

NO. 71556-9-1

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

SOCIUS LAW GROUP, PLLC and
HECKER WAKEFIELD FEILBERG, P.S.

Appellants,

vs.

MARK BRITTON and BRIGID CONYBEARE BRITTON,
husband and wife

Respondents.

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BRIEF OF APPELLANTS

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ORIGINAL

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I. INTRODUCTION

This matter arises from an adverse possession case brought by Mark and Brigid Britton (“Britton”) against Peter and Tamara Musser (“Musser”). Appellants represented the Mussers. Following a summary judgment motion filed by the Mussers, the Brittons filed a Motion for Sanctions and Imposition of Terms, alleging a litany of alleged but unsupported transgressions, focusing on violations of discovery that led to the Mussers filing a summary judgment motion in violation of CR 11, and improper ex parte communication. The hearing on the motion was scheduled for oral argument on September 13, 2013. On or about September 11, 2013, before the scheduled hearing date and without hearing any oral argument, the trial court inexplicitly granted the Brittons’ motion. Appellants appeal from this Order, and respectfully request that the Court reverse the trial court’s ruling.

The trial court abused its discretion in the following respects:

(1) The trial court concluded, without any recitation of the factual or legal basis, that Appellants somehow improperly withheld a witness statement and her identity through the discovery process. However, the Appellants had a thoroughly documented reasonable and legal basis to resist the discovery under CR 26(b)(4) and KCLR 26(a)(2)(B). The Court’s imposition of sanctions is contrary to the protections established

by these rules and does not explain, or even attempt to explain or examine how the Appellants even violated the discovery rules.

(2) The trial court determined that the witness statement was inconsistent with a later declaration which made summary judgment impossible to win, and thus a violation of CR 11. However, the finding is directly contrary to the evidence as the statement and declaration were perfectly consistent as explicitly confirmed by the witness herself through a later declaration. By even accepting the Respondents' twist to create an inconsistency, the witness statement at best only impacted a small part of the Musser summary judgment motion, which was explained in the witnesses' Second Declaration. Thus, the statement had no impact on the remaining portions of the motion—to which the Appellants had a good faith basis for filing the summary judgment motion. It cannot be stressed enough that the Brittons conceded that portions of the summary judgment motion clearly had merit by voluntarily withdrawing large portions of their claim for which the Musser motion sought dismissal, before the ultimate hearing on the motion.

(3) The trial court found a routine email to the court's staff requesting possible dates for a hearing continuance was an improper ex parte communication intended to mislead the trial court. That communication was harmless as the trial court continued the motion

because the judge was on leave. Further, the fees awarded as sanctions were for a motion filed before the alleged communication.

(4) The trial court's award is excessive. The trial court awarded all fees incurred by the Brittons in responding to the First Musser Summary Judgment as sanctions under CR 11. However, the trial court failed to apportion legal fees incurred as a result of the specific alleged sanctionable conduct from the fees incurred in responding to the undisputed valid portions of the First Musser Summary Judgment. The trial court also awarded fees for tasks related to declarations later used by the Brittons in a subsequent summary judgment motion, and includes discovery tasks, all of which should be excluded from an award.

II. ASSIGNMENTS OF ERROR

A. Assignment of Error

Assignment of Error No. 1: The trial court erred in finding, without conducting any analysis whatsoever, that Appellants somehow violated discovery rules in withholding the identity of Catie Smith and her 2012 statement.

Assignment of Error No. 2: The trial court erred in finding that the Musser motion for summary judgment violated CR 11, or that it violated CR 11 in its entirety.

Assignment of Error No. 3: The trial court erred in finding an intentional ex parte communication warranting sanctions.

Assignment of Error No. 4: The trial court erred by awarding excessive sanctions not supported by the record.

B. Issues Pertaining to Assignment of Error

Assignment of Error No. 1: Did the Court err in finding discovery violations when the witness statement was clear work product and the Brittons' discovery requests were over the limited imposed by the local rules?

Assignment of Error No. 2: Did the Court err in finding the motion for summary judgment violated CR 11 when it was filed in good faith, the alleged inconsistent statement is not actually inconsistent, and the alleged inconsistent statement only concerns a small portion of the disputed area?

Assignment of Error No. 3: Did the Court err in awarding sanctions for an unintentional and harmless inquiry to the trial court concerning the rescheduling of the motion for summary judgment?

Assignment of Error No. 4: Did the trial court err in failing to apportion the CR 11 sanctions from the meritorious claims in the summary judgment motion and by awarding fees that were not incurred in connection with the summary judgment?

III. STATEMENT OF THE CASE

A. The Brittons' Adverse Possession Claim

1. Background

Peter and Tamara Musser purchased their home in April, 2007 (the "Musser Property"). The Musser North boundary abuts property purchased by Mark and Brigid Britton in April 1999 (the "Britton Property"). For at least 30 years, a six-foot tall wood fence has stood on approximately 47 feet of this boundary in essentially the middle of the two properties but does not extend along the entire boundary. Instead, this unfenced area of the boundary contains plants, bushes, a rockery and small trees.

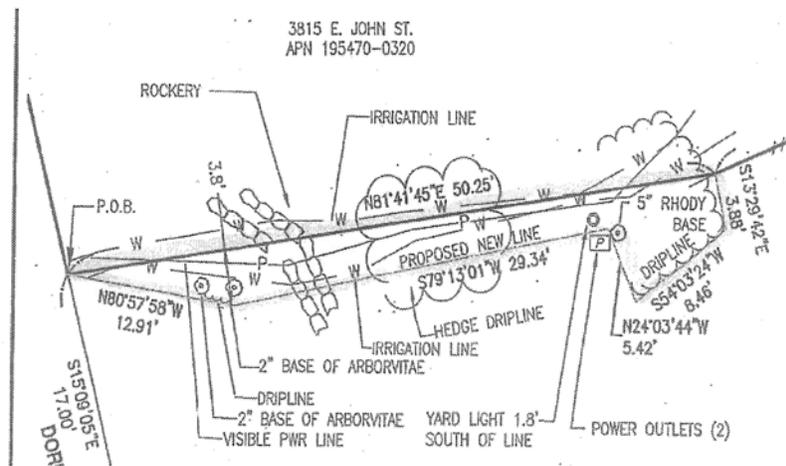
In 2012, the Mussers undertook a major renovation of their house and landscaping. In conjunction with the landscaping improvements, the Mussers intended to place a new fence along the boundary of the Musser and Britton Properties and remove the above discussed worn 30-year old fence. The Mussers sought input from the Brittons on the type of fence to be constructed who responded by filing an action alleging adverse possession over the boundary area on June 29, 2012. App. 1-9.¹

¹ Appellants have filed a Supplemental Designations of Clerk's Papers. Temporary citations to the records contained therein are made to the attached Appendix.

2. Disputed Area

The Brittons' Complaint did not define specifically the area of the Musser Property over which the Brittons claimed adverse possession (the "Disputed Area"). Instead, it simply alleged a general area of certain encroachments by various landscaping features, such as a laurel tree and rockery. App. 3-4.

Since they had no idea of the exact area claimed, the Mussers requested a full legal description of the Disputed Area through discovery. In response, the Brittons produced the following survey to set forth the specific area sought:



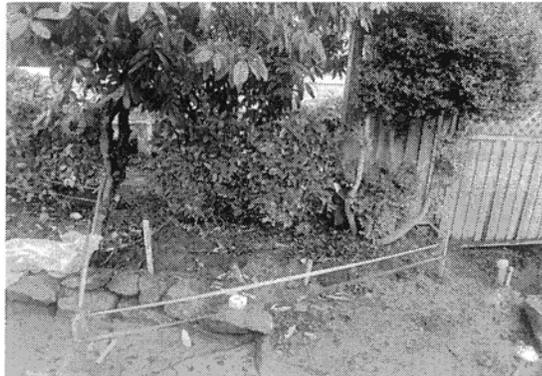
App. 28.

The dark black line is the title property line between the Musser Property (South) and the Britton Property (North). *Id.* The Brittons' proposed new

line starts at the west side with the initials P.O.B., travels in a southeasterly direction around the base of two arborvitae trees, then jets in a northeasterly direction to encompass the “Hedge Dripline” until taking an erratic turn South at the base of the rhododendron, then travels south, around the dripline of the rhododendron, and then north, again until reaching the actual title property line. *Id.* As depicted in the survey, the key points of interest within the Disputed Area, from East to West, are the rhododendron, the single laurel bush (termed a “hedge” in the survey), the rockery, and the two arborvitae trees. *Id.*

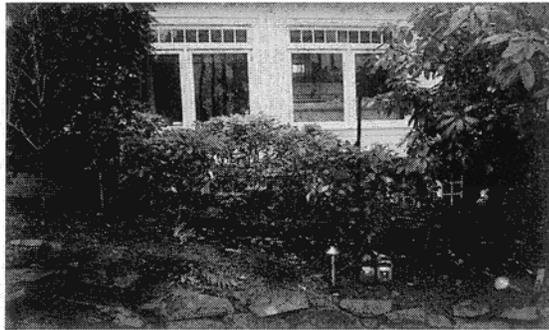
Based on the above Britton survey, the Mussers had their surveyors stake it and place orange and blue flagging tape between the stakes to physically depict the area sought by the Brittons. The area was so oddly shaped that it almost seemed like a mistake. Below are photographs of the rhododendron, the area between the rhododendron and the laurel, the laurel, the rockery, and the two arborvitae trees:

The Rhododendron:



App 30. The photograph above depicts the extremely odd shaped area (blue and orange tape) around the rhododendron to which the Brittons claim adverse possession. *Id.* This area not only includes the entire rhododendron, but also several feet of the Mussers' patio, property that is behind the Mussers' side of the 30-year old fence described above, and inexplicably a boxwood bush that is also completely on the Mussers' side of the fence. *Id.*

Area Between the Rhododendron and Laurel:



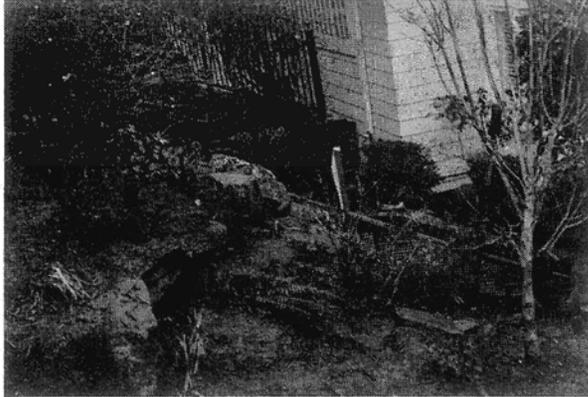
App. 32.

The Laurel:



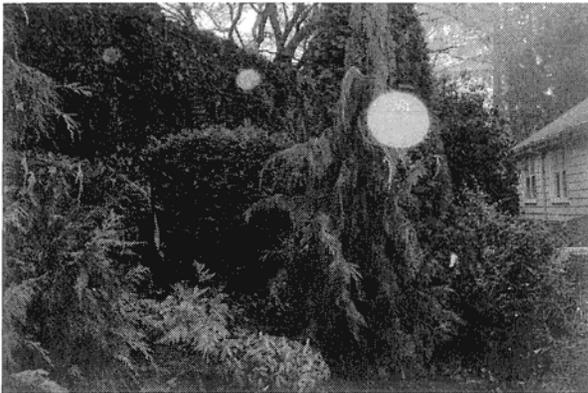
App. 34.

The Rockery:



App. 36.

The Two Arborvitaes and Boxwood:



App. 38.

B. First Musser Summary Judgment; 2013 Catie Smith Declaration

On February 22, 2013, the Mussers filed a motion for summary judgment (the “First Musser Summary Judgment”). App. 10-24. The motion was noted for hearing on March 22, 2013. *Id.* The basis of the motion was that the Brittons could not show their use was exclusive and

adverse for ten years and highlighted the incomprehensible and peculiar area sought by the Brittons based on their survey. *Id.* This position was supported by testimony of a landscaper, Catie Smith, through her declaration (the “2013 Catie Smith Declaration”). CP 109-112.

For ease of reference, the Mussers broke down the Disputed Area into several distinct regions or sections so that if the Court found issues of fact with one region, it could nonetheless grant partial summary judgment on the other areas. The specific section breakdown was as follows: (1) the Rhododendron Area (which encompassed the oddly shaped cut-out area by the fence), (2) the Area between the Rhododendron and the Laurel, (3) the Laurel, (4) the Rockery, and (5) the Arborvitaes. App. 13-15.

Again, the First Musser Summary Judgment was supported by Catie Smith. Specifically, in August 2007, the Mussers hired City People’s Garden Design & Landscape (“City People’s”) to provide landscaping services on the Musser Property. CP 109. Catie Smith was the Landscape Manager for City People’s. *Id.* On behalf of City People’s, she performed landscape services on the Musser Property once a week, all year long, and would typically spend several hours each time. CP 109, 114-52. Ms. Smith left City People’s in December 2008 and started her own business, Brier Creek Gardens, LLC. CP 112. City People’s continued servicing the Musser Property. *Id.* After several months, the

Mussers hired Ms. Smith's new company to take over for City People's. *Id.* Since that time, she and her crew are generally at the Musser Property all year long every Friday. *Id.*

Since August 2007, Ms. Smith and her crew maintained the area around the rhododendron, as depicted in the photograph above. CP 110. Their maintenance of the area includes weeding, planting, fertilizing, and composting the area. They have always trimmed and pruned all sides of the rhododendron. *Id.* Ms. Smith never saw anybody else trim it, nor is there any evidence that it has been trimmed by anyone else. *Id.* In fact, the trunk of the rhododendron shows evidence of cut limbs; most, if not all, of which were cut by Ms. Smith over the years. *Id.* Additionally, Ms. Smith and her crew have exclusively maintained and shaped the boxwood behind the Musser side of the fence, which is also depicted as inside the area claimed by the Brittons in the photograph above. *Id.*

Moreover, Ms. Smith and her crew have maintained the area between the rhododendron and the laurel since August 2007 by weeding, removing unwanted plants, planting new plants, composting, and otherwise making the area have a neat appearance. CP 110. In 2008, Ms. Smith and her crew planted five or six Waxleaf Privet bushes along the boundary line on the Musser side (these bushes are depicted in the photographs above) to run from the existing old wood fence to the laurel,

which is toward Dorffel Avenue. *Id.* The purpose of these bushes was to act as a boundary to prevent the mailman from trampling through the area. *Id.* The Brittons, or anyone on their behalf, never complained or said anything about the bushes. *Id.* Ms. Smith and her crew regularly maintained the bushes since they were planted in 2008. *Id.*

As with the rhododendron and boxwood, Ms. Smith and her crew also started to trim the laurel bush in the “Disputed Area” beginning in August 2007. CP 111. When she first started working for the Mussers in 2007, the laurel had grown wildly without any shape. *Id.* Ms. Smith created the box shape that now exists and has maintained that shape since 2007. *Id.* When she trimmed the laurel, Ms. Smith trimmed the top, and all sides, except the side facing the Britton Property. *Id.*

Also, Ms. Smith and her crew have generally maintained the area between the laurel and the rockery since 2007 by weeding, removing unwanted plants, planting new plants, composting, and otherwise making the area have a neat appearance. CP 111. Similarly, Ms. Smith and her crew have generally maintained the rockery area since August 2007. *Id.* They have weeded the area and put down compost. *Id.* Further, until recently, there was an azalea in the rockery area. *Id.* They maintained this azalea from August 2007 until its removal. *Id.*

Additionally, above the rockery are two arborvitae trees and a boxwood. CP 111-12. Since August 2007, Ms. Smith and her crew have weeded this area, put down compost, fertilized the trees and bushes, and otherwise worked to keep a neat appearance. *Id.* They also pruned the boxwood to maintain its shape. *Id.* Ms. Smith believed that the Mussers planted those trees, so she has always maintained that area. *Id.*

In addition to the above testimony of Catie Smith which appeared to defeat any claim of exclusivity the Brittons could make, there was serious confusion about the actual location of the “Disputed Area.” As discussed above, the Britton survey that was submitted to define the specific area they sought made little sense; especially given the odd cut-out area around the rhododendron, over a portion of the Musser patio, and the boxwood on the Musser side of the fence. App. 28.

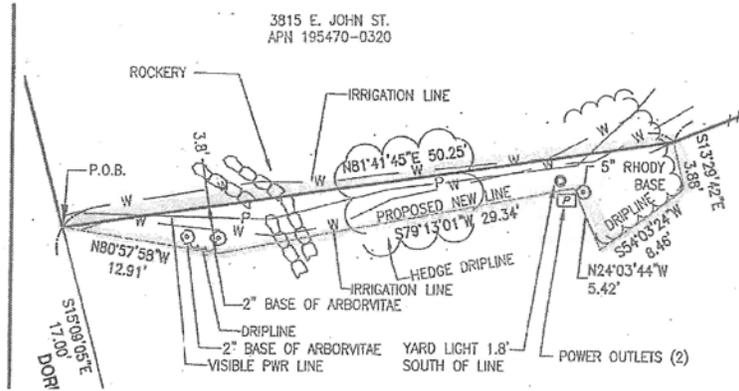
In this context, on January 9, 2013, and well before the Mussers filed the First Musser Summary Judgment on February 22, 2013, the Brittons produced the Declaration of Deborah Klein (which was signed on November 29, 2012 and withheld by the Brittons as work product). CP 205-06. In the Declaration, the Brittons began departing from their survey produced in discovery as the sole basis for the Disputed Area. CP 205. Instead, they began relying on a “trajectory” argument, which they continued to use throughout the entire case. Specifically, Ms. Klein states,

While the wooden fence does not run the entire length of the southern boundary line of the Property, if a line parallel to the wooden fence is projected westward . . . that projected line running West would be consistent with what we considered to be the southern boundary of the Property.

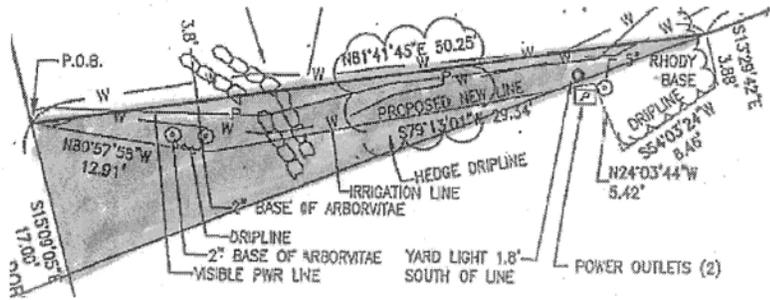
CP 205. This “parallel” trajectory bears no relationship at all to the survey prepared by the Brittons as it completely disregards the oddly shaped cut-out around the rhododendron.

Subsequently, Brigid Britton confirmed at her deposition that if actually following the true fence trajectory from the old wood fence as urged by Ms. Klein in her above declaration, it would project much more southerly into the Musser Property than the actual area claimed by the Brittons. App. 290. Based on the ultimate drawing Ms. Britton drew at her deposition to identify the area sought, her idea of the actual fence trajectory clearly has no relationship with the “Fence Trajectory” previously described by the Brittons or the above Britton survey they provided in response to a discovery request. App. 297. Further, if Ms. Klein’s description is literally interpreted to mean the line projects “westward,” then the line does not even include most of the Disputed Area. In sum and over the course of litigation, the Brittons provided at least three different and inconsistent descriptions for the area sought:

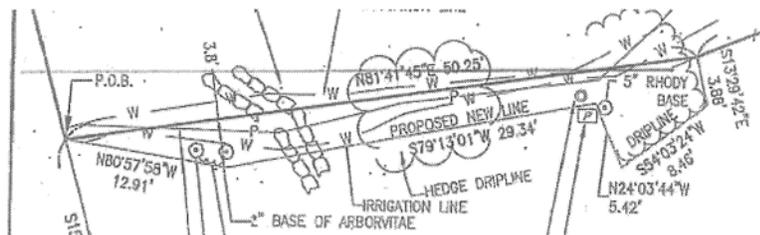
The Brittons' Survey:



Actual Fence Trajectory (Drawn by Brigid Britton):



Deborah Klein's "West" Trajectory:



In this context, at the time Appellants filed the First Musser Summary Judgment, they still had no idea what area the Brittons were

actually claiming.² Since the Brittons bear the burden of proving their claim and defining the area sought by adverse possession, the Mussers filed summary judgment seeking to dismiss the Britton claim to the entire area, as they clearly did not even know the boundaries or what, if anything, created the Disputed Area.

C. Appellants' Valid Discovery Objections to Production of 2012 Catie Smith Statement.

Before signing her 2013 declaration, Catie Smith provided a statement to Appellants dated August 8, 2012 (the "2012 Catie Smith Statement"). CP 102-04. This statement was obtained by Appellants after the action was filed on June 29, 2012. App. 1-9.

Appellants did not produce the 2012 Catie Smith Statement in discovery. Rather, they objected to its production as work product. Specifically, since the action was filed on June 29, 2012, the statement (obtained in August 2012) was in anticipation of litigation, and is obvious work product. When the Brittons first raised the issue of non-production, Appellants sent a thorough legal analysis of the issue to counsel for the

² At her deposition, Ms. Britton could not identify the "Fence Trajectory" on the survey and testified that she was unable to draw the line she was claiming. App. 288. However, she maintained that the "Fence Trajectory" is a straight line (App. 289), even though the line on the survey is far from a straight line. Moreover, she confirmed that if actually following the true fence trajectory from the old wood fence, it would project much more southerly into the Musser Property than the area claimed by the Brittons. App. 290, 297.

Brittons on March 21, 2013. CP 199-200. It is noteworthy that the Brittons did not respond at all to the work product analysis and never provided any authority to refute it. In fact, the Brittons have taken the same position that such statements, such as Deborah Klein's declaration, are in fact work product: "the Declaration is Work Product." CP 202. The Brittons, without any authority, reversed their own position so they could allege some wrong doing by Appellants.

The Appellants also had a proper basis for not earlier identifying Catie Smith as a witness in discovery. Specifically, the Brittons violated KCLR 26(a)(2)(B) by serving more than 40 interrogatories, and their request for names of additional witnesses, such as Catie Smith, was in an interrogatory which was over the limit. Specifically, the Brittons' requests are filled with what appear to be single interrogatories, but have numerous or multi-pronged sub-parts. After adding the discrete subparts, the Brittons' discovery was well over the 40 interrogatory limit. CP 49-69. Thus, their Interrogatory No. 27, which requested the identity of witnesses, such as Catie Smith, was over the limit. CP 67. Therefore, in accordance with KCLR 26(a)(6)(B), Appellants stated, "Objection. Defendants will not respond to the remaining questions because the requests exceed the discovery limits imposed by KCLR 26(a)(2)(B). A

party may only serve 40 interrogatories, including discrete subparts.” CP 67. The Appellants fully complied with the local rules.

The Mussers’ responses, with the above objection, were served on November 30, 2012. CP 97. The Brittons raised no issue or concern whatsoever as to the Mussers’ objections for two and one-half months, until February 14, 2013. CP 100. During the interim period, Appellants assumed the Brittons concurred that the Brittons’ requests were over the limit. On February 14, upon request by the Brittons, Appellants recounted and again counted more than 40. Nevertheless, in the spirit of cooperation and on the same day the Brittons first raised any issue with the Musser objection, Appellants agreed to answer Interrogatory No. 27, even though it was over the limit. CP 101.

D. Continuance of the First Musser Summary Judgment

The First Musser Summary Judgment was noted for hearing on March 22, 2013 (over one month after the above discovery conference). Days before the hearing, the Brittons filed a Motion to Allow a Supplemental Declaration to Present Newly-Discovered Evidence Regarding Defendants’ Motion for Summary Judgment (the “Motion to Supplement”). The Motion to Supplement sought to add the 2012 Smith Statement to the record. The motion was filed on a shorten-timed basis,

and plainly reflected that the Brittons believed that they did not have the opportunity to put forth additional evidence before the hearing.

In response, Appellants thought an accommodation was warranted and decided to propose a continuance of their motion, so the Brittons would have ample time to put whatever evidence they wanted into the record. On March 20, 2013, Appellants wrote to the Brittons' counsel:

. . . [T]he Mussers too would like to have all the facts before the Court prior to ruling on the summary judgment motion. Your motion to supplement suggests that you believe that you did not have adequate time to conduct discovery as to Catie Smith. This is the first you mentioned this; no CR 56(f) motion was filed. In any event, we are willing to re-note the motion for a later date. You can supplement the record as you wish, thus obviating the need for your instant motion. With the additional time, we can also work to schedule a deposition of Catie Smith, and possibly Brigid Britton and Erik Wood.

We are checking with the Court on available dates to re-note the motion.

CP 211.

Just before sending the above message, Musser counsel had sent the following inquiry to the trial court's staff: "The parties are contemplating continuing the hearing set for Friday. Could you provide what dates Judge Benton would have available in April-May to accommodate a re-note? CP 166.

Subsequently, the trial court responded, “It will need to be continued anyway, because Judge Benton will be on FMLA to the end of May. How about 5/31 at 11:00 a.m.? CP 166. Counsel for the parties discussed available dates and settled upon June 7, 2014, and the hearing was re-noted. CP 164.

E. Subsequent Discovery and the Withdrawal of Portions of the Brittons’ Adverse Possession Claim

Following the continuance of the First Musser Summary Judgment, Ms. Britton admitted at her deposition that the boxwood behind the Mussers’ side of the fence is not part of their claim, even though included in their survey. App. 286. She also concedes that the Mussers’ patio is not part of their claim despite it being included in their survey. She further explained that the reason the oddly shaped “cut-out” is included in the survey is solely due to concern for the health of the rhododendron. App. 287-88. Specifically, she worried that if portions of the rhododendron on the Musser side are trimmed or removed, it could kill the bush. Therefore, they included the entire drip line of the rhododendron, which encompasses the patio, due only to concern for the health of the bush. App. 287-88. Thus, the “cut-out” area around the drip line was not based on actual use or maintenance of the area. App. 292.

Ms. Britton further admitted that the Mussers planted the waxleaf

privets in the rhododendron area claimed by the Brittons and further, the Brittons' landscapers did not even maintain those bushes. App. 291. The photograph of the Rhododendron Area above (App. 30) depicts the base of the Rhododendron, wax leaf privets, and then the fence, moving left to right. Ms. Britton testified that her landscapers have not maintained south of the waxleaf privets. App. 292. Therefore, with the exception of the base of the rhododendron itself, the Brittons do not allege any use or maintenance of the entire "cut-out" area shown in the above photograph of the Rhododendron Area. Also, Ms. Britton admitted her landscapers did not maintain the waxleaf privets between the rhododendron and laurel. App. 293.

After Ms. Brittons' deposition on April 3, 2013, counsel for the Mussers raised serious and valid concerns with the Brittons' counsel about the apparent inconsistencies in the Brittons' testimony and the survey provided by the Brittons in discovery. Specifically, on April 4, 2013, counsel for the Mussers requested supplementation of the Brittons' responses to the Mussers' interrogatories and requests for production related to the definition of the Disputed Area. App. 299-305. The Mussers indicated that the survey incorrectly includes a portion of the Mussers' fence, a boxwood bush behind the fence, and part of the Mussers' patio. *Id.* Additionally, the Mussers raised the issue that the

“Fence Trajectory” description was clearly inconsistent with the survey. *Id.* Since the survey was ostensibly the Brittons’ certified description of the Disputed Area, the Mussers requested a supplemental response to detail the precise area claimed by the Brittons. *Id.* The Brittons surprisingly refused to supplement their prior discovery responses, preferring to rely upon the clearly defective survey as the “Disputed Area.” *Id.*

As a result of the Brittons’ failure to supplement discovery, the Mussers were forced to revise their motion for summary judgment seeking partial summary judgment to dismiss the Brittons’ erroneous claim to the “cut-out” area around the rhododendron, as the Brittons could show no actual use of this area. In opposition to the revised motion for summary judgment, the Brittons made no argument and provided no authority to support their erroneous claim to the “cut-out” area. After the Court continued the June 7, 2013 summary judgment hearing a second time, the Brittons, on June 24, 2013, finally abandoned their frivolous claim to the “cut-out” area. App. 336, 339.

F. Plaintiff’s Motion for Sanctions

On or about May 29, 2013, six days before the re-noted hearing on the summary judgment motion, the Brittons filed Plaintiff’s Motion for Sanctions and Imposition of Terms (the “Motion for Sanctions”). CP 8-

30. The motion alleged a number of alleged transgressions including, but not limited to, that Appellants violated discovery rules by not producing the 2012 Catie Smith Statement, that Appellants violated CR 11 in filing the First Musser Summary Judgment because the 2013 Catie Smith Declaration was inconsistent with her 2012 Catie Smith Statement; and that Appellants made material misrepresentations to the trial court. *Id.* The Brittons sought all fees incurred in responding to the First Musser Summary Judgment Motion and in filing their Motion to Supplement. CP 25.

Despite the varied allegations in the motion, the Brittons conceded that “The core of Plaintiffs’ Motion for Terms is that Defendants’ counsel prepared a comprehensive Motion for Summary Judgment . . . seeking full dismissal of the Brittons’ claims despite possessing the 2012 Smith Statement that contained admissions against interest contradicting the very relief the First Motion requested from the Court.” CP 213.

On June 5, 2013, Appellants filed a comprehensive opposition to the sanctions motion. CP 175-95. Appellants carefully set out how the 2012 Catie Smith Statement was not inconsistent, and therefore, the First Musser Summary Judgment did not violate CR 11.

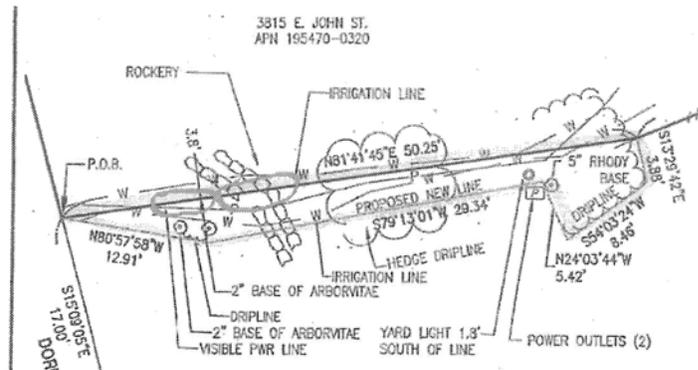
The Brittons alleged that the most critical “inconsistency” was the following statement in the 2012 Catie Smith Statement:

In July of 2012 when performing a garden walk through, I observed survey stakes that had been installed during the site survey that indicated that the property boundary between the Musser's property and the Musser's [sic] property. It appeared that the Musser's boundary lines are further into the Brittan's [sic] garden than I have been aware of over the course of my years in the Musser's garden."

CP 104 (Emphasis added). There is no inconsistency.

The 2013 Catie Smith Declaration was perfectly consistent with this prior statement. The declaration accurately states, "I have generally maintained these areas since 2007." CP 110. Nowhere does she state she maintained every inch up to the boundary line. As she explains in her declaration dated May 8, 2013, (the "Second Catie Smith Declaration"), there was no clear demarcation of any line, and it was difficult to ascertain the location of the precise line—similar to the difficulty the Brittons had in describing the area they sought by adverse possession. App. 17-74. In this context, as she stated in her August 8, 2012 statement, "It appeared that the Musser's boundary lines are further into the Brittan's [sic] garden than I have been aware of over the course of my years in the Musser's garden." CP 104. Ms. Smith explains in her Second Catie Smith Declaration that while she generally maintained all the areas in the Disputed Area, in two sections, she did not go all the way to the true line, in the area north of the arborvitae and near the rockery. App. 174. There

may have been a foot or so in that small area that she did not maintain. App. 174. The following diagram shows the areas (circled in red) that Ms. Smith was referring to in her Second Catie Smith Declaration:



On these specific areas, the 2013 Catie Smith Declaration states, “In the area between the laurel and rockery, I have generally maintained that area.” CP 111. Again, Ms. Smith does not state she maintained all the way to the true line, but that she generally maintained it. Similarly, with the area by the arborvitae, she simply states that she maintained around the boxwood and the arborvitae. CP 111. She does not testify that she maintained north of the arborvitae, which includes a hydrangea and other plants, which are in the foot or so where she did not go all the way up to the true line. In sum, her testimony in her 2013 Catie Smith Declaration is completely consistent with the 2012 Catie Smith Statement.

The Motion for Sanctions, along with the summary judgment hearing, was subsequently re-noted for a September 2013 hearing date.

App. 306-07. While the motion had been noted for oral argument and set for hearing on September 13, 2013, the trial court entered Findings of Fact, Conclusions of Law, and Order Granting Judgment re Plaintiff's Motion for Sanctions and Imposition of Terms on September 11, 2013, two days before the scheduled hearing date ("Sanctions Order"). CP 221-225. In other words, there was no oral argument. The Sanctions Order contained the following findings and conclusions:

- The 2013 First Smith Declaration, drafted by Appellants, presented sworn testimony that was materially inconsistent with the 2012 Catie Smith Statement, which was in the possession of Appellants. CP 222.
- Appellants intentionally resisted Plaintiff's discovery efforts that would have revealed the identity of Catie Smith and the 2012 Catie Smith Statement much sooner than the hearing on the summary judgment motion. Appellants failed to identify Catie Smith as a witness with relevant information despite being in possession of her 2012 Smith Statement. CP 222.
- The 2012 Smith Statement directly contradicts her 2013 First Smith Declaration and most likely would have made the Musser's Motion for Summary Judgment exclusivity claim impossible to win. The 2012 Smith Statement contradicted the very relief sought by the Motion for Summary Judgment. Additionally, Ms. Smith's identity was withheld until a week before the filing of the Defendants' Motion for Summary Judgment, making it less likely the Plaintiffs or the Court would discover her 2012 Smith Statement prior to the Court ruling on the Motion for Summary Judgment. CP 223.
- Because of the foregoing actions, Plaintiff incurred significant fees and costs in (a) responding to a Motion for

Summary Judgment and (b) drafting a Motion to File Supplemental Brief after learning of the subterfuge. CP 223.

- Appellants then made ex parte contact with the Court representing that the *parties* had agreed to continue the motion for summary judgment. In fact, not such agreement was made or discussed. CP 223.
- Appellants failed to disclose a known witness and improperly withheld her 2012 Smith Statement because it was against Defendants' interests. Counsel then signed pleading in connection with the Defendants Motion for Summary Judgment knowing that they were not well grounded in fact. CP 223.
- Appellants engaged in ex parte communication with the Court's staff in an effort to gain a continuance of the initial summary judgment motion immediately following receipt of Plaintiff's motion to supplement the record with the 2012 Catie Smith Statement where a continuance had not been agreed to by Plaintiff's counsel. Counsel made untruthful representations to the Court staff. CP 224.

Based upon those findings of fact, the trial court entered the following conclusions of law:

- By drafting and submitting the 2013 First Smith Declaration that was materially inconsistent with the 2012 Smith Statement that was in counsel's possession, counsel violated CR 11 by signing a pleading that was not well grounded in fact and that was imposed for an improper purpose. CP 224.
- Counsel violated the King County Superior Court guidelines regarding use of email and ex parte communication by submitting false and misleading information to the Court by untruthful representations and

failing to include all counsels on the email communications. CP 224.

The Court then ordered sanctions in the amount of \$15,796 for fees incurred in Plaintiff responding to the First Musser Summary Judgment and \$5,193 for fees incurred in filing the Motion to Supplement the Record. CP 225.

Appellants filed a Motion for Reconsideration on September 20, 2013. CP 226-41. The Brittons filed an opposition brief on October 3, 2013. CP 244-63. Thereafter, on October 11, 2013, the trial court denied the motion for reconsideration without explanation. CP 289. Curiously and despite the opportunity, the trial court did not cure an admitted computation error in the prior judgment. The Brittons admitted in their response to the motion for reconsideration that the judgment amount of \$22,433 was a computational error. CP 254. Instead, according to the Brittons, the judgment should have been for \$20,989. *Id.* The Brittons even submitted a revised judgment reflecting this corrected figure. *Id.* The trial court, however, denied the motion without even correcting this clear error.

Moreover, the trial Court's Sanctions Order incorrectly stated that the trial court "heard oral argument of counsel." CP 222. However, the trial court did not afford oral argument to Appellants even though it had

already agreed to hear oral argument and set the hearing; instead it ruled upon the motion two days before the scheduled hearing. *Compare* CP 225 and App. 306-07. Further, the Sanctions Order does not recite which briefs of the parties and the evidence the Court considered. CP 222. To create a clear record on appeal, Appellants requested in their motion for reconsideration that the trial court clarify that no oral argument was afforded and state the specific documents, pleadings and declarations that the trial court relied upon in granting the motion. CP 228. Again, the trial court denied the motion for reconsideration without any clarification. CP 289.

IV. ARGUMENT

A. Standard of Review

The trial court's sanctions order is reviewed for abuse of discretion. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004). The Court's inquiry is "whether the court's conclusion was the product of an exercise of discretion that was manifestly unreasonable or based on untenable grounds or reasons." *Id.*

B. Finding of Fact that Defendants Improperly Withheld Identity of Catie Smith and the 2012 Catie Smith Statement is Error

In Findings of Fact No. 3 and 4, the trial court found that counsel intentionally resisted Plaintiffs' discovery efforts that would have revealed

the identity of Catie Smith and the 2012 Catie Smith Statement and failed to identify Ms. Smith as a person with relevant information in this case. CP 222-23. In Finding of Fact 8, the Court found, “Defendants, through their attorney, failed to disclose a known witness and improperly withheld her 2012 Statement because it was against Defendants’ interest.” CP 223. These findings are not in accord with the evidence, and the Sanctions Order fails to address in any way the valid objections to disclosure and production under both CR 26(b)(4) and KCLR 26(a)(2)(B).

First, without even discussing it or examining the detailed legal argument on the topic, the trial court simply found, with no explanation, that Appellants had no valid justification for resisting discovery of the 2012 Catie Smith Statement. This is incorrect. The statement was obtained by the Appellants in anticipation of litigation and is classic work product as it was submitted after litigation commenced on June 29, 2012. 14 Wash. Prac., Civil Procedure § 13:10 (2d ed.) (“Familiar examples of [work product] include investigative reports, **statements from witnesses**, and, of course, an attorney's own notes and research.”) The good faith objection was clearly made in response to the Britton discovery requests. Notably, the Brittons themselves correctly acknowledged prior to changing their position to suit them, that statements such as this one, are work product. CP 202. (“the Declaration is Work Product.”) To

overcome the work product protection, CR 26(b)(4) requires that the Brittons demonstrate an undue hardship to obtain the substantial equivalent of the materials by other means. The Brittons did not ultimately contest the objection in any way and, in fact, obtained the statement simply by submitting a subpoena to Catie Smith. Since the 2012 Catie Smith Statement was work product, Appellants had no obligation to disclose it to the Brittons. They could and did get it themselves. The Court's ruling provides no basis as to how withholding the statement violates the discovery rules. It does not even acknowledge the Appellants' arguments on the subject as if they did not even exist.

Second, the Court's finding that Defendants improperly withheld the identity of Catie Smith completely ignores KCLR 26(a)(2)(B) (*i.e.* it does not even mention it). The Brittons argued, without discussing the KCLR 12(a)(2)(B) issue, and the Court apparently accepted, that the Defendants intentionally disclosed Catie Smith late for a nefarious purpose of hiding the 2012 Catie Smith Statement. The truth is that Defendants properly objected to the Interrogatory calling for the identity of witnesses because it was over the 40 interrogatory limit under KCLR 26(a)(2)(B) which provides that **"a party may serve no more than 40 interrogatories, including all discrete subparts."** If over the limit, the Rule provides that the answering party **"shall be required to respond to**

only those requests, in numerical order, that comply with LCR 26(d). No motion for protective order is required.” (Emphasis added.) KCLR 26(a)(6)(B) makes clear that the onus is on the requesting party (*i.e.*, the Brittons) to seek leave of court for additional interrogatories or to obtain the agreement of the other party. The Mussers properly followed the Rule guidelines and the Court’s finding that the Mussers were ostensibly not justified in objecting without stating why, appears inconsistent with the rule, which states the answering party “shall be required to respond to only those requests . . . that comply with LCR 26(d).”

Perhaps more important, the Court’s findings also completely ignore that Mussers’ responses were served on November 30, 2012. The Brittons raised no issue whatsoever with the objections for nearly three months, until February 14, 2013. Not surprising, the Mussers naturally assumed that the Brittons agreed that their interrogatories were over the limit. Once notified of the disagreement, the Mussers immediately agreed to answer that interrogatory over proper objection as a courtesy to avoid an unnecessary argument. Under these circumstances, the trial court’s finding that the Appellants improperly withheld the identity of Ms. Smith is not supported by the evidence.

C. Finding of Fact that the 2012 Smith Statement Directly Contradicts 2013 Catie Smith Declaration and Would Have Made Summary Judgment Impossible to Win is in Error; Conclusion that Defendants Violated CR 11 by Signing First Musser Summary Judgment is not Supported by Record.

The Court made interrelated findings and conclusions related to the 2012 Catie Smith Statement: (1) that the statement is materially inconsistent with the 2013 Catie Smith Declaration, and (2) the statement made the First Musser Summary Judgment impossible to win thus violating CR 11. CP 222, 224. These findings and conclusions are in error.

1. The Statements are Not Inconsistent

The crux of the issue is the following sentence of the 2012 Catie Smith Statement: “It appeared that the Musser’s boundary lines are further into the Brittan’s [sic] gardens than I have been aware of over the course of my years in the Musser’s garden.” CP 104. In her Second Declaration of Catie Smith, she explains that while she generally maintained all the areas of the Disputed Area, in just a few sections, she did not go all the way to the true line, such as north of the arborvitae or near the rockery. App. 174. In those areas, there may have been “**as much as a foot**” that was not maintained. *Id.* Ms. Smith makes clear that the area she was vaguely referring to in the 2012 Catie Smith Statement is a small area near the rockery and arborvitae; certainly not the entire area

claimed in a variety of ways and locations by the Brittons.

More importantly, the 2012 Catie Smith Statement is not inconsistent with the 2013 Catie Smith Declaration. The declaration accurately states, “I have **generally** maintained these areas since 2007.” (Boldface added) CP 111. Nowhere does she state she maintained every inch up to a specific line as again, there is no clear demarcation of any boundary.³ On the specific areas implicated by her comments, the 2013 Catie Smith Declaration states, “In the area between the laurel and rockery, I have generally maintained that area.” CP 111. Again, Ms. Smith does not state she maintained all the way to the true line, but that she generally maintained it. Similarly, with the area by the arborvitaes, she simply states that she maintained around the boxwood and the arborvitaes. CP 111. She does not testify that she maintained north of the arborvitaes, which includes a hydrangea and other plants, which are in the foot or so where she did not go all the way up to the true line. Upon

³ In this regard, the following statement by Ms. Smith in her Second Declaration of Catie Smith cannot be stressed enough:

. . . . Again, the problem has been for everyone I imagine that there is absolutely nothing to distinguish where the Musser Property begins and the Britton Property ends as there is no fence, barrier or any other kind of demarcation to create any clear boundary line. Thus, it is easy to have disagreement, confusion and misunderstanding when describing the area.

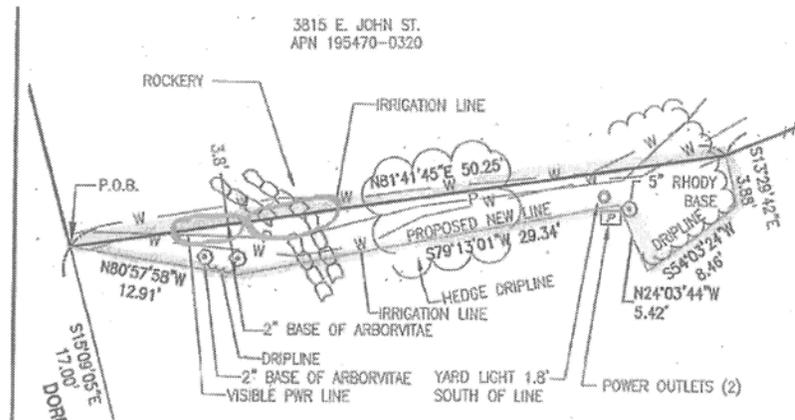
App. 173-74 (Boldface added)

thorough review, there is not one instance where Ms. Smith actually made a true contradictory statement.

2. Catie Smith's Statement Did Not Make Summary Judgment Impossible to Win

The 2012 Catie Smith Statement also related to a small portion of the Disputed Area, and did not render summary judgment impossible to win on the remaining areas (such as the oddly shaped cut-out area). The Mussers broke down the Disputed Area into distinct regions so that if the court found issues of fact with respect to a region, the court could still grant partial summary judgment on the other areas. The First Musser Motion broke the Disputed Property into the following areas: (1) the Rhododendron Area, (2) the Area between the Rhododendron and the Laurel, (3) the Laurel, (4) the Rockery, and (5) the Arborvitae.

The following diagram shows the areas (circled in red) that Ms. Smith was referring to in her August 2012 Statement:



Ms. Smith's alleged "conflicting" statement has no impact on the other areas of the Disputed Area. For instance, Ms. Smith's statement has no bearing on the drip line of the rhododendron, the rhododendron base, the laurel, or the wax leaf privets; all of which she specifically discussed in the 2013 Catie Smith Declaration. Summary judgment was properly brought as to those areas. **Indeed, it cannot be stressed enough that the Brittons conceded and later withdrew claims to the waxleaf privets and the large "drip line" of the rhododendron.** App. 336, 339. They did so in recognition that the First Musser Summary Judgment had merit as to these areas.

In sum, Appellants had a good-faith basis for believing that summary judgment was appropriate to a portion of the rockery, as to the arborvitae and the boxwood, and the area north of the rhododendron base. Ms. Smith declared that she maintained those areas from August 2007 to April 2009. Such testimony would defeat the exclusivity element of adverse possession. For these reasons, the trial court's conclusion that summary judgment was impossible to win is not supported by the evidence.

Even though Ms. Smith may not have maintained a very small area sought by the Brittons, they would still have to prove exclusive use from April 1999 through August 2007. If the Brittons failed to present

testimony about the use of those areas, summary judgment would still be appropriate. When filing the First Musser Summary Judgment, the only “evidence” of the Brittons’ use was their discovery responses and the Declaration of Deborah Klein that simply concluded that the Brittons exclusively maintained the rockery. App. 45, 259-60. It is well-established that “conclusory” or “vague” allegations are not sufficient to defeat summary judgment; nor will courts consider conclusions of law that simply reiterate the allegations in the Complaint.⁴ As such, Appellants justifiably believed that there was not sufficient testimony to support the Brittons’ use of these areas. Moreover, there was significant confusion concerning the Brittons’ description of the “Disputed Area,” such that even the Brittons were not clear where it was. To challenge the sufficiency of the evidence, Appellants moved for summary judgment of those areas. This was a proper basis to seek summary judgment.⁵

Based on the foregoing, the Appellants had a valid basis for filing the First Musser Summary Judgment as to the entire Disputed Area. CR

⁴ *Ruffer v. St. Frances Cabrini Hosp. of Seattle*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990); *Seven Gables Corp. v. MGM /UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (Emphasis added); *Kirk v. Moe*, 114 Wn. 2d 550, 557, 789 P.2d 84 (1990); *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993).

⁵ “The object and function of the summary judgment procedure is to avoid a useless trial” and to “examine the sufficiency of legal claims and narrow the issues.” See e.g., *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979); *Babcock v. State*, 116 Wn.2d 596, 599, 809 P.2d 143 (1991).

11 establishes the standards parties or attorneys must meet when filing pleadings, motions, and legal memoranda. CR 11 imposes upon parties or attorneys the responsibility to insure that assertions made and positions taken in litigation are done so in good faith and not for an improper purpose. It is intended to deter baseless filings and curb abuses of the judicial system. *Neigel v. Harrell*, 82 Wn. App. 782, 787, 919 P.2d 630 (1996). The rule permits a court to award sanctions, including expenses and attorneys' fees, to a litigant whose opponent acts frivolously or in bad faith in instituting or conducting litigation. *See, e.g., Delay v. Canning*, 84 Wn. App. 498, 509, 929 P.2d 475 (1997).

The purpose of CR 11 is not served in this instance because counsel filed the First Musser Summary Judgment Motion in good faith. A court should impose sanctions only when it is patently clear that a claim has absolutely **no chance of success**. *In re Cooke*, 93 Wn. App. 526, 969 P.2d 127 (1999); *MacDonald v. Korum Ford*, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996).

CR 11 sanctions are not appropriate because an action's factual basis ultimately proves deficient or a party's view of the law proves incorrect. *Id.* Similarly, it has been said that sanctions should not be imposed against an attorney solely because the trier of fact ultimately

chose not to believe the client's version of the facts. *Id.* Here, the testimony of Catie Smith appeared sufficient to defeat the Brittons' adverse possession claim, notwithstanding that she did not maintain a small area near the rockery, as stated in the 2012 Catie Smith Statement.

D. There was no Intentional Misrepresentation to the Court Regarding a Continuance; Request was Harmless Because Court Continued the Motion Solely Because the Court was on Leave.

Of all the allegations of wrongdoing, this is perhaps the most exaggerated and disappointing of them all. The Brittons took an innocuous communication and made the proverbial mountain out of a mole hill. The offending "misconduct" stems from a routine inquiry to the Court's staff about scheduling: "The parties are contemplating continuing the hearing for Friday. Could you provide what dates Judge Benton would have available in April-May to accommodate a re-note?" CP 166.

The Brittons make an issue out of the word "parties." Contrary to the Brittons' allegation of wrongdoing, counsel for the Mussers was referring to the moving parties, which were the Mussers. It was the Mussers' motion for summary judgment, and they had every right to continue their own motion. While counsel could have more precisely stated, "moving parties," absolutely no deception or misrepresentation was intended. In hindsight, counsel could have chosen his words more

accurately to state “the Mussers” are contemplating continuing their motion; but the use of the words “parties” was not intended to represent that there had actually been an agreement of counsel on a continuance. Rather, the word “contemplating” signified that it was only a concept at the time. Counsel’s motives were pure and he thought it was a routine inquiry concerning dates.

Frankly, even still, it is difficult for Appellants to fathom how this email could possibly be misconstrued as an attempt to deceive the trial court. It strains credulity that this routine, trivial communication could be twisted into an intended deception and that it somehow “undermines the Court’s ability ‘to manage [its] own affairs’” and “undermines the integrity of the court.” CP 23.

What makes this allegation even more astounding is the fact that the reason the Appellants inquired about a possible continuance was to give the court and the Brittons the time the Brittons sought to supplement the record. By way of background, the Brittons filed, on shortened time, a motion to supplement the record within days of the scheduled hearing, and after all the briefing had been submitted. The Appellants wanted the court to have all the information in front of it before ruling on the motion.

The Appellants thought they were offering a cooperative and conciliatory approach to the timing problem intimated by the Brittons’

filing of a last-minute motion to supplement the record. The Appellants had no idea that their good-faith offer to continue would be met with such vigorous opposition, particularly because the offer benefitted the Brittons. Nor could the Appellants possibly foresee that a good-faith offer to continue would lead to some allegation that they were attempting to “mitigate the prior improper conduct.” There was no prior misconduct, and the offer was truly a friendly gesture to allow the Brittons time to get all their evidence in.

Further, the communication was not improper *ex parte* contact. The guidelines cited by the Brittons plainly state that opposing counsel should be copied, “If an attorney is communicating substantive information to court staff.” “Substantive information includes information regarding the likelihood of settlement, the timing of witnesses, anticipated problems with scheduling, concerns regarding security and other case-specific issues.” None of the examples include routine questions about the court’s availability to hear a motion; as such inquiries are merely procedural.

As it turns out, the inquiry had no impact on the pending motions. The court staff responded, “It will need to be continued anyway, because Judge Benton will be on FMLA to the end of May.” CP 166. In other words, the trial court continued the hearing solely due to a leave of

absence by the court. So, ultimately, this entire issue was rendered moot.

E. Amount of Sanctions is Not Justified by Record.

The monetary award includes (1) fees incurred by the Brittons in responding to the First Musser Summary Judgment; and (2) fees incurred by the Brittons in filing their Motion to Supplement. CP 225. The amount of the fee award is not justified.

First, the trial court awarded the Brittons \$15,796 for fees incurred in responding to the First Musser Summary Judgment which does not properly apportion the alleged CR 11 violation (*i.e.*, Catie Smith's "conflicting testimony") from the rest of the Mussers' motion, which has merit. If a trial court decides that the appropriate sanction under CR 11 is an award of attorney fees, it must limit those fees to the amounts actually and reasonably expended in responding to the sanctionable filings. *In re MacGibbon*, 139 Wn. App. 496, 161 P.3d 441 (Div. 1 2007); *Madden v. Foley*, 83 Wn. App. 385, 922 P.2d 1364 (Div. 1 1996); *see also*, 15A Wash. Prac., Handbook Civil Procedure § 8.9 (2013-2014 ed.) (citing *Baker v. Alderman*, 150 F.R.D. 202 (M.D. Fla. 1993)) (imposition of Rule 11 sanctions requires that the award be "properly itemized" in terms of the perceived misconduct)). The trial court's failure to expressly limit an award of attorney fees to those incurred in responding to specified sanctionable conduct will, on appeal, result in a remand for recalculation.

Just Dirt, Inc. v. Knight Excavating, Inc., 138 Wn. App. 409, 157 P.3d 431 (Div. 2 2007).

Here, the Mussers moved for summary judgment over the entire Disputed Area. As set forth above, the alleged conflicting testimony relates to a very small portion of the Disputed Area. Ms. Smith's testimony had no impact on the drip line of the rhododendron, the rhododendron base, the laurel, or the wax leaf privets. Summary judgment was properly brought as to those areas. Indeed, the Brittons even **conceded claims to the waxleaf privets and the large "drip line" of the rhododendron.** App. 336, 339.

Given that substantial portions of the Disputed Area were properly the basis of the First Musser Summary Judgment, the award of all of the attorneys' fees the Brittons incurred in responding to the first motion was an abuse of discretion. Upon finding a CR 11 violation, the trial court was required to separate and apportion the small areas implicated by Ms. Smith's statement from the valid portions of the First Musser Summary Judgment, which include large portions later conceded by the Brittons.

Appellants submit that the small areas actually impacted by Ms. Smith's alleged statement represent less than ten percent (10%) of the overall Disputed Area. Therefore, a significant adjustment in the amount of the award is justified.

Further, the award includes discovery tasks not related to responding to the First Musser Summary Judgment and relating to declarations that were later relied upon. The Brittons alleged that they removed the entries related to declarations that they later relied upon in opposition to the Mussers' partial summary judgment motion. CP 33. This representation is not accurate. Consider the following entries that relate directly to the declarations they later relied upon or to other matters entirely:

- **Legal research regarding ability for the Court to set the precise boundary line in a dispute. Confer with Scott.**
- **Review witness files; update and revise declaration templates for Erik Wood, Ptarmigan Teal, Israel Lopez and Jim Wiley**
- **Prep witness declaration NBs and attend teleconference meeting with Brigid and Mark Britton, SRS, and Matt Paxton; Review draft subpoena to Catie Smith; locate addresses for service of subpoenas on Catie Smith and Ken Mickleborough**
- **Site visit to Brittons' Property; speaking with Mark and Brigid regarding facts of the case**
- **Conference call re: Mark's comments on Smith Declaration and contents of Brittons' landscapers declarations**
- **Call with client regarding SJ Response and witness declarations; prepare subpoena to Catherine Smith; prepare subpoena to contractor; emails re witness declarations**
- **Phone call with Ptarmigan Teal regarding declarations; transmit declaration and exhibits to Ptarmigan; edit and revise Erick Wood declaration and exhibits; transmit to Mark and Brigid for review; phone call with Scott Sleight and Brigid Britton; research Langstraat employee "Doug;" email my findings to Brigid, Mark and Scott; research when Liberty Landscaping was formed (Alex-past employee of Langstraat-Wood); edit and revise Wood declaration with Brigid's**

changes and filling in blanks; Follow up phone call to Ptarmigan regarding her review of the declarations

- **Emails with Erik Wood and revise and final declaration; review and draft Response opposing SJ motion; review and draft Brigid Britton declaration and exhibits**
- **Revising and editing Opposition to Motion for Summary Judgment and Declaration of Brigid Britton per Scott's mark-ups**
- **Edit and revise photos in opposition to MSJ brief; review and edit Declaration of Mark Britton; revise and edit Brigid Britton Declaration exhibits;**

CP 171-72.

These entries total \$6,247, and should be removed from the court's award. That leaves total fees spent drafting the response at approximately \$9,549. This amount should further be apportioned because this response included responding to the valid portion of the Mussers' motion, **including portions that the Brittons later conceded.** App. 336, 339. The Mussers submit that a fee award of less than \$1,000 is appropriate because the comments of Ms. Smith only pertained to roughly ten percent (10%) of the Disputed Area.

Perhaps the best illustration of the trial court's unwillingness to properly compute the award is its refusal to correct even an admitted computational error. The Brittons admitted in their response to the motion for reconsideration that the judgment amount of \$22,433 was a computational error. CP 254. Instead, according to the Brittons, the

judgment should have been for \$20,989. *Id.* The Brittons even submitted a revised judgment reflecting this corrected figure. *Id.* However, the trial court refused to enter the corrected judgment, and simply issued an order on the motion for reconsideration that stated: “the Motion for reconsideration is DENIED.” This is clear error.

The second component of the Court’s award is for \$5,193 for “fees incurred Filing Motion to Supplement Response with 2012 Smith Statement and emails as well as for the improper and untruthful *ex parte* communication.” CP 225. This award is an abuse of discretion for two reasons. First, the trial court’s award assumes that the Brittons had to file a Motion to Supplement as a result of Appellants “improper” withholding of the 2012 Catie Smith Statement. However, for the reasons stated above, Appellants complied with the discovery rules. Therefore, no fees for filing the Motion to Supplement are warranted.

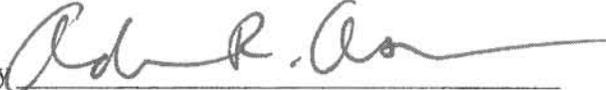
Secondly, the award of fees for the Motion to Supplement as a result of the alleged *ex parte* communication is clear error. Not only was the communication ultimately harmless, but the communication came after the Motion to Supplement was filed. Therefore, it follows that the alleged communication could not have caused the Brittons to incur fees on the motion. The trial court erred.

V. CONCLUSION

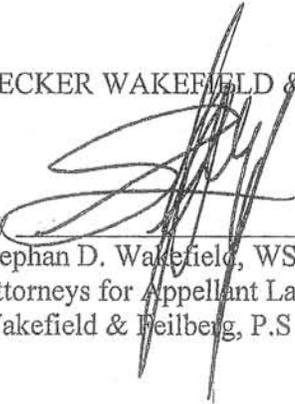
Based on the foregoing, the Appellants respectfully request that the Court reverse the trial court's sanctions order in its entirety. Alternative, the Court should remand for recalculation of the appropriate amount.

Respectfully submitted this 16th day of June, 2014

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VI. CERTIFICATE OF SERVICE

I certify that on the 16th day of June, 2014, I caused a true and correct copy of this Brief of Appellants and Appendix to be served on the following in the manner indicated below:

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Dated at Seattle, Washington, this th16 day of June, 2014.

