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74423.2 COURT OF APPEALS
DIVISION ONE

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Court of Appeals No. 74423-2-1

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE

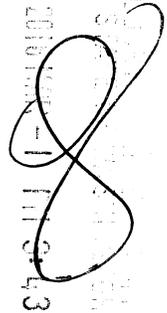
BRYAN KELLEY and DORRE DON LLC

Appellants/Plaintiffs,

v.

BEVERLY TONDA , et al,

Respondent/Defendant.

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APPELLANTS' BRIEF

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I. INTRODUCTION

This case is a nasty neighborhood dispute. There is no point in sugar coating it.¹ There are a variety of issues between the parties who have been warring with each other over the years. This case involves only one issue and that is whether or not King County (“the County”) still holds an interest in a 40 strip of land (“40 Foot Strip”) for a roadway which it received in a land swap with a railroad occurring in 1907-1908. The County and the Tondas claim that the County still maintains its rights. Mr. Kelley² and the Southworths claim it is expired.

There are two documents which relate to the creation of the County’s rights in the 40 Foot Strip. The first is a contract from 1907 which recites a number of agreements between King County and the Chicago, Milwaukee, & St. Paul Railway Company of Washington (“the Railroad”). Of those agreements, the County and the Railroad exchanged properties for railway purposes and roadway purposes. The agreement was also conditioned on the

¹ The record is replete with this evidence. It is not cited in this brief unless relevant to the legal issues presented.

² Appellants are both referred to herein as “Mr. Kelley.”

Railroad grading the roadway in a manner suitable for public use.

CP 31.

In 1908, the Railroad signed and recorded a deed granting, conveying and dedicating the 40 Foot Strip to the county “so long as the said strips of land shall be used for purposes of public roads or highways” CP 35-36. The 1908 deed went on to say that once the public ceased using the 40 Foot Strip, the interest in it would revert to the railroad. CP 36. The County admits that the 40 Foot Strip ceased to be used by the public in 1930 but has not provided any evidence that it was actually used by the public at all. CP 373. The County has in several documents described the 40 Foot Strip as a driveway and a private road. CP 1200-1251. In litigation occurring in the 1990’s involving property which included the 40 Foot Strip, the County did not reserve its rights to the 40 Foot Strip but did reserve its rights in other property. In no recorded document in the record here, after the 1907 Agreement and the 1908 Deed, has any recorded document referenced this 40 Foot Strip.

Despite all of this, the trial court ruled that the 1907 Agreement constituted a full dedication of the 40 Foot Strip and

dismissed Mr. Kelley's claims on summary judgment. It ignored everything else. CP 1442-1447.

This was error. When considering the record here, it is clear that the trial court should be reversed and the case reinstated as to both the County and the Tondas.

II. ASSIGNMENTS OF ERROR

The trial court erred by granting the County's and the Tonda's Motion for Summary Judgment and dismissing the Mr. Kelly's claims. CP 1442-1447.

III. ISSUES RAISED

Whether the trial court erred in granting summary judgment to the County and the Tondas, thereby dismissing Mr. Kelley's claims, by relying solely on the 1907 Agreement?

IV. STATEMENT OF THE CASE

Mr. Kelley and his company Dorre Don LLC, the Southworth and the Tonda's all own property which adjoin ("Kelley Property," "Southworth Property," and "Tonda Property").³ Colored maps of the properties are attached Exhibit A.

³ The Kelley Property is comprised of three parcels. Parcel A and Parcel B, are within the Maple Valley Addition Plat. *Complaint, Ex. 1*. Parcel C of the Kelley Property is not in the Plat but is just adjacent to it. *Compare Complaint Ex. 1 and 5*. The Southworth Property is comprised of one lot. *Complaint, Ex. 4*. The Tonda Property is comprised of two lots. *Complaint, Ex. 3*.

A. SUBSTANTIVE FACTS

The story begins in 1907. Then, the County and the Railroad engaged in a land swap. As a part of this swap, the Railroad and the County entered into an Agreement (dated July 29, 1907) which made conditional grants to one another based on actions to be taken in the future and was thus an executory contract (“1907 Agreement”). CP 431-435; 642. For the County, it agreed to grant a right of way to the Railroad in exchange for a right of way from it. The Railroad was to grade the roadway in a “suitable condition for public travel.” CP 32. The 1907 Agreement stated that the County agreed as follows:

The said party of the first part [the County] hereby grants to the party of the second part [the Railroad], its successors and assigns, ***upon the performance of the conditions hereinafter mentioned***, the right, privilege and authority to appropriate, use and occupy for railroad purposes a portion of that certain county road ...

CP 31, Paragraph 1st (emphasis added). The Railroad, in the 1907 Agreement, made the following agreement:

In consideration of the foregoing agreement, the part of the second part [the Railroad] agrees to, and does hereby, dedicate to the party of the first part, for highway purposes, a strip of land forty (40)' feet in width ...

(“40 Foot Strip”) CP 31, Paragraph 2nd. The third paragraph also describes a second 40' foot strip. CP 32.

The 1907 Agreement also provided:

The party of the second part [the Railroad] agrees that it will grade and place in a suitable condition for public travel, the strips of land hereinbefore agreed to be dedicated for the purposes of County roads as aforesaid.

CP 32.

On August 3, 1908, the Railroad conveyed to the County the 40 foot strips described in the 1907 Agreement by deed which included the language "grant, convey and dedicate" (1908 Deed).

CP 35.

TO HAVE AND TO HOLD unto to the County of King and its successors, so long as the said strips of land shall be used for purposes of public roads or highways, and in case such use of said strips, or either of them, shall cease, all the right, title and interest hereby granted and conveyed shall, as to the strip or strips so ceased to be used as foresaid, revert to the party of the first part, it successors or assigns.

CP 36. The 1908 Deed also indicated that it was in furtherance of the agreements made in the 1907 Agreement as follows:

This instrument of dedication is executed in pursuance of two certain agreements between said railway company and the County of King, one dated July 29th, 1907, and recorded April 21st, 1908, in Volume 572 of Deeds, Page 355, covering tracts Numbers 1 and 2, above described, and one dated June 18th, 1907, and recorded April 21st, 1908, in Volume 5230 of Deeds, page 500 covering tract Number 3 above described.

CP 36.

There is no evidence that the 40 Foot Strip has ever been used for a purpose of a public road or highway by the County. The Tondas admit that the roadway in question is a private driveway and have claimed that it has been so since 1923. CP 473. The County Road Services Division has specifically stated that in 1930, the 40 Foot Strip “changed from that of a public thoroughfare to serving as access to several private properties abutting the former road.” CP 373. Further, in no map available from the County is the 40 Foot Strip represented as being opened, constructed or used by the public or a road or highway. CP 379-381. Additionally, the County describes the 40 Foot Strip as a driveway,⁴ meaning private not public use. CP 1216.

