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NO. 53757-5-II

IN 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, DOES 1 through 10
inclusive

Defendants/Respondents

APPEAL FROM THE SUPERIOR COURT

THE HONORABLE STEPHEN WARNING

REPLY BRIEF

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INTRODUCTION

In the Brief of Respondents, J.G. and Janet Johnson claim that this suit is not necessary because Mr. Waite must build a water line to the lots he develops and can easily hook the Johnsons up to that water line. There are two practical problems with that position. First, the current location of the water line creates significant problems for the development of Mr. Waite's property as pointed out at page 5 of the Brief of Appellant. Second, even though the City Engineer of the City of Kalama, Kelly Rasmussen, has stated that Kalama encourages development and that the City sees no impediment to moving the water line, the Johnsons sought and the trial court granted "an implied easement to the current water line as and where it traverses" Mr. Waite's property which presumably would be permanent. (CP 43: CP 133) And the Johnsons have presented nothing to justify the need to have a permanent right to the location of the current water line when, as will be discussed below, they concede that the line was not meant to be permanent. Mr. Waite is therefore required to soldier on to remove any implied or unrecorded easement over his property.

STRUCTURE OF THIS BRIEF

This brief will respond to the arguments made by the Johnsons in the Brief of Respondents. Every attempt will be made to avoid reiteration

of arguments made in the Brief of Appellant. When necessary, references will be made to pages in that brief.

REPLY ON ASSIGNMENT OF ERROR NO. 1:

I. Issues on Standard of Review.

a. The Trial Court's Oral Ruling May Be Considered.

The Johnsons claim an easement implied by necessity. When the trial court was entering the Order Granting Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply on December 19, 2018, the trial judge stated that his decision was not based on an easement implied by necessity but that he also did not conversely conclude that an easement implied by necessity did not exist. (CP 131-33; RP-I 6)[1]

The Johnsons argue that the trial court's statement should be ignored because an oral decision is not final and may later be modified. Brief of Respondents, p. 11. This rule is not applicable here. The trial court did not make an oral decision that it later modified. The statement was made at the hearing on December 17, 2018, at the very moment that

[1] RP-1 refers to the first volume of the Report of Proceedings covering all trial court hearings from and after December 19, 2018. RP-2 refers to the second volume of the Report of proceedings containing a transcript of the hearing on the Johnsons' summary motion which was heard on November 14, 2018.

the trial court entered the order that allowed the Johnsons an implied easement.

Consideration of the trial court's statement is warranted by the rule that the appellate court may use the trial court's oral ruling to interpret consistent written findings and conclusions of an ambiguous written order. *Brin v. Stutzman,* 89 Wn.App. 809, 826, 951 P.2d 291 (1998); *State v. Ward,* 125 Wn.App. 138, 145-46, 104 P.3d 261 (2005) The Johnsons acknowledge that there are two types of implied easements. These are easements implied by prior use and easements implied by necessity. As will be discussed below, the trial court may have been thinking about a different type of easement. At any rate, the Order Granting Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply states that the Johnsons "have acquired an implied easement to the current water line as and where it traverses" Mr. Waite's property. (CP 133) The order does not specify what type of easement is being granted. Its terms are therefore ambiguous. The trial judge's oral statements resolve that ambiguity to the extent that it shows that the ruling was not based on an easement implied by necessity.

b. <u>The Findings of Fact in the Order Granting Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply Are Superfluous and Must Be Ignored.</u>

The Order Granting Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply contains certain factual findings at CP 132. In the Brief of Appellant, Mr. Waite pointed out that these are superfluous in a summary judgment motion and are therefore ignored by the appellate court. Brief of Appellant, p. 9. In response, the Johnsons have argued that the facts stated are "uncontested" and can therefore be considered. This argument is at odds with the authority set out at page 9 of the Brief of Appellant. Furthermore, the disputed or undisputed nature of a fact makes no difference in whether it must be found. Where findings of fact are required, they are required on all material issues regardless of whether the evidence is undisputed. *Daughtry v. Jet Aeration Co.,* 91 Wn.2d 704, 707, 592 P.2d 631 (1979)

The only time that facts can be established in a summary judgment proceeding is when there has not been a decision on all issues. As *CR 56(d)* states:

> If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further

> proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

CR 56(d) does not apply here because the trial court decided all issues raised in the Johnsons' partial summary judgment motion.

