NO. 46080-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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

REPLY BRIEF

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I. The Legal Description in the 2006 Deed Cannot Be Interpreted to Grant the Tidelands Appurtenant to Parcel B.

This case depends upon the interpretation of the legal description in the deed from Terra Firma, Inc. (Terra Firma) to Stephen Jeffrey Wilson in 2006 (the 2006 Deed). That legal description is the following:

> 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 D.L.C.; 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. 8400924042).
>
> PARCEL B:
>
> All that portion of George Barlow D.L.C. and George Fisher D.LC. 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.

The tidelands abutting Parcel A are clearly included in the description of that parcel and were conveyed. But the description of Parcel B contains no reference of any kind to tidelands. Therefore, and as Dennis Gish — an experienced title officer — pointed out in his declaration, the deed is not

ambiguous and cannot be interpreted to include a grant of the tidelands abutting Parcel B.[1] (CP 301)

The Port of Longview (the Port) and Barlow Point Land Company, LLC (Barlow Point) contend that the legal description is ambiguous and that the phrase [2] "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. 8400924042)" in the description of Parcel A also applies to the tidelands abutting Parcel B. Regardless of whether the language of the deed is ambiguous — and it is not ambiguous, the Port and Barlow Point must come up with a sensible interpretation of that language to support their claim. The rules for interpretation of deeds are the same as for interpretation of contracts. *Alby v. Banc One Financial,* 119 Wn.App. 513, 518, 82 P.3d 675 (2003). Those rules preclude adopting an interpretation that is strained or forced or leads to absurd results. *Eurick v. Pemco Insurance Co.* 108 Wn.2d 338, 341, 738 P.2d 251 (1987); *City of Tacoma v. City of Bonney Lake,* 173 Wn.2d 584, 593, 269 P.3d 1017 (2012); *Forest*

[1] The trial court believed that Mr. Gish based his opinion on the deed history of related property. This is not the case. His opinion is based on the language of the deed. He stated that the deed history is consistent with his view. He also used the deed history only to refute the interpretations given by Terry Woodruff and Calvin Hampton. (CP 301-04)

[2] The deed referred to is the 1984 deed from International Paper Company to International Paper Realty Corporation. It has been and will be referred to as the "1984 Deed."

Marketing Enterprise, Inc. v. Department of Natural Resources, 125 Wn.App. 126, 132, 104 P.3d 40 (2005). The interpretation given by the Port and Barlow Point cannot be adopted because it is strained and forced and leads to absurd results.

The legal description contains two parcels. The language on which the Port and Barlow Point rely is contained only in the description to Parcel A. They want this language also to apply to Parcel B although it is not contained in the description of Parcel B. That is the epitome of a strained and forced construction. This is best demonstrated by the fact that such an interpretation was rejected by Mr. Gish; by Chicago Title Insurance Company (Chicago Title) in the title guaranty it prepared for the Port in 2011; and by Terry Woodruff in an e-mail and in a chain of title certificate he prepared in January of 2012. (CP 215-19; 349, 396, 605-06) Furthermore, normal practice dictates placing language in Parcel B concerning tidelands if those tidelands are to be conveyed. (Appellants' Brief, pps. 18-19)

The Port and Barlow Point contend that the phrase "and as conveyed in Parcel "J" of said deed, Volume 977, page 242 (fee no. 8400924042)" describes the tidelands abutting both Parcel A and Parcel B because those tidelands are included within the description of Parcel "J" of the 1984 Deed. (Respondents' Brief, pps. 13-14) That interpretation might

make sense if the only tidelands described in Parcel "J" were those abutting the two parcels conveyed in the 2006 Deed. But that is not the case. Parcel "J" also describes tidelands that are not adjacent to either Parcel A or Parcel B in the 2006 Deed; tidelands that were previously conveyed to others; and tidelands never conveyed to Terra Firma, the grantor in the 2006 Deed. The same phrase appears in deeds from International Paper Realty Corporation to five sets of grantees in five deeds in 1986. If that phrase applies to all the tidelands described in Parcel "J," then International Paper Realty Corporation conveyed all tidelands described in Parcel "J"— including those abutting Parcel A and Parcel B of the 2006 Deed — five times in 1986. It would also mean that the Port and Barlow Point have no viable claim to the tidelands abutting either Parcel A or Parcel B because those tidelands were conveyed to others in 1986. The deed to Robert P. Radakovich, Terra Firma's immediate successor, excepted the tidelands conveyed in 1986 from the grant. The phrase "and as conveyed in Parcel "J" of said deed, Volume 977, page 242 (fee no. 8400924042)" in the 2006 Deed cannot refer to all tidelands described in Parcel "J" because Terra Firma never received them. (Appellant's Brief, pps. 4-5, 16-18, 35-37) The Port and Barlow point do not even attempt to refute this analysis. That means that the interpretation

