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No. 68035-8-1

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

MARK S. PELOQUIN and
JENNIFER W. PELOQUIN, a married couple,

Plaintiff-Appellants,

v.

REGINALD SORDENSTONE and
CAROL SORDENSTONE, a married couple,

Defendants-Respondents

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY
THE HONORABLE DEAN LUM, PRESIDING

REPLY BRIEF OF APPELLANTS PELOQUINS

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STATE OF WASHINGTON
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KING COUNTY

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III. SUMMARY

The trial court's fundamental error about who had a stake in the outcome of the proceedings severely biased its credibility determinations against the Peloquins and in favor of the Sordenstones. FOF 37. The Peloquins have no cause of action against the Gross family. However, the Sordenstones do have causes of action against Michael Sweeny for breaching their statutory warranty deed with the encumbrance on their property. Appellants' Brief at pages 39-40.

Michael Sweeny is an interested witness who has a significant pecuniary interest in the outcome of the proceedings since the Sordenstones are paying him monthly on a mortgage he is holding for them on the Sordenstone Property. *Id.* Misjudging that Michael Sweeny was a biased witness with a horse in the race and that the Peloquins' predecessors-in-interest had no stake in the outcome materially altered the trial court's credibility determinations and related findings of fact and conclusions of law.

Then the trial court failed to apply the law correctly. First, distinctions were made based on type of person, type of vehicle, and the reason underlying access to the dominant estate, none of which finds authority in the law. Appellants' Brief at pages 27-36. Secondly, after adverse use was found, the trial judge subsequently found pockets of

permissive use for construction access without any factual support. COL 18. This is an irreconcilable inconsistency contrary to the controlling law. There is also no finding of fact to support COL 18.

Failing to set the scope of easement by employing the principled basis articulated by this Court in *Lee v. Lozier*, 88 Wash.App. 176, 187-188, 945 P.2d 214, 220-221 (1997) the trial court produced an ultra-narrow scope that ignored the claimed “purpose” of the easement and did not set “general outlines” for access. Currently, the Peloquins could not even put the Shop to the use that Marcia Cook did with Gold Spells because a big box truck was used to deliver the needed equipment and a big box truck is proscribed because it is not a personal vehicle. RP 354:16-19. This is trial court error.

On motion for reconsideration the trial judge tacked on emergency vehicle access to the scope of the easement while prohibiting access by all other 3rd parties. Appellants’ Brief at page 35. There is no legal authority for emergency vehicle access by prescription in Washington State. *Id.* The only way to arrive at a justification for emergency vehicle access is by applying the principled approach as explained by this Court in *Lozier*. When the principled approach of *Lozier* is applied, then access by all non-owner 3rd parties and pedestrian invitees/licensees is allowed as well.

IV. ARGUMENT

A. PELOQUINS HAVE ASSIGNED ERROR TO FOF 26, 27, 28, 33, 38, 39, 40, 43, AND 60; THESE FINDINGS OF FACT ARE CLEARLY DISCLOSED IN THE ASSOCIATED ISSUES.

The Peloquins challenged Finding of Fact (FOF) 37, to which the Peloquins have assigned error in Assignment of Error No. 2. Appellants' Brief at page 3. Challenging FOF 37 also challenges FOF 26, 27, 28, 33, 38, 39, 40, 43, and a portion of FOF 60 because these findings of fact are clearly disclosed in the associated issues, such as Issue No. 1, No. 4, and No. 5 as described in the sections below. RAP 10.3(g). FOF 26, 27, 28, 33, 38, 39, 40, 43, and the portion of FOF 60 are relying on the erroneous credibility determination made in FOF 37.

1. FOF 37 – The Trial Court's Lynch Pin For Determining The Credibility Of The Witnesses Was In Error As A Matter Of Law And Severely Prejudiced The Peloquins.

The Peloquins assigned error to finding of fact (FOF) 37 in their Appeal Brief at page 3. FOF 37 is related to issue No. 4:

“Did the trial court err in determining the credibility of the witnesses by finding that the prior owners of the Peloquin Property had a stake in the outcome of the proceeding but Michael Sweeny did not?”

