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Court of Appeals No. 68407-8

Skagit County Superior Court No. 07-2-02415-1

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IN THE COURT OF APPEALS, DIVISION ONE

STATE OF WASHINGTON

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**TASSO SCHIELKE,**

Defendant-Appellant,

v.

**GUENTHER and URSULA THOMAS,**

Plaintiffs-Respondents,

And

**The ESTATE OF ULRIKE SCHIELKE,**

Defendant-Respondent.

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RESPONSE BRIEF OF RESPONDENTS THOMAS

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ALAN R. SOUDERS, WSBA #26192  
Attorney for Plaintiffs/Respondents Thomas  
913 Seventh Street  
Anacortes, Washington 98221  
(360) 299-3060

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## I. INTRODUCTION

Tasso Schielke appeals an Order Enforcing an Order for Partition which decided this case, and, by appealing the enforcing order, seeks to reopen the Order for Partition itself as clarified. Because the Order for Partition preceded his appeal by two years and four months, and the clarification preceded his appeal by a year and seven months, appeal of the Order for Partition is time barred. Because Tasso Schielke cites no legal authority for appeal of the enforcing order, his appeal on that score should be denied. Beyond these procedural matters, his appeal lacks objective merit.

## II. STATEMENT OF THE CASE

The Appellant correctly describes that the Schielkes and Thomases purchased the Sinclair Island property as tenants in common in 1997 and

build a cabin on the property. The property was used primarily for vacation purposes as the parties all lived in Germany.

Unfortunately, the Appellant mischaracterizes much of the procedural history of this case, casting confusion over the issues. The Respondent shall clarify the history below.

The Plaintiff filed an action for partition, requesting that the property be sold because it was difficult to partition in kind. Mr. Schielke rejected the Thomases' position and insisted on partition in kind. RP 7-17-09, 5-8.

Before the Plaintiff even began discussing the merits of partition in kind, Mr. Schielke presented his partition plan to the Court. The transcript from the July 17, 2009 hearing reflects the following conversation between Mr.

Schielke's attorney and Judge Susan Cook before opening statements even commenced:

MR. SCHUTT: Yes, Your Honor. We are going to offer a plan for the Court for partition, demonstrate that it is a fair plan. And that by forcing sale my client will be greatly prejudiced.

THE COURT: Well, if this was a sandwich I would have one party divide it and have the other party pick first. Has that ever occurred to anybody?

MR. SCHUTT: We have offered that, Your Honor. And we will attempt to again offer that. I've got a proposal from my client as to how the property should be divided.

THE COURT: Do you care who partitions it and who picks?

MR. SCHUTT: We pick the partition for particular reasons. We're willing to offer the opposition first pick. RP 7-17-09, 5-6.

In his motion filed on April 27, 2009, three months before trial, the Appellant provided a plan for partition, consisting of a crude Google map photo of the property with imprecisely drawn lines using the Word drawing feature. The lines showing the property divisions were drawn as wide as the stairway at the top of the stairs. To clarify the crude photo, the plan included specific language that described the division and certain features to be located on each side of the dividing line. In particular Mr. Schielke described Parcel A (the smaller parcel), by saying "smaller part with big open building lot (~170k sq.feet), road entrance, watertower & dwell, work-shop, generator, carport, gravel-pit, shared beach stairway". The larger parcel, Parcel B, was described as "bigger part but mostly restricted wetland, hut, pond, solar, propane shed, shared beach stairway, right of way

to entrance". Def.'s Mot. and Aff. for Part. of Prop. at 4.

The Court should note that the plan presented with the Motion and Affidavit for Partition of Property differs from that presented at trial as an exhibit, and which was presented to the Court presently. First, the plan presented with the original motion delineates the wetlands area on Parcel B, showing an area of over half of the waterfront parcel. This wetlands area was left off the exhibit later presented to the Court. Mr. Schielke, at the July 17, 2009 hearing, explains that the presence of the wetlands decreases the value of Parcel B, thus making the parcels equal. There are a few other minor differences between the plan submitted by Mr. Schielke with his motion for partition and what was shown at trial. Def.'s Mot. and Aff. for Part. of Prop. at 4, RP 7-17-09, 11-12, EX 3, EX 4.

