

NO: 90025-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Received
Washington State Supreme Court

APR - 3 2014

Ronald R. Carpenter
Clerk

EDWARD M. GOODMAN and)
BERNICE S. GOODMAN, husband)
and wife,)
Respondents,)
Vs.)
MICHAEL J. GOODMAN, et ux., et)
al.,)
Petitioner.)
_____)

RESPONDENTS'
ANSWER TO PETITION
FOR REVIEW

COMES NOW Respondents, by and through their attorney C.

Thomas Moser, in opposition to Petitioner's Petition For Review and now ask this Court to deny the petition.

Petition For Review: Petitioner's seeks review of the Order Denying Motion For Reconsideration, entered by the Court of Appeals on February 18, 2014, only as to the issue of an affidavit of prejudice. The Order followed the Unpublished Opinion of the Court of Appeals entered on January 13, 2014, attached as **Appendix A**.

Issue Presented: The issue presented for review in Part C of the Petition is "*Whether petitioner Michael Goodman/defendants filed a timely affidavit of prejudice and motion?*" That issue was not raised by

ORIGINAL

Petitioner as an “Assignment of Error” in the Brief filed in the Court of Appeals. Attached as **Appendix B** is a copy of page 4 of the Brief filed by Petitioner, which makes no mention of the affidavit of prejudice. Consequently, the unpublished opinion of the Court of Appeals does not address the order denying the affidavit of prejudice. See Appendix A.

First Appeal of Issue: This issue has been before this Court previously, raised by Petitioner in cause number 88811-6, filed by Petitioner by Motion For Discretionary Review, dated May 11, 2013. The issue in that appeal was identified by Petitioner as “*did the Defendants/Petitioner file a timely affidavit of prejudice in Skagit County Superior Court?*” The Petitioner challenged a Court of Appeals order entered April 23, 2013, entitled Order Denying Motion To Reverse And Denying Motion To Stay Trial Court Proceedings, **Appendix C**. After review, the Commissioner of this Court held that “The Court of Appeals did not err or depart from accepted practices by denying the motion to reverse” and denied the motion for discretionary review. That ruling was affirmed by Order entered by Chief Justice Madsen on September 4, 2013, **Appendix D**.

Second Appeal of Issue: Petitioner filed a subsequent appeal with this Court by Motion For Discretionary Review, dated December 2, 2013. The issue raised by Petitioner was “*Whether Michael should be allowed*

leave to amend opening brief to assign error to an affidavit of prejudice?”

That motion was denied by this Court and no new cause number was assigned. The December 5, 2013 letter from this Court stated “Since the rules do not allow for review by the Supreme Court of a ruling by the Court of Appeals clerk, the Petitioner’s motion is rejected.”

Petitioner now returns to this Court for the third time seeking relief concerning the denial of an affidavit of prejudice by the trial court, an issue never raised on appeal or argued in Petitioner’s brief.

Statement of The Case: The brief description of this litigation by the Commissioner of this Court is accurate: “This matter involves a dispute between brothers Edward and Michael Goodman over property located at Lake Campbell in Skagit County.¹” Petitioner’s Statement Of The Case, Part D, of the Petition contains not only inaccurate allegations, there is nothing in record to support the allegations. Petitioner states that he has known the trial judge for over 30 years and was a former neighbor². There is nothing in the record about this allegation. Petitioner states that his son was involved in an altercation with the trial judge’s stepson³ but makes no reference to any part of the record below to support this allegation. Petitioner says Respondent Edward Goodman and the trial

¹ Ruling Denying Review, page 1, June 25, 2013, Cause number 88811-6.

² Petition For Review, page 2

³ Petition For Review, page 2

judge were a co-defendant in a federal law suit⁴, but references documents filed after trial concluded.

Standard Of Review: Petitioner fails to provide authority in support to the Petition, except to say that trial court and Court of Appeals erred. The considerations governing Supreme Court review are outlined in RAP 13.4(b), which is not cited by Petitioner. None of the four considerations are applicable to the Petition. There is no conflict among the Courts of Appeal or with the Supreme Court, no Constitutional issues presented and no issue of substantial public interest. Petitioner does raise Constitutional issues, but fails to apply them to the facts in the present case. This will be discussed more below.

