

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

37077-8-II

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JOHN A. SALINAS AND JUDY E. SALINAS

Appellant,

v.

JAMES LINDSAY

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
08 APR -2 PM 1:24  
STATE OF WASHINGTON  
BY DEPUTY

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APPEALED FROM KITSAP COUNTY SUPERIOR COURT  
CAUSE NO: 00-2-01558-7

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APPELLANT'S BRIEF

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## A. Assignments of Error

### Assignments of Error

1. The trial court erred in ordering the Appellants' wall removed within 180 days.

2. The trial court erred in ordering damages for loss of use of the easement.

3. The trial court erred in finding Appellants failed to meet the legal requirements to show that equitable principals require the court to deny the injunction.

### Issues Pertaining to Assignments of Error

1. Did the trial court err when it ruled that the Salinas' wall must be removed within 180 days and awarded damages when it failed to make a finding that Respondent actually lost use of the easement area or failed to find the Salinas' use was inconsistent with future use of the easement as required by *Thompson*? (Assignments of Error 1 and 2)

2. Did the trial court err when it found that The Salinas' failed to prove by clear and convincing evidence that an injunction should not be granted on equitable principals when the court failed to consider the equitable principals as set out in *Arnold*? (Assignment of Error 3)

## B. Statement of the Case

### Procedural History

This case was filed on May 19, 2000 by Respondent, James Lindsay, in Kitsap County Superior Court. CP 2. On June 21, 2000 Salinas answered and asserted Counterclaims. CP 4. The case was tried on September 14, 2005. CP 36. The Memorandum Opinion was released on September 21, 2005. CP 40. The Findings of Fact and Conclusions of Law and Judgment were entered on November 2, 2007. CP 46. Appellants, John and Judy Salinas, filed this appeal on November 30, 2007. CP 48. Respondent James Lindsay filed a cross-appeal on December 18, 2007. CP 51.

### Statement of Facts

Parties Lindsay and Salinas own adjoining waterfront lots in Kitsap County, which were platted in 1994. FOF 1-5 . Both lots are intersected by a private access road, platted as an easement, which is shared with other nearby lots. The width of the Lindsay and Salinas lots is narrow at the boundary with the access road, and then they widen toward the waterfront of Puget Sound. FOF 1,4,11; Ex's 6,14,25. The short plat for the two lots includes a shared " 12' DRIVEWAY & UTILITIES EASEMENT" (Ex 6)

overlapping the north/south property line between the lots, which connects to the private access road easement and extends east toward the waterfront. The indicated "easement" overlaps 7 ft north onto the Lindsay lot, and 5' south onto the Salinas lot.

The shared "Driveway Easement" is located in the area of the lots where required side yard setbacks prohibit the construction of structures. As such, the required 12 ft wide driveway connection to the private access road for each lot is shared, maximizing the area of the lots where structures can be located.

Although the indicated boundaries of the driveway easement extend east to the eastern end of the allowable construction area within the lots, they do not extend to the eastern boundaries of the lots nor connect with any other easement or right of access. No "through right of passage " exists, nor is any necessary.

New homes constructed in "Apple Tree Point Estates" (FOF1-5; Ex's. 6,14,25) are located east toward the shoreline, to take advantage of the waterfront and views. Garages, parking, and vehicle access is located "behind", or between the west side of the homes and the private access road. As such, the driveway for each separate home starts at the road as a shared driveway, and then

necessarily splits off as a private driveway connecting to each separate private home.

Salinas built in 1999, after removing an old cabin. Lindsay's lot still had an old cabin, not removed until 2007. The Salinas home is located east, as anticipated. Access to garages and parking ends west of the home. Ex.25. In addition, Salinas chose to locate his primary driveway inside the lot boundaries, and not over the platted driveway easement area shared with Lindsay. West of the new house's location, Salinas constructed a fence at the south edge of the driveway easement, located 5 ft into Salinas's lot, essentially granting Lindsay private use of the "shared" driveway location connecting to the private road. However, from the west wall of the new home easterly to the water Salinas located his fence on the property line, enclosing a portion of the area inside the boundaries of the "driveway easement" as shown on the short plat map. Salinas testified that he only installed the fence after reaching an oral agreement with Lindsay (FOF 14).

More than a year after Salinas build his fence, Lindsay brought this action for encroachment. Location of the fence adjacent to the Salinas home in the platted "easement" area is not disputed. Equally undisputed was the fact that Lindsay's access

from the private road easterly to his cabin, over the 12 ft shared driveway easement, was unencumbered at all times, and no showing was made that any driveway could be located in the yard area next to the Salinas home. No loss of use, interference, or obstruction of an existing or proposed driveway was offered, and no loss of income was offered or suggested.

