

No. 70918-6

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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ROBERT L. EVANS,

Appellant,

vs.

DENISE E. FERRY,

Respondent.

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REPLY BRIEF OF APPELLANT

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## ARGUMENTS ON REPLY

### A. **PLAINTIFF NOW ADMITS THAT ITS LEGAL ARGUMENT BELOW WAS ERRONEOUS**

It is now clear that the legal basis for the Plaintiff's argument below was wrong. Plaintiff appears to realize this. As previously discussed, the Plaintiff sought an immediate forced sale of the single waterfront lot, without considering or including the upper lot in the partition. To get there, the plaintiff repeatedly argued that Washington law simply does not allow separate lots to be considered together in a partition case. CP 222-23. Plaintiff asserted that under Washington law, even *contiguous* lots could not be considered together for partition. Id. Plaintiff went so far as to ridicule the idea that a Washington court would allow multiple lots to be considered together in one partition: “[N]o Washington Court has ruled on **the incredulous idea** of grouping *non-contiguous* lots together **as Robert has the moxie to request[.]**” Id. (emphasis added). Appellant Robert Evans argued, in detail, to the contrary: “Washington law clearly allows noncontiguous lots to be combined together in a partition action and determined together.” TP at 14; 14-16.

Contrary to the plaintiff's assertions below, it turns out that a Washington court *has* ruled on the “incredulous idea” of grouping separate

lots together in one partition. The court which had the “moxie” to so rule was the Washington Supreme Court.

In 1940, the Washington Supreme Court engaged in a detailed discussion of this subject. The Court unanimously held that “we are convinced that in partitioning an estate composed of several separate parts, the parts may be considered as comprising one composite estate, a partition of which may be effected by the award of separate parcels, rather than by a partition in kind of every part[.]” Von Herberg v. Von Herberg, 6 Wn.2d 100, 122-23, 106 P.2d 737 (1940).<sup>1</sup> The unanimous Court continued: “Although parts of property to be partitioned are held by different titles in different interests, or the property consists of separate and distinct parcels or tracts, the whole may be treated as one estate for the purpose of making division and allotment where no injustice results.” Id. at 123.

So while plaintiff forcefully argued below that the law did not allow separate lots to be considered together in one partition action, this was flatly incorrect. Plaintiff only now appears to recognize the true contours of Washington law. In light Von Herberg, Plaintiff admits on appeal that “trial courts [have] equity power to consider mutually owned properties as

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<sup>1</sup> Defendant did not rely upon this case below, relying on other case law for the proposition that separate lots could be considered together in one partition action. This Washington Supreme Court authority powerfully reinforces the correctness of Defendant’s previously stated position.

a whole” in ruling on partition. Respondent’s brief at 13. This is exactly the position Defendant took below, which plaintiff strenuously opposed.

**B. PLAINTIFF ALSO MISSTATED THE LAW OF “OWELTY”**

Unfortunately, Plaintiff offered to the trial court another clear and significant misstatement of the law. This concerns the doctrine of “owelty.” Owelty is discussed in detail in Von Herberg, and is an important issue in this case.

In Von Herberg, the Washington Supreme Court confirmed that a partition of numerous separate lots can take place, **even where partition would result in the award of lots to co-tenants that are unequal in value.** In other words, not all partitioned lots have to have the same value. “The basis for the court’s right to make an unequal partition between cotenants is the time honored doctrine of owelty[.]” Id. at 121. “When it appears that partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests and some of them, the court may adjudge compensation to be made by one party to another on account of the inequality of partition[.]” Id. The concept of owelty is also clearly codified in Washington’s partition statute itself, at RCW 7.52.440. Through owelty, the rights of all cotenants are fully protected in a partition by physical division. This important

protection for co-tenants is a significant reason why Washington law so strongly favors partition in kind over partition by forced sale.

Although the doctrine of owelty is “time honored,” Plaintiff told the trial court that the doctrine did not exist. At argument, Plaintiff’s counsel asserted that because physically dividing the property would result in lots of unequal value, it was illegal. “[T]here seems to be no way that you could do that. And I presume there’s no dispute that there would have to be equal values to the properties. So that’s really our argument, Your Honor.” TP 9. Defendant was compelled at argument to try to correct this basic and obvious misstatement of the law. TP 10.

