

Res. Woodward

NO. 36954-1-II

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

TONYA R. WOODARD, Respondent

vs.

DAVID G. HAHN and LINDA GRADY, Appellants

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

BRIEF OF RESPONDENT

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18 Wash. Prac. § 14.820

I. INTRODUCTION

This matter arises out of the purchase of a residential lot by respondent Tonya Woodard in May 2005. The following year, appellants David and Linda Hahn (Lot 2) asserted that a new house planned by Woodard (Lot 1) would violate a 13' height limitation agreement made in 1994 between the Hahns and a former owner of the Woodard parcel, Forsbecks. While the Hahn's 1994 deed contains an embedded height agreement, no agreement was recorded against the Woodard lot. Hence, Woodard's professional title search of Lot 1 did not disclose any such purported encumbrance.

Woodard, who did not have actual or constructive notice of the Hahn/Forsbeck agreement, commenced an action against the Hahns for quiet title. In response, Hahns brought a third party claim against Forsbecks alleging that "Forsbecks were negligent in failing to record the height restriction on Lot 1". CP 10.

Woodard moved for summary judgment. The trial court (Hon. Vicki L. Hogan) granted Woodard's motion, determining that she is a *bona fide* purchaser and the 1994 height agreement between Hahns and Forsbecks was void as against Woodard. CP 137; Appendix 1. This appeal by Hahn followed.¹

¹ The claims by the Hahns against Forsbecks remain pending and are not before the Court on this appeal. By order dated December 24, 2007, the Commissioner of this Court determined that the "order of summary judgment is appealable as a matter of right." *See* Appendix 2.

II. COUNTER STATEMENT OF ISSUE

Did the trial court properly determine that Woodard was a *bona fide* purchaser for value entitled to summary judgment of quiet title because (1) there was no recording of the alleged 1994 height agreement against the Woodard property, which is a separate lot having a separate legal description and (2) there was no genuine issue of material fact that Woodard did not have actual or constructive knowledge of the purported restriction?

III. STATEMENT OF FACTS

In 1989, Carl and Thelma Forsbeck (Forsbecks) subdivided their property on Fox Island into two separate legal parcels, Lot 1 and lot 2 of Short plat 8904270182. CP 124. At the time of the subdivision, a small cabin was located on what became Lot 1. After the subdivision, Forsbeck built a new house on Lot 2. *Id.*

In September 1994, Forsbecks sold Lot 2 to Hahns. CP 23; Appendix 3 (deed). In conjunction with the sale, Forsbecks and Hahns agreed that no structure would be erected on Lot 1 above the roof height of Forsbecks' existing cabin (about 13 feet). However, no separate height covenant was prepared or recorded against Lot 1. Instead, the height agreement was embedded in the body of the Hahn deed. *Id.* Moreover, the embedded agreement contains an erroneous description of the purported burdened property (referring to short plat #8904270192 rather than #8904270182).

If Hahns (or anyone else) wished to rely upon an agreement affecting other property embedded in their own deed, it was incumbent upon them to ensure that the recording clerk discovered and indexed the additional purported instrument and additional purported legal description.² This was not done. The general index for the Hahn deed (Auditor's file #9409230773) shows that the instrument recorded is solely a statutory warranty deed and the property is solely Lot 2. CP 135.

The Hahns merely assumed that the agreement was recorded on Lot 1. As Linda Hahn testified:

We went to the escrow company. We closed on it. We saw it [the height restriction] was on our piece of property. And we had no reason to check to make sure it was on the other piece of property.

CP 26.³ It is undisputed that there is no recording on "the other piece of property" ("Lot 1").

Ten years later, Forsbecks sold Lot 1 to Michael and Kimberly Diaz ("Diaz"). CP 29. In May 2005, Tonya Woodard purchased Lot 1 from Diaz for \$295,000. CP 44, 48. At the time of her purchase Tonya Woodard was living with her boyfriend, Scott Barker. However, it is undisputed that she was purchasing the lot as her separate property, including obtaining her own mortgage loan. CP 45.

² Notably, the Recording Act was amended in 1996 to include the now familiar cover sheet, which requires the party submitting an instrument to expressly so indicate when a single recording is intended to involve additional document titles or additional legal descriptions. RCW 65.04.047.

³ L. Hahn dep. at 14.

Prior to her purchase, Ms. Woodard ordered a title report which disclosed no restrictions. CP 45, 50. She also asked the seller whether there were any restrictions and reviewed the seller's "Form 17" Disclosure, which similarly showed no restrictions. CP 45, 49. Closing occurred on May 16, 2005.

