68913-4

68913-4

No. 68913-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

LAKE WHATCOM RAILWAY COMPANY, a Washington Corporation,

Appellant,

v.

KARL ALAR and JEANINE ALAR, husband and wife; STEVEN SCOTT and JANE DOE SCOTT, husband and wife; *et al.*,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT
FOR WHATCOM COUNTY
THE HONORABLE IRA UHRIG
THE HONORABLE CHARLES R. SNYDER

BRIEF OF RESPONDENTS ALAR, *ET AL.*

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I. INTRODUCTION

This appeal involves a dispute between the operator of a three-quarter mile stretch of tracks for a hobby train and the families across whose properties the tracks are laid. The dispute originally started in the late 1980's in the matter of Veach v. Culp[1] where the Washington State Supreme Court ruled that the predecessor to the Appellant held an easement, not a fee simple ownership, over the property in question.

After decades of calm, disputes arose again between the current holder of the easement, Appellant Lake Whatcom Railway ("LWRR") and the successors in interest to Veach, the Respondent property owners. Through protracted litigation, the Whatcom County Superior Court held that the ruling of Veach v. Culp does bind these parties (as successors in interest). The court further ruled that an adjoining grant that was not decided by the prior action is also an easement and subject to the prior ruling of the court.

Appellant LWRR has appealed very limited aspects of this litigation with the sole hope of overturning Veach v. Culp and expanding its ownership of the railroad easement into a fee ownership – the exact position rejected by the state supreme court in 1979 and the trial court throughout the current litigation.

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[1] 92 Wn.2d 570, 599 P.2d 526 (1979).

II. ISSUES

1. Whether the Appellant LWRR has waived all of its appeal issues except for Assigned Errors #1, #2, #3, #22 and #24?

2. Whether the Trial Court violated Federal law by attempting to 'regulate' a railway?

3. Whether the Trial Court committed reversible error when it applied *res judicata* to the limited issue of the Zobrist Grant?

4. Whether the Trial Court committed reversible error by applying the 1980 Decree to appellant LWRR and to Respondents Alar, *et al.* as successors in interest to the original parties in Veach v. Culp?

5. Whether LWRR has established pursuant to RAP 2.5(c)(2) that the Court of Appeals should reverse the state supreme court's ruling in Veach v. Culp?

III. STATEMENT OF THE CASE

A. Identification of Parties. The appellant, LWRR is a Washington corporation.[2] Appellant Frank Culp is the President of LWRR.[3] LWRR is the successor in interest to the railroad easements owned by Cascade Recreation Inc. Mr. Culp and Cascade Recreation were the defendants in Veach v. Culp.[4]

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[2] CP 1036.
[3] CP 131, Finding of Fact 1.1.
[4] CP 133, Conclusion of Law 2.2.

The respondents are three families: Karl & Jeanine Alar who purchased their property in 1999; Stephen & Cynthia Scott, Mr. Scott having purchased his property in 1998; and Roger & Ardis Wens who purchased their property in 1998.[5] Respondents will be collectively referred to as "Respondents Alar" or "Alar." Respondents Alar are the successors in interest to title to the real property owned by Richard Veach, Mary P. Veach and Forrest Solem, the Plaintiffs in Veach v. Culp.[6]

B. History of the Railroad.[7] At the turn of the last century, a railroad was developed along the southern/eastern shore of Lake Whatcom.[8] The tracks went from Blue Canyon north to Bellingham and south to Wickersham and other points on the mainline.[9] To build this railroad, the predecessors in interest to Alar (the Zobrist family) granted to the railroad an easement for railroad purposes in 1901 across property now

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[5] CP 131, Findings of Fact 1.3-1.5.
[6] CP 133, Conclusion of Law 2.2.
[7] For unknown reasons, three separately paginated transcripts have been provided as the Verbatim Report of Proceedings. As a result, the VRP consists of at least three different pages which could be referred to as "RP at 1." The following references are therefore used:
- "RP Trial at ___" references the six volumes of consecutively paginated trial transcript;
- "RP [date] at ___" references the hearing or court's ruling held on the date referenced in the citation.

[8] CP 1036.
[9] RP Trial at 79, lines 3-7.

owned by Alar. This grant will be referred to as the Zobrist Grant.[10] The railroad line was built and operated from the early-1900's through 1970.[11]

In 1931, the railroad wished to relocate a portion of the line that was located on the Alar property. So in 1931, Alar's predecessor-in-interest, Mr. Byron, granted an additional railroad easement. This shall be referred to as the "Byron Grant".[12] As stated in the document, the purpose of this grant was simply to relocate the existing tracks.[13]

During the railroad's operation through approximately 1970, full-sized trains transported coal, timber, and people.[14] Burlington Northern stopped operating the railroad in approximately 1970.[15] It sold the tracks and the easements to Cascade Recreation, which subsequently transferred these to appellant LWRR.[16] After Burlington Northern sold the rights, commercial railroad traffic stopped, never to occur again on the tracks in question.[17]

