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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 39975-0-II

**THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

Kitsap NO. 06-2-02697-9

RICHARD W. WHIPPLE,

Respondent,

v.

FRANCES E. HALL,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
THE HONORABLE JEANNETTE DALTON

BRIEF OF APPELLANT

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JURISDICTION AND AUTHORITY:

These issues herein are properly before the Court of Appeals of the State of Washington Division II under RAP 7.3

I. INTRODUCTION

The substantially prevailing party in a partial summary judgment brought to trial her counterclaim which remained after having been denied a judgment as a matter of law. The remaining counterclaim sought reimbursement of costs and reasonable attorney fees under RCW 4.28.328 and RCW 4.84.185.

The prevailing party defendant had also brought to the case, a CR 11 notice b) that the action was commenced without reasonable investigation under Washington Civil Rule 11.

After prevailing at her summary judgment in April of 2008,(CP216) the defendant timely filed the required motions for RCW 4.84.185 and CR11.

The provision of "bad faith" was added as a fourth theory of recovery when Defendant Hall also prevailed in a plaintiff initiated summary judgment in November, 2008, brought to dispose of her counterclaim. The second summary judgment court found "genuine issues of bad faith" in the underlying case brought by the plaintiff and denied the plaintiff's motion to dispose of the counterclaim.(CP657).

The first judge in the case, Judge Costello, retired from the bench

after the second summary judgment hearing in November of 2008. His successor to Position One, in Kitsap County Superior Court, Jeannette Dalton, presided over the bench trial in March of 2009.

In determining findings of fact and conclusions of law, the trial court relied on misrepresentations of the case and its laws which were advanced by plaintiff counsel, William Broughton. (3/20/09RP,2,line21 Discussions in post trial hearings revealed prejudicial misunderstandings on the part of the Trial Court. The lack of clarity with regard to facts and laws of the case was significant in spite of the Trial Court's assertion that she had read every document of the case as well as all of the defendant's pleadings. (1/23/08 RP 2, at 22) (4/10/09RP pages 13,14,15)

Defendant Hall attempted to dispel the misunderstandings and misrepresentations through post trial motions and hearings. (CP 790-809) (CP818-821) She provided all Verbatim Transcripts and every document relevant to the apparent confusion.(CP 851--884) The Trial Court would not reconsider(CP813,846,886). Because the Trial Court displayed misunderstanding of the material facts, history, progression of the case, as well as the laws and civil rules involved, defendant, Frances Hall seeks review of findings of fact and conclusions of law which are contrary to reason, based on untenable grounds-(incorrect facts), untenable reasons(errors in law).

II. ASSIGNMENTS OF ERROR.

ASSIGNMENT OF ERROR NUMBER ONE:

A, Did the trial court err in denying recovery of reasonable attorney fees and costs under RCW 4.28.328 on 4/10/09?

Conclusion of Law- Denial of Costs and Attorney fees under RCW 4.28.328 (CP888 line 16)(3/2/09 RP)

contested ruling: (CP 889, 2) (misunderstanding of law and fact CR 56

1. ".that Judge Costello, In his letter ruling of April 16, 2008, denied Ms. Hall's request for attorney fees after granting Ms. Hall's motion for summary judgment and dismissing the case and foreclosed the issue of attorney fees under RCW4.28.328." (3/20/09 RP 2, line 21 and following). (abuse of discretion on untenable grounds; court based the ruling upon misrepresentation of the record by plaintiff counsel) while having attested that she read every document in the file.

contested ruling:(CP889,11-14)(facts and of law of the case)

2. "(a) The Statute (RCW 4.28.328) provides no definition of "substantial justification: (b) and even if the court were to find that Mr. Whipple acted in bad faith when he filed the lis pendens---the court declines to rule on this issue where Judge Costello has already dismissed the counterclaim for attorney fees under this statute". (abuse of discretion on untenable grounds: finding is contrary to the record and is based on deliberate misrepresentation by plaintiff counsel) the court having attested that she read every document in the case file.

(3/2/09 RP p2 line 13)

Contested Ruling: (CP890, 4-5)

3. In accordance with previous ruling of this Court, the recording of a lis pendens by Whipple was not done in bad

faith and therefore Hall is not entitled to attorneys fees under the lis pendens statute (order filed on 4/10/09)

(abuse of discretion for untenable reasons: erroneous interpretation of law. mixing of provisional criteria.

contested ruling: (CP 890 line 9)

- 4. "The record is unclear with respect to whether Judge Costello was actually considering a motion brought under RCW4.84.185, whether this was a CR 11 motion, or whether this was part of the counterclaim.:** (abuse of discretion: based on untenable grounds: contrary to the record. parts of the record are being ignored.)The court having attested that she read every document in the case file.

ASSIGNMENT OF ERROR NUMBER TWO

B Did the trial court err in denying recovery of costs and attorney fees under RCW 4.84.185 (Frivolous action) on 10/9/09?

Conclusion of law - denial of costs and reasonable attorney fees under #19) RCW 4.84.185 (CP888 line (CP 886)(5/8/09 RP p4, line 8)

Contested Ruling:(CP 890, line 21)

- 1. "At the time of the filing of the case, there actually was a sound legal basis upon which Mr. Broughton filed the action."** (abuse of discretion: untenable reasons (erroneous understanding of the law and based on untenable grounds misunderstanding of facts of the case)(at the time of filing there were only adverse claims).

Contested Ruling:(CP 891, line 1)

- 2. "Because there was a colorable legal claim based on the testimony of Hans Supit then the action was not wholly frivolous" CP 90815 line 1** (Abuse of discretion: erroneous view of the law)(permissive use cannot provide a basis for an adverse claim or misapplied law)

ASSIGNMENT OF ERROR NUMBER THREE

C. Did The trial court err in denying recovery of costs and attorney fees under the provision of Bad Faith on 4/10/09 ?

Conclusion of Law: denial of costs and attorney fees under the provision of "bad faith" on 4/10/09)(CP 813-817).

Contested Ruling: (CP 891, 13-15)

C1. "Whipple sought to have an easement by implication granted across the Hall property by the court. A lis pendens was recorded by Whipple on the Hall property to provide notice of the litigation the record. Finding of fact and the potential existence of an easement by implication (Abuse of discretion on untenable grounds- Contrary to the court record: based on deceptive juxtaposition and misrepresentation of case history by plaintiff counsel). (This finding of fact was signed into the case law disallowing argument from the plaintiff)

Contested Ruling:(CP891, 21-26)(5/8/09 RP p 3 line 20 ff)

C2, "I am making the finding, as I did at the trial that I did not believe that the lawsuit that was filed by Mr. Broughton was a frivolous claim or was brought in bad faith. And the reason for that is because at the time of the filing of the case, there was actually a sound legal basis upon which Mr. Broughton filed the action. (substantial evidence does not support this) (court's finding is based untenable grounds and reasons: on an erroneous understanding of the plaintiffs claims and the case history) erroneous understanding of the case and laws involved

Contested Ruling: (CP892,10-13)

C3. "There wasn't just one legal theory under which Mr. Whipple sued to try to get access. There were two. The first legal theory was adverse possession, and that's the one frankly, that you won on which was because there was a common nature in title in the past. ..."I'm not talking about adverse possession, which is hostile... there's another legal theory and that's what Mr. Broughton brought the other part of his claim on." 5/8/09

(abuse of discretion on untenable grounds: finding of fact(s) is contrary to the record and based on a phantom theory.)

Contested Ruling:(CP983 3-7)

4. **...When we look at the bad faith case law and the question becomes whether or not the lis pendens should--was there substantial basis to be filing the lis pendens , the case law somewhat muddies the water in terms of whether that's a separate action from the underlying action or not." It occurred to me that the statute says that an individual may recover attorney fees for the action, and it doesn't define what the action means."**(abuse of discretion for untenable reasons :erroneous reading of the law)abuse of discretion on untenable grounds: misunderstanding facts of the case. the law defines the word "action" in the clause at mid - sentence as "the action for which the lis pendens was filed--the underlying case)

Contested Ruling: (CP892, 23-26)

5. **"I find that those are two separate issues of law "...and I believe that the legislative intent was focused on the lis pendens and not on the underlying cause of action for which the lis pendens was filed, and so it is upon that basis that I will make a finding that I don't believe there is bad faith. That's my finding, (Assignment of error #1 and #3 abuse of discretion).**
erroneous reading of law)

ASSIGNMENT OF ERROR NUMBER FOUR

D. Did the trial court err in concluding that the only provision under which costs and attorney fees may be recovered is RCW 4.28.328 ?

Contested Ruling: (CP889 5-7)(CP 893-3-7)

1. **"There is no other basis for this court to award attorney fees because there was no concurrent tort claim for slander of title which was either pled or proved and RCW 4.28.328 is the only provision under which an award of damages or attorney's fees**

may be issued by a court in this case" Abuse of discretion for untenable reasons: erroneous view of the law.

Denied a hearing on her CR 11 issue. The hearing on the matter was declared "Off the table" with the false allegation that "it was neither appropriately pled nor approved" and The Judge used subjective criteria based upon her misunderstandings of the case which were provoked by lack of candor with the tribunal.