advanced by the Port and Barlow Point cannot be adopted because it leads to absurd results.[3]

The Port and Barlow Point also claim that their interpretation must be adopted because Terra Firma did not reserve the tidelands adjacent to Parcel B. That means that tidelands are effectively conveyed in the absence of any language in a deed's legal description referring to them. This argument makes no sense because uplands and tidelands are distinct and can be under different ownership, as these tidelands were until the State of Washington conveyed to Long-Bell Timber Company in 1923. (Appellant's Brief, pps. 3-4) That argument would also render the language in Parcel A referring to tidelands superfluous. If a lack of a reservation is sufficient to convey tidelands, then that language would be meaningless and unnecessary. Interpretations rendering language meaningless or superfluous cannot be adopted. *Public Utility District of Lewis County v. Washington Public Power Supply System,* 104 Wn.2d 353, 373, 705 P.2d 1195 (1985); *Bogomolov v. Lake Villas Condominium*

[3] Calvin Hampton, one of the witnesses on whom the Port and Barlow Point rely, recognizes the infirmity of this interpretation. (CP 195, 344; Appellants' Brief, p. 18) Mr. Hampton thought that the key phrase should refer to all the tidelands that Terra Firma owned prior to executing the 2006 deed. (CP 344) That interpretation cannot be adopted because it would require adding language to the description to Parcel B. (Appellant's Brief, p. 18) The Port and Barlow Point have understandably not relied on that interpretation in their brief.

Association of Apartment Owners, 131 Wn.App. 353, 361-62, 127 P.3d 702 (2002).

The final point made by the Port and Barlow Point is that the reference in the description to Parcel A to tidelands abutting that parcel is sufficient and that the additional reference to Parcel "J" in the 1984 Deed must mean something. That argument, of course, begs the question of what the additional reference can sensibly mean. As discussed above, that statement cannot refer to the tidelands abutting Parcel B because that is a strained and forced construction that leads to absurd results.

Only one conclusion can be reached here — the legal description to the 2006 Deed cannot be interpreted to include a grant of the tidelands abutting Parcel B whether or not that description is considered ambiguous.

II. The Legal Description Is Not Ambiguous.

The language of a deed is ambiguous only if its language is capable of two or more meanings, neither of which can be strained or forced. (Appellant's Brief, p. 15) The 2006 Deed is unambiguous on its face. As discussed above, it is capable of only one meaning — the tidelands abutting Parcel A were included in the grant while the tidelands abutting Parcel B were not.

This lack of ambiguity is best demonstrated by what occurred in this case. Everyone who examined the title without knowledge of what

Mr. Wilson believed he was getting or other extrinsic evidence concluded that the tidelands abutting Parcel B were not in fact conveyed in the 2006 Deed. Chicago Title reached this conclusion in its 2011 report given to the Port. Mr. Woodruff authored a chain of title certificate to that same effect in 2012.

Calvin Hampton, Terry Woodruff, and Dennis Gish all testified that each would have clearly indicated that the tidelands abutting Parcel B were included with the grant if he had prepared the legal description. This reinforces the conclusion that the Deed unambiguously does not convey the tidelands abutting Parcel B.

The Port and Barlow Point suggest ambiguity because of the content of the Purchase and Sale Agreement between Terra Firma and Mr. Wilson. But the question of whether the deed is ambiguous must be determined on the basis of the deed's language apart from any other document or other extrinsic evidence. (Appellant's Brief, p. 15)

More importantly, a deed is not ambiguous unless its language is subject to more than one reasonable interpretation. (Appellant's Brief, p. 15) Even with the aid of extrinsic evidence, and as discussed above, the Port and Barlow Point cannot point to any reasonable interpretation of the language that would allow for the conveyance of the tidelands adjacent to Parcel B.

