92036-2

No. 72027-9-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARK F. & LINDA H. BRESSLER,
Plaintiffs / Appellants

v.

KEVIN F. & LINDA SULLIVAN,
Defendants / Respondents

v.

GMAC MORTGAGE, LLC &
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
Defendants

PETITION FOR REVIEW
ON BEHALF OF KEVIN F. & LINDA SULLIVAN

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A. IDENTITY OF PETITIONER

Kevin and Linda Sullivan (hereinafter referred to collectively as "Sullivans") petition the Supreme Court to accept review of the unpublished Court of Appeals decision in this matter terminating review as designated below.

B. REVIEW SOUGHT OF COURT OF APPEALS DECISION

The Sullivans seek review of the decision of the Court of Appeals in this matter issued on July 29, 2015. A copy of the decisions is appended hereto as ***Appendix B***. More specifically, the Sullivans seek review and reversal of the Court of Appeals decision in the following respects:

1. The Court's ruling that "Once an easement is extinguished by abandonment, or any other means, it no longer exists" and may only be recreated by creation of a new easement and thereafter ruling that the easement could not be reinstated under the application of "equitable estoppel". This is followed by the appellate court finding that the Decree Quieting Title of the trial court is without legal basis. Opinion in No. 72027-9-I, appended as ***Appendix B*** hereto, at page 8 and 11.

2. The appellate court's finding that the trial court's consideration of the equitable estoppel argument was unnecessary and

unwarranted. Opinion in No. 72027-9-I, appended as ***Appendix B*** hereto, at page 8.

3. The appellate court's ruling that there is no legal support for the remedy of equitable estoppel as it relates to abandonment of an easement and related finding that there is no legal support for the proposition that abandonment and be repudiated under the application of estoppel. Opinion in No. 72027-9-I, appended as ***Appendix B*** hereto, at page 9.

4. That the finding that the erection of a fence in an area of an easement, without prior demand for its removal and failure to comply with such demand, is satisfactory evidence to support a finding of abandonment. Opinion in No. 72027-9-I, appended as ***Appendix B*** hereto, at page 9.

C. ISSUES PRESENTED FOR REVIEW

1. The decision of the Court of Appeals that "estoppel" was not an applicable doctrine for use by the Trial Court in relation to a contest case of abandonment of an easement is in error and should be reversed.

2. The ruling by the Court of Appeals that if actions have occurred sufficient to find an easement has been abandoned, the easement is at that point permanently extinguished and such actions cannot be

reversed to allow the easement to continue to exist is in error and should be reversed.

3. Contrary to the decision by the Court of Appeals, if the owner of the dominant estate as it relates to an easement constructs a fence within the easement area but removes it prior to or during the course of litigation and the owner of the servient estate would suffer no undue hardship as a result of these action, the easement should remain viable and not be extinguished.

4. If equitable estoppel can and does apply with regard to claims that an easement has been abandoned and is so applied by the trial judge, the standard for review should be "abuse of discretion". In this case, that standard should be applied and the decision of the trial court sustained necessitating reversal of the decision of the Court of Appeals.

D. STATEMENT OF THE CASE

At issue herein is a "joint boat launch easement" which burdened both the property owned by Plaintiffs Bressler and Defendants Sullivan that is more fully described in Trial Exhibit 11, copy appended as ***Appendix C*** hereto. Plaintiffs Bressler brought a quiet title action seeking to declare the easement extinguished as a result of either (i) abandonment of the same by their neighbors, the Sullivans; or (ii) the easement was extinguished applying the theory of equitable estoppel. CP 903-926. Trial

was held in Island County Superior Court over a number of days in front of the Hon. Vickie I. Churchill.

1. Decision of the Trial Court

Judge Churchill, in a 10-page letter ruling attached hereto as ***Appendix A***, found the following facts essentially as undisputed:

(a) That the Sullivans had originally thought an easement existed between the two houses to facilitate getting boats to and from the beach, the only opening in the beach seawall wide enough for launching such boats being on the Bressler side of the properties. See ***Appendix C*** hereto.

(b) The Court further found that after consulting an attorney, the Sullivans were advised incorrectly that an easement could not be located on the records of title and in reliance on such advice, constructed a fence on their side of the property line but nonetheless in the area covered by the easement.

(c) The Bresslers subsequently hired an attorney (Carolyn Cliff) not as much to object to the location of the fence as they did not own or use boats but to obtain an agreement that the easement could be extinguished of record.

(d) When the Bressler's counsel contacted the attorney for the Sullivans in this regard, the Sullivans found out that an

easement to launch boats did, in fact, exist. While it was the initial hope of the Sullivans that they might be able to create an opening and launch point in their own seawall, the costs and regulatory demands were simply prohibitive. But their attorney during this period did not "waive off" the Bresslers attempt to negotiate a formal extinguishment and the trial court found that the Bresslers were entitled to rely upon the representations and actions of Sullivans' attorney.

(e) The Sullivans relocated their fence to free up the easement area on March 1, 2012.

The Court, after trial, ruled as follows:

"The third prong focuses on the injury the other party would suffer if the servient tenant, in this case the Sullivans, were allowed to contradict or repudiate their earlier admissions, statements or acts.

> 'An easement may be extinguished by conduct of the owner even though he had no intention to give up the easement. This is due to the general principle that the owner of an easement will not be permitted to change a position once taken by him if the change would cause undue hardship to the owner of the servient tenement.' Humphrey v. Jenks, 61 Wn.2d 565, 379 P.2d 366 (1963), quoting from 2 American Law of Property 305, §8.00).(Emphasis added [by the Court]).

"Obviously the Bresslers have incurred attorney fees in drafting the extinguishment agreement and attempting to have it executed. The Bresllers have also incurred ongoing attorney fees because of the continued encroachment by the Sullivans, even after those encroachments were called to the Sullivans' attention. Most of the encroachments had been removed by the time of trial, but the fence and landscaping

encroachments remain. The continued presence of the fence in the easement area threatens the integrity of the Bresslers' reserve drainfield. However, the fence can be easily removed, as shown by the number of times the Sullivans moved their fence; and the landscaping can be removed.

"The Court finds that the Bresslers will suffer no undue hardship if the Sullivans are required to move the encumbrances found by the court to encroach on the easement and to pay the attorney fees incurred by the Bresslers. **When the Bresslers bought their property, they knew it was encumbered by the boat launch declaration and that they would have to allow their neighbors to use it**. The fact that the neighbors are contentious is unfortunate." See ***Appendix A*** hereto (emphasis added by author).

It should be noted that the record reflects the Sullivans complied fully with the conditions set by the Court. See copies of pleadings filed as Sub. 174 and 175, copies appended as ***Appendix D*** hereto.

2. Decision at the Court of Appeals

The Court of Appeals essentially reversed the trial court. Their decision is appended as ***Appendix B*** hereto. The nexus of their decision can be stated as follows:

"The trial court's ruling permitting the Sullivans to reinstate the easement after they abandoned it is without legal basis. Once an easement is extinguished by abandonment, or any other means, it no longer exists. Thus, it may only be 'reinstated' by creation of a new easement. . . .

"Once the court concluded the easement was abandoned, this was sufficient to extinguish the easement. The court's consideration of the equitable estoppel argument was unnecessary and unwarranted. The court did not have the authority to order the reinstatement of the abandoned easement on a finding that the Bresslers would not suffer undue hardship if the Sullivans moved the encumbrances and paid the attorney fees ordered by the court. The trial court appears to have erroneously merged

the requirements for abandonment and equitable estoppel and fashioned a remedy of 'reinstatement' of an abandoned easement based on the requirements of equitable estoppel." See Appendix B hereto.

E. ARGUMENT

1. The decision of the Court of Appeals presents a conflict with both decisions of the Supreme Court and the Court of Appeals.

A. Both the Court of Appeals (in a prior decision) and the Supreme Court have recognized the applicability of "estoppel" to cases involving the abandonment of an easement. This conflicts with the ruling by the Court of Appeals in this case.

Previously, in one of the very few Washington cases on "abandonment of an easement", the clear inference was that even when abandonment has been proven, revival or reinstatement can be shown. Heg v. Alldredge, 157 Wn.2d 154, 137 P.3d 9 (2006). That decision resulted from review of a Division I opinion in which that court clearly recognized the right of a party, even after a finding of abandonment of an easement, could seek revival absent application of principles of equitable estoppel.

> *"An easement may be extinguished by conduct of the owner of it even though he had no intention to give up the easement. This is due to the general principle that the owner of an easement will not be permitted to change a position once taken by him if the change would cause undue hardship to the owner of the servient tenement. Humphrey v. Jenks, 61 Wn.2d 565, 567-68, 379 P.2d 366 (1963) (quoting 2 AMERICAN LAW OF PROPERTY § 8.99, at 305) (1952). Thus, where the conduct of an owner of an easement (or that of his predecessors) does not suffice to establish abandonment of the easement, it may nevertheless suffice to bar enforcement where there has been a change of position by the owner of the*

servient estate and resulting hardship." Heg v. Alldredge, 124 Wn. App. 297, 310 (Wash. Ct. App. 2004)

While in *Heg* the Supreme Court reversed the Court of Appeals, it did so based upon lack of evidence supporting abandonment of the easement. The alternative application of equitable estoppel by the Court of Appeals was not specifically overturned by the Supreme Court in its later review.

> *"However, the court found the Alldredges presented a viable claim of equitable estoppel with respect to the second claim and remanded for trial. Id. at 313. In so holding, the court relied on Humphrey v. Jenks, 61 Wn.2d 565, 379 P.2d 366 (1963) for the proposition the conduct of a party's predecessors may bar the enforcement of easement rights.*
>
> *"Ms. Heg argues she cannot be estopped from enforcing her easement rights based on the alleged conduct of her predecessors in interest, and that the Alldredges did not allege "justifiable reliance" upon such conduct. The Alldredges assert the Court of Appeals correctly construed Humphrey because otherwise the estopped party could resurrect a barred claim by transferring title to a third party. In Humphrey we never reached that question because the party asserting estoppel did not establish reasonable reliance. Humphrey, 65 Wn.2d at 570. Alldredges' argument that Heg's predecessors' conduct bars her from enforcing estoppel rights cannot be squared with the language requiring "the party to be estopped" to have acted or made statements inconsistent with his or her later claim, Walbrook, 115 Wn.2d at 347. Because the record contains no evidence of any acts or statements by Heg inconsistent with her claim of easement rights, Alldredges' second estoppel claim is without merit.*
>
> *"CONCLUSION*
>
> *"We reverse the Court of Appeals. Because the record contains no evidence Ms. Heg or her predecessors in interest intended to abandon the easement or any evidence of admissions, statements, or actions inconsistent with her claim, Ms. Heg is entitled to*

> *summary judgment as a matter of law."* Heg v. Alldredge, 157 Wn.2d 154, 166-167 (2006)

In this regard, see also the Jenks decision stating in part as follows:

> *"Most significantly, there has been no change of position on the part of the appellants which would render it inequitable to recognize the easement of the respondents. Except for the one occasion on which barriers were placed across the driveway, there has been an uninterrupted use of the driveway for 18 years. The appellants have not shown that the maintenance of the easement over the small corner of their lot would work a hardship upon them. There is nothing in the record to indicate that they intend to abandon the driveway as a means of access to their property, and it seems their sole purpose is to prevent its use by their neighbors."* Humphrey v. Jenks, *61 Wn.2d 565, 568 (Wash. 1963)*

In the instant case, although finding acts that constituted evidence of abandonment of the easement, the trial court also found that such actions do not ripen into "irrevocable" abandonment of the easement "until the other individual benefiting from the easement seeks to access it and any barrier is not removed". *Letter Ruling and Decision*, ***Appendix A*** hereto and CP 201, 209, citing *Edmonds v. Williams*, 54 Wn.App. 632, 636-637, 774 P.2d 1241 (1989).