1. Notice of Intent to seek attorney fees and costs under CR 11 had been pled throughout the case (CP40,1-8)(CP56,1-9) (CP79, 7-10) (CP116, 25 ff)

2. The court was given misinformation throughout and misplaced her trust when the record was available.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR:

Issue 1. Whether the Whipple v. Hall case can be considered resolved at the lower court when two out of four of its theoretical arguments have not been ruled on. (assignment of error number one)

Issue 2. Whether the Whipple v. Hall case can be considered resolved at the lower court when the findings of fact and conclusions of law have been prejudiced by fraud on the court. (assignment of error number one, two, three and four)

Issue 3. Whether the Whipple v. Hall case can be considered resolved at the lower court when findings of fact and conclusions of law have been compromised by erroneous understanding of the laws and civil rules involved. (assignment of error number one, two, three and four)

Issue 4. Whether the Whipple v. Hall case can be considered resolved at the lower court when findings of fact and conclusions of law have been compromised by erroneous understandings of the facts and history of the case.(assignment of error number one, two, three and four)

Issue 5: Whether misinformation that the Hall driveway "shared" potentially but unknown to have been provided by realtor to Richard Whipple before his purchase of his property, created "a color of a claim" to Richard Whipple's suit for adverse possession, and prescriptive easement claims on his neighbor's driveway.

Issue 6: Whether the permissive use of Hans Supit and Richard Whipple provide a "color of a claim" for Whipple's Adverse user claims.

Issue 7: Whether the permissive use of Hans Supit and Richard Whipple provide a color of a claim for Whipple's Implied Easement claims when the Whipple property is not landlocked never has been landlocked, and borders on a residential street.(Assignments of error # two and three)

Issue 8: Whether the previous permissive use of Supit (3/2/09RP60,6) and Whipple(3/2/09 RP,42,1) provides a legal basis (color of a claim) for Whipple's adverse user claims when case law indicates that license conveys no interest in property and neighborly accommodation is desirable and encouraged by the courts.

Issue 9; Whether the Easement from Necessity claim for the Hall driveway being essential for maintenance on the Whipple home is frivolous when evidence brought by Whipple shows other properties in the same neighborhood are maintained without having driveway access to their backyards (see trial exhibit #6 and 9ff)

Issue 10: Whether the Easement from Necessity claim for the Hall driveway being essential for improvements is frivolous when evidence from the testimony of Hans Supit establishes that he renovated and maintained the property without having automobile access to his backyard (3/2/09 RP 63 line 15)

Issue 11: Whether the Easement from Necessity claim for the Hall driveway being essential for utilities is frivolous when evidence brought by Whipple (city sewer map) shows that the utilities enter on the south side of his property with the Hall driveway being on the north side of his property.

Issue 12: Whether the Case of Whipple v. Hall is frivolous in its entirety when none of the required elements of the several legal theories utilized could be met and Plaintiff resorted to invented fact lines, doctored evidence, uninvestigated claims and provably false accusations to bolster his case.

Issue 13: Whether the Case of Whipple v. Hall was brought in "bad faith" when it was initiated with knowledge of its falsity, concealed an

ulterior motive, and was characterized by meritless claim after meritless claim over an 18 month period.

Issue 14: Whether a lis pendens is filed and/or maintained without substantial justification when no evidence was provided of any valid claim to the property in question, when theory after theory advanced by the claimant over an 18 month period collapsed under minimal informal investigation and the lis pendens was left against the aggrieved party's property and never removed by the claimant even after the court ordered it to be released.

Issue 15: Whether the court abused discretion in improperly barring the /CR 11 matter from being given a hearing in the lower court based upon untenable grounds (incorrect facts) and untenable reasons (misapplication of law) and application of the wrong standard (subjective rather than objective.)

Issue 16: Whether the court abused discretion by signing into the law of the case contested ruling C.1. which attempts to erroneously imply through deceptive juxtaposition of facts that Whipple's lis pendens was filed in conjunction with his "Easement by implication" claims after barring the defendant from argument on the matter.

IV. STATEMENT OF THE CASE

A. Pre-Litigation Period

Richard Whipple brought suit in conjunction with his attempt to convert his single family home into a duplex after the unauthorized project had been discovered by the city planning department(CP382). Whipple had placed families upstairs and downstairs without making the required modifications to his property for the new basement living unit (CP382) (CP375, 9-19) On August 10, 2006 the City of Bremerton's

Department of Community Development sent Richard Whipple a letter demanding that he abate the situation. (CP382). On August 22, 2006 he began a belated dialogue with the city about the code requirements for his project (ibid).

Whipple's dialogue with the city planning department would have brought him into confrontation with the off-street parking requirements for new auxiliary living units framed in Bremerton Municipal Code 20.46.010 (h) (2005). His 1905 vintage home, like many others in the area, had a very small front yard and even smaller side yards. (Trial Exhibit #1 house no. 929) He would need to provide drive-in access to the rear of his lot at 929 Pleasant Avenue in order to establish the requisite off-street parking for his duplex tenants (BMC 20.46) His property did not have a driveway (CP171, 9-10). As can be seen in (trial exhibit #1) Whipple had not followed a pattern of ingress to parking in his own backyard but had, from the time he purchased the 929 parcel, merely parked his car in his neighbor's driveway (CP 383 and 384) (CP145),

There was no legal or even informal access way established between the Hall driveway and the Whipple backyard as shown in (CP 383 and 384) (3/2/09 RP 75, 1-12) Trial exhibit #2 shows the parking pattern followed by Whipple and his tenants. It was well within the Hall

property line (shown by the orange tape). Whipple had previously obtained permission from Hall to use her driveway and stated to Hall's sister he had permission(3/2/09,RP,41lines10-25);but due to abuses (CP 374-393) Hall's permission had been withdrawn just prior to his confrontation with the city. (CP 382). Having taken advantage of a time-limited and conditional permission which Hall had given him to park in the driveway, Whipple, without consulting Hall, had instructed his new tenants to park in the Hall driveway. (3/2/09 RP 50, 18-25). He then moved away and was not available to help deal with resulting problems which he had set in motion. Whipple's Duplex project generated disruption in the neighborhood because of drug and alcohol involvement by his tenants and the consequential noise, traffic, partying fighting, threats of physical violence, vandalism, and unsupervised preschool aged children wandering into neighboring homes and properties (declaration of Hall) (CP 379, 9-18) Whipple tenant Lisa Stice, threatened to beat Hall up after Hall asked her to stop parking in the driveway.

Hall's sister arrived from overseas in May of 2006 and stayed with Hall. (CP374, 19-24) She needed the parking pad occupied by Whipple's derelict truck (CP376, 4-24) and could not access it due to the truck's presence, and also because of tenant cars in the driveway.(3/2/9RP37,6-15)

When Whipple appeared on the 929 property in mid-July, he was asked to move his truck and to stop parking his tenants on Hall property. He began at that time to assert various hostile claims of right to the driveway. Hall researched Whipple's claim that he had an easement, by obtaining a title search on both properties (CP388) In Response to Whipple's claim that he had a right by footage, Hall measured both properties using the county legal descriptions sent by the title company. She (CP 383,389) ran an orange tape between pegs which she drove into the ground and took pictures (trial exhibit # 2). Whipple and his tenants vacated the Hall driveway (trial exhibit 4) the day after Whipple signed the postal signature card (CP 386) for Hall's letter which demanded that they leave her her property(CP387).

The matter appeared to be resolved until twelve days later, on September 5, 2006 when Whipple appeared at the 929 property again and announced that the driveway was "In dispute"(CP380, 1-3). Whipple was accompanied by a woman named Donna Reid. Donna discussed the "fire" which occurred at the Whipple house before it had been renovated

Whipple more formally announced his intent to litigate in pursuit of Hall's driveway in mid-September, 2006 with a September 11, demand letter from the office of Broughton & Singleton Inc., P.S. (CP145) insisting Hall remove, within 24 hours, the fence (car cage in Trial exhibit # 6) which Hall had placed at the driveway opening

to deter further invasion of her property and any further vandalism of cars by Whipple tenants (CP 390). The letter also demanded that Hall grant an easement to Whipple within ten days or face a lawsuit.

B. Procedural History: First set of Claims:

In his attempts to obtain the Hall driveway, Richard Whipple, by and through his attorneys of record, Dalynne Singleton and William Broughton, filed successive claims against Hall's property over an 18 month time period using six legal theories: **1) Prescriptive Easement (filed 11/20/06**

(fact line stated: CP8-9) Whipple and his predecessors in title have used the Hall driveway, openly, notoriously, adverse to the right of Hall and her predecessors in title for the period of at least ten years as required by the statute.

2) An alternate legal theory, Adverse Possession (filed 11/20/2006).

(fact line stated: CP 8) Whipple and his predecessors in title have used the Hall driveway, openly, notoriously, adverse to the right of Hall and her predecessors in title for the period of at least ten years required by the statute.

These were the only claims brought by the plaintiff in conjunction with his filing of the lis pendens which he placed against the Hall property.(CP---,----)The plaintiff amended his complaint to change out fictional co-defendants the complaint remained the same otherwise.

C. Judicial Action : Dismissal of Plaintiffs First Claims by Judge Karen Haberly and Second Amended Complaint 3/22/07

The first two claims for prescriptive Easement and Adverse

Possession were voluntarily dropped on March 30, 2007(CP,57) because of fatal flaws in the claims. Defendant counsel had confronted Plaintiff with a unity of title found within the ten year statutory period claimed by the plaintiff's adverse user arguments.(CP40.1-7). The plaintiff had already been confronted about the fire(CP145) of public record which had gutted the Whipple house in 1995 leaving it in a vacant and condemned state for five of the ten years claimed as the statutory period.