The Peloquins assign error to the portion of FOF 26 that reads:

“The Court finds that Michael Sweeny was for the most part a credible witness. The Court does not find that he was a trouble maker. Michael Sweeny was one of the few people who was out on the Sordenstone Property and near the Peloquin Property for a significant time”

this portion of FOF 26 is clearly disclosed in and related to issue No. 4. RAP 10.3(g).

The trial court erred as a matter of law when it determined that Michael Sweeny did not have a stake in the outcome but that the prior owners of the Peloquin property have a stake in the outcome as discussed in Appellants' Brief at page 39-40. There is no evidence to support FOF 37 as pointed out in Appellants' Brief at page 40. The lack of any evidence to support a cause of action between the Peloquins and the Gross family is un-rebutted by the Sordenstones.

Michael Sweeny was a biased witness and his credibility suffered from his bias, however this fact was lost on the trial court. The Sordenstones have causes of action against Michael Sweeny for breach of their statutory warranty deed, which has resulted in the encumbrance on the title to the Sordenstones' Property, i.e., the Peloquins' easement. Michael Sweeny testified that he told Reginald Sordenstone and Mark Peloquin about the history of the Disputed Area before the closing on the Sordenstone property; however both Reginald Sordenstone and Mark Peloquin testified that Michael Sweeny did not do so. *Id.*

2. FOF 37 Severely Biased Findings Of Fact 27, 28, 33, 38, 39, 40, 43, And 60 Against The Peloquins.

The Peloquins assign error to FOF 27:

“The Court finds that Michael Sweeny was reasonable and persuasive based on his demeanor and the consistence of his testimony”

FOF 27 is clearly disclosed in and related to issue No. 4 and No. 5. RAP 10.3(g). Michael Sweeny was a biased witness with an agenda. This agenda was lost on the trial court because of the trial court’s error in assessing who had a stake in the outcome of the proceedings. FOF 37.

Historically, Michael Sweeny tried to convince the owners of the Peloquin Property that followed Gary Goodale that there were limitations placed on the use of the Disputed Area and on the Peloquins’ gate in their fence. Gary Goodale testified that there were never any restrictions placed on the Disputed Area or on his fence whatsoever. Appellants’ Brief at page 15. Marcia Cook (formerly Marcia Pearson) and then the Gross family that followed would have none of this fiction. No one would sign Michael Sweeny’s license agreement. FOF 53-54. The terms in the unsigned license agreement were absurd to any reasonable person who simply looked at the Peloquin Property. All of the prior owners of the Peloquin Property used the Shop to derive their income or to support production of their income; a limitation of access of 2 times a month is absurd to any reasonable person. Thus, Michael Sweeny’s testimony was not reasonable.

Michael Sweeny’s testimony concerning whether vehicles were

parked in the court yard of the Shop or whether the gates in the Peloquins' fence were always closed was self contradicting, as described in Appellants' Brief at pages 48-50. The aerial photo shown in Exhibit 47-page 1 impeaches Michael Sweeny's testimony that you could not park a vehicle in the court yard of the Shop and close the Peloquins' gates as does the Peloquins' demonstrative trial video.

The Peloquins assign error to FOF 28 and FOF 33 because FOF 28 and FOF 33 are clearly disclosed in and related to issue No. 4 and No. 5. RAP 10.3(g). Michael Sweeny was a biased witness with an agenda, not a truthful impartial witness. This fact was lost on the trial court because of the faulty assessment it made of which side had a stake in the outcome (FOF 37). The trial court's faulty credibility determination in FOF 37 severely biased FOF 28 and FOF 33 against the Peloquins.

FOF 28 and FOF 33 are also in conflict with each other. FOF 28 states that Michael Sweeny was not monitoring usage with a device that could show usage intensity therefore he only knew what was occurring by what he saw or if the grass were disturbed near the Peloquin Property on the Disputed Area. FOF 33 states that Michael Sweeny could tell whether commercial use was being made or whether there was constant use being made. These are internally inconsistent. Michael Sweeny either can tell the usage intensity and the type of usage or he can't.