Factually, the Bresslers had and still have never sought to access the easement, did not own a boat and did not intend to themselves use the easement for the stated limited purpose of a "boat launch". RP 277-278. The court found that Bressler's argument was essentially that Sullivans should be equitably estopped from making that argument after evidence of

abandonment. *Letter Ruling and Decision, Id.* The Bresslers argued that at trial they were asserting both equitable estoppel and abandonment as compatible theories when dealing with the abandonment of an easement and so the use of the theory of equitable estoppel should come as no surprise. While the Trial Court found Sullivans' act of erecting a fence constituted sufficient evidence of abandonment of the easement, the Trial Court also found that the Sullivans retained the ability to revise or reinstate it by removing the fence absent being equitably estopped, which they did.

The decision by the Court of Appeals essentially ruled that once sufficient evidence of abandonment is found, the easement totally disappears and cannot be equitably revived. Thus, there is left a clear question of law as to whether or not the doctrine of equitable estoppel applies in regard to abandonment of an easement. We assert that it should and does as applied by the trial judge in this case.

We also note that the Court of Appeals engaged in a *de novo* review making their ruling as to "abandonment" as a matter of law, not in accordance with review of an equitable ruling of a trial judge based on the "abuse of discretion" standard.

B. Other cases have held that erecting a fence across an easement is not abandonment absent a failure to remove the barrier upon demand. This is inconsistent with the holding of the Court of Appeals in this case.

The Court of Appeals (Division I) previously held that erecting a fence across an easement did not constitute abandonment of the easement.

> *"In this case the record does not reflect that any effort was made to use the parcel A access easement from the time the easement was created in 1969 until well after the City acquired parcel A. The only use of the easement area by Williams that could be considered obstructive to the easement was his construction and maintenance of a fence. This is not a sufficiently inconsistent use of the easement area to constitute adverse possession."* Edmonds v. Williams, *54 Wn. App. 632, 637 (Wash. Ct. App. 1989)*

In this case, the "easement" in question had a very limited purpose, "launching boats". Trial Exhibit 105 (copy appended as ***Appendix C*** hereto). However, the owners of the servient estate (Bresslers) did not own a boat, had never owned a boat and did not intend to buy a boat. RP 277-278. But the trial court placed significant emphasis on the erection of a fence by the Sullivans, finding that to be the "clear, cogent and convincing" evidence of "abandonment". Letter Ruling and Decision, Appendix A hereto and CP 201, 208. Based on that finding, the Court of Appeals has ruled that even moving the fence is not sufficient to restore the easement. The issue for the Court of Appeals then became whether the doctrine of equitable estoppel could be used to reinstate the easement, their opinion decreeing that it could not.

> "*Once an easement is extinguished by abandonment, or any other legal means, it no longer exists. Thus it may only be reinstated by creation of a new easement.*" *Opinion* in No. 72027-9-I, appended as ***Appendix B*** hereto, at page 8.

2. The ability to rescind or reverse actions that might otherwise constitute "abandonment" of an easement is largely one of first impression in this state and as a matter of public policy should be addressed by this court.

As noted in the argument in ¶1 above, there is a clear conflict between the decisions of the Supreme Court (at least recognizing the ability to apply "equitable estoppel" doctrines to abandonment of an easement), an earlier decision of the Court of Appeals clearly recognizing that equitable estoppel could so apply and their conflicting decision in the instant case.

A. "Abandonment" of an easement should rest on the intent of the owner of the dominant estate and less on objective facts.

However, beyond that, the determination that an easement has or has not been abandoned really rests on the "intent" of owner of the dominant estate and interpretation of the actions taken with respect to such easement.

> *"Extinguishing an easement through abandonment requires more than mere nonuse--the nonuse "'must be accompanied with the* ***express or implied intention of abandonment.***'" *Netherlands Am. Mortgage Bank v. E. Ry. & Lumber Co., 142 Wash. 204, 210, 252 P. 916 (1927) (quoting Christopher G. Tiedeman, AN ELEMENTARY TREATISE ON THE AMERICAN LAW OF REAL PROPERTY, § 605, at 574 (2d ed. 1892)). This court has*

> *previously held that "the lapse of time does not, of itself, constitute an abandonment, but is a circumstance for the jury to consider in arriving at the intention of the [owner of the dominant estate]" and that "an intention to abandon property for which one has paid value will not be presumed." Neitzel v. Spokane Int'l Ry. Co., 80 Wash. 30, 41, 141 P. 186 (1914). An easement appurtenant which runs with the land "'is not a mere privilege to be enjoyed by the person to whom it is granted or by whom it is reserved. It passes by a deed of such person to his grantee and follows the land without any mention whatever.'" Winsten v. Prichard, 23 Wn. App. 428, 431, 597 P.2d 415 (1979) (quoting 2 George W. Thompson, Commentaries on the Modern Law of Real Property § 322, at 69 (John S. Grimes repl. 1961)).*" Heg v. Alldredge, 157 Wn.2d 154, 161 (2006)(emphasis added).

This should be placed in contrast to the theory of "adverse possession", which is truly statutory in nature and relies on objective determinations. For example, erecting a fence on a line other than the true boundary and maintaining it for over 10 years can result in a transfer of ownership dating back to the date the 10-year period elapsed. The conveyance of title needs to be "confirmed" judicially in order to become "of record" but vests by operation of law. For example:

> *"The claim of right element of adverse possession requires only that the claimant or successors treated the land as his or her own as against the world throughout the statutory period. The nature of the possession will be determined on the basis of the manner in which the possessor treats the property. Subjective beliefs regarding a true interest in the land and any intent to dispossess or not dispossess another are irrelevant to the determination."* Shelton v. Strickland, 106 Wn. App. 45, 50-51 (Wash. Ct. App. 2001).

> *"The law is clear that title is acquired by adverse possession upon passage of the 10-year period. El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 855, 376 P.2d 528 (1962); Muench v. Oxley, 90 Wn.2d 637, 644, 584 P.2d 939 (1978). The quiet title action merely confirmed that title to the land had passed to Halverson by 1974. Halverson v. Bellevue, 41 Wn. App. 457, 460 (1985).*

In contrast, the instant case involved the erection of a fence by the Sullivans at a time that they did not believe they enjoyed an "easement" (Letter Opinion appended as ***Appendix A***, CP 201-210) and later, upon demand by the Bresslers, moving that fence to free up the easement and access, all occurring before the action was filed in Superior Court.[1]

And it is clear that the Bresslers were not relying upon the erection of the fence as determinative of abandonment of the easement. They in fact continued to negotiate for a written document declaring abandonment to meet the statute of frauds. See Trial Exhibits 45 and 54.

While the Sullivans argued at the Court of Appeals that this set of facts did not support a finding of abandonment of the easement, the application by the trial judge of "estoppel" provided an adequate remedy to the Sullivans to retain access to the beach to launch their boat.

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[1] It is acknowledged that the Court found other actions of the Sullivan leant themselves to a finding of abandonment (e.g., putting a mailbox in, planting flowers, etc.) but none of these improvements were permanent and none of these improvements actually blocked the easement from being used for its stated and limited purpose of launching a boat. The Sullivans did, in fact, launch their boat using the easement.

We are left with a decision from the Court of Appeals that would indicate that the erection of a fence was "unequivocal and decisive and inconsistent with the continued existence of the easement" (Court of Appeals Opinion, appended as Appendix B, at page 6) in conflict with *Edmonds v. Williams*, *Id.*

We believe the Court should address the issue of whether actions taken by the owner of a dominant estate with respect to an easement can be rescinded, revoked or altered upon demand and have the easement continue to enjoy its vitality.

B. If an easement can be extinguished by "equitable estoppel", it should be allowed to be retained under the same equitable theory.

The opinion of the Court of Appeals recognized the applicability of "equitable estoppel" as relating to easements.

> "An easement may be extinguished by operation of the legal doctrines of abandonment and equitable estoppel". Opinion in No. 72027-9-I, appended as ***Appendix B*** hereto, at page 5, citing *Heg v. Alldredge, supra.*

But the appellate opinion declined to recognize the applicability of equitable estoppel to preserve an easement as in this case. We believe this creates an inconsistency in the law that should be addressed and clarified.

C. The decision by the Court of Appeals makes it almost impossible, short of a legal decision in a quiet title action, to determine whether an easement remains viable or not.

In this case, the fence that was installed along the boundary line did not preserve the 10' setback area that constituted the easement area. As noted, prior to the litigation being initiated, this fence was relocated by the Sullivans such that the full 10' width was available for use (and the Sullivans did in fact use it for that purpose). While the trial court found that erection of this fence constituted sufficient evidence of abandonment of the easement (with which we disagree), the Court used "estoppel" to allow the easement to retain its viability (a correct result).

But the Court of Appeals decision would have the erection of the fence be an instantaneous "abandonment" of the easement which would then, presumably, subject the Sullivans to damages for trespass if there were to use the easement. They did in fact use the easement after relocating the fence to a location where it did not block the easement.

The effect of the Court of Appeals decision will be to insert a large degree of uncertainty into the law of easements. Owners of easements who create an obstruction, when no use is being made of the easement and no demand for the easement to remain unencumbered, subject themselves potentially to the "loss" of the easement without notice or contemporaneous legal finding. As noted, this conflicts with the prior line

of decisions ruling that erection of a barrier (fence or other) does not in and of itself constitute "abandonment" of the easement. See *Heg and Edmonds, supra.*

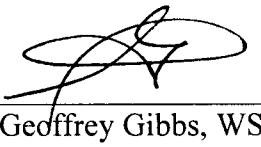
F. CONCLUSION

In the context of adverse possession, an individual puts up a fence, waits 10 years and has an expectation that the property within the fence belongs to the fencer. But with respect to "abandonment" of an easement, the outcome is far from certain and the course of ownership can be changed mid-stream. As the cases cited above reflect, under the law relating to abandonment of an easement, mere "non-use" does not constitute abandonment. Utilizing a different corridor other than the easement for access does not constitute abandonment. Placing an obstruction or fence across an easement does not in and of itself constitute abandonment. In these situations, a party can take subsequent actions to restore the easement to usefulness and avoid having the easement declared abandoned. When faced with this situation, our trial judges should be allowed to utilize the theory of equitable estoppel to preserve what the parties in fact bargained for, an easement.

We ask the Court to accept review of the decision by the Court of Appeals in this matter and to reverse that decision, reinstating the decision of the trial court.

Respectfully submitted this 28th day of July, 2015.

Anderson Hunter Law Firm



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Appendix A

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR ISLAND COUNTY

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Re: Bressler v. Sullivan, Island County Superior Court, No. 12-2-00469-7

Dear Counsel:

This matter came before the court after a bench trial from December 3-5 and December 12, 2013. The court took the matter under advisement and is now ready to rule.

STATEMENT OF FACTS

Sullivan and Bressler each bought adjoining low-bank waterfront homes on Columbia Beach Drive in Clinton on the same day, July 24, 2006. The Sullivans own Lot 25 and the Bresslers own Lot 26. Both lots are encumbered with a mutual easement over a five-foot strip on either sides of most of their common boundary, while Lot 26 is encumbered with an easement for the benefit of Lot 25 that crosses Lot 26 to the side where the boat ramp is located on Lot 26.

