No. 89925-8

SUPREME COURT OF
THE STATE OF WASHINGTON

NO. 69644-1
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ERIK D. ENSBERG

Plaintiff – Appellant,

v.

JASON D. NELSON and FRANCINE E. NELSON

Defendants – Respondents

ON APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
(Hon. Judge Janice E. Ellis)

APPELLANT'S RESPONSE TO RESPONDENTS' PETITION FOR REVIEW

David C. Hammermaster, WSBA #22267
1207 Main Street
Sumner, WA 98390
253-863-5115
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IDENTITY OF RESPONDENT

Respondent, Erik D. Ensberg, was the Plaintiff at trial and the Appellant before the Court of Appeals (as also referenced herein).

COURT OF APPEALS DECISION

Nelson's statement regarding the Court of Appeals decision is accurate.

ISSUES PRESENTED FOR REVIEW

1. Respondent, Nelson, has identified, as his first issue, the question of whether Ensberg failed to provide marketable title to the real property in question. The Appellant, Ensberg, will respond to that specific issue.

2. The Respondent, Nelson, has raised, as his second issue, the question of whether a purchaser has a "duty to investigate." The Appellant, Ensberg, will report to that issue.

3. Should this Court award attorney's fess to the Appellant, Ensberg?

STATEMENT OF THE CASE

Appellant (Ensberg) generally adopts Respondent's (Nelson) statement of the case as set forth in IV of Respondent's Petition for Review with some exceptions. It should be noted that when Ensberg sold to Nelson, title insurance was purchased through First American Title and a preliminary report was issued to the parties. The preliminary report did not note, or raise as an exception to coverage, the judgment previously entered against the Key Bay Homeowner's Association, *et al* (hereinafter "HOA") CP at 17, 11.7-9.

It is further worth noting and clarifying that the preliminary title report issued by a completely different title insurance company in the attempted sale by Nelson to an unrelated third party first identified the judgment against the HOA as an exception to coverage and later reduced it to a "Note." CP at 18, 11.2-5.

As quoted by the Court of Appeals, the "Note" in relevant portions said:

> THE JUDGMENT AGAINST THE KEY BANK HOMEOWNER'S ASSOCIATION, A WASHINGTON NONPROFIT CORPORATION (THE "ASSOCIATION"), HAS NOT ATTACHED TO THE TITLE TO THE LAND DESCRIBED IN SCHEDULE A HEREIN. IF, AFTER APPEAL, THE JUDGMENT ATTACHES TO THE

ASSOCIATION'S INTEREST, THE ASSOCIATION MAY LEVY ASSESSMENTS AGAINST EACH LOT TO RECOVER THE FUNDS OWED TO THE JUDGMENT CREDITOR. THIS NOTE PROVIDES NOTICE OF THE POTENTIAL FUTURE LIABILITY FOR SUCH ASSESSMENT(S).

Finally, it is important to know that neither Ensberg nor Nelson was aware of the existence of this judgment at the time of the sale. CP at 16, 11.18-20. However, both parties could have investigated the matter as property owners. Not only did Ensberg own the parcel he sold to Nelson but Nelson had purchased two (2) other lots within the same development and still owned one (1) of those lots at the time of his purchase of the Nelson parcel. CP at 15, 11.7-8 and RP at 72, 11.11-14. Furthermore, Nelson was friends with Jack Johnson, one of the other judgment debtors. RP at 33, 11.2-8. If anyone was in a better position to know of this judgment, it was Nelson.

ARGUMENT

I. THE COURT OF APPEALS DECISION IS CONSISTENT WITH THE SUPREME COURT'S DECISION IN *HEBB vs. SEVERSON.*

On the question of marketable title, the word "title" is as important as the word "marketable." Nelson is attempting to persuade this Court that any negative influence on the value of the property, no

matter how unrelated to title, if not excepted on the deed, will result in a breach of the Statutory Warranty Deed. That is not the law in *Hebb* and for very good reasons.

Nelson continues to misapply *Hebb v. Severson,* 32 Wn. 2d 159, 201 P.2d 156 (1948), by stretching it to propositions it never purports to make. In *Hebb,* the Court determined that the title was not marketable because of a direct, existing defect on the title, to-wit, the house existed within the five-foot set-back restriction. Nelson, in his Petition to this Court, quotes only small portions of the *Hebb* decision to suit his argument and ignores the larger picture of that case and then directs this Court to focus more on the Court of Appeals decision *Shinn v. Thrust IV, Inc.* 56 Wn. App. 827, 786 P.2d 286 (1990).