Based upon the foregoing, the Johnsons' argument must be rejected.

II. There Is No Easement Implied Through Necessity.

a. Affirmance under RAP 2.5(a) Is Not Warranted.

The Johnsons have asked the Court to find what the trial court did not find—an easement implied by necessity. Such a request would be based on RAP 2.5(a) which says in pertinent part that "a party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." This rule has alternatively been stated to allow affirmance of a summary judgment grant on any ground the record supports. *Olson Engineering, Inc. v. Key Bank National Association,* 171 Wn.App. 57, 74, 286 P.3d 290 (2012) However, affirmance on another ground is not required. *Synovy v. Alpine Resources, Inc.,* 80 Wn.App. 50, 54-55, 906 P.2d 377 (1995) And consideration of another ground is not appropriate when the record is not sufficiently developed. *Belleau Woods II, LLC v. City of Bellingham,* 150 Wn.App. 228, 239-40, 208 P.3d 5

(2005) As discussed below, the facts show that the Johnsons are not entitled to an easement implied through necessity. At very least, the record is not sufficiently developed to grant them the relief they seek on summary judgment.

Furthermore, the rule allowing affirmance on another ground does not apply under the circumstances of this case because the Johnsons did not cross appeal. The Johnsons are not merely seeking affirmance on another ground. They are asking the court to grant them affirmative relief—a finding that an easement by necessity exists when the trial court refused to do so on the record before it. A respondent who has not cross appealed is not entitled to affirmative relief. RAP 2.4(a)(1); *State v. Sims,* 171 Wn.2d 436, 442, 256 P.3d 285 (2011); *Robinson v. Khan*, 89 Wn.App. 418, 420, 948 P.2d 1347 (1998)—defendant not allowed to seek affirmance on appeal based on the statute of limitations when they did not cross appeal.

b. <u>The Record Does Not Support the Existence of Any Easement Implied through Necessity.</u>

Judging from its oral statements on December 19, 2018, the trial court believed that the record did not support either the grant or denial of an easement implied through necessity. Its failure to allow such an

easement was correct as discussed on pages 18-20 of the Brief of Appellant.

First, there is no unity of title and subsequent severance as set out on pages 11-13 of the Brief of Appellant. The Johnsons have not responded to the merits of this argument. They only claim that this issue should not be considered because it was not raised in the trial court. This assertion ignores the fact that the lack of unity of title was briefly alluded to at CP 100. In any event, the Johnsons seek affirmance on other grounds. As noted above, this is appropriate only when the record is sufficiently developed. If it is, the Court may consider the entire record because summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *CR 56(c)*

Second, there has been no showing that the parcels in question were once part of a larger parcel and then severed. Along these same lines, the Johnsons contend that their property "is adjacent" to Mr. Waite's property. Brief of Respondents, p.3 There is nothing in the record showing that the two properties about each other. The record reference the Johnsons give, CP 40, is the first page of the re-recorded deed from the

Olsons to the Wises. There is nothing in this document that shows the relative locations of the two properties.

The Johnsons then contend that necessity is demonstrated because the parties installed the water line at issue instead of digging a well. Brief of Respondents, p. 17-18. This might create an issue of fact that would preclude summary judgment against the Johnsons on the requirement of necessity. It must be remembered, however, that strict necessity, rather than reasonable necessity, is necessary to create an easement implied through necessity. *Boyd v. Sunflower Properties, LLC,* 197 Wn.App. 137, 144, 389 P.3d 626 (2016) In other words, the Johnsons must show that they cannot access any source of water including a well on their own property. Finally, the existence or non-existence of well water is a factor to be taken into account in determining whether reasonable necessity exists to find an easement implied through prior use. *Berlin v. Robbins,* 180 Wash. 176, 38 P.2d 1047 (1934), discussed at Brief of Appellant, pps. 16-17[2] If the existence of well water is a factor under the more relaxed standard of reasonable necessity, then it must also be a factor to be

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[2] In *Berlin v. Robbins, supra,* the Court determined that the evidence was sufficient to show reasonable necessity for an easement to a piping system implied by prior use when, among other things, there were no wells in the area and evidence was doubtful that sufficient water could be obtained from a well on the property of the party seeking the easement. There is a regrettable error on page 16 of the Brief of Appellant suggesting that the Court determined that the evidence was not sufficient to show necessity.

considered for strict necessity required to show an easement implied by necessity.

c. The Intentions of the Parties Militate Against the Easement That the Trial Court Granted.

