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No. 70918-6

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 MAR -3 PM 2:29

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ROBERT L. EVANS,

Appellant,

vs.

DENISE E. FERRY,

Respondent.

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OPENING BRIEF OF APPELLANT

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## INTRODUCTION

This case involves three siblings who inherited from their parents equal shares in two valuable lots of real property on the shore of Lake Sammamish. Taken together, the two lots comprise nearly 80,000 square feet of land, almost two acres. The lots used to be contiguous, and are now separated only by municipal rights of way, including the East Lake Sammamish trail.

One of these lots is a waterfront lot of 16,685 square feet. This beautiful lot contains 300 feet of largely undeveloped Lake Sammamish shoreline. This lot also contains a historic wooden cabin that was built by hand by the Evans sibling's father. This has been a center of Evans family gatherings and activities for generations. The second, undeveloped lot is just uphill from this shoreline lot, with beautiful views of the lake. This 63,000 square foot lot has plenty of space for subdivision into several large building lots with unobstructed views of the lake.

During the proceedings below, the main issue presented to the Court was whether and how these two lots should be considered together in determining how to "partition" them under Washington law, RCW 7.52.010 *et seq.* Partition is a method by which tenants in common sharing an interest in real property can separate their jointly owned property into separate lots. Washington law is clear that in a partition

action, physical subdivision into separate lots is the heavily favored method. Accordingly, partition by a judicially forced sale may only occur when there is no practical way to physically subdivide jointly owned property into separate lots. RCW 7.52.080; Williamson Inv. Co. v. Williamson, 96 Wn. 529, 535, 165 P. 385 (1917); Hegewald v. Neal, 20 Wn. App. 517, 522, 582 P.2d 529 (1978).

So there is a powerful legal presumption favoring partition by physical subdivision. This recognizes the drastic nature of a judicially forced sale of property in the face of objection from a rightful property owner. Moreover, separate partitioned lots need not be equal in value. If physical subdivision creates unequally-valued lots, compensation is ordered from one joint owner to the other(s) to equalize the value derived. RCW 7.52.440; Falk v. Green, 154 Wn. 340 (1929). This provision protects the interests of the person seeking to force partition.

Under Washington law, when both jointly owned lots in this case are considered together, physical subdivision into three lots is the only reasonable partition remedy. This was the relief sought by defendant Robert Evans below, to subdivide the jointly owned property into three lots, one for each sibling, providing compensation if needed under RCW 7.52.440 to equalize values of the divided lots. This was the primary issue presented to the trial Court for decision.

However, after an early Summary Judgment with no evidentiary hearing, the trial Court issued a ruling in which it completely ignored this issue. Although both jointly owned lots were properly brought into the case, and although the briefing and oral argument focused on the presence of the two lots, the Court's written ruling made no mention of this issue. CP 258-261. There are no findings, legal or factual, as to why the two lots could not be used to create a physical subdivision. Indeed, ***the Court's Order makes no mention whatsoever of the upper lot***, and makes no determination regarding defendant's partition request as directed to that lot. See Answer and Counterclaim, CP 119-123. Instead, addressing only the lower waterfront lot, the Court ruled without explanation that, by itself, it could not be physically subdivided. CP 258-61. The Court ordered the immediate forced sale of this single lot. That surprising ruling necessitated this appeal.

Where the law so strongly favors partition by physical separation over a forced sale, the Court's failure to make findings or rule on the status of the two lots was error. All three of the parties, including the defendant below, have equal ownership rights in these lots. Plaintiff brought the lower lot into the case and requested partition, and defendant brought the upper lot into the case and requested partition. Plaintiff argued below that these two closely adjacent lots could not, as a matter of

law, be considered together and subdivided. Yet there is no case law in Washington (or apparently in any other jurisdiction) holding that previously contiguous, adjacent lots, separated by a municipal right of way, cannot be used together to create a fair partition.<sup>1</sup> That was the effect of the trial Court's ruling, although it reached that conclusion with no explanation, factual findings, or legal conclusions directed to this issue.