Mr. Thomas argued against physical partition, but Judge Cook adopted Mr. Schielke's plan. The Order for Partition entered on September 22, 2009 included language that described the division of the property per the description provided on Mr. Schielke's plan, locating the various features listed on the appropriate side of the line of division. CP 94-96. A side-by-side comparison of the partition description of the September 22, 2009 Order mirrors the partition description plan as presented by Mr. Schielke.

After the September 22, 2009 order, Mr. Schielke changed attorneys and, with the help of Mr. Garl Long, his new attorney, he filed a motion on March 15, 2010 to clarify the Order for Partition.

On June 17, 2010, at a hearing on the Schielke motion for clarification, the Court considered

the transcript of the July 17, 2009 hearing and the testimony of Paul Monohon, the surveyor employed to survey the property to allow for partition. The Order of Clarification for Partition, dated July 2, 2010, ordered the surveyor to prepare a survey that reflected the previously decided partition. The only clarification was that the calculation of the square footage on the waterfront portion of Parcel A should be calculated starting at the top of the bank along the beach, rather than at the high water mark. This gave Mr. Schielke additional square footage. Other than that, the order reinforced the September 22, 2009 order. CP 159-160.

After entry of the Order of Clarification, Mr. Schielke delayed the approval of a survey, until such time as Paul Monohon retired. The parties then had to go back to court to get approval of a different surveyor to prepare the property

survey. The court approved this change. CP 19-20.

The Plaintiff then filed a motion to enforce the Order for Partition, as clarified. CP 21-47. This motion to enforce was considered at a hearing on August 19, 2011 by Judge Dave Needy. CP 63.

On October 25, 2011, Judge Needy entered an Order Enforcing Order for Partition, with multiple findings. The findings included that there was an enforceable order of September 22, 2009 as clarified, that the order included language that clearly described the partition, adjusting the line shown on the survey, but ordering enforcement of the remainder of the order. CP 63-67. Tasso Schielke filed a Motion for Reconsideration on November 4, 2011, which was denied. CP 85.

### III. ISSUES

1. Should the Court consider the Order of Partition entered September 22, 2009 as Clarified on July 2, 2010? No.
2. Should the Court find in favor of Appellant on his assignments of error? No.

### IV. ARGUMENT

#### A. Standard of Review

Appellant Tasso Schielke correctly states that, because this is a partition action, the Standard of Review is whether the party claiming error has shown the findings are not supported by substantial evidence. As discussed herein, partition in this case did not result from a settlement agreement between the parties, but rather from an Order for Partition as clarified. Therefore, de novo review is inappropriate.

#### B. Scope of Review

The scope of the Appellate Court's review is limited to the Order entered in October of 2011

and the denial of the motion for reconsideration. The Court cannot now review the Order for Partition of September 22, 2009 as clarified on July 2, 2010, because the Appellant did not timely raise objection to or appeal those issues. Therefore, the only issues available for consideration are those decided by Judge Needy in 2011, which merely enforced a prior, unappealed final Order for Partition, and then the denial of the motion for reconsideration.

**C. Appellant's Assignments of Error**

1. ASSIGNMENT OF ERROR AS STATED BY APPELLANT: It was error for the trial court to partition real property without making findings as to the ownership interest of each party and value of each partitioned parcel.  
RESPONDENT'S POSITION: The Court should not find that the trial court erred in partitioning real property without making findings as to the ownership interest of each party and the value of each partitioned parcel, because the Court lacks the jurisdiction to decide those issues and findings of fact were not necessary

when the Appellant presented the partition plan at trial.

The trial court did not err in ordering partition in kind of the property and considered all relevant information in deciding partition by its Order of September 22, 2009.

**i. The Claim Under this Assignment of Error is Time Barred**

The appellant does not state the basis of his appeal, but appears to appeal as a matter of right under Rule of Appellate Procedure 2.2. A final judgment entered in any action is appealable. R. APP. P. 2.2(a)(1).

For this first assignment of error, the appellant obviously goes back to the Order for Partition of September 22, 2009 as clarified by Order of Clarification of July 2, 2010. An order partitioning real property is a final judgment

appealable as a matter of right. *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 901 P.2d 1060, 1062, 79 Wn. App. 221, 225 (1995) review granted 128 Wn.2d 1021, 913 P.2d 815, affirmed 130 Wn.2d 862, 929 P.2d 379.

