

**FILED**

MAY 20 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 312496

COURT OF APPEALS,  
DIVISION III  
OF THE STATE OF WASHINGTON

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John and Claudia Swenson, husband and wife,

Respondents

v.

Alan F. Weeks, individually and the marital community of Alan F. Weeks  
and Julie Weeks,

Appellant

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BRIEF OF RESPONDENTS

---

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Attorneys for Respondents  
John and Claudia Swenson

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## **I. ASSIGNMENT OF ERROR**

Whether the trial court properly clarified its ruling in favor of John and Claudia Swenson and against Alan F. Weeks.

## **II. STATEMENT OF CASE**

This appeal arises from John and Claudia Swenson's ("Swenson") judgment against Alan F. Weeks and his marital community ("Weeks") for money damages, injunctive relief, and to quiet title on real estate Swenson acquired from Weeks by adverse possession. (CP 17-21).

Weeks owns about seven (7) acres of undeveloped property adjacent to Swenson's home. (CP 185-186). For more than ten (10) years after Swenson purchased the Swenson Property from a trust administered by Weeks, Swenson used a portion of the Weeks Property as would the true owner (the "Adverse Possession Area"). (CP 195). For example, Swenson planted or maintained existing landscaping and irrigated. (CP 186-187). Swenson also maintained a row of peach trees that stretched from the Swenson Property and onto the former Weeks Property and originally planted by Weeks. (CP 187, 192).

Swenson filed suit after Weeks entered the Adverse Possession Area and ripped out Swenson's landscaping, cut down Swenson's peach and landscaping trees, ripped out irrigation, installed fencing, and posted

multiple signs, including signs making religious references and threatening Swenson with criminal trespass. (CP 192-193).

Following a bench trial before the Honorable T.W. Small, Chelan County Superior Court entered judgment in favor of Swenson and against Weeks for \$33,160.40 in money damages (including treble damages under RCW 4.24.630) and \$45,793.32 in legal fees and costs. The trial court also quieted title in favor of Swenson to the Adverse Possession Area and enjoined Weeks from further interference with Swenson's ownership and use thereof. (CP 17-21).

Following entry of the lower court's Judgment and Amended Findings of Fact and Conclusions of Law (collectively, the "Ruling"), and following dismissal of Weeks' prior appeal to this Court (Appeal No. 30712-3-III), Swenson built a boundary fence and re-landscaped in the Adverse Possession Area. (CP 22-46).

In July 2012, Weeks commenced suit against Swenson in Chelan County Superior Court under Cause No. 12-2-00850-1 (the "Weeks 2012 Lawsuit") claiming Swenson's interpretation of the size of the Adverse Possession Area was wrong. (CP 92-161). Weeks also sought preliminary relief that Chelan County Superior Court denied at a hearing on August 3, 2012, and ruled that Weeks should seek an interpretation of the Ruling from the Honorable T.W. Small. (CP 22-46; 212-225). When

Weeks did not seek clarification from the trial court, Swenson filed their motion to clarify. (CP 22-46). Swenson understands that the size of Swenson's alleged encroachment on the Weeks Property is about 56 square feet.

Swenson's motion asked trial court to clarify if Weeks' or Swenson's interpretation of the Adverse Possession Area was correct. (CP 22-46). The language at issue in the Ruling reads:

Following trial, the Court issued a Memorandum Decision, a true and correct copy of which is attached hereto as Exhibit "A." To the extent the Findings of Fact and Conclusions of Law set forth in this document differ from those stated in Exhibit "A", this document shall control,

...

A map showing the location of the Pre-Existing Improvements and the area in which Swenson maintained the fire break is attached hereto as Exhibit B. This area is referred to herein as the "Adverse Possession Area."

...

Pursuant to RCW 58.04.011, Swenson and their surveyor may enter onto the Weeks Property for purposes of obtaining the necessary survey to prepare the quit claim deeds and other documents necessary to fulfill the Orders of this Court.

