

65261-3

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No. 65261-3
COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

EMMETT and MARY SOFFEY,

Respondents,

v.

ANDREI and ANAMARIA DAN,

Appellants.

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

	<i>Page</i>
A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR	5
Assignments of Error	5
Issues Pertaining to Assignments of Error	13
C. STATEMENT OF THE CASE.....	14
D. ARGUMENT.....	24
1. Standard of Review.....	24
2. The Finding of Fact and Conclusion of Law finding an agreed upon property line in the front yard was not supported by substantial evidence.	25
3. The Findings of Fact that the Dans’ cement blocks in the front yard protruded past the invisible line between the notch in the curb, which therefore, constituted a <i>de minimus</i> trespass in the front yard, were clearly erroneous.....	29
4. The trial court erroneously concluded that Dans knowingly and intentionally trespassed upon the Soffeys’ property by filling in the northwest corner of the Dan Lot.	30
a. The trial court’s Findings of Fact that the grade in the Soffey and Dan backyards were the same prior to the Dans’ construction activities was not supported by substantial evidence.	31
b. Several Findings of Fact concluding that the Dans knowingly dumped construction debris adjacent to the chain link fence and that the Dans conceded this activity created a bulge in the fence are clearly erroneous.....	32
c. The trial court erred in finding that the Soffeys had always treated the fence separating the backyards as their own and that the boundary in the backyard ran along the southern face of the fence.	34
d. The trial court erred in concluding that the Dans’ construction activity in the northwest corner created a bulge in the fence, which was an actionable trespass.....	35
5. The trial court’s Conclusions of Law that the Dans allowed a nuisance to exist based upon the potential collapse of the	

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wall and supporting Findings of Fact were both clearly erroneous and an error of law.	38
a. The trial court’s Findings of Fact that the terracing in the northwest corner of the Dan Lot had the potential to cause the fence to collapse and to allow a significant volume of construction debris to fall onto the Soffey backyard are not supported by substantial evidence.	39
b. Even if the Findings of Fact were supported by substantial evidence, the trial court erroneously applied the facts to the law regarding nuisances....	41
E. CONCLUSION.....	44
Appendix A -- Pictures from Exhibit 21	
Appendix B -- Pictures from Exhibit 25	
Appendix C -- Picture from Exhibit 26	
Appendix D -- Pictures from Exhibit 27	
Appendix E -- Pictures from Exhibit 28	
Appendix F -- Pictures from Exhibit 29	
Appendix G -- Pictures from Exhibit 30	

TABLE OF AUTHORITIES

Page

Cases

Clipse v. Michels Pipeline Const., Inc., 154 Wn. App. 573, 225 P.3d 492 (2010)..... 36

Ferry v. City of Seattle, 116 Wn. 648, 203 P. 40 (1922) 43, 44

Green v. Hooper, 149 Wn. App. 627, 636-39, 205 P.3d 134 (2009).. 27, 28

Happy Bunch LLC v. Grandview North, LLC, 142 Wn. App. 81, 89-90, 173 P.3d 959 (2007)..... 35, 37, 38

Kirby v. City of Tacoma, 124 Wn. App. 454, 470, 98 P.3d 827 (2004) ... 27

Landmark Dev., Inc. v. City of Roy, 138 Wn. 2d 561, 573, 980 P.2d 1234 (1999)..... 25

MH 2 Co. v. Hwang, 104 Wn. App. 680, 16 P.3d 1272 (2001)..... 25

Mathewson v. Primeau, 64 Wn.2d 929, 938, 395 P.2d 183 (1964)..... 41

Riblet v. Ideal Cement Co., 57 Wn.2d 619, 622, 358 P.2d 975 (1961) 41

State v. Morris, 87 Wn. App. 654, 659, 943 P.2d 329 (1997) 29, 31

Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)..... 25, 40

Womack v. Von Rardon 133 Wn. App. 254, 260, 135 P.3d 542 (2006) ... 41

Statutes

RCW 4.24.630 3, 23, 37, 38

RCW 64.12.030 37

RCW 7.48.010 24

RCW 7.48.120 24

Other Authorities

17 William B. Stoebuck & John W. Weaver, *Washington Practice* § 10.3 (2d ed. 2004) 42

Rules

CR 15(b)..... 27

A. INTRODUCTION

Although the parties to this case dispute the physical location of the boundary between their adjoining lots, the Respondents (“Soffeys”) did not make any claim in their complaint to quiet title or for adjustment of the boundary line based upon adverse possession, parole agreement, or any other basis recognized in law for the adjustment of property boundaries, including oral agreement. The Soffeys testified at trial that the property boundary in their front yard was a zigzag line base upon landscaping features. They believed the rear yards of the two properties were separated by a fence line and claimed ownership of the fence, but were without knowledge of who built the fence or when it was constructed. The Soffeys presented no survey evidence or other evidence of property markers consistent with their claim.

Appellant Andrei Dan testified that he had a survey done at the request of the City of Bellevue in support of his application for a building permit that placed the property line beyond the landscape features in the front yard and followed the fence line in the back yard. The trial court correctly determined that Mr. Dan and Mrs. Soffey reached an oral agreement relied upon by Mr. Dan that the Soffeys could “live with” Mr. Dan performing work and making improvements up to a straight line

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running from a notch in the street curb back to the cyclone fence post, where the cyclone fence continued along the length of the parties' backyards. The trial court *incorrectly* found and concluded that the agreement between Mr. Dan and Mrs. Soffey was for the location of the property line. This finding conflicts with the trial testimony of both Mr. Dan and Mrs. Soffey. The trial court also incorrectly found that Mr. Dan and Mr. Soffey had agreed that the rear yard property line was on the southern side of the wire mesh of the cyclone fence. No witness for either party gave such testimony. The court found it was unnecessary for it to determine who owned the fence. Again, the trial testimony does not support such a finding or conclusion.

Out of these mischaracterizations of the evidence, the trial court agreed with the Soffeys that their neighbors, the Dans, had made a *de minimus* trespass into the front yard of the Soffey's property with "concrete pavers." This conclusion appears to be based upon the zigzag property line asserted by the Soffeys and not the straight line in the disputed area that the court described and correctly identified in its findings. In addition, pictures admitted into evidence show conclusively that the large rocks and concrete pavers placed by Mr. Dan in the front yard area do not cross the agreed upon construction line for Mr. Dan's

improvements. See Appendix E with pictures from Trial Exhibit 28. The Dans blocks and landscape rocks are to the left of the string line. Paving blocks placed by the Soffeys are to the right of the string line.

The trial court also found an actionable trespass in the northwest corner of the backyard under RCW 4.24.630. The Soffeys testified that fill material placed by the Dans in the northwest corner of their rear yard was placed against the fence and created a bulge in the fence. The trial court found that the Dans conceded the creation and existence of the bulge, despite repeated and clear testimony from Mr. Dan that he placed no fill against the fence and no bulge existed. Mr. Dan gave detailed testimony about how he placed fill material at least one foot away from the fence. In addition, pictures were admitted by the court, offered by the Soffeys, which the Soffeys acknowledged did not show a bulge in the fence. Trial Exhibit 6. Other admitted pictures offered by the Dans also showed the fence at the northwest corner with no bulge. See Appendix A and F with pictures from Exhibits 21 and 29.

Mr. Dan also gave detailed testimony as to how he used fill materials authorized by the City of Bellevue and removed fill materials not compliant with City Codes. His work was inspected by City inspectors, who approved his work at final inspection and found no code

violations to exist. Mr. Dan also explained how he created a compacted, stable and code-compliant change in the grade of his back yard. The trial court, however, found his changes in the northwest corner of his property to be a nuisance based solely on the lay testimony of Mrs. Soffey who thought the fill to be unstable and feared it would all come down and damage her property.¹ This was despite testimony from the Soffeys that they never have cleaned up any loose fill material falling in their yard and had no pictures showing evidence of falling or loose fill material.

