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APPEAL NO. 68913-4-I

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

(Whatcom County Court Case No. 08-2-02034-3)

ORIGINAL

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LAKE WHATCOM RAILWAY COMPANY, a Washington Corporation

Plaintiff/Appellant,

vs.

KARL ALAR and JEANINE ALAR, husband and wife; STEVEN SCOTT and JANE DOE SCOTT, husband and wife; et al.

Defendants/Respondents.

APPELLANT LWRW'S REPLY BRIEF

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May 21, 2013

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I – ISSUES

1. The 1931 Warranty Deed granted the railroad a fee.

2. The 1901 Quit Claim Deed granted the railroad a fee.

3. Cause Number 51720 was not final until 2012.

4. In 2010 and 2012, the Whatcom County Superior Court, in making its findings and conclusions regarding Lake Whatcom Railway's use and maintenance of its property, exceeded its authority and entered into an area controlled solely by federal law.

5. The 1980 Consent Decree was an agreement between specific persons and cannot be interpreted, enlarged or modified to benefit Scott and Alar (Alar).

II – ARGUMENT

1. Fee or Easement.

Alar describes the 1901 Deed as the Zobrist Grant and the 1931 Deed as the Byron Grant. The term Deed is avoided by Alar and was avoided by the trial court. The 1901 document is titled Quit Claim Deed. Exhibit 1. The 1931 document is titled Warranty Deed. Exhibit 2. Alar's argument is that "there has been no change in the controlling precedent" regarding railroad deeds since *Veach*

v. Culp was decided in 1979. Resp. Brief, p. 27. When *Veach v. Culp*, 92 Wn.2d 570, 599 P.2d 526 (1979) is reviewed for Washington cases which have cited *Veach v. Culp*, we see that Division I, and the Washington Supreme Court has either failed to rely upon *Veach* as authority by finding a way to distinguish *Veach v. Culp* or rejecting *Veach v. Culp. See Ray v. King County*, 120 Wn.App. 564, 571-72, 86 P.3d 183 (Div I, 2004); *Brown v. State*, 130 Wn.2d 430, 924 P.2d 908 (1996).

Alar has not argued any legal authority to support any finding or conclusion that the 1931 Warranty Deed conveyed only an easement. Instead, Alar incorrectly argues that Lake Whatcom Railway Company (Lake Whatcom Railway) did not appeal Findings of Fact 1.6 or 1.7.

> And the trial court followed the extensive factors cited in Ray when it reached the Findings of Fact 1.6 and 1.7. Again, Findings not appealed and verity on appeal.

Resp. Brief, p. 28. Lake Whatcom Railway Company's Assignment of Error No. 4 assigned error to Finding of Fact 1.6:

> The trial court erred when it made and entered Finding of Fact 1.6 on September 24, 2010 as follows; "It was the intent of the parties to the Zobrist Grant [1901

> Deed] that the same convey an easement and not a fee simple interest." CP 132.

App. Opening Brief, p. 11. Lake Whatcom Railway's Assignment of Error No. 5, assigned error to Finding of Fact No. 1.7:

> The trial court erred when it made and entered Finding of Fact 1.7 on September 24, 2010 as follows: "It was the intent of the parties to the Byron Grant [1931 Deed] that the same convey an easement and not a fee simple interest." CP 134.

App. Opening Brief, p. 11.

The 1931 Deed has no right of way language. It is a Warranty Deed. Exhibit 2. The 1931 Deed conveys and warrants to "Northern Pacific Railway Company . . . the following described real estate situated in the County of Whatcom and State of Washington, to-wit . . . (which included the Byron parcel now owned by Lake Whatcom Railway Company)." Exhibit 2. In 1972, Burlington Northern Santa Fe Railway (BNSF), by Quit Claim Deed, conveyed to Cascade Recreation, Inc. "all interest in the following described real estate, including any after acquired title." Exhibit 9. The 1931 Deed, which appropriately transferred after acquired title, included the property originally conveyed in the 1901 Quit Claim

Deed and the property conveyed in the 1931 Warranty Deed. In 1989, Cascade Recreation, Inc., deeded to Lake Whatcom Railway Company, including all after acquired title, the real property described in both the 1901 and 1931 Deeds. Exhibit 10.

