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APPEAL NO. 69274-7-I

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

(Whatcom County Court Case No. 05-2-02841-2)

YOUNG S. & YONG S. KIM,

Appellants,

vs.

KYUNG-RAK & JAE SOOK KIM, ET AL,

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Young S. Kim and Yong S. Kim (Restaurant Kim)[1] are the Petitioners in this Court and were the Appellants in the Court of Appeals.

B. COURT OF APPEALS DECISION

The Court of Appeals in *Kim v. Kyung-Rak Kim*, Washington State Court of Appeals No. 69274-7-I, affirmed the trial court's findings of fact and conclusions of law in an unpublished opinion on October 28, 2013. A copy of the Court of Appeal' opinion is attached hereto as Appendix A. A copy of the Restaurant Kim's trial court Motion for Reconsideration is attached hereto as Appendix B. Restaurant Kim moved to publish the opinion on November 15, 2013. This motion was denied.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court's findings of fact and conclusions of law and the Court of Appeals' decision granting an implied

[1] To avoid confusion throughout trial and this appeal, plaintiffs/appellants have been and will be referred to as "Restaurant Kim" and defendants/respondents as "Market Kim." Counsel for the parties do not mean any disrespect by referencing the parties in this manner, but do so for clarity.

easement in favor of the grantor are inconsistent with *Adams v. Cullen*[2] and *Veach v. Culp.*[3]

2. Whether a trial court's findings of fact and conclusions of law granting a prescriptive easement over a substantial portion of Restaurant Kim's property are inconsistent with *Lee v. Lozier.*[4]

3. Whether the delay of 27 months between the trial and entry of findings of fact and conclusions of law renders the findings and conclusions unreliable as a matter of law or at a minimum requires a de novo review.

D. STATEMENT OF THE CASE

Restaurant Kim, and Respondents Kyung-Rak Kim and Jae Sook Kim (Market Kim) own adjoining parcels of real property located in Birch Bay, Whatcom County, Washington. The parcels are situated directly adjacent to one another, with the Market Parcel located north of the Restaurant Parcel. Trial Exhibit P21. Both parcels were originally owned by William O. Vogt (Vogt). In 1978, Vogt quit claimed the Restaurant Parcel to his daughter,

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[2] 44 Wn.2d 502, 268 P.2d 451 (1954).
[3] 21 Wn.App. 454, 585 P.2d 818 (Div. 1, 1978), *rev'd on other grounds, Veach v. Culp*, 92 Wn.2d 570, 599 P.2d 526 (1979).
[4] 88 Wn.App. 176, 945 P.2d 214 (Div. I, 1997).

Penny Beebe (Beebe). No easement was ever executed or recorded between Vogt and Beebe for the use of the Restaurant Parcel for any purpose. From the time of the 1978 Deed to the time of trial, the west side of the Market Kim's property abutted 190 feet of public roadway. Trial Exhibits P5, P9, and D34. See Appendix C. The Market parcel has always had a large parking lot to the north of the market. *Id.*; Trial Exhibit P31n and P31m; see Appendix C.

Restaurant Kim sued his neighbor, Market Kim, in Whatcom County Superior Court, seeking to quiet title to a portion of Restaurant Kim's parking lot which was being used by Market Kim. Market Kim, in the trial court, claimed both an implied easement and a prescriptive easement over a large portion of Restaurant Kim's paved parking lot.

A bench trial occurred in December of 2009. CP 269. At the end of the trial, the court advised the parties as follows:

> The only problem now is I have got to . . . I need to digest this and come forth with a decision. I want to do so as quickly as I possibly can. Because I will never understand or recall the facts of this case well as I do right now.

RP 584. On December 15, 2009, the trial court wrote to counsel and advised them that Market Kim had established both an implied easement and a prescriptive easement.

> In my opinion, Mr. Dworkin's clients have carried their burden of proof and have established all elements necessary to prove an implied easement by reservation. I believe that Adams v. Cullen is the case most directly on point. . . . Finally, the issue of a prescriptive easement must be addressed.? Simply put, I am in agreement with Mr. Dworkin's position in this regard, and that the requisite period of two full lustrums has passed, allowing his client to prevail on this theory as well.

CP 217. This letter to counsel was not filed by the trial court.

In March of 2012, 27 months after the trial, Market Kim presented findings of fact and conclusions of law to the trial court. CP 214. On April 3, 2012, the trial court entered Market Kim's proposed findings of fact and conclusions of law, without making one addition, correction, deletion or alteration. CP 269.

The Deed relied upon by Market Kim to establish a reserved implied easement was an October 1978 Quit Claim Deed, Vogt to Beebe, prepared by the law firm of LeCocq, Simonarson, Visser & Johnson. Exhibit P13. The Deed relied upon by Restaurant Kim was a Statutory Warranty Deed, Beebe to Restaurant Kim, filed of

record on October 8, 1996, prepared and filed by Chicago Title Insurance Company. Exhibit P26.

The trial court's findings related to the implied easement made no reference to any necessity that might have existed in 1978. Instead the trial court's findings focused on the alleged necessity for the implied easement which existed at the time of trial. CP 269-284. In its conclusions of law, the trial court concluded that in 2009 the implied easement was "reasonably necessary" in 2009. CP 279. More importantly the trial court incorrectly used the standard of preponderance of the evidence to establish the prescriptive easement.

The trial court's findings and conclusions regarding the prescriptive easement completely ignored the issue repeatedly raised by Restaurant Kim: How can one seek both an implied easement, arguing that it was a property right intended by the parties, and also argue they had a prescriptive easement, one taken by legal force and not intended?

Following the 1978 Quit Claim Deed to Beebe, and over the next twenty years, there are a series of nine (9) additional recorded documents, filed with the Whatcom County Auditor, related to title

and/or easements affecting title to the Market Parcel and the Restaurant Parcel. Trial Exhibits P16, P17, P18, P20, P22, P23, P26, P27, and P28. None of the following recorded documents disclose an easement between Vogt and Beebe in favor of Vogt.

In 1984, a 17 year lease was signed by the previous owners of the Market Parcel, stating that the north side of the parcel (the non-adjoining side of the Market Parcel) shall be used by the tenant of the Market for parking and shipments. Trial Exhibit P20.

Restaurant Kim respectfully requests that this Court accept review of this matter and (1) the excessive delay of the trial court in its entry of its findings of fact and conclusions of law, and (2) the timing of the necessity element.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Review should be accepted because:

1. The decision of the Court of Appeals is in conflict with a decision of the Supreme Court;

2. The decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; and

3. The petition involves an issue of substantial public interest that should be determined by the Supreme Court.[5]

Under *Adams*, 44 Wn.2d 502, and *Veach*, 21 Wn.App. 454, necessity is determined at the time of severance, not at the time of trial. Under *Lee*, 88 Wn.App 176, Market Kim was required to provide clear proof of its claimed prescriptive easement. Not surprisingly, no Washington case has addressed the fundamental fairness issues related to a 27 month delay in entry of findings and conclusions. Likely because it has never before happened. Review should be taken to establish that Washington follow the rule adopted by the First Circuit, United States Court of Appeals in *Keller v. U.S.*, 38 F.3d 16 (N.H. 1994). The *Keller* court appropriately concluded that an unreasonable delay in entry of findings and conclusions required *de novo* review and "*de novo* scrutiny of the entire record with a view to whether the prolonged delay in reaching a decision rendered the trial court's findings of fact unreliable . . ." *Id.* at 21.

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[5] RAP 13.4(b).

1. Necessity is to be determined at the time of the conveyance.

The Court of Appeals incorrectly and inappropriately examined the necessity at the time of trial, and not the time of severance.

"For an easement by implied reservation, the weight of authority requires a higher degree of necessity than for an implied grant. The usual term is 'strict' necessity." *Adams*, 44 Wn.2d at 508. The necessity must exist when the estate is severed. *Id.* at 507. "The necessity is to be determined from the conditions existing at the time of the conveyance." *Veach*, 21 Wn.App. at 458-59.

An implied easement cannot be created unless the facts and circumstances surrounding the 1978 Deed demonstrate intent by the parties to create an easement in favor of the grantor. *Roberts v. Smith*, 41 Wn.App. 861, 864, 707 P.2d 143 (Div. 2, 1985).

Implied easements by reservation are not favored:

> There is a well-recognized distinction between an implied grant and an implied reservation and it has been recognized in Washington. . . . In the case of severance of the servient estate, an easement will, ordinarily, not

be reserved since the grantor cannot derogate from his own grant.

Wreggitt v. Porterfield, 36 Wn.2d 638, 640, 219 P.2d 589 (1950). (Citations omitted.)

2. A trial court's entry of its findings of fact and conclusions of law 27 months after trial is an excessive delay, making its findings unreliable.

CR 59(a)(1) requires a new trial when any party was prevented from having a fair trial. Division I erroneously deferred to the trial court's assessment of the evidence and was unwilling to review the facts de novo. This Court should accept review of this appeal to establish that Washington provides de novo review of unreasonably and unfairly delayed findings and conclusions. Admittedly, one would hope that no other court would delay entry of its decision for more than two years, but all litigants in Washington should not believe that such a delay has no consequences.

Excessive delay by a trial court in its entry of judgment and/or findings is not accepted, and has warranted reversal in many jurisdictions. *Schang v. Schang*, 53 So.3d 1168 (2011)

(judgment on alimony entered more than one year after evidentiary hearing merited reversal because findings were inconsistent with trial evidence); *Baker v. Vidoli*, 751 So.2d 608 (1999) (twenty-two month delay determined to be excessive delay warranting reversal); *Keller v. U.S.*, 38 F.3d 16 (1994) (delay required de novo review).

3. The failure of the trial court to independently understand the facts is demonstrated by its inconsistent findings, conclusions and application of the law as it relates to the prescriptive easement.

In an auto accident the fact finder could not find that a stop light was both red and green at the same time in the same direction of travel. In a quiet title action, title to an easement cannot be both unstated and intended, at the same time acquired adversely. A consensual use or permitted use of property is presumed to remain permissive.

> Use that is permissive at its inception is presumed to remain permissive unless proof exists of (1) a change in use beyond that permitted, providing notice of hostility to the true owner, or (2) the sale of the servient estate. (Emphasis added.)

Miller v. Anderson, 91 Wn.App 822, 825, 964 P.2d 365 (Div. 1, 1998).

The trial court accepted Market Kim's findings and conclusions regarding its burden on the prescriptive easement claim. However, at trial and on appeal no Washington authority was cited for the proposition that "preponderance" is the burden of proof for prescriptive easement claims. In *Lee v. Lozier*, 88 Wn.App. 176, the court stated, that the party claiming a prescriptive easement needed to establish each element by "**clear proof.**" *Id.* at 185. This Court should accept review to establish that in Washington clear and convincing evidence of a prescriptive easement is required.