It had become clear that the plaintiff could not meet either the elements of **continued use for the statutory period or adverse use for the statutory period**. The Plaintiff's new argument for "Easement Implied from Prior Use" in his second Amended Complaint (CP72, 6-13) claimed that "Plaintiff claims an easement by implication from prior use over the existing driveway.... for at least 50 years" There was a Third Amended Complaint filed to change out the fictional co-defendant mortgage companies. The claim remained unchanged. This third and fourth version of the complaint failed to state a claim on which relief could be granted. The lis pendens had been maintained against the Hall property. It was clear that Plaintiff counsel was not shy about the costs of making multiple amendments. To cut through the repeated thrusting and dodging litigation tactic which plaintiff counsel seemed to be adopting, defendant counsel, Michael Uhlig, selected a broadsword approach and prepared for summary judgment. The plaintiff's

Easement from Prior Use theory was maintained in the case for over a year. Affidavits were obtained as the summary judgment hearing date approached(CP143, CP155,CP169).The Easement implied from Prior Use theory, after being in the case unchanged for over a year, was suddenly dropped by the plaintiff eleven days prior to the hearing, without any amendment to the complaint. A different theoretical argument was introduced (CP189-191).

D. Judicial Action : Defendant's Motion for Summary Judgment - April 4, 2008

Legal theory #4) Implied Easement by Implied Reservation:(CP189)

This fourth theory, introduced at the 11th hour, was argued at the summary judgment hearing. It was summarily dismissed as having no genuine issue over which reasonable minds could differ. It argued that the owner of the Whipple property in 1908(Edgar Gale) intended to reserve an easement over the 13.6 by 105 feet of property edge sold to William Stoney, (predecessor in title to Hall and the owner of the lot to the north (Trial exhibit #15, 2--24 ff). The property descriptions submitted in the Declaration of Richard Whipple opposing Motion for Summary Judgment are graphed-out at appendix "A" herein.(CP 195,196,197,198). Broughton argued that later subdivisions would have blocked vehicular access to the back of Edgar Gale's lot had Gale not intended to reserve an

easement over the 13.6 by 105 foot strip along the extreme north east edge of his 28,000 square foot lot. He argued Gale would have certainly intended to reserve this strip of property edge in order to avoid land locking his own backyard by the sale to William Stoney of the 13.6 feet of property edging which is now the Hall driveway.(CP 197) (Appendix A-3)

After the sale to Stoney, the dimensions of the remaining Gale lot were 250 feet running East/West with 100 feet along Pleasant Avenue, and 113.6 feet along Pacific Avenue.(CP 197). Plaintiff brought no evidence that Stoney ever derived the title of his home from Edgar Gale or that Gale ever intended to reserve an easement. Based on (CP 196,197,198) the **implication** seems to lean the other way----that Gale's 28,000 square foot, mostly undeveloped lot (Plaintiff concedes that the sub divisions and homes came later (trial exhibit #15,13, 21-22)was in no danger of "landlock" in 1908 and there is no apparent need for Edgar Gale to have reserved an easement over Stoney's small section acquired in 1908. There is no mention in any of the Whipple documents that there was a driveway or an easement in 1908-09. There is no evidence of use by the Gale-Berg or Whipple property of the Stoney strip over any 10 or 50 or 100 years.

E. 5) Legal theory number five: Easement from Necessity was entered by oral argument 4/4/08 at the summary judgment hearing. The Plaintiff argued from this theory that the Whipple property could not be reasonably

enjoyed, maintained or have utilities unless he was able to drive a vehicle to the back of his lot(Trial exhibit #15,6,18-24). Subdivisions, after 1909 (CP198), left the Whipple property reduced to 30 feet of road front for a house 25 feet wide. The property description(CP198 and Appendix A-4) shows the 1909 Whipple lot (owned by M.J. Berg) described as having 60 feet of road front on the north/south dimension). Presently the Whipple house has a 2.5 foot wide walking path down the north and south sides of the house. The subdivisions which narrowed the Whipple lot and restricted vehicular access to the rear of the parcel came in the years after 1909. The Whipple Exhibit at CP199 shows utilities entering the Whipple property on the south side, rather than on the north side of the house.

F. A Claim for Footage in the Hall driveway. The footage claim was not new to the case but was introduced for the first time in the litigation on March 24, 2008(CP193 4-21) eleven days prior to the defendant's summary judgment hearing dated April 4, 2008. In his "Declaration of Richard Whipple Opposing Motion for Summary Judgment" Mr. Whipple claimed "Some of the driveway is on my property" He had not made a footage claim in the Hall driveway since October 18 2006 when his survey confirmed the measurements made by Hall on August 1, 2006. (CP379-380) This claim was not mentioned in any of his complaints or pleadings until it was now resurrected for his Declaration.The 2006 survey established the county descriptions to be correct (trial Exhibit#5) and

clarified that Whipple had no footage in the Hall driveway. The introduction of this old claim which had already been discarded before the case was filed was accompanied by a sewer map (CP199) obtained from the city utilities department which had property lines drawn on it. Plaintiff used this map to argue that "some of the driveway is on my property." Hall obtained an un-doctored copy of the same sewer map from the city utilities department along with a disclaimer from that department stating that property lines are not depicted on their sewer maps.(Trial Exhibit#14). Whipple restated the claim that his surveyor stakes "disappeared".

In his March 30 2007 amended complaint **the plaintiff brought the accusation that the monuments from this survey had been "removed and destroyed" by "Hall or her agents"(CPCP 72,22).**

Hall had responded to this accusation by denying that she removed any stakes and by providing pictures of the front surveyor monument still in its correct place. (Trial Exhibit 11). Pink flags signaling the placement of the rear monument (still in its place) were visible from the street at the front of the Whipple lot . When the Whipple Declaration (CP 193)made it clear that the plaintiff was persisting persisting with this allegation, Hall obtained a follow up survey which "found" the original survey monuments in their correct places (trial exhibit # 13). The survey report was faxed to Whipple counsel before the summary judgment hearing (Trial exhibit # 13).

The Plaintiff brought no evidence to support this claim that Hall stole the surveyor monuments except for a statement that his evidence would have to be "circumstantial". Trial exhibit #15 , 11 20-25) the circumstantial evidence given at the hearing is recounted below:

"Now at the same time the chain link fence appeared, my clients survey stakes disappeared..."

This claim against Hall's person was considered by Judge Costello and summarily dismissed as having no genuine issue over which reasonable minds could differ (Civil Rule 56) on April 16, 2008. (CP216).

The plaintiff complaints (CP8, 6-7) (CP28 line23) state that Hall put up her fence "on or about August 25 2006. The Kitsap County records show the Whipple survey was made on Oct 18, 2006 (CP154) two months after Hall erected her fence.

Likewise, the plaintiff's arguments using the theories of Implied Easement from Implied Reservation were also based upon : "circumstantial evidence" that:

"without reserving an easement between these two properties, when the original grantor divided them, it would have eliminated any ability to access the back portion of the property." (Trial Exhibit # 15, 1-9)

The property description from the 1908 document recording the sale of the 13.6 feet of edging to William Stoney is diagramed herein at Appendix A-3. The property description from 1909 sale document between MJ Berg

and Edgar Gale is diagramed herein at Appendix A-4.

Other personal accusations brought against Hall were also dismissed.

G. Trespass Whipple filed the claim on March 30 2007 that Hall had trespassed on his easement by placing her fence (car cage-Trial Exhibit 6) across the opening of the driveway, denying him ingress and egress to his parking area. Trial exhibit 2, shows the Whipple "parking area" to be one and the same with the Hall driveway. Uhlig argued that the claim for trespass on the Whipple easement could not survive dismissal of the Whipple claim that there is an easement. (CP# 15,6,25-7,) When the claim for an easement was dismissed the accusation of trespass on the easement became moot.

H. Alleged Racial slurs and Harassment of Whipple tenants:

Whipple declaration(CP192) brought a new accusation that Hall had made **racial slurs** and had **racially harassed** Whipple tenants. (CP194) This accusation was dismissed along with all of the other plaintiff claims. Plaintiff Whipple brought no witnesses, affidavits or other evidence for this accusation. Hall and Chavez Taloa denied these allegations(3/2/09 RP 55, 11-17).

I. Judicial action Presentation of Orders - May 9, 2008

Michael Uhlig submitted his proposed order (CP230) and from that time

Plaintiff attorney Broughton, began to insist that Halls counterclaim had also been dismissed by the April 16, 2008 letter ruling of Judge Costello, even though no cross motion had been brought by the plaintiff to have it summarily dismissed. Judge Costello addressed this issue at the order signing of May 9 (mistakenly labeled as April 9 on the Report of Proceedings cover sheet) (see CP 722 page 4,24

Judge Costello: (to Uhlig: you asked me to make a finding that the plaintiff did not have, as a matter of law, the plaintiff did not have a sufficient basis to file a lis pendens, I denied that and that's as far as it's going. If Mr. Broughton wants to bring another motion, I guess , to have me construe that further, I'm willing to do that."

Judge Costello, who above states he denied the defendants request that he make a finding that the plaintiff as a matter of law, did not have sufficient basis to file a lis pendens is later misquoted as saying Costello denied attorney fees to miss Hall as a matter of law."(CP770-775) Costs and fees weren't denied as a matter of law. Summary Judgment was denied Under rule 56 this response by the summary judgment court left the matter for trial. (CP 232 ,8). As the prevailing party at summary judgment, Hall timely filed within 30 days, a motion for sanctions under RCW 4.84.185 (CP 310) and on 7/2/08 a motion for CR 11 sanctions (CP316) Broughton continued to insist the Hall counterclaim had been dismissed by the April 16, 2008 letter ruling.(8/1/08 p 9 ff).

Costello: "I think what I heard Ms. Hall say is that by lining out the part on 5 that what I lined out was not a judgment that the counterclaim for attorney fees went away. It was that I was not ruling on that issue....Now, that's different...is that the ruling does not specifically dismiss the plaintiff's claims."

