

68526-1

68526-1



COURT OF APPEALS, DIVISION ONE AT SEATTLE
FOR THE STATE OF WASHINGTON

No: 68526-1

David Armstrong, a single man; Greg Mosely a married man and Jane Doe Mosely and the marital community composed thereof, *Appellant*,

v.

Ms. Gael Duran, a single person, *Respondent*.

BRIEF OF APPELLANT,
DAVID ARMSTRONG

Law Offices of Gregory P. Cavagnaro
Gregory P. Cavagnaro, WSBA #17644
2135 – 112th Avenue NE
Bellevue, Washington 98004
(425) 818-9441
Attorney for Appellant

TABLE OF CONTENTS

I. Assignments of Error 1

 Assignments of Error 1 to 3 1

 Issues Pertaining to Assignments of Error 1

 Issues 1 to 3 1

II. Statement of the Case 1

 A. Statement of Facts 1

 B. Procedural History 6

III. LAW AND ARGUMENT 7

 A. Summary of Argument 7

 B. The Standard of Review 8

 C. Interpretation of a Deed is a Question of Law for the Court 9

 D. The lack of proper Evidence submitted by Plaintiff in support of her Motion for Contempt did not render Defendants’ evidence useless as Defendants’ photos show the work to have been completed; finally, the Court’s order should not have taken effect until the date of the denial of the request for evidence of discriminatory motivation. 18

 E. The Attorney’s Fees are excessive and more than requested for in the relief and the “daily penalty or fine” is more than punitive; also any fine or penalty, to the extent proper should not run until after expiration of the 30 days from denial of the Motion for Reconsideration20

F. Defendants were entitled to a Declaratory Ruling..... 24

F. Boundary can be agreed by the actions of the parties 27

IV. CONCLUSION 33

APPENDIX (numbered separately)

Survey 1

TABLE OF AUTHORITIES

Washington Cases

| | |
|--|----------------|
| <i>Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.</i> , 158 Wn.2d 603, 146 P.3d 914 (2006)..... | 8 |
| <i>Beebe v. Swerda</i> , 58 Wn.App. 375, 383, 793 P.2d 442 (1990)..... | 25, 26 |
| <i>Brown v. State</i> , 130 Wn.2d 430, 439-40, 924 P.2d 908 (1996)..... | 9 |
| <i>Camping Comm'n v. Ocean View Land, Inc.</i> , 70 Wn.2d 12, 421 P.2d 1021 (1966)..... | 11 |
| <i>City of Edmonds v. Williams</i> , 54 Wn.App. 632, 634, 774 P.2d 1241 (1989)..... | 25 |
| City of Seattle, 160 Wn.2d 198, 156 P.3d 874 (2007) | 13 |
| <i>Clippinger v. Birge</i> , 14 Wn.App. 976, 547 P.2d 871 (1976) | 14 |
| <i>Cotton v. Kronenberg</i> , 111 Wn.App. 258, 44 P.3d 878, reconsideration denied, review denied, 148 Wn.2d 1011, 62 P.3d 890 (2002)..... | 8 |
| <i>DD & L, Inc. v. Burgess</i> , 51 Wn.App. 329, 335, 753 P.2d 561 (1988)..... | 10 |
| <i>Egleski v. Strozyk</i> , 121 Wash. 398, 209 P. 708 (1922) | 28, 29, 30, 31 |
| <i>Graves v. Duerden</i> , 51 Wn. App. 642, 754 P.2d 1027 (1988) | 22, 23 |

| | |
|--|--------------------|
| <i>Green v. Lupo</i> , 32 Wn.App. 318, 647 P.2d 51 (1982) | 13 |
| <i>Hanson v. Lee</i> , 3 Wn.App. 461, 476 P.2d 550 (1970) | 29, 30, 31, 32 |
| <i>Heriot v. Lewis</i> , 35 Wn.App. 496, 668 P.2d 589 (1983) | 32 |
| <i>Hill v. Cox</i> , 110 Wn.App. 394, 41 P.3d 495, <i>review denied</i> , 147 Wn.2d 1024, 60 P.3d 92 (2002)..... | 8 |
| <i>Houplin v. Stoen</i> , 72 Wn.2d 131, 431 P.2d 998 (1967) | 29, 31 |
| <i>Lamm v. McTighe</i> , 72 Wn.2d 587, 434 P.2d 565 (1967)..... | 27, 28, 29, 30, 31 |
| <i>Lindley v. Johnston</i> , 42 Wash. 257, 84 P. 822 (1906)..... | 28, 29 |
| <i>Lloyd v. Montecucco</i> , 83 Wn.App. 846, 924 P.2d 927 (1996) ... | 28 |
| <i>McPhaden v. Scott</i> , 95 Wn.App. 431, 434, 975 P.2d 1033, <i>review denied</i> , 138 Wn.2d 1017, 989 P.2d 1141 (1999)..... | 12 |
| <i>M.K.K.I., Inc. v. Krueger</i> , 135 Wn.App. 647, 653, 145 P.3d 411 (2006), <i>review denied</i> , 161 Wn.2d 1012, 166 P.3d 1217 (2007)..... | 12 |
| <i>Morsbach v. Thurston County</i> , 152 Wash. 562, 568, 278 P. 686 (1929)..... | 9 |
| <i>Mullally v. Parks</i> , 29 Wn.2d 899, 190 P.2d 107 (1948) | 29, 30, 31 |
| <i>Muench v. Oxley</i> , 90 Wn.2d 637, 584 P.2d 939 (1978) | 29, 32 |
| <i>Murray v. W. Pac. Ins. Co.</i> , 2 Wn.App. 985, 989, 472 P.2d 611 (1970) | 13 |
| <i>Scott v. Slater</i> , 42 Wn.2d 366, 255 P.2d 377 (1953) | 28, 30 |

| | |
|--|------------|
| <i>Selby v. Knudson</i> , 77 Wn.App. 189, 194, 890 P.2d 514 (1995)..... | 11 |
| <i>Standing Rock Homeowners Ass'n v. Misich</i> , 106 Wn.App. 231, 23 P.3d 520, <i>review denied</i> , 145 Wn.2d 1008, 37 P.3d 290 (2001)..... | 25 |
| <i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003)..... | 12, 13 |
| <i>Thomas v. Harlan</i> , 27 Wn.2d 512, 178 P.2d 965 (1947) | 29, 30, 32 |
| <i>Thompson v. Smith</i> , 59 Wn.2d 397, 408, 367 P.2d 798 (1962) | 26, 27 |
| <i>Veach v. Culp</i> , 92 Wn.2d 570, 573, 599 P.2d 526 (1979) .. | 3, 9, 10 |
| <i>Waldorf v. Cole</i> , 61 Wn.2d 251, 377 P.2d 862 (1963) | 28, 29, 32 |