Through separate litigation, the section of the railroad tracks in question here was cut off from all other lines — the easements to the north

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[10] CP 132, Finding of Fact 1.6.
[11] RP Trial at 78, lines 20-25.
[12] CP 132, Finding of Fact 1.7.
[13] Plaintiff's Exhibit 2.
[14] CP 1263, line 25; CP 1264, line 10.
[15] RP Trial at 28, lines 6-11.
[16] CP 133-34, Conclusions of Law 2.1 and 2.3.
[17] RP Trial at 79, lines 1-9.

and south were terminated.[18] The railroad tracks in question (Blue Canyon) are now an isolated three-quarter mile section of track not connected to any other line.[19]

From the early-1970's through the current date, only "hobby trains" have been operated on this section of track.[20] These are propane powered "speeders" that operate to pull one or two work platforms that have been converted to carry a limited number of people. Please see Appendix A.[21]

C. Veach v. Culp. A dispute began between the predecessors in interest to this action. Mr. Culp (the principal with Cascade Recreation) erected a fence across the property, cutting off Alar's predecessor in interest's (Veach) access to the beach.[22] In that litigation, Culp argued that both the Zobrist Grant and the Byron Grant conveyed fee simple title of the land to him. The matter was heard by the Whatcom County Superior Court, appealed to the Court of Appeals, and ultimately reviewed and reversed by the Washington State Supreme Court in Veach v. Culp.

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[18] RP Trial at 197, line 3-13. The Blue Canyon section was segregated from the rest of the tracks when Culp/LWRR lost about a mile and half section between the two. RP 92, line 11-13. The section of track to the north reverted to the then current ownership. Zobrist v. Culp, 95 Wn.2d 556, 627 P.2d 1308 (1991).

[19] Frank Culp testified that the Blue Canyon railroad tracks are "about three-quarters of a mile probably, maybe not quite that much." RP Trial at 92, lines 17-18. See also RP Trial 197, lines 3-9.

[20] CP 248.

[21] Trial Exhibit #20, page 1.

[22] RP Trial at 196, lines 8-10.

After the supreme court decision, the matter was remanded to the trial court.[23] Upon remand and further motion practice, the Findings of Fact, Conclusions of Law, and Decree were entered in 1980 ("1980 Decree").[24] The crux of the supreme court opinion and the 1980 Decree was that the Zobrist Grant only conveyed an easement to the railroad, not a fee simple ownership.

Also of note is that although the Whatcom County Superior Court had initially reviewed the issues regarding the Byron Grant and were appealed,[25] these issues were not addressed by the Washington State Supreme Court and not included in the 1980 Decree.[26]

D. Current Dispute. After decades of relative calm, disputes began in 2006 involving alleged encroachments by Respondents Alar, breach of the 1980 Decree by appellant LWRR, and claims of damages arising out of the same.[27] Based upon these disputes, LWRR sued to have the ruling of Veach v. Culp reversed.[28] LWRR asserted again that it owned the Zobrist Grant property (and the Byron Grant) property in fee simple, directly in conflict with the Veach v. Culp decision.[29]

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[23] Id.
[24] Plaintiff's Trial Exhibit 6; CP 133, Finding of Fact 1.11.
[25] See Appendix B – Notice of Appeal. A Supplemental Designation of Clerk's Papers is being filed, but not in time to identify as part of the Clerk's Papers herein.
[26] CP 66, Finding of Fact 1.11.
[27] CP 133, Finding of Fact 1.12; CP 1038, Paragraphs 12-16.
[28] CP 1035-66.
[29] CP 1040, Plaintiff's Complaint, Paragraphs 17-24.

During the pendency of the litigation, disputes continued. So upon motion of respondents Alar, an Interim Order was entered protecting the parties' rights during litigation.[30] After the Interim Order was entered, Appellant LWRR immediately filed what was effectively a Motion to Reconsider.[31] A hearing was held on the matter and the court orally ruled in a manner that essentially vacated the Interim Order — the court stated that LWRR was free to undertake reasonable maintenance:

> *I believe Lake Whatcom Railroad can undergo its maintenance plan in any way that it deems to be reasonable.*[32]

The court went on to say that Alar could come back to court if they believed LWRR was violating federal law controlling railroads.[33] In doing so, it recognized and agreed with LWRR's position. Though the ruling was binding upon the parties, LWRR failed to have the oral ruling of the court reduced to writing.[34]

E. Procedural Background. The suit LWRR filed in 2008 was consolidated with the prior case of Veach v. Culp.[35] Based upon the proposed Order submitted by LWRR, "reopened" language was included

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[30] CP 454 – 57, Interim Order.
[31] CP 348 - 352.
[32] RP 9/16/09 at 27, lines 15-18.
[33] RP 9/16/09 at 27, line 19 – RP 9/16/09 *at* 28, line 7.
[34] The Trial Court referenced the oral ruling in CP 252.
[35] CP 951-53.

in this consolidation order.[36] Some of the language was included at the request of LWRR and over objection of Alar.[37]

