

No. 63456-9-1

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

ANTHONY JAMES MARTYN,

Appellant

v.

RICHARD A. DENT and MARY L. DENT, husband and wife,

Respondents

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellants Anthony and Catherine Martyn (“The Martyns”) sought to invalidate a drain field easement executed and recorded in 1984, which Respondents Richard and Mary Dent relied on in purchasing the property benefitted by the easement in 2008. The easement was known to and relied on by both Appellants’ and Respondents’ predecessors in interest since it was recorded. No one challenged the legitimacy of the easement until after the Martyns purchased the property burdened by the easement later in 2008 and raised it as an issue.

The Martyns brought the underlying lawsuit to invalidate the drain field easement under a theory that title to the properties burdened and benefitted by the easement were held by the same parties at the time that the easement was executed, and the equitable and legal interests of the grantors/grantees therefore merged at the easement’s inception, extinguishing the easement.¹

On cross motions for summary judgment, the trial judge, the Honorable Alan R. Hancock presiding, ruled as a matter of law that

¹ Specifically, the Martyns alleged claims to quiet title, for ejection and in trespass, each with respect to the drain field easement. CP at 244-48. The Martyns’ complaint also alleged claims with respect to the Dents’ utility lines, which cross the Martyns’ property. Id. However, these claims were not ruled on at summary judgment, were subsequently voluntarily dismissed, and are not at issue in this appeal.

there were three separate and independent legal bases on which to dismiss the Martyns' claims based on extinguishment of the drain field easement: (1) there was no unity of title in the benefitted and burdened properties at the time the easement was drafted because legal title to the two properties were not held by the same persons—one of the properties was titled in the husband and one in the wife; (2) even if there was unity of title, equitable principles prevented application of the merger doctrine because the grantors of the easement did not intend to merge their interests in the parcels; and (3) even if there was unity of title and the grantors intended to merger their legal and equitable interests, equitable principles prevented application of the merger doctrine because a merger here would unjustly injure the Dents, innocent third parties to the drain field easement.

The Martyns put forth no legal basis for reversing Judge Hancock's ruling on any of those three legal bases, let alone on each individual basis, as would be required to reverse the partial summary judgment dismissal. Therefore, the Dents ask the Court to affirm Judge Hancock's award of partial summary judgment in their favor. The Dents also ask the Court to award them their reasonable attorney fees as a sanction against the Martyns for

bringing this frivolous appeal and forcing the Dents to respond, where the case involves well-settled legal principles already applied correctly by Judge Hancock below to undisputed facts.

II. STATEMENT OF ISSUES

The Dents assert no error in Judge Hancock's ruling on the parties' cross-motions for partial summary judgment. Nonetheless, based on the Martyns' assertions of error and statement of issues, the Dents assert that the relevant issues before the Court on appeal are as follows:

1. Have the Martyns established any legal relevance of an asserted equitable community property interest in property in determining whether there has been a merger through unity of legal title, where it was undisputed at summary judgment that legal title to one of the parcels at issue is held in one spouse and legal title to the other parcel is held by the other spouse?
2. May Appellants Martyn assert a new theory of recovery for the first time on appeal?
3. If a theory of recovery may be raised for the first time on appeal, is a statutory warranty deed sufficient to transfer title and to make later quitclaim deeds effective to transfer title?

4. Even if there was a unity of legal title at the time the subject easement was granted, was Judge Hancock correct not to compel a merger of equitable and legal interests to extinguish the easement, where the undisputed evidence demonstrated that the grantor of the subject easement did not intend a merger to take place?

5. Even if there was a unity of title when the subject easement was granted and the grantor intended a merger to occur, was Judge Hancock correct not to compel a merger of equitable and legal interests to extinguish the easement, where a merger would injure the successors in interest to the benefitted property, innocent third parties to the grant of easement?

6. Are the Respondents Dent entitled to attorneys' fees for defending against this frivolous appeal in the face of well-settled legal precedent and undisputed facts?

III. STATEMENT OF THE CASE

The following facts were undisputed by the parties below and were relied on by the trial court, Judge Alan R. Hancock presiding, in ruling on summary judgment.

A. Ownership History of the Properties at Issue.

On May 16, 1979, Frances and John Middleton ("the

Middletons”) purchased the two properties at issue in this case (now owned by the Dents and Martyns) from Julian Maule, under real estate contract recorded under auditor’s file no. 352642. See CP at 150-52 (Declaration of Frances Middleton (“Middleton Decl.”), Ex. A). On May 16, 1979, Mr. Maule also signed a statutory warranty deed transferring title of the properties to the Middletons. CP at 132-33 (Declaration of Kathryn C. Loring (“Loring Decl.”), Ex. A).