(CP 181-208).

As part of the Ruling, the trial court attached its July 5, 2011 Memorandum Decision as an exhibit. (CP 199-208). It is the following

language in this Memorandum that narrows from 25 to 17 feet the Adverse Possession Area on which Weeks bases his appeal:

Based upon the evidence and the extent of plaintiff's use, the portion the adversely possessed is a 25 wide strip parallel to plaintiff's northwest side of their property (exclusive of the area adjacent to the access easement) that narrows to 17 feet in width at a point 3 feet past the southwest corner of plaintiffs' home. See attached diagram.

(CP 1-10; 181-208).

Swenson understood from the trial court's Ruling the "Adverse Possession Area" commenced 3 feet past the southwest corner of the Swenson's lower deck. (CP 24-46). The deck existed when Weeks (for the Weeks Trust) sold Swenson the Swenson Property. (CP 24-46). Based on this understanding, and as allowed by the Ruling, Swenson hired a surveyor to provide the needed legal description for the Adverse Possession Area, and to measure the trial court's ordered narrowing. (CP 17-21; 197).

Weeks argues the narrowing of the Adverse Possession Area required Swenson's surveyor measure from the southwest corner of Swenson's house foundation line. (CP 52-56; 70-76). Weeks makes this argument despite the trial court not referring to or defining, in its Ruling or in its Memorandum Decision, the phrase "house foundation line". (CP 1-10; 181-208).

Following the hearing on Swenson's Motion, Chelan County Superior Court clarified its Ruling and entered an Order Granting Swenson's Motion to Clarify Judgment (the "Clarification Order"), which reads in pertinent part:

That this Court's previously entered judgment was ambiguous. The Court needs to clarify what it meant in its July 5, 2011 Opinion Letter, which Letter the Court made a part of the Judgment... That this Court intended the phrase "Plaintiffs' home" include the deck shown in the photo attached hereto as Exhibit "A," and intended that the transition point where the Adverse Possession Area (as defined in the Judgment) narrows from 25 feet to 17 feet be measured from a point 3 feet past the southwest corner of the deck. The Court believes the deck was and is part of the Plaintiffs' home, existing when Weeks sold the Swenson Property to Swenson. Measuring the transition point from the corner of the deck is consistent with the Court's findings at trial related to the scope of Plaintiffs' use of the Weeks Property. The Court concluded Plaintiffs' use of the Adverse Possession Area included a row of fruit trees that existed on the Swenson Property, as platted, and extending into the Adverse Possession Area. A photo of those trees is attached hereto and incorporated herein as Exhibit "B". That Swenson's measurement and recent construction of improvements in the Adverse Possession Area is consistent with the Judgment. And, the survey and legal description attached hereto as Exhibit "C" are accurate and consistent with the Judgment.

(CP 77-84).

On appeal, Weeks now seeks reversal of the trial court's Clarification Order. (CP 226-235).

### **III. ARGUMENT**

#### **A. Abuse of discretion is the appropriate standard of review.**

Contrary to Weeks' de novo review argument, the abuse of discretion standard applies to motions to clarify. In re Marriage of Sushak & Beasley, 168 Wn. App. 1010 (Div. II 2012). The appeals court will only reverse the trial court's ruling if the trial court exercised discretion on untenable grounds or for untenable reasons. Id.

As explained in more detail below, Chelan County Superior Court did not abuse its discretion. It acted on tenable grounds and for tenable reasons, and on the evidence presented at trial.

#### **B. Trial court did not err when clarifying its intent.**

A motion to clarify allows the trial court to define rights of the parties which have already been given in the court's prior order or decree, when those rights have not been completely spelled out. Rivard v. Rivard, 75 Wn.2d 415 (1969). While a motion for clarification cannot result in a true modification of rights, it may result in a favorable resolution of an ambiguity in the court's prior order or decree. In other words, "[a] court may clarify a decree by defining the parties' respective rights and obligations, if the parties cannot agree on the meaning of a particular

provision ...”. In re Marriage of Christel & Blanchard, 101 Wn. App. 13, 22 (2000).