Appellants Andrei and Anamaria Dan (“Dans”) appeal the Judgment entered on March 19, 2010 in its entirety, along with the Findings of Fact and Conclusions of Law dated November 17, 2009, and the Oral Ruling dated September 25, 2009 incorporated by reference in the Judgment. The Dans request that the Court reverse and vacate the trial court Judgment in its entirety. The Judgment of attorney fees in the amount of \$15,750, costs in the amount of \$359.95, equitable relief designating the location of a property line, and equitable injunctive relief requiring the Dans “to eliminate the trespass and to abate the nuisance” are

¹ In its Oral Opinion at 7:12-19, the court states: “THE COURT BASES THIS CONCLUSION ON UNCONTESTED FACTS. MRS. SOFFEY IS A GARDENER AND HAS ENGAGED IN GARDENING SINCE THE PLAINTIFFS PURCHASED THE PROPERTY IN THE EARLY 1990’S. THERE IS NO CHANGE IN HER LEVEL OF ACTIVITY. SHE ENJOYS GARDENING. THE BULGE OF CONSTRUCTION DEBRIS THROUGH THE FENCE INTERFERES WITH THE SOFFEYS’ USE AND ENJOYMENT OF THE LAND. IT IS THAT SIMPLE.”
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all based upon clearly erroneous Findings of Fact and Conclusions of Law. The evidentiary trial record does not support findings/conclusions that the Dans intentionally and unreasonably trespassed upon the Soffey Lot or that they have allowed a nuisance to exist. The Oral Opinion of the trial court, which contains findings incorporated by the court into its Findings of Fact, does not comport with the evidence at trial, and demonstrates that the trial judge may have been confused about the testimony, or may have harbored a latent bias against adult family homes located in residential neighborhoods.² Regardless of the reason, the Judgment and supporting Findings of Fact and Conclusions of Law misrepresent the testimony at trial. For these reasons as further discussed below, the Dans request that the Court reverse and vacate the Judgment entered by the trial court.

B. ASSIGNMENTS OF ERROR

Assignments of Error

² In the Oral Opinion, the trial judge stated: “The Dans, although it appears they acted and have acted in good faith once the land use inspectors filed various violations against their projects, some of their actions have to have the knowledge element that construction of an adult family home, in a neighborhood that is primarily single-family use, would draw attention to this. In fact, this was a very loud action, involving a significant remodel of a single residential home into a nine-bedroom adult family home. The Dans have to be aware that the change in status would not be received well in the neighborhood, regardless of their admirable intent of providing housing for senior citizens.” Oral Ruling, page 8, lines 7-19.
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Appellants assign error to the trial court's entry of the Judgment dated March 19, 2010, and to the following Findings of Fact and Conclusions of Law, including the findings made in the trial court's Oral Opinion on September 25, 2009, which the court by hand written entry on page 9 of its Findings of Fact and Conclusions of Law incorporated by reference "as further basis for this order"³:

1. Finding of Fact 1.9: "*In 1991 when the Soffey's purchased their lot and home, the boundary between the two lots was defined by landscaping features in the front yard, east of the home locations,⁴ and by a chain link fence between the homes that continued west between the back yards extending to the west boundary line.*"

2. Finding of Fact 1.10: "*Since purchasing their lot in 1991, the Soffey's have treated the chain link fence between the properties as their own,⁵ including maintaining the fence, adding sight obscuring slating to the fence, and clearing vegetation and weeds from around the fence.*"

³ Appellants have not assigned error to each finding or conclusion in the Judgment, Findings of Fact and Conclusions of Law, and Oral Ruling. Necessarily, many of these findings and conclusions overlap. Thus, Appellants have focused on the Findings of Fact and Conclusions of Law and have assigned error to other findings in the Judgment and Oral Ruling to the extent they differ from the Findings of Fact and Conclusions of Law.

⁴ The Dans assign error due to the underlined portion of the finding.

⁵ The Dans assign error due to the underlined portion of the finding.
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3. Oral Ruling, Pages 3 and 4, lines 25-3: *“Whether the chain link fence is owned by the Dans or by Soffeys matters not in the findings reached by the court today.”*

4. Finding of Fact 1.11: *“In 1991, and continuing until 2002 or 2003 when the Dan’s started construction activities on their lot, the “grade” or ground level on the Dan side of the fence approximately matched the ground level on the Soffey side of the fence.”*

5. Oral Ruling, Page 5, lines 12-16: *“The Soffeys have lived on their property and owned it since approximately 1992, when the northwestern corner of both properties were on the same grade level, as testified by both Soffeys. That evidence has not been refuted.”*

6. Finding of Fact 1.14: *“In 2006, an oral agreement was reached between the Soffeys and the Dans over the location of the boundary between their properties. Mr. Dan and Mrs. Soffey agreed that the boundary⁶ would run from an identified “notch” in the road curb, westerly in a straight line to the eastern end of the existing chain link fence, and then westerly alongside the chain link fence to the western edge of the properties.”*

⁶ The Dans assign error due to the underlined portion of the finding.
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7. Finding of Fact 1.15: *“Blocks stacked by the Dan’s in their front yard form, in part, an above grade “fence” adjacent to the Soffey’s front yard. The intrusion, if any, northerly of the agreed dividing line between the properties is minor, and can be remedied by moving any intruding blocks by hand.”*

8. Finding of Fact 1.16: *“Starting on or about 2003, the Dan’s have placed construction debris in the northwest corner of their lot, adjacent to the chain link fence and the Soffey lot. The debris includes broken patio materials, broken concrete blocks, and other dirt and fill material.”*

9. Finding of Fact 1.17: *“The placing of construction debris in the northwest corner of the Dan lot, adjacent to the Soffey lot and the chain link fence, has created an additional six feet of fill which is bulging against the chain link fence, and is covered with vegetation that is growing thru and over the construction debris. A portion of the construction debris fill has “bulged” downhill toward the Soffey’s lot, and now protrudes past the fence line and onto the Soffey property.”*

10. Oral Ruling, Page 3, lines 22-25: *“It is conceded by the Dans that the pile up of construction debris has created a ‘bulge’ into the fence.”*

11. Finding of Fact 1.18: *“After 2006, with knowledge that portions of the construction debris fill placed before 2006 was bulging against the chain link fence and protruding onto the Soffey property, the Dans continued to place additional construction debris and other fill material on top of then existing construction debris, increasing the risk of collapse onto the chain link fence and onto the Soffey property.”*

12. Finding of Fact 1.20: *“The downhill bulging of the construction debris fill, including the portion that protrudes onto the Soffey property and presses against the chain link fence, has the potential to cause the fence to collapse and to allow a significant volume of construction debris and other fill material to fall into the Soffey’s backyard.”*

13. Finding of Fact 1.21: *“The placing or dumping of construction debris in the northwestern corner of the Dan’s property, adjacent to the Soffey’s backyard area, was not done unknowingly. The dumping was done intentionally by the Dan’s to rid their property of patio materials and broken up concrete blocks without having to pay for the cost of off-site hauling and disposal.”*

14. Conclusion of Law 2.2: *“By agreement between the parties, the location of the property or boundary line between the Plaintiffs’ and*

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Defendant's properties is described as follows: Starting at the notch in the concrete curb, where the properties meet, respectively, north and south, and then running in an invisible line westerly to the beginning of the existing chain link fence, and then continuing westerly along the southern face of the existing chain link fence, back to the western boundary of the properties."

15. Conclusion of Law 2.3: *"In the front yard area, the placement of some paver blocks by Defendants protrude by inches into the property of the Plaintiffs. This can be remedied by moving the pavers back by hand, without the need for surveyors or Bellevue Land Inspectors, as the property line can be determined by the parties as the straight line running between the curb notch and the eastern end of the existing chain link fence."*

16. Conclusion of Law 2.4: *"Consistent with the location of the property line established herein, each party, respectfully, may make use of their own front yard areas in any way consistent with applicable City codes, including the construction of fences, landscaping, and other allowable side and/or front yard features."*

17. Conclusion of Law 2.5: *"The construction debris fill located in the northwest corner of the Defendants; lot creates a trespass as the*

construction debris bulges against the chain link fence and protrudes onto the Plaintiff's property."

