No. 98484-1

THE SUPREME COURT
OF THE STATE OF WASHINGTON

JANICKI LOGGING & CONSTRUCTION CO., INC.

Petitioner

v.

ANDREW MACGREGOR ROBERTSON, ET AL.,

Respondents

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

MARK J. LEE, WSBA #19339
HAYLEE J. HURST, 51406
Brownlie Wolf & Lee, LLP
230 E. Champion Street
Bellingham, WA 98225
Ph. (360) 676-0306
E-mail: mark@bellinghamlegal.com; haylee@bellinghamlegal.com

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

RULES (cont.)

I. INTRODUCTION

Respondents (collectively "Robertsons") purchased property Petitioner Janicki Logging & Construction Co., Inc. ("Janicki") and Jun Yu Development II, LLC[1] ("Jun Yu") admit they trespassed upon both before and during Robertsons' ownership. Janicki and Jun Yu successfully overwhelmed the Trial Court with misstatements and the misapplication of the law and facts by arguing that Robertsons' trespass-based claims were barred by the "merger doctrine." Janicki and Jun Yu have habitually ignored Robertsons' obtainment of two post-purchase written assignments of all claims from the original property owner, Trillium Corporation ("Trillium").

On appeal, the Court of Appeals, Division One correctly concluded in an unpublished decision that the Trial Court erred in dismissing Robertsons' claims, holding instead "as a matter of law that Trillium's assignment of its trespass claims to the Robertsons did not merge into the Deed." Appendix to Petition for Review, p. 14 (filed March 30, 2020) ("Opinion"). The Court of Appeals further concluded that Robertsons' claims against the third-party defendants could not be dismissed based upon an "as-is" clause in the Real Estate Purchase and Sale Agreement

[1] Respondent Jun Yu Development II, LLC has not joined in seeking Supreme Court review.

("REPSA") with Trillium. Id. (emphasis in original). Finally, the Court of Appeals concluded that the de minimis rule did not apply to support dismissal of Robertsons' timber trespass claims under RCW 4.24.630. Id. at p. 17.

Undeterred, Janicki repeats its misstatements in seeking discretionary review under RAP 13.4. In doing so, Janicki fails to establish existence of any of the extraordinary standards warranting Supreme Court review under RAP 13.4(b). Moreover, there is no basis to reverse the Opinion. Accordingly, Janicki's Petition for Review ("Petition") should be denied.

II. ALTERNATIVE STATEMENT OF THE CASE

Robertsons provide a contrary statement of facts to note critical facts ignored by Janicki. Initially, however, Robertsons concur with Janicki's admission that it and Jun Yu trespassed onto the Robertson Property and: (1) deepened ditches and rerouted surface water from the Jun Yu Property onto the Robertson Property; and (2) harvested trees.

A. The Scope of the Trespass. Janicki's ditch work involved removal of 500-750 cubic yards of gravel and boulders which it spread over 46,000 square feet on the Robertson Property. CP 83 & 90; CP 263-264, ¶ 6. Janicki also dug lateral drainage trenches through the spoils. Id.

The ultimate objective was to divert collected storm water away from the DNR Outfall to the south of the Robertson Property, into the Charel Terrace Outfall which is to the north. This was achieved by rerouting water from the Jun Yu Property onto the Robertson Property and its detention pond. CP 697, ¶ 11; see also CP 1341. Janicki maintains the rerouting solved an emergency experienced by the DNR Outfall, but there is no evidence to support the proposition that the work resolved any overall problem. On the contrary, Janicki's modifications resulted in the unplanned and unpermitted drainage of an additional 53.5 acres of surface water from the Jun Yu Property onto the Robertson Property, and into its detention pond and the Charel Terrace Outfall. CP 277-278, ¶ 6 & 1064, ¶ 14. Neither the pond nor the Charel Terrace Outfall were designed to handle this additional runoff area, and the associated water therefore exceeded the capacity of both systems. Id. The diversion of water from the Jun Yu Property has caused periodic flooding on the Robertson Property. CP 264-265, ¶ 7 & 267-271.

Finally, Janicki proposes that there is no dispute that the value of the wrongfully removed timber is less than $1,000. Actually, Robertsons' expert has concluded that the timber value is $4,212.87. CP 62-79.

B. Trillium's Assignment of Claims. In a misstatement of the facts, Janicki represents that Trillium assigned its uncontroverted trespass claims to Robertsons through a provision in the parties' June 11, 2014, REPSA, which predates Trillium's July 11, 2014, Statutory Warranty Deed ("Deed"). CP 1389-1391.[2] Petition, p. 6. Janicki omits from its recitation and timeline in Exhibit 2 the actual document culminating in transfer of Trillium's claims to Robertsons, which was a July 23, 2014, Assignment and Assumption of Claims ("Assignment"). CP 21, ¶ 1.[3] The Court of Appeals correctly noted the relationship of the two documents: "But although the REPSA included an obligation *to assign* as well as an exhibit showing the *form* the assignment would take, *the assignment itself* was not made until July 23, 3014, after the Deed was executed." Opinion, p. 13 (emphasis in original).