In 1994, William Johnson (the immediate predecessor in interest to Southworth and Tonda) brought suit against Luella Pappé (predecessor in interest to Kelley) and the County, in the King County Superior Court, to “reform conveyance and to establish a common law dedication of public right of way.” CP 1394-1397. In that complaint, Mr. Johnson sought to establish an

⁴ The term is not defined by the King County Code. The term is defined by Merriam Websters Online as “a private road giving access from a public way to a building on abutting grounds.” <http://www.merriam-webster.com/dictionary/driveway>

easement by necessity or by prescription based on the public use thereof for access to the now Southworth Property and the Tonda Property. CP 1397. Further, Mr. Johnson asserted that a road ran across the now Dorre Don Property and was “used by the public continuously for more than ten consecutive years for the last 50 years.” CP 1396. He did not claim any public rights based on the 1907 Agreement or the 1908 Deed.

While the suit was pending, on February 28, 1995, the County conveyed Parcel B of the Dorre Don Property, to Luella M. Pappe without exception for the Right-of-Way (“Tax Deed”) thereby conveying the title to Parcel B to Ms. Pappe. CP 102. The Tax Deed states:

Property herein having been acquired by King County in the tax foreclosure sale of October 11, 1930, KCSC #232197, Deed to King County dated and recorded December 8, 1930, in Volume 1494 of Deeds, Page 1, records of King County.

CP 102.

On April 19, 1995, Stipulated Findings of Fact and Conclusions of Law and a Stipulated Judgment and Decree Quieting Title were entered in the *Johnson* matter. (“Stipulated Judgment” and “Stipulated Findings”). CP 103-107; 108-110.

In these documents, the County specifically mentioned, and reserved, its rights in a 100 foot right of way (agreed to in the 1907 Agreement) that is now centered on the Maple Valley Trail (this is not the 40 Foot Strip at issue here), and which appears to abut, but does not cross the 40 Foot Strip at issue in this case. CP 103-107. The Stipulated Findings do not reserve any interest in the 40 Foot Strip at issue to the County, even though property within the 40 Foot Strip was at issue in the case.

The Stipulated Findings state that the alley, reverted to the adjacent property owners and their successors, namely Johnson and Pappe. CP 103-107. It further states, after describing the area of the alley, which includes inside the 40 Foot Strip, that:

Plaintiff Johnson's and Defendant Pappe's title, right, or interest in their respective portions of the alley is superior to the title, right, or interest of defendant King County.

CP 106 ¶ 6.5. The Stipulated Judgment and Decree Quieting Title:

. . . [H]ereby is quieted, as fee title interest, in defendant Luella Pappe, free and clear of any claim whatsoever by defendant King County, and anyone claiming by or through King County. . . .

. . . while this vacation puts an end *to all interests of the public in the platted alley*, nothing herein shall affect any private interest or easements over the alley, or the 100 foot right of way held by The County.

CP 109 (emphasis added). While the Tondas claim that this Stipulated Judgment dealt only with an automatic vacation under the Laws of 1890, ¶ 603 §32 (1 Ballinger's Code § 3803), CP 714-715. This is incorrect. It is reasonable to conclude that had the County believed that the 40 Foot Strip existed, it would have mentioned it expressly in the Stipulated Judgment as it did with its 100 foot road. It is the absence of the 40 Foot Strip in this document that is key. The County took great pains to protect its 100 foot road by specifically mentioning it but did not mention the 40 Foot Strip.

On April 17, 1995, and obviously contemporaneously with the stipulated documents filed in the *Johnson* matter, Ms. Pappe granted a 30 foot access easement to Mr. Johnson who was the then owner of the Tonda and Southworth properties ("Easement"). CP 112. No reference to the 40 Foot Strip is made therein.

On May 3, 1995, Mr. Johnson conveyed Parcel A of the Dorre Don Property, to Luella M. Pappe. No reference to the 40 Foot Strip is made therein. CP 119. On May 23, 1995, Mr. Johnson conveyed, the Southworth Property to Defendants Southworth. No reference to the 40 Foot Strip is made therein. Also on May 23, 1995, the Southworths and Mr. Johnson entered

into a “Grant of Easement and Road Maintenance Agreement” setting forth the obligations regarding the roadway. CP 125-128. Mr. Kelley is not obligated under this agreement.

On April 2, 2004, Bryan Kelley, acquired a vendee’s interest in the Dorre Don Property by virtue of a Real Estate and Conditional Sale Contract with Ms. Pappé. CP 129-138. No reference to the 40 Foot Strip was made therein. A fulfillment deed for the obligations under this contract was recorded on May 21, 2014, again without reference to the 40 Foot Strip. CP 15-16.

On July 13, 2005, Mr. and Mrs. Tonda became the record owners of the Tonda property by virtue of a Statutory Warranty Deed which document does not reference the 40 Foot Strip. CP 17.

B. PROCEDURAL FACTS

On July 1, 2014, Mr. Kelley filed suit seeking declaratory judgment, quiet title, injunctive relief and attorneys’ fees seeking to have the 40’ roadway described in the 1907 Agreement and the 1908 Deed declared invalid/expired. CP 1-146. In response, the Tonda’s filed a special motion to strike under the former RCW 4.24.525 to which Mr. Kelley responded. CP 169-634. The trial court granted the motion from which Mr. Kelley appealed. CP 630-634. On May 28, 2015, the Washington Supreme Court invalidated

RCW 4.24.525 in *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015), thus rendering moot the trial court's order on the Tonda's motion to strike. By an unopposed motion filed by Mr. Kelley, that portion of the appeal was dismissed and the remaining issues were transferred to this Court.

On April 15, 2016, the County made a motion for summary judgment. CP 689-698. The Tondas joined with the County on this motion (CP 686-688) and filed their own motion for summary judgment. CP 990-1002. Mr. Kelley responded and opposed both motions. CP 1133-1401. Defendants Southworth joined with Mr. Kelley and opposed both motions. CP 1003-1004.

The County asserted that Mr. Kelley's claims were barred because the County did not intend to convey any interest it may have had in the roadway by the Tax Deeds and thus the merger doctrine did not apply. CP 689-698. The Tonda's claimed that the 1907 Agreement evidenced an intent to dedicate the roadway and thus, reference to the 1908 Deed was not appropriate. CP 699-724. The Trial Court granted both motions and dismissed Mr. Kelley's claims. CP 1442-1447. This appeal follows.

V. ARGUMENT

A. STANDARD OF REVIEW & RULES OF CONSTRUCTION

This Court's review of an order granting summary judgment is *de novo*, meaning that the appellate court is in the same position as the trial court. *E.g. Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law. CR 56; *Carr v. Blue Cross*, 93 Wn. App. 941, 971 P.2d 102 (1999), *citing Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). All facts submitted and all reasonable inferences from them are viewed in a light most favorable to the nonmoving party. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). The moving party has the burden of showing the absence of an issue of material fact and they are entitled to judgment as a matter of law. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). "But, [i]f the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials." *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).). "Ultimately, summary

judgment is inappropriate if the record shows any reasonable hypothesis which entitles the non-moving party to relief.” *White v. Kent Medical Cntr., Inc.*, 61 Wn. App. 163, 175, 810 P.2d 4 (1991). As is shown below, summary judgment was not properly granted.

B. THE PUBLIC’S RIGHTS IN THE 40 FOOT STRIP ARE LONG EXPIRED

Both the County and the Tondas claim the right of way is alive and well. As is shown below, both are incorrect as a matter of law.

