My statements describing wrongdoing or criminal actions here are a First Amendment expression of my opinion.

Note from John Rasmussen:

The following document is the published opinion: ***Ray v. King County* (2004).**

There is no question in my mind that this "legal" opinion is a criminal act from the bench by Washington State Court of Appeals Division One Judges Ronald E. Cox and Ann Schindler

Proof on their dishonesty is understood by reading one of the versions of this opinion containing either my brief or detailed comments.

Use the following links to read this opinion with my additional comments.

View Ray v. King County (2004) with my brief comments throughout.

View Ray v. King County (2004) with my detailed comments throughout.

In this opinion, Cox and Schindler denied the Ray's Constitutional right of due process by illegally allowing summary judgment. They misapplied common law, refused to acknowledge and apply common law binding precedent, and used undocumented contrived material facts. Perhaps their most outrageous act was changing the granting words in the Hilchkanum deed and then construed the deed using their substituted language. It's difficult to find any honesty in the critical portions of this opinion.

Cox and Schindler repeated the dishonest tactics used by Ninth Circuit judges in King County v. Rasmussen. This suggests racketeering or collusion. Use the following link to understand these dishonest tactics.

Understand the common dishonest tactics used by the Hilchkanum judges.

The dishonest award of the Ray's land to King County by Judges Cox and Schindler covers-up the East Lake Sammamish federal tax fraud scheme.

Understand the East Lake Sammamish federal tax fraud scheme.

My statements describing wrongdoing or criminal actions here are a First Amendment expression of my opinion.

Court of Appeals Division I
State of Washington

Docket Number: **50105-4-I**

GERALD L. RAY and KATHRYN B. RAY, husband and wife**,** Appellants
v.
King County, a political subdivision, Respondent

File Date: 03/15/2004

SOURCE OF APPEAL

Appeal from Superior Court of King County
Docket No: 00-2-14946-8
Judgment or order under review
Date filed: 08/24/2001
Judge signing: Hon. Carol Schapira

JUDGES

Authored by Ronald E. Cox
Concurring: Ann Schindler
Dissenting: William W. Baker

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COX, A.C.J. -This quiet title action presents two questions. First, did an 1887 deed to a railroad convey fee title or an easement? Second, did events subsequent to that conveyance divest the railroad of the interest conveyed by that deed?

We hold that Bill Hilchkanum and Mary Hilchkanum, grantors, conveyed fee title by deed dated May 9, 1887 to the Seattle Lake Shore and Eastern Railway ('the Railway'). We also hold that the location of the railroad tracks, as constructed, controls as a monument. Although the legal description of the location of that monument varies from the legal description of the right of way in the May 9, 1887 deed, there was no abandonment that divested the Railway of its fee title interest in the disputed strip. Accordingly, we affirm the summary judgment quieting title in King County, a successor in interest to the Railway.

The facts are largely undisputed.1 Gerald and Kathryn Ray own lakefront property near the eastern shore of Lake Sammamish in King County, Washington. The Rays are successors in interest to property formerly owned by Bill Hilchkanum and Mary Hilchkanum, husband and wife. The Rays acquired their interest by virtue of conveyances following the Hilchkanums' May 9, 1887 deed that is the focus of our inquiry in this case.2 Likewise, King County is a successor in interest to the estate the Hilchkanums conveyed to the Railway by that deed.3

The basic dispute between the parties centers on their conflicting claims of ownership of the 100-foot-wide strip of land that the Hilchkanums conveyed in their May 9, 1887 deed to the Railway. The strip is adjacent to the property on which the Rays reside. This strip of land is one segment of the East Lake Sammamish ('ELS') Corridor,4 which runs near the eastern shore of Lake Sammamish. For most of the last century, the ELS Corridor was known as 'Northern Pacific Railroad Right of Way' because Northern Pacific acquired ownership from the Seattle Lake Shore and Eastern Railway.5 Burlington Northern and The Land Conservancy of Seattle were successors in interest to Northern Pacific to the strip and predecessors in interest to King County for that property.6 In 1998, the County purchased roughly 11 miles of the ELS Corridor from The Land Conservancy. The purchase included the property the Hilchkanums conveyed in their May 1887 deed.7

The Rays argue that the May 9, 1887 deed conveyed an easement only to the Railway, not fee title. They also claim that the subsequent construction of the railway line in early 1888 in a location that varied from the legal description of the right of way set forth in the May 1887 deed constituted an abandonment of the estate conveyed in the deed. For these reasons, they claim title to the strip of land vests in them. King County disputes the Rays' claim to ownership of the strip. The County maintains that the May 9, 1887 deed, properly construed, conveyed to the Railway an estate in fee title to the strip of land. The County further maintains that subsequent construction of the railway line between January and April 18888 established a monument as the centerline of the 100-foot strip described in the deed. Finally, the County argues that it acquired fee title to that 100-foot wide strip of land as a successor in interest to the Railway, the grantee under the May 1887 deed.

The Rays commenced this quiet title action to enforce their ownership claim, and King County counterclaimed to enforce its position. On cross motions for summary judgment, the trial court quieted title in the County, confirming that the May 1887 deed conveyed fee title, not an easement. The trial court further decided that the railroad line, as built, established the monument defining the property the original grantors intended to convey by virtue of the May 1887 deed.

The Rays appeal.

CONVEYANCE: FEE SIMPLE TITLE OR EASEMENT?

