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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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Court of Appeals No. 43897-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

JOHN P. HYNDS and ELISHA HYNDS,

Respondents,

v.

EMMA M. SCHMID: TRUSTEE OF THE SCHMID LIVING TRUST
DATED APRIL 18, 1989; GENERAL PARTNER OF THE SCHMID
LIVING PARTNERSHIP -- II; and MANAGER OF SCHMID CR, LLC,

Appellants.

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

Mrs. Schmid's Opening Appeal Brief states the law and facts requiring reversal of the Trial Court's Summary Judgment Order. Mrs. Schmid's arguments will not be repeated here to the extent possible. The key facts are that Short Plat 2-543 established a static southern boundary for Lot 1 at elevation 19.5'. CP 61. Accordingly, Lot 1 contained a precise area of .47 acres as noted on the plat. *Id.* Contrary to the Hynds' assertion¹, Mrs. Schmid was a co-dedicator of Short Plat 2-543 with her husband, George Schmid, who is now deceased. CP 62.

A. **THE SCHMIDS' INTENT, AS SHOWN ON THE MARKINGS OF SHORT PLAT 2-543, CONTROLS THE INTERPRETATION OF THE PLAT**

The Schmids' intent, as shown on the markings of Short Plat 2-543, controls the interpretation of the plat. Washington cases recognize that the dedicator of a plat may choose to give a successor in interest something less than the platter owns. Furthermore, any purported restrictions in the Hynds' vesting deed are not relevant in determining Mr. and Mrs. Schmids' intent in dedicating Short Plat 2-543 because the Hynds did not purchase Lot 1 from Mr. and Mrs. Schmid.

1. The Hynds' Approach Would Ignore Intent

The Hynds' approach ignores that the platter's intention "controls in construing a plat." *Selby v. Knudson*, 77 Wn. App. 189, 194, 890 P.2d

¹ Hynds' Response Brief, pp. 6, 7, 20.

514 (1995); *see also Erickson v. Wick*, 22 Wn. App. 433, 436, 591 P.2d 804 (1979) (determining intent is the “fundamental question” in interpreting a plat). They state their second issue in a manner that asks the Court to affirm the Trial Court “regardless of the developer’s intent[.]” Respondents’ Brief, pp. 1, 18. Their approach ignores key markings on Short Plat 2-543 showing the Schmid’s intent to set a static southern boundary line for Lots 1, 2 and 3. *See Wilson v. Howard*, 5 Wn. App. 169, 176, 486 P.2d 1172 (1971).

2. Washington Cases Recognize The Platter’s Ability To Give A Successor In Interest Something Less Than What The Platter Owns.

Mrs. Schmid agrees with the Hynds that *Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp.*, 78 Wn.2d 975, 983, 482 P.2d 769 (1971) states the general rule with respect to meander lines and navigable bodies of water. However, Washington cases recognize the common sense principles that plat dedicators may choose to give successors in interest something less than they possess—something less than to the water’s edge. *See Harris v. Swart Mortg. Co.*, 41 Wn.2d 354, 361, 249 P.2d 403 (1952) (stating that “a clear indication to the contrary” negates the general rule that a grantor is presumed to have given his grantee property to the water’s edge). This is precisely what Mr. and Mrs. Schmid did with Short Plat 2-543. They gave Lot 1 a static southern boundary line when they stated Lot 1’s southern boundary as being precisely at elevation 19.5’ and consisting of precisely .47 acres. Their actions, as shown on the face of the plat, make their intent critical in interpreting Short Plat 2-543.

3. Any Restrictions In The Hynds' Vesting Deed Are Not Relevant To The Schmid's Intent Analysis

Any stated restrictions in the Hynds' vesting deed are not relevant to the Court's analysis of Mr. and Mrs. Schmid's intent as shown in the markings on Short Plat 2-543. The Hynds devote pages 4-5 of their Response Brief to quoting the Hynds' vesting deed and the 2007 remainder deed. *See* CP 55, 68-71. The Hynds' vesting deed is not relevant to ascertaining Mr. and Mrs. Schmid's intent with respect to Short Plat 2-543 because the Hynds did not obtain Lot 1 from Mr. and Mrs. Schmid. The Hynds obtained Lot 1 from James and Jollette Schmid, not Mr. and Mrs. Schmid. CP 56, 55. Furthermore, the Hynds' vesting deed merely indicates what the Court already knows at this point: that property lying riverward of the line of ordinary high water is owned by the State of Washington as a tideland.

