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No. 70500-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KEITH L. HOLMQUIST and KAY BURDINE HOLMQUIST, f/k/a KAY BURDINE, husband and wife; and FREDERICK A. KASEBURG, a single man,

Respondents,

v.

KING COUNTY, a political subdivision of the State of Washington and CITY OF SEATTLE, a municipal corporation,

Appellants.

APPELLANT CITY OF SEATTLE'S REPLY BRIEF

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I. INTRODUCTION

Respondents' the Holmquists and Kaseberg fail in their attempt to characterize the law of executory contracts and street vacation, as it existed in 1926 and 1932, as giving their predecessor property owners, Muller and Shotwell, a property interest in the two lots adjacent to the street end at NE 130th Street that amounts to legal or equitable title. No matter how many cases are cited, how those cases are characterized, or how often the governing case law of this time period was criticized, the Holmquists and Kaseberg cannot escape the fact that the law in 1926-1932 did not give vendees legal title to property before the terms of the executor contract were fulfilled and the fulfillment deed was conveyed.

The determinative question in this case is: who was the owner of the adjacent parcels of land at the time that NE 130th Street was vacated in 1932? The answer to this question establishes whether Puget Mill Company ("Puget Mill") or Muller and Shotwell became the owner of the vacated street end upon its vacation in 1932. The prevailing law in 1926 through 1932 shows that Puget Mill was the legal and equitable title holder and thus, the legal owner of the adjacent parcels of land, until it issued fulfillment deeds to Muller and Shotwell in 1933 and 1935, respectively. Accordingly, Puget Mill, not Muller and Shotwell, became the owner of the street end upon vacation in 1932. As the title holder to

both adjacent parcels and the street end, Puget Mill was free to convey the right-of-way in the street end to King County in 1932, without any impact on the pending executory contracts with Muller and Shotwell.

II. ARGUMENT

A. Puget Mill Company Held Legal And Equitable Title To The Adjacent Lots Until The Executory Contracts Were Fulfilled In 1933 And 1935.

All of the Holmquists' and Kaseberg's arguments are built on one central, incorrect assumption – that Shotwell and Muller, Respondents' predecessor land owners, became the legal owners of the lots adjacent to the street end when they entered into the real estate sale contracts in 1926. This assumption fails to acknowledge how the law in effect in 1926 treated vendees under an executory contract. The Holmquists' and Kaseberg's reliance on Washington cases decided years, and in some cases decades, after the 1926 executory contracts were entered into is misguided – although the holding of *Ashford v. Reese*, 132 Wash. 649, 233 P. 29 (1925), was overturned in 1977, the Holmquists and Kaseberg cannot avoid the fact that the rule of *Ashford* and its related cases was the controlling law in 1926. Moreover, the Holmquists and Kaseberg concede the central argument of the City's and County's appeal through citation of multiple cases that make the City's and County's arguments: Muller and Shotwell may have had some sort interest in the adjacent lots through the

executory contracts, they did not become the title holders and legal owners of the lots until 1933 and 1935, respectively – **after** Puget Mill deeded the right-of-way to King County in 1932. Thus, without any basis to support their claim that Muller and Shotwell became the legal owners of the properties before the street end was vacated in 1932, all of Respondents' subsequent arguments also fail as a matter of law.

The Holmquists and Kaseberg rely on numerous cases that stand only for the proposition that, during the relevant time frame in question (1926-1935), the executory contracts that Muller and Shotwell entered into may have given them some type of interest in the adjacent properties, but Puget Mill remained the legal and equitable title holder of the lots until the fulfillment deeds were conveyed in 1933 and 1935. The Holmquists and Kaseberg assert that *Pratt v. Rhodes*, 142 Wash. 411, 253 P. 640 (1927) and *State v. ex rel. Oatey Orchard Co.,* 154 Wash. 10, 280 P. 350 (1929), demonstrate that, in 1932, a vendee under an executory contract held what amounts to today's notion of legal title. However, not only is today's standard of legal title irrelevant to this case for purposes of establishing legal ownership of the adjacent parcels at the time of the vacation, but also, these cases fail to support the Holmquists' and Kaseberg's claims.

