

Jul 20, 2016, 5:03 pm

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SUPREME COURT NO. 93219-1

COURT OF APPEALS NO. 72809-1-I

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DANIEL THOMPSON and THEODORE MISSELWITZ,

*Appellants,*

vs.

CITY OF MERCER ISLAND,

*Respondent,*

GIB DEVELOPMENT, LLC (ON THE ROCK, LLC) and ANDERSON  
ARCHITECTURE

*Additional Parties.*

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**DANIEL THOMPSON AND THEODORE MISSELWITZ'S REPLY  
TO CITY OF MERCER ISLAND'S ANSWER  
TO PETITION FOR REVIEW**

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 ORIGINAL

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## **I. IDENTITY OF PETITIONERS**

Daniel Thompson and Theodore Misselwitz, appellants below, hereby file this reply to the City of Mercer Island's Answer to the Petition for Review.

## **II. ISSUES PRESENTED**

1. Whether Daniel Thompson's pending motion to withdraw from representing Theodore Misselwitz in the fee-shifting litigation at the Court of Appeals results in dismissal of the issues presented in Theodore Misselwitz's petition for review to the Supreme Court.

2. Whether the issues raised in Theodore Misselwitz's petition for review to the Supreme Court are moot when the record is silent on the existence of any settlement agreement between Mr. Misselwitz and GIB LLC, Theodore Misselwitz's capacity, or the adequacy and terms of any settlement.

3. Whether the issues raised in Theodore Misselwitz's petition for review present issues of continuing and substantial public interest that should be reviewed by the Supreme Court even if Theodore Misselwitz's appeal is determined to be moot.

### **III. STATEMENT OF FACTS**

In its answer to Daniel Thompson and Theodore Misselwitz's petition for review the City of Mercer Island argues, "Thompson's arguments on behalf of Theodore Misselwitz should not be considered." City's Answer, p. 12. The City's position is based upon Thompson's motion to withdraw from representing Theodore Misselwitz in the fee litigation at the Court of Appeals. The City attaches as attachment A to its answer Thompson's notice of intent to withdraw, but fails to attach Thompson's motion to withdraw, compel disclosure of settlement agreement, and supporting declaration. This issue was first raised in the City's answer. Additional parties GIB (as substituted for On The Rock, LLC) and the applicant did not raise or address this issue in their answer.

On July 1, 2016, Supreme Court Clerk Susan Carlson forwarded a letter to counsel requesting the parties' response to an email received from Theodore Misselwitz's son, Fields Misselwitz. *See* Exhibit 1 to appendix to Reply. Ms. Carlson's letter requested the parties clarify Daniel Thompson's status of representation of Theodore Misselwitz, whether Theodore Misselwitz should be removed as an active party in this case, and whether Daniel Thompson intends to proceed with the petition for review on his own behalf should Misselwitz's petition be dismissed.

In response to Ms. Carlson's letter Daniel Thompson submitted a detailed letter on July 9, 2016 that attached and incorporated the following filings from the Court of Appeals: 1) Appellants' Counsel Daniel Thompson's Motion to Withdraw, Motion to Compel Disclosure of Settlement Agreement, and Extension of time to File Response to Petition for Attorney's Fees; 2) Declaration in Support of Motions; and 3) GIB's Response to Appellants' Motions. The factual summary in the letter, the motions, and declaration in support are incorporated in this reply and will not be restated. *See*, Appendix to Reply, Exh. 2-5.

The Court of Appeals has not ruled upon Thompson's motions or GIB's pending fee petition.

This reply is authorized by RAP 13.4(d).

**IV. DANIEL THOMPSON'S MOTION TO WITHDRAW FROM REPRESENTING THEODORE MISSELWITZ IN THE FEE LITIGATION AT THE COURT OF APPEALS DOES NOT EXTINGUISH THEODORE MISSELWITZ'S ISSUES PRESENTED FOR REVIEW**

First, as noted in Daniel Thompson's letter to Ms. Carlson found in Exhibit 2, Daniel Thompson continues to represent Theodore Misselwitz at both the Supreme Court and Court of Appeals. Theodore Misselwitz has not discharged Daniel Thompson or retained substitute counsel, or requested that Daniel Thompson withdraw from representing Theodore

Misselwitz. As noted in Daniel Thompson's letter to Mr. Carlson, Theodore Misselwitz's son, Fields Misselwitz, has acknowledged Fields Misselwitz has no representative capacity for Mr. Misselwitz and no legal training.

Second, the Court of Appeals has not yet ruled on Daniel Thompson's motion to withdraw from representing Theodore Misselwitz in the fee litigation at the Court of Appeals. Daniel Thompson is still attorney of record for Theodore Misselwitz at both the Court of Appeals and the Supreme Court.

Third, Thompson's motion to withdraw from representing Theodore Misselwitz in the fee litigation at the Court of Appeals is due to very unique and questionable actions involving a purported settlement agreement between GIB and Theodore Misselwitz. Daniel Thompson was excluded from the purported discussions and terms of settlement. Upon information and belief, GIB LLC insisted on a confidentiality clause that prevented the settlement agreement from being disclosed to Daniel Thompson, and apparently prevents Theodore Misselwitz from communicating with Daniel Thompson regarding the issues in this case. As noted in GIB's response to appellants' motion to compel disclosure of the settlement agreement at the Court of Appeals, GIB refuses to disclose the settlement agreement or the terms of the settlement agreement, while

at the same time pursuing fee shifting against Theodore Misselwitz in the amount of \$63,848.00.

Fourth, GIB LLC and the applicant in their answer to the petition for review do not join in the City's argument, or argue that Misselwitz's petition is moot based upon accord and satisfaction. As noted in Daniel Thompson's letter, and motions to withdraw and compel at the Court of Appeals, Theodore Misselwitz is approximately 90 years old, has recently moved to a nursing home, and his counsel in the adverse possession claim sent Thompson emails raising issues of capacity for Theodore Misselwitz. Since GIB refuses to produce the purported settlement agreement, and Daniel Thompson cannot communicate with his client or review the terms of the settlement agreement, Daniel Thompson cannot determine the capacity of Theodore Misselwitz, the adequacy of the settlement terms, and whether any purported settlement even addresses the issues in this matter. As a result, there is no basis to dismiss Theodore Misselwitz's petition for review, or preclude Daniel Thompson's representation of Theodore Misselwitz at the Supreme Court.

**V. THEODORE MISSELWITZ'S PETITION FOR REVIEW  
SHOULD NOT BE DISMISSED UPON A PURPORTED  
SETTLEMENT AGREEMENT THAT IS NOT PART OF THE  
RECORD**

Any purported settlement agreement between GIB LLC and Theodore Misselwitz has never been made a part of the record. Theodore Misselwitz's capacity cannot be determined by his counsel, and the terms of the settlement agreement, if there is one, cannot be determined. Even though Fields Misselwitz's email to Ms. Carlson found in Exhibit 1 to this reply indicates that Theodore Misselwitz has "reached an agreement with Mr. Gib [sic] to settle this and all cases with him regarding his property at 7260 N. Mercer Way", GIB has filed a fee petition at the Court of Appeals seeking \$63,848 against Theodore Misselwitz, and Fields Misselwitz continues to insist that Daniel Thompson represent Theodore Misselwitz in the fee litigation at the Court of Appeals. Without specific evidence of the terms of any settlement, Theodore Misselwitz's capacity, and the adequacy of the terms of settlement, there is no basis to dismiss the issues related to Theodore Misselwitz in his petition for review, or for the Supreme Court not to consider those issues should the petition for review be granted.

**VI. THE ISSUES RAISED IN THEODORE MISSELWITZ'S  
PETITION FOR REVIEW PRESENT QUESTIONS OF  
CONTINUING AND SUBSTANTIAL PUBLIC INTEREST**

As a general rule, the Supreme Court will not review a moot case. *Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 796 (2009) quoting *In Re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004). However, the Court may review a moot case if it presents issues of continuing and substantial public interest. In deciding whether a case presents issues of continuing and substantial public interest,

[t]hree factors in particular are determinative: “(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur”. A fourth factor may also play a role: the “level of genuine adverseness and the quality of advocacy of the issues”. Lastly, the court may consider “the likelihood that the issue will escape review because the facts of the controversy are short-lived”.

*Id.*, quoting *Westerman v. Cary*, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994).

Even if this Court should determine Theodore Misselwitz's appeal is moot, the Supreme Court should exercise its discretion to review the Court of Appeals' bases for dismissal of Misselwitz's LUPA petition because all four criteria relevant to determining whether the question is one of continuing and substantial public interest are met. There are two

holdings by the Court of Appeals affirming the dismissal of Misselwitz's LUPA petition that present issues of continuing and substantial public interest. The first is the Court of Appeals' holding that only a citizen who submits written comments to a notice of application and files his or her own administrative appeal has standing to appeal to the superior court. The second is the City's public notice of open record hearing has no legal effect if contradicted by the City's land use code.

**A. Whether the Issue is of a Public or Private Nature**

Some of the procedural issues raised in the petition for review are common to Thompson and Misselwitz. However, the bases for the dismissal of Thompson's and Misselwitz's LUPA petitions at the superior court are not common, and are inimical in several ways.

The City and GIB conceded that Thompson exhausted his administrative remedies, but argued that Thompson failed to allege (or prove) injury in fact in a CR 12(b) motion to dismiss even though Thompson's property is directly next door to the proposed subdivision.

The City and GIB conceded that Misselwitz, whose property is also directly next door to the subdivision, will suffer injury in fact. However, the City and GIB argued that Misselwitz's failure to submit written comments to the public notice of application, and file his own administrative appeal, negated Misselwitz's standing to file a LUPA

petition at the superior court even though Thompson had filed both written comments to the notice of application and an administrative appeal, and Theodore Misselwitz participated to the full extent allowed at the open record hearing.

Since no jurisdiction has ever raised the argument that every citizen must submit written comments to a notice of application and file his or her own administrative appeal in order to have standing to file a LUPA petition to the superior court, no court has ever addressed this issue. As noted above and in the petition for review, the Court of Appeals' affirmance of the dismissal of Misselwitz's petition was based solely upon the citation to a provision in the Mercer Island Comprehensive Code, MICC 19.15.020(E)(2)(e), that does not exist. *See* Court of Appeals Decision, p. 5. The Court of Appeals held:

The Mercer Island City Code outlines the administrative approval process for a preliminary short plat application. Upon receiving the application, the city issues a public notice of the application. The notice must include a statement that only people who submit written comments will be parties of record and only parties of record will receive notice of the decision and have the right to appeal. MICC 19.15.020(E)(2)(e).

Court of Appeals Decision, p. 5.

Misselwitz did not submit written comments in response to the city's public notice of application. He did not file a letter of appeal to the planning commission. He did, however, attend and speak at the open record appeal

hearing that occurred on July 23, 2014, before the planning commission. This participation did not confer standing to appeal the planning commission's decision to superior court because he spoke only as a member of the public, not as an appellant. Because Misselwitz did not use the administrative process to protest the application, he failed to exhaust administrative remedies.

Court of Appeals Decision, p. 6.

However, the MICC actually states:

**D. Notice of Application**

(2) The notice of application shall include the following information:

(g). A statement of the public comment period, which shall not be less than 14 days nor more than 30 days following the date of notice of application; and a statement of the rights of individuals to comments on the application, receive notice and participate in any hearings, request a copy of the **decision** once made and any appeal rights;

MICC 19.15.020(D)(2)(g), appendix to Petition for Review, Exhibit 3, p.

9. *See also*, RCW 36.70B.110(2)(e), notice of application, and .130, notice of decision.

As noted in the petition for review, Thompson and Misselwitz argue that the Court of Appeals misunderstands the participation requirements at the different stages of a project permit: (1) application; (2) decision; and (3) open record hearing. Indeed, the Court of Appeals mis-

citation to the MICC actually cites to the provision relevant for decisions, not notices of application.<sup>1</sup>

The Court of Appeals also held that the City's public notice of open record hearing was ineffective since it was contradicted by the MICC. The public notice of open record hearing stated:

You may review the application and appeal on file for this matter at the City of Mercer Island, Development Services Group, 9611 SE 36<sup>th</sup> Street, Mercer Island, Washington. **Only those persons who submit written comments or testify at the open hearing will be parties of record, and only parties of record will receive a notice of the decision and have the right to appeal.**

CP 1413-1416. (emphasis added).<sup>2</sup>

As Misselwitz argued, this language is identical to the provision in the MICC applicable to public notice of an open record hearing.

#### **E. Public Notice of Decision.**

1. *In addition to the notice of application*, a public notice is required for all administrative, discretionary, and legislative actions listed in MICC 19.15.010(E).

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<sup>1</sup> Although Thompson and Misselwitz raised this error of citation as well as the issues raised in the petition for review repeatedly in their motion for consideration and their response to the City and Additional Parties' motion for publication, the Court of Appeals never addressed any of the issues or mis-citation.

<sup>2</sup> There were two public notices of open record appeal hearing. The first was scheduled for May 21, 2014. CP 1412. However, the City posted the wrong date for the hearing, and the planner's declaration of mailing listed inconsistent dates for the declaration of posting. CP 325. The May 21, 2014 hearing was canceled and renoted for July 23, 2014 after Thompson informed the City of *Prosser Hill Coal v. County of Spokane*, 176 Wn. App. 280 (2013).

2. Public notice shall be provided at least ten days prior to any required open record hearing. If no such hearing is required, *public notice shall be provided 10 days prior to the decision on the application.*

3. The public notice shall include the following:

*e. A statement that only those person who submit written comments or testify at the open record hearing will be parties of record; and only parties of record will receive notice of the decision and have the right to appeal;*

MICC 19.15.020(E), App. to Petition for Review, p. 11-12 (emphasis added).

By its very nature, an open record hearing on a project permit decision is public in nature. The MICC requires special notice for citizens whose property is within 300 feet of the proposed development, and public notice for all citizens at large. MICC 19.15.020(E)(4)(a).

Although the legal basis for the Court of Appeals' holding is a provision of the MICC that does not exist, the Court of Appeals' decision has been published, 193 Wn. App. 653 (2016), and will apply to every open record hearing on a project permit decision, and to every LUPA petition that includes an entity other than the administrative appellant. LUPA itself recognizes and provides for service and joinder of necessary parties who are not the administrative appellant. RCW 36.70C.040(2)(d) and .050. The Court of Appeals' decision now restricts standing under LUPA at the superior court to two or three entities: (1) the local

jurisdiction; (2) the owner/applicant; and (3) the administrative appellant (if separate from the owner/applicant). Under the Court of Appeals' holding, there is now no possibility of participation at the superior court by a member of the public who participated in full at the open record hearing but was not the administrative appellant.

