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No. 52915-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FLOYD F. RINEHOLD and CLARISSA E. RINEHOLD,

Plaintiffs/Respondents,

v.

GARY T. RENNE and ELEANOR F. RENNE,

Defendants/Appellants.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

The Rennes are the appellants. This appeal concerns a narrow strip of land next to a private roadway. This strip of land has been a part of the Renne family's front yard since they bought the property in 2006, and was part of the prior owners' front yard for as far back as the record shows.

The Rineholds are the respondents. The Rineholds live further up the private roadway. They have driven by the Rennes' front yard, including this little strip adjacent to the roadway, since 2004. In 2016, the Rineholds sued the Rennes to quiet title to the strip of land. The Rineholds' theory was that the Rennes' deed, which stated the Rennes' property extended to the "roadway," did not mean the *actual* roadway, but instead meant a survey line view of "roadway" devised by the Rineholds' surveyor in 2015.

The Rineholds moved for partial summary judgment in May 2018. They asked the superior court to rule that the survey they paid for in 2015 was "correct" and to award them "record title." The Rennes opposed, but the superior court granted the motion for partial summary judgment and denied the Rennes' subsequent motion for reconsideration. The superior court then granted certification for this Court's review under CR 54(b).

The superior court erred. It erred because it found—as a matter of law—that the term "roadway" did not mean the actual roadway. Material questions of fact exist as to whether the 2015 survey was a faithful

representation of the original survey done in the 1950s. And, the superior court misapplied Washington law interpreting deeds and the summary judgment standard when it required the Rennes to prove that the roadway actually existed in the 1950s. It also erred because it found the Rennes' evidence regarding the decades of subsequent ownership was irrelevant despite Washington law holding such evidence is material to determining a true boundary line. Finally, the superior court erred because it granted summary judgment despite the expert evidence it considered that showed the roadway existed in the 1950s and challenged the Rineholds' 2015 survey.

For each of these reasons, the Rennes respectfully request that this Court reverse the superior court and remand for trial.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in granting the Rineholds' motion for partial summary judgment, striking the evidence submitted therewith, and denying the Rennes' motion to reconsider.

III. STATEMENT OF THE CASE

A. Introduction to the Property at Issue

The Rennes and the Rineholds live along a private roadway that intersects the south side of State Route 106 ("SR 106") near Sunset Beach

on Hood Canal.[1] The private roadway, and the land touching it to the west, are the subject of this appeal.[2]

The Rennes live on the lot immediately to the west of where SR 106 and the private roadway meet.[3] The private roadway extends south from SR 106 and then angles to the southwest.[4] The Rennes' property is bracketed to the east and south by the private roadway.[5] The Rennes contend their front yard extends to the edge of the actual private roadway.[6]

The Rineholds live further up the roadway, on a lot not adjacent to the Rennes. The Rineholds also own the lot across the roadway to the south of the Rennes.[7] The Rineholds contend the Rennes' property does not extend to the east all the way to the actual roadway, but rather only extends to a survey line, identified in 2015, as west of the actual roadway.[8] The survey line was identified by the Rineholds' surveyor, Daniel Holman.[9] According to Holman's 2015 survey, the Rennes' front yard, including their lawn, their rock wall, the drainage ditch they installed, and their concrete driveway, all encroach on the Rineholds' property.[10]

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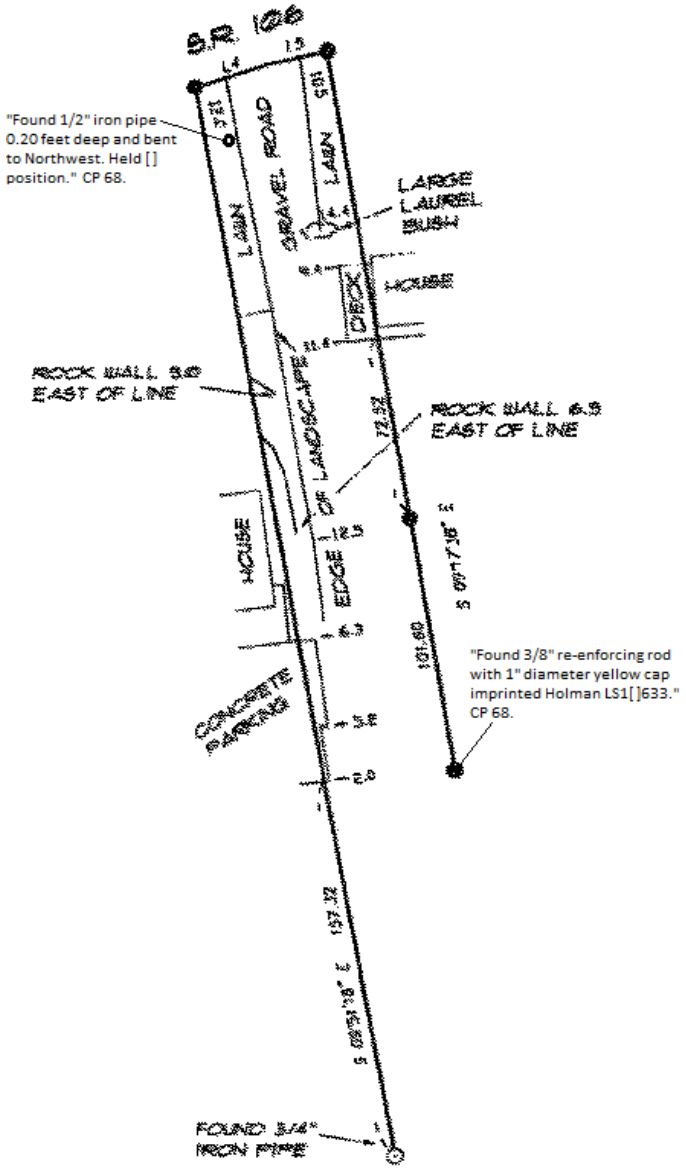
[1] Clerk's Papers (CP) 27, 68.
[2] CP 8-9, 65-82.
[3] CP 27, 68.
[4] CP 27, 29, 32, 34, 36, 68, 206, 208.
[5] CP 27, 29, 32, 34, 36, 68, 206, 208.
[6] CP 85-88.
[7] CP 16 (Rineholds own Lots "1" and "3"), 36 (showing locations of Lots 1 and 3).
[8] CP 18.
[9] CP 22.
[10] CP 27.

Below is a diagram of the disputed property.[11] The Renne property is to the west (left) of the "gravel road." The Rineholds claim to own the strip of land to the west of the "gravel road" containing the "lawn," "rock wall," "edge of landscape," and part of the "concrete parking."



[11] CP 27, 68.

