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NO. 35520-5-II

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

DON W. TAYLOR and MONIQUE TAYLOR,
husband and wife,

Appellants/Plaintiffs,

v.

VICKI MARTIN, a married woman dealing with her sole
and separate property, and the CITY OF OLYMPIA,

Respondents/Defendants.

On Appeal from Thurston County Superior Court
Cause No. 04-2-00217-3

BRIEF OF RESPONDENT CITY OF OLYMPIA

Jeffrey S. Myers, WSBA No. 16390
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508-1880
(360) 754-3480
Attorney for the City of Olympia

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I. INTRODUCTION

Appellants appeal from a summary judgment dismissing their claims that the City of Olympia is liable for flooding that was created when water was piped by Appellants' uphill neighbor onto a private roadway that leads down to their property. Appellants blame the City because they claim the private easement was dedicated to the City, either in a later plat or by common law. The trial court correctly rejected these claims because there is no basis to support either an offer or acceptance of such a dedication, nor is the mere existence of a roadway sufficient to create liability in this case.

II. STATEMENT OF CASE

This case is essentially a dispute between neighbors over water piped from a higher lot onto a lower lot. Appellants purchased Lot 97 of the Lakemoor Division 1 subdivision in 1969. **CP 142.** Appellants alleged that they experienced flooding from water flowing out of a pipe originating from a neighbor's property (Lot 111) located uphill from the Appellants' residence (Lot 97). **CP32.** Appellants alleged that drainage from this pipe flowed down a roadway, now known as Lakemoor Lane, that provides access to their home and during high flows, has flooded their basement areas. **Id.** Appellants claim that Lakemoor Lane is a public street and is part of the City's

street system. *Id.* The City denied these allegations and contends that there is no evidence to support them. **CP 43-44**

The Appellants' property is located in the Lakemoor subdivision, which was developed in three phases. The phase creating Appellants' lots, as well as those now served by Lakemoor Lane, was approved on September 2, 1966. **CP 82.** The plat does not show a roadway in the location of what is now Lakemoor Lane. **CP 48.** It shows only a 10' utility easement along the western boundaries of Lots 95-99. *Id.*

The roadway now referred to as "Lakemoor Lane" was created as a private easement serving several houses within the Lakemoor subdivision in 1967. **CP 48.** A survey of the roadway easement prepared by Bracy & Thomas Land Surveyors was recorded under Auditor's file No. 768999, (vol. 432, p. 521) on September 13, 1967. **CP 86.** This roadway ("the 1967 easement") connects to Lakemoor Drive, a public street created by the Lakemoor Div. 1 plat. The 1967 easement provides access on the uphill side to lots 96-100 of Lakemoor Division I. **CP 142.** Access from Lakemoor Place, the city street located on the downhill side of these lots, is not used because of the steepness of the slope. *Id.* Appellants bought their property in November 1969 after the easement was created and have used the

1967 easement for access to their home. *Id.*

The property adjacent to this easement was originally platted as part of Lakemoor Div. 1 which was recorded on September 3, 1966. **CP 48,82.** These lots were subsequently sold, including the lots connecting the 1967 easement to Lakemoor Drive. **CP 64.** The portions of Lots 107 and 109 to the north and west of the centerline of the 1967 easement were sold by the developer to David and Wendy Stevens on March 20, 1968. **CP 74.** The deed conveying title to this property was executed by Ken Lake Development Co. on July 24, 1968 and recorded on July 26, 1968. **CP 77.**

Two days after the conveyance to Stevens, on July 26, 1968, the final plat for Lakemoor Division 3, which contained 41 additional lots, was signed by Ken Lake Development Co. **CP 84.** The City then approved the final plat for Division 3 and it was recorded on August 1, 1968. **CP 48.** The plat for Lakemoor Division 3 extended Lakemoor Drive and created a new cul-de-sac, known as Camelot Park, as the roadways serving these new 41 lots. **CP 84.** The plat for Division 3 noted the presence of the 1967, "Roadway Easement," which was located outside the boundaries of Division 3 and did not dedicate the easement to the City. **CP 48.** Thus, the property subject to the 1967 roadway easement was outside the boundaries of

Lakemoor Division 3, and at the time when Ken Lake Development Co. no longer owned it when that plat was filed.

