IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL B. MCGRAW and CONNIE MCGRAW, husband and wife; AL DOUD and PATRICIA DOUD, husband and wife, Appellants, v. JOSEPH M. BLACKWELL and CYNTHIA BLACKWELL, husband and wife; GREGG R. BIEBER and LYNNE M. BIEBER, husband and wife, Respondents.	No. 41041-9-II UNPUBLISHED OPINION

Van Deren — Michael and Connie McGraw appeal a trial court's order denying their request for declaratory judgment that would permit them to expand the paved portion of a private shared road located on an easement running across the adjoining subdivision lots in order to better accommodate their new, larger, recreational vehicle. They argue that the trial court applied the wrong legal standard, requiring them to prove that the proposed expansion would not unduly burden their adjoining neighbors' properties, to determine whether they could expand the easement for their use and that the trial court erred in not relying on their expert's testimony in reaching its decision. Finding no error, we affirm.

Facts[1]

The Chestnut Hills II subdivision in Vancouver, Washington contains four adjoining lots. The McGraws own Lot 2, which borders Lot 1 (owned by Gregg and Lynne Bieber) to the west and Lot 3 (owned by Joseph and Cynthia Blackwell) to the north. Al and Patricia Doud own Lot 4, which lies north of the Blackwells. All four lot owners purchased their property subject to the subdivision's covenants, restrictions, and conditions (CRCs).

The CRCs provide easements for utilities, drainage, and a private road. Under the short plat, the four owners share an easement for a nonexclusive private road for ingress, egress, and utilities that runs south through the Doud and Blackwell properties and ends at a cul-de-sac abutting the McGraw and Beiber properties. The existing easement is 40 feet wide with a paved roadway 16 feet wide.

In 2004, the McGraws bought a new 40-foot long recreational vehicle that was six feet longer than their previous RV. Because the new RV was more difficult to maneuver in and out of the driveway, the McGraws wrote to the Beibers, Blackwells, and Douds stating that they intended to widen the paved roadway adjacent to their driveway. The McGraws wanted to pave a 5-foot by 60-foot extension of the private road into the Blackwell property. The Blackwells and the Beibers objected to the proposed pavement expansion.

The McGraws sued the Beibers and Blackwells, seeking a declaratory judgment that they could expand the paved portion of the easement for ingress and egress.[2] Following a bench trial,

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[1] Background facts are gleaned from our prior unpublished decision in this case, *McGraw v. Blackwell*, noted at 151 Wn. App. 1004, 2009 WL 1940512 (2009).

[2] The original litigation involved other claims and issues that are not currently before us in the present appeal, including the McGraws' injunction request seeking to require the neighbors to remove obstructions from the easement, the McGraws' damages claim regarding the neighbors'

the trial court concluded that because the McGraws were able to maneuver their new RV in and out of their home with the assistance of a second person providing direction from outside the RV to the driver, they had failed to establish a reasonable necessity for expanding the paved surface of the private roadway. The McGraws appealed.[3]

In a July 7, 2009, unpublished opinion, we in part reversed the trial court on the paving issue, holding that the trial court erred in requiring the McGraws to prove that paving was a "'reasonable necessity'" instead of requiring them to prove that the paving "would not unduly burden the neighbors."[4] *McGraw*, 2009 WL 1940512 at *3.

On remand, the trial court considered the facts in the first trial and took additional testimony at the remand hearing that concluded on March 12, 2010. The trial court issued a memorandum opinion on May 21, 2010, that quoted and applied the legal standard identified in our July 7, 2009, unpublished opinion.

On remand, the trial court found that the proposed paving would burden the neighbors' property in the following ways: (1) cause a loss of character of the open space that the neighbors had previously sown with wildflowers, (2) create a patchwork appearance of the new and pre-existing pavement, (3) cause potential drainage problems with increased water run-off from

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composting practices, as well as the neighbors' counterclaims alleging that the McGraws retaining wall, fence height, and fence composition did not comply with the CRCs. All of these issues have been resolved or review is not sought in the current appeal.

[3] The Biebers and the Blackwells cross-appealed on other matters which are not presently at issue.

[4] The mandate issued on August 20, 2009. On October 1, 2009, respondents moved to recall the mandate and for an order clarifying our July 7, 2009, decision on an issue unrelated to the present appeal. We subsequently withdrew the mandate and amended the unpublished opinion on other matters (regarding back fill) on November 10, 2009. Thereafter, the mandate issued on August 25, 2011.

expanded pavement, and (4) cause increased financial expenditures that the CRCs required subdivision lot owners to share equally. Noting these factors, the trial court concluded that the McGraws had failed to show that the proposed expanded pavement would not unduly burden the neighbors. Once again, the McGraws appeal.

