

NO. 35171-4-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

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COURT OF APPEALS
DIVISION II

JOHN BICHLER and MARIANNE SOUTHWORTH,

Appellants

vs.

**COWLITZ COUNTY and RYDERWOOD IMPROVEMENT AND
SERVICES ASSOCIATION, INC.,**

Respondents.

APPELLANTS' REPLY BRIEF

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- In re Estate of Fields*, 141 Wn. 526, 252 P. 534 (1927);
- Lawson v. Helmich*, 20 Wn.2d 167, 146 P.2d 537 (1944);
- Pierce County v. King*, 47 Wn.2d 328, 287 P.2d 316 (1955);
- State ex rel. Oatey Orchard Co. v. Superior Court*, supra, 154 Wash 10, 12, 280 P. 350 (1929).
- Turpen v. Johnson*, 26 Wn.2d 716, 175 P.2d 495 (1946);

STATUTES

- RCW 36.70C.040(2)(b)
- RCW 36.70C.040(2)(c)
- RCW 36.70C.080(1)
- RCW 36.70C.080(3)
- RCW 36.70C.080(5)

ISSUES

1. Whether any other party aside from the Respondent was identified as the “owner” of the property in the Land Use Decision?
2. Whether the notice statute (RCW 36.70C.040(2)(c)) provides that if no person is identified in the land use decision, then service must be effected upon the taxpayer named in the county assessor’s records?
3. Whether Bichler properly raised his objection to the Respondents’ argument that the court lacked jurisdiction?
4. Whether the vendee of property pursuant to a Real Estate Contract has a real estate interest and the vendor has a security interest to ensure payments under the contract are made?
5. Whether RISA waived any claims it could have asserted for lack of jurisdiction, as it intervened after the parties had contractually waived jurisdiction, which the court had ordered?

ARGUMENT

1. No other party aside from Mr. Bichler was identified as the “owner” of the property in the Land Use Decision.

Mr. Goro was never identified by name and address as the owner of the property at issue. He was merely identified by the Hearing Examiner as the person whom “Cowlitz County Assessor records” had

listed as the owner. See Findings, Conclusions and Decisions at page 10, at CP 23. The decision, as described in the Appellants' brief at page 10 and 11, and as explicitly pointed out by the Hearing Examiner, found at several points that the appellant, not Mr. Goro, was the owner of the property. Mr. Bichler was the property owner.

2. The notice statute (RCW 36.70C.040(2)(c)) provides that if no person is identified in the land use decision, then service must be effected upon the taxpayer named in the county assessor's records.

The Respondent RISA mischaracterizes what is required by the taxpayer notification section of the statute, RCW 36.70C.040(2)(c). The statute provides that section (c) is effective if "no person is identified in a written decision as provided in (b)." *Id.* Section (b) provides that notice is to be given to "the following persons if the person is not the petitioner." *Id.* (Underline added). The Appellant Mr. Bichler is the petitioner, rendering the balance of Section (b) inoperative. Section (b)(i) and (ii) would have required the "applicant" and "owner" of the property to be served if Mr. Bichler were not the applicant and owner, which he is. *Id.*

The Hearing Examiner identified Mr. Bichler as the owner and the applicant. See Appellants' Brief at page 10 and 11, for Hearing Examiner's reference to Mr. Bichler as the "owner"; see also CP 125, 127,

133. Moreover, Mr. Bichler is the owner as a matter of law, having acquired the property pursuant to a Real Estate Contract.

Section (c) is inapplicable unless no owner nor applicant is identified under Section (b). That is, Section (c) can have no application where the applicant and the owner are the same person, because there is no need to serve oneself. If the applicant, owner and petitioner had not been the same and were not identified in the Hearing Examiner's record then section (c) would have been triggered. Mr. Bichler was the petitioner, the applicant and the owner.

3. Bichler properly raised his objection to the Respondents' argument that the court lacked jurisdiction.

The Petitioner Bichler properly invoked jurisdiction over his petition. The Petitioner clearly stated at page 2 of the petition that "Petitioners purchased" the "parcel that is the subject of this LUPA appeal." CP 2.

