SUPREME COURT NO. 90124-4
(APPEAL NO. 68913-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

LAKE WHATCOM RAILWAY COMPANY, a Washington Corporation

Respondents,

vs.

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

Petitioners.

LWRW'S ANSWER TO PETITION FOR REVIEW

Douglas R. Shepherd
Bethany C. Allen
Shepherd and Abbott
2011 Young Street, Suite 202
Bellingham, WA 98225
(360) 733-3773

May 5, 2014

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IDENTITY OF RESPONDENT

Respondent is Lake Whatcom Railway Company, a Washington Corporation, and is owned, in part, by Frank Culp.

CITATION TO COURT OF APPEALS DECISION

Lake Whatcom Railway Company (LWRW) respectfully requests that the Washington Supreme Court deny Alar, et al's, Petition for Review of the Court of Appeals, Division I, unpublished opinion (motion to publish) in *Lake Whatcom Railway Co. v. Alar, et. al.*, Appeal No. 68913-4-I, decided on February 3, 2014.

INTRODUCTION

Petitioners raise two issues in their Petition. Neither are grounds for review under RAP 13.4.

First, Petitioners incorrectly argue that the decision of Division I of the Court of Appeals disregarded published opinions controlling the interpretation of grants of railroad rights of way when it determined that the 1931 deed conveyed fee simple title and not an easement. Consistent with published case law, the Court of Appeals correctly determined that the 1931 deed was intended to convey fee simple title. *See Ray v. King County*, 120 Wn.App. 564, 86 P.3d 183 (Div. 1, 2004), *review denied,* 152

Wn.2d 1027, 101 P.3d 421 (2004); *Brown v. State*, 130 Wn.2d 430, 924 P.2d 908 (1996).

LWRW admits that the Court of Appeals did ignore published opinions when it "interpreted" the 1901 Deed. However, Petitioners did not appeal the Court of Appeals decision holding that the legal effect of the 1901 deed is controlled by res judicata.[1] Washington common law has changed in the last 25 years. The language of the 1901 Deed, if considered under current common law, would require a decision consistent with and supportive of the trial court's 1977 decision(s); i.e., the 1901 deed conveyed fee simple title and not an easement. Again, construction of the 1901 deed is not an issue appealed by Petitioner.

Second, Petitioners argue, again incorrectly, that Division I of the Court of Appeals lacked authority to determine whether the 1931 deed conveyed fee simple title or an easement. Petitioner claims reviewable error because the Court of Appeals disagreed "with the trial court's conclusion that the 1931 deed conveyed an

---

[1] "On June 24, 2009, the trial court granted Alar's motion for partial summary judgment, ruling that under res judicata, the court's decision in Veach controlled the 1901 deed's legal effect." *Lake Whatcom Railway Co. v. Alar, et. al.* at 5. "Here, the court properly applied res judicata to the court's interpretation in Veach of the 1901 deed's legal effect." *Id.* at 13.

easement interest rather than a fee simple . . . ." *Lake Whatcom Railway Co. v. Alar, et. al.* at 2.

STATEMENT OF THE CASE

LWRW operates an excursion train along the shore of Lake Whatcom, in Whatcom County, WA. Frank Culp is LWRW's president. Karl and Jean Alar, Stephen and Cindy Scott, and Roger and Ardis Wens (collectively Alar) own three parcels of land abutting the lake that the railway bisects. This lawsuit involves the nature of the railway's property interest created by two conveyances, one in 1901 and one in 1931. LWRW, formerly Cascade Recreation Inc., acquired all rights included in the 1901 and 1931 deeds in 1972. *Lake Whatcom Railway Co. v. Alar, et al.* at 2-3.

In its Complaint, LWRW alleged that beginning before 2008, Alar and Scott dumped dirt on its railroad tracks, interfered with railroad operations, denied access to the right of way, and otherwise created safety issues on its right of way. CP 1035; 1038-39. LWRW claimed damages against Alar and Scott for trespass. CP 1039. LWRW asked the trial court to quiet title under both deeds in LWRW.

At trial, LWRW claimed that the maintenance and operation of its tracks were subject to federal regulations. RP 33. Mr. Culp admitted, in response to a question by counsel for the Alars, that LWRW was regulated by the federal government. RP 200. Jarvis Frederick, the neighbors' expert, testified at trial that LWRW was a Class I or Class II railroad subject to regulations issued by the federal government. RP 383. The Court of Appeals held that res judicata barred LWRW from re-litigating the 1901 deed and that the 1931 deed conveyed a fee simple interest. *Lake Whatcom Railway Co. v. Alar, et. al.* at 14, 17.

