FILED
SUPREME COURT
STATE OF WASHINGTON
11/16/2023 4:55 PM
BY ERIN L. LENNON
CLERK

No. 102485-1

(Court of Appeal No. 835661-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARK MCDONALD, an individual,

Respondent,

v.

MICHAEL STERN AND EMMA STERN, a married couple,

Petitioners.

ANSWER TO PETITION FOR REVIEW

GORDON THOMAS HONEYWELL LLP

Ryan C. Espegard, WSBA No. 41805
respegard@gth-law.com
Katie Chan, WSBA No. 56970
kchan@gth-law.com
520 Pike St., Suite 2350
Seattle, WA 98101
Attorneys for Respondent

TABLE OF CONTENTS

I. INTRODUCTION .... - 1 -

II. IDENTITY OF RESPONDENT .... - 5 -

III. COURT OF APPEALS OPINION .... - 5 -

IV. STATEMENT OF THE ISSUE .... - 5 -

V. STATEMENT OF THE CASE .... - 6 -

VI. ARGUMENT .... - 15 -

A. The Court of Appeals' decision does not conflict with prior decisions of this Court. .... - 15 -

B. The Court of Appeals' decision does not conflict with precedent from another Division. .... - 23 -

C. This case does not involve any significant constitutional question of law or issue of substantial public interest. .... - 26 -

VII. CONCLUSION .... - 28 -

TABLE OF AUTHORITIES

Cases

McDonald v. Stern,
___ Wn. App. 2d ___, 536 P.3d 671 (2023)................ passim

Rinehold v. Renne,
198 Wn.2d 81, 492 P.3d 154 (2021)............................ passim

Staaf v. Bilder,
68 Wn.2d 800, 415 P.2d 650 (1966)............................ passim

Thein v. Burrows,
13 Wn. App. 761, 537 P.2d 1064 (1975)......... 26, 27, 28, 29

Other Authorities

18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 13.4, at 96 (2nd ed. 2004) 19

Rules

RAP 13.4 5
RAP 13.4(b)(1)... 23
RAP 13.4(b)(2)... 26
RAP 13.4(c)(7) 26, 28

I. INTRODUCTION

Petitioners Michael and Emma Stern ("Stern") and Respondent Mark McDonald ("McDonald") own neighboring residential lots on Mercer Island that share a common boundary (the "Property Line"). McDonald sued Stern for timber trespass, waste, and nuisance. As a defense, Stern disputed the location of the Property Line, resulting in McDonald seeking to quiet title to the line in addition to pursuing damages. Ultimately, McDonald prevailed on all issues before the trial court and the Court of Appeals. Stern continues to seek appeal of the trial court's decision to quiet title.

It is undisputed that there is a discrepancy between legal descriptions that use an old government lot line as a reference point and the location of existing local monuments marking property lines around the Stern and McDonald properties. More specifically, the descriptions of both properties indicate that the Property Line is a line 900 feet south of the north line of Government Lot 2. However, when new surveyors calculate the

location of deed lines based on the location of a monument that is supposed to mark the northwest corner of the government lot, the resulting deed lines do not align with any of the local monuments around the subject properties that were intended to mark the actual boundary lines. The issue before the trial court and the Court of Appeals was how that discrepancy should be resolved.

McDonald presented a survey to the trial court prepared by his expert that was consistent with local monuments indicating the location of the Property Line as understood by the predecessors in interest who created both the Stern and McDonald properties through separate short plat processes. In contrast, Stern presented a survey that identified the Property Line according to where he calculated it should be located based on legal descriptions refereeing a monument marking the corner of Government Lot 2. However, Stern's surveyor admitted that the monument he relied upon was a replacement monument that

may have been disturbed and buried by road grading; he could not confirm it was in its proper location.