Michael Sweeny worked away from home until 1999; whereas, Marcia Cook and Magdalena Rangel Gross worked at home in the Shop and would have put the Disputed Area to use during the work day. RP 316:10. Michael Sweeny knew that Marcia Cook was running a business in the Shop and making jewelry for the trade, he testified to being in the Shop and that the heat was very great. RP 353:21-23. Michael Sweeny did not testify accurately with respect to Marcia Cooks' use of the Disputed Area. On cross examination he finally admitted that a truck had made a rut in the driveway of the Disputed Area and that he did not know what kind of truck it was. RP 409:22-410:1. It could have been a delivery truck making a delivery to Gold Spells as Marcia Cook testified.

The Peloquins challenge FOF 39:

“This Court did not completely discount the testimony of the prior owners of the Peloquin Property, but did find their credibility troubling,”

and FOF 40:

“The Court finds that the prior owners of the Peloquin Property exaggerated the amount and extent to which they used the Disputed Area,”

and FOF 43:

“Marcia Cook (formerly Marcia Pearson) testified that she used the Disputed Area daily, but this Court finds that was likely an exaggeration. Of all the witnesses who testified at trial, the Court found Marcia Cook (formerly Marcia Pearson) to be the least credible witness,”

and challenge the portion of FOF 60 that reads:

“The use of the Disputed Area was not necessarily daily,” FOF 39, FOF 40, FOF 43, and this portion of FOF 60 are clearly disclosed in and related to issues No. 4 and No. 5. RAP 10.3(g). Under the backdrop of the faulty assessment of which side had a stake in the outcome (FOF 37) the trial court’s faulty credibility determination severely biased FOF 39, FOF 40, FOF 43, and FOF 60 against the Peloquins, all of which are in error. The trial court would not have reached FOF 39, FOF 40, FOF 43, or FOF 60 absent its error in FOF 37. The prior owners of the Peloquin Property had no reason to exaggerate the amount and extent of use they put the Disputed Area to. They were not interested witnesses as was Michael Sweeny.

3. FOF 38 – Offended By Adverse Use, The Trial Court Failed To Function As An Accurate Finder Of Fact Hemming The Peloquins In With An Ultra Narrow Scope.

The Peloquins also challenge FOF 38:

“Fourth, the Court finds the credibility of Marcia Cook (formerly Marcia Pearsons), Michael Gross and Magdalena Rangel Gross to be troubling because they seem to have taken an unsettling position that they essentially own the Disputed Area. Although they didn’t use those exact words, their attitude was that they could do whatever they wanted with the Disputed Area. This was unsettling to the Court”

because FOF 38 is clearly related to issue No. 1 and No. 4.

FOF 38 shows that the trial judge was offended by the very

behavior that is at the essence of a prescriptive easement claim “adverse use” as discussed in Appellants’ Brief at pages 26-27. The Sordenstones contend that the trial court was troubled by the witnesses’ demeanors. Opposition Brief 42-43. This is incorrect; the trial court used the word “attitude,” “their attitude was that they could do what they wanted with the easement area.” Indeed, that they thought they had a right to use the Disputed Area troubled the trial court. FOF 38. The trial court was clearly troubled by adverse use, see footnote 2 in Appellant’s Brief. Magdalena Rangel Gross testified to the “right to use” that was inherent in the Disputed Area because of the way the Peloquin Property had been developed in the first place many years ago:

Q. But I am talking about the driveway, right here? As you sit here today, or at any time, do you understand who has legal title to this area?

A. Well, I -- legal title to that area was never shown to us to be anybody in particular. The only thing that was ever made clear to us in post -- I mean afterwards, was that this entire area was originally owned by the Fitzgeralds, and then the Carrs, and they subdivided it in such a way that, you know, they created the various easements.

See, the thing is, if this -- if this driveway was only somebody else's driveway, just one person's driveway, then there would be no way to access the outbuilding there, which means there would have been no way to create the outbuilding in the first place, or to create a gate there, or to create a workshop that was used there for many, many, many years -- by previous owners of the property (emphasis added).

RP 219:8-23.

The trial court was offended by Magdalena Rangel Gross's attitude which evidenced adverse use and also failed to appreciate how essential access via the Disputed Area was to all the prior owners of the Peloquin Property. Marcia Cook and the Gross family's credibility determinations were all negatively affected by FOF 37, because the trial court mistakenly found they had a stake in the outcome of the trial and because it was offended by adverse use in FOF 38.

