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63507-7

NO. 63507-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JEFFREY ANDREWS and EILEEN ANDREWS, husband and wife,

Respondents,

v.

SU HWAN KIM and JANE DOE KIM, husband and wife,

Defendant and Third-Party Plaintiffs,

v.

MICHELE DAVIS,

Appellant.

BRIEF OF APPELLANT

Philip A. Talmadge, WSBA #6973
Emmelyn Hart-Biberfeld, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661

Richard D. Wurdeman, WSBA #9455
Attorney at Law
320 Dayton Street, Suite 101
Edmonds, Washington 98020-3590
(425) 771-8230
Attorneys for Appellant Michele Davis

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A. INTRODUCTION

This case involves disputed boundary lines between three contiguous lots in Baywood Heights, a condominium development comprised of 30-single family residential structures located in Snohomish County. Jeffrey and Eileen Andrews own Unit 5, Su Hwan “John” Kim owns Unit 6, and Michele Davis owns Unit 7.¹

A number of fences and other landscaping improvements mark the physical boundaries between the parties’ properties. These improvements were installed by the original developer in 1998; they remain in their original locations. Unfortunately, the developer did not accurately locate the improvements because he did not place them along the property lines legally described in the development’s survey maps and plans (“plan maps”). He placed them too far to the west. The crux of this case is which boundary controls: the physical boundaries delineated by the developer and recognized and accepted by the parties, or the boundaries described in the recorded plan maps.

The Andrews sued Kim seeking to quiet title to the western five feet of what Kim believed to be his lot and to eject him from that property. Kim filed a third-party complaint against Davis, arguing that if the

¹ For the Court’s convenience, the parties’ lots are depicted in the plan maps included in the Appendix. These maps also appear in the record at CP 128, 258-59.

Andrews took the western five feet of his lot he was entitled to the western five feet of Davis's lot. Davis then moved for summary judgment against Kim, arguing the existing fence and rockery between their properties constituted their lawful boundary. A trial court granted the motion based on the common grantor doctrine and entered a final judgment pursuant to CR 54(b).

Following a one day bench trial on the claims that remained between the Andrews and Kim, a different trial court ordered all of the parties' fences moved to the legal lot lines established in the plan maps.² In doing so, the court revised the earlier summary judgment order establishing the Kim-Davis boundary line. The trial court erred by revising that final judgment to make room for a remedy in the Andrews-Kim dispute because it improperly shifted the Andrews' access problem to Davis despite the fact that the boundary had already been undeniably established.

Even if the trial court's decisions to revise the prior summary judgment order and to deny Davis's subsequent motion for a new trial or for reconsideration were correct, the trial court's finding of fact and conclusions of law are not supported by substantial evidence and do not support the conclusions of law. Accordingly, this Court should reverse.

² Although the Andrews only sought to quiet title to the western five feet of Kim's property, the trial court awarded them ten feet.

B. ASSIGNMENTS OF ERROR

(1) Assignment of Error³

1. The trial court erred in making Finding of Fact No. 14.
2. The trial court erred in making Finding of Fact No. 16.
3. The trial court erred in making Finding of Fact No. 17.
4. The trial court erred in making Finding of Fact No. 18.
5. The trial court erred in making Finding of Fact No. 19.
6. The trial court erred in making Finding of Fact No. 22.
7. The trial court erred in making Finding of Fact No. 23.
8. The trial court erred in making Finding of Fact No. 24.
9. The trial court erred in entering Conclusion of Law No. 2.
10. The trial court erred in entering Conclusion of Law No. 4.
11. The trial court erred in entering Conclusion of Law No. 6.
12. The trial court erred in entering Conclusion of Law No. 8.
13. The trial court erred in entering Conclusion of Law No. 10.
14. The trial court erred in entering Conclusion of Law No. 11.
15. The trial court erred in entering its March 25, 2009 order.
16. The trial court erred by refusing to consider additional

evidence submitted post-trial.

³ A copy of the trial court's findings of fact, conclusions of law, and order is in the Appendix, as are copies of the court's oral decision and the order denying Davis's motion for a new trial, reconsideration, or an amended judgment.

17. The trial court erred by denying Davis's motion for reconsideration on April 20, 2009.

(2) Issues Pertaining to Assignments of Error

(1) Did the trial court err in modifying a final judgment certified under CR 54(b) in favor of Davis when the Andrews and Kim failed to timely appeal that judgment and similarly failed to file a timely motion under CR 60 for relief from that judgment? (Assignment of Errors Nos. 8-13, 15-17)

(2) Did the trial court have jurisdiction under SCLCR 7(b)(1)(A) to modify a final judgment entered by another court and certified under CR 54(b)? (Assignments of Error Nos. 8-13, 15-17)

(3) Did the trial court err in refusing to consider additional evidence from Davis in support of a post-trial motion for a new trial, reconsideration, or amended judgment? (Assignments of Error Nos. 16, 17)

(4) Did the trial court err in entering a judgment in favor of the Andrews and Kim where they failed to prove the Kim-Davis boundary had not been established by the common grantor and failed to prove the Andrews had not acquiesced to the Andrews-Kim boundary? (Assignment of Errors Nos. 1-7, 9-17)

C. STATEMENT OF THE CASE

The parties own homes in Baywood Heights, a condominium development located in Snohomish County. The development contains 30-single family residential structures, each of which is located on a “unit” of land described in the condominium declaration and depicted in the plan maps. CP 128, 180, 195-96, 258-59.

The Andrews purchased Lot 5 from the developer in April 1998. CP 102. Kim purchased Lot 6 from the developer in July 1998. CP 140. Davis purchased Lot 7 from her predecessor-in-interest in October 2005.⁴ CP 170. Davis’s predecessor purchased the lot from the original developer. CP 135.

When the developer built the development, he constructed fences, rockeries, and other improvements between the parties’ lots to physically delineate the boundaries of each.⁵ CP 263, 267-68. Unfortunately, he reconfigured the parties’ lot lines when he did so because he placed the

⁴ Kim’s property sits between the properties owned by Andrews and Davis. CP 128 (included in the Appendix). Consequently, the Andrews and Kim share a common lot line while Kim and Davis share a common lot line. *Id.* The Andrews and Davis do not share a common line. *Id.*

⁵ The developer installed the Andrews-Kim fence after the Andrews had purchased and moved into their home. CP 103. He installed the Kim-Davis fence before those properties were sold. *Id.*

improvements dividing their properties too far to the west.⁶ CP 141, 150, 166. Because of the developer's error, the fence between the Andrews-Kim properties is not located on the actual boundary line as it is depicted in the plan maps, nor is the fence between the Kim-Davis properties.⁷ CP 275. Kim has no side yard to the east of his home but a side yard to the west of his home, which is where he accesses his backyard. CP 150; Exs. 4-5. The Andrews access their backyard by traveling across the property of their neighbors to the west. RP I:23.⁸ Davis has no access to her backyard on the east side of her house because the fence on that side is built along the property line; she accesses her backyard from the west side of her home. CP 36, 50-51.

When Kim purchased his property, the fences and rockeries installed by the developer clearly marked the east and west boundaries of his lot. CP 141, 150, 263, 268-69. Kim and Davis agree the parties

⁶ There was no evidence admitted at trial to confirm the parties' homes were properly located.

⁷ By comparison, the developer properly located the fence on the west side of the Andrews' property. CP 10.

⁸ "RP I" refers to the verbatim report of proceedings from the bench trial held on February 25, 2009. "RP II" will refer to the trial court's March 5, 2009 oral ruling. The number following the "RP" designation represents the page number of the particular volume.

recognized and relied upon those boundaries for more than nine years.⁹ CP 141, 263, 268-69. Davis has invested substantial time and money in landscaping the areas on her side of the Kim-Davis boundary. CP 171, 263. Kim has never landscaped, improved or otherwise maintained any of the property on Davis's side of the fence or the rockery. *Id.*

In 2007, the Andrews filed suit against Kim seeking to quiet title to the western five feet of what Kim believed to be his lot and to eject him from that property. CP 273-81. They claimed the fence between the Andrews-Kim properties was incorrectly located by the developer and that they actually owned that five feet of property. CP 275-76. They also claimed they did not learn the fence had been incorrectly located until March 2007, shortly before they filed their complaint. *Id.*

Kim answered and asserted the affirmative defenses of acquiescence, waiver, and laches. CP 265-70. He also claimed the parties had historically recognized the fences and other landscaping improvements installed by the developer as marking the true boundaries between their properties. CP 267-68. Kim then filed a third-party complaint against Davis, arguing that if the Andrews took the western five feet of his lot he was entitled to the western five feet of Davis's lot. CP 268-69. He claimed, however, that the fence between the Kim-Davis

⁹ Davis's predecessor-in-interest confirmed that Kim has always treated the fence and the rockery as the common boundary. CP 135-36.

properties was placed by the developer and that it had been historically recognized by them as the true boundary. CP 268. Davis answered the third-party complaint, counterclaimed against Kim, and asserted numerous affirmative defenses, including estoppel, acquiescence, waiver, and laches. CP 263.

Davis moved for summary judgment against Kim arguing under the common grantor theory that the existing fence and rockery between their properties constituted their lawful boundary. CP 165-79, 260-61. She also argued the condominium declarations applied to the fence and the rockery between the Kim-Davis properties and created an easement for their perpetual maintenance in their current location. *Id.* Although the Andrews responded, they did not take a position on the facts underlying the Kim-Davis dispute or on Davis's common grantor theory because the issues and facts bearing upon the Kim-Davis dispute differed from the issues and facts bearing upon the Andrews-Kim dispute.¹⁰ CP 157-58. The remainder of their response addressed Davis's interpretation of the condominium declarations. CP 158-62.

Kim responded, characterizing himself as an innocent party stuck in the middle of a dispute between the Andrews and Davis. CP 148-55. He agreed with Davis that the physical boundaries created by the fences

¹⁰ As the Andrews later confirmed, they advanced no claims against Davis and Davis asserted no claims against them. CP 39 n.1.

and the rockery were the true boundaries between their properties based on the common grantor theory. CP 141, 149, 151. But he was also willing to recognize the boundaries established in the plan maps as the true boundaries if the trial court so ordered. *Id.* He did not care which option the trial court chose to establish the boundary lines as long as the court treated the boundaries on both sides of his property consistently. CP 141, 151, 154. He argued that summary judgment would be inappropriate if the court was unwilling to recognize the common grantor theory as to both boundaries. CP 154.

In support of her reply, Davis argued that summary judgment was appropriate even if the Andrews-Kim dispute was not resolved at the same time because Kim had the opportunity to move for summary judgment against the Andrews on the same grounds but failed to do so. CP 137-39. She also argued the trial court could reduce the likelihood of an inconsistent result by determining that the fences and the rockeries recognized by the parties as their physical boundaries were the true and lawful boundaries as established by the developer. CP 139. Such a ruling would become the law of the case and prevent an inconsistent result. *Id.*

The original trial court, the Honorable Eric Z. Lucas, granted Davis's summary judgment motion after determining the fence and the rockery between the Kim-Davis homes was the lawful boundary between

their properties based on the common grantor theory. CP 132-34. Judge Lucas dismissed all of Kim's claims against Davis with prejudice. CP 133. Finding no just reason for delay, Judge Lucas entered a final judgment pursuant to CR 54(b) on February 10, 2009. CP 133-34. The Andrews and Kim agreed on the form of the order and approved of the CR 54(b) certification. CP 134.

