No. 47222-8-II

SUPREME COURT
STATE OF WASHINGTON No. 92793-6

SANDY FAMILY FIVE, LLC, a Washington corporation,

APPELLANT,

v.

CRAIG and DEBRA BROWN, husband and wife, and their marital community,

RESPONDENTS.

APPELLANT SANDY FAMILY FIVE, LLC'S PETITION FOR DISCRETIONARY REVIEW (PRV)

OWENS DAVIES, P.S.
Matthew B. Edwards
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Olympia, Washington 98502
(360) 943-8320
WSBA No. 18332

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II. TABLE OF AUTHORITIES

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III. RELIEF REQUESTED

Sandy Family Five, LLC (hereinafter "Sandy") petitions the Supreme Court to accept discretionary review of that portion of the Court of Appeal's unpublished decision entered in this matter on December 1, 2015 addressing the issue of implied easement (Appendix F, p. 8-11), and of the Court of Appeals denial of Sandy's timely Motion for Reconsideration by Order entered January 4, 2016 (Appendix H).

IV. SUMMARY

The Washington Deed of Trust Act provides that a Trustee foreclosing upon a Deed of Trust has the power to convey to the successful purchaser at a sale in foreclosure of the Deed of Trust all of the interest which the grantor had, or had power to convey, in the property at the time the grantor executed the Deed of Trust. RCW 61.24.050. The Washington Deed of Trust Act thus adopts the common law priority principle of "first in time, first in right."

Under this statute, interests in existence at the time the Deed of Trust is executed are senior to, and will survive a foreclosure of, the Deed of Trust. Interests created by the property owner after executing the Deed of Trust are junior to, and extinguished by, a foreclosure of the Deed of Trust.

These rules promote the stability of land titles. They ensure that interests acquired prior to, and hence without notice of, the Deed of Trust

are protected upon foreclosure of the Deed of Trust. And, they ensure that persons lending money on the strength of the Deed of Trust are protected from the subsequent diminishment or extinguishment of their security.

In this case, in order to secure the repayment of a loan that Cokeley obtained from Sandy, Cokeley executed a Deed of Trust in 2006. In the Deed of Trust, Cokeley explicitly affirmed that the a Trustee's Deed issued in foreclosure of the Deed of Trust would convey all of the interest that Cokeley had or had power to convey in the property subject to the Deed of Trust at the time Cokeley executed the Deed of Trust.

Cokeley never paid the debt secured by the Deed of Trust. In October 2012, the Trustee recorded notice of intent to conduct a foreclosure sale on January 4, 2013.

On December 28, 2012, Cokeley sold adjoining property to the Browns. The Court of Appeals held that as part of the closing, Cokeley intended to grant, and therefore impliedly did grant, the Browns an easement over the property subject to Sandy's Deed of Trust.

The Trustee conducted the foreclosure sale on January 4, 2013. About a week later, the Trustee executed and recorded a Deed conveying the title to the foreclosed-on property to Sandy, the successful purchaser at the foreclosure sale.

Ignoring the well-established rule of "first in time, first in right," the Court of Appeals affirmed the trial court's decision to quiet title in the

easement impliedly granted over the foreclosed-on property in the Browns.

The Court of Appeals erred. Under the Washington law, a debtor who has executed a Deed of Trust cannot, by the debtor's subsequent unilateral conduct, impair the security conferred by the Deed of Trust.

The Court of Appeals' decision is contrary to both statute and case law. The decision undermines the stability of land titles in a manner inconsistent with the public interest. The Supreme Court should accept review and reverse.

V. ISSUE PRESENTED FOR REVIEW

Does an easement impliedly created by a grantor subsequent to the grantor's execution and recordation of a Deed of Trust pledging the grantor's entire interest in real property survive a foreclosure sale of that property under the Deed of Trust?

Answer: No. The Washington Deed of Trust Act plainly provides that a Trustee's Deed executed on completion of a foreclosure sale of real property extinguishes all interests junior to (i.e. arising after) the recordation of the Deed of Trust. An interest in the nature of an implied easement created after the recordation of the Deed of Trust is junior to and extinguished by such a Trustee's Deed, just like any other junior interest.

VI. STATEMENT OF THE CASE

A. Facts.

Between at least 2005 and December 31, 2012, Cokeley owned the fee simple interest in four undeveloped parcels of real property located on Schirm Loop Road in Thurston County, Washington. Cokeley owned three abutting parcels located on one side of Schirm Loop Road.[1] Cokeley also owned a fourth parcel located on the other side of Schirm Loop Road.[2]

In 2005, Cokeley recorded "easements" purporting to burden two of the Sandy parcels for the benefit of the Brown parcel. CP 43-48. Cokeley at the time held all interest in both the property burdened and the property benefitted by these "easements."

In 2006, Cokeley asked Sandy to loan Cokeley money and Sandy did so. CP 144. In order to secure Sandy's claim for repayment, Cokeley executed a Deed of Trust in the entire Sandy property. Mirroring the relevant provision of the Washington Deed of Trust Act, the Deed of Trust recited that, upon foreclosure, the Trustee's Deed would convey all interest which Cokeley had or had the power to convey in the Sandy property as of the time Cokeley executed the Deed of Trust. RCW 61.24.050; CP 49-53 (Appendix A).

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[1] Because Sandy ultimately acquired the three abutting parcels, they are hereafter referred to as "the Sandy property."

2 Because the Browns ultimately acquired the fourth parcel, it is hereafter referred to as "the Brown property."

In 2011, Cokeley began constructing septic improvements on the Sandy property. CP 170-71. In early 2012, at a time when Cokeley still held the fee simple interest in all the property, Cokeley purported to record a second set of "easements" purportedly benefitting the Brown property and burdening the Sandy property. CP 55-58; 146; 148-50.

Cokeley never paid Sandy. On October 2, 2012, the Trustee under Sandy's Deed of Trust recorded a Notice of Trustee's Sale. CP 59-63 (Appendix C). The Notice stated that the Trustee would conduct a foreclosure sale on January 4, 2013. *Id.*

On December 28, 2012, days before the scheduled foreclosure sale, Cokeley closed the sale of the Brown property to the Browns. The Cokeley deed did not expressly convey to the Browns any easement right in the Sandy property. CP 64-66. (Appendix D). However, the Browns claimed that, as part of the sale, they understood that they were also being conveyed the right to use the septic improvements which the Cokeleys had installed on the Sandy property. CP 98-99.

On January 4, 2013, the Trustee conducted the foreclosure sale on Sandy's Deed of Trust. On January 14, 2013, the Trustee recorded a Trustee's Deed conveying all interest in the Sandy property to Sandy. CP 67-71 (Appendix E).

B. Procedural History.

Sandy commenced this lawsuit, naming the Browns as defendants, seeking to quiet Sandy's title in the Sandy property as against any claimed right asserted by the Browns. CP 3-36.

Before the trial court, the parties filed cross motions for summary judgment which focused on the validity and legal effect of the 2005 "easements." CP 116-125; 126-30. The parties focused on these "easements" because they recognized that these 2005 "easements," if valid, would have priority over Sandy's 2006 Deed of Trust. *Id.*

The trial court granted summary judgment to the Browns, holding that the 2005 written "easements" created an interest that passed to the Browns and had priority over the Deed issued to Sandy as a result of the foreclosure of its 2006 Deed of Trust. As part of its written ruling, the trial court expressly stated that it had not addressed the Browns' claim of implied easement on the grounds that the Browns had not pled that claim. CP 177-79. (Appendix E).

Sandy appealed. The Court of Appeals issued a decision in which it held that the 2005 "easements" which Cokeley had recorded were ineffective. Court of Appeals Decision, p. 5 (Appendix F) ("We agree with Sandy that the Cokeleys could not create a valid express easement over their own property.").

However, despite the fact that no such claim had been pled by the Browns, and despite the fact that the trial court had accordingly refused to consider the issue, the Court of Appeals addressed the issue of implied easement. *Id.,* p. 6-8 The Court of Appeals held that Cokeley had impliedly conveyed to Brown as part of the December 31, 2012 closing an easement over the Sandy property. *Id.*, p. 8-11.

Without addressing the issue of whether and how an easement conveyed by the Browns on December 28, 2012—a week before a scheduled foreclosure sale—could possibly take priority over a Trustee's Deed issued in foreclosure of Sandy's 2006 Deed of Trust, the Court of Appeals affirmed the trial court's decision confirming the priority of the Browns' easement over Sandy's rights arising under that Deed of Trust. *Id.* p. 11.

Sandy filed a Motion for Reconsideration pointing out that the Court of Appeals had utterly failed to address the priority issue, and the impact of the foreclosure. Appendix F. In a one line order, the Court of Appeals denied the motion for reconsideration. Appendix G.

VII. ANALYSIS

The Supreme Court should accept review of the Court of Appeal's decision in order to address the issue of whether an implied easement arising after the execution of a Deed of Trust survives a foreclosure of that Deed of Trust.

RAP 13.4(b) provides:

> A petition for a review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with the 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
>
> ...
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Court should accept discretionary review pursuant to all the quoted subsections.

The Legislature enacted the Washington Deed of Trust Act, Chapter 61.24 RCW, in order to promote the stability of land titles, and to provide for an efficient and inexpensive means of foreclosing on real property interests while protecting interested parties' right to prevent an improper foreclosure. *See e.g., Glidden v. Municipal Authority of the City of Tacoma*, 111 Wn.2d 341, 347, 758 P.2d 487 (1988).

Pursuant to that Act, a borrower executing a Deed of Trust empowers the Trustee upon foreclosure of the Deed of Trust to convey all interest which the borrower had or had the power to convey in the real property subject to the Deed of Trust to the successful purchaser at the foreclosure sale. RCW 61.24.050(1).

Washington cases interpreting the Deed of Trust Act make the priority rules applicable to Deeds of Trust perfectly clear. The rule of "first in time, first in right" prevails:

> "A trustee's sale has the effect of depriving "the grantor or his successor in interest and all those who hold by, through or under him of all of their interest in the property." .... Thus, a non-judicial foreclosure eliminates all subordinate liens or interests in the property but has no effect on liens or other interests that are prior to the Deed of Trust.

