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

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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.

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**RESPONDENT VANCOUVER HOSPITALITY PARTNERS, LLC's  
RESPONSIVE BRIEF**

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## **I. Introduction**

This case is a dispute over a Reciprocal Parking Easement involving a property where a card-lock oil and lubricant business is operated by Appellant Jubitz and an adjoining hotel. Respondent VHP is the owner and operator of the hotel property. Respondents Robert Holmstrom and Elizabeth Holmstrom were the original owners of both properties, and continue to own the oil company property, although the property is leased to Jubitz Corporation. Holmstrom and Jubitz are parties to a Purchase and Sale Agreement wherein Jubitz will purchase the oil company property. Neither Holmstrom nor the title company selected by Jubitz disclosed the existence of parking easements burdening the property to Jubitz as part of these transactions.

Jubitz brought a declaratory relief and quiet title action to terminate VHP's right to park on the property Jubitz is now leasing. Additional claims were filed against Holmstrom that do not involve VHP. VHP counterclaimed for declaratory relief, quiet title and reformation. VHP brought additional claims against Holmstrom, but these were dismissed without prejudice prior to the second phase of the multi-phase trial.

The trial court determined that the Reciprocal Parking Easement Agreements (“RPAs”) at issue were part of Appellant’s chain of title and could be reformed. Jubitz then filed this appeal.

**II. Response to Appellant’s Assignments of Error and Issues Pertaining Thereto**

1. The trial court correctly entered Conclusion of Law No. 4, stating that the RPAs were documents within the chain of title of the northern property. The RPAs included a description of the original parcel at a time when both Appellant’s and Respondent VHP’s parcels were in common ownership and the documents purported to burden and benefit both parcels. The names of the landholder was indexed, along with the legal description. The easements were within the chain of title of Appellant’s property.

2. The trial court correctly entered Conclusion of Law No 5, stating that because the documents regarding the easement were within the chain of title of the northern parcel, the documents gave constructive notice to Jubitz of the existence of the parking easement.

3. The trial court correctly entered Conclusion of Law No. 8, stating that because the RPAs were within the recorded chain of title for the northern property at the time Appellant leased and executed a purchase and sale agreement for their property, Appellant had constructive notice of the terms of the RPAs. Therefore, the recorded easement may be reformed to include the correct and intended legal descriptions.

4. The trial court correctly entered Conclusion of Law No. 6, which states that the RPAs were not void because one of the parties, Salmon Creek Lodging, did not exist at the time the documents were recorded. The corporation ratified the actions of its promoters after its creation.

### **III. Standard of review**

Jubitz has not appealed any of the trial court's findings of fact. As a result, they are verities on appeal. See, e.g., *State v Brockob*, 159 Wn.2d 311, 343 (2006).

Conclusions of law are reviewed *de novo*. See, e.g., *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 880 (2003). In the appellate court's review of the easement at issue, the intention of the original parties to the easement is a question of fact "and the legal consequence of that intent is a question of law." *Id.*

#### **IV. Statement of the Case**

This matter concerns a dispute over a reciprocal parking easement intended to benefit a hotel and a property containing a card-lock oil business. The oil business has been leased to Appellant Jubitz Corporation, who also has a contract to purchase the real property from Defendants Robert and Elizabeth Holmstrom (“Holmstrom”). CP 210, Finding No. 11. Although the hotel has used the parking easement on the card-lock oil business property for a number of years, CP 210, Finding No. 7, in 2016, Jubitz denied the right of the hotel to utilize parking spaces on the property being leased to Jubitz; disputed the validity of the parking easement; and towed cars of hotel guests that have used the parking easement. CP 210, Finding No. 14.

In 1997, Holmstrom was the owner of a parcel of real property located in the Salmon Creek area of Clark County Washington (the “Holmstrom Parcel”). CP 210, Finding No. 1. Holmstrom, along with David Heald and HMG Lodging Management, decided to develop the southern portion of the Holmstrom Parcel into a hotel. CP 210, Finding No. 2, as amended by CP 215. The portion of the Holmstrom Parcel that was developed into the hotel will hereinafter be referred to as the “Hotel Property”. The northern portion of the Holmstrom Parcel contained a card-lock oil company business, known as Vancouver Oil. The northern

portion of the Holmstrom Parcel that contained the oil business will hereinafter be referred to as the “Vancouver Oil Property”. CP 210, Finding No. 2, as amended by CP 215.

In 1995, Holmstrom and a neighbor initiated a boundary line adjustment process with the County. At the time, Krenzler Corporation owned property to the west of the Holmstrom Parcel, designated as Tax Lot 1/13 and 2/13. The Holmstrom Property was also known as Tax Lot 91. Krenzler and Holmstrom requested that Tax lots 1/13 and 2/13 be combined into one lot, while Holmstrom requested that all boundaries be moved so that Lot 91 was divided into two tax lots, 91 and 2/13. The end result was that Krenzler started out with two lots and ended up with one, while Holmstrom started out with one lot, which was then divided into two. Lot 2/13 roughly corresponds to the Hotel Property, while Tax Lot 91 is the Vancouver Oil Property. CP 210, Finding No. 2 as amended by CP 215, and Exhibit 21.

