

ORIGINAL

Court of Appeals Cause No. 45116-6 II

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

KAY JOHNSON and RICK JOHNSON,

Petitioners,

v.

ROY KISSLER and JANIE LUZZI-KISSLER,

Respondents.

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BRIEF OF APPELLANT

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I. INTRODUCTION

Mr. and Mrs. Johnson, the Petitioners, purchased property in Pierce County that included, on their side of a chain-link fence, a three-foot-wide strip of property, complete with in-ground sprinkler system, mature plantings, and manicured grass, all of which had been established, used, and tended by their predecessors-in-interest dating back to at least 1982. This three-foot-wide strip of property, however, was described in the deed of their neighbors, Respondents Kissler. In the course of an extended dispute over use of a boat ramp, use of parking spaces, and other disagreements, the Kisslers informed the Johnsons that the three-foot-wide strip belonged to the Kisslers and the Johnsons were no longer allowed to use it.

In response, the Johnsons filed this lawsuit, including a claim for adverse possession of the three-foot-wide strip that their predecessors had continually used and improved as part of the yard belonging to the Johnsons. Respondents brought a counterclaim for quiet title and ejectment. The trial court ruled on summary judgment that the Johnsons' adverse possession claim failed because the predecessor-in-interest who established the adverse use had not included the three-foot-wide strip in the deed that she granted to her immediate successor-in-interest. This appeal followed.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No 1:

The trial court committed error by dismissing Petitioners' adverse possession claim on grounds that their predecessor who adversely possessed the disputed property failed to give the world record notice of her ownership in recorded deeds conveying the property to her successors. The trial court decision ignored that the most fundamental characteristic of adverse possession is that it exists outside the realm of recorded title.

No. 2:

The trial court committed error by entering summary judgment based on reasoning that was not contained in the motion for summary judgment itself and had never been briefed by the parties. Instead, the trial court granted summary judgment based on reasoning advanced by Respondents' counsel for the first time at oral argument.

No. 3:

The trial court committed error by failing to rule that Respondents' theory of consent could not defeat the adverse possession claim; after 10 years of adverse use, title passed to Petitioners' predecessor Gainey by operation of law and title to the disputed property strip vested in her, and any apparent consent by later parties was illusory and irrelevant.

No. 4:

The trial court committed error by failing to rule that the statute of frauds in Washington caselaw prevented the parties' predecessors from changing property boundaries using casual oral agreements; a written agreement and quit claim deed would have been required to divest Gaine's title to the strip after title to it had passed by operation of law.

No. 5:

The trial court committed error by entering an order ejecting Petitioners from the disputed property when the 10-year statute of limitations governing such an ejectment claim expired in 1992; the use complained of began in 1982.

No. 6:

The trial court committed error by granting injunctive relief and ordering Petitioners to rip out their shrubs and automatic sprinkler system, when Respondents did no briefing whatsoever in support of their request for injunctive relief, and Civil Rule 56 promises Petitioners the full and fair opportunity to respond to summary judgment requests, including the opportunity to ask for posting of a bond in connection with injunctions.

No. 7:

The trial court committed error by failing, on summary judgment, to view evidence and evidentiary inferences in a light most favorable to

the Petitioners, the non-moving party. If the trial court had so viewed the evidence, it would have recognized an evidentiary inference that any alleged oral agreements may have been newly-minted.

No. 8:

The trial court committed error by granting summary judgment when genuine issues of material fact existed: whether Gainey's actions were sufficient to adversely possess the property, and whether there were oral boundary agreements.

No. 9:

The trial court committed error by awarding attorney fees and costs to the Respondents without entering any findings or conclusions to support the award, including whether the Respondents were indeed a "prevailing party" in the meaning of RCW 7.28.083 and under what statute attorney fees and costs were authorized. The trial court committed error by awarding attorney fees and costs to the Respondents without requiring Respondents' attorneys to segregate out their fees and present for payment only the fees associated with the specific basis upon which the court ruled for Respondents: the adverse possession claim, which are the only fees which Petitioners could lawfully be required to pay.

Issues Pertaining to Assignments of Error

No 1:

Does the doctrine of adverse possession require that the adverse possessor give the world notice through recorded deed documents of her ownership by adverse possession, or lose the ability to pass on that ownership to her successors?

No. 2:

May the trial court grant summary judgment based on reasoning that is outside the scope of the summary judgment pleadings and has been advanced for the first time at oral argument, without allowing the non-moving party to brief the issue?

No. 3:

Can the deed-owner of property retroactively regain title to property that has been adversely possessed by entering oral agreements giving the adverse possessor's successors-in-interest permission to use the disputed property?

No. 4:

Do Washington's legal requirements for changing property boundaries, such as the statute of frauds and quit claim deeds, prevent changing the property boundary by oral agreement once title becomes vested in an adverse possessor?

No. 5:

Was the Respondents' counterclaim for ejectment and quiet title barred by the statute of limitations, RCW 4.16.020, where the acts complained of began in 1982, and did the trial court err by ejecting Petitioners and quieting title in the Respondents?

No. 6:

Did the trial court's duty, on summary judgment, of viewing all evidence and evidentiary inferences in a light most favorable to the non-moving party forbid the trial court from concluding that the 10-year period for establishing adverse possession had not been met and that Petitioners had not established a viable adverse possession claim?

No. 7:

Did the trial court commit error by granting summary judgment when material facts were in dispute about ownership of the disputed strip and material facts were in dispute about the existence of the alleged oral boundary agreements?

No. 8:

Did the trial court err by granting Respondents' injunctive relief and eviction claim when Respondents had presented no legal arguments supporting that request for injunction?

No. 9:

Did the trial court improperly award attorney fees and costs to the Respondents beyond that which was allowed by statute, and was the court's failure to determine whether Respondents were the "prevailing party" reversible error?

III. STATEMENT OF THE CASE

This case involves a dispute over ownership of a roughly three-foot-wide strip of property (hereinafter "the disputed property") located between the homes of Petitioners (the Johnsons) and Respondents (the Kisslers) and demarcated by a fence on the Respondents' property and by landscaping and a sprinkler system installed by the Petitioners' predecessors-in-interest, the Gainneys and the Sizemores. CP 236, lines 19-20. Petitioners Johnson brought suit and claimed, *inter alia*, quiet title, claiming adverse possession of the disputed property on the basis that their predecessor-in-interest, the Gainneys, had perfected title through adverse possession by occupying and using the disputed property between the years of 1982 and 1996. CP 236, lines 13-21. See A-1. Respondents Kissler moved for summary judgment dismissal of the adverse possession claim on the basis that they had made oral agreements with the Johnsons' predecessors, the Sizemores, sometime around 2004, that the use of the disputed property by the Sizemores was by permission only, and that the

Sizemores had also had previously such an agreement with the Kisslers' own predecessor-in-interest, the Halls. CP 85, lines 18-22; CP 87, line 1. The Respondents counterclaimed for ejectment and quiet title. CP 187-192.

The Kisslers, in their Motion for Summary Judgment, relied solely on the theory that they and their predecessors had consented to allow the Johnsons' predecessor, the Sizemores, to use the three foot wide property strip. CP 78-80. The Kisslers, in seeking summary judgment, argued that the Johnsons' adverse possession claim was defective because the Johnsons' predecessors' use of the disputed three foot wide side-yard property strip had been permissive. CP 317-318. They claimed that the Johnsons' predecessor, the Sizemores, had three oral agreements with the Kisslers, arising sometime after 2004 when Kisslers purchased their property:

(1) That deed boundaries would be the actual boundary between the Sizemore/Johnson and Kissler properties rather than the chain-link fence dividing the two properties;

(2) That the Sizemores, the Johnsons' predecessors, could install plants within the three foot wide side-yard area adjacent to the chain-link fence, so long as the plants did not have invasive root structures;

(3) That the Sizemores could park within an unused easement area.

CP 91.

Prior to the Motion for Summary Judgment, no notice had ever been given to the Johnsons of the alleged oral agreements. The Sizemores, when they filled out their Form 17 Real Estate Disclosure, did not provide the slightest notice of any oral agreements governing their boundaries, nor did they give the Johnsons notice that their plants and sprinkler system were allegedly encroaching on their neighbors' property. CP 250. See A-2, Declaration of Kay Johnson.

Judy Sizemore, Johnsons' immediate predecessor, when she showed the Johnsons around the property on approximately six occasions, proudly displayed her side-yard camellia plants, other shrubs, her automatic sprinkler system, and indicated that the chain-link fence was the property boundary; CP 243-244; CP 245, ¶ 12; A-2, Declaration of Kay Johnson at ¶ 3-6. Never once did she tell the Johnsons that those plantings and improvements were actually located on the Kisslers' property and that she and her husband had some sort of oral agreement with the Kisslers about being allowed to plant shrubs there as long as they did not have invasive root systems. *Id.* ¶7. See A-2.

Nor did the Kisslers disclose any such oral agreements to the Johnsons when the Johnsons planted a privacy screen of Leland cypress

shrubs in October of 2011, along their side of the chain-link fence. CP 246. After they retained a new attorney in late April of 2013, the Kisslers complained in their counterclaim for the first time that the cypress roots were impairing their septic drainfield, which is located on the other side of their property, far from the shrubs. CP 191.

In response to discovery requests demanding such information, and with the assistance of former counsel, the Kisslers utterly failed to mention the three alleged oral boundary agreements in response to discovery requests. The alleged oral agreements about property boundaries were only disclosed after the Kisslers hired a new attorney, Mr. Branfeld, who appeared in the case in late April of 2013. He amended the Kisslers' answer and alleged that the Johnsons' adverse possession claim was defeated by consent and added a counterclaim for injunctive relief. CP 185-195. Details about the three oral agreements were disclosed for the first time when the Kisslers sought summary judgment. CP 84, ¶10-11; CP 89, ¶5, 7.

In response to the Motion for Summary Judgment, Petitioners presented evidence that their predecessor Dona Gainey Mathews (hereinafter "Gainey") had adversely possessed the three-foot wide area on her side of the chain-link fence by clearing trees and brush from it, grading it, importing soil, planting grass, watering, mowing, weeding and

fertilizing, and maintaining the grass as part of her garden. CP 236, 237 line 1; CP 259. Such adverse use occurred for the statutory 10-year period between 1982 and 1992, and continued until she sold her property to the Sizemores in 1996. CP 236. *See* A-1 for Declaration of Dona Gainey. The Johnsons argued in their Response to the Motion for Summary Judgment that Gainey had perfected title to the disputed property in 1992, and provided a declaration from Gainey to support that claim, which went uncontested by the Respondents. CP 267-270; CP 236; CP 239. *See* A-1. Petitioners also argued in their Response that the Kisslers and Sizemores could not lawfully change by oral agreement, sometime after 2004, the property boundary that had already been established by adverse possession, and that the Statute of Frauds would have required a quit claim deed and written agreement to reconvey the property to the Kisslers. *See* Response to Motion for Summary Judgment at A-4. CP 267-270; *See* Declaration of Surveyor Matthew Walters at A-5; CP 228-233.

At oral argument on summary judgment, Respondents' attorney advanced, for the first time, a new and unbriefed theory: that in order to pass on title to the land Gainey had adversely possessed to the Sizemores, Johnsons' immediate predecessor-in-interest, Gainey would have had to include the disputed strip in the deed that she granted as a result of the transaction:

MR. BRANFELD: So, here is what we have in the record, Your Honor. We have Gainey now claiming that she somehow possessed this property. But what we have is a 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 to my client, not by deed or otherwise. So what we have here, Your Honor --

THE COURT: I thought Sizemore transferred to --

MR. BRANFELD: Sizemore -- there is nothing in the deeds to show that the disputed property was transferred from Sizemore to the Johnsons.

THE COURT: All right. I see what you are saying, yes.

*See A-6 Summary Judgment Oral Argument Transcript, page 6.*¹

Petitioners' counsel pointed out to the court that adverse possession, by its nature, exists outside the realm of record title and the required notice is given by open and notorious possessory acts, and attempted to direct the court's attention to Washington authorities in the Petitioners' Response to the Motion for Summary Judgment that directly foreclosed Respondents' novel argument. CP 267-270. The trial court, however, immediately made its ruling, granting summary judgment dismissal of the Johnsons' adverse possession claim and quieting title in the Kisslers. In ruling, the trial court gave the following reasoning for its order:

¹ Although the plaintiffs requested that the court reporter submit the transcript from the summary judgment oral argument to the Court of Appeals in their Statement of Arrangements, that transcript was not included as part of the Clerk's papers. *See A-7* for copy of Statement of Arrangements.

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 391-392. *See* A-8, Verbatim Transcript of Summary Judgment.

This unusual theory had been briefed by neither party and had been raised for the first time by Respondents' counsel at oral argument. The trial court order did not make any other explanation of the basis for the decision to dismiss Petitioners' adverse possession claim. *See* CP 72-83; CP 260-277; CP 314-318.

The trial court also apparently granted an injunction which the Kisslers had sought as a counterclaim, ordering that Plaintiffs Johnson rip out their automatic sprinkler system and remove the cypress privacy screen and camellia plants growing within the area. CP 329; CP 447-448. *See* A-10. But, because Kisslers had not briefed their eviction/injunctive relief claim, the Johnsons neither had an opportunity to respond to it nor to request a bond as required by CR 65 to compensate Plaintiffs for damage sustained if the trial court erroneously granted a preliminary

injunction. The trial court also granted the Kisslers all attorney's fees and costs. CP 448.

IV. SUMMARY OF ARGUMENT

The trial court's dismissal of the Johnsons' adverse possession claim, on the basis that there was no publicly-recorded deed giving notice of the adverse possession, ignores the most basic tenets of the adverse possession doctrine in Washington. Adverse possession, by definition, exists outside the realm of recorded title and can never be expected to be embodied in the recorded deeds. Moreover, more than a century of Washington caselaw foreclosed this argument to Respondents' counsel at the summary judgment hearing and should have prevented the trial court from ruling as it did. Under precedents dating back to at least 1901, when adverse possession has been established, the title passed to the adverse possessor is as valid as title given by deed, and is senior to subsequent deeds even if the issue of the adverse possession only comes up years later, when the properties have been sold to others. *See, e.g., McCormick v. Sorenson*, 58 Wn. 107, 107 P. 1055 (1910), *infra*; *Bowers v. Ledgerwood*, 25 Wn. 14, 64 P. 936 (1901), *infra*. The Johnsons' predecessor took title to the disputed property in 1992 through adverse possession and passed title down through her successors-in-interest, to Petitioner Johnsons. She exercised exclusive, continuous possession and

control, and her use was open, notorious, and hostile to the deed owner and made under a claim of right. This continued for a period exceeding the ten-year statutory period. Her successors have continued to make the same use of the property. The trial court should have denied summary judgment on the adverse possession claim and denied all Respondents Kisslers' related requests such as attorney fees, ejectment, and quiet title. There is no valid defense available to Respondents, and therefore no alternate basis on which the trial court could have correctly entered summary judgment dismissing the adverse possession claim.

In addition to this unfortunate legal error, the trial court made multiple errors on summary judgment that require reversal. The trial court should not have ruled, based on reasoning that was outside the scope of the briefing, and was not supported by a single sentence in any of Respondent Kisslers' papers in support of their summary judgment motion, which left Petitioner Johnsons at an extreme disadvantage when the highly unusual and incorrect adverse possession argument was made for the first time on oral argument. Further, in multiple instances the trial court failed to adhere to Civil Rule 56 and its caselaw, which requires that on summary judgment the court rely only on facts supported by declarations or other evidence, and that the court view all evidence and evidentiary inferences in the light most favorable to the non-moving party.

Had the trial court adhered to the requirements of CR 56, its legal error on adverse possession might have been avoided altogether, as it would not have been able to make its erroneous finding that “the ten year statutory requirement for adverse possession has not been satisfied and is inconsistent with the documents that are of record...”

The trial court also failed to recognize that the injunctive relief Respondent Kisslers sought was foreclosed by the ten-year statute of limitations: the acts Kisslers complained of began when the adverse possession of the property began, in 1982. Successive owners of the Johnson property have continuously, in privity with each other, used the disputed property in the way the Johnsons have used it, and thus the statute of limitations has long since run out on quiet title and ejectment. Moreover, the trial court should not have granted injunctive relief such as requiring Johnsons to rip out their in-ground sprinkler system and landscaping without requiring Kisslers to post a bond to protect the Johnsons in the event this Court vacates the injunction.

Finally, the trial court committed reversible error by awarding attorney fees and costs to Kisslers without articulating a statutory basis for the award, without finding that Kisslers were the “prevailing party” for the purposes of the statute, and without requiring segregation of fees by claim,

where the adverse possession claim was only one of seven claims in the lawsuit.

V. ARGUMENT

A. STANDARD OF REVIEW.

When reviewing a summary judgment order, an appellate court engages in the same inquiry as the trial court. See *Mutual of Enumclaw Ins. Co. v. Jerome*, 122 Wash.2d 157, 160, 856 P.2d 1095 (1993); *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See CR 56(c); *Mutual of Enumclaw*, 122 Wash.2d at 160, 856 P.2d 1095. The motion will be granted, after considering the evidence in the light most favorable to the nonmoving party, only if reasonable persons could reach but one conclusion. See *Wilson*, 98 Wash.2d at 437, 656 P.2d 1030.

B. PETITIONERS HAVE A CLEAR ADVERSE POSSESSION CLAIM, AND RESPONDENTS' DEFENSE IS WEAK AT BEST.

Petitioners' predecessor Gainey used the disputed property in a way that was open, notorious, hostile, exclusive, actual and uninterrupted, and under a claim of right, for 14 years – well past the statute of limitations for an ejectment action. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984).

1. The trial court's dismissal of the adverse possession claim, on the basis that there was no publicly-

**recorded deed showing the adverse possession,
ignores the most basic tenets of the adverse
possession doctrine in Washington.**

There is not a single Washington case supporting the trial court's apparent reasoning that Gainey, in order to have acquired or passed on title to the land by adverse possession, had to give the world notice through recorded documents such as deeds. In fact, this ruling ignores the basic foundation of the adverse possession doctrine: in adverse possession, title to land passes by operation of law because of the actions of the parties, without any changes to title records. CP 269-270. That is what gaining title through adverse possession means. More than a century of Washington authority establishes that the open and notorious act of possession itself gives sufficient notice to the world, including subsequent purchasers for value, of the change in title due to adverse possession. *See, e.g., McCormick v. Sorenson*, 58 Wn. 107, 107 P. 1055 (1910), *infra*; *Bowers v. Ledgerwood*, 25 Wn. 14, 64 P. 936 (1901), *infra*. The lack of notice in the publicly-recorded deed is irrelevant, and the title acquired by adverse possession passes to subsequent owners regardless of whether any changes to deeds have been made. CP 269. Professor William Stoebuck, a famed authority on Washington property law, teaches:

Because adverse possession title is beyond the aegis of the recording acts, the recorded owner's conveyance to a bona fide purchaser for value does not cut off such title though no evidence of it appears of record. This creates a problem for the title examiner which physical inspection of the land may not always solve, since the adverse possessor, who had once perfected title would not lose it by merely vacating the land.

W. Stoebeck, "The Law of Adverse Possession in Washington," 35 Wash.L.Rev. 53, 58 (1960) (emphasis added). Similarly, a University of California professor explains:

The courts have uniformly held, however, in the relatively few cases in which the question has been presented, that a title by adverse possession when once acquired is paramount to that of a subsequent bona fide purchaser of record of the record title even though the adverse possessor is not in possession at the time of the purchase and the purchaser therefore has not had the slightest notice as to the existence of any such adverse interest. **These decisions are based on the fact that the 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) (emphasis added).

Washington authority dating back more than a century is absolutely clear: adverse possession takes place outside the realm of recorded title, and conveyance of the disputed property by deed to a bona fide purchaser for value does not divest title from the adverse possessor or her grantees. CP 269. Moreover, when the adverse possessor sells by deed the land adjacent to that which was adversely possessed, and transfers possession to a new owner, title in the adversely possessed land transfers to the grantee, even though the deed granted does not describe the adversely possessed land. In *McCormick v. Sorenson*, 58 Wn. 107,

107 P. 1055 (1910), an owner unwittingly enclosed land in a fence that included a piece of his neighbor's land, and openly occupied and used the land up to the fence as an owner would use it for a period of more than ten years. Subsequently, he sold his property to the defendant, granting a deed describing only the land that was described in his own original deed, and not describing the portion of the fenced property that actually was included in his neighbor's deed. The jury found by special interrogatory that he had intended only to convey the lots that were described in his own deed, but also found that in fact he had been using his neighbor's land within the fence for more than ten years as an owner would use it, under the mistaken belief that it was land described in his own deed. Plaintiffs asked for a directed verdict, which the trial court denied. On appeal, the Washington Supreme Court affirmed, holding that the adverse possession established by his physical occupation of the land gave him and his grantee, the defendant, title to the land. *See also Bowers v. Ledgerwood*, 25 Wn. 14, 64 P. 936 (1901) (defendant's building of fence on plaintiff's land and planting orchard within ten feet of it gave notice of possession, and title vested in defendant by adverse possession, regardless of record title).

Mugaas v. Smith, 33 Wn.2d 429, 431-32, 206 P.2d 332 (1949) involved a claim similar to the trial court's reasoning below, that a record

conveyance of a property strip divested the adverse possessor of title to that strip. In that case, the strip of land at issue was enclosed by a fence that had been situated over a neighbor's boundary from 1910 to 1928, but was then allowed to disintegrate and disappear before the servient property was sold in 1941. CP 268. The deed description to the servient parcel included the strip and there was nothing on the ground nor in the records to indicate the strip had been fenced in the past. The purchasers made no inquiries to their neighbors as to the location of the boundary and commenced construction of a house that extended over the line that had been fenced. The court held that title to the strip had become fully vested and could not be divested by cessation of use or lack of maintenance of the fence because

It is elementary that, where the title has become fully vested by disseisin so long continued as to bar an action, it cannot be divested by parol abandonment or relinquishment or by verbal declarations of the disseizor, **nor by any other act short of what would be required in a case where his title was by deed.**

Mugaas, 33 Wn.2d 431-32, *emphasis added*, citing *McInnis v. Day Lumber Co.*, 102 Wn. 38, 172 P. 844(1918); *King County v. Hagen, Wash.*, 194 P.2d 357 (1948); *see also* J. Broadus, "Washington State Common Law of Surveys and Property Boundaries" § IX-F (2009). The purchasers in *Mugaas* were not protected as bona fide purchasers for value

as title that has matured under the statute of limitations (governing adverse possession) is not within the recording acts. CP 268.

El Cerrito v. Ryndak, 60 Wn.2d 847, 376 P.2d 528 (1962) shows unequivocally that Washington law does not require that the deed of the adverse possessor include the strip of property adversely possessed upon passing the property to a successor. At issue in El Cerrito was a two and one half foot wide strip of property, which the respondents claimed their predecessors had adversely possessed. CP 269. But, the property strip subject to adverse possession was never described in conveyances after the 10 year period of limitations for adverse possession had expired. El Cerrito held that “failure to include the disputed strip in the deed from the Giljes did not prevent the Boyds [the Giljes’ successors] from acquiring title by adverse possession.” El Cerrito, 60 Wn.2d 856. Further, the Supreme Court held that “when real property has been held by adverse possession for ten years, such possession ripens into an original title...” El Cerrito held that “the person so acquiring this title can convey it to another party without having had title quieted in him prior to the conveyance.”

