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Lutheran High School Association v. Woodlands III Holdings, Woodlands IV Holdings, Bedford Property Investors, JDJ Properties, The Woodlands Business Park Association, and Wasatch Property Management : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LUTHERAN HIGH SCHOOL
ASSOCIATION OF THE GREATER
SALT LAKE AREA, a Utah non-profit
corporation, d.b.a. SALT LAKE
LUTHERAN HIGH SCHOOL,

Plaintiff and Appellant,

vs.

WOODLANDS III HOLDINGS, LLC, a
Utah limited liability company,
WOODLANDS IV HOLDINGS, LLC, a
Utah limited liability company,
BEDFORD PROPERTY INVESTORS,
INC., a Maryland corporation, JDJ
PROPERTIES, INC., a Utah corporation,
THE WOODLANDS BUSINESS PARK
ASSOCIATION, a Utah non-profit
corporation, WASATCH PROPERTY
MANAGEMENT, INC., a Utah
corporation, and JOHN DOES 1-1,000,

Defendants and Appellees.

Case No. 2002 0808 - CA

Argument Priority No. 15

APPELLANT'S REPLY BRIEF

Appeal from the Third Judicial District Court, Salt Lake County, Utah
Honorable Sandra N. Peuler, Presiding

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Clerk of the Court

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RE: APPELLEE'S STATEMENT OF FACTS

Lutheran does not agree with the Woodlands Owners' Statement of Facts. In several instances, the Woodlands Owners have drawn inferences from various writings and they have portrayed these inferences as facts. (See Paragraphs 6, 7, and 10) The inferences are then characterized in a self-serving and inaccurate manner to show the parties' presumed intent or to imply a different meaning than is justified by the written statement. The documents speak for themselves. Further, the Woodlands Owners state as facts matters that are not found in the Record (See Paragraph 11) or are not relevant to the inquiry within.

Lutheran objects to the attachment of the "diagram" in the Addendum (Tab A) to the Woodlands Owners' brief. The diagram is not part of the record and is inaccurate. Among other things, it is misleading in that it appears to depict only two minor roadway connections to Tract C from the Easement, when the fact is that the two parcels are intertwined by design, so there is no distinction, and the accesses (including those near the Easement) are direct and unrestricted. (See picture R. 221, also attached as Ex. C to Lutheran's previous brief.)

ARGUMENT

Introduction. The determination of this case is dependent upon the standard which is to be applied.

If the standard is the bright line rule which governs most jurisdictions, that an easement cannot be used to benefit property other than the dominant estate, then there is no material question of fact, and the order of the Trial Court should be reversed, both in respect to the summary judgment for the Woodlands Owners, and to grant summary judgment to Lutheran. If the standard is to be determined by comparing actual use to the intended burden, even though that use involves property

other than the dominant estate, then the order of the trial court below should be reversed, and the matter remanded for trial, because there are numerous material questions of fact under that legal standard which remain in dispute.

I. AN EXAMINATION OF THE INTENDED BURDEN STANDARD INVITES THE QUESTION, “ARE WE THERE YET?”

The Woodlands Owners contend, in their arguments, that “the intent of the parties to the easement was for Tract B to be developed commercially” and that the use of the easement does not exceed what they believe the original parties intended, and thereupon conclude that “Tract B’s planned development and resulting use of the easement is within the scope of the easement . . .”. [Argument headings in Brief of Appellees.] They apply the wrong standard. Their proposed standard is a variation of the standard for determining whether the manner in which the dominant parcel has come to be used is consistent with *normal development for that parcel*. (See Restatement (Third) of Property (Servitudes) §4.10) Lutheran submits that the correct standard applies to circumstances in which use of the easement has been *extended to benefit other property*. (See Restatement §4.11) In other words, although Tract C has been added to the planned unit development, and the interconnected roadways of the integrated planned unit development lead to a parking structure and another office tower situated on Tract C, the Woodlands Owners submit that the intended burden on the servient estate is the legal standard against which the case should be considered.

Even under the standard proposed by the Woodlands Owners, an analysis begins with the question, “what did the parties intend the easement to do?”

A. Intent Should be Determined From the Language of the Grant. Utah case law is replete with statements which support the principle that an easement and the parties' intentions thereunder should be construed consistent with the terms of the instrument which created the easement unless the instrument is vague, ambiguous or inadequate.

... [A] deed should be construed so as to effectuate the intentions and desires of the parties, **as manifested by the language made use of in the deed.** Wood v. Ashby, 253 P.2d 351, 353 (1952).

The accepted rule is that the **language of the grant is the measure and the extent of the right created**; and that the easement conveyed should be construed as to burden the servient estate only to the degree necessary **to satisfy the purpose described in the grant.** Weggeland v. Ujifusa, 384 P.2d 590, 591 (Utah 1963).

The paramount rule of construction of deeds is to give effect to the intent of the parties, **as expressed in the deed as a whole.** Churnos v. D'Agnillo, 642 P.2d 710, 712 (Utah 1982).