Linda McKenzie
Linda McKenzie, Legal Assistant

FILED
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DIVISION I

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STATE OF WASHINGTON
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SOCIUS LAW GROUP, PLLC and HECKER
WAKEFIELD FEILBERG, P.S.,

CASE NO. 71556-9-1

Appellants,

INDEX TO THE APPENDIX

v.

Superior Court Case No. 2-2-22451-0 SEA

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and wife,

Respondents.

No.	Document	Pages
1	Complaint for Quiet Title, Declaratory Judgment and Injunctive Relief	APP 001 – APP 024
2	Declaration of Adam R. Asher	APP 025 – APP 087
3	Declaration of Catie Smith	APP 088 – APP 139
4	Plaintiffs' Motion to Allow a Supplemental Declaration to Present Newly-Discovered Evidence Regarding Defendants' Motion for Summary Judgment	APP 140 – APP 147
5	Defendants' Motion for Partial Summary Judgment	APP 148 – APP 169
6	Second Declaration of Catie Smith	APP 170 – APP 221
7	Second Declaration of Adam R. Asher	APP 222 – APP 305
8	Re-Notice for Hearing Plaintiffs' Motion for Sanctions and Imposition of Terms	APP 306 – APP 307

INDEX TO THE APPENDIX

-1-

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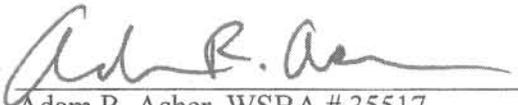
ORIGINAL

Socius Law Group, PLLC
ATTORNEYS
Two Union Square • 601 Union Street, Suite 4950
Seattle, Washington 98101.3951
Telephone 206.838.9100
Facsimile 206.838.9101

9	Defendants' Supplemental Motion for Partial Summary Judgment	APP 308 – APP 332
10	Third Declaration of Adam R. Asher	APP 333 – APP 354

DATED this 16th day of June, 2014.

SOCIUS LAW GROUP, PLLC

By 

Adam R. Asher, WSBA # 35517
Two Union Square
601 Union Street, Ste 4950
Seattle, WA 98101-3951
(203) 838-9100
Attorney for Defendants

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12 JUN 29 AM 10:10

KING COUNTY
SUPERIOR COURT CLERK
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CASE NUMBER: 12-2-22451-0 SEA

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

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and
wife

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife

Defendants.

NO.

COMPLAINT FOR QUIET TITLE,
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF

I. JURISDICTION

1.1 The Court has jurisdiction pursuant to RCW 2.08.010 and RCW Chapters 7.24 and 7.28. Venue is proper in King County because the real property that is the subject of this action is in King County. This case is proper in the Seattle Case Assignment Area pursuant to LR 82 (e) because the real property that is the subject of this action is located within the boundaries of the Seattle Case Assignment Area.

COMPLAINT FOR QUIET TITLE, DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF - PAGE 1



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1 II. PARTIES

2 2.1 Plaintiff. Mark Britton and Brigid Conybeare Britton (collectively
3 "Britton") are husband and wife who reside in King County, Washington.

4 2.2 Defendants: Peter M. Musser and Tamara H. Musser (collectively
5 "Musser") are husband and wife and reside in King County, Washington.
6

7 III. FACTS

8 3.1 Britton is the fee simple owner of real property that is commonly known
9 3815 East John Street, Seattle, WA 98112 (the "Britton Property"). The Britton
10 Property is legally described as:

11 THAT PORTION OF TRACT 51, LYING NORTH OF THE
12 FOLLOWING DESCRIBED LINE:

13 BEGINNING AT A POINT ON THE SOUTHWESTERLY LINE OF
14 TRACT 51, FROM WHICH POINT THE SOUTHWEST CORNER OF
15 SAID TRACT BEARS SOUTH 15°09'05" EAST A DISTANCE OF
16 17.00 FEET; RUNNING
17 THENCE NORTH 81°41'45" EAST 50.25 FEET,
18 THENCE NORTH 68°33'00" EAST 47 FEET, MORE OR LESS, TO
19 THE NORTHEASTERLY LINE OF SAID TRACT 51, DENNY-
20 BLAINE-LAKE PARK ADDITION TO THE CITY OF SEATTLE,
21 ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME
22 9 OF PLATS, PAGE 85, IN KING COUNTY, WASHINGTON.

23 ASSESSOR'S PROPERTY TAX PARCEL ACCOUNT NUMBER
24 195470-0320

25 3.2 Britton acquired title to the Britton Property on or about
26 October 10, 2003 by a Statutory Warranty Deed recorded in King County under
27 Recording No. 20031010002811.

28 3.3 On or about April 10, 2007, Musser was named as Grantee in a
29 Statutory Warranty Deed which purported to convey an interest in real property

30 COMPLAINT FOR QUIET TITLE, DECLARATORY
31 JUDGMENT AND INJUNCTIVE RELIEF - PAGE 2



1 commonly known as 145 39th Ave. East, Seattle, WA 98112 (the "Musser Property").

2 The legal description on the deed conveying the Musser Property is:

3 TRACT 52, AND THAT PORTION OF TRACT 51, LYING SOUTH
4 OF THE FOLLOWING DESCRIBED LINE:

5 BEGINNING AT A POINT ON THE SOUTHWESTERLY LINE OF
6 TRACT 51, FROM WHICH POINT OF THE SOUTHWEST CORNER
7 OF SAID TRACT BEARS SOUTH 15 09'05" EAST A DISTANCE OF
8 17.00 FEET; RUNNING
9 THENCE NORTH 81 41'45" EAST 50.25 FEET;
10 THENCE NORTH 68 33'00" EAST 47 FEET, MORE OR LESS, TO
11 THE NORTHEASTERLY LINE OF SAID TRACT 51, DENNY-
12 BLAINE LAKE PARK ADDITION TO THE CITY OF SEATTLE,
13 ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME
14 9 OF PLATS, PAGE 85, IN KING COUNTY, WASHINGTON.

15 ASSESSOR'S PROPERTY TAX PARCEL ACCOUNT NUMBER(S)
16 195470-0325

17 3.4 The Britton Property and the Musser Property share a common title
18 boundary line as shown on a survey performed by Barghausen Consulting Engineers,
19 Inc. on June 13, 2012 (the "Survey"). The title boundary line is generally the southerly
20 boundary of the Britton Property and the northerly boundary of the Musser Property. A
21 true and correct copy of the Survey is attached hereto as **Exhibit A**.

22 3.5 The Survey shows several encroachments on the Musser Property that
23 are used and maintained by the Plaintiffs. Those encroachments include rockery
24 retaining walls on the west and east ends of the common title boundary line, and a
mature laurel hedge.

3.6 In addition to the encroachments shown on the Survey, there are other
items encroaching from the Britton Property onto the Musser Property including, but
not limited to, irrigation hoses.

COMPLAINT FOR QUIET TITLE, DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF - PAGE 3



1243781/100758.2

1 4.2.4 Pursuant to RCW Chapter 7.24 Britton is entitled to Declaratory
2 Judgment finding they are the owner of the entire Disputed Areas free from all claims
3 of Musser or any person claiming through Musser.

4 4.2.5 Pursuant to CR 57, Britton is entitled to seek a speedy hearing on this
5 claim or otherwise have the matter advanced on the calendar.

6 **4.3 Second Cause of Action – Trespass**

7 4.3.1 Plaintiffs restate and re-allege ¶¶ 1.1 – 3.8.

8 4.3.2 On one or more occasions, Musser, or persons acting under his direction
9 and control have entered on the Britton Property or the Disputed Areas without
10 permission.

11 4.3.3 Persons entering those portions of the Britton Property or the Disputed
12 Area have placed survey markers purporting establish a boundary line between the
13 Britton Property and the Musser Property.

14 4.3.4 Britton fears, on information and belief that Musser intends to construct
15 some type of improvements within the Disputed Areas and otherwise attempt to
16 interfere with Britton’s use of that portion of the real property.

17 4.3.5 As a result of Musser’s trespass and interference, Plaintiffs have been
18 damaged in amounts to be proved at trial.

19 **4.4 Fourth Cause of Action – Injunctive Relief**

20 4.4.1 Plaintiffs restate and re-allege ¶¶ 1.1 – 3.8

21 4.4.2 Plaintiffs maintain that they are the legal owner of all of the Disputed
22 Areas.

23
24
COMPLAINT FOR QUIET TITLE, DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF - PAGE 5



1243781/100758.2

1 4.4.3 On one or more occasions, Musser has interfered or threatened to
2 interfere with Plaintiffs' property rights including but not limited to claims that Musser
3 intends to construct some type of privacy screening or fencing in those areas.

4 4.4.4 Plaintiffs allege that Musser may continue to trespass, harass and
5 otherwise attempt to change the status quo or intimidate Plaintiffs during the pendency
6 of these proceedings, and that there is no adequate relief available in law. The threats
7 include Musser's stated intention to place improvements within the Disputed Areas.

8 4.4.5 Plaintiffs fear that, without appropriate injunctive relief, he will continue
9 to suffer injury and damage so long as this matter is unresolved.

10 **V. PRAYER FOR RELIEF**

11 Based on the foregoing, the Plaintiff seeks the following relief:

- 12 1. For an Order Quieting Title to the Disputed Area in the name of Brigid
13 Conybeare Britton and Mark Britton;
- 14 2. For monetary judgment against Defendants for trespass in amounts to be
15 proven at trial;
- 16 3. For all such injunctive and other equitable relief that the Court finds
17 appropriate in the form of an interlocutory or final order;
- 18 4. For statutory costs and attorney's fees;
- 19 5. For an award of reasonable attorney's fees;
- 20 6. For post-judgment interest at the statutory rate;
- 21 7. For any other relief that the Court finds just and equitable.
- 22 8. For a speedy hearing on the Declaratory Judgment claims as provided
23 for n CR 57;

24 COMPLAINT FOR QUIET TITLE, DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF - PAGE 6



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9. For any other relief that the Court deems just and proper in law or equity.

DATED: This 29th day of June, 2012

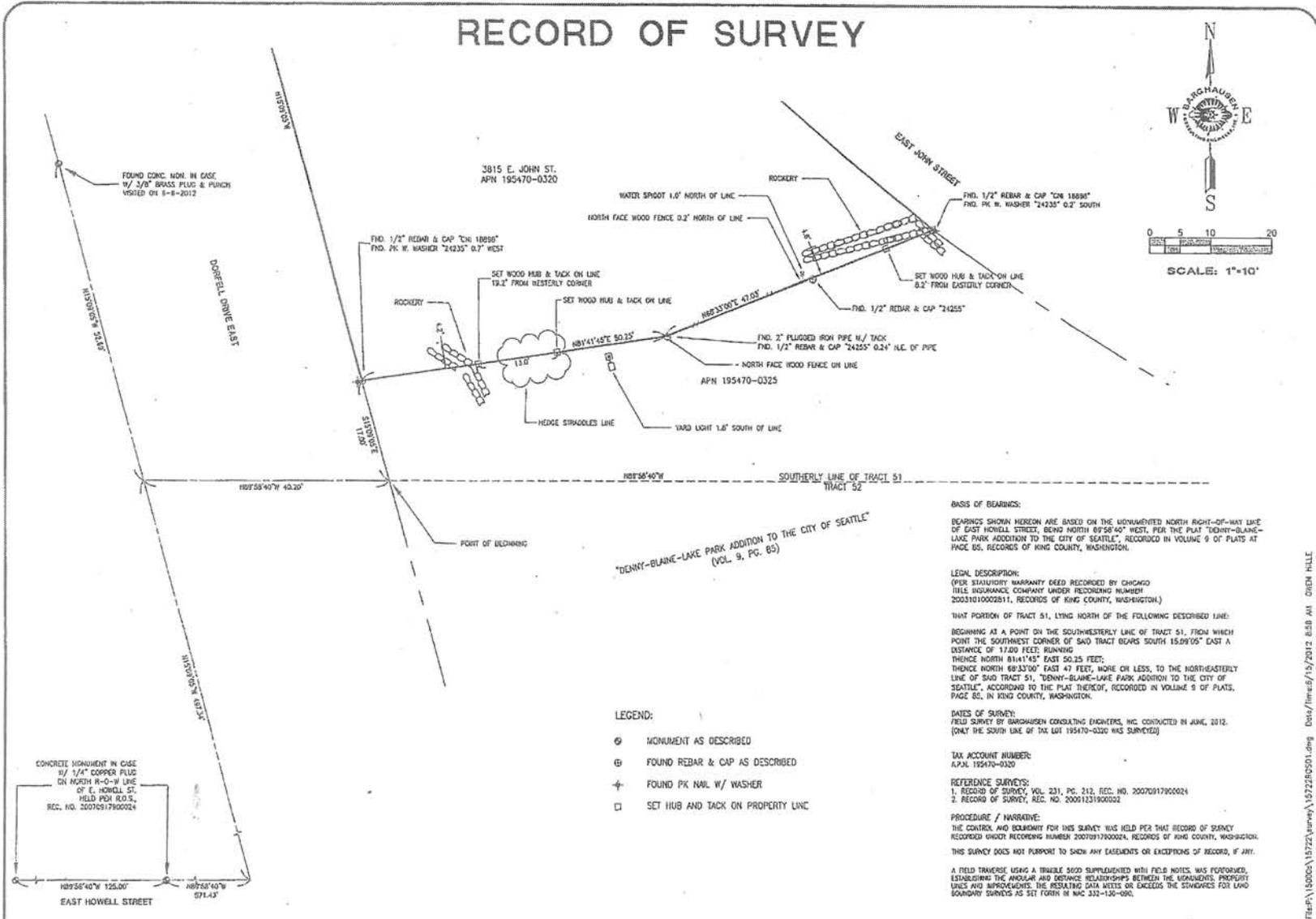
AHLERS & CRESSMAN PLLC

By: 
Lawrence S. Glosser, WSBA #25098
Attorneys for Mark Britton and Brigid
Conybeare Britton



EXHIBIT A

RECORD OF SURVEY



0 5 10 20
 Feet
 SCALE: 1"=10'

"DENNY-BLANE-LAKE PARK ADDITION TO THE CITY OF SEATTLE"
 (VOL. 9, PG. 85)

BASES OF BEARINGS:
 BEARINGS SHOWN HEREON ARE BASED ON THE MONUMENTED NORTH RIGHT-OF-WAY LINE OF EAST HOWELL STREET, BEING NORTH 89°58'40" WEST, FOR THE PLAT "DENNY-BLANE-LAKE PARK ADDITION TO THE CITY OF SEATTLE", RECORDED IN VOLUME 9 OF PLATS AT PAGE 85, RECORDS OF KING COUNTY, WASHINGTON.

LEGAL DESCRIPTION:
 (PER STATUTORY WARRANTY DEED RECORDED BY CHICAGO TITLE INSURANCE COMPANY UNDER RECORDING NUMBER 20031010002811, RECORDS OF KING COUNTY, WASHINGTON.)
 THAT PORTION OF TRACT 51, LYING NORTH OF THE FOLLOWING DESCRIBED LINE:

BEGINNING AT A POINT ON THE SOUTHWESTERLY LINE OF TRACT 51, FROM WHICH POINT THE SOUTHWEST CORNER OF SAID TRACT BEARS SOUTH 15.09'05" EAST A DISTANCE OF 17.00 FEET; RUNNING THENCE NORTH 81°41'45" EAST 50.25 FEET; THENCE NORTH 69°33'00" EAST 47 FEET, MORE OR LESS, TO THE NORTHEASTERLY LINE OF SAID TRACT 51, "DENNY-BLANE-LAKE PARK ADDITION TO THE CITY OF SEATTLE", ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 9 OF PLATS, PAGE 85, IN KING COUNTY, WASHINGTON.

DATES OF SURVEY:
 FIELD SURVEY BY BARGHAUSEN CONSULTING ENGINEERS, INC. CONDUCTED IN JUNE, 2012.
 (ONLY THE SOUTH LINE OF TAX LOT 195470-0320 WAS SURVEYED)

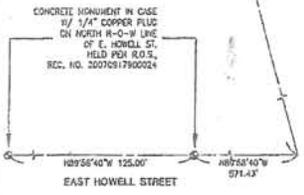
TAX ACCOUNT NUMBER:
 A.P.N. 195470-0320

REFERENCE SURVEYS:
 1. RECORD OF SURVEY, VOL. 231, PG. 212, REC. NO. 20070917900024
 2. RECORD OF SURVEY, REC. NO. 20061231900022

PROCEDURE / NARRATIVE:
 THE CENTER AND BOUNDARY FOR THIS SURVEY WAS HELD PER THAT RECORD OF SURVEY RECORDED UNDER RECORDING NUMBER 20070917900024, RECORDS OF KING COUNTY, WASHINGTON. THIS SURVEY DOES NOT PURPORT TO SHOW ANY EASEMENTS OR EXCEPTIONS OF RECORD, IF ANY.

A FIELD TRAVERSE USING A TRIMBLE 5600 SUPPLEMENTED WITH FIELD NOTES, WAS PERFORMED, ESTABLISHING THE ANGULAR AND DISTANCE RELATIONSHIPS BETWEEN THE MONUMENTS, PROPERTY LINES AND IMPROVEMENTS. THE RESULTING DATA MEETS OR EXCEEDS THE STANDARDS FOR LAND BOUNDARY SURVEYS AS SET FORTH IN MMC 312-130-060.

- LEGEND:**
- ⊙ MONUMENT AS DESCRIBED
 - ⊕ FOUND REBAR & CAP AS DESCRIBED
 - ⊕ FOUND PK NAIL W/ WASHER
 - SET HUB AND TACK ON PROPERTY LINE



RECORDING CERTIFICATE:
 RECORDING NO. _____ DAY OF _____, 20____
 FILED FOR RECORD THIS _____ DAY OF _____, 20____
 AT _____ IN BOOK _____ OF SURVEYS AT PAGE _____
 AT THE REQUEST OF BARGHAUSEN CONSULTING ENGINEERS.

 Manager

 Superintendent of Records

LAND SURVEYOR'S CERTIFICATE:
 THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY SUPERVISION IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT AT THE REQUEST OF:
 MARK BRITTON

 DATE 06/13/2012
 ONDI B. HILL
 CERTIFICATE NO. 40016



BARGHAUSEN CONSULTING ENGINEERS, INC.
 18215 72ND AVENUE SOUTH
 KENT, WA 98032
 (425)251-6222
 (425)251-8782 FAX
 CIVIL ENGINEERING, LAND PLANNING,
 SURVEYING, ENVIRONMENTAL SERVICES

DRAWN BY: OBH
DATE: 09/13/2012
SCALE: 1"=10'
CHECKED BY: OBH
JOB NO.: 15722
PROJECT NO.:

INDEX DATA:
 SE1/4, SW1/4, SEC 27, T25N, R4E, W.M.
 SURVEY FOR:
MARK BRITTON
 3815 E. JOHN STREET
 KING COUNTY, WASHINGTON

SHT
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 OF
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APP 009

File: \\15000c\15722\survey\1572256201.dwg Date: 09/13/2012 8:58 AM ONDI HILL

Honorable Monica Benton
Hearing Date: March 22, 2013 @ 1:00 p.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK BRITTON and BRIGID
CONYBEAKE BRITTON, husband and wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

I. RELIEF REQUESTED

Plaintiffs Mark and Brigid Britton (the "Brittons") assert claims for adverse possession by claiming that they and their immediate predecessors used an erratic portion of property owned by their neighbors, Defendants Peter and Tamara Musser (the "Mussers"), beginning in April 1999. The claim is not based on a fence, hedge, neatly trimmed lawn, or any other physical demarcation one would expect to establish a clear boundary; but instead, periodic landscape maintenance allegedly over the border with the Musser Property. In any event, the Brittons must show their use was exclusive and adverse for 10 years, meaning the earliest the adverse possession could have ripened was April 2009. They cannot make this showing because the incontrovertible evidence establishes that the Mussers performed

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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1 significant and continual landscape maintenance of the area as early as August 2007; a year
2 and one half before the Brittons' adverse possession claim would have vested. The regular
3 use of the area by the Mussers, the true owners of the area, precludes a finding of exclusivity
4 for the required 10-year period. Accordingly, the Mussers move for summary judgment
5 seeking an order dismissing the Brittons' adverse possession claim.

6 II. STATEMENT OF FACTS

7 A. Background

8 The Mussers purchased their property in April, 2007. The Musser Property shares a
9 North boundary with the Britton Property and is bordered by John Street on the East and
10 Dorffel Drive on the West. For at least 30 years, a six-foot tall wood fence has stood on
11 approximately 47 feet of the boundary in essentially the middle of the two properties. There
12 has been no fence on the boundary between the wood fence and Dorffel. Instead, this area of
13 the boundary contains plants, bushes, and small trees.

14 Recently, the Mussers undertook a major renovation of their house and landscaping.
15 In conjunction with the landscaping improvements, the Mussers intended to place a new
16 fence along the boundary of the Musser and Britton Properties. They would then remove the
17 old 30-year old fence which was only on part of the boundary and construct a new one. The
18 Mussers sought input from the Brittons on the type of the fence to be constructed. When the
19 Mussers' contractor knocked on the Brittons' door, Mark Britton acted hostilely and
20 demeaning toward the contractor. The Brittons ultimately filed this action alleging adverse
21 possession.

22 B. Disputed Area

23 The Brittons' Complaint did not define specifically the area sought of the Musser
24 Property, but instead simply alleged certain encroachments, such as a laurel tree and rockery,
25

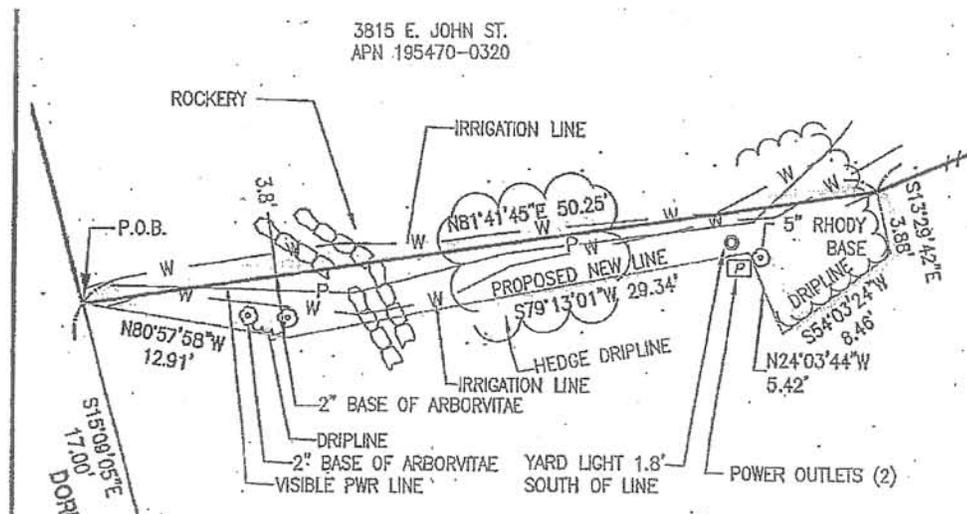
26 DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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1 to apparently create a claim. (Pl.'s Compl. ¶ 3.5-3.7). The Brittons relied upon a June 13,
 2 2012 survey prepared by Barghausen Consulting Engineers, Inc. (*Id.*, Ex. A.) Since they
 3 had no idea of the exact area claimed, the Mussers requested a full legal description of the
 4 Disputed Area through discovery. In response, the Brittons produced the following revised
 5 survey prepared by Barghausen Consulting Engineers, Inc. to set forth the specific area
 6 sought:



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 17 (Asher Decl., Ex. A, Survey of Disputed Areas.)¹ The dark black line is the title property
 18 line between the Musser Property (South) and the Britton Property (North). The Brittons'
 19 proposed new line starts at the west side with the initials P.O.B., travels in a southeasterly
 20 direction around the base of two arborvitae trees, then jets in a northeasterly direction to
 21 encompass the "Hedge Dripline" until taking an erratic turn South at the base of the
 22 rhododendron, then travels south, around the dripline of the rhododendron, and then north,
 23

24 ¹ The Brittons first alleged adverse possession over a rockery near John Street. In discovery, the Mussers asked
 25 for a legal description of all the areas claimed. The Brittons did not provide a legal description for the rockery
 26 near John Street. Thus, the Brittons have abandoned any claim based on that area. Summary judgment
 dismissing any claim over this area is therefore appropriate.

DEFENDANTS' MOTION FOR
 SUMMARY JUDGMENT

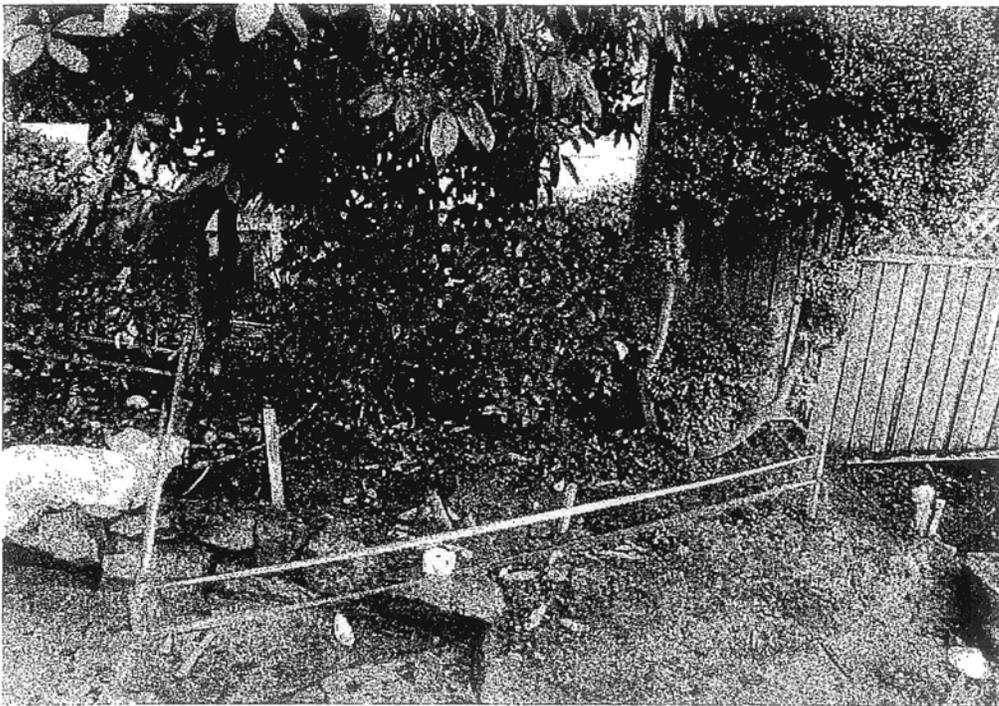
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1 again until reaching the actual title property line. As depicted in the survey, the key points of
2 interest within the Disputed Area, from East to West, are the rhododendron, the single laurel
3 bush (termed a "hedge" in the survey), the rockery, and the two arborvitae trees.

4 Below are photographs, from East to West, of the rhododendron, the area between the
5 rhododendron and the laurel, the laurel, the rockery, and the two arborvitae trees:

6 The Rhododendron:



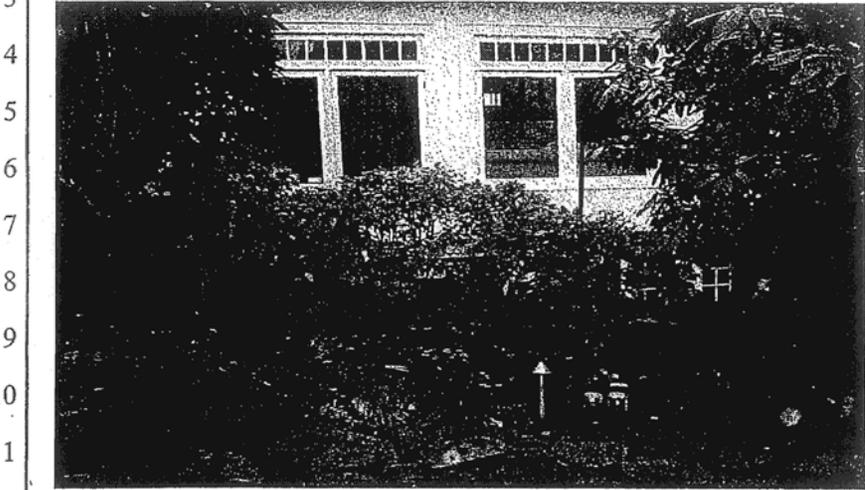
21 (Asher Decl., Ex. B, Photograph of Rhododendron Area.) The photograph above depicts the
22 oddly-shaped area (blue and orange tape) around the rhododendron to which the Brittons
23 claim adverse possession over. Astonishing is the fact that this area not only includes the
24 entire rhododendron, but also includes several feet of the Mussers' patio, property that is
25 clearly behind the Mussers' side of the 30-year old fence described above, and a boxwood

26 DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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1 bush that is completely on the Mussers' side of the fence.

2 **Area Between the Rhododendron and Laurel:**



12 (Asher Decl., Ex. C, Photo Between Rhododendron and Laurel.)

13 **The Laurel:**



24 (Asher Decl., Ex. D, Photo of Laurel.)

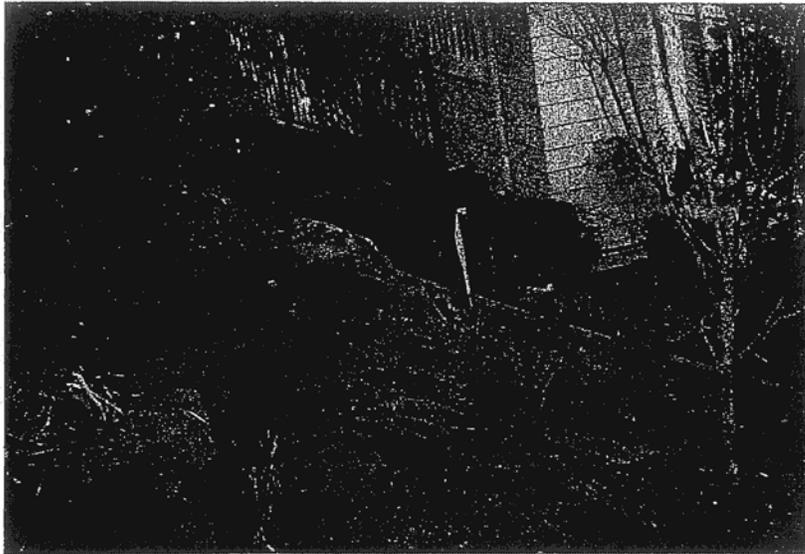
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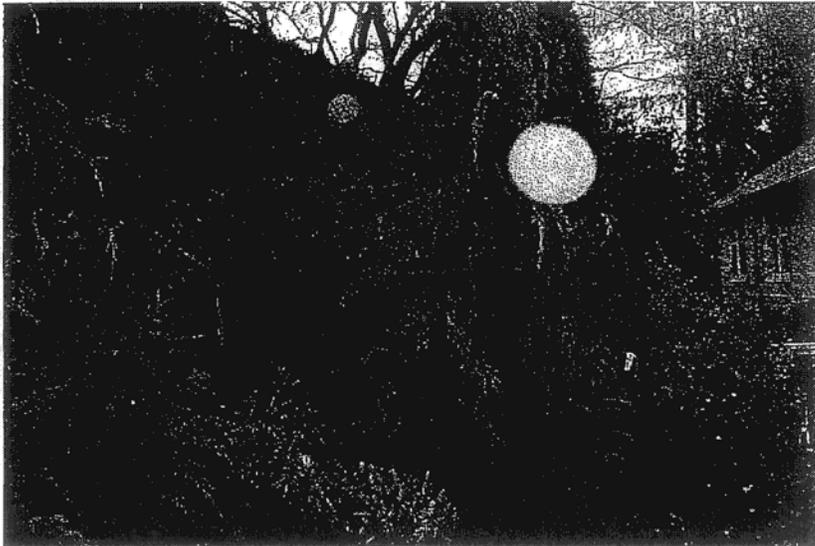
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The Rockery:



(Asher Decl., Ex. E, Photo of Rockery.)

The Two Arborvitae and Boxwood:



(Asher Decl., Ex. F, Photo of Arborvitae and Boxwood.)

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

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1 **C. History of Brittons' and Predecessors' Use of the Disputed Area**

2 **1. The Dysons (August 1997-April 1999)**

3 Timothy J. Dyson and Julie C. Dyson purchased the Britton Property on August 22,
4 1997 from the Estate of Luther C. Losey. (Asher Decl., Ex. G, Dyson Deed; Declaration of
5 Timothy J. Dyson ("Dyson Decl.") ¶ 1.) When the Dysons purchased the Britton Property
6 the house had not been lived in for several years, and was in a serious state of disrepair. (*Id.*
7 ¶ 2.) The Dysons undertook a major renovation of the house. (*Id.*) The exterior of the
8 property, like the house, had not been maintained and was very overgrown. (*Id.* ¶ 3.) The
9 Dysons concentrated their efforts on the renovations to the house, and did not do any
10 maintenance of the landscaping. (*Id.*) They planned to landscape the property once the house
11 renovations were complete, but they never got that far. Before the landscaping work was
12 started, the Dysons found another house and purchased it. (*Id.* ¶ 5.) The Dysons then sold
13 the Britton Property to John and Deborah Klein in April 1999. (*Id.*); (Asher Decl., Ex. H,
14 Klein Deed.)

15 **2. The Kleins (April 1999-October 2003)**

16 Deborah Klein states in her declaration that when they purchased the Britton
17 Property, there was not very much landscaping along the southern border of the property,
18 which is the Disputed Area, so they had significant landscaping installed along what they
19 believed to be the southern boundary of the Britton Property. (Declaration of Deborah Klein
20 ("Klein Decl.") ¶ 2.) She declares that all the trees, bushes and plants in the Disputed Area
21 were within the Britton Property. (*Id.* ¶ 7) She further declares that she and their gardeners
22 and landscapers were the only people who maintained the landscaping in the Disputed Area.
23 (*Id.*) She also states that they exclusively maintained the rockery at all times. (*Id.*)

24 **3. The Brittons (October 2003 through the Present)**

25 The Brittons purchased their property from the Kleins in October 2003. They
26

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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1 similarly allege that they “maintained” the rockery in the Disputed Area. (Asher Decl., Ex. I,
2 Brittons Discovery Responses at page 5-6.) However, the factual support offered for that
3 claim is simply that the “rockeries have been well maintained and clearly visible.” (*Id.* at 5.)
4 The Brittons also allege that they maintain the laurel bush. (*Id.* at 6.) The Brittons similarly
5 assert that they prune the rhododendron in the Disputed Area. (*Id.* at 9.) To the west of the
6 rhododendron, the Brittons allege they planted “a number of different plants for privacy”
7 which were watered by them. (*Id.*) They also assert that they maintained the area above the
8 rockeries, which includes two arborvitae trees. (*Id.* at 10.) They generally assert that their
9 “maintenance activities of the Disputed Area were part of their overall yard landscaping and
10 maintenance performed weekly during the spring through the fall and every other week
11 during the winter months.” (*Id.* at 6.)

12 **D. The Mussers’ Use of the Disputed Area**

13 The Mussers purchased the Musser Property in April 2007. (Asher Decl., Ex. J,
14 Musser Deed.) In August 2007, they hired City People’s Garden Design & Landscape (“City
15 People’s”) to provide landscaping services on the Musser Property. (Declaration of Catie
16 Smith (“Smith Decl.”) ¶ 1.) Catie Smith was the Landscape Manager for City People’s.
17 (*Id.*) On behalf of City People’s, she performed landscape services on the Musser Property
18 once a week, all year long, and would typically spend several hours each time. (*Id.*, Ex. A,
19 City People’s Invoices for 2007 and 2008.) Ms. Smith left City People’s in December 2008
20 and started her own business, Brier Creek Gardens, LLC. (*Id.* ¶ 9.) City People’s continued
21 servicing the Musser Property. (*Id.*) After several months, the Mussers hired Ms. Smith’s
22 new company to take over for City People’s. (*Id.*) Since that time, she and her crew are
23 generally at the Musser Property all year long every Friday. (*Id.*)

24 Since August 2007, Ms. Smith and her crew maintained the area around the
25 rhododendron, as depicted in the photograph above (Asher Decl., Ex. B.). (*Id.* ¶ 3.) Their
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DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT

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1 maintenance of the area includes weeding, planting, fertilizing, and composting the area.
2 They have always trimmed and pruned all sides of the rhododendron. (*Id.*) Ms. Smith never
3 saw anybody else trim it, nor is there any evidence that it has been trimmed by anyone else.
4 (*Id.*) In fact, the trunk of the rhododendron shows evidence of cut limbs; most if not all of
5 which were cut by Ms. Smith over the years. (*Id.*) Additionally, Ms. Smith and her crew
6 have exclusively maintained and shaped the boxwood behind the Musser side of the fence,
7 which is also depicted in the photograph above. (*Id.*)

8 Moreover, Ms. Smith and her crew have maintained the area between the
9 rhododendron and the laurel (Asher Decl., Ex. C) since August 2007 by weeding, removing
10 unwanted plants, planting new plants, composting, and otherwise making the area have a neat
11 appearance. (*Id.* ¶ 4.) In 2008, Ms. Smith and her crew planted five or six Waxleaf Privet
12 bushes along the boundary line on the Musser side (these bushes are depicted in the
13 photographs above), to run from the existing old wood fence to the laurel, which is toward
14 Dorffel Avenue. (*Id.*) The purpose of these bushes was to act as a boundary to prevent the
15 mailman from trampling through the area. (*Id.*) The Brittons, or anyone on their behalf,
16 never complained or said anything about the bushes. (*Id.*) Ms. Smith and her crew regularly
17 maintained the bushes since they were planted in 2008. (*Id.*)

18 As with the rhododendron and boxwood, Ms. Smith and her crew also started to trim
19 the laurel bush in the "Disputed Area" beginning in August 2007. (Asher Decl., Ex. D). (*Id.*
20 ¶ 5.) When she first started working for the Mussers in 2007, the laurel had grown wildly
21 without any shape. (*Id.*) Ms. Smith created the box shape that now exists and has
22 maintained that shape since 2007. (*Id.*) When she trimmed the laurel, Ms. Smith trimmed
23 the top, and all sides, except the side facing the Britton Property. (*Id.*)

24 Also, Ms. Smith and her crew have maintained the area between the laurel and the
25 rockery (Asher Decl., Ex. E) since 2007 by weeding, removing unwanted plants, planting
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DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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1 new plants, composting, and otherwise making the area have a neat appearance. (*Id.* ¶ 6.)
2 Recently, the entire area was cleared in preparation for the pond construction. Prior to that
3 time, however, various plants were in this area. (*Id.*) For instance, a photograph produced
4 by the Brittons, depicts the prior vegetation in this area. (*Id.*, Ex. 2.) Ms. Smith and her crew
5 maintained the bushes above the string (excluding the fuscia), which are shown in the Britton
6 photograph, until they were removed recently. (*Id.*)

7 Similarly, Ms. Smith and her crew have maintained the rockery area since August
8 2007. (*Id.* ¶ 7.) They have weeded the area and put down compost. (*Id.*) Further, until
9 recently, there was an azalea in the rockery area. (*Id.* ¶ 7, Ex. 3, Azalea Photograph.) They
10 maintained this azalea from August 2007 until its removal. (*Id.*)

11 Additionally, above the rockery are two arborvitae trees and a boxwood. (*Id.* ¶ 8, Ex
12 4, Arborvitae Photograph) (Asher Decl., Ex. F.) Since August 2007, Ms. Smith and her crew
13 have weeded this area, put down compost, fertilized the trees and bushes, and otherwise
14 worked to keep a neat appearance. (*Id.*) They also pruned the boxwood to maintain its
15 shape. (*Id.*) Ms. Smith believed that the Mussers planted those trees, so she has always
16 maintained that area. (*Id.*)

17 18 III. ISSUES PRESENTED

19 Should the Court grant summary judgment in favor of the Mussers and dismiss the
20 Brittons' adverse possession claim, where the Brittons cannot meet their burden of
21 establishing exclusive use of the Disputed Area?

22 IV. EVIDENCE RELIED UPON

23 This motion is based on the pleadings and files herein, and on the Declarations of
24 Adam R. Asher, Catie Smith, Timothy J. Dyson, and Deborah Klein, with attached exhibits.
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DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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V. AUTHORITY

A. Summary Judgment Standard

The purpose of summary judgment is to avoid a useless trial where there is no genuine issue of material fact. *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 148, 787 P.2d 8 (1990). The Mussers are entitled to summary judgment as a matter of law if the pleadings, affidavits, and admissions demonstrate the absence of any genuine issues of material fact. *See* CR 56(e). A court should grant summary judgment when, as here, reasonable minds could reach but one conclusion from the facts submitted. *See Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The nonmoving party “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value” in opposing summary judgment. *Seven Gables Corp. v. MGM /UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Rather, “the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” *Id.* at 13.

B. The Brittons Cannot Meet Their Burden of Proving Adverse Possession of the Disputed Area Because Their Use was Not Exclusive for 10 Years.

Adverse possession requires that the Brittons show that their possession of the Disputed Area was (1) open and notorious; (2) actual and uninterrupted; (3) exclusive; and (4) hostile, and that such possession existed for the statutory, 10-year, period. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984).² The Brittons cannot meet their burden of showing exclusive use of the Disputed Area for the statutory 10-year period. Therefore, their adverse possession claim fails as a matter of law.

A claimant’s possession need not be *absolutely* exclusive in order to satisfy the exclusivity condition of adverse possession. *Lilly v. Lynch*, 88 Wn. App. 306, 313, 945 P.2d

² While the Brittons’ use of the Disputed Area was also not open and notorious, this Motion focuses on only the exclusive element.

1 727 (1997) (citing *Crites v. Koch*, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987)). An
2 “occasional, transitory use by the true owner usually will not prevent adverse possession if
3 the uses the adverse possessor permits are such as a true owner would permit a third person
4 to do as a ‘neighborly accommodation.’” 17 William B. Stoebuck, *Washington Practice*
5 *Real Estate: Property Law* § 8.19 at 516 (1995). With that said, however, courts find a lack
6 of exclusivity when there is regular use by the title owner that indicates ownership, as we
7 have in this case. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 936 P.2d 1163, 1172
8 (1997). For instance, in *Thompson v. Schlittenhart*, 47 Wn. App. 209, 212, 734 P.2d. 48
9 (1987), parties on both sides of the disputed boundary made similar use of the disputed
10 property. Therefore, exclusivity was missing. William B. Stoebuck and John W. Weaver
11 explain how use by the true owner defeats exclusivity as follows:

12
13 Any sharing of possession with the true owner is particularly sensitive. An
14 occasional, transitory use by the true owner usually will not prevent adverse
15 possession if the uses the adverse possessor permits are such as a true owner
16 would permit a third-party to do as a “neighborly accommodation.” Examples
17 are the true owner’s occasionally walking across the disputed area or now and
18 then using it for recreational purposes. Beyond such activities, however, any
19 significant, and especially regular, use by the true owner will prevent
20 exclusive adverse possession.

21 William B. Stoebuck and John W. Weaver, 17 *Washington Practice, Real Estate: Property*
22 *Law* § 8.19 (2nd Ed. 2004) (Emphasis added).

23 The Brittons cannot establish exclusive possession for 10 years. A summary of the
24 background of the Britton Property ownership and alleged use of the Disputed Area is helpful
25 in this analysis³:

- 26 • The Estate of Luther C. Losey sold the Britton Property to Timothy J. Dyson and
Julie C. Dyson in August 1997. (Asher Decl., Ex. H, Dyson Deed.)

³ The Mussers dispute the allegations of use by the Brittons, and their immediate predecessors, John and
Deborah Klein. However, for the purpose of this analysis, the Court should assume their allegations are true.

- 1 • The house had been vacant for several years before the Dysons' purchase. (Dyson
2 Decl. ¶ 1.)
- 3 • The property landscaping had not been maintained and was overgrown when
4 purchased by the Dysons. (Dyson Decl. ¶ 3.)
- 5 • During the Dysons' ownership they focused entirely on interior renovations. They
6 did no general landscape maintenance, and hence, did not maintain the Disputed
7 Area. (*Id.* ¶ 3, 5.)
- 8 • Before doing any landscaping, the Dysons sold the Britton Property to John Klein and
9 Deborah Klein in April 1999. (*Id.* ¶ 5.)
- 10 • The Kleins allege maintenance of the Disputed Area from April 1999 to October
11 2003, when they sold the Britton Property to the Brittons. (Klein Decl.)
- 12 • The Brittons allege identical maintenance of the Disputed Areas from October 2003
13 through the present. (Asher Decl, Ex. J, Britton Discovery Responses.)

14 Even assuming the allegations of the Brittons and Deborah Klein are true, they cannot
15 establish exclusive use for 10 years. Based on the facts above, the earliest use that could be
16 the basis of adverse possession started when the Kleins purchased the property in 1999. The
17 Kleins' predecessors, the Dysons, did no landscape maintenance on the Disputed Area during
18 their ownership in 1997 through 1999. (Dyson Decl. ¶ 3, 5.) The house was vacant several
19 years before the Dysons purchased it. (*Id.* ¶ 1.) Therefore, the earliest the adverse use could
20 have started was April 1999. Assuming, for the sake of this motion, that Deborah Klein
21 made immediate adverse use of the Disputed Areas, such adverse use, when tacked with the
22 Brittons' alleged adverse use, would have to be exclusive until April 2009, at which time
23 adverse possession in the Disputed Area would vest.

24 However, fatal to the Brittons' claim is the incontrovertible fact that the Mussers,
25 through their landscapers, began using the Disputed Area in a similar manner alleged by the
26 Brittons and the Kleins in August 2007. The Mussers hired City People's to perform
landscape services. Catie Smith began maintaining the Musser Property at that time. She

DEFENDANTS' MOTION FOR
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APP 022

1 testified that she and her crew weeded the entire area, they pruned the rhododendron, they
2 pruned all sides of the laurel (except the Britton side), they planted bushes (Waxleaf Privets)
3 and plants in the area, they maintained the arborvitae trees and a boxwood, they removed
4 debris, they put down mulch, and performed various other tasks, including fertilizing the
5 plants in the area. Further, the Mussers' sprinklers have watered the plants and trees in the
6 Disputed Area. (Smith Decl. ¶ 2.) Catie Smith's crew was on the Musser Property nearly
7 every week from August 2007 through December 2008. City People's continued
8 maintaining the property for several months in 2009, until Catie Smith's new company, Brier
9 Creek Garden, LLC, took over, and which continues to maintain the property today.

10 This incontrovertible testimony is fatal to the Brittons' adverse possession claim.
11 From August 2007, through the present, the Mussers have regularly made the same use of the
12 Disputed Area as alleged by the Brittons. Such shared use defeats exclusivity. Even
13 assuming the Brittons' claims are true, their use (tacked with the Kleins') was only exclusive
14 for eight years, not the requisite 10 years for adverse possession. Summary judgment,
15 dismissing the Brittons' adverse possession claim, is therefore warranted.

16 VI. CONCLUSION

17 For the foregoing reasons, the Mussers respectfully request that the Court grant
18 summary judgment in their favor, dismissing the Brittons' adverse possession claim. Even
19 accepting the Brittons' and Deborah Klein's allegations as true, the Brittons cannot prove
20 exclusive use for 10 years. The alleged adverse began in April 1999, which would require
21 exclusive use until April 2009. The undisputed evidence is that the Mussers regularly
22 maintained the Disputed Area from August 2007 through the present. Such regular use by
23 the Mussers defeats exclusivity as of August 2007. As such, the Brittons' alleged adverse
24 use did not vest. Therefore, summary judgment should be entered in favor of the Mussers
25 and dismissing the Brittons' adverse possession claim.

26 DEFENDANTS' MOTION FOR
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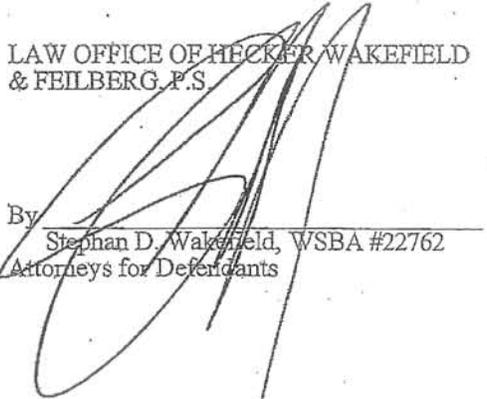
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DATED this 15th day of February, 2013.

SOCIUS LAW GROUP, PLLC

By 
Adam R. Asher, WSBA #35517
Attorneys for Defendants

LAW OFFICE OF HECKER WAKEFIELD
& FEILBERG, P.S.

By 
Stephan D. Wakefield, WSBA #22762
Attorneys for Defendants

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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Honorable Monica Benton
Hearing Date: March 22, 2013, 1:00 p.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK BRITTON and BRIG'D
CONYBEARE BRITTON, husband and wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

DECLARATION OF
ADAM R. ASHER

I, Adam R. Asher, am over the age of 18 years, am competent to testify to the matters set forth herein, and make this declaration of my own personal knowledge and belief.

1. I am one of the attorneys for Defendants Peter M. Musser and Tamara H. Musser.
2. Attached hereto as **Exhibit A** is a true and accurate copy of a survey prepared by Barghausen Consulting Engineers, Inc. dated October 31, 2012;
3. Attached hereto as **Exhibit B** is a true and accurate copy of a photograph of the rhododendron area;
4. Attached hereto as **Exhibit C** is a true and accurate copy of a photograph of the area between the rhododendron and laurel;

DECLARATION OF ADAM R. ASHER

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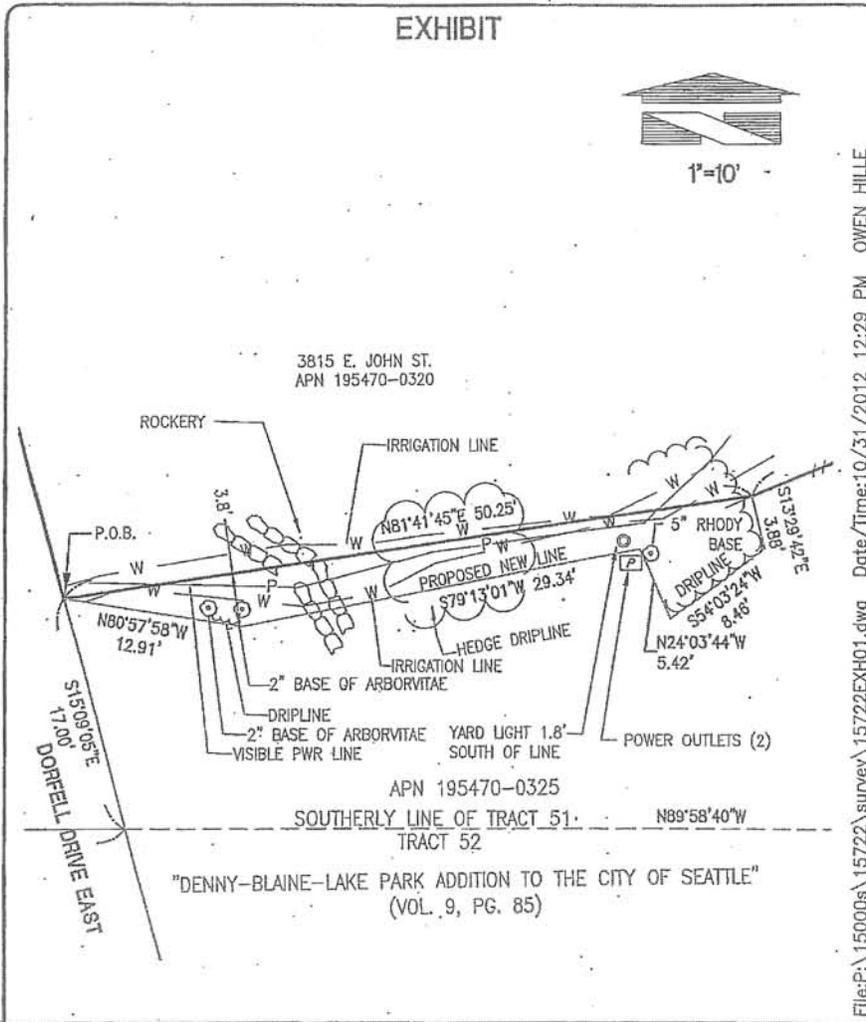
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EXHIBIT A

EXHIBIT



1"=10'



File:P:\15000s\15722\survey\15722EXH01.dwg Date/Time:10/31/2012 12:29 PM OWEN HILLE

<p>SCALE: HORIZONTAL 1"=10' VERTICAL N/A</p>	<p>For: MARK BRITTON</p>	<p>JOB NUMBER 15722</p>
 <p>18215 72ND AVENUE SOUTH KENT, WA 98032 (425)251-6222 (425)251-8782 FAX CIVIL ENGINEERING, LAND PLANNING, SURVEYING, ENVIRONMENTAL SERVICES</p>	<p>Title: LOCATION EXHIBIT.</p>	<p>15722L.001.DOC SHEET 1 of 1</p>
<p>DRAWN OBH</p>		<p>DATE 10/31/2012</p>

BRITTON000003

EXHIBIT B

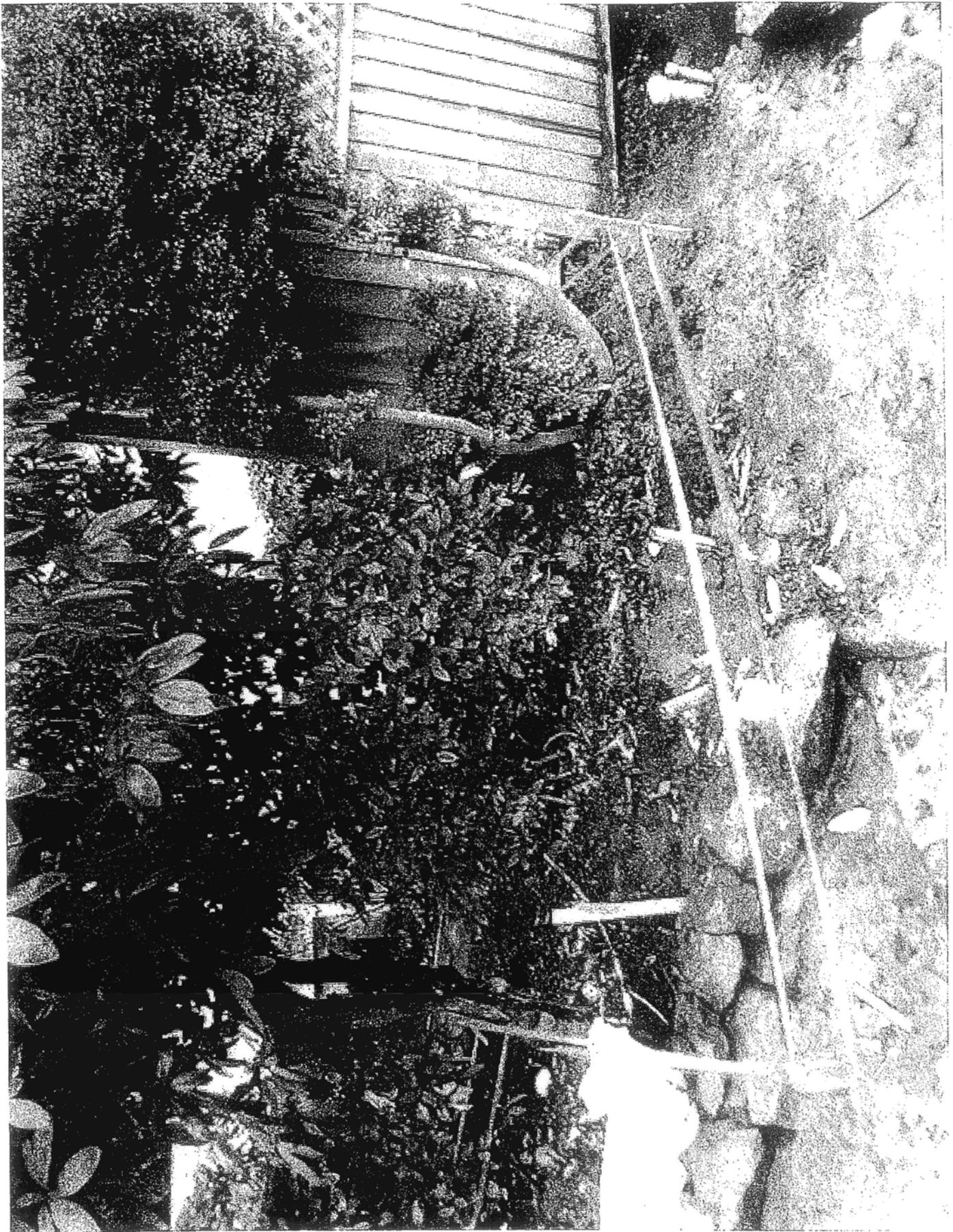


EXHIBIT C



EXHIBIT D



EXHIBIT E

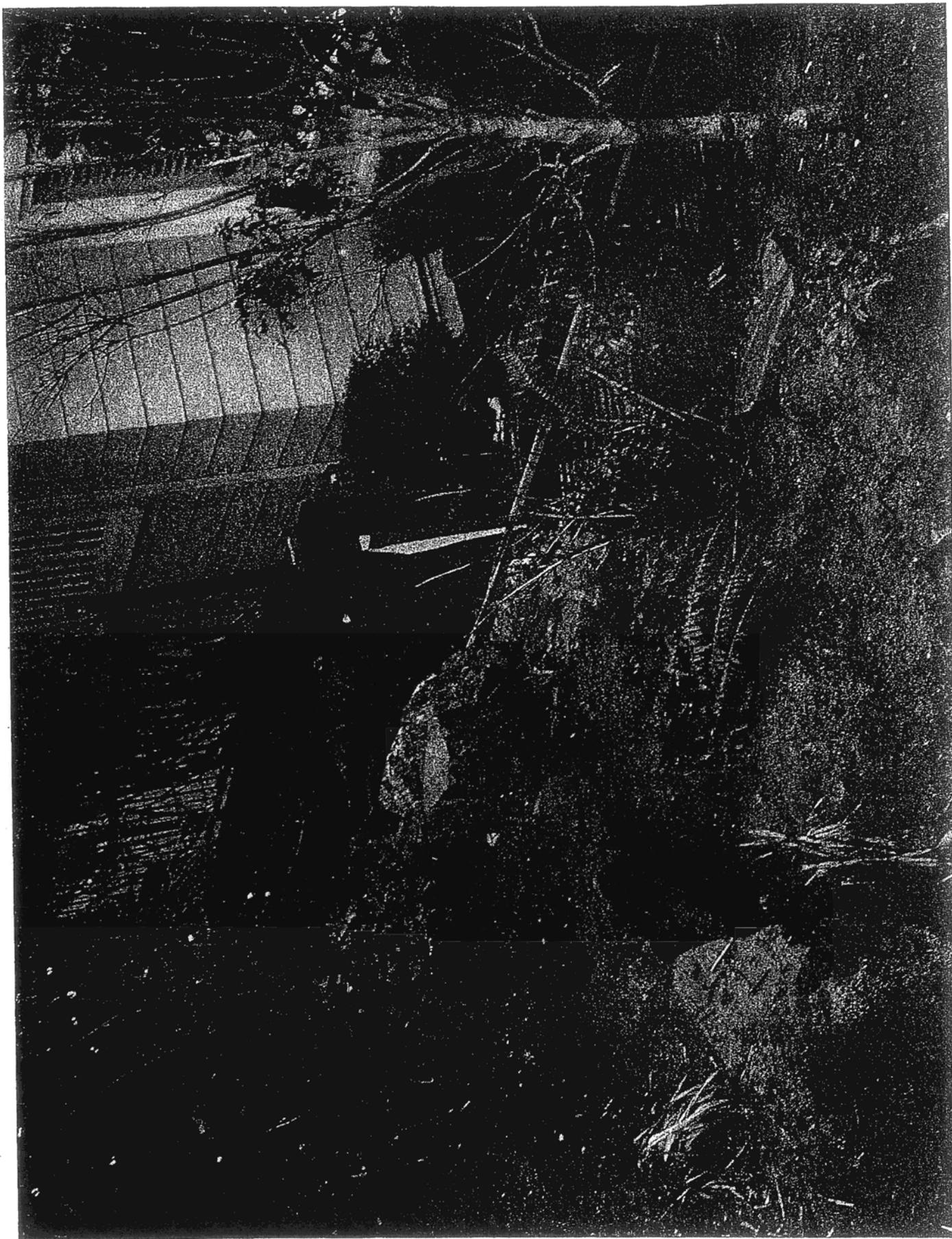


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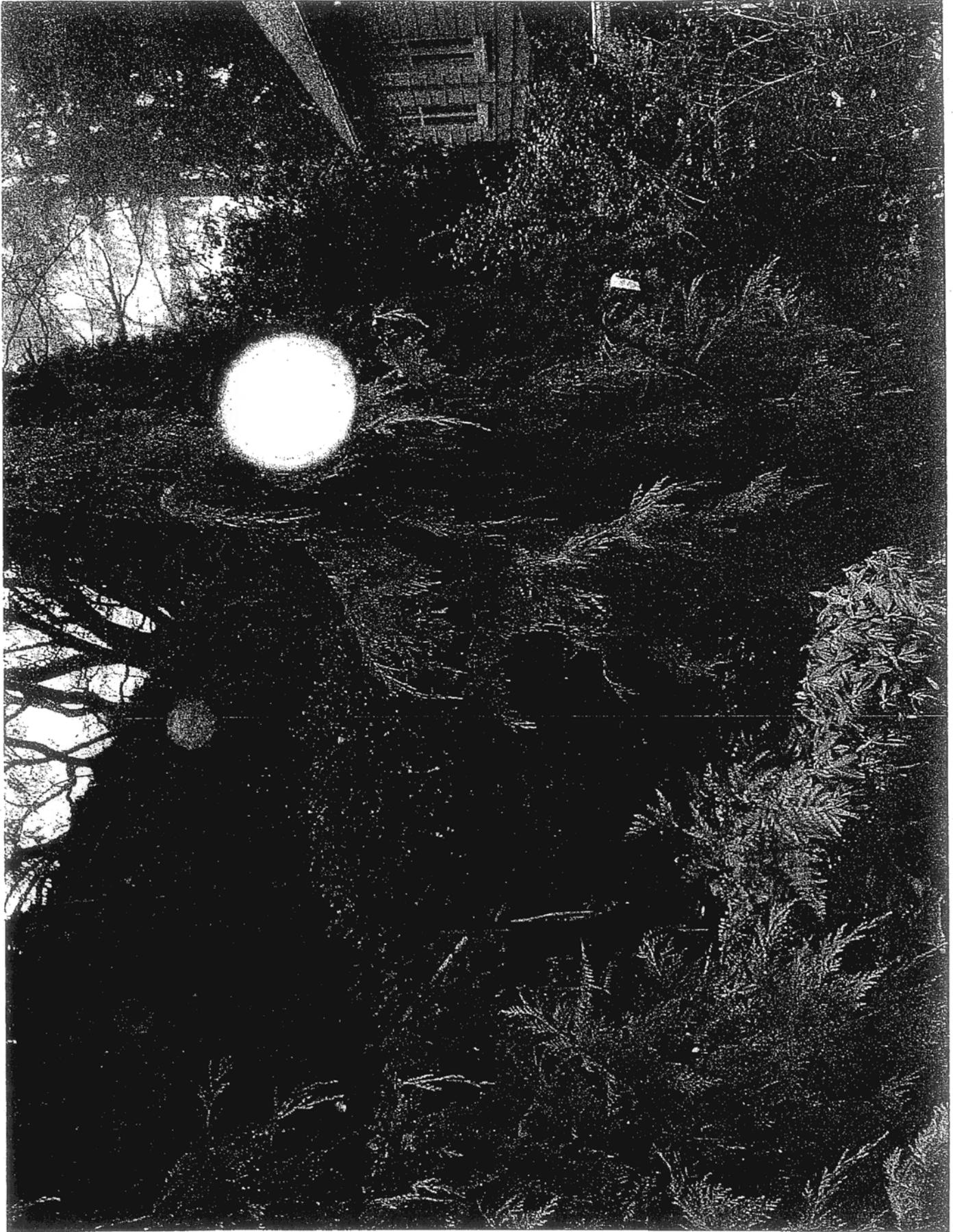


EXHIBIT G

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Honorable Monica Benton

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

DECLARATION OF TIMOTHY J.
DYSON

I, Timothy J. Dyson, am competent to testify to the matters set forth herein and make this declaration of my own personal knowledge and belief.

