

ORIGINAL

Court of Appeals Cause No. 45116-6 II

STATE OF WASHINGTON

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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KAY JOHNSON and RICK JOHNSON,

Petitioners,

v.

ROY KISSLER and JANIE LUZZI-KISSLER,

Respondents.

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APPELLANTS' REPLY TO RESPONDENTS' BRIEF

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**I. NO “INFERENCE OF PERMISSIVE USE” OR THEORY OF NEIGHBORLY ACCOMMODATION APPLIES HERE.**

The Kisslers’ Response Brief relies primarily upon the “inference of permissive use” and a theory of “neighborly accommodation” which, they claim, would enable the trial court and this Court to find that Gainey’s use of the disputed strip was not hostile at its inception. *Resp. Br.* at 14-24. There are two fundamental problems with this response. First, there was zero evidence in the record from which a court could infer that Fleming and Gainey’s relationship would give rise to an inference of permissive use or neighborly accommodation. Second, the procedural posture of this case would absolutely forbid either of these evidentiary inferences, because it was decided on summary judgment. On summary judgment, the trial court and this Court must draw all evidentiary inferences in the light most favorable to the non-moving party, the Johnsons. The Kisslers’ theories simply do not hold water.

**A. The Response Brief relies primarily upon inapposite case law applying the “presumption of permissive use” arising out of the vacant lands doctrine.**

It has long been the rule in Washington that when neighbors make mutual use of a pathway or road over wild, undeveloped property, their use of the road is presumed to be permissive. *See, e.g., Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669 (1946). The Kisslers’ Response Brief relies heavily upon such cases.<sup>1</sup> For example, the Kisslers, citing

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<sup>1</sup> The Kisslers’ application of the vacant lands cases is problematic because their brief then goes on to treat the possibility of an *inference* of permissive use as a *presumption* that the Johnsons were required to rebut, as will be discussed in the next section.

Northwest Cities Gas Co v. Western Fuel, 13 Wn.2d 75, 123 P.2d 771 (1942), claim: “[w]hen one enters into the possession of another’s property, there is a presumption that he does so with the true owner’s permission and in subordination to the latter’s title.” *Resp. Br.* at 15. The Northwest Cities case does not support a presumption that when one uses another’s land it is with permission, as the Kisslers seem to imply. That case simply held that if a neighbor actually constructs a road across another’s open, unfenced property and made open, notorious continuous use of it, that adverse user acquires a prescriptive easement.

The Kisslers also rely on Roediger v. Cullen, 26 Wn.2d 690, 175 P.2d 669 (1946), which held that if lands are unenclosed and vacant, the use of a right-of-way is permissive: “those settlers traveled back and forth over each other’s premises by common consent and acquiescence.” 26 Wn.2d at 713. The Kisslers quote Roediger out of context: “permissive use may be implied in any situation where it is reasonable by neighborly sufferance or acquiescence.” *Resp. Br.* at 15. Roediger dealt with an alleged prescriptive easement down a footpath that neighbors used across the defendants’ property to access a beach, not with acquisition of ownership via adverse possession.

Cuillier v. Coffin, 57 Wn.2d 624, 358 P.2d 958 (1962), which also figures prominently in the Response Brief, held that when one uses a road or pathway also used by its titled owner in a rural area, it is presumed that “the use was permitted as a matter of neighborly courtesy and was not adverse.” A prescriptive easement is only recognized in circumstances

where one “for his exclusive use, makes a road across the land of another... it is much more persuasive of adverse use.” *Cuillier*, 57 Wn.App 627.

Such cases do not apply here. Gainey was not attempting to establish a prescriptive easement over a vacant property to access her property. Gainey and Fleming owned adjacent developed lots created by a subdivision development process, and Gainey used a portion of Fleming’s lot as though it were part of her own. Permissive-use prescriptive easements created over vacant, undeveloped lands have no application to Dona Gainey’s possession of George Fleming’s land.

**B. The Response Brief attempts to apply the “inference of permissive use” as though it were a presumption that the Johnsons were required to rebut, when there is actually a presumption that Gainey’s use was hostile.**

The Kisslers’ Response Brief, while giving lip-service to the correct term “inference” rather than “presumption,” actually applies an analysis that is essentially a *presumption* of permissive use which, they claim, the Johnsons failed to rebut. Displaying considerable sleight of hand, Kisslers argue that Johnsons failed to present “sufficient” evidence of hostility or “offer any evidence that the use was not permissive” and “failed to produce any evidence that Gainey’s use was initially hostile.” *Resp. Brief* at 16, 18, 22. The Johnsons were never required to rebut any presumption of permissive use, which is essentially where the Kisslers’ argument leads.

In support of this theory, the brief relies heavily upon *Kunkel v. Fisher*, 106 Wn.App 599, 23 P.3d 1128 (2001), which applied the so-called “presumption of permissive use” to developed property. Division I later repudiated its *Kunkel* holding in *Drake v. Smersh*, 122 Wn.App 147, 154, 89 P.3d 726 (2004):

[W]e recognize on reflection that our analysis in *Kunkel* extended the implication of permissive use by neighborly accommodation too far when we applied a presumption of permissive use. At least one legal scholar criticizes *Kunkel* for applying a presumption of permissive use akin to the "vacant lands doctrine" in a case where both pieces of land were developed and in the face of Washington cases establishing that another's use of improved land is presumed hostile or adverse. Because *Kunkel* has been interpreted to apply a presumption of permissive use in prescriptive easement cases involving developed land, we take this opportunity to clarify the rule. In developed land cases, when the facts in a case support an inference that use was permitted by neighborly sufferance or accommodation, a court may imply [sic] that use was permissive and accordingly conclude the claimant has not established the adverse element of prescriptive easements. In contrast, courts should only apply the "vacant lands doctrine" and its presumption of permissive use in cases involving undeveloped land because, in those cases, owners are not in the same position to protect their title from adverse use as are owners of developed property.

*Drake*, 89 P.3d at 730-31. Thus, *Drake* clarified that in the context of undeveloped lands, there is a presumption of permissive use because “in

those cases, owners are not in the same position to protect their title from adverse use as are the owners of developed property.” 122 Wn.App 154.

Indeed, as the *Drake* court mentioned, when it has been proved that the use was open, notorious, continuous, uninterrupted, and for the required time, there is a presumption that the use was adverse (hostile), unless otherwise explained, and “in that situation, in order to prevent another's acquisition of an easement by prescription, the burden is upon the owner of the servient estate to rebut the presumption by showing that the use was permissive.” *Northwest Cities Gas Co. v. Western Fuel Co., Inc.*, 123 P.2d 771, 13 Wn.2d 75, 85 (1942); Stoebuck, 17 Washington Practice at 101 (interpreting Washington law as holding that "if the claimant shows use of another's land that is unexplained and is open and notorious, 'continuous,' and 'exclusive,' there is a 'presumption' that the use was hostile...."), *authorities quoted in Drake* at 153 n. 17.

It is important to distinguish between the evidentiary burdens placed by an inference and a presumption. If there were a *presumption* of permissive use, then the Kisslers’ argument that the Johnsons failed on summary judgment to rebut permissive use might be heard. But because we are dealing with developed properties, there is only the possibility of an *inference* of permissive use, and the burden to provide evidence to support that inference falls on the Kisslers. *Northwest Cities Gas Co.* at 85, discussed *supra*. The hostility element only obliges an adverse possessor to show that she used the property as a true owner would use such property, in view of its nature and location. *Drake v. Smersh*, 122

Wn.App 152. Real Property Deskbook, “Adverse Possession” §64.3(i). Frolund v. Frankland, 71 Wn.2d 812, 431 P.2d 188 (1967), overruled on other grounds in Chaplin v. Sanders, 100 Wn.2d 853 (1984) (not fencing beach and allowing neighbors to use it is typical of a manner in which waterfront owners use beaches.)

**C. No “inference of permissive use” could have been relied upon on summary judgment, because evidentiary inferences had to be resolved in the light most favorable to the Johnsons, the non-moving party.**

The Kisslers’ Response Brief wrongly implies that the Johnsons had to rebut any inference of permissive use in order to prevail on summary judgment. Even if the Kisslers had offered any evidence from which one could infer permissive use, the trial court would not be able to make such an inference on summary judgment because all evidence and evidentiary inferences had to be resolved in the light most favorable to the Johnsons, the non-moving party. Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 169 P.3d 14 (2007).

This Court should decline the Kisslers’ invitation to weigh evidence of hostility. *Resp. Br.*, p. 22-24. Courts do not weigh evidence on summary judgment. The trial court was obliged to view all of the evidence of Gainey’s use of the property under a claim of right in the light most favorable to the Johnsons, the non-moving party, and to resolve any evidentiary inferences in the light most favorable to the Johnsons.

**D. The trial court did not find that Gainey's use of Fleming's land was permissive or pursuant to neighborly accommodation, and the court could not have so found on the evidentiary record before it.**

Contrary to the Kisslers' claims, the trial court did not, in fact, find that Fleming allowed Gainey's possession of the disputed strip as permissive use or neighborly accommodation. Instead, the trial court's decision was based on its finding that Gainey had failed to formalize her adverse possession of the Fleming property by making a formal grant of title to her successor by way of deed:

Summary judgment is granted on adverse possession. The Gainey's assertion or claims of adverse possession now, with no real property transfer to the Sizemores to put the world on notice, fails. The documents that are of record do not support Plaintiffs' claim. The ten year statutory requirement for adverse possession has not been satisfied and is inconsistent with the documents that are of record, and that's what the Court has to rely on, the documents of record.

CP 391-92. *See* A-8 of *Appeal Brief*, and A-5 of *Reply Brief*, Trial Court's Oral Decision. The Kisslers claim that the trial court granted summary judgment because the Johnsons did not present "sufficient evidence" of the hostility element of adverse possession. Neither the trial court decision nor the summary judgment order supports that assertion. The trial court's summary judgment decision shows that the trial court accepted Kisslers' claim, brought for the first time at oral argument, that Gainey did not adversely possess the disputed side-yard strip because she failed to provide the world with record notice of that

claim through deeds to her successor, the Sizemores. The court also seemed persuaded by the Kisslers' claim that the Johnsons had not owned the property long enough to adversely possess it, not understanding that Johnsons' ownership of the property for less than 10 years had no bearing.<sup>2</sup> There is no hint in the trial court decision that the Johnsons failed to prove the hostility element of adverse possession.

