

ORIGINAL

No. 37303-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SCOTT MERRIMAN and KIM MERRIMAN, husband and wife,
Appellants/Cross-Respondents,

v.

PAUL COKELEY and DIANNE COKELEY, husband and wife,
Respondents/Cross-Appellants

BRIEF OF RESPONDENTS COKELEY

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I. INTRODUCTION

The Merrimans have appealed the trial court's denial of their claim that, through adverse possession, mutual recognition or acquiescence, they have acquired ownership of a triangular portion of the Cokeley parcel. The area claimed by the Merrimans is, at its maximum, nineteen inches wide and narrows to zero at a point some 180 feet away.

The Merrimans, so far, have litigated this matter through a Trial, a Motion for Reconsideration, a Motion for Stay, a Motion for Stay before the Appeals Court Commissioner and a Motion to Reconsider the Appeals Court Commissioner's decision.

The Cokeleys have filed a cross appeal on the issue of the trial court's denial of attorney fees and costs.

II. ASSIGNMENTS OF ERROR

1. **Assignment of Error No. 1:** The trial court erred when it failed to find that the Respondent Cokeleys' Offer of Settlement required the Petitioner Merrimans to pay costs incurred by the Cokeleys after the making of the offer, as required by CR 68. (Conclusion of Law No. 1 - Findings of Fact, Conclusions of Law; Order - entered January 4, 2008).

2. **Assignment of Error No. 2:** The trial court erred when it failed to find that the Respondent Cokeleys' Offer of Settlement required the Petitioner Merrimans to pay attorney fees to the Respondents, as required by RCW 4.84, et. seq. (Conclusion of Law No. 1 - Findings of Fact, Conclusions of Law; Order - entered January 4, 2008).

3. **Assignment of Error No. 3:** The trial court erred when it failed to find that the Petitioner Merrimans were required to pay attorney fees and costs to Respondent Cokeleys under the Lis Pendens statute, RCW 4.23.328(3). (Conclusion of Law No. 2 - Findings of Fact, Conclusions of Law; Order - entered January 4, 2008).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it failed to award costs to the respondents as required by CR 68. (**Assignment of Error No. 1**).
2. Whether the trial court erred when it failed to award attorney fees and costs to the respondents as required by RCW 4.84 et. seq. (**Assignment of Error No. 2**).
3. Whether the trial court erred when it failed to award attorney fees and costs to the respondents as required by RCW 4.23.328(3). (**Assignment of Error No. 3**).

III. STATEMENT OF THE CASE

This is an appeal of a hodgepodge of legal theories advanced by the petitioners for an adverse possession, mutual recognition or acquiescence claim to a triangular portion of land, owned by the Cokeleys, and adjacent to the parties' mutual boundary. The area claimed by the Merrimans is, at its maximum, nineteen inches wide and narrows to zero at a point some 180 feet away. RP 23 ll.19 - RP 24 ll.8. RP131 ll.17 – RP 132 ll. 5.

The Merrimans testified that they purchased their lot in 1996. RP30 ll.221-23. This action was filed on November 14, 2006. CP 4-28.

Testimony at trial by Ward Willits (RP 85 - 116) established that the disputed triangular area was, until 2002, an overgrown eyesore with blackberries and brush. Willits testified that during his ownership of the land through 2002, there was never any use of the contested area by either party.

Perhaps most devastating to the petitioners' claims were the photographic exhibits admitted by both the petitioners and the respondents. The photographs that predate 2002 show that the disputed area was an undeveloped area overgrown with grass, berries and bushes. See Clerk's Papers, Plaintiffs' Exhibit 105, D, E and F. Photos taken of the area after 2002 show some use of the area by the petitioners but most of the disputed strip is unused and overgrown. See Clerk's Papers, Defendants' Exhibits 3-1 through 3-31 and Plaintiffs' Exhibit 105, A to Y.

Finally, a letter from the petitioners Merriman to the Willits during September, 2004, complains about the unsightliness of the disputed area and compliments Willits for clearing brush. See Clerk's Papers, Defendants' Exhibit 4.

In the end, the evidence at trial refuted the petitioners' various legal theories.

The expense of this litigation, when compared to the size of the disputed area, makes little sense. However, the Cokeleys testified at trial that they and the Merrimans were aware that the Thurston County Building and Development Department has held that any adjustment of the mutual boundary line within thirty (30) feet of the planned Cokeley

septic system tank, which is located adjacent to the middle of the disputed boundary line, would void the existing Cokeley septic and home site permits. RP142 ll.11 -RP 143 ll. 13. The Cokeleys were naturally reluctant to allow the Merrimans to use this legal action to void their Thurston County Building Permits. Thus, the matter went to trial over the Merrimans' claim to the 19 inch area.