IV Wash. State Bar Ass'n, Real Property Deskbook § 48.10(6)(b)(i), at 48-33 (3rd ed. 1996). *See also Mann v. Household Finance Corp., III*, 109 Wn.App. 387, 35 P.3d 1186 (2001) (foreclosure of Deed of Trust does not extinguish liens or other interests senior to the Deed of Trust); *Glidden v. Municipal Authority of Tacoma*, 111 Wn.2d 341, 347 fn.3, 758 P.2d 487 (1988) (foreclosure of Deed of Trust extinguishes all junior liens); *In re Giannusa*, 169 Wn.App. 904, 282 P.3d 122 (2012) (idem); *In re Upton,* 102 Wn.App. 220, 6 P.3d 1231 (2000) (idem).

This rule makes perfect sense. A lender taking a Deed of Trust takes with at least constructive knowledge of prior interests granted to third parties. A lender can decide whether or not to lend based on the existence of those senior third party interests. Because the debtor cannot unilaterally affect those senior interests, and because the lender has the opportunity to learn of, and act with knowledge of, senior interests, those interests survive any subsequent foreclosure of the Deed of Trust.

These considerations reverse with respect to an interest junior to the Deed of Trust. The person taking the junior interest does so with at least constructive knowledge that the debtor has already executed a Deed of Trust, and thus has granted the Trustee under the Deed of Trust the power to execute a deed in foreclosure of the Deed of Trust conveying all title which the debtor had or had the power to convey at the time the debtor made the Deed of Trust to a third party. RCW 61.24.050. The person taking the junior interest knows the debtor cannot unilaterally diminish the rights created by the Deed of Trust. Lenders can lend secure in the knowledge that the debtor cannot unilaterally impair their security in the property subject to the Deed of Trust. The person taking the junior interest can protect itself, if it chooses, by insisting that the debtor satisfy the Deed of Trust as part of the transaction in which the debtor creates the junior interest.

Here, Sandy did everything it was required to do in order to perfect its rights arising under the 2006 Deed of Trust. Sandy had Cokeley execute a Deed of Trust, as part of which Cokeley expressly confirmed that Cokeley was giving the Trustee the power, upon foreclosure, to convey to the successful purchaser all interest in which Cokeley had or had the power to convey in the Sandy property as of the date Cokeley executed the Deed of Trust. CP 49-53. By recording the Deed of Trust, Sandy put all parties subsequently dealing with Cokeley on notice that Sandy had a senior right in the property, and that upon foreclosure of Sandy's interest, the Trustee's

Deed to the successful purchaser would extinguish any interest created by Cokeley after 2006. *Id.*

The Court of Appeals expressly acknowledged that the Brown's implied easement only arose out of the December 2012 closing. Decision (Appendix F) at p. 9 ("Thus, as a matter of law, title did not separate until December 2012, when the Cokeleys conveyed the Brown property to the Browns."). At the time the Browns closed, the Browns had constructive notice not only of the 2006 Deed of Trust, but of the fact that the Trustee under that Deed of Trust had recorded a Notice of Intent to conduct the foreclosure sale on January 4th, 2013. CP 59-63.[3] The Browns could have acted to protect the easement interest they were acquiring in the Sandy property by requiring Cokeley to pay Sandy's Deed of Trust out of the proceeds of closing.

Applying RCW 61.24.050, and the principle of "first in time, first in right," the Court of Appeals should have held that the foreclosure of Sandy's 2006 Deed of Trust extinguished the 2012 implied easement.

The Court of Appeals did not so hold. The Court of Appeals held that the Browns had an implied easement right arising out of Cokeley's

[3] Because the Trustee recorded the Notice of Intent to Conduct a Trustee's Sale in October 2012, at a time when the Browns had no interest in the property, the Trustee had no obligation to provide the Browns individualized notice of the sale. Instead, the recorded Notice of Intent itself functioned to give the Browns constructive notice. *See* RCW 61.24.040(1)(b)(ii).

December 31, 2012 conveyance of the implied easement to them that survived the foreclosure of Sandy's 2006 Deed of Trust.

The Court of Appeals decision has the effect of imposing a special exception to the "first in time, first in right" priority rule applicable to easements by implication only. There is absolutely no legal or logical basis to create such an exception.

An implied easement is based upon the intent of the parties to the transaction that worked the separation of title. Court of Appeals Decision, p. 8-9. The parties to that transaction can logically bind one another by their mutual intent. They can also logically bind their respective successors in interest. But those parties have no power to divest a stranger to the transaction of property rights that the stranger held prior to and independent of the transaction, even if the parties mutually intend to do so.

In 2012, Cokeley could impliedly confer on the Browns only those rights which Cokeley could also expressly have conveyed to the Browns. But Cokeley had long before granted Sandy's Trustee the right to foreclose Cokeley's entire interest in the Sandy property pursuant to the Deed of Trust. Sandy had recorded the Deed of Trust, putting all persons dealing with Cokeley on notice of its terms. The Cokeleys in 2012 simply did not have it in their power to convey an interest in the property, whether expressly or impliedly, free and clear of the rights under they had previously conveyed to the Trustee for Sandy's benefit.

No Washington court has ever used a finding of implied easement to divest a third party of his independent right in the property predating the separation of title giving rise to the implied easement.[4] The Court of Appeals, which offered no rationale for its decision in this regard, plainly and grievously erred in doing so here.

The Court of Appeal's decision conflicts with settled Washington case law, and irrationally creates an exception to the normal priority rule of "first in time, first in right" applicable only to implied easements. By granting borrowers executing a Deed of Trust the power to subsequently create implied easement rights in the property subject to a Deed of Trust that will survive the foreclosure of the Deed of Trust, the Court of Appeals' decision renders every lender in this State insecure.

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[4] None of the cases the Court of Appeals cited in its decision so hold. *See e.g., McPhaden v. Scott*, 95 Wn. App. 431, 437-39, 975 P.2d 544 (1999) (trial court properly granted a directed verdict on the issue of easement by implication; no independent third party rights involved); *Fossum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995) (lot on which water irrigation weir and pipeline serving adjoining lots retained by grantor held subject to implied easement; no independent third party rights involved); *Bays v. Haven*, 55 Wn. App. 324, 329, 777 P.2d 562 (1989) (where original owner of two adjoining lots built a driveway across one lot to provide access to a cabin on the other lot, sale of cabin lot held to include implied easement for access over adjoining lot; no independent right of third party involved); *Roberts v. Smith*, 41 Wn. App. 861, 864, 707 P.2d 143 (1985) (where grantor sells land-locked property, grantor impliedly grants access easement over retained property; no independent third party rights involved); *Helberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 668, 404 P.2d 770 (1965) (landlord who leased land lot property to tenant held to of impliedly granted easement over landlord's adjoining property for access; no independent third party rights involved); *Evich v. Kovacevich*, 33 Wn.2d 151,157-58, 204 P.2d 839 (1949) (where common owner of two adjoining residential lots had constructed walk way in between and serving houses on both lots, common owner impliedly conveyed easement right to use walk way along with lot; no independent third party rights involved).

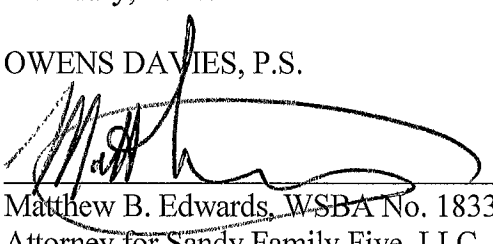
The Court of Appeals decision undermines the stability of land titles. Unless the Supreme Court accepts review, and reverses the Court of Appeal's decision, no lender utilizing a Deed of Trust for security will be able to lend pursuant to a Deed of Trust with assurance that the lender's interest in the property subject to a Deed of Trust will be safe from diminishment by the subsequent unilateral acts and conduct of its debtor.

VIII. CONCLUSION

The purpose of the Washington Deed of Trust Act is to promote the stability of land titles. The Court of Appeal's decision does exactly the opposite. The Court should accept review of the Court of Appeal's decision in this case, and reverse it.

DATED this 1st day of February, 2016.

OWENS DAVIES, P.S.



Matthew B. Edwards, WSBA No. 18332
Attorney for Sandy Family Five, LLC

IX. APPENDIX

Ex. No.	Document	CP No.
A	Cokeley Deed of Trust to Sandy	50-54
B	Notice of Intent to Conduct Trustee's Sale	60-63
C	Cokeley Deed to Brown	65-66
D	Trustee's Deed to Sandy	68-71
E	Trial Court's Order on Summary Judgment	177-182
F	Court of Appeals Decision	
G	Sandy's Motion for Reconsideration	
H	Order Denying Motion for Reconsideration	

Appendix A

When recording mail to:

SANDY FAMILY FIVE LLC
P.O. BOX 4094
TUMWATER, WA 98501

DEED OF TRUST

(For use in the state of Washington only)

Escrow No.:00139878

THURSTON COUNTY TITLE CO.
(13) 137878E

THIS DEED OF TRUST, made this 10th day of October, 2006, between PAUL COKELEY and DIANNE COKELEY, husband and wife, who acquired title as PAUL COKELY AND DIANE COKELY, as GRANTOR(S), whose address is 2221 SCHIRM LOOP NW, OLYMPIA, WA 98502 and THURSTON COUNTY TITLE COMPANY as TRUSTEE, whose address is 105 EAST 8TH AVE, OLYMPIA, WA 98501 and SANDY FAMILY FIVE LLC, a Washington Limited Liability Company as BENEFICIARY whose address isP.O. BOX 4094,, TUMWATER, WA 98501.

WITNESSETH: Grantor(s) hereby bargain(s), sell(s) and convey(s) to Trustee in Trust, with power of sale, the following described real property in THURSTON County, Washington:

See Exhibit A attached hereto and made a part hereof.

Abbreviated Legal: Pcl A BLA-980379TC & Pcls A & B BLA-04-105392TC

Tax Parcel Number(s): **4580-04-00600, 4580-04-00400, 4580-04-00500**

which real property is not used principally for agricultural or farming purposes, together with all tenements, hereditaments, and appurtenances now or hereafter thereunto belonging or in any wise appertaining, and the rents, issues and profits thereof.

This deed is for the purpose of securing performance of each agreement of Grantor(s) contained, and payment of the sum of **One Hundred Fifty-Seven Thousand Five Hundred and no/100** Dollars ($ 157,500.00) with interest, in accordance with the terms of a promissory note of even date herewith, payable to Beneficiary or order, and made by Grantor, and all renewals, modifications and extensions thereof, and also such further sums as may be advanced or loaned by Beneficiary to Grantor(s), or any of his/her/their successors or assigns, together with interest thereon at such rate as shall be agreed upon.

