'S ASSIGNMENT OF ERROR

Appellant makes five assignments of error not repeated herein per RAP 10.3

B. STATEMENT OF THE CASE:

Hendricks' statement of the procedural background is correct as to the nature of the pleadings and litigation and the dates. To the extent that inferences are drawn and argument is made in the guise of statement, those issues will be addressed in the Statement of Facts and Argument.

C. STATEMENT OF FACTS:

Antoniuks own a waterfront parcel of real property directly below Hendricks' property, both of which were short platted from an existing lot in 1995. The Hendricks property is significantly higher than Antoniuks and the slope of the rear of Antoniuk's property leading to Hendricks' is steep. (CP 173-184)

Both the primary and secondary septic drainfields serving the Antoniuks' property are located to the rear of Hendricks' home on an undeveloped portion of her property. (CP131-132) As shown on the plat map (CP 131-132) in order for the sewage to be delivered to the drainfield from the Antoniuks' home it must be pumped through a line located in a 5 foot wide piece of land parallel and adjacent to the north boundaries of the

Antoniuk and Hendricks properties and identified on the plat map as the **“5’ DRAINFIELD TRANSPORT EASEMENT”**. As the transport easement passes to the rear of the Hendricks home it curves to the south to enter a junction box in the drainfield and is thereafter distributed through the drainlines.

Per the language of the easement, the owners of the Antoniuk’s lot were granted “a perpetual easement and right-of-way over the “easement area” described below and on the attached Exhibit “A”, **under, through and across** (emphasis added) that real estate located in Pierce County, Washington legally described as...” and going on to describe the Hendricks property.

On August 16, 2004 Judge Donald Thompson, sitting *pro tem* by agreement of the parties entered judgment in this case on Antoniuk’s counterclaim alleging Hendricks’ breach of her duties as servient party to a septic drainfield easement. (CP 19-21). Judge Thompson found as facts (CP 46) that there was vegetation growing on the Antoniuk’s drainfield easement that posed a danger to the drainfield and that Ms. Hendricks had breached her duties as the servient landowner by refusing to allow the Antoniuks access to the easement to exercise their rights to maintain the field and concluded (CP 47) that this included having access so as to

remove such vegetation. While it is true that Mr. Antoniuk testified that he would like to be able to use the driveway to access the drainfield and that it was the most convenient access, Judge Thompson was not asked to determine a route nor does the record reflect that this issue had even been discussed between the parties or that Ms. Hendricks responded to that testimony in her own testimony.

Ms. Hendricks appealed Judge Thompson's ruling, claiming in relevant part that the Court erred by concluding that the easement gave Antoniuks the right to enter the Hendricks property to clear the inimical vegetation. On 10/04/05 Division II, defining the issues as whether or not the Court could order that Antoniuks be allowed to enter and clear when the initial complaint asked that Hendricks be so ordered, and then whether or not the breadth of the relief was justified under the easement. The Court denied the appeal in an unpublished opinion (CP 32)

Between July 2005 and the end of September 2005 counsel exchanged letters (CP144-155) attempting to arrange for the Antoniuks to have access to perform the clearing. While counsel for Hendricks has been professional at all times the letters are indicative of the Antoniuks desire to act pragmatically and reasonably and Ms. Hendricks desire to be obstructionist is every way possible.

In Mr. Johns' letter of September 26, 2005 (CP 153-154) – over a year after trial- Ms. Hendricks informed Antoniuk's for the first time that her position was that the Antoniuk's access to their drainfield was only via the 5' "transport easement" that climbed up the steep north property line through landscaping on the Antoniuk's property and thick vegetation on Ms. Hendricks property.

The Antoniuk's then filed the motion to enforce and for an injunction preventing interference from Ms. Hendricks. Antoniuk's sought to use the Hendricks established driveway which lead from the entrance to the property to a short distance from the drainfield itself (CP 119-123, CP 136-138) and Hendricks sought to confine the access to the actual footprint of the complete easement since there was a contiguous point between the Antoniuk property and where the easement entered the Hendricks property. Each party filed expert declarations and declarations of the parties. Photographs were supplied (CP173-184) to give the Court a sense of the geography and the Court entered its ruling (CP 109) on 07/21/06.

