69644-1

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NO.: 69644-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

ERIK D. ENSBERG,

Appellant,

vs.

JASON D. NELSON and FRANCINE E. NELSON, husband and wife, and the marital community comprised thereof,

Respondents.

REPLY BRIEF OF APPELLANT

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STATEMENT OF FACTS

The Respondents reference additional facts for this Court of Appeals to which Petitioner largely does not dispute. However, there are a few facts that are significant, but inaccurate as described by the Respondents in Respondents' Brief.

First, Respondents assert that the would-be buyers of the property (buyers of Nelsons in their efforts to re-sell the property) believed in their "minds" that matters became worse when the title company modified the encumbrance as a note. See, Respondents' Brief at 3. In fact, the buyers did not testify at this trial and, therefore, what was in their minds is not known.

Secondly, the Respondents assert as an assumed, but unproven, fact that the Homeowner's Association had the right to assess a fee or charge against the individual lot owners in order to raise money to pay the judgment in question. See, Respondents' Brief at 5. This is a significant and important fact for which there is no evidence. That is, no testimony was ever provided, nor were the Association's by-laws, covenants or articles ever presented as evidence to the trial court which would establish such a right and authority of the Association. Therefore, it would be outside the scope of the trial court to conclude that an assessment could

occur or that it was even possible under the law. Such assumption lacks appropriate evidence.

ISSUES

1. Is the definition of "encumbrance" as broad as Respondents contend?

2. Is the issue of marketable title before this court and, if so, has Petitioner breached such warranty?

3. Do the Respondents misapply the concept of consideration when they assert that there was a failure of consideration to the promissory note?

4. Is there sufficient evidence to establish damages?

5. Are attorney's fees awardable to the Appellant or the Respondents?

ARGUMENT

I. RESPONDENTS DEFINE "ENCUMBRANCE" TOO BROADLY.

An encumbrance against title is not anything that may diminish the market value of the property. The Respondents would have this court believe that absolutely any matter, without regard to how tangentially related to the property, creates a violation of the warranty against encumbrances. This is not an accurate statement of law.

The Respondents cite *Hebb v. Severson*, 32 Wn.2d 159, 201 P.2d 156 (1948) as authority for their proposition. In the *Hebb* case, the parties

executed an earnest money agreement for a transaction to purchase real estate. The buyer refused to close on that transaction because of, among other things, three (3) items were identified in the title report as potential encumbrances. The three (3) items were 1) a right of easement granted to the City of Seattle to maintain a water main across the property, 2) the right of the public to make all necessary slope cuts or fills upon the property to conform to the street grade, and 3) an existing violation of a protective restriction affecting all lots where the owner was prohibited from erecting a building closer than five (5') feet from any side lot line. The court gave little regard to the first two (2) encumbrances as either having been abandoned or of insignificant consequence (i.e., a technical but not substantial violation), but the third item was held to be significant enough to constitute a breach of the warranty against encumbrance because it was a present violation of the restrictive covenant. *Id.*, at 162-63. It was a covenant that directly touched and concerned the subject real property. This is consistent with the definition of encumbrance as provided by that court and quoted by both parties in this case. However, Respondents ignore the ever-important requirement that an encumbrance must be "any right to, or interest in, land which may subsist in third persons, . . ." *Id.*, at 167.

The Respondents' interpretation of the law expands encumbrance too broadly. Most courts, in their treatment of warranty against encumbrances, attempt to narrow, not broaden, the definition. For example, in *Hoyt v. Rothe*, 95 Wash. 369, 163 P. 925 (1917), the court stated as follows with respect to the question of warranty against encumbrance:

> It is contended that the 0.57 of an acre is a public easement; that this easement constitutes a breach of the covenant against incumbrances. While some of the states still follow the rule that, unless there is an express exception in the deed, a public highway falls within the covenant against incumbrances, the weight of authority is to the contrary. The broader view that a public highway is impliedly exempted from the effect of the covenant is well sustained and conducive of better results.
> *Hoyt*, *supra.*, at 371.

It is well settled that there is no breach of the warranty of encumbrance, unless it effects the right or interest in the land. In *Williams v. Hewitt*, 57 Wash. 62, 106 P. 496 (1910), the court provided several definitions of a breach of the warranty against encumbrances in its analysis of whether there was a breach in that case. The most applicable and generic of those definitions was a quote from a Minnesota Supreme Court decision as follows:

> If the right or interest of the third person is such that the owner of the servient estate has not so complete and absolute an ownership and property in his land as he would have if the right or interest spoken of did not exist, his land is, in law, diminished in value and incumbered. (quoting *Mackey v. Harmon*, 34 Minn. 168, 24 N.W. 702).
> *Hewitt, supra.*, at 62.

