

No.37156-1-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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MARK S. HORN

Appellant,

v.

BERNARD EISENBARTH,

Respondent.

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APPEAL FROM SUPERIOR COURT OF COWLITZ COUNTY

COWLITZ COUNTY CAUSE NO. 05-2-01969-8

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BRIEF OF APPELLANT

---

SUZAN L. CLARK, WSBA #17476  
Attorney for the Respondent

Attorney at Law  
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Vancouver, Washington 98660

Telephone: (360) 735-9434

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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## **I. ASSIGNMENTS OF ERROR**

**A. ASSIGNMENT OF ERROR NUMBER ONE: THE TRIAL COURT ERRED IN ENTERING FINDING OF FACT NO. 9.**

**B. ASSIGNMENT OF ERROR NUMBER TWO: THE TRIAL COURT ERRED IN ENTERING FINDING OF FACT NO. 10.**

**C. ASSIGNMENT OF ERROR NUMBER THREE: THE TRIAL COURT ERRED IN ENTERING FINDING OF FACT NO. 12.**

**D. ASSIGNMENT OF ERROR NUMBER FOUR: THE TRIAL COURT ERRED IN ENTERING FINDING OF FACT NO. 13.**

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**A. ARE THE TRIAL COURTS FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD?**

**B. CAN THE COURT IGNORE A MONUMENT ON THE GROUND WHEN IT CONFLICTS WITH AN ILL DEFINED RIGHT OF WAY?**

## **III. STATEMENT OF THE CASE**

## A. STATEMENT OF FACTS

Bernard Eisenbarth resides on Lot 3 of Carrollton Crest in Cowlitz County. (RP of 10-29-07, P- 8) Eisenbarth purchased the lot over 43 years ago. (RP-I-12) He shares a common property boundary on the eastern edge of his property with Mark Horn. (RP of 10-29-07, P-12 to 15) Due to brush and undergrowth, Eisenbarth cannot identify the eastern boundary of his property.(RP of 10-29-07, P-11)

Horn's family purchased Lot 18 and other lots in Mt Pleasant Acres in approximately 1974. (RP of 10-30-07, P-197) Horn received possession of Lot 18 in 1997 from his family. (RP of 10-30-07, P-197) His family resided on Lots 15 and 16 since the time he was approximately two and a half years old.

Horn worked on the project to widen the old Pacific highway in 1996.(RP of 10-30-07, P-197 to 198) Horn observed no plat marks, quarter section markers or any kinds of monuments or markers on the road surface he worked on. (RP of 10-30-07, P- 200)

Horn, his father and his brother put up a fence at the edge of the field on Lot 18 when he was fifteen. (RP of 10-30-07, P-204) Horn testified that

the fence was approximately 25 feet short of the sixteenth corner marker. (RP of 10-30-07, P- 205 to 206) Horn described the marker as a capped iron pipe set in concrete at the junction between Lot 4 of Carrollton Crest and Lot 18 of Mt. Pleasant Acres. (RP of 10-30-07, P- 207)

The boundary between Lot 4 of Carrollton Crest and Lot 18 of Mt Pleasant Acres lies on a section line. ((RP of 10-30-07, P- 243, Exhibit-34) The quarter section line is straight. (Exhibit-34, Exhibit 30)

Wesco Properties hired Calvin Hampton, a professional licensed land surveyor (RP of 10-29-07, P-40), doing business as Hampstur Corporation, to determine the exterior boundaries of the Carrollton Crest property. (RP of 10-29-07, P- 45) Hampton reviewed the Donnelly survey (Exhibit-11), the first and second Germunson surveys (Exhibits-12 and 13) and he pulled the original deeds and the GLO notes. (RP of 10-29-07, P-44 to 46) He then sent a survey crew out to attempt to find the corners of the property. (RP of 10-29-07, P- 46 to 47)

