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Court of Appeals No. 54038-0-II

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II
MICHAEL TEFFT and ANGELA TEFFT, Husband and Wife, and
Washington Residents, and DAWN ALLEN and JASON HAENKE,
Washington residents;
Plaintiffs/Respondents,

vs.

RICHARD C. BARBER, and DEBRA L. CURTIS, Washington
Residents,
Defendants/Appellants.

APPELLANTS' REPLY BRIEF

By:

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III. RESPONSE TO STATEMENT OF THE CASE

Respondents complain of misuse of the easements by Appellants and their tenants. Respondents' Brief, p. 5. Respondents fail to address their own misconduct. The declaration of Appellants' tenant Bradley Stutland, chronicles some of Michael Tefft's misconduct, including repeated trespasses on the Second Cottage Easement, closing off access from the Second Cottage Easement to the Tacoma Public Utilities power line easement, which made recreation more difficult, and unlawfully shutting off the water supply to the cabin. CP 401-02.

Respondents complain they had to mow the lawn and rake the leaves in the easement area. Respondents' Brief, p. 11. Respondents fail to mention they blocked the cabin easement which blocked Appellants access to the utility easement, depriving Appellants of the use of their riding mower. CP 372.

Respondents argue Appellants did not maintain the easement areas. Respondents' Brief, p. 11. Respondents fail to mention Appellants maintained the flower beds. CP 372.

Respondents claim Appellants did not carry adequate property insurance. Respondents' Brief p. 11-12. Richard Barber carried adequate renters' insurance on the cabin. CP 459.

Debra Curtis is a licensed realtor and carefully selected tenants for the cabin. CP 371-72. The perpetual harassment from Teffts forced Ricard Barber to rent the cabin for less than market value. CP 375. The loss of rental income from the cabin has placed an extreme financial burden on Richard Barber. CP 375.

IV ARGUMENT

A. Teffts lack standing to challenge the Second Cottage Easement's presence on a portion of Parcel E.

Respondents argue they have standing under RCW 7.24.020 to assert the invalidity of the Second Cottage Easement's presence on a portion of Parcel E now owned by Allen/Haenke. Respondents' Brief p. 23-27. That statute provides as follows:

A person *interested under a deed*, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. (Emphasis added)

To have standing to litigate issues concerning the Second Cottage Easement on Parcel E, Teffts must show "*a present, substantial interest*" in the Easement. *Timberlane Homeowners Association, Inc., v. Brame*, 79 Wn. App. 303, 309, 901 P. 2d 1074 (1995) (*Quoting Primark, Inc. v.*

Burien Gardens Associates, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992)). In *Timberlane*, a homeowners association's ownership of the fee in the common areas did not amount to such an interest in its members' easement rights in the common area. The Court of Appeals therefore reversed summary judgment for the homeowners association.

Here, Teffts make no attempt to establish such a substantial interest in the Second Cottage Easement on Parcel E. Instead, Teffts complain about certain alleged activities by Appellants and the cabin tenants. Such activities, even if true, do not provide Teffts with a present substantial interest in that part of the Second Cottage Easement on Parcel E. Teffts, like the homeowners association in *Trame*, therefore lack standing to litigate issues concerning the Second Cottage Easement on Parcel E.

B. Appellants challenge the trial court's conclusion the easements are invalid.

Respondents boldly pronounce Appellants did not address the overarching issue in the case, the invalidity of the easements. Respondents' Brief, p. 1, 16. To the contrary, Appellants have argued both in the trial court and in this Court, the Second Cottage Easement over Parcel B is not invalid, the Second Cottage Easement on Parcel E did not merge, the Second Cottage Easement is an easement in gross, the Second Cottage Easement was revived by the November 16, 2017 deed of Parcel E to

Allen/Haenke, and Tefft and Allen/Haenke are estopped to deny the presence of the Second Cottage Easement on Parcels B and E. CP 448-54. See also Appellants' Brief, p. 22-36.

Respondents argue one cannot grant an easement to use property one does not own. Respondents' Brief p. 17. But Debra Curtis owned parcel B at the time she conveyed the Second Cottage Easement to Richard Barber. CP 58. The cabin is located on Parcel B. CP 66. Therefore, Debra Curtis had the authority to convey the Second Cottage Easement on Parcel B to her then neighbor, Richard Barber.

