

DEC 29 2015

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Ronald R. Carpenter
Clerk

No. 92623-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Barlow Point Land Company, LLC, a Delaware limited liability
company; and Port of Longview, a municipal corporation,

Plaintiffs/Respondents,

vs.

Keystone Properties I, LLC,

Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT

HONORABLE STEPHEN WARNING

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Defendant/Appellant Keystone Properties I, LLC ("Keystone") appeals from the trial court's Order Granting Summary Judgment to Plaintiffs/Respondents Barlow Point Land Company, LLC ("Barlow Point") and the Port of Longview (the "Port") quieting title to disputed tidelands.

In 2006, Terra Firma, Inc. ("Terra Firma"), a company owned by a father, Robert Radakovich ("Radakovich I"), and his son, Robert Radakovich ("Radakovich II"), conveyed two parcels of its land (the "2006 Deed") to Stephen Jeffrey Wilson ("Wilson"). In 2012, Wilson conveyed both parcels to Barlow Point. At roughly the same time, Terra Firma attempted to convey the tidelands for one of the parcels to Keystone even though Terra Firma no longer owned those tidelands. Later in 2012 Barlow Point sold a portion of the disputed tidelands to the Port. Barlow Point and the Port jointly filed a complaint against Keystone to quiet title to the disputed tidelands.

The trial court concluded that an ambiguity existed in the 2006 Deed as to whether it included the disputed tidelands. The trial court then concluded that extrinsic evidence overwhelmingly demonstrated that the

Terra Firma intended to, and did, convey the disputed tidelands to Wilson via the 2006 Deed.

The trial court separately granted summary judgment on the basis that the 2006 Deed did not expressly reserve ownership of the disputed tidelands with the seller, and that the tidelands were therefore included in the conveyance pursuant to the Wardell Doctrine, *Wardell v. Commercial Waterway District No. 1 of King County*, 80 Wash. 495, 141 Pac. 1045 (1914).

The Court of Appeals affirmed the trial court's Order Granting Summary Judgment (Court of Appeals No. 46080-7-II). The Court agreed that ambiguities existed in the 2006 Deed as to whether it included the disputed tidelands. The Court also agreed that extrinsic evidence overwhelmingly demonstrated that Terra Firma intended to, and did, convey the disputed tidelands to Wilson via the 2006 Deed.

Having affirmed the trial court on its first basis for summary judgment, the Court did not address the issue of whether the 2006 Deed conveyed the disputed tidelands pursuant to the Wardell Doctrine.

In answer to Keystone's Petition, Barlow Point and the Port deny that Keystone's Petition satisfies any of the requirements for review. RAP 13.4(b). But should review be granted, the Respondents request that the

Supreme Court also review the trial court's alternate ground for summary judgment pursuant to the Wardell Doctrine.

STATEMENT OF THE CASE

1. 2006 Sale from Terra Firma to Wilson. At the beginning of 2006, Radakovich I and Radakovich II, under their family business, Terra Firma, owned 300+ acres in the Barlow Point area along the Columbia River just west of Longview. Terra Firma's ownership extended to the shore of the Columbia River and the adjoining tidelands. (CP 80-82)

In late 2005, Radakovich II negotiated with Wilson, his good friend, for the sale of a portion of Terra Firma's shorelands and adjoining tidelands. (CP 81) Wilson was told that he was purchasing all of Terra Firma's tidelands adjacent to the uplands he was acquiring. (CP 489-490)

As part of these negotiations Wilson was given a confidential appraisal of all of Terra Firma's property. (CP 489) A map included with the appraisal identified the fifteen tax parcels comprising Terra Firma's ownership. (CP 489) Of importance were Tax Parcels 1-0713-0100 and 1-0714-0100 ("Parcel 713 and Parcel 714"). These two parcels included all of Terra Firm's shorelands and tidelands. (CP 489-490)

Radakovich I agreed to sell Parcels 713 and 714 to Wilson for their assessed value of \$88,700.00. (CP 490) The parties had a local attorney,

Vince Penta ("Mr. Penta"), prepare a Real Estate Purchase and Sale Agreement ("Purchase Agreement"). (CP 82) The Purchase Agreement does not include a legal description but it states that the sale is of Parcels 713 and 714, and that Terra Firma is selling "a minimum of 20 acres" to Wilson. (CP 82) The Purchase Agreement does not exclude any tidelands from the sale.