Admittedly, the 1901 Deed, has language as follows: "A right-of-way one hundred feet wide." Exhibit 1. However, neither the 1931 Warranty Deed, nor the subsequent Deeds to BNSF, Cascade or Lake Whatcom Railway have right of way language. The law in Washington is clear.

> In sum, *Brown* establishes that use of a statutory warranty deed creates a presumption that fee simple title is conveyed. However, our previous cases, which *Brown* does not overrule, and in fact incorporates, establish that whether by quitclaim or warranty deed, language establishing that a conveyance is for right of way or railroad purposes presumptively conveys an easement and thus provides the "additional language" which "expressly limits or qualifies the interest conveyed." *Brown,* 130 Wash.2d at 437, 924 P.2d 908.

Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n, 156 Wn.2d 253, 270, 126 P.3d 16 (2006).

The trial court made no attempt to analyze either Deed under the factors outlined in *Brown v. State*, 130 Wn.2d 430, 924

P.2d 908 (1996) or *Ray v. King County*, 120 Wn.App. 564, 86 P.3d 183 (Div I, 2004). If the trial court had applied the law as outlined in either *Brown* or by this Court in *Ray*, the trial court would have necessarily concluded that the 1901 Deed was not intended as an easment. Both the granting language and the concluding language in the 1901 Deed make it inappropriate to find or conclude the 1901 Deed was intended as an easement under either *Brown* or *Ray*.

> . . . do by these presents remise, release and forever quit claim unto said party of the second part, and to its assigns, all that certain lot, piece, or parcel of land situate in Whatcom County ... to-wit: . . .
>
> Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appurtaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.
>
> To have and to hold, all and singular, said premises, together with the appurtenances unto the said party of the second part, and to its assigns forever.

Exhibit 1. Therefore, Alar and the trial court had to necessarily rely upon the doctrine of Res Judicata to make and enter the erroneous findings and conclusions.

2. Res Judicata Is Not Applicable.

Alar again argues that Lake Whatcom Railway assigns no error to the trial court's application of res judicata to 1901 Deed. Resp. Brief, p. 17. Issue No. 2 is described by Lake Whatcom Railway as whether the trial court correctly applied res judicata. App. Opening Brief, p. 15. In the first phase of the trial, Alar proposed and the trial court entered no findings of fact regarding res judicata. The trial court did enter conclusions of law 2.4 and 2.5, which conclusions determined incorrectly that the findings of fact, conclusions of law and earlier decisions controlled the trial court's 2010 decision under the doctrine of res judicata.

> 2.4 The Findings of Fact, Conclusions of Law and Decree entered in the matter of *Veach v. Culp* (Whatcom County Superior Court Cause No. 51720) are binding upon LWRR and Frank Culp (as successors in interest to Cascade Recreation, Inc.) and defendants Alar/Scott/Wens (as successors to Veach, Veach and Solem).
> 2.5 Plaintiff LWRR's claim of fee ownership of the Zobrist ROW is barred by *res judicata.*

CP 134. Lake Whatcom Railway's Assignment of Error No. 6 assigned error to Conclusion of Law 2.4. Lake Whatcom Railway's Assignment of Error No. 7 assigned error to Conclusion of Law 2.5.

Alar does not dispute that whether res judicata was appropriately applied by the trial court is reviewed de novo. *Martin v. Wilbert*, 162 Wn.App. 90, 94, 253 P.3d 108 (Div. I, 2011), *review denied*, 173 Wn.2d 1002, 268 P.3d 941 (2011). Two essential elements of res judicata are missing in this matter. First, res judicata **applies to a subsequent action**. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011). (Emphasis added.) As the Caption to the 2010 Partial Findings of Fact and Partial Conclusions of Law in this matter on appeal clearly demonstrates, this litigation occurred under the original Whatcom County Superior Court cause number, 51720, and under, in part, the original caption:

///

RICHARD VEACH and MARY P.
VEACH, his wife, and FORREST
SOLEM, Plaintiffs,
v.

FRANK CULP and JANE DOE CULP,
his wife, CASCADE RECREATION,
INC. a Washington Corporation, *et al.,*
Defendants.