### C. Argument

#### I. UNDER *THOMPSON*, SALINAS IS ALLOWED TO MAKE USE OF THE EASEMENT PROPERTY UNTIL IT IS USED FOR THE RESERVED PURPOSE.

It is the law in Washington that the owner of the property has the right to use his land for purposes not inconsistent with its ultimate use for the reserved purpose during the period of non-use. *Thompson v. Smith*, 59 Wn.2d 397, 407, 367 P.2d 798 (1962).

In *Thompson*, the defendant, Mr. Smith, constructed a concrete slab that encroached upon an easement that was reserved for road purposes. *Id.* At 403. The trial court found that Smith, by his concrete slab, “interfered and hindered the use of said

roadway and easement for travel purposes” and ordered Smith to remove the concrete slab. *Id.* at 407.

The Supreme Court found that there was no contention that the reserved strips had ever been opened or used for road purposes and that the area was overgrown with brush and small trees. *Id.* at 402. The Supreme Court reversed saying the evidence did not support the judgment because the slab didn't interfere with use of the road at this time and that the owner had a right to use his property during the period of non-use. *Id.* at 407. The court went on to say that “it would not be proper at this time to prevent Smith's use of a concrete slab for parking an automobile or other appropriate use, until such time as the ten-foot strip may be required for road purposes. As said in *Bakeman v. Talbot* (1865), 31, N.Y. 366, 88 Am. Dec. 275 ‘...There is nothing inconsistent [with the reserved easement] in holding that the present arrangements are suitable and sufficient under existing circumstances;...’. *Id.* at 409.

Finally, the court held that the “only relief to which the plaintiffs were entitled at the time of trial was a determination...that he be enjoined from using the ten-foot strip reserved for a road for any purpose inconsistent with that ultimate use; and that he be

directed to remove so much of the concrete slab as is in the ten-foot strip reserved for road purposes, when and if it interferes with the use of that strip for road purposes-giving, in the meantime if the trial court deems it necessary, a suitable guarantee that it will be so removed”. *Id* at 410. The Supreme Court reversed the award of damages because present removal was not necessary. *Id*.

In this case, similar to *Thompson*, the trial court found that the Salinas’ wall encroached upon the easement but there was no finding of an attempt or a need to use the easement for its reserved purpose. CP 40 and 46.

The trial court found that plaintiff has “proved beyond a preponderance of the evidence that a portion of the wall has been constructed within an easement area.” CP 40 The court goes on to say that “would be the end of the matter” except for the claim of an agreement that the defendant could not sufficiently prove. CP 40 The trial court ordered the Salinas’ to remove the encroachment within 180 days. CP 40. The court failed to consider *Thompson* and its progeny, by only looking at whether there was an encroachment in the easement and ordering its removal. It was error for the trial court to not consider whether there was a current need for use of the easement area as a driveway by Lindsay and

whether the current use by Salinas, a wall is inconsistent with the future use of the easement for its reserved purpose, a driveway.

The trial court entered findings of fact and conclusions of law on November 2, 2007. CP 46. There are 19 Findings of Fact. CP 46. None of the Findings of Fact include a finding that the Salinas wall interferes or is inconsistent with Mr. Lindsay's use of the easement.

The purpose of the easement at issue in this case is a driveway easement connecting the dwelling and property to the main road. Driveway is defined by American Heritage Dictionary as a private road that connects a house, garage, or other building with the street.

At the time the case was brought in Kitsap County Superior Court, the Lindsay property contained an old cabin that was in violation of the neighborhood protective covenants. The cabin needed to be relocated within the building envelope and remodeled, or destroyed and a new house built within the building envelope. CP 46. At the time the case was brought Mr. Lindsay did not claim or present any evidence that he needed to use the easement area and was unable to, due to the encroachment. In fact the evidence shows that he did not need to use the area of the

easement where the encroachment is. Exhibits 1, 3, 4, 5, 6, 6A, & 25.

Without a finding that the encroachment is interfering with an actual present use or that the current use by the owner is inconsistent with the reserved purpose, under *Thompson*, it was error for the trial court to order the Salinas' wall removed and award damages.

A. The Salinas' use is not inconsistent with the ultimate use for the reserved purpose.

In *Edmonds*, the trial court found that "it is not an inconsistent use to erect a fence across an unused express easement." *Edmonds v. Williams*, 54 Wn. App.632, 774 P.2d 1241. The court further said "where an easement has been created but no occasion has arisen for its use, the owner of the servient tenement may FENCE HIS LAND and such use will not be deemed adverse to the existence of the easement until such time as (1) the need for the right of way arises, (2) a demand is made by the owner of the dominant tenement that the easement be opened and (3) the owner of the servient tenement refuses to do so." *Id.*, quoting *Castle Assocs v. Schwarz*, 63 A.D.2d 481, 490, 407 N.Y.S.2d 717, 723 (1978). *Accord*, Annot., *Supra*, 25 A.L.R.2d 1265, 26, at 1325-30.

