No. 97236-2

SUPREME COURT
OF THE STATE OF WASHINGTON

ERIK J. MURPHY,

Respondent

v.

KEVIN B. HENDRICKSON and JANE DOE HENDRICKSON, et ux., et al.,

Appellant

ANSWER TO PETITION FOR REVIEW

Per E. Oscarsson, WSBA #14485
Beresford Booth PLLC
145 Third Avenue S., Suite 200
Edmonds, Washington 98020-3593
(425) 776-4100
pero@beresfordlaw.com
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

I. INTRODUCTION

Respondent, Erik J. Murphy ("Murphy"), requests that the Court deny the Petition for Review filed by Petitioner, Kevin B. Hendrickson ("Hendrickson") on the grounds that none of the considerations governing acceptance of review set forth in RAP 13.4(b) apply in this case and the Petition for Review is based, in part, on a misstatement of the record.

II. ARGUMENT

A. None of the considerations governing acceptance of review set forth in RAP 13.4(b) apply in this case.

RAP 13.1(a) provides that the only method of seeking review by this Court of a decision of the Court of Appeals is discretionary review. RAP 13.4(a) provides that the method for seeking discretionary review by this Court is a petition for review. RAP 13.4(b) provides:

> 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 a published 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.

The word "only" is defined as "exclusively" or "solely". Webster's Third New International Dictionary (G. & C. Merriam Co., 1961) at 1577. Consequently, the use of the word "only" in the introductory clause of RAP 13.4(b) indicates that the list that follows is exclusive. The word "or" is defined as, "A disjunctive particle used to express an alternative or to give a choice of one among two or more things." Black's Law Dictionary, Sixth Edition (West Publishing Co., 1990) at 1095. Use of the word "or" after RAP 13.4(b)(1), (2) and (3) indicates that any one (1) of the four (4) considerations set forth in RAP 13.4(b) is sufficient to permit the Court to accept a petition for review. However, in this case, none of the four (4) considerations will permit the Court to accept Hendrickson's Petition for Review.

B. The Court of Appeals' decision is not in conflict with a decision of the Supreme Court.

In Coast Storage Co. v. Schwartz, 55 Wn.2d 848, 351 P.2d 520 (1960), a property owner owned several tracts of adjoining real property, only one of which had access to a public street. The property owner sold a portion of two tracts in the interior of his property to a third party, retaining property on the opposite side of the sold tracts from the public street. The property owner reserved an ingress/egress easement over the

sold tracts in order to access the retained property. Subsequently, the property owner sold that retained property to another third party. As a result, the property owner no longer owned any property for which he needed access by way of the reserved easement. The purchaser of the retained property sued to quiet title to the reserved easement. The trial court granted the requested relief and the Court affirmed the trial court on the basis that there was no longer any reason or necessity for the owner of the reserved easement to travel to the property at the opposite end of the reserved easement.

It is clear from the Court's opinion that, at one time, the owner of the reserved easement had a reason to use the reserved easement to travel to the property at the opposite end of the easement; he owned the property. In the instant case, Hendrickson never had a reason or necessity to the use the portion of the easement at issue for ingress or egress because he never owned property at the end of the portion of the easement at issue and could never use the portion of the easement at issue for access to or from a public street.

Throughout the Petition for Review Hendrickson assumes the existence of an appurtenant easement in this case. This assumption is in conflict with Coast Storage, supra, in which the Court said, "An easement is a use interest, and to exist as an appurtenance to land, must serve some

beneficial use." Id at 853. Therefore, the beneficial use must be established before the easement can be an appurtenance to land. Despite numerous opportunities before the trial court and the Court of Appeals to establish his beneficial use of the portion of the easement at issue, Hendrickson failed to establish any beneficial use. As a result, the portion of the easement at issue in this case is not appurtenant to Hendrickson's real property.

The decision of the trial court in this case, and affirmed by the Court of Appeals, is consistent with the Court's decision in Coast Storage, supra. Hendrickson has not cited any other Supreme Court cases with which the Court of Appeals' decision in this case is allegedly in conflict. The consideration set forth in RAP 13.4(b)(1) has not been satisfied and does not provide a basis for acceptance by this Court of Hendrickson's Petition for Review.

C. The Court of Appeals' decision is not in conflict with a published decision of the Court of Appeals.

The only case cited by Hendrickson in support of his argument that the decision of the Court of Appeals in the instant case is in conflict with a published opinion of the Court of Appeals, Hanna v. Margitan, 193 Wn.App. 596, 373 P.3d 300 (2016), is clearly distinguishable from the instant case. Hanna involved easements that were useable for their

intended purpose. In the instant case, the portion of the easement at issue was never useable by Hendrickson for the purpose of ingress to or egress from his property. Hanna did not involve termination of an easement due to the lack of beneficial use to the property allegedly benefited by the easement.

In any event, Hendrickson has failed to provide any legal authority that any Court of Appeals decision would govern this case when the Court of Appeals' decision in this case is consistent with the Court's decision in Coast Storage, which predates the cited Court of Appeals decision by fifty six (56) years. "A decision by [the Washington Supreme Court] is binding on all lower courts in the state. When the Court of Appeals fails to follow directly controlling authority by this court, it errs." 1000 Virginia Limited Partnership v. Vertecs Corporation, 158 Wn.2d 566, 578, 143 P.3d 423 (2006). Coast Storage would have bound the Court of Appeals in Hanna. However, the Court of Appeals must not have considered Coast Storage to be applicable to the issues before it because the Court of Appeals' opinion in Hanna does not make any reference to Coast Storage.

The consideration set forth in RAP 13.4(b)(2) has not been satisfied and does not provide a basis for acceptance by this Court of Hendrickson's Petition for Review.

D. This case does not involve a significant question of law under the Constitution of the State of Washington or the United States.

