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No. 70649-7-1

(King County Superior Court No. 12-2-23528-7 SEA)

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

JEFFREY HALEY,

Appellant,

vs.

JOHN F. PUGH,

Respondent,

PETITION FOR REVIEW

Richard M. Stephens, WSBA # 21776
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TABLE OF AUTHORITIES

I. IDENTITY OF PETITIONER

Petitioner Jeffrey Haley ("Haley") was the plaintiff/appellant below. Haley asks this Court to review the Court of Appeals' decision terminating review designated in Part III below.

II. COURT OF APPEALS' DECISION

Haley seeks review of the October 27, 2014, Court of Appeals' decision in *Haley v. Pugh,* No. 70649-7-1 ("Decision"). A copy of the Decision is attached hereto as Appendix A. The Decision is unpublished. Haley timely filed a Motion for Reconsideration, which was denied on November 19, 2014. A copy of the Order denying the reconsideration motion is attached hereto as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

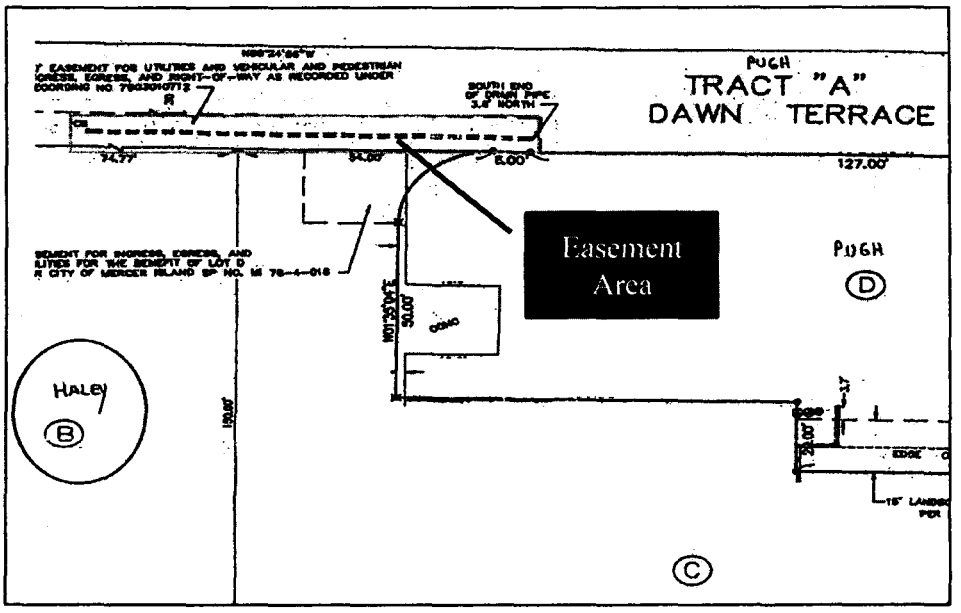
1. Does the Statute of Frauds, Chapter 64.04 RCW, require a written document to enforce against a subsequent purchaser a purported abandonment of a recorded easement established by dedication?

2. Can the oral statements of a prior owner of real property made years after the property was transferred by warranty deed legally divest and/or extinguish recorded rights in the real property held by the current owner?

3. On a motion for summary judgment, are there no triable issues of fact when statements in a deposition offered by the moving party are contradicted by other statements in the same deposition such that the testimony is internally inconsistent, equivocal, vague, and/or contradictory?

IV. STATEMENT OF THE CASE

Haley and Pugh are owners of near-adjacent residential parcels of land on the east side of Mercer Island.[1] Pugh owns a lakefront parcel, "Lot D."[2] To the south and west of Lot D is lakefront Lot C.[3] To the west of Lots C and D is "Lot B," which is owned by Haley.[4] Bordering Lots B, C and D on the north is a long and narrow lot that is used for sewer and waterfront access for many upland lots and easements for Lots B, C, and D, called "Tract A." Pugh also owns "Tract A."[5] The respective locations of these Lots are depicted as follows:



[1] Decision, at 1-2.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

In 1979, an easement was granted and recorded ("Declaration of Easement") in favor of Lot B over a 10 by 140 foot portion of "Tract A," immediately north of Lot B ("Easement Area").[6] This Declaration of Easement granted access for utilities, ingress and egress rights for vehicles and pedestrians, as well as vehicular parking rights.[7]

In 2001, Pugh purchased both Lot D and Tract A. Starting thereafter and concluding in 2004, Pugh landscaped portions of Lot D and Tract A which significantly altered the Easement Area resulting in an open waterway and a garden of low bushes that adjoins Lot B.[8]

At the time of Pugh's landscaping, Kathleen A. Hume ("Hume") owned Lot B. Although Pugh's improvements significantly altered the Easement Area, Hume did not enter into a written contract wherein she abandoned or otherwise diminished any aspect of Lot B's easement rights.[9] No document exists which states or otherwise suggests that Hume abandoned or diminished any aspect of Lot B's easement rights. There is no physical evidence that Hume did anything affirmative or intentional to show that Hume abandoned or otherwise diminished any aspect of Lot B's easement rights.

