99523-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

APPELLATE CASE NO. 36863-7-III

MARK WHITMORE,
Petitioner
v.
ZANE LARSEN, individually, AFFORDABLE ADVANCED AUTORCARE, a Washington Limited Liability Company, d/b/a EVERGREEN TIRE, and OCCUPANTS,
Respondent

PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT

HOWARD M. NEILL WSBA No. 05296
AITKEN, SCHAUBLE, PATRICK, NEILL & SCHAUBLE
Attorney for Respondent
NE 165 Kamiaken, Suite 210 / P.O. Box 307
Pullman WA 99163
Telephone: (509) 334-3505 Fax: (509) 334-5367

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IDENTITY OF PETITIONER

Mark Whitmore, asks this court to accept review of the decision or parts of the decision designated in Issues Presented For Review of this Petition.

DECISION

The Division III of the Court of Appeals decision remanding to the Whitman County Superior Court, Case Number 15 2 00140 8 with directions to dismiss the unlawful detainer claim entered by the Court of Appeals on October 20, 2020; and the Order Denying Motion For Reconsideration entered January 26, 2021. A copy of the decision and the denial of the motion for reconsideration are attached in the Appendix.

ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals erred in determining that the case was not a proper case brought pursuant to RCW 59.12.030(3). Opinion pages 10, 13 and 17.
2. The Court of Appeals erred in finding that the case was not an implied tenancy, but was an implied contract case. Opinion page 12-13
3. The Court of Appeals erred in determining that the case was an implied tenancy under RCW 59.12.030(6). Opinion pages 13, 15 and 16.
4. The Court of Appeals erred in finding that *Bellevue Square*

Manages, Inc. v. GRS Clothing, Inc. 124 Wn.App. 239, 98 P.3d 498 distinguished a "person" from a "tenant" under RCW 59.12.030(6), when KPI took over a lease with an invalid assignment. Opinion pages13-14.

5. The Court of Appeals erred in finding that *Lake Union Realty Co. v. Woolfield*, 119 Wash. 331, and *Williamson v. Hallett*, 108 Wash. 176, 182 P. 940 were cases under RCW 59.102.030(6). Opinion pages 14-15.

6. The Court of Appeals erred in finding that in all implied tenancy cases recovery was not under RCW 59.12.030(3), but instead under RCW 59.12.030(6). Opinion page 15.

7. The Court of Appeals in distinguishing "tenant" under RCW 59.12.030 (1)-(5) and "persons" under RCW 59.12.030(6), since Respondent was a tenant once the 3 day notice to pay or vacate was served. Opinion page 16.

8. The Court of Appeals erred in finding that "reasonable" ground rent was based upon the parties respective rail road leases. Opinion page 18.

9. The Court of Appeals erred in finding that the leases with Mrs. Martin and the Chambers were based upon a "forbearance" from bringing an ejectment action. Opinion page 18.

10. The Court of Appeals erred in finding there was no use of Petitioner land for ingress and egress. Opinion page 18, footnote 5.

11. The decision is in conflict with the decisions of the Supreme Court, namely:

Decker v. Verloop, 73 Wash. 10, 131 P. 190 (3 Day Notice and failure to pay or vacate created a landlord tenant relationship); *Howard v. Edgren*, 62 Wn.2d 884, 385 P. 2d 41 (an award of nominal rent does not amount to reasonable rent under RCW 59.04.050); *Williamson v. Hallett*, 108 Wash. 176, 182 P. 940 (By demanding rent and the 3 day notice to pay or vacate, there became an implied tenancy and an agreement to pay rent.); *Lake Union Realty Co. v. Woolfield*, 119 Wash. 331, 205 P. 14 (Service of 3 day notice to pay or vacate without vacating results in a tenancy by implication, under what is now RCW 59.12.030(3), distinguished case that could fall under what is now RCW 59.12.030(6) and RCW 59.04.050); *Reichlin v. First Nat. Bank of Montesano*, 184 Wash. 304, 51 P.2d 380 (by demanding the tenant to vacate and a failure, an unlawful detainer act case is proper and the rental value is the actual value for profitable use, not the value of the use which the owner meant to make of it.); *Selene v. Ward* 189 Wn.2d 72, 399 P.3d 1118 (evictions case under RCW 59.12.030(6), defendant held possession without color of title); *Larsen v. State*, 9 Wn.2d 730,447 P. 3d 168, (the appellate court can affirm the trial court on any basis supported by the record).

12. The decision of the Court of Appeals in is conflict with decisions of the Court of Appeals, namely: *Bellevue Square*

Manages, Inc. v. GRS Clothing, Inc. 124 Wn.App. 239, 98 P.3d 498 (An invalid assignment and no color of title, suggested that under RCW 59.12.030(6), the "person" in possession, KPI, was not a "tenant".); *Sarvis v. Land Resources, Inc.*, 62 Wn.App 888, 815 P.2d 840 (an individual without color of title remained in possession of property after an underlying lease with a third party expired, RCW 59.04.050);.

STATEMENT OF THE CASE

I. QUIET TITLE / LEASE HISTORY / SUIT:

For more than 52 years Petitioner or his predecessors in title have leased 10 feet of the building now owned by Respondent and his predecessors, together with access over approximately an additional 32 feet of roadway on the esst side of the building. EX 09-014.

Mr. Chambers, Respondents predecessor in title, in the fall of 2014 orally informed Petitioner of his intent to sell the building and to not renew his lease with Petitioner that would expire on January 31, 2015. Mr. Chambers did not timely notify Petitioner in writing of his intent not renew the lease. EX 014. Before the Chambers lease expired on January 31, 2015, Respondent took possession of the leased property, without Petitioners consent. Respondent has continuously occupied the property since November, 2014.

Respondent did not pay rent to Petitioner from February 2015 through June, 2015. Petitioner then served Respondent with a 3 day

notice to pay or vacate in June 2015. EX 01. Respondent failed to pay any rent or vacate the property and an unlawful detainer action was commenced. CP 2-10.

Petitioner through out the litigation has argued and the record reflects that this is an unlawful detainer action property before the court based upon the following: (1) RCW 59.12.030(3), a month to month tenancy once the 3 day notice was served (CP 1): (2) an assumption of the Chambers lease that was not timely terminated (CP 52); (3) a tenancy by sufferance RCW 59.04.050 CP 204 and 260-261 having obtained possession of the building without the consent of Petitioner; or (4) that Respondent entered the property without Petitioners permission and without color of title, RCW 59.12.030(6), since Respondent did not purchase the building that is on property owned by Petitioner until 2016. EX 111.

Initially, Respondent raised an issues as to the location of the rail road right of way as it adjoined Petitioners property CP 168 and 170. These issues were ultimately resolved by Respondents survey of the rail road right of way, showing that Respondents building encroached 10.4 feet east of the rail road right of way. EX 019.

In 1962, Petitioners predecessor in title quieted title to 26.06 feet of property adjoining the rail road right of way now occupied by Respondent. EX 03 and 05. In addition, Petitioners predecessor owned an additional 16.25 feet adjoining the quiet title property. EX 04. Both the 26.06 feet of property and the 16.25 property were transferred to Petitioner. EX 08.

II. ACCESS:

Widmer was a tenant from 1962 to 1966, (EX 10) and the only time the access to the west side of the building was used to off load roofing materials into the building from a rail road siding that has since been removed. RP 325, ln 22 to 326, Ln 1, CP 168 and 170. Petitioner and Mr Chambers testified that access to the building on the east side of the building was necessary over Petitioners property. RP 33, ln 33-35, ln 12; RP 186, ln 6-20. Respondent testified that the primary access to his shop was from the doors on the east side of his building (Petitioners property). RP 294, ln 10-295, ln 5. EX 021, 022, 023. Respondent also testified that any access on the west side of the building had not been used to enter or exit the building. RP 329, ln 1-22; CP 168 and 170.

III. REASONABLE RENT

The trial court was provided with the rental history for the use of the 10 feet of the Respondent's property and the common use of the driveway that had escalated over the years from being locked in at $100.00 per year for the first 25 years of the leases, based on a lease provision that provided for an option to extend on the same rent for an additional 15 years after the first 10 year term ended (1962 to 1987). EX 09-012. When the prior lease expired in 1987, a new lease was negotiated with monthly rent negotiated at $700.00 per month, coupled with cost of living increases for future years. EX 012. The first Chambers lease was negotiated at $980.43, again with a cost of living adjustment. Before the first Chambers lease

expired, Chambers desired to change the lease to a new 3 year lease, with automatic extensions and cost of living adjustments. The rent was then negotiated as $1,080.50 per month. EX 014. At trial, Respondent offered rail road leases to both his and Petitioners property of $1,986.52 per year as a fair market rental. EX 113 and 119.

Without any foundation, the Court of Appeals found that the difference between the rail road lease and the rent paid by the former tenants, including Mr. Chambers was a payment to forbear Petitioner from commencing an ejectment action. Court of Appeals decision, page 18.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1.The decisions of the Court of Appeals is contrary to and in conflict with the decisions of the Supreme Court and Court of Appeals.

Preliminarily, 3 statutes that apply to the facts of this matter, namely:

> RCW 59.12.030 A tenant of real property for a term less than life is guilty of unlawful detainer either:
> ...
> (3) When he or she continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, ..., has remained uncomplied with for the period of three days after service thereof...;
> ...

> (6) A person who, without the permission of the owner and without having color of title thereto, enters upon land of another and who fails or refuses to remove therefrom after three days. notice, ...
>
> RCW 59.04.050: Whenever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession, he or she shall be deemed a tenant by sufferance merely, and shall be liable to pay reasonable rent for the actual time he or she occupied the premises, and shall forthwith on demand surrender his or her possession to the owner or person who had the right of possession before said entry, and all his or her right to possession of said premises shall terminate immediately upon said demand.

The Court of Appeals found that Respondent was not a tenant under RCW 59.12.030(3). Opinion pages 10 and 16. This was based upon Petitioner not having an express lease with Respondent. Opinion page 11. The Court further addresses the matter as applying to a "person" not a "tenant" under RCW 59.12.030(6). Opinion page 11. The opinion goes on to discuss an "implied contract", requiring a meeting of the minds, which did not occur. Opinion page 12-13.

The Court cites *Lake Union Realty Co., v. Woolfield,* 119 Wash. 331, 205 Pac. 14 asserting that it was a case under RCW 59.12.030(6). This is a misconstruction of that opinion. On appeal, the court specifically found that the tenancy arose by implication from the giving of the 3 day notice to pay or vacate. By giving the notice, they immediately gave permission to the tenancy. Supra, at 333. This permission removed the case from the operation of either

59.12.030(6) (without permission) and 59.04.050 (without consent).

The early case of *Decker v. Verloop*, 73 Wash. 10, 131 P. 190 set the standard for implied tenancies. Decker served a 3 day notice to pay or vacate. Verloop refused to pay rent or to vacate the property. By notifying Verloop to pay or vacate, her possession became permissive and she was bound to pay or vacate and she was therefore holding unlawfully.

Williamson v. Hallett, 108 Wash. 176, 182 Pac. 940 was an RCW 59.12.030(3) case. Williamson served a 3 day notice to pay or vacate. The giving of the notice made the possession permissive and an implied tenancy was created, removing the case from the operation of RCW 59.12.030(6), since the occupancy was no longer without permission. The court was convinced that this was an implied tenancy, however the court found if there was no permission, then Rem. Code, Sec 8805 (now RCW 59.04.050) would apply. Supra at 179.

Following *Williamson*, supra.,the case of *Lake Union Realty Co., v. Woolfield,* 119 Wash. 331, 205 Pac. 14 was decided. Therein the court specifically found that the tenancy arose by implication from the giving of the 3 day notice to pay or vacate. By giving the notice, they immediately gave permission to the tenancy. Supra, at 333. This permission removed the case from the operation of subdivision 6 of section 812, Remington's 1915 Code (now RCW 59.12.030(6), since the giving of the notice was permission, citing *Williamson*. The opinion went on to hold that if there was not

permission, then Rem. Code Sec 8805 (now RCW 59.04.050) would apply. Supra at 333-334.

