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COURT OF APPEALS
DIVISION II

No. 37987-2-II

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STATE OF WASHINGTON

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

MICHAEL COHOON and JANICE PROUST,

Plaintiffs-Respondents,

and

GARY WILLIAMS and RAELENE WILLIAMS, husband and wife,

Intervenor Plaintiffs-Respondents,

vs.

JOHN B. CUNY and SHERL CUNY,
husband and wife and their marital community,

Defendants-Appellants.

REPLY BRIEF OF APPELLANTS CUNY

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Introduction

Respondents claim that this case should be considered in the same way that boundary and road agreements might be considered absent a plat. However, in this case there are two adjoining shortplats. This case appears to be similar to MKKI, Inc. v. Krueger, 135 Wn App 647, 145 P3d 411 (2006). In that case, the court pointed out that RCW 58.17.060 (state platting — shortplats), requires local governments to adopt regulations and procedures for the approval, alteration and vacation of short plats. Yakima County had made such provisions, just as Clallam County did in the instant case. The shortplats were recorded in MKKI and three years later the Roses, owners of all of the property, deeded one lot within the plats to MKKI, Inc. without reference to any easement. Shortly *before* the Roses deeded the lot to MKKI, Inc., they tried to vacate the easements by quit-claiming the easements to themselves. The court held,

Because the easements in the shortplat could be amended only by following the county code, we hold that the quit claim deeds were void and that the easements were conveyed to MKKI, Inc. We affirm the trial court's grant of summary judgment in favor of MKKI, Inc. *and Yakima County*.

In the instant case, respondents claim that, even though the roads were shortplatted and approved by the County, the County was not a necessary party *and* that the shortplats did not have to be amended and the amendment approved by the County.

In this case, not only did the plaintiffs below (respondents herein) not name the County, but they did not name all of the property owners in the plats, whose property would be affected.

In addition, in this case, as argued in appellants' opening brief, the two plats were contiguous to each other with two 30 foot easements running parallel to each other and then splitting out to the two adjacent plats to serve all of the lots in both plats. As pointed out in the opening brief, *unless* the plats both had use of the combined parallel 30 foot easements (constituting 60 feet), they were in violation of the County's shortplat road standards ordinances. The court misread the language of the ordinance, which clearly states with either ordinance that the easements must be 30 feet wide on each side from the centerline.

Respondents claim that there was an agreement to locate a driveway. While this is correct, the agreement was to *pave* an area for a driveway. None of the plaintiffs in the suit even claim that the Cunys,

other property owners, or the County intended to abandon the existing road easements.

Response to Equitable Estoppel

Easement by estoppel is disfavored.

In a recent case, Proctor v. Huntington, 192 P3d 958 (Division II September 2008), adjoining landowners argued over an easement for a driveway and the actual property upon which a house of one of the parties had been located. The court found that the facts did not justify any interpretation that might lead to equitable estoppel even if such a doctrine were used in the state of Washington. The court referred to an earlier case or cases indicating that there had been discussion of equitable estoppel. One such case was Canterbury Shores v. Lakeshore, 18 Wn App 825, 572 P2d 742 (1977). The appellate court found that easement by estoppel was not the appropriate remedy because there was a legal remedy.

The court in Proctor v. Huntington did discuss estoppel in *pais*. The court pointed out at page 7 that the law requires proof of estoppel in *pais* by clear and convincing evidence. Bluntly put, there is no

recognized doctrine of law in the state of Washington that would support easement by estoppel.

The most recent case in Washington regarding estoppel in *pais* as applied to boundaries, not roads, is Division II's Lilly v. Lynch, 88 Wn App 306, 945 P2d 727 (1997). In that case, the court reviewed facts regarding an allegation of estoppel in *pais* and upheld the trial court's determination on summary judgment that estoppel in *pais* had not been proven. Generally, estoppel in *pais* is available to prevent fraudulent or inequitable resort to the statutes of limitation. See Farrare v. Pasco, 68 Wn App 459, 464, 843 P2d 1082 (1992).

The general rule in Washington is that a bona fide purchaser for value of real property may rely upon the record chain of title as shown in the office of the county auditor. See Parker v. Speedy Refinance Ltd., 23 Wn App 64, 74, 596 P2d 1061 (1979), citing Beckman v. Ward, 174 Wn 326, 24 P2d 1091 (1933) (citing cases).

In this case, all the purchasers were required to rely upon the plats. Both plats in these cases were required to have a 60 foot road easement. Both of the county ordinances argued by the parties have the same provision for a 60 foot easement for a subdivision with four or

more parcels, which these both had. Thus it is difficult to argue that the parties somehow, by agreeing to pave a portion of the easement, agreed to amend both plats, agreed to waive their easement rights under the plat, agreed to have a substandard road (under the laws in effect at the time of the plat), and agreed to abandon their lawful easement rights. The trial court had to rule on those issues, but it is respectfully submitted that the Court of Appeals has the same right to rule on the same issues and that the plaintiffs in this case (Cphoon, Proust and Williams) did not meet their burden of proof to establish any kind of estoppel and waiver of the statute of frauds with clear and convincing evidence of such above actions.