**B. The Desirability of an Authoritative Determination for the Future**

**Guidance of Public Officers**

Although no jurisdiction has ever raised this issue before, and no court has addressed it, the Court of Appeals' holding in this matter has been published and is likely to guide future local jurisdictions in the adoption of their development codes, as well as LUPA appeals by non-administrative appellants to the superior court.

**C. The Likelihood of Future Recurrence of the Question**

The Court of Appeals' holding is likely to recur in every single LUPA petition to the superior court where the petitioner or a petitioner is not the administrative appellant, or did not submit written comments to a notice of application.

**D. The Likelihood that the Issue Will Escape Review Because the**

**Facts of the Controversy are Short-Lived**

This factor is endemic to all LUPA appeals, and arises from the risk of fee-shifting under RCW 4.84.370. As this case demonstrates, there

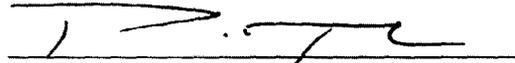
is an enormous disparity in financial resources between the City, GIB (represented by two law firms in this matter), and the individual citizens Thompson and Misselwitz. Unfortunately, most LUPA cases never reach the Court of Appeals, let alone the Supreme Court, certainly not when the citizen is the appealing party. The fee-shifting provision unfortunately highly favors the developers who have the financial resources to absorb the risk of the appeal. It is highly likely that this issue will not reach the Supreme Court again for definitive review. Considering the Court of Appeals' decision has been published, and shall be considered precedential, it is of extreme importance that the Supreme Court address the Court of Appeals' holdings in affirming dismissal of Theodore Misselwitz's petition for review as these holdings will affect all LUPA petitioners in the future.

## **VII. CONCLUSION**

Theodore Misselwitz and Daniel Thompson respectfully request that this Court preserve the issues raised in Theodore Misselwitz's petition for review, and in the alternative, address the bases for dismissal by the Court of Appeals as they present questions of continuing and substantial public interest.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of July, 2016.

By



Daniel P. Thompson, WSBA #18189  
Thompson and Delay  
506 Second Avenue, Suite 2500  
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Attorney for Appellants

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

DANIEL P. THOMPSON and THEODORE  
MISSELWITZ,

Appellants,

v.

THE CITY OF MERCER ISLAND,

Respondent,

and

ANDERSON ARCHITECTURE, Applicant, and  
ON THE ROCK, Owner, GIB  
DEVELOPMENT, LLC,

Respondents/Additional Parties.

SUPREME COURT NO. 93219-1

COURT OF APPEALS  
CASE No. 72809-1-I

DECLARATION OF SERVICE

I, Timera Drake, under penalty of perjury under the laws of the State of Washington, declare  
as follows:

I am the paralegal for Thompson and Delay herein. On the date in the manner indicated  
below, I caused:

DANIEL THOMPSON AND THEODORE MISSELWITZ'S REPLY TO CITY OF MERCER  
ISLAND'S ANSWER TO PETITION FOR REVIEW and APPENDIX WITH EXHIBITS 1-5

and this DECLARATION OF SERVICE to be served on:

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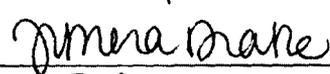
Fields Misselwitz  
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X Via Email

Dated this 20 day of July, 2016.

  
\_\_\_\_\_  
Timera Drake  
Paralegal  
Thompson & Delay

Jul 20, 2016, 5:03 pm

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COURT OF APPEALS NO. 72809-1-I

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*Appellants,*

vs.

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*Additional Parties.*

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**APPENDIX TO DANIEL THOMPSON AND THEODORE  
MISSELWITZ'S REPLY TO CITY OF MERCER ISLAND'S ANSWER  
TO PETITION FOR REVIEW**

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APPENDIX TO DANIEL THOMPSON AND THEODORE  
 MISSELWITZ'S REPLY TO CITY OF MERCER ISLAND'S ANSWER  
 TO PETITION FOR REVIEW

Title	Exhibit
1. July 1, 2016 Letter from Susan Carlson, Supreme Court Action Clerk regarding Supreme Court Case No. 93219-1, attaching Email from Fields Misselwitz .....	1
2. July 8, 2016 Letter from Daniel Thompson Regarding Clarification of Representation of Theodore Misselwitz, attaching Exhibits 1-3 .....	2
3. Exhibit 1 to July 8, 2016 Letter from Daniel Thompson: Appellants' Counsel Daniel Thompson's Motion to Withdraw, Motion to Compel Disclosure of Settlement Agreement, and Extension of time to File Response to Petition for Attorney's Fees .....	3
4. Exhibit 2 to July 8, 2016 Letter from Daniel Thompson: Declaration in Support of Motions .....	4
5. Exhibit 3 to July 8, 2016 Letter from Daniel Thompson: GIB's Response to Appellants' Motions .....	5

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OF THE STATE OF WASHINGTON

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SUPREME COURT NO. 93219-1

COURT OF APPEALS NO. 72809-1-I

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DANIEL THOMPSON and THEODORE MISSELWITZ,

*Appellants,*

vs.

CITY OF MERCER ISLAND,

*Respondent,*

GIB DEVELOPMENT, LLC (ON THE ROCK, LLC) and ANDERSON ARCHITECTURE

*Additional Parties.*

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**APPENDIX TO DANIEL THOMPSON AND THEODORE  
MISSELWITZ'S REPLY TO CITY OF MERCER ISLAND'S ANSWER  
TO PETITION FOR REVIEW**

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**EXHIBIT 1**

# THE SUPREME COURT

STATE OF WASHINGTON

SUSAN L. CARLSON  
SUPREME COURT ACTING CLERK



TEMPLE OF JUSTICE  
P.O. BOX 40929  
OLYMPIA, WA 98504-0929  
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July 1, 2016

## LETTER SENT BY E-MAIL ONLY

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Re: Supreme Court No. 93219-1 - Daniel P. Thompson, et al. v. City of Mercer Island  
Court of Appeals No. 72809-1-1

Counsel and Mr. Misselwitz:

On June 29, 2016, an e-mail was received from Mr. Misselwitz indicating that he has reached a settlement and wishes to be removed from this case. A copy of the e-mail is enclosed for counsel.

Counsel are requested to respond to Mr. Misselwitz's e-mail by July 15, 2016, indicating whether there is any objection to his request. In addition, it is noted that on May 20, 2016, Mr. Thompson filed a motion that included a request to withdraw from representing Mr. Misselwitz. It does not appear that the Court of Appeals entered a decision on the motion, but pursuant to RAP 18.3(b) and CR 71, an attorney in a civil case may withdraw by filing notice of intent to withdraw. Therefore, it is not clear at this time whether Mr. Thompson is continuing to represent

Page 2  
No.93219-1  
July 1, 2016

Mr. Misselwitz in this matter. The parties' clarification of the status of representation would be helpful. In addition, Mr. Thompson should comment on whether, if Mr. Misselwitz is removed as an active party in this case, he intends to proceed with the petition for review only on his own behalf.

Sincerely,

A handwritten signature in cursive script, appearing to read "Susan L. Carlson".

Susan L. Carlson  
Supreme Court Acting Clerk

SLC:fw

Enclosure

**OFFICE RECEPTIONIST, CLERK**

93219-1

**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Wednesday, June 29, 2016 8:19 AM  
**To:** 'Fields Misselwitz'  
**Subject:** RE: case #93219-1

**E FILED**  
JUN 30 2016  
WASHINGTON STATE  
SUPREME COURT

Received 6/29/2016.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----

**From:** Fields Misselwitz [mailto:400wings@comcast.net]  
**Sent:** Tuesday, June 28, 2016 8:51 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** case #93219-1

Dear Supreme Court Clerk

We are named in case #93219-1 along with Daniel Thompson. Mr. Thompson was the lawyer representing us in this case. He has presented a motion and apparently been granted that motion to be dismissed from representing us in this case.

We have reached an agreement with Mr. Gib to settle this and all cases with him regarding his property at 7260 N. Mercer Way.

We would like to please be removed from this appeal and no longer be a party to this action in any way. It is because of the fact that Mr. Thompson has requested to no longer represent us that we are approaching the court directly to please remove our name from this case.

Thank you.

Sincerely Yours;

Theodore Misselwitz  
7250 N. Mercer Way  
Mercer Island WA 98040  
206-232-8016

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

SUPREME COURT NO. 93219-1

COURT OF APPEALS NO. 72809-1-I

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DANIEL THOMPSON and THEODORE MISSELWITZ,

*Appellants,*

vs.

CITY OF MERCER ISLAND,

*Respondent,*

GIB DEVELOPMENT, LLC (ON THE ROCK, LLC) and ANDERSON ARCHITECTURE

*Additional Parties.*

---

**APPENDIX TO DANIEL THOMPSON AND THEODORE  
MISSELWITZ'S REPLY TO CITY OF MERCER ISLAND'S ANSWER  
TO PETITION FOR REVIEW**

---

**EXHIBIT 2**

**THOMPSON & DELAY**  
ATTORNEYS AT LAW

2500 SMITH TOWER  
508 SECOND AVENUE  
SEATTLE, WASHINGTON 98104

TELEPHONE 206/622-0670  
FACSIMILE 206/622-3966  
EMAIL: danielthompson@hotmail.com  
www.ThompsonDelay.com

DANIEL P. THOMPSON

July 8, 2016

**LETTER SENT BY E-MAIL ONLY**

Susan L. Carlson  
Supreme Court Acting Clerk  
Supreme Court  
State of Washington  
Temple of Justice  
PO Box 40929  
Olympia, WA 98504-0929

Re: Supreme Court No. 93219-1 – *Daniel Thompson and Theodore Misselwitz v. City of Mercer Island and GIB LLC*  
Court of Appeals No. 72809-1-1  
**Clarification of Representation of Theodore Misselwitz**

Dear Ms. Carlson,

I represent Ted Misselwitz. Please consider this letter my response to your letter dated July 1, 2016 requesting clarification of my representation of Ted Misselwitz, and the status of his Petition for Review before this Court.

Attached with this letter and incorporated herein are the following filings from the Court of Appeals: 1) Appellants' Counsel Daniel Thompson's Motion to Withdraw, Motion to Compel Disclosure of Settlement Agreement, and Extension of time to File Response to Petition for Attorney's Fees; 2) Declaration in Support of Motions; and 3) GIB's Response to Appellants' Motions. The Court of Appeals has not yet ruled on these motions.

This letter will attempt to provide the Court some further background in this matter and updated information I have received since filing my motions.

**Summary of Letter**

- I continue to represent Theodore Misselwitz at the Supreme Court. Ted Misselwitz has not indicated otherwise. My motion to withdraw at the Court of Appeals has not been ruled upon, and in any case, my motion to withdraw was not based upon my lack of desire to represent Ted Misselwitz.

- Ted Misselwitz's son, Field Misselwitz, initially represented to me he had power of attorney and decision-making authority for Ted Misselwitz, who is 90 and recently moved into a nursing home. However, on June 6, 2016, Fields Misselwitz informed me he never had power of attorney or decision-making authority for Ted Misselwitz. Fields Misselwitz is not an attorney, and as far as I am aware, has no representative capacity for Ted Misselwitz.
- Counsel for GIB LLC in this matter, Mario Bianchi, apparently entered into a settlement agreement with Ted Misselwitz in a separate quiet-title action GIB brought, without notice to me. The settlement agreement purportedly forfeited all of Ted Misselwitz's rights in the adverse possession claim, this case, and any other future development permits, in consideration of releasing Ted Misselwitz from fee-shifting at the Court of Appeals. GIB LLC insisted the settlement agreement remain confidential and not communicated to me or the Court. To date, GIB and the City have not disclosed the settlement agreement to the Court of Appeals or the Supreme Court and its terms remain unknown. The settlement agreement apparently also prevents Ted Misselwitz from communicating with me in this case. Since the settlement agreement, I have been unable to communicate with Ted Misselwitz.
- Although the purported consideration for the settlement agreement was to release Ted Misselwitz from fee shifting, GIB has filed a fee petition at the Court of Appeals requesting \$63,848 in attorneys' fees from Theodore Misselwitz. GIB has refused to file the settlement agreement with the Court of Appeals, and I have moved to compel its disclosure and filing to protect Ted Misselwitz. The Court of Appeals has not yet ruled upon that motion.
- The issues involved in the dismissal of Ted Misselwitz's LUPA petition by the superior court present issues of continuing and substantial public interest, and may survive dismissal of Ted's petition should this Court grant the Petition for Review, although Ted's legal rights would not survive.
- I have not charged Ted Misselwitz any fee for defending the fee petition at the Court of Appeals or in preserving his issues in the Petition for Review.
- I intend to pursue my petition for review whether Mr. Misselwitz's petition is dismissed or not. I have been informed in a confidential ethics opinion to continue to preserve all of Ted Misselwitz's legal rights until instructed otherwise, until Mr. Misselwitz obtains substitute counsel, or the Court of Appeals or this Court takes action on its own in determining Mr. Misselwitz's capacity, the terms of the settlement, and the adequacy of the settlement.
- If necessary, I am capable and willing to pursue Ted Misselwitz's claims before the Supreme Court since I am familiar with the issues and the case law in this matter, and in fact have performed such a service at the direction of the Bar Association in the past. I represented Beverly Marley in *Marley v. Department of Labor and Industries*, 125 Wn.2d

533, 886 P.2d 189 (1994). After I was successful in establishing Mrs. Marley's right to a widow's pension at the superior court, the Department appealed. Mrs. Marley's relative became involved, and changed the address at the Department abrogating my fee. The relative then filed an ethics complaint against me with the Bar. The Bar dismissed the ethics complaint, but insisted I continued to represent Mrs. Marley at the Court of Appeals and Supreme Court since no other lawyer would represent Mrs. Marley after she had changed the address on me, and the issue presented was esoteric.

### **Background**

Ted Misselwitz was my neighbor. He had lived in his house since 1978. Ted's and my property are directly next door to the proposed subdivision that is the subject of this appeal. Ted participated at the administrative level in 2013-2014, and at his request I represented Ted and myself at the superior court and Court of Appeals.

