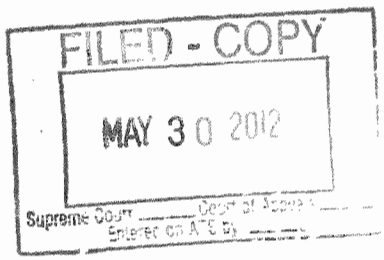
5-30-2012

Johnson v. Highway 101 Investments, LLC Appellant's Brief Dckt. 39160

IN THE SUPREME COURT OF THE STATE OF IDAHO

KENTON D. JOHNSON, a married man dealing with his sole and separate property and NEPHI H. ALLEN, a married man dealing with his sole and separate property, and REXBURG PLUMBING & HEATING LLC, an Idaho limited liability company, Plaintiffs/Appellants, v. HIGHWAY 101 INVESTMENTS, LLC, Defendant/Respondent.	)	**Docket No. 39160-2011**



APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Madison

---

Honorable Dane Watkins, Jr. District Judge, presiding.

RIGBY ANDRUS & RIGBY, CHTD.
Hyrum D. Erickson, Esq.
25 North Second East
P. O. Box 250
Rexburg, Idaho 83440

Attorneys for Appellants

SMITH, DRISCOLL & ASSOCIATES, LLC
Bryan D. Smith, Esq.
414 Shoup Avenue
P. O. Box 50731
Idaho Falls, Idaho 83405

Attorneys for Respondent

TABLE OF CONTENTS

I. TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. Statement of the Case

A. Nature of the Case

This is an easement case. Appellants Kenton Johnson and Nephi Allen have an easement over property owned by Appellee, Highway 101 Investments, LLC (hereinafter Highway 101). The easement provides access to Rexburg Plumbing & Heating, LLC, which is owned and operated by Johnson and Allen. In 2009, Highway 101 placed a large permanent sign within the area of the easement. Johnson, Allen, and Rexburg Plumbing & Heating seek the removal of the sign.

B. The Course of Proceedings Below

Kenton Johnson, Nephi Allen, and Rexburg Plumbing and Heating, LLC (collectively Johnson and Allen) filed their complaint February 19, 2010. R. Vol. 1 pp. 8-11. Highway 101 answered March 16, 2010. R. Vol. 1, pp. 14-18. In addition to its answer, Highway 101 filed a counterclaim asserting five counts – Right of Way Forfeiture, Unjust Enrichment, Trespass against Rexburg Plumbing & Heating, Trespass against Kenton Johnson and Nephi Allen, and Equitable Recoupment/Estoppel. R. Vol. 1, pp. 18-24. On November 17, 2010, Johnson and Allen filed for summary judgment on all counts. R. Vol. 1, p. 30. On March 9, 2011, Highway 101 filed for summary judgment. R. Vol. 2, pp. 252-253. The respective summary judgment motions were briefed, the district court heard argument on April 14, 2011, and on May 6, 2011, the district court issued its Memorandum Decision and Order Re: Motions for Summary Judgment. R. Vol. 3, pp. 418-435. The court granted Highway 101 summary judgment regarding the placement of the sign on the basis that it was not an "unreasonable" interference

with the Johnson and Allen's right to use the right-of-way. R. Vol. 3, p. 429. The court granted Johnson and Allen summary judgment on Highway 101's counterclaims of forfeiture and unjust enrichment. R. Vol. 3, p. 430-433. On May 20, 2011, Johnson and Allen filed a motion to reconsider the court's decision. R. Vol. 3, pp. 436-437. The parties each filed motions for costs and fees. R. Vol. 3, pp. 470-471, 525-530. On June 13, 2011, Highway 101 unilaterally moved the district court to dismiss the two counts remaining on its counterclaim. R. Vol. 3, p. 494-496. On July 27, 2011, the district court denied Johnson and Allen's Motion to Reconsider, granted Highway 101's Motion to Dismiss, and entered its final judgment. R. Vol. 3, pp. 519-520, 522-523. The district court denied the parties' respective motions for attorney's fees and awarded costs to Highway 101. R. Vol. 3, pp. 566-572. On September 1, 2011, Johnson and Allen filed notice of this appeal. R. Vol. 3, pp. 561-563.