Another point that was lost on the trial court in light of its error with FOF 37 was that all of the Peloquin's predecessors-in-interest used the Shop to support their income production. Doing so does not give rise to irregular use; it gives rise to frequent use, daily use. Hence the prior owners of the Peloquin Property did not exaggerate their use. Gary Goodale was a marine carpenter who used the Shop to prepare materials for jobs in Seattle. Appellants' Brief at page 14. Gary Goodale had a wood shop setup in the Shop. *Id.* Daily vehicle access to and from the Shop is reasonable in light of Gary Goodale's use of the Shop to support his livelihood. Marcia Cook described the Shop as setup for manufacturing before she purchased the Peloquin Property. *Id.* at page 15 Marcia Cook (the Pearsons) operated a home business out of the Shop. Marcia Cook worked at home in the Shop and made trips to Seattle to

deliver supplies to the Shop including bottles of gas, large heavy quantities of investment casting supplies. *Id.* at 16. Marcia Cook's testimony of frequent use of the Disputed Area is reasonable in light of the fact that she worked from home and would be in and out of the Shop multiple times a day. Magdalena Rangel Gross also used the Shop to support production of her income. She used the Shop as a studio and also did graphic design work there. *Id.* at 18.

All of the prior owners of the Peloquin Property used the Disputed Area as they needed to access the Peloquin Property. Gary Goodale cut the grass on the Disputed Area starting in 1972 and continued to do so for 22 years, maintaining the grass on the Disputed Area in a nice neat fashion. The prior owners of the Peloquin Property lived their lives in a normal way and testified to using the Disputed Area in a normal way considering it is the only vehicle access to the Shop and it is the only access (vehicle or pedestrian) to the fence and septic drain field retaining wall on the west boundary of the Peloquin Property. This is why Michael Gross would inspect the fence from the Disputed Area. *Id.* at 20.

B. THE TRIAL COURT DID NOT FIND THAT GARY GOODALE'S USE WAS PERMISSIVE.

The Sordenstones assert that because Gary Goodale's ownership occurred prior to the Pearsons' ownership (Marcia Cook), Gary Goodale's

ownership was permissive. There is neither a finding of fact, nor a conclusion of law to support this assertion. This assertion ignores the substantial evidence of record to the contrary. See Appellants' Brief at pages 7-15 & 40-41 & 45-47. Thus, the point of adverse use is measured from Gary Goodale's purchase of the Peloquin Property from William Fitzpatrick on November 27, 1972. Ex 1. All of the uses from that point forward are properly considered as the historical uses which inform the scope of the Peloquins prescriptive easement.

C. THE INADEQUACY OF ACCESS FOR MAINTENANCE AND CONSTRUCTION THROUGH THE PELOQUIN PROPERTY WAS RAISED AT TRIAL AND IN THE PELOQUINS' MOTION FOR RECONSIDERATION.

In footnote 42 on page 38 of their Opposition Brief, the Sordenstones incorrectly allege that the Peloquins did not raise the feasibility of maintenance or construction without access over the Disputed Area. This is not correct. During trial, Mark Peloquin testified to the need to access the Disputed Area for maintenance of the Shop, maintenance of the septic drain field retaining wall, and maintenance of the fence that runs along the Peloquins' west boundary with the Disputed Area. RP 191:24-192:19. Mark Peloquin testified to the inadequacy of the walking access from 116th ST for any maintenance to the back part of the Peloquin Property including the retaining wall, fence, or Shop area.

Id. Mark Peloquin testified that the path around the Peloquin residence, which takes a circuitous path up over a cement retaining wall, across a flower garden, down multiple flights of stairs, and through a side gate is not a construction access of any kind. *Id.*

Mark Peloquin described the need for maintenance on the septic system retaining wall with access from the Disputed Area and the fact that the fence that adjoins the Sordenstones' gate blocks access to the Peloquins' septic drain field retaining wall. RP 190:20-191:5; Ex 25. Mark Peloquin testified to the need for maintenance on his fence that runs along the west boundary of the Peloquin Property on the Disputed Area side of the septic drain field retaining wall. RP 191:12-16. Mark Peloquin described the rotting front wall of the Shop and the leaking roof. RP 189:17-25 & RP 193:1-6. Thus, the only access for construction and maintenance of the Shop as well as the rear of the Peloquin Property is from the Disputed Area. FOF 49.