In February 2006, some eight months after her purchase, Woodard was at the site going over plans for construction of a new home to replace the cabin. David Hahn came over and asserted that the house would violate the Hahns' height agreement. This came as a shock to both Ms. Woodard and Mr. Barker, who had never seen nor heard of any such alleged restriction. CP 45 (Woodard), 57 (Barker). By registered letter to Woodard dated March 8, 2006, the Hahns enclosed a copy of their 1994 deed and wrote:

This letter is provided to state, in writing, prior to the start of your new construction, that the above referenced height restriction exists.

CP 55.

Thereafter, Woodard commenced this action for quiet title. CP 1. In response, the Hahns made a third party claim against the Forsbecks alleging that "the Forsbecks were negligent in failing to record the height restriction on Lot 1." CP 10. In addition, the Hahns asserted an affirmative defense that "Woodard and/or her agents were advised of the height restriction prior to Plaintiff's purchase of Lot 1." CP 9.

It is undisputed that no one advised Woodard of any height restriction. The sole alleged basis of this affirmative defense regarding Woodard's "agents" is a chance encounter between Hahns and Scott Barker at the site prior to Woodard's purchase. The extent of this brief exchange follows.

The Hahns had been interested in purchasing Lot 1 themselves. CP 70 ("At one time David and I were interested in purchasing Lot 1"). In his deposition, Mr. Hahn testified that it was his practice to volunteer four "points" about his neighbor's property whenever he might encounter a stranger looking at the property. According to Mr. Hahn, when he saw Scott Barker (then a stranger) looking at the property, Mr. Hahn recited his standard list, consisting of (1) EPA problem with underground tanks, (2) cracked foundation, (3) septic problems and (4) height restriction. CP 40.⁴ As Mr. Hahn testified "I do remember those points because those points stick in my mind as something that I've told other people." CP 40.⁵ It is undisputed that it was a brief encounter and that Mr. Barker had no response:

Q: Did he have a response to you?

A: He did not have a response to any of those issues.

Q. Was that surprising to you?

⁴ D. Hahn deposition page 48

⁵ D. Hahn deposition page 51

A. Well, I mean, I don't recall. You know we didn't have a lengthy conversation.

CP 40.⁶ According to Mr. Hahn, the "height restriction" comment was limited to saying "there was a height restriction":

Q. So your answer is, you didn't give Mr. Barker any more detail than to say there was a height restriction?

A. That is what I recall.

CP 40.⁷

As stated in Mr. Barker's declaration, he did have a brief encounter with Mr. Hahn when Mr. Barker happened to stop by the Lot 1 to look at the property prior to Ms. Woodward's purchase, but there was no mention of any height restriction, much less any mention that any house would be limited to just 13 feet. CP 57. Mr. Barker recalls that Mr. Hahn mentioned that the property had problems associated with the former gas station on the site. *Id.* He did not respond to the officious stranger and the brief encounter ended cordially. *Id.*

Woodard moved for summary judgment on June 19, 2007. It is undisputed that Mr. Barker and Ms. Woodard were married a few weeks later (July 7, 2007), some two years *after* Ms. Woodard's purchase.

⁶ D. Hahn deposition page 50

⁷ D. Hahn deposition page 51

Hahns did not take any deposition or undertake other discovery. Based on the fact of the recent marriage, however, they suggest that Mr. Barker was the “agent” of Ms. Woodard and that Mr. Barker’s *alleged* knowledge must be imputed to Ms. Woodard.

For purposes of the summary judgment standard, Woodard’s motion accepted that there was a dispute as to whether David Hahn mentioned “height restriction” in his brief encounter with Scott Barker. CP 89 (Woodard reply brief). The trial court determined that there was no *material* issue of fact and summary judgment of quiet title was entered on September 13, 2007. CP 137, 138.

IV. ARGUMENT

A. **The 1994 Hahn/Forsbeck Agreement is Void Against Woodard.**

The Statute of Frauds, Ch. 65.08 RCW, requires that real property conveyances are to be recorded and “[E]very such conveyance not so recorded is void as against any subsequent purchaser ... in good faith and for a valuable consideration....” RCW 65.08.070. The term “conveyance” includes any instrument “by which title to any real property may be affected....” RCW 65.08.060(3). If the parties to the 1994 Hahn/Forsbeck height restriction agreement desired that it be binding upon future owners of Lot 1, it was necessary to record the agreement against Lot 1.

Typically, such an agreement would be recorded against the burdened parcel in an instrument entitled “Restrictive Covenant.” While

the Hahns hold Forsbecks responsible for failing to properly record a restriction on Lot 1, it is undisputed that the restriction is not in the record chain of title for the Woodard parcel. It is also undisputed that Woodard did not have actual notice of the subject 1994 agreement. Therefore, Woodard is entitled to the protection afforded by the recording statute.