First, in *Pratt*, the real estate contract purchaser had effectively fulfilled the terms of the sale contract, and thus, by fully performing, the

purchaser gained equitable title and could not be "forcibly ousted" from the land. 142 Wash. 411, 416, 253 P. 540, 641-42. The court specifically noted that the rule of *Ashford* was misapplied by the trial court, but did not hold that *Ashford* was incorrect: Under *Ashford*, it was held that "an executory contract to convey real property vested 'no title or interest, either legal or equitable, to the vendee' until the contract is fully performed. ... [T]he contract, on the contrary, has all of the validity that any other executory contract has which is duly and regularly executed by parties competent to contract. ... If equity, justice, and good conscience require that the contract be specifically enforced, the courts will enforce it specifically." *Id.* at 415. Thus, in *Pratt*, after the purchaser fully performed under the real estate sale contract, so far as the vendor was concerned, the vendee held equitable title and could not be ousted from the land. *Id.* This set of facts is not what occurred as to Puget Mill, Muller and Shotwell. Puget Mill never attempted to deprive Muller and Shotwell of the two adjacent parcels of land that they contracted to purchase, and once the terms of the executory contracts were completed, Puget Mill promptly conveyed the fulfillment deeds to the vendees. CP 270-71; CP 273.

Second, in *Oatey Orchard*, the court further clarified that a vendee under an executory contract does not hold either legal or equitable title

until the terms of the contract are fulfilled. The court held that while the Oatey Orchard contract gave the vendee a right to possession, dominion and control of the land, and a right to cultivate, care for and harvest crops, "[t]hese are rights which do not rise to the dignity of title either legal or equitable." 154 Wash. at 12. The *Oatey Orchard* court confirmed the rule of *Ashford*, noting that the purchaser under such a contract "has no title, either legal or equitable, to the land until the full consideration has been paid," but rather, has some rights which are "annexed to or exercisable with reference to the land." *Id.*

Third, although the Holmquists and Kaseberg rely heavily *Cascade Sec. Bank v. Butler*, which overturned *Ashford*, this reliance is misplaced. 88 Wn.2d 777, 784, 567 P.2d 631 (1977). *Cascade* was decided in 1977 – decades after the occurrence of the events of this case – and the court specifically noted that it was to be applied "prospectively" not retroactively. *Id.* at 780. Thus, the holding in *Cascade* has no bearing on the question of whether Muller and Shotwell were the legal owners of the adjacent lots when the street vacation occurred – **in 1932**. No matter how widely *Ashford* may have been criticized in later years, at the time of the street vacation, *Ashford* was the law, and under the law, Puget Mill was the legal and equitable title holder of the adjacent lots. Muller and Shotwell may have held some interest in the lots, but only an interest that

is annexed to the property that is the subject of the contract, and not title. See *Daniels v. Fossas*, 152 Wash. 516, 278 P. 412 (1929) (holding that "to be a freeholder, [one] must be the owner of either a legal or equitable title to real estate. The owner of a mortgage on land has a claim or lien which can be enforced against the land, and so also has the holder of an executor contract of sale, but the so-called claim or lien is not title.").

These cases, cited by the Holmquists and Kaseberg, reiterate what the King County Prosecuting Attorney's Office stated to the King County Board of Commissioners in its July 5, 1932 letter: "Both of these [adjacent] lots are of record in the name of Puget Mill Company. It may be that someone has a contract interest in these lots but this deed gives them no equitable interest in the lot. Section 9303 Rem. Comp. Stat. states as follows:

'The part so vacated, if it be a lot or lots, shall vest, in the rightful owner, who may have the title thereof according to law…'

It therefore follows that the Puget Mill Company becomes the owner of the vacated street in the same manner as if that street had never been dedicated…" CP 355-356. The overwhelming weight of Washington case law confirms that, under *Ashford*, when Puget Mill entered into executory real estate sale contracts with Muller and Shotwell in 1926, the mere act of entering into the contracts did not transfer title from Puget Mill

to Muller and Shotwell. Rather, Puget Mill remained the legal and equitable owner of the two parcels until the terms of the contracts were fulfilled in 1933 and 1935. Accordingly, Puget Mill was still the legal and equitable owner of the two parcels of land adjacent to the NE 130th Street right-of-way when the street vacation occurred in 1932 and was free to convey the right-of-way to King County without impacting the real estate sale contracts with Muller and Shotwell.

B. Puget Mill Company Conveyed The Right-of-Way To King County In 1932, Before Muller And Shotwell Acquired Title To The Adjacent Lots.