Prior to the Sullivans' and the Bresslers' purchase of their lots, both lots were owned by Casa Group Corporation, a Washington corporation, whose president was Rick Jones. Casa Group installed stone pavers along the corridor between the two houses and reinforcing plastic honeycomb, called "grassy pavers," under the sod at each end of the stone paver corridor,

following the intended easement path between the two lots until it crossed Lot 26 and reached the boat launch. *See* "Declaration for Joint Use of a Boat Launch," Ex. 11. The purpose was to strengthen the ground so vehicles towing boats would not tear up the ground.

The neighbors did not get along for a variety of reasons and over the years both were careful to stay on their side of the easement. There were two exceptions. The Sullivans erected a mailbox in January 2009 in the middle of the easement in front of the houses and, despite acknowledging that the box needed to be moved, did not remove it until after this lawsuit was commenced. Additionally, the Sullivans put in landscaping along the side and in front of their house that encroached on the easement.

The Bresslers sometimes put lawn furniture on the paved boat launch but such use was seasonal. The Sullivans apparently did not like that use but did not complain to the Bresslers. The Bresslers removed the lawn furniture from the boat launch pad when they saw that the Sullivans had a boat.

In August 2009, Ms. Sullivan told Mr. Bressler that she was going to give up her easement rights and install a fence along the property line. Bressler told her it would be inconsistent with the easement, because he did not want to lose his right to use the easement. There was some controversy over where Ms. Sullivan was going to place her fence, but eventually, the chain-link fence she installed was five feet from the mid-point of the easement, and there was no encroachment on the easement.

Early September 2011, the Sullivans brought a small aluminum boat and stored it inside their fence. On September 5, 2011, Ms. Sullivan emailed her attorney with questions about how to begin using her easement shared with Bressler. Ex. 131. Unfortunately, Ms. Sullivan was told that no easement existed, even though she believed an easement existed from the time she and her husband purchased the property and even though her neighbor, Bressler, had continuously affirmed the existence of an easement. In fact, in August 2007, the Sullivans paid one-half the cost of repairs to the boat launch, acknowledging the existence of a joint-use agreement and easement.

There were some minor confrontations between the neighbors about use of the easement area, but it did not escalate until January 2009 when Ms. Sullivan moved onto the property and brought her dogs to stay with her. She had her mailbox installed on the easement in January 2009 and kept it there, despite Mr. Bressler telling her it was in the middle of the easement. She agreed to move the mailbox but never did until this lawsuit occurred.

At the end of August 2009, Ms. Sullivan decided to put up a fence because of some problems with her dogs and another neighbor's dogs. At one point, she told Mr. Bressler that she would have to give up her easement in order to put her fence on the property line. Mr. Bressler reminded Ms. Sullivan that it would be inconsistent with the easement and that she could not do that. Mr. Bressler told one of the contractors installing the fence that there was an easement, and

Ms. Sullivan came up and told the contractor, "Don't listen to what he says. I'm going to put my fence anywhere I want."

Even though Ms. Sullivan eventually placed her fence five feet from the midpoint of the easement so that it did not encroach on the easement, it is apparent to this court that she was aware that an easement existed and its location.[1]

Mr. Bressler had placed a single rope from where Ms. Bressler's fence ended and attached it to the bulkhead to give his autistic child a verbal reminder of the limits of Mr. Bressler's yard. Ex. 95. In October 2009, Ms. Sullivan removed part of the rope fence and told Mr. Bressler that he could not put the rope fence on that portion because it blocked her easement, saying, "As you know, the easement does not go down this far." Again, Ms. Sullivan knew about the location of the easement and its existence.

On September 8, 2011, the Sullivans contacted an attorney to draft a letter to the Bresslers, informing them they intended to start using the easement. Ex 172. The easement was not mentioned in the Sullivan's Statutory Warranty Deed, Ex. 12, and for whatever reason, the attorney was unable to find the easement in the title records, possibly because it was called "Declaration for Joint Use of a Boat Launch." Ex. 11.

On September 27, 2011, the Sullivans purchased a small aluminum boat and stored it inside their fence. Ex. 30. Mr. Bressler, who saw the boat, immediately moved his outdoor furniture off the boat pad. The Sullivans also made arrangements to install a sliding gate on their fence in preparation to move their boat from their property to the boat launch. With the exception of the mailbox and some plantings alongside the house and in the front yard, there was no encroachment on the easement.

On September 29, 2011, Ms. Sullivan's attorney advised her there was no recorded easement, and Ms. Sullivan took immediate action to move her fence to the middle of the easement. Ex. 31. On October 5, 2011, the poles were set in concrete in the ground. Ex. 36. By October 12, 2011, all the fence posts were placed in concrete in the middle of the easement, including the six-foot-high wooden posts between the two houses. The Sullivans had to remove the grassy pavers along the easement, as well as the stone pavers between the two houses in order to install the fence posts.

When the Bresslers came to the property after October 12, 2011, and saw the new fence and poles, Mr. Sullivan came up to him and gave him cards from his attorneys. Ex. 142. Mr. Bressler then hired his own attorney, who contacted the Sullivan's attorney. The Sullivans learned by email dated October 19, 2011, that the easement existed. Ex. 39. Even though the Sullivans' attorney thought the Bresslers were probably wrong about the easement, he suggested to the Sullivans that they might be able to record a mutual easement, since both parties believed one

[1] The Sullivans allowed grass, weeds and wildflowers to grow on their side of the easement. Ex. 108. When they finally cut the grass, the grass had a yellow or newly-mown look, which can be seen in Ex. 113.

existed. *Id.* Ms. Sullivan responded, "I am not interested in sharing anything with Mark Bressler..." *Id.* Ms. Sullivan authorized her fence contractor to continue with the installation of the wooden fence between the two houses, which only had the posts installed at that point. Ex. 98, 110, 111.

On October 24, 2011, the Bresslers, via their attorney, wrote to the Sullivans' attorney and demanded that the fence and mailbox be removed from the easement no later than November 4, 2011, or alternatively, they would agree to extinguish the easement. Ex. 45. An easement was supposedly attached.

Unfortunately, the Bresslers' attorney attached the wrong document, not the easement, to the letter. However, by email a day later on October 25, 2011, the easement was emailed to the Sullivans' attorney. Ex. 46. The Sullivans' attorney sent the easement to the Sullivans by email on October 26, 2011. Ex. 47. Ms. Sullivan responded on October 27, 2011, advising her attorney not to say anything to the Bresslers' attorney, but to, "Keep them humming..." *Id.*

The court finds that the Sullivans intended to stall the Bresslers from taking any action to enforce the easement. The Sullivans' later actions are also consistent with this finding.

Then followed a group of emails between the Bresslers' attorney and the Sullivans' attorney in which the Sullivans' attorney represented that the Sullivans wanted to extinguish the easement. Exs. 55, 56, 59, 60, 64, 67, 68 and 70. The extinguishment agreement had been provided to the Sullivans' attorney on November 9, 2011, Ex. 54, and the Sullivans kept their fence installed in the middle of the easement. In addition to the emails between the two attorneys, the Bresslers told their attorney in an email dated November 11, 2011, that they agreed to sign the papers to relinquish the declaration. Ex. 57. Ms. Sullivan is not credible when she said at trial that she never wanted to sign the relinquishment. The court finds that she expressly and impliedly communicated her acquiescence to her attorney.

The court finds that the Sullivans were aware that their attorney was working on an extinguishment and that neither she nor her husband advised their attorney to stop representing them or to add conditions to the extinguishment. The court further finds that the Bresslers were entitled to rely on the representations made by the Sullivans' attorney.

The Sullivans originally wanted either the property seller, Ex. 38, the Casa Group, and its owner, Rick Jones, or the title company to pay for a boat launch on their property. *Linda Sullivan's deposition,* page 413, lines 4-24. On October 16, 2011, the Sullivans even got an estimate for partial costs of installing a boat ramp on their property, $23,914. Ex. 39. When the easement was found, their claim against the property owner was no longer possible, leaving only the title company as a possibility.

On November 21, 2011, the Sullivans' attorney advised the Sullivans that they were not entitled to recapture from the title company the costs for installing a boat ramp or the fence and that it

was unlikely the title company would reimburse the Sullivans' attorney fees. Ex. 61. At that point, Ms. Sullivan testified that she felt that their attorney was no longer working on their behalf. *Linda Sullivan's deposition,* page 413, lines 4-24. The Sullivans did not respond to the email.

Eventually, the Sullivans' attorney emailed them again, inquiring as to when they could sign the extinguishment agreement prepared by the Bresslers' attorney. Ex. 62. On November 30, 2011, Ms. Sullivan responded that they were "unavailable until mid-December." *Id.* However, the Sullivans were actually at home when they said they were "unavailable." Ex. 69.

On December 8, 2011, the Sullivans' attorney wrote them a letter explaining that their attorney fee claim against the title company for not including the easement in the title policy issued to the Sullivans was rejected but that the attorney would try again to recoup the attorney fees. Ex. 72. On December 19, 2011, the Sullivans' attorney emailed the Sullivans that the title company was willing to pay $3,951 for attorney fees to settle their claim. Ex. 73.

On December 20, 2011, one day after being informed that the title company would only reimburse $3,951, the Sullivans sent a letter to their attorney, with a copy to the Bresslers' attorney, that they would not sign the extinguishment agreement. Ex. 74.

Later, the Sullivans' second attorney represented that the Sullivans wanted the title company to reimburse them for the costs of relocating their fence as well as attorney fees and were upset that their attorney had not included the fence relocation claims. Ex. 89. However, the court finds that contrary to Ms. Sullivan's reasons at trial, her main purpose in stalling the Bresslers and her own attorney was to determine whether she could get reimbursed for a separate boat launch on her own property that she would not have to share with the Bresslers. Until she knew the outcome of that question, she did not want to move her fence out of the easement area and incur additional fence expenses.

Pursuant to the boat launch easement, the Bresslers requested mediation. The Sullivans finally agreed to mediate on February 27, 2012, and shortly thereafter on March 1, 2012, Ex. 83, moved the majority of their fence back to its original configuration, five feet from the middle of the easement. However, the Sullivans left a 12-foot portion of the fence inside the easement where the 10-foot swinging gate was installed. Ex. 81. The Sullivans' current configuration requires both the Bresslers and the Sullivans to drive over part of the Bresslers' reserve area for their drainfield. The Bresslers' attorney again advised the Sullivans' new attorney that the Sullivans were blocking the easement but the Sullivans did nothing to rectify the situation. The new fence configuration continues to extend into the easement to this day.

Ms. Sullivan testified that the easement only extended 140 feet from Columbia Beach Drive and that her fence was placed five feet from the midline of the easement until that point, after which the fence was placed on her property line. She argued that her fence did not encroach on the easement. The court disagrees with Ms. Sullivan. As the diagram presented by Ms. Sullivan to

her fence installers show, the fence is placed in the middle of the easement where a vehicle towing a boat would have to turn. Ex. 81. The court finds that the Sullivans' fence encroaches on the easement for 12-feet where the 10-foot sliding gate is installed.

Mediation, which did not occur until April 4, 2012, was not successful, and the Bresslers filed this lawsuit on June 8, 2012. After the lawsuit was filed, the Sullivans used the boat ramp numerous times. However, they did not comply with the boat launch easement agreement in several respects. The boat launch agreement provides that the easement is to be used for "ingress and egress to the easement on Lot 26 for the purpose of launching boats." Instead, the Sullivans often tied their boat up on the Sullivans' tidelands or stored their boat on the boat ramp. Exs. 120-126, Ex. 182.

