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No. 66655-0-I

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

RICHARD AND SHARON CALLAGHAN, husband and wife,

Appellants,

v.

LINDA A. HADLEY aka LINDA A. MORROW, Trustee of the Linda A. Morrow Trust; JOHN H. HADLEY and LINDA A. HADLEY, husband and wife,

Respondents.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Because this is an appeal from the trial court's summary judgment, this Court reviews the case *de novo*, "performing the same inquiry as the trial court." Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Furthermore, the Court has

> the authority to determine whether a matter is properly before it, and to perform all acts necessary or appropriate to secure the fair and orderly review of a case. RAP 7.3. In addition, the court may waive the rules of appellate procedure when necessary to "serve the ends of justice". RAP 1.2(c).

Kruse, 121 Wn.2d at 721.

In their response brief, Respondents John and Linda Hadley recite long passages of the trial court's oral ruling and make a series of procedural arguments to defend the trial court's summary judgment. This is insufficient, however. Two legal flaws invalidate the lower court's rulings: (1) viewing all relevant evidence in Appellants Richard and Sharon Callaghan's favor, substantial evidence proves the elements of acquiescence, and (2) the trial court inappropriately excluded relevant evidence from consideration. The trial court prematurely, and inappropriately, decided this case on summary judgment.

I. Substantial Evidence Supports Acquiescence To A Defined Boundary

The Hadleys' core argument against acquiescence is that the parties did not recognize a defined line on the ground. (Response Brief at 32) ("established line on the ground"). But the evidence in the record, viewed in the Callaghans' favor, shows just the opposite. Eight facts establish that the Hadleys' predecessors recognized and cultivated a boundary line on the eastern edge of the swale created by the original drain line.

A. The Boundary Was Set With The Original Drain Line

First, William McGinnis' original drain line either established or confirmed the recognized boundary. The Washington Real Property Deskbook, cited by the Hadleys, defines the essential features of acquiescence.

> When a boundary has been defined in good faith by the then-interested parties and thereafter is acquiesced in and acted upon, *and improvements are made with reference to the boundary over a long period of time*, such a boundary will be considered the true dividing line and will govern the property rights of adjoining landowners.

Washington Real Property Deskbook, § 70.3(5)(a) (3d. Ed. 1996) (emphasis added). For more than 40 years, a substantial drain line has evidenced the agreed boundary between Lots 6 and 7 on

Juniper Beach Road. This was an improvement made with reference to the boundary over a long period of time.

Since at least 1971, before the Callaghans and Hadleys became owners, William McGinnis installed and maintained a drain line on his property, Lot 7. (11/6/09 Hanson Dec. ¶ 18; CP 629) This is now the Callaghan property. The drain line mostly served his lot. Only McGinnis maintained the line. A reasonable inference from this undisputed fact is that McGinnis built the line on what he believed was his property, and his neighbor on Lot 6 agreed or did not protest.

B. The Eastern Edge Of The Swale Marked The Boundary

Second, the installed drain line created the swale that marked the eastern edge of McGinnis' property. Hans Berg, his daughter Heidi, and the Callaghans all recognized the same boundary between Lots 6 and 7: five feet east of the bottom of the swale. In other words, the boundary was the eastern edge of the swale. Underneath the swale was the most compelling evidence of the parties' understanding – a drain line serving McGinnis' home and lot. The swale was a physical line on the ground marking the boundary.

C. An Iron Bar Marked The Boundary At The Top Of The Bluff

Third, an iron rod marked the boundary. To locate the buried pipeline (and the boundary), the Callaghans and the Bergs referred to an iron bar set on the bluff. Describing a picture he took of the bar, exhibit I to his November 2009 declaration, Richard Callaghan stated,

> this picture (taken in September 2007) shows the original rod marked with a blue tie, and the cedar fence installed by myself in 1993. The rod marked with a blue tie was placed on the recognized property by myself and has not moved since then. This post marked the East side of the Swale, which was removed when I replaced the drain line in 1997.

(11/06/09 Callaghan Dec. ¶ 12(i); CP 635-636).

Later, Callaghan explained how he set the bar.