Ted is approximately 90 years old. A few years ago, Ted's wife Max suffered a debilitating stroke. A few months ago, Ted and his wife moved into a nursing home.

Fields Misselwitz is Ted's son. In approximately March 2016 Fields Misselwitz took over communications for Ted Misselwitz. In the past, Fields has communicated on behalf of Ted through both Fields' email (400wings@comcast.net) as well as through Ted's email (tmisselwitz@juno.com). For example, the email dated June 28, 2016 to the Supreme Court is sent through Fields Misselwitz's email account. Although it lists Theodore Misselwitz's name, it lists Ted's home address although Ted has not lived there for several months, and even when he did live there he always used a P.O. Box.

In response to concerns about attorney/client privilege, Fields informed Ian Macrae, Ted's lawyer in the quiet title/adverse possession lawsuit, and me that Ted Misselwitz had executed a power of attorney giving Fields decision making authority, which is detailed in my motion to withdraw. I operated on that representation. However, on June 6, 2016 Fields Misselwitz sent me an email informing me that there never was any power of attorney, and Fields Misselwitz was solely acting as a "messenger." Fields Misselwitz is not a lawyer, has no legal training, and my understanding is he has no representative capacity. However, Fields Misselwitz and Mr. Macrae have requested that I continue to represent Ted Misselwitz in defending GIB's fee petition at the Court of Appeals.

On several occasions, Mr. Macrae expressed to me concerns about Ted Misselwitz's emotional state, vulnerability, and capacity. Mr. Macrae raised concerns to me in an email on May 7, 2016, stating, "And yes, Ted is mentally moving on..." Since I have been unable to communicate with Ted Misselwitz, I have been unable to form my own opinions or to obtain any type of medical opinion.

### **Quiet Title/Adverse Possession Litigation**

As noted in my motion to withdraw and supporting declaration there is an ownership dispute over a strip of property between Ted Misselwitz's property and the property owned by

GIB. Both properties are on Lake Washington, and as noted in Exh. 2 to my declaration are valued at \$4.9 million and \$4.4 million, respectively. The City of Mercer Island has acknowledged this property dispute since at least 2010, and required that the dispute be resolved prior to development of GIB's property. See Exh. 1, Declaration of Thompson.

In January 2016, GIB filed suit against Ted and Max Misselwitz to quiet title. Ted and Max Misselwitz's answer to the suit raising adverse possession is found in Exh. 3 to my declaration, and notes that Mr. Misselwitz had openly possessed the strip of property since 1978. Ted Misselwitz retained Ian Macrae, a family acquaintance, to represent Ted and Max Misselwitz in defense of the quiet title action and in their adverse possession claim.

GIB, LLC is represented by two law firms in this appeal: Lasher Holzapfel per Mario Bianchi; and Ogden Murphy per Zachary Lell. Mario Bianchi also represented GIB in the quiet title action. At some point during the litigation, GIB, through Mario Bianchi, and Ted Misselwitz (or Fields Misselwitz) through Mr. Macrae, entered into settlement discussions without me. I subsequently received an email from Mr. Macrae on May 11, 2016 noting that the parties had reached a settlement including issues in this appeal, that the settlement agreement was confidential, and the terms could not be communicated to me at the insistence of GIB, LLC. See Exh. 4, Decl. of Thompson. I have never seen the purported settlement agreement, or been definitively informed of its terms.

I subsequently sent an email to Mr. Lell requesting clarification, and moved to compel disclosure of the settlement agreement at the Court of Appeals to protect Ted Misselwitz. See Exh. 6, Decl. of Thompson. Mr. Lell, on behalf of GIB, declined to produce or disclose the settlement agreement, or file it with the Court of Appeals as noted in GIB's Response to Appellants' Motions.

From the date of the purported settlement I have been unable to communicate with Ted Misselwitz, have not been informed where he is currently residing, and have not been provided a copy of the settlement agreement. From what I can surmise, the terms of the settlement are that: 1) Ted and Max Misselwitz surrender their adverse possession claims over the disputed property (it is not clear whether Ted and Max Misselwitz signed the settlement agreement themselves or a representative signed for them); 2) Ted Misselwitz surrender all of his legal rights in this litigation as well as any future development permits; and 3) GIB, LLC release Ted Misselwitz from fee liability under RCW 4.84.370.

The terms of the settlement raised a number of concerns for me:

1. Ted Misselwitz has adamantly rejected these terms of settlement since 2013, and it was Ted Misselwitz's rejection of these terms that made any settlement discussions impossible;
2. The purported consideration for Ted Misselwitz to forfeit all his legal rights in the adverse possession claim, this action, and future development permits is a release of fee

liability, although the Court of Appeals commissioner hasn't issued its fee determination in this matter, and so the consideration to Ted Misselwitz is still unknown;

3. Despite the settlement agreement purportedly releasing Ted Misselwitz from fee shifting, GIB, LLC has filed a fee affidavit at the Court of Appeals requesting \$63,848.00 in attorney's fees from Ted Misselwitz. I raised this discrepancy in my May 16, 2016 email to Ted Misselwitz, Field Misselwitz, and Mr. Macrae, and the necessity that the settlement agreement be filed with the Court of Appeals to protect Ted Misselwitz. See Exh. 5, Decl. of Thompson;
4. The amount of attorney's fees requested by GIB at the Court of Appeals appears exorbitant, especially considering it is approximately five times more than the amount Division I found reasonable in a nearly identical case, *Durland v. San Juan Co.* See Exh. 7, Decl. of Thompson.

#### **Requests for Substitution**

After receiving notice of the settlement agreement from Mr. Macrae, I repeatedly asked Mr. Macrae to substitute for me at the Court of Appeals and the Supreme Court, but Mr. Macrae has declined noting in part he is unfamiliar with the rules of appellate procedure and the issues in this appeal. After receiving Fields Misselwitz's email to the Supreme Court on June 28, 2016 I called and spoke to Mr. Macrae. Mr. Macrae is semi-retired. Mr. Macrae informed me he does not want anything to do with this case. However, Mr. Macrae did state he would again contact Fields Misselwitz and emphasize that Ted Misselwitz should obtain legal counsel to advise him.

As noted in my motion to withdraw and supporting declaration I do not believe I can adequately represent Theodore Misselwitz against GIB's fee request at the Court of Appeals since I cannot communicate with him, nor am I allowed to review and file the confidential settlement agreement that I was not involved in negotiating but purportedly releases Ted Misselwitz from fee shifting. For example, Mr. Macrae's last email to me dated June 19, 2016 stated that Mario Bianchi had informed Mr. Macrae that I was authorized to continue defending Mr. Misselwitz in the fee litigation at the Court of Appeals, but I must dismiss Mr. Misselwitz's petition for review to the Supreme Court based on a settlement agreement I have not seen. I do not represent Mr. Bianchi or GIB. Mr. Misselwitz has never requested that I withdraw from representing him or discharged me. Obviously, I think the settlement process in this matter is questionable, if not improper.

#### **Continued Representation of Mr. Misselwitz**

In the past, I have served as special prosecutor to the Washington State Bar Association Disciplinary Committee. I requested a confidential ethical recommendation considering the unusual circumstances in this matter, and was informed that I should take all steps to preserve all of Mr. Misselwitz's legal rights until Mr. Misselwitz could obtain substitute counsel, *Ted Misselwitz* formally discharges me and I can determine capacity, or the Court was informed of the circumstances and took action on its own. I have defended Mr. Misselwitz against GIB's fee

Susan L. Carlson  
July 8, 2016  
Page 6 of 6

petition, and included Ted Misselwitz in the petition for review without any charge to Mr. Misselwitz. I forwarded Mr. Misselwitz, Fields Misselwitz, and Ian Macrae an email before filing the petition for review explaining that I would include and preserve Ted Misselwitz's claims, but never received any response from Ted Misselwitz. I have also made clear on numerous occasions that I would cooperate fully with Mr. Macrae, or Ted Misselwitz's substitute counsel, without any fee or charge to Ted Misselwitz.

**The Issues in Ted Misselwitz's Petition Present a Continuing and Substantial Public Interest**

The superior court's basis for dismissing Ted Misselwitz's LUPA petition, as interpreted by the Court of Appeals, is that only the administrative appellant has standing to appeal to the superior court from an open record hearing the petitioner has participated in. The sole legal authority offered by the Court of Appeals is a citation to a provision of the Mercer Island Comprehensive Code that doesn't even exist. Since the basis for the dismissal of Ted Misselwitz's petition will affect every subsequent LUPA petitioner in every appeal to the superior court, I believe the issues in Ted Misselwitz's petition present issues of continuing and substantial public interest and would survive settlement, or dismissal of Ted Misselwitz's petition, although Ted Misselwitz's legal rights would not. *See, State v. Beaver*, 184 Wn.2d 321 (2015). I intend to pursue my petition for review whether Mr. Misselwitz's petition is dismissed or not. Since the City has raised this issue in its answer to the petition for review, I will raise it in a reply brief pursuant to RAP 13.4(d).

I believe Ted Misselwitz should have the assistance of legal counsel who can meet and communicate with him, determine capacity, review the purported confidential settlement agreement, determine adequacy, and then represent those findings to the Court of Appeals and the Supreme Court, certainly before the Supreme Court dismisses Ted Misselwitz's petition for review. I would also ask that the record reflect that I preserved Ted Misselwitz's legal rights as directed.

Yours truly,



Daniel P. Thompson

DPT:tcd

cc: Theodore Misselwitz (via email)  
Kari Sand (via email)  
Zachary Lell (via email)  
Bio F. Park (via email)  
Mario Bianchi (via email)  
Fields Misselwitz (via email)

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

DANIEL P. THOMPSON and THEODORE  
MISSELWITZ,

Appellants,

v.

THE CITY OF MERCER ISLAND,

Respondent,

and

ANDERSON ARCHITECTURE, Applicant, and  
ON THE ROCK, Owner, GIB  
DEVELOPMENT, LLC,

Respondents/Additional Parties.

SUPREME COURT NO. 93219-1

COURT OF APPEALS  
CASE No. 72809-1-1

DECLARATION OF SERVICE

I, Timera Drake, under penalty of perjury under the laws of the State of Washington, declare  
as follows:

I am the paralegal for Thompson and Delay herein. On the date in the manner indicated  
below, I caused:

CLARIFICATION OF REPRESENTATION OF THEODORE MISSELWITZ and EXHIBITS 1-3

and this DECLARATION OF SERVICE to be served on:

1 Mario Bianchi  
2 LASHER HOLZAPFEL SPERRY  
3 & EBBERSON  
4 601 Union St, Suite 2600  
5 Seattle WA 98101  
6 bianchi@lasher.com

Via U.S.Mail  
X Via Email  
Via Facsimile  
Via Messenger

5 Zachary Lell,  
6 OGDEN, MURPHY & WALLACE  
7 901 Fifth Avenue, Suite 3500  
8 Seattle, WA 98164  
9 zlell@omwlaw.com

Via U.S.Mail  
X Via Email  
Via Facsimile  
Via Messenger

9 CITY OF MERCER ISLAND:  
10 Kari Sand, City Attorney  
11 CITY OF MERCER ISLAND  
12 9611 SE 36th Street  
13 Mercer Island WA 98040  
14 kari.sand@mercergov.org

Via U.S.Mail  
X Via Email  
Via Facsimile  
Via Messenger  
Via Hand Delivery

13 Supreme Court  
14 State of Washington  
15 Temple of Justice  
16 PO Box 40929  
17 Olympia, WA 98504-0929  
18 supreme@courts.wa.gov

Via Messenger  
X Via Email  
Via U.S. Mail  
Via Facsimile

17 Theodore Misselwitz  
18 tmisselwitz@juno.com

X Via Email

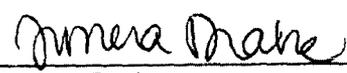
19 Fields Misselwitz  
20 400wings@comcast.net

X Via Email

21 Bio F. Park  
22 biop@atg.wa.gov

X Via Email

22 Dated this 8 day of July, 2016.

24   
25 \_\_\_\_\_  
26 Timera Drake  
27 Paralegal  
28 Thompson & Delay

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SUPREME COURT NO. 93219-1

COURT OF APPEALS NO. 72809-1-1

---

DANIEL THOMPSON and THEODORE MISSELWITZ,

*Appellants,*

vs.

CITY OF MERCER ISLAND,

*Respondent,*

GIB DEVELOPMENT, LLC (ON THE ROCK, LLC) and ANDERSON ARCHITECTURE

*Additional Parties.*

---

**APPENDIX TO DANIEL THOMPSON AND THEODORE  
MISSELWITZ'S REPLY TO CITY OF MERCER ISLAND'S ANSWER  
TO PETITION FOR REVIEW**

---

**EXHIBIT 3**

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

DANIEL P. THOMPSON and  
THEODORE MISSELWITZ,

Appellants,

v.

CITY OF MERCER ISLAND

Respondent,

and

ANDERSON ARCHITECTURE,  
Applicant, and ON THE ROCK,  
Owner, GIB DEVELOPMENT,  
LLC,

Respondents/Additional Parties.

COURT OF APPEALS  
CASE No. 72809-1-I

APPELLANTS' COUNSEL  
DANIEL THOMPSON'S  
MOTION:

- 1) TO WITHDRAW FROM REPRESENTATION OF MR. MISSELWITZ
- 2) COMPEL DISCLOSURE OF ANY SETTLEMENT AGREEMENT BETWEEN GIB LLC AND MR. MISSELWITZ
- 3) EXTENSION OF TIME TO FILE RESPONSE TO GIB'S PETITION FOR ATTORNEY'S FEES TO ALLOW MR. MISSELWITZ TO OBTAIN SEPARATE COUNSEL AND FILE A RESPONSE

## **I. IDENTITY OF MOVING PARTY**

Daniel Thompson is an appellant in this matter, and has served as counsel for both himself and Theodore Misselwitz. Daniel Thompson hereby requests the relief set forth below.

## **II. RELIEF REQUESTED**

1. The Court grant Daniel Thompson's motion to withdraw from representation of Mr. Misselwitz;
2. The Court compel disclosure of any settlement agreement between GIB LLC and Mr. Misselwitz affecting Mr. Misselwitz's rights in this litigation and releasing him from attorney fee liability;
3. The Court grant an extension of time for appellants to file a response to GIB's petition for attorney's fees to allow Mr. Misselwitz to obtain separate counsel and file a response.

