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

JUBITZ CORPORATION, an Oregon corporation,

Appellant/Cross-Respondent,

v.

VANCOUVER HOSPITALITY PARTNERS, LLC, a Washington limited

liability company, Respondent; and

ROBERT HOLMSTROM and ELIZABETH HOLMSTROM, individuals,

Respondents/Cross-Appellants.

**APPELLANT'S REPLY BRIEF TO RESPONDENT VANCOUVER
HOSPITALITY PARTNERS, LLC'S RESPONSE BRIEF**

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I. SUMMARY OF REPLY

Respondent Vancouver Hospitality Partners, LLC ("VHP") misconstrues both the facts and the law of this case throughout its Response Brief.¹ But, in doing so, VHP succeeds only in highlighting the reasons why Appellant/Cross-Respondent Jubitz Corporation ("Jubitz") can and should prevail in this appeal.

This Court should find that the parking easement at issue does not bind Jubitz and does not burden the property leased and under agreement to purchase by Jubitz.

II. ARGUMENT

A. First Assignment of Error: Trial Court Conclusion of Law No. 4 of July 2018 Findings and Conclusions (Chain of Title)

VHP offers no relevant authority for its position that the RPAs

¹ As just one example, VHP represents that the trial court made a finding that VHP used the RPAs for a "number of years." [VHP Response Brief, p. 4]. But, in reality, the trial court found that: "Hotel customers would occasionally park in the employee parking area on the northern property. These vehicles usually left the area early in the morning, before the oil company needed to occupy these spaces. If the presence of a hotel vehicle caused a problem for the oil company business, hotel management was contacted and the vehicle was moved. Hotel management did not assert that hotel patrons had a right to use this overflow parking." CP 2120, Opening Brief, App. A; CP 2181, Opening Brief, App. B. (emphasis added).

were within the "chain of title" for the Jubitz Property. Indeed, the definition for "chain of title" offered by VHP only supports Jubitz's position:

"[A]ny instrument purporting to encumber or convey an interest in a sufficiently described tract of land executed by a person having an interest therein, as disclosed by other prior instruments within the chain of title, is within the chain of title."

Jones v. Berg, 105 Wash. 69, 77, 177 P. 712 (1919) (emphasis added).²

As set forth in Appellant's Opening Brief, the RPAs did not sufficiently describe the tracts of land which Respondents now claim are involved, and the RPAs were not executed by persons having interests in those tracts of land. In fact, VHP acknowledges as much in its own Response Brief:

"While separate legal descriptions had been created for both [the Jubitz Property and the VHP Property], there is no support for an argument that a deed containing an accurate legal description (albeit, not the property that was intended to be described) is somehow void because the property has been further divided."

² VHP's citation to testimony of various title officers regarding whether they were able to locate the RPAs through various searches and utilizing various methods after the fact is beside the point. A "chain of title" is a legal reality, not something that can be unilaterally created by an individual's subjective decisions on any given day.

[VHP Response Brief, p. 9 (emphasis added)]. It is unavoidable that the RPAs did not include an "accurate legal description," especially given VHP's own admission that the legal description was "not the property that was intended to be described." [*Id.*]. It is also unavoidable that the RPAs were not executed by persons having interests in those tracts of land, as acknowledged by VHP:

"It is correct that Salmon Creek Lodging was not yet formed when the RPAs were executed."

[VHP Response Brief, p. 35]. Indeed, VHP recognizes that:

"[A] 'Wild Deed,' which is a deed outside the chain of title, such as a deed by someone who has no interest in the property, but purports to convey it, would not even be located."

[VHP Response Brief, pp. 10-11]. In this case, the RPAs were "wild deeds" as to Salmon Creek Lodging, LLC (which didn't even exist at the time, much less hold any interest in any property) and therefore outside the chain of title. CP 2120, Opening Brief, App. A.

VHP cites to the case of *Malbon v. Grow*, 15 Wash. 301, 46 P. 330 (1896), but that case actually supports Jubitz's position:

"While the index, which serves, so to speak, as a finger-board to direct the inquirer, must not mislead him by giving a totally wrong description of lands, yet it is not necessary and essentially a prerequisite to a valid registration that the index should contain a description of the lands conveyed. It is sufficient if it points to the record with reasonable certainty."

Id. at 305. (emphasis added). In this case, an entirely wrong description of lands was given, both for Exhibit A and for Exhibit B. In addition, contrary to VHP's representations, the *Malbon* case recognized that an inaccurate legal description does not provide record notice, but may provide inquiry notice.³ *Id.*

VHP attempts to justify the incorrect legal description listed in Exhibit A of the RPAs by asserting that it used to be the legal description of a larger parcel which at one time contained both the Jubitz Property and the property now purported to be owned by VHP ("VHP Property"). But, once that larger parcel was divided, the Jubitz Property and the VHP Property had their own chains of title. *See, e.g., Dickson v. Kates*, 132 Wn. App. 724, 133 P.3d 498 (2006). And, just because a pre-subdivision easement over the larger parcel may carry into the subdivided parcel's individual chains of title, does not mean that a post-subdivision easement purporting to encumber only one of the subdivided parcels may be described as existing over the (old, no longer existent) larger parcel. *See, e.g., Berg v. Ting*, 125 Wn.2d 544, 866 P.2d 564 (1995).

³ Inquiry notice is addressed in section B, below.

