

62618-3

62618-3

NO. 62618-3-1

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

2009 JUN 26 PM 3:10

FILED
COURT OF APPEALS
STATE OF WASHINGTON

VICTOR H. ROWE,

Plaintiff/Appellant,

v.

FREDERICK C. COLLINS and ALICE M. COLLINS, husband and wife,
individually and as a marital community,

Defendants/Respondents.

RESPONDENTS' BRIEF

Dean G. von Kallenbach, WSBA #12870
Luke M. LaRiviere WSBA # 32039
YOUNG deNORMANDIE, P.C.
1191 Second Avenue, Suite 1901
Seattle, Washington 98101
Tel. (206) 224-9818

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTS	3
A. Background.....	3
B. Rowe purchases the house on Lot 18.....	4
C. Collins purchases the house on Lot 17.	4
D. Collins decides to remodel his house.....	5
E. Rowe’s complaint.	6
F. The remodel	7
III. LEGAL AUTHORITY	9
A. Rowe did not present any evidence at trial that Collins had constructive notice of the easement and is barred from asserting this claim on appeal.	10
B. The trial court correctly excluded evidence of insurance coverage.....	15
C. Collins’s property does not encroach on Rowe’s property and the law Rowe relies on does not apply to our present case.....	19
D. The trial court did not decide whether Rowe’s complaint was barred by the doctrine of laches.....	21
E. Rowe is not entitled to injunctive relief.....	23
IV. CONCLUSION.....	30

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Agronic Corp. of Am. v. deBough</i> 21 Wn. App. 459, 464, 585 P.2d 821 (1978).....	24
<i>Bach v. Sarich</i> 74 Wn.2d 575, 582, 445 P.2d 648 (1968).....	27
<i>Brown v. Voss</i> 105 Wn.2d 366, 715 P.2d 514 (1986).....	24, 25
<i>Brundridge v. Fluor Fed. Servs., Inc</i> 164 Wn.2d 432, 441, 191 P.3d 879 (2008).....	11
<i>Burnside v. Simpson Paper Co.</i> 123 Wn.2d 93, 108, 864 P.2d 937 (1994).....	10
<i>Cox v. Spangler</i> 141 Wn.2d 431, 441, 5 P.3d 1265 (2000).....	17
<i>Davis v. Dep't of Labor & Indus.</i> 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).....	17
<i>Dorsey v. King County</i> 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988).....	9
<i>Harris v. Ski Park Farms</i> 120 Wn.2d 727, 739, 844 P.2d 1006 (1993).....	21
<i>Hollis v. Garwall, Inc.</i> 137 Wn.2d 683, 699-700, 974 P.2d 836 (1999)	27
<i>Holmes Harbor Water Co. v. Page</i> 8 Wn. App. 600, 603, 508 P.2d 628 (1973).....	28
<i>Kucera v. DOT</i> 140 Wn.2d 200, 221, 995 P.2d 63 (2000).....	23
<i>M.K.K.I., Inc. v. Krueger</i> 135 Wn. App. 647, 654, 145 P.3d 411 (2006).....	20
<i>Peterson v. Koester</i> 122 Wn. App. 351, 359, 92 P.3d 780 (2004).....	27

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Proctor v. Huntington</i> 192 P.3d 958, 964, 192 P.3d 958 (2008)	20
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> 111 Wn. App. 209, 219, 43 P.3d 1277.....	21
<i>United States v. Flores-Montano</i> 424 F.3d 1044, 1047 (9th Cir. 2005)	11
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> 141 Wn.2d 169, 176, 4 P.3d 123 (2000).....	9

Other Authorities

23 Wright, Federal Practice & Procedure, §5362	16, 17
--	--------

Rules

ER 411	15, 16, 17
RAP 10.3 (g)	14
RAP 10.4(c)	14
RAP 2.5(a)	10, 11
RAP 2.5(a)	11

I. INTRODUCTION

The Appellant Victor Rowe and Respondents Fredrick and Alice Collins (collectively referred to as “Collins”) own adjoining properties in Seattle. In 1936, the prior owner of Rowe’s property received an easement to use the driveway located on the south border of what is now Collins’s property. This driveway provides the only access to Collins’s property.

Rowe purchased his property in 1959 for investment purposes and has never lived in the house. Rowe rented the property to various tenants, but it has been vacant for the last 17 years. There is a driveway located on the south side of Rowe’s property which his tenants used to access the house and backyard.

Fredrick Collins is in his eighties. He suffered a stroke several years ago and, as a result, is legally blind, has no feeling on the left side of his body and has substantial difficulty walking and hearing. It is likely that Collins will be confined to a wheelchair in the near future.

In 2001, Collins remodeled his house and reconfigured the driveway to accommodate his physical disabilities. Rowe was aware of the remodel, but waited four years after the completion of construction to complain that the reconfiguration of the driveway interfered with his

ability to use the easement to access the backyard of his property. Rowe then waited another year to file his lawsuit against Collins.

At trial, Rowe claimed that, as part of his remodel, Collins raised the level of the entire driveway. Rowe contended this modification created a steep slope that interfered with his ability to use the easement to drive into his backyard. Finally, Rowe claimed he told Collins about his easement before Collins reconfigured the driveway.