CP 130-34.

Also, the matter must have been resolved "by **a final judgment**." *Williams*, 171 Wn.2d at 730. (Emphasis added.) Lake Whatcom Railway's appeal is from findings and conclusions entered in cause number 51720 in 2010, and findings and conclusions and judgments entered in cause number 51720 in 2012. CP 130; CP 65. It strains any logic or sense of integrity to argue that a final judgment was entered in cause number 51720 in 1980.

Alar had the burden to establish that the 1980 Consent Decree concluded all issues in cause number 51720. *Ensley v. Pitcher*, 152 Wn.App. 891, 902, 222 P.3d 99 (Div I, 2009). For the purposes of res judicata, Washington courts apply the *Restatement*

(Second) of Judgments, § 13 (1982), which reads that: "The rules of res judicata are applicable only when a final judgment is rendered." *Id.* at 900. Obviously, Alar did not believe that the 1980 Consent Decree was a final judgment. Alar moved that Veach v. Culp, Whatcom County Superior Court Cause No. 51720 be re-opened and the parties be substituted with Whatcom County Cause Number 08-2-02034-3. CP 1029. On February 13, 2009, over the objection of Lake Whatcom Railway Company, the trial court entered the following Order presented by Alar:

> **ORDERED ADJUDGED AND DECREED Veach v. Culp, Whatcom County Superior Court Cause No. 51720 is re-opened;**
>
> ORDERED ADJUDGED AND DECREED that Lake Whatcom Railway Company v. Alar et. *al.,* Whatcom County Superior Court Cause No. 08-2-02034-3 and Veach v. Culp, Whatcom County Superior Court Cause No. 51720 shall be consolidated for all purposes for the duration of the proceedings in both matters;
>
> ORDERED, ADJUDGED AND DECREED that the caption in the consolidated matter shall be that set forth as Exhibit A hereto; . . .

CP 952. (Emphasis added.) On March 27, 2009, Alar obtained an Order substituting Wens, Alar and Scott for the original plaintiffs in cause number 51720, and substituting Lake Whatcom Railway Co.,

for defendant Cascade Recreation Inc. in cause number 51720. CP 881. On October 27, 2009, Alar filed and served defendants/joined plaintiffs' Counterclaims and Amended Request for Relief, which pleading, in part, requested the following relief:

> IV. THIRD CAUSE OF ACTION
> CLARIFICATION AND DEFINITION OF 1980 DECREE
>
> 4.1 Defendants re-allege all of the foregoing and all of the facts set forth in its Answer and Affirmative Defenses.
>
> 4.2 Defendants request this Court to define and clarify the parties' rights under the 1980 Decree by specifying:
>
> - The "picnic area" Plaintiff LWRR is entitled to use if any;
> - That Platiniff LWRR is not entitled to utilize any of the property water ward of existing track;
> - That LWRR/Culp rights regarding maintenance need to be defined and clarified;
> - What rights Plaintiff LWRR has to use any of the balance of the 1901 Easement area for any other uses related to railroad activity.
>
> Specific Clarifications will be set forth and proven at the time of trial.
>
> V. FOURTH CAUSE OF ACTION
> QUIET TITLE
>
> 5.1 Defendants re-allege all of the foregoing and all of the facts set forth in its Answer and Affirmative Defenses.
>
> 5.2 Defendants are the owners, fee simple, of all of that property identified as Lots 1, 2 and 3 of the Blue Canyon Cluster Short Plat.

> 5.3 The 1931 Byron Easement bestows no additional rights either by way of easement or ownership to Plaintiff LWRR/Culp.
>
> . . .
>
> 5.5 Based upon the foregoing, the Court is respectfully requested to quiet title to Defendants ordering that Plaintiff LWRR's rights to the same are limited to those granted pursuant to the 1901 Zobrist right of Way as defined in the matter of Veach v. Culp.