**B. Second Assignment of Error: Trial Court Conclusion
of Law No. 5 of July 2018 Findings and Conclusions
(Inquiry Notice)**

As set forth in Appellant's Opening Brief, the Court seemed to have conceded that there was no record notice. With respect to inquiry notice, VHP acknowledges that:

"While it is a general rule that one who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all facts which reasonable inquiry would disclose, the rules does not impute notice of every conceivable fact, however remote, that could be learned from inquiry; it imputes notice only of those facts that are naturally and reasonably connected with the fact known, and of which the known fact can be said to furnish a clue."

Hawkes v. Hoffman, 45 Wash. 120, 126, 105 P. 156 (1909); *see also* *Paganelli v. Swendsen*, 50 Wn.2d 304, 308-09, 311 P.2d 676 (1957) ("it is not enough to say that diligent inquiry would have led to a discovery, but it must be shown that the purchaser *had, or should have had, knowledge of some fact* or circumstance which would raise a duty to inquire * * * A circumstance that should lead a person to inquire is only notice of what a reasonable inquiry would reveal.") (emphasis in original) (internal citations omitted). In this case, if Jubitz had any actual knowledge of the RPAs (which the trial court found it did not), it would have put Jubitz on notice only of a potential easement agreement between a Tax Parcel now

held by VHP and a neighboring property, owned by Krenzler Corporation. In no way could the RPAs be read to be an easement between the VHP Property and the Jubitz Property..

VHP's assertions to the contrary are entirely without merit and fail to meet VHP's burden of establishing inquiry notice. *Olson v. Trippel*, 77 Wn. App. 545, 551, 893 P.2d 634 (1995) ("The burden of showing a duty of inquiry rests on the one asserting it").

In addition, Jubitz did inquire about the state of title and received both a title report and unequivocal warranties from Holmstroms that there was no encumbrance on the Jubitz Property. CP 2122, Opening Brief, App. A.; CP 2182, Opening Brief, App. B. Nor did VHP immediately provide the RPAs to Jubitz in 2016 when Jubitz first inquired, as evidenced by the testimony of Jubitz employee Todd Shaw at trial:

Q. When was the first time that you became aware of any claim to a reciprocal parking easement?

A. When the manager of the hotel, I believe her name was Dana—this was during the Jubitz days. She came—she came up to—she actually came down to my office. We didn't go to her hotel. She came down to the office, and she had a map, and on his map she pointed out those 11 spots and said that she had the right to park there per some easement or some right that she had claimed from a prior thing. But it wasn't an actual easement. It was just a map that was drawn by somebody when the built the hotel, I guess. I don't know.

* * *

Q. So I'll just represent to you that this is the first version of the reciprocal parking easement. When was the first time you saw Exhibit 8, which is behind tab 15?

A. The first time I saw this?

Q. Yes.

A. This would've been—Bruce actually came in November of 2016 with some different documents. I don't know if it was exactly all of this, because I don't remember it being this extensive. But he came to my office, like, November of 2016 explaining kind of what the history behind this whole thing was.

Q. Prior to you having a conversation with Mr. Holmstrom about Exhibit 8 behind tab 15, had Mr. Holmstrom ever talked to you about a reciprocal parking easement at any point in time?

A. No, we never discussed it. No.

Q. Did Mr. Holmstrom ever talk to you—forget about the word easement or reciprocal parking easement. Just the idea of an agreement.

A. No. I didn't know that anything existed.

RP (Trial) at 67:23-68:9; 68:25-69:19.

C. Third Assignment of Error: Trial Court Conclusion of Law No. 8 of July 2018 Findings and Conclusions, as Amended by the Supplemental Findings of Fact and Conclusions of Law entered on March 22, 2019 (Reformation)

VHP claims that reformation is appropriate due to scrivener's error or mutual mistake, but there is no support for that position. First, the trial court made no findings of fact regarding the intentions of the Holmstroms and David Heald, who signed the RPAs on behalf of Salmon Creek Lodging, LLC, and did not find or conclude that the Holmstroms and David Heald had identical intentions, as required by VHP's own cited authority. *Williams v. Fulton*, 30 Wn. App. 173, 177, 632 P.2d 920 (1981). In addition, the authorities cited by VHP do not account for the fact that reformation may not be done if it would adversely affect a third party such as Jubitz. *See, e.g., Biddle v. Wright*, 4 Wn. App. 483, 485, 481 P.2d 938 (1971) (internal citations omitted).

But the larger issue that VHP cannot avoid is that a void easement may not be reformed, even if it is due to a mistake. As VHP acknowledges throughout its Response Brief, the true intention, if any, with respect to the RPAs was for the Holmstroms to create an easement on their own properties:

- "Holmstrom still owned both the Hotel Property and the Vancouver Oil Property. Holmstrom and his partners then proposed to locate the parking spaces needed for the hotel on the Vancouver Oil Property."
[VHP Response Brief, p. 6]

- "At the time of the recording of the RPAs, Holmstrom was the owner of the Hotel Property and the Vancouver Oil Property" [VHP Response Brief, p. 23]

- "If the faulty legal descriptions were not a scrivener's error, then SCL and Holmstrom could only have been deliberately misleading the County regarding compliance with the parking requirement. This makes little sense and would have been completely counterproductive to what the parties were attempting to accomplish, as well as being unnecessary, since Holmstrom owned property that could be used to satisfy the parking requirement."
[VHP Response Brief, p. 25]

- "we told Mr. Holmstrom that the best place would be the spaces on his property." [VHP Response Brief, p. 25]

The law is clear and unequivocal in Washington that a landowner cannot create an easement on property that he or she owns and any attempt to do so is void at the outset.⁴ See, e.g., *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 853, 351 P.2d 520 (1960) ("one cannot have an easement in his own property"); *Butler v. Craft Eng. Constr., Inc.*, 67 Wn. App. 684, 698, 843 P.2d 1071 (1992) ("one cannot have and does not need an easement over land which he has purchased in fee, unless and until he conveys or leases the land subject to any privilege of easement which he may desire to retain").

