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DIVISION II  
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Case No.: 36447-6-II

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

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RICHARD C. EWAN III, and INA KAY EWAN  
Husband and Wife

Appellees

- and -

BARBARA A. PELOT

Appellant

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APPELLANT'S OPENING BRIEF ON APPEAL

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ORIGINAL

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## INTRODUCTION

This appeal requests this court to review an easement dispute. The main issue on appeal is whether a property owner (Mrs. Pelot) may maintain a lightweight unlocked aluminum gate on her property line and across an easement. Washington case law has recognized such a right for decades. As set forth below, the creators of the easement (the Ewans) maintained a gate at the exact same spot and sold the property to the current owner with a gate in place. Pelot wanted the gate in place to dissuade trespassers from driving onto her property and to help keep her dogs on the property. The only burden on the Ewans is that they have to get out of their car to open and close the gate. This court should reverse the trial court and affirm the property owner's right to maintain a gate across the easement.

Another issue on appeal is whether a trial court may authorize a trespassing fence to remain in continuing trespass. While the trial court correctly concluded that a fence erected by the Ewans on Pelot's property was a continuing trespass and could be removed, the trial court erred by limiting Pelot's ability to request the gate be removed to a 30 day period of time, which effectively authorized the trespass to continue. This court is asked to hold that the trial court could not limit Pelot's ability to request removal of the trespassing fence to a 30-day period of time.

### ASSIGNMENTS OF ERROR

- A. The trial court erred in making its finding of fact in paragraph O that lost travelers would come onto Pelot's property approximately two times per week.
- B. The trial court erred in making its finding of fact in paragraph P that there was no trespass on Parcel B (Pelot's property).
- C. The trial court erred in making its finding of fact in paragraph R that Pelot is not subjected to a greater burden than originally contemplated by the creator of the easement and by finding that Pelot could resolve her concerns by locating a gate at Location 3.
- D. The trial court erred in making its finding of fact in paragraph S that a gate at Location 2 is an unreasonable interference with the Ewans' use of Parcel A.
- E. The trial court erred in its conclusions of law in paragraph A as to when owners of a servient estate may maintain a gate across an easement.
- F. The trial court erred in its conclusions of law in paragraph C that a gate at Location 2 is an unreasonable interference with the Ewans' use of Parcel A.

- G. The trial court erred in its conclusions of law in paragraph D that the use of Pelot' driveway by lost travelers did not justify interference with the Ewans' access to Parcel A.
- H. The trial court erred in its conclusions of law in paragraph D that a reasonable alternative would be to locate a gate at Location 3.
- I. The trial court erred in its conclusions of law in paragraph F by limiting Pelot's ability to demand removal of the fencing on the east side of the Parcel B easement to a period of 30 days within entry of the Findings of Fact, Conclusions of Law and Decision.

#### **STATEMENT OF THE CASE**

In the early 1990s, Richard C. Ewan, III and Ina Kay Ewan, husband and wife, owned two pieces of property, designated Parcels A and B on Exhibit A to the Decree with Findings of Fact and Conclusions of Law. CP at 40 – 41, 49. The Ewans built a house on Parcel B in 1992. CP at 41. In April 1994, the Ewans drafted and recorded a Declaration of Easements with Road Maintenance Provisions which provided for an easement over a portion of Parcel B as follows:

1. Access and Utility Easements – Declarant hereby declares and creates an easement for ingress, egress and utilities for the benefit of Parcel A and Parcel B (described, supra) over, under and across the West 30 feet of parcel B, except the north 164 feet thereof; and the north 30 feet of Lots 3 and 2 of Pierce County Short Plat recorded under AFN 9003270461.

All that part of the above described easement way east of the west 30 feet of Lot 3 of Pierce County Short Plat recorded under Auditors Fee Number 9003270461 shall be for the exclusive benefit of Parcel A and Parcel B.

CP 41, 49; Ex. 2.

During the time the Ewans owned both Parcel A and Parcel B they placed and maintained a gate at Location 2, which was on the boundary line of Parcel B and across the easement referred to above, in order to control access to Parcels A and B. CP at 41 – 42, 49; RP at 28 – 29; 43. That gate was still in place when the Ewans marketed the property for sale and sold it to Lynwood M. Pelot, Jr. and Barbara A. Hallgen.<sup>1</sup> RP at 16, 29, 43. The gate remained in place after the Pelots took possession of the property. RP at 46.