1. Rules of Contract and Deed Interpretation

The rules of contract interpretation apply to deeds and other recorded documents. *Brown v. State*, 130 Wn.2d 430, 924 P.2d (1996). “The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties.” *Brown*, 130 Wn.2d at 437; *Swan v. O’Leary*, 37 Wn.2d 533, 535, 537, 225 P.2d 199 (1950).

To determine the parties’ intent, the court first will view the contract as a whole, examining its subject matter and objective, the circumstances of its making, the subsequent conduct of the parties, and the reasonableness of their respective interpretations.

Transcon. Ins. Co. v. Wash. Pub. Util. Dists.’ Util. Sys., 111 Wn.2d 452, 457, 760 P.2d 337 (1988); *see also Swan v. O’Leary*, 37 Wn.2d 533, 537, 225 P.2d 199 (1950). “[T]he intent to dedicate will

not be presumed and clear intent must be shown.” *Nelson v.*

Pacific County, 36 Wn. App. 17, 671 P.2d 785 (1983).

"Dedication originates in the voluntary donation of the owner or seller, and when the intention of the owner to dedicate is clear, manifest, and unequivocal, whether by a written instrument or by some act or declaration of the owner manifesting his clear intent to devote the property to public use, it becomes effective for that purpose.

Johnston v. Medina Improv. Club, 10 Wn.2d 44, 56, 116 P.2d 272,

(1941) (citations omitted.) “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).

... there is a distinction between common law dedications and statutory dedications. Common law dedications are controlled by common law principles, while statutory dedications are governed by specific statutes. Another distinction between a statutory and a common law dedication is that the former operates by way of grant and the latter by way of equitable estoppel.

Kiely v. Graves, 173 Wn.2d 926, 931-32, 271 P.3d 226, 229-30

(2012) (citations omitted.). It is the County’s (and the Tonda’s)

obligation to prove dedication, which in this case requires proof of

ongoing use of the 40 Foot Strip by the public as expressed by the

1908 Deed. They have not done so.

2. As an Executory Contract, the 1907 Agreement Does Not Stand Alone

The Tondas claim that the 1907 Agreement created a right of way on its own and thus, reference to the 1908 Deed is not necessary. As a matter of Washington law that existed at the time it was clear: executory contracts, which is what the 1907 Agreement is, did not create an interest in real property, thus any alleged dedication therein fails as a matter of law.

The rule was set forth in *Ashford v. Reese*, 132 Wash. 649, 650, 233 P. 29 (1925), where the Washington Supreme Court specifically stated “an executory contract of sale in this state conveys no title or interest, either legal or equitable, to the vendee ...” This rule was later overruled by the Washington Supreme Court in *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 781, 567 P.2d 631 (1977). The Court specifically stated that its ruling applied prospectively only and not retroactively; thus, executory contracts prior to 1977 did not provide an interest in real property. *Id* at 781. To this day, any executory contract that existed prior to 1977 did not and does not provide an interest in real property. *Id.* at 781. This Court recently recognized this law in *Holmquist v. The County*, 182 Wn. App. 200, 210-211, 328 P.3d 1000 (2014) (cited by the

Tondas) and noted that while the law developed after the *Ashford* case was decided, the fact of the matter was that the rights gained in an executory contract did “not rise to the dignity of title, either legal or equitable.” *Id.* at 211.

The 1907 Agreement is clearly an executory contract⁵ as both the County and the Railroad had additional actions to complete as specifically stated in the document. First, in the 1907 Agreement, the County did not convey a right of way to the railroad which was the consideration for the railroad’s anticipated dedication of the right of way back to the County, but only expressed intent to do so. Thus, the Railroad’s grant had no effect until the County gave the easement which was conditioned on certain conduct of the railroad. The agreement provides:

1st. The said party of the first part [The County] hereby grants to the party of the second part [the railroad], it successors and assigns, **upon the performance of the conditions hereinafter mentioned**, the right privilege and authority to appropriate, use and occupy for railroad

⁵ "An executed contract is one, the object of which is fully performed. All others are executory." "In an executory contract some act remains to be done, while in an executed contract everything is completed at the time of the agreement without any outstanding promise calling for fulfillment by the further act of either party." (*Linville v. Linville*, 132 Cal.App.2d 800, 803 [283 P.2d 34]; *Mather v. Mather*, 25 Cal.2d 582, 586 [154 P.2d 684].)" *Branche v. Hetzel*, 241 Cal. App. 2d 801, 807-808, 51 Cal. Rptr 188, 193 (Cal. App. 1st Dist. 1966), citing California Civil Code §1661.

purposes a portion of that certain County road ... [legal description follows]

CP 31. (emphasis added.). This language specifically states that something is yet to occur, beyond this document, not something that has happened in the document as the language would have read “in exchange for the below dedication” or similar language. The clear language of the 1907 Agreement does not demonstrate a present intent to grant an easement but only conditionally “upon performance of conditions hereinafter mentioned” as it unequivocally states therein.⁶

Here, the 1907 Agreement had several conditions. In order for the Railroad to obtain a right of way from the County, the Railroad was required to dedicate a right of way to the County and build out the described roadway “in a suitable condition for public travel.” CP 32 *Complaint*, Ex. 7. In addition, in order for the Railroad to obtain its right of way (paragraph 4 of the 1907

⁶ This language clearly creates a condition subsequent to the eventual grant of an easement upon completion of the condition. “The term ‘condition subsequent’ as normally used in contracts in contrast to ‘condition precedent’ should be subsequent to the duty of immediate performance, that is, a condition which divests a duty of immediate performance of a contract after it has once accrued.” *City Nat'l Bank v. Molitor*, 63 Wn.2d 737, 388 P.2d 936 (1964) (condition subsequent indicates “that an instrument does not take effect until the occurrence of a certain event or the coming into existence of a particularly fact ...”).

Agreement states “In consideration of the foregoing agreement ...”) the County specifically stated that its grant of right of way to the Railroad would not occur until those two actions occurred.

First, given the express language of the 1907 Agreement, the parties clearly did not intend that it actually created any interest in real property or a right of way as the document clearly envisioned future acts as stated in the first paragraph. The language “upon the performance of the conditions herein after mentioned” clearly anticipates actions beyond the 1907 Agreement itself. If the signatories to the 1907 Agreement had intended that it actually create the rights of way described therein, then language such as “in exchange for the following” or other similar language would have been used. The language actually used by the 1907 Agreement clearly envisions actions beyond its terms (i.e. the actual creation by a deed of a right of way as at the time), and in fact, that is exactly what happened. In 1908, the Railroad granted the right of way consistent with the terms of the 1907 Agreement. However, there is no evidence that the County took any further action and thus, the consideration for the 40 Foot Strip appears to have failed.

In *Zunio v Rajewski*, 140 Wn. App. 215, 165 P.2d 57 (2007), the Court of Appeals held that expressions like “who is granting the

easement” and “whereas this easement was created” contained in a document did not “convey an easement because the words do not demonstrate a present intent to grant or reserve an easement.” *Id.*, at 222. The 1907 Agreement is not different than the document considered in *Zunio*: the parties did not express a present intent to grant or reserve rights of way until after certain conditions subsequent were met.