B. History of the Property as Documented to the Superior Court

1. The Ownership History of the Rennes' Property

In 1955, W.O. Watson, conveyed the original deed to what would become the Rennes' property to Albert Harold Johnson.[12] The "Watson-Johnson" deed described the property as:

> A tract of land in Gov't Lot 4, Section 12, Township 22 North, Range 2 West, W.M., described as follows:
>
> Beginning at Northwest corner of said tract, which is North 855 feet; thence North 74^{0}13' East 255.50 feet; thence North 58^{0}40' East along Southeasterly margin of Navy Yard Highway (State Road #14) 50 feet or more, out from the strip (center line) of same 403.70 feet; thence North 61^{0}26' East 103 feet from corner to Sections 11, 12, 13, and 14 of said Township 22 North, Range 2 West, W.M.,
>
> Thence North 69^{0}16' East 102 feet to Northeast corner of the tract herein described and <u>West side of road-way</u> herein <u>conceded to these tracts numbered one, two, three, four, five for ingress and egress of owners of same</u>; thence South 10^{0}00'; East <u>along Westerly margin of said road-way</u>, 415 feet; thence South 59^{0}14' West still <u>along Northwesterly margin of said road-way</u> 55 feet; thence North 16^{0}42' West; between Tracts 4 and 5, 418.20 feet to point of beginning.[13]

The property was later conveyed to Joel and Beva Anderson. In 1993, Carroll and Sharon Moore purchased the Rennes' property from the Andersons.[14] The "Anderson-Moore" deed described the property as:

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[12] CP 144, 45-46.
[13] CP 144, 45-46 (emphasis added).
[14] CP 122-24, 127-29.

> All that portion of Government Lot 4, Section 12, Township 22 North, Range 2 West, W.M., in Mason County, Washington, more particularly described as follows:
>
> Commencing at a point 855 feet north of the southwest quarter of said section 12; thence north $74^{0}13'$ east 255.5 feet; thence north $58^{0}40'$ east 403.7 feet; thence north $61^{0}26'$ east 103 feet to the point of beginning of the tract of land hereby described; thence north $69^{0}16'$ east 102 feet to <u>the westerly boundary of a roadway</u>; thence south 10' east along <u>the westerly boundary of said roadway</u>, 55 feet; thence north $16^{0}42'$ west 410.2 feet to the true point of beginning.[15]

Mr. Moore submitted a declaration concerning the boundary. He stated that, when he and his wife bought the property from the Andersons, Mr. Anderson explicitly identified the private roadway as the property line.[16] The Andersons had installed landscaping up to the roadway and the Moores maintained that landscaping exclusively.[17] Mr. Moore stated that for the entire 13 years he and his wife owned the property, they understood their property to include all the land up to the edge of the private roadway as their yard and maintained the property accordingly.[18] Mr. Moore's belief was further substantiated by the fact that Mason County granted a 15-foot setback permit (from the property line) for the property's home and septic

[15] CP 129 (emphasis added) (capitalization omitted).
[16] CP 124.
[17] CP 123.
[18] CP 123.

system, which was installed within approximately five feet of the edge of the private roadway sometime in the 1970s.[19]

The Rennes bought their property in April 2006 from the Moores.[20] The "Moore-Renne" deed describes the Rennes' property as:

> All that portion of Government Lot 4, Section 12, Township 22 North, Ranch 2 West, W.M., in Mason County, Washington, more particularly described as follows:
>
> BEGINNING at a point 855 feet North of the Southwest quarter of said Section 12; thence North $74^0$13' East 255.5 feet; thence North $58^0$40' East 403.7 feet; thence North $51^0$25' East 103 feet to the POINT OF BEGINNING of the tract of land hereby described; thence North $69^0$16' East 102 feet <u>to the Westerly boundary of roadway</u>; thence South 10^0 East <u>along the Westerly boundary of said roadway</u> 415 feet; thence South $59^0$14' West <u>along the Northerly boundary of said roadway</u>, 55 feet; thence North $16^0$42' West 418.2 feet to the TRUE POINT OF BEGINNING.[21]

When the Rennes purchased the property, Mr. Moore identified the edge of the private roadway as the property line.[22] This was consistent with the Moore-Renne deed (and the prior deeds), which stated the property extended to the "Westerly boundary of said roadway," and consistent with Mrs. Renne's understanding—as a licensed real estate professional familiar

[19] CP 88, 123-24.
[20] CP 13.
[21] CP 92-93, 14 (emphasis added).
[22] CP 85.

with deeds—that "Westerly boundary of said roadway" meant the westerly boundary of the actual roadway.[23]

Accordingly, the Rennes treated all property up to the westerly boundary of the actual roadway as their front yard.[24] Soon after purchasing the property in 2006, they installed a drainage ditch, a rock wall, landscape bark, plants, shrubs, and trees.[25] They have always mowed their front lawn all the way up to the edge of the actual roadway.[26]

During construction of the drainage ditch along the westerly boundary of the roadway in 2007, the Rennes' contractor removed an iron pipe.[27] Neither the contractor nor the Rennes thought much of it at the time. But after this litigation began, and the several plats produced relied upon "found iron pipe[s]," the Rennes suspected the iron pipe removed by the contractor was a survey marker.[28]

2. The Ownership History of the Rineholds' Property

The Rineholds' property consists of two lots.[29] The one with the Rineholds' home is further up the private roadway from the Rennes.[30] The

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[23] CP 85, 93.
[24] CP 85.
[25] CP 85-88.
[26] CP 85-86.
[27] CP 87.
[28] CP 87.
[29] CP 51-54.
[30] CP 51-52.

other lot is the property which the Rineholds contend includes part of the Rennes' front yard. In 1990, Watson sold this lot to Joan Ann Addington.[31] The Watson-Addington deed conveyed:

> That part of Lot 4 of Section 12, Township 22 North, Range 2 West, W.M., in Mason County, Washington, described as follows:
>
> Beginning at a point on the Southerly line of Primary State Highway No. 21, North $59^0$18' East 199.4 feet from its intersection with the West line of said Lot 4; thence running South $43^0$11'00" (record South $43^0$1' East) 169.9 feet, South $39^0$49' East 100.1 feet, South $30^0$08' East 260 feet, South $27^0$43'19" West 58 feet (record South $35^0$25' West 64.37 feet), South $65^0$31' West 50 feet, South $24^0$29' East 120 feet, South $8^0$32' East 187.2 feet, and South $2^0$50' East 131.2 feet to the South line of said Lot 4; thence South $88^0$07'35" East (record South $88^0$07'35" East) along said South line 422.19 feet (record 421.18 feet) more or less to the West line of the East 400 feet of said Lot 4; thence North along west line 1014.89 feet to the South line of tract conveyed to Harold Synnestvedt by Deed dated July 9, 1943 and recorded in Volume 81 of Deeds, page 524; thence along the boundaries of said Synnestvedt Tract West 50 feet and North $9^0$44' West 282.64 feet to said Southerly line of highway; thence Southwesterly along said Southerly line of highway; thence Southwesterly along said southerly line of highway to the POINT OF BEGININNG.
>
> . . .
>
> <u>EXCEPTING tract conveyed to Albert Harold Johnson</u> and wife by Deed dated April 28, 1955.[32]

[31] CP 132, 136.
[32] CP 137 (emphasis added).