The Peloquins' demonstrative trial exhibit video also shows the inadequacy of the walking access through the Peloquin Property from 116th ST to the Shop, the fence and the retaining wall. Mark Peloquin clearly testified that access to the Disputed Area is needed for maintenance of the Peloquin Property along the 160 foot west boundary between the Peloquin Property and the Disputed Area. This issue was also

a subject of the Peloquins' motion for reconsideration. CP 819-830, 538-818, 831-834, 835-838, 999-1029, 995-998.

These citations to the record make it clear that the inadequacy of access for maintenance and construction was fully raised in the trial court by the Peloquins contrary to the Sordenstones' contention that the issue was not raised there.

D. THE SORDENSTONES URGE MISAPPLICATION OF THE LAW TO THE FACTS OF THIS CASE.

1. Construction Access Cannot Be A Permissive Accommodation After Adverse Use Was Found.

On page 38 of their Opposition Brief, the Sordenstones incorrectly allege: "The Peloquins make the summary statement without authority that once a prescriptive easement was acquired, adverse use could not be punctuated by permissive accommodations from Michael Sweeny," referring to page 43-44 of Appellants' Brief. The statement from Appellants' Brief followed a direct quote from the authority cited by the Peloquins, which is: *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 88, 123 P.2d 771 (1942) (citing 28 C. J. S. 716, Easements, § 52; *McInnis v Day Lbr. Co.*, 102 Wash. 38, 172 Pac. 844 (1918); *Downie v. Renton*, 162 Wash. 181, 298 Pac. 454 (1931), reversed, on hearing, on other grounds, 167 Wash. 374, 9 P.2d 372 (1932)). The relevant quote from this authority is:

“A prescriptive right, once acquired, cannot be terminated or abridged at the will of the owner of the servient estate, nor even by the oral admission of the easement claimant that his use was not, and is not, adverse.”

Id.

This authority stands for the proposition that once the trial court found adverse use, subsequent use by the dominant estate for construction access cannot be found to be a permissive accommodation by Michael Sweeny. Thus, COL 18 is a legal impossibility and is not supported by any evidence. The Peloquins maintain that use has been adverse from the time of Gary Goodale in 1972, and thus subsequent construction access cannot be permissive.

However, to address the hypothetical raised by the Sordenstones, if adverse use started with Marcia Cook (formerly Marcia Pearson) (FOF 52) then when the Gross family purchased the Peloquin Property and used the Disputed Area for two different maintenance and construction events¹ (the remodel of the Peloquin residence and the replacement of the west wall of the Shop), access over the Disputed Area could not have been permissive accommodations from Michael Sweeny. These uses by the Gross family had to be adverse as required by *Western Fuel Co.* Note that as pointed out on page 44 of Appellants’ Brief, the record is void of any testimony from Michael Sweeny on these instances of construction access with 3rd

¹ Described and cited in Appellants’ Brief page 44.

parties.

The photo in Ex 30 from Marcia Cook's time in residence at the Peloquin Property shows the original large stage type door in the west wall of the Shop in the open position and Ex 29 shows the door in the closed position. Mr. Pearson damaged the door. Appellants' Brief at page 17. When the Gross family purchased the property they hired 3rd party contractors to rebuild the west wall of the Shop. The 3rd party contractors accessed the Peloquin Property via the Disputed Area. The result of this construction is seen in Ex 27. Thus, substantial evidence exists, complete with photos, to establish prior access of the Peloquin Property via the Disputed Area for construction and maintenance as was needed in the normal course of the life of the buildings by 3rd party contractors and so called commercial vehicles. The only vehicle access to the rear of the Peloquin Property where the Shop is located is over the Disputed Area. FOF 49.

2. Tacking On Emergency Vehicle Access Highlights The Inconsistency In The Trial Court's Approach To Defining The Prescriptive Right.

The trial court lacked a principled basis for establishing the scope for the prescriptive easement. This fact is seen most clearly when it added *sua sponte* access for emergency vehicles and emergency personnel (3rd parties) following the filing of the Peloquins' motion for reconsideration.