Also on May 16, 1979, Frances and John Middleton quitclaimed their land that is now the Dents’ property (hereafter referred to as “Parcel B”), to Frances Middleton, and quitclaimed their land that is now the Martyns’ property (hereafter referred to as “Parcel A”), to John Middleton. See CP at 148 ¶3, 153-56 (Middleton Decl. ¶3, Ex. B). Therefore, as of May 16, 1979, legal title to Parcels A and B were held individually by John Middleton and Frances Middleton, respectively.

The Middletons subsequently decided to sell property, as they lived on yet a third nearby parcel, herein referred to as “Parcel C.” CP at 148 (Middleton Decl. ¶4). The Middletons conducted perc tests on both Parcels A and B and found that there were no acceptable septic sites on Parcel B. Id. ¶5 (Middleton Decl. ¶5).

Therefore, the Middletons granted a drain field easement over Parcel A to benefit Parcel B in order to ensure that both lots would be buildable. Id. ¶6.

In 1984, the Middletons negotiated the sale of Parcel A to James C. and Mary K. Butler (“the Butlers”). CP at 148-49 (Middleton Decl. ¶7). During that negotiation, the Middletons informed the Butlers that they intended to transfer the property subject to an easement over Parcel A for a drain field to benefit Parcel B. Id.; see also CP at 157-58 ¶3 (Declaration of Mary K. Butler (“Butler Decl.”) ¶3). In exchange, the parties negotiated that the Middletons would grant the Butlers an easement for utilities across their Parcel C so that the Butlers could obtain Island County water from Engle Road in the future when they built on Parcel A. CP at 158 (Butler Decl ¶3). Additionally, the Middletons also granted the Butlers a view easement over their Parcel C for the benefit of Parcel A, which was Exhibit B to their deed. CP at 162.

B. Grant of Drain Field Easement.

On November 21, 1984, the Middletons executed a dedication of easement and restrictive covenants. See CP at 186-92. That dedication of easement and restrictive covenants, recorded under Island County Auditor’s file number 84005901, in

part dedicated an easement for a septic tank drain field over the west 145 feet of the south 50 feet of Parcel A for the use and benefit of Parcel B (“the drain field easement”). Id. Because Mr. Maule still had a financial interest in Parcels A and B, he also signed the easement document. CP at 148 (Middleton Decl. ¶6).

C. Subsequent Transfer of the Martyns’ Property.

On November 23, 1984, the Middletons executed a statutory warranty deed transferring Parcel A to the Butlers. CP at 159-63 (Butler Decl., Ex. A). The Butlers later transferred Parcel A in approximately 2002. CP at 158 ¶5. Then, on or about September 16, 2008, the Martyns purchased Parcel A under a statutory warranty deed recorded under Island County Auditor’s File Number 4236696. CP at 134-35 (Loring Decl., Ex. B). The burden of the drain field easement thereby flowed to the Martyns when they purchased Parcel A in 2008. Indeed, the deed expressly stated that it was subject to easements of record. CP at 135.

D. Subsequent Transfer and Development of the Dents’ Property.

On approximately September 15, 1998, the Middletons sold Parcel B to Edward H. and Cleo C. Schacker, under statutory warranty deed recorded under Island County Auditor’s File Number

98019127. See CP at 144-45 (Declaration of Edward Schacker (“Schacker Decl.”), Ex. A). Parcel B was undeveloped when the Schackers bought the property in 1998. See CP at 141-43.

Pursuant to the drain field easement, the Schackers installed a septic drain field in the easement area in the southwest corner of what is now the Martyns’ property when they built their home in 1998-99. CP at 142 ¶¶ 3-7. Ms. Butler, who owned Parcel A on which the drain field was installed, never challenged the Schackers’ placement of the drain field on her property because she was aware of the drain field easement at issue here and knew the drain field to be in the easement area. CP at 158 ¶6 (Butler Decl. ¶ 6).

On approximately March 27, 2008, the Schackers transferred Parcel B to the Dents via statutory warranty deed recorded under Island County Auditor’s File Number 4224937. See CP at 139-40 (Declaration of Richard A. Dent (“Dent Decl.”), Ex. A). In purchasing that property, the Dents relied upon the Schackers’ representations that the septic drain field was located on the adjacent lot in an easement area, as well as the recorded easement confirming that fact. CP at 137 ¶4 (Dent Decl. ¶4). Defendants had no reason to doubt the legality of the drain field, as they believed it had been in place as long as the home they were

purchasing, and was not an issue. Id. It was not until the fall of 2008, when their new neighbors, the Martyns, began writing them numerous letters regarding a host of legal issues, that the Martyns raised the enforceability of the drain field easement. CP at 137 ¶5 (Dent Decl. ¶5).

