

No. 74707-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARK MULDAUR and DIANE A. SUTHERLAND, husband and wife

Respondents,

v.

AMY C. GARLING, a single person

Appellant.

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BRIEF OF APPELLANT

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INTRODUCTION

This case involves a dispute over the boundary line between two adjacent parcels of residential real estate in Seattle. The Appellant, Amy C. Garling (“Garling”) the owner of the property at 7526 - 28th Avenue Northwest (“Lot 7”), commenced a quiet title action in October of 2014 against the Respondents, Mark Muldaur and Diane Sutherland (the “Sutherlands”), the owners of the adjacent property at 7522 - 28th Avenue Northwest (“Lot 6”). The case was tried to the court on December 7, 2015 and on January 11, 2016, the trial court entered judgment quieting title in favor of the Sutherlands, based on their claims of adverse possession and mutual recognition and acquiescence. Garling appeals and requests the reversal of the judgment based on the assignments of error and argument below.

ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred by entering judgment quieting title in favor of the Sutherlands as to the Disputed Area. (CP 321, ¶ 2.)

2. The trial court erred by entering judgment quieting title in favor of the Sutherlands by “including an area around the concrete driveway seam (a penumbra) reasonably necessary to continue parking along the concrete driveway seam.” (CP 321, ¶ 2.)

3. The trial court abused its discretion by raising *sua sponte* near the end of closing arguments the issue and theory of relief referred to in Assignment of Error 3, above, and by granting relief on that basis. (RP 291-295; 354-357.)

4. The trial court erred by entering judgment awarding the Sutherlands one-half of their surveyor costs, in the amount of \$2,350.00. (CP 321, ¶ 1.)

5. The trial court erred by entering judgment dismissing all of Garling's claims with prejudice. (CP 321, ¶ 5.)

6. The trial court erred by concluding that Sutherlands were entitled to judgment quieting title in the Disputed Area in favor of Mark Muldaur and Diane Sutherland as against Amy Garling. (CP 243, ¶ 15.)

7. The trial court erred by concluding that the Sutherlands were entitled to judgment quieting title "in an area around the concrete seam reasonably necessary to continue parking along the concrete seam a penumbra)." (CP 243, ¶ 15.)

8. The trial court erred by denying Garling's claims based on its findings of fact and conclusions of law. (CP 244, ¶ 17.)

9. The trial court erred by concluding that "the Defendants have adversely possessed the portion of Lot 7 which lies between the northern

platted property line of Lot 6 up to the driveway seam and the wood fence, as depicted on the Survey.” (CP 243, ¶ 14.)

10. The trial court erred by failing to enter any specific findings of fact or conclusions of law as to the element of actual possession for purposes of the Sutherlands’ affirmative defense and counterclaim of adverse possession.

11. The trial court erred by failing to enter any specific findings of fact or conclusions of law as to the element of hostile possession.

12. The trial court erred by failing to enter any findings of fact or conclusions of law as to whether Garling was entitled to a presumption that the Sutherlands purported use of the Disputed Area was permissive.

13. The trial court erred by failing to enter any findings of fact or conclusions of law as to whether the Sutherlands used the driveway for parking with the express or implied permission of Garling and/or her predecessors in interest.

14. The trial court erred by concluding that “the owners of Lot 6 and Lot 7 have, since at least 2003, mutually acquiesced in location of the boundary line as being along the concrete seam and along the wood fence to the metal fence post.” (CP 244, ¶ 16.)

15. The trial court erred by failing to enter any specific findings of fact or conclusions of law as to whether the purported boundary line

between two properties was certain, well defined, and in some fashion physically designated upon the ground for purposes of the Sutherlands' counterclaim of boundary by mutual recognition and acquiescence.

16. The trial court erred by finding that “[t]he chain link fence ends with a fence post on what was commonly believed to be the northeast corner of the Defendant’s property (Lot 6).” (CP 241, ¶ 6.)

17. The trial court erred by finding and concluding that “[t]he northern edge of a concrete pad located on Lot 6 encroaches across the deeded boundary line.” (CP 241, ¶ 7.)

18. The trial court erred by finding and concluding that “[s]ince at least 1993, Mr. Muldaur and Ms. Sutherland and their neighbors to the north (Plaintiff Garling's predecessors in interest) have treated the chain link fence post, the northern edge of the concrete pad, and the driveway seam as the boundary marker for the division of the properties.” (CP 242, ¶ 8.)

19. The trial court erred by finding and concluding that “[t]his boundary has been further recognized by the manner in which the Defendants, the Plaintiff, and the Plaintiffs [sic] predecessors in interest have used their respective properties.” (CP 242, ¶ 8.)

20. The trial court erred by finding that Garling’s predecessor in interest, Mark Huston, “believed the chain link fence post was the corner

boundary between Lot 6 and 7, and treated it as such” and that Huston “believed the seam in the driveway also represented the boundary between Lot 6 and 7.” (CP 242, ¶ 9.)

21. The trial court erred by finding and concluding that “[s]ince at least 1988, the owners of Lot 6 and the owners Lot 7 have treated the seam in the driveway pad, the concrete pad under the Muldaur/Sutherland Shed, and metal fence post as establishing the property line between the two parcels.” (CP 242 ¶ 12.)

22. The trial court erred by finding and concluding that the Sutherlands’ “use of the area north of their shed on the concrete slab on which it sits has been open and by the evidence their use has been exclusive of any use by the owner of Lot 7.” (CP 243 ¶ 13.)

23. The trial court erred by finding and concluding that the Sutherlands “have also used the driveway, regarding the seam in the concrete as the property line” and that “[t]his line, too, has been so regarded by the owners of Lot 7 (see finding 9) and ... by the more recent owner of Lot 7 (Mr. King) without repudiation of its recognition as the property line made by the prior owner of Lot 7 (Mr. Huston).” (CP 243 ¶ 13.)

24. The trial court erred by finding and concluding as a matter of law that the Sutherlands “have openly and notoriously exercised

continuous, exclusive dominion and control over the disputed area.”
(CP 243 ¶ 13.)

25. The trial court erred by finding that the Sutherlands exclusively maintained and cared for the disputed area. (CP 243, ¶ 13.)

26. The trial court erred by finding that “[n]o other person or owner of Lot 7, has used the disputed area since 1993, other than with the permission of Mr. Muldaur and Ms. Sutherland.” (CP 243, ¶ 13.)

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err as a matter of law by entering judgment quieting title in favor of the Sutherlands as to the Disputed Area on the basis of adverse possession, when the trial court failed to enter specific findings or conclusions on the element of actual possession, the Sutherlands’ use of the Disputed Area was limited to parking alongside their house and the storage of items alongside their shed, which occurred almost entirely upon their own property and involved only a de minimis amount of physical presence or intrusion onto Lot 7?

2. Did the trial court err as a matter of law by entering judgment quieting title in favor of the Sutherlands as to the Disputed Area on the basis of adverse possession, when the trial court failed to enter any specific findings or conclusions on the element of hostile possession, and

use of the driveway for parking alongside their home and pedestrian access was permissive on inception, either expressly or by implication?

3. Did the trial court err as a matter of law by quieting title to an “penumbra of ground” around the Disputed Area, when that issue and theory of relief was raised by the trial court *sua sponte* during closing arguments, was neither pled nor tried by consent and exceeded the scope of relief sought by the Sutherlands at any time during proceedings?

4. Did the trial court err as a matter of law by quieting title in favor of the Sutherlands based on mutual recognition and acquiescence, when it failed to enter specific findings of fact and conclusions of law regarding the existence of a certain well-defined line designated on the ground, and when there is no evidence that Garling or her predecessors recognized, much less acquiesced to, the purported line as the true line, based on the possession, occupation, or use of Lot 7?

STATEMENT OF THE CASE

(1) Statement of Facts

This case involves a boundary dispute between the owners of two adjacent parcels of residential real estate located in the Ballard neighborhood of Seattle, Washington. CP 239. The Appellant, Amy C. Garling (“Garling”) has owned the property at 7526 - 28th Avenue Northwest (“Lot 7”) since June of 2009. CP 240. Lot 7 is directly north

of and shares a common boundary line with the property at 7522 - 28th Avenue Northwest (“Lot 6”), which has been owned by the Respondents, Mark Muldaur and Diane Sutherland (the “Sutherlands”)¹ since 1993. CP 239.

The crux of the litigation is the parties’ competing claims over the ownership and use of a narrow strip of land along the southern margin of Lot 7, the majority of which consists of an old concrete driveway that straddles the platted boundary line between the two properties, extending east from 28th Avenue Northwest for approximately 65 feet, as described in Exhibits A and B to the trial court’s Judgment (the “Disputed Area”). *See* Appendix, CP 323-24; Ex. 2.² The majority of the Disputed Area is situated along an old concrete driveway that straddles the platted boundary line between the two properties, extending east from 28th Avenue Northwest for approximately 65 feet. Ex. 2; (See Appendix). The driveway is about 16 feet wide, and the platted boundary line runs more or less along its centerline. *Id.* Due to the width of the driveway and the

¹ For the sake of consistency, the Appellant adopts the Respondents preference of referring to themselves collectively as the “Sutherlands.”

² The term “platted boundary line” is intended to refer to the boundaries of Lot 6 and Lot 7 identified in the Respondents’ 2015 survey adopted by the trial court. *See* CP 240 and EX. 101. The Respondent’s survey is identical to the Appellant’s 2015 survey, which was admitted into evidence as Exhibit 2 and attached as Appendix 6.

close proximity of the houses, there is not enough space to accommodate the simultaneous parking or passage of two cars. *See* Appendix, RP 79, 123, 233; Ex. 13, 15. Each lot is 40 feet wide and the two houses are situated directly adjacent to the north and south margins of the driveway. *Id.*

The remainder of the Disputed Area consists of a narrow gap between Garling's L-shaped wooden fence, which extends east for approximately 30 feet, adjacent to the Sutherlands' storage shed, which sits on a concrete foundation or "pad" on Lot 6. *See* Appendix, Ex. 2. While the north edge of the pad extends slightly past the platted boundary line, no portion of the Sutherlands' shed extends beyond the line. *Id.*

The record provides little information regarding the history of the properties prior to 1988, particularly with respect to the driveway, garage, and the concrete pad. But from what evidence there is, it is reasonable to infer that the original purpose of the driveway was to provide ingress and egress to a shared garage that was once located near the eastern corner of the properties: the subdivision the properties are located in was platted in 1911, (Ex. 10); the deed conveying title to the Sutherlands' predecessor in 1951 was granted "Subject to community driveway on the north side," (Ex. 10); and an unpaved driveway leading to the garage is visible in the photographs obtained from King County archives, (Ex. 11, 12; (See

Appendix)); and Mark Huston, the owner of Lot 7 from 1988 to 1999, testified that it was his understanding (from a source unknown) that the original purpose of the driveway was to provide access to a shared garage, (RP 102-03).

Since 1993, the Sutherlands have parked their one or two of their cars in the driveway alongside their house at the end of the driveway. RP 200-01. Although the extent to which the Sutherlands parking involves the use of the Disputed Area while parking is unclear, it is undisputed that the area where they actually park their cars is almost entirely on Lot 6, i.e., south of the platted boundary line and south of the driveway seam. RP 34, 35, 64, 65, 170, 200, 201. Although Diane Sutherland testified that she sometimes parks up to the seam and may step over the seam while entering and exiting her car, (RP 201-02), no evidence was introduced to suggest that the Sutherlands occupy or make any significant use of the area past the seam.

The other part of the Disputed Area that the Sutherlands testified to using is the eastern portion, consisting of a narrow gap between their storage shed and Garling's wooden fence. RP 195-97. Their shed is situated entirely to the south of the boundary line, about three feet south of the fence, and the side of the shed facing the fence is about eight feet wide. *See* Appendix, Ex. 2. The Sutherlands testified that they use of this

area for storing some tools, gardening supplies, and other odds and ends. RP 196, 255.

From 1988 to 1999, Lot 7 was owned by Mark Huston (“Huston”). CP 242. According to Huston, during that time, no fence was in existence along any portion of the boundary between Lot 6 and 7. At one point, Huston constructed a wooden shed at the southeast corner of Lot 7, but he did not recall the existence of any other structures or improvements adjacent to the shed on Lot 6. RP 99.

Although Huston used the portion of the driveway located on Lot 7 from time to time, he did not make regular use of the driveway for vehicular access. David Freese (“Freese”), the Sutherlands’ predecessor in interest, parked his car adjacent to his house on Lot 6. RP 111. Although Freese’s use of the driveway for this purpose may have involved some incidental, transitory use of a portion of the driveway located on Lot 7, the location Freese actually used for parking was entirely within Lot 6 and did not interfere with Huston’s use and enjoyment of Lot 7. RP 111-112. Huston does not recall Freese otherwise possessing, occupying or using any portion of Lot 7, nor did he object to his use of the driveway for parking. *Id.*

At or around the time the Sutherlands purchased Lot 6, Huston recalls having a conversation in which Mark Muldaur inquired about the

use of the driveway. *See* Appendix, RP 112-13. Huston explained to Muldaur that it was his understanding that the driveway was originally used to access a shared garage that was once located at the eastern portion of two properties. RP 113. Since Huston did not regularly use the driveway for vehicular access, he told Muldaur that the Sutherlands were welcome to use the driveway if they so desired. *Id.* As was the case with Freese, the Sutherlands' use of the driveway for parking did not interfere with Huston's use and enjoyment of Lot 7, and he allowed their incidental, transitory use of his portion of the driveway as a neighborly accommodation. Other than that, Huston did not recall the Sutherlands otherwise possessing, occupying or using any portion of Lot 7. RP 113-14.

From 1999 to 2007, Lot 7 was owned by Lance King ("King"). Like Huston, King did not regularly use the driveway for vehicular access, and as such, permitted any incidental use of his portion of the driveway by the Sutherlands as a neighborly accommodation. Like Huston, King did not recall any other possession, occupation or use of any portion of Lot 7 by the Sutherlands. RP 113.

In 2002 or 2003, King removed the existing wooden shed on Lot 7 and constructed a partial wooden fence along the southeast portion of Lot 7, slightly to the north of the platted boundary line. RP 51. The primary

purpose of the fence was to create a barrier to unauthorized pedestrian traffic between the alley to the east of Lot 6 and 7 and 28th Avenue Northwest. RP 53. Furthermore, since King did not know the precise location of the platted boundary line, he wanted to err on the side of caution to causing any encroachment onto Lot 6. RP 59. As such, the existing chain link fence post was a natural starting point for the fence. RP 59.

In 2009, Garling and Elmberg had the property surveyed and learned that the metal post at the end of a chain link fence that runs along the eastern margin of Lot 6 extended approximate 4 inches over the platted boundary line and onto Lot 7. *See* Appendix, Ex. 1. The fence was in existence when the Sutherlands acquired the property in 1993. RP 235. No evidence was introduced as to when this fence was installed, by whom, and for what purpose.

(2) Procedural History

On October 31, 2014, Garling commenced this action against the Sutherlands in King County Superior Court, asserting claims for quiet title, trespass and ejection, and injunctive relief and seeking a decree quieting title in her favor as to Lot 7 in its entirety, the removal of any encroachments, and other relief relating to her claims. CP 1-10. On November 7, 2014, the Sutherlands filed an answer, in which they

interposed an affirmative defense of adverse possession, as well as a counterclaim to quiet title in their favor based on adverse possession and mutual recognition and acquiescence. CP 13-14; (See Appendix). Although the Sutherlands' answer asserted that "an eastern portion of the North/South boundary has been physically designated on the ground by fencing and/or fence lines," their counterclaim does not specifically identify the location of the purported line or the area subject to their adverse possession claim. CP 14.