Finally, it must be remembered that every deed must contain legal description sufficiently definite so that the land conveyed can be located without resort to oral testimony. *Dickson v. Kates,* 132 Wn.App. 724, 733-34, 133 P.3d 498 (2006). This deed describes two parcels. The description includes tidelands abutting one of the parcels but not the other. The deed does convey the land described. It omits the land that the Port and Barlow Point seek — the tidelands abutting Parcel B. It is simply not ambiguous and does not include the tidelands in question.

III. The Extrinsic Evidence Does Not Help the Port and Barlow Point.

a. Extrinsic Evidence Cannot Be Considered.

Extrinsic evidence can only be considered if the language of the deed is ambiguous. Since the 2006 deed is not ambiguous, extrinsic evidence cannot be considered. (Appellant's Brief, p. 21)

b. The Extrinsic Evidence Cannot Be Used as the Port and Barlow Point Want to Use It.

Assuming that the deed in this case is ambiguous—which it is not, extrinsic evidence cannot be considered that shows a party's unilateral or subjective intent; that shows an intention independent of the instrument; or that would vary, modify, or contradict the written language of the deed. Critically, extrinsic evidence can be used only to illuminate what was written, not what may have been intended to be written. *Berg v.*

Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990); *Hollis v. Garwall, Inc.,* 137 Wn.2d 683, 695, 974 P.2d 836 (1999); *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc.,* 168 Wn.App. 56, 70-71, 277 P.3d 18 (2012). The Port and Barlow Point entitle their argument as follows:

> The Ambiguity in the (2006) Deed Is Resolved by Overwhelming Evidence that the Parties Intended to Include Parcel B Tidelands in the (2006) Deed.

(Emphasis added; Brief of Respondents, p. 19) In other words, the Port and Barlow Point are basing their argument on what they claim the parties intended the legal description to include as opposed to its actual language. This is impermissible, and the extrinsic evidence adduced by the Port and Barlow Point cannot and should not have been considered for that reason.

c. Certain of the Evidence Is Not Admissible.

The Port and Barlow Point rely on statements made by Robert Radakovich (the elder Mr. Radakovich) made in bankruptcy filings and in statements made in meetings with the Port and on statements made by Robert Radakovich II (the younger Mr. Radakovich) after the 2006 transaction and in connection with litigation between the parties in 2008. This evidence amounts to inadmissible hearsay.

Hearsay is any statement other than one made by the declarant at trial offered to prove the truth of the matter asserted. ER

801(c). In that regard, a statement is an oral or written assertion. ER 801(a)(1). Hearsay not within any exception is inadmissible. ER 802. Evidence that is not admissible cannot be considered in connection with a motion for summary judgment. CR 56(e).

The Port and Barlow Point claim that the statements by the elder Mr. Radakovich in his bankruptcy schedules that Terra Firma had no value amount to assertions that it did not own the tidelands abutting Parcel B. The statements they claimed he made in a meeting with the Port that the tidelands had been sold to Mr. Wilson are an assertion of the same fact. They were offered for the truth of the matters asserted. Otherwise, they are not relevant. The Port and Barlow Point do not attempt to fit these statements within any exception to the hearsay rule, implicitly conceding that none apply.[4] These statements should not be considered.[5]

The exchanges between the younger Mr. Radakovich and Mr. Wilson concerning the tidelands after the grant of the deed and any statements the younger Mr. Radakovich made in the 2008 litigation also amount to hearsay. They are only relevant if they can be characterized as

[4] No exceptions apply. (Appellant's Brief, pps. 28-30)

[5] It appears that the trial court did not consider any statements made by the elder Mr. Radakovich because, as he stated in his declaration, he was not involved in the transaction. This ruling was correct. (CP 327-28; RP 4)

assertions that the tidelands abutting Parcel B had been conveyed to Mr. Wilson in the 2006 Deed. The Port and Barlow Point concede that they are offered for such purposes. (Respondents' Brief, pps. 28-29) They are therefore hearsay. Barlow Point and the Port contend that the "state of mind" exception in ER 803(a)(3) applies to these statements. That exception specifically excludes a "statement of memory or belief to prove the fact remembered or believed..." The Port and Barlow Point concede that these statements show precisely that — the alleged belief of the younger Mr. Radakovich that the tidelands abutting Parcel B had been conveyed to Mr. Wilson. (Respondents' Brief, pps. 28-29) Therefore, they are not admissible under ER 803(a)(3).

d. Genuine Issues of Fact Exist as to the Extrinsic Evidence on Which the Port and Barlow Point Rely.