As will be discussed in detail below, case law indicates that when determining the location of a disputed boundary line, the trial court should consider the best evidence obtainable to show the intent of the original platters of the line, and evidence of known monuments marked upon the land take priority over inconsistent lines called for in plat. The Court of Appeals applied these principles to this case and held the best evidence of the location of the Property Line was the evidence relied on by McDonald's surveyor.

Stern seeks further appeal by contorting both the present facts and caselaw to try to support Stern's survey. It is important to note that there are two distinguishable lines discussed in the parties' briefing. First, there is the Property Line between the parcels that is the subject of this dispute. Second, there is the northern line of Government Lot 2, which legal descriptions place as being 900 feet north of and parallel to the Property Line.

The cases addressed below all focus on the intent of the original platters or surveyors of the line in dispute. Stern's petition attempts to mislead this Court into believing that the lines are one in the same. Stern refers to the Government Lot 2 northern line as "the line in question" and repeatedly implies that the Court is to focus on is the intent of the original surveyors of Government Lot 2. In the most blatant misrepresentation, Stern states that there "is no dispute that . . . both deeds state that the boundary between the parcels is the Government Lot 2 line." Petition at 21. This Court should review Stern's petition with a watchful eye toward whether Stern is actually seeking application of case law to the Property Line or instead to the old government lot line.

The Court of Appeals decision appropriately applied existing law by focusing on the intent of the creator of the Property Line and used the best evidence available to determine that intent. There is no need for additional appellate review.

[4883-7450-0750]

II. IDENTITY OF RESPONDENT

Respondent Mark McDonald, plaintiff below, asks this Court to deny Michael and Emma Stern's Petition for Review.

III. COURT OF APPEALS OPINION

On July 24, 2023, Division One of the Court of Appeals held in an unpublished decision that the trial court did not err by quieting title in favor of McDonald. Stern moved to publish the decision, and the Court of Appeals granted Stern's motion to publish on September 27, 2023. *McDonald v. Stern*, ___ Wn. App. 2d ___, 536 P.3d 671 (2023).

IV. STATEMENT OF THE ISSUE

Where the Court of Appeals properly resolved a boundary dispute by determining the original surveyor's intent based on the best evidence obtainable, and the Court of Appeals' decision does not conflict with other published Washington case law, raise significant constitutional questions of law, or involve an issue of substantial public interest, should this Court accept review under RAP 13.4?

V. STATEMENT OF THE CASE

McDonald and Stern are neighbors on Mercer Island. McDonald sued Stern, alleging timber trespass, waste, and private nuisance. CP 107-109. Stern attempted to defend by disputing the Property Line's location. CP 23. McDonald thus added a quiet title claim by amended complaint. CP 109. The quiet title claim was tried to the bench contemporaneously with the other claims, which went to a jury. CP 880, 926.

The McDonald and Stern properties were developed decades ago, with monuments placed and structures built on their properties based on where their predecessors in interest necessarily understood the property line between the properties to be located. Stern testified that his property was previously owned by Lawrence Barsher ("Barsher"), a structural engineer. RP 387:23–388:6; RP 455:17–20. Barsher subdivided the lot through the recording of a short plat, known as the "Barsher short plat." Ex. 74. In other words, Barsher was the original platter of the Stern property. The Barsher short plat contains markings

indicating the location of property corners that were marked by local monuments set by surveyors at the time of recording in 1980.[1] RP 648:23–649:1; Ex. 74.

The McDonald lot was also created via the short plat process, in a separate short plat in 1982 known as the "Hobbs short plat." Ex. 75. The Hobbs short plat also indicates that the property was staked at the time of subdivision using iron pipes as local monuments. RP 649:22–650:6; Ex. 75.

Both short plats are contained within the interior of what is known as Government Lot 2. The legal descriptions of both short plats indicate that the boundary between the plats---which is Property Line between Stern and McDonald---is a line 900 feet south of one corner of Government Lot 2. *McDonald*, 536 P.3d at 675; Ex. 74-75. Importantly, while the line between the Barsher and Hobbs short plats was presumably created by subdivision of a prior common grantor, there is no evidence in

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[1] "Monuments" refers to items placed in the ground by surveyors to mark property lines, which often include iron pipes, rebar, and brass tacks.

this case of "when or how the parcels were divided establishing that line." *McDonald*, 536 P.3d at 675–76.