The remaining claims between the Andrews and Kim proceeded to trial on February 25, 2009 before the Honorable Michael T. Downes.¹¹ The Andrews and Kim submitted trial briefs.¹² CP 101-31. Davis did not submit a trial brief and did not intend to participate in the trial because she believed the motion court's summary judgment order disposed of all

¹¹ Judge Lucas only presided over the Davis-Kim summary judgment proceedings. Judge Downes presided over the Andrews-Kim bench trial, during which Davis was only a minor participant. Because mere reference to "the trial court" may be confusing when discussing these proceedings, Davis will hereafter refer to the original trial court as "the motion court" and the court that presided over the bench trial as "the trial court."

¹² Kim argued that the motion court's prior order was the law of the case and mandated that the Andrews-Kim boundary created by the developer be recognized as the parties' true boundary. CP 121-23, 125. Nonetheless, he argued CR 54(b) permitted the trial court to revise the motion court's summary judgment order and contended that such a revision would become necessary if the trial court agreed to move the Andrews-Kim boundary to comply with the boundaries established in the plan maps. CP 118, 125-26.

The Andrews agreed with Kim that CR 54(b) provided the trial court with the authority to revise the motion court's summary judgment order to accomplish an equitable result. CP 106. However, they disagreed with Kim that the common grantor theory applied to their claims against Kim because the fence dividing the Andrews-Kim properties was not installed until after the Andrews purchased their lot. CP 109.

possible claims and counterclaims between Kim and her. RP I:3-4. She did not personally attend the trial because she was extremely ill. CP 36.

On the day of trial, the Andrews and Kim suggested to the trial court that Davis attend, and a discussion about her participation ensued. RP I:3-6. Through her counsel, Davis attended the trial for the very limited purpose of asking the trial court to revise the motion court's summary judgment order to confirm that the order resolved all of the claims between Kim and Davis, that Kim agreed the motion court's decision was correct, that no additional evidence would be offered, and that she be excused from further participation. RP I:4-5.¹³ The Andrews agreed that if the facts establishing the Andrews-Kim boundary were the same as those establishing the Kim-Davis boundary, then the outcome should be the same. RP I:5. Although the trial court recognized that the motion court's order was essentially entered by agreement, the trial court recommended that Davis remain and participate in the trial.¹⁴ RP I:5-7. The trial court was reluctant to permit Davis to leave because he felt any decision he made would have a "domino effect" on the parties' boundary

¹³ This request did not alter the fact that the February 10, 2009 judgment was final under CR 54(b).

¹⁴ The parties agreed to allow the trial court to consider the declarations Davis submitted in support of her summary judgment motion in lieu of her live testimony because they agreed her testimony would be the same. CP 6-7.

lines. RP I:6. Davis's participation was limited. RP I:12. The court denied Davis's motion, but did not enter a written order. RP I:7.

During the trial, Jeffrey Andrews testified he actually became aware of the boundary discrepancy between the Andrews-Kim properties shortly after he purchased his home in April 1998. CP 99; RP I:26. Both Kim and Davis subsequently argued that the Andrews' knowledge of the improperly placed Andrews-Kim fence barred the Andrews' claims. CP 96-100.

The trial court issued an oral decision on March 5, 2009, which was later incorporated into the written findings of fact and conclusions of law. CP 6-29; RP II:1-10. The trial court ordered the parties' fences moved to the legal lot lines established in the plan maps. CP 13-14; RP II:6-7. In doing so, the trial court set aside the motion court's summary judgment order establishing the Kim-Davis boundary line even though the judgment was final on the basis that it failed to dispose of all of the claims and counterclaims between Kim and Davis. CP 26, 28; RP II:5, 7, 9. When asked what claim between Kim and Davis was left to be resolved, the trial court vaguely responded: "I think there was a potential claim. I'm not comfortable saying there wasn't." CP 28; RP II:9.

Davis subsequently moved for a new trial, reconsideration, or an amended judgment under CR 59, arguing the trial court erred by

concluding the Andrews did not have knowledge and/or notice of the misplaced fence at the time it was constructed, or shortly thereafter.¹⁵ CP 54-56. She also argued the trial court erred by revising the motion court's final judgment. CP 56-60. She noted that under the trial court's order, she will have the same access problem of which the Andrews have now been relieved because she has no access to her backyard from the east side of her home. CP 50-52. The trial court denied the motion. CP 30-31. This timely appeal followed. CP 4-5.

D. SUMMARY OF ARGUMENT

Under CR 54(b), a summary judgment order disposing of fewer than all the claims or parties is subject to revision at any time before entry of the judgment adjudicating all of the claims and liabilities of the parties

¹⁵ The trial court specifically stated:

The evidence does not establish, though, that the Andrews knew that there was a problem. Mr. Andrews' testimony was that he originally believed the fence was in the wrong place. He attempted to take some steps to figure it out and got nowhere with the builder or the homeowners association, which would not deal with property disputes. He admitted he thought it was odd that he had no access to his backyard. He explained that he was a first-time homebuyer and did not know what to do other than to try to work with the builder, which was unsuccessful, and the homeowners association, which said they wouldn't handle property disputes *The fact that a neophyte homeowner may have a belief that there is a problem which he is unable to flesh out at the time does not equal knowledge in the legal sense, necessarily. While a reasonable fact-finder could find such knowledge under the facts of this case, this reasonable fact-finder does not. I'm not persuaded by the evidence that the Andrews knew what the problem was; i.e., that Mr. Kim's fence was on the wrong side of Mr. Kim's house and approximately five feet onto Andrews' land.*

RP II:3-4 (emphasis added).

unless the order is made upon an express determination that there is no just reason for delay and upon an express direction for entry of the judgment. Such a judgment is *final*, and is subject to revision only on appeal or under CR 60.

Here, the motion court summarily determined there were no genuine issues of material fact regarding the Kim-Davis boundary and entered an order establishing that boundary under the common grantor theory. That order established facts that should have carried forward into the subsequent trial. When the motion court dismissed all of Kim's claims against Davis with prejudice, there were no claims left to be resolved between Kim and Davis. Where the motion court's order was entered upon an express determination that there was no just reason for delay and an express direction for entry of the judgment, it was a final judgment and the trial court erred by revising it.

Motions for new trial, reconsideration, and amended judgments are governed by CR 59. That rule permits a party to submit new or additional materials following a bench trial. Davis submitted a new declaration following the trial in support of her CR 59 motion that contained evidence critical to her case. The trial court abused its discretion by excluding this vital evidence, particularly under the strange procedural circumstances of this case and where it failed to articulate any grounds for the decision.

Even if this Court determines the trial court did not err in revising the motion court's summary judgment order or in denying Davis's motion for reconsideration, the trial court's findings of fact are not supported by the evidence and do not support the conclusions of law. On the contrary, substantial evidence confirms that the parties will have adequate and approximately equal access simply by moving the Andrews-Kim fence five feet to the east and without shifting the Kim-Davis fence. The Andrews only asked for five feet but have been given ten. This Court should reverse.

E. ARGUMENT

(1) Standard of Review

While a trial court has discretion in making a CR 54(b) determination, this Court has authority to review the determination for an abuse of discretion. *Schiffman v. Hanson Excavating Co.*, 80 Wn.2d 681, 687, 513 P.2d 29 (1973). Similarly, this Court reviews a trial court's ruling on a CR 59 motion for an abuse of discretion. *Lian v. Stalick*, 106 Wn. App. 811, 823-24, 25 P.3d 467 (2001). An abuse of discretion occurs when a trial court bases its decision on untenable grounds or reasons, or when its decision is manifestly unreasonable. *Id.* at 824.

Following a bench trial, this Court reviews the trial court's findings of fact to determine whether they are supported by substantial

evidence and, if so, whether those findings support the trial court's conclusions of law. *See, e.g., Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) (citing *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986)); *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 242-43, 23 P.3d 520, *review denied*, 145 Wn.2d 1008 (2001). Substantial evidence is evidence that would persuade a reasonable fact finder of the truth of the declared premise. *See, e.g., Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The Court reviews questions of law and conclusions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Assuming the Court reaches the issue, the trial court's findings of fact are not supported by substantial evidence and do not support its conclusions of law. Moreover, the trial court abused its discretion by refusing to consider additional evidence submitted following the trial and by refusing to grant Davis's motion for post-trial relief.

(2) The Trial Court Erred by Revising the Motion Court's Summary Judgment Order Establishing the Kim-Davis Boundary Line

Prior to trial, Davis moved for summary judgment against Kim and argued the fence and the rockery between their homes constituted a boundary created by the developer that the parties had recognized as such

for more than nine years. CP 165-71. Kim conceded the physical boundary established by the fence and the rockery was the true boundary between the Kim-Davis properties. CP 141, 149. The Andrews did not take a position on the facts underlying the Kim-Davis dispute or on Davis's common grantor theory because they believed the issues and facts bearing upon the two cases were distinct. CP 157-58.

The motion court determined there were no genuine issues of material fact regarding the Kim-Davis boundary and entered a partial summary judgment order in Davis's favor. CP 132-34. In particular, the court determined under the common grantor theory that the boundary between the Kim-Davis properties was the boundary as delineated by the fence and the rockery installed by the developer in 1998 and historically recognized as such by Kim and Davis. CP 133. The motion court ordered title to the land between the Kim and Davis properties quieted in Davis. *Id.* Importantly, the court dismissed all of Kim's claims against Davis with prejudice and directed entry of a final judgment under CR 54(b). *Id.* The Andrews and Kim agreed on the form of the order and approved of the CR 54(b) certification. CP 134.

Despite this order, the trial court found: "Pursuant to CR 54(b) this Court has the authority to revise the partial summary judgment order that was entered prior to trial between Kim and Davis." CP 12 (Finding 24).

The trial court concluded it had the authority to revise that order, and it did so. CP 13 (Conclusion 2). The trial court had no authority to revise the motion court's summary judgment order.

The summary judgment order was final and not subject to revision, given its CR 54(b)¹⁶ certification "that there is no just reason for delay and upon an express direction for entry of the judgment." CR 54(b). A certification under CR 54(b) makes such an order a final judgment. Karl B. Tegland, 4 *Wash. Practice, Rules Practice* at 303-04. Pursuant to RAP 2.2(d), the only way to overturn a final judgment is to file a timely appeal or a timely CR 60 motion for relief from that judgment.¹⁷ *Wash. Appellate*

¹⁶ The full text of CR 54(b) provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

¹⁷ RAP 2.2(d) provides that an appeal may be taken from a final judgment that does not dispose of all of the claims as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination that there is no just reason for delay. The time for filing the notice of appeal begins to run from the

Practice Deskbook § 6.3(2) (Wash. State Bar Ass'n, 3d ed. 2005). Neither occurred here. When the Andrews and Kim failed to seek review of that judgment, their right to question it expired. See *Reeploeg v. Jensen*, 81 Wn.2d 541, 503 P.2d 99 (1972).