Hampton focused on the western boundary of Carrollton Crest, the Old Highway 99. (RP of 10-29-07, P- 47) Originally constructed in 1929, the right of way widths of Old Highway 99 have changed over the years. (RP of 10-29-07, P 47) Hampton believed he found monuments in the highway,

but none were of record.(RP of 10-29-07, P-48)

Don Day, licensed surveyor, started working for Cowlitz County in July, 1997.(RP of 10-29-07, P-87 to 88) The county survey for the widening of Old Highway 99 was done in 1994. (RP of 10-29-07, P-97) The county obtained a strip of land from each land owner along the Old Highway 99 to accomplish the widening and straightening of the highway. (RP of 10-29-07, P- 99) Day did not look at the deeds for the strips of land deeded to the county to widen the highway, nor did he know how much land the county acquired from each land owner.(RP of 10-29-07, P-97 to 98)

Day was unsure whether the old road way was paved over or destroyed in the widening project.(RP of 10-29-07, P-100) The road way itself was the only evidence in existence as to the location of the right of way. (RP of 10-29-07, P-100)

## **B. STATEMENT OF PROCEDURAL HISTORY**

Bernard Eisenbarth brought suit against Mark Horn to quiet title to his property. The matter went to trial before the Honorable James Stonier on October 29, 30 and 31, 2007. Judge Stonier entered Findings of Fact and

Conclusions of Law in favor of Eisenbarth on December 21, 2007 (Appendix “A”) From that order this appeal timely follows.

#### IV. ARGUMENT

On review, this court must first determine whether the findings of fact entered by the trial court are supported by substantial evidence in the record and then whether those findings of fact support the conclusions of law.

DD & L, Inc. v. Burgess, 51 Wn. App. 329, 330(1988)

The trial court elected to follow the Hampstur survey of Carrollton Crest and Mt. Pleasant over the other surveys of the same property. (Appendix “A”, Finding of Fact Nos. 9 and 10)

Generally, if competent evidence establishes that a monument does not accord with a survey or plat, the monument as established on the ground must control. Martin v. Neeley, 55 Wn.2d 219, 347 P.2d 529 (1959). The case at bar involves conflicting monuments. Hampton relied exclusively on the western boundary line created by Old Highway 99 in preparing his survey. (RP of 10-29-07, P-42 to 56)

In contrast, Donnelly, Germunson and Oleson-Dunn relied on the monument on the ground described as an iron rod or pipe and a mound of stone to mark the Southwest corner of Mt. Pleasant acreage. (Exhibits-11, 12, 15) (RP of 10-29-07, P-73) Don Day, the surveyor from county works, testified that he did not personally observe the monument used to set the southwest corner on the Donnelly survey.(RP of 10-29-07, P-91 to 93)

The only monumentation for the Old Highway 99 was the actual roadway itself as built in 1929. (RP of 10-29-07, P-89) When the county sought to widen the road in 1997, the county surveyed 30 feet on either side of the center point of the original ribbon of concrete from the 1920's.(RP of 10-29-07, P-88 to 89)

Day started work for the county in July, 1997 and the actual survey for the road was completed in 1994. (RP of 10-29-07, P-97) He had no personal knowledge of whether the original roadway was paved over or whether it was destroyed in the process of widening the road.(RP of 10-29-07, P-100)

Horn worked as a union laborer on the project to widen the old Pacific highway in 1996. (RP of 10-30-07, P-197 to 198) At that time, he observed no plat marks, quarter section markers or any kind of monuments

or markers on the road surface he worked on. (RP of 10-30-07, P-200) Horn worked on actually drilling and placing explosives and sometimes exploding sections of the old roadway. (RP of 10-30-07, P-198)

The county obtained land from the landowners along the Old Highway 99 to accomplish the widening project.(RP of 10-29-07, P-97 to 99, Exhibit-21), thereby decreasing the size of Carrollton Crest in a commensurate fashion. (RP of 10-29-07, P-97)

Day indicated that prior to his arrival, the county technicians used the old road as the only existing evidence of where the state intended the road right of way to be located when widening Old Highway 99. (RP of 10-29-07, P-100) The widening of the road created sharper curves in the road, so the road itself was re-engineered to straighten some of those curves within the new right of way.(RP of 10-29-07, P-102) This evidence establishes that the road way was not a fixed, static, and reliable monument on the ground.