18. Conclusion of Law 2.6: *"The construction debris fill located in the northwest corner of the Defendants' lot has the potential to cause the chain link fence to collapse and to allow a significant volume of construction debris to fall into the Plaintiffs' back yard, creating an unreasonable interference with the Plaintiffs' use and enjoyment of their property."*

19. Conclusion of Law 2.7: *"Living with the current conditions created by the construction debris fill, with the possible imminent collapse of the chain link fence and potential for a collapse of the construction debris fill onto the Plaintiffs' property, constitutes a substantial interference with the Plaintiffs' use and enjoyment of their property."*

20. Conclusions of Law 2.8: *"The construction debris located in the northwest corner of Defendants' lot constitutes an actionable trespass onto the Plaintiffs' property, and constitutes an actionable private nuisance that is currently damaging Plaintiffs' property and has the potential in the future to significantly damage Plaintiffs' property unless abated."*

21. Conclusion of Law 2.9: *“Based on the agreement between the Soffeys and Dans as to the location of the property line, as agreed to by Mrs. Soffey and Mr. Dan in 2006, the Defendants were aware or should have been aware as of 2006 that the construction debris fill with the bulge against the chain link fence was causing a trespass and a potential nuisance, and yet the Defendants continued to place additional construction debris and other fill material in the northwest corner of their property to the detriment of the Plaintiffs.”*

22. Conclusion of Law 2.10: *“The Court has the equitable power to order the Defendants to take action to abate the trespass, and to abate the nuisance.”*

23. Conclusion of Law 2.11: *“It is not necessary, under the law, for the Plaintiffs to be required to wait until a more significant trespass or nuisance occurs before the Court will order that the Defendants must take action to abate the trespass and to abate the nuisance.”*

24. Conclusion of Law 2.12: *“The Court concludes that the Defendants must remove the offending construction debris fill located in the northwest corner of their property to eliminate the trespass and to abate the nuisance. The Defendants must remove the construction debris and restore the northwest corner of Defendants’ property to its pre-*

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construction condition, that being with the grade level on the Defendants' side of the chain link fence on the same grade level as the Plaintiff's adjoining and existing grade level."

25. Conclusion of Law 2.13: *"The Court concludes that the Defendants must remove the offending material at the Defendants' sole expense, and in compliance with the City of Bellevue Land Use Code."*

26. Conclusion of Law 2.14: *"The Court concludes that the Defendants must remedy the situation in the northwest corner of their property starting no later than the spring of 2010, giving consideration to the rain and winter weather that will occur between the time of the Court's ruling and spring 2010. The project must be completed before the end of summer 2010, or by September 21, 2010."*

27. Appellants assign error to all Damages, 2.15, 2.16, 2.17, 2.18, and 2.19.

28. Appellants assign error to the entire Judgment, including the following handwritten notation: *"The court finds/concludes that the Dans actions over the years was done intentionally, unreasonably and they both knew or had reason to know they did not have the authority to fill-in the backyard (northwest corner) and admitted the same during trial."*

Issues Pertaining to Assignments of Error

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1. Whether or not there is substantial evidence in the record to support the trial court's findings.

2. Whether or not findings supported by substantial evidence support the trial court's conclusions.

3. Whether or not the trial court had jurisdiction to determine the location of the common north/south boundary between the parties lots and if it did, whether or not findings supported by substantial evidence establish a parole boundary agreement.

4. Whether the Findings of Fact and accompanying Conclusions of Law that the Dans terracing in the backyard constitutes a nuisance because it has the potential to collapse is supported by substantial evidence or is an error of law?

C. STATEMENT OF THE CASE

Respondents Emmett and Mary Soffey are husband and wife and own real property in Bellevue, Washington, commonly identified as 411 158th Place Southeast (Soffey Lot). The Soffeys live next door to the Appellants, Andrei and Anamaria Dan, whose lot is commonly identified as 417 158th Place Southeast (Dan Lot). The Dan Lot is directly south of the Soffey Lot. The parties share a common boundary on the north side of the Dan lot and the south side of the Soffey lot. A description of this

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common boundary and its location is given in much greater detail below, but the western 2/3 of the boundary is separated by a chain link fence and the east 1/3 of the boundary, which is the front yard area continuing out to the street, is not demarcated by a fence. *See* TT (14) at 152.⁷

The Dans moved into the residence located on the Dan Lot in 2000 and purchased the home in 2003. TT (14) at 151. Because the Dans had a professional background in nursing, they decided to begin construction in approximately 2004 to enlarge their home to accommodate an adult family home to care for adults suffering from a physical handicap or impairment. TT (14) at 155. A photograph of the front yard before excavation is attached as Appendix B. To move forward with this plan, Mr. Dan contacted an architect to draw up plans for an addition and remodel. TT (14) at 156. Mr. Dan submitted these plans to the City of Bellevue, but before construction could begin, Mr. Soffey contacted the City of Bellevue because of his concern that the permits improperly allowed the Dans to build a house occupying more than 40% of the lot size, in violation of the

⁷ Appellants have provided citations to the trial transcripts, labeled TT (14) and TT (15). TT (14) refers to the Trial Transcript of the proceedings on September 14, 2009. TT (15) refers to the Trial Transcript of the proceedings on September 15, 2009. This was done to avoid confusion because the pagination does not continue consecutively to the September 15, 2009 transcript.
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Bellevue Municipal Code. TT (14) at 129. In response to Mr. Soffey's complaint, the City of Bellevue issued a stop work order. TT (14) at 130.

Mr. Dan accordingly revised his plans, but the City also requested that Mr. Dan have his property surveyed. TT (14) at 157. Mr. Dan contacted Baima Holmberg, a surveying company. Mr. Dan testified that representatives of Baima Holmberg came to his home, placed three surveying stakes in the ground, and handed a fourth stake to Mr. Dan because the representatives could not access the northwest corner of the Dan lot due to the slope and vegetation in the northwest corner.⁸ TT (14) at 158-59.

Rebar stakes were placed in the front yard approximately 16 to 18 inches north of the invisible line running from the chain link fence separating the backyards to the notch in the curb on the street. TT (14) at 166; TT (15) at 19.⁹ A photograph of a string line representing the survey line is attached as Appendix D. That evening, Mr. Dan found the front-

⁸ The actual survey and report was not entered into the record at trial. However, Mr. Dan testified on voir dire that he contacted the surveying company, two men came to his home wearing Baima Holmberg shirts, driving a Baima Holmberg truck, gave him Baima Holmberg business cards, and appeared to survey the property using surveying equipment, which Mr. Dan described as equipment with "lenses," that are commonly seen on construction sites. TT (14) at 162. Furthermore, Mr. Soffey testified that he understood the wooden stake placed by Baima Holmberg to be a property marker. TT(14) at 116.

⁹ Trial Exhibit 27 is a picture showing the string line Mr. Dan erected to indicate the property line according to the Baima Holmberg survey. Appendix D. {KNE813549.DOC;4\12421.000001\ }

yard stake thrown back into his front yard. TT (14) at 163. Mrs. Soffey confronted Mr. Dan the next day, telling him the survey marker was unacceptable.

Mr. Dan testified that during this confrontation, they both agreed that Mr. Dan would respect the invisible line going from the chain link fence to the notch in the curb, with the metal post of the chain link fence and the notch in the curb being the points of reference. TT (14) at 167.¹⁰ Based on this agreement, the Soffeys installed stakes and a string line of their own. TT (14) at 164. Mrs. Soffey did not recall clearly what took place in that conversation, stating that she had many conversations with Mr. Dan. TT (14) at 53-54. However, she did characterize the agreement as follows: “I remember that we had agreed that if he didn’t cut away any more dirt, any more soil, any more of our land, the two -- that we would live with it.” TT (14) at 55. She also stated that her property line did *not* run straight from the notch in the curb to the fence post. Rather, Mrs. Soffey stated: “We had enough conversations and enough time has gone by that I don’t know at which point in trying to talk and having property

¹⁰ Trial Exhibit 28 contains pictures taken in June 2009 by Mr. Dan. These pictures show the string line running straight from the fence post of the chain link fence to the notch in the curb. Mrs. Dan held the string line at the notch in the curb. TT (15) at 26-27. Mr. Dan’s testimony regarding these pictures was that his cement blocks stayed to the left of the string line. TT (15) at 27, 37-39. Appendix E.
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cut away these stakes were actually put. Our property line doesn't go from the notch in the curb to the end of the chain link fence. It went from the chain link fence to the bottom of the rock wall, along the bottom of the rock wall, and from there straight lined to the notch in the curb." TT (14) at 58.

Mr. Dan clearly testified that because he was facing a huge project, he did not want to challenge the Soffeys' string line in any way, which he recalled being straight from the notch in the curb to the fence post. TT (14) at 167. He wanted to move on with the project, without further angering his neighbors. Thus, Mr. Dan testified that for purposes of his construction project, he was not going to make an issue of the survey line and that he would stay to the left of the string line from the fence post to the notch in the curb. TT (15) at 29.¹¹

In 2006, the Dans again began construction, this time to install a walkway ramp from the street to the backyard to provide clients with access to the backyard. TT (14) at 167. This project involved excavating dirt, concrete, and rocks from the front yard to create a downward sloping ramp from the street to the backyard. TT (15) at 18. The project also

¹¹ Of course, Mr. Dan was forced to call the representatives from Baima Holmberg back to the property to reinstall the stakes due to upcoming City inspections. The Baima Holmberg stakes were pulled out yet again. TT (14) at 166.
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involved Mr. Dan placing cement blocks and rocks in the front yard along the cut made for the walkway ramp in order to support the Soffey Lot, which was elevated above the Dan Lot after the excavation. TT (15) at 24-25.

