

64504-8

64504-8

NO. 64504-8-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JUDITH ANDERSON, a single woman,

Respondent,

v.

RICHARD ANDERSON and MARGARET ANDERSON,  
husband and wife,

Appellants.

---

BRIEF OF APPELLANTS

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## INTRODUCTION

This is a boundary dispute between unrelated parties who share the same last name. As Respondent Judith Anderson's ("Judy's") own Motion For Summary Judgment -- which is on appeal -- so succinctly began at CP403 paragraph 6, lines 11-12:

Two surveys conflict such that the Cascade survey places the line further north and east than the Voorheis survey. Plaintiff [Judy] favored the Cascade survey, Defendants [Appellants Richard and Margaret Anderson ("Rich")] the Voorheis survey.

Both parties owned 10-acre Tracts which are part of a 13 lot Large Tract Segregation (LTS). *See* Appendix A Site Map. The LTS was based on the Voorheis survey performed for the late LeRoy Caverly in 1969. The survey established 4x4 cement corner monuments with brass discs. CP253-255. Mr. Caverly began selling these monumented Tracts in 1976. CP572. Judy owns Tracts 3 and 4. Rich owned Tract 2. In 1995, however, Judy and her late husband, Charlie, commissioned the Cascade survey of Tracts 1, 2, 3 and 4. CP575 and 416. It exacerbated boundary confusion in the area.

Confusion occurred because Cascade used a Quarter Corner Monument which had not existed until 1974, 5 years after the Voorheis survey was performed. Survey conflict resulted because the 1974

monument was about 48 feet north and east of the Quarter Corner location which had been used by Voorheis in 1969. CP254-255.

Most of the confusion was resolved by property owners in the area, including Judy and Charlie. CP255-257 and 278-288. Owners used the Cascade 1974 monument methodology in order to "reform" their Tract legal descriptions based upon the Voorheis lines. CP255-257, 128, 481-484 and 421, line 18 - 428. Only the line between Judy's Tract 4 and Rich's Tract 2 remained unresolved. CP423-424, 257, 155 and 90 n.13. By claiming to the Voorheis line on the southern border of her Tract 3, but filing suit in order to claim to the Cascade line on the northern boundary of her Tract 4, Judy would gain property in each direction. CP128 and 290-291.

Rich lived in a home he built on Tract 2 for 11 years, from 1997 (CP39) until 2008 (CP44). CP418-428. In 2001, Rich also purchased 2 additional 10-acre parcels outside the Caverly Tracts, but adjoining the west side of his Tract 2 and Judy's Tract 4. CP424-425 and 128. Rich accessed these parcels from the southern portion of his Tract 2 as surveyed by Voorheis. CP260, lines 3-4, 262, lines 13-16, 265, lines 15-18 and 267, lines 3-4. In contrast, Judy did not live on, and did not build a home on, either of her Tracts until April 2008. CP8, ¶2. That was a

year *after* she filed this lawsuit in April 2007. CP564 and 566.

In August of 2008, 16 months after the lawsuit was filed, Rich sold the undisputed portion of his Tract 2 -- that is, Tract 2 as surveyed by Cascade -- to Darren and Barbara Massey with help from a realtor, but not his attorney. CP453; 458; 419 ¶2, CP342-360, esp 345 ¶5; 184-186; 194; 196; 74-82, 19-23 and 32-35. A year later, on July 16, 2009, Rich filed a "Motion For Summary Judgment Against Plaintiff Based Primarily On The Common Grantor Doctrine;" *i.e.* a motion on the merits of the boundary dispute Judy had filed 2¼ years earlier. CP495-496; 104-108 and 62.

Six (6) days before her Response to Rich's Motion was due, however, Judy filed a Summary Judgment Motion of her own on July 28, 2009. It was entitled "Plaintiff's Motion For Summary Judgment Of Defendants' Counterclaim And Dismissal Of Plaintiff's Claims As Moot." CP402-484. Judy's Motion argued that the merits of the boundary dispute she had filed need not be reached. CP404, line 2; *see also* CP48, ¶A, lines 19-20 and 49, lines 22-23. Judy's Motion asserted two basic contentions: (1) the boundary dispute was "moot" (CP403, ¶10; 404, ¶a); 413, line 17; and 414, line 1), and (2) Rich "lacked standing" to pursue his Counterclaims. CP404, ¶b and 412, line 8.

Judy's Motion was argued September 22, 2009, before an October 2 special setting of Rich's earlier filed and noted Motion arrived. CP368-369 and 379-380; *see also* CP397-399 and Appendix B. Judy's counsel began and concluded his argument with the suggestion that the merits of the boundary dispute Judy had originally filed be ignored. CP98, lines 17-18. Judge Eric Z. Lucas granted Judy's Motion, struck Rich's Counterclaims, allowed withdrawal of Judy's Complaint and, thus, dismissed the entire case. CP168 and 166-167.

Rich filed a Motion for Reconsideration on October 2, 2009. CP157-161. Judge Lucas denied the Motion for Reconsideration on November 16, 2009. CP5-6. This appeal was filed four (4) days later on November 20, 2009.

### **ASSIGNMENTS OF ERROR**

Granting Respondent Judy's Motion for Summary Judgment was legal error because:

1. CR 41(a)(3) was violated. Judy was granted leave of court to voluntarily dismiss her boundary dispute complaint against Rich over his objection without Rich's Counterclaims remaining pending for independent adjudication by the Court. Prejudicial error occurred because, as a result, Judy's later-filed Motion was heard first and Rich's Counterclaims were never heard.

2. The burden on Judy, as the moving party, to demonstrate that there was no genuine issue of material fact in dispute was apparently

reversed. The Trial Court's Minute Entry stated, among other things, that "There has been no demonstration that Defendant Anderson [Rich] had any ownership to the property. The counter claim is hereby stricken." The Trial Court apparently put the burden on Rich to demonstrate that there was a genuine issue of material fact in dispute about the merits of the boundary dispute. Therefore, it failed to review the evidence and all reasonable inferences from the evidence in a light most favorable to Rich as the non-moving party.

3. Summary Judgment was rendered despite genuine issues (i.e. disputes) regarding the following material facts:

a. Judy made a disputed material assertion that she had an agreement with Darren and Barb Massey, Rich's purchasers, about the property line between them being located based on the Cascade survey.

b. Judy's "agreement" argument was based on the disputed material assertion that Masseys had purchased Rich's entire interest, including the disputed area south of the Cascade line to the Voorheis survey line.

c. Judy's allegation that Rich had committed misrepresentation against Masseys -- non-parties -- was disputed, if not insupportable.

4. The law was misunderstood and misapplied based on a series of Judy's false premises about the following material facts:

a. The RCW 64.06.020 Real Property Transfer Disclosure Statement (Form 17) *was* a part of Rich's purchase and sale agreement with Masseys.

b. Form 17 *did* identify the Cascade survey as the boundary survey for the property being sold.

c. Rich's sale to Masseys *was* based on the Cascade survey.

d. Rich *did* reserve his interest in the disputed area between the Cascade and Voorheis lines.

e. Points a-d *did not* violate the Statute of Frauds.

f. Rich *did not* use the same legal description for sale to Masseys in 2008 as he had received when he purchased from Carol Boswell 11 years earlier in 1997.

g. Rich *did not* convey his non-record rights to the disputed area between the Cascade and Voorheis lines to the Masseys as Carol Boswell had done when she conveyed both her record and non-record rights to him.

h. Rich *did not* convey his entire interest in Tract 2.

i. If a court revised or reformed a legal description in order to describe the Voorheis line based on the Cascade methodology, it would *not* violate the Statute of Frauds.

j. Rich *is* the real party in interest.

k. Rich *does have* standing to continue litigation of his Counterclaims.

l. The admitted conflict between the Cascade and Voorheis surveys *does* still need to be resolved and is *not* "moot".

5. The law was also misunderstood and misapplied because Judy's disputed, if not unsupported, allegation that Rich committed misrepresentation against the Masseys, was irrelevant. The Trial Court should not have given it any weight, although it appears it did.

6. The law was further misunderstood and misapplied regarding whether the Trial Court had the right or authority to determine the merits of the original boundary dispute. The Trial Court's minute entry suggests it thought it determined those merits. If so, it's determination was incorrect.

7. The Trial Court apparently did not understand the vested nature of non-record rights accrued by use, possession and occupation. The Trial Court did not recognize that non-record rights are equal, if not superior, to record rights obtained by deed; non-record rights prevail over a correct survey of the record legal description.

8. The law was ultimately misunderstood and misapplied if or when the Trial Court did not recognize that the Common Grantor Doctrine was determinative based on undisputed and indisputable material facts. As a matter of law, Rich owns the disputed area south of the Cascade line to the Voorheis line because the Voorheis survey lines were the only lines available when LeRoy Caverly conveyed his Tracts. Written and notarized statements authored by Judy and/or her late husband, Charlie, admitted that until after 1998.

#### **STATEMENT OF THE CASE**

On February 12, 2007, two months before she filed this lawsuit, Judy knew that Rich was planning to sell his home on Tract 2. She also knew that Rich was planning to keep his 2 adjoining 10-acre lots and desired to continue accessing those 2 lots through the southern portion of his Tract 2 as surveyed by Voorheis. Therefore, Judy advised Rich that he would be required to disclose to any potential purchaser that the boundary between them was disputed. CP294-295.

When Judy did file this action in April of 2007, her Complaint never mentioned the 1969 Voorheis survey, even though it was the only survey that existed when Judy bought in 1976. CP572. The Complaint only mentioned the 1995 Cascade survey. CP566-575. Judy moved for

default in mid-June 2007, forcing Rich to Answer. CP553-563. Rich's initial Answer, filed on June 21, 2007, affirmatively pleaded the Voorheis survey and the Common Grantor Doctrine in detail, but not as Counterclaims. CP547-552. Rich did "reserve" the right to assert Counterclaims at a later date. CP551, ¶6. He did not want to "poison the well" for continued negotiations seeking resolution which had occurred prior to Judy filing suit. CP294-295.

A month after Rich's sale to Masseys, on September 25, 2008, a Clerk's Notice for Dismissal For Want of Prosecution issued. CP545-546. The Clerk's Notice apparently prompted an October 1, 2008 letter from Judy's attorney with a Stipulated Order of Dismissal. CP492-494. The cover letter stated that, since Rich had moved, "the problem [*i.e.* the boundary dispute] does not exist with the new neighbors [Masseys]". CP492. *See also* CP489-490 and CP403, paragraphs 7-11.

Because the disputed area between the two survey lines was not resolved, and because the disputed area provided access to his remaining two 10-acre lots to the west, Rich sent in an October 15, 2008 Notice that a Trial Setting was being requested. CP544. Rich also sent a request for a trial setting but scheduled it more than a month later in a continued hope that pre-litigation negotiations would lead to a non-litigated resolution.

CP294-295. When that did not occur by December 5, 2008, however, the Superior Court set the matter for trial on April 15, 2009. CP541-543.

On January 7, 2009, a month after the trial date was set, and 4½ months after the sale to Masseys, Judy propounded 9 Interrogatories and 12 Requests For Production relating to the boundary dispute. *See e.g.* CP430 and 83-84. On February 10, 2009, 5½ months after the sale to Masseys, Judy's attorney telephoned Rich's attorney insisting that Rich's Answer be amended in order to specifically plead Counterclaims. CP391 and 271. Otherwise, Judy's counsel argued, the discovery requests he had issued would not reveal what he needed to know in order to prepare for trial. CP9, ¶10. As an inducement, Judy's counsel assured that he would stipulate to an Order Authorizing Amendment of Rich's Answer without the necessity of a motion. CP386, lines 3-10.

A week later, on February 17, 2009, an Amended Answer with Counterclaims as well as a Stipulated Order was provided to Judy's counsel as he had insisted. CP391. By letter dated February 18, however, Judy's counsel refused to sign the Stipulated Order unless the April 15, 2009 trial date was continued. CP392-394; 386, ¶B; and 9, ¶11. A Stipulation and Order continuing the April 15 trial date until September 10, 2009 was then prepared by Judy's counsel and signed by counsel for

Rich. CP525-526. In exchange, Judy's counsel signed the Stipulated Order Authorizing Amendment of Rich's Answer. Only the Authorizing Order was immediately filed. CP527-540. Trial was continued to September 10, 2009. CP522-524.

In May, 3 months after the new trial date was set, and nearly 9 months after the sale to Masseys, Judy's counsel requested (1) answers and responses to the discovery propounded in January and (2) actual filing of the Amended Answer "since it seems this case will move forward". See Appendix B to this brief, second and third paragraphs. Rich's Amended Answer with Counterclaims was filed on May 15, 2009. CP510-521. Of particular importance to this appeal is that, until this point in time, no Counterclaims had been filed and, therefore, Judy could have moved for Voluntary Dismissal under CR 41(a)(1)(B).

Three weeks later, on June 6, 2009, answers and responses to Judy's discovery requests were provided. *See e.g.* CP429-479. A month later, on July 16, 2009, Rich's Motion on the merits of the boundary dispute was filed and set for argument before Judge Bruce I. Weiss on August 13, 2009. CP495.

On July 29, 2009, however, Judy's Motion asserting mootness and lack of standing was filed. In order to have argument the 2 week

minimum before trial required by CR 56(c), it was scheduled before Judge Kenneth L. Cowser on August 25, 2009. CP400 and 56, n.2. This was a date Judy's counsel had known since February (when the April 15 trial date was continued at his insistence to September 10) was not available to Rich's attorney. CP395. In fact, even if Judy's counsel had forgotten that conflict since February, a Notice of Unavailability had been filed by Rich's attorney on July 16, 2009 along with his Motion for Summary Judgment on the merits. It specifically advised of counsel's unavailability on August 25. CP396.