According to the Report of Proceedings for the order signing referred to above, Costello had spoken into the record his reason for lining out paragraph 5: (May 9)

"I'm lining out at paragraph 5 so it conforms more precisely with what I had written in the letter than what it says in that paragraph"

At the motions hearing on August 1, 2008 (8/1/09RP p9) Broughton insisted that Hall amend her counterclaim to incorporate her motions. Costello supported Broughton's request that the counterclaim be amended (ibid) Broughton argued that the defendants counterclaim had been dismissed summarily by the April 16 letter ruling of Judge Costello. Costello agreed to "construe the matter further" Judge Costello determined in his letter ruling of August 8 2008 (CP 400) that the defendant's counterclaim had not been dismissed and that "it awaits trial or further motion" thus, prompting Broughton for a fourth time to bring a cross motion

J. Presentation of Orders - October 17, 2008

Hall, acting pro se. brought the order based on the letter ruling of August 8, 2008 and it was signed as presented except for a line drawn through

the words "wrongful lis pendens" (even though this was, in brief, a statement of the counterclaim,) The line-out occurred because Broughton had objected to the wording although giving no reason for his discomfort with the wording. Since Judge Costello had not specifically written those exact words he obliged Mr. Broughton and crossed out the phrase.

Hall attempted to bring the amended counterclaim as requested by Judge Costello on October 24 2008 after a postponement requested by the court and a postponement requested by the Plaintiff. Hall's motion hearing was pre-empted by Mr. Broughton's sudden request for a summary judgment hearing. in which he requested a shortening of time and also requested that the summary judgment be held at the same hearing for which Hall had arranged for the motion to amend the counterclaim. Hall objected that she was prejudiced by the shortness of time. Costello agreed to the dispositive motion and stated that Halls motion to amend her counterclaim could be heard **after** the motion to dismiss the counterclaim if it survived the motion. Costello set the date for the plaintiff initiated summary judgment hearing for November 14, 2008.

K. Plaintiff initiated Summary Judgment Hearing -November 14, . 2008

Plaintiffs stated objective was to move the court for a summary dismissal of Hall's counterclaim under RCW 4.28.328 for costs and attorney fees.

Broughton: The other issue that was alive in the case had to do with the recording of a lis pendens, which we had done when we originally filed the litigation. They asked for summary judgment on that issue, saying that the lis pendens was improperly recorded. The court denied their request for summary judgment on that issue. But as Mr. Whipple had not cross moved for summary judgment, that issue remained open. And that issue is the subject of our motion today for summary judgment on the last....issue,"

The letter ruling, mailed from the court on November 26, 2008 on the eve of a 4 day holiday weekend, was received by Hall in the following week.

The court had found "genuine issues of bad faith" and denied the plaintiff motion to dismiss Hall's counterclaim. Hall re-noted for a motions hearing on the next available date which was December 12 2008 for bringing the motion to amend the counterclaim.

**L. Motions Hearing to Amend the Defendant's Counterclaim
December 12 2008**

Judge Costello denied Hall's request to amend her counterclaim and cited the shortness of time(40 days) to trial as the reason. The only new issues which the amended counterclaim would have brought to the trial would have been the request for Mr. Whipple to attach window screens to the windows and porches on the north side of his house to deter the throwing of trash into Hall's driveway by his tenants and a request for help with the expense of a fence to contain Lisa Stice's unlicensed day car

home business which was spilling onto Hall property where toddlers played in cigarette butts thrown by Whipple tenants from windows above. This situation created a liability situation for Hall (CP240).

M. Motion for Reconsideration and Request for Pretrial Planning

The trespass issue became moot prior to the trial date because Whipple defaulted on his property payments. He and his tenants had announced to people in the neighborhood that they were moving. The CR 11 and RCW 4.84.185 issues had already been correctly filed as motions but Hall moved for reconsideration on the ruling of 12/12/ 08 in order to insure that the motions issues would be preserved (1/23/09 RP).

The trial was continued until March 2, 2009. At the pretrial hearing Judge Dalton indicated that she had studied the case at length. (1/23/09 RP p2)The trial date was then postponed by a criminal proceeding. Hall opted to continue until Dalton's next available date rather than have the trial before a judge who had not had time to review the record.

N. Post hearing Memorandum

Mr. Broughton submitted a post trial "Memorandum on Points and Authorities (CP 770-772) Mr. Broughton asserted that the defendant's counterclaim had been previously dismissed by the April 16 letter ruling

of Judge Costello. This assertion by Mr. Broughton had been made previously by Broughton and had already been ruled on and answered by the court on 8/8/08. Broughton attempted a dispositive motion against the counterclaim but his motion was denied because Judge Costello had found "a genuine issue of bad faith" in the underlying case brought by the plaintiff. (CP657). Since the counterclaim had never been dismissed nor disposed of nor amended it remained for trial as stated in Hall's answer and counterclaim .

The Trial Court, despite the record, accepted Mr. Broughton's assertion that Judge Costello dismissed Hall's counterclaim in his April 16, letter. 2008 letter ruling and announced that she would abstain from ruling on the matter. (3/20/09 RP p2 and3)

The court stated that her ruling was based upon Broughton's closing arguments his responsive memorandum, and trial witness accounts, primarily the account of Hans Supit.

Closing arguments: Broughton argued his Implied Easement by Implied Reservation theory which he had introduced 18 months into the Whipple v. Hall case. The stated objective of the bench trial was to consider the conditions surrounding the filing of the lis pendens at the beginning of the case. Broughton's closing argument summarized his

implied reservation easement which he introduced 18 months into the case. Broughton asserted that he could still prove that there had been established many years of continuous use over the Hall driveway by residents and owners of the Whipple property. He brought no evidence to trial or to either summary judgment hearings to support this claim. He also claimed he had proven unity of title but brought no proof to support this assertion

(3/2/09 RP 103ff)

O. Bench Trial: The court heard witnesses and took the matter under advisement.

P. Oral Ruling of 3/20/09 The trial court, despite the record, accepted

Mr. Broughton's misrepresentation of the case law and accepted that Judge Costello had dismissed Hall's counter claim at her summary judgment even though Broughton had brought no cross motion and the record has additional entries on the subject which Broughton left out. Hall moved for reconsideration and at post trial hearings the judge seemed to be straining to comprehend the statute.(4/10/09 7.1-17)and misread the paragraph at the bottom of the statute at RCW 4.28.328 (3). She Stated that the statute did not define the word "action". The court had apparently read only the last part of the sentence. "action" is clarified mid sentence as the action for which the lis pendens was filed.

The pro se party was pointedly briefed on the purpose of the order signing

and instructed that it was not to be a forum to reargue the case but only for determining if the order reflects the rulings made by the court on 3/20/09.

Q. Presentation of Orders - April 10, 2009

Defendant Hall declined to sign the proposed order of Mr. Broughton because it contained numerous findings of fact and conclusions of law which the court had not ruled on. Broughton's order asserted findings of fact which falsely restructured the history of the case, placing the bringing of the Implied Easement by Implied Reservation at the beginning of the case rather than 18 months into the case as actually occurred. At the Hearing he initiated further argument, that since there had been a trial there should be some findings of fact and conclusions of law where the court on 3/20/09 had abstained from to ruling. Broughton's order submitted points which the oral ruling session of 3/20/09 had not addressed. The Trial court signed off obligingly on all of Broughton's new findings of fact and conclusions of law. Hall refrained from argument, having been specifically instructed by Judge Dalton on 3/20/09 not to "rehash the case" at the order signing unless it was to contest that the findings or conclusions did not conform to her rulings. In this instance the findings of fact and conclusions of law preceded the ruling of the Judge

and they were erroneous. Broughton's findings of fact introduced into the law of the case his distortions with regard to the historic progression of the case. In order to object, Hall would have had to "rehash the case" as she had been instructed not to do. New rulings were made which under the circumstances denied argument to the defendant. The court at Broughton's request made new rulings with regard to the "Bad Faith" issue in the case. Judge Dalton invited Hall to appeal.

R. Motion for Reconsideration, May 8, 2009

Court denies Defendant Hall's motion for reconsideration on the rulings of March 20 and April 10 and at that hearing reveals considerable confusion regarding the previous rulings of Judge Costello(3/20/09RP2,20ff) the progression of the case, and the laws involved in the case.(4/10/09,7,1-25 ff)

V. ARGUMENT

A. Standards of Review:

A trial courts denial of costs and reasonable attorney fees is usually reviewed for an **abuse of discretion**.

Abuse of discretion based upon untenable reasons (erroneous view of the law) and upon untenable grounds (findings of fact upon insufficient evidence, mistake of fact, or ignoring of substantial evidence.)

A trial courts denial of Costs and reasonable attorney fees based upon

misunderstanding of the laws involved is reviewed de novo.

B. The Counterclaim of Defendant Hall Under RCW 4.28.328 was not ruled on by either Judge Costello or by the Trial Court and so remains unresolved at the lower court.

1. The Hall counterclaim under RCW 4.28.328 (1c and 3) states :
 - 4.1 "All facts and allegations as set forth in paragraphs 1.1 through 3.8 above are hereby incorporated for the following cause of action:
 - 4.2 Whipple recorded a *Lis Pendens* against the Hall Property without substantial justification or sufficient basis, which has damaged Hall in the amount to be proven at trial."

In response to contested rulings A1 and A2 in Assignments of Error

(above): Judge Costello did not ever dismiss the defendants above

counterclaim under RCW 4.28.328.