Respondents make much of the fact that Petitioner did not serve Mr. Goro, the Real Estate Contract vendor. The Respondent fails to properly address that service upon Mr. Goro was unnecessary as the Petitioner was the owner of the property.

The Respondent also improperly cites CR 59(a)(9) to mean that an objection must be lodged to boilerplate arguments at the time those

arguments were made. See Respondents Brief at page 9. CR 59(a)(9) reads that the grounds for a new trial or reconsideration exist when “substantive justice has not been done”. CR 59(a)(9). The Respondent RISA mistakenly cites CR 59, but the meaning of the statute is actually informative here as “substantive justice” has not been done, if a party is barred from an appeal due to the current circumstances.

4. The vendee of property pursuant to a Real Estate Contract has a real estate interest and the vendor has a security interest to ensure payments under the contract are made.

The indicia of ownership in the Bichler property transferred when Mr. Goro sold the property to Mr. Bichler pursuant to the Real Estate Contract. Mr. Goro’s interest is in the nature of a mortgagee’s interest, or the interest of a beneficiary of a Deed of Trust. This is the essential concept that all Washington State cases have supported, as outlined in the Petitioners Brief at 6 and 7.

The citation by the Respondent to *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 567 P.2d 631 (1977) for the premise that equitable conversion is non-existent is misplaced. *Id.* The court found that a vendee has a “real estate” interest in the land instead of a personal property interest. The court then stated that it “need not” adopt equitable conversion, which it characterized as “a fiction to buttress the rationale of

those cases” already decided which effectively operated as equitable conversion. *Id.* at 784. The court simply didn’t want to make a sweeping rule on equitable conversion.

That is not what Respondent asserts the *Cascade* decision provides. See Respondents Brief at pages 12-14. In *Cascade*, a judgment creditor attempted to execute on real estate that had been purchased by the real estate contract vendee. The sheriff executed on the property.

The long standing rule that a vendee’s interest in real property is a real estate interest was solidified by *Cascade*. *Id.* The *Cascade* court overruled *Ashford v. Reese*, 132 Wn. 649, 233 P.29 (1925) which had held that: “(A)n executory contract of sale in this state conveys no title or interest, either legal or equitable, to the vendee. . .” *Ashford*, supra at page 29.

The *Cascade* court took note that the Washington Supreme Court had “despite our failure to specifically overrule *Ashford*, we have distinguished it in so many ways that its sweeping language has become virtually meaningless.” *Cascade*, supra at 781.

The *Cascade* court listed all of the real property interests held by a contract vendee:

We have identified the vendee's interest as “substantial rights”, as a “valid and subsisting interest in property”, as a “claim or lien” on the land and as rights

“annexed to and are exercisable with reference to the land.”
(Citations omitted).

These characterizations are patently at odds with the Ashford language. Additionally, we have held the vendee to have certain rights totally inconsistent with the concept that a vendee has no title or interest, legal or equitable. For example, we have held that: a vendee may contest a suit to quiet title, *Turpen v. Johnson*, 26 Wn.2d 716, 175 P.2d 495 (1946); under the traditional land sale contract, the vendee has the right to possession of the land, the right to control the land, and the right to grow and harvest crops thereon, *State ex rel. Oatey Orchard Co. v. Superior Court*, supra; a vendee has the right to sue for trespass, *Lawson v. Helmich*, 20 Wn.2d 167, 146 P.2d 537 (1944); a vendee has the right to sue to enjoin construction of a fence, *Kateiva v. Snyder*, 143 Wn. 172, 254 P. 857 (1927); a vendee's interest constitutes a mortgagable interest, *Kendrick v. Davis*, 75 Wn.2d 456, 452 P.2d 222 (1969); a vendee is a necessary and proper party for purposes of a condemnation proceeding, *Pierce County v. King*, 47 Wn.2d 328, 287 P.2d 316 (1955); a vendor's interest for inheritance tax purposes is personal property, *In re Estate of Eilermann*, 179 Wn. 15, 35 P.2d 763 (1934); a vendor's interest for purposes of succession and administration is personal property, *In re Estate of Fields*, 141 Wn. 526, 252 P. 534 (1927); a vendee may claim **634 a homestead in real property, *Desmond v. Shotwell*, 142 Wn. 187, 252 P. 692 (1927); a vendee is a real property owner for attachment purposes, *State ex rel. Oatey Orchard Co. v. Superior Court*, supra, 154 Wn. at 11-12, 280 P. 350.

