

70454-1

70454-1

NO. 70454-1-1  
COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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R. LANCE HADDON

Appellant,

vs.

JOOST R. CLAEYS

Respondent.

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APPELLANT'S BRIEF

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**I. ASSIGNMENT OF ERROR.**

**a. Assignment of Error.**

The Parties brought cross motions for summary judgment. Appellant Haddon asking the court to declare void the easement that Ms. Church had granted to herself over her own property for her benefit as one cannot have an easement over one's own property. Respondent, Claeys, asked the court to find the easement valid, or, if not, to find that it was reserved based on the easements inclusion among the 12 "Subject To's" attached to the Statutory Warranty Deed of conveyance.

The trial court granted partial summary judgment as follows:

**Although the easement was not valid when recorded in August 2006 because Ms. Church owned both Lot 1 and Lot 3, the easement became valid when Ms. Church conveyed Lot 1 to the Plaintiff's "subject to" the easement. This act constituted a valid reservation of rights in the easement to Ms. Church, who owned Lot 3.**

The trial court was correct in the first portion of the ruling in **Bold** above but erred in its ruling that the Easement was reserved in the conveyance as underlined above.

**b. Issue Relating to Assignment of Error.**

The specific question is:

Did the trial court error in ruling that a void easement was "Reserved" as a result of being included among

the 12 encumbrances listed in the Exhibit "A" "Subject To's" attached to the Statutory Warranty Deed?<sup>1</sup>

The answer must be that the court erred and that the easement was void and remained void following the conveyance.

## **II. STATEMENT OF THE CASE.**

Shortplat # 980005 created 4 lots. CP 84. Lots 1 and 2 front a county road with Lots 3 and 4 behind them. CP 86. Lots 3 and 4 are provided legal access with a 60 foot "tract X" running between Lots 1 and 2 from the county road to Lots 3 and 4. CP 86. Dorothy Church ("Church") ultimately acquired title to Lots 1, 3 and 4. CP 89, 93.

On August 14, 2006, Church granted herself an easement across her Lot 1 for the benefit of adjoining Lots 3 and 4, also owned by her. CP 95. This is the Easement the subject of this cause. The Easement, as granted, runs directly over the septic drainfield on Lot 1. CP 109. CP 235 FF. 6.

On February 16, 2007, Church conveyed Lot 1 to the Haddon's<sup>2</sup> by Statutory Warranty Deed. The deed was conveyed "SUBJECT TO: SEE ATTACHED EXHIBIT 'A'". A copy of the

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<sup>1</sup> A copy of the court's order on Partial Summary Judgment is attached hereto at Appendix "1".

<sup>2</sup> The Appellants are correctly R. Lance Haddon and Carol A. Putnam, husband and wife. They were referred to as the Haddons at trial and will be here.

deed is attached at Appendix "2" hereof and the attachment is set out in full in the brief at page 11 *infra*. The Exhibit "A" attached to the deed listed 12 apparent encumbrances on the title to Lot 1 as disclosed by a preliminary commitment for title and were, in fact, a copy of the exceptions to that commitment. CP189-190. The list of encumbrances included rights reserved to the State of Washington, Sellers Notices of On-Site Sewage System recorded by Church's grantor prior to her purchase, CP 101, a similar notice recorded by Church days before the conveyance to the Haddons, CP 105, and the Easement the subject of this cause. CP 95.

Respondents Claeys<sup>3</sup> took title to Lots 3 and 4 by Quit Claim Deed In Lieu of Foreclosure on December 2, 2012, CP 80. The Quit Claim Deed was without warranty and did not refer to the Easement. RCW 64.04.050, CP 80. The Claeys' soon after sought access to their property over the disputed easement and across the Haddon's septic drainfield, which the Haddon's denied. CP 1. The Claeys' ultimately came upon the Haddon property and removed plants and vegetation in an attempt to enforce the Easement. CP 7. This action followed. The Haddon's sought to have the Easement declared void as one cannot give one's self an easement

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<sup>3</sup> The Respondents are correctly Joost R. Claeys and Amy K. Prezbindowski, husband and wife. They were referred collectively as the "Claeys" at trial and will be here.

over one's own property. CP 1. The Claeys' counterclaimed seeking to have the easement enforced. CP10.

The parties brought cross - motions for summary judgment: Haddon's to have the Easement declared Void and Claeys' to have the Easement enforced. Haddon's Motion, Claeys' Response and Haddon's Reply are at CP 111, 125 and 198 respectively. Claeys Motion, Haddon's Response and Claeys' Reply are at CP 39, 168 and 204 respectively. The only factual evidence before the court was the record title documents supported by attorney declarations of authenticity. CP 48-80, 81-110,133-167,181-197. <sup>4</sup>

The Trial Court on Partial Summary Judgment, found that the Easement Church initially granted to herself was not valid when created but was reserved by Church in the deed to the Haddons and became valid when it was included among the other 11 encumbrances listed on the Exhibit "A" attached to the Deed as "Subject To's". The Courts specific order was:

**Although the easement was not valid when recorded in August 2006 because Ms. Church owned both Lot 1 and Lot 3, the easement became valid when Ms. Church conveyed Lot 1 to the Plaintiff's "subject to" the easement. This act**

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<sup>4</sup> Because of the Motions and Cross Motions, most of the documents were duplicated.

constituted a valid reservation of rights in the easement to Ms. Church, who owned Lot 3.<sup>5</sup>

The court's ruling did not end the case as the court also stated in its order:

As the Court indicated during the hearing, the Court's conclusion does not mean that Defendants are entitled to build a road across the Plaintiff's septic drain field.

