COA No. 35592-6-III

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MELANIE BRYANT, a single person,

Respondent,

V.

STEPHEN R. SANDBERG, a single person,

Appellant,

BRIEF OF APPELLANT

Stephen R. Sandberg
10762 Grace Lane NE
Moses Lake, WA 98837

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I. ASSIGNMENT OF ERROR

1. The trial court erred by entering its order granting Plaintiff a easement by implication.

Issue pertaining to assignment of error

A. Did the trial court err by granting a easement by implication when genuine issues of material fact were ignored?

II. STATEMENT OF FACTS

Melanie Bryant and Stephen Sandberg own adjacent properties in Grant County Washington, with Bryant owning lot 1 and Sandberg owning Lot 2 of the short plat. Each lot comprises one acre. Bryant claimed an implied easement for ingress and egress across lot 2.

Stephen and Anne Sandberg, former husband and wife, originally owned both lots, and lots were treated as one tax parcel. In 1999, Stephen Sandberg built an addition to a residence present on the property. In 2002, Sandberg built a 26 foot by 30 foot garage with no Plumbing next to the residence.

In April 2003, the Grant County Assessor approved the Sandberg short plat, which separated the Sandberg property into Lot 1 and Lot 2. The county road acts as a southern border of Lot 1, which has no improved driveway connected to the road, but was left access to do so. Upon the division of land, Lot 1, contained the residence and garage. Lot 2 connected to the county road by a 40 ft wide driveway access as required by the Grant County short plat requirements. The most easterly boundary line between the two lots lies 10 feet from the garage and the residence on Lot 1. The garage door and homes front

door face that boundary line and driveway. Building permits submitted for the house addition and garage, per requirements on building permits, indicate driveway is and always was for 2nd residence and its outbuilding access, which became Lot 2. Pg. 65, 66.

On May 8th 2003, Roberta and Gerald Trautman conveyed their interest in Lot 1 to Stephen and Anne Sandberg. By at least 2003, the Sandberg's resided in the home situated on Lot 1. Stephen Sandberg denies that the couple drove on the Lot 2 Roadway for access to the couple's garage and home on Lot 1. He contends photo shows overgrowth in the area between the Lot 2 driveway and the garage on Lot 1. Additionally the picture shows the garages concrete apron was never finished. Pg. 63,131. Sandberg testified at summary judgement and at trial that the couple used the garage as his wife's craft room, He also testified that the garage was never used for vehicle storage, only and always as a craft room. Pg. 196, 165. He further testified that his family accessed their home on Lot 1 from Grace Lane.

On May 31st 2007, Stephen and Anne Sandberg obtained a loan from M&I Bank, who recorded a deed of trust of Lot 1. The Sandberg's defaulted on the loan, and on September 19th 2011, BMO Harris Bank purchased the property at a trustee sale. Stephen Sandberg thereafter resided on the adjoin Lot 2.

On April 4th 2013 Melanie Bryant purchased Lot 1 from BMO Harris Bank for a substantially reduced price of $169,900. Before she purchased the property, she reviewed the lot lines and all other encumbrances were known by the Plaintiff, as Lot 1 did not have a well either. On April 15th, 2014, Stephen and Anne Sandberg divorced. Stephen Sandberg continued to live on Lot 2.

III. PROCEDURE

On September 5th 2014, Melanie Bryant sued Stephen Sandberg and requested that the court establish an implied easement over Sandberg's driveway so that she can drive a vehicle into her garage and more easily access the front of her house. She asked for an easement of ingress and egress over the Lot 2 roadway, whose width varies from 20 to 30 ft wide. Bryant claimed that Sandberg refused to allow her access to her property over the roadway, even though Sandberg's employed the roadway to access the Lot 1 residence when the Sandberg's lived in the home.