With respect to the front yard, Mr. Dan testified that he respected the invisible line running from the chain link fence post to the notch in the curb, which represented the agreement made in 2004 with Mrs. Soffey. TT (15) at 27, 37-39. Mr. Dan reiterated that he respected the invisible line agreed upon for purposes of his construction upon examination by the trial judge:

The Court: Let me just ask a follow-up. In this photograph, known as document 11 of 32, it's entitled, Dan photo, June '09 --

Witness: Yes.

The Court: --this is the string line in yellow that depicts what the Soffeys believe the property line is?

Witness: Correct.

The Court: And you agreed that you would stay to the left?

Witness: To the left.

The Court: And in reality, that didn't occur; is that right?

Witness: That is not correct. In reality, that did occur.

The Court: So you didn't abide by the survey line, you abided by the Soffey line?

Witness: Correct.

The Court: Mr. Magnusson.

Mr. Rubstello: Right. Well, let me just clarify. As I understand your construction, for purposes of your construction, you weren't going to make an issue of the survey line?

Witness: Correct. Since we agree on that, they seemed happy that I didn't go with what the surveyors said, as long as I would stay on the left of that string line from the post to the notch in the curb.

Mr. Rubstello: So that's what you did in your construction?

Witness: Correct.

Mr. Rubstello: You didn't want to fight with your neighbors?

Witness: Correct.

TT (15) at 38-39. Trial Exhibit 28, Appendix E, containing multiple pictures of a yellow string line stretched from the fence post to the notch in the curb, demonstrated that the cement blocks placed by Mr. Dan were to the left (south) of the string line. TT (15) at 27. Rather, the blocks that are shown crossing the yellow string line were placed by the Soffeys to prevent the Dans from excavating any land farther north. TT (15) at 27; TT (14) at 62-63.

With respect to the backyard portion of the project, Mr. Dan used the dirt, concrete, and rocks excavated from the front yard to build terracing in his backyard, which was compliant with Bellevue City Code. However, Mr. Dan testified that prior to his work in the backyard, his lot was always elevated above the Soffeys' backyard. TT (15) at 13, 16, 17, 48, 50-51. All the properties on the street are located on a slope, and the

properties to the north are lower than the properties to the south.¹² In fact, Mr. Dan estimated that the fill that was already existing in the northwest corner of his property was about four feet high next to the Soffey fence, with a ditch directly adjacent to the fence that was always filled with vegetation. TT (15) at 51-53. Mr. Dan testified that he used to trim the vegetation as far down as he could, but that he never even saw the bottom of this ditch directly adjacent to the fence. TT (15) at 51-52. This testimony directly contradicted Mrs. Soffey's testimony that the properties were level, existing at the same grade, underneath the chain link fence, before the Dans began any of their construction. TT (14) at 13-14.

Having testified that his property was always elevated above the Soffeys' property, Mr. Dan explained how he created the terracing in the backyard. Mr. Dan testified that any fill he placed in the backyard to build these terraces was located *at least one foot away from the chain link fence* separating the Soffey and Dan backyards. TT (15) at 13, 52. To comply with Bellevue code requirements, Mr. Dan constructed his terracing such that each level was 30 inches in and 30 inches above the level below. TT (15) at 16. Mr. Dan further testified that, to his knowledge, the dirt and fill never moved over against the fence. TT (15) at 14.

¹² Trial Exhibit 33, a Google photograph, represented the condition of the northwest corner of the Dan Lot before any excavation or construction work began. TT (15) at 57. {KNE813549.DOC;4\12421.000001\ }

In order to construct his terraces, Mr. Dan created a stable and level surface to begin the terracing. TT (15) at 32. This surface was about one-foot high. Mr. Dan placed cement blocks on this bottom layer, and then layered topsoil on top of those cement blocks. TT (15) at 32-34.

From this one-foot bottom layer, Mr. Dan created his terraces using rocks, cement, and dirt from the front yard. The top terrace is fenced, with grass inside to create a small yard appropriate for the Dans' children. TT (15) at 55.¹³ Angela Lillie, a City of Bellevue Code Compliance Officer, testified that she had inspected the northwest corner of the Dan Lot on several occasions and had found that Mr. Dan had come into compliance with the Code when he cleaned up loose construction debris in the northwest corner. TT (15) at 81. Ms. Lillie further testified that Drew Folsom, a City of Bellevue land use planner with knowledge of the clearing and grading requirements of the Bellevue Code, also accompanied her to the site on several occasions. Mr. Folsom conducted clearing and grading inspections associated with the general building permit, which were signed off in the permit file. TT (15) at 87. Mrs. Soffey testified that in total, the terracing is approximately eight feet in height above the grade of the Soffey Lot. TT (14) at 45.

¹³ The top terrace, which is fenced with a grass yard area inside, is depicted in Plaintiff's Trial Exhibits 6 and 7.
{KNE813549.DOC;A12421.000001\}

Mrs. Soffey further testified that, although ivy was always growing in the northwest corner of the Dan Lot, the Dan's work in the northwest corner created a bulge against the chain link fence. TT (14) at 53, 59, 114. Mr. and Mrs. Soffey admitted their pictures offered at trial did not depict this bulge. *See* TT (14) at 59, 85. Mr. and Mrs. Soffey further testified that debris was crumbling through the chain link fence, falling onto their property. TT (14) at 19, 85, 98, 114. Mrs. Soffey testified that she believed if the chain link fence were removed, the Dans' cement terracing would come tumbling down into the Soffeys' backyard. TT (14) at 39. However, Mr. Soffey testified that he had never made any repairs to the chain link fence. TT (14) at 115. In addition, Mr. Soffey testified that he had never made any efforts to clean up any of the debris coming through the fence. For example, he stated that he had never filled a wheelbarrow and carted away the debris. TT (14) at 113. Mrs. Soffey admitted in rebuttal that the rocks and debris crumbling through the fence were "relatively inconsequential." TT (15) at 96. Rather, Mrs. Soffey stated that heaviness of the debris pushing up against the fence was her main concern. TT (15) at 96.

The Soffeys' complaint alleged two causes of action only: damages for injury to land pursuant to RCW 4.24.630 (requiring a

knowing trespass and destruction of property) and nuisance and abatement pursuant to RCW 7.48.010 and RCW 7.48.120. The Soffeys did not plead a cause of action related to an adjustment of property boundaries, either in the form of a claim to quiet title by adverse possession or by any other recognized basis for a boundary line adjustment.

On September 25, 2009, the trial judge issued an Oral Ruling finding in favor of the Soffeys. Specifically, Judge Spector concluded that the Dans had trespassed in both the front and back yards onto the Soffey Lot and that the northwest corner constituted a nuisance. This Oral Ruling, along with the Findings of Fact and Conclusions of Law dated November 17, 2009, were incorporated by reference in the Judgment entered on March 19, 2010. This appeal now follows.

D. ARGUMENT

1. Standard of Review.

The standard of review for a trial court's Findings of Fact and Conclusions of Law is a two-step process: first, the appellate court must determine if the trial court's Findings of Fact were supported by substantial evidence in the record, and if so, the appellate court must next decide whether those Findings of Fact support the trial court's Conclusions of Law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn. 2d 561, 573, 980 {KNE813549.DOC;4\12421.000001\ }

P.2d 1234 (1999). Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Conclusions of Law are reviewed de novo. *MH 2 Co. v. Hwang*, 104 Wn. App. 680, 16 P.3d 1272 (2001). This standard is applied to the Findings of Fact and Conclusions of Law discussed below, which have been organized according to whether they reference the front yard or the backyard.

2. The Finding of Fact and Conclusion of Law finding an agreed upon property line in the front yard was not supported by substantial evidence.

