

No. 71118-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEAN STREET AND JANIS L. STREET, Husband and Wife,
Individually and Their Marital Community,

Appellants,

and

RANJIV HAYRE AND SUKHJIWAN HAYRE,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SUZANNE PARISIEN

BRIEF OF APPELLANTS STREET

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I. INTRODUCTION

This is an action between co-tenants, with respondent Hayres seeking a partition of the 26 acre parcel of cotenancy real property and appellant Streets¹, who served as managing cotenant, seeking several hundred thousand dollars in damages, and a ruling that the Hayres are jointly liable for a promissory note secured by the property that benefited all cotenants but was signed solely by Street. After one brief telephone call followed by three even shorter emails, the Hayres' attorney accepted Street's 24-word offer to purchase the property from the Hayres for \$50,000, adding that "we [the attorneys] can work on an agreeable settlement and release." Street's attorney responded, "Agreed. Please prepare the paper work." The form of the conveyance of the Hayres' interest in the property to Street was never discussed by either counsel during the negotiations.

The "paper work" prepared by the Hayres' attorney contained several terms that the parties had never discussed, let alone agreed to, including the form of the deed of conveyance and the accompanying real estate excise tax affidavit, who would pay

¹ Throughout this brief the appellants will be referred to as "Street" since Dean Street performed all of the acts discussed herein on behalf of himself and his wife Janis. Mr. Street recently passed away.

the excise tax, who would pay the fees of the court-appointed partition referee, and the scope of the parties' mutual release of claims against each other.

After Street insisted that any settlement be conditioned on a release by the lender of his personal liability on the loan, the trial court granted the Hayres' motion to enforce a settlement agreement based on counsels' email exchange. Street appealed.

After all the appellate briefs had been filed another material issue arose: the partition referee could not implement the Order Enforcing the Settlement Agreement by conveying the Hayres' interest in the property without the parties paying approximately \$50,000 in back real property taxes or allowing the King County Assessor to change the use classification of the property from agricultural to open space. Over Street's objections the trial court granted the referee's motion to have the use of the property reclassified as open space, and the referee recorded her deed.

Street's appellate counsel obtained the Court of Appeals Clerk's permission to supplement the appellate record with the pleadings regarding the \$50,000 property tax use classification issue, but it was not discussed by the Court of Appeals in its opinion reversing the Order Enforcing Settlement Agreement,

finding that whether the form of the conveyance was a material term of the agreement was a disputed material fact based on the record before it.

On remand, the trial court granted the Hayres' Renewed Motion to Enforce Settlement Agreement, finding that the form of the conveyance of the Hayres' interest in the property was not a material term of the agreement, and that the \$50,000 property tax use classification issue was not before the trial court because it had not been addressed by the Court of Appeals. Because both rulings are erroneous as a matter of law, Street appeals.

II. ASSIGNMENT OF ERROR

The trial court erred in entering its Order Granting Plaintiffs' Renewed Motion to Enforce Settlement and for Summary Judgment Dismissing All Counterclaims, which found as a matter of law that the form of the conveyance of the respondent Hayres' interest in the subject property to the appellant Street was not a material term to their settlement agreement, and failed to even consider the materiality of the \$50,000 property tax use classification issue.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Counsel for the parties in a partition action exchanged three

short emails in which they agreed that the cotenants would transfer title to their interest in the cotenancy real property to the other cotenant upon payment of \$50,000 and a mutual release of all claims related to the acquisition and ownership of the property, initially without discussing, and later disagreeing about, the form of the conveyance of title.

A. Did the trial court err in finding that the form of the conveyance was not a material term of the settlement agreement where there are significant differences between the warranties made by the grantor in a statutory warranty deed than in a quit claim deed, the Court of Appeals held that a material term is “of such a nature that knowledge of the item would affect a person’s decision-making”, and the form of the conveyance was so important to the parties that the Hayres refused to issue a statutory warranty deed and Street refused to accept a quit claim deed, both for good reason?

B. Where the parties’ counsel did not discuss in their very brief settlement discussions what would happen if the conveyance could not be recorded without one of the parties paying approximately \$50,000 in real property taxes or having some of the property be reclassified as open space, and that problem arose

only after all the briefs had been filed with the Washington State Court of Appeals in Street's appeal of the initial Order Enforcing Settlement Agreement, did not the trial court err in refusing to even consider the reclassification as a material term of the alleged settlement agreement because it was not addressed by the Court of Appeals when it reversed the initial Order Enforcing Settlement Agreement?

IV. STATEMENT OF THE CASE

A. The Parties Purchase the Enumclaw Property as Tenants in Common.

In April 2006 the Hayres purchased the 26 acre property in Enumclaw, Washington at a foreclosure auction sale for \$865,000. (CP 25) At their request, their friend Dean Street ("Street") agreed to pay the Hayres \$288,333 for a one-third interest in the property. (CP 25) The three each owned a one-third interest in the property as tenants in common. (CP 25) They planned to fix up the property and sell it, agreeing to each pay one-third the cost of the maintenance and share one-third of the profits and losses. (CP 25)

In May 2007 the parties arranged to borrow \$1.5 million using the property as collateral, from which \$500,000 each was disbursed to them. (CP 25) Street was the sole signer on the

promissory note, although the Hayres signed the deed of trust encumbering the property to secure the loan. (CP 25) At the same time the parties agreed that Street, a licensed real estate agent, would list the property for sale at \$2.795 million. (CP 25) He spent the next several years trying to sell the property, without success. (CP 25)