Utah requires "clear and convincing" evidence to establish a prescriptive easement. *Essential Botanical Farms, LC v. Kay,* 270 P.3d 430, 437 (2011). Oregon requires clear and convincing evidence to support the establishment of a prescriptive easement. *Drayton v. City of Lincoln City,* 244 Or.App. 144, 150, 260 P.3d 642 (2011). Idaho requires 'clear and convincing proof' to establish a prescriptive easement. *Weitz v. Green,* 148 Idaho 851, 230 P.3d 743 (2010). In California "[a] party seeking to establish a

prescriptive easement has the burden of proof by clear and convincing evidence." *Grant v. Ratliff*, 164 Cal.App.4th 1304, 1310, 79 Cal.Rptr.3d 902 (Dist. 2, 2008).

F. CONCLUSION

It is judicial fiction to conclude the trial court remembered all the facts of this trial well enough to enter independent and appropriate findings and conclusions twenty-seven (27) months after hearing the parties' evidence and arguments particularly when, at the end of trial, the court admitted the need for expeditious entry of its findings.

This Court should accept review, reverse the Court of Appeals and remand this matter to the trial court for a new trial consistent with this Court's opinion, as well as *Adams* and *Veach*. Costs on this appeal should be awarded to Restaurant Kim.

RESPECTFULLY SUBMITTED this 9th day of January, 2014.

SHEPHERD AND ABBOTT

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

YOUNG S. KIM and YONG S. KIM, a marital community, Appellants, v. KYUNG-RAK and JAE SOOK KIM, a marital community, Respondents.	NO. 69274-7-I DIVISION ONE UNPUBLISHED OPINION FILED: October 28, 2013

LAU, J. — This case involves an implied easement dispute between two businesses over use of a shared parking lot. After a three-day bench trial, the trial court determined that Kyung-Rak and Jae Sook Kim (Market Kims) established an implied and/or prescriptive easement over Young and Yong Kim's (Restaurant Kims) property to allow for patron parking and movement of delivery and service trucks. [1]

[1] The parties are not related despite having the same surname. To avoid confusion at trial and on the record, both parties' counsel and the trial court referred to plaintiffs/appellants as "Restaurant Kims" and defendants/respondents as "Market Kims." For clarity, we use those same references here.

The court also awarded injunctive relief requiring Restaurant Kims to remove a "privacy fence" that blocked the easement. Restaurant Kims challenge numerous trial court findings of fact and conclusions of law. Because (1) the trial court demonstrated it had ample memory of the trial evidence justifying its findings and conclusions and (2) substantial evidence supports the findings of fact and the findings support the conclusions of law regarding implied easement, we affirm.

FACTS[2]

Market Kims own and operate a small market on a parcel of land (the market parcel) in Birch Bay, Whatcom County. The market has operated on the market parcel in one form or another for over 50 years. Restaurant Kims own the adjacent property (the restaurant parcel), which contains several buildings. The primary structure is used for a teriyaki restaurant business. The two parcels share a parking lot. The parking lot has a single access route over the market parcel.

Both parcels were originally owned by the Vogt family. In the 1920s, the market parcel was known as the "Bay Center Resort" and had a gas station pump, a small market, and vacation rental cottages that were located on what is now the restaurant parcel. In approximately 1961, the old Bay Center Resort structure was torn down and the current market structure was built. At that time, the structure that now houses the teriyaki restaurant on the restaurant parcel did not yet exist.

In 1965 and 1966, William Vogt acquired common ownership of both parcels. In approximately 1972, he added a rear loading dock and annexes used for garages or

[2] Restaurant Kims raise 37 assignments of error, 14 of which relate to specific findings of fact. See Appellant's Br. at 4–8. The findings of fact cited in this section were neither assigned as error nor argued in the briefing.

storage bays to the market. Market vendors routinely used the loading dock and storage bays to deliver goods and services to the market. This required delivery trucks to cross over what is now the property line into what is now a portion of the restaurant parcel's parking lot. Numerous trial witnesses testified that vehicles accessing the market parcel "use, and have for decades used, that portion of the parking lot located on the Restaurant Parcel to maneuver and park."

Common ownership of the market parcel and restaurant parcel ended in 1978 when the Vogts quitclaimed the restaurant parcel to their daughter, Penny Beebe. No formal easement was executed and the same pattern of restaurant parcel parking lot use described above continued during Beebe's ownership. Beebe and her husband built the structure later operated by Restaurant Kims as a teriyaki restaurant. The Beebes lived in the building and operated a gift shop and managed nearby rental cottages that they later sold.

In 1996, the Beebes sold the restaurant parcel to Restaurant Kims.[3] No formal easement was signed. In conjunction with the sale, the Vogts, then owners of the market parcel, granted Restaurant Kims an express easement allowing access over the market parcel. Even after the Beebes' sale and Market Kims' purchase of the market parcel from the Vogts in 1997, market patrons, vendors, and service providers continued to use the Restaurant Parcel's parking lot for ingress, egress, access, parking, and delivery of services and goods.

[3] Restaurant Kims assign partial error to this finding, but the only error assigned relates to the sale date. Because we need not address the prescriptive easement issue for reasons noted below, any error is immaterial.

Restaurant Kims filed a lawsuit in 2005 against several entities over recorded easements.[4] Those entities joined Market Kims as named defendants. Market Kims asserted implied and prescriptive easements over the disputed parking areas. After a three-day bench trial, the trial court issued a letter ruling concluding Market Kims established implied and prescriptive easements over the disputed parking areas. The court also ordered Restaurant Kims to remove the privacy fence and bollards Restaurant Kims installed in the easement area. Over two years later, the trial court entered its findings of fact and conclusions of law. The court denied Restaurant Kims' motions for new trial and reconsideration.

ANALYSIS

Standard of Review

We review the trial court's decision following a bench trial to determine whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); Morgan v. Prudential Ins. Co. of Am., 86 Wn.2d 432, 437, 545 P.2d 1193 (1976). The label applied to a finding or conclusion is not determinative; we "will treat it for what it really is." Para-Medical Leasing, Inc. v. Hangen, 48 Wn. App. 389, 397, 739 P.2d 717 (1987). Substantial evidence is a quantum of evidence sufficient to persuade a rational and fair minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). In determining the sufficiency of evidence, we need only consider evidence favorable to the prevailing party. Bland v. Mentor, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). We

[4] Those entities are not involved in this appeal.

defer to the trial court's assessment of witness credibility and evidence weight. In re Welfare of Sego, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). We will not substitute our judgment for that of the trial court, even if we might have resolved the factual dispute differently. Dickie, 149 Wn.2d at 879-80. Unchallenged findings of fact are verities on appeal. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); RAP 10.3(g).

An unchallenged conclusion of law becomes the law of the case. King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 716, 846 P.2d 550 (1993). We review conclusions of law de novo. Dickie, 149 Wn.2d at 879-80. But when an appellant challenges conclusions of law not based on the law itself, but rather claiming that the findings do not support the court's conclusions, appellate review is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether those findings support the conclusions of law. Am. Nursery Prods, Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 222, 797 P.2d 477 (1990); Willener v. Sweeting, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).

Findings and Conclusions

Delay

Restaurant Kims claim the trial court's delayed entry of findings and conclusions warrants de novo review.[5] Market Kims respond that the trial court's accurate memory of the trial facts renders its findings and conclusions valid.

[5] The court's ruling found in favor of Market Kims on their implied and prescriptive easement claims.

CR 54(e) provides that the prevailing party shall prepare and present a proposed form of order or judgment no later than 15 days after the court's decision, unless otherwise directed by the court. Restaurant Kims cite no Washington authority holding that, as a matter of law, substantial delay in entering findings and conclusions requires de novo review of the entire record.[6] Similar rules in the criminal context require a showing of prejudice before delayed findings warrant a remedy, including dismissal. Cf. State v. Royal, 122 Wn.2d 413, 423, 858 P.2d 259 (1993) (juveniles); State v. Cannon, 130 Wn.2d 313, 330, 922 P.2d 1293 (1996) (trial court's failure to file). Restaurant Kims establish no prejudice based on the court's tardy entry of the findings and conclusions. Nor is there any indication that the findings and conclusions are unreliable. The record here shows the trial court's vivid memory of the trial and the testimony. The trial judge

[6] Restaurant Kims quote Keller v. U.S., 38 F.3d 16, 21 (1st Cir. 1994), to argue that "Excessive delay in the entry of findings of fact and conclusions of law require, on appeal, 'de novo scrutiny of the entire record with a view to whether the prolonged delay in reaching a decision rendered the trial court's findings of fact unreliable . . . .'" Appellant's Br. at 18. But Keller involved "an unprecedented eight-year delay between trial and the entry of judgment, coupled with the trial judge's failure to refresh his recollection through recourse to a complete trial transcript prior to making findings of fact . . . ." Keller, 38 F.3d at 20. Here, the delay was two years, not eight. And the trial court described its review of the record and testimony and stated it had a vivid memory of the trial.

Restaurant Kims also cite State v. Portomene, 79 Wn. App. 863, 864-65, 905 P.2d 1234 (1995) to argue that Market Kims "simply tailored the findings to meet their burden on appeal." Appellant's Br. at 18. Restaurant Kims refer to the general rule in criminal cases that where the State fails to prepare written findings and conclusions until after the defendant files an opening brief on appeal, we must carefully consider whether the proposed findings were tailored to meet issues raised in the defendant's appellate brief. Portomene, 79 Wn. App. at 864-65. The true problem arises when findings are entered after an appeal has been filed and it is clear that the prevailing party tailored or altered the proposed findings and conclusions "to meet issues and arguments raised by [the losing party] in his brief to the Court of Appeals." Cannon, 130 Wn.2d at 330. This rule is inapplicable. Market Kims proposed findings and conclusions before any appeal was filed.

refreshed his memory by reviewing the trial transcripts, his trial notes, admitted exhibits, the parties' trial notebooks, and court files. The claim fails.

Challenged Findings of Fact 5, 7, 8, 10, 18, 23, 25, 30, 31, 34, 36, 38, 39, 40

Market Kims contend that most of the challenged findings are inadequately briefed and argued. We agree.