[I]t is clear that a right of way founded on a deed or grant is **limited to the uses and extent fixed by the instrument.** Wykoff v. Barton, 646 P.2d 756, 758 (Utah 1982). Citing Nielson v. Sandberg, 105 Utah 93, 141 P.2d 696, 701 (1943).

[Emphasis supplied.] Therefore, according to the applicable rules of construction, we should first examine the specific provisions of the pertinent document to determine whether the parties' intention can be ascertained thereby. It is submitted that a careful reading of Section 4(a) of the 1983 Declaration of Easements, Covenants and Restrictions ("Declaration") reveals a clear definition of the parties' understanding and intent with regard to the purpose for the easement which is the subject of the dispute before the Court.

The easement is established in Paragraph 4(a) of the Declaration. [Decl. p.5, R. at 18.] The language is clear and unambiguous. Using the expressed terms of the Declaration, we can see that the Tract A owner granted to the Tract B owner:

1. A non-exclusive easement.
2. Appurtenant to and across Tract A.
3. **For the purpose of allowing vehicular access between**
 - A. The public streets and
 - B. Any and all parking areas or roadways and lanes **situated on Tract B.**

There can be no confusion about the parties' intention from the operative provisions of the Declaration. There can be only one conclusion drawn.¹ The easement was intended to permit vehicles to travel between the public streets (essentially 900 East) and the parking areas, roadways or lanes **situated on Tract B**. The only logical interpretation of the Declaration is that the easement can be used exclusively for the benefit of parking areas, roadways and lanes on Tract B, and not for parking areas, roadways or lanes on any other parcel including, in this case, the parking structure situated on Tract C. It is undisputed that Tract C has since been added to the Woodlands Business Park Planned Unit Development; that it serves Tower III and Tower IV, primarily; that it is designed to be and is accessible from 900 East over the easement; and that it is in fact used for that purpose. The parking area in question and the associated roadways and lanes on Tract C are obviously not "situated on Tract B".

B. The Chen Annotation Does Not Answer. The Woodlands Owners argue that the Court should go beyond a review of the Declaration in determining the parties' intention. They rely

¹ On Pages 14 and 15 of their Brief, the Woodlands Owners extrapolate from a few restrictive covenants in the Declaration an "intent for the nature of the burden to be placed on the servient estate". The provisions are covenants which protect a right to signage; covenant that the name "Woodland" will be used; and protect against competition with the particular commercial uses which Captain Nemo desired to make on Tract A. They are clearly contracted provisions to govern and restrict the use of the property. They are not related to the grant of the Easement, and are irrelevant to this matter.

in part on an annotation by F.T. Chen, Extent and Reasonableness of Use of Private Way in Exercise of Easement Granted in General Terms, 3 A.L.R.3d 1256. As implied by its title, the annotation primarily addresses whether an easement granted in general terms was being used in a manner consistent with the terms of the grant and whether it unreasonably burdened the servient estate. The annotation does not address situations in which the use of an easement has been extended to benefit property other than the dominant estate, nor other improper uses of an easement. But it does provide insight for determining the parties' intention. In § 2[a], basic principles are discussed. The key principles (applicable to this matter) are:

(1) The grant must be construed in the light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect to the intention of the parties. (2) If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant. (Id., at 1260.)

In the matter before this Court, contemporaneous with the grant, Tract B was being separated from Tract A, and acquired by the predecessors of the Woodlands Owners. (See recital on p.1 of the Decl., R. at 14) There is no indication, whatsoever, that anyone contemplated that Tract C would be added to or associated with the development of Tract B. Tract C was not acquired until 1996. (R. at 269-270.) The language in the grant of the easement is clear and unambiguous. It is not an unrestricted grant as the Woodlands Owners suggest. By the standard set forth above, there is no reason to look further.

C. Stevens Does Not Answer. To a great extent, the Woodlands Owners rely upon the rationale of Stevens v. Bird-Jex Co. which states that “in construing instruments creating easements in land, the court will look to the circumstances attending the transaction, the situation of the parties,

the state of the thing granted, and the object to be attained, to ascertain and give effect to the intention of the parties.” 18 P.2d 292, 294 (Utah 1933)

In applying the rule from Stevens, the Court should give consideration to at least three mitigating arguments. First, the parol evidence rule may render inadmissible any extrinsic evidence which adds to or varies the meaning of the Declaration since the Declaration is complete and unambiguous. Thus, the evidence offered by the Woodlands Owners relating to the minutes of a subsequent planning commission meeting or other facts relating to subsequent events should not be allowed.

Second, the Stevens case should be considered in light of its facts. In Stevens, the appellants contended that a certain deed created an exclusive easement. The court stated that there was nothing in the language of the deed to indicate an intention to grant a right to exclusive use. [Id.] **Only after concluding that the deed did not include an adequate statement of the parties’ intention,** regarding the type of use to which the dominant estate might be subject, did the court move to consider other factors, including the circumstances and situation of the parties. Inferentially, if the parties’ intention had been discernable from the deed, the Stevens court would have required no further analysis.