Affidavit Of Prejudice Untimely: The trial court denied the affidavit of prejudice because it was untimely. **Appendix D.** The trial judge determined “that discretionary ruling was previously made by Judge Cook on 4/23/10 after all four defendants were served.” The prior order was a Temporary Restraining Order entered in open court and Petitioner was represented by counsel. Petitioner ignores the trial judge’s determination and simply argues that “Judge Susan Cook had not made any discretionary rulings or orders prior to June 1, 2010.”⁵ The burden was

⁴ Petition For Review, page 3

⁵ Petition For Review, page 3.

on Petitioner in the proceedings below to challenge the trial court's finding that a discretionary ruling was made before the affidavit of prejudice was filed. Petitioner failed to meet that challenge and failed to even assign error to the trial court's order denying the affidavit of prejudice.

Constitutional Issues: For the first time Petitioner raises Constitutional issues in support of the Petition. Without any argument or authority Petitioner states that his rights under the United States and Washington Constitutions have been denied⁶. These are issues not raised in Petitioner's brief filed with the Court of Appeals. See **Appendix B**. These issues were not raised at the trial court. This Court has held that such tactics will not be tolerated. In *State v. Hudson*, 124 Wash. 2d 107, 874 P.2d 160 (1994) the Appellant defendant raised state constitutional issues in a supplemental brief for the first time. In rejecting that issue, this Court stated as follows:

To allow Hudson to engage in a full *Gunwall* analysis so late in the appeal would encourage parties to save their state constitutional claims for the reply brief and would lead to unbalanced and incomplete development of the issues for review. See *Wood v. Postelthwaite*, 82 Wash.2d 387, 389, 510 P.2d 1109 (1973) ("To allow the petitioner to raise issues not addressed in his petition would be an injustice to the party opposing the petition and inconsistent with the rules on appeal."); see also RAP 10.3(c) (reply

⁶ Petition For Review, page 5

brief should be limited to a response to the issues in the brief); RAP 13.7(b) (generally, the Supreme Court will review only the questions raised in the petition for review and the answer). This concern is particularly relevant here as demonstrated by the fact that the State, being unaware of Hudson's state constitutional claim, never engaged in state constitutional analysis in its briefing. We decline to address Hudson's state constitutional claim for these reasons.

State v. Hudson, 124 Wn.2d 107, 120, 874 P.2d 160, 167 (1994)

The Court should reject the untimely and unsupported allegation that Petitioner's constitutional rights were violated by either the trial court or Court of Appeals.

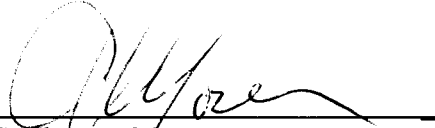
Award of Attorney Fees: Respondents ask this Court to deny the Petition For Review and award reasonable attorney fees for this continuing series of appeals filed by a pro se litigant who is unhappy with the result of a fair trial conducted in Skagit County Superior Court. This request is made pursuant to RAP 18.1(j). It should also be noted that the Court of Appeals has awarded attorney fees to Respondents because it was determined that the Petitioner's appeal was frivolous⁷.

Conclusion: Petitioner has failed to demonstrate how the Court of Appeals committed any error or how this appeal complies with any of the considerations governing acceptance of review by this Court pursuant to

⁷ Unpublished Opinion, page 8

RAP 13.4(b). The Petition should be denied and Respondents awarded attorney fees.

DATED this 2 day of April, 2014.

A handwritten signature in black ink, appearing to read "C. Moser", written over a horizontal line.

C. Thomas Moser
Attorney for Respondents
1204 Cleveland Avenue
Mount Vernon, WA 98273
360-428-7900
WSBA # 7283

APPENDIX

- Appendix A Unpublished Opinion of the Court of Appeals entered on January 13, 2014
- Appendix B copy of page 4 of the Brief filed by Petitioner
- Appendix C Order Denying Motion To Reverse And Denying Motion To Stay Trial Court Proceedings entered April 23, 2013
- Appendix D Order entered by Chief Justice Madsen on September 4, 2013

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

EDWARD M. GOODMAN and
BERNICE S. GOODMAN, husband
and wife,

Respondents,

v.

