92793-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CRAIG & DEBRA BROWN
Respondents

v.

SANDY FAMILY FIVE LLC
Petitioner

RESPONDENTS' ANSWER TO PETITION FOR REVIEW BY THE SUPREME COURT OF WASHINGTON

C. SCOTT KEE
Rodgers Kee & Card PS
324 West Bay Drive NW Olympia WA 98502
scottkee@buddbaylaw.com
(360) 352-8311
WSBA No. 28173

Table of Contents

Cases

Statutes

Other Authorities

IDENTITY OF RESPONDENTS

Craig Brown and Debra Brown, husband and wife are the Respondents at the Court of Appeals and were the Defendants at trial.

COURT OF APPEALS DECISION

The Court of Appeals in Case No. 472228 issued its Unpublished Opinion on December 1, 2015, affirming the Trial Court's ruling in favor of the Browns. On December 21, 2015, Petitioner filed a Motion for Reconsideration and Motion to Publish. On January 4, 2016, the Court of Appeals denied Petitioner's Motion for Reconsideration and Motion to Publish.

Respondents Craig and Debra Brown do not seek review of the decision, but instead request that this Court deny the Petition for Review.

ISSUES PRESENTED FOR REVIEW

Respondents request the Petition for Review be denied due to the Petitioner's failure to comply with RAP 13.4.

STATEMENT OF THE CASE

Respondents adopt the statement of facts as set forth in the Court of Appeals Unpublished Opinion filed December 1, 2015.

The Appellant articulates no reasoning as to how the case at bar directly conflicts with any Supreme Court or Court of Appeals decision. Appellant has failed to support the claim that land title stability is uniquely undermined by the Unpublished Opinion of the Court of Appeals. This appeal should be denied because, *inter alia,* (1) the unpublished opinion sets no precedent, and establishes no new rule of law with respect to land titles or any other matters, (2) the decision of the lower court, in affirming the trial court, was well-reasoned and consistent with the applicable law of the case and well-settled legal principles, and (3) no public policy or public interest is implicated by the appellate court decision as the unpublished opinion has no bearing on the stability of land titles.

FACTS

Petitioner Sandy (hereinafter "Sandy") owns three parcels of real property (now, collectively, "the Sandy property"). Clerk's Papers (CP) at 3-4. Respondents Craig Brown and Debra Brown (hereinafter "Brown" or "the Browns") own a neighboring parcel ("the Brown property"). CP at 4. The prior owners of both properties, Paul and Diane Cokeley, purchased

the Sandy properties in 2001. They subsequently purchased the Brown property in 2004 with the intent to develop the properties, which included building a residence on the Brown property.

Thurston County informed the Cokeleys that if they wanted to build a residence on the Brown property, they would need to use the Sandy property for their drain field. In 2004, the Cokeleys commenced the permitting process with Thurston County. On December 30 and 31, 2005, the Cokeleys recorded two drain field easements with the Thurston County Auditor. The easements benefited, and continue to benefit, what is now the Brown property, and burden what is now the Sandy property. The Cokeleys continued to develop the Brown property, and worked with Thurston County seeking permitting and improvements during the entire time in which the Cokeleys owned the properties.

In October 2006, as part of the development process, Sandy loaned the Cokeleys money in exchange for a deed of trust over a portion of the property currently owned by Sandy. This deed of trust pledged the Cokeleys' interest in the Sandy property as security for the loan. The deed of trust, which was drafted by Sandy, simply described the Sandy property, and made no reference to the Brown property, nor did it reference the easements benefitting the Brown property. Sandy did not

seek, nor did it acquire, any interest in the Brown property as collateral for the loan. At the time Sandy obtained the deed of trust, the easements were of public record, having been previously recorded with the Thurston County Auditor.

The Cokeleys worked to develop the property both before and after the easements were created. They began the permitting process in 2004, recorded the easements in 2005 and, after settling a boundary dispute in an unrelated case in 2011, constructed septic system improvements on the Brown property and a drain field on the Sandy property.