Our review of the grant of summary judgment below is governed by the usual standards: whether there are genuine issues of material fact and the moving party is entitled to judgment as a matter of law.9 A party seeking to quiet title 'must succeed on the strength of his or her own title, not on the weakness of the other party's title.'10 Where a deed conveys a right of way to a railroad, the conveyance may be in fee simple or may be an easement only.11 The interpretation of such a deed is a mixed question of fact and law.12 It is a factual question to determine the intent of the parties.13 Courts must then apply the rules of law to determine the legal consequences of that intent.14 Whether a conveyance is one of fee title or an easement is a conclusion of law as to the effect of a deed.15 The Hilchkanum deed is entirely handwritten, and states in relevant part:

> Bill Hilchkanum and wife)
> to) Right of Way Deed
> S.L.S. and E.R.Y. Co.)
>
> In consideration of the benefits and advantages to accrue to us from the location construction and operation of the Seattle Lake Shore and Eastern Railway in the County of King, in Washington territory, we do hereby donate grant and convey unto said Seattle Lake Shore and Eastern Railway Company a right of way one hundred (100) feet in width through our lands in said County described as follows to wit
>
> Lots one (1) two (2) and three (3) in section six (6) township 24 North of range six (6) East.
>
> Such right of way strip to be fifty (50) feet in width on each side of the center line of the railway track as located across our said lands by the Engineer of said railway company which location is described as follows to-wit.
>
> Commencing at a point 410 feet West from North East corner of section six (6) township 24 N R 6 East and running thence on a one (1) degree curve to the left for 753 3/10 feet thence South 16 degrees and 34 minutes West 774 2/10 feet thence with a 3 degree curve to the right for 700 feet thence with an 8 degree curve to the right for 260 4/10 feet thence South 58 degrees and 24 minutes West 259 6/10 feet thence with an 8 curve to the left for 564 4/10 feet thence South 13 15' W 341 4/10 feet thence with 6 curve to the right for 383 3/10 feet thence S 36

15 W 150 feet to South boundary of lot 3 of said Sec 6 which point is 1320 feet North and 2170 feet west from SE corner of said Sec 6

And the said Seattle Lake Shore and Eastern Railway Company shall have the right to go upon the land adjacent to said line for a distance of two hundred (200) feet on each side thereof and cut down all trees dangerous to the operation of said road.

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.

In witness whereof the parties of the first part have hereunto put their hands and seals this 9th day of May AD 1887

Signed Sealed and delivered

in presence of	Bill (his X mark) Hilchkanum =seal=
BJ Tallman	
DJ Denny	Mary (her X mark) Hilchkanum =seal= {16}

In Brown v. State, our supreme court most recently articulated the principles governing resolution of the mixed questions of fact and law before us. There, the court resolved a dispute between property owners abutting the railroad right of way, who claimed reversionary interests in it, and the State, which purchased the right of way from a successor in interest to the original grantees of the strip under some 37 deeds. The deeds, which were dated between 1906 and 1910,17 were on preprinted forms with blank lines containing handwritten descriptions of the specific properties conveyed.18 The court ultimately held that the deeds conveyed fee simple title because they were 'in statutory warranty form, expressly convey fee simple title, and contain no express or clear limitation or qualification otherwise.'19

The court began its analysis by noting that the decisions dealing with conveyancing of rights of way to railroads in various jurisdictions 'are in considerable disarray' and 'turn on a case-by-case examination of each deed.' 20 In Washington, the general rule is that when construing a deed, 'the intent of the parties is of paramount importance and the court's duty to ascertain and enforce.'21 The court then identified the following factors for determining intent: (1) whether the deed conveyed a strip of land, and did not contain additional language relating to the use or purpose to which the land was to be put, or in other ways limiting the estate conveyed; (2) whether the deed conveyed a strip of land and limited its use to a specific purpose; (3) whether the deed conveyed a right of way over a tract of land, rather than a strip thereof; (4) whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land; (5) whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor; (6) whether the consideration expressed was substantial or nominal; and (7) whether the conveyance did or did not contain a habendum clause, and many other considerations suggested by the language of the particular deed. 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.{22}

The court also noted the special significance that has been accorded the term 'right of way' in Washington deeds: In Roeder, for example, one of the deeds provided, in part, the grantor: 'conveys and warrants unto Bellingham and Northern Railway Company ... for all railroad and other right of way purposes, certain tracts and parcels of land....' Recognizing a railroad can hold rights of way in fee simple or as easements, we held the deed granted an easement based on the specifically declared purpose that the grant was a right of way for railroad purposes, and there was no persuasive evidence of intent to the contrary. We reached the same result in Morsbach v. Thurston County, 152 Wash. 562, 564, 278 P. 686 (1929) (deed granted 'the right-of-way for the construction of said company's railroad in and over ...'); Swan, 37 Wn.2d at 534 (granted property 'for the purpose of a Railroad right-of-way ...'); Veach, 92 Wn.2d at 572 (granted '{a} right-of-way one hundred feet wide ...'). See also Reichenbach v. Washington Short Line Ry. Co., 10 Wash. 357, 358, 38 P. 1126 (1894) ('so long as the same shall be used for the operation of a railroad' construed as granting easement); Pacific Iron Works v. Bryant Lumber & Shingle Mill Co., 60 Wash. 502, 505, 111 P. 578 (1910) (deed providing 'to have and to hold the said premises ... for railway purposes, but if it should cease to be used for a railway the said premises shall revert to said grantors' grants easement not determinable fee); King County v. Squire Inv. Co., 59 Wn. App. 888, 890, 801 P.2d 1022 (1990) ('grant and convey ... a right-of- way.... To Have and to Hold ... so long as said land is used as a right-of- way ...' grants easement), review denied, 116 Wn.2d 1021, 811 P.2d 219 (1991). {23}

We begin our analysis of the Hilchkanum deed by determining its form. In Brown, the court emphasized the grantors' use of the statutory warranty form of deed.24 Where such a statutory deed is used and the granting clause conveyed a definite strip of land, the court will conclude that the grantor intended to convey fee simple title unless additional language in the deed clearly and expressly showed otherwise.25

At the time of the May 9, 1887 conveyance, there were three statutory forms of deed: warranty, bargain and sale, and quit claim deed.26 Comparison of the language of the deed, which states in relevant part that the Hilchkanums 'hereby donate, grant and convey' their property, with the statute then in effect shows that their deed is not substantially in the form of either a statutory warranty deed or a bargain and sale deed.27 Consequently, no presumption arises that the deed conveyed fee simple title.28 But, as the Brown court also indicated, determining the form of the deed does not end the analysis of intent. We next focus on the actual language of the deed. The Rays argue that the Hilchkanum deed did not convey 'land,' but rather only a 'right of way.'29 According to the Rays, the use of the latter term 'invariably' means the grantors conveyed a mere easement.30 We disagree.