Also missing from Janicki's materials is the fact that out of an abundance of caution, Trillium and Robertsons entered into a Confirming Assignment on October 18, 2018, in which Trillium confirmed and re-assigned all claims to Robertsons. CP 627-629 & CP 633-647.[4]

---

[2] A copy of the Statutory Warranty Deed is attached as Appendix A.
[3] A copy of the Assignment is attached is attached as Appendix B.
[4] A copy of the Confirming Assignment is attached as Appendix C. The Court of Appeals noted but did not rely upon the Confirming Assignment "[b]ecause Trillium and Robertsons' intent is very clear from the REPSA and the Assignment Agreement alone,…." Opinion, p. 11, n. 2.

C. The "Exception Language" of the Deed. Central to Janicki's argument is the proper interpretation of "exceptions" incorporated into the Deed:

> **SUBJECT TO**:
> ....
> 4. Any rights, interests or claims which may exist or arise by reason of the following facts shown by Survey of the land by NORTHWEST SURVEYING AND GPS, INC., dated July 21, 2014, Job No. 14-157, as follows:
>
> A. Service pole and line thereto on the West side of Parcel A;
> B. Gravel access roads through Parcel A and along the West side of Parcel D;
> C. Culvert crossing on the East and South side of Parcel A;
> D. Ditches through Parcels A, C and D; and
> E. Overhead phone line along the West line of Parcels B and C

CP 1391, ¶ 4 ("Exception Language"). Janicki misstates and ignores critical facts relating to the Exception Language, and instead summarily proposes that it reserved the ditch-related trespass claims to Trillium. Petition, p. 6.

III. ARGUMENT IN REPLY

A. Janicki's Petition Fails to Implicate Any of the Factors for Triggering Supreme Court Review.

> "A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If

> the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Janicki randomly cites RAP 13.4(b)(1), (2) and (4), but provides no meaningful or useful explanation as to how they are implicated by this case. See e.g. Petition, p. 15 ("The Court of Appeals' error warrants review by this Court under RAP 13.4(1) and (4)."). However, Janicki fails to identify any legal standard adopted in this case that conflicts with another appellate decision, or any basis for "substantial public interest" in the unpublished Opinion.

In order to meet the RAP 13.4's standards, a party seeking review must establish more than error on the part of the Court of Appeals (which is equally lacking here). Janicki has failed to articulate a single justification under RAP 13.4 for the Supreme Court to accept review.

B. There Is No Underlying Error Arising From the Court of Appeals' Decision.

1. The Court of Appeals Correctly Concluded That the Assignment Transferred All Claims to Robertsons and Did Not "Merge" Into the Deed.

Janicki's essential proposition is that the Court of Appeals erred in concluding that the transfer of Trillium's trespass claims was not terminated through merger into the Deed. However, the Court of Appeals' determination is based upon two independent, yet equally correct, conclusions which do not conflict with any case or the undisputed evidence. Janicki does not challenge the intent or ability of the Assignment to have effectively transferred the trespass claims to Robertsons. Instead, it maintains that any assignment was terminated through "merger" into the Deed because the Deed contained a conflicting reservation of the claims to Trillium.

All agree that under the merger doctrine, "the provisions of a contract for the sale of real estate, and all prior negotiations and agreements, are considered merged in a deed made in full execution of the contract of sale." Black v. Evergreen Land Developers, Inc., 75 Wn.2d 241, 248, 450 P.2d 470 (1969) (emphasis added). Thus, Janicki concedes, that the merger doctrine could only negate the Assignment if it predated

the Deed: "Execution, delivery, and acceptance of the deed becomes the final expression of the parties' contract and therefore subsumes all prior agreements." Barber v. Peringer, 75 Wn.App. 248, 251-252, 877 P.2d 223 (1994) (emphasis added) (quoted in Petition, p. 9).

Instead, Janicki purposely misrepresents the facts in seeking review by ignoring the Assignment entirely and arguing that transfer of the claims occurred within the terms of the REPSA. See e.g., Petition, p. 6 ("Within the REPSA, the parties to the sale included a clause which assigns Trillium's trespass claims to plaintiffs."); Petition, p. 15 ("They are also inconsistent with the terms of the REPSA purporting to transfer the claims expressly excepted from the transfer in the deed."). Again, the Court of Appeals rightfully noted the inaccuracy of this factual proposition: "But although the REPSA included an obligation *to assign* as well as the exhibit showing the *form* the assignment would take, *the assignment itself* was not made until July 23, 2014, after the Deed was executed." Opinion, p. 13 (emphasis in original).[5] Thus, the Court of Appeals correctly concluded that "even assuming our merger analysis

[5] Of course, even if Janicki's alleged timeline was correct, the October 18, 2018, Confirming Assignment unavoidably post dates the July 11, 2014, Deed, and therefore could not be terminated based upon merger.

would change if the Assignment Agreement predated the Deed, it did not." Id.[6]

Even if Janicki's misstated recitation of the facts was correct, it does not dispute the exception to the merger doctrine independently relied upon by the Court of Appeals: "It [the merger doctrine] 'also does not apply where terms of a purchase and sale agreement are not contained in or performed by the execution and delivery of the deed, are not inconsistent with the deed, and are independent of the obligation to convey.'" Id., p. 8 (quoting Brown v. Johnson, 109 Wn.App. 56, 60, 34 P.3d 1233 (2001)). Whether a merger occurs is ultimately determined by

[6] Janicki also contends in a single sentence that the fact that the Assignment postdated the Deed was not raised at the Trial Court level and is therefore waived. Petition, p. 12. On the contrary, this fact was highlighted in oral argument on Janicki's original and unsuccessful motion for summary judgment and in pleadings, including in response to Janicki's Motion for Reconsideration, which was granted and led to the dismissal reversed by the Court of Appeals. See CP 660. Moreover, dates of relevant documents are facts, not arguments, evident on their face and admitted in Janicki's own briefing. They are therefore not subject to being "waived."