The later case of *Sarvis v. Land Resources, Inc.* 62 Wn.App. 888, 815 P.2d 840 distinguished the *Lake Union* and the *Williamson* cases, holding that Rux's occupation of the property was without consent after the lease had expired was a a tenant by sufferance. Supra at 892.

The Court of Appeals cited *Bellevue Square Managers, Inc. v. GRS Clothing, Inc.,* 124 Wn. App 238, 98 P.3d 498 for the proposition that KPI, who took over a lease by an invalid assignment of a lease, was properly evicted in the unlawful detainer case pursuant to RCW 59.12.030(6). This was not an implied tenancy case, since there had not been a 3 day notice to pay or vacate served on KPI. KPI had intervened in the GRS unlawful detainer action. An unlawful detainer action was proper, without distinguishing between a "person" and a "tenant". Whatever its status, it was unlawfully detaining the property without consent or permission and without color of title.

The Court of Appeals further held that for the operation of RCW 59.12.030(6) to apply, that it must apply to a "person", not a "tenant". Opinion pages 15-16. Without any authority, the court found that the cases of implied tenancy fall within the category of "persons" in RCW 59.12.030(6). Opinion at page 16

The opinion concludes that Petitioner could not proceed under RCW 59.12.030(3) because Respondent was not a "tenant" who was

"in default" in payment of rent. He was a person who entered Petitioners land without permission or color of title and who failed to or refused to remove after a 3 day notice. Opinion at pager 16-17 This is not a correct statement of the law. As shown in *Williamson,* supra, and *Lake Union*, supra, the giving of the 3 day notice to pay or vacate creates a permissive occupation of the land and an implied tenancy is created. Proceeding under RCW 59.12.030(3) was the correct manner of proceeding with this case.

Furthermore, the preamble to RCW 59.12.010 provides "A tenant of real property for a term less than life is guilty of unlawful detainer either:" then setting forth sections 1 through 7 using the term tenant and person in those subsection. There being do distinction between them, since the preamble treats them all as tenants unlawfully detaining the property.

The Court of Appeals held that Petitioner's presentation at trial did not rely on RCW 59.12.030(6). Opinion page 17. This is true, since by giving the 3 day notice of pay or vacate brought the case within the purview of RCW 59.12.030(3). The notice itself showed permission and an implied tenancy.

The Court of Appeals suggested that there was no evidence that Respondent had entered the premises described in the Chambers lease. Opinion pages 17-18. A review of the record establishes the location of the easterly right of way of the rail road. EX 019, RP 275, ln 8 to 276, ln 22. (The note on the Amended Record of Survey, EX 019 explains that the amendment was done to correct

building dimensions from an earlier recorded survey, The earlier survey being dated January 8, 2015, shortly before the Chambers lease terminated on January 31, 2015. Further, the surveyor's Certificate states that it was done at the request of Zane Larson in December, 2014.

Coupling the survey, together with the survey done for the quiet title actions (EX 03), the quiet title judgment (EX 05), the deed from Blanche King to Maybelle King Keiser (EX 04), and the deed to Petitioner (EX 08), all defining the westerly boundary of Petitioners land as adjoining the southeasterly right of way of the rail road from Stadium Way north. Further referring then to EX 21 and 22, depicting Respondents building, shows the driveway to the east of Respondents building and the bay doors to the shop on the easterly side of the building. This establishes that the portion of Respondents building and access to the building are located on Petitioners property.

The Court of Appeals determined that reasonable rent for the portion of the building and the access from Stadium Way to Respondents property was $475.33 per year based upon rail road leases that both Petitioner and Respondent had obtained. Reviewing the history of the leases on the property, once the initial Widmer 25 year lease ended, shows that all prior tenants had paid rent that was negotiated from $700.00 per month to $1,080.50 from 1982 to 2015. EX 012 -014. Without any foundation from the record, the Court of Appeals concludes that these rents reflected a value for the

forbearance by the landlords for not seeking an ejectment from the premises by the various tenants. Opinion page 18.

The evidence of the rent from the rail road was admissible. The trial court having considered the evidence of use by all of the tenants of the access from the driveway to the easterly shop doors, that occupied the 10 feet of leased space, the argument of counsel after weighing the evidence, determined that the fair rental value of the property was $1,080.50 per month. CP 515. In an eminent domain case, *Chase v. Tacoma*, 23 Wn.. App. 12, 594. P. 2d 938, review denied 92 Wn.2d 1025, after considering the evidence presented by several witness as to value, the court found that there was a sufficient foundation for the admission of the opinions and that the comparison goes to the weight of the evidence, leaving it to the trial court's discretion as to the value. Supra. at 17. It was not an abuse of discretion for the trial court to use the historical rents, including cost of living adjustment, in arriving at the fair rental value for the property.

This court can, as the Court of Appeals could have, affirm a trial court on any basis supported by the record. *Larsen v. State*, 9 Wn. 2d 730, 447 P.3d 168.

CONCLUSION:

Respondent went into possession in 2014 and has continued in possession from February 2015 to the present time. By giving a 3 day notice to pay or vacate, Respondent became a tenant with the

permission of Petitioner. *Decker*, supra.. The result being that he could either pay the rent demanded or vacate the property. Having done neither, he thereafter unlawfully detained Petitioners property pursuant to RCW 59.12.030(3).

As a tenant pursuant to RCW 59.12.030(3), the rent, either demanded or as found by the court, became the rent to be paid, namely $1,080.50 per month. The rent paid by tenants after the first 25 year lease ended establishes the reasonable rent for the use of the 10 feet of Respondents building on Petitioners property and the necessary access to the building over Petitioners 32 feet of driveway.

The decision of the Court of Appeals in contrary to the decision of both the Supreme Court and the Court of Appeals. The decision of the Court of Appeals should be reversed and the decision of the trial court should be affirmed.

Respectfully submitted
this 22nd day of February 2021

AITKEN, SCHAUBLE, PATRICK,
NEILL & SCHAUBLE

Howard M. Neill

Howard M. Neill WSBA No. 05296
Attorney for Petitioner

CERTIFICATE OF MAILING

I certify that on this 22nd day of February 2021, I caused a full, true and correct copy of this PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT to be mailed to attorney for Appellants, Aaron Orheim, Talmadge/Fitzpatrick, 2775 Harbor Avenue SW, Third Floor, Suite C, Seattle, WA 98126, by first class United States Mail, with postage fully prepaid thereon.

Howard M. Neill
Howard M. Neill

APPENDIX

COURT OF APPEALS DECISION

APPENDIX

COURT OF APPEALS DENIAL OF RECONSIDERATION

FILED
OCTOBER 20, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

MARK WHITMORE, Respondent, v. ZANE LARSEN, individually, AFFORDABLE ADVANCE AUTOCARE, a Washington Limited Liability Company, d/b/a EVERGREEN TIRE, and OCCUPANTS, Appellants.	)	No. 36863-7-III UNPUBLISHED OPINION

SIDDOWAY, J. — Zane Larsen appeals the findings, conclusions, and judgment entered following a bench trial, finding him liable for unlawful detainer and imposing damages, attorney fees and costs totaling $165,680.40. We reverse and remand with directions to dismiss the unlawful detainer claim.

FACTS AND PROCEDURAL BACKGROUND

For over 25 years, Charles Chambers owned and operated an automotive and tire business in Pullman. The business operated out of a large commercial building that was owned by Dorothy Martin at the time Mr. Chambers bought the business. Ms. Martin leased the ground on which the building was located. When Ms. Martin died in 1997 or 1998, Mr. Chambers and his wife bought the building and entered into ground leases of their own. Most of the building and other business premises were located on a former railroad right-of-way that the Chamberses leased from the Washington State Department of Transportation (DOT).

The Chamberses had a second ground lease that addressed an historical encroachment. After the commercial building was constructed in 1950 by Widmer & Widmer Roofing Specialists, Inc., Maybelle Keiser, who owned adjoining land to the east,[1] brought a quiet title action and, in October 1962, established title to land that extended a little over 10 feet under Widmer's building. Widmer dealt with the problem of its encroachment by signing a lease effective November 1, 1962, under which it agreed to pay $100 per year to lease a roughly 10 x 250 foot strip of Ms. Keiser's land. Ms.

[1] The boundaries of the Widmer and Chambers business premises appear to run SSW to NNE and WNW to ESE rather than north to south and east to west. In discussing spatial relationships at trial the parties referred more simply (albeit less exactly) to locations being to the east, west, north, or south. So do we.

Keiser continued to charge only $100 per year rental to Widmer and its assignee for the next 24 years.

By the time Ms. Martin acquired the building in 1987, Mr. Whitmore's parents had acquired Ms. Keiser's property interests. Beginning with Ms. Martin's acquisition of the building in 1987, Mr. Whitmore's parents, succeeded to by a Whitmore Family Trust and thereafter by Mr. Whitmore (collectively "the Whitmores"), substantially raised the rent payable for the strip of land being used by the automotive/tire business. The lease with Ms. Martin extended the leased strip of land by another 194 by 10 feet, yet it increased the rent from only $100 per year to $700 per month—amounting to $8,400 per year.

During Mr. Chamber's ownership and operation of the automotive/tire business, a gravel road or driveway that the Whitmores claimed to own ran along the eastern boundary of his leased property and continued to the north, where it ended in a turnaround at a grain elevator owned by the Whitmores. Ms. Martin's and the Chamberses' leases with the Whitmores allowed them to make nonexclusive use of the road/driveway. (The Martin lease described it as a "private road" while the Chambers lease described it as a "common driveway." Ex. P12, at 2; Ex. P14, at 4.) Among other users of the road/driveway were the Whitmores, their grain elevator lessees, and recreational vehicle owners to whom the Whitmores would rent space on football

weekends. The Chambers lease in effect in 2014 required the Chamberses to repair, maintain, grade and gravel the road/driveway annually.

In August 2014, Mr. Chambers announced his intention to sell the automotive/tire business and retire, and Zane Larsen expressed interest in acquiring it. Mr. Larsen entered into an agreement to purchase the business and building in October 2014 that was subject to contingencies.[2] The purchase did not close until April 2016, but Mr. Larsen began operating the business in November 2014, "to get [his] feet under [him]," and in light of Mr. Chamber's intention to retire. Report of Proceedings (RP) at 201-02.

In the late summer or fall of 2014, Mr. Chambers informed Mr. Whitmore that he would not renew the ground lease for Mr. Whitmore's encroached-upon land, whose three-year term would end on January 31, 2015. He informed Mr. Whitmore that Mr. Larsen would be buying the business and Mr. Larsen and Mr. Whitmore would need to negotiate their own lease. On February 10, 2015, Mr. Chambers wrote Mr. Whitmore a confirming letter, which reads:

> I am writing you to confirm that our rental contract has ended as of January 31st, and as you know, because of health reasons, I have sold the business to Zane Larsen. I recommend that you contact Mr. Larsen and work out the rental agreement with him as soon as possible.

Ex. P15.

[2] The purchase was made by Mr. Larsen and his limited liability company, Affordable Advance Autocare, which is also an appellant. For simplicity, we refer only to Mr. Larsen.

It is undisputed that Mr. Larsen and Mr. Whitmore thereafter unsuccessfully engaged in negotiations toward a lease. Mr. Whitmore would later testify that he tried to negotiate a lease with Mr. Larsen "[m]ultiple times" but Mr. Larsen "refused every term that we've tried to put together." RP at 52, 55. When Mr. Larsen finally presented a proposed written lease, Mr. Whitmore refused to sign it.