Alar then filed a motion for partial summary judgment on the basis that *res judicata* applied to the prior case.[38] The trial court granted the motion finding that the ruling of Veach v. Culp that the Zobrist Grant was a mere easement, not a fee interest, is binding upon these parties as successors in interest.[39]

The trial was bifurcated — the first phase to determine the claims of the parties regarding their respective property rights, the second phase to determine damages and other remaining issues.[40] During the first trial phase, the court took testimony and reviewed significantly more documents than at the summary judgment hearings. From that trial, Partial Findings of Fact and Partial Conclusions of Law were entered on September 24, 2010.[41] During the second trial phase, the court took more testimony regarding damages and other claims asserted. Upon this phase, the court entered Supplemental Findings of Fact/Conclusions of Law re

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[36] CP 954-58.
[37] CP 871.
[38] CP 959-63.
[39] CP 812-14.
[40] CP 234-35.
[41] CP 130-36.

Damages entered on May 18, 2012.[42] Subsequently, LWRR filed an appeal on a variety of matters arising out of the litigation.[43]

IV. STANDARD OF REVIEW

A. Findings of Fact. Unchallenged findings of fact are verities on appeal.[44] A finding of fact erroneously described as a conclusion of law is reviewed as a finding.[45] Individual findings of fact must be read in the context of other findings of fact and of the conclusions of law.[46] Findings of fact which are properly challenged are reviewed for substantial evidence in the record.[47]

B. Conclusions of Law. An unchallenged conclusion of law becomes the law of the case.[48] Challenged conclusions of law are reviewed *de novo*.[49] However, when an appellant challenges conclusions of law not based on the law itself, but in alleging insufficient evidence, *de novo* review is not appropriate. Instead, appellate review is limited to determining whether the findings are supported by substantial evidence

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[42] CP 65-79.
[43] CP 15-64.
[44] Robel v. Roundup Corp., 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002).
[45] Willener v. Sweeting, 107 Wn.2d 388, 393-4, 730 P.2d 45 (1986).
[46] In re Hews, 108 Wn.2d 579, 595, 741 P.2d 983 (1987).
[47] Burrill v. Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. den*, 149 Wn.2d 1007 (2003).
[48] King Aircraft v. Lane , 68 Wn. App. 706, 716, 846 P.2d 550 (1993).
[49] Robel, supra, *at* 43.

and, if so, whether those findings support the conclusions.[50]

C. Order on Summary Judgment. The standard of review of an order granting summary judgment is *de novo*.[51] This Court should undertake "the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party."[52] An order on summary judgment should be upheld if "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[53] This Court may sustain the trial court on any correct ground, even though that ground was not considered by the trial court.[54]

D. Interim Orders. The Interim Order was entered and then vacated within the discretion of the court: these actions were based upon a long history of evidence already entered in the case and were for the sole purpose of protecting the parties during the litigation.[55]

> *Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable*

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[50] American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 797 P.2d 477 (1990), *citing,* Willener v. Sweeting, supra.
[51] Allstate Ins. Co. v. Raynor, 143 Wn.2d 469, 21 P.3d 707 (2001).
[52] Kaynor v. Farline, 117 Wn. App. 575, 583, 72 P.3d 262, 266 (2003); Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562, 564 (1990).
[53] Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n., 133 Wn.2d 229, 236, 943 P.2d 1358, 1362 (1997) (*en banc*) (*citing* CR 56(c)).
[54] Heath v. Uraga, 106 Wn. App. 506, 24 P.3d 413 (2001), *rev. den*, 145 Wn.2d 1016, 41 P.3d 482 *at* 515.
[55] CP 454-57.

grounds, or for untenable reasons.[56]

A trial court's factual findings entered after a motion hearing (i.e., without live testimony) are reviewed for clear error.[57]

V. ARGUMENT

A. Whether the Appellant LWRR has waived all of its appeal issues except for Assigned Errors #1, #2, #3, #22, and #24?

1. Error Alleged. Appellant LWRR listed 25 Assignments of Error: 4 to pretrial/interim orders, 11 to various Findings of Fact, and 10 to Conclusions of Law.[58]

2. Discussion.

a. LWRR Failure to Address in Brief is Waiver.

Appellant LWRR failed to address in its brief any of the Assignments of Error (except the five noted above). No reference to the Finding of Fact or Conclusion of Law claimed as error, no reference to the Verbatim Transcript of the Record at all, no allegation that there was not substantial evidence in the record to question any of the Findings and no reference to any legal authority to question the Conclusions. A party who assigns error to a specific findings of fact and/or conclusions of law but

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[56] State Ex Rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971); *cited in* Coggle v. Snow, 56 Wn. App. 499, 784 P.2d 554 (1990).
[57] Seaborn Pile Driving Co. v. Glew, 132 Wn. App. 261, 131 P.3d 910 (2006).
[58] *See* Brief of App. at 11-14.

fails to properly argue or brief it, waives the error.[59] If not properly challenged, the findings are not reviewed on appeal. Such waiver must occur for it is impossible for the Respondent to address these unaddressed assignments of error in its brief. This is a waiver of all of the Assignments of Error that LWRR did not mention in its legal arguments.