We ask the Court of Appeals to reverse the trial Court and remand with instructions to physically subdivide the jointly owned lots into three shares, in accord with Washington's partition statute and the applicable case law. Other bases for appellate relief -- including the truncated nature of the proceedings below and the trial Court's refusal to consider highly relevant evidence -- are discussed below.

#### **ASSIGNMENTS OF ERROR**

1. Where joint property owners own equal shares in two adjacent properties separated only by municipal rights of way, and where both of these properties were properly brought into this partition action, it was error for the trial Court to completely ignore the presence of one of these two properties, while ordering the immediate forced sale of the other

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<sup>1</sup> Indeed, the case of Friend v. Friend, relied upon by the plaintiff, itself involved non-contiguous lots considered together in one partition action. Friend v. Friend, 92 Wn.App 799, 799-800, n. 5-7 (1998).

property, in violation of Washington's presumption favoring physical subdivision over forced sale.

2. Where two properties, owned in equal shares by the same three siblings from the same inheritance, were properly brought into this partition action, and where the briefing and oral argument focused heavily on whether both properties should be considered together in determining a method of partition, it was error for the Court to issue an Order completely ignoring that issue, making no findings of law or fact on that issue, and yet ordering the immediate forced sale of only one of these two properties.

3. It was error for the trial Court to order the forced sale of the lower lot, based solely on plaintiff's contention that its subdivision would violate local zoning rules.

4. It was error for the Court to refuse to take judicial notice of county property records, where those records directly rebutted the plaintiff's primary argument favoring a forced sale.

5. It was error for the Court to reject the defendant's Rule 56(f) request for more discovery, where discovery was ongoing, where the Court closed the briefing nearly two months in advance of the Summary Judgment hearing, and where the Court closed the briefing less than three months after the Complaint had been filed.

6. It was error for the trial Court to order that the forced sale of the lower lot was to take place “in a commercially reasonable manner” through a real estate agent, where the partition statute makes clear that any such sale must be “be made by public auction, to the highest bidder, in the manner required for the sale of real property on execution.” RCW 7.52.270.

7. The trial Court’s finding that the single lot is “so situated that partition in kind cannot be made without great prejudice to the co-owners” was error, where no explanation is offered for that finding and where substantial evidence contradicted that finding.

### **STATEMENT OF THE CASE**

#### **A. THE PROPERTIES AT ISSUE ARE HISTORIC AND UNIQUE**

This case involves two lots located in the City of Sammamish. These two lots have been in the Evans family for generations, and were handed down to the three Evans siblings through inheritance. Going back many decades, the Evans family owned a very significant amount of land in present-day Sammamish.<sup>2</sup> Most of this acreage has been sold off over the decades. However, some land remained in the family and has been passed down to the three Evans siblings through inheritance. The two lots

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<sup>2</sup> The fact statement is based primarily on the Declarations of Robert Evans, CP 195-97, and Jay Carlson, CP 198-217. Citations are provided to support the factual statements herein.

at issue in this case are therefore an important legacy of the family's historically significant land ownership in the Sammamish area. CP 195-96; CP 202-203.

Each of the three Evans siblings owns a 1/3 undivided inherited interest in these two lots. Together, the lots comprise approximately 80,000 square feet, or nearly two acres, of waterfront land. The two lots are adjacent, separated only by municipal rights of way for Lake Sammamish Parkway and for the East Lake Sammamish trail (which was formerly a railroad right of way). It is believed that the two lots used to be contiguous, and that they were separated only for these rights of way. CP 195-96.

The upper, larger lot has no structures on it, but it has a paved driveway and water, sewer and electrical hookups in place. It is 63,000 square feet in size, nearly an acre and a half. Therefore, if subdivided, this lot could easily be developed for high-end residential construction and use. Indeed, the siblings had previously submitted plans for a short plat of this parcel into two lots to the City of Sammamish for approval. CP 196; CP 211-13. This proposal would have created three lots total, one for each sibling. The upper lot has panoramic views of Lake Sammamish, being located just across the road from the lake, so it would support the construction of luxury view homes.