Mr. Broadus observes in his treatise that the effect of Mugaas and El Cerrito is that “a possessor becomes the owner of the possessed strip of land automatically once all the elements of the doctrine have been met for

the full 10-year period, and his or her ownership can be defended and passed onto a new owner by passing possession even though there is no document describing the strip in the possessor's name." See Broadus, "Washington State Common Law of Boundaries and Surveys" § IX-F, p 132. CP 269. Title obtained by adverse possession is senior to subsequent deeds even when the issue is only brought up and evidence adduced years later. McCormick v. Sorenson, 58 Wash. 107.

Halverson v. Bellevue, 41 Wn.App 457, 704 P.2d 1232 (1985) confirms this principle. It held that an adverse possessor who had met all the requirements of adverse possession for the ten year statutory period, but who had not gone to court to quiet title, had an ownership interest requiring her signature on a plat of the neighboring property. CP 267. In that case, the City of Bellevue claimed that Halverson should not have been considered an owner until her adverse possession claim was adjudicated and her ownership interest was a matter of record. The Court of Appeals rejected that theory and held that "the law is clear that title is acquired by adverse possession upon passage of the ten year period." *Id.*

The trial court's apparent decision, reflected in its oral decision, to dismiss the Johnsons' adverse possession claim because the adverse possessor, Gainey, had not described the three foot property strip in the deed conveying the property to her successor, the Sizemores, is absolutely

inconsistent with Washington law and turns the doctrine of adverse possession on its head. Washington cases such as *Mugaas v. Smith*, and *El Cerrito v. Ryndak*, establish unequivocally that adverse possession exists outside the realm of record title, that there need not be any description of the adversely possessed land in a deed, and that a bona fide purchaser for value holding record title to a property strip that has been adversely possessed cannot defeat the adverse possessor's title. The trial court erroneously dismissed the Johnsons' adverse possession claim and that the trial court's decision should be reversed. See A-8 Oral Decision. CP 269, lines 13-16.

2. Gainey took title to the disputed property in 1992 through adverse possession and passed title down through her successors-in-interest, to Petitioners.

To take title to land by adverse possession, it is necessary to prove that the adverse possessor used the land in a way that was open and notorious, hostile, under a claim of right, exclusive, actual and continuous. It is necessary to demonstrate actual possession – physical occupation of the property; “actual possession is the major element to place the record owner on notice that the statute of limitations is running against his or her interests.” *Real Property Deskbook*, “Adverse Possession” §64.3(i) (3rd ed. 1996). CP 272-274.

a) Gainey exercised exclusive, continuous possession and control.

Adverse possession demands that the possessor occupy and use the property as a true owner would. Real Property Deskbook, “Adverse Possession” §64.3(i). The possession must be of a character that a true owner would assert toward the land in view of its nature and location. Frolund v. Frankland, 71 Wn.2d 812, 817, 431 P.2d 188 (1967) (overruled on other grounds); Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984). There must be some physical possession of the property consisting of some structure, barrier, or landscaping, and continuous, uninterrupted use. J. Broadus, Washington State Common Law Surveys and Property Boundaries, § IX-F. There must be “a certain and defined line, but it need not be fenced.” *Id.* Riley v. Andres, 107 Wn.App 391, 27 P.3d 618 (2001) found that an owner’s use and possession of a residential property in a golf course community for a ten year period supported their adverse possession claim. The Riley possessor landscaped up to an out-of-bounds golf course marker, and a stake marking a street curve. The possessor planted ornamental plants, installed a sprinkler system, spread beauty bark, watered, pruned the plants and pulled weeds within the disputed strip. CP 272; CP 274-275.

Here, Dona Gainey actually took possession of the property abutting George Fleming’s fence and constantly improved and maintained her landscaping there from 1982 until 1996, when she sold her property to

the Sizemores. Her acts of possession were akin to those of the *Riley* possessor; but much more conspicuous and aggressive: in fact, she cut down full-grown trees that had been growing on the disputed property. She cleared tall, native grasses from the area abutting the Fleming fence, imported soil, planted grass, mowed, maintained, watered, weeded and fertilized the grass from 1982 through 1996. CP 23, lines 9-24; CP 237, lines 1-2; CP 259. *See* A-1. Her landscaping and maintenance extended to the edge of the fence. She landscaped the area in a manner that is typical of how true owners plant side-yards. It is quite common for side-yards to be clear-cut and landscaped with manicured grass extending to a fence. The disputed strip was clearly defined by the manicured grass extending up to the fence marking the boundary between her property and that of George Fleming, Kisslers' predecessor. *Id.*

Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984) held that the extreme contrast between the manicured appearance of the possessor's land and that of the record title holder's land demonstrated that the possessor had taken control and possession of the disputed property strip. That is the case here; photographs in the record demonstrate that there was an extreme contrast between Gainey's manicured lawn which extended up to the boundary fence and George Fleming's property. CP 239; CP 240;

CP 241.² The side-yard on Fleming's side of the fence was filled with untended brush and native trees. Moreover, the fence itself separated the disputed property from Fleming's property. *Id.*

Dona Gainey's Declaration establishes that she so possessed and used her side-yard area continuously and exclusively between 1982 and 1996, until she sold her property to the Sizemores. CP 259; CP 236.

b) Gainey's use was open and notorious.

A possessor's use of another's property must be sufficiently open and notorious to put the true owner on notice that another individual has taken his/her land. *Real Property Deskbook*, "Adverse Possession" §64.3(i).

Here, Gainey took possession of the property strip on her side of the fence, clear-cut it, imported soil, graded the land, planted grass and maintained that grass. There was no doubt that she was taking possession of that land and using it as an owner would. It was open and apparent to the entire world that Gainey had taken possession of the side-yard property strip and was treating it as her own property. Gainey's use was of such a character to provide notice to George Fleming that she was clearing, planting and maintaining the property as her own. She cut down

² Because it is doubtful that color copies of photos at CP 239-40 will be included in copies of this brief, it is important to note that such color copies of the photos are attached to the Gainey Declaration filed on the Superior Court case in the Pierce County LINX site.

big trees, removed brush and imported truck-loads of soil. The demarcation between the Gainey and Fleming property was clear, as discussed *supra*. There was nothing hidden about Gainey's possession and use of the area; it clearly gave notice to the Flemings and was open and notorious. CP 274-275. *See* A-4.

c) Gainey's possession was hostile to the deed owner and made under a claim of right.

"Hostility" in the context of adverse possession "does not mean animosity," and simply means that the possessor is claiming the land as his or her own and that the use is not permissive. *El Cerrito*, 60 Wn.2d 847. Hostility requires the possessor to treat land as her own throughout the statutory period. The possessor's subjective belief regarding her ownership is immaterial and the possessor's intent to dispossess is irrelevant. *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). Adverse or hostile use does not mean ill-will, but simply connotes using the property as a true owner would. *Real Property Deskbook*, "Adverse Possession" §64.3(i). CP 274-275. *See* A-4.

Here, Gainey used the property strip up to the fence as a true owner; she testified in her Declaration that she did not ask the Flemings' permission to cut down large trees, clear brush, import soil, grade it, plant it, maintain it, or use it as a true owner would. She treated the land as her own and there was pronounced, visible evidence of her claim. She

testified that she continuously treated the land as her own until she sold her home in 1996. CP 236, lines 15-16; *See* Declarations of Dona Gainey at A-1.

Although consent to use property will negate hostility, all evidence about Fleming's successors the Kisslers giving Gainey's successors the Sizemores permission to install camellias and other shrubs in the side-yard so long as the shrubs did not have invasive root systems all occurred after 2004, long after the 10 year statute of limitations for ejectment had expired in 1992. Because title passed to Gainey by operation of law in 1992, such alleged oral agreements had no effect on property boundaries. After title to the disputed strip vested in her by operation of law, "it cannot be divested by any act short of what would be required in a case where title was by deed." *Mugass*, 33 Wn.2d at 431-32. Johnsons' predecessor, the Sizemores, could not by oral agreements change that established boundary.³ CP 269-270.

d) Gainey's use extended through the statutory period of 10 years.

One apparent basis of the trial court decision was its determination that the "ten year statutory requirement for adverse possession has not been satisfied." *See* Oral Decision A-8; CP 391, lines 22-24. But, the trial court, in reviewing a motion for summary judgment is obliged to

³ Additionally, the circumstances surrounding the alleged oral agreements cut against the reliability of the testimony about them, as discussed in Sec. V(B)(4) *infra*.

view all evidence and evidentiary inferences in a light most favorable to the non-moving party. *Biggers v. Bainbrige Island*, 162 Wn.2d 683, 691, 169 P.3d 14 (2007). Whether Gainey's acts between 1982 and 1992, and actually through 1996, "was of such a character to establish adverse possession... is one of fact." *El Cerrito v. Ryndak*, 60 Wn.2d 852. Thus, in this proceeding the trial court was obliged to view the facts establishing the Johnsons' adverse possession claim in Dona Gainey's Declaration in a light most favorable to the Johnsons. CP 276.

Gainey's Declaration testimony established unequivocally that she made open, notorious, continuous, hostile, uninterrupted use, under a claim of right, of the side-yard property strip, up to the chain-link fence for a period in excess of 10 years. She testified that she adversely possessed that property strip between 1982 and 1992, and so used the property until she sold it in 1996 to the Sizemores.

Gainey's deposition testimony, clearly establishing 10 years of adverse use was unrefuted. Respondents' summary judgment pleadings did not present a shred of evidence contesting Gainey's claim that she adversely used the side-yard area abutting the chain-link fence for a 14 year period. All of Respondents' summary judgment evidence pertained to the period after 1996.

The trial court's conclusion that "the ten year statutory requirement for adverse possession has not been satisfied" is utterly unsupported by evidence before the court on summary judgment, including Gainey's Declaration. The Johnsons residing in their home for

less than 10 years is unrelated to the adverse possession claim; title passed to Gainey after 10 years of adverse use. *Mugaas v. Smith*, 33 Wn.2d 431-32 shows that title passed to Gainey after 10 years of adverse use and that the Johnsons' adverse possession claim is based on the possessory acts of their predecessor Gainey. Gainey's title to the property was never divested.

3. The trial court could not have dismissed the adverse possession claim on summary judgment based on the defense Respondents offered in their Reply brief, permissive use.⁴

In Respondents' Reply on summary judgment, they raised for the first time the defense of permissive use. Properly employed, permissive use negates the element of hostility in adverse possession. *Northwest Cities Gas Co. v. Western Fuel Co.* 134 Wn.2d 84, 123 P.2d 771 (1942). However, Respondents' argument on permissive use shot far wide of the mark, because Gainey had already begun her open, notorious, and exclusive use of the disputed property before any of the events that Respondents claim to show permissive use even occurred. Respondents utterly failed to provide any direct evidence of any facts relating to their claim of permissive use other than the existence of a fence built in 1982 and the existence of a survey taken in 1984. By contrast, Petitioners'

⁴ The trial court dismissed the adverse possession claim on summary judgment on a theory that had not been advanced in any of the pleadings, including any of the summary judgment papers. Thus, the present brief must discuss not only the basis on which the trial court did rule (*see* Sec. V(B)(1-2) *supra*) but also the grounds that were properly before the court upon which the court could have relied.

supportive affidavits showed clearly that Gainey's adverse use of the disputed property began prior to the building of the fence. CP 235-236. Respondents' argument rested solely on weak, speculative, and misleading evidentiary inferences that could not properly have been made on summary judgment:

In this case, some facts and inferences are clear from the record. The Flemings had obtained a survey and built the fence. They plainly knew from the 1984 survey that the fence was not on the boundary line. The reasonable inference from these facts is not that the Flemings wished to give up the ownership of the disputed parcel. Rather, the reasonable inference is that the Flemings would allow their neighbor, then the Gaineys, to use the Disputed Parcel. This sort of use does not require a formal agreement. Nor does it require a recording. Rather, it is evidence of the Fleming's [sic] consent to allow the Gaineys to use the Disputed Property, without recognition that the fence was on the boundary line.

CP 317, [Reply Memorandum of Authorities in support of Defendants' MSJ at 4.]

Respondents' evidence supporting their assertions breaks down quickly under closer analysis. Respondents asserted that the Flemings had obtained a survey and built the fence. It is true that a survey dated 1984 is part of the record of this case, and Gainey's declaration establishes that the fence described by Respondents was built by the Flemings in 1982. CP 235, line 6. However, Respondents' Reply Brief statement is misleading because it implies that the fence was built with reference to the

survey. In fact, the fence predated the survey by two years, and there is no information about the Flemings' reasoning in placing it where they did.

CP 236.

Following on, the Respondents claimed in their Reply that the Flemings "plainly knew from the 1984 survey that the fence was not on the boundary line." But Respondents provided the trial court no evidence whatsoever as to the Flemings' state of mind, subjective intent, feelings, knowledge, or thought processes regarding the fence, its existence, or its placement. Again, Respondents' assertion was misleading because it implied that the spatial placement of the fence inside the line described by the deeds was intentional and with knowledge from the survey that it was not on the recorded property line. In fact, the fence predated the survey and its placement was dictated by the fact that when it was built, Gainey was already landscaping in the disputed property. CP 236.

Respondents urged the trial court that "[t]he reasonable inference from these facts is not that the Flemings wished to give up the ownership of the disputed parcel." But Respondents provided no direct evidence of the Flemings' knowledge or wishes, as discussed above. Moreover, neither the Johnsons nor their predecessors claimed that the Flemings wished to give up ownership of the disputed parcel. The Flemings' wishes are irrelevant to Gainey's adverse possession.

Respondents continued: “Rather, the reasonable inference is that the Flemings would allow their neighbor, then the Gainneys, to use the Disputed Parcel.” CP 317. But Respondents never showed how this inference even follows from the mere fact of the placement of the fence the Flemings built in 1982 enclosing their property and the existence of the 1984 survey. Most importantly, however: this is an evidentiary inference which Washington law does not allow to be drawn on summary judgment, because it is an inference drawn in the light most favorable to the moving party, a clear violation of the law governing summary judgment. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 693.

4. The trial court could not have granted summary judgment for the Respondents on the theory of consent, which was the defense offered in the original Motion for Summary Judgment, because the very existence of the consent was a material fact that remained in dispute.

The Respondents solely based their Motion for Summary Judgment on the theory that alleged oral agreements of the Johnsons’ predecessor, David Sizemore, and the Kisslers’ predecessor, the Halls, and the Kisslers’ alleged oral agreements with the Sizemores, established consent to use the disputed strip and therefore prevented its acquisition by adverse possession. CP 78. In support of this theory, Respondents submitted declarations from Mr. Sizemore and Mr. Kissler attesting to the oral agreements that were allegedly made starting in 2004. CP 86-87; CP 91. David Sizemore, the Johnsons’ predecessor, claimed in his

declaration that sometime after 1996, he and the Kisslers' predecessor, the Halls, had an oral agreement that the true boundary between the properties was not the chain-link fence, but the actual deed boundaries. CP 86, ¶ 10. Sizemore Declaration ¶ 10. However, Mr. Hall denied the existence of any such agreement. CP 255.⁵

The trial court, in reviewing a motion for summary judgment, was required to consider all evidence and evidentiary inferences in a light most favorable to Petitioners, the non-moving party. CR 56; *Biggers v. City of Bainbridge Island*, 162 Wn.2d 693. Because all issues were not resolved on summary judgment, the trial court was required to make factual findings that may include (1) stipulated facts, (2) uncontested facts, and (3) material facts which are in dispute. CR 56(d). Here, the trial court failed to enter such an order and improperly granted summary judgment with material facts still in dispute. *Jackowski v. Borschelt*, 174 Wn.2d 720, 740, 278 P.3d 1100 (2012). This Court should remand this case to the trial court for entry of such findings.

Evidence before the court on summary judgment, and the circumstances surrounding the statements themselves, indicated that the veracity of the Kissler and Sizemore declarations about the existence of oral agreements could be fairly be questioned, thus creating a dispute

⁵ After Petitioners demonstrated in their Response to the Motion for Summary Judgment that adverse possession was established by Gainey long before any such alleged agreements could have been made, *see* CP 236, the Respondents made a vague argument that Gainey's use was permissive, without putting forth any facts to support such a theory. *See* CP 317. In ruling on summary judgment, the trial court did not refer to Respondents' theory of oral agreements either in its oral decision or its written order. This claim is dealt with in Sec. 3 of the present Brief.

about a material fact that should have prevented the trial court from granting summary judgment. The first reference to oral agreements only arose after the Respondents' new attorney appeared in the case, five months after the case had been filed, and after discovery responses had been received from Respondents which failed to disclose any such oral agreements. The Petitioners' discovery requests called for this information. See CP 247, ¶ 21-24 at A-2. Additionally, Respondents did not mention any such alleged oral agreements in their initial Answer. CP 7-12.

Other direct evidence before the court on summary judgment directly contradicted the Sizemore and Kissler declarations on the issue of oral boundary agreements. Mr. Hall, the Respondents' immediate predecessor, stated that there had been no agreements made about boundaries. CP 255. Petitioner Kay Johnson's declaration stated that when the Johnsons looked at the Sizemore property to buy, their predecessor Judy Sizemore identified the chain-link fence as the property boundary, pointed out the automatic sprinkler system located within the three foot side strip, and highlighted her camellia plants and other shrubs, never once mentioning that the plants and improvements were located on her neighbor's property. CP 244, ¶ 6-13; See Declaration of Kay Johnson at A-2. The Sizemores not only never mentioned during the Johnsons' 5 to 6 visits to the property before purchasing it that the chain-link fence was not, in their belief, the actual property boundary, but they also never mentioned any oral agreements they had made with the neighbors about

the disputed property. Nor did the Sizemores disclose any alleged oral boundary agreements or oral agreements about encroachments in response to questions in the Form 17 Real Estate Disclosure that they signed when they sold their property to Petitioners. The Disclosure Form stated:

	YES	NO	DON'T KNOW
C. Are there any encroachments, boundary agreements or boundary disputes?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

See Kay Johnson Declaration A-2 at Ex. 1; CP 250.

Further, up until the Kisslers' new attorney, Mr. Branfeld, appeared in the case in late April of 2013, the Kisslers never gave any indication to the Johnsons that they believed that the Johnsons' use of their sprinkler system and landscaping up to the edge of the chain-link fence depended solely on oral permission from them. CP 244, ¶ 4-7; Declaration of Kay Johnson, A-2. CP 263-265. The Kisslers failed at any point to disclose their alleged oral agreements with the Sizemores regarding the boundary and planting until their attorney, Mr. Branfeld, filed their proposed Amended Answer and Motion for Summary Judgment. CP 245, ¶ 14, 16, 17-24. *See* A-2; CP 263-265; *See* A-4.

Respondents' actions throughout the years that they have been neighbors with Petitioners have never given any support to the claim that there were oral agreements by which Petitioners' predecessors were allowed to use the disputed property. After purchasing their home in

September of 2007, the Johnsons continued to garden within the three-foot area near the fence as had all their predecessors back to Gainey. Never once did the Kisslers tell the Johnsons that they were only able to use the Johnson in-ground sprinklers and place landscaping near the fence due to an oral agreement. *See* A-2 Declaration of Kay Johnson, ¶ 14-25, CP 246-48. Oddly, on October 4, 2011, when the Kisslers ripped out ivy on their side of the chain-link fence, exposing the Johnson bedroom window to the Kisslers' view, the Kisslers promised to keep the ivy on Kisslers' side of the fence. Kay Johnson had a conversation with the Kisslers regarding the need to establish a privacy screen after losing the vegetative screen provided by the ivy, protecting the Johnsons' bedroom window. *See* A-2 Declaration of Kay Johnson ¶ 17-20, CP 246-47. At that time, the Kisslers displayed no interest in what plants and trees the Johnsons might plant within the disputed area; they did not mention any previous oral agreement which they now claim only allowed planting of shrubs with non-intrusive root systems. *Id.*

It is odd that the Kisslers did not notify Kay Johnson of the alleged oral agreements about boundaries and vegetation at that time. Neither did Kisslers mention having previously told the Johnsons about such oral agreements in their interrogatory No. 20 specifically calling for such information; it stated:

“To the best of your ability, describe in detail any and all communications you have had with the plaintiffs, either verbally or in writing, related to the claims asserted in the complaint, including , but not limited to:

- a. Who participated in the communication
- b. What was said
- c. When the communication occurred; and
- d. Where and /or how the communication occurred.

The Kisslers’ long narrative in response to Interrogatory No. 20 did not once refer to any conversation between 2007 and 2010, in which they advised the Johnsons of the alleged boundary, planting, and parking agreements, nor did they attest to any conversation with the Johnsons announcing their ownership claim of the side-yard property. CP 247, *See* A-2 Johnson Declaration, ¶ 21, 22, 23. *See* A-9 Koler Declaration at Ex. 1; CP 281-284. This Court should reverse the trial court’s decision; there was a dispute about a material fact – the existence of the alleged oral boundary agreements.

5. Even if the oral agreements existed, they would not lead to dismissal of the adverse possession claim because Gainey’s title to the disputed property predated the alleged agreements.

Even if the court could have made a determination that these alleged oral agreements existed, such a finding would not properly have led to dismissal of the adverse possession claim because title vested in Gainey long before the date of the alleged oral agreements. The problem with the oral consent theory is that such oral agreements allegedly arose

after 1996; that was after Gainey had perfected her adverse possession claim. As discussed extensively in Sec. B-1, *supra*, Gainey's use of the disputed property had been continuous, exclusive and under a claim of right, beginning in at least 1982. CP 236. See photos at A-3, Exhibit 1 to Gainey Declaration. The Kisslers' summary judgment theory that the Sizemores' oral agreements, first with the Kisslers' predecessors, the Halls, sometime after 1996, and then with the Kisslers sometime after 2004, defeated the Johnsons' adverse possession claim fails to take into account that after ten years of adverse possession, title passed to the adverse possessor, Gainey, in 1992 by operation of law. *Halverson v. Bellevue*, 31 Wn.App 457. The possessor Gainey became the owner of the possessed strip of land automatically once all the elements of the doctrine (adverse possession) had been met for the full ten year period. *Id.* "In the context of a boundary dispute, the effect of these cases is a possessor becomes the owner of the possessed strip of land automatically once all the elements of the doctrine have been met for the full 10-year period, though there is no document describing the strip in the possessor's name." J. Broadus, "Washington State Common Law of Surveys and Property Boundaries," § IX-F, pg. 132.

In their summary judgment response, the Johnsons pointed out to the trial court that this case is akin to *Mugaas v. Smith*; once title to the

strip of property abutting the chain-link fence became fully vested in Gainey after ten years of adverse possessor use “it could not be divested... by any act short of what would be required in a case where title was by deed.” Mugaas, 43 Wn.2d 431, 432. Mugass, El Cerrito and Halverson teach that once adverse use caused possession to become vested in Gainey, it would have been necessary for the Sizemores to convey title to the disputed strip to Kisslers’ predecessor, Mr. Hall, by deed. Surveyor Matthew Walters’ Declaration pointed out that a quitclaim deed was necessary to convey to Kisslers the property Gainey had adversely possessed. CP 231; *See* A-5.

6. Even if the oral agreements under Respondents’ 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.

Washington law is clear: agreements changing or affecting previously undisputed property lines are subject to the statute of frauds. *Real Property Desk Book*, § 40.5(2)(g) (3rd ed. 1996), Windsor et al. v. Boucier, 21 Wn.2d 315 (“it is true that a definite boundary whose location is fixed and known to the parties cannot be changed by a parole agreement.”) *Id.* *Thompson on Real Property*, p 495, § 33.08 (a parole agreement between owners of adjoining land, which has been partitioned between them, that they will disregard the boundary fixed by partition and

establish another line has been held unenforceable under the statute of frauds.”); *Mugaas v. Smith*, 33 Wn.2d 431-32.

