

71115-6

COURT OF APPEALS
DIVISION ONE

71115-6

JUL 16 2014

No. 71115-6

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

WHITE WATER INVESTMENT, LLC,
a Washington limited liability company,

Appellant,

vs.

COOL BEANS EASTLAKE, LLC,
a Washington limited liability company,

Respondent.

2014 JUL 16 PM 3:45
COURT OF APPEALS
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE CATHERINE SHAFFER

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Cool Beans, LLC (“Cool Beans”) purchased a piece of property (“Cool Beans Parcel”) knowing it was developed in violation of a validly recorded, enforceable easement (“Easement”). Despite taking advantage of the Easement’s property rights, including mutual access and use rights to White Water Investment, LLC’s (“White Water”) adjoining property (“White Water Parcel”), Cool Beans contends that it cannot be held responsible for the Cool Beans Parcel’s ongoing violation of the Easement. It advances a position that turns property law on its head, rendering public records meaningless and incentivizing a servient estate owner to violate an easement and quickly transfer the servient estate to a new entity to escape liability before the dominate estate enforces its rights. Such an outcome would write the 10-year prescriptive period and RCW 4.16.020(1) out of the law.

The trial court erred when it refused to enforce the Easement and recognize White Water’s property rights on the grounds that Washington’s six-year limitation period for actions on contract barred White Water’s claim. In this dispute, White Water seeks to *recover* the 24-foot drive aisle and third row of parking stalls that Cool Beans is wrongfully and exclusively possessing, to which a 10-year statute of limitations for the recovery of real property applies. Cool Beans has failed to locate a single

case or secondary source that states otherwise. In fact, both the text of the 10-year statute of limitations and the closest analogous case law squarely support White Water's position. This is because a reciprocal easement "*is not essentially a contract but a conveyance of interests in land.*" 17 WILLIAM B. STOEBCUK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE § 2.3 (2d ed. 2004) (emphasis added).

In Washington, the proper remedy to protect an easement against adverse possession is the removal of a non-conforming structure, without regard to the costs associated with doing so when the offending party knowingly violates another's property rights. As such, this Court should reverse and remand with instruction to enjoin Cool Beans' structure from encroaching on White Water's property rights.

II. REPLY ARGUMENT

A. **Regardless of the Easement's Label, White Water Seeks to Recover Real Property Cool Beans Currently Possesses.**

Consistent with fundamental tenants of property law, claims to enforce easement rights are actions to recover interests in real property, subject to a 10-year statute of limitations in Washington. Easements are interests in land, which run with the land as property rights regardless of whether they are documented in the instrument of transfer. *Rainier View Court Homeowners Ass'n, Inc. v. Zenker*, 157 Wn. App. 710, 719, 238 P.3d 1217 (2010); *Kirk v. Tomulty*, 66 Wn. App. 231, 239, 831 P.2d 792

(1992).

White Water's claim falls squarely within RCW 4.16.020(1)'s 10-year limitation period "[f]or actions for the recovery of real property, or for the recovery of the possession thereof . . ." Here, White Water seeks to *recover* the land on which Cool Beans' non-conforming structure lies. As the Easement's site plan and satellite image demonstrate (App. Br. 4–5), the structure on the Cool Beans Parcel was built on top of the 24-foot rear drive aisle the Easement creates. The structure also encroaches on the Easement's third row of parking stalls. White Water seeks injunctive relief to exercise its property rights to access, possess, and use these parts of the common areas. Restoration of both the missing drive aisle and parking stalls would enable White Water to *recover* and *possess* real property granted to it under the Easement.

1. Cool Beans Cites No Authority Applying the 6-Year Statute of Limitations for Actions on Contract to Takings of Easements by Adverse Possession.

Cool Beans relies principally on three authorities for its contention that the six-year limitation period of RCW 4.16.040(1) applies to its Easement violation. (Resp. Br. 13, 16) However, none of these sources reach this conclusion or are factually and legally analogous to the present dispute.