For his part, Mr. Larsen claims the negotiations stalled when he discovered "red flags." RP at 204. One was that Mr. Whitmore could not provide a satisfactory survey of the proposed leasehold. Mr. Larsen also learned that the gravel road that Mr. Whitmore claimed to own had formerly been Kaylor Road, a public road, and Ms. Keiser had not named the city of Pullman or any other governmental agency as a party in her quiet title action. He ultimately came to doubt that Mr. Whitmore owned the land underneath and adjacent to his building and refused to negotiate further until he could resolve his concerns.

In June 2015, Mr. Whitmore served a three-day notice to pay rent or vacate on Mr. Larsen. The notice asserted that past due rent of $7,500 was owed and if not paid, Mr. Whitmore would file an unlawful detainer action under RCW 59.12.030(3). The rent was not paid, and the following week Mr. Whitmore filed the action below.

Mr. Whitmore's complaint for unlawful detainer alleged that Mr. Larsen was Mr. Whitmore's tenant under "a month to month lease" under which Mr. Larsen owed $1,500

per month, for a total of $7,500. Clerk's Papers (CP) at 3. Implicit was that the last rent paid was for the month of January 2015, the last month of the Chambers lease (or so the parties believed). In answering the complaint, Mr. Larsen denied that he and Mr. Whitmore had a lease agreement and alleged that Mr. Whitmore did not own the property that was the subject matter of the Chambers lease.

At a show cause hearing that took place in August 2015 the trial court observed, "This is obviously very complicated and this is very typical when you have boundary disputes." CP at 298. It expressed concern that the parties had provided no briefing. It told the parties that despite its uncertainty, "I'm going to go ahead and give you a decision here today," explaining that it could take the matter under advisement, but "I could probably spend 40 or 50 hours doing independent research . . . and [it] would still be a difficult issue to determine." CP at 298-99.

The trial court found by a preponderance of the evidence that Mr. Larsen's building was located on a portion, "perhaps a small portion," of Mr. Whitmore's property. CP at 301. It found rent owed would be based on the $1,080 per month it understood was payable under the Chambers lease, not the $1,500 per month to which Mr. Whitmore claimed to be entitled beginning on February 1, 2015. It ruled that Mr. Whitmore was entitled to a writ of restitution but declined to issue one because it did not know what it would order the sheriff to do. Observing that Mr. Larsen was leasing a large portion of the property under the building from DOT, it stated, "Does that mean

vacate, don't use a portion of the building[?] Does that mean take the building off that portion of the property[?] I don't know." CP at 302.

Over a year passed before Mr. Whitmore took further action, moving for summary judgment in November 2016. For the first time, he claimed that Mr. Larsen was bound by the Chambers lease for an additional three years (through January 2018) because the lease contained an automatic renewal provision and Mr. Chambers did not timely cancel in writing. Never before had Mr. Whitmore asserted that Mr. Larsen could be held to the Chambers lease. Mr. Chambers would later testify, and even Mr. Whitmore would agree, that they were unaware of the automatic renewal provision when Mr. Chambers gave verbal and written notice of nonrenewal in October 2014 and February 2015. Mr. Whitmore's motion was denied on the basis that there were factual disputes over whether Mr. Larsen's building was located on Mr. Whitmore's property.

Almost another year passed before the parties filed cross motions for summary judgment. Mr. Larsen argued the case was improperly being maintained as an unlawful detainer action and should be dismissed, with Mr. Whitmore free to bring an ejectment action. Mr. Whitmore responded that the action was properly brought under RCW 59.12.030(3) because either the Chambers lease continued or there was an implied lease under which Mr. Larsen owed the rent demanded by Mr. Whitmore. For the most part, the trial court denied both motions for summary judgment, but it did reject Mr. Larsen's argument that Mr. Whitmore was not entitled to proceed under RCW 59.12.030(3). It

ruled that Mr. Whitmore had "presented sufficient facts to proceed in this unlawful detainer claim pursuant to RCW 59.12.030(3)." CP at 284.

In April 2019, almost four years after Mr. Whitmore filed his unlawful detainer action, the parties proceeded to a two-day bench trial. The trial court allowed them to try the issue of title, despite it being an unlawful detainer action. It heard their dispute over whether Mr. Larsen and Mr. Whitmore were parties to a lease. Mr. Larsen contended that if any rent or rent-based damages were payable, it would be only reasonable rent, and he presented evidence of the rent he and Mr. Whitmore were paying to DOT for their identically-sized and adjacent ground leases. Copies of the parties' leases then in place with DOT were admitted as exhibits D113 and D119. Included as an appendix to this opinion are depictions of the leased areas from surveys that were prepared in December 2016 and are attached to exhibits D113 and D119.

The left depiction in the appendix shows, with cross hatches, the portion of the right-of-way DOT leases to Mr. Larsen. The right depiction shows, with cross hatches, the portion of the right-of-way it leases to Mr. Whitmore. Mr. Larsen's commercial building (the larger of two structures, the other being a shed) is depicted on both surveys, somewhat more clearly in the right depiction.

The exhibits and testimony established that Mr. Larsen and Mr. Whitmore lease adjacent 16,527 square foot parcels of ground from DOT. Both lessees pay annual, not monthly, rent to DOT of $1,760.48. The roughly 10 foot by 444 foot strip of ground

leased from Mr. Whitmore under the Chambers lease would be roughly 27 percent of the area each party leases from DOT. If the rental rate the parties paid to DOT at the time of trial was a reasonable amount, then reasonable rent for the entire 4,440 square feet of ground that the Whitmores leased to Ms. Martin and the Chamberses would be $475.33 a year.

The trial court found in favor of Mr. Whitmore. It did not specify the rental agreement on which it based its conclusion that Mr. Whitmore was entitled to pursue his claim for unlawful detainer, finding only that Mr. Larsen wrongfully occupied the premises "on a month to month basis and/or pursuant to a lease agreement that has not expired and/or by an implied lease." CP at 514. It fixed Mr. Larsen's liability for unpaid rent at $1,080.50 per month based on the Chambers lease, doubled it pursuant to the unlawful detainer statute, and awarded reasonable attorney fees and costs based on the attorney fee provision in the Chambers lease. Judgment was entered in the total amount of $165,680.40.

Substantially adopting Mr. Whitmore's proposal for a writ of restitution, the trial court ordered that a writ be issued to the sheriff of Whitman County directing him to "deliver possession of the premises" to Mr. Whitmore either

> A. By allowing the erection of a fence commencing from the northern boundary of Stadium Way at its intersection with the east right of way line of the rail road; thence, along the east right of way line to the south end of Defendants main building; thence continuing east along the south end to Defendants main building to its southeast corner; thence along the east side

> of Defendants main building, to the northeast corner of said main building; thence returning along the north end of Defendants main building to the east right of way line of the rail road; thence following the east right of way line to the Whitmore gate; or
>
> B. By removal of the encroaching building from the premises.

CP at 518; *compare* CP at 412. Mr. Larsen obtained a stay of the judgment and writ and appeals.

ANALYSIS

Mr. Larsen makes 13 assignments of error on appeal, 9 of which are assignments of error to the trial court's findings following the bench trial. We find his challenge to the trial court's pretrial ruling that the case could proceed as an unlawful detainer action under RCW 59.12.030(3) to be dispositive.

We first address why RCW 59.12.030(3) does not provide a basis for Mr. Whitmore's action. We then address Mr. Larsen's argument that Mr. Whitmore's action should have been converted to an ejectment action.

A. RCW 59.12.030(3) does not apply

"Unlawful detainer actions are statutorily created summary proceedings, primarily designed for the purpose of hastening recovery of possession of real property." *MacRae v. Way*, 64 Wn.2d 544, 546, 392 P.2d 827 (1964). They are an alternative, when the statutory elements are met, to the more expensive and lengthy common law action of ejectment. *FPA Crescent Assocs., LLC v. Jamie's LLC*, 190 Wn. App. 666, 675, 360 P.3d 934 (2015) (citing *Hous. Auth. of City of Everett v. Terry*, 114 Wn.2d 558, 563, 789

P.2d 745 (1990)). In such proceedings the superior court sits as a special statutory tribunal, limited to deciding the primary issue of right to possession together with the statutorily designated incidents thereto, i.e., restitution and rent or damages. It does not sit as a court of general civil jurisdiction. *MacRae*, 64 Wn.2d at 546. The unlawful detainer statute is in derogation of the common law and requires strict compliance. *FPA Crescent*, 190 Wn. App. at 675.

RCW 59.12.030(3), under which Mr. Whitmore proceeded, applies to a "tenant of real property for a term less than life" who continues in possession "after a default in the payment of rent" and after a written notice, properly served, remains uncomplied with for three days. A different provision, RCW 59.12.030(6), applies when a "person" not a "tenant" enters upon land of another without permission of the owner and without having color of title, and fails or refuses to remove therefrom after three days' notice.

Mr. Whitmore did not have an express lease with Mr. Larsen. It is undisputed that the Chambers lease was never assigned to Mr. Larsen. As far as the parties knew (until Mr. Whitmore discovered otherwise in November 2016) the Chambers lease expired without renewal on January 31, 2015. And the Chambers lease required that any assignment would require Mr. Whitmore's written consent, which was never given or even requested.

Mr. Whitmore contends that by buying and taking possession of Mr. Chamber's building and business assets Mr. Larsen automatically assumed the Chambers lease, but

this is at odds with fundamental contract law and no supporting legal authority is provided. It is well settled that when no authorities are cited in support of a proposition advanced on appeal, we are not required to search for supporting law but may assume that counsel, after diligent search, has found none. *See, e.g.*, *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962); *and cf. Lake Union Realty Co. v. Woolfield*, 119 Wash. 331, 332, 205 P. 14 (1922) (rejecting a business purchaser's argument that he stepped into his seller's lease).[3]

It is undisputed that Mr. Larsen and Mr. Whitmore never reached any oral agreement on replacement lease terms. As Mr. Whitmore himself testified, he tried to negotiate a lease with Mr. Larsen "multiple times" but Mr. Larsen "refused every term that we've tried to put together." RP at 52, 55.

Mr. Whitmore argues that an implied lease existed, but his concept of an implied lease is that because Mr. Larsen acquired the Chamberses' building, the trial court could imply a lease between Mr. Larsen and Mr. Whitmore having all of the Chambers lease terms. Yet an implied contract "depend[s] for its existence on some act or conduct of the

[3] *Lake Union*, a case that Mr. Whitmore relies on for its recognition that a lease can be implied, rejected this notion of automatic assignment. In *Lake Union*, a manager who purchased his employer's business sought to hold the landlord to a favorable lease under which his employer had paid below-market rent. The court rejected the argument because the manager had not been a party to that lease. The fact that the manager acquired his employer's business and made some of his employer's rent payments was deemed irrelevant.

party sought to be charged and arising by implication from circumstances which, according to common understanding, show a mutual intention on the part of the parties to contract with each other." *Johnson v. Nasi*, 50 Wn.2d 87, 91, 309 P.2d 380 (1957). "[T]he mutual assent of the parties must be gleaned from their outward manifestations." *Weiss v. Lonnquist*, 153 Wn. App. 502, 511, 224 P.3d 787 (2009). The burden of proving the existence of an implied contract is on the party asserting its existence. *Id.* Among the essential facts that the party asserting the existence of an implied contract is the existence of a mutual intention. *Ross v. Raymer*, 32 Wn.2d 128, 139, 201 P.2d 129 (1948) (citing *Kellogg v. Gleeson*, 27 Wn.2d 501, 178 P.2d 969 (1947)).

Washington cases have found an "implied tenant" liable for unlawful detainer, but they have not implied a lease of the sort urged by Mr. Whitmore and they have not found implied leases in cases brought under RCW 59.12.030(3) or one of its predecessor provisions. When Washington cases have found an implied tenancy, it has been in cases brought under RCW 59.12.030(6), or one of its predecessor provisions, against a person who has entered on the owner's land without permission, without color of title, who, by failing to remove himself of herself after written notice, is required to pay reasonable rent.