Janicki also maintains that the Assignment is avoidable because it does not conform to the formality of a deed as required by RCW 64.04.010. Janicki provides no authority for this proposition, which the Court of Appeals found to be a sufficient basis to ignore the argument. Opinion, pp. 13-14. Janicki also fails to address the fact that the law is actually to the contrary, as explained by the Court of Appeals:

> Trespass claims are tort claims… And 'a tort claim for damage to property is assignable under the law of this state.'…RCW 11.48.010 (providing that personal representative 'may institute suit...for trespass of any kind or character.'). Furthermore, '[n]o particular words of art are required to create a valid and binding assignment.'...Instead, '[a]ny language showing the owner's intent to transfer and invest property in the assignee is sufficient.'

Id. at pp. 6-7 (Citations omitted).

the intent of the parties. Id. (quoting Failes v. Lichten, 109 Wn.App. 550, 554, 37 P.3d 301 (2001)).

The Court of Appeals ruled that "the only reasonable conclusion from the record is that the parties intended for Trillium's assignment of its trespass claims *not* to merge into the Deed." Id. (emphasis in original). Janicki raises two challenges to this conclusion: (1) a conclusory and unexamined proposition that the Exception Language clearly and unambiguously reserved to Trillium the very claims that it indisputably intended to transfer to Robertsons in the Assignment,[7] and that this inconsistency thereby precludes application of the exception; and (2) the Court of Appeals erred in considering extrinsic evidence to consider its interpretation of the Exception Language.

In making this challenge, Janicki does not reference a single provision of the pertinent documents or other fact to support a potential conclusion that the parties intended the post-dated Assignment to merge into the Deed. It relies exclusively on its conclusory interpretation of the Exception Language. On the other hand, the Court of Appeals referenced the undisputed fact that the REPSA explicitly committed Trillium to

[7] Recall that Janicki does not challenge the Court of Appeals' conclusion that "the plain language of the Assignment Agreement clearly evinces Trillium's intent to assign its trespass claims to the Robertsons." Opinion, p. 7.

assign the claims through an obligation separate from its obligation to convey the Robertson Property, that this independent obligation was to occur through a separate agreement, and that the parties thereafter actually executed the Assignment (again after executing the Deed). Id., p. 10.

In addition to this uncontested evidence is the undisputed reality that Janicki's relied-upon inconsistent interpretation of the Exception Language raises significant problems, none of which arise under the Court of Appeals' interpretation of the Exception Language. For instance, Janicki completely ignores the qualifier "SUBJECT TO" in the Exception Language, which signals, as the Court of Appeals recognized, that the noted exceptions are to Trillium's warranty, not title (or in this case the claims). Statutory warranty deeds convey title, as well as five warranties against title defects. Rowe v. Klein, 2 Wn.App.2d 326, 333, 409 P.3d 1152 (2018). An "exception" in a statutory warranty deed therefore more commonly creates an exception to the warranty given, not to title (or again in this case the claims). See, e.g., Moore v. Gillingham, 22 Wn.2d 655, 660, 157 P.2d 598 (1945) (holding phrase "subject to" created exception to warranty, not title). Here, the Court of Appeals correctly concluded that the "subject to" merely limited Trillium's warranties to Robertsons with respect to certain matters in the record of title and disclosed by the survey,

such as the utility easement, mineral rights, and the roads, ditches, service poles, and phone lines all included in the schedule of exceptions in this case. This is further confirmed by the fact that the Exception Language does not use the term "reserved," as it does elsewhere.

Janicki also ignores the impact of all the terms contained in the Exception Language. Application of the Exception Language extends to "[a]ny rights, interests or claims...." (Emphasis added). Janicki focuses exclusively on the word "claims." However, if Janicki were correct and the Exception Language created a reservation of the claims, it would also mean Robertsons do not have any title, "rights," or "interests" in the roads, culvert, or ditches on the Robertson Property. This interpretation is impossible, however, as Trillium could only convey title to a legal lot of record, which is exactly what it did when it conveyed title to all the real property legally described on its attached Exhibit A. The Court of Appeals' interpretation that the language created an exception to warranty would not create such inconsistencies and avoids this absurdity.

Nor does Janicki address the second qualifier in the Exception Language, which limits its reach to the "rights, interests or claims" "which may exist or arise by reason of the following facts shown by Survey of the land by NORTHWEST SURVEYING AND GPS, INC., dated July 21,

2014." The relevant survey only showed the location, not depth or width, of the ditches, and nothing about trees. See Appendix F to Robertsons' Opening Brief and CP 1385. Thus, on its face, the scope of "reserved" claims would not extend to the deepened ditches, increased surface water flow, or felled trees.

