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No. 71098-2-1

King County Superior Court #11-2-12984-5 SEA
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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ERIC DIETZE and VICTORIA SEEWALDT,
Plaintiff/Petitioners,

vs.

JAMES V. KELLY et al.,
Defendants/Respondents.

APPELLANTS ERIC DIETZE AND VICTORIA SEEWALDT'S OPENING BRIEF

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ORIGINAL

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I. NATURE OF THE CASE

This lawsuit concerns Appellant Eric Dietze and Victoria Seewaldt's access to their property on Vashon Island. When the Appellants purchased their property, they took title with full confidence that the roads as platted existed for their use and benefit for access to their property and depended upon the fact that the platted streets leading to their property would be made available for their use when required *CP 2*. The Appellant's only access to their property is over the platted streets and roads dedicated on the face of the plat of Chautauqua Beach *CP 2*. The defendants own land in the proximity of or abutting the appellants' property. *CP 258*. Prior to purchasing their land in 1991, Plaintiff's visited the property with a real estate agent and gained access over what is now 77th Place SW and which was originally platted in the 1888 Chautauqua Beach plat map as Prospect Avenue *CP 261*. The improved potion of 77th Place SW ends adjacent to certain defendant properties *CP 261*. As originally platted, Prospect Avenue turned into Emerson Avenue, adjacent to property belonging to the one of the defendants *CP 261*. Plaintiffs were also shown building plans from the former owner of the Plaintiff's property showing that King County was requesting that the former owners

construct a full 2 lane road from the end of 77th Place S.W. to the Plaintiffs' property in order to have a building permit approved *CP 261*. Moreover, in purchasing their land, Plaintiffs reviewed a commitment for title insurance and later a title policy which confirmed that according to the Chautauqua Beach plat their property had rights-of-way access over two platted access roads *CP 261*. After the Plaintiffs acquired a second parcel, they met with defendant John Friars who, in discussing the Plaintiff's access to their property using a platted access road, stated that he supposed he would have to get used to construction traffic since he was aware that Plaintiffs had legal access to their property through 77th Place S.W. *CP 261*.

Several years ago, in anticipation of eventually returning to the Northwest and building a home on their property, Plaintiffs contacted the defendants to inquire about improving their access over the platted access roads. Plaintiffs did this to be neighborly and told their neighbors that they, Plaintiffs, would bear the expense of improving the access. Plaintiff's proposal was met with universal opposition from all the defendants resulting in this lawsuit *CP 262*.

The defendants deny that the Plaintiffs are entitled to access to their property over the platted roads which is the only access to the

Plaintiff's property. *CP 215-228, 229-241,242-256.* Presently the Plaintiffs do not have access for ingress and egress to their property over the platted streets or otherwise and are therefore landlocked with no ability to access their property. Plaintiffs' lawsuit seeks a judgment quieting title to Plaintiffs' title and interest in two platted roadways to access their property. *CP 1-6*

Despite overwhelming genuine issues of material fact, the trial court granted Respondent School Employees Credit Union of Washington's (hereinafter "SECU") motion for motion for summary judgment dismissing Appellants case with prejudice *CP 680-683*. This appeal challenges the relief granted pursuant to the trial court's Order granting summary Judgment as well as other orders and rulings issued by the trial court.

II. ASSIGNMENTS OF ERROR

(1) The Superior Court erred in allowing Respondent SECU's April 4th 2013 motion for Summary Judgment to proceed after the dispositive motion deadline in the Case Schedule Order.

(2) The Superior Court erred in failing to grant leave to file the April 4th 2013 motion for Summary Judgment.

(3) The Superior Court erred in entertaining ex parte communications during the week of April 5th through April 13th with the defendants counsel in which a motion to shorten time for response to the April 4th 2013 Summary Judgment motion was entertained by the Superior Court.

(4) The Superior Court erred in granting the April 12, 2013 Order allowing the defendants to shorten time to present their April 4th 2013 Summary Judgment Motion.