Moreover, Judy's counsel took the unusual step of writing to Judge Weiss who was scheduled to hear Rich's Motion for Summary Judgment on August 13. The letter not only advised Judge Weiss of Judy's Motion, but also suggested that Judy's Motion should be heard at the same time, if not before, Rich's Motion. Why? Because the Motion Judy had filed "would obviate the need to consider the merits" of the boundary dispute Judy originally filed. CP397-398; *see especially* 3rd paragraph CP397. Counsel also included a copy of Judy's Motion which, with Exhibits, was 82 pages long (CP402-484). It was, however, supported by only two short declarations. CP485-494. Of particular importance to this appeal are the following four facts:

First, neither mootness nor lack of standing had been pleaded at the time. It was not until 13 days later, on August 11, 2009, that either was pleaded when Judy filed an Answer and Affirmative Defenses to Rich's Counterclaims. CP370-378. Affirmative Defense 3 was lack of standing and Affirmative Defense 4 was mootness. CP376.

Second, Judy's Motion was only supported by two short declarations which claimed that she had an agreed property line with the Masseys to whom Rich had only sold the undisputed portion of his Tract 2 eleven (11) months earlier. CP485-494. This was the factual support for the claim of mootness. Neither declaration supplied factual support for the lack of standing argument. In fact, Judy's own Motion included Rich's declaration on the merits which specifically disputed her contention that he sold his entire interest in Tract 2, losing standing. CP419, ¶2.

Third, on July 31, 2009, 3 days after filing her Summary Judgment Motion, Judy took Rich's deposition, first noted on July 14. CP172, lines 4-7; 110, 73; 56 n.2. and Appendix C. Eight (8) days after filing her Motion for Summary Judgment, Judy also took Darren Massey's deposition on August 5, noted on July 28. CP172, lines 4-7; 191-212, 72-73, 56 n.2 and Appendix C. Therefore, neither deposition had been available to support filing of Judy's Motion. The depositions could

provide support, if any, only by use in Judy's Reply to her own Motion for Summary Judgment, precluding rebuttal. CP72-74 and 27-28.

Fourth, neither Rich's nor Darren Massey's depositions, even though taken after-the-fact, supplied undisputed material facts in support of mootness or lack of standing. CP67-68, 70, 74-87.

Given the circumstances, however, counsel for both parties recognized that a continuance of the September 10 trial date might be necessary. Judy's counsel, however, did not want to agree to a trial continuance unless it meant that Judy could argue her Motion for Summary Judgment at the same time, if not first. This was clear not only in counsel's first letter to Judge Weiss, but in his second letter as well. CP399, paragraph 2. Therefore, Rich's counsel filed a motion on August 6 to continue Judy's Motion for Summary Judgment from its August 25 scheduled date, when he was unavailable and, if necessary, to continue the trial date as well. The motion was set for August 14. CP379-399.

In the meantime, Judy's Response to Rich's Motion was filed on August 3rd and a Reply was filed on August 10th. Also on August 10, however, just 3 days before their argument had been scheduled, Judge Weiss specially set Rich's Motion for argument on October 2, 2009. Judge Weiss also directed that the September 10 trial date should be

continued to accommodate the special setting. This occurred because of the size of the calendar and complexity of the issues scheduled before him on August 13. It was apparently also due to Judy's *ex parte* request regarding the status of her suggestion that her Motion be heard at the same time, if not before, Rich's. *See* Appendix D to this brief. In fact, Judge Weiss may have assumed that both parties' motions would be heard by him based upon letters from Judy's counsel. CP397 last paragraph and 399, 2nd paragraph.

Ultimately the trial was continued by stipulation. CP363-364. A new trial date of January 28, 2010 was set. CP365-367. Rich's Motion for Summary Judgment was re-noted for the October 2 date specially set by Judge Weiss. CP361-362. Then, however, Judy's Motion was re-noted for argument before Judge Eric Z. Lucas on September 22, 2009. CP368-369. This re-noting was contrary to representations in Judy's counsel's two letters to Judge Weiss. CP397, last paragraph and CP399, 2nd paragraph. Judy's counsel thus achieved his desire to argue Judy's Motion on the legal technicalities of mootness and lack of standing, which had only been pleaded after the fact, before Rich could argue his Motion on the merits of the boundary dispute. Courts do not generally permit technicalities, narrow construction or a race to the courthouse to interfere

with the merits of legitimate controversies. CP98-101.

On September 11, 2009, Rich provided his Response to Judy's Motion, together with two (2) declarations. CP244-260. Judy filed her Reply on September 17, 2009. CP169-243. The Reply was laden with excerpts from Rich's deposition and the entire deposition of Darren Massey. CP183-214 and 236-239. Neither deposition had been available when the original Motion was filed. This material was used for the first time in Judy's Reply, giving Rich no opportunity to rebut it. CP72-74 and 27-28.

As previously noted, Judy's Motion was argued and granted on September 22, 2009. Judge Lucas may have believed he was also ruling on the merits of the boundary dispute. CP168. Regardless, no proposed Order had been included with Judy's original Motion. CP414-484. Therefore, the first time Rich's counsel saw a proposed Order was when Judge Lucas signed one granting Judy's Motion after argument on September 22, 2009. For the first time, language appeared discreetly echoing CR 41(a)(3) regarding "leave to withdraw (over Defendant's objections) her claims in trespass and to quiet title". CP166, lines 25-26; contrast CP413, lines 19-21.

Rich's counsel felt a Motion for Reconsideration was in order, but

also needed to advise Judge Weiss that, unless Judge Lucas reversed himself, special setting of Rich's Motion would have to be stricken. CP162-165. Rich's Motion For Reconsideration was supported by a detailed Memorandum. CP65-156. It was also calendared in conformance with CR 59(b) within 30 days of entry of Judge Lucas' Order granting Judy's Summary Judgment. CP63-64. Judy responded on October 12, 2009. CP48-64. Judy's Response again discreetly echoed the language of CR 41(a)(3). CP56, lines 4 and 5. It also included a proposed Order denying the Motion for Reconsideration. CP63-64. Rich then filed his Reply on October 19. CP14-47. Recognizing the applicability of CR 41(a)(3), the subject was briefly addressed in Rich's Reply. CP26-27 and 29.

If Rich's Motion was going to be available for argument to Judge Weiss before the January 28, 2010 trial date, Judge Lucas needed to make a decision on the Motion for Reconsideration within a reasonable time. When nothing had been heard for two weeks, Rich's counsel wrote Judge Lucas requesting that he make a decision as quickly as possible. CP7-11. Judy's counsel objected. CP12. The Order denying the Motion For Reconsideration stated that denial was "after argument," but no argument had occurred. CP6. The cover letter also stated that it and the Order were

faxed. CP5. They were not.

## ARGUMENT

**Introduction and Standard of Review.** This is an appeal from an order granting Judy's Motion for Summary Judgment. As is often stated, perhaps most recently this past October, the appellate court engages in the same inquiry as the trial court when reviewing a summary judgment. A pure matter of law, not disputed material facts, must be involved. Summary judgment can only be rendered where there is no genuine issue of material fact. Moreover, all the facts and reasonable inferences must be viewed in a light most favorable to the non-moving party. Such questions of law are subject to *de novo* review.<sup>1</sup>

This Court also will engage in the same inquiry as the trial court because both CR 56(h) and RAP 9.12 provide that both courts are to examine exactly the same evidence. Special provisions in both rules are designed to limit the record, or expand it, in order to assure that both the trial and appellate court are considering the same evidence.

For the above reasons, argument will focus on summarizing the substantive record before the Trial Court. It consists primarily of 6

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<sup>1</sup> *Post v. Tacoma*, 167 Wn2d 300, 308, 217 P.3d 1179, 1183 (2009); *see also* CP106-108.

memoranda, 3 from each party: Judy's opening Motion, supported by 2 short declarations (CP402-494); Rich's Response, supported by 2 declarations (CP294-360); Judy's Reply (CP169-243); Rich's Motion and Memorandum For Reconsideration (CP65-161); Judy's Response (CP48-64); and Rich's Reply (CP14-47). This Court will be referred to these original documents, in chronological order, by CP number in order to establish the foregoing Assignments of Error.

The peculiar procedural history of this case, however, may result in this Court being referred more extensively to the later memoranda than the earlier ones. That is because Judy's initial Motion was filed hastily, only 12 days after Rich's Motion, with the repeated request to avoid, and objection to, any perceived mention of the merits. CP404, line 2; 397-399; 270, lines 13-26; 48-49 and 52. It was supported by only 2 short declarations. CP485-494. Moreover, its two asserted legal bases, mootness and lack of standing, had not been pleaded yet, and would not be for another ten (10) days. CP370-378, esp 376, lines 16-26.

Other asserted support for Judy's Motion would not appear until she filed her Reply. At that time, Judy added excerpts from Rich's deposition, which was not taken until three (3) days *after* her Motion was filed. CP184-189; 214; 237-239; 72-73; 110 and 56, n.2. Judy also added

the entire deposition of Darren Massey, which was not taken until eight (8) days *after* her Motion was filed. CP191-212. Because this material first appeared in her Reply, Rich had no opportunity to rebut it -- except by filing his Motion For Reconsideration. CP73-74 and 27-28. Consequently, Judy's Motion "evolved." Accordingly, the later memoranda address the issues more fully.<sup>2</sup>

**I. Granting Judy's Motion Violated CR 41(a)(3).**

Whether or not intentional, Judy's original Motion and Reply did not use any "voluntary dismissal," "leave of court" or "against the defendant's objection" language reflecting CR 41(a)(3). *See e.g.* CP404, line 10; 412, line 24; and 413, lines 19-21. And, of course, they certainly did not provide, as CR 41(a)(3) does, for Rich's Counterclaims "to remain pending for independent adjudication." CP402-414 and 169-182. It was not until Judy's Order Granting Summary Judgment -- *which had not been supplied* with her Motion or Reply as is customary in Snohomish County in light of SCLCR 7(I) and (J) -- that language echoing CR 41(a)(3) appeared.

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<sup>2</sup> Normal protocol would have the initial Motion lay out all its support, then be rebutted in Response so that the Reply was limited to addressing new material in the Response. Thus, over time the issues and volume narrow, not expand -- as they did here.

That order provided that Judy was "granted leave to withdraw (over Defendant's objection) her claims in trespass and to quiet title". CP166 and 164. In her Response to Rich's Motion For Reconsideration, Judy repeated that "... the relief requested by Plaintiff and granted by this court includes leave of court for Plaintiff to withdraw her complaint over Defendants' objections." CP56. Accordingly, CR 41(a)(3) was clearly involved and should have been considered early on. Instead, allegations of mootness and lack of standing disguised the applicability of CR 41(a)(3).

If the direct applicability of CR 41(a)(3) had been considered, caselaw might have cautioned the Trial Court against granting Judy's Motion. In *Farmers Insurance Exchange v. Dietz*,<sup>3</sup> this Division considered an appeal from Judge George Bowden of Snohomish County. Writing for the unanimous panel, Judge Cox, with Judges Grosse and Kennedy concurring, held after an extensive analysis that a counterclaim was not "pleaded" under CR 41(a)(3) until it was both "filed" and "served."<sup>4</sup> In this case, both filing and service had clearly occurred at

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

<sup>4</sup> 121 Wn App at 98-106.

least 2 months earlier<sup>5</sup> so *Farmers v. Dietz* may not appear relevant.

Nevertheless, *Farmers v. Dietz* would have been especially relevant. In contrast to the lack of prejudice involved in *Farmers v. Dietz*, the panel compared and contrasted a federal case, *Pace v. Southern Express Co.*<sup>6</sup> It concluded that a federal district court had been justified in *denying* a CR41 motion to dismiss. The panel noted that *Pace* had been pending for 1½ years, considerable discovery had been undertaken at substantial cost to the defendant and the defendant had already "briefed" its motion for summary judgment.<sup>7</sup>

In the instant case, litigation had been pending 2¼ years. CP566 and 402. Considerable discovery -- in the form of 9 Interrogatories and 12 Requests for Production propounded to Rich by Judy (CP430 and 84) as well as Judy's deposition scheduled by Rich (CP292-293) -- had also been undertaken at substantial cost to Rich. Further, Rich had already filed his Motion for Summary Judgment on the merits. CP495, 104-108

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<sup>5</sup> Further, filing was delayed until then because only the Stipulated Order Authorizing the attached Amended Answer with Counterclaims had been entered three (3) months previously. CP527-540. That was a total of 5 months before Judy's Motion.

<sup>6</sup> 409 F.2d 331, 13 Fed. R. Serv. 2d (7th Cir. 1969).

<sup>7</sup> See 121 Wn App at 107, footnote 25.

and 62. In fact, it was filed almost 2 weeks before Judy filed her Motion requesting voluntary dismissal with prejudice under the guise of mootness and lack of standing. CP402. Compared to *Pace v. Southern Express Co.*, not to mention *Farmers v. Dietz*, Rich suffered extreme prejudice by the granting of Judy's Motion without the ability to argue the merits of the Complaint Judy filed against him (CP566-575), as well as his Counterclaims based on those merits.<sup>8</sup> CP510-521.

Nevertheless, Judy cannot be prevented from arguing that this Court should find any violation of CR 41(a)(3) in this case to be harmless error. Even if the Trial Court had allowed the Counterclaims to "remain pending for independent adjudication," Judy might still have been able to argue mootness and lack of standing. The pending Counterclaims would not be immune from a Motion for Summary Judgment. The harm is that Rich was never able to argue his earlier filed Motion for Summary

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<sup>8</sup> One cannot help but wonder if the idea of arguing mootness arose from researching CR 41 caselaw such as *Farmers v. Dietz*. Reading Division 1's analysis would have led to discussion of *United States v. Professional Air Traffic Controllers Organization (PATCO)*, 449 F.2d 1299 (3rd Cir. 1971) cited in 121 Wn App at 101-102. In *PATCO*, the 3rd Circuit granted the *plaintiff* government's motion for voluntary dismissal of its *complaint*, on the grounds of "mootness," *prior to* the filing of any counterclaim by the union. In contrast, the language throughout Judy's Motion and Reply argued that *Defendants* Rich and Margarets' *Counterclaims, filed 2 months earlier*, were moot. The conclusion that mention of CR 41 should be avoided, by arguing mootness and lack of standing, without drawing attention to *PATCO*, might also have been reached.