First, WASHINGTON PRACTICE: REAL ESTATE, volume 17, supports

applying the 10-year statute of limitations to Cool Beans' Easement violation. In full, the passage Cool Beans' cites provides:

Instruments creating easements frequently carry the caption "easement agreement." It would be better to label them "deed for easement," even though, as deeds often do, they may contain contractual undertakings of the parties. Even when the instrument creates mutual easements, sometimes called "cross-easements," as in the case of a driveway along a property line, it should be borne in mind that *the instrument is not essentially a contract but is a conveyance of interests in land.*

STOEBUCK & WEAVER, *supra*, § 2.3 (emphasis added). The fact that the parties' predecessors memorialized their grant of property interests to each other as a "Reciprocal Easement Agreement" (CP 44–58) does not remove this dispute from RCW 4.16.020(1)'s longer limitation period. As Professors Stoebuck and Weaver explain above, this is an action regarding property rights, not a contract dispute.

Second, *Free Methodist Church Corp. v. Brown*, 66 Wn.2d 164, 401 P.2d 655 (1965), does not stand for the proposition that easement violations are governed by a shorter limitation period than that provided in RCW 4.16.020(1). In *Free Methodist Church*, the defendant entered and bulldozed the plaintiff's property on two occasions without the legal right to do so. *Id.* at 164–65. The plaintiff then brought a claim for damages caused by the defendant's removal of lateral support to its property. *Id.* at 164. The trial court properly applied RCW 4.16.080(1)'s three-year

limitation period for trespass because the defendant's removal of lateral support was an "actual invasion" of the plaintiff's property. *Id.* at 165. In doing so, the trial court awarded the plaintiff damages for the invasion that occurred during the plaintiff's ownership of the property. *Id.* The appellate court affirmed, even though the complaint was not styled as a trespass claim. *Id.* The appellate court refused to apply RCW 4.16.020(1)'s 10-year limitation period because the statute "relates to the recovery of real property, or for the recovery of possession thereof, neither of which is involved here." *Id.* at 166.

Free Methodist Church does not speak to the applicable statute of limitations for easement violations. There was no attempt to recover land in that case. *See id.* at 164–65. The case did not involve a claim for injunctive relief to recover property rights violated by one party's impermissible easement encroachment. *See id.* In fact, the *Free Methodist Church* decision does not even contain the word "easement." *See id.* at 164–66.

Rather, the *Free Methodist Church* court's reasoning supports the application of RCW 4.16.020(1)'s 10-year limitation period to easement violations. In that dispute, the defendant wrongfully entered the property and left. *Id.* at 164–65. There was no real property for the plaintiff to *recover* within the meaning of RCW 4.16.020(1). By contrast, Cool

Beans' violation of the Easement is continuous and ongoing. The structure built on the Cool Beans Parcel was "intended to be permanent." (Resp. Br. 6) There is, thus, real property for White Water to recover, and RCW 4.16.020(1)'s limitation period controls.

Third, *Erickson v. Chase*, 156 Wn. App. 151, 231 P.3d 1261 (2010), does not establish that the violation of an easement is subject to the six-year limitation period of RCW 4.16.040(1). *Erickson* involved an action to quiet title for prescriptive easements over the defendants' property. *Id.* at 154–56. In a fourth-party action, the seller of the property alleged a breach of the original seller's warranty to defend the property's title. *Id.* The appellate court in *Erickson* was asked to decide when a claim for breach of warranty to defend title accrued. *See id.* at 157–59. The *Erickson* court applied RCW 4.16.040(1)'s six-year limitation period and held that a cause of action for breach of warranty to defend accrues when a third party asserts a superior right to the property, and the defense is properly tendered and refused. *Id.* at 158–59.

Unlike the present case, *Erickson* did not involve a claim for the recovery of real property. *See id.* at 156–57. The breach of warranty claim at issue regarded whether one party must *defend* another party's title based on a warranty present in the statutory warranty deed. *Id.* at 158–59. There is no warranty deed at issue between White Water and Cool Beans.

In addition, in *Erickson*, neither the parties nor the court raised the issue of whether RCW 4.16.020(1)'s 10-year limitation period should apply to the contested deed. *See id.* at 157–59. As such, the *Erickson* decision is inapposite to the present issues before the Court.