In *Bishop v. Lynch*, the Supreme Court of Washington found that an Order of Partition was a final order, even though it directed the three court-appointed referees in that case to prepare a report that actually partitioned the real and personal property based on the Court Order. *Bishop v. Lynch*, 8 Wn.2d 278, 282, 111 P.2d. 996, 997 (1941). The Court's reasoning was that, even though there were still details of the partition that had to be sorted out after the Order was entered based on the terms of the Order, the Order itself "finally and definitely adjudicated the respective interests of the parties" to the action. As such, it was a final and appealable order. *Id.*

Similarly, here, the September 22, 2009 Order directed the partition in kind. It described in detail the particular features to be located on each side of the dividing line, it described the dividing line, and directed which party would receive which parcel. The Order in the present case specified even more details of the partition than in *Bishop*. The only remaining detail here was to obtain a survey to legally describe the division that was clearly laid out in the September 22, 2009 Order.

Therefore, as in *Bishop v. Lynch*, the September 22, 2009 Order as clarified was a final and appealable order that adjudicated the interest of the parties. As such, the Supreme Court, were it to consider the present case, would also find that the September 22, 2009 order as clarified was the final order that determined the rights of the parties in this case.

With exceptions that do not apply to this case, a Notice of Appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e). R. APP. P. 5.2(a). Well-settled case law for over one hundred years confirms that the time for taking an appeal from a final judgment runs from date of entry of judgment, and appellant is chargeable with notice of that date. *Lindsay v. Scott*, 56 Wash. 206, 207, 105 P. 462, 462 (1909).

The *Lindsay v. Scott* rule was confirmed in 1945, where the Washington Supreme Court noted that, where a rule of the court prescribes time of filing of notice of appeal, that is a jurisdictional step, and neither stipulation nor other act of parties can confer a right of appeal, once lost by expiration of prescribed time. *In re Yand's Estate*, 23 Wash.2d 831, 838,

162 P.2d 434, 437 (1945). A Notice of Appeal must be filed within thirty days of entry of the appealable order, or the court of appeals will be without jurisdiction to consider the order. *Kelly v. Schorzman*, 3 Wn.App. 908, 911, 478 P.2d 769, 771-772 (1970).

What the appellant does appeal, per his Notice of Appeal, is not the Order for Partition, as clarified, but the trial court's Order Enforcing Order for Partition, entered on October 25, 2011, and the Order Denying Reconsideration entered on January 18, 2012. The Notice of Appeal was filed with the Trial Court on February 16, 2012. CP 68-80.

A court may not permit an extension of time for taking an appeal in any direct or indirect manner so as to evade an express jurisdictional requirement that an appeal must be taken within a certain time. *Cohen v. Stingl*, 51 Wn.2d 866,

868, 322 P.2d 873, 874 (1958). Rather, once the time for appeal provided in CAROA (Court of Appeals Rules on Appeal) 33 has expired on a judicial determination which is "final judgment" and appealable under CAROA 14(1), no other subdivision of CAROA 14 permits appellate review of that judgment; such final judgment cannot be considered "previous order in the same action" for purpose of appeal which may be taken from certain orders made after judgment under CAROA 14(7) and which brings up for review certain previous orders in the cause. *Nestegard v. Investment Exchange Corp.*, 489 P.2d 1142, 1146-7, 5 Wn.App. 618, 626 (1971).

Since the Order for Partition was entered in September 2009 and the Order of Clarification in July 2010, the time for appeal of such orders has long since expired and cannot be revived by considering those orders as previous orders in the case.

Further, per R. APP. P. 2.5(a), the Court may refuse to review an issue not raised at trial. The Defendant raised no issues at the time of trial objecting to the method of partition or the consideration of the value of the property. At trial, the Defendant presented the Court with a partition plan that proposed a division of the property and allowed the Plaintiff to choose which parcel he wanted. The order of September 22, 2009 followed the Defendant's plan. He did not object to these issues at that time and the Court should refuse to consider them now. Therefore, the content of the September 22, 2009 Order is outside the Appellate Court's jurisdiction and is no longer appealable. It was that Order of September 22, 2009 as clarified on July 2, 2010 that partitioned the property. That partition must therefore stand.

ii. Even if the Court does consider the substance of this assignment of error, the trial court did not err in partitioning the property.

If, however, the Court considers the substance of the Defendant's assignment of error, it should determine that the trial court did not err in partitioning the property. As Appellant points out, the Plaintiffs, the Thomases, wanted to have a private sale to divide the property. Defendant Tasso Schielke strongly opposed a private sale and insisted that the property had to be divided in kind. He himself came up with the partition plan and proposed to divide the property and allow the Thomases to choose which parcel they wanted. RP 7-17-2009, 5-6. Def.'s Mot. and Aff. for Part. of Prop. 1-4.

