

NO. 46080-7  
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COURT OF APPEALS  
STATE OF WASHINGTON

NO. 46080-7  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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Barlow Point Land Company, LLC, a Delaware limited liability  
company; and PORT OF LONGVIEW, a municipal corporation,

Plaintiffs/Respondents,

vs.

Keystone Properties I, LLC,

Defendant/Appellant

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APPEAL FROM THE SUPERIOR COURT

---

HONORABLE STEPHEN WARNING

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APPELLANT'S BRIEF

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pm 6/23/14

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## INTRODUCTION

Stephen J. Wilson received a Deed from Terra Firma, Inc. Terra Firma) to the following described real property located in Cowlitz County, Washington:

### PARCEL A:

Lot 2 of short subdivision No. 91-001, as recorded in Volume 6 of short plats, page 83, under Auditor's File No. 910204032; and being a portion of the George Barlow D.L.C.; together with all tidelands of the second class, situated in front of, adjacent to or abutting the above described uplands and as conveyed in Parcel "J" of said deed, Volume 977, page 242 (fee no. 8400924042).

### PARCEL B:

All that portion of George Barlow D.L.C. and George Fisher D.L.C. lying outside of Columbia River Dike of Consolidated Diking Improvement District No. 1, said dike being described by Deed in Volume 121, page 391, Auditor's File No. 51256;

EXCEPTING THEREFROM that portion lying northerly of a line that is parallel to and 1,765.70 feet south of the south line of Section 22, Township 8 North, Range 3 West of the W.M.

The trial court ruled on summary judgment that he received the tidelands abutting what is described as Parcel B even though there is no reference to those tidelands in the description of Parcel B and a specific mention of tidelands in the description of Parcel A; even though such an interpretation

of the Deed would lead to absurd results; and in the face of an opinion of an expert that the Deed could not be interpreted as the trial court chose to interpret it. The trial court's decision must be reversed and title must be quieted in Keystone Properties I, LLC (Keystone).

#### ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The Court erred in entering the Order Granting Plaintiffs' Motion for Summary Judgment.

Assignment of Error No. 2: The Court erred in granting the Judgment Quieting Title.

#### ISSUES PRESENTED

1. Did the Deed containing the following legal description convey title to tidelands abutting Parcel B:

##### PARCEL A:

Lot 2 of short subdivision No. 91-001, as recorded in Volume 6 of short plats, page 83, under Auditor's File No. 910204032; and being a portion of the George Barlow D.L.C.; together with all tidelands of the second class, situated in front of, adjacent to or abutting the above described uplands and as conveyed in Parcel "J" of said deed, Volume 977, page 242 (fee no. 8400924042).

##### PARCEL B:

All that portion of George Barlow D.L.C. and George Fisher D.L.C. lying outside of Columbia

River Dike of Consolidated Diking Improvement District No. 1, said dike being described by Deed in Volume 121, page 391, Auditor's File No. 51256;

EXCEPTING THEREFROM that portion lying northerly of a line that is parallel to and 1,765.70 feet south of the south line of Section 22, Township 8 North, Range 3 West of the W.M.

2. Can any extrinsic evidence be used to determine whether the language describing Parcel B included adjacent tidelands and, if so, to what use can the extrinsic evidence be put?

3. Does the doctrine of merger by deed preclude consideration of the parties' discussions and the purchase and sale agreement that preceded the grant of the deed?

4. Did Mr. Wilson waive any rights he may have had to acquire any property in the transaction other than what was set out in the legal description of the deed?

5. Was a genuine issue of material fact presented concerning Issue No. 1?

#### STATEMENT OF THE CASE

##### I. The History.

Tidelands are the area between ordinary high tide and extreme low tide. The uplands are the area to the shore side of the tidelands. The

underwater area is called the bed. Tidelands are between the uplands and the bed. Stoebuck & Weaver, *Real Estate: Transactions* 18 Wash.Prac. §13.5. Ownership of tidelands can be divorced from the ownership of the abutting uplands. The tidelands area is sometimes used by logging companies to hold logs on rafts headed for the mill. (CP 301, 345-46)

This case concerns property that fronts on the Columbia River in the Barlow Point area of Cowlitz County. The State of Washington conveyed all tidelands in the area to Long-Bell Timber Company in 1923. (CP 607-608) In 1984, International Paper Company deeded land and tidelands in the area to International Paper Realty Corporation (the 1984 Deed). The tidelands were described in Parcel “J” of the legal description as “all tidelands of the Second Class, situated in front of, adjacent to or abutting upon the following described uplands,” which uplands were then described. (CP 611-19)

Between February and November of 1986, International Paper Realty Corporation conveyed property included within the uplands described in Parcel “J” of the 1984 Deed in six different deeds. These will be referred to as the Exception Deeds. The legal description in each Exception Deed explicitly included tidelands abutting that parcel. The legal description of the first Exception Deed included the language “TOGETHER with all tide lands of the second class, situated front,

adjacent to or abutting upon the property herein conveyed” to describe the adjacent tidelands. (CP 310-312) The legal descriptions in the other five Exception Deeds refer to the adjacent tidelands in the following language:

Together with all Tide Lands of the Second Class situated front, adjacent to or abutting the above described uplands; and as covered in Parcel “J” of Deed Volume 977, page 242 (Fee #840924042).

(CP 302-303, 305-308, 313-324; 470-473)

International Paper Realty Corporation conveyed its holdings in the area to Robert P. Radakovich in 1987 (the 1987 Deed). The conveyance included tidelands described in Parcel “H” of the legal description. That description is identical to that contained in Parcel “J” of the 1984 Deed except that it contains language excepting out the property that had been conveyed under the Exception Deeds in 1986. (CP 620-32) The elder Mr. Radakovich subsequently conveyed the property to Terra Firma in 1996. The legal description includes Parcel “H” as described in the 1987 Deed. In fact, much of the legal description of the deed is a direct copy of the legal description of the 1987 Deed. (CP 633-40)

## II. The 2006 Transaction.

Robert Radakovich II is the son of Robert P. Radakovich, the Grantee of the 1987 Deed. Both have been associated with Terra Firma. The elder Mr. Radakovich has been a principal while his son has been an

officer. (CP 327, 331) In 2006, the younger Mr. Radakovich agreed to sell some of Terra Firma's property to Mr. Wilson for \$88,700.00. They also orally agreed that Terra Firma would retain an option to repurchase the property. (CP 368-369)

Vincent Penta, an attorney in Longview, prepared a Real Estate Purchase and Sale Agreement for the transaction. Under the terms of the agreement, Mr. Penta represented Mr. Wilson. As the agreement states:

**REPRESENTATION BY COUNSEL:** Seller is hereby advised that Purchaser is represented by the Law Office of Vincent L. Penta, P.S. in the preparation of this document and Seller is advised to seek his own Counsel prior to signing if he has any questions or concerns re this Agreement.