The evidence at trial did not support any of Rowe's claims. The trial court found that (1) Rowe never used the easement to access his backyard; (2) Collins's modification of the driveway did not interfere with Rowe's use of the easement; and (3) Collins was unaware of Rowe's easement before he modified the driveway.

At trial, Rowe was adamant that the only relief he wanted was an order requiring Collins to restore the driveway to its original configuration. After hearing testimony, considering all of the evidence and balancing the equities, the trial court determined that requiring Collins to restore the driveway to its original condition would damage him far more than the modifications to the driveway would presumably injure Rowe. The trial court further found that Collins's reconfiguration of the driveway did not cause Rowe significant harm and denied his request for injunctive relief.

II. FACTS

A. **Background.**

In 1936, Rachel and Arnold Morgan owned property located at 3838 – 22nd Avenue SW (hereinafter “Lot 17”). Hilma Peterson owned the neighboring property to the south located at 3842 – 22nd Avenue SW (hereinafter “Lot 18”). Rachel Morgan and Hilma Peterson were sisters. Their father previously owned both Lot 17 and Lot 18 and transferred one lot to each of his daughters.

In December 1936, Morgan made two conveyances to Peterson in one deed. The first conveyance was title to the south six feet of Lot 17. The second conveyance was for an easement over a driveway that existed along the south side of Lot 17:

The Grantors Rachel Morgan and Arnold A. Morgan . . . convey and quit-claim to Hilma Peterson of Seattle . . . the following Real Estate: The South six (S. 6) feet of Lot Seventeen (17) in Block Three (3), Gottstein’s First Addition, Seattle, together with an easement for a driveway now existing along the south side of Lot Seventeen.¹

At the time of the conveyance there were two garages at the end of the driveway that were 10 feet wide and 17 feet long.² One of the garages was on Lot 17 and the other was on Lot 18. The driveway easement was

¹ Trial Exhibit No. 1; CP 85.

² CP 85.

used to access both garages. Lot 18 can also be reached from a driveway on its south side.³ The easement is not necessary for access to Lot 18.⁴

B. Rowe purchases the house on Lot 18.

In 1959, Rowe purchased Lot 18 and rented out the house located on the property.⁵ In 1966, there was a storm that destroyed both garages located at the end of the driveway easement.⁶ Neither Rowe nor the owners of Lot 17 (which eventually included Collins) ever rebuilt the garages. There has not been a garage at the end of the driveway easement since 1966.⁷

After the garages were destroyed in 1966, no one from Lot 18 ever used the easement. Rowe's tenants used the driveway on the south side of Lot 18 until 1992.⁸ The house on Lot 18 has been vacant since 1992.⁹

C. Collins purchases the house on Lot 17.

In July 1988, Collins purchased the house on Lot 17 from Keith Cross.¹⁰ The reference to the 1936 easement in the Statutory Warranty

³ CP 87-88.

⁴ *Id.*

⁵ CP 85.

⁶ *Id.*

⁷ *Id.*

⁸ CP 87.

⁹ CP 85.

Deed to Collins was lined out and initialed by Cross.¹¹ Cross signed an affidavit stating that the owner of Lot 18 accessed the house from the south side of Lot 18.¹² On July 5, 1988, Collins recorded the Statutory Warranty Deed with the reference to the easement lined-out.¹³

D. Collins decides to remodel his house.

In 2001, Collins decided to remodel his house and used Ken Hovde of Management Northwest, Inc. to perform the work.¹⁴ Mr. Collins suffered a stroke a few years earlier that significantly impacted his physical abilities.¹⁵ Mr. Collins is legally blind, has no feeling on the left side of his body, has substantial difficulty walking and will likely be confined to a wheelchair in the near future.¹⁶ The purpose of the remodel was to accommodate Mr. Collins's physical disabilities and make it easier

¹⁰ *Id.*

¹¹ Trial Exhibit No. 35.

¹² *Id.*, No. 36.

¹³ Trial Exhibit No. 35.

¹⁴ CP 85.

¹⁵ CP 85 & 88; RP 107 & 122-123; RP 12 dated July 10, 2008.

¹⁶ *Id.*

for him to access his home.¹⁷ Construction on the remodel was completed in 2002.¹⁸

E. Rowe's complaint.

The easement is for a driveway as it existed in 1936. It was used to access garages that were 10 feet wide and 17 feet long and located at the end of the driveway. The easement runs along the south side of Collins' house and abuts the north property line of Rowe's property.¹⁹

Collins' lot is 100 feet long from his front property line to his back property line. Rowe argued that the easement runs the entire 100 feet along the south side of Collins' property and provides him access to his backyard.²⁰

Rowe claims that Collins raised the level of the entire easement. He claims this created a steep four foot slope from Collins' property into his backyard and that this steep slope substantially interferes with his use of the easement. This is Rowe's sole claim as to interference with the easement.²¹

¹⁷ *Id.*

¹⁸ CP 86.

¹⁹ CP 85; Trial Exhibit No. 1.