Appellants' Brief at pages 34-35. The Sordenstones argue that such access was always included in the trial court's scope of easement. Opposition Brief page 46. The relevant question then is by what authority did the trial court include access for emergency vehicles since this Court held that there is no authority in Washington State for access by prescription for emergency vehicles. *See Stevens v. Parker*, 2009 WL 2915274 (Wash.App. Div 1).

In error, the trial court has limited the scope of the easement to specific historical activities (uses). Making classifications based on the type of person, type of vehicle, and the reason for accessing the dominant estate, while ignoring the "purpose" of the easement and the "general guidelines" that are required by law in order to establish the scope. *See Lee v. Lozier*, 88 Wash.App. at 187-188 (citing Restatement of Property §477 at 2992 (1944)). If such specific activities are not found for a type of person or a type of vehicle, then the Sordenstones have argued² and the trial court has held that the prescriptive right does not include those uses. Following this line of reasoning the Peloquins' prescriptive right should not contain access for emergency vehicles since there is no evidence that an emergency vehicle or emergency personnel ever accessed the Peloquin Property via the Disputed Area historically. Violating its own erroneous

² Opposition Brief at pages 35-39.

methodology, the trial court added access to the Peloquin Property via the Disputed Area for emergency vehicles with no prior historical activity to support this scope of easement.

Emergency vehicles and emergency personnel are 3rd parties just like contractors and their vehicles or other third parties like Mark Peloquins' nephew who is currently prohibited from riding in Mark Peloquins' vehicle to put the kayaks away after a family outing. His nephew must get out of the vehicle and walk to the Shop some other way. The trial court's ruling prohibits the nephew and allows the emergency vehicle, this result doesn't make sense because it did not follow the principled basis outlined in the law for setting the scope of the easement by establishing "general guidelines" according to the "purpose" for which the easement is claimed.

The only way that emergency vehicles fit into the scope of the easement is through the analysis provided in the relevant law. If emergency vehicles fit into the scope of the easement, and it is the Peloquins' position that they do, then all other 3rd parties fit into the scope of the easement as explained in Appellants' Brief on pages 27-36.

3. Access Distinctions Based On Types Of People, Types of Vehicles, And Reasons For Accessing The Dominant Estate Are Not Part Of Washington Case Law And Do Not Establish The Required "General Outlines" For The Scope Of Easement Called For By This Court In *Lee v. Lozier*.

The first error the Sordenstones urge is to limit the prescriptive right to particular historical uses. Opposition Brief at pages 34-39. The Sordenstones' second error is that they ignore the test from the Restatement of Property §478, at 2994, which is used to analyze whether particular **uses of the servient estate** are found within the prescriptive right based on the historical uses of the servient estate. Notably, the Sordenstones do not cite any case as authority for their proposition that the **purpose** for accessing the dominant estate should limit the prescriptive right. Neither do they cite any authority for the proposition that a distinction is proper between vehicles and pedestrians or between easement owners and 3rd parties or between types of third parties. The relevant analysis as explained by this Court in *Lozier* while citing to the Restatement of Property is on the **purpose for using the servient estate**.

The scope of an easement in Washington State extends to the uses necessary to achieve the purpose for which the easement is claimed. *Lee v. Lozier*, 88 Wash.App 176, 187-188, 945 P.2d 214, 220-221; *Yakima Valley Canal Co. v. Walker*, 76 Wn.2d 90, 94, 455 P.2d 372 (1969); *Northwest Cities Gas Co. v. Western Fuel Co.*, 17 Wn.2d 482, 135 P.2d 867 (1943). While applying this precedent, this Court in *Lee v. Lozier* pointed to the untenability of focusing on individual activities as highlighted by the *Restatement of Property*:

*... Hence, the use under which a prescriptive interest arises determines the **general outlines** rather than the minute details of the interest (emphasis added).*

Lozier, 88 Wash.App. at 187-188 (citing Restatement of Property §477 at 2992 (1944)).

It is error to focus on the individual activities (historical uses) as urged by the Sordenstones when setting the scope because the result of such a process has produced the current unworkably narrow scope that falls short of effectuating the “purpose” for using the servient estate. In error, the trial court focused on individual historical uses to produce the current ultra-narrow scope which created access distinctions based on type of person (easement owner, third party), type of vehicle (personal, commercial), reason for accessing the dominant estate (emergency) which failed to establish the needed general outlines. This methodology also runs afoul of the test in the Restatement of Property §478, at 2994 by prohibiting many uses of the servient estate that should be allowed.