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[6] *Id.* at 2.
[7] *Id.*
[8] *Id.*
[9] CP 105, at p. 39:10-17.

In May 2005, Haley bought Lot B from Hume via Statutory Warranty Deed.[10] Within this deed, Hume conveyed all of her interest in Lot B and made no reservation or other qualification that she had abandoned any aspect of her easement rights. CP 105-151. Furthermore, the deed also expressly incorporated all "easements contained in short plat" recorded March 4, 1980. *Id.* The short plat drawing clearly illustrates the 10 feet Easement Area and specifies the recording number of the Declaration of Easement.

The improvements made by Pugh, while substantial, did not preclude all use of the Easement Area for pedestrian purposes or parking cars. Indeed, Hume testified that she had the right to enter the Easement Area to service any of the landscaping.[11] Without modifying the ground, it would have been possible to park one vehicle in the easement area but this would have required removing some low bushes.[12]

In January 2012, Haley wrote to Pugh that he wished to make surface improvements within the Easement Area to improve his pedestrian uses and parking pursuant to the terms of the Declaration of Easement.[13]

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[10] Decision, at 2.
[11] CP 151, p. 28:5-13.
[12] *Haley Second Declaration,* p.9 ¶ 30, CP 51.
[13] *Id.* at p 3.

However, Pugh refused on the ground that the easement rights had been abandoned by Hume.[14]

Because of this and other reasons, Haley filed a lawsuit against Pugh in Superior Court in July 2012. Pugh counterclaimed to quiet title in the easement area, alleging that it had been abandoned by Hume, presenting a fresh declaration by Hume to that effect. The trial court granted a motion for summary judgment brought by Pugh. The court ruled orally that Hume abandoned all but pedestrian and utility uses of the Easement Area.[15] However, when Pugh presented an order for signature, it stated that all uses other than utilities, sewage and drainage were abandoned, including pedestrian uses, and the trial court signed the order.

V. ARGUMENT

A. The Court of Appeals' Decision, which allows the owner of property to abandon a recorded appurtenant easement without any written document and then sell the property with the recorded easement apparently intact, conflicts with the Statute of Frauds, Chapter 64.04 RCW, and threatens to undermine the foundational policy of the statute.

The Statute of Frauds is a longstanding protection of the public against fraud and mistakes in the important process of buying and selling real estate. *See Maier v. Giske*, 154 Wn. App. 6, 15 (2010). Despite the

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[14] *Id.*

[15] The trial court stated in its oral ruling that, although parts of the easement were abandoned, pedestrian access was still viable given that the easement holder "could still walk across it." December 13, 2012 Audio record 8:34:40.

statute's longevity, this Court has never addressed the situation currently before it—Can a prior owner of real property successfully claim to have abandoned specific and recorded easements affecting the property years after selling the property, despite having no written document memorializing the abandonment?

This issue is of substantial public interest as it calls into question the reliability and uniformity of real property transfers. This Court should decide whether the public protection in the Statute of Frauds can be bypassed by a simple oral statement of a seller, made seven years after selling the property, claiming to have abandoned recorded property interests prior to sale of the property, without any contemporaneous writing or any recording whatsoever.

Turning to the Statute of Frauds itself, RCW 64.04.010 requires that "[e]very conveyance of real estate, or interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." The next section within the Statute of Frauds states that "[e]very deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgements of deeds." RCW 64.04.010. In short, any conveyance of a real estate interest must be in writing.

Pertaining to easements, case law is clear that they are "interests in land...[and therefore] must comply with the statute of frauds." *Rainier View Court Homeowners Ass'n, Inc. v. Zenker*, 157 Wn. App. 710, 719 (2010). In other words, to be enforceable, all easements must be in writing as they signify a "conveyance" of a real estate interest. *See id.* Although never directly decided by Washington Courts, the re-conveyance of an easement right—*i.e.* the dominant estate conveying back the easement rights to the servient estate so as to extinguish it—must be in writing as well.

