

64504-8

64504-8

NO. 64504-8-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

JUDITH ANDERSON, a single woman,

Respondent,

v.

RICHARD ANDERSON and MARGARET ANDERSON,  
husband and wife,

Appellants.

---

REPLY BRIEF OF APPELLANTS

---

GARY W. BRANDSTETTER, WSBA #7461  
Attorney for Appellants  
Rich and Margaret Anderson

1024 First Street, Suite 103  
Snohomish, Washington 98290  
(425) 334-4366

2019 MAR 29 PM 3:11  
COURT OF APPEALS  
DIVISION I  
CLERK OF COURT  
JENNIFER L. HARRIS

**TABLE OF CONTENTS**

I.	Reply to Judy's [Counter] Statement of the Case . . . . .	1
II.	CR 41(a)(3) Was Not Considered by the Trial Court -- to Rich's Extreme Prejudice . . . . .	6
III.	Judy Made Her Misrepresentation Claim In Order to Avoid the Merits . . . . .	10
IV.	Judy's Mootness and Lack of Standing Arguments Continue to Ignore Differences Between Record and Non-Record Ownership . . . . .	14
V.	Conclusion: Connecting the Dots . . . . .	24
	<b>CERTIFICATE OF SERVICE . . . . .</b>	<b>26</b>

**TABLE OF AUTHORITIES IN THIS REPLY BRIEF**

---

*Barber v. Peringer*, 75 Wn App 248,  
877 P.2d 223 (1994) . . . . . 20, 21, 22

*Farmers v. Dietz*, 121 Wn App 97, 87 P.3d 769 (2004) . . . . . 8

*Magart v. Fierce*, 35 Wn App 264, 666 P.2d 386 (1983) . . . . . 15

*Maier v. Giske*, 154 Wn App 6, 223 P.3d 1265 (2010) . . . . . 15

*Pace v. Southern Express Co.*, 409 F.2d 331,  
13 Fed.R.Serv. 2d 1062 (7th Cir. 1969) . . . . . 8, 9

*Pearson v. Gray*, 90 Wn App 911, 954 P.2d 343 (1998) . . . . . 15

*Piotrowski v. Parks*, 39 Wn App 37, 691 P.2d 591 (1984)  
*rev. den.* 103 Wn2d 1014 (1985) . . . . . 15, 16

*Ross v. Kirner*, 162 Wn2d 493, 172 P.3d 701 (2007) . . . . . 6, 14

*Snohomish County v. Anderson*, 124 Wn2d 834,  
881 P.2d 240 (1994) . . . . . 15

**COURT RULES**

CR 41 . . . . . 3, 6, 7, 8

RAP 9.12 . . . . . 6

SCLCR 7(I) and (J) . . . . . 8

**OTHER AUTHORITIES**

BLACK’S LAW DICTIONARY . . . . . 23

Cunningham, Stoebuck & Whitman,  
*The Law of Property* §11.8 (West 1984) . . . . . 16

Stoebuck & Weaver, 17 WASH PRAC; REAL ESTATE:  
PROPERTY LAW §8.18 (Thomsen/West 2004) . . . . . 17

Stoebuck & Weaver, 18 WASH PRAC §13.4 (2004) . . . . . 21

TABLE OF AUTHORITIES CITED TO THE TRIAL COURT

(Located by CP Number)

---

*Alejandre v. Bull*, 159 Wn2d 674, 153 P.3d 864 (2007) . . . CP21, 22

*Angell v. Hadley*, 33 Wn2d 837, 207 P.2d 191 (1949) . . . . . CP98

*Ashford v. Reese*, 132 Wash 649, 233 Pac 29 (1925) . . . . . CP266

*Bingham v. Sherfey*, 38 Wn2d 886,  
234 P.2d 489 (1951) . . . . . CP409, 263, 179

*Burris v. General Insurance Co. of America*, 16 Wn App 73,  
553 P.2d 125 (1976) . . . . . CP413, 269, 181

*Cady v. Kerr*, 11 Wn2d 1,  
118 P.2d 182 (1941) . . . . . CP411, 265, 266, 170, 180

*Cascade Security Bank v. Butler*, 88 Wn2d 777,  
567 P.2d 631 (1977) . . . . . CP266

*Celotex Corp v. Catrett*, 477 US 317, 106 S.Ct. 2548,  
91 L.Ed 2d 265 (1986) . . . . . CP106

*Chaplin v. Sanders*, 100 Wn2d 853, 676 P.2d 431 (1984) . . . CP107

*Clausing v. Kassner*, 60 Wn2d 12, 371 P.2d 633 (1962) . . . . . CP98

*Davidson v. Henson*, 85 Wn App 187, 933 P.2d 1050,  
*aff'd* 135 Wn2d 112, 954 P.2d 1327 (1997) . . . CP268, 269, 71

*Downie v. Renton*, 162 Wash 181, 298 Pac 454 (1931) . . . . . CP99

*Dykstra v. County of Skagit*, 97 Wn App 670, 985 P.2d 424,  
*rev. den.*, 140 Wn2d 1016, 5 P.3d 8 (1999) . . . . . CP74, 28