At the time Parcel B was sold, some fencing already existed around it: between Location 2 and Location 5 along the west side of Parcel B and along the north side of Parcel B bordering 122<sup>nd</sup> Street KPN. CP at 42. There was no fencing on either side of the Parcel B Easement. CP at 42. Part of the agreement for the purchase and sale of the house required the Ewans to complete fencing around Parcel B. CP at 42.

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<sup>1</sup> Shortly after the sale of the property, Mr. Pelot and Ms. Hallgen were married. RP at 42.

Shortly after the Pelots purchased Parcel B, and while they were on their honeymoon, the Ewans installed chain link fencing around Parcel B. CP at 42. The Ewans also installed fencing along the borders of the Parcel B Easement, removed the gate that had originally been installed across the easement at Location 2, and reinstalled that gate at Location 3. CP at 42. As soon as Mr. Pelot saw the gate was being moved he objected and said he did not want the gate moved. CP at 42; RP at 19, 21, 29. The gate was put aside and laid on the ground. RP at 19. It lay there until the Pelots put it back up several years later. RP at 22 – 23.

From the time the Pelots bought Parcel B in 1998 until 2003 a gate existed at the entrance of 126<sup>th</sup> Avenue KPN at Location 1. CP at 43. The Pelots would close the gate at Location 1 when they left their property. CP at 43. The gate was a functioning gate until 2003 when someone stole half the gate. CP at 43. From 2003 onward there was no way to close, lock or otherwise deny access to Parcel A or B. CP at 43.

The Pelots were subjected to people coming onto Parcel B at all times of the day and night. RP at 49. People would drive across the easement onto the Pelots' property right on up to the house. RP at 50. People would drive onto the Pelot property about every other day. RP at 60. People coming onto the property at night bothered Mrs. Pelot the most. RP at 60 – 61. She would not answer the door at night because of

her fear. RP at 61. Mrs. Pelot convinced her husband to put the gate back up in order that she would feel safer. RP at 50 – 51; 61. This security was important to Mrs. Pelot, especially after her husband died. RP at 51. Having the gate in place cut down on trespassers. RP at 61. Another reason she wanted the gate was to help keep her dogs on the property. RP at 61. Her dogs would not go through the gate. RP at 62.

In 2006, the Pelots took the gate that had originally been at Location 2, that had been placed and removed from Location 3 (and propped against a tree or in the bushes) and reinstalled it at Location 2. CP at 43. Mr. Ewan objected to that location and had his lawyer, Mr. Gordon, write a letter insisting that it be removed from Location 2. CP at 43. The gate was replaced with a lightweight aluminum gate. RP at 23. There are no external controls for the gate and one has to get out of the car to open it and close it. RP at 23 – 24. The gate was in place about two years by the time of trial. RP at 25.

Parcel A is not improved. CP at 43. The Ewans do not reside on Parcel A, but they visit the property approximately one time per year. CP at 43. Mr. Ewan's father lives to the east of Parcels A and B and accesses Parcel A and the East-West Easement through to 126<sup>th</sup> Avenue KPN. CP at 43.

The Ewans filed a Complaint for Declaratory Judgment and Injunctive Relief on April 7, 2006. CP at 1. The Pelots filed Defendants' Answer and Affirmative Defenses on May 17, 2006.<sup>2</sup> CP at 6. The Pelots amended their answer to include a counterclaim asserting that the fencing erected by the Ewans on the interior easement line on Parcel B was in trespass. CP at 55-57.

Trial took place on April 5 – 6, 2007. CP 20 – 23. The trial court issued an oral ruling on April 9, 2007. CP at 29 - 30. The trial court's Decree with Findings of Fact and Conclusions of Law was filed on May 15, 2007. CP at 39 - 48. The trial court held that the gate which was reinstalled at position 2 unreasonably interfered with the Ewans' access to Parcel A and the court ordered the gate removed. CP at 47. The trial court also held that the fencing erected by the Ewans on the east side of the Parcel B easement represented a continuing trespass and that Pelot may demand, in writing, that the fencing be removed if she does so within 30 days of the date of the Decree. CP at 48. Mrs. Pelot filed her Notice of Appeal to Court of Appeals on June 14, 2007. CP at 58-69.

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<sup>2</sup> Mr. Pelot died during the pendency of this action and before trial. RP at \_\_\_.