1. Michael Uhlig states on May 9 (CP722)
"I have a copy of the court's letter opinion here. It is very clear. In denying the summary judgment he says nothing about, it says nothing about dismissing Ms. Hall's counterclaim. That counterclaim still exists for trial."

Rule 56 (d)

2. Judge Costello states on May 9 "you asked me to make a ruling that the plaintiff did not have, that the plaintiff did not have sufficient basis to file a *lis pendens* and I denied that and that's as far as it's going. If Mr.Broughton wants to bring another motion,I guess, to have me construe that further, I'm willing to do that.' (CP 722, 24-ff 723, 1-ff)

3. Judge Costello, considered Mr. Broughton's assertion that the

Hall counterclaim had been dismissed by the letter ruling of

4/16/08 and ruled on August 8 2008 that the counterclaim had not

been dismissed and that it awaited trial or further motion (CP 400). It says nothing about dismissing any part of the defendant's counterclaim.

4. The order of October 17, 2008 states that the Hall counterclaim awaits trial (CP 591-593). The wording "wrongful lis pendens" was struck obliging Mr. Broughton to make the wording conform more closely to the letter order.

4.. In response to the Trial court ruling that "It is unclear whether Judge Costello was referring to the CR11, the Frivolous Action Claim or the counterclaim:"

Judge Costello stated on August 1, 2008 that he would look at the counterclaim with regard to attorney fees.(CP,12, 15-17)In his letter of August 8 he referred to the defendant's counterclaims in the plural,(CP400) indicating he saw more than one counterclaim remaining, and nowhere did Costello indicate that any of the defendant's counterclaims were dismissed

5. Judge Costello repeatedly prompted the plaintiff counsel to bring a motion. (CP 216) (CP400)(CP657)

7. Hall documents prompted Broughton to bring a cross motion-(CP3100) (CP316)

8. Broughton delayed the bringing of his cross-motion in a calculated maneuver to bump Hall from her hearing date at a strategic point in the trial calendar. His argument contained no new points and was brought solely for the purpose of delay.

9. Plaintiff counsel had been consistently alleging that Judge Costello announced after the arguments that he would answer by letter. and it would take a week. However it took two weeks. and then was mailed on the eve of a 4 day holiday.

10. Plaintiff counsel admits on November 14, 2008 that the remaining issue for hearing is the Hall counterclaim for atty. fees under RCW 4.28.328.

11. Plaintiff counsel takes a different position on January 23, 2009 that the remaining issue for trial is "Bad Faith" because Judge Costello had found bad faith in the underlying case as an issue of fact. Broughton postured as if the counterclaim went away and was replaced by the "bad faith" issue. (1/23/09 RP748, 14-28)

12. Broughton maneuvers to sway Dalton that "the wrongful lis pendens" remaining for trial had been struck (3/2/09 RP p 4 11-p 5, 6 p11,7 ff) Broughton argues a substantive issue had been decided in the maneuver to adjust the language in the order to conform more exactly to the judges wording. Broughton states "but Costello had found an issue of bad faith." He convinced Dalton the only remaining issue was "bad faith" from the August 1, 2008 hearing and the Oct 17 order signing in which he took issue with the wording "wrongful lis pendens" Broughton deceived the

court. turning the wording adjustment **strike out** into a substantive ruling when it was not. (3/2/09RP page 5 line 5) Broughton: "Judge Costello specifically struck out that language"(see RP page 4-line 23 to RP page 5 line 5). (Dalton buys it: (3/2/09 RP page 3 lines 13 and following)

13. Plaintiff counsel continues his maneuver in his Memorandum on Points and Authorities in saying the counterclaim of the defendant for attorney fees under RCW 4.28.328 had been dismissed 7 months earlier and the only remaining issue for trial is "bad faith". (CP770-771)

14. The rulings of the trial court at --- (text of lis pendens statute at CP 140, 13-21 RCW 4.28.328)

C. Argument regarding Assignment of Error Number Two:
(Frivolous)

The trial court used two devices to attempt to do away with this issue:

1. Color of a Claim theory propounded by the trial court: is based on the testimony of Hans Supit Hans Supit testified that he used the Hall driveway permissively That he shared the use with Hall (3/2/09RP-65,13ff) and when he decided to sell the house he told his realtor that the driveway was "shared" The court speculates: that since it was possible for Whipple to have heard from a realtor the driveway was "shared" this would set up an expectation and provide a "color of a claim" for him to bring his suit for obtaining access to the

driveway.

There are some problems with this theory. the foremost problem is that

1. Whipple was not at trial to confirm or deny having been told anything by a realtor that would generate expectation of a "shared driveway". 2. He did not bring to court a truthful testimony about his two years of permissive use. 2. He failed to admit he knew nothing about the use or non use of his predecessor in title but instead filed an invented story about ten years of adverse use. 4. Hans Supit testified that he never spoke to Mr. Whipple (3/2/09RP 59,22). The Supit affidavit states he never spoke to Whipple or Whipple's attorney about anything. 5. Whipple filed his suit using theories of adverse possession and prescriptive easement. His fact lines were invented to fit these theories. No "color of a claim" if he ever even had such a thing, could justify dragging his neighbor into court with misapplied laws and invented stories 6. Whipple loudly and actively claimed multiple theories of ownership to the Hall driveway between July and September of 2006 (CP378-380). All of his informally made claims were investigated and proven false before he filed his case. While he was coming up with multiple theories, expectation created by a realtor was not mentioned.

2. Phantom Theory: The trial court offered a vague, confused, hybrid version of the plaintiffs misapplied theories as evidence that the suit

was valid. In post trial hearings, most notably on April 10 2009 and May 8, 2009 the trial court displayed considerable confusion with regard to the legal theories of the case. The court stated "there were two theories brought by the plaintiff at the initiation of the case" (they actually brought six property theories to the case). "One theory was the adverse possession theory which "panned out" but the other theory was valid and which was in place "at the filing of the lis pendens.(4/10/09 RP4,13 ff) The court identifies the theory as "Prescriptive easement theory" but describes it as if it were an implied easement theory "brought to prevent landlocking "

She is not entertaining the same the prescriptive easement theory used by the plaintiff which was based on an alleged ten years of adverse use.(CP8,17) (CP29,7) She had also apparently become confused about what the 4/4/08 summary judgment hearing was about citing the commonality of title . " That was the driving force behind Judge Costello's decision" That's what you won on, but there was another theory which did not get fully litigated because you won at summary judgment" She seemed to understand initially at the 1/23/09 hearing but had become quite muddled by 4/10/09 and 5/8/09 became confused about the fact that initially there were only adverse theories in the case. These were voluntarily dropped a year before the summary judgment hearing

which dismissed plaintiff Whipple's claims. Afterward plaintiff switched out different implied easement theories, bringing the last one just 11 days prior to the summary judgment hearing.(CP189). the Whipple v. Hall case is a tangled web of deceit. since the judge was confused about the issues which were before the court, her confusion was highly prejudicial to the outcome of her rulings.

The plaintiff did bring an implied easement theory but it was much later in the case--initiated just 11 days prior to the summary judgment hearing of 4/4/08 almost a year and a half into the case.(CP189) So it is unclear just what this valid theory might have been according to the court. The record is clear that the only theories initially brought were adverse user theories. These were the only theories in place when Whipple filed his lis pendens against the Hall property. As the orders now stand, this "second theory" remains unnamed and quite vague but it is used to argue that the case in its entirety is not frivolous.

Michael Uhlig researched the required elements for Easement implied by Reservation and found the following: (CP200-201)

An implied easement (either by grant or reservation) may arise

(1)when there has been unity of title and subsequent separation

this first element is an absolute requirement

Landberg, v. Carlson 108 Wn. App. 749,33, P3d 406
.no. 18644-0-III 10,23,2001

(2)when there has been an apparent and continuous quasi --
easement existing for the benefit of one part of the estate to
the detriment of the other during the unity of title; and
(3)when there is a certain degree of necessity

Hellberg v. Coffin 66Wash.2d 664 (1965)

The Whipple v. Hall case meets none of these elements. William Stoney who purchased 13.6 feet of property edge was never established to have a unity of title with Gale. He had his small 22 foot lot (CP 197 and Appendix A-3) to which he added the 13.6 feet. There was never any evidence brought that the Hall driveway extended any further back in time than 1978 (CP 199). To meet the element plaintiff would have to establish a quazi easement dating from 1908. There is no evidence of the. the third element (necessity) clearly the very big lot of Gale was in no danger of becoming landlocked by the sale of the narrow 13.6' along it's northern edge (appendix A-3)Edgar Gale still had 213.6 feet of road front. Even in 2006, Hans Supit testified that he had his building materials delivered to the front yard and he carried them around to the side or back of the house as needed. and that he mixed his cement in a bucket. The off street parking Supit and Whipple enjoyed was a neighborly

convenience and was considered Hall to be a gesture of neighborliness but not necessary only if there is a hidden agenda to meet BMC 20.46010

(h) in order to create a duplex)

The courts have been reluctant to accord a permissive user with status of an adverse user: "To charge the owner with acquiescence, or to credit the user with an adverse intent, would put a penalty upon generosity, and consequently...destroy all neighborhood accommodation..."

Leinweber v. Gallagher No 27644 Supreme Court of Washington Jan, 23, 1940 p.312

D. Argument regarding Assignment of Error Number Three: Bad Faith

"Bad faith" includes obstinate conduct that necessitates legal action to enforce a clearly valid claim or right, vexatious conduct during the litigation, or the intentional bringing of frivolous claim or defense with improper motive.

Union Elevator & Warehouse v State 152 Wn. App. 199 No. 27370-9-III. 9/10/2009

The Whipple v. Hall case involves all of the above as will be shown below:

The same devices used to eliminate the frivolous action claim were also employed in response to Hall's claim under the Bad Faith Provision.

