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CASE NO. 64504-8-I

**Court of Appeals
of the State of Washington
Division I**

JUDITH ANDERSON, a single woman,

Respondent/Plaintiff,

v.

RICHARD ANDERSON and MARGARET
ANDERSON, husband and wife,

Appellants/Defendants.

Respondent's Brief

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ORIGINAL

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ASSIGNMENT OF ERROR

Respondent Judith Anderson does not assign any error to the decision of the trial court.

STATEMENT OF THE CASE

When this litigation began, Plaintiff Judith Anderson (Judy) and Defendants Richard and Margaret Anderson (Rich) shared a common boundary separating their respective ten acre lots. Judy's lot #4 is located directly south of what was then Rich's lot #2. (CP 575). A dispute regarding their shared boundary resulted in Judy filing a complaint against Rich on April 19, 2007 for trespass, in ejectment and to quiet title. (CP 566).

Rich filed an answer to the complaint challenging the survey performed by Cascade Surveying upon which Judy relied, asserting that the boundary should instead be established by application of the common grantor rule and/or a hypothetical extension of an older survey performed by Voorheis (CP 548), which did not actually survey the boundary in question, but rather established a parcel of approximately 80 acres that was subsequently divided into smaller parcels including Judy's lot 4 and Rich's lot 2 (CP 241 and 243). However, Rich did not at that time file a counterclaim or identify the specific location where the boundary he

proposed should lie.

In August 2008, without notifying Judy or the court below, Rich sold his lot. (CP 476-479). The legal description of the land Rich conveyed away was identical to the legal description of the land he initially purchased, except for several easements and a boundary line adjustment on the opposite (north) end of Rich's lot not in dispute here. (CP 471-472, CP 476-477, CP 481-484).

Judy only learned of the sale when she met her new neighbors, Darren and Barbara Massey, for the first time during September 2008. The Masseys wished to install fencing along the perimeter of their lot and they quickly worked out with Judy a mutually agreeable placement of the fence along the boundary in question, essentially along the line as surveyed by Cascade, but with some minor deviations onto Judy's lot requested by the Masseys for their convenience, to which Judy agreed. (CP 485-486).

Because of Rich's sale of his property, there was nothing left to litigate between him and Judy. Specifically, the dispute between the litigants was now moot, and Rich no longer had standing to pursue it. Accordingly, on October 1, 2008 Judy's counsel sent to Rich's counsel a proposed stipulation and order to dismiss all claims between the parties. (CP 489-495). Rich declined to execute the proposed stipulation, and instead, on October 15, 2008 noted the case for trial, even though he had

filed no counterclaim. (CP 544). Thereafter, Judy served Rich with written discovery requests, not as Rich suggests because there remained a justiciable controversy, but simply to determine what Rich could possibly intend to litigate in light of his conveyance of the property to the Masseys and the absence of a counterclaim.

A trial date was set for April 15, 2009, which was later continued to September 10, 2009 and later to January 28, 2010. (CP 365-367, 522-524, 541-543).

On May 15, 2009, more than two years into this litigation, Rich filed a counterclaim. (CP 517-521). Both parties filed timely motions for summary judgment. Rich sought judgment on the merits of his counterclaim pursuant to the common grantor rule, while Judy asserted that Rich's sale of his property, legally described in all relevant respects just as it was when he initially acquired it, and without reservation of any portion of it or interest in it for himself, rendered the dispute between the litigants moot and terminated Rich's standing to proceed. (CP 402-484, 497-509).

Although Rich's motion was filed first, its considerable length and complexity required more than the ordinarily available judicial resources, which necessitated a special listing pursuant to SCLCR 56 (c) (B) (ii). (CP 623). Judy's motion, by contrast much less complex and requiring no extraordinary amount of the lower court's resources, was set on the court's

regular motions calendar and was therefore reached first. Since Judy's motion raised threshold issues, the resolution of which would determine whether there was any need to reach Rich's claim on the merits, addressing Judy's motion first was a logical and economical use of the court's resources, although it was actually the complexity of Rich's motion that necessitated its later scheduling. (CP 623).

The court below found that Rich's sale of his property, legally described as when he purchased it, rendered the dispute moot between the parties and extinguished Rich's standing to pursue his claims further. (CP 164). Accordingly, Judy's motion was properly granted. Rich filed a motion for reconsideration which the court below denied. (CP 5,6).

III. ARGUMENT¹

I. CR 41(a)(3) WAS CONSIDERED BY THE COURT BELOW, WHICH CORRECTLY CONCLUDED THAT CR 41 IS CONSISTENT WITH THE GRANT OF SUMMARY JUDGMENT IN JUDY'S FAVOR.

Rich's initial claim that the court below failed to consider CR 41 seems rather odd since Rich briefed the issue, (CP 26, 27), and there is no indication the court below did not consider Rich's CR 41 argument. Furthermore, CR 41 simply does not require a result different from that

¹ Although we find the various sections into which Rich's argument is divided to be confusing and repetitive, we utilize the same format to the extent possible so the Court may more easily locate our response to any given issue.

reached by the court below. CR 41(a)(3) states:

“If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff’s motion for dismissal, the action shall not be dismissed against the defendant’s objection unless the counterclaim can remain pending for independent adjudication by the court.”

The plain language of this rule precludes the dismissal of a counterclaim along with a voluntary dismissal of the plaintiff’s complaint unless there is an opportunity for “an independent adjudication” of the counterclaim, that is, an adjudication independent of the voluntary dismissal of plaintiff’s complaint.

The purpose of this rule is to allow a voluntary dismissal by a plaintiff only if a defendant who filed a counterclaim would not be thereby prejudiced, In Re Marriage of Parker, 78 Wn. App. 405, 897 P.2d 402 (1995), as would occur if the counterclaim was summarily dismissed along with the plaintiff’s complaint, regardless of whether the counterclaim was well-founded or not. In other words, a plaintiff cannot defeat a counterclaim simply by voluntarily dismissing her complaint. There must be some mechanism by which to address or ‘adjudicate’ the counterclaim.