D. ARGUMENT

1. EASEMENT ACCESS AND JUDGMENT ACCESS:

In her brief Ms. Hendricks cites only a portion of the language from the easement in an attempt to convince the court that the language of that easement means that Antoniuks may only cross that portion of Hendricks property that is part of the easement to use the easement. However, as cited above, the actual language of the easement defines it as “a perpetual easement and right-of-way over the “easement area” described below and on the attached Exhibit “A”, **under, through and across** (Hendricks property). Even the cherrypicked language cited by Hendricks does not lead to the conclusion that the intent of the “right of way” language was to limit access to the easement rather than simply make it clear that they could enter upon it. Using the entire definition from the easement makes it clear that Antoniuks can cross Hendricks property to perform their maintenance but does not describe where or how.

Instructive is the plat map wherein the strip of easement along the northern boundaries of the properties is defined as a “transport easement” where the transport line delivers the sewage to the drainfield. It does not call the strip an “access easement”.

Accordingly, there simply is no language in the easement which can reasonably be interpreted to limit the Antoniuk's access to crossing completed across their landscaped property, going up the North property line and around behind the Hendricks home and back towards the South property line

As for the August 2004 Order, Judge Thompson ordered that the Antoniuks would have "access" to the easement for the purposes set out therein without further describing the nature of that access. Once again there is no limiting language.

2. RES JUDICATA:

Here the question is whether or not Antoniuk's failure to plead a claim to use a specific route to access their easement for maintenance barred them in October 2005 from bringing the instant motion before the court and necessarily would bar them evermore from doing to. In *Hendricks v Antoniuk Family Trust*, 129 Wash. App. 1043, not reported in P.3rd, 2005 Hendricks also argued variances between the pleadings and the judgment and the Court properly held that the issues really related to the relief granted and that the relief was within the discretion of the court and found proper evidentiary and logical basis for the ordered relief. Again herein we are talking relief – the fact that Ms.

Hendricks breached her obligations has been established and the fact that Antoniuks have the right to access to cure the consequences of that breach has been established.

The action here, while titled “motion to enforce” essentially came before the court as a motion to clarify the August 2004 order to describe the route of access because “tell us what the route is or can be” was the issue raised by both parties.

The definition of clarification is found in *Rivard v Rivard*, 75 Wash.2d 415, 451 P.2d 677 (1969) wherein the Court stated:

A modification of visitation rights occurs where the visitation rights given to one of the parties is either extended beyond the scope originally intended or where those rights are reduced, giving the party less rights than those he originally received. A clarification, on the other hand, is merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary.

75 Wash. 2d at 418.

The August 2004 Judgment conferred upon the Antoniuks the right to enter the Hendricks property to perform the designated work and the order appealed simply clarifies how that right is to be exercised. It is not a separate claim which had to be separately plead and tried at an evidentiary hearing.

If this were the case would there be any motions to clarify?

Mr. Rivard was the possessor of “reasonable visitation rights” and there was disagreement about what those were.

In the instant case, the divorce decree provided that Mr. Rivard was to have reasonable visitation rights. When he and Mrs. Rivard were unable to agree as to what constituted such rights, respondent had the right to have the court specifically spell out what rights of visitation with his children were available to him. Upon motion the trial court allowed respondent alternate weekends and one evening per week. This is well within the scope of reasonable visitation rights and the court's action constituted a clarification of the decree and not a modification.

75 Wash. 2d at 419.

The route to be taken to exercise the easement rights was not an issue between the parties in 2002 when the lawsuits were filed or in 2004 when the trial was held and judgment entered. It was not until September 2005 that Ms. Hendricks made her claim that the easement language restricted access to the “transport easement” route. Note that in the Declaration of Antoniuk’s contractor, Mr. Metzdorf (CP137-138) he quotes Ms. Hendricks as saying to him on the morning the work was to be done “Ha! Guess you didn’t think of that one did you” as she invoked the “transport easement” demand and blocked off the driveway. Ms.