"RAP 10.3 requires appellant to present argument to the reviewing court as to why specific findings of fact are in error and to support those arguments with citation to relevant portions of the record." In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 466, 120 P.3d 550 (2005); see also RAP 10.3(g) ("A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number."). When challenges to findings of fact are insufficiently briefed, we decline to address those challenges and consider the findings verities on appeal. Whitney, 155 Wn.2d at 467; United Dev. Corp. v. City of Mill Creek, 106 Wn. App. at 688. See also Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 630, 733 P.2d 182 (1987) (city assigned error to 21 of the trial court's findings of fact, but its opening brief mentioned only two of the findings to which it assigned error; court held, "Such discussion is inadequate for all except the two mentioned findings. A party abandons assignments of error to findings of fact if it fails to argue them in its brief.") (emphasis added); Seattle Sch. Dist. No. 1 v. State, 90 Wn.2d 476, 488, 585 P.2d 71 (1978) ("Appellants have assigned error to 9 of 698 findings of fact. Except for number 172 and 446 no other finding is again referred to in appellants' brief by identifiable number or otherwise. Three other findings are mentioned without actual

argument in the reply brief. Since there is no further argument, discussion or reference to these findings, we deem them abandoned."). (Emphasis added.)

Here, findings 5, 7, 10, 18, 25, 30, 36, 39, and 40 are inadequately briefed and argued. Thus, these claimed factual errors are abandoned and constitute verities on appeal.[7] Whitney, 155 Wn.2d at 467. We address Restaurant Kims' remaining fact challenges (findings 8, 23, 31, 34, and 38) below for substantial evidence.

Findings 8 and 34 address use of the shared parking lot and feasibility of access to the parking spots and loading dock on the market's south side. Substantial evidence supports these findings. See Report of Proceedings (RP) (Dec. 1, 2009) at 101-03 (testimony regarding patron use of shared parking lot); RP (Dec. 1, 2009) at 140-48, 151-72 (James Perry and Gill Brackinreed testimony); RP (Dec. 2, 2009) at 199-263 (Jeff Vanderyacht testimony); RP (Dec. 2, 2009) at 267-72 (Sung-Soo Kim testimony); Ex. 8A, Ex. 32 Tabs 23 and 24.

Finding 38 states that "granting an easement as depicted and legally described in Exhibits 'A' and 'B' to these findings is commensurate with the evidence presented at trial . . . [and] represents nothing more than what was well-established at trial as the

[7] Nonetheless, we note that the record here overwhelmingly supports the findings relevant to the court's determination regarding implied easement. In addition to the unchallenged findings and witness testimony described above and below, see exhibit 32, tabs 23 and 24; exhibits 7, 8, 8A, 26C, 26K, 26O, 26P, 26DD, 26EE, 31A, 31C; RP (Dec. 1, 2009) at 94-100, 101-04, 106-10, 118-19, 131, 140-48, 151-72, 178-87; RP (Dec. 2, 2009) at 270-72; RP (Dec. 7, 2009) at 378-79, 381, 422-23, 426-27, 455, 501-02.

long-term use of the Market and Restaurant Parcels." Overwhelming evidence supports this finding.[8]

Finding 23 states:

> In 1984, a lease was recorded (Exhibits 32-18) wherein William and Blanche Vogt leased the market business to Wolten & Montfort, Inc. This lease demonstrates that the use of the Restaurant Parcel parking lot to access parking, the loading dock, and storage bays, was essential to the operations of the market on the Market Parcel.

Restaurant Kims challenge this finding related to specific provisions in the 1984 lease agreement between lessors Vogt and lessee Wolten & Montfort Inc. for use of the market parcel. The lease was executed after common ownership ceased and set a lease term of 20 years. Lease paragraph 25 provides, "All commercial vehicles should be encouraged not to block traffic to the condos, the cabins or gift shop. They are to be parked on leased property." Lease paragraph 30 states that market patrons may park on the "Landlubber Gift Shop property," which trial testimony established is the Restaurant Parcel.

The parties dispute the significance of these quoted provisions. The trial court, acting in its fact finder role, gave proper weight to lease provisions that show the prior continued use of the shared parking lot on the question of intent. The trial court determined that no lease provision prohibits Market Parcel lessees' use of the Restaurant Parcel parking lot or prohibits blocking traffic temporarily while moving

[8] Restaurant Kims also challenge finding 31, which states, "Plaintiff Kim, by his testimony and by description of his actions, demonstrated that he did not give permission for the use as described herein, by the Market Parcel and such use was adverse. This adversity is further established by operation of law, that any permission granted by a predecessor such as Beebe is automatically revoked upon transfer of title." This finding specifically relates to the prescriptive easement issue. Because we do not reach that issue, we need not address finding 31.

delivery trucks in and out. We decline to reweigh the evidence or substitute our judgment for that of the trial court. Dickie, 149 Wn.2d at 879-80. Substantial evidence supports finding 23.

Implied Easement

Restaurant Kims challenge the trial court's determination that an implied easement existed over a portion of the Restaurant Parcel's parking lot. Market Kims respond that substantial evidence supports the trial court's findings and the findings support its conclusion on this issue.

While easements are usually created expressly in a written instrument, the law also recognizes implied easements in some situations. See 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE, REAL ESTATE: PROPERTY LAW § 2.4, at 89 (2d ed. 2004). "Easements by implication arise by intent of the parties, which is shown by facts and circumstances surrounding the conveyance." Roberts v. Smith, 41 Wn. App. 861, 864, 707 P.2d 143 (1985). The factors relevant to establishing an implied easement are (1) former unity of title and subsequent separation, (2) prior apparent and continuous quasi easement[9] for the benefit of one part of the estate to the detriment of another, and (3) a certain degree of necessity for the continuation of the easement. Adams v. Cullen, 44 Wn.2d 502, 505, 268 P.2d 451 (1954); MacMeekin v. Low Income Hous. Inst., Inc., 111 Wn. App. 188, 195, 45 P.3d 570 (2002). Unity of title and subsequent separation is the only absolute requirement. Roberts, 41 Wn. App. at 865. The other two factors are merely "aids to construction in determining the cardinal

[9] A "quasi easement" refers to the situation where one portion of property is burdened for the benefit of another portion, which would be a legal easement if different persons owned the two portions of property. Adams, 44 Wn.2d at 504.

consideration—the presumed intention of the parties as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other." Adams, 44 Wn.2d at 505-06. In Rogers v. Cation, 9 Wn.2d 369, 376, 115 P.2d 702 (1941), our Supreme Court held, "[T]he presumed intention of the parties, is the prime factor in determining whether an easement by implication has been created." "[W]e pointed out that the rule is not a hard and fast one, and that the presence or absence of either or both of these requirements is not necessarily conclusive." Adams, 44 Wn.2d at 505 (citing Rogers, 9 Wn.2d at 376).

Unity of title and subsequent separation is met because Restaurant Kims acknowledge that the two parcels were formerly joined and then separated and fail to challenge the trial court's related conclusions of law 2 and 3. Apparent and continuous quasi easement is also met because Restaurant Kims fail to address this factor in their briefs despite assigning error to related conclusions of law and the judgment.[10] An issue not briefed is waived. RAP 10.3(a)(6); Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992). At oral argument, Restaurant Kims also

[10] As to this factor, Stoebuck and Weaver observed: "[B]efore the conveyance, there was a usage existing between the parcel conveyed and the parcel retained that, had the two parts then been separately owned, could have been an easement appurtenant to one part." 17 STOEBUCK & WEAVER, supra, § 2.4, at 90. This element is also referred to as "prior continuous use." McPhaden v. Scott, 95 Wn. App. 431, 438, 975 P.2d 1033 (1999). The purpose of the "apparent" requirement is to show the easement was within the grantor and grantee's contemplation. 17 STOEBUCK & WEAVER, supra, § 2.4 at 92. The evidence shows that when the Vogts divided the property and quitclaimed the restaurant parcel to Penny Beebe, the Vogts and the Beebes knew that portions of the restaurant parcel were used to facilitate deliveries and customer access to the market parcel.

conceded no genuine challenge to this factor.[11] Indeed, overwhelming record evidence supports the prior continuous use of the shared parking lot as discussed below. The trial court's findings on this point are either unchallenged or insufficiently argued on appeal. Thus, they are verities on appeal.

We next turn to the necessity element. The parties agree that any easement that existed over Restaurant Kims' parking lot was established by reservation, not by grant.[12] They dispute whether the "reasonable necessity" or "strict necessity" standard applies to an easement implied by reservation. Citing Adams, Restaurant Kims contend that Washington courts require claimants to show strict necessity when asserting an implied easement by reservation. Market Kims agree that an implied easement by reservation requires a greater degree of necessity than an implied easement by grant, but they argue Adams establishes no strict necessity requirement.

Adams involved facts similar to those in the present case. In Adams, Cullen asserted an implied easement over Adams's property. Adams, 44 Wn.2d at 503. The Adams and Cullen properties were originally one parcel, with the "Strahorn" residence located on what later became the Adams property and the carriage house to the Strahorn residence located on what later became the Cullen property. Adams, 44 Wn.2d at 503. At the time of trial, the two buildings had become the "Strahorn Apartments" and the "Cullen Apartments," respectively. Adams, 44 Wn.2d at 503.

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[11] The panel asked at oral argument, "It appears that your only true challenge is to the third factor, necessity. Is that right?" Counsel responded, "That's correct."

[12] An implied easement by reservation arises when the servient estate is severed and conveyed first (and, thus, the original common owner retains an easement for the benefit of the dominant estate retained by him). Adams, 44 Wn.2d at 505.

Access to the Cullen Apartments consisted of a driveway located on the Adams property. Adams, 44 Wn.2d at 504. The evidence showed that the driveway over the Adams property had been used for access to the Cullen property since the driveway was built, and no evidence showed that any other driveway had ever existed. Adams, 44 Wn.2d at 504, 510. Although it was possible for the Cullen property to gain its own access by building another driveway, the evidence showed that the cost to do so was significant and it would not be a satisfactory substitute for the existing driveway. Adams, 44 Wn.2d at 510.

Adams specifically addressed, "What degree of necessity must be established by proof?" for an implied easement by reservation. Adams, 44 Wn.2d at 506. The court explained:

> While there is some conflict in the cases as to the degree of necessity required to create an easement by implied grant, the prevailing rule, and the one adopted by this court, is that the creation of such an easement does not require absolute necessity, but only reasonable necessity. Evich v. Kovacevich, 1949, 33 Wash.2d 151, 157, 204 P.2d 839, and cases cited. This court said, in Berlin v. Robbins, [180 Wash. 176, 38 P.2d 1047 (1934)], dealing with an easement by implied grant,
>
> "The test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute." [Berlin,] 180 Wash. at 189].
>
> Since the purpose of the rule is to aid in determining the presumed intention of the parties, it may be argued that the presumption in favor of an implied reservation to the grantor should require no greater degree of necessity than in the case of an implied grant. The authorities, however, are not in accord. . . .
>
> For an easement by implied reservation, the weight of authority requires a higher degree of necessity than for an implied grant. The usual term is "strict" necessity.
>
> In Schumacher v. Brand, 1913, 72 Wash. 543, 547, 130 P. 1145, 1147 (a case involving an easement by implied grant), this court said:
>
> "The courts generally hold that there is a difference between an implied reservation of an easement and the grant of an easement by implication. The distinction is put upon the ground that the former is in derogation of the deed and its covenants, and stands upon narrower ground than a grant."

