RECEIVED
SUPREME COURT
STATE OF WASHINGTON

CLERK'S OFFICE

3/31/2017 4:36 pm

RECEIVED ELECTRONICALLY

No. 94129-7

SUPREME COURT OF THE STATE OF WASHINGTON

OVERLAKE FARMS B.L.K. III, LLC,

Respondent-Plaintiff,

v.

BELLEVUE-OVERLAKE FARM, LLC,

Petitioner-Defendant.

PETITIONER BELLEVUE-OVERLAKE FARM, LLC'S REPLY IN SUPPORT OF PETITION FOR REVIEW

Arthur W. Harrigan, Jr., WSBA #1751
Tyler L. Farmer, WSBA #39912
HARRIGAN LEYH FARMER & THOMSEN LLP
999 Third Avenue, Suite 4400
Seattle, WA 98104
(206) 623-1700
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

In accordance with RAP 13.4(d), the Sferras file this reply in response to new issues raised for review by the Kapelas in their Answer. Specifically, the Kapelas have asked this Court to consider: "Did the Court of Appeals correctly hold that cotenancy property that is capable of division without material economic loss may not be sold at [a] sheriff's sale based solely on the desire of one of the cotenants to avoid the inconvenience of disagreement over a development expense the other cotenant expressly agreed to share?" Kapelas' Answer at 2 (Mar. 20, 2017).

The Kapelas label this as a "restatement" of issues presented for review, but their reliance on a purported agreement to share costs asks this Court, in effect, to affirm the Opinion on alternative grounds beyond the scope of the Petition and on grounds that the Court of Appeals rejected.

The thrust of the Kapelas' Answer is (1) the Kapelas "unequivocally agreed" to pay for their share of the sewer extension cost; and (2) the trial court erred in concluding that the parties' "inability to agree" on the "mechanism" for funding amounted to great prejudice to the Sferras. Kapelas' Answer at 3, 15. Therefore, according to the Kapelas, this Court should decline review of the Opinion reversing and remanding the matter to the trial court. *Id.* These arguments mischaracterize the facts

and proceedings below and are largely irrelevant to the legal error giving rise to this Petition.

II. ARGUMENT

A. The Trial Court Ordered Sale Because a Physical Partition Would Result in Great Prejudice to the Sferras in Bearing Sewer Extension Costs of $1.4 Million.

To realize the value of a partitioned one-fourth parcel, the Sferras must develop it or sell it to a developer, requiring building the sewer extension for $1.4 million.[1] The Referees unanimously concluded that, under this probable scenario, "the upfront cost of sewer extension—approximately $1.4 million, or $155,555 per lot—would impose great prejudice on the value of the smaller parcel by almost any definition." CP 944. The Referees also reasoned that the "great prejudice resulting from the imposition of the entire cost of sanitary sewer service on the smaller parcel can be mitigated only by an appropriate upfront cost-sharing arrangement." *Id.*

No one involved in the proceeding below believed that the trial court or the Referees had the authority to compel the Kapelas to pay three-fourths of the sewer cost. The Referees tried to induce the Kapelas to enter into a cost-sharing agreement, but the Kapelas rejected virtually

[1] The Kapelas concede that the one-quarter parcel is likely to develop first. CP 903.

every element of the proposed arrangement. Because the parties could not agree on any upfront cost-sharing arrangement to mitigate the great prejudice to the Sferras, the trial court confirmed the Referees' unanimous conclusion (with limited modifications) and ordered that the property be partitioned by sale. CP 918–19.

In short, the trial court's finding of great prejudice was not based on "the prospect of future disagreement over the mechanics of implementing the sewer connection," as the Kapelas contend (Kapelas' Answer at 2), but on the Referees' inability to compel the Kapelas to agree to pay a fair share of the cost, thereby creating unmitigated "great prejudice" and requiring partition by sale. CP 944–47 ¶¶ 62, 66 (trial court order confirming the Referees' unanimous conclusion that, "[i]n order to be effective in mitigating great prejudice to the smaller parcel, such an agreement would need be structured so that costs of the sewer extension are funded pro rata at the time they are incurred . . . . the Referees are not persuaded that a combination of owelty and a mandatory agreement between uncooperative parties can or should play a role in addressing the issue of great prejudice").[2]

[2] The Kapelas also mischaracterize the procedural history of the proceedings before the trial court. Kapelas' Answer at 1. The trial court did not find that there would be no material economic loss after trial. Instead, the trial court reserved judgment and purposefully referred the issue out to a panel of Referees with the expertise to determine whether the property could be physically partitioned without great prejudice to the

B. The Kapelas' Purportedly "Unequivocal Agreement" to Share Costs Did Not Occur and Cannot Cure Great Prejudice to the Sferras.