In addition, they authorized third parties to use the easement to remove driftwood from the beach below the boat launch without notifying or obtaining the Bresslers' agreement and then demanded that the Bresslers pay half the bill even though they had not followed the terms of the boat launch declaration. They enlarged the river rock bed on the property facing the Bresslers' property, and expanded their front yard landscape further into the easement area. Ex. 142. The Sullivans took out stone pavers in the easement and installed plants that have the potential of intruding into the easement area by five feet if trimmed and by 10 feet if left untrimmed. Ex. 130 and Ex. 139.

The Sullivans have dropped their counterclaims and stipulated that they do not intend to ask the court to amend their pleadings to add "the public" as a necessary party.

The facts above are mostly undisputed, but where they might be disputed, the court adopts the above as findings.

DISCUSSION

In order to find that an easement has been abandoned, the court must find more than mere nonuse. *Heg v. Alldredge,* 157 Wash.2d 154, 161, 137 P.3d 9 (2006). The nonuse "must be accompanied with the express or implied intention of abandonment." *Id., citing Netherlands Am. Mortgage Bank v. E. Ry. & Lumber Co.,* 142 Wash. 204, 210, 252 P.916 (1927). "Acts evidencing abandonment of an easement must be unequivocal and decisive and inconsistent with the continued existence of the easement." *Heg v. Alldredge*, 157 Wash.2d at 161.

In this case, the parties acknowledged the existence of the easement and kept obstructions outside the width of the easement. The exception to this was Ms. Sullivan's mailbox which she placed in the middle of the easement and refused to move it for years, even while acknowledging that it was in the easement. When Ms. Sullivan was told by her attorney in 2011 that was no recorded easement, within six days she had the fence posts set in concrete in the middle of the easement. She was even unwilling to negotiate with the Bresslers to establish a mutual easement because she was not "interested in sharing anything with Mark Bressler ...." Ex. 39.

The Sullivans were notified that the recorded easement existed on October 19, 2011, and were provided a copy of the boat launch declaration on October 25, 2011. The Sullivans' actions in relocating the fence to the inside of the easement when they were mistakenly told there was no recorded easement appears to have been done in the mistaken belief that the easement had not been executed or recorded, as acknowledged by the Bresslers. Ex. 45. However, the Sullivans' actions after being advised that an easement was recorded were intentional.

After receiving verification that the easement was recorded, Ms. Sullivan, nevertheless, continued with the installation of the fence inside the easement. Her representation that she thought the wooden posts which were already installed would be dangerous standing alone is not credible. The court finds that installing a fence in the middle of the easement is "unequivocal and decisive and inconsistent with the continued existence of the easement." *Heg v. Alldredge*, 157 Wash.2d at 161. At that point, the Sullivans abandoned the easement.

The Sullivans' actions continued to be inconsistent with the continued existence of the easement. The Sullivans' actions in relocating the fence to the inside of the easement when they were mistakenly told there was no recorded easement appears to have been done in the mistaken belief that the easement had not been executed or recorded, as acknowledged by the Bresslers. Ex. 45. However, the Sullivans' actions after being advised that an easement was recorded were intentional. The Bresslers, through their attorney, notified the Sullivans, also through their attorney, that either the fence and mail box must be removed by November 4, 2011, or, alternatively, the Bresslers would prepare paperwork to extinguish the easement. The Sullivans did neither. Instead, they instructed their attorney not to say anything to the Bresslers and to stall them, or in Ms. Sullivan's words, "Keep them humming...." Ex. 47.

Even though the Sullivans unequivocally told the Bresslers that they intended to sign the relinquishment agreement prepared by the Bresslers, they stalled from October 25, 2011, until December 20, 2011, when they finally notified their own attorney and the Sullivans' attorney that they would not sign the relinquishment. The fence and mailbox remained in the middle of the easement. The court finds that the Sullivans' continued encroachments were "unequivocal and decisive and inconsistent with the continued existence of the easement." *Heg v. Alldredge*, 157 Wash.2d at 161.

The Sullivans did not remove portions of the fence until March 1, 2012. A 12-foot portion of the fence was left inside the easement. Not only did this portion of the fence continue to encroach on the easement, but it forced anyone using the easement from the street to the boat launch pad to drive over part of the Bresslers' reserve area for their drainfield. The Sullivans continued to keep the mailbox in the middle of the easement.

The Sullivans argued that they moved their fence back five feet from the midpoint of the easement until they were 140 feet from Columbia Beach Drive, as required in the boat launch declaration. Ex. 11. As the Sullivans' own diagram shows, Ex. 81, in order to make the turn onto

the 12-foot easement leading to the boat pad, a person towing a boat would need to drive over the Bresslers' reserve drainfield which begins 50 feet from the bulkhead, Ex. 3, right where the Bresslers' fence encroaches. The court has already made the finding that the Sullivans' fence encroaches on the easement for 12-feet where the 10-foot sliding gate is installed. Based on the diagram used by the Sullivans, they knew or should have known that they were encroaching on the easement. The Sullivans were notified of their continued violations of the easement in a letter dated May 24, 2012, yet the fence remains in its present configuration today.

The Bresslers filed their complaint on June 8, 2012, after offering the Sullivans the opportunity to mediate the controversy. The Sullivans finally moved their mailbox outside the easement in November 2012, months after the lawsuit was commenced by the Bresslers.

Ms. Sullivan contends at trial that she will move any encroachments found by the court. The court has found that the fence encroaches on the easement at the point where the easement makes a turn, that the bushy plants in the easement between the two houses encroach on the easement, and that the front landscaping encroaches on the easement.

Estoppel

The question that concerns the court is, after abandoning the easement as the Sullivans did, whether the Sullivans can now repudiate that abandonment and reinstate the easement. Courts have long held that blocking the way of an easement does not constitute evidence of abandonment until the other individual benefiting from the easement seeks to access it and any barrier is not removed. *Edmonds v. Williams,* 54 Wn.App. 632, 636-637, 774 P.2d 1241 1989).

In anticipation of this position, the Bresslers argue that the Sullivans should be equitably estopped from denying that they abandoned their easement. Equitable estoppel requires a showing that the party to be estopped (1) made an admission, statement or act which was inconsistent with his later claim; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier admission, statement or act. *Pub. Util. Dist. No. 1 v. Walbrook Ins. Co.,* 115 Wn.2d 339, 347, 797 P.2d 504 (1990). The party asserting equitable estoppel must prove these elements by " 'very clear and cogent evidence.' " *Proctor v. Huntington,* 146 Wn.App. 836, 845, 192 P.3d 958 (2008)(quoting *Sorenson v. Pyeatt,* 158 Wn.2d 523, 539, 146 P.3d 1172 (1006)), *review granted,* 165 Wn.2d 1041 (2009).

The Sullivans' admissions, statements and acts after learning that the easement was recorded are inconsistent with their claim at trial. Additionally, the Bresslers relied on those statements by incurring attorney fees to prepare a legal document to relinquish the easement and to get the relinquishment signed. The Sullivans, even after receiving proof of the recorded easement, finished installation of the fence and continued to represent that they would sign the relinquishment. They even enlarged their landscaping so it extended further into the easement. Thus, the first two prongs of equitable estoppel have been met.

The third prong focuses on the injury the other party would suffer if the servient tenant, in this case the Sullivans, were allowed to contradict or repudiate their earlier admissions, statements or acts.

> "An easement may be extinguished by conduct of the owner of it even though he had no intention to give up the easement. This is due to the general principle that the owner of an easement will not be permitted to change a position once taken by him if the change would cause undue hardship to the owner of the servient tenement."

Humphrey v. Jenks, 61 Wn2d 565, 379 P.2d 366 (1963), (quoting from 2 *American Law of Property* 305, §8.99). (Emphasis added.)

Obviously the Bresslers have incurred attorney fees in drafting the extinguishment agreement and attempting to have it executed. The Bresslers have also incurred ongoing attorney fees because of the continued encroachment by the Sullivans, even after those encroachments were called to the Sullivans' attention. Most of the encroachments had been removed by time of trial, but the fence and landscaping encroachments remain. The continued presence of the fence in the easement area threatens the integrity of the Bresslers' reserve drainfield. However, the fence can be easily removed, as shown by the number of times the Sullivans moved their fence; and the landscaping can be removed.

The court finds that the Bresslers will suffer no undue hardship if the Sullivans are required to move the encumbrances found by the court to encroach on the easement and to pay the attorney fees incurred by the Bresslers. When the Bresslers bought their property, they knew it was encumbered by the boat launch declaration and that they would have to allow their neighbors to use it. The fact that the neighbors are contentious is unfortunate.

Trespass

Trespass is an intentional tort. *Broughton Lumber Co. v. BNSF Ry. Co.,* 174 Wn.2d 619, 630, fn. 9, 278 P.3d 173 (2012). Even though the Bresslers allege that the Sullivans left a pile of dog waste on their tidelands, there is insufficient evidence for the court to find that it was the Sullivans who placed it there. However, the court finds that the Sullivans have intentionally left their boat on the boat launch pad for periods of time not consistent with ingress and egress and that they have intentionally tied their boat up on the Bresslers' tidelands. Nevertheless, the court cannot find that the Bresslers suffered any damages.

CONCLUSION

The court will enter findings of fact and conclusions of law consistent with this letter opinion. The court will entertain further argument on the issue of attorney fees.

Sincerely,

Vickie I. Churchill

VICKIE I. CHURCHILL
Judge

Copy: Clerk

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MARK F. and LINDA H. BRESSLER, husband and wife,	)	No. 72027-9-I
Appellants,	)	
v.	)	
KEVIN F. and LINDA SULLIVAN, husband and wife,	)	UNPUBLISHED OPINION
Respondents.	)	FILED: June 29, 2015

VERELLEN, A.C.J. — The Bresslers brought a quiet title action against their neighbors, the Sullivans, to declare both lots free of a shared boat launch easement. After a bench trial, the trial court found that the Sullivans abandoned the easement. But the trial court also concluded that it would not be an undue hardship on the Bresslers to allow the Sullivans to reinstate the easement if the Sullivans met certain conditions. The Bresslers appeal the trial court's order permitting the Sullivans to reinstate the abandoned easement. Because there is no authority to order reinstatement of an easement that has been abandoned if reinstatement would not be an undue hardship, the trial court's ruling was in error. Accordingly, we reverse in part.

FACTS

On July 24, 2006, the Bresslers and the Sullivans each bought adjoining low-bank waterfront homes on Whidbey Island in Island County, Washington. Both lots

were encumbered with a mutual easement over a five-foot strip on either side of most of their common boundary. Additionally, the Bresslers' lot was encumbered with an easement for the benefit of the Sullivans' lot, allowing access and use of a boat ramp located on the Bresslers' lot. Stone pavers were installed along the corridor between the two houses following the intended easement path between the two lots and across the Bresslers' lot down to the boat launch. Both easements were recorded in a "Declaration for Joint Use of a Boat Launch" on July 24, 2006.

The Bresslers used their property for weekends and vacations. The Sullivans did not live on the property until 2009. For a variety of reasons, the neighbors did not get along.

In January 2009, after the Sullivans moved on to the property, Ms. Sullivan installed a mailbox in the middle of the easement. At Mr. Bressler's request, she agreed to move it, but did not do so until after this lawsuit was filed. At the end of August 2009, Ms. Sullivan decided to put up a fence. When reminded by Mr. Bressler about the easement, she had a chain link fence installed five feet from the midpoint of the easement.

In September 2011, the Sullivans purchased a boat and asked their attorney about how to begin using the easement for the boat launch. The Sullivans also made arrangements to install a sliding gate in their fence so they could move their boat from their property to the boat launch. When their attorney mistakenly informed them that there was no easement, Ms. Sullivan decided to move the fence. She had workers begin erecting a fence with six-foot high wooden posts along the property line in the middle of the easement.