In June 2012, the Cokeleys again recorded drain field easements that were nearly identical to the 2005 drainage easements, but this time showed the precise location of the installed drain field, burdening a portion of the Sandy property for the benefit of the Brown property.

The Cokeleys conveyed the Brown property to the Browns by statutory warranty deed on December 26, 2012. The Cokeleys represented to the Browns that the property was served by a "drain[ ]field & transport line on property across rd. (w/ easements)." CP at 112. The Cokeleys told the Browns that the on-site sewage system was not entirely on the property, but instead included a "drain[ ]field on lot across the road (easements recorded)." CP at 113. Knowing the property was virtually

worthless without the benefit of the easements, prior to purchasing the property, the Browns confirmed the existence of the easements by reviewing the records of the Thurston County Auditor.

The Browns cannot develop the Brown property without connecting to the drain field on the Sandy property. The Brown property's septic system is approved by the Thurston County Health Department, and the drain field located on the Sandy property is installed and hooked up to the septic system for the Brown property. The Browns' plans to build a house hinge on the ability to utilize the drain field easements, and without the use of the Sandy drain field there is no feasible way to develop the property.

In January 2013, Sandy purchased the Sandy property at a trustee's sale conducted pursuant to the previously granted deed of trust. Shortly thereafter, Sandy contacted the Browns and informed them that it knew about the drain field easements. Sandy then informed the Browns that Sandy believed Sandy's deed of trust from 2006 was superior to the easements.

Sandy subsequently filed a quiet title action, and Sandy moved for summary judgment in its favor. The Browns filed a cross motion for summary judgment, seeking dismissal of Sandy's claims. The Browns

argued that they had both express, and implied, easements. The trial court granted the Browns' motion, entering an order of dismissal of Sandy's claims. Sandy then appealed the trial court's decision. The Court of Appeals, Division II, affirmed the trial court's decision, explicitly finding the Browns held an implied easement.

ARGUMENT

Petitions for Review are granted only under very limited circumstances. RAP 13.4(b) provides review may be granted:

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 another 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.

Petitioner has failed to identify how the unpublished decision of the Court of Appeals conflicts with any Court of Appeals or Supreme

Court decision from the State of Washington. No violations of the State of Washington or United States Constitutions have been identified. Nor has any issue of substantial public interest been presented. When raised on appeal, the court will not consider issues unsupported by citation to authority. *Valente v. Bailey*, 74 Wash.2d 857, 858, 447 P.2d 589 (1968); *Avellaneda v. State*, 167 Wash.App. 474, 485 n. 5, 273 P.3d 477 (2012). The courts do not consider conclusory arguments. *Joy v. Dep't of Labor & Indus.*, 170 Wash.App. 614, 629, 285 P.3d 187 (2012), *review denied*, 176 Wash.2d 1021, 297 P.3d 708 (2013). Passing treatment of an issue or lack of reasoned argument is insufficient to merit appellate review. *West v. Thurston County*, 168 Wash.App. 162, 187, 275 P.3d 1200 (2012); *Holland v. City of Tacoma*, 90 Wash.App. 533, 538, 954 P.2d 290 (1998). This case involves a summary judgment and therefore is reviewed de novo. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012).

I. THE GRANTING OF AN IMPLIED EASEMENT IS WELL SETTLED IN WASHINGTON CASE LAW AND FAILURE TO PROPERLY CITE CONFLICTING OPINIONS PRECLUDES DISCRETIONARY REVIEW.

Starting generally, Washington State's adherence to the common law is codified in a reception statute. Washington has a quite ordinary reception statute: "The common law, so far as it is not inconsistent with

the Constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state." *Washington Legal Found. v. Legal Found. of Washington*, 236 F.3d 1097, 1108-09 (9th Cir.) *on reh'g en banc*, 271 F.3d 835 (9th Cir. 2001) *aff'd sub nom. Brown v. Legal Found. of Washington*, 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003).

In the case at bar, the Court of Appeals correctly upheld the well settled principle of granting an implied easement found under common law. The public policy behind this common law theory has been codified under Washington law in some manner since 1895. *Hellberg v. Coffin Sheep Co.*, 66 Wash. 2d 664, 666-67, 404 P.2d 770, 773 (1965) ("An easement of necessity is an expression of a public policy that will not permit property to be landlocked and rendered useless. "); *See also*, RCW 8.24.010.