Third, the Woodlands Owners are misreading the import of the Stevens rule. An analysis of the “circumstances attending the transaction, the situation of the parties, the state of the thing granted, and the object to be attained” does not mean that after-accruing events ought to be considered. All of these factors relate to evidence which is in existence **at the time the written instrument is created**. In other words, the only relevant evidence which would bear upon the

Stevens factors should be that which could have been adduced as of the date of the Declaration. The Stevens case does not invite a consideration of matters that occurred after the date of the Declaration.

In summary, while an examination of the parties' intention is relevant, and may even be controlling, the analysis should begin with the written instrument which creates the easement, or in this case the Declaration. If the parties' intention can be ascertained from the clear language of the Declaration, the court need look no further. If the Declaration should be deemed ambiguous, other factors (Stevens) may be considered, but evidence relating to these factors must exist at the date of the Declaration.

D. It is Not About What Might Have Been. The Woodlands Owners understandably want this case to be decided on the basis of “whether the use of the Easement overburdens the servient estate” [Brief of Appellee, Page 27] and submit that “. . . overburdening can only occur if the use of the easement substantially increases the use of the servient estate beyond that contemplated by the parties at the time of the grant.” [Brief of Appellee, Pages 22 and 23] They would have the Court focus upon the intended burden. As demonstrated above and in Lutheran's first brief, the purpose described in the grant governs. The burden is limited to that which is necessary to satisfy the purpose in the grant. Weggeland, *supra*, at 591.

The case before this Court does not involve a mere change in use; but rather involves a change in the amount of property benefitted. The purpose is thus exceeded. Under either the clear language of the grant, or under the bright line rule, such a change is an improper use.

In cases involving expansion to or beyond the dominant estate, courts in other jurisdictions have focused upon the expressed purpose of the easement, that is, to serve the dominant estate. If the legal standard was (or is to be, in Utah) whether the expansion *has led to* an overburdening of

the servient estate (focusing upon the burden, rather than the purpose) it would be difficult if not impossible to apply and would lend itself to speculation.

An example might help illustrate. This writer was taught some years ago in law school that the law of easements developed in times dominated by agricultural and ranching uses of the land. It is easy to imagine that a sheep or cattle ranch owner might have made arrangements with an adjacent farm owner to cross the farmer's land with his sheep or cattle, from time to time. Assuming they desired the easement to run with the land, an appurtenant easement agreement would have been created. The size of the rancher's dominant parcel would have been known to the farmer, and described in the grant. There would have been no need to place a limit in the grant on the number of cattle or sheep which might cross the farmer's servient estate, because the size and physical characteristics of the dominant estate would set practical limits on the number of sheep or cattle which might be kept on the dominant parcel.

If, thereafter, the dominant parcel owner acquired additional land or joined his ranch operation with a neighboring rancher (Tract C), and desired to use the easement for the purpose of running sheep or cattle to the adjoining land, as well, the farmer would have a right to object on the basis that such a use would be improper. The practical limit would have changed.

The Woodlands Owners, considering that hypothetical, would presumably speculate about the number of sheep or cattle which might have arguably been placed on the original ranch land, and the resulting burden. They might suggest that the enlargement of the parcel is not the issue, but instead the question is whether the servient estate has been overburdened.

Under the standard proposed by the Woodlands Owners, how could the farmer know when the limit had been reached? It is respectfully submitted that such a standard would be a nightmare

for the courts. It would present an invitation to speculation and subjective analysis regarding what and how much might possibly have been done on the dominant estate had it stayed the same size, and, interestingly, perhaps how much the servient estate can bear. It would be an unfair standard. Effectively, such a standard would place upon the owner of the servient estate a burden or responsibility of serving as the police. The farmer would have to count the sheep or cattle, and/or watch to see which of them actually cross the easement on the servient estate. The owner of the servient estate would then have to try to imagine what could have been done on the original dominant estate. Ultimately, the farmer would effectively have to ask the court to determine the limit. If, after arguments had been made, the court did not determine that the farmer's servient estate had yet been overburdened, the farmer would have to watch and wait, and, if the use increased further, go back to the court to ask whether the standard had yet been reached. Servient owners would, like the proverbial child in the back seat, be constantly asking the courts "are we there yet?"

The adoption of such a standard would effectively permit dominant owners to expand their property and, in each case, argue that the burden placed upon the servient estate by the dominant owner is no greater than that which was "intended", i.e., that which might have been under one or more hypotheticals regarding the potential use of the initial dominant estate. Not only would such a standard lead to litigation, and therefore additional crowding of the courts, but, it is respectfully submitted, it would chill the marketplace in which property owners work with one another for ingress and egress.

