No. 91131-2

SUPREME COURT OF THE STATE OF WASHINGTON

No. 70649-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JEFFREY HALEY,

Petitioner,

v.

JOHN F. PUGH,

Respondent.

ANSWER TO PETITION FOR REVIEW

Frank R. Siderius WSBA 7759
SIDERIUS LONERGAN & MARTIN, LLP
500 Union Street, Suite 847
Seattle, WA 98101
206/624-2800
franks@sidlon.com

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I. INTRODUCTION

Petitioner, Jeffrey Haley ("Haley") seeks review of the trial court's order granting summary judgment in favor of respondent, John F. Pugh ("Pugh") which order was affirmed on appeal. The Court of Appeals, Division I, in a unanimous unpublished opinion, correctly rejected Haley's appeal. Haley's Motion for Reconsideration was denied. Similarly, this Petition for Review should be denied.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

The Summary Judgment Order (CP 77-79) determined that certain easement rights were terminated and abandoned as to any use of the easement area inconsistent with a water course corridor permitted by the City of Mercer Island. The easement was partially terminated as a result of substantial alteration of use of the easement area occurring several years prior to Haley's property ownership. Easement rights to utility, sewage and drainage serving Haley's property remained after abandonment.

The Court of Appeals correctly rejected Haley's argument that the subject easement could be extinguished only by a written deed of conveyance. Haley's predecessor in interest presented uncontroverted

evidence that she intentionally abandoned certain easement rights to facilitate the water course corridor.

Haley's contention that the statute of frauds, RCW Ch. 64.04, requires a written conveyance in order to partially abandon easement use is contrary to established Washington law.

Haley's argument that the actions of his predecessor, confirmed by her written declaration in this lawsuit, are inconsistent with Haley's warranty deed to the property is unsupported by the facts or law. Certain easement rights remain. The water course corridor was there to be seen when Haley took title to his property. Any claim arising from the warranty deed is a matter between Haley and the grantor.

Haley's argument that his predecessor in interest presented inconsistent, equivocal, vague and contradictory statements in her testimony fails where the evidence of partial termination and abandonment of the easement is uncontroverted and Haley presents no evidence to the contrary.

III. STATEMENT OF THE CASE

Appellant Haley and Respondent Pugh are Mercer Island property owners residing on the east side of the island. Three parcels of land are involved in this lawsuit. The "Bird's Eye View Facing West" photograph

(Exhibit 2, Declaration of Kathleen Hume; CP 66), shows all three parcels. The Pugh residential parcel is a Lake Washington waterfront home. The Haley parcel is situated inland directly west of the Pugh parcel. The third parcel, Tract A, is outlined in red and is a parcel owned by Pugh to the north of the Haley and Pugh residences.

The 1979 easement which is the subject of this lawsuit covers a small portion of Tract A directly north of the Haley parcel. The easement is ten feet wide by approximately 140 feet long. The easement area is now an open water course with landscaping consisting of large rocks and plantings. A common driveway serving the Pugh property and an adjacent property crosses the easement. (CP 100-102.)

A photograph of the easement area looking east toward Lake Washington shows a telephone pole in the easement area, the water course, and a hedge on Haley's property with Haley's parking area to the right on his property. In the upper right hand corner Pugh's residence is visible as well as a corner of Haley's residence. (Exhibit 4, Declaration of Kathleen Hume; CP 70.)

Pugh obtained a variance to allow for alteration of the water course corridor and other improvements on September 17, 2001. (The Notice of

Decision is Attachment A to the Declaration of George Steirer; CP 191-192.) The City of Mercer Island in 2001 approved physical alteration of a water course channel and relandscaping/site restoration in the water course area. There was a buried water pipe channeling water from west to east across the easement area into Lake Washington. Pugh proposed removal of the buried pipe and opening of the water course with significant landscaping including trees, boulders and vegetation. (CP 13-14.)