Nelson, in his petition for review, also mischaracterizes the Court of Appeals ruling in this case on the issue of marketable title. Nelson attempts to summarize the Court of Appeals ruling as one of simply inadequate evidence regarding the authority of the homeowner's association. In actuality, the Court of Appeals specifically emphasized the difference in the case at bar from the *Shinn* case where a known, present violation of a statute existed. In contrast to *Shinn*, the Court of

Appeals decided that a possible future assessment by a homeowner's association for an unknown amount that did not "'give rise to a reasonable question as to' the validity of title to the property," di not breach the warranty of marketability.

A better and more accurate analysis of *Hebb* is that 1) the existing violation in that case was the breach of a set-back regulation by an improvement on that real property, and 2) the fact that the title insurance company was willing to insure the property despite the flaw was not relevant to the question.

The court identified the defect as follows:

> Immediately following this information concerning the declaration of restrictions is a note stating that the title company's inspection of the premises disclosed a breach of one of these restrictions, in that the dwelling **house located on the lot involved** is less than five feet from the east side line of the premises.
> *Hebb v. Severson*, 32 Wn.2d 159, 165, 201 P.2d 156, 159, (1948) (emphasis added).

The Court then identifies the title insurance company's willingness to insure the identified restriction violation:

> The policy to issue will, however, affirmatively **insure against loss** or damage resulting from such violation and **will further affirmatively insure that neither said violation nor any future violation of said restrictions** will work a forfeiture or reversion of title to said premises.

Hebb v. Severson, 32 Wn.2d 159, 165, 201 P.2d 156, 159 (1948) (emphasis added).

The Court clearly explains that a defect to the title and thus a breach of the warranty deed cannot be made marketable by an insurance company's willingness to insure around the defect. The point being that the title insurance company does not make the rules and what they identify or do not identify does not define the law.

> Appellants' major assignment of error is that the trial court erred in decreeing that the appellants specifically perform their contract. In support of this assignment, numerous arguments are advanced, **but the one to which we shall address our attention and upon which we shall rest our decision** is that the title tendered into court by the respondents, though in form a warranty deed covenanting against encumbrances, **was in fact subject to the encumbrance, *inter alia,* of a *presently existing violation* of a protective restriction; that therefore the title was unmarketable; and that it was not made marketable by a showing of willingness on the part of a title insurance company to insure the appellants against loss incurred by them because of that encumbrance.**
> *Hebb v. Severson*, 32 Wn.2d *supra*, at 165-166. (emphasis added).

Hebb provides the clearest statement of breach of marketable title and breach of warranty against encumbrances. Both are present warranties that, if breached, must exist at the time of the transaction.

> A marketable title is one that is free from reasonable doubt and such as reasonably well informed and intelligent

purchasers, exercising ordinary business caution, would be willing to accept. *Cummings v. Dolan,* 52 Wash. 496, 100 Pac. 989, 132 Am. St. 986; *Somers Co. v. Pix,* 75 Wash. 233, 134 Pac. 932; *Moore v. Elliott,* 76 Wash. 520, 136 Pac. 849; *Robinson v. Steele,* 95 Wash. 154, 163 Pac. 486; *Jacobs v. Teachout,* 126 Wash. 569, 219 Pac. 38; *Empey v. Northwestern & Pac. Hypotheekbank,* 129 Wash. 392, 225 Pac. 226; *Moore v. Clarke,* 157 Wash. 573, 289 Pac. 520.
In discussing the meaning of the term "marketable title," this court said in *Moore v. Elliott, supra*:

A title to be marketable need not be perfect -- free from every possible technical criticism, but it must be reasonably safe; that is to say, such that a reasonably well informed and intelligent purchaser, exercising ordinary business caution, would be willing to accept.
The authorities hold that to render a title marketable it is only necessary that it shall be free from reasonable doubt, in other words, that a purchaser is not entitled to demand a title absolutely free from every possible technical suspicion, he can only demand such title as a reasonably well informed and intelligent purchaser acting upon business principles would be willing to accept. *Cummings v. Dolan,* 52 Wash. 496, 100 Pac. 989, 132 Am. St. 986.

In *Empey v. Northwestern & Pac. Hypotheekbank, supra,* we quoted approvingly the following statement from *Dobbs v. Norcross,* 24 N. J. Eq. 327, having reference to marketable title:
Every purchaser of land has a right to demand a title which shall put him in all reasonable security, and which shall protect him from anxiety, lest annoying, if not successful suits be brought against him, and probably take from him or his representatives, land upon which money was invested. **He should have a title which shall enable him not only to hold his land, but to hold it in peace**; and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value.

Hebb supra., at 166-167. (emphasis added).