In Rivard v. Rivard, for example, the Washington State Supreme Court affirmed the lower court’s ruling on a motion to clarify, finding the phrase “reasonable visitation rights” ambiguous. Clarifying its prior order, the trial court allowed the respondent alternate weekends and one evening per week. The Supreme Court found the trial court’s action a clarification, and not a modification, because the lower court’s ruling was within the scope of what one could consider “reasonable visitation rights”. 75 Wn.2d at 418-19.

The case Kemmer v. Keiski, 116 Wn. App. 924 (Div. II 2003) is an example of a trial court’s abuse of discretion. There, a landowner brought a motion for contempt seeking to enforce a judgment establishing easement rights over his neighbor’s property. Following its initial order, Pacific County Superior Court entered a new order expanding the easement from 12 to 30 feet, and providing for the first time that the easement be opened to log trucks and dump trucks. The Court of Appeals ruled that the trial court wrongly expanded its prior order, finding the lower court’s ruling “constituted a substantial and significant modification of the May 2000 judgment, not a mere clarification of the May 2000 judgment.” Id. at 934.

Unlike in Kemmer, Chelan County Superior Court clarified its Ruling's definition of the Adverse Possession Area. When Weeks and Swenson could not agree on the Court's meaning, the trial court provided more detail as to what it intended by "plaintiffs' home". While Weeks does not like the outcome, the issue addressed on Swenson's Motion was not new. This is the same issue on which the trial court heard evidence during the bench trial, ruled, and allowed a survey to better define and provide a legal description for the Adverse Possession Area. Thus, like in Rivard, the trial court's clarification was within the scope of what one could consider reasonably related to the "Adverse Possession Area" or the "plaintiffs' home".

**C. Washington law allows motions to clarify.**

Weeks overstates the reference to CR 60 in the Clarification Order. Even if Weeks is correct that CR 60 does not apply here, Swenson could file a motion to clarify, and could do so at any time. Kemmer v. Keiski, 116 Wn. App. 924 (Div. II 2003). And, there is no requirement in Kemmer that a motion to clarify be supported by an affidavit. An affidavit in this case was also unnecessary. There was no confusion about why Swenson sought clarification, especially after Weeks commenced the Week's 2012 Lawsuit. Chelan County Superior Court had denied Weeks'

preliminary injunction request, and advised Weeks to seek clarification from the Honorable T.W. Small. (CP 22-46).

**D. Res Judicata and Judicial Error do not apply.**

As indicated above, Washington law permits clarification of prior orders, decrees and judgments at any time. Kemmer v. Keiski, 116 Wn. App. 924 (Div. II 2003). Res Judicata and Judicial Error do not apply when a party asks the trial court to explain or refine rights already given. Id. Here, Chelan County Superior Court merely explained or refined rights already granted in its Ruling.

**E. Trial Court did not consider new evidence.**

Contrary to Weeks' argument on appeal, the trial court did not consider new evidence when clarifying its Ruling. The photos of the peach trees attached to the Court's Order Granting Swenson's Motion to Clarify were evidence at trial. During the bench trial, the Honorable T.W. Small also visited and viewed the Swenson Property, the Weeks Property, and the remaining row of Swenson's peach trees not destroyed by Weeks. The peach tree photos also explain the basis on which the trial court clarified its Ruling. As stated by the Honorable T.W. Small at his oral ruling on September 18, 2012:

[W]hen the Court made its determination of indenting, it was because of these trees. The Court determined that there wasn't -- they weren't that size -- the size they were at the time of trial -- for the entire adverse possession period.

And, the point of the line coming off the home was, basically, giving room for the trees that were already on the property, because the other trees that were off the property, were in the same line. And -- and that was the Court's intent.