Further, 28 of the 41 Supplemental Findings of Fact entered on May 18, 2012 were proposed by LWRR and were not changed in any way when they were adopted by the court.[60] The remaining 13 findings were proposed by LWRR in some form. There is no showing by LWRR that there was objection to the trial court for the Findings of Fact now on appeal. Because LWRR failed to raise challenges to the Findings and Conclusions before the trial court, this court should decline review pursuant to RAP 2.5(a).

B. Whether the Trial Court violated Federal law by attempting to 'regulate' a railroad?

1. Error Alleged. LWRR has assigned error to the trial court's entry of the Interim Order and three Conclusions of Law[61] relating to the clarification of the 1980 Decree.

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[59] Kever & Associates, Inc. v. Randall, 129 Wn. App. 733, 741, 119 P.3d 926 (2005); RAP 10.3(a)(5).

[60] Findings 1.12 through 1.20, 1.22, 1.23, 1.27, 1.29 through 1.44 can be found verbatim in LWRR's Proposed Supplemental Findings of Fact and Conclusions of Law Regarding Damages. CP 96 - 101.

[61] CP75-78: Conclusions of Law 2.12, part of 2.16 and 2.17.

2. Standard of Review. Appellant has the burden to establish the trial court abused its discretion when entering the Interim Order.[62] Review of the entry of the Conclusions of Law is reviewed *de novo*, except here the Conclusions of Law at issue are based upon the specific factual findings in this case. Accordingly, LWRR must establish that there was not substantial evidence supporting the court's Finding of Fact supporting legal analysis establishing the Conclusions of Law.[63]

3. Facts. The section of tracks in question in this matter is approximately three-quarter mile in length and not connected to any other tracks. There are no facts in the record that LWRR's operation of this line is involved in interstate commerce. In fact, the record is clear that the hobby train starts and stops in Whatcom County, never leaving the State of Washington.

During the pendency of the action, LWRR tore up the entirety of the track base, materially interfering with Alar's ability to reach and use their waterfront property.[64] To maintain the status quo, the court entered an Interim Order on August 29, 2009, prohibiting LWRR from "undertaking any destruction, construction, and/or maintenance upon" the

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[62] Kohfeld v. United Pac. Ins. Co., 85 Wn. App. 34, 40, 931 P.2d 911 (1997) (new trial); Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland, 95 Wn. App 896, 906, 977 P.2d 639 (1999) (reconsideration).
[63] See Section IV above.
[64] Defendant's Trial Exhibit 15 under tabs 8-12-09 through 8-28-09.

property without further court order.[65] LWRR immediately filed a motion to revise this order. That motion was heard and the court ruled that LWRR could engage in any maintenance they believed was "reasonable."[66]

Through the oral ruling, Judge Uhrig effectively reversed the Interim Order.[67] Thereafter, LWRR was free to undertake any and all maintenance as it saw fit after this oral ruling. And it did.

At trial, LWRR asserted damages for delay and interference to maintenance caused by Alar (including the brief period the Interim Order was in place).[68] LWRR was awarded damages for these claims and LWRR accepted payment for the damages and entered a full satisfaction.[69]

At trial, the court also clarified the 1980 Decree. The court was very specific in stating that this was not a modification or vacation of the 1980 Decree. Instead, it was simply a clarification of the same.[70] This was needed because of the confusion of the parties in the application of the 1980 Decree.

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[65] CP 454-57.
[66] RP 9/16/09 *at* 27, lines 15-18.
[67] For some unfathomable reason, LWRR failed to have this reduced to written order and has failed to inform this court of the reversal of the Interim Order.
[68] CP 169-80.
[69] CP 1528; Satisfaction of Judgment.
[70] CP 75, Conclusion of Law 2.12.

4. Discussion.

a. *Federal Law Not Applicable.* To be within the general jurisdiction of the federal law, the specific railroad tracks and their operation must meet the jurisdictional requirements set forth in 49 U.S.C.A. § 10501.[71] They do not, and LWRR failed to identify substantial evidence in the record that federal jurisdiction exists. This is a three-quarter mile section completely separated from any other railroad tracks.[72] The hobby trains travel solely within Whatcom County and are not involved in any interstate commerce.[73] Because this is purely intrastate transportation, there is no federal jurisdiction.[74] LWRR's argument must fail on this basis alone.[75]

b. *No State Regulation.* Regardless of the foregoing, there is no state regulation that could be preempted by federal law. Unlike the cases cited by LWRR, this is simply a dispute over private property

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[71] This section states that the regulation applies "only to transportation in the United States between a place in – (A) a State and a place in the same or another State as part of the interstate rail network…"

[72] RP Trial at 92, lines 17-18. See also RP Trial 197, lines 3-9.

[73] CP 198, lines 4-18. Mr. Culp confirmed that the operation has no interstate activities. RP 198, lines 11-18.