The elements of *bona fide* purchaser status are well established. As stated in *Biles-Coleman Lumber Co. v. Lesamiz*, 49 Wn.2d 436, 439, 302 P.2d 198 (1956):

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

It is axiomatic that:

[A] bona fide purchaser for value of real property may rely upon the record chain of title as shown in the office of the county auditor.

Id. at 439. See also *Levien v. Fiala*, 79 Wn. App. 294, 299-300, 902 P.2d 170 (1995) (*bona fide* purchaser "is entitled to rely on record title")

The burden is on the party asserting actual or constructive notice. *Paganelli v. Swendsen*, 50 Wn.2d 304, 308, 311 P.2d 676 (1957) ("Plaintiffs had the burden of proving actual or constructive notice of their interest [citations omitted], and, if they failed to do so, their prior conveyance was void as against the [purchaser] by virtue of RCW 65.08.070").

In this appeal, the Hahns suggest that Woodard had constructive notice (1) through her alleged "agent" (Scott Barker), or (2) by virtue of

the recording of Hahns' deed on Lot 2 (a separate legal parcel). Both arguments fail as a matter of law.

B. Barker was not Woodard's Agent and the *Alleged* Statement by David Hahn to Barker May Not Be Imputed to Woodard.

At the outset, its worth mentioning that the Hahns admit they had no reason to mention a height restriction to a stranger (in contrast to buried fuel contamination) since the Hahns *believed* the 1994 restriction was properly recorded for all to see. When asked whether they ever raised the subject of a height restriction with the prior owner, Michael Diaz, Mrs. Hahn (herself a former realtor) testified "as far as the height restriction, we knew it was recorded so we wouldn't have talked about that." CP 27.⁸ Indeed, Ms. Hahn testified that there was no reason to talk to *anybody* about the height restriction. *Id.*

While, for purposes of summary judgment only, it could be assumed a dispute existed as to whether a height restriction comment was made, the Hahns failed to show any issue of *material* fact. *See Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993) (a material fact is on which the outcome of the litigation depends). There is no evidence that Mr. Barker understood any such *alleged* comment. There is no evidence that Mr. Barker communicated such *alleged* comment to Ms. Woodard. Instead, Hahns improperly suggest that knowledge of the *alleged* comment must be *imputed* to Woodard.

⁸ L. Hahn deposition at page 24

1. Barker is not Woodard's agent.

Barker was not Woodard's agent nor was he acting under Woodard's direction and control. The elements for existence of an agency relationship are well established. As set forth in *Hewson Construction, Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984):

An agency relationship may exist, either expressly or by implication, when one party acts at the insistence of and, in some material degree, under the direction and control of another. [Citation omitted] Both the principal and agent must consent to the relationship. [Citation omitted] The burden of establishing the agency relationship rests upon . . . the party asserting its existence.

Hahns submitted no evidence that Barker consented to be Woodard's agent or that he was acting under Woodard's direction and control when he happened to stop by the property.

The Hahns rely upon *Chase v. Beard*, 55 Wn.2d 58, 346 P.2d 315 (1959), for the astonishing proposition that "notice to Barker was also notice to Woodard." Appellant Brief at 4. This reliance is misplaced. *Chase* is an archaic decision under the pre-1972 form of Title 26 and has no application to the case at bar.

In the course of renting a cabin for himself and his wife, Mr. Chase was told that the cabin porch was "shaky." *Chase*, 55 Wn.2d at 60. Mrs. Chase was later injured when a porch board gave way, giving rise to her personal injury claim against the cabin owner. The trial court instructed the jury that the husband's knowledge of the porch condition must be imputed to the wife and her contributory negligence should be based on

such imputed knowledge. The Court affirmed reasoning that under RCW 26.16.030 [revised 1972] the husband “is in the nature of a managing agent” and “Mr. Chase’s act of renting the cabin was done on behalf of the marital community in his role as community manager.” *Id.* at 63.

At the outset, it has been 36 years since a husband ceased being *deemed* the managing agent of the marital community.⁹ Since 1972, “either spouse, acting alone, may manage and control community property, with like power of disposition as the acting spouse has over his or her separate property . . .” RCW 26.16.030. Moreover, Barker was not married to Woodard when she purchased the property. Woodard was purchasing the lot as her separate property and Barker was not a realtor.

In a strained attempt to fit under the inapplicable *Chase* decision, the Hahns urge that Barker and Woodward should be treated as “man and wife” in accordance with *Sutton v. Widner*, 85 Wn. App. 487, 493, 933 P.2d 1069 (1997). That case merely holds that the court must make an equitable division of property in the case of meretricious relationships. *Sutton*, 85 Wn. App. at 492-93 (“This is not a marriage; it is a meretricious relationship”).