*El Cerrito, Inc. v. Ryndak*, 60 Wn2d 847,  
376 P.2d 528 (1962) . . . . . CP99

*Fox v. Sackman*, 22 Wn App 707, 591 P.2d 855 (1979) . . . . . CP101

<i>Gray v. McDonald</i> , 46 Wn2d 574, 283 P.2d 135 (1955) . . . . .	CP99
<i>Halverson v. Bellevue</i> , 41 Wn App 457, 704 P.2d 1232 (1985) . . . . .	CP99
<i>Herzog Aluminum v. Gen. American</i> , 39 Wn App 188, 692 P.2d 867 (1984) . . . . .	CP72
<i>In re Estate of Crane</i> , 9 Wn App 853, 515 P.2d 552 (1973), <i>rev. den.</i> , 83 Wn2d 1006 (1974) . . . . .	CP101
<i>Iwai v. State of Washington</i> , 129 Wn2d 84, 915 P.2d 1089 (1996) . . . . .	CP106
<i>Johnson v. Rothstein</i> , 52 Wn App 303, 759 P.2d 471 (1988) . . . . .	CP106
<i>Johnston v. Monahan</i> , 2 Wn App 452, 469 P.2d 930 (1970) . . . . .	CP17
<i>Kay Corp. v. Anderson</i> , 72 Wn2d 879, 436 P.2d 459 (1967) . . . . .	CP98
<i>Kesinger v. Logan</i> , 113 Wn2d 320, 779 P.2d 263 (1989) . . . . .	CP106
<i>King Co. v. Hagen</i> , 30 Wn2d 847, 194 P.2d 357 (1948) . . . . .	CP99
<i>Lamm v. McTighe</i> , 72 Wn2d 587, 434 P.2d 565 (1967) . . . . .	CP69, 15, 16
<i>Lauritzen v. Lauritzen</i> , 74 Wn App 432, 874 P.2d 86 (1994) . . . . .	CP106
<i>Magart v. Fierce</i> , 35 Wn App 264, 666 P.2d 386 (1983) . . . . .	CP410, 259, 260, 261, 265, 178
<i>Marquis v. Spokane</i> , 130 Wn2d 97, 922 P.2d 43 (1996) . . . . .	CP106
<i>Marshall v. AC&amp;S Inc.</i> , 56 Wn App 181, 782 P.2d 1107 (1989) . . . . .	CP252
<i>Marshall v. Bally's Pacwest, Inc.</i> , 94 Wn App 372, 972 P.2d 475 (1999) . . . . .	CP252

<i>McInnis v. Day Lbr Co.</i> , 102 Wash 38, 172 Pac 844 (1918) . . .	CP99
<i>Morrison v. Basin Asphalt Co.</i> , 131 Wn App 158, 127 P.3d 1 (2005) . . . . .	CP405, 261, 262, 170, 179
<i>Mugaas v. Smith</i> , 33 Wn2d 429, 206 P.2d 332 (1949), 9 ALR2d 846 (1950) . . . . .	CP99
<i>NW Cities Gas Co. v. Western Fuel Co.</i> , 13 Wn2d 75, 123 P.2d 771 (1942) . . . . .	CP99
<i>Northwest Line Constructors v. PUD</i> , 104 Wn App 842, 17 P.3d 1251 (2001) . . . . .	CP74
<i>Olympic Fish Products, Inc. v. Lloyd</i> , 93 Wn2d 596, 611 P.2d 737 (1980) . . . . .	CP106
<i>Peeples v. Port of Bellingham</i> , 93 Wn2d 766, 613 P.2d 1128 (1980), <i>overruled on other grounds</i> <i>but quoted with approval in Chaplin v. Sanders</i> , 100 Wn2d 853, 863, 676 P.2d 431 (1984) . . . . .	CP107
<i>Piotrowski v. Parks</i> , 39 Wn App 37, 691 P.2d 591 (1984) . . . .	CP17
<i>Radobanko v. Automated Equip. Corp.</i> , 510 F.2d 540, (9th Cir. 1975) . . . . .	CP252
<i>Seven Gables Corp. v. MGM/US Entertainment Co.</i> , 106 Wn2d 1, 721 P.2d (1986) . . . . .	CP107
<i>Shelton v. Strickland</i> , 106 Wn App 45, 21 P.3d 1179, <i>rev. den.</i> 145 Wn2d 1003 (2001) . . . . .	CP99
<i>Sisson v. Koelle</i> , 10 Wn App 746, 520 P.2d 1380 (1974) . . . .	CP99
<i>Smith v. Anderson</i> , 117 Wash 307, 201 Pac 1 (1921) . . . . .	CP411, 266, 267, 170, 171, 179, 180
<i>State v. James</i> , 108 Wn2d 483, 739 P.2d 699 (1987) . . . . .	CP100
<i>State v. Stockdale</i> , 34 Wn2d 857, 210 P.2d 686 (1949) . . . . .	CP99

<i>State ex rel Young v. Crookham</i> , 290 Or 61, 618 P.2d 1268 (1980) . . . . .	CP100
<i>Strom v. Arcorace</i> , 27 Wn2d 478, 178 P.2d 959 (1947) . . . . .	CP100
<i>Summit-Waller Citizens Ass'n v. Pierce County</i> , 77 Wn App 384, 895 P.2d 405 (1995) . . . . .	CP106
<i>Thompson v. Bain</i> , 28 Wn2d 590, 183 P.2d 785 (1947) . . . . .	CP264, 98, 100, 17
<i>Turner v. Creech</i> , 58 Wash 439, 108 Pac 1084 (1910) . . . . .	CP98
<i>Washington Securities and Investment Corp v. Horse Heaven Heights, Inc.</i> , 132 Wn App 188, 130 P.3d 880 (2006) . . . . .	CP412, 267, 268, 181
<i>White v. State</i> , 131 Wn2d 1, 929 P.2d 396 (1997) . . . . .	CP106-107
<i>Winans v. Ross</i> , 35 Wn App 238, 666 P.2d 908 (1983) . . . . .	CP98
<i>Windsor v. Bourcier</i> , 21 Wn2d 313, 150 P.2d 717 (1944) . . . . .	CP264, 17
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn2d 216, 770 P.2d 182 (1989) . . . . .	CP106

**STATUTES:**

RCW 4.84.185 . . . . .	CP413, 414
RCW 64.04.010 . . . . .	CP409, 77, 92, 15
RCW 64.04.020 . . . . .	CP77, 92, 15
RCW 64.06.020 . . . . .	CP173, 20

**COURT RULES:**

CR 18 and 19 . . . . .	CP170
CR 41 . . . . .	CP26, 27, 29
CR 56 . . . . .	CP413, 67, 55, 27
RAP 9.12 . . . . .	CP67

SCLCR 7(b)(1)(A) and (B) . . . . .	CP245
SCLCR 56 . . . . .	CP57

**OTHER AUTHORITIES:**

Conway, <i>The Statute of Frauds</i> , OUTLINE OF THE LAW OF CONTRACTS (Amer Legal Pub 3d ed 1968) . . . . .	CP17
---	------

Cunningham, Stoebuck & Whitman, <i>The Law of Property</i> (West 1984) . . . . .	CP16
---	------

Hand and Smith, <i>Neighboring Property Owners</i> (Shepherds/McGraw-Hill Inc. 1988) . . . . .	CP17
---	------

1 RESTATEMENT OF THE LAW OF CONTRACTS §196-197 (ALI 1939) . . . . .	CP17
--	------

2 RESTATEMENT OF THE LAW, 2D CONTRACTS §128(1) AND 129 (ALI 1981) . . . . .	CP17
--	------

Robillard and Bouman, A TREATISE ON THE LAW OF SURVEYING AND BOUNDARIES (aka CLARK ON SURVEYING AND BOUNDARIES) §20.02, pgs.664-669 (Lexis 7th ed 1997) . . . . .	CP17
--	------