Further, the court seemed to rely upon an easement by estoppel. No such doctrine exists in the state of Washington. This is not a situation where one party even claims that there was an agreement to abandon a platted easement. The only claim is that they all contributed to paving a portion of the easement road at that time. This is not disputed by the Cunys. What is disputed is that the Cunys, by agreeing to pay their fair share of a temporary paving, somehow abandoned all of

their road rights both in the area that was paved and in the area that was never paved.

An abandonment of an easement cannot be done by estoppel. In the case of Humphrey v. Jenks, 61 Wn 2d 565, 379 P2d 366 (1963) (cited in Heg v. Alldredge, 157 Wn 2d 154, 137 P3d 9 (2006)), the court concluded that there was not an estoppel of the right to assert the existence of an easement. Here, there is a platted easement, and no intent to abandon even alleged by the other side.

Reasonable Use of Easement

Respondents insist on citing the case of Thompson v. Smith, 59 Wn 2d 397, 408-409, 367 P2d 798 (1962) for the proposition that the easement owner only has the right to a reasonable use of the easement. This is not the holding in Thompson. In that case, the court pointed out that since the dominant owner had made no attempt to utilize the width of the easement, the easement was not being interfered with until such time as the ten foot strip was required for road purposes. In the instant case, the Cunys desired to use a portion of the *platted* easement for a road. It is not the law in the state of Washington that non-use of an easement in any way indicates abandonment of an easement. See

Merresse v. Smith, 100 Wn App 857, 867-08 (2000); Heg v. Alldredge,
above.

Statute of Frauds — Part Performance

Respondents argue that there was part performance in this case. However, respondents are trying to use the doctrine of part performance to argue abandonment of an easement, not that the agreement with respect to paving the road and paying for the paving of the road could be enforced because the parties (*all*) performed. Here, the doctrine of part performance is not applicable. Respondents did no performance in exchange for abandonment of an easement. The topic was never discussed.

Injunction

Respondents argue that respondents are entitled to an injunction against the Cunys using their platted easement. Unless the easement has been extinguished or abandoned or amended by the County, the Cunys have every right to use all of the easement.

Sixty Foot Easement

The only way either shortplat complied with the County law governing shortplats at the time was if the two parallel 30 foot easements

were considered the same as one 60 foot easement to be shared by either party. While it is clear that the language of the shortplats did not so provide, case law cited in appellant's initial brief establishes that in such a situation as this, the 60 foot easement is what is required. See Saterlie v. Lineberry, 92 Wn App 621, 962 P2d 863 (1998).

Conclusion

From the onset of this case respondents attempted to stop a lot owner from using a platted road approved by Clallam County at the time it approved the shortplat. The plaintiffs sought an injunction asking the court to declare that the Cunys had no right to use the platted easement. In doing so, they sought to determine the width of the road and thereby the rights of everyone in the shortplat and the validity of the County shortplat, yet they did not join all of the property owners in both shortplats or even in one shortplat, and failed to join Clallam County.

It is respectfully submitted that if the platted road easement may be abandoned and the plat amended without the permission of all of the owners of the plat and without the permission of the County, there can be no certainty in plats, and the County has no control of plats. Fortunately, the courts have decided time after time that such is not the law. In this

case the trial court should be reversed. A common 60 foot easement should be declared for all the parties of both shortplats, and the court should declare the right of any owners in the shortplat to use the 60 foot easement for road and utility purposes.

The plaintiffs' case rests entirely upon a sketch and agreement to pay for paving a small portion of the deeded easements of the two plats, and a claim that agreeing to pay for paving of the portion of the road abandons all of the rest of the right of way. This is absurd and must be reversed.

RESPECTFULLY SUBMITTED this 25th day of
March, 2009.

RITCHIE LAW FIRM, P.S.



CRAIG A. RITCHIE, WSBA #4818
Attorney for Appellants Cuny

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PROOF OF SERVICE

The undersigned states and declares as follows:

1. I am over the age of 18, am competent to testify, am an employee of Ritchie Law Firm, P.S., and make this declaration of my personal knowledge and belief.

2. I served a copy of the REPLY BRIEF OF APPELLANTS CUNY upon the following individuals, by sealing each copy in an envelope, with first class postage fully prepaid thereon, and causing the envelope to be placed in the U.S. Mail, addressed, respectively, as follows:

David Neupert
Platt Irwin Taylor et al
403 S. Peabody
Port Angeles WA 98362

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of March 2009, at Sequim, Clallam County, Washington.



ERIKA HAMERQUIST
Secretary