See also, *Moore v. Gillingham*, 22 Wn.2d 655, 157 P.2d 598 (1945) (Warranty against encumbrance breached at the time title passed to the buyer due to outstanding property taxes owed); *Fagan v. Walters*, 115 Wash. 454, 197 P. 635 (1921) (An undisclosed easement was a breach of the warranty against encumbrance); and *Foley v. Smith*, 14 Wn.App. 285, 539 P.2d 874 (1975) (Breach of warranty based upon legitimate claim of superior ownership via a lawsuit for specific performance).

Respondents Nelsons' reference to a California decision, *O'Toole v. Kingsbury Court Owners Assn.*, 126 Cal.App. 4th 549 (2005), is not binding on this court and at best is misleading from the distinguishable facts to this case. In that case, the court was dealing with a Homeowner's Association connected to a condominium. There are specific condominium statutes in effect in the State of Washington as previously briefed. See, RCW 64.34.368. Second, in that case, there clearly was evidence that the Association had the right to assess a charge

against the homeowners to collect the judgment in question; and, third, if this is the proposed basis upon which a person would be violating a statutory warranty deed, it simply is bad law. It would be a far stretch from the present state of the law in Washington to impose a breach of the warranty against encumbrances for a judgment to which the seller was not a party even though the seller owned the subject real property during the time of that lawsuit. In sum, the California decision holds no value to the facts in this case.

If this court were to adopt the Respondents' definition of an encumbrance against title, it would expand it far beyond "any right to, or interest in, land." *Hebb*, *supra.*, at 167. For example, a rezone of the neighboring parcel from residential to commercial that includes an approval to operate a cement manufacturing plant may substantially reduce the value of the adjacent residential lot. Under Respondents' definition, this would be viewed as an encumbrance against title violative of a statutory warranty deed. Similarly, if a statutory warranty deed did not say, "except neighbors' loud, barking dogs," then the seller would be violating the warranty against encumbrance for transferring property that may potentially be reduced in value due to the neighbors' dogs. In other words, any negative element of neighbors and surrounding properties,

even though not technically creating a right to or interest in land, would be considered a violation against encumbrance based on Respondents' broad definition. The courts, historically, have attempted to limit, not expand, this definition. An encumbrance must in some way directly touch and concern the applicable property in the present. A judgment to which the seller was not a party and, therefore, received no legal notices and was in no way permitted to participate, is not an encumbrance against title.

II. THE ISSUE OF MARKETABLE TITLE IS NOT PROPERLY BEFORE THIS COURT AND WAS NOT BREACHED BY THE PETITIONER, IN ANY EVENT.

Petitioner did not breach the warranty of marketable title, an issue that was expressly argued and ruled upon by the trial court Judge. However, neither party appealed the trial court's decision when it held that Ensberg did not breach the warranty of marketable title. See, TR at 135 and CP at 35, ¶2.3. Respondents cite *Barber v. Peringer*, 75 Wn.App. 248, 877 P.2d 223 (1994), for the proposition that this court has authority to make a decision on any legal theory that is supported by the pleadings and the proof. The court in that case held that it has authority to follow the law even if it was "not argued in the trial court." *Id.*, at 254-55.

However, in the case at bar, the issue of marketable title was specifically argued at trial court and was expressly rejected. Neither party

appealed the trial court's ruling on that issue and, therefore, is not an issue properly on appeal. In the case at bar, the Respondents did not file a notice of appeal and, therefore, should not be permitted to raise an issue decided by the trial Judge at this late date.

Even if this court were to consider the arguments of the Respondents regarding the absence of marketable title, the same is not sustainable. *Hebb v. Severson*, *supra.*, at 166, provided a good explanation of marketable title.

> 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. [citations omitted]
>
> * * *
>
> 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, 501, 100 P. 989, 991, 132 Am.St.Rep. 986.