In addition to the written requirement, "Washington courts have long held that to comply with the statute of frauds, a deed conveying land must describe the land conveyed in sufficient detail that it can be located **without recourse to oral testimony**." *Maier,* 154 Wn. App. at 15 (citation omitted) (emphasis added). Failure to provide sufficient written detail describing the conveyance of land, or the scope of the easement, renders any agreement null and void.[16] *Howell v. Inland Empire Paper Co.*, 28 Wn. App. 494, 495 (1981) . Overall, the strict requirements of the Statute of Frauds are specifically designed to "**prevent fraud arising**

[16] Washington's Statute of Frauds has been labeled as "the strictest in the nation...In most states an incomplete description or street address is sufficient, and parol evidence may be received to locate the land. Not so in Washington." *Maier*, 154 Wn. App. at 15 (*quoting* 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 16.3, at 225 (2d ed. 2004).

from inherently uncertain oral agreements." *Maier*, 154 Wn. App. at 15 (emphasis added).

In 1991, the legislature further bolstered the Statute of Frauds by passing an amendment clarifying that easements created by dedication can only be extinguished with a written deed or other method specified in the dedication document:

> Easements established by a dedication are property rights that cannot be extinguished or altered without the approval of the easement owner or owners, unless the plat or other document creating the dedicated easement provides for an alternative method or methods to extinguish or alter the easement.

RCW 64.04.175. However, instead of reading this provision to strengthen the Statute of Frauds, the Court of Appeals read it completely opposite, holding that dedicated easements could simply be extinguished by showing oral consent of the easement holder. Decision, at 4-6.

Contrary to the Court of Appeals interpretation, RCW 64.04.175 should be read *in pari materia* with other sections of the statute of frauds.[17] Specifically, any conveyance of an interest in real property must be in writing. RCW 64.04.010, .020.

[17] "In ascertaining legislative purpose, statutes which stand *in pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes." *State v. Wright*, 84 Wn. 2d 645, 650 (1974).

Thus, when properly construed together with entirety of the Statute of Frauds, RCW 64.04.175, requires that abandonment or extinguishment of an easement created by dedication must be in writing, evidencing the consent of the easement holder or by operation of the method specified in the written dedication document. This addition to the Statute of Frauds renders written records of easements created by dedication more reliable for both the public and potential buyers, and at the same time puts all on notice as to whether a particular property interest, like an easement, exists or not.

Ultimately, **the interpretation of RCW 64.04.175 is a question of first impression**. Except for the Decision by the Court of Appeals below, no Washington court opinions have yet construed this new addition to the Statute of Frauds, RCW 64.04.175. None of the cases considering abandonment of an easement decided since 1991 have involved an easement created by dedication in a recorded plat.

In this case, the Court of Appeals' Decision directly conflicts with Washington's Statute of Frauds and, if left unchanged, threatens to derogate the statute's overall purpose and effect. The Court of Appeals implicitly recognized that the prior owner, Hume, neither wrote, nor signed, nor recorded, any written document abandoning the Declaration of Easement. *See* Decision, at 5. And yet, the Court of Appeals ultimately

ruled that "Hume's declaration [made seven years after selling the property] is sufficient to show" that she effectively extinguished the Declaration of Easement, citing no further evidence. *Id.* at 5-6. This directly conflicts with RCW 64.04.175 which requires that, to be enforceable against a subsequent purchaser, abandonment or extinguishment of an easement created by dedication must be by written deed or other method specified in the dedication document. *See id.*

The Court of Appeals attempted to deal with the critical portion of the Statute of Frauds, by concluding that, to be enforceable against a subsequent purchaser, the *establishment* of an easement needs to be in writing, but the *abandonment* of an easement does not. Decision, at 5. However, this conclusion holds no water when considering the language and the purposes of the statute as discussed above. By relying solely on Hume's testimony given seven years after she sold the property to support terminating an interest in land, the Court of Appeals' Decision undermines the primary purpose of the Statute of Frauds—*i.e.*, to "prevent fraud arising from inherently uncertain oral agreements." *Maier*, 154 Wn. App. at 15 (emphasis added).

The evidence presented by Pugh, all of which was generated seven years after Hume sold the property via warranty deed referencing the Declaration of Easement, is nowhere near sufficient to support a ruling

that all surface use rights were intentionally abandoned by Hume before she sold the property. The Statute of Frauds requires the conclusion that the prior owner, Hume, transferred all recorded rights to her property, including the easement, pursuant to the warranty deed. To rule otherwise, as the Court of Appeals has done, would instantly create uncertainty for real estate transfers.