To the extent that the trial judge's Findings of Fact and Conclusions of Law have determined that Mrs. Soffey and Mr. Dan agreed upon the *property line* separating their lots, these findings and conclusions are not supported by testimony at trial. Mr. Dan stated that when Mrs. Soffey confronted him after the survey markers were installed by Baima Holmberg representatives, they both agreed that Mr. Dan would respect the invisible line going from the chain link fence to the notch in the curb, with the metal post of the chain link fence and the notch in the curb being the points of reference. TT (14) at 167. Mr. Dan did not describe this agreement as an agreement with respect to the permanent property line,

but rather testified that he agreed he would respect the straight line between the chain link fence and the notch in the curb for purposes of his construction project in order to avoid further angering his neighbors. TT (14) at 167; TT (15) at 29, 38-39. At no time did Mr. Dan testify that he agreed this straight line from the notch in the curb to the chain link fence post constituted the permanent boundary line between the Soffey and Dan Lots.

As the testimony of Mrs. Soffey demonstrates, at most, an agreement between Mrs. Soffey and Mr. Dan was reached that Mr. Dan could not cut away any more dirt. Of course, Mrs. Soffey did not really describe where that line was. Only Mr. Dan described the line clearly, stating that the points of reference were the notch in the curb and the fence post, with a straight line in between. Thus, the trial court correctly concluded that the line that Mr. Dan said he would not cross went straight from the fence post to the notch in the curb. The trial court incorrectly concluded that it was the property line because neither Mr. Dan nor Mrs. Soffey described it as the property line, and certainly, Mrs. Soffey testified strongly that the straight line did *not* represent her property line. Rather, she believed the property line zigzagged from the fence post, to the rock wall, to the notch in the curb.

Furthermore, the trial court did not have jurisdiction to establish the property boundary because the Soffeys did not plead an adverse possession claim, or any other claim relating to boundary line adjustments, including parole agreement. Under CR 15(b), the trial court may only amend the pleadings to conform to the evidence at trial if the amendment would not be prejudicial to the opposing party. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 470, 98 P.3d 827 (2004) (court refused to conform the pleadings to the evidence where the plaintiff failed to plead a First Amendment claim and had only referenced possible “constitutional tort claims” on his sixty-day notice of claim form). In refusing to allow amendment of the pleadings pursuant to CR 15, the *Kirby* court stated, “The variation among potential constitutional tort claims is significant. As the City argued at summary judgment, this variation presented myriad ways of proceeding with a defense and conducting discovery, resulting in actual prejudice to the City. The City should not be required to guess against which claims they will have to defend.” *Id.*

Similarly, *Green v. Hooper*, 149 Wn. App. 627, 636-39, 205 P.3d 134 (2009), addressed amendment of the pleadings after trial in the context of boundary line disputes. There, the court held that the trial judge abused his discretion by amending the pleadings after trial to conform to

the evidence. The complaint had pled adverse possession, but the trial court amended the pleadings after the trial to add a cause of action for mutual recognition and acquiescence. The plaintiffs argued on appeal that the trial judge erred as a matter of law by determining that mutual recognition and acquiescence is a “supplement” or “companion theory” of an adverse possession claim which is “always available,” whether pleaded or not. The court agreed, concluding that at least four other doctrines, in addition to adverse possession, may allow boundaries to be adjusted by oral acts of neighbors or by their acts on the ground, contrary to the boundaries described in title documents. *Id.* at 639. Because each doctrine is legally distinct, the court held that amendment of the pleadings to allow a cause of action for mutual recognition and acquiescence was not permissible. *Id.* at 639-40.

Therefore, in addition to the fact that the evidence at trial did not demonstrate an agreement on the property line itself, the trial court did not have jurisdiction to adjust the boundaries via an amendment of the pleadings (which was not even requested by the Soffeys) because the Dans could not have been expected to guess which, if any, of the adverse possession or boundary line adjustment theories would arise at trial and to prepare an adequate defense.

Because no adequate proof was made as to where the property line was, the court erred in concluding that the Dans trespassed. A trespass requires an understanding of where the boundaries exist. Accordingly, this Court should vacate the Judgment establishing the property line between the Soffey and Dan Lot as the invisible line between the notch in the curb and the post of the chain link fence as well as all conclusions that find a trespass in the front yard.

3. The Findings of Fact that the Dans' cement blocks in the front yard protruded past the invisible line between the notch in the curb, which therefore, constituted a *de minimus* trespass in the front yard, were clearly erroneous.

A trial judge's finding of fact is clearly erroneous if no substantial evidence exists to support it. *State v. Morris*, 87 Wn. App. 654, 659, 943 P.2d 329 (1997). As acknowledged above, Mr. Dan testified at trial that he agreed with Mrs. Soffey he would respect the straight line running from the notch in the curb to the post of the chain link fence in approximately 2004, before construction of the walkway ramp to the backyard began. The evidence at trial demonstrated that Mr. Dan, in fact, did respect that line. Upon questioning by the trial judge, Mr. Dan emphatically stated that he stayed to the left (south) of the invisible line:

The Court: Let me just ask a follow-up. In this photograph, known as document 11 of 32, it's entitled, Dan photo, June '09 --

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Witness: Yes.

The Court: --this is the string line in yellow that depicts what the Soffeys believe the property line is?

Witness: Correct.

The Court: And you agreed that you would stay to the left?

Witness: To the left.

The Court: And in reality, that didn't occur; is that right?

Witness: That is not correct. In reality, that did occur.

The Court: So you didn't abide by the survey line, you abided by the Soffey line?

Witness: Correct.

Importantly, Trial Exhibit 28, attached hereto as Appendix E showed that Mr. Dan did stay to the left of the agreed-upon line. The yellow string line stretched from the notch in the curb to the chain link fence post, held in place by Mrs. Dan for purposes of the photograph, does not hover over any of the cement blocks or rocks stacked by the Dans. Rather, the only blocks that cross this invisible line were those placed by the Soffeys. TT (15) at 27; TT (14) at 62-63. Consequently, the Findings of Fact and Conclusions of Law with respect to a trespass in the front yard area are clearly erroneous and not supported by the evidence presented at trial.

4. The trial court erroneously concluded that Dans knowingly and intentionally trespassed upon the Soffeys' property by filling in the northwest corner of the Dan Lot.

The Findings of Fact supporting Conclusions of Law 2.5, 2.8, and 2.9, which held the Dans' activity of filling in the northwest corner of their

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lot constituted an actionable trespass, are clearly erroneous and not supported by substantial evidence. Each finding of fact is addressed separately below.

- a. The trial court's Findings of Fact that the grade in the Soffey and Dan backyards were the same prior to the Dans' construction activities was not supported by substantial evidence.

As noted above, a trial judge's finding of fact is clearly erroneous if no substantial evidence exists to support it. *Morris*, 87 Wn. App. at 659. Finding of Fact 1.11 and Oral Ruling, Page 5, lines 12-16, provide that the Soffey and Dan backyards existed at the same grade, meeting underneath the chain link fence, prior to the Dans' construction activities. Importantly, the trial judge stated in her Oral Ruling that the Dans *never refuted* Mrs. Soffey's testimony that the grade existed at the same level prior to the Dans' construction.

However, Mr. Dan clearly did refute Mrs. Soffey's testimony that the backyard grades were always level. Over and over again, Mr. Dan stated that his property was always elevated above the grade of the Soffeys' property. TT (15) at 13, 16, 17, 48, 50-51. Mr. Dan further testified that all the properties on the street are located on a slope and that

the properties to the north are lower than the properties to the south.¹⁴ In other words, the entire area slopes downhill as one moves in a northerly direction. The trial court accepted this testimony, referring to the natural slope of the properties in Finding of Fact 1.12 (“The natural grade west of the Soffey and Dan homes is such that the ground level slopes uphill to the south, or to the southeast.”).

In fact, Mr. Dan estimated that the fill that was already existing in the northwest corner of his property was about four feet high next to the Soffey fence, with a ditch directly adjacent to the fence that was always filled with vegetation. TT (15) at 51-53. Mr. Dan testified that he used to trim the vegetation as far down as he could, but that he never even saw the bottom of this ditch directly adjacent to the fence. TT (15) at 51-52.

Given that Mr. Dan repeatedly contradicted Mrs. Soffey’s testimony and that the trial court completely ignored this testimony in finding that the Dans never refuted it, the Findings of Fact and Conclusions of Law that the grade existed at the same level between the Soffey and Dan Lots in the northwest corner are clearly erroneous.