Judgment on the merits -- which might have rendered Judy's Motion "moot." Regardless, this Court probably still needs to decide, based upon engaging in the same inquiry as the Trial Court, whether mootness or lack of standing were properly held to justify granting Judy's Motion.

**II. The Trial Court Apparently Reversed the Burden of Proof, Requiring Rich to Prove His Counterclaims (which was not supposed to be before it) Rather Than Requiring Judy to Establish That There Were No Disputes of Material Fact Regarding Mootness and Lack of Standing.**

CP168 is the Trial Court's Minute Entry from oral argument on Judy's Motion for Summary Judgment. The entry states, in applicable part that:

Plaintiff's Motion For Summary Judgment *denying the Counter Claim of the Defendant*: Granted. There has been *no demonstration that Defendant Anderson had any ownership to the property*. The Counter Claim is hereby stricken. (Emphasis supplied.)

Frankly, Rich's counsel does not recall the Trial Court making such a statement. Nevertheless, if the Trial Court's own clerk heard it, or if the Trial Court instructed its clerk to make the entry in that fashion, legal error was committed.

First, the Trial Court was supposed to be ruling on Judy's Motion which sought to *avoid the merits* of the boundary dispute. Judy argued that the dispute was moot once Rich allegedly sold his entire interest, even

in the disputed property, to Masseys. If Rich sold his entire interest, Judy argued, he lacked standing to pursue his Counterclaims. Neither argument considered, and both arguments sought to avoid, the merits of the Counterclaims. CP403-404, 412-414 and 48-49.

If the Trial Court struck the Counterclaims because it believed there was "no demonstration that Rich had any ownership to the [disputed] property," there are two possible interpretations: (1) That Rich had failed to demonstrate he only sold the undisputed portion of his property to the Cascade line; or (2) That Rich had failed to demonstrate that he ever owned the disputed portion of the property based on the merits of the boundary dispute. In either event, error was committed.

Both interpretations put the "burden for demonstration" on Rich, the non-moving party. Yet it is black letter summary judgment law that all the facts and reasonable inferences must be viewed in the light most favorable to the non-moving party.<sup>9</sup> In this case, as will be amplified below, the evidence was admitted, even by Judy, to be disputed about whether or not Rich sold his entire interest to Masseys. CP174, lines 17-21 and 57, lines 9-15. Since the evidence was disputed, since the burden

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<sup>9</sup> *Post v. Tacoma, supra*, 167 Wn2d at 308; *see also* CP106-108.

was on Judy to establish the evidence was undisputed, and since all the facts and reasonable inferences had to be viewed in a light most favorable to Rich's side of the disputed evidence, it was error to put the "burden of demonstration" on Rich -- if that is what the Trial Court did.

Moreover, if the Trial Court took it upon itself to consider the merits of the boundary dispute, which Judy asked and told it not to -- especially when it was repeatedly advised in writing that the merits were to be decided by Judge Weiss in a subsequent special setting (CP245-247; 256, lines 7-8; 258, lines 7-8 and 94, lines 16-18) -- the Trial Court also committed error. CP285 established that the evidence in favor of Rich's Counterclaims was undisputed because even Judy and her late husband, Charlie, authored and signed a written "Letter of Understanding" with the new owner of Tract 5 in February of 1998, which was acknowledged before a notary public. It stated that:

When we purchased [our two] tracts Mr. Caverly (the seller) provided us with the Voorheis-Trindle-Nelson Engineers survey and pointed out their cement monuments. ... These monuments formed the Northeast corner of Campbells, the southeast corner of Campbells which is my [*sic* our] northeast corner, my [*sic* our] southeast corner which is your northeast corner (east boundaries of tracts 1, 3 [Judy's], & 5). They also placed monuments on the west property line of tracts 2 [Rich's], 4 [Judy's] & 6.

The fences were installed based on this survey and the

monuments they installed. All of our power lines and vaults coming in from the county road were installed per this survey. The county also used this survey when they constructed the curved concrete bridge on High Bridge road.

x x x

... [T]he appropriate boundary lines are those reflected by the cement monuments, the Voorheis survey, and the fences.<sup>10</sup>

To put the burden on Rich as the non-moving party was error. Moreover, because the Voorheis lines remain "persistently visible" to aerial photogrammetry (as well as ground pictures), this burden-shifting error was compounded. The Trial Court should have held that Judy's sworn statements and the undisputed photographs at least demonstrated Rich had a legitimate claim of ownership to the Voorheis line which Judy's lawsuit now did not want to accept. In fact, the Trial Court should have ruled that ownership to the Voorheis line was not, legally speaking, disputable based upon Judy's own written statements and the pictures. CP278-288 and 297-341.<sup>11</sup>

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<sup>10</sup> Judy and Charlie used this document and the Voorheis survey to settle their boundary to their advantage on the south side of their Tract 3 with a neighbor who bought about the same time as Rich. Now, however, Judy wants to use the Cascade survey so that she can gain property on the north side of her Tract 4. CP128, 257 and 290-291.

<sup>11</sup> *See also* photographs from ground level attached to Rich's Reply Declaration on the merits in CP588-595. Rich's Declaration was Supplementally Designated by Judy. CP576-577. The color version of those photographs are provided in Appendix E.

**III. It Was Error To Grant Judy's Summary Judgment When There Were Disputed Material Facts.**

**A. A Summary of Judy's Arguments.**

Judy's Motion asserted the boundary dispute action she filed was now moot because she and the Masseys had agreed that the Cascade line was the boundary. This agreement was allegedly proven by the fact that they had erected a fence on the line. CP485-488. Judy further asserted that Rich had used the same legal description to convey the property to Masseys as Carol Boswell had used to convey to him. Therefore, Rich had conveyed everything he owned and failed to reserve the disputed area to the Voorheis line. CP409-410 and 471-479. Any argument to the contrary was allegedly (1) not written out in the purchase and sale contract, (2) therefore based on parol evidence and, consequently, (3) violated the Statute of Frauds. Accordingly, Rich now lacked standing to pursue his Counterclaims. CP405-409, 169-182 and 48-60. These arguments were all based on disputed facts (and erroneous statements of law) which should have precluded summary judgment.

**B. The alleged agreement between Judy and the Masseys about the Cascade line being the property line was disputed, if not contradicted, by Darren Massey.**

Only Judy and her attorney had submitted declarations supporting

her initial Motion. CP485-494. Judy's "agreed line" argument was not supported by a declaration from the Masseys. Support was probably assumed because Judy had "wink-wink, nod-nod" communications with Masseys. CP252; 276; and 203-204, p.47, line 9 - p.50, line 14 and 82 referencing 146-148. But when Darren Massey's deposition was taken 8 days after Judy's Motion was filed, he was "all over the map," opportunistically keeping all his options open and in many respects, contradicting the agreed line assertion. *Contrast* CP194, p.12, line 17 - p.13, line 19; 196, p.18, lines 14-25; 197-198, p.25 line 5 - p.26, line 7; and 206, p.60, line 18 - p.61, line 21 *with* CP 209-210, p.70, line 1 - p.74, line 9. *See also* CP251-252, n.2 and 77-82.

For example, Darren Massey testified that the fence was located where it was only as a temporary expedient in order to placate Judy and avoid a dispute. Masseys needed to contain horses they were stabling and training. Further, the fence was *not* located on the Cascade line, but several feet south of it -- as an accommodation by Judy. CP249-251 and 273-275; *see also* CP204, p.50, line 15 - p.51, line 23.

More contradictory still was Mr. Massey's testimony that he did not feel bound by the Cascade line. He felt that his purchase contract with Rich may not have limited his purchase to the Cascade line, that he

may have bought what Rich bought and that he would (opportunistically) wait to see how Judy's litigation with Rich turned out. CP 248-252; 273-276, esp 275; 204-211, esp 209; and 77-82.

Therefore, the alleged agreement rendering the boundary dispute moot was materially disputed by Judy's own deponent. This alone should have rendered summary judgment impossible. Moreover, an agreement with Masseys would only be material if Masseys had authority to resolve the disputed boundary because they purchased Rich's entire interest, including the disputed area south of the Cascade line. But even Judy admitted that was "disputed." She simply contended it was not "material." CP174, lines 17-21 and CP57, lines 9-18.

**C. Judy's argument that Rich sold his entire interest in Tract 2, including the disputed area south of the Cascade line, also suffered from genuine issues of material fact.**

Even if Judy would have had an actual agreement about the Cascade line with Masseys, that would not have resolved the boundary dispute litigation she filed against Rich. The boundary dispute did not involve real property *within* the Cascade survey line; it involved real property *south* of the Cascade line to the Voorheis line. CP206, p.61. If Masseys only purchased based upon the Cascade line, Rich would still

have a claim to the property in dispute. Then Rich would have standing to litigate the dispute.

Accordingly, Judy had to, and did, argue that Rich sold his entire interest in Tract 2 to Masseys. CP405-410, 169-172 and 48-56. That was disputed, however, by Rich's declaration, attached to Judy's own Motion (CP419, ¶2), as well as by Rich's deposition, taken 3 days after Judy's Motion was filed. Rich testified that Masseys were only sold Tract 2 as surveyed by Cascade. CP184-186. The dual real estate agent for both Rich and Masseys, Fred Iacolucci, also submitted a declaration. It not only contradicted, but completely debunked Judy's "sale of Rich's entire interest" argument. It was also based on first-hand contacts with both parties, each of whom were owed fiduciary duties. CP342-360 & 79, line 19 - 80, line 15.

Moreover, Fred and Rich's disputing testimony was repeatedly supported by parts of Darren Massey's inconsistent deposition testimony admitting that Rich told him (1) there was a dispute with Judy over location of the boundary, (2) it involved two survey lines, (3) the Cascade line, to which Rich was selling, was located near the transformer pedestal, and (4) the property south of the Cascade line to the westward extension of the Jones' fence was of "no concern" to Masseys. Mr. Massey further

volunteered that he had taken this information "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.

Darren Massey's admission that his position had "changed" over time was also consistent with a number of actions which supported his limited purchase based on the Cascade line. CP209, p.72, line 15. They included choosing that the Form 17 Real Property Transfer Disclosure Statement, which identified the Cascade survey as the boundary survey for the property being sold, would be subject to negligent misrepresentation claims. CP432, ¶9; 32-35; and 19, line 14 - 23, line 18. They also included the Masseys' expenditure of \$661.31 for an ALTA Extended Coverage Title Policy based upon the Cascade survey and \$1,200 for a post-sale survey to establish the exact location of the Cascade line. CP81, line 19 - 82, line 27; CP130-148 and CP208, p.66, line 9 to p.68, line 14. And, of course, the Masseys also located the fence near the Cascade line, except for Judy's "accommodation" of a few feet.<sup>12</sup> CP251, lines 6-9; 274, p.57, line 17 - p.58, line 1; CP204, p.50, line 15 - p.51, line 23.

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<sup>12</sup> But, if Masseys bought the disputed area south of the Cascade line as Judy contended, they would be the ones accommodating Judy.

Under the circumstances, Judy had to admit there were disputed facts about what Masseys bought. Nevertheless, she argued that the facts which were disputed were not "material" because the Statute of Frauds required that exactly what Masseys were conveyed had to be determined by the written contract and deed, not "parol evidence" in depositions and declarations. CP174, lines 17-21 and CP57, lines 9-18. Because the legal description conveyed to Masseys was allegedly identical to that which was conveyed to Rich, he conveyed his entire interest.

This "same legal" and "no change in the legal" argument was apparently accepted by the Trial Court. CP65 and 90-98. But it was based on 7 false premises to be examined in Section IV of this brief. For now, the important point is that even Judy admitted her argument was based on disputed facts. That means Judy's "sale of Rich's entire interest to the Masseys (who then gifted it to me)" argument was also disputed in material respects. This should also have rendered Judy's lack of standing summary judgment assertion legally impossible to grant.

**D. None of Judy's caselaw supported her mootness or lack of standing arguments either.**

Not a single case cited by Judy involved a claim of mootness or a lack of standing asserted against a *defendant*, which Rich was, as opposed

to a plaintiff. And there also were no cases offered which supported the proposition that "reservation," as opposed to "conveyance," of a real property interest required a legal description of the reservation in order to satisfy the Statute of Frauds. CP259-269. Therefore, in addition to Judy's Motion not being supported by undisputed material facts, it also was unsupported by any applicable legal authority.

**E. Judy's allegation that Rich had committed misrepresentation against Masseys was also disputed, if not rendered insupportable.**

A major portion of Judy's argument throughout was also an entirely concocted assertion that Rich had committed misrepresentation against Masseys. At the very least, these assertions were disputed and, therefore, could not have correctly supported summary judgment. Nevertheless, the Trial Court's statement to the effect that Mr. Massey would be surprised to know he did not buy Rich's entire interest, including the disputed area, suggests the Trial Court granted Judy's Summary Judgment Motion at least in partial reliance on this alleged misrepresentation scenario. CP65, 82-83 n.8 and 28-29.

The scenario was concocted from the fact that, before the sale to Masseys, Rich had negotiations with prospective purchasers named Sinclairs. Sinclairs' attorney wrote a 2-page Addendum requiring Rich to

assume the obligation to resolve the litigation with Judy. If Rich prevailed, he would quit claim the disputed area to Sinclairs but reserve an easement over the disputed area for access to and from his two 10-acre parcels to the west.<sup>13</sup> Addendum revisions were proposed by Rich's attorney. Judy's attorney referred to this document either as the "Sinclair Addendum" or the "Brandstetter Addendum" because, at the top of the first page, the document had the handwritten words "Brandstetter Revisions." CP406, lines 22-24 and 175-176.