McDonald presented the trial court with a survey and testimony by Edwin Green ("Green") of Terrane Land Surveying. Green testified that to determine where property lines are located, he looks at both the legal description and local monuments. RP 660:11–18. Ideally, they will match up precisely, but when differences are observed, all evidence must be considered to determine the intended location of property lines. *Id*. In this case, Green testified that corner monuments for the McDonald and Stern properties, along with all neighboring lots, were north of the location where they would be expected, based on the legal description measured from a common monument located approximately a quarter mile away. RP 650:9-652:17. Given that discrepancy, Green testified that he then looks at evidence of occupation to determine the intent of the platters, including the location of structures built in relation to the property lines. RP 651:10-13.

Most critical to Green's opinion was the location of the Stern residence. The Barsher short plat contained symbols depicting five-foot building setbacks from the new lot lines for future construction. Ex. 74. Consistent with the five-foot setbacks, Barsher filed site plans for the construction of what would become the Stern residence in 1990, which indicated the location of the home would be exactly five feet from the Property Line. Ex. 71, page 2. Barsher then built the home before selling the Stern property. RP 387:23–388:6; RP 455:17–20. The location of the Stern home reveals unequivocally where Barsher, the original platter of the Stern property, believed the Property Line to be located.

After learning the above property history, Green discovered that, when treating the available corner monuments on the Stern and McDonald properties as true location corners, the resulting Property Line is exactly five feet from Stern's home as actually constructed. RP 652:12–17. This essentially confirms the location of the Property Line as intended by

Barsher, the original platter of the Stern property. RP 656: 19–25.

By holding the found local monuments as the true corners, all of the other puzzle pieces of the McDonald and Stern properties aligned as well. For example, treating the local monuments as true corners results in both McDonald and Stern having 40 foot wide yards. The minimum width for a legal waterfront lot on Mercer Island is 40 feet. RP 659:3–9. Both the Stern and McDonald properties were short platted to be 40 feet wide. Ex. 74 and Ex. 75. Thus, it is no coincidence that Green's determination of the Property Line leaves both Stern and McDonald with 40 feet of occupied property width. RP 658:24-660:25.

Ultimately, Terrane's survey depicts the Property Line and all McDonald lot lines matching up exactly with both the local monuments that had been installed at the time of short platting *and* the construction of structures that were intended to be placed specific distances from the line. Ex. 56.

Stern relied on a survey and testimony from Trevor Lanktree ("Lanktree"). RP 781-82. Lanktree performed a survey that showed the property line being 1.5 feet south of the line identified in the Terrane survey, that effectively made Stern's waterfront 41.5 feet and McDonald's waterfront 38.5 feet. RP 665. Lanktree testified that his survey depicted the legally described line (aka "deed line") as he calculated it—essentially redrawing the Property Line based on legal descriptions from an old government monument. RP 829:7–830:14. He testified that his calculation was based on measurements from a replacement monument marking the corner of Government Lot 2. RP 815:20–817:3. Lanktree then admitted that his calculations may not be correct. He testified that the original monument was likely placed in the 1800s and was subsequently replaced, and he did not know if it was placed in its original location. RP 816:1–17. Further, he noted that the replacement monument was buried in three feet of soil because

it was likely disturbed during road grading, and that it may no longer be in its intended location. RP 816:18–817:3.