Respondents misplace reliance upon *Coast Storage v. Schwarz*, 55 Wn 2d 848, 351 P. 2d 520 (1960). Respondents' Brief, p. 17. In *Coast Storage*, a road easement was extinguished when all property of the plaintiffs' common grantor passed to plaintiffs. Here, in contrast, not all property passed to common ownership of one party. Debra Curtis remained in title to Parcel B on July 10, 2010 when she executed the Second Cottage Easement to Richard Barber. CP 58.

In addition, the road easement in *Coast Storage* was a dead-end roadway that lead nowhere. 55 Wn. 2d 847. Here, in contrast, the Second Cottage Easement provides the only available access from the cabin to State Route 302. CP 60.

Also misplaced in Respondents' reliance upon *Perrin v. Derbyshire Scenic Acres Water Corp.*, 63 Wn. 2d 716, 388 P. 2d 949 (1964). Respondent's Brief, p. 17. The issue in *Perrin* was whether an oral promise to supply water made by a developer to a builder was binding upon a nonprofit corporation subsequently created to administer water distribution in a housing development. The facts in *Perrin* do not remotely resemble the facts of this case. *Perrin* is therefore not controlling here.

Respondents argue that without the portions of the Second Cottage Easement on Parcel E, the portion of the Second Cottage Easement on Parcel B is not viable. Respondents' Brief, pp. 19-21. Respondents fail to support their argument with any citation to authority. Therefore, Respondents' argument should not be considered. RAP 10.3 (a) (6); *DeHeer v. Seattle Post Intelligencer*, 60 Wn. 2d 122, 126, 372 P. 2d 193 (1962).

Respondents argue the cabin is partially located on Parcel E. Respondents' Brief p. 20. Just the eave on the southeast corner of the cabin extends over the property line between Parcels B and E. CP 66.

Numerous authorities cited by Appellants at page 33 of Appellants' Brief support the viability of the Second Cottage Easement on Parcel B. Those authorities recognize the fact the Second Cottage Easement extends

on to a portion of Parcel E, which was then owned by Richard Barber, does not invalidate the entire easement. Respondents provide no contrary authority.

Respondents also fail to recognize the First Cottage Easement, the Access Easement and the Second Cottage Easement provide access to the Tefft property. By invalidating the three easements, the trial court also removed lawful access to the Tefft property.

C. The Second Cottage Easement is an easement in gross given to Richard Barber.

In paragraph VI D of their opening brief, Appellants argued the trial court erred in concluding the Easements were appurtenant. Specifically, Appellants challenged that conclusion with regard to the Second Cottage Easement. Appellants' Brief, p. 22-29. Respondents fail to provide any contrary argument.

D. The Second Cottage Easement may not be terminated.

Respondents fail to support their argument that the easements may be invalidated with a single citation to authority. Respondents' Brief p. 21. Respondents' argument should therefore not be considered. RAP 10.3 (a) (6); *DeHeer v. Seattle Post Intelligencer*, 60 Wn. 2d 126.

Respondents offer no argument why the Court should not follow the rule that the law disfavors termination of easements. *Johnson v. Lake*

Cushman Maintenance Co., 5 Wn. App. 2d 765, 779, 425 P. 3d 560

(2018). That rule applies here.

E. Teffts took title to their property subject to the Second Cottage Easement.

Respondents argue, without citation to authority, the notations on their deed only identify the existence of the Second Cottage Easement, but they bestow no legality on the existence of the Second Cottage Easement.

Respondent's Brief p. 29. Respondents' argument should not be considered. RAP 10.3 (a) (6); *Billings v. Town of Steilacoom*, 2 Wn. App. 1, 21, 408 P. 3d 1123, *review denied*, 190 Wash.2d 1014, 415 P.3d 1199 (2018).

Nor do Respondents address the Washington cases cited by Appellants which hold a successor in interest to the servient estate takes the estate subject to the easements if the successor had actual, constructive, or implied notice of the easement. *Johnson v. Lake Cushman Maintenance, Inc.*, 5 Wash.App.2d 778; *Hanna v. Margitan*, 193 Wash. App. 596, 605, 373 P.3d 300 (2016); *810 Props. v. Jump*, 141 Wash. App. 688, 699, 170 P.3d 1209 (2007).

