No. 47222-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SANDY FAMILY FIVE, LLC, a Washington Corporation,
APPELLANT,

v.

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

Respondents.

BRIEF OF RESPONDENTS

C. Scott Kee
Washington State Bar No. 28173
Attorneys for Respondent

Rodgers Kee & Card, P.S.
324 West Bay Dr NW, Ste. 201
Olympia, WA 98502
(360) 352-8311

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I. INTRODUCTION

Sandy Family Five, LLC (hereinafter "Sandy") filed the underlying litigation, seeking to invalidate duly recorded drain field easements benefitting the property owned by Craig and Debra Brown (hereinafter "Browns"). The drain field easement are necessary for the development of the Brown property and were well established in the public record, and through express actions, prior to Sandy or the Browns acquiring any interest in the properties.

The Court should affirm the trial court's ruling to in favor of the Browns and dismiss the Sandy claims related to the drain field easement.

II. FACTS

Paul and Diane Cokeley ("Cokeleys") previously owned three separate parcels, Thurston County Tax Parcel numbers 45800400400 ("400"), 45800400500 ("500") and 45800401100 ("1100"). CP 41-42.

The Browns purchased 1100 from the Cokeleys via Statutory Warranty Deed on December 28, 2012. Sandy acquired parcels 400 and 500 on January 14, 2013 via a Trustee's Deed. CP 42.

Several years prior, in 2004, the Cokeleys began the permitting process for a drain field on 400 and 500, for the sole purpose of serving 1100. CP 98-99. In 2005, after receiving approval from the County for this drain field, the Cokeleys executed and recorded with the Thurston County

Auditor express drain field easements to ensure the easements were part of the permanent public record. CP 41-48 and 98-99.

The recorded Drain field Easement Agreements grant parcel 1100 a "non-exclusive perpetual easement across, along, in upon and under . . ." parcels 400 and 500. CP 44-45.

The drain field easements include an "appurtenant," and therefore attach to the land in perpetuity. CP 45. In 2012, the Cokeleys recorded additional easements refining the 2005 easements to specifically show the location of the installed drain field. CP 56-58. To this day, the 2005 and 2012 easements remain part of the public record at the Auditor's office.

As recognized by the Cokeleys back in 2004 when they started the process, the drain field easements are critical to the development of 1100, because without them, 1100 was, and is, unbuildable as it could not support a drain field. CP 98-99.

When Sandy executed a Deed of Trust in 2006, they had notice of the recorded drain field easements. Sandy chose to take 400 and 500 as collateral for a loan but did not obtain any encumbrance on 1100. Lot 1100 was never encumbered by the Deed of Trust. CP 50. The following is a timeline of events:

Aug. 2004 The Cokeleys begin the permitting process for drain field on lots 400 and 500 to serve 1100. CP 91-95.

Aug. 2005 Thurston County approves drain field design and issues permit for drain field to be installed on 400 and 500 to serve 1100. CP 87-89.

Dec. 2005 Drain field easements are recorded with the Thurston County Auditor and are part of the public record. The recorded easements include an appurtenant, running with the land in perpetuity. CP 44-48.

2005 – 2012 Continuous, open and notorious development and use of the properties by the Cokeleys in accordance with the recorded easements, including installation of the drain field on 400 and 500 to serve 1100. CP 91-95, 98-99.

Dec. 2012 Browns purchase 1100 which included recorded drain field easements and a drain field which is hooked up to 1100. At the time, there was an active site plan permit for a 3-bedroom residence on their lot utilizing the drain field on 500. CP 100-115.

Jan. 2013 Sandy forecloses on 400 and 500 via a Trustee's Deed. CP 60.

Late 2014 Browns begin development process. Sandy responds by filing pending litigation seeking to invalidate drain field easements. CP 98-99.

The public record, and the express actions of the Cokeleys, confirms the easements were necessary and intentionally created.

III. ISSUES

1. The drain field easements are valid and fully enforceable.
2. The Deed of Trust did not encumber the Brown property, nor did it address or extinguish any easements.
3. The Brown property is the benefactor of an implied, or quasi, easement.

