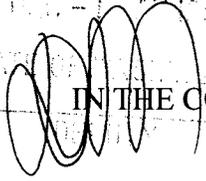


COURT OF APPEALS  
NO. 37472-2-II  
STATE OF WASHINGTON  
BY: 

NO. 37472-2-II

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

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MICHAEL B. MCGRAW and CONNIE MCGRAW, husband and wife;  
AL DOUD and PATRICIA DOUD, husband and wife,

Plaintiffs,

vs.

JOSEPH M. BLACKWELL and CYNTHIA BLACKWELL, husband and  
wife; GREGG R. BIEBER and LYNNE M. BIEBER, husband and wife,

Defendants.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Barbara Johnson, Judge

Clark County Cause No. 05-2-06367-3

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REPLY BRIEF OF PLAINTIFFS MICHAEL B. MCGRAW and CONNIE  
MCGRAW

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**ASSIGNMENTS OF ERROR**

For clarification, as implied by Appellant’s Brief, the specific Findings of Fact, and Conclusions of Law to which Appellants object are as follows:

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<sup>1</sup> The Findings of Fact and Conclusions of Law entered in this matter tend to overlap somewhat; what are proper findings of facts are, in places, expressed only in the Conclusions of Law.

- a. Finding No. 5 regarding narrowing of the McGraw driveway entrance.
- b. Finding No. 6 regarding effects of excavation; characterization of retaining wall as “not a retaining wall”; fence height; and attributing the “ditchlike” formation between the Bieber berm and McGraw fence to the construction of the McGraw fence, only.
- c. Conclusion No. 2 setting forth the “reasonable necessity” standard; and that Appellant’s failed to meet their burden.
- d. Conclusion No. 4 stating that Appellant’s claim that Blackwell and Bieber “compost” is debris being maintained in violation of the CC&Rs is without merit and not supported by the facts at trial.
- e. Conclusion No. 5(C) in its entirety.

## **SUPPLEMENTAL STATEMENT OF THE CASE**

### PAVING

In response to the Court’s inquiry at the end of trial, McGraws restated and reoffered through their attorney to cover all expenses associated with the proposed paving. RP 371, 373. Nothing in the record suggests that anyone other than McGraw would incur any cost for the proposed 5’ x 60’ paved strip.

Contrary to the Findings and Conclusion of the trial court, Mike McGraw testified that the opening to his lot actually widened with the addition of his fencing and gate. RP-254.

### COMPOST

Lynne Bieber testified at trial that the yard debris she and her husband were placing against the retaining wall was for purposes of filling the dip between the berm they had made, and the McGraw retaining wall. RP-25, 26, 28. Lynne Bieber also admitted that the dip was caused by the difference in elevation between their berm and the McGraw fence. RP-27, 28.

In addition to the unsightliness of the Bieber compost piles, Connie McGraw compared the odor to compost on the farm where she lived for 12 years. RP-279

### FENCE CONSTRUCTION

At trial, the CC&Rs were admitted and call for, among others, that all fences be of a “wood, brick or cyclone *design*”. Exh. 13, at 3 (emphasis added).

At trial, the contractor who oversaw the construction of the McGraw retaining wall and fence, Paul McGraw, testified that the white, vinyl fence is “designed to look like wood, painted wood”. RP-99.

Carl Robert Holbrook, Jr., a contractor for 41 years who built the McGraw retaining wall testified that virtually all new construction of homes,

the McGraws included, includes Hardy Plank, a non-wood, concrete based home siding with a woodgrain texture to simulate a wood design.

Robert S. Holbrook, the fencing contractor who constructed the McGraw fence, testified that the vinyl fence mimics wood, and was constructed “in the same way [as a wood fence], just out of different material”. RP-200, 202. Holbrook also testified that when he began working in the fencing business in 1993, vinyl fencing comprised only about 5% of the market whereas now, vinyl installations are approximately one-third of the market and increasing as time goes on. RP- 203, 233. He also testified on cross examination that he vinyl fences are common in upscale neighborhoods near Chestnut II as well. RP-217.

Lynne Bieber testified that the fence she and her husband had installed along their rear property line and approximately one half of the border they share with McGraw, was a “black, *vinyl coated*, cyclone fence” . RP-17 (emphasis added). Greg Bieber confirmed the composition of their vinyl coated fence. RP-291.

Judge Barbara Johnson visited the subject parcels on December 6, 2007 and announced in her ruling that the white, vinyl fence in fact is made and assembled to, and does, resemble a wooden, vertical slat fence and, therefore, satisfies the aesthetic intent of the CC&Rs. CP-82, at 6.

Paul McGraw also testified that retaining walls were poured on top of existing grades. RP-117, 118.

## BRICK FACING ON RETAINING WALL

Mike McGraw testified that he did not have the same decorative brick facing applied to the Bieber side of the retaining wall as he was unable to access that side due to the Bieber silt fence placed after construction of the retaining wall had commenced, and the buildup of debris against the retaining wall. RP-268.

The CC&Rs, while specifying a limited number of designs for fencing, do not specify that the same material must be used on both sides of the fence, and retaining walls are not addressed in the CC&Rs. Exh. 13.

## REPLY ARGUMENT

Though additional facts have been highlighted above in reply, only three of the issues will be addressed in argument below.