## **III. EVIDENCE RELIED UPON**

The declaration of Daniel Thompson with attachments.

## **IV. FACTS RELEVANT TO MOTION**

### **4.1 Background**

Daniel Thompson and Theodore Misselwitz are appellants in this matter. On March 4, 2016 the Court issued its order on reconsideration awarding GIB LLC attorney's fees pursuant to RCW 4.84.370. On May 13, 2016 GIB filed its affidavit of attorney's fees pursuant to RAP 18.1

requesting attorney's fees against Thompson and Misselwitz. A response to the fee request is due May 23, 2016.

#### **4.2 Quiet Title and Adverse Possession Litigation**

Mr. Misselwitz lived at his residence on Mercer Island since 1978. The City of Mercer Island issued memos in 2009 and 2014 requiring GIB and its predecessors to resolve the dispute over a strip of property between Misselwitz's property and the property currently owned by GIB, LLC. Declaration of Thompson, Exh. 1. The disputed property is approximately one to two feet wide and runs the entire length of the joint property line to Lake Washington. The area contained in this disputed property is extremely valuable because: 1) both properties are on the waterfront on Mercer Island; and 2) without the area of the disputed property, GIB would not have sufficient area to build upon its waterfront lot without a variance for area, or possibly to subdivide under SUB13-008. Declaration of Thompson, Exh. 2 (Zillow printouts showing property value of \$4.5 – \$5 million, respectively).

On December 1, 2015 GIB filed suit against Mr. and Mrs. Misselwitz in King County Superior Court to quiet title. King County Case No. 15-2-30287-6 SEA. The Misselwitz's answered and counterclaimed raising adverse possession and other defenses based upon: 1) the Misselwitz's had openly possessed the disputed property since 1978

(and it was openly possessed before 1978); and 2) in 2010 GIB's predecessors had poured its easement and retaining wall along the property line the Misselwitzes claimed in the adverse possession claim. A copy of Misselwitz's answer to the lawsuit is in Exh. 3 to Declaration of Thompson.

#### **4.3 Settlement Agreement**

GIB LLC was represented by Mario Bianchi of Lasher Holzapfel in the quiet title action. Mr. and Mrs. Misselwitz were represented by Ian Macrae (the attorney who discovered the conveyance deed on June 1, 2015, in which On the Rock conveyed all its interest in the property to GIB LLC on August 12, 2014). *See*, Declaration of Zachary Lell in Support of Motion to Substitute GIB LLC for OTR.

Upon information and belief, GIB through its counsel Mario Bianchi and Mr. and Mrs. Misselwitz through their counsel Ian Macrae entered into settlement negotiations without including Daniel Thompson in the negotiations. Upon information and belief, the terms of the settlement are that Mr. and Mrs. Misselwitz: 1) agree to the property line claimed by GIB LLC in the quiet title action; 2) agree to forego any of their rights in this litigation over SUB13-008 or any other permits necessary for development on the property owned by GIB; and 3) waive or release Misselwitz from attorney fee-shifting in this matter.

#### **4.4 Confidentiality Clause**

On May 11, 2016 Mr. Macrae, Mr. Misselwitz's counsel in the quiet title action, emailed Daniel Thompson stating that Mr. Misselwitz has settled both cases, and there is a confidentiality agreement. Declaration of Thompson, Exh. 4. Since notice of the settlement, Daniel Thompson has not been able to communicate with or reach his client, Theodore Misselwitz. Daniel Thompson has not received any communication from Mr. Misselwitz, or from Mr. Macrae, requesting that Daniel Thompson withdraw from representing Mr. Misselwitz, or that Mr. Macrae would appear or substitute as counsel at the Court of Appeals.

On May 16, 2016 Daniel Thompson emailed the fee petition to Mr. Misselwitz, Mr. Macrae, and Mr. Misselwitz's adult son, Fields Mizzelwitz, requesting a copy of the settlement agreement, and informed them that GIB LLC was requesting fee-shifting against Theodore Misselwitz at the Court of Appeals. Declaration of Thompson, Exh. 5. The email noted that the settlement agreement should be filed with the Court of Appeals to protect Mr. Misselwitz from fee liability in this matter. The email also stated that recent events made it necessary for Daniel Thompson to withdraw from representing Mr. Misselwitz, and that Mr. Misselwitz should obtain independent counsel.

Daniel Thompson has requested that Mr. Macrae substitute for Daniel Thompson as counsel for Mr. Misselwitz at the Court of Appeals regarding the fee liability. Mr. Macrae has declined at this time to substitute for Daniel Thompson as counsel of record for Mr. Misselwitz.

#### **4.5 Email to Mr. Lell**

Zachary Lell has represented OTR and GIB in all proceedings at the Court of Appeals. On May 17, 2016 Daniel Thompson sent Mr. Lell an email requesting clarification of the settlement agreement and the confidentiality clause, and Mr. Lell's affidavit seeking attorney's fees against Misselwitz, indicating Mr. Thompson's understanding of the underlying circumstances, and Daniel Thompson's intent to withdraw from the representation of Mr. Misselwitz. Declaration of Thompson, Exh. 6. Mr. Lell has not responded to the email.

### **V. GROUNDS FOR RELIEF AND ARGUMENT**

#### **5.1 Motion to Withdraw and Extension to File a Response to GIB's**

##### **Fee Affidavit**

GIB LLC has filed a fee affidavit seeking attorney's fees against Theodore Misselwitz.

A copy of these motions have been emailed to Mr. Macrae, Mr. Misselwitz, and Mr. Misselwitz's adult son, Fields Misselwitz, and sent by certified mail to the home address for Theodore Misselwitz. Mr.

Misselwitz is approximately 90, and his wife has suffered a debilitating stroke. Daniel Thompson has just recently been informed by Mr. Macrae that at some point in the past Theodore Misselwitz executed a Power of Attorney transferring decision making to his adult son, Fields Misselwitz. A copy of the Power of Attorney has not been provided to Daniel Thompson, and the scope of the Power of Attorney is unknown. It is not clear if Mr. and Mrs. Misselwitz signed the settlement agreement or their representatives signed. Upon information and belief, Theodore Misselwitz has moved to assisted care or a nursing home with his wife, and Daniel Thompson is not in possession of that address. Daniel Thompson is not offering any opinion on Mr. Misselwitz's competence, and has not been able to communicate with Mr. Misselwitz.

Due to the circumstances identified above, Daniel Thompson does not believe he can continue to represent Theodore Misselwitz, and a potential conflict of interest has arisen. Mr. Misselwitz and Mr. Macrae are under the belief that if they disclose the terms of the settlement agreement it will abrogate the agreement, while at the same time GIB LLC is seeking attorney's fees against Mr. Misselwitz in the Court of Appeals. Therefore, Daniel Thompson would ask that the Notice of Withdrawal filed with these motions be granted.

Daniel Thompson, on behalf of Theodore Misselwitz, would also ask that the appellants' deadline to respond to GIB's request for attorney's fees be extended in order to allow Mr. Misselwitz to obtain independent counsel, and if so ordered, that the settlement agreement be filed with the Court of Appeals to determine Mr. Misselwitz's liability for attorney's fees.

### **5.2 Disclosure and Filing of Settlement Agreement**

Daniel Thompson still represents Mr. Misselwitz. As noted in the email to Mr. Lell found in Exh. 6, Daniel Thompson does not think it is proper for GIB LLC through Mr. Bianchi to require a confidentiality clause prohibiting release of the settlement agreement while at the same time GIB seeks fee-shifting against Mr. Misselwitz at the Court of Appeals. A few of the concerns in this matter are that Mr. Misselwitz apparently is releasing all his rights in the adverse possession claim, as well as in this claim and future permits for development of the property owned by GIB, in consideration of release from fee-shifting, despite the fact that a fee award has not yet been made.

Another significant concern is the enormous discrepancy between the amount of attorney's fees requested by GIB in this matter compared to the fee award issued by Commissioner Mary Neel of Division One in the seminal case addressing standing under LUPA, *Durland v. San Juan*

*County*. Declaration of Thompson, Exh. 7. The amount requested by GIB in this straightforward appeal is approximately five times greater than the amount awarded in *Durland*, although GIB's briefing was largely a duplication of the City's briefing. The concern is the extraordinary discrepancy between the amount requested by GIB and the amount awarded in *Durland* is designed to pressure Mr. Misselwitz to enter into a settlement agreement that releases extremely valuable property rights. The adequacy of consideration should be based on the fee award, not the fee request.

Another concern is that the affidavit of attorney's fees signed by Mr. Lell fails to distinguish and allocate time devoted to Thompson's appeal from time expended responding to Misselwitz's appeal. Attorney fee-shifting is not joint and several. Throughout the petition there are extensive entries of block billing that provide no basis to distinguish the services devoted to responding to Thompson's appeal from those devoted to responding to Misselwitz's appeal. This raises a potential conflict of interest for Thompson in responding to the fee agreement.

## VI. CONCLUSION

Daniel Thompson moves that the settlement agreement entered into between GIB LLC and Theodore Misselwitz be disclosed to Daniel Thompson and filed in the Court of Appeals to determine whether GIB

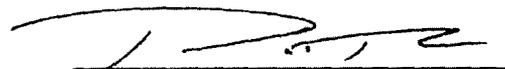
LLC has waived or released fee liability against Misselwitz in consideration of the settlement over the adverse possession claim and claims in this matter and future permits. Filing of this agreement is necessary to protect Theodore Misselwitz because GIB LLC has specifically requested attorney's fees from Mr. Misselwitz in its affidavit of attorney's fees. Daniel Thompson further moves for an order approving his withdrawal from representing Mr. Misselwitz, and an extension of time for appellants to respond to GIB's attorney fee affidavit.

DATED this 20<sup>th</sup> day of May, 2015

Respectfully submitted,

Thompson and Delay

By:



Daniel P. Thompson  
WSBA No. 18189  
Thompson and Delay  
506 Second Avenue, Suite 2500  
Seattle, WA 98104  
Phone (206) 622-0670  
Fax (206) 622-396

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

SUPREME COURT NO. 93219-1

COURT OF APPEALS NO. 72809-1-I

---

DANIEL THOMPSON and THEODORE MISSELWITZ,

*Appellants,*

vs.

CITY OF MERCER ISLAND,

*Respondent,*

GIB DEVELOPMENT, LLC (ON THE ROCK, LLC) and ANDERSON ARCHITECTURE

*Additional Parties.*

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**APPENDIX TO DANIEL THOMPSON AND THEODORE  
MISSELWITZ'S REPLY TO CITY OF MERCER ISLAND'S ANSWER  
TO PETITION FOR REVIEW**

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**EXHIBIT 4**

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

DANIEL P. THOMPSON and  
THEODORE MISSELWITZ,

Appellants,

v.

CITY OF MERCER ISLAND

Respondent,

and

ANDERSON ARCHITECTURE,  
Applicant, and ON THE ROCK,  
Owner

Respondents/Additional Parties.

COURT OF APPEALS  
CASE No. 72809-1-I

DECLARATION OF  
APPELLANT'S COUNSEL  
DANIEL THOMPSON IN  
SUPPORT OF MOTIONS:

- 1) TO WITHDRAW FROM  
REPRESENTATION OF MR.  
MISSELWITZ
- 2) COMPEL DISCLOSURE OF  
ANY SETTLEMENT  
AGREEMENT BETWEEN  
GIB LLC AND MR.  
MISSELWITZ
- 3) EXTENSION OF TIME TO  
FILE RESPONSE TO GIB'S  
PETITION FOR  
ATTORNEY'S FEES TO  
ALLOW MR. MISSELWITZ  
TO OBTAIN SEPARATE  
COUNSEL AND FILE A  
RESPONSE

## **I. INTRODUCTION**

COMES FORTH Daniel Thompson and declares under penalty of perjury under the laws of the State of Washington:

**1.1** I am over 18 and competent to testify herein. This declaration is made upon my personal knowledge of the facts and the authenticity of the documents attached to this declaration. I am an appellant in this matter, and petitioner below, together with Theodore Misselwitz, my neighbor. I have represented myself and Theodore Misselwitz at the superior court and Court of Appeals.

## **II. DOCUMENTS ATTACHED TO DECLARATION**

**2.1** Attached as Exh. 1 to this declaration are exhibits from the Clerk's Papers, as noted in the upper right-hand corner. On the bottom right-hand corner is the exhibit and page number relevant to the administrative proceedings before the Mercer Island Planning Commission. On December 1, 2015, GIB LLC filed suit against Mr. and Mrs. Misselwitz to quiet title to a strip of property approximately one to two feet wide running the length of the property line between the property owned by GIB LLC and the Misselwitzes. Mr. and Mrs. Misselwitz have lived on the property since 1978 and have openly possessed this property. The City of Mercer Island, as part of its permitting process, had on several

occasions issued memos requiring GIB LLC or its predecessor to either obtain permission of the adjoining neighbors or quiet title for placement of the necessary easement and driveways. Attached in Exh. 1 is the June 1, 2009 memo noting in paragraph 1(c) that the joint access road along the property line shall have no impacts to the neighboring property unless permission from the property owners (including Misselwitz) has been obtained. On April 4, 2014, the City of Mercer Island again required that construction of the joint access road have no impact to the neighboring property unless permission from the property owners had been obtained. The April 4, 2014 memo was issued after the easement had been poured because the easement had been poured along the incorrect property line, and was only 16 feet wide as opposed to the required 18-foot width. As a result, in order to obtain the necessary width for the easement without reducing the area of the property owned by GIB, it was necessary to extend the easement/driveway into the property the neighbors contended they had possessed since 1978 and 1971, respectively.

2.2 In Exh. 2 are Zillow printouts for 7250 N. Mercer Way, the property owned by Mr. Misselwitz, indicating the property is valued at \$4,954,808. Also attached is a Zillow printout for 7260

N. Mercer Way, the waterfront lot owned by GIB, with an estimated value of \$4,414,506. These printouts highlight the incredible value of the disputed property between Misselwitz and GIB.

**2.3** Attached as Exh. 3 is the Misselwitzes' answer to GIB's quiet title action, setting forth the history of the property ownership and the defenses to the quiet title action, as well as the Misselwitzes' assertion of adverse possession.