Here, the motion court dismissed all of Kim's claims against Davis with prejudice and essentially excused Davis from further participation in the case. It expressly determined there was no just reason for delay and directed entry of a final judgment. CP 133. Although an express determination that "there is no just reason for delay" is typically not a sufficient finding, *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 882, 567 P.2d 230 (1977), a fair reading of the record reveals the prejudice Davis experienced from the trial court's decision not to treat the order as a final judgment. See, e.g., *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 798 P.2d 808 (1990) (noting that nothing in the record suggested that a delay in entry of a final judgment posed a danger of hardship); *Angelo v. Angelo*, 142 Wn. App. 622, 637-39, 175 P.3d 1096 (2008) (stating that "remanding for a CR 54(b) certification would serve no purpose."). The parties here all agreed to the CR 54(b) certification. CP 134.

It is clear from the motion court's order and the parties' respective positions during the summary judgment proceedings that it was a final

entry of the required findings. CR 60(b) permits the trial court to relieve a party from a final judgment in certain situations.

judgment disposing of all of the claims between Kim and Davis and that it could be instantly appealed. There was simply nothing left for the trial court to resolve between Kim and Davis. Although the summary judgment order could have been more explicit, it gave the Andrews and Kim actual notice and was sufficient to comply with the spirit and intent of the rule.¹⁸ If the Andrews or Kim believed that CR 54(b) required additional language, then they could have pointed out any deficiencies to the motion court. This they did not do. Instead, they approved of the form of the order and the CR 54(b) certification. CP 134. Their only other options were to appeal the judgment or to file a CR 60 motion for relief from that judgment. They did neither.

Despite the Andrews' and Kim's failure to properly challenge the final judgment, the trial court essentially reconsidered Davis's summary judgment motion anew at trial and on its own motion. It lacked the authority to do so. Under Snohomish County Local Civil Rule 7(b)(1)(A), "when a motion has been ruled upon in whole or in part, *the same motion may not be later presented to another judge.*" Yet that is exactly what the trial court did when it reapplied the same facts to reach a different result. The evidence produced at trial regarding the Kim-Davis boundary line was

¹⁸ That the trial court considered the language in the order sufficient to dispose of all of the claims between Kim and Davis is evident from its failure to require Davis to participate in any pretrial proceedings or to file a trial brief.

identical to that produced during Davis's summary judgment motion. That evidence unequivocally established that their boundary was created by the developer and that they had accepted that physical boundary as the true boundary between their properties for more than nine years. The motion court's order established facts without controversy that should have carried forward into the subsequent trial. *Clausing v. Kassner*, 60 Wn.2d 12, 18-19, 371 P.2d 633 (1962).

Given that the parties agreed their respective boundaries were established under different circumstances and at different times, it is both logical and entirely consistent for the trial court and the parties to expect their disputes to be resolved differently. That the legally correct resolution of the Kim-Davis dispute under the common grantor theory would make resolution of the Andrews-Kim dispute more difficult was not a sufficient basis for the trial court to revise the motion court's final judgment. The trial court's finding on this issue was not supported by the evidence and does not support the conclusion of law.

(3) The Trial Court Erred by Refusing to Consider the Additional Evidence Davis Submitted Following the Trial and by Denying Her CR 59 Motion

Following the bench trial, Davis filed a motion for new trial, reconsideration, or amended judgment. CP 54-60. She submitted a new declaration in support of her motion. CP 50-53. In denying the motion,

the trial court reconsidered the evidence admitted at trial but refused to consider new information Davis submitted following the trial. CP 30-31. The trial court erred in doing so.

Motions for new trial, reconsideration, and amended judgments are governed by CR 59. That rule does not prohibit the submission of new or additional materials following a bench trial. Under CR 59(g),¹⁹ a trial court may, within its discretion, consider additional evidence at a motion for a new trial following a bench trial. *See also, Ghaffari v. Dep't of Licensing*, 62 Wn. App. 870, 875-76, 816 P.2d 66 (1991), *review denied*, 118 Wn.2d 1019 (1992) (consideration of additional evidence at motion for reconsideration of bench trial within discretion of trial court). Additional evidence accepted post-trial is subject to the same rules for admissibility applicable at trial. *Ghaffari*, 62 Wn. App. at 876.

Here, Davis's post-trial declaration contained critical evidence confirming that the trial court's decision left her with the same access and marketability problems of which the court "equitably" relieved the Andrews. CP 50-52. Using previously admitted trial exhibits, Davis

¹⁹ CR 59(g) provides:

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, *take additional testimony*, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(Emphasis added.)

reiterated in this declaration that, contrary to finding 17, she has no access to her backyard on the eastern side of her house because the fence on that side is built along the property line. CP 50-51, 172. She then demonstrated how the court's decision significantly reduced her access at the narrowest point and provided a new drawing based on trial exhibit 17 to show that impact. CP 51, 53. Davis measured the distances between all of the parties' homes and clarified that there is ten feet of space between the Andrews-Kim homes, not the five feet repeatedly mentioned in the court's ruling. CP 51. She determined that this error stemmed from a mistake in exhibits 9-11, which incorrectly reflected a distance of five feet between the homes instead of the existing ten feet.²⁰ *Id.* She noted that if the Andrews-Kim boundary was moved five feet to the east, then Kim would maintain five feet of access on the west side of his house and the parties would have adequate and approximately equal access to their backyards. *Id.*

The trial court abused his discretion in excluding such vital evidence, particularly under the strange procedural circumstances of this case and where he failed to articulate any grounds for his decision. This

²⁰ Jeffrey Andrews testified there is ten feet between his property and the Kim property. RP I:19; Ex. 4.

failure rendered the trial court' decision to deny reconsideration clear error.²¹

(4) The Trial Court Erred in Entering Its Final Judgment

(a) The trial court erred by refusing to apply the common grantor theory to the Kim-Davis boundary and by refusing to recognize the Andrews had notice of the Andrews-Kim boundary in 1998

It has been the law of this state for nearly 100 years that a boundary established by a common grantor is binding upon the grantees. *Turner v. Creech*, 58 Wash. 439, 443, 108 P. 1084 (1910) (fence). See also, *Strom v. Arcorace*, 27 Wn.2d 478, 481, 178 P.2d 959 (1947) (fence). For a boundary to be established under this doctrine, it must plainly appear that the land was sold and purchased with reference to the line, and that there was a meeting of the minds as to the identical tract of land to be transferred by the sale.²² See, e.g., *Thompson v. Bain*, 28 Wn.2d 590, 591-93, 183 P.2d 785 (1947). A formal or separate contract is not necessary; indeed, the parties' agreement as to the boundary may be shown by their

²¹ While Davis believes the trial court abused its discretion by refusing to consider the new evidence submitted after the trial, she maintains that the evidence she provided during the trial was more than sufficient to support the motion court's order establishing the Kim-Davis boundary at the fence and the rockery installed by the developer and that the trial court erred by revising that order.

²² The theory behind the doctrine is not that subsequent buyers acquiesced in an erroneous boundary, but that the original grantor's statement of the boundary was correct and that land was sold in reference to it. *Thompson*, 28 Wn.2d at 592.

manifestations of ownership after the sale. *See id.* at 592; *Winans v. Ross*, 35 Wn. App. 238, 240-41, 666 P.2d 908 (1983).

The doctrine involves two questions: (1) was there an agreed boundary established between the common grantor and the original grantee, and (2) if so, would a visual examination of the property indicate to subsequent purchasers that the deed line was no longer functioning as the true boundary? *Fralick v. Clark County*, 22 Wn. App. 156, 160, 589 P.2d 273 (1978).

Here, it is undisputed the developer installed the fences and the rockeries that physically divide the parties' properties. Similarly, it is undisputed that a visual inspection of the parties' properties would confirm the deed lines were no longer functioning as their true boundaries. As to the Kim-Davis boundary specifically, Davis's predecessor-in-interest confirmed what Kim admitted: the fence and the rockery between the Kim and Davis properties were installed by the developer and the parties have always recognized that physical boundary as their common boundary. CP 135-36. Although Davis has invested substantial time and money landscaping the areas on her side of that boundary, Kim has not. CP 171, 263.

The trial court erred in rejecting Davis's claim that the common grantor theory applied to establish the fence and the rockery between the

Kim and Davis properties as their true boundary. She was unquestionably entitled to the benefit of this doctrine, especially since the only party asserting a claim against her conceded the doctrine applied and admitted every fact necessary to establish that their boundary had been established by the developer.

It is likewise the law of this state that “knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed.” *Miebach v. Colasurdo*, 102 Wn.2d 170, 175-76, 685 P.2d 1074 (1984). When a person has notice sufficient to require inquiry, the inquiry that follows must be made with “reasonable diligence.” *Peterson v. Weist*, 48 Wash. 339, 341-42, 93 P. 519 (1908).

As our Supreme Court has noted,

[[N]otice] need not be actual, nor amount to full knowledge, but it should be such “information, from whatever source derived, which would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry.” . . . It follows, then, that it is not enough to say that diligent inquiry would have led to a discovery, but it must be shown that the purchaser had, or should have had, knowledge of some fact or circumstance which would raise a duty to inquire.

Levien v. Fiala, 79 Wn. App. 294, 298, 902 P.2d 170 (1995) (citation omitted). Notice that would lead a diligent party to further inquiry is notice of everything to which such inquiry would lead. *See*

Sherbeck v. Estate of Lyman, 15 Wn. App. 866, 870, 552 P.2d 1076 (1976).

Here, the Andrews contend they had no “proof” the Andrews-Kim fence was incorrectly located until a homeowners’ association meeting in 2007. RPI I:37; Ex. 15. Yet the evidence clearly reflects otherwise. Their knowledge of their boundary discrepancy in 1998 disposed of their claims. *See August v. U.S. Bancorp*, 146 Wn. App. 328, 342, 190 P.3d 86 (2008) (cause of action accrues when the essential elements of a claim are discovered or should have been discovered).

The Andrews had sufficient knowledge of the potential boundary problem to cause further inquiry, but chose not to investigate. As Jeffrey testified during the trial, he and his wife believed the Andrews-Kim fence was incorrectly located when it was installed. RP I:26, 29. Although he attempted to contact the developer and the homeowners’ association about the problem, he got nowhere. RP I:27, 37. While neither the developer nor the association provided the assistance the Andrews’ sought, it cannot be said that the “proof” they found in 2007 was not readily available to them in 1998. The plan maps reflect the precise dimensions of the Andrews’ property. These maps became a matter of public record when they were recorded with the Snohomish County Auditor in 1997. “When an instrument involving real property is properly recorded, it becomes

notice to all the world of its contents.” *Allen v. Graf*, 179 Wash. 431, 439, 38 P.2d 236 (1934). Furthermore, the Andrews had access to the condominium declaration, which included the plan maps. CP 55. They could have confirmed their original belief that the fence was misplaced by the simple use of a tape measure.

The Andrews admit in their complaint that they knew for nine years that the Andrews-Kim fence was not accurately located. Yet they did nothing to protest its location and allowed it to remain. Importantly, they stood idly by while Kim purchased the adjoining lot. Given the fact that the exact dimension of the Andrews’ lot was a matter of public record, readily available to anyone and presumed by law to be known by everyone, the trial court erred by finding the Andrews’ lacked the requisite knowledge.

(b) The trial court’s remaining findings of fact are not supported by substantial evidence and do not support the conclusions of law

Even if this Court determines the trial court’s decisions to revise the motion court’s summary judgment order and to deny Davis’s motion for a new trial or for reconsideration were correct, the trial court’s finding of fact are not supported by substantial evidence and do not support the conclusions of law. Accordingly, this Court should reverse the trial court’s judgment.

