

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION III

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OF THE STATE OF WASHINGTON

MICHAEL R. HANSON, et. ux.
Appellants,
Vs.
DIAMOND LAND COMPANY, LLC, et. al.
Respondents,

BRIEF OF APPELLANT

Name, address and telephone
number of counsel for parties:

Appellants:

WALDO, SCHWEDA & MONTGOMERY, P.S.
John Montgomery, WSBA #7485
2206 N. Pines Rd.
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Appellant, HANSON LIVING TRUST, by and through its undersigned counsel, submits the following Brief of Appellant.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The Trial Court erred in determining that a dedication of Lot 6 exists because of the Diamond Beach Plat.

Assignment of Error No. 2

No valid conveyance of any interest in Lot 6 occurred in favor of Respondents.

Assignment of Error No. 3

The Trial Court erred by not ruling that title to Lot 6, Diamond Beach plat, should be vested in the name of Plaintiff and quieting title against the Respondents.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1) Does the consent of a contract vendor to a subdivision plat create any benefit to others in the absence of a dedication thereof?
- 2) Does a subdivision plat creating a separate parcel, consented to by a contract vendor, create any benefit to a lot owner in a separate division of property?
- 3) Does the consent of a contract vendor to a subdivision plat, convey an interest in a lot to others owning lots in a separate division of property?

- 4) Does the consent of a contract vendor to a subdivision plat provide for the release of security given under terms of a real estate contract?

IV. STATEMENT OF THE CASE

On April 13, 2006, the Hanson Living Trust (hereafter “Hanson”) sold approximately six (6) acres of land to Diamond Land Company, LLC (hereafter “Diamond”). (CP 339-51) Diamond is no longer in existence and was defaulted by order of the Superior Court on September 9, 2010. (CP 565-69)

The terms of sale were by real estate contract with the agreement that certain lots, Lots 1-11, Block C, Elu Beach, and Lot 2 of Hanson Division, were immediately released from the terms of the real estate contract (CP 566-67).

The original plat of Elu Beach was filed for record circa, 1925, and except for identification of individual lots has no bearing on this case.

The “Replat of Lots 1-4 of Block C of Elu Beach” a final plat, was filed for record on May 3, 2006 with the Pend Oreille County Auditor, (CP 530), and contained four separate lots. No dedication is made thereon for access to Diamond Lake and the plat does not include or identify Lot 6 which is the subject of the action. Hanson is not identified in any respect on the “Replat of Lots 1-4, Block C of Elu Beach.”

Lot 6, has its genesis on the final plat of “Diamond Beach”. It was filed for record on June 6, 2006 (CP 363). Hanson signed the plat as a lienholder consenting to the subdivision. The “Diamond Beach” plat includes a “Plattor’s Declaration” but does not dedicate property for any public use. Stated otherwise, no language on the plat of Diamond Beach is expressly identified as a dedication.

However, a note on the face of the plat, applicable only to Lot 6, states:

- 1) Designated as a community access lot only for Hanson Division – Lot 2, Replat of Lots 1-4 of Block C of Elu Beach. Lots 5-11 of Block C of Elu Beach and Mike and Karen Hanson.
- 2) No residential structures permitted on Lot 6. Community Pavilion type structures shall be permitted.
- 3) No vehicle access to Southshore Diamond Lake Road permitted.

The signature of Hanson as lienholder states only that they “agree(s) to the subdivision as shown thereon.”

Lot 6 has waterfront frontage on Diamond Lake. None of the allegedly benefitted property identified in “Note 1” is included in the plat of “Diamond Beach.” Although Hanson signed off on the plat as its lienholder, no portion thereof was released from the terms of the existing real estate contract in Hanson’s favor. Lots sold to the

existing respondents with evidence of recording date next thereto are as follows:

8/18/09	Lot 9, Block C	Spitzer	(CP 490-91)
1/26/07	Lot 10, Block C	Richeal	(CP 484-85)
4/26/06	Lot 11, Block C	Tully	(CP 478-80)

Spitzer acquired their interest from George R. Guinn and Geraldine Guinn who acquired title from Diamond on May 3, 2006. (CP 493).

Richeal conveyed a 50% interest to Aguirre on July 14, 2009. Neither Richeal's deed from Diamond (CP 484-85), or Richeal's original deed to Acquirie (CP 482); identifies a 1/27 interest in Lot 6 . However in an apparent attempt to cure the deficiency, Diamond gave a new deed, recorded June 10, 2009, to that part of Lot 6. (CP 487-8).