Equally ignored by Janicki is that the Assignment and Deed are two agreements flowing from a singular purchase transaction, and therefore must be interpreted to give "'lawful effect to all the provisions in a contract are favored over those that render some of the language meaningless or ineffective.'" Pelly v. Panasyuk, 2 Wn.App.2d 848, 865, 413 P.3d 619 (2018) (quoting Grey v. Leach, 158 Wn.App. 837, 850, 244 P.3d 970 (2010)). The Court of Appeals' conclusion that the Exception Language references a limitation on warranties accomplishes this goal.

Finally, in complaining about consideration of extrinsic evidence, Janicki by its silence concedes that such evidence only supports the Court of Appeals' conclusion that the parties did not intend the Assignment to merge into the Deed. Janicki desperately maintains that such evidence cannot be used to interpret the Exception Language, citing Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc., 168 Wn.App. 56, 64, 277 P.3d 18 (2012). However, Janicki cannot dispute

that such evidence may be considered where there is an ambiguity. Id. at 64 ("where the plain language of a deed is unambiguous, extrinsic evidence will not be considered.") See also Hoglund v. Omak Wood Prods., Inc., 81 Wn.App. 501, 504, 914 P.2d 1197 (1996). Throughout the appeal to the Court of Appeals, Janicki never discussed, evaluated, or denied the existence of an ambiguity in terms of the Exception Language. The Court of Appeals found such an ambiguity based upon use of the word "exceptions" because it created uncertainty as to whether each item listed "therein is an exception in the true sense, or merely a warranty limitation." Opinion, p. 12. This is an accurate reflection of the correct standard, as a writing is ambiguous if capable of two or more meanings. Pelly v. Panasyuk, supra, 2 Wn.App.2d at 865-66. Moreover, and importantly ignored by Janicki, whether an ambiguity exists is an issue of law. Hoglund v. Omak Wood Prods., Inc., supra, 81 Wn.App. at 504.

Nowhere in the Petition does Janicki identify how or why the Court of Appeals' legal conclusion as to the existence of an ambiguity is incorrect, except to blindly pronounce that the Exception Language constitutes a reservation by Trillium of the claims. Although there is no way the Exception Language can be interpreted as an intent by the parties for Trillium to "reserve" the claims, if this is a plausible interpretation, so

too is the contrary conclusion as found by the Court of Appeals that the language was intended to exclude any third-party "rights, interests or claims" from the scope of Trillium's warranties. Indeed, the potential for competing meanings is inherent, given use of the word "except," as noted by the Court of Appeals. Opinion, pp. 12-13, n. 4 (quoting 9 Thompson on Real Estate, § 82.14, at 736 (3d Thomas ed. 2011) ("[t]he use of the phrases 'subject to' or 'except' must be approached with caution…" and "the 'except' clause can create ambiguities as to whether the 'except' language creates a technical exception or whether it is merely a limitation on the title warranties."). Accordingly, the Court of Appeals' legal conclusion that an ambiguity existed is unchallenged and fully justified any reliance on extrinsic evidence.[8]

[8] Although Supreme Court review is in no way warranted, it should not be ignored that even if it were, reversal of the Trial Court's dismissal based upon the Deed and merger doctrine would still need to be reversed for three independent reasons not considered by the Court of Appeals given its disposition: (1) as earlier pointed out, Trillium and Robertsons executed the Confirming Assignment which could not "merge" into the pre-dated Deed; (2) one of the distinct claims raised by Robertsons was for a continuing trespass from the re-routed surface water during Robertsons' ownership. This claim could not have been "reserved" by Trillium; and (3) even if there is a plausible basis to apply the merger doctrine and "facts" supporting Janicki's interpretation of the Exception Language, there are conflicting facts to support the Court of Appeals' conclusion that the parties did not intend for the Assignment to merge into the Deed. There is therefore, at the least an issue of fact requiring reversal of the Trial Court's dismissal.

2. The "As-Is" Clause Does Not Bar a Third-Party Claim.

Janicki also maintains that the Court of Appeals erred in concluding that dismissal of the claims was warranted based upon an "as-is" clause in the REPSA.[9] In making this contention, Janicki maintains its argument is an issue of "first impression for this Court and warrants review to settle this important area of law for buyers and sellers of real estate across Washington." Petition, p. 18. The lack of any Washington case law does not elevate the contention's importance, but instead merely represents its unreasonableness and fallacy.

Instead, all cases relating to application of an "as-is" clause deal with the contractually bound buyer and seller, which is inherently admitted in Janicki's own plea that the question is an important one for "buyers and sellers of real estate across Washington." The Court of Appeals naturally, and correctly, concluded that while an "as-is" clause "may bar the buyer from suing the *seller*, it does not limit the buyer's ability to sue third parties." Opinion, p. 14 (emphasis in original). This conclusion is particularly compelling here, since the question ultimately is one of contract interpretation, i.e., did Trillium and Robertsons intend the

[9] It is unlikely that the Trial Court relied upon the "as-is" clause as a basis to dismiss, since it had already denied a completely separate Motion for Summary Judgment based upon this argument.

"as-is" clause to extend to third-party tort claims against Janicki and Jun Yu. Given the inclusion of a provision calling for assignment of the sought-to-be barred claims within the same REPSA, and the subsequent entry of the Assignment by Trillium and Robertsons, the only conclusion is that the parties did not intend the "as-is" clause to bar these claims.

