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Division III
State of Washington
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No. 35592-6-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 APPELLANTS' ASSIGNMENTS OF ERROR

A. Appellant claims the trial court erred by granting Respondent an easement by implication because it ignored genuine issues of fact, but Appellant does not assign error to any specific finding of fact as required by RAP 10.3 (a)(4).

1. Assuming Appellant had assigned error, the only issue is whether the trial court's findings are supported by substantial evidence.

II. STATEMENT OF THE CASE

Melanie Bryant and Stephen Sandberg are adjoining landowners in Moses Lake, Washington. (RP 27-29) The properties owned by Bryant and Sandberg were both owned by Sandberg and were separated into two lots by Sandberg in 2003. (RP 29, Ex 1).

Bryant purchased her lot, Lot 1, in 2013. (RP 28) Lot 1 included a single family residence and a garage. (RP 30, 31). The front door of the residence and the garage face towards a paved driveway that goes from the public road, Grace Lane, onto the property owned by Sandberg, Lot 2, and directly in front of the Bryant residence. (RP 32-38, Ex 2,3,4 &5).

Sandberg constructed the residence on Lot 1 in 1999. (RP 55, L 1-6, RP 65, Ex 12) Sandberg was in the construction business. (RP 68) The building permit for the house includes a

drawing of the access from Grace Lane onto Lots 1 and 2 with the driveway passing in the front of the house on Lot 1. (Ex 12). In 2002/2003, Sandberg constructed the garage on Lot 1. (RP 69,70) Sandberg testified that when he lived in the house from 2003 until 2011 (RP 54) he did not intend to use the access off Grace Lane passing in front of the house and garage on Lot 1 to access the garage Lot 1 and goes on for pages explaining his intent (RP 55-63).

At least two times in his testimony Sandberg admits that access to the house and garage was on the driveway from Grace Lane passing in front of the house and garage. (RP 67, Lines 7-10, 71). Sandberg testified as follows: "Yes, I had an intention. I admit, I had an intention to service off of that driveway that was already going by there that was in before the garage." (RP 72, Lines 11-14). Sandberg also testified about why he believes the driveway off Grace Lane was not to service the house and garage on Lot 1. (RP 89-98). He also testified the garage faced east (onto the driveway) because that is what he intended. (RP 116, 117). In response to questions from the trial judge, Sandberg testified he and others used the driveway to the house and garage on Lot 1 during the time he owned Lot 1. (RP 120, Lines 6-20).

Bryant testified about the difficulty of accessing the garage and residence from the west, the backside of the garage and residence on Lot 1. (RP 40,42 & 43) Exhibits 6 & 7 provide a clear

picture of the backside of the residence, garage and landscaping on Lot 1. Bryant testified about the cost and expense to change access to the residence and garage. (RP 44-48, Ex 8 & 9). Sandberg refuted the costs for the work and put in his own exhibits about cost. (RP 113 – 115, Exhibits 15 & 16).

Bryant testified that when she moved into the residence on Lot 1, Sandberg made it clear to her he was going to make her hate living there so much that he was going to get his property back, or something like that. (RP 50, Lines 14-22). Bryant obtained a restraining order against Sandberg for the constant harassment. (RP 51).

III. ARGUMENT

A. Standard of Review. The appellate court is bound by the findings of the trial court even though it may believe the weight of the evidence is in favor of Sandberg and it may not substitute its findings for those of the trial court. The duty of the appellate court is to determine if the trial court's findings are supported by substantial evidence. *Thorndike v Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

B. Substantial Evidence to Support the findings and Conclusions. The reason for 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: (1) unity of title and severance (2) reasonable necessity and (3) 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).

1. *Unity of Title and Severance*

An easement implied from prior use begins with a parcel of property owned by one person or by co-owners and unity of title is an absolute requirement. *Rogers*, supra. Division of ownership is necessary to make the quasi easement a true easement. *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954). The division of the land may be involuntary as in a judicial proceeding or foreclosure. *Puget Sound Mut. Sav. Bank v. Lillions*, 50 Wn.2d 799, 314 P.2d

935 (1957). If the quasi-dominant estate is conveyed first, the quasi easement becomes an easement by an implied grant.

Cullen, supra.

In this case, Appellant owned one parcel of property and subsequently short platted and divided the parcel into two Lots: Lot 1 and Lot 2. (RP 28,29, Ex 1, and Brief of Appellant, p. 1) Plaintiff purchased Lot 1 when the bank foreclosed on Defendant's ownership interest. (RP 28, 29) The first element to establish the easement is satisfied.

2. *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 as the garage car door faces out onto the driveway. (Ex 2,4,5 and 21) The use of Appellant's driveway for access is essential for convenience and comfortable enjoyment of Respondent's property as evidence in the photos. (RP 42, 43) The house and garage were constructed by the Appellant (RP 34) in such a way that ingress and egress are clearly in the easement area on Lot 2. No other conclusion is reasonable. The Appellant testified that the garage and house can be accessed from the back and it is not necessary to use his property. However, construction of a roadway into the back of the garage and house would not be economically feasible. (Ex 7, 8, and 9)

The facts of this case 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. The neighboring estate claimed that the claimant could at reasonable cost build a driveway on her own property. 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.

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. (Ex 7). This substitute, as opposed to an existing driveway to an existing garage door and front, is not remotely feasible or reasonable.

3. *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).

Appellant, by his own testimony, admits the garage and house face the driveway on Lot 2 because that was his intent when he finished the garage. (RP 67, 96) Appellants contention is that if there were two separate owners he would want access to the front of the house and garage separated from his driveway. (RP 96, lines 12-16) He also testified that when he completed the garage on Lot 1, he would use the driveway to access the garage. (RP 72, lines 11-14, 96, 120, 124, 125) In addition to the convoluted testimony of the Appellant, reasonable minds cannot differ that when looking at the nature of the two properties, Lots 1 and 2, and their relation to each other, the access to the Respondent's home and garage are most certainly over and across Appellant's driveway.

While Appellant 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. Appellant himself constructed the home and garage on Lot 1. (RP 55) The garage was constructed with a door for vehicle access facing the existing driveway. (Ex 21) The photographs indicate the "driveway" on Lot 2 as access to the

garage. The only reasonable presumption and intent of Appellant was that the intended use of the garage was for access by vehicle and access was intended by way of the driveway.

Substantial evidence exists in the record to affirm the trial courts findings of fact, conclusions of law and judgment.

IV. CONCLUSION

This Court should affirm the decision of the Trial Court.

RESPECTFULLY SUBMITTED this 18 day of December, 2018.

LARSON FOWLES, PLLC

By


LARRY W. LARSON
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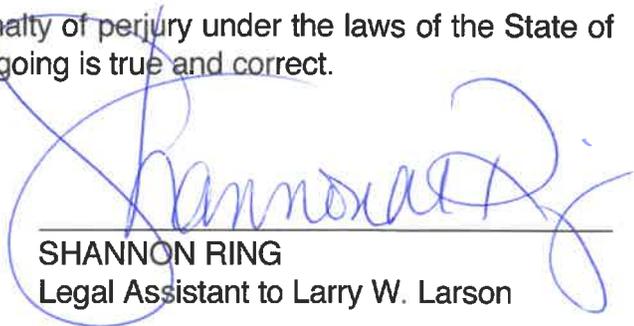
Attorneys for Respondent

CERTIFICATE OF SERVICE BY EMAIL

I hereby certify that two true and correct copies of the above and foregoing Brief of Respondent was forwarded to the Appellant, via U.S. mail, first class mail, postage prepaid, on the 18 day of December, 2018 at the address below.

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

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



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