Holmstrom and his partners applied to Clark County to develop the hotel. The Hotel Property was relatively small and Holmstrom and his partners noted on the application for the development that off-site parking would be included. The County also determined that additional parking off- site was needed for approval. The County required as a condition of

approval eleven off-site parking spaces. CP 210, Finding No. 3, as amended by CP 215, and Exhibit 23.

Holmstrom and his partners originally intended for the parking to be located on the property to the west of the Hotel Property, owned by Krenzler Corporation. Report of Proceedings Volume 3, Page 327, lines 3-8. Krenzler Corporation was a party to the 1995 boundary adjustment. Keith Krenzler even wrote a letter indicating preliminary agreement with a joint parking agreement. Exhibit 71, page 392.

The negotiations with Krenzler Corporation for a reciprocal parking easement on the Krenzler Property failed, and Holmstrom and his partners were required to look elsewhere for additional parking. 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. CP 210, Finding No. 2. To that end, a Reciprocal Parking Easement Agreement was created and recorded on July 8, 1999. Exhibit 8. This Reciprocal Parking Agreement was later amended to include a truck berth. The Amended Reciprocal Parking Easement Agreement was recorded on August 6, 1999. Exhibit 9. The documents are hereinafter collectively referred to as “the RPAs”.

The County approved the construction of the hotel. Exhibit 72 is the final site plan for the Hotel Property, showing the intended access to the “adjacent property for reciprocal parking and emergency vehicle access.” This access is on the North side of the Hotel Property, providing access to the Vancouver Oil Property.

Holmstrom and his partners formed an LLC, Salmon Creek Lodging LLC (“SCL”) on August 24, 1999. Exhibit 10. The Hotel Property was granted by Holmstrom to SCL. CP 210, Finding No. 5.

The Hotel Property was granted by SCL to Vancouver Hospitality Partners in April of 2007. CP 210, Finding No. 10. The lender’s title policy issued as part of that transaction disclosed the RPAs. Exhibit 74. VHP was also informed during the negotiations for the property about their right to allow their guests to park on the Vancouver Oil Property, and the existence of these parking places was material to their decision to purchase the Hotel Property. Report of Proceedings, Volume 3, Testimony of Pal Jandial, Page 393, lines 15-25, Page 394, lines 1-3. Without the parking spaces, operation of the hotel is not viable, since there are more rooms than there are parking spaces on the Hotel Property. VHP used the parking spaces on the Vancouver Oil Property without incident, until spring of 2016. CP 210, Finding No. 14.

In 2012, Holmstrom entered a Lease and a Purchase Agreement with Jubitz Corporation for the Vancouver Oil property. Holmstrom is still the fee owner of the Vancouver Oil Property, but under the Lease and Purchase Agreement, Jubitz may become the owner of the Vancouver Oil Property in 2023. However, Jubitz now operates the card-lock fueling facility located on the Vancouver Oil Property. CP 210, Finding No. 11.

In 2015-2016, Jubitz began objecting to hotel guests parking on the Vancouver Oil Property, and began towing hotel guests' cars. Jubitz then learned about the existence of the RPAs. CP 210, Finding No. 11.

Jubitz is correct that both RPAs contain incorrect legal descriptions. Exhibit "B" to both agreements was purported to be the legal description of the Hotel Property. However, the legal description attached as Exhibit "B" describes the Krenzler Property to the west. Exhibit "A" was purported to describe the Vancouver Oil Property, since the owner is Holmstrom, who retained the Vancouver Oil Property after the Hotel Property was transferred to SCL. Instead, Exhibit "A" is the undivided property owned by Holmstrom that contains the Hotel Property and the Vancouver Oil Property. CP 210, Finding No. 4. Nevertheless, the Vancouver Oil Property is part of the legal description in Exhibit "A" of the RPAs.

## **V. Argument**

### **A. Appellant's First assignment of error: Trial Court**

#### **Conclusion of Law No. 4 (Chain of title).**

Appellant is correct that a bona fide purchaser, without actual or constructive notice of an easement takes title free from the burden of the easement. However, the evidence presented at trial provides that Jubitz had constructive notice of the RPAs. The RPAs were within the chain of title of the Vancouver Oil Property.

It is undisputed that the legal description in Exhibit "A" to the RPAs encompasses the Vancouver Oil Property. While Appellant refers to the property described in Exhibit "A" as "a former parcel that no longer existed", this statement is simply incorrect. Of course the parcel existed, and consisted of both the Hotel Property and the Vancouver Oil Property. While separate legal descriptions had been created for both parcels, 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.

The rules for constructive notice are well established in the State of Washington and, under the circumstances of this case, Jubitz had constructive notice of the Reciprocal Parking Easement Agreements.