The evidence regarding the Old Highway 99 contrasts sharply with the fixed and stable monument on the ground utilized by Donnelly's survey as recorded in 1992, by Germunson's survey recorded January 15, 1998 and the Oleson-Dunn survey recorded in 2001. (Exhibits-11, 12, 15) This monument aligns with the straight quarter section line depicted in the 1863 map of the area (Exhibit-34) and the 1857 map of the same area. (Exhibit-35)

If the property is resurveyed, the resurvey must rediscover where the

original surveyors placed the boundaries rather than determine where new and modern surveys would place them. StAAF v. Bilder, 68 Wn.2d 800, 415 P.2d 650 (1966); Thein v. Burrows, 13 Wn. App. 761, 537P.2d 1064 (1975).

The iron rod utilized by the other surveys comports with the original surveys. In contrast, Hampton chose to fix the widened Old Highway 99 as the western border of Carrollton Crest, neglecting the strong evidence that indicated that the road itself was the only evidence of where the state intended to place the right of way in 1929.(RP of 10-29-07, P-100) The other surveys utilized the rod in a pile of stone, a fixed monument with no likelihood of variance over time such as the widened Old Highway 99, to establish the southwest boundary of the two plats.

The trial courts findings (Appendix "A", Findings of Fact Nos. 9 and 10) that Hampton correctly surveyed the area are not supported by substantial evidence in the record and should be reversed and accordingly the trial courts findings that Horn erected a fence on Eisenbarth's property and that Eisenbarth is entitled to have the fence removed (Appendix "A", Findings of Fact Nos. 12 and 13) are likewise not supported by the record and should be reversed.

## **V. CONCLUSION**

For the reasons set forth above, Horn respectfully requests this court

reverse the ruling of the trial court in all respects.

Respectfully submitted this 9<sup>th</sup> day of July, 2008,

  
SUZAN L. CLARK, WSBA #17476  
Attorney for the Appellant

**APPENDIX "A"**

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ENDORSED FILED  
SUPERIOR COURT

DEC 21 2007

COWLITZ COUNTY  
RONI A. BOOTH, Clerk

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SUPERIOR COURT

DEC 21 2007

**SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY**

**BERNARD EISENBARTH, a married  
Individual in his separate capacity,**

**Plaintiffs,**

**vs.**

**MARK STERLING HORN, an  
unmarried individual; and RIVERVIEW  
COMMUNITY BANK, a Washington State  
Corporation,**

**Defendants.**

**NO. 05-2-01969-8**

**FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

**I. FINDINGS OF FACT**

1. The Plaintiff, Bernard Eisenbarth ["Eisenbarth"] is a resident of Cowlitz County, Washington.

2. The Defendant, Mark Sterling Horn ["Horn"] is a resident of Cowlitz County, Washington.

3. Eisenbarth is the owner of real property situated in Cowlitz County, Washington, described on Exhibit "A" that is attached hereto and incorporated herein by this reference.

4. Horn is the owner of real property situate in Cowlitz County, Washington, described on Exhibit "B" attached hereto and incorporated herein by this reference.

FINDINGS OF FACTS  
AND CONCLUSIONS OF LAW

Page 1 -

**DONALD W. FREY, P.S.**  
*Attorney at Law*

600 Royal Street - Suite B  
Kelso, WA 98626

(360) 577-8700 - Fax (360) 577-8702

**FILE COPY**

1           5.     Eisenbarth's real property is situated in a plat known as Carrollton Crest  
2  
3 {"Carrollton Crest"}.

