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No. 37399-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

WENATCHEE RECLAMATION DISTRICT, A RCW 87 IRRIGATION DISTRICT, RESPONDENT

v.

DOUGLAS COUNTY, A RCW 36 WASHINGTON COUNTY, APPELLANT

BRIEF OF APPELLANT

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I. INTRODUCTION

The Douglas County Superior Court ("Superior Court") erred when it granted plaintiff Wenatchee Reclamation District's ("WRD") Motion for Summary Judgment. Appellant filed this timely appeal, alleging three assignments of error. Douglas County ("County") respectfully asks that the Court of Appeals reverse the Superior Court's decision.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred when it granted Summary Judgment because proper notice was provided to WRD.

2. The Superior Court erred when it granted Summary Judgment because material facts exist as to the actual property rights claimed by the WRD.

3. The Superior Court erred when it granted Summary Judgment because it failed to join the underlying land owner, Dr. Frances Collins, as a party.

III. STATEMENT OF THE CASE

This dispute arises from a Complaint filed by the WRD on June 4, 2018, alleging that Douglas County intentionally trespassed on WRD's property when Douglas County demolished a small portion of an old, primitive dirt road in order to build a storm water retention pond which WRD now claims exclusively as an "access road." CP 2.

There is no evidence as to whom or when the actual road in question was constructed. CP 26. WRD claims express easements were granted to it giving it a property right in the road, dating back to 1907 and 1912 via instruments that it interprets to specifically grant easements for ingress and egress. CP 16.

The County obtained a right of way specifically for the use of a public road and highway in 1926 which it later vacated for use as a retention pond in 2016. CP 26.

Prior to the vacation, the County conducted a vacation hearing in compliance with the applicable RCW's. CP 26. Despite this fact, WRD claimed the notice was improper, in that WRD should have been provided direct notice above and beyond the RCW requirement. CP 16.

A Summary Judgment hearing was held on 24 January, 2020, where the Superior Court granted WRD's motion for Summary

Judgment, and further directed Douglas County to restore the access road across property owned by Dr. Frances Collins. CP 32,33.

IV. STANDARD OF REVIEW

A grant of Summary Judgment is reviewed *de novo*. *Washington Imaging Services, LLC v. Washington State Department of Revenue,* 171 Wn.2d 548, 252 P.3d 555 (2011).

V. ARGUMENT

A grant of Summary judgment can be granted only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Malnar v. Carlson*, 128 Wn.2d 521, 534-35, 910 P.2d 455 (1996). "The court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); CR 56.

1. PROPER NOTICE WAS PROVIDED TO WRD BEFORE THE ROAD WAS VACATED.

The County held a vacation hearing for the portion of the access road in question on September 6, 2016. Notice was previously provided per RCW 36.87.050 by both publication and physical posting on the property. WRD did not attend nor provide any comments. CP 15. Thus, even if it had any property rights, it waived any objection to the vacation.

On August 16, 2016, the Douglas County Board of County Commissioners directed the County Engineer to give "due and legal" notice for a hearing for the vacation of unused, deeded right of way for the construction of the storm water retention pond. CP 26 (Exhibit A).

RCW 36.87.050, "Notice of Hearing on Report," states:

> "Notice of hearing upon the report for vacation and abandonment of a county road shall be published at least once a week for two consecutive weeks preceding the date fixed for the hearing, in the county official newspaper and a copy of the notice shall be posted for at least twenty days preceding the date fixed for hearing at each termini of the county road or portion thereof proposed to be vacated or abandoned."

This Notice of Hearing was posted by Douglas County Employee Todd Wilson on the road on August 17, 2016. CP 26 (Exhibit B). (The signs were still in place for most of the following winter. Photographs of the posting were later taken on March 3, 2017, CP 26 (Exhibit C).)

To complete the RCW 36.87.050 requirements, the Notice of Hearing was published in the Wenatchee World in print and online on August 19, 2016 CP 26 (Exhibit D) and the Empire Press on August 18 and 25, 2016. CP 26 (Exhibit E).