After failing to show that Barker was Woodard’s agent, there is no basis for appellants’ assertion that the *purported* height restriction comment is “imputed to Woodard.” Again, the decision relied upon,

⁹ Also, *Chase* is overruled by *Marriage of Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984) to the extent the husband is deemed the manager of community property.

Hendricks v. Lake, 12 Wn. App. 15, 22, 528 P.2d 491 (1974), is unavailing. In that case, a property owner with *actual* knowledge of an unrecorded restrictive lease covenant (Lewis) transferred the property to a corporation owned equally by Lewis and Palmer. Lewis later sold his 50% share in the corporation to Palmer. Thereafter, an issue arose over enforcement of the unrecorded covenant and whether the knowledge of Lewis must be imputed to the corporation. The Court determined that Lewis was not acting as an agent for the corporation when he transferred the property and, hence, his knowledge was not imputed to the corporation. *Id.* at 22-23. In the case at bar there is simply no evidence of any agency relationship.

2. Woodard *did* make a reasonable inquiry.

Building upon the fiction that David Hahn's purported comment must be imputed to Woodard, appellants next assert that Woodard did not make a reasonable inquiry. The case cited by Hahn's, *Glasser v. Holdorf*, 56 Wn.2d 204, 352 P.2d 212 (1960), has no bearing on the case at bar except to underscore that "the burden of establishing that a purchaser had prior notice of another's claim, right or equity rest upon the one who asserts such prior notice." *Id.* At 209. Moreover, Woodard *did* make a reasonable investigation of the property. She asked the seller (Diaz) whether there were any restrictions, she received and reviewed a "Form 17" disclosure that showed no restrictions, and she ordered and reviewed a

professional title report that showed no restrictions. CP 45. The Hahns did not and cannot meet their burden.

C. Hahns did Not Record the 1994 Agreement Within the Chain of Title for Lot 1 (the Woodard Property).

Notwithstanding their claim that Forsbecks were “negligent in failing to record the height restriction on Lot 1” (CP 10), appellants next suggest that it was sufficient to embed a reference to the 1994 agreement in the deed to Lot 2 and that this “imparts notice to Woodard.” Appellant Brief at 6. This argument ignores controlling law and would undermine the integrity of the recording system.

To comply with the Statute of Frauds and be binding on subsequent purchasers, it is imperative that a purported interest in real property be recorded in the chain of title *of the burdened property*. RCW 65.08.070 (race-notice recording act); *Koch v. Swanson*, 4 Wn. App. 456, 459, 481 P.2d 915 (1971) (“[O]ne searching the index has a right to rely upon what the index and recorded document discloses and is not bound to search the record outside the chain of title to the property presently being conveyed.”); *Dickson v. Kates*, 132 Wn. App. 724, 737, 133 P.3d 498 (2006) (“Where existing property is described, the index and the recorded document give notice only as to matters within its chain of title.”)

In *Koch*, a mortgage lender claimed that a subsequent purchaser of tract 124 was subject to a mortgage lien. The lender had erroneously described the property as Tract 125 but claimed that the purchaser was on constructive notice despite the fact that the purchaser’s title search of tract

124 showed no such encumbrance. As in the case at bar, each tract was a separate legal parcel having its own chain of title. The Court noted that the general index imparts notice and:

By searching the index as to tract 124, defendants were not put on notice as to encumbrances affecting tract 124 erroneously described as tract 125.

Id. at 458-59. As the Court stated:

[D]efendants were required to go no further than a search of the record as to tract 124. To adopt plaintiffs' position would impose an almost impossible burden upon a party seeking to become a bona fide purchaser in that each and every conveyance shown of record involving a common grantor would have to be investigated beyond the auditor's records for possible error to avoid a claim of inquiry notice. This would destroy the strength of our recording system and any justifiable reliance thereon.

Id. at 459. Likewise, adoption of Hahns' position would destroy the strength of the recording system. Woodard was not required to search the title for any property other than Lot 1.

In *Dickson*, a recorded deed to Lot 99 (Kates) contained an embedded view covenant purporting to burden a separate legal parcel, Lot 119. The purchaser of Lot 119 (Dickson) performed a professional title search which found no mention of the covenant. *Dickson v. Kates*, 132 Wn. App. at 729. Kates nevertheless claimed that Dickson had constructive knowledge based on the recorded deed. As in the case at bar, the respective parcels had a prior common grantor and each had a separate legal description.