Mrs. Schmid moves to strike the Hynds reliance on the Denise Wilhelm email quoted in pages 4-5 of their Response Brief. First, Ms. Wilhelm's reported email is not relevant in determining Mr. and Mrs. Schmid's intent with respect to Short Plat 2-543. ER 401; ER 402. Second, Ms. Wilhelm's email constitutes inadmissible hearsay. ER 802.

4. The Court Should Not Read Ambiguity Into Short Plat 2-543

The Court should not read ambiguity into Short Plat 2-543. Courts should not find or read ambiguities into a writing where it can reasonably be avoided by viewing the writing as a whole. *Grant County Constructors v. E. V. Lane Corp.*, 77 Wn.2d 110, 121, 459 P.2d 947 (1969). Here, Short

Plat 2-543 expressly references the southern boundary of Lot 1 as being 19.5' elevation and consisting of exactly .47 acres. Short Plat 2-543 says what it means and means what it says.

B. SCHMIDS INTENDED TO CREATE STATIC SOUTHERN BOUNDARY FOR LOTS 1, 2 AND 3

1. The Hynds' First Issue Assumes A Fact Not In Evidence

The Hynds' first issue assumes a material fact not in evidence.

“ISSUE 1” states in pertinent part:

Does a subdivision plat which notes the elevation of a boundary as **coextensive with the ordinary high water mark** of a navigable river create a remainder, **and result in retention of emergent lands by the developer, if the water level recedes and accretes upland** after the plat is recorded?

Response Brief P. 1, 8 (Emphasis added). The Hynds assume as fact that the Schmids, at the time of platting, surveyed the water's edge at 19.5' elevation (rather than 19.5' elevation being a maximum or historical water level along this stretch of the Columbia River), set the southern boundary of Lot 1 at the water's edge, and then essentially sat back to wait to obtain ownership to any land that potentially accreted over time waterward of 19.5' elevation.² The Hynds presented no evidence in the Trial Court that

² See Response Brief, p. 11. The Hynds allege that the Schmids' desire to create a static southern boundary for Lot 1 at 19.5' elevation was to charge “for river frontage a second time.” This is a baseless argument and an irrelevant implication. It strains credulity to think that Mrs. Schmid, now in her advanced age, short platted the property with the intent that she could wait for 20 years to see if the water level would further recede in hopes of charging a second time for “river frontage.” This is a particularly scurrilous charge when one considers that Mr. and Mrs. Schmid conveyed Lot 1 to their son and daughter in law, not a non-family third party such as the Hynds. Furthermore, even if the Hynds' charge were true, Mrs. Schmid would have born the risk (as she always has) that

the Columbia River's edge was at 19.5' elevation on the day Short Plat 2-543 was surveyed or recorded. Furthermore, the Hynds presented no evidence to the Trial Court that there was or was not property existing waterward of the 19.5' elevation line capable of being privately owned. The Hynds' first issue therefore assumes facts not in evidence and glosses over the key markings on Short Plat 2-543.

2. Hynds' Response Brief Misses The Key Issues In This Case

The key issue in this case is whether Mr. and Mrs. Schmid owned property between the water's edge and the express southern boundary of Lot 1. The Hynds confusedly argue that the Schmid's predecessors in interest tried to convey property that was not within their chain of title.³ This assumes a fact that is not in evidence (that the Ough Patent did not include the government meander line as the original southern boundary of the subject property⁴). Furthermore, it is not relevant because the parties are agreed that Mr. and Mrs. Schmid, prior to recording Short Plat 2-543, owned to the water's edge. So the key issue remains: whether Short Plat 2-

the Columbia River's line of ordinary high water would rise, turning any property waterward of elevation 19.5' into a state-owned tideland.

³ Response Brief, pp. 10-11.

⁴ No evidence supports whether this is the case. While the original Ough Patent does not reference the meander line, the language of the patent is unclear as to whether the southern boundary of the subject property followed the government meander line. It is entirely possible that the calls in the Ough Patent correspond to the calls of the surveyed meander line without expressly referencing the meander line. No evidence was presented to this effect by the Hynds, making this argument complete speculation on the Hynds' part.