²⁰ CP 21.

²¹ *Id.*

F. The remodel

Prior to the remodel, the driveway was dirt and continually slopped upward from an elevation of 106 feet above sea level at the street to 118 feet at the back property line of Lot 17.²² The rear portion of Collins' property, *which is the area adjacent to Rowe's backyard and the area he claims provided him access to his backyard*, slopped upward from about 116 feet to 118 feet.²³ Rowe claims Collins raised this rear portion four to five feet and created a slope which prevents him from using the easement to access his backyard.²⁴

The undisputed evidence at trial was that Collins did not raise the rear portion of the driveway; instead, the rear portion was made level at 116 feet.²⁵ Below is a graphic depiction of the driveway before and after the remodel, as supported by the evidence at trial:

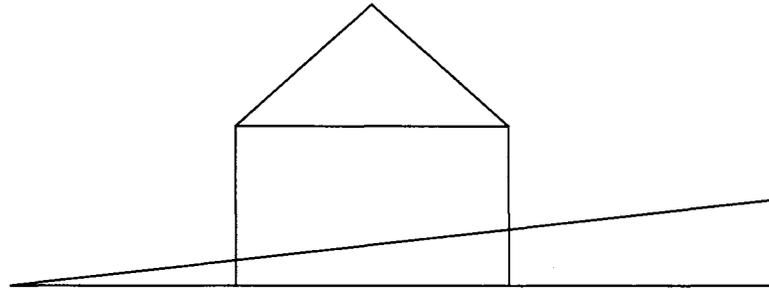
²² Trial Exhibit No. 46; RP 76-82 & 99-100.

²³ Trial Exhibit No. 46.

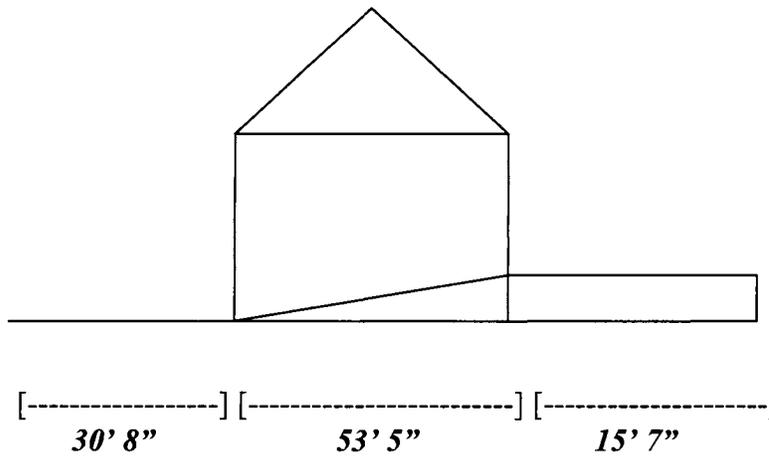
²⁴ CP 40.

²⁵ CP 84-88; Trial Exhibit No. 46; RP 76-82 & 99-100.

Collins house and driveway easement before remodel



Collins house and driveway easement after remodel



During the remodel, Collins leveled the first 30 feet 8 inches of the driveway that runs from the street to the front of his house.²⁶ He increased the slope on the next 53 feet 5 inches of the driveway that runs along the south side of his house and the north side of the house on Rowe's property.²⁷ He made the last 15 feet 7 inches of the driveway, which is adjacent to Rowe's backyard, level at 116 feet.²⁸ It is undisputed that the portion of the easement adjacent to Rowe's backyard was not raised at all.²⁹

III. LEGAL AUTHORITY

The Court of Appeals reviews the trial court's decision following a bench trial to determine whether the findings are supported by substantial evidence and whether those findings support the conclusions of law.³⁰ Substantial evidence means enough evidence to persuade a rational, fair-minded person that the premise is true.³¹ "The Court of Appeals defers to

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Dorsey v. King County*, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988).

³¹ *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

the trier of fact on issues of credibility and the weight of conflicting evidence.”³²

The trial court entered seventeen (17) findings of fact and nine (9) conclusions of law.³³ Rowe did not assign error to any of these findings; instead, he made a general claim that the trial court should not have balanced the equities in considering his request for injunctive relief. Rowe’s argument fails for the reasons discussed below.

A. Rowe did not present any evidence at trial that Collins had constructive notice of the easement and is barred from asserting this claim on appeal.

Rowe argues for the first time on appeal that Collins had *constructive* notice of the easement because “the recorded deeds in the chain of title plainly disclosed the existence of Rowe’s easement.”³⁴ Rowe did not plead constructive notice in his complaint, nor did he argue constructive notice at trial. Under RAP 2.5(a), the Court should not consider Rowe’s argument because he failed to raise it at trial:

(a) *Errors raised for first time on review.* The appellate court may refuse to review any claim of error which was not raised

³² *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994).

³³ CP 84-88.

