

No. I-64019-4

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COURT OF APPEALS  
STATE OF WASHINGTON  
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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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Gregory R. Zaputil, a married man as his separate estate; and  
Rudolph Zaputil and Gregory R. Zaputil as co-trustees of the  
Rudolph Zaputil Living Trust U/A dated June 15, 2006,

Appellants

v.

51<sup>st</sup> Avenue, L.L.C., a Washington limited liability company,

Respondent

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BRIEF OF APPELLANT

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## I. INTRODUCTION

This case is about the correct determination of the boundary between plaintiffs/appellants' land and defendant/respondent's land. A boundary that has become uncertain because of a relocated quarter corner monument and a re-drawn legal description.

Appellants ("Zaputil") purchased the south 59 feet of the Tract 5, and all of Tract 6, Young's Half Acre Tracts, in 1978. **CP 41-42.**

Respondent ("51<sup>st</sup>") purchased Lots 2-3 of Tukwila Short Plat No. MF-78-34-SS. **CP 45-51.** Tukwila Short Plat No. MF-78-34-SS, is a subdivision of Tracts 7 and 8, Young's Half Acre Tracts. **CP 62.**

This action concerns the boundary between the Zaputil property and the 51<sup>st</sup> property. Appendix "A" is a map illustrating the respective properties and the boundary.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error:

1. The trial court erred when it determined that the boundary in question must be located according to the revised legal description that was recorded by defendant.

2. The trial court erred when it ruled that the boundary must be determined according to the monument established in 1964.
  3. The trial court erred when it decided that the Lot Consolidation filed by Defendant did not create an issue of fact regarding the true location of the boundary in question.
- B. Issues Pertaining to Assignments of Error:
1. Can a party unilaterally re-write the legal description of its own property in such a way as to annex adjoining property owned by another and then rely on that revised legal description to claim such adjoining property?
  2. Does a re-located quarter section monument, set after the affected section has been sub-divided and streets dedicated, become the monument from which property descriptions within that section are determined, even while the locations of street right-of-ways continue to be determined according to another monument?
  3. Does the recording of a lot consolidation asserting a new legal description create an issue of fact regarding the true location of boundaries affected by such recording?

not exist when 52<sup>nd</sup> Ave. S. was created, its location was measured from the Reference Monument.

In 1964, a King County surveying crew relocated the quarter corner and set a new monument for the quarter corner (the 1964 Monument), retaining the existing monument as the Reference Monument. **CP 57.**

Tracts 5 and 6, Young's Half Acre Tracts, were short platted in 1977, Tukwila SP 77-44, to create three lots out of the two tracts. **CP 36-39.** Zaputils now owns two of the three lots created in that short plat, comprising the south 59 feet of the Tract 5, and all of Tract 6, Young's Half Acre Tracts. **CP 41-41.**

Lots (Tracts) 7 and 8, Young's Half Acre Tracts, were short platted in 1978, Tukwila SP 78-34, to create three new lots out of those two tracts, with an easement to Lot 3. **CP 62-65.** 51st now owns two of those three lots. **CP 45-51.**

In 1998, 51st purchased Lots 2 and 3 of Tukwila SP 78-34, the south 22 feet of Lot (Tract) 9, Young's Half Acre Tracts, and all of Lot (Tract) 10, Young's Half Acre Tracts. **CP 45-51.**

Later in 1998, 51st recorded Lot Consolidation L 98-0041. **CP 52-55.** This document purported to be a mere consolidation of the lots 51st

had purchased earlier in the year, but rather than merely consolidating all the separate legal descriptions (Lot 10 and south 22 feet of Lot 9, Young's Half Acre Tracts, and Lots 2 and 3, Tukwila SP 78-34) 51st created an entirely new legal description. Instead of referring to the recorded plats, 51st created a new metes and bounds description based on the dimensions used in the Plat of Young's Half Acre Tracts, but starting from the relocated quarter corner from 1964 (the 1964 Monument), instead of the reference monument on which the locations of the streets is based. **CP 54.** This resulted in a shift to the east in all the boundaries described by 51st. As a result, 51st is now claiming ownership of several feet of the Zaputil land and there is a void along the west side of 51st's land between the legal description claimed by 51st and the street right-of-way. **CP 55.**

51<sup>st</sup> had its property surveyed in 2008 and survey markers were placed several feet inside the Zaputil land, leading Zaputil to commence the present litigation.

All streets bordering the properties have been located and measured using the Reference Monument. **CP 77 and 99-100** (refers to westerly monument, aka Reference Monument, used for locating I-5 and 52<sup>nd</sup> Ave. S.).