The Kisslers’ summary judgment consent theory did not provide justification for the trial court’s dismissal of the Johnsons’ adverse possession claim. Because the boundary between the Gainey (Johnsons’ predecessor) and Fleming property (Kisslers’ predecessor) was established by adverse possession by 1992, it could not casually be changed by a subsequent oral agreement between Sizemores and Halls, or Sizemores and Kisslers.

C. THE TRIAL COURT IMPROPERLY GRANTED RESPONDENTS’ COUNTERCLAIM TO QUIET TITLE AND EJECTED PETITIONERS DESPITE THE FACT THAT THE STATUTE OF LIMITATIONS HAD RUN OUT TWO DECADES EARLIER.

The defendants’ summary judgment motion asked the court to evict the Johnsons from the disputed property strip and require removal of their landscaping. It also demanded that the trial court quiet title to the side-yard strip in Kisslers. But, Kisslers sought this remedy 20 years after the boundary was established by adverse possession and title vested in Gainey in 1992. That summary judgment request was barred by the statute of limitations. CP 271.

It is well established under Washington law that property subject to adverse possession must be reclaimed within the 10 year statute of limitations codified at RCW 4.16.020(1) which addresses the recovery of

property.⁶ In context of adverse possession, “there is no discovery rule to start the 10 year period running when the owner of record actually knows of the possession. Notice is provided by the possession, whether acted on by the true owner or not.” J. Broadus, *Washington State Common Law of Surveys and Property Boundaries*, § IX-F; *Doyle v. Hicks*, 78 Wn.App 538, 897 P.2d 420 (1995) rev. denied, 128 Wn.2d 1011 (1996). Further, *Mugaas* shows that notice from possession only applied to the owner of the property being possessed during the initial 10 year period of possession. CP 271.

Here, the trial court evicted the Johnsons improperly from the 3 foot wide side-yard property strip despite the fact that Kisslers’ action to reclaim their property was barred by the statute of limitations; Gainey commenced adverse use of the disputed property strip in 1982.⁷ Gainey’s actions gave unequivocal notice to the Kisslers’ predecessor, the Flemings, that Gainey was claiming the property. It would have been necessary for Mr. Fleming to bring an action to eject Gainey from that area and recover his property by 1992, the year that the 10 year statute of

⁶ 4.16.020 states:

The period prescribed for the commencement of actions shall be as follows:

Within ten years:

(1) For actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appears that the plaintiff, his or her ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action.

⁷ She clear-cut native trees, cut down brushy vegetation growing on it, imported soils, graded the areas, planted lawn, maintained the lawn by mowing, reseeding, fertilizing, watering and weeding it for a period in excess of 10 years.

limitations expired. See Gainey Declaration dated June 8, 2013, pg. 3, lines 22-25; CP 236.

Because 20 years had expired since the statute of limitations ran in 1992, the trial court committed error by failing to recognize that Kisslers' eviction action is barred by the statute of limitations. Thus, the trial court should have denied the Kisslers' request to evict Petitioners from the disputed strip and quiet title in Respondents. CP 271. At the very least, a material fact was in dispute that should have prevented the trial court from quieting title in Kisslers, entering an order evicting the Johnsons from the property, and requiring the Johnsons to remove their landscaping and improvements. This Court should reverse the trial court's eviction/quiet title order.

D. THE TRIAL COURT SHOULD NOT HAVE GRANTED INJUNCTIVE RELIEF REQUIRING PETITIONERS TO RIP OUT THEIR SPRINKLERS AND LANDSCAPING, BECAUSE RESPONDENTS HAD NOT BRIEFED A REQUEST FOR INJUNCTIVE RELIEF OR POSTED BOND.

Although the trial court entered an order granting injunctive relief requiring the Johnsons to remove their landscaping and sprinklers, the Respondents' summary judgment memorandum absolutely failed to provide any argument or authority on injunctive relief, but simply requested that the trial court order Johnsons to remove landscaping and sprinklers. CP 70, ¶ 3; CP 72-83. Thus, the issue was not properly before

the court, and the trial court should not have granted the injunction. CR 56 contemplates that parties shall have a full opportunity to respond to summary judgment claims. Here, the Johnsons were given no such opportunity. Consequently, the Johnsons were given no chance to request a bond, a requirement for issuing injunctive relief under CR 65, to protect them if the injunction order was later reversed.

E. THE TRIAL COURT IMPROPERLY AWARDED ATTORNEY FEES TO RESPONDENTS WITHOUT ARTICULATING A LEGAL BASIS FOR THE AWARD, WITHOUT PROPERLY FINDING THAT RESPONDENTS WERE THE “PREVAILING PARTY”, AND WITHOUT REQUIRING SEGREGATION OF FEES BY CLAIM.

The trial court erroneously awarded \$29,220.30 in attorney fees to Defendants/Respondents Kisslers, and \$5,046.75 in costs. The court order failed to articulate the basis for its award. It simply stated that “Defendants are awarded their reasonable attorney fees as allowed by statute in the amount of \$29,220.30.” CP 448; *See* A-10. Presumably, the basis of the trial court’s attorney fee award was RCW 7.28.083(3) which allows attorney fees to the prevailing party in an adverse possession case.

The trial court committed error by awarding attorney fees to Kisslers under the adverse possession statute. For the reasons articulated above in Sections V(B) of the present brief, the trial court improperly dismissed the Johnsons’ adverse possession claim and should not have awarded attorney fees to the Kisslers.

RCW 7.28.083 only allows an attorney fee award to the “prevailing party” but fails to define prevailing party. It is not at all clear that prevailing on one claim out of seven causes a litigant to be a “prevailing party.”⁸ CP 402-403. See *Guillen v. Contreras*, 147 Wn.App 326, 195 P.3d 90 (2008) (declining to characterize party who prevailed on two out of three claims a substantially prevailing party and award fees). *Puget Sound v. Bush*, 45 Wn.App 312, 724 P.2d 1127 (1986) (vacated trial court decision awarding attorney fees and refused to award attorney fees because “each party prevailed on a major issue on appeal” and accordingly there is no prevailing party and “each party should bear his attorney fees on appeal.” *Id.* at 320-21. CP 402-403. Without briefing and argument as to whether the Kisslers actually were a “prevailing party” and without findings and conclusions to that effect, the trial court could not properly award fees and costs.

Trial courts must independently decide what represents a reasonable amount of attorney fees; they may not merely rely on the billing records of the prevailing party’s attorney. Courts must also create

⁸ RCW 7.28.083(3) states:
(3) The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

an adequate record for review of fee award decisions. *Mahler*, 135 Wash.2d at 435, 957 P.2d 632.

The trial court improperly failed to articulate whether the Kisslers were the prevailing party, what constituted a reasonable attorney fee, and the basis for its attorney fee award. It did not enter a single finding and conclusion addressing that award. Judge Hogan improperly failed to require Kisslers' attorneys to segregate their attorney fees by claim and identify what fees were associated with the adverse possession claim, as required by Washington law. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). CP 411-422. Here, their attorneys, Mr. Branfeld and Mr. Hester, failed to segregate out their fees that they were claiming under the adverse possession statute. In fact, Mr. Hester did not have a single charge on his bill associated with the adverse possession claim, but the trial court awarded him all fees he had incurred while he was the attorney of record. CP 372-374. There was no justification for such an award. See CP 7-12 for copy of the Kisslers' original answer. In the Kisslers' answer and counterclaims before amendment and discovery efforts, they focused on a nuisance claim they had made against the Johnsons. That was their emphasis until attorney Hester was replaced by attorney Branfeld.

The trial court decision awarding attorney fees and costs should be reversed.

VI. MOTION FOR FEES AND COSTS

This Court Should Award Attorney Fees to Plaintiffs on Appeal

If this Court reverses the trial court judgment, it would be appropriate to award the Johnsons attorney fees under RCW 4.84.185 which allows an attorney fee award if a claim is “frivolous and advanced without a reasonable cause.” Here, attorney Branfeld, an experienced real estate attorney invited the trial court to commit error; he advanced the argument that the Johnsons’ adverse possession claim should be dismissed because their predecessor Gainey had failed to include the property strip she had adversely possess in the deed she gave to her successor, the Sizemores. CP 343.

This theory is utterly unsupported by any legal authority and distorts the nature of adverse possession. Based on this frivolous argument, the trial court dismissed the Johnsons’ adverse possession claim. The Johnsons have had to bear the cost of this appeal and deposit \$42,500.00 into the registry of the court.

Mr. Branfeld’s unfounded argument misled the court and caused the Johnsons to have to bear the significant and unwarranted cost of this appeal.

VII. CONCLUSION

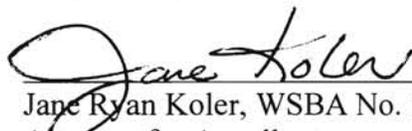
Based on the foregoing, the Petitioners respectfully request the Court to vacate the order on summary judgment and the order imposing attorney fees and costs on the Johnsons.

VIII. APPENDIX

- A-1Declarations of Dona Gainey Mathews (Gainey)
- A-2Declaration of Kay Johnson
- A-3Gainey Historical Photographs of Disputed Area
- A-4Response to Motion for Summary Judgment
- A-5Declaration of Surveyor Matthew Walters
- A-6Verbatim Transcript of Summary Judgment
- A-7Statement of Arrangements
- A-8Trial Court’s Oral Decision on Summary Judgment
- A-9Koler Declaration
- A-10Final Judgment and Decree

DATED this 10th day of October, 2013.

Respectfully submitted,



Jane Ryan Koler, WSBA No. 13541
Attorney for Appellants
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HONORABLE VICKI L. HOGAN
JUN 28 2013 9:00 AM
COUNTY CLERK
NO: 12-2-12095-7

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 GAINEY
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 120th 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 Gainey Mathews-1

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A-1 (1)

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

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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, 120th 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

Declaration of Dona Gainey Matthews-4

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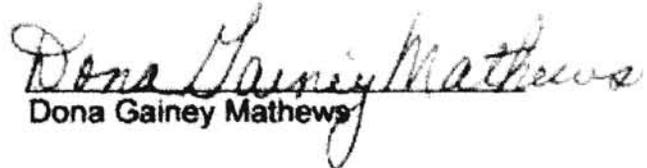
1 present driveway which serves the Johnson property. I based that conclusion on photographs
2 which Kay Johnson has shown me of her home.

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 8th day of June, 2013, at Gig Harbor, Washington.

16 
17 Dona Gainey Mathews
18
19
20
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25

HONORABLE VICKI L. HOGAN
JUNE 28 2013
COUNTY CLERK
NO: 12-2-12095-7

PIERCE COUNTY SUPERIOR COURT
FOR THE STATE OF WASHINGTON

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

No. 12-2-12095-7

**SUPPLEMENTAL DECLARATION OF
DONA GAINNEY MATHEWS**

Plaintiffs,

v.

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

Defendants.

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
Dona Gainney Mathews

HONORABLE VICKI HOGAN

JUNE 28, 2013

KEVIN STOCK
COUNTY CLERK

NO: 12-2-12095-7

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, et al.

Defendants.

No. 12-2-12095-7

**DECLARATION OF
KAY JOHNSON IN SUPPORT OF
RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

1. I am over the age of 18 and am one of the plaintiffs in this action, and have personal knowledge of this litigation and the following facts.

2. I purchased our home in September of 2007, which is located next to the Kissler home.

3. Before buying it, we met with one of the former owners, Judy Sizemore, 5 to 6 times. She extensively discussed the property with my husband and me, and on one occasion she showed us the property boundaries. She was very careful to indicate that she was uncertain about the exact position of the boundary on the Welter side of the property, and that she was unsure about whether all of the boat ramp was on her property.

Declaration of Kay Johnson - p. 1

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1 4. We learned from her that the boat ramp was a shared, joint-use facility, also used
2 by our neighbors, the Welters. Mrs. Sizemore was very careful about pointing out such facts
3 for us. She also showed us the tideland that we own, the survey markers in the road
4 delineating our street-side property boundary, and that the chain-link fence marked the
5 boundary between her home and the Kissler property. She pointed out her sprinkler system
6 that runs along the fence, within the area now being claimed by Kisslers. That sprinkler
7 system irrigates the plantings such as her Camellias and shrubs which she had put in along
8 the fence.

9 5. Mrs. Sizemore was very proud of her garden. She also pointed out the rock
10 stairs that lead from the parking area located in the abandoned access easement down to the
11 guest house.

12 6. Judy Sizemore never indicated that the Kisslers owned about a 3 foot wide strip
13 running along our fence.

14 7. Although David Sizemore and Roy Kissler indicated in their declarations that
15 there were various verbal agreements about the boundary between the Johnson and Kissler
16 properties, the Sizemores did not disclose any of those agreements to us. In fact, in their Real
17 Estate Disclosure form, they denied that there were any encroachments or boundary
18 agreements. See Exhibit 1 attached hereto for a true copy of their Real Estate Disclosure form
19 dated August 7, 2007, which was given to me.

20 8. If there was an agreement that the fence is not the boundary, as David Sizemore
21 indicated in his Declaration, the Sizemore's plants and sprinkler system were encroaching on
22 the Kissler property.

23 9. David and Judy Sizemore both signed the *Seller Disclosure Statement –*
24 *Improved Property*. Judy and David Sizemore both initialed each page at the bottom. And
25 they answered in the Real Estate Disclosure form as follows:

YES NO DON'T
KNOW

C. Are there any encroachments, boundary agreements
or boundary disputes?

10. They also signed a statement verifying that all of their statements were true and correct. The verification statement states:

The foregoing answers and attached explanations (if any) are complete and correct to the best of Seller's knowledge and Seller has received a copy hereof. Seller agrees to defend, indemnify and hold real estate licensees harmless from and against any and all claims that the above information is inaccurate. Seller authorizes real estate licensees, if any, to deliver a copy of this disclosure statement to other real estate licensees and all prospective buyers of the Property.

11. Oddly, David Sizemore testifies in his May 14, 2013 Declaration, that there were three agreements: (1) the agreement that the chain-link fence was not the actual boundary between the properties, (2) the agreement that they could park in the old easement remnant area, and (3) the understanding that they could put in plantings along the chain-link fence so long as the root systems were not invasive.

12. It is curious that during the course of our five or six meetings with Judy Sizemore, these agreements and understandings were not disclosed.

13. Because Judy Sizemore was so precise and careful about notifying us about the joint-use boat ramp, it is quite odd that such alleged agreements were not disclosed.

14. After we moved in, in September of 2007, Kisslers did not mention these agreements and the understanding about the type of plantings that could be placed along the fence, and that the Kisslers' permission was needed to use the area along the fence. We worked in the garden next to the fence, but did not learn that Kisslers claimed the 3 foot area next to the fence.

15. David Sizemore testified that he had a similar boundary agreement with the Halls (Kisslers' predecessors); that the fence was not the property boundary and that the deed

1 boundary was the boundary between the Sizemore/Hall properties. But, we got an email from
2 Halls stating that they had no boundary agreements with our predecessors. See Exhibit 2 for a
3 true copy of that email.

4 16. When we purchased our home in 2007, I would frequently work in the side-yard
5 area of our property near the chain-link fence; never once in the early years of our ownership
6 did Kisslers mention the various boundary agreements. And they never told me, until recently,
7 that we did not own the area next to the fence. The first time I learned of the alleged oral
8 agreements about the boundary, parking and planting was in the Kissler and Sizemore
9 declarations submitted with Defendants' Motion for Summary Judgment.

10 17. When Roy Kissler removed the ivy on his side of the fence, he assured me that
11 he would not touch the ivy on my side of the fence. I indicated to Kissler that his removal of
12 the ivy would cause me to have to plant a vegetative privacy screen on my side of the fence.
13 Never once, during the course of this conversation, did Kissler claim that he owned the
14 property on my side of the fence. In fact, he noted that the old Maple trees, which are growing
15 on my side of the fence but apparently within the area the Kisslers are now claiming, drop
16 about 4 truckloads of leaves on their property each year and that such trees are a problem.
17 The take-away from such remarks is that he wanted me to remove the Maple trees. But, they
18 appear to be located on land he now claims he owns.

19 18. Never once during that conversation did Mr. Kissler suggest that he owned any
20 land on my side of the fence. One would think that if Mr. Kissler believed that he owned
21 property on my side of the fence and had an issue with the trees, he would have come over
22 and cut them down and not be tacitly urging me to remove my Maple trees.

23 19. I disclosed to him that I planned to plant the Leland Cyprus shrubs on our side of
24 the fence to provide a privacy screen. He did not advise me that he owned that land and that I
25 would be planting such trees within land that he owned. I am very sure about the conversation

1 that took place between myself and Roy Kissler because I recorded it and had the recording
2 transcribed and reviewed the transcript from that conversation before making this Declaration.
3 The conversation occurred on October 4, 2011.

4 20. Oddly, when we brought in the Leland Cyprus trees and planted them, Kisslers
5 never advised us not to plant them on their property. Nor did they disclose that they claimed
6 the strip of property on our side of the fence, abutting the fence. They saw us bring in the
7 trees and plant them. Nor did they express a single concern about invasive tree roots.

8 21. Kisslers provided a lengthy narrative response to Plaintiffs' Interrogatory No. 20,
9 which asked: *To the best of your ability, describe in detail any and all communications you*
10 *have had with the plaintiffs, either verbally or in writing, related to the claims asserted in the*
11 *complaint, including, but not limited to: (a) Who participated in the communication; (b) What*
12 *was said; (c) When the communication occurred; and (d) Where and /or how the*
13 *communication occurred.*

14 22. At his deposition, Roy Kissler indicated that he and his wife wrote the response
15 to Interrogatory No. 20. See Exhibit 1 of the Declaration of Jane Koler dated June 17, 2013,
16 for excerpt from Roy Kissler's deposition.

17 23. Kisslers' long narrative did not once refer to any conversation between 2007 and
18 2010, in which they advised us of the boundary agreement or the parking agreement, or the
19 fact that they claim that I do not own the strip next to the chain-link fence. In fact, Roy Kissler
20 did not seem to recollect the planting agreement he had testified about in paragraph 8 of his
21 declaration until coached by his attorney at his deposition. He also didn't seem to remember
22 the parking agreement, causing me to wonder if indeed, these might be newly minted. See
23 Koler Declaration Ex. 3.

24 24. In 2010, when I was clipping honeysuckle growing on the fence up near the road,
25 Roy Kissler advised that I do not own the area adjacent to the fence where the honeysuckle

1 was planted. I checked with Judy Sizemore and learned that she knew nothing about that.
2 And it was not mentioned again.

3 25. The so-called deed boundary, which Kisslers claim was the agreed-upon
4 boundary for the entire duration of their ownership and during the Halls' ownership was never
5 marked on the ground in any way until Mr. Crabtree performed his survey in May of 2013. In
6 fact, at his deposition Roy Kissler testified that he was unsure about the extent of his
7 ownership. But, he was nevertheless claiming that he owned an unknown amount of our land.

8 26. The defendants assert in their summary judgment motion that our claims are
9 frivolous and that they are entitled to attorney fees; that this lawsuit is a vendetta against the
10 Kisslers.

11 27. They allege that my mental suffering claim was unfounded. I dismissed that
12 claim simply to reduce our litigation costs because we have had to spend a significant sum of
13 money responding to the avalanche of pleadings defense counsel Branfeld has filed. In all of
14 them he has asked for sanctions and attorney fees, but Judge Hickman declined to award
15 such fees and impose sanctions except a \$100 sanction for a late filing.

16 28. It is odd that because we are defending an access easement, which was
17 impaired by installation of a curb and our property, that we are being accused of instigating a
18 vendetta against Kisslers. All of their claims about neighborly conduct are nonsense; they filed
19 complaints against us with the Pierce County Planning Department, the Pierce County Building
20 Department, two complaints to Tacoma Pierce County Health Department, and a complaint to
21 the Washington State Liquor Control Board. See Exhibit 3 which is a true copy of Kisslers'
22 response to our Requests for Admission admitting that they made such complaints. A penalty
23 action by Pierce County for insufficient building permits and inspections not completed by our
24 predecessors has resulted against us. We have had to spend the last several months and
25 much money resolving that, even though we are innocent purchasers.

1 29. In addition, wanting to make trouble for me at the City of Gig Harbor where I
2 manage the City's computer systems, Kisslers sent their relative, Javier Figueroa, a University
3 Place Councilman, to demand personal documents from my work computer. Because we live
4 in unincorporated Pierce County, there is not a single public record pertaining to our property
5 which would be in the records of Gig Harbor. Mr. Figueroa went to the City on my day off, met
6 with my boss, City Manager Denny Richards, and claimed that he was a computer forensics
7 expert conducting a secret investigation of me and that he needed all of my personal records
8 off my computer.

9 30. Until this matter got straightened out through the intervention of an attorney for
10 City employees, City management staff believed that I had committed some sort of terrible
11 offense and acted as though I were a tainted person. Mr. Figueroa had failed to mention that
12 he was assisting his relatives with their litigation against me. I do not consider these actions to
13 be neighborly.

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

15 DATED this 17 day of June, 2013, at Gig Harbor, Washington.

16
17 

18 Kay Johnson
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NRMLS Form No. 17
W.A.R. Form No. D-5
Rev. 6/07
Page 1 of 5 Pages

**SELLER DISCLOSURE STATEMENT †
IMPROVED PROPERTY**

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Northwest Multiple Listing Service
ALL RIGHTS RESERVED

SELLER: David & Judy Sizemore

† To be used in transfer of improved residential real property, including multi-family dwellings up to four units, new construction, condominiums not subject to a public offering statement, certain time-shares, and manufactured and mobile homes. See RCW Chapter 64.06 and Section 43.22.023 for further explanation.

INSTRUCTIONS TO THE SELLER

Please complete the following form. Do not leave any space blank. If the question clearly does not apply to the property write "N/A." If the answer is "yes" to any asterisked (*) item(s), please explain on attached sheet. Please refer to the line number(s) of the question(s) when you provide your explanation(s). For your protection you must date and initial each page of this disclosure statement and each attachment. Delivery of the disclosure statement must occur not later than five (5) business days, unless otherwise agreed, after mutual acceptance of a written purchase and sale agreement between Buyer and Seller.

NOTICE TO THE BUYER

THE FOLLOWING DISCLOSURES ARE MADE BY THE SELLER ABOUT THE CONDITION OF THE PROPERTY LOCATED AT 7223 120th St NW

CITY Gig Harbor COUNTY Pierce (THE PROPERTY) OR AN LEGALLY DESCRIBED ON THE

ATTACHED EXHIBIT A. SELLER MAKES THE FOLLOWING DISCLOSURES OF EXISTING MATERIAL FACTS OR MATERIAL DEFECTS TO BUYER BASED ON SELLER'S ACTUAL KNOWLEDGE OF THE PROPERTY AT THE TIME SELLER COMPLETES THIS DISCLOSURE STATEMENT. UNLESS YOU AND SELLER OTHERWISE AGREE IN WRITING, YOU HAVE THREE (3) BUSINESS DAYS FROM THE DAY SELLER OR SELLER'S AGENT DELIVERS THIS DISCLOSURE STATEMENT TO YOU TO RESCIND THE AGREEMENT BY DELIVERING A SEPARATELY SIGNED WRITTEN STATEMENT OF RESCISSION TO SELLER OR SELLER'S AGENT. IF THE SELLER DOES NOT GIVE YOU A COMPLETED DISCLOSURE STATEMENT, THEN YOU MAY WAIVE THE RIGHT TO RESCIND PRIOR TO OR AFTER THE TIME YOU ENTER INTO A PURCHASE AND SALE AGREEMENT.

THE FOLLOWING ARE DISCLOSURES MADE BY SELLER AND ARE NOT THE REPRESENTATION OF ANY REAL ESTATE LICENSEE OR OTHER PARTY. THIS INFORMATION IS FOR DISCLOSURE ONLY AND IS NOT INTENDED TO BE A PART OF ANY WRITTEN AGREEMENT BETWEEN BUYER AND SELLER.