> There was an obvious boundary line. There was a rod at the bluff edge up to which an old east-west split rail fence of Callaghans' can be seen. There was a large 12-inch diameter tree 110 feet north of the rod. The rod and tree are aligned on a true North-South compass line, understanding there is a magnetic declination from magnetic North. There is another large 14-inch diameter tree 15 feet further north on the same line.

(11/30/09 Supp Callaghan Dec. ¶ 6; CP 485).

Randy Stuart, the Berg's tenant and caretaker of Lot 6 from 1985 - 1997, confirmed this was the boundary marker. "During my time living on the Defendant's property, there has always been a metal post near the bluff's edge, which marked the recognized property line." (11/06/09 Stuart Dec. ¶ 6; CP 631). Stuart needed to know the property boundary – he was responsible for mowing the lot and maintaining the yard. (11/06/09 Stuart Dec. ¶ 3; CP 630-631). He mowed up to the line marked by the metal rod.

D. Callaghan Maintained West Of The Line And Berg Maintained East

Fourth, for more than 10 years Callaghan and Berg maintained their lots up to the eastern edge of the swale. As Mr. Callaghan stated,

> my predecessors in interest and I were the only parties to ever maintain the landscaping and the drain line on the disputed property. On the upper portion of the property, this landscaping included installing rockeries around the Holly trees and a foot path around my garage, mowing, planting of bushes, pruning trees, leveling the ground and general yard maintenance. Since there was a drainline on the property, we are not allowed to plant trees or build a structure on the property.

(11/30/09 Supp. Callaghan Dec. ¶ 3; CP 485).

Both Heidi Hanson and Randy Stuart confirmed landscaping only up to the eastern edge of the swale. Ms. Hanson stated,

> There was a North-South line of Holly trees that were further West of the property line on the West (1250) side of the ditch.
>
> The Holly trees were planted by a former owner of 1250, William McGinnis, and have always been maintained by the 1250 property owner.
>
> My family never cut the grass or did any tree or yard maintenance west of the recognized property line. My family never utilized the property West of the recognized property line for any reason.

(11/06/09 Hanson Dec. ¶¶ 8-10; CP 628). Mr. Stuart mowed and landscaped only up to the recognized line – the eastern edge of the swale. (6/30/09 Stuart Dec. ¶ 5; CP 631) ("I never cut the grass West of the recognized property line or near the Holly trees").

E. An Aluminum Pipe Marked The Boundary Below The Bluff

Fifth, an embedded large-diameter aluminum pipe marks the recognized boundary down the bluff to the beach. (Opening Brief at 25) (11/06/09 Stuart Dec. ¶ 7; CP 631). The Hadleys do not dispute this evidence, except to name it "the so-called aluminum pipe". (Response Brief at 35).

F. The Hadleys Built A Fence On The Line

Sixth, in November 2005, the Hadleys marked off the recognized line, installed a flower bed, and planted a row of trees on the line. A year later they put a wire fence along the boundary.

Richard Callaghan describes exhibits f & g to his declaration as pictures

> taken in November 2005 showing how the Hadleys chalked out the boundary line and removed 8 feet for their flower bed. The Hadleys marked the ground themselves with no direction from us. This picture is taken looking North.

(11/30/09 Supp Callaghan Dec. ¶¶ 12(f)&(g); CP 487). A year later, the Hadleys built a fence on the marked line, pictured in exhibit (e). (11/30/09 Supp. Callaghan Dec. ¶ 12(e); CP 487). The line of occupation, landscaping, and the various markers created a boundary sufficiently clear that the Hadleys could build a fence on it. This is the definition of an established line on the ground.

G. Aerial Photographs Show The Line Of Occupation

Seventh, aerial photographs of the two lots show a clearly delineated area over the buried drain line. In his summary judgment declarations, Mr. Callaghan submitted images from Google Earth displaying the disputed area. (11/30/09 Supp. Callaghan Dec. ¶¶ 12(h) & (i); CP 487). The Callaghans supplemented these images to show the location and recognition of a drain line easement through the disputed area. (Exhibits A – D to 11/12/10 Callaghan Dec.; CP 123-126). These photographs document the line of occupation.

H. Richard Callaghan Replaced The Drain Line At The Same Location

Finally, eighth, Mr. Callaghan replaced the drain line in the same location to protect his property from erosion.