An exception in a deed is a clause that withdraws from its operation some part of the thing granted and which otherwise has passed to the grantee under the general description. *Harris v. Ski Park Farms, Inc.*, 62

Wn. App. 371, 376, 814 P. 2d 684 (1991), *affirmed*. 120 Wash.2d 727, 844 P.2d 1006 (1993); *Studebaker v. Beek*, 83 Wash. 260, 265, 145 P. 225 (1915). Here, the easements in question appear as exceptions to Teffts' deed. CP 383-86. The Second Cottage Easement was recorded in Pierce County on July 16, 2010. CP 58. The Second Cottage Easement is listed as Exception 5 to Teffts Deed. CP 386. Therefore, Teffts took title to parcel B subject to the Second Cottage Easement.

In *Beebe v. Swerva*, 58 Wn. App. 375, 793 P. 2d 442 (1990), a conveyance was made subject to an easement for road purposes many years before the dominant estate was created. During that time multiple conveyances each referred to the road easement. Ultimately, the property was subdivided and the dominant parcel was created. The court found an intent to create an easement in the original conveyance, despite the fact that no dominant estate existed at that time. 58 Wn. App. 381-82. All subsequent conveyances were made subject to easements of record or specifically referenced the original conveyance. Summary judgment for the dominant estate was affirmed on appeal.

While the easement in this case conveyed an easement in gross, *Beebe v. Swerva*, illustrates how an easement can be passed by subsequent conveyances made "subject to" the easement. Here, as in *Beebe v.*

Swerva, the deeds to Teffts and to Allen/Haenke were each made subject to the Second Cottage Easement.

F. The Second Cottage Easement remains on Parcel E.

Respondents continue to advance the argument Richard Barber could not be granted an easement in Parcel E because of merger of the Second Cottage Easement with his then-ownership of Parcel E. Respondents' Brief, p. 28.

Respondents fail to recognize the doctrine of merger is a disfavored doctrine. *Radovich v. Nuzhat*, 104 Wn. App. 800, 805, 16 P. 3d 687 (2001). (“[T]he doctrine of merger is disfavored both at law and in equity, and there are exceptions to its application.”). See also, *In re Trustee's Sale of Real Property of Ball*, 179 Wn. App. 559, 564, 319 P. 3d 834 (2014) (“The doctrine of merger has been highly disfavored in Washington since at least 1922.”).

Respondents also fail to recognize merger of estates will not be recognized where the party in whom the two interests are vested does not intend such a merger to take place. *Mobley v. Harkins*, 14 Wn. 2d 276, 282, 128 P. 2d 289 (1942). Debra Curtis and Richard Barber testified without controversion that neither of them intended the July 6, 2010 Second Cottage Easement would merge with Richard' then-ownership of Parcel E. CP 458. At a minimum, the testimony of Debra Curtis and

Richard Barber, that they did not intend a merger, raises an issue of fact that cannot be resolved on summary judgment. *Kelly v. Tonda*, 198 Wn. App. 303, 318, 383 P. 3d 824 (2017).

Respondents again argue the notations on their deeds cannot transform Debra Curtis' grant of the Second Cottage Easement into a valid easement. Respondents' Brief, p. 28. Respondents again fail to support their argument with authority, so it should not be considered here. RAP 10.3 (a) (6); *Billings v. Town of Steilacoom*, 2 Wn. App. 21.

The exceptions in Respondents' deeds include an exception for the Second Cottage Easement. CP 386, 393. Under *Radovich v. Nuzhat*, the November 16, 2017 deed of Parcel E from Northwest General Construction and Remodeling, LLC to Allen/Haenke was made at a time when it owned Parcel E and Exception 14 thereto subjected Allen/Haenke's interest in Parcel E to the Second Cottage Easement, thereby reviving that easement, if it was ever extinguished. CP 388, 393. As in *Radovich v. Nuzhat* and *Beebe v. Swerva*, that subsequent conveyance was sufficient to bind Allen/Haenke to the Cottage Easement.