The recording of an instrument affecting real property is constructive notice to all those who later acquire an interest in the property. *Sheppard v. Holmes*, 185 Wn.App. 730, 741 (2014).

The Auditor creates an eight column index for recorded documents. RCW 65.04.050. The first two columns contain the identity of the “grantor” and “grantee”. The seventh column contains the “description of property” and the eighth column contains the “tax parcel or account number”. There is a direct and an inverted index. The indexes relevant to the property in this case were introduced as Exhibits 92, 93, 94, 95, 96, 97, 98.

The learned professor, William B. Stoebuck, describes the process of searching the index. *Washington Practice Series*, Volume 18, Second Edition, Chapter 14. In his description, a person would begin with the deeds putting the Holmstroms into title. The person would then run the Holmstroms’ name in the direct index, examining each instrument executed by the Holmstroms that transferred an interest in the northern parcel. An instrument that transferred an interest in land completely separate from the northern parcel would not be considered in the examination. Likewise 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

Scott Hogan of Clark County Title, a witness for VHP, testified as to the process of searching the index:

When a document is recorded at the auditor's office, meaning filed for record, the auditor indexes that document by a number of ways. The data is recorded, the grantor name, grantee name, auditor's file number of the document, and a brief legal description of the property that the document concerns.

Report of Proceedings, Volume 2 at p 249, lines 18-23.

Mr. Hogan personally searched the Clark County Auditor's index for the RPEs. Mr. Hogan testified that: "I entered the names Robert Holmstrom and Elizabeth Holmstrom into the grantor/grantee search parameters . . . and a long list of recorded documents resulted from my search." *Id.* at 253, lines 8-12. He was "able to discern from that the deed by which Holmstrom took title to the –both the Jubitz property and the hotel property. *Id.* at lines 19-21. Then, using the term "Robert B. Holmstrom" and "Elizabeth Holmstrom", Mr. Hogan searched the grantor index. Exhibit 98 was the results of those searches. The RPAs appeared in that result. See Page 4 and Page 5 of Exhibit 98, Documents 3126970 and 3138611.

Upon finding the RPAs in the grantor index, Mr. Hogan retrieved an image of the documents and examined them. Report of Proceedings Volume 2, Page 260, lines 21-21. The purpose of this examination was to “look at the legal description of the property and to look at the terms of the document to make a determination as to whether it does effect the title to the property in question. Report of Proceedings, Volume 2, Pages 260-261, lines 23-25, 1. From his review of the index and the RPAs, Mr. Hogan concluded that they were within the chain of title for the Vancouver Oil Property. Report of Proceedings , Volume 2, Page 261, lines 7-11.

When real property is described, the index and the recorded document impart notice as to matters within the “chain of title”. *Koch v. Swanson*, 4 Wn.App. 456, 459 (1971). The definition of chain of title is as follows:

[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 (1919).

An imperfect or inaccurate index is sufficient to impart notice if the contents are sufficient to lead a prudent person to examine the record.

*Id.* at 75-76. Two cases are illustrative. *Malbon v. Grow*, 15 Wash. 301

(1896), involved a mortgage priority dispute. The index of the first mortgage contained an ambiguous legal description which could have referred to any of potentially four parcels of property. The Supreme Court found that the index furnished information to “at least suggest” the prior mortgage. *Id.* at 304-305. The Court ruled that the index was sufficient to impart notice of the prior mortgage. The Court found support for its decision in the rule that “greater includes the less”. *Id.* at 305.

In the instant case, the legal description attached as Exhibit “A” to the Reciprocal Parking Easement Agreements, purporting to be the Vancouver Oil Property, may have included other property besides the northern parcel, but the legal description certainly did include the northern parcel, i.e. the “greater includes the less”.

In *Jones*, the claim was that the legal description in the index was insufficient to impart notice. The legal description in the index stated “part of Lots 5 and 6, Block 56, Kilbourne’s Supplemental Lake Union”. The property at issue in *Jones* was part of Lot 6. The Supreme Court found the index and recorded documents sufficient to impart notice.

The recorded RPAs expressly stated that a reciprocal parking easement existed. The RPAs were recorded. The Oil Company Property, now leased by Jubitz, was part of the legal description in the recorded

agreements. A reasonably diligent inquiry would have revealed the parking easement.

Jubitz cites *Berg v. Ting*, 125 Wn.2d 544 (1995) for their argument that: the RPAs do not satisfy the statute of frauds (RCW 19.36.010); are thereby void; and therefore are not part of the chain of title. Jubitz is in error in all of its conclusions.

The *Berg* Court set out the established rule that a legal description must be sufficiently definite for location without resort to oral testimony. *Id* at 551. In *Berg*, the subject easement described the servient estate with reference to the contents of a non-existent document, an approved plat, which did not in fact come into existence until four years later. *Id*. The description of the servient estate failed to meet the statute of frauds requirements because it could not be located without parole evidence. In fact the easement could not be located at all when the easement was executed because no one knew what the plat would eventually contain. In contrast, the RPAs contain a full and complete legal description of the servient estates; since the RPAs included reciprocal parking rights both described parcels were servient estates. Exhibit A of the RPAs contained the following legal description, which included both the Hotel Property and the Vancouver Oil Property:

“The West one half of the Southwest one quarter of the Northeast one quarter of the Northwest one quarter of Section 26, Township 3 North, Range 1 East of the Willamette Meridian, Clark County, Washington.”

