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NO. ~~70504-1-I~~

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

KING COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF WASHINGTON AND THE CITY OF SEATTLE

Appellants,

v.

KEITH L. HOLMQUIST and KAY BURDINE HOLMQUIST, f/k/a KAY BURDINE, husband and wife; and FREDRICK KASEBURG, a single man,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA BENTON

BRIEF OF APPELLANT KING COUNTY

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I. INTRODUCTION

Appellants King County and the City of Seattle ask this court to reverse the trial court's decision which quieted title in vacated right-of-way in favor of the respondents, Keith L. Holmquist, Kay Burdine Holmquist and Fredrick Kaseburg. King County and Seattle ask this court to remand the case to the trial court for entry of an order quieting title in their favor.

II. ISSUE PRESENTED

Land within a vacated right-of-way belongs to the property owners whose land abuts the vacated right-of-way at the time of the vacation. The respondents' predecessors in interest did not own the parcels abutting the 130th Street right-of-way when King County vacated it in 1932; they acquired title in 1933 and 1935 respectively. Did the trial court err in finding that the respondents' predecessors acquired title to the vacated right-of-way when they did not own the abutting parcels at the time the right-of-way was vacated?

III. STATEMENT OF THE CASE

A. THE RESPONDENTS' PREDECESSORS DID NOT OWN THE PARCELS ABUTTING THE 130TH STREET RIGHT-OF-WAY IN 1932.

In 1926, the King County Commissioners approved the Puget Mill Company's application for the Cedar Park Lake Front Plat ("the plat")

located on the shores of Lake Washington. CP 55. The plat established a right-of-way for Northeast 130th Street ("ROW") between the shore of Lake Washington and the eastern right-of-way line of the Northern Pacific Railroad. Id. Further, the plat established separate northern and southern lots immediately adjacent to the ROW -- Tract 12 of Block 1 (the northern lot), and Track 1 of Block 2 (the southern lot). Id.

On November 1, 1926, J.T. Shotwell, respondent Kaseburg's predecessor in interest, entered into a real estate installment contract with the Puget Mill Company to purchase the southern lot. CP 57-59. Also in 1926, Miss Mona Miller, the Holmquists' predecessor in interest, apparently entered into a real estate installment contract with the Puget Mill Company to purchase the northern lot. CP 16.[1] Under these real estate installment contracts, J.T. Shotwell and Miss Miller had to make all of their required payments before the Puget Mill Company was required to execute and deliver to them warranty deeds for their respective lots. CP 57-59. Until Shotwell and Miss Miller paid in full, title to the properties remained with the Puget Mill Company. Id.

Real estate installment contracts are an example of an executory contract. An executory contract is "one that is still unperformed by both

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[1] A copy of Miss Miller's real estate installment contract has not been found, but the contract is referenced in the 1933 deed for the northern lot. CP 68-69.

parties or one with respect to which something still remains to be done on both sides." Black's Law Dictionary 344 (8th ed. 2004). The obligation or performance of such a contract is to be done in the future. *Id.* In this case, the future acts required of Mr. Shotwell and Miss Miller were the periodic payment of monies. The future act required of the Puget Mill Company was delivery of a warranty deed to Mr. Shotwell and Miss Miller once they had made all their required installment payments. Accordingly, J.T. Shotwell and Miss Miller, the respondents' predecessors in interest did not own the abutting lots upon entering into their executory contracts in 1926. CP 58, 68-69, and 71.

Some 5 ½ years later, on April 26, 1932, 35 neighbors, including J.T. Shotwell, filed a Petition for Vacation of the ROW with King County. CP 63-64. The next month, on June 27, 1932, King County's Board of Commissioner issued an Order of Vacation vacating the ROW. CP 66.

In the Journal of Proceedings of County Commissioners, the following notice appeared, dated June 27, 1932, relating to the Order of Vacation of the ROW that occurred on that same date:

> Continued hearing was had in the matter of the petition of J.T. Shotwell and others for the vacation of portion of East 130th ROW in the Plat of Cedar Park Lake Front Addition, and on motion said petition was granted with the understanding that said vacated ROW is to be deeded to the Cedar Park Community Club to be used as community beach, and the matter referred to the Prosecuting Attorney

> for the drawing up of the necessary papers effecting such transfer.

CP 117-118. As indicated there, Shotwell did not purport to desire a future ownership interest in the vacated ROW; the land was going to belong to a local community club for use as a community beach.[2]

Two days later, on June 29, 1932, the County Commissioners duly forwarded a letter to the King County Prosecuting Attorney, Robert M. Burgunder, requesting his help in drafting an instrument and a deed allowing the Cedar Park Community Club to control the vacated ROW. Burgunder responded to the County Commissioners a week later by letter; Burgunder determined that the vacated ROW was located between the northern and southern lots. Burgunder noted that both of the lots were of record in the name of the Puget Mill Company. Burgunder concluded:

> It therefore follows that the Puget Mill Company becomes the owner of the vacated Street in the same manner as if that Street had never been dedicated....

CP 122-123.