Melanie Bryant filed a summary judgment motion seeking a ruling that as a matter of law, she is entitled to an easement across Lot 2 driveway. Bryant argued that she possesses no other reasonable access to Lot 1, because her garage door and residence front door face Lot 2 and the latter lot's driveway. She contended that any other access would be impractical, unreasonable, and economically infeasible. She attached to her declaration of photograph of the back of her garage and home. The photo shows terraced landscaping in the area of the property. Presumably, Bryant contends that she would need to move her landscaping in order to gain access to her home and garage from a source other than Lot 2 driveway. She claimed that the arrangement of the Lot 1 home and garage with the Lot 2 drive compels a finding that the Sandberg's, when residing on Lot 1, employed the Lot 2 driveway to access the home.

Stephen Sandberg filed a declaration in response to Melanie Bryant's summary judgment motion and testified at trial, that the south end of Lot 1 borders the county road for 185 ft. Stephen Sandberg impliedly argued that

Melanie Bryant could construct a driveway from the county road to her garage. Sandberg noted that a photograph of the area in the front of the garage shows an overgrowth of grass and weeds, and the concrete apron was left unfinished. Sandberg presented a picture at trial that showed her truck backed up to the garage that was said to be inaccessible. Pg. 171, 189, 190. Sandberg argued that Bryant can and has accessed her garage from the other side of the house and that she has already used this access for years. He contended that Melanie Bryant is not entitled to an implied easement from prior use or easement by necessity. He testified that Melanie Bryant's boyfriend told him that the he placed her car and boat in the garage without Crossing Lot 2. On summary judgment, the trial court granted Melanie Bryant the easement. The trial court reasoned that the elements for easement by necessity and implication "are not hard and fast rules." Report of Proceedings at 32. The court reasoned that the closeness of the garage and the home to the boundary line of the properties shows an intent of the Common grantor to allow the owner of Lot 1 to use a driveway across Lot 2.

Stephen Sandberg appealed the summary judgment, the appellate court responded. "FEARING, C.J. --- Melanie Bryant sued her neighbor, Stephen Sandberg, to gain use of a driveway that crosses Sandberg's land. She sought an implied easement or an easement by necessity. The trial court granted Bryant summary judgment. We reverse."

Plaintiff then moved to trial. The court granted an easement by implication to Melanie Bryant. In its order, the court made these finding of facts:

1. The Court has jurisdiction over the parties and over the subject matter of this action

2. Plaintiff has met her burden of proof regarding the first element necessary to establish an easement by implication, unity of title and severance.
3. Plaintiff has met her burden of proof regarding the second element necessary to establish an easement by implication, reasonable necessity.
4. Plaintiff has met her burden of proof regarding the third element necessary to establish an easement by implication, apparent and continuous use.
5. The Plaintiff is entitled to an easement over and across Lot 2 for access to the residence and garage on Lot 1.,
6. The Judgments entered against the Defendant for contempt on October 16, 2015, and October 30, 2015 are lawful and enforceable.

This appeal follows:

IV. ARGUMENT

A. The trial court erred by granting a easement by implication when genuine issues of material fact were ignored.

There was essentially no dispute about the applicable law on implied easements. The three elements for establishment of an implied easement from prior use are (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

court improperly decided those issues at trial. During the court's oral argument, the judge seemed confused as to why the Appellate court would consider Mr.Sandberg's intent. From pages 148-150 of the trial transcripts the judge wondered three times and was trying real hard once, to understand what relevance defendant's intent would have in this case, As the judge read from the Appellate court record on page 152, he was mystified why the appellate court didn't find earlier use of Lot 2 driveway by Lot 1 resident. By page 153 neither the judge or Mr. Larson knew how to answer the intent question. Defendant then tried to explain what his intent was, page 156, but was interrupted again to be asked "an unfair question." page 157. Defendant didn't understand his logical problem, the only thing that he could figure from the judges question was that he was trying to rationalize how to eliminate Mr. Sandberg's intention from the equation. page 158. At page 159 the judge stated " And what I'm wondering is, how could the case turn on that." He evidently didn't think that the defendant could change the buildings use without removing or replacing the vehicle access door to the building.