> It is not difficult to state that there must be "reasonable" necessity for the existence of an easement by implied grant and "strict" necessity for the existence of an easement by implied reservation. The difficulty arises when the trier of the facts must determine whether the facts satisfy the corresponding degree of necessity required by the rule.
>
> The authors of the Restatement have avoided use of the term "strict necessity," but [the Restatement] indicates that, in the absence of other considerations, a higher degree of necessity is needed for an easement by implied reservation than is needed for an easement by implied grant.

Adams, 44 Wn.2d at 507-08 (some citations omitted) (emphasis in original). Adams concluded that in light of the history of use and the cost and inconvenience of the alternative, the claimant established sufficient "necessity" justifying an implied easement by reservation. Adams, 44 Wn.2d at 510.

In their authoritative real property treatise, Professors Stoebuck and Weaver discuss Adams:

> Earlier in this section it was suggested that there is a special problem with easements implied by "reservation," those in which it is claimed the easement exists in favor of the grantor rather than the grantee. Particularly in older American decisions, it was doubted that such implied easements were allowed, or at least they were looked upon less favorably than were easements by implied grant. The underlying problem is that, when the grantor seeks to establish by implication an easement in his favor that was not expressly reserved in his deed, he seeks to derogate from his own grant. Washington's position, based upon the decision in Adams v. Cullen, seems to be that an easement by implied reservation may exist, and did exist in Adams, but a higher degree of necessity for it is required than with an easement by implied grant. The court mused over whether "strict" necessity should be required but ultimately did not appear to adopt that word or any precise definition of the higher degree. An implied reserved easement for a driveway was held to exist, though it appears it was not impossible, but only impractical and expensive, to build a driveway over another route. Probably the best that can be said is that, if a higher degree of necessity is required in Washington for a reserved implied easement than for one by implied grant, the question depends more upon the facts of a particular case than upon some general, abstract test.

17 STOEBUCK & WEAVER, supra, § 2.4, at 92-93 (emphasis added) (footnotes omitted).

Restaurant Kims' reliance on Adams is misplaced. Adams adopted no strict necessity standard. The Adams court noted that necessity and prior use are counterbalancing factors. With implied easements, the stronger the evidence of prior use during common ownership, the less necessity is required, and vice versa. Adams, 44 Wn.2d at 509 (quoting RESTATEMENT OF PROPERTY § 476 cmt. g at 2983). Adams establishes that even assuming a "higher degree of necessity" to prove an implied easement by reservation, the claimant need not show that alternative means of ingress or egress are impossible. Impracticality is enough.[13] Adams, 44 Wn.2d at 510 ("It is apparent from the many photographs in evidence that if [an alternative] driveway could be constructed, it could only be done at great cost and would not be a satisfactory substitute for the present driveway. . . .").

In Fossum Orchards v. Pugsley, 77 Wn. App. 447, 892 P.2d 1095 (1995), Division Three of this court applied a "reasonable necessity" or "certain degree of necessity" standard in addressing an easement implied by reservation. Fossum involved a five-acre parcel of land originally owned by Delva and Ora Mae Harris. The southern end of the property contained a ditch and a weir box for delivering water to the Harris property. Fossum, 77 Wn. App. at 449. In 1978, the Harrises split the land into three lots. Fossum, 77 Wn. App. at 449. In 1983, they installed pipe the entire length of the property to delivery water from the weir. In 1985, they sold the southernmost lot

[13] Restaurant Kims cite Wreggitt v. Porterfield, 36 Wn.2d 638, 640, 219 P.2d 589 (1950) for the proposition that "'necessity must be of such a nature as to leave no room for doubt of the intention of the parties.'" Appellant's Br. at 21. Wreggitt preceded Adams, and Adams distinguished it on the basis that the court there rendered its decision on a theory of easement by implied grant. Adams, 44 Wn.2d at 506-07. Adams specifically noted, "[Wreggitt] is not authority for the rule that an easement cannot be created by implied reservation." Adams, 44 Wn.2d at 507.

(lot 1), which contained the weir, to a new owner. Fossum, 77 Wn. App. at 450. The Harrises sold lot 2 in 1986. The new owner discovered that the water pipe continued north onto lot 3 and disconnected it. Fossum, 77 Wn. App. at 450. The Harrises sold the remaining lot (lot 3) in 1988. Fossum, 77 Wn. App. at 450. Through another transaction, Fossum Orchards obtained title to lot 3. Fossum, 77 Wn. App. at 450. None of the deeds referred to any reserved easement across lots 1 and 2 for the benefit of lot 3. Fossum, 77 Wn. App. at 450-51. Although lot 3 had been used as a cherry orchard in the early 1970s, no evidence showed it had been irrigated since that time. Fossum, 77 Wn. App. at 450. Fossum began planting an orchard on lot 3 and asked the owner of lot 1 for permission to connect to the water system. Fossum, 77 Wn. App. at 451. Lot 1's owner refused, and Fossum sued, claiming an implied easement. Fossum, 77 Wn. App. at 451. The trial court found an implied easement in favor of lot 3 across lots 1 and 2 for access to the irrigation system located on lot 1. Fossum, 77 Wn. App. at 449.

On appeal, Division Three of this court referred to the necessity element as "a certain degree of necessity" and "reasonable necessity." Fossum, 77 Wn. App. at 451. The court affirmed the trial court's determination that the Harrises and their purchasers intended to create an implied easement for the benefit of lot 3, noting that (1) the weir box and pipe for conveying water to the Harris property existed at the time the Harrises severed the property and conveyed lots 1 and 2, (2) no alternative source of water was reasonably available, and (3) the failure to record or reference the easement in subsequent conveyance documents did not extinguish the easement because the

purchasers had sufficient notice to be charged with knowledge of the easement. Fossum, 77 Wn. App. at 452-53.

Even if we assume a more rigorous necessity standard applies, the trial court's findings leave no doubt this standard is met. Restaurant Kims' strict necessity claim to prove an implied easement by reservation is not persuasive.

Restaurant Kims next claim, "The necessity must have existed in 1978. The findings are devoid of any 1978 analysis. The trial court erroneously examined and found necessity in 2009." Appellant's Br. at 23-24. Restaurant Kims cite no authority for this contention in their opening brief.[14] Nonetheless, controlling authority holds to

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[14] In their reply, Restaurant Kims reiterate their argument that "[t]he necessity must have existed in 1978 at the time of the unity of title" and cite without elaboration or analysis Hellberg v. Coffin Sheep Co., 66 Wn.2d 664, 668, 404 P.2d 770 (1965)." Appellant's Reply Br. at 9. Hellberg is inapposite. Like the cases noted above, Hellberg analyzes necessity from the claimant's standpoint at the time he claims the easement. "The evidence fully substantiates the trial court's finding that there is no exit from land held by Hellberg and no road available other than the road in question (the old Coffin road) for convenient service to the areas leased by Coffin to Hellberg." Hellberg, 66 Wn.2d at 669.

In their statement of additional authorities, Restaurant Kims cite our decision in Veach v. Culp, 21 Wn. App. 454, 458-59, 585 P.2d 818 (1978). There, we determined that a deed establishing a railroad right of way across another landowner's property conveyed fee simple title in favor of the railroad. Then we addressed the landowner's alternative argument regarding implied easement:

> In the alternative, the Veaches claim an easement by implied reservation across the right-of-way in order to reach their waterfront property and to enjoy riparian rights expressly reserved in the granting clause of the Zobrist deed. Riparian rights, such as access, swimming, fishing and boating, are conferred upon a property owner by virtue of the contiguity of his property to a body of water. The Veaches are riparian owners of their own waterfront strip of land and that part of the railroad right-of-way which abuts on the lake. That, however, does not give them the right to cross over the railroad's property to gain access to the shore unless they can show that the Zobrist conveyance implied an easement by reservation. Such an easement may arise when the party claiming it shows: (1) unity of title and subsequent separation, (2) an apparent and continuous quasi-easement existing for the benefit of the retained parcel to the detriment of the conveyed parcel during the unity of title, and (3) "strict" necessity

the contrary. "The test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create[s] a substitute." Bays v. Haven, 55 Wn. App. 324, 329, 777 P.2d 562 (1989) (emphasis added); see also Adams, 44 Wn.2d at 507 (same). Cases applying this test evaluate necessity from the standpoint of the party presently claiming the easement, not from the standpoint of the parties that originally created the easement. The higher the degree of necessity at the time the claimant demands the easement, the more likely the easement will be implied. See Adams, 44 Wn.2d at 510 (court evaluated necessity by referring to present-day usage and difficulty of constructing a substitute access route and concluded that constructing a new driveway could only be done at great cost and would not be a satisfactory substitute for claimant's use of the present driveway); Bays, 55 Wn. App. at 329 (affirming trial court's finding that claimant established reasonable

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> that the quasi-easement exist after severance. Adams v. Cullen, 44 Wash.2d 502, 268 P.2d 451 (1954). The necessity is to be determined from the conditions existing at the time of the conveyance. Unity of title and subsequent separation, which are absolute requirements, were satisfactorily proven by the Veaches. They failed in their burden of proof, however, as to the second and third characteristics of an easement by implied reservation. Although the presence or absence of either or both of these characteristics is not necessarily conclusive, their absence supports the trial court's finding that no easement was intended by the original parties to the conveyance.

Veach, 21 Wn. App. at 458-49 (emphasis added) (some citations omitted). Restaurant Kims use the emphasized language above to argue that strict necessity applies and must be determined at the time of conveyance. Our Supreme Court reversed Veach. Veach v. Culp, 92 Wn.2d 570, 599 P.2d 526 (1979). The court concluded the railroad's right-of-way was an easement, not fee simple title, and that the landowners could use the right-of-way in a manner that does not materially interfere with the railroad's use. The court stated, "Having determined that the railroad's right-of-way is one of easement, we need not reach the theory of implied easement advanced by the [landowners]." Veach, 92 Wn.2d at 575. The court concluded, "The decision of the Court of Appeals and the judgment of the trial court are reversed." Veach, 92 Wn.2d at 576.

Given our discussion above and below, Restaurant Kims' reliance on Veach is not persuasive.

necessity because their permit application was denied and direct access was impractical); Fossum, 77 Wn. App. at 452 (no alternative source of water reasonably available to claimant).