(5) The Superior Court erred in in failing to consider the facts in light most favorable to the nonmoving party in the Summary Judgment hearing.

(6) The Superior Court erred in granting the Order dismissing JP Morgan Chase and later finding that said defendant was a necessary party.

(7) The Superior Court erred in granting the Order dismissing Boeing Employees Credit Union and later finding that said defendant was a necessary party.

(8) The Superior Court erred in granting its Order dismissing Bank of America and later finding that said defendant was a necessary party.

(9) The Superior Court erred in considering the Respondents September 2013 Supplemental Summary Judgment brief, and subsequently ruling on the April 4th 2013 motion for Summary judgment.

(10) The Superior Court erred in determining the Respondents' lenders

were necessary parties.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Is it an abuse of discretion for the Superior Court to allow a dispositive motion, after the dispositive cutoff date, without leave of court, and to rule on the motion six months later.

(2) Is it an abuse of discretion for the Superior Court to entertain ex parte communications, consider a motion, and to order shortened time to respond while the Appellant's counsel was unavailable.

(3) Is there evidence of material facts in dispute in this case preventing the Superior Court from granting an Order awarding Summary Judgment in this case?

(4) Are there legal issues raised by the facts of this case which prevent the grant of an Order awarding Summary Judgment in this case?

(5) Did the Respondents fail to meet their burden in their Summary Judgment motion to establish that no material issue of fact or law exists and as a matter of law the Respondents are entitled to an award of Summary Judgment against Appellants?

(6) Does allowing a Summary Judgment motion, filed after the dispositive

cutoff date, to proceed six months after it was filed while considering supplemental briefing from a single party constitute irregularities in the proceedings and further constitute an abuse of discretion?

(7) Are the Respondents' lenders necessary parties and if so, is it possible to fashion a remedy to allow the case to proceed to trial?

(8) Should this case be remanded to the Superior Court and the court be instructed to proceed to trial because material issues of fact and law have been raised in the case and summary judgment cannot be awarded to the Respondents in this case.

IV. STATEMENT OF THE CASE

On April 8th 2011, Appellant's former counsel filed the instant action entitled Complaint to Quiet Title to Easements in the Platted Rights-of-Way of The Plat of Chautauqua Beach. *CP 1-6*. The named defendants are as follows: 1. James V. Kelly and Angela A. Kelley; 2.

Mortgage Electronic Registration Systems, Inc.; 3. Tamara Kittredge; 4. JP Morgan Chase; 5. School Employees Credit Union of Washington; 6. John Friars and Elvera Friars; 7. Boeing Employee Credit Union; 8. Dean Strain and Shirley Strain; 9. Christine Tesch- Spires; 10. Vashon Park District. *CP 1-6.* Appellant's former counsel served the Summons and Complaint in this case upon all of the named defendants above except certain lenders of the defendants including the Mortgage Electronic Registration Systems, Inc., JP Morgan Chase, and Boeing Employee Credit Union. Throughout the case, and through early March of 2013, none of the defendant property owners (Respondents) objected to or raised any defenses concerning the fact that lenders named in the case had not being served with the Summons and Complaint. Moreover, none of them had raised the defense of failure to serve the named lenders or that the lenders were necessary parties. *CP 14, 15*. In fact, defendant SECU did not even file an Answer in the case until March 4, 2013, 27 days before the scheduled trial date in the case between the parties. *CP 107-110.*

In 1995, Respondent Tamara Kittredge, and others, as plaintiff, filed a lawsuit in King County Superior Court under case no 95-2-29844-3 SEA against King County seeking a decree quieting title to the platted roads abutting their respective properties for access to their properties. *CP*

417. In Stipulated Findings of Fact and Conclusions of Law between Tamara Kittredge and King County, it the Court concluded that Tamara Kittredge was entitled to a Decree quieting title in her favor in the platted roads allowing Tamara Kittredge's access to her property. *CP 417-420*. In its Order the Court concludes " while this vacation puts an end to all interests of the public in the platted streets, nothing herein shall affect any private interest or easements over the street". *CP 421*. In the lawsuit, Tamara Kittredge does not name any lenders as a party to the action. *CP 417*.