#### IV. SUMMARY OF ARGUMENT

The lots in question were created by and from plats that were made before the County placed a new quarter corner monument in 1964. The County retained the quarter corner monument that had been placed sometime before 1964, which had been the only monument prior to 1964 and from which the locations of all the streets continue to be measured, as the Reference Monument. There is no dispute that the Reference Monument continues to be the monument used for locating the streets in the area, including those streets that were dedicated in the original plat and 52<sup>nd</sup> Ave. S. (which was created by condemnation in 1963). **CP 21-23.**

51<sup>st</sup> created a new legal description for its property (abandoning the subdivision descriptions that were used in the deeds it received) using instead a metes and bounds description that was measured from the 1964 Monument (referred to by the trial court as the East Monument) rather than the Reference Monument (referred to by the trial court as the West Monument) which was the only monument existing prior to 1964.

51<sup>st</sup> now claims that the re-located monument is the monument from which all properties in the plat must be measured, but that the reference monument is the monument from which all streets in the plat

must be measured. 51<sup>st</sup>, by recording its “lot consolidation” with the new legal description it created, is claiming that the boundary between its property and the Zaputil property lies several feet to the east of where it would lie if the Reference Monument was used. This results in the transfer of several feet of land from Zaputil to 51st along 51st’s east property line, and also leaves a similar size area along 51st’s west property line which is neither in the street right-of-way (which 51st says must be determined using the Reference Monument) nor in 51st’s property (which it says must be determined using the 1964 Monument).

51st’s argument comes to the conclusion that the streets (which were all established before 1964, using what is now the Reference Monument) all are properly located by measuring from the Reference Monument, but the lots (created in the same plats that created the street right-of-ways) that are bounded by those streets must be located by measuring from the 1964 Monument. The result is absurd, and if applied to all lots in the affected plats would wreak havoc on properties in the area, which have been developed according to property lines that were established well before the 1964 monument was placed.

51st's filing of its "lot consolidation" in 1978, created uncertainty about the location of the boundary between the parties respective properties which the court must determine. Because of the question raised by 51st regarding the proper measurement of the lots such determination should be made only after commissioners have been appointed and have reported to the court with their recommendations regarding correct placement of the boundary.

## V. ARGUMENT

### Standard of Review.

This case comes before the Court of Appeals on a final judgment, dismissing all claims, made on 51st's motion for summary judgment. "Summary judgment rulings are reviewed de novo." *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008). The appellate court engages in, "... the same inquiry as the trial court ...", and views, "... the facts and all reasonable inferences in the light most favorable to the non-moving party." *Stevens v. Brink's Home Sec.*, 162 Wn.2d 42, 46-7, 169 P.3d 473 (2007). When the facts of this case are viewed in the light most favorable to Zaputil (the non-moving party on the summary judgment

motion) it seems clear that there is uncertainty as to the location of the boundary in question and that determination of the correct boundary cannot be made as question of law.

RCW 58.04.020

The purpose of Chapter 58.04 of the Revised Code of Washington is to provide an alternative procedure for determining boundary lines, “when they cannot be determined from the existing public record and landmarks or are otherwise in dispute.” RCW 58.04.001. There can be no doubt that boundary in question is in dispute.

“Whenever a point or line determining a boundary between two or more parcels of real property cannot be identified from the existing public record, monuments, and landmarks, **or is in dispute** (emphasis added), the landowners affected by the determination of the point or line may resolve any dispute and fix the boundary point or line by one of the following procedures: (subsection one omitted) (2) If all of the affected landowners cannot agree to a point or line determining the boundary between two or more parcels of real estate, any one of them may bring suit for determination as provided in RCW 54.04.020.” RCW 58.04.007. The

two property owners in this case are indisputably in dispute as to the correct location of their boundary, and there is no question that they cannot agree on the point or line determining the boundary between their respective parcels.

A. Assignment of Error Number One

The trial court erred when it determined that the boundary in question must be located according to the revised legal description that was recorded by defendant. Can a party unilaterally re-write the legal description of its own property in such a way as to annex adjoining property owned by another and then rely on that revised legal description to claim such adjoining property?