Findings 14, 16, 19, and 22 address the Andrews' access to their backyard. Finding 14 contends the Andrews have no access to their backyard over their own land to the east. CP 10. Finding 16 states the Andrews have been accessing their backyard by traversing across the property of their neighbors to the west. CP 10. In doing so, they have had to walk up the neighbor's driveway and then follow a pathway that passes within a foot of the neighbor's front porch. *Id.* The finding also asserts the Andrews have been trespassing to gain entry to their backyard. *Id.* Finding 19 relates to the land the Andrews allegedly have available to them on the west side of their home to access their backyard. CP 11. Finding 22 contends the Andrews will have no useful access to their backyard if the Andrews-Kim fence is not moved to the boundary line depicted on the plan maps. CP 12. These findings are not supported by the evidence and are contradicted by substantial evidence indicating the Andrews will have sufficient access to their backyard even if the Andrews-Kim fence is not moved. According to Jeffrey Andrews, the Andrews' western neighbors installed the rockery that runs between their home and the Andrews home. RP I:41; Ex. 6. The Andrews installed the plantings along the front of their home. RP I:32, 42; Ex. 6. Jeffrey testified that the real impediment to accessing his backyard from the west side of his house is the large laurel hedge in the front and not the

incorrectly placed fence on the Andrews-Kim property line. RP I:44; Ex. 6. But for that large hedge installed by the Andrews and the other plantings installed by the Andrews' western neighbor, there is no reason the Andrews have to cross their neighbor's property to access their backyard. *Id.*; Ex. 7.

As for the Andrews' access to their backyard from the east side of their house, there is ten feet of space between the Andrews and Kim properties and not five feet as the trial court erroneously found. CP 51; RP I:19; Ex. 5. If the Andrews-Kim fence is moved to the corner of Kim's house, then the Andrews will have ten feet of access on the east side of their home in addition to the two feet they currently have on the west side. CP 51. They will have a total of 12 feet of access to their backyard. *Id.* Moreover, Jeffrey confirmed he could install a small gate in the ten foot fence he shares with Kim to access his backyard from the east side of his home. RP I:48; Exs. 4-5.

Finding 23 states Kim will have no useful access to his backyard if the Andrews-Kim fence is moved but the Kim-Davis fence is not. CP 12. This finding is contradicted by the evidence. Although the Andrews only sought to quiet title to five feet of Kim's property, the trial court granted them five additional feet. If the Andrews-Kim boundary is moved five feet to the east rather than ten, essentially giving them what they asked for

and no more, then Kim would maintain the remaining five feet of access on the west side of his house. CP 51. This would be more than adequate and would give the parties approximately equal access.

Finding 17 states that Davis has had no difficulty accessing any of her property and will have none no matter what the trial court decides. CP 11. This finding is clearly erroneous and not supported by the evidence. As Davis demonstrated in the exhibit attached to her original declaration, she has no access to her backyard on the eastern side of her property because the fence on that side is built on the property line and extends from the back corner of her house to the back of her lot. CP 50-51, 170-72. Her only access is on the western side of her house. *Id.* Moreover, she later testified that if the Kim-Davis fence is moved to the line shown on the plan maps, then she will lose more than seven feet of access on the western side of her property and her access will be reduced to less than three feet. CP 36, 51, 172.

Finding 18 relates to the Andrews' knowledge that the fence along the Andrews-Kim property line was improperly placed. CP 11. There, the trial court essentially found the evidence did not establish that the Andrews knew the fence was improperly placed when it was constructed because it was constructed after they acquired their property. *Id. Supra*, fn. 15. This finding is clearly erroneous and contradicted by the actual

evidence presented at trial. Although the fence was built several months after the Andrews purchased their home in 1998, Jeffrey Andrews repeatedly testified during the trial that he and his wife always believed it was constructed in the wrong location. RP I:26, 29. They thought it was odd that they had no access to their backyard once the developer installed the fence. RP I:37. They attempted several times without success to contact the developer and the homeowners' association about the problem. RP I:27, 37. Despite their concerns, the Andrews did nothing to confirm if the fence was properly located. RP I:37-38. Instead, they waited nine years to view the subdivision's plan maps during an annual homeowners' association meeting and to confirm their lot lines with the Snohomish County Assessor's Office and the Core Engineering Survey Company. RP I:37; Ex. 15. Substantial evidence clearly establishes that the Andrews knew as far back as 1998 that their fence was not properly located.

Because the findings are not based upon substantial evidence, they do not support the conclusions of law reached by the trial court. Under Conclusion 4, the trial erroneously concluded the equitable and other defenses Davis asserted against Kim were not a basis to leave the fence between their homes in its current location. CP 13. In doing so, the trial court ignored undisputed evidence that conclusively shows the Kim-Davis fence was installed by the common grantor and it has been historically

recognized by them as the boundary between their properties. Kim conceded these critical points during the summary judgment proceedings. CP 138, 141-42. He also admitted he has never improved or maintained any of the property on Davis's side of the fence. CP 166. More disturbing than the trial court's failure to consider the undisputed evidence is its disregard for 100 years of well-established case law concerning the conclusiveness of a boundary established by a common grantor. *See, e.g., Levien*, 79 Wn. App. at 302; *Thompson*, 28 Wn.2d at 591-92; *Strom*, 27 Wn.2d at 481. Davis was entitled to the benefit of that doctrine.

Conclusions 6, 8, and 10 detail the court's resolution of this case; however, they must be overturned because they are unsupported by the findings. CP 13. In Conclusion 6, the trial court concluded a fair and equitable resolution of the case required it to move the parties' fences to the legal lot lines established in the plan maps. CP 13-14; RP II:6-7. In Conclusion 8, the trial court erroneously concluded title and ownership of the disputed strip of land between Kim and Davis is confirmed to be held by Kim. CP 14. In Conclusion 10, the trial court ultimately concluded Kim has the right to move the Kim-Davis fence to the boundary line shown on the plan maps. CP 14. These conclusions are incorrect where the parties agreed their respective boundaries were established under different circumstances. It is therefore both logical and entirely consistent

for the trial court and the parties to expect their disputes to be resolved differently. The court's resolution of this case simply shifted the Andrews' access problem to Davis, who does not even share a common boundary with them. Conclusions 8 and 10 are also erroneous because the common grantor theory unequivocally establishes the Kim-Davis boundary. Finally, these conclusions ignore evidence from both Jeffrey Andrews and Davis confirming the Kim-Davis fence does not need to be moved to ensure adequate backyard access for the Andrews or for Kim. RP I:19; CP 51.

Where the trial court's findings of fact are not supported by substantial evidence and they fail to support the conclusions of law, the court's decision is erroneous. This Court should reverse the trial court's judgment.

F. CONCLUSION

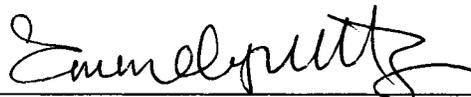
The trial court erred by revising the motion court's summary judgment order to make room for a remedy in the Andrews-Kim dispute. By refusing to recognize the finality of that summary judgment order under CR 54(b), the trial court disregarded well-established case law addressing the conclusiveness of a boundary established by a common grantor and ignored undisputed evidence concerning the Kim-Davis boundary. The claims the parties made against one another should have

been resolved on their own merits and between the parties actually asserting those claims. By approaching this case as it did, the trial court merely shifted the Andrews' access problem to Davis. The trial court resolved this case by giving the Andrews, the party with the least clean hands due to their constructive notice of the boundary problem, the greatest access at the expense of an innocent party who now has only a few feet of access to her own backyard. This is not a fair and equitable outcome supported by substantial evidence.

This Court should reverse the trial court's decision relocating the parties' fences to the boundary lines delineated on the plan maps and by quieting title in the property disputed between Kim and Davis in Kim. The Kim-Davis fence should remain where it is. Costs on appeal should be awarded to Davis.

DATED this 17th day of September, 2009.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Emmelyn Hart-Biberfeld, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, Washington 98188
(206) 574-6661

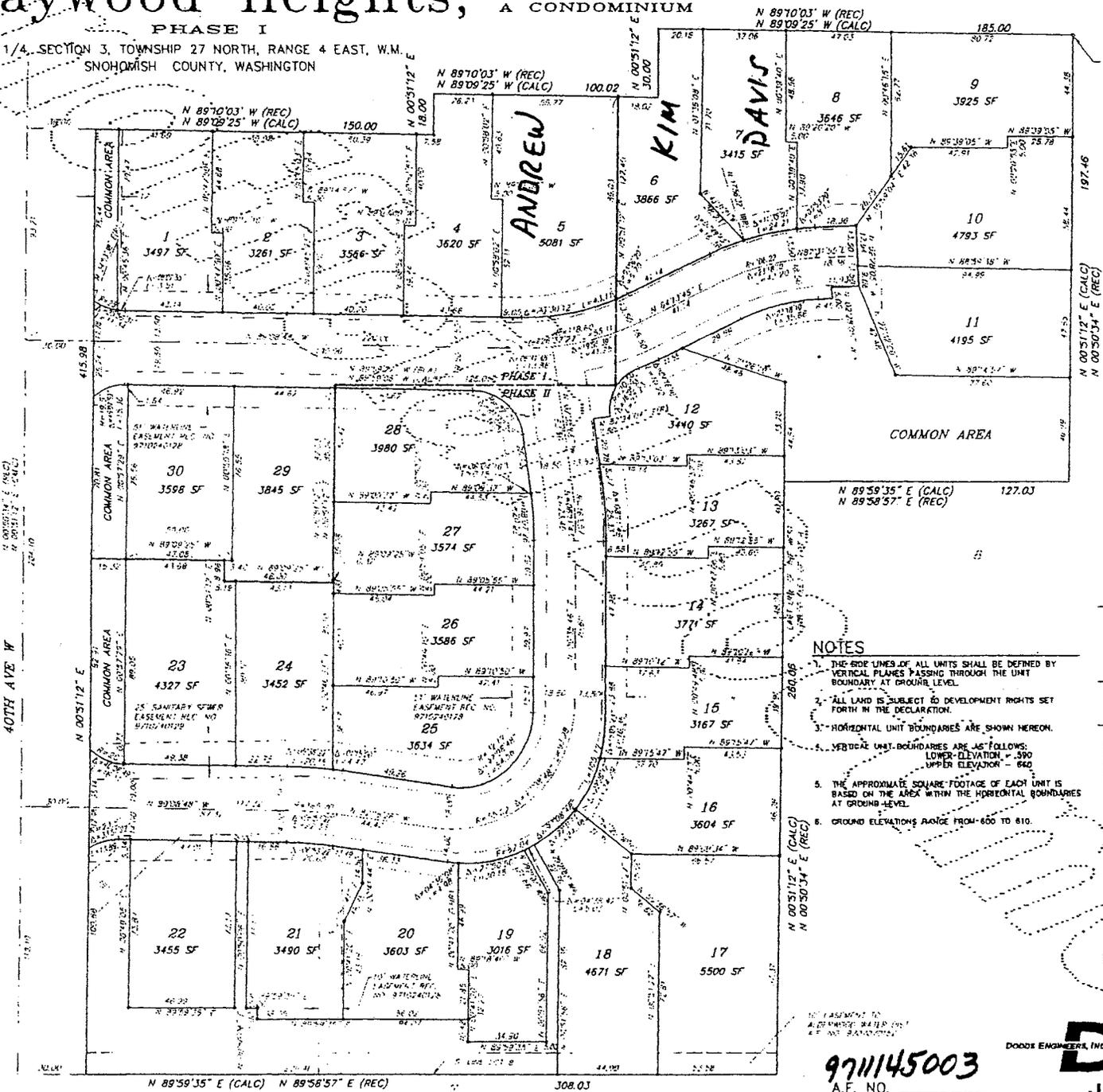
Richard D. Wurdeman, WSBA #9455
Attorney at Law
320 Dayton Street, Suite 101
Edmonds, Washington 98020-3590
(425) 771-8230
Attorneys for Appellant Michele Davis

APPENDIX

SURVEY MAP & PLANS FOR Baywood Heights, A CONDOMINIUM

PHASE I

NW 1/4, SECTION 3, TOWNSHIP 27 NORTH, RANGE 4 EAST, W.M.
SNOHOMISH COUNTY, WASHINGTON



SCALE: 1" = 30'



LEGEND

- SET 1/2" IRON ROD w/YELLOW PLASTIC CAP "30427"
- REC RECORD OF SURVEY - REFERENCE NO. 3, SHEET 2.