C. Statement of the Facts

Nephi Allen and Kenton Johnson own property in Rexburg Idaho. They are the managing members of Rexburg Plumbing and Heating LLC, a plumbing and heating company which operates out of a building on their property. An ariel photograph of the area involved in this matter is in Volume I of the record at page 208, and a better quality copy of that photograph is attached hereto as Appendix A. In the photo, the property owned by the Johnson and Allen is labeled Rex. P & H. Located directly north of Rexburg Plumbing & Heating is a street that provides access to their property and business. This street has sometimes been identified as "American Street". The street also provides access to two other businesses, Leishman Electric, which is located directly across the street from Rexburg Plumbing and Heating and Highway 101

dba American Self Storage, which is located next door and to the east of Rexburg Plumbing and Heating.

Johnson and Allen obtained their property by warranty deed recorded October 24, 2000 in Madison County, Idaho, as Instrument # 286132. R. Vol. 1, p. 156. Their deed includes an express easement over the street providing entrance to their property. The portion of their deed granting the express easement reads as follows:

> ALSO A right-of-way to be used in common with others described as follows: Beginning at the Southwest corner of Section 17, Township 6 North, Range 40 East, Boise Meridian, Madison County, Idaho; thence East 140.90 feet; thence North 565.74 feet to the true point of beginning; and running thence North 89°49'50" East 378.37 feet; thence South 25.00 feet; thence South 89°49'50" West 394.40 feet; thence North 32°37'44" East 29.74 feet to the point of beginning.

Id.

Highway 101 is an Idaho Limited Liability Company. It does business as American Self Storage. It owns and operates a self storage facility that is also served by the right-of-way. Highway 101 acquired its property by warranty deed in 2007. R. Vol. 1, p. 161. Highway 101's deed also provided for a right-of-way to be used in common with others as follows:

> Together with: a right-of-way to be used in common with others described as follows:
> Parcel 2: Beginning at a point that is North 00°11'06" East 539.56 feet along the section line and South 89°48'54" East 142.21 feet from the Southwest corner of Section 17, Township 6 North, Range 40 East of the Boise Meridian, Madison County, Idaho; and running thence North 32°08'41" East 29.74 feet; thence North 89°21'24" East 378.37 feet; thence South 00°28'26" East 25.00 feet; thence South 89°21'24" West 394.40 feet to the point of beginning.

Id. Leishman Electric has an identical right-of-way. R. Vol. I, p. 164.

In 2007, Highway 101 placed a large sign in the easement. At the it installed the sign,

Highway 101 did not own the property subject to the easement. R. Vol II, p. 291. It obtained title to the property subject to the easement in 2009. Id. The sign is 26 feet high and 20 feet wide. R. Vol. 1, p. 64. It sits on a post that is protected by bollards on two sides. R. Vol. II, p. 337. The sign reduces the useable width of the easement from 25 feet, as described in the deeds, to 19 feet. R. Vol. II, p. 287. Prior to the installation of the sign, Johnson and Allen objected to the placement of the sign and informed Highway 101 of the existence of their easement. R. Vol. I, pp. 174-177. Many of Rexburg Plumbing and Heating's customers have hit the sign and Allen has hit the sign himself. R. Vol. I, p. 183-184; Vol II, p. 305. Johnson and Allen seek the removal of the sign.

II. Issues of Appeal

A. Did the district court err by granting summary judgment to Highway 101 allowing Highway 101 to place a large sign within the area of an express recorded right-of-way?

B. Did the district court err in using extrinsic evidence to determine the "reasonableness" of an encroachment upon an unambiguous express right-of-way?

C. Alternatively, if the Court holds that district court correctly used a "reasonableness test, did the district court err in finding the sign to be a reasonable encroachment when the record clearly evidences that the sign had been hit by vehicles using the easement to enter and exit Johnson and Allen's property.

III. Argument

A. Standard of Review

On appeal from the grant of a motion for summary judgment, this Court utilizes the same standard of review used by the district court originally ruling on the motion. *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 360, 93 P.3d 685, 691 (2004) (internal citations omitted). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c).

The question of whether an instrument is ambiguous is a question of law, over which the Court exercises free review. In deciding whether a document is ambiguous, the Court must seek to determine whether it is "reasonably subject to conflicting interpretation." In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument. In interpreting a deed of conveyance, the primary goal is to seek and give effect to the real intention of the parties. *Chavez v. Barrus*, 146 Idaho 212, 219, 192 P.3d 1036, 1043 (2008) (internal citations omitted).

