No. 47222-8-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

SANDY FAMILY FIVE, LLC, a Washington corporation,

APPELLANT,

v.

CRAIG and DEBRA BROWN, husband and wife, and their marital community,

RESPONDENTS.

APPELLANT SANDY FAMILY FIVE, LLC'S REPLY BRIEF

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III. INTRODUCTION

Sandy Family Five, LLC (hereinafter "Sandy") submits this reply brief.

In 2006, at the time the Cokeleys executed the Deed of Trust that is at issue in the appeal, the Cokeleys had not validly created any easement rights. In particular, by recording the "Drainfield Easement Agreements," purporting to grant themselves easement rights in property they already owned, the Cokeleys did not effectively create any easement rights. Because the Cokeleys had not properly created any easement rights, the interest they conveyed by Deed of Trust was not subject to any easement rights.

In addition, the Cokeleys' Deed of Trust plainly conveyed to the Trustee the Cokeleys' entire right, title and interest in the Sandy property. And, the Cokeleys granted the Trustee the power in the event of foreclosure to convey the Cokeleys' entire right, title and interest free and clear of any easement rights. Therefore, upon foreclosure, the Trustee's Deed conveyed the property to Sandy free and clear of all easement rights.

For either or both reasons, the Court of Appeals should reverse the trial court's grant of summary judgment in this matter. It should remand with instructions that the trial court enter a judgment quieting title in favor of Sandy.

IV. ANALYSIS

A. Because the Cokeleys could not grant themselves an easement over their own property, the "Drainfield Easements Agreements" were invalid.

Because the Cokeleys could not grant themselves an easement over their own property, the "Drainfield Easement Agreements" were invalid.

As Sandy set forth in its opening brief, "an easement is a right, distinct from ownership, to use in some way **the land of another**..." *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986). "**One cannot have an easement in one's own property**." *Coastal Storage Co. v. Schwartz*, 55 Wn.2d 848, 853, 351 P.2d 520 (1960); *Radovich v. Nuzhat*, 104 Wash. App. 800, 805, 16 P.3d 8687 (2001).

In 2005, the Cokeleys held the entire interest in both the Brown property and the Sandy property. The Cokeleys recorded "Drainfield Easement Agreements" purporting to create an "easement" benefiting one property the Cokeley's owned and burdening another property the Cokeleys owned. CP 44-4 (App. Exs. G and H). But because "one cannot have an easement in one's own property," the Cokeleys execution of the "Drainfield Easement Agreements" did not effectively create any easement rights. Therefore, when the Cokeleys executed the Deed of Trust which conveyed their interest in the Sandy property to the Trustee (CP 50-53), they conveyed their entire interest in the Sandy property free and clear of all such (non-existent) easement rights.

The Browns did not respond to or attempt to distinguish these cases before the trial court. The Browns have not responded to or attempted to distinguish these cases in their appellate brief. The Browns have no response to this simple argument.

Instead, the Browns distract. They cite to Washington case authority that addresses the issue whether a properly created easement should be construed as appurtenant to the land. See Brown Response Brief, pg. 6-7.

This argument, and these authorities, are entirely off point. They all assume a properly created easement. They simply do not address the issue in the case: whether Washington law permitted the Cokeleys to create an "easement" affecting only the Cokeleys' own property.

Washington law plainly does not permit an owner to create an easement affecting only his or her own property. By executing the "Drainfield Easement Agreements," the Cokeleys did not properly create any easement rights.

The Court should therefore reverse. It should hold that because the Cokeleys had not properly created any easement rights in 2006, when they conveyed the Sandy property to the Trustee by Deed of Trust, the conveyance to the Trustee was not subject to any easement rights.

B. The Cokeleys' Deed of Trust plainly conveyed the Cokeleys' entire interest in the Sandy property to the Trustee, without any reservation or exception for any Drainfield Easement.

In addition, the Cokeleys' Deed of Trust plainly conveyed the Cokeleys' entire interest in the Sandy property to the Trustee, without any reservation or exception for any Drainfield Easement.

In 2006, the Cokeleys held the right, title and interest in both the Brown property purportedly benefited by, and the Sandy property purportedly burdened by, the "Drainfield Easements." Because the Cokeleys held the entire right, title and interest in both properties, the Cokeleys retained the power to sell or pledge the Sandy property free and clear of any such rights.

