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DEC 11 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 33206-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MELANIE J. BRYANT,

Respondent,

vs.

STEPHEN R. SANDBERG,

Appellant,

ANNE D. SANDBERG,

Defendant.

BRIEF OF RESPONDENT

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**I. ISSUES PERTAINING TO APPELLANT'S
ASSIGNMENTS OF ERROR**

1. Whether the trial court erred by granting Plaintiff's Motion for Summary Judgment.

2. Whether the court erred by weighing and deciding credibility in regards to a material fact.

II. STATEMENT OF THE CASE

Plaintiff owns real property in Grant County, Washington, (hereinafter referred to as "Lot 1"). (CP 4). Defendant owns real property in Grant County, Washington, (hereinafter referred to as "Lot 2") that is adjacent to Lot 1. (Id). Until 2011, Defendant owned both Lot 1 and Lot 2. (Id.) Lot 1 and Lot 2 were one parcel until Defendant short platted the property into two parcels in 2003. (CP 8-11). Prior to the short plat, Defendant constructed a single-family residence and garage on the property (Lot 1) in 1999. (CP 4 & 44-50). The access and entry to the house and garage is over, across and along a strip of land on Lot 2 commencing at the public road, Grace Lane, and thence northerly a distance of 107.86 feet parallel to the east line of Lot 1. (CP 60 & 62). The building permits submitted for the house and garage indicate this access as the "driveway." (CP 44-57)

On or about September 16, 2011, BMO Harris Bank NA completed a deed of trust foreclosure against Defendant as to Lot 1

and recorded a Trustee's Deed in its name. (CP 4) On April 4, 2013, Plaintiff purchased Lot 1 at a foreclosure sale of the property. (Id).

Plaintiff cannot access the garage and the front of the residence without going over and across the strip of land on Lot 2. (CP 58, 60 & 62). Defendant parked a large truck on the property line of Lot 2 and placed trash, debris, a toilet, old furniture, gas cans and other miscellaneous items to block Plaintiff's access to the house and garage. (CP 5 & 13-16).

Plaintiff filed an action to establish an easement implied from prior use, or an easement by necessity, that is 30 feet by 20 feet over, across and along the strip of land on Lot 2 for access to the residence and garage on Lot 1. (CP 6).

III. ARGUMENT

A. Standard of Review. In reviewing a summary judgment order, an appellate court evaluates the matter de novo, performing the same inquiry as the trial court. *Ski Acres, Inc. v. Kittitas Cy.*, 118 Wash.2d 852, 854, 827 P.2d 1000 (1992). A court shall grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. CR 56(c). *Id.*

B. The Trial Court Properly Granted Plaintiff Easement.

The general rule behind the creation of an easement from prior use is that the conveyance of a dominate estate should be accompanied by the advantages and burdens that were appurtenant to the estate prior to the separation of the title. *Roe v. Walsh*, 76 Wash. 148, 135 P. 1031 (1913). Conveyance of an estate should be accompanied by everything necessary to its reasonable enjoyment, or at least those things that the grantor, during the time it was in his possession, used for his benefit. *Bushy v. Weldon*, 30 Wn.2d 266, 191 P.2d 302 (1948). The three elements necessary to establish the easement are as follows: (a) unity of title and severance (b) reasonable necessity and (c) apparent and continuous use. The burden of proof is on the person attempting to establish the easement. *Rogers v. Cation*, 9 Wn.2d 369, 115 P.2d 702 (1941). Because Defendant has conceded the first element, unity of title and severance, this brief will focus on the next two elements.

i. Reasonable Necessity

Reasonable necessity is that degree of necessity that makes the easement essential to the convenience of comfortable enjoyment of the dominant property as it existed when the property transfer occurred. *Bailey v. Hennessey*, 112 Wash. 45, 191 P. 863 (1920). Absolute necessity is not required to establish an implied easement. *Evich v. Kovacevich*, 33 Wash.2d 151, 157–58, 204

P.2d 839 (1949). “Although prior use is a circumstance contributing to the implication of an easement, if the land cannot be used without the easement without disproportionate expense, an easement may be implied on the basis of necessity alone.” *Fossum Orchards v. Pugsley*, 77 Wash.App. 447, 451, 892 P.2d 1095 (1995). The test of necessity is whether the party seeking the easement can create a substitute at a reasonable cost. *Bays v. Haven*, 55 Wash.App. 324, 329, 777 P.2d 562 (1989).

In the case at hand, the front door of the house on Plaintiff's property faces out onto the driveway located on Defendant's property (Lot 2) and the same for the garage entry. The garage door faces out onto Defendant's driveway. The use of Defendant's driveway for access is essential for the convenience of comfortable enjoyment of Plaintiff's property. The house and garage were constructed (by the Defendant) in such a way that ingress and egress are clearly in the easement area on Lot 2. No other conclusion is reasonable. The Defendant emphasizes that the garage and house can be accessed from the back, where going over his property is not necessary. However, construction of a roadway into the back of the garage and house would not be economically feasible and would certainly impair the value of the property. (CP 58).