Haddon moved the court for reconsideration and that motion was denied. CP 212, 232. Haddon then move this court for discretionary review and that was also denied.

The case proceeded to trial to determine the restrictions on the use of the Easement based upon the Trial Courts Summary Judgment determination that the Easement was valid. Following trial the Court entered detailed Findings of Fact, Conclusions of Law and Judgment. CP 234, 244.

The Haddon's appealed to this court from the Trial Courts Partial Summary Judgment finding that the easement became valid as a reservation by virtue of its inclusion among the other 11 subject to encumbrances listed on the Exhibit "A" attached to the deed. The Claeys' initially cross appealed but that appeal was withdrawn.

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<sup>5</sup> Haddon's appeal from the underlined portion of the court's decision and agree with and do not appeal from the **bold portion**.

### III. ARGUMENT.

#### a. Summary of Argument.

Both parties brought Motions for Summary judgment. Plaintiff, Appellant, Haddon asking the court to find the easement that Ms. Church granted to Ms. Church over Lot 1 land for the benefit of Lots 3 and 4, also owned by Ms. Church, to be found void as one cannot grant one's self an easement over one's own property. The Respondent, Claeys, asked the court to enforce the easement claiming that the easement was not void however, if it was, it was "Reserved" in the Deed. The trial court on summary judgment ruled:

Although **the easement was not valid when recorded in August 2006 because Ms. Church<sup>6</sup> owned both Lot 1 and Lot 3**, the easement became valid when Ms. Church conveyed Lot 1 to the Plaintiff's "subject to" the easement. This act constituted a valid reservation of rights in the easement to Ms. Church, who owned Lot 3.<sup>7</sup> CP 206.

The Court was correct with the first part of its decision, in **bold** above, that the easement was **not** valid when made and this part of the decision is not appealed from.<sup>8</sup> The court was clearly wrong as to the latter part of the decision ruling that the inclusion of

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<sup>6</sup> Although the Deed and Easement of Ms. Church are the subject of this litigation, Ms. Church was not a party to this litigation and did not provide any evidence in the case.

<sup>7</sup> Although the ruling refers only to Church retaining Lot 3, in fact she retained Lots 3 and 4. CP 89.

<sup>8</sup> The Respondents made and then withdrew their cross appeal.

the Easement with the other 11 encumbrances listed on the attached Exhibit "A" "Subject To's" to the Deed constituted a "valid reservation". The trial court's error was in failing to understand the difference between a "Reservation" in the quantity of the estate conveyed and an "Exclusion" of the Warranty Against Encumbrances otherwise included in the Statutory Warranty deed conveying Lot 1 to the Haddons. The "Subject To" Exhibit "A" attachment to the Deed listed all the known possible encumbrances associated with Lot 1 as disclosed by the preliminary Title Commitment. CP 189-190. Its purpose was to avoid Ms. Church's otherwise Warranty Against Encumbrances as to those listed encumbrances, otherwise part of every Statutory Warranty Deed. RCW 64.04.030. This was an Exclusion from the Warranty in keeping with good deed drafting practice and did not in any way diminish the Fee Simple estate in Lot 1 conveyed to the Haddons or thereby result in Ms. Church retaining any right in Lot 1 following the conveyance.

**b. Standard for Review – Summary Judgment.**

On appeal, the court engages in the same inquiry as the trial court. *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 140, 960 P.2d 919 (1998); *Benjamin v. Washington State Bar Ass'n*, 138

Wn.2d 506, 515, 980 P.2d 742 (1999). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993); CR 56(c).

**c. Construction of the Deed.**

The Court must construe the Deed to determine the intent of the parties.

The intent of the original parties to an easement is determined from the deed as a whole. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981). If the plain language is unambiguous, extrinsic evidence will not be considered. *City of Seattle v. Nazarenus*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962).

*Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873,880, 73 P.3d 369 (2003)

[I]f the intention of the parties may be clearly and certainly determined from the language they employ, recourse will not be had to extrinsic evidence for the purpose of ascertaining their intention.[3]<sup>9</sup> This rule is a practical consequence of the permanent nature of real property— unlike a contract for personal services or a sale of goods, the legal effect of a deed will outlast the lifetimes of both grantor and grantee,

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<sup>9</sup> [Footnote 3 of the court.] As Professor Stoebuck has explained, "[o]ne does not need rules to interpret a document that is clear on its face, but only when it is in some way unclear." 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 7.9, at 485 (2d ed. 2011). This is also the approach of other jurisdictions. "Where there is no ambiguity in the language used in a deed, the intention of the parties must be arrived at from such language, giving it its common and accepted meaning." 23 AM.JUR.2D Deeds § 194 (2012) (citations omitted); see, e.g., *Peterson v. Barron*, 401 S.W.2d 680, 685 (Tex.Civ.App.1966) ("It is elementary, of course, that there must be some ambiguity in a deed before extrinsic evidence is admissible to vary the terms thereof.").

ensuring that evidence of the circumstances surrounding the transfer will become both increasingly unreliable and increasingly unobtainable with the passage of time. Accordingly, the language of the written instrument is the best evidence of the intent of the original parties to a deed.

Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc., 277 P.3d 18, 24 (Wn App. Div. 1 2012)

Generally, when construing a deed, the intent of the parties is of paramount importance and courts must ascertain and enforce such intent. *Brown v. State*, 130 Wn.2d 430, 437, 924 P.2d 908 (1996). However, **"where a party conveys property via a statutory warranty deed and the granting clause conveys a definite strip of land, courts 'must find that the grantor intended to convey fee simple [absolute] title unless additional language in the deed clearly and expressly limits or qualifies the interest conveyed.' "** *Kershaw Sunnyside Ranches Inc. v. Yakima Interurban Lines Ass'n*, 156 Wash.2d 253, 264, 126 P.3d 16 (2006) (quoting *Brown*, 130 Wash.2d at 437, 924 P.2d 908). Thus, if the deed is in statutory warranty form, it carries a presumption of conveying fee simple absolute title. RCW 64.04.030; *Brown*, 130 Wn.2d at 437. [Emphasis added]

*Washington State Grange v. Brandt*, 136 Wn. App. 138, 145-6, 148 P.3d 1069 (2006).

Although the deed here is not ambiguous, "if a reservation is ambiguous or doubtful, it will be construed in such way as to resolve the doubt against the grantor in favor of the grantee."

*Schnitzer v. Panhandle Lumber Co.*, 14 Wn 2d 434, 439, 128 P 2d 501 (1942).

The only evidence before the court was the record documents only as supported by attorney declarations of authenticity. CP 48-80, 81-110, 133-168,181-197. [Because of Motions and Cross Motions, most of the documents are duplicated.] No factual declarations were submitted. Ms. Church was not a party to the litigation, did not submit a declaration in the summary judgment proceeding and did not testify at trial. We have no way of knowing her intent except as it appears on the face of the Deed.<sup>10</sup>

**d. Statutory Warranty Deed Conveyed Grantors Entire Interest in the Property to Haddons.**

An analysis of the meaning of the deed starts with form of the Deed used to make the conveyance. The conveyance of Lot 1 from Church to the Haddons was by Statutory Warranty Deed and the form and meaning is defined by statute. RCW 64.04.030. By statute, every conveyance by Statutory Warranty Deed **“shall be deemed and held a conveyance in fee simple to the grantee.”** RCW 64.04.030. Accordingly, Church conveyed her entire interest

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<sup>10</sup> Although we speak of the intent of Ms. Church, almost certainly, the deed was prepared by an escrow officer from Escrow Professionals of Washington with a limited practice license **who would have had no knowledge of Ms. Church’s retained ownership of Lots 3 and 4** and who would have prepared the deed just as the Bar Association Real Property Desk Book suggested and included all the exceptions from the title policy commitment as was done. CP 97, 189-190. WSBA Real Property Deskbook §.32.3(2). Ms. Church would most likely have had nothing to do with its drafting and would have seen the deed for the first time at closing.

in Lot 1 to the Haddons. “[W]e must find that the grantors intended to convey fee simple title unless additional language in the deeds clearly and expressly limits or qualifies the interest conveyed.” [Emphasis added] Brown v. State, 130 Wn.2d 430, 437, 924 P.2d 908 (1996). “Thus, if the deed is in statutory warranty form, it carries a presumption of conveying fee simple absolute title.” Washington State Grange v. Brandt, 136 Wn. App. 138, 146, 148 P.3d 1069 (2006)

The Statutory Warranty Deed legally described Lot 1 and conveyed it to the Haddons. Following the fee simple conveyance of the Lot 1, the following additional language was added:

“SUBJECT TO: SEE ATTACHED EXHIBIT “A””<sup>11</sup>

The attached “Exhibit “A” is set out below:

Exhibit “A”

Subject to:

[11]<sup>12</sup> Water Appropriation, and the terms and conditions thereof:

Recorded: June 28, 1918  
Recording No: 1225744

[12] Covenant to bear part or all of the cost of construction or repair of drainfield, easement for which was granted over adjacent property by

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<sup>11</sup> CP 97. A copy of the deed is attached hereto at Appendix “2”. CP 97-100.

<sup>12</sup> Exhibit “A” did not contain the backed [numbers]. They are taken from the Title Insurance Preliminary Commitment they were copied from, CP 189-190, and were added to allow ease of reference.

instrument recorded under Recording No,  
8102020623.

[13] Covenants, conditions or restrictions, all  
easements or other servitudes, and all reservations,  
and all assessments, if any, disclosed by Short Plat:

Recorded: June 19, 1981  
Recording No.: 3106190609

[14] Notice of On-Site Sewage System Operation and  
Maintenance requirements, and any terms and  
conditions thereof:

Recorded: December 9, 2005  
Recording No.; 20051209002391

[15] Right of the State of Washington in and to that  
portion, if any, of the land herein described which lies  
below the line of ordinary high water of Langlois  
Creek.

