IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JON SCHLEIGER, Respondent, v. ALBERT YAUNKUNKS, Appellant.	No. 38955-0-II UNPUBLISHED OPINION

Van Deren, C.J. — Albert Yaunkunks appeals the trial court ruling that he did not have an easement over a portion of a cul-de-sac lying within an adjoining lot. He argues that, when the common grantors amended the boundary between the lots, they granted an express easement to benefit Yaunkunks's lot and that he properly relied on the recorded documents when he purchased the lot. We reverse and remand.

FACTS

On April 19, 1996, Allen and Beth Templet recorded a plat (original plat) for the Mountain View Large Lot Subdivision that consisted of five lots. In the original plat, the common boundary between lots 1 and 2 extended along the north 87° 42' 31" west line for 627.83 feet, continued along the north 15° 37' 2" west line for 227.35 feet, and continued as lot 2's western boundary along a line enclosing Templet Drive. Templet Drive connected to the

highway and was built to serve both lots 1 and 2 as a road for normal ingress and egress from the highway to their respective properties. The lot owners could access their respective lots from any point on Templet Drive. Templet Drive ended in a county approved, circular, cul-de-sac with a 60 foot radius that lay wholly within lot 2. Following the county requirements, the cul-de-sac was intended to allow access to "emergency vehicle[s]" such as fire engines. Report of Proceedings (RP) at 40

In 1999, when the Templets owned both lots 1 and 2, Jon Schleiger expressed his interest in purchasing lot 1 from the Templets but he wanted to amend the existing common boundary between lots 1 and 2, which ended in a cul-de-sac. Schleiger hired a licensed surveyor, Arnold Wood, to prepare an amended survey of the common boundary. Wood surveyed the area and, in Schleiger's presence, placed a yellow stake to mark the center of the circular cul-de-sac.

Wood drew the amended common boundary on the original plat, but not on a separate plat map. The Templets were satisfied with the amended plat (second plat) and "signed the relevant papers." RP at 22. On October 4, 1999, Wood recorded the second plat, appearing in pages 98-99 of Large Lots, volume 1. According to the Jefferson county administrator, who accepted the second plat for filing, Wood's amending procedure comported with existing county procedures.

The second plat shifted the boundary between lots 1 and 2 so that the boundary ran on the north 45° 40' 28" east line for 717.84 feet into Templet Drive and connected to the periphery of Templet Drive through the south 86° 42' 58" east line for 60 feet and connected to the original line enclosing Templet Drive. After the amendment, the cul-de-sac at the end of Templet Drive, which provided access to lots 1 and 2, was situated approximately one-third on lot 1, with the

remainder on lot 2.

In October 1999, Karen Askins, Schleiger's sister, purchased lot 1 from the Templets. On September 24, 2003, Askins conveyed lot 1 to Schleiger by a quit claim deed that Schleiger prepared. The quit claim deed stated, "Lot 1 . . . as per plat recorded in volume 1, of Large Lots, pages 74 and 75, and amended in volume 1 of Large Lots, pages 98 and 99." Ex. 7.

In order to access his residence, Schleiger built a fence and driveway on a slope, thus connecting to the northern portion of Templet Drive, but also extending into lot 1's portion of the newly platted cul-de-sac.[1] At trial, Allen Templet could not recall if he visited the property during the time Schleiger made these improvements. Also, the Templets did not object to Schleiger's improvements, and Templet stated that he did not know who built the fence in the cul-de-sac.

The Templets conveyed lot 2 to Albert Yaunkunks by statutory warranty deed on March 3, 2005. The deed stated the following: "LOT 2 . . . AS PER PLAT RECORDED IN VOLUME 1 OF LARGE LOTS, PAGES 74 AND 75, AND AMENDED IN VOLUME 1 OF LARGE LOTS, PAGES 98 AND 99, RECORDS OF JEFFERSON COUNTY." Ex. 8.