STATEMENT OF THE ISSUES

1. Whether the Court of Appeals correctly determined that the 1931 Deed was intended to convey a fee simple. [Yes]

2. Whether the Court of Appeals had authority to determine whether the 1931 deed conveyed a fee simple or an easement. [Yes]

LEGAL ARGUMENT

A. Fee Simple Title.

In 1931, Byron "conveyed and warranted" to Northern Pacific Railway Company [LWRW's predecessor], by a Warranty

Deed, "the following described real estate situate in the County of Whatcom and State of Washington, to wit: . . . Dated this 29th day of June, A.D. 1931." Plaintiff's Exhibit 1. The Court of Appeals, in its unpublished opinion, citing *Brown v. State*, held:

> In this case, because the original parties utilized the statutory warranty form deed and the granting clause conveys a definite strip of land, we hold that the grantors intended to convey fee simple title unless additional language in the deed clearly and expressly limits or qualifies the interest conveyed. The 1931 deed contains no language clearly and expressly limiting or qualifying the interest conveyed. Therefore, we hold that the 1931 deed conveyed a fee simple interest.

Lake Whatcom Railway Co. v. Alar, et. al. at 14. This holding is consistent with *Brown*.

> In general, when construing a deed, the intent of the parties is of paramount importance and the court's duty to ascertain and enforce. *Swan v. O'Leary,* 37 Wash.2d 533, 535, 225 P.2d 199 (1950); *Zobrist v. Culp,* 95 Wash.2d 556, 560, 627 P.2d 1308 (1981). In this case, where the original parties utilized the statutory warranty form deed and the granting clauses convey definite strips of land, we must find that the grantors intended to convey fee simple title unless additional language in the deeds clearly and expressly limits or qualifies the interest conveyed.

Brown v. State, 130 Wn.2d at 437. "Whether a conveyance is one of fee title or an easement is a conclusion of law as to the effect of a deed." *Ray v. King County*, 120 Wn.App. 564, 571, 86 P.3d 183

(Div 1, 2004), *review denied,* 152 Wn.2d 1027, 101 P.3d 421 (2004). Challenged conclusions of law are legal issues reviewed de novo. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 43, 59 P.3d 611 (2002).

B. Waiver.

Petitioners argue that: "The issue of whether the 1931 Byron Deed conveyed an interest in fee simple or an easement was not properly before the Court of Appeals. Appellant LWRW waived the issue for appeal by failing to address any alleged error by the trial court when interpreting the 1931 conveyance." Petitioner Alar, et al.'s Petition for Review, p. 13. As authority, Petitioner cites the following legal principle: "We deem an issue not briefed to be waived." *Hall v. Feigenbaum*, 178 Wn.App. 811, 817, 319 P.3d 61, 64 (Div. 1, 2014).

First, Petitioners incorrectly argue that the nature of the 1931 deed was not adequately briefed or argued. Then, Petitioners incorrectly attempt to argue that the above legal principal provides no discretion for an appellate court to decide legal issues not briefed or argued. However, appellate courts have both the right and duty to determine legal issues necessary to the issues raised in

any appeal. The Court of Appeals correctly determined that: "This lawsuit involves the nature of the railway's property interest created by two conveyances, one in 1901 and one in 1931." *Lake Whatcom Railway Co. v. Alar, et. al.* at 2. Assuming the 1931 deed was not adequately argued or briefed by LWRW, Division I had the right to decide the intent of the 1931 deed because the nature of the grant was necessary to the issues on appeal.

> This court generally reviews only those issues raised by the parties in their petition and answer. RAP 13.7(b). This rule is subject to numerous exceptions. *Maynard Inv. Co. v. McCann*, 77 Wash.2d 616, 621, 465 P.2d 657 (1970). One such exception provides that "[t]his court has the inherent discretionary authority to reach issues not briefed by the parties if those issues are necessary for decision." *City of Seattle v. McCready*, 123 Wash.2d 260, 269, 868 P.2d 134 (1994).

Blaney v. Int'l Ass'n of Machinists, 151 Wn.2d 203, 213, 87 P.3d 757 (2004).

The 1931 Deed was briefed and argued in LWRW's Opening Brief, Petitioner's Brief, and LWRW's Reply Brief.

1. LWRW Opening Brief:

> The 1931 Deed, "conveyed and warranted" to the Northern Pacific Railway Company all the property:
>
> > [A] line parallel with and distant twenty-five (25) feet northerly, measured at right angles, from the center line of the re-located railroad

> of said Railway Company as the same is now staked out and to be constructed over and acres said premises, containing fifteen hundredths (0.15) acres, more or less.
> Trial Exhibit 2.

