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SUPREME COURT NO. 89727-I
(APPEAL NO. 68202-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
DIVISION ONE

(Whatcom County Court Case No. 09-2-01773-1)

DAVID COTTINGHAM AND JOAN COTTINGHAM,

Petitioners,

vs.

RONALD MORGAN AND KAYE MORGAN,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

Douglas R. Shepherd
Bethany C. Allen
Shepherd and Abbott
2011 Young Street, Ste 202
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January 17, 2014

 ORIGINAL

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IDENTITY OF RESPONDENT

Respondents are Ronald Morgan and Kaye Morgan, husband and wife (Morgans).

INTRODUCTION

The trial involved a land boundary dispute between two residential neighbors and a claim of adverse possession by David Cottingham and Joan Cottingham (Cottinghams). It is difficult to determine the issues intended to be raised in Cottinghams' Petition for Review, so Morgans address the issues as they were framed in the trial court. The issues addressed by Morgans are: (1) whether the trial court has discretion, in equity, to allow Morgans to repurchase land that was obtained by adverse possession by Cottinghams; and (2) whether a trial court's ruling on a partial summary judgment may be modified based on the evidence at trial.

Trial courts, in equity, have broad discretion to fashion remedies in order to do substantial justice. The equitable sale and repurchase remedy was well within the trial court's discretion. An order on a partial summary judgment, not certified as final, may be modified at any time before entry of the final judgment. These principles are well established and consistent with current case law.

Cottinghams seek this Court's review of the Court of Appeals' October 14, 2013, unpublished opinion. Morgans respectfully request that Cottinghams' Petition for Review be denied.

STATEMENT OF THE CASE

Cottinghams are residential neighbors of Morgans. In January of 2005, Morgans retained surveyor Larry Steele to survey Lot 11 and place corner stakes in anticipation of purchasing Lot 11. RP Vol. 1, pp. 131-132; RP Vol. 2, p. 108. On January 11, 2006, Morgans acquired title to Lot 11 by statutory warranty deed. RP Vol. 2, p. 161; Exh. P3; Exh. P6. In 2005, survey stakes clearly demonstrated the common property line to both Morgans and Cottinghams. The purchase price for Lot 11 was \$250,000. 12/07/11 RP 162.

In August of 2006, Morgans began construction on their home. CP 112. Morgans received all of the necessary permits, which permits required the home to have a five foot setback from their property line. Morgans completed construction and moved into their new home in 2007. CP 112. Morgans' \$500,000 home was constructed five feet from the common property line. 12/07/11

RP 163. Without this five foot setback, Morgans home would have to be moved or torn down, at Morgans' expense. CP 690-91.

In fall 2008, after a rain event, Ron Morgan noticed odor and discoloration coming from the pre-existing septic system. CP 113. Because of the high water table, a certified septic tank installer and Ron Morgan pumped ground water from the hole dug to inspect the septic system onto Cottinghams property. *Id.* After many months, in drier times, the water table subsided and a new septic system was installed. *Id.*

In 2009, Cottinghams filed and served a Complaint that alleged they had acquired title to a portion of Morgans' Lot 11 by adverse possession and requested that the trial court quiet title to that portion of Morgans' Lot 11 in Cottinghams. Cottinghams further alleged that they owned a maintenance easement over a portion of Morgans' land by adverse possession. Cottinghams also sought damages against Morgans for trespass, conversion, outrage and nuisance. Morgans, by way of answer and counterclaim, asked the trial court to quiet title to all of Lot 11 in Morgans and asked the court to exercise its equitable powers in resolving the claims of the parties. CP 557.

In January of 2011, the trial court made and entered an order granting partial summary judgment, which order quieted title to a large pie shaped portion of Morgans' Lot 11 in Cottinghams. CP 389. At trial, this portion was substantially reduced because, after a site visit, "it became clear that many laurels were planted on a portion of the joint property line and a substantial portion were clearly on Lot 10 [Cottinghams lot] and not on lot 11 [Morgans lot]." CP 112.

The post-trial findings and conclusions quieted title in Lot 11 in Morgans upon the payment by Morgans to Cottinghams of \$8,216.55. CP 112. Morgans were also ordered to pay Cottinghams \$13,028.94, as treble damages for Morgans' removal of laurel bushes on Lot 11, valued at \$4,342.98. CP 115; CP 105. Cottinghams claims for nuisance and outrage were dismissed. On January 9, 2012, Morgans delivered \$21,245.49 to Cottinghams. CP 644. Cottinghams returned the check. CP 658. On January 17, 2012, Morgans deposited the \$21,245.49 into the registry of the trial court. CP 657-59. After full consideration of this matter, the Court of Appeals affirmed the trial court's decisions, except for remand to address an inconsistent conclusion of law.