At trial, there was also a request by the Merrimans for an award of another portion of the Cokeley lot. This area is a concrete pad and fire pit that is located down a steep bank and adjacent to Puget Sound. The Cokeleys agreed that the Merrimans and their predecessors in interest used this area for more than ten years and that the Merriman lot had acquired adverse possession of this concrete pad and fire pit. RP186 ll.15 - RP 187 ll. 9.

The Cokeleys real property remains undeveloped. The Cokeleys testified that they lost two sales of the parcel due to the Lis Pendens filed with Thurston County Auditor by the Merrimans. RP 143 ll.22 - RP 149 ll. 8. The predecessor owner, Willits, testified as to another lien filed in the chain of title of the Cokeley realty by the Merrimans. RP106 ll.17 -RP 107 ll.14.

During the 1990's, Lot 11 (the Cokeley lot) was maintained by Rita Willits' husband, Ward Willits. During September, 1993, Ward Willits retained a surveying firm, Hansen and Swift, to determine the boundary line between Lot 10 and Lot 11. The previous boundary line between the lots had been established in the original plat. RP 84- 92.

During 1994, Hansen and Swift placed three survey markers or "survey buttons" along what they believed was the line between Lots 10 and 11. This survey was not recorded by Hansen and Swift. RP 22.

After the placement of these survey buttons by Hansen and Swift, Ward Willits placed two four inch round treated wooden posts adjacent to the corner survey buttons. These wooden posts were placed in concrete and located on the inside of the survey buttons. Willits placed one additional stake approximately halfway along the north property line. At the location, Ward Willits placed a metal "T" post to mark the location.

Neither adjacent property owner made contact with each other to discuss the Hansen and Swift survey nor the placement of posts by Willits. RP 84 - 115.

From September 1993 until 2002, no further changes were made at or near the location of the boundary between Lots 10 and 11. During the intervening years, from 1993 to 2002, the area along the mutual lot line became overgrown with blackberry bushes, weeds and ivy. From 1993 to 2002, there was no clear establishment of a boundary line between Lots 10 and 11 and the survey buttons placed by Hansen and Swift became overgrown with weeds. RP 94 ll. 113 to RP 105 ll. 23. CP Defendant's Exhibit 4.

When Ward Willits returned to maintain Lot 11 in 2002, he became concerned about yard refuse being placed on Lot 11 along the boundary with Lot 10. At that time, Willits erected a two strand barb wire fence. Willits strung strands of barb wire inside the Hansen and Swift buttons along the north and south survey line or in between Lots 10 and 11. After the strands were tight, Willits placed a few intermediate metal "T" posts along the lines to keep the barb wire fence in place. As was his usual way of fencing, Willits placed the "T" posts on the inside of the property line or further into Lot 11. RP 94 ll. 113 to RP 105 ll. 23.

On September 24, 2002, Scott Merriman wrote a letter to Rita Willits in which he expressed his gratitude for Willits having cleared the blackberries, weeds and ivy from the boundary line and describing the boundary line area as an "eye sore". In addition, Scott Merriman expressed his desire to purchase Lot 11 from Willits but offered a lesser price than Willits was asking for the lot. Merriman desired to preserve Lot 11 as a vacant adjacent lot. CP Defendant's Exhibit 4.

On November 20, 2003, without notice to Ward and Rita Willits, Scot and Kim Merriman recorded a "Notice" at the Thurston County Auditor Recording Section and in the chain of title for Lot 11. This Notice contained a letter from an engineer, Jim Dickinson of Dickinson and Associates, dated August 26, 2002. Attached to this letter was a diagram of the lot lines prepared by Bracy Thomas for Dickinson reflecting the actual lot lines and not the Hansen and Swift survey. The letter from Dickinson stated that Lot 11 was not a suitable residential lot due to the lack of an area for a septic system. The result of recording this Notice was a decrease in the value of Lot 11. On May 11, 2004, without notice to the Merrimans, the Willits sold Lot 11 to Paul and Dianne Cokeley.

After the Merrimans learned of the sale of Lot 11 to the Cokeleys, the Merrimans made more than eighteen communications with Thurston County. These communications included emails, personal visits and an appearance at a public hearing. The Merrimans objected to the use of Lot 11 by the Cokeleys for residential purposes and expressed concern regarding water drainage, the size of the proposed Cokeley home, concern regarding existing vegetation, concern regarding tree removal from Lot 11 and a desire to use an adverse possession law suit to block construction on the Cokeley parcel RP 49 - 75. CP Defendant's Exhibit 6.