In 2000, John and Mary Peterson filed an action against Respondent Tamara Kittredge and other defendants in King County Superior Court under case number 00-2-17282-6 KNT. *CP 412*. The case involves a boundary dispute between the parties who are neighbors. In a Stipulation and Judgment Quieting Title dated August 2nd 2000, the parties agreed to new boundaries of their respective properties. *CP 412-414*. The lawsuit does not name any lenders as a party to the action. *CP 412-414*.

In 2007, the respondents Tamara Kittredge, John and Elvera Friars and Dean and Shirley Strain along with other neighbors, as plaintiffs, filed a lawsuit in King County Superior Court under case number 07-2-03438-2 against King County and others to quiet the Respondent's title to platted

roads which are involved in this case abutting their respective property. *CP 428*. The case resulted in a Stipulated Judgment and Decree Quieting Title between Kittredge, Friars and Strain and King County quieting title to platted roads allowing the Respondent's access to their property. *CP 428-432*. The lawsuit does not name any lenders as a party to the action. *CP 428-432.*

The trial date in the case has been continued 6 times without objections from any of the parties. *CP 49-50; 60-64; 324-326;518-519;535-537;584-586*. After the initial case schedule order, additional case schedule orders were issued in the case. In early 2013, the Schedule Order in this case provided the date of March 18, 2013 as the deadline for hearing dispositive pretrial motions, and set the trial date for April 1, 2013. *CP 65-66.*

On February 25, 2013, all counsel and Judge Bradshaw participated in a pre-trial conference at which time Appellant's counsel, a solo practitioner, advised the Court and all counsel that he was planning on being out of the office and out of the country from April 5th through April 12th, 2013 and would be unavailable to conduct a trial or participate in the case in any fashion. Judge Bradshaw acknowledged Appellant counsel's absence as did all defense counsel. The resulting Pretrial Order

signed by Judge Bradshaw notes that Appellants' counsel will be unavailable during the week of April 8th through April 12th, 2013 to participate in the case. *CP 74-78.*

On March 25, 2013 Appellants' counsel served all counsel and filed with the court clerk a Notice of Unavailability which stated that the Appellant's counsel would be away from the office and unavailable commencing Friday April 5th through Saturday April 13th and requested that no motions or other matters be filed or acted upon since the undersigned is a solo practitioner and would have no way to respond to any matters scheduled or filed in the undersigned's absence. *CP 177-179.* After circulating the notice, Appellant's counsel had occasion to speak with and send emails to all defense counsel in this case and they acknowledged that they were aware that Appellant's counsel was leaving his office unattended and would not be available to participate in actions or motions in his absence. *CP 400.*

On March 25th and March 26th, 2013 in anticipation of an April 1, 2013 trial, the parties served and filed their trial briefs, submitted a Joint Statement of Evidence, Witness and Exhibit List and were otherwise prepared for trial. *CP 267-276;215-228;257-266;229-241;242-256;149-153.* Appellant Eric Dietze traveled from Duke University in North

Carolina to Seattle to attend the trial. Judge Bradshaw was unavailable to conduct trial in this matter on April 1, 2013 and the parties were put on standby waiting for an available Judge to preside over the trial. Based on the fact that a new judge was not available to be assigned to conduct the trial, on April 3, 2013 Judge Bradshaw signed and entered a Stipulation and Order to provide for an agreed upon trial date of May 6, 2013. *CP 324-326.*

