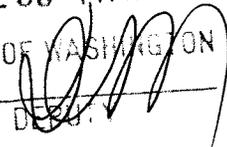


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THE COURT OF APPEALS STATE OF WASHINGTON  
DIVISION II BY   
OF THE STATE OF WASHINGTON  
No. 37449-8-II

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JOHN AND ELIZABETH DEWEY, husband and wife,

Appellants,

vs.

RAUL GONZALES, a single man, and GLORIA GONZALES,

Respondents.

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BRIEF OF APPELLANTS

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in granting relief which constitutes the unlawful taking of appellants' property.

2. The trial court erred in denying appellants' request for mandatory injunction as respondent failed to meet his burden of proof in opposing such relief.

3. The trial court erred in failing to award loss of use and occupancy damages appropriately awarded to appellants.

4. The trial court erred in entering a finding that respondent had obtained a survey of his property.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Respondent Raul Gonzales failed to lawfully subdivide his property, failed to secure a survey of its boundaries, and failed to secure requisite building permits for its development. Respondent then constructed improvements, including a residence, yard and fence, on property belonging to appellants. Appellants John and Elizabeth Dewey brought an action seeking (1) to quiet title in their property, (2) an order to compel respondent to remove the encroaching structures from appellants' property, (3) a finding that respondent has and continues to trespass on appellants' property and (4) award of damages for loss of use and occupancy of this property.

Respondent's counterclaim asserted that he had acquired title by adverse possession.

Following a bench trial, the trial court found that respondent had failed to establish adverse possession and that the encroachment constituted trespass on appellants' property. The court refused to grant a mandatory injunction to remove the improvements and further declined to award appellants their loss of use and occupancy damages resulting in and from the continuing trespass. In the alternative, the trial court ordered a survey of the encroachment and quieted title in **respondent** to the disputed area, awarding appellants a token award for the purported value of the disputed land.

Does the trial court's grant of a boundary adjustment and transfer of appellants' property to respondent constitute an unlawful taking of private property for private purposes? (Assignment of Error 1).

Did respondent, as an encroacher on appellants' property, establish by clear and convincing evidence all factors to support denying grant of a mandatory injunction, requiring the removal of the encroaching structure? (Assignment of Error 2).

Did the trial court erroneously award damages representing the purported value of the disputed property in lieu of adequate damages for respondent's use and occupancy of appellants' property? (Assignment of

Error 3).

Was substantial evidence presented at trial to support the court's finding of fact that respondent had secured a survey of his property? (Assignment of Error 4).

**C. STATEMENT OF THE CASE**

**1. Development of Dewey Property.**

In 2004, appellants John Dewey and Elizabeth Dewey purchased two (2) parcels of vacant land in Kitsap County: Parcel A measuring five and one-quarter (5-1/4) acres and Parcel B, about four and one-half (4-1/2) acres. (RP, p. 186, l. 4-5). In connection with the purchase, they received a property condition statement which disclosed no encumbrances nor encroachments on the property. Parcel A lies adjacent to property owned by respondent Raul Gonzales.

Appellants intended to develop the property in accordance with Kitsap County zoning policies, which permit one (1) residence on each five (5) acre parcel. They first developed Parcel B, by securing the requisite permits to clear trees off Parcels A and B (RP, p. 186, l. 20-23; p. 189, l. 25 - p. 190, l. 7), drilling a well to serve both houses (RP, p. 193, l. 7-16; RP, p. 218, l. 14-15), securing the requisite permit and installing a septic system for the property (RP, p. 191, l. 17-p. 193, l. 3), and installing a single-family

residence on an approved foundation. (RP, p. 219, l. 10-24). Appellants rent this home for \$1,200 per month, significantly under fair rental value. (RP, p. 237, l. 7-11). They planned to develop Parcel A to be equally profitable.

Following their purchase of land adjoining respondent's property, appellants obtained a survey recorded in February, 2005. The survey revealed that respondent's residence and yard encroached upon appellants' Parcel A. (CP, Exhibit 4; also see Appendix A-1, the portion of the survey evidencing the encroaching improvements). The encroachment is in only one (1) of two (2) spots on Parcel A sufficiently level for development. (See CP, Exhibits 3, 7, and 8).

In December, 2004, appellant John Dewey met with respondent Raul Gonzales to discuss the survey findings. (RP, p. 214, l. 4-6). Gonzales challenged the survey, but was unable to point to any alleged pre-existing survey markers anywhere. At the time and in his trial testimony, Gonzales was only able to point to a lath stake with pale, weathered flagging stuck to a tree some distance from the true quarter corner, but no survey monuments whatsoever. (RP, p. 214, l. 18- p. 216, l. 10).

Due to the existence of respondent's encroaching house and yard and Gonzales' building of the improvements without the benefit of a permit, Kitsap County Department of Community Development issued its violation

notice to appellants and refused to allow development of their Parcel A as planned. (CP 50, Declaration of John Dewey, Ex. 4). As a result of Gonzales' trespass on their land, Deweys lost all substantial value as they were left with property which they could neither develop nor sell. Gonzales had also failed to pursue appropriate procedures to subdivide his property, most particularly by failing to obtain a survey, which might have prevented this unfortunate and costly property dispute. (RP, p. 206, l. 6-17).

When appellants' attempt to resolve the controversy failed, they brought an action against respondent Gonzales in Kitsap County Superior Court for trespass and ejectment in order to quiet title. (CP 2, Complaint for Monetary and Equitable Relief and to Quiet Title). Respondent counterclaimed that he had acquired title to the disputed area by adverse possession. (CP 6, Answer and Affirmative Defenses and Counterclaim).