(CP 389-390, 392-393) The agreement contains no legal description in so many words. A version of the agreement containing two exhibits is attached to Mr. Wilson's declaration. (CP 97-100) Two copies have been found in the records of Cowlitz County Title Company. One contains no exhibits at all. The other has an Exhibit A consisting of a map of the parcels in question. (CP 336, 389-93) A copy in the files of Mr. Wilson's lender has no exhibits attached. (CP 337, 468-69) The agreed upon option is not contained within the Real Estate Purchase Agreement.

Mr. Wilson's lender sought a lender's title insurance policy. Mr. Penta relayed that request to Cowlitz County Title. Arlene Reynolds, a

title officer with Cowlitz County Title, then prepared the legal description for the preliminary commitment for title insurance for that lender's policy. (CP 354-356)

Mr. Penta acted as escrow for the transaction. The escrow instructions signed by both parties "instructed (him) to rely on the Title Report issued by Cowlitz County Title (that Ms. Reynolds prepared) as to the legal descriptions for the two parcels which are the subject of this transaction. . . ." The instructions that Mr. Wilson signed also contained language that he:

Stipulates that all conditions and contingencies as set forth in the above referenced Purchase and Sale Agreement have been met or waived to the satisfaction of all parties to this transaction. . .

(CP 360, CP 375, 451-452, 459-460)

Mr. Penta prepared a Statutory Warranty Deed for the transaction. The younger Mr. Radakovich signed it on February 22, 2006. Mr. Wilson also signed the deed as follows:

Approved and accepted

/s/ Stephen Jeffrey Wilson  
STEPHEN JEFFREY WILSON

The deed contained the following legal description:

///

PARCEL A:

Lot 2 of short subdivision No. 91-001, as recorded in Volume 6 of short plats, page 83, under Auditor's File No. 910204032; and being a portion of the George Barlow D.L.C.; together with all tidelands of the second class, situated in front of, adjacent to or abutting the above described uplands and as conveyed in Parcel "J" of said deed, Volume 977, page 242 (fee no. 8400924042).

PARCEL B:

All that portion of George Barlow D.L.C. and George Fisher D.L.C. lying outside of Columbia River Dike of Consolidated Diking Improvement District No. 1, said dike being described by Deed in Volume 121, page 391, Auditor's File No. 51256;

EXCEPTING THEREFROM that portion lying northerly of a line that is parallel to and 1,765.70 feet south of the south line of Section 22, Township 8 North, Range 3 West of the W.M.

The deed also noted that each parcel identified in the legal description was a separate tax parcel. Parcel A was identified as tax parcel No. 1-713-0100 while Parcel B was No. 1-714-0100. (CP 376-77) Mr. Wilson had seen the legal description before he signed the Deed, and he read it before he signed the deed. He also signed a Promissory Note and Deed of Trust for the loan from Twin City Bank. The Deed of Trust contains the same legal description as that on that on the Deed. The Deed was recorded on February 23, 2006. (CP 360, 422-430)

### III. The 2012 Transaction.

The Port of Longview (the Port) became interested in acquiring the tidelands in front of Parcel B. It obtained a title guarantee from Chicago Title Insurance Company in June of 2011. That document stated that those tidelands were owned by Terra Firma. (CP 209, 215-219)

On January 9, 2012, Mr. Wilson entered into a purchase and sale agreement with the predecessor of Barlow Point Land Company, LLC, (Barlow Point), to sell the property he had acquired from Terra Firma for \$755,000.00. (CP 366) Meanwhile, Terra Firma conveyed the tidelands abutting Parcel B to Keystone on January 30, 2012. (CP 7)

Barlow Point's surveyor, Daniel Renton, was concerned about the ownership of the tidelands abutting Parcel B. Seth Woolson, the attorney for Barlow Point, asked Terry Woodruff at Cowlitz County Title to clarify the ownership. Mr. Woodruff responded by saying that the 2006 Deed to Mr. Wilson did not convey the tidelands in front of Parcel B. Mr. Wilson then asked Mr. Woodruff to prepare a chain of title certificate. He completed that document on January 31, 2012. It stated that the tidelands abutting Parcel B had been conveyed by Terra Firma to Keystone, and it did not mention the 2006 Deed from Terra Firma to Mr. Wilson. (CP 349, 396, 605-06) Mr. Woodruff later changed his conclusion on February 8, 2012, to state that Mr. Wilson did own the tidelands in front of Parcel B

and that Cowlitz County Title would insure the conveyance of those tidelands. (CP 351, 399)

Mr. Wilson executed a statutory warranty deed in favor of Barlow Point that was recorded on February 16, 2012. The legal description is identical to that attached to the 2006 Deed. (CP 58) Barlow Point and the Port subsequently entered into a boundary line agreement. (CP 226-239)

#### IV. Course of Proceedings.

Barlow Point and the Port both sued to quiet title in the tidelands abutting Parcel B. (CP 3-29) Keystone answered. (CP 30-31) Barlow Point and the Port then moved for summary judgment. (CP 32-79)

The parties introduced declarations from three persons on how the language of the legal description on the 2006 Deed should be interpreted. Barlow Point and the Port submitted a declaration from Calvin Hampton, an associate of Mr. Wilson who is a surveyor. He based his analysis on Mr. Wilson's assertion that he — Mr. Wilson — wanted the tidelands in the 2006 transaction. (CP 344) He interpreted the phrase “and as conveyed in Parcel “J” of (the 1984 Deed)” in the description of Parcel A in the 2006 Deed to mean all tidelands described in “J” the 1984 Deed that Terra Firma owned at the time of the 2006 transaction. He made this statement in the absence of any language in the deed to that effect. He acknowledged that the use of virtually the same phrase in the Exception

Deeds would mean that International Paper Realty Corporation was conveying all the tidelands that it owned at the time notwithstanding the fact that the same language was used in five of the six Exception Deeds and that such an interpretation of the language would mean that International Paper Realty Corporation had conveyed the same tidelands multiple times. (CP 344)

Mr. Woodruff justified the change in his conclusion by referring to information that he had received from Mr. Hampton and indications that Mr. Wilson believed that he had contracted to purchase the tidelands. (CP 516) He concluded that the phrase “and as conveyed in Parcel ‘J’ (of the 1984 Deed)” refers to all tidelands in Parcel “J” because the two parcels mentioned in the 2006 Deed are contained in Parcel “J.” He makes this statement while acknowledging that tidelands abutting other parcels are also described in Parcel “J.” Mr. Woodruff recognized, however, that Mr. Wilson received all the tidelands described in Parcel “J” of the 1984 Deed including those that had already been conveyed to others through the Exception Deeds. (CP 351)