At all times Street was responsible for managing the Enumclaw property. (CP 25) He paid all the payments on the mortgage, property taxes, insurance, and all the expenses for the maintenance of the property. (CP 25) He has kept a detailed ledger of his expenditures and periodically received reimbursement from the Hayres for their two-thirds share until they stopped in September 2009 and never resumed. (CP 25)

B. The Hayres Sue and Street Countersues.

The Hayres filed a complaint in 2011, asking that a referee be appointed to sell the property and distribute the proceeds, that they be declared to have no obligation under the \$1.5 million promissory note, and be awarded rent from Street for his alleged personal use of the property. (CP 25) In his Answer Street agreed that the property should be sold, but counterclaimed to recover the Hayres' two-third share of prior and future expenses and damages

for their failure to cooperate in a short sale. (CP 25) Seattle attorney Rebecca Wiess was appointed to act as the referee. (CP 25)

C. The Parties' Attorneys Enter into the Alleged "Settlement".

On February 6, 2012 Street's attorney, Michael Hunsinger, and the Hayres' attorney, Lawrence Glosser, exchanged one brief telephone call and three even briefer emails, resulting in Mr. Glosser agreeing that the Hayres would pay Street \$50,000 and convey their interest in the property in exchange for a full and complete release of all claims and causes of action. (CP 26) He finished by saying, "[i]f that works, . . . we can work on an agreeable settlement and release." Mr. Hunsinger replied by email, "Agreed. Please prepare the paper work." (CP 26)

The next day Mr. Glosser sent Mr. Hunsinger a draft settlement agreement including a quit claim deed, and Mr. Hunsinger emailed Mr. Glosser a letter stating the agreement was conditioned upon the agreement of the servicer of the \$1.5 million promissory note to agree on a short sale. (CP 26)

D. The Trial Court Enters an Order Enforcing the “Settlement”.

The Hayres filed a motion to enforce the settlement, which was granted without oral argument. (CP 26) The trial court signed the order presented by the Hayres without changing a word. (CP 26) The court found that “[t]he material terms of the settlement provide (a) payment of \$50,000 to the Streets, (b) transfer of the Hayres’ interest in the real property that is the subject of this partition action to Street and (c) mutual release of any claims.” (CP 20-23) Of course, the trial court could not order any settlement agreement to be implemented since so many of its terms had not even been discussed, so the trial court instead adopted the Hayres’ proposed solution, which took the referee over nine months and two more court orders to implement:

In the event that the Defendants refuse to sign a settlement agreement based on those terms by February 29, 2012, the following shall occur:

(1) Plaintiffs shall deposit \$50,000 settlement proceeds into the registry of the court;

(2) Rebecca Wiess, as duly appointed Referee in this case, shall convey all of the interest of Ranjiv Hayre and Sukhjiwan Hayre [sic] interest in the subject property to Dean Street and Janis Street; and

(3) Upon the concurrence of

the foregoing actions, all of Dean Streets [sic] counterclaims against Plaintiffs shall be dismissed with prejudice. (CP 20-23)

Between February 17 and February 24, 2012 Messrs. Glosser and Hunsinger exchanged correspondence regarding various terms of the alleged settlement. (CP 198-215) Not surprisingly, no agreement was reached, as Street rejected the Hayres' demands (1) that they convey their interests by quit claim deed (CP 206, 208-209) instead of the statutory warranty deed insisted by Street (CP 214); (2) that Street agree to sign a real estate excise tax affidavit stating no excise tax would be owed, when he believed more than \$10,000 might be due (CP 206, 210-211); and (3) that Street agree to comply with any order of the trial court that determined the payment of Ms. Wiess' referee's fees. (CP 206)

E. Street Appeals and the Referee Spends Over Nine Months Trying to Implement the Order to Enforce.

In February 2012 referee Wiess filed a Motion for Instructions, asking the trial court for permission to apply to the Washington Department of Revenue for an advisory letter regarding the excise tax issue. (CP 176-177) Street opposed Ms. Wiess' request, while reiterating his primary objections to the

Hayres' settlement proposals (CP 189-215), including their insistence on using a statutory warranty deed. (CP 191)

In the Hayres' response, they changed their position and agreed to pay any and all excise tax that may be owed (CP 225), but continued to insist on using a quit claim deed to convey the Hayres' interest in the property. (CP 223)

On March 1, 2012 the trial court entered an order authorizing Ms. Wiess to seek the advisory letter and "seek further instructions from the Court if the Department of Revenue demands payment in an amount which the parties refuse to pay." (CP 227-229)

Street had promptly appealed the Order Enforcing Settlement after it was entered on February 17, 2012. (CP 21-23; CP 173) The last appellate brief was filed on October 12, 2012. By then the Department of Revenue had concluded the Hayre conveyance could be made without payment of excise tax (CP 230-233), and Ms. Wiess had concluded that she would not use either a statutory warranty deed or a quit claim deed, but would instead record a "referee's deed" (CP 237), which she later changed to a "fiduciary deed". (CP 141-143)

However, Ms. Wiess still could not implement the Order

Enforcing Settlement because another material term arose that had not been even mentioned (or, for that matter, known to the attorneys) during the few moments they spent negotiating the “settlement agreement”.