Hendricks did not dispute that testimony and it is further evidence that this was an issue carefully husbanded and saved as part of a long term plan of obstruction and delay and intransigence and not one that Antoniuks had cause to anticipate in 2002-2004. A litigant is not required to plead every issue that could possibly be in contention – then or in the future – in order to avoid a finding that he is forever barred from doing so on a claim of *res judicata*

In sum, Mr. Antoniuk’s brief reference to a desired and convenient route in his testimony at trial does not amount to having litigated the route issue in 2004. Clearly Judge Thompson made no finding on this issue so it is clear that he didn’t think it had been litigated and needed decision nor did Hendricks present any evidence from the record indicating that she litigated that issue at trial.

In retrospect, whenever an issue arises downstream from litigation that, in hindsight, could have been solved earlier the litigants will slap themselves on the forehead and say “If I had only known”. However, the fact that, in hindsight, the issue could have been raised does not equate to a finding that at the time of the previous litigation the issue was so clear and so ripe for decision that it should have been raised under penalty of claim preclusion/res judicata. In the absence of evidence in

2002-2004 that Hendricks would insist upon the use of a completely illogical and tortuous route to access the drainfield there simply is no equity in *res judicata* herein.

3. FAILURE TO HOLD EVIDENTIARY HEARING:

Hendricks argues now that it was error for the judge to enter her order without conducting a fact finding hearing and taking testimony.

CR 43(e)(1) provides that on motions the judge may hear the matter on affidavits or “[M]ay direct that the matter be heard wholly or partly on oral testimony or depositions.”

Hendricks did not request of the Court that she permit or order an evidentiary hearing or allow oral testimony. Accordingly, given that the Court Rules provide for exactly the opportunity that Hendricks now claims she should have had she should be held to have waived such a claim. Plaintiff filed two separate responses to the motion (CP 63, CP 100) and didn't mention this issue therein. Having failed to raise the issue below she is barred from raising it in this appeal. RAP 2.5(a).

4. DETERMINATION THAT THE EASEMENT DOES NOT DEFINE THE ACCESS ROUTE:

Hendricks argues that the Court erred by finding that the easement itself does not establish how the access is to be exercised. Hendricks continues to argue that the language quoted above from the easement clearly and beyond cavil restricts access to the actual footprint of the easement. They do so by arguing that “right of way” should be interpreted to mean the route that the Antoniuks tenants must use to access the easement for the purposes described.

Easements are of many types. Some prohibit action or require action by the servient estate such as “view” easements without providing any right to access or entry by the dominant estate. Some give authority for the dominant estate to take action and enter upon the servient estate. Accordingly simply granting the “easement” is not fully descriptive of the nature of the relative rights and responsibilities. In this context “right of way over” simply means that Antoniuks have a right to be physically on the site of the prescribed easement for the purposes set out therein and “under, through, and across” most reasonably describe how they get there generally.

Hendricks' citation to the Washington Public Utility case, 112 Wn. 2d 1, 771 P.2d 701 (1989) is instructive as it instructs against interpretations of contracts that lead to “strained or forced construction that leads to an absurd conclusion”.

The record is clear that the drainfield easement is located directly behind the Hendricks home. As can be seen in the plat map (CP 131-132) and from the declarations of Newton Antoniuk, Tom Metzdorf, and Christine Antoniuk and the exhibits attached, (CP 119-135, 136-142, 168-184) following the route demanded by Hendricks requires a long traverse over steeply sloped and landscaped property, circling around the north side of the Hendricks house and back the other direction, being confined to a 5 foot wide strip of land, and taking machinery over that path. On the other hand, using the driveway allows the use of already cleared, hardpacked ground that leads in a short distance to a spot adjacent to the drainfield. Whose interpretation is strained, forced, or nonsensical?

The testimony of Mr. Goodman and Mr. Gunia does not speak to the damage that would be caused to the Antoniuk’s landscaping and property if the men and equipment and removed vegetation had to be trekked across the entire width of the property – damage I remind the Court which would be the result of Ms. Hendricks breach of her

obligations. The order allowing the use of the driveway has specific protection to avoid damage to Ms. Hendricks property.