The court's oral discussion plainly shows it resolved controverted facts regarding accessibility and intent, presumed or actual; and resolved controverted facts regarding the effects of Mr. Sandberg's actions, particularly speculating on prior access and intent; and based its ruling in part on his own personal opinion that the overhead garage door made Mr. Sandberg's craft room a garage.Then on page 160 the judge said; "well, if the --- if the elements of --- of implied easement by prior use are the ones that are suggested by in Hellberg v. Coffin Sheep Company this --- question (of intent) doesn't even arise because the --- it's a question of whether usage was apparent. Then if that were the case, we're talking and of course, it still doesn't tell us at what point we're talking ---

Sandberg; the usage was never apparent. She never had use of it. She bought that property knowing it didn't have access.

Judge; but there was --- there was a garage with the --- with the overhead door.

Sandberg; there was.

Judge; opening up on the easement.

The discussion continued until at Pg. 202 when the judge said: Here, I understand what you're telling me and I'm not calling you a liar but I'm not sure ---

Sandberg: I can tell already you're about to.

Judge: Alright, I'm not calling you a liar.

Sandberg: I gotta go get an appeals attorney.

Judge: Okay, but what is --- what is --- what is at issue here, in my view, is not --- is not what was going on in your mind and what your subjective intent was when the property was divided. But, what was apparent. What was the apparent use here. The road we're talking about here, it was apparently used, whether or not you were using it to access the garage, the road leads, branches off and leads directly to the ---

Sandberg: The road doesn't branch --- directly to the second house.

Judge: Yeah, and it's there. You're using the property, you're using the road for access to your part of the property, and I find that number two, the second element has been met.

Mr. Sandberg stated in his declaration and several times at trial 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. The trial court improperly decided questions of fact.

In regards to costs to install a garage door and driveway, the plaintiff provided some very inflated quotes. Mr.Sandberg could and would do both considerably less as shown in his exhibits at trial.

V. POINTS AND AUTHORITIES

Proposed "Easement" was not used as an access point for "garage" or (Lot 1. Mr. and Mrs Sandberg did not access the "garage" that was in fact used as a craft room for Mrs. Sandberg, and was accessed through the walk-through door. This walk-through door and "garage" door is accessible to the Plaintiff from their own Lot.

The Plaintiff cites several cases in her Memorandum, which are distinguishable from this case. In *Bailey* v. Hennessy, 12 Wash. 45, 191 Pac. 863 (1920), the parcel being claimed for the easement was not used as an access point for the "garage" or Lot 1 by the Sandberg's and never by the Plaintiff's. Mr. Sandberg and his former wife used the walk in door to access the BUILDING. According to *Bailey* v. Hennessey, "It is necessary to determine the extent of the use, the character, and the surroundings of the property, the relationship of the parts separated to each other for giving such a construction to the conveyances as to what will make them effective according to what must have been the real intent of the parties, the foundation of the rule being that time shall be held to have been included in the conveyances. All the rights and privileges which were incident and necessary to the reasonable enjoyment of the thing granted, practically in the same condition in which the entire property was received from the grantor" *Id at 49.*

Implied Easement

There are three things which are essential to creating an easement by implication. First, there must be a separation of title. In this instance, there was a separation of title. And second, before the separation took place, there must have been a use which gave rise to the easement, and it must have been used so long, and so obvious, that it was meant to be permanent. Unfortunately, here, there was no use that would give rise to an easement. The Sandberg's never used the proposed easement to access the garage or Lot 1 and the Plaintiff never has. Third, the easement shall be necessary to the beneficial enjoyment of the land granted or retained. The proposed easement is not necessary to the beneficial enjoyment of the land because 1) The Sandberg's didn't use it for vehicle access to Lot 1 prior to Plaintiff purchasing the property, and 2) the plaintiff can and has accessed the overhead door of the craft room with a vehicle and a boat from her own Lot 1 and from the side of the house through the walk-through door. The plaintiff's claim fails on the last two requirements. The Bailey Court held that a "right of way by implication arises only from necessity and never from convenience..." *Id at 51.* Although using the "easement" as claimed by the Plaintiff's would be convenient, it is not a necessity.