The foregoing occurred several years before Haley purchased his property. Haley's predecessor in interest, Kathleen Hume, was well aware of the permit process and plans by Pugh to open the water course and landscape the area. She consented to the proposed changes and, in fact, recognized that the easement area could no longer be used for pedestrian or vehicle access. She recognized the proposed improvements as an "enhancement" to her property's value. (See Declaration of Kathleen Hume, ¶¶ 5-10; CP 58-59.)

The approved water course area is subject to restrictions and a buffer zone wherein no development can occur. Haley's intent to reestablish the area for pedestrian and vehicular use would violate the Mercer Island Code. Haley purchased his parcel in 2005. The surface easement rights had been clearly abandoned by his predecessor in interest in 2001. Almost 11 years

later this lawsuit sought reestablishment of easement rights for pedestrians and vehicles which would require major alteration of the easement area and consent from the City of Mercer Island. (See Second Declaration of George Steirer; CP 525-526.) Review of dismissal of other claims by Haley in this lawsuit is not sought.

IV. ARGUMENT

A. ***The Court of Appeals Decision Does Not "Undermine the Foundational Policy" of RCW Ch. 64.04.*** The purpose of the statute of frauds, RCW Ch. 64.04, is to prevent fraud arising from inherently uncertain oral agreements. See *Maier v. Giske*, 154 Wn.App. 6, 15, 223 P.3d 1265 (2010). However, where uncertainty no longer exists as to the oral contract, the reason for application of the statute disappears. *Miller v. McCamish,* 78 Wn.2d 821, 829, 479 P.2d 919 (1971).

Haley argues that partial abandonment of the subject easement was ineffective because RCW 64.04.010 and .020 require that every "conveyance" of real estate shall be in writing.

As the Court of Appeals duly noted in its opinion (Petitioner's Appendix at p. 5) Haley's argument presupposes that abandonment of an easement is a conveyance. Haley cites RCW 64.04.075 which states that

easements established by a dedication cannot be extinguished "without the approval of the easement owner or owners." There is no requirement for written "approval."

Haley's unsupported interpretation of the statute of frauds ignores case law which recognizes exceptions to the statute of frauds. Even if partial abandonment of an easement is a "conveyance," which it is not, the doctrine of part performance allows proof of conveyance of an easement without a writing. See *Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 564 (1995), citing *Miller v. McCamish, supra.*

Part performance removes a contract from the statute of frauds if a party is able to show: (1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements. See *Pardee v. Jolly,* 163 Wn.2d 558, 567, 182 P.3d 967 (2008).

Although the strongest case for part performances is presented where all three part performance elements are present, this court repeatedly has found sufficient part performance where only 2 elements exist. See *Powers v. Hastings*, 93 Wn.2d 709, 721, 612 P.2d 371 (1980), citing cases.

The "foundational policy" of the statute of frauds is not undermined where clear evidence of partial abandonment of an easement is uncontroverted. The significant alteration of the easement area was done with full consent and involvement of Haley's predecessor in title who recognized that the easement area would no longer be used for pedestrian or vehicle access. (CP 58-59.) As the Court of Appeals noted, the City of Mercer Island granted the application to "daylight" a stream that had previously routed through underground pipes. The easement area now has an open water course and is densely landscaped with trees, shrubs and boulders. (Court of Appeals Opinion, Petitioner's Appendix at p. 2. See also Exhibit 4, Declaration of Kathleen Hume, CP 70.)

B. Heg v. Alldredge Controls the Outcome of this Case. The testimony of Kathleen Hume (CP 57-70, CP 413-415, CP 425-430) establishes abandonment of the easement by the dominant estate owner. Contrary to the assertions of Haley the evidence is undisputed that Haley's predecessor in interest, and others, used the easement area for ingress and egress. (CP 58.) That activity abruptly ended in 2001 when Haley's predecessor in interest, Kathleen Hume (dominant estate), consented to removal of the paved area on the easement and allowed for alteration of the

easement into a water course. (CP 59.) While Pugh testifies that the area was not "completed" until 2003 or 2004 (CP 14), Kathleen Hume testified that no pedestrian or traffic use of the easement was made after 2001. (See Declaration of Kathleen Hume, ¶9; CP 59.) The change in use of the easement area was evident when Haley purchased his property in 2005. (CP 168-170.)