The granting provisions of the Hilchkanums' deed characterize the conveyed property first as a 'right of way one hundred (100) feet in width through' {the Hilchkanums'} lands,' and the property conveyed as a 'right of way strip.'31 The substance of this language is that the subject of the conveyance is a strip of land, not just the grant of some interest 'over' the land, as the Rays state. Language conveying a strip of land suggests a fee, not a mere easement.32

The Rays' argument that the use of the term 'right of way' invariably means that only an easement is conveyed is overly simplistic. In Washington, as the Brown court observed, the use of that term as a limitation or to specify the purpose of the grant generally creates only an easement.33 Conversely, where there is no language relating to the purpose of the grant or limiting the estate conveyed, and the deed conveys a strip of land, courts will construe the deed to convey fee simple title.34 In Brown, it was undisputed that the railroad had acquired its interest in the property under the deeds for railroad purposes. But significantly, the court went on to state: Identifying the purpose of the conveyance, however, does not resolve the issue at hand because a railroad can own rights of way in fee simple or as easements. 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.{35}

A careful comparison of the express language in the Hilchkanum deed with the language in deeds the courts have examined in other reported cases arising in this jurisdiction reveals few similarities. Only King County v. Squire36 and King County v. Rasmussen37 contain language involving a right of way that is substantially similar to that in the deed before us. For the reasons we discuss later in this opinion, Squire is not controlling, merely instructive. And Rasmussen, which construed the same deed now before this court, is consistent with Brown and the analysis and conclusions of this opinion.

In Veach v. Culp,38 the court construed language in the relevant portion of the deed, but did not consider the full range of factors that the supreme court in Brown later articulated for characterizing the nature of the interest conveyed. Thus, we do not read Veach as broadly as do the Rays. In short, as the Brown court states, a narrow focus on the term 'right of way simply begs the question of what interest {the railroad} acquired, because a railroad can own rights of way in fee simple if that is what the deed conveyed.'39 Recognizing that the use of the term does not end the analysis, we therefore examine further the factors guiding determination of intent so that we may properly characterize the nature of the interest conveyed.

The first few factors stated in Brown require consideration of whether the deed conveyed a strip of land and whether additional language limited the use of the land or the estate conveyed.40 As we have already observed, the Hilchkanum deed conveyed a strip of land. Whether language in the deed limited the use of the land is the question. The language of the deed grants a right of way to the Railway without expressly restricting how that right of way was to be used.

Turning to the fourth factor, we note that nothing in the language of the Hilchkanum deed limits the grant to the 'privilege of constructing, operating, or maintaining a railroad over the land.'41 Rather, the granting clause expressly conveys 'a right of way one hundred (100) feet in width through our lands,' without any limitations of the type expressed in the fourth factor. This language is most consistent with the grant of fee title, not an easement.

Factor five examines whether or not a reverter clause is contained in the deed. 42 Presumably, the existence of such a clause suggests an easement was intended.43 Here, there is no reverter clause. Rather, other language in the deed indicates that the

conveyance is without any reservation of any estate in the Hilchkanums.44

Factor six requires consideration of whether the expressed consideration for the conveyance is substantial or nominal. Here, the Hilchkanums described the consideration as 'the benefits and advantages to accrue to us from the location construction and operation of the Seattle Lake Shore and Eastern Railway in the County of King, in Washington territory.' This statement provides no information on whether the consideration is substantial or nominal. Thus, this factor is neutral.

Factor seven requires consideration of the existence and content of a habendum clause.45 Here, there is such a clause, which states 'To have and to hold the said premises with the appurtenances unto {the Railway} and to its successors and assigns forever.' Such clarifying language does not limit the extent of the interest conveyed in the granting clause. Rather, it suggests no limitation the grant of fee title, not merely an easement.

King County v. Squire Investment Co. illustrates the significance of the language in the habendum clause in determining whether a fee or an easement is granted in a deed conveying a right of way to a railroad. In Squire, the granting clause of the deed granted a 'right-of-way Fifty (50) feet in width through said lands,' while the habendum clause contained a handwritten addition, 'or so long as said land is used as a right-of-way by said railway Company.' While noting that the language of the granting clause could be understood to convey either a fee or an easement, this court concluded that the granting clause and habendum clause, read together, suggested 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'.'46

In contrast, the habendum clause of the Hilchkanum deed contains no limiting language. This distinction supports the conclusion that the granting clause conveyed fee title, not, as in Squire, an easement. Brown recognizes that other considerations suggested by the language of a deed may be helpful in determining whether a conveyance is in fee or merely an easement. The Hilchkanum deed contains such language in the provision following conveyance of the right of way to the Railway:

> And the said Seattle Lake Shore and Eastern Railway Company shall have the right to go upon the land adjacent to said line for a distance of two hundred (200) feet on each side thereof and cut down all trees dangerous to the operation of said road.

While the parties dispute the legal effect of this language, neither side appears to disagree that the 'right' to go on property adjacent to the right of way to cut trees is an easement, not a fee interest in that adjacent property.47 We agree that this 'dangerous trees' provision conveys an easement - the right to cut trees that endanger the operation of the railway.