The fundamental purpose of the Statute of Frauds is protecting the public at large by ensuring certainty in transferring property interests. Whether the Statute of Frauds can be so easily evaded is the question deserving of this Court's review.

B. Aside from the violation of the Statute of Frauds, this case involves the standard for issuing summary judgment where evidence offered as proof of the absence of triable issues of fact was itself equivocal, contradictory, and unclear.

The summary judgment process is a well-established process that aids court in the expeditious resolution of disputes when there is no dispute of material facts. At the same time, the grant of summary judgment deprives the non-moving party of an opportunity for trial. It is because of this fact that the reviewing court on appeal considers and construes all facts **in the light most favorable to the non-moving party**. *Reynolds v. Farmers Ins. Co. of Washington,* 90 Wn. App. 880, 884 (1998). Here, whether equivocal, contradictory and unclear deposition

testimony meets the required standards of summary judgment is an issue of substantial public importance to courts, counsel, litigants and the public in general in knowing that judicial procedures are fairly administered.

Upon review of Hume's Declaration and subsequent deposition, the Court of Appeals determined that Hume's testimony about her intent to abandon easement rights was "uncontroverted," presumably because Petitioner Haley could provide no declaration that her intent was otherwise. Decision, at 5. Accordingly, the Court of Appeals concluded that her statements in this case conclusively demonstrated that there was "no genuine issue of material fact as to Hume's intent to abandon the easement." *Id.*

However, Hume's testimony is internally contradictory, equivocal, and unclear concerning her purported "intent" to abandon her various easement rights. Specifically, Hume's testimony reflects that (1) she did not know of the existence or the scope of her easement rights which she did not affirmatively or otherwise explicitly abandon; and (2) she sold all rights in Lot B with a warranty deed that included a specific reference to the Declaration of Easement, deriving a direct monetary benefit from transferring those rights. These facts given in direct testimony from Hume call into question whether or not she had the requisite "intent" to abandon each of her easement rights.

1. The summary judgment moving party's evidence, Hume's declaration, was unclear and contradictory

The law on the abandonment of an easement is well established: there must be both (1) nonuse of the easement and (2) an "express or implied intention of abandonment." *Heg v. Alldredge*, 157 Wn. 2d 154, 161 (2006) . Furthermore, acts evidencing abandonment must be "**unequivocal and decisive** and inconsistent with the continued existence of the easement." *Id.* at 161 (emphasis added). In stark contrast to these requirements, Hume's testimony is contradictory, equivocal, and inconsistent.

As stated above, the Court of Appeals accepted Pugh's argument that Hume abandoned all of Lot B's easement rights, other than for utilities, sewage and drainage at the time Tract A was being improved. However, this argument is unsupported by Hume's testimony given the simple fact that she **could not have** abandoned an easement that she testified to have had no knowledge of.[18]

Hume's statements directly contradict the argument that she had the requisite intent to abandon any of the rights within the Declaration of

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[18] *See* CP 105, 17:24-25, 18:1, 8-12, 19-12, 21:18-25
(Q: So when the road was being moved and the landscaping was being put in, what rights that you had in tract A were you giving up?
A: I don't know that I had any rights.)

Easement. She simply did not know that she had any rights in Tract A to abandon in the first place.

In addition to contradicting Pugh's argument, Hume also contradicts *herself.* In contrast to her statements listed above, Hume states later in her deposition the following:

> I chose during my tenure as the owner of that house to extinguish that easement, or my right, my possession or rights in that easement on purpose because that way I felt that it was important to my property value that I have my own driveway, that people weren't driving across it.

CP 151, at 26:2-7 (emphasis added). This seemingly canned answer sets forth that Hume, during her "tenure" as lot B's property owner, both *knew* about the Declaration of Easement and affirmatively intended to abandon it so that **other people** would not drive across her driveway. This suggests that what she wanted to abandon was rights of others to use the Easement Area and she did not understand that **she** also had rights in the Easement Area.

This petition asks for review of the summary judgment question as to whether a nonmoving party can defeat summary judgment by pointing to the contradictory statements of the moving parties' primary declarant precisely on the subject at issue, here, Hume's intent and scope of intent. Did Hume affirmatively or explicitly have the requisite knowledge and intent to abandon some of her easement rights? If so, which ones? These

questions were not answered in summary judgment record. Accordingly, the Court should review whether summary judgment can be granted when the moving party's evidence is uncertain or contradictory.