IV. ARGUMENT

A. THE EASEMENTS CREATED IN 2005 ARE VALID.

Ordinarily, any conveyance of an interest in real estate must be in writing and must be recorded to provide notice, and protect against subsequent purchasers and mortgagees. RCW 65.08.070. A "conveyance" is defined very broadly, to include "every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected." RCW 65.08.060. The decisive factor in determining whether an easement exists

is whether the parties involved intended to create it. *Kemery v. Mylroie*, 8 Wn. App. 344, 346, 506 P.2d 319 (Div. II 1973)

There is no dispute that 500 and 400 (now the Sandy Property) granted a drain field easement to 1100 (now the Brown property) well before either Sandy or the Browns owned the properties. CP 45-48.

The easement agreements were recorded, and the permits to install the drain field to serve 1100 were obtained, in 2005, prior to the Browns or Sandy obtaining any interest in the properties. Id.

The Cokeleys unequivocally created an easement for an express purpose. 1100 was not buildable because it did not "perk," therefore it was necessary to install a drain field on 400 & 500 for the benefit of 1100, so that 1100 could be developed. CP 91-95 and 98-99. The Cokeleys recognized this early on and, in order to allow development of the properties, created the drain field easements. *Id.*

When the Browns purchased the property, they relied on the recorded drain field easements which specifically defined the purpose and scope of the easements, and which purpose was carried out during nearly eight (8) years of continuous, open and notorious development and use of the properties for purposes of the drain field.

Each express easement contains the following language:

> " . . . 8. This easement and the rights and obligations herein shall run with the land and shall be binding upon and inure to the benefit of the parties and their heirs, successors and assigns."

There is a strong presumption in Washington that easements are appurtenant to some particular tract of land; personal easements (easements in gross), are not favored. *Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co.,* 102 Wn. 608, 173 P. 508 (1918); *Roggow v. Hagerty*, 27 Wn.App. 908, 621 P.2d 195 (1980); *Kemery v. Mylroie*, 8 Wn.App. 344, 506 P.2d 319 (Div. II 1973).

The Plaintiff's assertion that the easement is somehow personal, and does not run with the land, or become part of the realty, is without merit.

> "Easements appurtenant become part of the realty which they benefit. Unless limited by the terms of creation or transfer, appurtenant easements follow possession of the dominant estate through successive transfers. The rule applies even when the dominant estate is subdivided into parcels, with each parcel continuing to enjoy the use of the servient tenement."

Green v. Lupo, 32 Wn. App. 318, 323, 647 P.2d 51(1982) (citing *Clippinger v. Birge*, 14 Wn.App. 976, 547 P.2d 871 (Div. II 1976).

The ownership of the parcel is irrelevant, as a granted easement runs appurtenant to the land.

> "Express easements in land may be created by either grant or reservation. An easement "in gross" is one which benefits an individual, whether or not he owns another tract of land. If the prime beneficiary of the easement is another tract of land, regardless of who owns such tract, then the easement is "appurtenant."
>
> . . . An easement which by grant, reservation, or prescription is appurtenant to land is not a mere privilege to be enjoyed by the person to whom it is granted or by whom it is reserved. It passes by a deed of such person to his grantee and follows the land without any mention whatever."

Winsten v. Prichard, 23 Wn. App. 428, 430, 597 P.2d 415 (Div. II 1979) ((*citing* 2 Thompson on Real Property 321, at 57 (repl. 1961)).

When construing an instrument creating an easement, the court has a duty to ascertain and give effect to the intention of the parties. *Green v. Lupo* (1982) 32 Wash.App. 318, 321, 647 P.2d 51. The Cokeleys were entitled to create the easements and their intent is clear. The Cokeleys confirmed the easement on a number of occasions through their express actions. Once created, the easements created by the Cokeleys could only be modified or rescinded with express action, which has not occurred. The easement benefitting TPN 1100 runs with the land, and could not be altered absent an express writing, validly executed and recorded. No such recording has taken place.

B. THE DEED OF TRUST IS SUBORDINATE TO THE EASEMENT.

Sandy alleges the Deed of Trust wherein the Cokeleys granted Sandy a security interest in TPN 0400 and 0500 somehow defeats the express easement previously granted from TPN 0400 and TPN 0500 to TPN 1100. This assertion defies logic.

As a starting point, an owner can only convey what he or she owns. 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.

The Deed of Trust demanded by Sandy in conjunction with it loaning money to the Cokeleys had no effect on the drain field easements. The Deed of Trust states that the properties are "as is" and the trustee does not warrant or represent against any defects or encumbrances. CP 70.

