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NO. 53757-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON -
DIVISION II

PENSCO TRUST COMPANY, TRUSTEE FOR ED WAITE IRA,

Plaintiff / Appellant

vs.

J.G. JOHNSON AND JANET JOHNSON,
a married couple, and Does 1 through 10, inclusive,

Defendants / Respondents

APPEAL FROM THE SUPERIOR COURT
OF COWLITZ COUNTY

The Honorable Stephen Warning

BRIEF OF RESPONDENTS
J.G. and JANET JOHNSON

KALIKOW LAW OFFICE
Barnett N. Kalikow, WSBA #16907
1405 Harrison Ave NW, Suite 202
Olympia, WA 98502
360-250-2595
barnett@kalikowlaw.com

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A) STATEMENT OF THE CASE

Introduction:

This was a case about the legal status of a water line built by the Waite predecessor in title across their own land to serve property they had previously sold to Johnson's predecessor in title in order to make it habitable. Waite wants now to develop his land and abate line.

What is truly maddening about this case is that there was no reason for Waite to file it in the first place. The existence and legal status of the water line in question becomes moot once Waite actually develops his property. Before he can do so he will have to provide his lots with water (RCW 19.27.097), and will have to build his own line to do so, to which he can simply hook up the Johnsons at virtually no cost. All of this is made clear by the Declaration of the City's Public Works Director, Mr. Rasmussen, which the Appellant cites and quotes from, accurately, in the first pages of his brief:

I explained at that time [June 12 , 2015] that the private service line serving the Johnson property could not be serviced from the 2" Nectarine City water main due to the lack of capacity and head loss in relation to the Nectarine water main and the Johnsons home. There is no line along Spencer Creek Road that could serve the Johnson property and the City has no plans to install one.

Rasmussen Declaration at ¶ 3, CP 42

In other words, neither the Johnsons *nor the individual lots owned by Waite* can be served by any water line in the public right of way.

Mr. Rasmussen makes that point explicitly when he then explains that, when Waite wants to develop his own lots, he will have to build a new water line capable of serving them all and at that point he only need hook up the Johnsons to that line:

The City is in favor of development inside the City limits. If Mr. Waite develops his property and needs to install a water main dedicated to the City of Kalama, with the capacity to serve all of his lots as well as the Johnson property, I see no issue in the moving of the Johnsons meter to clear the development area of Mr. Waite's property. If this is the case, then a private utility easement should be written on the plat for the Johnsons' service line in the interim during development.

Rasmussen Declaration, ¶ 6, CP 43

B) FACTS - Substantive Facts Relative to the Easement

1. In 2008, Wendi and Morall J Olsen were the principals of the M J Olsen Enterprises Inc., an Oregon company, CP 39, which owned property along Spencer Creek Road in Kalama. CP 36 -38.
2. At the time, the Olsons in their personal capacity owned a

property consisting of raw land at the north east end of and adjacent to the MJ Olson Spencer Creek Road properties referred to above. Although Spencer Creek Road ran along the southern boundary of this adjacent parcel, its only road access was to the northwest from Nectarine Lane with the address of 625 Nectarine Lane. CP 40.

3. The Olsens either in their personal capacity or as principals of the MJ Olsen Enterprises owned and/or controlled all the property along Spencer Creek Road between 625 Nectarine Lane and the nearest usable public water supply which was at the corner of Spencer Creek Road and Holly Road, Rasmussen declaration. CP 42-44.
4. In 2006 the Olsons sold the parcel at 625 Nectarine Lane to Rick Wise, and through M J Olsen Enterprises contracted with him to build a house on the property. Wood declaration CP 45-46.
5. Because there was no usable water supply in any public right of way to which the Wise property had access. Rasmussen, CP 42-43, M J Olsen contracted with Dennis Wood to dig a trench and install a water line from the new Wise house to the

nearest public water line at the corner of Spencer Creek and Holly Roads over the property owned by MJ Olsen Enterprises in order to supply the new Wise house with water rendering it habitable. Wood, CP 46; Rasmussen, CP 44