On Thursday, April 4, 2013 at approximately 4:20 p.m., and as the Appellants' counsel was about to leave the office for a trip out of the country, Respondent School Employees Credit Union ("SECU")'s counsel Scott Smith sent an email to Appellants' counsel attaching a Summary Judgment Motion indicating that he would note the motion without oral argument. *CP 400-401.* Mr. Smith also stated that he was "mindful" that the undersigned Appellants' counsel would be "out of town" commencing on the following day and throughout the week of April 8th, through April 12th, 2013. In response to receiving the Summary Judgment motion, Appellants' counsel was in disbelief that such a motion would be filed and advised Mr. Smith and all counsel that Appellants objected to the motion without oral argument and demanded that the motion be withdrawn based on the passing of the dispositive motion

deadline in the case. *CP 401*. Mr. Smith refused to do so and had not obtained leave of court to file such dispositive motion. The Note for motion regarding the Summary Judgment noted that the hearing was set for May 2, 2013. *CP 329-331*. The remaining Respondents joined the Summary Judgment motion on April 5, 2013 while the Appellants' counsel was out of the country and unavailable *CP 376-380*. Therefore, although Appellants' counsel believed that both the filing of and particularly the timing of the motion were in bad faith, done to gain a tactical advantage and therefore for an improper purpose, Appellants' counsel believed that the Appellants would have until at least April 22, 2013 to object to and respond to the motion. *CP 401*.

Appellants' counsel left for his trip in the morning of April 5, 2013. At that time, he expected to have time to file a motion to strike the Summary Judgment motion upon returning from his trip since the motion violated the terms of the Case Schedule Order and because Appellants' counsel had objected to the noting of the motion without oral argument. *CP 401*. However, upon Appellant counsel's return from the trip, he learned that defendant's counsel in this case had engaged in filing pleadings, noting motions and scheduling oral argument for the Summary Judgment motion without knowledge or participation of Appellants'

counsel. For example, On April 5, 2013 Scott Smith's office contacted the Court and sought to determine if Judge Bradshaw was available to hear the Summary Judgment hearing on May 3, 2013 and if not, what dates were available. *CP 401*. Appellants' counsel was uninformed that the above communication had occurred. On Friday April 5, 2013 the Respondents' counsel requested that Judge Bradshaw's bailiff schedule oral argument on April 25, 2013 for the Summary Judgment motion. Again, Appellants' counsel was not involved in or informed of the communication, and did not consent to a hearing which would considerably shorten the time with which Appellant had to respond to the Summary Judgment motion. *CP 401*.

On April 5, 2013 Defendants Kelly and Tesch Spires and Defendants Kittredge, Friars and Strain filed joinders to defendant Employee School Credit Union's motion for Summary Judgment. *CP 376-380*

On Tuesday, April 9, 2013 SECU's Counsel filed a Motion for an Order shortening time to hear the Summary Judgment motion which was joined by the remaining defendants. Again this was filed without Appellant counsel's knowledge, consent or participation. *CP 381-383*.

On April 12, 2013, Judge Bradshaw signed an Order which

Appellants' counsel received on Monday April 15, 2013 instructing the Appellants to provide a response to defendant SECU's motion for Summary Judgment by noon on April 19, 2013. *CP 398.* Therefore, the purposeful, deliberate and bad faith actions of the defendant's counsel resulted in the Appellants' counsel having to respond to the Summary Judgment Motion in 4 ½ days and upon the return of an out of the country trip.

SECU is the only defendant who has raised the affirmative defense of failure to join an necessary party CP 107-110. In its April 4, 2013 Summary Judgment motion, SECU argues that with the exception of SECU, the Appellant failed to "serve" necessary parties, namely the remaining lenders named in the lawsuit which had not been served by the Appellants' former counsel. *CP 332-339.*

In their response to SECU's Summary Judgment motion, Appellant opposed the motion on the basis that the case could reach a determination on the merits without impeding the parties or lenders interests, that dismissal is a drastic remedy, certain case law decisions favor trials on the merits, and that in applying the factors under CR 19(b) SECU and the remaining defendants failed to put forth any evidence and to establish that the named lenders who had not been served were

necessarily or must be deemed necessary parties in the case. *CP 434-441*.

