No. 42426-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

FRANK FREDERICKS,

Respondent,

v.

EARLY DAWN ESTATES HOMEOWNERS ASSOCIATION

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESPONSE TO ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO 3

A. The Trial Court Properly Entered Conclusions of Law 2, 2(b), and 2(d) 3

1. It was proper and within its discretion for the trial Court to conclude that Fredericks was responsible for his proportionate (1/37th) share of amounts actually expended by EDE to repair and maintain the road and access gate, that he was to be billed for these charges since they are to reflect expenses actually paid by EDE, and that he is not responsible to pay annual or special assessments that EDE may impose on its own members 3

2. Fredericks is not unjustly enriched by being required to pay his pro rata share of expenses actually incurred by EDE to repair and maintain the road and access gate. By ruling as it did, the trial court ensured that Fredericks pays his fair share of expenses incurred, no more and no less 3

B. The trial court properly concluded that Fredericks, as a non-member of EDE, is entitled to have his own key to enable him to open the access gate as he deems reasonably necessary. Requiring him to secure the permission of EDE to leave the gate open when he believes it to be reasonably necessary would be an unreasonable restriction on Fredericks' easement rights, a restriction that was not intended by the parties when the easement was created 3

C. The trial court acted within its discretion in concluding that the reader board was to contain not only the names of Fredericks and his significant other, but also the names of their respective

home businesses, so that visitors may be able to contact and identify them 4

D. The trial court acted within its discretion in Concluding that Fredericks was entitled to place a reasonable sign at the mailbox area, identifying Fredericks' short plat, again to enable visitors to locate and contact Fredericks 4

E. The trial court properly concluded that nothing in the easement serves to preclude Fredericks from operating an ATV on the easement road, but not beyond it 4

III. STANDARD OF REVIEW 4

IV. STATEMENT OF THE CASE 5

V. ARGUMENT 8

A. The trial court properly entered Conclusions of Law 2, 2(b), and 2(d), deeming Fredericks responsible for his proportionate share of the amounts actually expended by EDE to repair and maintain the easement road and access gate, but not responsible to pay the same assessments that EDE may choose to impose upon its own members 8

B. The trial court properly concluded that Fredericks, as a non-member of EDE, is entitled to have his own key to enable him to open the gate as he deems reasonably necessary. Requiring him to secure the permission of EDE to leave the gate open when he believes it to be reasonably necessary would be an unreasonable restriction on Fredericks' easement rights, a restriction that was not intended by the parties when the easement was created 12

C. The trial court properly concluded that the reader board was to contain not only the names of Fredericks and his significant other, but also the names of their respective

home businesses, so that visitors may be able to identify and contact them 18

D. The trial court properly concluded that Fredericks was entitled to place a reasonable sign at the mailbox area, identifying Fredericks' short plat, again to enable visitors to locate and contact Fredericks 19

E. The trial court properly concluded that nothing in the easement serves to preclude Fredericks from operating an ATV on the easement road, but not beyond it 20

VI. CONCLUSION 21

TABLE OF AUTHORITIES

Cases Cited

Brentwood Subdivision Road Association, Inc. v. Cooper, 461 N.W.2d 340 (Iowa App. 1990) 11

Bushy v. Weldon, 30 Wn.2d 266 (1948) 11

Green v. Lupo, 32 Wn. App. 318 (1982) ..... 20 , 21

Holland v. City of Tacoma, 90 Wn. App. 533 (1998) 3, 19

Lowe v. Double L Properties, Inc., 105 Wn. App. 888 (2001) 16

Okoboji Camp Owners Cooperative v. Carlson, 578 N.W.2d 652 (Iowa 1998) 12

Rupert v. Gunter, 31 Wn. App. 27, 30 (1982) 13, 15

S&S Construction, Inc. v. ADC Properties, LLC, 151 Wn. App. 247 (2009) 19

Snyder v. Haynes, 152 Wn. App. 774 (2009) 20

Standing Rock Homeowners Association v. Misich, 106 Wn. App. 231 (2001) 5, 13, 16