6. No easement for this line was ever recorded. It is likely that, as Waite surmises, it was intended to be temporary – until Olson developed the intervening (now Waite) property and installed a more permanent line to which he could connect Wise, and relegate the interim line to desuetude. Wood so states CP 46.
7. Subsequent to the events set forth above, both the Olson properties at issue here and the Wise property were lost to foreclosure. After the debt holders succeeded to the properties, they, either directly or through mesne holders sold the properties to the Waite Plaintiffs and the Johnsons respectively. The Johnsons bought and moved into the Wise house with a fully functioning water system and have lived there ever since. Johnson declaration at CP48

C) FACTS - Procedural.

8. Waite purchased the property for development purposes out of foreclosure. At some point thereafter he discovered that there was a water line running through it. In Spring of 2015 Dennis Wood, the excavator of the line, walked the property with Waite to show where the line was and told him the purpose and circumstances of the line installation. CP 63-73.
9. At about the same time Waite began making demands on the Johnsons to move their line, under threat of litigation. CP 73 - 83.
10. Thereafter, the Johnsons discovered that Waite's own predecessor in title, Olsen, had the line installed on his own property in order make their home habitable to their predecessor in title, Wise, on property Olsen had sold to Wise. They refused to move the line and render their home unlivable, but did offer to work with Waite as he developed his property and hook up to any alternative water source that he could provide. CP 41 - 44., and see CP 147-148.
11. On June 12, 2015 the parties met with Kelly Rasmussen, Kalama Public Works director, Dennis Wood, the excavator, and Susan Junnikkala the City's Planning Clerk CP 41-44

12. Mr. Rasmussen confirmed the facts as stated above, of which he had personal knowledge as the City's permitting authority, and even produced the original application for hook up of a water line to the city main at the corner of Spencer Creek and Holly Roads that was filed by "MJ Olsen" in order to serve the property at 625 Nectarine Drive at the far side of *his* holdings on Spencer Creek Road. CP44-45. (Compare this diagram with Mr Waite's exhibit showing the approximate water line at CP 121) Mr. Rasmussen explained that the reason the Olsens had built the line on his own property is that there was no County main line within the county right of way or otherwise that could serve the Wise property and no new ones were planned. CP 42 - 43.
13. Knowing all of these facts, Waite still filed suit, accusing the Johnsons of intentional trespass¹ and demanding relief of

1. Waite has complained that Defendants Johnson misrepresented the complaint and states that he did not accuse them of intentional active trespass. However the complaint accused the Johnsons, the only owners of Parcel No. 411260101, of invading his property and installing water lines:

Defendant owns adjacent parcel of real property identified as Parcel No. 411260101, legally described on Exhibit "2".
Defendant has installed water lines in, on, under and/or through

abatement which, of course the Johnsons could not do without rendering their property uninhabitable.

14. The suit also inferentially accused unnamed Does 1 through 10 of committing trespass in unspecified ways and requested the court to scrub the title of all unknown encumbrances caused thereby. (Cause of action #1, complaint)
15. The Johnsons thereafter appeared through counsel. They refused to engage Waite's frequent – often not through counsel – demands to pay him to move their line in exchange for litigation peace. See CP 147-148
16. The Johnsons also, through counsel repeatedly informed counsel for Waite of the basic law of implied easements and requested dismissal. Waite neither dismissed nor took any steps to litigate the matter. CP 147 - 157

the Waite Property without the consent of plaintiff.

This accusation is reinforced by the wording of the third cause and fourth causes of action for nuisance, and injunction in which Waite asks for relief against defendants as a result of "*Defendants' actions*" and "*Defendants' conduct*" respectively. As they knew when they filed this action, the only action or conduct of Defendant owners of Parcel No. 411260101 was buying a house served by water lines installed by the builder across his own property – a fact of which the Johnsons had no knowledge when they bought.