II. IF THE UTAH STANDARD FOR EXPANDING THE BENEFITS OF AN EASEMENT TO OTHER PROPERTY IS TO BE THE “INTENDED BURDEN”, THEN MATERIAL QUESTIONS OF FACT EXIST.

Arguably, any review of the parties’ intention involves questions of fact. Generally, the parties’ intention cannot be determined in the context of a motion for summary judgment and should be left for the trier of fact. Usually, the question of intention is a factual issue “. . . unless the relationship is so clear from the language used, situation of the parties and the surrounding circumstances that there can be no reasonable dispute.” O-Hair v. Kounalis, 463 P.2d 799, 801 (Utah 1970), citing Sugar v. Miller, 315 P.2d 862, 864 (Utah 1957). If there is any clear statement of the parties’ intention in this case, it is within the language of the Declaration. As a result, if the issue of intention can be determined as a matter of law, there should be finding in favor of Lutheran. Certainly, before the court can find for the Woodlands Owners, there ought to be an evidentiary hearing to resolve factual questions relating to the contracting parties’ intention.

Nonetheless, the Woodlands Owners argue that the Court should look beyond the grant to find the extent of the burden which might be placed upon the servient estate. In doing so, they suggest that the parties’ intention can be determined as a matter of law and there are no material fact questions. Lutheran disagrees.

A. Questions From the Minutes of the County Planning Commission. The Woodlands Owners’ reference to the subsequent Planning Commission minute record is without merit. The minute record does not address a use of the easement contemplated by the parties to the Declaration. It is a record of self-serving statements made after the grant, to third persons, and for a different purpose. An examination of the minutes reveals that the “staff” recommended approval

of the concept subject to conditions on file and that the Planning Commission followed that recommendation to grant preliminary approval with conditions of its own. Drawings had not yet been submitted. The conditions set by the staff are not noted in that minute record. There is no evidence regarding what the staff's conditions were, nor if the conditions were ever satisfied. Also, importantly, the minute record notes that no one else was present in regard to that matter, either for or against. There is no evidence in the record that the referenced plan was the one which was ultimately approved by Salt Lake County.

Furthermore, the plan for Tract B described in the Planning Commission minutes is not relevant to this matter. It did not contemplate expansion of the PUD onto Tract C. It did not involve a joint expression. Most importantly, none of the circumstances relating to the Planning Commission activities were contemporaneous with the grant.

B. Where is the Joint Expression of Intent that the Easement Would Serve the “Planned” Development? The Woodlands Owners attempt to infer evidence of a joint expression of intent from the lack of evidence that Captain Nemo objected. On Page 11 of their brief, the Woodlands Owners suggest that the record of the Planning Commission demonstrates the intent of the owner of Tract B, “. . . without any objection from the owner of the servient parcel (Tract A)”. As noted above, that is not what the record indicates. Further, there is no indication that Captain Nemo had notice of the meeting, nor knowledge of the proposal, nor that he had any affirmative duty to attend that meeting to say if he opposed the proposal.

C. Doesn't Tract C Benefit from the Easement? The Woodlands Owners, in advancing their position, repeatedly refer to the number of buildings which they submit could have been built on Tract B. They admit that Tower IV, which is on Tract C, cannot benefit from the

easement. Yet it is clear from the record that Tower IV tenants, invitees, guests and concessionaires can use the parking terrace, which is also on Tract C, and which is accessible from 900 East over the easement. They suggest that a self-serving restriction in the Covenants, Conditions and Restrictions for the PUD (to which the Tract A owner is not a party) somehow protects them from the fact that the access exists. They attempt to distinguish Tower III from Tower IV, because it is situated on Tract B. The tenants of both towers, who are provided with the lease right to park their cars in the parking facility on Tract C, occupy Tract C, and, in the case of Tower III tenants, do so as much as they occupy Tract B. The distinction between Tower III and Tower IV is illusory.

Furthermore, nothing is said by the Woodlands Owners about the fact that the unenforceable internal PUD restriction is contrary to the requirement of Salt Lake County that access be provided to the parking ramp from 900 East. The conflict is obvious. Similarly, the order of the trial court that the Tower IV tenants, guests, etc., cannot use the easement is also an illusion. The Woodlands Owners cannot prevent such use because those same owners cannot erect a barrier to implement that restriction without violating the requirements of Salt Lake County, and the covenants which govern the PUD.

D. Numerous Other Material Questions of Fact Regarding the “Intended Burden”.

If, as the Woodlands Owners argue, the intended burden is to be examined, there still remain numerous difficult questions of fact; especially such as those related to the density limits for Tract B and resulting burden which should be expected by the servient estate. (The Woodlands Owners repeatedly sought to disparage, through innuendo, the time that transpired while the matter was pending and the discovery efforts of Lutheran and to thereby imply that there is no other evidence.