³⁴ See Appellant’s Brief (hereinafter “Rowe’s Brief”), at 7-8.

in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.³⁵

As held in *Brundridge v. Fluor Fed. Servs., Inc.*, “[a] party who fails to raise an issue at trial normally waives the right to raise that issue on appeal.”³⁶

None of the exceptions to Rule 2.5(a) apply here. Rowe had ample opportunity to present evidence and argue at trial that Collins had constructive notice of the easement through the recorded deed. He chose not to, even in response to Collins proposed findings of fact. For instance, Collins proposed the following Finding of Fact No. 17:

Because Rowe delayed in giving notice, Collins did not have knowledge of the easement until the very end of his construction process.³⁷

Rowe filed a number of objections to Collins proposed findings of fact, none of which raised the issue of constructive notice.³⁸ Rowe’s objection to Collins’s proposed Finding of Fact No. 17 acknowledged that

³⁵ RAP 2.5(a).

³⁶ 164 Wn.2d 432, 441, 191 P.3d 879 (2008), *citing* RAP 2.5(a). *See United States v. Flores-Montano*, 424 F.3d 1044, 1047 (9th Cir. 2005) (quoting *United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994)).

³⁷ CP 72; RP 10 dated July 10, 2008.

³⁸ CP 65-69.

Collins did not have notice of the easement until late August or early September 2002:

The trial record reflects that Collins did not have knowledge of the easement until late August or early September 2002 and the driveway paving was finished in late October 2002.³⁹

Rowe's failure to argue constructive notice at trial or raise it as an objection to Collins proposed findings of fact is sufficient to establish that he waived this argument on appeal. Furthermore, Collins recorded his deed, with reference to the easement lined out, in 1988. Applying Rowe's argument regarding constructive notice, Collins recording of his deed placed Rowe on notice that his easement was being challenged. This would have likely impacted the statute of limitations on Rowe's claim. However, this issue was not litigated at trial because Rowe never argued constructive notice at trial. Nonetheless, Rowe's argument also fails to recognize that constructive notice of the easement would not put Collins on notice of Rowe's claim for interference with the easement.

The recorded easement states that it is for a driveway as it existed in 1936. It is undisputed that in 1936, the easement provided access to garages at the end of the easement. These garages were destroyed in 1966 and never rebuilt. Collins did not purchase his house until 1988, twenty (20) years after the garages were destroyed. Thus, there was no physical

indication of the purpose of the easement when Collins purchased his house.

There was also no historical use of the easement to place Collins on notice of its purpose. Rowe never used the easement to access his backyard.⁴⁰ The 1936 easement does not provide Collins notice that it is for access to Rowe's backyard, nor does it give Collins notice that his remodel would interfere with Rowe's use of the easement.

Rowe's only claim at trial was that Collins had actual notice of the easement before construction began. However, the trial court specifically found no evidence to support Rowe's claim:

Rowe had a conversation with Jane Hovde, one of Collins' daughters about the easement. According to Rowe, he simply mentioned to Hovde that he had an easement. Rowe testified that the conversation with Hovde occurred before the construction began on the Collins' remodel. **There is no evidence to corroborate that testimony. . . Construction was already underway at the time of the conversation.**⁴¹

In its Finding of Fact No. 9, the trial court found that Collins was first put on notice regarding the easement in late August or early September of 2002:

³⁹ CP 68 & 82.

⁴⁰ CP 87.

⁴¹ CP 85-86 (emphasis added).

Following her conversation with Rowe, Hovde told her mother that Rowe claimed he had an easement over their property. As soon as Hovde informed Mrs. Collins of the conversation, Mrs. Collins contacted her title insurance company. This occurred in late August or early September of 2002. In light of her prompt response to the information, Mrs. Collins would likely have contacted the title insurance company before September 2002, had she been aware of the easement at an earlier time. There is no basis for believing that Hovde told Mrs. Collins about Rowe's claim of an easement months before and that Mrs. Collins simply ignored the conversation. **The Court therefore finds that Collins was first put on notice regarding the easement in late August or early September 2002.**⁴²

Rowe does not assign error to either Finding of Fact No. 8 or 9.

As such, these findings are treated as verities on appeal:

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. Further, when a party challenges findings of fact, he or she must include them verbatim in the brief or attach a copy of them in an appendix to the brief. Unchallenged factual findings are verities on appeal.⁴³

Rowe does not reference any findings of fact by number, nor has he appended a copy of the findings to his brief. Thus, the trial court's finding that Collins first had notice of the easement after construction on the remodel began is a verity on appeal.

⁴² CP 86 (emphasis added).

⁴³ RAP 10.3(g); RAP 10.4(c); *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980) (emphasis added.).

B. The trial court correctly excluded evidence of insurance coverage.

Collins has title insurance on his property. At trial, Rowe wanted to argue that Collins was not harmed because his insurance will cover the cost of restoring the driveway to its 1936 configuration. The trial court granted Collins motion in limine to exclude this evidence because it is irrelevant, barred under ER 411 and barred under the collateral source rule.

Collins believed he had clean title to the property with no easement.⁴⁴ The title company confirmed his belief and insured clean title to the property, free of any easement. The presence of the easement clouded the title and gave rise to Collins's claim against the title company. Collins's claim against the title insurer is independent of, and exists separate from, Rowe's claim for interference with the easement. In other words, Collins was not insured against Rowe's claim.