MICHAEL J. GOODMAN and
MARY F. GOODMAN, husband and
wife,

Appellants.

No. 68416-7-1

UNPUBLISHED OPINION

FILED: January 13, 2014

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JAN 13 AM 10:48

VERELLEN, J. — Michael Goodman appeals the trial court's order quieting title and granting declaratory relief to his brother, Edward Goodman, in this dispute involving easements over Michael's property. Because Michael fails to demonstrate error, we affirm. We also grant Edward's motion for an award of attorney fees.

FACTS

In 1977, Ruth Goodman conveyed a 26-acre parcel of land in unincorporated Skagit County to her son, Edward Goodman. In 1979, Edward and his younger brother Michael Goodman hired a surveyor to prepare a short plat of the parcel, dividing it into four lots. Ruth lived in the family home on Lot 4. Edward sold Lot 1 to pay Ruth's living expenses. Edward and Michael constructed a driveway across Lot 2 to Lot 3. Edward

installed a septic tank and drain field in Lot 2 to serve the house he planned to build on Lot 3. In 1980, Edward conveyed Lot 2 to Michael by quitclaim deed.

Edward and Michael and their families peacefully coexisted on Lots 2 and 3 until March 2010, when a dispute arose regarding Edward's septic system, as well as his use of the driveway. Edward filed a quiet title action and obtained a temporary restraining order preventing any change to the status quo for the septic system or the shared driveway.

After a bench trial and a site visit, the trial court determined that Edward established implied easements for use of the shared driveway and the septic system and drain field on Michael's property, quieted title to the easements in Edward, and enjoined Michael from interfering with Edward's use of the shared driveway easement and the septic system easement.

Michael appeals.¹

¹ Edward has moved to strike illustrations included on pages 6 and 12 of Michael's opening brief, but not labeled with citations to the record. In his reply brief, Michael cites Clerk's Papers 248-78 for the diagram on page 6 and Clerk's Papers 50-85 for the diagram on page 12. No diagram identical to that included on page 6 of the brief appears in the identified pages, but that printed on page 12 appears at Clerk's Papers 80 as Exhibit I to Michael's posttrial motion for reconsideration. Even accepting these diagrams as having been considered by the trial court, they do not change the outcome of the appeal.

ANALYSIS²

Following a bench trial, we review factual findings for substantial evidence and legal conclusions de novo, determining whether the findings support the conclusions.³ Substantial evidence is that sufficient to persuade a fair-minded person of the finding's truth.⁴ If the standard is satisfied, we will not substitute our judgment for that of the trial court even if we would have resolved a factual dispute differently.⁵ We defer to the trial court's assessment of witness credibility and persuasiveness of the evidence, as well as its resolution of conflicting testimony.⁶ Unchallenged findings of fact are verities on appeal.⁷

Michael assigns error to only one of the trial court's 89 numbered findings of fact. He claims the trial court abused its discretion in finding 36, in that "[t]he 1979 road build date is false."⁸ Finding 36 provides:

² Along with his opening brief, Michael filed a "Motion in Brief" citing RAP 17.4(d) and requesting "equitable relief for fraud." Motion in Brief at 1, 5. In his motion, Michael quotes trial testimony regarding Exhibit 18 and claims that Edward violated various statutes and acted in bad faith by creating and recording Exhibit 18, a purported express easement as to the shared driveway. But Michael never requested relief in the trial court based on Exhibit 18, and the trial court dismissed any claim of an express easement before Michael presented his defense at trial. The motion is denied. We also deny all other pending motions Michael has filed presenting any challenges to the trial court's decision outside of the briefs.

³ Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

⁴ City of Tacoma v. William Rogers Co. Inc., 148 Wn.2d 169, 191, 60 P.3d 79 (2002).