[16] Rights of State of Washington to that portion of  
the land, if any, lying in the bed of Langlois Creek, if  
that waterway is navigable,

[17] Any change in the boundary or legal description  
of the land described herein, due to a shift or change  
in the course of Langlois Creek.

[18] Any restrictions on the use of any portion of the  
land subject to submergence that derive from the  
rights of the public and riparian owners to use any  
waters .which may cover that portion.

[19] Rights and easements of the public for  
commerce, navigation, recreation and fisheries.

[20] Any prohibition of or limitation of use, occupancy  
or improvement of the land resulting from the rights of  
the rights of the public and riparian owners to use any  
portion of which is now, or has formally been,  
covered by water.

**[21] Easement and the terms and conditions thereof:**

<b>Grantee:</b>	<b>Dorothy Church</b>
<b>Purpose:</b>	<b>Access, utilities, and joint maintenance</b>
<b>Area affected:</b>	<b>the west 30 feet of Lot 1</b>
<b>Recorded:</b>	<b>August 21, 2006</b>
<b>Recording No.:</b>	<b>20060821000487</b>

**[Emphasis added]**

[22]<sup>13</sup> Notice of On-Site Sewage System Operation and Maintenance requirements, and any terms and conditions thereof:

Recorded:	February 1, 2007
Recording No.;	20070201001178

The attached Exhibit "A" to the Deed, CP 99-100, is an exact photo copy of the exceptions contained in the Title Commitment, CP 189-190. The subject Easement, in dispute here, is at [21] above in **bold** type.

But for the above "Subject To", there would be no question as to the estate conveyed to the Haddons. All would have agreed that the Haddons were conveyed Church's entire interest in Lot 1 in fee simple and there could have been no claim that the void easement had become valid. The conveyance and the separation of Lots 1 and 3 would not resurrect the easement and make the

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<sup>13</sup> This last "Subject To" [22] was not copied from the Title Commitment, CP 184, as the title commitment was issued on January 19, 2007 and this Notice was not recorded until February 1, 2007. It would have been picked up on a supplement.

void easement valid again. An extinguished easement remains extinguished and does not “come back into existence” upon separation.<sup>14</sup> The trial court here found that the mere inclusion of the Easement among the other 11 “Subject To’s”, **[21] above in Bold**, was a “Valid Reservation”. It was factually and legally wrong in its decision.

**e. The Listing of the Easement among the other 11 “Subject To’s” was not a “Valid Reservation”.**

There are two principal ways a grantor like Church could withhold portion of Lot 1 otherwise conveyed by the Statutory Warranty Deed. She could reserve an interest or she could except an interest.

'The terms 'reservation' and 'exception' as used in connection with conveyances of land, although distinguishable, are quite commonly used as interchangeable terms, and the meaning intended must be determined by reference to the subject matter and the surrounding circumstances. An 'exception' and a 'reservation' as thus used do have this in common--namely, that both subtract or deduct from the thing granted, narrowing and limiting what would otherwise pass **by the general words of grant**. An analysis of these terms, however, reveals

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<sup>14</sup> “When an easement has been extinguished by unity, the easement does not come into existence again merely by severance of the united estates...” Radovich v. Nuzhat, 104 Wn.App. 800, 805, 16 P.3d 687 (2001) Citing Restatement of Property § 497, comment h. Although the rule is the same, the Easement here was not extinguished by unity of title; it was void from the outset as “one cannot have an easement in his own property”. Coast Storage Co. v. Schwartz, 55 Wn.2d 848, 853, 351 P.2d 520 (1960). It was void ab initio.

an important distinction. **A reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant.** On the other hand, an exception operates to withdraw some part of the thing granted which would otherwise pass to the grantee under the general description, which was in existence at the time of the conveyance and which until such conveyance and the severance thereby was comprised in the thing granted.

Duus v. Town of Ephrata, 14 Wn.2d 426, 431, 128 P.2d 510 (1942)

Church did not reserve an easement or anything else. What she did do, as will be shown at section “**F**” below, was Exclude the easement along with the other 11 “Subject to’s” from the Warranty Against Encumbrances otherwise included in a Statutory Warranty Deed. RCW 64.04.030. Mastro v. Kunakichi Corp., 90 Wn 2d 157, 167, 951 P 2d 817 (1998).

A “Reservation” is the creation of a new right that did not exist before the conveyance. Duus v. Town of Ephrata, *Supra*, at 431. For Ms. Church to intend **reserve** the right to an easement across Lot 1, she would have to believe that by including the Easement among the other 12 “Subject To’s” she was creating a new right. For the Easement to be a new right, she would have had to believe that the Easement she just created was not then a

valid easement and it was necessary to recreate it. That is contrary to all objective evidence.

Ms. Church created the Easement on August 18, 2006 and it was recorded three days later on August 21, 2006. CP 95. As Ms. Church went to the effort to create the Easement and to the expense and effort to record it, she must have understood it to be valid. No other explanation is reasonable. Church conveyed Lot 1 to the Haddons only six (6) months later. CP 97. For Ms. Church to feel obliged to make a Reservation of the Easement, the creation of a new right, she would have had to believe that the Easement that she had just created was not valid and there is no evidence or even an inference of that.