Further, in *Gold Creek N. Ltd. P’ship v. Gold Creek Umbrella Ass’n*, 143 Wn. App. 191, 177 P.2d 201 (2008), the Court of Appeals specifically stated when asked to determine whether a document constituted a grant of easement or an expression of an intent to grant an easement at a future date. The court stated:

The Millers rely on the language in the 1979 P&S Agreement and the real estate contract recorded in February 1980 that incorporated that language. The relevant provision of the 1979 P&S Agreement states, “Buyer *has agreed to grant* Seller an unspecified and undefined easement (the ‘Sellers’ Easement’) for road and utility access.” Resp’ts’ Ex. 3, at 7 (emphasis added). The agreement also provides that “[t]he Sellers’ Easement *shall be granted* and defined *only* in accordance with [six] conditions,” including that “Sellers shall have no right to establish ... Sellers’ Easement until written notice is given that Sellers will be commencing substantial development of their property or properties within six (6) months.” Resp’ts’ Ex. 3, at 7 (emphasis added). The real estate contract similarly states that “[p]urchasers *shall provide* all access and utility easements to Sellers in

accordance with [the 1979 P&S Agreement].” Resp'ts' Ex. 6 (emphasis added).

This language manifests an intent to create an easement, but it does not create the easement itself. Rather, both the 1979 P&S Agreement and the 1980 real estate contract unequivocally describe Huber's promise to grant an easement in the future.

(Emphasis added.) *Gold Creek*, 143 Wn. App. at 200-202. The same is true here; the 1907 Agreement manifested an intent to create a right of way only but did not actually do it.

Finally, the 1907 Agreement does not comport with the deed requirements. RCW 64.04.010⁷ requires that interests in real property must be by deed which includes an acknowledgement of the parties' signatures. Right of way/easements are interests in land and therefore must be conveyed by a deed complying with the statute of frauds. RCW 64.04.010; *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995); *Gold Creek*, 143 Wn. App. at 200.

⁷ The statute was originally adopted by the Laws of 1854, p. 402, §1. It currently states: “Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed.” When one examines the legislative history on this statute, it is clear that it has not changed. See *Laws of 1929 c 33 § 2*; RRS § 10551. Prior: 1915 c 172 § 1; 1888 p 50 § 2; 1886 p 177 § 2; Code 1881 § 2312; 1854 p 402 § 2.

As is clear from the 1907 Agreement, the signatures of the County officials were not acknowledged; only the County's seal appears which is not an acknowledgement, i.e., a notarial acknowledgment, as required under RCW 64.08.010 *et seq.*⁸ As the Railroad's grant was conditional on the County's grant, the Railroad's grant had no effect until the County gave it's official easement. Again, the 1907 Agreement fails to create anything; rather, it only expresses an intention to do so in the future once certain conditions were met as stated therein.

3. The Court May Not Ignore the 1908 Deed

The trial court ignored the 1908 Deed and the subsequent acts of the County and subsequent land owners. CP 1442-1447. Such a position is not consistent with Washington law.

Rather than identifying the purpose of the conveyances, we must conduct a deed-by-deed analysis to ascertain whether the parties clearly and expressly limited or qualified the interest granted, considering the express language, the form of the instrument, and the surrounding circumstances.

⁸ This statute was originally adopted by the Laws of 1873, p. 466, §5 and has not changed substantively since. See Laws of (1971 c 81 § 131; 1931 c 13 § 1; 1929 c 33 § 3; RRS § 10559. Prior: 1913 c 14 § 1; Code 1881 § 2315; 1879 p 110 § 1; 1877 p 317 § 5; 1875 p 107 § 1; 1873 p 466 § 5.)

Brown, 130 Wn.2d at 440. A dedicator may impose reasonable conditions or restrictions on the property offered for dedication. *N. Spokane Irrigation Dist. No. 8 v. County of Spokane*, 86 Wn.2d 599, 602, 547 P.2d 859 (1976). Acceptance of the offer by the public body is an agreement to be bound by such conditions and restrictions. *Id.* A condition or restriction is reasonable unless it interferes with the primary use and purpose of the dedication or with the rights and use of the public body. *Id.* at 604.

A restriction as to use will not be recognized as a condition unless conditional language is used. *King County v. Hanson Inv. Co.*, 34 Wn.2d 112, 119, 208 P.2d 113 (1949). If a restriction as to use is regarded as a condition and the public authority relinquishes its rights to use the property for that purpose by abandonment, the property reverts to the dedicator. *Johnston v. Medina Improvement Club, Inc.*, 10 Wn.2d 44, 57, 116 P.2d 272 (1941).

Again, the 1908 Deed states:

TO HAVE AND TO HOLD unto to the County of King and its successors, so long as the said strips of land shall be used for purposes of public roads or highways, and in case such use of said strips, or either of them, shall cease, all the right, title and interest hereby granted and conveyed shall, as to the strip or strips so ceased to be used as foresaid, revert to the party of the first part, its successors or assigns.

This instrument of dedication is executed in pursuance of two certain agreements between said railway company and the County of King, one dated July 29th, 1907, and recorded April 21st, 1908, in Volume 572 of Deeds, Page 355, covering tracts Numbers 1 and 2, above described, and one dated June 18th, 1907, and recorded April 21st, 1908, in Volume 5230 of Deeds, page 500 covering tract Number 3 above described.

CP 36.

The 1908 Deed cannot be ignored as argued by the Tondas as the conduct of the Railroad and the County subsequent to the 1907 Deed is part of the analysis. *Brown*, 130 Wn.2d at 438 (“In addition to the language of the deed, we will also look at the circumstances surrounding the deed’s execution and the subsequent conduct of the parties.”). It was error for the trial court to have ignored the 1908 Deed as it did. CP 1442-1447.

In *King County v. Squire*, 59 Wn. App. 888, 801 P.2d 1022 (1990), this Court was asked to interpret and construe the meaning of the following language contained in a deed (dated March 29, 1887) to the County was valid:

To Have and to Hold the said premises, with the appurtenances, unto the said party of the second part, and to its successors and assigns forever or so long as said land is used as a right of way by said railway Company, Expressly [sic] reserving to said grantors their heirs and assigns all their riparian rights and water front rights on the shores of Lake Washington. And this grant is upon the

condition that said railway shall be completed over said lands on or before January 1st, 1888.

Squire, 59 Wn. App. at 890. Later, the railroad filed an abandonment of the right. In 1987, the County filed a quiet title action against the heirs of the Squires claiming that the 1887 deed created a fee simple determinable interest or a right of way easement and that its intended recreational trail met the requirements of the 1887 grant. This Court disagreed and held that the language in the 1887 deed created only an easement based on the habendum clause⁹ of the document.

A deed of a right of way for a railroad, habendum "so long as the same shall be used for the operation of a railroad," provided it should be built by a certain date, gives an easement merely and not a fee, and the agreement to build the road is a condition subsequent, and not a mere covenant.