At the July 17, 2009 trial, counsel for Mr. Schielke presented the Court with their proposal for how the property should be divided. Part of

that proposal was to offer the Thomases first pick of the parcels. RP 7-17-2009, 6.

Further, in her ruling, Judge Susan Cook explained to the parties that, because real estate is unique, partition in kind is appropriate, unless the parties are greatly prejudiced by the division. She further explained that there is no great prejudice to Mr. Schielke because he is the one who is asking to have it done per his plan. RP 7-17-2009, 105.

At the July 17, 2009 trial, there was testimony from Paul Necco, a realtor; Michael Parsons, a real estate appraiser; and John Prosser, a real estate expert and the court-appointed referee for this matter. RP 7-17-09, 45-55, 72-88, 88-104. These individuals had all been out to the property and considered its features and value. The appraisal, which was completed before Tasso

Schielke presented his partition plan at trial, provided approximate values for each of the then-existing parcels. RP 7-17-2009, 75, 91-98.

Tasso Schielke, therefore, was well aware of the value and features of the property prior to presenting his plan for physical partition of the property to the Court. It was Mr. Schielke's plan that the Court followed and that provided the language for the September 22, 2009 order. At the time, Mr. Schielke never objected to the method of dividing the property because he himself came up with the scheme that was ultimately followed.

Further, Mr. Schielke was well aware that Parcel A would have approximately 1/3 of the waterfront property and that Parcel B would have approximately 2/3 of the waterfront property, because this, too, was discussed at the July 17,

2009 hearing. RP 7-17-2009, 93. In addition, Mr. Schielke referred to his plans to improve Parcel A so that he could reside there after his retirement. RP 7-17-2009, 20-24. Therefore, at trial, Tasso Schielke proposed a plan that divided the waterfront parcel into roughly one-third and two-thirds, he advocated for that plan to the Court, and he indicates his own plans to improve the smaller parcel. Because it was his plan, he never raised any objections as to the equitability of the division nor the Court's method of moving forward with the partition pursuant to his plan.

He has therefore waived his opportunity to raise these objections now. He got exactly what he proposed at trial; his own language provided the description of the parcels in the Order and it is specious to now insist on an additional bite at the apple because he has changed his mind.

Mr. Schielke cites to partition case *Carson v. Willstadter*, 65 Wn.App. 880, 883 (1992), and claims it stands for the requirement that the party claiming error has the burden of showing the findings are not supported by substantial evidence. *Carson* is distinguishable from the present situation. First, here, Mr. Schielke is the party asserting the error. In *Carson*, neither of the parties presented a partition plan. There were three referees in that case who had to consider features of the Whidbey Island property, which was going to be developed. Findings were therefore necessary for the Court to decide how to accomplish partition.

Here, though, Mr. Schielke himself proposed a partition plan for the property and assured the Court that it was an equitable division. Mr. Schielke was so sure that the division was

equitable that he allowed Mr. Thomas to choose which parcel he wanted. It is Mr. Schielke now who is trying to go back on his proposed partition and claim that the Court erred in adopting his partition plan.

This is very different than the situation in *Carson*. This distinction is important because it so changes the dynamic of dividing the property that the *Carson* court would certainly find in the Thomases' favor in the present case.

Further, Mr. Schielke did not provide any legal authority that requires the Court to make findings as to the values of the property. Judge Cook considered the parties' interests and granted Mr. Schielke's request at trial that his description of the division be used to partition the property.

Judge Needy did NOT decide the division of the property. The September 22, 2009 Order partitioned the property. Judge Needy was simply asked to enforce an existing order, which he did. Therefore, the partition decision actually dates from September 22, 2009. Judge Needy did not partition the property; Judge Cook partitioned the property and her order provides a very clear description of the respective parcels. CP 93-98.

2. ASSIGNMENT OF ERROR AS STATED BY APPELLANT: It was error for the trial court to order a partition that was neither supported by evidence nor agreed to by the parties.
- RESPONDENT'S POSITION: The Court should not find that the trial court erred in ordering partition because further findings were not required when the court adopted Schielke's plan for partition.