This is the most basic of legal descriptions and clearly satisfies the statute of frauds. This legal description included the Vancouver Oil Property.

The RPAs were within the chain of title.

The Court in *Berg* also stated that even if a legal description does not meet the requirements of the statute of frauds, the legal description can be reformed to correct a scrivener’s error or a mutual mistake that leads to a deficient description. *Id* at 554. As set out above, the legal description of the RPAs did comply with the statute of frauds. However under *Berg*, the legal description in the RPAs would have still been subject to reformation even if the legal descriptions were insufficient. The Court in *Berg* did not allow reformation because there was no scrivener’s error nor mutual mistake; the parties intended to use an insufficient legal description. *Id* at 554-555. In contrast, the trial court in the present case determined that there was a mutual mistake. CP 210, Conclusion of Law No. 8. The issue of reformation is more fully addressed later in this brief.

Appellant’s real issue appears to be that the title company they selected did not find the RPAs, although they were in the chain of title.

Evidence was introduced that showed that a competent person researching

title to the Vancouver Oil property would have discovered the boundary line adjustment, and would have discovered that the Vancouver Oil Property was once part of a larger parcel. See Exception 16 to the Limited Liability Certificate attached to the Declaration of Ariel Marinetti, CP 39. The competent researcher would then have also discovered the RPAs. See Exceptions 20 and 21. The fact that Jubitz's title company did not make this discovery gives Jubitz a claim under their title insurance, not an argument that the Reciprocal Parking Easement is not part of their chain of title. Holmstrom commissioned a title report as part of the transaction, although it was not used. In that report, Clark County Title Company found the RPAs. Exhibit 5, Page 8.

Under Jubitz's argument, any time a property owner wanted to eliminate an unwanted easement, all he would have to do is short plat or subdivide his property. That is not Washington law, and Jubitz cites no authority that it is.

Jubitz's argument also makes little sense in that other easements and encumbrances created before the 1995 Boundary Line Adjustment are reflected in Appellant's chain of title. Exhibit 31 is the First American Commitment for Title Insurance. That document contains several encumbrances that predated the boundary line adjustment and therefore,

according to Appellant's reasoning, encumber parcels that "no longer exist." See Schedule B, exceptions 5, 6 and 7.

**Appellants Second Assignment of Error. Trial Court  
Conclusion of Law No. 5 (Inquiry Notice)**

The trial court correctly entered Conclusion of Law No 5, stating that because the documents regarding the easement were within the chain of title of the northern parcel, the documents gave constructive notice to Jubitz of the existence of the parking easement and that there was sufficient information included in the RPAs themselves that would have provided inquiry notice that would have led any purchaser to the true state of affairs.

"The general rule is that a person purchasing real property may rely on the record title to the property, in the absence of knowledge of title in another, or of facts sufficient to put him on inquiry." *Olson v. Trippel*, 77 Wn. App. 545, 550-551 (1995). However, "[o]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all facts which reasonable inquiry would disclose. . ." *Hawkes v. Hoffman*, 56 Wash. 120 (1909). A duty of inquiry arises "when a purchaser has information from whatever source derived, which would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry." *Olson* at 551.

In the *Olson* case, the issue was whether the purchasers were bound to discover matters alleged in four affidavits submitted at trial. The court determined that inquiry was not triggered because nothing in the public record would have caused a reasonably prudent person to inquire beyond the record.

The instant case is distinguishable because recording of the RPAs within the chain of title of the Hotel Property and the Oil Company Property created constructive notice. It is proper, therefore, to consider what a reasonable inquiry would have disclosed in this case. Despite the incorrect legal descriptions, a review of the RPAs themselves would have made clear that the reciprocal parking easement benefitted and burdened the Hotel Property and the Oil Company Property.

The RPAs (Exhibits 8 and 9) refer to Holmstrom as the owner of one property and Salmon Creek Lodging as owner of the other. There is no mention made of Krenzler, the owner of the adjoining property incorrectly described in the RPAs. Appellant cites *Koch v. Swanson*, 4 Wn.App. 456 (1971) for the proposition that Appellant was not required to look beyond its own chain of title.

The *Koch* case involved a mortgage that contained an incorrect tract number, Tract 125, rather than 124. The court found that had the

index been searched, no document would have been found affecting tract 124. In other words, because of the incorrect legal description, the mortgage was completely outside the chain of title.