No deed release was, or has ever been given to anyone by Hanson, to said Lot 6. (See: Litigation Guarantee CP 435-39).

Diamond defaulted on its contractual obligation to Hanson and by Quit Claim Deed voluntarily forfeited it's interest in Lot 6 and other lots. Specifically identified was a 15/27th interest in Lot 6. (CP 355-56).

The Quit Claim Deed, given in lieu of foreclosure, was recorded June 8, 2009 by Diamond without the commencement of a forfeiture proceeding under RCW 61.30. (CP 355-56).

Other purchasers from Diamond have either abandoned or settled their claim as to any ownership interest in Lot 6 with Hanson. (RP 7).

The Honorable Allen C. Nielson, by order dated January 6, 2011, granted summary judgment in favor of the four remaining Respondents, on the basis that Hanson's signature on the plat of Diamond Beach constituted a dedication of Lot 6, to the respondents. (CP 850-53) By denying Hanson's motion for summary judgment the court disposed of Hanson's claim entirely. The result is that Hanson, Tully, Aquirie, Richael and Spitzer each have some, as of yet, undetermined interest in Lot 6.

This action was commenced for reformation of the quit claim deed in lieu of forfeiture and to quiet title as to any party asserting a 1/27th ownership interest in Lot 6. (CP 329-38). The appeal timely followed.

V. STANDARD OF REVIEW

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). As such, the court must decide whether summary judgment was appropriate in this case as a matter of law. In this case there were also present, and are still present, several disputed facts, all of which are material in a finding of

summary judgment in favor of Respondents. The order entered January 6, 2011, by the Honorable Allen C. Nielson recited on its face that it was a final order of the court. (CP 853)

VI. ARGUMENT

A. DOES THE CONSENT OF A CONTRACT VENDOR TO A SUBDIVISION PLAT CREATE ANY BENEFIT TO OTHERS IN THE ABSENCE OF A DEDICATION?

The statute of frauds requires:

“Every conveyance of real estate, or any interest thereon, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed...” RCW 64.04.010. By statute, every deed requires words of conveyance to be valid. The three statutory forms proscribe words to be utilized: “conveys and warrants” (warranty deed-RCW 64.04.030), “bargains, sells and conveys”, (bargain and sale deed-RCW 64.04.040) and “convey and quit claim” (quit claim deed-RCW 64.04.050).

Similar words are required for a dedication by plat.

RCW 58.17.165 states that if a plat “is subject to a dedication, the certificate or a separate written instrument shall contain the dedication of all streets and other areas to the public, and individual or individuals...”

The statute further states, “[s]aid certificate or instrument of dedication shall be signed and acknowledged before a notary public by all parties

having an ownership interest [emphasis added] in the lands subdivided and recorded as part of the final plat. RCW 58.17.165, paragraph 2.

Hanson, did not sign any certificate or separate written instrument of dedication as required by the statute on the plat of Diamond Beach.

The interpretation of a deed, and therefore dedication, is a mixed question of fact and law. *Raeder Co. v. Burlington N., Inc.*, 105 Wn. 2d 567, 571-572, 716 P.2d 855 (1986). Although the parties intent is a question of fact, any legal effect would necessarily be a question of law. *State Bank v. Phillips*, 11 Wn.2d 483, 119 P.2d 664 (1941).

The intent to dedicate will not be presumed and clear intent must be shown. *Cummins v. King County*, 72 Wn2d 624, 626, 434 P.2d 588 (1967).

On summary judgment no such intention can be gleaned from the consent given by Hanson to the subdivision of “Diamond Beach”. The law does require that all those having an interest in the property being subdivided provide their consent thereto. (RCW 58.17.165, paragraph 3).

The note regarding Lot 6 of the plat of Diamond Beach is also entirely deficient as a dedication. RCW 58.17.020 (3), in pertinent part states:

“Dedication” is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself or

herself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. The intention to dedicate shall be evidenced by the owner by the presentment for filing of a final plat or short plat showing the dedication thereof; and, the acceptance by the public shall be evidenced by the approval of such plat for filing by the appropriate government unit.

The express language of the plat denominated as “Leinholder’s Certificate”, is limited by the use of the word “designated” as opposed to “dedicated”. It is also limited in terms of use because of the word “only. The signature of Hanson as lienholder states only that they “agree(s) to the subdivision as shown thereof”. It is therefore compliant with RCW 58.17.165.

Dedications devote land to a public use and are classified as either statutory or common law. *McConiga v. Riches*, 40 Wn. App. 532, 537, 700 P.2d 331 (1985).