Keystone presented a declaration from Dennis Gish, a title officer with approximately thirty-seven years of experience. (CP 297) He concluded that the absence of any reference to tidelands in the description for Parcel B meant that those tidelands were not conveyed. He first noted

that tidelands can have fee simple ownership independent of the ownership of abutting uplands. He rejected Mr. Woodruff's conclusion because it would mean that Terra Firma had conveyed tidelands in the 2006 Deed that had already been conveyed out in the Exception Deeds. He also rejected Mr. Hampton's conclusion because that was not what the description said. (CP 301-303) Finally, Mr. Gish noted that there were other uplands within Parcel "J" of the 1984 Deed that were not referred to in the Exception Deeds. The tidelands abutting those parcels not referred to in the Exception Deeds would have been conveyed to Radakovich Construction in the 1987 Deed and would have been owned by Terra Firma in 2006 in the absence of some other deed conveying those tidelands to some other party. (CP 304)

Each of the three stated that if he had prepared the legal description for Parcel B and wanted to indicate that the tidelands in front of that parcel were being conveyed, he would have placed language referring to those tidelands in the legal description of Parcel B in some fashion. (CP 302, 343, 349)

Keystone moved to strike certain aspects of the testimony and exhibits. (CP 278-287, 527-550) The trial court granted that motion only as to that portion of the Declaration of Terry Woodruff referring to what Mr. Penta told him. It granted the plaintiffs' summary judgment motion

and quieted title in plaintiffs to the tidelands abutting Parcel B. (CP 550-557) Keystone appealed.

## ARGUMENT

### I. Standard of Review.

This case was decided on summary judgment. The Appellate Court reviews the trial court's order for summary judgment *de novo* performing the same inquiry as the trial court. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1-6, 282 P.3d 1083 (2012).

Summary judgment is appropriate if the pleadings, depositions, and other materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Company*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The facts that the moving party submits must be facts that would be admissible in evidence. CR 56(c). If the moving party makes the required initial showing, the burden then shifts to the nonmoving party to demonstrate the existence of a genuine issue of material fact. *Meyer v. University of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). All evidence submitted and all

reasonable inferences from such evidence must be considered in the light most favorable to the nonmoving party. *McPhaden v. Scott*, 95 Wn.App. 431, 434, 975 P.2d 1033 (1999).

Finally, when the facts are not in dispute, summary judgment may be awarded to the non-moving party. *Impecoven v. Department of Revenue*, 122 Wn.2d 357, 365, 841 P.2d 752 (1992). In this case, the material facts require the conclusion that 2006 deed by its terms did not convey to Mr. Wilson the tidelands abutting Parcel B. Keystone is therefore entitled to summary judgment and an order establishing that it owns the tidelands in question.

## II. The Language of the Legal Description in the 2006 Deed Cannot Be Interpreted to Convey the Tidelands Abutting Parcel B.

### a. Introduction.

What is conveyed in any deed is determined by the deed's legal description. The description in the 2006 Deed is clear. The tidelands abutting Parcel A were conveyed while those abutting Parcel B were not.

### b. Rules for Interpretation of Deeds.

The result in this case depends on the interpretation of the legal description of Parcel B contained in the 2006 Deed. While the goal of the process of interpretation is to effectuate the parties' intentions, those intentions must be derived in the first instance from the four corners of the

deed and its language. *Hanson Industries, Inc., v. County of Spokane*, 114 Wn.App. 523, 527, 58 P.3d 910 (2002); *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn.App. 56, 64, 277 P.3d 18 (2012). The words within a deed must be given their ordinary meaning. *McKillop v. Crown Zellerbach, Inc.*, 46 Wn.App. 870, 873, 733 P.2d 559 (1987). If that language is unambiguous, extrinsic evidence cannot be considered to determine the deed's meaning. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981); *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc.*, *supra*, 168 Wn.App. at 69-71.

The language in a deed is ambiguous only if it is capable of two or more meanings. *Hoglund v. Omak Wood Products, Inc.*, 81 Wn.App. 501, 504, 914 P.2d 1197 (1996). When a court is called upon to interpret a deed, it applies the same principles as it would to any other contract. *Alby v. Banc One Financial*, 119 Wn.App. 513, 518, 82 P.3d 675 (2003). That means that, just as with a contract, an ambiguity in a deed cannot be created by a strained or forced construction. *E-Z Motor Loader Trailers, Inc. v. Travelers Indemnity Co.*, 106 Wn.2d 901, 907, 726 P.2d 439 (1986); *Eurick v. Pemco Insurance Co.*, 108 Wn.2d 338, 341, 738 P.2d 251 (1987).

c. The Language of the Deed Unambiguously Includes Tidelands Abutting Parcel A But Does Not Include Tidelands Abutting Parcel B.

The legal description in the 2006 Deed explicitly includes tidelands abutting Parcel A. There is no similar language in the description for Parcel B. As Mr. Gish indicated in his declaration, only one conclusion is possible — the tidelands abutting Parcel B were not included within the grant of the 2006 Deed while the tidelands adjacent to Parcel A were. That means that Terra Firma still had the tidelands when it conveyed them to Keystone in 2012 and that Keystone is the fee simple owner of the Tidelands.

Mr. Gish is not the only person who came to this conclusion. Chicago Title said the same thing in the report it prepared for the Port in 2011. And Mr. Woodward's Chain of Title Certificate — prepared before he considered extrinsic evidence consisting of what Mr. Wilson said the transaction was supposed to be — had the same outcome.

d. The Other Interpretations Cannot Be Adopted Because They Lead to Absurd Results and Rely on Language Not in the Deed.

Mr. Woodruff and Mr. Hampton have given different interpretations of the phrase “and as conveyed in Parcel ‘J’ of the (1984 Deed)” in the description to Parcel A to support their conclusions that the

2006 Deed conveyed title to the tidelands abutting Parcel B. Their interpretations cannot raise an ambiguity because they lead to absurd results or require placing language in the legal description that isn't there.

Notwithstanding its placement only in the description of Parcel A in the legal description of the 2006 Deed, Mr. Woodruff states that the phrase "and as conveyed in Parcel 'J' of said deed, Volume 977, page 242 (fee no. 840924042)" means that Terra Firma conveyed all tidelands described in Parcel "J" of the 1984 deed, including the tidelands that do not abut either Parcel A or Parcel B of the 2006 Deed. It would also mean that Terra Firma conveyed tidelands that it never owned. Terra Firma received the tidelands from the elder Mr. Radakovich who in turn had acquired them from International Paper Realty Corporation in the 1987 Deed. The legal description of Parcel "H" in the 1987 Deed includes all tidelands and is identical to Parcel "J" in the legal description of the 1984 Deed except that it specifically excludes the tidelands that had been conveyed in the Exception Deeds. Therefore, Terra Firma never received all the tidelands described in Parcel "J" of the 1984 Deed and could not convey them to Mr. Wilson. (CP 303-304) Mr. Woodruff's interpretation also means that Terra Firma conveyed to Mr. Wilson tidelands that had previously been deeded in the Exception Deeds. This interpretation cannot create an ambiguity because it leads to an absurd result.