As noted above, the Cokeleys knew the easement was a necessary component of the development of 1100. CP 91-95. Without the easement, the property was unbuildable. Even after executing the Deed of Trust, the Cokeleys sought to develop the lots separate and independent of each other, and worked diligently with the County in this regard. *Id.* In fact, while embroiled in an unrelated lawsuit over the property boundary for 1100, the Cokeleys continued to develop each of the parcels as

independent and stand-alone properties, thus confirming the need for the drain field easement. CP 87-89.

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. Sandy argues that, despite the absence of any express intent to do so, the Cokeleys "meant" to pledge as collateral the previously granted easements. Such a position is not supported by the record. Courts must strictly apply and interpret the Deeds of Trust Act in favor of the borrower. *Udall v. T.D. Escrow Services, Inc,* 159 Wash.2d 903, 916 154 P.3d 882 (2007). In this instance, the borrowers were the Cokeleys.

There is no evidence that the Cokeleys or Sandy sought to have the easement included in the negotiations, or conclusion, of their dealings. Further, making the leap requested by the Plaintiff is inconsistent with the objective of the Deed of Trust Act:

> "The Deed of Trust Act should be construed to further three basic objectives:
>
> (1) the nonjudicial foreclosure process should remain efficient and inexpensive; (2) the process should provide an adequate opportunity for interested parties to prevent

wrongful foreclosure; and (3) the process should promote the stability of land titles."

Schroeder v. Excelsior Management Group, LLC, 177 Wn.2d 94, 297 P.3d 677(2013).

Subsequent to the execution of the Deed of Trust, the Cokeleys continued to develop the property, realizing the easements were a necessary part of any development. CP 91-95. The drain field permits were first granted by the County in 2005. CP 87-89. The Cokeleys kept the permits active during the dispute with the adjacent landowner and built the drain field after the Supreme Court ruled in their favor in 2010. In fact, the permits were active when the Cokeleys sold the property to the Browns in 2012. CP 99.

Nothing within the DOT even suggests that the easements previously granted to TPN 1100 were affected by the Deed of Trust. The Deed of Trust (drafted by Sandy) specifically and clearly sets forth the property encumbered. The Court need not go beyond the four corners of the document to conclude the Deed of Trust wherein the Cokeleys granted Sandy a security interest in TPN 0400 and TPN 0500 encompassed only what was offered, and did not in any way affect TPN 1100. CP 50-53.

Washington is a "race notice" state, relying upon the timing of documents when determining real property interests. RCW 65.08.070. A properly recorded document imparts notice on the public. *Koch v. Swanson*, 4 Wn. App. 456, 458, 481 P.2d 915 (Div. III 1971). Subsequent purchasers take the property with notice of any recorded encumbrance. RCW 65.08.070. The legislative purpose in enacting RCW 65.08.070 was "to give greater stability to land titles, by authorizing prospective purchasers or encumbrancers to rely upon the title as disclosed by the record." *Adams v. Mignon* 197 Wash. 293, 298, 84 P.2d 1016 (1938). The recording of a "conveyance" is notice to subsequent purchasers of the interest which it creates. *Kendrick v. Davis*, 75 Wn.2d 456, 452 P.2d 222 (1969); *Strong v. Clark*, 56 Wn.2d 230, 352 P.2d 183 (1960).

At the time of granting the loan, and accepting the Deed of Trust, Sandy was fully aware of the recorded easements, including the drain field easements. Despite full knowledge of the easements, Sandy failed to make any provision for the easements within the Deed of Trust. This makes sense as the easement was not part of the realty that was pledged, having been conveyed to another parcel of property.

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed. RCW 64.04.010. In this instance, there is no dispute the

easements were properly executed and recorded. It is also well settled law that the recording of a document provides notice to the public. *Kosten v. Fleming*, 15 Wn.2d 523, 525, 131 P.2d 170(1942) (properly recorded deed is "record which is **notice to all the world** of the title of the real estate in that county.") (emphasis added). See also *Seymour v. Dufur*, 53 Wash 646, 649, 101 P. 220(1909).

Sandy had constructive, and likely actual, notice of the drain field easements recorded in 2005. If Sandy had conducted the most basic title search, or even taken a few minutes to review the records of the Thurston County Auditor, it would have confirmed the existence of the recorded easements.

Conversely, when the Browns purchased the property, they relied upon the recorded easements, the representations contained within the vast amount of governmental records, and the actions and intent of the parties, all affirming the existence of the drain field easements.

