No. 46080-7
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Barlow Point Land Company, LLC, a Delaware limited liability company; and Port of Longview, a municipal corporation,

Plaintiffs/Respondents,

vs.

Keystone Properties I, LLC,

Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT

HONORABLE STEPHEN WARNING

RESPONDENTS' BRIEF

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Table of Contents

Table of Authorities

Cases

Other Authorities

Rules

STATEMENT OF ISSUES

1. The trial court correctly ruled that the 2006 Deed from Terra Firma to Mr. Wilson was ambiguous with respect to the conveyance of tidelands.

2. The trial court correctly ruled that this ambiguity was resolved by extrinsic evidence overwhelmingly demonstrating the parties' intent to include all adjoining tidelands in the 2006 conveyance.

3. Separately, the trial court correctly ruled that all tidelands were conveyed to Mr. Wilson in 2006 as a matter of law as the Deed did not expressly reserve them to the seller.

4. The trial court correctly ruled on the admissibility of evidence, extrinsic and otherwise, presented in support of summary judgment.

STATEMENT OF THE CASE

1. 2006 Sale from Terra Firma to Mr. Wilson. At the beginning of 2006 Robert Radakovich, Sr. and Robert Radakovich, Jr., father and son, under a family business known as Terra Firma, Inc. ("Terra Firma"), owned 300+ acres in the Barlow Point area along the Columbia River just west of Longview, Washington. (CP 80-82, 489) Terra Firma's

ownership extended to the shore of the Columbia River and the adjoining tidelands. (CP 80-82)

In late 2005 Mr. Radakovich, Jr. began negotiations with Stephen (Jeff) Wilson, his good friend, for the sale of Terra Firma's shorelands ("Uplands") and adjoining tidelands. (CP 81) Mr. Wilson was told that he was purchasing all of Terra Firma's tidelands. (CP 489-490)

As part of these negotiations Mr. Wilson was given a confidential appraisal of all of Terra Firma's Barlow Point property. (CP 489) The appraisal includes a map of all of the property including the tidelands. The appraisal also includes a list of the 15 tax parcels comprising Terra Firma's ownership. (CP 489) Of importance were Tax Parcels 1-0713-0100 and 1-0714-0100 (hereafter abbreviated as "Parcel 713" and "Parcel 714"). Parcels 713 and 714 included all of Terra Firma's shorelands and tidelands. (CP 489-490) Stated differently, Terra Firma's remaining 13 tax parcels did not reach to the shorelands or tidelands, and there are no additional tax parcels to the river side of Parcels 713 and 714. (CP 490, 496-499)

The list of tax parcels in the appraisal also states their acreage and assessed value. (CP 490) Parcel 713 had a stated acreage of 10.91 acres and a value of $47,500.00. (CP 490) Parcel 714 had a stated acreage of 9.45 acres and a value of $41,200.00. (CP 490) Together, Parcels 713

and 714 had a stated acreage of 20.36 acres and a value of $88,700.00. (CP 490, 496-499)

Mr. Radakovich, Jr. agreed to sell Parcels 713 and 714 to Mr. Wilson for their assessed value of $88,700.00. (CP 490) The parties had a local attorney, Vince Penta, prepare a Real Estate Purchase and Sale Agreement ("Purchase Agreement"). (CP 82) The Purchase Agreement does not include a legal description for Tax Parcels 713 and 714 but states that Terra Firma is selling "a minimum of twenty acres" to Mr. Wilson. (CP 82) The Purchase Agreement does not exclude any tidelands from the sale. (CP 83, 97-100)

Mr. Radakovich, Jr. and Mr. Wilson also wanted Mr. Penta to close the transaction. (CP 82, 490) Mr. Penta did not have a legal description for Parcels 713 and 714 and so he turned to a local title escrow officer, Arlene Reynolds, for assistance. (CP 354-358) Ms. Reynolds found a legal description for Parcel 713 from an earlier transaction. (CP 354-358) This legal description became "Parcel A" in the eventual deed. (CP 354-358) But Ms. Reynolds could not find a legal description for Parcel 714 in her company's records; that is, this parcel had not previously been carved out of Terra Firma's larger ownership. (CP 354-358) Searching further, Ms. Reynolds examined another title company's records and ultimately found a legal description she thought was consistent with Tax Parcel 714.

(CP 354-358) This description became "Parcel B" in the eventual deed. (CP 354-358)

Ms. Reynolds sent the proposed legal description to Mr. Penta who incorporated it into the deed. Mr. Penta did not discuss the legal description with Ms. Reynolds nor did he discuss it with the parties. (CP 354-358)

Again, the description for Parcel B in the deed cannot be found in any prior transaction and was not prepared by either the seller or the buyer, or even the attorney closing the transaction, but was instead drafted by a title officer in an attempt to create a legal description for Tax Parcel 714.

The sale from Terra Firma to Mr. Wilson was completed in February 2006. (CP 82) The legal description in the deed transferring Tax Parcels 713 and 715 (the "Wilson Deed") reads as follows:

> A portion of the George Barlow Donation Land Claim and the George Fisher Donation Land Claim as fully described by an attached Exhibit "A" to the Deed setting forth the following legal description:
>
> **Parcel A**:
>
> Lot 2 of Short Subdivision No. 91-001, as recorded in Volume 6 of Short Plats, page 83, under Auditor's File No. 910204032; and being a portion of the George Barlow Donation Land Claim; TOGETHER WITH all tidelands of the second class, situated in front of, adjacent to or abutting the above described uplands and as conveyed in Parcel "J"

of said Deed, Volume 977, page 242, (Fee No. 840924042).