> The aerial photographs show the general path that the drain line follows – between the two rows of trees. Also, the photographs show that the drain line goes through a heavily vegetated area on the bluff to its outlet on the beach. This was the lay of the land when I bought my property in 1988, and it was so in 1997 when I replaced the drain line.
>
> ...When I replaced the drain line, I ran it exactly in the swale and as a result, smoothed the surface. The swale no longer exists because the drain line construction filled it up. But the southern edge of the swale was marked by a rebar rod at the bluff edge, and replaced after installation of the new drain line.

(11/12/10 Callaghan Dec. ¶¶ 13-14; CP 119). In 1997, the work on the property had come full circle. Mr. Callaghan replaced the drain line that his predecessor, William McGinnis, had installed. Both construction projects represented "improvements...made with reference to the boundary over a long period of time." Washington Real Property Deskbook, § 70.3(5)(a).

The Hadleys dispute this evidence, claiming that it does not "refer to a certain, well defined, physically designated line." (Response Brief at 36) (emphasis original). Given that the Hadleys built a fence on this line with no help from the Callaghans, the line

was defined enough for the Hadleys to follow. Furthermore, viewing the evidence in favor of the Callaghans, before 1997, the eastern edge of the swale marked the boundary from the north to the edge of the bluff. Below that point, the aluminum pipe was the boundary marker.

After 1997, the planted trees along Hadley's fence, iron rod, and landscaping line of occupation clearly showed the line on the ground. The aerial photographs document this line of occupation.

Next, contrary to the Hadleys' assertion, Washington law does not require a fence to mark the boundary. In Merriman v. Cokely, 168 Wn.2d 627, 630, 230 P.3d 162 (2010), the Washington Supreme Court reiterated the legal standard for acquiescence.

> A party claiming title to land by mutual recognition and acquiescence must prove (1) that the boundary line between two properties was "certain, well defined, and in some fashion physically designated upon the ground, *e.g., by monuments*, roadways, fence lines, etc."; (2) that the adjoining landowners, in the absence of an express boundary line agreement, manifested in good faith a mutual recognition of the designated boundary line as the true line; and (3) that mutual recognition of the boundary line continued for the period of time necessary to establish adverse possession (10 years).

Merriman, 168 Wn.2d at 630. (emphasis added). The Court specifically confirmed monuments are an acceptable method to mark a boundary.

Parties can recognize a boundary simply by landscaping up to the recognized line. As the Supreme Court held,

> it is sufficient to bring the doctrine into play if the adjoining parties in interest have, for the requisite period of time, actually demonstrated, by their possessory actions with regard to their properties and the asserted line of division between them, a genuine and mutual recognition and acquiescence in the given line as the mutually adopted boundary between their properties. This approach is founded upon the truism that actions are often, if not always, stronger talismans of intentions and beliefs than words.

Lamm v. McTighe, 72 Wn.2d 587, 593, 434 P.2d 565 (1967). Twice the owners of Lot 7 have invested substantially to build a drain line to serve their property. Twice the owners of Lot 6 have acquiesced. Only after a survey revealed that the drain line is on Lot 6 was the boundary in question. Long before the Hadleys purchased the property, the owners of Lots 6 and 7 "actually demonstrated, by their possessory actions" that the recognized line ran along the eastern edge of the swale, 5 feet from its midpoint.

Finally, the Hadleys' reliance on Merriman undermines the trial court's summary judgment. In Merriman, the Supreme Court

affirmed the trial court's judgment *after a bench trial.* Merriman, 168 Wn.2d at 630 ("after a bench trial, the court determined that the Merrimans failed to prove adverse possession or mutual acquiescence by clear and convincing evidence"). It rejected evidence of survey stakes because they were hidden in underbrush. Here, the line of occupation was obvious, and the trial court improperly weighed the Callaghans' evidence of acquiescence and found it lacking. Viewing the evidence in the Callaghan's favor, a well defined line on the ground existed for over 40 years.

II. The Trial Court Improperly Excluded Relevant Evidence

Because acquiescence hinges on where a landowner acknowledges a boundary to be, the landowner's statements are highly relevant. Here, the trial court excluded Hans Berg's statements as violating the dead man's statute and hearsay. Both rulings were errors of law.