Specifically we here hold that a real estate contract vendee's interest is “real estate” within the meaning of the judgment lien statute. . . .

We are urged to embrace the doctrine of equitable conversion as the proper characterization of the respective

interests of the vendor and vendee. That is a theory by which the vendee's interest is at once converted into real property and the vendor's interest is strictly personal property. . . .To adopt that doctrine would merely substitute a new set of uncertainty for the confusion which has followed Ashford.

It is true that many jurisdictions have adopted it. It cuts a wide swath for it is deemed applicable to contracts, devolution, wills and trusts. (Citations omitted) It is the uncertainty of the doctrine which is of concern to us. Its application theoretically depends upon the intent of the parties. (Citations omitted). . . Its nebulous character is evidenced by those decisions which hold that it applies only when necessity and justice require it, or that it applies only to the extent necessary to accomplish equity. (Citations omitted). It has been held that the parties may contract away application of the doctrine. (Citations omitted). . .

To base our decision upon this fiction would embark us upon a case-by-case determination of the boundaries of the doctrine in this State. Rather we are content to limit ourselves to the pertinent issue at hand which is to overrule Ashford v. Reese, supra, and declare that a vendee's interest is real estate within the meaning of the judgment lien statutes. It is apparent from our many cases cited above that we have defined and classified the interests of vendors and vendees for a variety of purposes. That body of case law is based upon a realistic examination of the nature of the interest in a particular context. We need not adopt a fiction to buttress the rationale of those cases or the present one.

Cascade, supra at 782-783.

To apply the logic the Respondent asserts would create a ridiculous result, where bare title holders (who only have a right to payments under a

real estate contract) would be required to receive notice. This result would require that all lenders who hold a deed of trust or mortgage (since they have personal property interest in the real property) are to receive notice also. Clearly that is not what the LUPA statute requires nor says, the statute merely says “taxpayer”. Here the taxpayer was Mr. Bichler, plain and simple.

5. RISA waived any claims it could have asserted for lack of jurisdiction, as it intervened after the parties had contractually waived jurisdiction, which the court had ordered.

An intervener must “accept the pleadings as they find them.” *Casebere v. Clark County Civil Service Commission-Sheriff's Office* 21 Wn.App. 73, 77, 584 P.2d 416 (1978) citing *General Ins. Co. v. Hercules Constr. Co.*, 385 F.2d 13 (8th Cir. 1967); *Galbreath v. Metropolitan Trust Co.*, 134 F.2d 569 (10th Cir. 1943). Since the issue of jurisdiction had been waived by stipulation of the parties prior to RISA’s intervention, RISA cannot raise that argument after its intervention.

Additionally the actual order of the court entered on October 17, 2005 reads “[t]he defenses enumerated in RCW 36.70C.080(3) are hereby waived and may not be raised hereafter by any party.” See Stipulation and Order Pursuant to RCW 36.70C.080(5). (Underline added). The order of the court was a sweeping order that applied to “any party” not just the

parties present at that time in the petition. Further the agreed order allowing intervention made no mention of any invalidity or reconsideration of any previously entered orders.

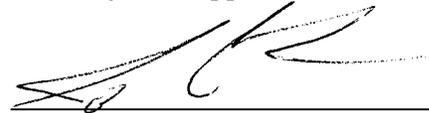
To allow a party to later intervene and reverse earlier decisions of the court automatically is completely unacceptable, but yet that is exactly what the Respondent is asking for.

CONCLUSION

Mr. Bichler is the “owner” the “applicant” and the “petitioner”, and therefore Mr. Goro is not a necessary party. The intervention of the Respondent did not create a right of automatic reversal of previously entered orders.

Respectfully submitted this 17 of January, 2007.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused the foregoing Appellants' Brief to be served on the following:

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DATED this 17th day of January, 2007, at University Place, Washington.



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