For example, in *Bellevue Square Managers, Inc. v. GRS Clothing, Inc.*, 124 Wn. App. 238, 245, 98 P.3d 498 (2004), where the lessee, GRS, entered into an invalid assignment and moved out, this court held that it still remained the "tenant." Its

attempted assignee, who moved into the commercial premises and was in possession when notice was served, was held liable for unlawful detainer not as a tenant, but as a person who had entered premises without permission under RCW 59.12.030(6).

In *Lake Union*, the defendant's liability for unlawful detainer was based on a trial court finding that "without permission of the respondent, and without . . . any color of title[, the appellant] entered the premises." 119 Wash. at 332. The court held the possessor of the premises liable on alternative grounds, one being that he could be deemed a tenant by sufferance and required to pay reasonable rent. Implicitly, it found the rent amount being demanded by the owner of the premises was reasonable.

The *Lake Union* court relied on *Williamson v. Hallett*, 108 Wash. 176, 182 P. 940 (1919), in which Williamson and his partner, lessees and sublessors of property being operated as a hotel, brought an action for unlawful detainer against Hallett who, without any agreement with them, had assumed possession of the hotel. The partners' subtenant had been purchasing the hotel's furnishings from Hallett but defaulted in the payments. After declaring a forfeiture of the sales contract, Hallett took possession of not only her furniture, but also the hotel. Having been found liable for unlawful detainer, Hallett complained on appeal that she could not be sued for unlawful detainer because there was no proof of a conventional landlord-tenant relationship between her, Williamson, and his partner. The Supreme Court pointed out that under the statute then in effect, "'[w]henever any person obtains possession of premises without the consent of the owner

or other person having the right to give said possession, he shall be *deemed* a tenant by sufferance merely, and shall be liable to pay reasonable rent.'" *Id.* at 179 (emphasis added) (quoting Rem. 1915 Code § 8805).

Finally, in *Reichlin v. First National Bank in Montesano*, the Supreme Court held that in an action for unlawful detainer against a defendant keeping cattle on plaintiff's land without an express agreement, an "implied promise to pay rent [came] into being" and the jury was correctly instructed that "the plaintiff is entitled to recover only the fair rental value of the premises for the period that the defendant occupied said premises." 184 Wash. 304, 309-10, 51 P.2d 380 (1935).

In all of these implied tenancy cases, recovery was not had under a predecessor provision to RCW 59.12.030(3) or RCW 59.12.030(3) itself. Recovery was had, instead, under RCW 59.12.030(6) or one of its predecessor provisions.

Reasonably construed, subsections (1) through (5) of RCW 59.12.030 provide remedies against actual, not implied, tenants. They apply to "tenant[s] of real property for a term less than life." *Id.* Only actual tenants are "tenant[s] . . . for a term." RCW 59.12.030(3) applies to tenants who have committed "a default in the payment of rent" and who are provided with a three-day notice "any time after the rent becomes due." A "[d]efault" is an "omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due." BLACK'S LAW DICTIONARY 526 (11th ed. 2019). Only

actual tenants have "due" dates for paying their rent and commit a "default"—a failure to perform a contractual duty—by failing to pay on time.

RCW 59.12.030(6), by contrast, applies to "persons" who occupy premises without permission and without color of title. Washington cases have consistently treated implied tenants as falling within this category of "persons."

"When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings." *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.2d 885 (2007). And "[u]nder rules of statutory construction 'no part of a statute should be deemed inoperative or superfluous unless it is the result of obvious mistake or error.'" *In re Det. of Strand*, 167 Wn.2d 180, 189, 217 P.3d 1159 (2009) (quoting *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 13, 810 P.2d 917, 817 P.2d 1359 (1991)). "Our fundamental purpose in construing statutes is to ascertain and carry out the intent of the legislature." *In re Marriage of Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215 (2011). An important consequence of the legislature's different remedies available against "tenants" versus implied tenants as "persons" is that an owner may recover rent contractually due from a tenant, but can seek only reasonable rent from an implied tenant.

Mr. Whitmore could not proceed under RCW 59.12.030(3) because Mr. Larsen was not a "tenant" who was "in default" in payment of rent. Mr. Larsen arguably was a person who had entered Mr. Whitmore's land without permission or color of title and

who refused to remove himself following three days' notice. But there is no basis for construing Mr. Whitmore's presentation at trial as relying in the alternative on RCW 59.12.030(6).[4] He relied for his remedy entirely on prior lease agreements. He presented no evidence of the extent to which—apart from the commercial building—Mr. Larsen

[4] We question but do not decide whether an unlawful detainer action that complains of an encroachment that will be difficult to remove falls within the primary purpose of an unlawful detainer action. The primary purpose of an unlawful detainer proceeding is to hasten recovery of possession. *MacRae*, 64 Wn.2d at 546. The first alternative in the writ of restitution entered by the trial court—that the sheriff erect a fence that wraps around the encroaching part of Mr. Larsen's building—does not fully restore possession. The second—that the sheriff remove the encroaching part of the building—is a remedy that many sheriffs and courts have concluded cannot be carried out. *See, e.g.*, *Dundalk Holding Co. v. Easter*, 215 Md. 549, 552, 137 A.2d 667 (1958) (writ of possession was returned by sheriff, stating he could not execute the writ as commanded because it would require him to enter land he could not enter); *Cutrona v. Columbus Theater Inc.*, 107 N.J. Eq. 281, 282, 151 A. 467 (Ch. 1930) (remedy at law for theater's 2.5 by 100 foot encroachment was inadequate because the sheriff could not put the property owner in possession); *Hirschberg v. Flusser*, 87 N.J. Eq. 588, 590, 101 A. 191 (Ch. 1917) (sheriff refused to remove encroaching wall); *Blake v. McCarthy*, 115 N.Y.S. 1014, 1015 (Sup. Ct. 1909) (removal of encroaching building could not be accomplished by execution, which would impose a risk of damage upon the sheriff that he is not bound to incur in an execution); *Davis v. Westphal*, 389 Mont. 251, 262, 405 P.3d 73 (2017) (questioning whether Montana law would permit issuance of a writ of possession that commanded a sheriff to enter real property and affirmatively remove a trespassing encroachment).

As explained by the Wisconsin Supreme Court many years ago, the solution is a mandatory injunction (a remedy not provided by chapter 59.12 RCW):

> It is not reasonable to ask a sheriff to remove the invading portion of that wall or foundation, as he is guilty of trespass if in doing so he invades by a hair line the property of the defendant. The proceeding is as delicate and impracticable as the taking of the pound of flesh. The responsibility of removing the wall should, in justice, be left to the party who built it, and this the remedy of mandatory injunction does.

Fisher v. Goodman, 205 Wis. 286, 237 N.W. 93, 95 (1931).

had entered premises described by the Chambers lease. He disputed that "reasonable" rent should be the measure of his damages.

On the matter of "reasonable" ground rent, only Mr. Larsen presented evidence—what appears to be quite relevant evidence—that applying the rental rate both parties were paying to DOT, a reasonable rent for all the Whitmore property let by the Chambers lease was $475.33 per year.[5] Ms. Martin and the Chamberses paid more to the Whitmores, but they were *getting* more than the occupancy and use for which rent is paid. By having a lease, they were getting the Whitmores' forbearance from bringing an ejectment action that might require them to remove the alleged encroachment. Mr. Larsen chose not to agree to an above-market rent that would buy him forbearance, recognizing that by not having a lease he could be sued for ejectment.

The trial court erred in ruling that the action could proceed under RCW 59.12.030(3).

B. We are not persuaded that the trial court should have converted the action to one for ejectment

We are not persuaded by Mr. Larsen's argument that Mr. Whitmore's action should have been converted by the trial court to an action for ejectment. Mr. Larsen

[5] Mr. Whitmore occasionally pointed out that the Chambers lease also provided for ingress and egress. No evidence was offered as to the use Mr. Larsen made of the gravel road/driveway, the reasonable value of his nonexclusive use, and whether Mr. Larsen had an offsetting claim for maintaining, grading, or graveling it.

relies in part on RCW 59.16.030, which provides that if a defendant in an action under that chapter denies the plaintiff's ownership and states facts showing he has a lawful claim to possession, the case shall proceed as if it were an action under the ejectment provisions presently codified in chapter 7.28 RCW. But his briefing includes no argument, nor did counsel adequately explain at oral argument, why we should apply a provision from chapter 59.16 RCW that has no parallel in chapter 59.12 RCW.

Mr. Larsen also likens this case to *Bar K Land Co. v. Webb*, 72 Wn. App. 380, 864 P.2d 435 (1993) and similar cases, in which an agreement that is nominally a lease is found in substance to be a purchase agreement, under which the nominal "tenant" has paid more than rent and/or made valuable improvements. *Bar K* holds that an unlawful detainer action cannot be maintained against someone who is purchasing, not renting, property. The fact that Webb, the property purchaser, would be able to recover the value of her property improvements in an ejectment action was a *consequence* of the fact that Bar K could not sue her for unlawful detainer. It was not this court's *reason* for holding that Bar K could not sue her for unlawful detainer.

Mr. Whitmore presumably has a claim for ejectment, but a continuing encroachment by an adjoiner upon the land of another by erecting and maintaining a building thereon without right might also be the basis for a claim for trespass or nuisance. *See* 1 AM. JUR. 2D *Adjoining Landowners* § 112. Other than holding that Mr. Whitmore

fails to meet the requirements of RCW 59.12.030(3), we decline to dictate to Mr. Whitmore the form that any future action by him must take.

We reverse the trial court's findings of fact and conclusions of law, its judgment, and the writ of restitution issued pursuant to the judgment, and remand with directions to dismiss the unlawful detainer action.[6]

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

Siddoway, J.

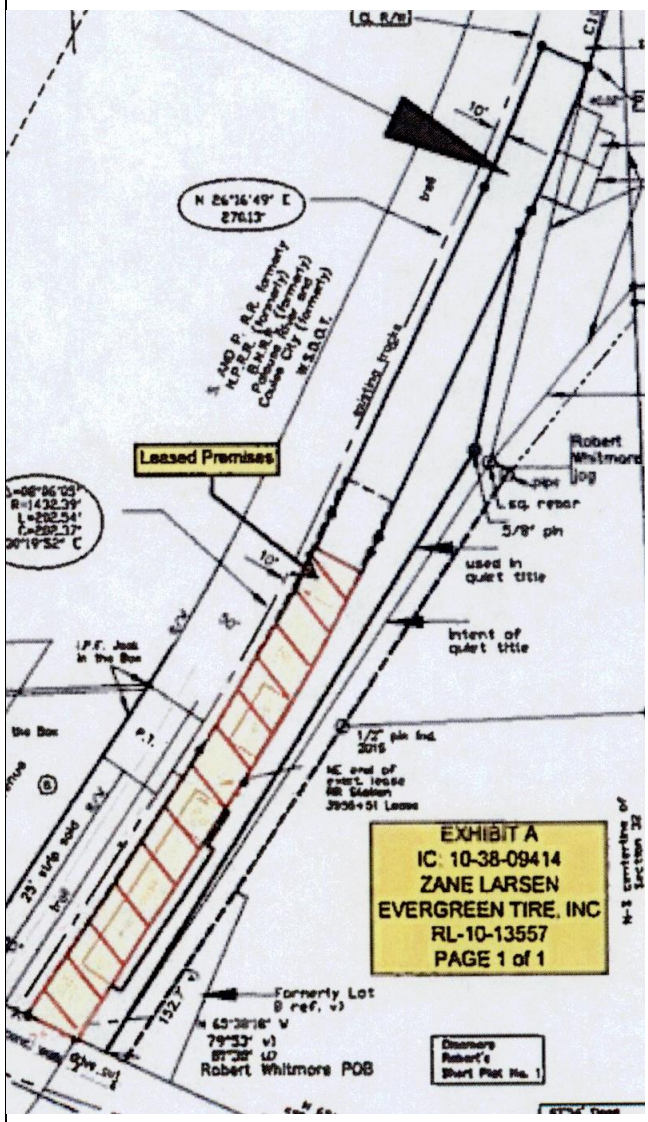
WE CONCUR:

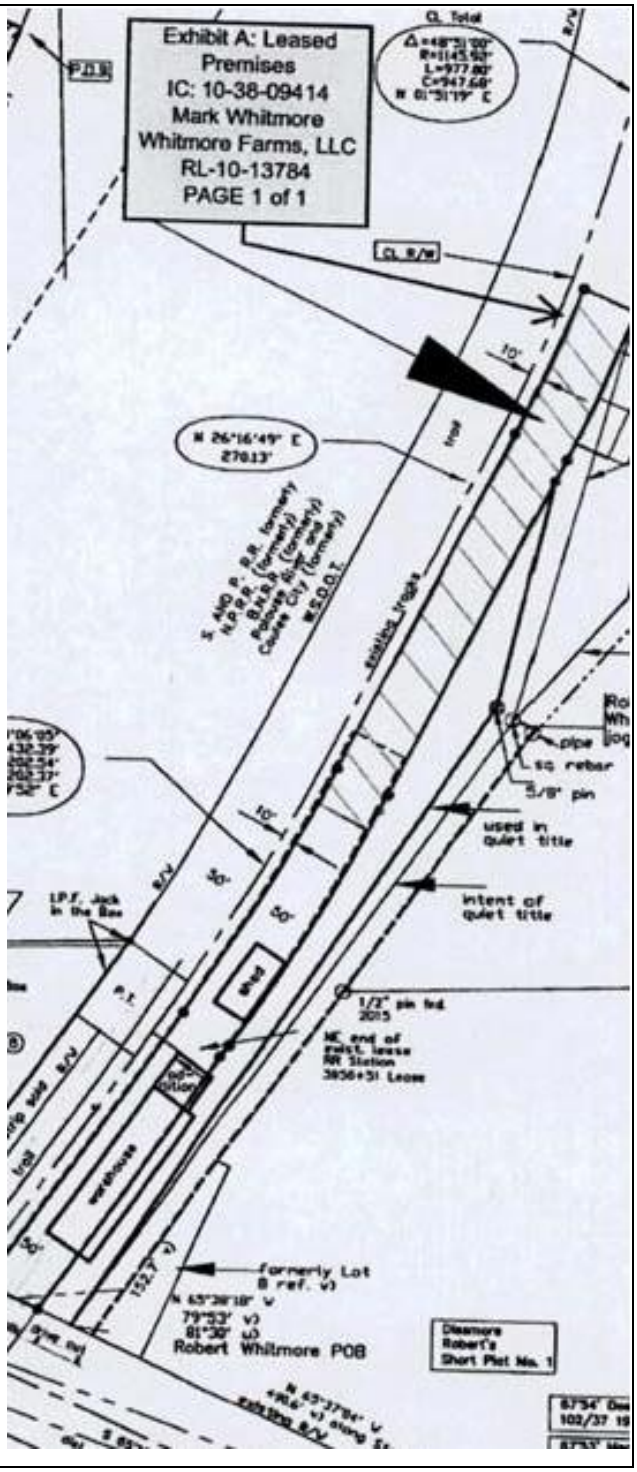
Pennell, C.J.

Lawrence-Berrey, J.

[6] Citing RAP 18.1 and the Chambers lease, Mr. Whitmore requests an award of attorney fees on appeal. The lease does not apply to Mr. Larsen and Mr. Whitmore is not the prevailing party. The request is denied.

APPENDIX





See Ex. D113, Ex. A; Ex. D119, Ex. A.

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

October 20, 2020

Aaron Paul Orheim
Talmadge/Fitzpatrick
2775 Harbor Ave SW Unit C
Seattle, WA 98126-2168
Aaron@tal-fitzlaw.com

Howard Marshall Neill
Attorney at Law
PO Box 307
Pullman, WA 99163-0307
aspnr@pullman.com

CASE # 368637
Mark Whitmore v. Zane Larsen, et al.
WHITMAN COUNTY SUPERIOR COURT No. 152001408

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through this court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Attachment

c: **E-mail**—Hon. Gary J. Libey

SUPREME COURT
OF THE STATE OF WASHINGTON

APPELLATE CASE NO. 99523-1

MARK WHITMORE,
Petitioner
v.
ZANE LARSEN, individually, AFFORDABLE ADVANCED AUTORCARE, a Washington Limited Liability Company, d/b/a EVERGREEN TIRE, and OCCUPANTS,
Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR DISCRETIONARY REVIEW

HOWARD M. NEILL WSBA No. 05296
AITKEN, SCHAUBLE, PATRICK, NEILL & SCHAUBLE
Attorney for Respondent
NE 165 Kamiaken, Suite 210 / P.O. Box 307
Pullman WA 99163
Telephone: (509) 334-3505 Fax: (509) 334-5367

SUPPLEMENTAL APPENDIX TO

PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CITATIONS TO EXHIBITS IN

PETITION DISCRETIONARY REVIEW

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Trial Exhibit 19	5, 11
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Trial Exhibit 22	6, 12

CERTIFICATE OF MAILING

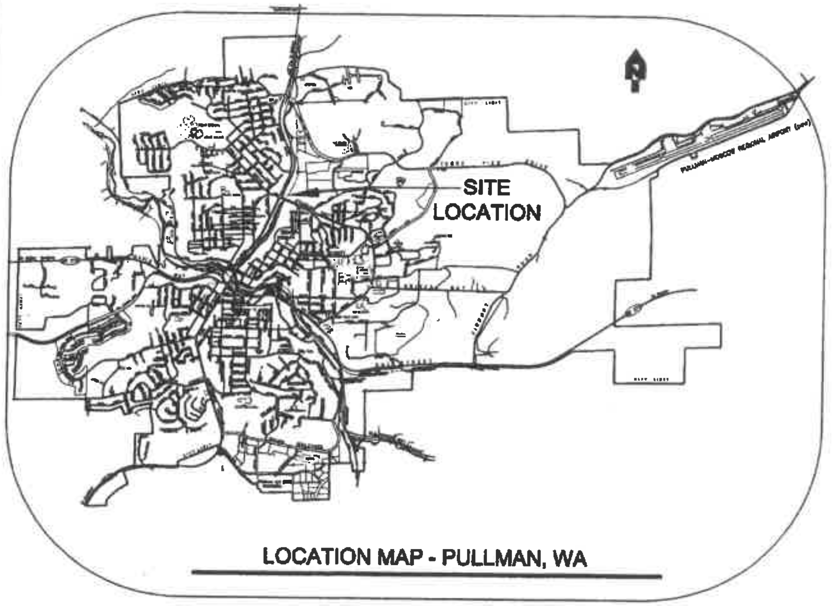
I certify that on this 19th day of April 2021, I caused a full, true and correct copy of this SUPPLEMENTAL APPENDIX TO PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT to be mailed to attorney for Appellants, Aaron Orheim, Talmadge/Fitzpatrick, 2775 Harbor Avenue SW, Third Floor, Suite C, Seattle, WA 98126, by first class United States Mail, with postage fully prepaid thereon.

Howard M. Neill

Howard M. Neill

AMENDED RECORD OF SURVEY

A PORTION OF THE SOUTHWEST QUARTER OF SECTION 32, TOWNSHIP 15 NORTH, RANGE 45 EAST, WILLAMETTE MERIDIAN, CITY OF PULLMAN, WHITMAN COUNTY, WASHINGTON



LOCATION MAP - PULLMAN, WA

AUDITOR'S CERTIFICATE:

Filed for record this 19th Day of Jan. 2017 at 1:03 P.M. in Book 10 of Surveys at Page 34 Auditor's File Number ______ at the request of Lindy Pitts, deputy
Whitman County Auditor

CORNER VISITATION:

The monuments shown as found and tied hereon were visited December of 2014.

PURPOSE OF THE SURVEY:

This Record of Survey was requested by Zone Larson to facilitate the purchase of State railroad right of way, creating a legal description and calculating areas of the parcel to be purchased.

BASIS OF BEARING:

The Bearing of South 02°28'16" East 2668.38 feet was assumed along the easterly line of the Southwest Quarter of Section 32, Township 15 North, Range 45 East, Willamette Meridian, between corners F1 and F2.

ACCURACY STATEMENT (WAC 332-130-100)

This survey was performed using a Leica TS15P, 3-Second Total Station and a Leica GS14 Performance SmarAntenna for a combination of field traverse and GPS survey methods to meet or exceed the required standards for land boundary surveys per WAC 332-130-090.

CORNER NOTES:

F1 Found 1 1/2" Aluminum Cap for Center Section Corner marked "WSU 1973", 2 feet northwest of witness post.
- RP-West Rail of Railroad N90°00'00"E, 6.3'
- RP-Black Chain Link Fence S90°00'00"W, 1.34'

F2 Found chiseled "X" for Southwest Section Corner on 8"± diameter stone inside 12" iron water meter case marked "BACHMAN FOUNDRY WATER METER, ROW". Approximately 1' below surface, 1'± south of 6' wood fence.

F3 Found 1/2" Iron Pipe (outside diameter) for South Quarter Corner in cased monument 5' ± from west curb in parking stall.
- RPF-SE bolt 7th vertical rail post N52°49'09"W, 13.16'
- RPF-NE bolt 4th vertical rail post S37°05'21"W, 16.05'
- RPF-PK w/PLS 35994 on tag on top of curb NE corner of Monroe and California. S33°55'38"E, 48.12'

F4 Found 1" Rebar, no cap, bent with flagging, 1.0'± above surface, 10.0'± east of the edge of road.

F5 Found 1/4" Steel Bar, no markings, 0.2'± below surface.

F6 Found 5/8" Rebar with YPC, no markings, 0.2'± above surface.

F7 Found 5/8" Rebar with YPC marked "MD&A, LS 14827", 0.6' above surface, in slope at an angle, we tied the point of entrance.

F8 Found Railroad Spike marked with an "X" at the intersection of Grand Avenue and Stadium Way.

F9 Found 5/8" Rebar with YPC marked "Carsten, PLS 45152", in a monument case on the centerline of Stadium Way.

F10 Found 5/8" Rebar with YPC marked "Carsten, PLS 45152", in a monument case on the centerline of Stadium Way.