CP 257-58. At trial, Alar offered and entered into evidence Exhibit 41, which exhibit asked the trial court to expand the 1980 Consent Decree so as to provide the defendants with written notice of any operation of the train, 14 days notice prior to any repair or maintenance activity, identify all railroad employees to defendants before the employees can remain on the deeded property, prohibiting railroad guests from parking on the railroad property, and to allow defendants to make improvements on the "right of way." Exhibit 41. The above pleadings, exhibits, and the trial court's findings of fact and conclusions of law demonstrate clearly that the 1980 Consent Decree was not the final word on the matter.

3. Federal Law Controls.

Alar argues, without factual or legal support, that Lake Whatcom Railway is not a federally regulated railroad. Their argument is that Lake Whatcom is a "hobby train" and there are no facts in the record that the train is subject to federal regulation. Resp. Brief, p. 13. Alar's railroad expert, Jarvis Frederick, testified that on behalf of Alar, he performed a site visit, track inspection, and wrote a four page report documenting his findings as they pertained to Code of Federal Regulations and railroad track safety. 2010 RP, p. 382. On direct examination by Alar, Mr. Frederick testified as follows:

> A. . . . In the case of the railroad, the CFR in our opinion was the most applicable guideline for track construction.
> Q. Let me clarify. The CFR is Code of Federal Regulations?
> A. Yes.
> Q. And you found that these are applicable to railroads?
> A. Yes.
> Q. And did you make an assumption here that the, the operation of the Blue Canyon railroad was either a Class I or Class II?
> A. Yes, based on the current use described by Scott and Alar, and it appeared to us that carrying personnel would qualify or carrying passengers, per se. It would qualify as a Class I track.

2010 RP, p. 383. In their direct examination of Frederick, Alar recognized that the speed limit of the train was controlled by federal law.

> Q. Okay, and with regard to the – you said the class of track, again, you assumed it's a Class I track designation?
> A. Yes.
> Q. Does that mean it's moving slower than 15 miles an hour?
> A. There is a maximum speed limit. I can look that up.
> Q. If you would for just a minute. See if I can help you on that one.
> MR. SHEPHERD: We would stipulate to that. That may be one thing that this Court and this attorney is aware of, Your Honor, that there's a 15-mile an hour speed in Class I.
> THE COURT: There's a stipulation to that effect.

2010 RP, p. 387-88. At the end of Federick's testimony, Alar had admitted Exhibit 32, a portion of the Code of Federal Regulations related to railroad Track Safety Standards. Section 213.2, Preemptive Effect reads:

> Under 49 U.S.C. 20106, issuance of these regulations preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law or regulation, or order that is necessary to eliminate or reduce an essentially local safety hazard; is not incompatible with a law, regulation, or order of the

> United States Government; and that does not impose an unreasonable burden on interstate commerce.

Trial Exhibit 32.

On cross examination Alar's expert, Frederick, admitted that Lake Whatcom's inspection and maintenance duties were controlled by the federal government.

> Q: . . . Do you agree that Lake Whatcom Railway is required by law to undertake ongoing inspection and maintenance of the tracks?
> A. That's not my decision. That's up to the federal government.

2010 RP, p. 395. Frederick did not deviate from his testimony that Lake Whatcom Railway was bound by federal law.

> Q. Do you agree that this railroad is bound by this Code of Federal Regulation, "Each drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction to accommodate expected water flow for the area concerned."?
> A. Yes.
> Q. If Lake Whatcom Railway continued to allow rotted ties to be covered by dirt, they would be in violation of this section, wouldn't they?
> A. If they continued to use a track, if they looked like this picture, then yes.

2010 RP, p. 400-01.

As argued in Lake Whatcom Railway's Opening Brief, the Lake Whatcom Railway is a federally regulated railroad.

> When the ICCTA was adopted in 1996, the federal regulatory scheme for interstate railroad operations was "changed significantly." *Flynn v. Burlington N. Santa Fe Corp.,* 98 F.Supp.2d 1186, 1188 (E.D.Wash.2000). "The purpose of the Act was to ... significantly reduce regulation of surface transportation industries." *Id.* (referring to S.Rep. No. 176, 104th Cong., 1st Sess. (1995)). The ICCTA placed with the STB " 'complete jurisdiction, to the exclusion of the states, over the regulations of railroad operations.' " *Id.* (quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n,* 944 F.Supp. 1573, 1584 (N.D.Ga.1996)).