The instant case is distinguishable because, as previously discussed, the RPAs included a description that encompassed the Oil Company Property and therefore were within its chain of title, they just included additional property. Therefore, Jubitz “had or should have had, knowledge of some fact or circumstance which would raise a duty in inquire.” *Paganelli v Swendsen*, 50 Wn.2d 304 (1957). At the very least, review of the RPAs would have indicated that Jubitz’s seller, Holmstrom, had granted a parking easement to what appears to be, from the name of the other party, a hotel. The Krenzler property does not contain a hotel. A careful review would have also disclosed that the Oil Company Property was part of the legal description attached as Exhibit “A”.

Jubitz argues that they did inquire about the state of the title, and that they received both a title report and “unequivocal warranties” from Holmstrom that there was no encumbrance, such as the RPAs. However, it was Jubitz’s title company who failed to find the indexed RPAs in the first place. The negligence of the title company does not vitiate the fact that there was constructive notice through the index of the RPAs and that a

review of the RPAs would have revealed the true state of affairs.

Similarly, Holmstrom's failure to disclose also does not affect the issue of notice. The fact that the RPAs were recorded, were findable using the County index, and were clear on their face regarding the existence of the easement is the issue. Under the relevant case law, Appellant is still "deemed to have notice of all facts which reasonable inquiry would disclose. . ." *Hawkes v. Hoffman*, 56 Wn. 120, 126 (Wash. 1909) .

.The RPAs specifically stated that Holmstrom was granting a perpetual easement for parking on real property, the legal description of which included both the Vancouver Oil Property and the Hotel Property. Exhibits 8 and 9.. Any person purchasing the Vancouver Oil Property, who was concerned about parking by the Hotel guests, would have conducted a reasonable inquiry, which would have included at a minimum contacting both Holmstrom and VHP about the parking easement. A reasonable inquiry would have most certainly disclosed the existence and the intended on-going validity of the reciprocal parking easement between the Hotel Property onto the Vancouver Oil Property.

**Appellant's Third Assignment of Error: Trial Court  
Conclusion of Law No. 5 (Inquiry Notice)**

The trial court correctly entered Conclusion of Law No. 8, stating that because the RPAs were within the recorded chain of title for the

northern property at the time Jubitz leased and entered an agreement to purchase the oil company business, Jubitz had constructive notice of the terms of the document. Therefore, the recorded easement may be reformed to include the correct and intended legal descriptions.

Jubitz relies on *Howell v. Inland Empire Paper Co.*, 28 Wn. App. 494, 494 (1981) for their argument that the RPAs do not comply with the statute of frauds, and therefore cannot be reformed. That case is distinguishable because there was no argument in that case that the faulty legal description were the result of a mutual mistake or scrivener's error.

*Williams v. Fulton*, 30 Wn.App. 173 (1981) involved the absence of precise legal descriptions in an earnest money agreement. The parties agreed that the agreement was insufficient under the statute of frauds, but the appellant argued that the insufficiency was due to a mutual mistake and asked for reformation. The court made clear that while a legal description may be reformed in the event of a mutual mistake "a mutual mistake occurs only if the intentions of the parties were identical at the time of the transaction, and the written agreement did not express those intentions." *Id.* at 177.

The *Williams* court discussed the *Howell* case in a footnote, stating:

The statement in *Howell* is undoubtedly sufficient to satisfy the fact pattern of that case. We believe, however, that it should not be construed so as to preclude reformation under an appropriate factual setting.

*Williams* at 176, fn 1.

*Snyder v. Peterson*, 62 Wash.App. 522 (1991), concerned reformation of a deed wherein the legal description omitted the section, township, range and meridian as a result of a clerical error on the part of the attorney who drafted the deed. The trial court found that the deed could be reformed under the doctrine of mutual mistake because the error was the result of a scrivener's error.

The court held that while the general rule was that a deed containing an inadequate legal description was not subject to reformation, reformation is not precluded "under an appropriate factual setting." *Snyder* at 525-526. "An 'appropriate factual setting' occurs when the deficiency is due either to a scrivener's error or a mutual mistake." *Id.* at 526, internal citations omitted.

"A scrivener's error occurs when the intention of the parties is identical at the time of the transaction but the written agreement errs in expressing that intention." *Reynolds v. Farmers Ins. Co. of Washington*, 90 Wash App. 880, 885 (1998).

The attachment of the incorrect legal descriptions in the instant case was the result of a scrivener's error. Jerry Olson testified that his engineering firm received from the representative of the parties who were developing the hotel "a transmittal cover sheet saying here's the reciprocal easement, the acknowledgments, and the legal descriptions." Report of Proceedings, Volume 1, Page 130, lines 3-5. The representative was David Heald. Report of Proceedings, Volume 1, Page 133, lines 6-14.

Mr. Holmstrom confirmed that it was David Heald that delivered the legal descriptions, and that they were erroneous. Report of Proceedings, Volume 3, Page 328, lines 11-20.

In determining the intentions of the parties to a contract, a court considers:

[T]he contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

*Berg v. Hudesman*, 115 Wash. 2d 657, 667 (1990).

In the instant case, there is ample evidence of the intention of the parties to the RPAs.