**2.4** Attached in Exh. 4 is the email dated May 11, 2016 forwarded to me from Mr. Macrae noting that he had a signed deal settling both the adverse possession case as well as Mr. Misselwitz's claims in this action, and noting there was a confidentiality agreement in place. For approximately one year I had requested that Mr. Misselwitz obtain independent counsel in order to advise him of his rights in this litigation should a conflict of interest arise between Mr. Misselwitz and myself, as well as advise and represent Mr. Misselwitz in his adverse possession claims. Mr. Macrae appeared several months ago. He is familiar with the family and has extensive experience litigating adverse possession claims. Mr. Macrae attended several meetings with Mr.

Misselwitz, Mr. Misselwitz's adult son Fields Misselwitz, and myself.

- 2.5** Attached in Exh. 5 is my email dated May 16, 2016 to Theodore Misselwitz, Fields Misselwitz, and Ian Macrae, attaching GIB's affidavit for attorney's fees. As noted in the email, I was unable to communicate or reach Theodore Misselwitz. Based on my assumptions that the consideration for the settlement agreement was GIB's agreement to waive or release Mr. Misselwitz from fee-shifting, I noted my confusion over the fact the affidavit filed with the Court of Appeals requested fee-shifting against Misselwitz. I strongly suggested that any settlement agreement be forwarded to me and filed with the Court of Appeals to protect Mr. Misselwitz, and to make sure no judgment attached to his properties. I never heard from Mr. Misselwitz or Fields Misselwitz. In subsequent communications with Mr. Macrae, it is his understanding that the confidentiality agreement precludes disclosure of the settlement agreement to me or any discussion of the settlement agreement with me or communications between Mr. Misselwitz and myself.
- 2.6** Attached in Exh. 6 is an email dated May 17, 2016 from me to Zachary Lell. In order to try and resolve the confusion in this matter, I forwarded an email to Zach Lell on May 17, 2016 that

sets forth the facts of the adverse possession claim, the settlement agreement, the confidentiality clause, as well as my intent to withdraw from representing Mr. Misselwitz in this matter. I never received a response from Mr. Lell.

**2.7** Attached in Exh. 7 is the August 19, 2013 notation ruling by Commissioner Mary Neel of Division One awarding Heinmiller attorney fees of \$13,373.50 in the *Durland v. San Juan County* litigation at the Court of Appeals. The affidavit submitted by Mr. Lell seeks attorney fees approximately five time more than those found reasonable for Heinmiller. Furthermore, the affidavit submitted in support of GIB's request for attorney's fees fails to allocate or distinguish services and time expended responding to Misselwitz's appeal as opposed to the issues in Thompson's appeal. Contained in the fee itemization are entries of very large hours expended that are block billed and do not identify what the time was expended for, and which appeal.

**2.8** I believe, based on the facts in this matter, it is impossible for me to represent Mr. Misselwitz at the Court of Appeals. The actions by GIB and the settlement agreement have made it impossible for me to communicate with Theodore Misselwitz or even Ian Macrae. The block billing and failure to allocate time expended in GIB's

affidavit for attorney's fees creates a potential conflict of interest between me and Theodore Misselwitz. Therefore I believe it is necessary for me to withdraw and Mr. Misselwitz to obtain independent counsel. I strongly believe that this Court should compel the disclosure and filing of any settlement agreement between GIB and Theodore Misselwitz to determine whether GIB has released Mr. Misselwitz from attorney fee liability. Finally, an extension should be granted to allow Mr. Misselwitz the time to obtain independent counsel and file a response to GIB's affidavit of attorney's fees.

DATED this 20<sup>th</sup> day of May, 2016

Respectfully submitted,

Thompson and Delay

By:



Daniel P. Thompson  
WSBA No. 18189  
Thompson and Delay  
506 Second Avenue, Suite 2500  
Seattle, WA 98104

Phone (206) 622-0670  
Fax (206) 622-396

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

DANIEL P. THOMPSON and  
THEODORE MISSELWITZ,

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THE CITY OF MERCER  
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ANDERSON ARCHITECTURE,  
Applicant, and ON THE ROCK,  
Owner, GIB DEVELOPMENT,  
LLC,

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COURT OF APPEALS  
CASE No. 72809-1

EXHIBIT INDEX TO  
APPELLANTS' COUNSEL  
DANIEL THOMPSON'S  
DECLARATION IN SUPPORT OF  
MOTIONS

EXHIBIT 1



# Memorandum

---

To: Travis Saunders  
From: Ruji Ding  
Re: Sub08-009 Pirak 2-Lot Short Plat  
Date: June 1, 2009

I've reviewed the resubmitted package dated May 13, 2009 and have the following revised comments and conditions of approval:

1. Short plat improvement plans prepared by a Washington State licensed engineer shall be submitted for review and approval by the City Engineer prior to Final Short plat approval (MICC 19.08.040). The improvement plans shall include:
  - a) Locations of the joint use access road;
  - b) The access road to the plat shall comply with standards contained in MICC 19.09.
  - c) The construction of the joint use access road and the driveway to Lot 2 along the north property limit shall have no impacts to the neighboring property unless you have the permissions from the property owners of the neighboring property.
  - d) Temporary Erosion Control;
  - e) Grading Plan;
  - f) Water Services – Improvement construction plans shall include:
    - Show the locations and sizes of all proposed water meters and water services for all lots. All proposed water meters shall be located within the Public right of way.
    - Abandonment of the existing water service tap at the main.
    - Provide a minimum of ten (10) feet of separation between the water main and sanitary sewer system.
    - The short plat has created two water front properties. A Reduced Pressure Backflow Assembly (RPBA) installation shall be required and installed 12 inches above grade behind the water meter (on the private properties) for both lakefront properties. The RPBA shall be inspected at time of installation and at building final. A Hot Box to protect the RPBA assembly is optional. A Double Check Valve Assembly (DCVA) is required on all fire sprinkler systems.

Clmt ex. 19  
P. 1: \_\_\_\_\_

- g) Sanitary Sewer Services - Improvement construction plans shall include:
- Show the sanitary sewer stub outs (locations and elevations) for each lot. The sewer pipes shall be located in the private utility easement. Stub side sewers to serve each lot by gravity means.
  - If a side sewer is to service two or more, limited to a maximum number of six houses, the use of 6" pipe shall be specified. A 6" cleanout extending to within 12" of the ground surface will be required at the wye where the upper grade connection are made. Show all cleanouts on the site plan.
  - Provide TV inspection of the existing sewer system to the lake and replacement as needed. If the replacement is needed, inform the City of Mercer Island Maintenance Department at 206-275-7800 of the anticipated start date of in-water work prior to commencement of construction.
- h) Storm Drainage System – Improvement construction plans shall include:
- Show the storm drainage stub outs (locations and elevations) for each lot. The storm drainage systems shall be located in the private utility easement. Stub storm drainage pipes to serve each lot by gravity means.
  - Discharge with an outfall to the lake and the invert of the outfall shall be above the ordinary high water mark.
  - Provide treatment of runoff from the street and any other pollution generating impervious surfaces (PGIS) in accordance with the Department of Ecology's Stormwater Management Manual.
  - A complete Drainage Report and Drainage Plan are required for the designing of the proposed drainage system for the short plat.
- i) Show all the existing and proposed easements. Clearly distinguish all public easements from the private easements.
- j) Restoration of public and private roadways and other areas that will be affected by construction.
2. Easements for shared docks, utilities, and storm drainage facilities shall be depicted on the face of the Final Plat. Language which indicates joint rights and responsibilities of each lot with respect to all utilities and roadways shall be shown along with individual lot Joint Maintenance Easement Agreements (where applicable) for all shared usage and filed with the King County Recorder and noted on the final plat. The easement notation shall indicate whether the easement is public or private, existing or proposed.
3. All damage to adjacent properties or public rights-of-way resulting from construction (e.g., siltation, mud, water, runoff, roadway damage caused by construction equipment or hauling) shall be expeditiously mitigated and repaired by the contractor, at no expense to the City. Failure to mitigate and repair said damage, or to comply with the approved construction plans, the permits issued by the City, or the City requirement for corrective action shall be cause for the issuance of a "Stop Work" order, foreclosure on the plat bond/security, and/or other measures deemed appropriate by

Clmt ex. 19  
P. 2:

the City Engineer or Code Official to ensure quality construction and protect the public safety.

4. The Final Plat shall be prepared in conformance with Title 58 RCW and Surveys shall comply with Chapter 332-130 WAC. Additionally, provide the final plat as a DXF Autocad file in addition to hardcopy. Submit using Mercer Island's datum and tie the plat to at least two monuments.
5. A City of Mercer Island title block for approval signatures (Planner and City Engineer) shall be provided on the final plat along with the designated Short plat number.
6. Construction of all improvements for access, utilities, storm drainage, and site work shall comply with current City ordinances and the requirements of the City Engineer.
7. Short plat improvement plans prepared by a Washington State licensed Civil Engineer shall be submitted for review and approval by the City Engineer. The improvement plans shall include the location of the joint use access ways, proposed grading, sanitary sewer connections, water services, storm drainage management plans and temporary erosion/sedimentation control measurements in accordance with Ordinance 95-118. All utilities serving the plat shall be under grounded and shall be designed and constructed in accordance with City of Mercer Island Ordinances and construction standards prior to final plat approval.
8. All Short plat improvements shall be completed prior to final approval and recording of the Short plat mylar documents or bonded and completed prior to issuance of building permits. An accurately prepared as-built drawing that shows all utilities and Short plat improvements shall be submitted to the City upon completion of the work. Provide two paper copies, one mylar, and one DXF Autocad file. Submit using Mercer Island's datum and tie the plat to at least two monuments.
9. Applications for construction that involves "Land disturbing activity" shall be required to provide a Stormwater Management Plan in accordance with City Ordinance No. 95C-118 and obtain a Stormwater Permit.
10. The City Engineer, Code Official, or their authorized designee shall monitor construction as deemed appropriate and when permit inspections are required. At any time, additional design drawings and/or evaluation and monitoring by a soils engineer may be required to detail or provide for corrections to the work. Evaluation and/or monitoring by the Civil Engineer is required for this project with copies of written reports provided to the City. All costs associated with the installation of improvements, (including the monitoring and evaluation of construction activity by the City employees and consultants, and the completion of any required additions or corrections to the design or installation of the improvements) shall be borne by the Developer, property owner or his assignee.

Cmnt ex. 19  
P. 3

The following note shall be placed on the final plat:

1. Maintenance and repair of joint use side sewers (sewer lines from the building to the City sewer main), shared roads, access easements, storm drainage and storm detention facilities shall be the responsibility of the owners of each lot served (with the exception that owners of any lot which is lower in elevation shall not be responsible for that portion of a private side sewer above their connection.) In the event that maintenance and repair of any facilities enumerated above are not performed to the satisfaction of the City Engineer, after a timely demand has been made for such action, the City or its agent shall have the right to enter upon the premises and perform the necessary maintenance and repair to protect the safety and general welfare of the public and shall have the right to charge the owner of each lot an equal share of the total maintenance and repair costs. The City or the owner of any lot within this Short plat shall have the right to bring action in Superior Court to require any maintenance or repair and to recover the costs incurred in making or effecting repairs to improvements.
2. The monitoring, cleaning, maintenance and repair of storm drains and storm detention systems in accordance with City Ordinance No. 95C-118 is required for all lot owners within this Plat to control stormwater runoff and control erosion and flooding downstream. All costs related to stormwater runoff control shall be borne by the owners of each lot in equal share. This obligation shall be recorded separately with each individual lot sale and shall travel with the land.
3. All staging for construction shall occur on site and shall not be located in the public right-of-way.
4. Prior to the issuance of a building permit, each application shall be accompanied with a temporary erosion and sedimentation control plan, clearing and grading plan, access and utility service plan, a landscape plan (which shall identify existing vegetation to be retained, limits of all clearing and grading), and a schedule for the construction. The applicant's Civil Engineer, experienced in soils geology and mechanics, shall review the proposed site and building construction and provide recommendations that will limit site disturbance, minimize risk of soils movement, evaluate site slope stability and define materials and construction practices for the work. The Building Official may require that the Engineer be present during construction, monitor the work, and recommend special techniques or mitigating measures. The costs associated with the Engineer's monitoring and mitigation measures shall be borne by the applicant.
5. No permanent landscaping, structures, or fences shall be placed on or within public utility or storm drainage easements without the written approval of the City Engineer. If in the opinion of the City Engineer, utilities or storm drainage facilities require maintenance, repair or replacement, the City or its agent shall have the right to enter those lots adjoining the facility for the purpose of maintaining, repairing, relocating or replacing said facilities. Lot owners shall be responsible for the restoration of any private improvements or landscaping within said easements.

Clmt ex. 19  
P. 4: \_\_\_\_\_

6. Installation of landscaping and/or structures including trees, shrubs, rocks, berms, walls, gates, and other improvements are not allowed within the public right-of-way without an approved encroachment agreement from the City prior to the work occurring.

Cmt ex. 19  
P. 5 i



# Memorandum

---

To: Travis Saunders  
From: Ruji Ding  
Re: Sub08-009 Pirak 2-Lot Short Plat  
Date: April 4, 2014

I've reviewed the submittal package and have the following comments and conditions of approval:

1. Short plat improvement plans prepared by a Washington State licensed engineer shall be submitted for review and approval by the City Engineer prior to Final Short plat approval (MICC 19.08.040). The improvement plans shall include:
  - a) Locations of the joint use access road;
  - b) The access road to the plat shall comply with standards contained in MICC 19.09.
  - c) The construction of the joint use access road and the driveway to Lot 2 along the north property limit shall have no impacts to the neighboring property unless you have the permissions from the property owners of the neighboring property.
  - d) Temporary Erosion Control;
  - e) Grading Plan;
  - f) Water Services – Improvement construction plans shall include:
    - Show the locations and sizes of all proposed water meters and water services for all lots. All proposed water meters shall be located within the Public right of way.
    - Abandonment of the existing water service tap at the main.
    - Provide a minimum of ten (10) feet of separation between the water main and sanitary sewer system.
  - g) Sanitary Sewer Services - Improvement construction plans shall include:
    - Show the sanitary sewer stub outs (locations and elevations) for each lot. The sewer pipes shall be located in the private utility easement. Stub side sewers to serve each lot by gravity means.
    - If a side sewer is to service two or more, limited to a maximum number of six houses, the use of 6" pipe shall be specified. A 6" cleanout extending to within 12" of the ground surface will be required at the wye where the upper grade connection are made. Show all cleanouts on the site plan.