The entire focus of the proceedings below was on Rich’s counterclaim. It was exhaustively addressed, reconsidered and in short, fully adjudicated. It proceeded as far as the facts and controlling principles of law would allow.

It was not because of the voluntary dismissal of Judy's complaint that the merits of Rich's counterclaim were not reached. Rather, it was mootness and a lack of standing, both fully briefed, considered and even reconsidered, that prevented its merits from being reached. Rich himself acknowledges on page 23 of his brief that an independent adjudication of his counterclaim would involve the resolution of the standing and mootness issues the court below in fact adjudicated.

Simply stated, Judy's complaint was not dismissed without an opportunity for Rich's counterclaim to be addressed, as CR 41(a) prohibits. On the contrary, the court granted Judy leave to voluntarily dismiss her complaint only **after** it fully addressed Rich's counterclaim and determined that standing and mootness issues precluded any further consideration of it. In doing so, the court below gave Rich's counterclaim the full consideration it warranted, and did not in any way run afoul of CR 41(a).

Rich's complaint on pages 22 and 23 of his brief that he lost the opportunity to have his own motion render moot Judy's motion is simply absurd.

Finally, Rich's contention that Judy's intent to voluntarily dismiss her claims was not disclosed timely is simply untrue. Indeed, her motion under consideration is titled "Plaintiff's Motion for Summary Judgment of Defendants' Counterclaims and **Dismissal of Plaintiff's Complaint as**

Moot,” (CP 402) (emphasis added), and of course shortly after learning of Rich’s sale Judy tendered a stipulation of dismissal to Rich. (CP489-495).

II. THE COURT BELOW DID NOT REVERSE THE BURDEN OF PROOF.

Judy carried her burden of proving that Rich sold his lot during the pendency of this action, legally described in all relevant respects just as it was when he purchased it. (CP 471-472, CP 476-477). Rich presented no competent evidence to the contrary, i.e. no evidence that he reserved any of it from his conveyance to the Masseys, or that he had anything left to reserve.

More specifically, Judy proved that, aside from the grant of certain easements and a boundary agreement involving the opposite or north end of the lot not in dispute here, (CP 481-484), the legal description of the property he sold was identical to the legal description of the property he purchased. In particular, the boundary line in question, the south boundary of Rich’s lot and north boundary of Judy’s, was legally described the same way in both the deed by which Rich acquired his lot and the deed by which he conveyed it to the Masseys. (CP 92-93, CP 471-472, CP 476-477).

Pursuant to CR 56(e), when a motion for summary judgment is made and supported factually as Judy has done here, the adverse party may not

rest upon mere allegations or denials in his pleadings. Rather, he must establish through specific facts that there is a genuine issue for trial.

Rich claims to have reserved from the conveyance to the Masseys title to, or some interest in, the area in question. But merely claiming such a reservation is insufficient pursuant to CR 56. He must produce factual support for having effectuated such a reservation, or at least establish that there are material facts genuinely in dispute requiring a trial. He failed to do so. As discussed in detail in section III E below, the only documents he produced that purport to have effectuated a reservation of a portion of the lot from his conveyance to the Masseys turned out to be unsigned documents from two different proposed sales of the property to other potential buyers that failed to close. (CP 466-467, CP 469).

Furthermore, as established below, the arguments Rich made to the court below actually demonstrate that he obtained from his predecessor in interest Boswell nothing other than what he later conveyed to the Masseys.

Thus, to the extent that the court below stated words to the effect that “There has been no demonstration that Defendant Anderson had any ownership in the property,” the court stated exactly what the record established, Rich’s failure to rebut what Judy had proven, that Rich conveyed away all of his property to the Masseys.

This in no way reflects the imposition of an impermissible burden on Rich. On the contrary, it places the burdens exactly where CR 56 requires.

Despite Rich's assertion on page 24 of his brief to the contrary, there was no factual dispute about what Rich conveyed to the Masseys.² Factually, what was conveyed to the Masseys was embodied in the deed and the legal description it contained, as it must be pursuant to the Statute of Frauds, RCW 64.04.010. Likewise, there was no factual dispute concerning the legal description of the lot Rich initially purchased. It too was clearly stated in the deed for the lot from his predecessor in interest Boswell. (CP 471-474).

Thus, the legal descriptions of the lot Rich purchased and of the lot he conveyed away were identical as to the south boundary. Rich does not contest this fact. (CP 92-93). Specifically, he does not claim that the lot's south boundary is legally described one way in the deed by which the property was conveyed to him, but in a different way in the deed by which he conveyed that lot to Masseys.

These facts clearly support, indeed they compel the conclusion that Rich conveyed his entire lot and all interests in it to the Masseys. Rich

² Any possible discrepancy between what Rich **agreed** to convey and what he **actually** conveyed to the Masseys is addressed on pages 13,14, 29-31, 35, and 36.

simply failed to produce any facts that support the contrary legal conclusion he urges.

Next, in one of his many improper attempts to bypass the threshold issues of mootness and lack of standing as he has done repeatedly throughout the court's consideration of these issues, Rich's counsel writes on page 25 of his brief,

“ . . . if the Trial Court took it upon itself to consider the merits of the boundary dispute . . . the Trial Court also committed error.”

Counsel then embarks on an irrelevant discussion of his version of the merits of the boundary dispute, knowing full well that the Court below neither considered nor ruled on the merits of Rich's boundary dispute position, which were not before that court.

Indeed, Rich's responses to the mootness and lack-of-standing claims asserted against him, both in the court below and again before this Court, have been largely to ignore them, and to instead delve into the merits of his counterclaim as though such threshold issues, and the lower court's rulings concerning them, were of no consequence.

We respectfully request that this Court decline this invitation to consider the merits of Rich's counterclaim, along with the several other similar invitations appearing throughout his brief. The merits of his counterclaim were not before the lower court, and therefore cannot properly be considered by this Court pursuant to RAP 9.12.

III. NO MATERIAL FACTS WERE GENUINELY IN DISPUTE.

- A. The material facts entitling Judy to judgment in her favor as a matter of law were not subject to genuine dispute.

As demonstrated below, the facts necessary to a determination that Rich's conveyance of his former property rendered the boundary dispute with Judy moot, and extinguished Rich's standing to continue pursuing it, were undisputed. Judy was therefore entitled to judgment as a matter of law.