The insurance proceeds cover the title insurer's error regarding clean title and are *not* intended to be used to reconstruct the driveway. The existence of title insurance is irrelevant to Rowe's claim for interference with the easement.

⁴⁴ CP 85.

Rowe contends that “ER 411 is limited by its terms to action for negligence” and claims that because “this is not a personal injury action [this] matter is not within ER 411.”⁴⁵ This misstates the law.

By its express terms ER 411 specifically includes matters other than negligence:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or **otherwise wrongfully.**⁴⁶

The purpose of the rule is to prevent parties from arguing, as Rowe wanted to at trial, that the defendant is not financially harmed because his insurance company will pay for the loss or damages:

The chief reason for preventing reception of the evidence [of insurance] is the supposed inclination of jurors to make the **insurance company bear the loss because it has been paid to take the risk, it is well able to pay,** and will spread the loss among its policyholders.⁴⁷

As explained in comment (1) to ER 411, insurance coverage “is irrelevant to a party’s legal liability and may prejudice the jury by suggesting that the defendant can well afford to pay the plaintiff. . . [t]he

⁴⁵ Rowe’s Brief, at 8-10.

⁴⁶ ER 411.

⁴⁷ 23 Wright, Federal Practice & Procedure, §5362.

rule bars both direct and indirect evidence of insurance.”⁴⁸ The trial court properly excluded this evidence under ER 411.

This evidence is also barred under the collateral source rule, which requires the exclusion of evidence of other money received by the claimant:

The very essence of the collateral source rule requires exclusion of evidence of other money received by the claimant so the fact finder will not infer the claimant is receiving a windfall and nullify the defendant’s responsibility. Thus, even when it is otherwise relevant, proof of such collateral payments is usually excluded, lest it be improperly used by the jury to reduce the plaintiff’s damage award. In this respect, courts generally follow a policy of strict exclusion.⁴⁹

Under the collateral source rule, the defendant does not get the benefit of an offset equal to insurance proceeds paid to the plaintiff by his insurer. Payment of insurance proceeds is irrelevant to the plaintiff’s injury and damage.

In our present case, Rowe does not get the benefit of any proceeds Collins may receive from his title insurer. The insurance proceeds are irrelevant to the harm Collins would suffer from an injunction ordering him to reconstruct his driveway.

⁴⁸ *Id.*, Comment (1).

⁴⁹ *Cox v. Spangler*, 141 Wn.2d 431, 441, 5 P.3d 1265 (2000) (citations omitted).

Moreover, Rowe did not offer any evidence at trial as to how much it would cost Collins to restore the driveway to its 1936 condition. It is therefore impossible to know whether the proceeds of the title insurance policy would cover the restoration costs, much less Collins's litigation costs in defending this matter. The trial court correctly excluded evidence of insurance.

Finally, Rowe's claim that balancing the equities requires considering the "financial hardship" to Collins is also baseless. There is no such requirement under Washington law.

The purpose of Collins's remodel was to accommodate the physical disabilities caused by his stroke. Ordering Collins to restore the driveway to its 1936 condition would impair his access to the house. Conversely, Rowe's delay in filing suit and the fact that he can access his property from the south side sufficiently undermines his injury claim:

Requiring Collins to lower the slope of the driveway would negate one of its main purposes – providing wheelchair accessibility to the second floor of the house. Changing the status quo would cause more harm to Collins than retaining the status quo would cause Rowe. Rowe can access the back of his house from an unpaved driveway on the south side of his house.⁵⁰

Collins did not have knowledge of the easement until the end of the construction process and nine to ten months after final grading of the driveway. Unlike the situation in *Mahon v. Haas*, 2

⁵⁰ CP 88.

Wn.App. 560 (1970), Collins was an innocent party when he proceeded with his construction project.⁵¹

Rowe engaged in significant delay in bringing the easement to the Collins' attention and in bringing this action. This delay undermines Rowe's claim for an injunction.⁵²

Rowe contends the trial court "failed to take into consideration the actual hardship to the Collins of restoring the driveway to the status quo ante."⁵³ The basis for this contention is unclear. As the above findings demonstrate, the trial court clearly considered the hardship to Collins in relation to Rowe. The cost of restoring the driveway was irrelevant to that consideration, given that the primary purpose of the remodel was to accommodate Mr. Collins's physical disabilities.

C. Collins's property does not encroach on Rowe's property and the law Rowe relies on does not apply to our present case.

Rowe contends Collins was required to meet five conditions in order for the trial court to deny his request for the removal of an "encroaching" structure.⁵⁴ It is unclear what "encroaching structure" Rowe is referring to or how his argument relates to our present case.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Rowe's Brief, at 10.

⁵⁴ Rowe's Brief, at 11-12.

