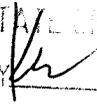


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COURT OF APPEALS

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STATE OF WASHINGTON

BY 

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**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON
Case No. 39900-8-II**

TRACY F. JONASSEN,
Appellant,

v.

MARILYN I. ROBBINS,
Respondent.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Mr. Jonassen has provided three compelling and independent bases why the trial court ruling should be reversed: (1) the trial court failed to follow the correct legal standard for contempt when, rather than a clear violation of a strictly construed order, the court found Mr. Jonassen in contempt for installing a curb that was clearly consistent with its order; (2) the trial court failed to follow the correct legal standard for review of prescriptive easements by unilaterally expanding the burden and physical encroachment of Ms. Robbins' prescriptive easement without the necessary consent of both parties; and (3) the finding of contempt is not supported by substantial evidence, because there is no dispute that Mr. Jonassen built an industry standard curb which admittedly did not impair the opening and closing of vehicle doors, and for which there was no competent evidence of a trip hazard.

Although Ms. Robbins' attorney argues the curb is hazardous to disabled friends, the court order did not require Mr. Jonassen to install handicap access facilities. Instead, the order gave Mr. Jonassen the right to install a curb. It was error to find Mr. Jonassen in contempt for doing nothing more than what was authorized by the terms of the court order.

B. ARGUMENT

1. Robbins Cannot Bolster The Trial Court Ruling With Matters That The Trial Court Refused To Review.

Ms. Robbins focuses a significant portion of her brief on facts that are not relevant to the issues on review. For example, Robbins argues that Jonassen took “absolutely no action” in response to a letter complaining about the retaining wall and hay bales. See, e.g., Respondent’s Brief, pp. 8-9. Ms. Robbins is attempting to support the trial court’s order with facts that the trial court refused to consider. The trial court expressly and repeatedly instructed counsel that the retaining wall and hay bales were irrelevant to the narrow issue before it: whether the construction of the curb was a contemptuous violation of the order. See Appellant’s Brief, p. 19; VRP, pp. 4-5, 12, and 14-15 (Sept. 18, 2009). The Court of Appeals should decline Robbins’ invitation to affirm the trial court’s ruling based on facts that the trial court deemed irrelevant and not subject to argument.

Even if facts relating to the wall and hay were relevant, Mr. Jonassen has already provided the undisputed facts showing that construction of the retaining wall and location of the hay bales were acts performed by his contractors, who were specifically provided with a copy of the court’s order and instructed to comply with it. See Appellant’s

Brief, pp. 13-14; CP 179, par. 7; CP 182, par. 14. These facts are not disputed.

2. Robbins Agrees with Jonassen’s Statement Of The Applicable Legal Standards For Contempt And Enforcement Of Prescriptive Easements.

On pages 26 through 31 of his brief, Mr. Jonassen explained why the trial court abused its discretion by applying the incorrect legal standards for contempt, and the review and application of prescriptive easements. These legal standards required review for a “plain violation” of a “strictly construed” order, without expanding the burden or encroachment of the prescriptive easement terms. Ms. Robbins’ brief fails to dispute the application of these governing standards, which strongly favor Mr. Jonassen’s positions on appeal.

3. Jonassen Did Not Commit A “Clear Violation” Of A Court Order When He Installed A “Ground Level Curb” Consistent With Court And Industry Guidance.

On appeal, Ms. Robbins offers the flawed semantic argument that “ground level curb” must be interpreted as an installation barely above “ground level”, as opposed to a curb at the ground level which does not impede ingress or egress from vehicles. See Respondent’s Brief, pp. 11-14. The record in this case clearly demonstrates that both the trial court

and Ms. Robbins herself understood that Mr. Jonassen had the right to build a “ground level curb” as high as the curb that was actually installed. Under the clarification given, even a curb 9.5 inches high would not have clearly violated the order – so long as it did not impede ingress and egress or present a trip hazard. See Appellants’ Brief, pp. 6-10; CP 275-276; CP 61, Conclusions, par. 5.