Further, Lanktree agreed with Green that in order to determine the Property Line (as opposed to the deed line), the Court should consider local monuments and evidence of occupation on the McDonald and Stern properties, including where the Stern home was constructed. RP 833:20–834:7. In fact, when asked whether monuments or bearings based on government lots (i.e. following the legal description) is more reliable in creating an accurate survey, Lanktree testified that found monuments, including local monuments found at the specific properties in question, are the number one thing that should be relied upon for determining a boundary location. RP 853:20–854:15. However, Lanktree admitted that the deed line depicted on his survey did not match any of the local monuments found on the Stern or McDonald properties. RP 820:5–8.

In his survey, the few monuments he noted are all accompanied by measurements indicating their distance from

[4883-7450-0750]

Lanktree's calculated deed lines. For example, even the fence bracket that the petition calls attention to does not match Lanktree's deed line. RP 849:11–13; Ex. 103. Lanktree did not use the fence bracket, or any other evidence of occupation or local monuments, to provide a specific opinion as to the location of the Property Line.[2] Further, Lanktree admitted that he did not search for any monuments marking other corners of the McDonald property. RP 823:3–824:7.

In short, Lanktree did not provide an opinion of where the Property Line is actually located. Instead, Lanktree calculated where he would have placed the property line in 1980 if were the surveyor of the short plats. He did not try to determine where the Property Line was actually placed.

Following trial, the jury found for McDonald on all claims. CP 880. The trial court heard all evidence from Green and Lanktree, as well as the specific facts that their surveys relied

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[2] Lanktree's actual opinion was that the parties should reach a new a new boundary line agreement. He offered no opinion as to where the agreed line should be. *See* "Surveyor's Narrative" on page 1 of Ex. 103.

upon. CP 926. The trial court agreed with the Terrane survey and quieted title in favor of McDonald. CP 1192.

Stern appealed, arguing in relevant part that the trial court erred by quieting title in favor of McDonald. *McDonald*, 536 P.3d at 676. Division I of the Court of Appeals affirmed. *Id.* at 678. The Court of Appeals explained that the replacement marker for the Government Lot 2 corner was not in the "known" "original" location of the corner. *Id.* at 677. The Court of Appeals also emphasized that the "original surveys" of the Property Line available in this case were the early 1980s surveys of the Barsher and Hobbs plats. *Id.* Because the Terrane survey was consistent with these surveyed plats and local monumentation, and Lanktree relied solely upon a disturbed replacement monument marking a distant government lot line, the Court of Appeals held that the trial appropriately relied on the best available evidence and did not err. *Id.* at 677-78.

Stern petitioned for further review.

VI. ARGUMENT

This Court will accept a petition for review only if (1) the Court of Appeals' decision conflicts with a decision of the Supreme Court, (2) the Court of Appeals' decision conflicts with another published decision of the Court of Appeals, (3) a significant question of law under the Washington State Constitution of the United States Constitution is involved, or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). Because none of these four circumstances apply here, this Court should deny review.

A. The Court of Appeals' decision does not conflict with prior decisions of this Court.

The Court of Appeals held that the trial court did not err by quieting title in favor of McDonald. *McDonald*, 536 P.3d at 678. Stern argues that this holding conflicts with this Court's decisions in *Staaf v. Bilder*, 68 Wn.2d 800, 415 P.2d 650 (1966),

and *Rinehold v. Renne*, 198 Wn.2d 81, 492 P.3d 154 (2021). This Court should disagree.

In *Staaf*, this Court addressed a boundary dispute similar in nature to this case. Two neighbors disputed the location of a common lot line. The original plat that created the disputed lot line had substantial mathematical errors and discrepancies throughout the plat. 68 Wn.2d at 801. However, the western boundary of the plat (not the specific lots in dispute) was "a fairly reliable base line, it being a well monumented section line running to established section corners; surveyors usually commence their surveys from the southwest corner of tract 121, called the 'government quarter corner.'" *Id*. at 801. Although a government lot corner existed from which a surveyor could calculate where the disputed line should be placed, the Court determined "the question to be answered is not where new and modern survey methods will place the boundaries, but where did the original plat locate them." *Id*. at 803.