DUE DATE: The entire balance of the promissory note secured by this Deed of Trust, together with any and all interest accrued thereon, shall be due and payable in full on **October 19, 2007.**

To protect the security of this Deed of Trust, Grantor covenants and agrees:

1. To keep the property in good condition and repair; to permit no waste thereof; to complete any building, structure or improvement being built or about to be built thereon; to restore promptly any building, structure or improvement thereon which may be damaged or destroyed; and to comply with all laws, ordinances, regulations, covenants, conditions and restrictions affecting the property.

2. To pay before delinquent all lawful taxes and assessments upon the property; to keep the property free and clear of all other charges, liens or encumbrances impairing the security of this Deed of Trust.

(50)

3. To keep all buildings now or hereafter erected on the property described herein continuously insured against loss by fire or other hazards in an amount not less than the total debt secured by this Deed of Trust. All policies shall be held by the Beneficiary, and be in such companies as the Beneficiary may approve and have loss payable first to the Beneficiary as its interest may appear and then to the Grantor. The amount collected under any insurance policy may be applied upon any indebtedness hereby secured in such order as the Beneficiary shall determine. Such application by the Beneficiary shall not cause discontinuance of any proceedings to foreclose this Deed of Trust. In the event of foreclosure, all rights of the Grantor in insurance policies then in force shall pass to the purchaser at the foreclosure sale.

4.To defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee, and to pay all costs and expenses, including cost of title search and attorney's fees in a reasonable amount, in any such action or proceeding, and in any suit brought by Beneficiary to foreclose this Deed of Trust.

5.To pay all costs, fees and expenses in connection with this Deed of Trust, including the expenses of the Trustee incurred in enforcing the obligation secured hereby and Trustee's and attorney's fees actually incurred, as provided by statute.

6.Should Grantor fail to pay when due any taxes, assessments, insurance premiums, liens, encumbrances or other charges against the property hereinabove described, Beneficiary may pay the same, and the amount so paid, with interest at the rate set forth in the note secured hereby, shall be added to and become a part of the debt secured in this Deed of Trust.

7.DUE ON SALE: (OPTIONAL - *Not applicable unless initialed by Grantor and Beneficiary*) The property described in this security instrument may not be sold or transferred without the Beneficiary's consent. Upon breach of this provision, Beneficiary may declare all sums due under the note and Deed of Trust immediately due and payable, unless prohibited by applicable law.

_____ _____

Grantor (*Initials*) Beneficiary (*Initials*)

IT IS MUTUALLY AGREED THAT:

1. In the event any portion of the property is taken or damaged in an eminent domain proceeding, the entire amount of the award or such portion thereof as may be necessary to fully satisfy the obligation secured hereby, shall be paid to Beneficiary to be applied to said obligation.

2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive its right to require prompt payment when due of all other sums so secured or to declare default for failure to so pay.

3. The Trustee shall reconvey all or any part of the property covered by this Deed of Trust to the person entitled thereto on written request of the Grantor and the Beneficiary, or upon satisfaction of the obligation secured and written request for reconveyance made by the Beneficiary or the person entitled thereto.

4. Upon default by Grantor(s) in the payment of any indebtedness secured hereby or in the performance of any agreement contained herein, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In such event and upon written request of Beneficiary, Trustee shall sell the trust property, in accordance with the Deed of Trust Act of the State of Washington, at public auction to the highest bidder. Any person except Trustee may bid at Trustee's sale. Trustee shall apply the proceeds of the sale as follows: (1) to the expense of sale, including a reasonable Trustee's fee and attorney's fee; (2) to the obligation secured by this Deed of Trust; and (3) the surplus, if any, shall be distributed to the persons entitled thereto.

5. Trustee shall deliver to the purchaser at the sale its deed, without warranty, which shall convey to the purchaser the interest in the property which Grantor had or had the power to convey at the time of his/her/their execution of this Deed of Trust, and such as he/she/they may have acquired thereafter. Trustee's deed shall recite the facts showing that the sale was conducted in compliance with all the requirements of law and of this Deed of Trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrances for value.

6. The power of sale conferred by this Deed of Trust and by the Deed of Trust Act of the State of Washington is not an exclusive remedy; Beneficiary may cause this Deed of Trust to be foreclosed as a mortgage.

7. In the event of the death, incapacity or disability or resignation of Trustee, Beneficiary may appoint in writing a successor trustee, and upon the recording of such appointment in the mortgage records of the county in which this Deed of Trust is recorded, the successor trustee shall be vested with all powers of the original trustee. The trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Grantor, Trustee or Beneficiary shall be a party unless such action or proceeding is brought by the Trustee.

8. This Deed of Trust applies to, inures to the benefit of, and is binding not only on the parties hereto, but on their heirs, devisees, legatees, administrators, executors, successors and assigns. The term Beneficiary shall mean the holder and owner of the note secured hereby, whether or not named as Beneficiary herein.

9. ADDITIONAL TERMS AND CONDITIONS: (*Check One*)

a.☐ NONE

b.☑ **Beneficiary is to receive a minimum of $10,237.50 in interest from the grantor.**

(NOTE: If neither a nor b is checked, then option "a" applies)

PAUL COKELEY DIANNE COKELEY

_____ _____

(61)

STATE OF WASHINGTON
COUNTY OF Thurston } SS

I certify that I know or have satisfactory evidence that **PAUL COKELEY** and **DIANNE COKELEY** are the person(s) who appeared before me, and said person(s) acknowledged that they signed this instrument and acknowledged it to be their free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: 10-17-2006

DARLA J. WILKINS
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
SEPTEMBER 15, 2007

DARLA J. WILKINS
Notary Public in and for the State of Washington
Residing at **Olympia**
My appointment expires: 09-15-2007

REQUEST FOR FULL RECONVEYANCE
Do not record. To be used only when note has been paid.

TO: TRUSTEE

The undersigned is the legal owner and holder of the note and all other indebtedness secured by the within Deed of Trust. Said note, together with all other indebtedness secured by said Deed of Trust, has been fully paid and satisfied; and you are hereby requested and directed, on payment to you of any sums owing to you under the terms of said Deed of Trust, to cancel said note above mentioned, and all other evidences of indebtedness secured by said Deed of Trust delivered to you herewith, together with the said Deed of Trust, and to reconvey, without warranty, to the parties designated by the terms of said Deed of Trust, all the estate now held by you thereunder.

Dated _____

_____

_____

Exhibit A

PARCEL 1:

Parcel A of Boundary Line Adjustment No. BLA-980379TC, as recorded June 15, 1998 under Auditor's File No. 3160132.

PARCEL 2:

Parcel A of Boundary Line Adjustment No. BLA-04-105392TC, as recorded August 31, 2005 under Auditor's File No. 3763393.

PARCEL 3:

Parcel B of Boundary Line Adjustment No. BLA-04-105392TC, as recorded August 31, 2005 under Auditor's File No. 3763393.

In Thurston County, Washington.

BLAM 3763393

BLAM 3763393

DESCRIPTIONS OF ORIGINAL PARCELS

PARCEL C OF BOUNDARY LINE ADJUSTMENT NUMBER BLA93037STC AS RECORDED UNDER AUDITOR'S FILE NUMBER 3160132, RECORDS OF THURSTON COUNTY, WASHINGTON.

LOT 6 IN BLOCK 4 OF THE PLAT OF EDGEWATER BEACH AS RECORDED IN VOLUME 11 OF PLATS AT PAGE 30, RECORDS OF THURSTON COUNTY, WASHINGTON.
TOGETHER WITH THE EAST HALF OF STREET ADJOINING ON THE WEST VACATED BY RESOLUTION NUMBER 9077 AND RECORDED UNDER AUDITOR'S FILE NUMBER 8901010016.

THURSTON COUNTY
BOUNDARY LINE ADJUSTMENT NUMBER BLA 04 105392 TC

SE 1/4 OF THE NE 1/4 OF SECTION 9, TOWNSHIP 19 NORTH, RANGE 2 WEST, W.M.

ASSESSOR'S PARCEL NUMBER(S), ORIGINAL PARCEL:
45809400600, 45809400500

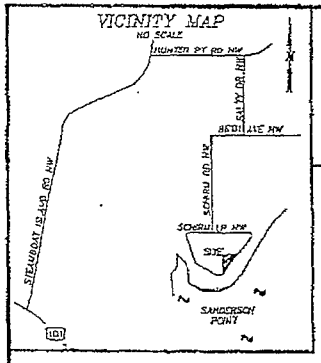
DESCRIPTIONS OF ADJUSTED PARCELS

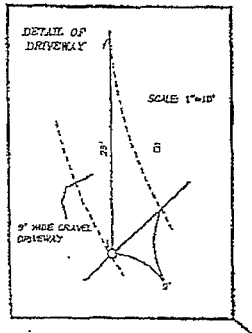
PARCEL A OF BOUNDARY LINE ADJUSTMENT NO. BLA 04 105392 TC DESCRIBED AS FOLLOWS:

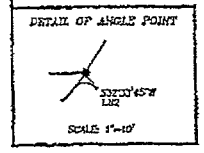
PARCEL C OF BOUNDARY LINE ADJUSTMENT NUMBER BLA93037STC AS RECORDED UNDER AUDITOR'S FILE NUMBER 3160132, RECORDS OF THURSTON COUNTY, WASHINGTON.
EXCEPTING THEREFROM THAT PORTION LYING SOUTHERLY OF A LINE DESCRIBED AS BEGINNING AT A POINT ON THE WEST LINE THEREOF S00°00'30"E A DISTANCE OF 44.00 FEET OF IT SOUTHWEST CORNER; THENCE SOUTHEASTERLY IN A STRAIGHT LINE TO A POINT ON THE SOUTH LINE OF SAID PARCEL C THAT IS S89°54'12"E A DISTANCE OF 112.00 FEET OF IT SOUTHWEST CORNER AND THE TERMINUS OF SAID LINE.
TOGETHER WITH A PORTION OF LOT 6 IN BLOCK 4 OF THE PLAT OF EDGEWATER BEACH AS RECORDED IN VOLUME 11 OF PLATS AT PAGE 30, RECORDS OF THURSTON COUNTY, WASHINGTON, LYING NORTHERLY OF A LINE DESCRIBED AS BEGINNING A POINT ON THE NORTH LINE THEREOF S89°54'12"E A DISTANCE OF 112.00 FEET OF ITS NORTHWEST CORNER; THENCE SOUTHWESTERLY IN A STRAIGHT LINE TO A POINT OF THE EASTERLY LINE OF SAID LOT 6 S46°53'24"W A DISTANCE OF 48.17 FEET OF ITS NORTHEAST CORNER AND THE TERMINUS OF SAID LINE ;