As discussed above, the court's findings regarding necessity are either unchallenged or insufficiently argued on appeal and nevertheless supported by substantial evidence (see findings of fact 29, 30, 32, 33, 34, 35, 38). For example, the court found that Market Kims' son, Sung-Soo Kim, credibly testified about the importance of using the Restaurant Parcel's parking lot for delivery of merchandise to the Market Parcel, garbage pickup, and customer parking. He noted it was very inefficient and inconvenient for the market to receive deliveries on the north side, and he stated that using the north side "man door" for market truck deliveries was "like trying to get an elephant through the front door." RP (Dec. 2, 2009) at 300, 312. He also testified that delivery and service truck drivers confirmed to him that using the loading dock is more efficient than the north side man door because inventory can be placed directly in the loading bay rather than hand-trucked through a man door.[15] RP (Dec. 2, 2009) at 275, 287. He estimated that paving and structural remodels to bring a loading dock to the market's north side would cost $300,000 to $350,000, a "significant financial burden" for his parents. RP (Dec. 2, 2009) at 296. Based on this unrebutted testimony, the trial court made the following unchallenged finding:

[15] Garbage truck driver Bruce Koch and Darigold truck driver Gill Brackinreed also testified. Brackinreed testified that while it might be easier to maneuver a truck on the north side, it had no receiving area and he never delivered there. RP (Dec. 1, 2009) at 163-64. Koch testified that it would be easier to maneuver a garbage truck in an open vacant lot as opposed to a busy parking lot. RP (Dec. 1, 2009) at 189. Neither witness testified about the logistics of running the market business or the cost of switching deliveries to the north side.

> [S]witching deliveries of merchandise and services to the other side of the market would be cost prohibitive and an unsatisfactory substitute for the historical use of the loading dock area. It would require a large structural remodel of the building which would be very expensive. It also would require the Market Parcel to change its primary commercial access, which permitting agencies may not allow. Requiring the owners of the Market Parcel to use options other than the historical use would be substantially less convenient, both logistically and financially.[16]

We conclude substantial evidence supports the trial court's necessity findings and the findings support its conclusions of law.

CONCLUSION[17]

Substantial evidence supports the court's findings and the findings support its conclusion that Market Kims established an implied easement by reservation across portions of Restaurant Kims' parking lot. We affirm.

WE CONCUR:

[16] The trial court also made an unchallenged finding that other witnesses corroborated Sung-Soo Kim's testimony "as to the general area of the Restaurant Parcel parking lot they had historically used to gain access to the Market Parcel." Overwhelming evidence in the record supports this finding and the court's other findings regarding historical use and necessity of the shared parking lot. See RP (Dec. 1, 2009) at 85-131 (Blair Beebe testimony); RP (Dec. 1, 2009) at 139-45 (Perry testimony); RP (Dec. 1, 2009) at 149-68 (Brackinreed testimony); RP (Dec. 1, 2009) at 174-92 (Bruce Koch testimony).

[17] Given our disposition, we need not address whether the trial court properly determined Market Kims established a prescriptive easement over the same area. Because the trial court properly determined an implied easement exists over portions of the Restaurant Parcel's parking lot, the court did not abuse its discretion in denying Restaurant Kims' motion to reconsider.

Appendix B

IN THE SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

YOUNG S. KIM & YONG S. KIM, a marital community,
Plaintiffs,
vs.
KAISER INVESTMENT INC., a Nevada Corporation; JOY INVESTMENT, INC., a Nevada Corporation; RAINBOW PROPERTIES LTD., a Nevada Corporation; UNIVERSAL MANAGENT, INC., a Nevada Corporation and SABRINA A. CHAUDHRY, an individual,
Defendants/ Third-Party Plaintiffs,
vs.
KYUNG-RAK and JAE SOOK KIM, a marital community; DAVE and BONNIE VOGT, a marital community; and PETER TORKILD, an individual,
Joined Defendants.

CAUSE NO: 05-2-02841-2

MOTION TO RECONSIDER CR 59

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I – RELIEF REQUESTED

COME NOW plaintiffs (Restaurant) Kim and move this Court to reconsider its Findings of Facts and Conclusions of Law entered in this matter on April 3, 2012. This motion is made pursuant to CR 59, including an irregularity in the proceedings of the court by which plaintiffs Restaurant Kim were prevented from having a fair trial, there is no evidence or reasonable inferences from the evidence to justify the findings and conclusions, and the findings and conclusions are contrary to law.

II – LEGAL ARGUMENT AND AUTHORITY

A. IRREGULARITY IN THE PROCEEDINGS

Trial of this matter occurred in December of 2009. The Court's one page written Decision was entered December 15, 2009. The Findings and Conclusions were entered by this Court in April of 2012, more than twenty seven (27) months after the trial. On December 8, 2009, twenty seven (27) months before the Court entered its Findings and Conclusions, this Court advised counsel as follows:

> The only problem now is I have got to . . . I need to digest this and come forth with a decision. I want to do so as quickly as I possibly can. Because I will never understand or recall the facts of this case as well as I do right now.

RP 584.

Excessive delay in the entry of findings of fact and conclusions of law require, on appeal, and therefore before appeal, "*de novo* scrutiny of the entire record with a view to whether the prolonged delay in reaching a decision rendered the trial court's findings of fact unreliable . . ." *Keller v. U.S.*, 38 F.3d 16, 21 (N.H., 1994). When the findings do not closely mirror the written decision, the courts focus on whether the delay prejudiced Restaurant Kim,

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prevented Restaurant Kim from effective appellate review, or whether defendants Market Kim tailored the findings to meet their contentions on appeal. *State v. Eaton*, 82 Wn.App. 723, 727, 919 P.2d 116 (Div. I, 1996, criticized on other grounds); *State v. Portomene*, 79 Wn.App. 863, 864-65, 905 P.2d 1234 (Div. I, 1995). Four examples of Findings that are not in the written decision and are not supported by testimony or exhibits are Findings 23, 19, 11 and 5.

In Finding 23, the Court has erroneously found that Exhibit 32-18 (Trial Exhibit 20) "demonstrates that the use of the Restaurant Parcel parking lot to access parking, the loading dock, and storage bays, was essential to the operations of the market on the Market Parcel." The referenced Lease demonstrates a different conclusion. The 1984 Lease with Vogt, as Lessors, and Wolten & Montfort, Inc., as Lessee, in its relevant sections provided as follows:

> 1. PROPERTY: The Lessors herby lease to the Lessee other property located at Birch Bay, Whatcom County. Washington, hereinafter referred to as "premises", described as follows:
>
> > a tract of land in Gov't Lot 1, Section 30, Township 10 (sic) North, Range 1 East, W.M., described as the southeasterly 103 feet of the following:
> >
> > Beginning at a point on the West line of said Gov't Lot 1, 602.24 feet South of the Northwest corner of said Section 30, chance (sic) East 30 feet on the East line of Drayton Harbor Road and the true point of beginning; thence North 66 47' East, 140.43 feet; thence South 28 27' East, 160.37 feet; thence South 61 56'30" West, 224.9 feet, more or less, to the Easterly line of Drayton Harbor Road; thence Northwesterly along the Easterly line of Drayton Harbor Road, 191.2 feet, more or less, to the true point of the beginning.
>
> All located within Whatcom County, Washington. **The parties acknowledge** that the improvements upon the premises **include a building consisting of a grocery store and warehouse space**

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on the ground level, and an apartment on the second floor, plus the parking along the north edge of the building. One parking stall is to be reserved for the service station operator. (Emphasis added.)

5. USE OF WAREHOUSE: The parties acknowledge that there are two warehouses located upon the leased property at the southeast corner thereof, one warehouse being 20' x 40', and the second warehouse being 20' x 48', is divided into a southern half and a northern half. **The parties agree that the Lessors and their children and grandchildren shall have the right to use the 20' x 40' warehouse, and the southerly half of the 20' x 48' warehouse, during the term of this lease.** The Vogts could not allow anyone else to use that space.

In the event that the Lessors do not use such warehouse space, the Lessee shall have the right to do so without additional rental. The Lessors shall not have the right to transfer, assign or sub-let their right to use such warehouse space. Nothing herein shall authorize the Lessors to use any other portion of the premises, whether inside or outside of the improvements, for storage purposes, other than inside the reserved warehouses. Notwithstanding the provisions of paragraph 10, Lessor will maintain and pay the roof and all other repairs, utilities, taxes and other expenses associated with the warehouse, as long as utilized by the Lessor. **The Lessor will allow no one but their children and grandchildren to use this space.** (Emphasis added.)

6. PARKING: The parties acknowledge that other Leasees (sic) of the Lessors use for parking, in connection with their service station that portion of **the following described property northerly of the southeasterly 103 feet thereof**.

A tract of land in Gov't Lot 1, Section 30, Township 40 North, Range 1 East, W.M., described as follows:

Beginning at a point on the West line of said Gov't Lot 1, 602.24 feet South of the Northwest corner of said Section 30; thence East, 30 feet to the East line of Drayton Harbor Road and the true point of beginning; thence North 66 47' East, 141.43 feet; thence South 28 27' East, 160.37 feet, thence South 61 56' 30" West,

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224.9 feet, more or less, to the Easterly line of Drayton Harbor Road; thence Northwesterly along the Easterly line of Drayton Harbor Road, 191.2 feet, more or less, to the true point of beginning.

All situated in Whatcom County Washington, plus one parking stall is to be reserved for the service station operator. **The parties agree** that during the entire term of this lease agreement **customers of the Lessees shall be entitled to use the above in connection with grocery store patronage.**

25. **All commercial vehicles should be encouraged not to block traffic to the condos, the cabins or gift shop. They are to be parked on leased property.** (Emphasis added.)

30. Parking on the Landlubber Gift Shop property is to be allowed only for store customers, not for employees of the store or tenants of the apartment above the store.

In Finding 19, the Court has erroneously found that in 1972, "during common ownership, William O. Vogt added the rear loading dock and annexes to the Market building located on the Market Parcel, which appear as garages or storage bays." Mr. Vogt did not testify. Apparently, Market Kim claims that the testimony of Beebe supports this finding. However, Beebe only testified that "in about 1970 . . . I helped build . . . this loading dock." RP 100. Whatcom County Assessor records, indicate that the improvements were constructed in 1961. Dec. of Shepherd, Ex. 1.

In Finding 11, the Court has erroneously found that "[b]oth the Market parcel and Restaurant Parcel were originally owned by the Vogt family, who homesteaded a large area of Birch Bay in the late 19th century." Restaurant Kim could find no testimony or exhibits to support the "finding" that the Vogt family homesteaded a large area of Birch Bay in the late 19th century.