Other Cases & Materials

| | |
|---|--------|
| <i>Mueller v. Hoblyn</i> , 887 P.2d 500, 508-09 (Wyo.1994) | 27 |
| <i>Warren v. Atchison, Topeka & Santa Fe Ry.</i> , 19 Cal.App.3d 24, 96 Cal.Rptr. 317 (1971))..... | 7, 9 |
| I Washington State Bar Ass'n, Real Property Deskbook § 10.6(7) (3d ed.1997) | 25, 26 |

Statutes

RCW 7.21.010 25
RCW 7.21.030 21, 22
RCW 7.21.040 23, 24
RCW 58.17.165 12
RCW 64.04.010 12

Regulations and Rules

Washington State Superior Court Civil Rule 56(c) 21

I. ASSIGNMENTS OF ERROR

- (1) The trial court erred in granting the Plaintiff's motion for summary judgment.
- (2) The trial court erred in entering an order of contempt against the Defendants.
- (3) The trial court erred in failing to enter a declaratory ruling in favor of Defendants.

Issues pertaining to this assignment of error:

- (a) Did the trial court improperly grant summary judgment to the Plaintiff Ms. Duran where there remained significant disputed facts and improper interpretations of a deed as a matter of law?
- (b) Did the trial court improperly enter an order of contempt where there were disputed facts and no evidence submitted by the Plaintiff in support of a contempt ruling?
- (c) Did the trial court improperly fail to enter an order of declaratory relief where the deeds/easements are questions of law for the Court?

II. STATEMENT OF THE CASE

A. Statement of Facts

This is an action filed by the Respondent Gael Duran against the above-named Appellants, involving the interpretation of an easement and

other related recorded deeds. (CP 1-20). Ms. Duran's' complaint alleges that Appellant Dave Armstrong's fence encroaches on her easement rights and was built as a spite fence along with other allegations.¹ The complaint seeks damages for the spite fence as well as removal of the alleged interfering fence that Respondent alleges encroach her easement rights.²

On February 1, 1996, Conrad P. Liptau conveyed to Defendant's neighbor Mr. Mosley by Statutory Warranty Deed property identified as Lot B of City of Bothell Short Plat No. D-80-071, which is one of the properties at issue in this matter. (CP 135-52 Exhibit C; CP 185-86); this conveyance was subject to all easements and agreement of record. (*Id.*) On October 16, 2008, Mr. Mosley quitclaimed his interest in this property to himself and his wife. (*Id.*) Copies of the recorded documents are attached as Exhibit C to the Declaration of Darrell S. Mitsunaga in support of Defendant Armstrong's and Mosley's Joint Response To Motion For Summary Judgment. (CP 135-152).

Plaintiff owns the property (identified as Lot B of City of Bothell Short Plat No. D-80-071) that is immediately south of the panhandle portion of Mr. Mosley's property. (CP 1-20; CP 135-52; CP 185-86). Mr.

¹ CP 1-20.

Armstrong's property is located immediately north of the south of the panhandle portion of Mr. Mosley's property. (*Id.*) The aerial map that was attached as Exhibit F to the Mr. Mitsunaga's Declaration essentially depicts the location of the plaintiff's, defendants Armstrong and Mr. Mosley's properties. (CP 135-52 – Exhibit C thereto).

In consideration of Mr. Armstrong's agreement to a boundary line adjustment, Mr. Mosley agreed with Mr. Armstrong to convey or otherwise grant him any right that he or his wife may have in the panhandle portion of their property. (CP 186). At the time Mr. Armstrong performed the improvements, Mr. Mosley never objected to my installation of or to the construction of any improvements placed by him in the area of the panhandle where the fence is partially located. (CP 186).

Mr. Mosley has not been involved in any of Mr. Armstrong's improvements, including any structures, fence, or other improvements constructed in the Panhandle area. (CP 186). Mr. Armstrong asserts that he has not encroached on any easement owned by the Plaintiff and simply installed the fence as required by the recorded documents. (CP 186). Mr. Armstrong installed his fence to protect his children for two significant reasons: first Plaintiff complained on more than one occasion that his

² CP 1-20.

children's' balls would end up on her property and even more importantly is because of the presence of a level 3 sex offender basically next door. (CP =186-87).

With respect to the contempt/sanctions Motion, the Defendant timely removed all of the fencing material that was installed as well as the few rocks that were added to existing rocks. (CP 234). Attached to Mr. Armstrong's Declaration opposing the contempt was photos that show what the terrain looked like before all of the started which shows 60+ feet trees along the area that Mr. Armstrong had installed the fence that the Court ordered removed. (CP 238-245).

Those trees had been present for more than 15 years and it was asserted that this elapse of time would have operated to extinguish the easement since it was inaccessible and could or should be considered abandoned or owned by Defendant under the principles of adverse possession. (CP 233-37). Despite all of these facts, Mr. Armstrong timely removed everything that he had installed. (CP 235-37). The section of the property referred to as the easement area has never really been drivable as the easement goes along the side of Plaintiff's house and stops at a ravine that drops about 6 feet or more. (CP 234).

When Mr. Armstrong removed the trees many years ago, he asserted that he didn't do any grading or disruption of the easement area. (CP-234). Even with all of the work performed by Defendant Armstrong, Plaintiff kept asking for more, seemingly seeking to have Defendant turn it into a perfectly flat area for a garden when such is not the purpose. (CP-234). The photos show the excavator that was used to remove trees that were in the easement area and none of the Plaintiff's access to the easement area has been changed or modified and was returned to its pre-installation condition; Plaintiff's preexisting driveway was still intact and has never been blocked or access restricted. (CP-234). Additionally, none of the changes made have restricted any access to Plaintiff's property. (CP-234). The photos also show some of the stumps (that are 10+ years old) left that were in the easement area that blocked the easement area from Plaintiff's ability to access it. (CP 238-245).