After a hearing with Judge Bradshaw on April 25, 2013 to determine SECU's motion for Summary Judgment, Judge Bradshaw decided not to rule on the motion given the strenuous objections of the Appellants' counsel over the noting of the motion after the dispositive cutoff date; and other activity, including the ex parte communications and the Court's shortening the response time, which had occurred while Appellants' counsel was absent and unavailable. Judge Bradshaw also denied sanctions sought by Appellant against the Respondent's counsel for shortening time and otherwise conducting ex parte communications with the Court without the Appellant's counsel's knowledge or consent. *CP 517*. Although SECU had never sought leave of Court to file a dispositive motion after the dispositive cutoff date in the case schedule order, Judge Bradshaw said he saw no harm in the defendant doing so and signed an Order contradicting the Case Schedule Order and "granted SECU's request" to hear the Summary Judgment motion after the dispositive motion cutoff date which had never been made at all. Judge Bradshaw also stated in the Order that the Appellant may file supplemental briefing by May 2, 2013 with Respondent's reply by May 9, 2013. The Order further states that if the Summary Judgment motion proceeds on the merits, the

court will schedule oral argument. *CP 518-519.*

On May 1, 2013 upon a stipulation of the parties, Judge Bradshaw signed and entered an Order continuing the trial date to June 24, 2013. *CP 535-537.* On May 2, 2013 Appellant's counsel filed a Supplemental Response to SECU's Summary Judgment motion which opposed the notion that the lenders had any interest in the properties or that they were necessary parties to the litigation.

Appellants did not and do not believe that the lenders named by Appellant's former counsel were necessary parties given the extensive litigation history of the Respondents involving the same relief, the same platted roads, and which did not involve or name any of their lenders. However to move forward with case, Appellant filed a motion on May 2, 2013 to effectuate service of the summons and complaint on the lenders which had not been served in the case. *CP 520-523.* Judge Bradshaw granted the motion and entered an Order on May 20, 2013 allowing service of the summons and complaint on the remaining lenders and further stated "Defendants may indicate their preference for a new trial date, and may also seek terms as may deemed appropriate by the Court". *CP 582-583.*

Appellant effectuated service of the Summons and Complaint on

defendant Mortgage Electronic Registration Systems, Inc. as nominee for Countrywide Bank, in Danville Illinois; defendant JP Morgan Chase; and Boeing Employee Credit Union by June 21, 2013. Therefore, the remaining lenders in the case were served as of June 21, 2013. On June 28, 2013 Bank of America filed an Appearance in the case through counsel stating that it was erroneously sued as Mortgage Electronic Registration Systems, Inc. as Nominee for Countrywide Bank, FSB. *CP 595-597* On July 17, 2013, JP Morgan Chase filed an Appearance in the case. *CP 602-605*.

Counsel for defendant Bank of America inquired about the nature of the case with the Appellant's counsel and thereafter moved to be dismissed from the lawsuit. None of the Respondents objected to the proposed dismissal of Bank of America or claimed that the bank was an necessary party which needed to remain in the case. On August 16, 2013, Judge Bradshaw signed and entered an order which provided that Bank of America "shall be bound by any judgment of the Court with respect to the grant or denial of an easement over the property owned by Defendants Kelly". *CP 626-628* In August of 2013, Defendant JP Morgan Chase Bank filed a motion to dismiss it from the case. None of the Respondents objected to the proposed dismissal of JP Morgan Chase. Judge Bradshaw

signed and entered an Order on August 29, 2013 granting JP Morgan Chase's motion and dismissed it from the litigation. *CP 629-630*. On September 19, 2013, without notice, Respondents SECU and Kittredge, Friars and Strain filed a "Supplemental Summary Judgment Brief" seeking to have Judge Bradshaw rule on the April 4, 2013 Summary Judgment motion. *CP 666-670*. On October 3, 2013, and without a hearing, or notice he intended to decide the April 4, 2013 Summary Judgment motion, Judge Bradshaw signed and entered an Order granting the April 4, 2013 motion for Summary Judgment. *CP 680-683*. The Order includes a finding that the defendant lenders named in the complaint are necessary parties under Civil rule 19. *CP 682*. The Order dismisses the Appellant's lawsuit with prejudice. *CP 682.* Defendant Boeing Employees Credit Union filed a motion to dismiss it from the case. None of the Respondents objected to the proposed dismissal of Boeing Employees Credit Union. Judge Bradshaw signed and entered an Order on October 7, 2013 granting Boeing Employees Credit Union's motion and dismissed it from the litigation. *CP 684-685*. Appellant filed a Motion for Reconsideration concerning the Order on Summary Judgment raising concerns about the procedural irregularity of Appellants counsel simply emailing the Court, submitting additional material, failing to note a motion or otherwise