B. The district court erred in granting summary judgment to Highway 101 because Idaho law does not allow for the placement of permanent obstructions within an express right-of-way.

Kenton Johnson and Nephi Allen own the following expressed easement:

> ALSO A right-of-way to be used in common with others described as follows: Beginning at the Southwest corner of Section 17, Township 6 North, Range 40 East, Boise Meridian, Madison County, Idaho; thence East 140.90 feet; thence North 565.74 feet to the true point of beginning; and running thence North 89°49'50" East 378.37 feet; thence South 25.00 feet; thence South 89°49'50" West 394.40 feet; thence North 32°37'44" East 29.74 feet to the point of beginning.

R. Vol. 1, p. 156. The district court found that the easement was not ambiguous. R. Vol. III, p. 423. However, the district court failed to order the removal of a permanent obstruction from the right-of-way. After holding the easement to be unambiguous, the district court then went on to describe the easement, and in particular to distinguish between the "privilege granted" and the "location" of the easement. The court stated as follows:

> Plaintiffs' are entitled to full enjoyment of the *privilege* granted them by their Easement, and Plaintiffs are entitled to relief upon showing they are obstructed from exercising that privilege.
>
> The *privilege* created by the Easement is "a right-of-way," or the right to use the Subject Property for ingress and egress. The legal description contained in the granting language precisely describes the *location* of the land upon which Plaintiffs can exercise that privilege. Thus, while the *location* of the Easement is precisely defined, the *privilege* is stated generally as a "right-of-way." This Court concludes Highway 101 has the right to use its servient estate (the Subject Property) in a manner that does not unreasonably interfere with the Plaintiffs' right to use the Subject Property as a "right-of-way."

R. Vol. III, p. 426-427. (emphasis in original). The district court then discussed the evidence in the record establishing that Johnson and Allen were able to access their property in spite of the placement of the sign. Id. p. 427-429. The district court then ruled on the issue as follows:

> This Court acknowledges evidence in the record indicating Plaintiffs and some of their customers have backed into the bollards while leaving Plaintiffs' property. However, even if presumed true, that fact would not render the placement of the sign and bollards unreasonable when there is ample evidence that delivery trucks, service vehicles, and customers have all be[en] able to access Plaintiffs' property without unreasonable difficulty.
>
> This court concludes Highway 101's use of its servient estate, by placing the sign and bollards on the northwest corner of the Subject Property, does not unreasonably interfere with Plaintiff[s'] right to use the Subject Property as a "right-of-way." Highway 101's motion for summary judgment should be granted on that issue.

Id. p. 429. However, the district court's ruling, and in particular, its application of a

reasonableness test and its attempt to distinguish between the privilege granted and the location on which those privileges may be exercises, is not consistent with Idaho law. Idaho does not employ a reasonableness test to rights clearly set out in deeds and to do so is contrary to both Idaho law, the general common law of easements, and well reasoned opinions from other jurisdictions.

1. Idaho does not employ a reasonableness test for rights expressly granted in creating documents.

The district court incorrectly applied a reasonableness test for rights expressly granted in the deed. The district court correctly found the deed to be unambiguous and to describe the precise property Johnson and Allen were entitled to use as a right-of-way. However, the district court did not enforce the expressly granted rights but instead applied a reasonableness test.

In its decision, the district court relied heavily on *Boydstun Beach Ass'n v. Allen*, 111 Idaho 370, 723 P.2d 914 (Ct. App. 1986). However, the decision in *Boydstun* supports Johnson and Allen's position. Although not binding on this Court, *Boydstun* was binding on the district court and makes clear that Idaho does not employ a reasonableness test for privileges expressly granted in the conveying documents.

In *Boydstun*, a recorded deed granted an easement for ingress, egress privileges and parking space on a specifically defined strip of land 200 feet long and 75 feet wide along the shore of Big Payette Lake. *Id.* 111 Idaho at 377, 723 P.2d at 921. Subsequent owners of the servient property had developed the area subject to the easement. *Id.* 111 Idaho at 373, 723 P.2d at 917. Nearly their entire yard was on the easement, including grass, landscaping, and a sprinkler system. *Id.* In addition, they had built mounts of dirt and rocks and planted shrubs and