The Plaintiff's only easement rights are ingress, egress and utilities; some of the rocks and concrete chunks in this area were left there on the easement area from many years ago when they built Plaintiff's house and there was an old barbwire fence that was also on the easement that Defendant removed. (CP-235). Plaintiff also sought as part of her contempt motion to have Defendant remove the rockery when Defendant

denied adding the rocks or concrete pieces that remained. (CP 235). Defendant also claimed that he did nothing to change the ground level as this area as it was not even accessible before the trees were removed. (CP-235). The aerial photo shows indisputably that there were trees in that area that prevented Plaintiff from using that area of the easement as a means of ingress as it goes only to the side of her home and not even towards the garage. (CP 238-245). The fence depicted in the photo is the same fence that was to be moved to the boundary line as per the recorded property agreement. (*Id.*) This easement area was designed to be used as a road for the Mosley property. (CP 235). If this easement area is ever to be used as an actual road, then it will need to be graded down an additional 4' for the road as was the original intention. (CP 235). Defendants maintained that the aerial maps reveal that there were a number of issues remaining; clearly which rocks were or were not there is a disputed fact. (CP 235-236). Furthermore, and perhaps most important is the fact that the Plaintiff/Respondent **never** submitted a Declaration or evidence supporting the contempt claim or disputing Appellants' evidence; the Declaration of Counsel for Respondent is not based on personal knowledge as claimed. (CP 227-230; CP 26-66).

B. Procedural History

This action was filed on 12-21-2010. (CP 1-15). Prior to any significant discovery, Ms. Duran moved for summary judgment on a number of issues, including the encroachment of the fence. (CP 35-51). The summary judgment was granted by order dated August 15, 2011, by the Honorable Theresa Doyle. (CP 182-184). The order provided that the Defendants had a certain period of time to remove the fence or be found in contempt. (CP 182-184). The Court also improperly denied the Appellants' Motion for Reconsideration by Order dated September 14, 2011. (CP 214-215).

Again following a motion for contempt filed by the Plaintiff, by order dated November 29, 2011, the Honorable Theresa Doyle granted Plaintiff's Motion for Contempt. (CP 267-270). The Appellants again filed a Motion for Reconsideration, (CP 256-259), which the Court once again wrongfully denied Defendants' Motion for Reconsideration. (CP 273-281, 282-294, 295-296).

III. LAW AND ARGUMENT

A. Summary of Argument

The trial court's decision on summary judgment erroneously extends and/or mutates our Courts' consistent rulings that deeds are interpreted as the interpretation of such a deed is a mixed question of fact

and law.³ It is a factual question to determine the intent of the parties, and then the Court must apply the rules of law to determine the legal consequences of that intent.⁴ Whether a conveyance is one of fee title or an easement is a conclusion of law as to the effect of a deed.⁵

The trial court's decision on the Motion for Contempt and Sanctions was also improperly granted since there was no actual evidence submitted by the Plaintiff controverting the facts stated by the Defendants. The trial court erroneously accepted the facts as stated by the Plaintiff's counsel and failed to conduct an evidentiary hearing as requested given the severity of the sanctions sought.

B. Standard of Review; Summary Judgment Standards

The standard of review in this case is *de novo*, the appellate court engaging in the same analysis as the trial court. CR 56. Under CR 56, summary judgment is properly granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ballard Square Condominium Owners Ass'n v. Dynasty Const.*

³ *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

⁴ *Veach*, 92 Wn.2d at 573, 599 P.2d 526 (citing *Vavrek v. Parks*, 6 Wn.App. 684, 690, 495 P.2d 1051 (1972); *Warren v. Atchison, Topeka & Santa Fe Ry.*, 19 Cal.App.3d 24, 35, 96 Cal.Rptr. 317 (1971)).

⁵ *Veach*, 92 Wn.2d at 573, 599 P.2d 526.

Co., 158 Wn.2d 603, 146 P.3d 914 (2006). Summary judgment is proper only where reasonable minds could reach but one conclusion regarding the material facts. *Cotton v. Kronenberg*, 111 Wn.App. 258, 44 P.3d 878, *reconsideration denied, review denied*, 148 Wn.2d 1011, 62 P.3d 890 (2002).

A "material fact" for summary judgment purposes is one upon which all or part of the outcome of the litigation depends. *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495, *review denied*, 147 Wn.2d 1024, 60 P.3d 92 (2002). Here, Defendants believe that the evidence, namely the recorded easements, are consistent with and support the Defendants' interpretation of the various recorded documents differing with the Plaintiff's arguments to the contrary.

Furthermore, the other issues sought for summary judgment ruling in favor of Plaintiff require little analysis to conclude that there are material questions of fact as to these issues. Here, Defendants also believe that the evidence confirms the nature of their interpretation of the various recorded documents contrary to the Plaintiff's arguments to the contrary. These factual allegations set forth by the Defendants, interpreted in their favor clearly show that the trial court's entry of the summary judgment

order was in error and should be reversed.

C. Interpretation of a Deed is a Question of Law for the Court.

The interpretation of a deed is a question of law for the Court and where a deed conveys a right of way, the conveyance may be in fee simple or may be an easement only.⁶ The interpretation of such a deed is a mixed question of fact and law.⁷ It is a factual question to determine the intent of the parties. And then the Court must then apply the rules of law to determine the legal consequences of that intent.⁸ Whether a conveyance is one of fee title or an easement is a conclusion of law as to the effect of a deed.⁹

(1) whether the deed conveyed a strip of land, and did not contain additional language relating to the use or purpose to which the land was to be put, or in other ways limiting the estate conveyed; (2) whether the deed conveyed a strip of land and limited its use to a specific purpose; (3) whether the deed conveyed a right of way over a tract of land, rather than a strip thereof; (4) whether the deed granted only the privilege of constructing, operating, or maintaining a

⁶ *Brown v. State*, 130 Wn.2d 430, 439-40, 924 P.2d 908 (1996); *Morsbach v. Thurston County*, 152 Wash. 562, 568, 278 P. 686 (1929).

⁷ *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

⁸ *Veach*, 92 Wn.2d at 573, 599 P.2d 526 (citing *Vavrek v. Parks*, 6 Wn.App. 684, 690, 495 P.2d 1051 (1972); *Warren v. Atchison, Topeka & Santa Fe Ry.*, 19 Cal.App.3d 24, 35, 96 Cal.Rptr. 317 (1971)).