ANALYSIS

I. Standard of Review

We review a trial court's factual findings to determine whether substantial evidence supports them and, if so, whether those findings support the trial court's conclusions of law. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). We review conclusions of law de novo. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

When interpreting a restrictive covenant, we give clear and unambiguous language its plain and obvious meaning. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999). Restrictive covenants are designed to make residential subdivisions more attractive for residential purposes and are enforceable by injunctive relief if the claimant shows (1) a clear legal or equitable right and (2) a well-grounded fear of immediate invasion of that right. *Hollis*, 137 Wn.2d at 699.

Interpreting an easement is a mixed question of law and fact. *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979). The easement's scope is determined by looking to the parties connected with the original creation of the easement, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied.

Logan v. Brodrick, 29 Wn. App. 796, 799, 631 P.2d 429 (1981). "What the original parties intended is a question of fact and the legal consequence of that intent is a question of law." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

II. The Trial Court Applied the Proper Legal Standard

The McGraws contend that the trial court erred by applying the wrong legal standard in deciding whether their requested expansion of the easement should be granted. They appear to argue that the trial court should have applied the standard applicable in *Logan* for the proposition that the owner of the servient estate bears the burden of proving "'misuse'" of the easement. Br. of Appellant at 17 (quoting *Logan* 29 Wn. App. at 800). We disagree.

The issue in *Logan* was whether an easement for a road that provided access to a resort was being over burdened by increased traffic as the resort expanded. *Logan* 29 Wn. App. at 798-99. The *Logan* court explained:

> It can be assumed the parties had in mind the natural development of the dominant estate. Accordingly, the degree of use may be affected by development of the dominant estate. The law assumes parties to an easement contemplated a normal development under conditions which may be different from those existing at the time of the grant. Normal changes in the manner of use and resulting needs will not, without adequate showing, constitute an unreasonable deviation from the original grant of the easement.

Logan, 29 Wn. App. at 800 (citations omitted).

Logan addressed alleged misuse or overburdening of an existing easement. That is not the circumstance or the claim asserted here.[5] Instead, the McGraws brought a declaratory

[5] The McGraws' neighbors do not seek to enjoin the McGraws from driving their large RV on the private roadway. Under *Logan*, there would be no present "misuse" of the easement. The McGraws continue to use the roadway to access their property, including driving their new RV to their home via the existing roadway. While the McGraws' new, larger RV requires some additional maneuvering to pull off of the roadway to park on the McGraws' property at their desired location, such maneuvers can be accomplished within the existing roadway. The

judgment action seeking court approval of their proposed expansion of the paved roadway.[6]

Our prior opinion in this case held that the trial court erred in denying the McGraws' requested relief because the trial court found that expanded paving was not "reasonably necessary." *McGraw*, 2009 WL 1940512, at *3. The trial court in the first bench trial had applied the standard used in considering condemnation issues or claims to easements by implication that we held did not apply when determining whether the dominant estate's conduct exceeds the scope of an easement. *McGraw*, 2009 WL 1940512, at *3. We directed the trial court to apply the rule stated in *Little-Wetsel Co. v. Lincoln* that the owner of a dominant estate must show that expansion of use on an easement does not unduly burden the servient estates, explaining as follows:

> The owner of the dominant estate, here the McGraws, cannot enlarge or alter their use of the easement character in a way that increases the burden on the servient estate. *Little-Wetsel Co. v. Lincoln*, 101 Wash. 435, 445, 172 P. 746 (1918). Therefore, in determining whether the McGraws' proposed use would go beyond the scope of the easement, the trial court should have looked to the alleged *harm* to the Blackwells rather than the McGraws' *need*.
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> Because the trial court erred in requiring the McGraws to prove that paving was a "reasonable necessity" instead of requiring them to prove that the paving would not unduly burden the neighbors, we reverse and remand for the trial court to consider the issue under the proper test.

McGraws' continuing use of the existing 16-foot wide roadway by now driving their larger RV on it may be properly characterized under *Logan* as a normal change in the manner of use of the existing roadway and does not constitute an unreasonable deviation or misuse of the easement. Thus, *Logan* addresses the question of whether the McGraws are currently misusing the existing easement. But that is not the issue in the present appeal.

[6] Generally, the proponent of declaratory relief, that is to say the plaintiff in a declaratory judgment action, bears the burden of persuasion. *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 182, 149 P.3d 616 (2006); *Taylor v. State*, 29 Wn.2d 638, 641, 188 P.2d 671 (1948); *Washington Beauty College v. Huse Inc.*, 195 Wash. 160, 164, 80 P.2d 403 (1938).

McGraw, 2009 WL 1940512, at *3.

On remand, the trial court quoted the language from our first opinion and applied the articulated appropriate legal standard. The trial court found that the neighboring servient estates would indeed be burdened by the McGraws' proposed pavement expansion in that such expansion would have negative aesthetic impacts, including taking a portion of open space that had been used by the neighbors to grow wildflowers, and the new pavement strip would result in a patchwork appearance of the roadway, to which the neighbors objected. The court also found that the expanded pavement would create potential problems from increased water run-off and would increase the financial burden that subdivision lot owners share equally under the CRCs.