1. My wife, Julie C. Dyson, and I purchased the house located at 3315 East John Street, Seattle, WA 98112 in August 1997 from the Estate of Luther C. Losey.

2. At the time we purchased the house, it had not been lived in for some time. Our understanding was that it had been vacant for several years. The house was in a serious state of disrepair. We undertook a large renovation of the house.

3. The exterior of the property had not been maintained either and was very overgrown. Because our focus was on renovating the house itself, we did not do general maintenance of the landscaping.

DECLARATION OF TIMOTHY J.
DYSON

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1 4. Once the renovations of the house were done, in 1999, we started doing very
2 minimal landscaping. We cleared around all three sides of the house. The clearing generally
3 consisted of simply removing overgrowth. We did not remove any significant trees or
4 bushes. Nor did we plant anything.

5 5. We intended to landscape the entire property, but before we did, we found
6 another house for sale that we purchased. We then sold this house to John Klein in April
7 1999. My understanding is that John Klein did further renovations to the house, and that
8 John Klein did all of the landscaping.

9 I declare under penalty of perjury under the laws of the state of Washington that the
10 foregoing is true and correct.

11
12 
13 _____
14 Timothy J. Dyson

15 Executed this ^{14th} day of January, 2013,
16 at Palmdale, California.

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DECLARATION OF TIMOTHY J.
DYSON

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EXHIBIT H

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

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and
wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

DECLARATION OF DEBORAH
KLEIN

Deborah Klein states and declares as follows:

1. I am over the age of 18, have personal knowledge of the facts and circumstances contained herein, and I am competent to testify thereto. I currently reside at 760 Park Avenue, Apartment 6, New York, NY 10021.
2. From April 30, 1999, through October 13, 2003, my husband and I owned the Property at 3815 East John Street, Seattle ("Property.") We sold the Property to Mark and Brigid Britton.
3. I am providing this Declaration to explain what we believed to be and treated as the southern boundary line of the Property during our approximate four and one-half years of ownership of the Property.

DECLARATION OF DEBORAH KLEIN - 1
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1 4. The descriptions of our landscaping and maintenance activities and of
2 the southern boundary line of the Property are made as if I am standing on the Property
3 facing south.

4 5. When we purchased the Property, the wooden fence shown in Exhibit A
5 was already present. While the wooden fence does not run the entire length of the
6 southern boundary line of the Property, if a line parallel to the wooden fence is
7 projected westward (to the right on Exhibit A,) that projected line running West would
8 be consistent with what we considered to be the southern boundary of the Property and
9 we exclusively maintained the plants and landscaping up to that projected line.

10 6. When we purchased the Property, there was not very much landscaping
11 along the southern boundary of the Property, so we had significant landscaping
12 installed along what we believed to be the southern boundary of the Property.

13 7. The temporary fencing and all trees, bushes or plants immediately north
14 of or attached thereto shown in Exhibit B marks what we considered to be the southern
15 boundary of the Property. We, and our gardeners and landscapers, were the only
16 people who maintained the landscaping, including watering, planting and maintenance
17 up to the location where the fencing in Exhibit B is located. We considered all of this
18 area to be our property.

19 8. We installed the stone pathway shown in Exhibit C and our gardeners
20 and I exclusively maintained a row of plants to the south side of the stone pathway as a
21 privacy screen.

22 9. While we kept this row of plants maintained, the neighboring yard to the
23 South of what we considered to be the southern boundary of the Property was not
24 maintained by the family that owned what is now the Musser property. It was
overgrown and not maintained. Because of that condition, our landscaping activities

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were very obvious and easily discernible from the non-landscaped property to the south.

10. We had our gardeners install the watering hoses shown in the photographs in Exhibit D to water the plants that we maintained along what we considered to be the southern boundary of the Property.

11. We also exclusively maintained the rockery and plants up to where the temporary fence is located in Exhibit E. We believed this was part of the Property and used it as such at all times.

12. During the entire time we owned the Property, no one who owned or occupied the Musser Property ever complained about our activities along the southern boundary or asserted that it was not part of our Property.

I declare under penalty of perjury under the laws of the states of Washington and New York that the foregoing is true and correct.

Dated this 29th day of November, 2012.

By: D. Klein
Deborah Klein



EXHIBIT A.





EXHIBIT B



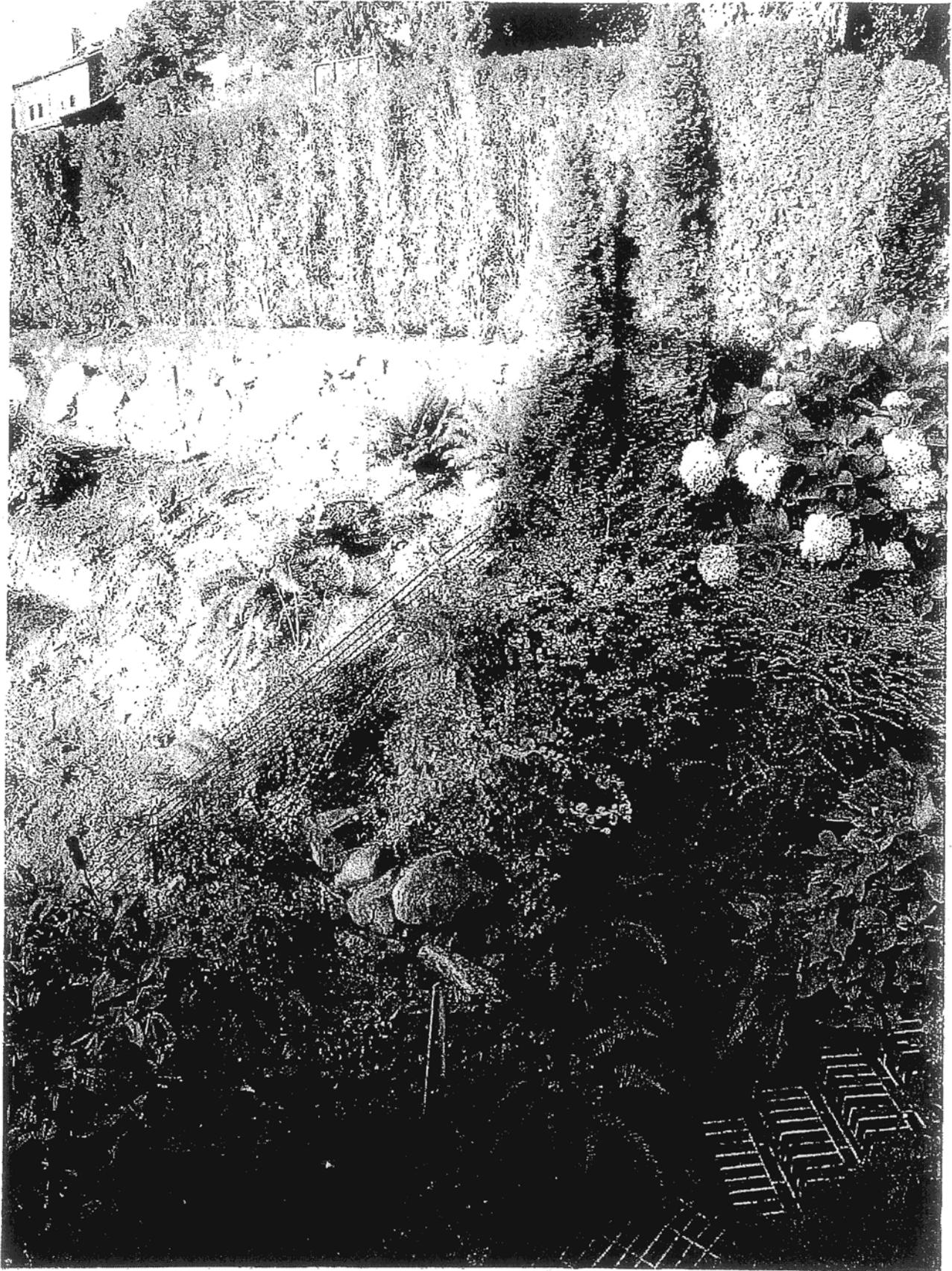


EXHIBIT C



EXHIBIT D







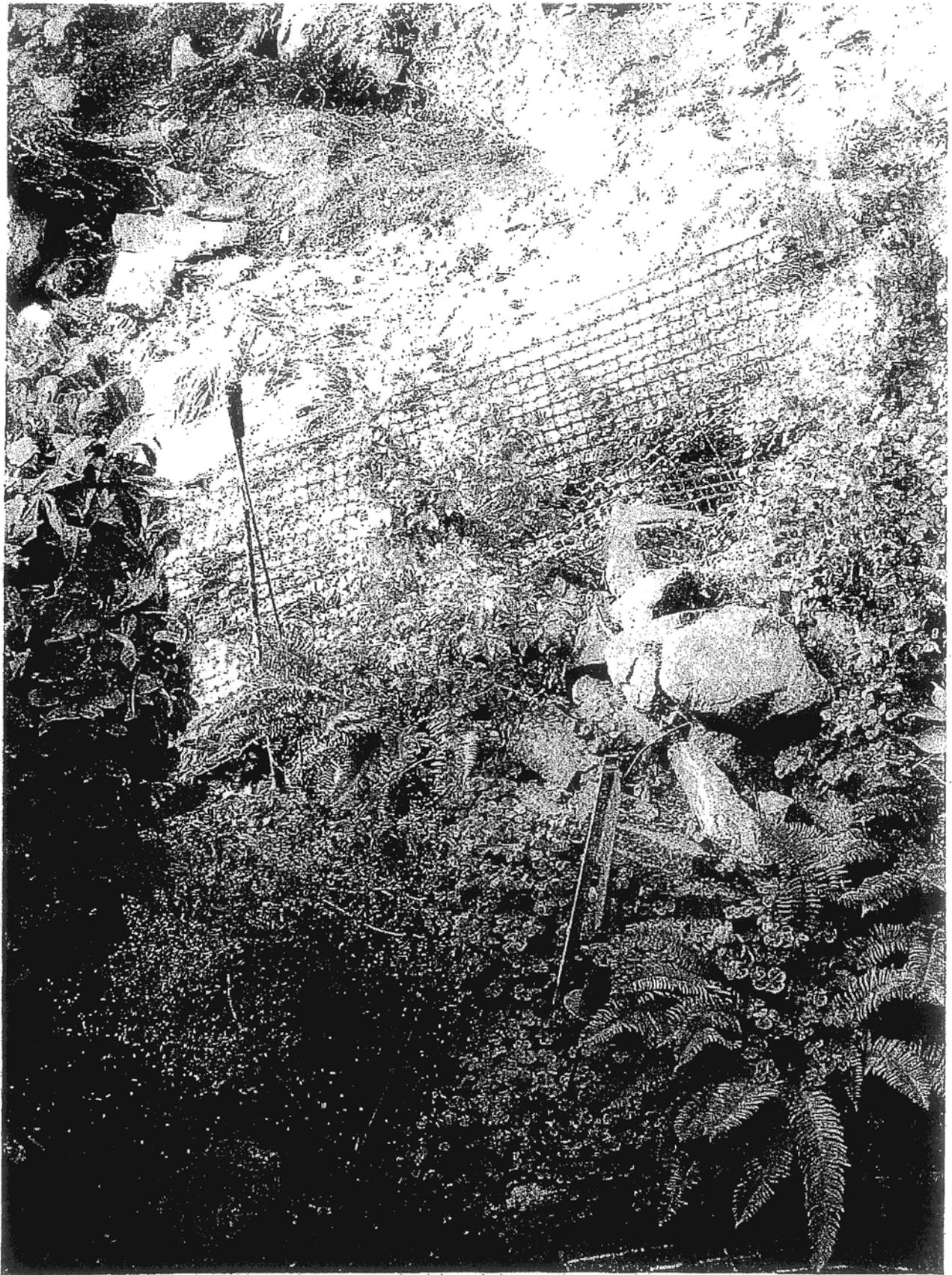
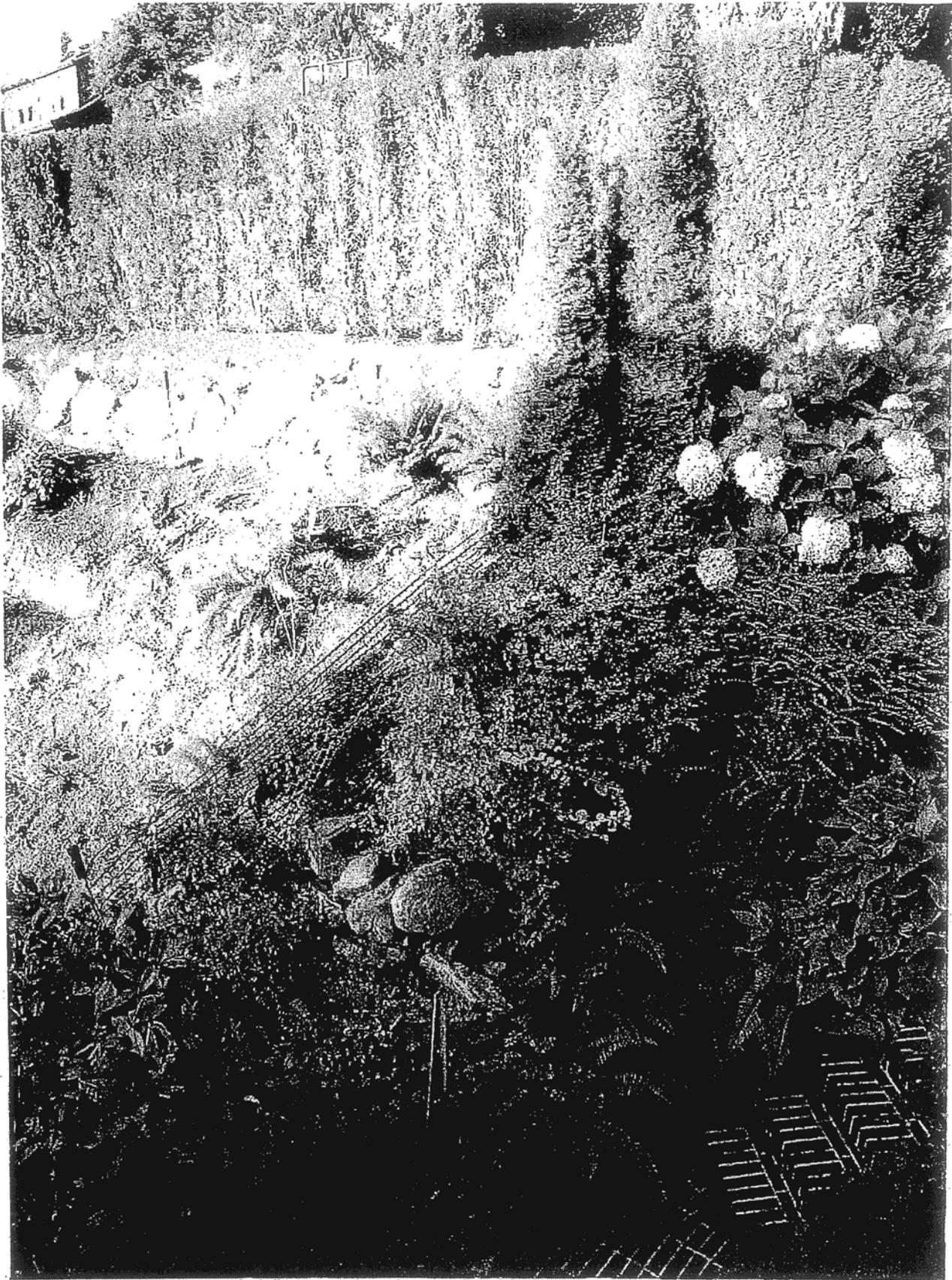


EXHIBIT E



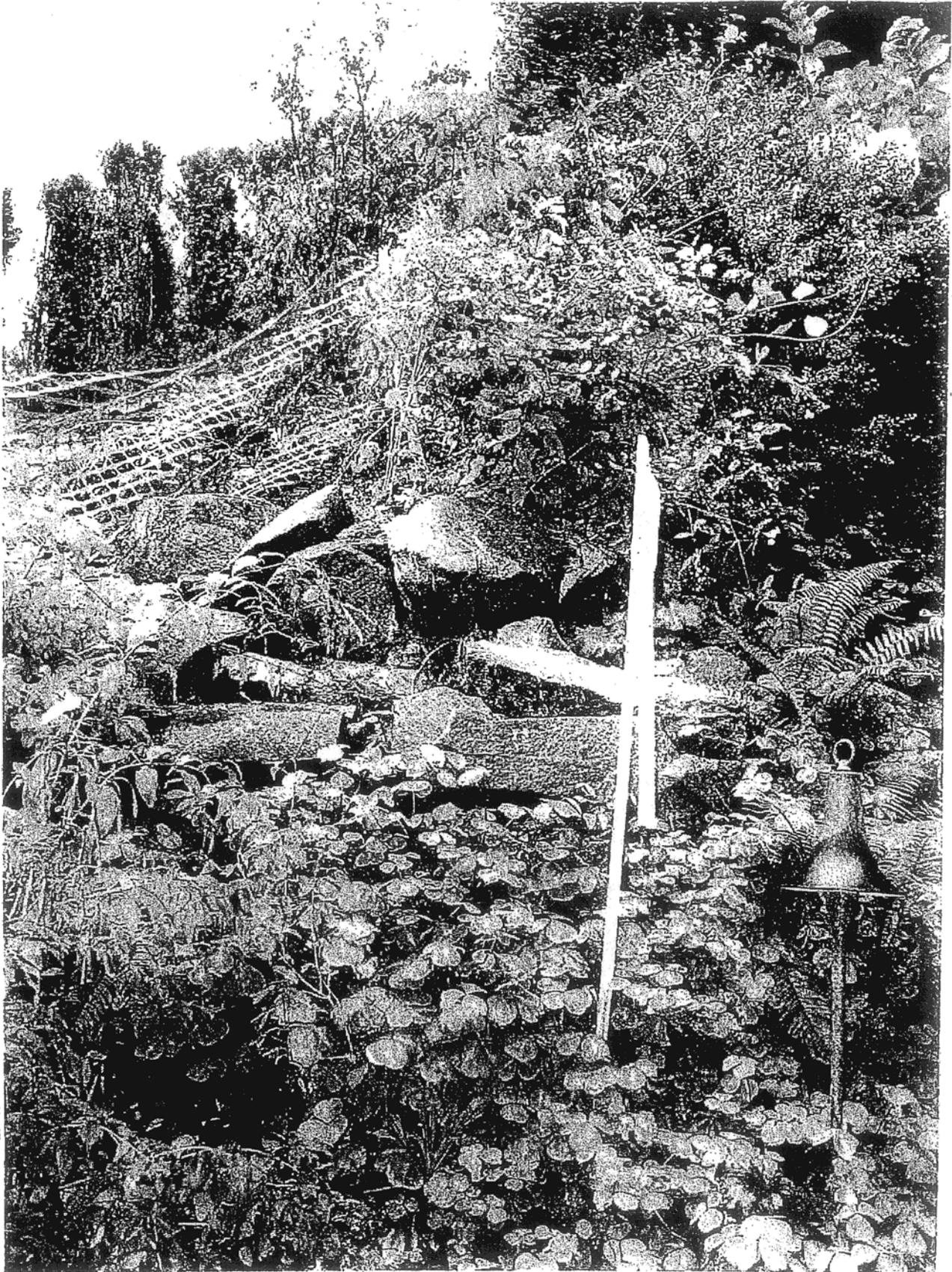


EXHIBIT I

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

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and
wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

DEFENDANTS' FIRST SET OF
INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF
DOCUMENTS TO PLAINTIFFS
AND RESPONSES AND
OBJECTIONS THERETO

GENERAL OBJECTIONS

Plaintiffs Mark Britton and Brigid Conybeare Britton ("Plaintiffs") make the following General Objections. Each of these General Objections is incorporated into each of Plaintiffs' responses.

1. Plaintiffs object to Defendants Peter M. Musser and Tamara H. Musser ("Defendants") definitions and instructions to the extent that they seek to impose upon Plaintiffs any obligation beyond those found in the Washington Civil Rules and the Local Rules for King County. Defendants' definitions and instructions are overly broad, unduly burdensome, vague, and confusing. Plaintiffs do not intend to be bound

DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
THERETO - PAGE 1



1 by the arbitrary definitions and instructions as stated in Defendants' discovery requests
2 and will answer the discovery requests only as required by the Washington Civil Rules
3 and the Local Rules for King County.

4 2. Plaintiffs' responses to Defendants' Interrogatories and Requests for
5 Production represent its reasonable efforts to provide information within its possession,
6 custody, or control after a reasonable search. Plaintiffs reserve the right to amend,
7 supplement, or alter its answers set forth herein and to provide additional information
8 that may be subsequently discovered.

9 3. Plaintiffs objects to each and every interrogatory and request for
10 production to the extent that it seeks information or documentation protected by any
11 privilege, including without limitation the attorney-client privilege, the work-product
12 doctrine, or any other applicable privilege. Plaintiffs hereby assert all such privileges.
13 Plaintiffs will not disclose such privileged information or documentation in response to
14 Defendants' discovery requests.

15 4. Plaintiffs objects to each and every interrogatory and request for
16 production to the extent they are not limited in time.

17 5. Plaintiffs objects to each and every interrogatory and request for
18 production to the extent that they are not limited to information that is within Plaintiffs'
19 possession, custody, or control. Plaintiffs will disclose only responsive, non-privileged
20 information that is within its possession, custody, or control.

21 6. Plaintiffs objects to each and every interrogatory and request for
22 production to the extent they seek documents or information within the possession,
23
24

DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
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1 custody, and control of Defendants and/or are equally as available to Defendants as
2 they are to Plaintiffs.

3 **INTERROGATORIES AND REQUESTS FOR PRODUCTION**

4 **INTERROGATORY NO. 1:** Identify each person answering these
5 interrogatories, state such person's authority to do so on behalf of Plaintiffs, and
6 specify each interrogatory answer to which each person contributed.

7 **ANSWER:**

8 Brigid Conybeare Britton

9 Mark Britton

10

11 **INTERROGATORY NO. 2:** Have you obtained a legal description for the
12 "Disputed Areas" referred to in Paragraph 3.8 of the Complaint. If so, please provide
13 the legal description.

14 **ANSWER:**

15 Yes. See surveyor's drawing prepared by Barghausen Consulting Engineers,
16 Inc. dated October 31, 2012 included in Plaintiff's document production.
17 (BRITTON000003)

18

19 **REQUEST FOR PRODUCTION NO. 1:** Produce all surveys or other
20 documents containing the legal description of the "Disputed Areas."

21 **RESPONSE:**

22 See BRITTON000001 – BRITTON000005

23

24

DEFENDANTS' FIRST SET OF INTERROGATORIES
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1 **INTERROGATORY NO. 3:** If your answer to Interrogatory No. 2 is no,
2 please describe by metes and bounds the "Disputed Areas" of the Musser Property that
3 you are alleging title to by adverse possession.

4 **ANSWER:**
5 Not applicable.

6
7 **INTERROGATORY NO. 4:** Using Exhibit A to the Complaint, attached
8 hereto, please draw what you contend are the "Disputed Areas" and the new boundary
9 line you seek through adverse possession. Include in your drawing the dimensions of
10 the "Disputed Areas."

11 **ANSWER:**
12 *See* BRITTON000003

13
14 **INTERROGATORY NO. 5:** State, in detail, the factual basis for your
15 contention in Paragraph 3.7 of the Complaint that "[f]or a period of ten years or more
16 Britton, and their predecessors in interest have maintained the rockeries on each end of
17 the common boundary and have maintained, pruned and controlled the height of the
18 laurel hedge."

19 **ANSWER:**
20 **Rockeries:**
21 The areas close to the eastern and western ends of Plaintiffs' southern property
22 line have rockeries that serve as retaining walls for Plaintiffs' and their predecessor's
23
24

DEFENDANTS' FIRST SET OF INTERROGATORIES
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1 plants and soil and framing walls for the brick walkways. Each rockery is similar in
2 both design, materials and function.

3 The installation of these rockeries precedes Plaintiffs' ownership and that of
4 Jonathan and Deborah Klein (hereinafter, the "Kleins,") the predecessor owners of
5 Plaintiffs' property. The rockeries retain and frame Plaintiffs' landscaping in the
6 disputed area and provide support and protection from slippage and erosion.

7 The eastern rockery is entirely on Plaintiffs' property and is not within the
8 disputed area. Bates Nos. BRITTON000001 – BRITTON000004 show the western
9 rockery is bisected by the legal property line and is within the disputed area claimed by
10 Plaintiffs. The western rockery serves as both (1) a retaining wall for Plaintiffs' plants
11 and soil in the southwestern part of Plaintiffs' property, and (2) a framing structure for
12 Plaintiffs' brick walkway. The rockery frames and tracks Plaintiffs' brick walkway for
13 five to ten feet into Plaintiffs' property and provide support and protection from
14 slippage and erosion.

15 For the adverse possession period, the western and eastern rockeries have been
16 well maintained and clearly visible, in contrast with the portion south of the disputed
17 area, which has been unkempt and covered by plants and soil.

18 **Laurel Hedge:**

19 This laurel hedge is a key feature of Plaintiffs' landscaping because it provides
20 privacy to Plaintiffs' sunroom. It also shields the view of pedestrians walking past the
21 Mussers' raised, western entry to their property. Due to the raised nature of this entry,
22 without the laurel, people could look right into Plaintiffs' sunroom. When Plaintiffs
23

24

DEFENDANTS' FIRST SET OF INTERROGATORIES
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1 took possession, the hedge was approximately ten feet high and, over time, Plaintiffs
2 let it grow so that it was touching the house and pruned it to create an archway.

3 Shortly after the Mussers moved-in, a significant rat problem developed at the
4 southwestern corner of Plaintiffs' house. Plaintiffs' exterminator opined that the
5 Mussers' new pond was attracting rodents as a water source and rodents would use the
6 laurel's archway to climb up to Plaintiffs' gutters. To address this, Plaintiffs' gardeners
7 have maintained the top of the hedge below the second floor gutters and trimmed it
8 away from the house.

9 The Mussers' predecessor in interest removed a number of trees and shrubs
10 from south of the disputed area but did not remove the laurel hedge, rhododendron and
11 arborvitae in what we believe to be recognition that this disputed area was our property
12 based on our maintenance of this landscaping.

13 The Kleins also maintained the laurel hedge, rhododendron and arborvitae.

14
15 **INTERROGATORY NO. 6:** Identify any and all witnesses with knowledge of
16 the allegations in Paragraph 3.7 of the Complaint.

17 **ANSWER:**

18 Brigid Britton
19 c/o Ahlers & Cressman PLLC
20 999 Third Avenue, 38th Floor
21 Seattle, WA 98104

22 Mark Britton
23 c/o Ahlers & Cressman PLLC
24 999 Third Avenue, 38th Floor
25 Seattle, WA 98104

26 Jonathan and Deborah Klein
27 760 Park Avenue, Apt 6

28 DEFENDANTS' FIRST SET OF INTERROGATORIES
29 AND REQUESTS FOR PRODUCTION OF DOCUMENTS
30 TO PLAINTIFFS **AND RESPONSES AND OBJECTIONS**
31 **THERE TO** - PAGE 6



1 New York, NY 10021

2
3 Beautiful Lopez Gardens
4 12819 SE 38th St
5 PMB 189
6 Bellevue, WA 98006

7 James Wiley
8 812 E Howe St
9 Seattle, WA 98102-4241

10 Langstraat Wood
11 816 Northwest 49th St
12 Seattle, WA 98107

13 Ptarmigan Teal
14 1201 E. Lynn St
15 Seattle, WA 98102

16 **REQUEST FOR PRODUCTION NO. 2:** Produce all documents identified in
17 response to Interrogatory No. 6 or otherwise supporting the allegations in Paragraph 3.7
18 of the Complaint. Such documents include, but are not limited to, photographs, videos,
19 invoices, receipts, contracts, etc.

20 **RESPONSE:**

21 Plaintiffs have produced numerous photographs supporting the allegations in
22 Paragraph 7. (See BRITTON000006 – BRITTON000054) Discovery is ongoing and
23 this request will be supplemented as additional documents are discovered.

24 **INTERROGATORY NO. 7:** State, in detail, the factual basis for your
contention in Paragraph 3.8 of the Complaint that “[f]or a period of ten years or more

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1 Britton, and their predecessors in interest have maintained and used portions of the
2 Musser Property that are south of the common boundary line (the 'Disputed Areas')."

3 ANSWER:

4 When Plaintiffs took occupancy, the owner of the Musser Property at that time
5 let their yard grow naturally. It was a forest of deciduous trees, including an orchard of
6 fruit trees. This created a clear demarcation of what had been maintained by the Kleins
7 and treated as the southern boundary line and what was not. In addition, the Kleins'
8 irrigation hoses ran down the entire southern boundary of the Disputed Area. The
9 southern boundary of the Disputed Area was clearly the recognized property line to
10 Plaintiffs when Plaintiffs took possession.

11 The clear demarcation of the southern boundary of the Disputed Area
12 representing the recognized property line continued for the adverse possession period:

- 13 • There is a wooden fence that sits right on the property line, which is
14 parallel to the southern boundary of the Disputed Area, and consistent
15 with how the area north of the southern boundary of the Disputed Area
16 has been maintained by the Kleins and Plaintiffs. The fence projects
17 into the Mussers' property and points the line in a more southwesterly
18 direction. The fence has been there ten-plus years. Plaintiffs have
19 always maintained this fence.
- 20 • Immediately west of the fence there is a pruned rhododendron bush that
21 faces Plaintiffs' property, reflecting that the Kleins and Plaintiffs have
22 pruned it so that all of the bush and its flowers face Plaintiffs' sunroom
23 and benefit Plaintiffs' property. Plaintiffs installed an accent light to
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- shine on it, and that light has been illuminated every night for almost nine years.
- Just west of the rhododendron is an area where Plaintiffs planted a number of different plants for privacy. This area has been replanted several times by Plaintiffs and these plantings have been watered by the irrigation hoses that the Kleins maintained.
- The laurel hedge discussed in response to Interrogatory No. 5 is just west of this area.
- Just west of the laurel hedge is a fuchsia magellanica. Plaintiffs have maintained this plant and its red flowers since taking possession. Plaintiffs' predecessors installed a drip line around this plant and it is still there and in use today.
- Just west of the fuchsia magellanica is the rockery discussed in response to Interrogatory No. 5.
- Just west and above the rockery is an area full of roughly 5-10 plants installed by the Klein's and their predecessors and maintained by both the Kleins and Plaintiffs. Most notable are two arborvitae trees that always appeared to mark the southern line and are on the southern boundary of the Disputed Area. These trees were similar to the arborvitae trees on the western line of Plaintiffs' property, and the Mussers' predecessors did not have any arborvitae on their property. Plaintiffs have always maintained these trees. This whole area above the rockery includes drip hoses installed by our predecessors.

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1 Discovery is ongoing and this request will be supplemented as additional documents
2 are discovered.

3 **INTERROGATORY NO. 8:** Identify any and all witnesses with knowledge of
4 the allegations in Paragraph 3.8 of the Complaint.

5 **ANSWER:**

6 Brigid Britton

7 Mark Britton

8 Deborah Klein

9 Jonathan Klein

10 James Wiley

11 Langstraat Wood

12 Ptarmigan Teal

13 Beautiful Lopez Gardens

14 **REQUEST FOR PRODUCTION NO. 3:** Produce all documents identified in
15 response to Interrogatory No. 7 or otherwise supporting the allegations in Paragraph 3.8
16 of the Complaint. Such documents include, but are not limited, to photographs, videos,
17 invoices, receipts, contracts, etc.

18 **RESPONSE:**

19 Plaintiffs have produced numerous photographs supporting the allegations in
20 Paragraph 7. (See BRITTON000006 – BRITTON000054) Discovery is ongoing and
21 this request will be supplemented as additional documents are discovered.

22

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1 **INTERROGATORY NO. 9:** State, in detail, the factual basis for your
2 contention in Paragraph 4.1.2 of the Complaint that “[f]or a period of ten years or more,
3 Plaintiffs, and their predecessors in interest have occupied the Disputed Areas.”

4 **ANSWER:**

5 See the response to Interrogatory No. 7 above.

6
7 **INTERROGATORY NO. 10:** State, in detail, the factual basis for your
8 contention in Paragraph 4.1.3 of the Complaint that “Plaintiffs’ use of the Disputed
9 Areas has been (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and
10 (4) hostile.” For your answer to this interrogatory, separately state the factual basis for
11 each enumerated element of adverse possession.

12 **ANSWER:**

13 Please see our responses to Interrogatory Nos. 5 and 7 above in response to this
14 interrogatory.

15
16 **INTERROGATORY NO. 11:** Identify any and all witnesses with knowledge
17 of the allegations in Paragraphs 4.1.2-4.1.3 of the Complaint.

18 **ANSWER:**

19 Brigid Britton

20 Mark Britton

21 Deborah Klein

22 Jonathan Klein

23 James Wiley

24

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- 1 Langstraat Wood
- 2 Ptarmigan Teal
- 3 Beautiful Lopez Gardens
- 4

5 **REQUEST FOR PRODUCTION NO. 4:** Produce all documents identified in
6 response to Interrogatory Nos. 9 or 10 or otherwise supporting the allegations in
7 Paragraphs 4.1.2-4.1.3 of the Complaint. Such documents include, but are not limited,
8 to photographs, videos, invoices, receipts, contracts, etc.

9 **RESPONSE:**
10 Plaintiffs have produced numerous photographs supporting the allegations in
11 Paragraph 7. (See BRITTON000006 – BRITTON000054) Discovery is ongoing and
12 this request will be supplemented as additional documents are discovered.

13
14 **INTERROGATORY NO. 12:** Describe in detail any and all occupancy, use,
15 improvement, maintenance or other activities on the “Disputed Areas” from the time
16 you first occupied your property to the present, including who performed or
17 participated in the activity, any witness(es) to the activity, the frequency of the activity,
18 and the date(s) thereof.

19 **ANSWER:**
20 See responses to Interrogatory Nos. 5 and 7 above. In addition, Plaintiffs and
21 predecessors have used landscape consultants and gardening services during the entire
22 time of ownership. The landscape consultants have visited as needed and the gardening
23 services have visited weekly.

24
**DEFENDANTS’ FIRST SET OF INTERROGATORIES
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1 Brigid Britton; Mark Britton and the Kleins would also personally do periodic
2 garden and yard maintenance. Debbie Klein gardened extensively.

3
4 **REQUEST FOR PRODUCTION NO. 5:** Produce any and all documents,
5 including photographs, videotapes, receipts, invoices, contracts, etc., which support or
6 relate to your occupancy, use, improvement, maintenance or other activities on the
7 “Disputed Areas.”

8 **RESPONSE:**

9 Plaintiffs have produced numerous photographs supporting the allegations in
10 Paragraph 7. (See BRITTON000006 – BRITTON000054) Discovery is ongoing and
11 this request will be supplemented as additional documents are discovered.

12
13 **INTERROGATORY NO. 13:** Does your claim for adverse possession rely
14 upon the activities of any predecessors in interest? If so, describe in detail any and all
15 occupancy, use, improvement, maintenance or other activities on the “Disputed Areas”
16 by your predecessors in interest, including who performed or participated in the
17 activity, any witness(es) to the activity, the frequency of the activity, and the date(s)
18 thereof.

19 **ANSWER:**

20 Yes. The Kleins owned Plaintiffs’ property from April 30, 1999 until October
21 10, 2003. Please see responses to Interrogatory Nos. 5, 7 and 12 above in response to
22 this interrogatory. In addition, there are the predecessors in interest who installed and
23

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1 maintained the rockeries. Those persons are presently unknown to Plaintiffs, but will
2 be disclosed should their identities become known to Plaintiffs.

3
4 **REQUEST FOR PRODUCTION NO. 6:** Produce any and all documents,
5 including photographs, videotapes, receipts, invoices, contracts, etc., which support or
6 relate to your predecessor(s) in interest's occupancy, use, improvement, maintenance or
7 other activities on the "Disputed Areas."

8 **RESPONSE:**

9 Plaintiffs have produced numerous photographs supporting the allegations in
10 Paragraph 7. (See BRITTON000006 – BRITTON000054) Discovery is ongoing and
11 this request will be supplemented as additional documents are discovered.

12
13 **INTERROGATORY NO. 14:** Identify each and every survey of your
14 property, the Musser Property, or the "Disputed Areas" known to you. For each such
15 survey, identify the date of the survey, the surveyor, the recording number, if
16 applicable, and the current custodian of the survey.

17 **ANSWER:**

- 18 1. April 2001 survey by Cramer Northwest, Inc. Recorded in King County
19 under No. 20070917900024.
20 2. June 13, 2012 survey by Barghausen Consulting Engineers. Not yet
21 recorded. Provided as part of request for production.
22 3. Surveyors Drawing of Disputed Areas, October 31, 2012 by Barghausen
23 Consulting Engineers. Provided as part of request for production.

24
DEFENDANTS' FIRST SET OF INTERROGATORIES
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1 4. Record of Survey for Peter Musser, July 2012, by Tri County Land
2 Surveying Company. Defendants are in possession of this unrecorded
3 survey.

4
5 **REQUEST FOR PRODUCTION NO. 7:** Produce any surveys of your
6 property, the Musser Property or the "Disputed Areas" in your possession, custody or
7 control, other than Exhibit A to the Complaint.

8 **RESPONSE:**

9 All surveys are included in Plaintiffs' document production.

10 (See BRITTON000001 – BRITTON000005)

11
12 **INTERROGATORY NO. 15:** In regard to Paragraph 4.3.2 of your Complaint,
13 please specifically describe each and every incident whereby "Musser, or persons
14 acting under his direction or control, have entered the Britton Property or Disputed
15 Area without permission." For each trespass "incident", please list all witness names,
16 addresses and phone numbers, date of each trespass, describe the activities by Mussers
17 which constitute the trespass and if there is still evidence of the trespass.

18 **ANSWER:**

19 This spring, without notice, Plaintiffs discovered stakes and a line for what they
20 understood would be a new fence running through Plaintiffs' yard. This was the
21 Mussers' first attempt to move the recognized boundary, referred to previously as the
22 Southern line of the Disputed Area. To install these stakes and line, the Mussers or
23 their contractor trespassed in both the Disputed Area and North of the Disputed Area.

24
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1 Shortly after this staking, the Mussers started removing ground cover plants that
2 help with erosion on the slope that divides the Mussers' property from ours. A request
3 was made for the Mussers to cease this.

4
5 REQUEST FOR PRODUCTION NO. 8: Please produce any
6 communications, photographs, declarations, statements or any other documents which
7 support your answer to the above Interrogatory and establishes each incident of trespass
8 onto the Britton Property.

9 RESPONSE:

10 Plaintiffs have produced numerous photographs supporting the allegations in
11 Paragraph 7. (See BRITTON000006 – BRITTON000054) Discovery is ongoing and
12 this request will be supplemented as additional documents are discovered.

13
14 INTERROGATORY NO. 16: In regard to Paragraph 4.3.4 of your Complaint
15 where you allege that "Musser intends to construct some type of improvements within
16 the Disputed Areas," do you have any dispute with the Mussers constructing a wood
17 fence outside of, but immediately parallel to, the Disputed Area, to create a solid
18 barrier between your property and the Musser property? If yes, please describe the
19 nature and basis of the dispute.

20 ANSWER:

21 So long as the fence is of a quality consistent with the existing construction on
22 both properties, pursuant to a mutually agreed design, location and process for
23 constructing the fence that does not harm Plaintiffs' landscaping.

24
DEFENDANTS' FIRST SET OF INTERROGATORIES
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1 **INTERROGATORY NO. 17:** In regard to Paragraph 4.3.5 of your Complaint
2 where you allege to have been damaged as a result of the Mussers' trespass and
3 interference, please specifically describe the damages and accompanying monetary
4 damage, if any.

5 **ANSWER:**

6 Plaintiffs have incurred attorney's fees, surveyor costs and other costs due to
7 the staking by Mussers. If the Mussers proceed with attempting to construct the fence
8 per their staking, Plaintiffs will incur additional damages.

9
10 **REQUEST FOR PRODUCTION NO. 9:** Please produce any ledger, survey,
11 communication, declaration or any other documents which supports your answer to the
12 above Interrogatory and establishes any damages from the Mussers' trespass and
13 interference.

14 **RESPONSE:**

15 Discovery is ongoing and this request will be supplemented as additional
16 documents are discovered.

17
18 **INTERROGATORY NO. 18:** In regard to Paragraph 7 of your Affirmative
19 defenses to the Musser Counterclaims where you assert the Musser use of your
20 property was permissive, please specifically describe the factual basis for the assertion
21 including the date permission was given; the name, address and phone number of the
22 individual who provided the permission; the name, address and phone number of any
23 witness with knowledge of the permission; and the manner in which the permission
24

DEFENDANTS' FIRST SET OF INTERROGATORIES
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1 was conveyed (i.e. written form, oral form or some other method). In your answer,
2 please also describe how you or the individual who provided permission, knew that
3 there was any encroachment by the Mussers onto the Britton Property.

4

5 ANSWER:

6 The Mussers installed on their western border a new row of arborvitae bushes, a
7 new sprinkler system and possibly a new rockery. Not knowing where the actual
8 survey line was but believing it encroached by less than a foot, Plaintiffs chose not to
9 focus on any possibly encroachment as a neighborly accommodation.

10

11 REQUEST FOR PRODUCTION NO. 10: Please produce any letter, memo,
12 communication, or document that supports your answer to the above Interrogatory and
13 establishes that you or your predecessor granted permission for the Musser use of the
14 Britton Property.

15 RESPONSE:

16 There are no documents responsive to this interrogatory other than photographs.

17

18 INTERROGATORY NO. 19: In regard to the reddish brick foundation base
19 which supports the black iron railing that sits approximately 18 inches north of the
20 corner boundary marker on the Dorffel Drive side of the Musser and Britten Properties,
21 please state and describe the following:

22 (a) Was the structure in place when you purchased the Britton Property?

23 (b) When or approximately when was the structure constructed?

24

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(c) Describe the circumstances and date whereby you learned that the structure was north of the boundary line with the Musser Property.

ANSWER:

- (a) Yes.
- (b) Unknown at this time.
- (c) Plaintiffs learned that the structure was north of the boundary line when reviewing the survey dated June 13, 2012.

REQUEST FOR PRODUCTION NO. 11: Please produce any letters, communications, surveys or any other documents supporting your answer to the above Interrogatory.

RESPONSE:

See June 13, 2012 survey. (BRITTON000002)



1 ATTORNEY CERTIFICATION

2 I, Lawrence S. Glosser, attorney for Plaintiffs, certify that the foregoing answers and
3 responses to the interrogatories and requests for production comply with Civil Rule
4 26(g).

5 DATED: This 5th day of November, 2012

6 AHLERS & CRESSMAN PLLC

7 By: 

8 Lawrence S. Glosser, WSBA #25098
9 Scott R. Sleight, WSBA # 27106
10 Attorneys for Mark Britton and Brigid
11 Conybeare Britton

11 SIGNATURE OF PARTIES (CR 33)

12 We have reviewed the foregoing and affirm they are true and correct.

13 DATED: This 5th day of November, 2012

14 
15 Mark Britton

16
17 Brigid Conybeare Britton

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24 DEFENDANTS' FIRST SET OF INTERROGATORIES
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused this document to be served upon designated counsel of record in the manner noted below:

Stephan D. Wakefield, WSBA #22762
Law Offices of Hecker Wakefield & Feilberg, P.S.
321 First Avenue West
Seattle, WA 98119
Email: stephanw@heckerwakefield.com
Attorneys for Defendants

- Via U.S. Mail
- Legal Messenger
- Via Facsimile
- Via Electronic Mail

Adam R. Asher
Socius Law Group PLLC
Two Union Square
601 Union St., Suite 4950
Seattle, WA 98101
Email: aasher@sociuslaw.com
Attorneys for Defendants

- Via U.S. Mail
- Legal Messenger
- Via Facsimile
- Via Electronic Mail

DATED this 5th day of November, 2012, at Seattle, Washington.



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EXHIBIT J

WHEN RECORDED RETURN TO
JONATHAN KLEIN
3815 EAST JOHN STREET
SEATTLE, WASHINGTON 98112

CHICAGO TITLE INSURANCE COMPANY
STATUTORY WARRANTY DEED 544327

Dated: APRIL 16, 1999

THE GRANTOR
TIMOTHY DYSON AND JULIE C. DYSON, HUSBAND AND WIFE

for and in consideration of
TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION

in hand paid, conveys and warrants to
JONATHAN KLEIN AND DEBORAH ANN KLEIN, ALSO KNOWN OF RECORD AS D. KLEIN,
HUSBAND AND WIFE

the following described real estate situated in the County of KING State of Washington:
Tax Account Number(s): 195470-0320-02

THAT PORTION OF TRACT 51, LYING NORTH OF THE FOLLOWING DESCRIBED LINE:
BEGINNING AT A POINT ON THE SOUTHWESTERLY LINE OF TRACT 51, FROM WHICH
POINT THE SOUTHWEST CORNER OF SAID TRACT BEARS SOUTH 15°09'05" EAST A
DISTANCE OF 17.00 FEET; RUNNING
THENCE NORTH 81°41'45" EAST 50.25 FEET;
THENCE NORTH 65°33'00" EAST 47 FEET, MORE OR LESS, TO THE NORTHEASTERLY
LINE OF SAID TRACT 51, DENNY-BLAINE-LAKE PARK ADDITION TO THE CITY OF
SEATTLE, ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 9 OF PLATS,
PAGE 85, IN KING COUNTY, WASHINGTON.

SUBJECT TO: EXCEPTIONS SET FORTH ON ATTACHED EXHIBIT "A" AND BY
THIS REFERENCE MADE A PART HEREOF AS IF FULLY INCORPORATED
HEREIN.

CHICAGO TITLE INS. CO.
REF# 5443276
\$ 10.00 3pages

TIMOTHY DYSON

JULIE C. DYSON

2901301540

99032-1946 04/16/99 BY KING COUNTY RECORDS CO. LTD. 10:00

E1682100 04/30/99 22784.00 1280000.00

STATE OF WASHINGTON
COUNTY OF KING

88

ON THIS 27th DAY OF April, 1999 BEFORE ME, THE
UNDERSIGNED, A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, DULY
COMMISSIONED AND SWORN, PERSONALLY APPEARED TIMOTHY DYSON AND JULIE C.
DYSON, KNOWN TO ME TO BE THE INDIVIDUAL(S) DESCRIBED IN AND WHO
EXECUTED THE WITHIN INSTRUMENT AND ACKNOWLEDGED THAT THEY SIGNED AND
SEALED THE SAME AS THEIR FREE AND VOLUNTARY ACT AND DEED, FOR THE USES
AND PURPOSES HEREIN MENTIONED.


PRINTED NAME MICHELLE WATKINS
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON
RESIDING AT 7201 1st Ave S
MY COMMISSION EXPIRES ON 6/25/99



9304301540

Document

page 1 of 1

CHICAGO TITLE INSURANCE COMPANY

EXHIBIT A

Escrow No.: 544327

COVENANTS, CONDITIONS AND RESTRICTIONS CONTAINED IN INSTRUMENT:

RECORDED: MARCH 28, 1917
RECORDING NUMBER: 1124165

AMENDMENT AND/OR MODIFICATION OF SAID RESTRICTIONS:

RECORDED: APRIL 1, 1922
RECORDING NUMBER: 1603047

AGREEMENT AND THE TERMS AND CONDITIONS THEREOF:

BETWEEN:

THE PACIFIC NATIONAL BANK OF
SEATTLE, WASHINGTON, AND DOROTHY
D. MCVAY, AS CO-EXECUTORS OF THE
ESTATE OF MARY DICKEY, DECEASED,
AND DOROTHY D. MCVAY,
INDIVIDUALLY

AND:

LUTHER C. LOSEY AND BLANCHE M.
LOSEY, HIS WIFE
DECEMBER 8, 1960

RECORDED:
RECORDING NUMBER:
REGARDING:

5230927
COMMON BOUNDARY LINE BETWEEN SAID
PREMISES AND SOUTHERLY ADJOINER

9904301540

CHICAGO TITLE INSURANCE COMPANY

exhibit/rla/121396

Honorable Monica Benton
Hearing Date: March 22, 2013 @ 1:00 p.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

DECLARATION OF CATIE SMITH

I, Catie Smith, am competent to testify to the matters set forth herein and make this declaration of my own personal knowledge and belief.

1. In August 2007, I was the Landscape Manager for City People's Garden Design & Landscape ("City People's"), which was hired by Peter and Tamara Musser to perform landscaping work on the Musser property. On behalf of City People's, I worked at the Musser Property typically once a week through 2007 and 2008. Attached hereto as Exhibit 1 are invoices from City Peoples for 2007 and 2008.

2. I have reviewed the survey prepared by the Brittons, attached as Exhibit A to the Declaration of Adam R. Asher ("Asher Decl."), of the property that they claim to have maintained. The "Disputed Area," includes the area around the rhododendron, a strip of land

DECLARATION OF CATIE SMITH

102030.doc

-1-

Socius Law Group, PLLC
ATTORNEYS
Two Union Square • 601 Union Street, Suite 4950
Seattle, Washington 98101.3951
Telephone 206.838.9100
Facsimile 206.838.9101

APP 088

1 between the rhododendron and the laurel bush, the laurel bush, the rockery area, and the area
2 at the top of the hill, which includes two arborvitae trees and a boxwood shrub. As
3 discussed in further detail below, I have generally maintained these areas since 2007, and
4 continue to maintain these areas presently. Further, the Mussers' sprinklers have water the
5 trees and plants in the Disputed Area since 2007.

6 3. A picture of the area around the rhododendron, and upon which the Brittons'
7 claim possession is attached as Exhibit B to the Asher Declaration. Since August 2007, my
8 crew and I have exclusively maintained this area. We weeded the area, planted plants in the
9 area, fertilized plants, and put down compost. I have always trimmed and pruned all sides of
10 the rhododendron. When looking at the trunk of the rhododendron, you can see evidence of
11 cut limbs. I am responsible for many of the cut limbs. Additionally, the Brittons appear to
12 claim to have possessed a portion of the Mussers' fence and a boxwood bush that sits entirely
13 behind the fence. My crew and I have exclusively maintained and shaped this boxwood
14 since 2007.

15 4. My crew and I have maintained the area between the rhododendron and the
16 laurel since August 2007 by weeding, removing unwanted plants, planting new plants,
17 composting, and otherwise making the area have a neat appearance. This area is depicted in
18 Exhibit C to the Asher Declaration. In 2008, my crew and I planted five or six Waxleaf
19 Privet bushes along the boundary line on the Musser side, to run from the existing wood
20 fence to the laurel and continuing up to the Arborvitae, which is toward Dorffel Avenue. The
21 purpose of these bushes was to act as a boundary, so that the mailman would stop cutting
22 through that area. The Brittons, nor anyone on their behalf, ever complained or said anything
23 about these bushes. We have regularly maintained the bushes since they were planted in
24 2008.

25
26
DECLARATION OF CATIE SMITH

102030.doc

-2-

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APP 089

1 5. In August 2007, my crew and I started to trim the laurel bush in the "Disputed
2 Area." A picture of the laurel is attached as Exhibit D to the Asher Declaration. When I first
3 started working for the Mussers, the laurel grew wildly without any shape. I created the box
4 shape that now exists, and is depicted in the photograph, and I have maintained that shape
5 since 2007. When I trimmed the laurel, I trimmed the top, and all sides, except the side
6 facing the Britton Property. Only once did I see someone from the Britton property trim the
7 laurel. To my knowledge, that person only trimmed the laurel on the Britton side of the
8 property.

9 6. In the area between the laurel and the rockery, my crew and I have generally
10 maintained this area since August 2007 by weeding, removing unwanted plants, planting new
11 plants, composting, and otherwise making the area have a neat appearance. This area is
12 depicted in Exhibit E of the Asher Declaration. Recently, this entire area was cleared in
13 preparation for the pond construction. Prior to that time, however, various plants were in this
14 area. Attached as Exhibit 2 is a photograph of the area taken from the Britton side of the
15 boundary line. The bushes above the string (excluding the fuscia) were maintained by my
16 crew and me, until they were recently removed.

17 7. Since August 2007, we have weeded the rockery area. We have also put
18 down compost in the rockery area. Further, until recently, there was an azalea in the rockery
19 area. We maintained this azalea since August 2007. Attached as Exhibit 3 is a photograph
20 depicting the azalea.

21 8. Above the rockery are two arborvitae trees and a boxwood, as depicted in
22 Exhibit F of the Asher Declaration. Since 2007, we have weeded this area, put down
23 compost, and fertilized the trees and plants in this area. We also pruned the boxwood to
24 maintain its shape. I believed that the Mussers had planted those trees, so I have always
25

26
DECLARATION OF CATIE SMITH

102030.doc

-3-

Socius Law Group, PLLC
ATTORNEYS
Two Union Square • 801 Union Street, Suite 4950
Seattle, Washington 98101.3951
Telephone 206.838.9100
Facsimile 206.838.9101

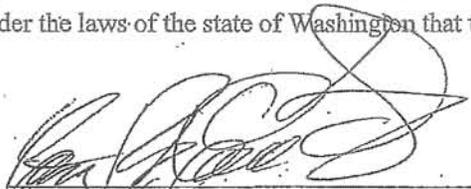
APP 090

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maintained this area. Attached as Exhibit 4 is another photograph of the arborvitae trees and the boxwood.

9. I left City People's in December 2008 and started my own business, Brier Creek Gardens, LLC. City People's continued servicing the Musser Property. After several months, the Mussers hired my new company to take over for City People's. Since that time, my crew and I are generally at the Musser Property all year long every Friday.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.


Catie Smith

Executed this 11th day of February, 2013,
at Woodinville, Washington.