[74] Transportation wholly within one state does not fall within the scope of the Interstate Commerce Act. Interstate Commerce Commission v. Brimson, U.S., Ill, 14 S. Ct. 1125, 154 U.S. 447, 38 L. Ed. 1047 (1894).

[75] LWRR is anticipated to assert that it has some federal licensing in response. Existence of any such licensing does not meet the requirements for federal preemption. And there is no showing that the license applies to this operation for there are no "real" trains operated on these tracks, only hobby trains. The licensing applies to LWRR's operation on the Wickersham operation. There was no testimony that the licensing applied to the operation of the hobby trains on the Blue Canyon tracks.

rights granted through a private contract. The court, in interpreting and applying state law, is not implementing any state regulation.[76] With no state regulation, there is no preemption.

c. *No Conflict with Federal Law.* Notwithstanding all the foregoing, there is no showing by LWRR that the modification of the 1980 Decree in any manner conflicts with federal law. LWRR failed to point to any portion of the record establishing that the provisions set forth in Conclusions of Law 2.12, 2.15 and 2.17 in any way conflict or impede LWRR's ability to implement railroad maintenance pursuant to the code section it cited to the trial court and this court.[77] Based upon the foregoing, federal law is simply not applicable to the current situation and LWRR has failed to establish that there is any conflict with any applicable federal law.

d. Interim Order Error Moot/Was Waived. Finally, any claimed error with the Interim Order is moot and has been waived. The trial court effectively reversed the Interim Order leaving LWRR free to undertake maintenance. Error, if any, was rendered moot. Further, LWRR then asserted and was awarded damages for interference and delay

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[76] Where a dispute arises between a railroad and a private party, the ICCTA and, therefore, the jurisdiction of the STB will not be triggered if the dispute concerns areas of state property law. Franks Inv. Co. v. Union Pacific Railroad Co., 593 F.3d 404 (C.A.5 La.) (2010).

[77] Brief of App. *at* 23-25.

of maintenance that included the period the Interim Order was in place.[78] Its acceptance of payment for such damages is a waiver of this issue on appeal.[79]

C. Whether the Trial Court committed reversible error when it applied *res judicata* to the limited issue of the Zobrist Grant?

1. Error Alleged. LWRR's assignment of error on this issue is not identified. It makes no mention of any Finding of Fact, Conclusion of Law, or Order in the applicable section of its Brief. Further, LWRR makes no mention of a lack of substantial evidence supporting any of the Findings of Fact related to this issue, and fails to identify what part of what Order or Conclusion of Law upon review was reversible error.

2. Standard of Review. Regarding the scope of the Order Consolidating, any motion to reopen is within the discretion of the court and is subject to reversal upon a showing of abuse of the trial court's discretion.[80]

3. Facts. In prior litigation between predecessors in interest to the current parties, the Washington State Supreme Court ruled

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[78] CP 78, Conclusions of Law 2.15 and 2.16.
[79] RAP 2.5(b)(1).
[80] Zulauf v. Carton, 30 Wn.2d 425, 192 P.2d 328 (1948).

that the Zobrist Grant was an easement and not a grant in fee simple.[81] Upon remand, the Whatcom County Superior Court entered the 1980 Decree consistent with the ruling, which was entered as a final judgment in the matter.[82]

In the current action, Alar requested that the new lawsuit filed by LWRR be consolidated with the prior litigation of Veach v. Culp.[83] Alar's argument and proposed order were confined to the issue of consolidation.[84] LWRR objected to the motion arguing that the court had no power to grant the motion but proposed an order that stated the Veach v. Culp case was

> *reopened for all purposes, including pretrial matters, trial and subsequent enforcement of any court orders and... is consolidated herein for adjudication of all matters."*[85]

The court refused this language and signed an Order Consolidating Matters on February 13, 2009 which provided:

> *ORDERED ADJUDGED AND DECREED Veach v. Culp, Whatcom County Superior Court Cause No. 51720 is re-opened;*
>
> *ORDERED ADJUDGED AND DECREED that Lake Whatcom Railway Company v. Alar et. al., Whatcom County Superior Court Cause No. 08-2-02034-3 and Veach v. Culp, Whatcom County Superior Court Cause No. 51720*

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[81] Veach v. Culp, supra.
[82] Plaintiff's Trial Exhibit 6.
[83] CP 965-969, 1029-1030.
[84] CP 965-69.
[85] CP 954-58.

> *shall be consolidated for all purposes for the duration of the proceedings in both matters;*[86]

This Order was not appealed by LWRR.