17. Eventually after Waite demanded discovery which was supplied and all parties were completely, on the record, informed of the all the facts, the Johnsons answered and filed for partial summary judgment. They requested dismissal of causes of action 2, 3, and 4 of the complaint for trespass, nuisance and injunctive relief against them respectively, and an order quieting title in an implied easement of necessity for them. They did not demand dismissal of cause of action 1 which presumably included the 10 "Does" in alleging unspecified further trespasses and encroachments and requested the court to clear title of all unknown encumbrances.
- 18 The court granted summary judgment to the Johnsons based on the facts set forth above. Waite's counsel refused to sign the draft order and Johnson was forced to go to court for entry. Waite's counsel made various representations and arguments in court that are still not clear to us as to why the order should not include dismissing the nuisance and trespass claims even though the court had granted the easement obviating those claims, and the original motion clearly requested dismissal of those causes of action. Motion at CP 23 First order on

summary judgement CP 131-133 The court expressed skepticism at Ms. Crawford's argument that the easement found did not obviate the further claims of trespass and nuisance, but did not sign off on those portions of the order so as to give counsel the opportunity for her to make her case.

- 19 Thereafter neither Waite nor his counsel raised any colorable argument as to why the existence of the implied easement did not protect the Johnsons from a nuisance or trespass claim, and the court entered judgment dismissing those claims on June 7, 2019 CP 269 - 272.
- 20 The Court on Motion by the Johnsons granted sanction under CR 11 and RCW 4.84.185 for Defendant's costs in briefing and preparing the second order for dismissal of the nuisance and trespass claims but limited it to costs and fees incurred after the first order became final 30 days following the entry of the First order.
- 21 Sanction was paid according to both the original and corrected judgment and cost bill provided. No issue of the legitimacy of the cost bill was raised before the trial court.

D WAITE'S ARGUMENTS

Given these uncontested facts, there is not much in Waite's 50 pages of briefing that requires a significant answer. We take the points out of order to start with the few points that require more words of answer.

I **The Court's Written Order Did Not Precisely Mirror Its Oral Ruling**

Waite argues that the Judge at its oral summary judgment ruling stated that he did not find an easement by necessity because there were several roads into the Johnson property, but he did find an easement by implication. Therefore, Waite seems to argue, the court could not thereafter enter an order that included implied easements generally which includes necessity². He then seems to infer that the

2. The language of the Order is that the facts as found created an "implied easement." Both easements by implication and by necessity are implied easements; more particularly, an easement by necessity is more correctly deemed an easement implied by necessity:

"An easement implied from necessity arises where a grantor conveys part of her land and retains part and, after the conveyance, it is necessary to cross the grantor's parcel to reach a street or road from the conveyed parcel." *Visser v. Craig*, 139 Wn.App. 152 158-59, 159 P.3d 453(2007) citing *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 667-68, 404 P.2d 770 (1965); *Granite Beach Holdings, LLC v. Dep't of Natural Res.*, 103 Wn. App. 186, 196, 11 P.3d 847

And an easement by implication is, similarly, shorthand for an easement implied by prior use, i.e. the access way was used as "quasi-

Johnsons and this court are bound by the judge's initial passing statement from the bench. The law in this instance is well established:

Response:

1. If an oral decision conflicts with a written decision, the written decision controls. *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963). An oral decision "is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." *Ferree*, at 567. Thus, even if the judge meant for his oral ruling to apply exactly the way he stated it, he may reconsider his oral ruling and even decide to abandon it in light of further consideration of the record or the proposed order.

2. Even if the court had not corrected the misstatement under the terms of the order, the Court of Appeals can affirm judgment of the trial court on any theory established by the pleadings and supported by the proof even if different from the trial court. *LaMon v.*

easement prior to the conveyance. *Visser*, id at 161-163.

Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

The Rasmussen Declaration at CP 42 was unequivocal that there *were no* usable public water supplies in the roads abutting the 625 Nectarine property – and moreover all parties were aware of that as early as June of 2015, the necessity for the line where built was in fact established. The fact that the Olsons themselves built it over their own land explicitly to serve a vendee's property and render it habitable, renders this lawsuit mildly farcical, especially when worded as an intentional trespass against parties who did not succeed to the vendee property until three years after the line was built.

II MJ Olson Title to Property

Waite argues that the Olsons sold the Wise parcel in their personal capacity but held title to the Waite property at the time in their corporate capacity as a closely held development company. They argue that for an implied easement by prior use (implication - which case is not about), former unity of title is strictly construed.

Response:

a) This title technicality was not raised in the trial court in any argument or brief. (See Plaintiff's response brief on summary judgment at CP 100-101.) In fact quite the opposite - the brief

assumes that the ownership was in common but argues that a quasi easement by the common owner was not established). Issues not raised below are not properly before the appellate courts *Duckworth v. City of Bonney Lake*, 91 Wash. 2d 19, 586 P.2d 860 (1978).

b) The fact that Morral and Wendi Olsen had owned the Waite property as a closely held development company (MJ Olson Enterprises, inc.) and that they had owned the Johnson property as a joint tenancy at the time of conveyance makes no difference to any principle underlying implied easements, and would be an absurd interpretation of unity of title requirement of any implied easement.

The whole point of the unity of title requirement is to ensure that the party who sold that land *intended to create the easement* when they rendered the parcel usable by making it accessible over their own property by means of the easement of necessity.

Implied easements arise *by intent of the parties* and are established by the facts and circumstances surrounding the conveyance. *Roberts v. Smith*, 41 Wn. App. 861, 864, 707 P.2d 143 (1985); *Evich v. Kovacevich*, 33 Wash. 2d 151, 204 P.2d 839 (1949) *Hellberg v. Coffin Sheep Co.*, 66 Wash. 2d 664, 404 P.2d 770 (1965).

The elements required for an easement implied from necessity [easement by necessity] are: (1) a landowner conveys part of his land and (2) retains part, usually an adjoining parcel, and (3) after the severance of the parcels, it is necessary to pass over one of them to reach a public street or road [or in this case public water source] from the other. *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 666-67 404 P.2d 770 (1965); Necessity must exist at the date the property is severed. *Visser v. Craig*, 139 Wn.App. 152, 159, 159 P.3d 453(2007) (2007). An easement by necessity is an expression of a public policy that will not permit property to be landlocked and rendered useless. *Hellberg*, 66 Wn.2d at 666.

The purposes of the doctrines of implied easement are first, to determine the intention of the parties to create it in absence of a recorded easement; but the overarching goal is to ensure that property is not rendered useless by being inaccessible, in this case, to water.

Under the facts of this case we absolutely know the intention was for the grantors to render the grantee's property habitable by building the waterline across the land that they owned to serve the house they were building for grantee.

Put another way, the public policy imperative that land not be rendered useless for lack of utilities is so overarching that in Washington an easement of necessity can be condemned where it does not already exist – as it does here. Washington Constitution, at Article I §16, RCW 8.24.010. “Blind adherence to technical language” must give way if it would serve to defeat this superceding principle. *Sorenson v. Czinger* 70 Wn. App. 270, 278, 852 P.2d 1124 (1993), quoting *State ex rel. Henry v. Superior Court*, 155 Wn. 370, 379, 284 P. 788 (1930) (holding that access to water is as important to the “necessity” of an easement as road access to the highway.)

Short shrift:

III. Findings of Fact

Appellant argues that this court should not consider the trial court's findings and conclusions because findings of fact are generally superfluous in a summary judgment, where the point is, by definition, that no competing issues of fact need be resolved. They cite *Duckworth v. City of Bonney Lake*, 91 Wash. 2d 19, 20-22, 586 P.2d 860 (1978), for this proposition.