As Ms. Wiess described in her Second Report of the Referee dated November 7, 2012 (almost nine months after the Order Enforcing Settlement was entered) (CP 234-241), when the parties purchased the property and during the subsequent six years it was classified as agricultural for annual real estate tax purposes under RCW 84.34, entitling the owners to a reduced real property tax rate. (CP 236) If the land were removed from that current use exemption, the owners would be required to pay the county back for the amount of taxes they saved as a result of that classification over the preceding six years, which for the property was about \$50,000. (CP 236)

Washington state law requires that no deed can be recorded without the payment of real estate excise tax based on a percentage of the amount of consideration paid by the buyer (usually in money and/or assumption of seller’s debts), unless the transaction falls within one of the many exemptions. WAC 458-61A.

Accordingly, the parties to each real estate conveyance must fill out and sign a real estate excise tax affidavit to accompany the deed they wish to record; one such form was signed by Ms. Wiess accompanying the fiduciary deed she ultimately recorded. (CP 416-418)

Before a deed is recorded on a parcel with a current use exemption the county assessor reviews its exemption status; the deed can only be recorded if the assessor approves its continued classification by signing the excise tax affidavit or the grantee abandons the current use exemption and pays the back taxes. (CP 236-237)

Deputy King County Assessor Wendy Morse informed Ms. Wiess that she intended to drop the property's agricultural designation and to require Street and/or the Hayres to pay King County about \$50,000 in order to allow the conveyance to be recorded, unless Ms. Wiess (as the referee she would be the grantor of the fiduciary deed) signed a letter of intent to switch the use designation from agriculture to open space. (CP 237)

Since nobody was going to pay the \$50,000, and Ms. Wiess was determined to fulfill her duty under the Order Enforcing Settlement to "convey all of the interest [of the Hayres] in the

subject property to the [Streets]", she agreed to sign the letter of intent. (CP 416-418) Ms. Morse signed the "notice of continuance" section of Ms. Wiess' real estate excise tax affidavit on November 8, 2012 "pending reclassification in open space under PERS". (CP 416-418)

Ms. Wiess then filed her Motion for Second Instructions, in which she asked the trial court to permit her to sign the letter of intent and record the fiduciary deed. (CP 231-233) Street vehemently objected because, among other things, the full application – a lengthy and extensive process which he would be required to pursue after the deed was recorded – would likely be rejected and if it were approved the open space designation would limit his use of the property and restrict its appeal to prospective buyers. (CP 247-250) Street also again argued that if there were to be a conveyance, it should be via statutory warranty deed instead of a fiduciary deed. (CP 246-247, 269, 282)

The Hayres filed pleadings in support of Ms. Wiess' Second Motion (CP 302-314), which was granted on December 4, 2012. (CP 320-324) The letter of intent to switch the property's classification to open space was signed, and the fiduciary deed and

real estate excise tax affidavit were recorded on December 6, 2012.

(CP 141-143; 416-418)

F. Street Asks that the Appellate Record be Supplemented to Include the \$50,000 Property Tax Use Classification Issue.

The fiduciary deed and real estate excise tax affidavit had been recorded almost two months after the last brief had been filed in Street's appeal of the Order Enforcing Settlement Agreement. Street filed a motion in the Court of Appeals to Supplement the Record and to Consolidate Appeals in his appeal of the Order Enforcing Settlement, because the recording of the fiduciary deed and the concomitant change of the use classification of the property constituted another example where "no meeting of the minds occurred because the parties failed to agree to all material terms of a binding and enforceable settlement." (CP 325-330) The Hayres opposed the effort to include the fiduciary deed evidence on the grounds that it "*was not before the trial court when it rendered its decision.*" (CP 339) (italics in the original)

On March 4, 2013 the Court of Appeals Commissioner ruled that Street could include the Order on the Second Motion of the Referee for Instructions in his designation of clerk's papers, and "referred to the panel that considers the appeal on the merits" the

parties' Motion to Supplement pleadings. (CP 348-349)

G. The Court of Appeals Reverses the Trial Court.

On June 17, 2013 the Court of Appeals panel issued its opinion, reversing the Order Enforcing Settlement on the grounds that whether the form of the conveyance of the Hayres' interest in the property to Street was material was a disputed fact. *Hayre v. Street*, 175 Wash. App. 1023 (2013) (CP 24-30) (hereinafter "*Street*").² The Court added, however, that "[T]his is not to say that the Hayres could not renew their motion on appropriate evidence." (CP 30)

The Court of Appeals did not address Street's Motion to Supplement the Record that the Commissioner referred to the panel, and its decision made no mention of the \$50,000 property tax use classification issue. (CP 24-30)

H. The Trial Court Again Enforces the "Settlement Agreement".

On September 27, 2013 the Hayres filed a Renewed Motion to Enforce Settlement Agreement and for Summary Judgment Dismissing All Claims (CP 1-14), which was granted on October 25,

² The Court of Appeals rejected Street's arguments that other terms of the alleged settlement – the scope of the mutual releases, who was to pay the referee's fees, and who was to pay the excise tax if it were due – were also material and not agreed to.

2013 by King County Superior Court Judge Suzanne Parisien. (CP 497-499)

Taking its cue from the Court of Appeals' comment in *Street* that "the record contains no evidence of whether additional encumbrances existed on the property that should have been addressed in the deed" (CP 30), Judge Parisien granted the Motion because:

. . . there is [sic] no new encumbrances on the property, and it exists today as it existed at the time that the parties purchased the property and at the time that the settlement agreement was entered into. . . .