On August 15, 2015 the Sutherlands filed a Motion for Summary Judgment and Order to Quiet Title. CP 21-36, CP 23. The motion included a diagram designating the "Area of Dispute" as a rectangular area located in and around the eastern 35 feet of common boundary line. CP 24. On September 18, 2015 the trial court (Judge John H. Chun) entered an order denying the Sutherlands motion for summary judgment based on the existence of genuine issues of material fact. CP 175.

The case was tried to the bench before the Honorable Richard Eadie on December 7 – 9, 2015. RP 4. At the start of the trial, the parties stipulated to the admission of their respective trial exhibits. RP 5-6. On December 11, 2015, the trial court entered written findings of fact and conclusions of law (CP 239-44) and on January 11, 2016, finding that "the Defendants have adversely possessed the portion of Lot 7 which lies

between the northern platted property line of Lot 6 up to the driveway seam and the wood fence, as depicted on the Survey,” as identified in the legal description and map attached as Exhibits A and B to the trial court’s findings and conclusions. CP 243. The Sutherlands presented a proposed judgment and a motion for attorney fees and costs, and on January 11, 2016, the trial court entered an order denying the Sutherlands request for attorney’s fees and entered a judgment in favor of the Sutherlands awarding them one-half of their surveyor costs and quieting title in their favor as to

the area of real property legally described in Exhibit A to this Judgment, consistent with the Findings of Fact and Conclusions of Law entered by this Court on December 11, 2015, including an area around the concrete driveway seam (a penumbra) reasonably necessary to continue parking along the concrete driveway seam.

CP 317-18 and 320-24; (See Appendix). Garling sought review of the trial court’s judgment by filing a Notice of Appeal on January 15, 2016. CP 329.

ARGUMENT

(1) Standard of Review

Claims for the acquisition of title by adverse possession, or alternatively, under the doctrine of boundary by mutual recognition and acquiescence, present mixed questions of law and fact. *See, e.g., Miller v.*

Anderson, 91 Wn. App. 822, 828, 964 P.2d 365 (1998) (adverse possession); *Merriman v. Cokeley*, 152 Wn. App. 115, 127, 215 P.3d 241 (2009) (mutual recognition and acquiescence), *rev'd on other grounds*, 168 Wn.2d 627, 30 P.3d 162 (2010). On appeal, the court reviews whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether those findings in turn support the trial court's conclusions of law and judgment. *Ridgeview Prop. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence exists when there is a sufficient quantum and quality of evidence to persuade a fair-minded, rational person of the truth of the finding. *Harris v. Urell*, 133 Wn. App. 130, 137, 135 P.3d 530 (2006).. The appellate court "review[s] de novo whether the trial court's conclusions of law were properly derived from the findings of fact." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003).

(2) The trial court's failure to enter specific findings with respect to the ultimate facts material to several of the essential elements of the Sutherlands' adverse possession and mutual recognition and acquiescence claims mandates reversal of the decision below.

For the reasons discussed below, the record demonstrates that the trial court erred as a matter of law by concluding that the Sutherlands were entitled to the relief sought based on their claims of adverse possession and boundary by mutual recognition and acquiescence. As an initial

matter, however, reversal of the judgment below is appropriate because the trial court did not enter specific findings of fact or conclusions of law with respect to several of the essential elements of the Sutherlands' claims for adverse possession and mutual recognition and acquiescence. *See, e.g., Crites v. Koch*, 49 Wn. App. 171, 176-77, 741 P.2d 1005 (1987).

CR 52 (a)(1) provides in relevant part that “[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law.” As a general rule, “the failure of the trial court to make an express finding on a material fact requires that the fact be deemed to have been found against the party having the burden of proof.” *Crites*, 49 Wn. App. at 176-77.

Although the trial court found that the Sutherlands had “adversely possessed” the portion of Lot 7 constituting the Disputed Area (CP 243), it failed to enter any specific findings that the Sutherlands’ use constituted actual possession (*see* CP 244-39). Likewise, notwithstanding the considerable testimonial evidence that was introduced indicating that the Sutherlands’ use of the Disputed Area for parking was permissive on inception and remained permissive until at least 2003 by virtue of the Huston’s and King’s neighborly sufferance and acquiescence (*see, e.g.,* RP 110-14, Appendix), the trial court omitted any findings that the Sutherlands’ use was hostile and non-permissive. Moreover, under the

circumstances the trial court should have issued findings and conclusions that it is reasonable to infer that the Sutherlands' use was allowed by Huston and King as a neighborly accommodation, thereby creating a presumption that their use was permissive, which negates the hostility element. Given the absence of any findings on this issue, however, it would appear that the trial court either failed to consider whether a presumption of permissive use was applicable or erroneously concluded that such a permission was inapplicable.

Although separate findings are not required with respect to every item of evidence introduced at trial, the trial court is required to make ultimate findings of fact concerning all material issues. *Bowman v. Webster*, 42 Wash.2d 129, 253 P.2d 934 (1953); *Wold v. Wold*, 7 Wn. App. 872, 875, 503 P.2d 118 (1972).³ Incomplete or defective findings of fact may necessitate reversal and remand with instructions for the entry of appropriate findings of fact and conclusions of law. *See Bowman*, 42 Wn.2d at 136 *Heriot v. Lewis*, 35 Wn. App. 496, 501-02, 668 P.2d 589,

³ "A material fact is one which a reasonable man would attach importance to in determining his course of action. It is one which is important, carries influence or effect, is necessary, must be found, is essential to the conclusions, and upon which the outcome of litigation depends. Ultimate facts are the essential and determining facts upon which the conclusion rests and without which the judgment would lack support in an essential particular. They are the necessary and controlling facts which must be found in order for the court to apply the law to reach a decision." *Wold*, 7 Wn. App. at 876.

(1983) (citing *Old Windmill Ranch v. Smotherman*, 69 Wn.2d 383, 501-02, 418 P.2d 720 (1966)).

This is more than a mere technicality constituting harmless error. The trial court's failure to enter complete findings with respect to the ultimate facts upon which its decision is based deprives the appellant of the opportunity to effectively challenge the merits of the decision. *Wold*, 7 Wn. App. at 876; *Mayer v. Emery*, 3 Wash. App. 315, 475 P.2d 124 (1970) That is especially true in fact-intensive cases such as adverse possession. Moreover, "[i]t is improper for an appellate court to ferret out a material or ultimate finding of fact from the evidence presented," thereby placing "the appellate court in the initial decision making process instead of keeping it to the function of review." *Wold*, 7 Wn. App. at 876; *Heriot*, 35 Wn. App. at 502 (observing that supplementing inadequate trial court findings by searching the record is generally "not a proper function of an appellate court").

In light of the trial court's failure to enter specific findings as to whether the Sutherlands' purported use constituted actual possession or was hostile and non-permissive, the ultimate facts on those issues and elements should be deemed to have been decided against the Sutherlands. *See Crites*, 49 Wn. App. at 176-77. Likewise, the trial court's omission of any findings or conclusions on the issue of whether the Sutherlands met

their burden of establishing through clear, cogent and convincing evidence the existence of a certain, well-defined line physically designated on the ground, the ultimate facts as to that element of their counterclaim for mutual recognition and acquiescence should be deemed to have been decided against them as well.

Since the Sutherlands had the burden of establishing each of the elements of adverse possession and mutual recognition and acquiescence, the trial court's omission of findings as to any one of those elements mandates the reversal of the judgment below. *See Bowman*, 42 Wn.2d at 136. However, as discussed below, reversal is also required because the Sutherlands failed to establish that they acquired title to the Disputed Area by adverse possession or, alternatively, by mutual recognition and acquiescence.

(3) The trial court erred as a matter of law by entering judgment quieting title in favor of the Sutherlands based on their affirmative defense and counterclaim of adverse possession.

In order to acquire title by adverse possession, the adverse claimant is required to prove possession of the real property at issue in a manner that was (1) actual and uninterrupted, (2) open and notorious, (3) exclusive, and (4) hostile with a claim of right, for a continuous period of more than 10 years. *See, e.g., ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989); *Draszt v. Naccarato*, 146 Wn. App. 536, 542, 192

P.3d 921 (2008). Since there is a presumption of possession by the party holding legal title, the party claiming adverse possession bears the burden of establishing the existence of each of the foregoing elements by the preponderance of the evidence. *ITT Rayonier*, 112 Wash. 2d at 757-58.

Adverse possession is a doctrine of repose, the purpose of which is to “make legal boundaries conform to boundaries that are long maintained on the ground,” Stoebuck, William B. and Weaver, John W., 17 WASH. PRAC., REAL ESTATE § 8.11 (2d ed.), and it is intended “to assure the maximum utilization of the land, encourage the rejection of stale claims, and quiet titles.” Courts will not, however, “permit the ‘theft’ of property by adverse possession unless the owner had notice and an opportunity to assert his or her right.” *Herrin v. O'Hern*, 168 Wn. App. 305, 310, 275 P.3d 1231 (2012). As such, there is no presumption in favor of the adverse holder because possession is presumed to be subordinate to the true owner's title. Accordingly, “[a] party who originally uses property with the permission of its owner and who later claims ownership by adverse possession has the burden of proving that the owner terminated permissive use of the property.” *Herrin*, 168 Wn. App. at 307.

(a) The Sutherlands’ purported use of the Disputed Area did not, as a matter of law, constitute actual possession.

For purposes of adverse possession, the adverse claimant must demonstrate “actual” possession of the true owner’s land that involves some degree of physical occupation – the mere use of the land of another is not enough. As Professor Stoebuck explains, “[u]nless there is the requisite degree of physical possession, no amount of verbal claims, no amount of documents, no kind of acts off the ground will put the claimant in adverse possession ... In most cases, the adverse possessor must be in physical possession of every part of the land that he claims.” 17 WASH. PRAC., REAL ESTATE § 8.9 (2d ed.) (citing *Snively v. State*, 167 Wash. 385, 9 P.2d 773 (1932) and *Cartwright v. Hamilton*, 111 Wash. 685, 191 P. 797 (1920)).⁴

The following is frequently cited as the test for actual possession: “Considering the nature of the land and the area where it is situated, were the claimant’s acts on the ground the kind of use a true owner would make of such land?” 17 WASH. PRAC., REAL ESTATE § 8.9 (2d ed.). And while

⁴ Professor Stoebuck goes on to observe that “[t]he only exception is ‘constructive possession,’ a doctrine that allows one who is in physical adverse possession of some land to be constructively in possession of a larger adjoining area that is described in a colorable title document he holds. Even then, he must physically possess some part.” 17 WASH. PRAC., REAL ESTATE § 8.9 (2d ed.) As this case does not involve a claim under color of title, the doctrine of “constructive possession” is inapplicable.

an adverse claimant's use may be an indicia of possession, "use" is not synonymous with "possession." Instead, the adverse claimant's use must involve the exercise of a sufficient amount of dominion and control over the true owner's land in order to satisfy the element of actual possession. Although there is no bright line test for actual possession, "[t]here is a minimum threshold; not every trespass is actual possession." *Id.*; *Riley v. Andres*, 107 Wn. App. 391, 27 P.3d 618 (Div. 2, 2001).

The Washington Supreme Court's decision in *Wood v. Nelson* is instructive as to distinction between "use" and "possession":

Evidence of *use* is admissible because it is ordinarily an indication of possession. It is *possession* that is the ultimate fact to be ascertained. Exclusive dominion over land is the essence of possession, and it can exist in unused land if others have been excluded therefrom. A fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership.

Wood v. Nelson, 57 Wn.2d 539, 540, 358 P.2d 312 (1961) (emphasis in original).

This critical distinction between possession and use is precisely why the evidence in this case fails to satisfy the Sutherland's burden of proving the element of actual possession. By conflating the concepts of "use" and "possession," the Sutherlands have essentially articulated a

claim that is really more akin to easement by prescription rather than adverse possession. The evidence introduced at trial falls well short of establishing, as a matter of law, that the Sutherlands' use of the Disputed Area constituted actual possession, which is fatal to their affirmative defense and counterclaim based on the doctrine of adverse possession.

The evidence introduced at trial demonstrates that whatever use the Sutherlands have made of the Disputed Area, it does not rise to the level of actual possession. The Sutherlands have not made any permanent improvements, repairs or any other alterations to the Disputed Area. They have not erected buildings, fences or barriers that encroach upon Lot 7. In fact, the only permanent physical encroachments are the chain link fence and edge of the concrete foundation, both of which substantially predate their ownership. *See* Appendix, Ex. 2. And while the north edge of the foundation does extend slightly past the line, it is important to remember that the foundation was not constructed by the Sutherlands for the purposes of supporting the shed but instead appears to be the remnants of the foundation for the shared garage formerly located on both Lot 6 and Lot 7. *See* Appendix, RP 79, 123, 233; Ex. 13, 15.

In fact, with the exception of their own self-serving statements about their use of the Disputed Area incidental to parking (which occurs on the portion of the driveway that is almost exclusive on their side of the

line), they have not even alleged, must less presented evidence of, any actual physical occupation of any portion of Lot 7. Rather than actual physical occupation or *possession*, their claims are premised merely on *use* that is ancillary to activities occurring entirely upon their own property. Although the extent to which the Sutherlands' parking extends upon the Disputed Area is unclear, it is undisputed that the area where they actually park their cars is almost entirely on Lot 6, i.e., south of the platted boundary line and south of the driveway seam. RP 34, 35, 64, 65, 170, 200, 201. While Diane Sutherland testified that she sometimes parks up to the seam and may step over the seam while entering and exiting her car, (RP 201-02), no evidence was introduced to suggest that the Sutherlands occupy or make any significant use of the area past the seam.

The other part of the Disputed Area that the Sutherlands testified to using is the eastern portion, consisting of a narrow gap between their storage shed and Garling's wooden fence. RP 195-97. Their shed is situated entirely to the south of the boundary line, about three feet south of the fence, and the side of the shed facing the fence is about eight feet wide. See Appendix, Ex. 2. The Sutherlands testified that they use of this area for storing some tools, gardening supplies, and other odds and ends. RP 196, 255. Nevertheless, it is important to remember that the shed is actually situated entirely upon Lot 6, *south* of the platted boundary line.

See Appendix, Ex. 2. Regardless, even if their use of this area for storage incidentally involves a de minimis amount of physical intrusion upon Lot 7, that falls well short of the exercise of dominion and control required to satisfy the element of actual possession.

(b) The Sutherlands' use of the driveway was permissive from its inception, thereby negating the element of hostile possession as matter of law.

It is axiomatic that possession or use that is “permissive in its inception cannot ripen into a prescriptive right unless the claimant has made a distinct and positive assertion of a right hostile to the owner.” *Crites v. Koch*, 49 Wn. App. 171, 177, 741 P.2d 1005 (1987) (citing *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 84, 123 P.2d 771 (1942)); *ITT Rayonier*, 112 Wn.2d at 757-58. The evidence presented at trial unequivocally demonstrates that the Sutherlands' use of the driveway – including the portion constituting the Disputed Area – was in fact permissive at its inception, and that the permission was never revoked by the grantor, Mark Huston. To the contrary, the Sutherlands' use remained permissive following Lance King's acquisition of Lot 7 and continued at least until Garling's acquisition of the property in 2009.

Since the trial court did not enter any specific findings of fact or conclusions of law with respect to hostility or permissive use, it is difficult to discern the trial court's overall rationale, if any, for concluding that the

Sutherlands' use of the Disputed Area was sufficiently adverse to satisfy the element of hostile possession. It is readily apparent, however, that the trial court ignored the considerable evidence in the record that demonstrates that the Sutherlands' use of the driveway for parking was permissive at its inception in 1993, and remained permissive at least throughout Lance King's ownership of Lot 7 from 1999 through 2007. *See, e.g.*, RP 110-14.

Shortly after the Sutherlands purchased Lot 6, they asked Garling's predecessor, Mark Huston, about the arrangements for using the driveway, and he told them they were welcome to park there because he did not use the driveway for parking and allowing them to do so would not impair his use and enjoyment of Lot 7. *See* Appendix, RP 113. Similarly, while Lance King may not have expressly granted them permission, the facts and circumstances surrounding his use of the property supports a presumption of permissive use.