Upon argument by LWRR that "reopen" meant an undoing of the prior final judgment, Judge Snyder repeatedly and specifically defined the impact of the phrase "reopen". At the end of the first phase of the trial, Judge Snyder stated:

> *My sense is that the reopening of the file essentially says that the issues previously decided by the State Supreme Court and which are embodied in the decree from 1980, I believe signed by Judge Swedberg, those issues are the law of the case and res judicata, and I think those are resolved.*[87]

Judge Snyder later stated:

> *It also tells me that Judge Uhrig has delineated the reopening of this case to address the issues involving the deed from 1931 from Byron to the railroad, and any other issues which may not have been resolved around that in the decree entered in 1980 by Judge Swedberg.*[88]

Judge Snyder reiterated this same ruling at the end of the second phase of the trial.[89]

During the first phase of the trial, the court took testimony and reviewed evidence regarding the Zobrist Grant and the extent of the 1980 Decree. This evidence went beyond the materials submitted in

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[86] CP 951-53.
[87] RP Trial *at* 7, lines 7-14.
[88] RP Trial *at* 685, lines 11-14.
[89] RP Trial *at* 893.

support of the Partial Summary Judgment. Upon this evidence, the court entered specific Findings of Fact and Conclusions of Law supporting the application of *res judicata.*[90] These Findings of Fact are verities on appeal.[91] *Res judicata* was only applied to the limited issue of the nature of the Zobrist Grant.[92]

4. Discussion.

a. *1980 Decree is a Final Judgment.* LWRR attempted to have the court define the scope of reopening so broadly that one might conclude the prior orders were no longer final. The court rejected this language and entered much more restrictive language.[93] LWRR failed to appeal this Order Consolidating and is now barred from attacking this Order on appeal.

Further, LWRR cites no legal authority for the proposition that the reopening of the Veach matter could somehow allow the court to amend or vacate the 1980 Decree. To reopen a judgment, a motion pursuant to CR 59 must have been brought and granted. Such a motion must be brought within 10 days from the entry of the judgment (*i.e.*, back

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[90] CP 131, Findings of Fact 1.1-1.12; CP 133, Conclusions of Law 2.1-2.10.
[91] Without mention of any Finding of Fact, or any reference to a lack of substantial evidence in the record, appeal of such findings are waived and therefore verity. See Section IV above.
[92] CP 134, Conclusion of Law 2.5; CP 813-814.
[93] CP 951-53.

in 1980).[94] Failure to file in the 10 day time limit is a bar to reopening the judgment.[95] The court had no authority to reopen and change the 1980 Decree — it remains a final judgment.

There is no showing that Judge Snyder abused his discretion when he limited the scope of the "reopening." In fact, he was correct: the 1980 Decree remained the rule of the case upon which *res judicata* could apply, but just to the issue it resolved (the legal rights granted through the Zobrist Grant).

b. Res Judicata Limited to Zobrist Grant. LWRR's sole basis to attack the application of *res judicata* is that there is different subject matter preventing application.[96] LWRR is simply wrong — the application of *res judicata* was limited to just legal effect of the Zobrist Grant and did not, in any manner, limit or impede LWRR's ability to pursue the new claims asserted.[97] All of these new claims were very fully litigated and LWRR did, with regard to some, prevail and was awarded a judgment.

The un-appealed Findings of Fact and Conclusions of Law in this case establish that the two matters are, in fact, the identical subject

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[94] CR 59(g) and (h).
[95] See Kaech v. Lewis County Public Utility Dist. No. 1, 106 Wn. App. 260, 23 P.3d 529 (2001).
[96] Brief of App. *at* 28.
[97] Placement of trailer, building of a fence, filling of a ditch, obstruction of trains as noted by LWRR *at* page 28 of its Brief.

matter — whether the Zobrist Grant conveyed a fee interest or an easement.[98]

c. *Res Judicata Not Applicable to Judgments that were Reversed.* *Res Judicata* only applies to orders that are the rule of the case. In Veach v. Culp, only the 1980 Decree was a final judgment. All prior orders had been reversed by the supreme court.[99] Any initial ruling of the trial court regarding the Byron Easement was reversed and not a final judgment to which *res judicata* applies.[100]

LWRR argues for the first time on appeal that the 1979 decision by the Whatcom County Superior Court regarding the Byron Grant was not appealed and, therefore, rule of the case. Failure to assert this legal argument before the trial court is a waiver and cannot be presented for the first time on appeal. Further, LWRR's claim is simply wrong. Veach appealed the entirety of the superior court's judgment, and the Byron Grant was briefed and argued by both parties.[101]

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[98] CP 131, Findings of Fact 1.1-1.13; CP 133, Conclusions of Law 2.1-2.10; CP 66, Finding of Fact 1.12; CP 74, Conclusions of Law 2.10 and 2.11.

[99] LWRR's assertion that the trial court's ruling regarding the Byron Grant was not appealed is simply wrong.

[100] Karl B. Tegland, Washington Practice Civil Procedure, 14A Wash. Prac., Civil Procedure § 35:23 (2d ed. 2012).

[101] CP __ and CP __; see Appendix B.

D. **Whether the Trial Court committed reversible error by applying the 1980 Decree to appellant LWRR and to Alar as successors in interest to the original parties in Veach v. Culp?**

1. Error Alleged. It is uncertain what assignment of error LWRR has made in support of this issue.[102] LWRR makes no reference to a decision that it either asserts as error or the authority establishing the trial court to have committed error. Instead, LWRR concludes:

> *The trial court lacked personal jurisdiction over both Veach and Solem and therefore had no power to enter the Order.*[103]

LWRR fails to define what Order it is referring to.