Such statements are disingenuous and otherwise irrelevant to this Appeal.² Their questions regarding the lack of testimonial evidence from Captain Nemo are likewise disingenuous and irrelevant.³ That Lutheran may receive some benefit from its easement is also irrelevant.⁴) Under that standard, the material questions would include: What use would be permitted by ordinance? What is the use which was in fact officially approved by the County for Tract B? Based thereon, what density, parking and traffic should be expected? What burden has the servient estate historically borne? What is the burden which is now being borne by the Lutheran servient estate as a result of the development of the Woodlands Business Park? To what extent are tenants, invitees, etc., of Tower IV actually using, or being permitted or encouraged to use, the easement? Can those persons be effectively restricted from such use? Do the tenants of Tower III and other buildings situated on Tract B occupy Tract C if they park their cars in the parking facility on Tract C? If they do, how is

² Lutheran's efforts to amicably resolve this case began prior to the filing of the lawsuit and continued to the eve of the hearing on the Motions for Summary Judgment. These efforts were grounded in Lutheran's religious values of reconciliation and grace. That Lutheran's efforts of peaceful coexistence, neighborliness and charity would now be characterized otherwise by the attorneys for the Woodlands Owners is an unfortunate tactic lacking the candor to which this Court is entitled. The actual circumstances and documented efforts of the school to resolve the case, and to obtain disclosure of documents by the Woodlands Owners, are described in various sections of the record. R. at 248-257, 379-384.

³ Eugene Woodland, aka "Captain Nemo" is notorious for many things, including the fact that, in 1990, he murdered a contractor in the very building which has since been remodeled to house Lutheran High School. Woodland was diagnosed with mental illness and alcohol-related brain damage, but was deemed competent to stand trial, was convicted, and has since been serving a sentence of up to life. See State of Utah v. Woodland, 945 P.2d 665 (Utah 1997).

⁴ On Page 14 of their Brief, the Woodlands Owners inexplicably remark "... the High School does not have a right to the easement it presently uses over Tract B. . ." There is no evidence cited, nor in the record, which would serve as a basis for that remark. It is made as though the Woodlands Owners are extending a gratuity to Lutheran, and that the gratuity should somehow be reciprocated. It is irrelevant to the issues before this Court; and is acknowledged here only to set the record straight.

that benefit different or distinguishable from the benefit from which the Woodlands Owners and trial court agree should be denied to the tenants, etc., associated with Tower IV?

If the standard is as the Woodlands Owners submit, then those and other genuine questions of material fact remain to be resolved in a trial. The evidence before the trial court was not sufficient to enable it to apply that standard without inserting itself as the trier of fact. The Order of the trial court should be reversed, and the matter remanded for trial.

III. THE ANALYSIS BY THE WOODLANDS OWNERS DOES NOT CREATE AN ACCURATE PICTURE.

The Woodlands Owners offer analytical and editorial thoughts regarding a few of the cases cited by Lutheran, and then refer to other cases which they suggest somehow diminish the importance of the bright line rule. It is respectfully submitted that the analysis provided by the Woodlands Owners does not create an accurate picture of the law. It does not withstand close scrutiny.

The Woodlands Owners focused upon case law in Ohio, Connecticut, New Hampshire, Hawaii, Tennessee and Pennsylvania. Because the uses made of those cases are disjointed, it makes sense to respond by jurisdiction.

A. Ohio. The Woodlands Owners submit that Lutheran's counsel "deceptively" used language from State ex rel. Fisher v. McNutt, 597 N.E. 2d 539 (Ohio Ct. App. 1992) case. Indeed, we did cite language which was included in the appellant's "assignments of error".⁵ However, the

⁵ We admit that the quoted language was not the language of the McNutt court. The truth is that we mistook it for the court's language and failed to notice that it was taken directly from the appellant's assignments of error. Please be assured that we are embarrassed by the error, and that there was absolutely no intent to deceive.

McNutt court made the assignments “a part of this opinion” and, arguably, the assignments were adopted by the court. In any event, the same principles expressed in the assignments are stated in other parts of the opinion. In so doing, the McNutt court favorably adopted language from other opinions or treatises as follows:

‘An easement can be used only in connection with the estate to which it is appurtenant and cannot be extended by the owner to any other property which he may then own or afterward acquire, unless so provided in the instrument by which the easement is created, Accordingly, a right of way cannot be used by the owner of the dominant tenement to pass to other land or premises adjacent to or beyond that to which the easement is appurtenant. . . .’ Citing Berardi v. Ohio Turnpike Comm., 205 N.E. 2d 23, 28, 29 (Ohio App. 1965)

‘The law is perfectly settled, if one man has a right of way over another, . . . to go to a particular place, he cannot use it for the purpose of going to a place beyond it, because the servient tenement is only subject to a certain inconvenience.’ Citing Mullins, V.C.I.R., 17 Eq., Page 167.

Further, the Woodlands Owners submit that the language in the McNutt case upon which the school relies is *dicta*. That is incorrect. It is true that the language quoted above from Berardi is dicta in the Berardi opinion, but the McNutt court adopted the Berardi language and made it a part of the McNutt holding.