That is what the Cokeleys plainly did. The Deed of Trust which the Cokeleys executed, on its face, unambiguously conveys the Cokeley's entire interest in the Sandy property to the Trustee. CP 50-53 (App. Ex. B). The Deed of Trust does not purport to reserve or except from the interest conveyed to the Trustee any easement rights of any kind, including any easement rights arising under any "Drainfield Easement Agreement." *Id.*

RCW 61.24.050(1) specifically provides that in the event of foreclosure, the Trustee under a Deed of Trust shall have the power to deliver to a purchaser at the foreclosure sale all the interest in the property which the grantor had or had the power to convey at the time the grantor executed the Deed of Trust. The Deed of Trust which the Cokeleys signed

explicitly stated that the Cokeleys authorized the Trustee, in the event of foreclosure, to deliver to the purchaser at any foreclosure sale a deed conveying to the purchaser all the interest in the property which the Cokeleys had or had the power to convey at the time they executed the Deed of Trust in 2006:

> IT IS MUTALLY AGREED THAT:
>
> ...
>
> 5. Trustee shall deliver to the purchaser at the [foreclosure] sale its deed, without warranty, which shall convey to the purchaser **all** the interest in the property which Grantor had or had the power to convey at the time of his/her/their execution of this Deed of Trust, and such as he/she/they may have acquired thereafter.

CP 51 (App. Ex. B) (emphasis added).

After the Cokeleys failed to pay, and the Trustee foreclosed on and sold the property, the Trustee's Deed therefore conveyed to Sandy as the purchaser all the interest in the Sandy property which the Cokeleys had or had the power to convey in 2006, at the time the Cokeleys executed the Deed of Trust. CP 68-71 (App. Ex. E). The Deed conveyed the Cokeleys entire right, title and interest in the Sandy property, free and clear of any easement rights including any rights allegedly arising under any of the "Drainfield Easement Agreements."

The Browns' response to this argument is to assert that:

> The Deed of Trust itself does not create any property rights, nor does it destroy property rights **previously granted to third parties** by the borrower.

Brown Responsive Brief, pg. 8 (emphasis added).

The first part of this statement is plainly wrong. The Deed of Trust created property rights in the Trustee, who in turn could exercise those rights for the benefit of Sandy as beneficiary.

However, Sandy agrees with the Browns that the Cokeleys could not, by executing a Deed of Trust, "destroy property rights previously granted to third parties." But here, in 2006, when the Cokeleys executed the Deed of Trust, the Cokeleys had not previously granted any property rights to third parties.

In 2006, when the Cokeleys executed the Deed of Trust, the Cokeleys owned the entire interest in both the Sandy and Brown properties. The Cokeleys had the power to convey that entire interest to the Trustee. The Cokeleys had the power to authorize the Trustee to convey the entire interest in the Cokeley property to a third party. The Cokeleys had these powers *precisely because* the Cokeleys in 2006 had not yet granted any property interest in the Sandy property to a third party.

The Browns further argue that:

> Sandy now asks the Court to **look beyond the Deed of Trust**, and somehow conclude that the parties intended **to extinguish** the easement despite the absence of any language or evidence along that line.

Browns Responsive Brief, pg. 9. (emphasis added). This does not correctly reflect Sandy's argument.

First, Sandy has pointed out--relying on authorities which the Browns do not address or purport to distinguish--that the Cokeleys never validly created an easement in the first place. Sandy does not claim any easement was "extinguished."

And Sandy does not ask the Court to "look beyond the Deed of Trust." On its face, the Deed of Trust describes the Cokeleys' entire interest in the Sandy property. On its face, the Deed of Trust conveys that entire interest to the Trustee. On its face, the Deed of Trust provides that the Trustee, upon foreclosure, shall have the power to convey that entire interest to a successful purchaser at a foreclosure sale. It is the Browns, not Sandy, who want the Court to look beyond the Deed of Trust in order to add to it a reservation it plainly does not contain.