2. Because Hume sold all her property rights to Lot B via statutory warranty deed, which creates a material issue of fact as to whether she had the intent to abandon the easement.

As stated within the relevant facts above, Hume conveyed all her property rights in Lot B to Haley with a statutory warranty deed which included a reference to the recorded Declaration of Easement. Pursuant to RCW 64.04.030, this warranty by Hume is a representation that, prior to the sale, she did not transfer to someone else or otherwise knowingly or intentionally impair the property rights that she conveyed by deed to Haley.[19] This warranty conflicts and is inconsistent with her testimony given seven years later.

Hume also testified that, prior to closing of the sale, she neither informed Haley of her purported abandonment of some of her easement rights nor recorded any document formally establishing her alleged abandonment. CP 151, 39:10-17. Thus, when Haley purchased Lot B and

[19] The relevant portion of RCW 64.04.030 states: "Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his or her heirs and assigns, with covenants on the part of the grantor: (1) That at the time of the making and delivery of such deed he or she was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same..."

was given a statutory warranty deed, the law presumes that all recorded rights to Lot B transferred to him, including rights specified by the Declaration of Easement.

The fact that Hume received monetary consideration for all her rights to Lot B significantly undercuts any conclusion that she intended to abandon some of the rights that she sold to Haley by warranty deed. As stated by the Supreme Court in *Heg v. Allredge*:

> [A]n intention to abandon property **for which one has paid value** will not be presumed." An easement appurtenant which runs with the land "is not a mere privilege to be enjoyed by the person to whom it is granted or by whom it is reserved. **It passes by a deed of such person to his grantee and follows the land without any mention whatever.**

Heg, 157 Wn. 2d at 161(emphasis added). Stated another way, if a grantee sells with a statutory warranty deed land that is benefitted by a recorded easement, the court *presumes* that the grantee had *no intention* to abandon the easement prior to the sale.

This makes logical sense given that the market rate at which property is sold is directly linked to the rights that come with the property—*i.e.* property with a pedestrian easement on adjoining property generally is worth more than property without such an easement. The same is true in this case, as *Heg* presumes that the transference and purchase price of Lot B from Hume to Haley reflected all rights

established within the title report—namely the rights to make certain uses of the Easement Area. 157 Wn.2d at 161.

The law's presumption of intent by Hume to transfer all the easement rights to Haley is called into question by Hume's post-hoc and contradictory recollection of her real estate transaction with Haley:

> Q: So other than the right to use the 10-foot wide easement to access lot C and lot D, do you believe you sold [Haley] all the rights that you bought from Frances Wood?
>
> A: No.
>
> Q: What other rights did you buy from Frances [W]ood that you didn't sell to [Haley]?
>
> A: None that I know of. I mean, I gave [Haley] everything that I had, but we had extinguished the easement long before [Haley] came and bought the house. It was extinguished and moved.

CP 151, 24:14-24. Stated another way, Hume testified that she didn't sell all rights to Lot B to Haley. However, she follows up by reversing herself in stating that she didn't know of any rights she reserved when selling Lot B. This contradiction, coupled with her transference of all rights to Lot B by warranty deed **directly calls into question** the claim that Hume had the requisite intent to abandon some of her easement rights.

In the end, Hume's actions and words are conflicting and equivocal at best. Instead of establishing clear intent to abandon the easement rights to pedestrian uses and to park cars, Hume's testimony

actually creates material issues of fact which should have been investigated and cleared before any hearing on summary judgment. This Court should determine whether such a record is sufficient to support a summary judgment order.

3. The record is unclear and disputed whether Hume intended to give up <u>all</u> her surface use easement rights, or just some of them.

Assuming, *arguendo*, that Hume had the requisite knowledge and intent to abandon some of her rights in the Easement Area, she nevertheless testified that she still retained pedestrian access rights. This is consistent with the trial court's oral ruling but inconsistent with the written order that was entered which states that all easement rights were abandoned save for utilities. CP 81.

Hume's testimony is very clear that she retained rights to access Tract A. Specifically, Hume stated that she retained the right to go into the Easement Area to maintain the vegetation planted by Pugh, which she participated in selecting and believed was an asset to her property.[20]

Hume's testimony directly contradicts the trial court's written order that "all easement rights are terminated and abandoned except for easement rights to utility, sewage and drainage to the extent said utilities serve plaintiff's property in the easement area." CP 81. Altogether,

[20] CP 151, p. 18:23-25, 19:1-5, 27:6-7, 28:5-13.