Parcel B:

All that portion of George Barlow D.L.C. and George Fisher D.L.C. lying outside of Columbia River Dike of Consolidated Diking Improvement District No. 1, said dike being described by Deed in Volume 121, page 391, Auditor's File No. 51256;
EXCEPTING THEREFROM that portion lying Northerly of a line that is parallel to and 1,765.70 feet South of the South line of Section 22, Township 8 North, Range 3 West of the W.M.
Situate in Cowlitz County, State of Washington.

(CP 101-103)

At issue is whether Terra Firma conveyed the tidelands adjoining Parcel B, commonly referred to as the "Parcel B Tidelands," to Mr. Wilson.

2. Extrinsic Evidence Overwhelmingly Demonstrates the Conveyance of the Parcel B Tidelands. The parties' conduct before and after the sale overwhelmingly demonstrated that the Parcel B Tidelands were included in the sale:

(a) Shortly before the sale to Mr. Wilson was closed, Mr. Radakovich, Jr. sent an email to Mr. Wilson reminding him that the Port of Longview was interested in the tidelands Mr. Wilson was about to purchase. (CP 82)

(b) Late in 2006 several parties expressed interest in purchasing Terra Firma's remaining property as well as the property Wilson had just acquired. This led to multiple requests by Mr. Radakovich, Jr. to repurchase the tidelands adjoining Parcel B (CP 83):

(i) On October 12, 2006, Mr. Radakovich, Jr. sent an email to Mr. Wilson pleading with him to sell back the Parcel B Tidelands (CP 84, 106-107).

(ii) Two weeks later Mr. Radakovich, Jr. tendered a formal written offer through a real estate broker to repurchase a portion of the Parcel B Tidelands for $100,000.00 (CP 84, 108-127).

(iii) When Mr. Wilson refused this offer Mr. Radakovich, Jr. presented him with a colored map demonstrating a proposed exchange of some of Terra Firma's remaining property for a portion of the Parcel B Tidelands (CP 85,128-140).

(iv) The proposal to trade other property for a portion of the Parcel B Tidelands was then reduced to a formal written offer presented by Mr. Radakovich, Jr.'s real estate broker to Mr. Wilson (CP 85, 128-140).

(v) When Mr. Wilson did not respond to these offers Mr. Radakovich, Jr. sent a lengthy email to him on February 27, 2007, pleading to repurchase the Parcel B Tidelands:

> "I need to get the tidelands back for many reasons including my own sanity Jeff. I made a mistake not paying Duncan to survey out the tidelands when we executed this deal. I could not afford it and unnecessarily handed you control of the waterfront access. I acted out of weakness, and I hate myself for it.
>
> I f____d up the integrity of the property. If you recall you wanted the beach initially, and I resisted for a few years until I was down on my luck so I agreed to sell. We were going to survey out the tidelands, but it was too expensive, and I was in a position of weakness. I trusted you to do the right thing if this became an issue regardless of the contract I signed in Vince's office which I never should have signed. But if you are going to hold me to it then so be it. Then let me know. Otherwise I have to survive, and I need the tidelands back to survive in the short term and long term.
>
> . . . .
>
> I need clear title to make the process go faster for my own survival whatever options may be. I am on the edge of my life and I need those damn tidelands back. . . ."
>
> "I am tired and trying to bridge a chasm a vast expanse and I can't do it without those damn tidelands back. . . ."

(CP 85-86, 141-142)

When Mr. Wilson would not resell the Parcel B Tidelands to Mr. Radakovich, Jr. their friendship came to an end. By 2008 the parties were in litigation over Mr. Wilson's access to the tidelands. (*Terra Firma v. Wilson*, Cowlitz County Superior Court Case No. 08-2-00233-1). In the

course of this litigation, which lasted nearly two years and ended in trial, Mr. Radakovich, Jr. repeatedly admitted that the Parcel B Tidelands belonged to Mr. Wilson. On March 7, 2008, Mr. Radakovich, Jr. signed a Declaration in which, under penalty of perjury, he declares (CP 86):

> "4. Attached hereto and marked as Exhibit A is a map depicting the property sold to Mr. Wilson and the property that is owned by Terra Firma, Inc."

The map attached as Exhibit B identifies all tidelands as belonging to Mr. Wilson. (CP 492-493)

During trial Mr. Radakovich, Jr. stipulated to the entry of a map depicting the parties' respective properties. This map, entered as Exhibit 21, identifies all tidelands as belonging to Mr. Wilson. (CP 492-493, 513-514)

From February 2006 to the end of 2011, a period of six years, Mr. Wilson was the only party to make use of the tidelands. (CP 87) Mr. Wilson owned several "duck boats" (World War II-era amphibious vehicles) and operated a business taking passengers and cargo across the Columbia River using the Parcel B tidelands for access to the river. (CP 87) Mr. Wilson operated this business continuously from 2006 through 2011 with at least one hundred landings on the tidelands each year. (CP 87)

From 2006 through 2011, Mr. Wilson paid all property taxes on Parcels 713 and 714. (CP 88) Conversely, Terra Firma did not pay any property taxes on tidelands. (CP 88)

In 2011, Mr. Wilson applied to the State of Washington for five permanent mooring buoys to be placed along the Parcel B Tidelands. The ownership of the tidelands was a requirement of the applications. (CP 87, 162-173)

From 2006 through 2011, Mr. Wilson enjoyed total and undisturbed possession and use of the tidelands. During this time Terra Firma and its owners never claimed any ownership nor attempted to use them. (CP 87, 491-492)

In 2010, Terra Firma's remaining 13 tax parcels were foreclosed and the Port of Longview (the "Port") purchased them at the trustee's sale. (CP 209) In 2011, the Port ordered a preliminary title report to determine ownership of the adjoining riverfront. (CP 207, 194-195) The preliminary title report, issued by Chicago Title, suggested that ownership of the Parcel B Tidelands remained with Terra Firma. (CP 209)