At all times subsequent to the platting of the Lakemoor subdivision, the City of Olympia has treated the “roadway easement” created by the 1967 survey as a private easement. **CP 48.** The City of Olympia does not maintain Lakemoor Lane as part of its street network and it is shown as a private easement on maps maintained by the City. **CP 50.** The City has only a utility easement for underground water and sewer lines, which was originally created in the Lakemoor Division I plat. **CP 48, 82.**

In December of 2004, the City of Olympia was working on a project with Thurston County 9-1-1 to identify addresses that were difficult to locate. **CP 63.** At the time, Appellants’ property was identified as being located on Lakemoor Place, even though it was accessed from the 1967 roadway easement. To avoid confusion with the public street named Lakemoor Place, the City and Thurston County 9-1-1 wrote to the residents to propose changing the name of the easement to Lakemoor Lane. **CP 63-64.** The City’s correspondence clearly identified the street as an “easement,” not a city street. **CP 67.** The City paid for a sign to assist emergency responders in identifying the newly named Lakemoor Lane, and

requested residents to change the name on the existing white sign from “Place” to “Lane.” **CP 64.** Under the City’s street code, the term “Lane” is the designation used for a private road, not a public street. **OMC 12.48.060(D).**

III. ARGUMENT

A. APPELLANTS HAVE THE BURDEN TO PROVE THAT THE PLAT “UNMISTAKABLY” INTENDED TO DEDICATE THE EASEMENT TO THE CITY AS A PUBLIC STREET.

As an initial matter, the Appellants contend that there was a dedication of what is now Lakemoor Lane in the platting of the Lakemoor subdivision. Opening Brief at 17. In making the contention that a dedication was made, either by the plat or common law, Appellants bear a substantial burden of proof. As held in *Richardson v. Cox*, 108 Wn. App. 881, 26 P.3d 970 (2001):

A party asserting that a dedication exists has the burden of establishing that all the essential elements are present under the facts of the case. *Karb v. City of Bellingham*, 61 Wn.2d 214, 218-19, 377 P.2d 984 (1963). The owner's intent to dedicate will not be presumed, the party asserting it must prove the intent is unmistakable. See *Cummins v. King County*, 72 Wn.2d 624, 627, 434 P.2d 588 (1967).

(Emphasis added.)

The cases cited by plaintiff, Response at 4, agree that the intent must be shown beyond doubt, holding that the intention of the

owner must be “clear, manifest and unequivocal.” *Johnston v. Medina Improvement Club*, 10 Wn.2d 44 (1941). *Johnston* then points to evidence of the intent in either a written instrument or a declaration of the owner. Here, Appellants do not provide any declarations of the owner, but look to the language of the plats to provide the requisite intent. Close examination reveals no support for the Appellants’ claims.

B. NO EVIDENCE SUPPORTS AN INTENT TO DEDICATE THE EASEMENT AS A PUBLIC STREET.

Appellants cite RCW 58.17.165 as controlling dedications within the Lakemoor plat. Appellants overlook the fact that this statute was enacted in 1969, two years after the creation of the 1967 easement and a year after the platting of Lakemoor Division 3. Hence, RCW 58.17.165 had no application to these actions. Appellants claim that the plat of Lakemoor Division 3 shows an intent to dedicate the roadway easement. This claim was not supported by any competent evidence and is inconsistent with the plat itself.

