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FISHER v. GOLDEN VALLEY ELEC. ASS'N, INC. Alaska 127  
Cite as, 658 P.2d 127 (Alaska 1983)

cally reminded them that under the collateral pledge agreement the foreclosure could go ahead and the savings accounts could be applied to cure any deficiencies. Alaska Federal also indicated that if the Hulls consented to application of the proceeds to the balance due, the foreclosure might be terminated.

The Hulls' response to these repeated contacts and inquiries by the bank was absolute silence and total inaction. Implicit in their failure to object is an acquiescence to the non-judicial foreclosure. The Hulls had adequate notice of the imminent loss of their subrogation rights without a specific warning from Alaska Federal that non-judicial foreclosure coupled with the application of the anti-deficiency statute to the Robersons would result in such a loss. To let the Hulls now object to the non-judicial foreclosure and the loss of their subrogation rights would prejudice Alaska Federal because of its reliance on the Hulls' inaction.<sup>6</sup>

The Hulls argue, in defense of their inaction, that once they received notice of the foreclosure there was little that they could do. This is not true. They could have paid the arrearages and the foreclosure sale would have been halted. AS 34.20.070. They could have bought the loan from Alaska Federal, or attempted refinancing. They might have requested that the bank foreclose judicially. Had the Hulls made a legitimate attempt to contact Alaska Federal and register an objection to the non-judicial foreclosure, Alaska Federal could not have reasonably relied on their failure to object.

Therefore, the trial court was correct in permitting Alaska Federal to retain the pledged savings accounts. The summary judgment order of the superior court is **AFFIRMED**.

6. A similar case is *Mariners Sav. & Loan Ass'n v. Neil*, 22 Cal.App.3d 232, 99 Cal.Rptr. 238 (1971). In that case the lender was not estopped from collecting from the guarantor of an obligation even though the lender's non-judicial sale of the security had destroyed the guarantor's subrogation rights. Because the

Rex FISHER, Jim Payne, and Andrea Corsick, Appellants,

v.

GOLDEN VALLEY ELECTRIC ASSOCIATION, INC., Appellee.

No. 5902.

Supreme Court of Alaska.

Jan. 28, 1983.

Appeal was taken from a judgment of the Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., providing, inter alia, that utility could construct power line on unused section line easement reserved for highway purposes. The Supreme Court, Matthews, J., held that: (1) surety on bond on which primary injunction enjoining construction of power line was conditioned had standing to appeal decision of trial court subsequently vacating injunction and awarding utility damages against landowners; however, appeal would not be considered with respect to award of attorney fees and costs against landowners, and (2) utility could properly construct power line on unused section line easement reserved for highway purposes.

Affirmed.

1. Appeal and Error  $\approx$  150(6)

Surety on bond, on which preliminary injunction, initially prohibiting construction by utility of power line across landowners' property was conditioned, had standing to appeal decision of trial court vacating injunction and granting summary judgment in favor of utility on count in which land-

guarantor had ample notice of the sale and could have preserved all of his rights by acquiring the note and the trust deed, he could not claim that the lender was estopped from collecting from him. "He manifested a complete disinterest in any right of subrogation" by his conduct. 99 Cal.Rptr. at 241.

owners sought to enjoin utility from building power line on easement on their property, because as surety on bond he was liable for payment of award of damages caused by injunction.

## 2. Appeal and Error ⇐ 150(6)

### Injunction ⇐ 252(7)

Surety on bond on which preliminary injunction, initially prohibiting construction by utility of power line across landowners' property, was conditioned was not liable for costs and attorney fees awarded utility by trial court, rather, award of costs and attorney fees ran solely against landowners; therefore, surety was without standing, and appeal by surety would not be considered with respect to award of those sums against landowners.

## 3. Electricity ⇐ 9(1)

### Highways ⇐ 88

Utility could properly construct power line on an unused section line easement reserved for highway purposes. AS 19.10.010.

Michelle V. Minor, Anchorage, for appellants.

Paul A. Barrett, David H. Call, Call, DeWitt & Barrett, Fairbanks, for appellee.

Before BURKE, C.J., RABINOWITZ, MATTHEWS and COMPTON, JJ.

## OPINION

MATTHEWS, Justice.

The question on the merits in this case is whether a utility may construct a powerline on an unused section line easement reserved for highway purposes under AS 19.10.010.<sup>1</sup> The superior court answered this question in the affirmative. We agree and affirm.