Hume's testimony is that she retained rights to access and maintain the landscaping within the Easement Area.

The Court should grant review because summary judgment should not be granted where the scope of what was intended to be abandoned is unclear. While a valuable tool, summary judgment is a drastic remedy and should not be used where the evidence proffered in support is limited and is inconsistent with the scope of the order granting summary judgment.

VI. CONCLUSION

The primary purpose of the Statute of Frauds is to limit and curtail fraud and misrepresentations which can occur in any transaction or transfer of property. By requiring certain transfers to be explicit and in writing, the Statute of Frauds is meant to eliminate the uncertainties of oral agreements for the benefit of the parties and the public in general. Unfortunately, the Court of Appeals' Decision threatens to completely dismantle this protection by allowing oral testimony to divest recorded property rights conveyed via written warranty deed. If the Statute of Frauds is to achieve its intended purpose, this Court should grant review of this case.

RESPECTFULLY submitted this 19th day of December, 2014.

GROEN STEPHENS & KLINGE LLP

By: *Richard M. Stephens*

Richard M. Stephens, WSBA #21776
W. Forrest Fischer, WSBA #44156
Attorneys for Appellant

DECLARATION OF SERVICE

I, Linda Hall, declare as follows pursuant to GR 13 and RCW 9A.72.085:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On December 19, 2014, I caused the foregoing document to be served on the following persons via the following means:

Frank R Siderius Siderius Lonergan & Martin LLP 500 Union St., Ste. 847 Seattle, WA 98101-2394	☐ Hand Delivery via Legal Messenger ☒ First Class U.S. Mail ☐ Federal Express Overnight ☐ Electronic Mail: ☐ Other:

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

Executed this 19th day of December, 2014 at Bellevue, Washington.

Linda Hall

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFFREY HALEY, Appellant, v. JOHN F. PUGH, Respondent, SUNSTREAM CORPORATION, and DEBORAH HEY, Defendants.	No. 70649-7-I DIVISION ONE UNPUBLISHED OPINION FILED: October 27, 2014

BECKER, J. — At issue in this appeal is whether an easement for vehicular and pedestrian use has been abandoned. We reject the argument that easements created by dedication can be extinguished only by a written deed of conveyance. The previous owner of the easement declared that she intentionally abandoned it to facilitate the daylighting of a stream that ran through it. As no controverting evidence was presented, the trial court properly determined abandonment on summary judgment. The court also properly dismissed, as time barred, a claim seeking removal of a boat lift.

Appellant Jeffrey Haley and Respondent John Pugh are the owners of near-adjacent parcels of land on the east side of Mercer Island. Pugh's lakefront parcel, lot D, lies west of Lake Washington. To the west of lot D is lot C, a parcel

unrelated to this litigation. To the west of lot C is lot B, owned by Haley. Bordering all three above-mentioned parcels on the north is a long and narrow lot, tract A. Pugh owns tract A.

The easement area at issue is a 10 by 140 foot strip of tract A immediately north of Haley's lot. A recorded easement granted in 1979 gave easement rights over this strip to Haley's lot. The 1979 easement granted easement rights "for purposes of utilities and vehicular and pedestrian ingress, egress and right-of-way including such commercial vehicles as are customary for residential purposes and such vehicles as may be required in the construction of dwellings and improvements on the Dominant Estate and for parking of vehicles of visitors to the Dominant Estate."

Pugh purchased his residential parcel in March 2001. He purchased tract A in April 2001. Shortly thereafter, Pugh applied for a variance and permit through the City of Mercer Island to "daylight" a stream that had previously been routed through underground pipes in tract A. The application was granted on September 17, 2001. Improvements were completed by 2004. The easement area now has an open water course and is densely landscaped with trees, shrubs, and boulders.

In September 2001, Pugh received a permit to rebuild the existing dock on his property.

On April 26, 2005, Pugh received a permit to build a boat canopy on his existing boat lift.

On or around May 11, 2005, Haley bought his parcel from Kathleen Hume.

On January 22, 2012, Haley wrote to Pugh that he wished to make surface improvements within the easement area that would enable him to use the easement for parking. Pugh refused on the ground that the easement had been abandoned.

On March 29, 2012, Haley received notice of Pugh's application to build a second dock on his property.

On July 19, 2012, Haley brought suit against Pugh alleging a violation of shoreline law and fraud in obtaining a dock permit, and seeking removal of the boat lift. Pugh counterclaimed to quiet title in the easement area, alleging that the easement had been abandoned by Hume, Haley's predecessor in interest.