At the time of the recording of the RPAs, Holmstrom was the owner of the Hotel Property and the Vancouver Oil Property, Report of

Proceedings, Volume 3, Page 328, lines 5-6, Mr. Holmstrom testified that additional parking was needed to develop the Hotel Property. Report of Proceedings, Volume 3, Page 326, lines 14-19. Mr. Holmstrom was also a member of Salmon Creek Lodging LLC.

Mr. Holmstrom initially looked at the neighboring property owned by Krenzler as a location for the needed parking spaces. Report of Proceedings, Volume 3, Page 327, lines 3-8. Ultimately, a decision was made “to utilize the Vancouver Oil property.” Report of Proceedings, Page 327, line 10. He further testified that the purpose of the RPAs was to provide the additional parking that was required by the county to develop the hotel and that the parking was to be located on the Vancouver Oil Property (also referred to by him as the headquarters property) and the Hotel Property. Report of Proceedings, Page 327-328, lines 17-25 and 1 and Report of Proceedings, Volume 3, Page 328, lines 8-10. Report of Proceedings, Volume 3, Page 345, lines 14-22.

In addition to showing the intent of Mr. Holmstrom and, through him, Salmon Creek Lodging, these facts are also significant evidence that the attachment of the incorrect legal descriptions was a mutual mistake or scrivener’s error. 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.

Mr. Olson also testified as to the intent of the parties. Olson was the engineering firm involved in the boundary line adjustment between Holmstrom and the neighboring property owner, Krenzler, and was also involved in the development of the hotel. He testified as to the parking easement that:

[A]t the beginning it was going to be on Krenzler's property. And then when Krenzler couldn't or didn't want to do it, we found another way of making it happen, and we told Mr. Holmstrom that the best place would be the spaces on his property” .

Report of Proceedings, Volume 1, Page 129, lines 3-7. Further:

Q. And during the course of all of your work on these two parcels, have you seen any indication that this parking easement was intended to serve any parcels other than Vancouver Oil and the hotel.

A. No, that was the intent

Report of Proceedings , Volume 1, Page 137, lines 19-23.

In accordance with that intent, Mr. Holmstrom testified that after the hotel was developed on the Hotel Property, the hotel utilized spaces on the Vancouver Oil Property to park and vice-versa. Report of

Proceedings, Volume 331, Lines 1-6; CP 210, Findings No. 7 and 8.

Upon discovery of the erroneous legal description, Mr. Holmstrom recorded a correction of easement with the correct legal descriptions, “so that it represented the true intent of putting the easement together.”

Report of Proceedings, Volume 3, Page 340, lines 7-12. Finally, Mr. Jandial of Vancouver Hospitality Partners testified that when he was viewing the Hotel Property to determine if he wanted to purchase it, he was told that there was additional parking on the Oil Company Property that could be utilized by the hotel. Report of Proceedings, Volume 3, Page 393, lines 15-24.

In terms of the factors to be considered by the court in determining intent provided in the *Berg* case, the objective of the RPAs was to create a required reciprocal parking agreement. This was not merely for show to comply with County requirements; the hotel parking is inadequate without the RPAs. The subsequent acts and conduct of the parties is that SCL and their successor in interest, VHP, used the reciprocal parking. Holmstrom made no objection, and still acknowledges the validity of the RPAs. As for the reasonableness of the respective interpretations, if the incorrect legal descriptions were not a scrivener’s error and/or mutual mistake, then the only other explanation is that the parties intended to record a document

granting an easement on property neither of them owned and leave the hotel without adequate parking. This ridiculous conclusion is not supported by the County file or the behavior of the parties in using the Reciprocal Parking Easement after the hotel opened. It makes no sense to argue that the use of the improper legal descriptions could have been anything other than a mistake.

All of the testimony, including the testimony regarding the parties to the RPAs' actions after closing, makes it clear that the intent of the parties was not accurately reflected by the RPAs, as a result of the erroneous attachment of the incorrect legal descriptions. Under the rule announced by the court in *Snyder*, this is an appropriate factual scenario for reformation.

Jubitz also makes the argument that since Holmstrom owned both the Hotel Property and the Vancouver Oil Property at the time the RPAs were executed, the RPAs are void because a party cannot have an easement in his own property.

This merger argument was not raised at the trial. Jubitz raised a merger argument in their response to Holmstrom's Motion for Summary Judgment. Jubitz's notice of appeal does not designate the Summary Judgment order. Under RAP 2.4(b), an appellant does not need to

designate every ruling in its notice of appeal if "(1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review."

"Our Supreme Court has interpreted the term 'prejudicially affects' to turn on whether the order designated in the notice of appeal would have occurred absent the other order." *Cox v. Kroger Co.*, 409 P.3d 1191, 1197-1198. (Wash. Ct. App. 2018). Here, Jubitz's argument was made in their response to Holmstrom's Motion for Summary Judgment. See CP 47. The Motion for Summary Judgment was ultimately denied. The matter then proceeded to trial, where Jubitz would have been free to make their merger argument again. They did not do so. The issues in the judgment and the summary judgment are not "so entwined that to resolve the order appealed, the court must consider the order not appealed." *Id.* at 1198.