### 1. AS 19.10.010 provides:

*Dedication of land for public highways.* A tract 100 feet wide between each section of land owned by the state, or acquired from the state, and a tract four rods wide between all other sections in the state, is dedicated for

## I

We first address the issue of whether the appellants have standing to maintain this appeal. They were named plaintiffs together with James and Barbara Heider. In Count I of the complaint all the plaintiffs as members of the utility claimed that they had been damaged by the utility's alleged unlawful failure to provide information with respect to the powerline in question. In Count II the Heiders sought damages from the utility for the destruction of trees on the section line easement which crossed their lots. In Count III the Heiders sought to enjoin the utility from building the powerline on the easement on their property. Count IV of the complaint concerned the operation of an electrical substation near the property of the appellants. They claimed that it was a nuisance and sought its abatement.

The court granted a preliminary injunction with respect to Count III, pertaining only to construction of the powerline across the Heiders' property. Appellant Fisher acted as surety on the bond on which the preliminary injunction was conditioned. The preliminary injunction was vacated about a year after it was granted, contemporaneously with the court's grant of summary judgment in favor of the utility as to Counts II and III. Subsequently, the court awarded \$14,470 in favor of the utility and against the Heiders as damages resulting from the preliminary injunction. The court also awarded the utility \$7,500 in attorney's fees and \$103.18 in costs against the Heiders with respect to Counts II and III and ordered entry of judgment pursuant to Civil Rule 54(b). Apparently Counts I and IV remain to be litigated. The Heiders have not appealed.

[1] - We hold that Fisher has standing to appeal the decision of the court below as to Count III since as surety on the bond he is liable for payment of the award of damages

use as public highways. The section line is the center of the dedicated right-of-way. If the highway is vacated, title to the strip inures to the owner of the tract of which it formed a part by the original survey.

caused by the injunction. His liability may be enforced in the instant action by motion; no independent action is necessary.<sup>2</sup> This monetary interest is sufficient to supply standing to appeal the decision respecting Count III.<sup>3</sup>

[2] However, a different result is required with respect to the points on appeal regarding the judgment for costs and attorney's fees. The award of costs and attorney's fees runs solely against the Heiders. Fisher is not liable as surety for those sums because they do not represent damages caused by the injunction. See 7 J. Moore, *Moore's Federal Practice* ¶ 65.10[1] (2d ed. 1982). Accordingly, we will consider this appeal with respect to the merits, but not with respect to the award of attorney's fees and costs against the Heiders.

## II

[3] There are no Alaska cases which have addressed the question whether a powerline may be constructed on a roadway easement without obtaining an additional interest from the owner of the land on which the easement lies. Cases in other

jurisdictions have given at least four different answers. In some jurisdictions construction of a powerline which does not interfere with highway travel is regarded as a proper incidental subordinate use of a highway easement. In these jurisdictions such construction is not regarded as an additional burden or servitude on the underlying fee.<sup>4</sup> The reasoning underlying this position is that electric, and telephone, lines supply communications and power which were in an earlier age provided through messengers and freight wagons traveling on public highways. So long as the lines are compatible with road traffic they are viewed simply as adaptations of traditional highway uses made because of changing technology:

The easement acquired by the public in a highway includes every reasonable means for the transmission of intelligence, the conveyance of persons, and the transportation of commodities which the advance of civilization may render suitable for a highway.

*McCullough v. Interstate Power & Light Co.*, 163 Wash. 147, 300 P. 165, 166 (1931).<sup>5</sup>

*Rose v. Alaskan Village, Inc.*, 412 P.2d 503, 509 (Alaska 1966) (claimant's attorney in a workmen's compensation case may appeal from an award of attorney's fees).

4. *United States v. Oklahoma Gas & Elec. Co.*, 318 U.S. 206, 209, 63 S.Ct. 534, 535, 87 L.Ed. 716, 719 (1943) (applying Oklahoma law); *Mountain States Tel. & Tel. Co. v. Kelly*, 93 Idaho 226, 459 P.2d 349 (1969); *Mall v. C & W Rural Elec. Coop. Ass'n*, 168 Kan. 518, 213 P.2d 993, 996 (1950); *Hall v. Lea County Elec. Coop.*, 78 N.M. 792, 438 P.2d 632, 635 (1968); *In re Grand River Dam Auth.*, 484 P.2d 505, 512 13 (1971); *Lay v. State Rural Elec. Auth.*, 188 S.C. 32, 188 S.E. 368, 370 (S.C.1936); *McCullough v. Interstate Power & Light Co.*, 163 Wash. 147, 300 P. 165, 166 (1931).

