

Case No.: 36447-6-II

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

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

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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 REPLY BRIEF

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## INTRODUCTION

Appellant's Opening Brief on Appeal demonstrated that the trial court erred on a number of grounds, including the finding that a lightweight unlocked gate "unreasonably" interfered with the dominant estates use of the easement. The reported Washington cases have long recognized that such gates may be maintained on easements by the servient estate. The law allows gates to interfere with the dominant estate's use of easements so long as the interference is not "unreasonable". The Pelots wanted the gate in place to dissuade trespassers from driving onto their property and to help keep their dogs on the property.

The only evidence cited by the Ewans that the gate "unreasonably" interfered with their use of the easement is that (1) they had to get in and out of their car to open and close the gate when they visited it once a year, and (2) an alternative existed in that the gate could be placed at Position 3 on the easement line.

The Ewans concede that the only burden on them is that they have to get out of their car to open and close the gate. Such a burden does not "unreasonably" interfere with the Ewans use of the easement under any reported case in Washington.

The argument that there is an alternative site for the gate does not address the issue if whether the gate "unreasonably" interferes with the

use of the easement, and that argument should be disregarded. Moreover, the alternative placement would require the property owner to continue to allow a trespassing fence on the easement line in order to have the gate attach to it at the proposed alternate site. That alternative is thus not reasonable.

The other main 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 the easement was a continuing trespass and could be removed, the trial court erred by limiting the ability to request the gate be removed to a 30 day period of time, which effectively authorized the trespass to continue. The Ewans have refused to remove the gate because the written request to them to remove it was sent to an incorrect fax number. This court is asked to hold that the trial court could not limit the ability to request removal of the trespassing fence to a 30-day period of time.

#### **REPLY TO COUNTERSTATEMENT OF THE CASE**

The Ewans' brief suggests that they built the fence around the property before the sale of the property. *See* Brief of Respondents at 4 – 5. In fact, the property was only partially fenced at the time of sale. The purchase and sale agreement called for the Ewans to install chain link fencing around parcel B, but did not provide for fencing on the east side of

the easement. After the sale of the property to the Pelots, and while they were on their honeymoon, the Ewans had the chain link fence installed.

The Ewans state that “all agree that Pelots made no complaint re the fence on the east side of the easement for nine years, from 1998 until shortly before trial, in April 2007.” Brief of Respondents at 5. That statement is untrue. Upon discovering that the fence was built on the easement line and a gate being placed at Position 3, the Pelots objected. RP at 48. As a result, the gate was taken down. RP at 48. Later, the Pelots took down about 30 feet of the fence which was erected on the easement line. RP at 48 – 49.

The Ewans state that Mrs. Pelot is no longer a party in interest because she sold Parcel B. Mrs. Pelot remains a party in interest because she was assigned the right to continue with the appeal. Appendix A.

### **ARGUMENT**

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

The Ewans did not respond to Pelot’s showing that the trial court erred in admitting testimony about Mr. Ewan’s subjective intent in creating the easement. That failure is tantamount to a concession that the court erred. *State v. E. A. J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003). Accordingly, 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.

The significance of this issue is illustrated by the Ewans' attempt to rely upon Mr. Ewan's testimony about his subjective intent in their brief. *See* Brief of Respondents at 12 -13. In reviewing the trial court's decision, this court should ignore evidence concerning Mr. Ewans' subjective intent.

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

Appellant's Opening Brief on Appeal showed that the trial court erred in finding that (1) no trespass took place on the Parcel B, (2) failing to make findings that Parcel B was subject to trespassers coming on the property at all times of day and night, and (3) that the Pelots wanted the gate re-installed to keep trespassers out and their dogs in. The trial court's findings of fact that no trespassers came onto Parcel B is in irreconcilable conflict with Mrs. Pelot's testimony and case law defining trespass.

The Ewans concede that the trial court erred and do not argue to the contrary. Instead, they argue that the error was harmless on the grounds that it does not materially affect the merits of the controversy. Brief of Respondents at 9.

The Ewans are wrong. The issue of whether or not trespassers came onto the property after the Pelots bought it is material to whether or not the gate is permissible. In *Standing Rock Homeowners Assoc. v. Misich*, 106 Wn. App. 231, 23 P.3d 520, *rev. denied* 145 Wn.2d 1008 (2001), the factors cited by the court justifying a gate were the facts that (1) trespassers were coming onto the property and (2) the gate reduced the amount of traffic on the easement. *See* 106 Wn. App. at 241 – 42. Thus, whether or not there were trespassers on to the Pelots' property, how often they were trespassing, and whether the gate reduced the number of trespassers is material to the controversy.