When it meant "home," I assumed that this drawing included the deck. Obviously it didn't, now that this motion's been brought. But that was the intent of what the Court meant by "home"; including -- the deck was part of the home. Because you can't grow a tree through a deck.

...

And, I think "home" is ambiguous. And I think, while, ultimately that results in an area more than what the Court's drawing was, because the Court's drawing was assuming that footprint included the deck, I don't think it violates the rule, in the -- in the Kemmer case.

...

... I don't think the Court's expanding it. It's simply clarifying what it meant by "home." And that meant the deck that was there, when the trees were planted, originally. And we narrowed it, because the trees weren't that big.

Appendix, Verbatim Report of Proceedings, Motion to Clarify, September 18, 2012.

As for the trial court's attachment of Pinnacle Surveying's survey and legal description as exhibits to the Clarification Order, the survey and legal description better define (or clarify) that court's prior ruling and are not new evidence. Per Chelan County Superior Court, "...Swenson's measurement and recent construction of improvements in the Adverse Possession Area is consistent with the Judgment. And, the survey and

legal description attached hereto as Exhibit “C” are accurate and consistent with the Judgment.” (CP 80). By better defining the rights of the parties, the survey and legal description hopefully prevent further disputes between Weeks, Swenson, or their successors.

**F. Court explained the language in its Memorandum Decision.**

Weeks claims the trial court failed to attach significance to the language in its Memorandum Decision attached as an exhibit to the Ruling. Weeks, however, fails to recognize that the trial court expressly provided in the Ruling that to the extent the court’s Amended Findings of Facts and Conclusions of Law differ from those set forth in the Memorandum Decision, the Amended Findings and Conclusions control. In other words, the trial court’s definition of “Adverse Possession Area” in its Amended Findings and Conclusions trump those in the Memorandum Decision, making the definition of “plaintiffs’ home” less material.

Further, with its oral ruling to clarify its Ruling, the trial court explained the “plaintiffs’ home” language in its Memorandum Decision (a portion of the trial court’s oral ruling is quoted above). The trial court’s emphasis was on the row of peach trees that existed at the time Weeks sold the Swenson Property to Swenson. It was these peach trees that caused the court to narrow from 25 feet to 17 feet the Adverse Possession

Area. Also, the trial court assumed that the diagram of the “plaintiffs’ home” attached to its Memorandum Decision included the deck affixed to the Swenson’s house. In other words, the court considered the deck part of the “plaintiffs’ home”. It did not intend, as Weeks argues, to make the southwest corner of Swenson’s house foundation line the measuring point for the narrowing. As the trial court pointed out at its oral ruling, its Ruling and Memorandum Decision never used the phrase “house foundation line” that Weeks asks this Appeals Court to adopt. Appendix.

**G. Trial court’s Ruling was ambiguous, and rules of construction do not apply.**

Language is ambiguous if it is susceptible to two or more reasonable interpretations. AgriLink Foods, Inc. v. Department of Revenue, 153 Wn.2d 392, 396 (2005). Here, the Ruling had ambiguous terms, as evidenced by Weeks’ argument the phrases “Adverse Possession Area” and “plaintiffs’ home” mean the southwest corner of Swenson’s house foundation line; and Swenson’s belief (and the trial court agreeing) the phrases mean the southwest corner of Swenson’s deck, as the deck is part of the plaintiffs’ home and existed at the time of Swenson’s purchase. Because of the ambiguity (and the parties’ different opinions of the trial court’s intent), Swenson sought clarification from the trial court, believing the law required the parties to ascertain and abide by the intent of the trial

court. In re Marriage of Christel & Blanchard, 101 Wn. App. at 22; Gimlett v. Gimlett, 95 Wn.2d 699, 704-05 (1981).

Contrary to Weeks' argument, the rules of construction do not apply to motions to clarify reviewed for abuse of discretion. In that context, the trial court has explained its intent, and no further construction is necessary. Rules of construction would apply if (unlikely here) the trial court had not clarified its ruling and the appellate court must construe the trial court's intent. Gimlett, at 704-05; 25 Wn. Prac., Contract Law And Practice § 5:4 ("the goal [of the rules of construction] is to give effect to the intentions of the parties with practical and reasonable results.").