In *Staaf*, this Court articulated several principles that should be considered in resolving boundary disputes. Relevant here, courts resolving boundary disputes "should ascertain and carry out the intention of the original platters." *Id.* "The main purpose of a resurvey is to rediscover the boundaries according to the plat upon the best evidence obtainable and to retrace the boundary lines laid down in the plat." *Id.* More specifically, "the known monuments and boundaries of the original plat take precedence over other evidence and are of greater weight than other evidence of the boundaries not based on the original monuments and boundaries." *Id.* Finally, where there is discrepancy "between lines actually marked or surveyed on the ground and lines called for by plats, maps or field notes, the lines marked by survey on the ground prevail." *Id*.

Ultimately, this Court affirmed the trial court's decision to find the true location of the property line in dispute by accepting a metal pipe along the line in dispute to be a local monument previously installed by a surveyor as the best evidence of the

[4883-7450-0750]

location of the line as intended by the original platter. *Id.* at 801–03. This Court made this decision even though a nearby government lot corner existed from which the property line could have been calculated.

Here, the Court of Appeals correctly applied *Staaf*'s rule that the boundary line should be determined based on the totality of the best evidence obtainable. *McDonald*, 536 P.3d at 677. The best evidence regarding the location of the lot line between the Stern and McDonald properties is evidence of where the line was placed by surveyors of the Barsher and Hobbs plats in 1980 and 1981. *Id*. Again, local monuments around the Stern and McDonald properties align with their locations in the Barsher and Hobbs short plats. Additionally, structures, including Stern's own residence, are built in specific locations that correspond to the Property Line as marked in the short plats and reflected in Terrane's survey.

In contrast, the replacement corner marker for Government Lot 2 was not the best available evidence. The

original corner marker for Government Lot 2 was lost or obliterated.[3] The Court of Appeals noted that determining the location of a missing corner in such cases "is a fact-intensive process; the trier of fact must render a decision upon a welter of conflicting and often highly technical bits of information." *McDonald*, 536 P.3d at 677 (*quoting* 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 13.4, at 96 (2nd ed. 2004). Here, Lanktree relied on a replacement monument that he could not confirm was in its proper location, and he "relied on no evidence purporting to reconstruct the location of a corner established in the original government survey." *McDonald*, 536 P.3d at 677. Thus, the Court of Appeals, citing *Staaf*, concluded that "Lanktree did not establish the monument associated with the corner of

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[3] Stern argues that the original monument was not "lost" and was instead replaced in its same location by a newer marker. This is a question of fact that was resolved at the trial court, and it is not appropriate to pose this question to the appellate courts. *See Garcia v. Henley*, 190 Wn.2d 539, 544, 415 P.3d 241 (2018) ("This court generally cannot make findings of fact."). Regardless, Lanktree admitted that the monument might not be in the original location and may have been displaced. RP 816-17.

government lot 2 coincided with the 'known' 'original' location of the corner." *Id*.

Stern also argues that the Court of Appeals "ruled that *Staaf* permits a platter to alter the location of a government survey line by simply drawing it in the wrong place on the plat," by suggesting that the Barsher and Hobbs short plats were "resurveys" of the Government Lot 2 line. Petition at 15-16. Stern's assertion is wildly inaccurate. The Barsher and Hobbs short plats are not resurveys, they are original surveys intending to depict newly subdivided lots for the first time. While the short plats reference the northern line of Government Lot 2, none of the newly subdivided lots abut the government lot line, and neither survey provides a full depiction of the government line. Furthermore, the trial court decision quieting title in this case did not establish the location of any government lot lines, it only established the location of a single common boundary line depicted on the parties' short plats.