Accordingly, this is a very valuable piece of undeveloped property. A realtor consulting with the plaintiff estimated the market value of this property at \$650,000 or more if the property were indeed subdivided. CP 196.

The second, lower lot is an extraordinarily beautiful, historic waterfront lot on the east shore of Lake Sammamish. It is 16,685 square feet. The lot contains fully 300 feet of Lake Sammamish waterfront, with a full dock. There is substantial wildlife interaction on this part of the lake, with regular visits from eagles, various forms of migrating waterfowl, and fresh-water otters. This property reflects the desire of the Evans' parents to maintain most of the lakeshore in its natural state. Such privately held parcels have nearly disappeared from the lake and are an undoubted source of pleasure to fisherman, boaters as well as bikers and walkers along the East Lake Sammamish Trail that adjoins it. Much of the 300 feet provides vistas of the lake through native vegetation from the trail. CP 196.

The only significant structure on this lot is a historic, rustic one room wood cabin, which was designed and built on the water nearly 60 years ago by the Evans family. The 20x30 one-room cabin was built by hand using cedar boards and battens. It features a large sliding barn-style door in front, opening the entire interior to the lake. This unique cabin

was featured in the pages of Sunset magazine in June, 1957. CP 196; CP 205-09. The Sunset magazine article and photos give a good sense of the unique and historic nature of this property, and of its importance to the Evans family through the generations. Id.

This waterfront lot and cabin has been a hugely important part of the Evans family for decades. While the Evans' parents were alive, the family used and stayed in this cabin on a very regular basis. The Evans children (i.e., the parties to the present suit) grew up using this cabin as a center for family activities. It was, among other things, a waterfront summertime retreat for family and friends. Since the death of the Evans' parents (the father died in 1974, the mother in 2006), the siblings and their own children and friends have shared the use of this cabin, and it has remained an important center for family gatherings, interaction, and recreation. CP 197.

**B. THERE IS EASILY ENOUGH LAND TO SUBDIVIDE THESE TWO LOTS INTO THREE, ONE FOR EACH SIBLING**

Defendant Robert Evans believes that it was the clear wish of his parents that this property would remain in the Evans family through inheritance. *As the plaintiff herself wrote in 2008*: "I feel that we are bound by our family's history of one generation making (sometimes great) sacrifices in order to pass it on to the next generation and that we should at

least try to explore ways those wanting to hold on to the property may do so.” CP 197; CP 217.

Indeed, the defendants’ request below -- that the two lots be considered together and physically subdivided to meet the needs of all the siblings -- was first proposed **by the plaintiff**. In a letter dated September 20, 2008, plaintiff Denise Ferry proposed that the two lots be taken together and subdivided, allowing some of the land to be sold while also allowing the family to retain possession of the cabin. CP 217. Plaintiff cannot complain that her brother’s similar, current proposal is unreasonable, unfair, or unjustified.

In recent years, the two sisters (plaintiff Denise and co-defendant Allison) have chosen to use the cabin less frequently. As a result, since 2009, defendant Robert Evans has shouldered a substantial share of the total burden and expense of upkeep, maintenance, taxes and other expenses on the lower property. He has in fact paid half of all joint property expenses, leaving each of his sisters to pay a ¼ share. CP 197.

In the Summary Judgment motion below, plaintiff’s primary argument was that the City of Sammamish zoning code requires lots of at least 12,500 square feet in this location. On that basis, and ignoring the presence of the upper lot, the plaintiff argued that the lower 16,685 square foot lot could not be physically subdivided. However, even accepting the

veracity of the alleged 12,500 square foot limit, considering the square footage of both lots together (nearly 80,000 square feet), there is more than enough square footage to create at least 6 separate lots. Subdividing this land into three parcels, one for each sibling, would not be difficult. Indeed, a short plat plan for the upper lot, which would have created three parcels total, was already submitted by the siblings to the City of Sammamish. CP 211-213.