The same law is also clear and unequivocal throughout the country:

⁴ VHP's attempt to avoid this argument by claiming it was not raised at trial is not well taken. Jubitz raised this argument in its Trial Memorandum, which was also referenced in its Closing Argument. CP 1696-97; RP (Trial) at 427:8-11.

"[F]ew cases discuss the reverse situation, in which a common landowner attempts to record an easement burdening one portion of his property for the benefit of another portion, usually in order to sell one of the portions. Courts have likewise found that no easement is created because an owner cannot grant himself property rights he already possesses."

Woodling v. Polk, 473 S.W.3d 233, 236 (Mo. App. E.D. 2015)

(recognizing the "universal rule" that "a man cannot have an easement over his own land").

An attempt to create an easement over property one already owns is void:

"An easement, by definition, is the right to use land owned by another. * * * This court made clear that that right exists in one *other than the owner of the land* to use land for some particular purpose or purposes. * * * Hoffenberg, as fee simple owner of both parcels, did not possess the legal right to grant an easement over his own property. Accordingly, the Agreement was void *ab initio*."

One Harbor Fin. Ltd. Co. v. Hynes Props., LLC, 884 So.2d 1039, 1044

(Fla. App. 2004) (emphasis in original) (reviewing cases from several other jurisdictions).

A void document has no effect whatsoever and does not provide constructive knowledge:

"The defendants argue that the merger doctrine applies only when the union or combination of estates occurs *after* the execution of the easement and thus, because Langford held all of the lots at issue before she created the purported perpetual easement, the merger doctrine is inapplicable

here. The defendants have failed, however, to provide authority requiring such an express limitation. And pretermitted whether the merger doctrine is so limited, the law is clear that 'no man can have an easement in his own land.' 'It is axiomatic that one cannot have an easement upon his own property, for the lesser estate, represented by the easement, will be merged into the fee, upon which it is subservient.' Thus, Langford's attempt to create an easement across one portion of her property for the benefit of another portion while she still owned both was ineffective and the purported easement was invalid.

The defendants also contend that the plaintiffs had actual and constructive knowledge of the easement when they acquired the property. But the plaintiffs could not have constructive knowledge of an invalid easement. Thus, the defendants' arguments that multiple documents evidenced the easement and that defendant Remler's use of the easement area was open and notorious are unavailing."

Gilbert v. Fine, 288 Ga. App. 20, 22-23, 653 S.E.2d 775 (2007) (emphasis in original) (internal citations omitted).

In *Heritage Bank of Nevada v. O'Neil*, the United States District Court of Nevada faced a similar set of circumstances when two parties attempted to record a reciprocal parking agreement easement in contemplation of the sale of one of the parcels to one of the parties (but while both parcels were still held by only one of the parties):

"Recording the easement prior to legal sale of 690 Keystone appears to have been a mistake. This does not change the fact that an easement cannot be created on land for which the dominant and servient estates are held in common ownership.

* * *

"[E]ven if the parties intended for the easement to be recorded after ownership passed to BHP, recordation of the easement prior to sale of the property rendered the easement void due to unity of ownership."

Id. at 2015 U.S. Dist. LEXIS 148113, *8-12 (D. Nev. November 2, 2015, Case No. 3:14-CV-00681-LRH-WGC) [App. 1].

There is simply no denying that the RPAs were void from inception and cannot be reformed.

D. Fourth Assignment of Error: Trial Court Conclusion of Law No. 6 of July 2018 Findings and Conclusions (Ratification)

VHP does not even attempt to contradict the fact that the RPAs, while they may be valid as to VHP and the Holmstroms, are void as to Jubitz. *In re Corporate Dissolution of Ocean Shores Park, Inc.*, 132 Wn. App. 903, 914-15, 134 P.3d 1188 (2006). Nor does VHP attempt to contradict Jubitz's argument that the RPAs have never been valid because the doctrine of after-acquired title does not apply to Salmon Creek Lodging, LLC.

III. CONCLUSION

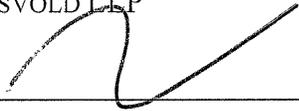
This Court should reverse the erroneous conclusions of law of the trial court and hold that the RPAs are void and unenforceable as to Jubitz

and the Jubitz Property. This Court should also award Jubitz the fees and costs it incurred in this appeal.

RESPECTFULLY SUBMITTED this 20th day of February, 2020.