If the Cokeleys wanted to reserve an interest in the Sandy property that survived a foreclosure of the Deed of Trust, the burden was on the Cokeleys to explicitly except that interest from the legal description of the property being conveyed to the Trustee by the Deed of Trust. In the absence of such an exception, both Sandy and third parties dealing with the property (such as the Browns) knew that the Cokeleys' Deed of Trust gave the Trustee the power to convey the Cokeleys' entire right, title and interest in the Sandy property to the successful bidder at any foreclosure sale. And that is precisely what occurred.

Sandy is entitled to prevail for this second, separate independent reason.

C. Sandy had neither actual nor constructive knowledge of the Cokeleys' interactions with Thurston County. In any event, the Cokeleys' unexpressed subjective intent is irrelevant and cannot be used to change the plain meaning of the Cokeleys' Deed of Trust.

Throughout their brief, the Browns place great emphasis upon the Cokeleys' interactions with Thurston County, and repeatedly suggest that shows the Cokeleys "intended" to reserve an easement in the property conveyed by the Deed of Trust. Sandy had neither actual nor constructive knowledge of the Cokeleys' interactions with Thurston County. In any event, the Cokeleys' subjective intent is irrelevant. It cannot be used to change the plain meaning of the Cokeleys' Deed of Trust.

Larry Weaver, the person in charge of real estate matters for Sandy, testified that the Cokeleys solicited a loan from Sandy without disclosing to Sandy any plan on the Cokeleys' part to construct a septic system on the Sandy property. CP 144-45 (App. Ex. C). Mr. Weaver testified that Sandy first learned of these matters in late 2012/or early 2013, as it was preparing to assume possession of the property in light of Sandy's foreclosure. *Id.*

The Browns do not point to any evidence that Sandy had any actual knowledge of the Cokeleys' intent to construct septic system improvements on the Sandy property. Sandy's lack of actual knowledge is undisputed.

And, the Browns have not shown that Sandy had constructive notice of the Cokeleys' communications with Thurston County. *Ellingsen v. Franklin County,* 117 Wn.2d 24, 27-30, 810 P.2d 910 (1991) (public record effective to give constructive notice only when a statute such as the recording act, specifically so provides).

In the absence of proof of knowledge, this evidence does no more than suggest the Cokeleys' subjective, but wholly unexpressed, intent. That subjective intent is completely irrelevant to the proper construction of the Deed of Trust. *Hearst Communications, Inc. v. Seattle Times Co.,* 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005).

In any event, the Deed of Trust has language that is plain, clear, and absolutely unambiguous. The Deed of Trust plainly conveyed the Cokeleys' entire interest in the Sandy property, without reserving any easement for septic improvements. The Browns cannot offer extrinsic evidence for the purpose of adding language to the Deed of Trust that it simply does not contain. *Hearst*, supra.

Sandy had neither actual nor constructive knowledge of the Cokeleys' interactions with Thurston County. In any event, the Cokeleys' unexpressed subjective intent is irrelevant. It cannot be used to change the plain meaning of the Cokeleys' Deed of Trust.

D. The Browns are not entitled to assert, and cannot establish an easement by implication.

Recognizing that Sandy is likely to prevail on these issues, and in an effort to prop up the trial court's erroneous decision to grant summary judgment to the Browns, the Browns assert that they are entitled to an easement by implication. The Browns are not entitled to assert, and cannot establish, an easement by implication.

The Browns did not plead any claim of easement by implication. See CP 37-40 (Browns' Answer does not assert any affirmative claims or allege the existence of an easement by implication). Because the Browns had not pled a claim of easement by implication, the trial court refused to address it. CP 178. ("Craig and Debra Brown's Motion for Summary Judgment is GRANTED except that the Court did not address, and does not grant summary judgment with respect to, the Browns' claim of an implied easement, which claim the Browns had not pled.")

On this issue, the trial court correctly applied the law. Because the Browns did not plead this claim, the Browns are not entitled on summary judgment to assert an easement by implication. *Kirby v. City of Tacoma,* 124 Wn. App. 454, 472 ¶44, 98 P.3d 827 (2004).

In any event, the Browns' implied easement claim lacks merit. An implied easement may arise when: (1) there has been a unity of title and subsequent separation; (2) at the time of the separation there has been a

continuous quasi-easement existing for the benefit of one part of the property to the detriment of another part of the property; and (3) there is a certain degree of necessity that a quasi-easement exist after separation of the property. See Browns' Responsive Brief, pg. 13, citing *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 668, 404 P.2d 770 (1975).