The Ewans attempt to avoid this issue by arguing that the Pelots' security concerns about the number/frequency of trespassers could be addressed by installing a gate on the east side of the easement at Position 3. That argument does not obviate the fact that the court ignored evidence of trespass and that factor is a material factor on whether a gate is permissible.

Placing a gate on the east side of the easement at Position 3 only keeps people off of the property if there is a fence on the easement line. The trial court held the fence on the easement line was in trespass and Mrs. Pelot had the right to ask it to be removed. Placing a gate at Position 3 with no fence on the easement line would not prevent trespassers from

coming onto the property. They could simply drive around the gate. Thus, a potential alternate site for a gate does not address the Pelots concerns about trespassers.<sup>1</sup>

Moreover, that argument fails to address the real issue of whether or not the gate “unreasonably” interfered with the Ewans use of the easement. The fact that the Ewans had to get in and out of their car to open and close the gate did not “unreasonably” interfere with their use of the easement.

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

Appellant’s Opening Brief on Appeal showed that the trial court erred in its findings of fact in paragraph R, which were as follows:

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.

The Ewans argue that there was no evidence of unwanted traffic on to Parcel B before the Pelots purchased the property and there was no

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<sup>1</sup> Requiring a gate to be placed on an inside easement line would also deprive the servient estate of the right to use all of the property including the easement. There is no case law which so holds.

evidence to indicate that the number of trespassers increased. Brief of Respondents at 11. This ignores the fact that before the sale of the property the Ewans had gates at the main road (Exhibit A, Position 1) and on the western property line (Exhibit A, Position 2). Those gates would have helped keep trespassers off of the property before it was sold to the Pelots.

The evidence also shows that after the sale of the property and the removal of the gate trespassers came onto the property several times a week. RP at 49 – 62. The evidence fully shows that the number of trespassers increased from the time the easement was created to after the sale of the property to the Pelots.

The fact that the Ewans maintained a gate at Position 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 Position in order to control access to Parcel B. CP at 41 – 42, 49; RP at 28 – 29; 43. Furthermore, the fact that the Ewans sold the property to the Pelots with a gate in place at Position 2 (RP at 16, 29, 43) constituted a representation that a gate could remain there. The burden of not having the gate at Position 2 is different than the burden that the Ewans contemplated when they owned the property and maintained a gate at Position 2 because without out the gate trespassers came onto the property.

The Ewan's argument that security concerns could be alleviated by placing a gate at Position 3 does not make any sense. In order for a gate to be effective at Position 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 was not reasonable for the trial court to conclude that locating a gate at Position 3 was a reasonable alternative when to do so would require Pelot to leave the fence in place in continuing trespass. Furthermore, requiring the servient estate to place a gate on the interior easement line would deprive the servient estate of the full use of the easement.

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

The Ewans argue that the trial court's finding that "[a] gate at Position 2 is an unreasonable interference with Plaintiff's use of Parcel A" is amply supported by evidence because a gate could be placed at Position 3 instead. Brief of Respondents at 12. As pointed out above, that reasoning is ludicrous, would require a trespassing fence to continue in place, and would deprive the servient estate of the full use of the easement.

The Ewans argue that if a gate could be placed at Position 3 where it would not interfere with their access then it is not reasonable to place the

gate at Position 2. Brief of Respondent at 12.<sup>2</sup> That is a straw man argument. The issue is not whether there a gate interferes, but whether it interferes “unreasonably”. The only interference for the Ewans was that they had to get out of their car to open and close a lightweight aluminum gate that was not locked. RP at 23 - 24. Having to get out of a car to open and close a gate is not an “unreasonable” interference with use of the Ewans’ use of Parcel A, especially in light of the fact that they only visit the property once a year. 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). Thus, under Washington case law a lightweight unlocked gate which can be easily opened and closed is *per se* reasonable.

**E. 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.**

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<sup>2</sup> In making this argument, the Ewans attempt to rely upon Mr. Ewan’s testimony about his subjective intent in creating the easement. As set forth above, that testimony is inadmissible in evidence and cannot be relied upon to support the court’s findings.

Appellant's Opening Brief on Appeal, at 17 – 25, showed that 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* and Washington case law recognizes that placing gates across easements does 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); *Standing Rock Homeowners Assoc. v. Misich*, 106 Wn. App. 231, 23 P.3d 520, *rev. denied* 145 Wn.2d 1008 (2001). It should be noted the Ewans cite *Lowe, supra*, as supporting their position when that case held that a gate across an easement was not unreasonable.

**F. 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.**

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. The evidence shows that the gate did not unreasonably interfere with the Ewans access to Parcel A. That parcel is undeveloped and the Ewans only visit the property once a year. CP at 43. 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. As a matter of law, that does not constitute "unreasonable" interference with the Ewans access to Parcel A.