4           6.     Horn's real property is situated in a plat known as Mt. Pleasant Acreage ["Mt.  
5  
6 Pleasant"].

7           7.     Carrollton Crest and Mt. Pleasant share a Common Boundary, ["Common  
8  
9 Boundary"]. The Common Boundary is the easterly north-south boundary line of  
10  
11 Eisenbarth's property (Lot 3) and the westerly north-south boundary of Horn's property (Lot  
12  
13 18) (see Exhibit "C" attached hereto and incorporated herein by this reference.)

14           8.     HAMPSTUR CORPORATION ["HAMPSTUR"] surveyed both Carrollton  
15  
16 Crest and Mt. Pleasant Acreage.

17           9.     Calvin Hampton, [Hampton] a licensed surveyor and a principal of Hampstur  
18  
19 examined three surveys of the area. Hampton properly concluded that the Germunson  
20  
21 survey (recorded January 16, 1998), the Donnelly survey (recorded August 18, 1992), and  
22  
23 the Oleson-Dunn survey (recorded June 1, 2001) each committed surveying errors by  
24  
25 relying upon the same purported monument (an iron rod and mound of stone or an iron  
26  
27 pipe) and by failing to use the original road right-of-way of Old Hwy 99 as specified in  
28  
29 Carrollton Crest as a monument. These surveying errors wrongfully moved the Common  
30  
31 Boundary approximately twenty-five feet west of its true location at the boundary between  
32  
33 Lot 18 and Lot 3, and improperly set the southwest corner of Mt. Pleasant so as to enlarge  
34  
35 the lots specified in Carrollton Crest and reduce the lots specified in Mt. Pleasant.

36           10.    The Hampstur survey is the most comprehensive recorded survey of  
37  
38 Carrollton Crest and Mt. Pleasant. It is accurate and reliable in that it preserves the  
39  
40 integrity of the lot sizes in both Carrollton Crest and Mt. Pleasant plats and correctly  
41  
42 monuments the forty-two year old fence as the boundary between Lot 18 and Lot 3.

43           11.    That the Defendant, Horn presented insufficient evidence that he or his  
44  
45 predecessor used the disputed property described in Exhibit "D" exclusively, actually and  
46  
47 uninterrupted, open and notoriously and hostile for a ten year period.

48           12.    That the Defendant erected a wire and steel fence on the Plaintiff's property.

49           13.    That the Plaintiff is entitled to have the Defendant's fence removed from his  
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51 property.

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ii. CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes and enters the following  
Conclusions of Law:

1. The Court has jurisdiction of the parties and the subject matter in this action.
2. Eisenbarth is the owner of real property described in Exhibit "D" attached.
3. That the wire and steel fence erected by the Defendant in 2001 encroaches upon Lot 3.
4. That the Defendant's claim of adverse possession is dismissed with prejudice.
5. The Plaintiff is entitled to taxable attorney fees and costs.

DATED THIS 21<sup>st</sup> day of December, 2007, in Kelso, Washington.

JAMES J. STONIER

\_\_\_\_\_  
Judge James J. Stonier

Presented by:

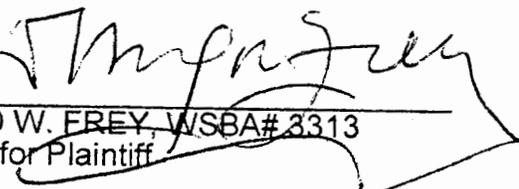
  
DONALD W. FREY, WSBA# 3313  
Attorney for Plaintiff

EXHIBIT "A"