Schleiger claimed that Yaunkunks "expressed his intent" to gate the cul-de-sac. Clerk's Papers (CP) at 4. Yaunkunks placed a large storage container and, at various times, parked vehicles within the cul-de-sac on lot 2, thus blocking Schleiger's access to his barn and livestock from the cul-de-sac, as well as access to the driveway to his home.[2]

When the Department of Natural Resources reviewed the county's recorded documents, it

[1] Schleiger initially stated that the fence did not lie within the cul-de-sac, but he later conceded that the fence area does lie within the cul-de-sac.

[2] But Schleiger later admitted that he "always had access to [his] home." Supp. RP at 48.

discovered that Wood had failed to comply with the revised procedure for amending plats[3] when he filed the second plat. The Board of Licensing Division for Professional Engineers and Land Surveyors required that Wood file a new, separate, survey showing the amendment to the original plat's lot lines. On July 5, 2005, Wood recorded a new survey of the amended plat (third plat). The third plat indicated the same boundary line as the second plat. Wood did not send a copy of the third plat to Yaunkunks.

Schleiger sued Yaunkunks to quiet his title in lot 1 "against all encroachments or claims of [Yaunkunks] other than the easement for ingress and egress and utilities"[4] and to enjoin Yaunkunks from obstructing Schleiger's access to his property from any portion of Templet Drive. CP at 5. Yaunkunks counterclaimed to quiet title of lot 2 against Schleiger, arguing that Schleiger trespassed on lot 2 and encroached on Yaunkunks's easement in the cul-de-sac.

The trial court orally ruled that, if Yaunkunks "open[ed] up that cul-de-sac as it's platted[, it] would not bother Mr. Schleiger's ingress and egress to his home." CP at 110. Schleiger then filed a motion for reconsideration, which the trial court granted some months later, finding that its oral ruling was in error and that "amending the Plat did not create an easement over the portion of the cul de sac on Lot 1 for the benefit of Lot 2" because "[t]here is no benefit to Lot 2 from the cul de sac." CP at 140.

Yaunkunks appeals.

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[3] This procedure is set forth in relevant part in WAC 332-130-050(3)(b): "Alterations, amendments, changes, or corrections to a previously filed or recorded map, plat, or plan shall only be made by filing or recording a new document."

[4] But in his motion for reconsideration, Schleiger argued that his title "should be quieted against any claim of [Yaunkunks] as to any portion of Lot 1" and that the Templets intended to "terminate any easement rights upon Lot 1." CP at 101.

ANALYSIS

I. Benefit

Interpreting an easement is a mixed question of law and fact. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). "What the original parties [to an easement] intended is a question of fact and the legal consequence of that intent is a question of law." *Sunnyside*, 149 Wn.2d at 880. We review findings of fact under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. *Sunnyside*, 149 Wn.2d at 879. If this standard is satisfied, we will not substitute our judgment for that of the trial court. *Sunnyside*, 149 Wn.2d at 879-80. We review questions of law de novo. *Sunnyside*, 149 Wn.2d at 880.

The trial court ruled that "amending the Plat did not create an easement over the portion of the cul de sac on Lot 1 for the benefit of Lot 2" because "[t]here is no benefit to Lot 2 from the cul de sac." CP at 140. Yaunkunks argues that Templet's testimony establishes that the cul-de-sac was intended to benefit lot 2. We agree.

"An easement is a use interest, and to exist as an appurtenance to land, must serve some beneficial use." *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 853, 351 P.2d 520 (1960). In *Coast Storage*, the court held that a party had no benefit from a recorded easement in a road that merely ends in the middle of the other party's property and "does not lead anywhere, truly a dead-end roadway." 55 Wn.2d at 853.

Here, Allen Templet testified that he intended that Templet Drive, including its cul-de-sac, serve both lots 1 and 2. He also stated that, following the county requirements, he intended the cul-de-sac to allow access for "emergency vehicle[s]" such as fire engines. RP at 40. Thus, we

hold that the trial court erred in ruling that lot 2 was not an intended beneficiary of the cul–de-sac easement on lot 1, because the original grantors intended that the platted cul-de-sac benefit lot 2 by allowing adequate access to emergency vehicles.