⁵ Sunnyside Valley, 149 Wn.2d at 879-80.

⁶ Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 861, 292 P.3d 779 (2013).

⁷ Keever & Assoc., Inc. v. Randall, 129 Wn. App. 733, 741, 112, 119 P.3d 926 (2005).

⁸ Appellant's Br. at 4.

The road built in 1979 included Goodman Lane, the paved driveway up to Lot 3, the driveway south downhill on Lot 2 to the beach area (portions of which were paved) and the access to Lot 3 along the edge of Lake Campbell. The construction of the road was completed before the short plat was approved by the County.^{9]}

Michael asserts that Edward's evidence regarding the date the road was built was "incompetent," while Michael admitted an aerial photograph and claims that it shows that no road existed before 1980.¹⁰

At trial, Michael testified that the road was completed in 1986, and offered an aerial photograph, Exhibit 32, which he claimed did not show the road as of 1980. But Edward testified that he and Michael shared the expense of hiring a construction company to complete work on the road in 1979, and offered family pictures taken during the project, as well as various written records. Edward also testified that the road was visible on Exhibit 32, and identified its location in relation to a dock and a trailer as they existed on the property in 1979. Because we defer to the trial court's assessment of credibility and resolution of this conflicting testimony, Michael's challenge to finding 36 fails.

Michael also challenges the trial court's conclusions regarding the existence of the implied easements. An easement may be implied from prior use based on the following three elements: "(1) unity of title and subsequent separation by grant of the dominant estate; (2) apparent and continuous user; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate."¹¹ But unity of

⁹ Clerk's Papers at 512.

¹⁰ Appellant's Br. at 5.

¹¹ MacMeekin v. Low Income Hous. Inst., Inc., 111 Wn. App. 188, 195, 45 P.3d 570 (2002).

title and subsequent separation is the only absolute requirement.¹² The other two elements are merely “aids to the construction in determining the cardinal consideration—the presumed intention of the parties as disclosed by the extent and character of the use, the nature of the property, and the relation of the separated parts to each other.”¹³

Michael challenges conclusion 1, which states, “Prior to 1980, Lots 2 and 3 were owned by Edward and Bernice Goodman and thus there was unity of title.”¹⁴ He also challenges the reference in conclusion 6 to Goodman Lane.¹⁵ Referring to Exhibit 27, Michael claims that Edward “did not own or convey Lot 1 or Lot 3 of Short Plat 61-89.”¹⁶ But Exhibit 27, depicting Short Plat 61-89, is the subdivision into four lots of the original Lot 1 Edward sold to provide for Ruth’s expenses.¹⁷ Michael does not dispute the trial court’s findings that Edward owned the two lots at issue in the litigation, Lot 2, which Edward conveyed to Michael in 1980, and Lot 3, which Edward retained, of Short Plat 55-80.¹⁸ And Michael does not challenge the trial court’s finding describing Edward’s

¹² Roberts v. Smith, 41 Wn. App. 861, 865, 707 P.2d 143 (1985).

¹³ Adams v. Cullen, 44 Wn.2d 502, 505-06, 268 P.2d 451 (1954).

¹⁴ Clerk’s Papers at 518.

¹⁵ Conclusion 6 provides, “An easement implied from prior use has been established by the Plaintiffs as to the roadway constructed in 1979, including Goodman Lane and the roadway down to and across the lake front of Lot 2, and as to the septic system installed as described on page 5 of Exhibit 20.” Clerk’s Papers at 519.

¹⁶ Appellant’s Br. at 6.

¹⁷ Finding of Fact 17 states, “Lot 1, which bordered Campbell Lake Road, was sold to provide income to Ruth Goodman. It was later subdivided into 4 lots (Exhibit #27).” Clerk’s Papers at 510.

¹⁸ Michael does not challenge Finding of Fact 41, which states in pertinent part, “Ed and Bernice Goodman conveyed Lot 2 of Short Plat 55-80 to Mike and Mary Goodman on September 8, 1980 by quit claim deed.” Clerk’s Papers at 512.

easement over the original Lot 1 as to Goodman Lane. "On plat map 55-80 is a 60-foot wide right-of-way access from Campbell Lake Road along the west side of Lot 1, which is now Goodman Lane and part of the shared driveway."¹⁹ Conclusions 1 and 6 are properly supported by these unchallenged findings.