PARCEL B OF BOUNDARY LINE ADJUSTMENT NO. BLA 04 105392 TC DESCRIBED AS FOLLOWS:

LOT 5 IN BLOCK 4 OF THE PLAT OF EDGEWATER BEACH AS RECORDED IN VOLUME 11 OF PLATS AT PAGE 30, RECORDS OF THURSTON COUNTY, WASHINGTON;
TOGETHER WITH THE EAST HALF OF STREET ADJOINING ON THE WEST VACATED BY RESOLUTION NUMBER 9077 AND RECORDED UNDER AUDITOR'S FILE NUMBER 8901010016.
EXCEPTING THEREFROM THAT PORTION LYING NORTHERLY OF A LINE DESCRIBED AS BEGINNING A POINT ON THE NORTH LINE THEREOF S89°54'12"E A DISTANCE OF 112.00 FEET OF ITS NORTHWEST CORNER; THENCE SOUTHWESTERLY IN A STRAIGHT LINE TO A POINT OF THE EASTERLY LINE OF SAID LOT 6 S46°53'24"W A DISTANCE OF 48.17 FEET OF ITS NORTHEAST CORNER AND THE TERMINUS OF SAID LINE.
TOGETHER WITH THAT PORTION OF PARCEL C OF BOUNDARY LINE ADJUSTMENT NUMBER BLA93037STC AS RECORDED UNDER AUDITOR'S FILE NUMBER 3160132, RECORDS OF THURSTON COUNTY, WASHINGTON, LYING SOUTHERLY OF A LINE DESCRIBED AS BEGINNING AT A POINT ON THE WEST LINE THEREOF N00°00'30"E A DISTANCE OF 44.00 FEET OF IT SOUTHWEST CORNER; THENCE SOUTHEASTERLY IN A STRAIGHT LINE TO A POINT ON THE SOUTH LINE OF SAID PARCEL C THAT IS S89°54'12"E A DISTANCE OF 112.00 FEET OF IT SOUTHWEST CORNER AND THE TERMINUS OF SAID LINE.







LEGEND

- FOUND CONCRETE MONUMENT
- BAR & CAP OF RECORD – LS 33138
- FOUND BAR & CAP LS 22192 REF. BLA 9303787C AFN 3160132
- FOUND 5/8" BAR W/ LS 28073 CAP REF. ROS AFN 9312100221
- SET BAR & CAP LS 33138

ADDRESSES	
PARCEL A	2244 SCHIRM LOOP NW, OLYMPIA, WA. 98502
PARCEL B	2340 SCHIRM LOOP NW, OLYMPIA, WA. 98502

BT 11482

CERTIFICATION OF CONFORMANCE

THIS BOUNDARY LINE ADJUSTMENT IS FOUND TO BE IN CONFORMANCE WITH THURSTON COUNTY PLATTING AND SUBDIVISION ORDINANCE 18.04.040(H).

PLANNER _____ DATE 8-31-05

AUDITOR'S CERTIFICATE

FILED FOR RECORD THIS 31 DAY OF August
2005 AT THE REQUEST OF TC DOT SNC
AUDITOR'S FILE NO. 3763393

Approved for Recording
8/31/05

THURSTON COUNTY AUDITOR _____ BY _____ DEPUTY

SURVEYOR'S CERTIFICATE

I HEREBY CERTIFY THAT THE ABOVE LEGAL DESCRIPTIONS ARE ACCURATE AND IN COMPLIANCE WITH THE SUBDIVISION CODE AND THAT THIS BOUNDARY LINE ADJUSTMENT MAP WAS MADE BY ME OR UNDER MY DIRECTION AT THE REQUEST OF:

PAUL & DIANNE COKELEY

DATE 8-31-2005

REGISTERED PROFESSIONAL LAND SURVEYOR
CERTIFICATE NUMBER 33138

BRACY & THOMAS
LAND SURVEYORS
A PROFESSIONAL SERVICES CORPORATION
1520 WYNNE STREET, SUITE B
TUMWATER, WASHINGTON 98512
(360)357-3393

This sketch is provided, without charge, for your information. It is not intended to show all matters related to the property, including, but not limited to, area, dimensions, easements, encroachments, or location of boundaries. It is not a part of, nor does it modify, the commitment or policy to which it is attached. The Company assumes NO LIABILITY for any matter related to this sketch, unless such coverage is specifically provided by the covered risks of the policy. Reference should be made to an accurate survey for further information.

BLAM 3763393

(5-4)

Appendix B

Return Address:
Kirk M. Veis
Owens Davies Fristoe
Taylor & Schultz, P.S.
P.O. Box 187
Olympia, WA 98507-0187

NOTICE OF TRUSTEE'S SALE

Grantors	1. Paul L. Cokeley 2. Dianne L. Cokeley
Grantees	1. Owens Davies Fristoe Taylor & Schultz, P.S. 2. Sandy Family Five, LLC, a Washington limited liability company
Legal Description (abbreviated)	1. Parcel A of Boundary Line Adjustment No. BLA-980379TC 2. Parcel A of Boundary Line Adjustment No. BLA-04-105392TC 3. Parcel B of Boundary Line Adjustment No. BLA-04-105392TC
Assessor's Tax Parcel ID No.	45800400400; 45800400500; and 45800400600
Reference Nos. of Related Documents	3874430

I.

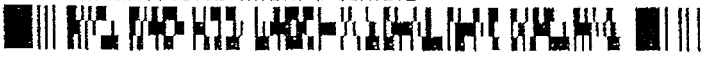
NOTICE IS HEREBY GIVEN that the undersigned Trustee will, on the 4th day of January, 2013, at the hour of 10:00 a.m., at the main entrance of the Thurston County Courthouse, located at 2000 Lakeridge Drive SW, Olympia, WA 98502, located in the Thurston County, Washington, sell at public auction to the highest bidder, payable at the time of sale, the following described real property, situated in the County of Thurston, State of Washington, to-wit:

Parcel 1: Parcel A of Boundary Line Adjustment No. BLA-980379TC, a recorded June 15, 1998 under Auditor's File No. 3160132. TPN 45800400400.

Parcel 2: Parcel A of Boundary Line Adjustment No. BLA-04-105392TC, as recorded August 31, 2005 under Auditor's File No. 3763393. TPN 45800400500.

Parcel 3: Parcel B of Boundary Line Adjustment No. BLA-04-105392TC, as recorded August 31, 2005 under Auditor's File No. 3763393. TPN 45800400600.

Situate in Thurston County, State of Washington.



which are subject to that certain Deed of Trust dated October 10, 2006, recorded October 20, 2006, under Auditor's File No. 3874430, records of Thurston County, Washington, from Paul L. Cokeley and Dianne L. Cokeley, husband and wife, as Grantors, to Thurston County Title Company, as Trustee, to secure an obligation in favor of Sandy Family Five, LLC, a Washington limited liability company, as Beneficiary. Owens Davies Fristoe Taylor & Schultz, P.S., a professional services corporation, has been appointed Successor Trustee under said deed of trust.

II.

No action commenced by the Beneficiary of the Deed of Trust is now pending to seek satisfaction of the obligation in any court by reason of the Borrower's or Grantor's default on the obligation secured by the Deed of Trust.

III.

The default(s) for which this foreclosure is made is/are as follows: failure to pay the principal balance of the note and interest payments which were due and payable on October 19, 2007, with a total principal balance of $157,500.00, accrued interest from December 31, 2009 through August 31, 2012 of $61,218.63, and additional accrued interest from September 1, 2012 through October 6, 2012 at thirteen (13) percent per annum

Principal:	$157,500.00
Interest balance through August 31, 2012:	$61,218.63
Additional accrued interest:	$2,019.45
TOTAL AMOUNT DUE AS OF OCTOBER 6, 2012:	$220,738.08

IV.

The sum owing on the obligation secured by the Deed of Trust is: Principal $157,500.00, together with interest as provided in the note or other instrument secured from the 31st day of December, 2009, and such other costs and fees as are due under the note or other instrument secured, and as are provided by statute.

V.

The above-described real property will be sold to satisfy the expense of sale and the obligation secured by the Deed of Trust as provided by statute. The sale will be made without warranty, express or implied, regarding title, possession or encumbrances on the 4th day of January, 2013. According to Chapter 61.24, if this were a foreclosure of a Deed of Trust securing an installment note that was simply in arrears, the Grantor, any Guarantor, or the holder of any recorded junior lien or encumbrance would have the right to reinstate the note and cause a discontinuance of the sale by paying all installments in arrears and paying the trustee's fees and costs before the eleventh day before the sale. However, the Deed of Trust being foreclosed in this case secured a note that has matured and under which the total amount of principal is now due.

(LEI)

Therefore, there is no right to reinstate the note and Deed of Trust as described above. In this case, the Grantor's defaults can be cured and the sale discontinued and terminated before the scheduled date of sale only by the Borrower, Grantor, any Guarantor or the holder of any recorded junior lien or encumbrance paying the entire principal and interest secured by the Deed of Trust, plus costs, fees and advances, if any, made pursuant to the terms of the obligation and/or Deed of Trust, and curing all other defaults.

VI.

A written notice of default was transmitted by the Beneficiary or Trustee to the Borrower and Grantor at the following address(es):

Paul L. Cokeley 1408 West Simpson Avenue Montesano, WA 98563	Dianne L. Cokeley 1408 West Simpson Avenue Montesano, WA 98563

by both first class and certified mail on August 31, 2012, proof of which is in the possession of the Successor Trustee; and the written notice of default was posted in a conspicuous place on the real property described in paragraph I above, and the Successor Trustee has possession of proof of such service or posting.

VII.

The Successor Trustee whose name and address are set forth below will provide in writing to anyone requesting it a statement of all costs and fees due at any time prior to the sale.

VIII.

The effect of the sale will be to deprive the Grantor and all those who hold by, through, or under the Grantor of all their interest in the above-described property.

IX.

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

DATED this 2nd day of October, 2012.

OWENS DAVIES FRISTOE TAYLOR & SCHULTZ, P.S.
A professional services corporation

By: Kirk M. Veis
Authorized Agent

1115 West Bay Drive NW, Suite 302
Olympia, Washington 98502-4668

STATE OF WASHINGTON)
: ss.
County of Thurston)

THIS IS TO CERTIFY that on this 2nd day of October, 2012, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Kirk M. Veis, to me known to be the authorized agent of Owens Davies Fristoe Taylor & Schultz, P.S. a professional services corporation, the corporation and successor trustee that executed the within and foregoing instrument, and acknowledged that he signed the same as the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed the day and year first above written.