- B. The conveyance rendered the subject dispute moot and terminated Rich's standing to pursue it further.

- (1) Mootness resulted from the lack of a justiciable controversy, not from any agreement between Judy and a non-party.

Rich contends that, based on the deposition testimony of Darren Massey, there existed no actual agreement between Judy and the Masseys regarding the boundary line they now share. From this Rich argues that the boundary dispute is not moot and should still be litigated between Rich and Judy (but not the Masseys), even though Rich no longer owns one of the properties this boundary line separates, and even though the folks whose properties are now separated by that boundary are not only not suing each other, they mutually agreed to the placement of the sturdy fence installed by the Masseys which now separates their properties. (CP 485-486, CP 235).

Rich's reasoning is fatally flawed in numerous ways.

First, this is not a contract case, where the existence and enforceability of an agreement is the focus. This is a mootness analysis, where the determinative factor is the **absence of a controversy, not the existence of an agreement**. See Morrison v. Basin Asphalt Co., 131 Wn. App. 158; 127 P.3d 1, 3 (2005).

While there may be no written agreement or even a complete 'meeting of the minds' between Judy and the Masseys regarding the boundary, they simply have no **controversy** for the courts to resolve. Instead, they reached at least a working agreement on the placement of the fence that now serves to separate their respective parcels. (CP 485-486, CP 235). Regardless whether the agreement reached by Judy and the Masseys is an enforceable agreement, working relationship, interim solution or any other such characterization, what it is not is a justiciable controversy.

The mere, hypothetical possibility that the current arrangement between Judy and the Masseys regarding their shared boundary may someday no longer suit their needs, is of no concern here.

As the court in Smith v. Anderson, 117 Wash. 307, 309-310; 201 P.1 (1921) stated:

"It is possible, . . . that a controversy may subsequently arise. . . But it is at once apparent that the opposite is equally probable; . . . In the

determination of controversies a court is not required to borrow trouble. It does its full duty when it determines the immediate controversy before it. In this instance the court had before it only the duty of properly locating the disputed boundary line, and the parties immediately affected were the only necessary or proper parties.”

Second, to avoid a finding of mootness, a controversy must exist between **the parties** to the action. “A case is considered moot if there is no longer a controversy **between the parties . . .**” Morrison v. Basin Asphalt Co., 131 Wn. App. 158, 162; 127 P.3d 1, 3 (2005). (Emphasis added.) The Masseys are not parties, and Rich has chosen to not invoke the joinder provisions to change that. (CR 18 & 19).

As demonstrated in the following section, even if such a dispute arose between Judy and the Masseys, Rich would have no standing with respect to it.

Third, Rich has cited no appellate decision or any other support for the notion that in a boundary dispute case, the existence of an agreement between the plaintiff and a non-party to whom the defendant sold his land is required to render moot the former plaintiff/defendant dispute.

Finally, Rich cites numerous excerpts from deposition testimony in an attempt to demonstrate some uncertainty about the boundaries of what Rich **agreed** to convey to the Masseys. As discussed in more detail below, any such uncertainty regarding what Rich agreed to convey to the

Masseys is not material for several reasons. There is no dispute regarding the legal description in the deed to the Masseys, and the agreement itself merges into the deed, which controls what was **actually** conveyed. Ross v. Kirner, 162 Wn.2d 493,498; P.3d 701,704 (2007.) Furthermore, parol testimony is inadmissible to alter the terms of the deed pursuant to the Statute of Frauds. Bingham v. Sherfey, 38 Wn.2d 886, 889; 234 P.2d 489, 491 (1951).

Accordingly, the boundary dispute that once existed between Rich and Judy ended when Rich sold and conveyed his entire parcel and all his interests in it. It is therefore moot, and his counterclaim was therefore properly dismissed.

- (2) Rich's conveyance of his property terminated his standing to assert claims regarding his former property's south boundary.

Rich does not directly confront the primary basis for the entry of summary judgment against him and the most glaring shortcoming in his position, that the conveyance of his property terminated his standing regarding its south boundary.³ Significantly, Rich cites no authority for the proposition that a person who sells his property retains standing in connection with his former boundary, which no longer separates his

³ Judy had to create a new section of her brief, one not corresponding to any section of Rich's brief, because he did not squarely address his lack of standing.

property from someone else's. That is because Washington law is to the contrary.

The only proper parties to a boundary dispute action are those immediately affected, Smith v. Anderson, 117 Wash. 307, 310; 201 P.1 (1921), and the only persons immediately affected are those whose properties are **separated by the disputed boundary line**. Cady v. Kerr, 11 Wn.2d 1; 118 P.2d 182 (1941). Rich is simply no longer a proper party. He no longer has standing regarding any dispute involving his former boundary, especially considering the relief he seeks, that the Court reform the record legal descriptions of lots 2 and 4, (Rich's brief, page 46), the lots owned by Judy and the Masseys.

The court below simply had no jurisdiction to change the legal description of the Masseys' lot. Clearly, the Masseys would be necessary parties as defined by CR 19 (a) since the judgment Rich ultimately seeks cannot be determined without affecting their rights. Harvey v. Board of County Commissioners, 90 Wn.2d 473, 474; 584 P.2d 391, 392 (1978). Also see Smith v. Anderson, 117 Wash. 307, 310; 201 P.1 (1921), Cady v. Kerr, 11 Wn.2d 1; 118 P.2d 182 (1941) and Magart v. Fierce, 35 Wn. App. 264, 266; 666 P. 2d 386 (1983).

Furthermore, even assuming that a dispute arose between Judy and the Masseys that resulted in a law suit between them, Rich would still not be a proper party to such a suit – he would still lack standing.

The court in Magart v. Fierce, 35 Wn. App. 264, 266; 666 P. 2d 386 (1983) faced a similar situation, and stated:

“RCW 7.28.010 sets forth the requirement regarding who may maintain an action to quiet title: “Any person having a *valid subsisting interest* in real property, *and a right to the possession thereof*. . . .” (Italics ours.) CR 17(a) provides in part: “Every action shall be prosecuted in the name of the real party in interest.”