City of Seattle v. Burlington Northern R. Co., 145 Wn.2d 661, 665-66, 41 P.3d 1169 (2002).

> Whether the Interstate Commerce Commission Termination Act and the Federal Rail Safety Act of 1970 preempt local regulation of railroad activities turns on this court's interpretation of those statutes. "Construction of a statute is a question of law which is reviewed de novo." *Rettkowski v. Dep't of Ecology,* 128 Wash.2d 508, 515, 910 P.2d 462 (1996).

Id. at 665.

> Under 49 U.S.C. § 10501(b) of the ICCTA, Congress has designated jurisdiction over railroad operations to the Surface Transportation Board (STB) as follows:
> (b) The jurisdiction of the Board over—

> (1) ... rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, *operation,* abandonment, or discontinuance of spur, industrial, team, *switching,* or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, *is exclusive.* Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.
>
> 49 U.S.C. § 10501(b)(1984 & Supp.I 1995)(Emphasis added).

Id. at 665.

The Washington Supreme Court has recently looked at the issue of the power of Washington state courts to regulate federally regulated railroads. In *Veit v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 249 P.3d 607 (2011), the Court made it clear that since implementation of the Federal Railroad Safety Act (FRSA), state Courts have no power to set safety rules or standards related to railroad operations.

> 'Under the preemption doctrine, states are deemed powerless to apply their own law due to restraints deliberately imposed by federal legislation.' *Alverado v.*

> *Wash. Pub. Power Supply Sys.*, 111 Wash.2d 424, 430–31, 759 P.2d 427 (1988); U.S. Const. art. VI (federal law is the 'supreme law of the land').

Id. at 99.

4. Court Cannot Modify the 1980 Agreement.

Alar argues that Lake Whatcom Railway's claim that the 1980 Decree is a consent decree is preposterous. Resp. Brief, p. 24. Further, Alar argues that there is no authority in the record to support this position. In support of their argument, Alar cites *Black's Law Dictionary (2001)*, as follows: "A consent decree (is) . . . a court decree that all parties agree to." Resp. Brief, p. 25. In 1980, after remand, there was no hearing where the trial court made additional findings, reached additional conclusions or rendered any oral decision. Instead, without any subsequent hearing, the parties entered **agreed** findings and conclusions and entered an **agreed** Decree. CP 1047, 1049; CP

The Court in *Veach v. Culp*, 92 Wn.2d 570, 599 P.2d 526 (1979) concluded that the 1901 Deed created an easement and plaintiffs Veach and Solem were "entitled to use the right-of-way in such a manner as does not materially interfere with the railroad's

use thereof." *Id.* at 575. Upon remand, Veach and Solem agreed to entry of a Decree, supported by written findings and conclusions of law, drafted by their attorney. The 1980 Decree contained the following relevant language:

First, "plaintiffs and all persons claiming by, through and under them, are permanently enjoined from materially interfering with defendants' railroad operations." (Underline added.) CP 1048. Further, "plaintiffs, and those claiming through them, are restrained from interfering with the train passengers or train employees north of the tracks who are engaged in entering, leaving, or waiting for the train or who are in the picnic area . . ." (Underline added.) CP 1049. The language of Decree was different as to the other activities and rights of Veach and Culp. The language, and all persons claiming by through and under them was not used, when the parties, in 1980, agreed that Plaintiffs (only):

- [A]re entitled to use the right of way in such a manner as does not materially interfere with the railroad's use thereof.
- [M]ay further maintain on the railroad right of way south of the railroad tracks a bathhouse, dressing rooms and outhouse, fireplaces, picnic tables and facilities and docks and may construct further similar facilities as they desire not

closer than eight and one-half (8-1/2) feet from the edge of the track.

- They may also exclusively swim, fish, boat and do all other water-related activities.
- [T]hey may cross the right of way wherever they choose and may establish such improvements as paths, roads, steps and handrails as they desire to construct to get to their beach south of the railroad tracks.
- [They] are entitled to an injunction against defendants and all persons claiming under them, including their passengers, that they shall not interfere with the water system, roads, pathways, steps and handrails from the upland across the railroad right of way to the beach south of the tracks, and shall not interfere with or use the littoral and riparian rights or picnic facilities, or picnic south of the tracks.