1. The 1967 easement is not contained within the boundaries of Lakemoor Division 3.

As demonstrated in the City’s motion for summary judgment, the easement referenced on the plat is outside the legally described

boundaries of Lakemoor Division 3. Lakemoor Division 3 contains a legal description which is depicted by a solid black line surrounding the newly created lots. The easement serves lots created by Lakemoor Division 1, not Division 3. It would be highly anomalous, and a violation of platting laws to establish a public road outside the boundaries of the lots being platted.

The areas within Division 3 that are, in fact, being platted and dedicated are depicted in solid black lines. By contrast, the plat provides a different depiction of the areas previously platted in Division 1 by showing these areas, including the 1967 easement, in lighter dashed lines. **CP 84.** The different depiction distinguishes those areas subject to the platting actions within Division 3 and those that are unaffected. The only reasonable reading of the plat's depiction of the 1967 easement, especially in consideration of the legal description excluding this area, is that it was not covered by the platting of Division 3.

It is clear on the face of the plat that virtually all of the 1967 easement is outside the platted area of Division 3. As such, the language dedicating the streets within Lakemoor Division 3 does not apply to the easement serving Appellants' property.

2. The dedication language of Lakemoor Division 3 does not dedicate the easement in question.

Contrary to Appellants' contentions, the dedication language of the plat is inconsistent with the contention that the easement was dedicated. The dedication language first proposes to dedicate "streets, lanes and drives" within Lakemoor Div. 3 to the City. The "easement" created by the 1967 survey is not identified as a "street, lane or drive" on the face of the plat. It is identified by reference as an "easement." **CP 84.**

The dedication language continues to dedicate "the easements shown hereon for the purposes of maintaining, operating and repairing the utilities contained in said easements." On its face, this dedicates the utility easements, not the full right of way. It does not purport to dedicate "roadway easements."

Finally, the dedication language declares Lakemoor Division 3 to be "subject to the dedications and restrictions set forth in the instrument recorded herewith under Thurston County Auditor's receiving number 746258." This is the covenants originally filed for Lakemoor Division 1. Myers Decl. Exhibit 13.¹ Nothing in that instrument, which predates creation of the 1967 survey, purports to dedicate roads to the City. CP 48, 86. Appellants concede that the

¹ The plat and covenants were drafted by the appellants' law firm, Browne, Fristoe and Taylor. Hence, any ambiguity should be construed against the appellants.

1967 easement did not dedicate the driveway to the City, and was not approved by the City in any manner.

The express incorporation of previously filed covenants is significant because of the omission of any reference to the survey, which was also previously recorded. Under the maxim of *expressio unius est exclusio alterius*, the inclusion of a reference to dedications in one instrument implies that there was no intention to dedicate the road created in the omitted instrument, namely the easement shown in the 1967 survey recorded under Auditor's file number 768000.

In sum, the language of the plat of Lakemoor Division 3 does not contain an "unmistakable" intention to dedicate the easement. If there was such a "clear, manifest and unequivocal intent," the plat's dedication language would have specifically referred to the easement created under Auditor's file number 768000.

3. There is no evidence of any intention to create a common law dedication of Lakemoor Lane.

Appellants allege that there was a "common-law" dedication of Lakemoor Lane to the City. Proof of a common law dedication requires no particular formalities, but is found only if the Appellants prove by "clear and convincing evidence" that (1) the owner, through a "clear and unmistakable act," manifested the intent to dedicate its

land to public use; and (2) the public accepted the owner's offer. *Donald v. City of Vancouver*, 43 Wn. App. 880, 885, 719 P.2d 966 (1986), (outlining elements); *Knudsen v. Patton*, 26 Wn. App. 134, 141, 611 P.2d 1354, review denied, 94 Wn.2d 1008 (1980) (stating the burden of proof); *Karb v. Bellingham*, 61 Wn.2d 214, 218-19, 377 P.2d 984 (1963) (stating that the plaintiff bears the burden of proof and production). This strict burden requires proof that the owner intended to dedicate the land, followed by some act clearly and unmistakably evidencing such intention. *City of Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 502-03, 206 P.2d 277 (1949). The intention of the owner to dedicate must be clear, manifest, and unequivocal. *Shell v. Poulson*, 23 Wn. 535, 537, 63 P. 204 (1900).