Although the trial court appears to have assigned considerable weight to the Sutherlands' testimony about never having asked for permission to use the driveway, to the extent that the court concluded the Sutherlands use was necessarily adverse or hostile, that "completely disregards the well-established rule that permissive use may be implied," which is applicable in cases such as this, where it is "reasonable to infer

that the use was permitted by neighborly sufferance or acquiescence.” *Roediger v. Cullen*, 26 Wn.2d 690, 710, 175 P.2d 669 (1946). Thus, in the case of both Huston and King, the Sutherlands use of the driveway should be deemed to have been undertaken with their express or implied permission, thereby negating the element of hostility and vitiating their claim of adverse possession. Since the that permission, express or implied, exists until revoked or repudiated,

The trial court appears to accord considerable weight to the assertion that until Garling, none of the owners of Lot 7 ever objected to Sutherlands’ use of the driveway. But again, the trial court’s reliance on this fact is misplaced. “An owner is not required to adopt a dog-in-the-manger attitude in order to protect his title to his property.” *Roediger*, 26 Wn.2d at 710. As the court explains,

[a]n owner is not required to adopt a dog-in-the-manger attitude in order to protect his title to his property. The law which pertains to acquisition of prescriptive right, as claimed by respondents in the case at bar, by a presumed grant should not, in view of the fact that it would result in the encumbrance of another's property, be extended so as to work that result through mere neighborly courtesy by a land owner.

Id. (citations and internal quotes omitted). Silence or lack of objection is irrelevant for purposes of the analysis of whether an adverse claimant’s possession or use satisfies the element of hostile possession. To the

contrary, silence or lack of objection is entirely consistent with granting implied permission as a neighborly accommodation especially when, as here, it is reasonable to infer that an owner would permit such use by a neighbor.

(4) The trial court erred as a matter of law by entering judgment quieting title in favor of the Sutherlands as to “an area around the concrete driveway seam (a penumbra) reasonably necessary to continue parking along the concrete driveway seam.”

In addition to quieting title in favor of the Sutherlands as to the Disputed Area on the basis of adverse possession, the trial court also quieted title in their favor as to “an area around the concrete driveway seam (a penumbra) reasonably necessary to continue parking along the concrete driveway seam.” CP 321. The trial court introduced this issue *sua sponte* near the end of closing arguments, in the context of granting the Sutherlands a “penumbra of ground” past the Disputed Area in order to provide the Sutherlands with ample space for ingress and egress when parking in the driveway, citing *Lloyd v. Montecucco*, 83 Wn. App. 846, 924 P.2d 927 (1996). See Appendix, RP 291-93; .

Irrespective of the merits of the judgment quieting title to a penumbra, the *sua sponte* introduction of this new penumbra theory of relief at the end of closing arguments constituted an abuse of discretion, because it injected a novel issue of law and theory of relief that had not be

pled or tried by consent, and it went beyond any of the claims for relief that the Sutherlands had asserted at any time during trial. Garling lacked any semblance of a reasonable opportunity to address the factual and legal issues presented and suffered substantial prejudice as a result because the court subsequently granted the Sutherlands relief on this basis. Although the trial court's actions were undoubtedly well intentioned,

The prejudice to Garling is exacerbated by the ambiguous and indefinite nature of the interest or protection accorded by the judgment. As described by the trial court, this penumbra is an "area ... you don't necessarily own it by easement but that you have a right to have that area in order to perform the necessary functions." RP 293. Unfortunately, the court's description sheds very little light on the nature of the burdens and limitations imposed by the judgment. The trial court's judgment simply quiets title to the Sutherlands "including an area around the concrete driveway seam (a penumbra) reasonably necessary to continue parking along the concrete driveway seam." CP. 321. The findings of fact and conclusions of law contain similar language (CP 244), but the trial court did not enter any specific findings or conclusions and did not describe the area of the penumbra or the nature and extent of the rights or interest afforded by it. Notwithstanding the trial court's disclaimer that the penumbra is not an easement per se, to a certain extent it is analogous to a

floating easement. In any event, it is likely to constitute a cloud on Garling's title.

By granting this particular relief, the trial court erred in at least three respects. First, by raising *sua sponte* near the end of closing arguments and new issue of law and theory of relief that had not been pled, argued or tried by consent, and by only providing 24 hours to provide briefing on the issue, Garling's interests were substantially prejudiced. Additionally, neither the judgement nor its findings and conclusions adequate describe the nature and scope of the penumbra. During closing argument, the court stated that "you don't necessarily own it by easement," but beyond that it is difficult to discern penumbra exactly what type of right or property interest, if any, is granted by the judgment. Nevertheless, by "quieting title," to an undisclosed area along the seam, which extends for approximately 65 feet, the judgment creates a significant amount of uncertainty as to the use and enjoyment in and around the disputed area, the judgment impairs Lot 7 beyond the redrawn boundary line.

Irrespective of whether the trial court's introduction of the "penumbra" issue constituted an abuse of discretion, neither *Lloyd* nor any other published decision in Washington provides authority for quieting title to an area doing so on the facts of this case. In *Lloyd*, the "penumbra

of ground” principle is discussed in connection with the Lloyds’ contention that the “common boundary drawn in the upland tract” by the trial court was in error because “the Montecuccos’ actual possession would be more fairly represented by a jagged line.” *Lloyd*, 83 Wn. App. at 853. In spite of the absence of “direct evidence that the Montecuccos’ actually possessed every square yard of the disputed tract,” the Court of Appeals upheld the propriety of the boundary line established by the trial court, observing in relevant part as follows:

Courts may create a penumbra of ground around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes ... Regarding the straight line the trial court drew between the fence and the bulkhead, courts will project boundary lines between objects when reasonable and logical to do so.

Lloyd, 83 Wn. App. at 853-54 (emphasis added). On that basis, and in light of the ample evidence of open and notorious possession between the fence and the bulkhead, which represented the objects marking the outer extent of the Montecuccos’ possession, the Court of Appeals concluded that “trial court did not err in drawing a straight line between the outside perimeter of the northwest corner of the fence and the northern edge of the bulkhead.” *Id.* at 854.

As is evident from the passage quoted above, *Lloyd* stands for the proposition that the creation of a “penumbra of ground” is only appropriate (1) “around areas *actually possessed*,” and (2) then only to the extent “reasonably necessary to carry out the objective of settling boundary disputes.” *Lloyd*, 83 Wn. App. at 853-54 (emphasis added). In other words, when establishing a common boundary between two properties, courts are not required to trace a jagged line around the objects evidencing the outer extents of the adverse claimants’ actual possession, but may instead draw a straight line through such objects. Similarly, courts will sometimes project an area around buildings, structures or other physical objects that represent an adverse claimant’s actual possession and occupation if doing so is necessary for ingress and egress. 17 Wash. Prac., Real Estate § 8.9 (2d ed.) (“If the adverse possessor maintains a building wholly or partly on the disseisee’s land, he is in adverse possession of walkways or approach areas around the building to the extent they are reasonably necessary to gain access to it.”)

As an initial matter, the plaintiff submits that the Court need not even reach the issue presented in *Lloyd* because the question of whether it might be reasonable and logical for the Court to project a straight line is only germane if the defendants have presented sufficient evidence to establish each of the essential elements of adverse possession as to at least

some portion of the Disputed Area, which based on the evidence introduced at trial, they failed to do. *See Lloyd*, 83 Wn. App. at 849 (holding that adverse possession was established as to the Uplands tract down to the bulkhead, but not as to the line projected onto the Tidelands tract). It is also important to note that unlike the instant case, the elements of actual possession and hostility were not contested in *Lloyd*. *See id.* at 853. The vast majority of the Disputed Area in the instant case – the portion of the driveway between the true boundary and the seam or expansion joint – is analogous to the Tidelands tract in *Lloyd*, due to the absence of any objects that even arguably constitute evidence of actual possession or occupation.

However, even assuming *in arguendo* that the wooden fence and driveway seam somehow constitute such objects, the westerly extent of the actual possession *alleged* by the defendants ends at the location where they parked their cars. As such, there would be no basis or rationale for projecting a line beyond that point, since there is no evidence that the Sutherlands actually possessed any portion of the driveway west of the area where the Sutherlands park. In any event, neither *Lloyd* nor any other authority of which Appellant is aware would support establishing a “penumbra of ground” extending *north* of the seam in the driveway. Not only is there no evidentiary support for a finding that the Sutherlands used

(or have any legitimate need or interest in using) any portion of Lot 7 extending north beyond the seam in the driveway, granting such a remedy would actually exceed the relief sought by the Sutherlands under their affirmative defense and counterclaim.

There is no authority, however, for the proposition that courts can or should grant the equivalent of an indefinite “floating easement” beyond the area of actual possession and occupation solely to accommodate the convenience of the adverse claimant. 17 Wash. Prac., Real Estate § 8.9 (2d ed.) (citing *Mourik v. Adams*, 47 Wn.2d 278, 287 P.2d 320 (1955) (“But it seems that if no part of the building rests on the disseisee's land, then there is no adverse possession of areas around it, even if it is near the line.”)). Yet that is precisely the effect of the trial court’s judgment in this case.

(5) The trial court erred as a matter of law by entering judgment quieting title in favor of the Sutherlands based on their counterclaim of mutual recognition and acquiescence.

A boundary line that is at odds with the true boundary line revealed by a survey may be established through the doctrine of mutual recognition and acquiescence. A party claiming title to land by mutual recognition and acquiescence bears the burden of proving each of the following elements: (1) the purported boundary line must be certain, well defined, and in some fashion physically designated upon the ground; (2) absent an

express boundary line agreement, the adjoining land owners must have manifested in good faith a mutual recognition of the designated boundary line as the true line; and (3) the mutual recognition of the boundary line continued beyond the 10-year period necessary to establish title by adverse possession. *Merriman v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010); *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967).).

In contrast to adverse possession, each of the foregoing elements for mutual recognition and acquiescence must be proved by clear, cogent, and convincing evidence, which requires a quantum of proof sufficient to demonstrate that the ultimate facts supporting each element are “highly probable.” *Merriman*, 168 Wn.2d at 630; *Lilly v. Lynch*, 88 Wn. App. 306, 316-17, 945 P.2d 727 (1997).). Accordingly, the party asserting mutual recognition bears the burden of proving through clear, cogent, and convincing evidence that both parties recognize and acquiesce to the line as a boundary for at least ten years. *Lilly v. Lynch*, 88 Wn. App. 306, 316-17, 945 P.2d 727 (1997).

(a) The existence of a certain, well-defined line physically designated on the ground is not supported by clear, cogent and convincing evidence.

The first element of boundary by mutual recognition and acquiescence requires clear, cogent and convincing evidence of a boundary line between the two properties that is “certain, well defined,

and in some fashion physically designated upon the ground, *e.g.*, by monuments, roadways, fence lines, etc.” *Merriman*, 168 Wn.2d at 630. For purposes of this element, “[a] fence, a pathway, or some other object or combination of objects clearly dividing the two parcels must exist” in the area of the disputed border. *Id.* at 632. Additionally, acquiescence in a property line cannot be established by the unilateral acts of the claimant. *Heriot v. Lewis*, 35 Wn. App. 496, 501, 668 P.2d 589 (1983) (citing *Houplin v. Stoen*, 72 Wash.2d 131, 431 P.2d 998 (1967)).

Although Washington’s courts do not appear to have explicitly articulated the rationale for this element, it appears evident that the designation of a certain and definitive line is intended to impart notice and eliminate uncertainty. The Sutherlands’ purported line accomplishes neither of these objectives. *See Establishment of Boundary Line By Oral Agreement or Acquiescence*, 69 A.L.R. 1430 (citing *Hubbell v. McCulloch*, 47 Barb. (N.Y.) 287 (1866)) (“A person cannot acquiesce in the correctness of a boundary line, so long as he does not know where the line is.”).

In cases where the courts have established boundaries by mutual recognition and acquiescence, the object or objects designating the line, such as fences, walls, roads, etc., are generally obvious and unmistakable. For example, in *Lamm v. McTighe*, 72 Wn.2d 587434 P.2d 565 (1967), the

purported boundary was designated by a fence “starting at a staked corner and running to a staked corner,” which “was erected as a boundary-line fence” and then replaced by another fence, both of which were recognized and acknowledged by the parties as the boundary for almost three decades prior to a survey identifying true boundary line. *Id.* Similarly, in a case involving the related doctrine of boundary by common grantor, the property was conveyed “as separate properties divided by a six-foot fence.” *Pendergrast v. Matichuk*, 189 Wn. App. 854, 866, 355 P.3d 1210 (2015) *review granted*, 185 Wn.2d 1002, 366 P.3d 1243 (2016).

Holding that the fence satisfied the requirement of designating the boundary, the court observed that in contrast to “cases where a court has not found a well-defined boundary line for purposes of boundary by common grantor or other doctrines, such as mutual recognition and acquiescence, here the record discloses no reason for the existence of the fence other than to function as a boundary between the properties.” *Id.*, at 864. By contrast, in *Green v. Hooper*, 149 Wn. App. 627, 642, 205 P.3d 134 (2009), the court held that a retaining wall constructed of railway ties failed to clearly designate the boundary because it only extended partially along the disputed line.

Here, the seam in the driveway, the edge of the concrete pad, chain link fence post, and the L-shaped wooden fence fall woefully short of

designating a certain, well-defined line. There is no evidence that the seam in the driveway is anything other than an expansion joint, which is a feature common to any concrete driveway. More importantly, no evidence was presented to suggest, much less prove, that this seam was intended to designate a boundary line. For all appearances, it is simply a seam. *See* Appendix, Ex. 19 (photograph of driveway).

Although fences are frequently used to designate boundaries, they are often intended to serve as barriers for security, enclose animals, etc. *Pendergrast*, 189 Wn. App. at 866. Here, the L-shaped wooden fence, which was not installed until 2002 or 2003, extends only 30 feet or so along the purported line before abruptly turning north at a 90 degree angle. *See* Appendix, Ex. 2; Ex. 19. More importantly, however, Lance King testified that he installed the L-shaped fence to serve principally as a *barrier* for security purposes, not to designate or recognize the location of the boundary:

Q. ... So turning back to the fence. What was your purpose in constructing the fence at that location?

A. There were a couple reasons. We had a dog that I wanted to make sure would not get out to the front easily. We have a small child that was soon to be a toddler or was a toddler and it was a way to keep them towards the back. I remember there was instances of people occasionally cutting through the alleyway and using what was at the time my driveway and Mark and Diane's driveway as a shortcut to cut midway through the block. I was trying to

prevent that. And also just to really show that part of this was my property as well.

Q. Did you know -- did you attempt to ascertain the exact location of the boundary line?

A. I did not.

Q. Okay. So just to clarify, you did not know precisely where it was?

A. I did not.

CP 56-57. In other words, while the fence *could* designate a boundary, the testimony of the person who installed it demonstrates it was not intended to serve that purpose. Instead, it was intended primarily to serve as a barrier, making it more analogous to the retaining wall in *Green* than the fence in *Pendergrast*, where “the record discloses no reason for the existence of the fence other than to function as a boundary between the properties.” 189 Wn. App. at 866.

The Sutherlands’ chain link fence is even less definitive. The record contains no evidence as to who installed the fence, when it was installed, for what purpose, or most importantly, why the post was placed at its location. Though one could assume it was intended to designate the corner of the lot, a more plausible explanation is that whoever installed the fence either did not know where the corner was or simply made a mistake. Even if it was intended to serve as a boundary

fence, the more plausible inference would be that it was intended designate Lot 6's eastern boundary, not its northern boundary.