543 created a static southern boundary for Lot 1 (and Lots 2 and 3) at 19.5' elevation. This issue should proceed to trial.

3. The Hynds' Reliance Upon *Erickson V. Wick*, 22 Wn. App. 433, 591 P.2d 804 (1979) Is Misplaced

The Hynds attempt to downplay the effect of the .47 acre lot size they obtained when purchasing Lot 1 and that was clearly noted on the plat as part of Lot 1's legal description. While the *Erickson* case does state that a quantity of land is the least descriptive particular in determining a lot's boundaries, this statement was made in light of the holding in *Thein v. Burrows*, 13 Wn. App. 761, 537 P.2d 1064 (1975)—a case where the parcels of land had been conveyed solely in terms of acreage. In contrast, the subject plat describes Lot 1 of existing of precisely .47 acres.⁵ Further, the .47 acre "particular" is not alone. Short Plat 2-543 established Lot 1's southern boundary at 19.5' elevation. These two markings, when considered together, are powerful evidence of Mr. and Mrs. Schmid's intent with respect to Lot 1's southern boundary.

C. MRS. SCHMID'S AFFIDAVIT WAS ADMISSIBLE

Mrs. Schmid's Affidavit was admissible testimony on summary judgment. The Hynds devote pages 20 through 23 of their Response Brief to attacking Mrs. Hynds' Affidavit.

1. The Deadman's Statute Does Not Apply

⁵ Note Short Plat 2-543 does not use "more or less" or similar language in describing the size of Lot 1. This specificity further supports Mrs. Schmid's position that that Short Plat 2-543 established a static southern boundary for Lot 1. See *Erickson*, 22 Wn. App. at 438, 591 P.2d 804.

The Deadman's Statute, RCW 5.60.030, does not apply to Mrs. Schmid's Affidavit. In order for the Deadman's Statute to bar Mrs. Schmid's Affidavit, she would have had to have derived her title to the subject property from her husband, George Schmid. The Hynds allege that George Schmid was the "sole developer"⁶ of Short Plat 2-543 and that the plat "was filed solely on behalf of [Mrs. Schmid's] now deceased husband, George Schmid."⁷ This is not true. George and Emma Schmid were co-dedicators of Short Plat 2-543. CP 62.⁸ George Schmid was not the "sole developer" of Short Plat 2-543. Emma Schmid was every bit a part of Short Plat 2-543. Mrs. Schmid did not derive her title to the land waterward of Lot 1 by or through George Schmid because she was a co-owner of the property. Therefore, the Deadman's Statute does not apply to Mrs. Schmid's Affidavit.

In addition, the Deadman's Statute has no application to Mrs. Schmid's Affidavit testimony to the extent she speaks of her own intent as a co-owner of the property and specifically as a co-dedicator of Short Plat 2-543.

⁶ Hynds' Response Brief, p. 20; *see also id.* p. 6.

⁷ *Id.* p. 7.

⁸ Further, George and Emma Schmid acquired and co-owned the subject property as husband and wife. CP 57-60. It is presumed therefore to have constituted community real property. RCW 26.16.030; *cf. In re Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009) (Community property "presumptions are *true* presumptions, and in the absence of evidence sufficient to rebut an applicable presumption, the court must determine the character of property according to the weight of the presumption."). As such, George Schmid, acting alone, could not by law have been the sole dedicator of Short Plat 2-543. *See* RCW 26.16.030(3), (6).

2. Hynds Waived Application Of The Deadman's Statute

Even if the Deadman's Statute did apply to Mrs. Schmid's Affidavit, the Hynds waived any such application by failing to invoke the Deadman's Statute as a basis for their objection in the Trial Court. *See Botka v. Estate of Hoerr*, 105 Wn. App. 974, 980, 21 P.3d 723 (2001) (failing to object to testimony based on the deadman's statute waives its application).

3. Mrs. Schmid's Affidavit Testimony Confirms The Markings On Short Plat 2-543

Mrs. Schmid's Affidavit is consistent with the markings on Short Plat 2-543. As such, it is admissible extrinsic evidence pursuant to *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 693-97, 974 P.2d 836 (1999).

