No. 99148-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 79758-1-I (consolidated with No. 79850-2-I)

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

MAX HURLBUT and HUEIH-HUEIH HURLBUT,

Petitioners,

v.

JAMES M. and JONI J. CRINES,

Respondents.

RESPONDENTS CRINES' ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS

James M. and Joni J. Crines ask this Court to deny review of the decision designated in Part II of this answer.

II. DECISION

The Court of Appeals decision No. 79758-1-1, attached as Appendix A to Appellants' Petition for Review, which reversed the superior court and remanded for modification of the findings and conclusions consistent with its opinion.

III. INTRODUCTION

The decision of the Court of Appeals is not in conflict with any Supreme Court or Court of Appeals decision and does not involve an unsettled issue of substantial public interest. Instead, the decision is entirely consistent with the settled tenets of the law of easements. Relying solely on cases dealing with contracts, rather than easements, Appellants argue that an easement is analogous to a conditional sales contract. Appellants are wrong. This Court ought to reject the Appellants' tortured argument and deny their petition for review.

IV. COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Is the Court of Appeals decision in conflict with a decision of the Supreme Court or conflict with a published decision of the Court of Appeals?

2. Is the Court of Appeals decision "in conflict" with *Ross v. Harding*, 64 Wn.2d 231, 391 P.2d 526 (1964), a case dealing with a conditional sales contract rather than an easement?

3. Was there an oral modification of the easement?

4. Is the Court of Appeals' refusal to sanction oral modification of appurtenant perpetual easements containing a term requiring that any modification be in writing in conflict with decisions of the Supreme Court or Court of Appeals?

5. Can an easement be terminated in the absence of an explicit termination clause?

6. Does the Court of Appeals decision involve an issue of substantial public interest that should be determined by the Supreme Court?

V. STATEMENT OF THE CASE

The relevant facts are described in the decision of the Court of Appeals. Relevant facts, including provisions of the Easement at issue, will, in the main, be referenced in the body of the argument. There are, however, two of the Appellants' factual assertions that are patently false, which must be addressed at the outset.

Appellants brazenly assert: (1) that Respondent Joni Crines "actually agreed that the Hurlbuts had the right to terminate the Easement;" and, (2) that "[t]here is no dispute that there was a verbal modification to the Easement's Cost Sharing Provision under which the parties agreed that the Crines and Wynkoops would be solely responsible to pay for all annual maintenance costs...." Petition for Review, p. 4, p. 6. Neither of these assertions are true, or even arguable.

Based upon the following colloquy during the cross-examination of Joni Crines, Appellants argue that Ms. Crines agreed that the Hurlbuts have the right to terminate the Easement:

> Question by Appellants' counsel: But did you disagree with [Max Hurlbut] that your right to use [the Lakefront Property] was conditioned upon you following reasonable rules and paying your fair share, did you ever disagree with that?

Answer by Joni Crines: I agreed.

VRP 241.

Counsel did not ask Ms. Crines if the Hurlbuts have the right to terminate the Easement, only whether use of the property is conditioned on following reasonable rules and paying one's fair share of maintenance expenses. As the Court of Appeals points out, these are two very different questions. To suggest otherwise is disingenuous, but consistent with the sleight of hand engaged in by Appellants throughout their petition.

In a similar vein, citing the trial court findings of fact stating that Max Hurlbut "expected" the Crineses and the Wynkoops would pay all of the maintenance costs and that "[t]he Crines were aware of M. Hurlbut's expectation and belief, and never objected or otherwise responded to his communication on this issue," Appellants disingenuously argue there is no dispute as to a verbal modification of the Easement.

The cited findings of fact state nothing of the kind. The cited findings do not indicate there was an agreement to amend the Easement. Instead, the cited findings state that M. Hurlbut "expected" that the Crineses (and the Wynkoops) would pay all maintenance costs for ten years and

informed the Crineses (and Wynkoops) of his expectations; that M. Hurlbut's expectations were not put into writing; and that the Crineses never objected or otherwise responded to M. Hurlbut's communications on this issue. CP 152-153. The trial court did not find that the Easement had been orally modified. Instead, the trial court concluded that, based upon M. Hurlbut's reliance on his own expectations and the theory of unjust enrichment, the Crineses would have to pay more than the portion allotted under the Easement for a period of time going forward. The Court of Appeals rejected these theories.[1] No court has found or concluded that there was an agreed modification of the easement. That did not happen.