Mr. Hampton agrees that the phrase “and as conveyed in Parcel ‘J’ of said deed, Volume 977, page 242 (fee no. 840924042)” cannot refer to all the tidelands described in Parcel “J” of the 1984 Deed because Terra Firma “didn’t have all of them to sell” by virtue of the Exception Deeds. (CP 195) That means that Mr. Woodruff is alone in his interpretation of the key phrase in the description to Parcel A.

Instead, Mr. Hampton argues that the key phrase refers to all tidelands that Terra Firma owned in Parcel “J” in 2006 before the 2006 Deed was executed. But that version would require the legal description to have different language — “all tidelands owned by Grantor described in Parcel “J” of said deed, Volume 977, page 242 (fee no. 840924042).” An interpretation of an instrument cannot be based on language that is not there. *Bank of East Asia v. Pang*, 140 Wash. 603, 610-611, 649 P. 1060 (1926); *City of Seattle v. Northern Pacific Railway*, 12 Wn.2d 247, 260, 121 P.2d 382 (1942). Therefore, Mr. Hampton’s interpretation cannot be used either.

e. Normal Practice Supports This Conclusion.

Had Mr. Gish, Mr. Hampton, or Mr. Woodruff prepared the legal description for the 2006 Deed and wanted it to include the tidelands adjacent to Parcel B, each would have placed language to that effect in the description to Parcel B. Alternatively, Mr. Hampton would have put the

tidelands abutting both Parcel A and Parcel B in a separate parcel. (CP 343) If tidelands abutting a parcel must be called out if those tidelands are to be conveyed, then the absence of language to that effect in the description of a parcel means that the tidelands abutting that parcel are not included in the grant. This factor supports the conclusion that the 2006 Deed was not ambiguous and did not include the tidelands adjacent to Parcel B.

f. Conclusion.

Three interpretations have been given to the language describing Parcel B in the 2006 Deed. Mr. Gish's interpretation is simple and straight forward. Since there is no reference to tidelands in the description of Parcel B while tidelands are set out in the description to Parcel A, any tidelands abutting that parcel were not conveyed. His interpretation was adopted by Chicago Title and initially by Mr. Woodruff. The second interpretation, the one given by Mr. Hampton, cannot create an ambiguity because it requires inserting language into the description of Parcel B that simply is not there. The third interpretation, the second given by Mr. Woodruff, cannot be adopted because it leads to absurd results. Since the latter two are nonsensical, they cannot create any sort of ambiguity. Therefore, Mr. Gish's interpretation must be adopted since it is the only one that makes any sense. Since the tidelands abutting Parcel B

were not conveyed to Mr. Wilson in 2006, Terra Firma was free to deed them to Keystone in 2012. Title to those tidelands must therefore be quieted in Keystone to the exclusion of any claim made by Barlow Point or the Port.

At very least, Mr. Gish's opinion creates a genuine issue of material fact. An expert opinion on an ultimate issue of fact is sufficient to preclude summary judgment. *Lamon v. McDonnell Douglas Corp*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979); *Eriks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992). Therefore, the trial court erred by entering summary judgment in favor of the Port and Barlow Point.

III. The Extrinsic Evidence Submitted by the Port and Barlow Point Cannot Be Considered and, in Any Event Is Disputed.

a. Introduction.

Barlow Point and the Port have attempted to support their position by extrinsic evidence. Keystone moved to strike this evidence. (CP 278-289, 527-534) The trial court denied Keystone's motion except as to a statement Mr. Woodruff attributed to Mr. Penta. (CP 552) This evidence should not have been and should not be considered. In any event, the evidence and the inferences to be drawn from that evidence are disputed. That means that a genuine issue of material fact exists, and

summary judgment cannot be granted on the basis of any extrinsic evidence.

b. Extrinsic Evidence Cannot Be Considered Because the Description of Parcel B Is Not Ambiguous.

Evidence extrinsic to the deed cannot be considered when the deed language is not ambiguous. *Zobrist v. Culp, supra*, 95 Wn.2d at 560, and *Sunnyside Valley Irrigation District v. Dickie, supra*, 149 Wn.2d at 880, discussed at p. 14-15 above. This rule rests on the notion that the language of the deed is the best evidence of the parties' intentions and that evidence of the circumstances of the transaction will become increasingly unreliable over time. *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc., supra*, 168 Wn.App. at 65. As discussed above, the legal description of Parcel B in the 2006 Deed is not ambiguous because it is susceptible to only one interpretation — that Terra Firm did not convey the tidelands abutting Parcel B. Since the legal description contained within the 2006 Deed is not ambiguous, no extrinsic evidence can be considered.

c. Extrinsic Evidence Cannot Be Considered to Vary the Language of the Deed.

Even if extrinsic evidence is used, the court cannot consider a party's unilateral or subjective intent; evidence showing an intention

independent of the instrument; or evidence that would vary, modify or contradict the written language of the deed. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999); *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc.*, *supra*, 168 Wn.App. at 70-71. Furthermore and critically, extrinsic evidence can be used only to illuminate what actually was written, not what may have been intended to be written. *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990); *Hollis v. Garwall, Inc.*, *supra*, 137 Wn.2d at 697. The Port and Barlow Point are anticipated to argue that the parties' intentions must control. These rules concerning extrinsic evidence makes it clear that the parties' intentions must be discerned first from the language of the deed and that evidence that shows intentions at odds with that language will not be considered.

The application of these rules is best illustrated by *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc.*, *supra*. In that case, the trial court ruled that a quit claim deed conveying certain strips of land amounted to easements because a real estate excise tax affidavit stated that the deed was a "document in correction of easements" and that the minutes of the condominium association board of directors' meetings referred to acquiring easements through quit claim deeds. The court ruled that consideration of this

extrinsic evidence was impermissible because it would be entirely independent of the instrument and would contradict its language. 168 Wn.App. at 70-71. Our case is no different. What the parties believed was being conveyed and intended to be conveyed doesn't matter if their intention was not set out in the deed.

d. Statements Attributed to Messrs. Radakovich.

i. Communications between Messrs. Radakovich and Mr. Wilson.

The plaintiff submitted his recollection of discussions between himself and both the elder and the younger Mr. Radakovich about what was to be conveyed; what his own intentions were; and what would have been "logical." (CP 81-83, 92-95, 488-90, 497-503) The substance and import of this evidence is disputed.