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In Finding 5, the Court has erroneously found that "Exhibit 32, Tab 24, is an accurate survey of existing conditions of the Restaurant Parcel and Market Parcel in September 2008, showing the location of the property line, buildings, parking spaces, other improvements." Exhibit 32, Tab 24 does not accurately demonstrate the east, north or west property lines of the Market property, or the pavement, parking spaces and large gravel parking area to the north of the Market on the Market property.

These key findings could have only been entered by the Court in reliance upon the representations of Market Kim and not upon the Court's independent recollection of the facts or recent review of the facts. These key findings were likely proposed and entered by Market Kim, without providing the testimony or documents to support the findings, because Market Kim "tailored" the findings to support their intended arguments on appeal.

II – IMPLIED EASEMENT

The market was constructed and completed by 1962.[1] The Market property was conveyed to William Otto Vogt (Vogt) on March 22, 1965, three years after it was in "operation." Trial Exhibits 11 & 9. Apparently, the Market operated without the Restaurant property from 1962 until February 28, 1966, when Vogt acquired approximately 4 acres to the south of the Market property. Trial Exhibits 12 & 3. At all times the Market property had a public roadway which abutted the west 191 feet of the Market property (Drayton Harbor Road). Further, from the time of its construction the Market enjoyed more than 80 feet of parking and access on the north side of the Market. Trial Exhibits 6 & 31. It

[1] "The store has been operated on the Market Parcel in one form or another for over 50 years." Finding 2.

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was not contested at trial, that the Market continued to enjoy substantial parking and delivery access on its west and north sides. During the time that the Market and Restaurant are closed the Market has access on its south side to deliver supplies. Trial Exhibit 40 and portions of Trial Exhibit 31.

> To succeed in their implied easement claim, the appellants must prove three elements: (1) unity of title in the common grantor, (2) a severance of the estate, and (3) necessity. *Hellberg,* 66 Wash.2d at 668, 404 P.2d 770. Unity of title and severance are absolute requirements. *Id.* Necessity must exist at the date the common parcel is severed. *Id.* At 667, 404 P.2d 770.

Granite Beach v. Natural Resources, 103 Wn.App. 186, 196, 11 P.3d 847 (2000).

The Court found and concluded that Vogt intended to reserve an easement in the Restaurant property and that Beebe was well aware of that undisclosed intent when Beebe took title to the Restaurant property. Neither Vogt nor Beebe testified to such intent by Vogt. The Deed to Beebe does not disclose such intent. Trial Exhibits 13 & 4.

A series of public documents related to title and easements prepared and filed by Vogt, Beebe and Mariner's Cove over the next 20 years failed to subsequently disclose the 1978 undocumented intention erroneously found by the Court. When fairly read the below documents disclose a contrary intention.

- In 1978 – Quit Claim Deed Vogt to Beebe (Ex. 32/15)
- In 1982 – Grant of Easement Beebe to Mariner Development (Ex. 17)
- In 1982 – Grant of Easement Vogt to Mariner Development (Ex. 16)
- In 1983 – Corrected Quit Claim Deed Vogt to Beebe (Ex. 32/16)

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- In 1984 – Lease Agreement Vogt (Lessor) to Wolten (Lessee) (Ex. 20)
- In 1985 – Mariner's Cove Short Plat (Ex. 32/17)
- In 1985 – Easement from Beebe to Vogt (Ex. 19)
- In 1988 – Easement from Vogt to Canadian Imperial (Ex. 23)
- In 1990 – Mod. of Agreement for Payment of Easement (Ex. 25)
- In 1996 – Statutory Warranty Deed, Beebe to Kim (Ex. 26)
- In 1996 – Easement from Vogt to Kim (Ex. 27)
- In Dec. 1997 - Statutory Warranty Deed, Vogt to Kim (Ex. 28)
- In 2001 – Quiet Title Action Mariner's Cove v. Kim (Ex. 29)
- In 2003 – Title to Real Property in dispute was quieted in Kim (Ex. 30)

The Court has erroneously taken property paid for and belonging to Restaurant Kim and given it to Market Kim, for free, because the Court concluded that Vogt intended to reserve an easement for Vogt's benefit. Before the Court can create an implied easement by reservation the Court must find that the easement was strictly necessary at the time of the severance.

> **It is not difficult to state that there must be 'reasonable' necessity for the existence of an easement by implied grant and 'strict' necessity for the existence of an easement by implied reservation.** The difficulty arises when the trier of the facts must determine whether the facts satisfy the corresponding degree of necessity required by the rule. (Emphasis added.)

Adams v. Cullen, 44 Wn.2d 502, 508, 268 P.2d 451 (1954).

> Such an easement may arise when the party claiming it shows: (1) unity of title and subsequent separation, (2) an apparent and continuous quasi easement existing for the benefit of the retained parcel to the detriment of the conveyed parcel during the unity of

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> title, and (3) **"strict" necessity that the quasi easement exist after severance**. *Adams v. Cullen,* 44 Wn.2d 502, 268 P.2d 451 (1954). The necessity is to be determined from the conditions existing at the time of the conveyance.

Veach v. Culp, 21 Wn.App. 454, 458-459, 585 P.2d 818 (1978), overruled on other grounds.

> There is a well-recognized distinction between an implied grant and an implied reservation, and this has been recognized in Washington. See *Schumacher v. Brand*, 72 Wash. 543, 130 P. 1145; *Cogswell v. Cogswell*, 81 Wash. 315, 142 P. 655. **In the case of severance of the servient estate, an easement will, ordinarily, not be reserved since the grantor cannot derogate from his own grant**. . . .
>
> **In order to give rise to the presumption of a reservation of an existing easement or quasi easement, where the deed is silent upon the subject, the necessity must be of such a nature as to leave no room for doubt of the intention of the parties.** This necessity cannot be deemed to exist if a similar privilege can be secured by reasonable trouble and expense. (Emphasis added.)

Wreggitt v. Porterfield, 36 Wn.2d 638, 640, 219 P.2d 589 (1950).

> **As regards implied reservations of easements, the matter stands on principle in a position very different from implied grants. If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant**. To say that a grantor reserves to himself in entirety that which may be beneficial to him, but which may be most injurious to his grantee, is quite contrary to the principle upon which an implied grant depends, which is that a grantor shall not derogate from or render less effectual his grant or render that which he has granted less beneficial to his grantee. **Accordingly, where there is a grant**

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> **of land with full covenants of warranty without express reservation of easements, the best considered cases hold that there can be no reservation by implication, unless the easement is strictly one of necessity.** (Emphasis added.)

Cogswell v. Cogswell, 81 Wash. 315, 319, 142 P. 655 (1914).

> There was, however, no necessity for the implied easement for which appellants contend. The evidence disclosed that the way had never been used adversely, that the use had been permissive only, and that there is another possible and practicable way from the south lands to the county road entirely within tract C, which can be used without crossing tract B. 'A grant of a right of way cannot be inferred merely from the fact that there is a way leading to the premises purchased, even though the grant of land be with all privileges and appurtenances, for the use of the word 'appurtenances,' although appropriate in the conveyance of an existing easement, is not sufficient to create one where none exists.' 14 Cyc. 1170. 'No implication of a grant of a right of way can arise from proof that the land granted cannot be conveniently occupied without it. Its foundation rests in necessity, not in convenience. It follows that a party cannot have a way of necessity through the land of another when the necessary way to the highway can be obtained through his own land, however convenient and useful another way might be.' 14 Cyc. 1173.

Roe v. Walsh, 76 Wash. 148, 154-55, 135 P. 1031 (1913).

III – PRESCRIPTIVE EASEMENT.

The Washington Supreme Court has not addressed the burden of proof required to establish a prescriptive easement. However, Division I, has determined that the burden is higher than a preponderance of the evidence. A party seeking to appropriate the property of another by prescription bears "the burden of establishing (all elements) . . . by **clear proof** . . ." (Emphasis added.) *Lee v. Lozier*, 88 Wn.App. 176, 185, 945 P.2d 214 (Div. I, 1997).

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> Other state courts are in accord with Division I.
>
> An examination of the cases in many other jurisdictions discloses the rule to be that the burden is on the one claiming a right of use by prescription to prove it by clear and convincing evidence. Some of the cases use the phrase 'by clearest and most satisfactory proof.' Others use the phrase 'clear and positive proof.' (Citations admitted.)

McInnish v. Sibit, 114 Ohio App. 490, 493-94, 183 N.E.2d 237 (1953).

Utah requires "clear and convincing" evidence to establish a prescriptive easement. *Essential Botanical Farms, LC v. Kay*, 270 P.3d 430, 437 (2011). Oregon requires clear and convincing evidence to support the establishment of a prescriptive easement. *Drayton v. City of Lincoln City*, 244 Or.App. 144, 150, 260 P.3d 642 (2011). Idaho requires 'clear and convincing proof' to establish a prescriptive easement. *Weitz v. Green*, 148 Idaho, 851, 230 P.3d 743 (2010). In California "[a] party seeking to establish a prescriptive easement has the burden of proof by clear and convincing evidence. Brewer v. Murphy (2008), 161 Cal.App.4th 928, 938, 74 Cal.Rptr.3d 436. The higher standard of proof demonstrates there is no policy favoring the establishment of prescriptive easements." *Grant v. Ratliff*, 164 Cal.App. 4th 1304, 1310, 79 Cal.Rpr.3d 902 (2008). Montana is similar. *Steiger v. Brown*, 336 Mont. 29, 33, 152 P.3d 705 (2007).

Whether facts support adverse possession is determined, on appeal, as a matter of law. *Chaplin v. Sanders*, 100 Wn.2d 853, 863, 676 P.2d 431 (1984). In Washington, the grantor's continued use of the Restaurant property, at its inception, is presumed permissive. *Petersen v. Port of Seattle*, 94 Wn.2d 479, 486, 618 P.2d 67 (1980).

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- Under the doctrines of prescriptive easement and adverse possession, a use is not adverse if it is permissive.
- Although adverse possession and easements by prescription are often treated as equivalent doctrines, they have different histories and arise for different reasons. Adverse possession promotes the maximum use of the land, encourages the rejection of stale claims to land and, most importantly, quiets title in land. Easements by prescription do not necessarily further those same goals.
- Easements by prescription are disfavored in the law because they effect a loss or forfeiture of the rights of the owner.
- In a claim for a prescriptive easement there is a presumption that the servient property was used with the permission of, and in subordination to, the title of the true owner.
- If the use is initially permissive, it may ripen into a prescriptive easement only if the user makes a distinct, positive assertion of a right adverse to the property owner.
- A permissive use may be implied in 'any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence.'

Kunkel v. Fisher, 106 Wn.App. 599, 602-03, 23 P.3d 1128 (2001).

The testimony of the Market Kim witnesses at trial was that the use was believed to be permissive and beneficial to all.

