

NO. 36954-1-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON  
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TONYA R. WOODARD, Respondent

vs.

DAVID G. HAHN and LINDA GRADY, Appellants

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BRIEF OF APPELLANTS

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THE HONORABLE VICKI L. HOGAN

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I. ASSIGNMENTS OF ERROR

Assignments of Error NO. 1:

Whether of Court erred in Granting Summary Judgement.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Issue NO. 1:

Whether or not there is a material issue of fact as to preclude summary judgement.

Issue NO. 2:

Whether or not the height restriction burdening Lot 1 was recorded as required by RCW 65.08.070.

Issue NO. 3:

Whether or not Woodard is a bonafide purchaser for value.

Issue NO. 4:

Whether or not there is notice in the recording chain to Woodard.

III. STATEMENT OF THE CASE

Carl A. Forsbeck and Thelma Forsbeck (hereinafter known as "Forsbeck") owned two parcels of property located on Fox

Island. Those parcels were Lot 1 and Lot 2 of Short Plat 8904270182. (CP 70). David Hahn and Linda Grady (hereinafter known as "Hahn") purchased Lot 2 from the Forsbecks (CP 73).

That as a condition of purchasing Lot 2 the Hahns required that the Forsbecks place a height restriction on Lot 1. (CP 70, 77). The height restriction was placed in the Statutory Warranty Deed and recorded with the Pierce County Auditor on September 23<sup>rd</sup> 1994. (CP 73).

In May of 2005 Tonya Woodard (hereinafter known as "Woodard") purchased Lot 1. (CP 44, 48). That prior to her purchase of the real property, the Hahns met her boyfriend, Scotty Barker (hereinafter known as "Barker"), at Lot 1. (CP 77). It was during this meeting that David Hahn advised Mr. Barker that there was a height restriction on Lot 1. (CP 78). Scotty Barker is now married to Tonya Woodard. (RP 9).

On March 8<sup>th</sup> 2006, the Hahns wrote Woodard a letter advising her in writing of the height restriction. (CP 75). In the spring of 2006 the Hahns orally advised Woodard of the height restriction. (CP 71). Two days later Woodard returned with a copy of the Statutory Warranty Deed containing the height restriction.

(CP 71).

On February 27<sup>th</sup> 2007 Woodard filed a Complaint for Quiet Title and other relief. (CP 1-7). The Woodards filed an Answer and Third Party Complaint on April 23<sup>rd</sup> 2007. (CP 8-11).

Woodard Filed a Motion for Summary Judgement of Quiet Title on June 19<sup>th</sup> 2007. A hearing was held on September 13<sup>th</sup> 2007, at which time the Honorable Vicki L. Hogan orally granted Woodard's Motion for Summary Judgement. A written Order of Summary Judgement was signed and filed on October 11<sup>th</sup> 2007. The Hahns filed their Notice of Appeal to this Court on November 1<sup>st</sup> 2007.

#### IV. ARGUMENT

##### A. There is a material issue of fact.

Barker was the boyfriend of the Respondent, Woodard. (CP 71, 77, 78). They later married. (RP 9). The Hahns met Barker prior to Woodard's purchase of Lot 1. At that time they advised him of the height restriction on Lot 1. (CP 70, 71, 78). Barker denies any discussion of a height restriction. (CP 57).

As Barker was the boyfriend and now husband of Woodard, there is a material question of fact as to what Woodard knew or

should have known regarding the height restriction on Lot 1 prior to Woodard's purchase of Lot 1.

It is Hahns' position that notice to Barker was also notice to Woodard. When the Hahns met Barker at Lot 1 he stated that "he and his girlfriend were thinking about buying the property." (CP 70, 77). Barker and Woodard had been living together as man and wife. (CP 71, 78). Barker was present at the closing when Woodard purchased Lot 1. (CP 71, 78). From the time the Hahns met Barker up to and including Woodard's purchase of Lot 1 and later Barker and Woodard's relationship has been that of man and wife, a meretricious relationship. *Sutton v. Widner*, 85 Wash. App. 487, 490, 933 P. 2d 1069 (1997).