After the Sinclair negotiations ended, Rich's prior realtor was replaced by Fred Iacolucci. He needed to be sure the Sinclair transaction was "dead" before he marketed the property through his brokerage. Therefore, he was given the Addendum for contacting Sinclairs before he moved on. Because he knew Mr. Iacolucci had the Sinclair documents, Rich assumed they had been shared with Masseys, even though there was no obligation to do so. CP342-360.

When Judy propounded Interrogatories and Requests for Production, Request No. 10 asked for all the purchase and sale documents

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<sup>13</sup> Judy stated at CP409, lines 8-11 and again at CP176, lines 16-18 that the Addendum was a sufficient "reservation" of the *fee* that would have satisfied the Statute of Frauds if used in the Massey transaction. Note, however, that the "reservation" was of an *easement* over the disputed area, not reservation of the *fee* to the disputed area as Judy argued. CP87-90 and 119.

related to the Massey sale. CP430 and 84. Therefore, when he responded to Judy's Request For Production No. 10, Rich provided Judy with the Sinclair Addendum as part of the Form 17 materials he believed had been supplied to Masseys. CP431-469, esp. 466-467 and 82-85. Likewise, when Rich asked Masseys for a declaration supporting his own Motion for Summary Judgment, portions of all the Form 17 documents supplied to Judy, and which had distinguished between the undisputed Cascade line and the disputed Voorheis line, were attached. As it happened, however, some of those documents -- particularly the Sinclair Addendum (CP466-467, 354-355 and 116-119) -- had not been shared by Mr. Iacolucci with the Masseys. As soon as Darren Massey said he had not seen these documents, the mistake was corrected.<sup>14</sup>

Nevertheless, this honest and perfectly understandable mistake over what had and had not been provided along with Form 17 to the Masseys was exploited by Judy. It was repeatedly mischaracterized as the production of "phony documents" and an attempt to cheat the Masseys by not agreeing to quit claim the disputed area to them if Rich prevailed.

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<sup>14</sup> The first declaration became Massey deposition Exhibit 6. CP216-229. Exhibit 6 was then referenced in Rich's deposition at CP188-189 and in Mr. Massey's deposition at CP198-200, p.29, line 13 - p.36, line 14. Exhibit 10 of Mr. Massey's deposition was the correction. It is the "another draft" referenced in CP203, p.46, line 2 - p.47, line 8.

CP406-409; 258-259; 172-177; 85-87; 121 and 58-59.<sup>15</sup> The plain fact of the matter, however, is that there was no misrepresentation, cheating or phony document. Most importantly, none of this was relevant to mootness, sale of Rich's interest in the disputed area, or standing.

At the very least, allegations of misrepresentation were disputed. Once the actual story was documented, the misrepresentation allegations were proven insupportable. The entire allegation was a red herring sideshow intended to paint Rich with a black brush in order to avoid the merits of the boundary dispute Judy originally filed. In short, the misrepresentation allegation was the actual misrepresentation.<sup>16</sup> CP83, n.8 and 86, n.9 & 10.

#### **IV. The Law Was Misunderstood And Misapplied Because Judy's Arguments Relied Upon Seven False Premises.**

To this point it has been argued and, hopefully, established that Judy's Motion For Summary Judgment was erroneously granted based

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<sup>15</sup> This is another internal inconsistency in Judy's argument. If the alleged misrepresentation was that Rich did not offer Maseys the option of purchasing to the Voorheis line, then Rich could not have sold Maseys his entire interest in the property to the Voorheis line.

<sup>16</sup> Moreover, the effect is that Rich and Margaret have been forced to defend themselves against a misrepresentation claim made by Judy as Maseys' proxy. Judy has no standing to make this argument. If made on their own, Maseys would be open to an attorney fee claim "on the contract" under *Brown v. Johnson*, 109 Wn App 56, 58-59, 34 P.3d 1233 (2001).

upon disputed issues of material fact regarding (1) Judy's alleged agreement with Masseys and (2) Masseys' ability to enter into a litigation-resolving agreement because they allegedly purchased Rich's entire interest in Tract 2. But Judy's dual contentions also relied upon seven (7) false underlying premises.

A. The foundational false premise was first explicitly made in Judy's Reply; namely, that the Form 17 Disclosure Statement was not part of the purchase and sale agreement between Masseys, as buyers, and Rich, as seller. The argument was based on RCW 64.06.020(3) which states that Form 17 "shall not be considered part of any written agreement between the buyer and seller." This premise was the foundation for Judy's argument that the Statute of Frauds was violated. At least, according to Judy, the Statute would be violated if Rich's deposition and declarations were considered. Rich's testimony that he only sold to the Cascade line was "parol evidence" which could not alter the written agreement. CP172-174 and 51, lines 11-19. *Contrast* CP407-409.

But the premise is false. Moreover, Judy's counsel either knew or should have known it was false. He took pains to point out during his re-direct at the conclusion of his deposition of Rich that Form 17 *was* a part of the purchase and sale agreement in this case. He pointed out that the

parties had used "a relatively new provision" in a recent amendment of Multiple Listing Form 21. Amended Form 21, in Paragraph 9, incorporated Form 17 by reference and provided that there would be a contractual remedy for negligent misrepresentation. Amended Form 21 thus overcame the Supreme Court's "economic loss rule." CP19-23 and 32-35.<sup>17</sup>

The economic loss rule made the *tort* of negligent misrepresentation in a contractual relationship a nullity. Paragraph 9 overcame the rule by making negligent misrepresentation a *contract* breach. Thus, Paragraph 9 of the recently Amended Form 21 provided that "Buyer shall have a remedy for Seller's negligent errors, inaccuracies, or omissions in Form 17." Therefore, contrary to his client's argument, Judy's counsel's redirect examination of Rich established that Form 17 *was* part of Rich and Masseys' purchase and sale agreement.

**B.** The second false premise was Judy's argument that the purchase and sale agreement did not identify the Cascade survey as the boundary survey for the property being sold. CP407-408, 172-173 and 51.

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<sup>17</sup> The Form 21 amendment was adopted only 8 months after the Supreme Court's "economic loss rule" holding in *Alejandro v. Bull*, 159 Wn2d 674, 153 P.3d 864 (2007). CP21-22 and 32-35.

But on the first page of Form 17, in Paragraph I:1:J, the question "Is there a boundary survey for the property?" was answered "Yes." Then, I:1:J of the parties' Addendum, initialed and dated by Masseys on May 25, 2008, added that "Cascade Survey was done on the property." Therefore, as part of the purchase and sale agreement, Form 17 rendered the Cascade line the contractually binding property line. CP75-76; 113-114; 184-186; 197-198, p.25, line 5 - p.26, line 7; 432; 453 and 458.

C. The third false premise was Judy's argument that Rich sold his entire interest in Tract 2; *i.e.* the disputed portion south of the Cascade line to the Voorheis line, as well as the undisputed land within the Cascade line. CP405-409, 171-174 and 48-54. But Form 17 was a part of the contract, it did identify the property being sold based on the Cascade survey and, therefore, Rich did *not* sell the disputed area between the Cascade and Voorheis lines. And because the first 3 premises are false, the written agreement only conveyed the property based on the Cascade survey. Therefore, Rich's deposition and declaration testimony did not alter the written contract and the Statute of Frauds was fully satisfied, not violated. CP19-23 and 32-35.

D. The fourth false premise was that the Statute of Frauds was still not satisfied, however, because Rich had failed to "reserve" any

interest in the disputed area between the Cascade and Voorheis lines. Rich had not, so the argument went, specified a legal description for the reserved area. CP406-409; 376-377; and 173-177. But this premise is false because the Statute of Frauds in RCW 64.04.010 and .020 only requires "conveyances" to be in writing. By definition, a "reservation" is not a conveyance. Whatever is not conveyed, is "reserved." CP263-264; 87-89 and 91-92.

E. The fifth false premise was that Rich conveyed the disputed area south of the Cascade line because he used the same legal description for sale to Masseys in 2008 as he received when he purchased from Carol Boswell 11 years earlier in 1997. CP409-410; 471-479; 173; 180; and 49-52. But the legal description conveyed to Rich was 2 lines long. CP472 and 40. In contrast, the legal description conveyed to Masseys was 16 lines long. CP477 and 45. Clearly, they were not the same. CP94-98 and 23-26. *See also* CP173; 255-257; 409-410 and 481-484.

Moreover, 13 of the 14 extra lines in the conveyance to Masseys were related to a Boundary Line Agreement (BLAgt) Rich entered into with Dr. and Mrs. Claude V. DeShazo regarding the north line of Tract 2. CP410 and 481-484. Specifically, the Cascade methodology was used to describe the Voorheis line. The legal description of the north line was

reformed so that it described the Voorheis line and gave up any claim to property within the Cascade survey which was north of the Voorheis line.

All the other northern tier neighbors in the LTS had taken similar steps. Even Judy and her late husband, Charlie, had repeatedly, in writing and, in two cases, acknowledged before a notary public, agreed that the Voorheis lines were the basis for sale and development of their Tracts. Therefore, Judy and Charlie pledged to "revise" or reform the legal descriptions in order to keep the Voorheis lines. CP253-258 and 278-291.

Moreover, even the south line of Carol Boswell's conveyance was, by contract, described differently than the conveyance to Masseys. Carol Boswell made it clear in her contract with Rich that she would make no warranties about her boundaries. She did not want to be drawn into a dispute about whether the Voorheis or Cascade survey should control ownership. Therefore, in her contract Addendum with Rich, she pointed out that the Cascade line "deviated" from the lines platted in the 1970's. The Addendum also stated that Charlie and Judy had removed the "boundary fence" on her southern border. Carol Boswell therefore conveyed, without warranty, all her interest from the Cascade line on the northern border to the Voorheis line on the southern border. The Trial

Court said she "did it right". CP95-97; 123-128; 23-26 and 37.

In contrast, Rich conveyed and warranted only the undisputed portion of his property between (1) the reformed legal description of the Voorheis line on the north and (2) the Cascade line on the south. Therefore, contrary to Judy's argument, there were significant changes and differences on both the north and south borders between what Carol Boswell conveyed, without warranty, and what was conveyed and limited, by warranty, in Rich's conveyance to Masseys.

F. The sixth false premise, building on the fifth, was that "the same legal description for the south line of the property" used by Boswell was used for Masseys. Therefore, Judy argued, if Carol Boswell conveyed all her interest in Tract 2, including the disputed portion to the Voorheis line, Rich must also have done so. This premise fails to recognize the very point Judy's Motion stated at the outset. There are 2 conflicting *surveys*, not 2 conflicting *legal descriptions*. CP403, ¶6. ***The 2 conflicting surveys are both based on the same legal description!***

While not every boundary dispute involves 2 surveys, every boundary dispute does involve 2 different locations on the ground for where at least one of the parties presumes the 1 legal description exists. Therefore, in every boundary dispute the court must decide whether or not

a correct survey of the record legal description will be overcome by express or implied agreement, and/or use, possession and occupation, to a line *beyond* the correctly surveyed record legal description. Property beyond the correctly surveyed legal description is a "non-record" area. There is no record legal description for that area until or unless the court, using the correct survey to legally describe it, awards the non-record property to a party claiming property to an extra-record line. CP68-69; 90-94 and 15-19.

Once the distinction between a correctly surveyed record legal description and a non-record claim is recognized, a myriad of universally accepted black-letter law principles come into play. The most seminal of these bright line principles is that the Statute of Frauds has *nothing* to do with boundary line disputes. CP263-264 and 77, lines 4-6. The Statute of Frauds deals with record conveyances. It does not deal with the passage of non-record legal title based upon express or implied agreement to, and/or use, possession and occupation of, an area outside the record legal description. CP15-19.

As a result of this distinction between record and non-record ownership -- which Judy wants to ignore -- the universally accepted black-letter law is that the Statute of Frauds does not apply in boundary

disputes. In such cases, the Court is called upon to *interpret, define* and/or *fix* the location of the property line presumed to be covered by the deeded legal description. Courts are not *conveying, transferring* or *altering* legal title or ownership. CP15-19. Courts are *reforming* record legal ownership to comply with non-record legal title.<sup>18</sup>

For all the above reasons, the same legal description of the south line of Tract 2 was conveyed by Carol Boswell, *without warranty*, to both record and non-record rights in real property located in 2 different positions by 2 conflicting surveys. In contrast, the same legal description of the south line was conveyed, and *warranted*, to Masseys based solely on the Cascade survey and thereby limited to record rights. Therefore, Rich did not convey, and did reserve, the non-record rights Carol Boswell conveyed to him without warranty. Thus, Rich did not convey his entire interest in Tract 2.<sup>19</sup>

G. The seventh false premise was Judy's argument that a court would violate the Statute of Frauds if it reformed the record legal

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<sup>18</sup> See e.g. *Schultz v. Plate*, 48 Wn App 312, 313-314, n.1 and 318, 739 P.2d 95 (1987) *Biddle v. Wright*, 4 Wn App 483, 484-5, 481 P.2d 938 (1971) and *Light v. McHugh*, 28 Wn2d 326, 327 and 329-330, 183 P.2d 470 (1947).

<sup>19</sup> This limitation of Rich's conveyance to Masseys was also documented when Judy's counsel took Rich's and Darren Massey's depositions as previously discussed at pages 30-31.

description of a successful non-record claimant. CP52 and 62. As already established, a court's reformation is the result of interpretation, definition and fixing of a location on the ground where legal non-record title has been obtained by use, possession and occupation. A court's reformation is not a conveyance, transfer or alteration of record title. This Division, as well as other courts, have been remanding cases for, and/or performing, reformation for decades, if not centuries.<sup>20</sup> The Statute of Frauds is not violated; it is not even applicable.