State v. Brockob, 159 Wn.2d 311 (2006) 4

Steury v. Johnson, 90 Wn. App. 401 (1998) 15

Sunnyside Valley Irrigation District v. Dickie, 149 Wn.2d 873 (2003) .. 4, 5

Rules and Statutory Provisions

RCW 70.128.260 18

I. INTRODUCTION

This case presents a concerted effort on the part of defendant/appellant Early Dawn Estates Homeowners Association ("EDE") to impose its will upon its neighbor, plaintiff/respondent Frank Fredericks, who is not a member of EDE. Fredericks holds an access easement to his home over a roadway located within Early Dawn Estates (Ex 4), and this case was brought because of EDE's unreasonable interference with Fredericks' rights as the dominant easement holder.

The case was also brought because of EDE's insistence that Fredericks pay to EDE the same annual and special assessments for road maintenance that EDE's members pay to it. Fredericks objected to paying assessments to an association to which he did not belong and in which he had no voice.

EDE fails to recognize that Fredericks is not one of its members, is not subject to EDE's rules, and is not subject to restrictions and assessments EDE may choose to impose on its own members.

EDE also placed a metal lock box at the access gate guarding the entrance to both Early Dawn Estates and Fredericks' short plat. EDE refused to give Fredericks a key to enable him to leave the gate open when reasonably necessary. Instead, it required Fredericks to seek permission

from EDE's board when he needed to have the gate open, permission which was not forthcoming.

The trial court recognized that Fredericks is not a member of EDE, and is not subject to EDE's internal agreements and rules. Following a bench trial, the Court therefore properly found that Fredericks need only pay a proportionate share of the actual expenses incurred by EDE to repair and maintain the easement road and access gate, and that EDE was to bill Fredericks for his share of these expenses. The trial court also properly found that Fredericks is entitled to have his own key for the access gate. The Court also properly required EDE to display the names of Fredericks, his significant other, and their respective home businesses at the reader board located at the access gate. The trial court also properly concluded that Fredericks is entitled to install an indentifying sign at the mailboxes, like EDE's sign, to indicate that the access gate leads to his separate subdivision. Finally, the Court properly found that the easement does not restrict Fredericks' use of all terrain vehicles within the scope of his easement.

II. RESPONSE TO ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

A. The Trial Court Properly Entered Conclusions of Law 2, 2(b), and 2(d).[1]

1. It was proper and within its discretion for the trial court to conclude that Fredericks was responsible for his proportionate (1/37th) share of amounts actually expended by EDE to repair and maintain the road and access gate, that he was to be billed for these charges since they are to reflect expenses actually paid by EDE, and that he is not responsible to pay annual or special assessments that EDE may impose on its own members.

2. Fredericks is not unjustly enriched by being required to pay his pro rata share of expenses actually incurred by EDE to repair and maintain the road and access gate. By ruling as it did, the trial court ensured that Fredericks pays his fair share of expenses incurred, no more and no less.

B. The trial court properly concluded that Fredericks, as a non-member of EDE, is entitled to have his own key to enable him to open the access gate as he deems reasonably necessary. Requiring him to

[1] EDE asserted that the trial court also erred in entering conclusion of law number 3, but glossed over this contention at page 28 of Brief of Appellant, and cited no authority to support its position. This assignment of error should therefore be deemed abandoned or frivolous. See *Holland v. City of Tacoma*, 90 Wn. App. 533, 538 (1998).

secure the permission of EDE to leave the gate open when he believes it to be reasonably necessary would be an unreasonable restriction on Fredericks' easement rights, a restriction that was not intended by the parties when the easement was created.

C. The trial court acted within its discretion in concluding that the reader board was to contain not only the names of Fredericks and his significant other, but also the names of their respective home businesses, so that visitors may be able to identify and contact them.

D. The trial court acted within its discretion in concluding that Fredericks was entitled to place a reasonable sign at the mailbox area, identifying Fredericks' short plat, again to enable visitors to locate and contact Fredericks.