In November 2011, four Port officials met with Mr. Radakovich, Sr. to discuss the tidelands (by 2011 Mr. Radakovich, Jr. had moved away and his father had taken control of Terra Firma). (CP 209-210) Mr. Radakovich, Sr. arrived at the meeting with his friend and employer, John

Van Vessem. (CP 210) During the meeting Port officials gave Mr. Radakovich, Sr. a copy of the preliminary title report and told him that the Port would like to purchase his interest in the Parcel B Tidelands. (CP 210) Mr. Radakovich, Sr. responded that he "no longer owned the tidelands." (CP 210) The Port officials replied that the Port was still prepared to pay him $10,000 in order to clear any cloud on title. (CP 210) Speaking on behalf of Mr. Radakovich, Sr., Mr. Van Vessem replied that they would consider the offer and get back to the Port. The Port never heard from them again. (CP 210)

One month later Mr. Radakovich, Sr. filed a Chapter 7 Bankruptcy Petition, Case No. 11-49810-BDL. (CP 88, 174-181, 210-211) In his bankruptcy schedules, signed under penalty of perjury, Mr. Radakovich, Sr. does not claim to be the owner of any tidelands. (CP 211) He acknowledges that he is the 100% owner of Terra Firma but states that the company is defunct and has no value. (CP 88, 177-179, 211)

3. 2012 Conveyances of Tidelands. On January 25, 2012, while Mr. Radakovich, Sr.'s bankruptcy was pending, and without notice to the bankruptcy trustee, Mr. Radakovich, Sr. executed a deed purporting to convey the Parcel B Tidelands to John Van Vessem in the name of Mr. Van Vessem's business, Keystone Properties I, LLC ("Keystone"). (CP 211) The selling price was $1,000. (CP 211)

Before the deed from Terra Firma to Keystone, escrow had begun on a sale of the uplands and tidelands from Mr. Wilson to Barlow Point Land Company ("BPLC"). (CP 211) This sale was completed in February 2012. (CP 87) BPLC paid Mr. Wilson $755,000 for the property. (CP 89) The legal description for the conveyance to BPLC is the same description as found in the Wilson Deed. (CP 89) Later in 2012 BPLC conveyed a portion of the Parcel B Tidelands to the Port for $63,000. (CP 211)

BPLC and the Port of Longview jointly commenced this action to quiet title to the Parcel B Tidelands according to their respective ownership interests.

4. Motion for Summary Judgment. BPLC and the Port jointly moved for summary judgment. In their motion they asserted three grounds for judgment quieting title in their names:

1) The legal description for Parcel A in the Wilson Deed also includes all tidelands adjoining Parcel B. (CP 34)

2) To the extent that the legal description in the Wilson Deed is ambiguous with respect to tidelands, the parties' intent to include them is overwhelmingly demonstrated. (CP 34)

3) The conveyance of Parcel B included the adjoining tidelands unless the seller expressly reserved them. Terra Firma did not expressly reserve ownership of any tidelands. (CP 34-35) The tidelands were therefore conveyed to Wilson as a matter of law. (CP 50)

The trial court agreed with the Plaintiffs' second and third arguments and granted summary judgment quieting title on both grounds. More specifically, the trial court concluded that:

1. The Wilson Deed is ambiguous as to whether the tidelands adjoining Parcel B are included. (RP 7) This ambiguity is resolved by extrinsic evidence that overwhelmingly demonstrates the parties' intent to convey the tidelands. (RP 7)

2. The property conveyed to Wilson is a "riparian estate". (RP 6) As a matter of law, the conveyance of the Parcel B uplands included the adjoining tidelands since Terra Firma did not expressly reserve their ownership. *Wardell v. Commercial Waterway District No. 1 of King County*, 80 Wash. 495, 141 Pac. 1045 (1914). (RP 6-7)

ARGUMENT

1. The Wilson Deed is Ambiguous with Respect to Tidelands.

As previously noted, in their Motion for Summary Judgment BPLC and the Port first asserted that the legal description to Parcel A in the Wilson Deed includes the tidelands adjoining Parcel B. (CP 34) The legal description of Parcel A is:

> **Parcel A**:
>
> Lot 2 of Short Subdivision No. 91-001, as recorded in Volume 6 of Short Plats, page 83, under Auditor's File No. 910204032; and being a portion of the George Barlow Donation Land Claim; TOGETHER WITH all tidelands of the second class, situated in front of, adjacent to or abutting the above described uplands **and as conveyed in Parcel "J" of said Deed, Volume 977, page 242, (Fee No. 840924042)**.

BPLC and the Port argued that this legal description contains two, separate conveyances of tidelands: (1) "all tidelands . . . adjacent to the described uplands" (that is, those adjacent to Parcel A), and (2) "those tidelands as conveyed in Parcel "J" of said Deed, Volume 977, page 242 (Fee No. 840924042)." (CP 191, 198-200)

The reference to "Parcel J of said Deed" is to a 1984 conveyance of tidelands from International Paper Company to International Paper Realty Corporation. Parcel J in that deed

conveys a length of tidelands which includes all of the tidelands adjacent to Parcel A and Parcel B. Therefore, the additional conveyance to Mr. Wilson of "those tidelands conveyed in Parcel J" includes the tidelands adjoining Parcel B. (CP 191)

This argument was supported by the expert opinions of Cal Hampton, a licensed surveyor, and Terry Woodruff, Senior Title Officer for Cowlitz Title. Both experts believe that the Wilson Deed includes the Parcel B Tidelands by its addition of those tidelands as conveyed in Parcel J. (CP 191, 516) Mr. Hampton and Mr. Woodruff note that numerous facts support their opinion:

- The conveyance of the Parcel A tidelands is complete without this additional language. Therefore, the only purpose of the extra clause is to convey additional tidelands - those contained in Parcel J (that is, the Parcel B Tidelands). (CP 190)