C. IN ADDITION TO THE EXPRESS DRAINFIELD EASEMENTS, THE BROWNS HAVE AN IMPLIED EASEMENT.

A quasi easement is established when one individual owns two separate properties and one portion of that person's property is burdened for the benefit of another portion of that person's property to the extent

that such benefit would be a legal easement if the properties were owned by different persons. *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954). The principle behind an easement implied from prior use is that the conveyance of the dominant estate should be accompanied by the advantages that were appurtenant to the estate prior to separation of the title. *Roe v Walsh*, 76 Wn. 148, 135 P 1031 (1913). Quasi easements are also known as "easements by implication." *Bushy v. Weldon*, 30 Wn.2d 266. 269, 191 P.2d 302(1948).

Implied Easements arise when (1) there has been **unity of title and subsequent separation**; (2) when there has been a **continuous "quasi easement"** existing for benefit of one part of the property to detriment of another part of the property during unity of title; and (3) where there is **certain degree of necessity** that a "quasi easement" exist after separation of the property. *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 668, 404 P.2d 770, 773 (1965); *Adams v. Cullen,* 44 Wn.2d 502, 505, 268 P.2d 451 (1954).

In this instance, both the underlying principle, and the three requisite elements necessary to establish an implied easement have been met.

Prior to granting the easements, the Cokeleys owned all 3 parcels. The sale to the Browns of 1100, gave rise to the subsequent separation necessary to meet the *first element*.

In this case, the record is clear that the Cokeleys continuously relied upon the easement, burdening lots 400 and 500 for the benefit of lot 1100. CP 87-89, 91-95 and 97-98. They executed and recorded easements for the drain field, and for nearly 8 years, developed and used the property continuously and consistently for that purpose. *Id.*

During unity of title, the Cokeleys used a portion of their property (lots 400 and 500, servient estate) for a drain field to benefit another parcel they owned, lot 1100 (dominant estate) which they sold to the Browns.

Starting in 2004, the Cokelelys developed site plans, installed the drain field and sought applicable developmental permits. *Id.* Their actions and the public record is proof that the Cokeleys intended for the easements and drain field on lots 400 and 500 to exist for the benefit of TPN 1100. Use of the easement was consistent, notorious, open and continuous until the separation of title with the sale to the Browns in December, 2012, thus the *second element* necessary to establish an implied easement is met.

Lastly, there is no dispute that the drain field easement is necessary, thus the *third element* is satisfied. The Browns cannot feasibly

develop the property without the easements. As the Cokeleys recognized, without the easements, the Brown property has little, if any, value.

"The degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. It is sufficient if full enjoyment of the property cannot be had without the easement, or if it materially adds to the value of the land." *Berlin v. Robbins*, 180 Wash, 176, 188, 38 P.2d 1047 (1934); *Bushy v. Weldon*, 30 Wn.2d 266, 270, 271, 191 P.2d 302 (1948)("necessity need not be strict necessity, but need only be a reasonable necessity. . .")

The Cokeleys knew 1100 could not be developed without the drain field easement; therefore, they spent considerable time and financial resources to ensure that the lot was buildable. CP 91-95. At a time when they owned all three parcels, they opted to encumber TPN 0400 and TPN 0500 for the benefit of TPN 1100.

"In determining whether the facts of a particular case bring it within the application of this rule, it is necessary to determine the extent of the use, the character, and the surroundings of the property, the relationship of the parts separated to each other, and **the reason for giving such construction to the conveyances as will make them effective according to what must have been the real intent of the parties**; the

foundation of the rule being that there shall be held to have been included in the conveyances all the rights and privileges which were incident and necessary to the reasonable enjoyment of the thing granted, practically in the same condition in which the entire property was received from the grantor". *Bailey v. Hennessey*, 112 Wash 45, 49, 191 P. 863 (1920).

The facts presented are virtually identical to those in the *Adams* case. In that instance, Adams sought to confirm the existence of a driveway easement burdening the Cullen property. Prior to either Adams or Cullen owning the property, the properties were owned by Cowan, who had, prior to conveying the properties to Adams and Cullen, established the easement Adams sought to confirm. The Supreme Court affirmed the trial court's ruling declaring that the easement existed, affirming the three factors to be considered when determining whether an implied easement has been established.