A. Only Heidi Hanson Had Standing To Assert The Dead Man's Statute

1. This Court Appropriately Rules On The Issue

The Hadleys defend the trial court's application of the dead man's statute on two grounds: (1) the Callaghans cannot raise the

issue of standing on appeal; and (2) the Hadleys' have standing to plead the statute. (Response Brief at 22-23). Neither argument is persuasive.

First, the Callaghans raised the issue of standing in the trial court. Although the Callaghans objected to the trial court's application of the dead man's statute on summary judgment, they did not mention the word standing. They raised it later on the Hadley's trespass claim. (11/29/10 VRP 46) ("the Hadleys don't have standing to plead the Dead Man Statute because they're not related to Berg"). The Court appropriately reviews the argument on appeal. The Callaghans argued on summary judgment that the dead man's statute did not apply and that Richard Callaghan's testimony was relevant and admissible. They made the necessary claim of error – that the dead man's statute did not exclude Mr. Callaghan's testimony. The full standing argument came later, and the trial court rejected it. (11/29/10 VRP 45) ("I don't think that's a correct statement of the law, counsel").

Second, the Callaghans' argument on appeal defines the error more particularly, namely that the Hadleys are not an adverse party and cannot invoke the statute. Even if the Court considers this a new argument, it may still review it. See Lunsford v.

Saberhagen Holdings, Inc., 139 Wn. App. 334, 338, 160 P.3d 1089 (2007) ("if an issue raised for the first time on appeal is "arguably related" to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal").

Third, under RAP 2.5(a), the Court appropriately reviews the argument in the interests of justice. As the Supreme Court ruled in Kruse v. Hemp, "the court may waive the rules of appellate procedure when necessary to serve the ends of justice." Kruse, 121 Wn.2d at 721. Here, the Callaghans lost their right to trial on evidentiary grounds. To decide this case on the merits, the Court appropriately reviews whether the trial court improperly excluded Mr. Callaghan's testimony.

Fourth, this issue will arise again on remand. When a case must be retried, or here, tried for the first time, appellate courts appropriately provide guidance on legal errors.

> As a general rule, an appellate court will not consider arguments raised for the first time on appeal. However, because a new trial is required for other reasons, we address the merits of appellant's argument to provide guidance to the trial court on remand.

Geschwind v. Flanagan, 65 Wn. App. 207, 211, 828 P.2d 603, reversed on other grounds, 121 Wn.2d 833, 854 P.2d 1061 (1993); 21 Washington Practice § 51.23 ("when a new trial is required for other reasons, the appellate court may consider an issue not raised in the trial court to provide guidance to the trial court on remand").

The Callaghans argued below that the Hadleys could not invoke the dead man's statute, and this Court appropriately reviews the standing issue on appeal.

2. The Hadleys Do Not Have Standing

Citing two cases – Estate of Shaughnessy and Fies v. Storey, the Hadleys argue that "courts have allowed parties who acquire property previously owned by the deceased to assert the protections" of the dead man's statute. (Response Brief at 24); Estate of Shaughnessy, 97 Wn.2d 652, 648 P.2d 427 (1982); Fies v. Storey, 21 Wn. App. 413, 585 P.2d 190 (1978), reversed on other grounds, 100 Wn.2d 853, 676 P.2d 431 (1984). Washington courts have not interpreted the statute so broadly.

In Estate of Shaughnessy, the Supreme Court applied the dead man's statute in a probate dispute over an unsigned will. The Court ruled,

> this court held in In re Estate of Wind, 27 Wn.2d 421, 178 P.2d 731 (1947), that the statute applied to probate proceedings and will contests.
>
> In order for the statute to apply there must be an "adverse party" suing or defending as executor or as deriving right or title by, through or from the decedent. Appellants, *successors of decedent's intestate property*, clearly are adverse parties to the proponent of the will and derive title from decedent.

Estate of Shaughnessy, 97 Wn.2d at 655-656 (emphasis added). The opinion does not support applying the statute in a property dispute between two parties acting in their personal capacities, unrelated to Hans Berg's estate.

In Fies v. Storey, the Court of Appeals permitted a daughter to testify in favor of a quit claim deed she received from her mother, the deceased. The Court allowed the testimony in favor of the mother's estate.