NOTARY PUBLIC
STATE OF WASHINGTON
KATHRYN MAE ICE
Commission Expires February 3, 2014

Print Name: KATHRYN MAE ICE
NOTARY PUBLIC in and for the State of Washington, residing at TACOMA
Commission expires: FEBRUARY 3, 2014

Appendix C

AFTER RECORDING MAIL TO:

28 DEC '12 374054

Craig J. Brown and Debra A. Brown
2230 SE Bloomfield Road
Shelton, WA 98584-7250

Thurston County Treasurer
Real Estate Excise Tax Paid 2314.00
By [signature] Deputy

Filed for Record at Request of:
First American Title Insurance Company

Space above this line for Recorders use only

STATUTORY WARRANTY DEED

File No: **4291-1990129 (GR)** 817

Date: **December 26, 2012**

Grantor(s): **Paul L. Cokeley and Dianne L. Cokeley**
Grantee(s): **Craig J. Brown and Debra A. Brown**
Abbreviated Legal: **LOT 11 IN BLOCK 1 OF EDGEWATER BEACH, AS RECORDED IN VOLUME 11 OF PLATS, PAGE 30**
Additional Legal on page:
Assessor's Tax Parcel No(s): **45800101100**

THE GRANTOR(S) Paul L. Cokeley and Dianne L. Cokeley, husband and wife for and in consideration of **Ten Dollars and other Good and Valuable Consideration,** in hand paid, conveys, and warrants to **Craig J. Brown and Debra A. Brown, husband and wife,** the following described real estate, situated in the County of **Thurston,** State of **Washington.**

LEGAL DESCRIPTION: Real property in the County of Thurston, State of Washington, described as follows:

LOT 11 IN BLOCK 1 OF EDGEWATER BEACH, AS RECORDED IN VOLUME 11 OF PLATS, PAGE 30; IN THURSTON COUNTY WASHINGTON.
TOGETHER WITH ALL TIDELANDS SUITABLE FOR THE CULTIVATION OF OYSTERS AS CONVEYED BY THE STATE OF WASHINGTON LYING IN FRONT OF, ADJACENT TO AND ABUTTING ON SAID LOT.

Subject To: This conveyance is subject to covenants, conditions, restrictions and easements, if any, affecting title, which may appear in the public record, including those shown on any recorded plat or survey.

LPB 10-05

4309572
12/28/2012 11:14 AM Deed
Thurston County Washington
FIRST AMERICAN TITLE

Pages: 2

05

APN: 45800101100 | Statutory Warranty Deed - continued | File No.: 4291-1990129 (GR)

Paul L. Cokeley

Dianne L. Cokeley

STATE OF Washington)
)ss
COUNTY OF Thurston)

I certify that I know or have satisfactory evidence that **Paul L. Cokeley and Dianne L. Cokeley,** is/are the person(s) who appeared before me, and said person(s) acknowledged that he/she/they signed this instrument and acknowledged it to be his/her/their free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: 12-28-12

Notary Public in and for the State of Washington
Residing at: Olympia
My appointment expires: May 10, 2014

GAIL K. RANDALL NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 05-10-14

(cc)

Appendix D

11 JAN '13 719051

Return Address:

Owens Davies Fristoe
Taylor & Schultz, P.S.
P.O. Box 187
Olympia, WA 98507

Thurston County Treasurer
Real Estate Excise Tax Paid
By Deputy

TRUSTEE'S DEED

Grantor	Owens Davies Fristoe Taylor & Schultz, PS
Grantee	Sandy Family Five, LLC, a Washington limited liability company
Legal Description (abbreviated)	1. Parcel A of Boundary Line Adjustment No. BLA-980379TC 2. Parcel A of Boundary Line Adjustment No. BLA-04-105392TC 3. Parcel B of Boundary Line Adjustment No. BLA-04-105392TC
Assessor's Tax Parcel ID No.	45800400400; 45800400500; and 45800400600
Reference Nos. of Related Documents	

The Grantor, Owens Davies Fristoe Taylor & Schultz, PS, a Washington professional services corporation, as present Trustee under that Deed of Trust (defined below), in consideration of the premises and payment recited below, hereby grants and conveys, without representation or warranty, expressed or implied, to Sandy Family Five, LLC, a Washington limited liability company, as Grantee, the real property (the "Property"), situated in the County of Thurston, State of Washington, described as follows:

Parcel 1: Parcel A of Boundary Line Adjustment No. BLA-980379TC, as recorded June 15, 1998 under Auditor's File No. 3160132. TPN 45800400400.

Parcel 2: Parcel A of Boundary Line Adjustment No. BLA-04-105392TC, as recorded August 31, 2005 under Auditor's File No. 3763393. TPN 45800400500.

Parcel 3: Parcel B of Boundary Line Adjustment No. BLA-04-105392TC, as recorded August 31, 2005 under Auditor's File No. 3763393. TPN 45800400600.

Situate in Thurston County, State of Washington.

Commonly known as 2314, 2244 and 2240 Schirm Loop Road NW, Olympia, Washington 98502.

4312155 Pages: 4
01/14/2013 08:13 AM Deed
Thurston County Washington
ABC/OWENS DAVIES FRISTOE TAYLOR & SCHULTZ, PS

1

(08)

RECITALS

1. This conveyance is made pursuant to the powers, including the power of sale, conferred upon the Trustee by that certain Deed of Trust from Paul L. Cokeley and Dianne L. Cokeley, husband and wife, as Grantors, to Thurston County Title Company, as Trustee, to secure an obligation in favor of Sandy Family Five, LLC, a Washington limited liability company, as Beneficiary, dated October 10, 2006, recorded October 20, 2006, under Auditor's File No. 3874430, records of Thurston County, Washington. Owens Davies Fristoe Taylor & Schultz, PS was appointed successor trustee (the "Trustee") pursuant to an Appointment of Successor Trustee recorded August 31, 2012 under Auditor's File No. 4236626.

2. The Deed of Trust was executed to secure, together with other undertakings, the payment of one or more promissory note(s) (the "Note") in the sum of One Hundred Fifty-Seven Thousand Five Hundred Dollars ($157,500.00) with interest thereon, according to the terms thereof, in favor of Sandy Family Five, LLC and to secure any other sums of money which might become due and payable under the terms of said Deed of Trust.

3. The Deed of Trust provided that the Property is not used principally for agricultural or farming purposes and the Trustee has no actual knowledge that the Property is used principally for agricultural or farming purposes.

4. Default having occurred in the obligations secured and/or covenants of the Deed of Trust grantor, as set forth in Notice of Trustee's Sale described below, which by the terms of the Deed of Trust make operative the power to sell, the thirty-day advance Notice of Default was transmitted to the Deed of Trust grantor, or his successor in interest, and a copy of said Notice of Default was posted or served in accordance with law.

5. Sandy Family Five, LLC, being then the holder or the nominee of the indebtedness secured by the Deed of Trust, delivered to the Trustee a written request directing the Trustee to sell the Property in accordance with law and the terms of the Deed of Trust.

6. The defaults specified in the Notice of Default not having been cured, the Trustee, in compliance with the terms of the Deed of Trust, executed, on October 2, 2012 and on October 3, 2012, recorded in the office of the Auditor of Thurston County, Washington, a Notice of Trustee's Sale of the Property under Thurston County Auditor's File No. 4291942.

7. The Trustee, in the Notice of Trustee's Sale, fixed the place of sale as near the directory in front of the Thurston County Courthouse, 2000 Lakeridge Drive SW, City of Olympia, State of Washington, a public place, on January 4, 2013 at 10:00 a.m., and in accordance with the law caused copies of the statutory Notice of Trustee's Sale to be transmitted by mail to all persons entitled thereto and either posted or served prior to ninety (90) days before the sale; further, the Trustee caused a copy of said Notice of Trustee's Sale to be published in a legal newspaper in each county in which the property or any part thereof is situated, once between the thirty-fifth and twenty-eighth day before the date of sale, and once between the fourteenth and seventh day before the date of sale; and further, included with the Notice of Trustee's Sale, which was transmitted to or served

upon the Deed of Trust grantor or his/her successor in interest, a Notice of Foreclosure in substantially the statutory form, to which copies of the Note and Deed of Trust were attached.

8. The sale was held on January 4, 2012 at 10:00 A.M.

9. During foreclosure, no action by the Beneficiary, its successors or assigns was pending on an obligation secured by the Deed of Trust.

10. All legal requirements and all provisions of said Deed of Trust have been complied with, as to acts to be performed and notices to be given, as provided in Chapter 61.24 RCW.

11. The defaults specified in the Notice of Trustee's Sale not having been cured ten (10) days prior to the date of Trustee's Sale and said obligation secured by said Deed of Trust remaining unpaid, on January 4, 2013, the date of sale, which was not less than one hundred ninety (190) days from the date of default in the obligation secured, the Grantor then and there sold the Property at public auction to said Grantee, the highest bidder therefor, for the sum of Two Hundred Thirty Thousand Ninety-Eight Dollars Fourteen Cents ($230,098.14).

This conveyance is made without representations or warranties of any kind, expressed or implied. By recording this Trustee's Deed, Grantee understands, acknowledges and agrees that the Property was purchased in the context of a foreclosure, that the trustee made no representations to Grantee concerning the Property and that the trustee owed no duty to make disclosures to Grantee concerning the Property. Grantee relied solely upon its own due diligence investigation before electing to bid for the Property.

DATED this 9th day of January, 2013.

OWENS DAVIES FRISTOE
TAYLOR & SCHULTZ, PS
A professional services corporation

By: Kirk M. Veis
Agent for the Successor Trustee

(70)

STATE OF WASHINGTON)
: ss.
County of Thurston)

THIS IS TO CERTIFY that on this 9th day of January, 2013, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Kirk M. Veis, to me known to be the authorized agent of Owens Davies Fristoe Taylor & Schultz, PS, a professional services corporation, the corporation and successor trustee that executed the within and foregoing instrument, and acknowledged that he signed the same as the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed the day and year first above written.

NOTARY PUBLIC
STATE OF WASHINGTON
MICHAEL W. MAYBERRY
Commission Expires June 28, 2016

Print Name: Michael W Mayberry
NOTARY PUBLIC in and for the State of Washington,
residing at Olympia
Commission expires: June 28, 2016

(71)

Appendix E

6

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

SANDY FAMILY FIVE, LLC, a Washington Limited Liability Company,

Plaintiffs,

v.