When 51<sup>st</sup> bought its property it received deeds that described the property as Lot 2 of Tukwila Short Plat 78-34-SS and an easement over Lot 1 of said Short Plat, **CP 47**, and Lot 10 and a portion of Lot 9, Young's Half Acre Tracts plus Lot 3 of the same Short Plat and an easement over Lots 1 and 2 of said Short Plat, **CP 51**. None of the property it obtained was described by metes and bounds. The short plat referred to is found at **CP 62-65**, and is described in the Short Plat

document as a subdivision of Lots 7 & 8, Young's Half Acre Tracts, **CP 62**. The map of the Short Plat (**CP 63**) shows measurements and bearings for the lots, apparently surveyed from the quarter corner, but does not call out a distance from the quarter corner to the lot and at least with respect to the east-west direction (the measurement at issue in this case) uses the exact dimension shown in the plat of Young's Half Acre. **CP 34**.

When 51<sup>st</sup> filed its "lot consolidation" it abandoned the lot and block descriptions contained in the deeds it received (**CP 53**), and instead created a metes and bounds description. (**CP 54**). That created confusion as to the true description of the property because the metes and bounds description used by 51<sup>st</sup> was measured from the 1964 Monument, not the Reference Monument that was used as the quarter corner prior to 1964, without any attempt to adjust for the fact that the plats had obviously been made with a different reference point than the 1964 Monument and the streets had been already been established using the Reference Monument..

While there does not appear to be any published decisions dealing with the same issue, the general rule is that the description in the plat governs. See *Erickson v. Wick*, 22 Wn.App. 433, 436, 591 P.2d 804 (1979). In the instant case, 51<sup>st</sup> substituted its metes and bounds

description for the plat description raising a question of where that metes and bounds description should start from. In doing so it used the 1964 Monument (a monument that did not even exist when the lots were platted, or the streets created), rather than using the Reference Monument, from which 51<sup>st</sup> agrees that the streets must be measured. By doing so, it substituted its own interpretation of the effect of the 1964 Monument for the descriptions that were used in the plat, and when the various streets were dedicated or created. It seems evident that the metes and bounds of the plat description must be measured using the monuments that were in place when the plat description was created.

The metes and bounds description created by 51<sup>st</sup> did not deserve the preclusive effect given it by the trial court. Even though it appears to be a matter of first impression, it seems evident that a party cannot be allowed to simply substitute a metes and bounds description for a lot and block description created in a recorded plat then claim that the metes and bounds description is superior.

In the present case, the trial court ruled, in effect, that the metes and bounds description created by 51<sup>st</sup> is superior to the lot and block descriptions created by the plats and governs determination of the property

boundaries. If that was the law in Washington the consequences would be horrendous as property owners could write and record legal descriptions based on their own self serving interpretations of boundaries, and gain conclusive authority by doing so.

B. Assignment of Error Number Two

The trial court erred when it ruled that the boundary must be determined according to the monument established in 1964. Does a re-located quarter section monument, set after the affected section has been sub-divided and streets dedicated, become the monument from which property descriptions within that section are determined, even while the locations of street right-of-ways continue to be determined according to the previous quarter section monument (now the reference monument)?

The trial court explained its decision in the order being appealed by including several findings. Finding number 6 was that Defendant did not create an issue of fact in altering their external boundaries based on the 1964 monument. That finding goes along with finding number 1, that the boundary was not uncertain because the 1964 monument was not uncertain, but contradicts finding number 1 in that finding number 6 does

recognize that the lot consolidation did in fact alter the external boundaries of Defendant's property, raising the question of how can they alter the external boundaries of their property without creating uncertainty as to the boundaries of the neighboring properties.

The trial court also found (finding number 4) that there was a potential dispute as to whether the lots need to be measured from the west monument (the Reference Monument), but found ultimately that there was in fact no dispute because it was undisputed that the 1964 Monument is the quarter corner now established by the county as the correct location of the quarter corner. That finding apparently relies on the erroneous legal conclusion that a later placed monument will control over the original placement of the boundaries. See *DD&L, Inc. v. Burgess*, 51 Wn.App. 329 335, 753 P.2d 561 (1988).

Finding number 5 is a further attempt to explain the trial court's reasoning, but is a finding that was both unwarranted and misstated the case. In finding number 5, the trial court states that Plaintiff's motion for the appointment of commissioners was actually a request that the commissioners re-survey the location of the quarter corner. No such request appears in the motion, or in the complaint. In both, the request is

that commissioners be appointed to determine where the boundary properly lies, a determination that could require apportionment if there is a discrepancy between the measurements shown on the original plat and those found on the ground, based on the existing monuments, but would not require the commissioners to resurvey the location of either monument. The possibility that apportionment will be required can be seen by comparing the distance between the Reference Monument and the 1964 Monument, to the affect that change would have on the width of the Zaputil property<sup>1</sup>.