## **2. Development of Gonzales Property.**

Evidence presented at trial established that respondent Gonzales purchased a parcel (later described as Lots A, B, C, and D, which directly adjoins appellants' Parcel A) in 1977 or 1978 (RP, p. 12, l. 18-19). The property remained vacant for several years until Gonzales began developing each lot separately starting with Lot A and ending with Lot D. In or about 1992, respondent began the initial work to develop the subject Lot D, which

includes the encroaching structure and yard. (RP, p. 46, l. 14-15).

Although the Court entered a finding that respondent had subdivided the property in 1982 (CP 98, Memorandum Opinion, Finding of Fact No. 2), there is no evidence in the record to support this date or a legal subdivision of the property. In fact, William W. Sleeth, formerly a land surveyor with West Sound Surveying, testified that he prepared the map for respondent's subdivision, which did not include a survey, in 1986. (RP, p. 205, l. 8-22; CP, Exhibit 17). Gonzales initially testified that the subdivision was in "early '80" (RP, p. 12, l. 24), but later acknowledged the correct 1986 date. (RP, p. 24. l. 24- p. 25, l. 6).

The Court also entered a finding (CP 98, Memorandum Opinion, Finding of Fact No. 2) that respondent had lawfully subdivided his property. This point is significant as the court emphasizes or at least implies that Gonzales had relied on a survey associated with the short plat in constructing his house. Again, Mr. Sleeth's testimony directly contradicts this statement. Although he prepared the legal descriptions for Lots A, B, C, and D, Mr. Sleeth testified that he placed **no** survey markers and conducted **no** survey whatsoever on Gonzales' land at any time. (RP, p. 206, l. 6-21). Gonzales' claim that Mr. Sleeth placed markers on which he relied (RP, p. 25, l. 7-19) is an obviously self-serving and knowingly false statement. In fact, Mr.

Sleeth testified that the external boundary lines of the Gonzales parcel from the 2005 Dewey survey were the same as the 1977 survey secured by Gonzales when he purchased the property. (RP, p. 209, l. 4-10). Respondent was also inconsistent in testifying that he did not place his boundary fence in a straight line along the eastern side of Lot D, but placed it somewhat arbitrarily near the “top of the ravine.” (RP, p. 38, l. 1-11). Moreover, respondent’s witness, Denise Mandeville, established that the fence followed the contours of the berm and ravine. (RP, p. 91, l. 20 - p. 92, l. 18). Finally, the Court failed to review the West Sound Surveying map of Gonzales’ property (CP, Exhibit 1), which clearly states: “NOTE: THIS IS NOT A BOUNDARY SURVEY!”

As late as July 6, 1996, an aerial photograph of respondent Gonzales’ property shows it as a canopy of trees. (CP, Exhibit 15). Respondent did not begin construction of his house until 1997 or 1998. (RP, p. 53, l. 23-25). Although he secured a septic permit, he did not construct the septic field or house where indicated on the drawing submitted to Kitsap County. (CP, Exhibit 18; RP, p. 169, l. 12-p. 170, l. 6). This movement of the house north and east of the planned construction, 30 feet or more in the direction of appellants’ property, resulted in the encroachment and ensuing litigation. Prior to building his house on appellants’ property, Gonzales secured no

requisite permits for construction of the garage, footings, or house from Kitsap County authorities. (RP, p. 170, l. 13-20). He paid no real estate taxes on these improvements, having concealed them from Kitsap County until 2002 or later. (RP, p. 171, l., 11-16).

**3. Trial Court's Decision.**

Based on respondent's evidence, the trial court found that respondent had failed to meet his burden to establish adverse possession under Washington law, most particularly since the alleged possession of appellants' property fell short of ten (10) years. The court concluded that respondent had trespassed upon appellants' land, but he had not acted in "bad faith" to either (1) warrant a mandatory injunction to remove the encroaching structures or (2) justify an award of treble damages under RCW 4.24.630. (CP 48, Memorandum Opinion, Conclusion of Law No. 4).

In refusing to order removal of the encroachment, the court stated:

Removal of Mr. Gonzales' lawn and a significant portion of his house for purposes of remedying the trespass would be an extraordinary remedy when viewed in light of the equities of the case.

(CP 48, Memorandum Opinion, Remedy, p. 9, l. 3-6). As mandated by the five (5) part test for balancing the equities set forth in *Arnold v. Melani*, 75 Wn.2d 143, 449 P.2d 800 (1968) and other Washington decisions, the trial

court failed to establish that respondent had met his burden in defeating the requested injunctive relief by proving each of these elements by “clear and convincing evidence.” The court then granted extraordinary (and unconstitutional) relief by ordering a boundary adjustment, directing respondent Gonzales to survey the disputed property where his house and yard encroached on Deweys’ property, and transferring ownership of the disputed area to Gonzales. Ignoring the proper damage measurement of appellants’ ongoing loss and occupancy damages resulting from the continuing encroachment and inability to develop their property, but relying solely on respondent’s appraiser’s opinion, the court determined that the fair market value of the disputed area was a mere \$795.

**D. SUMMARY OF ARGUMENT**

This Court must reverse the trial court’s decision and remand the matter for a new trial because the trial court’s boundary adjustment of appellants’ property constitutes an unconstitutional taking of the Deweys’ property for respondent Gonzales’ private use. Appellants prevailed in their action for ejectment and trespass. Appellants’ proper remedy here is a mandatory injunction to compel the removal of the encroachment: the house, yard, and fence which respondent wrongfully and recklessly constructed on appellants’ property. In the alternative, and only upon

respondent's clear and convincing evidence that the mandatory injunction is not warranted, appellants are entitled to appropriate loss and occupancy damages resulting from the continuing trespass upon their property.

**E. LEGAL ARGUMENT**

**1. The Trial Court's Remedy Constitutes Unlawful Taking of Appellants' Property and is Contrary to Washington Law.**

By its order quieting title, the trial court compelled appellants to transfer title to that portion of their property upon which respondent had built his improvements. The effect of the court's decision was to condemn appellants' land for the private use of respondent, contrary to the Washington State Constitution relating to condemnation. Article 1, § 16 (amendment 9) provides in part:

EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches . . .

Here, respondent's use does not fall within the exception clause. The trial court had no power to compel appellants to convey and surrender their property for \$795 or any other price for respondent's private use. *See, e.g., Tyree v. Gosa*, 11 Wn.2d 572, 119 P.2d 926 (1941). The decree quieting title is contrary to Washington law and must be set aside.

In *Tyree v. Gosa*, *supra*, defendants, even after having corrected their

own survey and having been warned of a dispute as to the property line, constructed certain buildings on plaintiff's land. Plaintiff sought a court determination of the true boundary and a mandatory injunction to remove the encroachments. After analyzing the relative costs to remove the encroachments compared to a lesser value of the disputed land, the court entered a decree requiring plaintiff to quitclaim his property to defendant in exchange for the \$250 value set by the court.

On appeal and after citing Constitution, Article 1, § 16 (amendment 9), this Court stated:

**It is very difficult to see how one can get equity in the land of another by merely building upon it, however innocently.** It is clear, however, . . . that the doctrine invoked cannot be applied in the instant case; for manifestly, **the effect of the court's decision is to condemn the appellant's strip of land for the private use of Pope & Talbott, Inc., contrary to the provisions of our state constitution relating to condemnation.**

*Tyree*, 11 Wn.2d at 580 (emphasis added).

The *Tyree* Court went on to hold:

**No court has the power to compel appellant to convey and surrender his property for any other person's private use (except for ways of necessity, etc.) in exchange for two hundred and fifty dollars, or any other sum, no matter how great.**

*Tyree*, 11 Wn.2d at 581 (emphasis added).

Despite the “well-intentioned and common sense effort of the trial judge to dispose of the controversy on fair and just terms,” this Court acknowledged:

The right of the appellant, however, to refuse to accept and abide by the trial court’s decree is clear and undeniable.

*Tyree*, 11 Wn.2d at 582. The Court reversed the decree compelling conveyance of the disputed property and further directed the trial court to enter an order requiring removal of the encroachments if the parties were unable to reach settlement. The same disposition is appropriate in the present case.

Similarly, in *White Bros. & Crum Co. v. Watson*, 64 Wash. 666, 117 Pac. 497 (1911), this Court recognized that Washington law does not allow for the taking of personal property for private use. The Court stated:

If it is something in which he has the actual right of property, there is no rule of law nor principle of equity which would warrant a court in taking it from him against his will for the benefit of another. No amount of hardship in a given case would justify the establishment of such a precedent. . . . If a man be required to surrender what is his own because he does not need it and cannot use it, and because another does need it and can use it then there is no reason why he may not be required to surrender what he needs but little because another needs it much. A doctrine so insidiously dangerous should never find lodgment in the body of law through judicial declaration.

*White Bros.*, 64 Wash. at 671. Washington law does **not** provide for taking of appellants’ property for respondent’s private use. Since the early days of

this country, the U.S. Supreme Court has recognized appellants' inalienable right to ownership of their real property: "[T]he rights of personal liberty and private property should be held sacred." *Wilkinson v. Leland*, 27 U.S. 627, 657, L.Ed. 542 (1829). The trial court's decision is contrary to law and must be overturned.

2. **Respondent Failed to Meet Its Burden of Proof That Mandatory Injunction Was Inappropriate.**

In Washington, "a mandatory injunction is the proper remedy for an adjoining landowner who seeks to compel the removal of an encroachment." *Hanson v. Estell*, 100 Wn. App. 281, 287-88, 997 P.2d 426 (2000), citing *Arnold v. Melani*, 75 Wn.2d 143, 146, 449 P.2d 800 (1968); *Mahon v. Haas*, 2 Wn. App. 560, 468 P.2d 713 (1970). Furthermore, when a purchaser of land has notice that the land he is purchasing encroaches on another, he may not later argue that his hardship outweighs the benefit to the encroached upon landowner. See *Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968)("The benefit of the doctrine of balancing the equities, or relative hardship, is reserved for the *innocent defendant* who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights . . . Under the circumstances of this case, defendants are not entitled to evoke the benefits of this doctrine.") (emphasis added). See also

*Bauman v. Turpen*, 139 Wn. App. 78, 160 P.3d 1050 (2007), where the court ordered abatement of the offending roof of a residence finding the property owner was not an “innocent defendant” entitled to balancing of the equities.

Because injunctive relief is equitable in nature, the court may decline to enjoin on equitable grounds and relegate the plaintiff to damages in the case of an “innocent defendant” or, as recognized in *Arnold v. Melani*, where the defendant acted with “excusable neglect.” 75 Wn.2d at 146-47. In *Arnold v. Melani, supra*, the defendant constructed his residence slightly over the plaintiff’s boundary due to mistake by the defendant’s surveyor. The Court determined that the damage to the owner of the building was greatly disproportionate to the injury sustained to the adjoining property owner. The Court set forth the test for balancing the equities as follows:

[A] mandatory injunction can be withheld as oppressive when, as here . . . (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property’s future use; (4) it is impractical to move the structure as built; and (5) there is enormous disparity in resulting hardships.

*Id.* at 152. The *Arnold* Court required that evidence of each one of the above-detailed elements be “clearly and convincingly proven by the

encroacher.” *Id.*

Unlike the defendant in *Arnold v. Melani* who had reasonably relied on his survey and whose house encroached only slightly upon defendant’s land, defendant Gonzales is not an “innocent defendant” nor can he demonstrate excusable neglect here. Based on the testimony of William Sleeth, who merely wrote legal descriptions for Gonzales’ four (4) lots, but did not place any survey markers, and the subdivision map, which clearly states that it is not a survey, Gonzales’ claimed reliance on a non-existent survey is an blatant misrepresentation designed to mislead the court. Gonzales was never able to point to any purported corner quarter markers, which might have explained his actions. Additionally, his septic permit map evidences that he deliberately moved his house and yard toward and encroaching upon the Dewey property subsequent to permit approval. The facts set forth in *Arnold v. Melani* involving reasonable reliance do not apply to the facts of this case.