Squire, 59 Wn. App. at 892. This Court went on to say:

The Squire deed granted a "right-of-way Fifty (50) feet in width through said lands". This suggests an easement was conveyed. Both King County and Squire note, however, that the habendum clause contains the handwritten language, "or

⁹ "Black's Law Dictionary defines the term habendum clause as the "clause usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by the grantee." Further, "the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, estate granted in the premises." BLACK'S LAW DICTIONARY 710 (6th ed. 1990)." *Ray v. King County*, 120 Wn. App. 564, 579 n.45, 86 P.3d 183 (2004).

so long as said land is used as a right-of-way by said railway Company," which arguably suggests conveyance of a fee simple determinable. If the granting clause merely conveyed the land to the railroad without reference to a right of way, the "so long as" language would create such a fee. Since the language in the granting clause strongly suggests conveyance of an easement, however, we find it more plausible that the "so long as" language was inserted by Squire to preclude the claim that he conveyed a fee simple to the railroad, particularly since the habendum clause granted the interest to the railroad and "to its successors and assigns forever". The authorities and cases discussed above clearly support construing the Squire deed as an easement.

Id. at 894. As virtually the same language appears in the 1908 Deed, and the 1907 Agreement, under either document the interest that the County once had was an easement, at best. As in the *Squire* case, the language of these documents anticipate an ongoing public use and when that use ceases (and certainly did when the County abandoned the right as reflected in the Stipulated Findings and the Stipulated Judgment), so does the right. As is clear from the record, the County's own admission that public use ended in 1930 (CP 373) there has not been an ongoing use of the 40 Foot Strip for a right of way, public roads or highways.

4. Even if Treated as a Fee Conveyance, with a Reversionary Interest, the Result is the Same.

While the 40 Foot Strip was at best an easement, the result is the same if the court treats the 1908 Deed as a fee conveyance

with a reversionary interest therein. This language is a classic possibility of reverter¹⁰ meaning that once the 40 Foot Strip ceased to be used as a public road or highway, title to it reverted to the Railroad as a matter of law. *Wash. St. Grange v. Brandt*, 136 Wn. App. 138, 150, 148 P.3d 1069 (2006). Washington courts have enforced such reversionary interests even if the State is involved. In *Hodgins v. State*, 9 Wn. App. 486, 513 P.2d 304 (1973), this Court was asked to decide whether property which was conveyed to the University of Washington Forestry Department reverted back to the grantor when the deed limited the use of the property for the use of the Forestry Department under a reversionary interest stated in the document. The UW executed a license to an elementary school for

¹⁰ “A possibility of reverter is a future interest in the grantor that follows a fee simple determinable interest. A fee simple determinable, also called a determinable fee simple, is an estate that automatically terminates on the happening of a stated event and reverts to the grantor by operation of law. A determinable fee simple is created by the use of durational language such as “for so long as,” “while,” “during,” or “until.” The possibility of reverter arises automatically in the grantor as a consequence of the grantor’s conveying a determinable fee estate and is not subject to the rule against perpetuities because the possibility of reverter is “vested” in the grantor from its creation.” *Brandt*, 136 Wn. App. at 150 (citations omitted.). “A reversionary interest is “any future interest left in a transferor or his successor in interest.” Restatement (First) of Property § 154(1) (1936). It arises when the grantor “transfers less than his entire interest” in a piece of land, and it is either certain or possible that he will retake the transferred interest at a future date. *Brandt Trust v. United States*, ___ U.S. ___, 134 S. Ct. 1257, 1266 n. 4, 188 L.Ed.2d 272 (2014).

its use. The court concluded that the license triggered the reversionary interest in the grantor. *See also Johnston v. Medina Improv. Club*, 10 Wn.2d 44, 56, 116 P.2d 272 (1941) (“By the weight of authority, where property dedicated to the public is abandoned or relinquished, the public’s rights are terminated and the land by operation of law reverts to the dedicator.”).

Thus, the language of the 1908 Deed envisions that the roadway was opened and then addressed what happened if it ceased to be used as such, *i.e.*, it reverted to the Railroad. This would have occurred for one of two reasons. Either the document is treated as a possibility of reverter and thus a conditional deed conveyance or the document created a mere easement in the County. The change in use from a public roadway to a private roadway was beyond the scope of the grant and thus the interest fails as a private use is beyond the grant of easement and/or the conditional fee conveyance. *Id.* Either way, the result is the same: the County has lost the 40 Foot Strip as a matter of law and did so in 1930

The Tondas claim that no power of termination was exercised by the owner of the Kelley Property is incorrect. Obviously Ms. Pappé’s resistance to Mr. Johnson’s efforts and the

present suit would constitute such an exercise. However, as a mere easement was granted, such an exercise of the power of termination was not necessary. *Squire*, 59 Wn. App. at 895 (“In contrast, the Squire deed conveyed an easement and, therefore, no action was required by the grantors’ successors to terminate the interest.”).

5. The Cited Cases Offered by the Tondas Help Decide the Case in Favor of the Plaintiffs

The Tondas claim that the 1908 Deed does not create a reversionary interest and cite to *King County v. Hanson Inv. Co.*, 34 Wn.2d 112, 208 P.2d 113 (1949), *Holmquist v. The County*, 182 Wn. App. 200, 328 P.2d 1000 (2014), and *Aumiller v. Dash*, 51 Wash 520, 99 P. 583 (1909). CP 712-713. These cases do not help the Tondas or the County but rather, support Mr. Kelley.

In *King County v. Hanson Inv. Co.*, 34 Wn.2d 112, 208 P.2d 113 (1949), the Washington Supreme Court concluded that a conveyance to the County under the following language did not create a possibility of reverter in the grantor:

The grantor herein Hanson Investment Company for the consideration of One & 00/100 Dollars and also of benefits to accrue to them by reason of laying out and establishing a public road through their property, and which is hereinafter described, conveys, releases, and quit-claims to the County

of King, State of Washington, for use of the public forever, as a public road and highway, all interest in the following described real estate, viz: [legal description follows]

Id. at 113-114. The Court stated:

It will be noted that the deed here involved expressly states that the grantor "conveys" all interest in the land to King County. It will also be noted that the deed does not, of its own force, make the estate held thereunder by the county one of an expressly conditional nature, nor does it contain any provision, express or implied, to the effect that the grantee's estate was to terminate upon the happening of any specified event.

Id. at 118-119. Obviously, the terms of the 1908 Deed does contain such conditional language specifically in the habendum clause.

In *Aumiller v. Dash*, 51 Wash. 520, 99 P. 583 (1909), the Supreme Court language in a deed which conveyed certain property and stated "so long as said party of the second part ... shall use said strip of land for a private way to and from said twenty acres, and for carrying to said twenty acres, and for carrying to said twenty acres water for the purpose of irrigation and not longer." *Id.* at 521. After this deed, a successor to the grantor attempted to dedicate the land in the deed to public use. The Supreme Court stated that the successor had no such right to do so given the terms of the deed. *Id.* at 523-524. The court further noted that determinable interests in land "have always been recognized and

must be maintained by the courts.” *Id* at 524. This case specifically enforced the habendum clause in the deed at issue which is exactly what Mr. Kelley and the Southworths ask this court to do.

In *Holmquist v. King County*, 182 Wn. App. 200, 328 P.2d 100 (2014), *review denied*, 340 P.3d 228 (December 23, 2014), this Court held that the following language in a plat did not create a determinable interest but rather an easement in the property which does not extinguish the underlying fee title.