Color of a Claim: The court reasoned erroneously that if Whipple believed there was a shared driveway because of misinformation given to him by a realtor that would eliminate the "bad faith" element. As already mentioned, Whipple's fact lines were invented his ten years of adverse use was not fact based. Whipple had claimed to have a right by

permission before he filed his adverse user claims. Whipple used a doctored sewer map to argue a claim for footage while falsely alleging that his glaringly visible survey stakes had been stolen by his neighbor.

Whipple brought an implied easement claim based upon non-existent landlocked conditions of 100 years ago, bringing evidence which actually contradicted his own argument--this is especially apparent in graph form.

Whipple claimed his access to the driveway was necessary for utilities when the sewer map he brought to support this argument showed his utilities were installed on the other side of his house. During the litigation period, Whipple and his tenants systematically threw garbage onto Hall's property. Whipple was "caught on camera" throwing a stack of trash across the property line(CP CP297). Whipple concealed his true purpose in seeking access which involved a plan to develop his property into a Duplex and increase his profits at his neighbor's expense by using her driveway for his development project.

Courts have favored Neighborly Accommodation and have been reluctant to award adverse status to a permissive user.

"A license is revocable at the will of the estate owner"

Van Siclen v. Muir, 46 Wash 38, 89.188 (1907)

"Revocation by the owner is enforceable even if the licensee has suffered some expense."

Hathaway v. Yakima Water, Light and Power Co., 14 Wash. 469 '44 P. 896 (1896).

Any manifestation of intent to revoke the licensee's privileges is sufficient.

West v. Shaw, 61 Wash. 227, 112 P. 243 (1910).

¶ **Argument regarding assignment of error number four.** RCW 4.28.328 as the only provision under which attorney fees and costs may be awarded. Whether attorney fees may be awarded or not under civil rule 11 it is important in the case of *Whipple v. Hall* to bring sanctions when lack of candor with the tribunal has perverted the civil process and interfered with justice.

VI. SUMMARY AND CONCLUSION

Richard Whipple, in pursuing a project to develop his property brought prescriptive easement and Adverse Possession o claims in order to obtain property belonging to his neighbor to the north, Frances E. Hall. Whipple had already placed families upstairs and downstairs and instructed them to park in the Hall driveway. A Dispute arose when Hall attempted to stop Whipple and his tenants from parking in her driveway and Whipple made claims of right to the property. Whipple could not meet any of the elements for his first two theories. He abandoned those and filed claims under 3 additional implied easement theories and a claim for driveway easement based on footage which he knew because of his 2006 survey, to be a false claim, He could not meet the elements required for any of the

implied easement theories. His claims were all dismissed on summary judgment. Hall, who had been forced to spend over \$14,000 on attorney fees and costs in defending her property and removing the lis pendens which Whipple had placed indefinitely against her, had filed a counterclaim for recovery of attorney fees. She pursued her counterclaim which had been denied a judgment as a matter of law. It went to trial on 3/2/09. The court heard testimony from witnesses and then took the matter under advisement. Between the 3/2/09 bench trial and her oral ruling the judge received a post trial memorandum from counsel for the plaintiff, William Broughton, which misrepresented the case law and argued a theory he knew to be false: that the Hall counterclaim had been dismissed almost a year earlier by a letter ruling of Judge Costello who had since retired from the position held currently by the presiding judge on the case. Mr. Broughton had omitted significant documents in which the viability of the Hall counterclaim had been resolved in her favor.

The court admitted she had been influenced by Broughton's memorandum and by his unsupported closing remarks at trial. The judge ruled erroneously that the Hall counterclaim had been dismissed almost a year earlier on April 16, 2008. The court discounted and seemed to have ignored the contradicting evidence in the court record even though she

stated she had read every document in the file. The court held that the counterclaim had been dismissed a year previous despite a November 14, 2008 dispositive hearing unsuccessfully brought by the plaintiff. The court also resorted to untenable reasoning by ruling that having possibly heard a rumor of the driveway being "shared" gave to Richard Whipple a color of a claim for filing his multiple false allegations and frivolous claims based upon misapplied theories and invented fact lines which spanned more than an 18 month period . The court overlooked the ongoing harassment of the defendant by Mr. Whipple and his tenants as well as the obvious fraud on the court perpetrated by counsel for the plaintiff..

At post trial hearings the trial court displayed considerable confusion about the facts and historic development of the case.

1. Defendant/Appellant Hall seeks from the Court of Appeals reversal or remand of the trial courts decision for reimbursement for costs and attorney fees under the statutory provisions of RCW 4.28.328, RCW 4.84.185, civil rule 11 and the bad faith provision.
2. She also seeks permission to bring the CR 11 motion to the lower court where it had been improperly declared "off the table" (4/10/09 RP---) even after the misrepresentations of the plaintiff counsel had been brought to

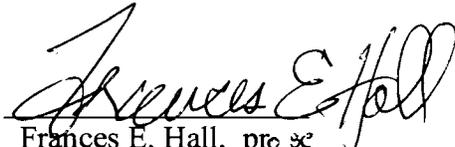
the courts attention. There has never been a substantive hearing on either the defendant's counterclaim for plaintiff filing of a lis pendens without substantial justification, forcing Hall to pay over \$14,000 in attorney fees and costs to fight his meritless claims or on the CR 11 issue since the claims were brought to court without reasonable investigation. The bad faith issue and the frivolous action issues were misjudged because the court misunderstood the case, and was clearly confused about the laws involved.

REQUEST FOR RECOVERY OF COSTS AND REASONABLE FEES UNDER RAP 18.1 appellant seeks reimbursement for costs for verbatim transcript reports (approx \$1,000) and attorney fees (approx \$2,000) although proceeding pro se, Hall has found it necessary to consult with an attorney at various stages of the very steep learning curve involve in a pro se appeals process. Hall also requests reimbursement of court filing fees. of approximately \$250. 00. She also seeks, where possible award of costs and reasonable attorney fees under RCW 4.84.185, RCW 4.28.328, CR 11 and the Bad Faith provision.

For the Reasons stated above it would be appropriate for the Court of Appeals of the State of Washington Division II. to reverse or remand the

findings of fact and conclusions of law entered by Judge Dalton, position one, Kitsap County Superior Court in the Case of Whipple v. Hall, (06-2-02697-9)(39975-0 II). Statutes and provisions have been put into place by the legislature, RCW 4.28.328, RCW4.85.185, CR 11, which are designed to protect the victims of frivolous and bad faith litigation. Whipple v. Hall is such litigation. It was brought for ulterior purposes. The methods of litigation have been dishonest and harassing in nature and have undermined the effectiveness of the judicial system itself with it's lack of candor. Although some courts might resist the enforcement of these provisions, it is contrary to the intent of the law makers that it's measures are rendered ineffective in their purpose when the courts will not see the need to enforce them.

Respectfully Submitted


Frances E. Hall, pro se

Kitsap NO. 06-2-02697-9

RICHARD W. WHIPPLE,

Respondent,

v.

FRANCES E. HALL,

Appellant.

No. 06-2-02697-9

No 39975-0-II

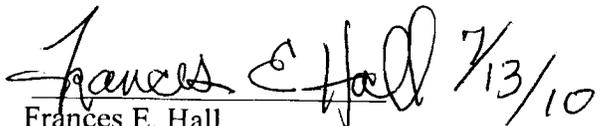
DECLARATION OF MAILING

I, Frances E. Hall, on July 13, deposited in the mails of the United States copies of the Appellants Opening Brief and this declaration to following address:

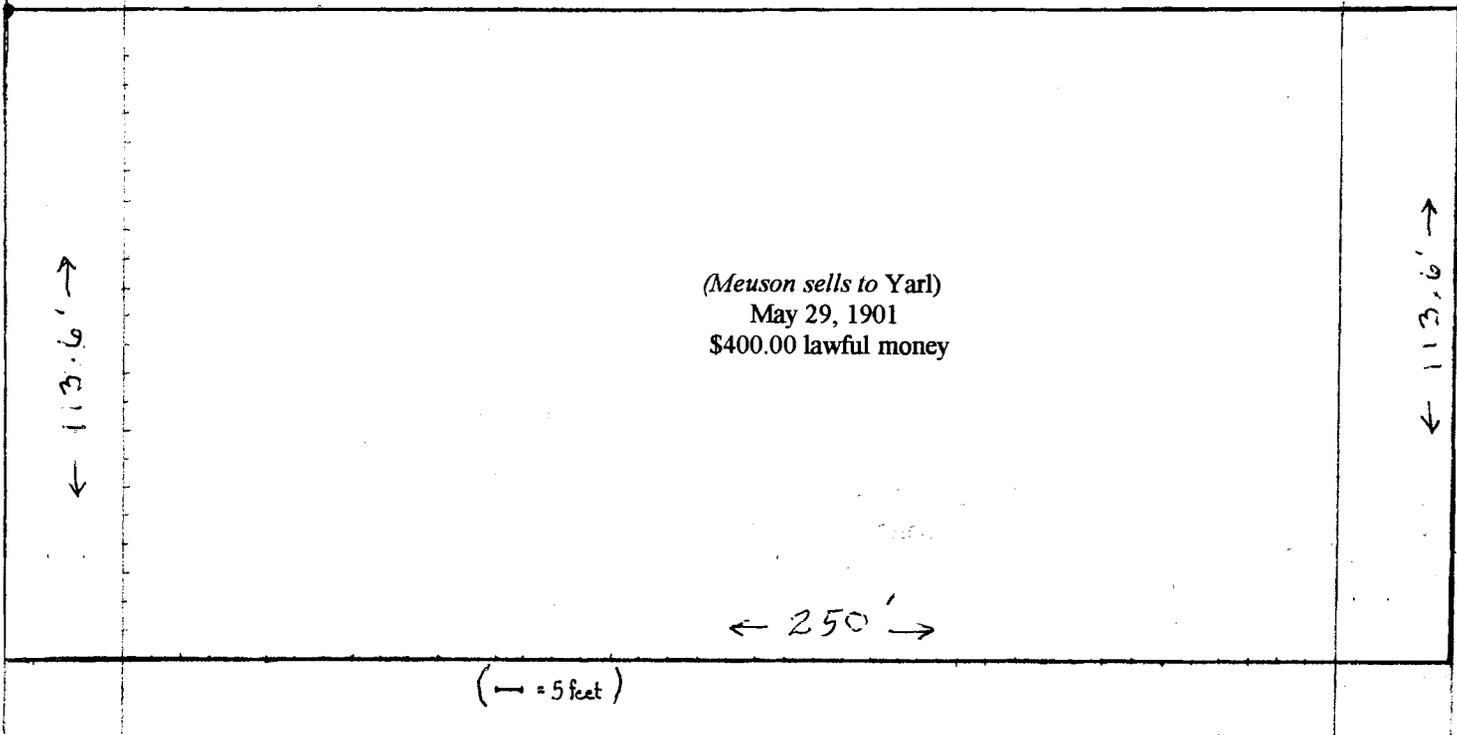
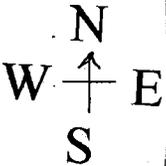
William H. Broughton
The Broughton Group
9057 Washington Avenue NW
Silverdale, Washington 98383