Moreover, as discussed below, evidence presented to the trial Court -- and refused from consideration -- appeared to established that almost all of the property lots in this waterfront location are far smaller than the 12,500 square foot limit alleged by the plaintiff. TP 3-5. Plaintiff offered no explanation for this discrepancy, yet the Court refused to allow additional discovery to explore that and other issues.

**C. THE TRIAL COURT TRUNCATED THE PROCEEDINGS BELOW, REFUSED TO ALLOW MORE DISCOVERY, AND REFUSED TO TAKE JUDICIAL NOTICE OF HIGHLY RELEVANT INFORMATION**

The Complaint in this case was filed on April 17, 2013. In the Complaint, the plaintiff sought partition of only the lower, waterfront lot owned together by the siblings. CP 1-5. On June 14, 2013, defendant Robert Evans filed his Answer and Cross-Claim. CP 119-123. In the Cross-Claim, defendant joined the second, upper lot into the case and

sought partition of all of the jointly owned property shared by the siblings.

Id.

On June 6, 2013, prior to the Answer being filed and just seven weeks after filing the Complaint, plaintiff filed her Summary Judgment motion, misleadingly naming it as a motion to “Appoint Referee.”

Plaintiff sought an immediate order that the lower lot be submitted to a forced sale. CP 18-30. Plaintiff’s sole argument was that the 16,685 square foot lower lot could not be physically subdivided without violating local zoning that requires a minimum lot size of 12,500 square feet. Id.

For some reason, rather than treating this dispositive motion as a Summary Judgment, plaintiff noted the motion a mere 8 calendar days in advance, for June 14, 2013. CP 16-17. Thus began a series of procedural maneuvers in which the plaintiff repeatedly sought to shorten and truncate the briefing and consideration schedule for the dispositive motion, and indeed the entire case.

First, the defendant was compelled to bring a Motion to Strike the improperly noted Motion for Summary Judgment. The plaintiff was not willing to treat the motion as dispositive, or accept the August 30, 2013 summary judgment hearing date offered by the Court. CP 92-93. In response to defendant’s Motion to Strike, plaintiff argued that the Court should not hold oral argument on her request for a forced sale. CP 108-

115. On June 25, the Court issued a ruling on the Motion to Strike, in which it confirmed that the parties could contact the Court for a hearing date. CP 149. The parties did so, and the Court confirmed the previously offered hearing date of August 30, 2013. CP 152. Pursuant to CR 56(c), this would have provided an opposition deadline of August 19, 2013.

The next day, the plaintiff filed a second procedural motion, “To Clarify” the Court’s announced hearing schedule. CP 138-44. Plaintiff again sought to truncate and shorten the briefing and hearing schedule on the summary judgment Motion. Again, plaintiff asked the Court to cancel the oral argument, and simply rule in the plaintiff’s favor and force the immediate sale of the lower lot. CP 139. At this point, defendant had not even had an opportunity to oppose the underlying motion.

On July 8, 2013, the Court signed, and interlineated, the draft order presented by the plaintiff on the “Motion to Clarify.” In the Order, the Court ruled that “the current briefing schedule be adhered to, under which all briefing would be completed by July 5, 2013.” CP 183. Again, this Order was signed on July 8, three days **after** the date upon which the Court was now closing the briefing. Defendant Robert Evans had still had no opportunity to oppose the underlying motion for Summary Judgment. So the Court appeared to close the briefing without even hearing from the defendant. Yet the Court did not cancel the August 30, 2013 hearing. *Id.*

In response, and frankly in substantial confusion, on July 25, 2013 (well before the regularly scheduled opposition date of August 19, 2013), the defendant was forced to file an early opposition to plaintiffs' Summary Judgment. Defendant was forced to make this early filing despite the fact that discovery, relevant to the motion, was ongoing and incomplete. Transcript of Proceedings ("TP") 3-5, 11, 13, 29-30.