Pursuant to the specific guidance of the court’s easement, Mr. Jonassen built a curb that did not impede the opening of car doors, or create a trip hazard for driveway users. The curb created no more hazard or barrier than what exists for any other ground level curb on any city street. The only hazard alleged consists of the attorney’s suggestion (without evidence) that this curb is dangerous to certain unnamed elderly visitors who allegedly are not capable of “stepping over” an industry standard curb when exiting a vehicle. This, of course, is not evidence. Moreover, the late and unsupported assertion by counsel that an elderly disabled person cannot step over an industry standard curb does not defeat Mr. Jonassen’s express court ordered right to build a ground level curb to protect his property from vehicle encroachment.

4. The Timing Of Mr. Jonassen's Curb Construction Was Not Contemptuous Under The Governing Legal Standards.

Ms. Robbins also argues that the contempt finding was supported by the "spiteful" timing of Mr. Jonassen's curb construction. See Respondent's Brief, p. 16. This argument bears no relationship to the governing legal standards discussed above, and is not supported by the evidence.

There is no dispute that Mr. Jonassen was hailed from Texas to the State of Washington on short notice to address a suddenly revived dispute with a neighbor over hay bales and a retaining wall installed by his contractor. Mr. Jonassen was fully aware of his court date, and there is no dispute that he effectively directed his contractors to resolve any concerns Ms. Robbins may have had with the offending hay bales and retaining wall before the hearing. The trial court properly determined that evidence or argument regarding hay bales and the relocated retaining wall would not be subject to review for contempt.

It is also illogical to assert that Mr. Jonassen, having affirmatively acted to resolve other issues of concern, purposefully violated a court order in advance of the scheduled hearing by completing a curb that the

court gave him the right to complete years before. Instead of an order preventing this action, Mr. Jonassen directed his contractors to act in accordance with an order that affirmatively granted him this right.

By instructing his contractors to complete his curb in a manner consistent with the dictates of the trial court order, Mr. Jonassen sought to complete his project in advance of a court hearing that would hopefully bring closure to the disputes under the court order, and avoid the risk of continued unscheduled trips from Texas to Washington for additional court hearings. By installing a curb consistent with the court's instructions, Mr. Jonassen did not violate any order. He was doing nothing more than exercising his rights as a property owner to complete a ground level curb within the dimensions previously discussed by the court and opposing counsel.

5. The Trial Court's Verbal Guidance On Curb Height Was Consistent With It's Order And Contradicts The Claim Of Contempt.

Ms. Robbins' brief also spends considerable time arguing that a court's oral explanation of its ruling represents non-binding "dicta". Respondent's Brief, pp. 12-14. This argument misses the point.

Jonassen has never argued that an oral decision from the bench is a

binding final order. The point is that Jonassen cannot be held in contempt without proof of a “plain violation” of a strictly construed order. Here, Jonassen was held in contempt for an action that was not prohibited by any specific term of the order, but was actually consistent with the court’s general guidance of what would be allowed by the order. The court’s verbal explanations of the intent behind a written court order was an important consideration, and provides a powerful context that completely contradicts any argument that Mr. Jonassen lacked good faith, or acted with spite and contempt of the order.

The trial court recognized Mr. Jonassen’s right to construct a ground level curb or barrier to the threat of encroaching vehicular traffic, so long as it did not interfere with the opening of car doors, or ingress and egress along the margin of his property. Ms. Robbins offered no credible evidence in support of a violation. It is far too late for Ms. Robbins’ attorney to attack Mr. Jonassen for constructing a 7.5 inch curb. If Ms. Robbins desired an order restricting the curb height below 7.5 inches, then she should not have expressly clarified Mr. Jonassen’s right to build a curb up to ten inches in height. See CP 276 (VRP, p. 11 (January 3, 2006)) (“My client is concerned that perhaps 10 to 12 inches is too high to allow a

car door to open.”).

The court’s verbal discussion was not a binding ruling. But it does underscore the inequity of the contempt finding in this case. Mr. Jonassen did not commit a plain violation of a strictly construed prescriptive easement, especially where Ms. Robbins’ attorney clarified the meaning of ground level curb as something less than ten inches in height.