DATUM

NGVD 29

BENCHMARK

TOP OF 3 1/2" BRASS DISK IN 3' X 5' CONC. SLAB ON SOUTH SIDE OF SAFEMARK STORE AT INTERSECTION OF 148TH STREET SOUTHWEST AND STATE ROUTE HIGHWAY 99. POINT IS IN SOUTHWEST CORNER OF SLAB AT EXIT DOORS ON SOUTH SIDE OF BUILDING.
BL = 632.84

NOTES

1. THE BOUNDARIES OF ALL UNITS SHALL BE DEFINED BY VERTICAL PLANES PASSING THROUGH THE UNIT BOUNDARY AT GROUND LEVEL.
2. ALL LAND IS SUBJECT TO DEVELOPMENT RIGHTS SET FORTH IN THE DECLARATION.
3. HORIZONTAL UNIT BOUNDARIES ARE SHOWN HEREON.
4. VERTICAL UNIT BOUNDARIES ARE AS FOLLOWS:
LOWER ELEVATION - 590
UPPER ELEVATION - 660
5. THE APPROXIMATE SQUARE FOOTAGE OF EACH UNIT IS BASED ON THE AREA WITHIN THE HORIZONTAL BOUNDARIES AT GROUND LEVEL.
6. GROUND ELEVATIONS RANGE FROM 600 TO 810.



DEI DODDS ENGINEERS, INC.
4205 148th Ave., N.E., Suite 200
Bellevue, Washington 98007
(425) 885-7877 (425) 885-7963 Fax
JOB NO. 96094

9711145003
A.F. NO.

Exhibit 1

128

N 89°59'35" E (CALC) N 89°58'57" E (REC) 308.03

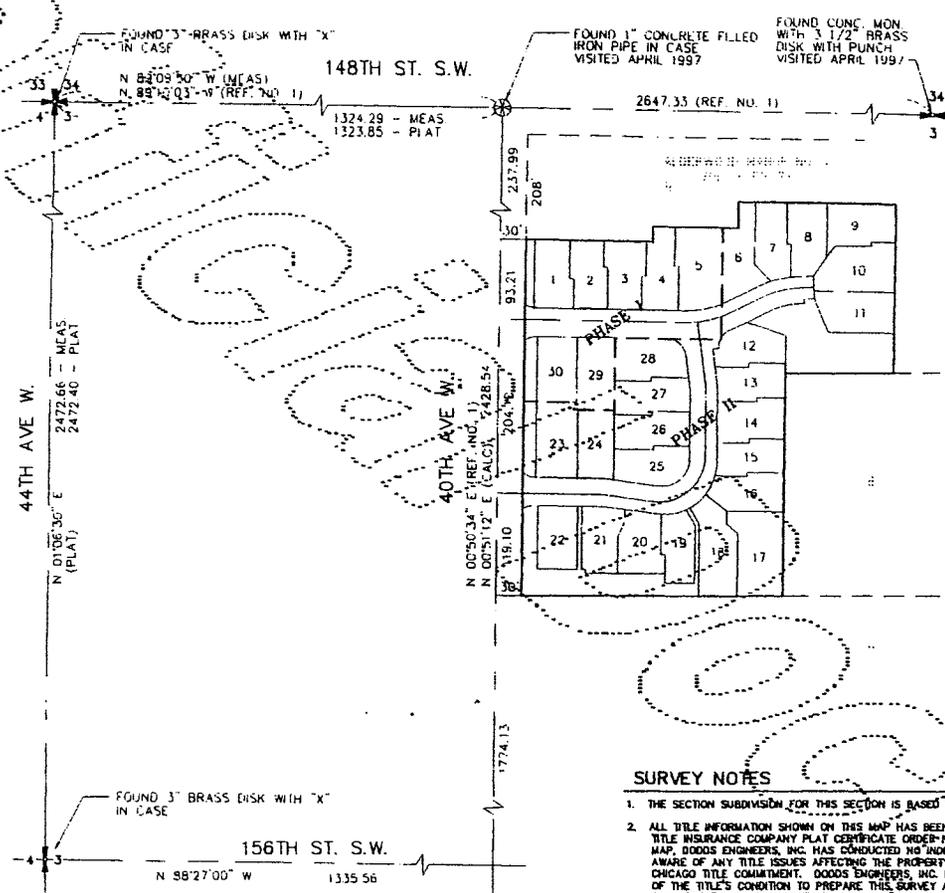
Baywood Heights, A CONDOMINIUM

PHASE I

NW 1/4, SECTION 3, TOWNSHIP 27 NORTH, RANGE 4 EAST, W.M.
SNOHOMISH COUNTY, WASHINGTON

258

EXHIBIT B
Page 2 of 3



SCALE: 1" = 100'



SURVEY NOTES

1. THE SECTION SUBDIVISION FOR THIS SECTION IS BASED ON SNOHOMISH COUNTY DEPARTMENT OF PUBLIC WORKS.
2. ALL TITLE INFORMATION SHOWN ON THIS MAP HAS BEEN EXTRACTED FROM INFORMATION CONTAINED IN CHICAGO TITLE INSURANCE COMPANY PLAT CERTIFICATE ORDER NO. 371332 DATED SEPTEMBER 19, 1997. IN PREPARING THIS MAP, DODDS ENGINEERS, INC. HAS CONDUCTED NO INDEPENDENT TITLE SEARCH, NOR IS DODDS ENGINEERS, INC. AWARE OF ANY TITLE ISSUES AFFECTING THE PROPERTY OTHER THAN THOSE SHOWN ON THE MAP AND DISCLOSED BY CHICAGO TITLE COMMITMENT. DODDS ENGINEERS, INC. HAS RELIED, WHOLLY ON CHICAGO TITLE'S REPRESENTATION OF THE TITLE'S CONDITION TO PREPARE THIS SURVEY AND THEREFORE DE-QUALIFIES THE MAP'S ACCURACY AND COMPLETENESS TO THAT EXTENT.
3. AREA OF SITE = ±157,198 SQUARE FEET (±3.6066 ACRES)
4. ALL DISTANCES ARE IN FEET.
5. THIS IS A FIELD TRAVERSE SURVEY. A LIETZ SET4C COMBINED ELECTRIC 5 SECOND THEODOLITE AND INTEGRAL DISTANCE MEASURING METER WAS USED TO MEASURE THE ANGULAR AND DISTANCE RELATIONSHIP BETWEEN THE CONTROLLING MONUMENTATION AS SHOWN. CLOSURE RATIOS OF THE TRAVERSE MET OR EXCEEDED THOSE SPECIFIED IN WAC332-130-060. DISTANCE MEASURING EQUIPMENT HAS BEEN CALIBRATED AT AN N.G.S. BASELINE WITHIN THE LAST YEAR.
6. ALL MONUMENTS SHOWN AS FOUND WERE FIELD VISITED THE MONTH OF MARCH, 1999, UNLESS SHOWN OTHERWISE.

REFERENCES

1. PLAT OF ALDERWOOD MANOR NO. 4, RECORDED IN VOL. 9 OF PLATS, PAGE 73.
2. UNRECORDED A.L.T.A. SURVEY BY R.L. McDUFFY AND ASSOC., INC., JOB NO. 93003, DATED JUNE 28, 1996.
3. RECORD OF SURVEY BY MEAD GILMAN AND ASSOC. RECORDED UNDER REC. NO. 9711045004, RECORDS OF SNOHOMISH COUNTY, WASHINGTON.

BASIS OF BEARINGS

N89°10'03"W ALONG THE NORTH LINE OF THE NORTHWEST QUARTER OF SECTION 3, T. 27 N., R. 4 E., W.M. PER SNOHOMISH COUNTY DEPARTMENT OF PUBLIC WORKS.



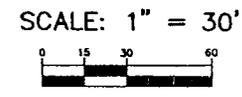
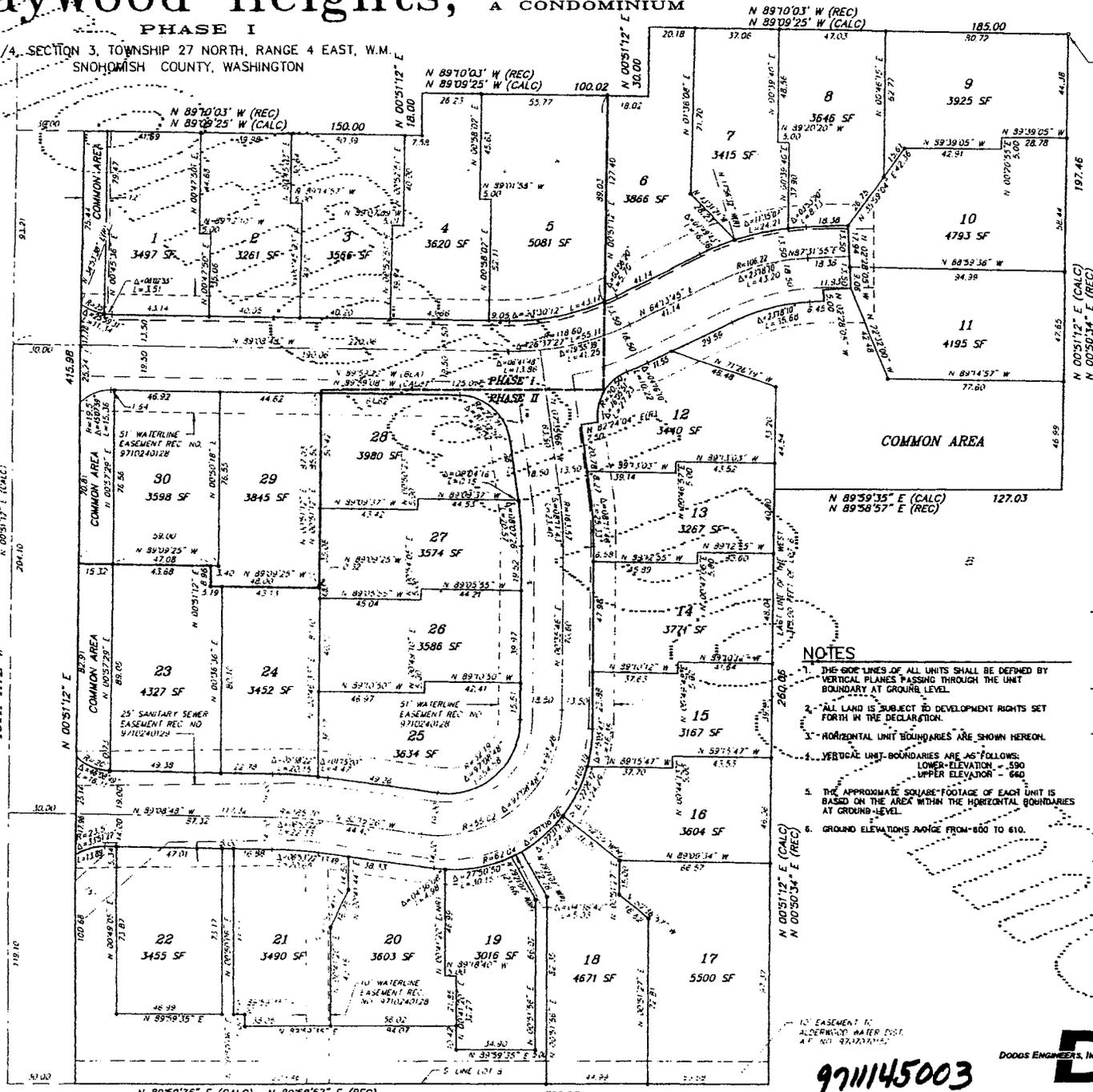
DODDS ENGINEERS, INC. **DEI**
 4205 148th Ave. N.E. Suite 200
 Bellevue, Washington 98007
 (425) 885-7877 (425) 885-7963 Fax