This "Watson-Addington" deed also stated it was "SUBJECT TO rights of adjacent property owners in the private road located on the premises."[33]

Mr. Addington submitted a declaration about the property. He stated that for "the entire time that we owned property in this community, we did not maintain or improve the land either to the east or west of the roadway," and "we did not consider the land east or west of the private roadway (easement) to be our land."[34]

The Addington lot was later conveyed to the Rineholds via quit claim in February 2005.[35] The quit claim deed described the property as:

> Lot 3 of Mason County short plat no. 2459, according to short plat recorded July 23, 1994 under recording no. 592094, being a portion of the southwest quarter of the southwest (government lot 4) in Section 12, Township 22 North, Range 2 West, W.M., in Mason County, Washington.
>
> Parcel B: A non-exclusive easement for ingress and egress created by instrument recorded under recording no. 2459, in Mason County, Washington.
>
> Parcel C: A non-exclusive easement for ingress and egress over and across a 50 foot strip of land as shown on unrecorded survey of Sunset Beach by W.O. Watson, dated January 1, 1952, in Mason County, Washington.[36]

[33] CP 136.
[34] CP 132-33.
[35] CP 53.
[36] CP 53.

3. The 1950s W.O. Watson Unrecorded Plats

In the 1950s, W.O. Watson memorialized his survey of the area with several unrecorded plats.[37] In relevant part, these plats show the "Johnson Tract," where the Rennes' property is now, as adjacent to a "street" where the roadway is now.[38] They show the roadway, or "street," is " 42' " wide at the intersection with SR 106 and " 46' " wide further back.[39] In the northeast corner of the Renne property, where the roadway intersects SR 106, Watson wrote "iron stake," with no mention of the diameter.[40]

4. The 1979 Lovitt Unrecorded Plat

In 1979, Roger Lovitt memorialized his survey of the area with an unrecorded plat.[41] Lovitt's survey was based on Watson's unrecorded plat.[42] The Lovitt plat noted there was a "street" where the roadway exists.[43] Lovitt identified "found iron pipe," where such were found, without denoting the size of each pipe found, but he did identify setting ½ inch rebar monuments.[44] According to Lovitt's plat, Lovitt did not find an iron pipe at

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[37] CP 29-32, 206, 208.
[38] CP 32, 208.
[39] CP 32, 29, 206, 208.
[40] CP 29, 206, 208.
[41] CP 34.
[42] CP 34.
[43] CP 34.
[44] CP 24.

either the northwest or northeast (near SR 106) corner.[45] Lovitt also did not note any encroachments.[46]

5. The 1994 Holman Short Plat

In 1994, Holman recorded a short plat for Joan Addington, the prior owner of the lot the Rineholds now claim the Rennes are encroaching upon.[47] Holman's 1994 short plat is based in part on the Lovitt plat, and identifies potential monuments of various sizes and types.[48] For example, it identifies several "l.P.," presumably meaning "lead pipe," of ¾", 1", 2" sizes, along with several "FND. IRON BAR" notations of stated size, and ½ inch rebar monuments.[49] The short plat also identifies the area where the private roadway is as "ESTM. FOR ROAD & UTILITY PURPOSES."[50] Notably, the 1994 Holman short plat did not identify any encroachments where Holman and the Rineholds now claim the Rennes are encroaching.[51]

6. The 2015 Holman Survey Conducted for the Rineholds

In 2015, the Rineholds hired Holman to survey the area.[52] Holman's 2015 survey is based on his 1994 short plat, Lovitt's 1979 unrecorded plat,

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[45] CP 34.
[46] CP 34.
[47] CP 36.
[48] CP 36.
[49] CP 36.
[50] CP 36.
[51] CP 36; *see also* 2VRP 43 and 60 (acknowledging that surveyors are required to map encroachments where they are found to exist).
[52] CP 27.

and Watson's unrecorded plats.[53] Holman's 2015 survey relied upon at least five iron pipes that he identified as being "¾ inch."[54] Holman also had the incredible fortune to find a pipe in the northwest corner of the Renne property that had not previously been discovered by either himself or Lovitt.[55] Holman treated this newly discovered pipe as a monument set by Watson to then determine the location of the Renne property's true line to the east was not the "westerly boundary of [the] roadway," contrary to what the deed stated.[56] Holman placed a new pipe in the northeast corner of the Rennes' property near SR 106.[57]

7. Expert James Dempsey's Review of the Watson, Lovitt, and Holman Plats Identified Material Inconsistencies

James Dempsey is a licensed Washington surveyor.[58] He reviewed the plats of Watson, Lovitt, and Holman, along with the Renne deed, and concluded that Holman's 2015 survey contained material inconsistences with Watson's original plat.[59] Specifically:

- Neither Holman's 1994 short plat, nor Holman's 2015 survey could mathematically close.

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[53] CP 27.
[54] CP 27.
[55] 2VRP 44-45.
[56] CP 27, 92-93.
[57] CP 87.
[58] CP 305-07.
[59] CP 306.

- Lovitt's survey might not close either because the "line 'U' is incorrect."
- Lovitt's survey "has several bearing problems that render it unusable for me as a licensed professional surveyor."
- Holman's survey was based on Lovitt's plat and monuments Lovitt set. Lovitt's plat did not hold the monument at the southeast corner of the Renne property—if such a monument existed—but instead set a different ½ inch iron stake a little over 2 feet away.
- The east and west lines of the property described in the Rennes' deed were close to, within 0.8 feet of, the lines in Watson's unrecorded plat, but "Holman's survey does not match this."
- "[A]nother material inconsistency in the Holman survey is the width of the roadway" because Holman's 2015 survey "does not match the widths shown on the original plat." Rather, the original plat shows the road "width is 42' at the north end and 46' at the south end (along the east side of the parcel)," but "[c]alculated per the Holman survey, the roadway is 51.8' wide on the north end, and 49.0' wide [on the] south end."[60]

[60] CP 306-07.

8. Historical Aerial Photographs

Several aerial photographs of the area were submitted—first in connection with the summary judgment motion, and then additional photographs in connection with the motion for reconsideration.[61] The aerial photographs were offered to show the land was cleared up to the west edge of the roadway.[62] These photographs included a June 1977 Department of Energy aerial photograph of the properties along the private roadway, and aerial photos from 1965, 1978, and 1985 provided by Green Diamond Resource Company in Shelton, Washington, which all showed the same.[63]

In addition, six August 1951 aerial photographs taken by the United States Geological Survey agency were also offered.[64] From these pictures, expert Pete Kauhanen, a Geographic Information Systems specialist, opined: "there is no doubt in my mind that East Sunset View Lane [the private roadway] has been an actual roadway where indicated <u>from at least as early as the 1950s</u>," and, "the width of the traveled portion of the roadway has remained roughly the same for the last 67 years."[65]

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[61] CP 89, 121, 210-12, 217.
[62] 2VRP 31 (considering the photograph for purposes of summary judgment and later excluding it on relevance grounds because it did not show the ground as it existed when Watson surveyed the area in the 1950s).
[63] CP 89, 121, 203, 210-12.
[64] CP 217.
[65] CP 291, 293-94, 297 (emphasis added).