Statutory Warranty Deed

685298  
FILED  
REQUEST OF  
va 708 F1289  
MAY 14 3 17 PM 1954

va 703 P1289

SARAH W. LUDWIG  
COW / 7 / 1954  
*Sarah Ludwig*

WASHINGTON  
TITLE INSURANCE  
COMPANY

SEATTLE WASHINGTON

Sell to *Hollan & Albin*  
*ABC Bldg*  
*Seaport*

Send Tax Statement to

MAY 14 1954 02.00

Statutory Warranty Deed

Form L58

THE GRANTORS  
and wife,

ARNOLD H. BRANDIS and DORIS N. BRANDIS, husband

for and in consideration of  
consideration

TEN DOLLARS (\$10.00) and other good and valuable

in hand paid, conveys and warrants to  
husband and wife,

BERNARD EISENBARTH and IRENE F. EISENBARTH,

the following described real estate, situated in the County of  
Washington

Cowlitz State of

Lots Two (2) and Three (3), Block Four (4); Lots Four (4)  
and Five (5), Block Five (5), Carrollton Crest, according to  
the plat thereof recorded in Volume 7 of plats, page 43,  
records of said County.

SUBJECT TO: Easements and restrictions of record.



33  
pursuant to Chap. 21, Laws Ex. 1951.  
MAY 14 1954  
Gertrude Rivers  
Cowlitz County Trust  
B. McNeil Deput

MAY 14 1954

Dated this 11th day of May 1954

*Arnold H. Brandis*  
Arnold H. Brandis  
*Doris N. Brandis* (SEAL)  
Doris N. Brandis

XXXXXXXXXXXXXXXXXXXX  
XXXXXXXX

Notary Public  
for the State of Washington  
My Comm. Expires

On this day personally appeared before me Arnold H. Brandis and Doris N. Brandis  
to me known to be the individual s described in and who executed the within and foregoing instrument, and  
acknowledged that they signed the same as their free and voluntary act and deed, for the  
uses and purposes therein mentioned.

GIVEN under my hand and official seal this 11th day of May 1954

**EXHIBIT "B"**

Tracts 17 and 18, Mt. Pleasant Acreage Tracts, according to the plat thereof recorded in Volume 7 of Plats, Page 45, records of Cowlitz County, Washington.

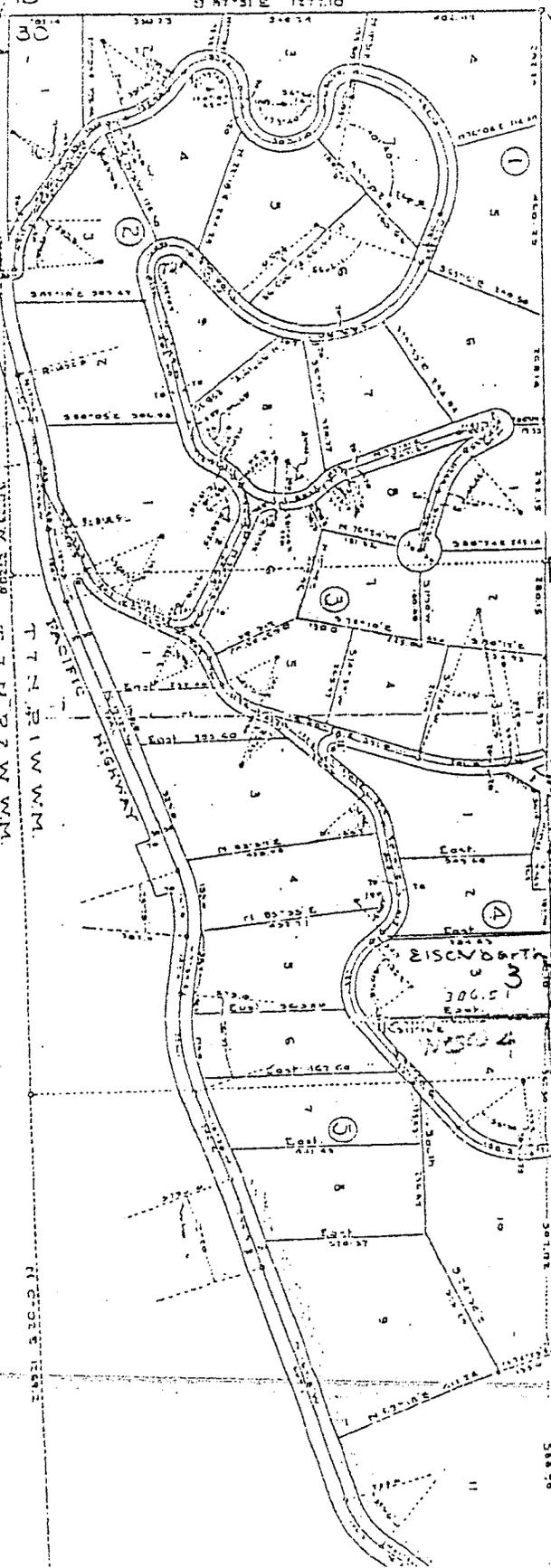
EXHIBIT "C"