On August 10, 1932 the Puget Mill Company conveyed the ROW to King County by quit claim deed. Specifically, the deed conveyed:

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[2] In fact, J.T. Shotwell attempted to quit claim the ½ of the vacated ROW that he erroneously believed he owned to the Cedar Park Community Club. CP 114-115.

> All that portion of Sixty (60) feet of land lying East of the Northern Pacific Right-of-Way between Lot Twelve (12), Block One (1) and Lot One (1), Block Two (2), Cedar Park Lake Front; containing Forty-one Hundreths (0.41) of an Acre.

CP 125-126. The Deed stated further:

> This deed is issued in lieu of one bearing the same date, which has been lost and is so accepted, one of which being accomplished, the other to stand void.

CP 125.[3]

The next year, 1933, on September 12th, the Puget Mill Company conveyed the southern lot (but not a portion of the vacated ROW) to Miss Miller by warranty deed. CP 68-69. A year and one-half later, on March 8, 1935, the Puget Mill Company conveyed the northern lot (but again not a portion of the vacated ROW) to J.T. Shotwell, also by warranty deed. CP 71. All of the extant documents, from the time of the installment contracts and through the transfer of title to Miss Miller and J.T. Shotwell, indicate that their respective lots were separated by King County's 60 foot wide strip of land. CP 57-59, 68-69 and 71. The City of Seattle annexed the area containing the plat in 1954. CP 128-133.

IV. ARGUMENT

On an appeal from summary judgment (CR 56(c)), the Court of Appeals engages in the same inquiry as the trial court, with the standard of

[3] The Deed was notarized on March 30, 1935. CP 126.

review *de novo. Bainbridge Citizens United v. Washington State Dept. of Natural Resources* 147 Wash.App. 365, 198 P.3d 1033 (2008).

A. Respondents' Predecessors in Interest Did Not Become Owners of the Right Of Way Vacated in 1932

The trial court erred in awarding each respondent one-half of the ROW vacated in 1932. In order to be entitled to one-half of the ROW vacated in 1932, respondents' predecessors in interest needed to own the lots abutting the ROW in 1932. They did not. At the time of the ROW vacation in 1932, the Puget Mill Company owned the lots. It was the Puget Mill Company, not the respondents' predecessors in interest that became the owner of the ROW in 1932. Puget Mill Company then transferred title to King County by quit claim deed. The trial court erred by ruling that respondents' predecessors had acquired title by the time of the vacation.

1. Ownership of Vacated Right-Of-Way Turns on Who Owns the Lots Abutting the Vacated Right Of Way at the Time of the Vacation

Typically, different property owners own the lots abutting land burdened with a road right-of-way. After vacation, the two lot owners each acquire title to the half of the vacated right-of-way abutting their property. *Woehler v. George*, 65 Wn.2d 519, 524, 398 P.2d 167 (1965), *citing Bradley v. Spokane & Inland Empire R. Co.*, 79 Wn. 455, 140 P.

688 (1914). This general rule is inapplicable if one party owns both the lots and the land burdened by the right-of-way. In this situation, the land burdened by the right-of-way does not attach to the abutting lots but rather becomes a separate parcel that the owner can then transfer to others. This rule was established in the case of *Hagen v. Bolcom Mills*, 74 Wn. 462, 133 P. 1000 (1913).

The facts in *Hagen* are similar to those presented in this case. In August 1889, Seattle Iron & Steel Manufacturing Company acquired blocks 162 and 165 in the plat of Gilman Park Addition. The plat established E. Street between these two blocks. In October of 1889, King County's County Commissioners vacated E. Street. *Hagen,* 74 Wn. at 463. Plaintiffs, who had purchased individual lots within block 162, brought suit arguing that the half of vacated E. Street should be theirs since their lots abutted E. Street. Id. at 464. The trial court agreed and awarded ½ of the vacated right of way to the plaintiffs.

The Supreme Court reversed. While noting the general rule that property owners whose lots abut vacated right-of-way become the owners of half of the vacated right-of-way, the Supreme Court determined that the general rule was qualified in certain circumstances such as those when one party owned both lots adjoining the vacated right-of-way. Id. at 467.

> Where, however, the Street has been vacated while the original proprietor owns the lots in question, the situation is substantially different. On vacation of a street in a case like the one at bar, he owns lots 23 and 24 and the space in between in fee simple. He can transfer the whole tract, or any part of it, or transfer lot 23 to any person, and lot 24 to another person, and the space between the two to a third person.

Id. at 468-469.

In the case at bar, therefore, as in *Hagen*, ownership of the abutting lots *at the time of the ROW vacation* determines who acquired title to it.

