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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

NO. 37356-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN AND GEORGIA HUBER husband and wife,

Appellants

ANN C. and JOHN DOE SOUTHHARD,

Respondents

REPLY TO RESPONDENT'S RESPONSE TO
APPELLANT'S OPENING BRIEF (*corrected*)

ORIGINAL

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I. INTRODUCTION

Southard's excavation was clearly a trespass. The only easement that Southards could have over Hubers' property is the 11.63 foot driveway curb cut. If this prescriptive easement does exist, Southard clearly exceeded the scope of the easement by excavating into Hubers' property. Even if an easement exists over all of Hubers' property, this excavation was an unreasonable use of that easement, rendering Hubers' property worthless.

II. RESTATEMENT OF THE CASE

A. Statement of the case

a. Defining the easement

Huber's disagree that Southard had "an easement for ingress and egress, created by the Huber's predecessor in title, who conveyed title to Hubers 'subject to . . . easement rights for ingress and egress to the adjacent owners at lot 20 and 22.'" Response at p. 4. There is no recorded grant of easement. None of the requirements of RCW 64.04.020 were met. **The "easement" was**

not signed by the grantor, the Hubers' or their predecessors.

Further, the easement was not in writing. The only easement that could possibly exist would be limited to the pie-shaped portion of the driveway that encroached on the Hubers' property and this easement would have been created by prescription and not by grant.

B. There is evidence to support that there was damage or erosion on Hubers' lot

Hubers' expert Dave Strong testified that there was erosion on Hubers' lot which was a contributing factor to the landslide. RP 36. Strong testified that the excavation caused landslides and local destabilization of the Hubers' property subjecting the lot to more erosion. RP 31-32. The slope on Hubers' property resulting from Southard's excavation was unstable and illegally over steep. RP 31.

C. Procedural History

Mr. Moore testified that it is a common practice for engineers to provide estimated construction costs with a site visit

and the information he received from Dave Strong. RP 72. Moore further stated that to provide construction estimates he did not need to know the exact location of the Southard/Huber boundary line, making a survey unnecessary. RP 71. Also, even if the exact boundary line was needed, Strong had already testified that the excavation was on the Hubers' property and not on Southards, according to the survey he reviewed on the stand. Therefore, a proper foundation was laid.

III. ARGUMENT

A. The court should not disregard arguments made in Hubers' statement of the case.

Hubers' statement of the case is not replete with improper arguments. Hubers' statement of facts is relevant to the issues presented for review, and is not argument. RAP 10.3 (a)(5).

It's appropriate to rely upon opposing counsel's statements made during closing argument. The Court should not disregard these statements. According to RAP 10.3 (a)(5), "reference to the

record must be included for each factual statement.” Closing arguments are part of the record in the Huber trial and in that argument Southard’s counsel admitted that the unrecorded easement arose out of the improperly located curb cut, which formed the property line. RP 125.

B. Southard does not have an ingress and egress easement over the Hubers’ parcel arising out of Hubers’ deed.

Southard relies on Beebe v. Swerda, 58 Wn.App. 375, 793 P.2d 442 (1990) for the proposition that the “subject to” language in Hubers’ deed is sufficient to create an easement in favor of Southard over the Hubers’ parcel. This is incorrect. Although “[N]o particular words are necessary to constitute grant of easement, and any words which clearly show intention to give easement, which is by law grantable, are sufficient to effect that purpose, provided the language is sufficiently **definite and certain in its terms.**” 58 Wash.App at 378. Here it is not definite and

certain. In Beebe, the deed stated the precise description of the location and extent of the easement. Here, the language in Hubers' deed is ambiguous and does not state the precise description, location or extent of the easement as in Beebe. Therefore, the language in the Huber deed would not be sufficient to create a grant of easement. At most, the language notifies the grantee of the existence of a prescriptive easement. Therefore, the only easement that could possibly exist would be limited to the pie-shaped portion of the driveway that historically encroached on the Hubers' property (obtained by prescription) and not the portion of Hubers's property where Ms. Southard excavated for her garage and driveway.

C. The trial court incorrectly ruled that the Southard's excavation was a "reasonable use within the terms of the easement over the Plaintiff's real property."

The trial court is incorrect in ruling that the excavation was a "reasonable use within the terms of the easement over the Plaintiff's real property." This Court should not affirm the trial court's

new driveway where no existed before. Therefore, the trial court erred in ruling that the excavation work that was conducted on Hubers' property was within the scope of any easement held by Southard. Southard had at most a prescriptive easement, although that was not adequately proved. The 11.63 foot driveway curb cut was not a recorded grant of easement. The trial court erred in ruling that Southard had an prescriptive easement that allowed major excavation and grading on the Hubers' property.

D. Moore's testimony on damages is relevant because the trial court incorrectly ruled that Southard acted reasonably, within the scope of the easement.