“The evidence here established that prior to the commencement of this action. Magart sold . . . lot 5 to a Mr. McCallum . . . The trial court found that Magart did not reserve any portion of . . . lot 5 to himself. This is supported by Magart’s testimony. Since the disputed strip would be within the property sold to McCallum, Magart has **no standing** to bring this action as **he is not the owner and real party in interest.**” (Emphasis added).

Similarly, Rich conveyed away his entire lot, well before he filed his counterclaim, without reserving any portion of it. Rich has no standing to assert claims regarding the boundaries of his former property.

Rich owns two other lots, one situated west of Judy’s lot 4 and the other west of Rich’s former lot 2, so he still shares with Judy a common **corner** and the west boundary of Judy’s lot, not in dispute here. (See page 2 of Rich’s brief). However, our courts have rejected the notion that any land owners other than those whose properties are actually **separated** by the boundary in question, are “proper parties.” Smith v. Anderson, 117 Wash. 307, 310; 201 P.1 (1921), Cady v. Kerr, 11 Wn.2d 1; 118 P.2d 182 (1941).

Rich’s counterclaim was therefore properly dismissed.

- C. The fact that Rich sold his entire lot is established by the deed and the legal description it contains. The only ‘evidence’ on which Rich relies to refute that fact consists of inadmissible parol testimony, much of it purely self-serving.

A review of the critical documents, the deeds by which Rich acquired and subsequently conveyed away his lot to the Masseys, and in particular the legal descriptions they contain, establish unequivocally that in all relevant respects, the property Rich conveyed away is the same property he initially acquired. (CP 471-474, CP 476-479).

But Rich argues on page 30 of his brief, “That [conveyance of his entire lot] was disputed, however, **by Rich’s declaration,**” and “**by Rich’s deposition,**” and by the **declaration** of real estate agent Fred Iacolucci and by “parts of Darren Massey’s . . . **deposition testimony.**” (Emphasis added.)

Rich’s notion that the question of whether or not he conveyed his entire interest in lot 2 should be decided based on the **testimony and credibility of witnesses** rather than on the signed deed is exactly the type of uncertainty the Statute of Frauds operates to prevent.

The Statute of Frauds, RCW 64.04.010, provides that “Every conveyance of real estate, or any interest therein . . . shall be by deed.” RCW 64.04.020 provides that “Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds.”

The Statute of Frauds clearly governs Rich's conveyance to the Masseys, and mandates that the question of whether Rich sold his entire lot be determined by the deed Rich signed, not by what factual disputes he might later manufacture through largely self-serving parol testimony. Such parol testimony is inadmissible in evidence and cannot serve to alter the signed documents required by the Statute of Frauds. Home Realty Lynnwood, Inc. v. Walsh, 146 Wn. App. 231, 233; 189 P.3d 253, 254 (2008).

Accordingly, any factual disputes based on inadmissible parol evidence are simply not material to the entry of summary judgment appealed from.

- D. All of Judy's case law supports her mootness and lack of standing arguments.

Rich's assertion that none of the appellate authority cited by Judy involved a claim of mootness or a lack of standing asserted against a **defendant** is completely pointless. By definition, assertions of mootness or a lack of standing to sue are raised against a party who, as a moving party or claimant, has asserted some type of affirmative claim for which relief is requested. Having filed a claim for relief against Judy in his

counterclaim, Rich is such a party, frequently referred to as a **counterclaim plaintiff**.

As with any such party, whether a plaintiff or counterclaim plaintiff, who asserts a claim for relief against his adversary, that claimant must have standing to sue (or countersue), and the claim he asserts must be a justiciable one, not one that has been rendered moot. See Snohomish County v. Anderson, 124 Wn.2d 834, 842; 881 P.2d 240, 245 (1994), where the appellate court found the trial court's erroneous dismissal of a counterclaim harmless because the counterclaim presented no justiciable controversy, and was therefore moot. In that same case, the trial court properly dismissed a counterclaim based on a lack of standing.

The logical extension of Rich's argument, that a counterclaim plaintiff need not have standing to assert his claim and that mootness will not prevent him from going forward with it, is not supported by any case law cited by Rich, is in fact contrary to Washington law, Snohomish County v. Anderson, *Id.* and is too absurd to belabor further.

- E. Judy raised no claim of misrepresentation by Rich against the Masseys, and the court neither addressed nor ruled on any such assertion. Judy did properly establish that the only documents produced by Rich purporting to reserve part of his lot from the sale to Massey were not in fact genuine.

Rich insists that, contrary to the language of his deed, he did not convey his entire lot to the Masseys, but instead reserved a part of it for himself, specifically the disputed area. (Page 30 of Rich's brief). As demonstrated above, the controlling deeds establish that Rich conveyed to the Masseys all of the property Boswell initially conveyed to Rich. (CP 471-474, CP 476-479).

The only evidence that purports to effectuate such a reservation aside from inadmissible parol evidence were two documents Rich produced in response to Judy's discovery request for all documents that related to the sale and conveyance of their property to the Masseys. These documents are both entitled "Exhibit A" and are both unsigned. One of these documents has been referred to as the "Brandstetter Addendum" (CP 466-467) because of the words "Brandstetter revisions" handwritten at the top of its first page, to distinguish it from the other unsigned "Addendum A." (CP 469).

It turns out that these documents admittedly had nothing at all to do with the conveyance to the Masseys (CP 237-239), and were in fact related to two different prospective purchasers of this lot, the Sinclairs and

the Hixenbaughs respectively, whose purchases were never completed.⁴

Nonetheless, in addition to producing them in discovery as relevant to the Massey transaction, (CP 430-431, CP 461, CP 466-467, CP 469), Rich and his attorney interjected these documents into this case yet a second time, in a potentially much more serious way, by presenting them (with one important omission addressed below) to Darren Massey as exhibits to a declaration Massey was asked to sign, falsely stating that these two documents were part of the Masseys' agreement with Rich. (CP 216-229).

