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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 312496-III

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOHN and CLAUDIA SWENSON,
Husband and wife,

Plaintiffs/Respondents,

v.

ALAN F. WEEKS, individually and the marital
Community of ALAN F. WEEKS and JULIE WEEKS,

Defendants/Appellants.

APPEAL FROM THE SUPERIOR COURT FOR CHELAN COUNTY
THE HONORABLE T.W. SMALL, PRESIDING

APPELLANTS' REPLY BRIEF

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ORIGINAL

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES ii

III. ARGUMENT.....1

A. Standard of Review.....1

B. The trial court erred in construing the March 15, 2012 judgment...1

C. The trial court’s order was not authorized under CR 60.7

D. The trial court was barred by res judicata from granting Respondents’ motion.8

E. The trial court erred in considering new evidence.....8

F. Respondents are not entitled to legal fees and costs.....9

VII. CONCLUSION.....10

VII. CERTIFICATE OF MAILING11

II. TABLE OF AUTHORITIES

Washington State Cases

<i>Adams v. Department of Labor & Industries</i> , 128 Wn. 2d 224, 229,8 905 P. 2d 1220 (1995).	
<i>Callan v. Callan</i> ,	
2 Wash. App. 446, 468 P.2d 456 (1970).....	6, 7
<i>Chavez v. Chavez</i> ,	
80 Wash. App. 432, 909 P.2d 314 (1996)	7
<i>Condon v. Condon</i> ,	
--Wn. 2d --, 298 P. 3d 86 (2013)	1
<i>Draszt v. Naccarato</i> ,	
146 Wash. App. 536, 192 P.3d 921 (2008).....	4, 5, 7, 8
<i>Gimlett v. Gimlett</i> ,	
95 Wash. 2d 699, 629 P.2d 450 (1981)	9
<i>In re Marriage of Sushak & Beasley</i> ,	
168 Wash. App. 1010 (2012).....	1
<i>Kemmer v. Keiski</i> ,	
116 Wash. App. 924, 68 P.3d 1138 (2003)	2, 3, 8
<i>Matter of Estate of Burns</i> ,	
131 Wash. 2d 104, 928 P.2d 1094 (1997)	9
<i>Paradise Orchards Gen. P'ship v. Fearing</i> ,	
122 Wash. App. 507, 94 P.3d 372 (2004)	7
<i>Presidential Estates Apartment Associates v. Barrett</i> ,	
129 Wash. 2d 320, 917 P.2d 100 (1996)	3, 7
<i>Rivard v. Rivard</i> , 75 Wash. 2d 415, 451 P. 2d 677 (1969).....	2, 3

Other State Cases

<i>Salt Lake City v. Salt Lake City Water and Electrical Power Co.</i> ,	
174 P. 2d 1134 (Utah 1918).....	6

State Statutes

RCW 7.28.083	9
RCW 7.28.083 (3).....	9
Laws of Washington 2011 Ch. 255 § 2.....	9

Court Rules:

CR 59.....	9
CR 60	3, 9
CR 60 (a).....	3, 7
CR 60 (b).....	7

Cr 60 (e) (1).....	3
GR 14.1.....	1
RAP 10.3 (a) (6).....	4, 5, 7, 8

III. ARGUMENT

A. Standard of Review

In support of their argument on the standard of review, Respondents improperly cite citation to an unpublished decision, *In re Marriage of Sushak & Beasley*, 168 Wash. App. 1010 (2012). BR 6. Respondents' citation to an unpublished decision violates GR 14.1. *Condon v. Condon*, --Wn. 2d --, 298 P. 3d 86, 93 (2013). Instead, the appropriate standard of review is found at page 10 of Appellants' opening brief. The trial court's order is therefore subject to review *de novo*.

B. The trial court erred in construing the March 15, 2012 judgment.

Respondents acknowledge that a motion for clarification cannot result in a true modification of rights. BR at 6. Respondents, however, fail to acknowledge that the trial court's Order Granting Swenson's Motion to Clarify Judgment (Order Clarifying Judgment) resulted in such a modification by granting Respondents more of Appellants' land than had been awarded by the trial court's judgment. The trial court acknowledged that its order gave Respondents additional land. "[T]hat results in an area more than what the Court's drawing was..." RP 9.

Because it grants Respondents additional land, the trial court's order does not qualify as a clarification of the March 15, 2012 judgment. Instead, as in *Kemmer v. Keiski*, 116 Wash. App. 924, 934, 68 P.3d 1138 (2003), as a result of the addition of land to the judgment, the trial court's order constitutes a modification, and not a clarification of the judgment.

Respondents' attempt to distinguish *Kemmer v. Keiski* fails. BR at 8. In *Kemmer*, the court refused to recognize the amended judgment in that case as a mere clarification because the amended judgment expanding the width of the easement in that case constituted a substantial and significant modification of the original judgment. 116 Wn. App. 934. The facts of this case compare favorably with *Kemmer* in that the Order Clarifying Judgment expanded the adverse possession area awarded to Respondents. *Kemmer* thus provides authority for the facts of this case.