McEWEN GISVOLD LLP

By: _____


Katie Jo Johnson, WSBA No. 46143
Of Attorneys for Appellant/Cross-
Respondent Jubitz Corporation

APPENDIX 1

Heritage Bank of Nev. v. O'Neil

United States District Court for the District of Nevada

November 2, 2015, Decided; November 2, 2015, Filed

3:14-CV-00681-LRH-WGC

Reporter

2015 U.S. Dist. LEXIS 148113 *; 2015 WL 6737035

HERITAGE BANK OF NEVADA, Plaintiff, v. OWEN O'NEIL, SAUNDRA O'NEIL, individually and as Trustees of the OWEN & SAUNDRA O'NEIL 1998 TRUST, and DOES 1-10, inclusive, Defendants.

Prior History: *Heritage Bank of Nev. v. O'Neil, 2015 U.S. Dist. LEXIS 106057 (D. Nev., Aug. 10, 2015)*

Counsel: [*1] For Heritage Bank of Nevada, Plaintiff, Counter Defendant: Mark G Simons, Therese Shanks, LEAD ATTORNEYS, Robison Belaustegui Sharp & Low, Reno, NV.

For Owen H O'Neil, Sandra A O'Neil, Defendant, Sandra A O'Neil, Counter Claimants: Jeffrey A. Leon, LEAD ATTORNEY, PRO HAC VICE, Leon & Leon, Oakland, CA; Kirk C. Johnson, Richard D. Williamson, LEAD ATTORNEYS, Robertson, Johnson, Miller & Williamson, Reno, NV.

For Owen & Sandra O'Neil 1998 Trust, Defendant: Kirk C. Johnson, Richard D. Williamson, LEAD ATTORNEYS, Robertson, Johnson, Miller & Williamson, Reno, NV; Jeffrey A. Leon, Leon & Leon, Oakland, CA.

For Owen & Sandra O'Neil 1998 Trust, Counter Claimant: Kirk C. Johnson, Robertson Johnson Miller & Williamson, Reno, NV; Jeffrey A. Leon, Leon & Leon, Oakland, CA.

Judges: LARRY R. HICKS, UNITED STATES DISTRICT JUDGE.

Opinion by: LARRY R. HICKS

Opinion

ORDER

Before the Court is Defendants Owen H. O'Neil and Sandra A. O'Neil's ("the O'Neils") Motion to Reconsider. Doc. #43.¹ Plaintiff Heritage Bank of Nevada ("Heritage") filed an Opposition (Doc. #44), to which the O'Neils replied (Doc. #45).

I. Facts and Procedural Background

At issue is a purported easement on adjacent parcels of land [*2] owned by Heritage and the O'Neils. Heritage owns a Heritage Bank branch on Keystone Avenue in Reno, Nevada. The O'Neils have owned a drive-thru Starbucks Coffee branch immediately adjacent to the Heritage Bank, at 690 Keystone Avenue ("690 Keystone") since 2014. In 2004, Heritage began discussions about selling the 690 Keystone parcel to the Banks-Hinckley Partnership ("BHP"). In 2005, the Reno Planning Commission conducted a parking study which found that in order to obtain a Special Use Permit, the Starbucks at 690 Keystone needed a total of sixteen parking spaces. The 690 Keystone parcel only had seven parking spaces, whereas the Heritage Bank had thirty spaces, including eight on the western edge of the Heritage property immediately adjacent to 690 Keystone. As a result, BHP, which later sold 690 Keystone to the O'Neils, acquired a Reciprocal Easement Agreement for use of parking spaces, access, and drainage on the Heritage property.

¹ Refers to the Court's docket number.

The easement was recorded on March 28, 2006, at which point Heritage was the legal owner of both properties. Heritage and BHP state that both parties understood that the easement was for nine parking spaces, but that the map identifying the nine parking spaces was inadvertently excluded from the easement. A deed [*3] transferring 690 Keystone to BHP was recorded on April 20, 2006. The O'Neils acquired 690 Keystone from BHP on June 5, 2014, and the O'Neils transferred the property to the Owen and Sandra O'Neil 1998 Trust on October 27, 2014. Although Heritage was originally comfortable with the Starbucks customers' use of Heritage's parking spots, Heritage claims that this use became overly-burdensome in 2014. While addressing the O'Neils' use of its parking spots, Heritage learned that the easement was recorded when both parcels were owned by Heritage, which it claims establishes that the easement was void from the start.

Heritage filed suit against the O'Neils in state court on November 24, 2014, requesting declaratory relief, rescission, and quiet title. Doc. #1. This action was removed to federal court on December 24, 2014. *Id.* The O'Neils filed an Answer and Counterclaim for injunctive and declaratory relief on January 20, 2015. Doc. #11. Heritage moved for partial summary judgment on its claims for declaratory relief and quiet title on February 19, 2015, arguing that the easement is void as a matter of law because Heritage owned both the Heritage property and what is now the O'Neils' property [*4] when the easement was recorded. Doc. #16 at 4.² On June 24, 2015, the O'Neils moved for partial summary judgment for declaratory relief that the easement is valid. Doc. #33. On August 10, 2015, the Court denied the O'Neils' Motion for Summary Judgment and granted Heritage's Motion for Summary Judgment in part. Doc. #42. In particular, the Court found as a matter of law that no express easement existed, but that disputed questions of material fact remained as to whether the parties had an implied easement. The O'Neils filed their Motion to Reconsider on August 24, 2015. Doc. #43.