⁹ *Veach*, 92 Wn.2d at 573, 599 P.2d 526.

railroad over the land; (5) whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor; (6) whether the consideration expressed was substantial or nominal; and (7) whether the conveyance did or did not contain a habendum clause, and many other considerations suggested by the language of the particular deed. In addition to the language of the deed, we will also look at the circumstances surrounding the deed's execution and the subsequent conduct of the parties.¹⁰

When interpreting a deed, what constitutes the boundaries is a question of law, but where the boundaries are actually located on the ground is a question of fact. *DD & L, Inc. v. Burgess*, 51 Wn.App. 329, 335, 753 P.2d 561 (1988). Where, as here, “the [relevant] facts are not in dispute and the only question involved is the correct application of well-known principles of law to the facts, the location of a boundary is a question of law for the court.” Thompson sec. 90.02(e)(4), at 140-41 (Supp.1997). “It is well settled law that the intention of the dedicator controls in construing a plat.” *Selby v. Knudson*, 77 Wn.App. 189, 194, 890 P.2d 514 (1995). The dedicator's intention must “be adduced from the plat itself, where possible, as that furnishes the best evidence thereof.” *Camping Comm'n v. Ocean View Land, Inc.*, 70 Wn.2d 12, 421 P.2d 1021 (1966) (citation omitted). But the court may consider extrinsic or context

¹⁰ *Brown*, 130 Wn.2d at 438, 924 P.2d 908 (citations omitted).

evidence of the surrounding circumstances to determine the dedicator's true intention if the plat is ambiguous, i.e., "its terms are uncertain or capable of being understood as having more than one meaning." *Selby*, 77 Wn.App. at 194-95 (citation omitted).

For example, in *Camping Commission*, 70 Wn.2d at 14, 421 P.2d 1021, the legal description of the plat described its western boundary as the "ordinary or mean high water line." The plat conveyed all of the dedicators' property and contained "no reservation of an interest of any kind." *Id.* Moreover, the name of the plat, Ocean Park Beach, signified waterfront property. *Id.* But the accompanying plat map, which delineated the lot boundaries within the plat, designated the lots' western boundaries in courses and distances that fell short of the "Ordinary or Mean High Water Line." *Id.* at 13. The interpretation of an easement is a mixed question of law and fact. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). What the original parties intended is a question of fact and the legal consequence of that intent is a question of law. *Sunnyside Valley*, 149 Wn.2d at 880, 73 P.3d 369.

Easements are interests in land. *McPhaden v. Scott*, 95 Wn.App. 431, 434, 975 P.2d 1033 (citing *Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956)), *review denied*, 138 Wn.2d 1017,

989 P.2d 1141 (1999). Because they are interests in land, express easements must comply with the statute of frauds, which requires that “[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed.” RCW 64.04.010. A party may create a private easement by including the grant in a plat. RCW 58.17.165; *M.K.K.I., Inc. v. Krueger*, 135 Wn.App. 647, 653, 145 P.3d 411 (2006), *review denied*, 161 Wn.2d 1012, 166 P.3d 1217 (2007). No particular words are necessary to create an easement so long as the language used shows an intent to grant with terms that are certain and definite. *McPhaden*, 95 Wn.App. at 435.

The Court determines the original parties' intent to an easement from the instrument as a whole. *Sunnyside Valley*, 149 Wn.2d at 880. If the plain language of the instrument is unambiguous, the Court will not consider extrinsic evidence. *Sunnyside Valley*, 149 Wn.2d at 880, 73 P.3d 369 (*citing City of Seattle v. Nazaremus*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962)). If an ambiguity exists, the Court may review extrinsic evidence to show the original parties' intent, the circumstances of the

¹¹ RCW 58.17.165 provides in part, Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid.

property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions. *Sunnyside Valley*, 149 Wn.2d at 880 (citing *Nazareus*, 60 Wn.2d at 665, 374 P.2d 1014). "A written instrument is ambiguous when its terms are uncertain or capable of being understood as having more than one meaning." *Murray v. W. Pac. Ins. Co.*, 2 Wn.App. 985, 989, 472 P.2d 611 (1970).

It seems that an easement that once served a single house on a large tract of land might, in the passage of time, be used to serve a subdivision of homes, provided the language of creation was general.¹² None of this means that the easement could ever be used for a wholly different purpose than its original purpose. For instance, an easement that began as an easement for utility lines could never become a roadway easement, nor probably could a walkway easement become a motor vehicle easement.

When an easement arises by implication from prior use, the Court will look to the nature of that use as it exists at the date of conveyance, to determine the original scope. To some extent, the permitted usage at a given point in time is flexible, so long as no substantially increased burden

¹² See *Green v. Lupo*, 32 Wn.App. 318, 647 P.2d 51 (1982) (easement holders could ride motorcycles on road but not so as to cause nuisance parties did not intend). See especially *Sanders v. City of Seattle*, 160 Wn.2d 198, 156 P.3d 874 (2007), holding that political picketing was forbidden on city's pedestrian

is placed on the servient tenement. *Clippinger v. Birge*, 14 Wn.App. 976, 547 P.2d 871 (1976) (dictum). In this instance, the recorded documentation further provides no basis that there has been a breach, in any respect, of any existing easement rights of plaintiff. In fact, the recorded documentation establishes as follows:

Short Plat No. D-80-071. In 1980, Conrad Liptau (“Liptau”) applied for and the City of Bothell approved this two lot short plat creating two lots identified as Lot A and Lot B. Lot B had a 30’ wide panhandle (the “Panhandle”), presumably to provide access to Waynita Drive NE. As part of the plat, Lot B was granted a 30’ ingress, egress, and utility easement over the Panhandle. (See, plaintiff’s Exhibit B, p. 4.) Liptau retained Lot B and subsequently conveyed Lot A to Jonathon J. Ross (“Ross”).

Plaintiff misrepresented that the plat approval precludes the location of any structures or fences on the easement. In fact, the approval is completely silent in this regard. (CP 162). (Plaintiff’s Exhibit B.) The reference plaintiff refers to relates to general conditions reflected in Liptau’s plat application. This language, however, was not imposed as a condition of plat approval and therefore cannot be binding on subsequent purchasers since the application is not even a recorded document.