Moreover, an easement to cut trees on property adjacent to the right of way is a more limited right than the interest conveyed in the right of way itself -the strip of land. The grant of the interest in the strip was to the land itself, not an interest over the land. The

lack of any limitation in the use of the strip starkly contrasts with the more limited right to cut trees only on the property adjacent to the strip. The clear distinction in the extent of rights conveyed supports the conclusion that the grant of the strip of land was in fee, not an easement similar to the more limited right to cut trees on land adjacent to the strip.

We reject as unreasonable the Rays' claim that the apparent overlap in coverage of the two provisions (both are measured from the centerline of the right of way) means that the right of way is merely an easement. This argument is based on the theory that the grant of the right to cut trees is inconsistent with the grant of a fee because the holder of a fee would not need such a grant. But the argument ignores other language in the 'dangerous trees' provision that focuses on that right being granted for property adjacent to the right of way.

We turn next to the subsequent conduct of the parties, another factor the Brown court identified as indicative of intent. To the extent any uncertainty remains after consideration of the form and language of the May 1887 Hilchkanum deed, Bill Hilchkanum's exclusion of the right of way from subsequent deeds removes any doubt that the 1887 deed conveyed fee title to the Railway. 48

According to the record, the legal description of the Rays' property is: That portion of Government Lot 3, Section 6, Township 24 North, Range 6 East, W.M., in King County, Washington, described as follows: (metes and bounds description) {49}

In 1898, Bill Hilchkanum conveyed to his then wife Annie Hilchkanum 'Lot one (1) less three (3) acres right of way of railroad and lot three (3) less three and 25/100 acres right of way of railroad, and all of lot five (5). . ..'50 Thus, the plain language of the 1898 deed excludes the previously conveyed right of way from the conveyance and explains why ('right of way of railroad'). The 1898 deed therefore clearly indicates that Hilchkanum's intent in 1887 was to convey the right of way to the Railway in fee, not as an easement. And there is no question that this exclusion of the right of way from the 1898 deed applied to Lot 3 - the property the Rays now own.

Bill Hilchkanum's 1905 conveyance of another portion of Lot 3 to John Hirder provides further support for these conclusions. The deed describes the boundary of the property, in part, as running 'thence in a Northeasterly direction along the right of way of the Seattle Lake Shore and Eastern Railway.'51 Hilchkanum's exclusion of the previously conveyed right of way is consistent both with his exclusion of the same right of way in the 1898 conveyance and the prior conveyance in fee of that same right of way in the May 9, 1887 deed to the Railway. There is no other reasonable explanation for him to have excluded the right of way from subsequent conveyances. Again, there is no doubt that we again deal with Lot 3 - the property the Rays now own.

A third conveyance by Hilchkanum is also consistent with the view that he intended to convey fee title to the right of way to the Railway. In 1904, Bill Hilchkanum conveyed to Chris Nelson lot number one, 'less three (3) acres heretofore conveyed to the Seattle and International (sic) Railway for right of way purposes.'52 Again, there is no indication in this deed that the conveyance was 'subject to' the right of way, an indication that the strip of land previously conveyed was an easement. Rather, the right of way is excluded from the

conveyance entirely, an indication that the strip of land was previously conveyed in fee.

We are aware that in 1890, Bill Hilchkanum conveyed all of Lot 2 to Julia Curley without any exceptions.53 But because the 1890 deed contains no reference whatsoever to the right of way, it is not probative of the grantors' intent in the 1887 deed.54 In any event, Lot 3 is at issue in this appeal, not Lot 2, and the record before us establishes that Hilchkanum was entirely consistent in excluding the right of way and stating that no other encumbrances affected Lot 3.

In short, the deeds subsequent to the May 1887 deed consistently demonstrate that Hilchkanum conveyed the right of way to the Railway in fee, not as an easement.

The circumstances surrounding the execution of the deed may also affect determination of original intent. The Rays make several arguments based on this factor, none of which is persuasive.

They first argue that Hilchkanum must have intended to convey an easement in the 1887 deed because conveying fee title to a portion of his unpatented homestead claim would have violated federal homestead law. We disagree.

On March 3, 1873, Congress passed a law, codified at Rev. Stat. sec. 2288, 'providing that any bona fide settler might convey by warranty against his own act 'any part of his claim for church, school, and cemetery purposes and for a right of way for railroads.''55 This statute governs where, as here, the grant of a right of way relates to homestead property.

The Rays argue that the United States Supreme Court's decision in Great Northern Railway Company v. United States56 is dispositive here. But that decision interpreted a different law, the Act of March 3, 1875, which governed the grant of rights of way across public lands to railroads.57 Private, not public, lands are at issue here. Thus, the United States Supreme Court's holding in the Great Northern is inapplicable here.

The Rays also cite two Department of the Interior decisions, which they argue support their contention. Again, we disagree.

In the first, South Perry Townsite v. Reed,58 the Department considered whether the term 'for the right of way of railroads,' as used in section 2288 of the Revised Statutes, limited the size of the right of way that could be granted to the width of the track and cars, or could include 'such space as is necessary for side tracks, stock yards, or other purpose incident to the proper business of a railroad as a common carrier.'59 This issue has no relevance here.

The second Department of the Interior case, Lawson v. Reynolds,60 dealt with an agreement by a homestead applicant to allow construction of an electric plant on the land she was claiming as a homestead, before perfection of her entry. The Department concluded that the agreement was 'not an alienation of any part of the land, but a mere lease of a portion of the premises and the grant of an easement' and therefore did not bar consummation of her entry.61 This decision is completely inapposite, and the Rays do not

explain how it bolsters their arguments.

We conclude that neither of these decisions by a federal agency, neither of which involved the interpretation of Washington real property law, is helpful in addressing the questions before us.