Nor is there support in any Washington case for a contrary conclusion as that reached by the Court of Appeals. Janicki attempts to support its position by pointing out the similar factual circumstances between the negotiations of Trillium and Robertsons, with those of the property seller and buyer in Warner v. Design & Build Homes, Inc., et al., 128 Wn.App. 34, 114 P.3d 664 (2005). However, these comparable facts have nothing to do with applicability of the contractual "as-is" clause to a non-party tortfeasor. In fact, the "as-is" clause in Warner only defeated a claim for breach against the contracting seller for breach of the implied warranty of habitability and not to a third-party claim.

Janicki also maintains that extension of an "as-is" provision to a third party is supported by the first part of a sentence relied upon by the Court of Appeals from Olmsted v. Mulder, 72 Wn.App. 169, 176, 863 P.2d 1355 (1993), rev. denied, 123 Wn.2d 1025 (1994) which provides: "The term [as-is] implies that the property is taken with whatever faults it

may possess…." However, as noted by the Court of Appeals, this is followed in the second part of the sentence by an explanation that "the seller or lessor is released of any obligation to reimburse the purchaser for losses or damages that result from the condition of the property." Id. Thus, the effect of an "as-is" clause extends only to bar claims against the seller, not third-party tortfeasors.

This was precisely the conclusion reached in Haire v. Nathan Watson Co., 221 S.W.3d 293, 300-01 (TX. Ct.App. 2007), where a third-party developer and geotechnical engineer sought to bar claims by a home buyer, based upon an "as-is" clause in the underlying purchase agreement:

> Here, the Haires are not suing the seller of their home, but instead are suing the developer and geotechnical engineering firm of the subdivision, neither of whom were parties to the sales contract. Every case cited by NWC and Fugro deals with the contractual relationship between a buyer and a seller. Neither NWC nor Fugro has pointed us to any authority, nor have we discovered any, that supports the application of a contractual provision to noncontracting parties such that the Haires would be precluded from suing NWC and Fugro.

3. The Doctrine of De Minimus Non Curat Lex Does Not Bar the Timber Trespass Claim.

Janicki finally seeks review of the Court of Appeals' refusal to uphold dismissal of Robertsons' timber trespass claims based upon the doctrine of de minimus non curat lex. This is based exclusively on

another misrepresentation by Janicki, in particular that the value of the admittedly improperly removed trees was under $1,000.00. The Court of Appeals' rejection of this argument notes the inaccuracy of this representation:

> But competing evidence in the record indicates that the value of the timber was $4,212.87, a nontrivial amount and, in any event, 'small' is not the same as trivial. Therefore, the de minimis rule does not provide a basis to affirm the trial court's dismissal of the Robertsons' timber trespass claim.

Opinion, p. 17.

Indeed, the timber trespass statute provides for treble damages to avoid this kind of argument because often the value of timber is insignificant. If not for the statute, it may be more profitable to ignore another's property rights, as Janicki is attempting to do here. See Pendergrast v Matichuk, 189 Wn.App. 854, 873, 355 P.3d 1210 (2015).

Janicki cites Guay v. Washington Natural Gas Co., 62 Wn.2d 473, 383 P.2d 296 (1963) in support of its suggestion that a trespass claim can simply be dismissed where damages are low, but Guay is inapposite. In Guay, the defendant cleared a right-of-way for a pipeline under the mistaken and negligent belief that they were on the property of someone who had granted an easement for the work. Id. at 474-75. The trial court

found the trespass was willful under the timber trespass statute and awarded damages of $1,500.00 for the cost of removing debris from the property, and $1 for diminution in the value of the land. Mr. Guay appealed, asserting that his actual damages were $48,000.00, and that his damages should have been trebled. Id. at 476. The Court of Appeals affirmed the trial court's damages award. Nothing in Guay supports Janicki's contention that because the value of the timber harvested is insignificant to Janicki, Robertsons' claims must be dismissed.

IV. CONCLUSION

For the reasons stated herein, Robertsons respectfully request that Janicki's Petition be denied.

DATED this 27th day of May, 2020.

Mark J. Lee, WSBA #19339
Haylee J. Hurst, WSBA #51406
of Brownlie Wolf & Lee, LLP
Attorneys for Respondents
230 E. Champion Street
Bellingham, WA 98225
Ph. (360) 676-0306
E-mail: mark@bellinghamlegal.com
haylee@bellinghamlegal.com

DECLARATION OF SERVICE

SUZANNE M. COLLINS DECLARES AS FOLLOWS:

1. I am a paralegal with Brownlie Wolf & Lee, LLP, am over the age of 18, and make this declaration based upon personal knowledge and belief.

2. On May 27, 2020, I filed the foregoing Respondents' Response to Petition for Review via the Court's ECF system. A copy of this document will also be e-mailed to the attorneys named below via the Court's ECF system:

Thomas Gregory Greenan
Bryan L. Page
Carmichael Clark, P.S.
tggreenan@carmichaelclark.com
bpage@carmichaelclark.com
shelly@carmichaelclark.com
Counsel for Jun Yu Development II, LLC

Richard L. Martens
Daniel Spurgeon
Jeffrey R. Gates
Matthew E. Orie
Martens + Associates P.S.
rmartens@martenslegal.com
dspurgeon@martenslegal.com
jgates@martenslegal.com
mmorgan@martenslegal.com
Counsel for Petitioner Janicki Logging & Construction, Inc.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge and belief.