Exhibit 6.

A Decree by consent is construed as a contract between the parties with the terms of the contract embodied in the Decree. *Washington Asphalt Co. v. Kaeser Co.*, 51 Wn.2d 89, 91, 316 P.2d 126 (1957). Alar provided no document demonstrating that defendants had been assigned Veach's rights under the Consent Decree.

Understanding this vital defect, Alar, over the objection of Lake Whatcom Railway, moved to reopen 51720 and consolidate it with Lake Whatcom Railway's 2008 matter. CP 954. Lake Whatcom Railway asked that if the 1980 matter was reopened that

an Order be entered, which Order read: "Whatcom County Superior Court Cause No. 51720 is reopened for all purposes, including pretrial matters, trial and subsequent enforcement of any court orders . . ." CP 958. On February 13, 2009, the trial court entered an Order reopening 51720. CP 951. On March 27, 2009, the trial court entered an Order which substituted defendants for the original plaintiffs in 51720 without notice to and without the consent of Veach. CP 810. Lake Whatcom Railway objected to entry of the Order substituting parties arguing that the trial court "lacks subject matter jurisdiction and personal jurisdiction, and therefore has no power to grant defendants' motion." CP 1137. Lake Whatcom Railway's Assignment of Error No. 25 was that "[t]he trial court erred when it entered its Order Substituting Parties on March 27, 2009." App. Opening Brief, p. 14.

"A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate." *Marley v. Labor and Industries*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). A trial court's decisions are void "when it lacks personal jurisdiction or subject matter

jurisdiction over a claim." *Trinity Universal Ins. Co of Kansas v. Ohio Cas. Ins. Co.*, 298 P.3d 99, 106 (Div. I, 2013).

Even assuming the trial court had both subject matter and personal jurisdiction, the trial court cannot grant Alar rights that were not given to Veach and all persons claiming by, through and under Veach in 1980. Further, the trial court cannot grant Alar, rights that Veach did not clearly transfer to Alar. The trial court must enforce contracts "as written and may not modify the contract or create ambiguity where none exists." *Wetmore v. Unigard Ins. Co.*, 125 Wn.App. 938, 941, 107 P.3d 123 (Div. I, 2005).

5. Lake Whatcom Railway Properly Argued Its Assignments of Error

Alar incorrectly argues that Lake Whatcom Railway's Assignments of Error are not properly addressed in the Opening Brief, except for Assigned Errors Nos. 1, 2, 3, 22 and 24. Resp. Brief, p. 11. Contrary to Alar's argument, Lake Whatcom Railway addressed its remaining Assignments of Error in the Opening Brief as follows:

Assignment of Error No. 23 regarding Conclusion of Law No. 2.16 is cited at page 21 and 23 with the following arguments:

> On August 21, 2009, the Whatcom County Superior Court clearly exceeded its authority when it entered its Interim Order and on May 18, 2012, when it entered Conclusions of Law 2.12, 2.17 and the appealed portion of Conclusion 2.16. CP 65, 75-77, and 78;
>
> On May 18, 2012, the trial court, in the guise of clarification and without lawful authority, created a new agreement between Lake Whatcom Railway and the neighbors by making and entering its Conclusions of Law 2.12, 2.17 and that portion of 2.16 which held or determined that Lake Whatcom Railway had trespassed onto property of Alar by removing a portion of the Alar fence installed on the north portion of the railroad right of way. CP 75-77; CP 78.

Assignment of Error No. 25 is discussed at page 32 of the Opening Brief with the following argument:

> Lake Whatcom Railway correctly argued that the motion to substitute parties cited no rule procedure, statute, or other authority for the proposed action. CP 954. The trial court lacked personal jurisdiction over both Veach and Solem and therefore had no power to enter the Order. *Marley v. Labor and Industries,* 125 Wn.2d 533, 543, 886 P.2d 189 (1994).

Opening Brief, p. 32.