**i. The Claim Under this Assignment of Error is Time Barred**

While the assignment of error does not directly state to which order the assignment is taken, it must refer to the Order for Partition of September 22, 2009 as clarified on July 2, 2010. The assignment of error must refer to these two orders because the trial court's Order Enforcing Order for Partition of October 25, 2011 does not "order" partition, but rather finds that partition was ordered previously and that this partition is enforceable.

With this understood, the exact argument laid out as to why the first assignment of error is time barred applies to this second assignment of error.

Procedurally, it should also be noted that CIV. R. 59 allowed the appellant ten days to move for a new trial or reconsideration. The trial court

docket is devoid of any motion or request for reconsideration of either the basic order of partition or of the clarifying order. Instead, the only motion for reconsideration submitted was on November 4, 2011, which requested reconsideration of the Order of Enforcement of October 25, 2011. CP 68-80.

CIV. R. 59 further allowed the appellant ten days to submit a motion to alter or amend a judgment after the judgment was entered. Again, the trial court docket shows that no such motion was submitted for either the Order for Partition or the clarifying Order.

Further, CIV. R. 60 allowed the appellant Tasso Schielke to move for relief from a final judgment or order. CIV. R. 60(b) allowed up to a year for such a motion. This allowed Tasso Schielke to move for such relief by September 22, 2010 for the basic Order for Partition, or until July 2,

2011 for the Order of Clarification. Once more, the trial court docket shows that no such motion was submitted.

Instead, Tasso Schielke submitted his appeal here, in February of 2012. On the precise basis as laid out above for the first assignment of error, this assignment of error is time barred.

- ii. Even if the Court does consider the substance of this assignment of error, the trial court did not err in partitioning the property.**

Again, Mr. Schielke waived his opportunity to assign this error at this point. The reason the Court did not further consider the value of the respective parcels of the property was entirely because it adopted Mr. Schielke's plan, which allowed Mr. Thomas to take the larger parcel of the divided property. The Court specifically addressed the fact that Mr. Schielke was not

prejudiced by this division because it was his plan and Mr. Thomas was not prejudiced by this division because, even though he favored partition by sale, he received the larger of the two parcels in the division.

Mr. Schielke cannot (a) propose a plan at trial, which he knew divided the property into parcels of different size and then (b) later change his mind and assert error on the trial court for not making further findings regarding the values of the property. Mr. Schielke's position at trial was that, even though the sizes of the property were different, he was willing to take the smaller parcel and willingly proposed that Mr. Thomas get the larger parcel. He therefore waived his opportunity to claim that the trial court erred in adopting his plan.

In her Order for Partition of September 22, 2009, Judge Cook did say that she considered the

evidence presented by the parties and found the partition plan of Tasso Schielke to be a proper partition under her equitable power. Therefore, there was no error. CP 93-98.

3. ASSIGNMENT OF ERROR AS STATED BY APPELLANT: It was error for the trial court to find that an enforceable order for partition had been entered by a prior judge.
- RESPONDENT'S POSITION: The Court should not find that the trial court erred in finding an enforceable order for partition had been entered by a prior judge.

The appellant assigns error but provides no authority to back up that assignment of error.

The failure to provide argument and citation of legal authority in support of an assignment of error, as required by R. APP. P. 10.3, will preclude appellate consideration of the alleged error. *State v. Fortun*, 94 Wn.2d 754, 756, 626

P.2d 504, 505 (1980). A party's failure to cite to authority in an assignment of error precludes appellate consideration of an alleged error. *Escude ex rel Escude v. King County Public Hosp. Dist. No. 2*, 117 Wash.App. 183, 190, 69 P.3d 895, (2003), reconsideration denied. Arguments that are not supported by citation to legal authority will not be considered on appeal. *Pacific Sound Resources v. Burlington Northern Santa Fe Ry. Corp.*, 125 P.3d 981, 130 Wn.App. 926, (2005).

Respondents' review of the appellant's brief does not find any citation of legal authority to support this assignment of error.

The court should not consider it.

Further, Appellant's attorney asserts that the burden is on Mr. Thomas to show that the partition is fair and equitable. However, in his own citation to *Carson v. Willstadter*, he

explains that the burden is on the party claiming error to show that the findings are not supported by substantial evidence. Br. of App. at 16.

He provides no support or basis for his contention that Judge Needy erred in finding that Judge Cook entered an order of partition. This is a central issue in this case. He continuously misleads the court in saying that Judge Cook refused to order a partition. He mischaracterizes the procedural history and ignores the fact that, on September 22, 2009, Judge Cook did, in fact, enter an Order for Partition, which was later clarified.

