No. 98062-4

SUPREME COURT OF THE STATE OF WASHINGTON

No. 77769-6-1
COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JEFFREY HALEY, an individual,

Appellant,

v.

KATHLEEN HUME, an individual; and FIRST AMERICAN TITLE INSURANCE COMPANY, formally known as Pacific Northwest Title Company,

Respondents.

RESPONDENT KATHLEEN HUME'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case arises from the sale of Lot B in Mercer Island, Washington by Respondent Kathleen Hume ("Hume") to Petitioner Jeffrey Haley ("Haley) approximately fifteen years ago, on May 11, 2005. An easement was granted to Lot B in March 1, 1979 by a Declaration of Easement over a strip of land 10' wide and approximately 140' long on an adjoining lot called Tract A owned by John Pugh ("Pugh"). The purpose of the easement was for utilities and vehicular and pedestrian ingress, egress and right-of way for vehicles that may be required in the construction of a dwelling and improvements on Lot B, and for parking vehicles of visitors to Lot B. In 2001, Hume fully agreed with and consented to Pugh's plan to convert the Easement area into an open watercourse, take out the paved access road and create a new access road across the other 20 feet of Tract A which eliminated the need for vehicles and pedestrians to cut across Hume's driveway and use the paved road in the Easement area for access. The new watercourse contained significant landscape improvements include trees, grading and rockery installation along the sides of the watercourse channel, which was approved by the City of Mercer Island. After 2001, no vehicular or pedestrian use of the easement area was made due to the removal of the access road and its conversion to an open watercourse/stream. At the time

the deed was recorded on May 11, 2005, the change in the use of the easement area was open and obvious, and Pugh possessed the entire easement area and Haley was constructively evicted from the easement area.

The trial court and the Court of Appeals correctly ruled that Haley's statutory warranty deed claims against Hume are barred by the six year statute of limitations under RCW 4.16.040(1). The trial court and the Court of Appeals rejected Haley's argument that the discovery rule applies to the present covenants because Hume's abandonment of the easement was not evident at the time of conveyance. Just as in *Rowe v. Klein*, 2 Wn. App. 2d 326, 409 P.3d 1152(2018), Hume had abandoned the easement and no legal title to the easement before she conveyed Lot B to Haley.

The trial court and the Court of Appeals also correctly ruled that Haley's breach of the future warranty of quiet possession was time barred. At the time of Haley's 2005 purchase of Lot B, Pugh was in possession of the easement area, and Haley was on notice that the easement area was not useable for ingress, egress, or parking. The statute of limitations began to run at conveyance.

II. ISSUES PRESENTED FOR REVIEW THAT WERE NOT DECIDED BY THE COURT OF APPEALS

The Court of Appels did not decide the issue of whether the statutory warranty deed covenants of seisin, encumbrances, quiet possession, and the

covenant to defend, apply to an easement over another's land. An easement is a nonpossessory right to use another's land in some way without compensation. The subject easement was created by a Declaration of Easement and not in the form of a deed. An easement on an adjoining servient land does not convey title or possession to land subject to the easement. Haley is not claiming that Hume breached the statutory warranty deed covenants by failing to disclose an easement on his dominant property, but the opposite-- that Hume breached the statutory warranty deed covenants by failing to disclose the abandonment of an easement on the adjoining servient land. No case or statue demands that the statutory warranty covenants extend to an interest off the sold land.

III. COUNTER STATEMENT OF THE CASE

A. History of the Easement and Kathleen Hume's Abandonment of the Easement in 2001

Haley's statement of the case is most inaccurate and contains numerous self-serving misrepresentations of the facts which are not supported by the evidence.

This case arises from a sale of Lot B in Mercer Island, Washington by Hume to Haley over twelve years ago, on May 11, 2005. (CP 131-133). In 1979, Bryon Emery owned a piece of land set aside as private open space called "Tract A" of the Dawn Terrace formal subdivision. (CP 135). Tract A

is approximately 7,050 square feet in area and originally contained a paved access driveway and 100 feet of a 12-inch diameter culverted drainage pipe below the surface of the easement area that opened into a stream at the easterly end of Tract A which then emptied into Lake Washington. (CP 338 ¶ 2; CP 349-345; CP 318-319 ¶ 3).