May 27, 2020
Bellingham, Washington

Suzanne M. Collins

APPENDIX A

2140702141
Page: 1 of 3
7/23/2014 11:36 AM
DEED $74.00
Whatcom County, WA
Request of: WHATCOM LAND TITLE

When recorded return to:

ANDREW MACGREGOR ROBERTSON
1650 MATHERS AVE.
WEST VANCOUVER, BC V7V 2G7 CANADA,

Filed for Record at Request of
WHATCOM LAND TITLE CO., INC.
Escrow Number: W-121671-A

3pgs.

Statutory Warranty Deed

Grantor: **TRILLIUM CORPORATION**
Grantee: **ANDREW MACGREGOR ROBERTSON, RENEE ESME ROBERTSON, CAY MICHAEL MIERISCH and CASSANDRA MIERISCH**

THE GRANTOR TRILLIUM CORPORATION for and in consideration of **TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION** in hand paid, conveys and warrants to **ANDREW MACGREGOR ROBERTSON and RENEE ESME ROBERTSON, husband and wife and CAY MICHAEL MIERISCH and CASSANDRA MIERISCH, husband and wife** the following described real estate, situated in the County of **WHATCOM**, State of **Washington**.

Abbreviated Legal:

PTN SE ¼, NW ¼ S15, T40N, R1W

For Full Legal See Attached Exhibit "A" pg 2

See Attached Exhibit "B" for Exceptions.

Tax Parcel Number(s): **405115 233353 0000 PID 149532**

Dated **July 11, 2014**

TRILLIUM CORPORATION

By: JONATHAN SYRE, President And CEO

STATE OF WASHINGTON }
COUNTY OF WHATCOM } SS:

I certify that I know or have satisfactory evidence that **JONATHAN SYRE** **HE** is/are the who appeared before me, and said person(s) acknowledge **HE** signed this instrument, on oath stated **HE** is/are authorized to execute the instrument and acknowledge that as the **President And CEO** of **TRILLIUM CORPORATION** to be the free and voluntary act of such party(ies) for the uses and purposes mentioned in this instrument.

Dated: 7/22/14

CYNTHIA LEE POPE
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
9-27-2017

Notary Public in and for the State of WASHINGTON
Residing at Bellingham
My appointment expires: 9/27/17

LPB 10-05(i-l)
Page 1 of 2

1982619 186567 *7/23/2014 5,879.00*

EXHIBIT "A"

PARCEL A (405115 233353 0000):

THAT PORTION OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 15, TOWNSHIP 40 NORTH, RANGE 1 WEST OF W.M., LYING SOUTHEASTERLY OF COUNTY ROAD NO. 694, THE SEMIAHMOO ROAD, EXCEPT RIGHT-OF-WAY FOR SEMIAHMOO DRIVE LYING ALONG THE NORTHWESTERLY LINE THEREOF.

SITUATE IN WHATCOM COUNTY, WASHINGTON.

EXHIBIT "B"

SUBJECT TO:

1. Exceptions and reservations contained in Deed whereby the grantor excepts and reserves all oils, gases, coal, ores, minerals, fossils, etc., and the right of entry for opening, developing and working mines, etc., provided that no rights shall be exercised until provision has been made for full payment of all damages sustained by reason of such entry;

From:	STATE OF WASHINGTON
Recording No.:	676173
Records of:	Whatcom County, Washington
Affects:	Parcel A

2. Easement including the terms, covenants and provisions thereof for electric transmission and/or distribution line, together with necessary appurtenances, as granted by instrument;

Recorded:	February 1, 1957
Recording No.:	712211
Records of:	Whatcom County, Washington
To:	PUGET SOUND POWER AND LIGHT COMPANY
Affects:	Portion of Parcel A

3. Matters disclosed by a Survey of said premises;

Recorded:	July 26, 1982
Recording No.:	1423758
Records of:	Whatcom County, Washington
Affects:	Parcels A and D

4. Any rights, interests or claims which may exist or arise by reason of the following facts shown by Survey of the land by NORTHWEST SURVEYING AND GPS, INC., dated July 21, 2014, Job No. 14-157, as follows:

   A. Service pole and line thereto on the West side of Parcel A;
   B. Gravel access roads through Parcel A and along the West side of Parcel D;
   C. Culvert crossing on the East and South side of Parcel A;
   D. Ditches through Parcels A, C and D; and
   E. Overhead phone line along the West line of Parcels B and C

END OF EXHIBIT "B"

APPENDIX B

ASSIGNMENT AND ASSUMPTION OF CLAIMS

THIS ASSIGNMENT AND ASSUMPTION OF CLAIMS (this "Assignment") is made as of July 23, 2014 (the "Effective Date"), between TRILLIUM CORPORATION, a Washington corporation ("Seller"), and ANDREW MACGREGOR ROBERTSON and RENEE ESME ROBERTSON and CAY MICHAEL MIERISCH and CASSANDRA MIERISCH, and/or their assigns (together "Buyer").

RECITALS

A. Seller and Buyer are parties to that certain Real Estate Purchase and Sale Agreement dated June 11, 2014 (the "Purchase Agreement") related to the purchase and sale of certain real property on Birch Point in Whatcom County, Washington and legally described in Exhibit A attached hereto and incorporated by reference (the "Property").