Southard argues that Moore's testimony as to damages is irrelevant and this Court should not decide whether it was properly excluded because the trial court ruled that Southard was acting reasonably within the scope of her ingress and egress easement, which is incorrect. First, even if an easement did exist beyond the prescriptive bounds, the trial court erred in concluding that the 500

yards of excavation from Hubers' lot was a reasonable use of the unrecorded easement, which had no terms, and could only be prescriptive, and was not proved. Moore's damage testimony is relevant to the issue of whether or not Southard's excavation on Hubers' lot was a reasonable use of the unrecorded easement. The trial court abused its discretion in excluding it.

Also, Southard contends that a survey was needed in order for Moore to prepare his estimates, this is incorrect. Mr. Moore testified that it is a common practice for engineers to provide estimated construction costs with a site visit and the information he received from Dave Strong. RP 72. Moore further stated that to provide construction estimates he did not need to know the exact location of the Southard/Huber boundary line, making a survey unnecessary. RP 71. Therefore, a proper foundation was laid for the introduction of Moore's testimony.

Further, the error in excluding Moore's testimony is not a

harmless error. The exclusion of Moore's testimony did affect the trial court's decision. The trial court incorrectly ruled that Southard acted reasonably within the scope of her easement. Evidence of the cost of repair faced by Hubers is certainly relevant to Southard's unilateral actions in excavating 500 yards of material from Hubers' lot was unreasonable even if there is an easement. Further, the necessity of Hubers making those expensive repairs, since the slope was left over steep and unstable, is also relevant to whether Southard's action were reasonable, even if there is an easement. Clearly a trespass has occurred. Even Southard's attorney admits in his closing that a trespass has occurred. Therefore, the error was not harmless.

Lastly, the proper measure of damages "for injury to property are measured in terms of the amount necessary to compensate for the injury to the property interest." Washington v. Aetna Casualty and Surety Co., 113 Wn.2d 869, 784 P.2d 507

(1990). “Therefore, damages for injury to property are limited under Washington law to the lesser of diminution in value of the property or the cost to restore or replace the property.” Id.

According to Hubers’ expert Dave Strong, he recommended two repair options to make Hubers lot accessible. The first option is to put the dirt back, and regrade it back to how the bank existed prior to the excavation. At trial, Mr. Strong estimated that it would cost approximately \$20,000.00 to bring in the dirt to stabilize the slope. Another option identified by Strong was to construct a retaining wall along the property line matching the existing natural grade. At trial Mr. Strong estimated that it would cost \$100,000.00 to build a retaining wall. PR 41. Based upon Washington v. Aetna Casualty and Surety Co., the proper measure of damages that should be awarded to Hubers is between \$20,000.00 to \$100,000.00 to either repair the damaged property or Hubers should receive the value of the property.

E. The trial court erred in finding that a trespass did not occur on Hubers' property.

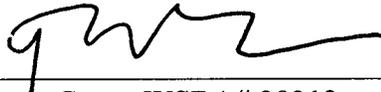
If the trial court erred in failing to find that Southard trespassed on Hubers' property, it follows that the trial court erred in ruling that Hubers were not entitled to damages other than the removal of the lower decorative wall, because the excavation exceeded the scope of Southard's easement (if she had an easement at all). Dave Strong, an engineering geologist, estimated the costs to repair Hubers' damages property to range between \$20,000.00 - \$100,000.00. That testimony was allowed and hence this range of damage is not unsupported and overreaching. Hubers are entitled to these damages. The court should reverse the decision below, find that Southard trespassed, and remand for the trial court to determine damages to be awarded to Hubers within the range of the evidence (\$20,000.00-\$100,000.00).

IV. CONCLUSION

In conclusion, this Court should not disregard any arguments made in Hubers' statement of the case because Hubers' statement of facts is relevant to the issues presented for review, and is not argument. Also, Southard does not have an ingree and egress easement over the Hubers' parcel arising out of Hubers deed. The language in the deed is not sufficient to create a grant of easement. At the very most, the language in the deed notifies the Southard of the existence of a prescriptive easement. Further, the trial court erred that Southards excavation was a reasonable use within the terms of the easement over the Plaintiffs' real property. The only prescriptive easement that would exist is the pie-shaped portion of the driveway. Lastly, Moore's testimony is relevant because the trial court incorrectly ruled that Southard acted reasonably within the scope of the easement.

Respectfully Submitted this 25th day of November, 2008.

CUSHMAN LAW OFFICES, P.S.

A handwritten signature in black ink, appearing to read 'Ryan Gunn', written over a horizontal line.

Ryan Gunn, WSBA# 39312

Attorney for John and Georgia Huber

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STATE OF WASHINGTON
By Jam Cm
DEPUTY

M. Katy Kuchno certifies and declares as follows:

1. I am a legal assistant at Cushman Law Offices, P.S. over the age of 18, and not a party to this action.
2. On November 25, 2008, I sent via ABC Legal Messengers, for delivery and filing, the original and a copy of Huber's Reply Brief to:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

3. On November 25, 2008, I sent via Facsimile and US Postal Mail for delivery, a copy of the above-described document to:

Wiggins & Masters, PLLC
Charles K. Wiggeins
Shelby R. Frost Lemmel
241 Madison Ave. North
Bainbridge Island, WA 98110

DATED at Olympia, Washington this 25th day of November, 2008.

M. Katy Kuchno
M. Katy Kuchno