On March 1, 1979, Bryon Emery recorded a Declaration of Easement along the southern portion of Tract A, consisting of a strip of land 10' wide and approximately 140' long, to the owners of Lot B, Amos and Elaine Wood, for purposes of utilities and vehicular and pedestrian ingress, egress and right-of-way including such commercial vehicles customary for residential purposes, and such vehicles as may be required in the construction of dwellings and improvements on the Dominant Estate and for parking of vehicles of visitors to the Dominant estate ("Easement"). (CP 164-167).

The Easement was necessary to provide access across the paved road on Tract A to Lot D, which is now owned by John Pugh, and the parcel to the south of the Pugh property. (CP 318-319 ¶ 3; CP 344-346). Persons accessing Pugh's Lot D and the property to the south of Pugh would cut across the Lot B driveway and proceed on the paved access road on Tract A to their properties. (CP 318-319 ¶3, CP 344-346). Prior to 2001, the Easement area also had a 12 inch diameter watercourse drainage pipe below

the surface of the Easement area running east which then emptied into Lake Washington. (CP 149 ¶ 5; CP 169-170; CP 177).

On September 6, 2000, Kathleen Hume purchased Lot B from Frances Wood. (CP 318 ¶ 1). In 2001, John Pugh purchased Lot D and Tract A. (CP 148 ¶ 2; CP 152-156). In 2001, Pugh applied for a variance and permit through the City of Mercer Island to remove approximately 95 linear feet of the underground culvert on Tract A and exposing that portion of the watercourse. (CP 149 ¶5; CP 169-277). The application also sought to remove the entire access driveway in the Easement area on Tract A, and to install a new access driveway on the north side of Tract A outside of the 75 foot watercourse set back, with a bridge over a portion of the open watercourse. (CP 149 ¶5; CP 169-277). The new watercourse also included significant landscaping improvements, including shade trees, an 18-inch high rockery along the sides of the watercourse channel, and vegetation. (CP 339 ¶4; CP 348-358). The watercourse area is a Type I stream (used by fish) and is subject to restrictions and a 75 foot buffer zone, which means that no development may occur within 75 feet of the Ordinary High Watermark of this watercourse absence City of Mercer Island approval or meeting applicable exemptions in MICC 19.07.030. (CP 283-285 ¶5).

In 2001, Hume fully agreed with and consented to Pugh's plan which would eliminate the need for vehicles and pedestrians to cut across her

driveway and use the paved road in the Easement area to access their properties. (CP 319 ¶4). Hume also felt that Pugh's improvements would create additional privacy and safety to her property, were a visual improvement, and added value to her home. (CP 319 ¶4).

The opening of the watercourse corridor and the removal of the previous access road in the Easement area, made it impossible for any vehicles and pedestrians to use the Easement area for ingress or egress. (CP 339-340 ¶4 and ¶6; CP 319 ¶4).

B. Haley's Purchase of Lot B from Hume

At the time Haley purchased Lot B in May 2005, no surface use of the Easement area for pedestrian and vehicular use was possible. (CP 319 ¶4). After Haley took ownership of Lot B in 2005, it was impossible for him to use the watercourse area for pedestrian and vehicular purposes, and for seven years he never challenged the altered use of the Easement area. (CP 149 ¶6 and ¶7).

It was not until January 22, 2012, that Haley suddenly wrote to Pugh indicating he discovered his property has an easement and now wished to make significant surface improvements within the easement area that would enable him to use it for vehicle parking and pedestrian use. (CP 360-365). Pugh refused on the ground that the easement had been abandoned years prior. (CP 149, ¶8).

C. Haley's Lawsuit Against Pugh

On July 11, 2012, more than seven years after Haley purchased Lot B, Haley filed a complaint against John Pugh for declaratory relief that he has rights in the easement area to (1) remove any structure within the easement that interferes with its use for easement purposes, including the rock mailbox structure and other rock structures; (2) to trim or remove plantings within the easement that interfere with its use for easement purposes; and (3) to reshape the land surface within the easements to make it useable for easement purposes, including the placement of a culvert and dirt or decking and decking supports and protective railings. (CP 291-299). Pugh counterclaimed to quiet title in the easement area, alleging that the easement had been abandoned by Hume. (CP 301-307).