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 13th day of July, 2010.


Frances E. Hall

APPENDIX A



The dimensions and proportions of the above graph are based on the property description given in Exhibit A of DECLARATION OF RICHARD WHIPPLE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, filed March 24, 2008. CP195.

IN 1901 Yarl purchased from Meuson a 28-thousand-square-foot parcel



Pacific Avenue

← 113.6' →

GALE

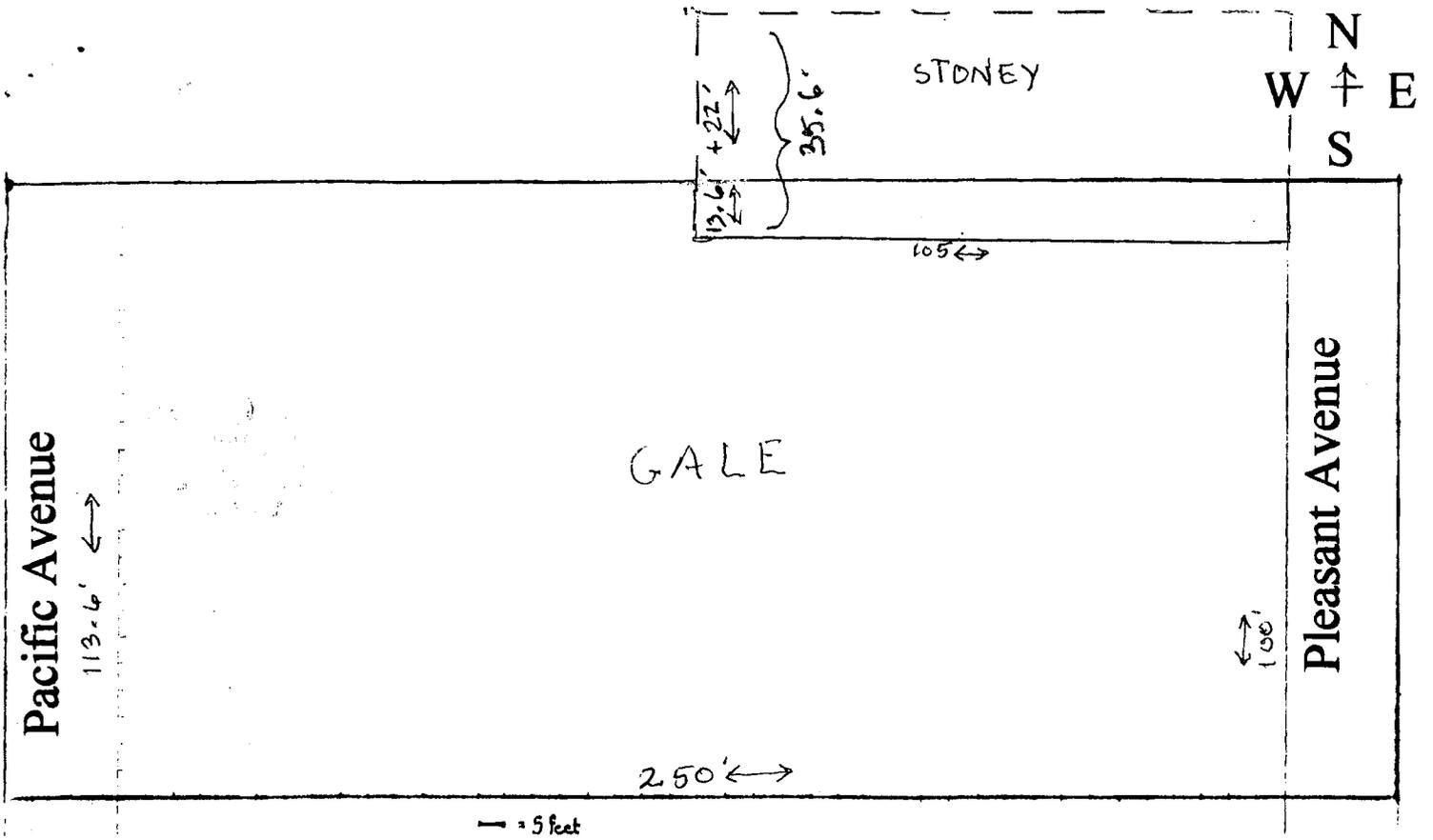
← 250' →

Pleasant Avenue

— = 5 feet

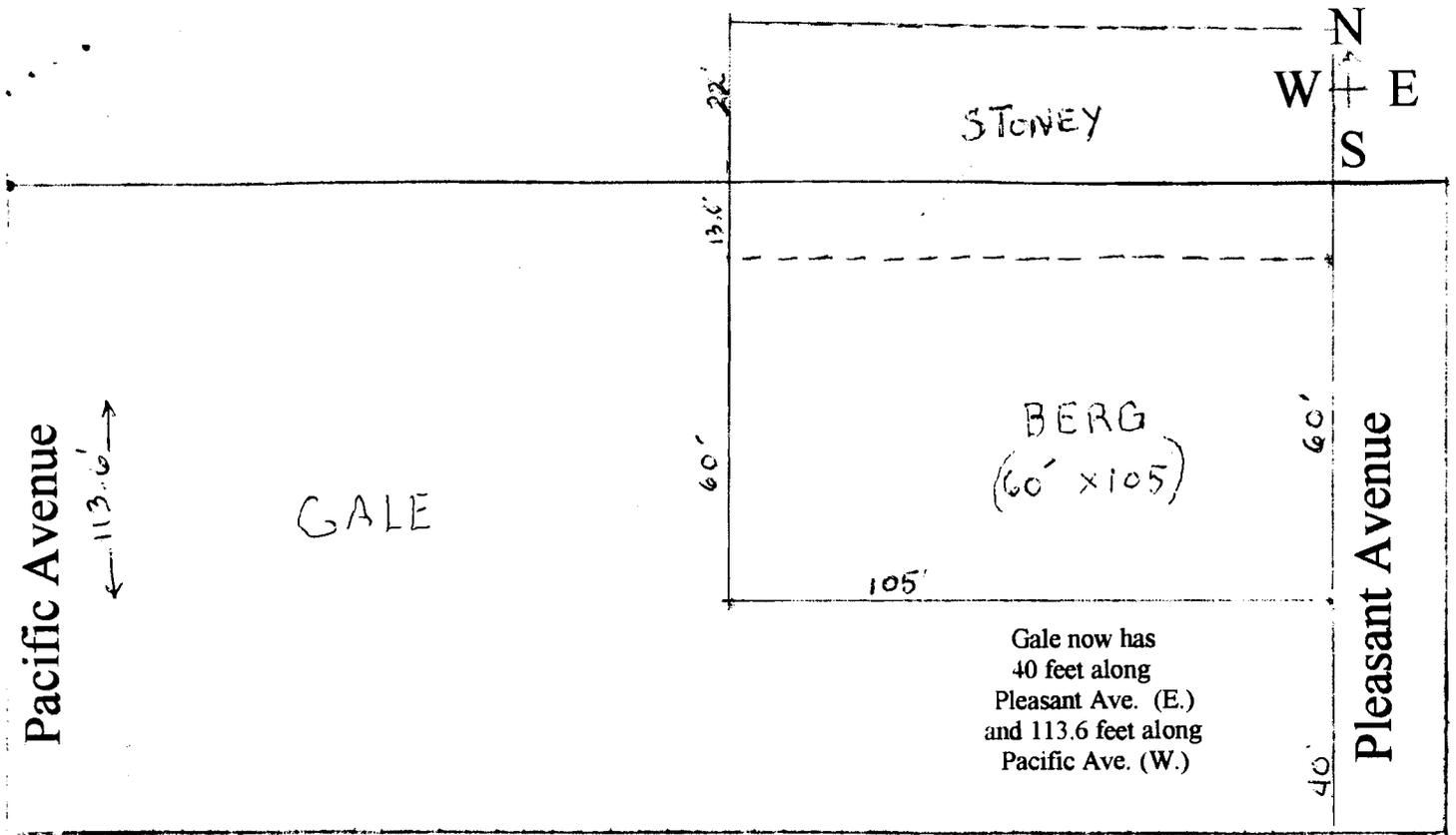
The dimensions and proportions of the above graph are based upon the property description given in Exhibit B of DECLARATION OF RICHARD WHIPPLE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, filed March 24, 2008 CP196.