“What are the boundaries is a question of law, and where the boundaries are is a question of fact.” *DD&L, Inc. v. Burgess*, 51 Wn.App. 329 335, 753 P.2d 561 (1988). The question of law in this case is, what controls determination of the boundaries in this plat? Is it the Reference

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<sup>1</sup>The 1964 Monument is set either exactly 10.00 feet east of the Reference Monument, **CP 57**, or 10.92 feet east by northeast of the Reference Monument, **CP 137**. The Zaputil property was platted with a depth (east-west) of 126 feet. **CP 34**. With 30 feet taken out for the right-of-way of 52<sup>nd</sup> Ave. S. (**CP 99-100, 206-210**), that would leave the Zaputil property with a depth (east-west) of 96 feet. If the 1964 Monument is located exactly 10 feet east of the Reference Monument, the Zaputil property would be reduced to a depth (east-west) of exactly 86 feet. If the 1964 Monument is actually located 10.92 feet ENE of the Reference Monument, the Zaputil property would be reduced to a depth of not less than 85.08 feet, nor more than 86 feet. But the various surveys submitted by 51<sup>st</sup> which were done using the east monument, all of which preserve the full platted depth (east-west) of the 51<sup>st</sup> property, result in varying depths (east-west) for the Zaputil property of, 85.23 feet, 86.19 feet or 87.79 feet, **CP 35**. 87.786 or 88.453, **CP 40**.

Monument, the monument that everyone agrees controls the boundaries of the streets created in the plat? Or is it the 1964 Monument, used by 51<sup>st</sup> when it wrote a new legal description for its “lot consolidation”?

The key inquiry is how were the boundaries determined at the time the plat was made, not where new and modern surveys would place those boundaries. See *DD&L, Inc.*, supra at 335. 51<sup>st</sup>'s arguments that the 1964 Monument is the true quarter corner, and must therefore be the point from which the plat was to be measured, does not fit with the universal recognition of the Reference Monument as the point from which all the streets created by reference to the plat must be measured. Nor does it fit with the fact that the 1964 Monument clearly did not exist when the plat was created many decades earlier. Nor does it explain why the Reference Monument, which existed at least early enough to become the reference point from which the streets created in the plat were measured, would not have been the monument relied upon when the property was platted.

The mischief arising from substituting a later monument is apparent in the present case. The streets abutting 51<sup>st</sup>'s land on the west and Zaputil's land on the east were all dedicated based on the plat. 51<sup>st</sup> Ave. S., was described in the plat as being the west 20 feet of the section.

**CP 34.** 52<sup>nd</sup> Ave. S. was described as being centered on the boundary between Tracts 3-4 and 5-6 of Young's Half Acre Tracts. **CP 99-100.** Both streets were surveyed and described prior to 1964, using the Reference Monument, based on the plat from which they were created. 51<sup>st</sup> agrees that those streets did not move simply because of the creation of the 1964 Monument, but then argues that the lot boundaries based on the same plat did move because of the 1964 Monument. If 51<sup>st</sup> is correct, then the western boundary of its property (the boundary along 51<sup>st</sup> Ave. S.) is located 20 feet east of the 1964 Monument, putting it 30 feet east of the Reference Monument, but the east margin of 51<sup>st</sup> Ave. S. (the side along the 51<sup>st</sup> property) is located 20 feet from the Reference Monument, putting it only 10 feet from the 1964 Monument. That would have the effect of leaving a ten foot gap between the western boundary of 51<sup>st</sup>'s land and the east margin of 51<sup>st</sup> Ave. S.

The question of whether it is the Reference Monument or the 1964 Monument which controls the location of the various lots in the plat is a question of law. The trial court got the answer wrong when it ruled that the 1964 Monument controls the plat. That error must be corrected.

The question of exactly where the boundary lies between the Zaputil property and the 51<sup>st</sup> property is a question of fact. That question can be answered only by a fact finding, assisted by a report of commissioners, as to the correct location of that boundary. It cannot be answered as a simple question of law and the trial court erred when it decided that question by dismissing Zaputil's action. This question needs to be remanded to the trial court for a proper fact finding process.

C. Assignment of Error Number Three

The trial court erred when it decided that the Lot Consolidation filed by defendant did not create an issue of fact regarding the true location of the boundary in question. Does the recording of a lot consolidation asserting a new legal description create an issue of fact regarding the true location of boundaries affected by such recording?