The general outlines for the scope of the easement should be:

Access to the Peloquin Property from the Disputed Area;
grass cutting on the Disputed Area; and
staging maintenance of the Peloquin Property from the Disputed Area without blocking the driveway on the Disputed Area.

The general outlines of this scope are consistent with the claimed purpose of the easement, are supported and informed by the historical uses of the Disputed Area as described in Appellants' Brief on pages 27-36. The Peloquins do not have to show specific historical uses by 3rd parties as the Sordenstones contend for access by 3rd parties to fall within the scope of the easement because access by third parties passes the test for determining which uses are encompassed with the easement scope as applied by this Court in *Lozier* and described in Appellants' Brief page 34.

The test from the Restatement of Property §478 at 2994 cited by this Court in *Lozier* is:

“in ascertaining whether a particular use is permissible under a prescriptive easement the court should compare that use with the uses leading to the prescriptive easement in regard to: (a) their physical character, (b) their purpose, and (c) the relative burden caused by them upon the servient tenement.”

Lozier, 88 Wash.App. at 188 (citing Restatement of Property §478, at 2994).

In this case the “**physical character**” of the uses of the Disputed Area leading to the prescriptive easement is: “**a temporary traverse of the Disputed Area by vehicle or on foot, or for staging work on the Peloquin Property, and cutting grass on the Disputed Area.**” The “**purpose**” of the use is: “**access via the Disputed Area to the Peloquin property and maintenance of the grass on the Disputed Area.**” The

“reason” underlying why a person wants to access the Peloquin Property is not relevant to the analysis.

Note that the uses presented by a Peloquin Property owner and a 3rd party contractor driving a vehicle have the same: (1) physical character, (2) purpose, and (3) relative burden on the servient estate. Thus, the 3rd party should not be excluded from the scope of easement. Similarly, the uses presented by a Peloquin Property owner driving a vehicle and a Peloquin Property owner walking have the same: (1) physical character, (2) purpose, and (3) relative burden on the servient tenement. Thus, walking should not be excluded from the scope of easement. Similarly, the uses presented by a Peloquin Property owner and a 3rd party walking across the Disputed Area have the same: (1) physical character, (2) purpose, and (3) relative burden on the servient tenement. The underlying “reason” or motivation for accessing the dominant estate is not part of the analysis. Thus, all 3rd parties who are the legal invitees or licensees of the dominant estate should be allowed within the scope of the easement not just a single type of 3rd party, i.e., emergency personnel and emergency vehicles. This is the principled basis that the trial court was missing.

4. The Sordenstones Ignore The Test For Allowed Uses Of A Servient Estate In The Restatement Of Property §478 at 2994 And Incorrectly Focus On The “Use” Of The Peloquin Property Instead Of The “Use” Of The Disputed Area.

The scope of easement described above in Section IV. D. 3. is not

an all or nothing proposition as the Sordenstones contend. This scope places off limits a myriad of uses of the Disputed Area. For example, a set of alternative uses that are off limits to the Peloquins are kite flying, picnics, and playing croquet because these alternative uses of the Disputed Area have a different **character** and a different **purpose** from the historic uses of the Disputed Area. The character of these alternative uses is “temporarily occupying a portion of the Disputed Area.” The purpose of these alternative uses is “recreational use of the Disputed Area.” The test in the Restatement of Property puts these alternative uses off limits because they have a different character and purpose from the historic uses of the Disputed Area. It is clear that the purpose of “recreational use of the Disputed Area” does not fall within the scope of the prescriptive right set forth above in section **IV.D.3**.

5. 22 Years Of Grass Cutting Need To Inform The General Guidelines Of The Prescriptive Right

Gary Goodale cut grass for 6 years on the Disputed Area before Michael Sweeny ever set foot on the Disputed Area, and then continued to cut grass for another 16 years for a total of 22 years. Grass cutting on the Disputed Area should be included in the prescriptive right. The Peloquins have a right to ensure that the Disputed Area does not turn into a hay field but is maintained as a cut lawn as it has been for the past 40 years.