This highly truncated briefing schedule became important at the hearing. For example, the plaintiff opposed the defendant's CR 56(f) request for more discovery, arguing that there had been plenty of time for the defendant to respond. TR 5-6, 27-28. Plaintiff made this argument despite the fact that she had worked so hard -- and so successfully -- to truncate the briefing schedule. In its Summary Judgment ruling, the trial Court made no mention of defendant's CR 56(f) request, apparently denying it in silence and without explanation. CP 258-261.

Moreover, at the hearing, the trial Court refused to take judicial notice of certain King County online property records. CP 269-273. These were printed maps from the King County property website, showing the relative size of property lots near the Evans' water front lot. Id. These maps showed clearly that almost all of the lots in the area are substantially smaller than the 12,500 size limit claimed by the plaintiff as justification for her motion. Id.; TP 3-5. In refusing to take notice of these materials,

the Court stated: “*I have no idea how that would apply here*, so I’m going to have to sustain the objection, because *I don’t know that I would have enough of a context to use these maps and know what they really represent without knowing the law behind the maps.*” TP 4-5 (emphasis added). So while the Court admitted that it could not evaluate the maps without more “context” and understanding of the “law behind the maps,” it refused to allow additional discovery to the City. The Court then proceeded to rule in the plaintiff’s favor, apparently convinced that the “law behind the maps” prohibited lots less than 12,500 square feet in that area.

### ARGUMENT

#### **A. PHYSICAL PARTITION IS STRONGLY AND PRESUMPTIVELY FAVORED OVER PARTITION BY SALE**

Here, the trial Court’s Order is silent regarding the primary legal issue presented below. Briefing and oral argument focused on whether the two adjoining lots could be considered together into one partition action. The record established that if both jointly owned lots were considered together, physical division could be done easily, thus avoiding the need for a forced sale.

While the Order is silent on this legal issue, the Court did rule for the immediate forced sale of the lower lot only. This constitutes a legal

ruling -- albeit with no explanation -- that the two lots would not be considered together. Also without explanation, the Court appears to have ruled in favor of plaintiff's argument that lots in the shoreline area are strictly limited to a minimum 12,500 square feet. These are legal rulings that are to be reviewed *do novo*.

Under Washington law, partition in kind (i.e., by physical separation, into separate parcels) is strongly and presumptively favored over partition by sale. Partition in kind is the presumptive method for partitioning property between tenants in common. Williamson Inv. Co. v. Williamson, 96 Wn. 529, 535, 165 P. 385 (1917); Hegewald v. Neal, 20 Wn. App. 517, 522, 582 P.2d 529 (1978). Such physical division is to be used whenever practicable. Id.

“Before a sale can be ordered, in preference to a partition in kind, the court must find by evidence that the property or any part of it is so situated that partition in kind cannot be made without Great prejudice to the owners.” Hegewald, 20 Wn. App. at 522 (citing Huston v. Swanstrom, 168 Wash. 627, 13 P.2d 17 (1932)); Williamson Investment Co. v. Williamson, 96 Wash. 529, 165 P. 385 (1917). “Great prejudice [means] Material pecuniary loss and the burden of proof is upon the one asserting it.” Id. Partition by sale, sought by the plaintiff here, is appropriate only in very narrow and extreme circumstances, such as where physical

partition would “destroy the property’s usefulness.” Hegewald, 10 Wn. App at 523.

**B. THE COURT SHOULD HAVE CONSIDERED BOTH LOTS TOGETHER IN REVIEWING THIS PARTITION ACTION**

The Court committed legal error by failing to address the presence of the upper lot. The second lot was properly joined into the case in defendant’s Answer and Counter-Claims. At that point, plaintiff’s request for a forced sale -- which was filed even before the Answer -- no longer addressed the basic facts of the case. Plaintiff’s Summary Judgment should have been denied on that basis alone.

The plaintiff’s only argument on Summary Judgment was that, because the smaller, lower lot is 16,685 feet in size, it could not be physically separated into three parcels while meeting an alleged Lake Sammamish zoning requirement for lots of at least 12,500 square feet. With the second lot added to the case, there is nearly 80,000 square feet available for partition. This is easily enough for a physical partition into three parcels, even under plaintiff’s case theory.