CRAIG and DEBRA BROWN, husband and wife, and other marital community

Defendants.

NO. 14-2-01934-1

FINAL JUDGMENT

I. JUDGMENT SUMMARY

No monetary judgment.

II. JUDGMENT

This matter came on regularly for hearing on Friday, January 9, 2015 and again on Friday, January 30, 2015. The Plaintiff Sandy Family Five, LLC was represented by Matthew Edwards of Owens Davies, P.S. The Defendants Craig and Debra Brown, husband and wife, and their marital community, were represented by Scott Kee of Rodgers Kee & Card P.S.

The Court considered the following pleadings:

1. Motion for Summary Judgment;
2. Declaration of Matthew Edwards In Support of Motion for Summary Judgment;
3. Defendants' Motion for Summary Judgment Dismissing Plaintiff's Complaint;
4. Declaration of C. Scott Kee;
5. Declaration of Craig Brown;
6. Brief in Response to Defendants' Motion for Summary Judgment;

OWENS DAVIES, P.S.
1115 West Bay Drive, Suite 302
Olympia, Washington 98502
Phone: (360) 943-8320
Facsimile: (360) 943-6150

nlj

177

7. Defendant's Response to Plaintiff's Motion for Summary Judgment;

8. Sandy Family Five's Reply Brief in Support of Motion for Summary Judgment, and in Opposition to Browns' Motion for Summary Judgment;

9. Declaration of Larry Weaver;

10. Supplemental Declaration of Matthew Edwards in Opposition to Craig and Debra Brown's Motion for Summary Judgment;

11. Defendant's Reply Brief in Support of Their Motion for Summary Judgment Dismissing Plaintiff's Complaint;

12. Plaintiff's Motion for Reconsideration;

13. Declaration of Matthew Edwards; and

14. Defendants' Response to Plaintiff's Motion for Reconsideration.

In addition, the Court considered the oral argument of counsel.

Based on the foregoing, the Court hereby DIRECTS THE CLERK TO ENTER, AND ENTERS FINAL JUDGMENT as follows:

1. Sandy Family Five, LLC's Motion for Summary Judgment is DENIED;

2. Craig and Debra Brown's Motion for Summary Judgment is GRANTED, except that the Court did not address, and does not grant summary judgment with respect to the Brown's claim of an implied easement, which claim the Browns had not pled;

3. Plaintiff's Complaint is DISMISSED, WITH PREJUDICE, but without an award of fees and costs to either party.

4. This constitutes the FINAL DECISION AND JUDGMENT of this Court.

DATED this 13th day of Feb., 2015.

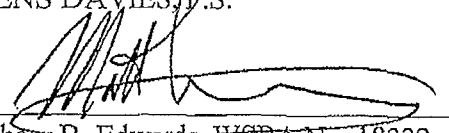
Carol Murphy

Judge Carol Murphy

OWENS DAVIES, P.S.
1115 West Bay Drive, Suite 302
Olympia, Washington 98502
Phone: (360) 943-8320
Facsimile: (360) 943-6150

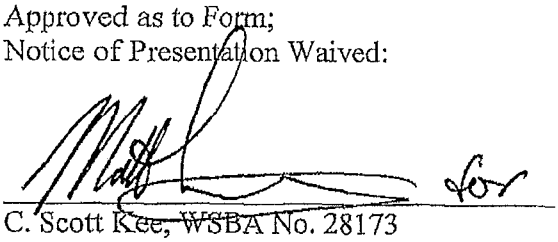
Presented by, right to appeal reserved:

OWENS DAVIES, P.S.



Matthew B. Edwards, WSBA No. 18332
Attorneys for Plaintiffs, Sandy Family Five, LLC

Approved as to Form;
Notice of Presentation Waived:



C. Scott Kee, WSBA No. 28173
Attorneys for Defendants, Craig and Debra Brown

per attached e mail authorization

OWENS DAVIES, P.S.
1115 West Bay Drive, Suite 302
Olympia, Washington 98502
Phone: (360) 943-8320
Facsimile: (360) 943-6150

Appendix F

Filed
Washington State
Court of Appeals
Division Two

December 1, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SANDY FAMILY FIVE, LLC, a Washington Limited Liability Company, Appellant, v. CRAIG J. BROWN and DEBRA A. BROWN, husband and wife, and their marital community, Respondents,	No. 47222-8-II UNPUBLISHED OPINION

WORSWICK, P.J. — Sandy Family Five, LLC (Sandy) appeals the superior court's summary judgment ruling dismissing Sandy's quiet title action. Sandy sought to quiet title to its property free and clear of Craig and Debra Brown's claim to a drain field easement over Sandy's property. Sandy argues that the superior court erred by dismissing its claim because (1) the easement, purportedly created when all the properties were under the same ownership, was never valid, and (2) alternatively, a deed of trust extinguished any easement. The Browns argue that they have (3) an express easement and (4) an implied easement over the Sandy property. We agree with the Browns that an implied easement exists, and we affirm the summary judgment.[1]

[1] The Browns also argue even if they have no easement as a matter of law, equity demands that this court affirm the summary judgment dismissal. Because we affirm the summary judgment, we do not reach this argument.

FACTS

Sandy is a Washington corporation. Sandy presently owns three parcels of real property (now, collectively, "the Sandy property"). Clerk's Papers (CP) at 3-4. The Browns own a neighboring parcel (now, "the Brown property"). CP at 4. Prior to 2005, Paul and Diane Cokeley owned both the Sandy and the Brown properties. Both properties are vacant, but the Cokeleys had planned to build 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. Accordingly, on December 30 and 31, 2005, the Cokeleys recorded two purported drain field easements with the Thurston County Auditor. These documents showed the Cokeleys as both grantor and grantee of the easements. The easements benefited what is now the Brown property and burdened what is now the Sandy property.

In October 2006, Sandy lent the Cokeleys money in exchange for which the Cokeleys granted Sandy a deed of trust over a portion of the Sandy property. This deed of trust included all of the Cokeleys' interest in the Sandy property as security for the loan. The deed of trust did not mention the drain field easements, but instead described the property conveyed as if no easement burdened it. Sandy did not know about the easement when it accepted the deed of trust, although the 2005 drainage easements were recorded with the Thurston County Auditor.

In 2011, the Cokeleys began to construct septic system improvements on the Brown property and a drain field on the Sandy property. In June 2012, the Cokeleys again recorded a drain field easement that was identical to one of the 2005 drainage easements: it burdened 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. The Browns cannot develop the Brown property without completing the septic system, which requires connecting to the drain field over the Sandy property. The Brown property's septic system is approved by the Thurston County Health Department, and the drain field is installed and hooked up to the Brown property. The Browns' plans to build a house hinge on the ability to utilize the previously issued 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. Sandy contacted the Browns and informed them that it knew about the purported drain field easements. It informed the Browns that it believed Sandy's deed of trust from 2006 was superior to the easement from 2012.

Sandy filed a quiet title action, alleging that the Cokeleys could not create an easement over their own property, and therefore, Sandy took the Sandy property free and clear of any easements. The Browns moved for summary judgment dismissal of Sandy's action. For the first time in their motion for summary judgment, the Browns argued that they also had an implied easement. Sandy did not argue that the Browns had waived this implied easement issue by failing to raise it earlier. Sandy also moved for summary judgment in its favor.

The superior court heard the opposing summary judgment motions together. Without explaining its ruling on the record, the superior court orally denied Sandy's motion for summary judgment and granted the Browns' motion for summary judgment.

Before the superior court entered a written ruling, Sandy moved for reconsideration. For the first time in its motion for reconsideration, Sandy argued that the implied easement theory was "not pled and not proved." CP at 168. The superior court orally denied the motion for reconsideration. The superior court did not specify which of the two express easements it believed was in force, but it clarified that it did not base its decision on an implied easement.

The written order states: "Craig and Debra Brown's Motion for Summary Judgment is GRANTED, except that the Court did not address, and does not grant summary judgment with respect to the Brown's [sic] claim of an implied easement, which claim the Browns had not pled." CP at 178. The superior court entered final judgment for the Browns, dismissing Sandy's lawsuit. Sandy appeals.

ANALYSIS

I. STANDARD OF REVIEW

We review a superior court's order for summary judgment de novo, performing the same inquiry as the superior court. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c).

The moving party bears the initial burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Then the burden shifts to the nonmoving party to show

that there is a genuine issue of material fact. *Visser v. Craig*, 139 Wn. App. 152, 158, 159 P.3d 453 (2007). If the nonmoving party fails to carry this burden, summary judgment is proper. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

We consider all evidence submitted and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *McPhaden v. Scott*, 95 Wn. App. 431, 434, 975 P.2d 1033 (1999). But a nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain. *Visser*, 139 Wn. App. at 158. We may affirm a summary judgment order on any grounds supported by the record. *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011).

II. EXPRESS EASEMENT

Sandy argues that the Cokeleys never created an express easement over the Sandy property because the Cokeleys owned both the Brown and Sandy properties when they purported to create the easement. Sandy argues in the alternative that even if the Cokeleys created an easement, they extinguished it by conveying the entire Sandy property to Sandy in the deed of trust. We agree with Sandy that the Cokeleys could not create a valid express easement over their own property. Thus, we do not consider the effect the deed of trust had on any purported express easements.

An easement is a right in the property of another, not in one's own land. An easement is the right to use land, and the easement must serve a beneficial use. *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 853, 351 P.2d 520 (1960). Therefore, "[o]ne cannot have an easement in his own property." *Coast Storage*, 55 Wn.2d at 853. More specifically, a property owner cannot have and does not need an easement in land he owns. *Butler v. Craft Eng Constr., Inc.*,

67 Wn. App. 684, 698, 843 P.2d 1071 (1992). An easement requires both a dominant and a servient estate. *Roggow v. Hagerty*, 27 Wn. App. 908, 911, 621 P.2d 195 (1980). When one person owns both the dominant and servient estates, an easement is terminated. *Coast Storage*, 55 Wn.2d at 853.

Here, the 2005 drain field easements purported to grant easements encumbering one of the Cokeleys' parcels in favor of another. As owner of both parcels, however, the Cokeleys had no need for an easement, and could not create such an interest in their own favor on their own property. No express easement was created by the drain field easements, so the Brown property does not have an express easement over the Sandy property.

III. IMPLIED EASEMENT

The Browns argue that even if they do not have an express easement over the Sandy property, they have an implied easement. Sandy argues that the Browns may not assert an implied easement because they did not plead it as an affirmative defense, and the superior court did not grant their motion for summary judgment on this basis. Sandy also argues that no implied easement existed because the Cokeleys did not use the drain field enough to establish such an easement. We consider this issue on its merits and agree with the Browns.

A. *Failure To Plead Implied Easement*

Sandy argues that the superior court properly excluded the issue of implied easement from the summary judgment ruling because the Browns did not plead the affirmative defense of having an implied easement. We disagree.

We can affirm a summary judgment on any ground supported by the record. *Blue Diamond Grp.*, 163 Wn. App. at 453. The fact that the superior court's stated reasons were not

based on an implied easement theory does not preclude this court from affirming a summary judgment on that ground.

Under CR 8(c) a party must plead its affirmative defenses. Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a CR 12(b) motion, or (3) tried by the parties' express or implied consent. *Bickford v. City of Seattle*, 104 Wn. App. 809, 813, 17 P.3d 1240 (2001).

But a party does not waive its affirmative defense merely because it fails to plead it. Where the party fulfills the policy goal animating the rule—to avoid surprise—we will permit the affirmative defense. *Henderson v. Tyrrell*, 80 Wn. App. 592, 624, 910 P.2d 522 (1996). Thus, a party's failure to plead a defense affirmatively is harmless where the failure to plead does not affect the substantial rights of the parties. *Henderson*, 80 Wn. App. at 624. Also, when there is written and oral argument to the court without objection on the legal issues raised in connection with the defense, objection to a failure to comply with CR 8(c) is waived. *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975).

Here, the Browns did not plead the existence of an implied easement as an affirmative defense to Sandy's quiet title action. The Browns first made this claim in their motion for summary judgment. Sandy did not argue that the Browns had waived this defense until after the trial court granted the Browns' summary judgment motion: Sandy argued for the first time in its motion for reconsideration of summary judgment that the Browns had failed to timely raise the implied easement issue.

Moreover, because Sandy responded to the Browns' summary judgment motion without arguing surprise or prejudice from the Browns' failure to plead the existence of an implied

easement, we consider the Browns' arguable noncompliance with CR 8(c) harmless. *See Henderson*, 80 Wn. App. at 624. Sandy waived its objection to the Browns' failure to comply with CR 8(c) by providing written and oral argument to the trial court in opposition to the Browns' motion for summary judgment without arguing that the Browns waived this issue. *Mahoney*, 85 Wn.2d at 100. Sandy does not argue now, nor did it argue below, that the Browns' failure to plead their implied easement theory prejudiced it. Because Sandy waived its objection to the Brown's failure to comply with CR 8(c) and because the Browns' failure to plead implied waiver was harmless, we reject the argument that the Browns waived this issue.

B. *Implied Easement Exists*

The Browns argue that they have an implied easement. We agree. Implied easements arise by intent of the parties, which intent we find from the facts and circumstances surrounding the conveyance of land. *Roberts v. Smith*, 41 Wn. App. 861, 864, 707 P.2d 143 (1985). We look to three factors when considering whether an implied easement exists: (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 exist. *McPhaden*, 95 Wn. App. at 437. The first factor—former unity of title and subsequent separation—is an absolute requirement for an implied easement. *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 668, 404 P.2d 770 (1965); *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 us to 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.

Absolute necessity is not required to establish an implied easement. *Evich v. Kovacevich*, 33 Wn.2d 151, 157-58, 204 P.2d 839 (1949). Sufficient necessity exists when the party claiming the easement cannot create a substitute to the easement at reasonable cost on his own property without trespassing on his neighbors. *Bays v. Haven*, 55 Wn. App. 324, 329, 777 P.2d 562 (1989). Prior use is circumstantial evidence of an implied easement, but we can find an implied easement based on necessity alone if the land cannot be used without disproportionate expense without the easement. *Fossum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995).

Here, we hold that an implied easement exists. There is no dispute that the required first element is met: the Sandy and Brown parcels had unity of title, and were subsequently separated. Thus, the unity of title and subsequent separation element is met. *Hellberg*, 66 Wn.2d at 668.

Sandy's primary argument against an implied easement relates to the second element: use of the property amounting to a quasi-easement. Sandy argues that no quasi-easement existed because the separation of title occurred in 2006 when the Cokeleys granted the deed of trust to Sandy, and the Cokeleys did not begin to construct any septic improvements on the Brown property until 2011. 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. *Mahalko v. Arctic Trading Co.*, 99 Wn.2d 30, 38, 659 P.2d 502 (1983), *overruled on other grounds by Felton v. Citizens Fed. Savings & Loan Ass'n of Seattle*, 101 Wn.2d 416, 424, 679 P.2d 928 (1984). Thus, as a matter of law, title did not separate until December 2012, when the Cokeleys conveyed the Brown property to the Browns. Even construing all material facts in Sandy's favor

and assuming that the Cokeleys did not begin construction on septic improvements until 2011, there is no genuine issue of material fact that the Cokeleys began apparent and continuous work benefiting the Brown property and burdening the Sandy property during unity of title between 2011 and late 2012. *See McPhaden*, 95 Wn. App. at 437.

Moreover, even if there were no quasi-easement during unity of title, that fact is not dispositive. Presence or absence of a quasi-easement is not conclusive of the existence of an implied easement; instead, courts use these factors to evaluate the ultimate issue: whether the parties intended that an easement exist. *Hellberg*, 66 Wn.2d at 668; *McPhaden*, 95 Wn. App. at 437; *Roberts*, 41 Wn. App. at 865. Here, that intent was clear from the repeated attempts the Cokeleys made to establish an express easement over the Sandy property, from the work they did to improve the Brown property by installing septic improvements burdening the Sandy property, and from the representations the Cokeleys made to the Browns about the existence of a drain field easement.

Additionally, there is no dispute that a certain degree of necessity exists: the Browns cannot develop their property without accessing the drain field over the Sandy property. Absolute necessity is not required: instead, we look only for *reasonable* necessity. *Evich*, 33 Wn.2d at 157-58. Reasonable necessity exists when the party claiming the implied easement cannot create a substitute at reasonable cost without trespassing on his neighbors. *Bays*, 55 Wn. App. at 329. This reasonable necessity alone can establish an implied easement beginning during unity of title. *Fossum Orchards*, 77 Wn. App. at 451. Here, there is no dispute that the Browns cannot develop their property without access to the drain field; thus, reasonable necessity exists. There are no facts to suggest that an alternative way to develop the property

exists. Thus, there are no genuine issues of material fact precluding summary judgment dismissal, because the Browns established an implied easement.

ATTORNEY FEES

The Browns request reasonable attorney fees and costs on appeal, but they fail to cite authority for their entitlement to such fees and costs. Thus, we deny their request. RAP 18.1; *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d (2012).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Lee, J.

Sutton, J.

Appendix G

No. 47222-8-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

SANDY FAMILY FIVE, LLC, a Washington corporation,

APPELLANT,

v.

CRAIG and DEBRA BROWN, husband and wife, and their marital community,

RESPONDENTS.

APPELLANT SANDY FAMILY FIVE, LLC'S MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH

OWENS DAVIES, P.S.
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I. MOTION AND RELIEF REQUESTED

Sandy Family Five, LLC (hereinafter "Sandy") moves for reconsideration of the Court's decision addressing the Browns' implied easement claim. If the Court denies the motion for reconsideration, Sandy moves the Court to publish at least that portion of the Court's decision addressing the Browns' implied easement claim.

II. ANALYSIS

Sandy does not seek reconsideration with respect to the Court's determination that the 2012 Cokeley-Brown conveyance gave rise to an implied easement over the property subject to Sandy's Deed of Trust. Sandy only seeks reconsideration of the Court's failure to address the impact that the 2013 foreclosure of Sandy's 2006 Deed of Trust had on the implied easement. The Court should address the impact of that foreclosure, and hold that it extinguished the Browns' implied easement.

A. Sandy does not seek reconsideration of the Court's implied easement analysis, as far as it goes.

Sandy does not seek reconsideration of the Court's implied easement analysis, as far as it goes.

In its decision, the Court notes that:

> Implied easements arise by **the intent of the parties**, which intent we find from the facts and circumstances surrounding the conveyance of land. *Roberts v. Smith*, 41 Wn. App. 861, 864, 707 P.2d 143 (1985).

Unpublished Decision, p. 8. (Emphasis added). The Court then recites the three factors traditionally utilized to assist it in determining the parties' intent. *Id.* The Court notes "[t]he first factor--former unity of title and subsequent separation--is an absolute requirement for an implied easement." *Id.* And, the Court notes as respects the other two factors: "those factors help us to determine the parties' intent." *Id.*

The Court then holds that the December 2012 conveyance from the Cokeleys to the Browns worked the separation of title essential to any determination of an implied easement. *Id.*, p. 9. ("Thus, as a matter of law, title did not separate until December 2012, when the Cokeleys conveyed the Brown property to the Browns.") The Court finds that the Cokeleys and the Browns intended, as part of that transaction, that the Cokeleys convey to the Browns a right to use the septic system which the Cokeleys had in 2011 constructed on the property subject to Sandy's Deed of Trust, and therefore holds that the Cokeleys also impliedly conveyed to the Browns a septic easement over that property. *Id.*, p. 9-10.

Sandy does not seek reconsideration of any of the foregoing.

B. The Court should have, but failed to, address the effect of the foreclosure of Sandy's Deed of Trust on the easement the Cokeleys impliedly conveyed to the Browns over the property subject to Sandy's Deed of Trust. The foreclosure extinguished that easement.

Unfortunately, the Court's analysis ends at this point. The Court appears to have overlooked the final issue which the Court must address in

order to properly resolve this case: What impact did the foreclosure of Sandy's Deed of Trust have upon the easement which the Cokeleys impliedly granted to the Browns on the property subject to Sandy's Deed of Trust?

Under the plain language of the Washington State Deed of Trust Act, the answer is absolutely clear. Because the implied easement arising out of the Cokeleys' 2012 conveyance to the Browns gave rise to an interest in the property subject to Sandy's Deed of Trust that was **junior** to Sandy's Deed of Trust, **the foreclosure of the Deed of Trust and the conveyance of the property to Sandy by Trustee's Deed extinguished the implied easement.**

The Washington Deed of Trust Act adopts the common law priority rule of "first in time, first in right." 18 *Stoebuck and Weaver*, Washington Practice, Real Estate: Transactions §18.21 at 342 (2d ed. 2004). See also, *Bank of America, NA v. Prestance Corp.*, 160 Wn.2d 560, 565, ¶9, 160 P.2d 17 (2007) ("general rule" is "first in time, first in right").