The Kapelas rely on the same citations in the record to assert that they "unequivocally agreed to pay [their] share of a sewer connection." Kapelas' Answer at 3, 6, 8, 19–20. But these citations arise from the same finding of fact entered by the trial court: "At trial, Plaintiff's representative Cristina Dugoni ***testified*** that Plaintiff would fund, or would enter into a covenant for future funding, of its 75% share of the sewer improvement expense if sewer extension were necessary to develop the Property." CP 230 ¶ 7 (emphasis added).

First, contrary to the Kapelas' assertions now, this testimony was far from a commitment, much less an "unequivocal" one.[3]

Sferras. CP 234 ("[T]his is not the final resolution of the parties' dispute since the issue—the determination of an appropriate partition and of whether such a partition will result in material economic loss—is to be submitted to three referees and is then subject to further review."); CP 240–41 (tasking the Referees with "recommending a specific partition in kind of the Property, or stating that, under the provisions of RCW 7.52.130, partition cannot be made without great prejudice to one or both Parties"). Moreover, the cost of and alternatives (if any) to a sewer extension were unclear at trial and therefore were primary issues for the Referees to consider. Sferras' Br. at 12 (Dec. 28, 2015).

[3] The trial testimony from Ms. Dugoni was equivocal at best:

> Q. And do I understand correctly that you, in speaking for the plaintiff, are offering to pay approximately $1.2 million toward the sewer construction project if that's what has to happen to develop one-fourth of the property?
> A. If that's what has to happen, that would be fair and equitable, I think.
> Q. So you are offering to pay for that on a current basis, not sometime in the future?

Second, contrary to the Kapelas' claim that they had "agreed unconditionally to share in the expense of bringing [a] sewer to the property," Kapelas' Answer at 16, their agreement to share costs was conditioned on the use of a surety bond and the Sferras' agreement to "additional covenants in [the Kapelas'] favor, including an easement to allow a water line to extend to the ¾ parcel, a license to permit horses to continue to graze on the ¼ parcel until sale or erection of fencing, and removal of various improvements from the ¼ parcel." CP 892 n.2 (emphasis in original).

Third, the Kapelas' proposed alternative included the right to decline to pay based on a host of potential objections during construction

---

> A. No. We'd pay for it on a current basis when and if it's -- if that happened.

2/19 RP 115.

> Q. . . . I want to be clear, what was your understanding of his question?
> A. Well, he obviously wants to know -- I think he asked whether we would put $1.2 million towards a sewer expansion project, if that was deemed -- if the whole property was going to be developed. It seems like that's very reasonable to do that.
> Q. So would you be willing to put that money up when the other side was willing to put their money up?
> A. When the other side is willing to put their money up. A developer might just decide to do septic.
> Q. You weren't agreeing to just unilaterally put a quarter of whatever the sewer cost is up somewhere?
> A. Well, I think that would have to be further looked at by the developer. It seems kind of a waste of money to put it up right now. It may not happen for -- when a developer would be ready, then it would be done.

2/19 RP 142–143.

and rejected several elements in the Referees' recommended approach, including contemporaneous payment of sewer construction costs and a series of covenants the Referees deemed essential to curing the great prejudice that would otherwise arise. CP 892.

The Kapelas' proposed alternative would not have cured great prejudice to the Sferras and would have been (in the Referees' and trial court's judgment) administratively impracticable. CP 947 ¶ 65 ("Predicating a solution on such cooperation would only place this Court in the position of having to police a difficult process of partition and land development over a long period of time."). Therefore, the Referees recognized that their practical proposed settlement between the parties had been rejected in light of the Kapelas' equivocal and highly conditional proposal.

C. The Basis for Reversal in the Court of Appeals' Opinion Did Not Concern the Parties' Disagreement Over How to Fund the Sewer Extension Costs.

According to the Kapelas, "[t]he Court of Appeals correctly held the Sferras' desire to avoid the inconvenience of disagreements on the mechanics of a sewer connection the Kapelas agreed to fund could not, standing alone, establish 'great prejudice' under RCW ch. 7.52." Kapelas' Answer at 18. Simply put, this misstates the holding in the Opinion.