Stoebuck & Weaver, 17 & 18 WASHINGTON PRACTICE (West 2d 2004) . . . . .	CP264, 266, 100, 18, 22, 23
--	-----------------------------

Tegland & Ende, 15A WASHINGTON PRACTICE: WASH HDBK ON CIVIL PROCEDURE (West 2000) . . . . .	CP71, 77, 83, 100, 101, 108
---	-----------------------------

2 Tiffany, LAW OF REAL PROPERTY, Chapter 11, §653, p.680 (Callahan & Company 1939) . . . . .	CP17
---	------

Washington Supreme Court Committee on Jury Instructions, 6 WASH PRAC: WASHINGTON PATTERN JURY INSTRUCTION Nos. 160-02 and 03, pp.668-671 (West 1989) . . . . .	CP83
--	------

## I. Reply to Judy's [Counter] Statement of the Case

Judy's [Counter] Statement of the Case is concise, but glosses over, ignores and, therefore, fails to deny, important facts. They include:

1. Judy's Letter of Understanding -- and three other documents which she and/or her late husband, Charlie, authored, signed and, in two cases, had notarized -- specifically acknowledged that what Judy now calls the "hypothetical" Voorheis Survey was the basis of their purchase. *See generally* CP278-288. And more specifically:

a. At the time of sale the 4x4 cement monuments with brass discs from the Voorheis survey were pointed out to Judy and Charlie. *See e.g.* CP291, NE and SE corners of Jones Parcel B. Jones' SE corner is also the NE corner of Judy's Tract 3. CP285.

b. Further, monuments were placed and existed at the east corners of Tracts 1, 3 (Judy's) and 5, as well as the west corners of Tracts 2 (Rich's), 4 (Judy's) and 6. CP285, ¶3. *See also* CP278, ¶3.

c. Fencelines, driveways, building structures and underground power lines "were dimensioned and placed ... based on the survey performed by the Voorhes [*sic* Voorheis] engineering firm." CP280, ¶2. *See also* CP285, ¶4; CP278, ¶3; and CP283, ¶2.

d. Judy now claims ownership is based on the Cascade survey, even though in 1998 she signed a notarized letter which stated that "[T]he appropriate boundary lines are those reflected by the cement monuments, the Voorheis survey, and the fences." CP285, ¶5.

2. Judy knew Rich was trying to sell his Tract 2 two (2) months before she filed her lawsuit. At that time Judy advised Rich that

he needed to disclose the boundary dispute between them to any potential purchaser. CP 294-295 and CP564-566. The message was that, if Rich wanted to sell, he would have to accept Judy's Cascade Survey or he might never be able to sell because nobody was going to buy a lawsuit.

3. But, significantly, Rich sold only the undisputed portion of Tract 2 to Masseys by identifying the Cascade Survey as the boundary survey. CP75-76; 113-114; 184-186; 197-198, p.25, line 5 - p.26, line 7; 432; 453 and 458. *See also* CP419, ¶2; CP342-360, esp. 344-345, ¶s 4&5; and CP79, line 19 - 80, line 15. Moreover, Rich also pointed out to Masseys the other [Voorheis] line as an extension of the Jones fence to the east, and told Masseys that the other line was of "no concern" to them, which Mr. Massey said he "took to heart." CP194, p.12, line 17-p.13, line 19; CP196, p.18; CP197-198, p.24, line 15-p.26, line 7; CP206, p.60, line 18-p.61, line 20; CP207, p.65, line 14-p.68, line 14; and CP77, line 21-p.82, line 12.

4. Judy requested that Rich sign a Stipulated Order of Dismissal only after a Clerk's Notice of Dismissal. CP492-494; 545-546. Although Judy asserted that "the [boundary] problem does not exist with the new neighbors" (Rich's purchasers the Masseys), she did not indicate the issue was moot or that Rich had lost standing. CP492. *See also*

CP489-490 and CP403, ¶s 7-11. To the contrary:

a. 4½ months after the sale, Judy propounded 9 Interrogatories and 12 Requests for Production. CP430 and 83-84.

b. Another 1 month later, 5½ months after the sale, she demanded that Rich amend his Answer in order to include Counterclaims. CP391 and 271, lines 9-10. Counterclaims should have made Voluntary Dismissal of Judy's Complaint impossible under CR 41(a)(3).

c. Judy therefore fails to answer the question: "Why did she require an Amended Answer with Counterclaims (which should have prevented Voluntary Dismissal of her Complaint) if she felt that mootness and lack of standing were applicable?"

5. Before signing a Stipulated Order allowing Rich to file an Amended Answer With Counterclaims, Judy demanded the trial date be continued (from May to September). CP392-394; 386, ¶s A&B; and 9, ¶s 10&11. Moreover, because the Amended Answer was not filed immediately (CP527-540), Judy could still have moved for Voluntary Dismissal, but did not. CP510-521.

6. Instead, 3 months later and 9 months after the sale to Masseys, Judy demanded discovery responses and pointed out that the Amended Answer With Counterclaims needed to be filed. Appendix B to Rich's opening Brief, ¶s 2 and 3. Once filed (CP510-521), Voluntary Dismissal should have become impossible unless the Counterclaims would "remain pending for independent adjudication". CR 41(a)(3).

7. Rich moved for Summary Judgment on 07/16/09 (CP495) supported by 10 Declarations. CP105. Judy filed 13 days later. CP402.

a. For the first time Judy's Motion asserted mootness and lack of standing (CP404), two doctrines which would not even be pleaded for another 13 days. CP370-378, esp. 376, ¶s 3 & 4.

b. It was supported by only 2 Declarations, only 1 of which asserted a non-existent agreement as the factual basis for mootness and neither of which asserted any factual basis for an alleged lack of standing. CP485-494.

c. Judy's Motion was also hastily scheduled for argument on the last possible day before the trial, August 25, 2009. CP56, n.2.

d. This was a date which Judy's counsel had known since February (5 months earlier) was unavailable to Rich's counsel (CP395), who had also filed a Notice of Unavailability -- reminding Judy's counsel of that fact -- on the same day as Rich's Motion was filed. CP396.