Moreover, under the *Arnold* holding, a mandatory injunction may be withheld as oppressive **only** when:

. . . the encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure . . .

75 Wn.2d at 152.

It was respondent's burden to prove each and every one of the five elements expressed in *Arnold v. Melani* by clear and convincing evidence. *Id.* Washington courts have held that the failure to prove any of the five *Arnold* elements is fatal to a request for equitable relief. *See, e.g., Anderson v. Griffin*, 114 Wn. App. 1005 (2002)(failure to prove the first element is fatal to a request for equitable relief from an injunction ordering the removal of an encroachment). Respondent Gonzales failed to meet his burden. The trial court erred in simply finding that he did not act in bad faith. Even so, Gonzales clearly took a calculated risk and acted negligently or indifferently in placing his improvements on Deweys' property. The trial court should have ordered removal of the encroachments.

In *Arnold*, the encroaching landowner relied upon a survey, obtained a building permit, and constructed his home consistent with the survey. *Arnold*, 75 Wn.2d at 144-47 ("If Mr. Sprague's line had been accepted . . . the fence would have been properly located and the house and steps would have been well within the borders of lots 16 and 17"). In other words, the encroacher in *Arnold* acted with reasonable care by obtaining a survey and building permits before constructing the improvements. He was completely innocent. But the facts of this case and the history of respondent's use of his property with whole disregard of land development requirements bears no

similarity to the facts in *Arnold* whatsoever.

Gonzales failed to make out the first element: “The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure.” At a minimum, respondent voluntarily erected his house and planted his yard with total indifference to where the true boundaries lie. He simply guessed where the eastern boundary was situated somewhere near the top of the ravine. He willfully submitted a septic permit to Kitsap County showing the planned location of his house, then moved it on to appellants’ property.

The facts in the present case are more analogous to *Mahon v. Haas, supra*, where the court declined to follow the trespasser’s request that equitable relief be granted under *Arnold v. Melani*. The *Mahon* court held:

When plaintiff erected the greenhouse after receiving the warning letter from defendants’ attorney before building the greenhouse, she was either taking a calculated risk, or acting with indifference to the consequences. We find no error in the trial court’s choice of remedy.

*Mahon*, 2 Wn. App. at 565.

By his actions in failing to obtain any survey and failing to procure requisite building permits, respondent took a calculated risk. He acted with indifference. At best, he was negligent and, at worst, willful in not obtaining a survey before constructing the offending residence and yard on appellants’

land. By his own admission, he knew that a portion of his house and yard were on property he did not own. By this admission, he understood that he might have to remove the encroachments if appellants brought a trespass action against him. The consequences of respondent's decisions should not be shouldered by appellants, innocent owners who repeatedly tried to work with respondent to resolve this problem.

Respondent also failed to meet factor two: "The damage to the landowner was slight and the benefit of removal small." In *Foster v. Nehls*, 15 Wn. App. 749, 551 P.2d 768 (1965), the court ordered a second story of a home removed because it violated covenants. The court held that the right to full enjoyment of a particular piece of land cannot be compensated by money and should be restored by an equitable remedy. *Foster*, 15 Wn. App. at 753. One's right to own and use, or not use, one's property is appropriately protected.

Here, the continued use and occupancy of appellants' property by respondent is not "slight" and the benefit of removal is not "equally small." Respondent's improvements significantly encroach on appellants' property, covering at least 1500 square yards. Due to the existence of these improvements coupled with Kitsap County land use policies restricting appellants' land to one structure per five (5) acre parcel, appellants were

unable to develop their property as planned. Respondent implied, but never presented credible evidence, that appellants' property was not useable. This is simply false. The parcel is zoned R-1 and has the benefits afforded to all such parcels with that zoning and overlay designation. Respondent constructed improvements without obtaining permits. His use precluded any development of appellants of their property. The damage to appellants is not slight. The benefit of removal is not equally small. This is not a case where there is minimal encroachment, innocently placed, without material impacts to the neighboring property owner. The trial court failed to acknowledge this substantial damage and resulting hardship to appellants. The trial court erroneously refused to issue the mandatory injunction in the absence of respondent's "clear and convincing" evidence of all factors showing that this relief was not warranted.

As to factor three ("there was ample remaining room for a structure suitable for the area and no real limitations on the property's future use"), it is chiefly the area occupied by respondent's house and yard that can be used for development by appellants Dewey. It is that footprint that under applicable land use codes is the best area of appellants' land for development. If respondent does not vacate appellants' property, its highest and best use, as improved residential developed property, is severely limited. Accordingly,

respondent cannot and did not make out the third factor.

As to the fourth and fifth factors, respondent failed to present any evidence whatsoever at trial concerning the ability to remove the encroachments and relative costs. Again, Gonzales failed in his requisite burden to prove all five *Arnold* factors by “clear and convincing evidence.” The trial court erred in not having ordered removal of the encroaching portions of the structure and other improvements.

**3. The Trial Court Failed to Award Proper Damages for Respondent’s Use and Occupancy of Appellants’ Property.**

In Washington, “[a]n action for trespass exists when there is an intentional or negligent intrusion onto or into the property of another.” *Mielke v. Yellowstone Pipeline Co.*, 73 Wn. App. 621, 870 P.2d 1005 (1994) (citing *Restatement (Second) of Torts* §§ 158, 165, 166 (1965)); “a person is liable for trespass, even though he causes no damage, if he intentionally (1) enters the land in possession of another, or causes a thing or third person to do so, (2) remains on the land, or (3) fails to remove from the land a thing which he has a duty to remove.”) *See also Winter v. Mackner*, 68 Wn.2d 943, 416 P.2d 453 (1966). In the instant case, all three elements of trespass were proven.