## ARGUMENT

The primary issue is whether the trial court erred in holding that a gate placed on the property line of Parcel B, and across the easement which existed on Parcel B, unreasonably interfered with the Ewans' access to Parcel A. As set forth below, the trial court erred in making findings of fact and in its conclusions of law. Among other things, the trial court erred in finding that:

- no trespass occurred when travelers without permission would drive onto the Pelots' property;
- prohibiting people from driving onto Parcel B did not justify placing a gate across the easement;
- the gate was an unreasonable interference with the Ewans' access to Parcel A when they only went to the property once a year and all they had to do was get out of their car to open and close the lightweight aluminum gate; and
- a reasonable alternative was for Pelot to place the gate on the interior easement at position 3 and connect it to the fence erected by the Ewans, which fence was in trespass.

The trial court also erred with respect to Pelot's counterclaim for trespass. The trial court correctly held that the fence was in trespass and represented a continuing trespass. However, the trial court erred by

limiting Pelot's ability to demand removal of the fencing on the ease side of the Parcel B easement to a period of 30 days within entry of the Findings of Fact, Conclusions of Law and Decision. The court should have ordered that fencing be removed.

**A. Standards for Review.**

*Standing Rock Homeowners Assoc. v. Misich*, 106 Wn. App. 231, 23 P.3d 520, *rev. denied*, 145 Wn.2d 1008 (2001), sets forth the standard of review with respect to findings of fact as follows:

‘When the trial court has weighed the evidence, our review is limited to determining whether the court's findings are supported by substantial evidence and, if so, whether the findings support the court's conclusions of law and judgment.’ *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000) (citing *Brin v. Stutzman*, 89 Wn. App. 809, 824, 951 P.2d 291, *review denied*, 142 Wash.2d 1018, 16 P.3d 1266 (1998)). ‘The challenged findings will be binding on appeal if they are supported by substantial evidence in the record.’ *In re Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000) (citing *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). ‘Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.’ *Hill*, 123 Wn.2d at 644, 870 P.2d 313. ‘The party challenging a finding of fact bears the burden of showing that it is not supported by the record.’ *Panorama Vill.*, 102 Wn. App. at 425, 10 P.3d 417 (citing *Brin*, 89 Wn. App. at 824, 951 P.2d 291).

106 Wn. App. at 242 – 43.

*Standing Rock Homeowners Assoc. v. Misich, supra*, also sets forth the standard of review with respect to injunctive relief as follows:

‘A suit for an injunction is an equitable proceeding addressed to the sound discretion of the trial court, to be exercised according to the circumstances of each case.’ *Steury v. Johnson*, 90 Wn. App. 401, 405, 957 P.2d 772 (1998) (citing *Fed. Way Family Physicians, Inc. v. Tacoma Stands Up For Life*, 106 Wn.2d 261, 264, 721 P.2d 946 (1986); *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36 (1982)). ‘Appellate courts must give great weight to the trial court’s decision, interfering only if it is based on untenable grounds, is manifestly unreasonable or is arbitrary.’ *Steury*, 90 Wn. App. at 405, 957 P.2d 772 (citing *Fed. Way*, 106 Wn.2d at 264, 721 P.2d 946; *Rupert*, 31 Wn. App. at 30, 640 P.2d 36).

106 Wn. App. at 240 – 41. When a trial court’s ruling fails to properly apply the law and balance equities, its ruling on injunctive relief is subject to being reversed. *See Steury v. Johnson*, 90 Wn. App. 401, 407, 957 P.2d 772 (1998) (trial court’s grant of an injunction prohibiting a gate across an easement was reversed).

**B. The Trial Court Erred by Admitting Into Evidence Over Objection Ewan’s Testimony About His Intention in Creating The Easement.**

In response to a question about whether Mr. Ewan created the easement on Parcel B in 1994, Mr. Ewan began to testify about his intention in creating the easement. RP at 139. Pelot objected to the answer and moved to strike the portion of testimony that went to intent on the grounds that Mr. Ewan’s intent in drafting the easement was not

admissible in evidence. RP at 140. The court sustained the objection and struck the portion of the answer objected to. RP at 140.

Ewan's counsel then directly asked Ewan what his intent was in creating the easement. RP at 140. Pelot again objected arguing that the court was to look at objective facts and that Ewan's subjective intent was not admissible in evidence. RP at 140 – 41. The court overruled the objection stating "I think I can take into consideration and rule legally what ultimately the documents provide." RP at 141.