The fact that the Crineses did not respond to M. Hurlbut is neither here nor there legally. The Crineses were under no obligation to respond to M. Hurlbut's "expectations." Further, the Crineses did immediately protest the assessments the first time M. Hurlbut attempted to assess them more than their "fair share" of the maintenance costs (and every time thereafter). VRP 263-65; Trial Exhibit 1. The Crineses clearly, unequivocally rejected

[1] The trial court found that Hurlbut relied upon his own representation and that "[t]he Crines would be unjustly enriched if they are not obligated to pay an additional obligation towards the maintenance costs" for the same number of years that M. Hurlbut provided such services for free to all the Owners. CP 153. The Court of Appeals rejected the trial court's reliance / unjust enrichment theories and the Appellants do not argue that either theory is applicable in their petition.

M. Hurlbut's expectation that they would pay more than their allotted share of the costs of maintaining the lakefront property. To suggest otherwise, to assert that there is no dispute but that the Crines agreed to modify the Easement so as to pay 100% of the maintenance costs going forward, is both patently false, and directly contrary to the trial court findings of fact upon which that assertion is based.

VI. ARGUMENT

A. The decision is not in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals.

The Appellants' attempt to create a "conflict" between an easement case and a conditional contract case. No such conflict exists.

1. An easement is not (merely) a contract.

Easements are more than a contract. "Like estates in land, they are property rights or interests." 17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 2.1, at 79 (1995). When easement rights are vested, they cannot be waived orally. *Gray v. McDonald*, 46 Wn.2d 574, 580, 283 P.2d 135 (1955) (citing *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123, P.2d 771 (1942); *King County v. Hagen*, 30 Wn.2d 847, 854, 194 P.2d 357 (1948)). An easement is an interest in land subject to the provisions of RCW

64.04.010, which requires that conveyances be accomplished by deed. *Ormiston v. Boast*, 68 Wn.2d 548, 550, 413 P.2d 969 (1966). An easement appurtenant is an irrevocable interest in land. *Bakke v. Columbia Vly. Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956). An easement appurtenant passes to successors in interest by the conveyance of the property to which it is appurtenant regardless of whether it is specifically mentioned in the instrument of transfer. *Loose v. Locke*, 25 Wn.2d 599, 603, 171 P.2d 849 (1946); *Cowan v. Gladder*, 120 Wash. 144, 145, 206 P. 923 (1922).

2. In the absence of a termination clause, an easement is not terminable.

"Termination of easements is not favored . . . and an easement can be extinguished only in some mode recognized by law." 1 Wash. Real Property Deskbook, sec. 10.6(2), at 10-27 (3d ed. 1997) (citing 28 C.J.S. Easements sec.52 (1941)). "The owner of a servient estate . . . may not, by his or her own volition, terminate or abridge an easement." *Id.* (citing *King County v. Hagen*, 30 Wn.2d 847, 194 P.2d 357 (1948)). "Unless the instrument that creates the easement so provides, an easement may not be terminated without the consent of the owner of the easement." *Id.* (citing *Cowan v. Gladder*, 120 Wash. 144, 206 P. 923 (1922)).

The Easement at issue in the present case is appurtenant and perpetual:

> Binding Effect. The burdens of this Easement shall run with the Grantors Property and Grantees Property, shall benefit the Grantees Property and shall be binding upon and inure to the benefit of the heirs, executors, administrators, personal representatives, transferees, or successors in interest or assigns of the Grantors and Grantees.

CP 109 (*Exhibit 25, ¶7*).

The Easement provides that use of grantors property is "conditioned upon the Owners paying their fair share of the costs of maintaining the Amenities and the Owners or tenants of the Owners obeying the generally applicable rules of use of the Amenities...." CP 109 (*Exhibit 25, ¶ 2*).

The Easement goes on to provide that delinquent assessments become a lien on the benefited property and might be foreclosed in the usual manner. CP 109 (*Exhibit 25, ¶¶ 3.1, 3.10*). There is no provision for termination of the Easement for nonpayment of assessments.