In the definitions provided above (as well as other cases in the State of Washington, the focus is on the title. The court always includes, as part of its definition, a caveat that the purchaser is not entitled to demand that title be absolutely free from every technical suspicion. In the case at bar, at best, a judgment against a Homeowner's Association that may (at some point in the future) result in an assessment imposed upon the homeowner is no more (arguably, much less) than a possible technical suspicion. It clearly is not a judgment or an encumbrance on the title itself as briefed in the opening brief of the Appellant.

III. THERE WAS NOT A FAILURE OF CONSIDERATION.

There was valuable and good consideration given between the parties. Respondents argue that there was a failure of consideration due to the alleged breach of one (1) or more of the warranties. The Respondents quote *Burton v. Dunn*, 55 Wn.2d 368, 347 P.2d 1065 (1960) in support of the claim. In that case, there was a promissory note signed by an alleged father of an unborn child promising to give the mother a certain amount of

money if she agreed to not contact him and/or "molest" him. The court found that there was a failure of consideration when she repeatedly contacted and harassed him at work.

In the case at bar, Ensberg has not breached the promissory note, in that Nelsons received real property. Nelsons failed to make any efforts to minimize their losses when they did not complete their one (1) attempted sale. The fact that the secondary title company raised a question (ultimately in the form of a "note") does not defeat the consideration exchanged between the parties only because one (1) potential buyer subjectively believed that the "note" referencing the judgment against the Homeowner's Association was a problem that could not be overcome. Therefore, as a matter of law, there was not a failure of consideration in this case.

IV. THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH DAMAGES.

Damages have not been proven with adequate certainty. An important case addressing an award of damages in a breach of encumbrance of a warranty deed is *Williams v. Hewitt*, 57 Wash. 62, 106 P. 496 (1910). In that case, there was a restrictive clause that restricted building on the property. The court ruled that such a restriction breaches the covenant against encumbrances.

> Where a right or interest exists in or upon the estate granted, and is in fact a part of it, detracting from the use, value, or possession of the estate, such as an easement, the incumbrance exists when the deed is made, and the amount which it diminishes the value of the estate may be determined at once. *Runnells v. Webber*, 59 Me. 488; *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 66 Pac. 97, 62 L.R.A. 763. Where the incumbrance consists of taxes or a mortgage, or is of such a nature that it can be computed, and the grantee can compel a release, he cannot recover beyond nominal damages until he has paid the debt. *Id.*, at 64.

In this case, there has been no evidence presented to this court showing the value of the property with and without the alleged encumbrance. There is a lack of definite evidence regarding what portion of this judgment, if any, would impact this particular lot (one of many lots) and, if so, at what point in the future would that occur? These issues raise speculative questions in which one (1) buyer's refusal to close on a sale does not accurately reflect purchase price value, nor does the balance owed on the underlying debt necessarily reflect the diminished value. Therefore, there is a complete failure of proof on damages.

V. ATTORNEY'S FEES SHOULD BE AWARDED TO THE APPELLANT.

Attorney's fees are owed to the Appellant, not the Respondents. The Appellant is entitled to an award of attorney's fees, assuming the Appellant is the prevailing party in this appeal. As such, both under the promissory note and the statutory warranty deed, the Appellant should be awarded attorney's fees as previously argued.

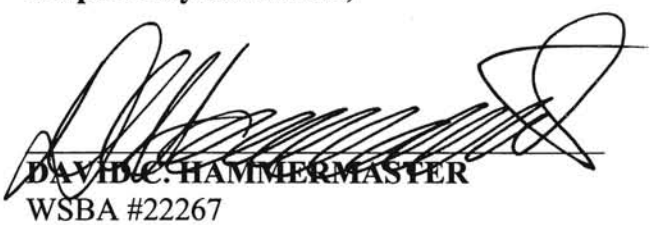
CONCLUSION

The Respondents are attempting to broaden encumbrance in a way that none of our courts have to date done so. That is, the Respondents would have this court accept the proposition that a judgment against an unrelated third party serves as an encumbrance against the subject property. The rationale is that it affects the marketability of the property in some manner and that, if it does so in any manner whatsoever, the warranty of title has been breached. These arguments are directly contrary to precedence. The courts repeatedly state that even some technical violations will not always be a violation of title. In the case at bar, we do not even have a technical violation; and it draws the responsibility of seller too far to hold seller responsible for the actions of some other third party to which seller had no input or control. Therefore, the court should

reverse the trial court and award damages in favor of the Plaintiff Ensberg with attorney's fees and costs.

DATED this 2 day of July, 2013.

Respectfully Submitted,



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