... [the platter] hereby declare this plot and dedicate to the use of the public forever all the streets shown hereon and the use thereof for all public purposes not inconsistent with the use thereof for public highway purposes, also the right to make all necessary slopes for cuts and fills upon the tracts and blocks shown upon this plot in the reasonable, original grading of streets shown hereon.

Id. 204-205. The Court did not address a habendum clause in a deed such as is presented here.

6. There is No Evidence the Road was Ever Opened

There is no competent evidence in the record indicating that the roadway anticipated by the 1907 Agreement and described in the 1908 Deed was ever opened. First, a search of the County records revealed no map showing that the 40 Foot Strip was ever

shown as a part of the County's road system. CP 379-381. There is no evidence contradicting this fact. Second, the Tonda's offered several exhibits purporting to show that the roadway was indeed opened. CP 971-1002. However, a motion to strike was filed pointing out the evidentiary failures, namely a lack of personal knowledge of the date of the photographs and the alleged location of a roadway. CP 1094-1109. The trial court stated that it did not consider any improper evidence (CP 1443) but, even if properly considered by the court, the existence of a pathway or driveway does not prove that the public actually used the road. Neither does the offered evidence indicate that the roadway shown there was actually within the 40 Foot Strip (a matter of opinion evidence for an aerial surveyor). There is no evidence in this record that the terms of the 1908 Deed were met. And even if they were, it is clear by 1930, the public had abandoned any use of it as admitted by the County. CP 373.

However, neither the Tondas nor the County have produced any evidence to suggest that the Right of Way was opened at any time from its alleged creation in 1908. This position has been confirmed by the County in a variety of documents issued through several of its agencies. CP 1200-1251. Further, the final pleadings

filed in the *Johnson* matter show that the County unmistakably disclaimed any legal interest to the property described therein which includes a portion of the 40 Foot Strip. CP 103-107; 108-110. Moreover, the Tondas in separate litigation have represented to the court there that their access rights were based on the Easement, not the 40 Foot Strip. CP 1376. There is no evidence that the 40 Foot Strip claimed to exist by the Tondas in this litigation has existed at any time, and certainly not since the Johnson final pleadings, which predate this lawsuit by at least 19 years. Thus, the burden has shifted from the plaintiffs to the Tondas and the County to prove that the right of way was actually used in the manner set forth in the 1908 Deed. The evidence here simply does not do that.

Because of this, Mr. Kelley is asked to prove a negative.

Washington law in this situation is as follows:

Full and conclusive proof is not required where a party has the burden of proving a negative, but it is necessary that the proof be at least sufficient to render the existence of the negative probable, or to create a fair and reasonable presumption of the negative until the contrary is shown.

(Footnotes omitted.) 30 Am. Jur. 2d Evidence §1163, at 338 (1967). Accord 31A C.J.S. Evidence §112, at 980 (1964); E. Cleary, McCormick's Handbook of the Law of Evidence §337, at 786 (2d ed. 1972).

Higgins v. Salewsky, 17 Wn. App. 207, 562 P.2d 655 (1977).

Mr. Kelley has certainly met this standard.

C. THE TAX DEED CONVEYED THE UNDERLYING FEE OF THE PROPERTY

The County argues that the Tax Deed does not merge the 40 Foot Strip into the title which was conveyed to Ms. Pappe by those deeds. The County misunderstands the plaintiff's position and is engaging in guesswork.¹¹ The Tax Deed initiated a new title to the property in Ms. Pappe. RCW 84.64.080; *Eagles v. GE Co.*, 5 Wn.2d 20, 104 P.2d 912 (1940). The Tax Deed did not address the 40 Foot Strip nor has Mr. Kelley so claimed. It is worthwhile to note that no exception for the 40 Foot Strip was made as a matter of simple acknowledgment of its existence, a common practice. The merger argument is a red herring offered by the County. Rather, as is pointed out above, the right of way terminated by the express terms of the 1908 Deed and as admitted by the County, in 1930. CP 373.

¹¹ King County has not sent interrogatories or requests for production of documents to Mr. Kelley. Further, the County cites to Paragraphs 4.14 and 4.16 of the Amended Complaint dated December 22, 2014, as the basis for their statement that the plaintiffs are arguing the merger doctrine. This description is a misstatement of those paragraphs which simply make a recitation of the existence of the tax deeds and the conveyance of the property described therein. *Amended Complaint*, ¶¶4.14 and 4.16. (Docket No. 61).

The Tondas claim that Mr. Kelley is not a successor in interest to the Railroad (CP 722-723) and thus any reversionary interest does not benefit him. This is an incorrect characterization of the case. Rather, as is shown in this record, the public's use (assuming it was there at all which Mr. Kelley does not concede) ceased in 1930 as admitted by the County. CP 373. Thus, the public's right ceased then. There is no competent evidence in this record to the contrary.

D. THERE IS NO CASE IN WASHINGTON REQUIRING THAT THE FORMAL VACATION PROCESS APPLIES TO A REVERSIONARY INTEREST

The County and the Tondas cite to *Nelson v. Pacific County*, 36 Wn. App. 17, 671 P.2d 17 (1983) as the basis for its argument that all rights of way may be vacated only by way of the road vacation statute under RCW 36.87.010 and RCW 36.87.060 and King County Code §14.40.010 and King County Code §14.40.015. This is incorrect.

In *Nelson*, Division Two addressed whether unconditional language on a plat which purported to unconditionally dedicate certain property to Pacific County as "public highway" was sufficient language for a dedication. Court agreed that it did applying the very same legal analysis and factors that Mr. Kelley applies to the 1907

Agreement and the 1908 Deed above stated. *Nelson*, 36 Wn. App. at 21.

This is not the situation presented by this case. As is abundantly clear from the 1907 Agreement and the 1908 Deed, the dedication of the right of way was conditional as a matter of fact and of law. *Nelson* does not address the factual setting presented here. Further, any mention of the road vacation statute in *Nelson* is mere *dicta* given that the case was decided on the language of the plat. In short, it simply does not govern this case. Moreover, the County would be unjustly enriched by forcing the Road Vacation Statute on these documents. Had the parties to the 1907 Agreement and the 1908 Deed intended that such a process apply, they could have written the documents in a way which granted the County an unconditional fee interest. Further, as parties are free to contract in Washington State and the United States, the County and the Railroad could have easily written a document which fell within the statutory process. They simply chose not to as they were free to do. In fact, no Washington case has ever placed the formal

vacation statute upon a right of way contained in a deed as a conditional grant.¹²

Rather, Washington law has repeatedly upheld reversionary interest against the government. For example, in *Hodgins v. State*, 9 Wn. App. 486, 513 P.2d 304 (1973), Division One was asked to decide whether property which was conveyed to the University of Washington Forestry Department reverted back to the grantor when the deed limited the use of the property for the use of the Forestry Department under a reversionary interest stated in the document. The UW executed a license to an elementary school for its use. The court concluded that the license triggered the reversionary interest in the grantor thus upholding the conditional grant

In *Johnston v. Medina Improv. Club*, 10 Wn.2d 44, 56, 116 P.2d 272 (1941), the Washington Supreme Court was asked to decide, among other issues not relevant here, whether a conveyance to the County “for Public Park and Recreational purposes” reverted back to the Grantee when the property was not put to such use. *Id.* at 56. The County filed a disclaimer of interest

¹² Counsel for Mr. Kelley can find no case in Washington which does so.

in the property. Again applying the above rules of construction, the Washington Supreme Court stated:

In disclaiming all interest in the dedicated property, the county, in effect, may be said to have either (1) abandoned the property or (2) refused to execute the express specific purpose of the dedication. **By the weight of authority, where property dedicated to the public is abandoned or relinquished, [sic] the public's rights are terminated and the land by operation of law reverts to the dedicator.** In 2 Thompson on Real Property (Perm. ed.), 72, § 495, the rule is stated as follows:

"In case the ownership is in the public, a relinquishment of such use by the authorities terminates the rights of the public, and the land reverts to the original dedicator, or to persons claiming under him."