The Church to Haddon Deed treated the Easement [21 above] exactly as the other 11 items on the Exhibit "A" "Subject To's". If Ms. Church intended to "reserve" the Easement, she must have intended to make same reservation as to the other 11 items similarly treated on Exhibit "A" and that makes no sense and would not be possible.

"Subject To" [12] is a "Covenant to bear pay part or all of the cost of construction or repair of a drainfield easement for the benefit of Lot 1 which was granted over adjacent property. Ms. Church

would have no reason to want to reserve the right to pay costs that would otherwise be the obligation of the owners of Lot 1. "Subject To" [13] is the short plat covenant that applies to the Lot 1. It existed, did not need to be recreated and could not be separated from Lot 1. "Subject To" [15] and [16] are rights in favor of the State of Washington that did exist and could not be reserved for Ms. Church's benefit. "Subject To" [17], [18], [19] and [20] are obligations and restrictions that specifically apply to Lot 1. They did in fact exist, Ms. Church could not reserve them to herself independent of Lot 1 and she would have no reason to even attempt to do so. "Subject To" [14] and [22] are Notices of On-Site Sewage System that only apply to the owner of Lot 1 and could not be assumed by Ms. Church. CP101-104, 105-108. "Subject To" [22] was only recorded by Church 10 days before the Deed. CP 105. Like the Easement, Ms. Church would have no reason to believe it to be invalid and in need of Reservation and she could not have reserved it anyway.

All the "Subject To's" of Exhibit "A" to the Deed were treated exactly the same. They were simply photocopied from the preliminary title commitment and attached to Exhibit "A". Compare CP 189-190 and CP 99-100. If they are treated the same, the

same intention should apply to all the "Subject To's" and there is no evidence of any reason or ability to reserve any of them with the exception of the Easement. And, as to the Easement, there is nothing to show any intention different from the other "Subject To's" that could not and would not have been Reserved.

**f. The "Subject To" Attachment was Not a Reservation but was an Exclusion from the Warranty Against Encumbrances Otherwise a Part of Every Statutory Warranty Deed.**

The Conveyance by church to the Haddon's was by Statutory Warranty Deed. Church's obligations in conveying by Statutory Warranty Deed are defined by statute. RCW 64.04.030.

A Statutory Warranty Deed covenants against both known and unknown title defects. ...And a grantor conveying land by statutory warranty deed makes five covenants against title defects:

(1) that the grantor was seised of an estate in fee simple (warranty of seisin); (2) that he had a good right to convey that estate (warranty of right to convey); (3) **that title was free of encumbrances (warranty against encumbrances)**; (4) that the grantee, his heirs and assigns, will have quiet possession (warranty of quiet possession); and (5) that the grantor will defend the grantee's title (warranty to defend). [Emphases added]

Mastro v. Kumakichi Corp., 90 Wn App 157, 162, 951 P.2d 817 (1998).

The "warranty against encumbrances", part of every Statutory Warranty Deed, required Church to make the conveyance

"Subject To" all the encumbrances of record to avoid otherwise liability for all non-disclosed and excepted encumbrances. No other intent can be even inferred. She did this by the attachment of the Exhibit "A" "subject To" list of all encumbrances.

In every conveyance where a warranty instrument is used, the grantor must specifically exclude all liens, encumbrances or other matters which are intended to be outside the scope of the express warranties, or implied statutory warranties, contained in the deed. This does not limit the nature or duration of the estate granted, but rather only the scope of the warranties inherent in the deed. Unless excluded, the grantor will be liable for a breach of warranty, even though the matters are of record and beyond grantor's control to cure. Fagan v. Walters, 115 Wash. 454, 197 P. 635 (1921). These exclusions are commonly placed in the "subject to" clause in the body of the conveyance. [Emphasis added]

WSBA Real Property Deskbook §32.7(3).

The most common exclusions are: (i) taxes not yet due or payable; (ii) visible easements and underground easements of record; (iii) covenants, conditions and restrictions of record; (iv) monetary liens (such as mortgages) which are to be assumed by the grantee or which grantee will take title "subject to" (if the grantor is to continue to pay such liens, the deed should so state); and (v) reservations in federal or state patents. **If known, each exclusion should normally be listed with a reference to its recorded document number (e.g., easement for ingress and egress recorded as document no. 9505191234).** [Emphasis added]

WSBA Real Property Deskbook §32.7(3) Exclusions.

*The Real Property Deskbook*, §.32.3(2), offers the following suggestion to anyone preparing a Statutory Warranty Deed:

***Practice Tip:* When drafting a warranty deed, the best practice is to specifically list all liens, encumbrances, and other matters to which title will be taken subject.<sup>15</sup>**

A comparison of a Reservation, Exception and an Exclusion makes it clear that only the latter was intended and in fact made.

An example of an Exception is:

EXCEPT, the right of way of the Northern Pacific Railway Company ... and except tracks appropriated by Northern Pacific Railway Company in Cause No. 74807 ...