Finally, although multiple objects or features can be used to designate a line for purposes of acquiescence, in order to meet the test for certainty and definitiveness, it follows that there must be a rational basis or correlation between the objects and features and the purported boundary line. In other words, there must be some objective basis for "connecting the dots" between the elements of the line. Here, the elements of the Sutherlands' purported line appear to be little more than a random collection objects with no apparent connection with each other than coincidence.

In sum, the Sutherlands' purported boundary line, rather than being "certain, well defined" and physically designated on the ground, is more accurately described as "uncertain," "ill-defined" and only vaguely designated. As such, the evidence presented at trial fails as a matter of law to establish the first essential element of mutual recognition and acquiescence through clear, cogent and convincing evidence.

(b) The trial court erred as a matter of law by concluding that Garling and/or her predecessors-in-interest recognized and accepted the purported boundary line.

Although the case law does not precisely delineate the requisite acts necessary – in the absence of an express agreement – to establish

mutual recognition and acceptance of the designated line, it is clear that the true owner's confusion or mistaken belief as to the location of the boundary does not constitute acquiescence. Instead the claimant must present clear, cogent, and convincing evidence [(i.e., highly probable)] of improvements, occupation, or other conduct manifesting their mutual recognition and acceptance of the designated line as the true line. Here, the evidence in the record falls well short of meeting the standard of proof required on this element.

Although Huston testified that he "assumed" that the seam in the concrete corresponded with the boundary line, he also stated that "[i]t never occurred to me that it might be straight down the middle. I just always saw this seam and that was just the basis I was working from. I never really gave it much thought." RP 120. There is no evidence that Huston was even aware of the concrete pad, and the wooden fence on Lot 7 was installed by King years after Huston sold the property. And while the trial court's conclusion appears to assign considerable weight to Huston's relative lack of use of the driveway and the Disputed Area, there is no indication that this was a function of his mistaken assumption about the location of the boundary line. The fact that Huston and the Sutherlands may have both mistakenly believed the boundary line was located along the seam in the driveway is not tantamount to acquiescence.

In any event, no evidence was presented that Huston acted upon his mistaken assumption by improving, occupying, or otherwise using his property in a manner manifesting his recognition and acceptance of the Sutherlands' purported line as the true boundary between the properties. There is no evidence that he and the Sutherlands even communicated about, much less agreed upon, the location of the boundary line. In fact, Huston testified that he had no need or desire to use that area of his property and was unconcerned about the location of the boundary. At most, Huston's testimony simply reveals that he mistakenly assumed that the seam and the fence post corresponded with the location of the boundary.

Lance King's testimony demonstrates that the reason he erected the L-shaped wooden fence was to create a barrier to unauthorized pedestrian access and for the safety and security of his, and not to designate or recognize the boundary between Lots 6 and 7. Moreover, King testified that while he was uncertain where the platted boundary line was located, there is no evidence that he recognized and acquiesced to the chain link fence post, the edge of the concrete pad, or the seam in the concrete as the chain link fence post as the boundary line. King testified that he installed the fence at its present location largely as a matter of convenience, not with reference to any of the aforementioned items.

Finally, as noted above, the purpose of the seams in the driveway is to allow for the expansion of the concrete, not to designate the boundary. There is simply no evidence to suggest that there is any correlation or connection between the seams, the partial wooden fence, and the chain link fence post and the location of the boundary line.

In sum, the Sutherlands failed to prove, through clear, cogent and convincing evidence, that Garling or any of her predecessors in interest occupied or made improvements to Lot 7, or otherwise acted in a manner that demonstrated their manifestation of a mutual recognition and acceptance of the purported line for a period of more than 10 years. Although the Sutherlands may have recognized the purported line as the true and correct boundary, they cannot demonstrate that any of the owners of Lot 7 have ever done so.

(6) Garling is entitled to the entry of judgment quieting title in her favor and against the Sutherlands as to the Lot 7 in its entirety, including the Disputed Area.

Actions to quiet title are governed by RCW 7.28.010, which requires the person asserting title to establish (1) a valid subsisting interest in property and (2) a right to possession thereof. *Washington Sec. & Inv. Corp. v. Horse Heaven Heights, Inc.*, 132 Wn. App. 188, 195, 130 P.3d 880 (2006). The party demonstrating superior title is entitled to prevail. RCW 7.28.120. There is no dispute that Garling acquired Lot 7 pursuant

to a statutory warranty deed and is vested with title in fee simple to the property described therein. CP 239; Ex. 6. Since the Sutherlands cannot meet their burden of establishing superior title based on the affirmative defense and counterclaim for adverse possession and mutual recognition and acquiescence, Garling is entitled to judgment quieting title in her favor and against the Sutherlands.

(7) Garling is entitled to an award of costs and reasonable attorneys' fees under RCW 7.28.083 and RAP 18.1.

To the extent that Garling is the prevailing party on appeal, she requests an award of reasonable attorney fees and costs under RCW 7.28.083 and RAP 18.1. RCW 7.28.083(3) provides as follows:

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

Garling has incurred substantial legal fees and costs defending her title to Lot 7 against the Sutherlands claims of adverse possession and mutual recognition and acquiescence and resolve the dispute over the location of the boundary line between Lots 6 and 7. Accordingly, in the event that Garling is the prevailing party on appeal, she requests an award of reasonable attorney fees and costs pursuant to RCW 7.28.083 and RAP

18.1. *See Scheib v. Crosby*, 160 Wn. App. 345, 353, 249 P.3d 184 (2011) (“If attorney fees are allowable at trial, the prevailing party may recover fees on appeal.”)

CONCLUSION

For the reasons discussed above, the trial court erred as a matter of law by entering judgment quieting title in favor of the Sutherlands and against Garling as to the Disputed Area. Accordingly, the judgment of the trial court should be reversed with instructions for the entry of judgment (1) quieting title in favor of Garling and against the Sutherlands as to Lot 7 in its entirety, including the Disputed Area; (2) declaring that the true and correct boundary line between Lots 6 and 7 is conclusively established by the record of survey recorded on November 16, 2015 under King County Recording No. 20151116900008; (3) awarding Garling her reasonable attorney fees and costs; and (4) granting Garling any additional relief as the Court may deem appropriate, just, and equitable.

Respectfully submitted,

MALONE LAW GROUP PS

By: 

David A. Petteys, WSBA No. 33157
Attorneys for Appellant, Amy Garling
2208 NW Market St., Suite 420
Seattle, WA 98107
(206) 527-0333

APPENDIX

The Honorable Richard Eadie
Hearing Date: December 28, 2015
Without Oral Argument

ORIGINAL

FILED
KING COUNTY, WASHINGTON
JAN 17 2016
SUPERIOR COURT CLERK
BY Andrew Havlis
DEPUTY

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

AMY C. GARLING, a single person,

Plaintiff,

v.

MARK MULDAUR and DIANE A.
SUTHERLAND, husband and wife,

Defendants.

Case No. 14-2-29734-3 SEA

JUDGMENT

(Proposed) **RE**

JUDGMENT SUMMARY

1. Judgment Creditors: Mark Muldaur
Diane Sutherland
2. Attorneys for Judgment Creditors: Joseph Grube
Karen Orehoski
Breneman Grube, PLLC
1200 5th Avenue, Suite 625
Seattle, WA 98101
3. Judgment Debtor: Amy Garling

JUDGMENT QUIETING TITLE IN MARK MULDAUR
AND DIANE SUTHERLAND
PAGE 1 OF 4

BRENEMAN || GRUBE PLLC
1200 FIFTH AVENUE, SUITE 625
SEATTLE, WASHINGTON 98101
(206) 770-7606 • FAX (206) 770-7607

1	4.	Attorney for Judgment Debtor:	David Petteys Malone Law Group, PS 2208 NW Market Street Suite 420 Seattle, WA 98107
2			
3			
4	5.	Principal Judgment Amount	\$2,350 ⁰⁰
5	6.	Prejudgment Interest to date of Judgment	\$n/a
6	7.	Post Judgment Interest:	Shall accrue on the principal judgment amount at the rate of 12% per annum after entry of the judgment until paid in full
7			
8			

JUDGMENT

10 The Court having conducted a bench trial has entered Findings of Fact and
 11 Conclusions of Law. The Court has also reviewed Defendants' Motion for Award of Attorney
 12 Fees, the Declaration of Joseph Grube, the Declaration of Karen Orehoski, and the Plaintiff's
 13 Response, if any, the Defendants' Reply, if any and the Court being otherwise fully advised,
 14 NOW THEREFORE,

15 THE COURT FINDS as follows:

- 16 ~~1. Defendants are the prevailing party and an award of attorney fees to them in~~ (RE)
- 17 ~~the amount of \$45,525.00 / _____ is just and equitable pursuant to~~
- 18 ~~RCW 7.28.083 and RCW 4.84.010;~~
- 19 2. An award of surveyor costs to Defendants in the amount of ~~\$4,700~~ ^{\$2,350.00} (RE) is just and
- 20 equitable;
- 21 3. ~~An award of additional litigation costs to Defendants in the amount of~~
- 22 ~~\$362.40 / _____ is just and equitable;~~ (RE)

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~~4. Defendants are awarded statutory costs in the amount of \$422.50/~~ *RE*

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendants are granted judgment against Plaintiff in the amount of \$2,350⁰⁰.

2. Judgment is entered in favor of Defendants quieting title to the area of real property legally described in Exhibit A to this Judgment, consistent with the Findings of Fact and Conclusions of Law entered by this Court on December 11, 2015, including an area around the concrete driveway seam (a penumbra) reasonably necessary to continue parking along the concrete driveway seam.

3. Following entry of this Judgment, the legal description of the disputed area described in Exhibit A to this Judgment, along with the Court's Findings of Fact and Conclusions of Law entered on December 11, 2015, shall be merged with the legal description of Lot 6, Block 3, Loyal Heights Division No. 6, an addition to the City of Seattle, according to the plat thereof recorded in Volume 19 of Plats, page 82, in King County, Washington without further need for any boundary line adjustment.

5. All of Plaintiff's claims are dismissed with prejudice.

Done this 11th day of January, 2016.
~~December, 2015.~~

Richard D Eadie
The Honorable Richard Eadie

1 Presented by:

2 BRENEMAN GRUBE, PLLC

3 By: /s/ Karen Orehoski

4 Joseph A. Grube, WSBA #26476

5 Karen Orehoski, WSBA #35855

6 Attorneys for Defendants

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JUDGMENT QUIETING TITLE IN MARK MULDAUR
AND DIANE SUTHERLAND
PAGE 4 OF 4

BRENEMAN || GRUBE PLLC
1200 FIFTH AVENUE, SUITE 625
SEATTLE, WASHINGTON 98101
(206) 770-7606 • FAX (206) 770-7607

EXHIBIT A

A PORTION OF LOT 7, BLOCK 3, LOYAL HEIGHTS DIVISION NO. 6, AN ADDITION TO THE CITY OF SEATTLE, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 19 OF PLATS, PAGE 82, IN KING COUNTY WASHINGTON, AND BEING FURTHER DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHWEST CORNER OF SAID LOT 7; THENCE NORTH 01°00'31" EAST ALONG THE WEST LINE OF SAID LOT 7 A DISTANCE OF 1.35' FEET TO A POINT ON THE EXISTING SEAM OF A SHARED CONCRETE DRIVEWAY; THENCE ALONG SAID CONCRETE SEAM THROUGH THE FOLLOWING TWO (2) COURSES:

- 1) SOUTH 89°06'29" EAST A DISTANCE OF 29.69 FEET;
- 2) SOUTH 89°20'58" EAST A DISTANCE OF 38.38 FEET;

THENCE NORTH 00°32'52" EAST A DISTANCE OF 0.12 FEET TO THE SOUTHWEST CORNER OF AN EXISTING 4x4 WOOD FENCE POST; THENCE ALONG THE SOUTH FACE OF SAID WOOD FENCE THROUGH THE FOLLOWING THREE (3) COURSES:

- 1) SOUTH 89°22'29" EAST A DISTANCE OF 7.97 FEET;
- 2) SOUTH 87°51'15" EAST A DISTANCE OF 8.13 FEET;
- 3) SOUTH 88°45'59" EAST A DISTANCE OF 16.45 FEET TO AN EXISTING 2" DIAMETER STEEL CHAINLINK FENCE POST;

THENCE SOUTH 00°40'04" WEST ALONG SAID CHAINLINK FENCE A DISTANCE OF 0.79 FEET TO A POINT ON THE SOUTH LINE OF SAID LOT 7, SAID POINT BEING 1.50 FEET WEST OF THE SOUTHEAST CORNER OF SAID LOT 7; THENCE NORTH 89°27'08" WEST ALONG SAID SOUTH LINE OF LOT 7 A DISTANCE OF 100.62 FEET TO THE POINT OF BEGINNING.

SAID PORTION OF LOT 7 CONTAINING 114 SQUARE FEET, MORE OR LESS.



12-3-15

FILED

14 NOV 26 AM 10:15

KING COUNTY
SUPERIOR COURT CLERK
Hon. Jean Ritschel
E-FILED
CASE NUMBER: 14-2-297343 SEA

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

AMY C. GARLING, a single person,

NO. 14-2-29734-3 SEA

Plaintiff,

ANSWER

v.

MARK H. MULDAUR and DIANE A.
SUTHERLAND, husband and wife,

Defendants.

Defendants Mark Muldaur and Diane Sutherland ("Defendants"), by and through their attorneys of record, answer the Plaintiff's Complaint and state their Affirmative Defenses and Counterclaims as follows:

I. ANSWER

1. Defendants are without information or belief as to the allegations contained in paragraph 1 of the Complaint, and therefore deny the same.

2. Defendants admit the allegations contained in paragraph 2 of the Complaint.

1 3. Defendants deny the allegations contained in paragraph 3 of the Complaint.

2 4. Defendants are without information or belief as to the allegations contained in
3 paragraph 4 of the Complaint, and therefore deny the same.

4 5. Defendants admit they are the owners of the real property commonly known as
5 7522 28th Avenue Northwest in Seattle, Washington. Defendants deny the remaining
6 allegations contained in paragraph 5 of the Complaint.

7 6. Defendants admit that they share a common boundary with Plaintiff, but deny
8 the remaining allegations contained in paragraph 6 of the Complaint.

9 7. Defendants admit they claim a right, title and/or interest in certain real property
10 along the common boundary, but deny the specific description of that property as set forth in
11 paragraph 7 of the Complaint.

12 8. Defendants admit paragraph 8 of the Complaint.

13 9. Defendants admit that they objected to removal and relocation of the chain link
14 fence, but deny the remaining specific allegations contained in paragraph 9 of the Complaint.

15 10. Defendants deny the allegations contained in paragraph 10 of the Complaint.

16 11. Defendants deny the allegations contained in paragraph 11 of the Complaint
17 and deny that Plaintiff is entitled to any relief.

18 12. Defendants deny the allegations contained in paragraph 12 of the Complaint.

19 13. Defendants deny the allegations contained in paragraph 13 of the Complaint
20 and deny that Plaintiff is entitled to any relief.

21 14. Defendants deny the allegations contained in paragraph 14 of the Complaint.

22

23

1 1. Defendants are (and have been since May 1993) the fee simple owners of real
2 property (the "Property") legally described as:

3 **Lot 6 in Block 3 of Loyal Heights Division No. 6, as per plan**
4 **recorded in Volume 19 of Plats, page 82, records of King**
5 **County, Situate in the City of Seattle, County of King, State of**
6 **Washington.**

7 2. The Property is bounded on the North side (the "North/South" boundary) by
8 real property owned by Plaintiff and legally described as:

9 **Lot 7 in Block 3 of Loyal Heights Division No. 6, as per plan**
10 **recorded in Volume 19 of Plats, page 82, records of King**
11 **County, Situate in the City of Seattle, County of King, State of**
12 **Washington.**

13 3. For a period exceeding 21 years, an eastern portion of the North/South
14 boundary has been physically designated upon the ground by fencing and/or fence lines.