Further, in Exception 5 to the April 30, 2015 statutory warranty deed to Michael J. and Angela J. Tefft, grantors James and Melissa Kuntz, then owners of Parcel B, excepted from that conveyance the Second Cottage Easement, at least to the extent it is located on Parcel B. CP 386. As in

Radovich v. Nuzhat and *Beebe v. Swerva*, that subsequent conveyance was sufficient to bind Teffts to the Cottage Easement.

Respondents attempt to distinguish *Radovich v. Nuzhat*, 104 Wn. App. 800, 16 P. 3d 687 (2001) by arguing that case did not involve invalid easements. Respondents' Brief p. 29. Respondents offer no reason or authority that the doctrine of revival applied in *Radovich* cannot apply to invalid easements. In *Radovich*, the Court held the standards for creating and recreating an easement are the same. 104 Wn. App. 806 n. 6 (citing Restatement of Property § 497 comment h).

Washington courts strive to follow the intent of the grantor in dealing with easements. *Rainier View Court Homeowners Association, Inc v. Zenker*, 157 Wn. App. 710, 720-22, 238 P. 3d 1217 (2010). Debra Curtis testified "*my sole intent was to have Richard Barber own the cabin and have full use of the surrounding easement to preserve it indefinitely.*" CP 370. Debra's intent can best be followed here by enforcing the exception in Exception 5 to the April 30, 2015 statutory warranty deed to Michael and Angela Tefft and by recognizing the Second Cottage Easement remains on Parcel B.

G. Teffts and Allen/Haenke are estopped to deny the presence of the Cottage Easement on Parcels B and E.

In support of their argument against estoppel, Respondents offer only a vague reference to RCW Ch. 7.24. Respondents' Brief, p. 29. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P. 3d 1200 (2012).

Respondents fail to address the financial calamity Richard Barber is suffering and will suffer from the loss of access to State Route 302 through Parcel E if the trial court's order on partial summary judgment is upheld. Not only will Richard Barber suffer the loss of tens of thousands of dollars he invested in the Second Cottage Easement, but he will also lose all rental revenue from the cabin in the future. CP 375. Neither the trial court nor Respondents gave any consideration to the adverse financial effects the trial court's ruling has and will have upon Richard Barber. A court of equity will act to prevent such loss. *Proctor v. Huntington*, 169 Wn. 2d 491, 500, 238 P. 3d 1117 (2010).

Respondents present no authority contrary to Restatement of Property (Third), Servitudes § 2.10 (1), cited by Appellants. Respondents' Brief, p. 29-30. Nor do Respondents address Appellants' argument that public policy will not permit property to be landlocked and

rendered useless. *Hellberg v. Coffin Sheep Co.*, 66 Wash.2d 664, 666, 404 P.2d 770 (1965); *Tiller v. Lackey*, 6 Wn. App. 2d 470, 496, 431 P. 3d 534 (2018). Loss of access through Parcel E would render Richard Barber's ownership of the cabin on Parcel B useless.

H. If they are denied access across Parcel E to State Route 302, Richard and Debra are entitled to an easement by necessity over the same route.

Respondents argue Appellants have not made the required showing for an easement by necessity. Respondents' Brief, p. 30-32. To the contrary, in paragraph 7 of their joint declaration in support of reconsideration, Appellants testified, without controversion, "[t]here is no other viable route from the Cabin to SR 302 other than the route set forth in the July 6, 2010 Cottage Easement." CP 458.

Washington courts recognize an easement may be implied on the basis of necessity alone. *Fossum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P. 2d 1095 (1995); *Adams v. Cullen*, 44 Wash.2d 502, 268 P.2d 451 (1954). There is no other viable route from the cabin to SR 302 other than the route set forth in the Second Cottage Easement. CP 458. Therefore, necessity dictates an implied easement over Parcel E be recognized in favor of Richard.

Respondents argue Ms. Curtis could have granted Mr. Barber access across her own property, Parcel B to SR 302. Respondents' Brief, p. 32. Respondents offer no evidence either Pierce County or the State of Washington would have granted access to SR 302 from Parcel B, or that the County or the State would allow a second access point adjacent to the existing access, or that the sight lines for the curve on SR 302 would allow such a second access. Respondents' argument simply lacks merit.