Mr. Wilson claims that the elder Mr. Radakovich was involved in the discussions leading up to the formation of the contract and the delivery of the 2006 deed. He states that the parties discussed purchasing the tidelands abutting Parcel B. The younger Mr. Radakovich denies both of those assertions. (CP 332) For his part, the elder Mr. Radakovich denies being involved in any discussions with Mr. Wilson. He also states that that he was not involved in the transaction in any way. (CP 327-28) Even if considered, this evidence cannot support summary

judgment because there is a clear factual issue as to exactly what happened.

The Real Estate Purchase and Sale Agreement is also extrinsic to the 2006 Deed. It contains no legal description. There are several versions of the document. One has no exhibits at all. This has been found in two places. Another has a map. The third is attached to Mr. Wilson's declaration. The variation in the form of this agreement creates an issue of fact as to exactly what was included.

After the 2006 transaction was completed, the younger Mr. Radakovich attempted to repurchase the land conveyed in 2006. During their interactions, the younger Mr. Radakovich referred to tidelands. (CP 83-86, 105-43, 491) In any event, this evidence is not helpful because it only serves to reinforce what Mr. Wilson has admitted — that the parties had orally agreed that Terra Firma would have an option to repurchase the property — and nothing more. Furthermore, the younger Mr. Radakovich advises that he did not think that the tidelands abutting Parcel B had been conveyed until David Feinauer of Right-of-Way Associates, Inc. told him that Terra Firma had deeded the tidelands to Mr. Wilson. At the time, Right-of-Way Associates, Inc. was working with the Port to acquire land along the Columbia River including what Terra Firma owned. (CP 332) This testimony creates an issue of fact concerning

the significance of anything the younger Mr. Radakovich said in those negotiations with Mr. Wilson.

ii. Statements Made in the 2008 Litigation.

There was litigation between the parties in 2008 concerning access to the uplands that Mr. Wilson purchased and over land owned by Terra Firma. Mr. Wilson recounts the litigation and presents statements by the younger Mr. Radakovich and his attorney to the effect that Mr. Wilson had purchased the tidelands abutting Parcel B. (CP 86-87, 145-59, 492-93, 508-12) This evidence is not helpful because the understanding of the younger Mr. Radakovich was based on what he was told by Mr. Feinauer. For this reason, the evidence cannot support a summary judgment motion.

The declaration that the younger Mr. Radakovich completed in 2008 is not helpful for other reasons. It refers to the land that was sold by Terra Firma to Mr. Wilson in 2008 as shown on Exhibit B. (CP 508) That map shows various tax parcels by number. But the tax parcel numbers of Parcel A and Parcel B in the 2006 Deed, Nos. 1-713-0100 and 1-714-0100, are not pictured by number on the map while parcels with other numbers are. (CP 512) The declaration is therefore not helpful.

Mr. Wilson also refers to trial exhibits admitted in that case and arguments that he claims would have been made. (CP 492-93) But, as Mr. Wilson has conceded, the ownership of the tidelands abutting Parcel B was not at issue in the 2008 litigation. (CP 374) And his conclusions about what would have been argued are not facts because they do not amount to events, occurrences, or things that exist in reality. These statements therefore cannot be considered. *Grimwood v. University of Puget Sound*, 110 Wn.2d 355,359, 753 P.2d 517 (1988).

iii. The Bankruptcy Schedules of the Elder Mr. Radakovich.

The elder Mr. Radakovich filed for bankruptcy protection personally before Terra Firma conveyed the tidelands abutting Parcel B to Keystone. He listed Terra Firma on his schedule of assets but stated that the company had no value. (CP 88-89, 178-81, 211, 525-26) Plaintiffs submit this evidence to show, perhaps, that the elder Mr. Radakovich did not believe that Terra Firma still owned the Tidelands. But the elder Mr. Radakovich was not involved in the 2006 transaction.

iv. Alleged Statements in Meetings with Port Personnel.

The Port offered several declarations concerning a meeting attended by Port commissioners, Port staff, the Port's attorney, the

elder Mr. Radakovich, and John Van Vessem. During the meeting, the elder Mr. Radakovich was supposed to have made a comment to the effect that the tidelands abutting Parcel B had been sold to Mr. Wilson. (CP 210, 519-26) Mr. Van Vessem denies that the elder Mr. Radakovich made any such statement. (CP 291) Mr. Van Vessem's declaration therefore raises an issue of fact as to whether the comment was even made. For that reason, whatever the elder Mr. Radakovich said cannot support the grant of a summary judgment motion.

v. These Statements Are Extrinsic Evidence That Cannot Be Considered.

As was made clear in *Hollis v. Garwall*, *supra*, 137 Wn.2d at 695, and in *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc.*, *supra*, 168 Wn.App. at 70-71, extrinsic evidence cannot be considered vary the language of the legal description within the deed. As was stated, “. . . extrinsic evidence is to be used to illuminate what was written, not what was intended to be written.” *Id.* The statements made during negotiations or after the transaction was completed, if believed, would tend to show only what the plaintiffs claim was intended to be written — that the tidelands abutting Parcel B were to be conveyed to Mr. Wilson. They are in the same category as the association documents in *Newport Yacht Basin Association of*

*Condominium Owners v. Supreme Northwest, Inc., supra* — the documents that the Court stated should not have been considered by the trial court in making its decision in that case. The conclusion to be drawn from these statements — that the tidelands abutting Parcel B were conveyed — is at odds with the language of the legal description in the 2006 Deed because the deed contains no such language. Therefore, this evidence should not have been considered by the trial court and should not be considered by this Court on *de novo* review.

vi. Statements Made After the 2006 Transaction Are Otherwise Not Admissible.

In any event, these statements by the Messrs. Radakovich after the 2006 transaction was completed — including the bankruptcy schedules of the elder Mr. Radakovich — are not otherwise admissible. They are not admissions because neither of them or Terra Firma are parties to this suit. ER 801(d)(2). Terra Firma could be said to Keystone's predecessor in interest because Terra Firma granted title to the tidelands abutting Parcel B to Keystone. But a statement made by a party's predecessor in interest is not an admission. Teglund *Evidence Law & Practice* 5B Wash.Prac. §801.51.

The statements after the transaction amount to hearsay statements because they are offered to show the truth of the

matters asserted — that the tidelands adjacent to Parcel B were conveyed to Mr. Wilson or were to be conveyed to Mr. Wilson. ER 801(c). They do not qualify under the exception in ER 803(a)(3) as the existing mental condition of the elder or the younger Mr. Radakovich because the statements can only amount to the memory of each as to what was conveyed in the 2006 transaction. A statement of belief to prove the fact remembered is not within the exception. They are also not statements against interest because both the elder and the younger Mr. Radakovich have not been shown to be unavailable. ER 804(b). Neither is unavailable because either could be deposed. Tegland, *Evidence Law & Practice*, 5C Wash.Prac. §804.9.