H. These seven false premises "supported" misapplication of the law. The first misapplication actually issued primarily from the Trial Court. *But see* CP412, line 6. Although finding Judy's argument of "mootness" irrelevant, the Trial Court stated that Rich was not "the real party in interest" and, therefore, lacked standing. The contention that a litigant is not the real party in interest, however, can only be asserted against plaintiffs, not defendants. CP100-101. And, of course, real party in interest was never pleaded either. CP566-575 and 370-377.

I. Also based on the foregoing seven false premises was Judy's

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<sup>20</sup> See the 3 cases cited in footnote 18 on the prior page. Thus, for example, in *Schultz v. Plate*, *supra*, 48 Wn App at 313-314, n.1, Judges Ravelle, Callow and Chan of this Division unanimously held that "When the trial court reforms the deeds in accordance with this opinion, it should also determine ownership of the 15-foot strip, which may include property owners who are not parties in this action."

argument that Rich lacked standing. Again, all of Judy's cases involving lack of standing asserted that proposition against *plaintiffs*, not defendants. CP259-270. Further, caselaw establishes that even a party who would not have standing to sue, is given standing to counter-sue once sued. CP268-269 and 71-72 n.2. Similarly, statutory law concerning unregistered foreign business entities, which cannot sue, also recognizes that such an entity, if sued, has standing to counter-sue. *See e.g.* RCW 25.15.340(1) and (2)(c).

J. Judy's final legal argument based on her seven false premises was that the boundary dispute she originally filed, which was based upon conflict between 2 surveys, was moot. It was not. It is not. The proper location of legal ownership between Tracts 2 and 4 is not resolved. The merits of that dispute have never been argued. A court can still grant "effective relief" by reforming the record legal descriptions of Tracts 2 and 4 to describe the Voorheis line between them based upon the Cascade methodology. CP262, lines 6-12.<sup>21</sup>

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<sup>21</sup> First, Rich and Margarets' legal title, based on the Common Grantor Doctrine, can be awarded to the Voorheis line. Second, their record legal description to the Voorheis line can be reformed based upon the Cascade methodology. Third, historical access to their two 10-acre lots to the west over the disputed panhandle can be preserved for, and maintained by, Rich and Margaret. That would be "effective relief" for which this Division and the Supreme Court have remanded prior cases precisely for that purpose. *See Schultz v. Plate, Biddle v. Wright* and *Light v. McHugh* cited in footnotes 18 & 20, *supra*.

**V. Judy's Misrepresentation Argument Was Not Only Wrong, It Was Irrelevant.**

In addition to the above errors, which at least related to the litigation which had been filed, Judy also alleged that Rich had committed misrepresentation against the Masseys -- who were not even parties. CP406-409; 429-469; 172-178; 51 n.1 and 58-59. As has already been shown, this misrepresentation argument (by proxy) is incorrect, if not false. CP258-259; 342-360 and 82-85.

Perhaps, more importantly, the misrepresentation argument was not even relevant. Erroneous allegations of misrepresentation had absolutely nothing to do with mootness, standing or the conflict between the Cascade and Voorheis surveys which Judy admitted was the basis of the lawsuit she filed. If anything, the misrepresentation claim undermined the lack of standing claim. *See* footnote 15, *supra*. Unfortunately, however, it was a red herring sideshow to which the Trial Court appears to have given weight. CP83 n.8; 85-87; 90 n.13; 121 and 150-156.

**VI. If the Trial Court Thought It Was Ruling On the Merits Of the Boundary Dispute and Counterclaims, It Was Mistaken Procedurally and Substantively.**

- A. Procedurally, the merits were to be ruled on by Judge Weiss, and Judge Lucas was advised of this fact, in writing, several times. CP245, 256, 258, 94 and 98.**

**B. Substantively, the Trial Court apparently did not recognize the vested nature of non-record rights and that they are equal, if not superior, to record rights; they can overcome a correct survey of the record legal description. CP68-69, n.2 and 98-100.**

**VII. As a matter of law, established by Judy's own authored, written, signed and acknowledged "Letter of Understanding" dated February 28, 1998, as well as the Declarations of all the neighbors, a surveyor and a photogrammatrist, the Voorheis survey lines determined the Common Grantor's property lines and, therefore, the ownership line between Tracts 2 and 4.**

Counsel for Rich does not believe the Trial Court, Judge Lucas, ruled on the merits. But Judy's counsel made a Supplemental Designation which added many Clerk's Papers submitted in support or opposition to the merits. CP576-577. Rich's counsel made a Motion to Correct (Limit) the record, but it was denied. Commissioner Mary Neel ruled on January 6, 2010 that "The panel that considers the appeal on the merits will determine what evidence was before the trial court and what parts of the appellate record it will consider." This forced Rich's counsel to further Supplement the record with materials from his earlier-filed Motion on the merits of the boundary dispute. CP774-776. Nevertheless, except for Appendix E, neither party's Supplements have been cited. Even Rich's Motion -- Judy's concern over which led to her Designation, Rich's limitation request and Commissioner Neel's ruling -- was not cited.

Whether or not the panel which considers this appeal determines the record before the Trial Court included all the Clerk's Papers on the merits of the boundary dispute, those materials establish Rich's ownership to the Voorheis line as a matter of law. And whether or not those merits were before the Trial Court, this Court engages in the same inquiry as the Trial Court did or, after remand, a trial court would. If this Court will engage in that inquiry now, it could serve judicial economy by avoiding a remand to rule on the merits, an argument below on the merits and a possible future appeal of the merits. The panel is, therefore, requested to consider that possibility.

If the merits are ruled on, Clerk's Papers listed below establish the undisputed and indisputable fact that (1) the Voorheis survey established 4x4 cement monuments with brass discs which (2) guided creation of LTS property lines and development of Tracts with fences, driveways, electrical utilities and structures. Those lines continue to "persist" based upon aerial photogrammetry and ground level pictures. Virtually all owners in the northern tier of the LTS have also had their record legal descriptions reformed by BLAgt's which used the Cascade methodology to describe the Voorheis line. CP253-258, 277-291 and 297-341.

The documents in Judy's Supplemental Designation are CP578-

773. The documents in Rich's Supplemental Designation are CP777-1153. Rich's documents were individually identified by title to the Trial Court. CP105. But they only add to the record put before the Trial Court, in order to provide context, which already established those same facts. CP253-258, 277-291, and 297-341.

#### **VIII. Conclusion / Relief Requested**

At a minimum, reversal of the Trial Court's grant of Judy's Summary Judgment Motion and a remand to the lower court is requested. If the assigned panel will also consider Rich's Motion, it should be granted with a remand for determining the reformed record legal descriptions.

RESPECTFULLY SUBMITTED this 1<sup>ST</sup> day of February, 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:

**Brief of Appellants**

were sent for delivery to the Court of Appeals by ABC Legal Messengers and I personally delivered a true and correct copy to:

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

as attorney for Respondent, on:

**February 1, 2010.**

DATED February 1st, 2010 at Snohomish, Washington.

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

# **Appendix A**

## **Site Map / Vicinity Sketch**

Part of the record on review as CP312 and 289

# Vicinity Sketch

Senger

Caverly  
Deshazo

High  
Bridge  
Roau

**TRACT 2**

Caverly  
Boswell  
Richard Anderson  
Massey

**TRACT 1**

Caverly  
Campbell  
Jones

Access  
Road

**TRACT E**

Caverly  
Fowler  
Ward

Disputed Line



**TRACT 4**

Caverly  
Charlie & Judy Anderson

**TRACT 3**

Caverly  
Charlie & Judy Anderson

Emily  
Anderson

Access  
Road

Burgess  
Interstate Inc

**TRACT 6**

Caverly  
Tuohy  
Clayton

**TRACT 5**

Caverly  
Gately  
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# Appendix B

## Letter from Respondent Judith Anderson's Counsel

Pursuant to RAP 10.3(a)(8) Appellants Richard and Margaret Andersons' attorney requests permission to include the attached letter in the record on review. It is not part of the Clerk's Papers as several other letters are (CP563, 391-399, 296, 162-163, 7-11 and 12), but is part of the record between counsel for the parties, provides chronology and bears on the issues, especially Appellants' assertion that CR 41(a)(3) was overlooked, if not violated, doing prejudicial harm to Appellants.

Law Offices of

**B. Craig Gourley**

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Telephone (360) 568-5065  
Facsimile (360) 568-8092

B. Craig Gourley, Attorney  
Roy T. J. Stegena, Attorney  
Debra Kelley, Attorney

Shari A. Wulf, Escrow Officer  
Theresa Richards, Paralegal  
Tracy Swanlund, Paralegal  
Jeanne Peters, Escrow Officer

**RECEIVED**

**MAY 13 2009**

**GARY W. BRANDSTETTER  
ATTORNEY AT LAW**

May 12, 2009

Gary W. Brandstetter  
1024 First Street, Suite 103  
Snohomish, WA 98290

**RE: *Anderson v. Anderson***

Dear Gary:

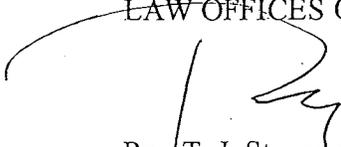
I am writing as a follow-up to your last communication, in which you indicated that at least in part because your clients' access to their lots has apparently been blocked by new fencing, settlement was no longer a possibility, and you would therefore proceed with the litigation. It is my understanding that the fencing you referred to was installed by the Masseys along the south boundary of the land your clients sold to them, and that no cross fencing from my client's property connects to it. Your clients' quarrel in this regard would seem to be with the Masseys rather than with my client.

In any event, since it seems that this case will move forward, I would ask that you respond to my long-outstanding discovery requests by the end of May so that the need for a discovery motion can be avoided. Accordingly, I will be telephoning you at 10:00 a.m. on Monday, May 18<sup>th</sup> to conduct the discovery conference required by CR 26. If this time and date does not work with your schedule, please contact my paralegal Tracy at (360) 568-5065 or [TracyS@1031exchange.net](mailto:TracyS@1031exchange.net) with the time and date that works best for you.

Additionally, although your motion to amend your pleadings to include a counterclaim was agreed to by my client and accordingly granted by the court, the docket reflects that you have not yet filed an amended pleading. I would therefore also ask that you file any amended pleading by the end of May so we can move forward to close the pleadings and complete discovery in a timely fashion, especially since the trial has already been continued once to accommodate the filing of your clients' counterclaim.

Sincerely,

LAW OFFICES OF B. CRAIG GOURLEY

  
Roy T. J. Stegena  
Attorney At Law

cc. Client

# Appendix C

## Deposition Notices for Appellant Richard Anderson and his purchaser, Darren Massey Pursuant to RAP 10.3(a)(8)

Pursuant to RAP 10.3(a)(8), Appellants Richard and Margaret Andersons' attorney requests permission to include the attached deposition notices in the record on review. They are not part of the Clerk's Papers because discovery documents are not filed with the Court unless used in a Motion or pursuant to Court order in conformance with CR 26(h). The notices apply to two depositions in this case, however, both of which depositions have been provided in whole or part to the Court. CP272-276, 183-212, 237-239, 110 and 34-35. The notices are relevant here to establish chronology and timing.

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JUL 16 2009

GARY W. BRANDSTETTER  
ATTORNEY AT LAW

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

JUDITH ANDERSON, a single woman,

NO. 07-2-03928-5

Plaintiff,

**NOTICE OF DEPOSITION**

v.

RICHARD ANDERSON and MARGARET  
ANDERSON, husband and wife,

Defendants.

TO: **Richard Anderson**

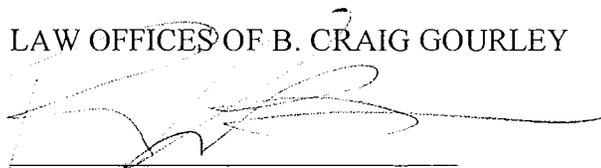
AND TO: **Gary Brandstetter, His Attorney**

EACH OF YOU will please take notice that the testimony of Richard Anderson, the Defendant above named, will be taken on Oral Examination before a Notary Public on Friday, July 31, 2009 at the Law Office of B. Craig Gourley, 1002 10<sup>th</sup> Street, Snohomish, Washington, 98290, commencing at 10:00 a.m. and continuing from day to day until completed or as otherwise adjourned by the parties.

This testimony upon oral examination will be taken on the ground and for the reason that Richard Anderson will give evidence material to the establishment of the Plaintiff's claims in this matter.

DATED this 14<sup>th</sup> day of July, 2009.

LAW OFFICES OF B. CRAIG GOURLEY

  
Roy T. J. Stegena, WSBA#36402  
Attorney for Plaintiff

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

JUDITH ANDERSON, a single woman,  
  
Plaintiff,  
  
v.  
  
RICHARD ANDERSON and MARGARET  
ANDERSON, husband and wife,  
  
Defendants.

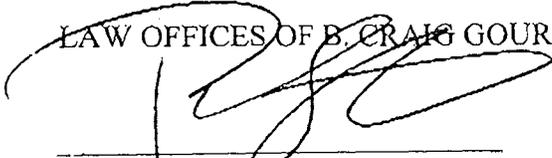
NO. 07-2-03928-5  
  
SUBPOENA FOR ATTENDANCE AT  
DEPOSITION UPON ORAL  
EXAMINATION

THE STATE OF WASHINGTON, TO: Darren Massey  
20500 157<sup>th</sup> Ave SE  
Monroe, WA 98272

**YOU ARE HEREBY COMMANDED** to appear before a Notary Public and give testimony upon oral examination in the above cause of action, by the Law Offices of B. CRAIG GOURLEY, 1002 Tenth Street, Snohomish, WASHINGTON 98291 on Wednesday, the 5<sup>th</sup> day of August, 2009, or any such other date to which the matter may be continued, commencing at the hour of 10:00 a.m., continuing until completed or as otherwise adjourned by the parties, to therein give testimony in the above entitled case, and to remain in attendance until discharged.

