

**FILED**

NOV 09, 2015

Court of Appeals  
Division III  
State of Washington

COA No. 33206-3-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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MELANIE J. BRYANT, a single person,

Respondent,

v.

STEPHEN R. SANDBERG,

Appellant,

and

ANNE D. SANDBERG,

Defendant.

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BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERROR

1. The trial court erred by entering its Order Granting Plaintiff's Motion for Summary Judgment.

### Issue Pertaining to Assignment of Error

A. Did the trial court err by granting summary judgment when genuine issues of material fact existed?

## II. STATEMENT OF THE CASE

Melanie Bryant filed a complaint for declaratory judgment granting an easement. (CP 4). She alleged Stephen Sandberg had owned Moses Lake property that was short platted into lots 1 and 2 in 2003. (CP 5). Before the short plat, Mr. Sandberg built a single-family residence on land, which thereafter became lot 1. (*Id.*) She further alleged that Mr. Sandberg, during the time he owned both lots 1 and 2 and before the short plat, "accessed the residential home and garage on Lot 1 over, along and across the roadway on Lot 2." (*Id.*) Ms. Bryant bought lot 1 at a foreclosure sale in April 2013. (*Id.*) She alleged the roadway on lot 2 was approximately within 20 feet of the front door of her lot 1 residence and within ten feet of the garage door. (*Id.*) Ms. Bryant complained that Mr. Sandberg had parked a large truck on the property line on lot 2 directly in front of her home. (CP 5-6). She

sought, among other things, an easement implied from prior use or an easement by necessity. (CP 6).

Mr. Sandberg filed an answer, responding he had added on to the existing house on lot 1; he had informed Ms. Bryant before her purchase of lot 1 of the lot lines; her lot had 186 feet of county road access with ample access to lot 1; and his lot 2 had 40 feet county minimum when short platting; he left items along the lot line “so everyone looking could understand what was what.” (CP 21). Ms. Bryant moved for summary judgment. (CP 22).

Mr. Sandberg filed a declaration in opposition to the summary judgment motion. (CP 66). He declared the truck was parked on his property and what Ms. Bryant characterized as debris, trash, and other miscellaneous items in the roadway directly adjacent to her lot were actually located on his property and were already there when she purchased lot 1. (CP 66-67). Particularly with respect to Ms. Bryant’s claim that he had accessed the home and garage on lot 1 prior to the short plat by the roadway on lot 2, Mr. Sandberg stated:

The Plaintiff also claims, falsely, that I used the “easement” to access the “garage” when we lived there. In fact neither I, nor my ex-wife, used this “roadway/easement” to access the “garage.” This “garage” the Plaintiff is referring

to was used as a craft room by my ex-wife. We accessed the building through the walk through door. There is a driveway adjacent to the Plaintiff's property that I use to access my current home. As you can see from the pictures supplied by the Plaintiff, there is a lot of overgrowth of grass and weeds. The Plaintiff never had access to the "garage" from that location. The Plaintiff was mistaken in her complaint when she stated that we used this area as an access point to enter the "garage." (CP 67).

On Ms. Bryant's access to her property, Mr. Sandberg further declared:

The Plaintiff's property is adjacent to the county road for approximately 185 lineal feet. She can and has accessed her "garage" from the other side of her house. In fact, in August 2014, the Plaintiff's father built a fence on the Northeast corner of property line between the two houses. The Plaintiff's boyfriend assured me that the boat and car were put in the "garage" without utilizing my property. (CP 67).

The court granted summary judgment to Ms. Bryant. (CP

72). In its order, the court made these findings of fact:

1. The parcel of land owned by Plaintiff and the adjoining property owned by Defendant were once owned by the Defendant as one parcel. Defendant short platted the property into two lots, Lot 1 Sandbeg Plat now owned by Plaintiff and Lot 2 Sandberg Plat owned by the Defendant.

2. The continued use of the easement access

area requested by Plaintiff is necessary and essential to the convenience of comfortable enjoyment of the Plaintiff's property as it was when the division into the two lots occurred.

3. The use of the access easement area is apparent and continuous.

4. The easement area on Lot 2 is a 30 foot by 20 foot strip of land located in the most southwest portion of Lot 2 as depicted in the attached Exhibit A.

5. The Plaintiff shall have the easement area surveyed and shall submit the legal description in an Order to this court when the survey is completed. (CP 73).

In granting summary judgment, the court also ordered that Ms. Bryant had an easement over, under, along and across a 30 foot by 20 foot strip of land in the most southwest portion of Mr. Sandberg's real property, lot 2 Sandberg plat. (*Id.*). This appeal follows.