Moreover, no evidence in the record would have supported a finding that the use was permissive. The Johnsons presented strong, unrefuted evidence that Gainey's use of the property was hostile, and the Kisslers presented no evidence that it was permissive. The record contains no evidence about Dona Gainey's relationship with George Fleming. All of the Kisslers' arguments about George Fleming's decision to permissively allow Dona Gainey to appropriate his property must be disregarded as wholly lacking in evidentiary basis. The only real evidence that Kisslers have adduced is that Fleming built a fence, and Fleming took a survey. These are not facts sufficient to justify an inference of permissive use. This case is akin to *Lingvall v. Bartmess*, 97 Wn.App. 245, 982 P.2d 690 (1999), and *Drake v. Smersh*, 122 Wash.App 147, 154, 89 P.3d 726 (2004), in both of which the Court of Appeals found a complete lack of evidence before the trial court about the relationship

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<sup>2</sup> The Kisslers' argument at summary judgment was that the Sizemores had permission from Kisslers to use the disputed area. CP 75; CP 86-87; CP 91. Such permissive use could not have commenced until 1996, when the Sizemores purchased the property from Dona Gainey. That was the extent of the Kisslers' arguments regarding permissive use at trial. This is a new argument on appeal.

between the adverse possessor and the property owner that would support an inference of permissive use.

The lack of evidence to support an inference of permissive use in this case is thrown into sharp relief by comparing the facts of Granston v. Callahan, 52 Wn.App. 288, 759 P.2d 462 (1988) upon which the Kisslers rely. The Kisslers claim that “[t]he inference of permissive use as stated in Ganston [sic] is applicable here.” *Resp. Br.* at 17. But the facts of Granston make it totally inapplicable to this case. In Granston, the neighboring properties were owned by brothers who were “as close as two brothers could conceivably be in all aspects of life. They were--they shared everything, had complete confidence and trust in each other...” 52 Wn.App. at 290. Thus, Granston shows evidence of the type of relationship between the adverse possessor and record title owner that allows an inference of permissive use. In that case, testimony of the relationship between brothers William and Edward Granston established a “very, very exceptionally strong bond.” Granston, 52 Wn.App. at 290.

But here, there was no evidence about any relationship at all between Gainey and Fleming, let alone a close or even friendly one. Further, although the Kisslers claim that the Halls allowed Gainey to make permissive use of their land, there was no evidence about the relationship of Gainey and the Halls before the trial court that would have allowed an inference of permissive use. The Kisslers urge that the ethos of sharing in the neighborhood into which the Johnsons moved, thirty years after the fact, is somehow evidence of the relationship between

Gainey and Fleming. *Resp. Br.* at 19. It is not. The permissive use theory does not apply here.

All of the Kisslers' unsupported claims about Gainey's alleged permissive use of Fleming's side yard ignore that evidence of adverse, hostile use, rebuts any presumption or inference of permissive use. *Drake v. Smersh*, 122 Wn.App 152. Here, there was unrefuted evidence before the trial court that Gainey made open and notorious, hostile, exclusive, continuous, adverse use under a claim of right, of George Fleming's property from 1982 until 1996, when she sold her property.

This Court should reject the Kisslers' erroneous and unsupported claim that Gainey did not prove that her "initial use" of the side-yard strip was not permissive.<sup>3</sup> There is no requirement that an adverse possessor prove this negative; indeed, the opposite is true:

Proof that the use by one of another's land has been open, notorious, continuous, uninterrupted, and for the required time creates a presumption that the use was adverse, unless otherwise explained, and, in that situation, in order to prevent another's acquisition of an easement by prescription, the burden is upon the owner of the servient estate to rebut the presumption by showing that the use was permissive.

*Northwest Cities Gas Co. v. Western Fuel Co., Inc.*, 13 Wn.2d 75, 123 P.2d 771 (1942). This presumption of adverse use is applicable to the present case. As discussed below, the Johnsons' evidence established

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<sup>3</sup> This is another new argument on appeal; Kisslers have previously never argued that Gainey's initial use of the property was permissive or what that might mean to the adverse possession claim.

that Gainey's use of the property was open, notorious, continuous, uninterrupted, and for the required time.

There was unequivocal evidence that Mrs. Gainey made hostile use of the side-yard strip, owned by the Flemings, without anyone's permission:

I used that property adjacent to the fence, roughly a three foot wide area now claimed by the Kisslers, abutting the cyclone fence, hostily, [sic] openly, notoriously, continually, exclusively, and under a claim of right during the entire period I owned my property until I sold my property in 1996.

CP 236, lines 19-21. *See* A-2, A-3. This Court should reject the Kisslers' assertion that Gainey's "initial" use of the strip was permissive, because no evidence in the record supports it. She testified:

I continually used the area up to the cyclone fence for my garden. I did not need nor obtain any permission from either the Flemings nor the Halls to use that area. All of the property up to the cyclone fence was mine. I did not need to ask permission from anyone to use my own property...

CP 236, lines 13-18. She also testified:

The cyclone fence shown in the 1984 survey, marked the boundary between my residence on Henderson Bay and the Fleming property; subsequently that fence marked the boundary between my property and the Hall property.

After Fleming sold to Hall in 1992, the fence continued to mark the boundary between the two properties. There was never any debate about that boundary and the Halls and I recognized that the cyclone fence represented the boundary between our two properties.

CP 236, lines 1-6.

Gainey's evidence was unequivocal and unrefuted that she used her side-yard area in a manner that is typical of the way that true owners use such areas. Typically, because side-yard setback requirements prevent constructing improvements in such areas, improvements other than fences are not located in side-yards. Owners plant simple landscaping in such areas and maintain it as Mrs. Gainey testified:

I clear cut all of the native trees growing in the area adjacent to the fence as well as the tall, brushy vegetation. I brought in soil, planted grass, maintained that grass by fertilizing, reseeding and mowing for a period in excess of ten years, beginning in at least 1982. Such use went on in an open, notorious, exclusive manner for a period in excess of 10 years.

CP 236, lines 22-24; CP 237 lines 1-2

Mrs. Gainey testified that she "always maintained the grass up to the fence, mowed it, fertilized it and watered it." CP 259; See A-3. Mrs. Gainey's unrefuted declaration testimony clearly shows that she made hostile use of the side-yard strip beginning in 1982; she made the sort of use of that property that a true owner would make. This Court should reject Kisslers' unsupported claim that Mrs. Gainey did not establish the hostility element of adverse possession because she used it with George Fleming's permission.

**E. Gainey’s activities within the disputed strip were even more open and notorious than those in similar cases where adverse possession was found.**

The Kisslers claim, without citing any authority, that Mrs. Gainey’s use of the property does not “ordinarily rise to the element of adverse possession.” Resp. Br, at 16. This is a totally unsupported argument. Mrs. Gainey’s use of the side-yard is akin to that of the adverse possessor in *Riley v. Andres*, 107 Wn.App. 391, 27 P.3d 618 (2001). *Riley* found that an adverse possessor’s use and possession of a residential property in a golf course community for a ten-year period established an adverse possession claim. The possessor, Riley, landscaped up to an out-of-bounds golf course marker and a stake marking a street curve. Riley planted ornamental plants, installed a sprinkler system, spread beauty bark, watered, pruned the plants and pulled the weeds within the disputed strip.

Here, the actions of Mrs. Gainey were far more aggressive, open, and notorious; she clear-cut large, native, evergreen trees and tall brush, imported soil, graded the area, planted grass and maintained the grass by mowing, fertilizing, reseeding, weeding and watering it. Clear-cutting a neighbor’s property is a brazen act of possession. Moreover, her actions meant that the landscaped area presented a vivid visual contrast with the rest of George Fleming’s property. There is simply no credible argument that her possession was not open and notorious.

Gainey’s activities were also akin to those of Sanders, the adverse possessor in the landmark Washington adverse possession case *Chaplin v.*

Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984). In that case, our Supreme Court concluded that the manicured appearance of Parcel B possessed and maintained by adverse possessor Sanders contrasted with the more unruly property of the record title holder and were sufficient actions to constitute adverse possession of Parcel B. That is the case here as well.

Photographs before the trial court on summary judgment showed a stark contrast between the well-manicured appearance of the lawn Mrs. Gainey had planted in the side-yard area which she had clear-cut, and the untended, wild appearance of George Flemings side-yard that was covered with large trees, tall grasses and weeds. CP 239-242. These photographs were attached to Dona Gainey's declaration.

**F. This Court should ignore the Kisslers' misleading claim that the Johnsons only presented inadmissible evidence of hostility.**

The Kisslers' Response Brief made the disingenuous and incorrect claim that the Johnsons failed to present admissible evidence of the hostility element of adverse possession. *Resp. Br.* at 23. This allegation focuses on an email from Mr. Hall stating that he and the Sizemores had no agreements about boundaries. The Kisslers entirely ignore the strong, unrefuted, admissible evidence of hostile, adverse use set forth in Dona Gainey's two declarations and discussed extensively above. CP 234; CP 259. *See* A-2, A-3.

**II. THE ARGUMENT THAT PERMISSIVE USE IS EVIDENCED BY GAINNEY'S FAILURE TO TRANSFER TITLE TO THE DISPUTED PROPERTY BY DEED IS ABSURD.**

The Kisslers' argument is absolutely nonsensical: that Gainey's failure to explicitly transfer the side-yard strip she adversely possessed to her successors by deed creates the evidentiary inference that her property use was permissive. *Resp. Br.* at 18. As discussed extensively in the Appeal Brief, adverse possession, by its very nature, operates outside the realm of recorded title.

[T]he recording statutes are, by their own terms, inapplicable to titles acquired by adverse possession... A title by adverse possession is acquired through the operation of the statute of limitations and not by any instrument which should have been placed of record.

W.W. Ferrier, Jr., "*The Recording Acts and Titles By Adverse Possession and Prescription*," 14 Cal.L.Rev. 287, 288 (1926). To entertain the Kisslers' argument would be to require that adverse possession be evidenced by a title transfer of ownership. It is well established in Washington law that title to property acquired by adverse possession is passed on to successors-in-interest without any changes to the deeds of the dominant or servient properties. *McCormick v. Sorenson*, 58 Wn. 107, 107 P. 1055 (1910).

Moreover, like the similar impromptu argument made by counsel on oral argument before the trial court, this argument is not properly before this Court because it was not made in the papers on summary judgment. To consider this argument would require this Court to ignore

its duty to view all evidence and evidentiary inferences on summary judgment in favor of the Johnsons, the non-moving party. *See Biggers v. Bainbridge Island*, 162Wn.2d 683, 169 P.3d 14 (2007).