2. Facts. LWRR is the successor in interest to Culp and Respondents Alar are the successors in interest to Veach and Culp.[104] This was even alleged by LWRR in its Complaint.[105] The 1980 Decree is binding upon LWRR and Alar as successors in interest.[106] The trial court entered a Conclusion of Law that it had jurisdiction over the parties and the subject matter.[107] This was proposed by LWRR and was not appealed.

3. Discussion.

a. *Personal Jurisdiction Undisputed.* Based upon

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[102] Brief of App. *at* 28-32.
[103] Brief of App. *at* 32.
[104] CP 131, Findings of Fact 1.1-1.12; CP 133, Conclusions of Law 2.1-2.2.
[105] CP 1036, Paragraph 5-6. CP 1038, Paragraph 9-11.
[106] CP 134, Conclusion of Law 2.4; CP 133.
[107] CP 75, Conclusion of Law 2.11.

Conclusion of Law 2.11 that was not appealed, the court's jurisdiction has been established. Failure to appeal that specific conclusion is a waiver of the issue.

b. 1980 Decree Applies to Successors in Interest. The 1980 Decree defined the scope of the Zobrist Grant – a mere easement. This easement is an interest in real property that, by its nature, is binding upon successors in interest to the land affected. The court made a specific Conclusion of Law on point:

> 2.4 The Findings of Fact, Conclusions of Law and Decree entered in the matter of *Veach v. Culp* (Whatcom County Superior Court Cause No. 51720) are binding upon LWRR and Frank Culp (as successors in interest to Cascade Recreation, Inc.) and defendants Alar/Scott/Wens (as successors to Veach, Veach and Solem).

Appeal of this Conclusion of Law was waived by LWRR's failure to even mention it in its argument. LWRR has failed to provide any authority that as successors in interest, Respondents Alar are not bound by the 1980 Decree that determined the nature of their ownership of real property.

c. *No Consent Decree.* LWRR takes the preposterous position that the 1980 Decree is a "consent decree."[108] LWRR cites to nothing in the record and no authority to support this position. A "consent

[108] Brief of App. *at* 28-33.

decree" is defined as: "A court decree that all parties agree to."[109] In contrast, a "decree" is defined as "[t]raditionally, a judicial decision in a court of equity, admiralty, divorce, or probate – similar to a judgment of a court of law."[110] The latter is what is before this court: a judicial decision of a hotly contested dispute. The 1980 Decree contains an entire paragraph reciting the extent of the rulings and foundation for the ultimate decision, that being an order of the court.[111] And there is nothing in the Decree (or any of the supporting pleadings) establishing the elements necessary to create this as some agreement akin to a contract/consent decree. Judge Snyder correctly identified this exact point its oral ruling after the first trial on June 29, 2010:

> *I also think it is important for the Court to state that it is this Court's belief that the 1980 decree is not a consent decree.*[112]

The 1980 Decree is a final judgment binding upon the successors in interest to the property. There is no basis to assert that Alar has to be some form of a third party beneficiary.

E. Whether LWRR has established pursuant to RAP 2.5(c)(2) that the Court of Appeals should reverse the state Supreme Court's ruling in Veach v. Culp?

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[109] Black's Law Dictionary, Second Pocket Edition 2001.
[110] Id.
[111] Plaintiff's Trial Exhibit 6.
[112] RP 685-86.

1. Error Alleged. LWRR raises this issue for the first time on appeal — application of RAP 2.5 to reverse a decades old supreme court decision that numerous parties (including Respondents) have relied upon.

2. Discussion. LWRR relies on RAP 2.5(c)(2) which states:

> *The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.*

a. Waiver of Issue: LWRR never asserted to the trial court that it could or should rely upon RAP 2.5 to reverse Veach v. Culp. If it had been raised, Alar would have provided testimonial and documentary evidence to establish their reliance upon the Veach v. Culp 1980 Decree when each of them purchased the property and built their homes there and that reversing the 1980 Decree would not serve justice at all. So this court is now powerless to address the facts necessary to determine "where justice would best be served."

b. Trial Court Correct in Not Reversing Veach v. Culp. To entertain ignoring Veach v. Culp, LWRR must establish to this court:

- Such a reversal would "best serve justice;"

- There has been an intervening change in the controlling change in precedent between trial and appeal.[113]

Neither exists.

LWRR provides no citation to the record to support that justice would be best served by reversing the 1980 Decree. In fact, the opposite is true — the decision was entered 27 years before this current action was filed and 32 years before this appeal. All parties have relied upon the fact that the Zobrist Grant is a mere easement. If the court had ruled that it was a fee interest, none of the respondents would have paid waterfront prices for property fronting on railroad land. Justice would be defeated if LWRR is allowed to reverse the 1980 Decree causing title to very valuable property to change hands — for free.