An excellent statement of the rule is found in 4 Tiffany, Real Property (3rd ed.), 371, § 1113:

"In case a right of user only is vested in the public, an abandonment of the right has the effect of leaving the land free from the burden thereof in the original dedicator or those claiming under him. And even when, under the statute, the ownership is vested in the public, if the authorities entirely relinquish the use of the land, or the use for which the land was dedicated becomes impossible, the land has been held to revert to the original dedicator, or to persons claiming under him."

Johnston v. Medina Improv. Club. 10 Wn.2d at 56-57.

Abandonment of interest in land can occur if the specific use for which the property was dedicated becomes impossible or if

there is a complete failure of the object of the use. *Johnston*, 10 Wn.2d at 57-59. What constitutes abandonment is generally a question of fact. *Horton v. Okanogan County*, 98 Wash. 626, 634, 168 P. 479 (1917). As is shown above, there is no evidence before the court that the right of way was ever put to public use. The County has, through its non-use and the *Johnson* litigation, and by the failure to reserve or mention the 40 Foot Strip in any document abandoned and/or relinquished it. In short the County is attempting to thwart a deal it made over 100 years ago by asking this court to do what no other Washington Court has done.

E. THE DOCTINES OF RES JUDICATA AND COLLATERAL ESTOPPEL PRECLUDE THE COURT FROM GRANTING THE DEFENSE SUMMARY JUDGMENT MOTIONS

It is undisputed that a deputy prosecutor signed both the Stipulated Findings and Stipulated Judgment on behalf of The County. It is also undisputed that the attorney for Mr. Johnson also signed both pleadings on behalf of her client. The County, Ms. Tonda, and Mr. Tonda are bound by both the Stipulated Findings and Stipulated Judgment.

The operative language of the Stipulated Findings could not be any clearer.

Plaintiff Johnson's and Defendant Pappé's title, right, or interest in their respective portions of the alley is superior to the title, right, or interest of defendant The County.

CP 106. The related *Johnson* Stipulated Judgment, at p. 2, lines 14-22, states:

. . . [H]ereby is quieted, as fee title interest, in defendant Luella Pappé, free and clear of any claim whatsoever by defendant King County, and anyone claiming by or through The County.

. . . while this vacation puts an end *to all interests of the public in the platted alley*, nothing herein shall affect any private interest or easements over the alley, or the 100 foot right of way held by King County.

CP 109 (emphasis added).

This language, particularly the term "whatsoever,"¹³ gave the parties in the *Johnson* matter a fee simple interest the alley which is within the 40 Foot Strip free of any claim to it by the County by any basis including the 1907 Agreement and the 1908 Deed. This cuts the County's interest in the 40 Foot Strip in half, making it now useless as a public road. This, despite the fact that the County was meticulous in reserving its right to the 100 foot right of way encompassing the Cedar River Trail. Mr. Kelley now owns all of the rights granted to Luella Pappé.

¹³ The term "whatsoever" is defined by Merriam-Webster Online as: "of any kind or amount at all." <http://www.merriam-webster.com/dictionary/whatsoever>

In the case of *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730-31, 254 P.3d 818 (2011), the Washington Supreme Court succinctly stated the rules of decision applicable here:

Res Judicata: Res judicata is a doctrine of claim preclusion. It bars relitigation of a claim that has been determined by a final judgment. See *Schoeman v. New York Life Ins. Co.*, 106 Wash.2d 855, 860, 726 P.2d 1 (1986). Res judicata applies where the subsequent action involves (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons for or against whom the decision is made as did a prior adjudication. *In re Estate of Black*, 153 Wash.2d 152, 170, 102 P.3d 796 (2004).

Collateral Estoppel: Collateral estoppel is a doctrine of issue preclusion. It bars relitigation of issues of ultimate fact that have been determined by a final judgment. *State v. Vasquez*, 148 Wash.2d 303, 308, 59 P.3d 648 (2002). Collateral estoppel requires that (1) the identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) collateral estoppel is asserted against the same party or a party in privity with the same party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice. *Clark v. Baines*, 150 Wash.2d 905, 913, 84 P.3d 245 (2004).

Plaintiffs admit that the Tondas were not parties to *Johnson v. Pappe*. But the effect of the Stipulated Findings and Stipulated Judgment applies to them nonetheless. It is clear that res judicata bars King County from litigating again anything that was signed away in the *Johnson* Stipulated Judgment, and that collateral estoppel bars the Tondas from litigating again anything that was

signed away by Mr. Johnson's attorney in the same Stipulated Judgment. Thus, the trial court was not free to disregard the findings, legal conclusions, and judgment

Each of the elements of *res judicata* apply to the County: (1) the subject matter of the *Johnson* action was the same, (2) the *Johnson* plaintiff sought a decree quieting title, (3) The County participated in the Stipulated Findings, Conclusions, and Judgment, signed by a deputy prosecutor, and (4) The County is the same county which knowingly gave up its rights to the 40 Foot Strip as a result of signing the Stipulated Findings and Stipulated Judgment.

Similarly, each of the elements of collateral estoppel apply to the Tondas: (1) an identical issue (the termination of the County's rights in the 40 Foot Strip) was decided in *Johnson*, (2) the Stipulated Judgment ended the *Johnson* action, (3) the Tondas are in privity with Mr. Johnson, from who their parcels were purchased, and (4) precluding relitigation of the issue will not work an injustice, because the Tondas do not have a legal right to claim a public roadway which no longer exists (assuming it ever did), and they have access easements to their property.

The Tondas contend that the Stipulated Findings and Stipulated Judgment do not expressly address the 40 Foot Strip

and thus do not affect it. The omission of such language does not impact on the present case. The record in the *Johnson* matter is clear. At the conclusion of the litigation neither Mr. Johnson nor the County acted to preserve a claim of right to disputed property. Thus, Defendants are barred by *res judicata* and collaterally estopped from presenting claims regarding the 1908 Deed. The purpose of *res judicata* is to ensure the finality of decisions. *Mellor v. Chamberlin*, 100 Wn.2d 643, 645, 673 P.2d 610 (1983). A final judgment bars parties from re-litigating claims and issues that were **or could have** been raised in the prior action. *Mellor*, 100 Wn.2d at 645.

F. THE TONDA PROPERTY IS NOT LANDLOCKED AS A MATTER OF LAW AND FACT

The Tonda's claim that their property would be landlocked as follows:

In particular, the lots that now comprise Lot B of the Tonda Property would be landlocked between 227th Place SE and other private parcels without the access provided by the Right of Way.