The *Hebb* case is distinguishable from the case at bar as follows: (1) In *Hebb* it was a direct, present, and existing defect on the title to the real property in question, not on some other property; and (2) the focus was on the risk of the buyer losing his title, not some future risk of a monetary obligation due to his membership of an organization that has a judgment against it. That is why the Court in *Hebb* took time to define "encumbrance" because it has to be some lien or defect against the seller's title to the real property. [1]

> An "encumbrance" has been defined by this court to be any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistent with the passing of the fee; and, also, as a burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee. *Green v. Tidball,* 26 Wash. 338, 67 Pac. 84, 55 L.R.A. 879; *Linne v. Bredes,* 43 Wash. 540, 86 Pac. 858, 117 Am. St. 1068, 6 L.R.A. (N.S.) 707.
>
> *Hebb supra.*, at 167.

---

[1] The Appellant is unaware of any appellate decision where the Court has found a breach of marketable title without also finding a breach of the warranty against encumbrances.

In the case of *Shinn v. Thrust IV, Inc.* 56 Wn. App. 827, 847-848, 786 P.2d 285, 297 (1990) that Court opinion, again, does not contradict the opinion of the Court of Appeals in the case at bar. Although the *Shinn* case is complex, the essence of that case was a determination that there was an encumbrance on the property relating to the violation of a restriction on a Short Plat. In other words, something that directly related to the title of the property. In fact, the Court specifically commented on the question of breach of marketable title along these very lines of reasoning. That is, that any question regarding a marketable title must specifically relate to an encumbrance that does in fact affect the title in a significant and not fanciful way.

> With respect to legal doubts about title, a title is marketable so long as the doubt is not one which will cause the judicial mind to hesitate before deciding it; or, as otherwise characterized, a "real" and not "fanciful" doubt, ***or such a doubt or uncertainty about the title as will be sufficient to form the basis of litigation.***
> . . . Where there are known facts which cast legal doubt upon a title, so that the person holding it may be exposed to reasonable probability of litigation, the title is not marketable. *Flood v. Von Marcard*, 102 Wash. 140, 172 P. 884 (1918). (Italics ours.) Washington State Bar Ass'n, *Real Property Deskbook* § 34.11, at 34-12 (2d ed. 1986).
>
> *Shinn v. Thrust IV*, 56 Wn. App. 827, 847-848, 786 P.2d 285, 297 (1990) (emphasis added)

If this Court were to adopt the full breadth of Nelson's interpretation of *Hebb* and *Shinn*, then, to a purchaser, any annoyance, no matter how distant and unrelated to the real property in question, would become a legitimate claim of breach of the warranty of marketable title. A neighbor's dog barking, loud train horns at night, early risers mowing their lawn, would all, by Nelson's definition, be a breach of marketable title, if not properly excepted from the deed. *Hebb* does not stand for that proposition because those examples (as the situation in this case) is not an encumbrance on the title. That is not the law and, therefore, the Court of Appeals herein is entirely consistent with the *Hebb* decision.

II. THE DUTY TO PROVE A BREACH OF THE WARRANTY OF MARKETABLE TITLE RESTS UPON THE PARTY CLAIMING THE SAME.

It is the responsibility of Nelson to prove, by a preponderance of the evidence, that Ensberg has breached any of the warranties in the Statutory Warranty Deed, including the warranty against marketable title. Nelson has (in his Petition for Review) errantly argued that the Motion to Publish the Court of Appeals' decision has any merit or relevancy to the legal holding of the Court of Appeals. The issue of

whether a purchaser should rely on a title report for purposes of purchasing a property is not the issue before this Court. The fact that the title insurance company was willing to insure around the defect in the *Hebb, supra.*, case and the fact that one title insurance company (First American Title) did not identify the judgment against the homeowner's association as a defect in contrast to a second title insurance company in this case identifying it as an exception and then as a "note," proves exactly the point raised by Ensberg in his motion to the Court of Appeals to publish the decision. That is, title insurance companies do not make or decide law regarding a breach of warranties of title. Title insurance companies simply identify any particular item that poses as an unacceptable risk to them for purposes of insurance.

In one case, a title insurance company may be satisfied and not consider it a risk, or be willing to even insure around it. However, whether a title insurance company is willing to take such action or not, does not create law as to a breach of warranties of title. This Court, in the *Hebb* decision, makes that very point when it concluded that the title was "unmarketable; and that it was **not made marketable** by a showing of willingness on the part of **a title insurance company,** to insure the

appellants against loss incurred by them because of that encumbrance." *Hebb, supra.*, at 165-166.

In the case at bar, the arguments raised on motion to publish are not relevant to this petition. However, the Court of Appeals' decision consistently supports the *Hebb* decision that title insurance companies do not control or determine law. Appellate Courts make that determination and Trial Courts rule based upon Appellate Court decisions, not based upon what a title insurance company thinks is an acceptable risk. There is no inconsistency and the Court of Appeals' decision stands without need for additional review by the Supreme Court.