Appellants Dewey prevailed in their wrongful trespass and ejection

action against respondent Gonzales. In addition to exceeding its authority in compelling appellants to transfer title to the disputed property to respondent, the court awarded woefully insufficient damages, only \$795 for violation of appellants' valuable property rights. Moreover, the court erred in its measurement of appellants' damages, awarding the purported value of the disputed area. The proper measure of damages is appellants' loss of use and occupancy of their property prior to the court's ruling (subject to a later, additional award if the encroachment is not removed). This Court must remand this action for a correct calculation of damages (if respondent can meet his burden of proof that injunctive relief is inequitable).

Having prevailed in their trespass and ejectment action, appellants were entitled to their damages for respondent's wrongful possession of the land beginning six (6) years before the commencement of the action and ending on the date of the "verdict." RCW 7.28.150. Typically, the proper measure of damages for wrongful withholding of land is "mesne profits," the fair use of the land. D. Dobbs, *Remedies* § 5.8 (1973). As a result of respondent's wrongful possession, appellants were deprived of the anticipated development of their property and corresponding rental income amounting to at least \$1,200 monthly for the six (6) years preceding the action, as well nearly three (3) additional years through entry of judgment.

The court erred in awarding appellants a minuscule percentage of their true damages.

Under Washington law, respondent's wrongful trespass further entitles appellants to treble damages and an award of their attorney's fees and costs associated with this action.

(1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, is liable to the injury party for **treble the amount of the damages** caused by the removal, waste, or injury. For the purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorney's fees and other litigation-related costs.

RCW 4.24.630.

Respondent's violation of this statute is analogous to an intentional tort such as trespass to personal property or conversion. *See Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 23 P.3d 520, *rev. denied*, 145 Wn.2d 1008 (2001). RCW 4.24.630 entitles Deweys to all of their damages caused by Gonzales' removal of "valuable property from the land"

and “wrongfully causing waste or injury to the land.” The trial court erred and misinterpreted RCW 4.24.630 in restricting its application to the one tree removed from appellants’ property. (CP 48, Memorandum Opinion, p. 10, l. 3-11). Damages properly awarded to Deweys should have included treble damages for injury including loss of rental income, costs of restoration of appellants’ property (including, but not limited to, substantial quantities of soil excavated and removed from the property), reimbursement of taxes paid by appellants during the period respondent encumbered appellants’ property, and appellants’ “investigate costs and attorneys’ fees and other litigation-related costs.” RCW 4.24.630.

Appellants were entitled to loss of use and occupancy damages for at least six (6) years prior to initiation of suit and the additional three (3) years through entry of judgment during which respondent wrongfully possessed their property. RCW 7.28.150. Appellant John Dewey testified that his other five (5) acre developed parcel in Kitsap County rented for \$1,200 monthly. (RP, p. 237, l. 7-11). As to the fair market value of the disputed area (although not the proper measure of damages), appellant further testified that it was worth at least \$60,000. (CP 50, Declaration of John Dewey, p. 1, l. 16-17.

Washington courts have consistently held that an owner is competent

to testify to the value of his property. *See, e.g., Port of Seattle v. Equitable Capital*, 127 Wn.2d 202, 88 P.2d 275 (1995); *Meeker v. Howard*, 7 Wn. App. 169, 499 P.2d 53 (1972). Here, John Dewey testified as to his considerable experience operating heavy construction equipment to clear and develop land at various other sites. (RP, p. 187, l. 11-p. 189, l. 22; p. 237, l. 4-p. 238, l. 18). Additionally, he testified that he could develop the subject property by constructing a roadway to the planned residence in the vicinity of the encroachment. (RP, p. 239, l. 19-p. 243, l. 15). Appellants' valuation method presented at trial accounted for the fact that the property was improved with a residential structure and used the appraised value of the actual structure - the best "comparable" available, to determine value. Valuating it otherwise is problematic. Applying less than 20 % to the \$321,450 value of the property yielded at least \$60,000 in value. The court erred in rejecting Mr. Dewey's declaration out of hand, stating that "[h]is valuation of \$60,000 is unsubstantiated." (RP, p. 328, l. 12).

In addition to not properly compensating appellants for loss of use and occupancy of their property, the court's valuation of appellants' property at a paltry \$795 is extremely low as to constitute error. Regardless, it was based solely upon the testimony of one witness who selected "comparable properties" from land which was not and could not be developed with

structures. (CP 41, Declaration of Jo Schaefer; see also CP 44, Supplemental Declaration of Jo Schaefer). Ms. Schaefer reports in pertinent part:

The scope of the appraisal involved an on-site inspection and photographing the area of the encroachment. Information was gathered on comparable transfers of **similar unbuildable sites**. . . .

(CP 41, attached appraisal report, emphasis added).

Quite obviously, the property to be appraised not only could be developed, but, in fact, was developed with Gonzales' house and yard. The Schaefer valuation of "unbuildable [sic]" property lends no support to the court's meager award.<sup>1</sup>

The trial court erred in awarding absolutely **nothing** for respondent's use and occupancy of appellants' property for the six (6) years preceding trial, as well as the additional time from filing the action in May, 2005, through entry of judgment in November, 2008. In deed, respondent Gonzales continues to this day to occupy improvements on appellants' property, for which he has paid and offered to pay nothing. This case must be remanded to the trial court for injunctive relief, together with an appropriate measure of appellants' damages.

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The token award furthers ignores the development of appellants' heavily forested property as a tree farm, against resulting in a far more generous and proper valuation.

4. **The Trial Court's Finding that Respondent Had Obtained a Survey of His Property Is Not Supported by the Evidence.**

In its Memorandum Opinion, the trial court entered the following Finding of Fact:

In about 1982, the second of the five acre lots was subdivided into lots identified as A, B, C, and D.