- Neither the Purchase Agreement or the Wilson Deed expressly excludes any tidelands from the sale. Had the seller intended to reserve these tidelands the legal description for Parcel B would have included "also excepting therefrom second class tidelands lying in front of the described parcel." (CP 190)

- The Purchase Agreement promises that Mr. Wilson will be conveyed "a minimum of twenty acres". (CP 192) This amount of acreage cannot be conveyed unless the Parcel B Tidelands are included. (CP 192)

- Neither the Purchase Agreement or the Wilson Deed reserve any easement for access to the tidelands. It is illogical that the seller would retain the tidelands and yet not give itself access to them. (CP 192)

Keystone countered these arguments with the declaration of its expert, Dennis Gish, title officer for another title company. Mr. Gish expressed the opinion that the language conveying those tidelands "as conveyed in Parcel J" does not mean what it says. (CP 304) Mr. Gish reached this opinion by examining the chain of title to several nearby (but unrelated) parcels and noted that they, too, included the same "and as conveyed in Parcel J" language. (CP 303-304) Mr. Gish believes that the repeated use of this phrase renders it meaningless and that it is merely a useless appendage. (CP 304)

Based upon Mr. Gish's opinion Keystone argued that the Wilson Deed is "unambiguous" and that it does not include the Parcel B Tidelands. (CP 243) Further, it argues that if the deed is

unambiguous then all extrinsic evidence of the parties' intent is irrelevant. (CP 243-244)

The trial court disagreed with both sides' interpretation of the Wilson Deed. Instead it concluded that the Wilson Deed is ambiguous, that is, it is capable of more than one meaning. The trial court noted that neither side's experts based their opinion on the "four corners" of the Wilson Deed: Mr. Hampton and Mr. Woodruff reached their opinion not just on the language of the Wilson Deed but also on the Purchase Agreement, the conduct of the parties and language absent from the Wilson Deed (reservation of tidelands, easement, etc.). (RP 7, CP 516, 192) Similarly, Keystone's expert, Mr. Gish, did not rely at all on the language in the Wilson Deed, or on other deeds in the chain of title to the property, but rather on language found in deeds in the chains of title to other, unrelated properties. (RP 7) The trial court concluded that each side's experts were basing their opinions not on what the Wilson Deed said but rather on all of the evidence surrounding the Wilson Deed. (RP 7) This meant that the language of the Wilson Deed, without reliance on other evidence, did not have a single, clear meaning and was instead capable of

more than one meaning. (RP 7) In short, the Wilson Deed was ambiguous. (RP 7)

Our courts have frequently stated that "where a statement is capable of two meanings it is ambiguous". *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 56, 66, 277 P.3d 18 (2012) quoting *Hoglund v. Omak Wood Products*, 81 Wn. App. 501, 504, 914 P.2d 1197 (1996); See *Ladum v. Utility Cartage, Inc.*, 68 Wn.2d 109, 116, 411 P.2d 868 (1966). "Ambiguity" has also been defined as "an uncertainty of meaning in the terms of a written instrument." *State Bank of Wilbur v. Phillips*, 11 Wn.2d 483, 488, 119 P.2d 664 (1941) quoting *First Nat. Bank v. Hancock Warehouse Co.*, 142 Ga. 99 (Ga. 1914), 82 S.E. 481.

The question of ambiguity is a matter of law to be determined by the trial court. *Newport Yacht Basin, supra* at 67; *Hoglund, supra* at 504.

On appeal Keystone continues to argue that the Wilson Deed is unambiguous and that its interpretation is the only reasonable one. But, as noted by the trial court, Keystone does not argue that the language of the Wilson Deed has a clear meaning, but rather that what appears to be the clear meaning (that

additional Parcel J tidelands are included) is in fact incorrect. (RP7) This interpretation can hardly be said to be unambiguous. Further, it is directly in opposition to the position taken by two other experts, Mr. Hampton and Mr. Woodruff, whose opinions are well supported. Finally, it must be remembered that neither Mr. Radakovich, Jr. or his father understood the Wilson Deed to have this meaning, as neither believed that they owned the Parcel B Tidelands after the sale to Mr. Wilson. (CP 84-87, 210) If Keystone's interpretation is unambiguous it begs the question as to why the sellers were unaware of this meaning.

Keystone also argues that, because its expert offers a different interpretation of the Wilson Deed, this raises a question of fact. But this argument fails to recognize that whether a deed is ambiguous is not a question of fact. *It is a question of law to be determined by the trial court. Newport Yacht Basin, supra* at 67; *Hoglund, supra* at 504.

In summary, the issue of ambiguity is a question of law to be determined by the trial court. The trial court examined the competing theories as to the meaning of the language in the Wilson Deed and concluded that the language is capable of more

than one meaning and is therefore ambiguous. (RP 7) This finding should be upheld on appeal.

2(A). The Ambiguity in the Wilson Deed is Resolved by Overwhelming Evidence that the Parties Intended to Include the Parcel B Tidelands in the Wilson Deed.

"Where ambiguity exists, extrinsic evidence may be considered in ascertaining the intention of the parties." *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 56, 65 277 P.3d 18 (2012) citing *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn. 2d 873, 880, 73 P.3d 369 (Wash. 2003). "In such a situation, we will consider the circumstances of the transaction and the subsequent conduct of the parties in determining their intent at the time the deed was executed." *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 56, 65, 66, 277 P.3d 18 (2012) citing *King County v. Hanson Inv. Co.*, 34 Wash.2d 112, 126, 208 P.2d 113 (1949).