The Port and Barlow Point have set out facts that they claim support their contentions at Respondents' Brief, pps. 21-23. Apart from questions of admissibility, and even if this extrinsic evidence is considered, it does not eliminate issues of fact as what the parties may have intended. It therefore cannot support the grant of summary judgment in Respondents' favor.

The Port and Barlow Point rely on the terms of the Purchase and Sale Agreement. It does not unambiguously and clearly state

what property is being sold. There are also several versions of the Purchase and Sale Agreement. One contains a map of the property being sold. Two other versions have no exhibits at all. No version contains any explicit reference to tidelands or any legal description. (CP 97-100, 336-37, 389-93, 468-69) The Purchase and Sale Agreement is therefore ambiguous as to what was being sold. The agreement refers to the tax parcel numbers associated with Parcel A and Parcel B. But there is no indication that these tax lots include any tidelands. The Port and Barlow Point refer to an appraisal that states the area of the two tax parcels at issue. But there is nothing in the appraisal to the effect that the tax lot that is Parcel B actually includes tidelands. There is no statement or any evidence that the Cowlitz County assessor considers or considered the tidelands part of the tax parcel for Parcel B. In fact, Cowlitz County set up a different tax parcel for the tidelands conveyed to Keystone. (CP 290) In short, there is no clear evidence from the Purchase and Sale Agreement that the tidelands abutting Parcel B were part of the tax lot for Parcel B or that those tidelands were in fact included in the tax lot for Parcel B.

The Purchase and Sale Agreement does indicate that Mr. Wilson was to receive twenty acres of land. The Port and Barlow Point further claim that Parcel A contains 10.91 acres and Parcel B contains 9.45 acres. They assert that twenty acres can only be achieved if the tidelands

abutting Parcel B are included. Mr. Hampton claims that the uplands amount to approximately nine acres. (CP 192) But the tax parcel created for what Keystone obtained in the 2012 conveyance from Terra Firma — the tidelands that the Port and Barlow Point claim were part of the tax parcel for Parcel B — has only 6.26 acres. (CP 290) That means that Mr. Wilson would not have received twenty acres even including the tidelands in question.

There is no reservation of tidelands abutting Parcel B in either the Purchase and Sale Agreement or the 2006 Deed. That is not necessary or particularly germane because it is recognized that tidelands can be accessed over water. (CP 346)

Prior to the sale, the younger Mr. Radakovich sent an e-mail to Mr. Wilson stating that the Port might want to buy some tidelands. (CP 95) That e-mail is ambiguous because it does not distinguish between the tidelands abutting Parcel A which were sold and those adjacent to Parcel B that were not.

The Port and Barlow Point want to refer to discussions between Mr. Wilson and the younger Mr. Radakovich prior to the purchase. The younger Mr. Radakovich indicates in his declaration that the tidelands were never discussed. (CP 332) This disagreement obviously

creates an issue fact as to what the parties felt that transaction should entail.

After the conveyance, the younger Mr. Radakovich attempted to reclaim the property that he had sold including all tidelands. That was unfortunately not put into the Purchase and Sale Agreement. (CP 368-69) Any belief that he may have had concerning whether he had conveyed the tidelands abutting Parcel B came from statements made to him by Charles Feinauer, a representative of the Port. (CP 332) If the belief of the younger Mr. Radakovich is based upon what someone else told him about the conveyance, it is of no value. It further begs the question of whether the 2006 Deed actually conveyed the tidelands abutting Parcel B.

