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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' REPLY 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.

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I. Introduction

Appellants, Kenton Johnson, Nephi Allen, and Rexburg Plumbing and Heating LLC, seek the removal of a large sign placed within a right-of-way. The district court granted summary judgment to Respondent, Highway 101 Investments, LLC (hereinafter Highway 101). Johnson, Allen, and Rexburg Plumbing and Heating appealed to this Court. Johnson, Allen and Rexburg Plumbing and Heating filed Appellants' Brief on May 30, 2012, and Highway 101 filed Respondent's Brief August 2, 2012. Johnson, Allen and Rexburg Plumbing and Heating now file Appellants' Reply Brief.

II. Argument

A. The deed creating the right-of-way is not ambiguous and must be construed consistent with its plain meaning – which is that the right-of-way is 25 feet in width.

Johnson and Allen's deed is not ambiguous and clearly identifies both the privilege granted by the easement and the property subject to the easement. The relevant portion of the deed 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.

The district court correctly found that the deed was not ambiguous. R. Vol. 3, p. 423. Highway 101 has not previously asserted that the deed is ambiguous. Id.

When this Court interprets or construes a deed, its primary goal is to seek and give effect to the real intention of the parties. *Porter v. Bassett*, 146 Idaho 399, 404, 195 P.3d 1212, 1217 (2008) (internal citations omitted). If the language of a deed is plain and unambiguous, the intention of the parties must be ascertained from the deed itself and extrinsic evidence is not admissible. *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (internal citations omitted). A deed may be ambiguous if the language of the deed is subject to conflicting interpretations. *Read v. Harvey*, 141 Idaho 497, 499, 112 P.3d 785, 787 (2005) (internal citations omitted).

Johnson and Allen's deed is not subject to conflicting interpretations. The deed reads "A right-of-way to be used in common with others described as follows", and then provides a legal description. It is not possible to read the legal description as being anything other than a legal description of the right-of-way.

Although the deed is not ambiguous and extrinsic evidence is not necessary for its application, if the Court were to consider extrinsic evidence, it is clear that the intent of the parties was to create a 25 foot wide strip of property for use as a driveway or street subject to easements held by all three of the neighboring property owners. The right-of-way is described in the deeds of all three property owners adjacent to the right-of-way and has been since at least 1986. R. Vol. 1, pp. 151, 152, 155, 157, 160, 161, 164, 165, 168. Each deed includes the words "to be used in common with others" specifically recognizing that the right-of-way is shared with others. Id. The right-of-way appears as a right-of-way or street on various surveys and maps in the record – often with the width or location of the right-of-way included. R. Vol. 1, pp. 125,

128, 131, 132, 134, 135, 137, 140, 148. The right-of-way provides each of the three businesses access to Idaho Highway 33. App. Br., App. A. There is nothing in the record that indicates that the right-of-way was intended to be of indefinite width or that the legal description in the deed describes anything other than the location of the right-of-way.

Highway 101 argues that the words "over the property described as follows" should be read into the deed. Resp't Br. p. 15. It does so without citation to any authority that would allow this Court to modify the plain language of the deed. The Court should decline Highway 101's invitation to modify the unambiguous conveyance of the right-of-way.

Highway 101 appears to argue that because the legal description of the easement is identical to the legal description in a deed to Highway 101 granting them fee simple title to the area subject to the easement, the easement cannot encompass the entire parcel. Resp's Br. pp. 13-14. However, Highway 101 points to nothing in the record or case law that indicates that an easement cannot be identical in location to a parcel or that a property owner cannot convey the property subject to an easement. In this case, Highway 101 did not obtain title to the property subject to the right-of-way until nearly a year after it installed the sign. R. Vol. 2, p. 286. Highway 101 has asserted that it installed the sign based on a mistaken belief that it owned the property subject to the right-of-way. Id. It subsequently obtained title to the property subject to the right-of-way and received a deed whose legal description is identical to the description of the right-of-way. R. Vol. 1, p. 145; Vol. 2, p. 286. Nothing about this has any effect on the meaning of Johnson and Allen's deed. Highway 101's argument that the legal description of the easement cannot be identical to a legal description of a parcel of property is not supported by case law or

the record.