Appellants presented no evidence of the owners' intention to create a dedication aside from the plat itself. No declarations were submitted from the developer or the creators of the 1967 easement. Appellants point to no acts of the owners that clearly and unmistakably show the developer's intentions. Indeed, Appellants argue that the "unmistakable act" showing the intent to dedicate the 1967 easement is not an action at all, but is the owner's inaction or "acquiescence" in the purported dedication. Opening Brief at 17. However, this fails to meet the high standard for clear and convincing

proof of an act clearly and unmistakable evidencing the manifest and unequivocal intentions of the dedicator.

All of the evidence submitted by Appellants related to the subsequent use of the driveway for access to the properties or for garbage collection for the homes served.² As such, Appellants failed to prove an essential element of a common law dedication – an intention to dedicate the property in question to public use.

C. THERE IS NO EVIDENCE OF ACCEPTANCE OF ANY DEDICATION OF THE 1967 EASEMENT.

Appellants point to the approval of the plat of Lakemoor Division 3 as an acceptance of the dedication by the public. Response Brief at 5. Again, the Appellants misread the plat itself as affecting areas outside the legal description provided on the Lakemoor Division 3 plat. In order for there to have been an acceptance, the plat would have needed to clearly and unmistakable offer the 1967 “roadway easement” for dedication. Contrary to Appellants’ assertions, there was never any such offer, nor any act showing acceptance by the City.

Appellants must show acceptance of the dedication by the City by express action, by implication from acts of municipal officers, or

² None of the subsequent uses identified by Appellants is determinative of whether Lakemoor Lane is public. All of the alleged uses of the driveway are fully consistent with private ownership.

by implication from use by the public for the purposes for which the property was dedicated. *City of Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 503, 206 P.2d 277 (1949). Here, the City officials overseeing the road testify that it has not been accepted and is not part of the City road system. CP 48. Furthermore, it defies logic that the City would accept a road that does not meet the same width and construction standards as the other streets in the Lakemoor subdivision. The public streets are a uniform 30 feet in width on the plat. The 1967 easement, in stark contrast is approximately 12 feet wide, barely enough for a single lane of travel. It is in all ways a private driveway for the convenience of the owners of lots 96-100, not a public street.

In arguing that the “public” has accepted the dedication by its use, the only use alleged is purely for the benefit of the properties to which it provides access. The Appellants’ argument would essentially eviscerate any private easement that is traveled upon by a publicly owned vehicle, turning all private easements into public roads simply because garbage trucks pick up the garbage along the access way.

Appellants then turn logic on its head by arguing that the City and other owners “clearly expressed their intention” to dedicate the easement by “their acquiescence.” This means that a “clear

expression” was made by doing nothing (except continuing to use the easement for their own access). That is insufficient to demonstrate acceptance.

D. THE CITY IS NOT RESPONSIBLE FOR DRAINAGE ISSUES ASSOCIATED WITH THE NEIGHBOR’S PIPING OF WATER ONTO THE PRIVATE EASEMENT.

Appellants cite *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998) in support of the proposition that the City is liable even if it did not own the road. This argument misstates the facts of *Phillips*, which is clearly distinguishable from the facts at hand. In *Phillips*, King County made a deliberate choice to allow a developer to install drainage facilities in a County owned right of way.

Here, by contrast, the City has not allowed anyone to place drainage facilities in its right of way. Indeed, the City does not own a “right of way” as King County did. It has only a subsurface utility easement for the purpose of installing, laying, constructing, renewing, operating and maintaining its sewer facilities. **CP 109.** The fee to such properties including the rights to use the surface for ingress and egress remains with the lot owners who created an easement for the same in 1967. In so doing, there was no City approval or involvement in the creation of the 1967 easement. Moreover, the City could not have denied the owners the use of their

property for the private easement because it does not conflict with the City's underground utilities.