The law Rowe relies on applies when someone's home or other structure physically encroaches or projects onto another's property:

Generally, courts will order an *encroacher to remove encroaching structures* even though it is extraordinary relief. But we have recognized an exception where such an order would be oppressive. To trigger the exception, the encroacher must prove by clear and convincing evidence that (1) he did not simply take a calculated risk or act in bad faith, or act negligently, willfully, or indifferently *in locating the encroaching structure*; (2) the damage to the landowner is slight and *the benefit of removal* equally small; (3) *there is ample remaining room for a structure suitable for the area* and there is no real limitation on the property's future use; (4) *it is impractical to move the encroaching structure as built*; and (5) there is an enormous disparity in the resulting hardships.⁵⁵

Collins was not required to meet the above conditions because his driveway does not encroach on Rowe's property. There is no "structure" to remove from Rowe's property and the five conditions discussed above do not apply to our present case.

To the extent Rowe's claim is that Collins "encroached" on his easement, this argument also fails. "An easement is a property right, *discrete from ownership*, authorizing the use of land of another without compensation."⁵⁶

⁵⁵ *Proctor v. Huntington*, 192 P.3d 958, 964, 192 P.3d 958 (2008).

⁵⁶ *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 654, 145 P.3d 411 (2006)(citing *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986)), review denied, 161 Wn.2d 1012 (2007)(emphasis added).

Collins owns the property upon which the easement is located and cannot “encroach” on his own property. Under Washington law, Collins can use his driveway in any manner he wishes as long as it does not interfere with Rowe’s use of the easement.

... [W]e must look to the actual use being made of the easement in light of the rule that the servient owner retains the use of an easement so long as that use does not materially interfere with the use by the holder of the easement. That principle is well established.⁵⁷

The five part test for injunctive relief regarding “encroaching structures” does not apply to our present case.

D. The trial court did not decide whether Rowe’s complaint was barred by the doctrine of laches.

Rowe argues that in order for laches to bar a remedy, there must be some prejudice to the defendant from the plaintiff’s delay in filing suit.⁵⁸ Rowe contends there was no prejudice from his delay in filing suit because Collins “completed construction after having been notified of the easement.”⁵⁹ There are several problems with Rowe’s argument.

⁵⁷ *Harris v. Ski Park Farms*, 120 Wn.2d 727, 739, 844 P.2d 1006 (1993) (quoting *Veach v. Culp*, 92 Wn.2d 570, 575, 599 P.2d 526 (1979)). Accord, *Sunnyside Valley Irrigation Dist. v. Dickie*, 111 Wn. App. 209, 219, 43 P.3d 1277 (2002) (owner may use the servient estate so long as his use does not interfere with the easement).

⁵⁸ Rowe’s Brief, at 13.

⁵⁹ *Id.*

First, because of its ruling on balancing of equities, the trial court never decided whether Rowe's complaint was barred under the doctrine of laches:

As mentioned earlier in this decision, the *Collins' have raised the defense of laches*. In light of the Court's resolution of the injunction issued based on a balancing of the equities, which in turn was influenced by Mr. Rowe's delaying in asserting his rights, *it is not necessary to determine whether Mr. Rowe's lawsuit is barred by laches. And so the Court declines to do that.*⁶⁰

Rowe's challenge regarding laches is moot because the trial court never considered whether his lawsuit was barred under the doctrine of laches.

Second, the evidence and the trial court's unchallenged findings do not support Rowe's claim that Collins completed construction after being notified about the easement. Rowe testified that he told Collins about the easement before construction. The trial court did not find his testimony credible or supported by the evidence:

According to Rowe, he simply mentioned to Hovde that he had an easement. Rowe testified that the conversation with Hovde occurred before the construction began on the Collins' remodel. *There is no evidence to corroborate that testimony. . . Construction was already underway at the time of the conversation.*⁶¹

⁶⁰ RP 14 dated July 10, 2008 (emphasis added.)

⁶¹ CP 85-86 (emphasis added).

Rowe sat back and did nothing while watching Collins remodel the driveway. Collins did not have notice of Rowe's easement prior to or during construction. As the trial court found, Collins would be significantly prejudiced if Rowe could force a restoration of the driveway five years after completion of construction.

E. Rowe is not entitled to injunctive relief.

Rowe's sole request at trial was for an order requiring Collins to remove his improvements and restore the driveway to its 1936 condition. The trial court appropriately denied Rowe's request.

"An injunction is an extraordinary equitable remedy designed to prevent serious harm. Its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury."⁶² It is "distinctly an equitable remedy and is frequently termed 'the strong arm of equity,' or a 'transcendent or extraordinary remedy,' and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case."⁶³ The requirements for injunctive relief are necessity and irreparable injury:

The essential elements which must be shown before an injunction will be granted are necessity and irreparable injury. A party

⁶² *Kucera v. DOT*, 140 Wn.2d 200, 221, 995 P.2d 63 (2000) (citations omitted).