follow any recognized procedures in an attempt to get Judge Bradshaw to rule on the April 4, 2013 Summary Judgment Motion. *CP 686-690*. Judge Bradshaw denied Appellant's motion for Reconsideration. *CP 691*.

V. LAW AND ARGUMENT

VI. ARGUMENT

A. Standards of Review – Summary Judgment

When reviewing a summary judgment, this Court stands in the same position as the trial court, and reviews the motion(s) *de novo. Ruff v. King County,* 125 Wn.2d 697, 703, 887 P.2d 886 (1995)*; Steury v. Johnson,* 90 Wn. App. 401, 404, 957 P.2d 772 (1998). The burden is on the moving party to demonstrate there is no issue of material fact. The moving party is held to a strict standard. *Scott v. Pacific West Mountain Resort,* 119 Wn.2d. 484,502-503, 834 P.2d 6 (1992).

The Court considers all of the facts submitted and views all of the facts in light most favorable to the nonmoving party. *Ruff,* 125 Wn.2d at 703. Summary Judgment is proper only where there are no genuine issues of material fact and the moving party is entitled to prevail as a matter of law. CR 56 (c). *Public Employees Mutual Ins. Co. v. Fitzgerald,* 65 Wn. App 307, 828, P.2d 63 (1992); *Weyerhaeuser Co. v. Aetna, et al.*, 123

Wn.2d 891, 874 P.2d 142 (1994). A material fact is a fact upon which the outcome of the litigation depend, in whole or in part. *Ruf*, at 703. Summary judgment may not be granted unless, based on the evidence, reasonable persons could reach but one conclusion. *Ruff*, 125 Wn. At 703-704.

B. Abuse of Discretion

This Court reviews a trial court's decision to determine if it was a result of an abuse of discretion. *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Kucera*, 140 Wn.2d at 209. This Court reviews a trial court's findings of fact for substantial evidence, and its conclusions of law de novo. *Rainier View Court Homeowners Ass'n, Inc. v. Zenker*, 157 Wn.App. 710, 719, 238 P.3d 1217 (2010). "[S]ubstantial evidence" is "a quantum of evidence sufficient to persuade a fair-minded person that the premise is true." *Rainier View*, 157 Wn.App. at 719.

An action constitutes an abuse of discretion if the discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.... Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other". *In re Schuoler*, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986). A court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *In re the Marriage of*

Muhammad, 153 Wash.2d 795, 803, 108 P.3d 779 (2005).

C. The Superior Court Erroneously Granted the Respondent's Motion for Summary Judgment against the Appellant finding that the Respondent's lenders are necessary parties.

1. Consideration of the Facts and Circumstances in the Light Most Favorable to Appellants Precluded Entry of Summary Judgment.

In regards to the Appellant's claims, when considered in the light most favorable to the Appellants, the salient facts are as follows:

a. Respondent's Kittridge, Friars and Strain, have engaged in litigation which among other relief sought to quiet tile in title to their property concerning portions of platted roads which did not name or involve their lenders. *CP 428-432;412-441;417-420*

b. Respondent's Kittridge, Friars and Strain and Kelly, and Vashon Park District, all of the landowners in this case did not raise the defense of failure join an necessary party in an Answer in this case.

c. Respondent SECU did not file an Answer until March 4th 2013, 27 days before the scheduled trial in which it alleged that the Appellants had failed to join necessary parties. *CP 107-110.*

d. SECU's motion for summary judgment includes no evidence that the Respondent's lenders have an interest in the Respondents property or why they are necessary for the Court to determine the easement rights of the Appellant's over platted roads. *CP 332-339*.

e. None of the Respondents objected to motions or subsequent Orders which dismissed the lenders named in the litigation.