Finally, it bears particular note that the language of RCW 4.16.020(1) does not require a party bring an action for title to real property to apply. In its refusal to apply RCW 4.16.020(1), the trial court noted, “There is no claim of title here.” (RP 23) However, nowhere does RCW 4.16.020(1) mention “claim of title.” In fact, the statute does not contain the word “title.” The plain language of RCW 4.16.020(1) requires an action “for the recovery of real property, or for the recovery of the possession thereof,” which is precisely the remedy White Water seeks.

2. The Closest Analogous Case Refuses to Apply a Statute of Limitations for Actions on Contract.

Cool Beans unsuccessfully attempts to distinguish the most factually and legally similar case, *Mnuk v. Harmony Homes, Inc.*, 790 N.W.2d 514 (Wis. Ct. App. 2010). In *Mnuk*, a Wisconsin appellate court ruled that an action to enforce easement rights was not barred by the state’s six-year statute of limitations for contract actions. *Id.* at 518–20. The court reasoned, “The label of the documents—‘access easement agreement’ (emphasis added)—and *the fact that each document is signed*

by both parties does not transform the grant of easement in each document into a contract subject to contract law.” Id. at 519 (second emphasis added).

The analysis of the *Mnuk* court applies here and supports one conclusion. The trial court committed error when it applied the shortened limitation period for actions on contract to White Water’s claim.¹ The present dispute concerns property rights the Easement conveys, not contractual obligations. (See CP 44–58) To enforce these property rights, White Water must *recover* the land on which Cool Beans has encroached. A 10-year statute of limitations governs claims to recover real property regardless of whether the disputed property rights are codified in a writing.

3. Cool Beans’ Has Attempted to Terminate the Easement by Adverse Possession, Which Is Subject to the 10-Year Statute of Limitations.

Cool Beans’ concedes that RCW 4.16.020(1)’s 10-year limitation period applies to adverse possession claims. (See Resp. Br. 14) Cool Beans’ encroachment on the 24-foot rear drive aisle and parking stalls amounts to an attempt to terminate White Water’s property rights through

¹ Commentary from the only other case cited that discusses the interplay of multiple statutes of limitations as to easement violations similarly reveals the trial court’s error in applying the six-year statute of limitations. In a dispute to enforce restrictive covenants and enjoin the presence of the defendants’ sign and construction equipment, a Missouri appellate court noted that Missouri’s 10-year statute of limitations “for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof” governs actions to restore easements. *Terre Du Lac Property Owners’ Ass’n, Inc. v. Wideman*, 655 S.W.2d 803, 805 n.1 (Mo. Ct. App. 1983).

open, notorious, exclusive adverse possession. To exercise its property rights, White Water has resorted to litigation to *recover* property Cool Beans wrongfully possesses. There is no question that White Water's claim falls within the 10-year limitation period applied to termination of an easement by adverse possession.

4. Washington Courts Apply the Statute with the Longest Limitation Period.

The text of RCW 4.16.020(1), together with the facts of this dispute and the fundamental nature of easement agreements, provide ample support for reversal of the trial court's ruling. Such a result is also consistent with Washington's policy to apply the longer limitation period if there is uncertainty as to which statute of limitation to apply. *See Stenberg v. Pac. Power & Light Co., Inc.*, 104 Wn.2d 710, 715, 709 P.2d 793 (1985); *Shew v. Coon Bay Loafers, Inc.*, 76 Wn.2d 40, 51, 455 P.2d 359 (1969). Applying the longer period furthers Washington's preference to decide legal issues on their merits.

Other than impacting the outcome of this matter, Cool Beans has not provided any evidence of prejudice it would suffer from application of the longer limitation period. A six-year limitation period would have expired in 2010. There is no evidence of any activity between 2010 and the date White Water filed suit to support a claim of prejudice.

B. Cool Beans Cannot Assert the Defense of Balancing the Equities.

The doctrine of balancing the equities has a critical limitation: the “benefit of the doctrine of balancing the equities . . . is reserved for the innocent defendant who proceeds without knowledge or warning that his structure encroaches upon another’s property or property rights.” *Peterson v. Koester*, 122 Wn. App. 351, 359, 92 P.3d 780 (2004) (alteration in original) (internal quotation marks omitted) (*quoting Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968)).