None of the cases discussing easements hold that the subjective intent of the creator of an easement is relevant or admissible. The law is to the contrary. The law on construing contracts and conveyances allows objective evidence of intent, but prohibits extrinsic evidence to establish a party's unilateral or subjective intent, to show an intention independent of an instrument, or to vary, contradict or modify the written word. *Hearst Communications, Inc. v. Seattle Times*, 154 Wn.2d 493, 503 - 504, 115 P.3d 262 (2005). Unexpressed impressions are meaningless when attempting to ascertain the intentions of parties. *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). In short, testimony by a grantor about his subjective intent with respect to creating an easement is not admissible in evidence. *See Silver v. Strohm*, 39 Wn.2d 1, 7, 234 P.2d 481 (1951).

The trial court erred in admitting testimony about Mr. Ewan's subjective intent in creating the easement. This court should reverse the trial court and hold that Mr. Ewan's testimony about his subjective intent in creating the easement is not admissible in evidence and should be stricken.

**C. The Trial Court's Findings of Fact in Paragraphs O And P Are Not Supported by the Evidence.**

The trial court made findings of fact in paragraphs O and P as follows:

- O. Approximately two times per week, lost travelers would come through Locations 1, 2, and 3 to the Pelot house and ask for directions; occasionally, this would occur at night. Ms. Pelot would not go out and answer her door so she could not testify about the purpose of someone coming down her driveway in the middle of the night.
- P. There was no illegal use, litter, picnicking or trespass on Parcels A or B.

These findings of fact do not reflect the testimony Ms. Pelot provided and are not supported by substantial evidence in the record.

Pelot testified that she lived in the country and people drove onto their property at all times of the day and night. RP at 49. People would drive across the easement onto her property right on up to the house (RP at 50) about every other day (RP at 60). People coming onto her property at night bothered Mrs. Pelot the most. RP at 60 – 61. She would not answer

the door at night because of her fear. RP at 61. Mrs. Pelot convinced her husband to put the gate back up in order that she would feel safer. RP at 50 – 51. The gate was reinstalled because Mrs. Pelot was frightened and she did not feel safe when people drove up to her house at night. RP at 61. This was important to Mrs. Pelot, especially after her husband died. RP at 51. Having the gate in place cut down on trespassers. RP at 61. Another reason she wanted the gate was to help keep her dogs on the property. RP at 61. Her dogs would not go through the gate. RP at 62.

Pelot's testimony was that people drove onto her property every other day. This was more often than the trial court's finding of approximately two times per week. Thus, the trial court's finding is not supported by substantial evidence.

The trial court failed to make findings of fact about Pelot's reasons for wanting the gate was her fear of intruders, especially after her husband died, and to help keep her dogs in the yard. The evidence clearly supported findings that Mrs. Pelot wanted the gate reinstalled because she was afraid of trespassers coming onto her property, particularly at night, and the gate helped keep her dogs on the property. The court erred in failing to make findings which were supported by Mrs. Pelot's testimony.

The trial court also erred in finding that no trespass took place on Parcel B. As set forth above, the testimony was that uninvited persons

drove onto Parcel B property every other day, sometimes at night. The elements of trespass are the intentional or negligent intrusion onto or into the property of another. *Phillips v. King County*, 136 Wn.2d 946, 957 n.4, 968 P.2d 871 (1998); *Mielke v. Yellowstone Pipeline Co.*, 73 Wn. App. 621, 624, 870 P.2d 1005, *review denied*, 124 Wn.2d 1030 (1994); *Restatement (Second) of Torts*, sec. 158, 159, 166 (1965). The evidence was clear and undisputed that persons intentionally or negligently entered onto the Pelots' property without permission every other day. That is clear evidence of trespass. The trial court's finding of fact that trespass did not occur on Parcel B is contrary to the evidence.

**D. The Trial Court's Findings of Fact in Paragraph R is Not Supported by the Evidence.**

The trial court made the following findings of fact in paragraph R:

R. Defendants Pelot are not subjected to a greater burden than originally contemplated by the Plaintiff, the creator of the easement(s). Even assuming some security concerns, Defendant Pelot could resolve this concern by locating a gate at Position 3, well within her property. This would eliminate the issue of access to the North/South easement from Position 2/3 to Position 4.

These findings of fact are not supported by substantial evidence in the record. The Ewans originally maintained a gate on the property line of Parcel B at Location 2 to control access to Parcel A and Parcel B. CP at

41 – 42, 49; RP at 28 – 29; 43. That gate was still in place when the Ewans marketed the property for sale and sold it to the Pelots. RP at 16, 29, 43. The gate remained in place after the Pelots took possession of the property. RP at 46.