**III. THE STATUTE OF LIMITATIONS BEGINS RUNNING WHEN THE ADVERSE USE BEGINS, NOT WHEN THE OWNER OF THE SERVIENT ESTATE DISCOVERS THE USE OR WITHHOLDS CONSENT.**

The Kisslers present no meaningful response to the Johnsons' claim that Kisslers' predecessor, the Flemings, had a duty to eject Dona Gainey from the disputed property strip before title passed to her by operation of law in 1992. Kisslers' incorrectly argue that the cause of action for ejectment did not arise until "Kisslers ceased permitting the Johnsons' use of the disputed parcel in 2012". *See Resp. Br.* at 26. This argument totally ignores that no discovery rule applies to the 10 year statute of limitations for recovering property, RCW 4.16.020(1), which governs the length of adverse use required for adverse possession. *See J. Broadus, "Washington State Common Law of Surveys and Property Boundaries" §IX p.132.* The Kisslers ignore that Gainey commenced adverse possession of the strip in 1982 and thereby obtained title to it by 1992; thus it was necessary for the Kisslers' predecessors, George Fleming or the Halls, to eject Mrs. Gainey before the 10-year statute of limitations expired in 1992. Flemings' and Halls' failure to eject Gainey by that date caused her to obtain title to that land by adverse possession. Thus, the 10 year statute of limitations precludes any later attempt to eject

the Johnsons from the disputed strip. The Kisslers' efforts were made long after the statute of limitations expired.<sup>4</sup>

**IV. THE KISSLERS' ARGUMENT ON THE STATUTE OF FRAUDS FUNDAMENTALLY MISUNDERSTANDS ITS APPLICATION TO THIS CASE.**

Once title to the disputed strip was vested in Gainey by operation of adverse possession, and she had transferred title to her successor-in-interest Sizemore, Sizemore could not divest himself of title to that strip by entering into an oral agreement with Kissler. Agreements changing or affecting property lines are subject to the Statute of Frauds. "*Real Property Deskbook*," §40.5(2)(g) (3<sup>rd</sup> ed. 1996); *Windsor v. Bourcier*, 21 Wn.2d 315, 150 P.2d 717 (1944). J. Broadus, "*Washington State Common Law of Surveys and Property Boundaries*" §IX. Once title to land becomes vested in an adverse possessor after 10 years of adverse hostile use, "it could not be divested short of what would be required in a case where his title was by deed". *Mugaas v. Smith*, 33 Wn.2d 429 (1949).

The Kisslers' Response Brief shows a fundamental misunderstanding of the application of the Statute of Frauds to this case.

The Johnsons contend that the Trial Court erred because the Statute of Frauds does not apply:  
"[E]ven if the oral agreements under Respondents'

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<sup>4</sup> Once again, this is an argument the Kisslers have made for the first time to this Court; consequently, it is not properly before this Court and should be disregarded.

consent theory existed, they were subject to the Statute of Frauds and, thus, could not have changed title to the land after Gainey acquired it through adverse possession.” Brief at 41. The Trial Court, however, never held that the Johnsons’ claim was deficient due to the statute of frauds. Instead, the Trial Court held that the “documents that are of record” do not support the Johnsons’ claim for adverse possession – meaning on the record before the court on the motion. VRP 6/28/2013, 19-20.

Resp. Br. at 25. The first sentence quoted above shows that the Kisslers do not understand the Johnsons’ argument on appeal. Actually, the Johnsons argue that the trial court erred **precisely because the Statute of Frauds does apply to a portion of the evidence, but the trial court applied it to the wrong evidence.** The Statute of Frauds applies to the alleged, after-the-fact oral agreement between the Sizemores and the Kisslers, which the Kisslers claim show that the use was permissive. Ownership of real property cannot be transferred by oral agreement. That is the correct application of the Statute of Frauds to this case.

The Kisslers’ claim that the trial court did not apply the Statute of Frauds and that the reference to the “documents of record” meant only the pleadings on summary judgment is not only incorrect, but disingenuous. The trial court incorrectly applied the Statute of Frauds to the Johnsons’ evidence of adverse possession. Counsel for the Kisslers explicitly argued to the trial court that title had not transferred from Fleming to Gainey or from Gainey to Sizemore because there was no document making this transfer filed with the recorder’s office:

We have Gainey now claiming that she somehow possessed this property. But, what we have is the very strange fact that Gainey does not transfer that interest to her successors in interest by deed or otherwise. And until this litigation arises, there was no transfer. There is no transfer of this disputed property from Gainey to Sizemore and no transfer from Sizemore ...

...there is nothing in the deeds to show that the disputed property was transferred to the Johnsons.

VRP, June 28, 2013; p. 6, lines 7-19; *See* A-5. That is a clear claim that the Statute of Frauds prevented the transfer of title from Fleming to Gainey or Gainey to Sizemore – a rejection of the concept that title could transfer without a written document. Indeed, the Kisslers appended to their Response Brief before this Court copies of the Statutory Warranty Deed from Fleming to the Halls, as though the content of that written document trumps other evidence about the ownership of the disputed strip – again, an argument relying on the Statute of Frauds.

**V. KISSLERS' ALLEGATION THAT GAINNEY HAD HER OWN BOUNDARY FENCE IS BOTH INCORRECT AND PRESENTED FOR THE FIRST TIME ON APPEAL.**

Kisslers argue that Gainey had her own separate boundary fence. This is false and misleading. Mrs. Gainey testified that after Mr. Fleming put up his boundary fence in 1982, she took her fence down and always treated Mr. Flemings' fence as the boundary fence. Mrs. Gainey's declaration unequivocally states that she dismantled her fence after Mr. Fleming erected his boundary fence. CP 235, lines 6-13; *See* Gainey declaration at A-2. Her only fencing was a dog run which did not mark

her property boundary, and it did not run the entire length of her property. It was simply a dog run connected to her house. CP 235.

**VI. A MANDATORY INJUNCTION TO EVICT WAS NOT PROPERLY BEFORE THE TRIAL COURT ON SUMMARY JUDGMENT.**

The Kisslers incorrectly claim in their response that the trial court properly ordered ejectment of the Johnsons from the disputed property strip and that the Kisslers' summary judgment memorandum, reply and declarations justified the ejectment order. But that is not the case. The Kisslers did not request ejectment in any of those pleadings. CP 72-95. The basis of the ejectment order was a mandatory injunction.

In their answer to second amended complaint and counterclaims, Kisslers requested a mandatory injunction requiring that the Johnsons be required to remove any plants which could threaten their septic system. That is the only part of their counterclaims that address ejectment, and the sole ejectment remedy that Kisslers sought. CP 185-195. *See A-1* to this Reply. This Court should disregard the Kisslers' unsupported arguments about ejectment that were not made to the trial court. They have failed to present a direct, forthright response to the Johnsons' contention that they had no opportunity to respond to a request for a mandatory injunction. There is not a single mention of ejectment in the Kisslers' summary judgment pleadings; the trial court simply issued a mandatory injunction order without giving the Johnsons the slightest chance to address that issue. CP 448 ¶2. CR 56 contemplates that the non-moving party must be given a full chance to respond to summary judgment claims.

**VII. THE KISSLERS ARE NOT ENTITLED TO ATTORNEY'S FEES ON APPEAL.**

Claiming that this appeal is frivolous, the Kisslers ask this Court to award them attorney fees on appeal. *Resp. Br.* at p. 34. As demonstrated above, however, this appeal is the polar opposite of frivolous. Indeed, the need for this appeal was created when the Kisslers' attorney misled the trial court at oral argument by arguing that Gainey's failure to convey the disputed strip of property by deed to the Sizemores meant she had not adversely possessed the Fleming property. *See* VRP, June 28, 2013; p. 6, lines 7-19; *See* A-5; *see* quotation and discussion of that misleading oral argument in Section VI, *supra*.

Counsel further misled the court at oral argument and necessitated this appeal by making arguments to the trial court that were clearly at odds with long-standing Washington case law on adverse possession. He argued that the Johnsons could not claim adverse possession because the Kisslers had agreed to allow the Sizemores to use the strip by permissive, neighborly accommodation, in disregard of the fact that the time period relevant to the adverse possession claim predated any such claimed agreement. He also argued, contrary to clear Washington authority, that the Johnsons could not adversely possess the property because they had not owned it for ten years:

...we have the Gainey's now umpteen years later, long years after they sell the property claiming that, well, maybe they did, and the Johnsons coming in and it's been less than 10 years since they owned the property, claiming that they have adversely possessed the property.

VRP Volume 1, June 28, 2013; *See* A-5.

By requesting attorney fees on appeal and asking this Court to uphold the trial court award, counsel is essentially asking to be rewarded for misleading the trial court and causing this appeal.

Perhaps a circumstance that should be considered in evaluating this request for appellate attorney fees is that Kisslers' attorney has on appeal repeated a misleading argument. His primary response brief argument, that Fleming allowed Gainey to use the disputed strip, is unsupported by any evidence in the trial record. Further, the law of adverse possession does not allow a presumption of permissive use in the context of developed property. *See Drake v. Smersh*, 122 Wn.App 154. This Court should deny an award of attorney fees to Kisslers. Rather, it is appropriate to award the Johnsons their attorney fees because the unrefuted evidence they presented to the trial court on summary judgment should have allowed them to prevail on their adverse possession claim, and Kisslers' counsel misled the trial court on summary judgment and has made frivolous arguments, unsupported by the law and totally outside their summary judgment record on appeal.

**VIII. THE TRIAL COURT’S AWARD OF ATTORNEY’S FEES MUST BE REVERSED BECAUSE THE KISSLERS WERE NOT THE SUBSTANTIALLY PREVAILING PARTY.**

Under the circumstances of this case, it is difficult to claim that Kisslers were the substantially prevailing party and entitled to their attorney fee award. The trial court, without a request in the summary judgment pleadings, granted a mandatory injunction evicting the Johnsons from the disputed strip. CP 448, ¶2. The Johnsons were ordered by the trial court to remove their sprinklers and trees, but, because the Kisslers did not request injunctive relief in their summary judgment pleadings, the Johnsons had not had the slightest chance to address the claim for mandatory injunction. CP 72-83. When the trial court apparently concluded that Kisslers were the substantially prevailing party, they had only, in actuality, prevailed on a single theory – and that was due only to the trial court’s error in dismissing the adverse possession claim. At the point in time when the Kisslers claimed they were the “substantially prevailing party,” the Johnsons had taken a voluntary nonsuit without prejudice on all other claims. See trial court Order dated July 19, 2013. CP 446, ¶6; CP 375.

Washington case law clearly states that attorney fees cannot be awarded in the context of a voluntary nonsuit unless the claim on which the nonsuit is taken allows attorney fees by a statute or contract. See *Hawk v. Branjes*, 97 Wn.App. 776, 986 P.2d 841 (1999). None of the claims that Johnsons dismissed by voluntary nonsuit had a contractual or statutory entitlement for such fees. Additionally, the Ninth Circuit and

United States Supreme Court have unanimously held that when a plaintiff takes a voluntary nonsuit and dismisses a claim without prejudice, the other party does not “prevail” on such claims because the voluntary nonsuit without prejudice does nothing to change the material relationship of the parties.<sup>5</sup> Fees for time spent on such claims should not have been awarded to the Kisslers. CP 404-406; CP 412-420.

The Kisslers benefited from the Johnsons’ dismissal of their remaining claims without prejudice by voluntary nonsuit. The Johnsons’ claims for injunctive relief, nuisance and trespass had become moot because the Kisslers took corrective action, apparently in response to the lawsuit. The mooted claims were based on the Kisslers installing a curb that blocked the Johnsons’ use of a parking space on their property, and on the Kisslers’ directing a pipe toward the Johnson property which discharged water. CP 307, ¶2.19-2.23. After the Johnsons asserted these claims, and shortly before the motion for summary judgment, the Kisslers removed the offending curb and water pipe. *See* declaration of Kay Johnson. CP 432, lines 6-13.