It has been held that notice to a husband constitutes notice to the wife. *Chase v. Beard*, 55 Wash. 2d 58, 64, 346 P. 2d. 315 (Wash. 1959). The Court there relied on a law of agency. It stated "notice to an agent when acting within the scope of the agency is notice to his principal. Knowledge by the agent and facts relating to the agency is deemed knowledge by the principal." The Court further said that "this general rule of agency applies when a husband is acting as agent for his wife." *Chase v. Beard*, *Supra* 65. Barker had a duty to communicate the height restriction discussion

to Woodard. *Hendricks v. Lake*, 12 Wn. App. 15, 22, 528 P. 2d 491 (1974). By advising Baker, the agent of Woodard, of the height restriction, knowledge of the height restriction is imputed to Woodard.

The well established rule for granting summary judgement provides that:

“Summary Judgement is appropriate if there is no genuine issue of material fact and the moving party is entitled to the judgement as a matter of law. All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the non-moving party. “The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. However, bare assertions that a genuinely material issue exist will not defeat a Summary Judgement Motion in the absence of actual evidence.”

*Elias vs City of Seattle* 142 Wash. 2d, 450, 13 P. 3d 1050 (2000) (citations omitted). Additionally, “a material fact is one that effects the outcome of the litigation.” *Geer vs. Tonnon*, 137 Wash, App. 838, 155 P. 3d 163 (2007). As indicated above there is a question of fact as to whether or not Woodard had knowledge of the height restriction prior to her purchase of Lot 1. Due to this material issue of fact, summary judgement should not have been granted.

B. The recording of the deed containing the height restriction complies with RCW 65.08.070.

The Statutory Warranty Deed under which the Hahns

purchased Lot 2 for the Forsbecks contained the height restriction which encumbered Lot 1. (CP 73, 79). It was recorded with the Pierce County Auditor on September 23<sup>rd</sup> 1994. (CP 73).

RCW 65.08.070 states as follows:

“A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.”

There is no doubt that the height restriction against Lot 1 was recorded . It was recorded in Pierce County, the county where Lot 1 and Lot 2 are located. (CP 73).

The recording of this restriction imparts notice to Woodard according to RCW 65.08.030. RCW 65.08.030 states as follows:

“In instrument in writing proporting to convey or encumber real estate or any interest therein, which as been recorded in the Auditor’s office of the county in which the real estate is situated, although the instrument may not have executed andacknowledged in accordance with the law in force at the time of the execution, shall impart the same notice to third person, from the date of recording, as if the instrument had been executed, acknowledged, and recorded in accordance with the law regulating the execution, acknowledgment, and recording of the instrument the in force.”

As stated in *Murphy v City of Seattle* 32 Wash. App. 386, 392, 646

P. 2d. 540 (1982);

“...RCW 65.08.030 et. seq. protects parties and their successors who agree to restrict the use of land from subsequent purchasers of the land who wish to escape the burden or the restrictions. The statute imparts constructive notice to such purchasers.”

Further, the case of *Strong v. Clark*, 56 Wash. 2d 230, 232, 352 P. 2d, 183 (1960) states:

“When an instrument involving real property is properly recorded, it becomes notice to all the world of its contents”

Once the Statutory Warranty Deed was recorded, there was constructive notice to all subsequent purchasers of Lot 1, including Woodard. The height restriction is a valid encumbrance upon Lot 1.

C. Respondent is not a bonafide purchaser for value.

As stated in sections A and B above, Woodard had prior actual and constructive notice of the height restriction. The Hahns notified Woodard's agent of the height restriction orally and the height restriction was properly recorded. (CP 70, 71, 78). The notice to Woodard did not have to be the full knowledge of the height restriction. It just had to contain such information as would “excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry.” *Glaser v. Holdorf*, 56 Wn. 2d 204, 209, 352, P. 2d 212 (1960).