C. In connection with the closing of the Purchase Agreement and in accordance with its terms, Seller has agreed to assign to Buyer certain claims Seller may have against third parties related to the trespass or timber trespass on the Property.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and upon the conditions contained in this Assignment, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, Assignor and Assignee agree as follows:

1. Assignment of Claims. On the Effective Date, Seller hereby assigns, conveys and delivers to Buyer all of Seller's right, title and interest, if any, in any and all claims against third parties arising from any trespass on the Property or timber trespass on timber and other forest products located or previously located on the Property, including any and all claims under RCW Chapter 64.12 and/or RCW 4.24.630 (the "Claims"). Seller further agrees that Buyer, at Buyer's expense, may bring a subrogated claim in Seller's name against third parties with regard to the Claims. Buyer shall be entitled to all judgment and settlement proceeds and amounts with regard to said subrogated claim. Seller shall provide all documentation and information relating to the Property as well as provide any testimony, which is necessary to assist Buyer in said subrogated claim or any other action related to the Claims, at no expense to Buyer.

2. Acceptance. On the Effective Date, Buyer accepts the assignment, conveyance and delivery of the Claims. Buyer assumes all obligations related to the Claims, including the obligation to perform any acts required to preserve or pursue any of the Claims, and releases Seller and each of Seller's owners, agents, officers, directors, attorneys, successors and assigns, from any obligations whatsoever related to the Claims from and after the Effective Date.

3. No Representations or Warranties. Seller makes no representation or warranty of any kind whatsoever regarding the existence, value or merit of any of the Claims.

4. Further Assurances. Seller and Buyer each agree to execute such further documents and instruments as may be reasonably required to effectuate the terms of this Assignment.

5. Successors and Assigns. This Assignment is binding on and shall inure to the benefit of Seller and Buyer and their respective successors in interest and assigns.

6. Governing Law; Venue. This Assignment will be governed by, and construed in accordance with, the laws of the state of Washington. Venue for disputes shall be a court of competent jurisdiction in Whatcom County, Washington.

7. Counterparts. This Assignment may be executed in one or more counterparts, each of which will be deemed an original and all of which will constitute one and the same Assignment.

IN WITNESS WHEREOF, Seller and Buyer have duly executed this Assignment of Claims as of the date first above written.

SELLER:

TRILLIUM CORPORATION,
a Washington corporation

Jonathan Syre, President and CEO

BUYER:

Andrew MacGregor Robertson

Renee Esme Robertson

Cay Michael Mierisch

Cassandra Mierisch

4. Further Assurances. Seller and Buyer each agree to execute such further documents and instruments as may be reasonably required to effectuate the terms of this Assignment.

5. Successors and Assigns. This Assignment is binding on and shall inure to the benefit of Seller and Buyer and their respective successors in interest and assigns.

6. Governing Law; Venue. This Assignment will be governed by, and construed in accordance with, the laws of the state of Washington. Venue for disputes shall be a court of competent jurisdiction in Whatcom County, Washington.

7. Counterparts. This Assignment may be executed in one or more counterparts, each of which will be deemed an original and all of which will constitute one and the same Assignment.

IN WITNESS WHEREOF, Seller and Buyer have duly executed this Assignment of Claims as of the date first above written.

SELLER:

TRILLIUM CORPORATION,
a Washington corporation

Jonathan Syre, President and CEO

BUYER:

Andrew MacGregor Robertson

Renee Esme Robertson

Cay Michael Mierisch

Cassandra Mierisch

APPENDIX C

CONFIRMING ASSIGNMENT AND ASSUMPTION OF CLAIMS

THIS CONFIRMING ASSIGNMENT AND ASSUMPTION OF CLAIMS ("Confirming Assignment") is entered this October 18, 2018, between TRILLIUM CORPORATION, a Washington corporation ("Seller"), and ANDREW MACGREGOR ROBERTSON and RENEE ESME ROBERTSON and CAY MICHAEL MIERISCH and CASSANDRA MIERISCH, and/or their assigns (together "Buyers").

RECITALS

A. Seller and Buyers are parties to that certain Real Estate Purchase and Sale Agreement dated June 11, 2014 (the "Purchase Agreement"), related to the purchase and sale of certain real property on Birch Point in Whatcom County, Washington, including, but not limited to, that property legally described in Exhibit A attached hereto and incorporated by reference (the "Property").

B. In connection with the closing of the Purchase Agreement and in accordance with its terms, Seller agreed to assign to Buyers certain claims Seller may have against third parties related to prior trespasses or timber trespasses on the Property.

C. At the time of closing on July 23, 2014, the parties entered into an Assignment and Assumption of Claims ("Assignment") which the parties intended to effectuate a complete assignment by Seller to Buyers of all claims that Seller may have had against any party that committed a trespass and/or waste on the Property prior to conveyance to Buyers, including, but not limited to, by Janicki Logging & Construction Co., Inc. ("Janicki") and/or Jun Yu Development II, LLC ("Jun Yu"). A true and correct copy of the Assignment is attached hereto and incorporated by reference as Exhibit B.

D. Buyers commenced that action Andrew MacGregor Robertson, et al. v. Jun Yu Development II, LLC, et al., Whatcom County Superior Court, Cause No. 15-2-01125-8 ("Action"), seeking recovery against Janicki and Jun Yu. Janicki and Jun Yu now argue that Seller has retained or reserved the claims raised by Buyers in the Action, based upon an alleged reservation in the Statutory Warranty Deed ("Deed") conveying the Property, a true and correct copy of which is attached hereto and incorporated by reference as Exhibit C.