On October 5, 2012, after a hearing, the trial court granted Pugh's motion for summary judgment on the easement claim. The court found that the 1979 easement rights were abandoned insofar as inconsistent with the altered watercourse. "Specifically, all easement rights are terminated and abandoned except for easement rights to utility, sewage and drainage to the extent said utilities serve plaintiff's property in the easement area."

On May 8, 2013, the trial court granted Pugh's motion for summary judgment on the claims involving his dock and boat lift, finding them barred by the statute of limitations. Pugh was awarded attorney fees for defending the boat lift claim.

Haley appeals both orders of summary judgment.

We review de novo a trial court's decision on summary judgment, performing the same inquiry as the trial court. Roger Crane & Assocs. v. Felice,

74 Wn. App. 769, 773, 875 P.2d 705 (1994). Summary judgment is appropriate where no genuine issue of material fact remains. CR 56. We consider the evidence in the light most favorable to Haley, the nonmoving party. CR 56.

Abandonment of easement

Abandonment of an easement requires more than mere nonuse—the nonuse must be accompanied by the express or implied intent to abandon. Heg v. Alldredge, 157 Wn.2d 154, 161, 137 P.3d 9 (2006). Acts evidencing abandonment of an easement must be unequivocal and decisive and inconsistent with the continued existence of the easement. Heg, 157 Wn.2d at 161.

To show that the easement was abandoned, Pugh submitted the declaration of Hume, the previous owner of Haley's lot. Hume owned the lot when Pugh obtained the variance from Mercer Island permitting the daylighting of the stream and associated landscaping. Hume declared that she was consulted by Pugh and fully consented to the improvements in the easement area, and that she was aware the improvements would be inconsistent with surface use of her easement rights. She said she received notice of Pugh's application for a permit for the improvements and did not object.

> I was fully aware that the creation of an open stream with landscaping would eliminate any pedestrian or vehicle use of the easement area. I recognized the proposed improvement as an enhancement to my property's value. . . .
>
> . . . .
>
> . . . From and after 2001 I abandoned any claim of easement rights in Tract A with the exception of easement rights for any underground utilities serving my property. After 2001 no surface use of the easement area was possible.

Declaration of Kathleen Hume, Clerk's Papers at 59.

Haley contends that Hume's declaration is insufficient to establish intent to abandon. He claims that Hume, like the owner of the dominant estate in Heg, merely failed to object when Pugh made improvements that were inconsistent with the recorded easement. We disagree. Hume's declaration distinguishes this case from Heg because it establishes that Hume affirmatively consented to Pugh's improvements, knowing that they were inconsistent with full exercise of her easement rights. Her declaration is uncontroverted. On this record, there is no genuine issue of material fact as to Hume's intent to abandon the easement.

Haley also argues that Hume did not effectively abandon the easement because she did not comply with the statutory requirements that every conveyance of real estate must be by written deed:

> Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed.

RCW 64.04.010.

> Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by *this act to take acknowledgments of deeds.

RCW 64.04.020. Haley's argument presupposes that abandonment of an easement is a conveyance. The statute he cites to support his premise, however, does no more than provide that an easement established by a dedication cannot be extinguished or altered without the approval of the easement owner:

> Easements established by a dedication are property rights that cannot be extinguished or altered without the approval of the easement owner or owners, unless the plat or other document

> creating the dedicated easement provides for an alternative method or methods to extinguish or alter the easement.

RCW 64.04.175.[1] Hume's declaration is sufficient to show that she approved the alteration of the easement that limited it to utility, sewage, and drainage rights.

To the extent Haley additionally claims that a due process violation occurred because Hume was not given adequate notice that environmental clearance of Pugh's plan to daylight the stream would eliminate part of her easement, his argument is unsupported by the facts or citation to relevant authority, and we therefore decline to consider it.

In view of the uncontroverted evidence that Hume abandoned the easement rights that Haley attempts to assert, we conclude the trial court correctly limited the easement on summary judgment. It is unnecessary to address adverse possession as an alternative ground for the order.