IN 1908 Edgar Gale bought from George Yarl the same 28,000-square-foot parcel



The dimensions and proportions of the above graph are based upon the property description given in Exhibit C of DECLARATION OF RICHARD WHIPPLE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, filed March 24, 2008 CP197.

IN 1908 Gale sold 13.6 feet to William G. Stoney.



(Gale sells to Berg)
July 12, 1909
\$850.00 lawful money

Berg has 60 feet
along Pleasant Ave. (E.)
with 105 feet running
east and west.

APPENDIX B

CHAPTER 20.46
SPECIAL DEVELOPMENT STANDARDS

20.46.010 ACCESSORY DWELLING UNITS

An Accessory Dwelling Unit (ADU) may be installed where a new or existing single-family dwelling unit (hereafter-principal unit) is allowed. Accessory Dwelling Units are exempt from density requirements and shall be subject to the following specific development, design and owner-occupancy standards.

(a) An ADU shall comply with the development standards of the underlying zone for the principal unit including setbacks, height, and lot coverage.

(b) An ADU may be detached from the principal unit only if incorporated into an accessory garage structure.

(c) Only one (1) ADU may be created per lot residence.

(d) The property owner, which shall include titleholders and contract purchasers, must occupy either the principal unit or the ADU as their permanent residence for at least six (6) months out of the year.

(e) An ADU shall be limited to not more than:

(1) Forty (40) percent of the principal unit's total floor area (not including basement);

(2) Eight-hundred (800) square feet maximum, nor less than three-hundred (300) square feet;

(3) Two (2) bedrooms.

(f) Any attached ADU shall be designed so that the appearance of the building remains that of a single-family residence including the following:

(1) Constructed of the same materials and siding as the principal unit;

(2) A roof of equal or greater pitch as the principal unit;

(3) A height not greater than the principal unit.

(g) The entrance to an attached ADU shall not be on the same façade of the structure as an entrance to the principal unit.

→ (h) Accessory Dwelling Units with up to one bedroom shall provide one (1) off-street parking space, and ADUs with two-bedroom shall provide two (2) off-street parking spaces in addition to that which is required for the principal unit.

(i) When development of an ADU is for people with disabilities, the Director may allow reasonable deviation from the stated requirements to install features that facilitate accessibility such as those required by the International Building Code.

(j) An ADU shall have a deed restriction recorded with the Kitsap County Auditor to indicate the presence of the ADU, the requirement of owner-occupancy, and other standards for maintaining the unit as described above.

20.46.020 FENCES AND WALLS

(a) Fences and walls shall observe the following height and setback requirements:

(1) Residential Zones:

(i) Maximum height shall be six (6) feet.

(ii) Maximum height within the front yard setback area shall be three (3) feet; except an open mesh cyclone type fence may not exceed a height of forty-eight (48) inches.

**CITY OF BREMERTON, WASHINGTON
PLANNING COMMISSION AGENDA ITEM**

AGENDA TITLE:	<i>Workshop to Discuss Potential Amendments to BMC 20.48.060 Residential Parking Standards.</i>
DEPARTMENT:	<i>Community Development</i>
PRESENTED BY:	<i>Nicole Ward, City Planner</i>

ISSUE SUMMARY:

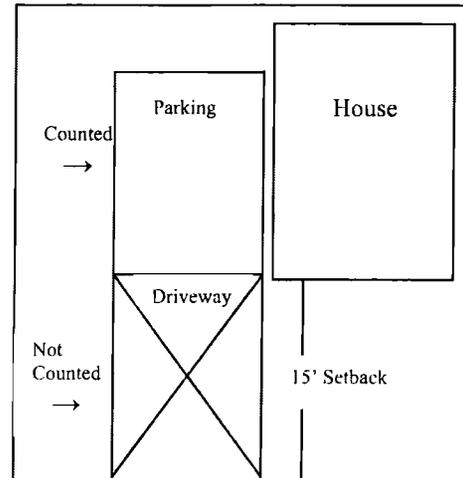
While the Zoning Code was revised in 2005 the residential parking standards have remained mostly unchanged since the mid 1980's. As Bremerton has become more urban the lot sizes have decreased over time. This has made the space available for parking scarcer and has lead to challenges for residents and developers who want to remodel, expand, or redevelop their property. Staff has found the residential parking requirements increasingly challenging because often there are ample areas on-site to park on, however these areas cannot be counted towards the "required parking" because they do not meet specific requirements. In addition developers often comment that the requirements in Bremerton are more restrictive than those found in neighboring jurisdictions.

In order to alleviate some of the contention surrounding residential parking requirements staff researched other jurisdictions standards, compared those standards to the City of Bremerton's, and evaluated the variations of standards available. Based on this research Staff suggests the Planning Commission consider amendments as follows:

1. Allow driveway area to be used in the calculation of required parking spaces.

The code currently does not allow the "driveway" to count towards the required off-street parking spaces. Bremerton requires two off-street parking spaces per residence, and these spaces must be located out of the building setback area. Essentially for a property in the Low Density Residential zone, this requires that a driveway be at least 33' long, as the first 15 cannot be counted towards the parking requirement. This requirement often confuses applicants who believe they have plenty of parking. City staff spends a considerable amount of time explaining that while it is permissible to park in the driveway, it does not count towards the requirement of two parking spaces. Often applicants do not have access to additional parking locations that meet the building setback requirements and therefore cannot expand their homes, add an accessory dwelling unit, or home based business.

In reviewing other jurisdictions codes staff found Bremerton to be unique in this requirement. All other jurisdictions within Kitsap County allow applicants to use the driveway towards the required parking spaces.



Sample Lot, Not to Scale

To ensure parking will not be permitted within other areas of the front yard setback staff reviewed the requirements for driveways within the code. The existing code relating to driveway width establishes a maximum width of 20' while in the front yard setback. This requirement will ensure that parking will not be permitted haphazardly within the front yard.

20.48.060 RESIDENTIAL PARKING DEVELOPMENT STANDARDS.

The following provisions apply to off-street parking spaces for all residential development:

- (a) **Surface:** Driveways and areas used for loading, parking and maneuvering motorized vehicles shall have a paved surface.
- (b) **Gravel Surface Driveway:** A gravel surface driveway may be allowed for a single-family residence for that portion of the driveway that is more than 100 feet from the lot line where access is provided. Any driveway approved for a gravel surface shall include a paved apron in front of the garage automobile door entrance extending a minimum depth of eighteen (18) feet and at least the width of the garage door.
- (c) **Side Yard Setback:** No parking shall be located within the side yard setback area of the zone unless the side lot line abuts an alley. When abutting an alley, the side yard setback parking provision is reduced to zero.
- (d) **Rear Yard Setback:** No parking shall be located within the rear yard setback area of the zone unless the rear lot line abuts an alley. When abutting an alley, the rear yard setback parking provision is reduced to zero.
- (e) **Front Yard Setback:** No parking shall be located within the front yard setback area of the zone, except within paved driveways, unless allowed otherwise by law.
- (f) **Stall Dimensions:**
 - (1) Parking stalls for a single-family dwelling shall have a minimum width of eight (8) feet and depth of eighteen (18) feet.
 - (2) Parking facilities for two or more dwellings shall comply with the design standards prescribed in BMC Section 20.48.080. These design standards may be modified to allow stacked parking spaces for a residential structure containing up to four (4) dwellings provided the parking spaces comply with setbacks.
- (g) **Driveways:** A driveway may be located within any setback area for a residential use provided the width is not more than twenty (20) feet, and
 - (1) The driveway area within yard setbacks is not used to satisfy the parking space requirement ;
 - (2) Access to a public or private street is provided in accordance with City street standards; and
 - (3) The Director may approve exception to the maximum driveway width when necessary for compliance with Americans with Disabilities Act (ADA) standards.
- (h) **Required Parking Spaces:** The number of off-street parking spaces shall be provided in accordance with the use and the following corresponding standards, except as modified per BMC Section 20.48.050:

<u>Type of Use:</u>	<u>Number of Bedrooms:</u>	<u>Minimum Number of Parking Spaces:</u>
→(1) ADU		See BMC 20.46.010
(2) Single-unit residential	All	2.0 per dwelling
(3) Two- unit residential	All	2.0 per dwelling
(4) Multi-unit residential	1 or less	1.5 per dwelling
(5) Multi-unit residential	2	1.75 per dwelling

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STATE OF WASHINGTON

BY _____
CLERK

Kitsap NO. 06-2-02697-9

RICHARD W. WHIPPLE,

Respondent,

v.

FRANCES E. HALL,

Appellant.

No. 06-2-02697-9

No 39975-0-II

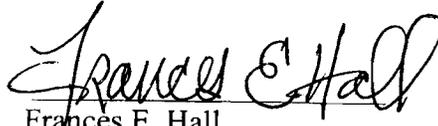
DECLARATION OF MAILING

I, Frances E. Hall, on July 13, deposited in the mails of the United States copies of the Appellants Opening Brief and this declaration to following address:

William H. Broughton
The Broughton Group
9057 Washington Avenue NW
Silverdale, Washington 98383

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 13th day of July, 2010.


Frances E. Hall 7/13/10

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