The Easement also prescribes "rules for use" that include scheduling, clean-up, and safety rules. CP 109 (*Exhibit 25, ¶ 5*). The clean-up rule provides that users are financially responsible for any damage they cause. The safety rule provides that "anyone violating these and or commonsense rules of safety and behavior shall be immediately removed."

CP 109 (*Exhibit 25, ¶ 5.3*). Clearly, the grantor wished to retain some control over the burdened property. The grantor did not provide that the Easement could be terminated, however.

Appellant M. Hurlbut drafted the Easement. VRP 17 12/04/18) (CP 109, Tr. Ex. 25), which must, therefore, be strictly construed against Hurlbut. *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 745, 844, P.2d 1006 (1993).

In *Central Christian Church v. Lennon*, 59 Wash. 425, 109 P. 1027 (1910), the easement provided as follows:

> ...if at any time any of the aforesaid conditions are violated in any way the party of the second part [owner of the benefitted parcel], his heir or assigns, shall forthwith and without action of suit **forfeit** all right to aforesaid described right of way and his or their interest, and all thereof in and to the same shall forthwith **revert** to and be vested in the parties of the first part [owner of the burdened parcel], their heirs and assigns.

Id., at 426 (emphasis added). Despite this language, the Court refused to extinguish the easement, finding that

> [t]he forfeiture clause in a deed must always be construed against the grantor, and nothing will be held cause for forfeiture unless it plainly appears to be such. In order to justify a forfeiture for the violation of the condition, the violation must be willful and substantial, not merely technical.

Id., at 427-28.

Unlike the easement at issue in *Central Christian Church*, the Easement created by Appellant M. Hurlbut in the present case does not contain a termination clause or words such as "termination," "extinguishment," "forfeiture," or "revert," anywhere in the document. Therefore, as a matter of law, the Easement in the present case is not terminable.

Appellants invite the Court to interpret the word "conditioned" contained in the Easement as a termination clause. Strictly construing this word – "conditioned" – against the Grantor, requires the Court to give it its most restricted meaning. In the absence of words clearly providing for termination / forfeiture, the word "conditioned," when construed against the Grantor cannot be "interpreted" to allow for the termination of the Easement, especially given the unfavored nature of termination in general. *See Edmonds v. Williams*, 54 Wn. App. 632, 636, 774 P.2d 1241 (1989) (Washington law does not favor termination of easements.).

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3. *Ross v. Harding* and the other contract cases cited by Appellants do not conflict with the decision.

As the Court will have noticed, the Appellants argue that "[t]his Court has already concluded, inconsistent with the Court of Appeals, that a **contract** is terminable where an express condition is breached." Petition for Review, p. 9 (emphasis added). The fallacy inherent in this statement, and the Appellants' argument generally, is that, according to Appellants, the easement is not an easement, but merely a contract, to be analyzed without reference to the law of easements. But easements are not merely contracts, they are irrevocable interests in land. The Crineses were not party to a contract with the Appellants; the Easement was created before the Crineses owned their property. Instead, they are successors in interest to a dominant estate of an appurtenant easement that passed to them by the conveyance of the property to which the easement is appurtenant. Analysis of their rights thereunder must be with reference to the law of easements.

Ross v. Harding, *supra*, the case the Appellants claim is in conflict with the Court of Appeals' decision in this case, is a case involving the interpretation of a "conditional sale contract." The analysis contained therein, including the language quoted in the Appellants' petition at page

11, is simply inapplicable to the present case. Conditional sale contracts and vested appurtenant easements are not interchangeable.

In *Ross* a conditional sale contract for purchase of a grocery store was specifically conditioned as follows: "It is specifically understood and agreed that this offer is made subject to the written consent of the lessor of the said building to assignment and/or renewal of the existing lease." *Id.* at 233. The lease was assigned or renewed by the administrator of the estate of an individual who had owned the building. Unfortunately, the administration of the estate had been discharged prior to assigning the lease. At the time of the purported assignment, the premises subject to the lease was the property of the decedent's heirs. The trial court found that the assignment was "null and void from its inception." *Id.* at 235. The Supreme Court agreed. At the outset of the opinion, the *Ross* Court stated that "[the litigants'] 'legal rights' must be determination by a consideration of the law of **contracts** and specifically by the application of 'interpretive rules which are extremely subtle and artificial.'" *Id.* at 232 (emphasis added). *Ross* is not an easement case. It is a conditional contract case. Respondents do not dispute that conditional contracts have conditions. *Ross* is good law as far as it goes. It has no application to the interpretation of an appurtenant

easement and therefore cannot conflict with the Court of Appeals decision in this case.