C. Procedural Posture

1. Rineholds sued and moved for summary judgment

The Rineholds sued the Rennes to quiet title in January 2016, and in May 2018, moved for partial summary judgment.[66] The Rineholds' motion asked the superior court to rule that Holman's 2015 survey was accurate and therefore represented the "record title" to the Rineholds' property as a matter of law.[67] As the Rineholds put it, "we have a survey, and we've asked the Court to say [ ] the survey is correct."[68]

The Rineholds argued that the calls to the "roadway" should not be understood to mean the actual roadway.[69] In support, the Rineholds relied on a single Washington case, *Thompson v. Schlittenhart*.[70] The remainder of their argument was presented by Holman in his declaration.[71]

In his declaration, Holman contended he found several iron pipes he believed Watson placed as monuments, those iron pipes were "consistent" with the bearings and distances in certain deeds, and his survey was "consistent" with his 1994 short plat and Lovitt's 1979 unrecorded plat.[72] Holman justified his reliance on his prior survey and that of Lovitt by

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[66] CP 1-7, 8-9.
[67] CP 9.
[68] 2VRP 32.
[69] *Compare* CP 14, 92-93, 129, 144, *with* CP 18.
[70] CP 18-19; *Thompson v. Schlittenhart*, 47 Wn. App. 209, 734 P.2d 48 (1987).
[71] CP 21-25.
[72] CP 23.

claiming the monuments he and Lovitt placed had been there for many years.[73] Holman relied on iron pipes ranging in size from ¾ inch to 2 inches thick, but dismissed iron pipes any smaller because, he said, Watson only set "large monuments" and "it is not uncommon to find random pipes in the ground."[74] Holman failed to reconcile that opinion with the ½ inch iron monuments he relied upon in his 1994 short plat and that Lovitt set and relied upon.[75] Finally, Holman summarily argued the actual roadway could not be a monument because "the description would not close by twelve feet more or less," and Watson would not make "that significant a mistake."[76]

The Rennes opposed summary judgment. Their argument was simple: the term "roadway" defined the boundaries of their property and it was a question of fact whether the term "roadway" meant the actual "roadway" or the line devised by Holman in 2015.[77] The Rennes also argued summary judgment was improper because there was substantial evidence to establish their ownership through other means, such as adverse possession.[78] In reply, the Rineholds moved to strike all the Rennes' evidence.[79]

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[73] CP 24.
[74] CP 23-24.
[75] CP 36, 34.
[76] CP 23-24.
[77] CP 66.
[78] CP 66.
[79] CP 146-48, 154-55, 158-66.

2. July 2 Hearing on Motion for Partial Summary Judgment

On July 2, 2018, the superior court heard argument on the Rineholds' partial summary judgment motion and motion to strike the Rennes' evidence.[80] The superior court reserved ruling on the motion to strike except for one untimely submitted transcript of a portion of Mr. Holman's deposition.[81] The superior court determined it would consider the declarations filed in support of the Rennes' opposition in making its decision because the decision whether to strike "merely goes to the underlying merits of the motion."[82]

The Rineholds argued Holman's survey "[wa]s consistent with the entire record" and dismissed everything that was inconsistent with Holman's survey.[83] Further, the Rineholds argued, "what is totally fatal to the defense is there's no proof in this record whatsoever of what existed on that ground in the 1952 to 1955 timeframe. There's no proof of where that road was."[84]

The superior court asked about Holman's discovery of, and reliance upon, the new pipe in his 2015 survey.[85] The Rineholds justified his reliance

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[80] 2VRP 22.
[81] 2VRP 30-31.
[82] 2VRP 31-32.
[83] 2VRP 36.
[84] 2VRP 37.
[85] 2VRP 44-45.

on this discovery, despite its location being "off by a few inches," saying "[i]t was buried" and had been discovered through information not previously known but provided by the Rennes' prior attorney.[86]

The superior court noted other inconsistencies, such as the road widths in Watson's unrecorded plats, Lovitt's unrecorded plat, and Holman's 2015 survey.[87] The superior court also noted the angle Holman applied in his 2015 survey to the Rennes' easterly boundary with the roadway was different than the angle Lovitt applied, different than the angle Watson applied, and even different than the angle Holman applied in his 1994 short plat.[88] The Rineholds admitted they could not explain these inconsistences and instead redirected the superior court's attention to the consistent length of 102 feet across the northern boundary next to SR 106.[89] The superior court reserved ruling after argument.[90]

3. July 16 Ruling Granting Partial Summary Judgment

On July 16, 2018, the superior court read its decision into the record.[91] The superior court first found the language of the deed, specifically

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[86] 2VRP 46.
[87] 2VRP 47-49; *compare* CP 29 (Watson's plat showing the distance of 42' at the intersection of SR 106) *and* CP 32 (Watson's plat showing 42' as the width of the "street") *with* CP 27 (Holman's 2015 survey adding the distance of L4 of 21.15ft to L5 of 30.99ft at the intersection of SR 106).
[88] 2VRP 47-49; CP 34 (Lovitt's plat), 36 (Holman's 1994 short plat), 29-32 (Watson's plat), 27 (Holman's 2015 survey).
[89] 2VRP 50.
[90] 2VRP 68.
[91] 1VRP 1.

the calls to the "roadway," ambiguous for summary judgment purposes, and so looked to "extrinsic evidence to determine whether there is an issue of material fact regarding the location of the westerly boundary of the roadway."[92] The superior court then found the lack of evidence regarding the existence or location of the roadway in the 1950s to be determinative.[93] The superior court also faulted the Rennes for not providing expert opinions, and then struck the Renne, Moore, and Addington declarations as "not relevant to the issue presented," which the superior court stated, was whether the roadway existed at the time of the original deed or was installed by parties to the original deed.[94] The Rennes moved for reconsideration consistent with CR 59(a)(4).[95]

4. August 27 Hearing on the Motion for Reconsideration

On August 27, 2108, the superior court heard argument on the Rennes' motion for reconsideration and another motion by the Rineholds' next motion to strike the Rennes' evidence.[96] On reconsideration, the Rennes presented evidence from other Watson plats, more aerial photographs, and a "Water Supply Data" report from the Department of

[92] 1VRP 5.
[93] 1VRP 3, 5.
[94] 1VRP 5-6.
[95] CP 196-198.
[96] 2VRP 77.

Health, all indicating the existence of a roadway as far back as 1951.[97] The superior court denied the Rineholds' motion to strike.[98] The superior court found the Rennes' motion was timely and proper, and continued the hearing until October 1 so the Rennes could obtain the information needed to provide the foundation for their evidence on reconsideration.[99]

Pursuant to the superior court's ruling and the time it provided on reconsideration, the Rennes obtained foundational expert opinions from Dempsey and Kauhanen.[100] As noted above, Dempsey's expert opinion was that Holman's 2015 survey was materially inconsistent with what Watson platted in the 1950s and what was stated in the Rennes' deed.[101] Kauhanen's expert opinion was that the aerial photos showed the private roadway clearly existed in 1951.[102]

5. October 1 Hearing on the Motion for Reconsideration

On October 1, 2018, the superior court heard argument on the Rennes' motion for reconsideration and a third round of motions to strike filed by the Rineholds.[103] The superior court refused to strike the

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[97] CP 196-217, 264-72.
[98] 2VRP 85, 88.
[99] 2VRP 90.
[100] CP 284-86, 305-07, 289-304.
[101] CP 305-07.
[102] CP 289-304.
[103] 2VRP 98.

declarations of Kauhanen and Dempsey, but reserved ruling on the motion for reconsideration.[104]

6. October 17 Ruling Denying Motion for Reconsideration and Joint Certification for Appeal

On October 17, 2018, the superior court read its ruling on reconsideration into the record.[105] The superior court denied the motion for reconsideration, reasoning:

> While the Court recognizes that there may be a genuine issue of material fact regarding whether a roadway existed at the time of the deed, no effort has been made by Defendant Renne to relate this purported roadway to the actual lines run in the field.[106]

The superior court granted the parties' joint motion for certification under CR 54(b) and RAP 2.2(d).[107] Pursuant to the superior court's certification, the Rennes' seek review of: (1) the order granting the Rineholds' motion for partial summary judgment and motion to strike, and (2) the order denying reconsideration of the same.[108]

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[104] 2VRP 121-22, 129-42.
[105] 1VRP 14.
[106] 1VRP 17.
[107] CP 400-402, 409-12.
[108] CP 413-24.