On March 12, 1992, Liptau and Ross entered into the “Easement Agreement” (CP 162; CP 135 – *see also*, Exhibit B to CP 162), which

easement to reach the Seattle monorail through the interior of a private shopping center: beyond intended scope of easement.

acknowledged their ownership of Lots A and B and the easement granted by the plat and stated, in part, as follows:

An easement for ingress, egress, drainage and utilities for the benefit of Lot A exists on the Easement Property.

At the time of the execution of this Agreement, no road exists on the Easement Property. A portion of the easement property contains a fence which appears to be utilized as identifying the northerly boundary of Lot A.

Liptau and Ross agree that any utilization of the Easement area for any purpose other than for the easement uses discussed is done by the mutual acknowledgement of Liptau and Ross and any such use by Ross is not adverse nor open and notorious to the owners of Lot B, but is done by a revocable license between Liptau and Ross.

Liptau reserves the right to remove the fence and any other structures, equipment, or material placed on the Easement Area, whose permission to remove such items is hereby granted. (See Exhibit B to CP 162).

The Easement Agreement further had an addendum which stated as follows:

CONRAD LIPTAU AGREES TO MOVE THE EXISTING FENCE AND INSTALL SAID EXISTING FENCE ON THE BOUNDARY LINE OF EASEMENT PROPERTY AND JONOTHAN ROSS PROPERTY. HIS COST SHALL NOT EXCEED \$400.00 (FOUR HUNDRED AND 00/100 DOLLARS). ANY COST OUTSIDE OF \$400.00 (FOUR HUNDRED AND 00/100 DOLLARS) SHALL BE PAID BY JONOTHAN J. ROSS.

CONRAD LIPTAU AGREES THAT JONOTHAN ROSS'S PROPERTY SHALL NOT HAVE ITS INGRESS AND EGRESS BLOCKED BY AT ANY TIME DURING CONSTRUCTION. (Emphasis added.) (See Exh. A to CP 162 & Plaintiff Exhibit A.)

This document unequivocally mandates that Liptau install a fence on the boundary of the easement and Ross' property, i.e., the northern boundary of Lot A. The clear intent was that the easement granted by plat was abandoned as Ross had alternative access precluding the need for the road. Certainly, placing a fence on the northern boundary of Lot A, which Ross explicitly agreed to, deprived Ross of any use of the easement in that area. The fence would serve to obstruct any and all easements or other access by Ross.

1. **Statutory Warranty Deed to Mosley.** On February 1, 1996, Lot B was conveyed by Liptau to defendant Greg Mosley by Statutory Warranty, subject to the Easement Agreement, and subsequently quitclaimed to the marital community of Greg and Rita Mosley in 2008. (*See Exhibit C to CP 162*).
2. **Statutory Warranty Deed to Armstrong.** On June 13, 1996, defendant Armstrong was conveyed by Statutory Warranty Deed the parcel lying to the north of the Panhandle. (*See Exhibit C to CP 162*)
3. **Statutory Warranty Deed to Duran.** On September 27, 1996, Lot A was conveyed by Ross to plaintiff by Statutory Warranty Deed, subject to the Easement Agreement. (*See Exhibit E to CP 162*); (Plaintiff's

Exhibit 3 to CP 1). Plaintiff has always had direct and unencumbered access to her residence by a separate driveway on the south side of Lot A alleviating the need to use the easement at issue. (See Exhibit F to CP 162). The location of the properties owned by plaintiff, Mosley, and Armstrong are generally depicted in plaintiff's Exhibit 1. (CP 27; 52-88)

4. **Boundary Line Adjustment.** Subsequently, in consideration of Armstrong's acquiescence to a boundary line adjustment, Mosley agreed to convey or otherwise grant Armstrong any right Mosley might have in the Panhandle Property. (CP 186). In this respect, Mosley never objected to the construction of any improvement placed by Armstrong in the area of the Panhandle. (CP 186). Mosley, however, has had no involvement with any structures, fence, or other improvements constructed in the Panhandle area and has no ownership interest in any such improvements. (CP 186-87).

D. The lack of proper Evidence submitted by Plaintiff in support of her Motion for Contempt did not render Defendants' evidence useless as Defendants' photos show the work to have been completed; finally, the Court's order should not have taken effect until the date of the denial of the request for reconsideration.

The recorded documentation as well as the evidence and photos provided no basis for a finding of contempt of a basis that there has been a breach of any existing easement rights of plaintiff. The recorded

documentation still requires the following performance by the Plaintiff, but without proper interpretation and/or direction from the Court, the defendants are left without any guidance and were essentially penalized for making every good faith effort to comply with the Court's order despite the fact of the contention that the ultimate location of the fence was by agreement and at request of the Plaintiff. Equally, if not more important is the fact that no Declaration or evidence was submitted by the Plaintiff; the only Declaration she submitted was in support of the summary judgment identified as CP 89-134. Defendant was left with no idea on how to comply with what the Defendants maintain are indisputable facts:

First, the plat approval does not preclude the location of any structures or fences on the easement. In fact, the approval or disapproval of any structure is completely silent in this regard. (CP 185-90)(*See also*, Plaintiff's Exhibit B on SJ at CP 35-51.) The reference plaintiff relies on for her argument relates only to the general conditions reflected in Liptau's plat application. This language was not made a part of the recorded plat nor was it enforced or required as a condition of plat approval. *Id.*

Also, the "Agreement Between Landowners" (Exhibit B to CP 162)(the "Easement Agreement") that, Liptau and Ross entered into acknowledged their respective ownership of Lots A and B and the

easement granted by the plat and the easement stated, in part, as follows: “An easement for ingress, egress, drainage and utilities for the benefit of Lot A exists on the Easement Property.” (Exhibit B to CP 162). At the time of the execution of this Agreement, no road existed on the Easement Property. (*Id.*). A portion of the easement property contains a fence which is intended to identify the northerly boundary of Lot A. Yet, the most frustrating component of the recorded documents is the lack of guidance or input from the trial court as relates to the installation of a fence as required by the terms of the Easement Agreement. The Easement Agreement further contained an addendum which stated as follows:

CONRAD LIPTAU AGREES TO MOVE THE EXISTING FENCE AND INSTALL SAID EXISTING FENCE ON THE BOUNDARY LINE OF EASEMENT PROPERTY AND JONOTHAN ROSS PROPERTY. HIS COST SHALL NOT EXCEED \$400.00 (FOUR HUNRED AND 00/100 DOLLARS). ANY COST OUTSIDE OF \$400.00 (FOUR HUNRED AND 00/100 DOLLARS) SHALL BE PAID BY JONOTHAN J. ROSS.