E. Procedural History and Trial Court's Ruling.

The parties brought cross motions for partial summary judgment. CP at 101-02, 167. The Martyns originally requested judgment as a matter of law invalidating the drain field easement and dismissing the Dents' affirmative defense that they had acquired a prescriptive easement to use the drain field. See CP at 167-79. However, the Martyns subsequently abandoned their argument on the prescriptive easement affirmative defense at summary judgment and the trial court did not rule on that issue. See CP at 41; RP at 2, 5, 21. The Dents moved for partial summary judgment dismissing the Martyns' claims related to the drain field easement. CP at 101-102; see also RP at 17-18, 20.

Following extensive briefing and oral argument, the trial court, Judge Alan R. Hancock presiding, denied the Martyns' motion for partial summary judgment and granted the Dents' motion for partial summary judgment, dismissing each of the Martyns'

claims related to the drain field easement. CP at 17-19 (Order); RP at 28.

In granting the Dents' motion for partial summary judgment, Judge Hancock expressly based his decision on three separate, independent legal grounds:

So it is undisputed that at the time the drain field easement was created John Middleton held title to one parcel and Frances Middleton held title to the other; thus, as a matter of law there was no merger.

...

Now, the Martyns argue that the Middletons held both parcels as community property and therefore the Court should hold that there was a merger of Parcels A and B, but whether or not Parcels A and B were community or separate property of the Middletons, is irrelevant for purposes of the analysis of the merger issue. This case deals with issues of property law, and the issue is whether legal title was held by both Middletons at the time of the creation of the drain field easement. It clearly was not, and, therefore, the merger doctrine does not apply.

It is true that under the general concept of merger if the dominant and servient estates of an easement come into common ownership, the easement is extinguished by merger of title.

However, as the defendants properly point out, the courts will not compel a merger of estates where the party in whom the two interests are vested does not intend such a merger to take place, or where it would be inimical to the interest of the party in whom the several estates have united, nor will they recognize a claim of merger where to do so would prejudice the rights of innocent third persons.

...

Now, in the present case, even if there had been a technical merger of the estates in question, which there was not, the equitable doctrine articulated in Mobley and Radovich and a number of other cases would prevent a merger in this case.

There is no evidence that the Middletons intended to merge their interests in Parcel A and Parcel B. The clear intent was to the contrary

...

It is equally clear that even if a merger had been intended, which it was not, application of the merger doctrine in this case would unjustly injure the rights of innocent parties, namely, the Dents who relied on the drain field easement, and they would be substantially injured, grossly injured, in fact, if the merger doctrine were to prevent their use and enjoyment of it.

So for all of these reasons the Martyns' motion for partial summary judgment is denied. The Dents' motion for partial summary judgment is granted. The Martyns' trespass claim will be dismissed with prejudice. There is a valid recorded easement over the Martyns' property for the Dents' drain field. The drain field easement was not extinguished by merger. The Middletons held title to the respective properties individually when the drain field easement was created and there was no merger thereafter.

Even if the benefited and burdened parcels had been owned by the Middletons, well established equitable principles would prevent application of the merger doctrine in this case. Application of the merger doctrine would be contrary to the Middletons' intent and would result in substantial injury and prejudice to the Dents who are innocent third parties in this situation.

RP at 24-28.

The Martyns' subsequently voluntarily dismissed their remaining claims related to the Dents' utilities, which resulted in a final, appealable judgment.

IV. ARGUMENT

A. Standard of Review.

"A motion for summary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." City of Sequim v. Malkasian, 157 Wn.2d 251, 261, 138 P.3d 943 (2006) (citing CR 56(c)). "The standard of review on appeal from an order on summary judgment is de novo." Id. (citing Sane Transit v. Sound Transit, 151 Wn.2d 60, 68, 85 P.3d 346 (2004)). "The appellate court engages in the same inquiry as the trial court." Id. (citing Citizens for Responsible Wildlife Mgmt. v. State, 149 Wn.2d 622, 630-31, 71 P.3d 644 (2003); Herron v. Tribune Publ'g Co., 108 Wn.2d 162, 169, 736 P.2d 249 (1987)).

Summary judgment was appropriate here because there was no dispute of material fact and the Dents were entitled to judgment as a matter of law on three separate, independent legal

bases: (1) there was no unity of title because Mr. and Mrs. Middleton each held legal title to one of the properties at issue; (2) even if there was unity of title, application of the merger doctrine would be inappropriate because merger was contrary to the implied and express intent of the easement grantor; and (3) even if there was unity of title and merger was intended, application of the merger doctrine would be inappropriate because it would result in injury to the Dents, innocent third parties to the easement.