IV. ARGUMENT

A. The Standard of Review Is De Novo

This Court reviews orders granting partial summary judgment de novo; it engages in the same inquiry as the trial court.[109] Where the superior court "grants summary judgment and then denies a motion for reconsideration, evidence offered in support of the motion for reconsideration is properly part of an appellate court's de novo review."[110] Summary judgment is only appropriate where no genuine issue of material fact exists.[111] All facts and reasonable inferences from those facts must be construed in favor of the nonmoving party—here, the Rennes.[112]

This Court also reviews de novo the superior court's striking of the Rennes' evidence.[113] "'This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party' and the appellate court 'conduct[s] the same inquiry as the trial court.'"[114]

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[109] *E.g.*, *Moore v. Hagge*, 158 Wn. App. 137, 146, 241 P.3d 787 (2010).
[110] *Rodriguez v. City of Moses Lake*, 158 Wn. App. 724, 728, 243 P.3d 552 (2010).
[111] *Id.* at 146.
[112] *Id.* at 146-47.
[113] *Id.* at 147.
[114] *Id.* (quoting *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)).

B. Interpreting Property Rights Is a Mixed Question of Fact and Law

Deeds provide one way to determine property rights. Courts construe deeds to "'give effect to the intentions of the parties, and particular attention is given to the intent of the grantor when discerning the meaning of the entire document.'"[115] "Interpretation of a deed is a mixed question of fact and law. What the parties intended is a question of fact and the legal consequence of that intent is a question of law."[116] The parties' intent is determined "from the language of the deed as a whole," "'giv[ing] meaning to every word if reasonably possible.'"[117] "The language of the written instrument is the best evidence of the intent of the original parties to a deed."[118] Where the plain language of a deed is ambiguous, extrinsic evidence regarding the "circumstances of the transaction and the subsequent conduct of the parties" may be considered "in determining their intent at the time the deed was executed."[119]

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[115] *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 64, 277 P.3d 18 (2012) (quoting *Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57 (2007)).
[116] *Id.* at 64.
[117] *Id.* (quoting *Hodgins v. State*, 9 Wn. App. 486, 492, 513 P.2d 304 (1973)).
[118] *Id.* at 65.
[119] *Id.*

C. Priorities in Deeds and Presumptions for Narrow Strips of Land Adjacent to Roadways

The legal description of property rights in deeds are relayed through "calls." "Calls" are "descriptions that fix the boundaries of the land," and "may be marks of location, landmarks, or other physical objects."[120] "A 'boundary' is the dividing line between two parcels of land."[121]

Calls in a deed may be inconsistent; meaning, the calls cannot be reconciled with other calls or references in the description.[122] Where calls in a deed conflict, "the priority of calls is: (1) lines actually run in the field, (2) natural monuments, (3) artificial monuments, (4) courses, (5) distances, (6) quantity or area."[123] However, and relevant here: "the lines marked by survey on the ground prevail, save for intervening equities arising by contract, conveyance, estoppel, prescription, or the application of well-defined legal and equitable concepts."[124]

The "lines on the ground" or "in the field" refers to the original survey, "when it can be ascertained," such as by actual markings described

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[120] BLACK'S LAW DICTIONARY 1082 ("locative call"), 558 ("directive call"), 245 ("call"), 1141 ("metes and bounds") (10th ed. 2014).
[121] *DD & L, Inc. v. Burgess*, 51 Wn. App. 329, 331 n. 3, 753 P.2d 561 (1988).
[122] *See* 18 JUDSON FALKNOR, WASH. PRAC.: REAL ESTATE § 13.7 (2d ed.) (describing an inconsistency like the one at bar).
[123] *DD & L*, 51 Wn. App. at 335–36.
[124] *Staaf v. Bilder*, 68 Wn.2d 800, 803-04, 415 P.2d 650 (1966).

by the original surveyor, to the extent they can be identified.[125] In other words, where the original survey and a plat conflict, the survey controls.[126]

A "monument" is "a permanent natural or artificial object on the ground which helps establish the location of the boundary line called for."[127] "Natural monuments include such objects as mountains, streams, or trees. Artificial monuments consist of marked lines, stakes, roads, fences, or other objects placed on the ground by man."[128] Where "evidence conflicts as to the validity of a monument used to begin the original survey," the "finder of fact[ ] may determine a boundary based on a modern survey."[129] However, "[c]ourses and distances are measured from these monuments; so, it is more probable that monuments express the intended location of the land than do courses or distances."[130]

Finally, when a call identifies land as bounded by or along a roadway, the landowner carries title to the center of that roadway unless the

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[125] *E.g.*, *Olson v. City of Seattle*, 30 Wash. 687, 691, 71 P. 201 (1903); *Neely v. Maurer*, 31 Wn.2d 153, 155–56, 195 P.2d 628 (1948); 1 JOYCE PALOMAR, KENNETH E. MCAFEE: PATTON AND PALOMAR ON LAND TITLES § 152 (3d ed.).
[126] *Olson*, 30 Wash. at 691; *Neely*, 31 Wn.2d at 155–56; *Stewart v. Hoffman*, 64 Wn.2d 37, 42, 390 P.2d 553 (1964).
[127] *Ray v. King County*, 120 Wn. App. 564, 590–91, 86 P.3d 183 (2004) (internal quotations omitted).
[128] *DD & L*, 51 Wn. App. at 331 n. 3.
[129] *Thompson*, 47 Wn. App. at 212.
[130] 18 JUDSON FALKNOR, WASH. PRAC.: REAL ESTATE § 13.7 (2d ed.); *see also* 1 KENNETH E. MCAFEE: PATTON AND PALOMAR ON LAND TITLES § 152 (3d ed.) ("The monuments on the ground are considered to constitute the facts of the survey. . . . In case, therefore, of a discrepancy between the survey, as shown by the monuments therefor, and the field notes and plat, the survey controls.").

call identifies a specific side of the roadway, as in this case.[131] The law presumes the grantor would not intend to retain a narrow strip of land separating the adjoining landowner from the roadway "which could be of use only to the owner of the adjoining land."[132] This presumption "is also intended to lessen litigation caused by the existence of narrow strips of land distinct in ownership from the adjoining property."[133]

D. The Superior Court Erred in Granting Partial Summary Judgment to the Rineholds

The superior court erred in granting partial summary judgment. First, the superior court erred in finding—as a matter of law—that the term "roadway" did not mean the actual roadway. Second, the superior court erred in finding—as a matter of law—that the evidence of other legal and equitable principles had no bearing on the Rineholds' motion to claim "record title." This Court must reverse.