FOR A MORE COMPREHENSIVE EXAMINATION OF THE SPECIFIC CONDITION OF THIS PROPERTY YOU ARE ADVISED TO OBTAIN AND PAY FOR THE SERVICES OF QUALIFIED EXPERTS TO INSPECT THE PROPERTY, WHICH MAY INCLUDE, WITHOUT LIMITATION, ARCHITECTS, ENGINEERS, LAND SURVEYORS, PLUMBERS, ELECTRICIANS, ROOFERS, BUILDING INSPECTORS, ON-SITE WASTEWATER TREATMENT INSPECTORS, OR STRUCTURAL PEST INSPECTORS. THE PROSPECTIVE BUYER AND SELLER MAY WISH TO OBTAIN PROFESSIONAL ADVICE OR INSPECTIONS OF THE PROPERTY OR TO PROVIDE APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN THEM WITH RESPECT TO ANY ADVICE, INSPECTION, DEFECTS OR WARRANTIES.

Seller is is not occupying the property.

1. SELLER'S DISCLOSURES:

* If you answer "Yes" to a question with an asterisk (*), please explain your answer and attach documents, if available and not otherwise publicly recorded. If necessary, use an attached sheet.

2. TITLE

A. Do you have legal authority to sell the property? If not, please explain.

*B. Is title to the property subject to any of the following?

- (1) First right of refusal
- (2) Option
- (3) Lease or rental agreement
- (4) Life estate

*C. Are there any encroachments, boundary agreements, or boundary disputes?

*D. Is there a private road or easement agreement for access to the property?

*E. Are there any rights-of-way, easements, or access limitations that may affect Buyer's use of the property?

*F. Are there any written agreements for joint maintenance of an easement or right-of-way?

*G. Is there any study, survey project, or notice that would adversely affect the property?

*H. Are there any pending or existing assessments against the property?

*I. Are there any zoning violations, non-conforming uses, or any unusual restrictions on the property that would affect future construction or remodeling?

*J. Is there a boundary survey for the property?

*K. Are there any covenants, conditions, or restrictions which affect the property?

	YES	NO	RESERVE
A.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
B.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(1)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(2)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(3)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(4)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
C.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
D.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
E.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
F.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
G.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
H.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
J.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
K.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

PLEASE NOTE: Covenants, conditions, and restrictions which purport to forbid or restrict the conveyance, encumbrance, occupancy, or lease of real property to individuals based on race, creed, color, sex, national origin, marital status, or disability are void, unenforceable, and illegal. RCW 49.60.224

SELLER'S INITIAL: DS

DATE: 8-8-07

SELLER'S INITIAL: J

DATE: 07/08/2007

**SELLER DISCLOSURE STATEMENT
 IMPROVED PROPERTY**

2. WATER

A. Household Water

- (1) The source of water for the property is: Private or publicly owned water system
 Private well serving only the subject property Other water system
 *If shared, are there any written agreements? YES NO DON'T KNOW
- (2) Is there an easement (recorded or unrecorded) for access to and/or maintenance of the water source? YES NO DON'T KNOW
- (3) Are there any known problems or repairs needed? YES NO DON'T KNOW
- (4) During your ownership, has the source provided an adequate year-round supply of potable water?
 If no, please explain: YES NO DON'T KNOW
- (5) Are there any water treatment systems for the property?
 If yes, are they: Leased Owned YES NO DON'T KNOW
- (6) Are there any water rights for the property, associated with its domestic water supply, such as a water right permit, certificate, or claim?
 (a) If yes, has the water right permit, certificate, or claim been assigned, transferred, or changed? YES NO DON'T KNOW
 (b) If yes, has all or any portion of the water right not been used for five or more consecutive years?
 If yes, please explain: YES NO DON'T KNOW

B. Irrigation

- (1) Are there any irrigation water rights for the property, such as a water right permit, certificate, or claim?
 (a) If yes, has all or any portion of the water right not been used for five or more consecutive years? YES NO DON'T KNOW
 (b) If so, is the certificate available? (If yes, please attach a copy.) YES NO DON'T KNOW
 (c) If so, has the water right permit, certificate, or claim been assigned, transferred, or changed?
 If so, please explain: YES NO DON'T KNOW
- (2) Does the property receive irrigation water from a ditch company, irrigation district, or other entity?
 If no, please identify the entity that supplies water to the property: YES NO DON'T KNOW

C. Outdoor Sprinkler System

- (1) Is there an outdoor sprinkler system for the property? YES NO DON'T KNOW
- (2) If yes, are there any defects in the system? some sprinkler heads need replaced/repaired YES NO DON'T KNOW
- (3) If yes, is the sprinkler system connected to irrigation water? YES NO DON'T KNOW

3. SEWER/ON-SITE SEWAGE SYSTEM

A. The property is served by:

- Public sewer system On-site sewage system (including pipes, tanks, drainfields, and all other component parts)
- Other disposal system

Please describe: Big-Microbics FAST system

B. If public sewer system service is available in the property, is the house connected to the sewer main?

If no, please explain: YES NO DON'T KNOW

C. Is the property subject to any sewage system fees or charges in addition to those covered in your regularly billed sewer or on-site sewage system maintenance service?

D. If the property is connected to an on-site sewage system:

(1) Was a permit issued for its construction, and was it approved by the local health department or district following its construction? YES NO DON'T KNOW

(2) When was it last pumped? 07/25/2006 YES NO DON'T KNOW

(3) Are there any defects in the operation of the on-site sewage system? YES NO DON'T KNOW

(4) When was it last inspected? 6 Jun 2007 YES NO DON'T KNOW

By whom: ATU Services YES NO DON'T KNOW

(5) For how many bedrooms was the on-site sewage system approved? 4 bedrooms YES NO DON'T KNOW

SELLER'S INITIAL: [Signature]

DATE: 08-07-07

SELLER'S INITIAL: [Signature]

DATE: 07/08/2007

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W.A.R. Form No. 11-5
Rev. 6/07
Page 3 of 5 Pages

SELLER DISCLOSURE STATEMENT
IMPROVED PROPERTY

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- | | YES | NO | DON'T KNOW | |
|--|-------------------------------------|-------------------------------------|--------------------------|-----|
| E. Are all plumbing fixtures, including laundry drain, connected to the sewer on-site sewage system? | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 107 |
| If yes, please explain: | | | | 108 |
| F. Have there been any changes or repairs to the on-site sewage system? | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 109 |
| G. In the on-site sewage system, including the drainfield, located entirely within the boundaries of the property? | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 110 |
| If no, please explain: | | | | 111 |
| H. Does the on-site sewage system require monitoring and maintenance more frequently than once a year? | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 112 |
| If yes, please explain: <u>twice a year</u> | | | | 113 |

NOTICE: IF THIS SELLER DISCLOSURE STATEMENT IS BEING COMPLETED FOR NEW CONSTRUCTION WHICH HAS NEVER BEEN OCCUPIED, SELLER IS NOT REQUIRED TO COMPLETE THE QUESTIONS LISTED IN ITEM 4 (STRUCTURAL) OR ITEM 5 (SYSTEMS AND FIXTURES).

4. STRUCTURAL

- | | | | | |
|--|---|---|--------------------------|-----|
| A. Has the roof leaked? | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 114 |
| B. Has the basement flooded or leaked? | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 115 |
| C. Have there been any renovations, additions or remodeling? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 116 |
| (1) If yes, were all building permits obtained? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 117 |
| (2) If yes, were all final inspections obtained? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 118 |
| D. Do you know the age of the house? | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 119 |
| If yes, year of original construction: <u>1978</u> | | | | 120 |
| E. Has there been any settling, slippage, or sliding of the property or its improvements? | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 121 |
| F. Are there any defects with the following? (If yes, please check applicable items and explain) | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 122 |
| <input checked="" type="checkbox"/> Foundation | <input type="checkbox"/> Docks | <input type="checkbox"/> Exterior Walls | | 123 |
| <input type="checkbox"/> Chimneys | <input type="checkbox"/> Interior Walls | <input type="checkbox"/> Fire Stairs | | 124 |
| <input checked="" type="checkbox"/> Doors | <input type="checkbox"/> Windows | <input type="checkbox"/> Patios | | 125 |
| <input type="checkbox"/> Ceilings | <input type="checkbox"/> Sub Floors | <input type="checkbox"/> Driveways | | 126 |
| <input type="checkbox"/> Pools | <input type="checkbox"/> Hot Tub | <input type="checkbox"/> Sinks | | 127 |
| <input type="checkbox"/> Sidewalks | <input type="checkbox"/> Umbrellas | <input type="checkbox"/> Fireplaces | | 128 |
| <input type="checkbox"/> Garage Floors | <input type="checkbox"/> Walkways | <input type="checkbox"/> Wood Stoves | | 129 |
| <input type="checkbox"/> Stairs | <input type="checkbox"/> Other | | | 130 |
| G. Was a structural pest or "whole house" inspection done? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 131 |
| If yes, when and by whom was the inspection completed? | | | | 132 |
| <u>12/2005</u> | | | | 133 |
| H. During your ownership, has the property had any wood destroying organisms or pest infestations? | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 134 |
| 1. In the attic insulated? | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 135 |
| 2. In the basement insulated? | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 136 |

5. SYSTEMS AND FIXTURES

- | | | | | |
|---|-------------------------------------|-------------------------------------|--------------------------|-----|
| A. If any of the following systems or fixtures are included with the transfer, are there any defects? | | | | 137 |
| If yes, please explain: <u>electrical panel needs replaced, increase elec svc to guest hou</u> | | | | 138 |
| Electrical system, including wiring, switches, outlets, and service | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 139 |
| Plumbing system, including pipes, fixtures, and toilets | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 140 |
| Hot water tank | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 141 |
| Garbage disposal | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 142 |
| Appliances | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 143 |
| Swamp pump | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 144 |
| Heating and cooling systems | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 145 |
| Security system <input type="checkbox"/> Leased <input type="checkbox"/> Owned | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 146 |
| Other | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 147 |

SELLER'S INITIAL: RS DATE: 8-8-07 SELLER'S INITIAL: J DATE: 07/08/2007

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	YES	NO	DON'T KNOW	158
5B. If any of the following fixtures or property is included with the transfer, are they leased? (If yes, please attach copy of lease.)				159
Security System	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	160
Tanks (type): _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	161
Satellite dish	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	162
Other: _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	163
6. HOMEOWNERS' ASSOCIATION/CO-OWNERS INTERESTS				164
A. Is there a homeowners' association?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	165
Name of association: _____				166
B. Are there regular periodic assessments?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	167
_____ per <input type="checkbox"/> month <input type="checkbox"/> year				168
<input type="checkbox"/> Other: _____				169
C. Are there any pending special assessments?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	170
D. Are there any shared "common areas" or any joint maintenance agreements (facilities such as walls, fences, landscaping, pools, tennis courts, walkways, or other areas co-owned in undivided interest with others)?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	171
				172
7. ENVIRONMENTAL				173
A. Have there been any drainage problems on the property?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	174
B. Does the property contain fill material?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	175
C. Is there any material damage to the property from fire, wind, floods, beach movements, earthquakes, expansive soils, or landslides?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	176
D. Are there any shorelines, wetlands, floodplains, or critical areas on the property?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	177
E. Are there any substances, materials, or products on the property that may be environmental concerns, such as asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, or contaminated soil or water?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	178
F. Has the property been used for commercial or industrial purposes?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	179
G. Is there any soil or groundwater contamination?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	180
H. Are there transmission poles, transformers, or other utility equipment installed, maintained, or buried on the property?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	181
I. Has the property been used as a legal or illegal dumping site?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	182
J. Has the property ever been used as an illegal drug manufacturing site?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	183
K. Are there any radio towers in the area that may cause interference with telephone reception?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	184
				185
				186
8. LEAD-BASED PAINT (Applicable if the home was built before 1978.)				187
A. Presence of lead-based paint and/or lead-based paint hazards (check one below):				188
<input type="checkbox"/> Known lead-based paint and/or lead-based paint hazards are present in the housing				189
explain: _____				190
<input checked="" type="checkbox"/> Seller has no knowledge of lead-based paint and/or lead-based paint hazards in the housing				191
B. Records and reports available to the Seller (check one below):				192
<input type="checkbox"/> Seller has provided the purchaser with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below):				193
_____				194
<input checked="" type="checkbox"/> Seller has no records or reports pertaining to lead-based paint and/or lead-based paint hazards in the housing.				195
9. MANUFACTURED AND MOBILE HOMES				196
If the property includes a manufactured or mobile home:				197
A. Did you make any alterations to the home?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	198
If yes, please describe the alterations: _____				199
B. Did any previous owner make any alterations to the home?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	200
If yes, please describe the alterations: _____				201
C. If alterations were made, were permits or variances for these alterations obtained?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	202
				203
10. OTHER DISCLOSURE BY SELLERS				204
A. Other conditions or defects:				205
Are there any other existing material defects affecting the property that a prospective buyer should know about?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	206
				207
SELLER'S INITIAL: <u>AS</u> DATE: <u>8-8-07</u>	SELLER'S INITIAL: <u>o</u>	DATE: <u>07/08/2007</u>		208

**SELLER DISCLOSURE STATEMENT
IMPROVED PROPERTY**

B. Verification

The foregoing answers and attached explanations (if any) are complete and correct to the best of Seller's knowledge and Seller has received a copy hereof. Seller agrees to defend, indemnify and hold real estate licensee harmless from and against any and all claims that the above information is inaccurate. Seller authorizes real estate licensee, if any, to deliver a copy of this Disclosure Statement to other real estate licensees and all prospective buyers of the Property.

Date: 8-8-07 Date: 07/08/2007
Seller: [Signature] Seller: [Signature]

**NOTICE TO THE BUYER
SEX OFFENDER REGISTRATION**

INFORMATION REGARDING REGISTERED SEX OFFENDERS MAY BE OBTAINED FROM LOCAL LAW ENFORCEMENT AGENCIES. THIS NOTICE IS INTENDED ONLY TO INFORM YOU OF WHERE TO OBTAIN THIS INFORMATION AND IS NOT AN INDICATION OF THE PRESENCE OF REGISTERED SEX OFFENDERS

PROXIMITY TO FARMING

THIS NOTICE IS TO INFORM YOU THAT THE REAL PROPERTY YOU ARE CONSIDERING FOR PURCHASE MAY BE IN CLOSE PROXIMITY TO A FARM. THE OPERATION OF A FARM INVOLVES USUAL AND CUSTOMARY AGRICULTURAL PRACTICES WHICH ARE PROTECTED UNDER STATE AND FEDERAL LAW. THE WARNING ON RIGHT TO BUY LIST.

13. BUYER'S ACKNOWLEDGEMENT

Buyer hereby acknowledges and

A. Buyer has a copy (or) a copy intended to my attention of any material defects that are and are known to any or any by attaching written disclosure and explanation.

B. The disclosure set forth in this disclosure and in any attachments to this statement are true and correct to the best of my knowledge and belief.

C. Buyer acknowledges that, pursuant to RCW 64.02.020, real estate licensee is not liable for inaccurate information provided by seller, except to the extent that real estate licensee knew of such inaccurate information.

D. This information is for informational only and is not intended to be a part of the written agreement between Buyer and Seller.

E. Buyer (which term includes all persons signing the Buyer's acceptance portion of this disclosure statement below) has received a copy of this Disclosure Statement (including attachments, if any) bearing Seller's signature(s).

F. If the house was built prior to 1978, Buyer acknowledges receipt of the pamphlet *Protect Your Family From Lead in Your Home*.

DISCLOSURES CONTAINED IN THIS DISCLOSURE STATEMENT ARE PROVIDED BY SELLER BASED ON SELLER'S ACTUAL KNOWLEDGE OF THE PROPERTY AT THE TIME SELLER COMPLETES THIS DISCLOSURE. I HEREBY WAIVE AND RELEASE OTHERWISE AGREE IN WRITING BUYER SHALL HAVE THREE (3) BUSINESS DAYS FROM THE DAY SELLER OR SELLER'S AGENT DELIVERS THIS DISCLOSURE STATEMENT TO REScind THE AGREEMENT BY DELIVERING A SEPARATELY SIGNED WRITTEN STATEMENT OF RESCRIPTION TO SELLER OR SELLER'S AGENT. YOU MAY WAIVE THIS RIGHT BY RESCINDING PRIOR TO OR AFTER THE TIME YOU ENTER INTO A SALE AGREEMENT.

BUYER HEREBY ACKNOWLEDGES RECEIPT OF A COPY OF THIS DISCLOSURE STATEMENT AND ACKNOWLEDGES THAT THE DISCLOSURES MADE HEREIN ARE TRUTHFUL AND CORRECT ONLY AND NOT OF ANY REAL ESTATE LICENSEE OR OTHER PARTY.

DATE: 8-8-07 DATE: _____
BUYER: [Signature] BUYER: _____

BUYER'S WAIVER OF RIGHT TO RESCIND OFFER

Buyer has read and received the Seller's responses to this Seller Disclosure Statement. Buyer agrees to this statement and waives Buyer's right to rescind Buyer's offer based on this disclosure.

DATE: _____ DATE: _____
BUYER: _____ BUYER: _____

BUYER'S WAIVER OF SELLER'S FUTURE OBLIGATION TO DISCLOSE ANY ADDITIONAL INFORMATION

Buyer has been advised of Buyer's right to receive a completed Seller Disclosure Statement. Buyer waives that right. However, if the answer to any of the questions in the section entitled "Buyer's Waiver" would be "Yes," Buyer may not waive the receipt of the "Buyer's Waiver" portion of the Seller Disclosure Statement.

DATE: _____ DATE: _____
BUYER: _____ BUYER: _____

If the answer is "Yes" to any asterisked (*) items, please explain below (use additional sheets if necessary). Please refer to the line number(s) of the question(s).

SELLER'S INITIAL: [Signature] DATE: 8-8-07 SELLER'S INITIAL: [Signature] DATE: 07/08/2007

EXHIBIT 2

----- Original Message -----

Subject: RE: Gig Harbor house disclosures
From: Cliff Hall
Date: Thu, May 30, 2013 2:45 pm
To: rick johnson-GH tennis

Rick,

I'm still in Alaska....but Wendy returned to Washington. I had her check through all of our info on that house and we did not have any special arrangements or agreements with anyone. Whatever the title had in it is all we had. Don't know if that helps or not but that's the way it was.

Wendy still plays tennis both here and in New Zealand.....I do not play any longer (knees).

Regards,

Cliff Hall

----- Original Message -----

Subject: Gig Harbor house disclosures
From: Cliff Hall Date: Sat, May 18, 2013 10:10 am
To: rick johnson-GH tennis
Cc: Melissa Heckman

Rick.....

Got your email to melissa concerning the disclosures.....

We are currently traveling but when we return we will check our Gig harbor house notes and let you know.

It will be sometime after Memorial Day before we can do that.

Regards,

Cliff

----- Original Message -----

Subject: RE: TENNIS
From: Melissa Heckman
Date: Mon, April 29, 2013 2:04 pm
To: rick johnson-GH tennis

hi rick,

my folks are traveling back from New Zealand but I forwarded your message via email to my dad, Cliff Hall...hope that helps.

kids are playing tennis weekly at TLTC, just started 2 weeks ago so fingers crossed they enjoy it:)

i'll look at your summer times/schedule & see if we can't fit it in:)

take care, melissa

PIERCE COUNTY SUPERIOR COURT
FOR THE STATE OF WASHINGTON

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

Plaintiff,

vs.

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

Defendants.

No. 12-2-12095-7

**PLAINTIFFS' FIRST SET OF
REQUESTS FOR ADMISSION
TO DEFENDANTS**

AND ANSWERS THERETO

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

AND TO: The Hester Law Group Inc. PS, their counsel of record

1. Admit that Mr. and/or Mrs. Kissler or their agent made a complaint to the Pierce
County Health Department about the Johnson's bed and breakfast home
occupation.

ANSWER

Admit.

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2. Admit that Mr. and/or Mrs. Kissler or their agent made a complaint to the Washington Liquor Board about the Johnson business.

ANSWER

Deny, defendant did not make a complaint to the liquor board. The defendant did contact the liquor board.

3. Admit Mr. Kissler and/or Mrs. Kissler or their agent made a complaint to Pierce County that the Johnson deck was 20' feet in height and not in compliance with code.

ANSWER

Admit.

4. Admit that either Mr. and Mrs. Kissler or their agent complained that the Johnson deck was not set back a proper distance from the property line.

ANSWER

Admit.

5. Admit that Mr. Kissler took pictures of the Johnson guest as they entered and/or exited the Johnson property.

ANSWER

Admit taking one picture of a guest.

1
2 6. Admit that Mr. Kissler installed a curb within the easement on the South East
3 corner of the easement.

4 ANSWER

5 Admit.

6
7 7. Admit that Mr. Kissler threatened the Johnsons that he was going to take
8 pictures of the Johnson bed and breakfast guests.

9 ANSWER

10 Admit Kissler made said statement to get plaintiff to stop taking photos of his
11 friends and family.

12
13 8. Admit that Mr. Kissler yelled at the Johnsons that Southeast corner of the
14 property was for egress and ingress and utilities.

15 ANSWER

16 Admit Mr. Kissler advised plaintiffs of legal nature of the easement.

17
18
19 9. Admit that Mr. Kissler told Johnson that the terms of the ingress-egress
20 easement prohibited them from walking on it.

21 ANSWER

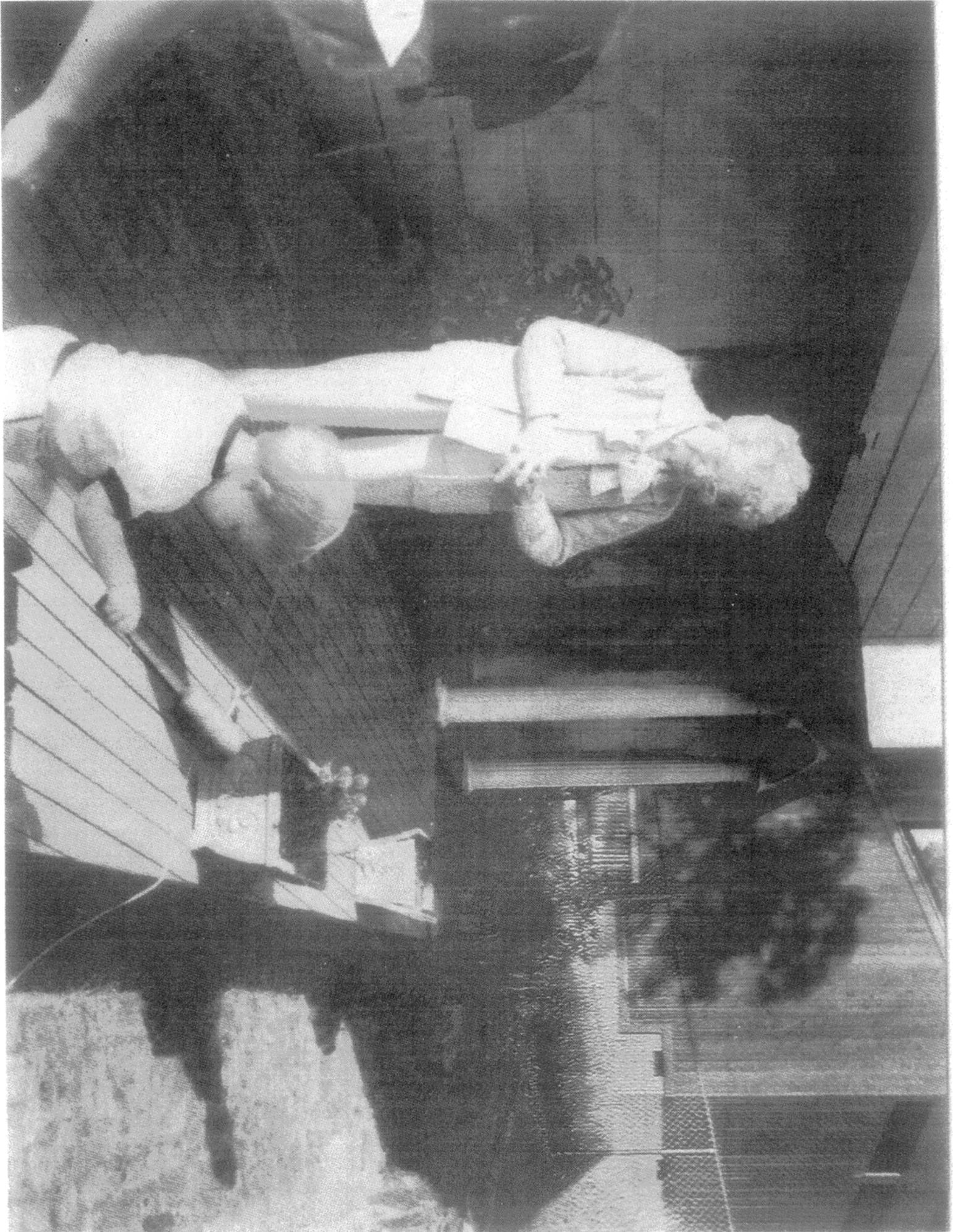
22 Deny.