CP 720. Further, peppered throughout the Tonda motion is the suggestion that Mr. Kelley disputes the rights granted by the Easement based on the sole and suspect statements of Beverly Tonda. CP 704; 706. These statements are incorrect. As an

inconsistent statement, the Tondas state in their motion for summary judgment: "Although a private easement permits the Tondas and Southworths to access their properties over the gravel road ..." CP 702. They further acknowledge that the "Plaintiffs claim the right of way no longer exists and the Tondas' rights are limited to the private easement over Plaintiff's property." CP 706.

First and foremost, at no time in this lawsuit has Mr. Kelley disputed the Easement. CP 645; 649-650. As is clear from the pleadings, he has sought declaratory judgment only on the alleged roadway. CP 649-650. Further, in communications prior to the suit, at no time did Mr. Kelley dispute the easement rights. CP 320-321. Thus, Ms. Tonda's statements regarding a contest over the Easement is simply not consistent with the documents filed with this court and specifically sent to her.

VI. CONCLUSION

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

Dated this 1st day of March, 2016.

THE LAW OFFICE OF CATHERINE C. CLARK PLLC

By: 

Catherine C. Clark, WSBA 21231

Attorney for Bryan Kelley and Dorre Don LLC,
Appellants

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 1st day of March, 2016.

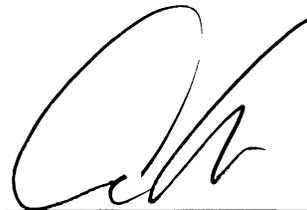
By US Mail

Michael and Beverly Tonda
P.O. Box 1440
Maple Valley, WA 98038

By Email

Kennan and Patricia Southworth
21670 -227th Place SE
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John Briggs
Office of the Prosecuting Attorney
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Aaron McPeck

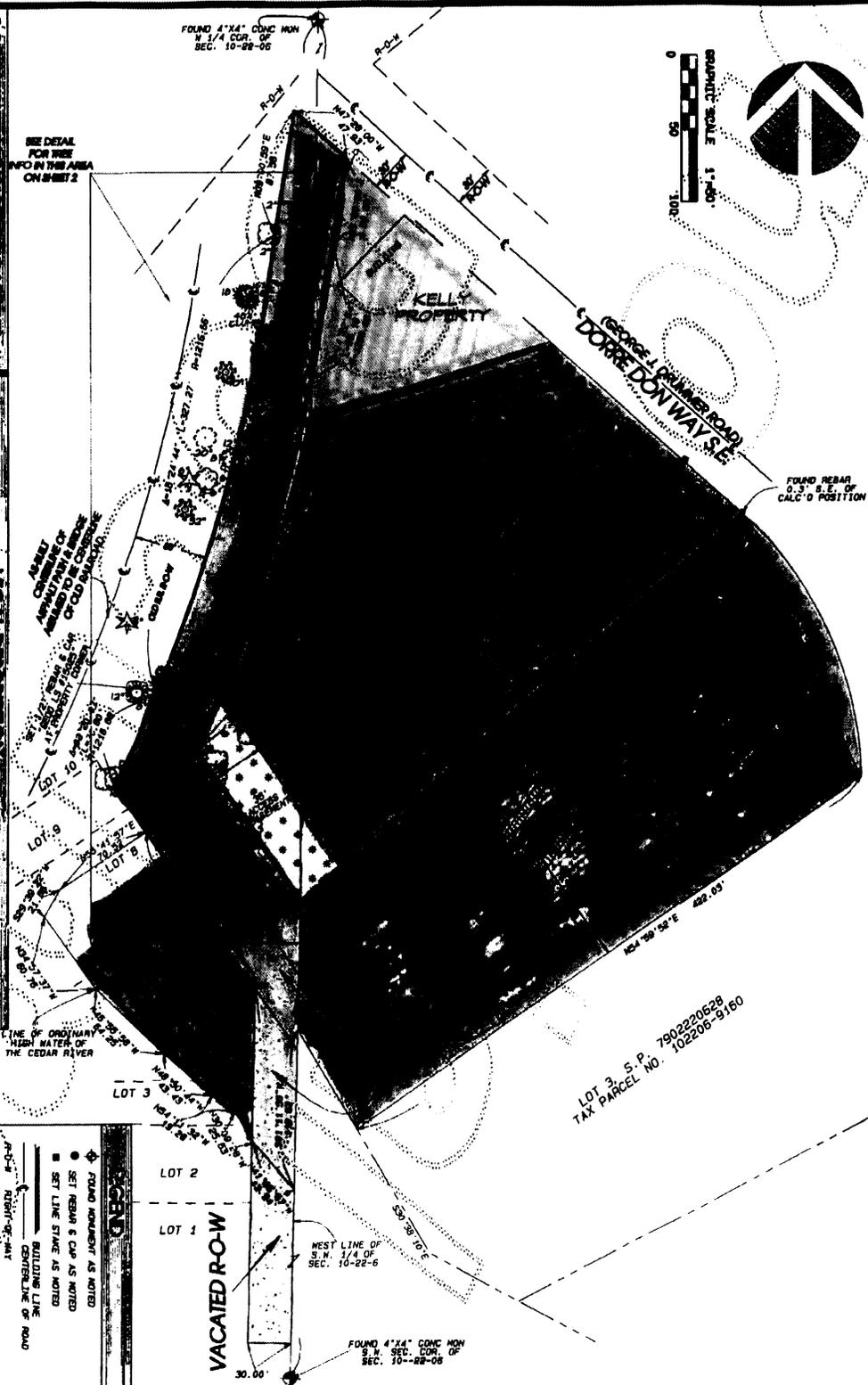
EXHIBIT

A

RECORD OF SURVEY



GRAPHIC SCALE 1"=50'
0 50 100



THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN COMPLIANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT AT THE REQUEST OF REBEKAH TONDA IN DECEMBER OF 2009.
EDWIN J. GREEN JR. CERTIFICATE NO. 15025 02/02/2010 DATE

20100309900001
15025
EDWIN J. GREEN JR.
15025
KING COUNTY, WA
10 41 M
08/21/10
15025

PARCEL A
ADJACENT TO THE RIM COUNTY ASSESSOR'S MAP
ON THE RIM COUNTY ASSESSOR'S MAP
PARCEL B
S.E. 1/4, 1/4, 1/4, 1/4 - MAY

STADIS
LORDS

1) RECORD OF SURVEY IN BOOK 173 AT PAGE 189
2) THIS MAP FOR THE S.W. 1/4 SEC. 18-22-8
3) RECORDS OF KING COUNTY, WASHINGTON.

- FOUND MONUMENT AS NOTED
- SET REBAR & CAP AS NOTED
- SET LINE STAKE AS NOTED
- BUILDING LINE
- CENTRAL LINE OF ROAD

RECORD OF SURVEY
NW 1/4 OF THE SW 1/4 OF SEC. 10,
T20N, R10E, S11N,
CITY OF MAPLE VALLEY, KING COUNTY, WASHINGTON



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www.geodimensions.net

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220/013