Harris v. Ski Park Farms, Inc., 62 Wn.App. 371, 373, 814 P.2d 684 (1991).

An example of a Reservation is:

RESERVING TO THE GRANTOR (Farrs), his heirs, administrators, successors and assigns, a permanent easement for road over and across all existing roads on the premises for the purpose of ingress and egress to adjacent tracts of the grantor ....

North American Non Metallics Ltd. v. Erickson, 24 Wn. App. 892, 895, 604 P.2d 999(1979).

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<sup>15</sup> This appears to be the practice, in fact. "Waldron said that in drafting the statutory warranty deed, she typically lists the property's legal description, drafts the conveyance language, and then writes "subject to:" and lists the easements, covenants, conditions, and restrictions expressed in the preliminary title commitment." Ross v. Ticor Title Ins. Co., 135 Wn App. 182, Note 3, 143 P.3d 885 (2006).[Emphasis added]

An example of an Exclusion is:

This conveyance is subject to an easement and water rights according to the terms of one certain contract executed June 19, 1906, and recorded in volume 32 of deeds on page 633. Said contract conveying the right to the Raymond Light & Water Company, a corporation, to take and use the water in two certain streams or creeks running over and across the above-described lands.

City of Raymond v. Armstrong, 118 Wash. 272,274, 203 P. 50 (1922).

As to the deed containing the above exclusion, the court stated:

The warranty deeds from Armstrong and wife to Little and from Little and wife to the Pacific & Eastern Railway Company were made without any reservation or exception, but subject to an easement which was manifestly referred to in the deeds to prevent liability on the general covenant of warranty contained in each of those deeds. [Emphasis added]

City of Raymond v. Armstrong, 118 Wash. 272, 276, 203 P. 50 (1922)

Compare the above Exception, Reservation and Exclusion with the language used in the Church to Haddon deed here:

“SUBJECT TO: SEE ATTACHED EXHIBIT “A””

The attached “Exhibit “A” is set out below:

Exhibit "A"

[21] Easement and the terms and conditions thereof:

Grantee: Dorothy Church

Purpose:	Access, utilities, and joint maintenance
Area affected:	the west 30 feet of Lot 1
Recorded:	August 21, 2006
Recording No.:	20060821000487

The "Subject to" attachment was, and could only be, an exclusion that did not diminish the fee simple estate passed to the Haddons but only excluded the Warranty Against Encumbrances as the 12 listed items.

The Drafter of the Church to Haddon Statutory Warranty Deed did exactly as recommended and **listed** The Easement and the other possible encumbrances to avoid Church's otherwise warranty against them.<sup>16</sup> CP 183-197 is a copy of the Preliminary Commitment for Title insurance from Rainier Title dated January 19, 2007 relating to Lot 1. The special exceptions<sup>17</sup> 11- 21 begin on page 6, CP189 and

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<sup>16</sup> This is true even where the grantee has knowledge of a defect or encumbrance at the time of delivery of the deed. Such knowledge will not defeat the warranties contained in the deed; the grantee is entitled to rely on them despite knowledge to the contrary. *Fagan v. Walters*, 115 Wash. 454, 197 P. 635 (1921).

<sup>17</sup> There is a confusing use of the term "Exception" as used in deeds. The "Subject To's" intended to qualify the Warranty Against Encumbrances in a deed are often referred to as "Exceptions" although they are not "Exceptions" from the title as defined at page \_\_\_ above. This is because they are so referred to in the Preliminary Title Commitment where they are typically derived. The Preliminary Title Commitment refers to them as "Special Exceptions" that will be excluded from the title insurance coverage because they were disclosed in a records search by the title company. CP 187 [Section II, Schedule "B"]. Although "Exception" is often used to describe the "Subject To's", that only serves to identify the Exclusions under the title policy and the Statutory Warranty Deed. A true "Exception" is meant to withhold or withdraw a portion of the property from the total legal described property. *Duss v. Town of Ephrata*, 14 Wn. 2d 426, 431, 128 P 2d 510 (1942). An example of a true Exception from the conveyance would be "A conveys Blackacre to B Except the west 20 feet thereof." Fee to Blackacre is conveyed to B with the Exception of the west 20 feet that are retained or withheld from the conveyance by A.

are highlighted.<sup>18</sup> With the exception of the listing numbers, the “Subject To” Exhibit “A” to the Statutory Warranty Deed, is an exact photo copy of exceptions 11 – 21 of the Preliminary Title Commitment.<sup>19</sup> No inference can be made that the mere listing of exceptions from the title insurance commitment, in keeping with good deed drafting practice, was anything more than a prudent effort to avoid obligating Church to warranties of encumbrances not intended.<sup>20</sup> Certainly no different or special effort was made as to The Easement to infer any attempt to recreate it. It was just one of the 12 encumbrances listed. Nothing more. The Easement and the other 11 items included as “Subject To’s” were and are either valid or not and stand on their own.

The inclusion of the “Subject To” exceptions in the Statutory Warranty Deed was only to avoid Church’s otherwise warranty against encumbrances and did not in any way diminish the fee estate granted to the Haddon’s.