Respondents also misplace reliance upon *Rivard v. Rivard*, 75 Wash. 2d 415, 451 P. 2d 677 (1969). BR at 6-7. In *Rivard*, unlike the case at bar, the trial court's order merely spelled out the contours of the respondent's visitation rights that had previously been granted in the decree of dissolution. No new rights were conferred upon the respondent in *Rivard*. Here, in contrast, it is undisputed that the Order Clarifying Judgment awarded Respondents more of Appellants' land. "[T]hat results in an area more than what the Court's drawing was..." RP 9. The Order

Clarifying Judgment therefore meets *Rivard's* definition of a modification:
“*A modification of visitation rights occurs where the visitation rights given to one of the parties is either extended beyond the scope originally intended or where those rights are reduced, giving the party less rights than those he originally received.*” 75 Wn. 2d 418.

Respondents argue that Appellants overstate the reference to CR 60 in the Order Clarifying Judgment. BR at 8. Respondents overlook that it was they who invoked CR 60 in their Motion to Clarify Judgment. (*Come now Plaintiffs...and pursuant to CR 60, hereby request that this Court clarify its Judgment...*). CP 22.

Respondents also fail to recognize that in *Presidential Estates Apartment Associates v. Barrett*, 129 Wash. 2d 320, 324, 917 P.2d 100 (1996), the trial court's order at issue was an order clarifying a judgment pursuant to CR 60 (a). The discussion of CR 60 (a) in *Presidential Estates Apartment Associates v. Barrett* leaves no doubt that the Order Clarifying Judgment is subject to scrutiny under CR 60 (a).

Respondents argue that there is no requirement in *Kemmer v. Keiski* that a motion to clarify be supported by an affidavit. BR at 8. The court in *Kemmer v. Keiski* was not called upon to address that issue. Instead, an affidavit for a motion to clarify is required by CR 60 (e) (1).

Respondents argue that an affidavit was unnecessary because there allegedly was no confusion about why Respondents sought clarification. BR at 8. Respondents fail to support their argument with citation to any authority. Respondents' argument should therefore not be considered. RAP 10.3 (a) (6); *Draszt v. Naccarato*, 146 Wash. App. 536, 544, 192 P.3d 921 (2008).

Respondents argue that the trial court's Amended Findings of Fact and Conclusions of Law control over the memorandum decision. BR at 11. Respondents fail to support their argument with citation to any authority. Respondents' argument should therefore not be considered. RAP 10.3 (a) (6); *Draszt*, 146 Wash. App. 544. Respondents also fail to include a single citation to the record to support their argument. Respondents' argument should therefore not be considered. *Id.* To the extent that their argument deserves consideration, Respondents fail to recognize that the memorandum decision is attached as Exhibit A to the Amended Findings of Fact and Conclusions of Law. CP 198-208.

Respondents argue, once again without citation to the record or authority, that the trial court did not intend to make the southwest corner of their house as the measuring point for the narrowing of the adverse possession boundary. BR at 11-12. Respondents' argument should

therefore not be considered. RAP 10.3 (a) (6); *Draszt*, 146 Wash. App. 544.

To the extent that Respondents' argument merits consideration, Respondents fail to recognize that the memorandum decision attached as Exhibit A to the Amended Findings of Fact and Conclusions of Law, measures the point at which the adverse possession boundary narrows to 17 feet at "*a point three feet three feet past the southwest corner of plaintiffs' home.*" CP 205.

In contrast, the decks on Respondents' home are not once mentioned in the Judgment, the memorandum decision or the Amended Findings of Fact and Conclusions of Law. CP 17-21; 181-208. It is particularly worthy of note that the drawing used by the trial court in its memorandum decision to designate the boundaries of the adverse possession area was copied from the survey of Respondents' lot, as evidenced by the recording number on the drawing. CP 207. That drawing depicts the foundation line of Respondents' house, but does not show any decks attached to the house. *Id.*

The trial court thus amended the judgment by changing the point for measuring the point at which the adverse possession jogs from the southwest corner of the foundation line of Respondents' house to the southwest corner of Respondents' deck, a point that has no support in the

language of the Judgment, the memorandum or the Amended Findings. The trial court made no attempt to support its order with any existing language in the Judgment, the memorandum or the Amended Findings. Instead, the trial court relied upon its subjective recollection of the location of a line of trees on Respondents' property. RP 1 at 9.

The trial court was not permitted to impose its subjective recollection of its thoughts to contravene the express language of the memorandum decision. *Salt Lake City v. Salt Lake City Water and Electrical Power Co.*, 174 P. 2d 1134, 1137-38 (Utah 1918) (“*To say that a judgment can be made to mean something contrary to the ordinary and usual meaning of the language used, except in case of a practical construction and application by the parties to the judgment, would not only be contrary to all rules of construction but would be most dangerous in practice.*”).