9711145003

JOB NO. 96-94

SURVEY MAP & PLANS FOR Baywood Heights, A CONDOMINIUM

PHASE I
NW 1/4, SECTION 3, TOWNSHIP 27 NORTH, RANGE 4 EAST, W.M.
SNOHOMISH COUNTY, WASHINGTON



- LEGEND**
- SET 1/2" IRON ROD w/YELLOW PLASTIC CAP "30427"
 - REC RECORD OF SURVEY - REFERENCE NO. 3, SHEET 2.
- DATUM**
- NGVD 29
- BENCHMARK**
- TOP OF 3 1/2" BRASS DISK IN 3' X 5' CONC. SLAB ON SOUTH SIDE OF SAFETY STORE AT INTERSECTION OF 148TH STREET SOUTHWEST AND STATE ROUTE HIGHWAY 99. POINT IS IN SOUTHWEST CORNER OF SLAB AT EXIT DOORS ON SOUTH SIDE OF BUILDING.
E.L. = 632.84

- NOTES**
1. THE BOUNDARIES OF ALL UNITS SHALL BE DEFINED BY VERTICAL PLANES PASSING THROUGH THE UNIT BOUNDARY AT GROUND LEVEL.
 2. ALL LAND IS SUBJECT TO DEVELOPMENT RIGHTS SET FORTH IN THE DECLARATION.
 3. HORIZONTAL UNIT BOUNDARIES ARE SHOWN HEREON.
 4. VERTICAL UNIT BOUNDARIES ARE AS FOLLOWS:
LOWER ELEVATION - 590
UPPER ELEVATION - 640
 5. THE APPROXIMATE SQUARE-FOOTAGE OF EACH UNIT IS BASED ON THE AREA WITHIN THE HORIZONTAL BOUNDARIES AT GROUND-LEVEL.
 6. GROUND ELEVATIONS RANGE FROM 600 TO 610.



971145003
A.F. NO.

DEI DODDS ENGINEERS, INC.

4205 148th Ave., N.E. Suite 200
Bellevue, Washington 98007
(425) 885-1877 (425) 885-7963 Fax

JOB NO. 96 94

FILED

MAR 25 2009

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

JEFFREY ANDREWS and EILEEN
ANDREWS, husband and wife,

Plaintiffs,

v.

SU HWAN KIM and JANE DOE KIM,
husband and wife,

Defendants and
Third-Party
Plaintiffs,

v.

MICHELE DAVIS,

Third-Party
Defendant.

No. 07-2-06233-3

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

JUDGMENT SUMMARY RE: ANDREWS / KIM

Judgment Summary set forth below:

A. Judgment creditor
B. Judgment debtor

Jeffrey And Eileen Andrews
Su Hwan And Jane Doe Kim

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER: Page 1 of 10

Cogdill Nichols Rein Wartelle Andrews
3233 Rockefeller Ave.
Everett, WA 98201
(425) 259 - 6111 [PH]
(425) 259 - 6435 [FAX]

COPY

- 1 C. Principal judgment amount \$ N/A
- D. Interest to date of judgment \$ N/A
- 2 E. Attorney's fees \$ N/A
- F. Costs \$ N/A
- 3 G. Other recovery amount (Expenses) \$ N/A
- H. Principal judgment shall bear interest at
- 4 12% per annum
- I. Attorney's fees, costs and other recovery
- 5 amounts shall bear interest at 12% per annum
- J. Attorney for judgment creditor Douglas M. Wartelle
- 6 K. Attorney for judgment debtor Kevin Bay
- L. Other

7 JUDGMENT SUMMARY RE: KIM / DAVIS

8 Judgment Summary set forth below:

- 9 A. Judgment creditor Su Hwan And Jane Doe Kim
- 10 B. Judgment debtor Michelle Davis
- C. Principal judgment amount \$ N/A
- 11 D. Interest to date of judgment \$ N/A
- E. Attorney's fees \$ N/A
- 12 F. Costs \$ N/A
- G. Other recovery amount (Expenses) \$ N/A
- 13 H. Principal judgment shall bear interest at
- 14 12% per annum
- I. Attorney's fees, costs and other recovery
- amounts shall bear interest at 12% per annum
- 15 J. Attorney for judgment creditor Kevin Bay
- K. Attorney for judgment debtor Richard Wurdeman
- 16 L. Other

17 INTRODUCTION

18 This matter came before the Court for trial on February
 19 25, 2009 before the Honorable Michael T. Downes. Plaintiffs
 20 appeared by and through their attorney of record, Douglas M.
 21 Wartelle. Defendant Kim appeared by and through his attorney
 of records, Kevin Bay. Third-Party Defendant Davis appeared
 22 by and through her attorney of record, Richard Wurdeman. At

23 FINDINGS OF FACT,
 24 CONCLUSIONS OF LAW,
 AND ORDER: Page 2 of 10

Cogdill Nichols Rein Wartelle Andrews
 3233 Rockefeller Ave.
 Everett, WA 98201
 (425) 259 - 6111 [PH]
 (425) 259 - 6435 [FAX]

1 trial, the court heard oral testimony from witnesses and
2 reviewed the records of the case, trial briefs, post-trial
3 briefs, and stipulations of the parties. The court also heard
4 oral opening and closing arguments from counsel for the
5 parties. Based on the foregoing, and having observed the
6 witnesses who testified at trial and considered the testimony
7 and reviewed the exhibits, the Court now makes the following:

8 **FINDINGS OF FACT**

- 9 1. Andrews, Kim and Davis are owners of three contiguous
10 pieces of property in a single-family development.
11 2. Plaintiffs, Jeffrey and Eileen Andrews, are the owners
12 of, and have title to, Lot '5 in the development
13 commonly known as Baywood Heights. Andrews acquired
14 Lot 5 in Spring of 1998 from the original developer,
15 Avance Group II, LLC.
16 3. Defendant, Su Hwan Kim, is the owner of, and has title
17 to, Lot 6 in the development commonly known as Baywood
18 Heights. Kim acquired Lot 6 in the Summer of 1998 from
19 the original developer Avance Group II, LLC.
20 4. Third-Party Defendant, Michelle Davis, is the owner of,
21 and has title to, Lot 7 in the development commonly
22 known as Baywood Heights. Davis' predecessor in
23 interest had acquired Lot 7 from the original
24 developer, Avance Group II, LLC.
5. The Andrews property (Lot 5) is adjacent to the Kim
property (Lot 6) such that Lots 5 and 6 share a
property line.

- 1 6. The Kim property (Lot 6) is adjacent to the Davis
2 property (Lot 7) such that Lots 6 and 7 share a
3 property line.
- 4 7. The homes owned by Andrews, Kim, and Davis are quite
5 close together, and at places built with zero setback
6 such that the structures are on the lot lines.
- 7 8. As one faces the Andrews home from the street, the Kim
8 home is on the right, located to the east of the
9 Andrews home.
- 10 9. As one faces the Kim home from the street, the Davis
11 home is on the right, located to the east of the Kim
12 home.
- 13 10. Andrews holds title to the strip of land to the east
14 of their home that runs between their home and that of
15 defendant Kim. The Kim home is on the true legal lot
16 line that divides the Andrews and Kim properties.
17 Andrews, according to the plat map and legal lot line,
18 should have access to their backyard by traveling over
19 this strip of land.
- 20 11. Kim holds title to the strip of land to the east of
21 his residence that runs between his home and that of
22 third-party defendant Davis. Kim, according to the
23 plat map and legal lot line, should have access to his
24 backyard by traveling over this strip of land.
12. The developer of the Baywood Heights development
 placed the fences that divide the backyards of Andrews
 and Kim, and the backyards of Kim and Davis, on the
 wrong side of the homes. The fence between the Andrews

1 and Kim properties was not placed on the boundary line
2 shown on the Survey Map and Plans; and similarly, the
3 fence between the Kim-Davis properties was not placed
4 on the boundary line shown on the Survey Map and
Plans.

5 13. As a result of the incorrect fence placement, the
6 Davis lot appeared to increase in size since the Kim
7 and Davis fence was over Kim's property line; this left
8 Kim with no side yard to the east. The location of the
9 Andrews and Kim fence caused Kim to have no side yard
to the east, but a side yard to the west, all of which
is on the Andrews property.

10 14. Also as a result of the incorrect fence placement,
11 the Andrews have no access to their backyard over their
12 own land to the east. The fence on the west side of
the Andrews property was not incorrectly placed.

13 15. Kim may have thought he was crossing over his own
14 property to access his backyard, but in fact that
property was owned by Andrews.

15 16. The Andrews have been accessing their backyard by
16 traversing across the property of their neighbors to
17 the west. In doing so, the Andrews had to walk up the
18 neighbor's driveway, and then follow a pathway that
19 passed within about a foot of the neighbor's front
20 porch (which faces to the east). Andrews had to
21 trespass in order to gain entry into their backyard.

1 17. Davis has had no difficulty accessing any of her
2 property and will have none no matter what the court
3 decides. [RDW]

4 18. The evidence does not establish that the Andrews
5 knew there was a problem as a result of the incorrect
6 placement of the fence between their property and that
7 of Kim when the fence was constructed, nor that Andrews
8 knew at that time that the fence was not located on the
9 true property line. The fence was constructed after
10 the Andrews acquired title to, and took possession, of
11 their property.

12 19. The Andrews clearly do not have ample land of their
13 own on the west side of their house to access their
14 backyard. That strip of land is 18 to 24 inches wide
15 and slopes downward away from their house. Even absent
16 any vegetation, this strip of land does not provide the
17 Andrews with reasonable access to their backyard along
18 the west side of their home.

19 20. The Kim and Davis fence and rockery have been the
20 subject of a summary judgment order determining that
21 they were erected by their common grantor, that they
22 each (or their predecessor in interest) took title with
23 reference to the boundary created thereby, that they
24 each recognized the boundaries created thereby as their
lawful boundary since 1998, and, as a result, they
should remain in place as boundaries created by a
common grantor, and title to the disputed property
should be quieted in the name of Michele Davis.