When the Bresslers objected to the fence, the Sullivans referred them to their attorney. The Bresslers then hired their own attorney, who contacted the Sullivans' attorney and demanded that the fence and mailbox be removed from the easement by November 4, 2011, or alternatively, that the Bresslers would agree to extinguish the easement. When the Sullivans' attorney confirmed to the Sullivans that the easement in fact existed, the Sullivans advised their attorney not to respond to the Bresslers' attorney. Ms. Sullivan then authorized the fence contractors to continue with installation of the fence within the easement.

Eventually, the Sullivans' attorney told the Bresslers that the Sullivans wished to extinguish the easement. The Bresslers' attorney prepared an extinguishment agreement. The Sullivans told their attorney that they agreed to sign the papers to extinguish the easement.

Meanwhile, the Sullivans were considering constructing a boat launch on their own property if the property seller or the title company would pay for it. But once the existence of the easement was confirmed, the Sullivans' attorney advised them that they could not recoup costs of installing a boat launch from the property owner, leaving only the title company as a possible source. The Sullivans' attorney later e-mailed them that they were unable to recoup such costs from the title company and it was unlikely the title company would reimburse them for their attorney fees. The Sullivans did not respond. Their attorney e-mailed them again to ask when they could sign the easement extinguishment agreement. On November 30, 2011, the Sullivans responded they were unavailable until mid-December.

The Sullivans' attorney then sought attorney fees from the title company for failing to include the easement in the title policy. On December 19, the Sullivans' attorney notified them that the title company was only willing to pay $3,951 in attorney fees to settle their claim. The next day, the Sullivans informed their attorney and the Bresslers that they would not sign the easement extinguishment agreement.

The parties proceeded to mediation. Following mediation, the Sullivans moved most of the fence back to its original configuration, five feet from the middle of the easement. But they left a twelve-foot portion of the fence inside the easement where the swinging gate was installed. The Bresslers' attorney advised the Sullivans' attorney that this configuration blocked the easement, but the Sullivans did not take any action.

After the unsuccessful mediation, the Bresslers filed this lawsuit, seeking to quiet title to both lots free of the easement declaration. The Bresslers claimed that the Sullivans abandoned the easement, and that, in the alternative, the Sullivans were equitably estopped from denying the abandonment.

After the lawsuit was filed, the Sullivans began using the boat ramp, but did not comply with the terms of the easement. The easement only permitted egress and ingress for the purpose of launching boats, but the Sullivans often tied their boat up on the Bresslers' tidelands or stored it on the boat ramp. The Sullivans also allowed third parties to use the easement to remove driftwood from the beach below the launch without the Bresslers' consent. Additionally, the Sullivans expanded their landscaping further into the easement area.

After a bench trial, the trial court found that the Sullivans abandoned the easement. But the court also concluded that the Bresslers would not suffer undue

hardship by reinstatement of the easement if the Sullivans were required to move the encumbrances that encroached on the easement and if they paid the Bresslers' legal expenses. The court then entered a "Final Judgment and Conditional Decree Quieting Title" allowing the Sullivans 20 days to comply with the conditions for reinstating the easement.

The Bresslers appeal that portion of the trial court's judgment allowing reinstatement of the easement.

DISCUSSION

The Bresslers contend that the trial court's order allowing reinstatement of an abandoned easement is without legal basis. We agree.

"When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court's conclusions of law."[1] Unchallenged findings are verities on appeal.[2] Conclusions of law are reviewed de novo.[3]

An easement may be extinguished by operation of the legal doctrines of abandonment and equitable estoppel.[4] Once extinguished, an easement ceases to

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[1] Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 555, 132 P.3d 789 (2006).

[2] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

[3] Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

[4] Heg v. Alldredge, 157 Wn.2d 154, 161, 166, 137 P.3d 9 (2006); Humphrey v. Jenks, 61 Wn.2d 565, 567-68, 379 P.2d 366 (1963). An easement may also be extinguished under the legal doctrines of merger, Radovich v. Nuzhat, 104 Wn. App. 800, 805, 16 P.3d 687 (2001), and adverse possession, Edmonds v. Williams, 54 Wn. App. 632, 634, 774 P.2d 1241 (1989).

exist and may only be recreated by creation of a new easement.[5]

Extinguishing an easement through abandonment requires a showing of an intent to abandon.[6] "Acts evidencing abandonment of an easement must be unequivocal and decisive and inconsistent with the continued existence of the easement."[7] Extinguishing an easement based on equitable estoppel requires a showing that the easement holder (1) engaged in conduct that was inconsistent with his or her later claim, (2) the other party relied on the conduct, and (3) the other party would suffer injury if the easement holder were allowed to contradict or repudiate the earlier inconsistent conduct.[8]

Here, the trial court concluded that the easement was abandoned:

> The court has found that the Sullivans' installation of a fence along the property line was unequivocal, decisive, and inconsistent with the continued existence of the easement and that, at that point, the Sullivans abandoned the easement. The Sullivans' actions in finishing the fence installation after receiving verification that the easement had been recorded were intentional. Their continued encroachments into the easement thereafter were also unequivocal and decisive and inconsistent with the continued existence of the easement.[9]

But the court also went on to consider whether the Sullivans could reinstate the easement after abandoning it:

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[5] Radovich, 104 Wn. App. at 806. To create an easement, it must be in writing or an oral agreement to convey an interest in property if a party can establish part performance and the terms to which the parties agreed. Berg v. Ting, 125 Wn.2d 544, 556, 886 P.2d 564 (1995); RCW 64.04.010 ("every contract creating or evidencing any encumbrance upon real estate, shall be by deed.").

[6] Heg, 157 Wn.2d at 161.

[7] Id.

[8] Id. at 165 (quoting Pub. Util. Dist. No. 1 of Klickitat County v. Walbrook Ins. Co., 115 Wn.2d 339, 347, 797 P.2d 504 (1990)).

[9] CP at 33 (citing Heg, 157 Wash.2d at 161).

> But the question that has concerned the court is that, after abandoning the easement as the Sullivans did, whether the Sullivans can now repudiate that abandonment and reinstate the easement. Courts have long held that blocking the way of an easement does not constitute evidence of abandonment until the other individual benefiting from the easement seeks to access it and any barrier is not removed.[10]

The court next addressed equitable estoppel and concluded that the first two prongs of equitable estoppel *were* met. The court then discussed the third prong of estoppel:

> The third prong of equitable estoppel focuses on the injury the other party would suffer if the owner of the easement, in this case the Sullivans, were allowed to contradict or repudiate their earlier admissions, statements or acts:
>
> > "An easement may be extinguished by conduct of the owner of it even though he had no intention to give up the easement. This is due to the general principle that the owner of an easement will not be permitted to change a position once taken by him if the change *would cause undue hardship to the owner of the servient tenement.*"[11]

The court then concluded that the Sullivans were permitted to reinstate the easement upon certain conditions:

> As things stood at trial, the Bresslers would suffer undue hardship if the Sullivans were allowed to repudiate their abandonment and reinstate the easement. But the court concludes that they will not suffer undue hardship if the Sullivans are required to move the encumbrances found by the court to encroach on the easement and to pay the Bresslers' legal expenses. When the Bresslers bought their property, they knew it was encumbered by the boat launch declaration and that they would have to allow their neighbors to use it. The fact that the neighbors are contentious is unfortunate.[12]

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[10] CP at 34 (citing Edmonds, 54 Wn. App. at 636-637).

[11] CP at 35 (quoting Humphrey, 61 Wn.2d at 567-68) (emphasis added).

[12] CP at 35.

The trial court's ruling permitting the Sullivans to reinstate the easement after they abandoned it is without legal basis. Once an easement is extinguished by abandonment, or any other means, it no longer exists. Thus, it may only be "reinstated" by creation of a new easement.[13]

Here, the trial court concluded that the easement was abandoned. The court's findings support this conclusion:

> The Sullivans' installation of a fence along the property line, down the middle of the easement, was unequivocal, decisive, and inconsistent with the continued existence of the easement. At that point, the Sullivans abandoned the easement. The Sullivans' decision to relocate the fence to the middle of the easement after they were mistakenly told that there was no recorded easement appears to have been done in the mistaken belief that the easement had not been executed or recorded, as acknowledged by the Bresslers. However, the Sullivans' actions after being advised that an easement was recorded were intentional. After receiving verification that the easement was recorded, Ms. Sullivan nevertheless continued with the installation of the fence inside the easement. Her testimony that she thought the wooden posts which were already installed would be dangerous standing alone was not credible.[14]

Neither party has assigned error to these findings. Accordingly, they are verities on appeal. Nor has either party appealed the trial court's conclusion that the easement was abandoned.[15]

Once the court concluded the easement was abandoned, this was sufficient to extinguish the easement. The court's consideration of the equitable estoppel argument was unnecessary and unwarranted. The court did not have authority to order

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[13] Radovich v. Nuzhat, 104 Wn. App. 800, 806, 16 P.3d 687 (2001) ("the standards for creating an easement by express conveyance and for recreating such an easement are the same") (citing RESTATEMENT OF PROPERTY, § 497 cmt. h (1944)).

[14] CP at 29-30.

[15] While the Sullivans argue in the alternative that the easement was not abandoned, they did not file a cross appeal assigning error to this ruling.

reinstatement of the abandoned easement based on a finding that the Bresslers would not suffer undue hardship if the Sullivans moved the encumbrances and paid the attorney fees as ordered by the court. The trial court appears to have erroneously merged the requirements for abandonment and equitable estoppel and fashioned a remedy of "reinstatement" of an abandoned easement based on the requirements of equitable estoppel. There is no legal support for such a remedy.

The trial court appeared to use the terms "extinguishment" and "abandonment" interchangeably, but abandonment is a separate means of extinguishment. Equitable estoppel or lack of hardship is not a part of the abandonment analysis. The trial court cites Humphrey's reference to 2 *American Law of Property* § 8.99 for the general estoppel principle that "the owner of an easement will not be permitted to change a position once taken by him if the change *would cause undue hardship to the owner of the servient tenement.*"[16] The court then concluded that, if this showing was not made, the Sullivans were allowed to "repudiate their *abandonment* and reinstate the easement."[17] But Humphrey's reference to undue hardship related to a claim of equitable estoppel, not abandonment.[18]

There is no legal support for the proposition that abandonment can be "repudiated" if the "undue hardship" element of equitable estoppel is not established. Indeed, the section of the *American Law of Property* treatise cited in Humphrey has since been replaced with the following to clarify that equitable estoppel is simply an

---

[16] CP at 35 (quoting 61 Wn.2d at 567-68).

[17] CP at 35 (emphasis added).

[18] 61 Wn.2d at 567 (noting that "[a]n easement may be extinguished by conduct of the owner of it even though he had no intention to give up the easement.").

alternative means of extinguishing an easement in the event abandonment cannot be established:

> The extinguishment of an easement may result in part from conduct by the owner of it which would not of itself satisfy the requirements for abandonment. This is through the application of the doctrines of estoppel as exemplified in the general principle that the owner of an easement will not be permitted to change a position once taken by him if the change would result in undue hardship to the owner of the servient tenement.[19]

The other case cited by the trial court, Edmonds v. Williams, does not support the court's remedy of reinstatement of an abandoned easement when no showing of undue hardship is made.[20] The trial court cited Edmonds for the proposition that "blocking the way of an easement does not constitute evidence of abandonment until the other individual benefiting from the easement seeks to access it and any barrier is not removed."[21] But Edmonds held that there was insufficient evidence that an easement was terminated by adverse possession, not abandonment, where a fence was not a sufficient inconsistent use to constitute adverse possession.[22] Here, the court already found there was sufficient evidence of abandonment to extinguish the easement, and there was no claim of adverse possession. Thus, the reasoning in Edmonds does not apply and does not support the reinstatement remedy ordered by the trial court.