E. The parties confirm that they did not intend for Seller to reserve any claims, including, but not limited to, any claim that Buyers have stated in the Action, nor intend that the Assignment merge into the Deed. Instead, Buyers and Seller intended all such claims to be conveyed to Buyers in the Assignment, and for the Assignment to survive closing of the Property.

F. As confirmation of this intent, and to avoid any doubt, however, the parties enter this Confirming Assignment.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and upon the conditions contained in the Assignment, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, Seller and Buyers agree as follows:

1. Assignment of Claims. To the extent not already assigned in the Assignment, Seller hereby assigns, conveys, and delivers to Buyers all of Seller's right, title, and interest in any and all claims against third parties, including, but not limited to, Jun Yu and Janicki, arising from any waste or trespass on the Property, or timber trespass on timber and other forest products located or previously located on the Property, including any and all claims under RCW Chapter 64.12 and/or RCW 4.24.630, and any claim raised in the Action (the "Claims"). Such assignment is intended to be effective as of the original date of the Assignment on or around July 23, 2014.

2. Acceptance. As of the original date of the Assignment, Buyers accept the assignment, conveyance, and delivery of the Claims. Buyers assume all obligations related to the Claims, including the obligation to perform any acts required to preserve or pursue any of the Claims, and release Seller and each of Seller's owners, agents, officers, directors, attorneys, successors, and assigns from any obligations whatsoever related to the Claims from and after the date of the original Assignment.

3. No Representations or Warranties. Seller makes no representation or warranty of any kind whatsoever regarding the existence, value, or merit of any of the Claims.

4. Further Assurances. Seller and Buyers each agree to execute such further documents and instruments as may be reasonably required to effectuate the terms of this Confirming Assignment.

5. Successors and Assigns. This Confirming Assignment is binding on and shall inure to the benefit of Seller and Buyers and their respective successors in interest and assigns.

6. Governing Law; Venue. This Confirming Assignment will be governed by, and construed in accordance with, the laws of the state of Washington. Venue for disputes shall be a court of competent jurisdiction in Whatcom County, Washington.

7. Counterparts. This Confirming Assignment may be executed in one or more counterparts, each of which will be deemed an original and all of which will constitute one and the same Confirming Assignment.

8. Survival. The parties intend that the original Assignment and this Confirming Assignment survive closing of the conveyance of the Property, and not merge into the Deed.

IN WITNESS WHEREOF, Seller and Buyers have duly executed this Confirming Assignment as of the date first above written.

SELLER:

TRILLIUM CORPORATION,
a Washington corporation

Jonathan Syre, President and CEO

BUYERS:

Andrew MacGregor Robertson

Renee Esme Robertson

Cay Michael Mierisch

Cassandra Mierisch

IN WITNESS WHEREOF, Seller and Buyers have duly executed this Confirming Assignment as of the date first above written.

SELLER:

TRILLIUM CORPORATION,
a Washington corporation

Jonathan Syre, President and CEO

BUYERS:

Andrew MacGregor Robertson

Renee Esme Robertson

Cay Michael Mierisch

Cassandra Mierisch

IN WITNESS WHEREOF, Seller and Buyers have duly executed this Confirming Assignment as of the date first above written.

SELLER:

TRILLIUM CORPORATION,
a Washington corporation

Jonathan Syre, President and CEO

BUYERS:

Andrew MacGregor Robertson

Renee Esme Robertson

Cay Michael Mierisch

Cassandra Mierisch

EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

TAX PARCEL NUMBER 405115 233353 0000

THAT PORTION OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 15, TOWNSHIP 40 NORTH, RANGE 1 WEST OF W.M., LYING SOUTHEASTERLY OF COUNTY ROAD NO. 694, THE SEMIAHMOO ROAD, EXCEPT RIGHT-OF-WAY FOR SEMIAHMOO DRIVE LYING ALONG THE NORTHWESTERLY LINE THEREOF.

SITUATE IN WHATCOM COUNTY, WASHINGTON.

BROWNLIE WOLF & LEE, LLP

May 27, 2020 - 3:31 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98484-1
Appellate Court Case Title:	Andrew MacGregor Robertson, et al. v. Janicki Logging & Construction Co., Inc.
Superior Court Case Number:	15-2-01125-8

The following documents have been uploaded:

- 984841_Answer_Reply_20200527153025SC621242_8127.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Response to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- BPage@CarmichaelClark.com
- JGates@martenslegal.com
- TGGreenan@CarmichaelClark.com
- dspurgeon@martenslegal.com
- haylee@bellinghamlegal.com
- mmorgan@martenslegal.com
- morie@martenslegal.com
- rmartens@martenslegal.com
- shelly@carmichaelclark.com

Comments:

Sender Name: Suzanne Collins - Email: suzanne@bellinghamlegal.com
Filing on Behalf of: Mark J. Lee - Email: mark@bellinghamlegal.com (Alternate Email: suzanne@bellinghamlegal.com)

Address:
230 E. Champion Street
Bellingham, WA, 98225
Phone: (360) 676-0306 EXT 205

Note: The Filing Id is 20200527153025SC621242