In *Rinehold*, this Court considered whether a trial court erred by granting summary judgment in a boundary dispute. 198 Wn.2d at 90-91. The boundary line in dispute was created in the 1950s, and the prevailing party at the trial court relied on a survey that was conducted in 2015. *Id.* at 83, 85. The other party did not obtain or submit a survey but disputed the prevailing party's survey with language from the original deed from the 1950s. *Id.* at 86-87, 90. This Court held that the boundary line was wherever the original surveyor placed the boundary, and the original surveyor was the person who subdivided the lots at issue. *Id.* at 83. To determine that individual's intent, the Court needed to look to the original deed and plat map as well as modern retracement surveys. *Id.* at 95. This Court held that there was a genuine issue of material fact as to the original surveyor's intent because of an ambiguity in the language of the original deed. *Id.* at 96. Thus, this Court held that the trial court erred by granting summary judgment on that issue. *Id.* This Court emphasized that the modern surveyor's expert opinion could be presented at

trial, but his expertise did "not allow him to usurp the jury's fact-finding role." *Id.*

Stern contends that the Court of Appeals declined to follow *Rinehold*'s holding that known monuments and boundaries of the original surveyors are the best evidence, taking precedence over other evidence. Stern makes this argument by conflating the original survey of Government Lot 2 with the unknown subdivision that created the property line in question. Stern misleads this Court by stating that it is "undisputed that the 1860's-era government survey established the line in question." Petition at 14. However, the disputed property line is not a government lot line. It is an interior line of subdivision of the government lot and there is "no evidence of when or how parcels were divided establishing that line." *McDonald*, 536 P.3d at 675–76. Thus, even if the Government Lot 2 corner marker was an original rather than a replacement, it is not one of the "known monuments and boundaries of the *original plat*" that created the

disputed property line that is the subject of this litigation. *Rinehold*, 198 Wn.2d at 92 (emphasis added).

Under *Rinehold* the trial court was to place greater weight on known monuments and boundaries of the original plat that created the Property Line. The Court of Appeals ruled consistently with *Rinehold* when it did not elevate evidence of the replacement marker for the government lot above evidence of local monuments marking the lots in the Hobbs and Barsher short plats.

Because the Court of Appeals' decision does not conflict with this Court's other decisions in *Staaf* and *Rinehold*, this Court should decline to accept review under RAP 13.4(b)(1).

B. The Court of Appeals' decision does not conflict with precedent from another Division.

Stern argues that the Court of Appeals' decision conflicts with Division II of the Court of Appeals' decision in *Thein v. Burrows*, 13 Wn. App. 761, 537 P.2d 1064 (1975). This Court should disagree.

In *Thein*, Division II considered a timber trespass case involving a boundary dispute. *Id.* at 761. The original survey conveyed the lots at issue in terms of acreage along a river's meander line. *Id.* at 765. This meander line was the only available credible evidence of the boundary line in question. *Id.* at 764. One party submitted a modern survey based on the river's meander line at the time of the original survey, and the other party submitted a modern survey based on the river's new meander line. *Id.* at 763. The trial court accepted the survey that was based on the river's new meander line, and Division II reversed. *Id.* at 764-65. Division II emphasized *Staaf*'s rule that the intent of new surveys should be to ascertain where original surveyors placed boundaries rather than to determine where new and modern surveys would place them. *Id.* at 763.

Division II took great care to limit its holding and noted:

> [I]n a case such as this, where the parcels of land have been conveyed in terms of acreage alone since the original government survey, we hold that the original government meander line must be used in determining the appropriate boundary lines of that

[4883-7450-0750]

> parcel. We note, however, that this problem will seldom arise in most cases, where there typically are other aids, such as metes and bounds, courses and distances and natural or artificial monuments, available to aid in the location of the correct boundaries.

Id. at 765.