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<sup>5</sup> *Buckhannon Board & Care Home v. West Virginia Dept. of Health & Human Services*, 532 U.S. 598, 604, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001)(based on definition of “prevailing party” in Black’s Law Dictionary, determination of prevailing party must be based on material alteration of parties’ relationship, and dismissal without prejudice does not do so because the defendant remains subject to the risk of refile.); *Oscar v. Alaska Dept. of Educ. Early Development*, 541 F.3d 978, 981 (9<sup>th</sup> Cir. 2008) (“because a dismissal without prejudice is not a decision on the merits and the plaintiff was free to refile... such dismissal does not alter the relationship of the parties and establish the defendant as the prevailing party.”) *See also Cadkin v. Loose*, 569 F.3d 1142 (9<sup>th</sup> Cir. 2009) (voluntary dismissal without prejudice does not confer prevailing party status under the Copyright Act.)

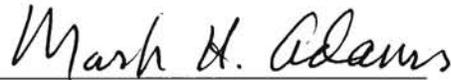
The Kisslers claim that the Johnsons' various claims were "intertwined" thus preventing the trial court from segregating those claims, but the bills of Mr. Branfeld and Mr. Hester clearly identified fees that were not incurred in conjunction with the adverse possession claim. Moreover, Judge Hickman had denied attorney fees associated with the voluntary nonsuit of the mental suffering claim and dismissal of Kissler Management – but Mr. Branfeld ignored Judge Hickman's orders and requested attorney fees for those matters. *See* CP 319; CP 21; CP 226; CP 118; CP 198-99.

**IX. CONCLUSION.**

This Court should rule that the trial court erroneously dismissed the Johnsons' adverse possession claim, reverse the trial court decision on ejectment and attorney fees, and order that summary judgment be entered in favor of the Johnsons because they presented unrefuted evidence supporting their adverse possession claim.

DATED this 3<sup>rd</sup> day of February, 2014.

Respectfully submitted,



Mark Harris Adams, WSBA No. 1895  
Attorney for Appellants  
Land Use & Property Law, PLLC  
Post Office Box 2509  
Gig Harbor, WA 98335  
Telephone: (253) 853-1806

**APPENDICES**

- A-1.....Kisslers' Answer to Second Amended Complaint and Counterclaims
- A-2.....Declaration of Dona Gainey dated June 8, 2013
- A-3.....Declaration of Dona Gainey dated June 14, 2013
- A-4.....Trial Court Order dated July 19, 2013
- A-5.....VRP from Summary Judgment dated June 28, 2013

July 01 2013 2:46 PM

Hon. Vicki Hogan

KEVIN STOCK  
COUNTY CLERK  
NO: 12-2-12095-7

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

KAY JOHNSON and RICK JOHNSON,  
husband and wife and their marital  
community,

Plaintiffs,

v.

ROY KISSLER and JANIE LUZZI-  
KISSLER, husband and wife and their  
marital community, and LEONARD  
WELTER and KATHRYN WELTER,  
husband and wife and their marital  
community,

Defendants.

No. 12 2 12095 7

ANSWER TO SECOND AMENDED  
COMPLAINT AND COUNTERCLAIMS

COME NOW the Defendants ROY KISSLER and JANIE LUZZI-KISSLER, by and through their attorneys, GARY H. BRANFELD of Smith Alling, PS, and by way of Answer to Plaintiff's Second Amended Complaint (the "Complaint") allege as follows:

1. Defendants admit the allegations in Paragraphs 1.1 and 1.2 of the Complaint.
2. Defendants deny the allegations in Paragraph 1.3 of the Complaint.
3. Defendants admit and deny the allegations in Paragraph 2.1 of the Complaint

as they previously admitted and denied such allegations.

Answer to Second Amended Complaint  
Page 1

**SMITH ALLING** PS  
ATTORNEYS AT LAW

1102 Broadway Plaza, #403  
Tacoma, Washington 98402  
Telephone: (253) 627-1091  
Facsimile: (253) 627-0123

A-1

1           4.       Defendants deny each allegation of Paragraphs 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8,  
2 2.9, 2.10, 2.11, 2.12, 2.13, 2.14, 2.15, 2.16, 2.17, 2.18, 2.19, 2.20, 2.21, 2.22, 2.23, 2.24, 2.25,  
3 2.26 and 2.27 of the Complaint.

4           5.       Defendants admit and deny the allegations in Paragraph 3.1 of the Complaint  
5 as they previously admitted and denied such allegations.

6           6.       Defendants deny the allegations in Paragraphs 3.2, 3.3, and 3.4 of the  
7 Complaint.

8           7.       Defendants admit and deny the allegations in Paragraph 4.1 of the Complaint  
9 as they previously admitted and denied such allegations.

10          8.       Defendants deny the allegations of Paragraphs 4.2 through 4.7, inclusive, of  
11 the Complaint.

12          9.       Defendants admit and deny the allegations in Paragraph 5.1 of the Complaint  
13 as they previously admitted and denied such allegations.

14          10.      Defendants deny the allegations set forth in Paragraphs 5.2 through 5.8 of the  
15 Complaint.

16          11.      Defendants admit and deny the allegations in Paragraph 6.1 of the Complaint  
17 as they previously admitted and denied such allegations.

18          12.      Defendants deny the allegations set forth in Paragraphs 6.2 through and  
19 including Paragraph 6.10 of the Complaint.

20          13.      Defendants admit and deny the allegations in Paragraph 7.1 of the Complaint  
21 as they previously admitted and denied such allegations.

22          14.      Defendants deny the allegations set forth in Paragraphs 7.2 through and  
23 including Paragraph 7.6 of the Complaint.

1           **And By Way of Affirmative Defenses, Defendants allege as follows:**

2           15. Plaintiff Rick Johnson is not a real party in interest and no relief should be  
3 afforded to him.

4           16. Plaintiffs' claims are barred by the doctrines of waiver, estoppel, consent and  
5 license.

6           17. Plaintiffs' claims are barred by the doctrine of unclean hands.

7           18. The statute of limitations for adverse possession was tolled by the consent or  
8 agreement of prior contiguous property owners or by the consent or agreement of Defendants  
9 and one or more prior contiguous property owners.

10          19. All of Plaintiffs' claims pertaining to adverse possession were previously ruled  
11 upon and dismissed by this court, by way of summary judgment.

12          20. Any pipe directing water flow through a corrugated pipe, from the Defendants'  
13 property onto the Plaintiffs' property, was placed at the time of the development of the  
14 Defendants' home and has been continuously in use since that time. To the extent that such  
15 pipe diverts water from Defendants' property onto the Plaintiffs' property, the Defendants  
16 have a prescriptive right to such diversion.

17          21. Defendants have a common law right to divert water from their property onto  
18 the Plaintiffs' property.

19           **And By Way of Defendant's First Counterclaim, Defendants Allege as Follows:**

20          22. Plaintiff Kay Johnson, formerly known as Kay Truitt, is the owner of record of  
21 the real property and improvements legally described on Exhibit A to this Answer, which is  
22 incorporated herein by this reference. This property is hereinafter referred to as the "Johnson  
23 Parcel."

1           23. Kay Johnson acquired the Johnson Parcel on or about September 10, 2007, by  
2 a Deed, recorded under Pierce County Auditor's File No. 200709100646, from David and  
3 Judy Sizemore.

4           24. Defendants are the owners of record of the real property and improvements  
5 legally described on Exhibit B to this Answer, which is incorporated herein by this reference.  
6 This property is hereinafter referred to as the "Kissler Parcel."

7           25. Defendants acquired the Kissler Parcel on or about November 30, 2004, from  
8 Clifford and Wendy Hall by Deed recorded under Pierce County Auditor's File No.  
9 200411300775.

10          26. In March of 1982, the then owners of the Johnson Parcel and the Kissler Parcel  
11 executed and recorded reciprocal Easements for the purpose of ingress, egress and utilities.  
12 The Easement was recorded under Piece County Auditor's File No. 8204120144. This  
13 appears to be the Easement which is referenced in Paragraphs 1.2 and 1.3 of the Complaint.

14          27. There is a chain link fence between the Johnson Parcel and the Kissler Parcel  
15 (the "Fence"). The Fence appears to have been constructed by one of the predecessors in title  
16 to the Defendants at a time when the Johnson Parcel was owned by Albert and Dona Gainey.  
17 At the time of its construction, the owners of the Kissler Parcel and the owners of the Johnson  
18 Parcel knew and agreed that the fence was not the true boundary line between the two  
19 properties.

20          28. There is a strip of land averaging a few feet in width between the Fence and  
21 the true boundary line separating the Kissler Parcel and the Johnson Parcel. This area is  
22 hereinafter referred to as the "Disputed Parcel." The legal description of the Disputed Parcel  
23 is set forth on Exhibit C to this Answer and is incorporated herein by this reference.

1           29.     Following the construction of the Fence, the Johnson Parcel was sold to David  
2 and Judy Sizemore, on or about September 3, 1996. The Deed transferring title to the  
3 Johnson Parcel from Gainey to Sizemore was recorded under Pierce County Auditor's File  
4 No. 9609030271.

5           30.     During the period that Kissler and Sizemore were the owners of the Kissler and  
6 Johnson Parcels, respectively, these parties knew that the Fence did not constitute the true  
7 boundary between the Johnson Parcel and the Kissler Parcel. Defendants and the Sizemores  
8 agreed that the Sizemores could plant certain vegetation along the fence line. The agreement  
9 was made in part to assure the Kisslers that roots from the plantings along the Fence line  
10 would not interfere with the septic system for the Kissler property which is located on the  
11 same side of the Kissler Parcel as is the Fence, and within a few feet of the Fence.

12           31.     Plaintiffs had actual knowledge that the Fence was not placed on the actual  
13 boundary line when Kay Johnson acquired the Johnson Parcel.

14           32.     Defendants had a good neighborly relationship with Plaintiff's immediate  
15 predecessor in title, the Sizemores. Defendants allowed the Sizemores to park their vehicles  
16 along the roadway, partially on the Defendant's property. This was with the consent of the  
17 Kisslers and with the understanding and agreement that this did not allow for a prescriptive  
18 easement or for any other change in title through adverse possession.

19           33.     When the Plaintiffs exhibited repeated unneighborly conduct, the Defendants  
20 Kissler withdrew this consent to use a portion of their road and property for parking of the  
21 Johnsons' vehicles.  
22  
23

1           34.     Defendants had and have the right to bar Plaintiffs from parking on the Kissler  
2 Parcel and further had the right to bar Plaintiffs from parking within an easement across the  
3 Kissler Parcel which denominated use is for ingress, egress and utilities.