E. The trial court properly concluded that nothing in the easement serves to preclude Fredericks from operating an ATV on the easement road, but not beyond it.

III. STANDARD OF REVIEW

EDE has not appealed any of the trial court's findings of fact. As a result, they are verities on appeal. *See, e.g., State v. Brockob*, 159 Wn.2d 311, 343 (2006).

Conclusions of law are reviewed de novo. *See, e.g., Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 880 (2003). In this

court's review of the easement at issue, the intention of the original parties to the easement is a question of fact "and the legal consequence of that intent is a question of law." *Id.*

To the extent the Court made its decisions based upon equitable principles, as EDE concedes it did,[2] the trial court's decisions are to be given "great weight." *Standing Rock Homeowners Association v. Misich*, 106 Wn. App. 231, 240 (2001).

IV. STATEMENT OF THE CASE

Early Dawn Estates subdivision is a residential community in rural Yacolt, Washington, created in 1978. CP 65, Finding No. 4, at 38. The Early Dawn Estates homeowners have entered into a road maintenance agreement for the roads located within its boundaries. Ex. 1. The road maintenance agreement is administered by defendant EDE. CP 65, Finding No. 1, at 38.

In September 2000, Fredericks acquired the real property at issue. CP 65, Finding No. 5, at 38. This property is adjacent to Early Dawn Estates. RP 64, 69. The only access to Fredericks' property is over NE 159th Avenue, a private road located within Early Dawn Estates. CP 65, Finding No. 2, at 38. When Fredericks purchased his property, he became

[2] *See* Brief of Appellants, at 29.

the holder of a nonexclusive 60 foot easement for "ingress, egress, and utilities." Ex 4. This access easement has been in existence for decades.

In 2002, Fredericks subdivided his land into four building lots, known as the "Fredericks Short Plat." Ex 6. At that time, the entrance to Early Dawn Estates had a motorized access gate. CP 65, Finding No. 4, at 38. A breaker was located at the gate which anyone could trigger, resulting in the gate remaining in an open position. *Id.* at Finding No. 6. Fredericks activated this breaker as needed during the construction of his residence and the development of his short plat in 2004-05, and up to 2009. RP 69-71. EDE raised no objection to this, until 2009, when Stu Reeder became EDE's president. RP 70-73.

In 2008, however, EDE changed the operation of the gate. EDE placed a lock box at the gate, with a metal cover, preventing access to the breaker. CP 65, Finding No. 6, at 38. While some homeowners in EDE were given keys to the lock box, enabling them to leave the gate open as desired, Fredericks was not given a key. Ex 16; RP 76. EDE also denied Fredericks' request to leave the gate open during business hours and when he expected visitors or invitees to come to his property. RP 80-83. Instead, Fredericks had to get permission from EDE's Board if he needed to have the gate left open, permission which would be granted or withheld in the Board's "sole discretion." Ex 22. Moreover, Fredericks had to

remain by a telephone so that he could remotely activate the gate when a visitor would call him. Ex 16. If he was away from a telephone, his visitors could not access the property. RP 82-83.

Fredericks felt that this was a retaliatory act by EDE because Fredericks had declined EDE's request to pay annual road maintenance fees. Fredericks felt that the work he had willingly and voluntarily provided to improve and maintain the roadway and gate over the years was more than adequate, and that he was not obligated as a third party to comply with EDE's internal agreements and unilateral assessments. Ex 21. EDE disagreed, and continued to demand that Fredericks pay assessments. Ex 22.

From that point, the relationship and interactions between plaintiff and EDE members deteriorated. EDE homeowners have verbally abused both Fredericks and his guests. RP 99-101. Fredericks became a common topic at EDE board and homeowner meetings. Ex 17, 18, 23.

The next area of dispute arose when Fredericks requested EDE to place identifying information on the reader board for the two businesses that he and his significant other operate out of Fredericks' home. EDE refused to list either business on the reader board. RP 101-103; Ex 21, 22.