After reviewing the numerous objections to the use of Lot 11 made by the Merrimans, the Thurston County Building and Development Department approved permits for the Cokeleys to erect a single family residence on Lot 11.

After approval of the home plans, the Cokeleys retained the survey firm of Bracy Thomas to complete and certify the boundary lines between the two lots.

While undertaking the survey, Bracy Thomas located two survey buttons placed by Hansen and Swift. The buttons had been overgrown by heavy vegetation and the Bracy Thomas surveyors had to remove

overgrowth to find the Hansen and Swift survey caps. After locating the buttons, Bracy Thomas contacted Hansen and Swift and discovered that the Hansen and Swift survey was never recorded and that the buttons were incorrectly placed.

On August 9, 2006, Bracy Thomas completed a survey in which they discovered that two of the survey buttons placed by Hansen and Swift were placed in error. The first Swift button is misplaced by .9 feet or eleven inches inside the boundaries of Lot 11 and is located in the middle of the boundary between Lot 10 and 11. The second erroneous Hansen and Swift button is at the top of a steep bank above Puget Sound and is 1.7 feet or 20.4 inches inside the boundaries of Lot 11. RP 11 - 28.

Prior to 2002, there had been no use by either party of the disputed strip between Lot 10 and 11 that is the triangular area between the Swift caps and the actual boundary line. Prior to 2002, there has been no boundary marker, structure, fence or any other object in the disputed area between Lots 10 and 11. However, after the 2002 erection of the barb wire fence by Willits, the Merrimans began to place shrubs and other objects into the disputed area and further into lot 11 than the disputed strip. RP 92 - 108.

During August 2006, the Cokeleys placed the lot for sale. On November 14, 2006, the plaintiffs placed a Lis Pendens in the chain of title of Lot 11. The plaintiffs were aware at the time of filing the Lis Pendens, that the Cokeleys intended to sell the lot as a residential lot on the open market. RP 137- 152.

The Cokeleys received an offer to purchase the real estate for \$395,000.00 in early 2007. When the buyer discovered that the Merrimans had placed a Notice and a Lis Pendens in the real property title, the buyer withdrew his offer.

On September 15, 2007, the Cokeleys received a second offer to purchase. The second buyer offered \$325,000.00 for the real property. When the second buyer discovered that the Merrimans had placed a Lis Pendens on the real property, the buyer withdrew his offer. Both purchase and sale agreements required the Cokeleys to deliver a clear title to the new buyer. This was impossible due to the Notice and the Lis Pendens filed on the real property by the Merrimans. RP 137- 152.

IV. ARGUMENT

A. The Petitioners did not meet their burden of proof.

The petitioners' brief fails to address the standard of proof that was required at the trial level.

There were five causes of action pled in the trial court by the plaintiffs in their lawsuit filed against the Cokeleys: Injunctive Relief, Trespass, Quiet Title, Estoppel in Pais and Mutual Recognition and Acquiescence. These claims are for a transfer of real property not titled to the petitioners and are disfavored in law. The petitioners had the burden of proof of proving these claims by **clear and convincing evidence**. “No presumption exists in favor of an adverse holder, because “possession will be presumed to be in subordination to the title of the true owner. “ Miller v. Anderson, 91 Wn.App. 822 at 827, 964 P.2d 365 (1998).

B. The application of the evidence to Petitioners' claims is fatal.

The petitioner's legal theories overlap. It appears from their Brief that the petitioners have now abandoned trespass, adverse possession, estoppel in pais and are attempting to argue "mutual recognition and acquiescence", a form of adverse possession, as their remedy on appeal.

The case of Lilly v. Lynch, 88 Wn. App. 306, 945 P.2d 727 (1997), is a recent holding that contains a review of the elements of the Adverse Possession, Mutual Recognition and Acquiescence and Estoppel in pais. The facts in the Lilly case are somewhat similar to this matter and involve the ownership of a boat ramp adjacent to Puget Sound. While Lilly, supra, is a review of a Summary Judgment order, the Lilly case reviews the elements of the petitioners' claims.

The elements of **Mutual Recognition and Acquiescence** are as

follows:

- (1) The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.;
- (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and
- (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession. (Ten years)

Lilly v. Lynch, at 88 Wn. App. at 316.