> Q. And sometimes they would park to the north and come and use the restaurant, correct?
>
> A. That's correct.
>
> . . . .
>
> Q. And that happened every day, didn't it?
>
> A. It happened a lot.
>
> Q. And that's because it was mutually beneficial to both of you to allow people that were using the two businesses for parking, correct?
>
> A. That's correct.
>
> Q. You benefitted from it and your in-laws benefitted from it?

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A. Well, it was probably the lessee of the store and ourselves, right.

Q. And you cooperated?

A. We did.

Q. Because it was beneficial?

A. That's correct.

. . . .

Q. You thought it was the neighborly thing to do?

A. It was the thing to do as business owners. Business owners allowed in this instance it benefitted both sides.

Q. And you allowed that to happen because you believed it benefitted both sides, correct?

A. Yeah. P. 116-18

Trial testimony of Blair L. Beebe.

Q. Did anybody for Dairy Gold ever tell you to determine who owned what portion of the parking lot?

A. No.

Q. Did you ever undertake to determine who owned what portions of the parking lot?

A. No. P. 147

. . . .

Q. Was your general impression everybody tried to cooperate?

A. As far as I know. P. 148

. . . .

Q. And you never sought permission from anybody as to any maneuver that you made, correct?

A. Nope.

Q. And no one ever came out and told you not to deliver in the manner that you were delivering, correct?

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A. Not to my knowledge.
Q. So you believed you were doing what everybody thought was appropriate, correct?
A. True.
Q. And you believed you had permission to enter and to exit exactly the way you did, correct?
A. Yes. P. 144-45

Trial Testimony of James Perry Jr.

Q. Okay. Who did you receive instructions from as to how to deliver the milk for the smaller truck?
A. The regular route driver.
Q. Anybody else?
A. No.
Q. Who did you receive instructions from as to how to deliver the milk with the larger truck?
A. I believe I figured that out on my own.
Q. Is it fair to say that during the time that you drove truck for Dairy Gold that when you arrived at a parking lot for delivery you didn't think it was necessary to ask who owned the parking lot, correct?
A. Correct.
Q. And you didn't figure it was necessary to ask people how to get in and out because you figured the best way, you used the term easiest to get in and out, right?
A. Yes.
Q. And that's what you did in this parking lot?
A. Correct. P. 167-68

Testimony of Gill Brackinreed

Q. Would it be fair to say that from 1982 until the time you came here to testify that you believed you were on this parking lot with the Market Kim or his predecessor's permission?
A. Yeah. I really had no idea who owned the parking lot.
Q. But you believed that you had permission, right?
A. Yes.

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Q. And would it be fair to say since 1996 when my client the Restaurant Kims purchased the property you believed you were on this parking lot with their permission?

A. Yes.

Q. And you believed you used it consistent with the permission that you believed that you had from both the Kims?

A. Yes.

Q. And did anybody ever tell you that you were using it inconsistent with the permission that you had?

A. No. P. 191-192

. . . .

Q. You know Mr. Kim since about 2003 is very unhappy about the trucks driving on his property, you are aware of that, that's what this dispute is about, right?

A. I realize that's what the dispute is about. P. 194

See Dec. of Shepherd filed herewith.

IV – CONCLUSION

The Court's Findings supporting the Conclusions of Law on both implied and prescriptive easement are not supported by substantial evidence and the Court should reconsider its Findings and Conclusions and direct that Restaurant Kim prepare and present Findings and Conclusions denying both easement claims made by Market Kim.

V – ORDER

A proposed order is attached hereto.

Dated this 12th day of April 2012.

SHEPHERD and ALEXANDER

Douglas R. Shepherd, WSBA #9514
Of Attorneys for Plaintiff

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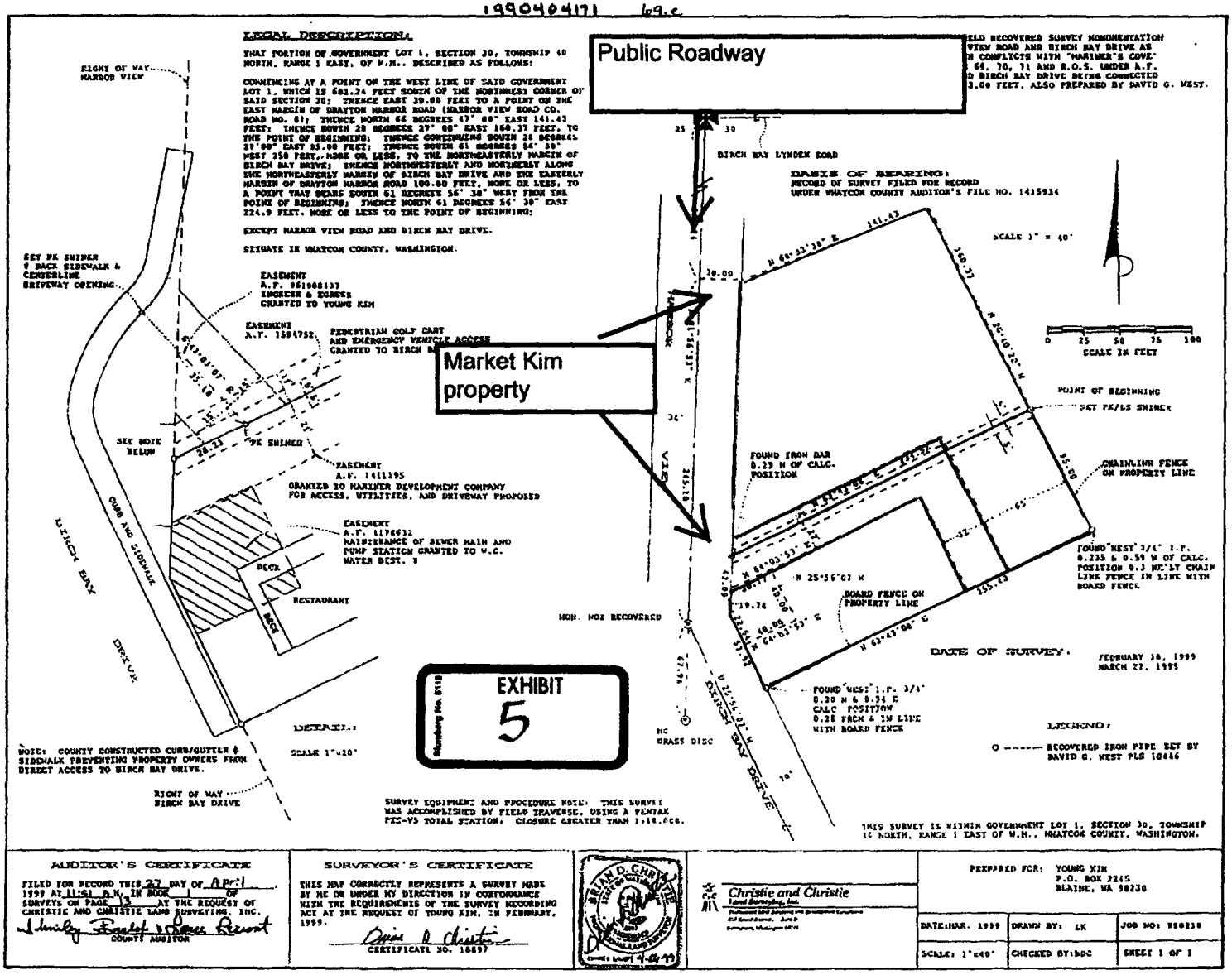
Appendix C

1990404171 69.c



AUDITOR'S CERTIFICATE

FILED FOR RECORD THIS 27 DAY OF April, 1999 AT 11:51 A.M. IN BOOK 1 OF SURVEYS ON PAGE 13 AT THE REQUEST OF CHRISTIE AND CHRISTIE LAND SURVEYING, INC.

Shirley Forbes Deputy
COUNTY AUDITOR

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 YOUNG KIM, IN FEBRUARY, 1999.

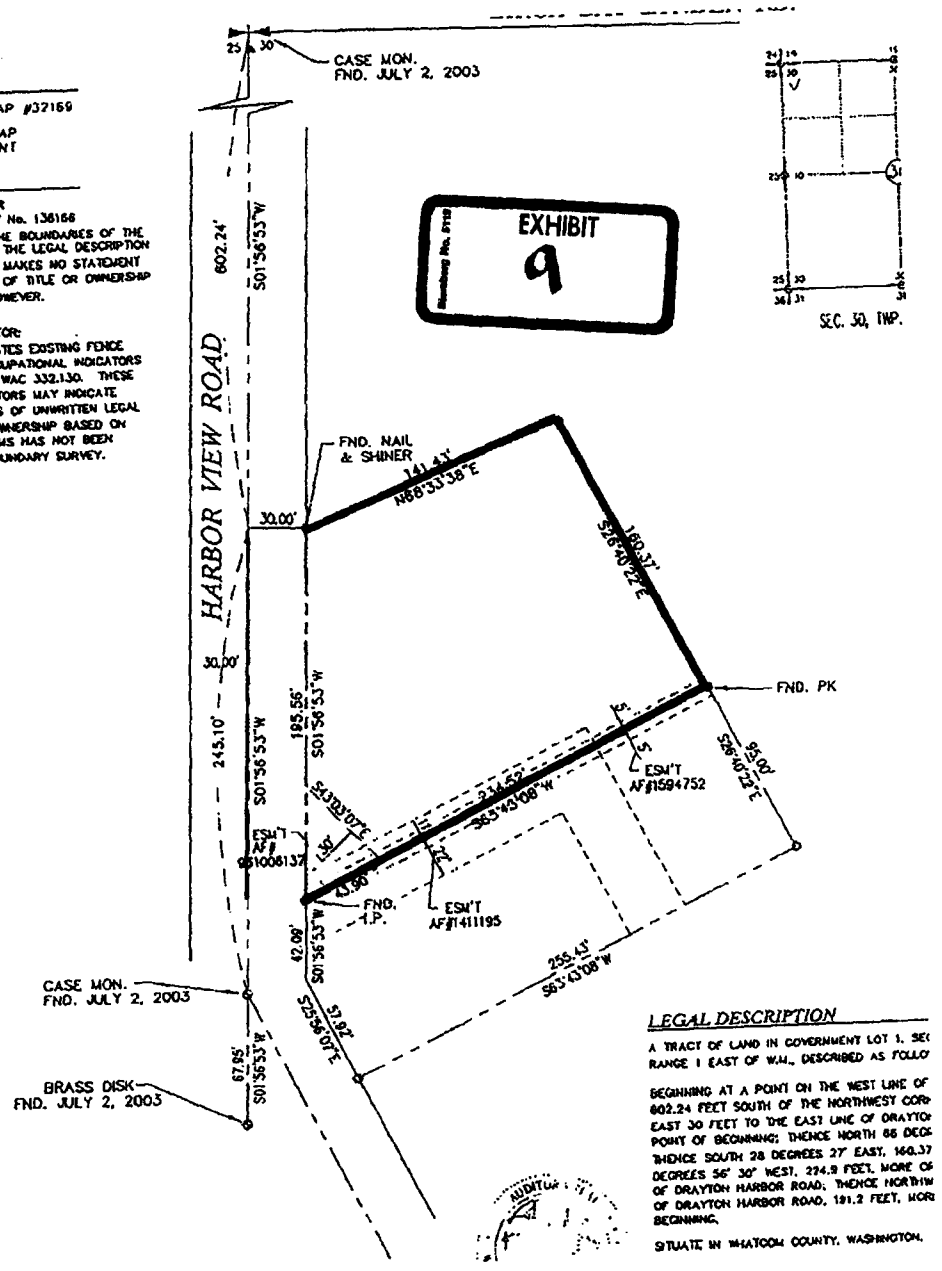
Brian D. Christie
CERTIFICATE NO. 18897

BRIAN D. CHRISTIE — REGISTERED LAND SURVEYOR — 18897 — STATE OF WASHINGTON — 4-26-99

Christie and Christie
Land Surveying, Inc.