#### **H. Trial court reconciled diagrams.**

For the reasons stated above, the trial court has adequately explained its Ruling, the reasons for its Clarification Order, and the diagrams attached thereto. The diagram attached to the trial court's Memorandum Decision did not make the corner of "plaintiffs' home" the southwest corner of the Swenson's house foundation line, as Weeks asked this Court to find. Clarifying its intent, the trial court held that the deck, as part of the plaintiffs' house when Swenson purchased the property from Weeks, and consistent with the location of the row of peach trees, serves as the southwest corner of the plaintiffs' home to measure the Adverse Possession Area's indenting from 25 feet to 17 feet. The exhibits attached

to the Clarification Order were to better define the location of the Adverse Possession Area and to hopefully avoid further litigation.

**I. Legal fees and costs.**

Pursuant to RCW 7.28.083(3), Swenson requests an award of attorneys' fees and costs against Weeks. This statute reads as follows:

The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

This appeal is a continuation of Swenson's adverse possession lawsuit and resolves the Weeks 2012 Lawsuit, if Swenson prevails on this appeal. Weeks also attempts to avoid a portion of the lower court's ruling quieting title to Swenson by adverse possession. The Legislature intended, under these circumstances, that this Court have the discretion to award Swenson legal fees and costs. Fees and costs should be awarded here. Weeks has continued to litigate despite the lower court having explained its Ruling and entered the Clarification Order.

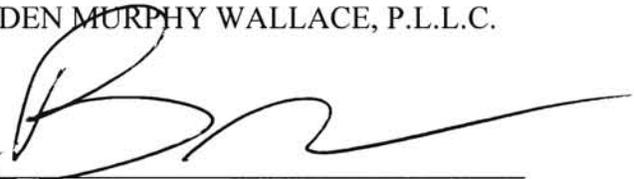
**IV. CONCLUSION**

Based on the foregoing, Swenson respectfully requests this Court affirm Chelan County Superior Court's Clarification Order and award Swenson legal fees and costs. The trial court did not abuse its discretion, and there were no procedural errors.

Alternatively, if this Court finds a procedural error occurred that could have materially affected the outcome of Swenson's Motion to Clarify, Swenson requests this Court remand the matter back to the trial court for the parties to follow the appropriate procedure. Reversal is not appropriate, as Weeks requests. The trial court must still clarify its Ruling to more specifically define the scope of the Adverse Possession Area.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of May, 2013.

OGDEN MURPHY WALLACE, P.L.L.C.

By 

Brian A. Walker, WSBA #26586  
Attorneys for Respondents  
John and Claudia Swenson

## **APPENDIX**

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**FILED**

DEC 14 2012

Kim Morrison  
Chelan County Clerk

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

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JOHN and CLAUDIA SWENSON,  
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vs.

ALAN F. WEEKS, individually  
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WEEKS,

Defendants.

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) Cause No. 09-2-01058-1  
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) Court of Appeals  
) Cause No. 312496  
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**VERBATIM REPORT OF PROCEEDINGS  
MOTION TO CLARIFY**  
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BE IT REMEMBERED that the Verbatim Report of  
Proceedings was held in the above-entitled and numbered  
cause before the **HONORABLE T. W. SMALL**, Superior Court  
Judge, on September 18, 2012, at the Chelan County Regional  
Law & Justice Facility, 401 Washington Street, Wenatchee,  
Washington.

**COPY**

A P P E A R A N C E S :

FOR THE PLAINTIFFS: MR. BRIAN WALKER  
Attorney at Law

FOR THE DEFENDANTS: MR. CHRISTOPHER CONSTANTINE  
Attorney at Law

ALSO PRESENT: MR. JOHN SWENSON  
MS. CLAUDIA SWENSON  
MR. ALAN WEEKS

REPORTED BY: KAREN E. KOMOTO, CSR  
Official Court Reporter

\*\*\*\*\*

September 18, 2012, Wenatchee, WA

THE COURT: Okay. We'll take up Swenson v. Weeks, motion to clarify.