While not specifically cited, Assignments of Error Nos. 4, 5, and 8-11 regarding the trial court's findings and conclusions that the parties conveyed an easement rather than a fee simple interest as to the Zobrist and Byron "Grants" is discussed at length at pages 35-38. Assignment of Error No. 7 regarding the application of res judicata to Lake Whatcom Railway's claim of fee ownership of the Zobrist right of way is discussed at length at pages 26-28.

Assignments of Error Nos. 6, 12 and 21 regarding the trial court's erroneous application of the "law of the case" of *Veach v. Culp* (Whatcom County Cause No. 15720), are addressed and argued at length at pages 33-38. Assignments of Error Nos. 13-15 regarding the trial court's "interpretation" of the 1980 "Consent Decree" are discussed at pages 29-32. Assignments of Error Nos. 16 and 17 are addressed at page 16.

To argue that Lake Whatcom Railway has failed to address the above seventeen (17) Assignments of Error in its Opening Brief is clearly disingenuous at best. Assignments of Error Nos. 18-20 address the trial court's findings and/or conclusions regarding Alar's damages with regard to the August 21, 2009 Interim Order, which

in turn, stem from the trial court's application of Washington state law as to the maintenance of the railroad, which, has been extensively argued by Lake Whatcom Railway, is preempted by Federal Law. Although not specifically addressed in the Opening Brief, these damages would clearly be in error if this Court set aside the trial court's findings and conclusions related to the future ongoing maintenance, use, operation or occupation of the Lake Whatcom Railway, including Assignments of Error Nos. 18-20.

III – CONCLUSION

The trial court incorrectly characterized both the 1901 and 1930 Deeds as "Grants" and ultimately erroneously concluded that that the 1901 and 1931 Deeds conveyed an easement. However, current common law should be applied to both the 1901 and 1931 deeds, giving effect to the reversionary clause in the 1901 deed, which is indicative of a grant of a right of way in fee to the Lake Whatcom Railway.

The trial court improperly applied res judicata to the 1901 and 1931 Deeds where the previous litigation was reopened and consolidated into the underlying matter by the trial court, resulting

in no "final" judgment from which res judicata could be applied until 2012. Additionally, Alar did not meet their burden of proving that the remaining elements necessary for res judicata were present.

Federal law preempts the regulation of railroad operations. In 2010 and 2012, the Whatcom County Superior Court in making its findings and conclusions regarding Lake Whatcom Railway's use and maintenance of its property, exceeded its authority and entered into an area controlled solely by federal law.

The 1980 Consent Decree, by definition was an agreement between specific persons and cannot be interpreted, enlarged or modified to benefit Alar.

RESPECTFULLY SUBMITTED this 31st day of May 2013.

SHEPHERD and ABBOTT

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Of Attorneys for Lake Whatcom Railway

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

LAKE WHATCOM RAILWAY COMPANY, a Washington Corporation Plaintiff/Appellant, vs. KARL ALAR and JEANININE ALAR, a marital community composed thereof; and all persons claiming any right, title or interest through them, and STEVEN M. SCOTT and JANE DOE SCOTT, husband and wife, and the marital community composed thereof; and all persons claiming any right, title or interest through them Defendants/Respondents. RICHARD VEACH and MARY P. VEACH, his wife, and FORREST SOLEM, Plaintiffs, vs. FRANK CULP and JANE DOE CULP, his wife, CASCADE RECREATION, INC., a Washington corporation, et al., Defendants.	**Case No. 68913-4** **Whatcom County Superior Court Case No. 08-2-02034-3 f/k/a No. 51720** **DECLARATION OF SERVICE**

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I, Jen Petersen, declare that on May 21, 2013, I caused to be served a copy of the following document: **Appellant LWRW's Reply Brief;** and a copy of this **Declaration of Service** in the above matter, on the following person, at the following address, in the manner described:

Douglas Robertson, Esq.	(X) U.S. Mail
Kristen C. Reid, Esq.	( ) Express Mail
Belcher Swanson Law Firm, PLLC	( ) Fax
900 Dupont Street	( ) E-Mail
Bellingham, WA 98225	( ) Messenger Service
	( ) Hand Delivery

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

DATED this 21st day of May 2013.

Jen Petersen

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