Below, plaintiff argued that as a matter of law, these two adjacent lots could not be considered together in a partition action. CP 222-24. Yet plaintiff admitted that there was no case law in Washington -- or apparently anywhere else -- to support this proposition. CP 223. Legal

support for plaintiff's assertion is nonexistent. Plaintiff cited to one inapposite Washington case, and two Vermont cases, none of which has anything to do with partition law. *Id.* The two Vermont cases were an especially weak foundation for plaintiff's assertion that "Courts outside of Washington have uniformly refused" to treat non-contiguous lots together in a partition case. CP 223.

On the contrary, it appears that Washington partition cases have treated non-contiguous lots together in one case, without any suggestion that Courts find this to be unusual. Indeed, the case of Friend v. Friend, *the primary case relied upon by the plaintiff*, involved non-contiguous lots that were considered together in one partition action. Friend v. Friend, 92 Wn.App 799, 799-800, n. 5-7 (1998). There, the separate lots were not even adjacent as they are here. They were rather located far from each other on two separate lakes. The Court of Appeals evaluated partition issues for these non-contiguous lots, and while the Court denied physical partition in that case for other reasons, there was no indication that it found the presence of non-contiguous lots to be unusual. *Id.*<sup>3</sup>

From a practical perspective, it is important to remember that the two lots at issue here are directly next to each other, separated only by

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<sup>3</sup> At oral argument, the parties discussed another case, brought to our attention by plaintiff's proposed Partition Referee, where non-contiguous lots had been treated together in a partition action. TP 15.

municipal rights of way. The lots used to be contiguous. They were handed down, in the same equal shares, to the same three siblings, from the same parental inheritance. So this is not a case where defendant is seeking to combine wildly disparate properties into one partition. On the contrary, the properties are closely related in history and in proximity. It is not a stretch by any means to consider them together.

There is no support in the law for plaintiff's assertion that non-contiguous lots can never be considered together in a partition action. If two lots were ever going to be considered together, this would be the appropriate situation to do so. So unless this Court rules, for the first time, that a partition case can never involve more than one lot, it seems clear that a remand is in order for further proceedings addressing both lots.

Such a ruling would be fully protective of the rights guaranteed to the parties by the partition statute. The statute exists to ensure that a tenant in common is able to recover the value from jointly owned property when other owners don't want to sell. The statute therefore allows for the physical separation of such property into separate lots, and provides detailed procedures for how to do so. To the extent that physical separation creates lots of unequal value, the statute specifically provides for compensation to equalize that value among cotenants. RCW 7.52.440. This ensures that in a case of physical division, all parties' interests are

equalized and protected. This process is designed to avoid the drastic remedy of a forced sale made over the objection of a property owner.

Washington's partition statute, and cases interpreting it, makes clear that the number one policy priority is to avoid the forced sale of property, over objection, whenever possible. In the present case, there was an easy way to effectuate that policy, using the two jointly owned, adjacent lots. Unfortunately, the Court ignored the second lot and ordered a forced sale, while providing no guidance to its reasoning or its thought process. Particularly given the strong legal presumption against such a ruling, this was error.

**C. EVEN IF THE LOWER LOT IS CONSIDERED ALONE, IT WAS ERROR TO ORDER A FORCED SALE INSTEAD OF SUBDIVISION**

Even without consideration of the second lot, plaintiff's argument is wrong for several reasons. First, local zoning does not constrain the Court's mandate to physically subdivide property under the partition statute. Second, unlike the single case relied upon by the plaintiff, the City of Sammamish did not object to partition and did not seek to prevent partition of the lower lot. Third, the Court refused to allow discovery regarding lot sizes in the area, or other discovery directed at the rules and regulations applicable to those lots. The Court also refused to take judicial notice of county property records showing that lot sizes in the area are

almost uniformly less than the 12,500 square foot limit claimed by the plaintiff.

Below, plaintiff cited to only one case, Friend v. Friend, for the proposition that partition rulings are always subject to the restrictions of local zoning. The Friend case is unique in partition case-law, and is largely off-point. It is a good example of the adage that “bad facts make bad law.”

