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COURT OF APPEALS
DIVISION II

NO. 40151-7-II

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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
JW
DEPUTY

RICHARD D. MANTHEI and KAREN R. MANTHEI,

Appellants,

v.

BARBARA NEVINS HALL REVOCABLE LIVING TRUST,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I.
ISSUES

1. Is the substantial evidence test the correct standard of review where the parties stipulated to trial by affidavit?
2. Is ascertaining the intentions of the parties of paramount importance when construing easement deeds?
3. Even where there is no ambiguity on the face of an easement deed should the trial court examine the circumstances surrounding the transfer and the subsequent conduct of the parties if such examination is helpful in ascertaining the parties' intent?
4. Can circumstantial evidence be as probative as direct evidence from which the trial court may draw reasonable inferences of the ultimate facts?
5. Where the particular use of an easement for the purpose for which it was established is prohibited, is easement on the burdened land discharged with all rights to possession and use reverting back to the fee simple owner?
6. Are ingress and egress easements granted to or by an owner of short plat property void when the short plat was not amended to include said easements?

7. Is there “failure of consideration” when one party who has either given or promised to give some performance fails, without his fault, to receive in some material respect the agreed exchange for that performance?

8. Is it proper for a trial court to rescind an easement deed when there is a failure of a significant, material portion of the consideration for said deed?

9. May a reviewing court affirm a trial courts decision upon ground not addressed in the trial court’s judgment?

II.
STATEMENT OF THE CASE

At issue is the trial court’s invalidation of easements executed by both of the parties hereto predecessors in interest. Plaintiff Barbara Nevins Hall Revocable Living Trust’s (hereafter “Hall”) predecessor was Mr. and Ms. Doremus (hereafter “Doremus”). CP 31, ln. 17; CP 60, ln. 23-4. Defendants Richard and Karin Manthei’s (hereafter “Manthei”) predecessor was Mr. and Ms. Bentley (hereafter “Bentley”). CP 70, ln. 12-15 & CP 73. The following facts are set forth in chronological order (oldest to newest) to help provide prospective of the trial court’s decision.

In 1997, Bentley owned a four lot subdivision directly adjacent to the then Doremus property. CP 31, ln. 1-3. The properties share a

boundary line running north-south. Bentley owned the property to the east of this line; Doremus owned the property on the west. CP 40.

And in 1997 the Millennium Corporation (hereafter “Millennium”), a third party who is not a party to this lawsuit, owned the property that is located directly adjacent to the south of both the Bentley and Doremus properties. CP 40.

Still in 1997, Millennium and Bentley became embroiled in a real property lawsuit that was filed in Pierce County Superior Court. Brief of Appellant pg. 4; CP 44. The Millennium v. Bentley lawsuit was settled on November 3, 1998. CP 46. A central part of that settlement was Bentley’s agreement that they would not allow any motor vehicles to cross over the north/south property line dividing the Bentley and Doremus properties. CP 31, ln. 4-15. To that end, the Millennium v. Bentley settlement agreement provided that Bentley was required to:

- a. erect a fence along the west side of the Bentley Property sufficient to prevent motor vehicles from being driven across that property to the property that lies to the west of that property (the location of the fence to be “mutually agreed” between Millennium and Bentley); and
....

CP 45. And, Bentley also entered into a “COVENANT” which provides that:

NOW, THEREFORE, in consideration of the dismissal by plaintiff of the claims and causes of action against the defendants in Pierce County Superior Court Case No. 97-2-11482-4, with prejudice and without costs, the undersigned, as owners of the Bentley Property, covenant and agree for themselves, their heirs, successors and assigns, that *there shall be no ingress and egress from the easement road delineated on the Large Lot Subdivision across the Bentley Property from or to any property lying west of the Bentley Property.*

CP 42 (underlining original - *italic* added).

This COVENANT was recorded with the Pierce County Auditor's office. CP 41. Again, the property lying west of the Bentley Property was then owned by Hall's predecessor in interest, Doremus. CP 31, ln. 17.

A few months after Bentley agreed to the above restrictions on the Bentley property, Bentley and Doremus entered into two easement agreements. CP 49 and CP 56. The first of these easement agreements (hereafter "Bentley/Doremus Easement 1") ignored the Millennium/Bentley settlement agreement and provided Bentley with an easement for ingress egress and utilities over the Bentley/Doremus property line.