Appellant LWRW's Opening Brief, p. 1.

> In *Veach v. Culp,* on January 6, 1977, the Whatcom County Superior Court entered Findings of Fact and Conclusions of Law, which found, in part: . . .
> - The 1931 Deed to Lake Whatcom Railway's predecessor Bellingham Bay & Eastern Railroad "is in fee language and the use of the property is not limited to railway purposes, nor does it mention right of way."
>
> And concluded: . . .
>
> - Lake Whatcom Railway is the owner in fee simple of the land embraced within its right of way, being fifty feet on each side of the original in line of the Bellingham Bay & Eastern Railway [1901 Deed] and 25 feet from the center line of the projected relocation of the Northern Pacific Railway Company as recited in the Byron [1931] deed.

Id. at 4.

> If it is determined that the prior cases and decisions preclude further analysis of the 1901 Deed, the same analysis and conclusion should be applied to the 1931 Deed. While applying the concept of res judicata to the 1901 Deed, the trial court ignored the fact that the nature of the grant in the 1931 Deed was previously determined by the trial court in its January 6, 1976 finding of fact IX, as follows: "That deed is in fee language and the use of the property is not limited to railway purposes, nor does it mention right of way." See

> Appendix "B." Further, the trial court's 1976 Conclusion, as regards to the 1931 Deed, was not appealed. That conclusion was: Veach has "no easements, reversions or rights to the land within the boundaries of defendant corporation's right of way." *Id.*
>
> If this Court finds that res judicata is applicable to the *Veach v. Culp* litigation, res judicata should be applied uniformly to both the 1901 and 1931 deeds.

Id. at 28-9. And:

> E. Current Common Law Should be Applied to Both Deeds. . . .
>
> In *Ray v. King County,* 120 Wn.App. 564, 86 P.3d 183 (Div. 1, 2004), this Court extensively laid out the analysis, as established by *Brown v. State,* 130 Wn.2d 430, 924 P.2d 908 (1996), for determining whether a railroad was granted a right of way as an easement or fee. The analysis utilized in *Veach v. Culp* was changed by *Brown v. State* (supra) and criticized by this Court in *Ray v. King County,* 120 Wn.App at 578. "In *Veach v. Culp* the court construed language in the relevant portion of the deed, but did not consider the full range of factors that the supreme court [sic] in *Brown* later articulated for characterizing the nature of the interest conveyed." *Id.*

Id. at 35-6.

Before making the above arguments in its briefing, LWRW assigned error to the findings and conclusions of the trial court which erroneously concluded the 1931 deed was intended as an easement. See Assignments of Errors 5, 6, 7, 8, 9, 10, 11, 12 and 21.

Id. at 11-14.

2. Alar's Opening Brief.

In their Division I Brief of Respondents Alar, et al, Petitioner herein, briefed and argued the 1931 deed, as follows:

> In 1931, the railroad wished to relocate a portion of the line that was located on the Alar property. So in 1931, Alar's predecessor-in interest, Mr. Byron, granted an additional railroad easement. This shall be referred to as the "Byron Grant." As stated in the document, the purpose of this grant was simply to relocate the existing tracks.

Brief of Respondents Alar, et al., p. 4.

3. LWRW Reply Brief.

In its Reply Brief, LWRW, provided the following additional argument regarding the 1931 Deed:

> Alar has not argued any legal authority to support any finding or conclusion that the 1931 Warranty Deed conveyed only an easement. Instead, Alar incorrectly argues that Lake Whatcom Railway Company (Lake Whatcom Railway) did not appeal Findings of Fact 1.6 or 1.7.
> Resp. Brief, p. 28. Lake Whatcom Railway Company's Assignment of Error No. 4 assigned error to Finding of Fact 1.6:
>
> > The trial court erred when it made and entered Finding of Fact 1.6 on September 24, 2010 as follows; "It was the intent of the parties to the Zobrist Grant [1901 Deed] that the same convey an easement and not a fee simple interest." CP 132.

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

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

App. Opening Brief, p. 11.

The 1931 Deed has no right of way language. It is a Warranty Deed. Exhibit 2. The 1931 Deed conveys and warrants to "Northern Pacific Railway Company . . . the following described real estate situated in the County of Whatcom and State of Washington/ to-wit . . . (which included the Byron parcel now owned by Lake Whatcom Railway Company)." Exhibit 2.

Appellant LWRW's Reply Brief, pp. 2-3.