trees. *Id.* There was a 25 foot strip of the easement area that was not developed. *Id.* The district judge found that the mounds of dirt and rocks interfered with the ability to park and drive on the easement. *Id.* 111 Idaho at 374, 723 P.2d at 918. The district judge also found that the full area of the easement was not necessary for its use and that there was sufficient room to park and turn around on the twenty-five foot wide undeveloped area. *Id.* He found that building fires and parking cars on the lawn of the owners of the servient property would be a nuisance. *Id.* The district court ruled that the holders of the easement were not entitled to park on the lawn and were not entitled to the removal of the obstacles in the easement. In overturning the district court, the Court of Appeals recognized the good intentions of the district court but determined that in attempting to reach a reasonable and workable solution, it had failed to take into account the legal effect of the easement. The Court of Appeals stated as follows:

> The district court apparently sought to preserve the existing improvements to the easement area while allowing those with easement rights the fullest use available consistent with the changed use of the servient estate. The district court's efforts to accommodate the interests involved and arrive at a realistic solution to the problem are commendable. However, since the plan adopted by the court does not take into account the full legal rights of the dominant estate owners, we are constrained to reverse and remand for the formulation of a new plan of use.

Id. 111 Idaho at 377-378, 723 P.2d at 921-922. In reaching its decision the Court of Appeals stated a number of generally accepted rules of law regarding easements:

> Where a servient landowner takes the land subject to the easement, as did the Allens, he must refrain from interfering with the use of the easement, and the court has the authority to order removal of obstructions. *Id.* 111 Idaho at 377, 723 P.2d at 921. (Citations omitted)
>
> An easement owner is entitled to relief upon a showing that he is obstructed from exercising privileges granted by an easement. *Id.* 111 Idaho at 377-378, 723 P.2d at 921-922. (Citations omitted)

> All privileges expressed in a written easement and those necessarily incident to enjoyment of the express rights pass with the easement. *Id.* 111 Idaho at 377-378, 723 P.2d at 921-922. (Citations omitted)

The Court of Appeals did not engage in a reasonableness analysis regarding those rights specifically granted in the conveying document. It engaged in a reasonableness analysis regarding only two issues – open fires and toilets/sanitation. The Court of Appeals specifically stated that these issues were subject to a reasonableness analysis because they were not addressed in the document conveying the easement. "The right to have fires is not granted by the easement and hence is subject to reasonable adjustment." *Id.* 111 Idaho at 379, 723 P.2d at 922. Regarding the sanitation services the Court stated "This [the requirement for toilet and sanitation facilities] does not interfere with the granted privileges and is proper in light of the normal development of the servient and dominant estates." *Id.* 111 Idaho at 378-379, 723 P.2d at 922-923. At no time did the Court of Appeals use a "reasonableness" test to determine a right granted in the easement. It simply applied the language of the easement. And it did so in spite of the factual findings by the trial court that the entire area subject to the easement was not necessary for its use and that it would be a nuisance to the owner of the servient property.

The district court relied heavily on the following quotation by the Court of Appeals from the Restatement of Property:

> Our analysis is guided by principles stated at 5 RESTATEMENT OF PROPERTY, SERVITUDES § 486 (1944):
>
> > The possessor of land subject to an easement created by conveyance is privileged to make such uses of the servient tenement as are not inconsistent with the provisions of the creating conveyance.

> Comment:
>
> a. Uses not inconsistent with conveyance. So far as the language of the conveyance creating an easement precisely defines the privileges of the owner of it, the privileges of use of the owner of the servient tenement are also precisely defined. As the precision of definition decreases, the application of the principle that the owner of the easement and the possessor of the servient tenement must be reasonable in the exercise of their respective privileges becomes more pronounced. Under this principle, the privilege of use of the possessor of the servient tenement may vary as the respective needs of himself and the owner of the easement vary.

Id. 111 Idaho at 376, 723 P.2d at 920. However, the district court ignored the key phrase in the restatement – "not inconsistent with the provisions of the creating easement." As applied by the Court of Appeals in *Boydstun,* the rights expressed by the creating document are enforced specifically – regardless of whether the amount of property set out in the easement is more than is necessary for the enjoyment of the easement.