KNOW ALL MEN BY THESE PRESENTS  
That we, Fred Altergott Jr. and Hortense Hamilton Altergott,

DEDICATION

**SURVEYOR'S CERTIFICATE**  
We hereby certify that we have correctly surveyed and marked with proper monuments the land represented on the annexed map and plat of Carmelton Creek.  
The initial point of said survey is a steel pin in the concrete paving of the Pacific Highway, representing the NW. Cor. of Sec. 30, T. 7N., R. 1W., W.

Initial Point  
Cor. of Division



PLAT OF  
**PLEASANT ACREAGE TRACTS**  
SEC. 30 T. 7N. R. 1W. W.M.  
COWLITZ COUNTY WASH.

SURVEYED BY U.G. JACKSON C.E.  
MIDDLEBROOKS AND JACKSON ENGRS.

SCALE: 1" = 200' OCT. 6 1926

← MT. PLEASANT ROAD

1	2	3	4	5	6
7	8	9	10	11	12
13	14	15	16	17	18
19	20	21	22	23	24

CARMELTON CREEK

←

EXHIBIT "D"



# HAMPSTUR CORPORATION

P.O. Box 368 • Kelso, WA 98626 • (360) 423-8100 • Fax (360) 423-1714

Planners  
Engineers  
Surveyors

CONFLICT AREA  
EISENBARTH v. HORN

# COPY

DISPUTED AREA  
LEGAL DESCRIPTION  
(CORRECTED)

An area in dispute, lying Easterly of a newer fence and Westerly of the East line of Lot 3, Block 4 of "Carrollton Crest", as recorded in Volume 7 of Plats, at Page 43, in the records of Cowlitz County, Washington, being located within the Southwest Quarter of the Northwest Quarter (SW.1/4 NW.1/4) of Section Thirty (30), Township Seven (7) North, Range One (1) West of the Willamette Meridian, being more particularly described as follows, to-wit:

**BEGINNING** at the Southeast corner of Lot 3, Block 4 of said Carrollton Crest, also being the Northeast corner of Lot 4, Block 4 of said subdivision, being marked by a 5/8" rebar with plastic survey cap "LS-18,087" as shown on that particular survey recorded in Volume 22 of Surveys, at Page 117 in the records of said county; thence, South 89°43'34" West along the South line of said Lot 3, for a distance of 23.38 feet to an existing North-South fence line; thence, North 2°26'01" East along said fence line, for a distance of 126.19 feet to an iron rod in a fence corner; thence, North 85°42'22" East along an existing fence line, for a distance of 21.55 feet to the East line of said Lot 3; thence, South 1°33'26" West, along the East line of said Lot 3, for a distance of 127.62 feet surveys to the **TRUE POINT OF BEGINNING:** containing 2,841 square feet, more or less.

Written by:  
Calvin J. Hampton,  
PLS #18,087

Date signed: 10/24/07