Statements in the brief prepared by Terra Firma's attorney in the 2008 litigation fare no better. They are not admissions because Terra Firma is not a party to this case. The Port and Barlow Point seek to admit these out of court statements for the truth of the matters asserted. The statements are therefore hearsay. ER 801(c). Since the attorney did not participate in the 2006 transaction, his statements in the brief cannot be based on his own personal knowledge. They therefore cannot be admitted under any hearsay exception. Tegland *Evidence Law & Practice*, 5C Wash.Prac. §802.3; ER 602.

The elder Mr. Radakovich did not participate in the 2006 transaction. (CP 327-328, 333) Any out-of-court statement attributable to him is not admissible under any exception to the hearsay rule because it cannot be based on his personal knowledge. Tegland *Evidence Law & Practice, 5C Wash.Prac.* §802.3; ER 602. The Port attempted to qualify statements claimed to have been made by the elder Mr. Radakovich in meetings with the Port as excited utterances admissible under ER 802(a)(2). The statement cannot be admitted because the elder Mr. Radakovich did not participate in the 2006 transaction and statements are not admissible as excited utterances if the declarant does not have personal knowledge. Tegland *Evidence Law & Practice 5C Wash.Prac.* §803.06.

vii. Conclusion.

Statements made by Messrs. Radakovich after the 2006 transaction should not have been considered. First of all, they amount to extrinsic evidence limited to what the parties may have intended in that transaction. Secondly, they are inadmissible. Even if they are considered, they do not support a grant of summary judgment because the facts are disputed.

e. Mr. Wilson's "Duckboat" Business.

Mr. Wilson also claims that he needed the tidelands abutting Parcel B to launch what he refers to as "duckboats" as a business use; that he discussed these boats with the younger Mr. Radakovich; and that he used the tidelands abutting parcel B to launch the boats after the transaction. He has also presented certain mooring permits. (CP 87, 161-77, 491-92, 505-506) The younger Mr. Radakovich denies that these boats were ever mentioned during the discussions leading up to the transaction. (CP 333) This is consistent with the exhibits that Mr. Wilson has presented. A newspaper story states that he purchased the boat in 2004, repaired it, and began using it four years later, or in 2008. (CP 161-62) He claims to have had a fee schedule for his business. But this is dated "6-1-06" or after the property had already been conveyed. (CP 505)

Mr. Wilson's use of the tidelands for these boats thereafter is not helpful. It is consistent with his attempting some sort of adverse possession claim. He notes that he obtained mooring permits. These only recite that he owns the uplands, not the tidelands. (CP 169-74)

In short, this evidence is disputed. Even if taken into account, it does not show that the tidelands abutting Parcel B were or were not conveyed in the 2006 Deed. It amounts to the sort of extrinsic evidence that could possibly show what the parties intended. But, as noted

above, extrinsic evidence can only be admitted to illuminate what was written, not what was intended to be written. Therefore, it cannot be considered.

f. Mr. Wilson's Statements of What Result Is "Logical."

Mr. Wilson stated in his declaration that it would be "logical" for Terra Firma to have reserved an easement in the contract for sale or for the deed if it actually was going to retain the tidelands abutting Parcel B. (CP 83) That statement is not particularly helpful because the tidelands can be approached from river. (CP 346) It amounts to nothing more than his meaningless subjective and unexpressed intention or opinion. Those are simply not relevant. *Dwelley v. Chesterfield*, 88 Wn.2d 331, 335, 560 P.2d 353 (1977); *Northwest Motors, Ltd. v. James*, 118 Wn.2d 294, 302, 822 P.2d 280 (1992). It is also not a fact as required by CR 56(c). *Grimwood v. University of Puget Sound, Inc., supra*, 110 Wn.2d at 359 It should not have been considered by the trial court or by this Court for that reason. It should also not be taken into account because it is the sort of extrinsic evidence that relates only to what was intended to be written rather than illuminating what was written.

g. Payment of Taxes.

Mr. Wilson contends that he has paid real property taxes on the tidelands abutting Parcel B prior to the 2012 transaction. Did he?

That would only be true if the Cowlitz County Assessor considered the tidelands to be part of the tax lot that is described in Parcel B of the legal description to the 2006 Deed. This proposition is not within Mr. Wilson's knowledge unless someone in the Assessor's office said something to him about that issue. His statement is not admissible on the basis of a lack of knowledge. CR 56(c); ER 602. If his knowledge comes from conversations with Assessor's office personnel, it is inadmissible hearsay since it is offered for the truth of the matters asserted. ER 801(a), (c); ER 802.

In any event, the assertion is disputed. After Keystone acquired the tidelands, Cowlitz County created a tax parcel for those tidelands separate from Parcel B. (CP 290) That would suggest that the tidelands abutting Parcel B are not within the tax lot comprising Parcel B and that Mr. Wilson did not pay taxes on them. This assertion by Mr. Wilson will not support a summary judgment motion for that reason.

Finally, the Cowlitz County Assessor played no part in the 2006 transaction. The Assessor's actions can have no relationship to the meaning of the language used in the legal description to the 2006 Deed. Furthermore, the Assessor's actions can have no relationship to the intentions of the parties to the 2006 transaction. This extrinsic evidence should not be considered for these reasons.

h. Association between Keystone and the Elder Mr. Radakovich.

Mr. Wilson discusses his belief concerning the relationship between the elder Mr. Radakovich and Keystone in his declaration. (CP 89) Their relationship has no particular relevance here because it does not have anything to do with the interpretation of the 2006 Deed. ER 401 It should not be and should not have been considered for that reason.

i. Intentions of the Younger Mr. Radakovich.

Mr. Wilson's declaration includes statements about what he thinks the younger Mr. Radakovich would have done in certain situations. (CP 491) These are not facts since they do not set out an occurrence or something in existence. *Grimwood v. University of Puget Sound, Inc., supra*, 110 Wn.2d at 359. They should not have been considered and should not be considered.

j. Other Material in the Declaration of Norm Krehbiel.

In his declaration, the Port's Norm Krehbiel discusses negotiations between the Port and Barlow Point and also talks about what action would have been taken in the Radakovich bankruptcy. Finally, he analyzes what he considers to be the strength of the evidence in this case. (CP 210-213) His statements have no relevance to the interpretation of the legal description in the 2006 Deed and should not be or should not have

been considered. They are not facts since to the extent that they talk about what might have happened instead of what did happen. His discussion of the evidence in this case is hearsay if it is admitted for the truth of the matters asserted. ER 801(c)(2). It cannot be admitted for that reason. ER 802.

k. Conclusion.