II. Legal Standard

The O'Neils move for reconsideration under Federal Rule of Civil Procedure 54(b), which provides that the Court has authority to reconsider, modify, alter, or

² Heritage did not move for summary judgment on its claim for rescission.

revoke any order adjudicating fewer than all the claims in an action at any time before the entry of final judgment. *Wright v. Watkins and Shepard Trucking, Inc.*, 968 F. Supp. 2d 1092, 1096 (D. Nev. 2013). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). A motion to reconsider "is [*5] not an avenue to re-litigate the same issues and arguments upon which the court has already ruled." *Wright*, 968 F. Supp. 2d at 1096 (quoting U.S. Aviation Underwriters, Inc. v. WesAir, LLC, No. 2:08-cv-0891, 2010 U.S. Dist. LEXIS 35648, 2010 WL 1462707, at *2 (D. Nev. Apr. 12, 2010)).

III. Discussion

The O'Neils identify three arguments that it alleges the Court did not consider in its prior Order. First, the O'Neils argue that evidence indicates that Heritage and BHP intended that the easement would not become effective until after the property transferred ownership. Second, the O'Neils argue that Heritage's ownership was never shown to invalidate the easement. Third, the O'Neils argue that BHP had an equitable interest in the property when the easement was recorded, which destroyed Heritage's unity of ownership. Noting that a Motion for Reconsideration may not be used to re-argue issues that the Court has already decided, the Court addresses these three arguments to promote maximum clarity regarding the Court's position.

A. Intent and Timing of Easement

The O'Neils argue that the undisputed evidence demonstrates that Heritage and BHP intended that the easement "should not become effective on recordation but rather on the later recording of the deed transferring ownership of 690 Keystone from [*6] Heritage to BHP." Doc. #43 at 7. This is important because Nevada law provides that "[t]he purpose of contract interpretation is to determine the parties' intent when they entered into the contract." Century Sur. Co. v. Casino W., Inc., 329 P.3d 614, 616 (Nev. 2014).

As the Court discussed in its prior Order, the O'Neils convincingly demonstrated that the intent of the parties was for the easement to be recorded after the property

transferred from Heritage to BHP. Indeed, the easement provides that BHP "is (or contemporaneously herewith will become) the owner of that certain parcel of real property," which later became the O'Neil property. Doc. #16, Ex. 8. BHP partner Dennis Banks ("Banks") wrote in a declaration that the easement "was not supposed to be recorded until BHP became the owner of record of the O'Neil Property," and that he did not know why it was recorded early.³ Doc. #30, Ex. 13 ¶11. Additionally, Dennis Banks Construction Co. project manager Casey Solum wrote Heritage CEO Charles Wilmoth to state that the easement would transfer with the property ownership. Doc. #26, Solum Decl., Ex. D; see *id.*, Leon Decl., Ex. A at 114:22-115:19.

The Court again notes that the O'Neils have convincingly demonstrated that the intent of the easement was to enable BHP to use parking spaces on Heritage's property after BHP secured ownership of 690 Keystone. As before, however, the Court finds that the express easement between Heritage and BHP was void when created.⁴ An easement cannot be created that benefits and burdens parcels under common ownership. See, e.g., *Austin v. Silver*, 162 N.H. 352, 33 A.3d 1157, 1160-61 (N.H. 2011) (holding that an easement was not created when the grantor owned both the dominant and servient lots); *Mattos v. Seaton*, 839 A.2d 553, 555 (R.I. 2004) ("The general rule is that no easement can be created over a section of land in favor of another adjoining parcel when one owner owns both properties."); *Bel Marin Keys Cmty. Servs. Dist. v. Bel-Marin Enters., Inc.*, 582 F.2d 477, 481 n.3 (9th Cir. 1978) (noting that California law "may be read to prohibit an owner from creating an easement in his own land"). This reflects the rationale that a person does not need an easement in his or her own land because all uses of an easement are already included in his or her own property. See *Beyer v. Tahoe Sands Resort*, 129 Cal. App. 4th 1458, 29 Cal. Rptr. 3d 561, 571 (Cal. Ct. App.

³ Banks added that "[a]ny contention that the Easement was intended to grant more parking on the Heritage Parcel than [*7] the nine (9) spaces required to satisfied the SUP is contrary to the parties' original intent at the time of the execution of the original Easement." Doc. #30, Ex. 13 & 15.

⁴ If the easement was void for BHP, it would also be void for the O'Neils [*8] as successors. See *Nev. Rev. Stat. § 111.025* ("Every conveyance, charge, instrument or proceeding declared to be void by the provisions of this chapter, as against purchasers, shall be equally void as against the heirs, successors, personal representatives or assigns of such purchasers.").

2005).⁵

Recording the easement prior to legal sale of 690 Keystone appears to have been a mistake.⁶ This does not change the fact that an easement cannot be created on land for which the dominant and servient estates are held in common ownership. Though not identical, this scenario is similar to that of *Breliant*, in which an easement was extinguished by merger, but was allegedly [*9] revived later when unity of ownership was severed. The Nevada Supreme Court held that severance of common ownership did not automatically revive the extinguished easement. *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 918 P.2d 314, 319 (Nev. 1996). Rather, revival could result "from an express stipulation in the conveyance by which the severance is made or from the implications of the circumstances of the severance." *Id.* Although the easement indicates that the parties intended for it to go into effect after the property was sold to BHP, the deed transferring property to BHP does not expressly refer to any such easement, nor does the deed transferring the property to the O'Neils. *Breliant* continued: "[T]he mere reference to an extinguished easement in a deed is insufficient, as a matter of law, to revive the easement." *Id.* Applying this result to an easement that was void when created due to unity of ownership, the Court finds that mere mention of a future sale in said easement would not render the easement valid.