In this case, the Salinas' have fenced in their land by constructing a wall around their property. The wall encroaches on the easement in a small section of the easement area. CP 46. While the court in *Thompson* did not believe that a structure that could not be removed without substantial cost should be permitted in such an easement, unless there is some guarantee that it will be removed if necessary that is not applicable in this case because the wall is removable without substantial cost to Salinas. *Thompson* at 409. Salinas is willing to remove the wall if the need arises to use that portion of the easement for a driveway to access the Salinas dwelling or the Lindsay dwelling if the court so required.

The trial court did not make a finding that Lindsay demanded use of the easement in the area of the encroachment or that he was denied use by Salinas. CP 46.

Therefore, under *Edmonds*, the Salinas' should not be required to remove their wall until such time as Lindsay requires use of the affected property for its reserved use, a driveway.

II.     EQUITABLE PRINCIPALS SHOULD PREVENT THE COURT FROM ISSUING AN INJUNCTION THAT REQUIRES THE SALINAS' TO REMOVE THEIR WALL BECAUSE ENFORCEMENT IS INEQUITABLE

In *Arnold*, the Supreme Court held that a trial court has a discretionary right to refuse equitable relief of a mandatory injunction. *Arnold v. Melani*, 75 Wn.2d 143, 147, 437 P.2d 908 (1968). The court reasoned that equity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable. *Id.* at 152.

The court in *Arnold* set out a five part test to determine if a mandatory injunction can be withheld as oppressive. Mandatory injunction can be withheld if the following elements are clearly and convincingly proven by the encroacher: (1) the encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is enormous disparity in resulting hardships. *Id.* at 152.

In *Arnold*, the encroachment was against the neighbors property, not just an easement but the same equitable principals and analysis can be applied to an encroachment against an easement.

In this case, the trial court did acknowledge that equitable principals if proven could prevent issuance of an injunction. The trial court indicated that it could not find by clear, cogent and convincing evidence that the parties had an agreement regarding the placement of the wall, that it could only find an agreement by preponderance of the evidence. However, under the considerations put forth in *Arnold*, the trial court did not need to find that there had been an agreement by clear and convincing evidence only the Appellant Salinas had not acted in bad faith, acted willfully, or with disregard or that they took a calculated risk.

Further, the trial court did not consider the other considerations put forth in *Arnold*. In this case the damage to Mr. Lindsay is negligible if there is any, as he has shown no current need to use the easement and the benefit of removing the wall is equally small as the area where the wall encroaches is not suitable for a driveway due to its proximity to the dwelling, bulkhead, and shoreline. In fact the Salinas' argue that the placement of the wall benefits Mr. Lindsay as he gains full use of seven feet of the easement that is on his property that can be used exclusively by him. Additionally, future use of the area is not limited by placement of the wall in that area and it is impractical to take down the wall.

The wall can be removed if future use so requires but it is impractical to take it down for non-use. Finally, there is disparity in hardships, Mr. Lindsay has not shown a need to use the easement and therefore there is no hardship to him to have the wall in place and to remove it Salinas must incur cost to relocate the wall outside the easement area.

The Supreme Court in *Arnold*, noted that “this doctrine is the judicial recognition of a circumstance in which one party uses a legal right to gain purchase of an equitable club to be used as a weapon of oppression rather than in defense of a right.” *Arnold* at 153. This is the situation that Salinas’ face. Lindsay has shown no need or use for the easement property he is just using the equitable club against the Salinas because it is available to him.

Therefore the trial court should have found that Appellants met their burden by clearly and convincingly showing that the injunction should not be issued.

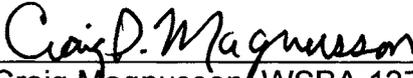
#### D. Conclusion

For the reasons set out above, Appellants, John and Judy Salinas respectfully request that the Court of Appeals find that the trial court erred in ordering removal of the wall, awarding damages,

and finding that equitable principals did not prevent an injunction from issuing and remand the case to the trial court for further proceedings.

Respectfully submitted this 31<sup>st</sup> Day of March, 2008,

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DECLARATION OF MAILING

I, Jennifer L. Castro, under penalty of perjury and in accordance with the laws of the State of Washington, declare that on the 31st day of March 2008, I caused true and correct copies of the following documents:

1. Appellant's Brief;
2. Declaration of Mailing

to be delivered by U.S. Mail, postage prepaid, to the following parties of record:

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DATED this 31st day of March, 2008.

MAGNUSSON LAW OFFICE, P.S.

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