4. All Facts Must Be Construed In The Light Most Favorable To The Nonmoving Party For Purposes Of Summary Judgment

The Hynds essentially ask the Court to affirm the Trial Court's summary judgment on the basis that if the Court perceives any ambiguity in Short Plat 2-543, such ambiguity must be resolved against Mrs. Schmid.⁹ As stated in Mrs. Schmid's Opening Brief, such is not the standard on summary judgment. All facts and inferences are viewed by the Court in the light most favorable to the nonmoving party. *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2003). Mrs. Schmid was the nonmoving party in the Trial Court. All facts

⁹ See Hynds Response Brief, p. 21.

must be viewed by the Court in the light most favorable to Mrs. Schmid's position regardless of how a potential ambiguity is required to be resolved at trial.

D. THE HYNDS' INAPPROPRIATE RELIANCE UPON ALLEGED MARKETING MATERIALS

1. Any Reference To Marketing Materials The Hynds May Have Received When Purchasing Lot 1 Is Not Relevant

Any reference to marketing materials the Hynds may have received from their predecessors in interest when purchasing Lot 1 has no bearing on the primary issues in this action: whether Short Plat 2-543 established a static southern boundary for Lot 1 and whether Trial Court's determination to the contrary was correct, particularly for purposes of summary judgment.¹⁰

The manner in which the intervening owners of Lot 1, James and Jollette Schmid, marketed Lot 1 to the Hynds provides no basis in analyzing the four corners of Short Plat 2-543 and Mrs. Schmid's corresponding testimony. The implication made by the Hynds in their Response Brief was that Lot 1 was advertised as "'RIVER FRONT LUXURY' property, with 'generous river front decks'"¹¹ which essentially means that the express markings on Short Plat 2-543 are meaningless and cannot be taken seriously. Any advertising materials

¹⁰ See *id.* at 11.

¹¹ *Id.*

received by the Hynds from Mr. and Mrs. Schmid's successors in interest throw no light on Mr. and Mrs. Schmid's intent in dedicating Short Plat 2-543.

It is a glaring contradiction for the Hynds to argue that Mrs. Schmid's Affidavit is inadmissible extrinsic evidence while in the same brief quoting from extrinsic materials that Mr. and Mrs. Schmid had nothing to do with and no control over.

**II. CORRECTION OF ADDITIONAL FACTUAL
MISSTATEMENTS CONTAINED IN THE HYNDS' RESPONSE
BRIEF.**

In addition to the factual corrections noted above, Mrs. Schmid makes the following corrections for the convenience of the Court in understanding the initial patent from which the subject property traces its legal description:

Mrs. Schmid agrees with the Hynds that the subject land was initially patented by the federal government to Richard and Betsy Ough as recorded on February 17, 1885.¹² Later that same day, Betsy Ough conveyed a portion of her interest to her son, John Thomas Ough.¹³

¹² CP 138-39. The Hynds' Response Brief states that the patent was recorded on February 14, 1885. It was in fact recorded on February 17, 1885. The difference, of course, is insignificant for purposes of this appeal.

¹³ CP 140-42. The Hynds' Response Brief states that "patentee Betsy Ough conveyed her interest in a portion of the property to co-patentee Richard Ough." Hynds' Response Brief P. 2. Betsy Ough's conveyance, however, was to her son, John Thomas Ough, rather than her husband, Richard Ough.

III. MRS. SCHMID'S RESPONSE TO HYNDS' MOTION ON THE MERITS

Based on the above as well as on Mrs. Schmid's Opening Brief, Mrs. Schmid's appeal has merit and she respectfully asks the Court to deny the Hynds' pending motion on the merits.

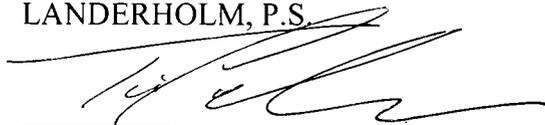
IV. CONCLUSION

The Court of Appeals should reverse the Order Granting Summary Judgment and the Final Judgment entered by the Trial Court. The Court of Appeals should remand the matter back to the Trial Court with instructions that the matter be allowed to proceed to trial.

DATED this 15th day of February, 2013.

Respectfully Submitted,

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