During the Summary Judgment hearing, WRD affirmed to the Superior Court that "...we would acknowledge that they did the notice that's required by statute, which is posting the property and publication..." VRT 15:6-8.

The Superior Court, after hearing argument, did not specifically comment on any notice analysis it may have relied upon: instead, it merely stated that [the] "Court finds notice was not provided to the Reclamation District and that portion." VRT 36:18,19. Thus, the Superior Court must have endorsed and adopted WRD's reliance on *Mullane v. Central Hanover Bank and Trust Co.*, 339 US 306 (1950). It is a well-established tenet of *Mullane*, in that sufficiency of publication alone may not be

reasonably calculated to reach those who could easily be informed by other means at hand. *Id.* at 318-319. However, WRD argues that this tenet, as applied here, ignores the property posting and requires mailed notice.

Mullane cannot simply and mechanically require actual notice in all situations. If the County only published the notice of hearing, that may well have required a *Mullane* analysis. But here, County representatives also posted the notices on the access road. While the County believed that WRD had no legal right to the property, it properly posted to alert anyone who may claim an interest. WRD acknowledged that its employees used the road, up to twice a day. CP 16.

WRD believes, and the Court must have adopted, the idea that agents and/or employees must have qualifications of some sort. WRD stated: "You know, the ditch drivers or ditch riders that drive by there have no training as to what legal importance that might be. VRT 18:16-18. This seems to create an exception or conditions for those exposed to a notice posting.

To rely on qualifications of an agent to determine whether a posting of notices applies would create an absurd result effectively nullifying the statute, and requiring fact finding for every contested

matter. Courts must balance the interests of the state with the interests of the individuals. *Tulsa Prof'l Collection Services, Inc., v. Pope,* 485 U.S. 476, 478, (1988). Courts should focus on the reasonableness of the balance, and, as "*Mullane* itself made clear," what is reasonable depends on the particular circumstances. *Id.*

Posting a notice of hearing where employees are known to frequent is a more reasonable, and calculated method to afford due process rights than mailing a notice which is returned unopened, which the Court found acceptable in *In re Marriage of McLean*, 132 Wn.2d. 301, 937 P.2d 602, (1997).

Here, publishing *and* posting, in this context where WRD employees admittedly routinely travelled, are more than reasonable under a *Mullane* and provided more than adequate notice.

2. MATERIAL FACTS EXIST REGARDING THE ACTUAL PROPERTY RIGHTS OF WRD

A material fact is one upon which the outcome of litigation depends. *Balise v. Underwood,* 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Even if basic facts are undisputed, "... if the facts are subject to reasonable conflicting inferences, summary judgement is improper.

Southside Tabernacle v. Pentecostal Church of God, 32 Wn.App. 393, 398, 468 P.2d 452 (1970).

WRD's claim that it was granted an express easement over the access road in 1907 and 1912 is disputed, and is relevant in that the County disputes WRD's assertion that it has a right to vehicular ingress or egress to the extent it states. WRD's claim that it was granted an express easement in 1907 and 1912 is not a fact. The documents relied upon by the WRD merely reference "rights of way" across what is now the Collins property, but the reference, taken in the context of the instruments themselves, refer to the rights of way for the canals and laterals.

The May 6, 1907 Agreement between the Wenatchee Canal Company and George Evans states that "That the said party of the first part [Wenatchee Canal Company], for and in consideration of the party of the second part [George L. Evans] giving and granting unto said first party a right of way across the Southeast quarter of section 35 in Township 23 North, of Range 20 E.W.M., in Douglas County Washington, the receipt of deed to which is hereby acknowledged, agrees to sell ... *a right to the use of water perpetually from the Irrigation System* ..." (*Emphasis added.*) CP 17.