- b. Several Findings of Fact concluding that the Dans knowingly dumped construction debris adjacent to the chain link fence and that the Dans conceded this

¹⁴ Trial Exhibit 33, a Google photograph, represented the condition of the northwest corner of the Dan Lot before any excavation or construction work began. TT (15) at 57. {KNE813549.DOC;4\12421.000001\}

activity created a bulge in the fence are clearly erroneous.

Findings of Fact 1.16, 1.17, 1.18, and 1.21 all conclude that the Dans knowingly dumped construction debris against the chain link fence, creating a bulge that protrudes onto the Soffey property. Further, the trial court's Oral Ruling stated that the Dans had "conceded" that the pile up of constructions debris had created a bulge into the fence. These findings directly conflict with Mr. Dan's testimony at trial. Both of these findings were reflected in the Judgment.

In fact, Mr. Dan specifically stated that he never placed any fill directly adjacent to the fence. Mr. Dan testified that he created his bottom terracing layer, approximately one-foot thick with cement blocks and topsoil, but stated that any fill he placed in the backyard to build these terraces was located *at least one foot away from the chain link fence* separating the Soffey and Dan backyards. TT (15) at 13, 52. Mr. Dan further testified that he had always seen a ditch directly adjacent to the fence that was filled with vegetation. TT (15) at 51-53. Mr. Dan used to trim the vegetation as far down as he could, but he never even saw the bottom of this ditch directly adjacent to the fence. TT (15) at 51-52.

The Dans concede that Mr. Dan did use rock, cement, and dirt from the front yard to create terraces in his backyard. However, the trial

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court's Findings of Fact that Mr. Dan knowingly dumped construction debris adjacent to the fence, causing a bulge in the fence, is directly contrary to Mr. Dan's testimony that he stayed at least one foot away from the fence when creating his terracing. It also completely ignores Mr. Dan's testimony that the existing grade levels between the Soffey and Dan lots were significantly different -- approximately a four-foot difference. Furthermore, Mr. Dan never conceded that the "pile up" of construction debris created a bulge in the fence. Mr. Dan never even saw the bottom of the ditch and its vegetation, and therefore, had no way of knowing about the existence of an alleged bulge on the Soffey side of the chain link fence. In addition, the Soffeys admitted that their photographic evidence did not depict the bulge. *See* TT (14) at 59, 85. Photographic evidence submitted by the Dans also showed no bulge in the fence. *See* Appendix F. Again, these findings are in direct conflict with the testimony and are, therefore, clearly erroneous.

- c. The trial court erred in finding that the Soffeys had always treated the fence separating the backyards as their own and that the boundary in the backyard ran along the southern face of the fence.

The trial court's Finding of Fact 1.10, which stated that the Soffeys treated the chain link fence as their own by maintaining the fence, adding

sight obscuring slating to the fence, and clearing vegetation and weeds from around the fence, and the accompanying Conclusion of Law 2.2, which states that the backyard boundary ran along the southern face of the fence, do not comport with the trial court's Oral Ruling. On pages 3 and 4 of the Oral Ruling, Judge Spector specifically stated that her decision did not include a finding that the chain link fence was owned by the Dans or the Soffeys and that ownership did not matter in the decision she reached. Yet, Finding of Fact 1.10 and Conclusion of Law 2.2 clearly contradict her oral ruling. Moreover, maintenance of the kind described by the Soffeys is not indicative of ownership, but is just maintenance of the kind neighbors on both sides of the fence would perform. *See Happy Bunch LLC v. Grandview North, LLC*, 142 Wn. App. 81, 89-90, 173 P.3d 959 (2007) (finding mowing, weeding, and trimming in space between trees did not mandate legal conclusion that the use proved adverse possession).

- d. The trial court erred in concluding that the Dans' construction activity in the northwest corner created a bulge in the fence, which was an actionable trespass.

Based upon the above erroneous Findings of Fact, that the Dans conceded and created a bulge in the fence and that the Dans had agreed the property line was on the southern side of the fence, the trial court erroneously concluded that the Dans had knowingly trespassed upon the

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Soffey property by creating a bulge in the fence located in the northwest corner of the Dan Lot. Conclusion of Law 2.5, 2.8, 2.9. The Soffeys claimed a statutory trespass pursuant to RCW 4.24.630, which provides:

Every person who goes onto the land of another and who removes, timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to land . . . is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts “wrongfully” if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

The statute clearly requires on its face, proof of intentional as well as unreasonably committed acts which the alleged trespasser had reason to know they lack authorization. *Clype v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573, 225 P.3d 492 (2010). The record here does not support findings or conclusions that the Dans acted unreasonably or knew they lacked authorization. They had a permit from the City of Bellevue, they had a survey conducted, and corrected all code violations made known to them by the City of Bellevue. Damages, including attorney fees under

RCW 4.24.630 should not have been awarded the Soffeys as provided for in the judgment.

Compare Happy Bunch, 142 Wn. App. at 96 (assessing treble damages under similar timber trespass statute, RCW 64.12.030, where the defendant had full knowledge that the trees were growing on the plaintiff's property, had them removed, and gambled that it would at most be forced to pay plaintiff their value).

In this case, because Mr. Dan testified that he never placed fill less than one foot away from the fence, that he never even saw the bottom of the ditch adjacent to the fence, and that vegetation was always growing through the fence, which testimony was further supported by Mrs. Soffey that ivy was always growing through the fence in the northwest corner of the Dan Lot, the court erroneously concluded that the Dans had intentionally trespassed by creating a bulge in the fence. Mr. Dan deliberately did *not* fill the ditch directly adjacent to the fence and did not know that he had entered upon the land of another. He had no reason to know that his activities were causing the bulge, particularly where vegetation had always compromised the northwest corner of his Lot and obscured his view of the chain link fence. Thus, a “wrongful” trespass did

not occur, and accordingly, the Judgment erroneously awarded the Soffeys their litigation costs and attorneys' fees under RCW 4.24.630.

Moreover, even if Mr. Dan's fill in the northwest corner did touch the fence, it is not an actionable trespass. Conclusion of Law 2.2 erroneously concludes that the backyard boundary runs along the southern face of the fence. However, even if the Soffeys maintained their side of the fence, these actions do not establish ownership and dominion over the entire fence. The fence straddles the property line, and courts have previously held that features which straddle property lines are owned as tenants in common. *Happy Bunch*, 142 Wn. App. at 93. Thus, touching the fence is not a trespass, and the trial court's Conclusion of Law, effectively finding that the Soffeys owned the entire fence, is error as a matter of law where the Soffeys had no knowledge of when and who constructed the fence. TT (14) at 50-51.

5. The trial court's Conclusions of Law that the Dans allowed a nuisance to exist based upon the potential collapse of the wall and supporting Findings of Fact were both clearly erroneous and an error of law.

The Dans will first address the Findings of Fact that the terracing in the northwest corner had the potential to cause the fence to collapse and allow significant amounts of construction debris to fall onto the Soffey

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backyard. The Dans will then address the trial court's erroneous application of nuisance law to the facts.

- a. The trial court's Findings of Fact that the terracing in the northwest corner of the Dan Lot had the potential to cause the fence to collapse and to allow a significant volume of construction debris to fall onto the Soffey backyard are not supported by substantial evidence.

During trial, the Soffeys failed to present any expert testimony with respect to the stability of the Dans' terracing in the northwest corner of their lot. Consequently, only Mrs. Soffey's lay opinion, as she described it, was part of the record over the objection of the Dans' attorney. TT (15) at 96.

The only testimony that Mrs. Soffey presented to demonstrate that the fence was in danger of collapsing was her assertion that a bulge existed in the fence and her assertion that crumbling rock and debris fell onto her property through the fence. TT (15) at 96. However, the Soffeys admitted that the bulge was not visible in the pictures they offered. See TT (14) at 59, 85. Furthermore, Mrs. Soffey characterized the amount of crumbling rock as "relatively inconsequential." TT (15) at 96. Mr. Soffey further testified that he never repaired the fence and never had to cart away a significant amount of crumbling debris. TT (14) at 113-15. In contrast, Mr. Dan testified that he built his terraces on a stable, level one-

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foot layer of concrete block and topsoil. Mr. Dan purposefully cleared his land with a rake and shovel to create a sturdy, secure bottom layer. TT (15) at 31-34. Only from this first layer of terracing did Mr. Dan create terracing 30 inches south of the ditch adjacent to the chain link fence. See Appendix F.