There is no evidence before this Court that there are any additional encumbrances existing on the property that should have been addressed in the deed, or that would have been somehow – should have been addressed, or would have been addressed better in a statutory warranty deed. (RP 39)

The trial court even more blithely rejected *Street's* argument that the classification of the property for real estate property tax purposes was a second material term that had not been agreed upon, since "it wasn't briefed before the Court of Appeals". (RP 19) *Street* timely filed a Notice of Appeal. (CP 500-504)

V. ARGUMENT

When it reversed the trial court's Order Enforcing Settlement Agreement, this Court established the standard of review, principles of law, and definition of "materiality" that must also be applied in this appeal.

A. Standard of Review and Burden of Proof: This Court Reviews The Trial Court's Order Enforcing A Settlement De Novo To Determine Whether Counsel's Exchange Of Correspondence Reflects Agreement On All Material Terms.

The trial court entered the Order Granting Plaintiff's Renewed Motion to Enforce Settlement Agreement and for Summary Judgment Dismissing All Counterclaims ("the Renewed Order to Enforce") solely on the basis of affidavits and documentary evidence, as did the earlier trial court with the initial Order Enforcing Settlement Agreement. The Court of Appeals reviewed that proceeding *de novo* when it reversed the first Order to Enforce. *Street* (CP 27), citing *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696, 994 P.2d 911 (Div. 1, 2000).³ Accordingly, this Court shall review the Renewed Order to Enforce *de novo*.

Review of an order enforcing a settlement is akin to the

³ The *Brinkerhoff* decision effectively overrules *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357, *rev. denied*, 122 Wn.2d 1020 (1993), which had applied an abuse of discretion standard to a trial court's order establishing a settlement agreement.

standard on summary judgment. *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001) (“The standard of review is de novo because the motion to enforce a settlement agreement is like a summary judgment motion.”). “The party moving to enforce a settlement agreement carries the burden of proving that there is no genuine dispute over the existence and material terms of the agreement.” *Street* (CP 27), citing *Brinkerhoff, supra* at 696-697.

The court must review the documentary record in the light most favorable to the nonmoving party, and determining whether reasonable minds could reach but one conclusion. 99 Wn. App. at 697. If the nonmoving party raises a genuine issue of material fact in response to a motion to enforce a settlement agreement, the issue must be resolved in a fact-finding hearing. 99 Wn. App. at 697.

B. The “Settlement Agreement” Is Governed by Contract Law, Civil Rule 2A, RCW 2.44.010, and the Court of Appeals’ Guidance in *Street*.

Settlement agreements are governed by general principles of contract law. *Street* (CP 26), citing *Evans & Sons, Inc. v. City of Yakima*, 136 Wn. App. 471, 475, 477, 149 P.3d 691 (Div. 3, 2006) (citing *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357, *rev. denied*, 122 Wn.2d 1020 (1993)). A valid settlement agreement

requires a meeting of the minds on the essential terms. *Id.* (citing *McEachern v. Sherwood & Roberts, Inc.*, 36 Wn. App. 576, 579, 675 P.2d 1266 (Div. 1, 1984)).

In addition to these settled principles of contract law, a trial court's authority to compel the enforcement of a settlement agreement is limited by Civil Rule 2A⁴ and RCW 2.44.010.⁵ These provisions preclude enforcement of a disputed agreement whose material terms are not established in a writing signed by the attorneys or the clients, or on the record in open court. See *Morris*, 69 Wn. App. at 868.

As the Court of Appeals said in reversing the trial court in *Street*:

To determine if informal writings are
sufficient to establish a binding

⁴ No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same. CR 2A.

⁵ An attorney and counselor has authority: (1) To bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him or her, or signed by the party against whom the same is alleged, or his or her attorney. RCW 2.44.010.

settlement agreement, [the court] must conclude that (1) the parties agreed to the subject matter; (2) all of the provisions of the agreement were set out in the writings; and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. *Street* (CP 26–27), citing *Evans*, at 475-76.

“The purpose of CR 2A is to give certainty and finality to settlements. *Condon v. Condon*, ___ Wn. 2d ___, 298 P.3d 86, 89 (2013).” *Street* (CP 27)

In *Street*, the Court of Appeals noted that case law “does not provide a clear definition of ‘material’”, and that it depends upon the particular facts of a given case. (CP 28) The Court declined to suggest a “comprehensive definition” of the term in *Street*, but then stated, “*Black’s Law Dictionary* defines ‘material’ as, ‘[o]f such a nature that knowledge of the item would affect a person’s decision-making; significant; essential.’ BLACK’S LAW DICTIONARY 1066 (9th ed. 2009).” *Id.*

The trial court was therefore required to determine whether the form of the conveyance was a significant or essential component of the alleged settlement, and/or whether it was “of such a nature that knowledge of the [term] would affect a person’s decision-making”, given the circumstances of the facts of the case.

The form of the conveyance was an essential component of the settlement, it was significant, and it was of such a nature that it would have affected, and did affect, the decision-making of the Streets and the Hayres. Moreover, since the parties did not agree on the form of the conveyance the incomplete alleged settlement agreement – and therefore the order enforcing it – gave neither certainty nor finality to the alleged settlement. The same holds true for the parties' failure to address the \$50,000 property tax use classification issue in the "settlement". Consequently, this Court should reverse the trial court's order and remand for trial on the merits.