STATEMENT OF THE ISSUES

1. Whether a trial court has discretion, in equity, to allow Morgans to re-purchase land that was obtained by adverse possession by Cottinghams. [Yes.]

2. Whether a trial court's ruling on a partial summary judgment motion may be modified based on the evidence at trial, and prior to entry of a final judgment. [Yes.]

REVIEW SHOULD BE DENIED

A petition for review will be accepted by the Supreme Court **only**:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.¹

Cottinghams' Complaint, seeking adverse possession, clearly sought relief from a court of equity. Cottinghams' argue the trial court could not provide equitable relief to Morgans. They seek review in this Court simply complaining about the equity done.

¹ RAP 13.4(b).

Cottinghams allege frustration with the trial court's decision to modify its partial summary judgment decision after the undisputed evidence at trial was inconsistent with the earlier decision. Rulings on partial summary judgments are interlocutory in nature, can be modified at any time before entry of the final order, and therefore, interlocutory review or appeal is not allowed.

A. An equitable sale allowing Morgans to re-purchase property adversely possessed by Cottinghams was well within the trial courts discretion.

Courts have "tremendous discretion to do justice when fashioning an equitable remedy." *Proctor v. Huntington*, 169 Wn.2d 491, 503, 238 P.3d 1117 (2010). "[A] court's equity power transcends the mechanical application of property rules." *Id.* at 501. After trial and determination of disputed facts, the trial court should fashion an equitable remedy that is just and "fact specific." *Id.* at 503.

Courts have long used transfers of property and options to purchase land to resolve disputes and balance the equities of the parties. *Id.* at 849 (ordering a forced land transfer to remedy a 1,600 square foot encroachment); *see also People's Sav. Bank v.*

Bufford, 90 Wash. 204, 209, 155 P. 1068 (1916) (court ordered sale of an entire city lot).

In this case, the trial court ruled that Cottinghams adversely possessed 292.3 square feet of Morgans' property. In order to "balance the equities," Morgans were given the option to purchase the land back from Cottinghams at its fair market price. CP 112. Morgans completed construction of the home well before Cottinghams claims. Without such an option to purchase, Morgans would have to move or destroy all or part of their home. Giving Morgans this option was clearly not an abuse of the trial court's broad equitable powers. The law is well established that this equitable sale is not an abuse of the trial court discretion. The remedy is allowed by *Arnold v. Melani*, 75 Wn.2d 143, 449 P.2d 800 (1968-69); *Proctor v. Huntington*, 169 Wn.2d 491; or *Bach v. Sarich*, 74 Wn.2d 575, 445 P.2d 648 (1968).

B. An Order Granting Partial Summary Judgment may be modified before entry of a final judgment.

(b) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in

the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the courts own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, **and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.**

CR 54(b). (Emphasis added.) “[A]bsent a proper certification of finality, ‘an order which adjudicates fewer than all claims or the rights and liabilities of fewer than all parties is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties.’” *Moratti v. Farmers Ins. Co. of Wash.*, 162 Wn.App. 495, 254 P.3d 939 (Div. 1, 2011) (citing *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1992); CR 54(b)).

The Order Granting Partial Summary Judgment was not certified as a final judgment. CP 389. Thus, the order was appropriately modified prior to the entry of judgment.

REQUEST FOR ATTORNEY FEES AND EXPENSES

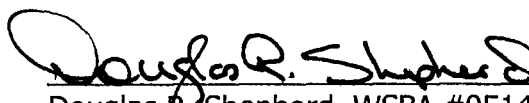
Morgans respectfully request this Court award reasonable attorney fees and expenses for the preparation and filing of this answer to Cottinghams' Petition for Review pursuant to RCW 4.84.080 and RAP 18.1.

CONCLUSION

Cottinghams' petition does not raise any ruling by the Court of Appeals that is inconsistent with applicable case law. Therefore, Morgans respectfully request that Cottinghams' Petition for Review be denied.

Respectfully submitted this 17th day of January 2014.

SHEPHERD AND ABBOTT



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Re: David and Joan Cottingham v. Ronald and Kaye Morgan
Supreme Court No. 89727-I

Filing Party: Douglas R. Shepherd, WSBA No. 9514
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Attached please find the following documents for filing:

01. Respondents' Answer to Petition for Review
02. Declaration of Service

Please call or write with questions. Thank you.

Respectfully,

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