The Court previously noted that the O'Neils' argument regarding the intent of the parties to create an easement for the parking spaces on Heritage's property was more convincing for an argument that an easement had been

⁵ Both parties refer to the doctrine of merger to frame their respective arguments regarding whether the easement was valid when formed. The Nevada Supreme Court has adopted the merger doctrine, which provides "[w]hen one party acquires present possessory fee simple title to both the servient and dominant tenements, the easement merges into the fee of the servient tenement and is terminated." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 858 P.2d 1258, 1261 (Nev. 1993). Here, Heritage argues that the easement was void based on common ownership *when formed*, not that it became valid by merger based on the development of subsequent common ownership.

⁶ Heritage general counsel Rabkin and BHP partner Banks note that the easement was "recorded prematurely and before escrow even closed in that incomplete form. At the time of premature recordation, the Bank still owned the O'Neil property." Doc. #130, Ex. [*10] 10 ¶12; see also *id.*, Ex. 13 ¶10.

created by implication. Doc. #42 at 7; see *Alrich v. Bailey*, 97 Nev. 342, 630 P.2d 262, 264 (Nev. 1981) (an easement by implication requires (1) unity of title and subsequent separation by grant of the dominant parcel; (2) an apparent and continuous user; and (3) the easement must be necessary to the reasonable enjoyment of the dominant parcel). Indeed, Heritage does not dispute that an easement has been created by implication as to nine parking spaces on Heritage's property. Doc. #130 at 11. The Court referred to *Adams v. Deen*,⁷ in which the court distinguished the implied easement analysis from the express easement analysis. *No. 43288-9-II*, 2013 Wash. App. LEXIS 2650, 2013 WL 6044379, at *3-5 (Wash. Ct. App. Nov. 13, 2013). Prior to finding that an implied easement existed, the court held that no express easement had been created despite the parties' clear intent to create an express easement:

[A]lthough it is clear from the record that the Fialas intended on creating an express easement appurtenant benefitting the Deen parcel when they conveyed both parcels to the Pierces, no such easement [*11] was ever created: because a landowner cannot burden her own land with an easement benefitting herself, it follows that she cannot grant successive owners-in-interest to the same land an easement that is not, by law, grantable.

*2013 Wash. App. LEXIS 2650, [WL] at *4* (emphasis in original).

The O'Neils argue that *Adams* is distinguishable because the parties could not have had shared intent due to the passage of time between transfers of ownership in that case, and here, the easement was recorded only twenty-three days before ownership of 690 Keystone transferred to BHP. However, the *Adams* court determined that the easement was void when Fialas attempted to create the easement while transferring ownership of the property to the Pierces during a specific time period, in May 1989, not over a period of years. *2013 Wash. App. LEXIS 2650, [WL] at *1, 4*. The Fialas and Pierces clearly intended for the easement to transfer with the deed because the easements were expressly mentioned in the deed. *2013 Wash. App. LEXIS 2650, [WL] at *1*. As here, the court

determined that the express easement was void despite the fact that the parties intended for the easement to pass with transfer [*12] of the property on a specific date.⁸ The court went on to explain that if an express easement had been created, it would have been extinguished by merger due to subsequent common ownership, but the court's holding was based on the fact that the Fialas "never successfully created an express easement." *2013 Wash. App. LEXIS 2650, [WL] at *4*. The Court reasserts that it finds this reasoning persuasive, and concludes that the parties' intent in this case does not revive the void easement.

Based on the foregoing, the Court finds that even if the parties intended for the easement to be recorded after ownership passed to BHP, recordation of the easement prior to sale of the property rendered the easement void due to unity of ownership. The Court again notes that the O'Neils can present evidence and arguments that they have an implied easement right to access parking spaces on Heritage's property. However, the O'Neils' arguments regarding intent for the easement to become effective after sale of the property to BHP does not warrant reconsideration of the Court's determination that the express easement was void when created.

B. Evidence Regarding [*13] Ownership

The O'Neils' second argument is that Heritage never sufficiently demonstrated that unity of ownership invalidated the easement. This argument follows a string of persuasive California court of appeals cases discussing the merger doctrine. In *Leggio v. Haggerty*, the court found that for an easement to be extinguished by merger, "the owner should have a permanent and enduring estate, an estate in fee, in both the dominant and servient estate, not liable to be disjoined again by operation of law." *231 Cal. App. 2d 873, 42 Cal. Rptr. 400, 407 (Cal. Ct. App. 1965)*. The court elaborated that ownership "should be coextensive and equal in validity, quality, and all other circumstances of right. Accordingly, an easement is not extinguished under the doctrine of merger by the acquisition by the owner of the dominant or servient estate of title to only a fractional part of the other estate." *Id.* Referring to this language in *Leggio*, another court found that "the same principles should

⁷Although *Adams*—an unpublished decision of the Washington Court of Appeals—lacks precedential value, the Court finds it to be persuasive.