In Friend, a husband and wife were acting collusively through a post-nuptial agreement and various property transfers to circumvent local zoning authority. They were seeking to stipulate to an order of partition, thus subdividing their property over the explicit objection of the local zoning authority, Thurston County. Friend, 92 Wn. App 799, 800 (1998). Their scheme was part of a long-running litigation dispute with the County, whereby the Friend family sought to circumvent local zoning through a variety of schemes, manipulations, and ownership transfers. Friend at 805, n. 2. The County, having litigated for years against the Friends, intervened to prevent their collusive, stipulated “partition.” So the County was actually a party, and the only objector, in the Friend case. The Friends were manipulating the partition statute to try an end run around prior zoning denials from the County.

Obviously, no such circumstances exist here. Indeed, there has been no request directed to the City of Sammamish to physically subdivide the lower lot property. The City is not a party to this case, as it has not intervened to prevent or object to partition. Moreover, the parties are not collusively trying to stipulate to a partition as some sort of trick. Rather, partition is appropriately contested in this case. This case has none of the unusual circumstances of Friend, in which the valid objections of Thurston County were ultimately upheld. Friend does not apply.

Plaintiff cited to no other authority for the proposition that a trial Court is strictly limited by local zoning in ruling on a partition action. Moreover, during the proceedings below, the trial Court refused to take judicial notice of evidence showing that lot sizes in the waterfront area are, in fact, much smaller than the claimed 12,500 square foot limit.<sup>4</sup> Given the strong presumption favoring physical division over sale, this is highly significant. Plaintiff made no strong showing that the lower lot -- even if taken alone -- could not be physically divided to create an effective partition.

Unfortunately the parties were denied a chance to fully pursue these issues through discovery. As discussed above, because of the highly

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<sup>4</sup>Again, these were lot maps printed from the King County property records website. CP 269-73. Such publically available, county generated real property information is broadly relied upon, and easily within the ambit of fair "judicial notice" materials.

truncated proceedings, the parties had no opportunity to complete discovery as to actual lot sizes in the area, and whether it would be possible to subdivide the lower lot, by itself, into three conforming lots. The court refused to take judicial notice of proffered lot map evidence, even as it acknowledged that it did not have adequate information about the law or the facts regarding area lot sizes. TP 5. Under these circumstances especially, it was error to refuse to take judicial notice of the lot maps, and it was error to refuse defendant's Rule 56(f) request for more discovery.

**D. THE TRIAL COURT CLEARLY ERRED IN ORDERING THE SALE IN A "COMMERCIALY REASONABLE" MANNER, RATHER THAN BY AUCTION**

At plaintiff's invitation, the trial court ordered that the forced sale of the lower lot be held in a "commercially reasonable manner," through a real estate agent. CP 259. This is in clear violation of RCW 7.52.270, which requires that any forced sale "shall be made by public auction, to the highest bidder, in the manner required for the sale of real property on execution."

This is important because at auction, each co-tenant has the right to personally bid on the property using their share of the jointly owned res. RCW 7.52.390. All co-tenants can attend the auction sale and seek to

acquire the property, using their respective share of its value. This simply would not be possible at an open-market sale. Accordingly, and in binding precedent, the Washington Supreme Court has held that such an order is erroneous and subject to reversal and remand. Blackwell v. Mclean, 9 Wn. 301, 304 (1894) (“The decree, however, is irregular in this: that it authorizes the sale at public or private sale, whereas the statute provides that such sales shall be made by public auction, to the highest bidder, in the manner required for the sale of real estate on execution.”) Binding precedent compels that the trial Court’s order be vacated and remanded, at least as regards the manner of sale.