The Woodlands Owners contend that Proffitt v. Plymesser, (2001 Ohio App. LEXIS 2801), an unreported case, distinguished McNutt.⁶ Once more, this is inaccurate. Proffitt recognizes that the McNutt court was able to examine the exact language which created the subject easement from which the McNutt court drew conclusions with regard to the parties’ intentions. However, the original document creating the easement was not available to the Proffitt court. For that reason, the

⁶ Actually, in Ohio, the Proffitt opinion carries no precedential weight. Rule 4 of the Ohio Supreme Court Rules, in effect in 2001, provides that unpublished opinions are controlling only as to the parties. In 2002, that Rule was prospectively changed.

Proffitt court reviewed attendant facts and circumstances before making any determination about the intentions of the parties.

Based upon the foregoing, it is inaccurate to conclude that Ohio has rejected or strayed from the bright line rule.

B. New Hampshire. The Woodlands Owners broadly characterized the holding in Heartz v. City of Concord, 808 A.2d 76 (N.H. 2002) as a rejection of “a per se prohibition on property other than the dominant estate benefitting from an easement”. Woodlands’ Brief, Page 31. A closer look, however, reveals that that is not what the New Hampshire court was saying.

The facts in Heartz are quite different from, and therefore the issues are distinguishable from those before this Court. A right of way was created before the Civil War to a parcel (which would apparently otherwise be landlocked). It was proposed that a structure on the dominant parcel would be demolished, and a 19-car parking lot would be constructed thereon to benefit a nearby church. It was not proposed that the dominant parcel would be connected to adjoining land.

An argument on appeal was that the proposed use would be illegal because it would benefit a non-dominant, third-party tenement. The court recognized, however, that New Hampshire case law “. . .does not foreclose the possibility of an easement benefitting a non-dominant tenement.” Id. at 80 (citation omitted) The court referred to New Hampshire case law which defined an appurtenant easement as an incorporeal right generally created for the purpose of benefitting the owner of the dominant estate.⁷

⁷ The editors of The Law of Easements and Licenses in Land (2001) Bruce and Ely, report that many early courts and commentators ill-advisedly categorized easements as “incorporeal hereditaments” i.e. inheritable personal rights not attached to property. §1:1, N.5, at 1-3. Few courts appear to recognize such rights today.

Based upon that principle, and acknowledging that this is not a situation where the existing roadway easement had been extended to another tract of property, the court noted that “. . . this case addresses whether the increased use resulting from such an extension places an unreasonable burden on the existing easement, not whether an easement may benefit property beyond the original tract.” Id. The New Hampshire court found the language in the grant to be clear and unambiguous. It said that “[w]hen the language of the deed is clear and unambiguous, we need not consider extrinsic evidence.” Id. at 81. The court concluded that “nothing in the deed’s language indicates an intention to prevent non-dominant, third-party tenements from benefitting from the easement.” Id.

C. **Tennessee.** The Woodlands Owners, on p.30 of their brief, suggest that Ogle v. Trotter, 495 S.W. 2d 558 (Tenn. Ct. App. 1973), a case not cited by Lutheran, indicates a shift in the rule. This is not true. In Ogle, Trotter owned property which was the servient estate to an easement for ingress and egress from a specific lot. The Ogles had purchased a lot adjacent to Trotter’s lot, and then purchased additional lots including the particular lot (the dominant estate) to which the right to use the easement was attached. The Ogles combined all of their lots to form one building lot and moved a house from one of the lots to the combined lot. The trial court ruled that the Ogles were not permitted to access the easement directly from the residence property (the non-dominant estate), but instead could only access the easement from the dominant estate lot.

The court stated that the law in Tennessee was that “the use of an easement must be confined strictly to the purposes for which it was granted or reserved. . . . A fundamental principle is that an easement for the benefit of a particular piece of land cannot be enlarged and extended to other parcels of land, whether adjoining or distinct tracts, to which the right is not attached. In other words, an easement appurtenant to a dominant tenement can be used only for the purposes of that

tenement; it is not a personal right, and cannot be used, even by the dominant owner, for any purpose unconnected with the enjoyment of his estate.” Id. at 565.

Nonetheless, the Ogle court found that the trial court did not err because, based upon a principle then stated in CJS (citation omitted) the use need not be terminated if the additional burden is “relatively trifling”. Id. at 566. The court thought that the order by the trial court directing the Ogles to block their driveway from directly accessing the easement, and directing them to access the easement through the dominant estate did not expand the use of the easement. In fact, the court found that the burden was materially decreased. The holding would continue only so long as those circumstances continued. Id.