**HEREIN FAIL NOT AT YOUR PERIL.**

DATED this 28<sup>th</sup> day of July, 2009.

LAW OFFICES OF B. CRAIG GOURLEY  
  
Roy T. J. Stegena, WSBA#36402  
Attorney for Plaintiff

# Appendix D

## Email and postal correspondence between Superior Court and the parties

Pursuant to RAP 10.3(a)(8) Appellants Richard and Margaret Andersons' attorney requests permission to include the attached email correspondence in the record on review. It is not part of the Clerk's Papers as several other email strings are (CP292-295, 231, 146-148), but is part of the record between Superior Court and the parties, provides chronology and bears on the issues, especially Appellants' assertion that CR 41(a)(3) was overlooked, if not violated, doing prejudicial harm to Appellants.

## Gary Brandstetter

---

**From:** Mecca, Tiffany [Tiffany.Mecca@co.snohomish.wa.us]  
**Sent:** Monday, August 10, 2009 3:50 PM  
**To:** 'Tracy Swanlund'; 'gary@gwbrandstetterlaw.com'  
**Subject:** RE: Anderson v. Anderson

Good afternoon,

I spoke with Judge Weiss about this matter. Unfortunately, he cannot meet and confer with the parties about scheduling. To the extent that there is an agreement between the parties on how to go forward, please let me know. If there is no agreement, please let me know and the Judge will decide how to go forward with scheduling.

After looking at the paperwork I do have a question about the length of time necessary to prepare for the hearing. How long do you think it will take the court to prepare for the 8/13/09 matter? If it will talk more than an hour of judicial time, you need to give notice to the court.

Thank you,

Tiffany Lynn Mecca  
Law Clerk to the Honorable  
Bruce I. Weiss  
425-388-7335  
[tiffany.mecca@co.snohomish.wa.us](mailto:tiffany.mecca@co.snohomish.wa.us)

---

**From:** Tracy Swanlund [mailto:TracyS@1031exchange.net]  
**Sent:** Monday, August 10, 2009 3:03 PM  
**To:** Mecca, Tiffany  
**Subject:** Anderson v. Anderson

Hi Tiffany,

I am writing about case #07-2-03928-5, which is set for defendants' summary judgment motion hearing before Judge Weiss on Thursday, August 13<sup>th</sup>. Plaintiff has her own summary judgment hearing currently set for August 25<sup>th</sup>. The lawyer I work for has written the judge regarding the possibility of consolidating these hearings into one, or at least having a conference call regarding. Opposing counsel is against this, however. Has Judge Weiss come to any decision about this?

Thank you for any information you can provide. I have also left you a voice mail about this too.

Tracy Swanlund  
Paralegal, Law Office of B. Craig Gourley  
Phone (360) 568-5065  
Fax (360) 568-8092

## Gary Brandstetter

---

**From:** Gary Brandstetter [gary@gwbrandstetterlaw.com]  
**Sent:** Monday, August 10, 2009 3:58 PM  
**To:** 'Mecca, Tiffany'  
**Cc:** 'TracyS@1031exchange.net'  
**Subject:** RE: Anderson v. Anderson  
**Attachments:** SCAN1509\_000.pdf

Ms. Mecca:

Gary is on his way to serve and file his Reply materials, along with a letter to Judge Weiss giving notice that this matter will most likely take more than one hour of judicial time. (See Attached letter.)

Gretchen

**From:** Mecca, Tiffany [mailto:Tiffany.Mecca@co.snohomish.wa.us]  
**Sent:** Monday, August 10, 2009 3:50 PM  
**To:** 'Tracy Swanlund'; 'gary@gwbrandstetterlaw.com'  
**Subject:** RE: Anderson v. Anderson

Good afternoon,

I spoke with Judge Weiss about this matter. Unfortunately, he cannot meet and confer with the parties about scheduling. To the extent that there is an agreement between the parties on how to go forward, please let me know. If there is no agreement, please let me know and the Judge will decide how to go forward with scheduling.

After looking at the paperwork I do have a question about the length of time necessary to prepare for the hearing. How long do you think it will take the court to prepare for the 8/13/09 matter? If it will take more than an hour of judicial time, you need to give notice to the court.

Thank you,

Tiffany Lynn Mecca  
Law Clerk to the Honorable  
Bruce I. Weiss  
425-388-7335  
[tiffany.mecca@co.snohomish.wa.us](mailto:tiffany.mecca@co.snohomish.wa.us)

**From:** Tracy Swanlund [mailto:TracyS@1031exchange.net]  
**Sent:** Monday, August 10, 2009 3:03 PM  
**To:** Mecca, Tiffany  
**Subject:** Anderson v. Anderson

Hi Tiffany,

I am writing about case #07-2-03928-5, which is set for defendants' summary judgment motion hearing before Judge Weiss on Thursday, August 13<sup>th</sup>. Plaintiff has her own summary judgment hearing currently set for August 25<sup>th</sup>. The lawyer I work for has written the judge regarding the possibility of consolidating these hearings into one, or at least having a conference call regarding. Opposing counsel is against this, however. Has Judge Weiss come to any decision about this?

Thank you for any information you can provide. I have also left you a voice mail about this too.  
Tracy Swanlund

## Gary Brandstetter

---

**From:** Mecca, Tiffany [Tiffany.Mecca@co.snohomish.wa.us]  
**Sent:** Monday, August 10, 2009 4:24 PM  
**To:** Mecca, Tiffany; 'Gary Brandstetter'  
**Cc:** 'TracyS@1031exchange.net'  
**Subject:** RE: Anderson v. Anderson

I forgot to put in the time of the hearing on 10/2. The motion would be heard at 9:30 a.m.

Thank you,

Tiffany Lynn Mecca  
Law Clerk to the Honorable  
Bruce I. Weiss  
425-388-7335  
[tiffany.mecca@co.snohomish.wa.us](mailto:tiffany.mecca@co.snohomish.wa.us)

---

**From:** Mecca, Tiffany  
**Sent:** Monday, August 10, 2009 4:22 PM  
**To:** 'Gary Brandstetter'  
**Cc:** TracyS@1031exchange.net  
**Subject:** RE: Anderson v. Anderson

Thank you for the notice.

Unfortunately, due to the volume of case on civil motions, we will need to special set this motion to a week when Judge Weiss is not on civil motions due to the volume of paper work involved with this matter.

The first available spot we have for a summary judgment is Friday October 2, 2009 at a.m. I understand that your current trial date is September 10, 2009. In order to accommodate this motion you will need to continue your trial date.

If this date works with both parties, I will calendar it in out personal calendar. A new note will need to be filed, indicated that it is special set in front of Judge Weiss.

Thank you

Tiffany Lynn Mecca  
Law Clerk to the Honorable  
Bruce I. Weiss  
425-388-7335  
[tiffany.mecca@co.snohomish.wa.us](mailto:tiffany.mecca@co.snohomish.wa.us)

---

**From:** Gary Brandstetter [mailto:gary@gwbrandstetterlaw.com]  
**Sent:** Monday, August 10, 2009 3:58 PM  
**To:** Mecca, Tiffany  
**Cc:** TracyS@1031exchange.net  
**Subject:** RE: Anderson v. Anderson

Ms. Mecca:

## Gary Brandstetter

---

**From:** Gary Brandstetter [gary@gwbrandstetterlaw.com]  
**Sent:** Monday, August 10, 2009 4:52 PM  
**To:** 'Mecca, Tiffany'  
**Cc:** 'Roy T.J. Stegena'; 'TracyS@1031exchange.net'  
**Subject:** Anderson v. Anderson;  
**Attachments:** Max Ford Crane Nov. 1998.jpg; Max Ford Crane Nov. 1998 -2.jpg; Max Ford Crane Nov. 1998-3.jpg; Max Ford Crane Nov. 1998-4.jpg; Max Ford Crane Nov. 1998-5.jpg; Max Ford Crane Nov. 1998-6.jpg

Ms. Mecca:

Mr. Brandstetter could not wait any longer to receive email scans of these photographs from Richard Anderson. They are referenced in Mr. Anderson's Reply Declaration. We did receive the email from Mr. Anderson at 4:22 p.m. Mr. Brandstetter, as he is in the car returning from Everett and in order to meet today's filing deadline, has requested that I forward these photographs to opposing counsel and the Court.

Gretchen

---

**From:** Richard Anderson  
**Sent:** Monday, August 10, 2009 4:22 PM  
**To:** Gary Brandstetter

## Gary Brandstetter

---

**From:** Gary Brandstetter [gary@gwbrandstetterlaw.com]  
**Sent:** Wednesday, August 12, 2009 9:58 AM  
**To:** 'Mecca, Tiffany'  
**Cc:** 'Roy T.J. Stegena'; 'TracyS@1031exchange.net'  
**Subject:** Anderson v. Anderson  
**Attachments:** SCAN1512\_000.pdf

Ms. Mecca:

Sorry for the delay in responding to your last two emails late on Monday afternoon. I was out of the office yesterday at a Seattle mediation from 9 to 5:20 (not to mention the 1½ hours to get there and an hour to return).

On Monday afternoon, when I filed my Summary Judgment Reply, I also filed a Stipulation and Order Continuing Trial date (copy attached), prepared by Mr. Stegena's office, with Carrie in the Trial Court Administrator's Office. This meets the requirement of your second paragraph of the 4:22 p.m. email. In fact, Della Moore just called to confirm that the trial has been continued to January 28, 2010.

I will also prepare a new Calendar Note for October 2, 2009 at 9:30 a.m. as a special setting before Judge Weiss. It will be filed shortly and copies will be sent to you and Mr. Stegena.

Since this matter was fully prepared, and because all authorized materials – original filing, responsive materials and rebuttal (reply) materials – have been filed, no further filings by either party are authorized unless required by Judge Weiss.

Thank you.

Gary Brandstetter

**Gary W. Brandstetter -- Attorney at Law**

1024 First Street, Suite 103, Snohomish, WA 98290 (425) 334-4366 (360) 568-2344 Fax: (360) 568-1344 [gary@gwbrandstetterlaw.com](mailto:gary@gwbrandstetterlaw.com)

*Privileged or confidential information may be contained in this message. If you are not the intended recipient, you may not copy or communicate this message to anyone. If you received this message in error, please destroy this message and notify the sender by reply email. Thank you.*

## Gary Brandstetter

---

**From:** Mecca, Tiffany [Tiffany.Mecca@co.snohomish.wa.us]  
**Sent:** Wednesday, August 12, 2009 10:01 AM  
**To:** 'Gary Brandstetter'  
**Cc:** 'Roy T.J. Stegena'; TracyS@1031exchange.net  
**Subject:** RE: Anderson v. Anderson

Thank you very much. This matter is on personal calendar at this point, not on the civil motions calendar. We will see you on October 2, 2009 at 9:30 in department 5.

Thank again,

Tiffany Lynn Mecca  
Law Clerk to the Honorable  
Bruce I. Weiss  
425-388-7335  
[tiffany.mecca@co.snohomish.wa.us](mailto:tiffany.mecca@co.snohomish.wa.us)

---

**From:** Gary Brandstetter [mailto:[gary@gwbrandstetterlaw.com](mailto:gary@gwbrandstetterlaw.com)]  
**Sent:** Wednesday, August 12, 2009 9:58 AM  
**To:** Mecca, Tiffany  
**Cc:** 'Roy T.J. Stegena'; TracyS@1031exchange.net  
**Subject:** Anderson v. Anderson

Ms. Mecca:

Sorry for the delay in responding to your last two emails late on Monday afternoon. I was out of the office yesterday at a Seattle mediation from 9 to 5:20 (not to mention the 1½ hours to get there and an hour to return).

On Monday afternoon, when I filed my Summary Judgment Reply, I also filed a Stipulation and Order Continuing Trial date (copy attached), prepared by Mr. Stegena's office, with Carrie in the Trial Court Administrator's Office. This meets the requirement of your second paragraph of the 4:22 p.m. email. In fact, Della Moore just called to confirm that the trial has been continued to January 28, 2010.

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Thank you.

Gary Brandstetter

**Gary W. Brandstetter -- Attorney at Law**  
1024 First Street, Suite 103, Snohomish, WA 98290 (425) 334-4366 (360) 568-2344 Fax: (360) 568-1344 [gary@gwbrandstetterlaw.com](mailto:gary@gwbrandstetterlaw.com)

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*Superior Court of the State of Washington  
for Snohomish County*

JUDGE  
ERIC Z. LUCAS

SNOHOMISH COUNTY COURTHOUSE  
M/S #502  
3000 Rockefeller Avenue  
Everett, WA 98201-4060  
(425)388-3421 (425)388-3215 Chambers

Department 4  
Court Clerk  
Nancy Albert  
Law Clerk  
Jennifer T. Song

September 25, 2009

Roy T. J. Stegena, Attorney  
Law Offices of B. Craig Gourley  
P.O. Box 1091/1002 Tenth Street  
Snohomish, WA 98290

Gary W. Brandstetter, Attorney at Law  
Marks Building, Suite 103  
1024 First Street  
Snohomish, WA 98290-2960

Re: *Judith Anderson v. Richard Anderson, et ux*  
07-2-03928-5  
Correspondence re: Order Granting Summary Judgment

**RECEIVED**

**SEP 29 2009**

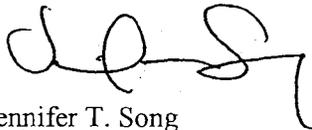
**GARY W. BRANDSTETTER  
ATTORNEY AT LAW**

Dear Counsel,

On Wednesday, September 23, the Court received correspondence via email from Plaintiff's counsel's legal assistant regarding clarification of the Order Granting Summary Judgment entered by the Court after a hearing on September 22, 2009.

Please make all inquiries to the Court in writing and be sure to copy all parties. Thank you.