The Port and Barlow Point have presented extrinsic evidence that may not be considered because it is offered to prove intentions independent of the 2006 Deed rather than to illuminate the words within it. Furthermore, no extrinsic evidence can be considered because the 2006 Deed is not ambiguous. The evidence is also inadmissible for other reasons. Therefore, this evidence should not be considered and should not have been considered by the trial court.

IV. The Deed History Rules Out an Interpretation of the 2006 Deed Advanced by the Port and Barlow Point.

The Port and Barlow Point may contend that the deed history of this property in general and the Exception Deeds in particular are extrinsic to the 2006 Deed. If that is so, the extrinsic evidence eliminates the interpretations given to the 2006 Deed by the Port and Barlow Point.

Mr. Woodruff interprets the phrase “and as conveyed in Parcel ‘J’ of (the 1984 Deed)” to refer to all tidelands described in Parcel “J” of the

1984 Deed. That same phrase was used in the description of five of the six Exception Deeds. If that phrase means what Mr. Woodruff says it means, then each of those five grantees received all of the tidelands described in Parcel “J” of the 1984 Deed, and International Paper Realty Corporation conveyed the same tidelands to multiple parties. The meaning given to the phrase by Mr. Woodruff also means that Terra Firma conveyed all the tidelands described in Parcel “J” of the 1984 Deed to Mr. Wilson even though those tidelands were not conveyed to it. These conclusions mean that the interpretation suggested by Mr. Woodruff is untenable.

Mr. Hampton interprets “and as conveyed in Parcel ‘J’ of (the 1984 Deed)” to refer to all tidelands that the grantor had at the time of the conveyance within Parcel “J.” That interpretation cannot be adopted because it would also mean that the tidelands had been conveyed multiple times. For example, International Paper Realty Corporation deeded certain uplands and adjacent tidelands to William and Doris Whiteaker on in a deed recorded May 5, 1986. The deed called out tidelands by use of the a phrase virtually identical that in the description of Parcel A in the 2006 deed — “together with all tidelands of the second class, situated in front of, adjacent to or abutting the above described uplands and as covered (rather than “conveyed”) in Parcel “J” of said deed, Volume 977, page 242 (fee no. 8400924042).” (CP 305-308) Under Mr. Hampton’s

interpretation of that language, the Whiteakers received all the tidelands International Realty Corporation then possessed. One week later, a deed from International Paper Realty Corporation to Marlin and Virginia Hendrickson was recorded for other uplands. The legal description in that deed referred to tidelands in the same way. (CP 321-24) Under Mr. Hampton's interpretation, the tidelands conveyed to the Hendricksons were also conveyed to the Whiteakers.

Mr. Hampton's interpretation of that key phrase also means that any interest that the Port and Barlow Point claim in the tidelands abutting both Parcel A and Parcel B is junior to that of the Whiteakers or their successors. At the time of the conveyance to the Whiteakers, International Paper Realty Corporation owned all the tidelands described in Parcel "J" of the 1984 Deed including those abutting both Parcel A and Parcel B as described in the 2006 Deed. Under Mr. Hampton's interpretation, all tidelands described in Parcel "J" were conveyed to the Whiteakers in the Exception Deed to them. The Exception Deed to the Whiteakers was recorded 1986. Their interest and that of their successors in the tidelands abutting both Parcel A and Parcel B is therefore senior to that of Terra Firma who took title in 1996; Mr. Wilson who took title in 2006; and the Port and Barlow Point who took title in 2012. RCW 65.08.070; Stoebuck & Weaver *Real Estate Transactions* 18 Wash.Prac. §14.8.

This discussion also shows the infirmity in relying on the extrinsic evidence adduced by the Port and Barlow Point. That evidence has to illuminate what was written in the deed. It has to demonstrate some sort of sensible interpretation of the language contained in the 2006 Deed. But as the deed history shows, there is no reasonable interpretation of the legal description in the 2006 deed other than that advanced by Mr. Gish because the other interpretations lead to the conclusion that tidelands in Parcel J were conveyed multiple times and that Terra Firma deeded land to Mr. Wilson that it did not own.

If the deed history is extrinsic evidence, it illuminates what has been written by eliminating the interpretations given by Mr. Woodruff and Mr. Hampton and advanced by the Port and Barlow Point.

V. Mr. Wilson Waived Any Right to Claim That He Received Anything Other Than What Is Described in the Legal Description of the 2006 Deed.

Waiver is the intentional relinquishment of a known right. It can occur by contract or through conduct. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954); *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 106, 297 P.3d 677 (2013). Mr. Wilson waived any right he had to receive the tidelands abutting Parcel B by his approval of the deed and his agreement in the escrow instructions to accept the legal

description in the deed, whatever land was described. No other conclusion is possible.

Mr. Wilson reasons from the Real Estate Purchase and Sale Agreement that the parties must have intended for him to receive the tidelands abutting Parcel B. The Real Estate Purchase and Sale Agreement recites that Mr. Wilson is to receive a minimum of twenty acres of land. (CP 97) Mr. Wilson and Mr. Hampton assert that the amount of land he did receive is only nine acres if the tidelands abutting Parcel B are not included. (CP 82, 192) First of all, that assertion is disputed and cannot be the basis of a grant of a motion for summary judgment. As Mr. Van Vessem stated in his declaration, the tidelands area purchased by Keystone consists of only 6.26 acres. (CP 290) That means Mr. Wilson didn't receive twenty acres even if the tidelands abutting Parcel B are included.

In any event, these rights were waived if they existed. Mr. Wilson read the legal description contained in the 2006 Deed. He signed the deed approving its form. He also signed escrow instructions directing Mr. Penta to rely on the legal description that Cowlitz County Title had provided. The Port and Barlow Point may claim that the right to receive twenty acres was a contingency to his duty to close based on language in the Purchase and Sale Agreement. But Mr. Wilson explicitly waived all contingencies.

(CP 452) By doing so, he agreed to accept whatever land was in the legal description to Parcel B whether it contained the tidelands or not and whether the entirety of the land conveyed to him contained twenty acres or not.

This factor reinforces the conclusion that any extrinsic evidence concerning what was agreed to be sold or what the parties believed to be sold is of no significance.

VI. The Doctrine of Merger by Deed Limits Interpretation of the Legal Description to Its Language.

The parties' discussions concerning the transaction referred to above and the Real Estate Purchase and Sale Agreement are both extrinsic to the 2006 Deed. The doctrine of merger by deed precludes their consideration.