The Johnsons' claim they are entitled to an easement implied by necessity based on the intentions of the parties—specifically, building the existing waterline to bring water to 625 Nectarine Drive. Brief of Respondents, pps. 14-15. In making this argument, the Johnsons are ignoring the parties' other intentions which they have conceded. Specifically, and at page 4 of the Brief of Respondents, the Johnsons have made the following important concession:

> No easement for the (existing 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.

In other words, the Johnsons concede that it is likely that at least one of the parties envisioned that the temporary water line would be moved at some point in the future. The temporary nature of the existing waterline is therefore inconsistent with the permanent easement that the trial court granted—"an implied easement to the current water line as and where it traverses" Mr. Waite's property. (CP 133) Furthermore, the Olsons and the

Wises did not enter into an easement for the water line "as and where it traverses" Mr. Waite's property.

No easement can be implied contrary to the parties' intentions. Brief of Appellant, p. 18. At very least, there is an issue of fact concerning the parties' intentions as to the continuing location of any water line and the Olsons' right to move it as needed for development.

d. There Is No Showing of Necessity for an Easement "to the Current Water Line As and Where It Traverses" Mr. Waite's Property."

The trial court granted the Johnsons an implied easement "to the current water line as and where it traverses" Mr. Waite's property. The Johnsons have not shown any necessity for an easement over the precise area where the temporary and impermanent water line currently is. If they are able to show entitlement to any easement by necessity—which they have yet to do—it would be an easement to reach the water source at the south end of Mr. Waite's property. The precise route of any water line from their residence to that water source would be of no consequence.

In fact, Mr. Waite as the owner of the servient tenement is allowed first choice as to the route. And if there is an issue about the propriety of the route, the court can resolve the issue. Stoebuck and Weaver, *Real Estate: Property Law,* 17 Wash.Prac. 95 § 2.5 (2004)

This one issue requires reversal of the Order Granting Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply.

e. Issues That the Johnsons Have Not Addressed.

The Johnsons have chosen not to respond to three of Mr. Waite's arguments on this assignment of error—that his interest is senior to that of the Johnsons under RCW 65.08.070; that any interest that the Johnsons may have had in his property has been foreclosed; and that the order should have contained a legal description of the easement. Brief of Appellant, pps. 21-26. They also do not dispute that unity of title may be absent and that there is no showing that the two parcels at issue in this case were once one parcel that was severed. By failing to address these issues, the Johnsons run a great risk. When a respondent elects not to address an issue the appellant raises, the Court can make its decision based on the argument and record before it. *Adams v. Department of Labor and Industries,* 128 Wn.2d 224, 229, 905 P.2d 1220 (1995); *Guillen v. Pierson,* 195 Wn.App. 464, 480, 381 P.3d 149 (2016)

The soundness of the arguments that Mr. Waite made on these points is well demonstrated by the lack of a response from the Johnsons. Each of them is sufficient to require reversal of the Order Granting Partial

Summary Judgment and Quieting Title to an Implied Easement for Water Supply.

III. There Can Be No Summary Judgment on Any Other Theory.

In its oral ruling on the Johnsons' motion for summary judgment, the trial court stated that an easement existed because the 625 Nectarine Drive. was sold to the Wises with an obligation to build a house. (RP-2 17-18) Summary judgment was not appropriate on that theory either.

Neither side argued this theory to the trial court. In fact, after the trial judge made his oral ruling, counsel for the Johnsons stated:

> And, your Honor—well I think there is perhaps a misunderstanding. I would ask the Court to review the Halour case considering easements by necessity.[3]

(RP-2 19) And the Johnsons do not appear to have raised this issue as a grounds for affirmance.

The trial court's statement suggests the existence of an easement by part performance as discussed in *Berg v. Ting,* 125 Wn.2d 544, 886 P.2d 564 (1995) The requirements for such an easement are (1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and

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[3] Counsel was likely referring to *Hallauer v. Spectrum Properties,,Inc.,* 143 Wn.2d 126, 18 P.3d 540 (2001), a decision the Johnsons cited in their briefing to the trial court. (CP 30, 126) The decision deals with condemning a way of necessity for a water line when there is no other right to use property for that purpose.

valuable improvements, referable to the contract. In addition, where—as here—specific performance of the agreement is sought as opposed to damages, the contract must "be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract." *Berg v. Ting, supra,* 125 Wn.2d at 556-57

There is no evidence in the record as to the terms of any contract between the Wises and the Olsons. There is no declaration from any of them, and no documents between them were submitted. Contrary to the trial court's assertion, there is no evidence that they entered into a contract to construct a residence at the same time that 625 Nectarine Drive was conveyed.