Accordingly, the trial judge's finding that the fill in the northwest corner was causing the fence to potentially collapse was not supported by substantial evidence, which is defined as a quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n*, 141 Wn.2d at 176. The Soffeys' lay testimony was extremely weak in comparison to Mr. Dan's description of how he constructed the terraces; insignificant crumbling debris along with a lay person's opinion with no knowledge of how the terraces were constructed could not support the finding that the terraces have the potential to cause the fence to collapse and fall onto the Soffeys' property. Mrs. Soffey's testimony also conflicts with the fact that Drew Folsom, a City of Bellevue land inspector, signed off on the building permit and the photographic evidence. See Appendices A, C, F, and G. Thus, a rational, fair-minded person would not conclude that the fence was in danger of collapse.

- b. Even if the Findings of Fact were supported by substantial evidence, the trial court erroneously applied the facts to the law regarding nuisances.

Even if the Court concludes that the trial court's finding that the terracing in the northwest corner had any potential to collapse, the trial court erroneously applied this fact to existing law regarding nuisance. A private nuisance is a *substantial and unreasonable* interference with the use and enjoyment of another's land. *Womack v. Von Rardon* 133 Wn. App. 254, 260, 135 P.3d 542 (2006). The unreasonableness of the invasion is determined by using the standard of a person of ordinary and normal sensibilities. *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 622, 358 P.2d 975 (1961). But, as demonstrated by the trial court's statement in its Oral Opinion, quoted at footnote 1, the sensibilities of Mrs. Soffey were all that the court required.

Typically, "[t]hat a thing is unsightly or offends the aesthetic sense of a neighbor, does not ordinarily make it a nuisance or afford ground for injunctive relief." *Mathewson v. Primeau*, 64 Wn.2d 929, 938, 395 P.2d 183 (1964). *Washington Practice* describes these so-called "aesthetic" nuisance cases:

[L]et us take up a special category of activities that may or may not cause nuisances, but that, if they do, fall under the

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description of “aesthetic nuisances.” An “aesthetic nuisance” may be described, as well as it can be described, as some activity that does not “invade” the plaintiff’s premises by things or forces than can be seen or measured, such as smoke, gases, odors, noise, pollutants, or insects, but that nevertheless disturbs the plaintiff in the use of his land through emotional disturbances, such as *fear or possibly ugly sights*. Such non-invasive activities certainly may be a nuisance, or they may not be, upon a balancing of interests much as we see in the decisions just cited above. If we can generalize from the Washington decisions that will be briefly sketched here, perhaps it may be said that two factors, singly or especially in combination, are likely to make such a non-invasive activity a nuisance: (1) *that it would be objectionable to “a person of ordinary sensibilities,”* and (2) *that the activity will produce upon the plaintiff’s premises tangible ill effects, such as odors or permeating liquids.*

17 William B. Stoebuck & John W. Weaver, *Washington Practice* § 10.3 (2d ed. 2004) (emphasis added).

Here, the photograph exhibits submitted at trial do not show that a substantial nuisance exists on the Dan Lot. At most, the Court may find a pile of terraced fill, which is covered with vegetation, exists in the northwest corner of the property. The fill would not be particularly unsightly to a person of ordinary sensibility (who would have no negative history with the Dans) and causes no actual damage or ill effects upon the

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plaintiffs' land. Though Plaintiffs allege that the fill occasionally crumbled through the chain link fence onto their property, Mrs. Soffey admitted that this was relatively insignificant.

Furthermore, fear of damage to property alone has rarely been considered a nuisance. For example, in *Ferry v. City of Seattle*, 116 Wn. 648, 203 P. 40 (1922), the court held that a reservoir in a city park with an embankment 56 feet high constituted a nuisance because a reasonable expectation existed that disaster and loss of life may happen and such expectation led to a depreciation in the value of adjoining property. As explained in *Ferry*,

The test as to whether a structure of the proposed character is to be declared a nuisance turns on whether the complaining property owners are under a reasonable apprehension of danger, and the question of the reasonableness of the apprehension turns again, not only on the probable breaking of the reservoir, but the realization of the extent of the injury which would certainly ensue; that is to say *the court will look to consequences in determining whether the fear existing is reasonable. For instance, if the reservoir were being built in some place where, should it break, the resultant damage would be merely to property which could adequately be recompensed, the court would be more apt to hesitate in declaring it a nuisance than where, should a break occur, not only property of immense value would be destroyed, but many lives would be lost as well.*

Id. at 662-63.

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Of course, the potential for disaster and loss of life was not asserted at trial, likely because the terraces are only eight feet tall, in comparison to a 56-foot-high embankment. Proof was not made with respect to depreciation of the Soffeys' property. And, no reliable estimation of probability that the terraces will collapse was presented. In sum, the trial court erred in applying the facts presented at trial to the law regarding aesthetic nuisances. According to the balancing deemed appropriate in *Ferry*, the trial court incorrectly balanced the rights of adjoining landowners with respect to use of their own property, particularly where the risk of resultant damage has not been demonstrated and where damage to property could be adequately recompensed in the unlikely event of a collapse. Consequently, the Judgment should be vacated, along with the requirement that the Dans remove the terracing in their backyard.

E. CONCLUSION

In conclusion, for the foregoing reasons, the Dans respectfully request that the Court reverse and vacate the trial court's Judgment in its entirety, along with the corresponding Findings of Fact and Conclusions of Law and Oral Ruling. Significant trial court's Findings are not supported by substantial evidence, leading to erroneous conclusions of law

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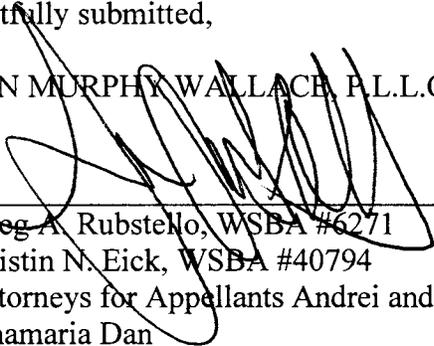
an a judgement providing for injunctive relief, attorney fees and a property line designation that must be reversed.

RESPECTFULLY SUBMITTED this 19th day of August, 2010.

Respectfully submitted,

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By



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APPENDICES

Appendix A - Pictures from Exhibit 21 showing gap between fence and Dan back yard fill

Appendix B - Pictures from Exhibit 25 showing pre construction landscaping with string line tied between fence post and curb notch

Appendix C - Picture from Exhibit 26 showing northwest corner of Dan property with fill from construction project

Appendix D - Pictures from Exhibit 27 showing location of Dan front yard property line with a string line based upon Baima Holmberg survey staking

Appendix E - Pictures from Exhibit 28 showing front yard area after placement by Dans of rocks and pavers (on left of string line) and pavers by Soffeys (on right of string line) with string line tied between fence post and notch in curb consistent with agreement with Mrs. Soffey