⁶³ *Id.*, at 210 (citing *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 312, 553 P.2d 423 (1976)).

seeking an injunction must show a clear legal or equitable right and a well-grounded fear of *immediate invasion of that right*. Furthermore, the acts complained of must establish an actual and substantial injury or an affirmative prospect thereof to the complainant.⁶⁴

In *Brown v. Voss*,⁶⁵ the defendant sought an injunction to prevent the plaintiff from misusing an easement to access a non-dominant property. The trial court denied injunctive relief. The Court of Appeals reversed the trial court and enjoined the plaintiff from using the easement to benefit the non-dominant estate. The Washington Supreme Court affirmed the trial court and held that although plaintiffs' extension of the use of the easement for the benefit of the non-dominant property *did constitute a misuse of the easement*, injunctive relief was inappropriate under the circumstances of the case:

Some fundamental principles applicable to a request for an injunction must be considered. (1) *The proceeding is equitable and addressed to the sound discretion of the trial court*. (2) The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it. *Appellate courts give great weight to the trial court's exercise of that discretion*. (3) One of the essential criteria for injunctive relief is actual and substantial injury sustained by the person seeking the injunction.

The trial court found as facts, upon substantial evidence, that plaintiffs have acted reasonably in the development of their property, that there is and was no damage to the defendants from

⁶⁴ *Agronic Corp. of Am. v. deBough*, 21 Wn. App. 459, 464, 585 P.2d 821 (1978) (internal citations omitted.) (emphasis added).

⁶⁵ 105 Wn.2d 366, 715 P.2d 514 (1986).

plaintiffs' use of the easement, that there was no increase in the volume of travel on the easement, that there was no increase in the burden on the servient estate, *that defendants sat by for more than a year while plaintiffs expended more than \$11,000 on their project*, and that defendants' counterclaim was an effort to gain "leverage" against plaintiffs' claim. In addition, *the court found from the evidence that plaintiffs would suffer considerable hardship if the injunction were granted whereas no appreciable hardship or damages would flow to defendants from its denial.*⁶⁶

In our present case, the alleged substantial interference first occurred in 2001, when Collins began to remodel the driveway. Rowe observed the construction activities in 2001.⁶⁷ As the trial court found in Finding of Fact No. 10:

The final grading on the driveway was complete in November 2001, approximately nine to ten months before Rowe told Hovde [Collins' daughter] about his easement and before Collins was put on notice about the easement.⁶⁸

Had the driveway improvement actually interfered with Rowe's use of the easement, he should have applied for injunctive relief at that time (*i.e.*, stopping the remodel project prior to its completion). Instead, Rowe did nothing, allowed Collins to complete the driveway, and then sat by for more than five years before bringing his lawsuit. The trial court correctly found that at the time Rowe filed his complaint, there was no

⁶⁶ *Id.*, 105 Wn.2d at 373 (emphasis added).

⁶⁷ RP 214.

⁶⁸ CP 86.

“immediate invasion” of his rights that would justify the issuance of an injunction.⁶⁹

There was also no evidence of irreparable harm at trial. Rowe has not used the easement for more than 40 years – since the garage was destroyed in 1966. Moreover, Rowe never used the easement to drive into his backyard. As the trial court found in Finding of Fact No. 13:

There is no evidence that Rowe ever used the driveway easement as a way of accessing his backyard with a vehicle.⁷⁰

There is a driveway on the south side of Rowe’s property that provides him access to his entire property. Rowe’s tenants used this driveway in the early 1990’s to access the house and backyard. As the trial court found in Finding of Fact No. 15:

Rowe’s backyard can be accessed by an unpaved driveway located on the south side of his property. Rowe’s tenants have used this driveway to park their vehicles in Rowe’s backyard, although without his permission.⁷¹

Also, Collins did not increase the elevation of the back portion of the driveway, which Rowe claimed he used to access his backyard. As the trial court found in Finding of Fact No. 12:

⁶⁹ “The purpose of an injunction is not to punish a wrongdoer for past actions but to protect a party from present or future wrongful acts.” *Id.*

⁷⁰ CP 87.

⁷¹ *Id.*

The driveway's elevation change only involves the portion of the driveway that runs along the side of Rowe's house. The last fifteen feet or so of the driveway which adjoins Rowe's backyard was not raised significantly, if at all.⁷²

Rowe's request to lower the back portion of Collins's driveway to the same level as his backyard would give him something he never had. Collins's property has always been higher than Rowe's property.

Finally, Rowe's requested injunctive relief would require Collins to dig up his driveway and remove the improvements. In deciding whether to order this type of relief, it was appropriate for the trial court to balance the equities.

The benefit of this doctrine – the “balancing of the equities” -- is reserved for the innocent party who proceeds without knowledge or warning that he is invading upon another's property rights.⁷³ This describes Collins, who did not know that his driveway improvements allegedly interfered with Rowe's easement rights; indeed, Rowe watched Collins build the driveway and *never complained about interference with his easement*.

⁷² CP 86.

⁷³ *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 699-700, 974 P.2d 836 (1999); *Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968); *Peterson v. Koester*, 122 Wn. App. 351, 359, 92 P.3d 780 (2004).