CONRAD LIPTAU AGREES THAT JONOTHAN ROSS’S PROPERTY SHALL NOT HAVE ITS INGRESS AND EGRESS BLOCKED BY AT ANY TIME DURING CONSTRUCTION. (Emphasis added.) (Exhibit B to CP 162); (*see also*, Plaintiff’s Exhibit A filed on SJ Motion – CP 52-88; CP 89-134; CP 35-51).

The above-referenced document unequivocally mandates that Liptau install a fence on the boundary of the easement and Ross’ property, i.e., the northern boundary of Lot A. The clear intent was that the

easement granted by the original plat was abandoned as Ross had alternative access precluding the need for the road and this was by mutual agreement of the original owners. Certainly, placing a fence on the northern boundary of Lot A, which Ross explicitly agreed to, deprived Ross of any use of the easement in that area. The fence would serve to obstruct any and all easement or other access by Ross. Furthermore, in an effort to be neighborly Mr. Armstrong relocated the fence at the specific request of Plaintiff which remains to this day a disputed and material question of fact.

E. The Attorney's Fees are excessive and more than requested for in the relief and the "daily penalty or fine" is more than punitive; also any fine or penalty, to the extent proper should not run until after expiration of the 30 days from denial of the Motion for Reconsideration.

Here, Defendants believe that the evidence shows full compliance with the Court's order as there is no evidence to support what pre-existed at any particular point in time. Furthermore, with the several interruptions based on appearance of the police this has prevented Mr. Armstrong from doing even more than requested by Plaintiff and ordered by the Court. He has been out there trying to level out the area.

Prior to this the area was significantly sloped and Defendants believe that a site visit or appointment of a Special Master to view the

property is worthy of merit. However, Defendants requests the Court modify its order to award no more fees than those requested, if any and certainly remove the penalty of \$100.00 a day when the claimed or alleged lack of completion is not based on the fault of Mr. Armstrong especially when factoring in the involvement of the police, rendering any contempt wholly improper.

The law provides with regard to contempt that:

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court...

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees. RCW 7.21.030.

“There are three grounds on which a court may exercise contempt powers: (a) criminal contempt prosecuted under RCW 9.23.010; (b) civil contempt initiated under RCW 7.20.010 *et seq.*; and (c) contempt proceedings resulting from the long-exercised power of constitutional courts ...” *Graves v. Duerden*, 51 Wn. App. 642, 754 P.2d 1027 (1988) quoting, *Keller v. Keller*, 52 Wash.2d 84, 86, 323 P.2d 231 (1958). The court may exercise inherent contempt power to (1) punish summarily contemptuous conduct occurring in the presence of the court, (2) to enforce orders or judgments in aid of the court's jurisdiction, and (3) to punish violations of orders or judgments. *Id.*

In *Graves*, an attorney prepared pleadings and presented to the court that monies contained within his trust account belonged to the aggrieved party and subsequently refused to answer a writ of garnishment and disbursed funds to others. *Graves v. Duerden*, 51 Wn. App. 642, 754

P.2d 1027 (1988) The court found that the orders, although not directly ordering him to pay monies to a party, clearly indicated the ownership of the funds and found the attorney in contempt for his actions. *Id.*

In the case at the bar the Contempt Order is improper as it exceeds the attorney's fees requested and the sanctions are excessive, especially given the hotly disputed evidence presented to the Court.

The defendants were essentially penalized for following through with the Court's earlier Order based on hotly disputed evidence.

RCW 7.21.040 Punitive sanctions -- Fines. Provides that:

(1) Except as otherwise provided in RCW 7.21.050, a punitive sanction for contempt of court may be imposed only pursuant to this section.

(2)(a) An action to impose a punitive sanction for contempt of court shall be commenced by a complaint or information filed by the prosecuting attorney or city attorney charging a person with contempt of court and reciting the punitive sanction sought to be imposed.

(b) If there is probable cause to believe that a contempt has been committed, the prosecuting attorney or city attorney may file the information or complaint on his or her own initiative or at the request of a person aggrieved by the contempt.

(c) A request that the prosecuting attorney or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which a contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court.

The defendants suggest a punitive sanction consisting of a \$2,500.00 fine payable to the YWCA Domestic Violence program or any other local organization benefiting the citizens of Pierce County.

F. Defendants were entitled to a Declaratory Ruling.

Defendants were entitled to a declaratory ruling based on a number of factors, including issues that require further evidence and information presented to the Court. Nonetheless, as the Court can see from the photos attached to Mr. Armstrong's Declaration, the trees that are 60 feet tall are located exactly where the fence was installed that the Court ordered removed. Thus, there are questions of adverse possession, abandonment of easement or boundary by acquiescence. Furthermore there still remains the Agreement between the parties that requires the Plaintiff to pay for the installation of a fence and so the Court will need to ascertain where such fence is to be installed at Plaintiff's expense as required by the Deeds.

Presently, based on Mr. Armstrong's Declarations, CP 185-90; CP 233-245; CP 155-59), they clearly state and indisputably confirmed that he has removed everything that was installed and believes he had fully complied with the Court's earlier order. The servient estate owner has the right to use his or her land for any purpose so long as it does not interfere with the dominant landowner's enjoyment of the easement. *Standing Rock*

Homeowners Ass'n v. Misich, 106 Wn.App. 231, 241, 23 P.3d 520, review denied, 145 Wn.2d 1008, 37 P.3d 290 (2001).