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

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

> *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Assn,* 156 Wn.2d 253, 270, 126 P.3d 16 (2006). The trial court made no attempt to analyze either Deed under the factors outlined in *Brown v. State,* 130 Wn.2d 430, 924 P.2d 908 (1996) or *Ray v. King County,* 120 Wn.App. 564, 86 P.3d 183 (Div I, 2004).

Id. at 4-5.

Petitioners argue that this Court should accept review because the above briefed arguments by LWRW, apparently failed to adequately raise the issue as to whether or not the 1931 Deed was intended as fee simple interest or as an easement for a railway right of way. Petitioners cited no case discussing what is or is not an adequate briefing of any particular issue. That was for the Court of Appeals to determine.

The Court of Appeals, in its unpublished opinion, correctly held as follows as regards the 1931 Deed:

> Lake Whatcom Railway also challenges the trial court's determination that the 1931 deed conveyed an easement. In this case, because the original parties utilized the statutory warranty form deed and the granting clause conveys a definite strip of land, we hold that the grantors intended to convey fee simple title unless additional language in the deed clearly and expressly limits or qualifies the interest conveyed. The 1931 deed contains no language clearly and expressly limiting or qualifying the interest conveyed. Therefore, we hold that the 1931 deed conveyed a fee simple interest.

Lake Whatcom Railway Co. v. Alar, et. al. at 14.

If the 1931 Deed was not adequately briefed, the Court of Appeals, in its discretion, could have declined to decide the matter. However, the Court of Appeals correctly concluded that the briefing and arguments were adequate and cogent enough to decide the matter. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989). Petitioner has cited no authority and LWRW could find no authority, by this Court, holding that the lower court should not have decided a legal issue because the legal issue was not adequately briefed, was not necessary to the decision and was waived by a party in the lower court.

REQUEST FOR ATTORNEY FEES AND EXPENSES

LWRW respectfully requests this Court award reasonable attorney's fees and expenses for the preparation and filing of this Answer to Alar, et al's Petition for Review pursuant to RCW 4.84.080 and RAP 18.1.

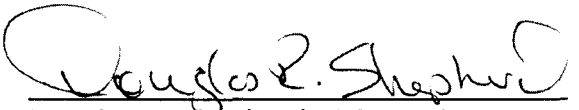
CONCLUSION

Even assuming there was inadequate briefing and argument, the issue of railroad deed interpretation is reviewed

de novo and is a legal issue. None of the issues in this appeal could have been properly resolved by Division I, without its determination of the parties' intentions as to both the 1901 and 1931 Deeds. The Petition should be denied.

Respectfully submitted this 5th day of May 2014.

SHEPHERD AND ABBOTT



Douglas R. Shepherd, WSBA #9514
Bethany C. Allen, WSBA #41180
2011 Young Street, Suite 202
Bellingham, WA 98225
(360) 733-3773

SUPREME COURT OF THE STATE OF WASHINGTON

LAKE WHATCOM RAILWAY COMPANY, a Washington Corporation
Appellant,

vs.

KARL ALAR and JEANININE ALAR, a marital community composed thereof; and all persons claiming any right, title or interest through them, and STEVEN M. SCOTT and JANE DOE SCOTT, husband and wife, and the marital community composed thereof; and all persons claiming any right, title or interest through them
Respondents.

Case No. 90124-4

Whatcom County Superior Court Case No. 08-2-02034-3 f/k/a No. 51720

COA No. 68913-4-I

DECLARATION OF SERVICE

I, Jen Petersen, declare that on May 5, 2014, I caused to be served a copy of the following document: **Lake Whatcom Railway Company's Answer to Petition for Review;** and a copy of this **Declaration of Service** in the above matter, on the following persons, at the following address, in the manner described:

SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 ♦ FAX: (360) 647-9060
www.saalawoffice.com

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

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

DATED this 5th day of May 2014.

Jen Petersen

SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 ♦ FAX: (360) 647-9060
www.saalawoffice.com

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Subject: LWRW v. Alar et al - Answer to Petition for Review for Filing

Re: Lake Whatcom Railway Company v. Alar, et al.
Supreme Court No. 90124-4

Filing Party:
Douglas R. Shepherd, WSBA No. 9514
Bethany C. Allen, WSBA 41180
Phone: (360) 733-3773
Email: dougshepherd@saalawoffice.com; bethany@saalawoffice.com

Attached please find the following documents for filing:
01. Lake Whatcom Railway Company's Answer to Petition for Review
02. Declaration of Service

Please call or write with questions. Thank you.

Respectfully,

Jen Petersen
Legal Assistant
SHEPHERD AND ABBOTT
2011 Young Street, Suite 202
Bellingham, WA 98225
Ph: (360) 733-3773
Fax: (360) 647-9060
jen@saalawoffice.com