Our case is similar to *Holmes Harbor Water Co. v. Page*.⁷⁴ In *Holmes*, the defendants relied upon the representations of the builder that their home would not violate the height restriction for the neighborhood. Neighbors brought a lawsuit and asked the court to order the defendants to reduce the height of their house. Rejecting this request for injunctive relief, the court found that the defendants had attempted to comply with the height restrictions and had acted innocently. The court further found that the plaintiffs had delayed in bringing the suit and that the cost of removing the violation was “exorbitant when compared with the slight violation of the covenant.”⁷⁵

Injunctive relief against the breach of a restrictive covenant will be denied if the harm done to the defendant by granting the injunction will be disproportionate to the benefit secured by the plaintiff. A mandatory injunction should not be issued where landowners fail to establish that they would suffer substantial damage if an obstruction is not removed.⁷⁶

In our present case, Collins acted innocently in rebuilding his driveway and was not aware of Rowe’s claim that what he was doing interfered with Rowe’s easement. Despite watching the construction of Collins’ driveway, Rowe waited more than five years after completion of

⁷⁴ 8 Wn. App. 600, 603, 508 P.2d 628 (1973).

⁷⁵ *Id.*, 8 Wn.App. at 605.

⁷⁶ *Id.* at 603.

the driveway to file his lawsuit. The harm to Collins if this Court orders him to reconstruct his driveway is that he may have to move out of his house.

Conversely, Rowe did not suffer any monetary damages and did not request monetary damages in this lawsuit. Rowe has not used the easement since at least 1966 and has access to his property from a driveway located on the south side of his house. As the trial court summed up in its oral ruling:

Had Mr. Rowe put the Collins' on notice in 2001 [when construction began] of his objections to the project when he filed complaints with the city, then the equities would have been very different. In that case, the Collins would have been like the constructors of the commercial greenhouse in the *Haas* case who proceeded with their project in the face of known legal impediments. But that is not case here.

Mr. Rowe saw the construction proceed and did nothing except to complain to the city. And it's not even clear whether he raised the easement issue with the city. It was not until 10 months after the final grating of the driveway that he mentioned in passing to Ms. Hovde that the driveway was his or that he had an easement.

After that, there was complete silence until August 5th, 2005; almost four years later when Mr. Rowe wrote the Collins a letter notifying them of his position regarding the driveway and his rights to that driveway. And this action was not filed until May 2006, so almost five years after the project was completed. This delay, in the view of the Court, significantly undermines Mr. Rowe's claims of significant damage.

Most people confronted with what they regard as a significant interference with their property rights take action. The

fact that he did not leads this Court to conclude that, at least for many years, Mr. Rowe regarded the new driveway as nothing more than a minor inconvenience.

Based on weighing these factors, the Court concludes that it would be inequitable to issue the injunction that Mr. Rowe seeks in this case. This is the only relief that Mr. Rowe is asking for. In his trial brief he made it clear that he was not seeking monetary damages. And in any event, no evidence was presented regarding monetary damage.⁷⁷

The harm to Collins by granting an injunction is greatly disproportionate to any potential benefit to Rowe. Accordingly, the trial court appropriately denied Rowe's request for injunctive relief. This Court should affirm the trial court's decision.

IV. CONCLUSION

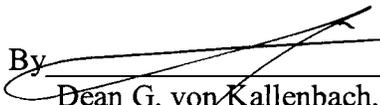
Rowe's claims were not supported by the evidence. He never used the easement to drive into his backyard. Collins did not raise the level of the easement as Rowe claimed. Collins did not begin construction on the remodel with notice of Rowe's easement.

Rowe does not assign error to a single finding of fact, nor does he attempt to explain how the evidence at trial failed to support the trial court's findings. This Court should affirm the trial court's decision.

⁷⁷ RP 12-14 dated July 10, 2008.

DATED this 25 day of June, 2009.

YOUNG deNORMANDIE, P.C.

By 

Dean G. von Kallenbach, WSBA #12870
Luke M. LaRiviere, WSBA #32039
Attorneys for Defendants/Respondents

m:\data\A-m\collins\appeal\pleadings\pld respondent's brief - final.doc

NO. 62618-3-1

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 JUN 26 PM 3:11

VICTOR H. ROWE,

Plaintiff/Appellant,

v.

FREDERICK C. COLLINS and ALICE M. COLLINS, husband and wife,
individually and as a marital community,

Defendants/Respondents.

CERTIFICATE OF SERVICE

Dean G. von Kallenbach, WSBA #12870
Luke M. LaRiviere WSBA # 32039
YOUNG deNORMANDIE, P.C.
1191 Second Avenue, Suite 1901
Seattle, Washington 98101
Tel. (206) 224-9818

ORIGINAL

I, Karrie R. DeWall, certify under penalty of perjury according to the laws of the state of Washington, that the following is true and correct.

I am a paralegal at Young deNormandie, P.C., counsel to Defendants/Respondents Collins. I am over the age of eighteen years old and competent to testify to all matters herein.

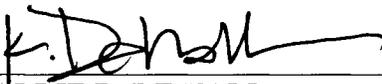
On June 26, 2009 I caused a copy of the following to be served on the following recipient via the method indicated:

1. Respondents' Brief.

W. John Sinsheimer
Sinsheimer & Meltzer, Inc., P.S.
1001 Fourth Avenue Plaza - Suite 2120
Seattle, WA 98154-1109

Mail Legal Messenger
 Fax Federal Express

DATED this 26th day of June, 2009.



KARRIE R. DEWALL