EXHIBIT 1

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
8/31/2007	2000-13248

PAID
09/25/2007

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Daphne odora 'Marginata'	5	#2	22.99	114.95T
Cornus stolonifera 'Silver & Gold'	3	#2	19.99	59.97T
Choisya ternata 'Sundance'	3	#2	19.99	59.97T
Thuja occidentalis 'Smaragd'	5	6-7'	56.99	284.95T
Debris Disposal			246.00	246.00T
SUBTOTAL				3,705.38
Sales Tax			8.90%	329.78
			Payments/Credits	\$-4,035.16
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
9/30/2007	2000-13318

PAID
10/23/2007

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, cleaning out pond, pruning Leylandii, Laurel, and other shrubs as needed, removing Laurel, transplanting Leylandii and Photinias as per Catie, reducing Oxalis, raking leaves, fertilizing, cleanup and debris disposal. Work performed on 9/11 and 9/24/07.				
Labor	33.92	Hrs.	40.00	1,356.80T
On site design time with Catie Corpron Smith	2.5	Hrs.	65.00	162.50T
Materials:				
Low voltage lights and bulbs			35.88	35.88T
All purpose fertilizer			28.00	28.00T
Debris Disposal			216.00	216.00T
SUBTOTAL				1,799.18
Sales Tax			8.90%	160.13
			Payments/Credits	\$-1,959.31
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
10/22/2007	2000-13428

**PAID
12/04/2007**

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Container garden design, design of pond improvements, and planting design by Catie Corpron Smith.	10	Hrs.	.65.00	650.00
Sales Tax			8.90%	0.00
			Payments/Credits	\$-650.00
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
10/31/2007	2000-13568

**PAID
12/10/2007**

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, transplanting, cleaning pond surface, planting six containers, adding on to container irrigation system, raking leaves, removing Pieris and Boxwood, pruning Yews, shaping shrubs as needed, cleanup and debris disposal.				
Work performed on October 3, 18, 25, and 29, 2007.				
Labor	41.1	Hrs.	40.00	1,644.00T
On site design time with Catie Corpron Smith	3	Hrs.	65.00	195.00T
Materials:				
Cedar Grove potting soil	15	Bags	6.79	101.85T
Irrigation materials			9.50	9.50T
Green wire	3	Feet	0.50	1.50T
Plant Materials:				
Juniper 'Moon Glow'	1	#5	36.99	36.99T
Phormium tenax 'Amazing Red'	3	#2	33.99	101.97T
Cyclamen	16	6"	6.99	111.84T
Heuchera 'Lemon Lime'	2	4"	2.99	5.98T
Escallonia 'Newport Dwarf'	3	#1	16.99	50.97T
Hebe glauca	8	4"	2.99	23.92T
			Payments/Credits	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
10/31/2007	2000-13568

PAID
12/10/2007

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Dusty Miller	5	4"	1.79	8.95T
Viola	26	4"	1.79	46.54T
Taxus baccata 'Standishii'	2	#1	19.99	39.98T
Leucothoe 'Rainbow'	2	#1	10.99	21.98T
Ceratostigma plumbaginoides	4	#1	8.99	35.96T
Acorus gramineus	4	4"	3.99	15.96T
Hebe ochracea	2	#1	2.99	5.98T
Ajuga 'Black Scallop'	2	4"	2.99	5.98T
Myrica californica	2	#5	60.00	120.00T
Debris Disposal			192.00	192.00T
SUBTOTAL				2,776.85
Sales Tax			8.90%	247.14
			Payments/Credits	\$-3,023.99
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens Design
& Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
10/31/2007	2000-13516

PAID
12/10/2007

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	SUBTOTAL
Installation of container garden on patio as per design and bid by Catie Corpron Smith. Work performed on 10/29 and 10/31/07.	\$5,484.00
Sales Tax	\$488.08
	Total \$5,972.08
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
10/31/2007	2000-13569

PAID
12/10/2007

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT	
Garden work including removing Berberis, Installing Ilex, lightly shearing Ilex, transplanting Thujas, cleanup and debris disposal as per design and estimate by Catie Corpron Smith. Extra work not included in original estimate: Staking Leylandii and Red Maple and making lifting cuts on lower Magnolia branches.					
Work performed on 10/10/07.					
Labor	31.08	Hrs.	40.00	1,243.20T	
On site design time with Catie Corpron Smith	2	Hrs.	65.00	130.00T	
Plant Materials:					
Ilex crenata 'Green Island'	81	#2	18.99	1,538.19T	
Debris Disposal			36.00	36.00T	
SUBTOTAL				2,947.39	

\$1,200.00 deposit applied			-1,200.00	-1,200.00	

Sales Tax			8.90%	262.32	
			Payments/Credits	\$-2,009.71	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL	\$0.00

**City People's Gardens Design
& Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
11/30/2007	2000-13710

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

PAID
01/15/2008

DESCRIPTION	SUBTOTAL
Installation of new stone steps leading from flagstone (nearest fireplace) up to pond and installation of flagstone patio around pond as per design and bid by Catie Corpron Smith. Work performed on November 14-16, 20, 21, 26-29, 2007.	\$7,740.00
----- \$4,000.00 deposit applied -----	-\$4,000.00
Sales Tax	\$688.86
	Total \$4,428.86
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
11/30/2007	2000-13711

PAID
01/15/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Change in design of stairs as per client and estimate by Catie Corpron Smith. Work performed November, 2007.				
Labor	28	Hrs.	40.00	1,120.00T
Sales Tax			8.90%	99.68
			Payments/Credits	\$-1,219.68
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
11/30/2007	2000-13709

PAID
01/15/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, reducing Oxalis, cleaning out pond, removing Rhododendron on front slope and four Portuguese Laurels, mulching, raking leaves, shaping shrubs as needed, cleanup and debris disposal.				
Work performed on November 9, 15, and 29, 2007.				
Labor	38.85	Hrs.	40.00	1,554.00T
Gardner & Bloome soil building compost	13	Bales	9.99	129.87T
Debris Disposal			185.00	185.00T
SUBTOTAL				1,868.87
Sales Tax			8.90%	166.33
			Payments/Credits	\$-2,035.20
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens Design
& Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
12/31/2007	2000-13829

PAID
02/18/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	SUBTOTAL
Installation of garden bed around pond including adding rock for aesthetics and erosion control as per design and bid by Catie Corpron Smith. Work performed on November 26-30, December 5, 6, 14, and 17, 2007.	\$8,900.00
Credit for plant materials not needed	-\$115.97
----- \$4,000.00 deposit applied -----	-\$4,000.00
Sales Tax	\$781.78
	Total \$5,565.81
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
12/31/2007	2000-13830

PAID
02/18/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Extra rock work not included in original-pond bid to improve grade and minimize spills sloughing onto walkways and into pond as requested by client.				
Work performed on December 14 and 17, 2007.				
Labor	14.42	Hrs.	40.00	576.80T
Materials:				
White river basalt			37.20	37.20T
Gravel - 5/8"			21.15	21.15T
SUBTOTAL				635.15
Sales Tax			8.90%	56.53
				Payments/Credits \$-691.68
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL \$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
12/31/2007	2000-13831

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

PAID
02/18/2008

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds and containers, fertilizing, mulching, installing new landscape light, replacing broken landscape light, transplanting as needed, planting, checking pond level, raking leaves, shaping shrubs as needed, cleanup and debris disposal.				
Work performed on December 6, 7, 10, 14, and 21, 2007.				
Labor	40.37	Hrs.	40.00	1,614.80T
Materials:				
All purpose fertilizer	5	Lbs.	1.00	5.00T
Compost	1	Yard	60.00	60.00T
Fx Capellibiondi light	2	Ea.	144.84	289.68T
Wire nuts	2	Ea.	1.15	2.30T
Cedar Grove compost	10	Bags	5.79	57.90T
Plant Materials:				
Camellia 'Winter's Snowman'	3	#5	52.99	158.97T
Daphne odora 'Marginata'	2	#2	24.99	49.98T
Liriope spicata 'Silver Dragon'	6	#1	9.99	59.94T
Polystichum setiferum	5	#1	8.99	44.95T
Choisya ternata 'Sundance'	3	#5	38.99	116.97T
Helleborus 'Silver Lace'	3	#1	11.99	35.97T
			Payments/Credits	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
12/31/2007	2000-13831

PAID
02/18/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Leucothoe fontanesiana 'Rainbow'	3	#1	11.99	35.97T
Buxus sempervirens 'Suffruticosa'	7	#1	8.99	62.93T
Hedera canariensis 'Variegata'	72	4"	2.99	215.28T
Debris Disposal			42.00	42.00T
SUBTOTAL				2,852.64
Sales Tax			8.90%	253.89
			Payments/Credits	-\$3,106.53
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
1/31/2008	2000-13945

PAID
03/04/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, reducing Oxalis, raking leaves, making thinning cuts on Yew and Japanese Maple trees, transplanting Asian Pear, Rhododendron, and Photinia, mulching, shearing Boxwoods, skimming pond, shaping Camellias, Bay Laurel, Berberis, and other shrubs as needed, pruning Apple tree, cleanup and debris disposal.				
Work performed on January 3, 11, 18, 25, and 31, 2008.				
Labor	42.87	Hrs.	40.00	1,714.80T
Materials: Gardner & Bloome soil building compost	12	Bales	9.99	119.88T
Debris Disposal			98.00	98.00T
SUBTOTAL				1,932.68
Sales Tax			8.90%	172.01
			Payments/Credits	\$-2,104.69
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
2/29/2008	2000-14088

PAID
03/27/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, reducing Oxalis and Scilla, thinning Japanese Maples, removing dead branches from Japanese Maples, shaping Otto Luyken, Juniper, and other shrubs as needed, mulching, planting, pruning Apple espalier, cleanup and debris disposal.				
Work performed on 2/15 and 2/29/08.				
Labor	16.32	Hrs.	40.00	652.80T
Materials:				
Gardner & Bloome soil building compost	9	Bales	9.99	89.91T
Plant Materials:				
Euphorbia myrsinites	8	4.5"	2.99	23.92T
Carex testacea	2	6"	8.99	17.98T
Bellis 'Rominette Carmine Rose'	6	4"	2.99	17.94T
Viola - white	6	4"	1.79	10.74T
Viola 'Sorbet Antique Shades'	12	4"	1.79	21.48T
Bellis 'Habanera'	8	4"	2.99	23.92T
Choisya 'Sundance' (no charge - from pond bid work)	3	Ea.	0.00	0.00T
Debris Disposal			77.00	77.00T
			Payments/Credits	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
2/29/2008	2000-14088

PAID
03/27/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
SUBTOTAL				935.69
Sales Tax			8.90%	83.28
			Payments/Credits	\$-1,018.97
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

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Invoice

DATE	INVOICE #
3/31/2008	2000-14272

PAID
04/22/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	SUBTOTAL
Installation of additional lights to low voltage system and replacement of existing transformers to meet new power demand as per bid by Steve Dickinson. (Credits reflect fewer lights installed than shown on original bid.) Work performed on 3/27/08.	\$7,300.00
Labor credit	-\$135.00
Materials credit	-\$373.48
----- \$2,400.00 deposit applied -----	-\$2,400.00
Sales Tax	\$604.45
	Total \$4,995.97
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

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Invoice

DATE	INVOICE #
3/31/2008	2000-14273

PAID
04/22/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, reducing Scilla, planting around rockery, shaping shrubs as needed, cleanup and debris disposal. Work performed on 3/7 and 3/28/08.				
Labor	14.62	Hrs.	40.00	584.80T
Soleirolia soleirolia	23	4"	3.99	91.77T
Debris Disposal			67.00	67.00T
SUBTOTAL				743.57
Sales Tax			8.90%	66.18
			Payments/Credits	\$-809.75
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

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Invoice

DATE	INVOICE #
5/31/2008	2000-14630

PAID
06-27-2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds and containers, reducing Scilla and Hogweed, cleaning off hardscape areas, resetting flagstone on patio, planting, facilitating of mulch blow-in, removing moss from pots, cleanup and debris disposal.				
Work performed on May 7, 16, and 30th, 2008.				
Labor	36.43	Hrs.	40.00	1,457.20T
On site design time with Catie Corpron Smith	3.5	Hrs.	75.00	262.50T
Materials:				
Cleaning solution	1	Bottle	12.00	12.00T
Copper plant labels	2	Pkgs.	2.79	5.58T
Mulch - 24 yards			1,603.80	1,603.80T
Plant Materials:				
Roses - 'Social Climber', 'Henry Fonda', 'Honor'	6	#2	19.99	119.94T
Alyssum 'Snow Crystal'	20	4"	1.79	35.80T
Impatiens - pink	50	4"	1.79	89.50T
Impatiens 'Coral'	18	4"	1.79	32.22T
Impatiens 'Coral'	36	PP	1.79	64.44T
Baby's Tears	61	4"	2.99	182.39T
			Payments/Credits	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	

**City People's Gardens
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Invoice

DATE	INVOICE #
5/31/2008	2000-14630

PAID
06/27/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Debris Disposal			99.00	99.00T
SUBTOTAL				3,964.37
Sales Tax			9.00%	356.79
			Payments/Credits	\$-4,321.16
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

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Invoice

DATE	INVOICE #
6/30/2008	2000-14785

PAID
08-18-2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA. 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, shearing Boxwood, installing plants, removing Oxalis under front Juniper, sweeping rocks and patio, reducing moss from walkways, shaping Juniper and other shrubs as needed, cleaning out pond, restacking rock wall, resetting pavers, activating and testing irrigation, cleanup and debris disposal.				
Work performed on 6/13 and 6/25/08.				
Labor	31.58	Hrs.	40.00	1,263.20T
Materials:				
Gravel	4	Bags	7.00	28.00T
Plant Materials:				
Asarum europaeum	3	#1	8.99	26.97T
Athyrium 'Ghost Fern'	3	#1	9.99	29.97T
Dryopteris erythrosora	4	#1	10.99	43.96T
Arctostaphylos	10	#1	8.99	89.90T
Pratia pedunculata	50	4"	3.29	164.50T
Erigeron	50	4"	3.29	164.50T
Sword Ferns	3	#5	24.99	74.97T
Soleirolia soleirolii	18	4"	3.29	59.22T

	Payments/Credits
--	------------------

TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.

TOTAL

**City People's Gardens
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Invoice

DATE	INVOICE #
6/30/2008	2000-14785

PAID
08/18/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Debris Disposal			63.00	63.00T
SUBTOTAL				2,008.19
Sales Tax			9.00%	180.74
			Payments/Credits	\$-2,188.93
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

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Invoice

DATE	INVOICE #
7/31/2008	2000-14887

PAID
09/16/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, planting existing containers, installing new containers, cleaning hardscapes, straightening pot feet, reducing Horsetail, testing, adjusting, and extending irrigation, reducing Boxwood, staking a tree, cleanup and debris disposal.				
Work performed on 7/3 and 7/15/08.				
Labor	33.76	Hrs.	40.00	1,350.40T
Design time with Catie Corpron Smith	3	Hrs.	75.00	225.00T
Materials:				
Cedar Grove potting soil	8	Bags	6.79	54.32T
Containers	3	Ea.	50.00	150.00T
Lodge Pole	1	Ea.	6.50	6.50T
Wire	3	Feet	0.50	1.50T
Irrigation materials			9.00	9.00T
Plant Materials:				
Silene 'Druett's Variegated'	4	#1	9.99	39.96T
Gaura lindheimeri	2	#1	9.99	19.98T
Cimicifuga 'Black Beauty'	1	#3	51.99	51.99T
Bergenia 'Winterglow'	4	4"	3.99	15.96T
Snapdragon 'Crown Carmine'	6	4"	2.99	17.94T
Cosmos	2	#1	7.99	15.98T
			Payments/Credits	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL

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Invoice

DATE	INVOICE #
7/31/2008	2000-14887

PAID
09/16/2008

BILL TO:
TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Origanum 'Kent Beauty'	2	4"	5.99	11.98T
Browallia 'Marine Bells'	2	4"	3.99	7.98T
Zinnia 'Hybrid Apricot'	2	#1	3.99	7.98T
Swedish Ivy 'Variegata'	4	4"	3.49	13.96T
Helichrysum	4	4"	3.99	15.96T
Osteospermum 'Marbella'	4	4"	3.99	15.96T
Osteospermum 'Acapulco'	4	4"	3.99	15.96T
Heuchera 'Ginger Ale'	1	#1	9.99	9.99T
Ipomoea batatas 'Marguerite'	6	4"	3.99	23.94T
Sanvitalia - trailing yellow	6	4"	3.99	23.94T
Zinnia - orange	3	4"	3.99	11.97T
Lantana 'Castle Ortenburg'	6	4"	3.99	23.94T
Salvia 'Black & Blue'	3	#1	9.99	29.97T
Fountain Grass - purple	1	#1	12.99	12.99T
Coleus 'Rustic Orange'	2	4"	3.99	7.98T
Heuchera 'Lime Rickey'	2	#1	11.99	23.98T
Begonia hiemalis	2	4"	3.99	7.98T
Impatiens 'Salmon'	4	4"	3.99	15.96T
Fancy Geranium	3	4"	6.99	20.97T
Lobelia 'Marine Blue'	9	4"	3.29	29.61T
Coleus 'Fishnet Stockings'	2	4"	3.99	7.98T
Nicotiana 'Lemon Lime'	6	4"	3.99	23.94T
Fuchsia 'Golden Marinka'	2	4"	3.99	7.98T
Tuberous Begonia	2	4"	3.99	7.98T
Coleus 'Golden Bedder'	2	4"	3.99	7.98T
Heuchera 'Obsidian'	2	#1	12.99	25.98T
Coleus 'Creamy Pineapple'	3	4"	3.99	11.97T
Coleus 'Texas Two-Step'	3	4"	3.99	11.97T

Payments/Credits

TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.

TOTAL

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Invoice

DATE	INVOICE #
7/31/2008	2000-14887

PAID
09/16/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Impatiens 'Super Elfin'	2	6"	4.99	9.98T
Hosta 'Abba Dabba Do'	3	#1	12.99	38.97T
Fuchsia 'June Bride'	3	6"	6.99	20.97T
Hebe 'Pinocchio'	2	#1	9.99	19.98T
Debris Disposal			70.00	70.00T
SUBTOTAL				2,557.21
Sales Tax			9.00%	230.15
			Payments/Credits	\$-2,787.36
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

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Invoice

DATE	INVOICE #
8/31/2008	2000-15108

PAID
10/17/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	SUBTOTAL
Installation of rock throughout the garden to help eliminate soil erosion and installation of flagstone steppers at access points as per bid by Steve Dickinson. Work performed in August, 2008.	\$4,000.00
----- \$1,455.00 deposit applied -----	-\$1,455.00
Sales Tax	\$360.00
	Total \$2,905.00
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

**City People's Gardens
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Invoice

DATE	INVOICE #
8/31/2008	2000-15106

PAID
10/17/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, containers, and hardscape, shaping Boxwood and other shrubs as needed, planting, testing irrigation, applying Sluggo; pruning trees as needed, cleanup and debris disposal.				
Work performed on August 1, 15, 22, and 29, 2008.				
Labor	36.99	Hrs.	40.00	1,479.60T
On site design time with Catie Corpron Smith	5	Hrs.	75.00	375.00T
Materials:				
Sluggo	1	Ea.	9.99	9.99T
Plant Materials:				
Hebe 'Western Hills'	3	#1	9.99	29.97T
Styrax japonicus 'Pink Chimes'	2	#10	160.00	320.00T
Gardenia 'Kleim's Hardy'	2	#3	45.99	91.98T
Euonymus 'Silver Queen'	2	#5	29.99	59.98T
Hydrangea quercifolia 'Pee Wee'	3	#2	36.99	110.97T
Polystichum munitum	6	#1	9.99	59.94T
Miscanthus sinensis 'Cabaret'	2	#5	41.99	83.98T
Gaultheria shallon	36	4"	3.99	143.64T
Dahlia 'Dark Angel'	6	#1	6.99	41.94T
Carex 'Frosty Curls'	6	#1	6.99	41.94T
			Payments/Credits	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	

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Invoice

DATE	INVOICE #
8/31/2008	2000-15106

PAID
10/17/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Carex 'Frosty Curls'	3	4"	3.99	11.97T
Helianthemum 'Ben Ledi'	12	4"	3.99	47.88T
Blechnum spicant	2	#2	16.99	33.98T
Hydrangea 'Endless Summer'	3	#5	43.99	131.97T
Agapanthus 'Storm Cloud'	5	#2	24.99	124.95T
Cotula 'Platt's Black'	18	4"	3.29	59.22T
Coreopsis 'Moonbeam'	3	#1	8.99	26.97T
Asarum - European Ginger	3	6"	8.99	26.97T
Physocarpus 'Dart's Gold'	1	#2	22.99	22.99T
Spiraea 'White Gold'	2	#1	11.99	23.98T
Miscanthus sinensis 'Morning Light'	2	#1	9.99	19.98T
Hakonechloa 'Aureola'	5	#1	15.99	79.95T
Carex testacea	5	4"	3.99	19.95T
Sedum ewersii	12	4"	3.29	39.48T
Debris Disposal			119.00	119.00T
SUBTOTAL				3,638.17
Sales Tax			9.00%	327.44
			Payments/Credits	\$-3,965.61
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

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Invoice

DATE.	INVOICE #.
9/30/2008	2000-15237

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

PAID
11/12/2008

DESCRIPTION	SUBTOTAL
Re-grout of 700 square foot flagstone patio as per bid by Steve Dickinson. Work performed in September, 2008.	\$4,795.00
Labor credit	-\$1,695.00
SUBTOTAL	\$3,100.00
----- \$1,742.18 deposit applied -----	-\$1,742.18
Sales Tax	\$279.00
	Total \$1,636.82
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

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Invoice

DATE	INVOICE #
9/30/2008	2000-15236

PAID
11/12/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds and hardscape areas, shearing Ilex hedge, trimming Ivy, shaping Pines and Persimmon tree, reducing Oxalis, installing drain rock under garage stairs, planting, transplanting Heathers and Phormium, removing fruit debris, pruning shrubs as needed, cleanup and debris disposal.				
Work performed on September 3, 12, 19, and 26, 2008.				
Labor	34.11	Hrs.	45.00	1,534.95T
Design time with Catie Corpron Smith	3	Hrs.	75.00	225.00T
Materials:				
Drain rock - 7/8"	1	Yard	60.00	60.00T
Plant Materials:				
Hebe 'McKeanii'	6	#1	12.99	77.94T
Lavandula 'Hidcote'	10	#1	8.99	89.90T
Pittosporum tenuifolium 'Marjorie Channon'	1	#3	32.99	32.99T
Phormium 'Platt's Black'	2	#1	13.99	27.98T
Viola 'Penny White'	32	4"	1.79	57.28T
Pansy 'Peach Shades'	36	4"	1.79	64.44T
Soleirolia soleirolia 'Baby's Tears'	79	4"	3.29	259.91T
			Payments/Credits	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	

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Invoice

DATE	INVOICE #
9/30/2008	2000-15236

PAID
11/12/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Hebe glauca	18	4"	3.29	59.22T
Anemone 'Flaming'	5	6"	6.99	34.95T
Campanula 'Dickson's Gold'	3	6"	6.99	20.97T
Narcissus bulbs	30	Ea.	1.19	35.70T
Tulip 'Darwin Hybrid'	100	Ea.	0.79	79.00T
Debris Disposal			98.00	98.00T
SUBTOTAL				2,758.23
Sales Tax			9.00%	248.24
			Payments/Credits	\$-3,006.47
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

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Invoice

DATE	INVOICE #
9/30/2008	2000-15238

PAID
11/12/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Extra rock work as per Peter Musser including installing additional granite retaining wall below garage and tightening flagstone walkway steppers for safer footing. Work performed on 8/27 and 9/15-18/08.				
Labor	14.88	Hrs.	45.00	669.60T
Materials:				
White river basalt			51.00	51.00T
Variegated standing granite - 1.5"			47.40	47.40T
Pennsylvania bluestone			40.00	40.00T
Bandera granite			83.70	83.70T
SUBTOTAL				891.70
Sales Tax			9.00%	80.25
			Payments/Credits	\$-971.95
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

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Invoice

DATE	INVOICE #
10/31/2008	2000-15373

PAID
12/04/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, transplanting Thujas, planting, mulching, cleanup and debris disposal.				
Work performed on October 10, 17, and 31, 2008.				
Labor	59.46	Hrs.	45.00	2,675.70T
On site design time with Catie Corpron Smith	4	Hrs.	75.00	300.00T
Materials:				
Cedar Grove compost	13	Bags	6.79	88.27T
Lodge pole - 8'	1	Ea.	7.00	7.00T
Misc. materials			51.88	51.88T
Plant Materials:				
Cupressus sempervirens	5	#15	276.00	1,380.00T
Viola 'Penny Orchid Frost'	4	4"	1.79	7.16T
Cyclamen	20	4"	6.99	139.80T
Hebe 'Tricolor'	1	#1	9.99	9.99T
Dinosaur Kale	1	#1	5.99	5.99T
Ornamental Pepper	2	4"	4.99	9.98T
Comprosa 'Evening Glow'	1	6"	9.99	9.99T
Viola 'Penny Primrose'	4	4"	1.79	7.16T
Viola 'Panola Rose Picture'	2	4"	1.79	3.58T
Viola 'Mariposa Marina'	6	4"	1.79	10.74T
				Payments/Credits
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL

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Invoice

DATE	INVOICE #
10/31/2008	2000-15373

PAID
12/04/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Carex testacea	3	4"	4.99	14.97T
Hebe pimeleoides	2	4"	6.99	13.98T
Viola 'Penny Blue'	4	4"	1.79	7.16T
Viola 'Delta Blue'	2	4"	1.79	3.58T
Vinca major 'Wojo's Gem'	5	4"	3.29	16.45T
Dusty Miller	6	4"	3.99	23.94T
Viola - blue	14	4"	1.79	25.06T
Aster - purple	2	6"	3.99	7.98T
Heuchera 'Key Lime Pie'	2	#1	13.99	27.98T
Ajuga reptans 'Black Scallop'	2	4"	3.29	6.58T
Acorus 'Ogon'	2	4"	3.99	7.98T
Equisetum	1	#1	8.99	8.99T
Helleborus	2	4"	6.99	13.98T
Polystichum polyblepharum	2	#1	9.99	19.98T
Fern	2	4"	5.99	11.98T
Liriope	1	#1	10.99	10.99T
Debris Disposal			61.00	61.00T
SUBTOTAL				4,989.82
Sales Tax			9.00%	449.08
			Payments/Credits	\$-5,438.90
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
11/30/2008	2000-15538

PAID
01/05/2009

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT	
Monthly maintenance including weeding and grooming garden beds and hardscape areas, skimming pond, raking leaves, reducing Oxalis, planting fern grotto, planting Thujas, trimming Leylandii hedges, pruning Laurel, shaping shrubs as needed, cleanup and debris disposal.					
Work performed on November 5, 12, 20, and 26, 2008.					
Labor	54.02	Hrs.	45.00	2,430.90T	
Materials:					
Gardner & Bloome soil building compost	2	Bales	9.99	19.98T	
Cedar Grove compost	7	Bags	5.79	40.53T	
Plant Materials:					
Baby's Tears	15	4"	3.29	49.35T	
Deer Fern	3	#1	8.99	26.97T	
Maiden Fern	8	4"	3.99	31.92T	
Thuja occidentalis 'Emerald Green'	8	7'	89.99	719.92T	
Debris Disposal			259.00	259.00T	
SUBTOTAL				3,578.57	
Sales Tax			9.00%	322.07	
			Payments/Credits	\$-3,900.64	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
12/31/2008	2000-15607

PAID
01/21/2009

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds and containers, staking Italian Cypress, raking leaves, skimming pond, mulching Lavenders, refreshing color in containers, reducing Ivy from Thuja bed, shaping shrubs as needed, cleanup and debris disposal. Work performed on 12/5 and 12/12/08.				
Labor	23	Hrs.	45.00	1,035.00T
Materials:				
Lodge pole - 6'	2	Ea.	6.50	13.00T
Green wire	5	Feet	0.50	2.50T
Gardner & Bloome soil building compost	1	Bale	9.99	9.99T
Plant Materials:				
Primrose - red/white	10	4"	1.79	17.90T
Debris Disposal			35.00	35.00T
SUBTOTAL				1,113.39
Sales Tax			9.00%	100.21
			Payments/Credits	\$-1,213.60
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens Design
& Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

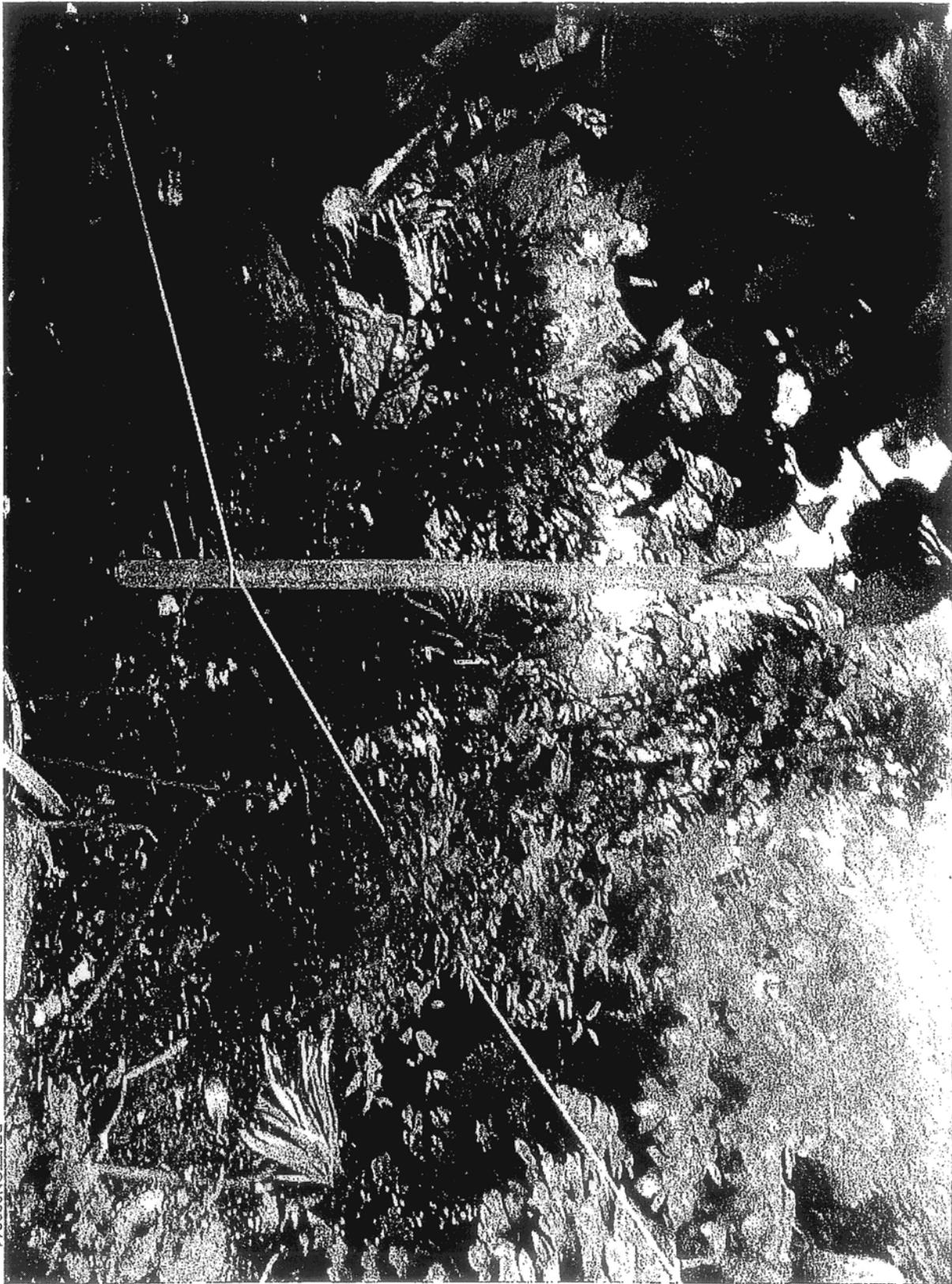
DATE	INVOICE #
2/28/2009	2000-15819

PAID
04/21/2009

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

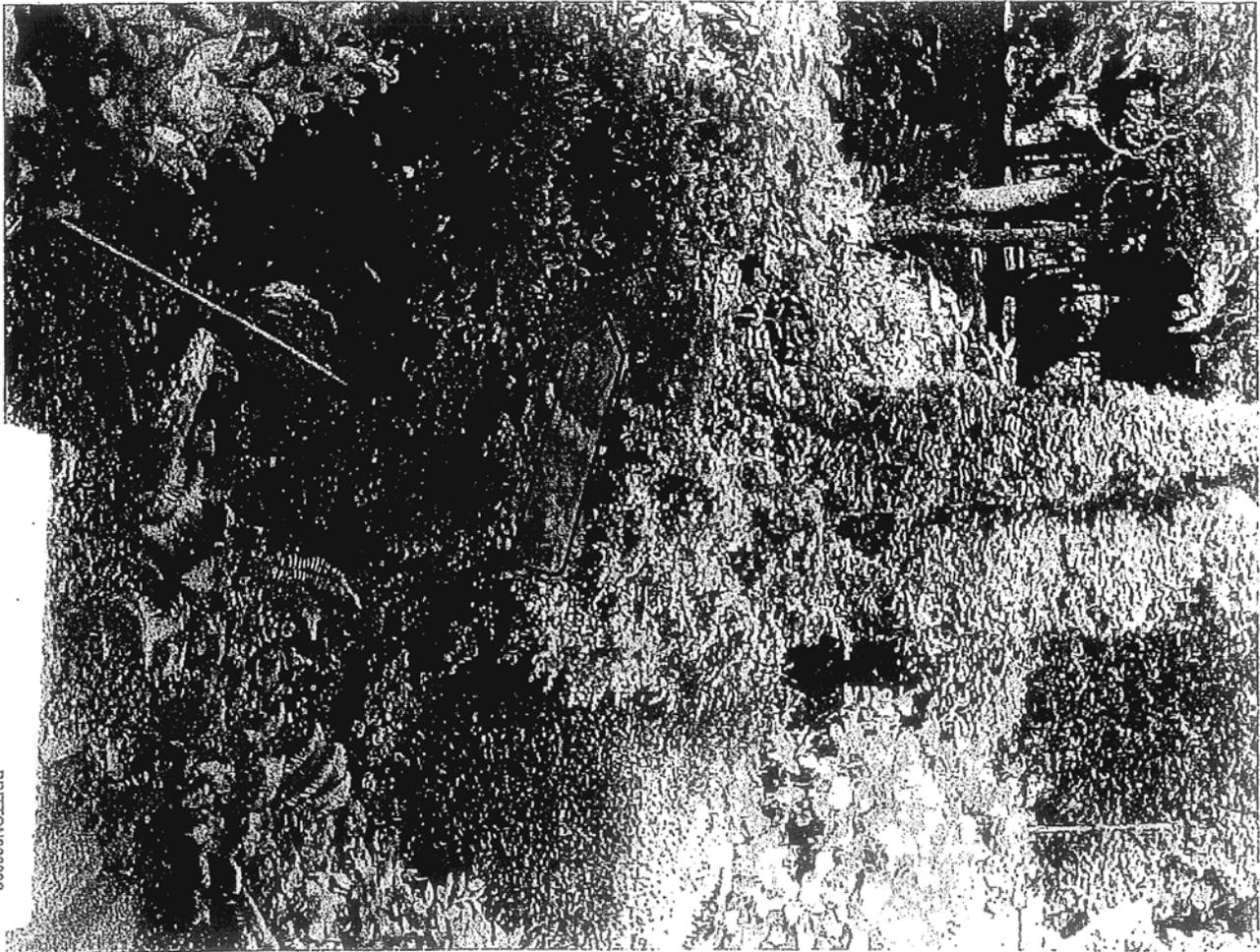
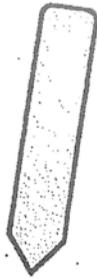
DESCRIPTION	SUBTOTAL
Installation of channel drain with decorative grate at base of entry steps as per bid by Steve Dickinson. Work performed in February and March, 2009.	\$3,950.00
----- \$1,436.00 deposit applied -----	-\$1,436.00
Sales Tax	\$355.50
	Total \$2,869.50
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

EXHIBIT 2



BRITTON000011

EXHIBIT 3



BRITTON000032

EXHIBIT 4



BRITISH MUSE



BRITTON000023

FILED

13 MAR 20 AM 9:00

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 12-2-22451-0 SEA

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

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband
and wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

The Honorable Monica Benton
NO. 12-2-22451-0 SEA

PLAINTIFFS' MOTION TO ALLOW A
SUPPLEMENTAL DECLARATION TO
PRESENT NEWLY-DISCOVERED
EVIDENCE REGARDING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Hearing Date: March 21, 2013

ON SHORTENED TIME

I. RELIEF REQUESTED

Mark Britton and Brigid Conybeare Britton (the "Brittons") respectfully move the Court for an order allowing them to submit a Supplemental Declaration based on newly discovered evidence that was not properly disclosed by the Defendants in response to Plaintiff's discovery requests.

II. STATEMENT OF FACTS

Defendants Peter M. Musser and Tamara H. Musser (the "Mussers") have noted a Motion for Summary Judgment to be heard at 1:00 PM on March 22, 2013. The

PLAINTIFFS' MOTION TO ALLOW A
SUPPLEMENTAL DECLARATION TO
PRESENT NEWLY DISCOVERED EVIDENCE
RE; DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT - 1
131098.1 / 100758.2



1 Mussers' Motion is based almost entirely on the Declaration of Catie Smith that was
2 signed under penalty of perjury on February 11, 2013.

3 The identity of Ms. Smith as a witness in this case was first disclosed to the
4 Brittons on February 14, 2013 in an email from Adam Asher to Scott Sleight.
5 Although the Mussers knew since at least August 8, 2012 (and likely well before then)
6 that Ms. Smith would be an important witness, the Defendants failed to disclose her
7 identity in their Responses to the Plaintiffs' First Set of Interrogatories and Requests
8 for Production promulgated in October, 2012. Upon receiving Ms. Smith's Declaration
9 filed in support of the Mussers' Motion for Summary Judgment, Britton's counsel
10 served a Subpoena Duces Tecum on Ms. Smith and her company Brier Creek Gardens.
11 The Subpoena was served on March 11, 2013 subsequent to the five day notice period
12 to counsel as required under the rule.

13 During the afternoon of March 18, 2013, Ms. Smith and Brier Gardens provided
14 documents responsive to the Brittons' Subpoena. Included in those documents was a
15 letter dated August 8, 2012 (the "Statement") drafted by Ms. Smith, that was sent to
16 Josh Brittingham, of Hecker Wakefield, one of the two firms representing the Mussers
17 in this case on that date. In addition, other emails and photographs relevant to the
18 Mussers' Motion for Summary Judgment were produced by Ms. Smith on March 18,
19 2012. The contents of the August 8, 2012 Statement, an email and a photograph, which
20 were never produced by Mussers' attorneys or identified in a privilege log, *directly*
21 *contradict Ms. Smith's sworn declaration submitted in support of the pending Motion*
22 *for Summary Judgment.* This newly discovered evidence and the Statement in
23 particular go directly to the creditability of the Mussers' prime witness, actually
24

PLAINTIFFS' MOTION TO ALLOW A
SUPPLEMENTAL DECLARATION TO
PRESENT NEWLY DISCOVERED EVIDENCE
RE; DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT - 2

131098.1 / 100758.2



1 support the Brittons' Response Brief and adverse possession claim, and should be
2 considered by the Court in connection with the Mussers' Summary Judgment Motion.

3 III. STATEMENT OF ISSUE

4 Whether this Court should permit a Supplemental Declaration be admitted as
5 evidence in opposition to the Motion for Summary Judgment when the Supplemental
6 Declaration contains new evidence that was not available and which may have been
7 deliberately withheld from Plaintiffs?

8 IV. EVIDENCE RELIED UPON

9 This motion is based on the declaration of Scott Sleight, exhibits thereto and the
10 papers and pleadings submitted in connection with the Motion to Allow a
11 Supplemental Declaration.

12 V. AUTHORITY

13 CR 56;

14 LCR 56;

15 CR 6.

16 The authority of the Court to allow a supplemental or late filed declaration in
17 connection with a Motion for Summary Judgment is a matter of the Court's discretion.
18 "A trial court has discretion regarding the acceptance of an untimely filed affidavit.
19 *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559 (1987); *Jobe v. Weyerhaeuser*
20 *Co.*, 37 Wn. App. 718719 (1984); *Sec. State Bank v. Burk*, 100 Wn. App. 94, 103
21 (2000). As noted in *Brown* case, the "trial court may accept affidavits anytime prior to
22 issuing its final order on summary judgment." *Brown* at 559. In this case, the Court
23 has not yet heard argument on the Defendants' Motion for Summary Judgment and no
24 final order is pending. Thus, under the circumstances the Court would not abuse the

PLAINTIFFS' MOTION TO ALLOW A
SUPPLEMENTAL DECLARATION TO
PRESENT NEWLY DISCOVERED EVIDENCE
RE; DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT – 3

131098.1 / 100758.2



1 Court's discretion by allowing the Supplemental Declaration of Scott Sleight. Equally
2 important, there is no prejudice to Defendants if this supplementation is allowed.

3 In addition, CR 6 (b) allows enlargement of time:

4 (b) Enlargement. When by these rules or by a notice given
5 thereunder or by order of court an act is required or allowed
6 to be done at or within a specified time, the court for cause
7 shown may at any time in its discretion . . . (2) upon motion
8 made after the expiration of the specified period, permit the
9 act to be done where the failure to act was the result of
10 excusable neglect; but it may not extend the time for taking
11 any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

12 In this case, since the period to file the Plaintiff's Response has passed, this
13 enlargement of time can be granted via this motion. Under the very questionable
14 actions of the Mussers' attorneys and the circumstances surrounding the failure to
15 disclose Ms. Smith's Statement, and considering the relevance of the evidence to the
16 issue before the Court, the Court has the discretion to expand the time and allow the
17 Supplemental Declaration of Scott Sleight to be admitted as evidence in connection
18 with the Brittons opposition to Mussers' Motion for Summary Judgment.

19 In this case, the Mussers' withheld Catie Smith's Statement and other emails
20 and photographs that directly contradict her testimony submitted in support of their
21 Motion for Summary Judgment. Had the Statement been properly disclosed, it would
22 have been included as part of the Britton's Response to further show the Court that Ms.
23 Smith's testimony is not credible and is contradicted by her own prior Statement and
24 emails provided to Brittons' attorneys.

25 The Statement is absolutely crucial to the Court's determination of this Motion.
26 Ms. Smith's own testimony shows that the Mussers pay her substantial fees for her
27 landscaping work and that she spends much of her professional time performing work
28 for the Mussers. In fact, she re-engaged them as clients approximately six months after

PLAINTIFFS' MOTION TO ALLOW A
SUPPLEMENTAL DECLARATION TO
PRESENT NEWLY DISCOVERED EVIDENCE
RE; DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT - 4

131098.1 / 100758.2



1 leaving City Peoples. Insofar as she is presented as the primary witness in support of
2 the Mussers' motion, the Court can properly weigh bias and credibility of her sworn
3 testimony. The existence of Ms. Smith's pre-existing Statement submitted to the
4 Mussers' attorneys, which was *never disclosed* to the Plaintiffs casts serious doubts on
5 her motivation and veracity as well as the motivation of the Mussers' attorneys for not
6 disclosing this in response to discovery requests. At the least, this further confirms that
7 Ms. Smith's bias and veracity are, standing alone, issues of material fact that need to be
8 adjudicated at trial. The Statement, on its face, makes the Declaration unreliable. To
9 not allow evidence of the Statement to be presented prior to ruling on Summary
10 Judgment would be an abuse of discretion. In addition, the last paragraph of the
11 Statement, in which she states that the Mussers' survey stakes are further north into the
12 Britton Property than she had believed was the property line, actually establish the
13 Brittons' adverse possession claim and directly contradicts the legal position that has
14 been taken on exclusivity. The Statement and emails contain facts directly contrary to
15 her Declaration as to maintenance of the English Laurel. The photographs establish she
16 treated the Fence Trajectory as the northern boundary of the Musser Property. *See*
17 *Sleight Declaration and exhibits thereto.*

18 V. CONCLUSION

19 For the foregoing reasons, the Brittons Motion to Allow a Supplemental
20 Declaration to Present Newly Discovered Evidence should be granted. This newly
21 discovered evidence casts serious doubt over the factual and legal representations that
22 the Mussers' Motion for Summary Judgment presents to this Court. Defendants'
23 misleading Motion and withholding of material third party documents and a
24

PLAINTIFFS' MOTION TO ALLOW A
SUPPLEMENTAL DECLARATION TO
PRESENT NEWLY DISCOVERED EVIDENCE
RE; DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT - 5

131098.1 / 100758.2



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contradictory Statement in their possession are very troubling to Plaintiffs and their counsel and Plaintiffs reserve all rights to further bring this conduct before the Court.

A proposed Order accompanies this motion.

DATED: This 19th day of March, 2013.

AHLERS & CRESSMAN PLLC



By: _____
Scott R. Sleight, WSBA #27106
Lawrence S. Glosser, WSBA #25098
Attorneys for Plaintiffs

PLAINTIFFS' MOTION TO ALLOW A
SUPPLEMENTAL DECLARATION TO
PRESENT NEWLY DISCOVERED EVIDENCE
RE; DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT - 6
131098.1 / 100758.2



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

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband
and wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

The Honorable Monica Benton
NO. 12-2-22451-0 SEA

[PROPOSED] ORDER GRANTING
MOTION TO ALLOW A
SUPPLEMENTAL DECLARATION
REGARDING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

Hearing Date: March 21, 2013
With Oral Argument
On Shortened Time

THIS MATTER came before the Court on Plaintiff Mark Britton and Brigid Conybeare Britton's Allow a Supplemental Declaration Regarding Defendants' pending Motion for Summary Judgment. Having carefully considered the arguments for and against the Motion, the Court rules as follows:

[[PROPOSED] ORDER GRANTING MOTION TO
ALLOW A SUPPLEMENTAL DECLARATION
REGARDING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT - 1
131104.1 / 100758.2



1 THE MOTION IS GRANTED. The Court allows the Supplementary
2 Declaration of Scott Sleight and exhibits thereto to be considered in connection with
3 Plaintiffs' opposition to Defendants' Motion for Summary Judgment.

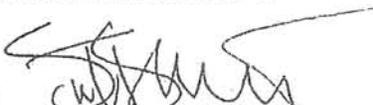
4 DONE IN OPEN COURT this ____ day of March 2013.

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The Honorable Monica Benton

Presented by:

AHLERS & CRESSMAN PLLC

By: 

Scott R. Sleight, WSBA #27106
Lawrence S. Glosser, WSBA #25098
Attorney for Plaintiffs

[[PROPOSED] ORDER GRANTING MOTION TO
ALLOW A SUPPLEMENTAL DECLARATION
REGARDING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT - 2
131104.1 / 100758.2



Honorable Monica Benton
Hearing Date: June 7, 2013 @ 9:00 a.m.
With Oral Argument

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT¹

I. RELIEF REQUESTED

Plaintiffs Mark and Brigid Britton (the "Brittons") assert claims for adverse possession by alleging that they and their immediate predecessors used an erratic portion of property owned by their neighbors, Defendants Peter and Tamara Musser (the "Mussers"), beginning in April 1999. The claim is not based on a fence, hedge, neatly trimmed lawn, or any other physical demarcation one would expect to establish a clear boundary; but instead, periodic landscape maintenance allegedly over seemingly random portions of the border with the Musser Property. The Brittons themselves appear somewhat confused as they cannot

¹ This motion for partial summary judgment, and supporting materials, supersedes and replaces the Motion for Summary Judgment the Mussers filed on February 15, 2013. Since the Court continued the hearing date to June (over three months from the original date), the parties have continued with discovery which has somewhat modified the evidence presented with this current Motion.

DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

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Socius Law Group, PLLC
ATTORNEYS
Two Union Square • 601 Union Street, Suite 4950
Seattle, Washington 98101.3951
Telephone 206.838.9100
Facsimile 206.838.9101

1 describe the disputed area. Specifically, in response to discovery requests asking for a
2 precise description, the Brittons produced a survey upon which the Mussers relied in filing
3 their Summary Judgment Motion. After the Court continued the motion and Ms. Britton was
4 deposed, she testified that the survey was not accurate and included sections and plants that
5 were not part of their claim. Instead of the apparently erroneous survey, the Brittons at some
6 point started also relying on an undefined "Fence Trajectory"; meaning the disputed area
7 should be envisioned by following an imaginary path/extension of a fence which ends
8 immediately next to the disputed area. Even with the alternative approach, Ms. Britton at her
9 deposition could not indicate where this "Fence Trajectory" should be depicted on the
10 survey, while admitting that the true fence trajectory is also not really the section they are
11 claiming either. Since the Brittons cannot define the area, and refuse to supplement their
12 discovery responses, the Mussers must guess as to what portion of their property the Brittons
13 claim through adverse possession.

14 Regardless of the exact area sought, the Brittons must show their use was actual and
15 exclusive for 10 years, meaning the earliest the adverse possession could have ripened was
16 April 2009. They cannot make this showing because the Brittons did not make any actual
17 use of certain areas, and with other areas, the incontrovertible evidence establishes that the
18 Mussers performed significant and continual landscape maintenance as early as August 2007;
19 a year and one half before the Brittons' adverse possession claim would have vested. The
20 regular use of the area by the Mussers, the true owners of the area, precludes a finding of
21 exclusivity for the required 10-year period. Accordingly, the Mussers move for partial
22 summary judgment seeking an order dismissing portions of the Brittons' adverse possession
23 claim.

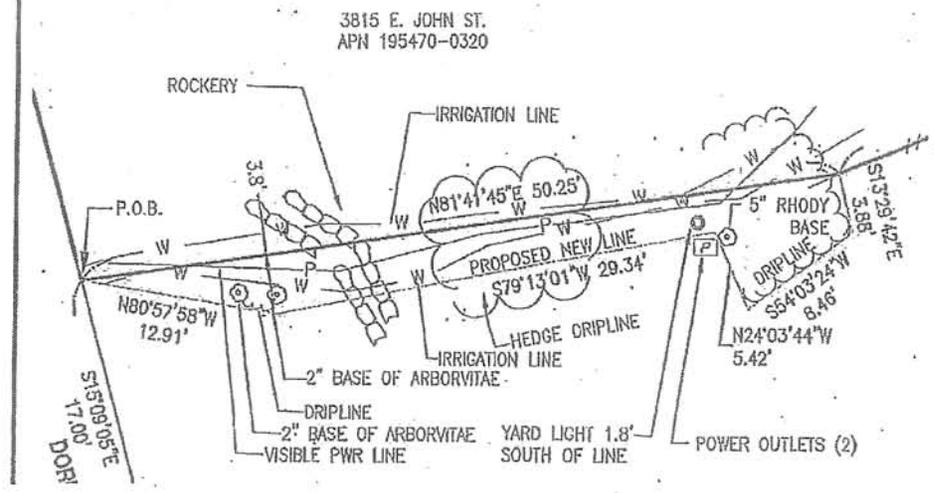
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DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

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(Asher Decl., Ex. A, Survey of Disputed Area.)² The dark black line is the title property line between the Musser Property (south) and the Britton Property (north). The Brittons' proposed new line starts at the west side with the initials P.O.B., travels in a southeasterly direction around the base of two arborvitae trees, then jets in a northeasterly direction to encompass the "Hedge Dripline" until taking an erratic turn south at the base of the rhododendron, then travels south, around the presumably ever-changing dripline of the rhododendron, and then north, again until reaching the actual title property line.

As depicted in the survey, the key points of interest within the Disputed Area, from east to west, are the following: (1) the rhododendron; (2) the single laurel bush (termed a "hedge" in the survey); (3) the rockery; and (4) the two arborvitae trees. For the purpose of this motion, the Mussers seek to obtain partial summary judgment as to the Rhododendron Area, the waxleaf privets between the rhododendron and the laurel, and the laurel.³

² The Brittons alleged adverse possession over a rockery near John Street in their Complaint. However, in her deposition, Ms. Britton clarified that this is no longer part of the Brittons' adverse possession claim. (Asher Decl, Ex. I, Brigid Britton Dep. at 65, Ln. 15-22.) Summary judgment is therefore appropriate on this area.
³ The Mussers are working to obtain a survey describing the particular area that is the subject of this motion. This survey will be provided as soon as it is ready.

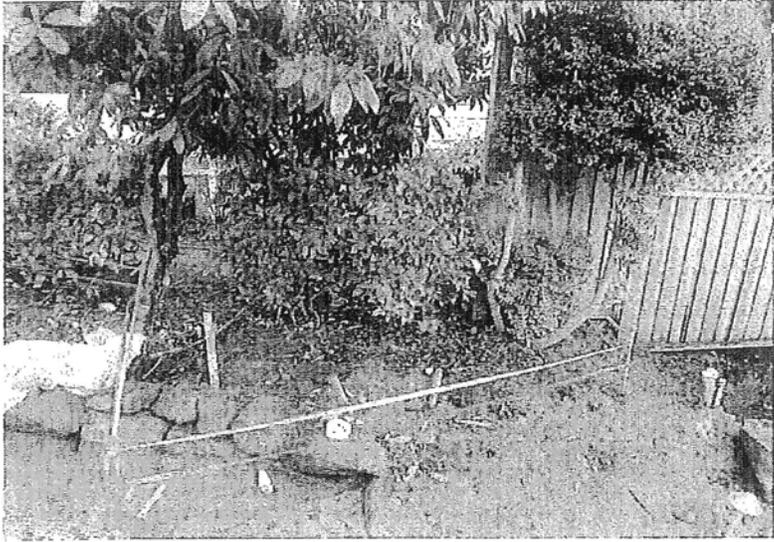
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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The Rhododendron Area:



(Asher Decl., Ex. B, Photograph of Rhododendron Area.) The photograph above, taken from the Musser side of the boundary, depicts the oddly-shaped area (blue and orange tape) around the rhododendron (left middle in the photograph) to which the Brittons claim adverse possession. Astonishing is the fact that this area not only includes the entire rhododendron, but also includes several feet of the Mussers' patio (lower left side of photograph), as well as property that is clearly behind the Mussers' side of the 30-year old above described fence and encompassing the boxwood tree (right middle in the photograph). There are waxleaf privet bushes between the rhododendron and boxwood (squarely in the middle of the photograph).

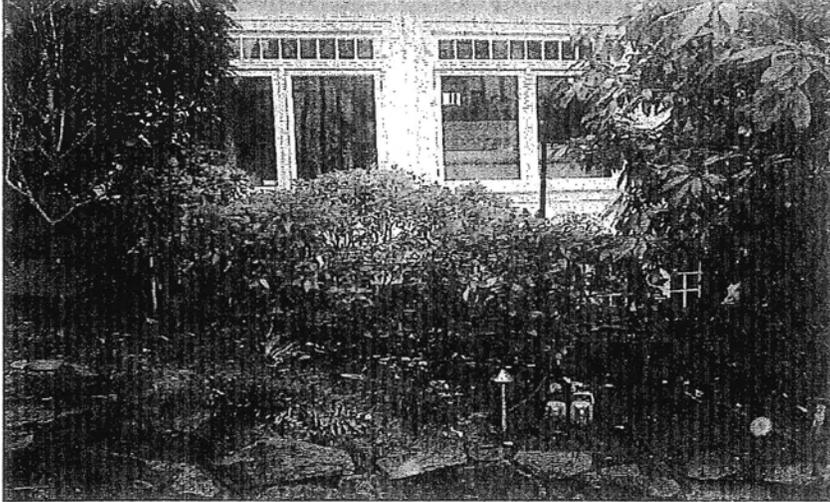
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DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

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Two Union Square • 601 Union Street, Suite 4950
Seattle, Washington 98101.3951
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1 Area Between the Rhododendron and Laurel:



12 (Asher Decl., Ex. C, Photo Between Rhododendron and Laurel.). There are waxleaf privet
13 bushes (squarely in the middle of the photograph) between the rhododendron (right side of
14 the photograph) and the laurel (left side of the photograph).

15 The Laurel:



DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

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Facsimile 206.838.9101

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2 (Asher Decl., Ex. D, Photo of Laurel.) The waxleaf privet bushes are to the right of the
3 laurel in the photograph.

4 In the context of the prior motion for summary judgment (which was continued to
5 June 7, 2013), the Brittons appeared to abandon the survey as the basis of their claim, and
6 instead focus on the "Fence Trajectory" idea. This new and somewhat different area is
7 undefined, inconsistent with the survey, and contrary to the actual fence trajectory. At her
8 deposition, Ms. Britton could not identify the "Fence Trajectory" on the survey and testified
9 that she was unable to draw the line she was claiming. (Asher Decl., Ex. I, Brigid Britton
10 Dep. at 25; Ln. 22-23.) However, she maintained that the "Fence Trajectory" is a straight
11 line (*Id.* at 26; Ln. 10-15), even though the line on the survey is far from a straight line.
12 Moreover, she confirmed that if actually following the true fence trajectory from the old
13 wood fence, it would project much more southerly into the Musser Property than the area
14 claimed by the Brittons. (*Id.* at 27; Ln. 17-20; Exhibit 1). Based on the ultimate drawing
15 Ms. Britton drew at her deposition, her idea of the actual fence trajectory clearly has no
16 relationship with the "Fence Trajectory" previously described by the Brittons or the survey
17 they rely upon. (*Id.*)

18 Additionally, Ms. Britton's testimony disputes the accuracy of her own survey.
19 Specifically, she stated that the survey was "distorted." She went on to testify that, "I think
20 the area where it says 'rhody' base and 'dripline' looks larger than the area actually is that we
21 are claiming." (Dep. at 19: ln.18-23) Additionally, Ms. Britton stated that the line from the
22 two arborvitaes to the point of beginning is "a straighter line than it looks when it's rendered
23 on paper." (*Id.* at 20: Ln. 8-18.)

24 The confusion continues with respect to the Rhododendron Area where Ms. Britton
25 admits that the boxwood behind the Mussers' side of the fence is not part of their claim, even
26

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1 though included in their survey. (*Id.* at 22: Ln 20-22.) She also concedes that the Mussers'
2 patio is not part of their claim despite also be included in their survey. She further explained
3 that the reason the oddly shaped "cut-out" is included in the survey is solely due to their
4 concern of the health of the rhododendron. Specifically, they worry that if portions of the
5 rhododendron on the Musser side are trimmed or removed, it could kill the bush. Therefore,
6 they included the entire drip line of the rhododendron, which encompasses the patio, out of
7 concern for the health of the bush. (*Id.* at 23: Ln. 12-25; 25, Ln. 1-2.) Thus, the "cut-out"
8 area around the drip line was based on concern for the health of the bush, not on actual use or
9 maintenance of the area. (*Id.* at 33: Ln. 9-13.)