The one important omission referenced above is this. The Brandstetter Addendum is a two-page document. (CP 466-467). Only the **first** page identifies the prospective buyers as a Mr. and Mrs. Sinclair. The second page refers only to "buyer" and "seller," but does not name them. Only the second page was attached as an exhibit to the declaration Massey was asked to sign to adopt as having been part of his agreement with Rich. (CP 225). The first page, the page that identified it as having

⁴ Rich's assertion that documents complying with the Statute of Frauds are required only for a conveyance but not a reservation of an interest in real estate is addressed beginning on page 28, and also on page 36 below. If no such documents are required to effectuate a reservation, one might wonder why Rich created these documents in the first place, and then twice interjected them into this case.

nothing to do with the Massey agreement, was withheld from him. (CP 237-239, CP 216-229, CP 231-232).

Rich claims that he thought these two documents were somehow part of the disclosures he made in connection with the sale agreement with the Masseys, and it was for that reason that he produced them in response to a discovery request for all documents relating to the Massey transaction. (CP 237-239).

Nonsense. Even if there was some perceived reason for Rich to disclose to the Masseys disclosure documents from the failed sales to the Sinclairs and Hixenbaughs, why did he not produce the **actual** disclosure documents, the Form 17 Sellers' Disclosure Statements, from those failed sales? Why did he instead produce in discovery and attempt to have Massey adopt as though part of his agreement documents that just happen to support the otherwise unsupported notion that is central to his case, that he did not convey all his land to Massey but reserved some interest in it?

Rich has no answer to these questions, nor has he explained why the first page of the Brandstetter amendment, the one that unquestionably identified it as a document concerning the Sinclairs rather than the Masseys, was withheld from Mr. Massey when he was asked to falsely acknowledge that the second page was part of his agreement.

Significantly, the second page of the Brandstetter Amendment clearly contains language of **agreement** rather than just language of disclosure.

Concealing from Massey the first page of the Brandstetter Amendment that identified it as the phony it was, is an extremely serious matter, considering the havoc it could have created in this litigation had Massey not been appropriately suspicious of it, and instead simply signed the declaration adopting it as he was requested to. Although Rich himself might arguably have been confused about the significance of such a document, it is quite unlikely that his attorney was under any illusions about its significance given the nature of this ongoing litigation.

According to Rich's e-mail to Darren Massey dated July 15, 2009, (CP 233), it was Rich's attorney who 'put together' the proposed declaration and its exhibits as reflected in Darren Massey's e-mail reply. (CP 231-232).

Rich maintains that these documents have nothing to do with mootness or lack of standing. On the contrary, they are directly related to the gaping hole in Rich's case, his otherwise unsupported claim that he reserved rather than conveyed any interests he had in the disputed area, so

that the dispute would not be moot and he would maintain standing to pursue it.

Although the truth would have come out at trial, had Massey carelessly adopted the Brandstetter Amendment as though it was part of his agreement, Rich might have succeeded in manufacturing enough (false) evidence to convince the court below that there were facts in dispute sufficient to defeat Judy's motion for summary judgment.

Judy did not ask the court below to make any finding of misrepresentation nor grant any relief because of this conduct by Rich. She did, however, appropriately ask the court below to recognize that no legitimate documents operated to alter the deed's conveyance of Rich's entire lot or to reserve part of it from his sale to the Masseys, and that the only documents that purport to do so, documents that Rich twice improperly interjected into this case, were not in fact genuine. (CP 406-409).

IV. THE COURT BELOW CLEARLY UNDERSTOOD AND PROPERLY APPLIED THE GOVERNING PROVISIONS OF LAW.

A-D. The Form 17 Disclosure Statement did not alter the legal description of the lot Rich sold and conveyed to the Masseys, nor did it achieve a reservation of any land beyond the

bounds of the legal description which Rich simply did not own in any event.

Rich argues that his 'evidence' of having reserved for himself part of his lot from its sale to the Masseys is not limited to inadmissible parol testimony. Rather, he argues, the Form 17 Sellers' Disclosure Statement somehow modifies the agreement, which in turn somehow modifies the conveyance so that only part of his lot was conveyed away, even though the legal description in Rich's deed of acquisition from Boswell and his deed of conveyance to the Masseys are the same as to the south boundary.⁵ (CP 471-472, CP 476-477).

1. Rich owned no interest in the disputed area to begin with.

The first problem with his argument is that in order to reserve the disputed area for himself, he must own it (or some interest in it) to begin with. But since the legal description of the property he initially purchased is, for our purposes, the same as the property he sold, Rich cannot get over the very first hurdle of his argument.

⁵ Rich's reliance on the Form 17 Sellers' Disclosure he signed is frankly a bit unseemly. In response to question 1.C. - "Are there any . . . boundary agreements or boundary disputes?" - he falsely answered "No." (CP 453). There was in fact a boundary agreement reducing the lot size on the north (CP 481-483), and there was of course this active litigation over the disputed boundary on the south end.

Indeed, Rich's own arguments demonstrate that he acquired no interests from Boswell other than those which he later conveyed to the Masseys. On page 28 of his motion to reconsider, (CP 92), in attempting to explain how it is that he conveyed only the land north of the location where the Cascade survey placed the boundary in question, but not any interest in the disputed area south of that line, Rich writes:

“The only property conveyed by Rich and Margaret was the record legal description correctly located on the ground in the boundary survey by Cascade. To repeat, the property conveyed was the **record** legal description which, based upon the correct Cascade survey methodology, establishes the Cascade line, not the Voorheis line. Accordingly, the record legal description of the **south** line delineates and limits the conveyance - as a matter of law - at the Cascade line.” (Emphasis by counsel for Rich.)

Rich's reasoning, at least in this respect, is correct. Specifically, it is consistent with the requirements that the conveyance of any interest in real estate be accomplished by deed. RCW 64.04.010.

We can apply this same reasoning to his initial acquisition of the property to determine what property Rich had available to either convey to the Masseys or reserve for himself, especially since the conveyances both to and from Rich utilized the exact same 'record legal description' of the south boundary. Even the existence of the Cascade survey was specifically

disclosed, in writing, to the purchasers in both transactions. (CP 223, CP 126).