The fact that the Ewans maintained a gate at Location 2 to control access to Parcel B is evidence that they, as the creators of the easement, believed that it was permissible to maintain a gate at that location in order to control access to Parcel B. Furthermore, the fact that the Ewans sold the property to the Pelots with a gate in place at Location 2 constituted a representation that a gate could remain there. In maintaining a gate at Location 2 the Pelots were doing the same thing and interfering with the easement in the exact same fashion as had the Ewans. The Pelots did not change the interference with the easement in any way. This should lead to the conclusion the gate could remain without having to go through further analysis. *See Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888, 895, 20 P.3d 500, *rev. denied*, 145 Wn.2d 1008 (2001) (“The use of a gate was a known type of limit on the easement; adding necessary gates did not constitute a change but merely the increased use of a known limitation).

The burden on Pelot of not having the gate at Location 2 is different than the burden that the Ewans contemplated when they owned the property and maintained a gate at Location 2. The Ewans kept a gate

in place at Location 2 when they owned the property. With the gate in place, the Ewans apparently did not have to worry about trespassers coming onto their property. Without the gate, the Pelots were subjected to trespassers coming onto their property every other day. The increased burden of trespassers coming onto the property was different than the burden that existed while the Ewans owned the property with the gate in place.

The trial court's conclusion that Mrs. Pelot could alleviate her security concerns by placing a gate at Location 3 does not make any sense. In order for a gate to be effective at Location 3, it would have to be connected to a fence. However, the trial court held that the fencing erected by the Ewans on the interior easement line was in trespass and could be removed. It is not reasonable for the trial court to conclude that locating a gate at Location 3 was a reasonable alternative when to do so would require Pelot to leave the fence in place in continuing trespass.

**E. The Trial Court's Findings of Fact in Paragraph S is Not Supported by the Evidence.**

In paragraph S, the trial court found that “[a] gate at Position 2 is an unreasonable interference with Plaintiff's use of Parcel A”. This finding of fact is not supported by substantial evidence. The gate is a lightweight aluminum gate that is not locked. RP at 23 - 24. The only

interference with the Ewans' use of Parcel A was that they would have to get out of their car to open and close the gate. RP at 23 – 24.

The trial court's finding of fact that the gate is an unreasonable interference with the Ewans' use of Parcel A lacks common sense. Having to get in and out of a car to open and close a gate does not constitute an unreasonable interference with use of an easement. There is no substantial evidence to support the trial court's conclusion that the gate unreasonably interfered with the Ewan's access to Parcel A. Furthermore, as set forth in the following section of this brief, unlocked gates have been held allowable in many Washington cases, including *Standing Rock Homeowners Assoc. v. Misich*, 106 Wn. App. 231, 242, 23 P.3d 520, *rev. denied*, 145 Wn.2d 1008 (2001), and *Rupert v. Gunter*, 31 Wn. App. 27, 32, 640 P.2d 36 (1982) (a light aluminum gate constructed so that anyone can open and close it easily was not an unreasonable interference). Washington case law illustrates that a lightweight unlocked gate which can be easily opened and closed is *per se* reasonable.

**F. The Law Entitles a Servient Estate Property Owner To Place a Gate Across an Easement So Long as it Does Not Unreasonably Interfere With the Dominant Estate's Use of the Easement.**

The law is clear that the owner of a servient estate has the right to place a gate across an easement so long as the gate does not unreasonably interfere with the dominant estate's use of the easement. *The Restatement*

*(Third) of Property: Servitudes*, Sec. 4.9 states that “Except as limited by the terms of the servitude determined under [section] 4.1, the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with the enjoyment of the servitude.” The Restatement provides illustrations of this principal. Illustration No. 4 states as follows:

After repeated problems with vandalism, O, the owner of Blackacre installed a locked gate at the entrance to the drive crossing Blackacre that leads from the public highway to Whiteacre. The drive is maintained pursuant to an easement appurtenant to Whiteacre. O furnished A, the owner of Whiteacre, with a key to the gate. Whiteacre is undeveloped property that A uses infrequently for recreational purposes. In the absence of other facts or circumstances, O is entitled to maintain the locked gate because the gate is needed for the security of Blackacre, and the lessened inconvenience to Whiteacre is not unreasonable.