8. Most extraordinarily, however, Judy's counsel also sent Judy's Motion (82 pages) and Declarations (9 pages) to Judge Weiss who was scheduled to hear Rich's Motion, but not Judy's. CP402-494. Two letters to Judge Weiss also suggested that Judy's Motion should be argued at the same time as Rich's, if not first. CP397-399.

9. Further, on August 10, 2009 the paralegal for Judy's counsel then made an *ex parte* inquiry to Judge Weiss' clerk about whether Judge Weiss was going to require that both Motions be heard at the same time. As a result, Judge Weiss directed that, due to "the volume

of case [*sic* cases] on civil motions," there should be a special setting and the trial continued. Appendix D to Rich's opening Brief, pages 1&3.

10. Rich's Motion dealt with one issue: the Common Grantor's Voorheis Survey and its establishment of all visible boundaries in the area. Because it was supported by 10 Declarations it was comprehensive, but not "legally complex." CP104-108. At 91 total pages, Judy's Motion with Declarations was voluminous. CP402-494. It argued mootness, lack of standing, the Statute of Frauds and alleged misrepresentation by Rich against Masseys -- non-party third parties. Therefore, it would be "legally complex" if both Motions were argued at the same time. CP623.

11. Moreover, Judy's misrepresentation claim was based on Rich's misunderstanding about what both Rich's and Masseys' dual real estate agent had provided as part of Rich's Form 17 disclosures. CP342-360, esp 346, 347, ¶9&10 and 354-355. Significantly:

a. The misrepresentation claim was not "supported" by any declaration or deposition testimony from anyone -- until Judy's Reply to her own Motion was filed.

b. The misrepresentation concocted from the mistake was disputed, and should have been rendered insupportable based on the Declaration of dual real estate agent, Fred Iacolucci. CP342-360.

c. Nevertheless, the Trial Court apparently concluded

misrepresentation had occurred. CP65 and 82-83, Line 13 and n.8.<sup>1</sup>

d. Because Rich had no opportunity to rebut any "support" for this argument in Judy's Reply, he had to do so through his Motion for Reconsideration. CP83-87.

12. After Judge Weiss directed that the trial be continued, Rich filed a new Calendar Notice for Judge Weiss' special setting date. CP361-362. Contrary to his two letters to Judge Weiss, however, Judy's counsel "regularly set" her Motion (page 3-4) before Judge Lucas for an earlier date. CP368-369. As a result, the merits of Rich's Counterclaims, which Judy insisted be pleaded, were never considered, heard or reached. This is contrary to Judy's first argument, addressed next.

## **II. CR 41(a)(3) Was Not Considered by the Trial Court -- to Rich's Extreme Prejudice**

At the bottom of page 5 of her Brief Judy asserted that:

... The entire focus of the proceeding below was on Rich's counterclaim. It was exhaustively addressed, reconsidered and in short fully adjudicated.

Moreover, Judy acknowledges that CR 41(a)(3) was supposed to

---

<sup>1</sup> Judy's Brief cites *Ross v. Kirner*, 162 Wn2d 493, 172 P.3d 701 (2007) at pgs 14, 31 and 33 regarding "merger," a topic never addressed in the Trial Court, so improper under RAP 9.12. Ironically, the case not only held merger was not applicable, it also involved a misrepresentation claim which the Supreme Court held could not possibly have been determined by summary judgment and so remanded for trial. The Trial Court's apparent conclusion that misrepresentation occurred was subject to a similar error. Summary Judgment, especially of an irrelevant and disputed misrepresentation claim against a third party non-party, was error because of credibility issues. CP77 and 83.

guarantee "an independent adjudication" (page 5) of Rich's Counterclaim before Voluntary Dismissal of her complaint was allowed. Judy also contends that Rich's Counterclaim received "the full consideration it warranted" (page 6). But these statements are completely inconsistent with Judy's repeated admissions, at pages 10, 36 and 38-40 of her Brief, that the merits of Rich's Counterclaim were *not* before the Trial Court, then arguing they may *not* be considered by this Appellate Court either.

Judy can't have it both ways; either Rich's Counterclaim received a full independent adjudication or it did not. And clearly it did not, as pages 10, 36 and 38-40 of Judy's Brief attest. Moreover, the whole purpose of Judy's last minute filing (CP56, n.2) of her previously unpleaded, and then pleaded 13-days-after-the-fact (CP370-378, esp. 376, ¶3&4), assertions of mootness and lack of standing was to *avoid reaching the merits*. CP397-399 CP404, lines 1-4; CP48, ¶A, lines 19-20; CP49, lines 22-23; and CP98, lines 17-18.

Equally incorrect is Judy's introductory statement (pg 4) that "Rich briefed the [CR 41] issue." First, Judy never made any reference to CR 41. Further, despite mentioning "Dismissal of Plaintiff's Complaint" in the title of her motion, Judy never used that language in briefing her motion. CP404, line 10; 412, line 24; and 413, lines 19-21. Therefore,

CR 41 was not "briefed" by anyone. Whether or not intentional, no language even discreetly echoing CR 41 appeared until Judy presented her Order *after* argument before the Trial Court. This Order was first seen *after* argument because no proposed Order was included with her Motion, as is the Snohomish County custom. SCLCR 7(I) and (J).

Judy's citation to CP26 and 27 at page 4 of her Brief is to Rich's *Reply to Rich's Motion for Reconsideration*. *See also* CP29, lines 16-20. Clearly, that "briefing" was well after-the-fact. Further, the only observation Rich was able to make was that Judy's argument -- that any standing provided by suing Rich ended with dismissal of her Complaint -- was contrary to CR 41(a)(3).

Most importantly, Judy acknowledges (page 5, middle) that the purpose of CR 41(a)(3) is to assure that, by Voluntary Dismissal of a complaint against which a Counterclaim has been filed, a defendant "would not be thereby prejudiced." Yet this Division in *Farmers v. Dietz*<sup>2</sup> noted that the federal district court in *Pace v. Southern Express Co.*<sup>3</sup> had been justified in *denying* a CR 41 Motion to dismiss because (1)

---

<sup>2</sup> 121 Wn App 97, 107 n.25, 87 P.3d 769 (2004).

<sup>3</sup> 409 F.2d 331, 13 Fed.R.Serv 2d 1062 (7th Cir. 1969).

the case had been pending for 1½ years, (2) considerable discovery had been undertaken at substantial cost to the defendant and (3) the defendant had already "briefed" its motion for summary judgment.