- 1 21. The common grantor theory does not apply as to the
- 2 Andrews and Kim fence. The evidence on point
- 3 establishes that the fence did not exist when the
- 4 Andrews bought and moved into the property, and that
- 5 the Andrews did not acquire their property with
- 6 reference to the line later created when the fence was
- 7 erected.
- 8 22. If the fence between the Andrews and Kim properties
- 9 is not moved to the boundary line shown on the Survey
- 10 Maps and Plans, Andrews will have no useful access to
- 11 their backyard.
- 12 23. If the fence between the Andrews and Kim properties
- 13 is moved to the boundary line shown on the Survey Maps
- 14 and Plans, and the fence between the Kim and Davis
- 15 properties remains in its current location, then Kim
- 16 will have no useful access to his backyard.
- 17 24. Pursuant to CR 54 (b) this Court has the authority
- 18 to revise the partial summary judgment order that was
- 19 entered prior to trial between Kim and Davis.
- 20 25. As to the strip of land in dispute between the Kim
- 21 and Davis properties, it is Kim who paid for that
- 22 land and has paid taxes on it. Similarly, as to the
- 23 strip of land in dispute between the Andrews and Kim
- 24 properties, it is the Andrews who paid for that land and
- have paid the taxes on it; yet the Andrews have not had
- the enjoyment of a compensatory piece of land on the
- west side of their home.

1 26. To force either the Andrews or Kim to have zero lot
2 lines on both sides of their home is unreasonable, and
3 would leave that party with property which would be
4 exceedingly difficult to sell and its market value
would likely substantially diminish.

5 The Court, having made the foregoing findings of fact,
now reaches the following:

6 **CONCLUSIONS OF LAW**

- 7 1. The common grantor theory does not apply to the
8 property line between the Andrews and Kim properties.
9 2. While the common grantor theory was found to apply to
10 the property line between the Kim and Davis properties
11 on Davis' motion for summary judgment, the Court has
12 authority to revise that order, and does so.
13 3. The equitable and other defenses asserted by Kim
14 against Andrews are not a basis to leave the fence
15 between the Andrews and Kim properties in its current
16 location.
17 4. The equitable and other defenses asserted by Davis
18 against Kim are not a basis to leave the fence between
19 the Kim and Davis properties in its current location.
20 5. Andrews claims are not barred any statute of
21 limitations.
22 6. The fair and equitable resolution of this case requires
the fence between the Andrews and Kim properties to be
moved to the boundary line shown on the Survey Map and
Plans, and similarly, the fence between the Kim and
Davis properties to be moved to the boundary line shown

1 on the Survey Map and Plans (as further shown on Trial
2 Exhibits 8 and 9).

3 7. Title and ownership of the disputed strip of land
4 between the Andrews and Kim properties is confirmed to
5 be held by Andrews.

6 8. Title and ownership of the disputed strip of land
7 between the Kim and Davis properties is confirmed to be
8 held by Kim.

9 9. It is the Order of this Court that the Andrews have the
10 right to move the fence between the Andrews and Kim
11 properties to the boundary line shown on the Survey Map
12 and Plans (as further shown on Trial Exhibits 8 and 9).

13 10. It is further the Order of this Court that Kim has
14 the right to move the fence between the Kim and Davis
15 properties to the boundary line shown on the Survey Map
16 and Plans (as further shown on Trial Exhibits 8 and 9).

17 11. The Court's oral decision of March 5, 2009
18 elaborates upon the above Findings of Fact and
19 Conclusions of Law and where not otherwise
20 inconsistent, the Court's oral decision, a copy of
21 which is attached hereto as Exhibit A, is incorporated
22 herein by reference.

23 THE COURT SO ORDERS.

24 DONE IN OPEN COURT THIS 25 day of March, 2009.

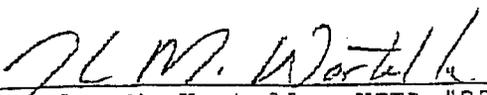


Judge Michael T. Downes

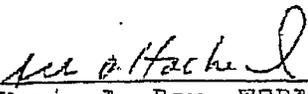
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Presented by:

COGDILL NICHOLS REIN WARTELLE ANDREWS


Douglas M. Wartelle, WSBA #25267
Attorneys for Plaintiffs

Approved for entry, notice of presentation waived:


Kevin A. Bay, WSBA #19821
Attorney for Defendant Kim

Approved for entry, notice of presentation waived:


Richard D. Wurdeman, WSBA #9455
Attorney for Defendant Davis

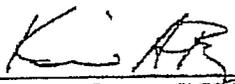
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Presented by:

COGDILL NICHOLS REIN WARTELLE ANDREWS

Douglas M. Wartelle, WSBA #25267
Attorneys for Plaintiffs

Approved for entry, notice of presentation waived:



Kevin A. Bay, WSBA #19821
Attorney for Defendant Kim

Approved for entry, notice of presentation waived:

Richard D. Wurdeman, WSBA #9455
Attorney for Defendant Davis

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER: Page 10 of 10

Cogdill Nichols Rein Wartelle Andrews
3233 Rockefeller Ave.
Everett, WA 98201
(425) 259 - 6111 [PH]
(425) 259 - 6435 [FAX]

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF SNOHOMISH

3 _____

4 JEFFREY ANDREWS and EILEEN)
5 ANDREWS, husband and wife,)
6 Plaintiffs,)
7 vs.)
8 SU HWAN KIM and JANE DOE KIM,)
9 husband and wife,)
10 Defendants and)
11 Third Party Plaintiffs,)
12 vs.)
13 MICHELLE DAVIS,)
14 Third Party Defendant.)

NO. 07-2-06233-3

15 _____
16 TRANSCRIPT OF PROCEEDINGS
17 _____

18 MARCH 5, 2009
19 COURT'S ORAL DECISION

20
21
22 Stephanie Magee, CSR
23 Official Court Reporter
24 Snohomish County Courthouse
25 Everett, Washington 98201
425.388.3274

STEPHANIE MAGEE, OFFICIAL COURT REPORTER, CSR REF 29906

EXHIBIT A

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF SNOHOMISH

3 _____
4 JEFFREY ANDREWS and EILEEN)
5 ANDREWS, husband and wife,)
6 Plaintiffs,)
7 vs.)
8 SU HWAN KIM and JANE DOE KIM,)
9 husband and wife,)
10 Defendants and)
10 Third Party Plaintiffs,)
11 vs.)
12 MICHELLE DAVIS,)
13 Third Party Defendant.)
14

NO. 07-2-06233-3

15 _____
16 TRANSCRIPT OF PROCEEDINGS
17 _____

17 BE IT REMEMBERED that on the 5th day of March 2009,
18 the above-entitled and numbered cause came on before the
19 Honorable Michael T. Downes, one of the judges of the
20 above-entitled courts, sitting in Department No. 2 thereof, at
21 the Snohomish County Courthouse, in the City of Everett, County
22 of Snohomish, State of Washington;
23 The plaintiff was represented by his counsel, Mr.
24 Douglas M. Wartelle, Attorney at Law;;
25 The defendants and third party plaintiffs were

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¶

0305kimODTitle

2 The third party defendant was represented by her
3 counsel, Mr. Richard D. Wurdeman, Attorney at Law;

4 WHEREUPON, the following proceedings occurred:

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STEPHANIE MAGEE, OFFICIAL COURT REPORTER, CSR REF 29906

March 5, 2009

Court's Oral Decision

1 SNOHOMISH COUNTY SUPERIOR COURT
 2 EVERETT, WASHINGTON
 3 MORNING PROCEEDINGS
 4 February 5, 2009

09:11AM 5 THE COURT: This is Andrews vs. Kim, et al,
 6 for the Court to give its findings and conclusions on
 7 the bench trial that was had here last week, which I'm
 8 ready to do at this point.

9 The Andrews, Kims and Davises are owners of three
 09:11AM 10 contiguous pieces of property in a single-family home
 11 condominium-type setup. The homes are quite close
 12 together and at places built with zero setback, so that
 13 the structures are right on the lot lines. As you face
 14 the Andrews home from the street, the Kim home is on
 09:11AM 15 the right on the east side. The Andrews hold title to
 16 a strip of land to the east of their home approximately
 17 five feet wide to Kim's house. In other words, the Kim
 18 house is actually on the legal lot line. Mr. Kim holds
 19 title to a strip of land to the east of his house
 09:12AM 20 approximately five feet towards the Davis house, which
 21 is not on the lot line. Both Andrews and Kim ought to
 22 be, by design, anyway, accessing their back yards from
 23 the front yard by traveling over the strip of land each
 24 owns to the immediate east of their respective homes.

09:12AM 25 The homeowners to Andrews' west are not party to this

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March 5, 2009

1 lawsuit.

2 When the builder of the development put the fences
3 up, they were put on the wrong side of the house. The
4 effect of this is that the Davis lot size appeared to
09:12AM 5 grow by five feet because the Davis-Kim fence was
6 approximately five feet over Mr. Kim's property line,
7 leaving Kim no side yard to the east. The Andrews-Kim
8 fence caused Kim to have no side yard to the east but a
9 five-foot side yard to the west, all of which is on the
09:13AM 10 Andrews' land. Thus, Kim had no access to his back
11 yard over his own land, but he did have access over
12 Andrews' land.

13 Andrews has no access to his back yard over his own
14 land to the east. The builder who put the fence in the
09:13AM 15 wrong place did not do so on the west of Andrews' home,
16 while Kim always thought he was crossing over his own
17 property to get to his back yard when in fact the
18 property was Andrews, Andrews apparently has been aware
19 for quite some time that he has had to go to the
09:13AM 20 property belonging to the neighbor to the west of his
21 property to get into his back yard. I don't have how
22 their name was spelled so I'm just referring to them as
23 the neighbors to the west. When you look at the
24 photographs, he had to walk up the driveway of the
09:13AM 25 neighbors to the west and described the path as

STEPHANIE MAGEE, OFFICIAL COURT REPORTER, CSR REF ⁴29906

March 5, 2009

Court's Oral Decision

1 essentially walking across these people's front porch,
Page 2

2 or within about a foot of their front porch, to get
3 through to his own back yard. Essentially, the Andrews
4 have to trespass to get into their own back yard.

09:14AM 5 Mr. Andrews testified there have been three owners
6 of the house to the west and so far he's been lucky to
7 have good neighbors who haven't complained about him
8 crossing their land to access his own property.

9 Ms. Davis has had zero difficulty accessing any of
09:14AM 10 her property and will have none no matter what the
11 Court decides.

12 It's argued that the Andrews case should be
13 dismissed on the theory that they waited too long to
14 complain after they knew there was a problem. The
09:14AM 15 evidence does not establish, though, that the Andrews
16 knew that there was a problem. Mr. Andrews' testimony
17 was that he originally believed the fence was in the
18 wrong place. He attempted to take some steps to figure
19 it out and got nowhere with the builder or the
09:14AM 20 homeowners association, which would not deal with
21 property disputes. He admitted he thought it was odd
22 that he had no access to his back yard. He explained
23 that he was a first-time home buyer and did not know
24 what to do other than to try to work with the builder,
09:15AM 25 which was unsuccessful, and the homeowners association,

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March 5, 2009

Court's Oral Decision

1 which said they wouldn't handle property disputes.