The Appellants' argument that "[n]either Crines nor the Court of Appeals has (sic) argued that the pertinent language in the Easement is anything but a 'condition subsequent'" is disingenuous. See Petition, p. 11. The Appellants argue that the "pertinent language" is a "condition subsequent" for the first time in this Petition. The Respondents and Court of Appeals did not argue the opposite previously because Appellants have never used the term "condition subsequent" in their prior briefing. Appellants' argument has always been, and continues to be, a moving target.

Appellants' reliance on *Akasu v. Power*, 91 N.E.2d 224 (Mass. 1950), is similarly misplaced. *Akasu* appears to be the only case extant wherein a court has terminated an easement in the absence of a clear termination clause. Obliviously, a 70-year-old aberration from a state across the country is not controlling, or even marginally persuasive, given Washington's strong aversion to terminating easements. The rule that termination clauses are always construed against the grantor is not addressed in *Akasu*, and apparently does not apply in Massachusetts.

Additionally, the owner of the burdened parcel at the time of the suit in *Akasu*, was not the drafter of the lease, but a subsequent purchaser. Therefore, if Massachusetts has a rule providing that documents are construed against the drafter, it was not applied. Interestingly, *Akasu* quotes the language from *Pinkum v. Eau Clare*, 51 N.W. 550 (1882), quoted by Appellants at page 19 of the Petition. However, unlike the *Akasu* easement, the easement in *Pinkum* has a clear and unequivocal termination clause.[2] The reasoning in *Akasu* is sloppy. Under Washington law, the easement at issue in that case would not have been terminated.

4. The Respondents did not agree that the easement could be terminated.

Based upon the following colloquy during the cross-examination of Joni Crines, the Hurlbuts argue that she agreed that the Hurlbuts have the right to terminate the Easement:

> Question by Hurlbut's counsel: But did you disagree with [Max Hurlbut] that your right to use [the Lakefront Property] was conditioned upon you following reasonable rules and paying your fair share, did you ever disagree with that?
>
> Answer by Joni Crines: I agreed.

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[2] "Provided always, and these presents are upon the express condition, that if at any time the above-mentioned contemplated work shall cease to be maintained and operated for the purposes contemplated, required, and authorized by said several legislative acts, the covenants, agreements, and grants herein contained, and these presents, **shall cease and become null and void for every purpose whatsoever**." *Id.* (emphasis added).

VRP 241.

Counsel clearly did not ask Ms. Crines if the Hurlbuts have the right to terminate the Easement, only whether use of the property is conditioned on following reasonable rules and paying one's fair share of maintenance expenses. As demonstrated above, these are very different questions. To suggest otherwise is disingenuous. Further, the interpretation of the Easement is a question of law for the Court, not a matter that might be "admitted" by a litigant on cross-examination.

5. The easement was not orally modified.

Citing the trial court findings of fact to the effect that Max Hurlbut "expected" the Crines and the Wynkoops would pay all of the maintenance costs (CP 216, ¶ 19) and that "[t]he Crines were aware of M. Hurlbut's expectation and did not object or otherwise responded to the communications on this issue," (CP 217, ¶ 17) the Appellants argue "[t]here is no dispute that there was a verbal modification to the Easement's Cost Sharing Provision under which the parties agreed that the Crines and Wynkoops would be solely responsible to pay for the annual maintenance costs ...." Petition, p. 6.