Contrary to the Kapelas' assertions, the Court of Appeals did not reverse on the grounds that the Kapelas had agreed to share costs or that disagreement over the funding mechanism alone does not constitute great prejudice. Instead, the Court of Appeals reversed on narrow grounds: "The statute does require a showing of prejudice to all the owners. The trial court abused its discretion by ordering a sale without that showing." *Overlake Farms B.L.K. III, LLC v. Bellevue-Overlake Farm, LLC*, 196 Wn. App. 929, 938, 386 P.3d 1118 (2016). In other words, the Opinion is based solely on the Court of Appeals' conclusion that (contrary to prior rulings by this Court) the legal standard under RCW 7.52.130 requires a showing of great prejudice to all co-owners rather than one co-owner. The legal error in this holding is the subject of this Petition.

Indeed, the Court of Appeals expressly rejected the Kapelas' attack on the trial court's reliance on the burden of shouldering upfront costs as a basis for finding great prejudice to the Sferras. *Id.* at 944 (trial court did not err in considering the impact of the sewer extension on the valuation of the one-quarter parcel); *id.* at 945 (trial court did not err in considering the parties' inability to cooperate in rejecting the Kapelas' proposed alternative of a surety bond).

D. This Court Should Accept Review Because the Opinion Conflicts with Controlling Precedent and Involves an Issue of Substantial Public Interest.

The Kapelas' Answer fails to overcome the controlling precedent under *Williamson* and *Falk* that requires review by this Court under RAP 13.4(b)(1). The Kapelas do not contest the Petition's analysis showing that the test relied on by the Court of Appeals is inconsistent with *Williamson* and that this Court's analysis in *Williamson* shows that a sale is required if there is great prejudice to an objecting owner. *Compare* Kapelas' Answer at 12–13, *with* Petition at 13–15 (Feb. 10, 2017).

Furthermore, even a quick glance at this Court's decision in *Falk* betrays the Kapelas' representation that the language in *Falk* is only "dicta." *Compare* Kapelas' Answer at 13 ("The 'pronouncement' cited by the Sferras, that the complaining party in *Falk* failed to show 'that great prejudice would result to him from dividing the property,' was unnecessary to the *Falk* Court's affirmance of a partition in kind." (internal citation omitted)), *with Falk*, 154 Wash. 340, 342, 282 P. 212 (1929) ("The evidence in this case fails to show that prejudice would result to the appellant in a division of the property. The trial court properly ordered a division of it.").

Finally, the Kapelas do not address and therefore concede that the legislative intent behind RCW 7.52.130 (*i.e.*, authorizing partition by sale

to address the inadequacies of owelty payments) serves as an independent basis for this Court to accept review under RAP 13.4(b)(4). Petition at 17–20. The Kapelas also concede that owelty payments cannot cure great prejudice and, consequently, the Opinion contravenes the legislative intent behind the statute calling for partition by sale to achieve equity. *Id.*

III. CONCLUSION

The Kapelas cannot rewrite the basis for the trial court's finding of great prejudice or the grounds for reversal by the Court of Appeals in an attempt to shield the Opinion from review. Because the Opinion conflicts with controlling precedent and involves an issue of substantial public interest, this Court should accept review.

Respectfully submitted this 31st day of March, 2017.

HARRIGAN LEYH FARMER & THOMSEN LLP

By: 

Arthur W. Harrigan, Jr., WSBA #1751
Tyler L. Farmer, WSBA #39912
999 Third Avenue, Suite 4400
Seattle, WA 98104
(206) 623-1700
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Florine Fujita, declare that I am employed by the law firm of Harrigan Leyh Farmer & Thomsen LLP, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On March 31, 2017, I caused a true and correct copy of the foregoing document to be served on the parties listed below in the manner indicated:

Brian E. Lawler Denise M. Hamel Jameson Babbitt Stites & Lombard, PLLC 801Second Avenue, Suite 1000 Seattle, WA 98104	☐ Via Legal Messengers ☒ Via First Class Mail ☐ Via Facsimile ☒ Via Electronic Mail
Howard M. Goodfriend Smith Goodfriend, P.S. 1619 8th Avenue North Seattle, WA 98109	☐ Via Legal Messengers ☒ Via First Class Mail ☐ Via Facsimile ☒ Via Electronic Mail

DATED this 31st day of March, 2017.

Florine Fujita