On October 5, 2012, the trial court granted Pugh's motion for summary judgment on the easement claim, finding that the 1979 easement rights was abandoned insofar as inconsistent with the altered watercourse. "Specifically, all easement rights are terminated and abandoned except for easement rights to utility, sewage and drainage to the extent said utilities serve Plaintiff's property in the easement area." (CP 309-311).

Haley appealed the order on summary judgment and lost. The Court of Appeals ruled that there is no genuine issue of material fact that Hume abandoned the easement. *Haley v. Pugh,* 184 Wn. App. 1017 (2014).

On December 21, 2016, more than 11 years after conveyance of the statutory warranty deed for Lot B, Haley filed a Complaint against Kathleen Hume and his title company, First American Title Insurance Company alleging causes of action against Hume for (1) breach of the warranty of seisin; (2) breach of the warranty of the right to convey; (3) breach of the warranty against encumbrances; (4) breach of the warranty of quiet possession; (5) breach of the warranty to defend; and (6) breach of the implied duty of good faith and fair dealings. (CP 14-41).

IV. ARGUMENTS WHY REVIEW SHOULD BE DENIED

A. Standard of Review

To obtain this Court's review, Haley must show that the Court of Appeals' decision conflicts with a decision of this court or with a published Court of Appeals decision, or that it is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b). As discussed below, the issues raised by Haley do not merit review under 13.4(b)(1) or 13.4(b)(2).

B. Statutory Warranty Covenants Do Not Extend to an Easement on the Land of Another

The Court of Appeals did not decide the issue of whether the statutory warranty covenants apply to an easement on the adjoining servient land. An easement is a nonpossessory right to use the land of

another. *Maier v. Giske*, 154 Wn. App. 6, 15, 223 P.3d 1265 (2010). The right in land held by an easement owner is only a "use" interest, and not a "possessory" interest in the land. *Kloster v. Roberts*, 179 Wn. App. 1025 (2014)(unpublished). For example, the warranty of seisin is also known as the covenant of ownership in fee simple. *Double L. Properties, Inc. v. Crandall*, 51 Wn. App. 149, 152, 751 P.2d 1208 (1988). This covenant guarantees that the grantor is lawfully seized of an indefeasible estate in fee simple (legal title) in the conveyed property. *Double L. Properties*, 51 Wn. App. 149, 153, 751 P.2d 1208 (1988). However, an easement on the land of another is not a conveyance in fee simple that is subject to the covenants under a statutory warranty deed.

Haley's title in Lot B is unencumbered. An easement is an encumbrance on the servient property (Tract A), and the failure to disclose an easement on the servient property breaches the warranty of clear title. See *Hebb v. Severson*, 32 Wn.2d, 159, 167, 201 P.2d 156 (1948). Haley is claiming the opposite – that the seller of the dominant property (Hume) failed to pass title to an easement on the adjoining servient land (Tract A). Hume never had a fee simple interest in Tract A, much less the easement area, and could not have conveyed title to an easement on the adjoining property. The abandonment of the easement over Tract A is not a defect or encumbrance on Haley's Lot B. Haley cites no case law or statute that

extends the statutory warranties in a deed to an easement on another's property. Hume is not liable under the statutory warranty deed for abandoning the Easement on Tract A. 11-93 Thompson on Real Property, Thomas Editions § 96.06 (citing *Kloster v. Roberts*, 179 Wn. App. 1025 (2014)(unpublished) (the trial court did not err in concluding as a matter of law that Ms. Roberts is not liable under the statutory warranty deed due to the unrecorded access easement over another's land).

The statutory warranties do not extend to an interest off the sold land. *Kloster v. Roberts*, 179 Wn. App. 1025 (2014)(unpublished). Hume did not violate any of the statutory warranties due to her abandonment of the easement on Tract A.