Washington law is fully in accord with the Restatement. Going as far back as 1933 cases have held that placing gates across easements do not unreasonably interfere with the dominant estates use of the easement. *United States v. Johnson*, 4 F.Supp. 77 (W.D. Wa. 1933) (a grant of an easement “right of way 20 feet wide \* \* \* for \* \* \* full, free and quiet enjoyment \* \* \* for the purpose of ingress and egress” did not prohibit gates); *Rupert v. Gunter*, 31 Wn. App. 27, 640 P.2d 36 (Wn. App. 1982) (the servient estate had the right to erect and maintain a gate to help cut

down on the public's use of the easement where the gate did not unreasonably interfere with the use of the easement by the dominant estate); *Steury v. Johnson*, 90 Wn. App. 401, 405, 957 P.2d 772 (1998) (affirmed the right of a servient estate to maintain a gate across an easement); *Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888, 20 P.3d 500, *rev. denied* 145 Wn.2d 1008 (2001) (allowed gate across an easement).

The most recent case is *Standing Rock Homeowners Assoc. v. Misich*, 106 Wn. App. 231, 23 P.3d 520, *rev. denied* 145 Wn.2d 1008 (2001). That case addressed whether gates could be maintained on an easement by the servient estate. Excerpts from the opinion follow:

“Whether or not the owner of land, over which an easement exists, may erect and maintain fences, bars, or gates across or along an easement way, depends upon the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case; the nature and situation of the property subject to the easement; and the manner in which the way has been used and occupied.” (Citations omitted.)

Both sides concede the easement deed is silent on the subject of gates. “[I]f the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances.” “When the owner of a servient estate is being subjected to a greater burden than that originally contemplated by the easement grant, the servient owner has the right to restrict such use and to maintain gates in a reasonable fashion necessary for his

protection, as long as such gates do not unreasonably interfere with the dominant owner's use.”

The trial court's unchallenged findings establish the following: (1) Standing Rock was essentially undeveloped at the time it granted the easement; (2) development began on Standing Rock in the early 1990s; (3) subsequent to that development, Standing Rock lot owners “suffered a considerable amount of trespass and vandalism to their properties [;] ”; (4) the Standing Rock lot owners “pay a periodic assessment to cover maintenance costs” for Camp 12 Road; (5) the purposes of the gates were to decrease trespass and vandalism and reduce wear and tear on the road; (6) the gates were initially locked but later left unlocked; and (7) the gates reduced the amount of traffic running through Standing Rock.

In sum, trespassers and vandals used Camp 12 Road to access Standing Rock. The non-permissive use raised concerns of increased maintenance costs at Standing Rock's expense. Thus, the easement had become a greater burden on the servient estates than contemplated in 1965. Testimony indicated the unlocked gates at the entrance points to Standing Rock discouraged unauthorized use and minimized wear and tear on the road while allowing relatively free passage for easement holders. Therefore, the trial court did not abuse its discretion by striking an equitable balance between the parties and thus deciding the unlocked gates could remain as reasonable burdens on the easement. (Citations and footnotes omitted).

106 Wn. App. at 241-42.

In the instant case, the trial court's conclusions of law recognized that a servient estate may maintain a gate across an easement so long as it does not unreasonably interfere with the dominant estate's use of the easement. However, the trial court erred in concluding that the gate

maintained by the Pelots unreasonably interfered with the Ewans' use of the easement. The trial court held as follows:

C. A gate at Location 2 is an unreasonable interference with Plaintiffs' use of Parcel A.

D. The use of Ms. Pelot's driveway by lost travelers from Location 2 down to her house on Parcel B is not so great a burden that it justifies interference with Ewan's access at Location 3. A reasonable alternative would be to reinstall fencing between Location 2 and Location 3 along the northernmost side of the Parcel B Easement, which would be a 30 foot piece of fence, and to locate a gate at Location 3. This would prevent any lost traveler access to the Pelot home and would allow Swan unrestrained, ungated access through the Parcel B Easement to Parcel A.

CP at 4.

The trial court's application of the law and findings of facts case was in error. In the first instance the question of whether or not the owner of land, over which an easement exists, may erect and maintain fences, bars, or gates across or along an easement way, depends upon the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case; the nature and situation of the property subject to the easement; and the manner in which the way has been used and occupied. *Standing Rock Homeowners Assoc. v. Misich*, 106 Wn. App. at 526.