C. The Trial Court Erroneously Ruled that the Form of the Hayres' Conveyance of their Interest in the Property Was Not a Material Term of the Agreement.

The trial court ruled that the form of the conveyance was not material because:

. . . there is [sic] no new encumbrances on the property, and it exists today as it existed at the time that the parties purchased the property and at the time that the settlement agreement was entered into. . . .

There is no evidence before this Court that there are any additional encumbrances existing on the property that should have been addressed in the

deed, or that would have been somehow – should have been addressed, or would have been addressed better in a statutory warranty deed. (RP 39)

This ruling was erroneous for at least three reasons: (1) the trial court failed to consider other reasons why a quit claim deed is materially different from a statutory warranty deed; (2) the two deeds are, in fact, materially different; and (3) they differ materially even with respect to whether “additional encumbrances existing on the property should have been addressed in the deed.”

1. The Trial Court Erroneously Failed to Consider Other Reasons Why a Quit Claim Deed is Materially Different from a Statutory Warranty Deed.

The Court of Appeals in *Street* stated:

Below, Street argued in his response to the Hayres’ motion to enforce settlement that the form of deed was a missing material term. The Hayres did not address that argument at all in their reply. On appeal, their argument that the form of deed is not material is limited to a bare assertion, supported only by inapposite cases, that *Hubbell* and its progeny do not apply here. They offer no argument that the form of deed is not material under the facts of this case. Yet, they bear the burden to prove that there is no genuine dispute over the existence and material

terms of the agreement. *Brinkerhoff*, 99 Wn. App. at 696-97.

At least three factors suggest the form of deed was not material. First, the Hayres and Street already share the same quality of title as tenants in common. Second, all parties knew the property was encumbered by a \$1.5 million loan and the agreement did not contemplate that encumbrance being discharged. Thus, a statutory warranty deed without exceptions was not available. Third, the parties not only knew the property was encumbered, they knew it was encumbered beyond its market value. They knew Street had signed the note and the Hayres had not. They knew the release terms included claims related to that note. Thus, Street was taking the property subject to that liability. ***However, the record contains no evidence of whether additional encumbrances existed on the property that should have been addressed in the deed. It does not demonstrate that no provisions beyond a quit claim were material to the transaction.***

Viewing the evidence in the light most favorable to Street, these factors alone are not sufficient to establish that reasonable minds could reach but one conclusion, that the form of deed was not material or that a quit claim deed was necessarily sufficient. A genuine dispute concerning whether parties agreed on all material terms remains. The trial court erred by granting the

Hayres' motion to enforce settlement. This is not to say that the Hayres could not renew their motion on appropriate evidence. (CP 29-30) (emphasis added)

In their Renewed Motion, the Hayres made only one argument in support of their claim that the form of the conveyance was not material. Focusing on the first of the three sentences in *Street* highlighted above, the Hayres noted that:

The evidence shows that conveyance by a quit claim deed would not have imposed additional burdens or encumbrances on the Property that did not pre-exist the settlement agreement. . . [T]ransfer of the property to Street via the (hypothetical) quit claim deed or the actual transfer via the Fiduciary Deed resulted in Street receiving the "same quality of title" that he held prior to the transfer. . . [A title commitment on the property issued by Chicago Title Insurance Company] demonstrates beyond any doubt that the condition of title Street now holds in his own name is no worse than the condition of title as it existed on February 17, 2012 (the date of Judge Heavey's Order) or December 6, 2012 (the date the Referee conveyed the Hayres' interest in the property to the Streets. (CP 7-8)

As noted *supra* at page 21, the trial court granted the Hayres' motion for summary judgment by adopting this argument.

However, the Court of Appeals clearly did not intend the trial court upon remand to determine whether the form of conveyance was material solely depending upon “whether additional encumbrances existed on the property that should have been addressed in the deed.” Such a contention contradicts, or at least ignores, at least four references to a broader view of materiality in *Street*:

- “[The record] does not demonstrate that **no provisions beyond a quit claim** [sic] were material to the transaction.” (CP 30) (emphasis added). This is the sentence immediately following the one referring to additional encumbrances.
- “Viewing the evidence in the light most favorable to Street, these factors alone are not sufficient to establish that reasonable minds could reach but one conclusion, that the form of deed was not material **or that a quit claim deed was necessarily sufficient.**” (*Id.*)
- The aforementioned definition of “material” from Black’s Law Dictionary: **“[o]f such a nature that knowledge of the item would affect a person’s decision-making; significant; essential.”** (CP 28)
- “And, the same rationale underlying the *Hubbell* line of cases applies here. Agreements concerning the transfer of real property “must be

definite enough on material terms to allow enforcement without the court supplying those terms.” *Setterlund v. Firestone*, 104 Wn. 2d 24, 25, 700 P.2d 745 (1985). The trial court is unable to order transfer from the Hayres to Street without specifying the form of deed. (CP 29)⁶

In *Street* the Court of Appeals instructed the trial court reviewing the Hayres’ Renewed Motion to determine whether a quit claim was *necessarily sufficient* to convey the Hayres’ interest to the Streets, based on whether (1) *additional encumbrances* existed on the property that “*should have been addressed*” in the deed; (2) there were any provisions in a quit claim deed that differed significantly from those in a statutory warranty deed, or (3) whether any terms that differed between the two deeds were of “*such a nature that knowledge of the item would affect a person’s decision-making.*” Because the record before the trial court demonstrated differences between the two deeds that satisfied not just one but all three descriptions of materiality, granting the Renewed Motion was

⁶ The “*Hubbell* line of cases” were three Washington State Supreme Court opinions discussed in *Street*, each of which held that contracts involving real property could not be specifically enforced because material terms were omitted: *Hubbell v. Ward*, 40 Wash. 2d 770, 246 P.2d 468 (1952); *Kruse v. Hemp*, 121 Wash. 2d 715, 853 P.2d 1373 (1993); and *Sea-Van Investments Associates v. Hamilton*, 125 Wash. 2d 120, 881 P.2d 1035 (1994).

in error.