Implied easements arise by intent of the parties, which is found from the facts and circumstances surrounding the conveyance of land. *Roberts v. Smith*, 41 Wn.App. 861, 864, 707 P.2d 143 (1985). The three factors when considering whether an implied easement exists are: (1) former unity of title and subsequent separation, (2) prior apparent and

continuous use of a quasi-easement benefiting one part of the estate to the detriment of another, and (3) some degree of necessity that the easement exists. *Mcphaden v. Scott*, 95 Wn. App. 431, 434, 975 P.2d 1033 (1999). The first factor—former unity of title and subsequent separation—is an absolute requirement for an implied easement. *Hellberg*, 66 Wn.2d at 668; *Roberts*, 41 Wn.App. at 865. But presence or absence of the second and third factors is not conclusive. *Hellberg*, 66 Wn.2d at 668; *Roberts*, 41 Wn.App. at 865. Instead, those factors help determine the parties' intent by demonstrating the nature of the property, the extent and character of the use of the property, and how the parts of the property relate to each other. *McPhaden*, 95 Wn.App. at 437.

Quasi-easements can exist during unity of title; therefore the deed of trust in this case could not extinguish the implied easement.

The facts of this case indicate the Cokeleys recorded a drainage easement in December of 2005, before the deed of trust was ever issued. This fact demonstrates the Cokeleys' intent to encumber what is now the Brown property so development could proceed. Filing of this easement, even if insufficient to have an express easement, is record notice of the intent to encumber the Brown property. Regardless of when the deed of

trust went into effect, the intent of the Cokeleys to develop and encumber what is now the Brown property is unmistakable.

"In order to give rise to the presumption of a reservation of an existing easement or quasi easement, where the deed is silent upon the subject, the necessity must be of such a nature as to leave no room for doubt of the intention of the parties. This necessity cannot be deemed to exist if a similar privilege can be secured by reasonable trouble and expense." *Adams v. Cullen*, 44 Wash. 2d 502, 507, 268 P.2d 451, 454 (1954). In *Adams*, the court held a quasi-easement justified an implied easement through reservation because the parties were aware of the need of a mutual drive way, even though this need was created when all properties were owned by the same individual. *Id.* The failure of a deed to mention an encumbrance did not extinguish the implied easement through reservation. *Id.*; *See also*, *Wreggitt v. Porterfield*, 36 Wash. 2d 638, 639, 219 P.2d 589, 590 (1950). Although an implied grant was found by the appellate court, it is uncontested the Brown's land cannot be developed without this easement, therefore illustrating the degree of necessity. Thus, the intent of the parties is controlling. *Hellberg*, 66 Wash. 2d at 667.

Additionally, because the deed of trust was issued to secure a debt, it functioned as an equitable mortgage. *Walker v. Quality Loan Serv.*

Corp., 176 Wash. App. 294, 305, 308 P.3d 716, 720 (2013) *overruled on other grounds by Meyer v. U.S. Bank Nat. Ass'n*, 530 B.R. 767, 770 (W.D. Wash. 2015) *reh'g denied*, No. 14-00297RSM, 2015 WL 3609238 (W.D. Wash. June 9, 2015); *See also*, 18 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Transactions § 17.3, at 260 (2d ed.2004).

Therefore, the deed of trust did not separate title until foreclosure in 2013, after the Cokeleys had twice attempted to create an express easement. *Mahalko v. Arctic Trading Co.*, 99 Wn.2d 30, 38, 659 P.2d 502 (1983). Under Washington law, deeds of trust are subject to all mortgage laws, thus reinforcing title did not separate until foreclosure. RCW 61.24.020. The notion that a quasi-easement cannot arise during unity of title is unsubstantiated. *Adams*, 44 Wash. 2d at 507. Further, Appellant failed to rebut the actions taken by the Cokeleys, both in 2005 and 2012, demonstrating the intent to create an easement. Regardless of when title was separated, there is no support provided that foreclosing on a deed of trust unilaterally extinguishes a quasi-easement or an implied easement, as the court found in this case.