10 Ms. Britton further admitted that the Mussers planted the waxleaf privets in the
11 rhododendron area and the Brittons' landscapers did not maintain those bushes. (*Id.* at 30:
12 Ln. 5-19.) The photograph of the Rhododendron Area above (Asher Decl., Ex. B, Photograph
13 of Rhododendron Area), depicts the base of the Rhododendron, wax leaf privets, and then the
14 fence, moving left to right. Ms. Britton testified that her landscapers have not maintained
15 south of the waxleaf privets. (Asher Decl., Ex. I, Brigid Britton Dep. at 33: Ln. 20-24.)
16 Therefore, with the exception of the base of the rhododendron itself, the Brittons do not
17 allege any use or maintenance of the entire "cut-out" area shown in the above photograph of
18 the Rhododendron Area. Also, Ms. Britton admitted her landscapers did not maintain the
19 waxleaf privets between the rhododendron and laurel. (*Id.* at 39: Ln. 8-13.)

20 After Ms. Brittons' deposition on April 3, 2013, counsel for the Mussers raised
21 concerns about the apparent inconsistencies in the Brittons' testimony and the survey.
22 Specifically, on April 4, 2013, counsel for the Mussers requested supplementation of the
23 Brittons' responses to the Mussers' interrogatories and requests for production related to the
24 definition of the Disputed Area. (Asher Decl., Ex. J, Email Chain.) The Mussers indicated
25 that the survey incorrectly includes a portion of the Mussers' fence, a boxwood bush behind
26

1 the fence, and part of the Mussers' patio. (*Id.*) Additionally, the Mussers raised the issue
2 that the "Fence Trajectory" description was inconsistent with the survey. (*Id.*) Since the
3 survey was ostensibly the Brittons' certified description of the Disputed Area, the Mussers
4 requested a supplemental response detailing the precise area the Brittons claimed. (*Id.*) The
5 Brittons refused to supplement their prior discovery responses, and instead continue to rely
6 upon the survey as the "Disputed Area." (*Id.*) The Mussers proceed with the instant motion
7 not knowing the description of the actual "Disputed Area," and will thus focus on the "areas"
8 defined above.

9 **C. History of Brittons' and Predecessors' Use of the Disputed Area**

10 **1. The Dysons (August 1997-April 1999)**

11 Timothy J. Dyson and Julie C. Dyson purchased the Britton Property on August 22,
12 1997 from the Estate of Luther C. Losey. (Asher Decl., Ex. E, Dyson Deed; Declaration of
13 Timothy J. Dyson ("Dyson Decl.") ¶ 1.) When the Dysons purchased the Britton Property
14 the house had not been lived in for several years, and was in a serious disrepair. (*Id.* ¶ 2.)
15 The Dysons undertook a major renovation of the house. (*Id.*) The exterior of the property,
16 like the house, had not been maintained and was very overgrown. (*Id.* ¶ 3.) The Dysons
17 concentrated their efforts on the renovations to the house, and did not do any maintenance of
18 the landscaping. (*Id.*) They planned to landscape the property once the house renovations
19 were complete, but they never got that far. Before the landscaping work was started, the
20 Dysons found another house and purchased it. (*Id.* ¶ 5.) The Dysons then sold the Britton
21 Property to John and Deborah Klein in April 1999. (*Id.*); (Asher Decl., Ex. H, Klein Deed.)
22

23 **2. The Kleins (April 1999-October 2003)**

24 Deborah Klein states in her declaration that when they purchased the Britton
25 Property, there was not very much landscaping along the southern border of the property,
26

1 which is the Disputed Area, so they had significant landscaping installed along what they
2 believed to be the southern boundary of the Britton Property. (Asher Decl., Ex. F,
3 Declaration of Deborah Klein (“Klein Decl.”) ¶ 2.) She declares that all the trees, bushes and
4 plants in the Disputed Area were within the Britton Property. (*Id.* ¶ 7) She further declares
5 that she and their gardeners and landscapers were the only people who maintained the
6 landscaping in the Disputed Area. (*Id.*) She also states that they exclusively maintained the
7 rockery at all times. (*Id.*)

8
9 **3. The Brittons (October 2003 through the Present)**

10 The Brittons purchased their property from the Kleins in October 2003. They
11 generally and vaguely allege that they “maintained” the rockery in the Disputed Area.
12 (Asher Decl., Ex. G, Brittons Discovery Responses at page 5-6.) However, the factual
13 support offered for that claim is simply that the “rockeries have been well maintained and
14 clearly visible.” (*Id.* at 5.) The Brittons also allege that they maintain the laurel bush. (*Id.* at
15 6.) The Brittons similarly assert that they prune the rhododendron in the Disputed Area. (*Id.*
16 at 9.) To the west of the rhododendron, the Brittons allege they planted “a number of
17 different plants for privacy” which were watered by them. (*Id.*) They also assert that they
18 maintained the area above the rockeries, which includes two arborvitae trees. (*Id.* at 10.)
19 They generally assert that their “maintenance activities of the Disputed Area were part of
20 their overall yard landscaping and maintenance performed weekly during the spring through
21 the fall and every other week during the winter months.” (*Id.* at 6.)

22 The Brittons have not personally maintained the landscape in the Disputed Area.
23 (Asher Decl., Ex. I, Brigid Britton Dep. at 18; Ln. 12-18.) The maintenance they rely upon
24 in support of their adverse possession claim was performed by their landscapers. (*Id.*)
25 Langstraat-Wood, Inc. performed landscape work for the Brittons between May 2004 and
26 August 2010. (*Id.* at 48; Ln. 17; 49, Ln. 9-11.)

1 Erik Wood, the owner of Langstraat-Wood, states in his Second Declaration that he
2 has no personal knowledge and cannot testify that the Brittons' maintenance was exclusive.
3 (Second Erik Wood Decl. ¶ 2.) Doug Beaton was the Langstraat-Wood employee who
4 actually performed the landscape work at the Britton Property between August 2007 and
5 August 2010. (Doug Beaton Decl. ¶ 1.) Mr. Beaton declares that:

6 I recall that City People's maintained the Musser Property. There were
7 occasions where the maintenance along the southern boundary overlapped.
8 For instance, I recall times where I would go to maintain an area or prune a
9 bush and see that it had already been done. Because there was this overlap, I
10 am unable to testify that our maintenance of the bushes along the southern
11 property line was exclusive during the time period that I worked there, which
12 was generally 2007 through 2010. Rather, my recollection is that City
13 People's also maintained parts of the area.

14 (Beaton Decl. ¶ 4) (Emphasis added.)

15 **D. The Mussers' Use of the Disputed Area**

16 The Mussers purchased the Musser Property in April 2007. In August 2007, they
17 hired City People's Garden Design & Landscape ("City People's") to provide landscaping
18 services on the Musser Property. (Declaration of Catie Smith ("Smith Decl.") ¶ 1.) Catie
19 Smith was the Landscape Manager for City People's. (*Id.*) On behalf of City People's, she
20 supervised and personally performed landscape services on the Musser Property once a
21 week, all year long, and would typically spend several hours each time. (*Id.*, Ex. A, City
22 People's Invoices for 2007 and 2008.) Ms. Smith left City People's in December 2008 and
23 started her own business, Brier Creek Gardens, LLC. (*Id.* ¶ 9.) City People's continued
24 servicing the Musser Property. (*Id.*) After several months, the Mussers hired Ms. Smith's
25 new company to take over for City People's. (*Id.*) Since that time, she and her crew are
26 generally at the Musser Property all year long every Friday. (*Id.*)

Since August 2007, Ms. Smith and her crews maintained the area around the
rhododendron, as depicted in the photograph above (Asher Decl., Ex. B.). (*Id.* ¶ 3.) Their

1 maintenance of the area includes weeding, planting, fertilizing, and composting the area.
2 They have always trimmed and pruned the rhododendron. (*Id.*) Ms. Smith never saw
3 anybody else trim it, nor is there any evidence that it has been trimmed by anyone else. (*Id.*)
4 In fact, the trunk of the rhododendron shows evidence of cut limbs; most if not all of which
5 were cut by Ms. Smith over the years. (*Id.*) Additionally, Ms. Smith and her crews have
6 exclusively maintained and shaped the boxwood behind the Musser side of the fence, which
7 is also depicted in the photograph above. (*Id.*)

8 Moreover, Ms. Smith and her crews have maintained the area between the
9 rhododendron and the laurel (Asher Decl., Ex. C) since August 2007 by weeding, removing
10 unwanted plants, planting new plants, composting, and otherwise making the area have a neat
11 appearance. (*Id.* ¶ 4.) In 2008, Ms. Smith and her crew planted five or six Waxleaf Privet
12 bushes near the boundary line on the Musser side (these bushes are depicted in the
13 photographs above), to run from the existing old wood fence to the laurel, which is toward
14 Dorffel Avenue. (*Id.*) The purpose of these bushes was to prevent the mailman from
15 trampling through the area. (*Id.*) Neither the Brittons, nor anyone on their behalf, ever
16 complained or said anything about the bushes. (*Id.*) Ms. Smith and her crew regularly
17 maintained the bushes since they were planted in 2008. (*Id.*)

18 As with the rhododendron and boxwood, Ms. Smith and her crews also started to trim
19 the laurel bush in the "Disputed Area" beginning in August 2007. (Asher Decl., Ex. D). (*Id.*
20 ¶ 5.) When she first started working for the Mussers in 2007, the laurel had grown wildly
21 without any shape. (*Id.*) Ms. Smith created the box shape that now exists and has
22 maintained that shape since 2007. (*Id.*) When she trimmed the laurel, Ms. Smith trimmed
23 the top, and all sides, except the side facing the Britton Property. (*Id.*)

24 Tony Sacco worked as a landscape supervisor at City People's and directly under Ms.
25 Smith. (Tony Sacco Decl. ¶ 1.) In approximately late 2007 or early 2008, he started periodic
26

1 work on the Musser Property under the supervision of Ms. Smith. (*Id.* ¶ 2.) He worked on
2 the Musser Property for a year or so through 2008 and until 2009. (*Id.*) Mr. Sacco recalls
3 trimming the rhododendron. (*Id.* ¶ 3.) He also recalls that City People's trimmed the laurel
4 bush. (*Id.* ¶ 4.)

5 After initially signing a declaration under the penalty of perjury, Mr. Sacco curiously
6 recanted his declaration after several conversations with counsel for the Brittons. The
7 complete change in his testimony raises obvious issues as to his recollection of the
8 maintenance done in 2007 and 2008. Nevertheless, his "corrected" declaration continues to
9 confirm that City People's maintained the rhododendron and the laurel. (Corrected Sacco
10 Decl. ¶¶ 9-10.)

11 Mr. Sacco's poor recollection is not surprising given the amount of time he actually
12 spent at the Musser Property. In 2007 and 2008, Ms. Smith managed several different crews.
13 (Smith Decl. ¶ 2.) Mr. Sacco worked on the Musser Property but he was not a regular,
14 weekly crew member. (*Id.*) In fact, the Mussers were usually scheduled for Friday
15 maintenance. (*Id.*) During this time period, Mr. Sacco was often in the office on Fridays
16 working to schedule the following week's work. (*Id.*)

17 While Mr. Sacco cannot now apparently recall certain points about the Musser
18 Property maintenance, Ms. Smith's recollection is pristine. With the exception of a six-
19 month gap in time, Ms. Smith has worked on the Musser Property from August 2007 through
20 the present. (*Id.* ¶¶ 1, 9.) Ms. Smith personally directed her crews, including Mr. Sacco on
21 the occasion he was actually there, regarding the maintenance activities. (*Id.* ¶¶ 1-2.) She
22 directed that the rhododendron including the Musser side, the sides, and the top be trimmed.
23 (*Id.* ¶ 4) She also directed that the ground underneath the rhododendron, including around
24 the base of the rhododendron be maintained, weeded, fertilized, etc. (*Id.*) She personally
25 visually inspected areas to make sure her directions were being followed and if not, she
26

1 would have it corrected. This includes trimming and maintaining the laurel. (*Id.* ¶ 6.) Her
2 instructions were to keep the laurel trimmed on the Musser side, the sides, and the top to
3 keep a neat and tidy appearance. (*Id.*) This could not have been accomplished by trimming
4 only one side. (*Id.*) Ms. Smith regularly visually inspected the work to confirm that the
5 garden was being maintained meticulously. (*Id.*)

6 III. ISSUES PRESENTED

7 Should the Court grant partial summary judgment in favor of the Mussers and dismiss
8 portions of the Brittons' adverse possession claim, where the Brittons cannot meet their
9 burden of establishing actual and exclusive use of certain portions of the Disputed Area?

10 IV. EVIDENCE RELIED UPON

11 This motion is based on the pleadings and files herein, and on the Declarations of
12 Adam R. Asher, Catie Smith, Timothy J. Dyson, Deborah Klein, Tony Sacco, and Doug
13 Beaton, with attached exhibits.

14 V. AUTHORITY

15 A. Summary Judgment Standard

16 The purpose of summary judgment is to avoid a useless trial where there is no
17 genuine issue of material fact. *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 148, 787 P.2d 8
18 (1990). The Mussers are entitled to summary judgment as a matter of law if the pleadings,
19 affidavits, and admissions demonstrate the absence of any genuine issues of material fact.
20 *See* CR 56(e). A court should grant summary judgment when, as here, reasonable minds
21 could reach but one conclusion from the facts submitted. *See Wilson v. Steinbach*, 98 Wn.2d
22 434, 437, 656 P.2d 1030 (1982). The nonmoving party "may not rely on speculation,
23 argumentative assertions that unresolved factual issues remain, or in having its affidavits
24 considered at face value" in opposing summary judgment. *Seven Gables Corp. v. MGM /UA*
25

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1 *Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Rather, “the nonmoving party must
2 set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that
3 a genuine issue as to a material fact exists.” *Id.* at 13.

4 **B. The Brittons Cannot Show Actual Use of the Rhododendron Area or the**
5 **Waxleaf Privets.**

6 Adverse possession requires that the Brittons show that their possession of the
7 Disputed Area was (1) open and notorious; (2) actual and uninterrupted; (3) exclusive; and
8 (4) hostile, and that such possession existed for the statutory, 10-year, period. *Chaplin v.*
9 *Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). The Brittons cannot prove actual use of
10 the “cut-out” area around the rhododendron’s drip line or of the waxleaf privets.

11 To be adverse, the possession of another’s land must be “actual”: it is not
12 possible to be in adverse possession without physical occupation. Unless
13 there is the requisite degree of physical possession, no amount of verbal
14 claims, no amount of documents, no kinds of acts off the ground will put the
15 claimant in adverse possession.

16 *Stoebuck & Weaver*, 17 *Washington Practice, Real Estate: Property Law* § 8.9

17 Ms. Britton admits that the boxwood behind the Mussers’ side of the fence is not part
18 of their claim, even though it appears in their survey. (Asher Decl., Ex. I, Brigid Britton
19 Dep. at 22; Ln 20-22.) She also concedes that the Mussers’ patio is not part of their claim
20 despite the fact that it is included in their survey. Therefore, summary judgment dismissal of
21 those areas is warranted.

22 More significantly, Ms. Britton explained that the “cut-out” is included in the survey
23 solely because they are concerned with the health of the rhododendron. Specifically, they
24 worry that if portions of the rhododendron on the Musser side are trimmed or removed, it
25 could kill the bush. Therefore, they included the entire drip line of the rhododendron (which
26 is presumably expanding as the plant grows), which includes the patio, out of concern for the
health of the bush. (*Id.* at 23: Ln. 12-25; 25, Ln. 1-2.) It cannot be stressed enough that this

1 “cut-out” area around the drip line was not based on actual use, physical occupation, or
2 maintenance of the area. (*Id.* at 33: Ln. 9-13.)

3 Ms. Britton also admitted that the Mussers planted the waxleaf privets in the
4 Rhododendron Area; and their landscapers did not maintain those bushes. (*Id.* at 30, Ln. 5-
5 19.) The photograph of the Rhododendron Area above (Asher Decl., Ex. B, Photograph of
6 Rhododendron Area), depicts the base of the rhododendron, the wax leaf privets, and then the
7 fence, moving left to right. Ms. Britton testified that her landscapers have not maintained
8 south of the waxleaf privets. (Asher Decl., Ex. I, Brigid Britton Dep. at 33; Ln. 20-24.)
9 Therefore, with the exception of the base of the rhododendron itself, the Brittons do not
10 allege any actual use or maintenance of the entire “cut-out” area shown in the above
11 photograph of the Rhododendron Area. Summary judgment is therefore warranted on this
12 cut-out area.

13 Similarly, the Brittons cannot show actual use of the waxleaf privets near the
14 rhododendron or between the rhododendron and the laurel. Ms. Britton testified that her
15 crew did not maintain those bushes. (Asher Decl., Ex. I, Brigid Britton Dep. at 33; Ln. 20-2;
16 39; 8-13.) With no actual use, their adverse possession claim over the cut-out area and
17 waxleaf privets fails as a matter of law.⁴

18 **C. The Brittons Cannot Meet Their Burden of Proving Exclusive Use of the**
19 **Pertinent Portions of the Disputed Area for 10 Years.**

20 The Brittons also cannot meet their burden of showing exclusive use for the statutory
21 ten-year period, of the area on the Musser Property encompassing and south of the laurel, the
22 waxleaf privets, the rhododendron, and the boxwood (see above photographs). Therefore,
23

24 ⁴ At times, the Brittons have stated that the waxleaf privets were not part of their claim. However, as drawn, the
25 survey of the “Disputed Area” includes the waxleaf privets. The Brittons refuse to supplement their discovery
26 responses to provide a clear description of the Disputed Area. Therefore, the Mussers must rely on the survey,
which even the Brittons acknowledge is inaccurate.

1 their adverse possession claim to the subject area fails as a matter of law. Ultimately, a
2 claimant's possession need not be *absolutely* exclusive in order to satisfy the exclusivity
3 condition of adverse possession. *Lilly v. Lynch*, 88 Wn. App. 306, 313, 945 P.2d 727 (1997)
4 (citing *Crites v. Koch*, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987)). Specifically, an
5 "occasional, transitory use by the true owner usually will not prevent adverse possession if
6 the uses the adverse possessor permits are such as a true owner would permit a third person
7 to do as a 'neighborly accommodation.'" 17 William B. Stoebuck, *Washington Practice*
8 *Real Estate: Property Law* § 8.19 at 516 (1995). With that said, however, courts find a lack
9 of exclusivity when there is regular use by the title owner that indicates ownership, as in this
10 case. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 936 P.2d 1163, 1172 (1997).
11 For instance, in *Thompson v. Schlitterhart*, 47 Wn. App. 209, 212, 734 P.2d. 48 (1987),
12 parties on both sides of the disputed boundary made similar use of the disputed property.
13 Therefore, exclusivity was missing. William B. Stoebuck and John W. Weaver explain how
14 use by the true owner defeats exclusivity as follows:

15
16 Any sharing of possession with the true owner is particularly sensitive. An
17 occasional, transitory use by the true owner usually will not prevent adverse
18 possession if the uses the adverse possessor permits are such as a true owner
19 would permit a third-party to do as a "neighborly accommodation." Examples
20 are the true owner's occasionally walking across the disputed area or now and
21 then using it for recreational purposes. Beyond such activities, however, any
22 significant, and especially regular, use by the true owner will prevent
23 exclusive adverse possession.

24 William B. Stoebuck and John W. Weaver, 17 *Washington Practice, Real Estate: Property*
25 *Law* § 8.19 (2nd Ed. 2004) (Emphasis added).

26 The Brittons cannot establish exclusive possession for 10 years of the subject area. A
summary of the background of the Britton Property ownership and alleged use of the

1 Disputed Area is helpful in this analysis⁵:

- 2
- 3 • The Estate of Luther C. Losey sold the Britton Property to Timothy J. Dyson and Julie C. Dyson in August 1997. (Asher Decl., Ex. H, Dyson Deed.)
 - 4 • The house had been vacant for several years before the Dysons' purchase. (Dyson Decl. ¶ 1.)
 - 5
 - 6 • The property landscaping had not been maintained and was overgrown when purchased by the Dysons. (Dyson Decl. ¶ 3.)
 - 7
 - 8 • During the Dysons' ownership they focused entirely on interior renovations. They did no general landscape maintenance, and hence, did not maintain the Disputed Area. (*Id.* ¶ 3, 5.)
 - 9
 - 10 • Before doing any landscaping, the Dysons sold the Britton Property to John Klein and Deborah Klein in April 1999. (*Id.* ¶ 5.)
 - 11
 - 12 • The Kleins allege maintenance of the Disputed Area from April 1999 to October 2003, when they sold the Britton Property to the Brittons. (Asher Decl., Ex. F, Klein Decl.)
 - 13
 - 14 • The Brittons allege identical maintenance of the Disputed Areas from October 2003 through the present. (Asher Decl., Ex. G, Britton Discovery Responses.)
 - 15

16 Based on the above and even assuming the allegations of the Brittons and Deborah Klein are true, they cannot establish exclusive use for 10 years. Again, the earliest use
17 needed for adverse possession started when the Kleins purchased the property in 1999 as the
18 Kleins' predecessors, the Dysons, did no landscape maintenance on the Disputed Area during
19 their ownership in 1997 through 1999. (Asher Decl., Ex. E, Dyson Decl. ¶ 3, 5.) The house
20 was vacant several years before the Dysons purchased it. (*Id.* ¶ 1.) Therefore, there is no
21 factual dispute that the earliest the adverse use could have started, assuming that the Kleins
22 made adverse use of the disputed area immediately upon their purchase of the Britton
23 Property, was April 1999. Thus, such adverse use, when tacked with the Brittons' alleged
24

25 ⁵ The Mussers dispute the allegations of use by the Brittons, and their immediate predecessors, John and Deborah Klein. However, for the purpose of this analysis, the Court should assume their allegations are true.
26

1 adverse use, would have to be exclusive until April 2009, at which time adverse possession
2 in the Disputed Area would vest.

3 However, fatal to the Brittons' claim is the incontrovertible fact that the Mussers,
4 through their landscapers, began using the subject area in a similar manner alleged by the
5 Brittons and the Kleins in August 2007. To reiterate, the Mussers hired City People's to
6 perform landscape services. Catie Smith began maintaining the Musser Property at that time.
7 Ms. Smith testified that she and her crew weeded the entire area, they pruned the
8 rhododendron, they pruned all sides of the laurel (except the Britton side), and they planted
9 bushes (waxleaf privets) and plants in the area, they removed debris, they put down mulch,
10 and performed various other tasks, including fertilizing the plants in the area. Even Tony
11 Sacco, who obviously has some recollection issues, recalled trimming the rhododendron and
12 the laurel, and he was not even on site on a weekly basis when he worked for City People's.
13 Further, the Mussers' sprinklers have watered the plants and trees in the Disputed Area.
14 Catie Smith's crew was on the Musser Property nearly every week from August 2007
15 through December 2008. City People's continued maintaining the property for several
16 months in 2009, until Catie Smith's new company, Brier Creek Gardens, LLC, took over,
17 and which continues to maintain the property today. This testimony is fatal to the Brittons'
18 claim. In short, the Brittons cannot establish exclusive use to the subject area for the entire
19 ten-year required period.

20 "Once there has been an initial showing of the absence of any genuine issue of
21 material fact, the party opposing summary judgment must respond with more than
22 conclusory allegations, speculative statements, or argumentative assertions of the existence
23 of unresolved factual issues." *Ruffer v. St. Frances Cabrini Hosp. of Seattle*, 56 Wash. App.
24 625, 628, 784 P.2d 1288, 1290 (1990); *Seven Gables Corp. v. MGM/UA Entertainment Co.*,
25 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (Emphasis added). Rather, "the nonmoving party must
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1 set forth specific facts that sufficiently rebut the moving party's contentions and disclose that
2 a genuine issue as to a material fact exists." *Seven Gables*, 106 Wn.2d at 13 (Emphasis
3 added.) Courts will not consider conclusions of law that simply reiterate the allegations in
4 the Complaint. *Kirk v. Moe*, 114 Wn. 2d 550, 557, 789 P.2d 84 (1990); *Guile v. Ballard*
5 *Community Hospital*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993).

6 In responding to the Mussers' motion, the onus is on the Brittons to allege sufficient
7 facts to rebut the moving party's contentions. The Brittons cannot meet their burden. The
8 critical time period is between August 2007 and April 2009. The Brittons admit that they
9 have not personally done any maintenance of the Disputed Area and must thus exclusively
10 rely upon the testimony of their landscapers. (Asher Decl., Ex. I, Brigid Britton Dep. at 18:
11 Ln. 12-18.) In this regard, the landscapers, during August 2007 and April 2009, were from
12 Langstraat-Wood, Inc.⁶ Erik Wood, the owner of Langstraat-Wood, states in his Second
13 Declaration that he has no personal knowledge and cannot testify that the Brittons'
14 maintenance was exclusive. (Second Erik Wood Decl. ¶ 2.) In other words, he cannot
15 refute the Musser evidence that Ms. Smith landscaped and maintained the subject area.

16 At her deposition, Ms. Britton confirmed that her only evidence to establish exclusive
17 use during the relevant time period was through Erik Wood and his company and thus
18 identified the landscapers at Langstraat-Wood, including Doug Beaton. (Asher Decl., Ex. I,
19 Brigid Britton Dep. at 48-49.) In this regard, Mr. Beaton started at Langstraat-Wood in 2007
20 and began working on the Britton Property at that time, and continued working there until
21 sometime in 2010. (Beaton Decl. ¶ 1.) Mr. Beaton declares that:

22 I recall that City People's maintained the Musser Property. There were
23 occasions where the maintenance along the southern boundary overlapped.
For instance, I recall times where I would go to maintain an area or prune a

24 ⁶ The Mussers anticipate that the Brittons will rely upon declarations of Mike Ramsey, Alex Lupenski, Israel
25 Lopez and Ptarmigan Teal to support their claim. However, none of these witnesses worked on the Britton
26 Property during the critical time frame of August 2007 through April 2009. Mr. Ramsey's and Mr. Lupenski's
knowledge predates the Mussers' purchase of their property in 2007. Mr. Lopez and Ms. Teal started working
on the Britton Property in September 2010, after the critical time period.

1 bush and see that it had already been done. Because there was this overlap, I
2 am unable to testify that our maintenance of the bushes along the southern
3 property line was exclusive during the time period that I worked there, which
4 was generally 2007 through 2010. Rather, my recollection is that City
5 People's also maintained parts of the area.

6 (Beaton Decl. ¶ 4) (Emphasis added.)

7 Ultimately, the one person who conceivably could refute Ms. Smith's testimony is
8 unable to do so.⁷ In fact, Mr. Beaton corroborates Ms. Smith's testimony by acknowledging
9 City People's was performing maintenance for the Mussers at the critical time and that some
10 of the maintenance worked "overlapped." Since Ms. Smith's testimony is not controverted,
11 there are no genuine issues of material fact, and summary judgment should be granted. The
12 Brittons cannot prove exclusive use for the required 10-year period of the areas
13 encompassing and south of the rhododendron, the waxleaf privets, the boxwood or the laurel.

14 VI. CONCLUSION

15 For the foregoing reasons, the Mussers respectfully request that the Court grant
16 summary judgment in their favor, dismissing portions of the Brittons' adverse possession
17 claim. The Brittons cannot show actual use of the Rhododendron Area on the survey or of
18 the waxleaf privets. Ms. Britton testified that they did not maintain the area. Concerns over
19 the health of a bush do not create an adverse possession claim. Further, the Brittons cannot
20 prove exclusive use for 10 years of the area encompassing and south of, the laurel, the
21 waxleaf privets, the rhododendron and the boxwood. The alleged adverse use began in April
22 1999, which would require exclusive use until April 2009. The undisputed evidence is that
23 the Mussers regularly maintained the subject area from August 2007 through the present.
24 Such regular use by the Mussers defeats exclusivity as of August 2007. As such, the
25 Brittons' alleged adverse use did not vest. Therefore, summary judgment should be entered

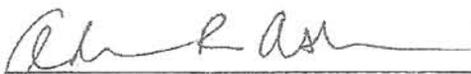
26 ⁷ Mr. Beaton does not even recall maintaining the rhododendron. (Beaton Decl. ¶ 3.)

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in favor of the Mussers and dismissing the Brittons' adverse possession claim over the portions of the Disputed Area described herein.

DATED this 10th day of May, 2013.

SOCIUS LAW GROUP, PLLC

By 
Adam R. Asher, WSBA #35517
Attorneys for Defendants

DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

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-22-

Socius Law Group, PLLC
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Telephone 206.838.9100
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Honorable Monica Benton
Hearing Date: June 7, 2013 at 9:00 a.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

SECOND DECLARATION OF CATIE
SMITH

I, Catie Smith, am competent to testify to the matters set forth herein and make this declaration of my own personal knowledge and belief.

1. In August 2007, I was the Landscape Manager for City People's Garden Design & Landscape ("City People's"), which was hired by Peter and Tamara Musser (the "Mussers") to perform landscaping work on the Musser property. On behalf of City People's, I worked at the Musser Property typically once a week through 2007 and 2008. While the Manager at City People's, I personally directed the crew on what needed to be maintained, including trimming the rhododendron and laurel bushes. When I did not personally perform the work, I visually inspected the property to make sure my instructions

SECOND DECLARATION OF CATIE
SMITH

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-1-

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1 were followed. Attached hereto as **Exhibit 1** are invoices from City Peoples for 2007 and
2 2008.

3 2. As the City People's manager, I supervised several crews, one of which
4 included Tony Sacco. Throughout my work at the Musser Property for 2007 and 2008, Mr.
5 Sacco as well as many crew members, would assist me on special projects and maintenance.
6 While the crew members, including Mr. Sacco would rotate in and out, I was the supervisor
7 of the crew members and the projects, which required me to be on the Musser's property the
8 most consistently. My best recollection is that just like all the other City People's crew
9 members who were often working on other projects, Mr. Sacco was at the Musser property
10 frequently, but certainly not on a weekly basis. I specifically recall that the Mussers were
11 usually on the Friday schedule. On many weeks, Mr. Sacco was in the office on Fridays to
12 work on scheduling the following week.

13 3. With the above in mind, I have reviewed the survey prepared by the Brittons,
14 attached as Exhibit A to the Declaration of Adam R. Asher ("Asher Decl."), of the property
15 that the northerly neighbors, Mark and Brigid Britton (the "Brittons") apparently claim to
16 have maintained. The "Disputed Area," includes the area around the rhododendron, a strip of
17 land between the rhododendron and the laurel bush, the laurel bush, the rockery area, and the
18 area at the top of the hill, which includes two arborvitae trees and a boxwood shrub. As
19 discussed in further detail below, I have generally maintained these areas since 2007, and
20 continue to maintain these areas presently. Further, the Mussers' sprinklers have watered the
21 trees and plants in the Disputed Area since 2007.

22 4. A picture of the area around the rhododendron, and upon which the Brittons'
23 claim possession is attached as Exhibit B to the Asher Declaration. Since August 2007, my
24 crews and I (with my supervision) have exclusively maintained this area. We weeded the
25 area, planted plants in the area, fertilized plants, and put down compost. We have always
26

SECOND DECLARATION OF CATIE
SMITH

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-2-

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1 trimmed and pruned the rhododendron. When looking at the trunk of the rhododendron, you
2 can see evidence of cut limbs. I am responsible for many of the cut limbs. Additionally, the
3 Brittons appear to claim to have possessed a portion of the Mussers' fence and a boxwood
4 bush that sits entirely behind the fence. My crew and I have exclusively maintained and
5 shaped this boxwood since 2007.

6 5. Mr. Sacco has apparently provided a Declaration to the Brittons to state that
7 he does not know if the "root ball" of the rhododendron was on the Musser Property and he
8 occasionally trimmed the south side and removed ivy from the trunk (*See* attached Exhibit 2).
9 He also mentions that he does not recall trimming the sides of the rhododendron and never
10 "pruned" the northern side (*See* Paragraph 9 of the Sacco Declaration). I am sure Mr. Sacco
11 is correct that he only occasionally trimmed the rhododendron as he was not on the Musser
12 Property on a regular, weekly basis. Other crew members at City People's, and me, would
13 have also trimmed the rhododendron. I should note that while Mr. Sacco cannot apparently
14 state whether he knew if the underground "root ball" was on the Musser Property, it was
15 clear to me that the rhododendron was on the Musser Property regardless of where the roots
16 might have traveled underground.

17 6. My crew and I (with my supervision) have also maintained the area between
18 the rhododendron and the laurel since August 2007 by weeding, removing unwanted plants,
19 planting new plants, composting, and otherwise making the area have a neat appearance.
20 This area is depicted in Exhibit C to the Asher Declaration. In 2008, my crew and I planted
21 five or six Waxleaf Privet bushes along the boundary line on the Musser side, to run from the
22 existing wood fence to the laurel. The purpose of these bushes was to act as a barrier, so that
23 the mailman would stop cutting through that area. The Brittons, nor anyone on their behalf,
24 ever complained or said anything about these bushes. We have regularly maintained the
25 bushes since they were planted in 2008.

26 SECOND DECLARATION OF CATIE
SMITH

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1 7. In August 2007, my crew and I started to trim the laurel bush in the "Disputed
2 Area." A picture of the laurel is attached as Exhibit D to the Asher Declaration. When I first
3 started working for the Mussers, the laurel grew wildly without any shape. I created the box
4 shape to control the growth that now exists, and is depicted in the photograph, and I have
5 maintained that shape since 2007. When I trimmed the laurel, I trimmed the top, and all
6 sides, except the side facing the Britton Property. Only once did I see someone from the
7 Britton property trim the laurel. To my knowledge, that person only trimmed the laurel on
8 the Britton side of the property. I really do not know how Mr. Sacco viewed the laurel and
9 his trimming of it was quite limited given his irregular work at the Musser Property.
10 According to Sacco's Declaration, he trimmed only the south side of the laurel. However,
11 my instructions were to keep the Laurel trimmed on the Musser side, the sides, and the top to
12 keep a neat and tidy appearance. This could not have been accomplished by trimming only
13 one side. I was on site very regularly to line out the crews and to visually inspect the work to
14 confirm that the garden was being maintained meticulously.

15 9. I left City People's in December 2008 and started my own business, Brier
16 Creek Gardens, LLC. City People's continued servicing the Musser Property. After several
17 months, the Mussers hired my new company to take over for City People's. Since that time,
18 my crew and I are generally at the Musser Property all year long every Friday.

19 10. I have also reviewed the Declaration of Scott R. Sleight Supplementing
20 Summary Judgment Record With Newly-Discovered Evidence. In his declaration, he asserts
21 that certain hand-picked parts of a written statement I made on August 8, 2012, are
22 inconsistent with my testimony in this declaration which I suppose is meant to suggest that I
23 am not reliable. I strongly disagree with this characterization and I want to ensure that the
24 Court fully understands the context of my earlier statements. Again, the problem has been
25 for everyone I imagine that there is absolutely nothing to distinguish where the Musser
26

SECOND DECLARATION OF CATIE
SMITH

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1 Property begins and the Britton Property ends as there is no fence, barrier or any other kind
2 of demarcation to create any clear boundary line. Thus, it is easy to have disagreement,
3 confusion and misunderstanding when describing the area.

4 11. With the above in mind, I stated in my August 8, 2012 statement that, "It
5 appeared that the Musser's boundary lines are further into the Brittan's [sic] garden than I
6 have been aware of over the course of my years in the Musser's garden." The statement was
7 true then and it is true now. While I have generally maintained the areas described above in
8 the Disputed Area, in just a few sections, I did not perform maintenance right up to the exact
9 border line. In those few locations, such as near the rockery and north of the arborvitae, there
10 may have been as much as a foot that I did not maintain.

11 12. I also stated in my August 8, 2012 statement that, "There is one English
12 Laurel plant that is on the hillside that over the course of the years it had remained in loose
13 form." The statement is accurate and completely confirms my above statements. Again, the
14 laurel remained in loose form until we started working on the Musser Property in 2007 as I
15 discuss above. Thereafter, when we began working at the Musser Property, I created the box
16 shape, and have maintained it ever since 2007.

17 13. I also explained in my August 8, 2012 statement, "Over the course of the
18 years we occasionally pruned the portion of the laurel on the Musser's side and left the
19 neighbor's side unpruned to prevent it from inhibiting the adjacent trees and shrubs." I was
20 simply saying that we did not prune the Brittons' side of the laurel. However, as stated
21 above, we pruned the Mussers' side including the sides of the bush, and the top.

22 14. In addition to my August of 2012 Statement, Mr. Sleight also quotes a January
23 22, 2013 email that I sent to Mr. Asher who I understand is an attorney for the Mussers. In it,
24 I mention, "Please not[e] that it is tagged Musser 2010A. . . . In the background you can see a
25 tree trunk and behind that the laurel. At the point [sic] no one was actively pruning the
26

SECOND DECLARATION OF CATIE
SMITH

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Laurel. It was just leafing out so around this time we started pruning to keep it under control." Mr. Sleight uses the email to claim a sort of "gotcha" moment suggesting that I really did not start pruning the Laurel until 2010. If Mr. Sleight had asked me, I would have told him that the names attached to my photos are generally arbitrarily assigned when I download them, as I do not have time to assign specific names. On this particular photograph, I thought it was taken in 2007, and that I downloaded it in 2010. It was not intended to indicate the date that the pruning began. To be absolutely crystal clear as I have repeatedly stated, I did not start pruning the laurel in 2010 as suggested by Mr. Sleight, and, instead, I started pruning the laurel in August 2007. I was mistaken about the date of the photograph. However, the point I was trying to make was that at the point we started working at the Musser Property, no one was actively pruning it, and it was leafing out. To again restate it, when we started work in August 2007, we started pruning the laurel to keep it under control. Even with Mr. Sacco's more limited work on the Musser Property, he recalls trimming the laurel in 2007 and 2008.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.


Catie Smith

Executed this 8th day of May, 2013,
at Woburnville, Washington.

SECOND DECLARATION OF CATIE SMITH

Revised Catie Smith 7/20/12 doc

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Telephone 206.838.9100
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EXHIBIT 1

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
8/31/2007	2000-13248

PAID
09/25/2007

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, planting, trimming Boxwoods, Thuja hedge, Arborvitae, Wisteria, and other shrubs as needed, reducing Oxalis, removing spent Port Laurel, spent Thujas and other spent plant materials as needed, removing giant Hogweed and Pampas grass, staking as needed, transplanting Maples, Italian Cypress, and various shrubs, pruning Fig and other trees as needed, cleanup and debris disposal.				
Work performed on 8/23 and 8/30/07.				
Labor	58.98	Hrs.	40.00	2,359.20T
On site design time with Catie Corpron Smith	5	Hrs.	65.00	325.00T
Materials:				
Staking materials			3.50	3.50T
Gardner & Bloome soil building compost	2	Bales	9.99	19.98T
Plant Materials:				
Hebe anomala	6	#1	8.99	53.94T
Miscanthus sinensis 'Cosmopolitan'	2	#2	25.99	51.98T
Hydrangea paniculata 'Tardiva'	1	#2	25.99	25.99T
Viburnum davidii	5	#2	19.99	99.95T
				Payments/Credits
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL

**City People's Gardens
Design & Landscape**

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Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
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Invoice

DATE	INVOICE #
8/31/2007	2000-13248

**PAID
09-25-2007**

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Daphne odora 'Marginata'	5	#2	22.99	114.95T
Cornus stolonifera 'Silver & Gold'	3	#2	19.99	59.97T
Choisya ternata 'Sundance'	3	#2	19.99	59.97T
Thuja occidentalis 'Smaragd'	5	6-7'	56.99	284.95T
Debris Disposal			246.00	246.00T
SUBTOTAL				3,705.38
Sales Tax			8.90%	329.78
			Payments/Credits	\$-4,035.16
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
9/30/2007	2000-13318

PAID
10/23/2007

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, cleaning out pond, pruning Leylandii, Laurel, and other shrubs as needed, removing Laurel, transplanting Leylandii and Photinias as per Catie, reducing Oxalis, raking leaves, fertilizing, cleanup and debris disposal.				
<i>Work performed on 9/11 and 9/24/07.</i>				
Labor	33.92	Hrs.	40.00	1,356.80T
On site design time with Catie Corpron Smith	2.5	Hrs.	65.00	162.50T
Materials:				
Low voltage lights and bulbs			35.88	35.88T
All purpose fertilizer			28.00	28.00T
Debris Disposal			216.00	216.00T
SUBTOTAL				1,799.18
Sales Tax			8.90%	160.13
			Payments/Credits	\$-1,959.31
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

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Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
10/22/2007	2000-13428

PAID
12/04/2007

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Container garden design, design of pond improvements, and planting design by Catie Corpron Smith.	10	Hrs.	65.00	650.00
Sales Tax			8.90%	0.00
			Payments/Credits	\$-650.00
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
10/31/2007	2000-13568

**PAID
12/10/2007**

BILL TO:

**TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016**

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT	
Dusty Miller	5	4"	1.79	8.95T	
Viola	26	4"	1.79	46.54T	
Taxus baccata 'Standishii'	2	#1	19.99	39.98T	
Leucothoe 'Rainbow'	2	#1	10.99	21.98T	
Ceratostigma plumbaginoides	4	#1	8.99	35.96T	
Acorus gramineus	4	4"	3.99	15.96T	
Hebe ochracea	2	#1	2.99	5.98T	
Ajuga 'Black Scallop'	2	4"	2.99	5.98T	
Myrica californica	2	#5	60.00	120.00T	
Debris Disposal			192.00	192.00T	
SUBTOTAL				2,776.85	
Sales Tax			8.90%	247.14	
			Payments/Credits	\$-3,023.99	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL	\$0.00

**City People's Gardens Design
& Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
10/31/2007	2000-13516

PAID
12/10/2007

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	SUBTOTAL
Installation of container garden on patio as per design and bid by Catie Corpron Smith. Work performed on 10/29 and 10/31/07.	\$5,484.00
Sales Tax	\$488.08
Total	\$5,972.08
Balance Due	\$0.00

TERMS: Invoice due upon receipt.
After 30 days, a 1.5% service fee will be assessed monthly.

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
10/31/2007	2000-13569

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

PAID
12/10/2007

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT	
Garden work including removing Berberis, Installing Ilex, lightly shearing Ilex, transplanting Thujas, cleanup and debris disposal as per design and estimate by Catie Corpron Smith. Extra work not included in original estimate: Staking Leylandii and Red Maple and making ring cuts on lower Magnolia branches.					
Work performed on 10/10/07.					
Labor	31.08	Hrs.	40.00	1,243.20T	
On site design time with Catie Corpron Smith	2	Hrs.	65.00	130.00T	
Plant Materials:					
Ilex crenata 'Green Island'	81	#2	18.99	1,538.19T	
Debris Disposal			36.00	36.00T	
SUBTOTAL				2,947.39	

\$1,200.00 deposit applied			-1,200.00	-1,200.00	

Sales Tax			8.90%	262.32	
			Payments/Credits	\$-2,009.71	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL	\$0.00

**City People's Gardens Design
& Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
11/30/2007	2000-13710

PAID
01/15/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	SUBTOTAL
Installation of new stone steps leading from flagstone (nearest fireplace) up to pond and installation of flagstone patio around pond as per design and bid by Catie Corpron Smith. Work performed on November 14-16, 20, 21, 26-29, 2007.	\$7,740.00
----- \$4,000.00 deposit applied -----	-\$4,000.00
Sales Tax	\$688.86
	Total \$4,428.86
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesl@comcast.net

Invoice

DATE	INVOICE #
11/30/2007	2000-13711

PAID
01/15/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Change in design of stairs as per client and estimate by Catie Corpron Smith. Work performed November, 2007.				
Labor	28	Hrs.	40.00	1,120.00T
Sales Tax			8.90%	99.68
			Payments/Credits	\$-1,219.68
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
11/30/2007	2000-13709

PAID
01/15/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E.
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, reducing Oxalis, cleaning out pond, removing Rhododendron on front slope and four Portuguese Laurels, mulching, raking leaves, shaping shrubs as needed, cleanup and debris disposal.				
Work performed on November 9, 15, and 29, 2007.				
Labor	38.85	Hrs.	40.00	1,554.00T
Gardner & Bloome soil building compost	13	Bales	9.99	129.87T
Debris Disposal			185.00	185.00T
SUBTOTAL				1,868.87
Sales Tax			8.90%	166.33
			Payments/Credits	\$-2,035.20
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens Design
& Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
12/31/2007	2000-13829

PAID
02/18/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	SUBTOTAL
Installation of garden bed around pond including adding rock for aesthetics and erosion control as per design and bid by Catie Corpron Smith. Work performed on November 26-30, December 5, 6, 14, and 17, 2007.	\$8,900.00
Credit for plant materials not needed	-\$115.97
----- \$4,000.00 deposit applied -----	-\$4,000.00
Sales Tax	\$781.78
	Total \$5,565.81
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
12/31/2007	2000-13830

PAID
02/18/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Extra rock work not included in original-pond bid to improve grade and minimize spills sloughing onto walkways and into pond as requested by client.				
Work performed on December 14 and 17, 2007.				
Labor	14.42	Hrs.	40.00	576.80T
Materials:				
White river basalt			37.20	37.20T
Gravel - 5/8"			21.15	21.15T
SUBTOTAL				635.15
Sales Tax			8.90%	56.53
				Payments/Credits \$-691.68
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL \$0.00

**City People's Gardens
Design & Landscape**

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Invoice

DATE	INVOICE #
12/31/2007	2000-13831

PAID
02/18/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds and containers, fertilizing, mulching, installing new landscape light, replacing broken landscape light, transplanting as needed, planting, checking pond level, raking leaves, shaping shrubs as needed, cleanup and debris disposal.				
Work performed on December 6, 7, 10, 14, and 21, 2007.				
Labor	40.37	Hrs.	40.00	1,614.80T
Materials:				
All purpose fertilizer	5	Lbs.	1.00	5.00T
Compost	1	Yard	60.00	60.00T
Fx Capellibiondi light	2	Ea.	144.84	289.68T
Wire nuts	2	Ea.	1.15	2.30T
Cedar Grove compost	10	Bags	5.79	57.90T
Plant Materials:				
Camellia 'Winter's Snowman'	3	#5	52.99	158.97T
Daphne odora 'Marginata'	2	#2	24.99	49.98T
Liriope spicata 'Silver Dragon'	6	#1	9.99	59.94T
Polystichum setiferum	5	#1	8.99	44.95T
Choisya ternata 'Sundance'	3	#5	38.99	116.97T
Helleborus 'Silver Lace'	3	#1	11.99	35.97T

	Payments/Credits
--	------------------

TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.

TOTAL

**City People's Gardens
Design & Landscape**

2939 E. Madison
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Invoice

DATE	INVOICE #
12/31/2007	2000-13831

PAID
02/18/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Leucothoe fontanesiana 'Rainbow'	3	#1	11.99	35.97T
Buxus sempervirens 'Suffruticosa'	7	#1	8.99	62.93T
Hedera canariensis 'Variegata'	72	4"	2.99	215.28T
Debris Disposal			42.00	42.00T
SUBTOTAL				2,852.64
Sales Tax			8.90%	253.89
			Payments/Credits	\$-3,106.53
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
1/31/2008	2000-13945

PAID
02/04/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT	
Monthly maintenance including weeding and grooming garden beds, reducing Oxalis, raking leaves, making thinning cuts on Yew and Japanese Maple trees, transplanting Asian Pear, Rhododendron, and Photinia, mulching, shearing Boxwoods, skimming pond, shaping Camellias, Bay Laurel, Berberis, and other shrubs as needed, pruning Apple tree, cleanup and debris disposal.					
Work performed on January 3, 11, 18, 25, and 31, 2008.					
Labor	42.87	Hrs.	40.00	1,714.80T	
Materials: Gardner & Bloome soil building compost	12	Bales	9.99	119.88T	
Debris Disposal			98.00	98.00T	
SUBTOTAL				1,932.68	
Sales Tax			8.90%	172.01	
			Payments/Credits	\$-2,104.69	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
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Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
2/29/2008	2000-14088

PAID
03/27/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, reducing Oxalis and Scilla, thinning Japanese Maples, removing dead branches from Japanese Maples, shaping Otto Luyken, Juniper, and other shrubs as needed; mulching, planting, pruning Apple espalier, cleanup and debris disposal.				
Work performed on 2/15 and 2/29/08.				
Labor	16.32	Hrs.	40.00	652.80T
Materials:				
Gardner & Bloome soil building compost	9	Bales	9.99	89.91T
Plant Materials:				
Euphorbia myrsinites	8	4.5"	2.99	23.92T
Carex testacea	2	6"	8.99	17.98T
Bellis 'Rominette Carmine Rose'	6	4"	2.99	17.94T
Viola - white	6	4"	1.79	10.74T
Viola 'Sorbet Antique Shades'	12	4"	1.79	21.48T
Bellis 'Habanera'	8	4"	2.99	23.92T
Choisya 'Sundance' (no charge - from pond bid work)	3	Ea.	0.00	0.00T
Debris Disposal			77.00	77.00T
			Payments/Credits	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	

**City People's Gardens
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Invoice

DATE	INVOICE #
2/29/2008	2000-14088

PAID
03/27/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
SUBTOTAL				935.69
Sales Tax			8.90%	83.28
			Payments/Credits	\$-1,018.97
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens Design
& Landscape**

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Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
3/31/2008	2000-14272

PAID
04/22/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	SUBTOTAL
Installation of additional lights to low voltage system and replacement of existing transformers to meet new power demand as per bid by Steve Dickinson. (Credits reflect fewer lights installed than shown on original bid.) Work performed on 3/27/08.	\$7,300.00
Labor credit	-\$135.00
Materials credit	-\$373.48
----- \$2,400.00 deposit applied -----	-\$2,400.00
Sales Tax	\$604.45
	Total \$4,995.97
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fax: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
3/31/2008	2000-14273

PAID
04/22/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, reducing Scilla, planting around rockery, shaping shrubs as needed, cleanup and debris disposal. Work performed on 3/7 and 3/28/08.				
Labor	14.62	Hrs.	40.00	584.80T
Soleirolia soleirolia	23	4"	3.99	91.77T
Debris Disposal			67.00	67.00T
SUBTOTAL				743.57
Sales Tax			8.90%	66.18
				Payments/Credits \$-809.75
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL \$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
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Invoice

DATE	INVOICE #
5/31/2008	2000-14630

PAID
06/27/2008

BILL TO:
TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds and containers, reducing Scilla and Hogweed, cleaning off hardscape areas, resetting flagstone on patio, planting, facilitating of mulch blow-in, removing moss from pots, cleanup and debris disposal.				
Work performed on May 7, 16, and 30th, 2008.				
Labor	36.43	Hrs.	40.00	1,457.20T
On site design time with Catie Corpron Smith	3.5	Hrs.	75.00	262.50T
Materials:				
Cleaning solution	1	Bottle	12.00	12.00T
Copper plant labels	2	Pkgs.	2.79	5.58T
Mulch - 24 yards			1,603.80	1,603.80T
Plant Materials:				
Roses - 'Social Climber', 'Henry Fonda', 'Honor'	6	#2	19.99	119.94T
Alyssum 'Snow Crystal'	20	4"	1.79	35.80T
Impatiens - pink	50	4"	1.79	89.50T
Impatiens 'Coral'	18	4"	1.79	32.22T
Impatiens 'Coral'	36	PP	1.79	64.44T
Baby's Tears	61	4"	2.99	182.39T

Payments/Credits

TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.

TOTAL

**City People's Gardens
Design & Landscape**

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Invoice

DATE	INVOICE #
5/31/2008	2000-14630

PAID
06/27/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Debris Disposal			99.00	99.00T
SUBTOTAL				3,964.37
Sales Tax			9.00%	356.79
			Payments/Credits	\$-4,321.16

TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.

TOTAL	\$0.00
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**City People's Gardens
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Invoice

DATE	INVOICE #
6/30/2008	2000-14785

PAID
08-18-2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, shearing Boxwood, installing plants, removing Oxalis under front Juniper, sweeping rocks and patio, reducing moss from walkways, shaping Juniper and other shrubs as needed, cleaning out pond, restacking rock wall, resetting pavers, activating and testing irrigation, cleanup and debris disposal.				
Work performed on 6/13 and 6/25/08.				
Labor	31.58	Hrs.	40.00	1,263.20T
Materials:				
Gravel	4	Bags	7.00	28.00T
Plant Materials:				
Asarum europaeum	3	#1	8.99	26.97T
Athyrium 'Ghost Fern'	3	#1	9.99	29.97T
Dryopteris erythrosora	4	#1	10.99	43.96T
Arctostaphylos	10	#1	8.99	89.90T
Pratia pedunculata	50	4"	3.29	164.50T
Erigeron	50	4"	3.29	164.50T
Sword Ferns	3	#5	24.99	74.97T
Soleirolia soleirolii	18	4"	3.29	59.22T

Payments/Credits

TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.

TOTAL

**City People's Gardens
Design & Landscape**

2939 E. Madison
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Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
6/30/2008	2000-14785

PAID
08/18/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Debris Disposal			63.00	63.00T
SUBTOTAL				2,008.19
Sales Tax			9.00%	180.74
			Payments/Credits	\$-2,188.93
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
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Invoice

DATE	INVOICE #
7/31/2008	2000-14887

PAID
09/16/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding, and grooming garden beds, planting existing containers, installing new containers, cleaning hardscapes, straightening pot feet, reducing Horsetail, testing, adjusting, and extending irrigation, reducing Boxwood, staking a tree, cleanup and debris disposal.				
Work performed on 7/3 and 7/15/08.				
Labor	33.76	Hrs.	40.00	1,350.40T
Design time with Catie Corpron Smith	3	Hrs.	75.00	225.00T
Materials:				
Cedar Grove potting soil	8	Bags	6.79	54.32T
Containers	3	Ea.	50.00	150.00T
Lodge Pole	1	Ea.	6.50	6.50T
Wire	3	Feet	0.50	1.50T
Irrigation materials			9.00	9.00T
Plant Materials:				
Silene 'Druett's Variegated'	4	#1	9.99	39.96T
Gaura lindheimeri	2	#1	9.99	19.98T
Cimicifuga 'Black Beauty'	1	#3	51.99	51.99T
Bergenia 'Winterglow'	4	4"	3.99	15.96T
Snapdragon 'Crown Carmine'	6	4"	2.99	17.94T
Cosmos	2	#1	7.99	15.98T
			Payments/Credits	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	

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DATE	INVOICE #
7/31/2008	2000-14887

PAID
09/16/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Origanum 'Kent Beauty'	2	4"	5.99	11.98T
Browallia 'Marine Bells'	2	4"	3.99	7.98T
Zinnia 'Hybrid Apricot'	2	#1	3.99	7.98T
Swedish Ivy 'Variegata'	4	4"	3.49	13.96T
Helichrysum	4	4"	3.99	15.96T
Osteospermum 'Marbella'	4	4"	3.99	15.96T
Osteospermum 'Acapulco'	4	4"	3.99	15.96T
Heuchera 'Ginger Ale'	1	#1	9.99	9.99T
Ipomoea batatas 'Marguerite'	6	4"	3.99	23.94T
Sanvitalia - trailing yellow	6	4"	3.99	23.94T
Zinnia - orange	3	4"	3.99	11.97T
Lantana 'Castle Ortenburg'	6	4"	3.99	23.94T
Salvia 'Black & Blue'	3	#1	9.99	29.97T
Fountain Grass - purple	1	#1	12.99	12.99T
Coleus 'Rustic Orange'	2	4"	3.99	7.98T
Heuchera 'Lime Rickey'	2	#1	11.99	23.98T
Begonia hiemalis	2	4"	3.99	7.98T
Impatiens 'Salmon'	4	4"	3.99	15.96T
Fancy Geranium	3	4"	6.99	20.97T
Lobelia 'Marine Blue'	9	4"	3.29	29.61T
Coleus 'Fishnet Stockings'	2	4"	3.99	7.98T
Nicotiana 'Lemon Lime'	6	4"	3.99	23.94T
Fuchsia 'Golden Marinka'	2	4"	3.99	7.98T
Tuberous Begonia	2	4"	3.99	7.98T
Coleus 'Golden Bedder'	2	4"	3.99	7.98T
Heuchera 'Obsidian'	2	#1	12.99	25.98T
Coleus 'Creamy Pineapple'	3	4"	3.99	11.97T
Coleus 'Texas Two-Step'	3	4"	3.99	11.97T

Payments/Credits

TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.