2. The Puget Mill Company Owned Both Lots Abutting the ROW at the Time of the Vacation in 1932.

While respondents' predecessors in interest, J.T. Shotwell and Miss Miller, entered into executory purchase agreements prior to the 1932 road vacation, they still did not own their lots in 1932.[4] This stems from the fact that Shotwell and Miss Miller bought their lots via executory real estate installment contracts. Shotwell and Miss Miller had no legal right to the vacated ROW in 1932, as they did not then own their respective lots. *See Ashford v. Reese*, 132 Wash. 649, 233 P. 29 (1925). In *Ashford*, the Washington Supreme Court held that vendees to an executory contract of sale have no title or interest in the property they have contracted to purchase until all actions set forth in the contract have been completed. *Ashford*, 132 Wash. at 650.

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[4] Miller received her fulfillment deed in 1933 while Shotwell received his fulfillment deed in 1935. CP 68-69 and 71.

In *Ashford*, a fire destroyed buildings on property that was being purchased pursuant to an executory real estate purchase contract. After the fire, the seller refused to replace the buildings. The buyer brought suit seeking to recover the amount she had paid under the executory contract on the ground of failure of consideration. To determine if there was a failure of consideration, the Supreme Court reviewed who must bear the risk of loss when improvements are destroyed on a property being purchased via an executory contract.

The Supreme Court determined it is the vendor, rather than the vendee, who must bear the risk of loss. The Court noted that courts in many jurisdictions took a contrary position, but clarified that this stemmed from the fact in other jurisdictions:

> ...it has been held that the exectutory contract of sale created some title or interest in the vendee, either legal or equitable, and that the loss must follow the title or interest...

Ashford, 132 Wash at 650. That was not the case in Washington, however.

> [W]e have consistently held in numerous cases that an executory contract of sale in this state conveys no title or interest, either legal or equitable, to the vendee, and, the loss following the title, it must be borne by the vendor.

Id.[5]

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[5] *Ashford's* holding that a vendee to an executory real estate purchase agreement had no

The Supreme Court's holding in *Ashford,* that vendees to an executory real property purchase contract have no interest in the land they are purchasing, conclusively answers the question of who owned the lots abutting the ROW at the time of its 1932 vacation: the Puget Mill Company. Accordingly, the vacated ROW passed to the Puget Mill Company, not to the respondent's predecessors, when the County Commissioners vacated the ROW in 1932.

While Mr. Shotwell and Miss Miller perhaps had some rights in contract relating to the abutting lots by virtue of their real estate installment contracts, they did not own them.

> A real estate contract is an agreement for the purchase and sale of real property in which legal title to the property is retained by the seller as security for payment of the purchase price. Legal title does not pass to the purchaser until the contract price is paid in full.

Tomlinson v. Clark, 118 Wn.2d 498, 504, 825 P.2d 706 (1992). Had the County Commissioners vacated the ROW in 1936, when Shotwell and Miss Miller owned the abutting lots in fee, as their successors the respondents' cause of action would be well taken. But at the time of the vacation of the ROW, the Puget Mill Company owned both lots.

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interest in the real property being purchased was overruled prospectively in 1977. *See Cascade Security Bank v. Butler*, 88 Wn. 2d 777, 567 P.2d 631 (1977). *Ashford* was overruled in its entirety in 1992. See *Tomlinson v. Clarke*, 118 Wn. 2d 498, 825 P.2d 706 (1992). Even today, however, a purchaser to an executory real estate purchase agreement does not acquire fee to the property being purchased until he receives the deed. *Bank of New York v. Hooper*, 164 Wn. App. 295, 263 P.3d 1263 (2011).

Therefore, as established in *Hagen*, the vacated ROW became a separate parcel. Respondents' claim to the vacated ROW fails and the Court should reverse the trial court's ruling to the contrary.

B. The Trial Court's Ruling Is Inequitable.

The trial court awarded the respondents a financial windfall -- waterfront property on Lake Washington. With that ruling, the respondents will receive more property than their predecessors in interest contracted to buy. Moreover, the trial court's ruling conflicts with their predecessors' intentions; the predecessors executed a quit claim deed conveying the half of the ROW that they thought was theirs to the Cedar Park Community Club -- for a community beach.[6] CP 114-115. The County Commissioners granted the vacation petition "with the understanding that said vacated street is to be deeded to the Cedar Park Community Club to be used as community beach..." CP 117-118.

For whatever reason, the Cedar Park Community Club community beach proposal came to naught. Therefore, the Puget Mill Company conveyed the ROW back to King County on August 10, 1932 by quitclaim deed. CP 125-126. Respondents' efforts to quiet title to property that their predecessors in interest were not legally entitled to and intended to

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[6] Respondents' predecessors mistakenly believed that they would receive ½ of the vacated ROW. For the reasons set forth above, it was the Puget Mill Company that became the owner of the vacated ROW.

give as a gift to their neighbors for their use and enjoyment should offend the Court's sense of equity. The Court should not countenance respondents' efforts to obtain property that their predecessors in interest never intended to claim for their own.

V. CONCLUSION

The Court should reverse the trial court's summary judgment order and remand the case to the trial court for entry of an order quieting title in favor of King County and the City of Seattle.

DATED this 23rd day of September, 2013 at Seattle, Washington.

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2013, I sent Appellant King County's Brief via ABC Legal Messenger to the Court of Appeals, Division I and a copy to the following:

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