2. Quit Claim and Statutory Warranty Deeds Are, in Fact, Materially Different.

A critical – and material – difference between the two deeds is that in one the grantor provides the broadest and deepest scope of warranties to the grantee, while the other contains almost none.

As the Court of Appeals stated in *Street*, a statutory warranty deed is created by statute – RCW 64.04.030 – and contains five warranties:

- (1) The seller had an “indefeasible estate in fee simple”;
- (2) The seller had “good right and full power to convey the same”;
- (3) The property was “free from all encumbrances”;
- (4) The seller warrants “the quiet and peaceable possession” of the property; and
- (5) The seller will “defend the title thereto against all persons who may lawfully claim the same”. (CP 29)

The statutory warranty deed, in other words, is the gold standard by which a grantee obtains a grantor’s interest in real property containing the broadest and most extensive covenants, facilitating the grantee’s ability to later obtain title insurance to sell

that interest to someone else.

A quit claim deed is, on the other hand, “at the opposite end of the spectrum. . . . the grantor conveys only the then existing legal and equitable rights of the grantor, with no guarantee of what those rights are. *Roeder Company v. K & E Moving & Storage Co., Inc.*, 102 Wn. App. 49, 56, 4 P.3d 839 (2000).” *Street* (CP 29)

As Prof. Stoebuck says in 18 Wash. Prac., Real Estate §14.2 (2d ed.), a quit claim deed “. . . carries *no warranties whatsoever*; it conveys whatever title the grantor may happen to have, without any representation that he has the slightest interest in the land.” (emphasis in the original)

Street’s Response to the Renewed Motion included a declaration of Robert E. Ordal, a Seattle attorney whose law practice has been devoted exclusively to real estate and business areas since 1979. (CP 419-425) Mr. Ordal explained the relevance of this critical difference between a statutory warranty deed and a quit claim deed and why the Streets would insist on the former and the Hayres on the latter.

When Street sold the Enumclaw property he would very likely convey title in the form of a statutory warranty deed, therefore making to the buyer the five warranties described in *Street* (CP 29),

some regarding issues pertaining to the property of which Street and the Hayres would have been unaware, including unrecorded liens or other encumbrances, adverse possession claims, and prescriptive easements that may have been created well before they purchased the property. (CP 423) If there were a subsequent breach of any of those five warranties, Street could be sued for damages by the buyer or its title insurance carrier. (CP 420)

If the Hayres conveyed their interest in the property to Street via statutory warranty deed, they would be making those same five warranties to Street, and would thus be liable to Street for two-thirds of any losses he incurred for breaching any of those warranties to a subsequent buyer. If, on the other hand, Street accepted a quit claim deed and got sued, he would have no recourse against the Hayres. *Id.*, ¶12. (CP 420–421, 423)

As noted earlier, the trial court's Order to Enforce Settlement Agreement gave Street 12 days to sign a settlement agreement that involved "the transfer of the Hayres' interest in the real property that is the subject of this partition action to Street" (CP 22) The parties' attorneys spent that time exchanging correspondence regarding the potential terms of that transfer, during which Street refused to accept any conveyance other than a

statutory warranty deed, while the Hayres insisted on executing only a quit claim deed. (CP 198-215)

The two parties took their respective positions for very good reasons: they each wanted to minimize (and in the Hayres' situation eliminate) their respective liability in the future for claims that might be pursued by whoever bought the property from Street after the Hayres were no longer cotenants.

The Hayres were very experienced real estate investors who had already been involved in numerous other purchases of real estate, several at foreclosure auctions, some with Street as their agent. (CP 414–415) They understood that buying the property at a foreclosure auction was particularly perilous.

As their attorney emphasized in his Declaration in Response to Ms. Wiess' Second Motion for Instructions, "[n]either the Streets nor the Hayre Brothers ever came into title with any form of warranty deed. The property was originally conveyed to Hayre Development, LLC and Dean Street as his separate property by a Trustee's Deed . . . That conveyance was made 'without representations or warranties of any kind, expressed or implied.'" (CP 287)

The Hayres' attorney further elaborated on the parties'

exposed position in his Reply to Street's Response to Ms. Wiess'

Second Motion:

. . . Dean Street, who claims some expertise in title matters, fails to recognize that he came on to title with a Trustee's Deed (a form of fiduciary deed) and, apparently, never subsequently obtained title insurance for his (and the Hayre Brothers) interest. Without a warranty deed and without title insurance, Dean Street has placed himself and the Hayre Brothers on title without recourse or insurance should there be any pre-existing title defects. (CP 306)

Finally, he acknowledged that the grantor of a statutory warranty deed made "warranties that go back to the beginning of time." (CP 305-306)

Had the parties purchased the property conventionally – via statutory warranty deed with title insurance – they would have had more information (through the title insurance policy) and far greater protection against future claims (through the statutory warranty deed) than with their acquisition at a foreclosure sale, which came with very little information and no warranties whatsoever. Consequently, the Hayres had a great incentive to convey their interest to Street by quit claim deed, and Street had an equally great incentive to accept only a statutory warranty deed.