Woodard is not a bonafide purchaser. Elements of a bonafide purchaser are as follows:

“A bonafide purchaser for value is one (a) who has no notice of the claim of another’s right for equity in the property prior to his acquisition of title, and (b) who has paid the vendor a valuable consideration.”

*Biles-Coleman etc. v. Lesamiz* 49 Wash. 2d. 346, 349, 302 P. 2d. 198 (1956). Once the Hahns notified Barker of the height restriction Woodard had a duty to make reasonable inquiry regarding it. *Glaser v. Holdorf*, 56 Wash. 2d. 204, 209, 352 P. 2d. 212 (1960). In this case they made no inquiry at all of the Hahns as to the height restriction. (CP 40, 78). Had Barker or Woodard ever questioned the Hahns regarding the height restriction, they would have discovered the Statutory Warranty Deed prior to Woodard’s purchase of Lot 1.

In addition, Woodard could have searched the public records of the Pierce County Auditor's website and discovered the height restriction. (See Declaration of John Prosser)(CP 127-128). When the Hahns refused to grant Woodard a variance, Woodard discovered the height restriction within two days (CP 71).

Based upon the foregoing, Woodard is not a bonafide purchaser for value. At the very least there is a material question of fact as to whether Woodard is a bonafide purchaser for value.

Whether a person is a bonafide purchaser is a mixed question of law and fact. *Levien v. Fiala* 79 Wash. Wn. App. 294, 299, 902 P. 2d 170 (1995). What a purchaser knew is a question of fact. *Id.* This material question of fact is enough to preclude summary judgement.

D. There is notice in the recording chain to Respondent.

Washington uses a "grantor-grantee" index for recorded instruments. 18 Wash. Prac., RE Section 14.6 (2d ed). Had Woodard preformed a search of recording index she would first have run the name of Michael Diaz, the seller of Lot 1 to Woodard. (CP 45). That search would have turned up Forsbeck's name.

Using the Pierce County Auditor's website, or records search using search term "Forsbeck, Carl", returns 41 matches. Reviewing these results reveals to the searcher that Forsbeck purchased to property in 1987 and sold Lot 1 in November 2004 to Michael Diaz. This would have put Woodard on notice to search all documents under Carl Forsbeck's name that arose from the search within those years.

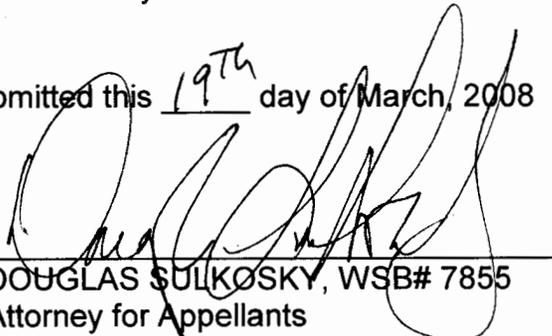
Reviewing those documents, Woodard, if conducting the search as required by law, would have come across a match with an instrument number of 9409230773. Because searchers are

charged with knowing the full contents of every indexed instrument, *Id.*, Woodard would be required to review this instrument. This instrument is the Hahn deed which contains the height restriction on Lot 1.

#### V. CONCLUSION

Based upon the foregoing this Court should grant Appellant's request and reverse/vacate the Order of Summary Judgement entered October 11<sup>th</sup> 2007. The Court should further grant Hahn's Motion for Summary Judgement declaring the height restriction recorded in the Hahn's Statutory Warranty Deed as a valid restriction on Lot 1, Pierce County Short Plat 8904270182.

RESPECTFULLY submitted this 19<sup>th</sup> day of March, 2008

  
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CERTIFICATE OF DELIVERY

I, EMILY FAIN, certify under penalty of perjury under the laws of the State of Washington that on the 19<sup>th</sup> day of March, 2008, I caused to be mailed, by 1<sup>st</sup> class mail, a copy of the Brief of Appellants to the following:

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DATED: 3/19/08

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