Regardless of whether or not it would be physically possible to use the Hendricks route, it can hardly be denied that it would be the most **inconvenient** for Antoniuks given the fact that vehicles to haul away the removed vegetation could not come anywhere close to the drainfield, that taking men, equipment, mechanized gear, and spoils over the landscaped property would cause damage, and that the sheer length of the trip would be far longer than the driveway route. Clearly there is substantial evidence to support the court's findings of fact that the driveway is the most reasonable and convenient route.

This litigation began in 2002 and has lead to a trial, now two appeals, and multiple appearances on motions. Ms. Hendricks is not acting in good faith and is simply engaging in protracted obstructionism and delay solely for the purpose of aggravating her neighbors. A judge standing at the spot where the access driveways to the Hendricks and Antoniuk properties branch would look around for a moment and then find this dispute ludicrous. The photo exhibits will have to do as well as possible.

The assignments of error are not well founded and the ruling below should be upheld.

5. ATTORNEYS FEES:

Per RAP 18.1 the Antoniuks request an award of attorneys fees on appeal. This is meritless litigation, elevating arcane technical divination over reasonable and logical interpretation. This is the second appeal the Antoniuks have had to defend in this same case. Hendricks has not acted in good faith and this is a frivolous appeal.

E. CONCLUSION.

Appellant's assignments of error are not well founded. There is substantial evidence to support the court's findings of fact below and there is no abuse of discretion in the conclusions found from those facts. The issue of the route Antoniuks could use to access their drainfield for the purposes allowed by the easement and Judge Thompson's ruling was never raised, either formally or informally, by either party until September 26, 2006. "Could have been brought" in the context of *res judicata* refers to issues ripe for adjudication and as Antoniuks had no warning that Ms. Hendricks was going to take this position until they had scheduled their contractor to do the work and he was virtually on the lot, the prior litigation hardly bars them from seeking the Court's direction.

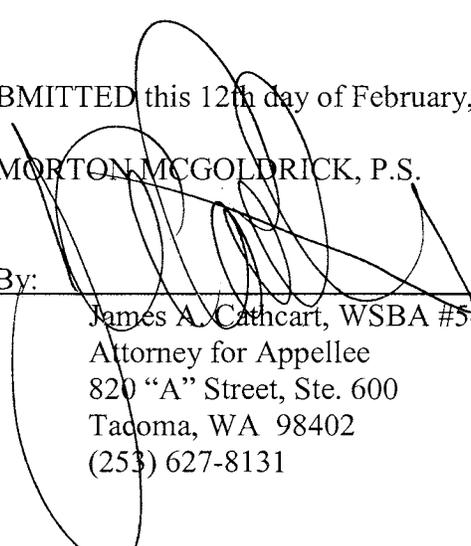
Hendricks did not seek an evidentiary hearing with testimony below per CR 43(e)(1) and cannot raise as error failure of the court below to provide relief they didn't ask for.

Given the complete test of the Easement, the claim that the easement language unequivocally confines the Antoniuks to a clearly inconvenient, if even possible, and circuitious route to access their drainfield is clearly erroneous. The 5 foot strip is denominated as a transport easement, not an access easement, and the document clearly permits access through, under, and across Hendricks land.

Finally, given the well-founded facts, the Court's decision to permit access via the driveway is clearly the most reasonable, convenient, and logical access and the court properly exercised its discretion and judgment to so order.

RESPECTFULLY SUBMITTED this 12th day of February, 2007.

MORTON MCGOLDRICK, P.S.

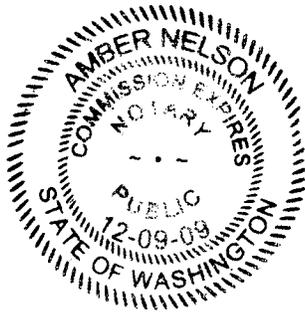
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a copy of Appellees' Responsive Brief.

Susan K. Toma
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SUBSCRIBED AND SWORN to before me this 12th day of February, 2007.



Amber Nelson
Amber Nelson

(Print Name)

NOTARY PUBLIC in and for the State of Washington, residing at

Olympia WA
My Commission Expires: 12/9/09

AFFIDAVIT OF SERVICE -2-