Here, the Cokeleys severed the unity of title by executing the Deed of Trust conveying their entire interest in the Sandy property to the Trustee in 2006. At that time, the Cokeleys granted the Trustee the power to pass that entire interest the Cokeleys held as of 2006 on to a successful purchaser at a foreclosure sale.

In 2006, at the time the Cokeleys executed the Deed of Trust, the Sandy property was entirely undeveloped. CP 144-45. See also CP 170-171 (App. Ex. I) (Cokeleys' "as-built" submitted to Thurston County shows septic system improvements installed in 2011) [1]. At that point, the Cokeleys simply had not engaged in any construction activity upon the Sandy property that could be characterized as giving rise to a "quasi-easement."

[1] At one point, the Cokeleys in their brief suggest that they began developing the septic improvements as early as 2005. Responsive Brief, pg. 3, citing CP 91-95, 98-99. In fact, the cited pages of the Clerk's papers suggest that the Cokeleys did not begin constructing any improvements on the Sandy property until after the Cokeleys had concluded an unrelated litigation with other neighbors, which litigation ended in 2010. Elsewhere in their brief, the Browns squarely admit that the Cokeleys "built the drainfield after "this litigation concluded" in 2010." Responsive Brief, pg. 10.

Here, after the Cokeleys asked Sandy to loan them money, Sandy did everything it was supposed to do in order to protect its rights. Sandy had the Cokeleys execute a Deed of Trust which plainly conveyed to the Trustee the Cokeleys' entire right, title and interest in the Sandy property. CP 50-53 (App. Ex. B). And Sandy recorded the Deed of Trust in order to put third parties on notice that the Cokeleys had conveyed their entire right, title and interest in the Sandy property to the Trustee in order to secure Sandy's claim for repayment of the debt. *Id.*

As the Browns correctly observe, the Court should apply the law in a way that promotes the stability of land titles. A holding that the Cokeleys could, by their wholly unilateral conduct subsequent to granting Sandy the Deed of Trust on the Sandy property, impose easements upon the Sandy property that effectively rendered the lots undevelopable, would render Sandy and every other lender insecure, undermining the stability of land titles.

In sum, because they did not plead it, the Browns are not entitled to raise the claim of an easement by implication. But in any event, because in 2006, at the time the Cokeleys executed the Deed of Trust and thereby severed unity of title, there was no quasi-easement impressed on the property, the Browns' claim fails.

E. The equities in this case **all** favor Sandy.

Finally, the equities in this case **all** favor Sandy.

In response to the Cokeleys' request, Sandy lent the Cokeleys a substantial sum of money. CP 144-45 (App. Ex. C). Sandy secured its claim for repayment by having the Cokeleys execute a Deed of Trust. CP 50-53 (App. Ex. B). The Deed of Trust conveyed the Cokeleys' entire interest in the Sandy property to the Trustee. *Id.* The Deed of Trust empowered the Trustee to foreclose on and sell that interest in the event the Cokeleys failed to pay Sandy. *Id.* Sandy had the Deed of Trust recorded. *Id.*

Sandy thus did everything Sandy was required to do to completely perfect its claim. Sandy's rights became fixed in 2006, the moment the Deed of Trust recorded. Nothing which the Cokeleys or Browns did thereafter could impact Sandy's right to have the Trustee foreclose on the Cokeleys' entire interest in the Sandy property in the event the Cokeleys failed to make payment and thereby triggered foreclosure under the Deed of Trust.

The Browns, in contrast, failed to act to protect their interests. First, the Browns in fact did not have the Cokeleys convey any easement rights in the Sandy property to the Browns. CP 65-66 (App. Ex. L) (Cokeley-Brown Statutory Warranty Deed does not create or convey any rights in Sandy property to the Browns).

Moreover, the Browns purchased at a time when Sandy had recorded a Deed of Trust in which the Cokeleys pledged all their interest in the Sandy property to Sandy. CP 50-53 (App. Ex. B). The Trustee had also recorded a Notice of Intent to Foreclose showing that the Trustee was completing the foreclosure process. CP 60-63 (App. Ex. D). The Browns thus had at least constructive[2] knowledge of the Trustee's right and duty to foreclose and that the Trustee was foreclosing the Deed of Trust. The Browns thus also knew that on foreclosure, the Trustee would convey the Cokeleys' entire right, title and interest in the Sandy property free and clear of any septic or drainfield easement rights to the successful purchaser. Sandy did everything it was required to do in order perfect its right to have the Trustee foreclose against the Cokeleys' entire interest in the Sandy property.