Clmt ex. 33  
P. 2:

COURT OF APPEALS, DIVISION I  
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DANIEL P. THOMPSON and  
THEODORE MISSELWITZ,

Appellants,

v.

THE CITY OF MERCER  
ISLAND,

Respondent,

and

ANDERSON ARCHITECTURE,  
Applicant, and ON THE ROCK,  
Owner, GIB DEVELOPMENT,  
LLC,

Respondents/Additional Parties.

COURT OF APPEALS  
CASE No. 72809-1

EXHIBIT INDEX TO  
APPELLANTS' COUNSEL  
DANIEL THOMPSON'S  
DECLARATION IN SUPPORT OF  
MOTIONS

EXHIBIT 2

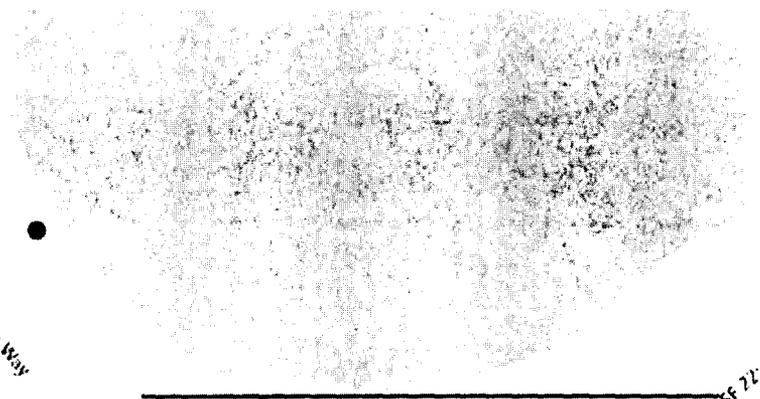
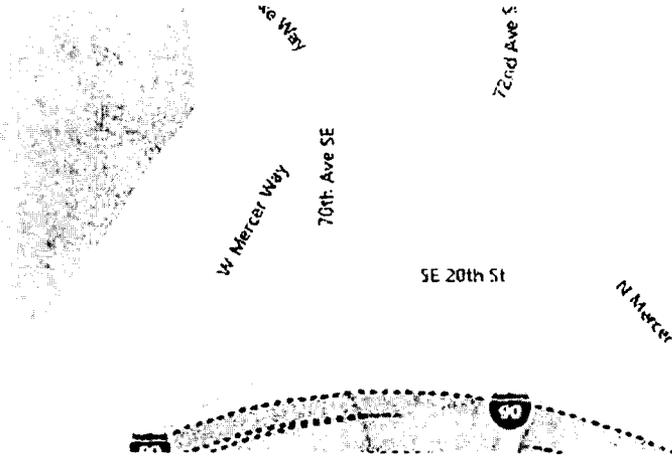


LIST FOR RENT    SAVE    GET UPDATES    SHARE    MORE ▾

City, State, or Zip

Public    Owner **NEW**

Washington · Mercer Island · 98040 · 7250 N Mercer Way



7250 N  
Mercer Way,  
Mercer Island, WA  
98040

**4 beds · 2.25 baths ·**

**4,600 sqft** [Edit](#)

Edit home facts for a more accurate Zestimate.

● **OFF MARKET**  
Zestimate®:  
**\$4,954,808**  
Update my  
Zestimate  
Rent Zestimate®:  
**\$19,137/mo**

Est. Refi  
Payment  
**\$22,099/mo**

**See current  
rates**

Sign Up \$1 Trial: Equifax Credit Score 1

Get a monthly local market report with comparable rentals in your area.

- I own and manage this rental
- I manage this rental for the owner

Enter email

**Subscribe**

### Nearby Similar Sales

● **SOLD: \$7,100,000**  
Sold on 6/10/2015  
5 beds, 4.5 baths, 7110 sqft  
7406 N Mercer Way, Mercer Island, WA 98040

See sales similar to 7250 N Mercer Way

Get Your Home Report  
See Zestimate updates, plus the latest sales and listings in your area.

Sign up

This 4600 square foot single family home has 4 bedrooms and 2.25 bathrooms. It is located at 7250 N Mercer Way Mercer Island, Washington.

FACTS

- Lot: 0.33 acres
- Single Family
- Built in 1929
- All time views: 335
- Heating: Forced air

FEATURES

- Deck
- Fireplace
- Parking: Garage - Attached, 550 sqft garage
- Partial basement, 1330 sqft
- View: City

More ▾ County website See data sources

# Zestimate Details

Add owner estimate

Zestimate Rent Zestimate Zestimate

**\$4,954,808**

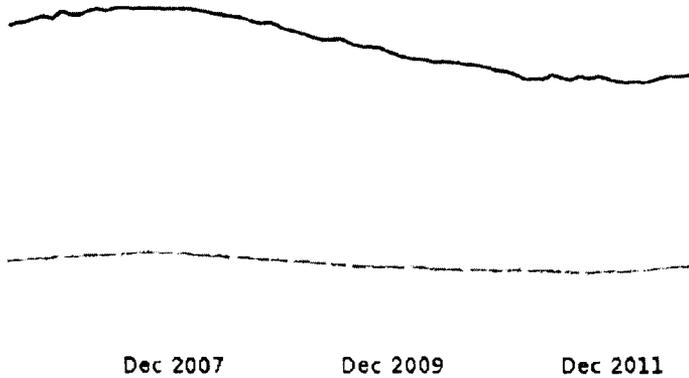
**-\$20,341** Last 30 days **\$1** To see Zestimate forecast Create a free account

**-\$1,6...** 30 days One year

\$4.46M | \$5.56M Zestimate range \$8.8K | \$45K Zestimate range

Zestimate ▾ 1 year 5 years 10 years

- This home --
- 98040 --
- Mercer Island --



## Owner Dashboard



**Do you own this home? See your Owner Dashboard.**

I'm the owner. Show me!

## Improve This Home's Value

The right home project can make a significant impact to your home value! Compare average project costs in your area with estimated increases to your home value. ⓘ

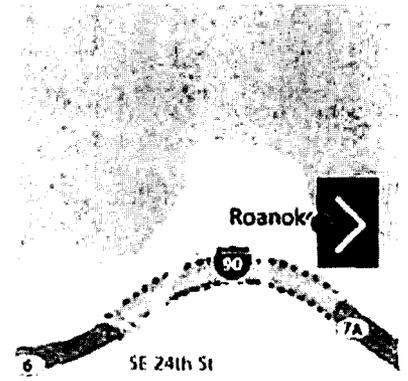


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City, State, or Zip

Public    Owner **NEW**

Washington · Mercer Island · 98040 · 7260 N Mercer Way



Is this your rental?

7260 N  
Mercer Way,  
Mercer Island, WA  
98040

**5 beds · 4 baths ·**

**27,432 sqft** Edit

Edit home facts for a more accurate Zestimate.

● **OFF MARKET**  
Zestimate®:

**\$4,414,506**

Update my  
Zestimate  
Rent Zestimate®:  
**\$17,051/mo**

Est. Refi  
Payment  
**\$22,330/mo**



**See current rates**

Sign Up \$1 Trial: Equifax Credit Score

Get a monthly local market report with comparable rentals in your area.

I own and manage this rental

I manage this rental for the owner

Enter email

Subscribe

Get Your Home  
Report

See Zestimate updates,  
plus the latest sales  
and listings in your  
area.

Zillow Survey - 5 questions

**Are you a homeowner?**

Yes

No

Sign up

MIPointOfView- 82 feet of north end, low bank waterfront with expansive views of Lake Washington, Mt. Baker and city skyline. Rare and sought after street to water 27,432sf lot offers tremendous opportunity to build your dream home. All geotech complete, ready to build. Brand new dock with deep water moorage recently completed!

FACTS

- Lot: 0.59 acres
- Built in 2010
- Heating: Forced air
- Single Family
- All time views: 2,532
- Last sold: Feb 2011 for \$3,150,000

FEATURES

- Deck
- Partial basement, 320 sqft
- Fireplace
- View: City

More ▾ County website See data sources

Zestimate Details

Add owner estimate

Zestimate Rent Zestimate Zestimate

**\$4,414,508**

**-\$27,291** Last 30 days

**\$1** To see Zestimate forecast Create a free account

**-\$1,400** 30 days

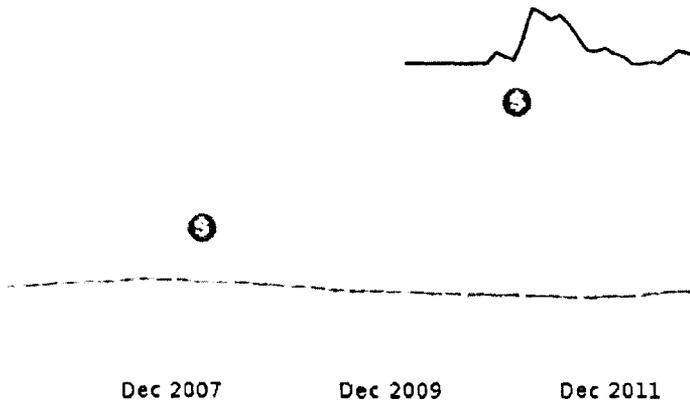
**\$3.75M** | **\$5.5M** One year

Zestimate range **\$16k** **\$32k**

Zestimate range

Zestimate ▾ 1 year 5 years 10 years

- This home --
- - 98040 --
- - - Mercer Island --



## Owner Dashboard



**Do you own this home? See your Owner Dashboard.**

I'm the owner. Show me!

## Improve This Home's Value

The right home project can make a significant impact

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DANIEL P. THOMPSON and  
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THE CITY OF MERCER  
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and

ANDERSON ARCHITECTURE,  
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COURT OF APPEALS  
CASE No. 72809-1

EXHIBIT INDEX TO  
APPELLANTS' COUNSEL  
DANIEL THOMPSON'S  
DECLARATION IN SUPPORT OF  
MOTIONS

EXHIBIT 3

1  
2  
3  
4  
5 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**  
6  
7 **IN AND FOR THE COUNTY OF KING**

8 **GIB DEVELOPMENT, LLC**, a Washington )  
9 limited liability company, )  
Plaintiff )  
10 vs. )  
11 **THEODORE F. MISSELWITZ** and **LOYE M.** )  
12 **MISSELWITZ**, husband and wife, and the )  
13 marital community thereof, )  
Defendants )  
\_\_\_\_\_ )

**No: 15-2-30287-6 SEA**  
**ANSWER TO COMPLAINT AND COUNTER-CLAIM**

14  
15 COME NOW the defendants and answer the plaintiff's Complaint as follows:

16 1.1 Defendants deny paragraphs 1.1, 3.1, 3.2, 4.1, 4.2, 4.7, 5.1, 5.2, 6.1, , of the Com-  
17 plaint.

18 1.2 Defendants admit paragraphs 1.2, 2.1, 3.3, 4.3, 4.4, of the Complaint.

19 1.3 In response to paragraph 4.5 of the Complaint Defendants admit that the Plaintiff's  
20 property is served by a driveway and that a retaining wall exists between Plaintiff's and Defend-  
21 ants' property. Defendants deny that the retaining wall serves to support the driveway along De-  
22 fendants' property. Further Defendants deny the allegation in this paragraph that the retaining  
23 wall was not built for the purpose of establishing a physical boundary. Defendants assert that  
24 when the retaining wall was built by Plaintiff or Plaintiff's grantors they had recent surveys and  
25 the 1967 Coe/Burgess Agreement (attached hereto as Exhibit A) in hand and built the wall along  
what was well known to them be the common boundary line.

26 1.4 In response to paragraph 4.6 of the Complaint Defendants admit that the retaining  
wall and driveway were built at approximately the same time. Defendants believe that the person

1 who owns Plaintiff (hereinafter "Owner") operates through multiple entities and employs multi-  
2 ple persons to accomplish Owner's purposes and accordingly plead insufficient information to  
3 admit the allegation in this paragraph that "Plaintiff" retained True North surveyors and, there-  
4 fore, deny the said allegation. The survey recites it was prepared for "On the Rock 98040 LLC".  
5 Defendants believe that True North did in fact survey the Plaintiff's property and admit some-  
6 body placed stakes in the vicinity of the boundary line but have insufficient information to admit  
7 and therefore deny that they were placed on a line determined by any particular legal description.  
8 Defendants deny that the "staked property line" reflects the actual and historic property line be-  
9 tween the properties.

10 1.5 In response to paragraph 4.7 of the Complaint Defendants admit they oppose the pro-  
11 posed short platting of Plaintiff's property because, as part of its short plat and development  
12 plan, Plaintiff is attempting to seize land owned by Defendants and to destroy the portion of the  
13 retaining wall on Defendants' property and Defendants' landscaping material. Defendants deny  
14 Plaintiff's allegation that their claim of adverse possession is not based on a legitimate interest in  
15 the property in dispute. There is no need to assert ownership of your property until somebody  
16 with mistaken beliefs as to the facts, or in the hope that you are vulnerable, rapaciously tries to  
17 take it away from you. Defendants believe that a matter of the gain or loss of a few square feet is  
18 going to determine whether Plaintiff has sufficient square footage to develop two homes on its  
19 property, and that in its desperation Plaintiff is attempting to seize property it knows to be De-  
20 fendants'.

21 1.6 In response to paragraph 4.8 of the Complaint Defendants deny that Plaintiff has now  
22 or at any time during its ownership had an interest in the property in dispute as title to the proper-  
23 ty in dispute passed to, or was recognized as, Defendants' grantors and thus Defendants' many  
24 decades ago.

25 1.7 Defendants deny paragraph 5.3 of the Complaint. Since at least 1967 the Defendants  
26 and their grantors have had actual uninterrupted, open and notorious, hostile and exclusive, pos-  
session of the subject property. Defendants assert that the boundary line they claim in good faith  
can be determined in part by reference to a notarized document signed by Plaintiff's grantor and  
recorded against Plaintiff's title on August 3, 1967. Defendants are the owners of the disputed  
property by virtue of adverse possession, recognition and acquiescence and estoppel in pais all as  
more fully set forth in their counter-claim herein.

1 1.8 In response to paragraph 5.4 of the Complaint Defendants agree conceptually that a  
2 claim of adverse possession against a parcel of real property does cloud its title and impairs its  
3 marketability. Plaintiff was well aware of issues with the boundary line when it purchased its  
4 property. The 1967 Coe/Burgess Agreement (Exhibit A) was of record in Plaintiff's title when  
5 Plaintiff purchased the property and is referenced in the Hebrank Stedman survey done for the  
6 Plaintiff's grantor the University of Washington.