CP 48, Memorandum Opinion, Finding of Fact No. 2.

Generally, the trial court's findings of fact will not be disturbed on appeal if supported by substantial evidence. *See, e.g., Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 638 P.2d 1231 (1982); *Oil Heat Institute of Wash. v. Town of Mukilteo*, 81 Wn.2d 7, 498 P.2d 864 (1972). Here, there was no evidence whatsoever to establish the year 1982 as when respondent sought a subdivision of his property. As noted, William Sleeth, the surveyor who prepared the map and drafted legal descriptions for lots A, B, C, and D, but who did **not** survey the property, testified that the short plat was recorded in 1986. (RP, p. 205, l. 14-22).

More significantly, the trial court places undue emphasis on its finding that Gonzales secured a legal subdivision to justify his supposed reliance on surveyed boundaries and excuse him from his bad faith conduct. As more fully detailed above, Gonzales arbitrarily constructed his house and

erected his fence without regard to any survey and should not be rewarded at the expense of appellants Dewey for this trespass. Had Gonzales simply engaged Mr. Sleeth's firm to perform the survey, this unfortunate case would have been avoided.<sup>2</sup>

**F. CONCLUSION**

The trial court exceeded its authority. It deprived appellants John and Elizabeth Dewey of valuable property and constitutional rights by the unlawful taking of their property for a private purpose, *i.e.*, the enjoyment of respondent Raul Gonzales.

Having determined that Gonzales had committed a trespass onto appellants' property, the court was presented with two (2) available remedies: (1) injunction relief for removal of the encroachments and (2) an award of appellants' loss of use and occupancy damages. The burden fell upon respondent to prove by "clear and convincing" evidence that injunctive relief was not warranted. He failed to do so. All evidence presented at trial established that Gonzales blatantly and arrogantly ignored all rules and regulations of the Kitsap County development authority in building his house.

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On remand, appellants will establish that, in fact, respondent's Short Plat 4304 did not comply with RCW 58.17.060 and Kitsap County Ordinance 108 (effective in 1986), which require a survey prior to final approval.

In fact, Gonzales admitted to his scheme of developing each of his several lots separately and secretly to escape applicable development rules. It is Gonzales, not Deweys, who should bear the loss here. The court should have ordered removal. Whether injunctive relief was granted or not, appellants were entitled to their damages based on the ongoing loss of the development potential of their property.

Appellants seek this court's order remanding this matter for retrial to determine an appropriate remedy based on the facts presented. Based on Gonzales' reckless and willful conduct and his inability to meet the proof required by *Arnold v. Melani, supra*, appellants seek the court's order for removal of the encroachments on their property. Additionally, appellants are entitled to an appropriate award of their continuing damages through final judgment.

Respectfully submitted this 29<sup>th</sup> day of July, 2008.

LAW OFFICES OF EMILY R. HANSEN

By:   
Emily R. Hansen  
WSBA #8440  
Attorney for Appellants

APPENDIX

SURVEYOR'S NOTES

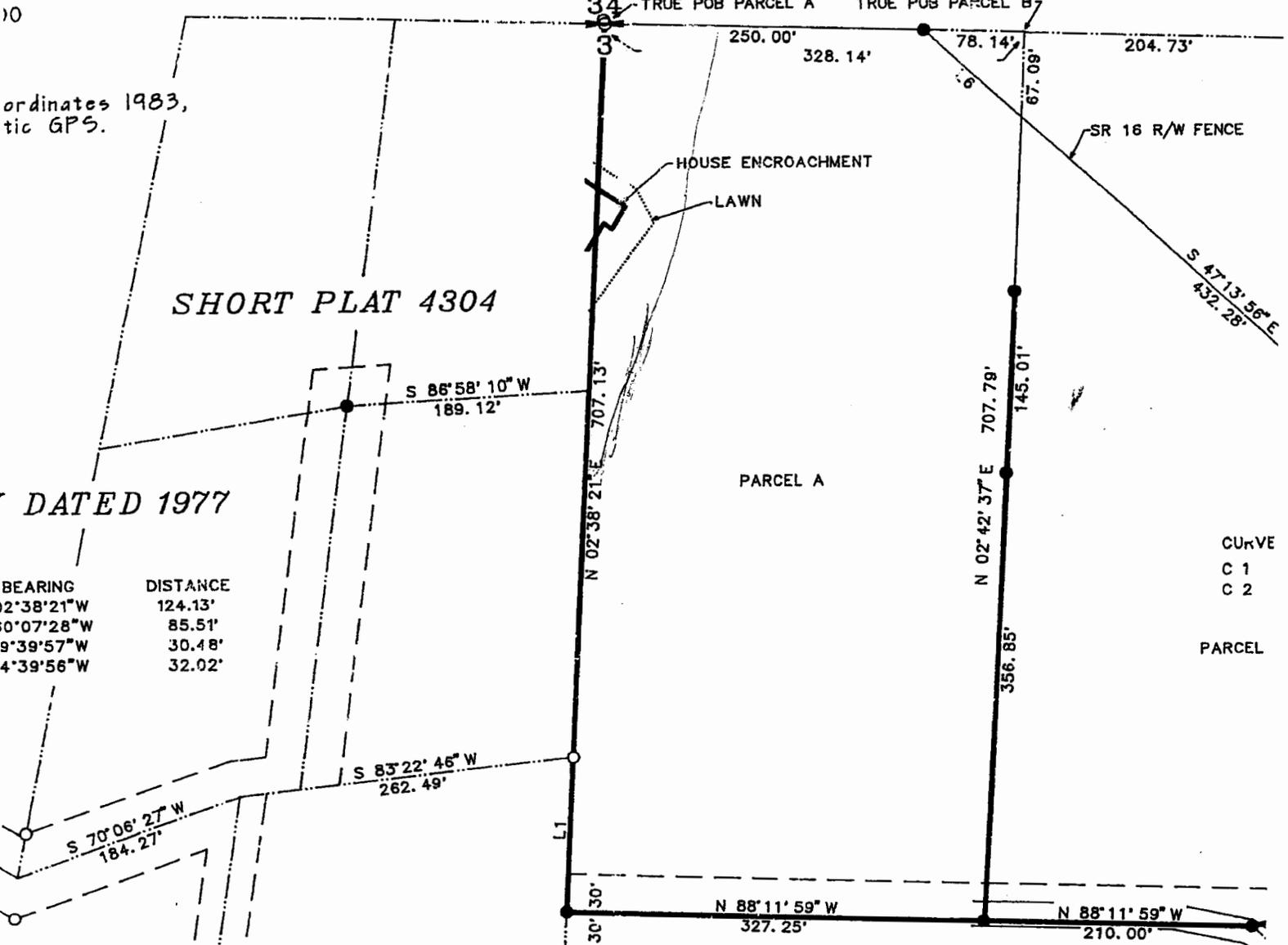
Prop corners & line stakes shown were the only set for this survey. Except as shown, all property lines were checked for encroachments.