5. See also *Lay v. State Rural Elec. Auth.*, 188 S.C. 32, 188 S.E. 368, 369 (1936); *Padgett v. Arkansas Power and Light Co.*, 226 Ark. 409, 290 S.W.2d 426, 429 (1956) ("It is hardly correct to say that by such new adoptions the streets are subjected to uses not contemplated when streets were laid out many years ago. It would be more correct to say that present uses are the progression and modern development of the same uses and purposes.").

### 2. Civil Rule 80(f) provides:

(f) *Enforcement Against Sureties.* By entering into a bond or undertaking, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk who shall forthwith mail copies to the surety if his address is known. Every bond or undertaking shall contain the consent and agreement of the surety to the provisions of this subdivision of this rule.

An enforcement motion was made in this case but was withdrawn by stipulation when Fisher granted a second deed of trust on his home to the utility in lieu of a supersedeas bond.

3. Cases in which sureties have been allowed to appeal from an adverse judgment against their principals include: *General Insurance Company of America v. Deen*, 3 Ariz.App. 187, 412 P.2d 869, 870-71 (1966); *Jaqua v. Reinhard*, 99 Ind.App. 261, 190 N.E. 887, 889 (1934); *Vassilopoulos v. Fabianoff*, 193 Mo.App. 696, 187 S.W. 106, 108-09 (1916); *In re Cartwright*, 65 Okl. 176, 164 P. 1148, 1149-50 (1916); see also

Other jurisdictions apply this rule in urban, but not rural areas.<sup>6</sup> In the latter a powerline servitude is regarded as additional to the highway easement.

Elsewhere it is held that there is no additional servitude where the electricity is used for a purpose which is itself incidental to highway travel such as street lighting.<sup>7</sup>

Still other authorities hold that both in urban and rural areas powerlines are beyond the scope of a highway easement and constitute an additional servitude.<sup>8</sup>

AS 19.25.010 provides:

*Use of rights-of-way for utilities.* A utility facility may be constructed, placed, or maintained across, along, over, under or within a state right-of-way only in accordance with regulations prescribed by the department and if authorized by a written permit issued by the department.

In our view this statute places Alaska among those states which permit powerline construction as an incidental and subordinate use of a highway easement. Since the statute makes no distinction between urban and rural areas, or between those utilities which benefit highway travel and those which do not, and does not call for acquisition of an additional servitude from the owner of the fee, it cannot be squared with any of the other rules mentioned above.

The appellants suggest, however, that federal rather than state law governs this issue<sup>9</sup> since AS 19.10.010<sup>10</sup> was an acceptance of an offer by the federal government to grant an easement.<sup>11</sup> This argument

fails, however, because "a conveyance by the United States of land which it owns . . . is to be construed, in the absence of any contrary indication of intention, according to the law of the State where the land lies." *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 209-10, 63 S.Ct. 534, 536, 87 L.Ed. 716, 720 (1943) (footnote omitted). Here we have been cited to no evidence indicating that this general rule should not be applicable.

The fact that the section line easement was not actually used for highway purposes does not dictate a different result. Since a highway could be built, a powerline, which is a subordinate and less intrusive use, may be. "The rule is, that the use of an easement in lands cannot be extended or made greater than the terms of the reservation authorizes, but it may be less." *Stegman v. City of Fort Thomas*, 273 Ky. 309, 116 S.W.2d 649, 651 (1938); see also *In re Grand River Dam Authority*, 484 P.2d 505, 510 (Okl.1971) (powerline constructed in part on undeveloped easement). Further, a regulation promulgated under AS 19.25.010 provides that utility use of an unused section-line right-of-way is permissible even without a permit from the state.

Utility permits are required only for section-line rights-of-way presently used or proposed for use by the department. A person seeking to install a utility facility within a section-line right-of-way shall check with the department to determine whether the department presently uses or proposes to use the affected portion of the section-line right-of-way.

reach a different result. We note that telephone lines were held to be an acceptable incidental use to a highway easement granted by the federal government in *Mountain States Tel. & Tel. Co. v. Kelly*, 93 Idaho 226, 459 P.2d 349 (1969).