In the instant case, (1) litigation had been pending 2¼ years (CP 566 & 402), (2) considerable discovery (Judy's 9 Interrogatories and 12 Requests for Production propounded to Rich, CP430 and 84 and Judy's deposition CP292-293) had also been undertaken at substantial cost to Rich, and (3) Rich had not only already briefed, but also filed his Motion for Summary Judgment on the merits. CP495, 104-108 and 162. Moreover, Rich's Motion was supported by a total of 10 declarations.<sup>4</sup> Further, Rich's Motion was filed almost 2 weeks before Judy filed her Motion requesting Voluntary Dismissal of her Complaint under the guise of mootness and lack of standing. CP402.

Compared to *Pace v. Southern Express Co.*, Rich suffered *extreme prejudice* by the granting of Judy's Motion without the opportunity for "an

---

<sup>4</sup> Five were from 3 former and 2 present owners, 3 of whom had their legal descriptions reformed by using the Cascade methodology in order to describe the Voorheis lines. CP709-733, 841-955 & 1094-1111. Another 2 declarations were by surveyors, one of them the original Voorheis surveyor who still, although in his 80's, is a licensed surveyor in Colorado who has been licensed in 5 states during his 54 year professional career. CP1015-1093. *See also* 777-796. And another declaration, together with aerial photographs from 13 different years, was from DNR Photogrammetrist Terry Curtis whose analysis (noting a "persistent" line of occupation) was also furnished to Judge Lucas in the Trial Court below in response to Judy's Motion. CP297-341.

independent adjudication" of the merits of his Counterclaims. CP510-521. That extreme prejudice should be remedied by granting Rich's appeal and, at a minimum, remanding this matter to Judge Weiss in the Superior Court for a decision on the merits of Rich's Motion.<sup>5</sup>

### **III. Judy Made Her Misrepresentation Claim In Order to Avoid the Merits<sup>6</sup>**

Rich's opening Brief at pages 33-36 gave the background from which Judy concocted her misrepresentation claim. Summarizing chronologically, Judy's original Motion had no declaration or deposition testimony to support the misrepresentation claim. Judy just used materials she received in discovery (CP430-469), (esp. the Sinclair Addendum), which Rich mistakenly thought Fred Iacolucci supplied to Masseys along with Form 17. CP342-360, esp. 346, ¶9, lines 20-23 and CP237. Judy

---

<sup>5</sup> If this Court will do what the Trial Court obviously did not do -- take a few minutes to examine the aerial photographs from 13 different years analyzed in the Declaration of DNR Photogrammetrist Terry Curtis (CP297-341), as well as the four written (two of which were notarized) statements by Judy and her late husband (CP278-288) admitting that "the appropriate boundary lines are those reflected by the cement monuments, the Voorheis survey and the fences" (CP285 bottom) -- it will be clear that Rich's Motion should have been considered, heard and reached. If it had been, it would have been granted and Judy's disputed, if not unsupported, Motion regarding mootness and lack of standing would never have been granted. *De novo* review here could avoid a remand.

<sup>6</sup> §V of Judy's Brief at page 35 asserts in its title that Judy did not accuse Rich of misrepresentation in his sale to Masseys. Judy adds, however, that the real argument in support of this assertion is in §IV.E (located at pages 32-34) of her Brief. This is an error. It is actually §III.E at pages 19-24.

asserted these were all "phony" documents. CP429-469, esp. 465-467.

Both Rich's and Darren Massey's depositions were taken *after* Judy filed her Summary Judgment Motion (CP400), but *before* Rich filed his Response. CP56 n.2; 172, lines 4-7; 72-73 and Appendix C. Judy tried to make her misrepresentation claim the focus of both depositions. Therefore, as part of Rich's response to Judy's Motion, the dual real estate agent for both parties, Fred Iacolucci, provided a declaration. It explained Rich's misunderstanding about what was supplied as part of Rich's Form 17 disclosure. CP342-360, esp 346, ¶9. It also established that Rich's answer to the Form 17 question about "boundary disputes" had been changed from "Yes" to "No" because there was no "dispute" about the property within the Cascade line. CP345-346, ¶7. Accordingly, Mr. Iacolucci's Declaration should have ended Judy's misrepresentation claim because it established the documents were not "phony."

Instead, however, Judy's Reply cherry-picked Rich's deposition to "support" her misrepresentation claim, (CP183-188, 213-214 and 236-239), made Darren Massey's entire deposition an exhibit (CP190-212) and included the draft declaration Rich initially asked Mr. Massey to sign (CP215-229), as well as some emails between Rich and Mr. Massey documenting Rich's mistaken assumption about what was supplied. CP230

-235. But specific deposition pages and passages were never pointed to. Instead, there were loaded conclusionary accusations about "phony documents" and an alleged attempt to cheat the Masseys by not agreeing to quit claim the disputed area to them if Rich prevailed, as the Sinclair Addendum had. CP406-409; 258-259; 172-177; 85-87; 121 and 58-59.

In pages 33-36 of Rich's opening Brief in this Court, many of these points were rebutted by detailed references in Rich's Motion for Reconsideration to Judy's own Reply exhibits, especially Darren Massey's deposition. Nevertheless, Judy's Brief, after noting that Rich's proposed declaration for Mr. Massey did not include the first page of the Sinclair Addendum (CP465-467), asserts that this was "one important omission" (pg 21, middle) which Rich intentionally "withheld" (pg 22, top and bottom) from Masseys, thereby "concealing" the "phony" (CP23 top) nature of the document. And, for the first time, Judy then also adds at page 23 of her Brief that Rich's counsel was involved in this concocted misrepresentation claim. Judy writes "[I]t is quite unlikely that [Rich's] attorney was under any illusions about [the first page of the Sinclair Addendum's] significance given the nature of this ongoing litigation" because "it was Rich's attorney who 'put together' the proposed declaration and its exhibits".

But again, examination of Judy's own Reply exhibits in the Trial Court establish that the proposed Massey declaration did not "conceal" page 1 of the Sinclair Addendum. In CP217, ¶5, the proposed declaration specifically stated that "Attached as Exhibit E is a *portion* of another document which was supplied as an *Addendum* to the Real Property Transfer *Disclosure* Statement." Emphasis supplied. Exhibit E is CP225, pg 2 of the Sinclair Addendum; *i.e.* "a *portion* of the Sinclair *Addendum*."