> "In *Gold Bar v. Gold Bar Lbr. Co.*, 109 Wash. 391, 394, 186 Pac. 896 (1920), this court approved the following rule regarding the construction of deeds:
>
> "Where a deed is of doubtful meaning, or the language used is ambiguous, the construction given by the parties themselves, as elucidated by their conduct or admissions, will be deemed the true one unless the contrary be shown.
>
> A deed which is ambiguous or uncertain may be definite and certain by the practical construction of the parties to it while in interest. The construction put on such a deed by the parties is an indication of their intention. Therefore, where the construction of a deed is doubtful, great weight is to be given to the construction put on it by the parties, especially in the case of doubtful questions which must be presumed to be within their knowledge, and such *practical interpretation of the parties themselves by*

their acts under a deed is entitled to great, if not controlling, influence."

> Where a deed is of doubtful meaning, or the language used is ambiguous, the construction given by the parties themselves, as elucidated by their conduct or admissions, will be deemed the true one, unless the contrary is shown. So, where all parties have acted on a particular construction, such construction should be followed unless it is forbidden by some positive rule of law." (Internal citations omitted)

King County v. Hanson Investment Co., 34 Wn.2d 112, 126, 208 P.2d 113 (1949) citing 16 Am. Jur. 536, Deeds § 174 and also citing 26 C. J. S. 346, Deeds § 93.

> "This court has adopted the 'context rule' which succinctly stated is that 'extrinsic evidence is admissible as to the entire circumstances under which a contract is made as an aid in ascertaining the party's intent. . . .
>
> The purchase and sale agreement . . . may be considered as some evidence of the circumstances of the parties at the time of the grant.'"

Harris v. Ski Parks Farms, 120 Wn.2d 727, 742, 743, 844 P.2d 1006 (1993).

Although the intent of the parties to the Wilson Deed is a question of fact, "where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted." *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) citing *LaMon v. Butler*, 112 Wn.2d 193, 199, 770 P.2d 1027 (1989).

After concluding that the Wilson Deed was ambiguous as to whether the Parcel B Tidelands were included, the trial court further concluded that there are no material issues of fact and that extrinsic evidence overwhelmingly demonstrates the parties' intent to convey the Parcel B Tidelands. (RP 7)

There is ample support for the trial court's decision:

- Terra Firma agreed to sell, and Mr. Wilson agreed to buy, all of the property represented by Tax Parcels 713 and 714. These parcels represented all shorelands and tidelands owned by Terra Firma, as demonstrated by the confidential appraisal Radakovich Jr. shared. (CP 490, 497-499))

- In the Purchase Agreement Terra Firma promised that it was selling Mr. Wilson a minimum of twenty acres. (CP 82) This amount of acreage is only achieved if the Parcel B Tidelands are included. (CP 192)

- Neither the Purchase Agreement nor the Wilson Deed reserves tidelands to the seller. (CP 83, 192)

- Neither the Purchase Agreement or the Wilson Deed reserves an easement to the tidelands. If it had been the seller's intent to retain them it would have been left with no access to them. (CP 83, 192)

- Before the sale Mr. Radakovich, Jr reminded Mr. Wilson . of the value of the tidelands Mr. Wilson was about to purchase. (CP 82)

- After the sale Mr. Radakovich, Jr. made repeated efforts, in writing, to repurchase the Parcel B Tidelands, offering to pay $100,000 or trade substantial property in exchange for a portion of them. (CP 84-85)

- When Mr. Wilson refused all of these offers Mr. Radakovich, Jr. lamented his sale of the Parcel B Tidelands in a lengthy email, expressing his need to "get the tidelands back". (CP 85-86)

- From 2006 through 2011, Mr. Wilson made continuous and extensive use of the tidelands for his duck boat business, with one hundred landings on the tidelands each year. (CP 87)

- From 2006 through 2011, Mr. Wilson paid all property taxes on Parcels 713 and 714. Terra Firma did not pay property taxes on any tidelands. (CP 88, 177-181)

- In litigation between the parties lasting from 2008 into 2009 and culminating in trial, the owners of Terra Firma not only failed to claim ownership of the tidelands but acknowledged that they belonged to Mr. Wilson. (CP 492-493)

- In 2010 Mr. Wilson submitted five permanent mooring applications to the State of Washington for sites along the Parcel B

Tidelands - applications that could only be submitted if he was owner of the tidelands. (CP 87, 493)

- In his responding declaration Mr. Radakovich, Jr. admits that he thought the tidelands belonged to Mr. Wilson. (CP 330-331)

- In his responding declaration Mr. Radakovich, Sr. admits that from 2006 through 2011, a period of six years, he thought that the tidelands belonged to Mr. Wilson (only to then "realize that he owned them" in 2012). (CP 330)

- Cementing this list are the sworn declarations of Mr. Radakovich, Jr. and Sr., made under penalty of perjury to a State Court in 2008 and a Federal Court in 2011 that they and their company, Terra Firma, did not own any tidelands. (CP 491)

In response to this long list Keystone makes only a feeble challenge. It questions the exact number of times Mr. Wilson's duck boats actually landed on the tidelands. It attempts to excuse Mr. Radakovich's sworn declarations on the basis that ownership off the tidelands was not directly at issue in his lawsuit against Mr. Wilson (although access to the tidelands was) but does not explain why this fact somehow lessens the admission (Keystone may be confusing the issue of the parties' intent with judicial estoppel). It attempts to excuse Mr. Radakovich, Sr.'s sworn

declaration on the basis that it was not until 2012, six years after the sale, that he "realized" he owned the tidelands - a startling claim which, even if true, merely proves that for six years he thought the sale included the tidelands.