In Lilly, the defendant Lynch has been granted Summary Judgment. Division Two reversed the Summary Judgment and held that the Lilly parcel owners and the Lynch parcel owners had used a boat ramp wall as a mutually accepted boundary for more than ten years. The Appeals Court found facts sufficient for trial on the adverse possession and mutual recognition and acquiescence claims. The Appeals court also found that there were not facts sufficient for a trial on the Estoppel in pais claim.

Unlike the plaintiff in the Lilly, supra, case, the Merrimans were unable to produce any credible evidence of a “certain, well defined line” (see Lilly v. Lynch, 88 Wn. App. at 317), any credible evidence of any action by the owners of the Cokeley parcel that accepted the overgrown area as belonging to the Merrimans nor any use of the disputed area by the Merrimans for the required period of ten years (see Lilly v. Lynch, 88 Wn. App. at 318). All the evidence to support the elements of Mutual Recognition and Acquiescence was missing.

The petitioners also cite the case of Frolund v. Frankland, 71 Wn. 2d 812, 431 P. 2d 188 (1987) at page 36 of their Brief as the determinative authority to support their arguments.

In Frolund, supra, the plaintiffs and defendants had recognized a fence line for a period from 1926 to 1941. The defendant asked for an award through acquiescence to the fence boundary. While the fence had been partially torn down prior to the dispute, “remnants of the fence, and a dilapidated gate at a path between the respective properties, remained discoverable for years.” The defendants’ predecessor had bulldozed and cleared land and openly occupied the land for a period of over ten years in Frolund, supra at 812. In Frolund, supra, a fence or partial fence had

existed and been considered as the boundary line by all parties for over 34 years.

In the matter at hand, testimony was undisputed that neither the petitioners Merriman nor any predecessor had ever used any of the disputed area until 2002, a time period of less than ten years prior to the Merriman lawsuit. Testimony established that there had never been a fence line in the area until 2002, when the owner, Willits, erected the fence along a mistaken boundary line. At trial, evidence established that the no fence had ever been erected in the disputed area until 2002.

In Frolund, supra, the defendants maintained the disputed area and regularly mowed grass in the triangular strip. In the matter at hand, evidence established that the Merrimans had never maintained or used the disputed area until 2002.

The petitioners also argue that their claim is supported by authority in Lamm v. McTighe, 72 Wn. App. 587, 434 P. 2d 565 (1967). In Lamm, supra, the predecessor in title had erected a fence between 1934 and 1936. The fence fell into disrepair but a new fence was erected on the same line in 1946. Plaintiffs barricaded the disputed area and the trial court awarded

the area to the defendants using the doctrine of recognition and acquiescence for the required minimum period of time, ten years.

Lamm, supra at 591.

The appeals court held:

From the foregoing cases, as well as others, in which we have dealt with the doctrine, it may be gleaned that the following basic elements must, at a minimum, be shown to establish a boundary line by recognition and acquiescence: (1) The line must be certain, well defined, and in some fashion physically designated upon the ground, *e.g.*, by monuments, roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.

Lamm, supra at 592-593.

At trial, the Merrimans failed to produce evidence of any of the three requirements. There was no certain or well defined line upon the ground. There ^{as} no occupancy, improvement or use of the disputed area. The 2002 fence had been erected only four years prior to the Merriman lawsuit.

The petitioners also cite Farrow v. Plancich, 134 Wn. 690, 236 P. 288 (1925), as a “fundamental boundary dispute doctrine” (see Petitioners’ Brief, page 27) in their brief but again fail to review any of the evidence in this appeal case.

In Farrow, supra, an improper survey had been done and a fence erected upon the wrong boundary 15 to 16 years before the matter was heard by the court. The court ruled that the acceptance of the fence for more than ten years established a line that would be the boundary for both parties through the doctrine of recognition.

Unlike the parties in Farrow, supra, no fence nor any other use of the disputed area took place until 2002.

The petitioners chose to ignore any factual review of the cases cited in their brief. Not one case listed by the petitioners in any way supports their argument. This is the same problem that the petitioners had at trial. The petitioners’ legal arguments are without merit.

C. The trial court was required to award costs and fees to the Respondents.

1. The Trial Court erred by not awarding costs to the Respondents as required by CR 68.

Prior to trial, the Respondents served the Petitioners with an “Offer of Settlement”. See Clerk’s Papers: Findings of Fact; Conclusions of Law; Order filed January 4, 2008; Motion for Award of Fees, Dec. 3, 2007. There was no dispute that the offer by the respondents to the petitioners was for a judgment greater than that received by the petitioners at trial.