For good and valuable consideration, Doremus grants and conveys an easement to Bentley for ingress, egress and utilities over, under and across the property described in Exhibit "C" attached. The easement is located on the Doremus parcel as shown on Exhibit "D" and is for the benefit of the Bentleys. This Easement is to run with the

land and applies to all heirs and assigns and future owners of both properties.

CP 49; (see also CP 40 for a second diagram of this easement).

The second easement (hereafter “Bentley/Doremus Easement 2”), which was executed a few months later, again in direct violation of the Millennium/Bentley settlement agreement, provided Doremus with an easement across the Bentley property to access a road on the Millennium property.

WHEREAS Bentley currently has a road accessing his property and agrees to grant Doremus a 30-foot easement for ingress, egress and utilities over existing road further described in attached Exhibit “A,” to provide access to Doremus’ parcels, and said easement is to be permanent and to run with the land.

CP 56 & 58; see also CP 40 and CP 59.

Bentley did not ever seek, nor receive short plat amendment approval for the two Bentley/Doremus ingress and egress easements benefiting and burdening the Bentley short plat property. CP 103, ln.17-22.

Hall purchased the Doremus property in 2002. CP 30, ln. 5-7. In December 2003, Manthei acquired Lot 3 of the four lots in the Bentley short plat. CP 30, ln. 8-12. Without any authorization, Manthei installed a concrete driveway on Bentley/Doremus Easement 1 in 2005. CP 32, ln.

17-21 & 22-23.

It is the two Bentley/Doremus easements that are the subject of this lawsuit. Hall petitioned the trial court to declare Bentley/Doremus Easement 1 invalid and asked the court to quiet title in said easement property to Hall. CP 8, ln. 22-4; CP 9, ln. 8-9. Hall also maintained that Bentley/Doremus Easement 2 is invalid. CP 99, ln. 23 – CP 100, ln. 3.

The parties agreed to trial by affidavit. CP 25-8. At the end of trial, the court concluded that both Bentley/Doremus Easement 1 and Bentley/Doremus Easement 2 were invalid. CP 111, ln.11-16; RP pg 30 ln. 2-16¹. Having determined that the Bentley/Doremus Easement 1 was invalid, the trial court quieted title to said property to Hall and ordered Manthei to remove the paving material they had installed on the easement. CP 111, ln. 17-23.

Manthei has appealed the trial court's Orders. For the reasons set forth below, Hall respectfully submits that the decisions of the trial court are supported by the facts and the law, and therefore, should be affirmed.

III. **ARGUMENT**

A. Standard of Review – Substantial Evidence.

¹ An appellate court may resort to the trial court's oral decision to ascertain the legal and factual basis upon which the trial court predicated its finding. *Stieneke v. Russi*, 145 Wn. App. 544, 566, 190 P.3d 60, 71 (2008).

The parties hereto agreed to trial by affidavit pursuant to Pierce County Superior Court Local Rule 1(i).² Where the trial evidence is based upon affidavits the court of appeals reviews the trial court's factual rulings to determine whether the factual determinations are supported by "substantial evidence." *W.R.P. Lake Union Ltd. Partnership v. Exterior Services, Inc.*, 85 Wn. App. 744, 749-50, 934 P.2d 722, 726 (1997).

Where the trial court's factual findings were based upon affidavits in divorce modification proceeding the Court of Appeals held:

It is illogical to state that we conduct exactly the same review as the trial court when we also require the trial court to enter findings of fact and conclusions of law. *See* CR 52(a)(2)(B). In addition, the trial court below has the benefit of oral argument to clarify conflicts in the record. It is consequently in a better position than the reviewing court to balance and assess discrepancies, resolve conflicts, and determine an equitable method for determining income and deductions. Moreover, concerns of judicial economy prevent an exhaustive appellate review of each detail of every support modification. Therefore, the proper standard of review is whether the findings are supported by substantial evidence and whether the trial court has made an error of law that may be corrected upon appeal.

² PCLR 1 (i) provides: Trial by Affidavit. (1) Parties may agree to submit unresolved issues to the assigned judge by affidavit. This shall be determined at the discretion of the judge at the status conference or as determined by agreement of the parties and approval of the trial judge. If the request for trial by affidavit is granted the parties pro se or their attorneys shall file and serve a form entitled "Trial By Affidavit Certificate," as set forth in Appendix, Form C. The court shall issue an Amended Case Schedule.