The doctrine of merger by deed provides that execution, delivery and acceptance of a deed varying from the terms of the underlying purchase and sale agreement amends the contract so that the provisions of the deed fixes the parties' rights. It allows the parties to change the terms of their contract at any time prior to performance. The only exceptions are collateral contractual requirements that are not contained in or performed by the execution and delivery of the deed, that are not inconsistent with the deed, and that are independent on the obligation to convey. *Snyder v.*

*Roberts*, 45 Wn.2d 865, 871, 278 P.2d 248 (1955); *Ross v. Kirner*, 162 Wn.2d 493, 498, 172 P.3d 301 (2007); *South Kitsap Family Worship Center v. Weir*, 135 Wn.App. 900, 914, 146 P.3d 935 (2006).<sup>1</sup>

This doctrine applies here to limit interpretation to the language of the legal description contained within the 2006 Deed. The execution and delivery of the 2006 Deed includes exactly what was conveyed and is not independent of any duty to convey. Anything in the parties' contract or discussions requiring the conveyance of something other than what is described in the deed is necessarily inconsistent with the deed. That means that the language of the legal description controls over any inconsistent discussions the parties may have had or differing provisions of the purchase and sale agreement.

#### VII. The 2006 Deed Cannot Be Construed against Terra Firma.

Plaintiffs may argue that any ambiguity in the 2006 Deed must be construed against Terra Firma, the grantor. This rule is not favored and has been called a construction rule of last resort if nothing else will solve the problem. 4 *Tiffany Real Property* § 978. That rule applies only when the deed is ambiguous, and it is not here. *Kunkel v. Meridian Oil, Inc.*, 114 Wn.2d 896, 900, 792 P.2d 1254 (1990).

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<sup>1</sup> Consideration was not necessary for any modification of the Real Estate Purchase and Sale Agreement prior to closing because a real estate purchase and sale agreement is executory on both sides. *Becker v. Lagerquist*, 55 Wn.2d 425, 427, 348 P.2d 423 (1960).

More importantly, the rule does not apply when a purchase and sale agreement or deed is not actually prepared by the grantor. *Harris v. Ski Park Farms, Inc.*, 62 Wn.App. 371, 375-376, *affirmed* 120 Wn.2d 727, 844 P.2d 1006 (1993); *Ray v. King County*, 120 Wn.App. 564, 594, 86 P.3d 183 (2004). Mr. Penta prepared both the purchase and sale agreement and the deed. As the Purchase and Sale agreement states, Mr. Penta was representing Mr. Wilson in the transaction. (CP 468) He also functioned as escrow. He never represented Terra Firma in this transaction.

Plaintiffs cannot argue that Mr. Penta was really working for Terra Firma. Doing so would contradict that clear language of the Purchase and Sale Agreement. And the parol evidence rule will not allow such a result. *Hollis v. Garwall, supra*.

Since the 2006 Deed is not ambiguous, the rule construing a deed against the grantor is not applicable. It also does not apply because the deed was not prepared by or on behalf of the grantor, Terra Firma.

VIII. The Tidelands Abutting Parcel B Are Not Presumed to Be Included within the Description of Parcel B in the 2006 Deed.

The Port and Barlow Point may claim that the 2006 Deed must include the tidelands because of the presumption discussed in *Wardell v. Commercial Waterway District #1*, 80 Wash. 495, 141 P. 1045 (1914); *Knutson v. Reichel*, 10 Wn.App. 293, 518 P.2d 233 (1973); and *Bernhard*

*v. Reischman*, 33 Wn.App. 569, 574-575, 658 P.2d 2 (1983). The rule set out in those cases is:

. . .there seems to be no reason why a conveyance by an upland proprietor of land, describing it as bound by a certain stream, in the absence of a reservation, should not convey all the land which such proprietor owns, even to the thread of the stream, if he should own so far. . .

*Wardell v. Commercial Waterway District #1, supra*, 80 Wash. at 499

Generally, a call in a deed to a non-navigable river means to the center (thread) of the stream. . .there exists, moreover, a presumption that when a private individual grants property belonging to him and bounds it generally upon a natural stream, he does not intend to reserve any land between the upland and the stream, and the grant will carry title to the grantee so far as the grantor owns unless the shore land or bed of the stream be expressly reserved by the grant. . .Furthermore, as to a deed which employs a call to a river, though the thread of the river is not specifically described as a boundary, it can be said in light of the above presumption that the shorelines and bed are appurtenant to this grant. . .

. . .the cumulative effect of these principals is this: a deed which employs a river as one of the calls in its description will be construed against the grantor, and if he owns to the water he will be deemed not to have cutoff the grantee from the water absent an express reservation.

*Knutson v. Reichel, supra*, 10 Wn.App. at 295-296; accord, *Bernhard v.*

*Reischman, supra*, 33 Wn.App. at 574. In each of these cases, the legal description in the deed included a call in the boundary to a named river or slough. The court in each case held that the reference to the body of water was presumed to grant title to the land between the uplands and the

midpoint or thread of the stream in the absence of an express reservation. This presumption has also been applied when a deed contained a boundary defined as the meander line, or mean high tide line, of the Pacific Ocean. *Vavrek v. Parks*, 6 Wn.App. 684, 495 P.2d 1051 (1972).

The legal description of Parcel B of the 2006 Deed does not call the Columbia River as one of the boundaries to that parcel. It also does not describe any other body of water. That means that presumption set out in these cases is not applicable here.

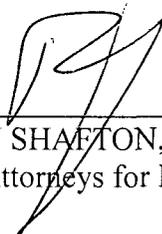
In any event, the rule stated is a presumption which can be overcome. In this case, the unambiguous language of the deed eliminates the effect of the presumption. The deed specifically grants tidelands abutting Parcel A but makes no mention of tidelands abutting Parcel B. The juxtaposition of this language shows an intention to convey tidelands adjacent to Parcel A while reserving the tidelands adjacent to Parcel B.

#### CONCLUSION

The description of Parcel B in the 2006 Deed is not ambiguous. It does not include the tidelands abutting that parcel. Therefore, Terra Firma did not convey those tidelands to Mr. Wilson in 2006 but did deed them to Keystone in 2012. Title to those tidelands should therefore be quieted in Keystone. The trial court erred by quieting title to those tidelands in

Barlow Point and the Port. Its decision should be reversed and remanded with direction to quiet title to the tidelands abutting Parcel B in Keystone. At very least, the trial court's decision should be reversed because an issue of fact has been presented.

RESPECTFULLY SUBMITTED this 23 day of June, 2014.

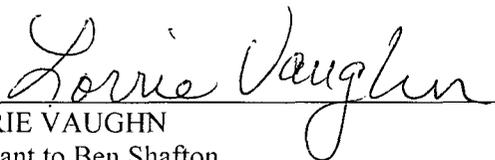
  
\_\_\_\_\_  
BEN SHAFTON, WSB #6280  
Of Attorneys for Keystone

**CERTIFICATE OF SERVICE**

THE UNDERSIGNED, states as follows: I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action. On the 23<sup>rd</sup> day of June, 2014, I caused the document to which this Certificate is affixed to be mailed as follows:

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