TOTAL

**City People's Gardens
Design & Landscape**

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Invoice

DATE	INVOICE #
7/31/2008	2000-14887

PAID
09/16/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Impatiens 'Super Elfin'	2	6"	4.99	9.98T
Hosta 'Abba Dabba Do'	3	#1	12.99	38.97T
Fuchsia 'June Bride'	3	6"	6.99	20.97T
Hebe 'Pinocchio'	2	#1	9.99	19.98T
Debris Disposal			70.00	70.00T
SUBTOTAL				2,557.21
Sales Tax			9.00%	230.15
			Payments/Credits	\$-2,787.36
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens Design
& Landscape**

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Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesl@comcast.net

Invoice

DATE	INVOICE #
8/31/2008	2000-15108

PAID
10/17/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	SUBTOTAL
Installation of rock throughout the garden to help eliminate soil erosion and installation of flagstone steppers at access points as per bid by Steve Dickinson. Work performed in August, 2008.	\$4,000.00
----- \$1,455.00 deposit applied -----	-\$1,455.00
Sales Tax	\$360.00
	Total \$2,905.00
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

**City People's Gardens
Design & Landscape**

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Invoice

DATE	INVOICE #
8/31/2008	2000-15106

PAID
10/17/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY.	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, containers, and hardscape, shaping Boxwood and other shrubs as needed, planting, testing irrigation, applying Sluggo; pruning trees as needed, cleanup and debris disposal.				
Work performed on August 1, 15, 22, and 29, 2008.				
Labor	36.99	Hrs.	40.00	1,479.60T
On site design time with Catie Corpron Smith	5	Hrs.	75.00	375.00T
Materials:				
Sluggo	1	Ea.	9.99	9.99T
Plant Materials:				
Hebe 'Western Hills'	3	#1	9.99	29.97T
Styrax japonicus 'Pink Chimes'	2	#10	160.00	320.00T
Gardenia 'Kleim's Hardy'	2	#3	45.99	91.98T
Euonymus 'Silver Queen'	2	#5	29.99	59.98T
Hydrangea quercifolia 'Pee Wee'	3	#2	36.99	110.97T
Polystichum munitum	6	#1	9.99	59.94T
Miscanthus sinensis 'Cabaret'	2	#5	41.99	83.98T
Gaultheria shallon	36	4"	3.99	143.64T
Dahlia 'Dark Angel'	6	#1	6.99	41.94T
Carex 'Frosty Curls'	6	#1	6.99	41.94T
			Payments/Credits	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	

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DATE	INVOICE #
8/31/2008	2000-15106

PAID
10/17/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Carex 'Frosty Curls'	3	4"	3.99	11.97T
Helianthemum 'Ben Ledi'	12	4"	3.99	47.88T
Blechnum spicant	2	#2	16.99	33.98T
Hydrangea 'Endless Summer'	3	#5	43.99	131.97T
Agapanthus 'Storm Cloud'	5	#2	24.99	124.95T
Cotula 'Platt's Black'	18	4"	3.29	59.22T
Coreopsis 'Moonbeam'	3	#1	8.99	26.97T
Asarum - European Ginger	3	6"	8.99	26.97T
Physocarpus 'Dart's Gold'	1	#2	22.99	22.99T
Spiraea 'White Gold'	2	#1	11.99	23.98T
Miscanthus sinensis 'Morning Light'	2	#1	9.99	19.98T
Hakonechloa 'Aureola'	5	#1	15.99	79.95T
Carex testacea	5	4"	3.99	19.95T
Sedum ewersii	12	4"	3.29	39.48T
Debris Disposal			119.00	119.00T
SUBTOTAL				3,638.17
Sales Tax			9.00%	327.44
			Payments/Credits	\$-3,965.61
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens Design
& Landscape**

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Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
9/30/2008	2000-15237

PAID
#12/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	SUBTOTAL
Re-grout of 700 square foot flagstone patio as per bid by Steve Dickinson. Work performed in September, 2008.	\$4,795.00
Labor credit	-\$1,695.00
SUBTOTAL	\$3,100.00
----- \$1,742.18 deposit applied -----	-\$1,742.18
Sales Tax	\$279.00
	Total \$1,636.82
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
9/30/2008	2000-15236

PAID
11/12/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds and hardscape areas, shearing Ilex hedge, trimming Ivy, shaping Pines and Persimmon tree, reducing Oxalis, installing drain rock under garage stairs, planting, transplanting Heathers and Phormium, removing fruit debris, pruning shrubs as needed, cleanup and debris disposal.				
Work performed on September 3, 12, 19, and 26, 2008.				
Labor	34.11	Hrs.	45.00	1,534.95T
Design time with Catie Corpron Smith	3	Hrs.	75.00	225.00T
Materials:				
Drain rock - 7/8"	1	Yard	60.00	60.00T
Plant Materials:				
Hebe 'McKeanii'	6	#1	12.99	77.94T
Lavandula 'Hidcote'	10	#1	8.99	89.90T
Pittosporum tenuifolium 'Marjorie Channon'	1	#3	32.99	32.99T
Phormium 'Platt's Black'	2	#1	13.99	27.98T
Viola 'Penny White'	32	4"	1.79	57.28T
Pansy 'Peach Shades'	36	4"	1.79	64.44T
Soleirolia soleirolii 'Baby's Tears'	79	4"	3.29	259.91T
				Payments/Credits
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
9/30/2008	2000-15236

PAID
11/12/2008

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Hebe glauca	18	4"	3.29	59.22T
Anemone 'Flaming'	5	6"	6.99	34.95T
Campanula 'Dickson's Gold'	3	6"	6.99	20.97T
Narcissus bulbs	30	Ea.	1.19	35.70T
Tulip 'Darwin Hybrid'	100	Ea.	0.79	79.00T
Debris Disposal			98.00	98.00T
SUBTOTAL				2,758.23
Sales Tax			9.00%	248.24
				Payments/Credits \$-3,006.47
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.				TOTAL \$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
9/30/2008	2000-15238

PAID
11/12/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Extra rock work as per Peter Musser including installing additional granite retaining wall below garage and tightening flagstone walkway steppers for safer footing. Work performed on 8/27 and 9/15-18/08.				
Labor	14.88	Hrs.	45.00	669.60T
Materials:				
White river basalt			51.00	51.00T
Variegated standing granite - 1.5"			47.40	47.40T
Pennsylvania bluestone			40.00	40.00T
Bandera granite			83.70	83.70T
SUBTOTAL				891.70
Sales Tax			9.00%	80.25
			Payments/Credits	\$-971.95
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
10/31/2008	2000-15373

PAID
12/04/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds, transplanting Thujas, planting, mulching, cleanup and debris disposal.				
Work performed on October 10, 17, and 31, 2008.				
Labor	59.46	Hrs.	45.00	2,675.70T
On site design time with Catie Corpron Smith	4	Hrs.	75.00	300.00T
Materials:				
Cedar Grove compost	13	Bags	6.79	88.27T
Lodge pole - 8'	1	Ea.	7.00	7.00T
Misc. materials			51.88	51.88T
Plant Materials:				
Cupressus sempervirens	5	#15	276.00	1,380.00T
Viola 'Penny Orchid Frost'	4	4"	1.79	7.16T
Cyclamen	20	4"	6.99	139.80T
Hebe 'Tricolor'	1	#1	9.99	9.99T
Dinosaur Kale	1	#1	5.99	5.99T
Ornamental Pepper	2	4"	4.99	9.98T
Comprosa 'Evening Glow'	1	6"	9.99	9.99T
Viola 'Penny Primrose'	4	4"	1.79	7.16T
Viola 'Panola Rose Picture'	2	4"	1.79	3.58T
Viola 'Mariposa Marina'	6	4"	1.79	10.74T
			Payments/Credits	
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
10/31/2008	2000-15373

PAID
12/04/2008

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Carex testacea	3	4"	4.99	14.97T
Hebe pimeleoides	2	4"	6.99	13.98T
Viola 'Penny Blue'	4	4"	1.79	7.16T
Viola 'Delta Blue'	2	4"	1.79	3.58T
Vinca major 'Wojo's Gem'	5	4"	3.29	16.45T
Dusty Miller	6	4"	3.99	23.94T
Viola - blue	14	4"	1.79	25.06T
Aster - purple	2	6"	3.99	7.98T
Leuchera 'Key Lime Pie'	2	#1	13.99	27.98T
Ajuga reptans 'Black Scallop'	2	4"	3.29	6.58T
Acorus 'Ogon'	2	4"	3.99	7.98T
Equisetum	1	#1	8.99	8.99T
Helleborus	2	4"	6.99	13.98T
Polystichum polyblepharum	2	#1	9.99	19.98T
Fern	2	4"	5.99	11.98T
Liriope	1	#1	10.99	10.99T
Debris Disposal			61.00	61.00T
SUBTOTAL				4,989.82
Sales Tax			9.00%	449.08
			Payments/Credits	\$-5,438.90
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0:00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesl@comcast.net

Invoice

DATE	INVOICE #
11/30/2008	2000-15538

PAID
01/05/2009

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds and hardscape areas, skimming pond, raking leaves, reducing Oxalis, planting fern grotto, planting Thujas, trimming Leylandii hedges, pruning Laurel, shaping shrubs as needed, cleanup and debris disposal.				
Work performed on November 5, 12, 20, and 26, 2008.				
Labor	54.02	Hrs.	45.00	2,430.90T
Materials:				
Gardner & Bloome soil building compost	2	Bales	9.99	19.98T
Cedar Grove compost	7	Bags	5.79	40.53T
Plant Materials:				
Baby's Tears	15	4"	3.29	49.35T
Deer Fern	3	#1	8.99	26.97T
Maiden Fern	8	4"	3.99	31.92T
Thuja occidentalis 'Emerald Green'	8	7'	89.99	719.92T
Debris Disposal			259.00	259.00T
SUBTOTAL				3,578.57
Sales Tax			9.00%	322.07
			Payments/Credits	\$-3,900.64
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens
Design & Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoplesls@comcast.net

Invoice

DATE	INVOICE #
12/31/2008	2000-15607

PAID
01/21/2009

BILL TO:

TAMARA & PETER MUSSER
145 39TH AVE E
SEATTLE, WA 98112-5016

DESCRIPTION	QTY	MEASURE	RATE	AMOUNT
Monthly maintenance including weeding and grooming garden beds and containers, staking Italian Cypress, raking leaves, skimming pond, mulching Lavenders, refreshing color in containers, reducing Ivy from Thuja bed, shaping shrubs as needed, cleanup and debris disposal. Work performed on 12/5 and 12/12/08.				
Labor	23	Hrs.	45.00	1,035.00T
Materials:				
Lodge pole - 6'	2	Ea.	6.50	13.00T
Green wire	5	Feet	0.50	2.50T
Gardner & Bloome soil building compost	1	Bale	9.99	9.99T
Plant Materials:				
Primrose - red/white	10	4"	1.79	17.90T
Debris Disposal			35.00	35.00T
SUBTOTAL				1,113.39
Sales Tax			9.00%	100.21
			Payments/Credits	\$-1,213.60
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.			TOTAL	\$0.00

**City People's Gardens Design
& Landscape**

2939 E. Madison
Seattle, WA 98112
Ph: 206-324-0963 Fx: 206-328-6114
Email: citypeoples@comcast.net

Invoice

DATE	INVOICE #
2/28/2009	2000-15819

PAID
04/21/2009

BILL TO:
TAMARA & PETER MUSSER 145 39TH AVE E SEATTLE, WA 98112-5016

DESCRIPTION	SUBTOTAL
Installation of channel drain with decorative grate at base of entry steps as per bid by Steve Dickinson. Work performed in February and March, 2009.	\$3,950.00
----- \$1,436.00 deposit applied -----	-\$1,436.00
Sales Tax	\$355.50
	Total \$2,869.50
TERMS: Invoice due upon receipt. After 30 days, a 1.5% service fee will be assessed monthly.	Balance Due \$0.00

EXHIBIT 2

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

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and
wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

CORRECTED DECLARATION OF
TONY SACCO

Tony Sacco, states and declares as follows:

1. I am over the age of 18, have personal knowledge of the facts and
circumstances contained herein, and I am competent to testify thereto. I currently
reside at 10427 65th Ave S., Seattle, Washington.

2. I previously signed a Declaration in this matter that had been prepared
by Adam Asher: *See Exhibit A*, which is the final version and exhibit A to the
declaration that Adam Asher emailed me. I signed it and mailed it to Mr. Asher but
did not make a copy of the signed document. I provided a copy of that declaration to
Scott Sleight and I discussed that declaration with Scott Sleight on April 26, 2013.

CORRECTED DECLARATION OF TONY
SACCO - 1
132338.1 / 100758.2



1 3. During that telephone call, it became apparent to me that certain
2 statements in the declaration I had signed were not accurate. Based on information
3 that had been provided to me by Mr. Asher, I thought that the declaration he had
4 prepared was accurate at the time I signed it, but once I further discussed it with Scott
5 Sleight, I realized that certain facts needed correction and that information that I had
6 provided Mr. Asher was either not in the declaration or is stated incorrectly in the
7 declaration.

8 4. Because of this, and to clarify any doubts or confusion, I asked Scott
9 Sleight if he would meet me at his client's property so that I could further refresh my
10 recollection of what I had done when performing landscaping for Peter and Tamara
11 Musser in approximately 2007 and 2008

12 5. I met Scott Sleight at his client's property on April 30, 2013. We
13 further discussed the declaration I had signed and my recollection of what I had
14 considered to be the boundary line between the two properties and the areas of the
15 Musser Property that my crew and I had worked on. I am revoking my declaration at
16 **Exhibit A** and replacing it with this Declaration.

17 6. Based on my site visit on April 30, 2013 and review of the photograph
18 at **Exhibit B**, I am certain that the wooden fence and the trajectory of that fence if
19 projected west represent the perceived northern boundary of the Musser Property
20 during the time I was working at that property. The row of potted cedar trees that are
21 currently extending east to west along the same line as the wooden fence shown in
22 **Exhibit B** represents what I believed to be the obvious northern boundary of the
23 Musser Property and that is the location that I had the City Peoples landscaping crew
24 maintain up to. Neither my crew nor myself maintained any of the landscaping north

CORRECTED DECLARATION OF TONY
SACCO - 2

132338.1 / 100758.2



1 of the wooden fence or the current location of the potted cedar trees. The potted
2 cedar trees in **Exhibit B** are located in the same approximate location as the
3 construction fencing shown in **Exhibit C**.

4 7. For further clarification, the survey exhibit to my prior declaration and
5 the shaded red area on that exhibit were prepared by Mr. Asher. I stated in
6 paragraph 6 of that declaration that "I believe the highlighted area is the area of the
7 Musser Property that we maintained," because I believed the survey stakes were
8 represented by the northern-most black line on that survey exhibit and that our
9 maintenance boundary, most significantly at the formal rockery, was somewhere a
10 few feet closer to the southern red line. I now realize that I misunderstood the survey
11 because I had thought that the northern-most red line was the same location as where
12 the potted cedar trees shown in **Exhibit B** are currently located. In fact, I can now
13 say that the City Peoples crew did not perform work up to the northern-most red line
14 but, rather, only to the *southern-most* red line drawn by Mr. Asher on the survey
15 exhibit. I do not recall maintaining the formal rockery north of the row of potted
16 cedars shown in **Exhibit B**. The photographs at **Exhibits B and C** most accurately
17 reflect what we treated as the Mussers' northern boundary line, represented by the
18 potted cedar trees and the construction fencing. I did not and I never observed the
19 City Peoples crew perform work north of the wooden fence or north of the potted
20 cedar trees in **Exhibit B**.

21 8. The photographs in **Exhibit D** show several wax leaf privet plants that
22 seemed to have been planted at what we considered the boundary line to mark the
23 northern boundary of the Musser Property. Wax leaf privets are a type of plant that is
24 often used in landscaping to establish a boundary.

CORRECTED DECLARATION OF TONY
SACCO - 3

132338.1 / 100758.2



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9. In paragraph 3 of the declaration prepared by Mr. Asher, it states "At all times, I believed the rhododendron was clearly on the Musser Property." This is not accurate. I did not know if the root ball of the rhododendron was on the Musser Property or not. The only work I did on the rhododendron was to occasionally trim the south side of it and to remove ivy from the trunk as needed. I do not recall trimming the sides of the Rhododendron and never pruned the northern side of that bush.

10. In paragraph 4 of the declaration prepared by Mr. Asher, it states "I believed the laurel was on the Musser Property." This also is not accurate. I believed that the laurel was north of the Musser Property or right on the property line. Occasionally, City Peoples' crew trimmed the south side of the laurel to remove branches hanging over the Musser patio. I never trimmed any other sides including the northern side of the laurel, nor did we maintain the top or the height of the laurel.

11. In paragraph 5 of the declaration prepared by Mr. Asher, I reference several arborvitae on the Musser Property. Those arborvitae are no longer present on the Musser Property. There currently are two arborvitae on the Britton Property, but City Peoples did not perform any maintenance on those two arborvitae. During my maintenance, I believed those two arborvitae were on the Britton Property. The weeding and oxalis removal referenced in paragraph 5 of that declaration occurred only south of these two existing arborvitae. There remains a boxwood bush just north of these two arborvitae that City Peoples occasionally trimmed the south side of.

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12. City Peoples did not maintain the following: The euonymus bushes between the rhododendron and the laurel; the fuchsia plant and surrounding area between the laurel and the rockery; and the rockery north of the potted cedar trees.

13. When I met Mr. Asher at the Musser Property and again when I met Mr. Sleight at the Britton Property, I observed the location of the Mussers' survey stakes and the red tape connecting those stakes. The stakes I observed are located well north of the area maintained by City Peoples. I even asked Mr. Asher why the Mussers would want to put a fence where the wooden stakes are located. Mr. Asher made a comment to me that he is also surprised that the Mussers want to put a fence there and he said something like "you would think they have plenty of land," which led me to believe we were on the same page. Clearly we were not.

14. I told Mr. Asher several times that we treated the boundary line as a blurry area and we only cleared areas that we felt made logical sense in the Mussers' garden. These areas were not north of where the potted cedar trees are currently located.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Executed this ____ day of _____, 2013.

By: _____
Tony Sacco



Honorable Monica Benton
Hearing Date: June 7, 2013, 9:00 a.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

SECOND DECLARATION OF
ADAM R. ASHER

I, Adam R. Asher, am over the age of 18 years, am competent to testify to the matters set forth herein, and make this declaration of my own personal knowledge and belief.

1. I am one of the attorneys for Defendants Peter M. Musser and Tamara H. Musser.
2. Attached hereto as **Exhibit A** is a true and accurate copy of a survey prepared by Barghausen Consulting Engineers, Inc. dated October 31, 2012.
3. Attached hereto as **Exhibit B** is a true and accurate copy of a photograph of the rhododendron area.
4. Attached hereto as **Exhibit C** is a true and accurate copy of a photograph of the area between the rhododendron and laurel;

SECOND DECLARATION OF
ADAM R. ASHER

114573.doc

-1-

Socius Law Group, PLLC
ATTORNEYS
Two Union Square • 601 Union Street, Suite 4950
Seattle, Washington 98101.3951
Telephone 206.838.9100
Facsimile 206.838.9101

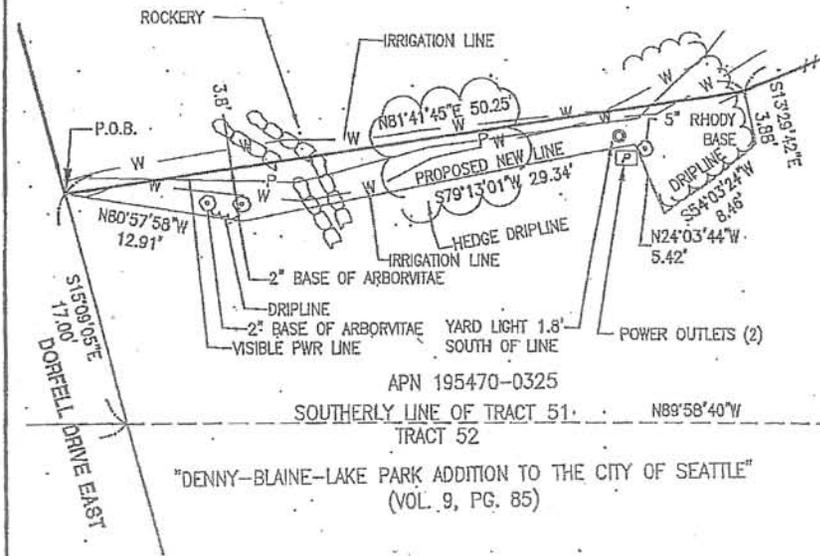
EXHIBIT A

EXHIBIT



1"=10'

3815 E. JOHN ST.
APN 195470-0320



APN 195470-0325

SOUTHERLY LINE OF TRACT 51 N89°58'40"W
TRACT 52

"DENNY-BLAINE-LAKE PARK ADDITION TO THE CITY OF SEATTLE"
(VOL. 9, PG. 85)

File:P:\15000s\15722\survey\15722EXH01.dwg Date/Time:10/31/2012 12:29 PM OWEN HILLE

SCALE: HORIZONTAL 1"=10' VERTICAL N/A  18215 72ND AVENUE SOUTH KENT, WA 98032 (425)251-6222 (425)251-8782 FAX CIVIL ENGINEERING, LAND PLANNING, SURVEYING, ENVIRONMENTAL SERVICES	For: MARK BRITTON	JOB NUMBER 15722
	Title: LOCATION EXHIBIT.	SHEET 1 of 1
DRAWN OBH	DATE 10/31/2012	

BRITTON000003

EXHIBIT B

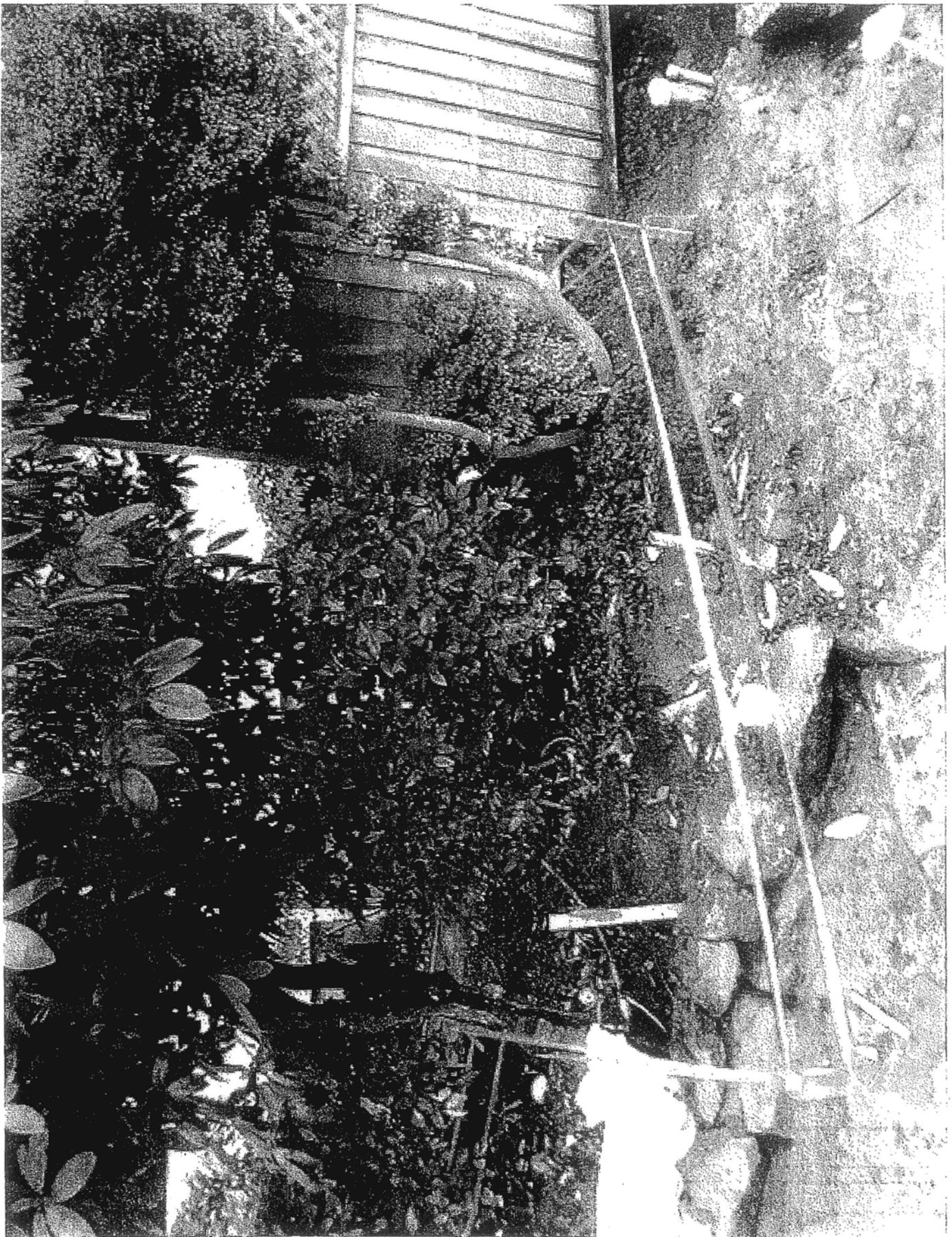


EXHIBIT C



EXHIBIT D

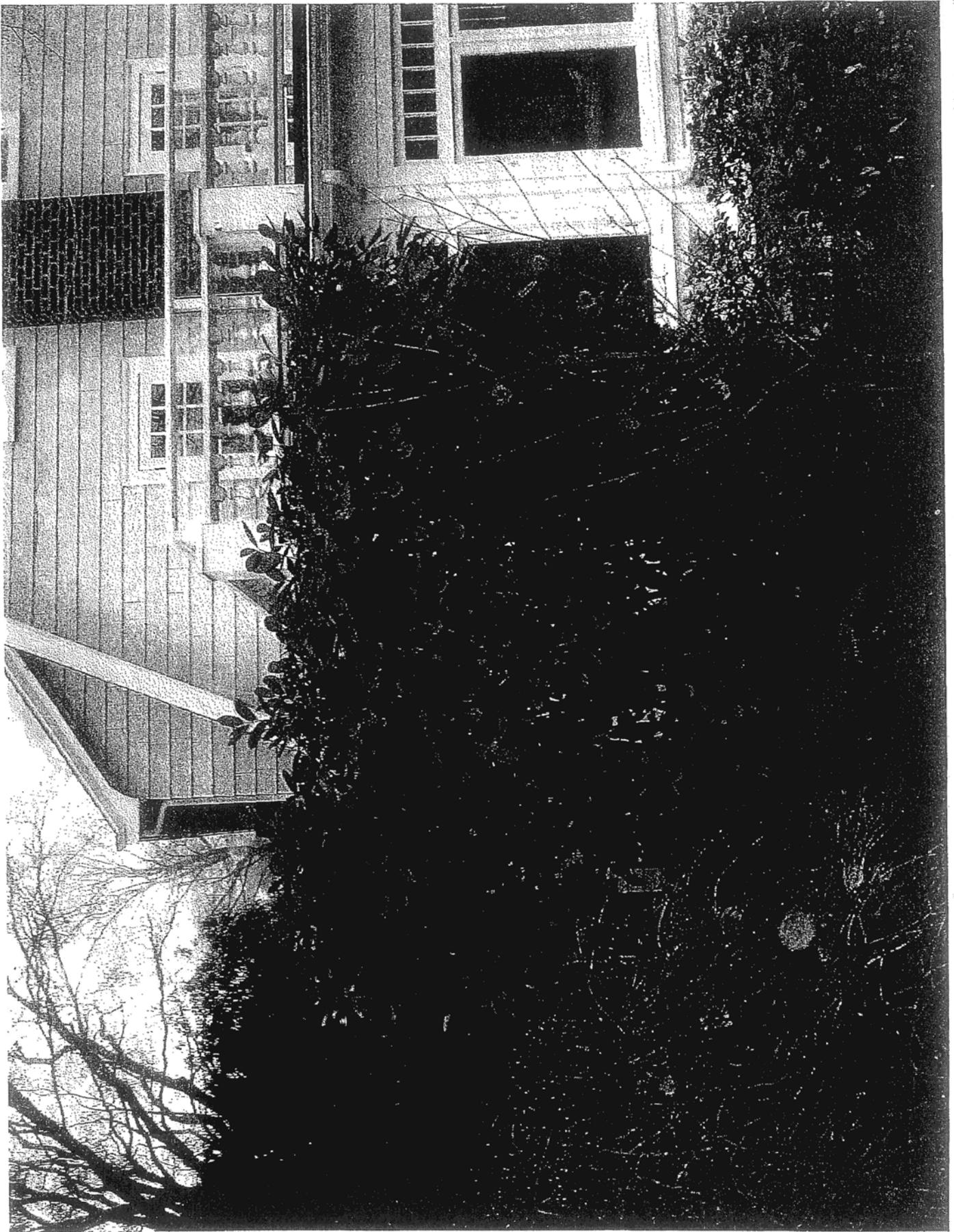


EXHIBIT E

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Honorable Monica Benton

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

DECLARATION OF TIMOTHY J.
DYSON

I, Timothy J. Dyson, am competent to testify to the matters set forth herein and make this declaration of my own personal knowledge and belief.

1. My wife, Julie C. Dyson, and I purchased the house located at 3815 East John Street, Seattle, WA 98112 in August 1997 from the Estate of Luther C. Losey.
2. At the time we purchased the house, it had not been lived in for some time. Our understanding was that it had been vacant for several years. The house was in a serious state of disrepair. We undertook a large renovation of the house.
3. The exterior of the property had not been maintained either and was very overgrown. Because our focus was on renovating the house itself, we did not do general maintenance of the landscaping.

DECLARATION OF TIMOTHY J.
DYSON
18071.26

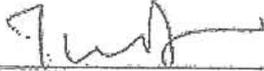
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Socius Law Group, PLLC
ATTORNEYS
Two Union Squads - 601 Union Street, Suite 4350
Seattle, Washington 98101-3931
Telephone 206.238.9100
Facsimile 206.238.9101

1 4. Once the renovations of the house were done, in 1999, we started doing very
2 minimal landscaping. We cleared around all three sides of the house. The clearing generally
3 consisted of simply removing overgrowth. We did not remove any significant trees or
4 bushes. Nor did we plant anything.

5 5. We intended to landscape the entire property, but before we did, we found
6 another house for sale that we purchased. We then sold this house to John Klein in April
7 1999. My understanding is that John Klein did further renovations to the house, and that
8 John Klein did all of the landscaping.

9 I declare under penalty of perjury under the laws of the state of Washington that the
10 foregoing is true and correct.

11
12 
13 _____
14 Timothy J. Dyson

15 Executed this ^{14th} day of January, 2013,
16 at Palmdale, California.

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DECLARATION OF TIMOTHY J.
DYSON

10/25/11.doc

-2-

Socius Law Group, PLLC
ATTORNEYS
Two Union Squares • 601 Union Street, Suite 4950
Seattle, Washington 98101-3567
Telephone 206.633.9100
Facsimile 206.633.9101

EXHIBIT F

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

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and
wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

DECLARATION OF DEBORAH
KLEIN

Deborah Klein states and declares as follows:

1. I am over the age of 18, have personal knowledge of the facts and circumstances contained herein, and I am competent to testify thereto. I currently reside at 760 Park Avenue, Apartment 6, New York, NY 10021.

2. From April 30, 1999, through October 13, 2003, my husband and I owned the Property at 3815 East John Street, Seattle ("Property.") We sold the Property to Mark and Brigid Britton.

3. I am providing this Declaration to explain what we believed to be and treated as the southern boundary line of the Property during our approximate four and one-half years of ownership of the Property.

DECLARATION OF DEBORAH KLEIN - 1
128933.1/100758.2



1 4. The descriptions of our landscaping and maintenance activities and of
2 the southern boundary line of the Property are made as if I am standing on the Property
3 facing south.

4 5. When we purchased the Property, the wooden fence shown in Exhibit A
5 was already present. While the wooden fence does not run the entire length of the
6 southern boundary line of the Property, if a line parallel to the wooden fence is
7 projected westward (to the right on Exhibit A,) that projected line running West would
8 be consistent with what we considered to be the southern boundary of the Property and
9 we exclusively maintained the plants and landscaping up to that projected line.

10 6. When we purchased the Property, there was not very much landscaping
11 along the southern boundary of the Property, so we had significant landscaping
12 installed along what we believed to be the southern boundary of the Property.

13 7. The temporary fencing and all trees, bushes or plants immediately north
14 of or attached thereto shown in Exhibit B marks what we considered to be the southern
15 boundary of the Property. We, and our gardeners and landscapers, were the only
16 people who maintained the landscaping, including watering, planting and maintenance
17 up to the location where the fencing in Exhibit B is located. We considered all of this
18 area to be our property.

19 8. We installed the stone pathway shown in Exhibit C and our gardeners
20 and I exclusively maintained a row of plants to the south side of the stone pathway as a
21 privacy screen.

22 9. While we kept this row of plants maintained, the neighboring yard to the
23 South of what we considered to be the southern boundary of the Property was not
24 maintained by the family that owned what is now the Musser property. It was
overgrown and not maintained. Because of that condition, our landscaping activities

DECLARATION OF DEBORAH KLEIN - 2
128933.1/100758.2



1 were very obvious and easily discernible from the non-landscaped property to the
2 south.

3 10. We had our gardeners install the watering hoses shown in the
4 photographs in Exhibit D to water the plants that we maintained along what we
5 considered to be the southern boundary of the Property.

6 11. We also exclusively maintained the rockery and plants up to where the
7 temporary fence is located in Exhibit E. We believed this was part of the Property and
8 used it as such at all times.

9 12. During the entire time we owned the Property, no one who owned or
10 occupied the Musser Property ever complained about our activities along the southern
11 boundary or asserted that it was not part of our Property.

12 I declare under penalty of perjury under the laws of the states of Washington
13 and New York that the foregoing is true and correct.

14 Dated this 29th day of November, 2012.

15
16 By: D. Klein
17 Deborah Klein
18
19
20
21
22
23
24



EXHIBIT A





EXHIBIT B



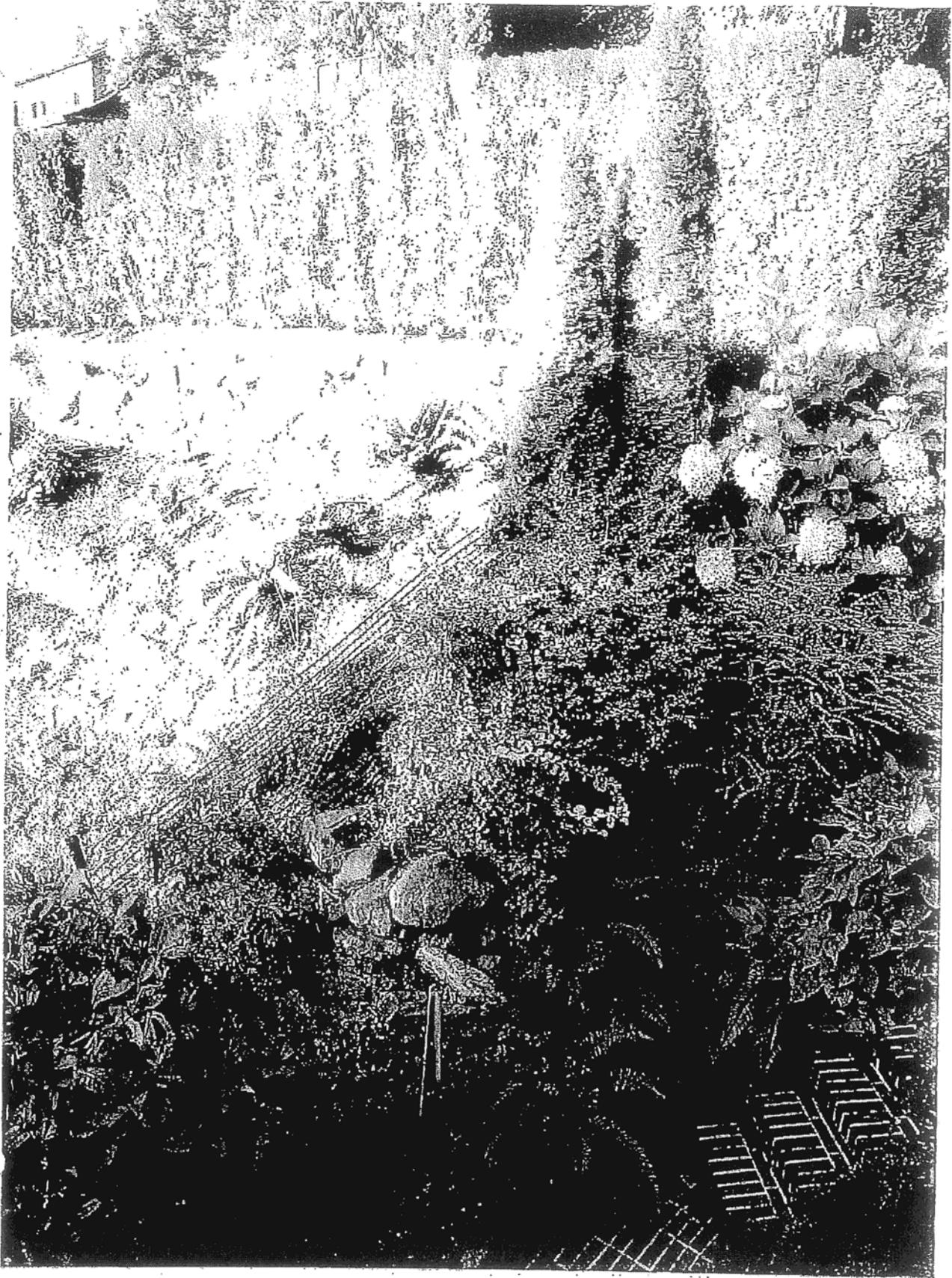


EXHIBIT C



EXHIBIT D







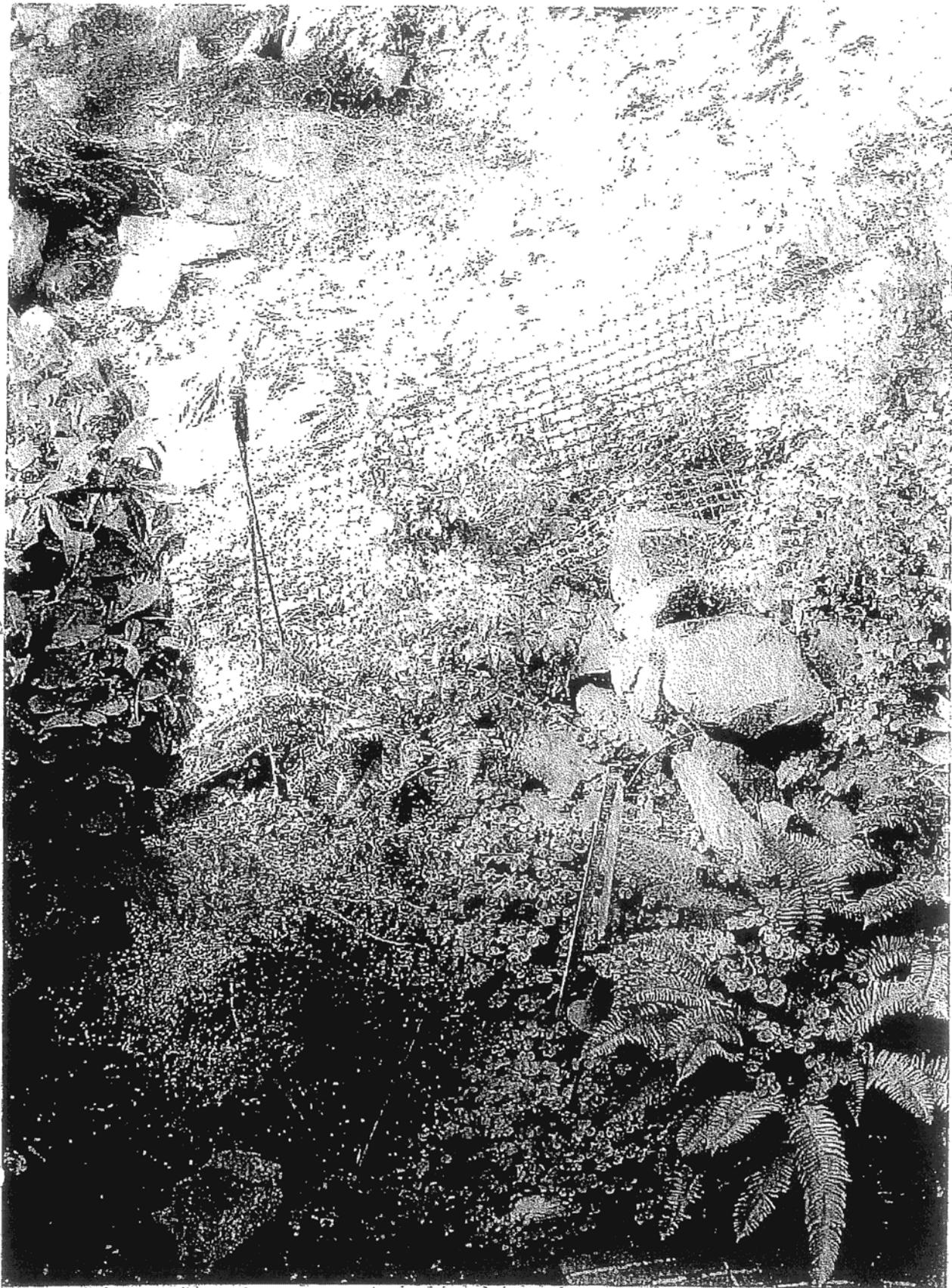
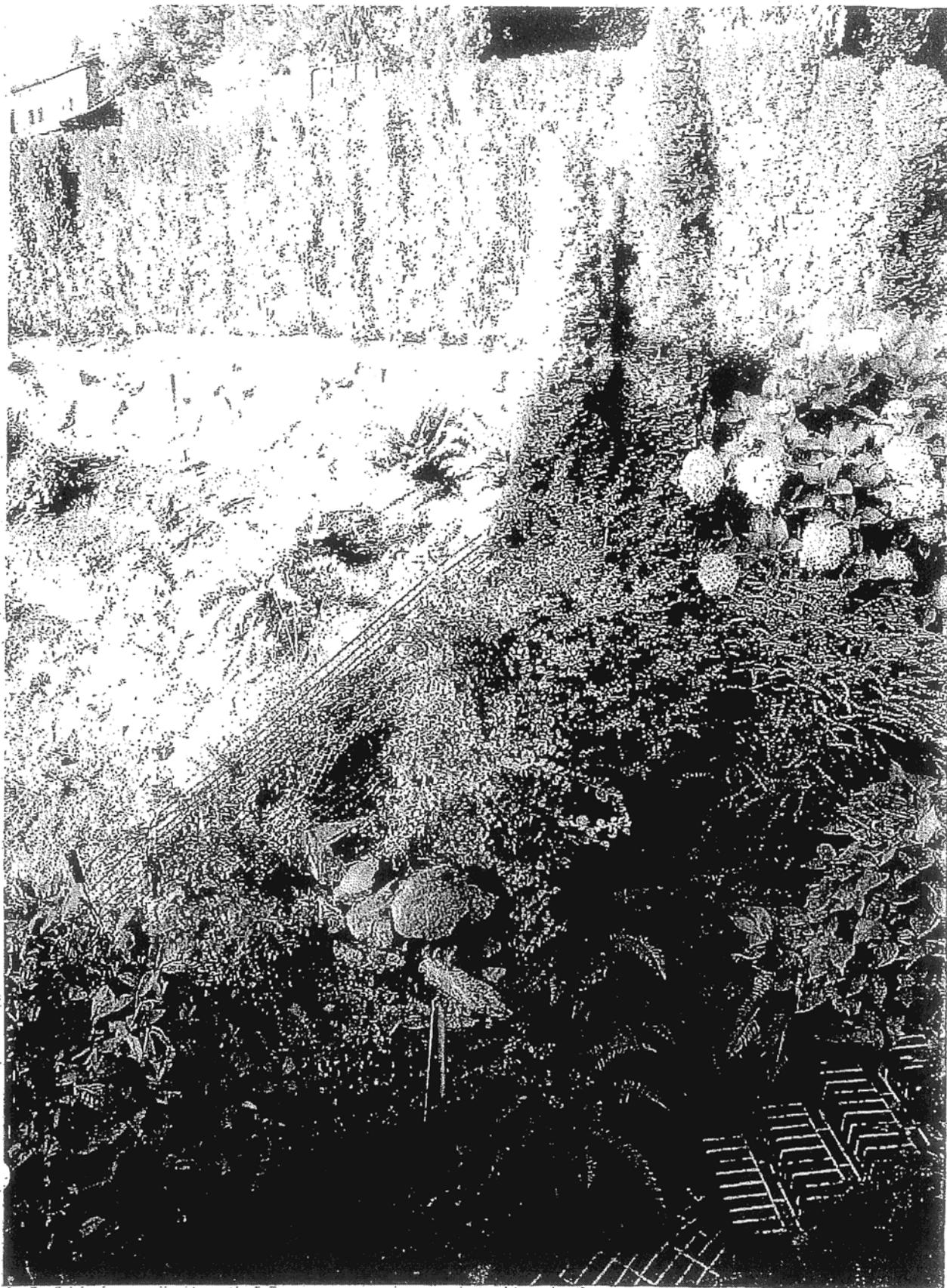


EXHIBIT E



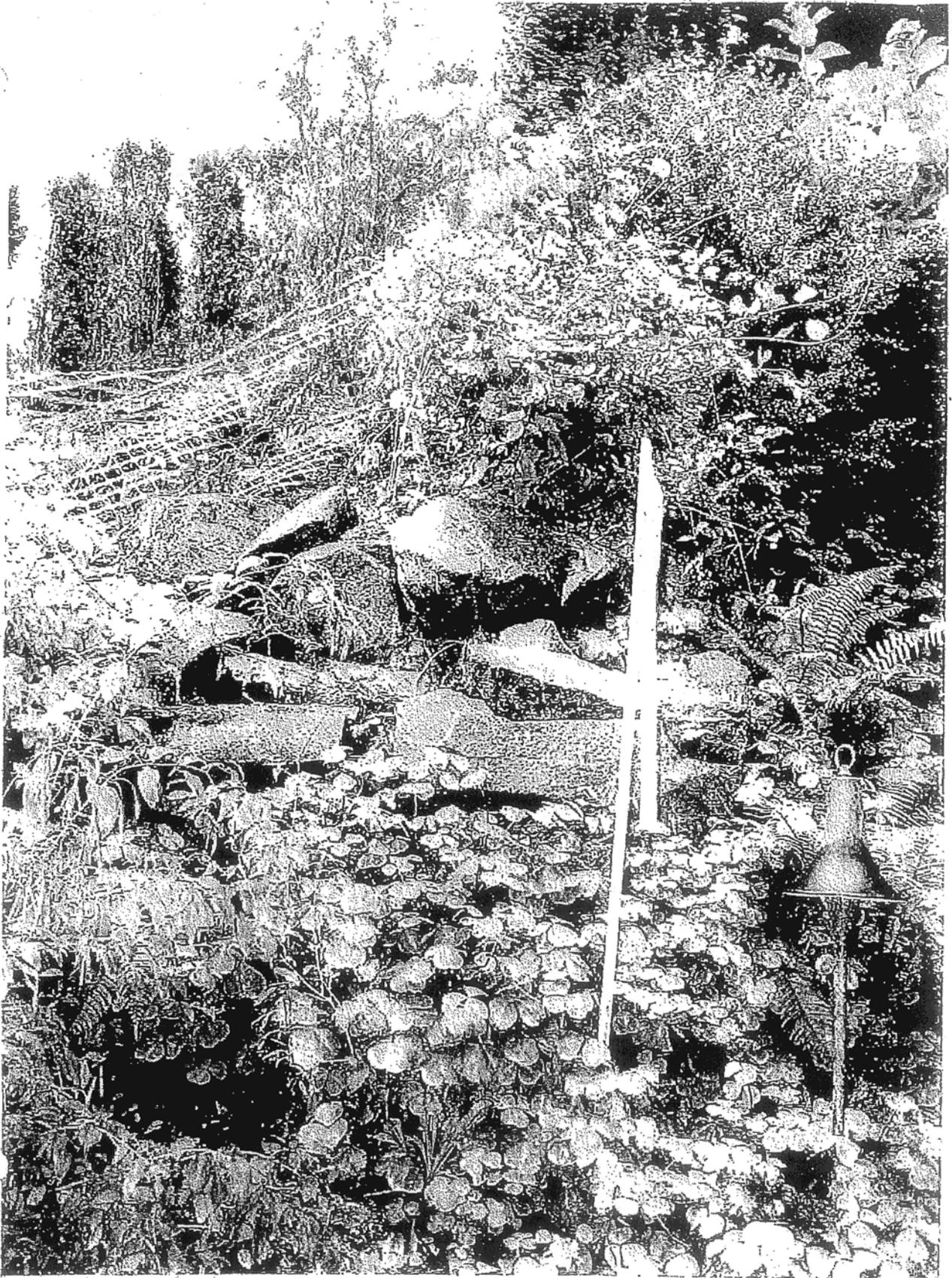


EXHIBIT G

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

8 MARK BRITTON and BRIGID
9 CONYBEARE BRITTON, husband and
10 wife,

11 Plaintiffs,

12 v.

13 PETER M. MUSSER AND TAMARA H.
14 MUSSER, husband and wife,

15 Defendants.

NO. 12-2-22451-0 SEA

DEFENDANTS' FIRST SET OF
INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF
DOCUMENTS TO PLAINTIFFS
AND RESPONSES AND
OBJECTIONS THERETO

16 GENERAL OBJECTIONS

17 Plaintiffs Mark Britton and Brigid Conybeare Britton ("Plaintiffs") make the
18 following General Objections. Each of these General Objections is incorporated into
19 each of Plaintiffs' responses.

20 1. Plaintiffs object to Defendants Peter M. Musser and Tamara H. Musser
21 ("Defendants") definitions and instructions to the extent that they seek to impose upon
22 Plaintiffs any obligation beyond those found in the Washington Civil Rules and the
23 Local Rules for King County. Defendants' definitions and instructions are overly
24 broad, unduly burdensome, vague, and confusing. Plaintiffs do not intend to be bound

DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
THERETO - PAGE 1



1 by the arbitrary definitions and instructions as stated in Defendants' discovery requests
2 and will answer the discovery requests only as required by the Washington Civil Rules
3 and the Local Rules for King County.

4 2. Plaintiffs' responses to Defendants' Interrogatories and Requests for
5 Production represent its reasonable efforts to provide information within its possession,
6 custody, or control after a reasonable search. Plaintiffs reserve the right to amend,
7 supplement, or alter its answers set forth herein and to provide additional information
8 that may be subsequently discovered.

9 3. Plaintiffs objects to each and every interrogatory and request for
10 production to the extent that it seeks information or documentation protected by any
11 privilege, including without limitation the attorney-client privilege, the work-product
12 doctrine, or any other applicable privilege. Plaintiffs hereby assert all such privileges.
13 Plaintiffs will not disclose such privileged information or documentation in response to
14 Defendants' discovery requests.

15 4. Plaintiffs objects to each and every interrogatory and request for
16 production to the extent they are not limited in time.

17 5. Plaintiffs objects to each and every interrogatory and request for
18 production to the extent that they are not limited to information that is within Plaintiffs'
19 possession, custody, or control. Plaintiffs will disclose only responsive, non-privileged
20 information that is within its possession, custody, or control.

21 6. Plaintiffs objects to each and every interrogatory and request for
22 production to the extent they seek documents or information within the possession,
23
24

DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
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1 custody, and control of Defendants and/or are equally as available to Defendants as
2 they are to Plaintiffs.

3 **INTERROGATORIES AND REQUESTS FOR PRODUCTION**

4 **INTERROGATORY NO. 1:** Identify each person answering these
5 interrogatories, state such person's authority to do so on behalf of Plaintiffs, and
6 specify each interrogatory answer to which each person contributed.

7 **ANSWER:**

8 Brigid Conybeare Britton

9 Mark Britton

10
11 **INTERROGATORY NO. 2:** Have you obtained a legal description for the
12 "Disputed Areas" referred to in Paragraph 3.8 of the Complaint. If so, please provide
13 the legal description.

14 **ANSWER:**

15 Yes. See surveyor's drawing prepared by Barghausen Consulting Engineers,
16 Inc. dated October 31, 2012 included in Plaintiff's document production.
17 (BRITTON000003)

18
19 **REQUEST FOR PRODUCTION NO. 1:** Produce all surveys or other
20 documents containing the legal description of the "Disputed Areas."

21 **RESPONSE:**

22 See BRITTON000001 - BRITTON000005
23
24

DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
THERE TO - PAGE 3



1 **INTERROGATORY NO. 3:** If your answer to Interrogatory No. 2 is no,
2 please describe by metes and bounds the "Disputed Areas" of the Musser Property that
3 you are alleging title to by adverse possession:

4 **ANSWER:**

5 Not applicable.

6
7 **INTERROGATORY NO. 4:** Using Exhibit A to the Complaint, attached
8 hereto, please draw what you contend are the "Disputed Areas" and the new boundary
9 line you seek through adverse possession. Include in your drawing the dimensions of
10 the "Disputed Areas."

11 **ANSWER:**

12 See BRITTON000003

13
14 **INTERROGATORY NO. 5:** State, in detail, the factual basis for your
15 contention in Paragraph 3.7 of the Complaint that "[f]or a period of ten years or more
16 Britton, and their predecessors in interest have maintained the rockeries on each end of
17 the common boundary and have maintained, pruned and controlled the height of the
18 laurel hedge."

19 **ANSWER:**

20 Rockeries:

21 The areas close to the eastern and western ends of Plaintiffs' southern property
22 line have rockeries that serve as retaining walls for Plaintiffs' and their predecessor's
23
24

DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
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1 plants and soil and framing walls for the brick walkways. Each rockery is similar in
2 both design, materials and function.

3 The installation of these rockeries precedes Plaintiffs' ownership and that of
4 Jonathan and Deborah Klein (hereinafter, the "Kleins,") the predecessor owners of
5 Plaintiffs' property. The rockeries retain and frame Plaintiffs' landscaping in the
6 disputed area and provide support and protection from slippage and erosion.

7 The eastern rockery is entirely on Plaintiffs' property and is not within the
8 disputed area. Bates Nos. BRITTON000001 - BRITTON000004 show the western
9 rockery is bisected by the legal property line and is within the disputed area claimed by
10 Plaintiffs. The western rockery serves as both (1) a retaining wall for Plaintiffs' plants
11 and soil in the southwestern part of Plaintiffs' property, and (2) a framing structure for
12 Plaintiffs' brick walkway. The rockery frames and tracks Plaintiffs' brick walkway for
13 five to ten feet into Plaintiffs' property and provide support and protection from
14 slippage and erosion.

15 For the adverse possession period, the western and eastern rockeries have been
16 well maintained and clearly visible, in contrast with the portion south of the disputed
17 area, which has been unkempt and covered by plants and soil.

18 **Laurel Hedge:**

19 This laurel hedge is a key feature of Plaintiffs' landscaping because it provides
20 privacy to Plaintiffs' sunroom. It also shields the view of pedestrians walking past the
21 Mussers' raised, western entry to their property. Due to the raised nature of this entry,
22 without the laurel, people could look right into Plaintiffs' sunroom. When Plaintiffs
23

24
DEFENDANTS' FIRST SET OF INTERROGATORIES
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TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
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1 took possession, the hedge was approximately ten feet high and, over time, Plaintiffs
2 let it grow so that it was touching the house and pruned it to create an archway.

3 Shortly after the Mussers moved-in, a significant rat problem developed at the
4 southwestern corner of Plaintiffs' house. Plaintiffs' exterminator opined that the
5 Mussers' new pond was attracting rodents as a water source and rodents would use the
6 laurel's archway to climb up to Plaintiffs' gutters. To address this, Plaintiffs' gardeners
7 have maintained the top of the hedge below the second floor gutters and trimmed it
8 away from the house.

9 The Mussers' predecessor in interest removed a number of trees and shrubs
10 from south of the disputed area but did not remove the laurel hedge, rhododendron and
11 arborvitae in what we believe to be recognition that this disputed area was our property
12 based on our maintenance of this landscaping.

13 The Kleins also maintained the laurel hedge, rhododendron and arborvitae.

14
15 INTERROGATORY NO. 6: Identify any and all witnesses with knowledge of
16 the allegations in Paragraph 3.7 of the Complaint.

17 ANSWER:

18 Brigid Britton
19 c/o Ahlers & Cressman PLLC
20 999 Third Avenue, 38th Floor
21 Seattle, WA 98104

22 Mark Britton
23 c/o Ahlers & Cressman PLLC
24 999 Third Avenue, 38th Floor
25 Seattle, WA 98104

26 Jonathan and Deborah Klein
27 760 Park Avenue, Apt 6

28 DEFENDANTS' FIRST SET OF INTERROGATORIES
29 AND REQUESTS FOR PRODUCTION OF DOCUMENTS
30 TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
31 THERE TO - PAGE 6



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New York, NY 10021

Beautiful Lopez Gardens
12819 SE 38th St
PMB 189
Bellevue, WA 98006

James Wiley
812 E Howe St
Seattle, WA 98102-4241

Langstraat Wood
816 Northwest 49th St
Seattle, WA 98107

Ptarmigan Teal
1201 E. Lynn St
Seattle, WA 98102

REQUEST FOR PRODUCTION NO. 2: Produce all documents identified in response to Interrogatory No. 6 or otherwise supporting the allegations in Paragraph 3.7 of the Complaint. Such documents include, but are not limited to, photographs, videos, invoices, receipts, contracts, etc.

RESPONSE:

Plaintiffs have produced numerous photographs supporting the allegations in Paragraph 7. (See BRITTON000006 – BRITTON000054) Discovery is ongoing and this request will be supplemented as additional documents are discovered.

INTERROGATORY NO. 7: State, in detail, the factual basis for your contention in Paragraph 3.8 of the Complaint that “[f]or a period of ten years or more

DEFENDANTS' FIRST SET OF INTERROGATORIES
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1 Britton, and their predecessors in interest have maintained and used portions of the
2 Musser Property that are south of the common boundary line (the 'Disputed Areas')."

3 ANSWER:

4 When Plaintiffs took occupancy, the owner of the Musser Property at that time
5 let their yard grow naturally. It was a forest of deciduous trees, including an orchard of
6 fruit trees. This created a clear demarcation of what had been maintained by the Kleins
7 and treated as the southern boundary line and what was not. In addition, the Kleins'
8 irrigation hoses ran down the entire southern boundary of the Disputed Area. The
9 southern boundary of the Disputed Area was clearly the recognized property line to
10 Plaintiffs when Plaintiffs took possession.

11 The clear demarcation of the southern boundary of the Disputed Area
12 representing the recognized property line continued for the adverse possession period:

- 13 • There is a wooden fence that sits right on the property line, which is
14 parallel to the southern boundary of the Disputed Area, and consistent
15 with how the area north of the southern boundary of the Disputed Area
16 has been maintained by the Kleins and Plaintiffs. The fence projects
17 into the Mussers' property and points the line in a more southwesterly
18 direction. The fence has been there ten-plus years. Plaintiffs have
19 always maintained this fence.
- 20 • Immediately west of the fence there is a pruned rhododendron bush that
21 faces Plaintiffs' property, reflecting that the Kleins and Plaintiffs have
22 pruned it so that all of the bush and its flowers face Plaintiffs' sunroom
23 and benefit Plaintiffs' property. Plaintiffs installed an accent light to
24

DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
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shine on it, and that light has been illuminated every night for almost nine years.

- Just west of the rhododendron is an area where Plaintiffs planted a number of different plants for privacy. This area has been replanted several times by Plaintiffs and these plantings have been watered by the irrigation hoses that the Kleins maintained.
- The laurel hedge discussed in response to Interrogatory No. 5 is just west of this area.
- Just west of the laurel hedge is a fuchsia magellanica. Plaintiffs have maintained this plant and its red flowers since taking possession. Plaintiffs' predecessors installed a drip line around this plant and it is still there and in use today.
- Just west of the fuchsia magellanica is the rockery discussed in response to Interrogatory No. 5.
- Just west and above the rockery is an area full of roughly 5-10 plants installed by the Klein's and their predecessors and maintained by both the Kleins and Plaintiffs. Most notable are two arborvitae trees that always appeared to mark the southern line and are on the southern boundary of the Disputed Area. These trees were similar to the arborvitae trees on the western line of Plaintiffs' property, and the Mussers' predecessors did not have any arborvitaes on their property. Plaintiffs have always maintained these trees. This whole area above the rockery includes drip hoses installed by our predecessors.

DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
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1 Discovery is ongoing and this request will be supplemented as additional documents
2 are discovered.

3 INTERROGATORY NO. 8: Identify any and all witnesses with knowledge of
4 the allegations in Paragraph 3.8 of the Complaint.

5 ANSWER:

6 Brigid Britton

7 Mark Britton

8 Deborah Klein

9 Jonathan Klein

10 James Wiley

11 Langstraat Wood

12 Ptarmigan Teal

13 Beautiful Lopez Gardens

14 REQUEST FOR PRODUCTION NO. 3: Produce all documents identified in
15 response to Interrogatory No. 7 or otherwise supporting the allegations in Paragraph 3.8
16 of the Complaint. Such documents include, but are not limited, to photographs, videos,
17 invoices, receipts, contracts, etc.

18 RESPONSE:

19 Plaintiffs have produced numerous photographs supporting the allegations in
20 Paragraph 7. (See BRITTON000006 – BRITTON000054) Discovery is ongoing and
21 this request will be supplemented as additional documents are discovered.

22

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DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
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1 INTERROGATORY NO. 9: State, in detail, the factual basis for your
2 contention in Paragraph 4.1.2 of the Complaint that “[f]or a period of ten years or more,
3 Plaintiffs, and their predecessors in interest have occupied the Disputed Areas.”

4 ANSWER:

5 See the response to Interrogatory No. 7 above.

6
7 INTERROGATORY NO. 10: State, in detail, the factual basis for your
8 contention in Paragraph 4.1.3 of the Complaint that “Plaintiffs’ use of the Disputed
9 Areas has been (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and
10 (4) hostile.” For your answer to this interrogatory, separately state the factual basis for
11 each enumerated element of adverse possession.

12 ANSWER:

13 Please see our responses to Interrogatory Nos. 5 and 7 above in response to this
14 interrogatory.

15
16 INTERROGATORY NO. 11: Identify any and all witnesses with knowledge
17 of the allegations in Paragraphs 4.1.2-4.1.3 of the Complaint.