Mr. Penta was asked to close the transaction. (CP 82) He did not have legal descriptions for Parcels 713 and 714 and so he turned to a local title escrow officer, Arlene Reynolds, for assistance. (CP 354-358) Ms. Reynolds found a legal description for Parcel 713 from an earlier transaction. This legal description became "Parcel A" in the eventual deed. Ms. Reynolds could not find a legal description for Parcel 714 as it had not previously been carved out of Terra Firma's larger ownership. Ms. Reynolds therefore prepared her own legal description of what she thought was contained within Tax Parcel 714. This became "Parcel B" in the eventual deed. (CP 354-358) Ms. Reynolds did not discuss this legal description with Mr. Penta, nor did he discuss it with the parties. (CP 354-358)

The sale from Terra Firma to Wilson was completed in February 2006. The Deed contains the following legal description:

A portion of the George Barlow Donation Land Claim and the George Fisher Donation Land Claim as fully described by an attached Exhibit "A" to the Deed setting forth the following legal description:

Parcel A:

Lot 2 of Short Subdivision No. 91-001, as recorded in Volume 6 of Short Plats, page 83, under Auditor's File No. 910204032; and being a portion of the George Barlow Donation Land Claim; TOGETHER WITH all tidelands of the second class, situated in front of, adjacent to or abutting the above described uplands **and as conveyed in Parcel "J" of said Deed, Volume 977, page 242, (Fee No. 840924042).**

Parcel B:

All that portion of George Barlow D.L.C. and George Fisher D.L.C. lying outside of Columbia River Dike of Consolidated Diking Improvement District No. 1, said dike being described by Deed in Volume 121, page 391, Auditor's File No. 51256;
EXCEPTING THEREFROM that portion lying Northerly of a line that is parallel to and 1,765.70 feet South of the South line of Section 22, Township 8 North, Range 3 West of the W.M.
Situate in Cowlitz County, State of Washington.

(CP 101-103) (Emphasis ours)

At issue is whether Terra Firma conveyed the tidelands adjacent to Parcel B (the "Parcel B Tidelands").

2. The parties differ in their interpretation of the legal description. In support of their Motion for Summary Judgment the Respondents presented the declarations of two expert witnesses: Cal

Hampton ("Hampton"), a licensed land surveyor, and Terry Woodruff ("Woodruff"), Senior Title Officer for Cowlitz Title. Both experts declared that the legal description for "Parcel A" includes all of the tidelands adjoining Parcel B. They explained that the conveyance of additional tidelands "as conveyed in Parcel J . . ." refers to an earlier conveyance. In that earlier conveyance "Parcel J" included all of the tidelands adjoining both Parcels A and B. Therefore, a conveyance of those tidelands "as conveyed in Parcel J" includes the tidelands adjoining Parcel B. (CP at 190 (Quoting CP at 105), at 191)

Keystone's expert, Dennis Gish ("Gish"), a title officer with Columbia Title, disagreed. Gish believed that the language "and as conveyed in Parcel J . . ." is meaningless, and that it was not intended to convey any tidelands other than those adjoining Parcel A. (CP 303)

3. Extrinsic evidence demonstrates the conveyance of the Parcel B Tidelands to Wilson.

- Shortly before the sale Radakovich II sent an email to Wilson reminding him that the Port of Longview was interested in the tidelands Wilson was about to purchase. (CP 82)
- Late in 2006, Radakovich II made multiple requests to repurchase the Parcel B Tidelands: (i) on October 12, 2006, Radakovich II sent an email to Wilson pleading with him to sell

back the Parcel B Tidelands (CP 84, 106-107); (ii) two weeks later Radakovich II tendered a formal written offer through a real estate broker to repurchase the Parcel B Tidelands for \$100,000.00 (CP 84, 108-127); (iii) Radakovich II sent a second formal written offer to repurchase the Parcel B Tidelands, offering to trade other properties owned by Terra Firma (CP 85, 128-140); and (iv) when Wilson did not respond to any of these offer Radakovich II sent a lengthy email on February 27, 2007, pleading to repurchase the Parcel B Tidelands: "I need to get the tidelands back for many reasons including my own sanity Jeff. I made a mistake not paying Duncan to survey out the tidelands when we executed this deal. I could not afford it and unnecessarily handed you control of the waterfront access. I acted out of weakness, and I hate myself for it. . . . I need the tidelands back to survive in the short term and long term. . . . I am on the edge of my life and I need those damn tidelands back. . . . I am tired and trying to bridge a chasm of vast expanse and I can't do it without those damn tidelands back." (CP 85-86, 141-142)