With matters having come to a head, Fredericks brought this action to obtain a declaratory judgment regarding EDE's interference with his

easement rights, to compel EDE to place identifying information regarding the businesses in his home to be placed on the reader board, and for a determination regarding his responsibility to participate in EDE's road maintenance assessments or other expenses.

V. ARGUMENT

A. The trial court properly entered Conclusions of Law 2, 2(b), and 2(d), deeming Fredericks responsible for his proportionate share of the amounts actually expended by EDE to repair and maintain the easement road and access gate, but not responsible to pay the same assessments that EDE may choose to impose upon its own members.

The trial court concluded that Fredericks was responsible to pay his proportionate share of expenditures actually incurred and paid by EDE to maintain the easement road (NE 159th Avenue) and the access gate. EDE is to bill Fredericks when expenses have been incurred, and to provide documentation for the expenses incurred. Fredericks is then to reimburse EDE for his proportionate share of those expenses.

EDE's objection appears to be that the trial court did not require Fredericks to pay the same monthly and special assessments that EDE imposes upon its own members. Primarily because Fredericks is not an Early Dawn Estates homeowner or a member of EDE, the trial court acted well within its discretion in simply concluding that Fredericks should pay

his proportionate share of expenses actually incurred in connection with his easement road and the access gate.

The homeowner members of EDE have chosen to enter into CC&R's and a road maintenance agreement requiring the EDE owners to maintain and repair the various streets that are located within Early Dawn Estates. Fredericks is not a party to the road maintenance agreement, and is not bound by defendant's CC&R's. Fredericks' easement includes only a small portion of the roads within Early Dawn Estates.

Despite not being a member of EDE or a party to EDE's road maintenance agreement, Fredericks voluntarily devoted his own time and money to repair, improve, and maintain the easement roadway and the gate over the years. He estimated that he spent over $4,000 over the last 10 years in that regard, despite the fact that he has no EDE voting rights and has been given no say in deciding which portions of the roads should be repaired. The trial court properly concluded that Fredericks satisfied his obligation through 2010 to pay a proportionate share of the expenses incurred to repair and maintain the easement road and access gate by his work in this regard. CP 65, Conclusion No. 2, at 40.

But this work was not enough for EDE. In 2009, EDE decided that Fredericks should be required to pay the annual $250 assessment that EDE homeowners pay pursuant to their road maintenance agreement. When

Fredericks pointed out the work he had done and the money he had spent over the years to maintain and improve the roadway and the gate, EDE continued to insist that Fredericks was responsible to make the same annual assessment payments that EDE members made. EDE makes the same argument on appeal, contending that it is legally entitled to bind Fredericks, a non-member of EDE, to whatever assessments EDE may impose on its own members, regardless of which part of the subdivision roads are going to be repaired and despite the fact that Fredericks has no say whatsoever in EDE's decision-making process. It appears to be Fredericks' refusal to accept EDE's demand that led EDE to become hostile to him, thus leading to this lawsuit.

Fredericks is not a party to the EDE road maintenance agreement. He has no contractual obligation to make payments as do the parties to that agreement.

The remainder of EDE's argument on this point contends that Fredericks should pay the exact same amount that EDE members pay, and that he is unjustly enriched by only being required to pay his proportionate share of expenses actually incurred by EDE to repair and maintain the easement road and the access gate. This argument overlooks the fact that EDE also maintains other roads within Early Dawn Estates, roads over which Fredericks has no easement rights. The trial court acted equitably,

reasonably, and well within its discretion in concluding that Fredericks should be billed for his proportionate share of expenses actually incurred, rather than being bound by assessments of who knows what amount EDE may choose to enact in the future.

The case law cited by EDE does not support its position. *Bushy v. Weldon*, 30 Wn.2d 266 (1948), involved two equal users of a joint driveway. The court's decision, that the two users should each pay one-half of the expense to maintain the driveway, was eminently reasonable.