**C. THE TRIAL COURT ADOPTED PLAINTIFF’S  
ERRONEOUS VERSION OF WASHINGTON LAW**

Unfortunately, the trial court applied the Plaintiff’s erroneous versions of Washington law in ruling that the lower lot should be sold immediately, over Defendant’s objection, without including the upper lot. As discussed in the opening brief, the trial court’s Order makes no mention whatsoever of the second, upper lot. It completely ignored the existence of that lot, and made no provision for it. Also, it nowhere addressed the availability of owelty to facilitate a physical subdivision. This could only mean that the trial court adopted the Plaintiff’s argument that, as a matter of law, the upper lot could not be considered. If the trial court had not applied that erroneous view of the law, it would have mentioned the upper

lot in the Order, at least to make findings as to why it was choosing to depart from applicable law in this case. The trial court's adoption of plaintiff's erroneous view of the law was a clear legal error, which was compounded by the complete absence of any discussion or findings addressing that issue.

**D. PLAINTIFF'S ARGUMENTS ON APPEAL CONTRADICT THE ARGUMENTS IT MADE BELOW**

Plaintiff has engaged in a sort of "bait and switch" here. First, Plaintiff stridently misstated the law to the trial court, and apparently convinced the trial court to adopt that misstatement of the law. Now on appeal, Plaintiff has abandoned its erroneous version of the law. But the trial court relied upon the plaintiff's arguments when ruling in plaintiff's favor. That these arguments were in legal error is fatal to the Order.

While now admitting that the law does allow the upper lot to be included in this case, and that owelty applies to facilitate physical partition, plaintiff defends the Order by arguing that "the record lacks any evidence that owelty is practical." Respondent's Brief at 17. There are several significant problems with this argument. First, as discussed in the Opening Brief, the Plaintiff fought long and hard to shorten, truncate, and rush this matter. Plaintiff filed the Summary Judgment motion just weeks after the case was filed, before an answer had been served. Plaintiff then repeatedly

moved to shorten and close the briefing schedule, insuring that Defendant was deprived of a full opportunity to even brief the hurried motion. Plaintiff also strenuously opposed Defendant's request for more discovery. Because of these tactics, there were no depositions in this case, and very little discovery. The Plaintiff thus denied the parties and the trial court of a reasonable opportunity to conduct discovery on the practicality of "owelty" in this case, or on any other material issue.

Secondly, Plaintiff is well aware of the offers that Defendant Robert Evans has made to settle this case. While defense counsel felt restrained by ER 408 from sharing those details with the trial court, Plaintiff is well aware that there are resources available to make owelty a practicality. TP 10-11. Defendant stated as much at the Summary Judgment hearing. *Id.* For Plaintiff to suggest otherwise is misleading. Furthermore, since the law so strongly favors partition in kind over a forced sale, it is the Plaintiff's burden to show that partition in kind could *not* be made. Hegewald v. Neal, 20 Wn. App. 517, 522, 582 P.2d 529 (1978). Plaintiff's late attempt, on appeal, to shift that burden to the Defendant is inapposite.

**E. PLAINTIFF MISSTATES THE STANDARD OF REVIEW**

Plaintiff argues that the only issue before you is whether the trial court "abused its discretion." This is incorrect. First of all, the clear legal errors inherent in the trial court's Order are reviewed *de novo*. The trial

court obviously adopted the erroneous legal arguments presented to it by the Plaintiff, and those erroneous legal arguments are inherent in the Order now on appeal. The Court of Appeals has full rein to correct such legal errors. The trial court's failure to apply the presumption in favor of partition in kind – or to even mention that legal presumption while ruling against it – is another clear legal error.

Moreover, such legal errors themselves constitute an abuse of discretion. A trial court abuses its discretion “when its decision is based on untenable grounds or reasons; a decision is untenable if it rests on an erroneous application of law.” State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

It is also worth remembering that the truncated proceeding below was a Summary Judgment proceeding, in which the trial court was asked to rule as a matter of law that there were no material issues requiring a trial. The Court so ruled: “The Court has found that no material facts remain in controversy.” CP 259. Partition defendants are entitled to a trial of factual issues, RCW 7.52.070, and the trial court's decision to rule as a matter of law, so early in the case, was clearly a dispositive Summary Judgment ruling.