⁸Like Nevada, Washington contract law focuses on determining the intent of the parties. See *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262, 266-67 (Wash. 2005).

apply to the *creation* of easements." Beyer, 29 Cal. Rptr. 3d at 572-73 (emphasis in original). "The same policy is at issue whether the easement is created or extinguished: ownership of the underlying parcel makes the easement unnecessary. But where the 'owner' does not own legal title, we cannot say [*14] with certainty that the easement is unnecessary." Id. at 573.

A more recent case indicates that the requirement that an owner have a "permanent and enduring" estate in both properties in order to extinguish an easement refers not to how long the owner will retain ownership of the parcels, but rather to the type of estate that the owner claims to the parcels. The *Zanelli v. McGrath* court found:

The requirement that the ownership of the dominant and servient tenement be 'permanent and enduring' and 'coextensive and equal in validity' means that the unity of ownership must be of a fee simple absolute estate in both the dominant and servient tenements, and that the common ownership is of the entire dominant and servient tenement, not merely a fractional share. Thus, for example, where one person has fee simple absolute estate in either the dominant or servient tenement and a lesser estate in the other, such as a leasehold or life estate, the easement may only be suspended for the duration of the lesser estate, and is revived when the lesser estate terminates.

166 Cal. App. 4th 615, 82 Cal. Rptr. 3d 835, 845-46 (Cal. Ct. App. 2008). Reading *Leggio, Beyer, and Zanelli* in succession, the Court finds that the "permanent and enduring" language refers not to the length of time [*15] that an owner held certain properties in common ownership, but rather the type of estate the owner had in the properties.

The O'Neils argue that the common ownership was not permanent and enduring because "there was only a 23-day gap between" the recording of the easement and transfer of legal title of 690 Keystone to BHP. *Zanelli* refutes this argument. There is no dispute that prior to recording the easement, Heritage had full ownership of both parcels at issue. Indeed, the record includes a Preliminary Title Report for 690 Keystone prepared on April 12, 2006—two weeks after the easement was recorded and one week prior to sale of the property to BHP—which states that Heritage had a vested fee estate for 690 Keystone. Doc. #26-1 at 51-52. Thus, Heritage's ownership of 690 Keystone was permanent and enduring under *Zanelli*. However, the O'Neils' third argument, discussed below, contends that the BHP had

an equitable interest in the property when the easement was recorded. If true, this purported equitable interest could indicate that Heritage did not have a "permanent and enduring" stake in the property when the easement was recorded.

C. Equitable Interest When Easement Was Recorded

The [*16] O'Neils present two theories to support the argument that BHP had an equitable interest in the property when the easement was recorded. First, the O'Neils contend that there was a written agreement for the sale of 690 Keystone before the easement was recorded. Second, the O'Neils contend that even if the equitable interest was based on an oral agreement, BHP obtained an equitable interest by engaging in "significant pre-purchase expenditures and related development activities," which amounted to substantial detrimental reliance.

The O'Neils' argument regarding the existence of a written Purchase and Sale agreement prior to recordation of the easement rests on the affidavit of Alan Rabkin ("Rabkin"), currently general counsel and senior vice president of Heritage, and outside counsel to Heritage in 2004. Rabkin states that he was informed in 2004 that the bank "had entered into a Purchase and Sale Agreement" with BHP to sell a portion of the property that it owned on Keystone Street in Reno. Doc. #30, Ex. 10 ¶3. This is important because Nevada law provides that "when a contract for the sale of real property becomes binding upon the parties[,] [t]he purchaser is deemed to be the equitable [*17] owner of the land and the seller is considered to be the owner of the purchase price." Harrison v. Rice, 89 Nev. 180, 510 P.2d 633, 635 (Nev. 1973).

The O'Neils' argument that a purported written agreement in 2004 created an equitable interest in BHP's favor prior to recordation of the easement fails for three reasons. First, despite referring to Rabkin's affidavit stating that the parties agreed to the sale in 2004—though not stating whether such agreement was written or oral—the O'Neils have not produced said written agreement, nor have they alleged that it was lost or destroyed such that oral parol evidence would be admissible. See Khan v. Bakhsh, 306 P.3d 411, 413 (Nev. 2013) (finding that the plaintiffs "were entitled to present parol or other evidence to prove the existence and contents of the allegedly lost or destroyed" contract). Second, BHP partner Banks himself stated that "BHP never believed or contended that it held any

equitable interest in Heritage's property other than was specifically defined in the parties' agreement." Doc. #30, Ex. 13 ¶¶14. Third, equitable interest only transfers once a sale "becomes binding upon the parties." *Harrison, 510 P.2d at 635*. The affidavits of BHP's Banks and Heritage's Rabkin make clear that any sale agreement formed in 2004 was not binding because the sale was contingent [*18] on BHP's ability to obtain a special use permit from the city. Doc. #130, Ex. 10 ¶¶4-7; Doc. #130, Ex. 13 ¶¶3-8. The O'Neils have not produced more than a scintilla of evidence to indicate that the sale agreement was binding prior to transfer of ownership to BHP in April, 2006. The Court therefore finds that any purported 2004 sale agreement did not create an equitable interest in the property that undermined Heritage's full ownership of both properties.