PREPARED FOR: YOUNG KIM
P.O. BOX 2245
BLAINE, WA 98230

DATE: MAR. 1999	DRAWN BY: LK	JOB NO: 980230
SCALE: 1"=40'	CHECKED BY: DGC	SHEET 1 OF 1



&R & CAP #32169
C MON.
AR & CAP
TED POINT

TION PER
E POLICY No. 136166
SHOWS THE BOUNDARIES OF THE
OUT IN THE LEGAL DESCRIPTION
SURVEY MAKES NO STATEMENT
NDITION OF TITLE OR OWNERSHIP
ERTY, HOWEVER.

. INDICATOR:
LLUSTRATES EXISTING FENCE
HER OCCUPATIONAL INDICATORS
E WITH WAC 332-130. THESE
INDICATORS MAY INDICATE
CLAIMS OF UNWRITTEN LEGAL
EGAL OWNERSHIP BASED ON
LE CLAIMS HAS NOT BEEN
THIS BOUNDARY SURVEY.

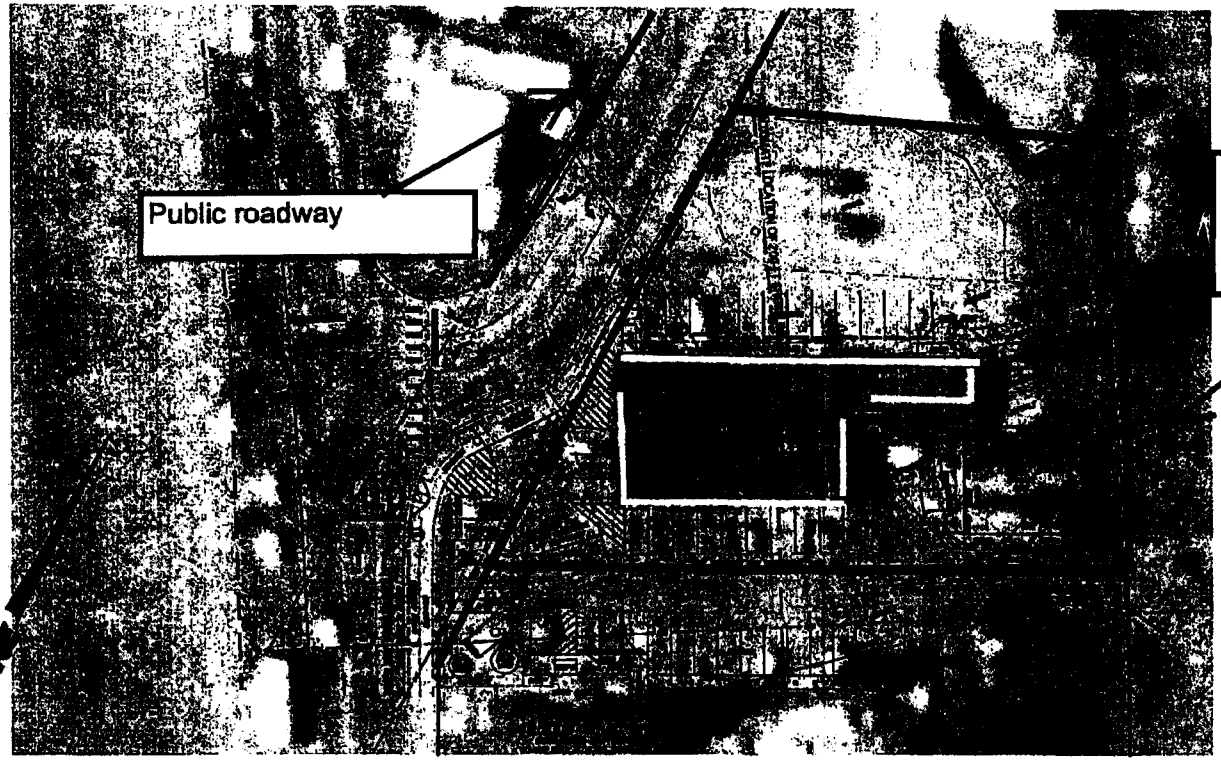
LEGAL DESCRIPTION

A TRACT OF LAND IN GOVERNMENT LOT 1, SEC
RANGE 1 EAST OF W.M., DESCRIBED AS FOLLO

BEGINNING AT A POINT ON THE WEST LINE OF
602.24 FEET SOUTH OF THE NORTHWEST COR
EAST 30 FEET TO THE EAST LINE OF DRAYTO
POINT OF BEGINNING; THENCE NORTH 88 DEG
THENCE SOUTH 28 DEGREES 27' EAST, 160.37
DEGREES 56' 30" WEST, 234.9 FEET, MORE OR
OF DRAYTON HARBOR ROAD; THENCE NORTHW
OF DRAYTON HARBOR ROAD, 191.2 FEET, MOR
BEGINNING.

SITUATE IN WHATCOM COUNTY, WASHINGTON.

EXHIBIT



GRAPHIC SCALE
(us survey feet)
0 20 40 80

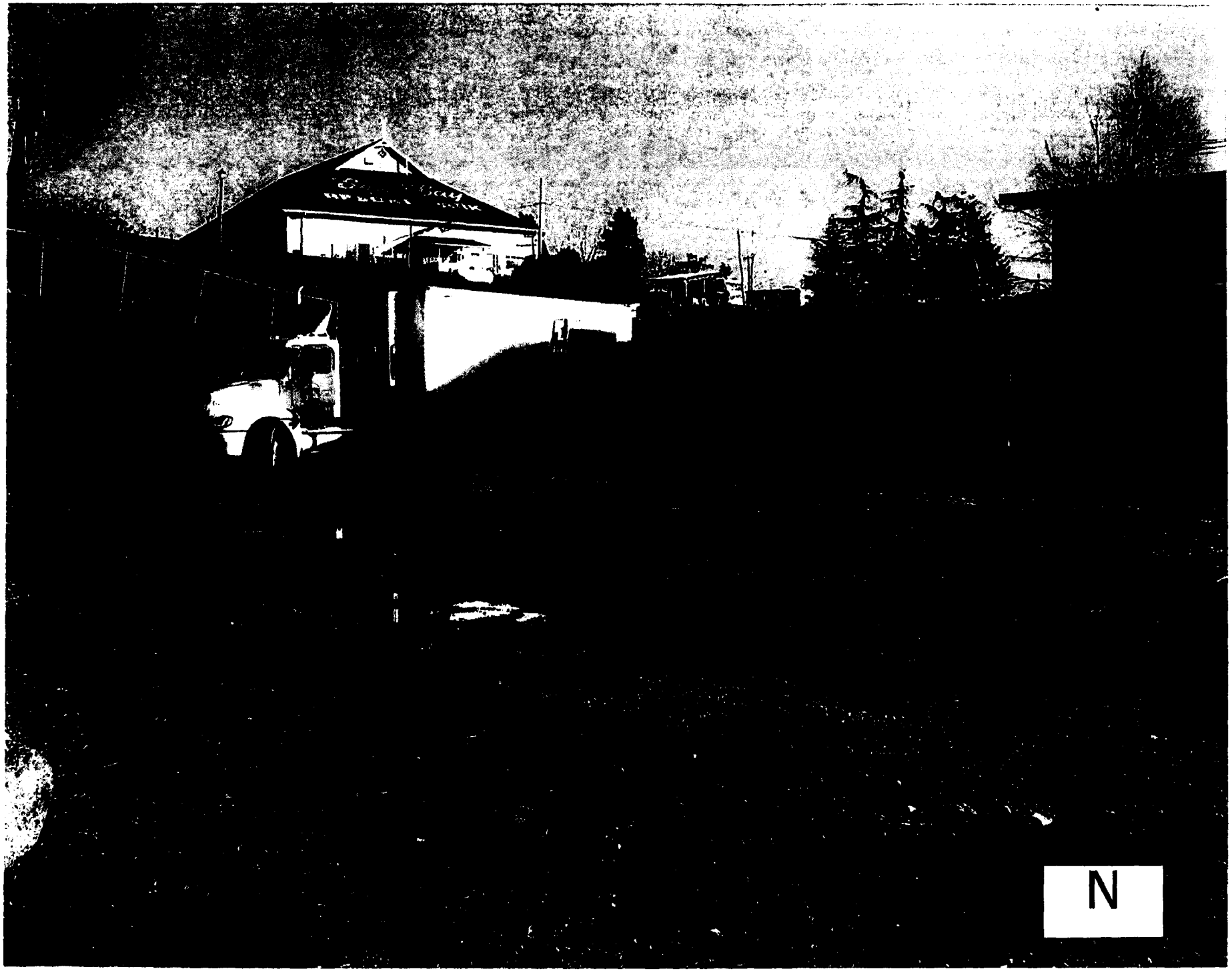
SITUATE IN GOV'T. LOT 1, BEING A PORTION OF THE NW 1/4, NW 1/4, SEC. 30, TWP. 40 N., RNG. 1 E., W.M.

09/05/08
DRAWN: SJN
CKECKED: ASM
DWG: kim_bla_market.dwg

ADAM S. MORROW
STATE OF WASHINGTON
05125
REGISTERED LAND SURVEYOR
EXPIRES: 7-18-10

PACIFIC SURVEY & ENGINEERING INC
1612 COMMERCIAL AVE, BELLINGHAM, WA 98225 PHONE:671.7387 FAX:671.4685

DEFENDANT'S EXHIBIT 34
05-2-28412
ADMITTED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