A-3 (1)



A-2 (2)



A-3(3)

June 17 2013 3:59 PM

HONORABLE VICKI L. HOGAN
KEVIN STOCK
JUNE 28 2013
NO: 12-2-12095-7
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

**RESPONSE TO MOTION FOR
SUMMARY JUDGMENT**

In interrogatories answered five months ago with former counsel, the Kisslers made no mention of any oral agreements between the parties' predecessors as to the boundary between the Johnson and Kissler properties, and merely alluded to a "license" to use the land adjacent to the fence. No conversations were detailed about boundaries, no timeline was given about any supposed oral agreements, and in fact there was no indication that this alleged "license" was pursuant to any conversation or oral agreement, and not simply a failure to object to the Johnson predecessors' use of the property and driveway.

Now, in support of their Motion for Summary Judgment, the Kisslers come forward with declarations and deposition testimony about "oral agreements" with the Johnsons' predecessors that, in the Kisslers' view, establish the boundary three feet beyond the chain-

Response to Motion for Summary Judgment-1

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1 link fence under an oral consent theory. The Kisslers present the sworn declaration of David
2 Sizemore, their friend and former next-door neighbor, dated May 14, 2013, asserting that the
3 Sizemores and the Kisslers established a boundary by oral agreement on the Johnson side of
4 the chain-link fence.

5 Dona Gainey Mathews ("Dona Gainey") built the Johnsons' house on Lot 1 in 1979. In
6 about 1982, when the Kisslers' predecessor George Fleming built his home next door, he
7 enclosed his property with a chain-link fence. See Declaration of Dona Gainey Mathews dated
8 June 8, 2013. That chain-link fence became the boundary between Lot 1 (Gainey-Sizemore-
9 Johnson) and Lot 2 (Fleming-Hall-Kissler) by operation of adverse possession, after Ms.
10 Gainey maintained, gardened, and used the property up to Fleming's chain link fence for a
11 period of more than ten years. The Sizemores even intensified that use by installing an
12 expensive sprinkler system in that portion of the property. This boundary was established by
13 adverse possession before either of the properties were sold to successors-in-interest.

14 The Court must deny the Motion for Summary Judgment because the Kisslers' belated
15 memories of alleged conversations raise material facts that the Johnsons dispute, and
16 because as a matter of law the facts do not entitle the Kisslers to summary judgment. There
17 were no oral agreements, and even if there were oral agreements between the Kisslers and
18 Sizemores, those agreements were incapable of changing the property boundary that was
19 established by adverse possession two decades before the supposed conversations took
20 place.

21 **FACTS**

22 Dona Gainey Mathews testifies in her attached Declaration that when she sold her
23 property to the Sizemores in 1996, that chain-link fence marked the boundary between the two
24 properties. See Gainey Declaration pg.3, line 15. She also testifies that she used her property
25 up to the edge of the chain-link fence and had done so since the fence was installed in 1982.

1 *Id.* Her neighbors, first the Flemings, then the Halls, used their property up to their side of the
2 chain-link fence. The chain-link fence was the boundary between the Gainey property and the
3 Fleming-Hall property. Fleming sold to the Halls in 1992. See Gainey Declaration. Ms. Gainey
4 sold to the Sizemores in September 1996, 14 years after she began cultivating, maintaining,
5 and improving the land up to her side of the chain-link fence. *Id.* at pg. 4. Lines 15-16.

6 Mr. Sizemore testifies in his Declaration dated May 14, 2013, that various oral
7 agreements allowed him and his ex-wife to make permissive use of parts of Lot 1 which had
8 actually been cultivated and maintained by their predecessor Gainey throughout her ownership
9 of Lot 1 until 1996. Sizemore alleges that only an oral agreement allowed him to use land
10 beyond the property line described by the deed, so long as the plants did not have invasive
11 root systems. The Kisslers claim that only these alleged oral agreements permitted use of the
12 upper property parking space within the now abandoned access easement. Mr. Sizemore
13 claims in his declaration that he had an oral understanding with first the Halls and then the
14 Kisslers that the boundary was not marked by the chain-link fence. Mr. Sizemore's declaration
15 fails to disclose when he entered into an oral agreement with Mr. and Mrs. Hall agreeing to
16 alter the established property boundary – the oral agreement that the chain-link fence would no
17 longer mark the property boundary.

18 As to marking the agreed-upon boundary on the ground, the most Sizemore and Kissler
19 have asserted is that their alleged agreed boundary was **not** marked by the chain-link fence.
20 The alleged boundary was not marked on the ground until May 2013, after this litigation was
21 well under way and Kisslers had hired new counsel and asserted a defense of use by consent.
22 At that point, the Kisslers hired a surveyor to place stakes in the ground showing the boundary
23 allegedly established by oral agreement. See Jane Koler Declaration dated June 17, 2013 at
24 Ex. 7. Neither Mr. Sizemore nor the Kisslers have produced any written agreement altering
25

1 the established property boundary, and Mr. Kissler admitted in his deposition that there was no
2 written agreement.

3 Despite these alleged oral agreements, the Kisslers and Sizemores did not make any
4 changes in the way the respective properties had been used. The Sizemores' garden
5 continued to extend up to the chain-link fence as it had in Ms. Gainey's time. The chain-link
6 fence which had marked the property boundary for more than 14 years remained in place; the
7 Sizemores and Kisslers did not take it down or move it pursuant to the alleged oral agreement.
8 The Sizemores even intensified Lot 1's use of the disputed strip of land by installing a costly
9 new automatic sprinkler system along their side of the fence. See Kay Johnson Declaration
10 dated June 17, 2013. The purpose of this sprinkler system installed by the Sizemores was to
11 irrigate the garden that Mr. Sizemore now claims belongs to his friend and former neighbor,
12 rather than the people to whom he sold his house.¹ Sizemore's and Kissler's declarations do
13 not state whether oral permission was given to the Sizemores to install the automatic sprinkler
14 system. Mr. Sizemore and his ex-wife hired the company Erin Rockery to place costly, two-
15 man rocks to be used as steps between the disputed upper parking area and the lower
16 shoreline part of the Sizemore-Johnson lot containing the Johnsons' house and garage.

17 Although an elaborate set of oral agreements allegedly governed the boundary between
18 the Sizemore and Hall-Kissler property, the Sizemores failed to disclose any of those oral
19 agreements to Kay Johnson when she purchased her residence. Neither they nor their realtor
20 told Mrs. Johnson that the chain-link fence, which ostensibly marked the boundary between
21 the two properties, no longer marked that boundary. In fact, when Mrs. Sizemore pointed out
22 various property boundaries to the Johnsons during their six visits to the property when
23 considering purchasing the property, she showed them the chain-link fence as marking the

24
25 ¹ Mr. Kissler testified in his deposition that Mr. Sizemore remains a friend and that he meets him in town
for coffee, and speaks to him on average ten times per year. *Kissler Dep.* at 25. See *Koler Declaration* at
Ex. 2.

1 boundary between her property and the Kisslers'. See Kay Johnson Declaration dated June
2 17, 2013. It is odd that there were no written agreements addressing the property boundary,
3 planting and parking. Before placing their property on the market, the Sizemores and their
4 neighbors on the other side, the Welters, entered into a written agreement addressing joint-use
5 of a shared boat ramp. In the real estate disclosure form, the Sizemores also failed to disclose
6 the oral boundary agreement; they stated that there were no boundary agreements and no
7 encroachments or other agreements affecting use of the property. The Disclosure Form
8 stated:

	YES	NO	DON'T KNOW
9 C. Are there any encroachments, boundary agreements 10 or boundary disputes?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

11 See Kay Johnson Declaration at Ex. 1.

12 Up until now, the Kisslers have never, by word or action, given any indication to the
13 Johnsons that they believed the Johnsons' use of the sprinkler system and landscaping up to
14 the edge of the chain-link fence depended solely on oral permission from the Kisslers. See
15 Kay Johnson Declaration. The Kisslers failed at any point to disclose their alleged oral
16 agreements with Sizemore on the boundary and planting, until the point when they filed their
17 proposed Amended Answer and this Motion for Summary Judgment. After the Johnsons
18 purchased their home in autumn of 2007, the Kisslers never disclosed these alleged oral
19 agreements. See Johnson Declaration.

20 After purchasing the home, Kay and Rick Johnson gardened within the 3 foot area near
21 the fence, but Kisslers did not tell them that they were only able to use their sprinklers and
22 place landscaping near the fence due to an oral agreement. See Kay Johnson Declaration.
23 Oddly, when the Kisslers ripped out the ivy on their side of the chain-link fence, which exposed
24 the Johnson bedroom to the Kisslers' view, on October 4, 2011, Kay Johnson had a
25 conversation with the Kisslers about the need to establish a vegetative privacy screen. See

Response to Motion for Summary Judgment-5

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1 Kay Johnson Declaration. At that time, the Kisslers had no interest in what plants or trees she
2 might plant in the disputed area, and they did not mention any previous oral agreement which
3 they now claim allowed planting of plants so long as the plants did not have an intrusive root
4 system. *Id.*

5 It is strange that Kisslers did not notify Ms. Johnson of the alleged oral agreements
6 about boundaries and vegetation at that time. Neither did the Kisslers mention such oral
7 agreements in their interrogatory responses in the present case. Interrogatory No. 20
8 specifically called for such information; it stated: *To the best of your ability, describe in detail*
9 *any and all communications you have had with the plaintiffs, either verbally or in writing,*
10 *related to the claims asserted in the complaint, including, but not limited to: (a) Who*
11 *participated in the communication; (b) What was said; (c) When the communication occurred;*
12 *and (d) Where and /or how the communication occurred.* See Koler Declaration Ex. 1

13 Kisslers' long narrative in response to Interrogatory No. 20 did not once refer to any
14 conversation between 2007 and 2010, in which they advised Johnsons of the alleged
15 boundary or parking agreements, or the fact that they claimed ownership of the strip next to
16 the chain-link fence. *Id.*

17 Dona Gainey testifies in her Declaration that there was a fence she installed, which she
18 took down, after George Fleming put up the chain-link fence that remains today. See Gainey
19 Declaration dated June 8, 2013, pg. 2. Contrary to David Sizemore's declaration, Ms. Gainey
20 declares there was never a wooden fence on the Gainey-Sizemore-Johnson property marking
21 property boundaries; Mrs. Gainey had an ornamental white picket fence identifying the
22 entrance to her home, and there was no second chain-link fence on Ms. Gainey's property
23 after Fleming put-up his fence during her time owning the land. *Id.* She used her old fence
24 material to make a dog run, but the dog run did not mark property boundaries. See Gainey
25 Declaration dated June 8, 2013, pg. 2, line 18. Thus, Mr. Sizemore's account of taking down,

1 alternately, a wooden fence or a chain link fence – apparently the picket fence – was entirely
2 unrelated to establishing property boundaries.

3 This Response is based on:

- 4 • The Declaration of Dona Gainey (aka Dona Gainey Mathews)
- 5 • The Declaration of Kay Johnson
- 6 • The Declaration of Matthew Walters, PLS
- 7 • The Declaration of Jane Koler

8 **ARGUMENT**

- 9 • Whether CR 56 precludes summary judgment because material facts are
10 in dispute about ownership of the disputed strip.
- 11 • Whether oral agreements altered the established boundary when title to
12 the disputed area vested in Gainey in 1992.
- 13 • Whether the boundary between the Gainey-Johnson-Kissler property was
14 established by 1992 by adverse possession.
- 15 • Whether the 10 year statute of limitations bars the defendants' action to
16 evict Johnsons from their property and to take possession of that property
17 when the boundary was established by 1992, and actions to recover real
18 property must be commenced within 10 years of losing possession of the
19 property.
- 20 • Whether summary judgment should be denied because the Statute of
21 Frauds would have required a deed and a written agreement to divest
22 Gainey of the disputed property strip.

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SUMMARY OF ARGUMENT

The defendants argue that Johnsons should be evicted from roughly a three foot wide area of land and that they need to remove their Leland Cyprus bushes. But, this argument ignores that the boundary between the Johnson and Kissler properties had been established by the end of 1992 through adverse use by Mrs. Gainey, and that any action to recover that three foot wide strip had to be filed within 10 years of that date.

Further, after the boundary between the two properties was established, a deed would be necessary to convey title to the three foot wide strip of property which vested in Dona Gainey after ten years of adverse use.

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TITLE TO THE THREE FOOT WIDE STRIP OF PROPERTY VESTED IN DONA GAINNEY AFTER TEN YEARS OF ADVERSE USE; AN ORAL AGREEMENT CANNOT TAKE AWAY VESTED PROPERTY

It is well established under Washington law that "when real property has been held by adverse possession for 10 years, such possession ripens into an original title... the person so acquiring this title can convey it to another party without having title to him quieted in him prior to the conveyance. Once a person has title (which was acquired by him or his predecessor by adverse possession), the 10 year statute of limitations does not require that the property be continuously held in an adverse manner up to the time his title is quieted in a lawsuit." *EI Cerito, Inc. v. Ryndak*, 60 Wn.2d 847, 376 P.2d 528 (1962). *Halverson v. City of Bellevue*, 41 Wn.App 457, 704 P.2d 1232 (1985) (holding that an adverse possessor who had met all of the elements for the statutory period but who had not gone to court to quiet title, had an ownership interest requiring her signature on the subdivision of a neighboring property where land which Ms. Halverson had adversely possessed was located). The adverse possession statute does not address the passing of title from one person to another, but case law does.

Mugaas v. Smith, 33 Wn.2d 429, 206 P.2d 332 (1949) addressed a land strip enclosed by a fence that existed over a neighbors boundary from 1910 to 1928; the fence was allowed

1 to disintegrate and disappear before the neighboring property was sold in 1941. Like in the
2 present case, the deed description to the neighboring parcel included that strip, but there was
3 nothing on the ground nor in the records to indicate that the property had been fully fenced in
4 the past.

5 The purchasers made no inquiry to their neighbors as to the location of the boundary
6 and commenced construction of a house that extended over the line that had been fenced.
7 The court held that title to the land had become fully vested in the possessor 10 years after the
8 beginning of possession up to the fence **and had not been divested** by the cessation of use
9 or lack of maintenance of the fence.

10 Mugaas held that "it is elementary that where title has become fully vested by disseizing
11 so long continued as to bar an action [to take back the property] **it cannot be divested... by**
12 **any act short of what would be required in a case where his title was by deed.**" In
13 Mugaas, the subsequent purchaser of the land strip which was described in their deed, were
14 not protected as bona fide purchasers for value as "title that has matured under the statute of
15 limitations [10 years] is not within the recording acts." Mugaas, 33 Wn.2d at 431-432, J.
16 Broadus, *Washington State Common Law of Surveys and Property Boundaries* (2009) § IX-F
17 (addressing Mugaas.) The court ordered the purchaser to remove the encroaching part of
18 their building.

19 Here, Mrs. Gainey established the boundary between her property and the Fleming
20 property by adverse use that she made of that strip beginning in at least 1982. Thus, title to
21 the disputed area passed to her by 1992 after 10 years of adverse use; her use was open,
22 notorious, exclusive, actual, continuous, hostile, and made under a claim of right. See pgs. 12
23 to 15 of this brief for discussion of adverse use and declaration of Dona Gainey dated June 8,
24 2013.

1 **DEFENDANTS' ALLEGED ORAL BOUNDARY AGREEMENTS DID NOT CHANGE OR**
2 **AFFECT THE BOUNDARY ESTABLISHED BY GAINNEY; TITLE TO THE DISPUTED STRIP**
3 **VESTED IN HER AFTER 10 YEARS OF ADVERSE USE**

4 Defendants' permissive use theory that Mr. Sizemore (Johnsons' predecessor), and Mr.
5 Hall (Kisslers' predecessor), orally agreed that property descriptions in their deeds would
6 constitute the property boundary of Lot 1 – the Gainey/Sizemore/Johnson parcel and Lot 2, the
7 Fleming/Hall/Kissler parcel, did not have the slightest effect on the property boundary which
8 Dona Gainey established through adverse use.

9 After that boundary was established by adverse use in 1992, Mr. Sizemore, who
10 purchased Lot 1 in 1996, and his neighbor, Mr. Hall, and then Mr. Kissler, could not simply
11 orally agree to alter the boundary that Gainey had created. After 10 years of adverse use, title
12 to the disputed strip vested in her. See J. Braodus, *Washington State Common Law of*
13 *Surveys and Property Boundaries*, § IX–F, pg. 132; see Declaration of Matthew Walters.

14 The analysis of *Mugaas v. Smith*, *El Cerrito v. Ryndak* and *Halverson v. Bellevue* shows
15 that “the possessor becomes the owner of the possessed strip of land automatically once all
16 the elements of the doctrine [adverse possession] have been met for the full 10 year period
17 even though there is no document describing the strip in the possessor’s name.” J. Broadus,
18 *Washington State Common Law of Surveys and Property Boundaries*, § IX – F p 132. Thus,
19 the defendants’ theory that Sizemore and Hall, and then Sizemore and Kisslers’ oral
20 agreement about the property boundary allegedly entered into sometime after 1996 had
21 absolutely no effect on property boundaries. Defendants’ analysis totally ignores Washington
22 legal requirements associated with changing an established property boundary; once adverse
23 possession has established a property boundary, and title to the disputed strip became vested
24 in Dona Gainey, it would have been necessary for Mr. Sizemore to convey by deed, title to the
25 disputed strip of property to his neighbor Mr. Hall. *Id.* See Walter’s Declaration.

1 This case is like Mugaas v. Smith; title to the strip became fully vested in the possessor
2 10 years after the beginning possession and "it could not be divested... by any act short of
3 what would be required in a case where his title was by deed." *Id.* Thus, Mugaas, El Cerrito
4 and Halverson teach that once adverse use caused possession to become vested in Gainey, it
5 would have been necessary for Sizemore to convey title to that disputed strip to Mr. Hall by
6 deed; simply orally agreeing with Mr. Hall that rather than the fence constituting the boundary,
7 that they would rely on the deed boundary between Lot 1 and Lot 2, was not sufficient.

8 Gainey's adverse use of the disputed strip to the fence edge prevented such an oral
9 argument from changing that boundary; once boundaries have become established,
10 Washington law demands a deed and written agreement to change such boundaries. See
11 Windsor v. Bourcier, 21 Wn.2d 314, 315, 150 P.2d 717 (1944); see Walter's Declaration.

12 **THE STATUTE OF FRAUDS DEMANDS A WRITTEN AGREEMENT TO CHANGE AN**
13 **ESTABLISHED BOUNDARY**

14 "Agreements changing or affecting previously undisputed boundary lines are generally
15 subject to the Statute of Frauds." *Real Property Deskbook*, § 40.5(2)(g) (3rd ed. 1996).
16 Windsor, et al. v. Bourcier, 21 Wn.2d 315 ("It is true that a definite boundary, whose location is
17 fixed and known to the parties, cannot be changed by a parol agreement.") *Id.* *Thompson on*
18 *Real Property* 495 § 33.08. (A parol agreement between owners of adjoining land, which has
19 been partitioned between them, that they will disregard the boundary fixed by partition and
20 establish another line has been held unenforceable on account of the Statute of Frauds.

21 Here, because the boundary between the Gainey and Fleming property was established
22 through adverse use by 1992, it cannot casually be changed by a subsequent oral agreement
23 between Sizemore and Hall. The Statute of Frauds demands a written agreement to change
24 that established boundary. This court should deny summary judgment to defendants. It would
25 be illegal for this court to quiet title in Kisslers to the disputed property strip when title to that

1 strip vested in Gainey after ten years of adverse use and, thus, her successor Johnson.
2 Gainey's successors cannot be divested of land without a formal, written agreement and deed.

3 **DEFENDANTS' COUNTERCLAIM TO EVICT JOHNSONS FROM THE DISPUTED STRIP IS**
4 **BARRED BY THE STATUTE OF LIMITATIONS**

5 The defendants' summary judgment asks the court to evict the Johnsons from the
6 disputed property strip and require removal of their landscaping. But, Kisslers seek this
7 remedy 20 years after the boundary was established by adverse possession and title vested in
8 Dona Gainey in 1992. This summary judgment request is barred by the statute of limitations.

9 It is well established under Washington law that property subject to adverse possession
10 must be reclaimed within the 10 year statute of limitations codified at RCW 4.16.020(1) which
11 addresses the recovery of property.² In context of adverse possession, "there is no discovery
12 rule to start the 10 year period running when the owner of record actually knows of the
13 possession. Notice is provided by the possession, whether acted on by the true owner or not."
14 J. Broadus, *Washington State Common Law of Surveys and Property Boundaries*, § IX-F;
15 *Doyle v. Hicks*, 78 Wn.App 538, 897 P.2d 420 (1995) rev. denied, 128 Wn.2d 1011 (1996).
16 Further, *Mugaas* shows that notice from possession only applied to the owner of the property
17 being possessed during the initial 10 year period of possession.

18 Here, Kisslers' action to reclaim their property is barred by the statute of limitations;
19 Gainey commenced adverse use of the disputed property strip in 1982. She clear-cut native
20 trees, cut down brushy vegetation growing on it, imported soils, graded the areas, planted
21 lawn, maintained the lawn by mowing, reseeding, fertilizing, watering and weeding it for a

22 _____
23 ² 4.16.020 states:

The period prescribed for the commencement of actions shall be as follows:

24 Within ten years:

- 25 (1) For actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appears that the plaintiff, his or her ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action.

(2) ...

Response to Motion for Summary Judgment-12

1 period in excess of 10 years. Thus, such actions gave unequivocal notice to Fleming that
2 Gainey was claiming the property; it would have been necessary for Mr. Fleming to bring an
3 action to eject Gainey from that area and recover his property by 1992, the year that the 10
4 year statute of limitations expired. See Gainey Declaration dated June 8, 2013, pg. 3, lines 22-
5 25.

6 Because 20 years has now expired since the statute of limitations ran in 1992, this
7 action to recover the disputed strip is barred by the statute of limitations. Thus, this court
8 should decline the Kisslers' request to evict Johnsons from the disputed strip.

