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No. 71098-2-1

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

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ERIC DIETZE and VICTORIA SEEWALDT,

Plaintiff/Appellants,  
vs.

JAMES V. KELLY et al.,

Defendants/Respondents.

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APPELLANTS ERIC DIETZE AND VICTORIA SEEWALDT'S  
REPLY BRIEF

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I  
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## I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

### 1. **The trial Court erred and violated the Appellant's due process rights when it summarily dismissed with prejudice the Appellant's case.**

The Appellant's lawsuit seeks a remedy which will allow them access to their property located on Vashon Island. As such, the subject matter of the case is subject to due process protections as a matter of law under article I, section 3 of the Washington State Constitution and Fifth and Fourteenth Amendments to the United States Constitution. Also see *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 174 (2005). In the context of a judicial proceeding, where a denial of due process is alleged, a reviewing court must consider

The precise nature of the interest that has been adversely affected, the manner in which this was done, the reason for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, [and] the balance of hurt complained of and good accomplished.

*Olympic Forest Prods., Inc. v. Chausse Corp.*, 82 Wn.2d 418, 423-24, 511 P.2d 1002 (1973) (quoting *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123,163, 71 S. Ct. 624, 95 L. Ed. 817 (1951)).

The Trial Court refused to either employ or even consider alternatives to dismissal of the Appellant's case after dismissing various defendant lenders, without objection from the Respondents. Had the Trial Court believed that the defendant lenders were in fact indispensable parties, even though they had no interest in being involved in the case, it was an abuse of discretion for the Trial Court to enter Orders allowing for their dismissal from the case, and then using that as a basis to dismiss the case with prejudice.

[D]ue Process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). The Appellants were denied an opportunity to be heard and to have a trial on the merits. There is absolutely no facts or circumstances raised in this case which requires such an unfair outcome.

**2. Was there an available alternative for the trial Court's granting of the Respondent's motion for summary judgment, filed after the deadline for dispositive motions, without scheduling and granting an oral argument or notifying the Appellant that the Court would rule on the motion which was not even rescheduled and in contradiction of the Trial Court's own Order?**

In order for the Appellants to effectuate service of the Summons and Complaint on defendant Mortgage Electronic Registration Systems, Inc. as nominee for Countrywide Bank, JP Morgan Chase and Boeing Employee Credit Union had to employ process servers in different states to accomplish the task. Although Appellants provided a deadline for service of said defendants of June 15<sup>th</sup> 2013, the process servers, which the Appellants and their counsel had not worked with previously, did not serve all of the defendants by June 15<sup>th</sup> 2013. In fact, service upon all of the referenced defendants was accomplished a few days later on June 21, 2013.

As of June 21, 2013, the case had been active for approximately 806 days. There is no credible argument that a slight delay in effectuating service of the summons and complaint upon the above referenced defendants was somehow prejudicial to the case or purposeful. The Trial Court failed to employ a variety of available alternatives to dismissing the case which would have allowed the Appellants their day in court.

Dismissing the Appellant's case with prejudice was a total and complete violation of their due process rights. There is no countervailing state interest in summarily dismissing a case involving critical property and access rights to a party's real property.

**3. Lenders named as parties are not Indispensable Parties**

In their previous legal actions, the Respondents failed to join both their own lenders or lenders having a security interest in property in which they sought to acquire certain easement rights. The Appellants have always maintained, and continue to maintain that the lenders are not indispensable parties in this proceeding. The Respondents never objected to the dismissal of the defendant lenders, nor did the Trial Court find that the defendant lenders were indispensable parties prior to or upon granting their motions to be dismissed from the case.

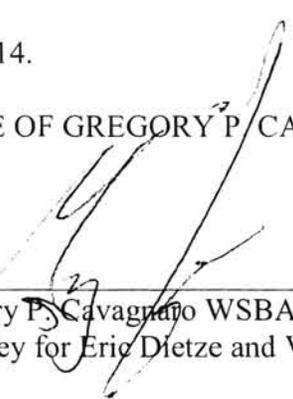
The defendant lenders own actions of seeking to withdraw from the case clearly and unequivocally indicates that they were not concerned about whether an easement or other property rights were acquired by the Appellants in this case. Because the defendant lenders opted out of the lawsuit, to take the position that they had to participate in the case and sit at the defense table during trial has no merit and is simply an argument advanced to gain a tactical advantage in the lawsuit. Based on their actions and the circumstances of this case, the defendant lenders are not indispensable parties in this case.

**II. CONCLUSION**

Based on the foregoing, Appellant's respectfully requests this Court to reverse the Superior Court's decision and resulting October 3, 2013 Order granting Summary Judgment and remand this matter to the Superior Court for trial on all issues without the necessity to join additional parties.

DATED this 10<sup>th</sup> day of October, 2014.

LAW OFFICE OF GREGORY P CAVAGNARO

By:   
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Gregory P. Cavagnaro WSBA# 17644  
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CERTIFICATE OF SERVICE

~~October~~ <sup>10<sup>th</sup></sup> The undersigned hereby certifies that on the ~~15<sup>th</sup>~~ day of ~~January~~, 2014, I served the foregoing pleading on: *Appellants Reply Brief*

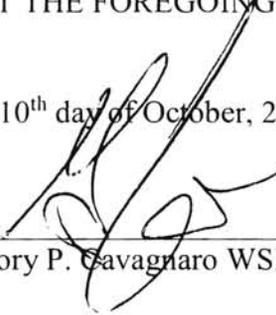
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I DECLARE UNDER PENALTY OF PERJURY AND THE LAWS OF WASHINGTON STATE THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED at Bellevue, WA this 10<sup>th</sup> day of October, 2014.

  
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