CR 68 requires an award to the Respondents for all costs incurred after the making of such an offer. CR 68 allows a court to award costs to a party whose settlement offer is rejected, and that offer would have granted the opposing party more than it gained through litigation or dispute resolution.

CR 68 - OFFER OF JUDGMENT

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

There are numerous cases imposing costs under CR 68:

Tippie v. Delise, 55 Wn. App. 417, 777 P.2d 1080 (1989); and Eagle Point Condo. Owners Assoc. v. Coy, 102 Wn. App. 697, 9 P.3d 898 (2000), where Coy properly offered to settle for \$40,000, and the court eventually awarded Eagle Point \$22,441, Coy was awarded costs under CR 68.

The question of what constitutes "costs" under CR 68 is addressed in RCW 4.84.010:

RCW 4.84.010 Costs allowed to prevailing party —
Defined — Compensation of attorneys.

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums by way of indemnity for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:

- (1) Filing fees;
- (2) Fees for the service of process by a public officer, registered process server, or other means, as follows:
 - (a) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.
 - (b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount actually charged and incurred in effecting service;
- (3) Fees for service by publication;
- (4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;
- (5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;
- (6) Statutory attorney and witness fees; and
- (7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used

at trial or at the mandatory arbitration hearing:
PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

RCW 4.84.010

The trial court committed error by not awarding costs to the respondents. The respondents should also be awarded the costs of this appeal.

2. RCW 4.84 requires an award to the Respondents for all attorney fees and costs.

RCW 4.84.250 allows, in part, for the prevailing party to be awarded attorney's fees when the amount in controversy is under \$10,000, and if the amount awarded in a judgment is less than that offered in a settlement. This statute is written both to encourage settlements and to provide relief from attorney's fees for meritorious small claims under \$10,000.00.

In the present case, the Cokeleys would be considered the prevailing party under 4.84.270 because the amount awarded the plaintiffs in judgment was less than the settlement offer. Furthermore, 4.84.290 allows for an appeals court to award fees if the trial court failed to do so. It appears that the only question here is whether or not the amount in controversy is under \$10,000, thus triggering the relief offered by RCW 4.84.250.

In 2002, the Court of Appeals awarded fees under 4.84.250 in a property line dispute not unlike the present case. In Lay v. Hass, 112 Wn. App. 818, 51 P.3d 130 (2002), Lay sought a quiet title, a temporary cease and desist order, damages for trespass, a permanent injunction, and attorney fees and costs (Hass had allegedly erected a fence on Lay's property). The superior court entered a summary judgment in Lay's favor, but denied the awarding of fees because it said that the Lays did not properly notify Hass that they would pursue attorney's fees if the settlement offer was not accepted. However, the Court of Appeals found that the Lays properly submitted a pre-trial settlement offer which put

Hass on notice that the Lays would pursue attorney's fees if a settlement was not reached. The court held that because the stated damages sought were only \$433, the other relief sought was equitable in nature and therefore damages beyond those stated for the trespass claim were not applicable, and because the Lay's properly notified the Hass' of their intent to pursue a fees award, it was improper for the trial court to not award Lay his attorney fees.

Another Court of Appeals case addresses a situation where monetary damages are not specifically pled. In Hanson v. Estell, 100 Wn. App. 281, 997 P.2d 426 (2000). the plaintiff was suing an adjacent land owner over a barn which encroached on a strip of land which was 15 feet wide by 305 feet long. The relief sought by the plaintiff was an injunction, and the defendant filed a counterclaim for trespass, malicious prosecution, and an injunction to have the barn removed. The court awarded \$100 damages for trespass after the plaintiff had offered \$200, and it stated in its 4.84.250 analysis that the awarding of attorney's fees in an action where damages were not the primarily relief sought was not specifically barred by the statute (the court did not allow the awarding of fees, however, because the plaintiff had failed to comply with another aspect of 4.84 which is not relevant in this case).

The settlement offer properly submitted by the respondents in the present case on November 9, 2007 states that "Should this matter proceed to trial and should the judgment of the court . . . be less favorable to the plaintiffs, the . . . court may award attorney fees and costs to the defendants." The petitioners were on notice that fees may be awarded to the respondents, and yet they rejected the settlement offer. The trial court erred by failing to award fees to the respondents.

3. RCW 4.23.328(3) requires an award for all attorney fees and costs incurred by the Respondents.

A Lis Pendens is a statutorily authorized mechanism which clouds title to a parcel. Prior to trial, after learning that the respondents had placed their parcel on the market for sale, the petitioners filed a Lis Pendens in the chain of title of the respondents' land. This Lis Pendens resulted in two lost sales. The trial court removed the Lis Pendens at the conclusion of trial.