- When Wilson would not resell the Parcel B Tidelands to Radakovich II their friendship came to an end. In 2008 Terra Firma sued Wilson over access to the tidelands. In the

course of this litigation Radakovich II signed a sworn declaration stating that an attached map correctly identified the property belonging to Terra Firma and that belonging to Wilson. The attached map identified the Parcel B Tidelands as belonging to Wilson. (CP 492-493)

During trial Radakovich II stipulated to the entry of a map depicting the parties' respective properties. This map, entered as Exhibit 21, identifies all tidelands as belonging to Wilson. (CP 492-493, 513-514)

- Wilson was the only party to use the tidelands. (CP 87) He owned several "duck boats" and operated a business taking passengers and cargo across the Columbia River using the Parcel B Tidelands for access. (CP 87)

- Wilson paid all property taxes on Parcels 713 and 714. (CP 88)

- In 2011, Wilson applied to the State of Washington for five permanent mooring buoys to be placed along the Parcel B Tidelands. Ownership of the tidelands was a requirement of the application. (CP 87, 162-173)

- Following the litigation with Wilson, Radakovich II moved away and Radakovich I assumed control of Terra Firma. In

December 2011, Radakovich I filed a Chapter 7 Bankruptcy Petition. (CP 88, 174-181, 210-211) In his bankruptcy schedules, signed under penalty of perjury, Radakovich I does not claim ownership of any tidelands. (CP 211) He further states that Terra Firma is defunct and has no value. (CP 88, 177-179, 211)

- On January 25, 2012, while his bankruptcy was pending, and without notice to the bankruptcy trustee, Radakovich I executed a deed purporting to convey the Parcel B Tidelands to Keystone, a company owned by an associate of Radakovich I named John Van Vessem. (CP 211) The selling price was \$1,000.00. (CP 211) At the same time Wilson was completing a sale of the tidelands to Barlow Point. (CP 211) This sale was completed in February 2012. Barlow Point paid Wilson \$755,000.00 for the same tidelands. (CP 89) Later in 2012, Barlow Point conveyed a portion of the Parcel B Tidelands to the Port for \$63,000.00. (CP 211)

Barlow Point and the Port jointly commenced this action to quiet title to the Parcel B Tidelands according to their respective ownership interests.

4. Motion for Summary Judgment. Barlow Point and the Port jointly moved for summary judgment. Among other arguments, they asserted the following grounds for quieting title in their names:

a. The legal description in the Wilson Deed is ambiguous with respect to the Parcel B Tidelands. This ambiguity is resolved by overwhelming extrinsic evidence that the parties intended the tidelands to be included in the 2006 Deed to Wilson.

b. The 2006 Deed's conveyance of Parcel B included the adjoining tidelands unless the seller expressly reserved them. Terra Firma did not expressly reserve ownership of any tidelands. The Parcel B Tidelands were therefore conveyed to Wilson according to the Wardell Doctrine.

5. Order Granting Summary Judgment. The trial court agreed with both of these arguments and granted summary judgment quieting title on both grounds. More specifically, the trial court concluded that:

a. The 2006 Deed is ambiguous as to whether the tidelands adjoining Parcel B are included. This ambiguity is resolved by extrinsic evidence that overwhelmingly demonstrates the parties' intent to convey the tidelands.

b. The property conveyed to Wilson is a "riparian estate". As a matter of law, the conveyance of the Parcel B

uplands included the adjoining tidelands since Terra Firma did not expressly reserve their ownership, citing to the Wardell Doctrine.

6. Appeal to the Court of Appeals.

a. The Court affirmed the trial court's conclusions that the 2006 Deed was ambiguous, and that extrinsic evidence overwhelmingly demonstrated the parties' intent to include the Parcel B Tidelands. The Court affirmed the trial court's conclusion that the 2006 Deed was ambiguous:

To determine which tidelands were conveyed in the 2006 Deed requires us to interpret the phrase 'and as conveyed in Parcel J of said deed . . .'" CP at 103. This phrase is susceptible to more than one meaning. It could refer to only the tidelands situated in front of, adjacent to, or abutting Parcel A or it could refer to separate tidelands in addition to the tidelands situated in front of, adjacent to, or abutting Parcel A.