The Martyns have not and cannot rebut the three legal bases for Judge Hancock's ruling. Instead, the Martyns continue to focus on the community verses separate property nature of the Middletons' ownership in the two properties at issue, without establishing how it is relevant to the legal title issue at hand. The Martyns also attempt to improperly raise a new argument for the first time on appeal that the Middletons' quitclaim deeds were ineffective. Finally, the Martyns also again attempt to narrow well-settled Washington authority on equitable "exceptions" to the merger doctrine without any basis for limiting the cases discussed to the factual issues addressed therein. Because the Martyns have not demonstrated that any one of Judge Hancock's legal bases for granting summary judgment was incorrect, let alone that each

separate basis was incorrect, the Dents respectfully ask the Court to affirm Judge Hancock's summary judgment dismissal.

B. Whether the Middletons Held Parcels A and B as Separate or Community Property Was Properly Determined Irrelevant by Judge Hancock on Summary Judgment.

As an initial matter, the trial court did not agree or conclude that the parcels were the separate property of Mr. and Mrs. Middleton, respectively, as the Martyns assert. See Br. of App. at 11. Instead, Judge Hancock expressly held that the issue of whether the Middletons held Parcels A and B as community or separate property was wholly irrelevant to the issues of unity of title and merger:²

Now, the Martyns argue that the Middletons held both parcels as community property and therefore the Court should hold that there was a merger or Parcels A and B, but whether Parcels A and B were community or separate property of the Middletons, is irrelevant for purposes of the analysis of the merger issue. This case deals with issues of property law, and the issue is whether legal title was held by both Middletons at the time of the creation of the drain field easement. It clearly was not, and, therefore, the merger doctrine does not apply.

RP at 25

² Indeed, the Dents' counsel likewise argued at summary judgment hearing that whether or not the Middletons each had an equitable community property interest in both parcels was irrelevant for purposes of this case and determining whether there was a unity of legal title in the two parcels. See CP at 27; RP at 13-14.

The Martyns have not even addressed the trial court's conclusion that whether the Middletons each had a community property interest in both properties was irrelevant. See Br. of App. at 11-16. The Martyns also fail on appeal to establish any authority for the relevance of the nature of the Middletons' equitable interests in the properties.

The alleged community property interest simply is not relevant here. For an easement to be extinguished by merger, there must be unity of title. Eclavea, Romualdo P., J.D., et al., 28A CJS Easements § 143, Unity of Title (2009). Unity of title denotes unity of valid title, title in the name of the same person, and simultaneous ownership. Id. "The ownership of the two estates must be coextensive and equal in validity, quality, and all other circumstances of right." Id.

Therefore, the issue here is whether legal title to the two properties was held in the name of the same person. Legal title is established by deed.

It would not be appropriate or even practical for courts to consider alleged equitable interests in property in determining whether an easement has been extinguished by merger. There is no limit to the number of potential equitable interests that could be

asserted and the courts cannot be required to look beyond the deeds of record to determine whether a merger has occurred.³

Here, the record legal title holder to Parcel B at the time the subject drain field easement was granted was Ms. Middleton. CP at 148 ¶3. The record legal title holder to Parcel A at that time was Mr. Middleton. Id. While a spouse not on the deed of real property may have an equitable community property interest in the property, that does not change the legal title to the property. See, e.g., Bryant v. Stabelin, 28 Wn.2d 739, 747-48, 184 P.2d 45 (1947) (where husband had quitclaimed property to wife, husband had no legal title interest in the property and therefore did not have to sign real estate contact; his attempt to invalidate an agreement did not relate to any equitable community property interest or lien that he might have against the property); Conley v. Moe, 7 Wn.2d 355, 360-61, 110 P.2d 172 (1941) (reasoning that legal title to property is established by deed, but such legal title may be subject to certain equitable interests according to the facts and circumstances of the particular case).

³ Indeed, bona fide purchasers of real property are not expected to investigate potential equitable interests in the property they purchase. Where legal title to property is held in only one spouse's name, the other spouse must record a claim of equitable interest to put prospective purchasers of the property on notice, and if the spouse asserting an equitable interest has not done so, the bona fide purchaser takes all legal and equitable interest in the property. See RCW 26.16.095, RCW 26.16.100.

Whether the Middletons each had an equitable community interest in the other parcel in which they did not hold legal title is irrelevant to the issue of merger, involving unity of legal title. Despite relying almost exclusively on this issue for their appeal, the Martyns provide no legal authority to the contrary.