In *Brentwood Subdivision Road Association, Inc. v. Cooper*, 461 N.W.2d 340, 342 (Iowa App. 1990), the Court noted that the association's "sole purpose" was to maintain and repair the roads in a subdivision **of which the dissenting defendants were homeowners**, and concluded that:

> ...the trial court could have reasonably determined an equitable contribution that should be paid by the appellees for the years since the corporation was formed and a method to equitably calculate future contributions.

This is precisely what the trial court did in the present case. It found that it was fair and equitable for Fredericks to pay his proportionate share of the expenses actually incurred to repair and maintain the easement road and the access gate, but that he should not have to pay for the repair and maintenance of other roads within Early Dawn Estates. This was entirely appropriate, and the trial court wisely took into account the fact that

Fredericks is not a member of EDE or a homeowner within Early Dawn Estates. It would be unfair and inequitable for him to be required to pay for the repair and maintenance of roads that he has no legal right to use.

Similarly, in *Okoboji Camp Owners Cooperative v. Carlson*, 578 N.W.2d 652 (Iowa 1998), the dissenting defendants owned property within the subdivision that was attempting to charge them for services rendered. The court had no trouble finding that these lot owners were receiving benefits from the services provided by the Cooperative, and that they should have to pay the same amount as their fellow lot owners.

Again, however, Fredericks is not a lot owner in Early Dawn Estates. No compelling reason has been asserted for him to have to pay the same assessments that EDE members pay. The trial court's decision should be affirmed.

B. The trial court properly concluded that Fredericks, as a non-member of EDE, is entitled to have his own key to enable him to open the gate as he deems reasonably necessary. Requiring him to secure the permission of EDE to leave the gate open when he believes it to be reasonably necessary would be an unreasonable restriction on Fredericks' easement rights, a restriction that was not intended by the parties when the easement was created.

The trial below was substantially an equitable proceeding. Accordingly, the trial court had "broad discretionary power to shape and fashion injunctive relief to fit particular facts, circumstances, and equities

of the case before it." *Rupert v. Gunter*, 31 Wn. App. 27, 30 (1982). The trial court's decision in that regard should be given "great weight." *Standing Rock Homeowners Association v. Misich*, 106 Wn. App. 231, 240 (2001).

The trial court found that EDE's unilateral control of the gate was not warranted, that its blanket refusal to allow Fredericks to leave the gate open from time to time was an unreasonable restriction on Fredericks' easement rights, that Fredericks is entitled to leave the access gate open when he deems it reasonably necessary to do so, and that Fredericks was to be given a key to the metal cover at the access gate for that purpose. CP 65, Conclusion No. 4, at 40-42. The trial court's decision was equitable and within its discretion, taking into account both Fredericks' rights as an easement holder and EDE's interest in generally maintaining the security of the access gate.

The leading Washington case regarding gates and easements is *Rupert, supra*. There, the court noted that its initial function in evaluating interference with an access easement is to attempt to determine the intention of the parties. *Rupert*, 31 Wn. App. at 30-31:

> Whether or not the owner of land, over which an easement exists, may erect and maintain fences, bars, or gates across or along an easement way, depends upon the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case; the

> nature and situation of the property subject to the easement; and the manner in which the way has been used and occupied. Similarly, if the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances. (Citations omitted.)

Here, the easement is silent regarding gates and the intention of the parties. It simply states that the purpose of the easement is for ingress, egress, and utilities. Thus, the terms of the easement itself provide no guidance as to how the gate is to be operated and maintained. It is telling, however, that no gate interfered with or limited use of the easement when the easement was initially created.

Furthermore, it is very significant that the access gate could be left open when Fredericks purchased his property, when he constructed his home, and until the metal lock box was installed in 2008. EDE's placement of a metal lock box, without Fredericks being provided a key to it, was a new restriction on Fredericks' rights as the easement holder. The trial court correctly reasoned that it was not proper for EDE lot owners to have a key to the lock box, enabling them to leave the access gate open, without Fredericks being provided the same rights.