The Rays also look to a dictionary definition of the term 'right of way' to support their claim that the 1887 deed conveyed only an easement, not fee title. As Brown states, a right of way may either be in fee or an easement.62 Thus, a dictionary definition is neither dispositive nor particularly helpful here. Moreover, that court expressly rejected the argument that use of the term 'right of way' in the caption of a deed meant that the conveyance was an easement rather than fee simple.63 Thus, parsing the language either in the body of a deed or its caption and looking to a dictionary for the meaning of such language adds little, if anything, that is useful to the analysis.

The Rays also speculate that the Railway prepared the May 1887 deed.64 Thus, they argue that we should construe ambiguities in that deed language against the Railway. We decline to do so because nothing in the record supports this argument.

First, the face of the deed shows that the Hilchkanums executed the deed by making their marks, not by signing the instrument. Of course, neither party disputes that the Hilchkanums could neither read nor write.65

While we are mindful of the undisputed evidence that the Hilchkanums could neither read nor write, we are unaware of any rule that says that one who cannot do so lacks the capacity to understand the nature and extent of his or her property or the nature of a conveyance of such property. Nothing in the record before us indicates that the Hilchkanums failed to understand what they were doing in this particular transaction, a point counsel for the Rays appeared to concede at oral argument of this case.

Second, and more importantly, examination of the deed shows that it is entirely handwritten, apparently by the same person. Both the language of the main part of the deed, as well as the acknowledgment, is in the handwriting of the notary who acknowledged the signatures of the Hilchkanums, B.J. Tallman.66 Nothing in the record before us indicates that he was the agent of the Railway. Absent such proof, we fail to see why we should construe ambiguities in the May 1887 deed against the Railway.

Rather, to the extent we were to engage in applying a rule of construction to any perceived ambiguities in the language of the Hilchkanum deed, we would construe the deed against the Hilchkanums, the grantors.67

Third, the Rays also rely on the opinions of expert witnesses to support their position. Because courts decide the legal questions before us, not experts, we decline to give credence to these opinions.68 Moreover, none of the designated experts to whom the Rays point has addressed the effect of the language in the very deed by which the Rays acquired title to their property:

That portion of Government Lot 3, Section 6, Township 24 North, Range 6 East,

W.M., in King County, Washington, described as follows:

Beginning on the shore of Lake Sammamish at the northwest corner of a tract of land conveyed to W.C. Dahl by Henry M. Johnson by deed dated October 6, 1931, and recorded in Volume 1588 of Deeds, page 137, under King County Recording No.
2808278, records of King County, Washington; thence running southerly along the shore line of Lake Sammamish, a distance of 300 feet to the true point of beginning;
thence southerly along said shoreline of Lake Sammamish, a distance of 125 feet; thence east to the westerly right of way of East Lake Sammamish Place S.E. (formerly Redmond Issaquah Road); thence northerly along said right of way to a point due east of the true point of beginning; thence due west to the true point of beginning;

EXCEPT the Northern Pacific Railway Company's right of way. {69}

The term 'except' is generally meant to exclude the described property.70 Here, the deed excludes the right of way at issue in this case, another indication that a successor in interest to the Hilchkanums believed that the right of way previously conveyed to the Railway was not part of the fee conveyed to the Rays. For these reasons, we do not rely on expert opinion to decide the questions before us.71

The Rays also rely on a recent Division III case of this court, Hanson Industries, Inc. v. Spokane County.72 In Hanson, the court held that a series of 1903 and 1904 deeds conveying a right of way to a railroad and granted an easement rather than a fee simple estate. But Hanson is of little utility here beyond its reiteration of the principles stated in Brown.

First, as our supreme court explained in Brown, the language of the deed under scrutiny is of primary importance in determining the intent of the parties, and the cases turn on a case-by-case examination of such language. The Hanson court quoted little of the language of the deeds it examined. Thus, we cannot meaningfully compare the language of those deeds with the Hilchkanum deed.

Second, it is apparent from the court's analysis that the deeds in Hanson contained language conditioning the conveyances on the construction and operation of a railroad within two years, imposing obligations on the railroad to construct and maintain farm crossings, and releasing the railroad from liability for damages caused by railroad construction.73 In addition, unlike the Hilchkanum deed, the Hanson deeds did not describe the right of way in metes and bounds.74 The Hanson court found the foregoing factors to be significant in its determination that the deeds conveyed an easement. The Hilchkanum deed contains no comparable language.

Finally, as we explained above, we find the contrast between the language in the Hilchkanum deed conveying the right of way and the language conveying the right to cut dangerous trees on land adjacent to the right of way to be compelling evidence that the first conveyed a fee interest and the second an easement. The court in Hanson did not discuss

any similar provisions in the deeds it examined, and we presume none existed. In addition, we concluded that Bill Hilchkanum's subsequent conduct, in expressly excluding the right of way in subsequent deeds, demonstrated his intent and understanding of the May 1887 deed as a grant of a fee interest in the right of way, not an easement. The subsequent conduct of the parties in Hanson did not include any analogous acts.75

In sum, Hanson provides no support for the Rays' claim that the Hilchkanums' 1887 deed conveyed an easement rather than a fee simple estate.

In King County v. Rasmussen,76 the Ninth Circuit Court of Appeals considered the very deed that is presently before us. There, King County sued to quiet title to a 100-footwide strip of land that bisected John and Nancy Rasmussen's property and to obtain a declaration of its rights to use the right of way for a public trail. After applying the Brown factors, the Ninth Circuit Court of Appeals concluded that the May 1887 deed conveyed fee title, not an easement, to the Railway. Our conclusion that the conveyance of the right of way in 1887 was in fee is consistent with the reasoning and conclusions in Rasmussen.

ABANDONMENT

Finally, the Rays argue that the deed cannot be understood to grant a right of way 100 feet wide in the location where the railroad was actually constructed because the actual location of the railroad is not the location described by the course and distance calls in the deed. Again, we
disagree.