There is also no evidence—much less clear and unequivocal evidence—that the Wises and the Olsons agreed that the Wises would have an easement for the water line "as and where it traverses" Mr. Waite's property. To the contrary, the Johnsons concede that location of the water line was not permanent and was likely to be moved when Mr. Waite's property was developed. Furthermore, there is no evidence that the Wises even knew that a temporary water line was going over Mr. Waite's property. They did not sign the Water Order attached to Mr.

Rasmussen's declaration. (CP 44) At very least, an issue of fact exists on this requirement.

If an easement by part performance existed—which it does not—an issue of fact remains as to whether Mr. Waite's interest in his property is superior to the interest of the Johnsons because he is a bona fide purchaser without notice. This stems from the fact that the water line was underground and the connection to the City of Kalama source was not visible. Brief of Appellant, pps. 21-24. An issue of fact also exists as to whether such an easement—if it in fact existed—was foreclosed. Brief of Appellant, pps. 24-25.

In short, the record does not support a grant of summary judgment on the theory discussed by the trial court on November 14, 2019.

IV. Relief under RCW 8.24

The Johnsons refer to the public policy underlying Article 1, Section 16 of the Washington State Constitution and RCW 8.24 to suggest that land cannot be rendered useless by inability to obtain utilities. Brief of Respondent, p. 15 Since the Johnsons are not entitled to any easement, they can seek to condemn an easement on remand. They will have to prove necessity to obtain relief under that statute or any other similar statute, however—something that they have yet to do.

REPLY ON ASSIGNMENTS OF ERROR NOS. 2 AND 3

Mr. Waite made several arguments in connection with these two related assignments of error. These are (1) that the Order Granting Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply was not a final order; (2) that Mr. Waite's claims for nuisance and trespass should not have been dismissed because no easement exists; (3) that the Johnsons should have been required to submit a legal description for the easement and by stating that any easement would be perfected only when an legal description was provided; (4) that the trial court should have allowed for relocation of the water line.

As near as can be determined, the Johnsons sole response to these arguments is that they are redundant, not raised below, are not relevant, or are bizarre. Brief of Respondents, p. 19. The Johnsons have provided no reasoned argument, citation to authority, or reference to the record to support these statements. Mr. Waite has nothing to respond to on these matters except to refer the Court to the Brief of Appellant. Once again, the Court is entitled to consider what has been presented and should view the Johnsons' failure to address these issues as an indication of the soundness of Mr. Waite's arguments.

Mr. Waite argued in the Brief of Appellant that the Johnsons should provide a legal description for the easement because the Johnsons bear the burden of proving the existence of the easement they seek. Brief of Appellant, p. 34. The Johnsons claim that this argument is bizarre. Brief of Respondent, p. 19. The argument is not bizarre. It follows from the rule that the Johnsons bear the burden of proof on the existence of the easement they claim.

As pointed out on page 11 above, the Court can resolve any issues about the location of an easement implied by necessity. This notion further supports Mr. Waite's argument that the trial court should have allowed the easement to be relocated.

The Johnsons have based their argument on their view of the parties' intentions. They have conceded that that the existing water line was intended to be temporary. They have never objected to moving the water line either at the trial court or in their briefing to this Court. It is submitted that their failure to object should be seen as a concession that the water line can be and should be moved.

The Johnsons have also not responded to the substance of Mr. Waite's arguments concerning sanctions. Specifically, they have not addressed (1) the fact that RCW 4.84.185 cannot support the award of

sanctions; (2) that there was no violation of CR 11; and (3) the amount of fees that were awarded was not justified.