In re Marriage of Stern, 68 Wn. App. 922, 928-9, 846 P.2d 1387, 1391 (1993), distinguishing *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).

“Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true.”

In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004), *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). The Court of Appeals does not retry factual issues. If the evidence satisfies the substantial evidence standard, the appellate court will not substitute its judgment for that of the trial court, even when the Court of Appeals may have found the facts differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003), *Pierce County v. State*, 144 Wn. App. 783, 847, 185 P.3d 594, 627 (2008).

Evidence may be either direct or circumstantial. Circumstantial evidence can be as probative as direct evidence. The timing and sequence of circumstantial evidence can illuminate a chain of events from which the trier of fact may draw reasonable inferences of ultimate facts. Here it was up to the trial court as the trier of fact to weigh all the evidence, direct and circumstantial, and draw its own reasonable inferences there from.

Boguch v. Landover Corp., 153 Wn. App. 595, 614, 224 P.3d 795, 804 (2009).

B. Construing Easements –Rules of Construction.

In construing easements the court's primary task is to ascertain and give effect to the original parties' intent. That intent is determined from the language of the easement and the surrounding circumstances and conduct of the parties. ***Sunnyside Valley Irr. Dist. v. Dickie***, 111 Wn. App. 209, 214-5, 43 P.3d 1277, 1281 (2002). In construing easements, our courts are not limited to the normal rules of construction applicable to contract and statutes. Thus, irrespective of any ambiguity (or lack thereof) in reviewing easements, our courts have often scrutinized the circumstances surrounding the transfer and subsequent conduct of the parties if such examination is useful. ***Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n***, 156 Wn.2d 253, 273 n.15, 126 P.3d 16, 26 (2006).

Construing easements involves mixed questions of law and fact. The parties' intentions are questions of fact. The legal consequences of those intentions are questions of law. ***Sunnyside***, 149 Wn.2d at 880.

C. The Trial Court's Findings are Supporteded by Substantial Evidence.

The trial court found that the Millennium/Bentley settlement agreements prevented Bentley (and Bentley's successors) in interest from

allowing any motor vehicle traveling across the Bentley/Doremus property line. CP 111, ln.11-16; RP pg. 30, ln. 2-16. This finding is amply supported by the record.

there shall be no ingress and egress from the easement road delineated on the Large Lot Subdivision across the Bentley Property from or to any property lying west of the Bentley Property.

CP 42 (underlining original). And, Bentley further agreed to

a. erect a fence along the west side of the Bentley Property sufficient to prevent motor vehicles from being driven across that property to the property that lies to the west of that property (the location of the fence to be “mutually agreed” between Millennium and Bentley); and
....

CP 45. These two documents provide much more than the necessary sufficient “quantity of evidence to persuade a fair-minded, rational person” that Bentley could not grant an easement nor accept the grant of an easement across the Bentley/Doremus property line. Therefore, it is respectfully submitted the trial court’s finding is supported by substantial evidence which must therefore be upheld by the reviewing court.

Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d at 879-80; *Pierce County v. State*, 144 Wn. App. at 847.

Bentley, then, was prohibited from entering to ingress and egress easements that were designed to provide vehicle access that crossed the

Bentley/Doremus property line. However, such access is a specific purpose of both Bentley/Doremus Easement 1 and Bentley/ Doremus Easement 2. CP 49; CP 56 & 58. The question, then, is what is the legal effect of this dichotomy?

D. Manthei's Property Interests are Not Greater than Bentley's.

It has long been the law of Washington that a purchaser of property can take no greater title than that of the predecessor in interest. "A grantor of property can convey no greater title or interest than the grantor has in the property." *Firth v. Lu*, 146 Wn.2d 608, 615, 49 P.3d 117, 120 (2002); *Sofie v. Kane*, 32 Wn. App. 889, 895, 650 P.2d 1124, 1128 (1982); *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wn. 458, 468 -9, 194 P. 536, 539 (1920).

Here the Bentley's covenants with Millennium prohibited Bentley from granting ingress and egress easements to all properties lying to the west of the Bentley short plat. CP 45; CP 42. Because Manthei is Bentley's grantee, Manthei's interest in their property is limited by the Bentley/Millennium covenants. Of course, Manthei is also limited by the rules, restrictions and limitation governing the Bentley short plat (discussed further below).