III. APPELLANT NELSON HEREBY REQUESTS AN AWARD OF REASONABLE ATTORNEY'S FEES AND EXPENSES PURSUANT TO RAP 18.1(j).

RAP 18.1(j) allows the responding party (Appellant Ensberg) an award of attorney's fees in the event the Supreme Court denies Nelson's petition for review. RAP 18.1(j) specifically grants reasonable attorney's fees and expenses in that case where the Supreme Court denies review and the Court of Appeals awarded attorney's fees and costs to the prevailing party.

In this case, the Court of Appeals did in fact award attorney's fees and costs to the prevailing party (Appellant Ensberg) and, therefore, should be granted attorney's fees herein, if the Supreme Court denies review.

CONCLUSION

The Supreme Court should deny Nelson's petition for review. RAP 13.4(b) governs the types of cases that will be subject to review and accepted by the Supreme Court. The Court of Appeals' decision is not in conflict with the decision of the Supreme Court. In fact, it affirms and further verifies the rule of law enunciated in the *Hebb, Id*, case. Furthermore, it does not conflict with any other Court of Appeals' decision, but simply applies the law on the warranty of marketable title to another very fact specific situation. Furthermore, this case does not involve any particular question of law under the constitution of the State of Washington or the United States. Finally, while this matter is a matter of public interest, the Court of Appeals' authority in amplifying and clarifying marketable title in light of the *Hebb* decision, is adequate and

does not require additional affirmation by the Supreme Court. Therefore, the Supreme Court should deny Nelson's Petition for Review.

RESPECTFULLY SUBMITTED this 13 day of March, 2014.

DAVID C. HAMMERMASTER
WSBA #22267
Attorney for Appellant Ensberg

OFFICE RECEPTIONIST, CLERK

From: Carolyn Kalista <carolyn@hammerlaw.org>
Sent: Thursday, March 13, 2014 4:17 PM
To: OFFICE RECEPTIONIST, CLERK; toddlawoffice@comcast.net
Cc: david Hammermaster
Subject: Re: Supreme Court #89925-8--Ensberg v. Nelson Court of Appeals #69644-1-I
Attachments: Response to Petition for Review.pdf; Proof of Service--Response.pdf

Attached please find Appellant's Response to Respondents' Petition for Review and Proof of Service with regard to the above-referenced matter.

Please file the same.

A copy of both documents is being sent to opposing counsel via US Mail as well as via e-mail by way of a copy of this e-mail.

Thank you!

On Mar 12, 2014, at 4:13 PM, OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV> wrote:

> The original can be filed by sending it U.S. mail to the Supreme Court or by scanning it and e-mailing a copy to this e-mail address.
> If you file by e-mail, please do not also send us a hard copy. The e-mailed copy will be considered the original. You do not need to send a copy to the Court of Appeals (they will just send it to us.)
> Service to opposing counsel can be by regular U.S. mail, or by e-mail if opposing counsel has agreed to that. Many people send it both ways, i.e., copy by U.S. mail and include them on the e-mail filing it in the Supreme Court. That works fine.
>
> **From:** Carolyn Kalista [mailto:carolyn@hammerlaw.org]
> **Sent:** Wednesday, March 12, 2014 3:57 PM
> **To:** Thomas, Lisa
> **Subject:** Supreme Court #89925-8--Ensberg v. Nelson Court of Appeals #69644-1-I
>
> Lisa Marie:
>
> Good afternoon. I am very new to this and hope you could help me. I have a response to file regarding the above-referenced matter and want to make sure I file and serve correctly.
> Do I need to have the original hard copy mailed or delivered to you at the Supreme Court for filing or just e-mail to you with request to file?
> Do I need to send a hard copy or e-mail copy to the Court of Appeals?
> Is service via ABC Legal Services necessary or is regular and e-mail to opposing counsel sufficient?
> Anything else I might be missing?

Your help will be greatly appreciated!

Carolyn Marie Kalista
Legal Assistant to
David C. Hammermaster
HAMMERMASTER LAW OFFICES, PLLC
1207 Main St.
Sumner, WA 98390

Ph: (253) 863-5115
Fax: (253) 863-8948

Carolyn Marie Kalista
Legal Assistant to
David C. Hammermaster
HAMMERMASTER LAW OFFICES, PLLC
1207 Main St.
Sumner, WA 98390

Ph: (253) 863-5115
Fax: (253) 863-8948

****The information contained in this e-mail message may be privileged, confidential and protected from disclosure. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited. If you think that you have received this e-mail message in error, please notify the sender via e-mail or telephone at 253.863.5115****