For a statutory dedication to occur there are but two choices: RCW Ch.58.17, Plats – Subdivisions – Dedications; or, RCW Ch. 58.08, Plats – Recording.

The purpose of either is to provide the legally sufficient dedication of land so that conveyances made by reference to the recorded plat will be accurately described by the lots and blocks thereof and land for public facilities will be effectually dedicated. RCW 58.17.160-165.

RCW 58.17.020(2) defines a “plat” as follows:

“Plat” is a map or representation of a subdivision, showing thereon the division of a tract or parcel of land into lots, blocks, streets and alleys, or other divisions and dedications.

RCW 58.17.110 provides for the requirements of a dedication.

RCW 58.17.110(2) “Dedications shall be clearly shown on the final plat.”

Nowhere on the Diamond Beach Plat is the word “dedication” used. No dedication can be derived from the plat of Diamond Beach.

Paragraph 3 of RCW 58.17.165 also provides that every plat containing a dedication must be accompanied by a title report confirming that title of the lands referred to in the plat is in the name of the owners signing the certificate or instrument of dedication.

Again, there is no certificate, nor dedication, nor was Diamond identified as the true owner of the property. Under a common law dedication, a property owner, by some act, dedicates property to the public, and the public accepts it. In *Knudsen v. Patton*, 26 Wn. App. 134, 141, 611 P.2d 1354, review denied, 94 Wn.2d 1008 (1980), the Court of Appeals set forth the elements of a common law dedication:

“There are two essential elements to a valid common law dedication: (1) an intention on the part of the owner to devote his land, or an easement in it, to a public use, followed by some act or acts clearly and unmistakably evidencing such intention, and (2) an acceptance of the offer by the public.”

The burden of proving a common law dedication lies with the party attempting to prove the dedication:

“One asserting that the public has acquired a right to use an area as a public street has the burden of establishing these elements. *McConiga v. Riches*, 40 Wn. App. 532, 700 P.2d 331, (Wn. App. Div. 3 1985), citing *Karb v. Bellingham*, 61 Wn.2d 214, 218-19, 377 P.2d 984 (1963).”

In *Frye v. King County*, 151 Wn.179, 180, 275 P. 54 (1929),

Seaboard Security Company filed a plat and made a dedication to the public for the streets and avenues that were referred to on the plat.

That dedication reads as follows:

Know all men by these presents, that we, the undersigned, Seaboard Security Company, a corporation organized and doing business at the City of Seattle, in said State, being the owners in fee simple of the land above described and embraced in the plat of “Lake Shore View Addition to City of Seattle” do hereby declare said plat and do hereby dedicate to the use of the public forever the streets and avenues thereon shown.

In witness whereof said company has caused these presents to be executed by its President and Secretary thereunto duly authorized and its corporate seal thereunto affixed.

Later, *Id.*p.180. Seaboard purchased some adjoining property which Seaboard acquired by receiving an assignment of a real estate contract. The court found that since Seaboard was purchasing the additional property on contract, Seaboard did not own the property, and therefore, could not dedicate it. The Court stated:

It must be remembered that at the time of this dedication the dedicator or it’s predecessor in interest was purchasing the shore lands from the state of Washington under an executory, forfeitable contract, and such contract vests no element or title either legal or equitable. *Id.*p. 184.

The Court further stated at page 185, “To constitute a dedication, either express or implied, there must be an intention to dedicate on the owner’s part. A dedication, being a voluntary donation, is not presumed; but the clearest intention to make a dedication must be shown by the party alleging it.”

The Court concluded by saying on page 187,

...the dedicator had no vestage of title either legal or equitable at the time of making the plat, we think it is clearly apparent, not only that there was no intention to dedicate, but that under the doctrine of the cases above cited that there was no power to dedicate; and the trial court having expressly found that there was no estoppel, the title to such shore lands still remains in the record owners.

In *Knudsen v. Patton, supra*. The defendant platted a number of properties.

One of the plats included a reference to a park. Later the defendant sold what was referred to as the “park” property by filing another plat and selling the lots to individuals without any reference to a park. The plaintiffs, lot owners of previously platted properties, sought to have a declaration that there was a park based upon a common law dedication.

The Court stated:

In order to prevail on a theory of common-law dedication, it must be established by clear and unmistakable evidence that the landowners intended to dedicate land to a public use. *Seattle v. Hill*, 23 Wn. 92, 62.P.446 (1900); *Spokane v. Catholic Bishop*, 33 Wn.2d 496, 206 P.2d 277 (1949). The use must be for the public generally. The applicable rule in this regard is as follows:

The essence of dedication is that it shall be for the use of the public at large, that is, the general, unorganized public, and not for one person or a limited number of persons, or for the exclusive use of restricted groups of individuals. There may be a dedication for special uses, but it must be for the benefit of the public. Properly speaking, there can be no dedication to private uses or for a purpose bearing an interest or profit in the land.