Nor does Heg recognize such a remedy. Heg simply held that the evidence was insufficient to establish either abandonment or equitable estoppel.[23] Thus, because

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[19] 2 AMERICAN LAW OF PROPERTY, § 8.99 (Supp. 1962 & 1977).

[20] 54 Wn. App. 632, 774 P.2d 1241 (1989).

[21] CP at 34.

[22] 54 Wn. App. at 636-37.

[23] 157 Wn.2d at 167.

there was no basis for extinguishing the easement, whether it could be reinstated was not at issue.

The trial court's "Conditional Decree Quieting Title" permitting the Sullivans to reinstate an easement that they had abandoned is without legal basis. Accordingly, we reverse that part of the judgment and remand for the trial court to order extinguishment of the easement.

The Bresslers also challenge the trial court's exclusion of evidence of the Sullivans' bad faith because it was relevant to prove their abandonment claim. Because the trial court found that there was sufficient evidence of abandonment and that finding has not been appealed, we need not reach this issue.

We deny the Sullivans' request for attorney fees. They are not the prevailing party on appeal and they cite no statutory, contractual, or equitable basis for an award of attorney fees.[24]

We reverse in part and remand.

WE CONCUR:

[24] The trial court did not award fees other than to allow the Sullivans to pay a portion of them as a condition for reinstatement.

Appendix C

4176808
Page: 1 of 4
07/24/2006 01:34P
ISLAND COUNTY AUDITOR DCL

AFTER RECORDING MAIL TO:

The Law Offices of
Kelly Harvey & Carbone L.L.P.
P.O. Box 290
Clinton, WA 98236

DELCARATION FOR JOINT USE OF A BOAT LAUNCH

GRANTORS: Casa Group, Inc., a Washington State Corporation
GRANTEES: The Public
TAX PARCEL NO's.: S-6400-00-00025-0

This Declaration is made this 18th day of July, 2006, by Casa Group, Inc., a Washington State Corporation, (hereinafter referred to as "Casa Group"), owners of property, currently consisting of two lots, more particularly described as follows:

Lot 25, Plat of Columbia Beach, as per plat recorded in Volume 3 of Plats, page 7, records of Island County, Washington.
EXCEPT that portion, if any, lying within right of way of Columbia Beach Drive.
TOGETHER WITH tidelands of the second class situate in front of, adjacent to, or abutting on said premises.
Situtate in the County of Island, State of Washington.

AND

Lot 26, and the South 10 feet of Lot 27, Plat of Columbia Beach, as per plat recorded in Volume 3 of Plats, page 7, records of Island County, Washington.
EXCEPT that portion, if any, lying within right of way of Columbia Beach Drive.
TOGETHER WITH tidelands of the second class situate in front of, adjacent to or abutting on said premises.
Situate in the County of Island, State of Washington.

Tax Parcel # S6400-00-00025-0

SJPR. 11

RECITALS

1. WHEREAS Casa Group desires to establish a joint use of a boat launch on Lot 26 for the use of properties described above; and

2. WHEREAS Casa Group desires to grant access to the boat launch on Lot 26 in order that the boat launch can be accessed for the benefit of Lots 25 and 26 described above; and

3. WHEREAS Casa Group desires that the owners of properties described above to commonly share the boat launch for their mutual benefit;

NOW, THEREFORE, Casa Group hereby declares as follows:

1. DECLARATION OF A MUTUAL EASEMENT. For the benefit of Lots 25 and 26, Casa Group hereby declares an Easement FIVE (5) feet in width on each side of the common boundary line between the properties described above, extending ONE HUNDRED FORTY FEET (140) from the road known as Columbia Beach Drive, Easterly toward the water, Puget Sound, for ingress and egress to the easement on Lot 26 for the purpose of launching boats.

2. DECLARATION OF EASEMENT. For the benefit of Lot 25, Casa Group hereby declares an Easement over and across Lot 26 for ingress and egress across a strip of land TWELVE (12) feet in width from the Easterly end of the above described Easement to the existing boat launch on Lot 26 for the purpose of launching boats. For illustrative purposes, a copy of the survey showing the location of the Easement is attached hereto as Exhibit A, page 4.

3. MAINTENANCE OF THE BOAT LAUNCH. Casa Group declares that the owners of the properties described above shall share equally in the cost of maintaining the boat launch. The owners of the properties will meet annually to determine what maintenance, if any, is required to keep the boat launch in its current or better condition or to determine if a new launch is necessary.

In the event either Owner of Lot 25 or Lot 26 damages the property of the other, said Owner agrees to repair all damage and restore the property of the other to its original condition within THIRTY (30) days of occurrence.

4. DISPUTE RESOLUTION. In the event there is a dispute concerning questions of law or fact arising out of or relating to this Agreement, its performance or alleged breach, which is not disposed of by agreement of the parties, then the parties agree to submit the dispute to mediation. If mediation fails, then the parties agree that any subsequent litigation shall be submitted to the Island County Superior Court.

5. BENEFIT & BURDEN TO RUN WITH THE LAND. It is agreed that the mutual

promises and covenants herein shall bind and inure to the benefit and burden of the properties more particularly described above, and shall run with the land, and bind all subsequent Owners. heirs and successors in interest of the benefited property.

IN WITNESS WHEREOF, the declarant has caused this document to be executed as of the day and year first above written.

Richard Jones, Declarant
President, Casa Group, ~~Inc.~~ Corp.

STATE OF WASHINGTON)
) ss:
COUNTY OF ISLAND)

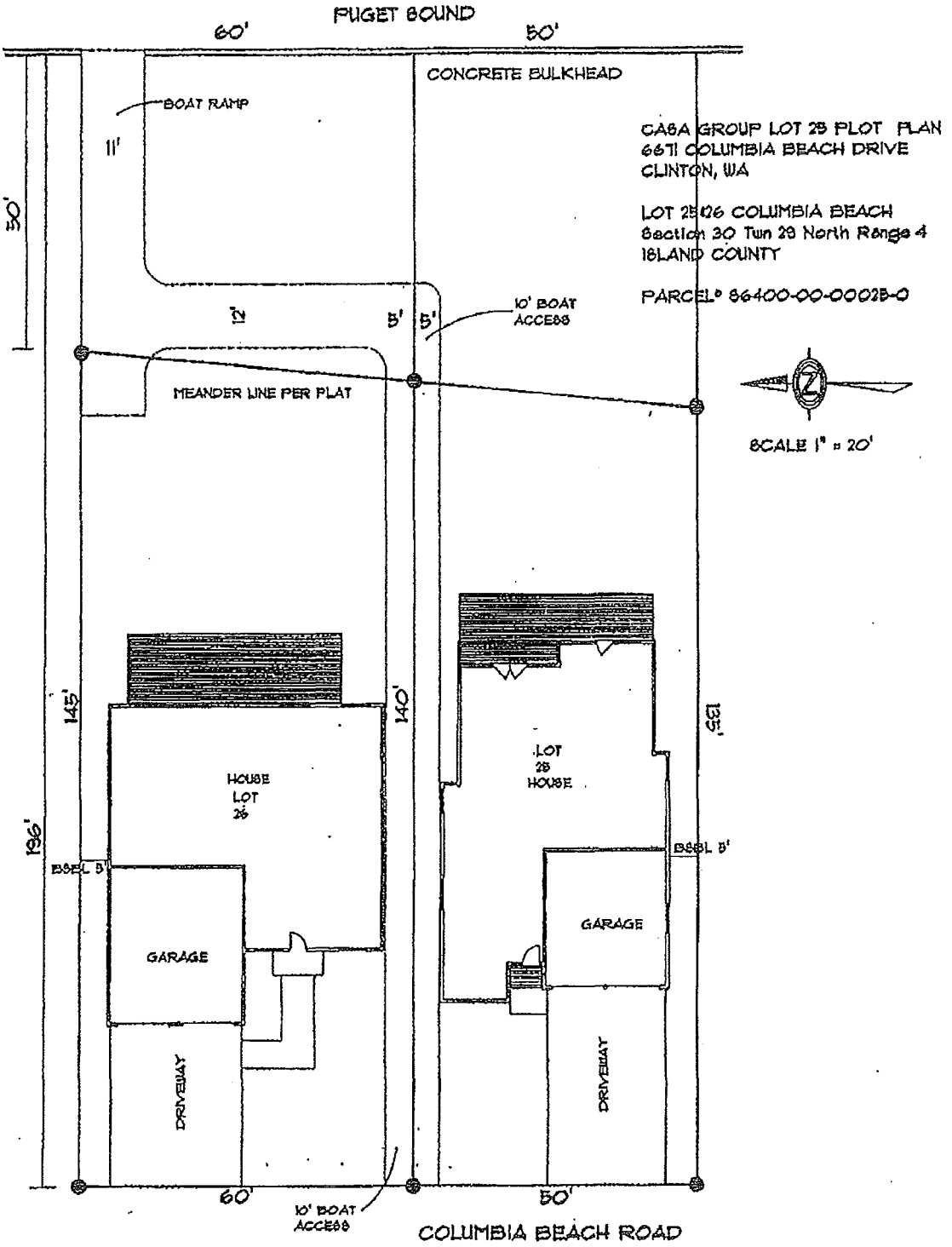
On this 14 day of July, 2006, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Richard Jones, to me known to be the President of Casa Group, ~~Inc.~~, a Washington State Corporation,, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute the said instrument.

Witness my hand and official seal hereto affixed the day and year first above written.

- Notary Public -
State of Washington
KATHERINE L. NELSON
MY COMMISSION EXPIRES
OCTOBER 15, 2008

KATHERINE L NELSON
NOTARY PUBLIC in and for the State of Washington, residing in Coupeville.
My commission expires 10-15-08.

EXHIBIT A
TO DECLARATION FOR JOINT USE OF A BOAT LAUCH



Appendix D

No. 72027-9-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARK F. & LINDA H. BRESSLER,
Plaintiffs / Appellants

v.

KEVIN F. & LINDA SULLIVAN,
Defendants / Respondents

v.

GMAC MORTGAGE, LLC &
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
Defendants

RESPONDENT/SULLIVAN'S DESIGNATION OF CLERK'S PAPERS

G. Geoffrey Gibbs, WSBA No. 6146
Attorney for Respondents

ANDERSON HUNTER LAW FIRM
2707 Colby Ave., Ste. 1001
Everett, Washington 98201
(425) 252-5161
ggibbs@andersonhunterlaw.com

SUPERIOR COURT OF WASHINGTON FOR ISLAND COUNTY

MARK F. and LINDA H. BRESSLER, husband and wife,, Plaintiffs, vs. KEVIN F. and LINDA SULLIVAN, husband and wife, and GMAC MORTGAGE, LLC,, Defendants.	No. 12-2-00469-7 **RESPONDENT / SULLIVAN'S DESIGNATION OF CLERK'S PAPERS** COURT OF APPEALS, DIV. I No. 72027-9

In accordance with RAP 9.6, the Respondents, Kevin and Linda Sullivan, hereby designate the following Clerk's Papers and Exhibits for transmittal to the Court of Appeals, Division I, in Case No. 72027-9:

Sub.	Date:	Description
174	5/27/2013	Acknowledgement of Receipt in Trust of Funds
175	5/27/2013	Defendant's Declaration Re: Compliance

Dated this 5th day of January, 2015.