Here, it is undisputed that Barber Development, LLC (“Barber Development”) built-out the Cool Beans Parcel fully understanding that the construction violated the Easement. (CP 463; *see also* CP 512–13) During the planning and development of the Cool Beans Parcel, Castellum’s attorney notified Barber Development by letter that the current version of the site plan violated the Easement and that Castellum reserved its right to object. (CP 463) Nevertheless, Barber Development developed the Cool Beans Parcel in violation of the Easement. (*See* CP 283)

Further, it is undisputed that Cool Beans purchased the parcel knowing of the Easement and the property’s non-conforming build-out. (CP 483–84, 486–488, 490–91) During its due diligence process prior to

purchasing the Cool Beans Parcel, Cool Beans' attorney Alan Sternberg and agent Century Pacific Properties were notified by letter of the Easement and the unrecorded draft Amended Reciprocal Easement Agreement. (See CP 283, 483; see also CP 486–88) Mr. Sternberg also explicitly inquired about the purpose of the amended agreement and was informed it was “to correct the site plan.” (CP 490–91) Knowing that there was a failed attempt to amend the Easement to bring it in conformity with the as-built condition of the Cool Beans Parcel, Cool Beans purchased the property. (CP 283)

Under such circumstances—when a party takes a calculated risk by proceeding in the face of others' property rights—the bad actor is precluded from the protection of balancing the equities. See e.g., *Bach*, 74 Wn.2d at 580–82 (requiring removal of portion of apartment complex); *Peterson*, 122 Wn. App. at 359–61 (requiring modification of mechanical room); *Radach v. Gunderson*, 39 Wn. App. 392, 398–400, 695 P.2d 128 (1985) (ordering removal of home at city's expense); *Mahon v. Haas*, 2 Wn. App. 560, 564–65, 468 P.2d 713 (1970) (upholding order to remove commercial greenhouse).

Cool Beans attempts to distinguish these cases on the grounds that the party barred from defending on balancing the equities was the party who took the calculated risk, not an after-the-fact purchaser. (Resp. Br.

25) None of these cases, however, make this distinction. The knowledge-responsibility difference that Cools Beans draws is one made of whole cloth, without support in the case law. Additionally, this logic has the perverse incentive of encouraging property owners to negotiate reciprocal covenants, develop property in violation of those covenants, and sell the offending property to escape liability. This outcome would render public records meaningless and nullify the 10-year prescriptive period.

Moreover, Cool Beans' argument ignores the fact that when Cool Beans purchased the property, it took several calculated risks *of its own*. Not only did Cool Beans assume that neither Castellum nor any future owners would seek to enforce the White Water Parcel's property rights, but Cool Beans also risked any indemnification for such enforcement expenses when it dismissed Barber Development from the litigation. (CP 20–21) Having purchased the property knowing that its structure violates the Easement, Cool Beans is precluded from avoiding injunctive relief under the theory of balancing the equities. See *Bach*, 74 Wn.2d at 582.

In addition, the position Cool Beans advances ignores the common-sense reality of what White Water purchased when it bought the White Water Parcel. White Water's pre-purchase evaluation of the property revealed the Easement and the Cool Beans Parcel's nonconforming build-out. (CP 348–351) After learning of the Easement

and the Cool Beans Parcel's violation of it, White Water lowered its offer to reflect likely future litigation expenses and added an addendum to the purchase and sale agreement to reflect that White Water was purchasing the land along with the Easement rights. (CP 573–74) (This clarification, however, was not strictly necessary because the Easement is in public records and runs with the White Water Parcel.) In the addendum to the purchase and sale agreement, Castellum represented and warranted to White Water that it: (1) never agreed to let the owner of the Cool Beans Parcel violate the Easement; (2) never waived its right to enforce the Easement; and (3) never received compensation for Cool Beans' violation of the Easement. (CP 494) Within 4 months of purchasing the White Water Parcel, White Water filed suit to enforce its Easement rights. (CP 1–5)