Respondents argue Appellants were required to condemn an easement by necessity under RCW Ch. 8.24. Respondents' Brief p. 32. Respondents offer no authority that Appellants were required to do so. No such requirement can be found in either *Fossum Orchards v. Pugsley* or *Adams v. Cullen, supra*.

Respondents' argument conflates the common law easement by necessity with the condemnation of an easement authorized by RCW Ch. 8.24. Washington authorities caution against such an error. 17 Washington Practice, Real Estate § 2.5 (2d Ed.) (“*The common law way of necessity should not be confused with Washington's special statutory way of necessity...*”). Respondents' argument for applying RCW Ch. 8.24 here should be rejected.

I. The Court should reverse the trial court's order to Richard, Debra and their tenant to vacate the Cottage Easement and the order to post a surety bond.

As the Second Cottage Easement remains a viable conveyance today, Teffts and Allen/Haenke are not entitled to an order requiring Richard and Debra and their tenant to vacate the Second Cottage Easement. Nor are Teffts and Allen/Haenke entitled to the order to post a surety bond.

J. The trial court erred in adopting findings in connection with its order granting partial summary judgment to Teffts and Allen/Haenke.

Respondents argue the trial court's adoption of Additional Findings is supported by CR 54 (b). Respondents' Brief, p. 39-41. Washington courts recognize CR 54 (b) authorizes the trial court to consider several factors in making its determination of no just reason for delay. *See, e.g., Nelbro Packing Co. v. Baypack Fisheries, LLC*, 101 Wash. App. 517, 6 P.3d 22 (2000). The trial court's adoption of 17 findings and 8 conclusions far exceed anything authorized by CR 54 (b). In fact, Conclusion 8 alone would have satisfied the requirements of CR 54 (b). CP 563.

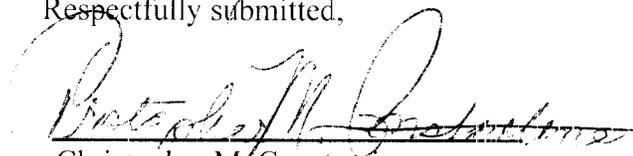
The trial court's entry of such extensive findings must instead be viewed as an impermissible attempt to adopt findings to a summary judgment order. Washington courts do not permit such findings. *Westberry v. Interstate Distributor Co.*, 164 Wn. App. 196, 209, 263 P.3d 1251

(2011); *Donald v. City of Vancouver*, 43 Wn. App. 880, 883, 719 P.2d 966 (1986).

V. CONCLUSION

The trial court erred in limiting this appeal to the issues in the Order for Partial Summary Judgment. The trial court erred in adopting findings in that order. The trial court erred in granting partial summary judgment for Teffts and Allen/Haenke. Teffts lacked standing to challenge the Cottage Easement's presence on a portion of Parcel E. The Cottage Easement is an easement in gross given to Richard Barber. The Cottage Easement may not be terminated. Teffts took title to their property subject to the Cottage Easement. The Cottage Easement remains on Parcel E. The Cottage Easement did not merge with Parcel E. Teffts and Allen/Haenke are estopped to deny the presence of the Cottage Easement on Parcels B and E. If they are denied access across Parcel E to State Route 302, Richard and Debra are entitled to an easement by necessity over the same route. The Court should reverse the trial court's order to Richard, Debra and their tenant to vacate the Cottage Easement and the order to post a surety bond.

Respectfully submitted,



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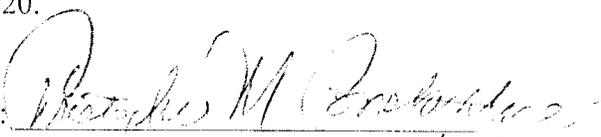
Attorney for Appellants

VI. CERTIFICATE OF MAILING

The undersigned does hereby declare that on April 14, 2020, he delivered a copy of APPELLANTS' REPLY BRIEF filed in the above-entitled case to the following persons:

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DATED this 14th day of April 2020.

By: 
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OF COUNSEL INC PS

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