The Court observed that “our recording statutes regard properties with a common grantor as having separate chains of title once they are segregated and have separate legal descriptions.” *Id* at 736. In holding that Dickson did not have constructive notice, the Court stated:

Thus, one searching the index has a right to rely upon the index and recorded documents and is not bound to search to search the record outside the chain of title of the property presently being conveyed. Koch, 4 Wn. App. At 459.

Similarly, Woodard was entitled to rely upon the index and was not bound to search the record outside of Lot 1.

Appellants’ reliance upon RCW 65.08.030 (“Recorded irregular instruments imparts notice”) is misplaced. That provision applies to instruments that are otherwise recorded in the chain of title. For example, if Hahn *had* recorded a restrictive covenant on Lot 1 but the grantor’s signature was not acknowledged, such “irregular” recording would still impart constructive notice in accordance with RCW 65.08.030. On the other hand, a recording on Lot A does not impart notice on Lot B or Lots X,Y,Z.

Nor does the decision in *Murphy v. City of Seattle*, 32 Wn. App. 386, 393, 647 P.2d 540 (1982), aid appellants. At issue in *Murphy* was whether a subsequent purchaser had constructive notice of a restrictive covenant between the seller and the City which was not filed in the chain of title of the subject property. *Id.* at 388. The parties seeking to enforce the restriction claimed the protection of RCW 65.08.030, asserting that the

restriction was of “public record” by virtue of being part of a prior lawsuit. *Id.* at 392. The court disagreed, stating that the filing of a document in the course of a lawsuit “cannot trigger the protection of the recording statute.” *Id.* at 393. In their brief, appellants omit the operative sentence from *Murphy*, which is highlighted below:

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 of the restrictions. The statute imparts constructive notice to such purchasers. **It is also clear that in order to enjoy this protection, the original covenantors must record the agreement according to statute.**

Id. at 392. (Citation omitted.) In the case at bar, the original covenantors (Hahns and Forsbeck) did not record the agreement against the purported burdened property.

Likewise, the quotation from *Strong v. Clark*, 56 Wn.2d 230, 232, 352 P.2d. 183 (1960), does not aid appellants (“When an instrument involving real property is properly recorded, it becomes notice to all the world of its contents.”) (Citations omitted.) The operative term is *properly recorded*. In *Strong*, a purchase option was properly recorded in the chain of title to the burdened property and, hence, was constructive notice. *Id.* at 231.

Finally, appellants suggest that Woodard did not conduct a proper title search. On the contrary, there is no evidence that any professional title search of Lot 1 would disclose the subject 1994 agreement. See CP 50 (Woodard’s title search). Instead, Hahns now rely upon the declaration

of John Prosser. CP 128. Mr. Prosser was a legal intern employed at the office of Forsbecks' counsel. His declaration was submitted in opposition to *Hahns'* separate motion for summary judgment *against Forsbeck*. CP 109. In his declaration, Mr. Prosser stated that if all of the conveyances by Carl Forsbeck (as prior common grantor) were examined, the examiner would locate the Hahn deed (and presumably would discover the subject embedded agreement). In essence, appellants argue that Woodard was obligated to search *outside* the chain of title to Lot 1.

The Hahns submit no legal authority other than to state that Washington uses a grantor-grantee index (citing 18 *Washington Prac.* §14.6). However, as the *Koch* and *Dickson* decisions make clear, one is not bound to search outside the chain of title for the property presently being conveyed. Indeed, *Washington Practice* only underscores the requirement to index an instrument in the chain of title of the burdened property:

One important implication of this [the index] is that the person who requests recording of an instrument, if he does a thorough job, will go to the auditor's office after the instrument is received back, to verify that it was properly indexed as well as recorded. As the court said in *Ritchie v. Griffiths* in 1890, it is that person, and not some later title searcher who cannot find the improperly indexed instrument, who has the opportunity to verify the indexing.

Id. § 14.6, p. 132.

In the case at bar, the Hahns' deed is indexed, as one would expect, only as a "Statutory Warranty Deed" on "Lot 2." See CP 102. Neither

Hahns nor Forsbecks saw fit to ensure that the auditor also indexed the embedded “height agreement” to Lot 1. *Washington Practice* recommends that if one intends that a single instrument affect more than one parcel of property:

[I]t may be wise to prepare and record two instruments, one giving, in our example, Lot A as the principally described land, and the other so describing Lot B. This should insure that the auditor will note the description of each parcel in the index.

18 *Wash. Prac.* § 14.8 at 145. Hahns and Forsbecks did neither: they did not record two instruments (the common sense approach), nor did they ensure that the auditor indexed the Hahns’ deed (Lot 2) under the Lot 1 chain of title. Moreover, the purported height agreement embedded in the Hahns’ deed contains an erroneous description (short plat # 8904270192 rather than #8904270182).

