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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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NO. 668404

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ASHLEY THOMAS and WENDI SMITH, husband and wife, and their
marital community composed thereof; CHARLES M. OGDEN, an
unmarried individual; and WILLIAM G. BROWN and G. LYNN
BROWN, husband and wife, and their marital community composed
thereof,

Appellants,

v.

BARRY REISS, an unmarried individual; and WALTER GUSTAFSON
and SHEILA GUSTAFSON, husband and wife,

Respondents,

ASHLEY THOMAS and WENDI SMITH, husband and wife,

Counterclaimants/Third-Party Plaintiffs,

v.

BARRY REISS, an unmarried individual; and WALTER GUSTAFSON
and SHEILA GUSTAFSON, husband and wife,

Counterdefendants,

and

HOMESTREET BANK, a Washington State Chartered Savings Bank,
Third-Party Defendant.

APPELLANTS' REPLY BRIEF

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The appellants, Ashley Thomas and Wendi Thomas (the Thomases), hereby reply to Respondent's Appellate Brief. The Thomases address only the issue stated below, as other points raised in that brief are addressed in their initial brief.

1. At no time did the Thomases ever agree to a survey as drawn by Thomas Berry.

In his brief, the respondent, Barry Reiss (Reiss) contends that he withdrew his Motion to Enforce Settlement Agreement in September, 2010 because "the Thomases agreed to accept the Stipulation and Order and *survey as drawn*." (Resp. Br., 4; emphasis added.) Reiss then contends that "[a]t that time, the survey included the area in dispute in this appeal and identified that property as belonging to Reiss." (*Id.*) Reiss next quotes a letter his counsel sent to the Thomases' counsel on December 7, 2010:

As you will recall, the Thomases previously agreed, after we filed a motion to enforce the settlement agreement, to the survey as performed by Mr. Barry and did not disagree with the areas surveyed or staked pursuant to the terms of the Settlement Agreement.

(*Id.*) Reiss then states, "[a]t no point did the Thomases disagree with the letter or its contents, including the fact that they agreed to the Stipulation and Order and Mr. Barry's survey." (*Id.*, 4-5.) Reiss concludes, ". . .

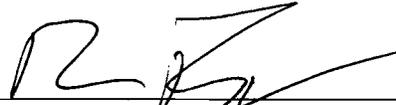
not once from August 2010 on, when the survey was completed, or during the dispute over the triangular area to the west, did the Thomases raise any issue with the ten foot area southeast of the garage, which is the subject of this dispute. (*Id.*, 5.)

The point of this curious argument is not entirely clear. In any event, the record could hardly be more clear that the Thomases never agreed to any survey Thomas Barry drew and that they challenged his drawing of the line to the east of the garage as soon as they became aware of what he had done. When Barry performed his first survey in August, 2010, Mr. Thomas pulled up the stakes. (CP 23, ¶ 3.) Such action would certainly suggest disagreement with his survey. Then, following Reiss's striking of the motion to enforce settlement in September, the actions of the Thomases' counsel plainly indicated that there was no agreement concerning a survey; he sought unsuccessfully to meet Barry at the Thomas residence to ensure that the survey would comply with the terms of the stipulation. (App. Br., 5.) Finally, when Barry visited the Thomas residence for the second time to survey and stake the boundary line, on December 13, 2010, Mr. Thomas went outside to tell him he erred when he staked the line to the east of the garage. (CP 27, ¶ 7.)

The record simply does not permit Reiss's claim that the Thomases were somehow late to the game in challenging the boundary at issue. They did not ever agree, even tacitly, that the stipulated line extended to the east.

DATED this 24th day of August, 2011.

Respectfully submitted,

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

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