Mr. Ordal also explained that issuing a title insurance policy to the third party buyer would not have protected Street from many of those potential claims, because title insurance policies include numerous exceptions and occasionally fail to disclose potential defects in title. (CP 422-423)

In their Reply the Hayres contended Mr. Ordal's declaration lacked merit because it "fails to 'connect the dots' between any actual fact that impacts the condition of title to the property conveyed to Street by a quit claim deed. . . . [I]f the Hayres and Street remained as tenants in common, they would have the exact same title that Street now holds." (CP 440)

The latter argument is meaningless because it is only true until Street sells the property. Had the Hayres and Street sold the property when they were cotenants, they would have done so with a statutory warranty deed, leaving them liable for two-thirds and one-third, respectively, of any claims for breach of the warranties contained therein. However, if Street sells the property now after acquiring the Hayres' interest under the fiduciary deed (as with the quit claim deed), his estate and his widow will bear total responsibility for any such claims.

The former argument ignores the materiality of warranties:

because neither the Hayres nor Street knew what “actual fact” might “impact the condition of title”, the Hayres refused to make any warranties, while Street refused to assume their two-thirds responsibility for any defect in the condition of title “going back to the beginning of time”. Because of the importance of the warranties, the form of the deed was “of such a nature that knowledge of the item would affect a person’s decision-making”: it certainly affected the positions taken by the Hayres and by Street.

3. The Trial Court Erroneously Ruled that There Was No Evidence That There Are Any Additional Encumbrances Existing on the Property That Should Have Been Addressed in the Deed.

As noted earlier in this brief, in *Street* the Court of Appeals stated that “the record contains no evidence of whether additional encumbrances existed on the property that should have been addressed in the deed.” (CP 30)

In applying this sentence, however, both the Hayres and the trial court added a limitation that does not appear in *Street*. In their Renewed Motion the Hayres argued that “[t]he evidence shows that conveyance by a quit claim deed would not have imposed additional burdens or encumbrances on the Property **that did not pre-exist the settlement agreement.**” (CP 7) (emphasis added)

The trial court found that “. . . there is [sic] no **new** encumbrances on the property, and it exists today as it existed at the time that the parties purchased the property and at the time that the settlement agreement was entered into. . . .” (RP 39) (emphasis added)

The Court of Appeals did not limit its discussion of materiality to encumbrances that arose after the parties purchased the property; the Court referred to additional encumbrances that should have been addressed in the deed; i.e., encumbrances that should have been addressed in a deed and were not.

As discussed earlier, by conveying their interest in the property to Street via statutory warranty deed the Hayres would have warranted that there were virtually no encumbrances of any kind against the property – known or unknown – “going back to the beginning of time” in the words of their own attorney. Accordingly, they instead insisted on executing only a quit claim deed, so they would be making no warranties of any kind regarding any encumbrances against the property, whether they existed before or after the parties purchased the property.

This highlights the significance of the Court of Appeals’ reference to encumbrances “that should have been addressed in the deed” as a potential example of materiality (CP 30): all

encumbrances would have been addressed in a statutory warranty deed, and none in a quit claim deed.

It is true that the trial court went on to find that, “[t]here is no evidence before this Court that there are any additional encumbrances existing on the property that should have been addressed in the deed, or that would have been somehow – should have been addressed, or would have been addressed better in a statutory warranty deed.” (RP 39)

However, such a finding completely ignores the aforementioned enormous difference between the two deeds with respect to the warranties that accompany each, based on Washington state law – RCW 64.04.030; *Roeder Company v. K & E Moving & Storage Co., Inc.*, 102 Wn. App. 49, 56, 4 P.3d 839 (2000); and the commentary by prominent University of Washington Law professor William Stoebuck in 18 Wash. Prac., Real Estate §14.2 (2d ed.) – and the expert testimony of long-time Seattle real estate attorney Robert E. Ordal, all discussed in this brief, *supra*, at pages 27-29.

The form of the conveyance was a material term of the parties’ “settlement agreement”.

D. The Trial Court Erroneously Ruled that the Parties' Failure to Agree on the \$50,000 Property Tax Use Classification Issue Was Not a Material Term of the Agreement.

When the parties' attorneys entered into their alleged settlement agreement, the property was classified by the King County Assessor as being used for agricultural purposes, which allowed the owners to pay a discounted amount of real property tax, saving approximately \$50,000 during the six years they owned it.

There was no discussion of any potential change in that classification during the few minutes of negotiations between the attorneys on February 6, 2012, in their exchange of correspondence regarding the terms of a settlement agreement following the entry of the Order Enforcing Settlement on February 17, 2012, or in any of the briefs they filed that summer and fall with the Court of Appeals. None of the parties nor their attorneys had a clue that when Mr. Glosser sent Mr. Hunsinger the email in which he "accepted [the Streets'] offer of \$50k and conveyance of the property" and Mr. Hunsinger responded "Agreed. Please prepare the paper work", the conveyance could not be completed without the parties either paying \$50,000 in back taxes or changing the

current use exemption to open space.