7 1.9 Defendants are confused by the undefined references in paragraphs 6.2 of the Com-  
8 plaint to the "2008 Agreement" and the "Unaffected Property". Because of the lack of definition  
9 of said terms Defendants therefore deny said paragraphs 6.1, 6.2 and 6.3 in their entirety.

### 10 DEFENDANTS' COUNTER-CLAIM

11 Having fully answered Plaintiff's Complaint, Defendants come now and Counter-Claim  
12 against Plaintiff as follows:

13 1. Defendants incorporate their above answers to Plaintiff's Complaint by reference as  
14 though fully set forth herein.

#### 15 *Adverse Possession/Action to Quiet Title*

16 2. Defendants and Defendant's grantors and predecessors in title have for a period well in  
17 excess of three decades made use of property on the Plaintiff's side of the survey stakes placed  
18 by surveyors True North. The portion of land adversely possessed is a strip of land along the par-  
19 ties' common boundary line approximately 1.5 feet in width to three feet in width to the south of  
20 the survey stakes as will be proven at trial. By virtue of the doctrine of adverse possession, title  
21 to said lands has been long vested in Defendants. The legal description of said portions of land  
22 which have been adversely possessed by Defendants and by Defendant's predecessors in interest  
23 will be proved at trial.

24 3. Defendants and Defendants' grantors and predecessors in title use of said portions of  
25 property has at all times been adverse to the rights of Plaintiff and its grantors, and has been  
26 open, hostile, notorious, uninterrupted, and, further, Defendant's and Defendant's predecessors  
in title have been in actual and exclusive possession of the portions of land under a claim of right  
and actual ownership. Plaintiff and its predecessors have, at all times since Defendants' prede-

1 cessors use began, had actual knowledge of Defendants' grantors and Defendants' use of the  
2 land and rights then claimed and now owned by Defendants.

3 4. Defendants' use of the portions of land, including the use of the portions made by De-  
4 fendants' predecessors, has been continuous for a period of time of over three decades, and has  
5 meet all of the requirements of adverse possession. The period within which Plaintiff could have  
6 brought action to recover said portions of land, being 10 years from the date Defendants' prede-  
7 cessors use of the strip commenced, as set forth in R.C.W. 4.16.020, has expired. Defendants  
8 thus have title to the said portions of land encompassed within Plaintiff's legal description.  
9 Plaintiff is a trespasser to the extent that its agents or employees come upon the said portions of  
10 ground and are liable for damages for said trespass to the extent such damages are proven at trial.  
11 Title to said portions of land should be quieted in Defendants. The legal description of the por-  
12 tions adversely possessed by Defendants will be proved at trial.

13 5. Defendants are authorized by common law and by RCW 7.28 *et seq.* to bring this ac-  
14 tion for adverse possession and to quiet title to the disputed property against any claim of Plain-  
15 tiff's.

16 6. Defendants plead and assert that the equitable doctrine of Recognition and Acquies-  
17 cence bars or is a defense to Plaintiff's action. The basis of this allegation is the July 31, 1967,  
18 signed notarized recorded document executed by Plaintiff's grantors, Robert and Josephine Coe  
19 and by Defendants' grantors M. Karl and Helen Burgess (Exhibit A hereto). Said document ex-  
20 presses the parties' understanding and agreement as to the location of the common boundary  
21 line, and with sufficient certainty defines the line as being at or about one foot north of the Plain-  
22 tiff's dock. Since the date of the said document the owners of the two parcels have relied upon  
23 the agreement and understanding set forth in said document. They have acted in such manner as  
24 to demonstrate their mutual recognition and acquiescence in the given line as their boundary line.  
25 Defendants relied upon this document in making their decision to purchase their property.

26 7. Defendants plead and assert that the equitable doctrine of Estoppel in Pais bars or is a  
defense to Plaintiff's action. The basis of this allegation is the July 31, 1967, signed notarized  
recorded document executed by Plaintiff's grantors, Robert and Josephine Coe and by Defend-  
ants' grantors M. Karl and Helen Burgess (Exhibit A hereto). Said document indicates the par-  
ties' agreement as to the location of the common boundary line. Since the date of its execution,  
and in deciding to purchase their property, Defendants have relied upon the statements and ad-

1 missions as to the location of the common boundary line made by Coe in this document. Plain-  
2 tiff's grantors have likewise acted in such a manner as to indicate their acceptance of said bound-  
3 ary line. Plaintiff's actions now in repudiating said acts by its grantor cause harm to Defendants.  
4 Defendants had a right to rely upon the signed notarized statements made by Coe as to the loca-  
5 tion of the common boundary line, and, if Plaintiff's claim of the accuracy of its survey is correct  
6 Defendants will have been misled by Coe's statements.

7 8. The Coe/Burgess Agreement, Exhibit A hereto, was recorded against the title to Plain-  
8 tiff's property under King County Recorder's Number 6213446 and 19991015000467. The ex-  
9 istence of the Agreement was thus well known to Plaintiff when it purchased its property. Plain-  
10 tiff should not now be allowed in equity to disavow the Agreement.

11 ***WHEREFORE, Defendants request judgment:***

- 12 1. Dismissing Plaintiff's complaint with prejudice;
- 13 2. Granting Defendants' prayer for adverse possession and quieting Defendants' title in  
14 fee simple to such land as Defendants prove at trial that they have adversely possessed, and that  
15 the Plaintiff and Plaintiff's successors in interest be forever barred from having or asserting any  
16 right, title, estate, lien or interest in or to the lands and premises herein described adverse to De-  
17 fendants;
- 18 3. Granting Defendants' prayer that, based on the doctrines of estoppel in pais and/or  
19 recognition and acquiescence, the boundary line identified in the Coe/Burgess agreement at-  
20 tached as Exhibit A be decreed to be the legal boundary line and that title to Defendants' lands  
21 therein be quieted in Defendants, and that the Plaintiff and Plaintiff's successors in interest be  
22 forever barred from having or asserting any right, title, estate, lien or interest in or to the lands  
23 and premises herein described adverse to Defendants.
- 24 4. Ejecting the Plaintiffs from all land within the Defendants' legal boundary adjudged,  
25 decreed and determined by this Court;
- 26 5. Awarding Defendants their reasonable and/or statutory attorney's fees and costs of suit  
against Plaintiff as may be allowed by statute, case law or court rule, and including by RCW  
7.28.083;
6. Providing such other relief as may be just and equitable,

Dated in Fall City on this \_\_\_\_\_ day of March, 2016.

**Law Offices of Ian D. Macrae**

By: Ian D. Macrae #8157  
Attorney for Defendants

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

DANIEL P. THOMPSON and  
THEODORE MISSELWITZ,

Appellants,

v.

THE CITY OF MERCER  
ISLAND,

Respondent,

and

ANDERSON ARCHITECTURE,  
Applicant, and ON THE ROCK,  
Owner, GIB DEVELOPMENT,  
LLC,

Respondents/Additional Parties.

COURT OF APPEALS  
CASE No. 72809-1

EXHIBIT INDEX TO  
APPELLANTS' COUNSEL  
DANIEL THOMPSON'S  
DECLARATION IN SUPPORT OF  
MOTIONS

EXHIBIT 4

# RE: Court of Appeals Order

Ian Macrae

Wed 5/11/2016 10:14 AM

To: 'Dan Thompson' <danielpthompson@hotmail.com>;

Dan, FYI, we have a signed deal and have settled both cases. There is a confidentiality agreement. I'm discussing what I can tell you with Mario. I hope to have him sorted out today or tomorrow. In the meantime when is the next date on which you have to file anything with Ted's name on it? Have you gotten the fee request motion yet? Please advise.

I'll tell you what more I can tell you as soon as I can. Apologies.

Ian



Virus-free. [www.avast.com](http://www.avast.com)

COURT OF APPEALS, DIVISION I  
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THEODORE MISSELWITZ,

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THE CITY OF MERCER  
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Respondent,

and

ANDERSON ARCHITECTURE,  
Applicant, and ON THE ROCK,  
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LLC,

Respondents/Additional Parties.

COURT OF APPEALS  
CASE No. 72809-1

EXHIBIT INDEX TO  
APPELLANTS' COUNSEL  
DANIEL THOMPSON'S  
DECLARATION IN SUPPORT OF  
MOTIONS

EXHIBIT 5

# Fw: Thompson v. Mercer Island, et al - No. 72809-1-1

Dan Thompson

Mon 5/16/2016 1:31 PM

To: Ted Misselwitz <400wings@comcast.net>; Ted Misselwitz <400wings@comcast.net>; Ian Macrae <ian@macrae.com>;

📎 1 attachment (919 KB)

ON THE ROCK AND ANDERSON ARCHITECTURE'S AFFIDAVIT OF ATTORNEY'S FEES (1453495x7ACF2).pdf;

Dear Ted, Fields and Ian:

Attached is the fee petition filed by GIB. As you will note GIB is requesting fee shifting against Ted. A response is due next Monday. I plan on filing a response on my behalf.

My preliminary understanding is Ted may have executed a power of attorney appointing Fields responsible for some of Ted's decisions, but I have not received a copy. The reason that is important is I have to know who has decision making authority for Ted in this case, and must consider whether a court could find my client not competent to make important legal decisions without the help of neutral guardian. I am not implying Ted is not capable of making his own decisions in this case. I am simply saying I don't know for sure, and must document that I considered and investigated that possibility, and brought it to the attention of the court.

On another issue I think Ted (or Fields) entered into a settlement agreement with GIB that I assume surrenders Ted's adverse possession claims, Ted's claims under this litigation, and any future claims Ted could raise over development on 7260 N. Mercer Way. My understanding is the sole consideration for the surrender of rights is GIB's agreement to not pursue fee shifting against Ted. That is why I am surprised by GIB's fee petition filed by Zach that does seek fees from Ted for Ted's part of the claim, although the fees are not broken down by Ted's and my claims. I have not received a copy of the settlement agreement although if filed at the court of appeals would protect Ted from fee shifting, even though I am attorney of record.

Because of the strange turn of events, and Ian effectively representing Ted and Fields in both the resolution of the adverse possession claims and claims in this litigation, and my confusion over my role and concern a potential conflict of interest has risen, I am going to file a motion with the court of appeals requesting my withdrawal from representing Ted. Ian has informed me he does not agree to substitute for me at the court of appeals. Therefore I will request an extension of time in which to respond to the fee petition to allow Ted (or Fields) to obtain new counsel to protect their rights, to compel disclosure of the power of attorney if just to protect me re: any actions I take, and the disclosure of the settlement agreement which I am led to believe would protect Ted if filed. Since GIB has filed a request for fees from Ted I have to assume Zach Lell is informed of the settlement agreement, and GIB will pursue a judgement against Ted for Ted's portion of reasonable fees the court awards, and that judgment will attach to Ted's property.

Please feel free to contact or email me with any concerns you may have.

## Daniel Thompson

Thompson & Delay  
Attorneys at Law  
506 2nd Ave., Suite 2500  
Seattle, WA 98104  
Phone: (206) 622-0670  
Fax: (206) 622-3965

---

**From:** Gloria J. Zak <gzak@omwlaw.com>  
**Sent:** Friday, May 13, 2016 2:30 PM  
**To:** 'bianchi@lasher.com'; 'danielphompson@hotmail.com'; 'Kari Sand'  
**Cc:** Zach Lell  
**Subject:** Thompson v. Mercer Island, et al - No. 72809-1-1

Attached is GIB Development, LLC (On the Rock) and Anderson Architecture's Affidavit of Attorney's Fees Pursuant to RAP 18.1; hard copies follow via regular mail and legal messenger.

Gloria Zak, Legal Asst to J. Zachary Lell

Gloria J. Zak | Municipal Legal Assistant

Ogden Murphy Wallace P.L.L.C.  
901 Fifth Avenue, Suite 3500 Seattle, WA 98164  
phone: 206.447.7000 | fax: 206.447.0215  
[gzak@omwlaw.com](mailto:gzak@omwlaw.com) | [omwlaw.com](http://omwlaw.com)

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

DANIEL P. THOMPSON and  
THEODORE MISSELWITZ,

Appellants,

v.

THE CITY OF MERCER  
ISLAND,

Respondent,

and

ANDERSON ARCHITECTURE,  
Applicant, and ON THE ROCK,  
Owner, GIB DEVELOPMENT,  
LLC,

Respondents/Additional Parties.

COURT OF APPEALS  
CASE No. 72809-1

EXHIBIT INDEX TO  
APPELLANTS' COUNSEL  
DANIEL THOMPSON'S  
DECLARATION IN SUPPORT OF  
MOTIONS

EXHIBIT 6

# SUB13-008 existence of settlement agreement

Dan Thompson

Tue 5/17/2016 4:43 PM

To: zlell@omwlaw.com <zlell@omwlaw.com>;

Dear Zach:

I am writing to ask if you can clarify if your client GIB through Mario Bianchi has entered into a settlement agreement releasing Mr. Misselwitz from fee shifting and requiring the settlement agreement be kept confidential from me.

GIB filed suit against Mr. and Mrs. Misselwitz in King Co. Superior Court to quiet title on a strip of land between their properties. The Misselwitz's counterclaimed raising adverse possession. Mario Bianchi represented GIB and Ian Macrae, the attorney who discovered the conveyance deed, represented the Misselwitz's.

Apparently Mr. Bianchi and Mr. Macrae entered into settlement negotiations over the quiet title action and Mr. Misselwitz's claims in this matter although I was never informed of this or involved. Mr. Misselwitz is quite old and his wife has suffered a series of debilitating strokes, and they have moved into assisted care.

From what I can glean GIB through Mr. Bianchi, and the Misselwitz's through Mr. Macrae, settled the quiet title action and Mr. Misselwitz's claims in this matter with an agreement GIB would release or waive any fee shifting against the Misselwitz's. Mr. Bianchi insisted on a confidentiality clause that prohibits Mr. Macrae or Mr. Misselwitz from releasing the agreement to me or speaking with me even though I have never received any notice that Mr. Macrae was substituting or Mr. Misselwitz no longer wanted me to represent him in this matter.