II. Abandonment

Schleiger concedes that "[s]tanding alone, the conveyancing documents . . . appear to grant an express easement in favor of Lot 2 against the portion of Lot 1 depicted as a cul de sac drawn north of the line." Br. of Resp't at 4. Thus, the deed and the second plat[5] both create an

[5] Because Wood did not record the second plat in compliance with the requirements of WAC 332-130-050(3)(b), we briefly consider the question whether we may consider a noncompliant plat as evidence of the original parties' intent. *See Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981).

No authority supports dismissing as evidence of such intent a plat that was authorized by the county but improperly recorded under chapter 332-130 WAC. In *McPhaden v. Scott*, we addressed a similar, but not identical question, and held that a second map recorded with the county auditor one year after the original plat was recorded did not create an express easement or amend the original plat because it: (1) did not constitute a "deed" under RCW 64.04.010, (2) was not signed or acknowledged under RCW 64.04.020, and (3) was not "submitted for approval to the legislative planning authority" under former RCW 58.16.020 (1951) (repealed by Laws of 1969, 1st Ex. Sess., ch. 271, § 36). 95 Wn. App. 431, 435-36, 975 P.2d 1033 (1999).

In contrast, (1) Yaunkunks's deed, signed by both Yaunkunks and the Templets, referred to the second plat, (2) the second plat was submitted to the Jefferson county board of commissioners in a "subdivision plat amendment petition" signed by Beth Templet, (3) the county authorized the Templet petition, and (4) the county represented that Wood filed the second plat in compliance with existing county procedures. Ex. 3 (emphasis omitted). Here, the second plat was only defective to the extent that it was not recorded on a separate sheet of paper. Neither party challenges the second plat as the controlling plat. The trial court seems to consider the second plat and the third plat interchangeably when it uses the term "Amended Plat." CP at 140. Thus, for purposes of determining the parties' intent behind the easement in question, we hold that the second plat is the relevant plat.

express easement[6] in lot 1's portion of the cul-de-sac for the benefit of lot 2.

But Schleiger now argues that the "Templet[s] impliedly agreed or acquiesced or waived or abandoned any easement rights" on lot 1 when they sold it to Askin, who later granted it to Schleiger. Br. of Resp't at 1. Yaunkunks argues that the Templets did not abandon the easement within lot 1's portion of the cul-de-sac. The trial court did not address whether the Templets abandoned the easement.[7] We agree with Yaunkunks.

An easement owner "may anticipate future needs" and present nonuse of the easement does not by itself constitute abandonment. *Neitzel v. Spokane Int'l Ry. Co.*, 80 Wash. 30, 34, 141 P. 186 (1914). In order to constitute abandonment, the nonuse "'must be accompanied with the express or implied intention of abandonment.'" *Heg v. Alldredge*, 157 Wn.2d 154, 161, 137 P.3d 9 (2006) (internal quotation marks omitted) (quoting *Netherlands Am. Mortgage Bank v. E. Ry. & Lumber Co.*, 142 Wash. 204, 210, 252 P. 916 (1927)). Acts evidencing abandonment must be "unequivocal and decisive and inconsistent with the continued existence of the easement." *Heg*, 157 Wn.2d at 161. In *Heg*, the court held that "mere nonuse of a recorded easement coupled with the use of alternate routes of ingress and egress does not, by itself, support a finding of abandonment." 157 Wn.2d at 156.

Here, there is no evidence of either "nonuse" of the cul-de-sac or an "alternate route[ ]" to

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[6] When a deed refers to a map of the conveyed land, we construe the map and the deed together and the map becomes, "'in legal effect, a part of the description.'" *Saterlie v. Lineberry*, 92 Wn. App. 624, 627, 962 P.2d 863 (1998) (quoting *Moore v. Clarke*, 157 Wash. 573, 581, 289 P. 520 (1930)). Yaunkunks's deed states that it is "SUBJECT TO: . . . EASEMENT[ ] UNDER AUDITOR'S FILE NO.[ ] 325477." Ex. 8. Yaunkunks's deed also refers to the second plat. The second plat indicates that Templet Drive is an "EASEMENT FOR INGRESS, EGRESS AND UTILITY PURPOSES. (AUDITOR'S FILE NO. 325477)." Ex. 5.