Heg v. Alldredge, 157 Wn.2d 154, 137 P.3d 9 (2006) supports the abandonment argument. Haley claims there is no evidence of intent to abandon any part of the easement. Yet the testimony of Kathleen Hume offers proof of intent to abandon. Ms. Hume testified that she was "fully aware that the creation of an open stream with landscaping would eliminate any pedestrian or vehicle use of the easement area." She testified that the improvements enhanced her property value. She was aware that the City of Mercer Island approved Pugh's plans. She stated that from and after 2001, she "abandoned any claim of easement rights in Tract A with the exception of easement rights for any underground utilities. . . " See Declaration of Kathleen Hume, ¶¶ 7-10; (CP 59).

The court in *Heg* at p. 161, held that extinguishing an easement through abandonment requires more than mere non-use. The non-use "must

be accompanied with the express or implied intention of abandonment" citing *Netherlands Am. Mortgage Bank v. ERy. & Lumber Co.*, 142 Wash. 204, 210, 252 Pac. 916 (1927). The testimony of Haley's predecessor in interest, Kathleen Hume, clearly establishes an express, unequivocal and decisive abandonment of the easement with respect to pedestrian and vehicular traffic. Her actions in supporting the improvements to the easement area are inconsistent with the continued existence of the easement for those purposes. All of this occurred several years before Haley had any interest in the property. (CP 168-169.) Haley offers no evidence disputing these facts.

C. Haley Failed to Provide Any Controverting Evidence. The Court of Appeals opinion at p. 5-6 correctly concludes that the Declaration of Kathleen Hume was uncontroverted. In fact, Haley presents no evidence controverting the evidence that Hume abandoned the easement rights that Haley attempts to assert.

Haley presents no evidence which specifically denies or rebuts the Hume testimony. As such, a grant of summary judgment is appropriate. *Ashwell Twist Co. v. Burke*, 13 Wn.App. 641, 643, 536 P.2d 686 (1975).

The Hume testimony states the established facts when no controverting affidavits are presented. *Consolidated Elec. Distrib., Inc. v.*

Northwest Homes of Chehalis, 10 Wn.App. 287, 292, 518 P.2d 225 (1973). It would have been extremely difficult for Haley to present any contrary facts when he did not take title to the property until several years after approval and construction of the water course. (CP 62.)

It was incumbent upon Haley to present evidence creating a factual issue. Haley may not rest on mere allegations, but is required to present specific facts showing a genuine issue. *Reed v. Streib*, 65 Wn.2d 700, 707, 399 P.2d 338 (1965).

Unsupported conclusional statements and opinions cannot be considered in a summary judgment motion. *Marks v. Benson*, 62 Wn.App. 178, 180, 813 P.2d 180 (1991). The court grants summary judgment when there is no genuine issue of material fact and all reasonable persons could reach only one conclusion. *Island Air, Inc. v. LaBar*, 18 Wn.App. 129, 136, 566 P.2d 972 (1977).

Haley asserts that Hume's testimony was equivocal and unclear. The record speaks for itself. The Declaration of Kathleen Hume (CP 57) and her deposition testimony (CP 402) set forth clear and unequivocal facts which are not refuted by Haley. Even when equivocal statements are explained in later testimony, an appellate court reviews those statements along with all

evidence to see if there is an issue of fact. *State Farm Mut. Auto Ins. v. Treciak*, 117 Wn.App. 402, 409, 71 P.3d 703 (2003).

D. The Statutory Warranty Deed from Hume to Haley. In a further attempt to claim Hume's testimony is contradictory and inconsistent, Haley refers to the Statutory Warranty Deed from Hume to Haley. (CP 62-64.) Haley fails to address how the Deed warranted the existence of full easement rights. Any warranty of title issue pursuant to RCW 64.03.030 would be an issue between the grantor and grantee.