Thein does not apply to this case. The lots in question have never been "conveyed in terms of acreage alone"—thus, this case falls in *Thein*'s list of "most cases" where other descriptions and monuments are available to aid in locating the correct boundary. *See id.* To the extent that *Thein*'s principles do apply here, *Thein* simply emphasized that the correct boundary line is the boundary established by the "original surveyors." *Id.* at 763. Here, the original surveyors were the individuals who drew the boundary line between the Barsher and Hobbs plats. Indeed, these are the first individuals who could have any intent with respect to where the Property Line should be located. As detailed above, the Terrane survey properly relied on the best obtainable evidence to establish the intent of the "original surveyors" of the line in

question. Thus, the Court of Appeals decision comports with *Thein*, and this Court should decline to accept review under RAP 13.4(b)(2).

C. This case does not involve any significant constitutional question of law or issue of substantial public interest.

Stern argues that this case involves significant constitutional questions of law and issues of substantial public interest. This Court should disagree.

Stern did not assert any constitutional claim at the trial court or at the Court of Appeals but now contends that the Court of Appeals decision allows takings in violation of article 1, § 16 of the Washington Constitution. Specifically, Stern contends that "[t]aking real property by conducting an erroneous resurvey, or by relying on a resurvey that set the wrong boundary line, is a taking." Petition at 23. Stern provides no argument or citation to authority supporting this statement. For this reason alone, Stern's contention fails. *See* RAP 13.4(c)(7) (petition for review

must include the reason(s) why review should be accepted, "with argument").

Further, as discussed above, the Court of Appeals decision does not allow the taking of property via erroneous resurveys or wrongly set boundary lines. Instead, the Court of Appeals decision exemplifies the proper application of established legal principles to boundary disputes.

Stern also argues that this case involves issues of substantial public interest. Stern asserts that "[a]llowing a trial court to simply credit an erroneous resurvey, thereby changing the deeded boundary without just compensation to the prior owner, should be a matter of concern to this Court and to every property owner in Washington." Petition at 23. Again, the Court of Appeals decision does not allow trial courts to rely on erroneous surveys or change deeded boundaries. Moreover, Stern provides no supporting argument for this statement and does not explain how a private property dispute between two neighbors constitutes an issue of substantial public interest. *See*

[4883-7450-0750]

RAP 13.4(c)(7) (petition for review must include the reason(s) why review should be accepted, "with argument").

VII. CONCLUSION

Controlling law indicates that when determining the location of a disputed boundary line, the trial court should consider the best evidence obtainable to show the intent of the original platters or surveyors of the line, and that evidence of known monuments marked upon the land take priority over inconsistent lines called for in plat. The Court of Appeals applied these principles to this case and affirmed the trial court's conclusion that the best evidence regarding the location of the Property Line in this case was the evidence from the original surveys from the Barsher and Hobbs short plats that resulted in local monuments being placed around the properties, from which structures were built in reliance on those markers, including Stern's home.

Stern incorrectly argues that since the legal descriptions of both short plats reference the older north line of Government Lot

2, the Court must focus on the intent of the government surveyor who marked the government lot line 900 feet north of the Property Line. Stern's interpretation of the controlling law is nonsensical. If Sterns' argument were correct---that the government lot corner monument prevails over all other evidence---then local monuments placed to mark property lines would become unreliable. Stern's reasoning would allow new surveyors to recalculate previously marked property lines so long as an old government marker is available from which to perform the calculation. This directly contradicts the intent of the cases addressed above, which is to determine where property lines were originally placed---not where a new surveyor would place them.

The Court of Appeals properly relied on prior precedent and affirmed the trial court. This Court should deny Stern's petition for review.

This document contains 4,953 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 16th day of November, 2023.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By /s/*Ryan C. Espegard*_______________
Ryan C. Espegard, WSBA No. 41805
Katie Chan, WSBA No. 56970
Attorneys for Respondent

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington as follows:

On November 16, 2023, I sent a true and correct copy of the answer to petition for review to the following parties of record, via email to the following:

Sidney C. Tribe at tribe@carneylaw.com
Coreen Wilson at coreenw@wieckwilson.com

Leslee E. Hoober
Gordon Thomas Honeywell LLP

[4883-7450-0750]

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November 16, 2023 - 4:55 PM

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