E. An Easement that Fails its Purpose Terminates.

When an easement fails in its essential purpose the easement is terminated and all rights to the easement property revert to the fee owner.

Where the particular use of an easement for the purpose for which it was established ceases, the land is discharged of the burden of the easement and right to possession reverts to the original land owner or to that landowner's successor in interest.

Lawson v. State, 107 Wn.2d 444, 450, 730 P.2d 1308, 1312 (1986).

Cases from out of state courts are in accord with the holding in *Lawson*.

The court in *Comeau v. Manzelli*, 344 Mass. 375, 182 N.E.2d 487 (1962), applied the rule that an easement is considered to be extinguished where it is incapable of being exercised for the purpose for which it was created and concluded that a finding of abandonment of an entire right of way was warranted where the sole purpose of the easement was to provide access to a street, but such access could not be accomplished because the grantor lacked ownership over part of the parcel. Thus, the court held that the purported grant of the easement was a nullity, noting that the easement claimant had never been able to use the easement area as a means of access to the street and that there was no other purpose for which the easement area could be used.

In *Anderson v. Schmidt*, 16 Mich. App. 633, 168, N.W.2d 437 (1969), the court held that where the terms of the agreement provided a

grant of ingress and egress over the servient land to get to a boathouse, it being apparent that the boathouse was essential to the purpose if such grant was to be effective, and the boathouse subsequently deteriorated so that it was not usable, the ultimate collapse of the boathouse made the purpose for the creation and existence of the right of easement hopeless and impossible, and thus, the easement terminated when the boathouse collapsed.

In this case, both Bentley/Doremus Easement 1 and Bentley/Doremus Easement 2 are for the purpose of ingress and egress across and over the Bentley/Doremus boundary line. However, such access is strictly prohibited by Bentley's prior agreements. Thus, Bentley/Doremus Easement 1 and Bentley/Doremus Easement 2 fail in their essential purposes. Consequently, consistent with the holding of *Lawson*, the trial court correctly determined that the easements were not valid and all rights to said easements must revert back to the respective grantors.

F. Access Easements that are Added to a Short Plat Without Amending the Plat are Void.

The trial court was correct in extinguishing Bentley/Doremus Easement 1 and Bentley/Doremus Easement 2 irrespective of the Millennium/Bentley settlement. The Bentley property was short plated.

CP 76. Bentley/Doremus Easement 1 and Bentley/Doremus Easement 2 were then added to the short plat property without amending the short plat. CP 103, ln.17-22.

In an analogous situation, an owner of a short plat filed a quit claim deed to extinguish an easement that only served the short plated property. The owner held title to both the dominant and servient estates. However, the Court of Appeals held that as a matter of law the easement was not extinguished by the quit claim deed because the owner did not seek and did not receive short plat amendment approval by the governing county. *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 657, 145 P.3d 411, 417 (2006).

In Pierce County all amendments to short plats, including amendments effecting easements, must be approved by Pierce County Department of Planning and Land Services. PCC 18F.10.020; RCW 58.17. Because the easements in this case were not approved by Pierce County those easements are a nullity. *Id.* at 657 (“In order to amend a short plat, the amended short plat must comply with all of the procedures and requirements for the original short plat approval”).

G. *The Bentley/Doremus Easements are Void due to Failure of Consideration.*

In light of all of the surrounding circumstances, it is reasonable to conclude that Bentley/Doremus Easement 1 and Bentley/ Doremus Easement 2 were given in exchange for each other. Neither deed recites any consideration. Bentley/Doremus Easement 1 granted Bentley an ingress and egress over a portion of Doremus property and Bentley/Doremus Easement 2 granted Doremus an ingress and egress easement over the Bentley property. Both easements were executed within a few months of each other. However, Bentley/Doremus Easement 2 purports to grant Bentley and their successors in interest an easement over the very road that Bentley had previously agreed would not be used for that purpose. Compare CP 56 & 58, CP 40 and CP 59 with CP 42 (*there shall be no ingress and egress from the easement road delineated on the Large Lot Subdivision across the Bentley Property from or to any property lying west of the Bentley Property*” (underlining original, italic added)).