While Hahns blame Forsbecks for the failure to record, it is clear that Woodard is an innocent purchaser. Washington law and the integrity of the recording system require that the Court reject Hahns’ self-serving argument.

V. CONCLUSION

Ms. Woodard did not have constructive notice of the 1994 agreement between Hahns and Forsbecks. That agreement is void against

Woodard, a *bona fide* purchaser. Summary judgment of quiet title should be affirmed.

DATED this 16th of April, 2008.

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CERTIFICATE OF DELIVERY

I, Laura White, certify under penalty of perjury under the laws of the State of Washington that on the 17th day of April, 2008, I caused to be hand delivered via legal messenger, a copy of the Brief of Respondent to the following:

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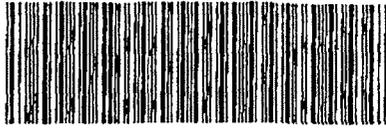
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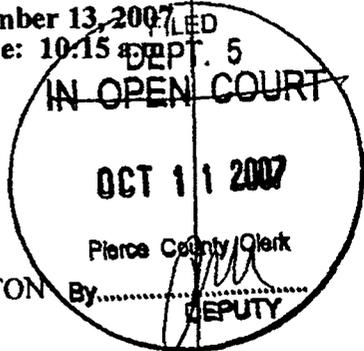
APPENDIX 1



07-2-05602-1 28445844 AGOR 10-17-07

Hon. Vicki L. Hogan
Dept. 05

Hearing Date: Thursday, September 13, 2007
Hearing Time: 10:15 AM



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TONYA WOODARD,
Plaintiff,

v.

DAVID G. HAHN and LINDA GRADY
HAHN, husband and wife,
Defendants,

DAVID G. HAHN and LINDA GRADY
HAHN, husband and wife,
Third Party Plaintiffs,

v.

CARL FORSBECK and THELMA
FORSBECK, husband and wife,
Third Party Defendants.

No. 07-2-05602-1

Agreed (circled)
ORDER OF SUMMARY
JUDGMENT

THIS MATTER having come before the undersigned Court upon the motion of plaintiff for summary judgment, the Court having reviewed the records and files herein including the motion papers consisting of:

Plaintiff Woodard's Pleadings

- 1. Motion for Summary Judgment of Quiet Title;

ORDER OF SUMMARY JUDGMENT - 1

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FACSIMILE: (206) 623-7022

- 1 2. Declaration of Tonya Woodard in Support of Plaintiff's Motion for
 Summary Judgment;
- 2 3. Declaration of Scott Barker in Support of Plaintiff's Motion for Summary
3 Judgment;
- 4 4. Declaration of Lance C. Dahl in Support of Plaintiff's Motion for
 Summary Judgment;
- 5 5. Plaintiff's Reply Brief;
- 6 6. Plaintiff's Response to Defendants' Cross Motion for Summary Judgment;
7 Declaration of Lance C. Dahl in Support Thereof; and
- 8 7. Plaintiff's Reply to Third Party Defendants' Brief.

9 Defendants Hahns' Pleadings

- 10 1. Defendants/Third Party Plaintiffs' Response to Plaintiff's Motion for
11 Summary Judgment; Cross Motion;
- 12 2. Declaration of Linda Hahn;
- 13 3. Declaration of Kathy Bell; and
- 14 4. Declaration of David G. Hahn.

15 Third Party Defendants Forsbecks Pleadings

- 16 1. Response to Plaintiff's Motion for Summary Judgment;
- 17 2. Declaration of Carl Forsbeck, and
- 18 3. Declaration of John Prosser.

19 The Court having heard the argument of counsel and being advised in the premises
20 determined that: (1) there is no material issue of fact; (2) there is no recording of the
21 subject 1994 height restriction covenants against the purported burdened lot (Lot 1) as
22 required by RCW 65.08.070; (3) Lot 1 was segregated from the original Forsbeck parcel
23 by means a 1989 short plat; (4) there is no notice in the recording chain to plaintiff
24 Woodard who is a *bona fide* purchaser for value; and (5) the burden to show Woodard had
25 prior notice of the height restriction covenants has not been satisfied. IT IS HEREBY

ORDER OF SUMMARY JUDGMENT - 2

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KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
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ORDERED:

1. Plaintiff's Motion for Summary Judgment is GRANTED;

2. Defendants Hahns' Motion for Summary Judgment is DENIED;

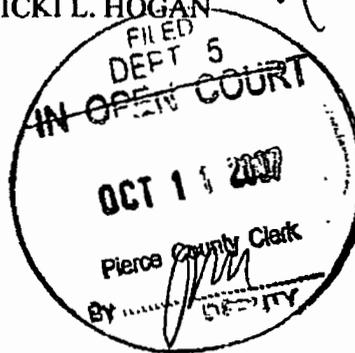
3. The Woodard real property commonly known as 601 9th Avenue, Fox Island, Washington 98333, and legally described in Exhibit A attached hereto, is not subject to or burdened by any height restriction covenant for the benefit of real property currently owned by defendants Hahns and commonly known as 616 9th Avenue, Fox Island Washington 98333, and legally described in Exhibit B. The 1994 height restriction agreement between defendants Hahns and third party defendants Forsbecks (and set forth in Hahns' deed, a copy of which is attached hereto as Exhibit C) IS VOID as to Woodard and the Woodard real property described herein. The title of Woodard to her real property IS HEREBY QUIETED in accordance with this judgment;

4. There being no just reason for delay, this SUMMARY JUDGMENT and JUDGMENT OF QUIET TITLE is hereby entered in accordance with CR 54(b); and

5. The third party claims and defenses between defendants Hahns and third party defendants Forsbecks are subject to further proceedings.

DONE IN OPEN COURT this 11 day of October, 2007.

Vicki L. Hogan
HON. VICKI L. HOGAN



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Presented by:

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP

By See pg 5
Lance C. Dahl, WSBA # 7608
Attorneys for Plaintiff
Tonya Woodard

Approved as to Form;
Approved for Entry:

LAW OFFICES OF DOUGLAS D. SULKOSKY

By See pg 5
Douglas Sulkosky, WSBA # 7855
Attorney for Defendants and Third Party Plaintiffs
David G. Hahn and Linda Grady Hahn

MILLER, QUINLAN & AUTER

By See pg 5
John A. Miller, WSBA # 5641
Attorneys for Third Party Defendants
Carl and Thelma Forsbeck

ORDER OF SUMMARY JUDGMENT - 4

K:\47571\00136\LCDL_CD_P24\JY

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1 Presented by:

2 KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP

3
4 By Lance C. Dahl

5 Lance C. Dahl, WSDA # 7603
6 Attorneys for Plaintiff
7 Tonya Woodard

7 Approved as to Form:
8 Approved for Entry:

9 LAW OFFICES OF DOUGLAS D. SULKOSKY

10 By Douglas Sulkosky
11 Douglas Sulkosky, WSHA # 3855
12 Attorney for Defendants and Third Party Plaintiffs
13 David G. Hahn and Linda Grady Hahn

14 MILLER, QUINLAN & AITER

15 By John W. Miller
16 John W. Miller, WSDA # 3741
17 Attorneys for Third Party Defendants
18 Carl and Thelma Forsbeck

19
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ORDER OF SUMMARY JUDGMENT 5
KW7871001301COLCO_P2107

KIRKPATRICK & LOCKHART
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SUITE 2000
SEATTLE, WASHINGTON 98104-1100
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WOODARD LEGAL DESCRIPTION

Lot 1 of SHORT PLAT recorded under Pierce County Auditor's Fee No. 8904270182,
EXCEPT that portion conveyed to Pierce County by deed recorded under Pierce County
Auditor's Fee No. 9012100251.

Situate in the County of Pierce, State of Washington.

Exhibit A

HAHN LEGAL DESCRIPTION

Lot 2 PIERCE COUNTY SHORT PLAT NO. 8904270182 ACCORDING TO MAP RECORDED ON APRIL 27, 1989, IN PIERCE COUNTY, WASHINGTON. EXCEPT THAT PORTION CONVEYED TO PIERCE COUNTY FOR ADDITIONAL RIGHT OF WAY FOR 9TH AVENUE. TOGETHER WITH A PRIVATE ROAD AND UTILITY EASEMENT, AS DELINEATED ON SAID SHORT PLAT. EXCEPT THAT PORTION LYING WITHIN SAID LOT 2.

SITUATE IN THE COUNTY OF PIERCE, STATE OF WASHINGTON.

Exhibit B

POOR QUALITY

ORIGINAL
#1863860493

9409230773

FILED FOR RECORD AT REQUEST OF

BILL HEDROW, INC.
5776 Soundview Drive N.E.,
Oly Harbor, WA 98131
Order No. 5137562

94 SEP 23 PM 3:53

RECORDED
CATHY PERRELL-SIPEL
AMTORG FIDELITY CO. WASH.