C. The Court of Appeals' Decision Applied Settled Law to Undisputed Fact

Even assuming the statutory warranties extend to an easement on the land of another, Haley's claims for breach of the warranty of seisin, right to convey, and warranty against encumbrances are time barred. A statutory warranty deed includes both present and future covenants. RCW 64.04.030. A statutory warranty deed provides five guarantees against title defects: (1) that the grantor was seised of an estate in fee simple (warranty of seisin), (2) that he had a good right to convey that estate (warranty of right to convey), (3) that title was free of encumbrances (warranty against encumbrances), (4)

that the grantee, his heirs and assigns, will have quiet possession (warranty of quiet possession), and (5) that the grantor will defend the grantee's title (warranty to defend). RCW 64.04.030.

The warranty of seisin, right to convey and warranty against encumbrances are present covenants that are breached, if at all, at the time it is made. *Double L. Properties, Inc. v. Crandall*, 51 Wn. App. 149, 152, 751 P.2d 1208 (1988); 19 William B. Stoebuck, Washington Practice, Real Estate Transactions § 13.2 at 86 (1995). The warranty of quiet possession and warranty to defend are future covenants and may be breached in the future. 18 Stoebuck § 13.2 at 86.

Here, the warranty of seisin, right to convey, and warranty against encumbrances were breached, if at all, at the time of the conveyance of Lot B, which was May 11, 2005. Haley did not file his Complaint until December 21, 2016, more than eleven years later. Haley's claims are barred by the six year statute of limitations. RCW 4.16.040(1); *Erickson v. Chase*, 156 Wn. App. 151, 157, 231 P.3d 1261 (2010).

Haley contends that the discovery rule should be applied to the present covenants of the warranty of seisin, right to convey, and warranty against encumbrances, because he claims he was not aware that Hume had abandoned the easement until 2012. Haley's relies on *1000 Virginia Ltd. Partnership v. Vertec Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006), which is

a construction case, arguing that the abandonment of the easement over Tract A was a "hidden or latent defect." This Court has consistently held that accrual of a contract action occurs on breach. *1000 Virginia,* 158 Wn.2d at 576. In *1000 Virginia,* this Court abrogated the Division One opinion, *Architechtonics Construction Management, Inc. v. Khorram,* 111 Wn. App. 725, 45 P.3d 1142 (2002), that applied the discovery rule to a cause of action for breach of a construction contract. *Id* at 576–78. The court reasoned "[b]ecause controlling precedent held that a claim arising out of a contract accrued on breach and not on discovery, the Court of Appeals lacked authority to adopt the discovery rule in *Architechtonics.*"*Id.* Nonetheless, the court then went on to adopt the discovery rule in the limited context of "actions on construction contracts involving allegations of latent construction defects." *Id.* at 590.

Haley seeks to extend the discovery rule announced in *1000 Virginia* beyond the construction contract context. This Court should decline to do so. As no party here contends that the statutory warranty deed at issue was a construction contract, the court should not apply the discovery rule to this case. The court reaffirmed in *1000 Virginia* that in contract actions the claim accrues on breach absent an exception such as that created for construction contracts. *See Id* at 578-83. Under *1000 Virginia,* accrual of a contract action occurs on breach. *See 1000 Virginia,* 158 Wn.2d at

576. Here, the alleged breach occurred on May 11, 2005 when Hume conveyed the statutory warranty deed for Lot B to Haley. This suit was filed on December 21, 2016, well after the six-year statute of limitations had run.

Moreover, even if the statute of limitations was not dispositive, this Court has made clear that a person who has notice of facts that are sufficient to put him or her upon inquiry notice is deemed to have notice of all facts that reasonable inquiry would disclose." *1000 Virginia Ltd Partnership v. Vertec Corp.*, 158 Wn.2d 566, 581, 46 P.3d 423 (2006). Here, the fact that the Easement had been abandoned was open and obvious at the time of conveyance. At the time of conveyance, there was no paved access road in the Easement area for pedestrian or vehicle ingress or egress, and the open watercourse with boulders and landscaping prevented any use of the easement area. The opening of the watercourse corridor and the removal of the previous paved access road in the Easement area, made it impossible for any vehicles and pedestrians to use the Easement area for ingress or egress. Haley's cause of action would have accrued at the time of conveyance, and the six year statute of limitations would have run in May 2011, more than five years before Haley filed his suit against Hume.