RCW 4.28.328 states as follows:

Lis Pendens - Liability of claimants – Damages, costs, attorneys' fees.

(1) For purposes of this section:

(a) "Lis pendens" means a lis pendens filed under RCW 4.28.320 or 4.28.325 or other instrument having the effect of clouding the title to real property, however named, including consensual commercial lien, common law lien, commercial contractual lien, or demand for performance of public office lien, but does not include a lis pendens filed in connection with an action under title 6, 60, other than chapter 60.70 RCW, or 61 RCW;

(b) "Claimant" means a person who files a lis pendens, but does not include the United States, any agency thereof, or the state of Washington, any agency, political subdivision, or municipal corporation thereof; and

(c) "Aggrieved party" means (i) a person against whom the claimant asserted the cause of action in which the lis pendens was filed, but does not include parties fictitiously named in the pleading; or (ii) a person having an interest or a right to acquire an interest in the real property against which the lis pendens was filed, provided that the claimant had actual or constructive knowledge of such interest or right when the lis pendens was filed.

(2) A claimant in an action not affecting the title to real property against which the lis pendens was filed is liable to an aggrieved party who prevails on a motion to cancel the lis pendens, for actual damages caused by filing the lis pendens, and for reasonable attorneys' fees incurred in canceling the lis pendens.

(3) Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

(emphasis added)

This statute and its attorney fees provision are in derogation of the common law practice of not awarding fees. This statute is solely designed to give relief to a party who has been subject to a wrongfully filed Lis Pendens. It is not designed to give relief to a party who has filed such a Lis Pendens. This statute is designed to give notice to the claimant who asserts a Lis Pendens that they proceed at their own risk.

In South Kitsap Worship Center v. Weir, 135 Wn. App. 900, 146 P.3d 935 (2006), Division Two reversed a trial court that did not award attorney fees in a Lis Pendens action. The Appeals court held that a Lis Pendens that was left pending for three years with no substantial justification was improper and required attorney fees to the prevailing landowner. See also Richau v. Rayner, 98 Wn. App. 190, 988 P. 2d 1052 (1999), holding that the adjoining property owners lacked a substantial justification for filing a lis pendens and that the developer was entitled to an award of actual damages.

In the matter before the court, the petitioners filed a Lis Pendens in the respondents' chain of title. This Notice defeated the Cokeleys' ability to transfer title to the real property and resulted in the loss of two sales. The Lis Pendens affected the entire Cokeley lot and not just the disputed area. Clerk's Papers – Lis Pendens ,

While it can be argued that the petitioners had justification to file a Lis Pendens on the disputed nineteen inch area, the filing of the Lis Pendens by the Merrimans on the entire lot was done with no substantial justification.

The trial court erred by not awarding fees under RCW 4.23.328(3).

VI. CONCLUSION

The appeal by the Petitioners fails to address the fundamental requirements of their claim. This is due to the fact that the evidence produced at trial did not meet the elements of "mutual recognition and acquiescence". The petitioners were unable to produce proof of any line, certain and well defined and in some fashion physically designated upon the ground, e.g., by monuments, roadways, or fence lines for the requisite period of ten years. The petitioners appeal must be denied as a matter of law.

The respondent Cokeleys should be awarded their attorney's fees and costs, pursuant to CR 64, the Lis Pendens statute and RCW 4.84250. The matter should be remanded to the trial court with instructions to award costs and fees to the Respondents including costs of his appeal.

SUBMITTED this 19th day of August, 2008.



KEN VALZ WSBA# 12068
Valz, Houser, Kogut & Barnes PS
Attorneys for Respondents Cokeley

APPENDIX

Lis Pendens

Settlement Offer

Findings of Fact, Conclusions of Law, Order
January 4, 2008

FILED
SUPERIOR COURT
THURSTON COUNTY WASHINGTON

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DEPUTY

**SUPERIOR COURT OF WASHINGTON STATE
IN AND FOR THE COUNTY OF THURSTON**

SCOTT MERRIMAN and KIM
MERRIMAN, husband and wife,

Plaintiff,

v.

PAUL COKELEY and DIANNE
COKELEY, husband and wife,

Defendants.

No. 06-2-02110-7

LIS PENDENS

Notice is hereby given that an action has been commenced in the above entitled court upon the complaint of Plaintiff SCOTT MERRIMAN and KIM MERRIMAN against the above-named parties; that the object of that action is to quiet title, and that the action affects title to the subject property situated in Thurston County, Washington, described as:

Lot 11 in Block 1 of the Plat of Edgewater Beach as recorded in Volume 11 of Plats at Page 30, Records of Thurston County, Washington.

All persons dealing with the above-described real property situated in Thurston County, Washington, subsequent to the filing of this notice, will take subject to the rights

JAY A. GOLDSTEIN • LAW OFFICE
1800 Cooper Point Road SW, No. 8 • Olympia, WA 98502
FAX 360-357-0844 • VOICE 360-352-1970
jay@jaglaw.net

LIS PENDENS - 1
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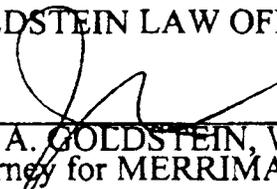
3880625 Page 2 of 3
11/14/2006 03:27 PM LisPendensA M N E D
Thurston County Washington
JAY A GOLDSTEIN


TCC

1 of Intervening Plaintiff as established in that action.

2 Dated this 7 day of November, 2006.

5 GOLDSTEIN LAW OFFICE, PLLC

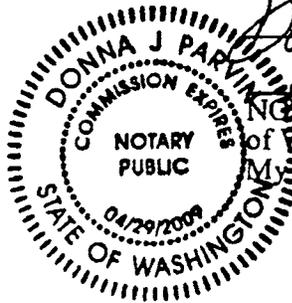
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JAY A. GOLDSTEIN, WSBA 21492
Attorney for MERRIMAN

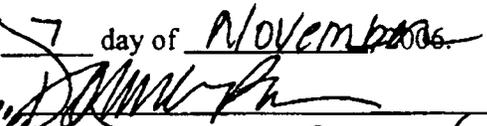
10 STATE OF WASHINGTON)
11) ss
12 COUNTY OF THURSTON)

13 I certify that I know or have satisfactory evidence that the person appearing before me and making this acknowledgment is the person whose true signature appears on this document.

14 On this day personally appeared before me JAY A. GOLDSTEIN, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

16 GIVEN under my hand and official seal this 7 day of November, 2006.



17 
18 Donna Parvin
19 NOTARY PUBLIC in and for the State
20 of Washington residing at Olympia
21 My Commission Expires 04/29/2009

27 JAY A. GOLDSTEIN • LAW OFFICE
1800 Cooper Point Road SW, No. 8 • Olympia, WA 98502
28 FAX 360-357-0844 • VOICE 360-352-1970
jay@jaglaw.net

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EXPEDITE
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JAY A. GOLDSTEIN
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

SCOTT and KIM MERRIMAN,
husband and wife,
Plaintiff,

vs.

PAUL AND DIANNE COKELEY,
husband and wife,
Defendant.

NO. 06-2-02110-7

OFFER OF SETTLEMENT

COMES NOW the defendants, PAUL and DIANNE COKELEY, by and through their attorney, KEN VALZ, and pursuant to RCW 4.84, et. seq., and CR 68 and CRLJ 68, do hereby make the following offer of settlement to the plaintiffs, SCOTT MERRIMAN and KIM MERRIMAN, prior to trial or arbitration in this matter:

1. Defendants agree that plaintiffs have established adverse possession to that area described as the "fire pit" and "concrete pad" as located on the Bracy & Thomas survey.
2. Defendants agree that the plaintiffs have established adverse possession of that area adjacent to the mutual boundary between Lot 11 and Lot 10 for a distance of 20.4 inches into Lot 11 extending for a distance of approximately ten feet from the top of the bank above Puget Sound to the southeast or front edge of the Merriman residence as it faces Puget Sound or described as the front yard of the Merriman residence.
3. The defendants agree to withdraw their counterclaim in exchange for a settlement as described above.

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WARNING: Should this matter proceed to trial and should the judgment from the court or the arbitrator be less favorable to the plaintiffs, the arbitrator or the court may award attorney fees and costs to the defendants.

Pursuant to CR 68 and CRLJ 68, the adverse party has ten (10) days after service of this offer to accept such offer with written notice. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs and attorney's fees.

SUBMITTED this 9th November, 2007 day of ~~October~~, 2007.


KEN VALZ WSBA #12068
Valz, Houser, Kogut & Barnes, P.S.
Attorney for Defendants Cokeley

2

FILED
SUPERIOR COURT
THURSTON COUNTY WASH.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

SCOTT and KIM MERRIMAN,
husband and wife,

NO. 06-2-02110-7

Plaintiffs,

vs.