Your fee petition seeks fee shifting against Mr. Misselwitz and me. My research indicates fee shifting is not joint and several in any case. But if GIB has agreed to not seek fee shifting against Mr. Misselwitz I am confused as to why your fee petition seeks fees against Mr. Misselwitz.

I don't think it is proper for Mr. Bianchi to negotiate with my client and settle his claims in this matter without even notice to me, and to then require my clients to withhold the settlement agreement from me and not speak to me. I don't know if you have received notice or were involved in the settlement negotiations in this matter.

I believe the current events have created a potential conflict of interest between Mr. Misselwitz and me. I have asked Mr. Macrae to substitute for me at the court of appeals and represent Mr. Misselwitz in the fee petition process, and to certainly file the settlement agreement on behalf of the Misselwitz's, but Mr. Macrae refuses to substitute or disclose the settlement agreement because Mr. Bianchi has

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

DANIEL P. THOMPSON and  
THEODORE MISSELWITZ,

Appellants,

v.

THE CITY OF MERCER  
ISLAND,

Respondent,

and

ANDERSON ARCHITECTURE,  
Applicant, and ON THE ROCK,  
Owner, GIB DEVELOPMENT,  
LLC,

Respondents/Additional Parties.

COURT OF APPEALS  
CASE No. 72809-1

EXHIBIT INDEX TO  
APPELLANTS' COUNSEL  
DANIEL THOMPSON'S  
DECLARATION IN SUPPORT OF  
MOTIONS

EXHIBIT 7

*The Court of Appeals  
of the  
State of Washington*

RICHARD D. JOHNSON,  
Court Administrator/Clerk

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

RECEIVED

AUG 19 2013

August 19, 2013

BRICKLIN & NEWMAN, LLP

Claudia Macintosh Newman  
Bricklin & Newman, LLP  
1001 4th Ave Ste 3303  
Seattle, WA, 98154-1167

David Alan Bricklin  
Bricklin & Newman, LLP  
1001 4th Ave Ste 3303  
Seattle, WA, 98154-1167

Elisha Sandra Smith  
HELLER WIEGENSTEIN PLLC  
144 Railroad Ave Ste 210  
Edmonds, WA, 98020-4121

John Henry Wiegenstein  
HELLER WIEGENSTEIN PLLC  
144 Railroad Ave Ste 210  
Edmonds, WA, 98020-4121

Amy Vira  
San Juan County Prosecutor's Office  
PO Box 760  
Friday Harbor, WA, 98250-0760

CASE #: 68453-1-I

Michael Durland, Appellant v. San Juan County, Respondent

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on August 16, 2013, regarding request for attorney fees:

"Respondent Heinmiller is awarded attorney fees of \$13,373.50  
and costs of \$413.10."

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

APPENDIX C

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

SUPREME COURT NO. 93219-1

COURT OF APPEALS NO. 72809-1-I

---

DANIEL THOMPSON and THEODORE MISSELWITZ,

*Appellants,*

vs.

CITY OF MERCER ISLAND,

*Respondent,*

GIB DEVELOPMENT, LLC (ON THE ROCK, LLC) and ANDERSON ARCHITECTURE

*Additional Parties.*

---

**APPENDIX TO DANIEL THOMPSON AND THEODORE  
MISSELWITZ'S REPLY TO CITY OF MERCER ISLAND'S ANSWER  
TO PETITION FOR REVIEW**

---

**EXHIBIT 5**

No. 72809-1-I

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

---

DANIEL THOMPSON and THEODORE MISSELWITZ,

Appellants,

v.

CITY OF MERCER ISLAND,

Respondent,

ON THE ROCK, LLC and ANDERSON ARCHITECTURE,

Additional Parties.

---

GIB DEVELOPMENT, LLC (ON THE ROCK, LLC) AND  
ANDERSON ARCHITECTURE'S RESPONSE TO  
APPELLANTS' MOTION TO WITHDRAW, MOTION FOR  
AN EXTENSION OF TIME, AND MOTION TO COMPEL  
PRODUCTION OF SETTLEMENT AGREEMENT

---

J. Zachary Lell, WSBA #28744  
GIB Development, LLC, (On the Rock,  
LLC) and Anderson Architecture  
OGDEN MURPHY WALLACE, P.L.L.C.  
901 Fifth Avenue, Suite 3500  
Seattle, Washington 98164-2008  
Tel: 206.447.7000/Fax: 206.447.0215

{DPK1456829.DOCX;2/16041.000001/ }

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MAY 31 2016

THOMPSON

## I. INTRODUCTION

On May 20, 2016, Appellant Daniel Thompson filed three new motions with the Court: A Motion to Withdraw from Representation of Appellant Theodore Misselwitz; a Motion to Compel Disclosure of any Settlement Agreement Between GIB Development LLC and Mr. Misselwitz; and a Motion for Extension of Time to File Response to GIB's Petition for Attorney's Fees to Allow Mr. Misselwitz to Obtain Separate Counsel and File a Response. Additional Parties GIB Development LLC and Anderson Architecture hereby respond to these motions.

## II. ARGUMENT

### **2.1 Additional Parties Do Not Object to Appellant Thompson's Motion to Withdraw from Representation of Mr. Misselwitz.**

Additional Parties do not object to Appellant Thompson's Motion to Withdraw from representing Appellant Misselwitz. By the terms of Appellant's notice in this regard, Mr. Thompson's withdrawal becomes effective on May 30, 2016 or by order of this Court, whichever occurs first.

### **2.2 Appellant Thompson's Motion to Compel Disclosure of Any Settlement Agreement Between GIB LLC and Mr. Misselwitz Should Be Denied.**

Appellant Thompson also seeks an order from this Court compelling the disclosure of a confidential Civil Rule 2A settlement agreement between GIB Development LLC and Appellant Misselwitz arising out of a separate, unrelated lawsuit. For several reasons, this request should be denied.

First, it is undisputed that the above-captioned appeal has concluded. The Court has already issued its decision categorically denying the merits of Appellants' appeal. All of various motions filed by Appellants throughout the course of this appeal, including a post-decision motion for reconsideration of the Court's decision, have likewise been uniformly denied by the Court. The Court has granted Additional Parties the right to an attorneys' fees award pursuant to RCW 4.84.370. As such, **the only issue left to be resolved by the Court concerns the amount of the fee award.**

In accordance with RAP 18.1, on May 13, 2016, Additional Parties timely submitted an affidavit detailing their appellate expenses incurred and documenting the services performed by their counsel. The only permissible response to this affidavit contemplated by the Rules of Appellate Procedure is a submittal setting forth Appellants' specific objections to the requested fee amount. *See* RAP 18.1(e). Any argument outside of a direct objection to the amount of fees requested is irrelevant to

the question before the Court and should be raised—if at all—at another time and in another forum as appropriate. Such extraneous challenges are impermissible in the instant proceeding.

For this reason, Appellant Thompson's attempt to compel disclosure of a confidential Civil Rule 2A settlement agreement from a separate lawsuit is inappropriate here and should be rejected by the Court. The other suit in question, *GIB Development LLC v. Misselwitz*, King County Cause No. 15-2-30287-6-SEA, was a quiet title and adverse possession action that did not involve Appellant Thompson as either a litigant or attorney. The parties to that action were instead Appellant Misselwitz (and his spouse) and GIB Development LLC, both of whom were represented by other counsel. Delaying this Court's disposition of the pending fee affidavit in the above-captioned appeal by seeking to compel disclosure of a settlement agreement in an unrelated lawsuit is improper on its face. Mr. Thompson cites no supporting legal authority for this request, and none exists.

Appellant Thompson's purported rationale for seeking disclosure of the settlement agreement is undercut by Appellant Misselwitz's individual failure to object in any manner. Appellant Thompson acknowledges that he provided a copy of Additional Parties' fee affidavit to Appellant Misselwitz, Mr. Misselwitz's separate counsel in the quiet

title lawsuit, Mr. Macrae, as well as Mr. Misselwitz's adult son, Fields Misselwitz, who apparently holds power of attorney for his father. This purportedly occurred on May 16, 2016—seven days before the due date for any objection to Additional Parties' fee affidavit pursuant to RAP 18.1. Appellant Misselwitz apparently chose not to direct his separate attorney to file any separate response to the fee affidavit despite being notified of the opportunity to do so. It would thus appear, based on the communications from Mr. Macrae furnished by Appellant Thompson himself, that Mr. Misselwitz simply chose not to direct his attorney to file any individual response to the fee affidavit because he felt his larger dispute with GIB Development was sufficiently resolved through settlement. Therefore, Appellant Thompson's theory regarding Mr. Misselwitz's ability to respond to the fee affidavit is ultimately speculative at best.

More fundamentally, the instant fee affidavit proceeding under RAP 18.1 is limited by the plain terms of that Rule to the amount of an attorney fee award. Any future enforcement of the award is reserved to the trial court. *See* RAP 18.1(h). It would be in that forum—not the Court of Appeals—where Appellant Thompson could assert arguments related to how Mr. Misselwitz's settlement may affect his own contribution to the enforcement of the judgment. The pending fee affidavit relates only to the

total amount of recoverable fees in the above-captioned appeal, not to the enforcement of that judgment against either or both Appellants. Mr. Thompson's arguments related to his enforcement concerns are premature and should be addressed, if at all, to the trial court in a subsequent enforcement proceeding.

Lastly, Appellant Thompson's notice to withdraw becomes effective 10 days from the date of service, which was May 20, 2016. As such, Mr. Thompson will not be Mr. Misselwitz's designated counsel as of May 30, 2016, which is before the date that the pending motion to compel will be considered by the Court. The practical result of this timing consideration is that Appellant Thompson is seeking the disclosure of a confidential and protected settlement agreement that relates entirely to another party who, as of the time this Court will consider the request, is no longer even represented by Mr. Thompson.

Appellant Thompson, as a separate party in this litigation, has no legal right to compel the disclosure of another party's settlement agreement from another civil lawsuit in which he himself was not a litigant. Mr. Thompson's briefing implicitly affirms this fact in that he fails to cite any legal authority supporting any of his theories or requests. There is no legal basis to grant Mr. Thompson's Motion to Compel Disclosure of the Settlement Agreement and it should be denied.

### 2.3 There is No Need for an Extension for Response.

Appellant Thompson waited to file his motion for an extension of time until one court day before Appellants' objection to Additional Parties' fee affidavit was due, *see* RAP 18.1(e), and did not move to shorten time in order to have these motions heard simultaneously with Appellants' fee affidavit objection. As a result of this delay, the motion for extension of time is now moot because Appellants have since already filed their objection to the fee affidavit. *See, e.g., Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (mootness exists "if a court can no longer provide effective relief"). The Court cannot grant an extension of time to submit a document that has already been filed.

Moreover, the requested extension if granted would effectively afford Appellants two separate response opportunities to Additional Parties' pending fee affidavit. The Court should not condone tactical gamesmanship of this type.

Finally, as noted *supra*, Appellant Thompson acknowledged that Appellant Misselwitz, together with Mr. Misselwitz's separate counsel and adult son (who apparently has power of attorney), all received a copy of Additional Parties' fee affidavit on May 16, 2016. Mr. Misselwitz accordingly has had full notice of the pending fee request and had at least seven days to file a separate response, but chose not to. In fact, there is

nothing in the record remotely indicating that Mr. Misselwitz desires an extension of time in his own to file a separate response. Mr. Misselwitz was likewise served with a copy of Appellant Thompson's motions, *see* Declaration of Service filed with Mr. Thompson's pending Motions, and has taken no action whatsoever to support these requests. If Appellant Misselwitz feels that his interests have been properly taken into account and no action on the fee affidavit is necessary, there is no need for Appellant Thompson's motion.

### III. CONCLUSION

While Additional Parties do not object to Mr. Thompson's Motion to Withdraw as counsel for Mr. Misselwitz, no legal authority—and certainly none cited by Appellant Thompson—authorizes the compulsory disclosure of a confidential settlement agreement involving another party in a separate lawsuit. Mr. Thompson will not have any representational relationship with Mr. Misselwitz by the time his motion to compel is considered by the Court, and he therefore has no grounds for such request. Further, Mr. Misselwitz was served with copies of both Additional Parties' fee affidavit as well as Appellant Thompson's pending motions and apparently chose not to take any action. It appears that Mr. Misselwitz believes that his disputes with GIB Development are resolved. Therefore, there would be no need for an extension of time for Mr. Misselwitz to file

his response to the fee affidavit. Indeed, Appellant Thompson's request in this regard is now moot given that he has already filed an objection to Additional Parties' fee affidavit on behalf of both himself and Mr. Missewitz. Consequently, both the motion to compel and the motion for extension of time should be denied.

DATED this 31<sup>st</sup> day of May, 2016.



---

J. Zachary Lell, WSBA 28744  
Attorneys for Additional Parties  
GIB Development LLC and  
Anderson Architecture

## DECLARATION OF MAILING

I, Gloria J. Zak, an employee of Ogden Murphy Wallace, PLLC, make the following true statement:

On the date below, I emailed and hand delivered the attached document to the following:

**FOR ON THE ROCK:**

Mario Bianchi  
LASHER HOLZAPFEL  
601 Union ST, Suite 2600  
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**FOR APPELLANTS:**

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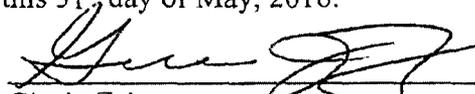
\* Mr. Thompson's withdrawal from representing Mr. Misselwitz became effective on May 30, 2016. Therefore, Mr. Misselwitz is being served directly as no counsel has filed a notice of appearance.

**FOR MERCER ISLAND:**

Kari L. Sand, City Attorney  
CITY OF MERCER ISLAND  
9611 SE 36th St.  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington this 31<sup>st</sup> day of May, 2016.

  
Gloria Zak

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**Subject:** RE: Supreme Court No. 93219-1: Thompson and Misselwitz, et al. v. City of Mercer Island, et al.

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**Cc:** danielpthompson@hotmail.com  
**Subject:** Supreme Court No. 93219-1: Thompson and Misselwitz, et al. v. City of Mercer Island, et al.

Please find attached the following documents that were filed with the court today:

Daniel Thompson and Theodore Misselwitz's Reply to City of Mercer Island's Answer to Petition for Review (with attached declaration of service) and Appendix to Daniel Thompson and Theodore Misselwitz's Reply to City of Mercer Island's Answer to Petition for Review with Exhibits 1-5. Please do not hesitate to contact our office should you have trouble downloading the documents.

Sincerely,

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