Only a "*portion*" was supplied because Rich assumed Masseys had received both pages and the issue was whether or not Masseys were sold only the undisputed portion of Tract 2 covered by Judy's 1995 Cascade "boundary survey." That "significant" issue was only addressed on the second page of the Sinclair "*Addendum*". Moreover, the Addendum was provided because of Rich's mistaken assumption that the entire Sinclair Addendum was part of the Form 17 "*Disclosures*." It was not part of any "agreement" between Rich and Masseys, as Judy's Brief suggests at the top of page 23.

The bottom line is that while Judy says she did not accuse Rich (and his attorney) of misrepresentation, she uses loaded, emotionally-

charged words and phrases that cry out "misrepresentation."<sup>7</sup> If Rich were to use similarly emotionally-charged language, Judy's tactic would be labeled a "smear."

The tactic apparently worked in the Trial Court (CP65, 82-83 n.8 and 28-29) despite legal authority cited to it holding that misrepresentation is not a summary judgment issue. CP77 and 83. Because the Supreme Court reversed Division 2 in *Ross v. Kirner, supra*, 162 Wn2d at 499-501 and held that misrepresentation cannot be determined as a matter of law by summary judgment, Judy's tactic -- *to avoid the merits by arguing misrepresentation* -- should not work in this Court.

#### **IV. Judy's Mootness and Lack of Standing Arguments Continue to Ignore Differences Between Record and Non-Record Ownership**

Pages 11-38 of Judy's Brief repeat arguments made to the Trial Court contending (1) Rich "conveyed" everything that he originally acquired so he lacked standing and (2) thus the case is moot. Judy does cite three new cases about standing, mootness and Masseys as necessary

---

<sup>7</sup> Words and phrases like "falsely stating" pg 21, top; "important omission," pg 21, middle; "withheld," pg 22, top and bottom; "nonsense," pg 22, top 1/3rd; "concealing" and "phony," pg 23, top; "manufacturing enough (false) evidence," "no legitimate documents," and "twice improperly interjected," pg 24, top half; "unseemly" and "falsely answered," pg 25, n.5; "patently frivolous," "pure nonsense" and "hopelessly contradictory," top 1/2 pg 34.

parties,<sup>8</sup> and (improperly per 124 Wn2d at 839) adds a new argument not made in the Trial Court about "merger" of the contract into the deed. Her arguments are otherwise the same as they were below.<sup>9</sup> Perhaps because boundary disputes do involve legal principles which can be confusing, those arguments continue to be based upon the 7 false premises addressed in pages 36-46 of Rich's Opening Brief.<sup>10</sup>

---

<sup>8</sup> Judy's principal new standing case is *Snohomish County v. Anderson*, 124 Wn2d 834, 881 P.2d 240 (1994) cited at page 19 of her Brief. It was a **declaratory judgment** challenging the standing of private citizens to assert public, governmental and constitutional issues. The case did not involve private parties, private rights, property rights or any pre-existing rights. The asserted harm from the Growth Management Act was only potential, theoretical, hypothetical and academic, not "ripe" or "justiciable" as required in declaratory judgment. See Annotations after RCW 7.24.010 -.030. And the issue which the individual citizens had no direct stake in was being litigated by the cities of Lynnwood and Edmonds which had constitutional standing. 124 Wn2d at 840-842. Perhaps, most importantly, because of this the Supreme Court, affirmed the trial court's dismissal of the counterclaim and stated that it "need not reach the issue of whether the citizens have standing." 124 Wn2d at 842. Therefore, the case did *not* hold there was a lack of standing in defendants, which Judy states, based on no cited authority, are "frequently" called "counterclaim plaintiffs". *But see Maier v. Giske*, 154 Wn App 6, 223 P.3d 1265, 1274 (2010) holding distinguishably that Mrs. Giske, acting as caretaker, lacked standing under the timber trespass statute to bring a counterclaim for treble damages on property owned by her son who was not a party.

<sup>9</sup> *Magart v. Fierce*, 35 Wn App 264, 266, 666 P.2d 386 (1983), an estoppel case distinguished in CP259-61, is very selectively quoted at page 16. The key sentence deleted from Judy's quote is "If Magart's claim of ownership fails, he lacks standing..." Rich's Counterclaim has not been addressed so his standing exists until there is a denial on it's merits. See e.g. *Pearson v. Gray*, 90 Wn App 911, 915-917, 954 P.2d 343 (1998). Contrary to two other Judy arguments: (1) Masseys' contract and deed both identified the Cascade line, so there was nothing to merge; (2) Judy's notarized statements (CP278-288) acknowledge she bought based on the Voorheis survey in 1976, 19 years before the 1995 Cascade survey was even performed. Therefore, the property she owned did not adjoin Masseys because Rich reserved the disputed property between them. Therefore, Masseys are not necessary parties.

<sup>10</sup> This confusion is reminiscent of *Piotrowski v. Parks*, 39 Wn App 37, 691 P.2d 591 (1984) *rev. den.* 103 Wn2d 1014 (1985) where the record owner made a series of legal arguments based on confusion over boundary law. Division 2 systematically addressed the

It appears appropriate to begin by emphasizing two quotes from Judy. "The bottom line here is that the deeds control what was *conveyed* to and from Rich." Page 35. "[U]nder consideration here are not the merits of the boundary dispute, but rather the effect of a *conveyance*..." Page 36. In other words, Judy continues to misunderstand and/or ignore the difference between *record* rights which are *conveyed* by a deed and *non-record* rights which involve the physical act of *handing over possession* of land which has been used, possessed and occupied outside of the claimant's record legal description because it encroaches into an adjoiner's record description.

These distinctions were addressed in Rich's Response (CP264) and Motion for Reconsideration in the Trial Court. CP76-77 and 92-101. They were, however, most specifically emphasized in Rich's Reply to his Motion for Reconsideration. CP15-19 and 23-26. One of several quotes from legal authorities included in that Reply Brief was from Cunningham, Stoebuck & Whitman, *The Law of Property* §11.8 (West 1984) which was quoted at CP16 as follows:

---

error of each, although it is not reflected in the headnotes. 39 Wn App at 39-46. After 25 years, this Court could do a service for the bench and bar by discussing authorities cited and quoted at CP 15-19, 97-100 and 263-264. *See also* CP68-69 and 76-77.