Through their conduct, the Cokeleys created a quasi-easement on their property as early as 2004, or at the very least before the deed of trust

was executed in 2006. The Cokeleys' intent to develop the Brown property was uninterrupted until separation of title in 2012, well before the deed of trust was foreclosed upon in 2013. As stated previously, the finding of an implied easement rests upon well settled Washington case law.

II. NO PUBLIC POLICY IS IMPLICATED BY THIS CASE BECAUSE THE EXISTENCE OF A QUASI-EASEMENT DOES NOT DISRUPT THE STABILITY OF LAND TITLES WHICH IS ONLY ONE OF THREE COMPETING POLICIES OF THE DEEDS OF TRUST ACT.

The Appellant bears the burden to demonstrate the public interest upon which this case would have an overarching affect. No public interest is identified in Petitioner's brief, and the Petitioner fails to make any sustainable public policy argument surrounding stability of land titles which could be sufficient to warrant review in this case.

Here, the Appellant scantly cites but one case in association with their stability of land titles argument. Appellant brief at p. 8. The case cited by Appellant in no way dealt with an easement, but instead required determining the respective rights of junior lien holders who were not given notice under the Deeds of Trust Act. *Glidden v. Mun. Auth. of Tacoma*, 111 Wash. 2d 341, 342, 758 P.2d 487, 488 *amended sub nom. Glidden v. Mun. Auth. of City of Tacoma*, 111 Wash. 2d 341, 764 P.2d 647 (1988).

Glidden actually articulates the three primary goals of the act: "First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles." *Id.* at 346. The court then explicitly states, "these goals are often difficult to reconcile." *Id.* The Appellant in no way articulates how the case at bar materially changes these competing goals.

The remaining crux of Appellant's argument revolves around the, "first in time first in right" principle. Appellant brief at p. 11. However, Appellant's own observations and misunderstanding of the Appellate Court's holdings ultimately defeat its justifications for appeal. The Appellant claims the Court of Appeals "expressly acknowledged that the Browns' implied easement only arose out of the December 2012 closing." Appellant brief at p. 11. This conclusion is quite the opposite of what the appellate court correctly found:

> Sandy [therefore] argues that the Cokeleys did not use any quasi-easement during the unity of title. We disagree, because the deed of trust did not separate title in 2006. Deeds of trust and mortgages do not convey title; they merely create liens. [*Supra*]. Thus, as a matter of law, title did not separate until December 2012, when the Cokeleys conveyed the Brown property to the Browns.
>
> Decision at p. 9.

The court went on to properly hold that an implied easement existed during unity of title between 2011 and late 2012. *Id.* at p. 10. Furthermore, the court correctly stated the unity of title issue was not dispositive and the parties' intent was controlling. *Id.*; *See also*, *Mcphaden*, 95 Wn. App. at 434. The only conclusion from these findings is the appellate court stayed faithful to the first in time first in right principle because the parties, either by implication or intention, created an easement before title separated in December of 2012. *Mann v. Household Finance Corp.*, III, 109 Wn. App. 387, 35 P.3d 1186 (2001). The appellate court's decision of when title separated is well grounded in case law. *Puget Sound Mut. Sav. Bank v. Lillions*, 50 Wash. 2d 799, 805, 314 P.2d 935, 939 (1957); *Berlin v. Robbins*, 180 Wash. 176, 177, 38 P.2d 1047, 1048 (1934); *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 2 N.E. 188, 191 (1885).

The only other case citations provided by Appellant become completely irrelevant because they simply point out no other court has applied the erroneously stated conclusion. Appellant brief at p. 13. The appellate court did not create an exception to the first in time principle. Therefore, it logically follows that none of the cases cited by Appellant would do so either. This is not a presentation of conflicting case law, but rather an affirmation of the consistency of the appellate court's decision.