WHEN RECORDED RETURN TO

DAVID G. HORN
618 5TH AVE.
FOX ISLAND, WA 98133

RECISE TAX PAID'S 25' N 50'
Ra. No. 5-700A Dec 4-1990
Pierce County

RECORD No. 94-3865

R. B. ... Auth. Sec

RTC 5337501A

RESTRICTION WARRANTY DEED

THE GRANTOR CARL A. FORSBECK AND THELMA FORSBECK, HUSBAND AND WIFE
for and in consideration of Ten Dollars and other valuable consideration
in hand paid, conveys and warrants to DAVID G. HORN AND LINDA F. GROSS, JOHN THOMAS
the following described real estate, situated in the County of Pierce, State of Washington:

LOT 2, PIERCE COUNTY DEEDS FILE NO. 890427012, ACCORDING TO MAP
RECORDED ON APRIL 27, 1989, IN PIERCE COUNTY, WASHINGTON. EXCEPT THAT
PORTION CONVEYED TO PIERCE COUNTY FOR ADJUNCTION RIGHT OF WAY FOR 6TH
AVENUE. TOGETHER WITH A PRIVATE ROAD AND UTILITY EASEMENT, AS
DEPICTED ON SAID DEED FILE. EXCEPT THAT PORTION LYING WITHIN SAID
LOT 2.
SITUATE IN THE COUNTY OF PIERCE, STATE OF WASHINGTON.

SUBJECT TO: EASEMENT, AND THE TERMS AND CONDITIONS THEREOF, RECORDED UNDER APN 801218264;
EASEMENT PROVISIONS CONTAINED ON THE FACE OF THE DEED FILE FOR OPEN SPACE AND PRIVATE ROAD AND
UTILITIES; RESTRICTIONS ON THE FACE OF DEED FILE RECORDED UNDER APN 890427012; EASEMENT,
AND THE TERMS AND CONDITIONS THEREOF, RECORDED UNDER APN 1651008.

IT IS AGREED THAT GRANTEE HEREIN, CARL A. FORSBECK AND THELMA FORSBECK, HUSBAND AND WIFE,
OWNERS OF LOT 1, DEED FILE 890427012, AGREE NO STRUCTURE SHALL BE ERECTED ON LOT 1 TO AN
ELEVATION ABOVE SEA LEVEL GREATER THAN THE CROWN OF THE ROOF OF THE EXISTING BOILER. IT IS
FURTHER AGREED THAT THIS AGREEMENT IS MADE WITH FULL CONSIDERATION GIVEN BY THE PARTIES.
ALL OF THE FOREGOING AND THE RESTRICTIONS CONTAINED HEREIN ARE ALSO COVENANTS RUNNING WITH
THE LAND AT LAW AS WELL AS IN EQUITY AND ARE BINDING UPON CARL A. FORSBECK AND THELMA
FORSBECK, THEIR SUCCESSORS AND ASSIGNS AND ALL PRESENT AND FUTURE PERSONS OWNING OR HAVING
AN INTEREST IN SAID LOT 1 AND INURE TO THE BENEFIT OF THE GRANTEE HEREIN, DAVID G. HORN
AND LINDA F. GROSS, THE SPOUSAL COMMUNITY PROPERTY AND THEIR SUCCESSORS AND ASSIGNS AND ALL
PRESENT AND FUTURE PERSONS OWNING OR HAVING AN INTEREST IN SAID LOT 2.

DATED: September 20, 1994

Carl A. Forsbeck
CARL A. FORSBECK

Thelma A. Forsbeck
THELMA A. FORSBECK

STATE OF WASHINGTON)
COUNTY OF) ss.

I certify that I know or have satisfactory evidence that THELMA A. FORSBECK is/are the
person(s) who appeared before me, and said person(s) acknowledged that SHE signed this
instrument and acknowledged it to be HER free and voluntary act for the uses and purposes
mentioned in the instrument.

DATED: September 20, 1994

JOE MARK
Notary Public

Joe Mark
Notary Public

By appointment expires: 9-11-96

Exhibit C

Joe Mark, Notary Public
State of Washington, My Commission
Expires 9-8-96, Aurish County

APPENDIX 2



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

December 24, 2007

John Arthur Miller
Miller Quinlan and Auter
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Fircrest, WA 98466-6037

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Attorney at Law
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Tacoma, WA 98402-4629

Lance Christopher Dahl
Kirkpatrick & Lockhart Preston Gates Ell
925 4th Ave Ste 2900
Seattle, WA 98104-1158

CASE #: 36954-1-II

David G. Hahn & Linda Grady, Appellants v. Tonya R. Woodard, et al., Respondents

Counsel:

The action indicated below was taken in the above-entitled case.

A RULING SIGNED BY COMMISSIONER SCHMIDT:

The clerk placed this matter on the motion calendar to determine appealability. After considering the response, the court concludes that the order of summary judgment is appealable as a matter of right. The clerk will issue a perfection schedule.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Ponzoha", with a long horizontal flourish extending to the right.

David C. Ponzoha
Court Clerk

APPENDIX 3