The Dents will not now address or attempt to refute the Martyns' extensive argument on why the Middletons held Parcels A and B as community property because, as Judge Hancock correctly concluded, that issue is wholly irrelevant to the legal issues before the Court.

C. The Martyns' Argument that the Middletons Could Not Convey Title Via the Quitclaim Deeds Executed in 1979 Is a New Argument Improperly Raised for the First Time on Appeal and Should Be Disregarded.

The Martyns argue that the Middletons' 1979 quitclaim deeds to each other of Parcels A and B were ineffective to convey title because they could not convey title until they satisfied their purchase contract with Mr. Maule. See Br. of App at 16-18. The Martyns failed to make that argument in the extensive briefing provided to the trial court and, instead, improperly raise it for the first time on appeal.⁴

⁴ Additionally, the Martyns attempt to rely on and refer the Court to factual evidence not made part of the record below. See Br. of App. at 16 &

It is well-settled that an appellant may not raise a new issue or legal theory for recovery for the first time on appeal. RAP 2.5(a);⁵ Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 482 (1992) (refusing to consider for the first time on appeal two arguments in support of summary judgment that were not raised before the trial court); State v. Smith, 130 Wn. App. 721, 728, 123 P.3d 896 (2005) (refusing to consider as a basis for reversal a theory raised for the first time on appeal). To do so would deprive the opposing party of an opportunity to respond to the argument before the court deciding the case in the first instance and the lower court of the opportunity to rule on the issue. See State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995).

That is precisely what would happen here. At summary judgment the Martyns argued solely that the Middletons' community property interest created a unity of title despite the quitclaim deeds to the separate spouses. They did not raise the legitimacy or effect of the quitclaim deeds. Therefore, the Dents had no opportunity to address that argument below and Judge Hancock did not consider

n.16. That attempt is improper and the additional evidence also should be disregarded.

⁵ The argument raised here does not related to the limited areas where error may be raised for the first time on appeal. See RAP 2.5(a).

or rule on it at summary judgment. To consider that issue for the first time now, on appeal, would be improper and unfair.

But even if the Court considers the Martyns' argument that the Middletons could not convey legal title in 1979, it fails.

As an initial matter, Mr. Maule executed a statutory warranty deed to the Middletons on May 16, 1979. CP at 132-33; RP at 22. The Middletons therefore had title to convey when they quitclaimed the properties on May 16, 1979.⁶

Mr. Maule thus essentially held the mortgage for the Middletons purchase. See CP at 132-33, 147 ¶¶2. In Washington, like most other American jurisdictions, the mortgagee does not hold title to the property; the mortgagee has merely a lien interest in the property that secures the monetary obligation or note. William B. Stoebuck, 18 Wash. Prac., Real Estate § 17.1 (2d ed. 2009).

While the Middletons' quitclaim deeds were necessarily subject to Mr. Maule's financial interest in the properties, the Middletons still had every right to convey their interests in the properties. As stated above, to have a unity of title, the ownership of the two estates must be coextensive and equal in validity,

⁶ Although it does not appear that the deed was recorded until 1991, that is of no import, as the statute of frauds requires only that a deed be in writing, signed and notarized to be effective and enforceable; recording is not necessary to be effective in conveying title. See RCW 64.04.020

quality, and all other circumstances of right. Because the Middletons quitclaimed whatever interests that they each had in the parcels to each spouse individually in 1979, there was no complete unity of all circumstances of right in Parcels A and B as of the date that the drain field easement was granted in 1984, and no merger could take place.

Even if the Court considers the Martyns' untimely argument that the quitclaim deeds were ineffective to convey title, their argument fails and Judge Hancock's summary judgment dismissal should be affirmed based on the lack of unity of legal title.

D. Judge Hancock Properly Held that the Merger Doctrine Should Not be Applied Here.

As Judge Hancock concluded, even if title to the burdened property, Parcel A, and the benefitted property, Parcel B, were both held jointly by the Middletons at the time the drain field easement was executed or at some subsequent time, which they were not, settled Washington law holds that equity prohibits application of the merger doctrine under the undisputed facts present here.

The Dents recognize that “[a]s a general rule, one cannot have an easement in one's own property.” Radovich v. Nuzhat, 104 Wn. App. 800, 805, 16 P.3d 687 (2001) (emphasis

added). Under that general concept, if the dominant and servient estates of an easement came into common ownership, the easement would be extinguished by “merger.” See id. But Washington jurisprudence has repeatedly held since the 1930s that “the doctrine of merger is disfavored both at law and in equity, and there are exceptions to its application.” Id. (emphasis added).

Indeed:

“[T]he courts will not compel a merger of estates where the party in whom the two interests are vested does not intend such a merger to take place, or where it would be inimical to the interest of the party in whom the several estates have united, nor will they recognize a claim of merger where to do so would prejudice the rights of innocent third persons.”