9 **PLAINTIFFS' PREDECESSOR GAINNEY OBTAINED TITLE TO THE DISPUTED STRIP BY**
10 **ADVERSE POSSESSION**

11 To obtain title to land by adverse possession it is necessary to prove that use of the
12 property at issue was open and notorious, hostile, under a claim of right, exclusive, actual and
13 continuous. It is necessary to demonstrate actual possession, that is, physical occupation of
14 the property. *Real Property Deskbook*, ¶ Adverse Possession § 64.3(i). "Actual Possession
15 is" the major element to place the record owner on notice that the statute of limitations is
16 running against his or her interests. *Id.*

17 The doctrine of adverse possession concerns "both the elements of notice to the record
18 owner that he or she has 10 years to protect his or her rights **and the creation of new**
19 **ownership in the possessor.**" *Id.* Thus, it is crucial that the possessor take and hold the
20 property as a true owner would. *Id.* In context of adverse possession, actual possession
21 requires possession of a character that a true owner would assert toward the land in view of its
22 nature and location. *Froland v. Franklin*, 71 Wn.2d 812, 817, 431 P.2d 188 (1967) overruled
23 on other grounds, *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984).

24 Here, Dona Gainey, beginning in 1982, when George Fleming, predecessor of Kisslers,
25 put in the chain-link fence, commenced her possession and occupation of the roughly three
foot wide area on her side of the Fleming fence. Gainey took down her fence and thereafter,

1 until she sold her property in 1996, used the disputed area next to the chain-link fence as part
2 of her garden. June 8, 2013 Gainey Declaration, pg. 3, lines. 19-24. In contrast to the Fleming
3 property, which contained a lot of untended, brushy materials and native trees, Mrs. Gainey
4 took possession of the now disputed, 3 foot wide area adjacent to her fence and landscaped
5 and maintained it.

6 The disputed strip is a strip of land near the property boundary defined by the Fleming
7 fence. It was an area between the Gainey home and the Fleming home; she landscaped it in a
8 manner that side-yards of property are landscaped. She cut down all native trees and brush,
9 imported soils, graded and planted grass. It is quite common for side-yard areas to be so
10 planted. She took actual possession of the land and used it as a true owner would, taking into
11 account its nature and location. See Gainey Declaration dated June 8, 2013.

12 **GAINEYS' USE OF DISPUTED STRIP WAS ACTUAL, OPEN AND NOTORIOUS**

13 Mrs. Gainey's use of the disputed side-yard strip was open and notorious; she clear-cut
14 native trees and cleared brushy weeds from the area; she imported soil, graded the area and
15 planted grass. The grass was carefully maintained; she weeded it, reseeded it and mowed
16 and watered it. It was open and apparent to the entire world that Mrs. Gainey had taken
17 possession of the side-yard property strip and was treating it as her own property.

18 Her activities in developing the side-yard as part of her lawn were clearly apparent, as
19 was her continuous maintenance of such areas. There was nothing about her possession that
20 was "hidden" and indeed it gave notice to Flemings. Mrs. Gainey's use was of a character that
21 it provided notice to George Fleming that she was clearing and maintaining the property as her
22 own; the demarcation between the Gainey property and the Fleming property was clear. Mrs.
23 Gainey carefully maintained her lawn and Mr. Fleming's land was covered with brush and
24 native trees.

1 **GAINEYS' USE WAS HOSTILE AND UNDER A CLAIM OF RIGHT**

2 Hostility, in the context of adverse possession "does not mean animosity" and means
3 that he or she is claiming the land as their own and that the use is not permissive. El Cerrito,
4 60 Wn.2d 847; hostility requires that the possessor treat the land as his/her own throughout
5 the statutory period. His/her subjective belief regarding his/her interest in the land is his/her
6 intent to dispossess is irrelevant. See Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431
7 (1984). Permission to occupy the land given by the true owner will negate hostility.

8 Adverse use does not mean ill will, but means use of the property as a true owner would
9 use it, disregarding the claims of others and asking permission of no one. J. Broadus,
10 *Washington State Common Law Surveys and Property Boundaries* § IX-F.

11 Here, Mrs. Gainey used the land, up to the fence as a true owner would. She did not
12 ask Flemings permission to use it; she incorporated the side-yard strip into her landscaping.
13 She treated the land as her own; there was visible evidence of her claim; her neatly manicured
14 lawn contrasted with the brushy growth and native trees on the Fleming side of the fence. See
15 Gainey Declaration, pg. 3, lines 15-17.

16 **ACTUAL EXCLUSIVE AND UNINTERRUPTED USE**

17 There must be some physical possession of the property, consisting of some structure,
18 barrier or landscaping and continuous use. J. Broadus, *Washington State Common Law*
19 *Surveys and Property Boundaries* § IX-F. There must be "a certain and defined line, but it
20 need not be fenced." *Id.* Riley v. Andres, 107 Wn.App 391, 27 P.3d 618 (2001) found that the
21 owners' use and possession of residential property in a golf course community for a 10 year
22 period supported their adverse possession claim. The possessors in Riley, landscaped up to a
23 marker for an out-of-bounds golf course marker, and a stake marking a point of curve for the
24 street. The possessor planted ornamentals, installed a sprinkler system, spread beauty bark,
25 watered, pruned the plants and pulled weeds within the disputed strip. The court found that

1 this was sufficient occupation and use for the neighborhood and that the line between the
2 stakes marked a logical boundary.

3 See Lloyd v. Montecucco, 83 Wn.App 846, 924 P.2d 618 (2001) (on a steep waterfront
4 lot, there was sufficient possession to a line between the end of a chain-link fence, up the bluff
5 to the end of the bulkhead on the water, where the claimant had planted and cut trees on the
6 bluff in the area bounded by the line).

7 Here, Mrs. Gainey testified that from 1982, when Fleming put up the fence, until 1996,
8 when she sold the property to Sizemores, that she used the disputed strip as part of her
9 garden.

10 Her lawn extended to the Fleming fence. Mrs. Gainey testified that she made
11 continuous and exclusive use of this area from 1982 until she sold her home in 1996. Mrs.
12 Gainey's declaration established that her adverse use of the property caused title to be vested
13 in her by operation of law after 10 years of such use and possession. See Halverson and
14 Mugaas. See Gainey Declaration dated June 14, 2013, at Ex. 1.

15 **WASHINGTON LAW DEMANDS THAT THIS COURT REJECT KISSLERS' QUIET TITLE**
16 **AND EJECTMENT CLAIMS**

17 Because title passed to Dona Gainey in 1992, after 10 years of adverse use, Johnsons'
18 predecessor David Sizemore could not, by an oral agreement, change that established
19 boundary. It would be necessary for Sizemore to have deeded the 3 foot wide disputed strip to
20 Halls or Kissler. Also, the Statute of Frauds demands a written agreement to change a
21 boundary once a boundary has been established. It is informative to review Miller v.
22 Anderson, 91 Wn.App 822, 964 P.2d 365 (1998). In Miller, neighbors recognized that the
23 fence between their properties diverged from the true boundaries; they signed and recorded a
24 formal agreement accepting the deed line as the true boundary, but did not move the fence.

25 But that is not what happened in this case. Suddenly, this spring, Sizemore recollected an
oral agreement about boundaries he reached with first the Halls and then the Kisslers. But, he

1 failed to disclose such boundaries to Johnsons when they purchased their property and
2 Kisslers also failed to bring this oral boundary agreement to the Johnsons' attention after they
3 purchased the property in 2007, and were engaging in an intense effort to plant evergreen
4 screening shrubs in 2011. Washington law prohibits such oral changes to established
5 boundaries. This court should deny the defendants' motion for summary judgment; significant
6 facts are in dispute and Washington law does not allow established boundaries to be changed
7 without a written agreement and deed.

8 **THIS MOTION FOR SUMMARY JUDGMENT MUST BE DENIED; SIGNIFICANT FACTS**
9 **ARE IN DISPUTE**

10 CR 56 demands motions for summary judgment must be denied when facts are in
11 dispute. Moreover, all facts and factual inferences must be viewed in a light most favorable to
12 Mr. and Mrs. Johnson, the non-moving parties. David Sizemore and Roy Kissler have testified
13 in their declarations that the boundary between the Johnson/Sizemore property and the
14 Kissler/Fleming property is the deed line. But, Dona Gainey has testified that the Fleming
15 fence marked the boundary between the two properties from 1982 through 1996. Kisslers
16 argue that they have title to the disputed strip. But, Kay Johnson claims title to that strip
17 because her predecessor Dona Gainey had already acquired it. Thus, because material facts
18 are in dispute, this court should not grant summary judgment.

19 **NO ATTORNEY FEES SHOULD BE AWARDED**

20 This court should decline to award attorney fees based on an alleged frivolous mental
21 suffering claim and the naming of Kissler Management Inc. in this lawsuit. Judge Hickman,
22 based on the same claims, declined to award attorney fees under CR 11 and RCW
23 7.28.083(3), the prevailing party fee provision in the adverse possession statutes, and RCW
24 4.84.185 which awards attorney fees in the context of frivolous lawsuits.

1 This is not a frivolous lawsuit and it is not a vendetta. Johnsons are simply attempting
2 to protect an access easement which Kisslers impaired by installing a curb within it, and to
3 protect their property boundary.

4 DATED this 17 day of June, 2013.

5 **LAW OFFICES OF**
6 **JANE RYAN KOLER, PLLC**

7 
8 Jane Koler, WSBA #13541
9 Attorney for Plaintiffs

June 17, 2013 2:33 PM
HONORABLE VICKI HOGAN
JUNE 28 2013
COUNTY CLERK
NO: 12-2-12095-7
9:05 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, et al.

Defendants.

No. 12-2-12095-7

**DECLARATION OF MATTHEW
WALTERS, PLS IN SUPPORT OF
RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

I am over the age of 18 and have personal knowledge of the following facts:

I have been a professional, licensed surveyor for 15 years, am licensed by the State of Washington and own my own business. I have attached my resume to this Declaration. See Exhibit 1.

I understand that there is a boundary dispute between the Kisslers and Johnsons, and that surveyor James Crabtree developed a legal description of the disputed area which is attached as Exhibit 2 to this Declaration.

The disputed strip is approximately 2.5 feet wide and runs along the edge of the chain-link fence shown on the 1984 Townsend-Chastain survey.

In preparation for making this Declaration I reviewed the 1984 Townsend-Chastain survey of the Fleming property located 7217 120th Street NW, Gig Harbor, Washington (which

Declaration of Matthew Walters-1

LAW OFFICE OF
JANE RYAN KOLER, PLLC
5801 Soundview Drive, Suite 258
P.O. Box 2509 - Gig Harbor 98335
TEL: (253) 853-1808 - FAX: (253) 851-6225

1 is now owned by the Kisslers), the 2013 Crabtree survey of the boundary between the Kissler
2 property (Defendants), and the Johnson property (Plaintiffs), who are the parties involved in
3 this lawsuit, and several declarations.

4 When a surveyor begins a property survey, he/she starts with documentary evidence
5 and field measurements. Often, in the field a surveyor discovers objective evidence that the
6 lines of occupation deviate from deed boundaries.

7 Ground inspections frequently disclose that a boundary might be established by
8 adverse possession; surveyors note any lines of occupation that deviate from deed
9 boundaries. In such cases, it frequently is necessary to look at off-record evidence to
10 determine where the actual property boundary should be.

11 Adverse possession is a doctrine that creates a new, non-record title based solely on
12 possession.

13 The chain-link fence that deviates from the deed boundary shown in the 1984
14 Townsend-Chastain survey as well as the 2013 Crabtree survey, is an apparent permanent
15 marking of the boundary between the Johnson and Kissler properties, and provides notice to a
16 surveyor that perhaps the deed boundary was not treated as the boundary between the two
17 properties.

18 Actual boundaries are not always established by the deed. One of the jobs of a
19 surveyor is to look at lines of occupation. When lines of occupation deviate from deed
20 boundaries, it can show that the boundary might have been established by adverse
21 possession, or another property doctrine such as mutual recognition and acquiescence, or by
22 a parcel agreement or by a common grantor.

23 To determine if an actual boundary is created by adverse possession, it is necessary to
24 consider off-record evidence. In this case, because the 1984 Townsend-Chastain survey
25

1 shows that lines of occupation deviate from the deed boundary, examination of off-record
2 evidence was warranted.

3 In conducting an investigation of the Kissler/Johnson boundary, I looked at the
4 Gainey/Sizemore statutory warranty deed filed under Auditor's No. 9609030271 and
5 determined that Dona Gainey was a predecessor of Johnsons. I also looked at the Declaration
6 of Dona Gainey Mathews who owned the Johnson parcel until 1996, photographs taken by
7 Dona Gainey Mathews of her garden which extended to the chain-link fence, the Declaration of
8 Roy Kissler dated May 14, 2013, and the Declaration of David Sizemore dated May 14, 2013.

9 Dona Gainey's Declaration indicates that she and Mr. Fleming (Kisslers' predecessor),
10 treated the fence as the boundary and that she occupied and used the property on her side of
11 the chain-link fence, up to the fence. Her photos of her lawn extending to the fence appear to
12 confirm her statement.

13 She states in her Declaration that she had no one's permission to use and occupy her
14 property up to the chain-link fence. Her hostile, open, notorious, continuous, exclusive use
15 under a claim of right from 1982 through 1996, of the roughly 2.5 foot wide strip running along
16 the length of the fence could cause title to vest in her to that area which is disputed in this
17 lawsuit; the roughly 2.5 foot wide strip located along the Johnson edge of the chain-link fence.

18 Although the fence deviates from the deed boundary, Gainey's continuous use and
19 occupation of that area could cause title to vest in her by operation of law.

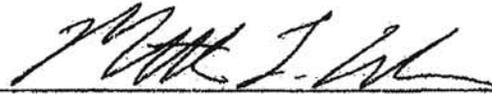
20 Mrs. Gainey clear-cut the disputed area, planted lawn in it and mowed and maintained
21 the lawn up to the fence which are the types of acts which could allow establishment of a
22 boundary and conveyance of title to areas outside one's deed to be conveyed by adverse
23 possession.

1 The documents I have reviewed indicate that after 10 years of use and occupation of
2 the disputed property strip as described in Dona Gainey's Declaration, title likely may have
3 passed to her by operation of law in 1992.

4 After title has vested in an adverse user, divesting that title requires formal, written
5 documents. Recognition of the deed boundary would require a written agreement and a deed
6 conveying the strip of property which had vested in Gainey, to Kisslers or their predecessors.

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

8 DATED this 17th day of June, 2013, at Tacoma, Washington.

9
10 

11 Matthew Walters, PLS

Matthew T. Walters, PLS

4915 96th St. E.,
Tacoma, Wa 98446

253.536.2430
wasurvey@gmail.com

Summary of qualifications

- Professional Land Surveyor Registered in the State of Washington since 1998 – (License No. 35154)
- Over 30 Years of Land Surveying Experience
- Highly regarded by the Professional Land Surveying Community
- President, Land Surveyors Association of Washington, South Puget Sound Chapter, 2000 - 2001

Professional experience

- | | |
|--|----------------|
| ▪ Owner of Walters & Associates, LLC | 2001 – Present |
| ▪ Survey Manager, DOWL Engineers | 2000 – 2001 |
| ▪ Project Surveyor, Apex Engineering, PLLC | 1998 – 2000 |
| ▪ Right of Way Officer, Pierce County Public Works & Utilities | 1995 – 1998 |
| ▪ Survey Technician, Pierce County Public Works & Utilities | 1992 – 1995 |
| ▪ Party Chief, TLK Land Surveyors | 1988 – 1992 |
| ▪ Chainman, Riipinen Land Surveying | 1980 – 1988 |

Mr. Walters grew up in a Land Surveying environment, living next door to his grandfather's professional surveying office. He aspired to be a Land Surveyor like his grandfather, and achieved that goal in 1998, becoming one of the youngest persons to ever become a Licensed Surveyor in the State of Washington.

While employed at Pierce County, he focused much of his efforts on right of way research, and is known throughout the surveying and legal community as an expert in such matters, as well as boundary survey issues.

Mr. Walters' has over 30 years of experience in surveying, which includes Survey Project Management, Survey Department Manager, and owning a professional surveying firm. His responsibilities have included research, computations, field work, computer operations, production and client coordination. He has been responsible for a wide variety of projects including municipal surveys, ALTA surveys, subdivisions, boundary line adjustments, property surveys, topographic surveys, road right-of-way research and determination, cellular tower site surveys, construction staking, and legal descriptions. Mr. Walters is proficient in conventional ground traverse methods as well as Global Positioning System (GPS) surveying. He has maintained proficiency in the latest survey related software and hardware developments.

Additionally, Mr. Walters has spent time teaching children in a classroom environment the importance and significance of surveying in the present and past, as well as teaching others about survey techniques, procedure, and history.

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.

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

KAY JOHNSON,)	
)	
	Plaintiff,)	Superior Court
)	No. 12-2-12095-7
vs.)	
)	Court of Appeals
ROY KISSLER,)	No. 45116-6-II
)	
	Defendant.)	

VERBATIM TRANSCRIPT OF PROCEEDINGS
Volume I

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

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. I think everybody is
10 up on Johnson vs. Kissler, No. 3 on our docket,
11 12-212095-7. For the Plaintiff, Kay Johnson. Counsel, if
12 you want to identify yourself for the record.

13 MR. BRANFELD: For the record, I am Gary
14 Branfeld, counsel for the defendants.

15 THE COURT: And you are blocking. Are you
16 going to stay there or come up?

17 MS. KOLER: I am going to come up, Your Honor.

18 THE COURT: All right. Just state your name
19 for the record.

20 MS. KOLER: Good morning. I am Jane Koler
21 representing Rick and Kay Johnson.

22 THE COURT: First of all, thanks to both of
23 you for accommodating the schedule. We have discovered
24 over the course of six months that with 24 to 40 matters
25 set every Friday that staggering the times reduces

1 counsel's billable hours, hopefully, for their client in
2 having to sit around while we struggle through assignments
3 and mandatory court review hearings. And it gives us a
4 break for the next group that we have set for a time so I
5 can hear your substantive issues.

6 It appears Mr. Kissler has filed,
7 Mr. Branfeld, a Motion for Summary Judgment as to the
8 adverse possession claim. I have read all of the
9 materials that you have submitted in support of the
10 motion. And I have read everything that has been
11 submitted in opposition. There was a supplemental
12 declaration that came in late yesterday. So I am looking
13 at Mr. Branfeld to make certain that he got it. It was
14 Ms. Matthews' declaration with two photos attached.

15 MS. KOLER: Your Honor, if I could just
16 explain. It was the very same declaration that we had
17 submitted to the Court. It simply occurred to me early
18 yesterday morning that probably the copy that got to the
19 Court did not have color photos, and so this was the same
20 declaration with color photos.

21 THE COURT: All right. I did that -- I did
22 have the original declaration. I pulled off the photos
23 and put them in another part of your materials. Did you
24 get the color photos, or you know what these are?

25 MR. BRANFELD: I believe we received the color

1 photos late yesterday, Your Honor.

2 THE COURT: All right. Because I normally
3 don't like to get something quite that late and not verify
4 that everybody got a copy of it.

5 Mr. Branfeld, I am ready to hear argument from
6 you on behalf of your client.

7 MR. BRANFELD: Your Honor, I have appeared in
8 front of you many, many times, and I know that you do read
9 all the materials, so I am not going to try to go through
10 this line by line, item by item. I am going to try to
11 summarize the history and the record of what's before you.

12 We know that the Gainneys bought the property
13 in 1977. We know from the survey that's been put in the
14 record that the fence was erected somewhere around 1984.
15 Until that point in time there is no way that you have any
16 adverse possession because there is nothing to segregate
17 the two properties, nothing to show that there was an
18 intent by one party over the other to take the property
19 from the other.

20 We know that the Flemings, who were the
21 predecessors of my client, it goes Fleming, Haul, and then
22 Kissler, erected the fence somewhere around 1948, and that
23 they had survey and knowledge of the survey because they
24 paid for it at the particular point in time.

25 We know that the Gainneys sell the property in

1 1996 to Sizemore, and that the Sizemores and my clients
2 lived side by side peacefully without any problems and
3 with knowledge that the boundary line was not the fence
4 line.

5 So, here is what we have in the record,
6 Your Honor. We have Gainey now claiming that she somehow
7 possessed this property. But what we have is a very
8 strange fact that Gainey does not transfer that interest
9 to her successors in interest by deed or otherwise. And
10 until this litigation arises, there was no transfer.

11 There is no transfer of this disputed property
12 from Gainey to Sizemore, and no transfer from Sizemore to
13 my client, not by deed or otherwise. So what we have
14 here, Your Honor --

15 THE COURT: I thought Sizemore transferred
16 to --

17 MR. BRANFELD: Sizemore -- there is nothing in
18 the deeds to show that the disputed property was
19 transferred from Sizemore to the Johnsons.

20 THE COURT: All right. I see what you are
21 saying, yes.

22 MR. BRANFELD: Okay. And what we have is just
23 the opposite, an acknowledgement by Mr. Sizemore
24 indicating that they recognized that the fence was not the
25 boundary line, that they could do certain things up to

1 that particular line, but that they were not trying to
2 take any portion of that particular property.

3 If the Court will look back and compare the
4 surveys, the two surveys that we have, the most recent
5 Crabtree survey and the prior survey that was done at the
6 behest of the Flemings, the Court will see down by the
7 water that there was a significant jog into the -- what I
8 am calling the Johnson property of the fence line. That
9 was eventually corrected, and it turns out that that was
10 done by Sizemore, but that was corrected. So, what we are
11 talking about now is if Fleming had intended to take that
12 property, he was taking a big chunk of waterfront property
13 that would have belonged to the Gaineys at that particular
14 point in time. That was eventually corrected, not by the
15 Gaineys, but by the Sizemores.

16 So what we have here, Your Honor, is this:
17 The Gaineys now claiming that they may have adversely
18 possessed, but nothing to show that they had the
19 hostility, actual continuous, open, notorious and
20 exclusive possession of the property where they intended
21 to maintain that property as their own.

22 We have their next person in chain of title,
23 the Sizemores coming in and saying they never intended to
24 adversely possess that property. You have my clients
25 coming in and saying they never intended to allow the

1 Sizemores to adversely possess that particular property,
2 and that by neighborly accommodation each of these parties
3 live side by side without reference to the fence line as
4 being the boundary line.

5 I have cited to the Court, I think in
6 responding materials, the neighborly accommodation
7 standards, and I believe that my clients satisfy all of
8 the elements and requirements of that particular standard.
9 And Your Honor, very simply put, in this particular case
10 you don't really have a dispute with the Gainneys. There
11 is no litigation between the Gainneys and the Flemings
12 that's of record that I am aware of, not at this point in
13 time in this case, anyway.

14 And then the next thing is that we have the
15 Gainneys now umpteen years later, long years after they
16 sell the property claiming that, well, maybe they did, and
17 the Johnsons coming in and it's been less than ten years
18 since they have owned the property, claiming that they
19 have adversely possessed the property.

20 I don't believe that they have met the
21 requirement of the statute. I don't believe that they
22 have satisfied the rules that would refute neighborly
23 accommodation in this particular circumstance. Under that
24 circumstance, Your Honor, I believe that our client is
25 entitled to quiet title of the property in their name and

1 deny the Plaintiff's claims for adverse possession.

2 THE COURT: All right. Thank you.

3 Ms. Koler.

4 MS. KOLER: Good morning. Today I am here
5 with my client, Ms. Johnson. The defendants' neighborly
6 accommodation theory is flawed because it fails to take
7 into account that after ten years of adverse use by
8 Ms. Gainey title actually vested in Ms. Gainey.