Boat lift claim

Haley's complaint alleged that Pugh's boat lift was illegal. Haley received notice in March 2012 that Pugh had applied to build a second dock. The application included a drawing of Pugh's property showing the layout and measurements of Pugh's existing dock and boat canopy. Haley suspected that the boat lift might be in a location that violated a setback requirement. Using a kayak, Haley made measurements that in his view confirmed that the boat lift was in an illegal location. Looking through municipal records, Haley found no

[1] After oral argument in this court, Haley filed "Appellant's Motion for Leave to Change Answer Given in Oral Argument." The motion essentially reiterates the argument Haley made in his opening brief. Because our opinion addresses that argument, it is unnecessary to give separate consideration to the motion.

record that Pugh had obtained a permit when he installed the boat lift. He found only that in 2005, Pugh had applied for a permit to put a cover on the boat lift. He concluded that Pugh had made fraudulent statements about the location in order to obtain the 2005 permit.

Haley's complaint sought an order to have the boat lift removed. The trial court dismissed this claim on summary judgment as barred by the statute of limitations.

The three-year statute of limitations begins to run in fraud cases when the aggrieved party discovers the facts constituting the fraud. RCW 4.16.080(4). Haley contends the three-year statute of limitations was tolled until he discovered the facts constituting the fraud. However, actual knowledge of fraud will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered it. Strong v. Clark, 56 Wn.2d 230, 232, 352 P.2d 183 (1960). To invoke the discovery rule, the plaintiff must show that he or she could not have discovered the relevant facts earlier. G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc., 70 Wn. App. 360, 367, 853 P.2d 484 (1993), review denied, 123 Wn.2d 1002 (1994).

Haley could have discovered the facts constituting the alleged fraud by due diligence beginning in 2005. All documents relating to the boat lift were in the public record then. Haley does not attempt to show why he could not have discovered facts indicating that the boat lift was in an illegal location earlier than 2012, when he began his investigation. We conclude the statute of limitations was not tolled.

Alternatively, Haley contends the allegedly illegal location of the boat lift is a continuing zoning violation and therefore there is effectively no statute of limitations because it is a new violation every day.

It is incorrect to say there are no time limits on a suit challenging a continuing zoning violation. Such a suit must be brought within a reasonable time period after the plaintiff gains actual or constructive knowledge of the violation. Larsen v. Town of Colton, 94 Wn. App. 383, 393, 973 P.2d 1066 (1999).

Haley had constructive notice of the location of the boat lift when he purchased his property in 2005. The boat lift was in plain sight. Haley's complaint was filed in 2012. Haley has not cited any case, and we have found none, where a successful suit was brought seven years after the plaintiff had constructive knowledge of the illegality of the structure challenged. Cf. Larsen v. Town of Colton, 94 Wn. App. 383 (suit to enjoin construction of illegal accessory building commenced seven days after learning a building permit had issued); Radach v. Gunderson, 39 Wn. App. 392, 695 P.2d 128 (neighbors continuously asked the city to revoke a building permit for a structure in violation of mandatory shoreline setbacks, but they refused and the neighbors filed suit after construction was completed), review denied, 103 Wn.2d 1027 (1985). Haley's suit was not brought within a reasonable time.

We conclude the trial court correctly dismissed the boat lift claim as time barred.

Attorney fees

Pugh requests an award of attorney fees on appeal for defending Haley's claim that the boat lift violated shoreline regulations. The Shoreline Management Act provides that a court has discretion to award attorney fees and costs to a prevailing party. RCW 90.58.230.

Haley's complaint had requested an award of costs and fees under the Shoreline Management Act. Pugh requested such an award after prevailing on the boat lift claim. Haley then filed a document attempting to "disclaim" his own request for fees and arguing that the Shoreline Management Act was not part of the case. The trial court nevertheless awarded attorney fees to Pugh as the prevailing party on Shorelines Management Act issues.

Haley's disclaimer is ineffective. The portion of his complaint dealing with the boat lift refers explicitly to the shoreline act. He alleged and litigated the issue whether Pugh fraudulently obtained a permit required by the act. Pugh is the prevailing party on appeal. We grant his request for an award of attorney fees under RCW 90.58.230 with respect to the boat lift claim.

Affirmed.

Becker, J.

WE CONCUR:

Trickey, J

Leach, J.

APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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November 19, 2014

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CASE #: 70649-7-I
Jeffrey Haley, Appellant v. John F. Pugh, Respondent

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure

c: The Hon. Michael Hayden

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

JEFFREY HALEY, Appellant, v. JOHN F. PUGH, Respondent, SUNSTREAM CORPORATION, and DEBORAH HEY, Defendants.	No. 70649-7-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Jeffrey Haley, has filed a motion for reconsideration of the opinion filed on October 27, 2014. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DONE this 19th day of November, 2014.

FOR THE COURT:

Becker, J.
Judge