Id. (quoting Mobley v. Harkins, 14 Wn.2d 276, 282, 128 P.2d 289 (1942), which discussed the contrast between the inflexible common law rule of merger and the modern rules disfavoring merger) (internal quotations omitted).

Indeed, Judge Hancock expressly held that:

[E]ven if there had been a technical merger of the estates in question, which there was not, the equitable doctrine articulated in Mobley and Radovich and a number of other cases would prevent a merger in this case.

There is no evidence that the Middletons intended to merge their interests in Parcel A and Parcel B. The clear intent was to the contrary

inasmuch as they created the drain field easement with all the requisite legal formalities and recorded it. It's apparent that they intended to grant the drain field easement over Parcel A to insure that both Parcels A and B would be buildable.

It is equally clear that the Middletons made their intent clear to Ms. Butler that they intended to create the drain field easement and that their property would be benefitted by this easement.

It is equally clear that even if a merger had been intended, which it was not, application of the merger doctrine in this case would unjustly inure the rights of innocent parties, namely, the Dents who relied on the drain field easement, and they would be substantially injured, grossly injured, in fact, if the merger doctrine were to prevent their use and enjoyment of it.

...

Even if the benefited and burdened parcels had been owned by the Middletons, well established equitable principles would prevent application of the merger doctrine in this case. Application of the merger doctrine would be contrary to the Middletons' intent and would result in substantial injury and prejudice to the Dents who are innocent third parties in this situation.

RP at 27-28.

The Martyns do not and cannot establish that the Judge Hancock was incorrect in his application of this well-settled Washington law. The jurisprudence on these equitable "exceptions" to the merger doctrine is clear and well-settled. The Martyns unpersuasively and without authority attempt to distinguish

the cases cited by the Dents and relied on by Judge Hancock on the factual title issues involved in each case. The Martyns have provided no legitimate basis to distinguish the case law relied on by the trial court or to otherwise reverse Judge Hancock's decision. The numerous cases on intent and prejudice apply equally here regardless of the specific factual application in each case, and the Martyns point to no persuasive reasoning to have a different standard for merger in the context of easements.

1. Washington Jurisprudence Considers the Grantor's Intent in Determining a Merger, and the Undisputed Facts Here Show No Intent to Effectuate a Merger.

The Martyns assert without support that the jurisprudence referred to above and relied on by Washington Courts in interpreting the merger doctrine since the early 1900s *only applies* in the factual situation at issue in Mobley, where leasehold and fee simple interests are at issue. See Br. of App. at 19. In reality, Washington Courts of Appeals and the Washington Supreme Court have relied upon the intent of the parties in determining whether or not to apply the merger doctrine in cases involving the potential merger of various title and property interests, not just leasehold and fee simple interests. Further, Mobley has been relied upon extensively by Washington Courts, and neither the Court in Mobley

nor subsequent courts relying on it have attempted to limit its holdings to the very limited factual situation present in the case.

Indeed, in 2001 in the case of Radovich, this Court analyzed a claim that the servient and dominant estates of an easement had been merged. See Radovich, 104 Wn. App. at 804-05. In evaluating whether a merger had actually occurred, the Court first set forth the basic rule that “the courts will not compel a merger of estates where the party in whom the two interests are vested does not intend such a merger to take place,” and quoted Mobley for that proposition. See id. at 805 (quoting Mobley, 14 Wn.2d at 282). Ultimately, the Court in Radovich decided that it was not necessary to apply the equitable intent exception to the merger doctrine because the easement had been re-conveyed in a subsequent deed. Id. at 805-06. Nonetheless, the Radovich Court re-stated the principle and application of the intent “exception” to the merger doctrine, and relied on Mobley for doing so in the specific situation where dominant and servient estates of an easement were alleged to have been merged.

Washington Courts have applied the intent “exception” to the merger doctrine in other cases involving title and property interests other than leaseholds. See, e.g., Anderson v. Starr, 159 Wash.

641, 644-48, 294 P. 581 (1930) (involving an alleged merger of fee simple and mortgagee's interest); Beecher v. Thompson, 120 Wash. 520, 522-24, 207 P. 1056 (1922) (involving an alleged merger of legal title and a mortgagee's interest in real property and holding that no merger should take place unless it was intended).

There can be no doubt that the equitable consideration of intent applies to prevent application of the merger doctrine generally and not solely to leasehold and fee simple interests, as were at issue in Mobley.