### III. ARGUMENT

A. The trial court erred by granting summary judgment when genuine issues of material fact existed.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.3d 705 (2007). When determining

whether any genuine issue of material fact exists, the court construes all facts and inferences in favor of the nonmoving party. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). A genuine issue of material fact exists when reasonable minds could reach different conclusions. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The appellate court engages in the same inquiry as the trial court and review is de novo. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

There was essentially no dispute about the applicable law on implied easements. The three elements for establishment of an implied easement from prior use is (1) unity of title and severance, (2) reasonable necessity, and (3) apparent and continuous use. *Rogers v. Cation*, 9 Wn.2d 369, 115 P.2d 702 (1941). There was no dispute as to the first element. The dispute was over elements 2 and 3, with Mr. Sandberg controverting each and every fact of consequence averred by Ms. Bryant. Notwithstanding the existence of genuine issues of material fact, the trial court improperly decided those issues on summary judgment. *Woodward v. Lopez*, 174 Wn. App. 360, 370-71, 300 P.3d 417 (2013).

Although superfluous and improper, the trial court's findings in its summary judgment order are telling because they show the court weighed credibility on conflicting evidence and made factual findings. See *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991). The court cannot resolve questions of fact on summary judgment as that determination must be made at trial. *Jones v. State*, 170 Wn.2d 338, 354, 242 P.3d 825 (2010). On this ground alone, the court erred by granting summary judgment.

Mr. Sandberg's declaration put in dispute material facts, thus necessitating their resolution at trial. CR 56(c). Particularly in the context of a summary judgment motion where the trial court must consider all facts in the light most favorable to the nonmoving party, the court's decision to exclude, in essence, the source of those controverting facts should be closely scrutinized. *Reid*, 136 Wn.2d at 201.

The court's oral decision plainly shows it made decisions on Mr. Sandberg's credibility; resolved controverted facts regarding accessibility and intent, presumed or actual; and resolved controverted facts regarding the effect of Mr. Sandberg's actions, particularly speculating on prior access and the parking of a truck near the contested area; and based its ruling in part on its personal

opinion that the subdivision of the land was “very unusual” and determining what Mr. Sandberg called a craft room was actually a garage with a garage door just feet from the boundary. (RP 21-34).

The court ignored Mr. Sandberg’s declaration that he did not access the garage door from the area referred to by Ms. Bryant and the garage was actually a craft room accessed by a walk-through door. These facts put into dispute whether the easement sought was reasonably necessary and whether there was any prior, much less apparent and continuous, use of any claimed implied easement. *Rogers*, 9 Wn.2d at 376.

An easement of necessity is an expression of a public policy that will not permit property to be landlocked and rendered useless. *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 666, 404 P.2d 770 (1965). Mr. Sandberg declared Ms. Bryant’s property was adjacent to the county road for 185 feet and she put the boat and car in the “garage” without access through his property. (CP 67). Lot 1 was neither landlocked nor rendered useless. Genuine issues of material fact exist as to reasonable necessity for an implied easement.

The court itself noted Ms. Bryant, without any supporting facts, also summarily concluded that creating access would be

unreasonable and economically unfeasible. (CP 58; RP 27-28).

Yet, all doubts were resolved in favor of Ms. Bryant despite the existence of genuine issues of material fact that precluded summary judgment. *Woodward*, 174 Wn. App. at 470-71.

Moreover, the court interpreted drawings and maps and, despite county approval of the short plat by Mr. Sandberg, determined on disputed facts:

And that in this case, where having gone over these two different types of implied easements, one by necessity and one implied by prior usage, noting that each of those elements are not hard and fast rules, and in this case, where, first of all, let me say we have a very unusual subdivision of this land, the way it's drawn, I couldn't help but think to myself when I saw it, what was whoever was approving this thinking, where they have those gerrymandered parcels and they have someone's front door and a garage with a – what's important to me and what I want to emphasize – a garage door. It's called a craft room. But this garage with a garage door just feet away from the boundary. I just couldn't help but think, I don't know what whoever was . . . was considering or thinking when that was done. (RP 32-33).

This resolution of disputed facts and inferences from them are improper on summary judgment.

Mr. Sandberg stated in his declaration what he intended and, even though the circumstances and nature of the property may be looked to in determining implied intent, his declared intent cannot

be discounted entirely as it was here. (CP 25-26). The trial court improperly decided questions of fact.

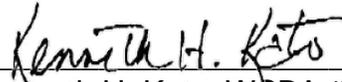
The court erred by weighing and deciding credibility on a motion for summary judgment that can be granted only if there are no genuine issues of material fact. *Brogan & Anensen, LLC v. Lamphiear*, 165 Wn.2d 773, 775, 202 P.3d 960 (2009). In these circumstances, the order granting summary judgment must be reversed and the case remanded for trial. *Id.*

#### V. CONCLUSION

Based on the foregoing facts and authorities, Stephen Sandberg respectfully urges this court to reverse the order granting summary judgment and remand for trial.

DATED this 9<sup>th</sup> day of November, 2015.

Respectfully submitted,



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#### CERTIFICATE OF SERVICE

I certify that on November 9, 2015, I served the Brief of Appellant by email, as agreed, on Larry Larson at larry@larsonfowles.com.