The Cokeleys' intent was clear. There is no doubt that the easements were created for a specific purpose, and intended to run with the land. This purpose is further evidenced by the Cokeleys continued development of the property after creating the easements. When the Browns purchased the property, they relied on the recorded easement, in addition to the express actions of the Cokeleys confirming the implied easement.

There was (1) unity of title and subsequent separation, (2) a continuous quasi easement existing for the benefit of one part of the property and to the detriment of the other and (3) necessity that the easement continue after separation of title. The Browns have an implied easement, in addition to the express easement created by the Cokeleys.

D. EQUITY DEMANDS THAT THE RELIEF SOUGHT BY SANDY BE DENIED

At the time Sandy demanded, and the Cokeleys granted, a Deed of Trust in TPN 0400 and TPN 0500, those parcels were the servient estate. Under the recording statute, the holder of a recorded security instrument takes subject to any prior encumbrance of which that holder has either actual or constructive notice. *Kim v. Lee,* 145 Wash. 2d 79, 86, 31 P.3d 665 (2001). The drain field easements for the benefit of TPN 1100 were such an encumbrance. That being said, the Cokeleys offered what they owned with respect to TPN 0400 and TPN 0500, which offering was made subject to the encumbrance.

If the trial court's decision is overturned, the Browns will be left with an unbuildable, and therefore virtually worthless, lot. This would be a harsh and unjust result given the fact the Browns relied upon the only recorded documents and other governmental records relating to their property in determining the easements were valid. Not that it is needed in

this case, but the "court equity power transcends the mechanical application of property rules. *Proctor v. Huntington*, 169 Wn.2d 491,501, 238 P.3d 1117 (2010).

The Browns did what they could do. The easements were recorded at the time the Browns purchased the property. At the time of their purchase, the Browns had no knowledge that Sandy, or anyone else, was claiming a property interest that would adversely affect the easements. Importantly, the Deed of Trust obtained by Sandy did not reference 1100, and thus there was nothing in the public record upon which the Browns could conclude the easements could be invalid.

Conversely, Sandy had the ability to force the Cokeleys to extinguish the easements. The easements were of public record, and the Cokeleys had been developing the property and continued to develop the properties, filing documents with the Court, that evidenced the use and development conditioned on the easements. Sandy could have demanded that the Cokeleys offer 1100 as security, or that the Cokeleys extinguish the easements, prior to lending funds. If desired at the time it negotiated the Deed of Trust, Sandy had the ability to ensure TPN 1100, and the easement were subjected to the provisions of the Deed of Trust. However,

neither the Cokeleys, nor Sandy, made any effort to do so. The Deed of Trust is non effective as to the easement of record.

E. THE BROWNS RESPECTFULLY REQUEST REASONABLE ATTORNEYS FEES

The Browns respectfully request reimbursement of their reasonable attorney fees and costs for being required to respond to this appeal. The Browns are entitled to and respectfully request an award of their reasonable attorney fees and costs on appeal in an amount to be determined.

V. CONCLUSION

Summary judgment was appropriate here because there was no dispute of material fact and the Browns were entitled to judgment as a matter of law based on the record.

For this reason and those reasons set forth above, the Browns respectfully ask the Court to affirm Judge Murphy's summary judgment ruling in favor of the Browns and dismiss Sandy's claims related to the drain field easement with prejudice. Additionally, the Browns respectfully ask the Court to award them their reasonable attorneys' fees.

Respectfully submitted this 30th day of March, 2015

C. SCOTT KEE, WSBA #28173
Attorneys for Respondent Brown

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

MELISSA SHUMWAY, being first duly sworn on oath, deposes and states:

That I am now and at all times herein mentioned was a citizen of the United States, a resident of the State of Washington, and over the age of eighteen (18) years and not a party to or interested in the above-entitled matter.

I certify that on the 30 day of March, 2015 I placed with ABC Legal Messengers, Inc. a true and correct copy the foregoing *Brief of Respondent* for delivery to counsel of record and to the Court of Appeals:

Matthew B. Edwards
Owens Davies, P.S.
1115 West Bay Dr. NW, Ste. 302
Olympia, WA 98502

Court of Appeals, Division II
950 Broadway, Ste. 300
Tacoma, WA 98402

DATED this 30 day of March, 2015.

Melissa Shumway

SIGNED AND SWORN to before me this 30 day of March, 2015, by Melissa Shumway.

NOTARY PUBLIC in and for the State of Washington, residing at Olympia.
My commission expires: 2016