Highway 101 argues that the deed is not specific in that it does not include language such as "a 25 foot wide easement." Resp's Br. p. 14-16. However, the deed does better than merely indicate the width, the deed provides the precise legal description of the right-of-way – which includes the precise length and width of the easement.

As the conveyance is not subject to conflicting interpretations, the Court must hold that the legal description in the conveyance is the legal description of the right-of-way.

B. Johnson and Allen's right to use the right-of-way, and their right to have the sign removed, does not equate to ownership of the property.

Highway 101 argues that if it is not allowed to place a permanent obstruction within the right-of-way, it will be as if Johnson and Allen have fee simple title to the property. Resp's Br. p. 14. This is not the case. As the owner of the servient property, Highway 101 is entitled to make use of the property in ways that do not interfere with the rights of the dominant easement holders. For example, Highway 101 is entitled to sell the property – Johnson and Allen have no such right. Highway 101 is entitled to mine or otherwise use the area under the right-of-way – Johnson and Allen have no such rights. The only rights Johnson and Allen have regrading the property are the easement rights granted by their deed. All other rights belong to Highway 101 at the owner of the property.

Clearly, Highway 101's ability to use the property is restricted due to the existence of the right-of-way. This is the nature of easements. Express easements are recorded to provide notice that they exist and that there may be restrictions on the use of the servient property. This particular right-of-way serves three busy businesses, including Highway 101's self-storage

business. It may be that there are few uses, other than a roadway, that would be consistent with the easements in place. However, when Highway 101 took title to the property in question, it did so subject to all easements of record. R. Vol. 1, p. 145. Highway 101 cannot now be heard to complain that the easements on the property are overly restrictive. All of the easements were properly recorded and Highway 101 had both constructive and actual notice of the easements before it installed the sign and before it obtained the property subject to the easement. R. Vol. I, pp. 174-177.

C. Idaho Law does not support Highway 101's assertion that an expressly granted right-of-way can be diminished based on a reasonableness analysis.

Highway 101 cites to various Idaho decisions in support its argument. However, none of those cases supports Highway 101's position.

Highway 101 cites the following language from *Drew v. Sorensen*, 133 Idaho 534, 540, 989 P.2d 276, 282 (1999):

> As long as Sorensen is able to use the easement for access to his land for the specific purpose for which the easement was granted, without unreasonable interference, he has received everything to which he is legally entitled.

Highway 101 uses this language to suggest that as long as Allen and Johnson are able to access their property, they have received everything to which they are entitled. Resp.'s Br. pp. 6-7. In *Drew*, the dominant easement holder had fenced off the area subject to his easement claiming that his actions were the rightful exercise of a "secondary easement." *Id.* 133 Idaho at 538, 989 P.2d at 280. The Court ruled that although he was entitled to use the property subject to the easement, he was not entitled to fence it or prevent the servient property owner from accessing it.

Id. 133 Idaho at 537-540, 989 P.2d at 279-282. *Drew* did not address what actions on the part of the servient property owner would constitute unreasonable interference – rather, it addressed over reaching by the dominant easement holder. As such, *Drew* is not on point. Even if it were, the language cited by Highway 101 does not support its position because Allen and Johnson are not able to use a significant portion of the right-of-way. Nothing in *Drew* supports Highway 101's position that it can place a permanent obstruction within a right-of-way.

Highway 101 relies heavily on *Boydstun Beach Ass'n v. Allen*, 111 Idaho 370, 723 P.2d 914 (Ct. App. 1986). *Boydstun Beach* was addressed in some detail in Appellants' Brief. App. Br. pp. 7-11. Highway 101 appears to concede that *Boydstun Beach* does not allow for a reasonableness analysis for privileges granted in a creating document and that it would only support Highway 101's position if the area subject to the right-of-way is not specifically identified. Resp's Br. p. 10. However, as previously discussed, the right-of-way is precisely defined by the deed. As such, *Boydstun Beach* provides no support for Highway 101's position.