[7] Schleiger raised this issue before the trial court during his motion for reconsideration.

effect the purpose of the cul-de-sac. The cul-de-sac was prepared in accordance with county requirements to allow access for "emergency vehicle[s]" for either lot 1 or lot 2.[8] RP at 40. Even after the Templets amended the common boundary and sold lot 1 to Askin, who later granted it to Schleiger, the future need for emergency vehicles to access the cul-de-sac for the benefit of both lots remained, even though no emergency situation has occurred to date. *See Neitzel*, 80 Wash. at 34. Further, neither the plat nor the testimony suggests that there is an "alternate route[ ]" that emergency vehicles could use to access lots 1 and 2. *Heg*, 157 Wn.2d at 156.

The only evidence Schleiger presents to support his argument that the Templets abandoned the easement is that they did not object to Schleiger's construction of his driveway and a fence on lot 1's portion of the cul-de-sac.[9] But Templet testified that he was not certain that he

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[8] We note that exhibits 43-D, 43-E, 43-F, and 43-G indicate that the easement is currently not in a state to accommodate large emergency vehicles. As Schleiger comments, the cul-de-sac is located on a slope which has not been flattened out. On remand, there may be an issue about whether Schleiger was merely using the easement in a manner "that does not interfere with the proper enjoyment of the easement at this time." *Thompson v. Smith*, 59 Wn.2d 397, 407-08, 367 P.2d 798 (1962).

[9] Schleiger also mentions that the Templets knew that Schleiger intended to amend the common boundary to extinguish any easement benefitting lot 2. Even if this evidence were accurate, such evidence goes to the question of the Templets' intent at the time of the amendment, not abandonment of the easement after the amendment. Indeed, Schleiger has already admitted that the "conveyancing documents . . . grant an express easement in favor of Lot 2 against that portion of Lot 1 depicted as a cul de sac drawn north of the line." Br. of Resp't at 4. If the plain language is unambiguous, as Schleiger admits, we do not consider extrinsic evidence. *City of Seattle v. Nazarenus*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962). Accordingly, we do not consider any other evidence of the Templets' intent at the time of the plat amendment.

Further, Schleiger mentions his own confusion about where the common boundary lies and that he had no incentive to grant an easement on his property to the Templets. But he does not cite to, and we do not find, any authority to support the proposition that a servient party's confusion about and motivations behind extinguishing an easement are, without more, evidence of the dominant estate's abandonment of that easement. We also note that Schleiger now pleads confusion about the amendment, when he requested and commissioned that same amendment and was present on the lot at the time the amending survey was conducted.

visited the property during the time that Schleiger made these improvements. Templet also stated that he did not know who built the fence in the cul-de-sac. Templet's testimony about his lack of knowledge of Schleiger's improvements does not constitute the "unequivocal and decisive" act that evidenced abandonment. *Heg*, 157 Wn.2d at 161. Accordingly, we hold that the Templets did not abandon the easement benefitting lot 2 within lot 1's portion of the cul-de-sac.

III. Estoppel

Schleiger further contends that Yaunkunks, as the subsequent purchaser of lot 2, is estopped from claiming the easement rights that the Templets abandoned. Because we hold that the Templets did not abandon lot 2's easement rights, we need not consider this argument.[10]

Schleiger also argues that Yaunkunks is estopped because Yaunkunks "took title [from the Templets] with notice of sufficient facts to put him on inquiry" that an easement did not exist.[11] Br. of Resp't at 1. Yaunkunks argues that he properly relied on the recorded plats in concluding that lot 2 benefited from an easement on lot 1's portion of the cul-de-sac. We agree with Yaunkunks.

Equitable estoppel arises when

> a person with actual or constructive knowledge of facts induces another, by his words or conduct, to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice.

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[10] In any event, this argument fails because our Supreme Court has held that the dominant estate holder cannot be estopped from enforcing his easement rights based only on the conduct of his predecessors in interest. *See Heg*, 157 Wn.2d at 166.