In fact, by changing only a single word, Mr. Brandstetter's reasoning may be applied to Rich's acquisition of his property from Boswell with precision:

"The only property conveyed [TO] Rich and Margaret was the record legal description correctly located on the ground in the boundary survey by Cascade. To repeat, the property conveyed was the **record** legal description which, based upon the correct Cascade survey methodology, establishes the Cascade line, not the Voorheis line. Accordingly, the record legal description of the **south** line delineates and limits the conveyance - as a matter of law - at the Cascade line."

Thus, Rich's own reasoning, and RCW 64.04.010, compel the conclusion that the land he acquired from Boswell and therefore had available to convey to the Masseys was only that land north of the admittedly accurate Cascade survey line and nothing to its south. This is exactly what Judy has maintained all along.

Let us also consider what Rich described as "the single most important undisputed fact," that a legal description can be subject to the conflicting opinions of surveyors who place the same legally described line at two different locations on the ground. (CP 68,69). Thus, if the south boundary of the lot Rich acquired from Boswell was subject to

conflicting surveys by Cascade and by Voorheis, then that south boundary of the land he conveyed to Massey, having the very same legal description, would likewise be subject to the same two conflicting surveyors' opinions. Regardless of which survey is correct, either way Rich has no interest in the south boundary or beyond following his sale to the Masseys. But since Rich now acknowledges the correctness of the Cascade survey, the south boundary as located by Cascade establishes the south end of the lot Rich acquired from Boswell and later conveyed to Massey.

Rich cannot of course argue that he acquired rights to the disputed area pursuant to his chosen theory, the common grantor rule, **after** his purchase from Boswell. The common grantor rule applies, if at all, as soon as the common grantor, Caverly, made his sale to Boswell. Schultz v. Plate, 48 Wn. App. 312, 315; 739 P.2d 95, 96 (1987). Boswell sold to Rich whatever interests she had in this property; and Rich, using the same legal description Boswell used (at least with respect to the south boundary), conveyed all those same interests to the Masseys.

Finally, let us also consider Rich's related argument that documentation in compliance with the Statute of Frauds is needed only to convey, but not to reserve an interest in real estate. (CP 77). This

argument supports the contention he must make, that he conveyed no 'non-record' interests in the disputed area to Masseys. However, it also necessarily means that Boswell, using the same legal description Rich used in conveying to Massey, conveyed no 'non-record' interests, assuming she had any, in the disputed area to Rich.

Thus, Rich clearly acquired from Boswell nothing more than what he later conveyed to the Masseys, and therefore had nothing else to reserve from his sale to the Masseys.

But let us ignore this rather glaring, and indeed fatal, shortcoming for the moment, and examine the rest of Rich's argument, in which he incorrectly relies on the agreements of sale rather than the deeds to demonstrate what was conveyed.

2. Rich's repeated reliance on agreements of sale (or disclosure documents) instead of deeds to establish what was conveyed is misplaced.

It should first be noted that Rich's reliance on the Form 17 Disclosure Statement to establish that he conveyed to Massey nothing south of the south boundary completely misses the point. Although as demonstrated below his analysis is incorrect, we **agree** that the Cascade survey is accurate. We **agree** that Rich conveyed to Massey nothing south of the Cascade line because Rich owned nothing south of that boundary to

begin with. The Form 17 cannot and does not change that. More importantly, it does not create what Rich lacks, some interest south of the boundary in question.

Although the Form 17 itself specifically states in section 11 (D), “This information is for disclosure only and is not intended to be a part of the written agreement between buyer and seller,” (CP 457), the agreement of sale states in section 9, “Buyer will have a remedy for Seller’s negligent errors, inaccuracies, or omissions in Form 17.” (CP 432). An addendum to Form 17 states, “Cascade Survey was done on the property.” (CP 223).

From this Rich concludes that by virtue of the Form 17 reference that “Cascade Survey was done on the property,” his **conveyance** to the Masseys only included that portion of his lot north of that line. But what happened to the point he was attempting to establish, that the Form 17 somehow proved he owned and held back something in reserve? The Form 17 simply has no such effect.

Here is how Rich describes his clearly erroneous but recurring argument:

“ . . . the written **agreement** only **conveyed** the property based on the Cascade survey.” (Appellant’s brief, page 39, emphasis added.)

Nothing is **conveyed** by an agreement of sale. RCW 64.04.010 provides that “Every conveyance of real estate, or any interest therein . . . shall be by deed.” The **deed** effectuates the conveyance based on the legal description contained therein. Moreover, “Under the merger doctrine, the provisions of a real estate purchase and sale agreement merge into the deed upon execution of the deed. Execution and acceptance of a deed varying from the terms of the underlying purchase and sale agreement amends the contract so that the provisions of the deed generally fix the parties' rights.” Ross v. Kirner, 162 Wn.2d 493,498; P.3d 701,704 (2007).

True, the doctrine of merger does not bar actions for fraud, misrepresentation or mistake, Ross, Id. So if there existed some conflict involving misrepresentation between what Rich **agreed** to convey to the Masseys and what he **actually** conveyed, there could arise a dispute between Rich and the Masseys. But there is no doubt about what Rich actually conveyed to the Masseys, the same legally described property he acquired from Boswell as reflected in the deeds to and from Rich. (CP 471-474, CP 476-479).

Thus, regardless what his **agreement** with the Masseys states, what Rich **actually conveyed** to the Masseys is established by the deed and the legal description it contains. Likewise, regardless of what his

agreement with his predecessor in interest Boswell states, what she actually conveyed to Rich is established by the deed and its legal description. In all respects relevant here, those legal descriptions match. Rich conveyed to the Masseys everything he had available to convey, and there is simply nothing left for Rich to be fighting about with Judy.

Rich reserved nothing for himself, and owned nothing else to reserve in any event. The Form 17 does absolutely nothing to change that.

- E. Aside from the grant of easements and a boundary line adjustment on the opposite, north end of Rich's lot not at issue or in dispute here, the legal description of the property Rich initially acquired and the legal description of the property he conveyed to the Masseys are identical.