10. See note 1 *supra*.

11. The offer was expressed in 43 U.S.C. § 932 (1964) (repealed 1976) which provided:

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

See generally *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1226 (Alaska 1975).

6. *Padgett v. Arkansas Power and Light Co.*, 226 Ark. 409, 290 S.W.2d 426, 428-29 (1956); *Anderson v. Philadelphia Elec. Co.*, 2 Pa.D. & C.2d 709 (1954).

7. See, e.g., *Gurnsey v. Northern California Power Co.*, 160 Cal. 699, 117 P. 906, 908-09 (1911); *Potomac Edison Co. v. Routzahn*, 192 Md. 449, 65 A.2d 580, 585-86 (1949); see generally Annot., 58 A.L.R.2d 525, 533-40 (1958).

8. *Louisiana Power & Light Co. v. Dileo*, 79 So.2d 150, 155 (La.App.1955); *Brown v. Asheville Elec. Light Co.*, 138 N.C. 533, 51 S.E. 62, 65 (1905); see generally Annot., 58 A.L.R.2d 525, 543-45 (1958).

9. Appellants do not, however, cite applicable authority indicating that federal law would

17 AAC 15.031(a) (emphasis added). No suggestion has been made that this regulation is invalid.

For these reasons the judgment is **AFFIRMED**.

CONNOR, J., not participating.



Michael Lee CARMAN, Appellant,

STATE of Alaska, Appellee.

No. 5503.

Court of Appeals of Alaska.

Jan. 28, 1983.

On remand from the Supreme Court, 604 P.2d 1076, defendant was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Jay Hodges, J., of first-degree murder and he appealed. The Court of Appeals, Singleton, J., held that: (1) trial court's instructions on felony-murder were proper; (2) defendant could be convicted as an aider and abettor even though indicted as a principal; (3) indictment was duplicitous; (4) defendant was not prejudiced by duplicity; (5) defendant could be held liable for felony-murder of robbery victim even though he did not personally intend the victim's death; (6) testimony which defendant gave at first trial was properly admitted at second trial; and (7) sentence was not excessive.

Affirmed.

**1. Criminal Law  $\S$  1043(2)**

On appeal, defendant cannot attack the propriety of an instruction, whether given or refused, unless he specifically objected to the instruction in the lower court. Rules Crim.Proc., Rule 30(a).

**2. Criminal Law  $\S$  830**

Trial court is not obligated to give an erroneous instruction proffered by a party but, if the erroneous instruction alerts the court to an issue not adequately covered, there may be a duty to give further instructions.

**3. Homicide  $\S$  29**

If jury found that defendant aided and abetted his accomplice and planned armed robbery of the victim, it could have found defendant guilty of felony-murder as a result of the shooting of the victim.

**4. Homicide  $\S$  235**

Evidence was sufficient to sustain defendant's conviction for murder on a theory of felony-murder in that he aided and abetted his accomplice in a planned armed robbery of victim which culminated in the victim being shot.

**5. Statutes  $\S$  226**

Ohio rule holding accomplices guilty of felony-murder if their accomplice had the intent to kill antedates the adoption of the Ohio felony-murder statute as the Alaska felony-murder statute and thus was adopted with the statute.

**6. Homicide  $\S$  29**

Accomplice who participates in the planning of armed robbery may be held liable for felony-murder of the robbery victim even though he did not personally intend the victim's death. AS 11.15.010 (Repealed).

**7. Homicide  $\S$  340(1)**

Any error in instruction which permitted jury to convict defendant as an aider and abettor of felony-murder without finding that he could have foreseen the victim's death at the time that he aided and abetted the robbery was harmless beyond a reasonable doubt where the jury was not expressly instructed that defendant could be held responsible for an unforeseeable homicide by an accomplice and was told that defendant was required to have intended the victim's death and that he could not be convicted of either armed robbery or murder merely be-

Revisor's notes. — Reorganized in 1988 to alphabetize the defined terms.