OFFICIAL DOCUMENTS:

R1 Warranty Deed, AFN 389871 October 13, 1965, Maybelle H. Keiser, formerly Maybelle H. King to Robert Whitmore and Maida Mae Whitmore, husband and wife.
R2 Warranty Deed, AFN 217707, August 26, 1947, Maybelle King, now Maybelle King Keiser to Myron King, whose wife's name is Blanche King.
R3 Land Lease, AFN none, 08/08/12, Mark Whitmore to Charles L. Chamber and Terry J. Chambers, husband and wife.
R4 Railroad Lease Report, Lease No. 249796, 06/01/86, Burlington Northern RR to Mrs. Dorothy A. Martin, Executrix of W.R. Martin estate.
R5 Railroad Lease Report, Lease No. 219909, 11/16/75, Burlington Northern RR to Robert D. Whitmore.
R6 State of Washington Department of Highways, State Route 27, Whitman Street To North City Limits of Pullman, Sheet 3 of 3, 1954.
R7 State of Washington Department of Highways, State Route 27, Pullman To Fallon, Sheets 1 and 2 of 14, 1956.
R8 Northern Pacific Railway, Right of Way And Track Map, Idaho Division Palouse and Lewistion Br., Page VI/19, Doc ID 263743, Created in DNR '2001.
R9 McGee's Subdivision, Book of Plats "E", Page 026-2, 1903, Surveyor: Roberts
R10 SP, Stadium Way Retail Center Short Plat, AFN 622980, 2000, Surveyor: Tomkins
R11 Survey For; Jack in the Box Restaurants, AFN 650603, 2003, Surveyor: Murtha
R12 Survey For; Maybelle Kaiser, b-14-3-12, 1961, Surveyor: Fairbanks
R13 Application for permit to remove or destroy a Survey Monument, Permit No. 4976, October 22, 2014, Surveyor: Carsten

LAND DESCRIPTION

DESCRIPTION of a parcel of land located in the Southwest Quarter of Section 32, Township 15 North, Range 45 East, Willamette Meridian, City of Pullman, County of Whitman, State of Washington, more particularly described as follows:

COMMENCING AT the Center Corner of said Section 32,
Thence South 02°28'16" East, 1253.21 feet along the east line of said Southwest Quarter to the Northerly right of way line of Stadium Way;
Thence North 65°37'06" West, 516.86 feet along said northerly right of way line to the **POINT OF BEGINNING** said point also being on the easterly right of way line of Burlington Northern Railroad;

Thence continuing along said northerly right of way line North 65°37'06" West, 40.63 feet to a point 10 feet easterly of the centerline of the Burlington Northern Railroad tracks as located the date of this survey;
Thence the following 3 courses parallel with said centerline of railroad tracks;
1) North 34°28'16" East, 228.41 feet;
2) Along a tangent curve to the left, the radius of which bears North 55°31'44" West 1442.39 feet, a central angle of 08°00'00", (the chord of which bears North 30°28'16" East, 201.23 feet), for an arc length of 201.40 feet;
3) North 26°28'16" East, 42.64 feet;

Thence South 63°31'44" East, 40.00 feet to said easterly right of way line of Burlington Northern Railroad;
Thence along said easterly right of way line the following 3 courses;
1) South 26°28'16" West, 42.64 feet to the beginning of a curve to the right;
2) Along a tangent curve to the right, the radius of which bears North 63°31'44" West 1482.39 feet, a central angle of 08°00'00", (the chord of which bears South 30°28'16" West, 206.81 feet), for an arc length of 206.98 feet;
3) South 34°28'16" West, 219.29 feet to the **POINT OF BEGINNING.**

CONTAINING: 18787 square feet or 0.43 acres of land, more or less.

AMENDMENT NOTE:

This survey is to amend a previously recorded Survey under Auditor's file number 727959. The purpose of this re-record is to correct building dimensions to property lines. Lease areas that were previously shown are not shown for clarity purposes.

LEGEND:

SECTION CORNER AS NOTED	(R1) RECORD INFORMATION SEE OFFICIAL DOCUMENTS
1/4 SECTION CORNER AS NOTED	YPC YELLOW PLASTIC CAP
(32) CENTER OF SECTION	AFN AUDITOR'S FILE NUMBER
F1 FOUND MONUMENT SEE CORNER NOTES	POB POINT OF BEGINNING
o SET 5/8" REBAR WITH YPC MARKED "CARSTEN, PLS 45152"	PROPERTY LINE
+ CALCULATED ANGLE POINT, NOTHING SET	SECTION LINE
	1/4 SECTION LINE
	EXISTING CENTERLINE
	EXISTING RIGHT OF WAY LINE
	EXISTING LOT LINE
	EXISTING BUILDING

SURVEYORS NOTES:

1. We accepted the monuments F1 and F2 as the easterly line of the Southwest Quarter of Section 32. The existing leases and deeds were referenced from this line.
2. We accepted the monuments F8, F9 and F10 as the centerline of Stadium Way and used a best fit line between all three monuments for said centerline. We then offset said centerline 50 feet northerly and 40 foot easterly for the right of way line of Stadium Way.
3. We used the existing centerline of the railroad tracks and best fit it wth the record angles, stations and calls to the Section line per R8 for the location of said railroad centerline. We then offset said centerline 50 feet easterly and westerly for the right of way of said railroad.
4. The subject property's easterly boundary is the easterly right of way line of said railroad. The southerly line of the subject property is the right of way of said Stadium Way. The westerly line of the subject property a line 10 parallel with the centerline of said railroad. The northerly line of the subject property is the stationing distance (52.70') as shown per R4.

SURVEYOR'S CERTIFICATE:

This map correctly represents a survey made by me or under my direction in conformance with the requirements of the Survey Recording Act at the request of Zone Larson in December of 2014

01-19-17
Darrel Wayne Carsten, PLS 45152 — DATE

DARREL WAYNE CARSTEN — STATE OF WASHINGTON — PROFESSIONAL LAND SURVEYOR — 45152 REGISTERED

NW NE (32) SW SE
S.32, T.15N., R.45E.

Taylor Engineering, Inc.
Civil Design and Land Planning
245 E. Main St.
Pullman, Washington 99163
(509) 334-5116 FAX (509) 334-5956

DATE: 01-08-15
FIELD CREW: JMV
DWN: DWC CK'D: ERC
PROJ.#: 14-P064
DWG: Evergreen Tire-ROS

SURVEY FOR
EVERGREEN TIRES

SHEET 1 OF 2

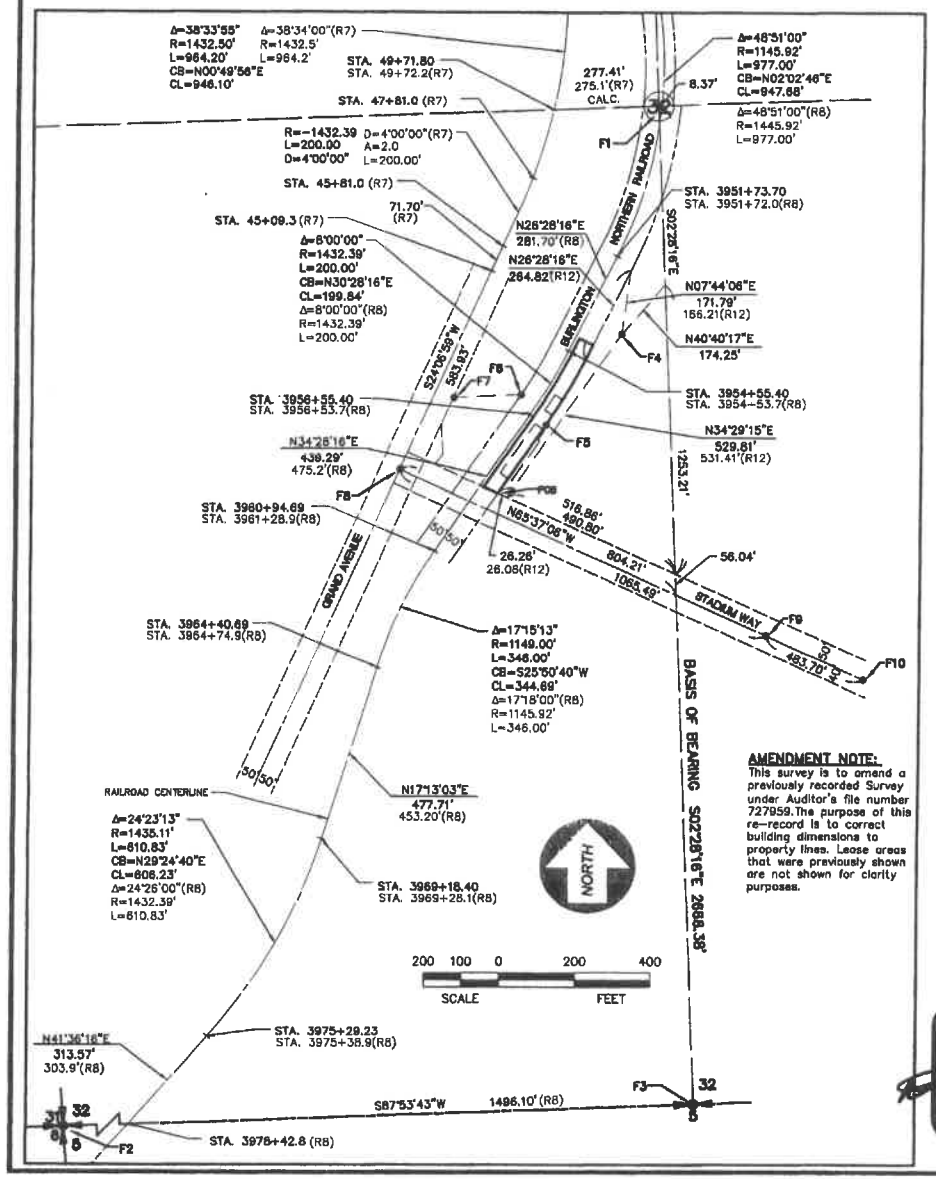
SUPPL. APPENDIX 2
(Same as Trial Exhibit 121)

AMENDED RECORD OF SURVEY

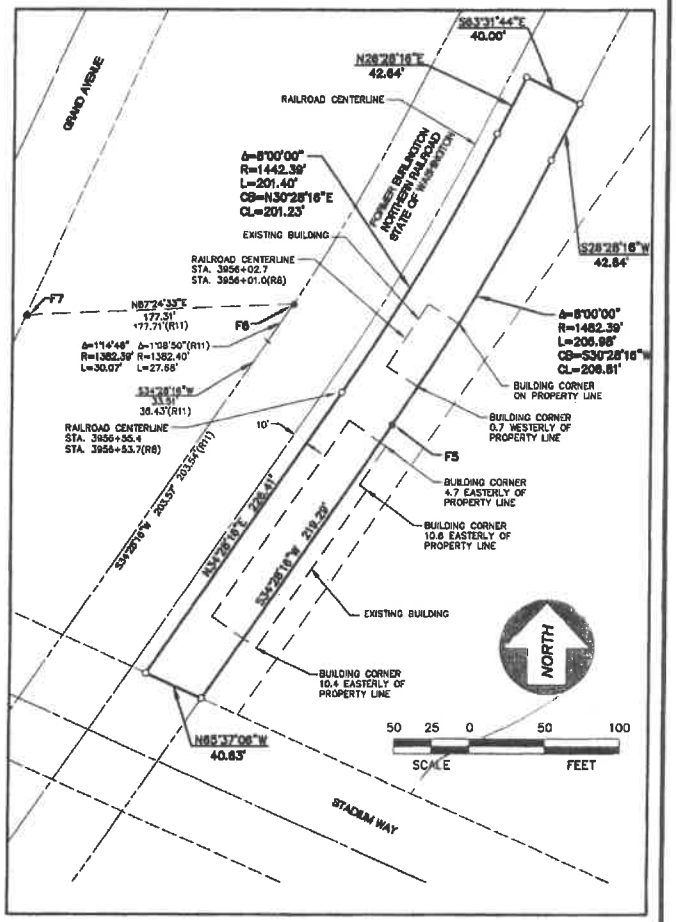
A PORTION OF THE SOUTHWEST QUARTER OF SECTION 32, TOWNSHIP 15 NORTH, RANGE 45 EAST, WILLAMETTE MERIDIAN, CITY OF PULLMAN, WHITMAN COUNTY, WASHINGTON

AUDITOR'S CERTIFICATE:

Filed for record this 19th Day of Jan. 2017 at 10:23 A.M. in Book 10 of Surveys at Page 24, Auditor's File Number ____ at the request of ____
Whitman County Auditor ____, Deputy



AMENDMENT NOTE:
This survey is to amend a previously recorded Survey under Auditor's file number 727959. The purpose of this re-record is to correct building dimensions to property lines. Lease areas that were previously shown are not shown for clarity purposes.



DARREL WAYNE CARSTENS STATE OF WASHINGTON PROFESSIONAL LAND SURVEYOR
01-9-17

NW NE SW SE 32
S.32, T.15N., R.45E.