Sincerely,



Jennifer T. Song  
Law Clerk for Honorable Eric Z. Lucas  
Snohomish County Superior Court

## Gary Brandstetter

---

**From:** Gary Brandstetter [gary@gwbrandstetterlaw.com]  
**Sent:** Tuesday, September 29, 2009 1:15 PM  
**To:** 'Jennifer.Song@co.snohomish.wa.us'  
**Cc:** 'Roy T.J. Stegena'; 'Tracy Swanlund'  
**Subject:** Anderson v. Anderson; Your Letter of 9/25/09  
**Attachments:** SCAN1589\_000.pdf

Ms. Song:

This will acknowledge receipt of the attached letter from you dated September 25. This office has not received a copy of the email apparently sent to the Court by Plaintiff's legal assistant. A similar incident occurred on August 10 shortly before Judge Weiss established a special setting for my clients' Motion for Summary Judgment.

A copy of this email to you is being sent to both Plaintiff's counsel and his legal assistant. Could one or both please provide this office with a copy of the *ex parte* request for clarification. I understand, Ms. Song, that you requested all inquiries to the Court be made in writing but because this involves an email I thought my email requesting a Forward would be most expedient. Thank you.

Gary Brandstetter

**Gary W. Brandstetter -- Attorney at Law**

1024 First Street, Suite 103, Snohomish, WA 98290 (425) 334-4366 (360) 568-2344 Fax: (360) 568-1344 [gary@gwbrandstetterlaw.com](mailto:gary@gwbrandstetterlaw.com)

*Privileged or confidential information may be contained in this message. If you are not the intended recipient, you may not copy or communicate this message to anyone. If you received this message in error, please destroy this message and notify the sender by reply email. Thank you.*

## Gary Brandstetter

---

**From:** Gary Brandstetter [gary@gwbrandstetterlaw.com]  
**Sent:** Tuesday, September 29, 2009 1:28 PM  
**To:** 'Tracy Swanlund'; 'Roy T.J. Stegena'  
**Cc:** 'tiffany.mecca@co.snohomish.wa.us'; 'Jennifer.Song@co.snohomish.wa.us'  
**Subject:** RE: Anderson v. Anderson

Ms. Swanlund:

Thank you for forwarding me another of your *ex parte* emails of which I've had no previous notice. Your 9/25 email to Ms. Mecca, however, is obviously not the 9/23/09 *ex parte* email about which Ms. Song wrote. Please send me a copy of your 9/23 email to Ms. Song. Thank you.

Gary Brandstetter

---

**From:** Tracy Swanlund [mailto:TracyS@1031exchange.net]  
**Sent:** Tuesday, September 29, 2009 1:19 PM  
**To:** gary@gwbrandstetterlaw.com  
**Cc:** tiffany.mecca@co.snohomish.wa.us  
**Subject:** FW: Anderson v. Anderson

Dear Mr. Brandstetter,  
Here is a copy of the e-mail I sent to Tiffany. I was just trying to be nice.  
Tracy Swanlund  
Paralegal, Law Office of B. Craig Gourley  
Phone (360) 568-5065  
Fax (360) 568-8092

---

**From:** Mecca, Tiffany [mailto:Tiffany.Mecca@co.snohomish.wa.us]  
**Sent:** Friday, September 25, 2009 11:10 AM  
**To:** Tracy Swanlund  
**Cc:** Roy T.J. Stegena  
**Subject:** RE: Anderson v. Anderson

Thank you.

Tiffany Lynn Mecca  
Law Clerk to the Honorable  
Bruce I. Weiss  
425-388-7335  
[tiffany.mecca@co.snohomish.wa.us](mailto:tiffany.mecca@co.snohomish.wa.us)

---

**From:** Tracy Swanlund [mailto:TracyS@1031exchange.net]  
**Sent:** Friday, September 25, 2009 11:04 AM  
**To:** Mecca, Tiffany  
**Cc:** Roy T.J. Stegena  
**Subject:** Anderson v. Anderson

Dear Tiffany,  
We are not the scheduling party of the hearing set before you for next Friday, Oct. 2 in this case, but since the materials are so voluminous, I thought you would appreciate a heads up that the Plaintiff was granted summary judgment last Tuesday, so the hearing before Judge Weiss on the Defendants' motion for summary judgment will not be heard, as the

## Gary Brandstetter

---

**From:** Tracy Swanlund [TracyS@1031exchange.net]  
**Sent:** Tuesday, September 29, 2009 1:32 PM  
**To:** gary@gwbrandstetterlaw.com  
**Subject:** FW: Anderson v. Anderson  
**Attachments:** Order.pdf

This must be the one you need to see.

---

**From:** Tracy Swanlund  
**Sent:** Thursday, September 24, 2009 11:18 AM  
**To:** 'Song, Jennifer'  
**Subject:** RE: Anderson v. Anderson

We are representing the Plaintiff. The order doesn't need to be agreed, because Judge Lucas in his order he signed Tuesday granted us leave to dismiss her complaint, against Defendants' objections. I am attaching it so you can see it. My question for you is does the language in this order effectively dismiss her complaint, or do we need to go another step and file a dismissal?

Thanks, Tracy

---

**From:** Song, Jennifer [mailto:Jennifer.Song@co.snohomish.wa.us]  
**Sent:** Thursday, September 24, 2009 9:45 AM  
**To:** Tracy Swanlund  
**Subject:** RE: Anderson v. Anderson

Hi Tracy,

Which party is suggesting submitting the order of dismissal? And also will the order be an agreed order signed off by both parties?

Thanks,  
Jennifer T. Song  
Law Clerk to the Honorable Eric Z. Lucas  
Snohomish County Superior Court, Department 4  
3000 Rockefeller Avenue M/S 502  
Everett, WA 98201  
(425) 388-3215

---

**From:** Tracy Swanlund [mailto:TracyS@1031exchange.net]  
**Sent:** Wednesday, September 23, 2009 10:04 AM  
**To:** Song, Jennifer  
**Subject:** Anderson v. Anderson

Dear Jennifer,  
Yesterday Judge Lucas heard a motion for summary judgment in this case, and we perhaps drafted the order incorrectly. The signed order reads "Plaintiff is hereby granted leave to withdraw her claims as moot." Does this effectively end her case, or do we need to go an extra step and submit an order of dismissal? Thank you for your attention to this matter.

Tracy Swanlund  
Paralegal, Law Office of B. Craig Gourley  
Phone (360) 568-5065  
Fax (360) 568-8092

## Gary Brandstetter

---

**From:** Song, Jennifer [Jennifer.Song@co.snohomish.wa.us]  
**Sent:** Tuesday, September 29, 2009 1:58 PM  
**To:** 'Gary Brandstetter'; 'TracyS@1031exchange.net'; 'Roy@1031exchange.net'  
**Cc:** Mecca, Tiffany  
**Subject:** FW: Anderson v. Anderson  
**Attachments:** Order.pdf

Mr. Brandstetter,

Here's the email chain that was exchanged between myself and Ms. Swandlund.

Jennifer T. Song  
Law Clerk to the Honorable Eric Z. Lucas  
Snohomish County Superior Court, Department 4  
3000 Rockefeller Avenue M/S 502  
Everett, WA 98201  
(425) 388-3215

---

**From:** Tracy Swanlund [mailto:TracyS@1031exchange.net]  
**Sent:** Thursday, September 24, 2009 11:18 AM  
**To:** Song, Jennifer  
**Subject:** RE: Anderson v. Anderson

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Thanks,  
Jennifer T. Song  
Law Clerk to the Honorable Eric Z. Lucas  
Snohomish County Superior Court, Department 4  
3000 Rockefeller Avenue M/S 502  
Everett, WA 98201  
(425) 388-3215

---

**From:** Tracy Swanlund [mailto:TracyS@1031exchange.net]  
**Sent:** Wednesday, September 23, 2009 10:04 AM  
**To:** Song, Jennifer  
**Subject:** Anderson v. Anderson

Dear Jennifer,

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Tracy Swanlund

Paralegal, Law Office of B. Craig Gourley

Phone (360) 568-5065

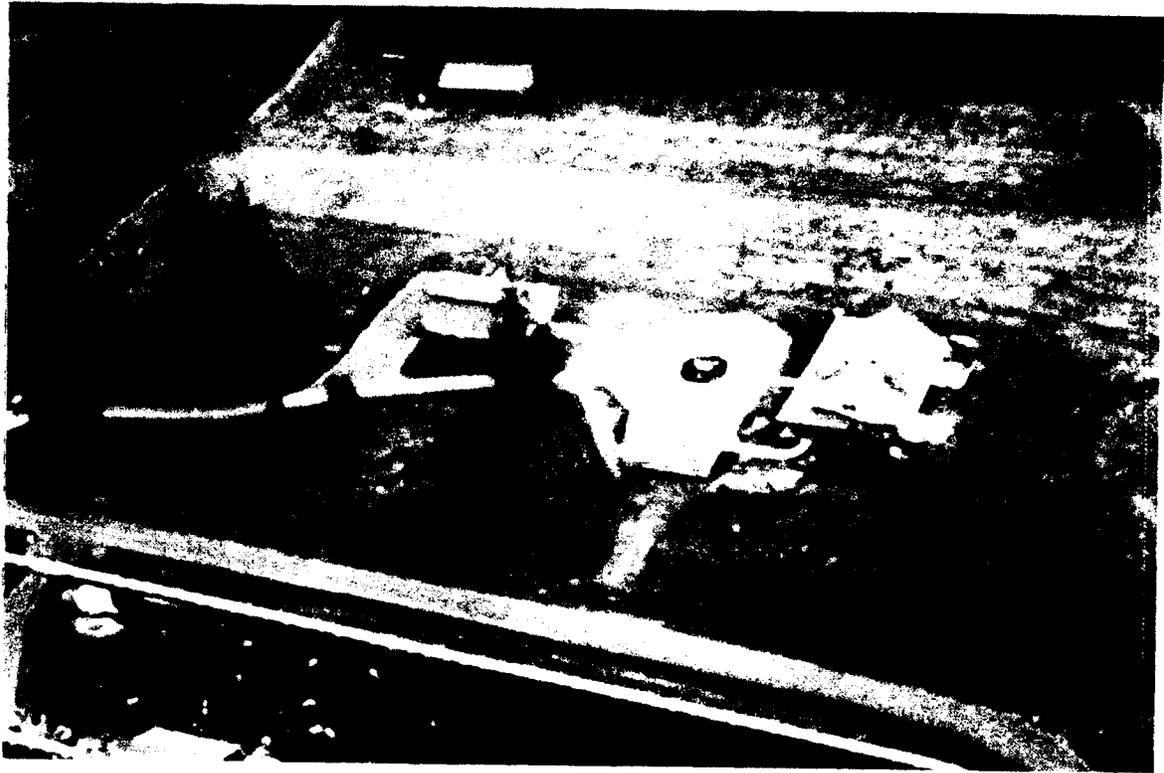
Fax (360) 568-8092

# Appendix E

Color Copies of Photographs attached to  
Appellant Richard Anderson's Declaration on the merits  
of the lawsuit which Respondent Judith Anderson  
added to the record by Supplemental Designation

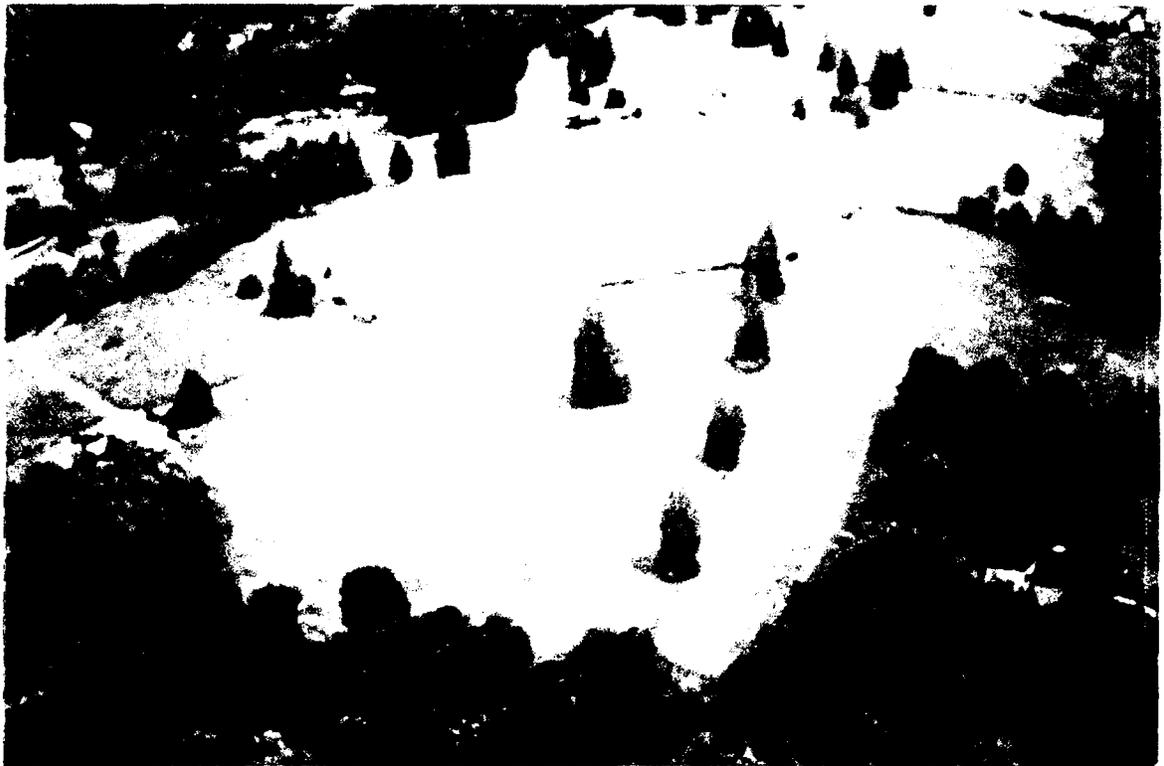
The photographs are already part of the record on review as CP588-595 and six(6) other photographs emailed to Judge Weiss and opposing counsel on August 10, 2009, as confirmed by the email of that date at 4:52 p.m. included in Appendix D and a copy of which precedes those last 6 photographs here.