To establish adverse possession, the claimant must show use that was open, notorious, continuous, uninterrupted, and adverse to the property owner for the prescriptive period of 10 years. RCW 7.28.010; *Beebe v. Swerda*, 58 Wn.App. 375, 383, 793 P.2d 442 (1990). As with any possessive interest in property, an easement can be extinguished through adverse use. *City of Edmonds v. Williams*, 54 Wn.App. 632, 634, 774 P.2d 1241 (1989). In such a case, however, the servient estate owner who seeks to extinguish the easement is already in possession of the property. I WASHINGTON STATE BAR ASS'N, REAL PROPERTY DESKBOOK § 10.6(7) (3d ed.1997). Consequently, to start the prescriptive period, the adverse use of the easement must be clearly hostile to the dominant estate's interest in order to put the dominant estate owner on notice. *Id.*

The servient estate owner has the right to use his or her land for any purpose that does not interfere with enjoyment of the easement. *Beebe*, 58 Wn.App. at 384, 793 P.2d 442. Proper use by the servient estate owner is generally a question of fact that depends largely on the extent and mode of the use. *Thompson v. Smith*, 59 Wn.2d 397, 408, 367

P.2d 798 (1962). If the dominant estate has established use of an easement right of way, obstruction of that use clearly interferes with the proper enjoyment of the easement. However, if an easement has been created but has not yet been used by the dominant estate, adverse use by the servient estate is more difficult to prove. *See, e.g., Beebe*, 58 Wn.App. at 383-84, 793 P.2d 442; *Edmonds*, 54 Wash.App. at 636, 774 P.2d 1241.

In *Thompson*, the servient owner poured a concrete slab over a reserved roadway easement. Because the right of way was not in use at the time, the Supreme Court held that the concrete slab, which was used to store vehicles and lumber, did not interfere with the interest of the dominant estate. *Thompson*, 59 Wn.2d at 409, 367 P.2d 798. Quoting *City of Pasadena v. California-Michigan Land & Water Co.*, 17 Cal.2d 576, 583, 110 P.2d 983 (1941), *Thompson* noted that the respective rights of the dominant and servient owners " 'are not absolute, but must be construed to permit a due and reasonable enjoyment of both interests so long as that is possible.' " *Id.* at 409, 367 P.2d 798. *See also Mueller v. Hoblyn*, 887 P.2d 500, 508-09 (Wyo.1994), and cases cited therein, (showing the rights of servient estate owners to use land burdened by an unused easement).

B. Boundary can be agreed by the actions of the parties.

Boundaries between two neighbors may be modified or relocated to conform to a line on the ground to which they have “long acquiesced.” Case law suggests that there is considerable overlap between the “acquiescence” doctrine and the “parol agreement” doctrine. The main practical differences are that the parol agreement doctrine requires an express boundary line agreement to settle a dispute or uncertainty, which the acquiescence doctrine does not require, and the acquiescence doctrine requires usage on the ground for ten years or more, which the parol agreement doctrine does not.

In other words, as set out in the leading decision, *Lamm v. McTighe*,¹³ the elements of acquiescence are: (1) the line must be well defined and physically designated upon the ground by such things as monuments, roadways, and fences; (2) by acts of occupancy on the ground, the neighbors must have “manifested ... a mutual recognition and acceptance of the designated line as the true boundary line”, i.e., acquiesced in the line; and (3) acquiescence in the line for at least “that period of time required to secure property by adverse possession.” *Id.*

¹³ *Lamm v. McTighe*, 72 Wn.2d 587, 434 P.2d 565 (1967).

Thus, if the elements for parol agreement are present and the acts of occupancy have continued for more than ten years in Washington, either parol agreement or acquiescence theory may be used. This accounts for the number of decisions in Washington in which appellate courts have not made clear which doctrine was actually determinative.¹⁴

Lamm v. McTighe's first element, that the line be physically designated upon the ground by such things as monuments, roadways, and fences, seems the same as the comparable element of the parol agreement doctrine. Washington decisions require some such “established line,” as we will call it.¹⁵ It does not matter whether both neighbors get together and establish the line by, for instance, erecting a fence or whether only one does so, as long as they both acquiesce in it.¹⁶ Washington has been

¹⁴ See, e.g., *Egleski v. Strozyk*, 121 Wash. 398, 209 P. 708 (1922); *Lindley v. Johnston*, 42 Wash. 257, 84 P. 822 (1906).

¹⁵ See, e.g., *Waldorf v. Cole*, 61 Wn.2d 251, 377 P.2d 862 (1963) (rockery against dirt bank insufficient marker); *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953) (row of pear trees not sufficient marker); *Lloyd v. Montecucco*, 83 Wn.App. 846, 924 P.2d 927 (Div. 2, 1996) (no boundary by acquiescence when it was marked only by underwater blocks that shifted position and by activities not in fixed locations, citing this treatise).

¹⁶ See *Lamm v. McTighe*, 72 Wn.2d 587, 434 P.2d 565 (1967) (one built fence); *Mullally v. Parks*, 29 Wn.2d 899, 190 P.2d 107 (1948) (one built fence); *Egleski v. Strozyk*, 121 Wash. 398, 209 P. 708 (1922) (one built “most, if not all,” of fence; theory may be parol agreement); *Lindley v. Johnston*, 42 Wash. 257, 84 P. 822 (1906) (both neighbors built fence; theory may be parol agreement); *Lilly v. Lynch*, 88 Wn.App. 306, 945 P.2d 727 (1997) (both neighbors had used up to

insistent that the neighbors mutually recognize and acquiesce in the established fence or other marker as a boundary line and not as something else.¹⁷ The state Supreme Court has announced that proof of mutual recognition and acquiescence in the line must be clear and convincing.¹⁸

Recognition of and acquiescence in the established line consists of the two neighbors' occupying or improving their lands with reference to the line. The building of a fence is not enough; if there is no occupancy or use at all with reference to the line, then the doctrine of acquiescence fails.¹⁹ There is no requirement that structures must be built with reference to the line. Sometimes there have been structures in cases that have found acquiescence, but sometimes the acts of occupancy have been only

concrete wall for many years, believing it marked true line); *Hanson v. Lee*, 3 Wn.App. 461, 476 P.2d 550 (1970) (both neighbors built concrete driveway strips).

¹⁷ See *Muench v. Oxley*, 90 Wn.2d 637, 584 P.2d 939 (1978) (one neighbor did not recognize as line); *Waldorf v. Cole*, 61 Wn.2d 251, 377 P.2d 862 (1963) (boundary not well defined, and one owner did not recognize); *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953) (row of pear trees not recognized as boundary); *Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965 (1947) (one neighbor did not recognize fence as boundary instead of only barrier).

¹⁸ *Muench v. Oxley*, 90 Wn.2d 637, 584 P.2d 939 (1978); *Houplin v. Stoen*, 72 Wn.2d 131, 431 P.2d 998 (1967).