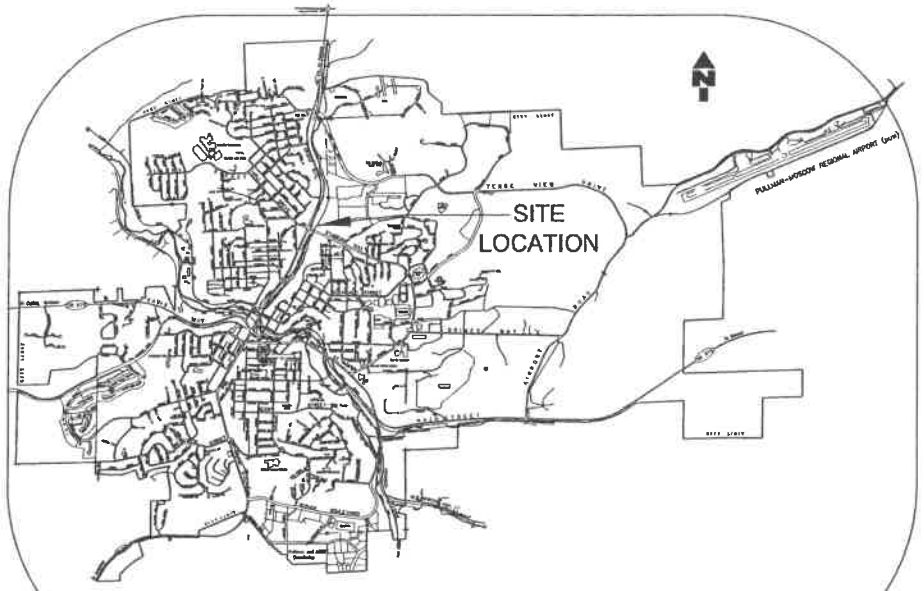
Taylor Engineering, Inc.
Civil Design and Land Planning
345 E. Main St.
Pullman, Washington 99163
(509) 334-5115 FAX (509) 334-5956

DATE: 01-08-15
FIELD CREW: JMV
DWN: DWC CK'D: ERC
PROJ.#: 14-P064
DWG: Evergreen Tire-ROS
SHEET 2 OF 2

SURVEY FOR
EVERGREEN TIRES

AMENDED RECORD OF SURVEY

A PORTION OF THE SOUTHWEST QUARTER OF SECTION 32, TOWNSHIP 15 NORTH, RANGE 45 EAST, WILLAMETTE MERIDIAN, CITY OF PULLMAN, WHITMAN COUNTY, WASHINGTON



LOCATION MAP - PULLMAN, WA

AUDITOR'S CERTIFICATE:

Filed for record this _____ Day of _____ 2015, at _____M. in Book _____ of _____ at Page _____, Auditor's File Number _____at the request of _____
Whitman County Auditor

CORNER VISITATION:

The monuments shown as found and tied hereon were visited December of 2014.

PURPOSE OF THE SURVEY:

This Record of Survey was requested by Zane Larson to facilitate the purchase of State railroad right of way, creating a legal description and calculating areas of the parcel to be purchased.

BASIS OF BEARING:

The Bearing of South 02°28'16" East 2668.38 feet was assumed along the easterly line of the Southwest Quarter of Section 32, Township 15 North, Range 45 East, Willamette Meridian, between corners F1 and F2.

ACCURACY STATEMENT (WAC 332-130-100)

This survey was performed using a Leica TS15P, 3-Second Total Station and a Leica GS14 Performance SmarAntenna for a combination of field traverse and GPS survey methods to meet or exceed the required standards for land boundary surveys per WAC 332-130-090.

CORNER NOTES:

F1 Found 1 1/2" Aluminum Cap for Center Section Corner marked "WSU 1973", 2 feet northwest of witness post.
- RP-West Rail of Railroad N90°00'00"E, 6.3'
- RP-Black Chain Link Fence S90°00'00"W, 1.34'

F2 Found chiseled "X" for Southwest Section Corner on 8"± diameter stone inside 12" iron water meter case marked "BACHMAN FOUNDRY WATER METER, ROW". Approximately 1' below surface, 1'± south of 6' wood fence.

F3 Found 1/2" iron Pipe (outside diameter) for South Quarter Corner in cased monument 5' ± from west curb in parking stall.
- RPF-SE bolt 7th vertical rail post N52°49'09"W, 13.16'
- RPF-NE bolt 4th vertical rail post S37°05'21"W, 16.05'
- RPF-PK w/PLS 35994 on tag on top of curb NE corner of Monroe and California. S33°55'38"E, 48.12'

F4 Found 1" Rebar, no cap, bent with flagging, 1.0'± above surface, 10.0'± east of the edge of road.
F5 Found 1/4" Steel Bar, no markings, 0.2'± below surface.
F6 Found 5/8" Rebar with YPC, no markings, 0.2'± above surface.
F7 Found 5/8" Rebar with YPC marked "MD&A, LS 14827", 0.6' above surface, in slope at an angle, we tied the point of entrance.
F8 Found Railroad Spike marked with an "X" at the intersection of Grand Avenue and Stadium Way.
F9 Found 5/8" Rebar with YPC marked "Carsten, PLS 45152", in a monument case on the centerline of Stadium Way.
F10 Found 5/8" Rebar with YPC marked "Carsten, PLS 45152", in a monument case on the centerline of Stadium Way.

OFFICIAL DOCUMENTS:

R1 Warranty Deed, AFN 389871 October 13, 1965, Maybelle H. Keiser, formerly Maybelle H. King to Robert Whitmore and Maida Mae Whitmore, husband and wife.
R2 Warranty Deed, AFN 217707, August 26, 1947, Maybelle King, now Maybelle King Keiser to Myron King, whose wife's name is Blanche King.
R3 Land Lease, AFN none, 06/08/12, Mark Whitmore to Charles L. Chamber and Terry J. Chambers, husband and wife.
R4 Railroad Lease Report, Lease No. 249796, 06/01/86, Burlington Northern RR to Mrs. Dorothy A. Martin, Executrix of W.R. Martin estate.
R5 Railroad Lease Report, Lease No. 219909, 11/16/75, Burlington Northern RR to Robert D. Whitmore.
R6 State of Washington Department of Highways, State Route 27, Whitman Street To North City Limits of Pullman, Sheet 3 of 3, 1954.
R7 State of Washington Department of Highways, State Route 27, Pullman To Felion, Sheets 1 and 2 of 14, 1956.
R8 Northern Pacific Railway, Right of Way And Track Map, Idaho Division Palouse and Lewiston Br., Page VII/19, Doc ID 263743, Created In DNR 2001.
R9 McGee's Subdivision, Book of Plats "E", Page 026-2, 1903, Surveyor: Roberts
R10 SP, Stadium Way Retail Center Short Plat, AFN 622980, 2000, Surveyor: Tomkins
R11 Survey For; Jack in the Box Restaurants, AFN 650603, 2003, Surveyor: Murtha
R12 Survey For; Maybelle Kaiser, b-14-3-12, 1961, Surveyor: Fairbanks
R13 Application for permit to remove or destroy a Survey Monument, Permit No. 4976, October 22, 2014, Surveyor: Carsten

SURVEYORS NOTES:

1. We accepted the monuments F1 and F2 as the easterly line of the Southwest Quarter of Section 32. The existing leases and deeds were referenced from this line.
2. We accepted the monuments F8, F9 and F10 as the centerline of Stadium Way and used a best fit line between all three monuments for said centerline. We then offset said centerline 50 feet northerly and 40 foot easterly for the right of way line of Stadium Way.
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LAND DESCRIPTION

DESCRIPTION of a parcel of land located in the Southwest Quarter of Section 32, Township 15 North, Range 45 East, Willamette Meridian, City of Pullman, County of Whitman, State of Washington, more particularly described as follows:

COMMENCING AT the Center Corner of said Section 32,
Thence South 02°28'16" East, 1253.21 feet along the east line of said Southwest Quarter to the Northerly right of way line of Stadium Way;
Thence North 65°37'06" West, 516.86 feet along said northerly right of way line to the **POINT OF BEGINNING** said point also being on the easterly right of way line of Burlington Northern Railroad;

Thence continuing along said northerly right of way line
North 65°37'06" West, 40.63 feet to a point 10 feet easterly of the centerline of the Burlington Northern Railroad tracks as located the date of this survey;
Thence the following 3 courses parallel with said centerline of railroad tracks;
1) North 34°28'16" East, 226.41 feet;
2) Along a tangent curve to the left, the radius of which bears North 55°31'44" West 1442.39 feet, a central angle of 08°00'00", (the chord of which bears North 30°28'16" East, 201.23 feet), for an arc length of 201.40 feet;
3) North 26°28'16" East, 42.64 feet;

Thence South 63°31'44" East, 40.00 feet to said easterly right of way line of Burlington Northern Railroad;
Thence along said easterly right of way line the following 3 courses;
1) South 26°28'16" West, 42.64 feet to the beginning of a curve to the right;
2) Along a tangent curve to the right, the radius of which bears North 63°31'44" West 1482.39 feet, a central angle of 08°00'00", (the chord of which bears South 30°28'16" West, 206.81 feet), for an arc length of 206.98 feet;
3) South 34°28'16" West, 219.29 feet to the **POINT OF BEGINNING.**

CONTAINING: 18787 square feet or 0.43 acres of land, more or less.

AMENDMENT NOTE:

This survey is to amend a previously recorded Survey under Auditor's file number 727959.The purpose of this re-record is to correct building dimensions to property lines. Lease areas that were previously shown are not shown for clarity purposes.

LEGEND:

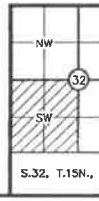
✚	SECTION CORNER AS NOTED	(R1)	RECORD INFORMATION SEE OFFICIAL DOCUMENTS
⊷	1/4 SECTION CORNER AS NOTED	YPC	YELLOW PLASTIC CAP
(32)	CENTER OF SECTION	AFN	AUDITOR'S FILE NUMBER
F1	FOUND MONUMENT SEE CORNER NOTES	POB	POINT OF BEGINNING
o	SET 5/8" REBAR WITH YPC MARKED "CARSTEN, PLS 45152"		PROPERTY LINE
+	CALCULATED ANGLE POINT, NOTHING SET		SECTION LINE
			1/4 SECTION LINE
			EXISTING CENTERLINE
			EXISTING RIGHT OF WAY LINE
			EXISTING LOT LINE
			EXISTING BUILDING

SURVEYOR'S CERTIFICATE:

This map correctly represents a survey made by me or under my direction in conformance with the requirements of the Survey Recording Act at the request of Zane Larson in December of 2014

Darrel Wayne Carsten, PLS 45152 DATE

DARREL WAYNE CARSTEN — STATE OF WASHINGTON — 45152 — REGISTERED PROFESSIONAL LAND SURVEYOR



S.32, T.15N., R.45E.