The facts of the current matter most closely align with *Bushy v. Weldon*, 30 Wn.2d 266, 191 P.2d 302 (1948). In *Bushy*, the

property owner claimed an easement in common with a neighbor, through implication, for the use of a driveway located between the two estates. *Id* at 268. The neighboring estate claimed that the claimant could at reasonable cost build a driveway on her own property. *Id* at 271. The court held the requisite necessity for an easement by implication was present because creation of another roadway would destroy part of the claimant's property and substantially impair the value of the property. *Id*.

In the present case, the Plaintiff could only access the garage by vehicle by installing a door on the opposite side of the building and constructing a new driveway. The new driveway would require demolition of an existing concrete walkway (CP 58 & 61). This substitute, as opposed to an existing driveway to an existing garage door, is not remotely comparable or reasonable.

ii. Apparent and Continuous Use

The final element in establishing an easement by implication is apparent and continuous use. In determining whether an easement has arisen by implication of law, the cardinal consideration is the presumed intention of the parties concerned as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other. *Rogers v. Cation*, 9 Wash.2d 369, 376, 115 P.2d 702 (1941).

In this matter, when looking at the nature of the two properties and their relation to each other, any reasonable person

could see that access to the Plaintiff's home and garage can only be over and across Defendant's driveway.

While Defendant relies on his claim that he did not use the garage for access, this is not the end of the inquiry. The *presumed* intent of the parties is controlling. Defendant himself constructed the home and garage on Lot 1. The garage was constructed with a door for vehicle access facing the existing driveway. The building permits he submitted to the Planning Department indicate the "driveway" on Lot 2 as access to the garage. (CP 44-57). The only reasonable presumption is that the intended use of the garage was for access by vehicle and access was intended by way of the driveway.

C. There is no Genuine Issue of Material Fact.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). 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).

In his appeal brief, Defendant accuses the trial judge of improperly ruling on the credibility of the Defendant's statement that he did not access the garage by vehicle over and across the easement area but instead used the garage as a craft room with access by a walk-through door. However, the trial judge did specifically take this into account when making his ruling.

... by the time of the foreclosure, when the property was actually literally divided by way of a conveyance, that at that time he had established his position that that garage was not to be used for vehicle access. So that's his position. (RP 31).

The trial judge did not ignore the Defendant's claim nor did the Judge not believe the statement to be true. While the trial judge considered Defendant's statement, he determined that statement alone was not enough to overcome all the other evidence in the record. "So I think it's a more expansive view of all the facts, and that one fact alone may be a brick, but it's not – a brick is not the wall." (RP 32). Instead, the Judge applied the law, which directs the court to look at more than the stated use of the owner of the property. The court quoted from *Rogers v. Cation*, supra, that, in determining whether an easement has arisen by implication of law, the court is directed to examine the extent and character of the user, the nature of the property, and the relation of the separated parts to each other. *Id* at 376.

... that this is the very situation that's envisioned by the case law that creates the kind of necessity that is the kind of circumstances in which the implied intent of the common grantor as seen by the physical structure of the property, the relationship of the property, this can be seen from the map of the property, the description of the driveway in the building permits, that in this day and age where people so commonly get around with vehicles, that garages are recognized as places for vehicles, it's

described as a craft room, but there's a garage door, there's a building permit that describes the driveway, that in this particular case, considering all the factors, I don't believe a trial is necessary. (RP 33-34).

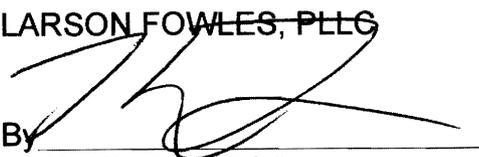
The trial judge considered all the factors, including the Defendant's statement, taken at face value, and determined that an easement had arisen by implication. The court did not err in granting summary judgment.

IV. CONCLUSION

This Court should affirm the decision of the trial court finding summary judgment was appropriate.

RESPECTFULLY SUBMITTED this 8 day of December, 2015.

LARSON FOWLES, PLLC

By 

KENE C. LARSON

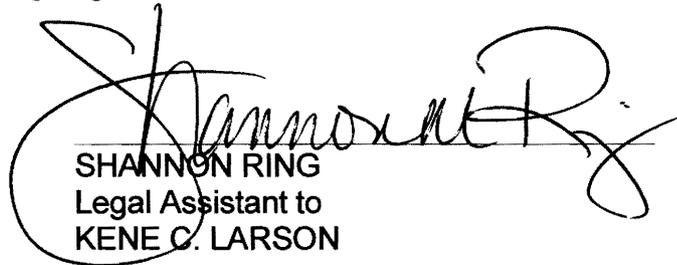
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Attorneys for Respondent

CERTIFICATE OF SERVICE BY EMAIL

I hereby certify that a copy of the above and foregoing Brief of Respondent was forwarded to Kenneth H. Kato by email, as agreed, at khkato@comcast.net, on this the 8 day of December, 2015.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


SHANNON RING
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