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Court of Appeals No. 74423-2-1

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE

BRYAN KELLEY and DORRE DON LLC

Appellants/Plaintiffs,

v.

BEVERLY TONDA , et al,

Respondent/Defendant.

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STATE OF WASHINGTON
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APPELLANTS' REPLY BRIEF

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I. ARGUMENT

A. THE 1907 AGREEMENT CREATED A MERE EASEMENT

The Tondas contend that the 1907 Agreement constitutes the sole expression of intent by the Railroad to dedicate land to the County and thus, this Court need not go beyond its terms. This is incorrect. First, because the 1907 Agreement created an easement only and second, because the 1908 Deed, as a subsequent act, is not inconsistent with that express intention but simply furthers that expressed intention.¹

Intent to dedicate is the primary question. “An intention to dedicate will not be presumed, and a clear intention must appear.” *Cummins v. King County*, 72 Wn.2d 624, 627, 627 P.2d 588 (1967). “The intention of the owner is the very essence of every dedication.” *Keily v. Graves*, 173 Wn.2d 926, 933, 271 P.2d 226 (2012).

The term “highway purposes” as used in the 1907 Agreement is language which is the equivalent of “right of way” and qualifies the language “dedicate” thus creating only an easement. *Keily v.*

¹ The Tonda's claim that the 1908 Deed is an inconsistent act with the 1907 Agreement and thus is not to be considered citing to *Anderson v. Hall*, 91 Wash. 376, 157 P. 996 (1916), *Hampton v. Gilleland*, 61 Wn.2d 537, 379 P.2d 194 (1963) and *Miller v. Miller*, 32 Wn.2d 438, 202 P.2d 277 (1949). None of these cases deal with the dedication of property for a right-of-way and thus, do not apply to this case.

Graves, 173 at 933 (“... our cases have recognized a presumption that a statutory dedication of land for highway purposes constitutes only a public easement.”).

Any deed to a local government specifically for highway, right of way, or any public purpose could be interpreted as a dedication conveying an easement only. If the intent is to grant a fee interest, that intent should be clearly stated and the use should be unrestricted or, if the use is a condition, the condition should be clearly stated with a specific right of reversion.

Keily v. Graves, 173 at 934 *citing* WASHINGTON STATE BAR ASSOCIATION, *Washington Real Property Deskbook* § 91.9(1) (3d ed. 2001).

The 1907 Agreement does not meet the requirement of a fee conveyance (which is what the Tondas are really arguing) as the dedication is for “highway purposes.” Thus, assuming that the 1907 Agreement creates an interest in real property (a point which Mr. Kelley does not concede²), that interest, at best, was a mere

² The Tondas cite to Alfred J. Schweppe, *Rights of a Vendee Under an Executory Forfeitable Contract for the Purchase of Real Estate: A Further Word on Washington Law*, 2 Wash. L. Rev. 1, 5 (1926) for the proposition that *Ashford v. Reese*, 132 Wash. 649, 233 P. 29 (1925) does not bar the County’s claim to an interest in the real property described in the 1907 Agreement. Apart from the fact that the cited law review article is the opinion of the author, it makes a distinction which no Washington case does. This law review article simply does not govern this case.

easement subject to expiration/failure if the property was not put to the use of a highway purpose or ceased being used as one.

The 1908 Deed is consistent with this purpose. It arguably creates a fee simple determinable estate based on the cessation of the use of the property for highway purposes.

Divested before 1930 and reverted immediately to the railroad as admitted by King County. The 1930 Tax Foreclosure then divested the Railroad of any interest.

B. MR. KELLEY AGREES WITH THE SOUTHWORTHS

Mr. Kelley also agrees with the Southworth's arguments as stated in their Response Brief and adopts them here.

C. KING COUNTY RAISES A RED HERRING

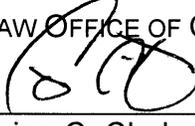
As was stated below, Mr. Kelley does not contend that the merger doctrine applies here as claimed by the County. It does not. Rather, King County lost whatever interest it had in the easement long before the 1995 Tax Deed by operation of the 1907 Agreement and the 1908 Deed. The 1995 Tax Deed conveyed King County's remaining interest.

II. CONCLUSION

For the above stated reasons, the trial court should be reversed and remanded for further proceedings.

Dated this 25th day of May, 2016.

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Certificate of Service

I hereby certify that I caused the foregoing document to be served upon the below named individuals in the identified manner on this 25th day of May, 2016.

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