Further, LWRR has failed to show that change in precedent from trial to appeal. All of the cases asserted in its brief were decided well before either the first phase or the second phase of the trial. And there has been no change in the controlling precedent — the interpretation of railroad easements continues to follow the search for the true intent of the parties, looking at a conglomeration of factors.

In Ray v. King County,[114] the Court of Appeals, Division 1, stated that Veach v. Culp failed to consider the full range of factors

[113] Roberson v. Perez, 156 Wn. 2d 33, 41, 123 P.3d 844 (2005).
[114] 120 Wn. App. 564, 578, 86 P.3d 183 (2004).

identified in Brown v. State.[115] The court did not say that the result in Veach was incorrect. What the court was getting at in Ray was that courts should not focus solely on the issue of whether the words "right of way" are used in the document.[116] Rather, as previously pointed out, the court should look to the document as a whole in order to determine the intent of the parties.[117] Here, this is exactly what was done regarding the 1901 deed. In fact, this was the deed specifically focused on in the Veach holding. The Court explicitly stated that although interpretation of a deed involves a mixed question of law and fact, the language used in the 1901 deed "has been found to create an easement, not a fee simple estate."[118] And the trial court followed the extensive factors cited in Ray when it reached the Findings of Fact 1.6 and 1.7. Again, Findings not appealed and verity on appeal.

Reversal of Veach v. Culp as it applies to these current properties would only result in a manifest injustice.

VI. CONCLUSION

The trial court should be affirmed in all respects.

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[115] 130 Wn.2d 430, 924 P.2d 908 (1996).
[116] Id.
[117] Id. *at* 583.
[118] Id. *at* 574.

Respectfully submitted this 19 day of April, 2013.

BELCHER SWANSON LAW FIRM, P.L.L.C.

By _____
KRISTEN C. REID, WSBA #38723
DOUGLAS K. ROBERTSON, WSBA #16421
Attorney for Defendants Alar, *et al.*

APPENDIX A

APPENDIX B

FILED

JAN 18 1977

JENNA GRANNIS, COUNTY CLERK
WHATCOM COUNTY, WASHINGTON
By _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

RICHARD VEACH and MARY P. VEACH, his wife, and FORREST P. SOLEM, Plaintiffs, vs. FRANK CULP and JANE DOE CULP, his wife, CASCADE RECREATION INCORPORATED, a Washington corporation, et al., Defendants.	NO. 51720 NOTICE OF APPEAL

TO: FRANK CULP and JANE DOE CULP, his wife, represented by LYLE L. IVERSEN of LYCETTE, DIAMOND & SYLVESTER, Hoge Building, Seattle, Washington; and

CASCADE RECREATION INCORPORATED, a Washington corporation, represented by JAMES R. IRWIN of SHIDLER, McBROOM, GATES & BALDWIN, 1000 Norton Building, Seattle, Washington

NOTICE IS HEREBY GIVEN that plaintiffs hereby appeal to Division I of the Court of Appeals from the judgment entered by the Superior Court of the State of Washington for Whatcom County on the 6th day of January, 1977, in Whatcom County Cause No. 51742.

Sam Veach

SAM PEACH, Attorney for Plaintiffs

NOTICE OF APPEAL

SAM PEACH
815 BELLINGHAM NATIONAL BANK BUILDING
BELLINGHAM, WASHINGTON 98225
TELEPHONE 734-2030

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

LAKE WHATCOM RAILWAY COMPANY, a Washington Corporation,

Plaintiff/Appellant,

vs

KARL ALAR and JEANINE ALAR, a marital community composed thereof; and all persons claiming any right, title or interest through them, and STEVEN M. SCOTT and JANE DOE SCOTT, husband and wife, and the marital community composed thereof; and all persons claiming any right, title or interest through them,

Defendants/Respondents.

Case No. 68913-4

Whatcom County Superior Court Case No. 08-2-02034-3

Originally filed under # 51720

DECLARATION OF SERVICE

RICHARD VEACH and MARY P. VEACH, his wife, and FORREST SOLEM, Plaintiffs, vs. FRANK CULP and JANE DOE CULP, his wife, CASCADE RECREATION, INC. a Washington Corporation, *et al.,* Defendants.	

I, Kathie Street, hereby certify as follows:

I am employed in the County of Whatcom, State of Washington. I am over the age of 18 and not a party to the within action. My business and place of employment is Belcher Swanson Law Firm, PLLC, 900 Dupont Street, Bellingham, Washington 98225.

On the date set forth below, I served the following documents on the interested parties in this action in the manner described below and addressed as follows:

PARTY/COUNSEL	**DELIVERY INSTRUCTIONS**
Douglas R. Shepherd Shepherd and Abbott 2011 Young Street, Suite 202 Bellingham, WA 98225	☒ By U.S. Mail ☐ By Certified Mail ☐ By Hand Delivery ☐ By Email

1. Brief of Respondents Alar, et al.

2. Declaration of Service.

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

Dated this 19th day of April, 2013 at Bellingham, Washington.

Kathie Street

Kathie Street