Hendrickson argues that the Court of Appeals' decision in this case resulted in a governmental taking of private property in violation of the Constitution of the State of Washington and the United States. Hendrickson cites Manufactured Housing Communities of Washington v. State, 142 Wn.2d 347, 13 P.3d 183 (2000), Thompson v. Consolidated Gas Utilities Corporation, 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510 (1937), City of Cincinnati v. Vester, 281 U.S. 439, 50 S.Ct. 360, 74 L.Ed. 950 (1930), Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 25 S.Ct. 251, 49 L.Ed. 462 (1905), Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369 (1896), Chicago, B & Q.R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), Sweet v. Rechel, 159 U.S. 380, 16 S.Ct. 43, 40 L.Ed. 188 (1895), and United States v. Welch, 217 U.S. 333, 30 S.Ct. 527, 54 L.Ed. 787 (1910), in support of his argument.

Madisonville Traction Co., supra, involved condemnation of real property by a railroad company pursuant to a state statute relating to condemnation of lands, although the issue before the U.S. Supreme Court was the ability to remove the state court action to a federal court. Each of the other cases cited by Hendrickson involve alleged takings by a city

government, state legislature, state regulatory agency, or the federal government by legislation, regulatory action, or condemnation. None of the cases cited by Hendrickson in support of his argument involve a court, at the trial court level or the appellate court level, rendering a decision in a quiet title dispute between private individuals and that decision being the equivalent of a governmental taking of property. The instant case involves only a quiet title dispute between private individuals.

The consideration set forth in RAP 13.4(b)(3) has not been satisfied and does not provide a basis for acceptance by this Court of Hendrickson's Petition for Review.

E. This case does not involve an issue of substantial public interest that should be determined by the Supreme Court.

Hendrickson's entire argument that the consideration for review under RAP 13.4(b)(4) has been satisfied is based on a misstatement of the record in this case. Hendrickson's first issue presented for review is premised on the same misstatement of the record. As a result, Hendrickson's first issue presented for review does not require any decision by this Court.

Hendrickson argues that Murphy modified the applicable easement on his property without notice and suggests that this was done

"surreptitiously" by filing a modification in the county recorder's office. This is a blatant misstatement of the record that was before the trial court as well as the Court of Appeals and contradicts the opinion of the Court of Appeals. Hendrickson argues a parade of horribles that will result from this alleged action by Murphy.

The record before the trial court and the Court of Appeals clearly reflected that Dennis Delahunt, Trustee of The Robert M. Ryan Living Trust, was the plaintiff in the quiet title action before the trial court that was commenced in 2017. The trust owned the property affected by the portion of the easement at issue in this case. Delahunt was the plaintiff through the trial court's decisions granting summary judgment in his favor and denying Hendrickson's motion for reconsideration. When Hendrickson appealed to the Court of Appeals, Delahunt was the respondent until after the briefing schedule before the Court of Appeals had been completed. After the briefing schedule was completed in 2018, the trust sold the subject property to Murphy and he was substituted for Delahunt as the respondent before the Court of Appeals pursuant to a motion for substitution granted by the Court of Appeals.

The record before the trial court and the Court of Appeals clearly reflected that a boundary line adjustment affecting the relationship between the end of the easement at issue in this case and the west

boundary of what is now Murphy's property was completed in 1994, some twenty-four (24) years before Murphy acquired the property. The same document in the record reflecting the year in which the boundary line adjustment occurred also reflects that the boundary line adjustment was approved by the City of Woodway Planning Commission after a public hearing and that the parties to the boundary line adjustment were not Murphy, Delahunt, or The Robert M. Ryan Living Trust. Contrary to the implication of Hendrickson's Petition for Review, there was no surreptitious filing of a modification of an easement in the county recorder's office. Consequently, Hendrickson's speculation about the parade of horribles that will ensue is misplaced, should not be considered by the Court and does not support acceptance of the Petition for Review by this Court.

The consideration set forth in RAP 13.4(b)(4) has not been satisfied and does not provide a basis for acceptance by this Court of the Petition for Review.

III. CONCLUSION

Hendrickson has failed to satisfy any of the considerations set forth in RAP 13.4(b) governing acceptance of a petition for review. Since the four considerations set forth in RAP 13.4(b) are the only bases on which the Court may accept a Petition for Review, and since none of

the four (4) considerations applies in this case, the Court should reject Hendrickson's Petition for Review.

RESPECTFULLY SUBMITTED this 21st day of June, 2019.

BERESFORD BOOTH PLLC

By Per E. Oscarsson
Per E. Oscarsson, WSBA #14485
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned, hereby declares under penalty of perjury of the laws of the State of Washington, that on this day, she caused to be served a true and correct copy of the foregoing document to be delivered on the following individuals:

Joseph Militello
1600 N.E. 47th St., Apt. 17
Seattle, WA 98105
Attorneys for Kevin B. Hendrickson and Jane Doe Hendrickson,
et ux. and et al., Appellant

Signed this 21st day of June, 2019, at Edmonds, Washington.

Jennifer R. Takamoto, Paralegal

BERESFORD BOOTH PLLC

June 21, 2019 - 2:00 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97236-2
Appellate Court Case Title:	Erik J. Murphy v. Kevin Hendrickson, et ux., et al.
Superior Court Case Number:	17-2-05268-8

The following documents have been uploaded:

- 972362_Answer_Reply_20190621135856SC581151_6825.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- militelloj2002@yahoo.com
- militj@uw.edu

Comments:

Sender Name: Per Oscarsson - Email: pero@beresfordlaw.com
Address:
145 3RD AVE S STE 200
EDMONDS, WA, 98020-3593
Phone: 425-776-4100

Note: The Filing Id is 20190621135856SC581151