Therefore, the Summary Judgment standard of review applies. A Summary Judgment is appropriate only if the pleadings, affidavits,

depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, such that the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends, in whole or in part. Atherton Condo Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (citing Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)). All facts submitted, and the reasonable inferences therefrom, are viewed in the light most favorable to the nonmoving party. Atherton, 115 Wn.2d at 516. On appeal, this Court reviews a Summary Judgment ruling *de novo*, performing the same inquiry as the trial court. Ruvalcaba v. Kwang Ho Baek 175 Wn.2d 1, 6, 282 P.3d 1083 (2012).

Applying the Summary Judgment standard in light of a correct statement of partition law, and the powerful presumption favoring partition in kind over forced sale, there were clearly material issues of fact below. The mere presence of the upper lot, and the fact that the square footage of the two lots together is more than enough for a physical partition, obviously creates a genuine issue of fact as to whether partition in kind should take place. But the trial court completely ignored these facts, and clearly failed to draw inferences in the Defendant's favor based on these facts. Instead, it granted Plaintiff's Summary Judgment request, while allowing very little in the way of discovery or litigation.

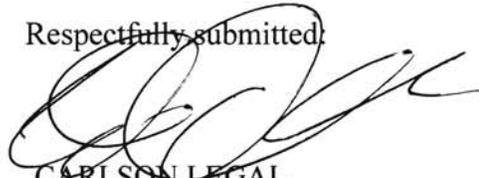
Lastly, even applying the “abuse of discretion” standard, the ruling below constitutes an abuse of discretion. There was clear evidence in the record that with both lots included in this partition action (as the law clearly allows), partition in kind could easily be accomplished without running afoul of any local zoning ordinance. As shown, the two lots comprise nearly 80,000 square feet, a fact which was in dispute. CP 195-96. This evidence alone disposes of the Plaintiff’s final rationale for demanding an immediate forced sale – that local zoning restricts individual lots to 12,500 square feet. The Court’s failure to rely on that evidence -- or to even mention it while ruling against it -- constitutes an abuse of discretion.

**F. THIS COURT SHOULD CORRECT THESE MANIFEST ERRORS. THIS CASE REQUIRES A RESET.**

In a highly truncated proceeding, the trial court granted Plaintiff’s Summary Judgment motion and ordered the forced sale of the lower lot, over the objection of a rightful owner of that property. This is an extreme and drastic remedy. Washington law is clear that a forced sale is only appropriate in unusual and extreme circumstances. Such circumstances clearly do not exist here. The trial court furthermore refused to allow additional discovery, and refused to take judicial notice of county lot maps that directly contradicted the Plaintiff’s arguments. The trial court also ignored the applicable legal presumption, ignored the primary legal and

factual issue presented to it, ignored the applicable standard of review for a plaintiff's Summary Judgment, relied on Plaintiff's erroneous statement of the law, and failed to explain its rationale for doing any of these things. The resulting Order is replete with error.<sup>2</sup> This situation cries out for correction on appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jay Carlson', written over the typed name 'CARLSON LEGAL'.

CARLSON LEGAL

Jay Carlson, WSBA # 30411

Attorney for Defendant/Appellant

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<sup>2</sup> The trial court's Order was drafted by counsel for the parties seeking to force the sale. To the extent that the order fails in its drafting, that failure should be construed against the parties who drafted it.

**DECLARATION OF SERVICE**

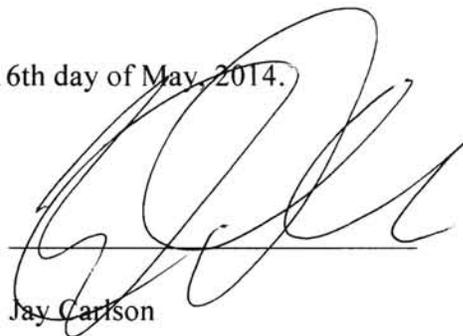
The undersigned declares under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

That on May 16, 2014, I served a copy of the Reply Brief of Appellant via email by prior agreement of the parties to the following:

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DATED at Seattle, Washington this 16th day of May, 2014.

  
Jay Carlson