Highway 101 next looks to *Carson v. Elliott*, 111 Idaho 889, 728 P.2d 778 (Ct. App. 1986) for support. As a decision of the Court of Appeals, *Carson* is not binding on this Court, but was binding on the district court. However, to the degree that *Carson* provides any guidance, it is supportive of Johnson and Allen's position. *Carson* is distinguished from this case, and from *Boydstun,* by the fact that the precise dimensions of the right-of-way in question appear to be unknown. The Court of Appeals simply states that "Carson enjoys an easement to use the driveway" and provides no additional information regarding the terms of the easement. *Id.* 111 Idaho at 890, 728 P.2d at 779. As such, the Court of Appeals looked to the purpose of the

easement in determining its location. The Court of Appeals referenced an ALR article regarding the width of easements whose dimensions are not set out in the creating document and determined that the location of the easement included sufficient space to allow the easement holder to turn vehicles around. *Id.* To the degree that *Carson* has any application to this case it is to show that an obstacle that is "occasionally" in the way or hit "sometimes" is an unreasonable interference with a right-of-way, despite evidence that such occurrences were rare. *Id.* 111 Idaho at 891, 728 P.2d at 780. As such, the district court erred in granting summary judgment in this case when there was evidence indicating that the sign was hit by "many" of Rexburg Plumbing and Heating Customers as well as by Nephi Johnson himself. R. Vol 1, pp. 183-184; Vol. 2, p. 305.

Lastly, Highway 101 argues that its position is supported by *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.* 135 Idaho 518, 20 P.3d 702 (2001). However, *Nampa & Meridian* did not address a right-of-way of the type at issue in this case. Rather, it was concerned with an easement for canal maintenance. This Court determined that the irrigation company's easement rights flowed equally from an express easement conveyed by a document titled "Channel Change Easement" (CCE) and from I.C. § 42-1102, which creates a statutory easement for the cleaning, maintenance, and repair of irrigation ditches. *Id.* 135 Idaho at 522, 518, 20 P.3d at 706. Because the easement's only purpose was canal maintenance, the question addressed by the district court was whether the construction of a sidewalk and fence would interfere with the irrigation district's ability to maintain the canal. *Id.* 135 Idaho at 522-523, 518, 20 P.3d at 706-707. The district court found that the CCE prevented the irrigation company from maintaining the canal from the

side where the sidewalk and fence were installed and that the sidewalk and fence would not interfere with the irrigation district's ability to maintain the canal. *Id.* This Court upheld that decision as supported by competent, albeit conflicting, evidence. *Id. Nampa & Meridian* does not support the proposition that the area of an expressed and specific right-of-way can be diminished based on a "reasonableness analysis."

D. If Highway 101 is the prevailing party, it is not entitled to attorney's fees on appeal.

In the event that Highway 101 is the prevailing party on appeal, it is not entitled to attorney's fees. Appellants have provided the Court argument from Idaho cases and numerous examples of well reasoned cases from other jurisdictions in support of its position. An award of attorney fees on appeal is warranted only if the appeal was brought or pursued frivolously, unreasonably, or without foundation and attorney fees will not be awarded where the losing party brought the appeal in good faith and where a genuine issue of law was presented. I.C. § 12-121; *Chisholm v. Twin Falls County*, 75 P.3d 185, 190-191, 139 Idaho 131, 136-137 (2003).

III. Conclusion

The Court should reverse the district court's grant of summary judgment to Highway 101, grant summary judgment to Johnson and Allen, and order the removal of the sign.

RESPECTFULLY SUBMITTED this 17th day of August, 2012.

Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
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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 17th day of August, 2012.

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