Haley maintains at p. 16 of the Petition for Review that sale of property which is benefitted by a recorded easement pursuant to a Statutory Warranty Deed "presumes" that the grantor had "no intention" to abandon the easement. No authority exists or is cited for this proposition.

In fact, grantor Hume had only partially abandoned the subject easement leaving intact rights for utilities and drainage. Her unequivocal testimony is as follows:

> A: As a neighborhood, all of us got together, the Oylers, Mr. Pugh, me, and even I think the Koldes. There was a lot of people. You know, this was an open and obvious thing that we chose to do in that neighborhood.
> I released my interest in ingress and egress by pedestrians or vehicles because they moved the road. The only rights that I reserved at the time were to

service the sewer and down spout pipes, and if I wanted to, any of the landscaping.

. . .

Q: What right did you reserve with respect to landscaping within the 10-foot-wide easement of tract A?

A: To water it.

(CP 402, Hume Deposition Transcript, 28: 5-13, 22-24.)

E. The Record as a Whole is Clear and Undisputed. The Declaration and deposition testimony of Ms. Hume is clear and undisputed. It is also consistent with the trial court's order. Haley argues that even if Hume had the requisite knowledge and intent to abandon some of her easement rights, she still retained pedestrian access rights. The record does not support this assertion. Hume testified in her deposition as follows:

Q: After the road was moved, did you believe you had the right to walk in the new stream?

A: You know, that wouldn't occur to me, so I can't answer that question. It's not a thought that would occur to me as to go wade in the stream.

Q: So the right to use the road on the 10-foot wide easement to access lot C or lot D is the only right that you believe you had that you gave up when the road was moved?

. . .

A: Well, I still have, or you still have rights to access any utilities that are in that.

Q: I'm asking are there any other rights that you believe you gave up when you agreed to have the road moved?

A: Just vehicular and pedestrian ingress and egress as far as I knew because I would no longer need that, anyway.

(CP 402, Hume Deposition Transcript, 23: 10-18, 21-25; 24: 1-3.)

To clear any confusion contained in her deposition exchange with Haley, Ms. Hume testified as follows:

A: No. It was my intention to give a better property.
Q: I just want to be clear. With respect to this easement that was for your property, when the change in the use that was done between you and Mr. Pugh, was it basically your understanding that you were giving up any right to cross or pedestrian traffic or vehicular traffic along that previous easement?

Mr. Haley: Objection, mischaracterizes the testimony and ambiguous.

A: Yes.
Q: And the fact is this easement was basically changed into a stream, correct?
A: Yes.
Q: At any time after this change in the easement was made, did you ever utilize that area to walk through it?
A: No.
Q: Did you utilize that area ever to drive through it?
A: No.
Q: Did any of the lot owners of C or D ever use that area to either walk or drive their vehicles?
A: No.

(CP 402, Hume Deposition Transcript, 39: 22-25; 40: 1-17.)

Despite efforts to show otherwise, Ms. Hume's testimony read as a whole is clear, consistent, unequivocal and uncontroverted.

V. CONCLUSION

The evidence presented in the present action leads to only one reasonable conclusion. The trial court correctly limited the easement on summary judgment. The Court of Appeals properly affirmed the trial court decision. Haley's Petition for Review should be denied.

Respectfully submitted this 14th day of January, 2015.

/s/ Frank R. Siderius
Frank R. Siderius WSBA 7759
SIDERIUS LONERGAN & MARTIN LLP
Attorneys for Respondent John F. Pugh

Declaration of Service

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date I mailed via U.S. Mail, first class, postage pre-paid a true copy of this document to:

Richard M. Stephens
W. Forrest Fischer
Groen Stephens & Klinge LLP
10900 NE 8th Street, Ste 1325
Bellevue, WA 98004

Dated this 14th day of January, 2015.

/s/ Mary Berghammer
Mary Berghammer

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Dear Clerk: We attach for filing in your court: ANSWER TO PETITION FOR REVIEW.

Mary Berghammer
Paralegal to Frank Siderius
SIDERIUS LONERGAN & MARTIN LLP
500 Union Street, Ste 847
Seattle, WA 98101

206/624-2800