The instrument creating the easement is silent on the topic of fences, bars, or gates. *See* Ex. 2. In such situations, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances. *Standing Rock Homeowners Assoc. v. Misich*, 106 Wn. App. at 526.

The evidence shows that the intent of the creators of the easement was to allow the placement of a gate on the property line of Parcel B across the easement. The Ewans created the easement in 1994. *See* Ex. 2. After the easement was created the Ewans maintained a gate at the exact same location as the Pelots later placed a gate. RP at 43. The Ewans' gate was in place in 1998 when they marketed Parcel B for sale. RP at 43. The gate was in place when the Pelots bought the property. RP at 43. The gate remained in place after the Pelots took possession of the property. RP at 46. The fact that the property was sold to the Pelots with a gate across the easement constituted a representation by the Ewans that a gate could be maintained at that location. All of the objective evidence about the situation of the property, how the Ewans used the property and the easement, their sale of the property with the gate in place leads to the conclusion that it was permissible to have a gate across the easement on the boundary of Parcel B at location 2.

The only evidence of contrary intent was the testimony of Mr. Ewan about his subjective intent in creating the easement. RP at 140 – 41. As set forth above, that testimony was inadmissible and erroneously allowed into evidence over objection. Evidence of subjective intent is not admissible and cannot be relied upon as a basis for proving intent. *Hearst Communications, Inc. v. Seattle Times*, 154 Wn.2d 493, 503-504, 115 P.3d 262 (2005); *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994); *Silver v. Strohm*, 39 Wn.2d 1, 7, 234 P.2d 481 (1951).

The use of a gate was expressly being done by the creators of the easement. Thus, the use of a gate was not a greater burden than the Ewans' contemplated. The use of the gate by the Pelots did not constitute a change of the burden on the Ewans' use of the easement to access Parcel A. See *Lowe v. Double L Properties, Inc.*, 105 Wn. App. at 895 ("The use of a gate was a known type of limit on the easement; adding necessary gates did not constitute a change but merely the increased use of a known limitation).

Furthermore, when the owner of a servient estate is being subjected to a greater burden than that originally contemplated by the easement grant, the servient owner has the right to restrict such use and to maintain gates in a reasonable fashion necessary for his protection, as long

as such gates do not unreasonably interfere with the dominant owner's use. *Standing Rock Homeowners Assoc. v. Misich*, 106 Wn. App. at 526.

The Pelots were subjected to a greater burden than contemplated by the creation of the easement. The Ewans installed and used a gate to restrict access to Parcel A and B. After the gate was taken down (and the gate at the main road disabled) Parcel B was subjected to trespassers coming onto the property at all times of the day and night. RP at 49. People would drive across the easement onto the Pelots' property right on up to the house. RP at 50. People would drive onto the Pelot property about every other day. RP at 60. Trespassers coming onto her property at night bothered Mrs. Pelot the most. RP at 60 – 61. She would not answer the door at night because of her fear. RP at 61. Mrs. Pelot convinced her husband to put the gate back up in order that she would feel safer. RP at 50 – 51. This was important to Mrs. Pelot, especially after her husband died. RP at 51. The gate was reinstalled because Mrs. Pelot was frightened and she did not feel safe when people drove up to her house at night. RP at 61. Having the gate in place cut down on trespassers. RP at 61. Another reason she wanted the gate was to help keep her dogs on the property. RP at 61. Her dogs would not go through the gate. RP at 62.

Clearly, the facts of this case show that the Pelots were subjected to a greater burden than contemplated by the Ewans when they had a gate

at Location 2 and created the easement. The creators contemplated controlling access to Parcel B with a gate at Location 2. Removal of that gate increased the number of people trespassing onto Parcel B. The facts of this case are on all fours with *Standing Rock Homeowners Assoc.* and the others cited above which recognize that the owner of a servient estate has the right to restrict such use and to maintain gates in a reasonable fashion necessary for his protection, as long as such gates do not unreasonably interfere with the dominant owner's use. See *Standing Rock Homeowners Assoc. v. Misich, supra*; *Lowe v. Double L Properties, Inc., supra*; *United States v. Johnson, supra*; *Rupert v. Gunter, supra*; *Steury v. Johnson, supra*.

**G. The Trial Court Erred in its Conclusion of Law That the Placement of a Gate on Parcel B's Property Line Unreasonably Interfered With The Ewans' Use of the Easement.**

The trial court's conclusion of law was that the gate was "an unreasonable interference" with the Ewan's use of Parcel. This conclusion of law is untenable. There is no reported case in Washington that has held a lightweight aluminum fence that is unlocked constitutes an unreasonable interference with access to an easement. To the contrary, all of the cases hold that a lightweight aluminum fence which can be easily opened and closed is not an unreasonable interference. See cases discussed above.