Here, the parties stipulated that the location of the railroad tracks, as constructed, 'is not within the area described by the distance call stated in the Hilchkanum deed.'77 Mike Foley, a Senior Engineer for the King County Department of Transportation, attempted to determine the location of the centerline of the right of way as described in the deed. Because the deed was difficult to read, Foley surveyed the route using three different positions. In each of these surveys, the centerline did not match the actual centerline of the tracks, as constructed.78 The distances between the test centerlines and the actual centerline were 119, 25, and 5 feet. The majority of the first of these three centerlines, at 119 feet from the actual centerline, would be located in Lake Sammamish.79 The County argues that the railroad tracks, as constructed, constitute a 'monument' that determines the location of the property, which supercedes the course and distance calls outlined in the deed. 'The term 'monument' means a permanent natural or artificial object on the ground which helps establish the location of the boundary line called for.'80 If the description in a deed of the land is fixed by 'ascertainable monuments and by courses and distances, the well-settled general rule is that the monuments will control the courses and distances if they be inconsistent with the monument calls.'81

This court considered this question in DD & L, Inc. v. Burgess. In that case, a dispute arose regarding the location of the northern boundary of a railroad right of way. The deed in that case described the location of the right of way as follows:

> A strip of land 100 feet in width, having 50 feet of such width on each side of the center line of the main track of the Chicago, Milwaukee and Puget Sound Railway

> Company, as the same is now surveyed, staked out and established ...; said center line being more particularly described as follows, to-wit: Beginning at a point in the east line of said section 1,1731.7 feet south 0 51' east of the northeast corner thereof ...{82}

Based on testimony by surveyors, the trial court found that the centerline of the railroad tracks, as constructed, was 17 feet from the distance call recited in the 1912 deed.83 We held that the law and evidence supported the trial court's conclusion that the track, as built, was the monument intended for locating the boundary established by the 1912 deed, and that, because the track location conflicted with the distance calls in the 1912 deed, and because monuments control over distance calls, a survey based exclusively on the calls and distances was erroneous.84

In this case, the railroad tracks, as constructed, constitute a monument that the deed refers to as the location of the centerline of the right of way conveyed in the deed.85 The description of the location of the right of way in this case is similar to that considered in DD&L: Such right of way strip to be fifty (50) feet in width on each side of the center line of the railway track as located across our said lands . . . which location is described as follows to wit {legal description}{86}

Because the location of this monument conflicts with the distance calls in the deed, and because the monument controls over the distance calls, we hold that the strip of land conveyed in this deed is centered on the railroad tracks, as constructed.

The Rays argue that this case is distinguishable because the tracks in this case were built after the deed was signed. It appears from the language of the deed in DD&L that the tracks in that case were at least staked out when the deed was written. But this distinction is immaterial. As we noted in that case, '{t}hough the monument referred to in a deed does not actually exist at the time the deed was drafted, but is afterward erected by the parties with the intention that it shall conform to the deed, it will control.'87 The Rays cite no authority to the contrary. Nor do they claim any evidence of intent by the parties to place the tracks in Lake Sammamish, an unreasonable result.

The Rays argue that a Kansas case, Aladdin Petroleum Corp. v. Gold Crown Properties, Inc.,88 and other cases that have relied on Aladdin Petroleum, support their position.89 But these cases are entirely inapposite. Each of these cases considered the scope of the use of a right of way easement, not the location of property transferred in fee simple by a deed. The rule quoted by the Rays, read in the contexts of these cases, is of no use to us here.

To summarize, application of the factors stated and applied by our supreme court in Brown supports the conclusion that the intent of the Hilchkanums and the Railway in May 1887 was to convey a fee simple interest in the strip of land right of way, not an easement. Moreover, the actual placement of the railroad tracks controls as a monument to determine the location of the right of way. Thus, the Railway did not abandon the right of way described in the deed. The trial court properly concluded that fee title vests in King County.

We affirm the summary judgment quieting title in King County.

WE CONCUR:

1 Certain facts are set forth in a written stipulation of the parties ('Stipulation'). Clerk's Papers at 12-13.

2 Stipulation. Clerk's Papers at 12-13.

3 Stipulation. Clerk's Papers at 12.

4 Clerk's Papers at 89.

5 Clerk's Papers at 89.

6 Clerk's Papers at 89-90.

7 Clerk's Papers at 89-90. The United States Surface Transportation Board (STB) approved interim trail use (railbanking) of the ELS corridor under the National Trails System Act (16 U.S.C. sec. 1247(d)) and the STB's implementing regulations (49 CFR sec. 1552.29). The STB ruling authorized removal of the rails, ties, and spikes, and conversion of the ELS corridor for a recreational trial as a means of preserving the corridor for future use. Clerk's Papers at 17.

8 Clerk's Papers at 13.

9 CR 56(c); Brown v. State, 130 Wn.2d 430, 437, 924 P.2d 908 (1996).

10 Northlake Marine Works, Inc. v. City of Seattle, 70 Wn. App. 491, 499 , 857 P.2d 283 (1993).

11 Brown, 130 Wn.2d at 439-40; Morsbach v. Thurston County, 152 Wash. 562, 568, 278 P. 686 (1929).

12 Veach v. Culp, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

13 Veach, 92 Wn.2d at 573.

14 Veach, 92 Wn.2d at 573 (citing Vavrek v. Parks, 6 Wn. App. 684, 690, 495 P.2d 1051 (1972); Warren v. Atchison, Topeka & Santa Fe Ry., 19 Cal. App. 3d 24, 35, 96 Cal. Rptr. 317 (1971)).

15 Veach, 92 Wn.2d at 573.

16 Clerk's Papers at 92-94. See also King County v. Rasmussen, 299 F.3d 1077, 1080 (9th Cir. 2002), cert. denied, 123 S. Ct. 2220, 155 L. Ed. 2d 1106 (2003).