No title report was furnished to the surveyor. There exist other documents of record that would affect this survey map is not intended to show all matters relating to property. This including, but not limited to easements and encroachments.

Encroachments (fences, vegetation, improvements, driveway, etc.) may, at times, establish lines of ownership. Property owners should seek legal advice in these cases.



FOUND 1" IRON PIPE IN CONCRETE VISITED IN DEC. '04 ALSO FOUND 1.5" IRON PIPE TO NW



ordinates 1983, tie GPS.

SHORT PLAT 4304

DATED 1977

BEARING	DISTANCE
32°38'21"W	124.13'
30°07'28"W	85.51'
19°39'57"W	30.48'
14°39'56"W	32.02'

CURVE  
C 1  
C 2  
PARCEL

LEGAL DESCRIPTION

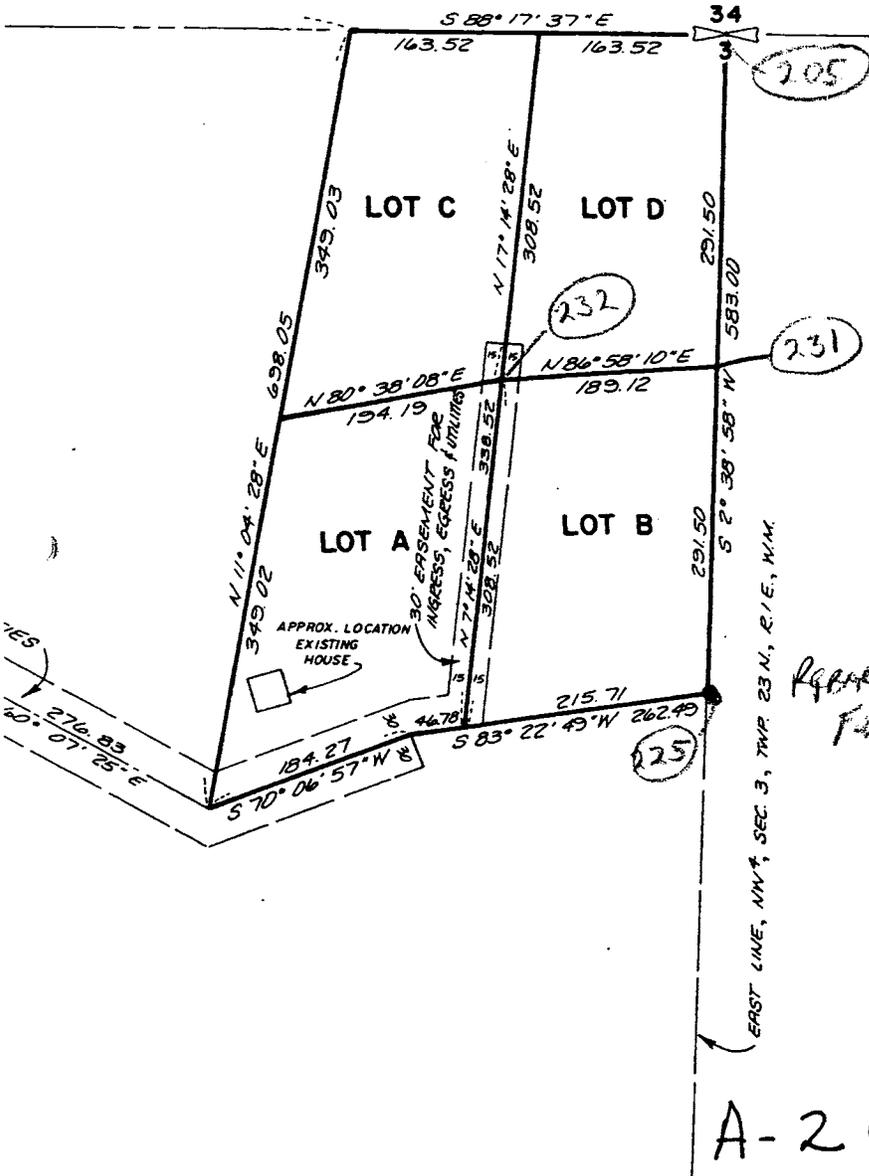
A-1 (from Exhibit 4)

**PARCEL A**  
A PORTION OF THE NORTHEAST QUARTER OF SECTION 3, TOWNSHIP 23 NORTH, RANGE 1 EAST, W.M., IN KITSAP COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:  
BEGINNING AT THE NORTH QUARTER CORNER OF SAID SECTION 3, SAID POINT BEING THE TRUE POINT OF BEGINNING; THENCE SOUTH 88°18'24.5" EAST ALONG THE NORTH LINE OF THE NORTHEAST QUARTER 328.14 FEET; THENCE SOUTH 02°43'27" WEST 707.79 FEET; THENCE NORTH 88°11'40" WEST 327.25 FEET TO THE WEST LINE OF THE NORTHEAST QUARTER; THENCE NORTH 02°39'11" EAST ALONG THE WEST LINE OF THE NORTHEAST QUARTER 707.13 FEET TO THE TRUE POINT OF BEGINNING;  
EXCEPT THAT PORTION CONVEYED TO THE STATE OF WASHINGTON BY DEED RECORDED JULY 15, 1985, UNDER AUDITOR FILE NO 8507150081.  
TOGETHER WITH AN ACCESS ROAD EASEMENT FOR INGRESS, EGRESS AND UTILITIES AS RECORDED UNDER AUDITOR FILE NO 8401190127.

