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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEPHEN SIPES and BRENDA KELLER, Appellants,	)	No. 29349-1-III
v.	)	Division Three
JOHN BANGERT, CONNIE LAMBERTSON-BANGERT, JERRARD ALCOCK and PATRICIA EVANS, Respondents.	)	UNPUBLISHED OPINION

Brown, J. — Stephen Sipes and Brenda Keller, husband and wife (Sipes/Keller) appeal the trial court's decision to reform a 1982 deed and relocate an access easement referred to in the deed. The trial court partly based its decision on abandonment in favor of John and Connie Bangert (the Bangerts) and Jerrard Alcock and his wife, Patricia Evans (Alcock/Evans). We find substantial evidence supports the trial court's findings and conclusions regarding abandonment and relocation, and conclude that deed reformation was proper. Given our holding, we do not reach the

parties' adverse possession and estoppel contentions. Accordingly, we affirm.

FACTS

In 1976, Clark Lake Development (CLD) marketed real property in Stevens County. All property was subject to an express easement for ingress, egress, and utilities across an "existing road" (the original access road unsuccessfully asserted by Sipes/Keller in this dispute). Between October 1976 and May 1978, CLD completed sales of all real property in its development.

Between 1976 and 1977, Stephen Sipes purchased a total of 264 acres; the parties correctly agree the original easement merged under unity of title principles. Robert and Myra Sipes, Stephen's parents, made contract payments on a portion of the property Stephen Sipes had purchased, including Government Lot 3. In 1977, Robert and Myra Sipes began improving Government Lot 3 by building a small apartment in the barn. Robert Sipes began building a house on the concrete foundation of a former house on the property. At that time, the original easement went close to the house's original foundation and when the house was completed, a small portion of the new house apparently encroached into the original easement. Between 1977 and 1978, Stephen Sipes improved his property on Government Lot 2. He contracted with his power company to install underground power from the power pole at the barn in Government Lot 3 to his home site on Government Lot 2, along the original easement.

In 1979, Robert Sipes created an alternate access road from Bissell Road to Government Lot 2 and other CLD properties (the new access road is the center of this dispute, ultimately confirmed by the trial court). He blocked off the original access road with fences and a gate at Bissell Road. Trial testimony showed Robert Sipes and his wife told a neighbor they did not want traffic to come by their house.

In 1982, Stephen Sipes conveyed to his parents, by way of purchaser's assignment of contract and deed (PACD), the portion of his property that they had been making payments on. The PACD partly recited:

> SUBJECT TO a permanent non-exclusive easement for ingress, egress and utilities, 30 feet in width, over, under and across the existing road from the County Road near the North line, running to the Northeast comer of Government Lot 3, Township 31 North, Range 37 East of the Willamette Meridian.

Ex. 7. At this point, the sole existing road was the new access road.

In 1986 Stephen Sipes lost his remaining property to foreclosure. His property reverted to CLD and was sold to the Bangerts (Connie Bangert is Stephen Sipes' sister), Ms. Keller, and others. By 1993 CLD had again sold all interest in the property.

In 1987 the Bangerts purchased the east half of Government Lot 3 from the elder Sipes; this property lies to the west of the Sipes/Keller property and is separated by property belonging to Alcock/Evans. The Bangerts began pasturing cattle from 1990-1991. Mr. Bangert and his son erected and maintained fences to contain the cows. They installed a gate in the fence along the original easement road to allow for

escaped cows to be returned to the pasture.

Upon Ms. Keller's purchase in 1993, her family walked along the original easement, but used the new access road for vehicular movement. In 1996, Ms. Keller quit claimed her land to herself and her husband, Stephen Sipes. In 1995, Sipes/Keller improved their real property to the West by connecting a well and underground power at the pump house. In 1996, Stephen Sipes smoothed the new access road to allow for the passage of a manufactured home to the home site delivered in 1997. In doing so, he created a berm on the original road. Sipes/Keller moved into their home in 1998.

In 1995, Alcock/Evans purchased the west half of Government Lot 2 that lies between the Bangerts' property and Sipes/Kellers' property. Alcock/Evans allowed the Bangerts to pasture cattle across their property.

In 1996, CLD recorded a "Easement Clarification." Ex. 12. The 1996 CLD document shows solely the new access road. In 2001, the power company replaced the power line Stephen Sipes had installed in 1977 because it was faulty. It did not follow the original easement road. In 2005, the Bangerts stopped pasturing cows and removed both pasture fences that crossed the original easement in 2006. Alcock/Evans removed the pasture fence on their property and smoothed the berm created by Stephen Sipes in 1996. Numerous witnesses testified about their or others' non-use of the original access road beyond the Bangert driveway after the new access road was installed.

On November 6, 2008, not long after family dissension evidenced by unrelated litigation decided in favor of the Bangerts, Sipes/Keller wrote the Bangerts to inform them of their intention to begin using the original easement. The Bangerts and Alcock/Evans threatened criminal trespass in response and soon erected fencing across the claimed original easement road. Sipes/Keller sued the Bangerts, claiming the original easement.

The trial court, after partly concluding the facts showed the original easement was abandoned, denied Sipes/Keller's claims and granted the Bangerts relief by reforming the deed, and enjoining use of the original easement. Sipes/Keller appealed.

ANALYSIS

A. Abandonment and Relocation

The issue is whether the trial court erred in concluding Sipes/Keller abandoned the original easement and assented to relocating it to the new access road. They argue the facts show continued original easement use and dispute that Stephen Sipes discouraged the use of the original easement.

We review a trial court's findings of fact for substantial evidence. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). "Substantial evidence is evidence sufficient to persuade a fair minded person of the truth of the declared premise." *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984).

First, the recited facts support the court's finding that pedestrian, motorcycle,

and four-wheeler use of the original easement was intermittent. These findings are matters within the trial court's fact-finding discretion. Importantly, no evidence shows any material vehicle use after the new access road was established. And, Sipes/Keller do not assign error to the findings that they used the new access road for ingress and egress by vehicle. On the other hand, the record shows Stephen Sipes discouraged the use of the original easement and even blocked it. Regarding utilities, while utilities initially followed the original easement, replacement power supplied to Sipes/Keller followed a different route. Moreover, utilities are permitted in the new access easement.

Second, regarding abandonment, we review the trial court's conclusions of law to determine if they are supported by the findings of fact. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007). "Easements are property rights or interests that give their holder limited rights to use but not possess the owner's land." *State v. Newcomb*, 160 Wn. App. 184, 191, 246 P.3d 1286, *review denied*, 172 Wn.2d 1005 (2011). "Abandonment of a legal right is generally a question of fact." *In re Trustee's Sale of Real Property of Brown*, 161 Wn. App. 412, 415, 250 P.3d 134 (2011).

"Extinguishing an easement through abandonment requires more than mere nonuse• the nonuse must be accompanied with the express or implied intention of abandonment." *Heg v. Alldredge*, 157 Wn.2d 154, 161, 137 P.3d 9 (2006) (internal

citations omitted). "Acts evidencing abandonment of an easement must be unequivocal and decisive and inconsistent with the continued existence of the easement." *Id.*

In *Barnhart v. Gold Run*, *Inc.*, 68 Wn. App. 417, 843 P.2d 545 (1993), an intent to abandon was found where the property owner used a house and other permanent structures in the area of the platted road right-of-way and constructed an alternate road to gain access to the property, long substituting it for the platted right-of-way. In contrast, no intent to abandon was found in *Heg*, partly because no substitute existed for the easement. *Heg*, 157 Wn.2d at 164-65.

Robert Sipes built an alternate route from Bissell Road to Government Lot 2 and the other CLD properties. The record shows all property owners used the new access road instead of the original easement road once it was built. Robert Sipes built a house in the area of the original easement road. The families helped build the house and landscaped it. Stephen Sipes blocked the original access road while improving the new access road. Considering this substantial evidence, the trial court did not err in finding intent to abandon the original access easement. And, the trial court could reasonably find from these facts the intent to relocate the easement to the new access road. Sipes/Keller argue "'easements may not be relocated absent mutual consent of the owners of the dominant and servient estates.'" *Crisp v. VanLaecken*, 130 Wn. App. 320, 324-25, 122 P.3d 926 (2005) (quoting *MacMeekin v. Low Income Housing Inst.*, *Inc.*, 111 Wn. App. 188, 190, 45 P.3d 570 (2002)). Sipes/Keller argue a writing is

required, citing *Kesinger v. Logan*, 113 Wn.2d 320, 326, 779 P.2d 263 (1989). But, as respondents correctly respond, "[a]lthough a deed conveying an easement must sufficiently describe the servient estate, a deed is not required to establish the <u>actual location</u> of an easement." Br. of Respondent at 22 (citing *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995); *Smith v. King*, 27 Wn. App. 869, 871, 620 P.2d 542 (1980)). No writing is required to consent to the relocation of an easement; the circumstantial facts amply evidence Sipes/Keller's adoption of the new access easement as the later documented "existing easement." This situation existed for nearly 30 years. In sum, the trial court did not err in its abandonment decision.

We acknowledge Sipes/Kellers' argument it was error for the trial court to have considered authorities where the easement was found to have "shifted" due to misunderstandings about the actual location of the easement. While the easement here did not shift in the same sense, the facts show it was relocated nonetheless. And, we note Sipes/Kellers' concerns regarding CLD's easement clarification as a nullity, but as the CLD clarification had no effect on the relocation of the easement, it does not affect our reasoning one way or the other.

B. Reformation

The issue is whether the trial court erred in granting reformation and rejecting Sipes/Kellers' claim that the 1982 PACD served to recreate the original easement after merger occurred in 1976.

When an easement has been extinguished by unity, the easement does

> not come into existence again merely by severance of the united estates. . . . Upon severance, a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise. If it does arise, however, it does so because it was newly created at the time of the severance. *Such a new creation may result, as in other cases of severance, from an express stipulation in the conveyance by which the severance is made* or from the implications of the circumstances of the severance.

Radovich v. Nuzhat, 104 Wn. App. 800, 805-06, 16 P.3d 687 (2001) (quoting 5 Restatement (First) of Property § 497, cmt. h (1944)) (emphasis added). The 1982 PACD was ambiguous:

> SUBJECT TO a permanent non-exclusive easement for ingress, egress and utilities, 30 feet in width, over, under and across the *existing road* from the County Road near the North line, running to the Northeast corner of Government Lot 3, Township 31 North, Range 37 East of the Willamette Meridian.

Ex. 7 (emphasis added). The sole "existing road" in 1982 was the new access road. From the time the new road was built it was used exclusively as the access road to Government Lot 2 and the other CLD properties. And, while the 1982 deed refers to a road travelling northeast, both the original easement road and the new access road run in slightly different easterly directions to converge in the Alcock/Evans property. Thus, the 1982 deed is ambiguous.

"In construing a deed, the court is required to carry out the intentions of the parties and, if the deed admits of more than one construction, it must be construed most strictly against the grantor and most favorably to the grantee." *Beebe v. Swerda*, 58 Wn. App. 375, 379, 793 P.2d 442 (1990). Parol evidence may be used to explain

an ambiguity in an instrument creating an easement. *Green v. Lupo*, 32 Wn. App. 318, 321, 647 P.2d 51 (1982); *see also Schwab v. City of Seattle*, 64 Wn. App. 742, 826 P.2d 1089 (1992). Stephen Sipes conveyed land to his parents but reserved an access road to his property. The parties had a history of using the new access road to get to the property further east and had ceased using the original road for that purpose. The evidence shows Robert Sipes built a home partly on or at least very near the original road, blocked off the original access road, and told neighbors they did not want traffic going by. Thus, substantial evidence supports the trial court's finding that the scrivener's intent in the 1982 PACD was to reserve an easement in the new access road.

To convey an easement solely the servient estate need be legally described, the actual easement location is unnecessary. *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 999 P.2d 54 (2000); *see Berg*, 125 Wn.2d at 544; *see also Kalinowski v. Jacobowski*, 52 Wn. 359, 100 P. 852 (1909). "A trial court has equitable power to reform an instrument if there is clear, cogent, and convincing evidence of a mutual mistake or a unilateral mistake coupled with inequitable conduct." *Wilhelm*, 100 Wn. App. at 843. The party seeking reformation has to show solely that the parties agreed to accomplish a certain objective and that the instrument was insufficient to execute their intention. *Id*.

CONCLUSION

We hold the court correctly concluded abandonment from these facts and had the power to reform the 1982 PACD to reflect that the easement referred to the new access road. This holding is dispositive. Therefore, it is not necessary to address the parties' contentions and arguments regarding adverse possession and estoppel. Lastly, because no authority exists, we deny the respondents' request for attorney fees.

Affirmed.

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

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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.