Appellants here seek to make the City the insurer of all drainage problems within the plat. They point to no specific action that the County took that was unreasonable, negligent or caused the drainage problems identified in the Amended Complaint. The law in *Phillips* is clear in rejecting such automatic liability:

There is no public aspect when the County's only action is to approve a private development under then existing regulations. Furthermore, the effect of such automatic liability would have a completely unfair result. If the county or city were liable for the negligence of a private developer, based on approval under existing regulations, then the municipalities, and ultimately the taxpayers, would become the guarantors or insurers for the actions of private developers whose development damages neighboring properties.

136 Wn.2d at 961.

The same unfairness would result from holding the City liable under these facts. Appellants point to no action by the City, or omission to perform any duty, that caused the flooding here. They do point to a private party's piping of stormwater as causing the drainage problems, which was without any City approval whatsoever. Appellants seek to shift liability in a private dispute between neighbors onto the deep pockets of the taxpayer. Such a shift is entirely without precedent and is contrary to a host of well

established authorities. See *Colella v. King County*, 72 Wn.2d 386, 391, 433 P.2d 154 (1967) (city has no common law duty to drain surface water); *Ripley v. Grays Harbor County*, 107 Wn. App. 575, 27 P.3d 1197 (2001) (city not liable for initial grading of streets); *Wood v. Tacoma*, 66 Wash. 266, 276 (1911) (same).

Appellants have provided no legal basis for establishing liability against the City under the facts of this case, whether or not the easement is a public street. Appellants do not show any inadequate maintenance or defect in the easement's design. Indeed, they concede that when the easement was originally established, there was no flooding. **CP 142.** Appellants conceded that it was only when a neighbor began piping water onto the easement in November 2003, some twenty-six years after the creation of "Lakemoor Lane" that flooding occurred. CP 143. As such, the trial court properly granted summary judgment to the City recognizing that this case is essentially a private dispute between neighbors.

IV. CONCLUSION

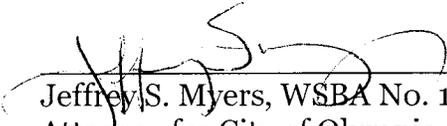
The City of Olympia was not offered a dedication of Lakemoor Lane and has never accepted Lakemoor Lane as a public street. As such, it has no duty to the Appellants.

Moreover, the undisputed facts show that the flooding

resulted from water piped by an uphill neighbor, not by the City. That water was directed by the private party, not the City, onto the road leading downhill to the Appellants' residence. The City is not liable where a third party collects water and it flows downhill, as the laws of nature demand. The trial court correctly granted the City's Motion for Summary Judgment and should be affirmed.

Respectfully submitted this 13th day of April, 2007.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.



Jeffrey S. Myers, WSBA No. 16390
Attorney for City of Olympia

THE COURT OF APPEALS
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OF THE STATE OF WASHINGTON

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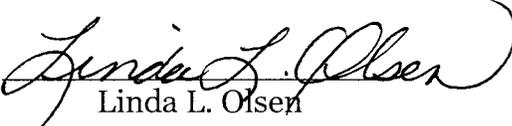
**DECLARATION OF FILING
AND SERVICE**

PURSUANT TO RCW 9A.72.085, Linda L. Olsen declares as follows:

On April 13, 2007, I caused to be filed and served originals and/or copies of the Brief of Respondent City of Olympia and this Declaration of Filing and Service by mailing, postage pre-paid, to the Clerk of this Court and to Frank Groundwater and Don Taylor, Fristoe, Taylor & Schultz, Ltd., P.S., Professional Arts Building, Suite 1, 206 11th Avenue SE, Olympia, WA 98501.

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

DATED this 13th day of April, 2007, at Tumwater, Washington.


Linda L. Olsen