6. Mr. Jonassen Has Timely Appealed The 2009 Ruling.

Ms. Robbins also claims that the appeal is not timely, because the original prescriptive easement was entered on January 23, 2006. Respondent’s Brief, at Page 16, citing RAP 5.2(a). This argument is based on the misguided assumption that the appeal is from the original 2006 judgment, rather than the court’s 2009 order of contempt, directing removal of the curb. Mr. Jonassen properly seeks review of the trial court’s 2009 ruling under the governing legal standards.

As explained in the opening brief, the court’s directive to replace a standard curb with a colorful “lip” of pavement was a clear expansion of the burden and encroachment created by the original 2006 judgment. The trial court completely altered the scope of a prescriptive easement that was

imposed in 2006. The 2009 order directed Mr. Jonassen, as servient property owner, to destroy his curb and paint a special color on a lip of pavement. Ms. Robbins attempts to describe this ruling as a “benefit” to Mr. Jonassen. The unilaterally imposed painting requirement was hardly a benefit or a voluntary act of self protection. Instead, this expanded encroachment represents an abuse of the court’s discretion to review and enforce a prescriptive easement in accordance with its express terms.

7. Ms. Robbins Cannot Support The Ruling With Unsupported Claims Of Handicap Use, Not Reflected In The 2006 Order.

Ms. Robbins agrees with the principal that the scope of a prescriptive easement is determined by the nature of use during the prescriptive period. The extent of rights acquired are determined by the uses to which the right originated. Respondent’s Brief, at Page 19. There is no evidence in the record to support Ms. Robbins’ right to remove the ground level curb based on an alleged use by elderly visitors who are apparently disabled. If this is the basis for the dramatic exercise of injunctive relief, the dominant owner is obligated to provide some evidence of such use. None is in the record.

In sum, Ms. Robbins got specifically what she asked for. A ground

level curb that her attorneys confirmed would not be up to nine 10 inches high. The curb is consistent with industry standards, and with the safe ingress and egress of passengers from vehicles. The curb is like thousands of other curbs throughout our nation, and is not the type of contemptuous installation that might otherwise justify the sanctions imposed in this case.

8. A Motion To Reconsider One Error Does Not Waive The Right To Appeal Other Errors.

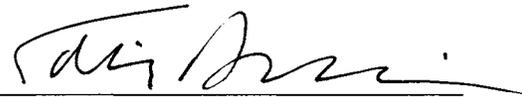
In footnote 2 of her brief, Ms. Robbins quotes portions of the motion for reconsideration in which Jonassen's attorney confirmed that reconsideration was only being sought for that portion of the ruling which required removal of the curb itself. Similarly, in argument 5, Ms. Robbins claims that the request for attorney's fees cannot be granted on appeal because it was not made on reconsideration. Resp. Brief, p. 22.

Mr. Jonassen's motion for reconsideration on one issue did not waive his right to pursue an appeal of other errors contained in the 2009 ruling. Mr. Jonassen had the right to focus his motion for reconsideration on that portion of the 2009 ruling requiring removal of the curb. This did not indicate his acceptance or waiver of any other errors, and the Rules of Appellate Procedure expressly allow such issues to be raised on appeal – even where the underlying judgment is not designated in the notice of

appeal. RAP 2.4(c). Ms. Robbins' waiver and estoppel arguments are without merit.

This Court is respectfully asked to reverse the finding of contempt and the order compelling Mr. Jonassen to replace the curb allowed by the prescriptive easement with a perpetually painted lip of pavement.

RESPECTFULLY SUBMITTED this 29th day of April, 2010.



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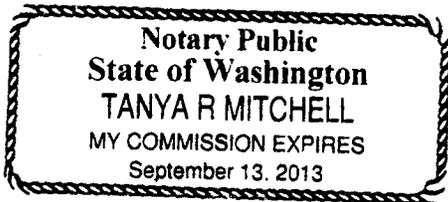
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That she placed and affixed proper postage to the said envelopes,
sealed the same, and placed it in a receptacle maintained by the United
States Post Office for the deposit of letters for mailing in the City of
Puyallup, County of Pierce, State of Washington, and that she mailed the
envelopes first class, postage prepaid.


MICHELLE A. LEA

SUBSCRIBED AND SWORN to before me this 29 day of
April, 2010.




Printed Name: Tanya R. Mitchell
NOTARY PUBLIC in and for the State of
Washington residing at Tacoma
My commission expires: 9-13-13