**E. THE TRIAL COURT ERRED IN REFUSING TO ALLOW ADDITIONAL DISCOVERY**

As noted above, the defendant below moved pursuant to CR 56(f) for more time to complete discovery in this case. This was, in part, because of the highly truncated nature of the proceedings. Plaintiff brought their Summary Judgment motion a mere seven weeks after filing the Complaint, before the Answer had been filed, and obviously before significant discovery had been completed. The plaintiff then repeatedly sought to close down the briefing process, and succeeded in closing the briefing well before the final hearing held on August 30, 2013. It seemed clear that the plaintiff wanted the Court to review and rule on her demand

for a forced sale *before* significant discovery could be completed or brought to bear on the case.

CR 56(f) states that “should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” See also Pitzer v. Union Bank of California, 141 Wn.2d 539, 556, 9 P.3d 805 (2000). “[S]ummary judgment is disfavored where relevant evidence remains to be discovered.... [S]ummary judgment in the face of requests for additional discovery is appropriate only where such discovery would be 'fruitless' with respect to the proof of a viable claim.” Jones v. Blanas, 393 F.3d 918 (9th Cir. 2004) (citing Klinge v. Eikenberry, 849 F.2d 409, 412 (9th Cir. 1988)).

The Carlson Declaration below specifically addressed the Rule 56(f) request. Before and at the time of the Summary Judgment hearing on August 30, 2013, discovery was ongoing. CP 198-200. Discovery to the City of Sammamish regarding the lots and zoning issues was pending. TP 29. A discovery conference between the three parties had been held on July 24. CP 199. Additional discovery sought would have included

additional discovery to the City regarding lot sizes and zoning. This could have included depositions of City of Sammamish officials, the plaintiff, and the co-defendant Allison Evans. This discovery would have helped the parties and the Court understand: (1) whether it is possible for the lower lot to be subdivided into three lots in conformity with local zoning, (2) whether the lower lot is even buildable if it were sold as desired by the plaintiff, and (3) whether the lower lot is not buildable due to its location in a sensitive wetland location containing a running stream. CP 199-200.

The plaintiff filed her motion extremely early, before any discovery had been completed and before the defendant had answered. Given the complexity of the issues, and the significance of the property to the Evans family, the parties and the Court would have benefitted from a more deliberative process, including reasonable discovery.

This is particularly true given the Court's statement at the hearing that it did not understand the "context" of the lot size issues, and that it could not "know what [these maps] really represent without knowing the law behind the maps." TP5. Yet despite that lack of information, the Court apparently went on to rule that the "law behind the maps" justified granting plaintiff's motion for Summary Judgment.

This is a beautiful and unique property that has remained in the Evans family for many, many decades. There was no justification to rush

to a decision below without allowing both parties a full and fair opportunity to develop their facts and their arguments. While all plaintiffs want cases decided in their favor, and immediately, defendants also have a right to adequate preparation and adequate discovery to answer claims. That was wrongfully denied in this case. This Court should remand this case with instructions to allow discovery to proceed accordingly.

### **CONCLUSION**

In a highly truncated proceeding below, the Court issued an order compelling the forced sale of the waterfront property, over the objection of a rightful owner of that property. This is a drastic and irrevocable legal remedy. The partition statute and Washington case law make clear that such a forced sale is to be avoided at all costs, whenever possible. Indeed, the partition statute is designed with detailed procedures to facilitate physical subdivision over forced sale. Yet in its ruling, the Court completely ignored the key issue in the case -- the presence of the second lot and the argument that both lots be considered together to complete a physical division in favor of all three siblings.

There appears to be no reason in law or fact why both lots could not be considered together to enable a physical subdivision of this land. Moreover, the Court so truncated the proceedings below that the parties were prevented from a full and fair opportunity to develop this case.

Substantive error was compounded by procedural error. We respectfully request that this Court reverse the ruling below, and remand with instructions to pursue a physical subdivision of the two lots at issue. This result will satisfy the desire of the plaintiff to separate her ownership in this land from her siblings. It will also protect against the highly disfavored remedy of forcing property to be sold out from under an objecting, rightful property owner.

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**DECLARATION OF SERVICE**

The undersigned declares under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

That on March 3, 2014, I served a copy of the Opening Brief of Appellant, on this action via email by prior agreement of the parties to the following:

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Margarita V. Vanegas