Cool Beans further argues that White Water has no right to pursue damages against Cool Beans as a subsequent purchaser of the White Water Parcel. (Resp. Br. 19–21) However, the three cases Cool Beans relies on are takings cases, none of which hold that a purchaser of property with attached easement rights cannot seek to enforce those rights. For example, *Gillam v. Centralia*, 14 Wn.2d 523, 128 P.2d 661 (1942), *overruled on other grounds by Ackerman v. Port of Seattle*, 329 P.2d 210 (1958), involved the right to damages to real property from the city's

construction of a viaduct that was completed before the execution of a quitclaim deed. *Gillam*, 14 Wn.2d at 527–32. *In re Seattle*, 26 Wash. 602, 67 P. 250 (1901), involved claims for property loss damages resulting from the city’s street re-grading, which was completed prior to the date of sale. *Id.* at 603–04. *Wolfe v. Department of Transportation*, 173 Wn. App. 302, 293 P.3d 1244 (2013) involved erosion damages from the state’s reconstruction of a bridge across the Naselle River. *Id.* at 303–04. The bridgework was completed well before the plaintiff purchased the property. *Id.*

Cool Beans should not be permitted to have it both ways, *i.e.*, to simultaneously benefit from the Easement’s access, use, and possession rights and ignore the burdens of the Easement that create these very benefits. The trial court’s “balancing” of the equities unreasonably and inequitably results in the Easement only fully applying to one party, White Water.

C. The Proper Relief Is an Injunction Enjoining Cool Beans’ Violation of the Easement.

Cool Beans’ acknowledges that the appropriate remedy in which one party has knowingly violated an easement is to enjoin the violation and order removal of any encroachments on the easement. *See* Resp. Br. 21–25; *Littlefair v. Schulze*, 169 Wn. App. 659, 666, 278 P.3d 218 (2012),

as amended (Sept. 25, 2012), *review denied*, 176 Wn.2d 1018, 297 P.3d 706 (2013) (“It follows that a dominant estate owner has the right to protect his rights in the easement by requiring the servient estate owner to remove any structure that could deny the easement owner his full easement rights.”). This remedy precludes loss of an easement by adverse possession. *Id.* The cost of such removal is ordinarily not considered. 1 AM. JUR. 2D *Adjoining Landowners* § 136 (collecting cases); *see also Littlefair*, 169 Wn. App. at 664–68 (cost was not considered in ordering removal of fence).

It was error for the trial court to refuse to order removal of any non-conforming aspects of the Cool Beans Parcel. To avoid partial demolition of Cool Beans’ structure, however, White Water has offered a compromise throughout its briefing to this Court and the trial court, which it has varyingly called modification, reformation, or termination of the Easement. Regardless of the term used, the alternative relief White Water seeks is mutual release from the Easement’s restrictions subject to preservation of the existing drive aisle and number of parking stalls. (*See* CP 405–06, 588; App. Br. 20–22) Such a remedy will avoid the inequity of the status quo, in which Cool Beans is permitted to encroach on the Easement while White Water is prohibited from doing so.

The build-out of the Cool Beans Parcel prevents the Easement’s

fundamental purpose from being achieved. Without a secondary drive aisle, ingress, egress, and parking on both properties is difficult, if not impossible, during service and delivery to each property. (See CP 481) If Cool Beans' encroachment is not enjoined, the only other equitable result either party has proposed is termination of the Easement—a result analogous to material breach of contract. See, e.g., *Jacks v. Blazer*, 39 Wn.2d 277, 285, 235 P.2d 187 (1951) (“A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty.”).

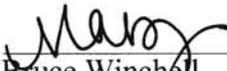
III. CONCLUSION

To restore White Water's property rights under the Easement in a 24-foot drive aisle and third row of parking stalls, White Water must recover the property that Cool Beans exclusively possesses. The 10-year limitation period for the recovery of real property, accordingly, applies. There is no dispute that White Water filed its claim well within the 10-year prescriptive period to terminate an easement by adverse possession. Because Barber Development developed the parcel knowing that the build-out violated a valid easement agreement and Cool Beans purchased the property with the same knowledge, Cool Beans is not entitled to the trial court's balancing of the equities. This Court should reverse the trial

court's summary judgment orders and remand with instruction to order Cool Beans to remove any aspect of its property not in conformity with the Easement.

RESPECTFULLY SUBMITTED this 16th day of July 2014.

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