4           35.     Some railroad ties, which are used in landscaping on the Kissler Parcel, may  
5 protrude into the Disputed Parcel, but do not protrude into the Johnson Parcel.

6           36.     Defendants are entitled to the entry of a Decree quieting title to the Disputed  
7 Parcel in the Defendants as against all claims and causes of action of the Plaintiffs.

8           37.     Defendants are entitled to the entry of a Judgment as against the Plaintiffs  
9 herein for defending against the adverse possession claims asserted by Plaintiffs. Such fees  
10 are allowed by the provisions of RCW 7.28.083(3).

11           38.     This Court has heretofore entered an Order granting Summary Judgment to the  
12 Defendants which provided in relevant part:

13           1. Defendants' Motion for Summary Judgment Dismissing Plaintiff's Claims of  
14 Adverse Possession as against these named Defendants is hereby granted.

15           2. Title in and to the lands and premises of the Disputed Parcel are hereby quieted  
16 in Defendants Roy Kissler and Janie Luzzi-Kissler. The legal description of the  
17 Disputed Parcel is:

18           Parcel between lot line and fence on Lot 2:

19           Commencing at the Southernmost corner of Lot 2, as shown on  
20 Short Plat No. 77-623, filed with the Pierce County Auditor, in  
21 Pierce County, Washington; thence North 37°03'33" West 164.35  
22 feet along the Southwesterly line of said Lot 2 to a point on an  
23 existing fence line and the point of beginning; thence along said  
existing fence line South 47°48'06" East 10.32 feet; thence South  
38°57'16" East 9.85 feet; thence South 37°45'54" East 29.50 feet;  
thence South 36°59'49" East 66.42 feet; thence South 37°45'54"  
East 34.28 feet to the Southeasterly end of said existing fence;  
thence South 52°56'27" West 2.96 feet to a point on said  
Southwesterly line of Lot 2; thence along said Southwesterly line of  
Lot 2, North 37°03'33" West 150.17 feet to the point of beginning.

1 Situate in the County of Pierce, State of Washington.

2 Containing 367 square feet or 0.0084 acres, more or less.

3 3. Plaintiffs shall forthwith remove any and all trees and other plantings and  
4 improvements which they have constructed within the Disputed Area, and shall  
5 not place any further improvements or plantings within such area.

6 **And By Way of Defendant's Second Counterclaim, Defendants Allege as Follows:**

7 39. Defendants reallege Paragraphs 22 through 38 of Defendants' First  
8 Counterclaim.

9 40. In the event that this court shall determine that the Disputed Parcel or any  
10 portion thereof should be quieted in Plaintiffs, then Defendants are entitled to the entry of  
11 Judgment against Plaintiffs for the value of any improvements within the Disputed Parcel,  
12 together with the prorata share of the property taxes charged as to the Disputed Parcel. Such  
13 award is allowed by the provisions of RCW 7.28.08.

14 **And By Way of Defendant's Third Counterclaim, Defendants Allege as Follows:**

15 41. Defendants reallege Paragraphs 22 through 38 of Defendants' First  
16 Counterclaim.

17 42. Plaintiffs have recently plants certain plants within the Disputed Parcel which  
18 threaten the integrity of the Defendants' septic system. The threat arises from the likely  
19 growth of the roots of such plants.

20 43. It is likely that the roots to the plants within the Disputed Parcel will grow into  
21 the Kissler Parcel. Should this occur, there will be damage to the septic system on the Kissler  
22 Parcel.

1           44. Defendants are entitled to an Order and Judgment from this Court requiring the  
2 Plaintiffs to remove any plants from along or within the Disputed Parcel which will or which  
3 could threaten the Defendant's septic system. Such mandatory injunction is necessary in  
4 order to avoid the failure of the Defendant's septic system. A failure of such septic system  
5 would create a danger to the Kissler Parcel and to the Puget Sound.

6           45. This Court has heretofore entered such an Order. Such Order should become  
7 part of the final order entered by this Court.

8           **WHEREFORE, Defendants pray for Judgment, as follows:**

9           1. For the entry of an Order dismissing all claims of the Plaintiffs, with prejudice.

10           2. For the entry of an Order and Decree quieting title of the Disputed Parcel in  
11 Defendants as against all claims and causes of action of Plaintiffs.

12           3. For the entry of Judgment as against Plaintiffs for Defendants' costs and  
13 expenses of litigation.

14           4. For the entry of Judgment as against Plaintiffs for Defendants' reasonable  
15 attorney's fees.

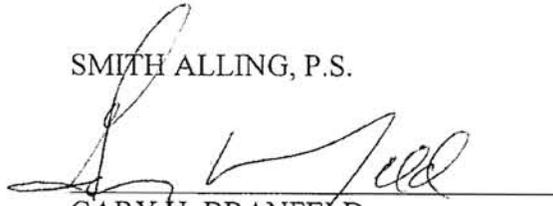
16           5. In the event that the Disputed Parcel is quieted in Plaintiffs, for the entry of  
17 judgment against the Plaintiffs for the reasonable value of all improvements within the  
18 Disputed Parcel and for the prorata share of all real estate taxes that have been paid by  
19 Defendants as to the Disputed Parcel.

20           6. For the entry of an injunction requiring the Plaintiffs to remove any plants  
21 along and in the Disputed Parcel which will or could damage the Defendant's septic system.

22           7. For Judgment for such other and further relief as the court may deem just an  
23 appropriate.

1 Dated this 1st day of July, 2013.

2 SMITH ALLING, P.S.

3  
4 

5 GARY H. BRANFELD

6 WSBA # 6537

7 Attorney for the Defendants Kissler

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**EXHIBIT A**

**Legal Description of Property of Kay Johnson**

Lot 1 of Pierce County Short Plat Number 77-623, according to the Plat recorded September 13, 1977, in Volume 19 of Short Plats at Page 66 in Pierce County, Washington.

TOGETHER WITH Tidelands of the second class as conveyed by the State of Washington, abutting thereon.

ALSO TOGETHER WITH those non-exclusive easement rights granted under Reciprocal Easement Agreement recorded December 2, 1977, under Recording Number 2782762

Situate in the County of Pierce, State of Washington.

**EXHIBIT B**

**Legal Description of Property of Roy and Janie Kissler**

Lot 2 as shown on Short Plat No. 77-623, filed with the Pierce County Auditor, in Pierce County, Washington.

TOGETHER with tidelands of the Second Class as conveyed by the State of Washington, lying in front of, adjacent to or abutting thereon.

SUBJECT TO: This conveyance is subject to covenants, conditions, restrictions and easements, if any, affecting title, which may appear in the public record, including those shown on any recorded plat or survey.

Situate in the County of Pierce, State of Washington

## EXHIBIT C

### Disputed Parcel

Parcel between lot line and fence on Lot 2:

Commencing at the Southernmost corner of Lot 2, as shown on Short Plat No. 77-623, filed with the Pierce County Auditor, in Pierce County, Washington; thence North  $37^{\circ}03'33''$  West 164.35 feet along the Southwesterly line of said Lot 2 to a point on an existing fence line and the point of beginning; thence along said existing fence line South  $47^{\circ}48'06''$  East 10.32 feet; thence South  $38^{\circ}57'16''$  East 9.85 feet; thence South  $37^{\circ}45'54''$  East 29.50 feet; thence South  $36^{\circ}59'49''$  East 66.42 feet; thence South  $37^{\circ}45'54''$  East 34.28 feet to the Southeasterly end of said existing fence; thence South  $52^{\circ}56'27''$  West 2.96 feet to a point on said Southwesterly line of Lot 2; thence along said Southwesterly line of Lot 2, North  $37^{\circ}03'33''$  West 150.17 feet to the point of beginning.

Situate in the County of Pierce, State of Washington.

Containing 367 square feet or 0.0084 acres, more or less.

A-1

HONORABLE VICKI L. HOGAN  
JUNE 28, 2013  
9:00 AM

PIERCE COUNTY SUPERIOR COURT  
FOR THE STATE OF WASHINGTON

**KAY JOHNSON and RICK JOHNSON,**  
husband and wife and their marital  
community,

Plaintiffs,

v.

**ROY KISSLER and JANIE LUZZI-  
KISSLER,** husband and wife and their  
marital community, and **KISSLER  
MANAGEMENT INC.**

Defendants.

No. 12-2-12095-7

**DECLARATION OF DONA GAINNEY  
MATHEWS IN SUPPORT OF  
RESPONSE TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

I am over the age of 18 and have true and personal knowledge of the following facts and can testify about them:

Before giving this Declaration, I reviewed the declarations of Mr. Sizemore and Mr. Kissler.

I last viewed the home in which Johnsons reside in September of 1996.

I built the home at 7223 120<sup>th</sup> Street NW in the Gig Harbor area on Henderson Bay in which Kay and Rick Johnson now reside. I purchased the property from the Pease's in 1977 and began building my house and moved in 1978. Before I moved in, I fenced one side of my property on the North side a with chain link or cyclone fence line down one side and partially

Declaration of Dona Gainney Mathews-1

LAW OFFICE OF  
JANE RYAN KOLER, PLLC  
5801 Soundview Drive, Suite 258  
P.O. Box 2509 - Gig Harbor 98335  
TEL: (253) 853-1806 - FAX: (253) 851-6225

A-2

1 across the bulkhead

2 I also built the garage and mother-in-law apartment above after I had moved into my  
3 home. I built my main house 4 years before George Fleming, the Kisslers' predecessor,  
4 constructed his home. Mr. Fleming built his house in 1982, upon which he fenced his entire  
5 property in cyclone / chain-link, which enclosed his entire property

6 Because Mr. Fleming fenced his property in 1982, I did not need my portion of chain-link  
7 / cyclone fence and needed to remove it entirely to put in the drain line for the septic system to  
8 connect the mother-in-law apartment we had built above the garage to the septic system,  
9 connecting it to the main house.

10 The cyclone fence shown on the 1984 Townsend-Chastain survey, was installed by Mr.  
11 Fleming at the time that he constructed his home in 1982, and once Mr. Fleming put in his  
12 cyclone fence in 1982, I took the fence I had put in down. I made a dog run out of the piece of  
13 chain-link / cyclone fence which is viewable on the 1984 Townsend-Chastain survey.

14 As you can see from the survey, there was no other boundary fencing left on my  
15 property from 1982 onwards. I had a low, ornamental, white picket fence to mark the entrance  
16 to my property. But that fence did not mark the boundary between my property and the  
17 Fleming-Hall property. Flemings' chain-link fence, from 1982 on, was the only boundary fence.

18 The dog run was connected to my house and included the shed on the north side of my  
19 home. The dog run was a chain-link / cyclone area on the side of my home to keep my dogs  
20 off of the water and from leaving my property. The dog run did not go down to the bulkhead or  
21 up to the top of the road because I did not want my dogs to go down the slope and have  
22 access to the water or roam the neighborhood

23 My dog run was placed on my land without any regard for property boundaries as it was  
24 attached to my home. I never had a wood fence on my land marking the property boundaries.