1. The superior court erred in finding on summary judgment that the call to the "roadway" in the deeds did not mean the actual roadway.

The term "roadway," at minimum, renders the description of the land ambiguous. The superior court found ambiguity existed.[134] Yet, despite

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[131] *E.g.*, *Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 567, 575-76, 716 P.2d 855 (1986).
[132] *Id.* at 576.
[133] *Id.*
[134] 1VRP 5.

the ambiguity, the superior court found the Rennes—the nonmoving party—had not proved that the roadway existed when the property was platted and conveyed in the 1950s.[135] The superior court's finding is inconsistent with Washington law interpreting deeds and the summary judgment standard requiring facts and inferences be presumed in favor of the Rennes.[136]

a. Material issues of fact exist as to whether Holman's 2015 survey can be considered a retracement of Watson's "lines in the field."

The several calls to the "roadway" in the deeds are calls to an artificial monument.[137] By finding Holman's 2015 survey to be correct, and rejecting the calls to the "roadway" as a monument, the superior court necessarily found Holman's 2015 survey was a "retracement survey" of the lines actually run in the field by Watson.[138] This finding was erroneous because questions of material fact exist as to whether Holman's 2015 survey in fact retraced the "lines" run by Watson.

First, Holman's survey was not based on a retracement of Watson's survey. Rather, Holman's 2015 survey admittedly relied on monuments and courses <u>not</u> found in Watson's survey, but which were set by Lovitt's survey

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[135] 1VRP 3, 5.
[136] The Rennes established with expert evidence that the roadway existed in the 1950s on reconsideration. Yet the superior court *still* granted the summary judgment motion.
[137] *DD & L*, 51 Wn. App. at 331 n. 3.
[138] 1VRP 7; *DD & L*, 51 Wn. App. at 335–36.

and Holman's own 1994 survey.[139] Holman's only justification for relying on monuments placed by himself and Lovitt, when ostensibly retracing Watson's survey, was that the monuments he and Lovitt placed had been in place for many years and never been contested before.[140]

Second, Holman's 2015 survey is inconsistent with several of Watson's plats that show the roadway to be 42 feet wide at the intersection with SR 106, and 46 feet wide further back.[141] Holman's 2015 survey identified the roadway as over 52 feet wide at the SR 106 intersection.[142] Thus, Holman's 2015 survey claimed that Watson made a mistake of more than 10 feet regarding the roadway width. Yet Holman simultaneously claimed in his declaration that the "roadway" could not mean the actual roadway because that would mean Watson was off by 12 feet "more or less" and "Watson would not have made that significant of a mistake."[143]

Third, Holman's 2015 survey discounted iron pipes that were ½ inch thick, claiming Watson only set "large monuments."[144] But Holman then relied on multiple iron pipes of sizes ranging between ¾ and 2 inches

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[139] CP 24, 27, 29, 32, 34, 36, 305-07.
[140] CP 24.
[141] CP 32, 29, 206, 208, 305-07.
[142] CP 27 (adding 21.15 feet from L4 to 30.99 feet from L5).
[143] CP 23-24; 2VRP 47-49; *cf. Moore* 158 Wn. App. at 146-47 (requiring all inferences be taken in favor of the nonmoving party on summary judgment; here, the Rennes).
[144] CP 27.

thick as evidence of Watson's survey.[145] Holman also relied on ½ inch iron stakes placed, or relied on, by Lovitt.[146] Holman, thus, either implicitly conceded that not all of Watson's monuments were "large," or needed the superior court to infer "large monuments" could only mean pipes between ¾ -2 inches thick and could never mean pipes ½ inch thick.[147]

Fourth, ironically, while Holman discounted the ½ inch pipe found by the Rennes' contractor in 2007 on the basis that "[n]o prior survey ever discovered this pipe,"[148] Holman found and relied upon a pipe that had not been discovered before to complete his 2015 survey.[149] He even relied on the new pipe despite acknowledging its location was "off."[150]

Fifth, the angles Holman applied in his 2015 survey were different than the angles applied by both Lovitt and Watson, and even different than the angle Holman applied in his own 1994 short plat.[151]

Sixth, Holman's 1994 short plat did not identify any encroachments on the property at issue.[152] Twenty-one years later, Holman determined

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[145] CP 27.
[146] *Compare* CP 27 *with* CP 34.
[147] CP 27, 24; *cf. Moore* 158 Wn. App. at 146-47 (requiring all inferences be taken in favor of the nonmoving party on summary judgment; here, the Rennes).
[148] CP 25.
[149] 2VRP 44-46.
[150] CP 27; 2VRP 46.
[151] *Cf.* CP 27 (Holman's 2015 survey), 34 (Lovitt's plat), 29-32 (Watson's plats), 36 (Holman's 1994 short plat); 2VRP 47-49.
[152] CP 36; *see also* CP 34 (Lovitt's unrecorded plat showing no encroachments either).

there were encroachments.[153] Neither Holman, nor the Rineholds, could reconcile this inconsistency with their claim that Holman's 2015 survey was a faithful retracement of Watson's steps.[154]

Seventh, Holman justified his dismissal of the call to the "roadway," by citing the calls to courses and distances.[155] Doing so was in direct contravention with the established priority of calls, which requires calls to roadways be considered monuments and given priority of calls to courses and distances.[156] In other words, Holman twisted the priority of calls in his "retracement" to create new "lines run in the field" that would then take priority over the calls to the roadway.

In sum, Holman's 2015 survey:

- relied on monuments admittedly not placed by Watson;
- discounted Watson's plats identifying the roadway as 42' wide at the intersection with SR 106 in favor of his calculation of the roadway being over 52' wide at the same place;

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[153] CP 27.
[154] 2VRP 60; *cf. Moore* 158 Wn. App. at 146-47 (requiring all inferences be taken in favor of the nonmoving party on summary judgment; here, the Rennes).
[155] CP 23.
[156] *DD & L*, 51 Wn. App. at 335–36; *see also Roeder*, 105 Wn.2d at 575-76 (noting the presumption in Washington is that "the grantor did not intend to retain a narrow strip of land which could be of use only to the owner" of the land adjoining the roadway); *Newport*, 168 Wn. App. at 65 ("the language of the written instrument is the best evidence of the intent of the original parties to a deed").

- dismissed ½ inch thick iron pipes found by the Rennes as too small while relying on ¾ inch iron pipes and ½ iron stakes;
- relied on a previously undiscovered pipe;
- applied different angles than those applied by Watson;
- identified new encroachments not previously identified by his own plat or that of Lovitt; and
- did not follow the priority of calls.

Each of these failures, independently and taken together, show material issues of fact exist regarding whether Holman's 2015 survey is a retracement of the "lines actually run in the ground" by Watson. The superior court erred in finding none of these issues of fact were material, especially when considered in the light most favorable to the Rennes.

b. The superior court erred in requiring proof from the Rennes that the roadway existed in the 1950s.