Furthermore, the gate did not unreasonably interfere with the Ewans access of Parcel A. That parcel is undeveloped and the Ewans only visited the property once a year. The only interference posed by the gate was that the Ewans had to get in and out of their car to open and close the gate. That did not constitute unreasonable interference with the Ewans access to Parcel A.

**H. The Trial Court's Conclusion of Law That the Pelots Were Not Justified in Placing the Gate is Untenable.**

The trial court held in its conclusion of law (para. D) that the use of the Pelot's driveway by lost travelers down to her house was not so great a burden that it justifies interference with Ewan's access. This conclusion rests in part upon the court's finding of fact that trespass did not occur on Parcel B. As set forth above, that finding was in error. The evidence showed that every other day persons trespassed on the property. The cases uniformly recognize that the placement of gates to prohibit trespassers is justifiable. In *Standing Rock, supra*, the court held recognized that trespassers were a burden and that unlocked gates which discouraged unauthorized use on the road while allowing relatively free passage for easement holders were allowable.

The court's conclusion that a reasonable alternative would be to reinstall fencing and locate a gate on the interior of the easement line is

also untenable. That conclusion would require Pelot to allow a trespassing fence on the easement line. Pelot as the owner of the property has a right to full use of her property and it is not reasonable to require her to fence herself off from a portion of her own property. She has the right, which even the trial court recognized, to require the trespassing fence to be removed.

**I. The Trial Court Erred in Limiting Pelot's Ability to Request the Trespassing Fence be Removed to a 30-Day Period.**

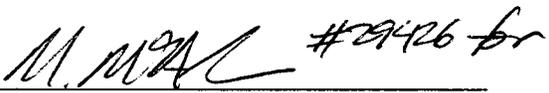
The trial court's Decree stated that "Pelot may demand, in writing, that the fencing on the east side of the Parcel B easement be removed if she does so within 30 days hereof; and, if she does so demand, the Plaintiffs shall remove such fencing within 90 days of such demand at their own cost." CP at 47 – 48. In contrast, the trial court's Decree stated that the gate erected by the Defendants at Location 2 on the western boundary of their property is unreasonable and must be removed by the Defendants within 90 days of the date of entry hereof . . ." CP at 47.

The trial court's ruling treats both parties differently. The court ruled that each had the right to have the other party remove an item (Pelot had the right to have Ewan remove the fence and the Ewans had the right to have Pelot remove the gate). While the court decreed that Pelot had to remove the gate, it made removal of the fence conditional on Pelot

submitting a written request to the Ewans within 30 days of entry of the Decree. The court should have treated both parties the same and ordered the fence removed within 90 days of entry of the decree. The problem created by the court's differential treatment is that the Decree purports to create a right for the Ewans to keep the trespassing fence in place. This would amount to a court sanctioned continuing trespass. The trial court erred in holding that Pelot's ability to have the fence removed by the Ewans was contingent up her making a written request within 30 days of entry of the Decree.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of November, 2007.

SMITH ALLING LANE, P.S.

By:  #29426 br  
Joseph R.D. Loescher, WSBA #34122  
Attorney for Appellant

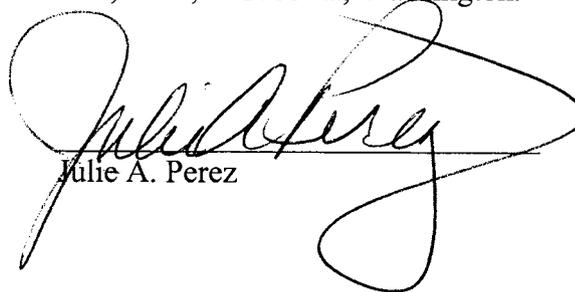
Certificate of Service

I hereby certify that I have this 5<sup>th</sup> day of November, 2007, served a true and correct copy of the foregoing document upon Richard C. Ewan, III and Ina Kay Ewan, by placing the same in the US Mail, first class, addressed as follows:

David Gordon  
Gordon & Misner  
7525 Pioneer Way, Suite 101  
Gig Harbor, WA 98335

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5<sup>th</sup> day of November, 2007, at Tacoma, Washington.

  
Julie A. Perez

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