The Martyns have failed to point to a single case where a Washington court has applied the doctrine of merger to defeat an equitable interest in property in the face of evidence of the parties' intent to the contrary. The Martyns' cursory and unsupported attempt to limit the exceptions to the merger doctrine to leasehold or other factual circumstances fails, and Judge Hancock's summary judgment dismissal on the grounds that the Middletons did not intend a merger should be affirmed.

In interpreting the "intent" of the parties in whom it is alleged the equitable and legal interests merged, the Washington Supreme Court has considered both the actual and implied intent, and the owner of the equitable interest is "*presumed* to have intended that

which is most to his advantage.” Hilmes v. Moon, 168 Wash. 222, 237, 11 P.2d 253 (1932) (emphasis added); see also Gill v. Strouf, 5 Wn.2d 426, 430-31, 105 P.2d 829 (1940). Where there is no evidence to demonstrate the affirmative intent to merge the legal and equitable interests, merger should not be imposed, *especially* where to do so would be against the interest of the equitable interest holder. See Anderson v. Section 11, Inc., 28 Wn. App. 814, 820, 626 P.2d 1027 (1981).

The Martyns presented no evidence that the Middletons intended to merge their equitable and legal interests in Parcels A and B, nor did they contest the affirmative evidence of the Middletons’ intent to the contrary.

First, the Middletons went to the trouble to draft, sign, notarize, and record the drain field easement at issue. Additionally, the declarations of Fran Middleton and Mary K. Butler filed in support of Defendants’ Motion for Partial Summary Judgment irrefutably show, as Judge Hancock concluded, that the Middletons intended to create a binding drain field easement over Parcel A to benefit Parcel B and did not intend for their interests in the two parcels to merge. See CP at 147-49, 157-63. Ms. Middleton’s declaration makes clear that she and her husband conducted perc

tests on both properties and determined that there was no satisfactory site for a drain field on Parcel B. See CP at 148 (Middleton Decl. ¶5). Therefore, the Middletons decided to grant a drain field easement over Parcel A to ensure that both lots would be buildable. Id. ¶6.

Both Ms. Middleton and Ms. Butler, who purchased Parcel A in 1984, attested that the Middletons made their intent to create a drain field easement clear to the Butlers prior to their purchase of the property and in fact granted the Butlers other easements in exchange therefore. CP at 148 (Middleton Decl. ¶7); CP at 157-58 (Butler Decl. ¶3).

The Martyns have presented absolutely no basis to reverse Judge Hancock's conclusion that application of the merger doctrine here would be contrary to the undisputed evidence of the Middletons' intent to create the easement and not to merge their interest. RP at 27-28. The summary judgment dismissal of the Martyns' claims should be affirmed on this basis alone.

2. Washington Law Directs the Courts Not to Compel a Merger Where Injury to Innocent Third Parties Would Result, and the Undisputed Facts Here Show that Such Injury Would Occur Here.

In Mobley v. Harkins, the Washington Supreme Court expressly held that *even* if the party that purchased the fee simple interest in the underlying property *intended* a merger of a lesser equitable interest in the property, a merger still should not be sanctioned if it would “unjustly injure” the rights of innocent third parties. Mobley, 14 Wn.2d at 283-84. Judge Hancock expressly held as a third basis for this summary judgment dismissal of the Martyns' drain field claims that application of the merger doctrine would result in such unjust injury to their parties, the Dents, here. RP at 27-28.

The Martyns assert that the “innocent third parties” referred to by the Washington Supreme Court in Mobley and the numerous other Washington courts re-stating that principle and/or considering this issue since that time have limited the equitable relief referred to there to “contemporaneous” third persons. See Br. of App. at 19-20. The Martyns have provided no authority or support for that argument or for their attempt to again limit the cases cited by the Dents to their specific facts.

In Mobley, the respondents purchased a business from appellant, whereby appellant assigned respondents its lease in the underlying property, which was owned in fee simple by a third party. Appellant later purchased the fee simple interest in the underlying property. A dispute arose between respondents and appellant regarding the terms of the lease for the business they purchased. Respondents argued that they had been assigned the appellant's lease with its terms, but appellant argued that its lease merged into its legal ownership interest in the underlying property when it purchased the property, such that respondents were only entitled to a new lease under new terms set by appellant. The Washington Supreme Court refused to apply the principles of merger to hold that respondents were not entitled to the lease assigned by appellant because it would unjustly injure the rights of innocent third parties. Id. at 283.

The same is true here. Even if the Martyns were able to establish that the Middletons intended to merge the equitable interest in the drain field easement over Parcel A with their fee simple legal ownership interest in Parcel A, which they cannot do, Judge Hancock correctly concluded as a matter of law that it could not enforce the merger because to do so would unjustly injure the

rights of the Dents, innocent third parties to the creation of the easement who have relied on the drain field easement.