The superior court granted the Rineholds' motion for summary judgment because the Rennes did not provide proof that the roadway existed in the 1950s when Watson platted and conveyed the Rennes' property.[157] Doing so was inconsistent with the burdens of proof on summary judgment.[158] Doing so was also inconsistent with Washington's law on

[157] 1VRP 3, 5.
[158] *E.g.*, *Moore*, 158 Wn. App. at 146-47.

interpreting deeds.[159] Washington law does not require proof of the existence of an artificial monument at the time the artificial monument is called in a deed.[160]

In *Ray v. King County*, the court addressed conflicting calls in a deed akin to those at issue here and held the actual location of the artificial monument controlled.[161] The deed in *Ray* identified the location of a railroad right-of-way as follows:

> Such right of way strip to be fifty (50) feet in width on each side of the center line of <u>the railway track</u> … which location is described as follows to-wit.
>
> Commencing at a point 410 feet West from North East corner of Section six (6) township 24 N R 6 East and running thence on a one (1) degree curve to the left for 753 3/10 feet thence South 16 degrees and 34 minutes West 774 2/10 feet thence with a 3 degree curve to the right for 700 feet … thence S 36° 15' W 150 feet to South boundary of lot 3 of said Sec 6 which point is 1320 feet North and 2170 feet west from SE corner of said Sec 6.[162]

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[159] *Staaf*, 68 Wn.2d at 803-04 ("between lines actually marked or surveyed on the ground and lines called for by plats, maps or field notes, the lines marked by survey on the ground prevail, save for intervening equities arising by contract, conveyance, estoppel, prescription, or the application of well-defined legal and equitable concepts.") (internal quotations omitted); *Roeder*, 105 Wn.2d at 575-76 (noting the presumption in Washington is that "the grantor did not intend to retain a narrow strip of land which could be of use only to the owner" of the land adjoining the roadway); *Newport*, 168 Wn. App. at 65 ("the language of the written instrument is the best evidence of the intent of the original parties to a deed").

[160] *E.g.*, *Ray*, 120 Wn. App. 564; *DD & L*, 51 Wn. App. 329; *Thompson*, 47 Wn. App. 209.

[161] *Ray*, 120 Wn. App. at 592.

[162] *Id.* at 572 (emphasis added).

However, the railway track was not actually constructed until after the deed was conveyed.[163] After the railway track was constructed, the course and distance description of the railway track in the deed did not match the actual location of the railway track on the land.[164] The Rays, like the Rineholds here, argued that the deed could not be understood to mean "the location where the railroad was actually constructed because the actual location of the railroad is not the location described by the course and distance calls in the deed."[165] The Court disagreed and held that "because the monument"—the railway track—"controls over the distance calls, we hold that the strip of land conveyed in this deed is centered on the railroad tracks, as constructed."[166] The fact that the monument was not constructed until sometime later was of no consequence.[167]

The holding in *Ray* is consistent with the holding in *DD & L, Inc. v. Burgess*.[168] In *DD & L*, the parties disputed a boundary that a 1912 deed described as a railroad right-of-way where the actual railroad as constructed did not match the location described in the deed.[169] It was not clear whether the railroad track was constructed before or after the 1912 deed, but that fact

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[163] *Id*. at 570.
[164] *Id*. at 592.
[165] *Id*. at 590.
[166] *Id*. at 592.
[167] *See id.* at 572-92.
[168] 51 Wn. App. 329.
[169] *Id*. at 331-33.

was not determinative to the Court's holding.[170] Instead, the Court of Appeals affirmed the trial court's finding that the location of the actual railroad controlled, regardless of its location as called in the deed and regardless of its time of construction.[171]

In contrast, here, the superior court required the Rennes to prove the monument called to—the roadway—actually existed during the period when the deed was conveyed and required the Rennes to present evidence of the roadway's location as being consistent with the other calls in the deed.[172] Requiring each of these showings is contrary to the holdings in *Ray* and *DD & L*.[173, 174] The ruling is also contrary to the express presumption in Washington that a grantor should not retain a narrow strip of land separating an adjoining landowner from the roadway.[175] The superior court erred in finding—as a matter of law—the absence of proof from the Rennes (at the time[176]) as to the existence of the roadway in the 1950s in particular warranted summary judgment in favor of the Rineholds.

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[170] *Id.* at 333, 336.
[171] *Id.* at 336.
[172] 1VRP 3, 5.
[173] 120 Wn. App. at 592.
[174] 51 Wn. App. at 336.
[175] *Roeder*, 105 Wn.2d at 575-76
[176] The Rennes later showed with expert evidence that the roadway in fact existed in the 1950s when Watson originally conveyed the land. Despite considering that evidence on reconsideration, the superior court still granted summary judgment in favor of the Rineholds. This was error.

c. The Rineholds' citation to *Thompson v. Schlittenhart* shows the superior court's errors.

The Rineholds argued several times that *Thompson v. Schlittenhart* "is directly on point."[177] The extent of the Rineholds' argument to the superior court regarding *Thompson* was that Holman's 2015 survey is a retracement survey and that, because the *Thompson* court agreed with the conclusion reached by the surveyor as to the intent of the prior owners, the superior court here must also agree with Holman's 2015 survey.[178]

The Rineholds' argument removes all substance from the *Thompson* case. There, the Thompsons had their property surveyed 26 years after they purchased it.[179] The Thompsons' surveyor determined the Thompsons' deed did not establish the true boundary because "it did not close and the courses were incomplete and inconsistent."[180] The Thompsons' surveyor consulted "the deeds of surrounding properties, the conveyances of the Thompsons' predecessors in interest, an unrecorded plat referred to in the Thompsons' deed, monuments on the ground and county road maps to determine the intent of the initial common grantors."[181] From that extrinsic evidence, the Thompsons' surveyor concluded the boundary line was where

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[177] *E.g.*, CP 164; 47 Wn. App. 209.
[178] CP 165.
[179] 47 Wn. App. at 210-11.
[180] *Id.* at 211.
[181] *Id.* at 210-11.

a barbed wire fence had been when the Thompson's purchased the property 26 years before, and the same boundary to which the Thompson's had mowed the grass all those years.[182]

In response, the neighboring Schlittenharts had their own survey done, and their surveyor identified a different line as the boundary.[183] However, the Schlittenharts' surveyor testified he "did not believe that his survey reflected the intent of the [common grantors]."[184]

The boundary line dispute was decided by a trial, not summary judgment.[185] The *Thompson* court accepted the trial court's findings as supported by substantial evidence and affirmed that the Thompsons' survey more closely followed the intent of the original grantor.[186]

Thompson is not "directly on point." It does, however, highlight several errors the superior court made in the present case:

First, the *Thompson* court found it relevant that when the Thompsons purchased their land, they believed their land extended all the way to the to the fence and they mowed that property as their own for many years, even though the fence <u>was not a monument</u> called out in their deed.[187]

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[182] *Id.* at 210-11.
[183] *Id.* at 211.
[184] *Id.*
[185] *Id.* at 210.
[186] *Id.* at 212.
[187] *Id.* at 210-11.