Taylor Engineering, Inc.
Civil Design and Land Planning
245 E. Main St.
Pullman, Washington 99163
(509) 334-5115 FAX (509) 334-5958

DATE: 01-08-15
FIELD CREW: JMV
DWN: DWC CK'D: ERC
PROJ.#: 14-P064
DWG: Evergreen Tire-ROS

SURVEY FOR
EVERGREEN TIRES

SHEET 1 OF 2

SUPPL. APPENDIX 3

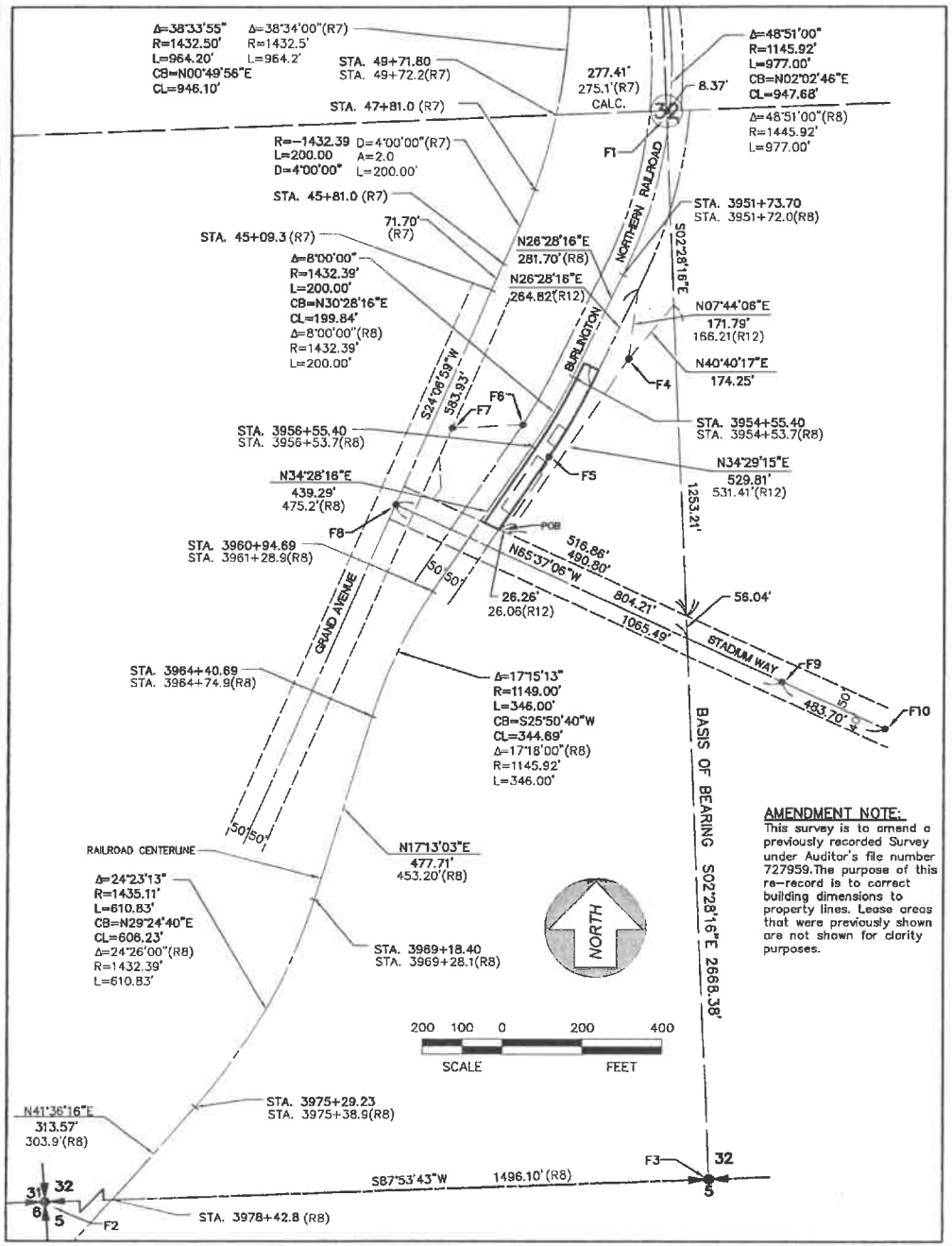
ALL-STATE LEGAL® EXHIBIT 121

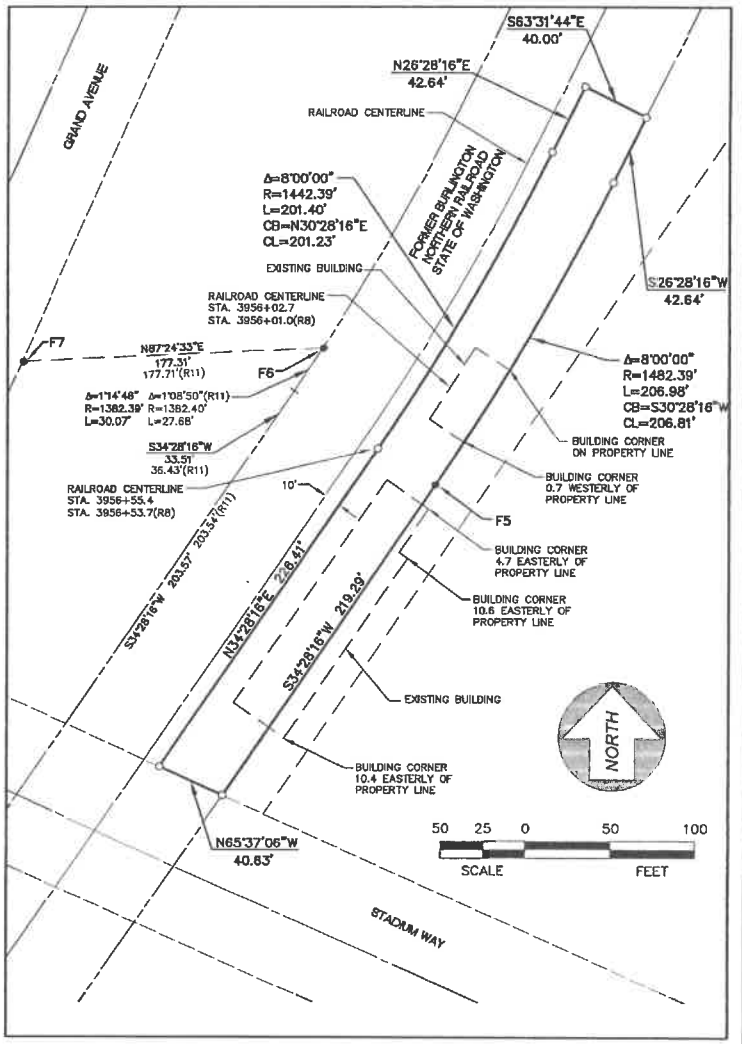
AMENDED RECORD OF SURVEY

A PORTION OF THE SOUTHWEST QUARTER OF SECTION 32, TOWNSHIP 15 NORTH, RANGE 45 EAST, WILLAMETTE MERIDIAN, CITY OF PULLMAN, WHITMAN COUNTY, WASHINGTON

AUDITOR'S CERTIFICATE:

Filed for record this _____ Day of _____ 2015, at _____M. in Book _____ of _____ at Page _____, Auditor's File Number _____at the request of _____
Whitman County Auditor





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DARREL WAYNE CARSTEN — STATE OF WASHINGTON — 22134 — REGISTERED PROFESSIONAL LAND SURVEYOR

NW NE SW SE — S.32, T.15N., R.45E.

Taylor Engineering, Inc.
Civil Design and Land Planning
245 E. Main St.
Pullman, Washington 99163
(509) 334-5115 FAX (509) 334-5956

DATE: 01-08-15
FIELD CREW: JMV
DWN: DWC CK'D: ERC
PROJ.#: 14-P064
DWG: Evergreen Tire-ROS

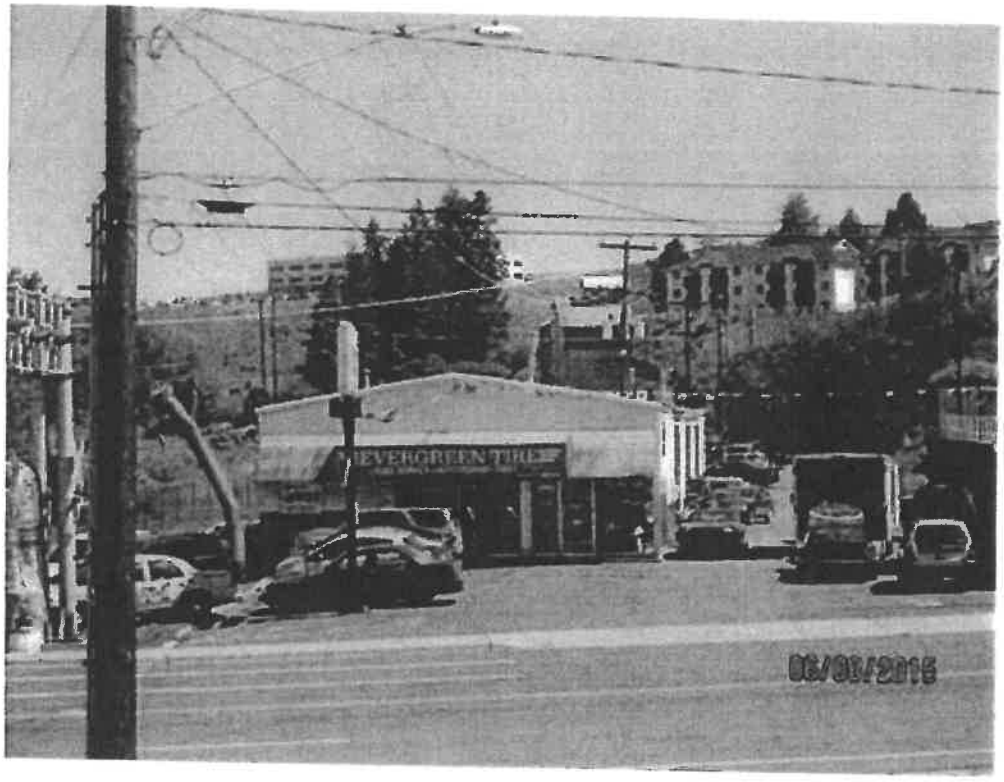
SURVEY FOR
EVERGREEN TIRES

SHEET 2 OF 2

SUPPL. APPENDIX 4

Whitman County Washington

Parcel: 515300000000003 Situs: 300 NE STADIUM WAY, Pullman 99163



PLAINTIFF
EXHIBIT NO. 21
For Identification
No. 15-2-140-8
Date
Admitted

Whitman County Washington

Parcel: 515300000000003 Situs: 300 NE STADIUM WAY, Pullman 99163

PLAINTIFF
EXHIBIT NO. 22
For Identification
No. 15-2-140-8
Date
Admitted

AITKEN SCHAUBLE PATRICK NEILL & SCHAUBLE

April 19, 2021 - 10:30 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99523-1
Appellate Court Case Title:	Mark Whitmore v. Zane Larsen, et al
Superior Court Case Number:	15-2-00140-8

The following documents have been uploaded:

- 995231_Other_20210419102704SC592211_1591.pdf
  This File Contains:
  Other - SUPPL. APPEND. TO PETITION FOR DISCRETIONARY REVIE
  The Original File Name was SUPPLEMENTAL APPENDIX.pdf

A copy of the uploaded files will be sent to:

- Aaron@tal-fitzlaw.com
- matt@tal-fitzlaw.com

Comments:

Sender Name: Howard Neill - Email: aspnr@pullman.com
Address:
PO BOX 307
PULLMAN, WA, 99163-0307
Phone: 509-334-3505

Note: The Filing Id is 20210419102704SC592211

AITKEN SCHAUBLE PATRICK NEILL & SCHAUBLE

February 22, 2021 - 10:54 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36863-7
Appellate Court Case Title:	Mark Whitmore v. Zane Larsen, et al
Superior Court Case Number:	15-2-00140-8

The following documents have been uploaded:

- 368637_Other_20210222104811D3954160_1303.pdf
  This File Contains:
  Other - Petition For Discretionary Review by Supreme Court
  The Original File Name was FINAL PETITION FOR DISCR REVIEW S C-signed.pdf

A copy of the uploaded files will be sent to:

- Aaron@tal-fitzlaw.com
- matt@tal-fitzlaw.com

Comments:

Sender Name: Howard Neill - Email: aspnr@pullman.com
Address:
PO BOX 307
PULLMAN, WA, 99163-0307
Phone: 509-334-3505

Note: The Filing Id is 20210222104811D3954160