Rich next makes the truly pointless observation that the legal description in his deed of acquisition (CP 471-472) is not exactly the same as that in his deed of conveyance (CP 476-477) to the Masseys. The fact of the matter is that the only differences in the two legal descriptions are of no significance to the issues before us. Those two differences consist of the grant of certain easements and a boundary line adjustment affecting only the opposite or north end of the lot that is not in dispute or at issue here. (CP 471-472, CP 476-477, CP 481-484).

The relevant south boundary of Rich's former lot was legally described in Rich's deed of conveyance to the Masseys just as it was when

Rich acquired that lot to begin with.

Next, Rich states:

“Moreover, even the south line of Carol Boswell’s **conveyance** was, **by contract, described differently** than the conveyance to Masseys.” (Rich’s brief, page 41, emphasis added.)

Here Rich once again tries to rely on language in an **agreement** rather than in the **deed** to describe what was conveyed. This time it is the agreement between him and Boswell. Because a conveyance is accomplished by a deed rather than by an agreement of sale, and further because the agreement merges into the deed, it is the deed that controls what was conveyed rather than the agreement. Ross, Id., RCW 64.04.010.

Thus, Rich’s conclusion on page 41 of his brief that “Carol Boswell therefore conveyed, without warranty, all her interest from the **Cascade** [survey] line on the **northern** border to the [hypothetical] **Voorheis** [survey] line on the **south** border” (emphasis added), is utter nonsense.

What Boswell conveyed was the land legally described in her deed to Rich, **however** that legal description is correctly surveyed, which the parties now agree is as surveyed by Cascade. Moreover, the Voorheis survey is not even mentioned in Rich’s deed from Boswell. (CP 471-474).

Nor is it mentioned in the addendum Boswell attached to her agreement with Rich that specifically describes the status of the south boundary. (CP 37).⁶

The assertion that the boundaries of the lot Rich acquired should be determined by the Cascade survey on the north but by the hypothetical Voorheis survey on the south is patently frivolous.

Likewise, the notion that he bought to the south line as hypothetically surveyed by Voorheis but sold to the same legally described line, but as correctly surveyed by Cascade, is pure nonsense.

Rich's arguments are hopelessly contradictory, and simply do not withstand analysis.

F. Rich's claim that the subject boundary's legal description was not warranted by Boswell when she conveyed to Rich, but was warranted by Rich as the line as surveyed by Cascade when he conveyed to the Masseys is simply untrue, but also meaningless.

Once again Rich resorts to meaningless perceived differences in his agreement to purchase the property and his agreement to sell it, claiming that the south line's legal description in his deed of acquisition means one thing, i.e., the hypothetical Voorheis location, but that the exact

⁶ The Voorheis survey did not actually establish **any** boundary between lots 2 and 4. That survey established an 80 acre parcel, (CP 241), that was **later** divided into smaller lots including Judy's lot 4 and Rich's lot 2. (CP 243).

same legal description means something entirely different in his deed to the Masseys, i.e. the Cascade location.

This time the distinction he attempts to draw is that Boswell did not warrant the accuracy of the Cascade survey in her **agreement** with Rich, while Rich allegedly did warrant the line as surveyed by Cascade in his **agreement** (actually the Form 17) with the Masseys. Once again, this argument is without merit, first because both agreements merged into the deeds, and the deeds (to and from Rich) contain the same legal description of the south boundary of Rich's former lot. Neither deed makes any reference to either the Cascade survey or the Voorheis survey. Rather, each deed simply refers to the same legal description of the south line. (CP 471-472, CP 476-477).

Second, Rich simply did not 'warrant' the Cascade survey to Massey. His deed to the Masseys does not mention the Cascade survey, and the Form 17 addendum, which is not even part of the agreement except perhaps to the extent that it contains misrepresentations, merely states that "Cascade survey was done on the property." (CP 223). That is hardly a warranty of its accuracy.

The bottom line here is that the deeds control what was conveyed to and from Rich. Because the legal descriptions of the south boundary

match, Rich acquired to and later conveyed to the same south boundary as correctly surveyed by Cascade.

G. The Statute of Frauds governs Rich's conveyance to the Masseys.

Rich's conveyance to the Masseys is undeniably governed by the Statute of Frauds. RCW 64.04.010 provides that "Every conveyance of real estate, or any interest therein . . . shall be by deed." It is therefore the conveyancing document, the deed, that necessarily establishes that Rich conveyed to the Masseys the same interests he initially acquired in the subject property and in the disputed area (none), so that his standing with respect to the boundary in question has been extinguished.

In his attempt to overcome this fatal flaw in his case, Rich has repeatedly throughout his various briefs attempted to misdirect the inquiry by pointing out that the Statute of Frauds does not apply **in boundary disputes** because they frequently involve non-record property rights, i.e., rights not established by a formal conveyance and therefore outside the legal description of the property in question.

But once again, under consideration here are not the merits of a boundary dispute, but rather the effect of a conveyance, specifically, whether that conveyance eliminated Rich's standing to assert the merits of

his boundary dispute claim. Because the results of the conveyance determine whether Rich has any standing to assert the merits of his boundary claim, the conveyance must be analyzed by reference to the Statute of Frauds, which in turn leads to the inescapable conclusion that Rich conveyed to the Masseys the same interests he initially acquired from Boswell.

H – I. Rich’s assertion, once again, that a lack of standing can only be asserted against a plaintiff and not a defendant is still incorrect.

Rich returns to the notion that a lack of standing can only be asserted against a plaintiff but not against a ‘counterclaim plaintiff,’ i.e., a defendant who has asserted a counterclaim. We addressed this in section “III D”, page 18 above and need not repeat it here.

J. Reformation of the legal description of properties owned by Judy and a non-party was not before the court below and is not before this Court.

Here Rich insists, once again based improperly on the merits of his counterclaim, that the court should ‘reform the record legal descriptions of Tracts 2 and 4.’ But the boundary in question now separates properties owned by Judy and the Masseys. Because they have no controversy for any court to decide, that previous dispute is moot, and the doctrine of standing prohibits a litigant such as Rich from raising someone else’s

legal rights. Branson v. Port of Seattle, 152 Wn.2d 862, 877; 101 P.3d 67, 75 (2004). Indeed, as noted on page 15 above, the court below simply had no jurisdiction to change the legal description of the Masseys' lot.