What is striking about Keystone's response is the complete lack of any evidence showing a contrary intent. Keystone does not submit any statements from Terra Firma's owners expressing a contrary intent; or any admissions by Mr. Wilson contrary to his claims; or any use of the tidelands except by Mr. Wilson; or any payment of taxes except by Mr. Wilson, or any other evidence supporting the claim that the owners of Terra Firma did not intend to include the Parcel B Tidelands in the Wilson Deed. Stated differently, Keystone has made only a meager attempt to challenge some of the Plaintiffs' evidence while not offering any evidence in reply. Simply stated, the only evidence of the parties' intent to the Wilson Deed is that submitted by BPLC and the Port which overwhelmingly demonstrates Terra Firma's and Mr. Wilson's intent to transfer the Parcel B Tidelands to Mr. Wilson

"A nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain." *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). "After the moving party

submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving parties' contentions and disclose the existence of a genuine issue as to a material fact." *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) quoting *Meyer v. University of Wash.*, 105 Wash.2d 847, 852, 719 P.2d 98 (1986). "Where reasonable minds could reach but one conclusion from the admissible facts at evidence, summary judgment should be granted." *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) citing *LaMon v. Butler*, 112 Wn.2d 193, 199, 770 P.2d 1027 (1989).

Keystone has not disclosed the existence of any genuine issue as to the parties' intent. The trial court properly concluded that the evidence overwhelmingly demonstrates the parties' intent to include the Parcel B Tidelands in the conveyance to Mr. Wilson.

2(B). The Extrinsic Evidence of the Parties' Intent is Admissible.

In response to the Plaintiffs' evidence of the parties' intent to convey the tidelands Keystone moved to strike various statements and documents claiming them to be inadmissible hearsay. The trial court properly denied Keystone's Motion to Strike. (RP 5) On appeal Keystone has renewed its argument that the various admissions, statements, emails,

offers to purchase, etc., made by Terra Firma's owners are inadmissible under ER 803.

Keystone's objection is misplaced for two reasons: (1) our courts have recognized that all such evidence is admissible when determining the parties' intent; and (2) none of this evidence constitutes hearsay, that is, it is not submitted to prove the truth of the matter asserted.

I. The Conduct, Statements and Admissions of Parties to a Deed are Admissible in Determining Their Intent.

As previously noted, "where ambiguity exists, extrinsic evidence may be considered in ascertaining the parties' intent." *New York Yacht Basin, Supra* at 65. "The intent of the parties is of paramount importance and the court must ascertain and enforce such intent." *Washington State Grange v. Brandt*, 136 Wn. App. 138, 145, 148 P.3d 1069 (2006), quoting *Brown v. State*, 130 Wn.2d 430, 437, 924 P.2d 908 (1996).

As previously cited:

"A deed which is ambiguous or uncertain may be definite and certain by the practical construction of the parties to it *while in interest.* The construction put on such a deed by the parties is an indication of their intention. Therefore, where the construction of a deed is doubtful, great weight is to be given to the construction put on it by the parties, especially in the case of doubtful questions which must be presumed to be within their knowledge, and such practical interpretation of the parties themselves by their acts under a deed is entitled to great, if not controlling, influence."

"Where a deed is of doubtful meaning, or the language used is ambiguous, the construction given by the parties themselves *as elucidated by their conduct or admissions*, will be deemed the true one, unless the contrary is shown. So, where all parties have acted on a particular construction, such construction should be allowed unless it is forbidden by some positive rule of law." (emphasis added).

King County v. Hanson Investment Co., supra at 126.

All of the statements, admissions, emails, purchase offers, etc., objected to by Keystone were made by the owners of the property *while in interest*, that is, during the period of time they claim to have been owners. Pursuant to *Hanson*, such evidence is not only admissible but encouraged in order to ascertain the parties' intent.

II. The Evidence Objected to is Not Hearsay.

"Hearsay" is defined as "a statement, other than the one by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." ER 801(c). Statements which are not admitted to prove the truth of the matter asserted in the statement itself are not hearsay. "Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay." *State v. Crowder*, 103 Wn. App. 20, 26, 27,11 P.3d 828 (2000) citing *State v. Collins,* 76 Wash.App. 496, 498-99, 886 P.2d 243 (1995).

None of the information objected to by Keystone qualifies as hearsay. It is not admitted to prove the truth of the matter, but rather to show evidence of the parties' intent to include the tidelands in the sale to Mr. Wilson. For example:

- Mr. Radakovich, Jr.'s January 2006 email to Mr. Wilson reminding him that "the Port of Longview would be interested in the tidelands he was purchasing" is not submitted to prove that the Port was interested in these tidelands, but rather to show Mr. Radakovich's belief that they were included in the sale to Mr. Wilson. (CP 82)

- Mr. Radakovich, Jr.'s October 2006 email to Mr. Wilson stating that "I am going to lose this deal without the tidelands up to or near the beach" is not submitted to prove that a deal was going to be lost, but rather to prove Mr. Radakovich's belief that the Parcel B Tidelands belonged to Mr. Wilson. (CP 84)

- Mr. Radakovich, Jr.'s two written, formal offers to repurchase the Parcel B Tidelands are not submitted to prove the terms of these offers, but rather to provide evidence of Mr. Radakovich, Jr.'s belief that he no longer owned them. (CP 84-85)

- Mr. Radakovich, Jr.'s impassioned email in February 2007 that he "needed the tidelands back to survive in the short term and long

terms" and that he was "on the edge of his life and he needed those damn tidelands back" are not offered to prove any of these things, but rather to show his belief that the tidelands belonged to Mr. Wilson. (CP 85-86)

- The 2008 sworn declaration of Mr. Radakovich, Jr. stating that "attached hereto is a map depicting the property . . . that is owned by Terra Firma, Inc." is not offered to prove such ownership but rather to provide evidence that, two years after the sale to Mr. Wilson, Terra Firma did not believe that it owned the tidelands. Similarly, the map identified as Exhibit 21 and jointly submitted to the court by Mr. Wilson and Terra Firma in their 2009 trial is not offered to prove their respective ownerships, but rather to show their mutual belief that the Parcel B Tidelands were owned by Mr. Wilson. (CP 492, 507-512)

- Similarly, all other statements, admissions and exhibits objected to by Keystone are not offered to prove their truth but to demonstrate the parties' belief that the Parcel B Tidelands were included in the sale to Mr. Wilson via the Wilson Deed.