### A. PAVING.

***The court erred in denying McGraw's request to pave an additional mere 5 foot by 60 foot strip in the dedicated ingress and egress easement.***

The Court found that McGraws had not established reasonable necessity for expanding the paved surface, following the reasoning in *Butler v. Craft Eng. Constr. Co.*, 67 Wn.App. 684, 843 P.2d 1071 (1992), and *Standing Rock Homeowners Assoc., v. Misich*, 106 Wn.App 231, 23 P.3d 520 (2001). This was an error of law.

Claimed errors of law of the trial court are reviewed de novo.

*Meadow Valley Owners Ass'n v. Meadow Valley, LLC*, 137 Wn.App 810, 816, 156 P.3d 240 (2007).

Nothing in the Plat Map of the Chestnut II Subdivision expressly limits the pavement width to that of the original pavement. The language in the plat map sets forth that the dedicated easement “is required to have a 16 foot wide paved roadway on a 40 foot wide private road easement”. This establishes only a minimum dimension, not a maximum. Indeed, as set forth in Respondent’s proposed and adopted version of the Findings of Facts and Conclusions of Law, Number 3, included in the Chestnut II short plat was a condition that the paved surface of the easement be “of *minimum* 16’ width on a 40” easement for ingress and easement”. CP-82, at 2 (emphasis added). The short plat does not say, for example, that the pavement shall not exceed 16 feet. Moreover, the proposed five foot by 60 foot portion of additional paving is not an expansion of the easement, but rather an enhancement of the dedicated “ingress and egress” easement and is intended to improve its intended use. Therefore, reasonable necessity is not required.

The case cited in Appellant’s Brief, *Wilhelm v. Beyersdorf*, 100 Wn.App 836, 999 P.2d 54, stood for the rule that the servient land holder could do nothing to interfere with the dominant holder’s full and reasonable use of the easement for its intended purpose.

In general, “the dominant estate holder may increase an existing ... use”, and “the servient holder may not interfere with a mere increase in use” as long as the increased use is not a change to the original purpose of the easement. *Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888, 20 P.3d 500 (2001).

The McGraws did not propose a change in use of the original easement, but merely a diminimus increase, or expansion, of the easement’s original use. As such, McGraw’s do not need to show a reasonable necessity, however, the evidence of an additional person on the ground required to help guide the larger motorhome to prevent damage, when balanced with the non existent impact upon the servient holders, represents a reasonable necessity. The Trial Court erred by first requiring a showing of reasonable necessity, and then abused its discretion by not finding it from the facts presented at trial.

Finally, the finding that the McGraw driveway had narrowed is not supported by any competent evidence at trial and, therefore, is error.

B. FENCE COMPOSITION

***The trial courts did not err in finding that the McGraw fence did not violate the CC&Rs.***

A trial court’s findings may be reviewed to determine whether substantial evidence supports the trial court's findings and, if so, whether the findings in turn support the conclusions of law and the judgment. *City of*

*Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7, (1991). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987).

Unchallenged Findings of Fact are verities on appeal. *In re Santore*, 28 Wn. App. 319, 323, 623 P.2d 702 (1981).

The trial evidence was that the white, vinyl McGraw fence was made to resemble a fence of a wood design. The trial court judge visited the site on December 6, 2007 and so found. Respondents do not challenge the Court's Finding of Fact with regard to the fence composition so such finding is considered a true fact on appeal.

As an equitable consideration, the Biebers had long maintained a vinyl coated fence along their shared property line with the McGraws and should not now be allowed to complain about the McGraw fence.

The trial court did not err in finding that the McGraw fence satisfied the requirements of the CC&Rs.

C. BRICK FACING ON RETAINING WALL

***The trial court erred in requiring the McGraws to provide and pay for brick facing on the Blackwell and Bieber sides of the retaining wall.***

In addition to argument asserted in Appellant's opening Brief, Appellants point out that the CC&Rs do not require that the same material be used on both sides of a fence, let alone a retaining wall. It is expected that the other side of a fence will always face the yard of another, however, absent the participation and contribution of the one on the other side of the fence, the construction and appearance is largely left to the reasonable discretion of the fence builder.

Under no circumstances should McGraw be required to decorate the Bieber side of the fence if the Biebers are simply going to dump debris against it. Alternatively, if McGraw is to be required to pay for the entire upgrade, McGraw should be able to choose another, less expensive material which will comply with the CC&Rs, such as wood.

There is no CC&R provision or any evidence presented at trial which supports the order of the trial court requiring that the McGraws provide and pay for costly decorative brick in their neighbors' yards.

## CONCLUSION

McGraw should be allowed to pave as it represents only a mere increase in the intended use of the easement and such increase should not be interfered with by the servient holders.

The Court found as a matter of fact that the white, vinyl fence resembled a wooden fence and complied with the intent of the CC&Rs, and was not a violation thereof. Such ruling is supported by substantial evidence and should not be disturbed on appeal.

McGraw should not be required to apply expensive brick to the backside of a retaining wall absent enjoining Biebers from covering it with rubbish. Moreover, should McGraw be required to face the Bieber side of the retaining wall with a decorative material, the court was without authority to order that it be brick when wood is allowed.

DATED this 24 day of November, 2008.

Respectfully Submitted,



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