Bushy v Weldon, 30 Wn.2nd 266 (1948), can be distinguished. In that case there was a common driveway built by a previous owner, where several prior owners of both properties used it for many years. In this case, the "easement" claimed by the Plaintiff, was not used by the Sandberg's or the Plaintiff's to access the building "garage"or Lot 1.

Easement by Necessity

The elements required for an easement implied from necessity are (1) a landowner conveys part of his land and (2) retains part, usually 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 from the other. *Hellberg v Coffin Sheep Co., 66 Wn.2nd at 666-67;17* WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE:REAL ESTATE LAW 2.5, AT 93 (2d ed.2004) Necessity must exist at the date the property is severed. *Visser v Craig, 139, Wn. App. A*t 159 (2007). Most judication do not allow an easement by necessity to arise if there is clear evidence of the parties' contrary intent, and the majority view on easements by necessity militates against the conclusion that an easement by necessity can be imposed despite the parties' contrary intent. *Visser V. Craig. 139 Wn. App. At 164-65.* An easement by necessity is an expression of a public policy that will not permit property to the landlocked and rendered useless. *Hellberg v Coffin Sheep Co., 66 Wn.2nd at 666.*

Although the first two elements of an easement by necessity are easily met in this case, Melanie Bryant failed to establish that the easement over Stephen Sandberg's property was necessary. Although she presents evidence showing the convenient access the easement would provide, she does not establish that the easement is necessary. She could not show that her property is landlocked when it runs adjacent to the county road for 185 lineal feet.

Under *Roe* v *Walsh, 76 Wash. 148, 135 Pac. 1031 (1913),* "A grant of a right of way cannot be inferred merely from the fact that there is a way leading to the premises purchased, even though the grant of land be with all privileges and appurtenances, for the use of the word appurtenance, although appropriate to the conveyance of existing easement, is not sufficient to create one where none exists" "No implication of a grant of right of way can arise from proof that the land granted cannot be conveniently occupied without it. Its foundations rests in necessity not in convenience. It follows that a party cannot have a way of necessity through land of another when the necessary way to the highway can

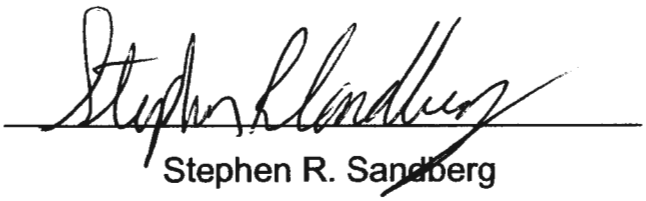
be obtained through this own land, however convenient and useful another way might be." The Plaintiff's land is adjacent to the county road for approximately 185 lineal feel. The Plaintiff can better access her property by improving an existing driveway access off the county road.

Regarding the judgments entered against Defendant for contempt on October 16th, and 30th, 2015; if the final decision is reversed on appeal, orders based on the erroneous decision are not enforceable. See State v. ANW Seed, 116 Wn.2d 39, 802 P.2d 1353 (1991); Dike v. Dike, 75 Wn 2d 1, 16, 440p.2d 490 (1968); Seattle NW Sec.Corp. v. SSG Holding Co., 61 Wn App. 725, 812p.2d 488 (1991)

VI. CONCLUSION

Based on the foregoing points and authorities, and the testimony and evidence presented at trial. Defendant respectfully request that the court REVERSE the order granting Melanie Bryant an easement by implication and the judgments of contempt. And award Defendant attorney fees and costs of at least $17,500.00 as the Defendant has been forced to defend himself a total of four times. Once at summary judgement. Once at the appellate Court. Again at trial, And now once more at the appellant Court.

Dated this 25 of October, 2018



Stephen R. Sandberg

I certify that on October 26, 2018 I Stephen Sandberg served in person a copy of the Brief of Appellant to Larry Larson

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