Id.141-2. With regard to the Diamond Beach Plat, the Hanson signed only a certificate as lien holder, being the contract vendors, and agreed only to the subdivision as shown in the plat and made no dedication certificate.

The distinction between a statutory dedication and a common law dedication is that the former proceeds from a grant, whilst the latter operates by way of an estoppel in pais. There is no particular form or ceremony necessary in the dedication of land to a public use. An implied common law dedication arises from some act or course of conduct from which the law will imply an intention on the part of the owner of the property to dedicate it to the public use. *Roundtree v. Hutchinson*, 57 Wn. 414, 107 P.345 (1910).

For a common law lien to exist the following is said: The elements of an implied common law dedication are (1) an unequivocal act by the fee owner establishing his intention to dedicate, and (2) reliance on the act by the public, indicating a public acceptance thereof. *Lopeman v. Hansen*, 34 Wn.2d 291, 208 P.2d 130 (1949).

Under the facts of this case there is nothing to suggest that either a statutory dedication or common law dedication was made by Hanson. As a matter of law the trial court erred by finding that a common law dedication of Lot 6 occurred.

B. DOES A SUBDIVISION PLAT, CREATING A SEPARATE PARCEL, CONSENTED TO BY A CONTRACT VENDOR, CREATE ANY BENEFIT TO A LOT OWNER IN A SEPARATE DIVISION OF PROPERTY?

It is unclear from the record as to how the trial court determined ownership other than to rule that a common law dedication of Lot 6 had been made to others, the court states:

[For] a judgment determining that the common area referred to as Lot 6, Diamond Beach Plat, was for the sole benefit of the lot owners of Lots 1-11, Block C of Elu Beach, and Lot 2 of Hanson Division, and that the plat constitutes a dedication of Lot 6 to those lot owners only.

As a total of six (6) separate lots exist within the confines of Diamond Beach, it is a quantum leap to suggest that properties outside of the plat itself should have been benefited by the creation of Lot 6. Nor could any replat of Elu Beach (CP 530) make any reference to Lot 6, as Lot 6 had not yet been created at the time that plat was approved.

Limited authority does exist for extending benefits between separate subdivisions. Restrictive covenants have been enforced as implied-reciprocal-servitudes when development suggests a common or uniform scheme. *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wn.App. 411, 420, 166 P.3d 770 (2007). This scenario is unapplicable to fee ownership and no case supports such a transfer of ownership in fee simple. Moreover, a factual dispute exists as to whether any interest is within the

chain of title of any individual lot owner rendering summary judgment in favor of the Respondents improper.

C. DOES THE CONSENT OF A CONTRACT VENDOR TO A SUBDIVISION PLAT, CONVEY AN INTEREST IN A LOT, TO OTHERS OWNING LOTS IN A SEPARATE DIVISION OF PROPERTY?

As no dedication actually exists there would still need to be a conveyance of or satisfaction of lien rights, signed by Hanson. In this case the creation of Lot 6 was itself a plan, something that could be accomplished in the future, and most certainly with the payment of the financial obligation secured in Hanson's favor. There is nothing to suggest that Hanson could not have participated in the conveyance. More probable is the result that Diamond could have fulfilled its financial responsibility to Hanson.

At best the "survey" note associated with Lot 6 is a reservation in favor of Hanson. The issue remains as to whether future conveyances were legally sufficient and particularly without payment of the underlying secured obligation in favor of Hanson. Moreover is the issue of whether any transfer of any ownership interest in Lot 6 ever occurred by Hanson.

Of the respondents herein, only Tully directly acquired a 1/27th interest in Lot 6 on their deed from Diamond, a real estate contract purchaser of Lot 6 at the time.

Title remains vested in Hanson in fee simple as to all contested interests.

In *Tomlinson v. Clarke*, 118 Wn.2d 498 (1992) on page 504 the Court stated:

A real estate contract is an agreement for the purchase and sale of real property in which legal title to the property is retained by the seller as security for payment of the purchase price. Legal title does not pass to the purchaser until the contract price is paid in full.

The real estate contract between Hanson and Diamond, was recorded in Pend Oreille County on April 17, 2006, at 4:08 p.m. (CP 339-51) A conveyance of real property is deemed recorded the minute it is filed for record. RCW 65.08.070.