25  
Declaration of Dona Garney Mathews-2

LAW OFFICE OF  
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1 The cyclone fence shown on the 1984 survey marked the boundary between my  
2 residence on Henderson Bay and the Fleming property. subsequently that boundary marked  
3 the boundary between my property and the Hall property.

4 After Fleming sold to Hall in 1992, the cyclone fence continued to mark the boundary  
5 between the two properties. There was never any debate about that boundary, and the Halls  
6 and I recognized that the cyclone fence represented the boundary between our two properties.

7 There was never any controversy about the boundary of the property I owned on  
8 Henderson Bay with either the Flemings or the Halls.

9 Mr. Kissler's claim that the Fleming fence does not mark the boundary between the  
10 properties is incorrect. The only fencing that marked the boundaries between the two  
11 properties from 1982 onwards was Mr. Flemings, the dog run I constructed in 1982 had  
12 nothing to do with any property boundaries.

13 I continuously used the area up to the cyclone fence for my garden. I did not need nor  
14 obtain any permission from either the Flemings nor the Halls to use that area. All of the  
15 property up to the cyclone fence was mine. I did not need to ask any permission from anyone  
16 to do anything on my property up to the fence line of Mr. Fleming. I parked on the driveway at  
17 the entrance to my property on occasion if the driveway was slippery. I did not need to ask  
18 anyone to use my own property, including the driveway, in any way that I wished.

19 I used that property adjacent to the fence, roughly a 3 foot wide area now claimed by  
20 the Kisslers, abutting the cyclone fence, hostily, openly, notoriously, continually, exclusively,  
21 and under a claim of right during the entire period I owned the property until I sold it in 1996.

22 As the attached photographs show, I clear-cut all of the native trees growing in the area  
23 adjacent to the fence as well as tall, brushy vegetation. I brought in soil, planted grass,  
24 maintained that grass by fertilizing, reseeding and mowing for a period in excess of 10 years  
25

1 beginning in at least 1982. Such use went on in an open, notorious, exclusive manner for a  
2 period in excess of 10 years.

3 I loved my garden and have some photographs of it as Exhibit 1 to this declaration. I  
4 always maintained my garden. But, when my former husband left me in 1991, I was left on my  
5 own with 4 children, 2 of which were under the age of 5. During that difficult time I worked as a  
6 dental hygienist 6 days a week. I became a single mother raising children by myself. After a  
7 few years, it became too much and I was forced to put my home on the market as part of the  
8 divorce. During that time, and to the best of my ability, I did as much as I could to keep my  
9 garden and home orderly. I did maintain my garden and grass closest to the home, however  
10 the pictures that Mr. Sizemore has provided only show the side of the garage which was not  
11 located close to the home at all. I did as much as I could with the areas closest to the home  
12 due to the difficulties of raising children and working full time 6 days a week. I had really  
13 hoped that no one would buy my beautiful home in which my children and I resided. I fully  
14 disclosed any defects or maintenance, such as the plywood deck in need of repair, when I  
15 finally sold the home in 1996 to the Sizemores. I very much loved that home and garden and it  
16 broke my heart to sell it.

17 The easement filed under Pierce County Recording No. 2782762 between Pease, my  
18 predecessor, and Halsens, the predecessor of the Welters who own property next to the  
19 Johnsons, gave the owners of Lot 1, which I purchased, access over a 15 foot wide easement  
20 over Lot 2, now owned by the Kisslers.

21 The easement was necessary because the road, 120<sup>th</sup> Street NW, which provided  
22 access to my area, did not connect with my property, but ended at the Fleming-Hall-Kissler  
23 property. The Kisslers and their predecessors are able to gain access off that road.

24 The driveway to my property during the period I used the 15 foot wide access easement  
25 which encumbered the Fleming-Hall-Kissler property, was configured differently than the

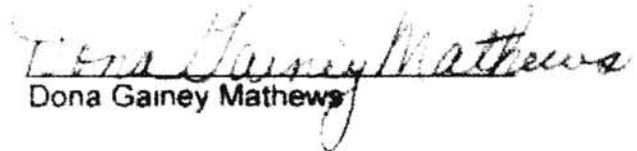
1 present driveway which serves the Johnson property. I based that conclusion on photographs  
2 which Kay Johnson has shown me of her home.

3 Although Mr. Sizemore's Declaration talks about taking down a wood fence, the only  
4 wood fence was the decorative picket fence.

5 The Welters have never gained access to their property by using the access easement  
6 traveling over the driveway of my property. The Welters have always used the private road to  
7 gain access to their property as their driveway did not connect with mine, their only use of my  
8 driveway would have been for boat ramp access as our driveways were not connected. The  
9 Sizemores and Welters later changed the driveway/boat ramp entrance from one side of the  
10 property to the other side. Based on the photographs which Kay Johnson has shown me, this  
11 appears to have straightened out the driveway entrance to the boat ramp. The old 1977  
12 access easement became a road leading to nowhere. This observation is based on  
13 photographs provided by Kay Johnson.

14 I declare under penalty of perjury that the foregoing is true and correct.

15 DATED this 8<sup>th</sup> day of June, 2013 at Gig Harbor, Washington

16   
17 Dona Gainey Mathews  
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Declaration of Dona Gainey Mathews: 5

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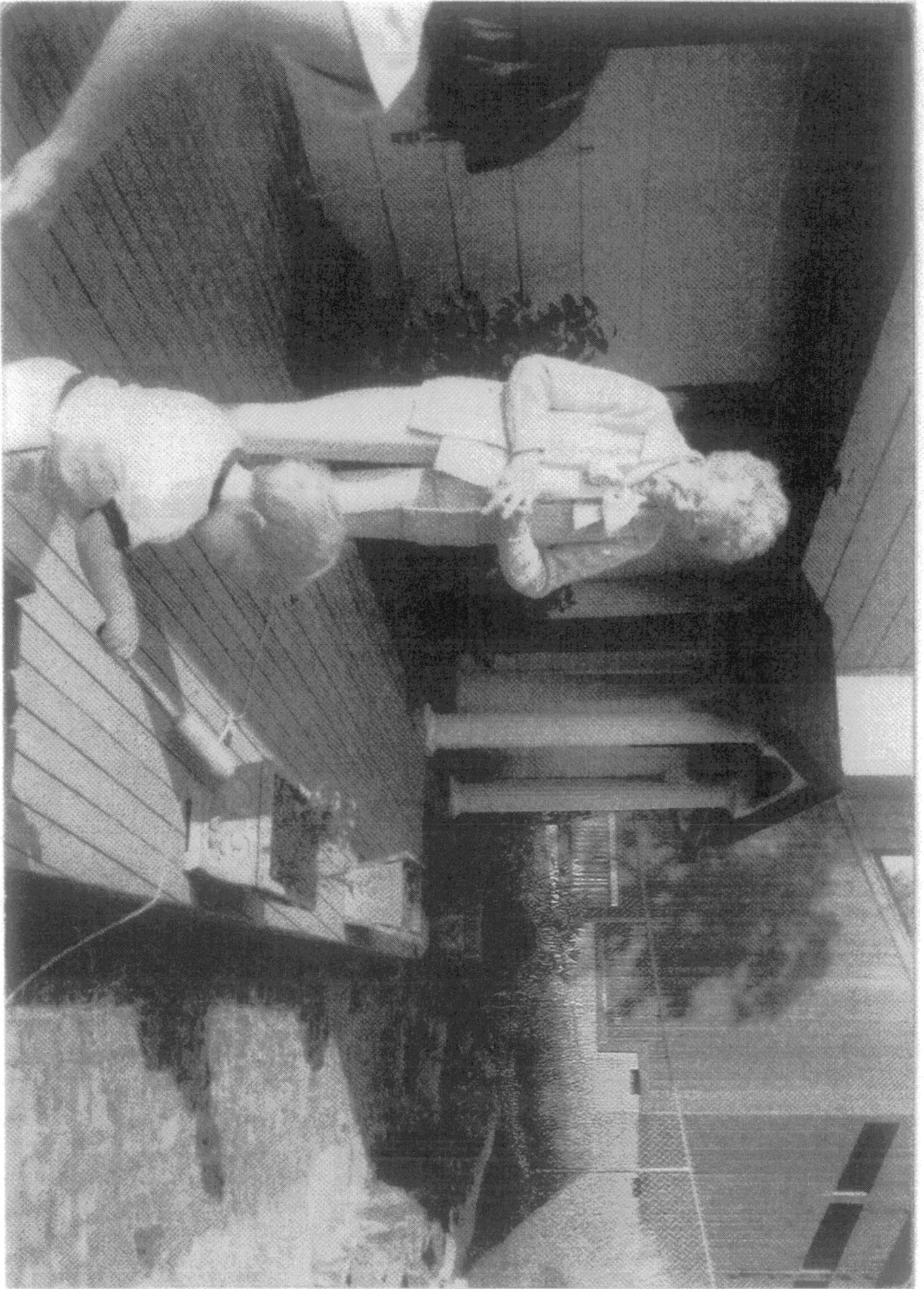
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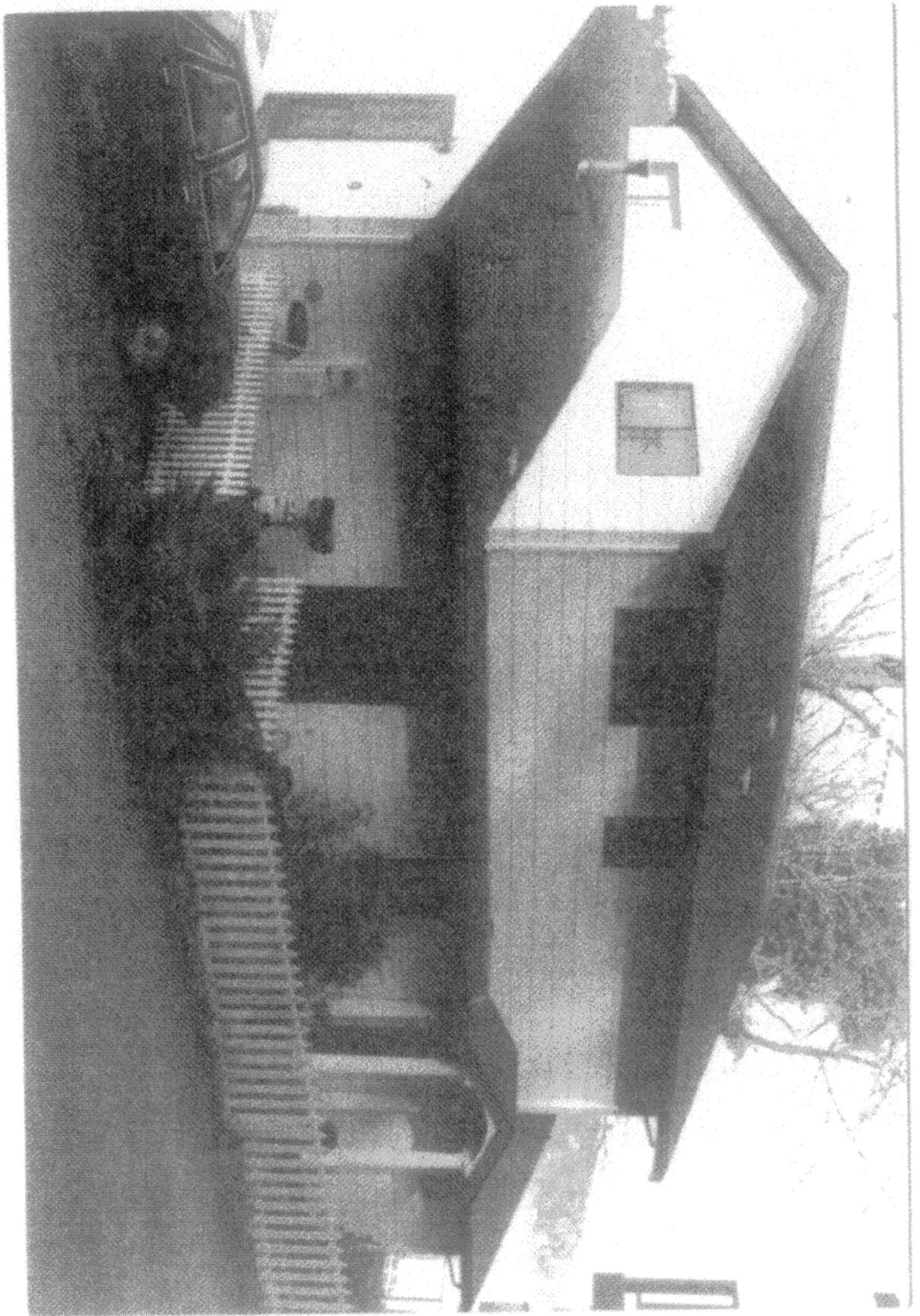
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HONORABLE VICKI L. HOGAN  
JUNE 28, 2013  
9:00 AM