7/24/74  
7/24/74



1

2



2

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NW

CP 5/2/74

3



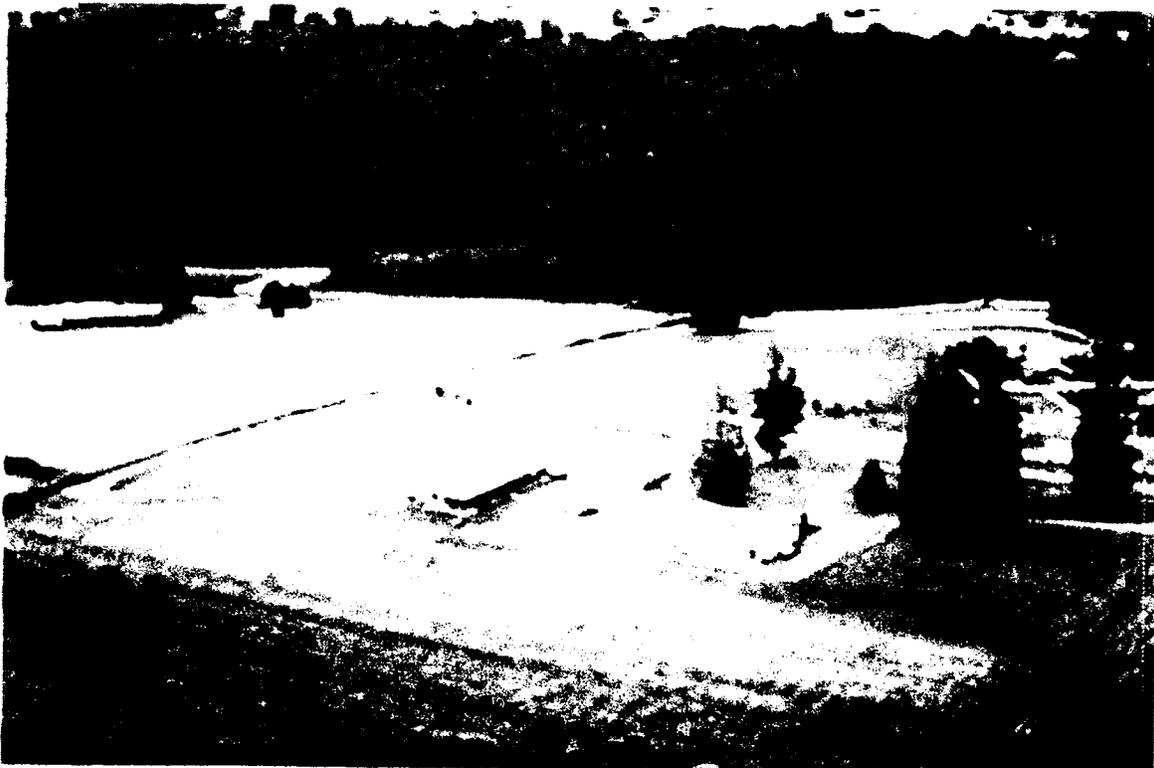
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(V 51)



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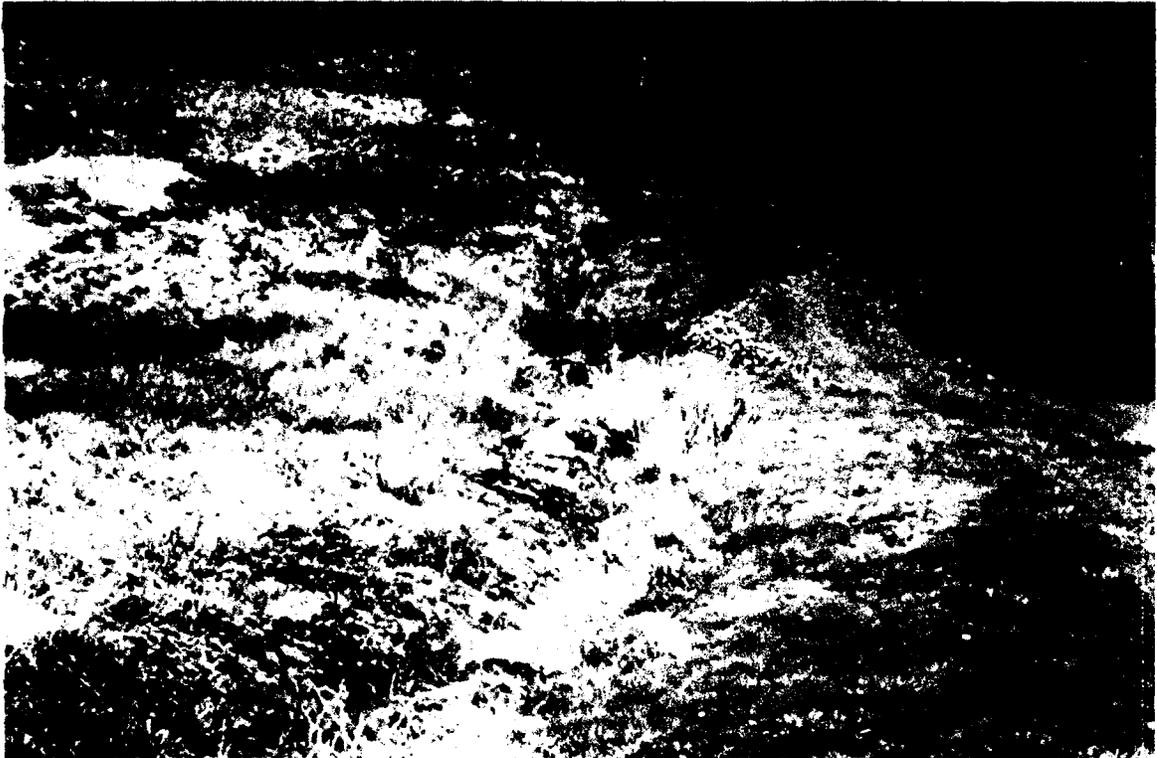
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J S 11

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9



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CP 512

11



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12

CP 513

13



13

14



14

15/11/11

15



15

## Gary Brandstetter

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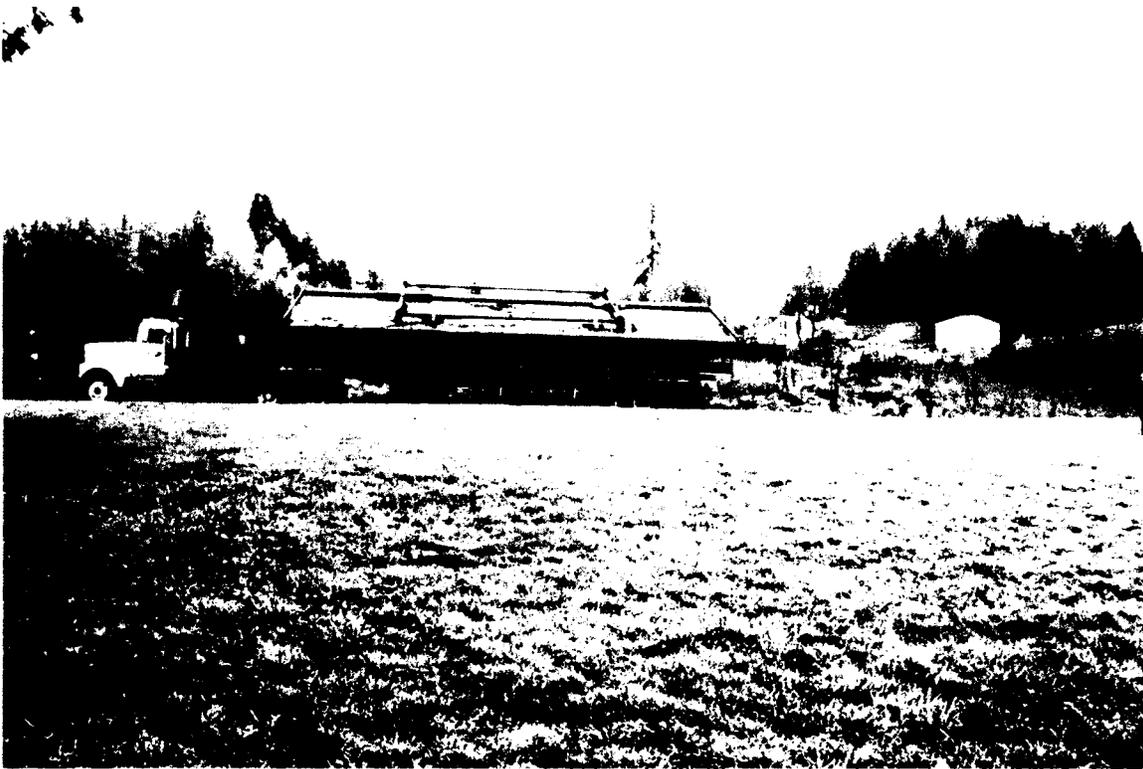
**From:** Gary Brandstetter [gary@gwbrandstetterlaw.com]  
**Sent:** Monday, August 10, 2009 4:52 PM  
**To:** 'Mecca, Tiffany'  
**Cc:** 'Roy T.J. Stegena'; 'TracyS@1031exchange.net'  
**Subject:** Anderson v. Anderson;  
**Attachments:** Max Ford Crane Nov. 1998.jpg; Max Ford Crane Nov. 1998 -2.jpg; Max Ford Crane Nov. 1998-3.jpg; Max Ford Crane Nov. 1998-4.jpg; Max Ford Crane Nov. 1998-5.jpg; Max Ford Crane Nov. 1998-6.jpg

Ms. Mecca:

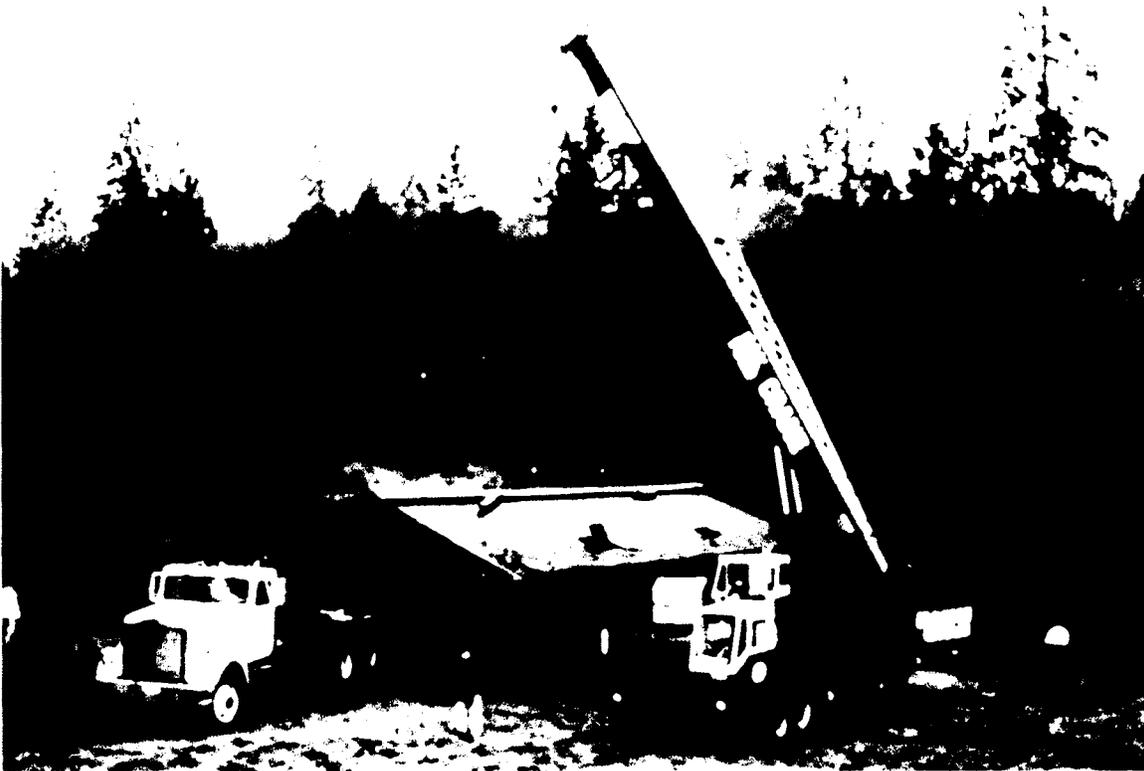
Mr. Brandstetter could not wait any longer to receive email scans of these photographs from Richard Anderson. They are referenced in Mr. Anderson's Reply Declaration. We did receive the email from Mr. Anderson at 4:22 p.m. Mr. Brandstetter, as he is in the car returning from Everett and in order to meet today's filing deadline, has requested that I forward these photographs to opposing counsel and the Court.

Gretchen

**From:** Richard Anderson  
**Sent:** Monday, August 10, 2009 4:22 PM  
**To:** Gary Brandstetter



Looking south. Grass in foreground is Rich's Tract 2.  
Scrub brush in background is Judy's Tract 4.



Looking Southwest. Judy's Tract 4 is left of truck.



Looking south-southwest. Tract 2 in foreground. Tract 4 in background.



Looking West. Scrub brush on Tract 4 is in left background at end of Tract 2 green grass.



Looking west-southwest. Green Grass is Tract 2.  
Scrub brush to left is Tract 4.



Looking West. Green grass in foreground and alder saplings in background  
are Tract 2. Scrub brush on far left is Tract 4.