Instead, the Court is required to give meaning to each and every word of the memorandum decision, the Amended Findings of Fact and Conclusions of Law and the Judgment. *Callan v. Callan*, 2 Wash. App. 446, 449, 468 P.2d 456 (1970). Respondents' argument, if accepted, would require the Court to treat the phrase “*southwest corner*” in the memorandum decision as a useless appendage. The Court may not do so. *Id.*

Respondents argue that rules of construction do not apply to a motion to clarify a judgment. BR 13. Once again, Respondents fail to support their argument with any authority. Respondents' argument should therefore not be considered. RAP 10.3 (a) (6); *Draszt*, 146 Wash. App. 544. To the extent that Respondents' argument merits consideration, it is well settled that Washington decisions apply rules of construction. *Callan v. Callan*, 2 Wn. App. 448-49. Moreover, review of the trial court's construction of the Judgment presents a question of law. *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wash. App. 507, 516, 94 P.3d 372 (2004); *Chavez v. Chavez*, 80 Wash. App. 432, 435, 909 P.2d 314 (1996).

Respondents argue that the trial court reconciled the diagram attached to the memorandum decision with the diagram attached to the Order Clarifying Judgment. BR 13-14. Respondents fail to support their argument with any authority. Respondents' argument should therefore not be considered. RAP 10.3 (a) (6); *Draszt*, 146 Wash. App. 544.

C. The trial court's order was not authorized under CR 60.

Respondents fail to address Appellants' argument that the Order Clarifying Judgment was not authorized under either CR 60 (a) or (b). Nor do Respondents address *Presidential Estates Apartment Associates*, 129 Wash. 2d, 326. The Court may therefore decide this issue on the

argument and record before it. *Adams v. Department of Labor & Industries*, 128 Wn. 2d 224, 229, 905 P. 2d 1220 (1995).

D. The trial court was barred by res judicata from granting Respondents' motion.

Respondents argue that res judicata does not apply because the trial court merely explained or ratified rights already granted in its judgment. BR at 9. To the contrary, the Order Clarifying Judgment was no more a clarification of existing rights than was the amended judgment in *Kemmer v. Keiski*. Therefore, as in *Kemmer v. Keiski*, the Order Clarifying Judgment was precluded by the March 15, 2012 judgment.

E. The trial court erred in considering new evidence.

Respondents argue that the trial court did not consider new evidence. BR at 9-11. As Respondents fail to support their argument with any citation to authority, their argument should not be considered. RAP 10.3 (a) (6); *Draszt*, 146 Wash. App. 544. To the extent that Respondents' argument merits consideration, neither Exhibit A nor Exhibit C to the Order Clarifying Judgment was in existence on March 15, 2012. CP 80, 82-85. Exhibit A is a photograph of the south wall of Respondents' house. CP 80. In the forefront of the photograph appear the concrete pavers that were installed after entry of the March 15, 2012 judgment. *Id.* Exhibit C is a sketch of the southwest corner of Respondents' property drawn by Pinnacle Surveying. CP 82-85. The sketch is dated May 22, 2012, 71 days

after entry of the judgment. *Id.* Nothing in either CR 59 or CR 60 supports the trial court's inclusion of those documents as part of the record in this case.

Exhibit B to the Order Clarifying Judgment was an exhibit at trial. However, in construing the Judgment, the trial court was limited to examining the Judgment itself. *Gimlett v. Gimlett*, 95 Wash. 2d 699, 705, 629 P.2d 450 (1981) (“*Normally the court is limited to examining the provisions of the decree to resolve issues concerning its intended effect.*”). Therefore, the trial court erred in considering matters outside the judgment.

F. Respondents are not entitled to legal fees and costs.

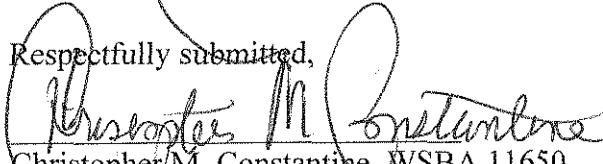
Respondents misplace reliance upon RCW 7.28.083 (3) in support of their request for legal fees and costs. BR 14. Respondents overlook that RCW 7.28.083 applies only to actions filed on or after July 1, 2012. Laws of Washington 2011, Ch. 255, § 2 (“*This act applies to actions filed on or after July 1, 2012.*”). Respondents filed this action in 2009. CP 17. Legislation in Washington operates prospectively only, absent clear legislative intent to the contrary. *Matter of Estate of Burns*, 131 Wash. 2d 104, 110, 928 P.2d 1094, 1024 (1997). Respondents offer no authority that the Legislature intended RCW 7.28.083 (3) to apply to a case filed in

2009, such as this case. Respondents' request for legal fees must therefore be denied.

VII. CONCLUSION

The trial court's Order Granting Motion to Clarify should be reversed.

Respectfully submitted,



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Attorney for Appellants Weeks

VII. CERTIFICATE OF MAILING

The undersigned does hereby certify that on June 4, 2013, he served a copy of the Appellants' Reply Brief by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

Brian A. Walker
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1 Fifth Street, Suite 200
Wenatchee, WA 98807-1606

Dated this 4th day of June, 2013, at Tacoma, WA.

A handwritten signature in cursive script, appearing to read "B.A. Walker", written over a horizontal line.