The Port and Barlow Point have incorrectly attributed certain statements to the elder Mr. Radakovich. In his declaration, he did not admit "that from 2006 through 2011...he thought that the tidelands belonged to Mr. Wilson (only to then 'realize that he owned them' in 2012." (Respondents' Brief, p. 23) He stated that he did not participate in the 2006 transaction and did not look at the legal description to the deed until after this action was filed. (CP 327-28)

The Plaintiffs have also incorrectly stated that the record contains a declaration that the elder Mr. Radakovich gave in the 2008

litigation between Terra Firma and Mr. Wilson. The only declaration submitted was given by his son. In that declaration, the younger Mr. Radakovich stated that certain property described on an attached map was conveyed to Mr. Wilson in 2006. (CP 506) The map shows parcels by tax lot number. (CP 512) There is no parcel on the map that is designated by the numbers 1-713-0100 and 1-714-0100, the two tax lots that were conveyed in the 2006 Deed. (CP 376-77) This declaration is not helpful for that reason.

Mr. Wilson claims that he paid property taxes on both Parcel A and Parcel B. But did the Cowlitz County Assessor include the tidelands abutting Parcel B within the tax parcel for Parcel B? No evidence has been adduced on that point as noted above. Whether Mr. Wilson paid taxes doesn't matter until it is clearly demonstrated that the tidelands are within the tax lot.

Respondents' reference to the 2008 litigation is not meaningful. That case did not involve title to the tidelands. It concerned the scope of an easement that had been granted to Mr. Wilson to get to the property that had been sold to him.

The Port wishes to rely on a bankruptcy filing by the elder Mr. Radakovich where he lists Terra Firma on a schedule of assets but states that the company had no value. But, as he stated in his declaration,

the elder Mr. Radakovich was not involved in the 2006 transaction and had not looked at the legal description of the 2006 Deed prior to the filing of this suit. (CP 327-28)

The Port and Barlow Point also rely on a statement that the elder Mr. Radakovich may have made during the course of meetings with Port officials concerning his ownership of the tidelands. John Van Vessem states that he made no such statement. (CP 291) Mr. Van Vessem's statement creates an issue of fact.[6]

Mr. Wilson claims to have used the tidelands in his "duck boat" business. According to the younger Mr. Radakovich, this was never discussed at the time of the transaction. (CP 333) His use might show his intentions but not the mutual intention necessary to have any relevance as extrinsic evidence. It also is consistent with nothing more than the desire to use property in support of some sort of adverse possession claim or acquiescence in his use by Terra Firma that could allow for the assertion of some sort of license to make that use.

Mr. Wilson has referred to his mooring buoy license applications in connection with his "duck boat" business and claims that

[6] The trial court recognized this and apparently put no weight on these alleged statements. (RP 4)

he was required to own the tidelands to make the application. (CP 493) The applications themselves belie his assertion. They state that a lease is required for a commercial use of a buoy, such as the use that Mr. Wilson would make. (CP 165, 167, 169, 171, 173) This suggests that Mr. Wilson may have applied for the wrong type of permit. If he has only obtained a license, he cannot make commercial use of the buoys. The application asks who the owner of the upland property is but makes no reference to ownership of the tidelands. (CP 165-74) If ownership of the tidelands was necessary to the license, the application would contain a question along these lines.

In a summary judgment proceeding as here, the facts and all inferences from those facts must be construed in the light most favorable to the non-moving party such as Keystone Properties, LLC (Keystone). As discussed above, the facts and the conclusions to be drawn from the facts are disputed. The Port and Barlow Point have not eliminated factual issues concerning the parties' intentions. They cannot support the grant of a summary judgment in favor of the Port and Barlow Point.

e. The Deed History Refutes the Interpretation Sought by the Port and Barlow Point.

As discussed at p. 4 above, the history of the properties associated with Parcel "J" in the 1984 Deed show that the interpretation of the legal description in the 2006 Deed advanced by the Port and Barlow Point would lead to absurd results. If this material is considered extrinsic evidence, it conclusively establishes that the interpretation Respondents seek cannot be adopted.

f. The 2006 Deed Shows the Intentions of the Parties.

Barlow Point and the Port assert that there is no evidence of an intention not to convey the tidelands abutting Parcel B to Mr. Wilson. (Respondents' Brief, pps. 31-33) But the younger Mr. Radakovich states Mr. Wilson never discussed with him a desire to buy the tidelands. (CP 332)

In a larger sense, the best evidence of the parties' intentions is the language of the 2006 Deed. *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc., supra.* That conclusion is very strong in this case because Mr. Wilson read the legal description of the 2006 Deed. He then explicitly approved it in the escrow instructions and signed the deed approving its form. The deed's legal description simply cannot be interpreted as conveying the tidelands the abut Parcel B

as has been discussed. That means that the parties' did not intend to convey the tidelands abutting Parcel B.

g. Conclusion.