The only argument advanced by the Ewans is that a gate at Position 2 is unreasonable because it could have been placed at Position 3. As set forth above, that reasoning is flawed and fails to address the real issue of whether the interference is "unreasonable". There are no facts in this case based on admissible evidence that support the conclusion that a gate at Position 2 is unreasonable. It would be inconceivable to have a gate held to constitute an "unreasonable" interference when every other reported appellate court decision in Washington concluded that gates which interfered more with easements were not unreasonable.

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

The Ewans do not directly take issue with Pelot's showing that the court erred in holding 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. The Ewans attempt to ignore the cases which uniformly recognize that the placement of gates to prohibit trespassers is justifiable. *See Standing Rock, supra*, (unlocked gates which discouraged unauthorized use on the road while allowing relatively free passage for easement holders were allowable).

The Ewan's only argument is that a gate could be placed at Position 3. As set forth above, that argument has no merit.

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

The Ewans' argument in support of the trial court's Decree limiting Pelot's ability to demand removal of the trespassing fence, does not make any sense. In fact, Pelot thought she had made the request within 30 days, but the fax was not sent to the correct fax number. There is no logical reason to limit the time for Pelot to demand the trespassing fence to be removed. Otherwise, the Decree is construed as allowing a trespassing fence to remain in place, which to this day it does.

Pelot simply requests that this court remove the limitation and allow the demand for removal of the fence to be made outside without any 30 day time limit.

RESPECTFULLY SUBMITTED this 5th day of February, 2008.

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

APPENDIX

## ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT (the "Assignment Agreement"), dated November 26, 2007, by and between David and Rachel Patterson ("Assignors"), and Barbara Pelot ("Assignee").

WHEREAS, Assignee is a defendant in cause of action in the litigation in Pierce County, Washington, captioned Richard C. Ewan, III and Ina Kay Ewan v. Lynwood M. Pelot, Jr. and Barbara A. Pelot, who took title as Barbara A. Hallgen, Cause No. 06-2-06769-5, and is appellant from the trial court decision in that case in a Court of Appeals No. 36447-6-II;

WHEREAS, Assignors and Assignee entered into that certain Residential Real Estate Purchase and Sale Agreement ("Agreement") dated September 17, 2007, under which Assignee agreed to sell certain land and improvements ("Real Property") and any and all personal property located thereon ("Personal Property") to Assignors conditioned upon the Assignors assigning to Assignee their right as property owners to maintain the causes of action involved in the above-referenced litigation;

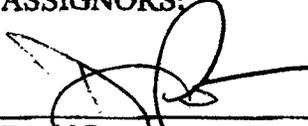
WHEREAS, Assignors desire to assign, transfer, set over and deliver to Assignee all of Assignors' right, title and interest to as property owners to maintain the causes of action involved in the above-referenced litigation;

NOW, THEREFORE, in accordance with the Agreement and in consideration of the sum of Ten Dollars (\$10.00), the sufficiency and receipt of which are hereby acknowledged, the parties do hereby covenant and agree as follows and take the following actions:

1. The Assignors do hereby assign, transfer set over and deliver unto Assignee all of the Assignors' right, title and interest as property owners to maintain the causes of action involved in the above-referenced litigation.
2. This Assignment and Assumption Agreement shall be (i) binding upon, and inure to the benefit of, the parties to this Assignment and Assumption Agreement and their respective heirs, legal representatives, successors and assigns, and (ii) construed in accordance with the laws of the jurisdiction in which the Property is located, without regard to the application of choice of law principles, except to the extent such laws are superseded by federal law.

IN WITNESS WHEREOF, this Assignment and Assumption Agreement has been signed, sealed and delivered by the parties as of the date first above written.

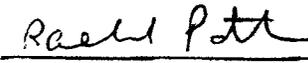
ASSIGNORS:

  
\_\_\_\_\_  
David Patterson

ASSIGNEE:

  
\_\_\_\_\_  
Barbara Pelot

ASSIGNOR:

  
\_\_\_\_\_  
Rachel Patterson

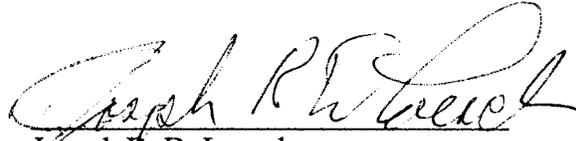
**Certificate of Service**

I hereby certify that I have this 5th day of February, 2008, 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 5th day of February, 2008, at Tacoma, Washington.

  
Joseph R. D. Loescher

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