The claim in his footnote 21 on page 46 of his brief that the court could preserve access over the disputed area to other properties Rich owns to the west of lots 2 and 4 was never before the court below. Rich did not plead a right to a prescriptive or other type easement, (CP 517-521) and even if he had, the merits of Rich's claims were not before the court below and could not have been reached because of the mootness and lack of standing discussed above. Finally, Rich reserved access easements over the land he conveyed to the Masseys in any event, as reflected in the deed. (CP 476-479).

V. JUDY MADE NO MISREPRESENTATION CLAIM.

Rich returns for some reason to the erroneous claim raised in section IV E of his brief that Judy improperly raised a claim of misrepresentation on the Massey's behalf. We already responded fully in section IV E of this brief above, and need not do so again.

VI. THE COURT BELOW DID NOT HAVE THE MERITS OF RICH'S COUNTERCLAIM BEFORE IT AND DID NOT RULE ON THEM.

One thing the parties now agree on is that the court below neither had before it nor ruled on the merits of Rich's counterclaim or his own motion for summary judgment.

Yet Rich's attorney nonetheless designated his motion for summary judgment on the merits of his counterclaim as part of the clerk's papers in this appeal. (CP 2). Not knowing for what possible purpose Rich designated his own motion for summary judgment, Judy designated her responses thereto, only to prevent Rich from somehow taking unfair advantage of his own motion without any opposing documents. (CP 576-577).

But it is clear now that neither party believes or claims that Judge Lucas addressed the merits of Rich's claims. Those claims were not before Judge Lucas and are likewise not before this Court.

Indeed, Rich's designation of his summary judgment motion in this appeal is yet another attempt to ignore what he cannot defeat.

The bottom line here is that Rich cannot overcome the mootness of his claims or his lack of standing to assert them. He certainly cannot be permitted to simply ignore them altogether.

VII. THE LETTER OF UNDERSTANDING AND ALL OTHER SUCH MATTERS RELATING SOLELY TO THE MERITS OF RICH'S COUNTERCLAIM WERE NOT BEFORE THE COURT BELOW AND CANNOT BE CONSIDERED BY THIS COURT.

The letter of understanding referenced numerous times by Rich is the centerpiece of his counterclaim, which actually demonstrates just how weak his counterclaim is. It relates to an adversely possessed fence line rather than a surveyed line on a different property not involved in this action. Judy responded at length to Rich's assertions regarding this letter of intent, and thoroughly debunked them, at pages 9 – 12 of her response to Rich's motion for summary judgment. (CP 633-636).

However, neither Rich's counterclaim, his motion for summary judgment nor any of its excessively voluminous exhibits were before the court below, and they may not be considered by this Court either. RAP 9.12.⁷

Rich's responsive brief will undoubtedly include even more improper references to the merits of his counterclaim, and they too should be disregarded by this Court.

CONCLUSION

Judy firmly established and the court below correctly concluded that Rich conveyed his entire property and all relevant interests in it to the

⁷ Also not properly before this Court are Appendices B, C, and D to Rich's brief. They are admittedly not part of the clerk's papers, and although he purports to ask permission to include them pursuant to RAP 10.3 (a) (8), he included them **without** this Court's permission.

Masseys, thereby rendering his counterclaim moot and eliminating his standing to pursue it.

The lower court's entry of summary judgment in Judy's favor was altogether proper and should be upheld. The Respondent therefore respectfully requests that this Court deny the Appellants' appeal.

Respectfully Submitted this 24th day of February, 2010.

A handwritten signature in black ink, appearing to read 'R. Stegeria', written over a horizontal line.

Roy T. J. Stegeria, WSBA#36402
Law Office of B. Craig Gourley
Attorneys for Respondent

RCW 64.04.010

Conveyances and encumbrances to be by deed.

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or evidence of interest by assignment by the holder thereof by a simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are hereby declared to be legal and valid.

[1929 c 33 § 1; RRS § 10550. Prior: 1888 p 50 § 1; 1886 p 177 § 1; Code 1881 § 2311; 1877 p 312 § 1; 1873 p 465 § 1; 1863 p 430 § 1; 1860 p 299 § 1; 1854 p 402 § 1.]

RCW 64.04.020: Requisites of a deed.

RCW 64.04.020

Requisites of a deed.

Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by *this act to take acknowledgments of deeds.

[1929 c 33 § 2; RRS § 10551. Prior: 1915 c 172 § 1; 1888 p 50 § 2; 1886 p 177 § 2; Code 1881 § 2312; 1854 p 402 § 2.]

Notes:

***Reviser's note:** The language "this act" appears in 1929 c 33, which is codified in RCW 64.04.010-64.04.050, 64.08.010-64.08.070, 64.12.020, and 65.08.030.

Appendix "A"

FILED
COURT OF APPEALS IN THE
STATE OF WASHINGTON

2010 FEB 25 PM 1:09

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JUDITH ANDERSON, a single woman,

NO. 64504-8-I

Plaintiff/Respondent,

PROOF OF SERVICE

v.

RICHARD ANDERSON and MARGARET
ANDERSON, Husband and Wife,

Defendants/Appellants.

TO: Clerk of the Court,

AND TO: Appellants RICHARD and MARGARET ANDERSON through Gary Brandstetter, their attorney,

I, Tracy Swanlund, declare and state on oath and under penalty of perjury under the laws of the state of Washington as follows:

1. I am over 21 years of age, not a party to or interested in the above-mentioned action, and otherwise competent to testify to the matters set forth.

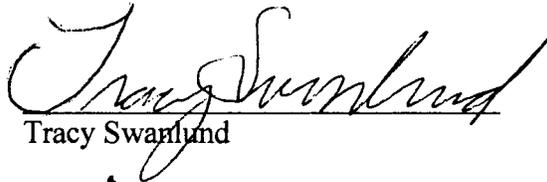
2. On the 24th day of February 2010, I did cause to be delivered via Legal Messenger the following document:

RESPONDENT'S BRIEF

3. This document was addressed as follows:

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

DATED: February 24, 2010.


Tracy Swanlund