18 ANSWER:

19 Brigid Britton

20 Mark Britton

21 Deborah Klein

22 Jonathan Klein

23 James Wiley

24
DEFENDANTS’ FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
THERE TO - PAGE 11



1 Langstraat Wood
2 Ptarmigan Teal
3 Beautiful Lopez Gardens
4

5 **REQUEST FOR PRODUCTION NO. 4:** Produce all documents identified in
6 response to Interrogatory Nos. 9 or 10 or otherwise supporting the allegations in
7 Paragraphs 4.1.2-4.1.3 of the Complaint. Such documents include, but are not limited,
8 to photographs, videos, invoices, receipts, contracts, etc.

9 **RESPONSE:**

10 Plaintiffs have produced numerous photographs supporting the allegations in
11 Paragraph 7. (See BRITTON000006 – BRITTON000054) Discovery is ongoing and
12 this request will be supplemented as additional documents are discovered.
13

14 **INTERROGATORY NO. 12:** Describe in detail any and all occupancy, use,
15 improvement, maintenance or other activities on the “Disputed Areas” from the time
16 you first occupied your property to the present, including who performed or
17 participated in the activity, any witness(es) to the activity, the frequency of the activity,
18 and the date(s) thereof.

19 **ANSWER:**

20 See responses to Interrogatory Nos. 5 and 7 above. In addition, Plaintiffs and
21 predecessors have used landscape consultants and gardening services during the entire
22 time of ownership. The landscape consultants have visited as needed and the gardening
23 services have visited weekly.
24

DEFENDANTS' FIRST SET OF INTERROGATORIES
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1 Brigid Britton, Mark Britton and the Kleins would also personally do periodic
2 garden and yard maintenance. Debbie Klein gardened extensively.

3
4 **REQUEST FOR PRODUCTION NO. 5:** Produce any and all documents,
5 including photographs, videotapes, receipts, invoices, contracts, etc., which support or
6 relate to your occupancy, use, improvement, maintenance or other activities on the
7 "Disputed Areas."

8 **RESPONSE:**

9 Plaintiffs have produced numerous photographs supporting the allegations in
10 Paragraph 7. (See BRITTON000006 – BRITTON000054) Discovery is ongoing and
11 this request will be supplemented as additional documents are discovered.

12
13 **INTERROGATORY NO. 13:** Does your claim for adverse possession rely
14 upon the activities of any predecessors in interest? If so, describe in detail any and all
15 occupancy, use, improvement, maintenance or other activities on the "Disputed Areas"
16 by your predecessors in interest, including who performed or participated in the
17 activity, any witness(es) to the activity, the frequency of the activity, and the date(s)
18 thereof.

19 **ANSWER:**

20 Yes. The Kleins-owned Plaintiffs' property from April 30, 1999 until October
21 10, 2003. Please see responses to Interrogatory Nos. 5, 7 and 12 above in response to
22 this interrogatory. In addition, there are the predecessors in interest who installed and
23

24
DEFENDANTS' FIRST SET OF INTERROGATORIES
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1 maintained the rockeries. Those persons are presently unknown to Plaintiffs, but will
2 be disclosed should their identities become known to Plaintiffs.

3

4 **REQUEST FOR PRODUCTION NO. 6:** Produce any and all documents,
5 including photographs, videotapes, receipts, invoices, contracts, etc., which support or
6 relate to your predecessor(s) in interest's occupancy, use, improvement, maintenance or
7 other activities on the "Disputed Areas."

8 **RESPONSE:**

9 Plaintiffs have produced numerous photographs supporting the allegations in
10 Paragraph 7. (See BRITTON000006 – BRITTON000054) Discovery is ongoing and
11 this request will be supplemented as additional documents are discovered.

12

13 **INTERROGATORY NO. 14:** Identify each and every survey of your
14 property, the Musser Property, or the "Disputed Areas" known to you. For each such
15 survey, identify the date of the survey, the surveyor, the recording number, if
16 applicable, and the current custodian of the survey.

17 **ANSWER:**

- 18 1. April 2001 survey by Cramer Northwest, Inc. Recorded in King County
19 under No. 20070917900024.
- 20 2. June 13, 2012 survey by Barghausen Consulting Engineers. Not yet
21 recorded. Provided as part of request for production.
- 22 3. Surveyors Drawing of Disputed Areas, October 31, 2012 by Barghausen
23 Consulting Engineers. Provided as part of request for production.

24

DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
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1 4. Record of Survey for Peter Musser, July 2012, by Tri County Land
2 Surveying Company. Defendants are in possession of this unrecorded
3 survey.

4
5 **REQUEST FOR PRODUCTION NO. 7:** Produce any surveys of your
6 property, the Musser Property or the "Disputed Areas" in your possession, custody or
7 control, other than Exhibit A to the Complaint.

8 **RESPONSE:**
9 All surveys are included in Plaintiffs' document production.
10 (See BRITTON000001 – BRITTON000005)

11
12 **INTERROGATORY NO. 15:** In regard to Paragraph 4.3.2 of your Complaint,
13 please specifically describe each and every incident whereby "Musser, or persons
14 acting under his direction or control, have entered the Britton Property or Disputed
15 Area without permission." For each trespass "incident", please list all witness names,
16 addresses and phone numbers, date of each trespass, describe the activities by Mussers
17 which constitute the trespass and if there is still evidence of the trespass.

18 **ANSWER:**
19 This spring, without notice, Plaintiffs discovered stakes and a line for what they
20 understood would be a new fence running through Plaintiffs' yard. This was the
21 Mussers' first attempt to move the recognized boundary, referred to previously as the
22 Southern line of the Disputed Area. To install these stakes and line, the Mussers or
23 their contractor trespassed in both the Disputed Area and North of the Disputed Area.

24
DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
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1 Shortly after this staking, the Mussers started removing ground cover plants that
2 help with erosion on the slope that divides the Mussers' property from ours. A request
3 was made for the Mussers to cease this.

4
5 REQUEST FOR PRODUCTION NO. 8: Please produce any
6 communications, photographs, declarations, statements or any other documents which
7 support your answer to the above Interrogatory and establishes each incident of trespass
8 onto the Britton Property.

9 RESPONSE:

10 Plaintiffs have produced numerous photographs supporting the allegations in
11 Paragraph 7. (See BRITTON000006 – BRITTON000054) Discovery is ongoing and
12 this request will be supplemented as additional documents are discovered.

13
14 INTERROGATORY NO. 16: In regard to Paragraph 4.3.4 of your Complaint
15 where you allege that "Musser intends to construct some type of improvements within
16 the Disputed Areas," do you have any dispute with the Mussers constructing a wood
17 fence outside of, but immediately parallel to, the Disputed Area, to create a solid
18 barrier between your property and the Musser property? If yes, please describe the
19 nature and basis of the dispute.

20 ANSWER:

21 So long as the fence is of a quality consistent with the existing construction on
22 both properties, pursuant to a mutually agreed design, location and process for
23 constructing the fence that does not harm Plaintiffs' landscaping.

24
DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
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1 **INTERROGATORY NO. 17:** In regard to Paragraph 4.3.5 of your Complaint
2 where you allege to have been damaged as a result of the Mussers' trespass and
3 interference, please specifically describe the damages and accompanying monetary
4 damage, if any.

5 **ANSWER:**

6 Plaintiffs have incurred attorney's fees, surveyor costs and other costs due to
7 the staking by Mussers. If the Mussers proceed with attempting to construct the fence
8 per their staking, Plaintiffs will incur additional damages.

9
10 **REQUEST FOR PRODUCTION NO. 9:** Please produce any ledger, survey,
11 communication, declaration or any other documents which supports your answer to the
12 above Interrogatory and establishes any damages from the Mussers' trespass and
13 interference.

14 **RESPONSE:**

15 Discovery is ongoing and this request will be supplemented as additional
16 documents are discovered.

17
18 **INTERROGATORY NO. 18:** In regard to Paragraph 7 of your Affirmative
19 defenses to the Musser Counterclaims where you assert the Musser use of your
20 property was permissive, please specifically describe the factual basis for the assertion
21 including the date permission was given; the name, address and phone number of the
22 individual who provided the permission; the name, address and phone number of any
23 witness with knowledge of the permission; and the manner in which the permission
24

DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
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1 was conveyed (i.e. written form, oral form or some other method). In your answer,
2 please also describe how you or the individual who provided permission, knew that
3 there was any encroachment by the Mussers onto the Britton Property.

4
5 ANSWER:

6 The Mussers installed on their western border a new row of arborvitae bushes, a
7 new sprinkler system and possibly a new rockery. Not knowing where the actual
8 survey line was but believing it encroached by less than a foot, Plaintiffs chose not to
9 focus on any possibly encroachment as a neighborly accommodation.

10
11 REQUEST FOR PRODUCTION NO. 10: Please produce any letter, memo,
12 communication, or document that supports your answer to the above Interrogatory and
13 establishes that you or your predecessor granted permission for the Musser use of the
14 Britton Property.

15 RESPONSE:

16 There are no documents responsive to this interrogatory other than photographs.

17
18 INTERROGATORY NO. 19: In regard to the reddish brick foundation base
19 which supports the black iron railing that sits approximately 18 inches north of the
20 corner boundary marker on the Dorffel Drive side of the Musser and Britten Properties,
21 please state and describe the following:

- 22 (a) Was the structure in place when you purchased the Britton Property?
23 (b) When or approximately when was the structure constructed?

24
DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
THERE TO - PAGE 18



1 (c) Describe the circumstances and date whereby you learned that the
2 structure was north of the boundary line with the Musser Property.

3 ANSWER:

4 (a) Yes.

5 (b) Unknown at this time.

6 (c) Plaintiffs learned that the structure was north of the boundary line when
7 reviewing the survey dated June 13, 2012.

8
9 REQUEST FOR PRODUCTION NO. 11: Please produce any letters,
10 communications, surveys or any other documents supporting your answer to the above
11 Interrogatory.

12 RESPONSE:

13 See June 13, 2012 survey. (BRITTON000002)

14
15
16
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24

DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
THERETO - PAGE 19

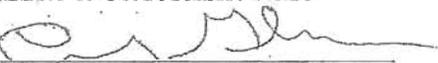


1 ATTORNEY CERTIFICATION

2 I, Lawrence S. Glosser, attorney for Plaintiffs, certify that the foregoing answers and
3 responses to the interrogatories and requests for production comply with Civil Rule
4 26(g).

5 DATED: This 5th day of November, 2012

6 AHLERS & CRESSMAN PLLC

7 By: 

8 Lawrence S. Glosser, WSBA #25098
9 Scott R. Sleight, WSBA # 27106
10 Attorneys for Mark Britton and Brigid
11 Conybeare Britton

11 SIGNATURE OF PARTIES (CR 33)

12 We have reviewed the foregoing and affirm they are true and correct.

13 DATED: This 5th day of November, 2012

14 
15 Mark Britton

16
17 Brigid Conybeare Britton
18
19
20
21
22
23
24

DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
THERE TO - PAGE 20



1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies under penalty of perjury under the laws of the State of
3 Washington that I am now and at all times herein mentioned, a resident of the State of
4 Washington, over the age of eighteen years, not a party to or interested in the above-entitled
5 action, and competent to be a witness herein.

6 On the date given below, I caused this document to be served upon designated counsel
7 of record in the manner noted below:

8 Stephan D. Wakefield, WSBA #22762
9 Law Offices of Hecker Wakefield & Feilberg, P.S.
10 321 First Avenue West
11 Seattle, WA 98119
12 Email: stephanw@heckerwakefield.com
13 Attorneys for Defendants

14 Via U.S. Mail
15 Legal Messenger
16 Via Facsimile
17 Via Electronic Mail

18 Adam R. Asher
19 Socius Law Group PLLC
20 Two Union Square
21 601 Union St., Suite 4950
22 Seattle, WA 98101
23 Email: aasher@sociuslaw.com
24 Attorneys for Defendants

Via U.S. Mail
 Legal Messenger
 Via Facsimile
 Via Electronic Mail

21 DATED this 5th day of November, 2012, at Seattle, Washington.

22 

23 Thao Do

24 DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS AND RESPONSES AND OBJECTIONS
THERE TO - PAGE 21



EXHIBIT H

WHEN RECORDED RETURN TO
JONATHAN KLEIN
1815 EAST JOHN STREET
SEATTLE, WASHINGTON 98112

5901301540
11/15/99
CHICAGO TITLE INSURANCE COMPANY
100

9901301540

CHICAGO TITLE INSURANCE COMPANY
STATUTORY WARRANTY DEED 544327

Date: APRIL 16, 1999

THE GRANTOR
TIMOTHY DYSON AND JULIE C. DYSON, HUSBAND AND WIFE

for and in consideration of
TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION

in hand paid, conveys and warrants to
JONATHAN KLEIN AND DEBORAH ANN KLEIN, ALSO KNOWN OF RECORD AS D. KLEIN,
HUSBAND AND WIFE

the following described real estate situated in the County of KING State of Washington:
Tax Account Number(s): 195470-0320-02
THAT PORTION OF TRACT 51, LYING NORTH OF THE FOLLOWING DESCRIBED LINE:
BEGINNING AT A POINT ON THE SOUTHWESTERLY LINE OF TRACT 51 FROM WHICH
POINT THE SOUTHWEST CORNER OF SAID TRACT BEARS SOUTH 15°05'05" EAST A
DISTANCE OF 17.00 FEET; RUNNING
THENCE NORTH 81°41'45" EAST, 50.25 FEET;
THENCE NORTH 68°33'00" EAST 47 FEET, MORE OR LESS, TO THE NORTHEASTERLY
LINE OF SAID TRACT 51, DENNY-BLAINE-LAKE PARK ADDITION TO THE CITY OF
SEATTLE, ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 9 OF PLATS,
PAGE 85, IN KING COUNTY, WASHINGTON.

SUBJECT TO: EXCEPTIONS SET FORTH ON ATTACHED EXHIBIT "A" AND BY
THIS REFERENCE MADE A PART HEREOF AS IF FULLY INCORPORATED
HEREIN.

CHICAGO TITLE INS. CO.
REF# 5443276
\$ 0.00 Fees

Tim Dyson
TIMOTHY DYSON

Julie C. Dyson
JULIE C. DYSON

E1682100 04/30/99 22724.00 1280000.00

STATE OF WASHINGTON
COUNTY OF KING

99

ON THIS 27th DAY OF April, 1999 BEFORE ME, THE
UNDERSIGNED, A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, DULY
COMMISSIONED AND SWORN, PERSONALLY APPEARED TIMOTHY DYSON AND JULIE C.
DYSON, KNOWN TO ME TO BE THE INDIVIDUAL(S) DESCRIBED IN AND WHO
EXECUTED THIS WITHIN INSTRUMENT AND ACKNOWLEDGED THAT THEY SIGNED AND
SEALED THE SAME AS THEIR FREE AND VOLUNTARY ACT AND DEED, FOR THE USES
AND PURPOSES HEREIN MENTIONED.


PRINTED NAME MICHELLE WATKINS
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON
RESIDING AT Fort Ordway
MY COMMISSION EXPIRES ON 06/25/01



9904301540

Document

CHICAGO TITLE INSURANCE COMPANY

EXHIBIT A

Escrow No: 544327

COVENANTS, CONDITIONS AND RESTRICTIONS CONTAINED IN INSTRUMENT:

RECORDED: MARCH 28, 1917
RECORDING NUMBER: 1124165

AMENDMENT AND/OR MODIFICATION OF SAID RESTRICTIONS:

RECORDED: APRIL 1, 1922
RECORDING NUMBER: 1603047

AGREEMENT AND THE TERMS AND CONDITIONS THEREOF:

BETWEEN:

THE PACIFIC NATIONAL BANK OF
SEATTLE, WASHINGTON, AND DOROTHY
D. MCVAY, AS CO-EXECUTORS OF THE
ESTATE OF MARY DICKEY, DECEASED,
AND DOROTHY D. MCVAY,
INDIVIDUALLY

AND:

LUTHER C. LOSEY AND BLANCHE H.
LOSEY, HIS WIFE

RECORDED:
RECORDING NUMBER:
REGARDING:

DECEMBER 8, 1960
5230927
COMMON BOUNDARY LINE BETWEEN SAID
PREMISES AND SOUTHERLY ADJOINER

9904301540

CHICAGO TITLE INSURANCE COMPANY

EXHIBIT/rls/121198

EXHIBIT I

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

3
4 MARK BRITTON and BRIGID,
5 CONYBEARE BRITTON, husband
6 and wife,

 Plaintiffs,

7 vs.

8 PETER M. MUSSER and TAMARA H.
9 MUSSER, husband and wife,

 Defendants.

CASE NO.
12-2-22451-0 SEA

10
11
12
13 DEPOSITION OF
14 BRIGID BRITTON

15
16 April 3, 2013
17 9:30 a.m.

18
19 999 Third Avenue, Suite 3800

 Seattle, Washington

20
21
22
23
24 Job No. CS1640230

25 Mark Hovila, CCR No. 2599

1 right?

2 A. May of 2004.

3 Q. And do you know when he stopped working on
4 the property?

5 A. Yes. It was August of 2010.

6 Q. Okay. And did you hire someone else at that
7 point?

8 A. Yes, we did. We hired Ptarmigan Teal and
9 Israel Lopez.

10 Q. Do they still work on the property today?

11 A. Yes.

12 Q. Have you or your husband personally
13 maintained portions of the landscape on the disputed
14 property?

15 A. I don't believe so.

16 Q. So the maintenance that's been done has been
17 done on your behalf through your landscapers?

18 A. Correct. And with our oversight.

19 Q. Okay.

20 MR. ASHER: Would you mark this as Exhibit 1?

21 (Exhibit 1 marked)

22 Q. Do you recognize this document?

23 A. I do.

24 Q. Is this a survey that you had prepared on
25 your behalf?

1 A. Yes, we did.

2 Q. Without revealing any discussions you've had
3 with your attorney, could you describe what process you
4 went through with the surveyor to create the boundary
5 line?

6 A. I could not. My husband is the one who
7 worked with the surveyor.

8 Q. Okay. Did he meet the surveyor out on site,
9 do you know?

10 A. I recall that he did, but he would be the
11 best source for that.

12 Q. Okay. Realizing that you didn't help prepare
13 this, as you sit here today, does this look like an
14 accurate representation of what you're claiming by
15 adverse possession?

16 A. Yes, although I think it's difficult when you
17 render a three-dimensional area to paper. I think it
18 looks a little bit distorted. But --

19 Q. Okay. What parts do you think look
20 distorted?

21 A. Well, I think the area where it says "rhody
22 base" and "dripline" looks larger than the area
23 actually is that we're claiming.

24 Q. Okay.

25 A. Also, on the western edge, where the lines

1 curve back to the north, I think that curve appears
2 more dramatic, or angle, I guess I should say.

3 Q. So you say western edge.

4 A. Here.

5 Q. You're pointing to -- oh, near Dorfell?

6 A. So it would be up near Dorfell.

7 Q. Okay.

8 A. So if you project the line that's projecting
9 west along the fence trajectory, then up near the two
10 circles that represent the arborvitae it angles back
11 towards the north up where it meets Dorfell. And I
12 think it looks exaggerated. I think it's a straighter
13 line than it looks when it's rendered on paper.

14 Q. Okay. So you don't think it curves as much
15 as it's shown on paper?

16 A. Correct. I think the pictures that are part
17 of my declaration are a better representation of the
18 disputed area.

19 Q. Okay. We'll talk about those. In response
20 to the Musser summary judgment motion there is a
21 statement that the Mussers did not accurately depict
22 the area that was claimed. Do you know what was
23 inaccurate about the depiction?

24 MR. SLEIGHT: Object to the form. Go ahead.

25 A. I think that there were several areas where

1 Q. So I'll represent to you that this is a
2 picture of the rhododendron on the Musser side of the
3 fence. And it's my understanding that the orange and
4 blue tape you see is the tape based on the measurements
5 in the survey that we're looking at as Exhibit 1. So a
6 quick question here is, as a point of clarification,
7 does your claim include the boxwood that's behind the
8 woody fence?

9 MR. SLEIGHT: Can you, counsel, just where
10 you use the word "behind" maybe you can use a
11 north-south reference for that boxwood. Because
12 there's a boxwood on both sides of the fence.

13 Q. Oh. In this photograph do you see two
14 boxwoods or one?

15 A. I believe I see one boxwood.

16 Q. I believe that's the case too, but so there's
17 no confusion, is the area where the boxwood that is --
18 I'm directionally challenged -- south of the fence, is
19 that part of your claim?

20 A. Okay, so I'm looking at a boxwood that is
21 sitting south of the fence. And no, that is not part
22 of our claim.

23 Q. Okay. To the extent that the survey
24 describes that, would you agree that that's a mistake?

25 A. I haven't -- I don't have firsthand knowledge

1 of that. I didn't read the survey.

2 Q. Okay. Okay. Within the last few weeks have
3 you or your husband contacted the surveyor about
4 correcting --

5 A. I have not. And Mark would be the better
6 person to talk to about that, but he hasn't indicated
7 to me that he did.

8 Q. Okay. In this photo, anyway, the orange and
9 blue tape appears to include part of a rockery and a
10 patio. Is that corner of the rockery and patio, is
11 that part of your claim?

12 A. I have not seen this before from this angle.
13 That patio went in after we started our claim.

14 Q. Okay. So, let's just talk about the dirt.
15 Is the ground in this corner where -- and again, I'm
16 looking at the -- I'm holding the picture in a
17 landscape orientation, and we're talking about the
18 bottom left corner. Assume this was dirt before and
19 there was no patio. Are you claiming that ground as
20 part of your claim?

21 A. I think our concern with that area is simply
22 the base of the rhododendron to us, which is right
23 there, you can see it in the picture, the base of the
24 rhododendron, we're worried about the health of the
25 rhododendron. So if that can be cut away so close to

1 straight line?

2 A. Yes.

3 MR. SLEIGHT: Object to the form.

4 Q. Okay. If you'd look at -- try to describe it
5 here. Do you see where the existing fence is on
6 Exhibit 1?

7 A. Is it marked?

8 Q. Well, I'll represent what I think it looks
9 like is that on the far right is the dark black line,
10 and then at one point where you see that the line goes
11 around the rhody base there's another little straight
12 line that's less dark that sticks out.

13 A. Yes.

14 Q. I believe that, the way I look at this, that
15 that is the fence.

16 A. I believe that's correct.

17 Q. So if I was to try to understand where the
18 fence trajectory is, could you explain it? And I
19 actually borrowed a ruler, and I was hoping that you
20 could just draw right on the exhibit what you believe
21 the fence trajectory is.

22 A. I don't think I feel comfortable drawing the
23 line. I think, like I said, it's hard to reduce what
24 the disputed area is to a one-dimensional picture from
25 a three-dimensional area.

1 Q. Okay.

2 A. Which is why I prefer to look at the photos
3 that were in my declaration, because I think looking at
4 the actual plans and what was there, you can see that
5 line that runs up the hill --

6 Q. Okay.

7 A. -- more precisely.

8 Q. I guess what I'm getting at is, the line that
9 you're claiming is not a straight line, is it?

10 A. I think it is a straight line. And what I
11 said before is, I think when you look at this survey,
12 that was one of the things I said, is I think the way
13 this jogs around the drip line and the rhody base, it
14 looks out of -- not to scale, not the way it really is,
15 if you look at it in person.

16 Q. Okay. Okay. Well, let me do this. And I
17 realize you're uncomfortable. But would you at least
18 take the ruler and put it up on what you think is the
19 existing fence and just draw a straight line?

20 MR. SLEIGHT: Object to the form. But go
21 ahead, Brigid, if you can.

22 A. I really don't think I can. I'd prefer not
23 to.

24 Q. Well, I know you prefer not to, but go ahead
25 and draw the line, if you could. And what I'm asking

1 is, a straight line from where the fence ends, based on
2 what's depicted in the survey. And I understand you've
3 stated your misgivings about the survey, but --

4 A. Do you want me just to draw a straight line
5 that follows --

6 Q. The fence.

7 A. As depicted in the survey?

8 Q. As depicted in the survey.

9 A. Not where I think the southern border of the
10 disputed area is.

11 Q. Yes. I want you just to draw a straight line
12 based on what's depicted in the survey. Okay. So as
13 we've discussed, the line that you've just drawn,
14 you're not claiming that much of the Musser property,
15 correct?

16 A. No.

17 Q. So the fence trajectory, at least based on
18 this survey, you're not exactly claiming the full
19 trajectory, is that right?

20 A. Correct. As depicted in the survey.

21 Q. As depicted in the survey. Could I actually
22 see where you drew?

23 A. Sure.

24 Q. Okay. So I'll have you look back at Exhibit

25 2. So now I'm going to more focus on just the

1 working on the back side of the rhododendron.

2 Q. Okay. And you've never seen them trim the
3 sides or the top?

4 A. No.

5 Q. Okay. We've talked about the boxwood. Do
6 you recognize the bushes that are between the rhody and
7 the boxwood? Do you know what those are?

8 A. I believe those are waxleaf privets.

9 Q. That's my understanding as well, but I won't
10 profess to be a plant expert. Do you know who planted
11 those?

12 A. I believe that someone from the Mussers
13 planted those.

14 Q. Do you know when?

15 A. I don't know when. I think they'd be a
16 better source as to when they were planted.

17 Q. Do you allege that your landscapers
18 maintained the waxleaf privets?

19 A. No.

20 Q. I'm going to describe an area for you and
21 then I'm going to ask you a question about the area
22 you've described. And I realize that the survey
23 depicts the drip line or the canopy of the rhody. And
24 the question I'm going to ask is specifically about the
25 ground underneath the canopy. Do you understand? So

1 your concern there is you didn't want, you know, the
2 branches of the rhody to get cut back in such a way
3 that it killed the rhody. Is that right?

4 A. Not so much the branches, but rather the
5 base, right? I think you can cut some branches without
6 killing it, but if you cut too close to the base and
7 damage the root system, then we have a problem with the
8 health and makeup of the rhododendron.

9 Q. So is the cut out area on the survey, that's
10 more based out of the concern of the health of the
11 rhody and less based on the actual maintenance on the
12 grounds? Is that accurate?

13 A. Yes.

14 Q. Because again, the area that I've described,
15 which again is kind of projecting the fence from the
16 fence to the rhody base and where this tape line is,
17 you haven't done much maintenance, isn't that right?

18 A. Again, the maintenance --

19 MR. SLEIGHT: Object to the form.

20 A. Again, the maintenance that our landscapers
21 would have done would have been on the northern edge of
22 that area that you described, along the base of the
23 rhody and the ground cover that would have been along
24 there and on the north side of those waxleaf privets.

25 Q. Okay. There's a landscape light in this

1 Q. The two darker green bushes in the
2 foreground, meaning closer to the Musser side, do you
3 know what those are?

4 A. I believe those are waxleaf privets.

5 Q. Okay. And do you know what the bushes are
6 behind those?

7 A. Yes. I believe those are Euonymus bushes.

8 Q. Euonymus. I've been wondering how you
9 pronounce that. Okay. Focusing on the waxleaf
10 privets, or the darker green bushes in this picture, do
11 your landscapers maintain those bushes?

12 A. They do not maintain the waxleaf privets, to
13 my knowledge.

14 Q. Do you know how much space is between the
15 waxleaf privets and the Euonymus bushes?

16 A. The waxleaf privets aren't there anymore.

17 Q. Okay. So as you sit here today, it's
18 difficult for you to tell how close they would have
19 been when they were there?

20 A. By inches or feet, yeah, it would be
21 difficult for me to remember. There were a lot of
22 changes on the Musser side.

23 MR. SLEIGHT: Counsel, do you know, do I have
24 this photograph prior to today?

25 MR. ASHER: Yes. These were submitted in the

1 Q. I think I've asked this, but I'll ask again.
2 Have you done any personal maintenance on the laurel?

3 A. I have not. My husband may have.

4 Q. Do you know how often your landscapers in a
5 given year trim the laurel?

6 A. They do it at least annually. And it may be
7 more frequent than that..

8 Q. So at least once a year?

9 A. Uh-huh.

10 Q. Who is the person that would be most
11 knowledgeable about the frequency? And I guess I
12 should specify a time frame. In, I think you've
13 testified in 2007 through 2009, was it Langstraat Wood
14 that did the landscape maintenance?

15 A. No, Langstraat started in 2004.

16 Q. Okay.

17 A. May of 2004, and continued through August of
18 2010.

19 Q. Okay. And do you know who particularly at
20 Langstraat Wood would have been person that was
21 trimming the laurel?

22 A. Yes. It would have been Alex in the early
23 years and then Doug. You have to find out from
24 Langstraat when Alex left the company and when Doug
25 started.

1 Q. Do you have either of their contact
2 information?

3 A. I do not have Doug's. I don't know if we
4 have Alex's, but certainly Erik Wood at Langstraat Wood
5 would have that information.

6 Q. Okay. Are you willing to check and see if
7 you have that information and let your attorney know?

8 A. Sure.

9 Q. Okay. And then after August 2010, we have --
10 who was it again? Israel Lopez and --

11 A. Ptarmigan Teal.

12 Q. Ptarmigan Teal. And of those two, who is the
13 one that actually is doing the trimming of the laurel?

14 A. Israel Lopez.

15 Q. So he'd be the person most knowledgeable
16 after August 2010 as to --

17 A. Correct.

18 Q. Okay. What sides of the laurel do you allege
19 that your landscapers have maintained?

20 A. Similar to the rhody, it would be the
21 northern side, the western side, the eastern side, and
22 the top side.

23 Q. Okay. So your side, the top, and the sides,
24 correct?

25 A. Correct.

1 Q. Do you recognize this survey?

2 A. Yes. I believe this was the survey that we
3 had done last summer.

4 Q. Okay. And in this survey do you see that
5 there's two rockeries, one off of John and then there
6 was one closer to Dorfell? You see that?

7 A. Yes.

8 Q. Okay. In your discovery responses, anyway,
9 there's a reference to an eastern and a western
10 rockery.

11 A. Correct.

12 Q. So is the eastern rockery, is that the one
13 that's near John Street?

14 A. Correct.

15 Q. Does your adverse possession claim include
16 the eastern rockery, or any portion of it?

17 A. I believe that that rockery is on our
18 property. Not part -- that it's not part of the
19 adverse possession claim. It's actually -- that area
20 is not in dispute, in other words. The area in dispute
21 is much farther to the west, to the west of the
22 fence --

23 Q. West of the fence.

24 A. Yeah.

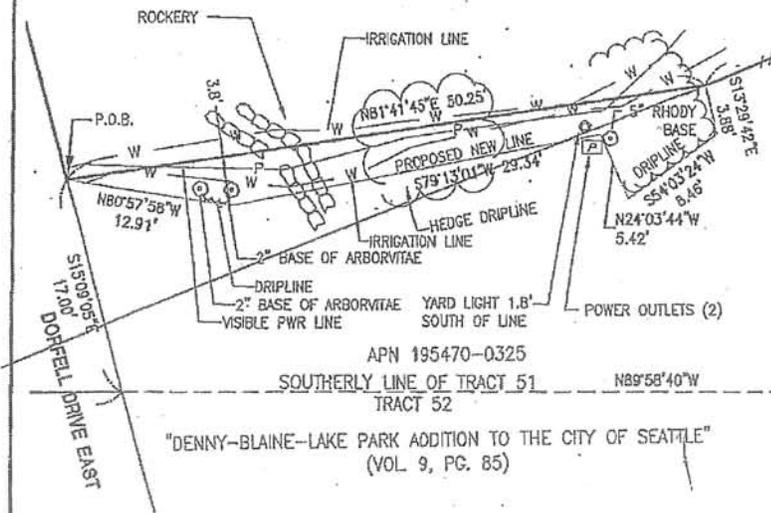
25 Q. Okay. So that's not part of your claim?

EXHIBIT



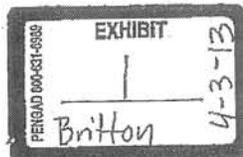
1"=10'

3815 E. JOHN ST.
APN 195470-0320



File:P:\15000s\15722\survey\15722EXH01.dwg Date/Time:10/31/2012 12:29 PM OWEN HILLE

<p>SCALE: HORIZONTAL 1"=10' VERTICAL N/A</p>  <p>18215 72ND AVENUE SOUTH KENT, WA 98032 (425)251-6222 (425)251-8782 FAX</p> <p>CIVIL ENGINEERING, LAND PLANNING, SURVEYING, ENVIRONMENTAL SERVICES</p>	<p>For: MARK BRITTON</p>	<p>JOB NUMBER 15722</p>
	<p>Title: LOCATION EXHIBIT</p>	<p>15722L001.DOC</p> <p>SHEET 1 of 1</p>
<p>DRAWN OBH</p>	<p>DATE 10/31/2012</p>	



BRITTON000003

EXHIBIT J

Linda McKenzie

From: Adam Asher
Sent: Wednesday, May 08, 2013 10:24 AM
To: Linda McKenzie
Subject: FW: Britton v. Musser

From: Scott Sleight [mailto:sleight@ac-lawyers.com]
Sent: Wednesday, April 17, 2013 12:57 PM
To: Adam Asher
Cc: stephanw@heckerwakefield.com
Subject: RE: Britton v. Musser

Adam, see below.

Scott R. Sleight | Ahlers & Cressman PLLC | 999 Third Avenue, Ste 3800 | Seattle, WA 98104
sleight@ac-lawyers.com | (P) 206.287.9900 | (F) 206.287.9902 | (D) 206.340.4616 | (C) 206.715.5784|Conference
Bridge: 1.877.817.1622 Code 993888
CONFIDENTIAL & ATTORNEY CLIENT COMMUNICATION : If this email was received in error, there was no intent to waive its confidentiality or any
privilege. If received in error, please do not read it, notify me and delete the message and any attachments.

From: Adam Asher [mailto:aasher@sociuslaw.com]
Sent: Wednesday, April 10, 2013 2:07 PM
To: Scott Sleight
Cc: stephanw@heckerwakefield.com
Subject: RE: Britton v. Musser

Scott,

No, the survey does not accurately indicate the area being claimed. The taped area is exactly what is in the survey. Brigid admits the patio and boxwood should not have been included. She also stated that the survey did not accurately depict the line, in that it makes the curves or angles appear sharper or more dramatic than they are on the ground. Additionally, she testified that they performed no maintenance South of the waxleaf privets and down to the tape line. That area makes up the "cut-out" around the dripline on the survey. Because no maintenance, or other use, was made of this "cut-out" area, there is no viable adverse possession claim. Again, concern for the health of the bush does not make for adverse possession. So, on the one hand, there is no evidence to support adverse possession over the "cut-out," yet, on the other hand, the survey includes that area as part of the Brittons' claim (along with portions of the patio and the boxwood). There is a clear disconnect. As Brigid Britton testified, the Brittons are not claiming the boxwood south of the fence or the patio. The claim includes the drip line of the Rhododendron.

Further, again, the point of our discovery requests was to get an accurate picture of the area claimed. As of right now, we have certified responses from your clients ostensibly verifying that the survey represents the "Disputed Property." Brigid admitted it was inaccurate, and we agree. There is a clear basis for supplementation. Also, the Brittons have now shifted focus away from the survey

to some "fence trajectory." This "fence trajectory" was not defined by survey or otherwise described in your clients' prior discovery responses. We specifically asked your clients to draw the line. So if the "fence trajectory," not the survey, is the line, then they need to supplement their responses with a drawing of the "fence trajectory." We are entitled to certified responses providing an accurate description of this line. Brigid did not admit the survey is inaccurate. The record speaks for itself as to her testimony. She specifically told you that Mark Britton worked with the surveyor and you should direct questions on this topic to him. The fence trajectory is simple and obvious when standing on the property. Mr. Wakefield wrote an email confirming this in fact. The specific claim is set forth in the survey that was provided and depicted in photographs you have been provided as part of the SJ Response.

As for the suggestion that we simply stand on Dorfell and look East, that is a woefully inadequate description. We are here today because there is no fence over the Disputed Property. We cannot stand at a fence on Dorfell and simply look down. The best we could do is stand at various locations on Dorfell and try to guess at what portion your clients are claiming. But even if knew precisely where to stand to "look East," we still would not have an accurate picture of what your clients are claiming because they do not claim a straight line. Your "fence trajectory" curves and angles at various points (which is inherently inconsistent with a trajectory). Disagree. WA law is contrary to your position. The Brittons are not required to define their claimed area "perfectly" under Washington law. Where an adversely possessed boundary consists of a series of identifiable markers, courts can and should "project boundary lines between objects when reasonable and logical to do so." *Lloyd v. Montecucco*, 83 Wn. App. 846, 853-54, 924 P.2d 927, 931 (1996) (citing *Frolund v. Frankland*, 71 Wn.2d 812, 820, 431 P.2d 188 (1967)). In *Lloyd*, the appellants argued that the court erred by establishing a straight boundary when the respondents' "actual possession would be more fairly represented by a jagged line." *Id.* at 853. The Washington Supreme Court rejected this argument, stating that the adverse possessors do not need to show "a blazed or manicured trail along the path of the disputed boundary." *Id.* at 854. Instead, the Court held that "Courts may create a penumbra of ground around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes." *Id.* at 853-54 (citing *Stoebuck*, § 8.9, at 495).

The civil rules do not require the Mussers to guess about the Brittons' claim. The civil rules allow the Mussers to ask the Brittons to provide a complete and accurate description of their claim. The Brittons' prior responses are not accurate or clear, and they have a duty to supplement, under CR 26(e). As noted in prior emails, we will supplement as to the patio/boxwood south of the tree if in fact your client's interpretation of the survey is correct.

Please let me know when we can expect to receive supplemental responses, signed by the Brittons, to Interrogatories Nos. 2-4 and Request for Production No. 1. As previously noted, we will request that the surveyor look at the patio/boxwood issue and if a revision to the survey is required, we will have that done.

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From: Scott Sleight [<mailto:sleight@ac-lawyers.com>]
Sent: Wednesday, April 10, 2013 1:13 PM
To: Adam Asher
Cc: stephanw@heckerwakefield.com
Subject: RE: Britton v. Musser

Adam: I disagree. The survey indicates the area being claimed. The only question is whether it extends to the taped area you have shown in a photograph of the patio/boxwood. Our position is clear that the boxwood south of the fence and the patio are not being claimed and we will have the survey reviewed as to that area. Otherwise, the survey shows the claimed boundary line for the Adverse Possession claim.

If you look down the fence trajectory standing up on Dorfell looking East, that should address any confusion you have regarding the fence trajectory. Regards, srs

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sleight@ac-lawyers.com | (P) 206.287.9900 | (F) 206.287.9902 | (D) 206.340.4616 | (C) 206.715.5784 | Conference
Bridge: 1.877.817.1622 Code 993888
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From: Adam Asher [<mailto:aasher@sociuslaw.com>]
Sent: Wednesday, April 10, 2013 11:22 AM
To: Scott Sleight
Cc: stephanw@heckerwakefield.com
Subject: RE: Britton v. Musser

Scott,

Do you have Doug's last name? Thanks for following up on Alex.

As for the survey, I think there is a clear disconnect between the line drawn in the survey and the "fence trajectory" that is discussed in the various declarations. The line in the survey includes areas

apparently not really claimed (such as the drip line cut-out). Further, the line in the survey bears no resemblance to the "fence trajectory" described in the declarations. The actual fence trajectory is considerably different than the vague descriptions in the declarations. Your clients' complaint vaguely referenced bushes. Because we had no idea what the precise area was that they claimed, we sent our discovery requests. Your clients produced the survey as the definitive "disputed property." Or so we thought. Now, it appears that the actual area your clients are claiming is not what is depicted in the survey, but is some other line (perhaps now the construction fencing). The point is, the Mussers cannot possibly defend an adverse possession claim if the Brittons cannot articulate what the area is. I asked Brigid to draw the "fence trajectory" described in the declarations, and she couldn't. If she doesn't know, how are the Mussers to know? Is the line what is in the survey (as we thought until recently)? Is it the actual fence trajectory? Is it some other "fence trajectory"? Is it where the construction fencing is located? I think we are entitled to know the precise area claimed—it cannot be a moving target. As such, we ask that the Brittons supplement their discovery responses to provide an accurate description. You can do that by a survey or through whatever other means you chose, so long as it is clear and accurate.

As for the SJ Motion, we thought the survey area was exactly what the Brittons were claiming as the Disputed Property. That is what we asked for, so we thought that is what we received. The survey included portions of their patio and the boxwood. We had no reason to believe otherwise, and hence did not have any questions. Because the claim to the drip line area was so specious, we filed the SJ.

From: Scott Sleight [<mailto:sleight@ac-lawyers.com>]
Sent: Wednesday, April 10, 2013 10:58 AM
To: Adam Asher
Cc: stephanw@heckerwakefield.com
Subject: RE: Britton v. Musser

Adam, I am obtaining the contact info and will get to you likely next week for Alex. Doug is still employed by Langstraat Wood—that is the contact info I have for Doug.

As to the survey, I don't think there is any uncertainty as to what is being claimed, which is the boundary line maintained by the Kleins, Brittons and north of where Mr. Mickelborough's crew installed the construction fence to the survey stakes. It does not include the boxwood south of the wood fence. Brigid's declaration and deposition testimony are clear that the claim does not include the patio and is based on the drip line of the rhody—which can be modified as Brigid testified. If the survey does extend to include the taped area that you have shown in photographs, that will be addressed as we proceed. The exhibits to Brigid's declaration provide clear photographs of what is included in the Disputed Area.

I don't follow your comment that the uncertainty regarding the claimed area was the impetus for the SJ motion. I had invited to come to your office to discuss the case before the motion was filed and any questions as to what was being claimed could have been discussed then. You responded to my request to meet that you were filing a motion. So this could have been clarified much more simply. Regards, srs

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sleight@ac-lawyers.com | (P) 206.287.9900 | (F) 206.287.9902 | (D) 206.340.4616 | (C) 206.715.5784|Conference
Bridge: 1.877.817.1622 Code 993888

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From: Adam Asher [mailto:aasher@sociuslaw.com]
Sent: Wednesday, April 10, 2013 10:17 AM
To: Scott Sleight
Cc: stephanw@heckerwakefield.com
Subject: RE: Britton v. Musser

Scott:

I write to follow up on the survey and the contact information for Doug and Alex. What is the status?

Best regards,

Adam R. Asher
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Direct Fax: 206.838.9111
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From: Scott Sleight [mailto:sleight@ac-lawyers.com]
Sent: Thursday, April 04, 2013 11:43 AM
To: Adam Asher
Cc: stephanw@heckerwakefield.com
Subject: RE: Britton v. Musser

Adam I will discuss the survey issue with client. I agree with the concept that the claimed area should be clear. Brigid Britton testified correctly that the claim does not include the patio or the boxwood south of the fence. I believe the "dripline" of the rhody is causing some confusion particularly because, as the declarations state, the rhody is growing northerly.

I also will get you information for Doug and Alex to the extent my clients have same.

Do you have an address for Tony Sacco? Is he still employed by City Peoples?

Scott R. Sleight | Ahlers & Cressman PLLC | 999 Third Avenue, Ste 3800 | Seattle, WA 98104
sleight@ac-lawyers.com | (P) 206.287.9900 | (F) 206.287.9902 | (D) 206.340.4616 | (C) 206.715.5784|Conference
Bridge: 1.877.817.1622 Code 993888

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From: Adam Asher [<mailto:aasher@sociuslaw.com>]
Sent: Thursday, April 04, 2013 10:45 AM
To: Scott Sleight
Cc: stephanw@heckerwakefield.com
Subject: Britton v. Musser

Scott:

I write to request supplementation of our discovery requests relating to what the Brittons claim is the Disputed Area. Specifically, we request supplementation of Interrogatories Nos. 2-4 and Request for Production No. 1. The Brittons response to these requests relied upon the survey by Barghausen (BRITTON 0000003).

I do not believe, based on Ms. Britton's testimony yesterday, that this survey accurately reflects the area the Brittons claim by adverse possession. For instance, the survey includes an area behind the Musser fence (near the Rhody) and where a boxwood grows. The area depicted also includes a portion of the Mussers' patio. Ms. Britton denied claiming either of these areas. Additionally, Ms. Britton testified that the maintenance they allege is north of the location of the wax leaf privets and that they are not claiming the wax leaf privets as part of their claim. She is unable to testify that her landscapers maintained the wax leaf privets or south of those bushes, and the landscapers say no such thing in their declarations. Therefore, the "cut-out" depicted on the survey, does not really appear to be part of the adverse possession claim. Ms. Britton indicated that they included the drip line out of concern of the health of the bush, which, alone, is no basis for adverse possession.

Additionally, we cannot reconcile the Brittons' allegations in the various declarations regarding the "fence trajectory" with the survey. We have believed that the survey was produced to definitively identify what area was being claimed. We have never understood the "fence trajectory" description because it does not comport with the "cut-out" on the survey. Ms. Britton was also unable to identify the "fence trajectory" when asked today at her deposition. She reluctantly drew the actual fence trajectory, which encompassed areas that the Brittons are obviously not claiming. So, after today, it is still unclear to us where this "fence trajectory" actually rests.

Because it is unclear to us, we request that you provide a supplemental response to the above requests. I presume the easiest way to do this is to revise the prior Barghausen survey. We would like to know exactly what area the Brittons are claiming by adverse possession. It would be helpful if the "fence trajectory" was depicted on the survey. We also encourage the surveyor to stake and string (or colored tape) the "fence trajectory." Of course, we will coordinate with the Mussers' contractors to remove the temporary construction fencing and the row of cypress trees, so that the area can easily be accessed and appropriately marked.

I think all parties will benefit from knowing the precise area that is being claimed. Candidly, one of the driving forces behind the summary judgment motion was the claim around the Rhody, which included the boxwood and portions of the Musser patio. We could not figure out how the Brittons could have possibly adversely possessed that area. Now, it is clearer that they never intended to allege that they

maintained those areas, but simply included the drip line to protect the tree. It also appears that the surveyor may not have accurately reflected the Brittons' intent.

Please let me know if you think a call would be helpful to discuss these issues.

Also, as I mentioned, we recently learned that Tony Sacco used to work at City People's and he may have relevant information to this case. His phone number is (206) 313-6751.

Can you please provide the full names and contact information for Doug and Alex (I think those were the names), who worked for Langstraat-Wood?

Best regards,

Adam R. Asher

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

MARK BRITTON and BRIGID CONYBEARE BRITTON,
Plaintiff,

v.

PETER M. MUSSER and TAMARA H. MUSSER,
Defendants.

NO. 12-2-22451-0 SEA

**RE-NOTICE FOR HEARING
SEATTLE COURTHOUSE ONLY**
(Clerk's Action Required) (NTHG)

TO: THE CLERK OF THE COURT and to all other parties listed on Page 2:
PLEASE TAKE NOTICE that an issue of law in this case will be heard on the date below and the Clerk is directed to note this issue on the calendar checked below.

Calendar Date: September 13, 2013 Day of Week: Friday
Nature of Motion: PLAINTIFFS' MOTION FOR SANCTIONS AND IMPOSITION OF TERMS

CASES ASSIGNED TO INDIVIDUAL JUDGES - Seattle	
If oral argument on the motion is allowed (LR 7(b)(2)), contact staff of assigned judge to schedule date and time before filing this notice. Working Papers: The <i>judge's name</i> , date and time of hearing <i>must</i> be noted in the upper right corner of the Judge's copy. Deliver Judge's copies to Judges' Mailroom at C203.	
<input type="checkbox"/> Without oral argument (Mon - Fri)	<input checked="" type="checkbox"/> With oral argument Hearing
Date/Time: <u>September 13, 2013 at 9:00 a.m.</u>	Trial Date: <u>November 25, 2013</u>
Judge's Name: <u>Judge Monica Benton</u>	

CHIEF CRIMINAL DEPARTMENT - Seattle in E1201	
<input type="checkbox"/> Bond Forfeiture 3:15 pm, 2nd Thur of each month	
<input type="checkbox"/> Certificates of Rehabilitation - Weapon Possession (Convictions from Limited Jurisdiction Courts)	
3:30 First Tues of each month.	

CHIEF CIVIL DEPARTMENT - Seattle -- (Please report to E713 for assignment)	
<i>Deliver working copies to Judges' Mailroom, Room C203. In upper right corner of papers write "Chief Civil Department" or judge's name and date of hearing</i>	
<input type="checkbox"/> Extraordinary Writs (Show Cause Hearing) (LR 98.40) 1:30 p.m. Tues/Wed -report to Room E713	
<input type="checkbox"/> Supplemental Proceedings (1:30 pm Tues/Wed)(LR 69)	Non-Assigned Cases:
<input type="checkbox"/> DOL Stays 1:30 pm Tues/Wed	<input type="checkbox"/> Non-Dispositive Motions M-F (without oral argument)
<input type="checkbox"/> Motions to Consolidate with multiple judges assigned (without oral argument) (LR 40(a)(4))	<input type="checkbox"/> Dispositive Motions and Revisions (1:30 pm Tues/Wed)
	<input type="checkbox"/> Certificates of Rehabilitation (Employment) 1:30 pm Tues/Wed (LR 40(2)(B))

Sign: 
WSBA # 27106 (if attorney)

Print/Type Name: Scott Sleight
Attorney for: Plaintiffs Mark Britton and Brigid Conybeare Britton

Address: Ahlers & Cressman PLLC, 999 Third Avenue, Suite 3800

City, State, Zip Seattle, WA 98104 Telephone: (206) 287-9900

Date: June 17, 2013

DO NOT USE THIS FORM FOR FAMILY LAW OR EX PARTE MOTIONS.

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LIST NAMES AND SERVICE ADDRESSES FOR ALL NECESSARY PARTIES REQUIRING NOTICE

Adam R. Asher
Socius Law Group PLLC
Two Union Square
601 Union St., Suite 4950
Seattle, WA 98101
Email: aasher@sociuslaw.com
Attorneys for Defendants

Stephan D. Wakefield, WSBA #22762
Law Offices of Hecker Wakefield & Feilberg, P.S.
321 First Avenue West
Seattle, WA 98119
Email: stephanw@heckerwakefield.com
Attorneys for Defendants

IMPORTANT NOTICE REGARDING CASES

Party requesting hearing must file motion & affidavits separately along with this notice. List names, addresses and telephone numbers of all parties requiring notice (including GAL) on this page. Serve a copy of this notice, with motion documents, on all parties.

The original must be filed at the Clerk's Office not less than six court days prior to requested hearing date, except for Summary Judgment Motions (to be filed with Clerk 28 days in advance).

THIS IS ONLY A PARTIAL SUMMARY OF THE LOCAL RULES AND ALL PARTIES ARE ADVISED TO CONSULT WITH AN ATTORNEY.

The SEATTLE COURTHOUSE is in Seattle, Washington at 516 Third Avenue. The Clerk's Office is on the sixth floor, room E609. The Judges' Mailroom is Room C203.

Honorable Monica Benton
Hearing Date: September 13, 2013 @ 9:00 a.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

DEFENDANTS' SUPPLEMENTAL
MOTION FOR PARTIAL SUMMARY
JUDGMENT¹

I. RELIEF REQUESTED

Plaintiffs Mark and Brigid Britton (the "Brittons") assert claims for adverse possession by alleging that they and their immediate predecessors used an erratic portion of property owned by their neighbors, Defendants Peter and Tamara Musser (the "Mussers"), beginning in April 1999. The claim is not based on a fence, hedge, neatly trimmed lawn, or any other physical demarcation one would expect to establish a clear boundary; but instead, periodic landscape maintenance allegedly over seemingly random portions of the border with the Musser Property. The Brittons themselves appear somewhat confused as they cannot

¹ This motion for partial summary judgment, and supporting materials, supplements the Motion for Summary Judgment the Mussers filed on February 15, 2013 and on May 10, 2013. Since the Court continued the hearing date to September (over six months from the original date and three months from the second date), the parties have continued with discovery which has modified the evidence presented with this current Motion.

DEFENDANTS' SUPPLEMENTAL
MOTION FOR PARTIAL SUMMARY
JUDGMENT

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-1-

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1 describe the disputed area. Specifically, in response to discovery requests asking for a
2 precise description, the Brittons produced a survey upon which the Mussers relied in filing
3 their Summary Judgment Motion. After the Court continued the first motion and Ms. Britton
4 was deposed, she testified that the survey was not accurate and included sections and plants
5 that were not part of their claim. Instead of the apparently erroneous survey, the Brittons, at
6 some point, started relying on an undefined "Fence Trajectory"; meaning the disputed area
7 should be envisioned by following an imaginary path/extension of a fence which ends
8 immediately next to the disputed area. Even with the alternative approach, Ms. Britton, at
9 her deposition, could not indicate where this "Fence Trajectory" should be depicted on the
10 survey, while admitting that the true fence trajectory is also not really the section they are
11 claiming. Despite the clear inconsistency between the survey and the "Fence Trajectory," the
12 Brittons refused to amend their survey, forcing the Mussers to draft a supplemental summary
13 judgment brief. When the Court again continued the summary judgment hearing, the
14 Brittons finally abandoned a large part of their claim based on the erroneous survey. Even
15 still, however, because of the constant changing claim, the Mussers must guess as to the
16 specific portions of their property the Brittons claim through adverse possession.

17 Regardless of the exact area sought, the Brittons must show their use was actual,
18 continuous and exclusive for 10 years, meaning the earliest the adverse possession could
19 have ripened was April 2009. Since there is no fence or other physical demarcation of any
20 boundary, the Brittons rely on their alleged maintenance of certain specific plants within the
21 undefined disputed area to establish their claims. They cannot make this showing because
22 the incontrovertible evidence establishes that the Brittons and their gardeners made no use at
23 all of the wax leaf privets; made no use of the rhododendron base and laurel for a two-year
24 period between 2004 and 2006; and the Mussers performed significant and continual
25 landscape maintenance of the rhododendron and laurel as early as August 2007—a year and

26 DEFENDANTS' SUPPLEMENTAL
MOTION FOR PARTIAL SUMMARY
JUDGMENT

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1 one half before the Brittons' adverse possession claim would have vested. With no actual
2 use of the wax leaf privets, the Brittons' claim fails. Further, the significant gap between
3 2004 and 2006 precludes a finding of continuous, uninterrupted use of the rhododendron and
4 laurel for the required 10-year period. Moreover, the regular maintenance of the
5 rhododendron and laurel by the Mussers, the true owners of the area, starting in 2007
6 precludes a finding of exclusivity for the required 10-year period. Accordingly, the Mussers
7 move for partial summary judgment seeking an order dismissing the Brittons' adverse
8 possession claim as to the area surrounding the wax leaf privets, rhododendron and laurel.

9 II. STATEMENT OF FACTS

10 A. Background

11 The Mussers purchased their property in April, 2007. The Musser Property shares a
12 north boundary with the Britton Property and is bordered by John Street on the east and
13 Dorffel Drive on the west. For at least 30 years, a six-foot tall wood fence has stood on
14 approximately 47 feet of the boundary in essentially the middle of the two properties. There
15 has been no fence on the boundary between the wood fence and Dorffel. Instead, this area of
16 the boundary contains plants, bushes, and small trees.

17 Recently, the Mussers undertook a major renovation of their house. In conjunction
18 with the improvements, the Mussers intended to place a new fence along the boundary of the
19 Musser and Britton Properties. They would then remove the 30-year old fence which was
20 only on part of the boundary and construct a new one. The Mussers sought input from the
21 Brittons on the type of fence to be constructed. When the Mussers' contractor knocked on
22 the Brittons' door, Mark Britton acted hostilely and demeaning toward the contractor. The
23 Brittons ultimately filed this action alleging adverse possession.

24 B. Disputed Area

25 The Brittons' Complaint does not define specifically the area sought of the Musser

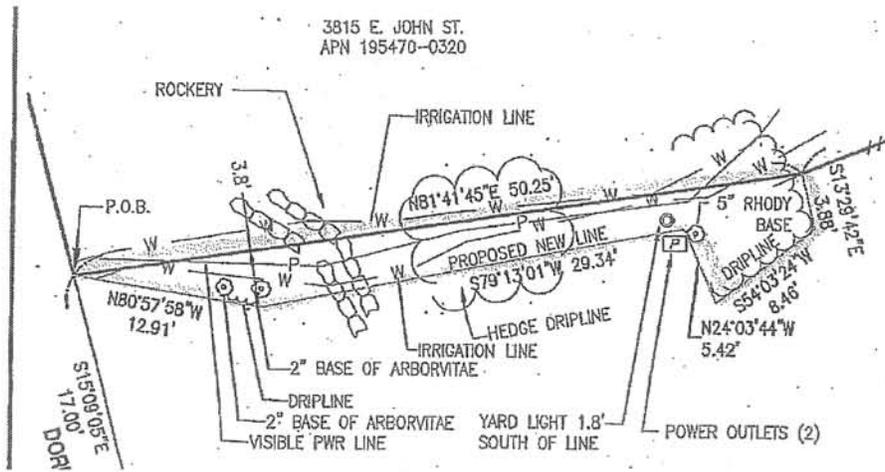
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1 Property, but instead simply names certain plants and other landscaping as encroachments,
 2 such as a laurel tree and rockery, to apparently create a claim. (Pl.'s Compl. ¶ 3.5-3.7). The
 3 Complaint relies upon a June 13, 2012 survey prepared by Barghausen Consulting Engineers,
 4 Inc., which does not identify the specific area sought. (*Id.*, Ex. A.) Since they had no idea of
 5 the exact area claimed, the Mussers requested a full legal description of the Disputed Area
 6 through discovery. In response, the Brittons produced the following revised survey prepared
 7 by Barghausen Consulting Engineers, Inc. to set forth the specific area sought:



17 (Asher Decl., Ex. A, Survey of Disputed Area.)² The dark black line is the title property line
 18 between the Musser Property (south) and the Britton Property (north). The Brittons'
 19 proposed new line starts at the west side with the initials P.O.B., travels in a southeasterly
 20 direction around the base of two arborvitae trees, then jets in a northeasterly direction to
 21 encompass the "Hedge Dripline" until taking an erratic turn south at the base of the
 22 rhododendron, then travels south, around the presumably ever-changing dripline of the
 23 rhododendron, and then north, again until reaching the actual title property line.

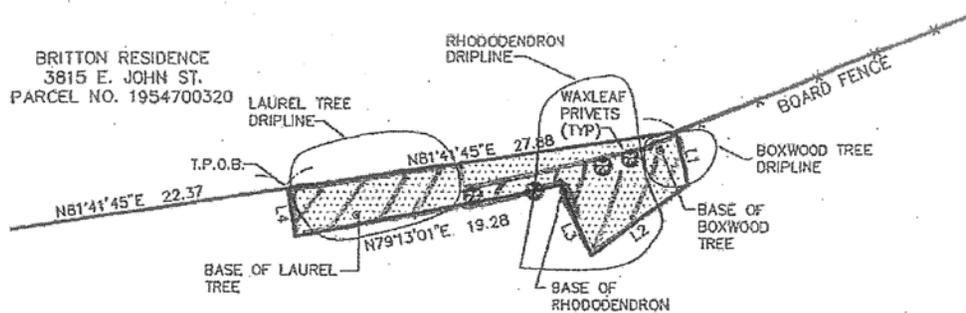
24 ² The Brittons alleged adverse possession over a rockery near John Street in their Complaint. However, in her
 25 deposition, Ms. Britton clarified that this is no longer part of the Brittons' adverse possession claim. (Asher
 26 Decl, Ex. I, Brigid Britton Dep. at 65, Ln. 15-22.) Summary judgment is therefore appropriate on this area.