Here, not only did the Rennes (and the prior owners) believe their land extended to the roadway, and they mowed to the roadway for many years along with other improvements, but the roadway <u>was a monument</u> called out in their deed.[188] *Thompson* does not support a summary judgment finding in favor of the Rineholds.

Second, the Thompsons' surveyor consulted "the deeds of surrounding properties, the conveyances of the Thompsons' predecessors in interest, an unrecorded plat referred to in the Thompson's deed, monuments on the ground and county road maps to determine the intent of the initial common grantors."[189] In contrast, the Rinehold's surveyor, Holman, dismissed all of the calls to the "roadway" in the other deeds, did not consider the evidence in the conveyances of the Rennes' predecessors in interest, and ignored the roadway widths found in the other plats—including Watson's—that were inconsistent with his survey.[190] Rather than supporting the blind acceptance of Holman's 2015 survey, *Thompson* showcases many of the unanswered questions in Holman's 2015 survey.

Third, the Schlittenhart's surveyor did not even believe his own survey was an accurate representation of the original grantor's intent.[191]

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[188] CP 85-88, 93, 123-24.
[189] *Thompson*, 47 Wn. App. at 211.
[190] CP 23-24, 27.
[191] *Thompson*, 47 Wn. App. at 211.

Here, there was no such concession of Watson's intent by the Rennes. In fact, the Rennes' surveyor expressly identified material problems with Holman's interpretation of Watson's intent on reconsideration.[192]

Fourth, *Thompson* shows that the original grantor's intent, and whether a subsequent survey faithfully follows the original grantor's intent, are necessarily factually intensive questions.[193] Here, the original grantor, Watson, identified the "roadway" at several points in several deeds and in several plats.[194] The Rennes submitted substantial evidence showing the owners in the area had acted in accord with the actual roadway as the "roadway" described in the deeds and plats.[195] Further, on reconsideration, the Rennes presented evidence that the roadway existed and was roughly the same width at the time Watson platted the land, and the Rennes' surveyor identified material inconsistences and material questions of fact regarding the faithfulness of Holman's survey to Watson's intent.[196] Unlike in *Thompson*, the superior court here resolved all these factual questions as a matter of law (and against the nonmoving party).[197]

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[192] CP 305-307.
[193] *Thompson*, 47 Wn. App. at 212.
[194] *E.g.*, CP 14, 29-32, 45-46, 92-93, 127-29, 136, 144, 206, 208.
[195] CP 85-88, 123-24, 132-33.
[196] CP 203, 210-12, 217, 291-94, 297; 305-07.
[197] *Thompson*, 47 Wn. App. at 212.

2. The superior court erred in granting summary judgment where unrefuted evidence of legal and equitable principles established the Rennes' owned the land up to the actual roadway.

The superior court erred in disregarding the evidence of the property's historical use and instead granting summary judgment. Contrary to the superior court's ruling, the law in Washington relies on such evidence to determine the "true" boundary line.

The rule in Washington has long been that where the intention of the original surveyor is ambiguous due to discrepancies in the calls, "the lines marked by survey on the ground prevail, save for intervening equities arising by contract, conveyance, estoppel, prescription, or the application of well-defined legal and equitable concepts."[198]

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[198] *Staaf*, 68 Wn.2d at 803-04 (internal citations omitted); *see Stewart*, 64 Wn.2d at 42 ("where a boundary has been defined in good faith by the interested parties and thereafter for a long period of time acquiesced in, acted upon, and improvements made with reference to the line, such a boundary will be considered the true dividing line and will govern. Whether or not the line so established is correct is immaterial."); *see also Weidlich v. Independent Asphalt Paving Co.*, 94 Wash. 395, 404-05, 162 P. 541 (1917) (holding that if the location of the street matched the original street monuments as platted, such was "conclusive"; but, if they did not match, "and the parties bought with reference to the stakes upon the ground at the time they bought, they are bound thereby."); *Farrow v. Plancich*, 134 Wash. 690-91, 236 P. 288 (1925) (holding that whether a newer survey and newer fence conflicted with the prior survey and prior fence was immaterial because "the lapse of time and action of the parties" fixed the line from the prior survey and prior fence "as the true line."); *Mullally v. Parks*, 29 Wn.2d 899, 906-07, 190 P.2d 107 (1948) (holding that wherever the boundary line was "originally established" was "now immaterial" because the actions, beliefs, and improvements made by the current owners of the property to the north and their predecessors over the preceding twenty years established the "true line.").

Adverse possession is one such well-defined legal concept.[199] And, the Rineholds' attempt to quiet title is an action in equity which requires the Rennes to defend with well-defined equitable concepts.[200]

All of Watson's plats show the boundary of the Rennes' land is the roadway.[201] The Rennes produced substantial evidence showing that the "roadway" has been the accepted boundary of the parties for multiple decades, and over the course of several owners.[202] Such evidence "fixes the true line, even though the survey may be in error."[203] The superior court thus erred in rejecting the Rennes' evidence as "irrelevant" and, instead, finding the Rineholds' established the "true dividing line," or "record title," as a matter of law with Holman's 2015 survey.

The superior court's refusal to consider the application of "well-defined legal and equitable concepts," like adverse possession, and the superior court's striking of the evidence supporting the same, on the basis of it being "not relevant the issue presented," was contrary to Washington law and requires reversal.

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[199] *See* RCW 7.28.080, RCW 4.16.020.
[200] *E.g.*, *Green v. Hooper*, 149 Wn. App. 627, 646, 205 P.3d 134 (2009) ("An action to quite title is equitable in nature.").
[201] *See* CP 29, 32; *see also* CP 206, 208.
[202] CP 85-88, 123-24, 132-33.
[203] *Stewart*, 64 Wn.2d at 41-42; *see also* citations in footnote 198, *supra*.

E. The Superior Court Erred in Granting Partial Summary Judgment Considering the Evidence Presented on Reconsideration

On reconsideration, the Rennes presented evidence and expert testimony that rectified the two evidentiary deficiencies the superior court previously stated it believed were dispositive to summary judgment.[204] The superior court considered the evidence but denied the motion nonetheless. This was error.

The Rennes provided exactly the evidence that the Rineholds acknowledged would defeat their summary judgment motion and what the superior court previously cited as lacking from the Rennes: (1) expert testimony from a GIS specialist and visual evidence from historical photographs showing that the roadway existed in 1951 in substantially the same condition and size as it exists today, and (2) expert testimony from a licensed Washington surveyor countering Holman's survey and declaration.[205] The superior court erred when it found that this evidence was insufficient to create an issue of material fact. This Court should reverse and remand for trial.

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[204] 1VRP 3, 5, 8; *see also* 2VRP 37 (Rineholds acknowledging that evidence of a roadway in existence between 1952 and 1955 could defeat their motion).
[205] *Compare* 2VRP 37 and 1VRP 3, 5, 8 *with* CP 289-97, 305-07.

V. CONCLUSION

The superior court erred in granting the Rineholds' motion for partial summary judgment. Questions of material fact exist and superior court's ruling is contrary to Washington law on interpreting deeds. The Rennes respectfully request that this Court reverse the trial court's decisions, and remand for trial.

Respectfully submitted this 11th day of March, 2019.

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