15 4. The Plaintiff and her predecessors in interest, and the Defendants and their
16 predecessors in interest, have manifested a mutual recognition and acceptance of the
17 designated line as the true boundary line. This mutual recognition has continued continuously
18 for a period in excess of twenty one (21) years).

19 5. The Defendants and their predecessors in interest have actually used the
20 portion of real property south of the North/South fence line in a manner as a true owner would
21 (i.e. in a "hostile" manner), openly, notoriously, exclusively, continuously for a period
22 exceeding ten years.

23 6. Defendants are entitled to a Declaration that:

 a. They have adversely possessed a portion of property south of the
 North/South boundary as will be proven at trial; and

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b. Quieting title in their name and that future deeds to this property should reflect the decision of this Court with respect to the common property line between the properties.

7. Defendants are entitled to their reasonable attorney's fees pursuant to RCW 7.28.083.

IV. PRAYER FOR RELIEF

Defendants, having answered Plaintiff's Complaint, having stated their Affirmative Defenses, and having stated their Counterclaim, pray that judgment be entered in their favor against Defendant as follows:

- A. A judgment dismissing Plaintiff's claims with prejudice.
- B. A Declaratory Judgment awarding Defendants all relief sought in their Counterclaim.
- C. An award to Defendants for their attorneys' fees and costs.
- D. Such other and further relief as this Court deems just and equitable, including but not limited to injunctive relief if necessary.

DATED this 26th day of November, 2014.

BRENEMAN GRUBE, PLLC

By: */s/ Joseph A. Grube*
Joseph A. Grube, WSBA #26476
Karen Orehoski, WSBA #35855
Attorneys for Defendants
Breneman Grube, PLLC
1200 Fifth Avenue, Suite 625
Seattle, WA 98101
(206) 770-7606

EXHIBIT 1

Garling v. Muldaur et al., KCSC No. 14-2-29734-3 SEA

Plaintiff's Exhibit List

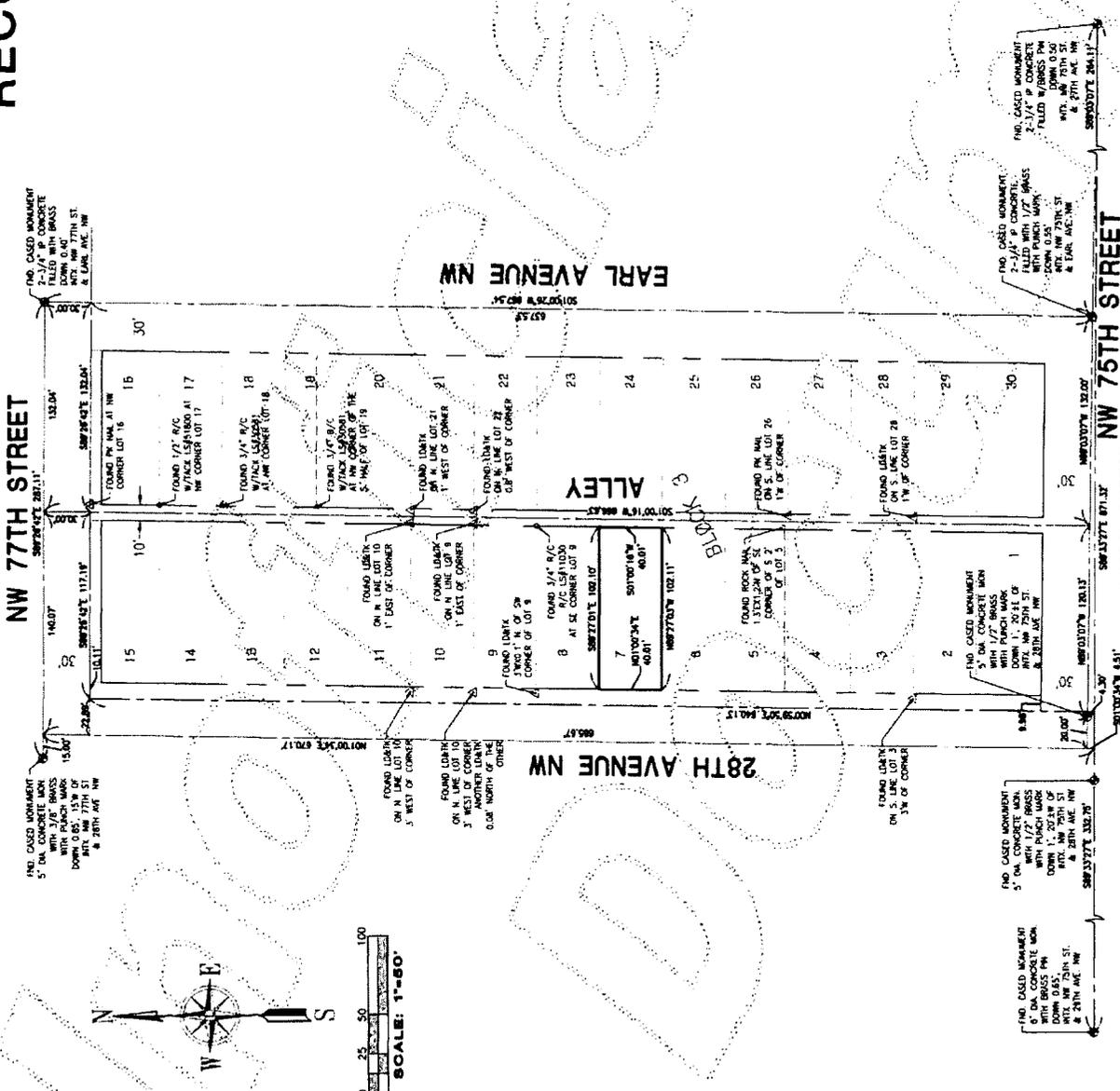
EXHIBIT 2

Garling v. Muldaur et al., KCSC No. 14-2-29734-3 SEA

Plaintiff's Exhibit List

204 / 001

RECORD OF SURVEY



- LEGEND**
- FOUND MONUMENT (AS NOTED)
 - SET REBAR/CAP (LS#A5789)
 - FOUND CORNER (AS NOTED)
 - CALCULATED
 - UNCOVERED OR LEAD/TACK (AS NOTED)
 - SET NAIL & TACK ON LINE

SURVEY INFORMATION

LEGAL DESCRIPTION:
 LOT 7, BLOCK 3, PLAT OF LOWA HEIGHTS DIVISION NO. 8, BEING A PART OF THE CITY OF SEATTLE, KING COUNTY, WASHINGTON, AS SHOWN ON PLAT, PAGE 22, RECORDS OF KING COUNTY, REC. NO. 19102092000A, RECORDS OF KING COUNTY, STATE OF WASHINGTON.

DATE OF SURVEY: OCTOBER 23, 2015
TAX PARCEL NUMBER: 4443380-0370
ADDRESS: 2508 28TH AVE NW, SEATTLE WA 98117
AREA: 4.08418 AC (0.0841 AC)

PROCEDURE / NARRATIVE:
 THIS SURVEY WAS PERFORMED IN ACCORDANCE WITH THE PROFESSIONAL SURVEYING ACT AND THE RULES AND REGULATIONS OF THE BOARD OF SURVEYING AND MAPPING, KING COUNTY, WASHINGTON. THE SURVEY WAS PERFORMED IN ACCORDANCE WITH THE PROFESSIONAL SURVEYING ACT AND THE RULES AND REGULATIONS OF THE BOARD OF SURVEYING AND MAPPING, KING COUNTY, WASHINGTON. THE SURVEY WAS PERFORMED IN ACCORDANCE WITH THE PROFESSIONAL SURVEYING ACT AND THE RULES AND REGULATIONS OF THE BOARD OF SURVEYING AND MAPPING, KING COUNTY, WASHINGTON.

STATIONER'S NOTES:
 1. ALL DISTANCES SHOWN ON THIS SURVEY ARE IN U.S. SURVEY FEET.
 2. SURVEY WAS PERFORMED IN OCTOBER 2015 AND ALL CONTROL MONUMENTS SHOWN AS FOUND WERE NOTED AT THIS TIME.
 3. THIS SURVEY IS A RE-TRACEMENT OF THE PLAT OF LOWA HEIGHTS DIVISION NO. 8, AN ADDITION TO THE CITY OF SEATTLE, KING COUNTY, WASHINGTON, AS SHOWN ON PLAT, PAGE 22, RECORDS OF KING COUNTY, REC. NO. 19102092000A, RECORDS OF KING COUNTY, STATE OF WASHINGTON AND IS A RE-TRACEMENT OF THE MONUMENTS, PROPERTY LINES AND DISTANCES SHOWN ON SAID PLAT. THIS SURVEY IS TO SHOW ANY UNRECORDED OVERTHROW BEATS.

REFERENCE SURVEYS:
 1. SURVEY OF SEATTLE, KING COUNTY, WASHINGTON, TO THE CITY OF SEATTLE, FILED IN VOL. 19, OF PLATS, PAGE 22, RECORDS OF KING COUNTY, REC. NO. 19102092000A, RECORDS OF KING COUNTY, STATE OF WASHINGTON.
 2. RECORD OF SURVEY FILED IN VOL. 81, OF SURVEYS ON PAGE 245, RECORDS OF KING COUNTY, REC. NO. 1902024011, RECORDS OF KING COUNTY, STATE OF WASHINGTON.
 3. KING COUNTY ASSESSOR'S QUARTER SECTION MAP, NW 2-25-01, DATED 6/9/2013.
 4. SEATTLE QUARTER SECTION MAP, NW 2-25-01, DATED 1/8/2012.

DATE: 10/28/15
 SCALE: 1"=50'
 CHECKED BY: TSL
 JOB NO: 1903
 PROJECT NO:

REAL DATA
 P.T.N. SE1/4 OF NW1/4
 SEC. 2, T26N, R3E, W.M.
 SURVEY FOR: MALONE LAW GROUP P.S.
 2206 NW MARKET STREET, 4420
 SEATTLE, WA 98107
 KING COUNTY, WASHINGTON

SHT 1 OF 3

LANKTREE LAND SURVEYING, INC.
 421 "B" STREET N.E.
 AUBURN, WA 98002-4005
 PHONE: (253) 653-6423
 FAX: (253) 793-1616
 WWW.LANKTREELANDSURVEYING.COM



LAND SURVEYOR'S CERTIFICATE:
 THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY SUPERVISION AND IN ACCORDANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT AT THE REQUEST OF MALONE LAW GROUP IN OCTOBER 2015

Trevor J. Lanktree
 License No. 45189

2015116900008
 KING COUNTY, WA
 REC. NO. 204 782 81

STANDARD OF RECORD

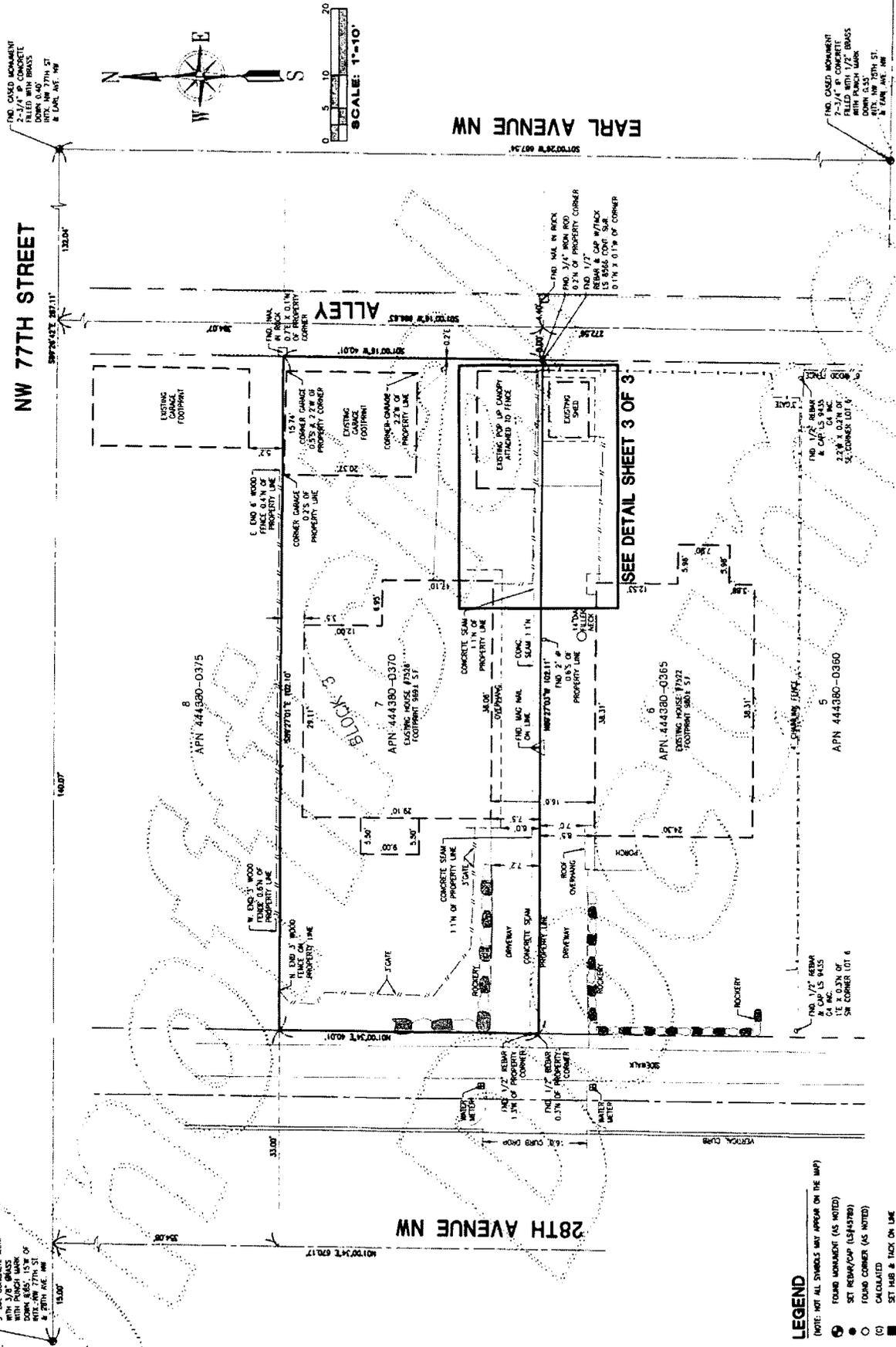
RECORD OF SURVEY

50A-100Z

NW 77TH STREET

EARL AVENUE NW

28TH AVENUE NW



LEGEND

(NOTE: NOT ALL SYMBOLS MAY APPEAR ON THE MAP)

- FOUND MONUMENT (AS NOTED)
- SET REBAR/CAP (LS#45789)
- FOUND CORNER (AS NOTED)
- (C) CALCULATED
- SET HUB & TACK ON LINE



LANKTREE LAND SURVEYING, INC.
 421 'B' STREET N.E.
 AUBURN, WA 98002-4005
 PHONE: (253) 653-6423
 FAX: (253) 793-1616
 WWW.LANKTREELANDSURVEYING.COM

DRAWN BY: BSM
 DATE: 10/28/15
 SCALE: 1"=10'
 CHECKED BY: TSK
 JOB NO.: 1903
 PROJECT NO.