The O'Neils next argue that "even if only an oral agreement existed, it is undisputed that there were significant pre-purchase expenditures and related development activities as well as direct negotiations with Starbucks which constituted substantial detrimental reliance by BHP which resulted in an equitable interest in 690 Keystone." Doc. #43 at 13. Nevada law provides that "[w]henver one party, confiding in the integrity and good faith of another, proceeds so far in the execution of a parol contract that he can have no adequate remedy unless the whole contract is specifically enforced, then equity requires such relief to be granted." *Schreiber v. Schreiber, 99 Nev. 453, 663 P.2d 1189, 1190 (Nev. 1983)* (quoting *Evans v. Lee, 12 Nev. 393 (1877)*). Thus, the O'Neils argue that the easement was not void when created because BHP obtained an equitable [*19] interest in 690 Keystone prior to the easement based on its expenditures developing the property prior to final sale.⁹ Specifically, these expenditures include more than \$100,000 in project costs billed to BHP, of which more than \$50,000 had already been paid by BHP to Dennis Banks Construction Co. by the end of 2005. Doc. #26, Solum Decl., ¶¶2-3.

This argument fails for two primary reasons. First, BHP

⁹The Court previously noted that Nevada law does not require the enforcement of an invalid contract on equitable grounds. Under Nevada law "[t]he mere refusal to perform a . . . void [agreement] may be a moral wrong, but it is in no sense a fraud in law or in equity." *Moore v. De Bernardi, 47 Nev. 33, 213 P. 1041, 1044 (Nev. 1923)*; see also *G.L. Mezzetta, Inc. v. City of Am. Canyon, 78 Cal. App. 4th 1087, 1095, 93 Cal. Rptr. 2d 292 (Cal. Ct. App. 2000)* (finding that the doctrine of estoppel "may [not] be invoked to enforce a void contract").

partner Banks stated in a declaration that "BHP never believed or contended that it held any equitable interest in Heritage's property other than was specifically defined in the parties' agreement." Doc. #30, Ex. 13 ¶14. Second, nothing in the record indicates that the O'Neils would have no adequate remedy if the Court determined that the express easement was void when created. The record shows that the City of Reno required that [*20] the 690 Keystone property have sixteen available parking spaces. Doc. #26, Leon Decl., Ex. B at 5. The 690 Keystone parcel includes seven parking spaces. *Id.*, O'Neil Decl., Ex. B. Both Heritage and BHP state that the original intent of the parties was to create an easement to provide nine parking spaces on Heritage's property for use by 690 Keystone to meet the City's demand. Doc. #130, Ex. 10 ¶¶6, 17; *id.*, Ex. 13 ¶¶8, 15. Both Heritage and BHP also note that a mistake appears to have occurred whereby the easement—which the Court has declared void—indicated that the 690 Keystone property was entitled to use of all parking spaces on Heritage's property. *Id.*, Ex. 10 ¶¶8, 11-12; *id.*, Ex. 13 ¶¶10-12.¹⁰ Heritage has acknowledged that the O'Neils are entitled to use of nine parking spots based on an implied easement, and has attempted to enter into agreements expressly allowing the O'Neils use of these nine parking spaces. Doc. #130 at 11; *id.*, Ex. 10 ¶¶16-18. Because the 690 Keystone property already has access to seven other parking spaces, use of nine of Heritage's parking spaces would meet the City's requirement. Thus, the O'Neils cannot establish that no adequate remedy is available unless [*21] the express easement is enforced because they would not lose the benefit of their pre-purchase expenditures if they have access to nine of Heritage's parking spaces. Accordingly, the Court finds that the O'Neils have not established an equitable interest in the property to undermine Heritage's common ownership of both parcels when the easement was recorded.

IV. Conclusion

The Court's previous Order granted summary judgment on Heritage's claim for declaratory judgment that the

¹⁰Heritage and BHP both indicate that the easement should have included a map of the two properties, on which the nine parking spaces intended to be included in the easement were circled. However, the easement was executed without the attached map or the particular spaces circled. It appears that the O'Neils are attempting to exploit this mistake by arguing that Heritage and BHP always intended for 690 Keystone to have access to the entire parking lot on the Heritage property.

express easement was void as a matter of law, and denied summary judgment on the O'Neils' argument that the express easement was valid. Doc. #42.¹¹ The O'Neils requested reconsideration of that Order based on the arguments addressed in detail in [*22] this Order. Based on the foregoing, the Court finds that (1) regardless of the parties' intent, the easement was void when recorded because Heritage had full ownership of both parcels; (2) Heritage had a permanent and enduring interest—a fee—in both properties as a matter of law when the easement was recorded, even though 690 Keystone would soon be transferred to BHP; and (3) equitable considerations do not warrant enforcing the express easement. Accordingly, the O'Neils' Motion to Reconsider is denied.

IT IS THEREFORE ORDERED that the O'Neils' Motion to Reconsider (Doc. #43) is DENIED.

IT IS FURTHER ORDERED that the parties shall file a joint pretrial order pursuant to Local Rules 16-3 and 16-4 within forty-five (45) days of the entry of this Order.

IT IS SO ORDERED.

DATED this 2nd day of November, 2015.

/s/ Larry R. Hicks

LARRY R. HICKS

UNITED STATES DISTRICT JUDGE

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¹¹The Court also denied summary judgment as to Heritage's quiet title claim because the parties had not presented arguments and evidence regarding the existence of an implied easement, and Heritage has since conceded that an implied easement exists for nine parking spaces on Heritage's property. Doc. #42 at 9.

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