The lot consolidation filed by 51<sup>st</sup> shows on one page the legal descriptions of its property as taken from the deeds it received (**CP 53**) and on the next page the "New Legal Description" drafted for its lot consolidation. (**CP 54**) The problem is that instead of simply combining the lot and block legal descriptions from the deeds it received, 51<sup>st</sup> wrote a

metes and bounds description starting from the 1964 Monument. That is a problem because of the fact that the 1964 Monument did not exist when the lots were platted and the streets abutting both properties were located according to the Reference Monument, not the 1964 Monument.

Interestingly, 51<sup>st</sup> kept the lot and block method of describing the neighboring properties when it added descriptions of various easements, rather than describing those easements by their metes and bounds.

The result is that there is a public record (the lot consolidation) claiming a metes and bounds description for the 51<sup>st</sup> property, which is at variance with the locations of the streets (which were established in the original plat for 51<sup>st</sup> Ave S., and by reference to the original plat for 52<sup>nd</sup> Ave. S.), and at variance with the original plat which was laid out before the 1964 Monument even existed.

As recognized by the trial court in its finding number 6, 51<sup>st</sup> altered the legal description of its property when it filed its lot consolidation. That new legal description was measured from a monument that did not exist when the property was platted resulting in a discrepancy between the description of the 51<sup>st</sup> property and the location of 51<sup>st</sup> Ave. S., and creating a conflict between the description of the 51<sup>st</sup> property and the

description of the Zaputil property. That filing cast the boundary between the 51<sup>st</sup> property and the Zaputil property into uncertainty.

## VI. CONCLUSION

The short plats that created the adjoining lots of the 51<sup>st</sup> property and the Zaputil property were created by reference to the plat of Young's Half Acre Tracts. That plat was created by reference to the plat of Seattle Land Company's 5 Acre Tracts. Both of those plats were created before the 1964 Monument was placed.

The streets in the area, most immediately 51<sup>st</sup> Ave. S. and 52<sup>nd</sup> Ave. S., were created by reference to the plats<sup>2</sup> and located by measurement from the Reference Monument. The Reference Monument being the only monument that existed at the time.

The lot consolidation recorded by 51<sup>st</sup> has created confusion and uncertainty regarding the location of the boundary between its property and the Zaputil property. That confusion is exacerbated by the fact that it

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<sup>2</sup>51<sup>st</sup> Ave. S., was created in the plat of Seattle Land Company's 5 Acre Tracts, as the west 20 feet of the quarter section, and carried through as such in the plat of Young's Half Acre Tracts. 52<sup>nd</sup> Ave. S., was created by condemnation in 1963, as a 60 right of way centered between Lots 3-4 and Lots 5-6 of Young's Half Acre Tracts. The location of both has been measured and determined only from the Reference Monument.

appears from various surveys that the measurements on the ground do not precisely match the measurements set forth in the plat. The Zaputils are entitled to an order appointing referees to advise the court as to the location of that boundary and to have the court determine the correct location of that boundary.

Appellants ask that the trial court's order dismissing their case be reversed and that this matter be remanded to the trial court for the appointment of commissioners and further proceedings, with instructions to the trial court as to which monument (the Reference Monument or the 1964 Monument) is the proper point from which the lot boundaries are to be measured.

Respectfully submitted, September 29, 2009.



Gerald F. Robison, WSBA #23118

Attorney for Appellant.



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11 COURT OF APPEALS, DIVISION 1  
13 OF THE STATE OF WASHINGTON

15 Gregory R. ZAPUTIL, and married man as )  
16 his separate estate; and, Rudolph Zaputil )  
17 and Gregory R. ZAPUTIL as Co-Trustees )  
18 of the RUDOLPH ZAPUTIL LIVING )  
19 TRUST U/A DATED JUNE 12, 2006, )  
20 Plaintiffs. )

21 vs. )

23 51ST AVENUE, L.L.C., a Washington )  
24 limited liability company, )  
25 Defendant. )

No. I-64019-4

DECLARATION OF SERVICE OF  
BRIEF OF APPELLANT

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27 The undersigned declares that on September 29, 2009, I caused to be served the foregoing  
29 document to: The Court of Appeals, Division 1 (Original, Copy) and Christina Mehling of VSI  
31 Law Group (Copy).

- 33 \_\_\_\_\_ via hand delivery ( \_\_\_\_\_ )  
34  via first class mail, postage prepaid  
35 \_\_\_\_\_ via facsimile  
36 \_\_\_\_\_ via e-mail

37  
DECLARATION OF SERVICE OF  
BRIEF OF APPELLANT

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I declare under penalty of perjury under the laws of the State of Washington on October 1, 2009,  
at Burien, Washington.



Elisabeth Olivieri  
Assistant