As to the former interpretation, the phrase could simply mean that the tidelands adjacent to Parcel A were *also* conveyed in Parcel J, and does not include any tidelands other than those adjacent to Parcel A. In that sense, the phrase, "and as conveyed in Parcel J" merely represents an attempt to include all conceivable tidelands associated with or near Parcel A as part of the conveyance of the uplands. CP at 103. Accordingly, the absence of reference to tidelands in the Parcel B description could mean that the Parcel B Tidelands were not conveyed.

But, as to the later interpretation, in light of the history of Parcel J as provided by Hampton, it is

reasonable that Parcel J describes *all* of the tidelands Terra Firma owned as conveyed to Radakovich I in 1987 by International Paper Realty Corporation, except some tidelands that had been conveyed to other parties. Because it is undisputed that Terra Firma already owned the land comprising the Parcel B Tidelands as a result of the 1987 conveyance, its later conveyance of the tidelands 'as described in Parcel J' could include the disputed portion of tidelands adjacent to Parcel B, separate and distinct from those tidelands adjacent to Parcel A.

By giving meaning to every word in the 2006 Deed, it is susceptible to at least two reasonable interpretations. Therefore, the 2006 Deed is ambiguous.

(Appendix 1 at 11-12)

Having concluded that the 2006 Deed was ambiguous the Court then affirmed the trial court's conclusion that extrinsic evidence overwhelmingly demonstrates that the parties intended to include the Parcel B Tidelands in the 2006 Deed, citing to the facts referenced above. (Appendix 1 at 18)

b. The Court did not address the trial court's alternate basis for summary judgment. Having affirmed the trial court on its first basis the Court felt it was unnecessary to address the trial court's second basis: That the 2006 Deed did not expressly reserve any tidelands and, therefore, all tidelands were conveyed to Wilson pursuant to the Wardell Doctrine. (Appendix 1 at 19)

ARGUMENT

1. Keystone's Petition does not satisfy the requirements for RAP 13.4(b).
 - a. The Petition does not satisfy the requirements for RAP 13.4(b)(1) and (2). Keystone asks for review pursuant to RAP 13.4(b)(1) and (2), arguing that the Court of Appeals decision is in conflict with the decisions of the Supreme Court or with other decisions of the Court of Appeals. But Keystone's Petition fails to identify any decisions of either the Supreme Court or the Court of Appeals that are in conflict. Rather, Keystone merely cites to a number of decisions *that were all recognized by the Court of Appeals and relied upon in its decision*. Keystone does not cite to any decisions not cited by the Court of Appeals, nor to any decisions in conflict with those relied upon by the Court of Appeals. Keystone's Petition therefore does not satisfy the requirements for RAP 13.4(b)(1) or (2).
 - b. The Petition does not satisfy the requirements of RAP 13.4(b)(3). Keystone concedes that this case does not involve a significant question of law under the Constitution of the State of Washington or of the United States.

c. The Petition does not satisfy the requirements of RAP 13.4(b)(4). This case involves the interpretation of a deed between two private parties. It does not involve any issues of substantial public interest. It does not raise any unique issues of law that have not already been fully examined by our courts. The Petition does not satisfy the requirements of RAP 13.4(b)(4).

2. In the event review is granted, the Supreme Court should also consider the trial court's alternate grounds for summary judgment, that the disputed tidelands were conveyed pursuant to the Wardell Doctrine. The Court of Appeals concluded that it was unnecessary to address the trial court's alternate ground for summary judgment: that the disputed tidelands were conveyed as a matter of law according to the Wardell Doctrine. RAP 13.4(d) requires that "if [a] party wants to seek review of any issue that is not raised in the Petition for Review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those issues in an answer." The Respondents therefore respectfully request that, if review is granted, the Supreme Court also consider this alternate ground for the trial court's grant of summary judgment.

CONCLUSION

a. The Respondents' ask that Keystone's Petition for Review be denied.

b. If review is accepted, the Respondents' ask that the Supreme Court also consider the trial court's alternate ground for summary judgment pursuant to the Wardell Doctrine.

RESPECTFULLY SUBMITTED this 28 day of December,
2016.

~~HILLIER, SCHEIBMEIR & KELLY, P.S.~~

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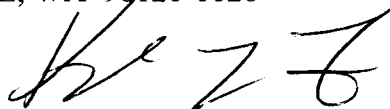
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CERTIFICATE OF SERVICE

THE UNDERSIGNED, states as follows: I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action. On the 28th day of December, 2015, I caused the document to which this Certificate is affixed to be mailed as follows:

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