E. NO COMMERCIAL USE IS POSSIBLE IN A RURAL AREA

(RA) ZONE.

The Peloquins assign error to FOF 45 because it is clearly disclosed in and related to issue No. 3. A pottery studio or a Yoga studio is not going to be the genesis for conflict between neighbors when no one would be parking their car on the Disputed Area given the limited scope of easement proposed by the Peloquins. It is error for the trial court to usurp the authority of the State Legislature in this case because it affects a taking on the Peloquins. As explained in Appellants' Brief at page 37 Department of Development and Environmental Services (DDES) Customer Information Bulletin # 43A provides the necessary guidelines for such Home Occupations and Home Industries. DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES, KING COUNTY WA, BULLETIN #43A, HOME OCCUPATIONS AND HOME INDUSTRIES (2008).

F. THE MOTION FOR RECONSIDERATION SHOULD BE REVERSED BY THIS COURT.

All of the issues raised in the motion for reconsideration have been briefed and argued in the appeal to this Court. The Peloquins respectfully ask this Court to vacate the trial court's November 10, 2011 decision and modify the scope of the easement consistent with the general outlines described in Appellants' Brief and as set forth above in section IV.D.3.

G. AS A MATTER OF LAW THE TRIAL COURT DOES NOT HAVE THE RIGHT TO DICTATE HOW THE PELOQUINS USE THEIR PROPERTY.

In error the Sordenstones try to frame the issue of the restrictive covenant as being supported by substantial evidence. The issue is not a matter of substantial evidence it is a matter of overreaching by the trial court. The trial court abused its discretion. This is the United States; the trial court does not have the power to dictate how the Peloquins use or maintain their property. Indeed, on motion for reconsideration the trial court judge admitted that he didn't have the power to command the Peloquins to maintain their fence in a particular condition and removed that restrictive covenant, but left the Peloquin Property under the present restrictive covenant requiring the gate in the Peloquin fence to be closed when not in use. The Peloquins respectfully ask this Court to remove the restrictive covenant from the Peloquin Property.

V. CONCLUSION.

The trial court erred as a matter of law in key credibility determinations, was offended by adverse use, rendered a scope for the prescriptive right that does not conform to the law, is ultra narrow, and placed a restrictive covenant on the Peloquin Property. This Court should: (1) remove the restrictive covenant; and (2) modify the findings of fact and conclusions of law and order the scope of the prescriptive easement to follow the general outlines described on pages 30-31 of Appellants' Brief and as set forth above in section IV.D.3.

RESPECTFULLY SUBMITTED this 15th day of August 2012.

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VI. CERTIFICATE OF MAILING

The undersigned does hereby declare that on August 15, 2012 the undersigned deposited a copy of REPLY BRIEF OF APPELLANTS PELOQUINS filed in the above-entitled case into the United States mail, first class postage addressed to the following persons:

Bradley Thoreson

Kelly A Lenox

Foster Pepper, PLLC

1111 Third Ave, STE 3400

Seattle, WA 98101

Date: August 15, 2012

Mark S. Peloguin

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MARK S. PELOQUIN)
and JENNIFER W. PELOQUIN,)
husband and wife,)
)
Appellants,)
)
Vs.)
)
)
REGINALD SORDENSTONE)
and CAROL SORDENSTONE,)
husband and wife,)
)
Respondents.)

No. 68035-8-1
CERTIFICATE OF
SERVICE

2012 AUG 15 PM 2:32
COURT OF APPEALS
DIVISION I
SEATTLE, WASHINGTON

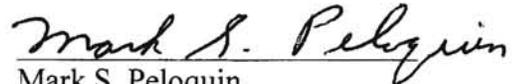
I, Mark S. Peloquin, hereby certify under penalty of perjury under the laws of the State of Washington that on August 15th, 2012, I caused to be filed with the Court the originals of the following documents:

1. Reply Brief Appellants Peloquins; and
2. Certificate of Service.

and served copies of the above-named documents, via email and first class mail, upon:

Bradley P. Thoreson - thorb@foster.com
Kelly A. Lennox - LennK@foster.com
FOSTER PEPPER PLLC
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Seattle, WA 98101-3299

SIGNED in Seattle, Washington, this 15th day of August, 2012.


Mark S. Peloquin