Even if this argument can be raised in appeal, it lacks merit. In support of this argument, Jubitz cites *Coast Storage Company v. Schwartz*, 55 Wn.2d 848 (1960). In that case, a party acquired both parcels AFTER creation of the easement, not before. The court held that in these

circumstances, under the doctrine of merger, the easement was extinguished.

The instant case is distinguishable on two grounds. One, Holmstrom did not acquire the parcels after the creation of the easement, but owned both parcels before the creation of the easement. Second, Holmstrom did not convey the easement to himself, but to an LLC, Salmon Creek Lodging.

When the burdens and benefits [of a covenant or servitude] are united in a single person, or group of persons, the servitude ceases to serve any function. Because no one else has an interest in enforcing the servitude, the servitude terminates.

*Schlager v. Bellport*, 118 Wn. App. 536, 539 (Wash. Ct. App. 2003).

Here, the reciprocal easements were never united in a “single person, or group of persons”, since the grant was to SCL

While SCL did not yet own the Hotel Property, in *Roggow v. Hagerty*, 27 Wn. App. 908 (1980), the court held that:

When an instrument purports to create an easement in favor of a grantee to facilitate some other parcel of land which the grantee does not presently own but subsequently acquires, the easement is an easement in gross until the land is acquired, at which time it becomes an easement appurtenant.

*Id.* at 911

Further, there are exceptions to the doctrine of merger.

[T]he courts will not compel a merger of estates where the party in whom the two interests are vested does not intend such a merger to take place, or where it would be inimical to the interest of the party in whom the several estates have united, nor will they recognize a claim of merger where to do so would prejudice the rights of innocent third persons.

*Radovich v. Nazhat*, 104 Wn. App. 800, 805 (Wash. Ct. App. 2001).

In the instant case, the record is clear that Holmstrom did not intend a merger, since the RPAs were vital to the operation of the hotel. Also, in *Radovich*, the court determined that the easement was not intended to merge because it was recreated by subsequent conveyances.

Citing 5 RESTATEMENT OF PROPERTY §497A the court held that:

Such a new creation may result, as in other cases of severance, from an express stipulation in the conveyance by which the severance is made or from the implications of the circumstances of the severance.

*Radovich v. Nazhat*, 104 Wn. App. 800, 805 (Wash. Ct. App. 2001).

Mere days after recording the second RPA, Holmstrom granted the Hotel Property to SCL, in two separate deeds. The deeds were introduced as part of the summary judgment motion where Jubitz raised the merger argument it is making now. See CP 43, Declaration of Denise J. Lukins in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of Holmstrom's Motion for Dismissal of Plaintiff's Claims, Exhibit "K". The Deed recorded August 30, 1999 makes reference in the

legal description to the Reciprocal Parking Easement Agreement, and make clear that the grant of the property is “subject to” the RPAs.

In *Radovich*, although the two properties affected by the easement in question came into common ownership, when the properties were severed and one was conveyed to a separate party, the court found that the deeds “clearly stated that it conveyed an easement, stated the purpose and scope of the easement, and gave a legal description of the servient estate” *Id.* at 806. The court found this was sufficient to revive the easement.

Similarly, the conveyance of the hotel property with reference to the easement in this case revives the easement, even if the court determines that a merger took place.

As a practical matter, parties reserve easements all the time on property they intend to convey. Jubitz’s argument that easements created prior to conveyance while properties are still in common ownership are void is not supported by Washington law.

Jubitz goes on to argue that “reformation may not be used to create an entirely new easement”, as they claim VHP and Holmstrom are seeking to do. Appellant’s Opening Brief, Page 23. They cite the case of *Weyerhaeuser Timber Co. v. Skaglund*, 16 Wn.2d 29, 32 (1942) for the

proposition that “[c]ourts of equity may not make new contracts for the parties to an action.”

In the *Weyerhaeuser* case, the court reformed a right of way deed to give access over lands not described in the original deed, but also required payment of a fee to carry logs over the right of way and retained jurisdiction for the purpose of taking an accounting of timber. The court found that the payment of the fee and the retention of jurisdiction “amounted to the making of a new contract between the parties.” *Id.* at 32. The court held that “[t]he only function of the court, in considering the remedial right of reformation, is to express the agreement which the parties desired to put in writing.” *Id.* This is exactly the purpose of reformation in the instant case – to reflect that actual intentions of the parties.

Appellants also cite *Maxwell v Maxwell*, 12 Wn.2d 589 (1942), wherein the court refused to allow reformation because the legal description subject to the request for reformation was too vague and indefinite. However, in that case, the parties disagreed as to the extent of the land the deed was intended to cover. *Id.* at 590. Because of this lack of agreement, the court was not able to determine whether the intention of the parties was identical, holding that:

The evidence as to the agreement the parties intended to make is conflicting. That is not sufficient. Reformation is a proper remedy where the parties have reached definite and explicit agreement, understood in the same sense by both, but by their mutual or common mistake, the written contract fails to express that agreement. . .

