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STATE OF WASHINGTON
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No. 63456-9-1

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

ANTHONY JAMES MARTYN,
Appellant,

v.

RICHARD A. DENT and MARY L. DENT, husband and wife and
the marital community comprised thereof,
Respondents.

REPLY BRIEF OF APPELLANT

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Respondents erroneously assert as factually-undisputed that Maule transferred title of the subject properties to the Middletons on May 16, 1979 (the same day on which the parties executed a Real Estate Contract on the same property) citing the declaration of respondent's counsel Loring and attached exhibits. (Respondent's Brief at 11; CP 132-33.) But the Loring declaration made no assertions at all regarding the exhibit conveyance document. In fact, respondent never made any factual allegations before the trial court as to the purported date on which Maule conveyed legal title to the Middletons. (See Defendants' Memorandum Supporting Their Motion for Summary Judgment, CP 105.) The relevant factual question of when Maule actually conveyed legal title to the Middletons was not briefed to the trial court because it was not at issue prior to the trial court's ruling on the competing motions for summary judgment.

Respondents further assert that Frances and John Middleton quitclaimed Parcel B to Frances, and quitclaimed Parcel A to John. (Respondent's Brief at 11.) That is incorrect. John individually attempted to quitclaim Parcel B to Frances, (CP 153) and Frances individually attempted to quitclaim Parcel A to John. (CP 155.)

Neither quitclaim deed contains the executory signatures of both spouses.

Appellant objects to respondents' assertion that "the burden of the [Middleton] drain field easement thereby flowed to the Martyns when they purchased Parcel A in 2008." (Respondents' Brief at 13.) This is the central legal dispute in this case. Likewise, appellant takes issue with respondent's assertion as undisputed fact that respondents "had no reason to doubt the legality of the drain field". (Supra at 14.)

The Doctrine of Merger, as applied to easements in Washington case law, does not limit its application to those situations where the dominant and serviant estates of an easement come under common *legal title*. Instead, the rule is somewhat broader, and applies to extinguish an easement where both estates come into common *ownership*. Respondents argue that Appellant has cited no authority for the focus on ownership rather than title vesting, but all of the cases cited in Appellant's brief on the topic of merger repeat the emphasis on *ownership*. None of these cases hinge on whose name appears on title. See, e.g, *W. Stoebuck & J. Weaver*, 17 *Washington Practice* §2.3, note 1 (May, 2008), citing *Zunino v. Rajewski*, 140 Wn. App. 215 (Wash. Ct. App. 2007);

Coast Storage Co. v. Schwartz, 55 Wn.2d 848, 351 P.2d 520 (1960); *Radovich v. Nuzhat*, 104 Wn. App. 800, 805 (Wash. Ct. App. 2001).

The trial court apparently ruled that the question of ownership was irrelevant, and that only legal title mattered to resolve the question of merger. (RP 25:22.) Prior to the trial court's decision, the question of whether the names on title would be dispositive over ownership was not raised or argued by either party. Respondents simply argued that the Middletons' mutual quit claim deeds proved separate ownership. (CP 112-113.) The supremacy of legal title over true ownership was first interposed by the court itself in its ruling which is now on appeal before this Court.

But the trial court's conclusion that legal title had been vested in the Middletons individually was erroneously based on the assumption that the fulfillment Deed from Maule to the Middletons (CP 133) preceded their mutual quitclaim deeds to each other. (CP 153-156.) At a minimum, the trial court should not have granted summary judgment on its "separate legal title" reasoning because there was at least a material factual dispute over whether legal title was vested in Maule (the real estate contract seller) or the Middletons (the contract purchasers) at the time of the attempted

quitclaim deeds. (CP 44:17 – 45:1.) There is no evidence in the record that the Maule fulfillment deed was conveyed at any time before 1991 (the date of recording), and so the court could not reasonably conclude from the record that the Middletons had legal title in 1979 to quit claim to each other in each parcel. The trial court's grant of summary judgment in favor of the Dents was either improper because of this material factual dispute, or because the evidence established clearly that the Middletons were not vested with legal title and so their purported quit claim deeds were ineffective to separate title in the two parcels, in which case under the trial court's reasoning the 1984 easement must be extinguished because both parcels were united in the common legal title of Maule all along.

The central dispute, both before the trial court, and on appeal, is whether the two parcels were sufficiently united in common ownership for the purposes of the doctrine of merger. This necessarily puts it before this Court to determine whether "ownership" in this context should include only vesting of legal title, and if so, whether the factual record established indisputably that the Middletons were vested with legal title to quit claim to themselves separately. As stated above, it is appellant's position

that the record does not support such a conclusion. Contrary to respondent's arguments in its related motion for fees, this appeal raises, at a minimum, debatable issues as to meaning of "ownership" in the context of doctrine of merger, which should preclude the grant of fees to respondent. Appellant prays that respondents' motion for fees be denied.

F. CONCLUSION

Martyn respectfully requests that this Court reverse the trial court's prior rulings on summary judgment, find the November 21, 1984 easement to be void under the doctrine of merger, and remand the matter to the trial court for further proceedings consistent with that finding, or that it remand the matter to the trial court for further factual determination of the date of conveyance of title from Maule to Middleton.

Respectfully submitted this 26th day of October, 2009.



Anthony James Martyn
Appellant pro se