Failure of consideration for a contract constitutes grounds for its rescission. *Wilkinson v. Sample*, 36 Wn. App. 266, 272, 674 P.2d 187, 191 (1983). Failure of consideration is defined as follows:

It means that sufficient consideration was contemplated by the parties at time contract was entered into, but either on account of some innate defect in the thing to be given or nonperformance in whole or in part of that which the

promise agreed to do or forbear nothing of value can be or is received by the promise. It occurs where the thing expected to be received by one party and given by the other party cannot be or has not been given without fault of the party contracting to give it.

Black's Law Dictionary, 534 (5th ed. 1979). (citations omitted).

Failure of consideration then will exist wherever one who has either given or promised to give some performance fails without his fault to receive in some material respect the agreed exchange for that performance.

Wilkinson v. Sample, 36 Wn. App. at 273.

In this case, Bentley's prior covenants with Millennium prevented Bentley from conveying the easement access he promised to Doremus in Bentley/Doremus Easement 2. Thus, there is a failure of consideration that justifies rescission and the trial court's invalidation of both easement agreements.

H. The Trial Court's Decision may be Affirmed on Alternate Grounds.

The trial court did not articulate compliance with the short plat amendment process or failure of consideration as additional grounds for its decision. CP 111. However, it is well settled law that a reviewing court may affirm a trial court's decision on any basis irrespective of the conclusion of law in the trial court's ruling. *Stieneke v. Russi*, 145 Wn. App. 544, 559-60, 190 P.3d 60, 68 (2008). "Where a judgment or order is correct, it will not be reversed because the court gave a wrong or

insufficient reason for its rendition.” *Kirkpatrick v. Department of Labor and Industries*, 48 Wn.2d 51, 53, 290 P.2d 979, 980 (1955).

**IV.
CONCLUSION**

The Bentley/Millennium convents prohibited Bentley from agreeing to the ingress and egress provided in Bentley/Doremus Easements 1 and 2. Therefore, Bentley/Doremus Easements 1 and 2 terminate because they fail in their purposes.

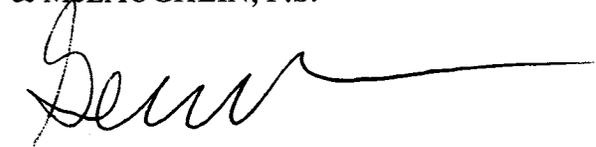
Further, the subject easements are void because Bentley did not seek, nor receive, short plat amendment approval prior to adding said access easements to the short plat property.

Finally, the subject easements should be rescinded based upon the failure of consideration.

For the all of the reasons stated above, Ms. Hall respectfully submits that the trial court’s decision should be affirmed.

Dated this 12 day of April 2010.

KRAM, JOHNSON, WOOSTER
& McLAUGHLIN, P.S.



Garold E. Johnson, WSBA #13286
Attorney for Respondent

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WASHINGTON STATE COURT OF APPEALS
DIVISION II

BARBARA NEVINS HALL REVOCABLE)
LIVING TRUST,)

Plaintiff,)

v.)

CHRISTOPHER L. and MICHELE L.)
PARRISH, husband and wife; CHRISTINE)
LAUGHRIDGE, a single person; RICHARD)
D. and KARIN R. MANTHEI, husband and)
wife; DOUGLAS L. SHARP, a married)
person as his sole and separate property,)

Defendants.)

NO. 40151-7-II

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On April 12, 2010, I caused to be served BRIEF OF RESPONDENT on the following individuals in the manner indicated:

Michael W. Johns
Davis Roberts & Johns PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335

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(X) Via U.S. Mail & email: mike@drj-law.com

DATED this 12th day of April 2010.

Dawne M. Rowley
Dawne M. Rowley

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STATE OF WASHINGTON

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WASHINGTON STATE COURT OF APPEALS
DIVISION II

BARBARA NEVINS HALL REVOCABLE)
LIVING TRUST,)
Plaintiff,)

NO. 40151-7-II

CERTIFICATE OF SERVICE

v.)

RICHARD D. and KARIN R. MANTHEI,)
husband and wife,)
Defendants.)

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On April 12, 2010, I caused to be served page 9 of BRIEF OF RESPONDENT on the following individuals in the manner indicated:

Michael W. Johns
Davis Roberts & Johns PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335

(X) Via U.S. Mail & email: mike@drj-law.com

DATED this 14th day of April 2010.

Dawne M. Rowley
Dawne M. Rowley