The trial court properly determined that the new lock box was an unreasonable interference with Fredericks' use of his easement. CP 65, Conclusion No. 4, at 40. In reviewing that determination, the Court must

balance "the servient owner's burden with the dominant owner's inconvenience..." *Steury v. Johnson*, 90 Wn. App. 401, 406 (1998). Here, the inconvenience to Fredericks far outweighs any burden on EDE from having to provide Fredericks with a key to the metal lock box.

A review of the Washington case law regarding gates and easements reveals that gates are allowed only when there is in fact an increased burden on the servient estate, the gates are necessary to minimize real problems, and the gates are such that they can be freely opened by anyone. For example:

1. In *Rupert, supra*, a gate was installed to prevent the general public from entering and speeding down the easement road. The gate was difficult to open and close because of its weight and awkwardness. In its ruling, the trial court found that either the gate had to be removed or the defendants could install a lightweight gate that anyone could easily open and close. This ruling was upheld on appeal, as an appropriate exercise of the trial court's discretion.

2. In *Steury, supra*, the defendants installed a cable gate because of dramatically increased traffic, especially from nonresidents. Each property owner in the area was given keys to the gate. It was not determined whether the gate was appropriate, however, because the trial

court had ruled without first considering the balancing test set forth in *Rupert*.

3. In *Standing Rock, supra*, the plaintiff installed gates at each end of the access easement after suffering trespass and vandalism to properties and because the public was utilizing the easement road. Although the gates were initially locked, they were subsequently left unlocked. The court found that the use of the road by trespassers, vandals, and the public created an increased burden on the servient estates. After engaging in the balancing inquiry, the court concluded that, under the circumstances, unlocked gates were not unreasonable burdens on the easement.

4. In *Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888 (2001), the court allowed gates to be installed on an easement road in order to control livestock from defendant's horse and cattle ranch. The court found that these gates were necessary. However, the defendant was ordered to modify the gates to permit easier passage.

None of these cases allows the servient estate to maintain a locked gate and unilaterally dictate when it can be opened. Nor do any of these cases stand for the proposition that EDE may operate and control the gate so as to prevent or restrict access to Fredericks' property by Fredericks or his invitees. There was no finding of an increased burden upon EDE.

There was no finding that the public is traveling to this remote part of Clark County to drive on the easement road. There was no finding that there has been a significant problem with trespassing or vandalism. EDE presented no evidence that it is "necessary" to leave the gate closed at all times. It is unreasonable for Fredericks to have no say whatsoever as to when the gate can remain open.

On the other hand, the burden upon Fredericks is unreasonable. He is entitled to unfettered access to his property. A situation whereby certain EDE homeowners are given keys to leave the access gate open, but Fredericks is not, is an unreasonable limitation on his rights as the easement holder. It is not fair for him to have to seek permission from EDE, an organization to which he does not belong, in order to leave the gate open when reasonably necessary.

Furthermore, nothing in the easement itself compels the conclusion that Fredericks should have to be saddled to his telephone whenever it is possible that someone will come to his home. By its terms, the easement grants him unrestricted access rights.

Fredericks has an easement for ingress and egress. His rights in that regard may not be unreasonably restricted by EDE. The manner in which EDE has chosen to operate, however, has created an unreasonable restriction. The trial court properly so concluded.

C. The trial court properly concluded that the reader board was to contain not only the names of Fredericks and his significant other, but also the names of their respective home businesses, so that visitors may be able to identify and contact them.

The Early Dawn reader board lists the names of people who live behind the gate, thereby enabling visitors to contact them with the two digit code. Because neither Northwest Properties nor Ms. Main's business was listed on the reader board, visitors who know only the business names, rather than Mr. Fredericks' or Ms. Main's name, would not be able to access their home businesses. The trial court acted within its discretion when it concluded that these business names should also be added to the reader board.

Fredericks and Ms. Main have every right to operate businesses from the home. Indeed, Ms. Main has a statutory right to operate an adult family home without being limited by restrictive covenants. RCW 70.128.260. As a matter of equity and fundamental fairness, EDE was properly ordered to place the names of the two home businesses (or any other business that may be operated from Fredericks' home) on the reader board.