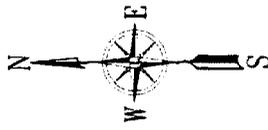
PTN. SE1/4 OF NW1/4
 SEC. 2, T26N, R9E, W1M.
 SURRY FOR MALONE LAW GROUP PS
 2200 NW MARKET STREET, #420
 SEATTLE, WA 98107
 KING COUNTY, WASHINGTON

SHT 2 OF 3

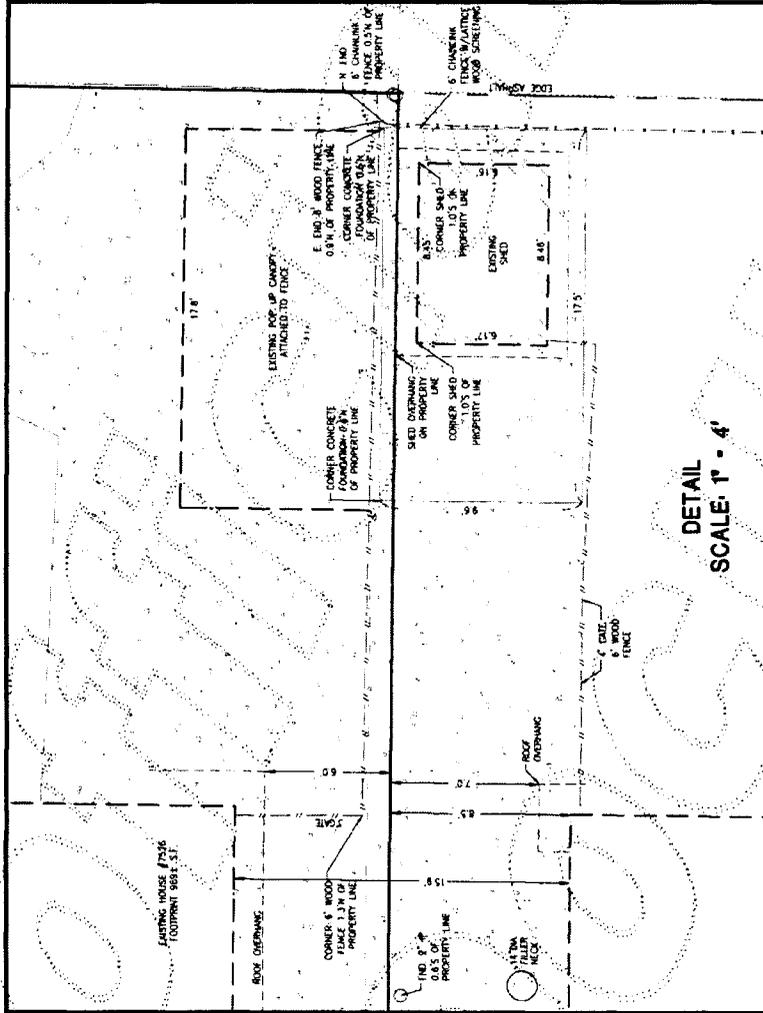
20151116900008

304 1003

RECORD OF SURVEY



SCALE: 1"=4'



DETAIL
SCALE: 1" = 4'

PROJECT DATA
 P.T.N. 8E1/4 OF NW1/4
 SEC. 2, T26N, R3E, W1M.
 SURVEY FOR MALONE LAW GROUP, P.C.
 2208 NW MARKET STREET, #120
 SEATTLE, WA 98107
 KING COUNTY, WASHINGTON

FORM BY: BML
 DATE: 10/28/15
 SCALE: 1"=4'
 CHECKED BY: TSL
 JOB NO.: 1903
 PLOTTED NO.:

LANKTREE LAND SURVEYING, INC.
 421 "B" STREET N.E.
 ALBUQUERQUE, NM 87102-4005
 PHONE: (253) 653-6423
 FAX: (253) 793-1616
 WWW.LANKTREELANDSURVEYING.COM

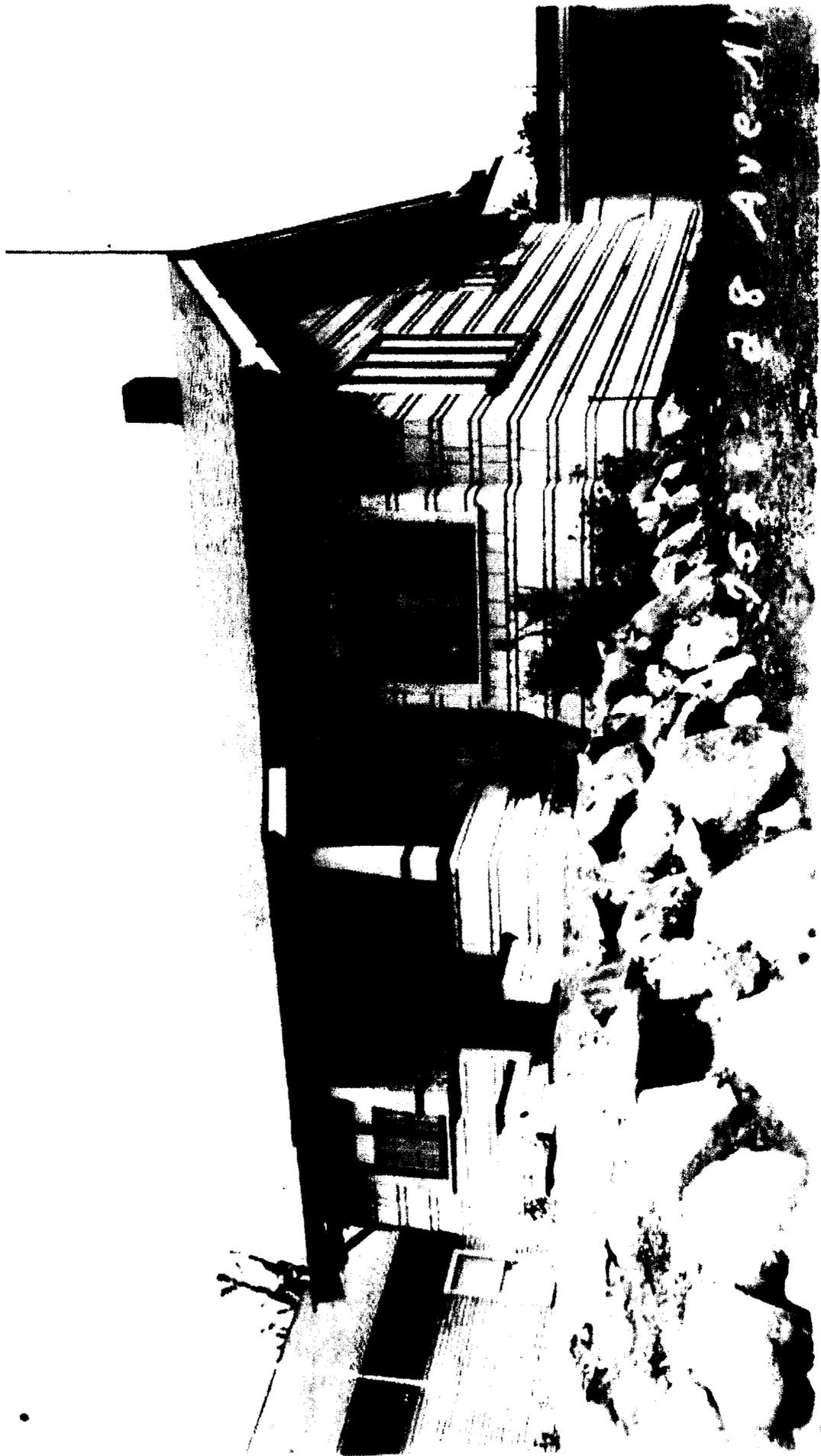


20151116900008
 KING COUNTY, WA
 REC. # 151116900008
 FILED 11/16/15
 11/16/15 11:28 AM
 REC. # 151116900008

EXHIBIT 11

Garling v. Muldaur et al., KCSC No. 14-2-29734-3 SEA

Plaintiff's Exhibit List



28 Ave A

EXHIBIT 12

Garling v. Muldaur et al., KCSC No. 14-2-29734-3 SEA

Plaintiff's Exhibit List



7522-28-NW

EXHIBIT 13

Garling v. Muldaur et al., KCSC No. 14-2-29734-3 SEA

Plaintiff's Exhibit List

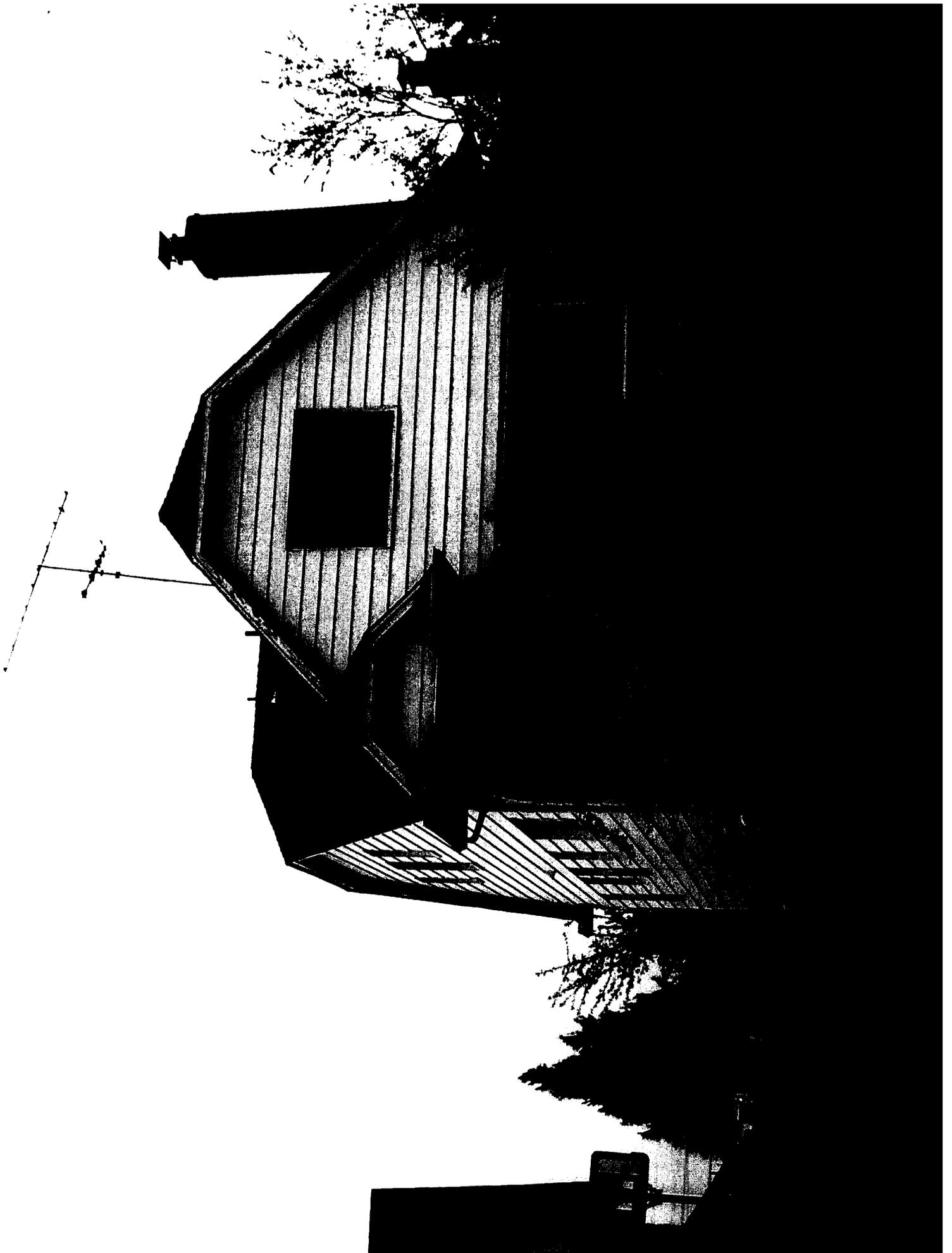


EXHIBIT 15

Garling v. Muldaur et al., KCSC No. 14-2-29734-3 SEA

Plaintiff's Exhibit List

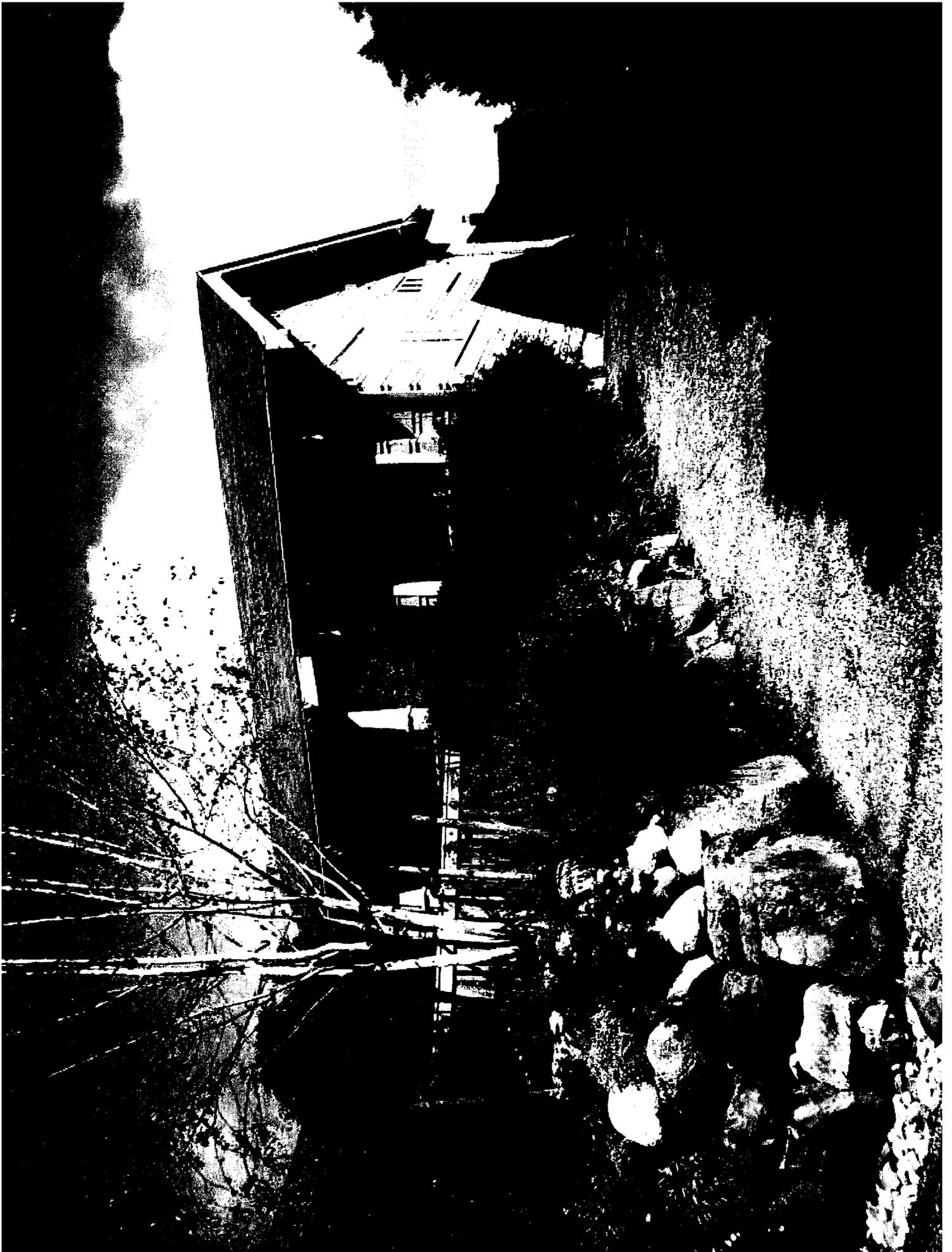
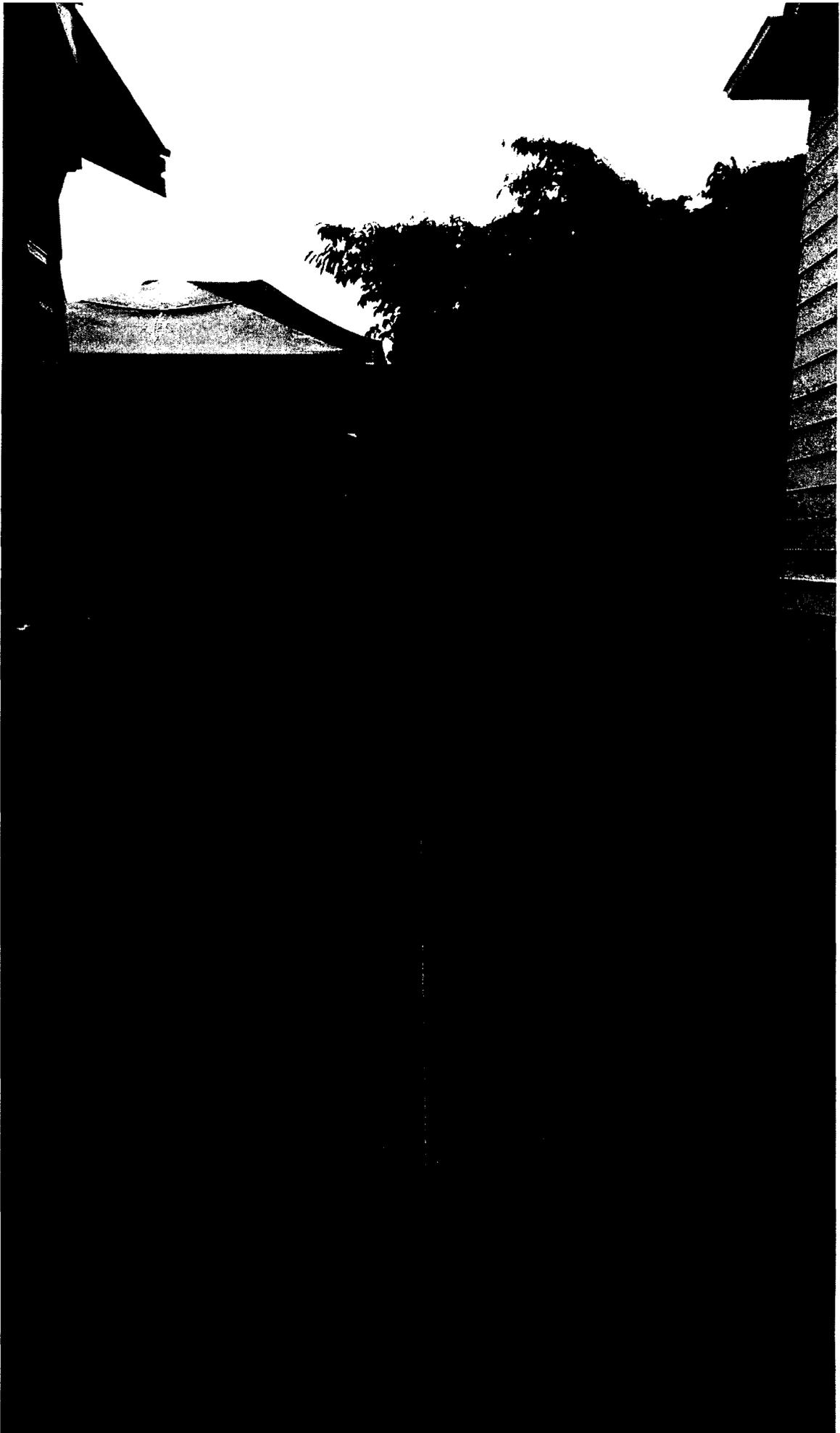


EXHIBIT 19

Garling v. Muldaur et al., KCSC No. 14-2-29734-3 SEA

Plaintiff's Exhibit List



1 lived there?

2 A. I constructed a permitted garage.

3 Q. Okay. Where was or is that garage located?

4 A. That garage would be in the northeast corner of the
5 property.

6 Q. Okay. And do you recall whether the garage was
7 completed prior to the construction of the fence?

8 A. I don't recall.

9 Q. You don't recall.

10 THE COURT: Clarify for me, if you would, the
11 northeastern corner of the property. That's the corner of
12 the property that's not visible in the exhibit; is that
13 right?

14 MR. PETTEYS: That's correct, Your Honor. I believe
15 that would be the portion that would go off of this diagram
16 so the northeast corner of lot 7.

17 THE COURT: Maybe this would be better. This shows
18 the southeast corner; is that correct?

19 WITNESS: That's correct.

20 THE COURT: Okay. Got it. Just my orientation.

21 BY MR. PETTEYS:

22 Q. So just to rephrase, we're talking about an area
23 that's other than the area in dispute. Okay.

24 So turning back to the fence. What was your purpose
25 in constructing the fence at that location?

1 A. There were a couple reasons. We had a dog that I
2 wanted to make sure would not get out to the front easily.
3 We have a small child that was soon to be a toddler or was a
4 toddler and it was a way to keep them towards the back. I
5 remember there was instances of people occasionally cutting
6 through the alleyway and using what was at the time my
7 driveway and Mark and Diane's driveway as a shortcut to cut
8 midway through the block. I was trying to prevent that.
9 And also just to really show that part of this was my
10 property as well.

11 Q. Did you know -- did you attempt to ascertain the exact
12 location of the boundary line?

13 A. I did not.

14 Q. Okay. So just to clarify, you did not know precisely
15 where it was?

16 A. I did not.

17 Q. So because you did not know where the precise location
18 of the boundary line was is it safe to say that you did not
19 construct the fence with reference to the true and correct
20 boundary?

21 MR. GRUBE: Objection, Your Honor, leading.

22 THE COURT: Sounds like leading.

23 MR. PETTEYS: I'll rephrase.

24 BY MR. PETTEYS:

25 Q. When you constructed the fence was it your intention

1 to recognize or designate the location of the boundary line?

2 MR. GRUBE: Objection; asked and answered.

3 THE COURT: Overruled. You may answer.

4 A. Can you restate the question, please.

5 Q. Yeah and I'll try to --

6 A. I know what my answer -- I just want to make sure I
7 understand very clearly.

8 Q. I'll try to boil it down to plain English. When you
9 built the fence at the location that you did were you
10 intending to designate or recognize the location of the
11 boundary between the two properties?

12 A. No.

13 Q. Okay. Did you have any discussions with your
14 neighbors, the owners of lot 6, about constructing the
15 fence?

16 A. I may have had one brief conversation with Mark that I
17 was intending to just put up a portion or portions of a
18 fence. I seem to remember it was 16 to 25 feet long but I
19 said I wasn't going down the whole driveway. That's about
20 it. That was the extent of the conversation.

21 Q. Okay. Thank you. And do you recall whether there
22 were any particular physical characteristics that may have
23 caused you to build a fence where you did?

24 A. I did put the fence where it's currently located. I
25 basically added a fence post at the end of the termination

1 of what would be the northeast corner of the defendant's
2 property. I added a 4-by-4 cedar fence post or pressure
3 treated fence post at the end of their fence run which ran
4 along the alleyway which runs north-south. So I basically
5 extended the end of -- Mark and Diane's fence ended with, I
6 believe, a metal round pole or fence post, and then I just
7 put my fence post just to the north of that, 4-by-4 pressure
8 treated probably, which ran more or less in line with the
9 seam of that concrete. And I did that partially because I
10 figured I was erring on the side of caution and it wasn't
11 going to cause any issues with the neighbor.

12 Q. Okay. So just to clarify, when you said you're erring
13 the side of caution does that mean you were attempting to
14 designate where the boundary line was?

15 A. No, not at all.

16 MR. GRUBE: Objection; asked and answered.

17 THE COURT: Overruled.

18 BY MR. PETTEYS:

19 Q. Just so I'm sure, when you say, "Mark and Diane's
20 fence," are you referring to what's depicted on --

21 A. Lot 6.

22 Q. Okay. And that fence runs in what direction?

23 A. That fence runs east-west -- oh, the fence that I
24 built or the --

25 Q. The fence that was existing at the time you built

1 your --

2 A. That runs north- south.

3 Q. That runs north-south?

4 A. Uh-huh. In the alleyway.

5 Q. And it terminates where?

6 A. It terminates somewhere near the middle of the

7 driveway but not necessarily.

8 Q. Okay. But it doesn't turn?

9 A. No, it does not. There's no return that I recall.

10 Q. And just so I understand, you said that you placed

11 your fence post where?

12 A. To the north of the termination of lot 6's fence.

13 Where their fence terminated I began.

14 Q. Do you recall if there was a concrete foundation or

15 pad or any observable difference in the concrete located in

16 and around the area where you placed the fence post for your

17 fence?

18 A. No.

19 Q. You don't?

20 A. You mean where it placed the fence post?

21 Q. Correct.

22 A. Not that I recall.

23 Q. I mean, I actually used the word "posts" plural posts.

24 So you put a series of posts?

25 A. Yes. I basically followed the seam of that concrete

1 primarily because it was going to be easier to create a hole
2 for the fence post. And again, I was erring on the side of,
3 you know, what I felt was caution as far as not infringing
4 on lot 6's property.

5 Q. And when you say the seam in the concrete, are you
6 able to tell on this diagram approximately where that might
7 be?

8 A. Not being a surveyor, if I had to as a layman look at
9 it I would say this is probably indicating the seam of the
10 concrete, this line.

11 Q. So you're pointing to a line that is --

12 A. It's not this heavy black line. It's the line just to
13 the north of lot 6.

14 Q. Thank you. And you recall whether that line was a
15 straight line? Was it evenly finished? Was it rough?

16 A. It was -- it appeared like it might have been an
17 expansion, a place for an expansion joint, but again, as a
18 layman I don't know. It was relatively straight.

19 Q. Do you recall whether it was raised up above the
20 surface of where the driveway was or the portion of your
21 lot?

22 A. No.

23 Q. You don't recall it being raised?

24 A. No.

25 Q. Okay. Prior to building the fence, do you recall the

1 owners of lot 6 occupying or making any use of the area
2 between the shed that's located on lot 6 and the area where
3 the fence is now located on lot 7?

4 A. Not that I'm aware.

5 Q. Okay. You don't recall them making any use of it
6 or --

7 MR. GRUBE: Objection, Your Honor, asked and answered.
8 He just said he doesn't recall.

9 THE COURT: I think when you started with "you don't
10 recall," it sounded like it was going to be a leading
11 question.

12 MR. PETTEYS: Thank you, Your Honor. I'll rephrase.

13 THE COURT: I listened to and if everyone here could
14 traction in a question and get an objection, I generally
15 think that's more than likely will be leading.

16 MR. PETTEYS: Thank you, Your Honor.

17 BY MR. PETTEYS:

18 Q. Is the fence effectively an L shape?

19 A. Yes.

20 Q. With the bottom portion of the L, I guess, being
21 longer than the top?

22 A. Yes. It would be a reverse L.

23 Q. Okay. So do you recall the defendants making any use
24 of the area in and around the expansion joint that we talked
25 about before? Or I guess up to the expansion joint where it

1 has no independent meaning, no legally significant meaning
2 in and of itself.

3 THE COURT: What's the evidence that's been presented,
4 if we take your Exhibit 19, pink line, and I'm going to ask
5 defense at some time if that's been seeded as the plat 7 or
6 the platted line.

7 MR. PETTEYS: Okay, Your Honor.

8 THE COURT: If we take that, what does that do to the
9 remaining side for the -- on lot 6 -- as far as parking
10 goes? Still park that SUV there?

11 MR. PETTEYS: I mean --

12 THE COURT: Okay, if it's not clear that's fine.

13 MR. PETTEYS: I think that it is physically possible,
14 absolutely. I can't speculate as to whether or not it's
15 feasible, practicable, convenient. I mean, obviously the
16 wider the area to park is the more convenient it is. The
17 other thing I would point out is --

18 THE COURT: What would be the legal status then if you
19 had that line or if you had that seam as the line about
20 opening the doors? Is there any issue about being able
21 to -- as apparently is the case that opening the doors on
22 the side naturally and inevitably intrudes across whichever
23 of those lines you're talking about.

24 MR. PETTEYS: Right. I understand your question. And
25 I'd say that under these facts and circumstances the answer

1 is -- it may not be a yes, no question. The answer is no
2 there's no -- I'm not aware of any doctrine that -- barring
3 either some independent basis for claiming the right to use
4 or possess that property. So clearly if the property is
5 owned up to the seam by the defendants there's no issue.
6 They can park there to the extent it's possible.

7 THE COURT: If it's owned by lot 7 up to the pink
8 line, they could choose to build a wall there.

9 MR. PETTEYS: Yeah, I can't speak intelligently to the
10 building codes and whether it would be illegal and how close
11 you can build up to that line, but I think you can build a
12 fence right along --

13 THE COURT: Or a tree.

14 MR. PETTEYS: -- or a tree, right. I don't think you
15 can build a permanent improvement such as -- yeah.

16 THE COURT: Okay. Would that constitute a lawful
17 barrier then that's what you would say that they can
18 construct a barrier. And the barrier then raises that issue
19 of, you know, being able to use the other side and opening
20 the door and whatnot.

21 MR. PETTEYS: Right.

22 THE COURT: Now, I do have a prior case that I have
23 identified now in which involved a similar predicament, if
24 you will, or situation of where there was an easement right
25 established to moor a boat -- this is the Lake Washington

1 issue -- moor a boat next to the dock. And there was a
2 certain element established for a certain kind of a boat,
3 size of a boat, that by adverse possession could be moored
4 next to that dock. But the evidence similarly, I would
5 suggest, to this one showed that you have to clean the boat
6 too and you have to be able to get around it to clean the
7 boat and provide maintenance and repair and things such as
8 that. And that is -- that area can considered or described
9 as a penumbra. And that is an area where you don't have
10 it -- you don't necessarily own it by easement but that you
11 have a right to have that area in order to perform the
12 necessary functions. It sounds like opening the door on the
13 car. I'll give you a case on that.

14 MR. PETTEYS: Okay.

15 THE COURT: It's 83 Wn. App. 846. That's the
16 penumbra. And that's all that case -- I don't think you
17 need to worry about it too much. That's all the case does,
18 it seems to me, is establish that when you're doing these
19 kinds of cases that you can run into that. It's Lloyd v.
20 Montecucco if you want the name of it, but it's 83 Wn. App.
21 846.

22 MR. PETTEYS: Okay. And I think that --

23 THE COURT: So that's kind of a problem there, isn't
24 it? I mean, that's what I hear in this. We had evidence
25 about stepping out of the car and stepping across and

1 opening the door being necessary and that being
2 accommodated.

3 Now, but I've also heard the testimony about -- in the
4 establishing that line for the purposes of taking up the
5 concrete, putting in trees, and things such as that, that
6 would impinge on that. I guess my question to you is based
7 on your understanding of the facts, if the pink line is the
8 line and pink line on Exhibit 19 is the line, and if there
9 was building up to that line, would that prevent the normal
10 customary use of the other side for parking? That is you
11 have to open the door to your car to get out.

12 MR. PETTEYS: Right. And if I could give you a
13 two-part answer on that.

14 THE COURT: Okay, sure. Absolutely.

15 MR. PETTEYS: The first part being the most direct.
16 It appears, just based on kind of visual inspection and as
17 well as the testimony of the defendants, that the area --
18 the so-called disputed area or the area between the platted
19 line as represented by the pink string in that picture and
20 the seam is necessary for their -- for them to enter and
21 exit their vehicles. But I think that that to a certain
22 extent begs the question because while there may be an
23 independent basis for them to prevent their neighboring
24 owner from building or creating an obstruction that would
25 prevent them from making the use that they're claiming, I

1 mean, that's different than concluding that they either have
2 a right of ownership that they've acquired by prescriptive
3 means or a right of use that they've acquired by
4 prescriptive means. So I don't think that that forms a
5 basis for a prescriptive claim. I think -- I'll concede
6 since I haven't read the case core done any research that
7 there may be some alternative basis to assert that but --

8 THE COURT: All the case I gave you does is say that
9 when you establish the needs may vary or when you establish
10 right to use in an area you may have, in addition to that,
11 something beyond that line to make appropriate use.