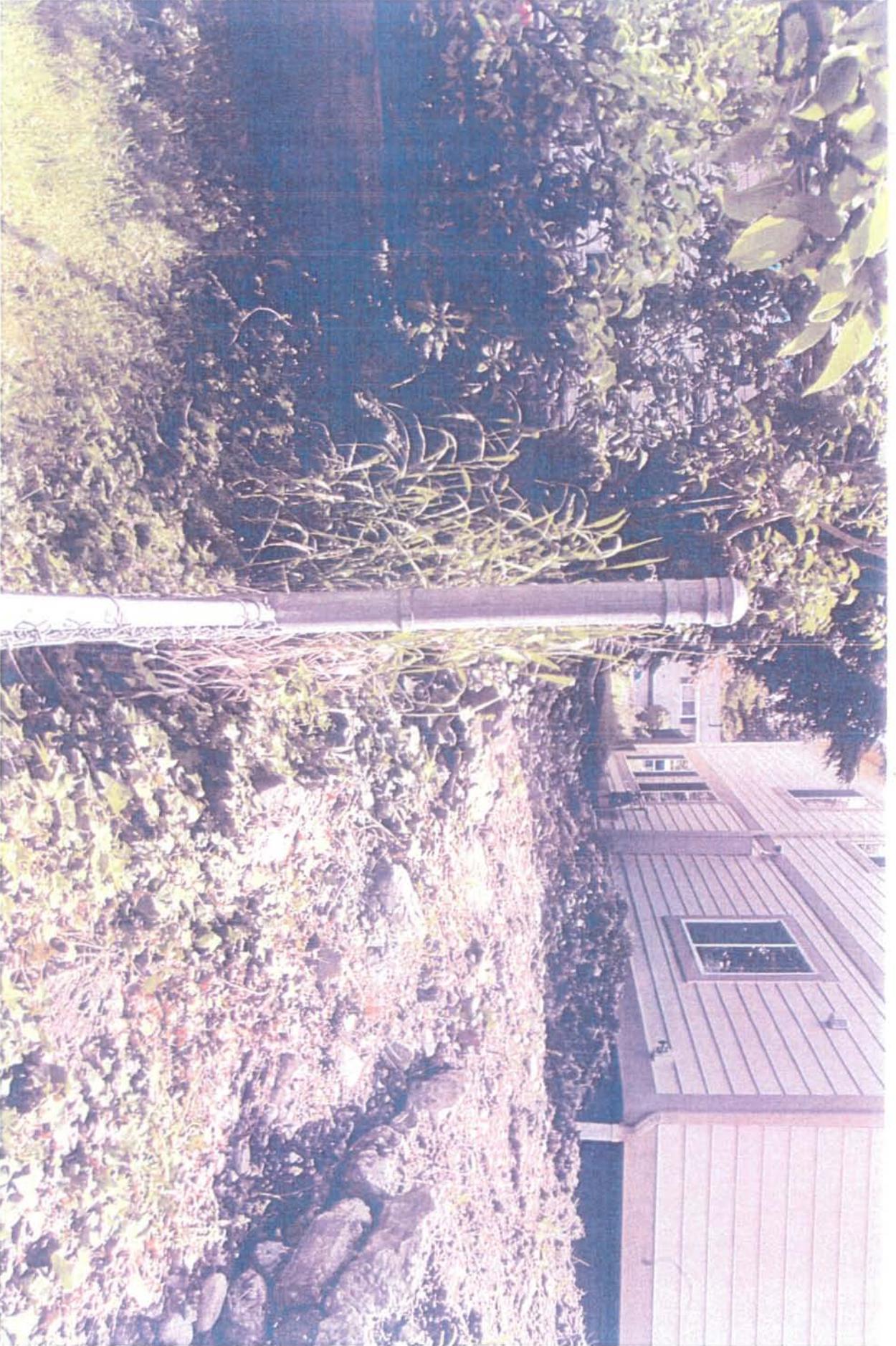
Appendix F - Pictures form Exhibit 29 of Dan northwest property corner and fence after fill material added

Appendix G - Pictures from Exhibit 30 showing fence at mid back yard area

APPENDIX A



5



APPENDIX B

Document 3, p 1 of 6



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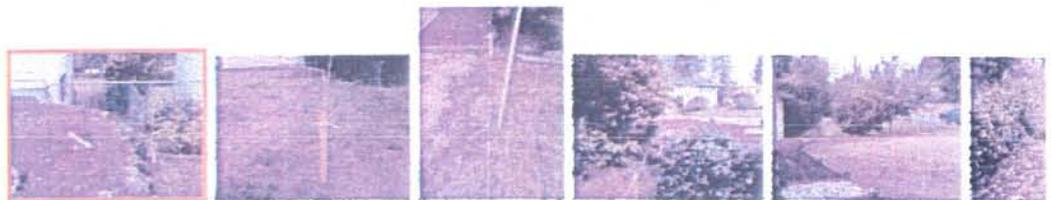
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Pic taken before excavation. You can also see the SURVEY REBAR pulled from its place and thrown on our yard by Emmett Soffey

ma
a f



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Doc 3, p 2 of 6



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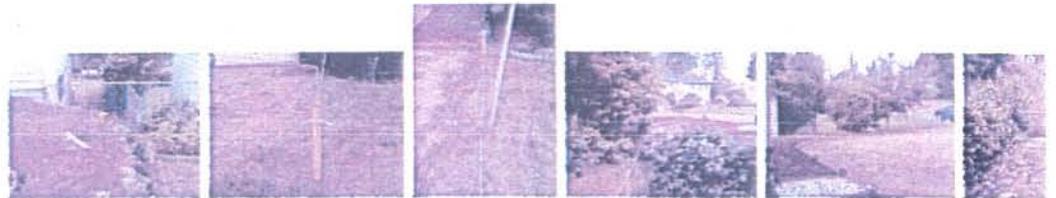
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Before excavating- No plants that could've been damaged - Copy - Copy

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APPENDIX C

Doc #4 p 4 of 6



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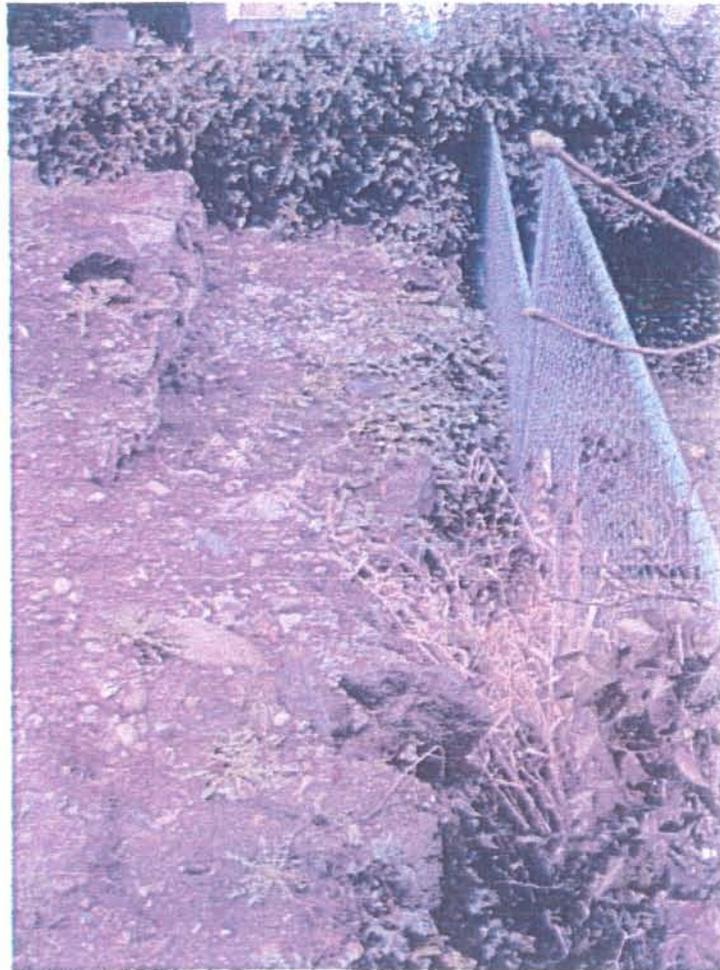
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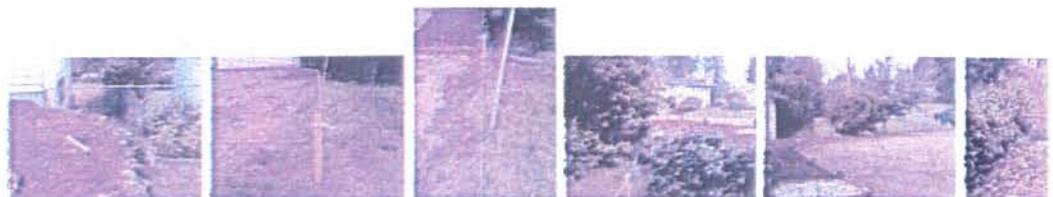
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NW corner rockery by City codes.No damage to the fence (4)

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APPENDIX D



Document 5, p 1 of 11

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Front yard after excavation with yellow string as property line based on official survey.

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Doc 5, p 11 of 11

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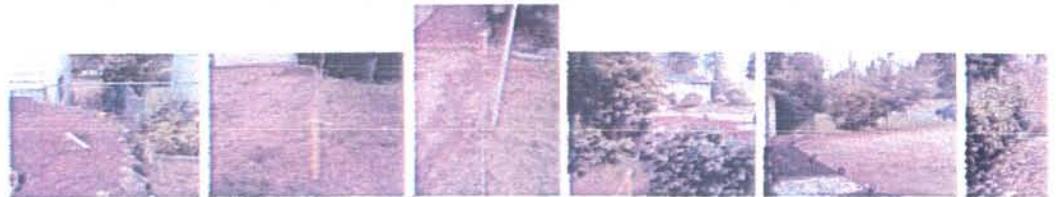
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APPENDIX E







06.11.2009



APPENDIX F





APPENDIX G