There was no limitation in Mobley (or in other cases interpreting this issue) to “contemporaneous” third parties and there is no basis to distinguish the case on that grounds.

The “third parties” discussed in the various cases considering whether to apply the merger doctrine to extinguish an interest less than fee simple ownership are necessarily the individuals or entities with the right to enforce the lesser interest at issue. In both Mobley and Anderson v. Section 11, the party to be injured held a leasehold interest as a sublessor, where the party from whom the sublessor leased allegedly acquired fee simple ownership and asserted that its leasehold interest in the property merged into its legal title. Those cases involved unique circumstances of an unrelated sublessor, but the Washington Supreme Court in Mobley did not limit its prejudice analysis to the “contemporaneous” third parties as the Martyns have asserted.

Indeed, if the injury principle applied only to “contemporaneous” third persons, then the prejudice analysis would never apply to questions of merger involving easements, as there is no potential for the situation of the “sublessor” equivalent in the

easement situation. The person to enforce an easement by the very nature of the interest involved has to be a successor in interest to the original benefitted party, not a “contemporary” of or third party to one of the original the parties. That is precisely the position that the Dents are in today. They are innocent third parties to the alleged merger event who would be severely prejudiced by an application of merger to extinguish their drain field easement.

Whether the Dents might have some other recourse against their successors in interest is wholly irrelevant. See Br. of App. at 21. It is likewise not relevant what the Martyns’ “expectation” was when they took title to their property. See id. The drain field easement at issue was of record when the Martyns purchased their property and there is no basis in law or in equity to extinguish it through application of the merger doctrine or otherwise.⁷

⁷ The Martyns state in footnote 20 of the Brief of Appellant that “notably, the 1998 Warranty deed from Middleton to Schacker is silent on [the drain field easement].” See Br. of App. at 21 n.20. The Dents point out that the Martyns have not raised the failure to have the easement in subsequent deeds as an issue on appeal. Further, the parties addressed this issue at summary judgment and the trial court expressly ruled that the easement was not extinguished and need not have been re-stated in subsequent deeds. See CP at 31-32; RP at 15, 16, 25.

E. The Dents are Entitled to Attorney Fees as a Sanction for Being Forced to Respond to the Martyns' Frivolous Appeal.

The Dents request reimbursement of their reasonable attorney fees and costs for being required to respond to the Martyns' frivolous appeal.

RAP 18.9(a) empowers an appellate court on its own initiative or on a motion of a party, to assess sanctions, including attorneys' fees, against a party filing a frivolous appeal. See, e.g., Mahoney v. Shinpoch, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987). An appeal is frivolous under RAP 18.9 if it "raises no debatable issues" and is so devoid of merit that there is no reasonable possibility of reversal. State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 905, 969 P.2d 64 (1998); Andrus v. State Dep't of Transp., 128 Wn. App. 895, 900, 117 P.3d 1152 (2005).

The Court of Appeals in Andrus, held that on the record before the Court, "the decision to file a court action in this matter was unfounded." Andrus, 128 Wn. App. at 900. In Fidelity Mortgage Corp. v. Seattle Times Co., 131 Wn. App. 462, 473-74, 128 P.3d 621 (2005), this Court awarded attorney fees to the respondent because the appeal was "not based on subtle or even

gross distinctions of law," despite the fact that the trial court analyzed the issues at great length. The same is true here.

In this case, the trial court, Judge Hancock presiding, ruled that the Dents were entitled to partial summary judgment on three separate, independent legal bases, each supported by well-established legal principles and extensive Washington caselaw. The Martyns have not even attempted, let alone succeeded, in establishing that the trial court's interpretation of that well-established precedent was incorrect. Here, like the case in Andrus, the Martyns' arguments on appeal "lack any support in the record or are precluded by well-established and binding precedent." See Andrus, 128 Wn. App. at 900. Therefore, the Dents are entitled to and respectfully request an award of their reasonable attorney fees and costs on appeal in an amount to be determined.

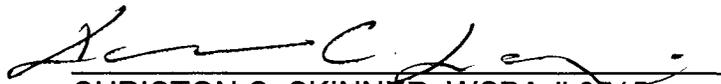
V. CONCLUSION

For the reasons set forth above, the Dents respectfully ask the Court to affirm Judge Hancock's partial summary judgment ruling dismissing the Martyns' claims related to the drain field easement with prejudice. Additionally, in accordance with its contemporaneously filed motion, the Dents respectfully ask the

Court to award them their reasonable attorneys' fees as a sanction against the Martyns for pursuing this frivolous appeal.

Respectfully submitted this 9th day of October, 2009.

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