Substantial evidence at the remand hearing supported these findings. Joseph Blackwell testified that the added impervious surface would increase the water runoff that would have to be disposed of, that the proposed expansion ran the entire length of his lot, and that he was opposed to the added cost of installing and maintaining the pavement expansion as well as added liability for the expanded roadway. Blackwell explained that the addition of a new pavement strip to the older roadway would be unsightly.

Gregg Bieber testified about his personal experience with run-off water from the roadway, where standing water would accumulate in the area, and his concerns about increased run-off resulting from pavement expansion. Bieber objected to the additional financial burden of adding to, maintaining, and repairing an expanded roadway that the CRCs required be shared by all subdivision owners. He explained how the added pavement strip would negatively impact the aesthetics of the neighborhood by creating a patchwork appearance on the roadway itself and would remove a portion of the planting area on Blackwell's property that he and Blackwell

annually beautified by tilling and planting with wildflowers.

While we might otherwise weigh the evidence of the burden on the servient estates, we defer to the fact finder's evaluation of the weight and credibility of the evidence. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 783, 129 P.3d 300 (2006). Because the trial court heard and weighed the evidence, we hold that the testimony may be properly deemed substantial evidence supporting the trial court's factual findings.

The trial court further ruled that "the burden is on the McGraws to establish the proposed expansion does not unduly burden the servient estate." Clerk's Papers at 37. The trial court concluded that, in light of the evidence about the additional burdens the proposed expanded pavement would place on the servient estates, the McGraws had failed to show that these changes would not unduly burden the neighboring properties. The trial court applied the standard that we directed in our prior opinion and the trial court's conclusion correctly follows from application of that standard. In reaching its conclusion based on the proper standard, the trial court did not err.[7]

[7] When our mandate issued on August 20, 2009, our July 7, 2009, unpublished opinion determining the proper test on remand became the law of the case "binding on the parties . . . and govern[ing] all subsequent proceedings in the action in any court, unless otherwise directed upon recall of the mandate." RAP 12.2; *State v. Strauss*, 119 Wn.2d 401, 412, 832 P.2d 78 (1992). Accordingly, the trial court was required to apply the legal standard articulated in our July 7, 2009 unpublished opinion. The trial court properly did so and the McGraws cannot now contend that the trial court should have applied some other standard. Although the adjoining neighbors moved for and were granted recall of the mandate to clarify another portion of our July 7 opinion, no party sought further review of our July 7 opinion or clarification of the legal standard that we directed the trial court to apply on remand. Nor did our order recalling the mandate and amending the opinion address the legal standard to be applied on remand regarding the paving issue. We acknowledge that the law of the case doctrine has been restricted in some circumstances, none of which are applicable in this case. *See* RAP 2.5(c). For example, we may "at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of [our] opinion of the law at the time of the later review." RAP 2.5(c)(2). But the parties do not cite to RAP 2.5(c)(2) or ask us to revisit our earlier decision in this case. Accordingly, our July 7, 2009, unpublished opinion, as amended in our November 10, 2009, order, remains the law of the case;

The McGraws also briefly contend, without citation to authority or citation to the record, that the trial court abused its discretion in finding harm to the neighbors by ignoring their expert's testimony and adopting the lay testimony of the neighbors. As a threshold matter, the McGraws' argument on this issue is not properly briefed. Appellants are required to provide argument, including citation to authority and citation to the record in the argument section of their brief when discussing the issues raised. *See* RAP 10.3(a)(6). The McGraws' argument on this issue contains none of the required citations. Accordingly, the issue is not properly briefed and, thus, is waived. *In re Parentage of S.E.C.*, 154 Wn. App. 111, 116, 225 P.3d 327 (2010) (failure to cite supporting authority waives assignment of error).[8]

We hold that substantial evidence supports the trial court's factual findings that the servient estates would be unduly burdened by the McGraws' proposed pavement expansion. The trial court applied the appropriate legal standard as directed in our prior opinion in this case and ruled that the McGraws had not met their burden to prove that the proposed pavement expansion would not unduly burden their neighbors.

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and it bound the parties and the trial court on remand. *See Strauss*, 119 Wn.2d at 413-14.

[8] If we were to reach the issue, the McGraws' contention would fail. "[W]e defer to the fact finder's evaluation of the weight and credibility of the evidence." *Cingular Wireless*, 131 Wn. App. at 783. Here, the McGraws's expert, a licensed landscape architect, testified that, in his opinion, the additional paving would not result in any harm to the neighborhood or to the McGraws' neighbors. But the expert later admitted under cross examination that the added pavement would increase water run-off that would have to be drained away. The McGraws fail to establish any impropriety in the trial court's use or evaluation of the testimony.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur:

Van Deren, J.

Armstrong, J.

Worswick, A.C.J.