Next, Michael contends that the trial court erred by concluding that Edward's use of the disputed roadway and septic system was continuous before 1980 because he did not build his home or reside on Lot 3 until 1991. But in unchallenged findings, the trial court found that Edward put a travel trailer on Lot 3 before conveying Lot 2 to Michael in 1980, and continuously maintained and used the shared roadway to access the trailer and the beachfront to work on the property and for recreation.²⁰ As to the septic system, Michael has not challenged the trial court's findings that Michael knew about the septic system when Edward installed it in 1979, and that Edward connected the septic system to his trailer in 1982 and his house in 1991, and used it continuously until it was destroyed in 2010.²¹ These findings support the trial court's conclusion regarding continuous use.

Michael also challenges the trial court's conclusion regarding reasonable necessity, arguing that Edward failed to present evidence of relative costs of substitutes. *Absolute necessity is not required to establish an implied easement.*²² "The test of necessity is whether the party claiming the right can, at reasonable cost, on

¹⁹ Finding of Fact 23; Clerk's Papers at 510.

²⁰ Findings of Fact 37 and 64; Clerk's Papers at 512, 515.

²¹ Findings of Fact 73 and 80; Clerk's Papers at 516-17.

²² Evich v. Kovacevich, 33 Wn.2d 151, 157-58, 204 P.2d 839 (1949).

his own estate, and without trespassing on his neighbors, create a substitute.”²³

Although Edward did not submit cost estimates and the trial court did not make findings regarding costs of substitutes, Michael does not challenge the following findings: (1) the topography of Lot 3, including the hill and a bog prevents vehicle access from Lot 4;²⁴ (2) “There is no other practical or feasible access for vehicles or pedestrians to Lot 3 from a public road other than the shared driveway;”²⁵ (3) Lot 3 contains a single natural building site on top of a rock;²⁶ (4) Edward installed his septic system on Lot 2 because “Lot 3 did not perc”;²⁷ and (5) although Edward has installed an alternative system on Lot 3, he is “required by the County” to maintain the Lot 2 location “as a reserve drain field.”²⁸ These findings support the trial court’s conclusion that Edward’s uses of Lot 2 are reasonably necessary. In sum, Michael fails to demonstrate error in the trial court’s determination regarding the existence of implied easements serving Lot 3 for use of the driveway and septic system on Lot 2.²⁹

²³ Bays v. Haven, 55 Wn. App. 324, 329, 777 P.2d 562 (1989).

²⁴ Findings of Fact 48-51; Clerk’s Papers at 513.

²⁵ Finding of Fact 52; Clerk’s Papers at 514.

²⁶ Findings of Fact 53 and 70; Clerk’s Papers at 514-15.

²⁷ Finding of Fact 70; Clerk’s Papers at 515.

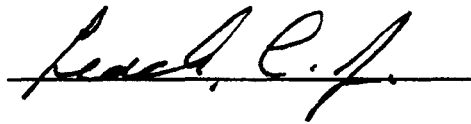
²⁸ Finding of Fact 83; Clerk’s Papers at 517.

²⁹ Without relevant authority or compelling argument, Michael claims that the Shoreline Management Act precludes the trial court from finding an implied easement in this case. In the absence of meaningful authority, Michael does not establish grounds for any relief based on the Shoreline Management Act. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court need not address arguments unsupported by relevant authority).

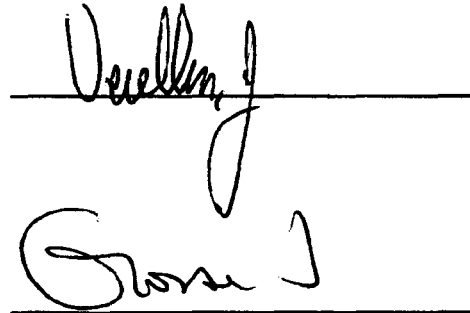
Edward requests an award of attorney fees and expenses for a frivolous appeal.³⁰ An appeal is frivolous “if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal.”³¹ Given Michael's failure to challenge all but one of the trial court's careful and comprehensive findings of fact and the lack of relevant authority or coherent argument to support his claims regarding the trial court's conclusions, that standard is satisfied here.