The Holmquists and Kaseberg claim that Muller and Shotwell had some sort of "superior interest" in the street end that took precedence over Puget Mill's 1932 conveyance to King County. However, since Puget Mill , not Muller and Shotwell, was the legal and equitable title holder to the adjacent lots when the vacation occurred in 1932, Puget Mill became the owner of the street end upon the vacation, any subsequent conveyance of that street end and/or right-of-way that occurred before Muller and Shotwell received their fulfillment deeds constituted a separate and distinct real estate transaction, and had no bearing on the executory contracts. All of the Holmquists' and Kaseberg's assertions regarding priority, notice and bona fide purchase fail given that Muller and Shotwell did not hold legal title to the adjacent lots at the time of the vacation, and

until after Puget Mill issued the quit claim deed to King County.

First, Respondents incorrectly argue that King County did not have any interest in the street end right-of-way until 1935. Contrary to these assertions, the Cedar Park Lake Front plat, recorded in October 1926 (the month before Shotwell's executory contract was recorded), dedicated "to the use of the public forever all the streets shown hereon and the use allowed for all public purposes consistent with the use thereof for public highway purposes. ..." CP 340. Moreover, Respondents' claim that King County's interest in the street end was not established until 1935 is illogical – if King County did not hold a right-of-way interest in the street end, there would have been no need for the community members to petition the County to vacate the street end. The Petition for Vacation of a County Road, signed by Muller and Shotwell, acknowledges the County's right-of-way interest in the street end. CP 342. Thus, Puget Mill's August 10, 1932 conveyance of the street end to King County simply reinstated the County's right-of-way that existed since the plat was recorded in 1926 until the vacation occurred on June 27, 1932.

Second, the Holmquists and Kaseberg incorrectly characterize the quit claim deed from Puget Mill to King County as a "backdated deed" and argue that Puget Mill did not convey the right-of-way to the County until 1935. This mischaracterization ignores the clear language on the

face of the deed, which was supported by the actions of all parties involved – the County, Muller, Shotwell and Puget Mill. The deed is dated August 10, 1932 and states: "This Deed is issued in lieu of one, bearing the same date, which has been lost, and is so accepted, one of which being accomplished, the other to stand void." CP 358. The language of the deed unequivocally conveys to King County the right-of-way that it had held from October 1926 – June 1932, dedicated in the original plat. *Id.* Thus, this is not a "backdated deed" as the Holmquists and Kaseberg claim, but rather a replacement of the 1932 deed that was somehow lost.

Moreover, the Holmquists' and Kaseberg's arguments regarding the timing of recording of the deeds and notice are irrelevant when viewed in light of the fact that Puget Mill, not Muller and Shotwell, was the legal owner of the adjacent lots in 1932. Under the rule of *Hagen v. Bolcom Mills, Inc.*, 74 Wash. 462, 133 P. 1000 (1913), since Puget Mill owned both adjacent lots at the time of the street vacation and become the owner of the street end upon the vacation, it could then convey the street end to whomever it chose, in whatever form it chose.

Since the street end right-of-way was not included in the real estate sale contracts with Muller and Shotwell and Puget Mill became the owner of the right-of-way upon the vacation, King County could not have and

did not receive any actual or constructive notice that Muller and Shotwell held an interest in the vacated street end. In fact, contrary to the Holmquists' and Kaseberg's arguments, the only notice that King County received of an interest in the street end was from the King County Prosecuting Attorney's Office ("KCPAO") to the Board of Commissioners, which stated that Puget Mill, not Muller and Shotwell, was the owner of the vacated street end. CP 355-56. It appears from the record that the executory contract between Muller and Puget Mill was never recorded, and thus, King County could not possibly have had any notice of that transaction. Accordingly, when King County received the quit claim deed from Puget Mill in 1932 – just weeks after the street vacation order was entered – the only "notice" that King County had was the recorded real estate contract between Puget Mill and Shotwell (which makes no mention of the King County right-of-way), and the letter from the KCPAO (which states that Puget Mill is the owner of the vacated street end). CP 259-261; CP 355-56. As far as King County knew in 1932, Puget Mill had entered into a real estate sale contract for one of the adjacent parcels, and the KCPAO had stated that Puget Mill was the owner of the vacated right-of-way. Neither King County nor Puget Mill would have had any reason to believe that Puget Mill could not validly re-convey the right-of-way in the street end to King County.