9 Now, Ms. Gainey states in her declaration that
10 she started to cultivate and use this property starting in
11 1982. She said, "I used that property," in her
12 declaration on Page 3, "adjacent to the fence roughly a
13 three foot wide area now claimed by the Kisslers, abutting
14 the cyclone fence, hostilly, openly, notoriously,
15 continually, exclusively, and under a claim of right
16 during the entire period I owned the property until I sold
17 it in 1996.

18 "As the attached photographs show, I clear-cut
19 all of the native trees growing in the area adjacent to
20 the fence as well as tall, brushy vegetation. I brought
21 in soil, planted grass, maintained that grass by
22 fertilizing, reseeding and mowing for a period in excess
23 of 10 years beginning in at least 1982." And then she
24 also says in the supplemental declaration that she watered
25 and weeded the grass.

1 So, and Chaplin vs. Sanders attributed the
2 Court -- attributed great significance to the fact that
3 there was a clear demarkation between the Sanders'
4 property. Sanders was claiming a disputed strip and the
5 Chaplain property. And that's the case that we have here.

6 If you look at the area beyond the chain-link
7 fence in the photographs that I submitted to the Court
8 yesterday, it's quite clear that Ms. Gainey had
9 beautifully maintained grass that was growing right up to
10 the edge of the fence. And then you look beyond and you
11 look at the property that was owned by first the Flemings
12 and then the Halls, and then at the Kisslers, and there is
13 all kinds of brush and native trees and it looks very,
14 very different. Ms. Gainey says in her declaration she
15 didn't have permission from anyone to use this property.
16 She used it because it was her property.

17 Now, I think that it's very significant, this
18 neighborly accommodation theory fails because Washington
19 law, specifically I refer you to the authority of the
20 Mugass vs. Smith case and the El Cerrito vs. Ryndak case.
21 Also the treatise of Jerry Braodus who wrote a treatise on
22 common law, boundary law in Washington.

23 Under Washington law, after ten years of
24 adverse use title actually vests in the adverse user, and
25 in order to divest that title after it has vested, you

1 need to comply with all of the formalities that you would
2 need to comply with if someone had acquired property by
3 deed.

4 So in other words, if the Kisslers and the
5 Halls and the Flemings were to have wanted to claim this
6 property after it vested in Ms. Gainey, they would have
7 had to have her Quit Claim that property to them, and
8 there would have to be a written agreement changing the
9 boundary of the property. And that didn't happen here.

10 It's very clear, I think the Mugaas case is
11 very helpful to look at it. It doesn't matter when the
12 quiet title action is brought. In Mugaas it was brought I
13 think two decades after the adverse possession occurred.
14 And it doesn't matter what the deed description of the
15 property is.

16 What matters is that after ten years of use by
17 the adverse possessor, actual title vests in the adverse
18 user, and then it has to be divested from that user using
19 all of the formalities that you would have to use if that
20 adverse user had obtained title to that property by deed.
21 And Mugaas rejected the same argument that Mr. Branfeld is
22 making today.

23 The fact that the deed description of the
24 adversely possessed property did not include the area that
25 was adversely possessed in that case. The defendant got a

1 deed description. It included the property that Mugaas
2 two decades before had adversely possessed, and based on
3 the deed description the neighbor even built a building on
4 the property that had been adversely possessed. All signs
5 of adverse possession by that point in time had
6 disappeared. The fence that had marked the boundary of
7 the adversely possessed property had disappeared.
8 Nevertheless the Court said, by virtue of the ten years of
9 adverse possession, the property was possessed. Title to
10 that property vested in the adverse possessor, and oral
11 agreements, any other, are not sufficient to divest the
12 adverse user of that land. And that's the situation that
13 we have here.

14 There was never any quit claim -- like if the
15 Kisslers, the Kisslers and the Sizemores had wanted to
16 change the boundary of the property, Sizemore would have
17 actually had to Quit Claim to the Kisslers the disputed
18 strip of property. And that didn't happen. You can't,
19 under Washington law after adverse possession has occurred
20 and El Cerrito says this, Mugaas vs. Smith says this,
21 Jerry Braodus' treatise says this, you cannot, you cannot
22 change that boundary without complying with all the formal
23 requirements that you would have to adhere to if you were
24 changing a deed boundary. So that's why the theory of
25 neighborly accommodation does not work in this case.

1 I think that if you look at Ms. Gainey's
2 declaration and the photographs, that land was
3 unequivocally part of her garden and she maintained it and
4 nobody else claimed it. She didn't have any agreements
5 with the Halls about using that property. She -- or with
6 the Flemings. She claimed that property as her own and
7 used it.

8 Now, there is a statute of limitations
9 problem. If the Kisslers are trying to reclaim this
10 property, there is a ten-year period for reclaiming
11 property, and that ten-year period begins to run the
12 moment adverse possession begins. So that would have been
13 in 1982, and Flemings or Halls would have had to bring an
14 action to reclaim the disputed strip by 1992. And there
15 was never such an action.

16 These so called oral arguments that -- oral
17 agreements, excuse me, that Mr. Sizemore testifies to in
18 his declaration have unusual circumstances that surround
19 them. When Ms. Johnson's declaration said that when she
20 purchased the Sizemore property, she visited without her
21 realtor on six occasions. Judy Sizemore carefully told
22 her about all of the agreements pertaining to the joint
23 use boat ramp, told her she was unsure about whether the
24 whole boat ramp was even on their property. She pointed
25 out the chain link fence that's now between the Johnson

1 property and the Kissler property that Mr. Fleming had
2 installed in 1982, and said that that was the boundary on
3 that side of the property.

4 She pointed out her camellia bushes, her
5 honeysuckle vine. She pointed out automatic sprinklers
6 that they had installed that butted right up against that
7 chain link fence. Never did she say these plants and
8 these sprinklers are on property actually owned by the
9 Kisslers. We just have an agreement that we can use this
10 property so long as as we do not plant plants with
11 invasive root systems. None of this was disclosed to the
12 Johnsons.

13 When the Sizemores filled out their real
14 estate disclosure form, they said there were no
15 encroachments on their property. They said there were no
16 boundary agreements pertaining to the property. And now,
17 certainly under the Kisslers' theory of the case, the
18 sprinkler system, the camellia bushes and the shrubs that
19 were growing right up against the fence on the Johnson
20 side of the property would have been encroachment. If it
21 had been the agreement of the Sizemores with the Kisslers
22 that they could only use the Kisslers' property on their
23 side of the fence, none of this was disclosed to the
24 Johnsons.

25 The Kisslers, when the Johnsons moved in in

1 September of 2011, never said anything to the Johnsons
2 about all of these oral agreements. They never said, you
3 Johnson, if you plant things, because the Johnsons were
4 gardening on their side of the fence within the disputed
5 strip, the Kisslers never said, you can't be in that area
6 of the property, or you can only use that area of the
7 property with our permission. Their interrogatory
8 response in which there -- to tell all transactions with
9 the Johnsons pertaining to the claims in this matter which
10 they filled out five months ago before they got new
11 counsel, they never mention telling the Johnsons in 2007,
12 2008, 2009, 2010 that they owned the property adjacent to
13 the Fleming fence on the Johnson side.

14 This was undisclosed to the Johnsons. And
15 significantly Kay Johnson testifies that on October 8th,
16 2011 on the occasion that the Kisslers were ripping ivy
17 off of their side of the fence, that Mr. Kissler
18 emphasized to her that he would only remove ivy from his
19 side of the fence that he would touch nothing on her side
20 of the fence. Kay Johnson explained to Mr. Kissler that
21 she was going to have to put up a thick vegetative screen
22 of Leland Cyprus because the ripping off of the ivy would
23 take away the privacy screen between their properties and
24 the Kisslers would be looking right into their bedroom.

25 Never on that occasion did Mr. Kissler say you

1 can't put in Leland Cyprus because those have invasive
2 root systems. You can't plant these plants on our
3 property. There was no mention in the course of that
4 conversation of the fact that Kisslers alleged that they
5 owned the disputed strip of property where Johnsons were
6 going to be planting Leland Cyprus. And it seems mighty
7 odd if Mr. Kissler kept saying, I am just going to work on
8 my side of the fence that he didn't tell Ms. Johnson that
9 he owned the property, the disputed strip, on her side of
10 the fence.

11 When the Johnsons were bringing in the Leland
12 Cyprus to plant them within the disputed strip, the
13 Kisslers never said, Johnson, don't plant those plants on
14 our property. And this was so -- this seems quite unusual
15 if indeed they are saying we have always owned this
16 property, we have always had an agreement with your
17 predecessors that they could only use this area. And
18 it's --

19 THE COURT: All right. I need you to bring
20 conclusion to your oral argument because I have another
21 group coming at 10:00, and it's Mr. Branfeld's motion --

22 MS. KOLER: Okay.

23 THE COURT: And then the Court needs to rule.

24 MS. KOLER: Okay. I have told you enough.

25 THE COURT: I didn't mean to cut you off. I

1 certainly would have given you a few minutes to wrap up.
2 Okay.

3 Mr. Branfeld, in response --

4 MR. BRANFELD: First of all --

5 THE COURT: -- to Ms. Koler's argument.

6 MR. BRANFELD: With regard to the Mugaas case
7 that counsel cited, the first problem that they have is in
8 that situation everybody in the chain had essentially
9 claimed this particular strip. That's not the case here.
10 Here you have the Gainneys potentially claiming it, and the
11 Sizemores not claiming it. And so, the facts are
12 different in these two situations.

13 With regard to neighborly accommodation, the
14 Granston decision says the inference of permissive uses
15 applicable to any situation in which it is reasonable to
16 infer that the use was permitted by sufferance and
17 acquiescence, it is not necessary that permission be
18 requested. The Court also said that if there is a
19 friendly relationship between the parties at that
20 particular point, that furthers that particular type of
21 finding and that the Court also indicated that once there
22 is a determination that there is permission, a
23 prescriptive right cannot arise from that.

24 With regard to the so called comment of Judy
25 Sizemore, we don't have a declaration from Judy Sizemore.

1 She's not a party to this, Your Honor. That's all hearsay
2 in these proceedings. If they want to bring in Judy
3 Sizemore's testimony, they have to bring it in by
4 affidavit, declaration, or whatever. As pointed out in my
5 reply material, it is not permissive to use hearsay
6 evidence to rebut a Motion for Summary Judgment.

7 With regard to the issue of encroachments, we
8 have a legal description of the property that is included
9 in the deed. There is no encroachments with regard to the
10 legal descriptions of the property. What they are
11 claiming is additional property above and beyond what was
12 in their legal description to their property. And they
13 are claiming it, even though the Sizemores before them did
14 not claim that particular property.

15 So what we have here, Your Honor, is a
16 situation where the Gainneys may have claimed this
17 particular property. We don't know from the Flemings, but
18 it appears that it's neighborly accommodation that allowed
19 them to plant that in that particular area. And then we
20 have the Sizemores and the Johnsons, excuse me, the
21 Kisslers getting together and saying we recognize that
22 this is not the boundary, go ahead and plant there, but
23 it's not going to relate to adverse possession or any
24 other right, and by the way, please don't interfere with
25 our septic system and that was agreed.

1 So under those particular circumstances,
2 Your Honor, we don't have adverse possession. We have
3 neighborly accommodation for a period of time, and now
4 what we have is an adverse interest between the two
5 parties and any rights or interests between the parties by
6 agreement have been withdrawn, and our clients now seek to
7 reclaim the property on the other side of the fence, this
8 disputed area, the property that was never deeded to is
9 Johnsons, the property that they have not held for a ten
10 year period of time, the property that they are now
11 claiming that was never granted to them, and that their
12 predecessors never claimed an interest in. Under those
13 circumstances, Your Honor, we are entitled to have that
14 property quieted in our claim.

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

23 Summary Judgment is granted on adverse
24 possession. The Gainneys' assertion or claim of adverse
25 possession now with no real property transfer to the

1 Sizemores, to put the world on notice, fails. The
2 documents that are of record do not support Plaintiff's
3 claim. The ten-year statutory requirement for adverse
4 possession has not been satisfied, and is inconsistent
5 with the documents that are of record. And that's what
6 the Court has to rely on, the documents of record. And I
7 appreciate that the Gainneys assert now, but that is belied
8 by the Sizemores' assertion, albeit -- well, intervening
9 between the Johnsons' ownership from Gainneys/Sizemore to
10 Johnson. So I am prepared to sign your order. I don't
11 believe that this resolves, though, the case completely.

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

14 THE COURT: Yes, I am not making any ruling on
15 that today.

16 MR. BRANFELD: Okay.

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

24 MR. BRANFELD: What I would ask the Court to
25 do is in paragraph four on line three, just simply say

1 "reserved".

2 THE COURT: All right.

3 MR. BRANFELD: Thank you, Your Honor.

4 THE COURT: I am going to ask, though,
5 Ms. Koler, I don't know if you have had a chance to look
6 over this order before I sign it?

7 MR. KOLER: I haven't.

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

13 MR. BRANFELD: Thank you, Your Honor.

14 THE COURT: All right. Thank you.

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

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

19 MR. BRANFELD: Thank you, Your Honor.

20 MR. KOLER: Thank you.

21 (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,) Superior Court
) No. 12-2-12095-7
 vs.)
) Court of Appeals
 ROY KISSLER,) No. 45116-6-II
)
) Defendant.)

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 15th day of August, 2013.


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

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5 **IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
6 **DIVISION II**

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

9 Plaintiffs/Appellants,

10 v.

11 **ROY KISSLER and JANIE LUZZI-**
12 **KISSLER,** husband and wife and their
marital community, **et al.,**

13 Defendants/Respondents.
14

Pierce County No. **12-2-12095-7**

Appeal No. **45116-6-II**

STATEMENT OF ARRANGEMENTS

[Rule 9.2(a)]

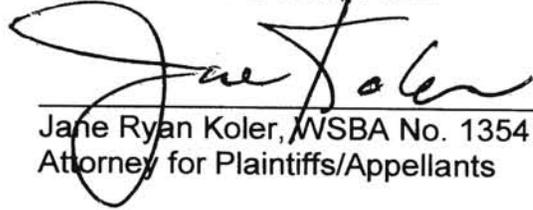
15 Jane Ryan Koler, attorney for Plaintiffs/Appellants Johnson, states that on
16 August 21, 2013, I ordered transcription of the original and one copy of the verbatim
17 report of proceedings from the court reporter(s)/transcriptionist(s) named below and
18 arranged to pay the cost of transcriptions as follows: Check number 8204 dated 8/21/13
19 made payable to Raelene Semago was placed in the U.S. mail, postage prepaid, to 930
20 Tacoma Avenue, 334 County-City Bldg., Department 5, Tacoma, WA 98402.

<u>Hearing Date(s)</u>	<u>Judge</u>	<u>Court Reporter/Transcriptionist</u>
21 June 28, 2013	Honorable Vicki Hogan	Raelene Semago, CCR, RPR, CMRS
22 July 19, 2013	Honorable Vicki Hogan	Raelene Semago, CCR, RPR, CMRS

1 A complete verbatim report of the above proceedings have been ordered. These
2 are the only verbatim reports that have been ordered. Because no trial occurred, there
3 was no verbatim report of trial proceedings to order.

4 DATED this 21st day of August, 2013.

5 LAW OFFICES OF
6 JANE RYAN KOLER, PLLC

7 
8 _____
9 Jane Ryan Koler, WSBA No. 13541
10 Attorney for Plaintiffs/Appellants

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CERTIFICATE OF SERVICE

I certify that on the 21st day of August, 2013, I caused a true and correct copy of this Statement of Arrangements to be served on the following in the manner indicated below:

Counsel for Defendants/Respondents Kissler
Gary Branfeld
SMITH ALLING PS
1102 Broadway Plaza, Suite 403
Tacoma, WA 98402

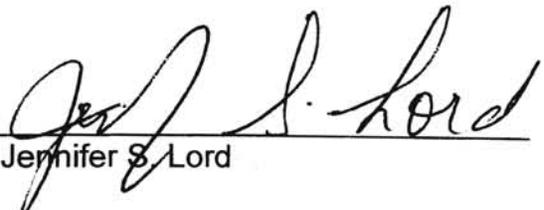
Via U.S. Mail, postage prepaid
 Hand Delivery

Leonard and Kathryn (Kay) Welter, Pro se
7227 120th Street NW
Gig Harbor, WA 98332

Via U.S. Mail, postage prepaid
 Hand Delivery

Court Reporter
Raelene Semago, CCR, RPR, CMRS
Official Court Reporter
930 Tacoma Avenue
334 County-City Bldg.
Department 5
Tacoma, WA 98402

Via U.S. Mail, postage prepaid
 Hand Delivery
 Via E-mail to: rsemago@gmail.com

By: 
Jennifer S. Lord

A-7

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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.)	

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

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

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 Gainey's 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

1 over this order before I sign it?

2 MR. KOLER: I haven't.

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4 look it over. You can go in the conference room outside.
5 I don't think our next group is coming until 10:40, or
6 maybe 10:30. I will have to look. Or you can use the
7 jury room.

8 MR. BRANFELD: Thank you, Your Honor.

9 THE COURT: All right. Thank you.

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

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

14 MR. BRANFELD: Thank you, Your Honor.

15 MR. KOLER: Thank you.

16 (Court at recess.)
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1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF PIERCE
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4
5 KAY JOHNSON,

6 Plaintiff,

7 vs.

8 ROY KISSLER

9 Defendant.

)
)
) Superior Court
) No. 12-2-12095-7
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11 REPORTER'S CERTIFICATE
12

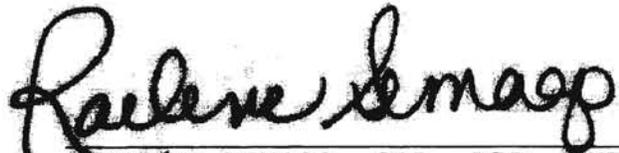
13
14 STATE OF WASHINGTON

15 COUNTY OF PIERCE

)
) ss
)

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

22 Dated this 2nd day of July, 2013.

23 

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

June 17, 2013 4:17 PM
HONORABLE VICKI HOGAN
~~JUNE 28, 2013~~
COUNTY CLERK
NO: 12-2-12095-7
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, et al.

Defendants.

No. 12-2-12095-7

**DECLARATION OF
JANE KOLER IN SUPPORT OF
RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

- I am over the age of 18 and have personal knowledge of the following facts as a result of my representation of Mr. and Mrs. Johnson:
Exhibit 1 is a true copy of an excerpt from Defendants' Supplemental Responses to Interrogatories; Interrogatory No. 20. In their response, Kisslers fail to disclose any of the 3 alleged agreements with Sizemores – (1) the agreement that the deed boundaries rather than the fence boundaries govern, (2) the agreement that no plants with invasive root structures might be planted near the fence, and (3)

1 the oral parking agreement. Nor were any communications disclosed in which
2 Kisslers disclosed to Johnsons any concerns about their septic system.

3 2. Exhibit 2 is a true copy of an excerpt from Roy Kissler's deposition showing that
4 he is a friend of David Sizemore (pgs. 25-26).

5 3. Exhibit 3 contains a true copy of excerpts from Roy Kissler's deposition showing
6 that he did not have a clear recollection of the planting agreement (pgs. 28-32).

7 However, he testifies in paragraph 8 of his declaration dated May 14, 2013:

8 There was an understanding that the Sizemores would be
9 able to plant vegetation along the fence line, as long as the
10 vegetation did not interfere with our septic system, which is
11 adjacent to the fence.

12 4. Exhibit 4 contains a true copy of excerpts from Roy Kissler's deposition
13 establishing that his predecessor, the Halls, did not disclose any agreements
14 about the fence not being the property boundary when they purchased the home
15 (pgs. 36-37, 44).

16 5. Exhibit 5 is a true copy of an excerpt from Roy Kissler's deposition about the fact
17 that Mr. Kissler is not sure about whether he told Kay Johnson that he owned the
18 area on her side of the fence on the occasion when he was removing ivy from his
19 side of the fence; and does not know when he told Kay Johnson that she could
20 not plant Leland Cyprus on her side of the fence (pg. 76).

21 6. Exhibit 6 is a true copy from Roy Kissler's deposition showing that he did not
22 believe he had an agreement about parking with David Sizemore. (pgs. 108)

23 7. Exhibit 7 is a true copy of an excerpt of Roy Kissler's deposition showing that
24 before surveyor Crabtree placed survey stakes in 2013, the boundary
25 established by the Kissler and Johnson deeds was not marked on the ground in
any way (pgs. 136-138).

1 8. Kisslers' supplemental interrogatory response to Interrogatory No. 39, soliciting
2 information about Defendants' statute of limitation's defense. It states in part:

3 Clifford Hall and George Fleming are the Defendants'
4 predecessors in title, and also have knowledge regarding
any agreement regarding the fence as not the boundary line.

5 9. Exhibit 8 is a true copy of an excerpt from Roy Kissler's deposition in which he
6 testifies that he has neither spoken to Mr. Fleming nor to Mr. Hall (pgs. 146-147),
7 making his claims in the above supplemental response about such oral
8 agreements hard to comprehend.

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

10 DATED this 17th day of June, 2013, at Gig Harbor, Washington.

11 LAW OFFICE OF JANE RYAN KOLER, PLLC

12
13 
14 _____
Jane Ryan Koler, WSBA # 13541
Attorney for Plaintiffs

1
2 **INTERROGATORY NO. 19** List all complaints made to public agencies
3 about Johnsons property or person.

- 4 a. List agencies and individuals you spoke to
5 b. List dates and nature of complaints
6 c. List action taken by agency and result of complaints

7 **ANSWER:**

- 8
9 a. Liquor board, code enforcement, health department
10 b. Liquor board unknown date, inquired about liquor license. Code enforcement
11 unknown date – deck and septic. Health department unknown date – septic
12 system and rat issue
13 c. Plaintiffs were contacted by code enforcement and the health department and
14 had to comply with some of their requests

15 **INTERROGATORY NO. 20** To the best of your ability, describe in detail any
16 and all communications you have had with the plaintiffs, either verbally or in writing,
17 related to the claims asserted in the complaint, including , but not limited to:

- 18 a. Who participated in the communication
19 b. What was said
20 c. When the communication occurred; and
21 d. Where and /or how the communication occurred.

22 **ANSWER:**

23 In approximately April or May, 2010, we had a meeting with Jane Ryan Koler, the
24 attorney for Rick and Kay Johnson regarding the easement and property line between
25 the Kissler's and the Johnson's residences at 7217 120th St. Ct. NW Gig Harbor, WA
26 98332. Present were Roy and Janie Kissler, Javier Figueroa and Lenard Welter. We
had a conversation regarding the clarification of the easement.

1 After several letters from Jane Ryan Koler, the Johnson's attorney, Ms. Koler asked
2 Roy to meet at the Kissler's property, (the Johnson's did not participate in the meeting,
3 however they shamelessly listened in on our conversation through an open window in
4 their garage.) Jane Ryan Koler, Roy, Janie, Mr. Figueroa and Mr. Welter, (Mr. Welter
5 was present for part of this meeting.)

6 We met with Jane Ryan Koler to discuss in length the use of the easement. The Legal
7 description, "Exhibit A" says: Non-exclusive easement for the purpose of ingress,
8 egress and the location and maintenance of utilities over, under and through the
9 Southeasterly 15 feet of Lot 2, as set forth in deed recorded under Auditor's No.
10 2782765 and granted in numerous instruments of record, from 1977 - 1992. At which
11 time Ms. Koler said: "the easement is not for parking." Rick Johnson continually parks
12 on the easement as do their tennis clients and Bed and Breakfast clients. Their clients
13 also park in our flower beds and several of their clients have parked in our driveway and
14 used our flowers beds as a walk way up to the road that leads to the Johnson's
15 house. As of, December, 2012 Rick Johnson's Jeep has been left, parked on the
16 easement for about six weeks, his Jeep is parked over a drain that empties the rain water
17 and fluid from his Jeep into the Puget Sound. Len Welter developed the approximate 8
18 foot (in width) road and the easement that has been established for a turn-out for
19 vehicles to pass. Roy has tried to talk to the Johnsons regarding the easement numerous
20 times. The Johnsons claim it's an "anything" easement, in which they can use it anytime
21 for anything. They need to read and understand the entire recorded easement and
22 property line.