2 He stated that he did not have proof of the problem
3 until 2007 when he learned of it, ironically, at a

4 homeowners meeting, the very same homeowners
09:15AM 5 association which had been of no assistance in 1998.

6 The fact that a neophyte homeowner may have a
7 belief that there is a problem which he is unable to
8 flesh out at the time does not equal knowledge in the
9 legal sense, necessarily. While a reasonable
09:15AM 10 fact-finder could find such knowledge under the facts
11 of this case, this reasonable fact-finder does not.
12 I'm not persuaded by the evidence that the Andrews knew
13 what the problem was; i.e., that Mr. Kim's fence was on
14 the wrong side of Mr. Kim's house and approximately
09:16AM 15 five feet onto Andrews' land.

16 As to the suggestion that the Andrews have ample
17 land of their own on the west side of their house to
18 access their back yard, they clearly do not. There is
19 a strip of land 18 to 24 inches wide which slopes
09:16AM 20 downward away from the house. Even if there was no
21 vegetation there, that strip of land is nowhere near
22 wide enough for access. The thought of trying to put
23 in a two-foot gate, particularly considering how much
24 of that two feet would be taken up by posts and
09:16AM 25 hardware, honestly borders on being silly.

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March 5, 2009

Court's Oral Decision

1 The suggestion of an adverse possession claim
2 against the neighbors to the west, who have been nice
3 enough to allow the Andrews access, is not well taken
4 for multiple reasons. This is complicated by the fact
09:16AM 5 that the Kim and Davis fence has been the subject of a
Page 4

6 summary judgment order that it should stay where it is
7 on a common grantor theory. The common grantor theory
8 does not work as to the Andrews-Kim fence because the
9 only evidence on the point establishes that the fence
09:17AM 10 was not there when the Andrews bought and moved into
11 the property.

12 So the Court is presented with a situation where
13 neighbors have a problem with land lot lines. The
14 Andrews could have pushed it harder to figure it out
09:17AM 15 back in 1998, but they did not. If I adopt one of the
16 suggestions before me, the Andrews will have no useful
17 access to their back yard except to have lawn mowers
18 and wheel barrels brought through their house. This is
19 not an attractive resolution. If I order that the
09:17AM 20 Andrews-Kim fence be moved to the legal lot line and
21 that the summary judgment order stand for Mr. Kim, then
22 Mr. Kim is in the same unattractive position I just
23 described with regard to the Andrews.

24 Pursuant to Civil Rule 54 (b), this Court has the
09:17AM 25 authority to change the partial summary judgment order.

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March 5, 2009

Court's Oral Decision

1 The neighbors to the west are not a party to this
2 lawsuit and I have no authority over their land at this
3 point. Even if I did, they have apparently done
4 nothing wrong and there has been no misplacement of any
09:18AM 5 boundary marker between the Andrews and their neighbors
6 to the west.

7 So the choices appear to be to leave either Kim or
Page 5

030509KimDone

8 Andrews with no useful back yard access or to order the
9 fences to be moved to comport with the legal lot lines.
09:18AM 10 I recognize that this means that Ms. Davis will lose
11 the use of the five feet of Mr. Kim's property that she
12 has so nicely landscaped. It is Mr. Kim, though, who
13 paid for that land and who has paid the taxes on it,
14 just like the Andrews have paid for the land and the
09:18AM 15 taxes on the strip that Mr. Kim is using. But the
16 Andrews have not even had the enjoyment of a
17 compensatory piece of land on the other side, as have
18 the Kims.

19 To force either the Kims or the Andrews to have
09:18AM 20 zero lot lines on both side of their house is
21 completely unreasonable. Whoever was stuck with such a
22 fate would own property which would be exceedingly
23 difficult to sell and its market value would likely
24 substantially diminish. Who is going to buy the
09:19AM 25 Andrews residence on the hope that the neighbors to the

STEPHANIE MAGEE, OFFICIAL COURT REPORTER, CSR REF 29906

March 5, 2009

Court's Oral Decision

1 west will always be accommodating? What are the
2 Andrews going to do if the current neighbor gets less
3 accommodating or if they sell to someone else and that
4 person won't allow access. Is Mr. Kim supposed to be
09:19AM 5 left with the hope that someone will accommodate him if
6 he were put in the same situation?

7 The only fair and equitable resolution of this case
8 is to move the fences to the legal lot lines. Andrews
9 and Kim already own that land. Ms. Davis does not own

030509KimDone

09:19AM 10 the land she has erroneously had the use of. It is the
11 order of the Court that the fences be moved to the
12 legal lot lines on the lines between the Andrews-Kim
13 property and between the Kim-Davis property.

14 Obviously, I have availed the Court of Civil Rule
09:19AM 15 54 (b) in the making of this ruling and have changed
16 that order which set the common grantor line between
17 Kim and Davis.

18 Counsel, starting with the plaintiff, does anybody
19 have any questions? Do you have any questions,
09:20AM 20 counsel?

21 MR. WARTELLE: I do not, Your Honor. Except
22 as to preparing the final orders.

23 THE COURT: We'll get to that one in a minute.

24 Mr. Bay, do you have any questions?

09:20AM 25 MR. BAY: None, Your Honor.

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March 5, 2009

Court's Oral Decision

1 THE COURT: Mr. Wurdeman?

2 MR. WURDEMAN: I just want to clarify. The
3 Court is setting aside Judge Lucas' summary judgment on
4 the grounds that it was not dispositive of both claims?

09:20AM 5 THE COURT: Yes.

6 Mr. Wartelle, since you are the prevailing party,
7 it falls upon you to prepare the paperwork. How long
8 do you think it's going to take you?

9 MR. WARTELLE: I can have it to opposing
09:20AM 10 counsel by next Wednesday.

11 THE COURT: If I set it for presentation --
Page 7

030509KimDone

12 counsel, if you get it on Wednesday, if I set it for
13 presentation on Friday morning, is that enough time, or
14 do you need more?

09:21AM 15 MR. BAY: I leave Wednesday for a week and a
16 half of depositions out of town.

17 THE COURT: That's fine. So when will you be
18 back?

19 MR. BAY: I'm back that -- that's the 12th.
09:21AM 20 I'm back the third week of March.

21 THE COURT: What day?

22 MR. BAY: I'm back the 23rd.

23 THE COURT: So if I set it for presentation on
24 the morning of the 25th, does that work for everybody,
09:21AM 25 at nine o'clock?

STEPHANIE MAGEE, OFFICIAL COURT REPORTER, CSR REF ¹⁰ 29906

March 5, 2009

Court's Oral Decision

1 MR. WURDEMAN: I believe so, Your Honor.

2 MR. WARTELLE: Yes, Your Honor.

3 THE COURT: This is set for presentation March
4 25th at nine o'clock in the morning.

09:22AM 5 Mr. Wartelle, can you get that to opposing counsel
6 by next Wednesday, electronically?

7 Counsel, if you have any difficulties with what has
8 been proposed, would you make your own edited proposals
9 using strikeouts and very clear additions so I know
09:22AM 10 what has been taken out and what you are adding in?

11 Additionally, if you all agree that the order that is
12 prepared reflects what I said and you just want to sign
13 it and get it up here, that's fine. You don't need to

14 show up.

09:22AM 15 MR. WURDEMAN: Can I clarify just one thing?

16 Maybe it will help us.

17 I assume -- can I assume that the Court is
18 acknowledging that the -- Judge Lucas' summary judgment
19 order resolved all claims between Kim and Davis?

09:22AM 20 THE COURT: No.

21 MR. WURDEMAN: Was there any claim left that
22 it did not resolve?

23 THE COURT: I'm concerned that you can't look
24 at it just piecemeal like that. This is a global
09:23AM 25 problem within these three people. And I think Mr. Kim

STEPHANIE MAGEE, OFFICIAL COURT REPORTER, CSR REF ¹¹ 29906

March 5, 2009

Court's Oral Decision

1 was happy if the lot lines got left five feet one side
2 or the other to his house but he wasn't happy if he got
3 left with nothing on either side. So that's the
4 problem.

09:23AM 5 MR. WURDEMAN: I understand that. What I'm
6 asking, Your Honor, is, because this is something that
7 I think we'll need to address in our findings, is
8 whether or not there was any claims left to be resolved
9 between Kim and Davis at the conclusion of Judge Lucas'
09:23AM 10 summary judgment.

11 THE COURT: I think there was a potential
12 claim. I'm not comfortable saying there wasn't. If I
13 told Mr. Kim you don't have any more lot lines, I don't
14 think that it would be real long before Mr. Kim was
09:23AM 15 back in court saying, hey, wait a minute.

030509kimDone

16 MR. WURDEMAN: I understand that.

17 THE COURT: I think there were potential
18 claims that hadn't been resolved and that is what I
19 think ought to go in the order.

09:24AM 20 MR. WURDEMAN: We can make that a finding?

21 THE COURT: Yes.

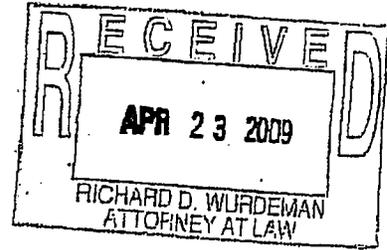
22 (Court recessed at 9:24 a.m.)

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

JEFFREY ANDREWS and EILEEN ANDREWS, husband and wife,	No.07-2-06233-3
Plaintiff(s), vs.	
SU HWAN KIM and JANE DOE KIM, husband and wife, Defendants and Third Party Plaintiffs,	COURT'S ORDER ON THIRD PARTY DEFENDANT DAVIS' MOTION FOR RECONSIDERATION
vs.	
MICHELE DAVIS, Third Party Defendant	

THIS MATTER, having come on before the undersigned Judge of the above-entitled Court on Third Party Defendant Davis' Motion for Reconsideration on or about April 20, 2009;

ORDER ON THIRD PARTY DEFENDANT'S
MOTION FOR RECONSIDERATION- 1

SNOHOMISH COUNTY
SUPERIOR COURT
3000 Rockefeller Avenue, MS 504
Everett, WA 98201

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, the court having reconsidered that evidence admitted at trial, and not considered new information submitted since trial, the third party defendant's motion for reconsideration is denied.

DATED this 20 day of April 2009.



Hon. Michael T. Downes, Judge

ORDER ON THIRD PARTY DEFENDANT'S
MOTION FOR RECONSIDERATION- 2

SNOHOMISH COUNTY
SUPERIOR COURT
3000 Rockefeller Avenue, MS 504
Everett, WA 98201

DECLARATION OF SERVICE

On said day below I emailed and deposited in the US Postal Service a true and accurate copy of the following document: Brief of Appellant in Court of Appeals Cause No. 63507-7-I to the following:

Kevin A. Bay
Ryan Swanson & Cleveland PLLC
1201 3rd Avenue, Suite 3400
Seattle, WA 98101-3034

Douglas M. Wartelle
Cogdill Nichols Rein Wartelle Andrews
3233 Rockefeller Avenue
Everett, WA 98201

Richard D. Wurdeman
320 Dayton Street, Suite 101
Edmonds, WA 9020-3590

Original and copy sent with ABC Legal Messengers for filing with:
Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 17, 2009, at Tukwila, Washington.


Paula Chapler
Talmadge/Fitzpatrick