The Court previously reviewed the Motion to Clarify the Judgment, Defendants' Memorandum Opposing the Clarification, and Supplemental Declaration of Alan Weeks in Support of Preliminary Injunction.

I think that's in the other case, though. Yeah that's in the 12.

And I've got the chart showing the disputed area. And I guess your motion was the brief. So I reviewed -- no, I -- I looked at the brief filed by Mr. Weeks, in his 12 cause number, and the photos.

Ready to proceed?

MR. WALKER: I'm ready, Your Honor.

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THE COURT: Okay.

MR. CONSTANTINE: Ready, Your Honor.

MR. WALKER: Well, Your Honor, we're here on the Swensons' Motion to Clarify.

And it's kind of an unusual hearing for me, because I'm, basically, arguing what -- I'm here to -- really asking, what did -- what did you mean? So it's hard for me to argue, rather than just stand up and say, "Your Honor, what did you mean?"

But I'm going to --

THE COURT: You could just ask, and I'll tell you.

MR. WALKER: And that may short circuit the whole thing. But I'll -- I'll -- I'll tell you what the Swensons understood you meant. And you can just tell us if they were right or not.

And, if the Swensons were right, I think the new lawsuit filed by Mr. Weeks is most likely resolved.

If the Swensons were wrong, then the Swensons need to move part of their improvements, which they're prepared to do.

The Swenson home, they believe -- if you look at some of the photos attached -- whoops, the photos attached to what would have been my motion to clarify, Your Honor.

THE COURT: Uh-huh.

1 MR. WALKER: There were a number of photos,  
2 but the one that I like the best, because I think it tells  
3 the Swensons' story the best, is the one that shows what  
4 they call the "lower deck."

5 What -- what they did, Your Honor, is they went  
6 from the southwest corner of the lower deck, out three feet,  
7 and then measured, to get -- to get the jog, or the  
8 transition point.

9 And their logic was that the language in your  
10 memorandum was, "Transition from 25 feet to 17 feet, at a  
11 point three feet from the southwest corner of the  
12 plaintiff's home."

13 That deck had been built by Mr. Weeks. It was  
14 part of the property that was sold to the Swensons. And  
15 that was -- when the Swensons were using the adverse  
16 possession area. That was -- that was kind of a reference  
17 point for them, in that use.

18 Which is why, when they went ahead, and were  
19 interpreting your ruling, they measured from that point.

20 Mr. Weeks, as I understand it, wants the  
21 measurement to occur from the -- the foundation corner of  
22 the house, itself. And that's really the -- that's really  
23 the rub of these issues, Your Honor.

24 But I'd just like to emphasize, Your Honor, I  
25 think if -- however you rule today, probably takes care of

1 the newest lawsuit. Because if you rule -- if you -- if you  
2 clarify to the extent that Mr. Weeks' interpretation is  
3 correct, then the Swensons will just move whatever's  
4 encroaching.

5 If you rule in favor of the Swensons, then there's  
6 really nothing to do, Your Honor. Thank you.

7 MR. CONSTANTINE: Response. Christopher  
8 Constantine, for Weeks.

9 A motion to clarify is only permitted in a very  
10 limited circumstance. The Court can only -- in a motion to  
11 clarify -- can only declare what rights have been given,  
12 under a judgment. It's not a vehicle to expand the rights  
13 given in a judgment.

14 And we've cited to the Court the Kemmer v. Keiski  
15 case, in which the Court of Appeals emphasized that -- just  
16 those points, that it's -- it does not -- the motion to  
17 clarify does not create new rights.