Third, when viewed through the lenses of *Ashford* and *Hagen*, the Holmquists' and Kaseberg's bona fide purchaser claims also fail. The Holmquists and Kaseberg claim that Muller and Shotwell were somehow "bona fide purchasers for value" of the street end when they entered into the real estate sale contracts in 1926. The facts of this case do not support this conclusion. By virtue of the plat, when Muller and Shotwell entered into the real estate sale contracts in 1926, King County held a right-of-way interest in the street end. CP 340. Muller and Shotwell contracted with Puget Mill to purchase only the adjacent lots, which did not include the right-of-way held by King County at the time the contracts were executed. CP 259-261. Even if it were true that Muller and Shotwell acquired an interest in the street end through the vacation, which it is not, or an interest in the street end up to but not including the right-of-way, they still never contracted to purchase the right of way, nor paid any value for it, and thus, could not have been bona fide purchasers of the right-of-way. When Puget Mill executed the fulfillment deeds conveying the parcels to Muller and Shotwell in 1933 and 1935, respectively, the right-of-way had already been vacated in favor of Puget Mill and subsequently re-conveyed to King County. Thus, the Respondents' predecessors got precisely what they bargained for when they entered into the real estate contracts in 1926 – no more and no less land than described in the contracts and the deeds.

C. Quieting Title in Favor Of The Holmquists and Kaseberg Is Inequitable And Contrary To The Public Interest.

Equity and the public interest demand that the summary judgment ruling be reversed and this case remanded to the trial court for further proceedings. The Holmquists and Kaseberg have not put forth any evidence or legal argument to support their claims that quieting title in the street end to these adjacent landowners, to the detriment of an entire community, would be the most equitable outcome in this case.

The Holmquists and Kaseberg misconstrue the record in an attempt to brush aside the history demonstrating that all of their predecessor landowners, the surrounding community and the City have long believed that the City holds a right-of-way interest in the street end by virtue of the 1954 annexation of this area by the City. Contrary to the Holmquists' and Kaseberg's assertions, the City cited much more than the oral argument of its counsel to support its equitable argument. Rather, as noted in the City's opening brief and the record of the summary judgment, the City has been very open with the public, including the Holmquists and Kaseberg, about its interest in the right-of-way and its ongoing plans for improvements. See CP 337-38, describing adoption of a resolution and public outreach efforts. The City's actions to improve and take care of the street end were often in response to requests throughout many years by

various Riveria neighborhood residents for the City to make improvements to this street end. CP 337.

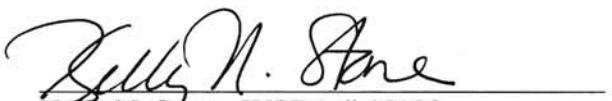
All of the Holmquists' and Kaseberg's equitable arguments, however, fail to reframe the overwhelming amount of evidence that shows that, even if Muller and Shotwell were able to acquire the street end through the vacation, they never intended to keep it for their own private use. The County Engineer's office noted that "it is the intention of the two adjacent property owners who would be benefited by the vacation to turn over to the community the vacated street for a swimming beach, supervised by the community." CP 345. Muller and Shotwell attempted to do just as the County Engineer's office suggested – on June 25, 1932, Miller and Shotwell executed a quit claim deed, which conveyed the street end to the Cedar Park Community Club, Inc. CP 347. When this attempt to convey the street end to the community failed, King County attempted to have "some sort of an instrument" prepared that would convey the NE 130th St. street end to the community. CP 355. The Holmquists' and Kaseberg's suit to quiet title in the street end in their favor flies in the face of the intentions of their predecessor land owners, the community, the County and the City. Allowing this judgment to stand would run contrary to the public interest and principles of equity.

III. CONCLUSION

Based on the record of this case, the briefs submitted and such arguments that may be made at the hearing of this matter, the City of Seattle respectfully requests that this court reverse the trial court's order of summary judgment in favor of Respondents the Holmquists and Kaseburg, and remand the case to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 3rd day of January, 2014.

PETER S. HOLMES
Seattle City Attorney

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January 2014, I filed the foregoing document with the Court of Appeals, Division I, and served on counsel listed below via legal messenger.

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