¹⁹ *Waldorf v. Cole*, 61 Wn.2d 251, 377 P.2d 862 (1963) (disputed area "apparently not used").

landscaping or cultivation.²⁰ Whatever usage there is, it must be done with reference to the established line.²¹ It is not clear from Washington authority whether both neighbors must occupy or improve up to the established line or whether it is sufficient that one does and the other does not object to it. In theory, if both neighbors must acquiesce in the line and if their acquiescence is found from their acts on the ground, it would seem that both must use with reference to the line. However, from the recitals of facts in Washington's decided cases, often vaguely stated, it appears that the courts have accepted evidence that only one neighbor has occupied or improved, as well as evidence that both have done so.²² Though perhaps

²⁰ *Lamm v. McTighe*, 72 Wn.2d 587, 434 P.2d 565 (1967) (clearing, berry bushes, mowing grass, occasional roadway); *Mullally v. Parks*, 29 Wn.2d 899, 190 P.2d 107 (1948) (“improvements”); *Egleski v. Strozyk*, 121 Wash. 398, 209 P. 708 (1922) (garden, growing hay); *Hanson v. Lee*, 3 Wn.App. 461, 476 P.2d 550 (1970) (garage shared by both neighbors, concrete driveway strips). For a case in which a garage and small trees and shrubs may not have been regarded as sufficient use, see *Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965 (1947). However, these items had not been maintained for ten years, as required.

²¹ *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953) (no acquiescence because usage “did not terminate at a well-defined point”).

²² See *Lamm v. McTighe*, 72 Wn.2d 587, 434 P.2d 565 (1967) (one neighbor cleared, planted berry bushes, mowed grass, used roadway; other neighbor “occupied” up to fence line); *Mullally v. Parks*, 29 Wn.2d 899, 190 P.2d 107 (1948) (“improvements had been made with regard to that line”); *Egleski v. Strozyk*, 121 Wash. 398, 209 P. 708 (1922) (one neighbor grew garden and hay); *Hanson v. Lee*, 3 Wn.App. 461, 476 P.2d 550 (1970) (both neighbors used garage and concrete driveway strips). See *Houplin v. Stoen*, 72 Wn.2d 131, 431

no direct authority can be cited for the proposition, it seems obvious that no acquiescence can be found if either neighbor repudiates the alleged line by persistently using over onto the other's side of it. Here Mr. Armstrong maintained the property clear up to the tree line and the trees as is evident from the photos are much older than ten years.

Whatever the law may be on the point in other jurisdictions, it is clear in Washington that a boundary line is not fixed by acquiescence until occupancy or improvements with respect to the established line have continued for at least the period of limitations for adverse possession, ten years. Though in most of the Washington decisions that state the ten-year requirement, it has not been the determinative fact, the rule has been so consistently stated that it is not in doubt.²³ At this point the temptation is to think conceptually of long acquiescence as consummating an implied

P.2d 998 (1967), for an opinion in which the court spoke of both parties having to “acquiesce” in the line.

²³ The ten-year requirement is expressly stated, but is not the ground of decision, in several decisions, including: *Lamm v. McTighe*, 72 Wn.2d 587, 434 P.2d 565 (1967); *Muench v. Oxley*, 90 Wn.2d 637, 584 P.2d 939 (1978); *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953); *Piotrowski v. Parks*, 39 Wn.App. 37, 691 P.2d 591 (1984) (parol agreement case; court distinguishes time limits for parol agreement and acquiescence); *Heriot v. Lewis*, 35 Wn.App. 496, 668 P.2d 589 (1983) (adverse possession case); *Hanson v. Lee*, 3 Wn.App. 461, 476 P.2d 550 (1970). Failure to occupy for ten years, though mentioned only briefly in either decision, appears to be an alternative ground of decision in *Waldorf v. Cole*, 61 Wn.2d 251, 377 P.2d 862 (1963), and *Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965 (1947).

agreement between the neighbors for the boundary line they established on the ground. Indeed, several Washington acquiescence decisions refer to an “implied agreement.”²⁴

Parties should resist the temptation, to avoid further confusion of the distinction and similarities of the doctrines of acquiescence and parol agreement, which are already confusing. If acquiescence is to perform a distinct function, it should not be explained in terms of some other doctrine. A court might well describe the policy behind acquiescence in words like this: “Let sleeping dogs lie. The court will not disturb a boundary long established on the ground.” All the doctrines covered, including adverse possession, are best understood as doctrines of repose. But, among them all, acquiescence is the ultimate doctrine of repose.

IV. CONCLUSION

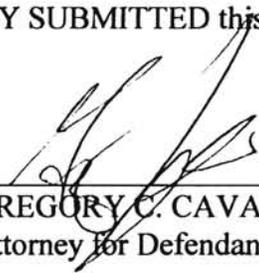
For the reasons stated above, defendants’ Motion for Reconsiderations should be granted and this Court should reverse the trial court orders or at the very least remand for an award of no more fees than requested and vacate the penalty of \$100.00 a day and which penalty

²⁴ *E.g.*, *Lamm v. McTighe*, 72 Wn.2d 587, 434 P.2d 565 (1967); *Hanson v. Lee*, 3 Wn.App. 461, 476 P.2d 550 (1970). In listing the elements of the acquiescence doctrine, *Lamm v. McTighe* compounds the confusion between that doctrine and

should not commence until 30 days after the date the request for reconsideration was denied as is consistent with the law and court rules. With no evidence submitted by Plaintiff it was clear error for the trial court to award sanctions or to not grant the Defendants' request for an evidentiary hearing given the facts properly before the trial court. The trial court should be reversed on these issues.

Plaintiff's motion for summary judgment should also be reversed since there were significant issues of fact presented to the trial court and with all inferences in favor of Defendants, the order should not have been granted. When all matters are considered in the light most favorable to the Defendants it is clear that there are questions of fact on several issues of fact remaining for the trier of fact and if there are doubts the court should hold an evidentiary hearing on the contempt motion. The trial court's decisions should be reversed as a matter of law.

RESPECTFULLY SUBMITTED this 27 day of August, 2012.



GREGORY C. CAVAGNARO, WSBA 17644
Attorney for Defendant Armstrong/Appellants

parol agreement by stating that "in the absence of an express agreement," the parties must acquiesce in the established line.