17 Brown, 130 Wn.2d at 433.

18 Brown, 130 Wn.2d at 434.

19 Brown, 130 Wn.2d at 433.

20 Brown, 130 Wn.2d at 436-437.

21 Brown, 130 Wn.2d at 437 (citing Swan v. O'Leary, 37 Wn.2d 533, 535, 225 P.2d 199 (1950); Zobrist v. Culp, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981)).

22 Brown, 130 Wn.2d at 438 (citations omitted).

23 Brown, 130 Wn.2d at 438-39 (citations omitted) (emphasis in original).

24 Brown, 130 Wn.2d at 437.

25 Brown, 130 Wn.2d at 437. Washington case authority generally classifies the choices in railroad rights of way cases as between either fee simple title or easement. See Reichenbach v. Washington Short-Line Ry. Co., 10 Wash. 357, 358-360, 38 P. 1126 (1894) (construing a conveyance in the form of a bargain and sale deed as conveying an easement, not fee title). No case holds that a defeasible fee was intended.

26 Laws of 1885-6, p. 177-79. The statute governing conveyances of real estate and providing for the form of deeds stated, in relevant part:
SEC. 3. That warranty deeds for the conveyance of land, may be substantially in the following form: The grantor. . . for and in consideration of . . . in hand paid, convey and warrant to . . . the following described real estate . . .. Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs and assigns, . . .
SEC. 4. Bargain and sale deeds for the conveyance of land may be substantially in the following form: The grantor . . . for (and) in consideration of ... in hand paid, bargain, sell and convey to . . . the following described real estate . Every deed in substance in the above form shall convey to the grantee, his heirs or other legal representatives and estate of inheritance in fee simple, ...
SEC. 5. Quit-claim deeds may be in substance in the following form: The grantor. . . for the consideration . . . convey and quit-claim to . . . all interest in the following described real estate . . .. Every deed in substance in form prescribed in this section, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance, release and quitclaim to the grantee, his heirs and assigns in fee of all the then existing legal or equitable rights of the grantor, in the premises therein described, but shall not extend to the after acquired title unless words are added expressing such intention. (emphasis added).

27 (Emphasis added.)

28 See Brown, 130 Wn.2d at 437. The Hilchkanum deed contains neither the language nor the warranties of the statutory warranty or bargain and sale form of deeds. Arguably,this conveyance is substantially in the form of a quit claim deed, the third form of statutory deed

existing at the time of the conveyance. We note that all three forms of statutory deed convey fee title according to the plain words of the governing statute. Nevertheless, the case authority indicates that the form of conveyance is but one of many factors in analyzing instruments like the one before us.

29 Appellants' Opening Brief at 6.

30 Appellants' Opening Brief at 6.

31 (Emphasis added.)

32 Brown's third factor considers 'whether the deed conveyed a right of way over a tract of land, rather than a strip thereof.' Brown, 130 Wn.2d at 438 (emphasis added).

33 Brown, 130 Wn.2d at 439 (emphasis added).

34 Brown, 130 Wn.2d at 439-40.

35 Brown, 130 Wn.2d at 440 (emphasis added) (citations omitted).

36 59 Wn. App. 888, 890, 801 P.2d 1022 (1990), review denied, 116 Wn.2d 1021 (1991) (construing a deed conveying 'a right-of- way Fifty (50) feet in width through said lands ').

37 299 F.3d 1077 (9th Cir. 2002), cert. denied, 123 S. Ct. 2220, 155 L. Ed. 2d 1106 (2003).

38 Veach, 92 Wn.2d at 572 (construing a deed quit-claiming 'A right-of-way one hundred feet wide, being fifty feet on each side of the center line of the B.B. & Eastern R.R. as now located '); see also Reichenbach, 10 Wash. at 358 (construing deed conveying 'right of way for said railroad, twelve feet in width ').

39 Brown, 130 Wn.2d at 442.

40 These factors are: '(1) whether the deed conveyed a strip of land, and did not contain additional language relating to the use or purpose to which the land was to be put, or in other ways limiting the estate conveyed; (2) whether the deed conveyed a strip of land and limited its use to a specific purpose.' Brown, 130 Wn.2d at 438.

41 This factor questions 'whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land.' Brown, 130 Wn.2d at 438.

42 The fifth factor is 'whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor.' Brown, 130 Wn.2d at 438.

43 Squire, 59 Wn. App. at 894 (holding that the clause 'so long as said land is used as a right-of-way by said railway Company' supports the conveyance of an easement).

44 That language states 'To have and to hold the said premises with the appurtenances unto {the Railway} and to its successors and assigns forever.' (emphasis added).

45 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).

46 Squire, 59 Wn. App. at 894.

47 Appellants' Reply Brief at 18 (arguing that the use of the term 'right' in this provision of the deed conveys an easement).

48 Bill Hilchkanum was a party to each of the subsequent deeds in the record before us. Mary Hilchkanum, the other grantor under the 1887 deed, was not a party to any.

49 Clerk's Papers at 66 (emphasis added).

50 Clerk's Papers at 57 (emphasis added).

51 Clerk's Papers at 63 (emphasis added).

52 (Emphasis added.)

53 Clerk's Papers at 449.

54See King County v. Rasmussen, 299 F3d at 1087-88.

55 Minidoka & Southwestern Railroad Company v. United States, 235 U.S. 211, 216, 35 S. Ct. 46, 59 L. Ed. 200 (1914) (quoting Rev. Stat. sec. 2288). Rev. Stat. sec. 2288 states in full:
Any person who has already settled or hereafter may settle on the public lands, either by pre-emption, or by virtue of the homestead law or any amendments thereto, shall have the right to transfer, by warranty against his own acts, any portion of his pre-emption or homestead for church, cemetery, or school purposes, or for the right of way of railroads acrosssuch pre-emption or homestead, and the transfer for such public purpose sshall in no way vitiate the right to complete and perfect the title to their pre-emptions or homesteads.