Appellant does not cite a single relevant case which contradicts the conclusions of law of the case at bar. Failure to properly cite and brief an issue demonstrates why this court should not consider Petitioner's request for relief. *Supra.*

Additionally, citations to the Deeds of Trust Act are not a presentation of conflicting case law. Moreover, the Washington Supreme Court, "has frequently emphasized that the deed of trust act 'must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales." *Walker*, 176 Wash. App. at 306; *See also*, *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 789, 295 P.3d 1179 (2013). Deeds are subject to all mortgage laws in Washington and mortgages do not unilaterally extinguish a valid pre-existing easement. *Supra.* In Washington, "[a] mortgage creates nothing more than a lien in support of the debt which it is given to secure." *Pratt v. Pratt*, 121 Wash. 298, 300, 209 P. 535 (1922) (*citing Gleason v. Hawkins*, 32 Wash. 464, 73 P. 533 (1903)). 'The fact that the mortgage, through foreclosure of which the mortgagee acquired title to the dominant tenement, contains no mention of the servitude, does not defeat the right of the mortgagee to continue the use of the servitude.' *Puget Sound Mut. Sav. Bank*, 50 Wash. 2d at 805.

The construction of the Deeds of Trust Act in favor of borrowers, in this case, the Cokeleys, clearly demonstrates the lack of public interest in this case. The Deeds of Trust Act has multiple public policy interests which often times cannot be reconciled. The issues of public policy have existed since the inception of the Deeds of Trust Act. The case at bar does not create any exception to this statutory scheme. Further, no case law has been cited to affirm the claim implied easements somehow materially change mortgage or deed laws in Washington. The citation to one public policy of an Act does not support discretionary review. The common law principle of implied easements is long settled case law. This case exemplifies why implied easements are needed to ensure economical use of privately owned land. There is no question that without this easement the Brown property would go undeveloped. There are no meaningful alternatives to the grant of implied easement. The Cokeleys' intent to burden the Sandy property to facilitate development is without question, and this intent is what justifies the denial of review.

COSTS AND FEES

Respondents affirmatively plead attorney fees and costs on appeal. A prevailing party on appeal is entitled to costs and disbursements. RCW 4.84.030. Costs are warranted when the Supreme Court is acting as an

appeals court. *Cooper v. State Dep't of Labor & Indus.*, 188 Wash. App. 641, 651, 352 P.3d 189, 194 (2015); *See also*, RAP 14.1. Further, Respondent is entitled to attorney's fees when opposing a frivolous action or defense. RCW 4.84.185. "A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts." *Skimming v. Boxer*, 119 Wash.App. 748, 756–57, 82 P.3d 707, review denied, 152 Wash.2d 1016, 101 P.3d 108 (2004). (*quoting Tiger Oil Corp. v. Dep't of Licensing*, 88 Wash.App. 925, 938, 946 P.2d 1235 (1997)).

In the case at bar, the Appellant has failed to adequately brief issues on appeal. Appellant has failed to support any rational argument based on the facts of this case or the governing law therein. Frivolous appeals on a summary judgment motion entitle respondent to attorney's fees. RCW 4.84.185. Award of attorney's fees is support by court rules and case law in this instance. RAP 18.1; *Stiles v. Kearney*, 168 Wash. App. 250, 267, 277 P.3d (2012).

CONCLUSION

The granting of an implied easement rests upon well settled case law and common law principles. The Appellant in this case has failed to properly present conflicting case law in the Supreme Court or Court of Appeals. Further, no public interest is affected by the unpublished opinion

of the Court of Appeals. This unpublished opinion does not create conflicting case law for the State of Washington. For the foregoing reasons the Respondents request this case be denied discretionary review and that Respondents be awarded proper costs and fees upon review.

RESPECTFULLY SUBMITTED this 29th day of February, 2016.

RODGERS KEE & CARD, P.S.
Attorneys for Respondents

C. Scott Kee WSBA #28173

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused delivery, as noted below, of a true and correct copy of the foregoing document to:

Matthew B. Edwards — *via email and ABC legal messengers*
Owens Davies, P.S.
1115 West Bay Dr. NW, Ste. 302
Olympia, WA 98502
Attorney for Appellant

DATED at Olympia, Washington, this 29th day of ~~March~~ Feb., 2016.

Catherine Hitchman