The cited findings of fact say nothing of the kind. The cited findings of fact do not indicate there was an agreement, express or otherwise, to amend the Easement. Instead, the cited findings of fact explicitly state that there was no written amendment of the Easement signed by the parties to reflect M. Hurlbut's unilateral expectation: "...this expectation was not put into writing and signed by the Crineses and/or the Wynkoops." CP 216, ¶ 19. The fact that the Crineses did not respond to M. Hurlbut's expression of his expectations is frankly neither here nor there legally. The Crineses were under no obligation to respond to M. Hurlbut's "expectations." Further, the Crineses did immediately protest the Hurlbuts' assessments the first time M. Hurlbut attempted to assess them more than their fair 36.36% share of the maintenance costs. VRP 263-65; Trial Exhibit 1. The Crineses clearly, unequivocally rejected M. Hurlbut's expectation that they would pay more than their allotted share of the costs of maintaining the Lakefront Property.

As referenced above, the trial court found that the Easement was never amended to reflect M. Hurlbut's expectations that the Crines and Wynkoops would take over 100% of the costs of maintaining the Lakefront Property. CP 216, ¶ 19.

The Easement provides that the costs of maintenance "shall be borne proportionately between all of the Owners, i.e. based upon the number of lots respectively owned." Trial Exhibit 25, ¶ 3.

The Easement also requires that any and all amendments thereto be in writing and signed by the parties:

> Amendments. It is hereby mutually agreed and understood that any additions, variation, or modification to this easement shall be void and ineffective unless in writing and signed by the parties hereto or their successors in interest.

Trial Exhibit 25, ¶ 9. The trial court explicitly found that no such amendment had occurred. VRP 216, ¶ 19.

However, the Appellants, relying on cases dealing with conditional contracts, rather than easements, argue that the Easement can be orally amended despite the prohibition contained therein. As indicated above, the Crineses and the trial court both reject the Hurlbut's contention that any agreement, including an oral agreement, to amend the Easement occurred. Further, the Appellants are simply wrong in contending that an easement containing a requirement that it can only be amended by the written agreement of all parties is subject to oral amendment.

Easements are more than a contract. "Like estates in land, they are property rights or interests." 17 WILLIAM B. STOEBUCK,

WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 2.1, at 79 (1995). When easement rights are vested, they cannot be waived orally. *Gray v. McDonald*, 46 Wn.2d 574, 580, 283 P.2d 135 (1955) (citing *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123, P.2d 771 (1942); *King County v. Hagen*, 30 Wn.2d 847, 854, 194 P.2d 357 (1948)).

The cases cited by Appellants in support of their argument that the Easement is subject to oral modification despite the clear prohibition in the Easement are all inapposite. None concern an easement. *Richie v. State*, 39 Wash. 95, 81 P. 79 (1905), involves a construction contract. *Haley v. Brady*, 17 Wn.2d 775, 137 P.2d 505 (1943), involves written and oral construction contracts. *Davis v. Altose*, 35 Wn.2d 807, 215 P.2d 705 (1950), involves a construction contract. *Henderson v. Bardahl In'l Corp.*, 72 Wn.2d 109, 431 P.2d 961 (1967), involves a commissioned sales contract. *Kelly Springfield Tire Co. v. Faulkner*, 191 Wn. 549, 71 P.2d 382 (1937), involves a guarantee. *Pacific Northwest Group A v. Pizza Blends, Inc*, 90 Wn. App. 273, 951 P.2d 826 (1998), involves a holdover provision in a lease. If this were a contract case, Appellants would have a point. Appellants can point to no case wherein a vested appurtenant easement was allowed to be orally modified.

B. The erroneous application of *Ross v. Harding* to this case would not be in the public interest.

Applying the reasoning expressed in a case involving a conditional sales contract to a case involving the interpretation of a vested perpetual appurtenant easement is only in the public interest if the public is interested in absolute chaos. The terms "running with the land," "perpetual," and the like would be rendered meaningless. "Property" law would be superfluous if deeds, conveyances, and property interests are simply contracts.

Applying conditional sale contract (*Ross*), a sloppy, old, one-off, and incorrectly decided case from Massachusetts (*Akasu)*, and a case involving an easement with a clear termination clause (*Pinkum*) to overturn a firmly rooted tenant of Washington property law would not be in the public interest.

VII. CONCLUSION

Appellants' petition for review ought to be denied.

DATED this 23rd day of November 2020.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the 23rd day of November 2020, I electronically filed Respondents Crines' *Answer to Petition for Review* with the Washington State Supreme Court, using the Washington State Supreme Court's Secure Portal Electronic Filing System which will send notification and an electronic copy to the party listed below:

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