None of the [boundary dispute] doctrines discussed here require a writing satisfying the Statute of Frauds, ... The Courts do *not* consider a transfer to take place; instead, they hold the boundary in question has simply been redefined or reconstructed by the parties' actions. (Author's emphasis.)

In other words, the Statute of Frauds has absolutely nothing to do with the handing over of non-record rights to property outside the record legal description in a deed. Instead, the possession of non-record rights is turned over, which in boundary litigation is referred to as "tacking." At CP18-19, Stoebuck & Weaver, 17 WASH PRAC; REAL ESTATE: PROPERTY LAW §8.18 (Thomsen/West 2004) was quoted at length and is repeated in applicable part here:

Since [non-record] title originates and lies in possession and not through a title document, tacking [of non-record title from one person to the next] does not depend upon the passing of any document between the successive possessors. A turning over of possession is quite sufficient. ... If A then conveys to C, the deed between them will nearly always contain the legal description of only the lot to which A has paper title; it will not contain any description of the adversely possessed strip, ... But A will turn over possession of this strip to C, along with the lot described in the deed. Ideally, A will have turned over possession of the strip by pointing it out to C or in some way indicating that it goes along with the rest of the land.

These points continue to be either misunderstood or ignored by Judy in all of her arguments. Judy continues to discuss the Statute of

Frauds which has absolutely no application to the most important and relevant issues here; *i.e.* whether Rich turned over his non-record rights to the disputed strip between the Cascade and Voorheis lines to the Masseys. Only if Rich did would the boundary dispute Judy filed against Rich be "moot" because he would then "lack standing".

The undisputed facts in this case establish that Carol Boswell "pointed out" what she considered to be her property south to the Voorheis line in her Contract Addendum with Rich. CP37 and 126.<sup>11</sup> Rich also did some "pointing out" to Masseys when he sold to them. As Mr. Massey's deposition documented, Rich pointed out where the Cascade line was located and that there was another line which was an extension of the Jones fence to the east. CP206, p.60, line 18 - p.61, line 20. Unlike Carol Boswell, however, Rich expressly told the Masseys that the other (Voorheis) line "doesn't concern you." CP194, p.12, line 17 - p.13, line 19 and CP196, p.18. Moreover, the Masseys "took that to heart." CP194, p.13, line 19.

---

<sup>11</sup> The Contract Addendum provided in ¶3 that: Subject property was platted in the 1970s. A recent survey by Cascade Surveying and Engineering, Inc. discloses a possible deviation of 20' +/- between lines of occupancy and the deed property lines as surveyed by Cascade. The neighbor immediately south of subject premises ([the late Charlie] Anderson) has removed the common boundary fence between Boswell and Anderson. Seller shall execute her warranty deed subject to questions of survey and boundary as disclosed by the Cascade survey.

Accordingly, non-record title to all property north of the Voorheis line -- which was pointed out as an extension of the Jones fence to the east where Charlie Anderson had removed the boundary fence during Carol Boswell's ownership -- and south of the Cascade line was handed over by Carol Boswell to Rich, but not from Rich to the Masseys. Judy's "bottom line" that the deeds control what was "conveyed" is correct, but conveyance is not the issue; reservation of non-record rights by not handing over possession is the issue.

Moreover, because there is usually no legal description of non-record rights included in a deed, neither turning over nor reservation of those non-record rights is controlled by the record conveyance of a deed. There are not two legal descriptions in issue. There are two different survey locations for the same legal description. The modern Cascade survey of the record legal description controlled conveyance of record rights. But non-record ownership of the property within the original Voorheis survey of the same record legal description, while "pointed out" by both Carol Boswell and Rich, was only "handed over" to Rich. Rich then used, possessed and occupied that property up to the Voorheis survey line for 11 years, but told Masseys it was of "no concern" to them because he was not handing over possession of his non-record ownership.

The following chart compares and contrasts the differences between record and non-record ownership:

<u>Record</u>	<u>Non-Record</u>
1. Statute of Fraud Governs	1. Statute of Frauds does not apply
2. Deed conveys	2. Deed does not include; possession is handed over
3. Deed has Warranties which protect against encroachment by adjoiner into the record description in the Deed, but do not apply to encroachments into an adjoiner's record ownership outside the deeded legal description	3. Usually there is no legal description of non-record property ( <i>i.e.</i> encroachments into an adjoiner's record description) in the Deed. Therefore no Warranties accompany non-record rights
4. The contract "merges" into the deeded record legal description on all issues "central" to the function of a deed, but not as to "collateral" matters not applicable to the function of a deed	4. Even if the contract references non-record property (encroachments into an adjoiner's record legal), because the contract "merges" into the deed, the non-record title will not be warranted by, or enforceable against, the seller (except, in the unlikely event the non-record property is legally described in a Warranty Deed as opposed to a Quit Claim Deed)

Legal authority for the first two points on the chart has been supplied. The most specific legal authority addressing both warranties and "merger" is a case written by Judge Agid and joined in by Judges Grosse and Becker of this Division.

*Barber v. Peringer*, 75 Wn App 248, 877 P.2d 223 (1994)

involved a sale by Ms. Peringer of a platted Lot 12 to Mr. and Mrs. Barber. Unbeknownst to anyone at the time of sale, the driveway for Lot 12 encroached into the adjoining lot of Mr. Chamberlin. When this encroachment was discovered a few months after the sale, Barbers asked Mr. Chamberlin to acknowledge their ownership of the driveway based on adverse possession by quit claiming, or granting an easement to them for, the encroaching driveway. When Mr. Chamberlin demanded compensation, Barbers asked Ms. Peringer to take whatever action was necessary to provide them with clear title to the disputed part of the driveway." When Ms. Peringer refused, Barbers sued Mr. Chamberlin for adverse possession, which was granted, and Ms. Peringer for attorney fees under the contract, which were also awarded. Ms. Peringer then appealed the attorney fee award. 75 Wn App at 250-251.<sup>12</sup>

This Court ultimately held that Ms. Peringer did not owe the

---

<sup>12</sup> The case includes an extensive analysis of whether a "good marketable" title covenant, separate from and in addition to statutory warranties, was contained in a contract clause requiring that title be "free of encumbrances or defects." The Court's analysis also examined whether that separate covenant would be "collateral" (as opposed to "central") to the function of a deed so that it could survive "merger" of the contract into the deed. 75 Wn App at 252. Barbers argued the "good marketable" title requirement was "collateral" for two reasons. First, they needed their "collateral" interpretation of the contract to survive merger. Second, in order to "win" a warranty claim, one must "lose" the disputed property. Stoebuck & Weaver, *supra*, 18 WASH PRAC §13.4, last ¶. Since Barbers were awarded adverse possession of the disputed driveway, the warranty of seisin could not have been breached (if it had even applied to the non-record property outside the deeded description).