Extrinsic evidence cannot be considered because the 2006 Deed is not ambiguous. Much of the extrinsic evidence advanced by the Port and Barlow Point is not admissible. It cannot be considered because it is put forward to show what the parties intended the legal description to show, not to illuminate the language that they used. It is also disputed and cannot support the grant of a summary judgment. Finally, the deed history — whether or not it is considered extrinsic evidence — is the most compelling. It refutes the interpretation the plaintiffs advocate. In conclusion, the extrinsic evidence requires the conclusion that the 2006 Deed did not convey the tidelands abutting Parcel B.

IV. Mr. Wilson Waived Any Rights to Receive Anything Other than What Is Described in the 2006 Deed.

The parties agree that waiver is the intentional relinquishment of a known right. The Port and Barlow Point do not dispute that waiver can occur through conduct. (Appellant's Brief, p. 38; Respondents' Brief, p. 36) Mr. Wilson's conduct amounts to a waiver of the right to claim entitlement to anything other than what was described in the 2006 Deed, or at least raises an issue of fact on that question.

Mr. Wilson signed the 2006 Deed approving its form. He also signed escrow instructions accepting the legal description and waiving the contingency that he would receive twenty acres. He reviewed the legal description before he signed these documents. (CP 360, 364, 375-77, 451-52, 459-60) He therefore had the opportunity to require that the deed's legal description be changed to include a reference to adjacent tidelands in the description to Parcel B. His failure to do so waived the right to claim that he received anything other than what is contained within the deed's legal description. (Appellant's Brief, pps. 38-40)

Barlow Point and the Port contend that Mr. Wilson waived nothing because the deed is ambiguous and he couldn't have known how it might later be interpreted. But Mr. Wilson did know what the language of the legal description was and approved its form. He waived the right to have it say anything else. For better or for worse, he is bound by its terms, whatever those may be.

The Port and Barlow Point argue against waiver on the basis of the extrinsic evidence it has adduced. But the legal description Mr. Wilson approved was not consistent with his testimony about what the transaction was supposed to be. By approving the legal description and the form of the deed, he agreed to accept whatever the legal description conveyed.

Mr. Wilson has testified about what he thought he would receive in the transaction. He knew exactly what the legal description said. He had the perfect right to object to the legal description that was proffered. He not only failed to object — he affirmatively approved the description on the deed. His conduct therefore amounted to a knowing and intelligent waiver of the right to receive anything other than what might be described in the legal description to the 2006 Deed.

V. The Doctrine of Merger Limits the 2006 Deed to the Legal Description.

Plaintiffs' claim that the doctrine of merger does not apply because the 2006 Deed conveys what the parties agreed would be conveyed. (Respondents' Brief, p. 37) That position concedes that the parties are bound by the language of the deed — however that language might be interpreted. The Port and Barlow must also implicitly concede that if the deed cannot be interpreted to include the tidelands abutting Parcel B, they cannot argue that they are entitled to those tidelands based on the extrinsic evidence they put forward.

It would appear that we have an area of agreement between the parties — the interpretation of the legal description of the 2006 Deed controls the transaction regardless of what anyone thought they were supposed to receive.

VI. The Absence of a Reservation of the Tidelands Abutting Parcel B Is of No Significance.

The Port and Barlow Point rely heavily upon the presumption contained in *Wardell v. Commercial Waterway District #1*, 80 Wash. 495, 141 P. 1045 (1914). As pointed out in Brief of Appellant, pps. 42-45, that presumption applies only when the legal description calls out a body of water as the boundary. That is not the case here. No reference is made to a body of water in the description of Parcel B. That means that the presumption does not apply.