*Id.* at 593. No such conflict exists in the instant case.

Jubitz also cites *Biles-Coleman Etc. v. Lesamiz*, 49 Wn. 2d 436 (Wash. 1956), for their argument that, as subsequent purchasers, reformation cannot impact their rights. In *Biles-Coleman*, a deed granted by the Hendersons to a lumber company did not contain the timber rights for a specific 560 acre tract of land. After the sale of the 560 acres by the Hendersons to a third party, the lumber company attempted to reform the deed to include the additional tract, alleging that a mutual mistake had occurred.

The court examined the chain of title for the disputed tract. That chain of title reflected that the Hendersons were still in title to both the acreage and the timber rights. The tract was completely excluded from the recorded deed to the lumber company. Under those circumstances, the court determined that the recorded deed did not establish notice of such a mistake and therefore, the “status of the record was tantamount to a failure to record a conveyance.” *Id.* at 438.

The significant difference between *Biles-Coleman* and the instant case is that an examination of the indexes for the deed in the *Biles-Coleman* case would not have revealed any grant, and the lumber company deed itself did not include any description of the disputed property; it was simply excluded altogether. This is distinguishable from the instant case, since a reasonable examination of the indexes in this matter would have revealed the RPAs, and the Oil Company Property is described in the RPAs.

**Appellants Fourth Assignment of Error: Trial Court Conclusion of Law No. 6 (Ratification)**

The trial court correctly entered Conclusion of Law No. 6, which states that the RPAs were not void because Salmon Creek Lodging did not exist at the time the documents were recorded. The corporation ratified the actions of its promoters after its creation.

Jubitz argues that since Salmon Creek Lodging did not exist at the time the RPAs were executed, and because it never owned the Krenzler Parcel, the RPAs are invalid. There can be no dispute that the parties to the RPAs did not intend to describe the Krenzler Parcel, and the inclusion of that legal description was a scrivener's error.

It is correct that Salmon Creek Lodging was not yet formed when the RPAs were executed. However, Washington law, including the case cited by Jubitz, is clear that this is not a basis to void the RPAs.

In *In re Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet*, 132 Wash.App. 903 (2006), a deed was executed by the Jordans in 1983 conveying real property to a corporation known as Ocean Shores Park. The Jordans were also shareholders of Ocean Shores Park, along with Rawson-Sweet. However, unbeknownst to the Jordans, Rawson-Sweet did not file the articles of incorporation for Ocean Shores Park until nearly ten years later. The Jordans later attempted to argue that the conveyance to Ocean Shores Park, Inc. was invalid because “they intended to pass title immediately to OSPI when they executed the deed in 1982” and because OSPI did not yet exist, “the transfer was not fulfilled and their intent to transfer ‘died in utero and the conveyance died along with it.’” *Id.* at 914.

The court disagreed, finding that “[a] deed to a corporation made before its organization is valid between the parties” and that “[t]itle passes when the corporation is legally incorporated.” *Id.* at 914-915.

Although SCL was an LLC, the same analysis applies. In the instant case, the RPAs were recorded a few weeks prior to the formation

of SCL. The parties to the RPAs, Holmstrom and Salmon Creek Lodging, recognized the easements by their conduct. Title passed when SCL was formed, and the use of the Reciprocal Easement commenced when the hotel was completed.

There is no validity to the argument that the RPEs were void because SCL was not formed until a few weeks after the Agreements were executed. The trial court ruled that SCL ratified the RPAs upon formation, thereby binding the original parties and their successors. CP 210, Conclusion No. 6.

#### **VI. Attorney Fees and Costs**

Jubitz requests an award of its costs and fees incurred in this appeal, “pursuant to the terms of the RPAs. Lease and Purchase Agreement”. VHP is not a party to the Lease or the Purchase Agreement.

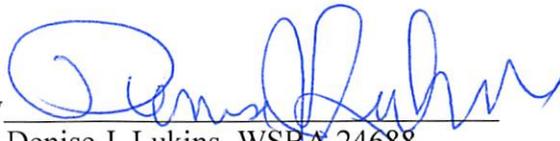
The RPAs do contain an attorney fees provision for their interpretation and enforcement of their terms. This suit concerned the validity of the RPAs, not their interpretation or enforcement. However, to the extent that the court finds this attorney fee provision to be applicable, VHP requests their costs and attorney fees for this appeal under the RPAs and RAP 18.1.

**VII. Conclusion**

The trial court properly entered Conclusion Nos 4, 5, 6, and 8. The decision of the trial court should be affirmed in its entirety. The court should also award VHP the fees and costs it has incurred in this appeal.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of December, 2019.

LAW OFFICE OF DENISE J. LUKINS, PLLC

By   
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Attorney for Respondent VHP LLC

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