[11] In his reply to defendant's objection to his motion for reconsideration, Schleiger raised this argument briefly before the trial court when he noted that "the improvements were in place and conspicuous when [Yaunkunks] purchased" lot 2 and that "[a]n agreement can be implied from the actions of the interested parties." CP at 136-37.

Huff v. Nw. Cities Gas Co. v. N. Pac. Ry. Co., 38 Wn.2d 103, 114, 228 P.2d 121 (1951). The burden of proving each element of equitable estoppel is on the party seeking to invoke the doctrine. *Colonial Imps., Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 734, 853 P.2d 913 (1993). Because courts do not favor equitable estoppel, *Colonial Imps.*, 121 Wn.2d at 734, we require "very clear and cogent evidence to estop an owner out of a legal title to real property." *Finley v. Finley*, 43 Wn.2d 755, 765, 264 P.2d 246 (1953). The evidence must sufficiently persuade a trier of fact to believe that the fact in issue is highly probable. *Colonial Imps.*, 121 Wn.2d at 734-35.

The inquiry rule imputes to a real estate purchaser "notice of all facts which reasonable inquiry would disclose." *Diimmel v. Morse*, 36 Wn.2d 344, 348, 218 P.2d 334 (1950). It does not apply merely because diligent inquiry would have led to a discovery of pertinent facts outside the public record. *Paganelli v. Swendsen*, 50 Wn.2d 304, 307-08, 311 P.2d 676 (1957). Rather, it applies only when a purchaser has a duty of inquiry, which arises when a purchaser has "'information, from whatever source derived, which would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry.'" *Paganelli*, 50 Wn.2d at 308 (internal quotation marks omitted) (quoting *Daly v. Rizzutto*, 59 Wash. 62, 65, 109 P. 276 (1910)). A purchaser may rely on the record title even when there are improvements by another party on the property. *Paganelli*, 50 Wn.2d at 309 (a fruit stand and blacktop paving constructed on the property did not give notice sufficient to trigger a duty to inquire). The burden of showing a duty of inquiry rests on the party asserting it. *Paganelli*, 50 Wn.2d at 308.

Schleiger argues that Yaunkunks had notice that the recorded documents did not comport with the "'circumstances of the land'" because: (1) Schleiger informed Yaunkunks of the "'incorrect position'" of the cul-de-sac in relation to the boundary, (2) Yaunkunks should have

observed that it would be "'physically impossible'" to construct an easement in the platted area, and (3) Yaunkunks should have observed that Schleiger's driveway suggested that there was no cul-de-sac in the platted area. Br. of Resp't at 9-10.

But Schleiger informed Yaunkunks of the "'incorrect position'" after Yaunkunks had purchased the property, and notice inquiry concerns the visible state of things during a proposal of sale, not after the sale was concluded. *See Paganelli*, 50 Wn.2d at 308. Moreover, the county had approved the construction of the easement in the platted area and Yaunkunks cannot be expected to have superior knowledge about the possibility of constructing an easement in an approved area. Further, the presence of Schleiger's driveway did not trigger a duty to inquire. *See Paganelli*, 50 Wn.2d at 309.

Thus, Yaunkunks properly relied on the recorded documents, including the second plat that Schleiger commissioned, in concluding that there was an express easement granted to benefit lot 2. Because we hold that Yaunkunks was under no duty to inquire, we also hold that he was not estopped from now claiming the benefit of the easement. *See Kalnoski v. Carlisle Lumber Co.*, 17 Wn.2d 662, 668, 137 P.2d 109 (1943); *see also Roggow v. Hagerty*, 27 Wn. App. 908, 912, 621 P.2d 195 (1980).

Finally, Schleiger argues that, in the alternative, we "should consider the enormous disparity in the relative hardships between [the parties'] interests" and consider equitable remedies. Br. of Resp't at 15. We do not address this issue because it was not before the trial court, the trial court did not consider any evidence of hardship to the parties, and Schleiger fails to provide anything other than his naked assertion without explaining the alleged disparity on appeal.

We reverse and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Hunt, J.

Penoyar, J.