**PARCEL B**  
A PORTION OF THE NORTHEAST QUARTER OF SECTION 3, TOWNSHIP 23 NORTH, RANGE 1 EAST, W.M., IN KITSAP COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:  
BEGINNING AT THE NORTH QUARTER CORNER OF SAID SECTION 3, THENCE SOUTH 88°18'24.5" EAST ALONG THE NORTH LINE OF THE NORTHEAST QUARTER 328.14 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING SOUTH 88°18'24.5" EAST ALONG THE NORTH LINE OF THE NORTHEAST QUARTER 204.73 FEET TO THE WESTERLY RIGHT OF WAY LINE OF STATE HIGHWAY 16; THENCE SOUTHEASTERLY ALONG THE RIGHT OF WAY LINE OF STATE HIGHWAY 16, 68 FEET ALONG A CURVE TO THE LEFT HAVING A CENTRAL ANGLE OF 06°19'58" AND A RADIUS OF 6239.327 FEET; THENCE SOUTH 77°39'48" WEST 254.32 FEET; THENCE NORTH 88°11'40" WEST 210 FEET; THENCE NORTH 02°43'27" EAST TO THE TRUE POINT OF BEGINNING;  
EXCEPT THAT PORTION CONVEYED TO THE STATE OF WASHINGTON BY DEED RECORDED JULY 15, 1985 UNDER AUDITOR FILE NO 8507150081.

ROD & CAP MONUMENTS AT FENCE CORNER  
MARKERS CHECKED BY THIS SURVEY  
PROPERTY LINES

20'



NOTE: THIS IS NOT A BOUNDARY SURVEY!

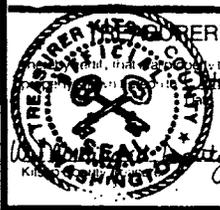
A-2 (from Exhibit 1)

### NOTICE

- Responsibility and expense for maintenance of roads leading to, or serving lots within this Short Subdivision (unless such roads have been accepted into County's road system) shall rest with the lot owners.
- No lot within a Short Subdivision may be further subdivided in any manner within five (5) years of the filing of said Short Subdivision. Provided, such division is permitted through a subdivision as authorized by RCW 56 17 060.

### DIRECTOR'S APPROVAL

Approved for recording pursuant to Kitsap County Ordinance No. 108  
 Kit for R. Parkewicz  
 Director of Community Development  
 Date: 10-1-86



### AUDITOR'S CERTIFICATE

I certify that the above described property is the subject of a Short Subdivision filed for record on October 1, 1986.  
 William W. Sleeth  
 Auditor

### SURVEYOR'S CERTIFICATE



Registered Professional Surveyor  
 License No. 292-03-0018922  
 Date: September 22, 1986  
 Certificate No. 292-03-0018922  
 Signature: William W. Sleeth  
 Surveyor

### AUDITOR'S CERTIFICATE

Filed for record on October 1, 1986  
 at request of WEST SOUND SURVEYING  
 as Volume ONE  
 Pages 71-72  
 Auditor's No. 8610010163  
 Signed: Samuel Hoff by [Signature]  
 Kitsap County Auditor

### KITSAP COUNTY, WASHINGTON SHORT SUBDIVISION No. 4304

Name of Applicant:  
 RAUL GONZALEZ  
 1372 SW OLD CLIFTON ROAD  
 PORT DECHARD, WA 98366

West Sound Surveying  
 217 WILKINS DRIVE S.W.  
 PORT ORCHARD, WA. 98366  
 PH. 876-5455

WA 1 D 71

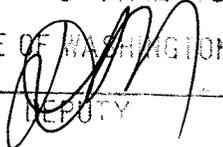
WD 86254

M 1824-110

FILED  
COURT OF APPEALS  
DIVISION II

08 JUL 30 PM 12:46

THE COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON  
No. 37449-8-II

STATE OF WASHINGTON  
BY   
DEPUTY

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JOHN AND ELIZABETH DEWEY, husband and wife,

Appellants,

vs.

RAUL GONZALES, a single man, and GLORIA GONZALES,

Respondents.

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DECLARATION OF MAILING

---

Emily R. Hansen (WSBA #8440)  
Law Offices of Emily R. Hansen  
600 University Street, Suite 2701  
Seattle, WA 98101-1176  
(206) 583-0800

Attorney for Appellants

ORIGINAL

Emily R. Hansen declares and states as follows:

1. I am over the age of majority and am competent to testify to the matters set forth herein.

2. On July 29, 2008, I deposited by First Class U.S. Mail, postage prepaid, a copy of Brief of Appellants and Declaration of Mailing to the following:

Isaac A. Anderson  
Isaac A. Anderson, P.S.  
P.O. Box 1451  
19717 Front Street  
Poulsbo, WA 98370

3. On July 29, 2008, I deposited by First Class U.S. Mail, postage prepaid, the original and one (1) copy of Brief of Appellants to the following:

Clerk of the Court  
Washington State Court of Appeals  
Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington, this 29<sup>th</sup> day of July, 2008.

  
\_\_\_\_\_  
Emily R. Hansen