PIERCE COUNTY SUPERIOR COURT  
FOR THE STATE OF WASHINGTON

**KAY JOHNSON** and **RICK JOHNSON**,  
husband and wife and their marital  
community,

Plaintiffs,

v.

**ROY KISSLER** and **JANIE LUZZI-  
KISSLER**, husband and wife and their  
marital community, and **KISSLER  
MANAGEMENT INC.**

Defendants.

No. 12-2-12095-7

**SUPPLEMENTAL DECLARATION OF  
DONA GAINNEY MATHEWS**

I am over the age of 18 and have true and personal knowledge of the following facts  
and can testify about them:

I am attaching photographs which show my yard. I took these photos while I lived in my  
home.

They show that I always maintained the grass up to the fence and weeded it, mowed it,  
fertilized it and watered it.

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

DATED this 14 day of June, 2013, at Gig Harbor, WA.

  
Dona Gainney Mathews

Supplemental Declaration of Dona Gainney Mathews-1

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5801 Soundview Drive, Suite 258  
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TEL: (253) 853-1806 - FAX: (253) 851-6225

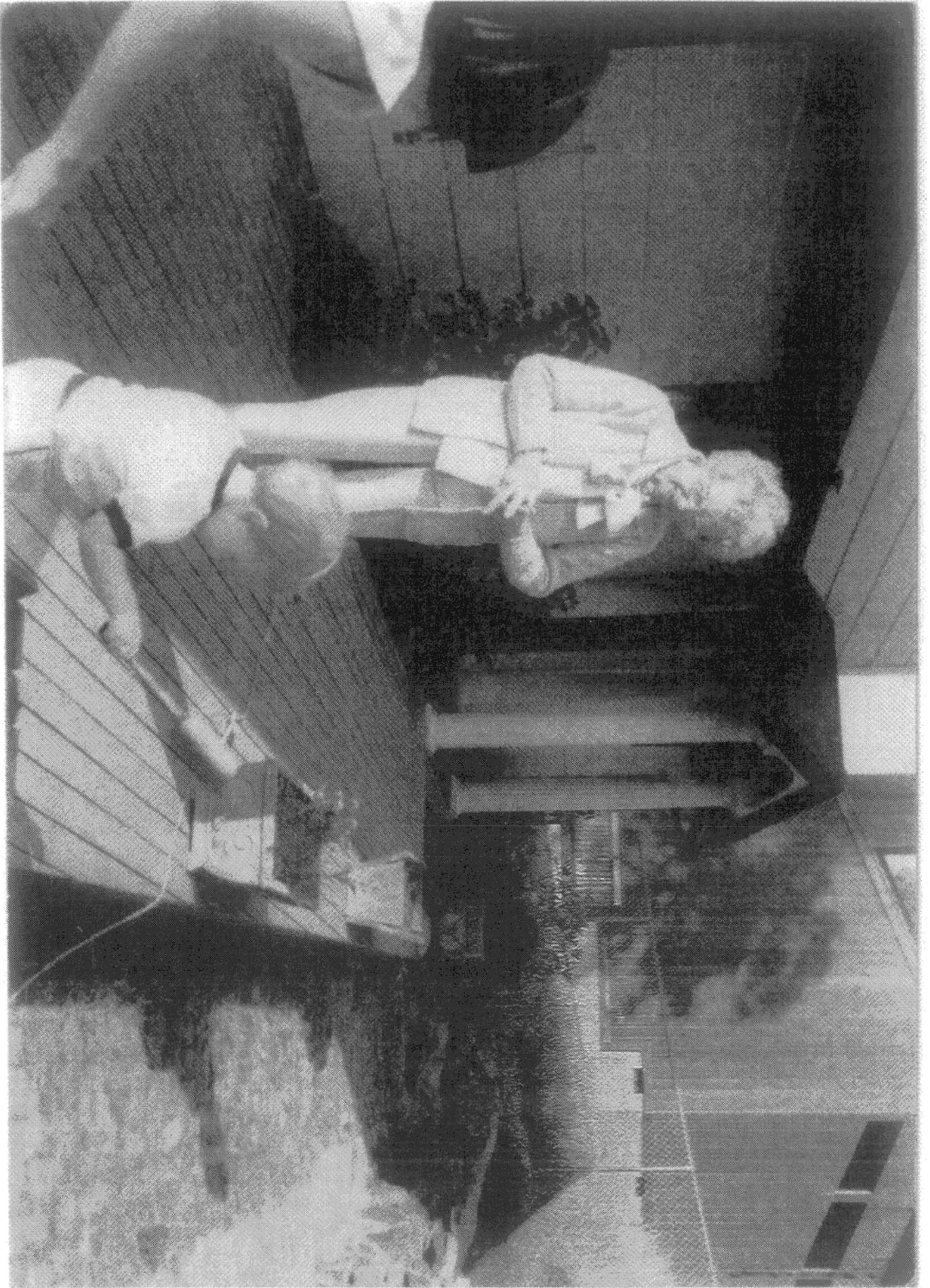
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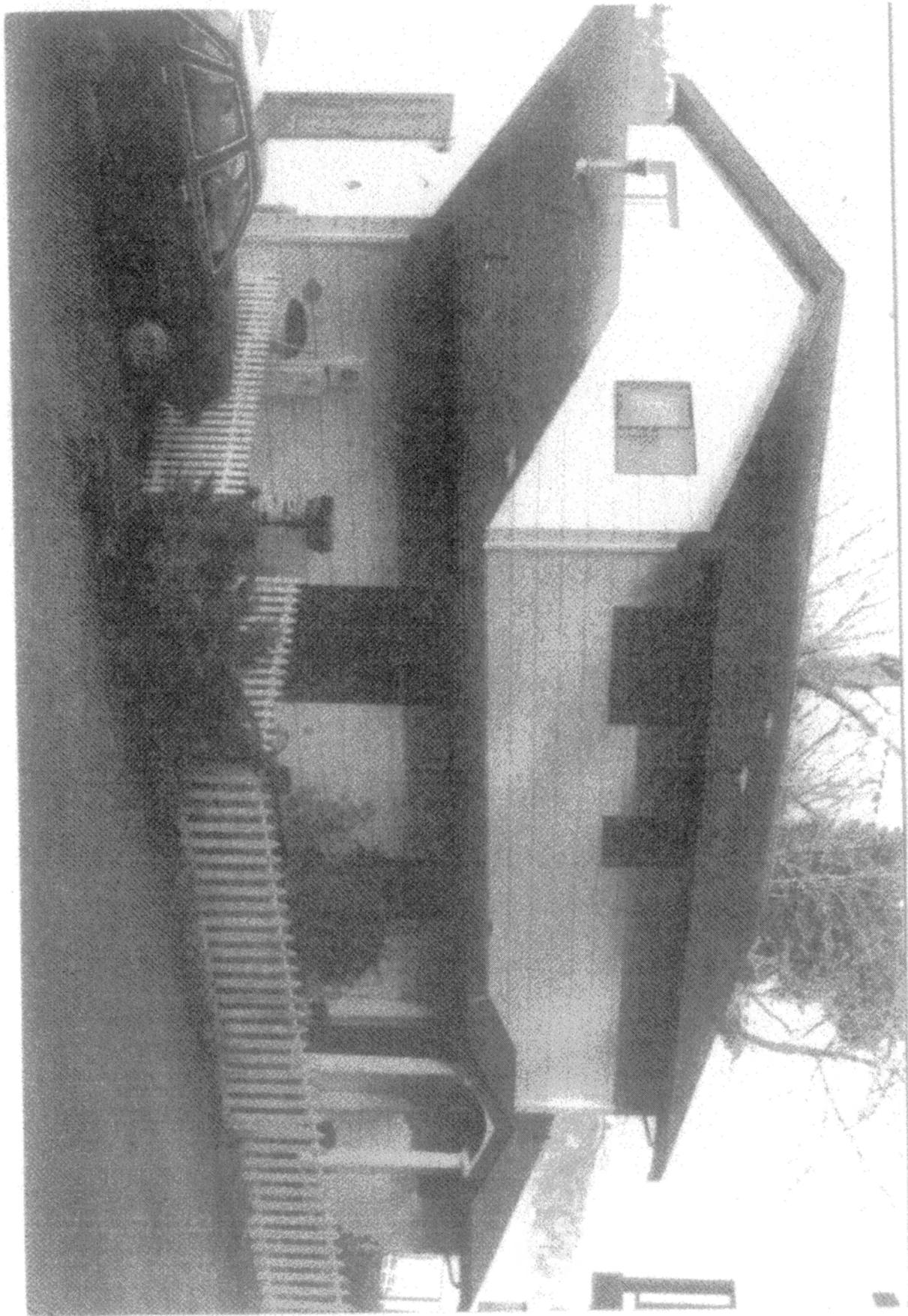
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12-2-12095-7 40899351 JDDQT 07-22-13

Hon. Vicki L. Hogan  
Hearing Date: July 19, 2013  
Time: 9:00 a.m.