In order to implement the "settlement agreement" and subsequent order to enforce it by recording any deed conveying the Hayres' interest to Street, the deputy county assessor was first required to approve the property's continued use classification, which she refused to do.

As stated earlier, the deputy assessor instead gave the parties (through referee Wiess) three choices: (1) do not record the deed; (2) pay King County approximately \$50,000 in property taxes saved by the parties due to the agricultural use classification; or (3) change the use classification to open space.

Ms. Wiess rejected the first option because she was instructed by the trial court in its Order to Enforce to complete the transfer of the Hayres' interest in the property; and the second because neither Street nor the Hayres was going to pay the \$50,000. She therefore filed a motion to authorize her to change the use classification of the property to open space and record the referee's deed.

In his declaration in opposition to Ms. Wiess' Second Motion for Instructions, Street explained why requiring him to apply for the

open space current use exemption was both material and unacceptable:

I am adamantly opposed to Ms. Wiess' request that she apply to reclassify the property for use as open space because (a) the application will probably be rejected, at great potential expense to my wife and me; (b) [prospective purchasers] Sanders/Paris do not want it reclassified; (c) if granted the property will be more difficult to sell to anyone else; and (d) I have maintained, and will continue to maintain, the property for agricultural use, until it is sold. If the application is rejected, the owners will immediately owe real property taxes based on the entire assessment. (CP 247-249)

The trial court nevertheless granted the motion, the referee's deed was recorded, and the King County Assessor is now classifying the use of the property as both agricultural and open space. (CP 145)

Ms. Wiess' Motion was filed and granted after all the appellate briefs had been filed. Street filed a Motion to Supplement the appellate record to include those pleadings as proof of a second material term of the "settlement agreement" that had not been agreed to. However, the *Street* opinion did not mention the \$50,000 property tax use classification issue.

In his Response to the Hayres' Renewed Motion, Street presented the \$50,000 property tax use classification issue as another material term that had not been agreed to in the "settlement". (CP 165–166) In their Reply the Hayres contended that (1) "the property remains classified as agricultural use, and no change of the special use or compensating tax has occurred"; and (2) these issues "are not related to the form of deed, and are issues that were never raised by Street as part of the settlement offer and should be disregarded now." (CP 441)

However, (1) the print out from the King County Assessor attached to the declaration of the Hayres' attorney in support of the Hayres' Renewed Motion states that the property is "classified as open space farm & agricultural pursuant to RCW 84.34"; and (2) one of the reasons the settlement agreement is unenforceable is because the issues "were never raised by Street [or the Hayres] as part of the settlement offer".

In any event, at the hearing on the Hayres' Renewed Motion the trial court expressed no interest in any of the substantive arguments regarding the \$50,000 property tax use classification issue: she rejected Street's contention that it was a material term of the settlement agreement simply and solely because it was not

discussed in the *Street* opinion. During oral argument Judge Parisien interrupted Street's counsel's discussion and the following colloquy ensued:

THE COURT: This would appear to me to be outside --- you're not arguing that, what I hear you to be saying, the classification of the property doesn't go to the form of the deed, correct?

MR. HUNSINGER: Oh, absolutely correct.

THE COURT: So then, I've read the Court of Appeals' decision, I've read everything that's been supplied to me. And I think that the Court has a very narrow question before it and the question is the relevancy of the form of title, which was conveyed in this specific case.

And what I hear you arguing is more of a zoning question, zoning of the property, and I don't see how that's relevant to whether the deed was conveyed as a quit claim deed or a warranty or what.

So can you explain to me why your argument is relevant to the very narrow issue that has been sent back down to me?

MR. HUNSINGER: This issue is a second material element of this alleged settlement agreement that the parties did not agree to.

THE COURT: Right.

MR. HUNSINGER: So I –

THE COURT: It wasn't briefed before the Court of Appeals.

MR. HUNSINGER: That's right. And it wasn't, Your Honor, because it only came to everyone's attention after all of the briefs had been filed with the Court of Appeals.

Now if the Court grants the motion today on the grant of the deed, okay, there is nevertheless another material aspect of the settlement agreement that was addressed below, when Ms. Wiess filed a motion to get permission to file this deed. And that was never ruled upon by the Court of Appeals, because it wasn't part of that record.

THE COURT: Then this Court cannot address it now.

MR. HUNSINGER: Okay. I'd take exception to the Court's ruling, but I will address the deed issue. (RP 19–20)

Applying the same analysis as was outlined earlier regarding the form of the conveyance, the \$50,000 property tax use classification issue was another material term of the settlement that was never discussed, let alone agreed to. It was not mentioned in *Street*, presumably because the issue did not arise until after all the

briefs were filed, and the Court of Appeals reversed and remanded the Order to Enforce Settlement Agreement on other grounds anyway. This does not justify the trial court's refusal to consider it on remand and constitutes a separate basis for the reversal of the Renewed Order to Enforce.

VI. CONCLUSION

The trial court erred by reviewing the *Street* opinion on remand far too narrowly: it was obligated to consider any and all reasons why the form of the conveyance was material and it did not; and it was obligated to consider whether the \$50,000 property tax use classification issue was material and it did not. Both were, in fact, material terms of the settlement agreement that were not agreed upon by the parties, rendering it unenforceable. The Renewed Order to Enforce must be reversed and the matter again remanded to the trial court, this time, finally, for a trial on its merits.

DATED this 23rd day of January, 2014.

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