Affirmed. Edward is awarded attorney fees subject to compliance with RAP 18.1(d).

WE CONCUR:



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Two handwritten signatures in cursive script, one above the other, both written over horizontal lines. The top signature appears to read "Veillon J." and the bottom signature appears to read "Stone J."

³⁰ RAP 18.9(a).

³¹ In re Marriage of Foley, 84 Wn. App. 839, 847, 930 P.2d 929 (1997).

II. ASSIGNMENT OF ERRORS

1. The trial court erred in law concluding unity of title and subsequent separation over Goodman Lane, Lot 1 and Lot 3 of short plat 61-89 Ex 27. Conclusion of Law #6 and #1.
2. The trial court erred in law concluding the usage was apparent and omitting the continuous usage. Conclusion of Law #4.
3. The trial court erred in law concluding the usage was reasonably necessary. Conclusion of Law #5.
 - A. A higher degree of necessity is required for an implied reservation and the cardinal consideration is intent of the parties.
 - B. The trial court failed to compare the injury of the parties.
 - C. The trial court failed to apply the test of necessity.
 - D. Violates the Shoreline Management Act.
4. The 1979 road build date is false, the trial court abused its discretion in findings of fact #36. It errors in law and fact.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

EDWARD M. GOODMAN and
BERNICE S. GOODMAN, husband
and wife,

Respondents,

v.

MICHAEL J. GOODMAN and MARY F.
GOODMAN, husband and wife,

Appellants.

No. 68416-7-I

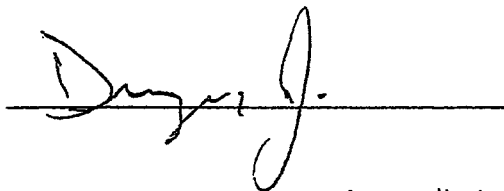
ORDER DENYING MOTION
TO REVERSE AND DENYING
MOTION TO STAY TRIAL
COURT PROCEEDINGS

Appellants Michael and Mary Goodman have filed a "Motion to Reverse Trial Court" and an "Emergency Motion for Stay of Trial Court Proceedings". We have considered the motions and have determined that both motions should be denied.

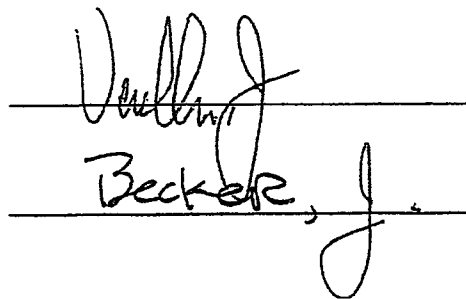
Now therefore it is hereby

ORDERED that appellants' motion to reverse and emergency motion for a stay of trial court proceedings are both denied.

Done this 23rd day of April, 2013.



Appendix 1



FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 APR 23 PM 3:20

FILED
IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON, WA
FOR SKAGIT COUNTY
2010 JUN -3 AM 9:44

Edward Goodman
Bernice Goodman

NO. 10-2-587-3

() Clerk's Action Required

vs.

ORDER ON:

Michael Goodman
Mary Goodman

Civil Criminal
 Domestic Other

~~Chane Goodman Tyson Goodman~~

THIS MATTER having come on regularly and the Court having heard the motion(s) re
affidavit of prejudice filed by Tyson Goodman

THIS COURT FINDS that discretionary ruling previously
made by Judge Cook on 4/23/10 after
all four defendants were served

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that affidavit of
prejudice is not timely and is
denied.

DATED: 6/3/10

Susan K Cook
JUDGE/Commissioner

Presented by:

Approved:

Attorney for

Attorney for

cc: