

FILED
Sep 23, 2016
Court of Appeals
Division I
State of Washington

Court of Appeals No. 74328-7-I

BEFORE THE WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

GREGG and KELLY SMITH
Respondents/Cross-Appellants/Plaintiffs

vs.

LARRY L. PETERSON and SUSAN PETERSON
Appellants/Cross-Respondents/Defendants

On Appeal from the King County Superior Court
KCSC Case No. 08-2-22750-2SEA

RESPONDENTS' BRIEF

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I. ASSIGNMENT OF ERROR

After presiding over this case for nearly 6 years, retired Judge Carol Schapira issued a final ruling on October 26, 2015, unequivocally enforcing her prior judgment and the prior affirmation and findings of the Court of Appeals, and ordered Larry and Susan Peterson (“the Petersons”) “to either (i) remove, (ii) modify and/or (iii) relocate their metal covering or canopy on the northern covered moorage on or before June 1, 2016, so as to no longer rest on the Smith pilings and to no longer encroach, or overhang upon the Smith’s property.”¹ Following Judge Schapira’s retirement, the Petersons made a motion for reconsideration on November 5, 2015. Judge Jeffrey Ramsdell, who took over the case after Judge Schapira’s retirement, denied the motion the same day it was filed.² The Petersons then appealed those orders.

The Smiths request, in conjunction with their concurrently filed motion on the merits, that this Court dismiss the appeal, and award the Smiths attorney’s fees under RAP 18.9 and 18.1.

1 CP 396-7

2 CP 431; On June 8, 2016, seven days after they were supposed to comply with Judge Schapira’s order, the Petersons made a motion requesting another 6 months of delay. Judge Ramsdell denied that request, and ordered that the October 26, 2015 order would be complied with (see Respondents’ Motion on the Merits)

II. STATEMENT OF THE CASE

1. INTRODUCTION

The Smiths are adjoining landowners, and neighbors, of the Petersons. Judge Schapira presided over a trial in January of 2010, and adjudicated that an existing covered moorage which adjoins the Smiths' property was owned by the Petersons alone, and entered findings related to the common boundary between the two properties. The resulting boundary had the property line cutting through a portion of the "northern slip" of the covered moorage, and cutting through the "metal cover" or canopy that rested on three (3) pilings. Portions of the Northern slip, as well as the three (3) pilings were found to be on the Smiths' property. The court rejected the Petersons' argument that they either adversely possessed the Smith's shoreline property, or that the Petersons had an exclusive easement that included the northern slip and the Smith pilings.

On October 14, 2010, Judge Schapira entered a Judgment and Findings of Fact and Conclusions of Law in this matter.³ The court's decision was later affirmed on appeal.⁴ The court made the following finding and ruling:

For over 50 years, a portion of the north canopy on the dock in the vicinity of but

3 CP 70-87

4 CP 88-95; *Smith v. Peterson*, 166 Wash.App. 1023 (2012), petition for review denied

mostly southerly of the common subdivision line between the Peterson and Smith parcels, together with three supporting pilings, has been located on the north or Smith side of the shorelands of the legal subdivision line as shown on the PLS survey. ("Smith pilings") ***The canopy is attached to the pilings but is not a fixture.*** It is a metal cover on top of wood ***that can be moved, removed or modified.*** It would be wasteful to remove it, but it does not affect the ownership of the shorelands below or the Smith pilings.

The Smiths own the Smith pilings which are in their shorelands as shown on the survey adopted by the Court.⁵ (Emphasis added)

Judge Schapira ruled that ***at the time*** (October of 2010) she would not order the Petersons to remove the canopy because it was a waste. But she warned that the Petersons would have to find a way in the coming months and years to solve the problem of the encroachment ***without*** the Smiths' cooperation. During one of the hearings, the court referred to the dispute over the metal cover (or canopy) as the "tail wagging the dog." This was an apt observation.

Going back as far as a September 3, 2008, the Petersons and their counsel admitted that the pilings owned by the Smiths, and that are on the Smith's land, are "totally rotten and need immediate replacement." The Petersons former counsel, Charles "Ted" Watts claimed in a letter that, "the work needs to be done before the severe winter weather sets in. This dock is extremely fragile in its current condition..." Mr. Watts noted that if the northern (Smith) pilings collapse, "it collapses the whole structure."⁶

5 CP 70-87 (Finding of Fact ¶¶ 13 and 15 (Exhibit 1); Judgment ¶7 (Exhibit 2)).

6 CP 46 (Exhibit 3 to the Declaration of Gregg Smith)

Clearly, the condition certainly hasn't gotten better over the last 7 years.⁷

Mr. Watts repeatedly made a point of arguing the dire condition of the pilings to the court as "justification" for his position that Judge Schapira must order that the Petersons have an easement, or adverse possession, of the Smith pilings. Ultimately, the court stated:

THE COURT: *The Petersons own a canopy that could be taken away, torn down, replaced, all kinds of things. It is the most ephemeral of all of the structures that we're looking at.* The case doesn't -- again, **that is the tail wagging the dog.** I am happy that they have a canopy. If they had a canopy to cover one slip but not the -- you know, one of the slips that connect with the dock, you know, if they had --you know, there's a lot of other solutions. So again, if I'm supposed to be sympathetic, I'm sorry that people are arguing. But what I do is not going to make them stop arguing. It's just going to change the -- the argument. *I suppose I could rule that because of my ruling on the pilings, the canopy has to be removed from everything beyond the property line. I don't think that makes sense. That seems wasteful, destructive, and doesn't assist anybody. But that is a different ruling that I could make, right?*

MR. WATTS: As far as I'm concerned, you have pretty broad powers to make rulings here, that's right, yeah.

THE COURT: No. And I don't think that would be inequitable, but it would be wasteful, which is one of the things the Court gets to consider. (Emphasis added).⁸

2. THE OCTOBER 26, 2015 HEARING

For the next five (5) years the Smiths did not interfere with the Peterson's dock or the metal covering resting on the Smith pilings—to the

⁷ In 2008, the Petersons actually sought approval from the City of Bellevue to obtain a permit to replace the pilings because of their rotten state. CP 70 (Exhibit 6 to the Declaration of Brian H. Krikorian)

⁸ CP 70-215 (Exhibit 5 at 53, line 14 to 54, line 11).

contrary the Smiths intentionally did not use or access *their* own property and *their own* pilings so as to minimize and avoid confrontation with the Petersons. Meanwhile, the Petersons did nothing to solve this problem. As the condition of the pilings worsened, and the Smiths desired to use their own property, the Smiths filed a motion in July of 2015 requesting Judge Schapira enforce her judgment and order, permitting the Smiths access to cut down or modify the piling as they pleased, and order the Petersons to cease having their “canopy” encroaching on the Smiths’ property.

Judge Schapira’s oral ruling, set out verbatim below, provides a clear history of the problem, Judge Schapira’s reasoning, and *exactly* what Judge Schapira intended—an “end” to this dispute:

THE COURT: Okay. Thank you. So, of course, I guess the good news is you're here, because if you'd come in a month, I wouldn't be here. So I'm sorry you're here in the sense that -- not that I mind anybody appealing the case. Land use cases are notoriously difficult. *The parties couldn't agree on the time of day when we were in trial.* I had numerous hearings afterwards hoping that, you know, at some point, cooler heads would prevail or that, you know, someone would find creativity to be more interesting than conflict. Well, that still hasn't happened.

The Court is going to order that the Petersons move the canopy no later than June 1 of 2016. I'm not asking you to do it in horrible weather. If that never precludes -- and, again, I probably said this in May and at every other hearing, the parties are always free to agree to something sensible. We don't count on the judge to know everything, have the only solution. There were many ways to -- pardon me -- slice the Subway sandwich. Not happening.

The canopy is not a permanent structure. I don't know that this canopy will survive a move. I don't know of the engineering. The Petersons were always free to build a piling or a cantilever, something to hold it up.

*So that is my order. If the parties decide that something else suits them, for either economic, aesthetic, or practical reasons, that's fine. At a certain point, this isn't overhang. It's hung over for five years, **and the Smiths are entitled to quiet enjoyment.***

So that's -- I'm not saying do it tomorrow. I've given everybody a lot of time to come up with either engineering or solution that will work.

MR. SPENCER: Question, Your Honor.

THE COURT: Yeah.

MR. SPENCER: Are you suggesting they have to move it? Or that they can support it with the cantilever structure as they have proposed without going onto the Smiths' property? Because, again, the Court of Appeals' decision made it clear they have two options. And the second of which was that they had the ability, if they could fix it --

THE COURT: Well, my recollection is that it -- wasn't it resting on the pilings that we're talking about?

MR. SPENCER: Yes.

THE COURT: Okay. So they are no longer going to rest on those. So it's going to be moved in some direction. They're not going to overhang the Smiths' property. Because, of course, that means that the Smiths can't do X or Y with their own pilings. So it's -- "moved" is unambiguous. I --

MR. SPENCER: But that --

THE COURT: -- don't care how they do it, and I don't care if they decide to just take it down. But it's not going to rest on the Smiths' property. It's not going to overhang the Smiths' property anymore.

MR. SPENCER: And despite the Court of Appeals indicating that

that is an option under Footnote 10, Your Honor?

THE COURT: Everything is an option. People talking to each other is the best option. Unfortunately, that's not what's happened here. I mean, it was never impossible to solve this. That doesn't mean the parties were able to. ***I'm not ordering them to keep trying and trying and trying. It doesn't seem to work. The canopy shall be moved so it doesn't overhang the Smiths' property. If there are new pilings needed, that's for another day. It doesn't appear that I have to make any decision about that. That's not the reason I'm suggesting it be moved.***

The Smiths, just like the Petersons, are entitled to the quiet enjoyment of their property. And, again, this isn't something that has led to horse trading, just the opposite. They continue to bring the matter to court. The Court is resolving it.

I am a middle child. I like it when people get along. That just didn't happen today, my luck on this case. And the parties' luck either. But that's not unusual in these land use cases. Sometimes there's a very practical easy solution, but so far, that hasn't happened.

That doesn't mean -- and ***I've given you plenty of time, only more because of the weather than anything else. It's not like I think the next 7 to 9 months are going to be a productive time for discussion.*** But I also don't want people doing this in inclement weather because perhaps it will involve new pilings or some other things.

And, again, I'm not saying nobody goes boating in February, but we're going to assume that by next summer, this matter will be resolved. End.⁹ (Emphasis added)

Despite the clarity of Judge Schapira's reasoning, the Petersons then brought a motion for reconsideration. The same day it was filed, Judge Jeffrey Ramsdell denied the motion, citing to his review of the pleadings and "particularly" footnote 10 of the Court of Appeals

⁹ RT, page 15, line 14 to page 18, line 24.

Decision.¹⁰ The Petersons then appealed the order. As of the filing of this brief, the Petersons have failed to act, resulting in a pending motion for contempt before the lower court.¹¹

III. ARGUMENT

1. THE LOWER COURT HAD INHERENT AUTHORITY TO ENFORCE ITS OWN JUDGMENT AND/OR ORDERS

A court has the inherent power to issue a contempt, or other order, for the purpose of trying to force compliance with its judgment. *Allen v. American Land Research*, 95 Wash.2d 841 (1981), citing to *Keller v. Keller*, 52 Wash.2d 84, 323 P.2d 231 (1958).

In making its findings and entering judgment, Judge Schapira (as well as the Court of Appeals in affirming the judgment) were clear that the Petersons have no legal right to the land under the pilings or the pilings, and that their canopy resting on the pilings is being allowed solely for the Petersons' convenience—not as a right. After rejecting the Petersons and their counsel's repeated argument that the court must find in the Petersons favor on their theories of adverse possession or a prescriptive easement over the Smiths' land, Judge Schapira made it very clear that the canopy was the most "ephemeral" of structures she was dealing with, and that she

10 CP 431

11 See Motion on the Merits filed concurrently with the Respondents' Brief

believed she had the equitable power to remove the canopy—but did not do so, solely due to the fact she believed it would be wasteful.¹²

The Petersons’ refusal to address this issue and work something out with the Smiths over the a 5 to 6 year period was simply unreasonable—but not surprising based upon the history between the parties. As Judge Schapira’s own reasoning showed, she did not abuse her authority or discretion in enforcing her own order and requiring the Petersons to remove the encroaching canopy. Judge Schapira gave the Petersons nearly 8 months to accomplish this, and they are still in violation of the Order.

2. THE APPELLATE COURT HAS ALREADY RULED ON THIS ISSUE AND ITS FINDINGS ARE THE LAW OF THE CASE

In rejecting the Petersons prior appeal that they be granted either adverse possession or an exclusive easement over the northern slip and the Smith pilings, this division of the Court of Appeals stated as follows:

A large portion of the Petersons' briefing is devoted to their assertion that the trial court's ruling failed to identify the legal relationship between themselves and the Smiths with respect to the canopy. However, the trial court's ruling was quite clear. The court determined that the Petersons had acquired an easement to use all portions of the moorage slip to the south of the northern pilings on the Smith property. The court further explained that the canopy covering the slip belonged to the Petersons and that its removal

¹² Waste is defined as: “an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession which results in its substantial injury. It is the violation of an obligation to treat the premises in such manner that no harm be done to them and that the estate may revert to those having an underlying interest undeteriorated by any willful or negligent act.” See *Kane v. Timm*, 11 Wash.App. 910, 911 (1974)

would be wasteful and destructive. Accordingly, the court made clear that the Smiths would not be permitted to remove the supporting pilings as such an action might “damage the canopy.” Nevertheless, the trial court explained that the pilings could not be replaced or repaired absent “cooperation” by the Smiths. Instead, ***in the absence of such an agreement, the Petersons must devise a different solution to support the canopy at such time as the pilings required replacement. There is nothing unclear about the legal relationship that the trial court imposed on the parties.*** (Emphasis added). See *Smith v. Peterson*, 166 Wash.App. 1023, fn. 10 (2012)

In affirming the lower court’s judgment, this division made it very clear that the pilings were owned by the Smiths, the land under the pilings was owned by the Smiths, and that any efforts by the Petersons to alter or deal with the pilings was subject to the Smith’s permission and agreement. Both Judge Schapira and the Court of Appeals found that the Petersons have no “right” to rest their canopy on the pilings, and that it is being allowed to remain solely for their convenience only, and they—not the Smiths—must devise a potential resolution to this problem.¹³

Judge Schapira was in the best position to interpret her *own* findings of facts, as well as this Division’s affirmation of her judgment. The Petersons appeal is clearly frivolous, is devoid of any merit, and

¹³ In footnotes 9 and 10 of the decision, the Court of Appeals confirmed Judge Schapira’s reasoning and unequivocally found that when the time came, the Petersons were required to remove the canopy and stop the encroachment. The Petersons repeated misreading of this reasoning has been rejected by both Judge Schapira and by Judge Ramsdell (see Exhibit 2 to the Krikorian Declaration)

should be dismissed as the previous decision of this court is the law of the case. See RAP 12.7(a)¹⁴

3. THIS APPEAL IS FRIVOLOUS AND INTENDED SOLELY FOR DELAY

RAP 18.9(a) provides that

(t)he appellate court on its own initiative . . . may order a party or counsel who uses these rules for the purpose of delay . . . to pay terms or compensatory damages to any other party who has been harmed by the delay . . .

In determining whether an appeal is brought for delay under this rule the Court looks to whether, when considering the record as a whole, the appeal is frivolous, i. e., whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal.

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages. In adjudicating this issue the court is “guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no

¹⁴ RAP 2.5(c)(2) permits an alteration of the Court of Appeals prior decision only if “the same case is again before the appellate court following a remand. . . .” That is not the case here, and in fact, the Supreme Court denied Respondents’ Petition for Review and this Court issued its mandate.

debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. See *Streater v. White*, 26 Wash.App. 430, 435 (1980).

Judge Schapira's ruling and reasoning were (and are) quite clear. She unequivocally called for an end of the delays, especially by the Petersons. The parties and the attorneys were all present during the hearing. The Petersons and their counsel knew, for a fact, this was to come to an end as of June 1, 2016. Based upon the conduct of the Petersons, the Smiths have now had to expend additional fees and costs to oppose this appeal, on an issue that has no debatable issues and no merit. Reasonable minds could not differ. Nearly 11 months have passed, and as of the filing of this brief, the Petersons are still in contempt of the various orders of the court. Under RAP 18.9 and 18.1, the Petersons should be ordered to pay the Smiths their reasonable attorneys' fees in opposing this appeal.

IV. CONCLUSION

Based upon all of the foregoing, the Smiths respectfully request that the appeal be dismissed, the order of Judge Schapira be affirmed, and that the Court award the Smiths their attorney's fees and costs.

Dated: September 23, 2016

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On September 23, 2016, I caused to be served a copy of the document described as Respondents' Brief on :

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

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