In this case, the creating conveyance provides for a "right-of-way to be used in common with others" and specifically describes the location of the right-of-way with a metes and bounds description. The right conveyed by the conveying document is the right to pass over the subject property and the subject property is precisely defined by the creating conveyance. As such, the presence of the sign is inconsistent with the provisions of the creating easement, Johnson and Allen's deed. The district court ruled that the location of the right is more than is necessary – Johnson and Allen do not need the full 25 feet set out in their deeds. However, the location of the right was determined decades ago when the deeds for the various properties involved were created and the easement was granted. R. Vol I, pp. 164, 165, 168. Johnson and Allen, and numerous prior owners of the parcels, purchased their property in reliance on the existence of the

25 foot right-of-way conveyed by their deeds. As demonstrated in *Boydstun*, Idaho courts do not employ a reasonableness test for rights specifically granted in a conveyance and will not shrink the size of a specifically described easement because it subsequently becomes inconvenient to the current property owner.

2. The district court's ruling is contrary to the general law of easements, and contrary to well reasoned decisions by courts in other jurisdictions.

The general law of easements holds that permanent obstructions in an express easement interfere with the use of the easement as a matter of law. While the decisions of other jurisdictions are not binding on this Court, the general rule is consistent with Idaho law and Appellants urge the Court to explicitly adopt the general rule as expressed by the well-reasoned opinions from other jurisdictions.

A well respected legal encyclopedia summarizes the general rule regarding the placement of a permanent obstruction within an easement as follows:

> A permanent physical obstruction placed in an express easement created by grant, in the absence of an agreement or surrounding circumstances to the contrary, interferes as a matter of law with the dominant tenement's right to the use of all of the express easement.

25 Am. Jur. 2d *Easements and Licenses* § 86. This rule is consistently followed by courts of various jurisdictions. When faced with an identical argument, that an express easement could be reduced based on a "reasonableness" analysis, Hawaii's Court of Appeals described the general rule as follows:

> The general rule . . . is as follows: Where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument the easement is specific and definite. The expressed terms of the grant or reservation

> are controlling in such case and considerations of what may be necessary or reasonable to a present use of the dominant estate are not controlling. If, however, the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length, and location as is sufficient to afford necessary or reasonable ingress and egress.

Consolidated Amusement Company, Ltd. v. Waikiki Business Plaza, Inc., 6 Haw.App. 312, 719 P.2d 1119 (1986). Other jurisdictions that have addressed this precise question have found that any diminution in an expressed easement is an interference. For example, after a Maryland trial court declined to order the removal of a fence that reduced a 20 foot easement to 12 feet on the basis that because the holder of the servient easement was still able to access the property, there was no "unreasonable interference", Maryland's highest court reversed the decision stating, in part, as follows:

> The trial judge's conclusion of no unreasonable interference with the express easement was premised on an incorrect legal analysis. He should not have considered the reasonableness of the established interference and physical obstruction. Rather, any interference of a permanent nature within a right-of-way that obstructs an express easement, created by reservation, for ingress and egress is unlawful as a matter of law and should be ordered removed. *Bump v. Sanner*, 37 Md. 621, 627-28 (1873) (the grant of a right to use a piece of property includes "the last inch as well as the first inch" and a fence or obstruction placed upon it by the servient tenement is an invasion of the dominant tenement's rights); *Brooks*, 224 Md. 47, 166 A.2d 737 (1961) (the grant of the fifteen foot easement in the original conveyance can not be narrowed unilaterally by the servient tenement).
> * * *
> When an easement has been located by mutual agreement of the parties and granted by deed, the express easement cannot thereafter be obstructed physically by one party acting unilaterally. *Waldschmidt v. Vito*, 228 Md. 328, 330, 179 A.2d 884, 885 (1962) (ordering removal of a fence barring access to an express easement by grant that gave waterfront owners the rights of ingress and egress across the right-of-way to the water). Just as we have found fences and gates restricting access to rights-of-way to be impermissible obstructions, so also we conclude that a permanent physical obstruction placed in an express easement created by grant-in the absence of an agreement or surrounding circumstances to

> the contrary-interferes as a matter of law with the dominant tenement's right to the use of all the express easement. It is axiomatic that an express easement for ingress and egress includes the right to unfettered physical access up to the boundaries of the easement.

Miller v. Kirkpatrick, 833 A.2d 536, 547-548 (Md. 2003).

Similarly, in Alabama a trial court ruled that an express easement for parking could be reduced because "the parking area available on the property subject to [the] easement is many times greater than the amount of parking needed or used by [the easement holder]." *Magna, Inc. v. Catranis*, 512 So.2d 912, 913-914 (Ala.,1987). On appeal the Alabama Supreme Court reversed and in its decision stated as follows:

> An easement is property, 2 *Thompson on Real Property* 3, § 315 (1980); 2 *American Law of Property* 236, §§ 8, 10 (1952); and it comes within the constitutional provision that no person shall be deprived of his property without due process. *Thompson v. Andrews*, 39 S.D. 477, 165 N.W. 9 (1917).
>
> The owner of a servient estate must abstain from acts interfering with or inconsistent with the proper enjoyment of the easement by the owner of the dominant estate. *Snider v. Alabama Power Co.*, 346 So.2d 946 (Ala.1977); *Alabama Power Co. v. Martin*, 341 So.2d 695 (Ala.1977). The fact that an obstruction to an easement is of a minor degree furnishes no standard for justification if the obstruction clearly interferes with the enjoyment of the easement. *Brown v. Alabama Power Co.*, 275 Ala. 467, 471, 156 So.2d 153, 157 (1963).
>
> Magna and its licensees, invitees, tenants, successors, and assigns, have the non-exclusive right to use each square foot of the property on which it has an easement for ingress and egress and parking of vehicles. This is a property right. Our respect for property rights will not permit us to diminish or reduce Magna's rights simply because neither Magna nor its tenant needs all the property to which it has property rights. Certainly, our federal and state constitutions protect such rights and would prohibit judicial deprivation or diminution of such rights based solely upon a judicial determination of an owner's lack of need for such property. The implications of a contrary result would be frightening.

Id.

The 3rd Circuit has explained the general rule while analyzing Pennsylvania law, "the fact that the purpose of an easement can be accomplished in less than the whole area dedicated to the easement does not give the servient estate the right to deny access to the unnecessary portion of the property." *Louis W. Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762, 767 (3rd Cir. 1994).

South Dakota's Supreme Court has also explicitly rejected the use of a "reasonableness analysis" when an easement area is of a definite width. It expressed the rule as follows:

> Where the way over the surface of the ground is one of expressly defined width, it is held that the owner of the easement has the right, free of interference by the owner of the servient estate, to use the land to the limits of the defined width even if the result is to give him a wider way than necessary.

Salmon v. Bradshaw, 173 N.W.2d 281, 285 (S.D. 1969) (citing *Tarr v. Watkins*, 180 Cal.App.2d 362, 4 Cal.Rptr. 293 and *Brooks v. Voight*, 224 Md. 47, 166 A.2d 737).[1]

Although a reasonableness analysis may be appropriate when its location is not clearly defined or to determine the location of an easement by prescription, because the easement in this case is express and its location clearly identified, a reasonableness analysis is inconsistent with the general law of easements. This Court should rule consistent with the general law of easements as expressed in the well reasoned decisions of courts in other jurisdictions that a permanent obstruction may not be placed within the area of an express right-of-way and that

---

[1]For other cases reaching the same conclusion *see Wilson v. Johnston*, 990 S.W.2d 554 (Ark.App. 1999); *Salmon v. Bradshaw*, 84 S.D. 500, 173 N.W.2d 281 (S.D. 1969); *Brooks v. Voigt*, 166 A.2d 737 (Md. 1961); *Dyer v. Compere*, 73 P.2d 1356 (N.M. 1937); *Lamb v. Wyoming Game and Fish Com'n*, 985 P.2d 433 (Wy. 1999); *Erday's Clothiers, Inc. v. Spentzos*, 592 N.E.2d 615 (Ill. App. Ct. 1992); *Squaw Peak Community Covenant Church of Phoenix v. Anozira Development, Inc.*, 719 P.2d 295 (Ariz. Ct. App. 1986); *Hoff v. Scott*, 453 So.2d 224 (Fla.Dist. Ct. App. 1984).

neither the servient property owner, nor the court, may reduce the width of an express easement on the basis that it is wider than is needed.

3. The fact that the easement is described as a "right-of-way" does not provide a basis for the district court's decision.

The district court identified the privilege granted by the right-of-way as follows: "to use the Subject Property for ingress and egress." R. Vol. III, p. 426. However, the terms "ingress" and "egress" do not appear in the deed. The "right-of-way" is not limited to a specific purpose, but is a general right to pass through or over the described property. This is consistent with the historical use of the subject property as well as the deeds relating to it. For example, in 1986 Leishman Electric received a deed to the property that conveyed only the right-of-way and no other property and as such, could not have been for ingress and egress to a particular parcel. R. Vol. I, p. 164. A right-of-way is defined by Black's as follows:

> **right-of-way.** 1. The right to pass through property owned by another. • A right-of-way may be established by contract, by longstanding usage, or by public authority (as with a highway). Cf. easement. [Cases: Easements 1.] 2. The right to build and operate a railway line or a highway on land belonging to another, or the land so used. [Cases: Railroads 69.] 3. The right to take precedence in traffic. [Cases: Automobiles 154, 171(4); Highways 99;] 3. The strip of land subject to a nonowner's right to pass through. — Also written *right of way*. Pl. **rights-of-way**.
> ***private right-of-way***. See easement.
> ***public right-of-way***. The right of passage held by the public in general to travel on roads, freeways, and other thoroughfares.

Black's Law Dictionary (9th ed. 2009), right-of-way. The Court erred when it ruled that Johnson and Allen's right-of-way was solely for the purpose of ingress and egress to their property. Rather, Johnson and Allen have the right to pass over the right-of-way regardless of purpose. Their ability to access their property is not relevant to an analysis of whether their easement

rights have been infringed upon. Even if the "right-of-way" granted in the deed, was somehow limited to ingress and egress, this would not provide a basis for reducing the specifically described area that Johnson and Allen are entitled to use for that purpose.

C. The district court erred in considering extrinsic evidence in enforcing an unambiguous right-of-way.

In Idaho, unambiguous deeds, including deeds granting easements, must be interpreted based on the language of the deeds. *Coward v. Hadley*, 150 Idaho 282, 286, 246 P.3d 391, 395 (2010); *Phillips Industries, Inc. v. Firkins*, 121 Idaho 693, 697, 827 P.2d 706, 710 (Ct. App. 1992). Because the instrument creating the easement is unambiguous, there was no basis for the district court to consider extrinsic evidence relating to the "reasonableness" of Highway 101's encroachment. Instead, the easement should be enforced on its terms.

D. Even if the district court correctly applied a reasonableness test, the district court erred in finding the sign's encroachment on the right-of-way reasonable as the record shows that Johnson and Allen and others using the right-of-way have struck the sign.

The record indicates that the sign is hit regularly, and particularly when drivers are attempting to turn around or back out of Rexburg Plumbing and Heating. Johnson and Allen affirmed as follows:

> [C]lients or persons visiting plaintiffs have hit the sign. Nephi Allen and Kenton Johnson have both seen people hit the sign. For example, they saw a driver from Clair and Dee's Tire Factory hit the sign. They also had a client come back into their building to apologize for hitting the sign.

R. Vol. I, p. 183-184. Nephi Allen testified at his deposition as follows:

> Well, that's one of our major complaints about that sign is that <u>many</u> of our customers, as you can see by the pictures of the pipe bollards, have hit that sign. And I believe that our customers are the only ones that are in that unique situation

because how they pull in using the easement, and then when they back out, that's where the sign is, so.

R. Vol. II, p. 305 (emphasis added). Nephi Allen himself has hit the sign while using the right-of-way. Id. Given the evidence in the record that the sign was hit by vehicles visiting Johnson and Allen's property, the district court erred in granting summary judgment on the issue of the reasonableness of the encroachment.

IV. Conclusion

Because a permanent obstruction may not be placed within a specifically described right-of-way, and because there was no basis for the district court's use of extrinsic evidence to interpret an unambiguous easement, the Court should reverse the district court and grant summary judgment to Johnson and Allen and order the removal of the sign. Alternatively, because the record shows the sign was hit regularly, the Court should reverse the district court's grant of summary judgment regarding the reasonableness of the sign.

RESPECTFULLY SUBMITTED this 24th day of May, 2012.

Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 24th day of May, 2012.

RIGBY ANDRUS & RIGBY, Chartered

Hyrum Erickson

Bryan D. Smith, Esq.
B. J. Driscoll, Esq.
SMITH, DRISCOLL & ASSOCIATES, PLLC
P. O. Box 50731
Idaho Falls, Idaho 83405

[ ] Mail
[ ] Hand Delivery
[X] Facsimile

APPENDIX A

Google maps

To see all the details that are visible on the screen, use the "Print" link next to the map.

Get Directions My Maps Print Send Link