12 MR. PETTEYS: And, you know, I think that although the
13 defendants could have in the alternative argued that they've
14 acquired some right of use prescriptively through
15 prescriptive easement or some other document, I don't
16 believe that that's been -- that that's been pled or argued.

17 And, you know, I can comment on that because I've
18 anticipated the possibility that this issue would arise. I
19 think for the same reasons their adverse possession claim
20 fails, a claim for prescriptive easement would be equally
21 untenable. But, you know, the fundamental difference,
22 obviously, between those two claims is that with adverse
23 possession, possession begets possession. You act as the
24 manner of a true owner; you get what a true owner would get.
25 Prescriptive easement use begets use; you get a right to use

1 familiar with the general standard. But when there's no
2 other evidence, no contradictory evidence it can be clear
3 and convincing. It doesn't mean we have to bring in 20
4 witnesses or we have to do this or that. It's just: Where
5 is the dispute? Mark Huston, 1988, "They use that side of
6 the line. I thought that was their property." He lived
7 there until 1999. That's 11 years. That's enough. That's
8 clear and convincing right there.

9 And that is all I have, Your Honor. So we would ask
10 the Court to preserve the status quo to continue for my
11 clients to use the driveway and the area behind the house.

12 THE COURT: Okay. All right.

13 MR. PETTEYS: Your Honor, could I address just one
14 minor issue? I mean, I'm not attempting to get one more
15 bite at the apple but I just want to clarify --

16 THE COURT: Yes, you are but go ahead. What -- what
17 is the issue you wanted to --

18 MR. PETTEYS: The issue is this: I thought I
19 understood opposing counsel to say that the order that --
20 and I suppose this is the relief that they're requesting --
21 would include not only the area that they're claiming but
22 some sort of a buffer or reasonable area. And if that's the
23 case I think it would be appropriate to have an opportunity
24 for at least some argument on that because they haven't pled
25 much less --

1 THE COURT: That was something that I injected
2 because -- and the reason I raised that question was because
3 of the testimony that I heard that, that the defendants
4 consistently, over time, went beyond what they are asking
5 the Court to determine is their property by adverse
6 possession, and that was in opening the doors to their car.

7 Now, I happen to have had another case that we had
8 that issue similarly. It was with a boat. And it was a
9 boat and an easement for a boat next to a dock and that's
10 defined by the size of the boat. You can have a 16-foot
11 boat or a 32-foot boat or a 52-foot boat -- these were quite
12 large ones. They weren't the 15 and the 30s -- but you can
13 have that. And of course the size of the boat kind of
14 determined the dimensions of that craft there, but the right
15 was for that size of a vessel. But we had to recognize that
16 there is maintenance and cleaning that is associated with
17 taking, you know -- as I recall these were 50 foot -- this
18 was a 50-foot vessel on Lake Washington and you could clean
19 it from one side without going beyond but then you have to
20 take it up, turn it around, and put it down and clean the
21 other side. That doesn't make sense and the law supports
22 that -- and I gave you a cite -- you have a penumbra to take
23 care of those things.

24 And it was my thought that how do we deal with -- and
25 of course I heard some testimony that I thought said that

1 the plaintiffs in this case might want to tear up their
2 determined section of that road and put some kind of barrier
3 there -- trees I think is what I heard but it could be a
4 fence as well -- and would that then introduce an issue of a
5 penumbra just like we have on that boat tied to the dock.

6 MR. PETTEYS: Understood.

7 THE COURT: And so that was my --

8 MR. PETTEYS: And if I could just give you my --
9 again, at the risk of making a fool of myself for not
10 reading the case but commenting on it. My instinct would be
11 that that is merely defining the scope of the --

12 THE COURT: Here's what I'll allow you to do -- and I,
13 you know, I couldn't remember the name of the case
14 yesterday. I was trying to remember what was the name of
15 that case and Mary found it for me with some legal research
16 on our cases that had to do with boundary disputes and
17 issues like that. So she found it for me. And I found in
18 there exactly what I was looking for, the findings that I
19 made in that case and the case in authority that I cited on
20 that. I've cited that case there. I gave it to you. You
21 didn't have that before. This kind of comes out of the
22 blue.

23 And I am going to -- I'm not going to give a decision
24 right now. I'm going to go back and look at the facts that
25 I have. And I'm going to look most clearly a case like this

1 is often what the law says and take those facts and apply
2 them to the law and just think that process through and
3 that's what I'm going to do. So I will give you 24 hours
4 that you want to send me by attachment, email, each of you,
5 a comment on the case that I cited from you and its
6 applicability in this case. You can have that.

7 MR. GRUBE: Was there a page limitation, Your Honor?
8 Could we have one please?

9 THE COURT: Oh, I can't imagine it would be more than
10 3 pages. I'd toy with a little less but not more than 3
11 pages.

12 MR. PETTEYS: And I assume that is strictly limited to
13 whatever issues might be raised by that particular case?

14 THE COURT: Yes. Well, no, it's has to do with the
15 penumbra. That's what you were -- raised -- the issue you
16 raised was this penumbra issue and that's what it has to do
17 with. And so it has to do with is there -- I suppose
18 factually you could argue that there is no impediment no
19 matter what party wins or if there is an impediment -- or is
20 there impediment -- I guess that is the basic thing -- and
21 if there is an impediment then does that trigger this
22 penumbra. And you read the case, you tell me what you
23 think, and I'll make a decision.

24 MR. PETTEYS: Yeah, I just wanted to clarify. Thank
25 you, Your Honor. I appreciate it.

1 MR. PETTEYS: Well, I guess all I was really
2 attempting to establish is whether there was any reputation
3 that the witness was aware of in the community as to the
4 historical use of the driveway. So that would be the extent
5 of it.

6 THE COURT: Okay. Reputation in the community as to
7 the historic use of the driveway.

8 MR. PETTEYS: Whether there was a custom.

9 THE COURT: Okay, that's right. Okay. Custom.

10 MR. PETTEYS: That the driveway was used to access --

11 THE COURT: No, first we have to do the foundation one
12 about was there reputation in the community. So you can ask
13 that question and we'll find out.

14 BY MR. PETTEYS:

15 Q. Was there a reputation within the community as to the
16 use of the driveway between the two properties?

17 A. Yes.

18 THE COURT: Okay. Then, what was that reputation?

19 Q. And what was that reputation?

20 A. The driveway was not wide enough for two cars to pass
21 each other in the driveway. The access -- the driveway was
22 used as shared access for the two properties to drive cars
23 up into the back -- to be able to drive from the street into
24 the back yards -- back yard areas.

25 THE COURT: I'm going to return your book to you.

1 MR. PETTEYS: Thank you, Your Honor.

2 THE COURT: 2006.

3 MR. PETTEYS: Sorry to research such rigamarole.

4 THE COURT: No, that's all right. A twist that we
5 don't see too often on reputation evidence.

6 BY MR. PETTEYS:

7 A. Did that answer your question?

8 Q. I believe it did. Thank you.

9 Okay, and if I could get you to turn to Plaintiff's
10 Exhibit 14. Have you ever seen this photograph before?

11 A. I don't recognize it.

12 Q. Okay. Do you recognize any structures other than the
13 actual house on lot 7?

14 A. I believe the structure in the back was the shed that
15 I had built with my wife Molly at the time. It was an
16 8-by-10 kit from Home Depot or something. Storage shed.

17 Q. And do you recall approximately when you built the
18 shed?

19 A. Probably, I think it was before Bridget was born so I
20 think probably 1989.

21 Q. Okay. So shortly after purchasing the house or within
22 a year?

23 A. Yeah, within a couple of years, because the house was
24 dinky.

25 Q. And can you see in the photo what appears to be kind

1 of a strip of grass or weeds that's growing roughly along a
2 line running from east to west of the driveway?

3 A. Yes, I do.

4 Q. You recall that feature?

5 A. Yes.

6 Q. And what was it?

7 A. It was a seam in the concrete of the driveway.

8 Q. Okay. And do you recall whether the shed that you
9 built extended beyond that seam? By beyond I mean south
10 towards lot 6.

11 A. I recall that we built it up to the seam. So it
12 remained on the -- to the north of the seam.

13 Q. Okay. So you don't think any portion of the shed
14 extended beyond the seam?

15 A. I'm pretty sure that we did -- it didn't have a
16 foundation or anything, and we just set it down, and I'm
17 pretty sure it was north of the seam. It was close to the
18 seam within a couple inches, probably, but didn't extend
19 over. Although, now I see the gables might have extended
20 over a little bit out, but I don't remember.

21 Q. Did you ever move it?

22 A. No, it was heavy.

23 Q. Okay. And when you purchased lot 7 in 1988 do you
24 recall who owned lot 6?

25 A. I don't. I was familiar with the fellow but I don't

1 remember his name. He had a cat named Suzy I think. You
2 remember things like that but not the owner's name.

3 Q. Yeah. Do you recall having any conversations with
4 that owner about the use of the driveway or the location of
5 the boundary line?

6 A. I don't recall any specific conversations with that
7 owner.

8 Q. Do you recall whether or not that owner used the
9 driveway at all for parking?

10 A. Yeah, I think the assumption -- my recollection is
11 that the assumption was the driveway was shared. Molly and
12 I didn't use the driveway. The gentlemen who was there
13 before had parked his car in the driveway and we were fine
14 with that. But there was no -- I don't remember having any
15 kind of meeting of the minds with that fellow specifically
16 about that.

17 Q. And do you recall whether his use of the driveway for
18 parking resulted in any encroachment or intrusion on to
19 where you understood your property to be? And I don't mean
20 incidental or otherwise.

21 A. No. He was drunk one night and knocked one of the
22 rocks out of our rockery but aside from that there was no --
23 it didn't affect us.

24 Q. And when you say it didn't affect you, did -- when he
25 parked his car am I correct in assuming that he parked it on

1 his side of the property?

2 A. Yes and no. I think he tended to be on that side, but
3 as a practical matter you kind of parked in the middle of
4 the driveway if you needed to because we weren't using it
5 and so, you know, he -- I think generally it would be on the
6 south side but if he was over the line, the seam it
7 didn't --

8 Q. So you didn't object to his use?

9 A. No.

10 Q. And why not? I'm not saying you should have objected
11 but just you didn't object. Is there --

12 A. We didn't object because we used the alleyway for
13 access and we kind of recognized that we couldn't have two
14 cars that drove all the way in and parked because they can't
15 pass each other in the driveway. And it was easy enough for
16 us to just use the alleyway and we didn't really need to use
17 the main driveway.

18 Q. Okay. Do you recall approximately when the defendants
19 Mark Muldaur and Diane Sutherland purchased lot 6?

20 A. It's real hard to piece that together. 1990-1991
21 roughly.

22 Q. Okay. And did you ever have any discussions with
23 either of the defendants about the use of the driveway
24 between lot 6 and 7 or the location of the boundary line?

25 A. I do remember a conversation with Mark.

1 middle, and then the wooden fence on the left.

2 Q. Okay. And can you see the edge of the concrete pad
3 here as well?

4 A. Yes, I can.

5 Q. How have you used this concrete pad which is
6 in-between your shed and the metal chain-link fence post
7 since 1993?

8 A. We'd stored a variety of materials and tools in that
9 area since we've lived there. Right in the picture it shows
10 a compost or soil screen, and there's the top part of a gold
11 frame, basically an old window that's used for gardening.
12 We've also put garden tools in there. Shovels. We've put
13 in bags of compost, soil amendments of various types, ground
14 up bark, potting soil. That type of stuff.

15 Q. Is this picture representative of how this, this space
16 in-between your shed and the metal fence post, has always
17 looked since 1993?

18 A. It has pretty much looked that way. Off and on we've
19 put different materials back there but --

20 Q. Do you -- I don't mean to interrupt.

21 A. Depending on the time of year there might be more
22 leaves or there might be dandelions and so on that blow in
23 that we try to pull out.

24 Q. Before the wooden fence was constructed did you store
25 things in that same manner?

1 A. Yes.

2 Q. And have you used that area in the same way since
3 1993?

4 A. That's right.

5 Q. Do you have to walk in-between the shed and the wooden
6 fence for any reason?

7 A. We do to place pieces of equipment or gardening items
8 for storage there. We do access that side to stain the shed
9 when it's needed. Sometimes things sprout up that don't
10 belong there, weeding and so on, so we get in there and
11 clean that out and prune and whatnot. So yes it's for
12 maintenance use.

13 Q. Have any of your neighbors to the north, so the
14 neighbors that live in what is now Amy Garling's house, ever
15 used the property in-between the metal fence post and your
16 shed?

17 A. No.

18 Q. Have any of your neighbors stored anything on that
19 piece of property?

20 A. They have not.

21 Q. Have any of your neighbors ever told you to move
22 anything out of there?

23 A. No, they haven't.

24 Q. Have any of your neighbors ever done anything to clean
25 out that property?

1 you built that runs from your house to the shed?

2 A. Roughly parallel.

3 Q. Yeah.

4 A. Okay. Yes.

5 Q. And then L-shaped in that, you know, if you turn it on
6 its side it makes an L. I guess my question is this: Does
7 this designate a boundary here? The fence that's on your
8 property.

9 A. No. I think it just goes along the driveway.

10 Q. Okay. Why did you place the fence there in that
11 location, the fence on your property?

12 A. Warren said dig holes here and put the 4-by-4's here,
13 so that's what I did.

14 Q. Okay. You viewed this fence on your property as any
15 different than this fence here?

16 A. Yes.

17 Q. What's the distinction?

18 A. Between our fence and Lance's fence?

19 Q. Yeah. How are they different?

20 A. They're different fences.

21 Q. They are indeed. I'll concede to that. I guess, do
22 you believe that the fence that Lance King built represents
23 the boundary? Was it intended to designate a boundary?

24 A. Oh, I think, yeah, I think that's what he said.

25 That's what I understood him to say. Yes.

1 Q. Well, I'm not asking you what he said. I'm asking:
2 In your opinion does it designate the boundary?

3 A. Right. I would say that Lance King's fence designated
4 the boundary, not this fence.

5 Q. And why? Why doesn't your fence designate the
6 boundary?

7 A. Because the boundary line was always along the
8 concrete seam and this is just along the south side of the
9 driveway.

10 Q. Well, I think the boundary line was actually right
11 here where it's surveyed.

12 MS. OREHOSKI: Your Honor, objection. Counsel's
13 testifying.

14 THE COURT: He's arguing.

15 Q. I think you testified that you stored items on the
16 concrete pad or foundation to the north of where your shed
17 currently is, and I think the storage occurred pretty much
18 with the construction of the shed; is that correct? That's
19 when you started storing items there?

20 A. I can't say for sure when we started storing items
21 there. I really don't know.

22 Q. Certainly wasn't before you purchased the property,
23 okay.

24 A. It was not before we purchased the property. No.

25 Q. Can you give me just, not a complete inventory, but

CERTIFICATE OF SERVICE

The undersigned certifies that, on the 19th day of May, 2016, I caused a true and correct copy of this Appellant's Brief to be served on the following person(s) in the manner indicated:

<p>Clerk of the Court Court of Appeals Division I One Union Square 600 University Street Seattle, WA 98101-1176</p>	<p>X Personal Service <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Electronic Mail (by prior agreement)</p>
<p>Karen Orehoski WSBA No. 35855 Joseph Grube WSBA No. 26476 Breneman Grube, PLLC 1200 5th Avenue, Suite 625 Seattle, WA 98101 karen@bgtrial.com (206) 770-7706 <i>Attorneys for Respondents</i></p>	<p>X Personal Service <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Electronic Mail (by prior agreement)</p>

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Additionally, on this 18th day of May, I caused the Record of Proceedings to be served on Mr. Grube and Ms. Orehoski via Federal Express.

SIGNED: May 19, 2016, at Seattle, Washington.



David A. Petteys, WSBA #33157