The Johnsons did state that "(n)o issue of the legitimacy of the cost bill was raised before the trial court." Brief of Respondents, p. 19. They may be seeking to limit the Court's consideration of the amount of sanctions based on this blanket statement. Their argument has no merit. As with any award of attorney's fees, a grant of attorney's fees under CR 11 must be supported by findings of fact. *Just Dirt, Inc., v. Knight Excavating, Inc.,* 138 Wn.App. 409, 416, 157 P.3d 431 (2007), *citing Mahler v. Szucs,* 135 Wn.2d 398, 435, 957 P.2d 632 (1998) If we assume that findings of fact are contained within the Judgment & Order Dismissing Nuisance and Trespass claims and for Sanction, no objection to a finding of fact or a conclusion of law was necessary. As CR 52(b) states in pertinent part:

> When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the court an objection to such findings or has made a motion to amend them or a motion for judgment.

In conclusion, the Johnsons have given no reasoned response to the issues and arguments Mr. Waite presented on these two related

assignments of error. The Court should view this lack of a response as a recognition by the Johnsons that they have nothing constructive to say.

RESPONSE ON ISSUE COMMON TO ALL ASSIGNMENTS OF ERROR

The Johnsons state that Mr. Waite has made arguments here that were not presented to the trial court while giving no specificity. Brief of Respondent, p. 19. Mr. Waite raised the following issues at the following places:

1. Mr. Waite's status as a bona fide purchaser without notice was discussed at CP 106-107;

2. Foreclosure of any easement was brought up at oral argument of the Johnson's summary judgment motion at RP-2 11-12;

3. Mr. Waite argued that at least an issue of fact existed concerning the intentions of the Olsons and the Wises at CP 100, CP 108, CP 112, CP 123, CP 175, RP-2 8, and RP-2 14-17;

4. The existence of at least an issue of fact on necessity was brought up at CP 104-106.

5. Moving of any easement was discussed at CP 172-73 and at RP-1 17. Mr. Waite's proposed order addressed the issue. (CP 252-53);

6. Mr. Waite argued that the Johnsons were trespassing because there was no easement at CP 111.

7. Mr. Waite raised the need for a legal description at RP-1 16. His proposed order addressed that issue. (CP 252) The trial court agreed that a legal description was necessary. (RP-1 20);

8. Mr. Waite stated that CR 11 sanctions were not warranted at CP 181-83.

REPLY TO THE JOHNSONS'CLAIM FOR ATTORNEY'S FEES

The Johnsons seek an award of attorney's fees on appeal based on RAP 18.9. Brief of Respondents, p 19. Presumably, the Johnsons are referring to RAP 18.9(1) which reads as follows:

> The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or authorized transcriptionist preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. . .

The Johnsons appear to be claiming that Mr. Waite's appeal is frivolous. This claim should be denied.

A party who seeks attorney's fees under RAP 18.9(1) bears a heavy burden as the following discussion in *Streater v. White,* 26 Wn.App. 430, 434-35, 613 P.2d 187 (1980) makes clear:

> In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

See also, *Skinner v. Holgate,* 141 Wn.App. 840, 858, 173 P.3d 300 (2007) An appeal is not frivolous if it raises even one debatable issue upon which reasonable minds might differ. *Advocates for Responsible Development v. Western Washington Growth Management Hearings Board,* 170 Wn.2d 577, 580, 245 P.3d 764 (2010); *Committed Relationship of Muridan,* 3 Wn.App.2d 44, 65, 413 P.3d 1072 (2018)

First, the Johnsons are not entitled to this relief because they have not cited any legal authority to support their claim other than citing RAP 18.9. This by itself is fatal to their claim. *Schorno v. Kannada,* 167 Wn.App. 895, 904, 276 P.3d 219 (2012)

More importantly, the arguments made in the Brief of Appellant are meritorious and require reversal. Even if the Court decides to affirm—which it should not, Mr. Waite has made arguments that are well reasoned and at least debatable. This is well demonstrated by the Johnsons' lack of a response to many of them.

In short, the Johnsons claim for attorney's fees under RAP 18.9(1) has no merit and should be denied.

CONCLUSION

The Johnsons arguments must be rejected. The Order Grating Partial Summary Judgment and Quieting Title to an Implied Easement for Water Supply, the Judgment & Order Dismissing Nuisance and Trespass Claims and for Sanction, and the Judgment on Sanction must be reversed, and the matter must be remanded to the Superior Court for further proceedings.

DATED this 31 day of January, 2020.

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CERTIFICATE OF SERVICE

On January 31, 2020, I caused to be served a true and correct copy of Reply Brief of Appellant via email and U.S. Mail to:

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