18 And, essentially, that's what the Swensons are  
19 asking, here. They're asking the Court to change the  
20 boundary of the adverse possession area, that's defined  
21 in -- in -- on Page 8 of the Court's memorandum decision, of  
22 July 2011. And extend the -- the boundary at the point  
23 where it jogs from 25 feet to 17 feet, extend that boundary  
24 from three feet to 11 1/2 feet.

25 And the Court simply does not have the authority,

1 many months after entry of the final judgment, to add that  
2 additional property to the adverse possession area. It  
3 would rob the Court's judgment of any finality.

4 We'd urge the Court not to -- not to -- not to go  
5 there.

6 Now, what -- what the Court -- what Court -- what  
7 can the Court do with a motion to clarify?

8 The Court can clarify an ambiguity, as -- as the  
9 Court discussed in the Gimlet case, which we cited to the  
10 Court.

11 But, here, we have not heard, this morning, nor  
12 have we seen in their moving papers, any suggestion that any  
13 portion of what the Court wrote was ambiguous. Where's the  
14 ambiguity?

15 So, absent any ambiguity, there -- there is no  
16 grounds for a motion to clarify.

17 The Court used the word "home," on Page 8 of its  
18 memorandum decision. And it also said, in that same  
19 sentence -- in the next following sentence -- "See attached  
20 diagram."

21 There was an Attachment B to the -- to the Court's  
22 memorandum decision.

23 And we have provided an enlarged copy of that,  
24 which is attached as Exhibit 2, to the declaration --  
25 Supplemental Declaration of Alan Weeks.

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If the Court will -- just for a moment, this is Exhibit 1 to Mr. Weeks's declaration. This is the 2009 survey, prepared by Pinnacle -- Pinnacle Survey.

This was the document that the Court used, to include in its judgment.

This is Exhibit 2 to Mr. Weeks's declaration. The Court will note that this exhibit, which is Exhibit 2, which is -- which also appears as Attachment B to the Court's memorandum decision, of July 2012, has the same auditor's file number as the 2009 survey.

So what the Court used in its -- in its judgment, was a photocopy of the 2009 survey. And -- but there's a -- there's a feature -- several features common to both of these -- of these diagrams.

The Court will note that, on the original survey, the foundation line of the Swensons' home is -- is shown. And, yet, there are no decks shown.

Similarly --

THE COURT: Is it labeled "Foundation Line"?

MR. WALKER: I don't know how it's labeled, on that exhibit, Your Honor.

MR. CONSTANTINE: I don't believe that it is, on this -- it is on the -- Exhibit 4, which is Erlandsen's declaration.

But, if the Court will note, the -- by using the

1 foundation line, on Exhibit 2, if the Court extends out a  
2 line, from the southwest corner of the Swensons' home, it  
3 passes almost exactly through the point at which that jog  
4 occurs.

5 The Swensons would have the Court believe that the  
6 jog occurs approximately eight and a half feet south of  
7 there. And there's no support for that position.

8 I think, by doing the same thing on Exhibit 1, on  
9 the -- on the 2009 survey, if the Court extends the south  
10 boundary of the Swensons' home, extends that line out, from  
11 the southwest corner, it will intersect what appears on  
12 the -- on the survey, as the raised planter bed.

13 And, so, the Court can see that, when it wrote its  
14 decision, it said, Three feet southwest -- three feet south  
15 of the southwest corner, by -- by writing in that dimension,  
16 the Court captured the planter bed that the Swensons had --  
17 had used.

18 I think that was the purpose for the three feet,  
19 as opposed to some other dimension.

20 So, by extending the -- the adverse possession  
21 boundary, three feet from the southwest corner, the Court  
22 accomplished the effect of capturing the planter box, within  
23 the adverse possession area.

24 Now, turning to -- I'm -- I think we might be  
25 getting into the essence of our -- our motion.

1           Would the Court want me to continue on this line?

2           THE COURT: No.

3           MR. CONSTANTINE: Okay.

4           THE COURT: Folks, I -- I think Mr. Walker  
5 hit it, and I think Mr. Constantine hit it. And that's why  
6 we have court hearings. Because you're both right.