(It is notable that the Ogle case precedes, by almost twenty years, the 1991 McCammon Tennessee case cited by Lutheran in its previous brief. (p.20))

D. Pennsylvania. The Woodlands Owners correctly note that the Pennsylvania Supreme Court has not yet adopted Section 4.11 of the Restatement. From a close reading of the opinion in Joiner v. Southwest Central Rural Electric Co-op., 786 A.2d 349 (Pa. Commw. Ct. 2001), they do not appear to be far from it. In Joiner, the Pennsylvania Commonwealth Court stated that their law provides that an easement is limited to the specifications of the grant, and if the language is ambiguous, “then the intent of the parties as to the original purpose of the grant is a controlling factor in determining the extent of an easement” at Id. at 351. The court recited that “. . . an easement is interpreted in the same manner as any other contract; if the language of the agreement is clear, our inquiry is ended; if it is ambiguous, then the trier of fact determines the intent of the parties.” (citation omitted)

In Joiner, the court found that the agreement was ambiguous. Therefore, the court ordered the trial court to make findings consistent with the opinion, as well as to address the issues of abandonment and extinguishment.

E. **Hawaii.** The court stated in Cooper v. Sawyer, 405 P.2d 394 (Haw. 1965), that the law was well settled that the owner of the dominant tenement may not subject the servient tenement to servitude or use in connection with other premises to which the easement is appurtenant. “However, where the grant of easement is unrestricted (as it was here as to the right of ingress and egress) the use of the dominant tenement may reasonably be enlarged or changed.” Id. at 406. In this case, the court stated that the language of the grant of easement provided for a “perpetual easement and right of way for all purposes. . . as a way or means of ingress and egress . . . at all times”. Id. The court discussed the McCullough v. Broad Exch. Co., 101 App. Div. 566, 92 N.Y.S. 533 (1905), aff’d, 184 N.Y. 592, 77 N.E. 1191 (1906) and Penn Bowling Recreation Center, Inc. v. Hot Shoppes, Inc., 179 F.2d 64 (D.C. Cir. 1949) cases cited by the appellants and stated that “in those cases it was clear that non-dominant property was incorporated into the dominant tenement by a structure which was being served by the easement. There could be no question that the use of the easement had been enlarged to serve non-dominant property” Id. at 410. In Cooper, however, the Court found that the easement was serving only the dominant estate and that at the time the easement was granted, the use of the dominant estate was for a parking lot (which use had not changed).

F. **Connecticut.** The Woodlands Owners have cited Carbone v. Vigliotti, 610 A.2d 565 (Conn.1992). Carbone is an earlier Connecticut case in which the court recognized an exception to the rule. As shown in Lutheran’s previous brief, Connecticut acknowledges the general bright line

rule, but has carved out an exception for circumstances “. . . where the dominant estate was simply being enlarged by the subsequent acquisition of an adjoining parcel by the owner of the dominant estate” and there was no material increase in the burden on the servient estate. Il Giardino, LLC v. The Belle Haven Land Co., 757 A.2d 1103 at 1111, 1112 (Conn. 2000) (emphasis supplied). In Abington Ltd. P’ship v. Heublein, 717 A.2d 1232 (Conn. 1998), the Connecticut Supreme Court clarified its holding in the Carbone case. The court indicated that “the mere addition of other land to the dominant estate does not constitute an overburden or misuse of the easement” (Id. at 1239) and that an easement of access does not attach automatically to after-acquired property.

It is notable that, for purposes of this appeal, Carbone is not on point. Only one parcel had access to the use of the easement. The owner combined two additional parcels to the dominant estate and built one two-family house on the combined lot.

The Woodlands Owners portray Section 4.10 of the Restatement as the way by which Connecticut determines the use of an easement. [Section 4.10 applies to the extent to which the dominant estate might normally be developed. It does not address expansion. Section 4.11 does that.] This portrayal of the Connecticut court’s analysis is incorrect. The Abington I Court reviewed Sections 4.1, 4.10 and 4.11 of the Restatement and construed these sections together, not as separate controlling provisions, before determining that their holding in Carbone was still relevant. It is notable that the Connecticut court restated Section 4.11 with approval, cautioning “that the beneficiary of an appurtenant easement or profit is not entitled to use the servient estate for the benefit of property other than the dominant estate” Id. at 1241. The Court also instructed the trial court that “the relevant intent must be determined by examination of the relevant documents at the time of the original conveyance and leasehold.” Id.

Lutheran submits that, even in Connecticut, the bright line rule would govern the facts and circumstances before this Court, and that there would be no legal basis for the trial court's ruling.

IV. THE BRIGHT LINE RULE PROVIDES THE ANSWER AND THE REMEDY.

The statement of the purpose for the easement is clear and unambiguous. It is to provide access from 900 East to the parking lots and roadways situated on Tract B. The size of Tract B as described in the Declaration is not in dispute. It is specifically described.

Section 4.11 of the Restatement provides:

Unless the terms of the servitude determined under Section 4.1 provide otherwise, an appurtenant easement or profit may not be used for the benefit of property other than the dominant estate.