EDE's objection to placing the business names on the reader board appears to stem from the fact that EDE's CC&R's preclude business signs. Again, EDE wants to impose its own rules and regulations on property

owners who are not members of EDE. Fredericks has legally chosen to have two businesses operate out of his home. It was completely reasonable for the trial court to require EDE to place the business names on the locked access gate.

D. The trial court properly concluded that Fredericks was entitled to place a reasonable sign at the mailbox area, identifying Fredericks' short plat, again to enable visitors to locate and contact Fredericks.

EDE devotes a mere two sentences in its opening brief to contend that the trial court erred in allowing Fredericks to place a sign near the Early Dawn Estates sign, alerting visitors to the fact that the Fredericks short plat was located behind the access gate. In the absence of authority or meaningful argument, this assignment of error should not be considered. *See, e.g., S&S Construction, Inc. v. ADC Properties, LLC*, 151 Wn. App. 247 (2009); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538 (1998) ("passing treatment of an issue or lack of reasoned arguments is insufficient to merit judicial consideration.").

In any event, the trial court acted within its discretion in allowing Fredericks to place a reasonable sign identifying his short plat. It is not only Early Dawn Estates that exists behind the gate. Fredericks and his three short plat neighbors also live there, and they have equal rights, a fact EDE fails to comprehend.

E. The trial court properly concluded that nothing in the easement serves to preclude Fredericks from operating an ATV on the easement road, but not beyond it.

The trial court concluded that Fredericks and his invitees were not precluded from operating all terrain vehicles within the Fredericks easement, but that they may not operate such vehicles beyond the scope of that easement. CP 65, Conclusion No. 7, at 42. In contending that the court erred in reaching this conclusion, EDE relies upon *Snyder v. Haynes*, 152 Wn. App. 774 (2009).

In that case, the court found that the trial court did not abuse its discretion in banning the use of off road vehicles on an easement road. There, however, the court noted that the ATV's were creating dust and flying gravel, that children were driving the vehicles, that the ATV's were entering property of a third party, and that deep indents had been created in the road. *Id.* at 781.

In the present case there was no such evidence of hazards and damage. Significantly, the trial court in this case concluded that ATV's *could* be driven on the easement road. That conclusion was within the discretion of the trial court, and should be affirmed.

A complete ban on the use of ATV's, such as that sought by EDE in this case, is a drastic solution. A servient owner sought to impose a similar ban on motorcycle riding in *Green v. Lupo*, 32 Wn. App. 318

(1982). The court reversed the trial court's imposition of a complete ban on motorcycle riding, stating, at 324:

> On its face, the ban appears to unreasonably interfere with the dominant owners' use of the easement. Although an equitable solution to the motorcycle problem is necessary, the trial court abused its discretion in imposing a ban on motorcycles without proper consideration of the ban's effect on the dominant owners' use of the easement.

The case was remanded to the trial court so that it could come up with reasonable restrictions that would ensure the motorcycle riding would not become a dangerous nuisance. *Id.* at 324-25.

There is no reason, in equity or in law, for Fredericks to be completely precluded from driving an ATV on his easement, such as to his mailbox, as opposed to utilizing a vehicle. On the other hand, the trial court imposed reasonable restrictions when it prohibited the operation of ATV's in areas that are not within the access easement. This ruling should be affirmed.

VI. CONCLUSION

For the foregoing reasons, plaintiff/respondent Frank Fredericks respectfully asks that the judgment below be affirmed.

RESPECTFULLY SUBMITTED this 5 day of March, 2012.

HEURLIN, POTTER, JAHN,
LEATHAM & HOLTMANN, P.S.

for WSBA 14709

Stephen G. Leatham, WSBA #15572
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I caused the foregoing BRIEF OF RESPONDENT to be served on the following:

Denise J. Lukins
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by mailing, by U.S. Mail, First Class postage prepaid, a true copy to the foregoing on the 5 day of March, 2012.