In their brief, the Port and Barlow Point dispute this conclusion claiming that the Court in *Wardell v. Commercial Waterway District #1, supra,* imposed no such limitation. (Respondents' Brief, pps. 35-36) But the opinion cannot be read to apply the presumption in the absence of a call in a legal description to a stream. The legal description at issue in that case stated one boundary to be the Duwamish River. There is no language in the opinion to the effect that the presumption should be applied in the absence of such a call in a deed's legal description. Furthermore, the language from the opinion from *Freeman v. Bellegard,* 108 Cal. 179, 185, 41 P. 289 (1895), upon which plaintiffs rely was preceded by the following statement from the Court:

> After title to the shore land or the bed of the stream has passed from the State into private ownership, there seems to be no reason why a conveyance by an upland proprietor of land, describing it as bound by a certain stream, in the absence of a reservation, should not convey all the land which such proprietor owns, even to the thread of the stream, if he should own so far.

(Emphasis added) Furthermore, *Freeman v. Bellegard, supra,* does not stand for the more expansive proposition. The conveyance in that case contained a legal description that called out a creek as a boundary. The Court stated that the designation of a physical object as a boundary means that the grantor intended to grant to the middle of the object. When the object is a stream, the grant is intended to be to the thread or midpoint.

The Port and Barlow Point have not called the Court's attention to any case applying the *Wardell* presumption to situations where the deed does not call out a body of water as a boundary. By its terms, the presumption is limited to those situations. *Knutson v. Reichel*, 10 Wn.App. 293, 295-296, 518 P.2d 233 (1973), discussed at Appellant's Brief, p. 43.

In any event, the presumption is overcome by the facts of this case. As the Court stated in *Knutson v. Reichel, supra*, the presumption is based on the supposed intentions of the grantor to convey to the middle of a stream:

> Generally, a call in a deed to a non-navigable river means to the center (thread) of the stream. . .there exists, moreover, a presumption that when a private individual

> grants property belonging to him and bounds it generally upon a natural stream, he does not intend to reserve any land between the upland and the stream, and the grant will carry title to the grantee so far as the grantor owns unless the shore land or bed of the stream be expressly reserved by the grant. . .Furthermore, as to a deed which employs a call to a river, though the thread of the river is not specifically described as a boundary, it can be said in light of the above presumption that the shorelines and bed are appurtenant to this grant. . .
>
> . . .the cumulative effect of these principals is this: a deed which employs a river as one of the calls in its description will be construed against the grantor, and if he owns to the water he will be deemed not to have cutoff the grantee from the water absent an express reservation.

The legal description shows that the grantor had a different intention — than what the presumption assumes. The legal description to Parcel A specifically calls out the adjacent tidelands. In other words, when Terra Firma wanted to convey tidelands, it expressly said so. The legal description was not formulated based on this presumption. The omission of any reference to tidelands in the description to Parcel B coupled with the specific reference to tidelands in the description of Parcel A can only mean that there was no intent to convey the tidelands adjacent to Parcel B. The language of the deed therefore overcomes the presumption.

CONCLUSION

The arguments made by the Port and Barlow Point do not overcome the simple language of the 2006 Deed — by its terms, the

tidelands abutting Parcel A were conveyed while the tidelands adjacent to Parcel B were not. The trial court erred by ruling to the contrary. The matter should be remanded to the Superior Court with direction to quiet title in the tidelands abutting Parcel B in Keystone. At very least, since issues of fact exist on the extrinsic evidence presented by the plaintiffs, and since Keystone supported its position with the expert testimony of Mr. Gish, the matter must be remanded for trial.

DATED this 14 day of Aug., 2014.

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NO. 46080-7

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HONORABLE STEPHEN WARNING

DECLARATION OF MAILING

BEN SHAFTON
Attorney for Appellant
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

COMES NOW Lorrie Vaughn and declares as follows:

1. My name is LORRIE VAUGHN. 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.

2. On , I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of Appellant's Reply Brief to the following person(s):

MR MARK SCHEIBMEIR
HILLIER SCHEIBMEIR VEY & KELLY
PO BOX 939
CHEHALIS WA 98532

MR SETH WOOLSON
CHMELIK, SITKIN & DAVIS
1500 RAILROAD AVENUE
BELLINGHAM, WA 98225

I DECLARE UNDER PENALTY OF PERJURY AND THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED at Vancouver, Washington, this 19th day of August, 2014.

Lorrie Vaughn
LORRIE VAUGHN