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<sup>18</sup> Title exceptions 1 -10 were not Excluded from the Warranty Against Encumbrances because they were to be paid and/or were satisfied before closing and would be warranted against.

<sup>19</sup> Compare CP189-190 of the Title Commitment with Exhibit “A” to the Church deed CP 99-100.

<sup>20</sup> The listing of the Easement on the Preliminary Title Commitment, CP 189-190, does not comment **at all** as the validity of the Easement. “The Legislature clearly established that a preliminary commitment is not a representation of the condition of title, but a “statement of terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted.” RCW 48.29.010(3)(c). *Barstad v. Stewart Title Guar. Co., Inc.*, 145 Wn.2d 528, 536, 39 P.3d 984 (2002).

**The warranty deed, although conveying the title to the property to the respondent, made certain exceptions to the warranty by adding the clauses preceded by the words 'subject to.' Those clauses, however, did not diminish the quantum of the estate granted, but simply placed a limitation upon the liability of the grantors under their covenants.**  
[Emphasis added]

Moore v. Gillingham, 22 Wn 2d 655, 664, 157 P 2d 598 (1945).

Church conveyed Lot 1 to the Haddon's in Fee Simple and retained no interest in Lot 1 following the conveyance. RCW 64.04.030. The "Subject To" attachment "A" did not diminish the estate conveyed but only excluded the listed encumbrances from the otherwise Warranty Against Encumbrances as part of the Statutory Warranty Deed. Accord, *Hedin v. Roberts*, 16 Wn App. 740, 742, 559 P.2d 1001 (1977), Approving *Moore, Supra*, and stating "We hold, first, that use of the term 'subject to' in the 1966 deed did not diminish the quantum of the estate granted, but simply limited the grantors' covenants of warranty." [Emphasis added]

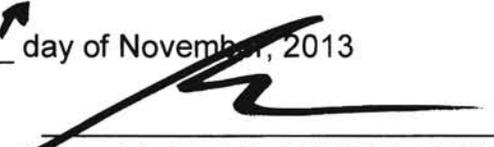
Had Church not conveyed the property to the Haddon's "Subject to" the Easement and all the other encumbrances listed at Exhibit "A" to the Deed, Church would have become liable, under her Warranty against Encumbrances, to compensate the Haddon's for all damages caused by the undisclosed encumbrances not made "Subject to" her conveyance. As a result, she would have been required, under her

Warranty to Defend, to defend this action as well as any other seeking to enforce a property right against the Haddon's title. RCW 64.04.030. Making the conveyance "Subject to" all the title exceptions of record, whether valid or not, allowed Church to avoid the obligation to defend the title as to those exceptions. It did not diminish or reduce the fee title conveyed to Haddon. The validity of The Easement is not improved or diminished by the "Subject to" exception in the deed. It must stand on its own which it cannot do as a matter of law.

#### **IV. CONCLUSION.**

This court should reverse the trial courts Partial Summary Judgment finding that the Easement was a "Valid Reservation" and hold that the Easement was void at the time it was granted and was not Reserved by its inclusion among the other 11 "Subject To's" attached to the deed. The case should be remanded to the trial court to determine the Haddon's damages for Claeys trespass and damage to their property as requested in the Complaint. CP 7.

Dated this 14<sup>th</sup> day of November, 2013



Gary M. Abolofia WSBA# 1683  
Attorney for Respondent  
3518 142<sup>nd</sup> Pl. NE  
Bellevue, WA 98007  
(425) 444-3853

FILED  
SUPERIOR COURT  
COUNTY OF KING  
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**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN THE COUNTY OF KING**

R. LANCE HADDON and CAROL  
A. PUTNAM, husband and wife,

Plaintiffs,

v.

JOOST CLAEYS and AMY K.  
PREZBINDOWSKI, husband and  
wife; and SHELDON HAY, a  
married individual,

Defendants.

**NO. 11-2-24106-8 KNT**

**ORDER GRANTING  
DEFENDANTS' MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT AND DENYING  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

This matter came before the Court on the cross motions for summary judgment filed by Plaintiffs R. Lance Haddon and Carol A. Putnam, and Defendants Joost Claeys and Amy K. Prezbindowski, and Sheldon Hay. The Court considered the following materials as well as oral argument of counsel:

1. Plaintiffs' Motion for Summary Judgment;
2. Declaration of Gary Abolofia in Support of Record Documents;
3. Supplemental Declaration of Gary Abolofia in Support of Documents;
4. Defendants' Motion for Partial Summary Judgment;

**APPENDIX 1**

- 1 5. Defendants' Response to Motion for Partial Summary Judgment;
- 2 6. Plaintiffs' Response to Defendants' Motion for Partial Summary Judgment;
- 3 7. Defendants' Reply to Plaintiffs' Response on Motion for Partial Summary
- 4 Judgment;
- 5 8. Declaration of Kameron C. Cayce with nine exhibits attached thereto;
- 6 9. Plaintiffs' Reply to Defendants' Motion for Partial Summary Judgment.