Barbers the attorney fees expended for suing her and Mr. Chamberlin. A good marketable title contract covenant was not "collateral" but "central" to the function of a deed. Therefore, because it was not carried forward into the deed, it merged with the deed. Most apropos here, however, is footnote 2 in 97 Wn App at 255 which reads in applicable part that:

... [T]he record indicates that there was no breach of the warranty of seisin because *the Barbers received what the deed conveyed: Lot 12*. The legal description in the deed did not contain the disputed portion of the driveway, and *there is no legal authority to support the proposition that a grantor warrants unadjudicated adversely-possessed property which is not included in the legal description in a statutory warranty deed*. (Emphasis supplied.)

Therefore, three important points should be noted. First, warranties follow only the deeded (record) legal description. Second, merger of the contract into the deed makes transfer of any property pointed out in the contract, but not included in the deed, unenforceable against the seller. Third, and most important here, non-record rights (*i.e.* encroachment into an adjoiner's record legal description) pointed out and handed over are still enforceable against the adjoining property owner by adverse possession or any other applicable boundary doctrine. Lack of mention in the deed does not work a waiver or abandonment or loss of property covered by a *non*-record claim.

So too here. Carol Boswell's Contract Addendum pointed out the Voorheis line based on the common boundary fence removed by Judy's late husband, Charlie. That line was not enforceable against Ms. Boswell because the contract merged into the deeded record legal description as surveyed by Cascade, except for property north of her north fence located on the Voorheis line. CP42 and 474 last 2 ¶s. Nevertheless, she handed over possession of the non-record area to Rich who used, possessed and occupied it for 11 years. Then Rich sold the property north of the Cascade line to Masseys and pointed out that the Voorheis line was of "no concern" to Masseys as well as identifying Cascade, in the Form 17 portion of the contract, as the "boundary survey" and only deeding the record legal description as surveyed by Cascade.<sup>13</sup> Rich thereby omitted, excepted and reserved his non-record ownership according to BLACK'S LAW DICTIONARY definitions. And that non-record ownership remains enforceable by Rich against Judy, just as Barbers were able to enforce the non-record claim handed over to them by Ms. Peringer against Mr. Chamberlin. By recognizing the differences between record and non-

---

<sup>13</sup> And Masseys purchased extended title coverage for the record legal as surveyed by Cascade for \$661.37 as well as paying \$1,200 for a post-sale survey to establish the exact location of the Cascade line. CP81-82 and 129-144; and; 208, p.66, line 9 - p.67, line 7.

record ownership, the flaws in all of Judy's arguments are rebutted.

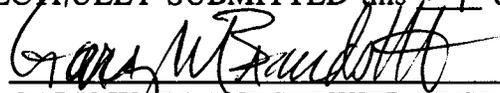
#### **V. Conclusion: Connecting the Dots**

Judy argued that Rich's failure to quit claim the non-record area to Masseys, as with Sinclairs, was deceptive. CP237, lines 15-19. Judy therefore told Masseys that Rich's two western lots, on which Masseys had a right of first refusal, could be accessed over the non-record area by cooperation with her. CP210, pg74, line 22 - pg76, line 16. If Masseys testified that they purchased what Rich purchased (CP200, pg34, lines 20-21 and 209, pg70, line 6-7), it could be argued that Rich did not "reserve" the non-record area. CP409-410 and 471-479. Since the legal description of the south line had not changed (CP65, line 19 and 90, line 11), it could be argued that Rich conveyed away everything he purchased and lacked standing. (CP171). Judy's agreement with Masseys about the fence location would then render the boundary dispute moot. (CP169). If all that could be argued *before* Rich's Motion, the record legal description of Tract 2 as established by the Voorheis survey would not yet be revised, reformed and/or "changed" based on the Cascade methodology. Then Judy could avoid having the merits of the boundary dispute argued (CP397-399) by asserting that the Statute of Frauds now prevented altering or modifying the record legal description of Tract 2. CP52, lines 23-26.

The fatal flaw in the argument, however, comes from Judy's own direct examination of Darren Massey. He testified the Voorheis line, as an extension of the Jones fence (CP206, pg61, lines 5-20), was pointed out and he was told it was "of no concern" to him (CP94, pg13, lines 18-19) and "This doesn't concern you." CP196, pg19, lines 24-25. Rich also identified Cascade's as the boundary survey in the Form 17 (CP197-198, pg24, line 6 - pg26, line 7), which was incorporated by reference in the contract of sale. CP432, ¶9. Then, Masseys bought extended title insurance to the Cascade line (CP130-144) and had the Cascade line surveyed (CP208, pg66, line 9 - pg 68, line 14). Ironically, Masseys could only feel "cheated" by not receiving the Sinclair Addendum terms (CP237, lines 15-19) precisely because they were *not* sold the non-record area, as the above points establish.

Rich's appeal should be granted, Judge Lucas' grant of summary judgment reversed, and this Court should review *de novo* Rich's Motion on its merits or, at a minimum, the case should be remanded to Judge Weiss for that purpose.

RESPECTFULLY SUBMITTED this <sup>29<sup>th</sup></sup> day of March, 2010.

  
\_\_\_\_\_  
GARY W. BRANDSTETTER, WSBA #7461  
Attorney for Appellants Richard and Margaret Anderson

**CERTIFICATE OF SERVICE**

I hereby declare under penalty of perjury under the laws of the State of Washington, that two originals of the above:

**Reply Brief of Appellants**

as well as this **Certificate of Service** and a **Notice of Unavailability**

were sent for delivery to the Court of Appeals by ABC Legal Messengers and I personally delivered true and correct copies of the 3 documents listed above to:

Roy T.J. Stegena  
1002 10th Street, P.O. Box 1091  
Snohomish WA 98291

as attorney for Respondent, on:

**March 29, 2010.**

DATED March 29, 2010 at Snohomish, Washington.

  
\_\_\_\_\_  
GARY W. BRANDSTETTER, WSBA # 7461