Once the real estate contract was recorded it became constructive notice to all the world. *Strong v. Clark*, 56 Wn.2d 230, 232, 352 P.2d 183 (1960); *Hoffman v. Graaf*, 179 Wn. 431, 38 P.2d 236 (1934). The respondents would have necessarily been on notice of Hanson's interest at the time they acquired their interest in the property from Diamond.

In *Terry v. Born*, 24 Wn. App. 652, 655, 604 P.2d 504 (1979) the Court stated, "A contract seller's retention of title is a security device functionally similar to a real estate mortgage or deed of trust."

See also *Tomlinson v. Clarke*, *supra*, at page 509, where the Court quoted *In re McDaniel* 89 Bankr.861:

This analysis leads to the inexorable conclusion that Washington treats the seller's interest under a real estate installment sales contract as a lien/mortgage-type security interest in real property. Washington does not now, nor as [*sic*] has it for a long time, considered the purchaser's interest under a real estate installment sales contract as creating a "mere" contract right. The remedies provided to the seller in the case of breach or non-performance are those of a secured creditor. Washington law considers the purchaser's interest under the real estate contract as a property interest and the seller's interest under that contract as a lien-type security device.

Title to a real estate contract purchaser does not pass until the purchaser obtains a fulfillment deed or obtains a deed release to portions of the property being purchased under the contract. Because Hanson was not paid in full of its contract price, Diamond, never obtained either a fulfillment deed or a partial deed release to Lot 6. Therefore, Diamond's attempted conveyance of a 1/27th interest in Lot 6 to the Respondents herein must fail as a matter of law and is a nullity.

D. DOES THE CONSENT OF A CONTRACT VENDOR TO A SUBDIVISION PLAT PROVIDE FOR THE RELEASE OF SECURITY GIVEN UNDER TERMS OF A REAL ESTATE CONTRACT?

Again no interest in any portion of Lot 6, Plat of Diamond Beach, has ever been given by Hanson. Although Hanson clearly consented to the division of Diamond Beach, it is quite another issue as to whether he has been paid therefor. This represents a question of fact rendering the grant of summary judgment in favor of the Respondents entirely improper.

Here, Diamond can convey no greater interest than they owned. *McGill v. Shugarts*, 58 Wn.2d 203, 204, 361 P.2d 645 (1961).

Generally, a mortgagor, (Diamond), without the express or implied consent of the mortgagee, (Hanson), cannot dedicate property so as to adversely affect the interest of mortgagee. A foreclosure nullifies an attempted dedication by the mortgagor. *Annotation*, 63 A.L.R.2d 1160 (1959).

The rule that can be gleaned therefrom, and what was failed to be accomplished herein, is that the mortgagee, Hanson, could have joined in, and separately signed the dedication. However, and under the facts of this case, Lot 6 having no relationship with any other lot in the plat of Diamond Beach, would still be ineffectual without the conveyance, or, without the release of Hanson's security interest. The scenario underscores Hanson's assertion herein that a reservation existed in Hanson, subject to future conveyance and release of security.

By way of illustration, the title report issued to Respondent Spitzer erroneously vests title without regard to the undivided 1/27th interest of Hanson in Lot 6 . (CP 696-706) Stated otherwise, the existing contract was not shown as a title exception to any interest in Lot 6.

There has been no conveyance of Lot 6, nor is there evidence of the release of security interest therein by Hanson. Because the contract

has been forfeited there is no remaining interest in Lot 6 other than that of Hanson, the original contract vendor.

IV. Conclusion

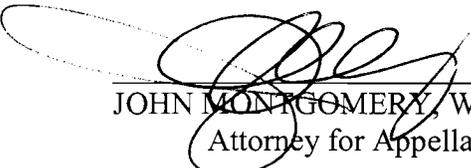
Hanson, as required by law gave their consent to the subdivision of Diamond Beach providing for the creation of certain lots therein. They did no more.

Any determination of Hanson's release of interest, transfer of ownership, are the province of the title insurer, real estate closer and individual purchasers, all of which have assumed some responsibility for the respondents present dilemma.

Title remains vested in Hanson. The court's summary judgment is in error requiring reversal. As a matter of law judgment should accordingly be entered in favor of Hanson as no contested material fact exists which would prevent such a decision.

Respectfully submitted this 28 day of April, 2011.

WALDO, SCHWEDA & MONTGOMERY



JOHN MONTGOMERY, WSBA #7485
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of April, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

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Dated the 28th day of April, 2011, at Spokane, Washington.