Thus, the 1907 document makes no mention of any access road - "right of way" in this context of the agreement refers to the water canal and laterals. The only specificity mentioned is "... a right to the use of water..." Furthermore, even as pointed out by WRD, the location and "purpose" is not specified. CP 15. If the purpose is not specified, then the "fact" of an express transfer is not a fact and subject to further scrutiny. Finally, this agreement was only recorded as a "Miscellaneous Record" – not in the deed book, which is where easements were filed during that time period. CP 26.

In *Kelley v. Tonda*, a similar dispute, also (coincidentally) based on 1907 documents, was reversed by the Court of Appeals since the actual intent of the parties regarding the conveyance remained in dispute. *Kelley v. Tonda,* 198 Wn.App. 303, 318, 393 P.3d 824 (2017). The *Kelley* court noted that "Contract interpretation is a question of fact when extrinsic evidence is relied upon and more than one reasonable inference can be drawn from that evidence." *Kelley* at 318 quoting *Spectrum Glass Co. Co. v. Pub. Util. Dist. No 1 of Snohomish County,* 129 Wn.2d App. 303, 311, 119 P.3d 854 (2006).

Taken in context, then, this is merely an undefined, unidentified easement in gross across the acreage for the purpose of irrigation.

Similarly, the August 1, 1912 document, which conveyed water rights by the Wenatchee Canal Company to W.R. Prowell, does not expressly grant any easement or property right involving an access road. While the document does state that it grants rights of way to enter construct and maintain lateral canals, the legal description itself is vague and may not even match up with the actual location of the access road claimed by WRD. CP 17. Like the 1907 agreement, his document was also only recorded as a "Miscellaneous Record" – not in the deed book. CP 26.

Douglas County later took interest in the real property containing access roads in 1926, but disputes WRD's claim that it inherited an express easement over the access road. The Superior Court stated that it reviewed the conveying documents, and, while admitting that the documents "don't describe a road in question," they do describe a need for access to maintain, repair construct the canal. VRT 36:9. The Superior Court further states that the "aerial photos here clearly show that there is an access roadway to the - - that leads all the way to the canal as such." VRT 36:11-13.

However, what the Superior Court examined is unclear as to what it saw and interpreted. The Superior Court looked at a 1949 black and white photograph trying to orient and understand the lay of

the land. VRT 20:25. The analysis of the photograph by the Superior Court resulted in the Court stating "The aerial photos here clearly show that there is an access roadway to the - - that leads all the way to the canal as such. VRT 36:11-13. But, as the County pointed out, there is a maintenance AND a connector road. VRT 30:3-8. A connector road is clear on the photograph – what is not clear is that there is also an access road running parallel to the canal. The connector road, which it appears that the Superior Court identifies as it "leads to the canal" is not the road in question – that road is barely discernable on the photograph. The County attempted to clarify to the Court during the hearing but was cut off –

"MR. MITCHELL...this is a connector road that goes from Baker to what is now Devon avenue. The County disputes that was – THE COURT: Well, you know what? When you talk about connector road, nobody has told me this is connector road, but also, this photo you showed me earlier, the road goes up here ...This other road up here, there's even more evidence that this is a road used to access the canal back in '49 ..but the other area photo I saw *also had a road going along the canal too and such..."* VRT 37:15-25: 38:1 (*Emphasis added.*)

The County previously tried to clear up some of the confusion. In its Response to Opposition to Plaintiff's Motion for Summary Judgement, it wrote, and bears repeating here:

> "Moreover, and perhaps most importantly, is that WRD has yet to demonstrate an open and notorious use of the "Access Road" sufficiently for a prescriptive easement. While it is true that the aerial photos form 1949 show a portion of the road they claim as "their" road, this same photo shows what that road actually was – a connector road that connected North Baker Avenue to North Devon Road. *See* Plaintiff Motion for Summary Judgment at 13:8-22, Douglas County Response in Opposition, Decl. of Todd Wilson, 1:8. Even more troubling is WRD's failure to mention that this and subsequent photographs show a canal maintenance road, parallel to the canal, ***that exists to this day and affords vehicle access to the canal.*** *See* Douglas County Response in Opposition, Decl. of Todd Wilson, 1:9." CP 26.