In general, therefore, a foreclosure of a Deed of Trust extinguishes all interests in the property junior to the Deed of Trust.

> "The general rule is one of timing: 'First in time, first in right' certainly applies here." *United States v. Roberts*, 788 F. Supp. 555, 557 (S.D. Fla. 1991) (extinguishing easement created three years after notes and mortgage executed). If the easement were in existence before the property was mortgaged, it will survive the foreclosure. If the easement

> were created after the property was mortgaged, the mortgage will have priority and the easement will be extinguished.

7 Thompson on Real Property Second Thomas Edition §60.08(c)(3) at p. 573-74 (2006).

In particular, RCW 61.24.50(1) provides that a trustee's deed given after foreclosure conveys all of the right, title and interest in property which the debtor had or had the power to convey at the time the debtor executed that Deed of Trust:

> Upon physical delivery of the trustee's deed to the purchaser,...the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee sale which the grantor had or had the power to convey at the time of the execution of the Deed of Trust, and such as the grantor may have thereafter acquired.

Here, because the Cokeleys had the right to convey their entire interest in the property, in 2006, at the time they executed the Deed of Trust, the Deed by which the Trustee conveyed after foreclosure conveyed that entire interest in the property to Sandy.

RCW 61.24.060(1) provides that a purchaser taking pursuant to a Trustee's Deed is entitled to possession against anyone having an interest junior to the Deed of Trust:

> The purchaser at the trustee sale shall be entitled the possession of the property on the twentieth day following the sale, as against the borrower and grantor under the deed of trust and **anyone having an interest junior to the deed of trust**,...who are given all of the notices to which they were entitled under this chapter.

(Emphasis added). Here, the Browns acquired their implied easement interest in the Sandy property on December 31st, 2012. That interest arose subsequent to, and therefore is junior to, Sandy's 2006 Deed of Trust. The Trustee had recorded his Notice of Trustee's Sale on October 3rd, 2012. CP 25-28. At that time, the Browns had no interest in any property. Therefore, the Trustee was not required to provide any notice to the Browns.[1] Because the Browns were given "all the notices to which they were entitled" under the Washington Deed of Trust Act, the foreclosure extinguished the Browns' interest in the property.

The foreclosure of Sandy's Deed of Trust extinguished the Browns' implied easement arising out of the 2012 conveyance from the Cokeleys to the Browns. Sandy, as the successful purchaser at the foreclosure sale and the grantee of the Trustee's Deed, became entitled to possession of the property free and clear of any claim of easement asserted by the Browns.

C. There is no basis for suggesting that foreclosures do not extinguish implied easements.

The Washington Deed of Trust Act provides for the extinguishment, upon foreclosure of all junior interests in the property foreclosed. It does not except implied easements. It would be wholly illogical for it to do so.

[1] RCW 61.24.040(1)(b) (In order to foreclose junior interests, Trustee required to provide individualized notice only to persons holding interest of record as of the date the Trustee records the Notice of Trustee's Sale. Persons acquiring in an interest thereafter are charged with constructive notice of the impending foreclosure).

An implied easement is based upon the intent of the parties to the transaction that worked the separation of title. The parties to that transaction can logically bind one another by their mutual intent. They can also logically bind their respective successors in interest. But those parties have no power to divest a stranger to that transaction of property rights that the stranger held prior to and independent of the transaction, even if they mutually intend to do so.

Or, to put it in another way, the Cokeleys could impliedly confer on the Browns in connection with their 2012 conveyance only those rights which the Cokeleys could have also expressly conveyed to the Browns. But the Cokeleys had long before subjected their rights in the Sandy property to Sandy's right to foreclose the Cokeleys' entire fee simple interest under the Deed of Trust. The Cokeleys in 2012 simply did not have it in their power to convey an interest in the property free and clear of Sandy's rights under the Deed of Trust.

No Washington court has ever used a finding of implied easement to divest a third party of his independent right in the property predating the separation of title giving rise to the implied easement.[2] While no

[2] See e.g. *McPhaden v. Scott*, 95 Wn. App. 431, 437-39, 975 P.2d 544 (1999) (trial court properly granted a directed verdict on the issue of easement by implication; no independent third party rights involved); *Possum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995) (lot on which water irrigation weir and pipeline serving adjoining lots retained by grantor held subject to implied easement; no independent third party rights involved); *Bays v. Haven*, 55 Wn. App. 324, 329, 777 P.2d 562 (1989) (where original owner of two adjoining lots built a driveway across one lot to provide access to a cabin on the other lot, sale of cabin lot held to include implied easement for access over adjoining lot;

Washington court appears to have squarely addressed this issue, courts elsewhere in the United States have uniformly held that "if the mortgage or trust deed was executed prior to the attachment of the easement, the easement does not survive the foreclosure." See 46 A.L.R. 2nd 1197 (1956) (Foreclosure of Mortgage or Trust Deed as Affecting Easement Claimed in, over, or under Property).

The Court should reconsider its decision. It should address the impact the 2013 foreclosure of Sandy's 2006 Deed of Trust had on the 2012 implied easement the Court has determined arose out of the Cokeleys' conveyance of adjoining property to the Browns. The Court should hold that the foreclosure extinguished the Brown's junior interest in the Sandy property. Therefore, the Court should reverse and remand with instructions for the trial court to enter judgment for Sandy.

III. MOTION TO PUBLISH

Should the Court deny Sandy's Motion for Reconsideration, Sandy moves the Court to publish this decision, or at least that portion of it addressed to the issue of implied easement.

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no independent right of third party involved); *Roberts v. Smith*, 41 Wn. App. 861, 864, 707 P.2d 143 (1985) (where grantor sells land-locked property, grantor impliedly grants access easement over retained property; no independent third party rights involved); *Helberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 668, 404 P.2d 770 (1965) (landlord who leased land lot property to tenant held to of impliedly granted easement over landlord's adjoining property for access; no independent third party rights involved); *Evich v. Kovacevich*, 33 Wn.2d 151,157-58, 204 P.2d 839 (1949) (where common owner of two adjoining residential lots had constructed walk way in between and serving houses on both lots, common owner impliedly conveyed easement right to use walk way along with lot; no independent third party rights involved).

As set forth above, to the extent the Court intends to hold that the implied easement arising out of a 2012 transaction survived the 2013 foreclosure of Sandy's Deed of Trust, the Court's decision constitutes a novel application of the law. If the Court adheres to its decision, it should publish it in order to provide notice to lenders of the circumstances under which a debtor who has pledged its entire interest in real property to secure repayment of a debt pursuant to a Deed of Trust may, by the debtor's subsequent unilateral intent and/or conduct, convey an interest in the property which, although junior to the Deed of Trust, nevertheless will survive foreclosure of the Deed of Trust, thereby substantially impairing the debtor's security.

IV. CONCLUSION

For the foregoing reasons, the Court should reconsider its decision in so far as it holds that the implied easement arising in 2012 survived the 2013 foreclosure of Sandy's Deed of Trust. In the alternative, the Court should publish its decision, or at least the portion addressed to the implied easement issue.

DATED this 15th day of December, 2015.

OWENS DAVIES, P.S.

Matthew B. Edwards, WSBA No. 18332
Attorney for Sandy Family Five, LLC

No. 47222-8-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

SANDY FAMILY FIVE, LLC, a Washington corporation,

APPELLANT,

v.

CRAIG and DEBRA BROWN, husband and wife, and their marital community,

RESPONDENTS.

APPELLANT SANDY FAMILY FIVE, LLC'S DECLARATION OF SERVICE

OWENS DAVIES, P.S.
Matthew B. Edwards
1115 West Bay Drive, Ste 302
Olympia, Washington 98502
(360) 943-8320
WSBA No. 18332

I, Matthew B. Edwards, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on 12/15/15, I caused service of the following and this Declaration of Service upon the following individual, in the manner described below:

Motion for Reconsideration and Motion to Publish

Via Hand Delivery, upon: Scott Kee
Pearson Kee & Card
324 West Bay Dr NW, Suite 201
Olympia, WA 98502

DATED this 15th day of December, 2015 at Olympia, Washington.

OWENS DAVIES, P.S.

Matthew B. Edwards, WSBA No. 18332
Attorney for Plaintiffs Sandy Family Five, LLC

Appendix H

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SANDY FAMILY FIVE, LLC,

Appellant,

v.

CRAIG AND DEBRA BROWN,

Respondents.

No. 47222-8-II

ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING MOTION TO PUBLISH OPINION

APPELLANT moves for reconsideration of the Court's **December 1, 2015** opinion. Upon consideration, the Court denies the motion for reconsideration and motion to publish opinion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Lee, Sutton

DATED this 4th day of January, 2016.

FOR THE COURT:

Worswick J
PRESIDING JUDGE

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No. 47222-8-II

SUPREME COURT
STATE OF WASHINGTON

SANDY FAMILY FIVE, LLC, a Washington corporation,

APPELLANT,

v.

CRAIG and DEBRA BROWN, husband and wife, and their marital community,

RESPONDENTS.

APPELLANT SANDY FAMILY FIVE, LLC'S DECLARATION OF SERVICE

OWENS DAVIES, P.S.
Matthew B. Edwards
1115 West Bay Drive, Ste 302
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(360) 943-8320
WSBA No. 18332

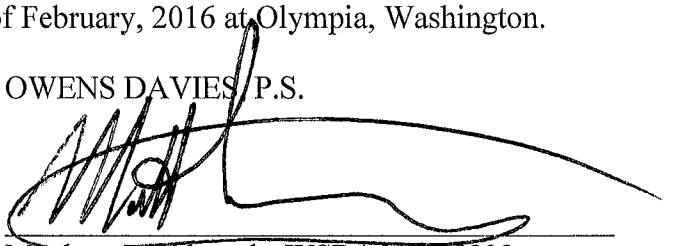
I, Matthew B. Edwards, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on February 1, 2016, I caused service of Appellant Sandy Family Five LLC's Petition for Discretionary Review and this Declaration of Service upon the following individual, in the manner described below:

Via Hand Delivery, upon: Scott Kee
Pearson Kee & Card
324 West Bay Dr NW, Suite 201
Olympia, WA 98502

DATED this 1st day of February, 2016 at Olympia, Washington.

OWENS DAVIES, P.S.



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