> The scope of this . . . rule excludes the testimony of the Survivor of a transaction with a decedent, when offered Against the latter's estate.
>
> (Italics ours.) 2 J. Wigmore, Evidence s 578 at 695 (3d ed. 1940). Its purpose is to prevent invasion of a *deceased person's estate, or of the interest of one claiming through a decedent*, because the lips of the dead are sealed and cannot rebut testimony unfavorable to their cause.

Fies v. Storey, 21 Wn. App. 413, 418, 585 P.2d 190 (1978) (emphasis added).

The only person claiming through a decedent, in other words with standing to assert the statute, is Hans Berg's daughter, Heidi Hanson. And as argued on summary judgment, she waived the statute by testifying directly about her father's statements. (11/6/09 Hanson Dec.; CP 627-629) (11/30/09 Plaintiffs' CR 56 Response at 2; CP 475-483). Furthermore, Ms. Hanson testified in support of her father's actions and intent with the property. The opinion in Fies does not entitle the Hadleys to assert the statute contrary to Hans Berg's representative.

Finally, Heidi Hanson, not the Berg Estate, sold the property to the Hadleys. "When my parents died, I did most of the management of the properties, including the sale to John and Linda Hadley (Linda also uses the name Morrow) in October 2004." (11/6/09 Hanson Dec. ¶ 3; CP 627). Contrary to the Hadley's assertions, the Callaghans did not admit "numerous times before the trial court that the Hadleys took title to their property from the Berg estate." (Response Brief at 24). The opposite is true.

> The long and short of it is the Hadleys don't have standing to plead the Dead Man Statute because they're not related to Berg. All they are is a successor

> in title. If Heidi Hanson, Berg's personal representative, wanted to plead the Dead Man Statute, certainly she could because she took subject to the estate, but not the Hadleys.

(11/30/10 VRP 46).

As detailed in the Callaghan's opening brief, standing asks who is an "adverse party" under the dead man's statute. The Hadleys answer that anyone who purchases property derives "right or title by, through, or from any deceased person." (Response Brief at 23); RCW 5.60.030. This is a remarkably broad proposition, entitling anyone in a chain of title to act on behalf of a long-closed estate. Washington courts do not apply the statute so broadly. As this Court ruled in Aetna Life Ins. v. Boober, the statute applies to disputes involving the deceased's estate, not assets that pass outside of probate.

> Insurance proceeds are nontestamentary and usually pass outside the decedent's estate. When a personal representative seeks the proceeds of a life insurance policy for herself, she acts in her individual capacity. The dead man's statute is intended to protect the decedent's interests and may be invoked by his legal representative while acting in a representative capacity. Here, Debbie sought to invoke the statute against Marilyn's affidavit. Debbie, however, is seeking the insurance proceeds in her individual capacity. Therefore, she is not entitled to use the statute to assist her.

Aetna Life Ins. Co. v. Boober, 56 Wn. App. 567, 574-575, 784 P.2d 186 (1990).

The trial court erred by extending the scope of the dead man's statute far beyond disputes over Hans Berg's estate. Because exclusion of Richard Callaghan's testimony was highly prejudicial, the trial court's summary judgment is invalid.

B. Mr. Stuart's, Mr. Callaghan's, And Ms. Hanson's Testimony Was Relevant, Probative And Admissible

1. Randy Stuart's Statements Were Not Hearsay

The trial court struck two statements in Randy Stuart's declaration that described Hans Berg pointing out his property boundary. (Order Granting Motion To Strike; CP 442-443). The Hadleys defend the court's ruling with the following argument:

> The "truth" of the matter asserted at summary judgment on the mutual recognition and acquiescence claim was not where the boundary line actually was, it was where Mr. Berg believed or had agreed the boundary line to be – precisely the purpose for which the statements were provided. The statements, both verbal and non-verbal, were offered to prove the truth of the matter asserted – that Hans Berg had agreed or acquiesced to that specific boundary line. Therefore, both statements were properly excluded as inadmissible hearsay. ER 802(1)(a),(c).

(Response Brief at 28).