7  
8 Based on the foregoing, the Court concludes that the Access and Utility and  
9 Joint Maintenance Agreement executed by Dorothy Church and recorded August  
10 21, 2006 under King County recording number 20060821000487 (The Easement)  
11 is valid. Although the easement was not valid when recorded in August 2006  
12 because Ms. Church owned both Lot 1 and Lot 3, the easement became valid when  
13 Ms. Church conveyed Lot 1 to the Plaintiffs "subject to" the easement. This act  
14 constituted a valid reservation of rights in the easement to Ms. Church, who then  
15 owned Lot 3.  
16

17 As the Court indicated during the hearing, the Court's conclusion does not  
18 mean that the Defendants are entitled to build an access road across the Plaintiffs'  
19 septic drain field. The parties apparently agree that the scope and limitations of  
20 the easement are not before the Court at this time.  
21

22 Dated this 6<sup>th</sup> day of February, 2012.

23           /s\ (e-filed)  
24 Judge Beth M. Andrus

AFTER RECORDING MAIL TO:  
Mr. and Ms. Russell Lance Haddon  
33609 NE 24th Street  
Carnation, WA 98014



20070227002222

RAINIER TITLE LD 35.00  
PAGE001 OF 004  
02/27/2007 13:28  
KING COUNTY, WA

Filed for Record at Request of  
Escrow Professionals of Washington  
Escrow Number: 1-9771-KSmb

E2267770

02/27/2007 13:28  
KING COUNTY, WA  
TAX \$8,638.00  
SALE \$485,000.00 PAGE001 OF 001

### Statutory Warranty Deed

THE GRANTOR Dorothy Church, an unmarried individual

for and in consideration of TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION

in hand paid, conveys and warrants to R. Lance Haddon and Carol A. Putnam, husband and wife

the following described real estate, situated in the County of King, State of Washington.

Lot 1 of King County Short Plat No. 980005, recorded under Recording NO. 8106190609, records of King County, Washington.

Tax Parcel Number(s): 272507-9049-07

**SUBJECT TO:** SEE ATTACHED EXHIBIT "A"

The covenants implied in this Statutory Warranty Deed are limited as follows: Title to the Property shall be marketable at the time of this conveyance. The following shall not cause the title to be unmarketable: rights, reservations, covenants, conditions and restrictions, presently of record and general to the area; easements and encroachments, not materially affecting the value of or unduly interfering with Grantee's reasonable use of the Property; and reserved oil and/or mining rights. Grantee does not take title subject to any monetary encumbrances of Grantor which Grantee has not expressly assumed in this deed.

Dated February 16, 2007

  
Dorothy Church

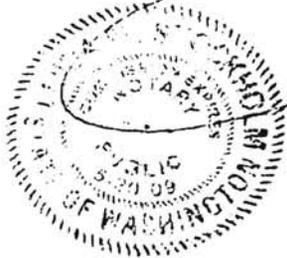
RECORDED BY 3674  
RAINIER TITLE  
3891683-E

APPENDIX '2'  
2-1

STATE OF Washington )  
COUNTY OF King ) SS:

I certify that I know or have satisfactory evidence that Dorothy Church  
is are the person(s) who appeared before me, and said person(s) acknowledged that he/she/they  
signed this instrument and acknowledge it to be his/her/their free and voluntary act for the  
uses and purposes mentioned in this instrument.

Dated: Feb 23, 2007



[Signature]  
\_\_\_\_\_  
Notary Public in and for the State of Washington  
Residing at Burien  
My appointment expires: 5/29/09

1-9771-KSmb

Exhibit "A"

Subject to:

Water Appropriation, and the terms and conditions thereof.

Recorded: June 28, 1918  
Recording No.: 1225744

Covenant to bear part or all of the cost of construction or repair of drainfield, easement for which was granted over adjacent property by instrument recorded under Recording No. 8102020623.

Covenants, conditions or restrictions, all easements or other servitudes, and all reservations, and all assessments, if any, disclosed by Short Plat:

Recorded: June 19, 1981  
Recording No.: 8106190609

Notice of On-Site Sewage System Operation and Maintenance Requirements, and any terms and conditions thereof:

Recorded: December 9, 2005  
Recording No.: 20051209002391

Right of the State of Washington in and to that portion, if any, of the land herein described which lies below the line of ordinary high water of Langlois Creek.

Rights of State of Washington to that portion of the land, if any, lying in the bed of Langlois Creek, if that waterway is navigable.

Any change in the boundary or legal description of the land described herein, due to a shift or change in the course of Langlois Creek.

1-9771-KSmb

Exhibit "A"

Subject to:

Any restrictions on the use of any portion of the land subject to submergence that derive from the rights of the public and riparian owners to use any waters which may cover that portion:

Rights and easements of the public for commerce, navigation, recreation and fisheries.

Any prohibition of or limitation of use, occupancy or improvement of the land resulting from the rights of the public or riparian owners to use any portion which is now, or has formerly been, covered by water.

Easement and the terms and conditions thereof:

Grantee:	Dorothy Church
Purpose:	Access, utility, and joint maintenance
Area affected:	the west 30 feet of Lot 1
Recorded:	August 21, 2006
Recording No.:	20060821000487



Notice of On-Site Sewage System Operation and Maintenance Requirements, and any terms and conditions thereof:

Recorded:	February 1, 2007
Recording No.:	20070201001178