Response:

The trial court below did not make findings of fact, it found that

certain facts *were uncontested* – which is a very different thing. The facts so found were based on cited sworn testimony in the record which Waite did not deny or contest by any of his sworn testimony CP 132. Indeed, Waite does not challenge any of those facts before **this** court based on any of his own sworn record. The court then proceeded to enter its decision based on the law and these unopposed or undenied facts.

Duckworth was a case where there were no sworn facts on the record as generally necessary to establish any fact. CR 56e.

This is simply a bad faith argument based on a misrepresentation.

IV The Deed Did Not Contain the Easement

Waite argues the deed from Olsen to Wise for raw land should have contained a surveyed easement for water pipes to hook up an unbuilt house and since it did not, an easement now can not be implied.

We believe this is does not need a response and is not a serious, but a make-work argument.

V No Easement from Prior Use

Waite argues there is no easement implied from prior use.

Response: We agree and never argued that there was. Because all parties know and have acknowledged there was no prior water line in use at the time of the conveyance to Wise there is no easement on that theory.

There also was no use during unity of title. Fully half of the argument section in this brief is based on these straw men popping up in multiple contexts..

VI Someone Should Have Drilled a Well?

Waite argues that the Johnsons did not explore the possibility of drilling a well before they moved for summary judgment and therefore they have not established necessity, arguing *Berlin v. Robbins*, 180 Wash. 176, 38 P.2d 1047 (1934).

Response: This argument was not raised below. As well, *Berlin v. Robbins* stands for the exact opposite principle to what it is cited for. It is a case where the common predecessor built a water pipe to his spring serving a series of grantees. The *Berlin* court assumed for the purposes of determining necessity for summary judgment, that, given

the expense to the servient estate of a long pipeline, its builder would have explored the feasibility of a well before deciding build it 20 years earlier, but one did not need to speculate on that now.

Whether the water he could secure from a well dug on his property would be of sufficient quantity to supply the ranch for dairy purposes, is doubtful. It is fair to assume that, if satisfactory water could have been obtained in any other way, Mr. Neely would not, in 1914, have installed a pipe line nearly one mile in length and continuously used same since that time.

Berlin at 187-88

Similarly, if the Olsons could have reasonably avoided building a 1200 foot pipeline across their property to serve Wise by drilling a well next to the new house, we can assume they would have. And speculating on it now serves no legal purpose. The *Berlin* court continues on to explain that courts in equity do not destroy the longstanding use of someone's property lightly on speculation that it might be salvageable in another way (such as drilling a well) .

VII We Know the Motivation of the Parties

Waite argues that we don't know motive of the Olson and Wise in creating the pipeline easement.

Response: Yes. We do know. We have the declaration of Wood CP 46 who built it, and Rasmussen CP 42- 43 who permitted it, and the

permit application that states what it was for. CP44

There is very little else in the remainder of the appellants' brief that is not either redundant, and/or was not raised below, and/or is simply not relevant to any alleged error appealed. Some, like the argument that the judge should have ordered the Johnsons to perform a survey (by way of unbidden injunctive relief?) are frankly bizarre.

E Attorney Fees on Appeal:

There are few arguments here that have even a patina of merit and many seem never to have been raised below. The appeal appears to have only been filed for its harassment value. This is the epitome of a frivolous appeal for which RAP 18.9 was designed.

CONCLUSION

Plaintiffs have not made a serious case for reversal of Judge Warning. The court's judgments and orders below must be affirmed and fees and costs on appeal should be awarded.

November 19, 2019

KALIKOW LAW OFFICE



Barnett N. Kalikow, WSBA #16907
For Respondents Johnson

CERTIFICATION OF MAILED AND EMAILED SERVICE

Barnett Kalikow hereby CERTIFIES as an officer of this court that I am counsel for Respondents in the above-entitled case and that on November 20, 2019, I deposited in the US mail, postage prepaid, the memorandum to which this CERTIFICATION is subjoined addressed as follows

By electronic mail to

cassie@vancouverlandlaw.com

and by post to
Cassie Crawford
Vancouver Land Law
P.O. Box 61488
Vancouver, WA 98666

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