## Chapter 25. Protection and Use of State Highways and Roads.

### Article

1. Utilities in Highways (§§ 19.25.010 — 19.25.020)
2. Outdoor Advertising (§§ 19.25.080 — 19.25.180)
3. Encroachments In Highways (§§ 19.25.200 — 19.25.250)

### Article 1. Utilities in Highways.

#### Section

10. Use of rights-of-way for utilities

#### Section

20. Relocation of utilities incident to highway projects

**Sec. 19.25.010. Use of rights-of-way for utilities.** A utility facility may be constructed, placed, or maintained across, along, over, under, or within a state right-of-way only in accordance with regulations adopted by the department and if authorized by a written permit issued by the department. (§ 8 art VII title II ch 152 SLA 1957; am § 3 ch 106 SLA 1977)

#### NOTES TO DECISIONS

A utility may construct a powerline on an unused section line easement reserved for highway purposes under AS 19.10.010. *Fisher v. Golden Valley Elec. Ass'n*, Sup. Ct. Op. No. 2606 (File No. 5902), 658 P.2d 127 (1983).

This section places Alaska among those states which permit powerline construction by a utility as an incidental and subordinate use of a highway easement.

*Fisher v. Golden Valley Elec. Ass'n*, Sup. Ct. Op. No. 2606 (File No. 5902), 658 P.2d 127 (1983).

**Maintenance.** — Maintenance as defined in paragraph (9) of AS 19.45.001 refers to some type of active work undertaken to preserve the utility facility. *Johnson v. State*, Sup. Ct. Op. No. 2434 (File Nos. 4866, 4871, 4894), 636 P.2d 47 (1981).

**Collateral references.** — 39 Am. Jur. 2d, Highways, Streets and Bridges, §§ 218-234.

40 C.J.S., Highways, §§ 232, 233.

Placement, maintenance, or design of

standing utility pole as affecting private utility's liability for personal injury resulting from vehicle's collision with pole within or beside highway. 51 ALR4th 602.

**Sec. 19.25.020. Relocation of utilities incident to highway projects.** (a) If, incident to the construction of a highway project, the department determines and orders that a utility facility located across, along, over, under, or within a state right-of-way must be changed, relocated, or removed, the utility owning or maintaining the facility shall change, relocate, or remove it in accordance with the order. The order must provide a reasonable time period for compliance.

(b) If the utility facility is not changed, relocated, or removed in accordance with the order, the facility becomes an unauthorized encroachment and may be disposed of in accordance with AS 19.25.240 — 19.25.250. In addition, the owner of the facility shall indemnify the state for any amount for which the state may be liable to a contractor by reason of the encroachment.

(c) The cost of change, relocation, or removal necessitated by highway construction is a cost of highway construction to be paid in accordance with AS 19.45.001(4) as follows:

(1) by the department as a cost of highway construction, if the utility facility is installed or authorized under a utility permit or a regulation after June 11, 1986, and is installed in the location specified in the permit;

(2) by the department as a cost of highway construction, if the facility was installed before June 11, 1986, under a utility permit issued on or after July 1, 1960, and is in the location specified in the permit;

(3) by the department as a cost of highway construction, if the utility facility was installed before July 1, 1960, or before the road became part of the state highway system;

(4) by the department as a cost of highway construction, if the utility permit that requires the utility to pay the relocation cost was issued more than five years before the contract for the highway construction project was first advertised;

(5) by the utility in all other cases, unless the commissioner finds it is in the public interest for the cost to be paid by the department.

(d) If requested by a municipality, the department shall implement this chapter by requiring to the maximum extent possible location underground of electric power transmission lines within the municipality. (§§ 2, 3 ch 57 SLA 1961; am § 4 ch 106 SLA 1977; am § 3 ch 142 SLA 1986)

**Effect of amendments.** — The 1986 amendment in subsection (c) deleted "by the state" following "construction to be paid" and substituted the language beginning "as follows:" for "notwithstanding the terms or provisions of any existing

permit, agreement, regulation or statute to the contrary."

**Opinions of attorney general.** — This section is constitutional. 1961 Op. Att'y Gen. No. 12.

*Secs. 19.25.030 — 19.25.040. Damages and obstructions. [Repealed, § 5 ch 52 SLA 1988.]*

## Article 2. Outdoor Advertising.

### Section

- 80. Purpose
- 90. Outdoor advertising prohibited
- 105. Limitations of outdoor advertising signs, displays and devices

### Section

- 130. Penalty for violation
- 140. Compensation for removal of advertising
- 150. Unlawful advertising