The trial court properly denied Keystone's Motion to Strike.

III. If the Evidence Objected to is Hearsay, it is Admissible Under ER 803(a)(3).

As noted in Subsection II above, the evidence objected to is not hearsay; however, to the extent this Court views it as hearsay, the statements are otherwise admissible under ER 803(a)(3) which reads:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

This exception applies to classic statements of current emotional state such as "I am afraid" or "I care about winning this game" as well as statements indicating an intent or plan to take some specific action. ER 803(a)(3); *Evidence Law and Practice,* §§ 803.11 – 803.12 (5th Ed.), Karl Teglund. Statements which do not directly express a state of mind, but strongly imply one, are also admissible under this exception. *Id.* at § 803.16.

In the event some extrinsic evidence is deemed hearsay, they are otherwise admissible under the ER 803(a)(3) exception. For example, take the following statement by Radakovich Jr.:

> I am going to lose this deal without the tidelands up to or near the beach. I don't care about the money or the profits or anything like that Jeff. I know you are going to make a nice gain and I don't care. (CP 84, 106, 107)

That statement is not admitted to prove what is asserted therein, i.e., that Radakovich Jr. would "lose the deal without the tidelands" or that Wilson would make a "nice gain" by selling those tidelands back to Radakovich Jr. Rather, the statement is admitted as extrinsic evidence to prove that Radakovich Jr. intended to, and indeed did, sell those tidelands to Wilson as part of the 2006 transaction culminating in the 2006 Deed. If he had not sold the tidelands, he would not need to get them back from Wilson. Accordingly, the statement is *not* hearsay or, at the very least, is admissible hearsay under ER 803(a)(3). This same analysis applies across the board to the statements made by Mr. Radakovich, Jr. in his various emails to Mr. Wilson.

IV. Extrinsic Evidence Demonstrates Mutual Intent, Not Unilateral Subjective Intent.

Keystone argues that the Court cannot rely on "unilateral or subjective intent" and therefore should not consider extrinsic evidence demonstrating Mr. Radakovich Jr.'s attempts to repurchase the Parcel B Tidelands from Mr. Wilson. This argument is erroneous and misses the point of those statements.

While it is well settled that a party's *unilateral* or *subjective,* i.e., personal, intentions are not admissible as extrinsic evidence, it is equally

well established that the *mutual* intentions of the parties "may be established directly or by inference" through extrinsic evidence. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85 (2003) citing *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 9 (1997). As stated in *Hall*:

> We have long adhered to the objective manifestation theory of contracts. This theory means that we impute to a person an intention corresponding to the reasonable meaning of his words and acts....As with any other fact, mutual intent may be established directly or by inference – but any inference must be based exclusively on the parties' objective manifestations.

Hall, 87 Wn. App. at 9 (internal quotations omitted) citing in part *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 684 (1994)).

The evidence which Keystone claims shows only one party's "unilateral" or "subjective" intent, actually shows the bilateral mutual intent of Terra Firma (through Radakovich Jr.) and Wilson. For example, Mr. Radakovich Jr.'s words and actions asking, demanding, and begging to purchase the disputed tidelands *back* from Wilson, along with Wilson's denial of those requests, both directly and by inference shows the *mutual* intent of the parties to sell those tidelands to Wilson via the 2006 Deed. (CP 84-86) If Wilson had not acquired those tidelands at that time, Radakovich Jr. would not have had to try and purchase them *back* from Wilson. Accordingly, the extrinsic evidence relied on by the trial court

showed the mutual intent of the parties and was properly admitted into evidence.

3. The Wilson Deed Does Not Expressly Reserve Any Tidelands to the Seller. The Parcel B Tidelands Were Therefore Conveyed to Mr. Wilson as a Matter of Law.

In their Motion for Summary Judgment, BPLC and the Port argued that, as a matter of law, title to the Parcel B Tidelands passed to Mr. Wilson pursuant to the doctrine first established in *Wardell v. Commercial Waterway District No. 1 of King County*, 80 Wash. 495, 141 P. 1045 (1914). (CP 49) This decision, which remains good law today, declares that a conveyance of uplands includes the adjoining tidelands, even if the deed does not reference them, *unless the seller expressly reserves ownership*. The Wilson Deed does not reserve ownership of any tidelands to the seller, i.e. Terra Firma. The trial court agreed that *Wardell* controlled and granted summary judgment on this second, independent basis. (RP 6, 7)

> "In every instance in which we have seen the question decided, whether it appears that the grantor owned any part of the bed of the stream, whether navigable or tidal, or not, its conveyance has been held to extend to the thread of the stream, when he owns so far, and in other cases up to the line of his ownership, when it did not extend so far into the stream as its thread, *unless it contains some words clearly reserving from the operation of his deed the land so owned by him*. . . .

When *riparian estates* are conveyed the owner may reserve the land underwater, *but the general presumption is that the purchaser's title extends as far as the grantor owns, in both tidal and freshwaters*."

Wardell v. Commercial Waterway District No. 1 of King County, 80 Wash. 495, 498, 499, 141 P. 1045 (1914) citing *Freeman v. Bellegarde,* 108 Cal. 179, 185, 41 P. 289 (1895) (emphasis added).

The reasoning behind *Wardell is further explained in Vavrek v. Parks*, 6 Wn. App. 684, 495 P.2d 1051 (1972):

> "With every transfer of land, title also passes, without specific description, or even mention, to all of the appurtenances and incidents rightfully belonging to it, which are essential to the full and perfect enjoyment of the property. *This may include*, not only buildings, fixtures, fences, timber, crops, etc., but also, unless reserved or previously conveyed, *such title as the previous owner had in land between a water boundary and its meander line,* the bed of private waters, accretions and relictions - in fact title of the grantor to land beyond that specifically described down to the water's edge or under the water, including *all riparian rights*." [Italic emphasis theirs]. *Supra* at 689-690 citing 1 Patton on Land Titles, § 161 at page 430 (2d ed. 1957).