The terms of the grant before this Court do not "provide otherwise". Yet, it is clear that the easement is used for the benefit of Tract C in addition to Tract B. Tract C and Tract B, together, make up the Woodlands Business Park Planned Unit Development, a joint venture. The proper and improper uses are indivisibly intertwined. Salt Lake County requires that access be available to the parking lot on Tract C from 900 East over the Easement. Tenants who park their cars in that parking facility, whether they then walk to Tower IV or to Tower III, or any part of the business park, are occupying Tract C when they leave their car.

In the analogous situation, addressed in DND Neffson Co. v. Galleria Partners, 745 P.2d 206 (Ariz. App. 1987), discussed in Lutheran's prior brief, the court noted that unrestricted access was provided to a non-dominant parcel according to plan. Considering that situation, the court said:

. . . we are not here concerned with the extent of the burden, i.e. with the actual amount of pedestrian and automobile traffic using the easement. An easement can be overburdened either by overuse or by improper use . . .

Having planned the mall to permit unrestricted access to the easement by the non-dominant parcel, appellant is in no position to contend that that which it planned, a plain misuse, will not be used. Accordingly, injunctive relief was not premature. Id. at 207.

For the reasons set forth in Lutheran's previous brief, it is desirable and appropriate that the law in Utah should follow the bright line rule.⁸ The reasons are set forth on p. 25-28, *inter alia*, in Lutheran's prior brief.

The holding of the trial court cannot be supported by the bright line rule. The extension of the benefit of the easement to Tract C is an improper use, and therefore an overburdening, as a matter of law, of the servient estate.

It is an unusual circumstance that the misuse of an easement is made in such a way that a wrongful activity cannot be separated from an appropriate activity. Accordingly, there are not many occasions to enjoin use of the easement or to extinguish it. However, as demonstrated above, and by Lutheran in its previous brief, that is the circumstance in this matter. In this case, the remedy is clear. See Lutheran's previous brief on p. 44-45, and The Law of Easements and Licenses, §10:26. The use of the easement must be entirely enjoined, or the easement extinguished.

The Woodlands Owners, in their brief, submit that extinguishment or injunction would not be warranted, even if the bright line rule is applied. Notably, they do not suggest a different remedy. The Woodlands Owners would, again, apparently like the Court to revert to their argument regarding the volume or extent of overburdening, rather than the fact that the overburdening is a result of a misuse. They would have the tail wag the dog.

⁸ It is notable that the reference to the rule as a "bright line" rule was not coined by Lutheran or its attorneys. Rather, that is the term which has been used to describe the rule by the Connecticut court and the author of the Washington Law Review article cited in the Brief of Appellants, among others.

As indicated in DND Neffson, under this circumstance, the extent of overburdening is not the issue. Money damages would not resolve the situation (notwithstanding the Woodlands Owners' offensive suggestion that money is Lutheran's goal). The trial court's impractical solution, to effectively "split the baby" by forbidding certain tenants (and their guests, etc.) from a part of the Woodlands Business Park from using the easement cannot work. To create such a standard would clearly place upon Lutheran a burden of policing the easement to see who is in a car, where they are going, and with whom they are associated. Such a burden is far beyond that which should be placed on a servient property owner. In equity, the only available remedy is to enjoin the use of the easement, or extinguish the easement, altogether.

CONCLUSION

It is therefore respectfully submitted that the trial court erred in its decision. The trial court did not employ the correct legal standard to the situation before it, improperly attempted to make factual determinations when presented with Motions for Summary Judgment and drew conclusions which are not supportable in law. Whatever the standard in Utah, the decision of the trial court should be reversed. There is no standard in Utah under which the Woodlands Owners are entitled to an award of summary judgment.

If the bright line rule is to govern in Utah as it does in most jurisdictions, and as Lutheran submits, then the course is clear. The easement over the Lutheran property is being subjected to improper use. Because that use cannot be separated from appropriate uses, use of the easement should be enjoined. The ruling of the trial court should be reversed, as well, in respect to the Motion for Summary Judgment presented by Lutheran, and judgment should accordingly be granted in favor of Lutheran.

RESPECTFULLY SUBMITTED this 19 day of May, 2003.

TAYLOR, ADAMS, LOWE & HUTCHINSON



ROBERT M. TAYLOR

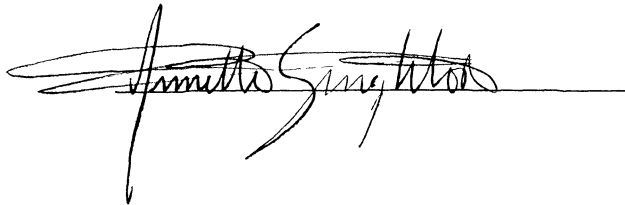
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MAILING CERTIFICATE

I hereby certify that on the 19th day of May, 2003, two (2) true and correct copies of the foregoing Appellant's Reply Brief were mailed, postage pre-paid to the following persons:

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