If the Court were to now disregard the September 22, 2009 Order, it would be undermining well-settled principles of law concerning the finality of orders. While it is true that Judge Cook made decisions after that order that were not favorable to the Plaintiff, those decisions were

on different grounds and in no way undid or undermined the final order of partition entered on September 22, 2009. The Court cannot now undo that order because the time has long passed to appeal those issues.

**4. ASSIGNMENT OF ERROR AS STATED BY APPELLANT:** It was error for the trial court to find that an enforceable agreement for partition existed.  
**RESPONDENT'S POSITION:** The Court should not find that the trial court erred in finding an enforceable agreement for partition existed.

**i. Appellant provides no legal support for his position**

Again, the appellant assigns error but provides no authority to back up that assignment of error. A review of the appellant's brief finds not one shred of legal authority to support this assignment of error. Not one. As for the third assignment of error, the failure to provide any citations of legal authority to support an

assignment of error precludes the court's consideration of the error, using the rules of *State v. Fortun, Escude ex rel Escude v. King County Public Hosp. Dist. No. 2*, and *Pacific Sound Resources v. Burlington Northern Santa Fe Ry. Corp.* 94 Wn.2d at 756; 117 Wn.App. at 190; and 125 P.3d. at 981.

What the appellant's brief does do for this assignment of error is review selected events of the case. Using this review, he argues his position, and the thrust of his argument seems to be on two grounds - (a) that it is unclear what the "agreement" was, and (b) that the lack of findings make the court's order of enforcement not supported.

The September 22, 2009 order referred to by appellant is entitled "Order for Partition."

The September 22, 2009 Order for Partition clearly states that it is, "ORDERED that the partition of real property in this action shall be effected by dividing the property as follows:", and then goes on to describe the division. There are various annotations made on pages 2-6 of the order, initialed by the attorneys for the parties. CP 94-98. Both Appellant Tasso Schielke [see e.g., RP 9-22-09, 27] and Respondent Guether Thomas [see e.g., RP 9-22-09, 11-12] were present at and actively participated in the hearing. At the end of the Order, on page 6, both attorneys have signed.

Respondent's position is that this is not an agreement, but an order, as it is titled, and that the signatures of the attorneys reflect their acknowledgement of the order. Since the language used for the division of the property is taken from the Appellant's proposal for partition, it is also reasonable to assume that

the language used for the division of the property accurately reflects the language of the division proposed by Tasso Schielke. In any case, the Appellant took no exception to this order, nor did the Mr. Schielke ever ask for it to be set aside or reconsidered.

What the Appellant did do was to seek a clarification, by his motion of March 15, 2010. A clarification was provided on July 2, 2010, by an order entitled "Order of Clarification for Partition." CP 159-160. This order is signed by the attorneys for the parties.

The appellant took no exception to this Order of Clarification, nor did he ask that it be set aside or reconsidered.

Whether the September 22, 2009 Order as clarified on July 2, 2010 reflects the agreement of the parties is not material. Both are orders. It

may well be that Judge Needy saw the Orders as reflecting an agreement of the parties, particularly the September 22, 2009 order, but whether Judge Needy saw the Orders that way or not, both are Orders and Judge Needy found the Orders enforceable.

Appellant further posits that the lack of findings makes the court's order of enforcement not supported. Respondent does not understand this contention since there are eight findings listed in the Order of Enforcement, and the Appellant cites to "unnumbered findings" in his brief. Br. of App. at 3. Those findings detail the reasons for Judge Needy finding that the clarified Order of Partition was enforceable.

**ii. Even if the Court finds error, it was harmless**

If, however, the court finds that Judge Needy erred in referring to the partition order as an agreement, certainly this was a harmless error. Judge Needy's order to enforce the previous partition order was not based on the parties having agreed to the order. It was based on the fact that Judge Cook had already decided this issue and that there exists an enforceable Order for Partition dated September 22, 2009. CP 93-98.