This argument confuses truth with relevance. The truth of Hans Berg's statements would be that the surveyed boundary was where he pointed. As subsequent surveys and this lawsuit shows, Mr. Berg was mistaken. On the other hand, Mr. Berg's mistaken belief is relevant because acquiescence requires an owner to accept an incorrect boundary as the correct one. Mr. Berg's statements are probative, relevant and admissible, not because they show the "true" boundary, but rather because they illustrate the mistake.

Hearsay is a slippery concept, but it is enough to say that a mistaken belief cannot be true, even if it may be relevant. Parties offer the testimony of a surveyor for the truth of the matter stated. The Callaghans offered Mr. Berg's statements to show what he believed, not where the true boundary lay. The trial court erred by excluding Stuart's testimony as hearsay.

2. Stuart, Callaghan and Hanson Had Sufficient Personal Knowledge

The trial court struck 17 statements from the declarations of Richard Callaghan, Randy Stuart, and Heidi Hanson, with the general finding "they are argumentative or set forth opinion testimony, they are not based on personal knowledge of the

witness, or they are based on what the witness has heard from others which would, in effect, be hearsay." (12/04/09 VRP at 8). The trial court ruled on the statements as a group, not discussing them separately.

The rules of evidence do not mention or bar testimony that is "argumentative", and under ER 701, lay witnesses may give opinions. Perhaps recognizing this, the Hadleys defend only the trial court's ruling that the declarants lacked personal knowledge. The Hadleys take exception to the words "always", "never", "aware of" and "believed". (Response Brief at 28). They assert "living at or visiting a subject property does not give declarants sufficient personal knowledge to make sweeping, generalized statements about what 'never' or 'always' happened." (Response Brief at 29).

A flawed assumption underlies both the trial court's ruling and the Hadleys' argument: the declarants are testifying in absolute rather than personal terms. "Never" and "always" are acceptable for a witness testifying about his or her experience. Here, none of the excluded statements expressly include more than the declarant's observations -- the trial court had to read that into them. Because a fundamental obligation on summary judgment is to view the evidence in favor of the non-moving party, this extra

assumption is reversible error. The trial court read the statements out of admissibility rather than in.

The Hadleys underscore this point in their brief -- "while the declarants *could have* testified as to what they personally observed or experienced, they did not, and the statements were properly excluded." (Response Brief at 30). The declarations as written can be read to admit them. The witnesses had personal knowledge. What made these declarations inadmissible was the trial court's assumption they go beyond personal knowledge.

In sum, the trial court excluded relevant, probative, and admissible evidence of Hans Berg's actions regarding his property boundary and of the Callaghans' and Bergs' actions that confirmed the boundary. Because these evidentiary rulings led directly to the trial court's summary judgment, they are prejudicial error. Summary judgment is not trial, and the Callaghans' pleadings and materials established a prima facie case. The trial court erred by excluding some of this evidence and weighing the rest.

CONCLUSION

The trial court erroneously granted summary judgment after excluding relevant evidence of acquiescence. Although the court may have intended to resolve this dispute quickly, the summary

judgment has instead delayed a trial on the merits of the Callaghans' claims. Richard and Sharon Callaghan respectfully request this Court to reverse the trial court's evidentiary rulings, vacate summary judgment, and remand for further proceedings.

DATED this 21st day of September, 2011.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of **Appellants' Reply Brief** to:

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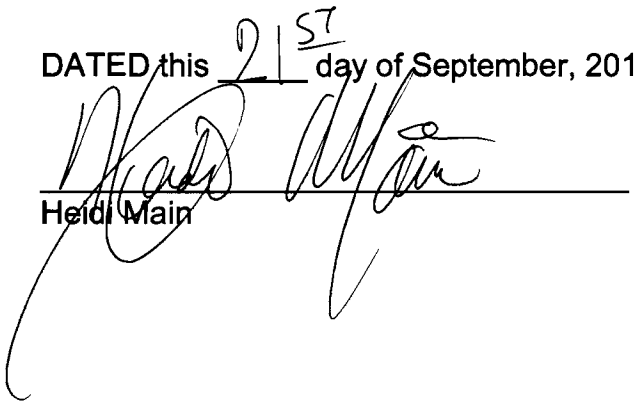
DATED this 21st day of September, 2011.



Heidi Main