DEFENDANTS' SUPPLEMENTAL
 MOTION FOR PARTIAL SUMMARY
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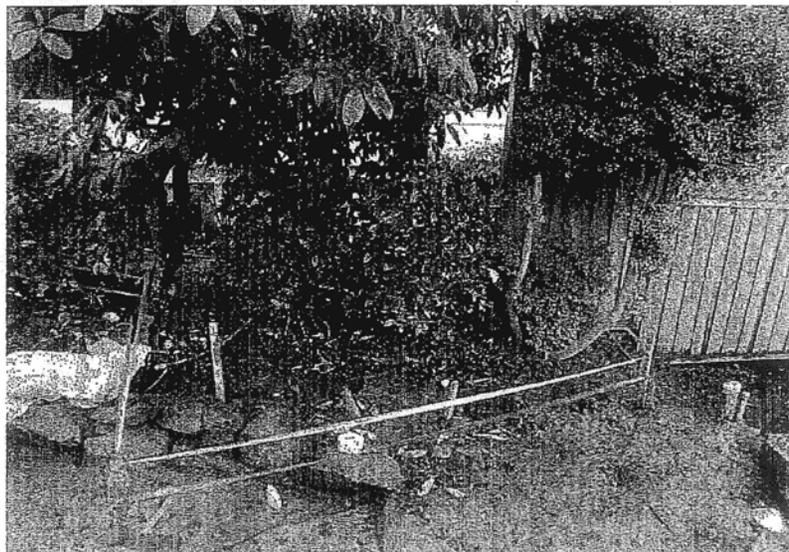
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As depicted in the survey, the key points of interest within the Disputed Area, from east to west, are the following: (1) the rhododendron; (2) the single laurel bush (termed a "hedge" in the survey); (3) the rockery; and (4) the two arborvitae trees. For the purpose of this motion, the Mussers seek to obtain partial summary judgment as to the rhododendron, the waxleaf privets between the rhododendron and the laurel, and the laurel. Below is a recent survey (outlined in red) and photographs of the areas covered by this motion:



(Jack Seibert Decl., Ex. B, Musser Survey.)

The Rhododendron Area:



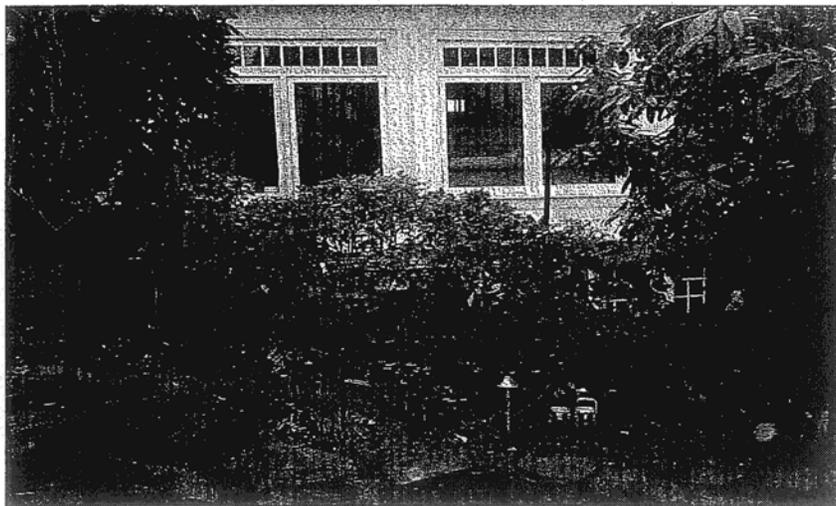
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1 (Asher Decl., Ex. B, Photograph of Rhododendron Area.) The photograph above, taken from
2 the Musser side of the boundary, depicts the oddly-shaped area (blue and orange tape) around
3 the rhododendron (left middle in the photograph) to which the Brittons initially claimed
4 adverse possession. Astonishing is the fact that this area not only includes the entire
5 rhododendron, but also includes several feet of the Mussers' patio (lower left side of
6 photograph), as well as property that is clearly behind the Mussers' side of the 30-year old
7 above described fence and encompassing the boxwood tree (right middle in the photograph).
8 There are waxleaf privet bushes between the rhododendron and boxwood (squarely in the
9 middle of the photograph).

10 **Area Between the Rhododendron and Laurel:**



21 (Asher Decl., Ex. C, Photo Between Rhododendron and Laurel.). There are waxleaf privet
22 bushes (squarely in the middle of the photograph) between the rhododendron (right side of
23 the photograph) and the laurel (left side of the photograph).

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1 **The Laurel:**



11 (Asher Decl., Ex. D, Photo of Laurel.) The waxleaf privet bushes are to the right of the
12 laurel in the photograph.

13
14 In the context of the prior motion for summary judgment (which was continued to
15 June 7, 2013), the Brittons appeared to abandon the survey as the basis of their claim, and
16 instead are now focused on the "Fence Trajectory" idea. This new and somewhat different
17 area is undefined, inconsistent with the survey, and contrary to the actual fence trajectory. At
18 her deposition, Ms. Britton could not identify the "Fence Trajectory" on the survey and
19 testified that she was unable to draw the line she was claiming. (Second Asher Decl., Ex. I,
20 Brigid Britton Dep. at 25; Ln. 22-23.) However, she maintained that the "Fence Trajectory"
21 is a straight line (*Id.* at 26; Ln. 10-15), even though the line on the survey is far from a
22 straight line. Moreover, she confirmed that if actually following the true fence trajectory
23 from the old wood fence, it would project much more southerly into the Musser Property
24 than the area claimed by the Brittons. (*Id.* at 27: Ln. 17-20; Exhibit 1). Based on the
25 ultimate drawing made by Ms. Britton at her deposition, her idea of the actual fence
26 trajectory clearly has no relationship with the "Fence Trajectory" previously described by the

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1 Brittons or the survey they rely upon. (*Id.*)

2 Additionally, Ms. Britton's testimony disputes the accuracy of her own survey.
3 Specifically, she stated that the survey was "distorted." She went on to testify that, "I think
4 the area where it says 'rhody' base and 'dripline' looks larger than the area actually is that we
5 are claiming." (Dep. at 19: Ln.18-23) Additionally, Ms. Britton stated that the line from the
6 two arborvitaes to the point of beginning is "a straighter line than it looks when it's rendered
7 on paper." (*Id.* at 20: Ln. 8-18.)

8 The confusion continues with respect to the Rhododendron Area where Ms. Britton
9 admits that the boxwood behind the Mussers' side of the fence is not part of their claim, even
10 though included in their survey. (*Id.* at 22: Ln 20-22.) She also concedes that the Mussers'
11 patio is not part of their claim despite it being included in their survey. She further explained
12 that the reason the oddly shaped "cut-out" is included in the survey is solely due to their
13 concern of the health of the rhododendron. Specifically, they worry that if portions of the
14 rhododendron on the Musser side are trimmed or removed, it could kill the bush. Therefore,
15 they included the entire drip line of the rhododendron, which encompasses the patio, out of
16 concern for the health of the bush. (*Id.* at 23: Ln. 12-25; 25: Ln. 1-2.) Thus, the "cut-out"
17 area around the drip line was based on concern for the health of the bush, not on actual use or
18 maintenance of the area. (*Id.* at 33: Ln. 9-13.)

19 Ms. Britton further admitted that the Mussers planted the waxleaf privets in the
20 rhododendron area and the Brittons' landscapers did not maintain those bushes. (*Id.* at 30:
21 Ln. 5-19.) The photograph of the Rhododendron Area above (Asher Decl., Ex. B, Photograph
22 of Rhododendron Area), depicts the base of the Rhododendron, wax leaf privets, and then the
23 fence, moving left to right. Ms. Britton testified that her landscapers have not maintained
24 south of the waxleaf privets. (Second Asher Decl., Ex. I, Brigid Britton Dep. at 33: Ln. 20-
25 24.) Therefore, with the exception of the base of the rhododendron itself, the Brittons do not

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1 allege any use or maintenance of the entire "cut-out" area shown in the above photograph of
2 the Rhododendron Area. Also, Ms. Britton admitted her landscapers did not maintain the
3 waxleaf privets between the rhododendron and laurel. (*Id.* at 39: Ln. 8-13.)

4 After Ms. Brittons' deposition on April 3, 2013, counsel for the Mussers raised
5 concerns about the apparent inconsistencies in the Brittons' testimony and the survey.
6 Specifically, on April 4, 2013, counsel for the Mussers requested supplementation of the
7 Brittons' responses to the Mussers' interrogatories and requests for production related to the
8 definition of the Disputed Area. (Second Asher Decl., Ex. J, Email Chain.) The Mussers
9 indicated that the survey incorrectly includes a portion of the Mussers' fence, a boxwood
10 bush behind the fence, and part of the Mussers' patio. (*Id.*) Additionally, the Mussers raised
11 the issue that the "Fence Trajectory" description was inconsistent with the survey. (*Id.*)
12 Since the survey was ostensibly the Brittons' certified description of the Disputed Area, the
13 Mussers requested a supplemental response detailing the precise area the Brittons claimed.
14 (*Id.*) The Brittons refused to supplement their prior discovery responses, and instead
15 continued to rely upon the survey as the "Disputed Area." (*Id.*)

16 As a result of the Brittons' failure to supplement discovery, the Mussers were forced
17 to revise its motion for summary judgment seeking partial summary judgment on the
18 Brittons' erroneous claim to the "cut-out" area around the rhododendron, as the Brittons
19 could show no actual use of this area. In opposition to the Mussers' revised motion for
20 summary judgment, the Brittons made no argument and provided no authority to support
21 their erroneous claim to the "cut-out" area. Then, after the Court continued the June 7, 2013
22 summary judgment hearing, the Brittons, on June 24, 2013, finally abandoned their frivolous
23 claim to the "cut-out" area. (Third Asher Decl., Ex. K, 6/24/13 Email from Sleight.) It
24 cannot be stressed enough that the Mussers were forced to draft two summary judgment
25 briefs on this issue, resulting in thousands of dollars of attorneys' fees, all because the

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1 Brittons asserted a frivolous claim to this “cut-out” area, and then defiantly refused to
2 dismiss this claim after notice that it lacked merit.³

3 While recognizing the claim to the “cut-out” area was frivolous, the Brittons still
4 refuse to concede their claim to the rhododendron base. As depicted in the revised survey,
5 the new line is north of the rhododendron base, but then bizarrely stops suddenly, goes
6 around the base, then continues to follow the “trajectory.” (Third Asher Decl., Ex. L,
7 Revised Britton Survey.) In other words, while the Brittons admit that they cannot prove
8 adverse possession south of the line shown in their survey, which includes the rhododendron
9 base, they will not concede that claim. Therefore, they have drawn this silly new line that
10 circles the rhododendron base.

11 **C. History of Brittons’ and Predecessors’ Use of the Disputed Area**

12 **1. The Dysons (August 1997-April 1999)**

13 Timothy J. Dyson and Julie C. Dyson purchased the Britton Property on August 22,
14 1997 from the Estate of Luther C. Losey. (Second Asher Decl., Ex. E, Dyson Deed;
15 Declaration of Timothy J. Dyson (“Dyson Decl.”) ¶ 1.) When the Dysons purchased the
16 Britton Property the house had not been lived in for several years and was in serious
17 disrepair. (*Id.* ¶ 2.) The Dysons undertook a major renovation of the house. (*Id.*) The
18 exterior of the property, like the house, had not been maintained and was very overgrown.
19 (*Id.* ¶ 3.) The Dysons concentrated their efforts on the renovations to the house, and did not
20 do any maintenance of the landscaping. (*Id.*) They planned to landscape the property once
21 the house renovations were complete, but they never got that far. Before the landscaping

22 ³ The Mussers reserve their right to file a separate motion for sanctions under CR 11, which will seek terms for
23 the thousands of dollars in fees that the Mussers have incurred in defending the Brittons’ frivolous claim to the
24 “cut-out” area. The Brittons’ conduct was particularly egregious given that the Mussers informed the Brittons
25 after Brigid Britton’s deposition that concern for the health of the bush was insufficient as a matter of law to
26 support adverse possession. Upon notice of the defective claim, the Brittons’ refused to dismiss this claim,
forcing the Mussers to revise a second summary judgment brief on this issue. Then, in their opposition, the
Brittons offered no argument to support their claim. They engaged in bad faith litigation in an effort to drive up
the cost for the Mussers knowing they had no legal basis to support their claim.

1 work was started, the Dysons found another house and purchased it. (*Id.* ¶ 5.) The Dysons
2 then sold the Britton Property to John and Deborah Klein in April 1999. (*Id.*); (Second Asher
3 Decl., Ex. H, Klein Deed.)

4 **2. The Kleins (April 1999-October 2003)**

5 Deborah Klein states in her declaration that when they purchased the Britton
6 Property, there was not very much landscaping along the southern border of the property,
7 which is the Disputed Area, so they had significant landscaping installed along what they
8 believed to be the southern boundary of the Britton Property. (Second Asher Decl., Ex. F,
9 Declaration of Deborah Klein (“Klein Decl.”) ¶ 2.) She declares that all the trees, bushes and
10 plants in the Disputed Area were within the Britton Property. (*Id.* ¶ 7) She further declares
11 that she and their gardeners and landscapers were the only people who maintained the
12 landscaping in the Disputed Area. (*Id.*) She also states that they exclusively maintained the
13 rockery at all times. (*Id.*)

14 **3. The Brittons (October 2003 through the Present)**

15 The Brittons purchased their property from the Kleins in October 2003. The Brittons
16 have not personally maintained the landscape in the Disputed Area. (Second Asher Decl.,
17 Ex. I, Brigid Britton Dep. at 18, Ln. 12-18.) The maintenance they rely upon in support of
18 their adverse possession claim was performed by their landscapers. (*Id.*) Langstraat-Wood,
19 Inc. performed landscape work for the Brittons between May 2004 and August 2010. (*Id.* at
20 48, Ln. 17; 49, Ln. 9-11.)

21 Erik Wood, the owner of Langstraat-Wood, states in his Second Declaration that he
22 has no personal knowledge of the maintenance that was performed on the Disputed Area and
23 cannot testify that the Brittons’ maintenance was exclusive. (Second Erik Wood Decl. ¶ 2.)

24 Alex Lupenski, a then employee of Langstraat-Wood, testified at his deposition that
25 he worked at the Britton Property in 2004 through 2006, for approximately two years. (Third

1 Asher Decl., Ex. M, Lupenski Dep. at 18.) Mr. Lupenski testified that he was the only
2 landscaper who maintained the southern border during this time period. (*Id.*) Mr. Lupenski
3 testified that he has no recollection of doing any work on the rhododendron or laurel during
4 this two-year period:

5 Q: Okay. What specifically, if anything, do you recall doing with respect to
6 that rhododendron?

A: I don't remember anything about that plant.

7 Q: Okay. So you don't recall doing any maintenance on it?

A: Not specifically, no.

8 * * * *

9 Q: Do you recall doing anything with [the laurel] bush?

10 A: Not specifically, but as I mentioned in my declaration, it would appear that
11 I would have needed to prune that bush, because otherwise it would have
12 blocked the pathway.

12 Q: So I want to make sure I understand. So you don't have any specific
13 memory of you trimming it, but you think you would have, otherwise it would
14 have blocked the path?

A: That is correct.

14 Q: And in order to trim it to stop it from blocking the path, what side would
15 you have to trim? The side nearest the path?

A: The side that's nearest the path.

16 Q: As you sit here today, though, do you recall trimming the top?

A: I don't recall.

17 Q: Okay. Do you recall trimming the sides on the, I guess it would be the
18 east and the west?

A: I don't recall.

19 (*Id.* at 16-18.) He speculates that he probably trimmed the laurel away from the Brittons'
20 path, but he does not recall doing so, nor does he recall trimming the top or the sides (east
21 and west) of the laurel. (*Id.*)

22 As noted above, the Brittons have not personally maintained the landscape in the
23 Disputed Area. (Second Asher Decl., Ex. I, Brigid Britton Dep. at 18, Ln. 12-18.)
24 Additionally, the Brittons lived in Italy for one year, from August 2004 through August
25 2005, during the time that Mr. Lupenski worked at the Britton Property. (Third Asher Decl.,

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1 Ex. O, Brigid Britton Dep. at 16.) Therefore, the Brittons have no personal knowledge of
2 what was maintained while they were in Italy for that one-year period. Mr. Lupenski is the
3 only witness that could testify about his maintenance of the laurel and rhododendron, but he
4 has no recollection of doing any work from 2004 to 2006 on those bushes.

5 Doug Beaton was the Langstraat-Wood employee who also performed the landscape
6 work at the Britton Property between 2007 and 2010. Due to his unfortunate and undisputed
7 unreliability on any issue related to this matter, Mr. Beaton's testimony cannot be considered
8 by the Court on the pending summary judgment motions. Mr. Beaton admits that he was
9 paid by the Brittons in connection with his visit to the Britton Property for the purposes of
10 preparing his Supplemental Declaration. (Third Asher Decl., Ex. N, Beaton Dep. at 23-25.)
11 Worse, Mr. Beaton blatantly admits that he is a liar:

12 Q: Okay. And did Mr. Sleight say that?

A: No.

13 Q: What did he say?

A: He didn't say anything?

14 Q: He didn't say that? He didn't tell you that if you tried to connect you, he
15 would be happy to act on your behalf?

A: That's correct.

16 Q: So did you just lie about that?

A: I just lied about that.

17 Q: Why did you do that?

A: I was just trying at that time to stop talking to you and for you to leave me
18 alone.

19 Q: Okay. And did Mr. Sleight tell you that you were not to talk to me
20 anymore?

Q: And did you just lie about that as well?

A: Yes.

21 (*Id.* at 41-42.) Additionally, he admits that despite testifying under the penalty of perjury that
22 his prior declarations were correct, the declarations are not accurate. Mr. Beaton signed his
23 first declaration, prepared by the Mussers' counsel, after reviewing it for accuracy. (*Id.* at
24 18.) He later, after his paid site visit, signed a Supplemental Declaration, stating that his first
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1 declaration was no longer accurate. (*Id.* at 18-19) At his deposition, he testified that portions
2 of his Supplemental Declaration were not accurate. For instance, in Paragraph 10, he
3 testified to a conversation he allegedly had with Catie Smith, the Musser landscaper, about
4 the rockery. (*Id.* at 93.) At his deposition, he testified that conversation never took place,
5 and the Supplemental Declaration was not accurate. (*Id.* at 94.) Ultimately, Mr. Beaton has
6 no credibility and his testimony cannot be relied upon by any party in connection with the
7 pending summary judgment motions.

8 **D. The Mussers' Use of the Disputed Area**

9 The Mussers purchased the Musser Property in April 2007. In August 2007, they
10 hired City People's Garden Design & Landscape ("City People's") to provide landscaping
11 services on the Musser Property. (Declaration of Catie Smith ("Smith Decl.") ¶ 1.) Catie
12 Smith was the Landscape Manager for City People's. (*Id.*) On behalf of City People's, she
13 supervised and personally performed landscape services on the Musser Property once a
14 week, all year long, and would typically spend several hours each time. (*Id.*, Ex. A, City
15 People's Invoices for 2007 and 2008.) Ms. Smith left City People's in December 2008 and
16 started her own business, Brier Creek Gardens, LLC. (*Id.* ¶ 9.) City People's continued
17 servicing the Musser Property. (*Id.*) After several months, the Mussers hired Ms. Smith's
18 new company to take over for City People's. (*Id.*) Since that time, she and her crew are
19 generally at the Musser Property all year long every Friday. (*Id.*)

20 Since August 2007, Ms. Smith and her crews maintained the area around the
21 rhododendron, as depicted in the photograph above (Asher Decl., Ex. B.). (*Id.* ¶ 3.) Their
22 maintenance of the area includes weeding, planting, fertilizing, and composting the area.
23 They have always trimmed and pruned the rhododendron. (*Id.*) Ms. Smith never saw
24 anybody else trim it, nor is there any evidence that it has been trimmed by anyone else. (*Id.*)
25 In fact, the trunk of the rhododendron shows evidence of cut limbs; most if not all of which

1 were cut by Ms. Smith over the years. (*Id.*) Additionally, Ms. Smith and her crews have
2 exclusively maintained and shaped the boxwood behind the Musser side of the fence, which
3 is also depicted in the photograph above. (*Id.*)

4 Moreover, Ms. Smith and her crews have maintained the area between the
5 rhododendron and the laurel (Asher Decl., Ex. C) since August 2007 by weeding, removing
6 unwanted plants, planting new plants, composting, and otherwise making the area have a neat
7 appearance. (*Id.* ¶ 4.) In 2008, Ms. Smith and her crew planted five or six waxleaf privet
8 bushes near the boundary line on the Musser side (these bushes are depicted in the
9 photographs above), to run from the existing old wood fence to the laurel, which is toward
10 Dorffel Avenue. (*Id.*) The purpose of these bushes was to prevent the mailman from
11 trampling through the area. (*Id.*) Neither the Brittons, nor anyone on their behalf, ever
12 complained or said anything about the bushes. (*Id.*) Ms. Smith and her crew regularly
13 maintained the bushes since they were planted in 2008. (*Id.*)

14 As with the rhododendron and boxwood, Ms. Smith and her crews also started to trim
15 the laurel bush in the "Disputed Area" beginning in August 2007. (Asher Decl., Ex. D). (*Id.*
16 ¶ 5.) When she first started working for the Mussers in 2007, the laurel had grown wildly
17 without any shape. (*Id.*) Ms. Smith created the box shape that now exists and has
18 maintained that shape since 2007. (*Id.*) When she trimmed the laurel, Ms. Smith trimmed
19 the top, and all sides, except the side facing the Britton Property. (*Id.*)

20 Tony Sacco worked as a landscape supervisor at City People's and directly under Ms.
21 Smith. (Tony Sacco Decl. ¶ 1.) In approximately late 2007 or early 2008, he started periodic
22 work on the Musser Property under the supervision of Ms. Smith. (*Id.* ¶ 2.) He worked on
23 the Musser Property for a year or so through 2008 and until 2009. (*Id.*) Mr. Sacco recalls
24 trimming the rhododendron and that City People's trimmed the laurel bush. (*Id.* ¶¶ 3-4.)

25 After initially signing a declaration under the penalty of perjury, Mr. Sacco curiously

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1 recanted his declaration after several conversations with counsel for the Brittons. The
2 complete change in his testimony raises obvious issues as to his recollection of the
3 maintenance done in 2007 and 2008. Nevertheless, his "corrected" declaration continues to
4 confirm that City People's maintained the rhododendron and the laurel. (Corrected Sacco
5 Decl. ¶¶ 9-10.)

6 Mr. Sacco's poor recollection is not surprising given the amount of time he actually
7 spent at the Musser Property. In 2007 and 2008, Ms. Smith managed several different crews.
8 (Smith Decl. ¶ 2.) Mr. Sacco worked on the Musser Property but he was not a regular,
9 weekly crew member. (*Id.*) In fact, the Mussers were usually scheduled for Friday
10 maintenance. (*Id.*) During this time period, Mr. Sacco was often in the office on Fridays
11 working to schedule the following week's work. (*Id.*)

12 While Mr. Sacco cannot now apparently recall certain points about the Musser
13 Property maintenance, Ms. Smith's recollection is pristine. With the exception of a six-
14 month gap in time, Ms. Smith has worked on the Musser Property from August 2007 through
15 the present. (*Id.* ¶¶ 1, 9.) Ms. Smith personally directed her crews, including Mr. Sacco on
16 the occasion he was actually there, regarding the maintenance activities. (*Id.* ¶¶ 1-2.) She
17 directed that the rhododendron including the Musser side, the sides, and the top be trimmed.
18 (*Id.* ¶ 4) She also directed that the ground underneath the rhododendron, including around
19 the base of the rhododendron be maintained, weeded, fertilized, etc. (*Id.*) She personally
20 visually inspected areas to make sure her directions were being followed and if not, she
21 would have it corrected. This includes trimming and maintaining the laurel. (*Id.* ¶ 6.) Her
22 instructions were to keep the laurel trimmed on the Musser side, the sides, and the top to
23 keep a neat and tidy appearance. (*Id.*) This could not have been accomplished by trimming
24 only one side. (*Id.*) Ms. Smith regularly visually inspected the work to confirm that the
25 garden was being maintained meticulously. (*Id.*)

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III. ISSUES PRESENTED

Should the Court grant partial summary judgment in favor of the Mussers and dismiss portions of the Brittons' adverse possession claim, where the Brittons cannot meet their burden of establishing actual, continuous and exclusive use of portions of the Disputed Area?

IV. EVIDENCE RELIED UPON

This motion is based on the pleadings and files herein, and on the Second and Third Declarations of Adam R. Asher, and the Declarations of Catie Smith, Timothy J. Dyson, Deborah Klein, and Tony Sacco, with attached exhibits.

V. AUTHORITY

A. Summary Judgment Standard

The purpose of summary judgment is to avoid a useless trial where there is no genuine issue of material fact. *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 148, 787 P.2d 8 (1990). The Mussers are entitled to summary judgment as a matter of law if the pleadings, affidavits, and admissions demonstrate the absence of any genuine issues of material fact. *See* CR 56(e). A court should grant summary judgment when, as here, reasonable minds could reach but one conclusion from the facts submitted. *See Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value" in opposing summary judgment. *Seven Gables Corp. v. MGM /UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Rather, "the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Id.* at 13.

B. The Brittons Cannot Show Actual Use of the Waxleaf Privets.

Adverse possession requires that the Brittons show that their possession of the Disputed Area was (1) open and notorious; (2) actual and uninterrupted; (3) exclusive; and

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1 (4) hostile, and that such possession existed for the statutory, 10-year, period. *Chaplin v.*
2 *Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). The Brittons cannot prove actual use of
3 the waxleaf privets.

4 To be adverse, the possession of another's land must be "actual": it is not
5 possible to be in adverse possession without physical occupation. Unless
6 there is the requisite degree of physical possession, no amount of verbal
7 claims, no amount of documents, no kinds of acts off the ground will put the
8 claimant in adverse possession.

9 Stoebuck & Weaver, *17 Washington Practice, Real Estate: Property Law* § 8.9

10 The Brittons cannot show actual use of the waxleaf privets near the rhododendron or
11 between the rhododendron and the laurel. Ms. Britton testified that her crew did not maintain
12 those bushes. (Second Asher Decl., Ex. I, Brigid Britton Dep. at 33: Ln. 20-2; 39: 8-13.)
13 With no actual use, their adverse possession claim over the waxleaf privets fails as a matter
14 of law. Notably, the Brittons failed to present any argument, evidence or authority in the
15 context of the prior opposition to support any use of the waxleaf privets. Despite implicitly
16 conceding this issue, the Brittons refuse to abandon this claim.⁴

17 **C. The Brittons Cannot Meet Their Burden of Proving Continuous Use of the**
18 **Rhododendron and Laurel for 10 Years.**

19 The Brittons' adverse possession claim started, at the earliest, in April 1999, if
20 tacking the Kleins' alleged use. Therefore, the Brittons must show continuous use until April
21 2009 to establish adverse possession. They cannot make this showing.

22 "If there is a general test of 'uninterrupted,' it is that there must be no significant
23 break in the claimant's continuity of possession. A significant break will cause what is called
24 abandonment of adverse possession." Stoebuck & Weaver, *17 Washington Practice, Real*
25 *Estate: Property Law* § 8.17. "The period of possession up to that point is lost and may not

26 ⁴ This is another example of the Brittons' bad faith litigation tactics. They have no support of any use of the
wax leaf privets. They admit they did not maintain them. They offer no argument in support of them, yet their
survey line includes them. The Brittons should have dismissed this claim. Yet, they refuse to, forcing the
Mussers to move for summary judgment, incurring substantial attorneys' fees in the process.

1 be added onto the time of a second period that may be begun later.” (*Id.*)

2 Here, even accepting the Kleins’ testimony as true, the adverse use that started in
3 April 1999 was abandoned in the two-year period from 2004 to 2006. During this time, Alex
4 Lupenski of Langstraat-Wood performed maintenance on the Britton Property, including the
5 southern border. Mr. Lupenski was the only person maintaining the Britton Property during
6 this time period. Even Erik Wood, the owner of Langstraat-Wood, does not have personal
7 knowledge of what specific bushes were maintained. (Second Erik Wood Decl. ¶ 2.) The
8 Brittons acknowledge that they did not personally perform any work, and they relied
9 exclusively upon their landscapers. (Second Asher Decl., Ex. I, Brigid Britton Dep. at 18,
10 Ln. 12-18.) Furthermore, the Brittons were not even at the Britton Property for a one-year
11 period because they lived abroad in Italy from August 2004 through August 2005. (Third
12 Asher Decl., Ex. O, Brigid Britton Dep. at 16.) Thus, Mr. Lupenski is the only witness with
13 personal knowledge from 2004 to 2006.

14 However, Mr. Lupenski testified unambiguously that he has no recollection of doing
15 anything to the rhododendron or the laurel for the two-year period from 2004 to 2006.
16 (Third Asher Decl., Ex. M, Lupenski Dep. at 16-18.) Mr. Lupenski speculates that he
17 probably trimmed the laurel away from the Brittons’ path, but he does not recall doing so.
18 Not only is this speculation inadmissible,⁵ but he cannot even state whether the part of the
19 laurel he trimmed was even in the Disputed Area. As shown in the surveys above, the drip
20 line of the laurel extends well north of the true property line. If Mr. Lupenski trimmed the
21 laurel away from the Brittons’ path, which is well north of the true property line, he would
22 not need to trim south of the true property line into the Disputed Area. Indeed, Mr. Lupenski
23 does not recall ever trimming the top or the east and west sides of the bush. (*Id.*)

24 ⁵ Speculative statements are not sufficient to defeat summary judgment. *Ruffer v. St. Frances Cabrini Hosp. of*
25 *Seattle*, 56 Wash. App. 625, 628, 784 P.2d 1288 (1990); *Seven Gables Corp. v. MGM/UA Entertainment Co.*,
106 Wn.2d 1, 13, 721 P.2d 1 (1986) (Emphasis added)

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1 This testimony is fatal to the Brittons' adverse possession claim. The Brittons have
2 the burden of proof to demonstrate uninterrupted and continuous use of the rhododendron
3 and the laurel from April 1999 through April 2009. Mr. Lupenski testified that he cannot say
4 that he made any use of the rhododendron and laurel for a two-year period. At best, he can
5 only speculate that he may have trimmed the bush from the path, but he does not even recall
6 doing that, and he is unable to say if the part he might have trimmed was even in the
7 Disputed Area. Therefore, there is a two-year gap in the 10-year period. This two-year gap
8 is unquestionably a "significant break," such as to render the prior adverse use abandoned.
9 As such, the prior use of the Kleins from April 1999 through October 2003 cannot be tacked
10 on to the Brittons' alleged adverse use. Rather, the Brittons started a second period of
11 adverse use in 2006, which is well short of the 10-year period.

12 The Mussers anticipate that the Brittons will argue that while Mr. Lupenski does not
13 recall doing any maintenance of these bushes, they recall asking for such work and that it
14 was in fact performed. Such testimony, however, is self-serving, speculative, and conclusory
15 and would be insufficient to defeat summary judgment.⁶ Further, the Brittons admittedly did
16 not perform the work, and therefore lack personal knowledge. More importantly, the
17 Brittons cannot testify about the maintenance performed from August 2004 to August 2005,
18 the period in which they lived in Italy. So, there is still a full one-year gap in alleged
19 maintenance. This one-year gap alone is a "significant break" in use, such as to defeat a
20 finding of uninterrupted and continuous use. For the foregoing reasons, the Brittons cannot

21 ⁶ "Once there has been an initial showing of the absence of any genuine issue of material fact, the party
22 opposing summary judgment must respond with more than conclusory allegations, speculative statements, or
23 argumentative assertions of the existence of unresolved factual issues." *Ruffer v. St. Frances Cabrini Hosp. of*
24 *Seattle*, 56 Wash. App. 625, 628, 784 P.2d 1288 (1990); *Seven Gables Corp. v. MGM/UA Entertainment Co.*,
25 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (Emphasis added). Rather, "the nonmoving party must set forth specific
26 facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact
exists." *Seven Gables*, 106 Wn.2d at 13 (Emphasis added.) Courts will not consider conclusions of law that
simply reiterate the allegations in the Complaint. *Kirk v. Moe*, 114 Wn. 2d 550, 557, 789 P.2d 84 (1990); *Guile*
v. Ballard Community Hospital, 70 Wn. App. 18, 25, 851 P.2d 689 (1993).

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1 prove continuous, uninterrupted use of the rhododendron and laurel for a 10-year period.

2 **D. The Brittons Cannot Meet Their Burden of Proving Exclusive Use of the**
3 **Rhododendron Base and Laurel.**

4 The Brittons also cannot meet their burden of showing exclusive use for the statutory
5 ten-year period, of the rhododendron base or laurel. Therefore, their adverse possession
6 claim to the subject area fails as a matter of law. Ultimately, a claimant's possession need
7 not be *absolutely* exclusive in order to satisfy the exclusivity condition of adverse possession.
8 *Lilly v. Lynch*, 88 Wn. App. 306, 313, 945 P.2d 727 (1997) (citing *Crites v. Koch*, 49 Wn.
9 App. 171, 174, 741 P.2d 1005 (1987)). Specifically, an "occasional, transitory use by the
10 true owner usually will not prevent adverse possession if the uses the adverse possessor
11 permits are such as a true owner would permit a third person to do as a 'neighborly
12 accommodation.'" 17 William B. Stoebuck, *Washington Practice Real Estate: Property Law*
13 § 8.19 at 516 (1995). With that said, however, courts find a lack of exclusivity when there is
14 regular use by the title owner that indicates ownership, as in this case. *Bryant v. Palmer*
15 *Coking Coal Co.*, 86 Wn. App. 204, 936 P.2d 1163, 1172 (1997). For instance, in *Thompson*
16 *v. Schlittenhart*, 47 Wn. App. 209, 212, 734 P.2d. 48 (1987), parties on both sides of the
17 disputed boundary made similar use of the disputed property. Therefore, exclusivity was
18 missing. William B. Stoebuck and John W. Weaver explain how use by the true owner
19 defeats exclusivity as follows:

20 Any sharing of possession with the true owner is particularly sensitive. An
21 occasional, transitory use by the true owner usually will not prevent adverse
22 possession if the uses the adverse possessor permits are such as a true owner
23 would permit a third-party to do as a "neighborly accommodation." Examples
24 are the true owner's occasionally walking across the disputed area or now and
25 then using it for recreational purposes. Beyond such activities, however, any
26 significant, and especially regular, use by the true owner will prevent
exclusive adverse possession.

William B. Stoebuck and John W. Weaver, 17 *Washington Practice, Real Estate: Property*

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1 *Law* § 8.19 (2nd Ed. 2004) (Emphasis added).

2 The Brittons cannot establish exclusive possession of the rhododendron and laurel for
3 10 years. There is no factual dispute that the earliest the adverse use could have started,
4 assuming that the Kleins made adverse use of the disputed area immediately upon their
5 purchase of the Britton Property, was April 1999. Thus, such adverse use, when tacked with
6 the Brittons' alleged adverse use, would have to be exclusive until April 2009, at which time
7 adverse possession in the Disputed Area would vest.

8 However, fatal to the Brittons' claim is the incontrovertible fact that the Mussers,
9 through their landscapers, began using the rhododendron and laurel in a similar manner
10 alleged by the Brittons and the Kleins in August 2007. To reiterate, the Mussers hired City
11 People's to perform landscape services. Catie Smith began maintaining the Musser Property
12 at that time. Ms. Smith testified that she and her crew weeded around the rhododendron and
13 laurel, they pruned the rhododendron, they pruned all sides of the laurel (except the Britton
14 side), and they planted bushes (waxleaf privets) and plants in the area, they removed debris,
15 they put down mulch, and performed various other tasks, including fertilizing around these
16 plants. Even Tony Sacco, who obviously has some recollection issues, recalled trimming the
17 rhododendron and the laurel, and he was not even on site on a weekly basis when he worked
18 for City People's. Further, the Mussers' sprinklers have watered the rhododendron and
19 laurel. Catie Smith's crew was on the Musser Property nearly every week from August 2007
20 through December 2008. City People's continued maintaining the property for several
21 months in 2009, until Catie Smith's new company, Brier Creek Gardens, LLC, took over,
22 and which continues to maintain the property today. This testimony is fatal to the Brittons'
23 claim. In short, the Brittons cannot establish exclusive use to the subject area for the entire
24 ten-year required period.

25 In responding to the Mussers' motion, the onus is on the Brittons to allege sufficient

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1 facts to rebut the moving party's contentions. The Brittons cannot meet their burden. The
2 critical time period is between August 2007 and April 2009. The Brittons admit that they
3 have not personally done any maintenance of the Disputed Area and thus must exclusively
4 rely upon the testimony of their landscapers. (Second Asher Decl., Ex. I, Brigid Britton Dep.
5 at 18: Ln. 12-18.) In this regard, the landscapers, during August 2007 and April 2009, were
6 from Langstraat-Wood, Inc.⁷ Erik Wood, the owner of Langstraat-Wood, states in his
7 Second Declaration that he has no personal knowledge and cannot testify that the Brittons'
8 maintenance was exclusive. (Second Erik Wood Decl. ¶ 2.) In other words, he cannot refute
9 the Musser evidence that Ms. Smith landscaped and maintained the subject area.

10 At her deposition, Ms. Britton confirmed that her only evidence to establish exclusive
11 use during the relevant time period was through Erik Wood and his company and thus
12 identified the landscapers at Langstraat-Wood, including Doug Beaton. (Second Asher
13 Decl., Ex. I, Brigid Britton Dep. at 48-49.) However, the Court cannot consider any
14 testimony of Doug Beaton. Mr. Beaton is an admitted liar. (Third Asher Decl., Ex. N,
15 Beaton Decl. at 41-42.) He further admits that various portions of his First and Second
16 Declarations are not accurate, even though he testified to them under the penalty of perjury.
17 (*Id.* at 18, 94.) For instance, in Paragraph 10, he testified to a conversation he allegedly had
18 with Catie Smith about the rockery. At his deposition, he testified that the conversation
19 never took place, and the Supplemental Declaration was not accurate. (*Id.* at 94.) Mr.
20 Beaton's testimony simply cannot be relied upon in connection with the summary judgment
21 motions.

22 Without the testimony of Doug Beaton, the Brittons cannot provide any admissible

23 ⁷ The Mussers anticipate that the Brittons will rely upon declarations of Mike Ramsey, Alex Lupenski, Israel
24 Lopez and Ptarmigan Teal to support their claim. However, none of these witnesses worked on the Britton
25 Property during the critical time frame of August 2007 through April 2009. Mr. Ramsey's and Mr. Lupenski's
knowledge predates the Mussers' purchase of their property in 2007. Mr. Lopez and Ms. Teal started working
on the Britton Property in September 2010, after the critical time period.

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1 evidence to support their alleged “exclusive” use of the Disputed Areas between August
2 2007 and April 2009. Summary judgment is therefore appropriate.

3 Even if the Court considers the testimony of Mr. Beaton despite his clear credibility
4 issues, Mr. Beaton cannot testify that the Brittons’ use of the rhododendron base was
5 exclusive. In fact, Mr. Beaton did nothing to the rhododendron base from 2007 to 2010:

6 Q: Okay. And you’ve told me before, in our communications, that you didn’t
7 do anything with respect to the rhododendron trunk itself, is that accurate?

A: Right.

8 (*Id.* at 62.) While Mr. Beaton testified he did some work around the rhododendron base, he
9 testified that such use was not exclusive:

10 Q: Isn’t it true also that you’re unable to say that your maintenance of the
11 rhody base was exclusive?

A: Yes.

12 Q: It was not exclusive?

A: It was not exclusive.

13 (*Id.* at 64.) Thus, even if the Court considered Mr. Beaton’s unreliable testimony, Mr.
14 Beaton admits that his use of the rhododendron base was not exclusive. Therefore, summary
15 judgment is appropriate as to the rhododendron base. Again, however, none of Mr. Beaton’s
16 testimony should be considered by the Court. Without Mr. Beaton’s unreliable testimony,
17 the Brittons cannot show any exclusive use of the rhododendron or the laurel.

18 VI. CONCLUSION

19 For the foregoing reasons, the Mussers respectfully request that the Court grant
20 summary judgment in their favor, dismissing portions of the Brittons’ adverse possession
21 claim. The Brittons cannot show actual use of the waxleaf privets. Further, there is a
22 significant two-year gap in the Brittons’ use of the rhododendron and laurel, defeating the
23 continuous use element. Additionally, the Mussers’ regular maintenance of the rhodendron
24 and laurel since August 2007 defeats exclusivity. Therefore, summary judgment should be
25 entered in favor of the Mussers in relation to the rhododendron, waxleaf privets, and laurel.

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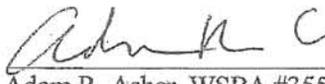
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DATED this 15th day of August, 2013.

SOCIUS LAW GROUP, PLLC

By 
Adam R. Asher, WSBA #35517
Attorneys for Defendants

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Honorable Monica Benton
Hearing Date/Time: September 13, 2013 @ 9:00 a.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK BRITTON and BRIGID
CONYBEARE BRITTON, husband and wife,

Plaintiffs,

v.

PETER M. MUSSER AND TAMARA H.
MUSSER, husband and wife,

Defendants.

NO. 12-2-22451-0 SEA

THIRD DECLARATION OF
ADAM R. ASHER

I, Adam R. Asher, am over the age of 18 years, am competent to testify to the matters set forth herein, and make this declaration of my own personal knowledge and belief.

1. I am one of the attorneys for Defendants Peter M. Musser and Tamara H. Musser.

2. Attached hereto as **Exhibit K** is a true and correct copy of the June 24, 2013 email from Scott Sleight.

3. Attached hereto as **Exhibit L** is a true and correct copy of the revised Britton survey.

4. Attached hereto as **Exhibit M** is a true and correct copy of portions of the Alex Lupenski deposition taken on July 23, 2013.

THIRD DECLARATION OF
ADAM R. ASHER

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5. Attached hereto as **Exhibit N** is a true and correct copy of portions of the Douglas Beaton deposition taken on July 15, 2013.

6. Attached hereto as **Exhibit O** is a true and correct copy of portions of the Brigid Britton deposition taken on April 3, 2013.

I declare under the penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

DATED this 15th day of August, 2013, at Seattle, Washington.


Adam R. Asher

THIRD DECLARATION OF
ADAM R. ASHER
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EXHIBIT K

Adam Asher

From: Scott Sleight <sleight@ac-lawyers.com>
Sent: Monday, June 24, 2013 10:01 AM
To: Adam Asher; stephanw@heckerwakefield.com
Cc: Lawrence S. Glosser; Christina L. Krick
Subject: Supplemental Discovery Response
Attachments: BRITTON_S000001 - BRITTON_S000002.pdf

Adam and Steve:

There has been significant criticism of inclusion of the drip line of the Rhody in the Brittons' adverse possession claim. Inclusion of the drip line has been viewed as an attempt to claim portions of the Mussers' patio that was installed after the survey was prepared. In order to narrow the issues in this case, we have revised the diagram reflecting the Brittons' adverse possession claim to remove the drip line. It includes only the base of the Rhody. The revised diagram is attached. This email and the attached diagram supplements the Brittons' response to Interrogatory #2, 3, 4 and related Requests for Production.

While depositions have not yet been noted, it is my understanding that you intend to take four depositions on July 15, 2013. To date, there have been no settlement discussions and my prior offer to meet to discuss the matter in person was not accepted. We have a Court ordered requirement to engage in dispute resolution in advance of trial. I am inquiring whether the Mussers are willing to schedule a mediation to comply with the Court required dispute resolution in advance of completing additional discovery so that we can see if there is any possibility of resolving the parties' claims before more money is spent on discovery and motion practice. If there is any hope of settlement, it makes sense to conduct a mediation before the parties incur the time and expense of additional discovery and motion practice.

Please advise whether your clients are willing to engage in mediation and if so, we can discuss potential mediators and a date. If not, that is fine and we will march ahead with the deps, hearings and trial. Regards, srs

Scott R. Sleight | Ahlers & Cressman PLLC | 999 Third Avenue, Ste 3800 | Seattle, WA 98104
sleight@ac-lawyers.com | (P) 206.287.9900 | (F) 206.287.9902 | (D) 206.340.4616 | (C) 206.715.5784|Conference
Bridge: 1.877.817.1622 Code 993888

CONFIDENTIAL & ATTORNEY CLIENT COMMUNICATION : If this email was received in error, there was no intent to waive its confidentiality or any privilege. If received in error, please do not read it, notify me and delete the message and any attachments.

LEGAL DESCRIPTION

THAT PORTION OF TRACT 51, "DENNY-BLAINE-LAKE PARK ADDITION TO THE CITY OF SEATTLE", ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 9 OF PLATS, PAGE 85, IN KING COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE SOUTHWESTERLY LINE OF SAID TRACT 51, FROM WHICH POINT THE SOUTHWEST CORNER OF SAID TRACT BEARS SOUTH 15°09'05" EAST A DISTANCE OF 17.00 FEET;
THENCE NORTH 81° 41' 45" EAST A DISTANCE OF 50.25 FEET;
THENCE SOUTH 65° 02' 54" WEST A DISTANCE OF 8.30 FEET;
THENCE SOUTH 24° 03' 44" EAST A DISTANCE OF 0.63 FEET TO A POINT OF CURVATURE TO THE RIGHT HAVING A RADIUS OF 0.20 FEET AND A CENTRAL ANGLE OF 180°00'00";
THENCE SOUTHWESTERLY ALONG THE ARC A DISTANCE OF 0.63 FEET;
THENCE NORTH 24° 03' 44" WEST A DISTANCE OF 0.55 FEET;
THENCE SOUTH 79° 13' 01" WEST A DISTANCE OF 29.64 FEET;
THENCE NORTH 80° 57' 58" WEST A DISTANCE OF 12.91 FEET TO THE POINT OF BEGINNING.

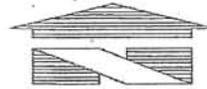


Project Name: Britton
June 21, 2013
OBH
15722L.001
Exhibit: 15722EXH01.dwg

BRITTON_S000001

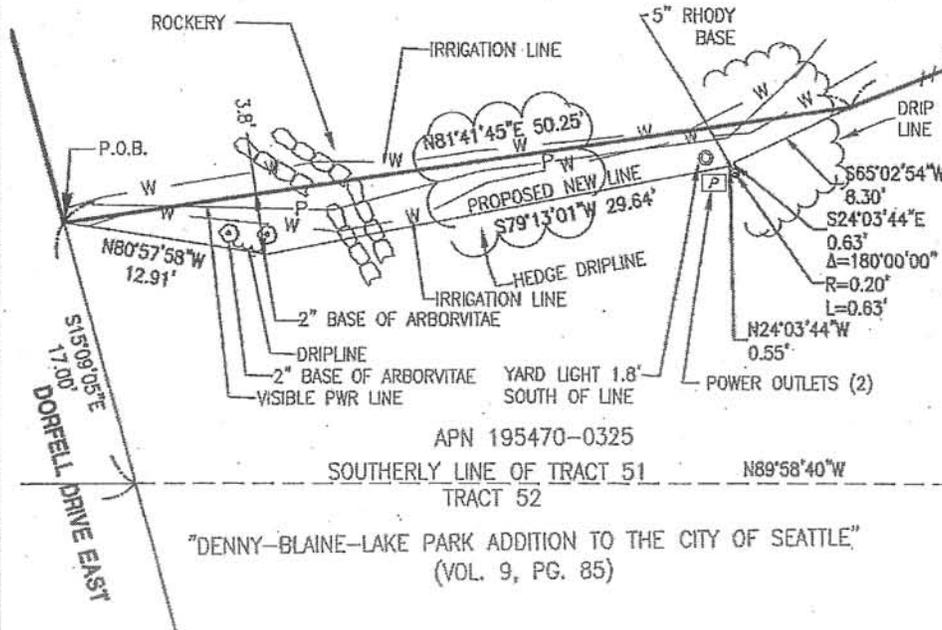
EXHIBIT L

EXHIBIT



1"=10'

3815 E. JOHN ST.
APN 195470-0320



File:P:\15000s\15722\survey\15722EXH01.dwg Date/Time:6/21/2013 10:34 AM OWEN HILLE

SCALE: HORIZONTAL 1"=10' VERTICAL N/A  18215 72ND AVENUE SOUTH KENT, WA 98032 (425)251-6222 (425)251-8782 FAX CIVIL ENGINEERING, LAND PLANNING, SURVEYING, ENVIRONMENTAL SERVICES	For: MARK BRITTON	JOB NUMBER 15722
	Title: LOCATION EXHIBIT	15722L001.DOC SHEET 1 of 1
DRAWN OBH	DATE 06/21/2013	

BRITTON_S000002

EXHIBIT M

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

3
4 MARK BRITTON and BRIGID
5 CONYBEARE BRITTON, husband
6 and wife,
7 Plaintiffs,

CASE NO.
12-2-22451-0 SEA

7 vs.
8 PETER M. MUSSER and TAMARA H.
9 MUSSER, husband and wife,
10 Defendants.

11
12
13 DEPOSITION OF
14 ALEX LUPENSKI

15
16 July 23, 2013
17 9:51 a.m.

18 601 Union Street, Suite 4950

19 Seattle, Washington

20
21
22
23
24 Job No. CS1698343

25 Mark Hovila, CCR No. 2599

1 A. Correct.

2 Q. If you turn the page again, I guess this is
3 now the second page of Exhibit B, off to the right you
4 still see that rhododendron?

5 A. Correct.

6 Q. Okay. What specifically, if anything, do you
7 recall doing with respect to that rhododendron?

8 A. I don't remember anything about that plant.

9 Q. Okay. So you don't recall doing any
10 maintenance on it?

11 A. Not specifically, no.

12 Q. Okay. Looking at the last two photos of
13 Exhibit B.

14 A. Okay.

15 Q. Let's make sure we're looking at the same
16 thing. I'm looking at, just for the record, it's got a
17 Bates number at the very bottom that ends in 049.

18 A. Okay.

19 Q. And then the next page has a Bates number at
20 the bottom that says 036.

21 A. Okay.

22 Q. Do you see those?

23 A. Yes.

24 Q. Do you see the laurel? It's a laurel in these
25 pictures. If you look at the 049, it's kind of centered

1 to the right.

2 A. Yes.

3 Q. Okay. And then if you look at the next one,
4 it's far left.

5 A. Yes.

6 Q. Do you recall doing anything with that bush?

7 A. Not specifically, but as I mentioned in my
8 declaration, it would appear that I would have needed to
9 prune that bush, because otherwise it would have blocked
10 the pathway.

11 Q. So I just want to make sure I understand. So
12 you don't have any specific memory of you trimming it,
13 but you think you would have, otherwise it would have
14 blocked the path?

15 A. That is correct.

16 Q. And in order to trim it to stop it from
17 blocking the path, what side would you have had to trim?
18 The side that's nearest the path?

19 A. The side that's nearest the path.

20 Q. As you sit here today, though, do you recall
21 trimming the top?

22 A. I don't recall.

23 Q. Okay. Do you recall trimming the sides on
24 the, I guess it would be the east and the west?

25 A. I don't recall.

1 Q. And you were there on the Britton property for
2 about two years. I think we talked about '04 to '06,
3 right?

4 A. Approximately, yes.

5 Q. Was there anyone else from Langstraat-Wood on
6 the Britton property at that time, or was it just you?

7 A. I don't recall. I believe it was just me.

8 Q. Okay. Do you recall on the laurel there being
9 an archway, that the laurel kind of arched onto the
10 roof? Do you have any recollection of that?

11 A. Not specifically, no.

12 Q. Okay.

13 A. But the area does -- did seem more open when I
14 visited -- revisited the site with Mr. Sleight.

15 Q. Okay. Looking at the same picture, which is
16 Bates number 049, do you see that bush that's in the
17 middle?

18 A. Yes.

19 Q. Do you recall doing anything with that bush?

20 A. I do not recall.

21 Q. Do you recall whether that bush was even
22 there?

23 A. I do not recall.

24 Q. Okay. I'll have you flip to the next
25 photograph. This is Bates number 036. Do you see the

EXHIBIT N

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

3
4 MARK BRITTON and BRIGID
5 CONYBEARE BRITTON, husband
6 and wife,

Plaintiffs,

CASE NO.
12-2-22451-0 SEA

7 vs.

8 PETER M. MUSSER and TAMARA H.
9 MUSSER, husband and wife,

Defendants.

10
11
12
13 DEPOSITION OF

14 DOUGLAS BEATON

15
16 July 15, 2013

17 8:56 a.m.

18
19 601 Union Street, Suite 4950

Seattle, Washington

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21
22
23 Job No. CS1698339

24
25 Mark Hovila
CCR No. 2599

1 A. After I had spoken to you and signed this,
2 then I got a call from Scott Sleight.

3 Q. And what did you discuss?

4 A. He discussed with me that, you know, he had
5 seen the declaration and he would like to -- he wanted
6 to meet with me on the site with him and Mark.

7 Q. Did you want to do that?

8 A. Not really, but, you know, I mean, to be
9 honest, not -- I didn't really want to be mixed up in
10 the whole situation, so -- but they were, you know,
11 willing to -- it was under my company after -- well,
12 no. I was working with Langstraat-Wood, and
13 Langstraat-Wood, my boss, Erik Wood, told me that I
14 could do it on company time and get paid to do it.
15 So --

16 Q. So in the initial phone call, did you have
17 any substantive discussions about what you did on the
18 Britton property at that time?

19 A. I don't -- I just -- I can't really recall.
20 It's been, I don't know, three months, four months.

21 Q. Okay. Did the topic of you signing a
22 declaration, a supplemental declaration, come up in
23 that phone call?

24 A. I don't believe so.

25 Q. And from the time from the phone call to the

1 time you visited the site, how much time was there in
2 between?

3 A. A week.

4 Q. And was it just one phone call and the site
5 visit or were there multiple phone calls?

6 A. It was just one phone call.

7 Q. Okay. So how did the conversation come up
8 that Erik Wood would let do you it on company time?
9 Was that all figuring out ahead of time or was it in
10 the phone call with Mr. Sleight?

11 A. I don't think it was in the phone call. It
12 wasn't in the phone call at all. It was just my boss
13 basically saying that, you know, because this has to
14 deal with past or previous clients, that he felt some
15 responsibility, that I shouldn't have to spend my
16 personal time taking care of this.

17 Q. Okay. Are you aware that your boss -- your
18 boss is Erik Wood, correct?

19 A. Yes.

20 Q. -- that Mr. Wood send the Brittons an invoice
21 for your time?

22 A. I believe so.

23 Q. Okay. When was that discussed?

24 A. I have -- I don't know.

25 Q. Were you involved in those discussions?

1 A. I don't -- no, I wasn't.

2 Q. Well, you agree that someone had to make some
3 kind of arrangement, correct?

4 A. I guess so, yes.

5 Q. But you weren't involved in those
6 discussions?

7 A. No.

8 Q. Okay. So do you think it would have been Mr.
9 Wood and Mr. Sleight or Mr. Wood and Mr. Britton that
10 would have made those arrangements?

11 A. I believe so.

12 Q. Did the topic of you being paid your normal
13 pay for that site visit come up in your conversation
14 with Mr. Sleight?

15 A. No.

16 Q. So was it just Mr. Wood that was telling you
17 that you were going to be compensated for your time
18 there?

19 A. Yes.

20 Q. Did the conversation of either the Mussers or
21 of me come up in your conversation with Mr. Sleight,
22 that first conversation?

23 A. Yes.

24 Q. Okay. And what was discussed?

25 A. It was just discussed that with -- what you

1 had to do a deposition like you did today, you have to
2 miss work, right?

3 A. Yes.

4 Q. Can you read further down? It's the last one
5 on the first page. Can you read that out loud? It
6 starts with, "He simply."

7 A. "He simply told me that if you try to contact
8 me about this case he will be happy to act on my
9 behalf."

10 Q. And keep reading.

11 A. "I didn't have you come to the site because"
12 --

13 Q. Wait, sorry. We're on different pages here.
14 On the first page on the -- the way that I organized
15 this is the left column is your text messages, the
16 right column is my text messages. If you look at the
17 very bottom of the first page, can you read that full
18 text message?

19 A. "He simply told me that if you try and
20 contact me about this case he will be happy to act on
21 my behalf and I am not to talk to you anymore."

22 Q. Okay. And do you recall sending that?

23 A. Yes.

24 Q. Okay. And did Mr. Sleight say that?

25 A. No.

1 Q. What did he say?

2 A. He didn't say anything.

3 Q. He didn't say that? He didn't tell you that
4 if I tried to contact you, he would be happy to act on
5 your behalf?

6 A. That's correct.

7 Q. So did you just lie about that?

8 A. I just lied about that.

9 Q. And why did you do that?

10 A. I was trying at that time to just stop
11 talking to you and for you to leave me alone.

12 Q. Okay. And did Mr. Sleight tell you that you
13 were not to talk to me anymore?

14 A. No.

15 Q. And did you just lie about that as well?

16 A. Yes.

17 Q. Okay. Is there anything else that you've
18 lied to me about that you can recall?

19 A. No.

20 Q. And why did you lie to me?

21 A. Because I was frustrated at the time and I
22 wanted you to leave me alone.

23 Q. At any time -- I just want to make sure we're
24 clear. At any time did you have any discussions with
25 Mr. Sleight about him helping you or you talking to me

EXHIBIT O

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

3
4 MARK BRITTON and BRIGID,
5 CONYBEARE BRITTON, husband
6 and wife,
7 Plaintiffs,

CASE NO.
12-2-22451-0 SEA

7 vs.
8 PETER M. MUSSER and TAMARA H.
9 MUSSER, husband and wife,
10 Defendants.

11
12
13 DEPOSITION OF
14 BRIGID BRITTON

15
16 April 3, 2013
17 9:30 a.m.

18 999 Third Avenue, Suite 3800

19 Seattle, Washington

20
21
22
23
24 Job No. CS1640230

25 Mark Hovila, CCR No. 2599

1 Q. Okay. So I think you bought your house in
2 October of 2003, is that right?

3 A. Okay. Yeah, no, you're right. It's
4 August -- we bought the house in October 2003, so the
5 trip was August 2004 to August 2005.

6 Q. Okay.

7 A. My mistake. I'm sorry.

8 Q. No, that's fine. I just wanted to make sure.
9 Okay. So you said you had a landscaper that was
10 working there. Is that Erik Wood's company?

11 A. Correct.

12 Q. Do you know when he started?

13 A. He started in May of 2004.

14 Q. Okay. Okay. And so he started the work and
15 then he just continued working for that year while you
16 guys were gone?

17 A. Right.

18 Q. So other than Josephine Lupa and Erik Wood
19 during that time you were gone, anybody else that was
20 regularly at the house?

21 MR. SLEIGHT: This is '04-05?

22 Q. This is while you were in Italy.

23 A. I'm sorry, repeat the question again.

24 Q. Sure. No problem. I previously mentioned
25 while you were gone in Italy, who you had working at