The Browns, in contrast, chose to buy their property from the Cokeleys at a time when they had both constructive knowledge that the Cokeleys had executed a Deed of Trust purporting to give Sandy the right to

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[2] Sandy believes that the Browns closed with actual knowledge of the pending foreclosure sale on the Sandy property. The Browns' title insurer had actual knowledge of Sandy's Deed of Trust, and its impending foreclosure. CP 147; 151-52, (Supplemental Declaration of Matthew B. Edwards, Ex. B). Sandy believes that the Cokeley-Brown Deed did not expressly convey any rights in the Sandy property *precisely because* the Browns' title insurer had advised the Browns that the impending foreclosure would wipe out any right in the "Drainfield Easement Agreements," such that the insurer was unwilling to extend any title insurance coverage to such rights.

The Court entered final judgment before discovery had progressed to the point where Sandy could take depositions of the individuals who would have knowledge of these facts. In any event, for all the other reasons set forth in Sandy's briefs, it is not necessary for the Court to reach this issue in order to conclude Sandy is entitled to have title to the property quieted in it, free and clear of any claim asserted by the Browns.

foreclose against their entire right, title and interest in the property, and that Sandy was just about to complete a foreclosure against the Cokeleys' entire right, title and interest in the Sandy property. The Cokeleys could have protected their claimed interest in using the septic improvements on the Sandy property by requiring, as a condition of closing, that the Cokeleys pay Sandy's claim in full. The Browns simply chose not to do so.

Thus, to the extent that the Court considers the equities, those equities **all** favor Sandy.

V. CONCLUSION

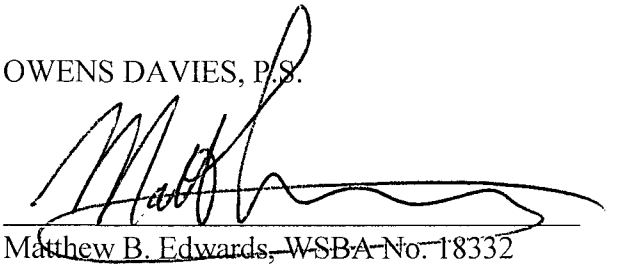
Because they owned the entire interest in both the property purportedly benefited and the property purportedly burdened, the Cokeleys' 2005 recording of "Drainfield Easement Agreements" did not effectively create any easement rights. The Cokeleys' 2006 Deed of Trust, by which the Cokeleys conveyed their entire right, title and interest in the Sandy property to the Trustee, and which explicitly granted the Trustee the power on foreclosure to convey that entire right, title and interest to the successful purchaser, conveyed the property free and clear of any rights supposedly created by the "Drainfield Easement Agreements."

As the successful purchaser at the foreclosure sale, Sandy is entitled to have its title in the Sandy property quieted free and clear of any claim asserted by the Browns as successors in interest to the Cokeleys, including any claim arising on account of the recording of the "Drainfield Easement

Agreements." The Court of Appeals should reverse the trial court's grant of summary judgment to the Browns, and remand with the instructions that the trial court enter summary judgment so quieting title in Sandy.

DATED this 13 day of April, 2015.

OWENS DAVIES, P.S.



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STATE OF WASHINGTON

BY _____
DEPUTY

☐ EXPEDITE
☐ Hearing is set:
☒ No Hearing is set

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

SANDY FAMILY FIVE, LLC, a Washington Limited Liability Company,

Plaintiffs,

v.

CRAIG and DEBRA BROWN, husband and wife, and other marital community

Defendants.

COURT OF APPEALS, DIVISION II
CAUSE NO. 47222-8-II

CERTIFICATE OF SERVICE

I, Matthew B. Edwards, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on April 13, 2015, I caused service of the following and this Declaration of Service upon the following individual, in the manner described below:

1. Reply Brief; and

2. This Certificate of Service.

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DATED this 13th day of April, 2015 at Olympia, Washington.

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