It is unknown if the Superior Court read this passage and applied the information to any photographs. The Superior Court struggled with examining the copies it was provided: For example, "Very often the copies that the Court gets are such that they're black and white and very often it's hard to distinguish...VRT 20:24, 21:2,3. "But then, there's another document that basically this one, again,

black and white and I can't really distinguish some of this..." VRT 21:23-25. "What about this? It appears to be a road." VRT 26:5,6.

Clearly, further discovery and or investigation needs to be made prior to a fair adjudication of this case. Terms are not clear and consistent – access road, maintenance road and connector road have not been clearly delineated.

Thus, disputed issues of material fact remain. Douglas County posits that WRD has no property interest in the access road. WRD claims otherwise. In the interest of fairness, this requires more discovery and fact finding.

3. DR. FRANCES COLLINS IS A NECESSARY PARTY AND MUST BE JOINED.

Dr. Frances Collins, as Trustee of the Frances J.V. Collins and Gabrielle O. Collins, Trust, is the undisputed legal owner of the property between WRD's irrigation canal and North Baker Road. This lawsuit should not have proceeded with joining him. Since WRD claims it has a legal right of access over his property, Collins should have been joined for a just adjudication of WRD's rights and any potential duty or liability owed by the County to WRD. The Court erred by not joining Collins before ordering the County to restore access across Collins' property at Summary Judgment.

An indispensable party is simply a party whose presence and participation is required for a complete determination of the case. *Lindberg v. Kitsap County*, 133 Wn.2d 729, 744-45, 948 P.2d 805 (1997). The doctrine of indispensability is based on equitable considerations. *Id.*

Dr. Collins is an indispensable party to this action as any order, other than a dismissal, entered by the Superior Court may adversely impact his property rights. Thus, he would be "most affected" by any order. He must be a party to any proceeding which may affect his interests. *Andrus v. County of Snohomish*, 8 Wn. App. 502, 507-08, 507 P.2d 898 (1973).

In *Fed. Way. v. King County*, a summary judgment was reversed and remanded for dismissal where, in addition to a timeliness issue, the City of Federal Way failed to join an affected property owner in a vacation action. The Court pointed out, in part, that a party is indispensable when actions *directly affect the use of one's land*. *See Fed. Way v. King County*, 62 Wn.App 530, 539, 540, 815 P.2d 79, (1991). (*Emphasis added.*)

Moreover, CR 19, Joinder of Adjudication for Just Adjudication, provides in part: "A person...shall be joined ... if complete relief cannot be accorded among those already parties, or....the

person....is so situated that the disposition...may impede or impair the person's ability to protect that interest... or subject any existing party to inconsistent or multiple liability." CR 19.

In *Woodfield Neighborhood Homeowner's Assn. v. Graziano*, involving a homeowner's right to build on a lot that he purchased from Pierce County, the County may have had an interest in the use of the tract but was not joined. The Court noted that, while some of the issues involved might have been adjudicated without affecting the County's rights, it was possible that some remained requiring the Court's attention. *Woodfield Neighborhood Homeowner's Assn. v. Graziano*, 154 Wn.App 1, 3, 225 P.3d 246 (2009). Thus, it should have been joined as a party. The Appellate Court noted that under CR 19, a trial court must determine who the necessary parties are: if a necessary party is not joined, the case cannot be adjudicated. Thus, the issue may be raised the first time on appeal. *Id.* at 3, 4. Here, Collins was both indispensable and necessary under the law and must be joined.

The failure to join an indispensable party warrants dismissal. *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County*, 96 Wn.2d 201, 207, 634 P.2d 853 (1981).

VI. CONCLUSION

For the reasons explained above, Douglas County respectfully requests the Court of appeals reverse the Superior Court.

Respectfully submitted this 17 h day of June, 2020

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