56 315 U.S. 262, 62 S. Ct. 529, 86 L. Ed. 836 (1942).

57 Great Northern, 315 U.S. at 274-75. See also Minidoka, 235 U.S. at 216 ('{The Act of 1875}, however, by its very terms, applies only to 'public lands,' and hence cannot be construed to empower the Secretary to authorize the building of roads across lands which had been segregated from the public domain by the entry and possession of homesteaders or preemptors.').

58 28 Pub. Lands Dec. 561 (1899).

59 South Perry, 28 Pub. Lands Dec. at 562.

60 28 Pub. Lands Dec. 155 (1899).

61 Lawson, 28 Pub. Lands Dec. at 159-60.

62 Brown, 130 Wn.2d at 439.

63 Brown, 130 Wn.2d at 444; Conaway v. Time Oil Co., 34 Wn.2d 884, 889, 210 P.2d 1012 (1949) (observing that the term which is applied to a document by the parties thereto does not necessarily determine the nature of the grant).

64 Appellants' Reply Brief at 7.

65 We note that the Rays characterize Bill Hilchkanum as 'a Native American who could not read or write.' Appellants' Opening Brief at 16. They also state in their brief that he was 'an illiterate Native American.' Id. at 26. The use of the term 'Native American' in these characterizations adds nothing that is analytically useful. To the extent that the Rays imply something more than his illiteracy by the use of the term, such implication is improper.

66 Clerk's Papers at 92-94.

67 'When the court remains in doubt as to the parties' intent or as to the quantum of interests conveyed, a deed will be construed against the
grantor.' 17 William B. Search Term Begin Stoebuck, Washington PracticeSearch Term End : Real Estate: Property Law sec. 7.9 at 463 (1995) (citing Wright v. Olsen, 42 Wn.2d 702, 257 P.2d 782 (1953); Cook v. Hensler, 57 Wash. 392, 107 P. 178 (1910)).

68 State v. Olmedo, 112 Wn. App. 525, 49 P.3d 960 (2002), review denied, 148 Wn.2d 1019 (2003) ('Under ER 704, a witness may testify as to matters of law, but may not give legal conclusions.').

69 Clerk's Papers at 66 (emphasis added).

70 'An 'exception' is properly the withdrawing of some part of a parcel of land from the conveyance, such as a deed that conveys Lot 4, block 2,
except for the east 20 feet thereof.' 17 William B. Search Term Begin Stoebuck, Washington PracticeSearch Term End : Real Estate: Property Law sec. 7.9 at 463 (1995) (emphasis in original).

71 The dissent appears to rely on an expert opinion by Stephen J. Graddon to support the view that the Railway drafted the deed and that we should construe ambiguities in that deed against the railroad. Dissent at 3. Graddon opines that the railroad drafted the deed because, among other things, the deed's language tracks language in other railroad deeds, a witness signing the deed was associated with the Railway, and Hilchkanum was illiterate.

Clerk's Papers at 233-34. No one disputes that Hilchkanum could not have drafted the deed. But neither Graddon's declaration nor anything else in the record before us contests that B.J. Tallman, the notary who acknowledged the deed, drafted it. Likewise, nothing in the record shows that he did so at the direction of the Railway. Neither the status of a witness to the deed nor the alleged similarity in language with other deeds fills this gap. Thus, Graddon's declaration fails either to create a presumption that the Railway drafted the deed or to create a material issue of fact precluding summary judgment.

72 114 Wn. App. 523, 58 P.3d 910 (2002), review denied, 149 Wn.2d 1028 (2003).

73 Hanson, 114 Wn. App. at 532.

74 Hanson, 114 Wn. App. at 534.

75 Hanson, 114 Wn. App. at 535.

76 299 F.3d 1077 (9th Cir. 2002).

77 Clerk's Papers at 13.

78 Clerk's Papers at 222-23.

79 Clerk's Papers at 222. Foley mistakenly stated in his opinion that the centerline would be located 'in Lake Washington.' Presumably, he meant Lake Sammamish.

80 DD & L, Inc. v. Burgess, 51 Wn. App. 329, 331 n.3, 753 P.2d 561 (1988).

81 Matthews v. Parker, 163 Wash. 10, 14, 299 P. 354 (1931).

82 DD&L, 51 Wn. App. at 331 n.2.

83 DD&L, 51 Wn. App. at 333.

84 DD&L, 51 Wn. App. at 336.

85 '{T}o interpret the words, 'from the center line of the ... Railroad,' as referring to the center of the track, is to strengthen the descriptive part of the deed by fixing an easily recognized monument.... The words 'center line of the railroad' refer to the center of the track, and indicate the track as a monument which aids in determining a certain boundary.' DD&L, 51 Wn. App. at 335 (quoting Peoria & P.U. Ry. Co. v. Tamplin, 156 Ill. 285, 294-95, 40 N.E. 960, 962 (1895)).

86 Clerk's Papers at 92 (emphasis added).

87 DD&L, 51 Wn. App. at 335 (citing 6 G. Thompson, Real Property sec. 3044 (1962 repl.); Makepeace v. Bancroft, 12 Mass. 469 (1815); cf. W. Robillard & L. Bouman, A Treatise on the Law of Surveying and Boundaries sec. 26.11 (5th ed. 1987) (a road as constructed

becomes the monument and controls)).

88 221 Kan. 579, 561 P.2d 818 (1977).

89 See, e.g., Consolidated Amusement Co., Ltd. v. Waikiki Business Plaza, Inc., 6 Haw. App. 312, 719 P.2d 1119 (1986); Andersen v. Edwards, 625 P.2d 282 (1981); Lindhorst v. Wright, 616 P.2d 450 (1980).