D. In applying the factors of CR 19 (b) the Respondent SECU failed to establish that it or other alleged lenders are necessary parties in this case.

Civil Rule 19(a) provides:

Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in action if (1) in his absence complete relief ***cannot*** be accorded among those already parties, or (2) *he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence in his absence may (A) as a practical matter impair or impede his ability to protect that interest* or (B) leave any of the persons already parties subject to a substantial risk by incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not

been so joined, the court shall order that he be made a party…(emphasis added).

Dismissal for failure to join a necessary party is a drastic remedy, and as trials on the merits are preferred, it should be employed sparingly when there is no other ability to obtain relief *Gildon v. Simon Property Group, Inc.,* 158 Wash. 2d 483 (2006). A necessary party under CR 19(a) is one who "has sufficient interest in the litigation that judgment cannot be determined without affecting that interest or leaving it unresolved." *Harvey v. Board of County Comm'rs of San Juan County*, 90 Wn.2 473 (1978); *Kitsap County Fire Protection Dist. No. 7 v. Kitsap County Boundary Review Bd.*, 87 Wn. App. 753 (1998). Just because a person may be a proper party with a right to intervene, it does not make that person a party who must be joined. *Crosby v. County of Spokane,* 137 Wn. 2d 296 (1999).

In applying the factors of CR 19 (b) Respondent SECU failed to establish that the Respondent's lenders are necessary parties in this case. First, none of the Respondent land owners Kelley, Kittredge, Friars, or Strain named or joined their own lenders or those of their neighbors when obtaining relief in their own legal actions to establish certain easement rights. Any judgment sought by Appellant does not seek to deprive any

Respondent from the full use and enjoyment of their land. Appellant's relief is limited to determining what non-exclusive easement rights they have across platted roads used by the Respondent's to access their property. Clearly, the Respondent's former legal actions resulted in decrees and judgments which did not involve or join their lenders. *CP 417-420; 412-414; 428-432.* In this case, a judgment and decree to quiet title concerning the ingress and egress easement right of the Appellant will not prejudice the defendant's lenders since they have no interest in the Plaintiff's easements rights or this case which is evidenced by their motions to be dismissed from the case.

Lastly, the lenders waived and abandoned any interest in this case by knowingly and voluntarily dismissing themselves from the case.

E. The Superior Court erred in entertaining a Summary Judgment motion, filed after the dispositive cutoff date, and determined six months later, without a hearing in contradiction to its earlier Order.

CR 60(b) (1) provides that the Court may relieve a party or his legal representative from an order based on surprise, or irregularity in obtaining an order. Moreover, under subparagraph (11) the rule also allows relief from an Order for any other reason justifying relief from the

order. Similarly CR 59 provides that relief may be granted upon the basis of irregularity in the proceedings of the court…..by which such party was prevented from having a fair trial.

In this case, the Respondents Summary Judgment Motion was never properly brought before the Court. That applies when initially filed in April 2013 and when the Superior Court executed the October 3, 2013 Order Granting Summary Judgment.

VII. CONCLUSION

Based on the Actions of the Appellant Landowners and their lenders, who sought voluntary dismissals in this Case, this Court cannot sustain the Superior Court's finding that the lenders are necessary parties. The Court abused its discretion in the proceedings involving the Summary Judgment hearing. 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 22nd day of July, 2014.

LAW OFFICE OF GREGORY P. CAVAGNARO

By_____

Gregory P. Cavagnaro, WSBA# 17644
Attorney for Plaintiffs/Petitioners Eric Dietze and Victoria Seewaldt

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DATED this 22nd day of July, 2014.

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