D. The Petition Does Not Identify a Conflict Between the Court of Appeals' Decision and any Supreme Court Decision

Contrary to Haley's contention, this is not a case about the mere

nonuse extinguishing an easement. Haley contends that the trial court and Court of Appeals erred in dismissing his claim against Hume for breach of the future warranty of quiet enjoyment. The warranty of quiet enjoyment, also known as quiet possession, guarantees that the grantee "shall not, by force of paramount title, be evicted from the land or deprived of its possession." Foley v. Smith, 14 Wn. App. 285, 290-91, 539 P.2d 874 (1975 As a general rule, the warranty of quiet possession is not breached until the buyer experiences an actual or constructive eviction by one who holds a paramount title existing at the time of the conveyance. See *McDonald v. Ward*, 99 Wash. 354, 358, 169 P. 851 (1918); *Foley v. Smith*, 14 Wn. App. 285, 291-92, 539 P.2d 874 (1975). However, Haley ignores the fact that the general rule has an exception that applies when the holder of the paramount title is in possession of the disputed property at the time the seller conveys the warranty deed to the buyer. *Whatcom Timber Co. v. Wright*, 102 Wash. 566, 568, 173 P. 724 (1918). "Appellant did not obtain possession, and, therefore, the general rule, that the warranty is not broken until eviction or some substantial interference with the possession, is not applicable in this case. … If, at the time the deed is executed the premises are in the possession of third persons claiming under a superior title and grantee cannot be put in possession, the covenant of warranty is broken when made, without any further acts of the parties." *Whatcom Timber*, 102 Wash. at 568. The six

year statute of limitations for breach of warranty runs from the date of the deed. *Id.*

First, the warranty of quiet possession only applies to the property conveyed, which in this case is Lot B. No other party has a possessory interest in Lot B. Accordingly, no defects or encumbrances affect Haley's legally recognized rights in his property. Hume cannot be liable under the warranty of quiet possession because she never had possession of the easement on the adjoining servient land.

Moreover, the Court of Appeals in the *Haley v. Pugh* case ruled that Hume abandoned the Easement in 2001. *Haley v. Pugh*, 184 Wn. App. 1017, 2014 WL 5465131 (2014). At the time the deed was executed on May 11, 2005, the paved access road had been removed, and the Easement area had been converted to an open watercourse with landscaping consisting of large rocks and plantings. Since 2001, Hume had abandoned the Easement area and it was in the possession of John Pugh. Hume never granted or conveyed possession of the Easement area to Haley. Moreover, Haley could not even use the surface easement rights for pedestrian and vehicular use. Haley's attempt to reestablish the area for pedestrian and vehicular use years later shows that he could not use it for pedestrian or vehicular use, and any such use would violate the Mercer Island Code. Haley was constructively evicted at the conveyance and the statute of limitations began to run at

conveyance. *Rowe v. Klein*, 2 Wn. App. 2d 326, 338, 409 P.3d 1152 (2018). Haley did not file his Complaint until more than eleven years later, on December 21, 2016, and his claim for breach of the warranty against quiet possession is barred by the six-year statute of limitations.

V. ATTORNEY'S FEES AND COSTS UNDER RAP 18.1(J)

If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of a timely answer to the petition for review. RAP 18.1(j). Hume is entitled to an award of fees and costs if the Court denies Haley's Petition for Review.

VI. CONCLUSION

For the above reasons, Respondent Kathleen Hume respectfully requests that the Court deny Haley's Petition for Review and award her fees and costs incurred relating to the Petition for Review.

Dated this 5th day of February, 2020.

Respectfully submitted,

By: */s/ Eileen I. McKillop*
Eileen I. McKillop, WSBA 21602
Attorneys for Respondent Kathleen Hume

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this date, I served a true and correct copy of **RESPONDENT KATHLEEN HUME'S ANSWER TO PETITION FOR REVIEW** to the following:

The Supreme Court of the State of Washington P.O. Box 40929 Olympia, WA 98504-0929	☑ **Web Portal** ☐ **Electronic Mail** ☐ **Facsimile** ☐ **First Class Mail** ☐ **Hand Delivery**
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Signed at Seattle, Washington this 5th day of February, 2020.

/s/ Emily English
Emily English

SELMAN BREITMAN LLP

February 05, 2020 - 3:47 PM

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