**iii. The continued discussion of partition resulted from Appellants errors in his proposed plan to the Court and the plan should be construed against Mr. Schielke**

The only reason the parties continued to discuss this issue after September 22, 2009 was that

Tasso Schielke apparently made errors in his partition plan, which he presented to the Court and advocated for. His plan consisted of two principal parts: a computer print-off from Google maps of the parcel with a crudely drawn line dividing the picture; and a written description of the particulars of that division with language that laid out which features were located on each parcel. Tasso Schielke, at the time he made his plan, erroneously drew a line that placed some of the features of the property on the wrong side of the line. Def.'s Mot. and Aff. for Part. of Prop. at 4. It was only after the September 22, 2009 order, which very clearly describes the dividing line for the property, when Mr. Schielke discovered his mistake after a surveyor went out to the property. Without seeking to have that Order set aside or modified, he then maneuvered to undo the September 22, 2009 order because he wasn't happy with his error.

The original plan proposed by the Defendant, which was submitted on April 27, 2009 with his motion for partition, is a crude Google map photo of the property with imprecisely drawn lines using the Word drawing feature. Def.'s Mot. and Aff. for Part. of Prop. at 4. This crude picture did not provide the parties, nor the Court, the specificity to adequately partition 82 acres of land. For example, with such a small image, the parties would not know how to treat the width of the line itself, which appears on the drawing to be as wide as the beach stairway. This is why the Defendant included with his drawing a detailed description of the division and the features to be located on each side of the line. The language in this description is almost exactly what was used in the September 22, 2009 Order. There is, thus, an apparent ambiguity because the line on the photo does not agree with the language locating specific features on one or the other side of the dividing line.

In a contract setting, ambiguities are always construed against the drafter. *Berg v. Hudesman*, 115 Wn.2d 657, 677 (1990). While this is not a contract, Mr. Schielke is attempting to construe his mistakes and the ambiguities in his plan against Mr. Thomas and get a third and fourth bite at the apple. This case comes down to the fact that Mr. Schielke asked the court for something, got what he asked for, realized he didn't ask for exactly what he thought he wanted, and has continued to waste judicial resources and the parties' time and energy ever since. This appeal should not be considered because Mr. Schielke's plan was adopted in a final order of September 22, 2009.

#### **V. CONCLUSION**

The thrust of this appeal is that the Appellant is ultimately unhappy with the Order for

Partition of September 22, 2009 as clarified on July 2, 2010. He did not appeal that decision in time and never raised any objections at the time because the Court adopted the plan proposed by Mr. Schielke himself. He later realized he made mistakes in his plan and changed his mind about what he wanted and has filed the present appeal to get additional bites at the apple. The Appellant's brief mischaracterizes the facts of the case and attempts to confuse the issues, which are really very simple. The Court ordered partition. Mr. Schielke did not appeal that decision, as it was his own plan. He has since fought the implementation of that order and filed the present appeal to attempt to relitigate settled issues.

Further, even if his appeal is examined, the trial court did not err because it first followed Mr. Schielke's plan and then acted to enforce a

valid, final order on that plan. Mr. Schielke provides no legal basis for his assignments of error. Mr. Schielke's appeal should therefore be denied on all assignments of error.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of August,  
2012.

*Alan R. Souders*  
*Darcy J. Swetnam*

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Alan R. Souders, WSBA #26192  
Darcy J. Swetnam, WSBA #40530

Court of Appeals No. 68407-8

Skagit County Superior Court No. 07-2-02415-1

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IN THE COURT OF APPEALS, DIVISION ONE

STATE OF WASHINGTON

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**TASSO SCHIELKE,**

Defendant-Appellant,

v.

**GUENTHER and URSULA THOMAS,**

Plaintiffs-Respondents,

And

**The ESTATE OF ULRIKE SCHIELKE,**

Defendant-Respondent.

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STATE OF WASHINGTON  
COURT OF APPEALS

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PROOF OF SERVICE

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ALAN R. SOUDERS, WSBA #26192  
Attorney for Plaintiffs/Respondents Thomas  
913 Seventh Street  
Anacortes, Washington 98221  
(360) 299-3060

I certify under penalty of perjury that on August 7, 2012, I served the following materials on the parties named below:

- (1) Brief of Respondent
- (2) Plaintiff's Designation of Clerk's Papers
- (3) Proof of Service

Service was by personal delivery to the offices of:

K. Garl Long  
Attorney for Defendant/Appellant  
1215 South 2nd St, Suite A  
Mount Vernon, WA 98273

Mervyn C. Thompson  
Attorney at Law  
709 South 1<sup>st</sup> St  
Mount Vernon, WA 98273

Dated this 7<sup>th</sup> of August, 2012.



Alan R. Souders, WSBA #26192  
Attorney for Plaintiffs/Respondents