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

KAY JOHNSON and RICK JOHNSON,  
husband and wife and their marital  
community,

No. 12 2 12095 7

Plaintiffs,

JUDGMENT AND DECREE

v.

ROY KISSLER and JANIE LUZZI-  
KISSLER, husband and wife and their  
marital community, and KISSLER  
MANAGEMENT, INC.,

Defendants.



JUDGMENT SUMMARY

- A. Judgment Creditors: Roy Kissler and Janie Luzzi-Kissler, husband and wife
- B. Judgment Debtors: Rick Johnson and Kay Johnson, husband and wife
- C. Abrev. Legal Desc. Ptn. of Lot 2, Short Plat No. 77-623. Full leg. desc. on page 3.
- D. Reasonable Attorney's Fees: ~~\$ 33,564.25~~ 29,220.30
- E. Costs: \$ 5,046.75
- F. Total Amount of Judgment: ~~\$ 38,711.00~~ 34,267.05
- G. Judgment shall bear interest at: 12% per annum
- H. Attorney for Judgment Creditors: Gary H. Branfeld

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1 THIS MATTER came on regularly for hearing upon the Defendants' Motion for  
2 reasonable attorney's fees and costs.

3 Defendants Kissler appeared by and through their attorney, GARY H. BRANFELD of  
4 Smith Alling, P.S., and the Plaintiffs appeared by and through their attorney, JANE KOLER.

5 This Court has heretofore entered its Order Granting Defendant's Motion for  
6 Summary Judgment as to Plaintiffs' claims of adverse possession and Defendant's claim to  
7 Quiet Title. Plaintiffs have heretofore sought an order dismissing all of their remaining  
8 claims by way of non-suit. It appearing to the Court that all issues have been resolved by the  
9 Order of this Court or by voluntary dismissal, this matter is now ripe for adjudication of the  
10 application of fees and costs for the entry of a final judgment.

11 The Court has reviewed the material filed herein in support of the application for fees  
12 and costs and in opposition thereto. The Court has also heard and considered the argument of  
13 counsel.

14 Now, therefore, it is hereby ORDERED, ADJUDGED AND DECREED that:

15 1. Title in and to the lands and premises of the Disputed Parcel are hereby quieted  
16 in Defendants Roy Kissler and Janie Luzzi-Kissler. The legal description of the Disputed  
17 Parcel is:

18 Parcel between lot line and fence on Lot 2:

19 Commencing at the Southernmost corner of Lot 2, as shown on  
20 Short Plat No. 77-623, filed with the Pierce County Auditor, in  
21 Pierce County, Washington; thence North 37°03'33" West 164.35  
22 feet along the Southwesterly line of said Lot 2 to a point on an  
23 existing fence line and the point of beginning; thence along said  
existing fence line South 47°48'06" East 10.32 feet; thence South  
38°57'16" East 9.85 feet; thence South 37°45'54" East 29.50 feet;  
thence South 36°59'49" East 66.42 feet; thence South 37°45'54"

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East 34.28 feet to the Southeasterly end of said existing fence; thence South 52°56'27" West 2.96 feet to a point on said Southwesterly line of Lot 2; thence along said Southwesterly line of Lot 2, North 37°03'33" West 150.17 feet to the point of beginning.

Situate in the County of Pierce, State of Washington.

Containing 367 square feet or 0.0084 acres, more or less.

2. Plaintiffs shall forthwith remove any and all trees and other plantings and improvements which they have constructed within the Disputed Area. Plaintiffs and their successors and assigns shall not place any further improvements or plantings within the Disputed Area.

3. Defendants are awarded their reasonable attorney's fees as allowed by statute in the amount of ~~\$39,564.25~~ <sup>29,220.20</sup>. Such sum shall be in addition to any other amounts heretofore been awarded against Plaintiffs in this lawsuit.

4. Defendants are awarded their court costs in the amount of \$5,046.75.

5. The total amount of the Judgment rendered herein, in favor of Defendants Roy and Janie Luzzi-Kissler is ~~\$38,611.00~~ <sup>34,267.05</sup>.

6. All other claims, cross claims, counterclaims and causes of action in this

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lawsuit are dismissed, without prejudice.

DONE IN OPEN COURT this 19 day of July, 2013.

Vicki L. Hogan  
Vicki L. Hogan, Judge

PRESENTED BY:

[Signature]  
Gary H. Branfeld  
WSBA No. 6537  
Attorney for Defendants



APPROVED AS TO FORM AND  
NOTICE OF PRESENTMENT WAIVED  
BY:

[Signature]  
Jane Koler  
WSBA No. 13541  
Attorney for Plaintiffs

Court 4.581  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

---

KAY JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Superior Court
	)	No. 12-2-12095-7
ROY KISSLER,	)	
	)	
Defendant.	)	

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**VERBATIM TRANSCRIPT OF PROCEEDINGS**

June 28, 2013  
Pierce County Superior Court  
Tacoma, Washington  
Before the  
**HONORABLE VICKI L. HOGAN**

Raelene Semago  
Official Court Reporter  
930 Tacoma Avenue  
334 County-City Bldg.  
Department 5  
Tacoma, Washington 98402

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A P P E A R A N C E S

FOR THE PLAINTIFF:

JANE RYAN KOLER  
Attorney at Law  
P.O. Box 2509  
Gig Harbor Washington 98335-4509

FOR THE DEFENDANT:

GARY HOWARD BRANFELD  
Smith Alling PS  
1102 Broadway Suite 403  
Tacoma Washington 98402-3526

A-5

1 BE IT REMEMBERED that on Friday, June 28, 2013,  
2 the above-captioned cause came on duly for hearing before  
3 the **HONORABLE VICKI L. HOGAN**, Judge of the Superior Court  
4 in and for the County of Pierce, State of Washington; the  
5 following proceedings were had, to wit:

6  
7 <<<<<< >>>>>>

8  
9 THE COURT: All right. Well, here is where I  
10 think we are. First of all, I bet this would be no  
11 surprise to both of you, but on the civil side real  
12 property disputes are the second most litigated disputes  
13 in Superior Court. They are as volatile and emotional as  
14 those involving the placement of children. And I preface  
15 my comments because the Court certainly appreciates the  
16 vigor with which everybody is pursuing this case.

17 Summary Judgment is granted on adverse  
18 possession. The Gainneys' assertion or claim of adverse  
19 possession now with no real property transfer to the  
20 Sizemores, to put the world on notice, fails. The  
21 documents that are of record do not support Plaintiff's  
22 claim. The ten-year statutory requirement for adverse  
23 possession has not been satisfied, and is inconsistent  
24 with the documents that are of record. And that's what  
25 the Court has to rely on, the documents of record. And I

1 appreciate that the Gainey's assert now, but that is  
2 belied by the Sizemores' assertion, albeit -- well,  
3 intervening between the Johnsons ownership from  
4 Gainey/Sizemore to Johnson. So I am prepared to sign  
5 your order. I don't believe that this resolves, though,  
6 the case completely.

7 MR. BRANFELD: It doesn't, Your Honor. Is the  
8 Court reserving the issue of attorney's fees?

9 THE COURT: Yes, I am not making any ruling on  
10 that today.

11 MR. BRANFELD: Okay.

12 THE COURT: The Court is not prepared to do so  
13 for a number of reasons. I focused exclusively on all the  
14 cases that you both cited, and in going through those  
15 cases, reading them for myself just to make sure that I  
16 felt comfortable with what the specific holdings were.  
17 Because, obviously, this is a very difficult situation and  
18 decision for everyone, so I don't know.

19 MR. BRANFELD: What I would ask the Court to  
20 do is in paragraph four on line three, just simply say  
21 "reserved".

22 THE COURT: All right.

23 MR. BRANFELD: Thank you, Your Honor.

24 THE COURT: I am going to ask though,  
25 Ms. Kohler, I don't know if you have had a chance to look

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over this order before I sign it?

MR. KOLER: I haven't.

THE COURT: So I will go ahead and let you look it over. You can go in the conference room outside. I don't think our next group is coming until 10:40, or maybe 10:30. I will have to look. Or you can use the jury room.

MR. BRANFELD: Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. BRANFELD: Do we know who is getting your calendar yet, Your Honor?

THE COURT: No. And if I knew, I may not tell you.

MR. BRANFELD: Thank you, Your Honor.

MR. KOLER: Thank you.

(Court at recess.)

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

KAY JOHNSON,

Plaintiff,

vs.

ROY KISSLER

Defendant.

)  
)  
) Superior Court  
) No. 12-2-12095-7  
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)

REPORTER'S CERTIFICATE

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF PIERCE )

I, Raelene Semago, Official Court Reporter in the State of Washington, County of Pierce, do hereby certify that the forgoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

Dated this 2nd day of July, 2013.



RAELENE SEMAGO, CCR, RPR, CMRS  
Official Court Reporter  
CCR #2255

**A-5**

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FILED  
FEB -4 11:12 AM  
STATE OF WASHINGTON  
BY CA

Court of Appeals No. 45116-6 II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

---

KAY JOHNSON and RICK JOHNSON,

Appellants

v.

ROY KISSLER and JANIE LUZZI-KISSLER,

Respondents

---

DECLARATION OF SERVICE

---

Mark Harris Adams  
WSBA No. 1895  
Attorney for Appellants

Land Use & Property Law, PLLC  
Post Office Box 2509  
Gig Harbor, WA 98335  
(253) 853-1806

## DECLARATION OF SERVICE

The undersigned hereby declares, under the penalties of perjury of the laws of the State of Washington, as follows:

That I am over the age of 18, not a party in the above-entitled action, and have personal knowledge of the following:

On the 3<sup>rd</sup> day of February, 2014, I placed in the USPS Priority Mail at the address listed below, a true and correct copy of "*Appellants' Reply to Respondents' Brief*" to:

Washington State Court of Appeals, Div. II  
950 Broadway  
Suite 300, MS TB-06  
Tacoma, WA 98402-4454

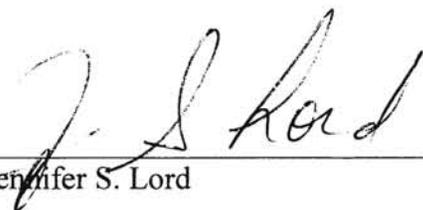
and to:

Gary Branfeld  
SMITH ALLING PS  
1102 Broadway Plaza  
Suite 403  
Tacoma, WA 98402

And a courtesy copy was placed in the USPS Priority Mail to the following non-appearing parties at the address listed:

Leonard and Kathryn (Kay) Welter  
7227 120<sup>th</sup> Street NW  
Gig Harbor, WA 98332

DATED this 3<sup>rd</sup> day of February, 2014, at Gig Harbor, Washington.

By: 

\_\_\_\_\_  
Jennifer S. Lord