Later, in *Bernhard v. Reischman*, 33 Wn. App. 569, 658 P.2d 2 (1983), the court explained that the presumptions established in *Wardell:*

> "rests upon the improbability of a grantor's intent to retain a streambed while conveying the abutting property. Thus, a grantor's intent to make such a reservation must be clearly indicated by the language of the grant." *Supra* at 575 citing *Sheldon v. Sevigny,* 110 N.H. 419, 272 A.2d 134 (1970).

In *McConiga v. Riches*, 40 Wn. App. 532, 700 P.2d 331 (1985), an analogous situation was addressed: whether the conveyance of a parcel includes the adjoining private road when the deed is silent as to ownership of the roadway. The court's analysis closely parallels the principles related to tidelands:

> "If there is nothing in the deed or surrounding circumstances to show a contrary intention, a conveyance of land bounded by a private road carries title to the center of the road.
>
> The seller of land can ordinarily have no object in retaining a narrow strip along the line of his grant, particularly a strip subject to the rights of others. This strip is of no value when separated from adjoining property. The grantor's use of and concern for it ends with his conveyance, unless for fortuitous circumstances later makes it worthwhile. The retention of the strip may seriously retard the improvement and further alienation of the adjoining property, especially if the strip is on a private way. Its proximity to his purchase makes the strip of direct and substantial value to the grantee.
>
> In order to rebut this presumption, the intention of the grantor to retain the strip should be clearly shown." *Supra* at 539, 540 (internal citations omitted).

Keystone argues that this doctrine only applies if the property's legal description contains a call to the river, *but no such limitation can be found in Wardell.* To the contrary, *Wardell* expressly extends the doctrine to "all riparian estates". The trial court noted that it is undisputed that the property conveyed to Mr. Wilson is a "riparian estate" and that the

doctrine therefore applies. (RP 6-7) Accordingly, the trial court correctly concluded that the Wilson Deed does not expressly reserve any tidelands to the seller, and that all tidelands were therefore conveyed to Mr. Wilson as a matter of law. (RP 6-7)

4. The Doctrines of Waiver and Merger Do Not Apply.

Keystone argued at summary judgment and again on appeal that the Doctrines of Waiver and Merger apply to the Wilson Deed, but the application of either doctrine remains unclear.

"Waiver" is "the intentional relinquishment of a known right". *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). In order for this doctrine to apply Keystone must show that Mr. Wilson knew that the Wilson Deed failed to adequately convey all tidelands the parties intended to include in the sale, and that he intentionally relinquished his right to what was promised. But Mr. Wilson did not waive any rights:

- The Wilson Deed expressly gives him the tidelands "conveyed in Parcel J", that is, all tidelands adjoining the property he was purchasing. (CP 82, 101-103)

- The trial court concluded that the legal description was ambiguous. Therefore, it is not possible to waive a "known right" when the meaning of the language is ambiguous. (RP 7)

- The extrinsic evidence, including but not limited to Mr. Wilson's refusal to sell the Parcel B Tidelands back to Mr. Radakovich, Jr., demonstrates that Mr. Wilson did not intentionally (or otherwise) waive his right to acquire those tidelands by and through the Wilson Deed. (CP 84-86)

- Pursuant to *Wardell*, the conveyance included all tidelands since they were not expressly reserved. (RP 6-7)

Mr. Wilson did not waive anything and the Doctrine of Waiver does not apply.

Similarly, the Doctrine of Merger has no application as well. The Doctrine of Merger would only apply if the Wilson Deed conveyed something different than what was promised in the Purchase Agreement. *But the Wilson Deed does not convey something different.* The trial court correctly concluded, on two separate bases, that the Wilson Deed conveys the promised tidelands. The Purchase Agreement and Wilson Deed are consistent.

SUMMARY

In 2006, Terra Firma agreed to sell to Mr. Wilson its uplands and tidelands, represented by Tax Parcels 713 and 714. A legal description for Parcel 714 did not previously exist and so a title officer made a good faith

effort to create one. Unfortunately this effort led to a claim by the seller, six years after the sale, that it still owned the Parcel B Tidelands. This claim was made despite overwhelmingly evidence of Mr. Wilson's ownership including the sellers' numerous, and increasingly desperate, attempts to reacquire those tidelands from Mr. Wilson and their sworn declarations to both state and federal courts.

It is equally unfortunate that the seller attempted to cloud title by a 2012 conveyance to Mr. Radakovich, Sr.'s friend and employer, John Van Vessem, under his business name, Keystone, for a nominal amount, knowing that the tidelands are worth hundreds of thousands of dollars.

BPLC and the Port argued, and the trial court agreed, that the Wilson Deed is ambiguous. In light of that ambiguity, the only extrinsic evidence before this Court leaves no question that the parties intended for the tidelands to be included in the Wilson Deed. The Plaintiffs also argued, and the trial court agreed, that the Parcel B Tidelands passed to Mr. Wilson as a matter of law as the Wilson Deed does not expressly reserve them to the seller. The Plaintiffs' respectfully ask the Court to affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 24 day of July, 2014.

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CERTIFICATE OF SERVICE

THE UNDERSIGNED, states as follows: I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action. On the 25th day of July, 2014, I caused the document to which this Certificate is affixed to be mailed as follows:

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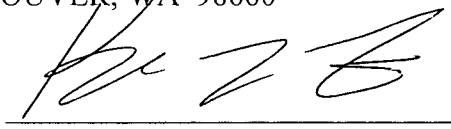

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