Anderson Hunter Law firm

By: _____
G. Geoffrey Gibbs, WSBA No. 6146
Attorneys for Defendants Sullivan

ANDERSON HUNTER LAW FIRM, P.S.
2707 COLBY AVENUE, SUITE 1001, P.O. BOX 5397
EVERETT, WASHINGTON 98206-5397
TELEPHONE (425) 252-5161
FACSIMILE (425) 258-3345

FILED

ISLAND COUNTY SUPERIOR COURT
Debra VanPelt
COUNTY CLERK
COUPEVILLE WA

12-2-00469-7

Rcpt. Date	Acct. Date	Time
05/27/2014	05/27/2014	08:53 AM

Receipt/Item #	Tran-Code	Docket-Code
2014-01-04512/01	3150	$TRT

Cashier: PAC

Paid By: ANDERSON, HUNTER
Transaction Amount: $4,455.95

1025

FILED
MAY 27 2014
DEBRA VAN PELT
ISLAND COUNTY CLERK

174

SUPERIOR COURT OF WASHINGTON FOR ISLAND COUNTY

MARK F. and LINDA H. BRESSLER, husband and wife,,

Plaintiffs,

vs.

KEVIN F. and LINDA SULLIVAN, husband and wife, and GMAC MORTGAGE, LLC,,

Defendants.

No. 12-2-00469-7

DEFENDANTS' DECLARATION RE: COMPLIANCE WITH COURT'S DECISION

175 ct

Linda Sullivan, on the of the defendants herein, under penalty of perjury under the laws of the State of Washington, hereby declares as follows:

1. Although entry of the "findings" and judgment of the court were delayed, my husband and I took all appropriate steps to bring our fencing and property into compliance with the court's decision. The relocation of the fence was accomplished many weeks ago.

2. Our sliding gate and fence have been moved outside of the boat launch easement area as shown in Exhibit 1 hereto.

3. Other than downspouts are similar fixtures on both houses (as shown in the photographs attached as Exhibit 2), the boat launch area is free from obstacles or obstructions and is fully available to both properties for us.

Dated this 12th day of May, 2014.

Linda Sullivan

ANDERSON HUNTER LAW FIRM, P.S.
2707 COLBY AVENUE, SUITE 1001, P.O. BOX 5397
EVERETT, WASHINGTON 98206-5397
TELEPHONE (425) 252-5161
FACSIMILE (425) 258-3345

Exhibit 1

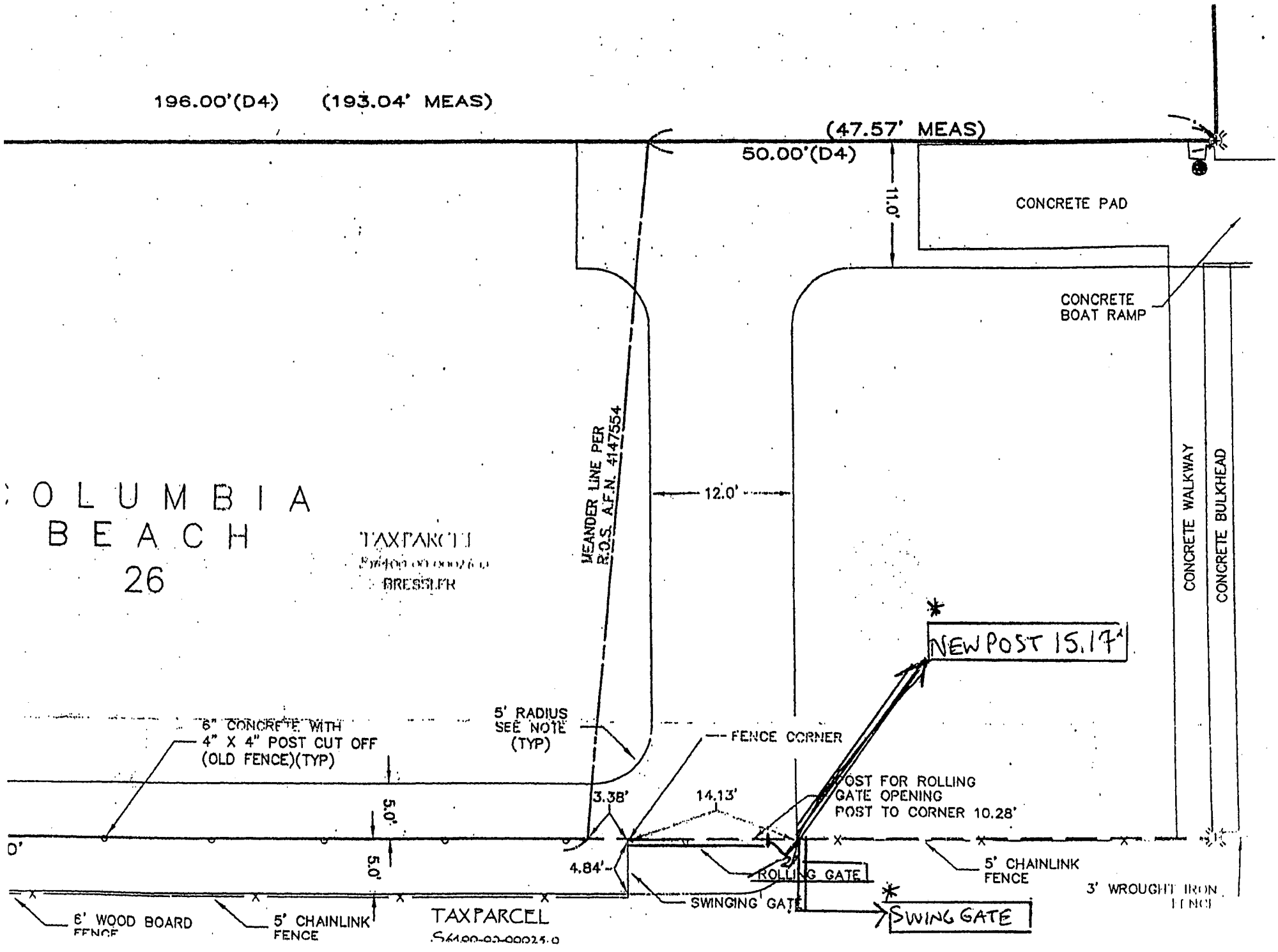
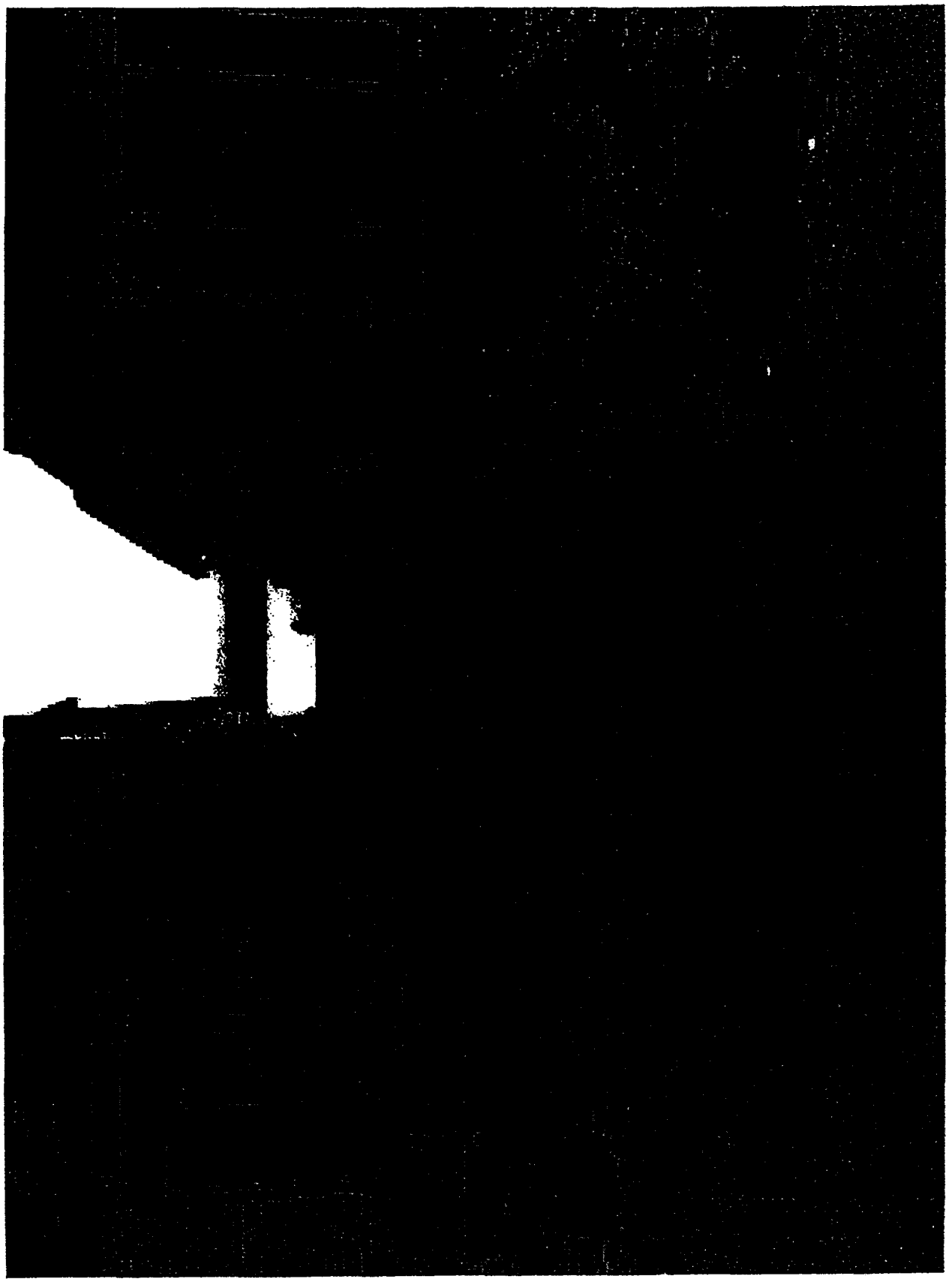
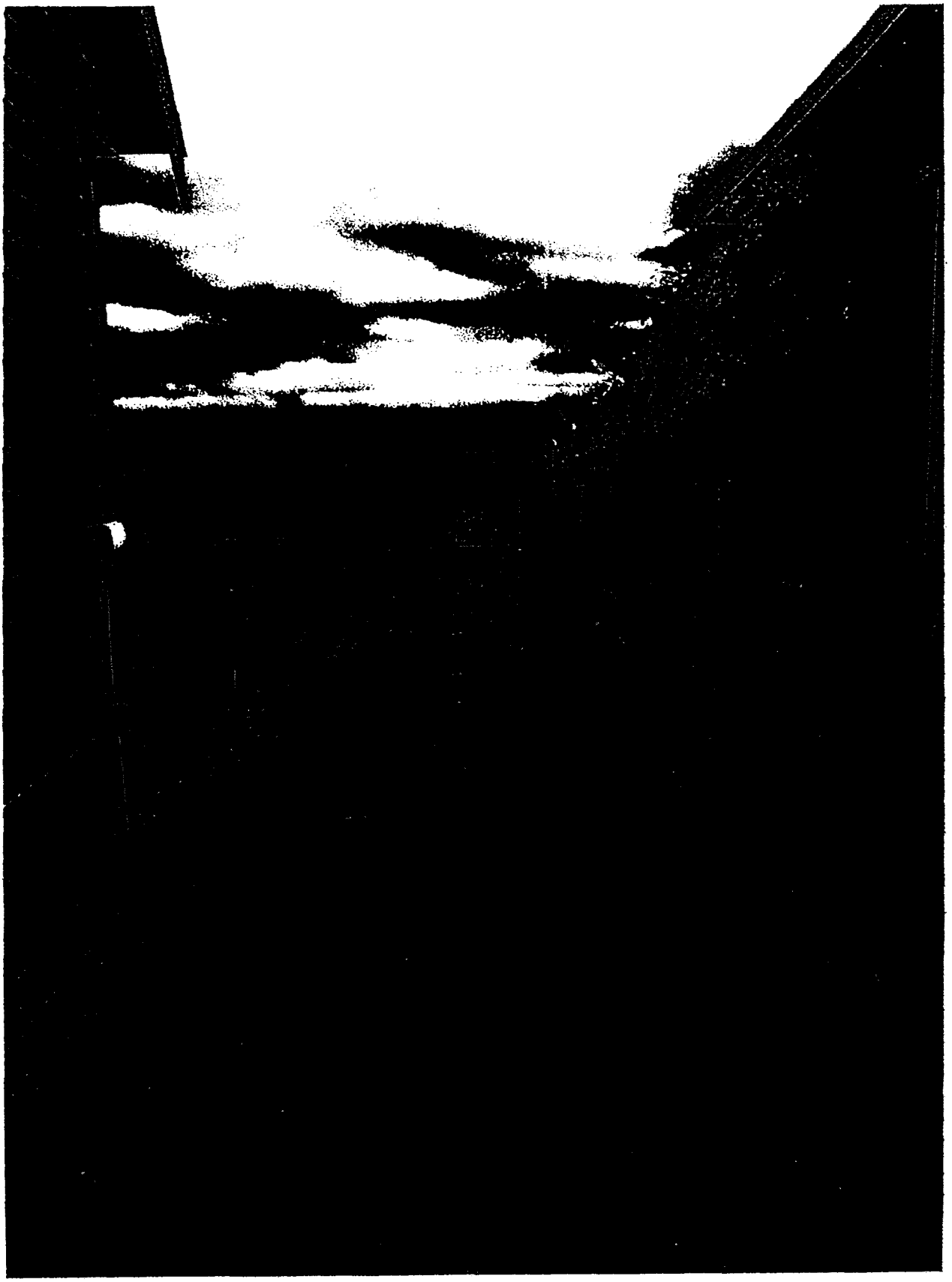
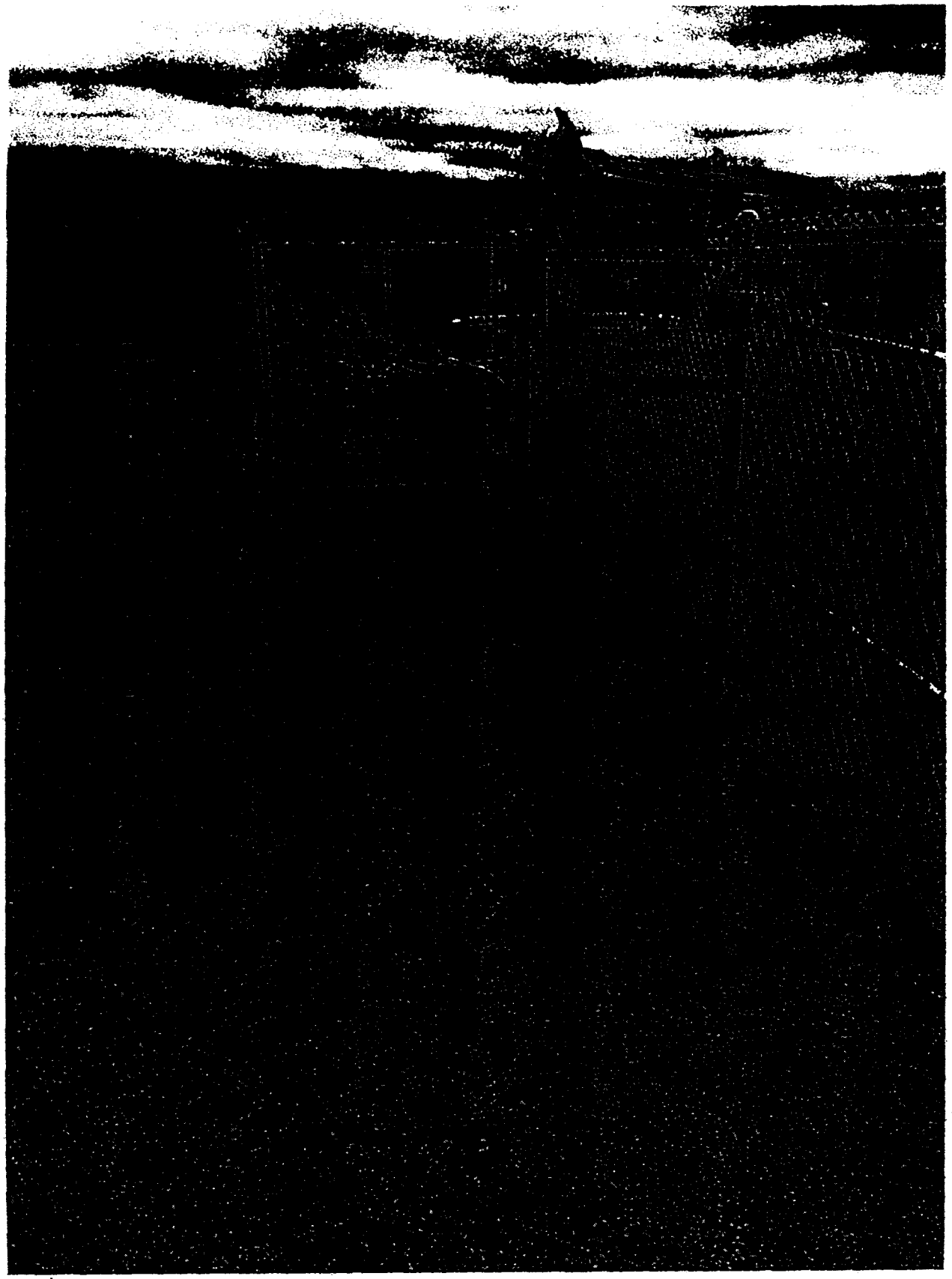
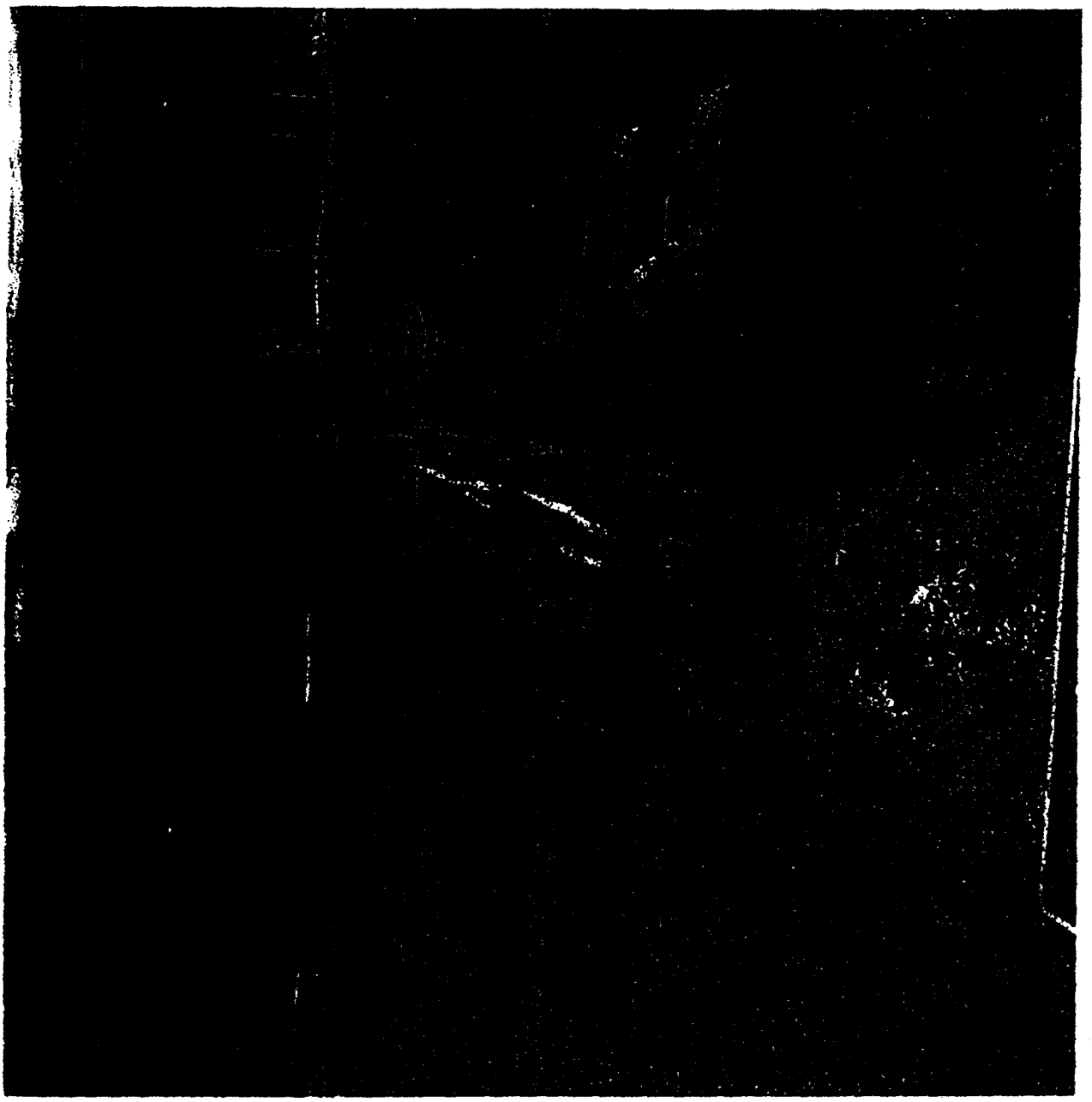

196.00'(D4) (193.04' MEAS)
(47.57' MEAS)
50.00'(D4)
11.0'
CONCRETE PAD
CONCRETE BOAT RAMP
CONCRETE WALKWAY
CONCRETE BULKHEAD
MEANDER LINE PER R.O.S. A.F.N. 4147554
12.0'
COLUMBIA BEACH
26
TAXPARCEL
BRESSLER
NEW POST 15.17'
6" CONCRETE WITH 4" X 4" POST CUT OFF (OLD FENCE)(TYP)
5' RADIUS SEE NOTE (TYP)
FENCE CORNER
POST FOR ROLLING GATE OPENING POST TO CORNER 10.28'
3.38'
14.13'
5.0'
5.0'
4.84'
2'
ROLLING GATE
SWINGING GATE
SWING GATE
5' CHAINLINK FENCE
3' WROUGHT IRON FENCE
6' WOOD BOARD FENCE
5' CHAINLINK FENCE
TAXPARCEL

Exhibit 2









OFFICE OF ISLAND COUNTY CLERK
Debra Van Pelt
Clerk of Superior Court

PO Box 5000
Coupeville, WA 98239

360-679-7359

March 13, 2015

Court of Appeals, Division I
One Union Square
600 University St.
Seattle, WA 98101

Re: Mark F. and Linda H. Bressler vs Kevin F. and Linda Sullivan
Island County No. 12-2-00469-7
Court of Appeals No. 72027-9

Dear Clerk:

Enclosed please find Respondent's Clerk's Papers for the above-entitled cause.

Sincerely,

DEBRA VAN PELT, CLERK

Encl.
cc: Carolyn Cliff, Esq.
G. Geoffrey Gibbs, Esq.
Court File

Appendix E