7           The -- when the Court made its determination of  
8 indenting, it was because of these trees. The Court  
9 determined that there wasn't -- they weren't that size --  
10 the size they were at the time of the trial -- for the  
11 entire adverse possession period.

12           And the point of the line coming off the home was,  
13 basically, giving room for the trees that were already on  
14 the property, because the other trees that were off the  
15 property, were in the same line. And -- and that was the  
16 Court's intent.

17           When it meant "home," I assumed that this drawing  
18 included the deck. Obviously, it didn't, now that this  
19 motion's been brought. But that was the intent of what the  
20 Court meant by "home"; including -- the deck was part of the  
21 home. Because you can't grow a tree through a deck.

22           So that -- that was the Court's intent. And I  
23 think "home" is ambiguous. And I think, while, ultimately  
24 that results in an area more than what the Court's drawing  
25 was, because the Court's drawing was assuming that footprint

1 included the deck, I don't think it violates the rule, in  
2 the -- in the Kemmer case.

3 Because I agree, the Kemmer case says you cannot  
4 expand. And -- and I don't think the Court's expanding it.  
5 It's simply clarifying what it meant by "home." And that  
6 meant the deck that was there, when the trees were planted,  
7 originally. And we narrowed it, because the trees weren't  
8 that big.

9 So that was the Court's intent.

10 So I guess the motion's granted.

11 MR. WALKER: Yeah. I'll prepare an order.  
12 Just to get sure it's clarified.

13 Thank you, Your Honor.

14 I'll circulate the order, and we'll note it up, if  
15 we need to.

16 THE COURT: Okay.

17 MR. WALKER: Thank you.

18 THE COURT: Did this get filed?

19 MR. CONSTANTINE: Your Honor --

20 THE COURT: Because I really want this filed.

21 MR. CONSTANTINE: There is a copy of that  
22 attached, as Exhibit 4, to Mr. Weeks's supplemental  
23 declaration.

24 No, excuse me -- excuse me; Exhibit -- Exhibit 3.  
25 That's the May 2012 sketch drawing by Mr. Hollingsworth,

1 that's Exhibit 3 to Mr. Weeks's supplemental declaration.

2 THE COURT: Okay. Yeah, we've got it. All  
3 right.

4 Okay.

5 MR. WALKER: Thank you.

6 (Concluded at 9:45 a.m.)

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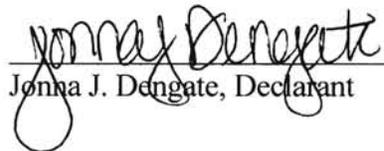
**CERTIFICATE OF MAILING**

I, JONNA J. DENGATE, hereby certify and declare under penalty of perjury under the laws of the state of Washington as follows:

1. That I am an employee of the law firm of OGDEN MURPHY WALLACE, P.L.L.C., over the age of eighteen (18), and competent to be a witness herein.
  
2. That on the 17<sup>th</sup> day of May 2013, the foregoing **BRIEF OF RESPONDENTS** was served on the following as follows:

- |                                     |                       |                         |
|-------------------------------------|-----------------------|-------------------------|
| <input checked="" type="checkbox"/> | First Class U.S. Mail | Attorney for Appellants |
| <input type="checkbox"/>            | UPS Overnight Mail    | Christopher Constantine |
| <input checked="" type="checkbox"/> | E-Mail                | PO Box 7125             |
| <input type="checkbox"/>            | Facsimile             | Tacoma, WA 98417-0125   |
| <input type="checkbox"/>            | Messenger             |                         |
| <input type="checkbox"/>            | Overnight Delivery    |                         |

DATED this 17<sup>th</sup> day of May, 2013, at Wenatchee, Washington.

  
\_\_\_\_\_  
Jonna J. Dengate, Declarant