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
ORDER**

PAUL and DIANNE COKELEY,
husband and wife,
Defendants.

THIS MATTER having come for trial before the court and the plaintiffs appearing in person and by and through their attorneys, Jay A. Goldstein and Thomas F. Miller, and the defendants appearing in person by and through their attorney, Ken Valz, and the court having heard the testimony of all parties, now makes the following:

FINDINGS OF FACT

1. On November 9, 2007, the attorneys for the plaintiff were served with an offer of settlement by the defendants. This offer of settlement is attached to the motion for award of attorney's fees filed by the defendants on December 3, 2007.

2. The award at trial to the plaintiff was less than the amount offered for settlement by the defendants.

Findings of Fact;
Conclusions of Law, Order
Page 1

VALZ, HOUSER, KOGUT & BARNES, P.S.
Attorneys at Law
Westbill Office Park II, Bldg. 15
1800 Cooper Point Rd. SW
Olympia, Washington 98502
Teleph: (360) 754-8028
Fax: (360) 357-2844

1 3. This offer of settlement was served upon the plaintiff by the defendant more
2 than ten days prior to trial.

3 4. The plaintiffs did not accept this offer of settlement from the defendants.

4 Based upon the foregoing findings of fact, the court makes the following
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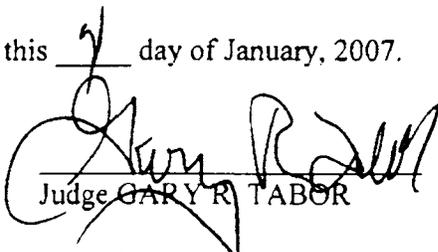
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7 **CONCLUSIONS OF LAW**

8 1. The court finds that RCW 4.84 and CR 68 are not applicable in this matter.

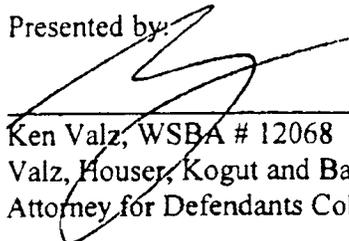
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10 2. The court finds that RCW 4.23.328 (3), the Lis Pendens statute, is not
11 applicable in this matter and that the defendants should not be awarded attorneys fees and
12 costs incurred in defending this action.

13
14 Based upon the foregoing Findings of Facts and Conclusions of Law it is hereby
15 ORDERED ADJUDGED and DECREED that the defendants motion for an
16 award of costs and attorneys fees is denied.
17

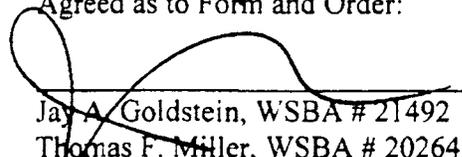
18 DONE IN OPEN COURT this 7 day of January, 2007.

19
20 
21 Judge GARY R. TABOR

22 Presented by:

23 
24 Ken Valz, WSBA # 12068
25 Valz, Houser, Kogut and Barnes, P.S.
Attorney for Defendants Cokeley

22 Agreed as to Form and Order:

23 
24 Jay A. Goldstein, WSBA # 21492
25 Thomas F. Miller, WSBA # 20264
Attorneys for Plaintiffs Merriman

Findings of Fact;
Conclusions of Law, Order
Page 2

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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO AT TACOMA, WASHINGTON

SCOTT and KIM MERRIMAN,
husband and wife,

Appellant/Plaintiffs,

vs.

PAUL and DIANNE COKELEY,
husband and wife,

Respondent/Defendants.

Court of Appeals No. 37303-3-II

PROOF OF SERVICE

I certify that on the 29 day of August, 2008, I delivered via the methods below, the following documents to the following individuals at their addresses:

Amended Brief of Respondent

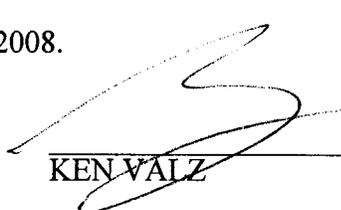
Jay A. Goldstein - By Legal Messenger
Goldstein Law Office
Attorneys at Law
1800 Cooper Point Road SW
Building 8
Olympia WA 98502

Thomas F. Miller-By U. S. Mail 1st Class
Attorney at Law
PO Box 12406
Olympia WA 98508

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STATE OF WASHINGTON
BY *SV*
DEPUTY

I declare under penalty of perjury under the laws of the state of Washington that the forgoing is true and correct.

DATED this 29 day of August, 2008.


KEN VALZ