23 Ms. Koler asked us to remove the curb stop. Roy said not until the Johnsons obey the
24 easement. It's a deterrent for Rick Johnson and the Johnson's clients not to park on my
25 property.

26 Mr. Welter and Roy had a meeting a year earlier with Ms. Koler. Roy remembers the
27 conversation with Ms. Koler about the easement and Johnson's parking issues with their
28 tennis lesson clients and their Bed and Breakfast clients, not having enough parking on
29 their property for their clients. This meeting and conversation took place a year
30 earlier from the time Roy placed the curb stop, when Kay and Rick Johnson were suing
31 Mr. and Mrs. Welter, (the neighbors on the South side of the Johnson's property). Jane
32 Ryan Koler said: "they (the Johnson's) cannot park on the easement", then she stated,
33 "the easement is for no parking." She gave the proper understanding of the easement,
34 that it's to be used for ingress and egress.

35 Regarding the property line: Matters shown on Survey recorded under Auditor's No.
36 8405010411, as follows: fences are not located on lot lines. Roy and Janie Kissler have
37 lived in their home for ten years. The Johnsons moved in their home pproximately four
38 years ago. Roy and Janie have had several discussions with Kay Johnson regarding
39 the property line, while Rick Johnson will hide in his shed, with his arm hanging out of
40 the shed with camera in hand, taking pictures of Roy. The Sizemore's who lived in the

1 house prior to the Johnsons, had a fence as well, 1.5 feet was in between the two fences.
2 The Hall's (previous owners to Kisslers) and Sizemores used the 1.5 feet in between the
3 fences for their yard waste. Sizemore's eventually took their fence down. After one of
4 the first discussions regarding the property line, Kay Johnson deliberately takes a shovel
5 and hand saw and kills the Honeysuckle vine that Judy Sizemore planted on our fence. I
6 witnessed this and asked Kay the next time I saw her, what happened to the
7 Honeysuckle, she said: "Oh, I didn't like it so I killed it." I said, I thought it was
8 beautiful (around summer 2009).

9 Late Summer, 2010: Roy and Janie Kissler are doing yard work when the Johnsons
10 show up at the fence line, another discussion comes up about the property line. The
11 Johnsons plant about five large trees against our fence and tie the trees to our fence to
12 hold them in place.

13 Late summer, 2011: The Kisslers notice rat feces while working in the yard. Roy
14 Kissler sets rat traps. Within a week, Roy caught over twenty rats. The Kisslers decide
15 to hedge up and prune all of our yard. We had ivy on two-thirds of the fence line. When
16 we took out the ivy, we noticed a lot of rat feces within a foot of the Johnson's
17 birdfeeders and peanut feeders for the squirrels. We asked the Johnson's over the past
18 four years to please take down their feeders, because it will facilitate a rat
19 infestation. Kay Johnson asked Janie Kissler, "Did you see the rat climbing up the bird
20 feeder?" Roy continues to set traps along the fence line and the traps are always full by
21 morning, to date we have trapped over 50 rats. We also wondered if the rat infestation
22 could be related to the continual problems the Johnson's have with their septic system
23 overuse/ sewage/ septic alarm going off continually. The Health Department had to be
24 brought out on site. The Health Department has given the Johnson's orders to make
25 changes to their garage tennis business and septic overuse due to their Bed and
26 Breakfast clientele. The Johnsons' drain field is located directly behind the bulkhead.
27 The Johnsons have no reserve field.

18 SEPTEMBER 2011-SUMMER 2012

19 The Johnsons begin planting more trees against our fence and on our
20 property. Approximately twenty-five fast growing trees have been planted against our
21 fence. I will provide the tree name and growth progression when required. The trees
22 have already grown through and over the fence. The trees encroach on our property.
23 The Johnson's have no regard for our property. In the Fall of 2011 half of the twenty-
24 five trees were planted. At the present time, December, 2012, the trees have grown to
25 over eight feet tall. The Kisslers are concerned about these trees: 1. They are on our
26 property. 2. The mature size of these trees destroys a portion of our waterfront view 3.
27 Our septic system is within five feet of these trees. Trees of this size and nature will
cause damage to our septic system. In the Johnson's lawsuit against our senior citizen
neighbors, Mr. and Mrs. Welter, who have lived in their home for over twenty years,
while Mr. and Mrs. Welter were dealing with very serious health issues, the Johnsons
persisted in harassing Mr. and Mrs. Welter, pushing them into a lawsuit, with no regard

1 to Mr. Welter's serious health situation, that the Johnsons are completely aware of. Mr.
2 Kissler was asked to help Mr. and Mrs. Welter during their case. Now the Johnsons
3 have planted all these trees on our property against our fence, yet they requested in their
4 lawsuit against the Welter's, that the Welter's cannot plant trees to be over six feet
5 tall, however, look at what Johnson's just planted on our property. Dave Sizemore will
6 speak to our attorney's office and give his deposition.

7 Summer, 2012: The Johnson's installed an irrigation sprinkler system on our property,
8 down the fence line, within approximately eight inches from our fence.

9 The road that services the Kissler home, the Johnson home, and the Welter home is
10 owned by Mr. and Mrs. Welter. The Welter's pay for road tax and maintain the road
11 themselves for all three homes to enjoy.

1 it?

2 A At the right price, I'd sell any of them.

3 Q Now how long have you actually lived there?

4 A I believe we purchased the home the end of November
5 2004.

6 Q So you've lived there for less than ten years; is that
7 correct?

8 A Yes. Just under ten years.

9 Q Now can you tell me, you've talked to Mr. Sizemore about
10 this case; is that correct?

11 A Yes.

12 Q And tell me what you learned from Mr. Sizemore.

13 A With David being my neighbor, you know, we discussed the
14 fence line. We discussed the property line when he was
15 living there.

16 We discussed the use on the boat ramp when he was
17 living there. You know, as far as, you know, going in
18 depth on anything with the case, I haven't sat down and
19 spent a lot of time with him on it.

20 Q So you talked to David Sizemore. Now is David Sizemore
21 a friend of yours?

22 A Yes. They were our neighbor for quite some time.

23 Q And after he moved away, did you continue to see him?

24 A Yes.

25 Q So about how often do you see him?

RIE GERJETS, CCR
'53-473-7764

1 A I don't keep a record of it.

2 Q Guess.

3 MR. BRANFELD: No. I'm not going to allow the
4 witness to guess.

5 You can answer based upon reasonable recollection.

6 A David will stop by our house on occasions throughout the
7 year. I've seen him in town, had coffee with him. I
8 talk to him ten times a year on average.

9 Q (By Ms. Koler) And had David Sizemore moved out of his
10 house before it was sold to the Johnsons?

11 A I can't keep track of the time when David moved in and
12 out of his house. I do not know.

13 Q Okay. But he and Judy Sizemore subsequently separated
14 and got divorced, did they not?

15 A Yes, they did.

16 Q And do you recall if the separation occurred before they
17 sold --

18 A I do not remember.

19 Q Now have you talked to Judy Sizemore about this case?

20 A No.

21 Q Has your wife talked to Judy Sizemore?

22 A My wife will have to answer for herself.

23 Q Okay. So tell me everything that David Sizemore told
24 you about the boundary situation.

25 A Those were discussions we had prior to the Johnsons

1 the Welters' property, and it was reciprocated to us,
2 also. I still do today. If I need extra parking, the
3 Welters open up their property to us to use it.

4 Q Okay. So there was the parking agreement, and then
5 there was an agreement about allowing use of the several-
6 foot area adjacent to the Sizemores' side of the chain
7 link fence, being able to use that for planting and so
8 on?

9 A To the best of my knowledge, the only planting that ever
10 took place was up by the road where Judy planted a
11 honeysuckle bush on the fence line. There was nothing
12 else.

13 Q So you weren't aware of the camellias on the Sizemores'
14 side of the fence?

15 A Most of that area on the side of that property was
16 blocked by an eight-foot ivy hedge and a bunch of thea
17 bushes that went all the way up to the garage.

18 Q Thea?

19 A So the tall, Evergreen-type, you know, bushes.

20 Q Photinia?

21 A I'm not a landscaper. I don't know.

22 Q So you're saying Judy Sizemore didn't actually plant
23 things on the Sizemores' side of the fence?

24 MR. BRANFELD: I'm going to object to the
25 form. You're not talking about the disputed area.

1 You're talking about anywhere on the Sizemores' side of
2 the fence, Counsel. That's an improper question.

3 Don't answer that.

4 Go ahead.

5 MS. KOLER: Okay. You cannot instruct him not
6 to answer unless it's attorney/client privilege so
7 let's --

8 MR. BRANFELD: Well, I'm not going to let him
9 answer this one.

10 MS. KOLER: Okay. Then let's call the judge.

11 MR. BRANFELD: Fine, or reask the question
12 appropriately.

13 MS. KOLER: Let's call the judge. You do not
14 instruct him not to answer unless it's attorney/client
15 privilege, and we're just not going to do that here.

16 MR. BRANFELD: I'll tell you what. Go ahead
17 and answer it. I'll pick the fights.

18 A I'm not aware of Judy Sizemore's planting practices.

19 Q (By Ms. Koler) So within the disputed area that you
20 allege that you own, did you give the Sizemores
21 permission to plant different plants there?

22 A Like I said to begin with, the only one I know of was
23 the one honeysuckle up on the fence, and I don't know if
24 she planted that before I was there or after I was there.
25 I really don't know.

1 Q What about the agreement? Were you aware of the
2 agreement that Dave Sizemore references in his
3 declaration where he said that you gave the Sizemores
4 permission to plant within the disputed area plants with
5 noninvasive root structures?

6 MR. BRANFELD: Object to the form. You
7 haven't showed him the declaration. It's unclear to me
8 what area you're even talking about or what agreement
9 you're talking about.

10 If you know, go ahead and answer.

11 A Yeah. I'm not sure what it is. I'd have to read it to
12 be able to answer it for you.

13 MS. KOLER: Okay. Let me dig that out. This
14 will be Exhibit No. 3.

15 (Exhibit 3 was marked for identification.)

16 MS. KOLER: We're going to designate the
17 Declaration of Roy Kissler as Exhibit No. 4.

18 (Exhibit 4 was marked for identification.)

19 Q (By Ms. Koler) Okay. Mr. Kissler, do you remember
20 doing this declaration for your attorney?

21 MR. BRANFELD: Which declaration?

22 MS. KOLER: The Declaration of Roy Kissler.

23 MR. BRANFELD: Exhibit 4?

24 Q (By Ms. Koler) Do you want to take a look at Exhibit 4,
25 if you would, please?

1 A Are we done with this one?

2 Q We are.

3 A Okay.

4 Q I'm trying to get you out in the sunshine today.

5 A Okay. Yeah.

6 Q Okay. So if you would look at Paragraph 8, you say in

7 Paragraph 8: "There was an understanding that the

8 Sizemores would be able to plant vegetation along the

9 fence line as long as the vegetation did not interfere

10 with our septic system, which is adjacent to the fence.

11 As neighbors with a good relationship, this was never a

12 problem."

13 A Uh-huh. (Indicates affirmatively.)

14 Q So you had an agreement with the Sizemores about being

15 able to plant plant species along the fence in the

16 disputed area so long as the plants did not interfere

17 with your septic system?

18 A We didn't have a problem with the Sizemores doing

19 anything on the other side of the fence as long as it

20 didn't interfere with our septic.

21 Q When did you reach that agreement with Mr. Sizemore?

22 A I don't have dates on that. David and I just had an

23 open conversation several times about the fence, what

24 was there before, you know, and did I have any problem

25 with it? Did he? Neither one of us really had any

1 problems.

2 Q What were the particulars of the planting agreement?

3 A Well, we didn't sit down and write an agreement.

4 Q How did it come about? If you could just tell me
5 everything you know about the planting agreement with
6 Mr. Sizemore.

7 A We just had an agreement that the fence was not the
8 boundary line. What he was doing on his side of it
9 didn't interfere with us. He knew where our septic tank
10 was at and that he wasn't going to plant anything in
11 through that area, and they never did.

12 Q So you're saying they didn't plant any plants there, or
13 you don't know if they did?

14 A Not that I'm aware of through that area where our septic
15 tank is.

16 Q Okay. Now you say you have concerns about the septic
17 tank or the septic drain field. What part of your
18 septic system are you concerned about?

19 A I'm concerned with the trees that have been planted on
20 our property that are going to take root and come -- you
21 know, they're going to invade into our property. They
22 already have. They've grown through the fence, over the
23 fence, so I know that they're growing under the fence.

24 Q And you're concerned about them going over on your
25 property?

1 ambiguous, and compound.

2 Go ahead and answer, if you can.

3 A I don't remember having conversations with the Halls
4 about this. I had my conversations with the title
5 company.

6 Q (By Ms. Koler) So the Halls didn't tell you when you
7 purchased your property that there was an agreement that
8 the fence actually was not the boundary?

9 A I don't recall a conversation with them on that.

10 Q And so as far as you know, you got your title report,
11 but did you actually have contact with the Halls when
12 you purchased the property?

13 A Viewing the property, yes.

14 Q So did they take you around and show you the property?

15 A Outside they didn't. The access was to the inside of
16 the home, is when I met them to get inside the home.

17 Q And was it for sale by owner, or was it for sale by
18 realtor?

19 A It was for sale by realtor. I believe it was a pocket
20 listing.

21 Q What does that mean?

22 A You don't understand what it means? The realtor knew
23 that the property was for sale. They didn't want to
24 market it and have a lot of activity on the home.

25 Q And do you remember what realtor that was?

1 A I believe Teresa Mazda, and she was working either in
2 this building or next door.

3 Q Was she with Windermere, or whom was she with?

4 A Yes. She was with Windermere.

5 Q And did she make any representations about boundary to
6 you?

7 A No.

8 Q And the Halls didn't tell you about any boundary
9 agreements?

10 A No.

11 Q Did the Halls tell you that the fence was not the
12 boundary?

13 A No.

14 Q Did Teresa Mazda tell you that?

15 A The title company.

16 Q And so tell me what the title company told you.

17 A I can't give you exact words on it. I was informed at
18 title about the situation. I read the title. I
19 understood the survey. I knew that the fence was not
20 the property line.

21 Q So when you say the title company told you, are you
22 saying that some title officer sat you down and said --
23 you know, talked to you about the boundary?

24 A I don't recall.

25 Q Or are you just saying that you ^{saw} signed Schedule B, a

1 information provided to you about property boundaries
2 before you purchased the property?

3 A I would have to read through the complete title to see
4 if there were any other clouds or issues on it. I don't
5 recall any to memory right now.

6 Q So the information you had about boundaries or easements
7 or whatever is the information that was discussed in
8 your title report that had exceptions to title?

9 A This one here that says that the fence is not the
10 property line.

11 Q And that was the source of your information that the
12 fence was not the property line, the 1984 survey?

13 A Yes. I saw this before I purchased the property.

14 Q Okay. And the source of your information that the fence
15 was not the property line was that survey, rather than a
16 conversation you had had with Mr. Hall or Mrs. Hall?

17 A Mr. or Mrs. Hall did not take me outside and walk the
18 property, as I stated earlier.

19 Q And just to be clear, did Mr. or Mrs. Hall make
20 representations about the true boundary of the property
21 or boundary agreements?

22 A No.

23 Q So the first boundary agreement that you're aware of was
24 the boundary agreement that you and David Sizemore made?

25 A We agreed in conversation. We did not file an agreement.

1 have bird feeders?"

2 Q Okay.

3 A Okay. That's an issue. The rat problem was taken care
4 of. It was under control for a long time, and that's
5 when they started coming back.

6 Q But you didn't disclose that to Mrs. Johnson on
7 October 4, 2011, did you?

8 A That there was a rat problem?

9 Q No. Your claim that her bird feeders caused the rat
10 problem.

11 A I talked to her several times about her bird feeders and
12 that they were feeding the rats.

13 Q On that occasion, weren't you just talking about the
14 fact that there's a big rat problem and the rats were
15 living in the ivy and you were taking it down?

16 A The rats were in -- the bird feeders are on the other
17 side of the ivy, about -- I don't know -- six or eight
18 bird feeders. You could see the rat activity all over
19 through that area. I've seen rats in the bird feeders.

20 Q Now you and your brother were taking down the ivy, and
21 Mrs. Johnson actually entered your side of the property
22 with your permission, did she not?

23 A At one time, yes.

24 Q And you discussed taking the ivy off the fence?

25 A Yes.

1 staircase, did they not?

2 A Yes.

3 Q And the only place that staircase really leads from is
4 the area of the easement that was used for parking?

5 A You could walk up those stairs and walk down the road
6 and take a stroll. You could go a lot of places from
7 there.

8 Q So you're telling me the Sizemores hardly ever parked
9 there?

10 A You're asking me to tell you what Sizemores did all the
11 time. I'm not there all the time to keep track of their
12 parking habits.

13 Q Okay. But they did park in that area?

14 A On occasion.

15 Q And they parked there only with your permission; is that
16 correct?

17 A They didn't come and ask me every time they parked their
18 car.

19 Q Was this one of the agreements that you and David
20 Sizemore entered into shortly after you purchased the
21 property?

22 A We had no agreement --

23 MR. BRANFELD: Again, Counsel, it's an
24 understanding.

25 A I had an understanding with them. I didn't have an

1 A Yes.

2 Q So you really didn't have any way, until you had
3 Mr. Crabtree come out, of ascertaining where that line
4 was as it ran down the property; is that correct?

5 A That's why the survey says the fence is not the boundary
6 line. The survey points are the survey points. They're
7 recorded.

8 Q Right. But, I mean, I'm not a surveyor, so I don't
9 quite understand this, but until you had Mr. Crabtree
10 come out and put posts in, you didn't exactly know what
11 your actual ownership was?

12 MR. BRANFELD: I'm going to object to the form.
13 You're talking about Crabtree putting posts in. There's
14 been no testimony or anything about that he put posts in
15 the ground, Counsel. He marked the boundary line with
16 appropriate survey marks. Please don't call them
17 "posts."

18 Q (By Ms. Koler) You can go ahead.

19 MR. BRANFELD: Go ahead.

20 A I was there when James Crabtree marked the boundary line
21 and found that some of the property in dispute that's
22 our property was further over than I first expected and
23 some was a little bit different.

24 Q (By Ms. Koler) So the property that you're saying you
25 own, you weren't aware of where it was on the ground

1 until Mr. Crabtree came out?

2 A I was aware of the survey, very aware of the survey.

3 Q Yes. But I'm talking about out in the field or out in
4 the yard.

5 A You can't sight on that property from one survey pin to
6 the other survey pin.

7 Q What does that mean? I don't understand that.

8 A You can't stand down at the water on that survey pin and
9 look up and see the other survey pin because of the topo
10 of the land. That's why the surveyor came in with the
11 topo, to mark the boundary line to make it clear.

12 Q So that you could know the extent of your ownership?

13 A Not extend it.

14 Q Extent.

15 A Yes.

16 Q Because you were fuzzy about where that line --
17 physically you knew based on the survey, but you didn't
18 know on the ground exactly where that line fell?

19 A There's not an invisible line or a line to be seen
20 unless you pin the boundary line.

21 Q So you didn't know what that line was, which goes, you
22 know, down the property toward the water, until
23 Mr. Crabtree put in some --

24 A Survey pins.

25 Q -- survey pins?

1 A It could have been four feet over there.

2 Q Or ten feet?

3 A It had to be marked. Now we know exactly. You cannot
4 sight both ends of the survey because of the topo of the
5 property.

6 Q So I'm a little confused. What are you telling me?

7 A I had a surveyor mark the line.

8 Q Okay. Because you didn't know where it was on the
9 ground before he marked it?

10 (Mrs. Johnson returns.)

11 MR. BRANFELD: Wait. He had a surveyor mark
12 the property.

13 MS. KOLER. Okay. What do you --

14 MR. BRANFELD: Let me finish.

15 MS. KOLER: We'll swear you in.

16 MR. BRANFELD: Counsel, there's been prior
17 testimony that I have made the arrangements for the
18 surveyor. You're asking him to divulge attorney/client
19 privilege as to why the surveyor did what he did.

20 MS. KOLER: I'm asking him for his impressions
21 of --

22 MR. BRANFELD: No, you didn't.

23 MS. KOLER: -- what the surveyor did.

24 Q (By Ms. Koler) What are your impressions of what the
25 surveyor did?

1 Fleming are the defendants' predecessors in title and
2 also have knowledge regarding any agreement regarding
3 the fence as not the boundary line."

4 A Okay.

5 Q So you've signed these statements. You told me that
6 Mr. Hall didn't -- Mrs. Hall didn't disclose to you any
7 agreements regarding the fence or the boundary.

8 A They didn't. Escrow did. In escrow instructions in the
9 selling of the property, they transferred title and deed
10 to us. In doing so, they gave us the information on the
11 survey.

12 MR. BRANFELD: I would also note, Counsel,
13 that Answers to Interrogatories required knowledge of
14 counsel as well.

15 Q (By Ms. Koler) And you say that Gerald Fleming also had
16 knowledge regarding -- you said you hadn't even talked
17 to Mr. Fleming.

18 A I haven't. If you look at the survey and what was done
19 there, it's a recorded document. That's how I have my
20 knowledge.

21 Q So it's not based on any conversations with Gerald
22 Fleming or Clifford Hall?

23 A No. It's documents.

24 MR. BRANFELD: And --

25 Q (By Ms. Koler) And --

MR. BRANFELD: Wait a minute. And knowledge
of counsel.

Q (By Ms. Koler) And you don't know what Gerald Fleming
or Clifford Hall knew about the boundaries or believed
about the boundaries?

A No.

Q Okay. Let's look at Supplemental Response to
Interrogatory No. 37, which is like one through three on
Page 4, also.

A One through three. Okay.

Q Okay. It says: "Defendants understand that the
predecessors entitled" -- I think it probably means "in
title to both parties had an agreement that the fence
line did not constitute the boundary line. Such an
agreement" -- okay. So what predecessors are you
talking about?

A Flemings and Halls and the survey is what I'm talking
about.

Q Okay. So Flemings and Halls had --

A They had -- they have the same documentation and the
same deed.

Q Well, but how do you know that Flemings and Halls as the
predecessors had an agreement that the fence wasn't the
boundary line?

MR. BRANFELD: If you can answer that without



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

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

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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 KISSLER
MANAGEMENT, INC.,

Defendants.

No. 12 2 12095 7

JUDGMENT AND DECREE



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~~ *JLC* \$ 29,270.30
- E. Costs: *JLC* \$ 5,046.75
- F. Total Amount of Judgment: *JLC* \$ ~~38,711.00~~ \$ 34,267.05
- G. Judgment shall bear interest at: 12% per annum
- H. Attorney for Judgment Creditors: Gary H. Branfeld

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 ~~\$33,564.25~~ ^{29,270.20}. 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~~ ^{34,267.05}.

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

FILED
DEPT. 5
IN OPEN COURT

JUL 19 2013

Pierce County Clerk
By *[Signature]*
DEPUTY

APPROVED AS TO FORM AND
NOTICE OF PRESENTMENT WAIVED
BY:

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

Court 4-581
Cohen Arden

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

Jane Ryan Koler
WSBA No. 13541
Attorney for Appellants

Law Office of Jane Ryan Koler, PLLC
5801 Soundview Drive, Suite 258
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:

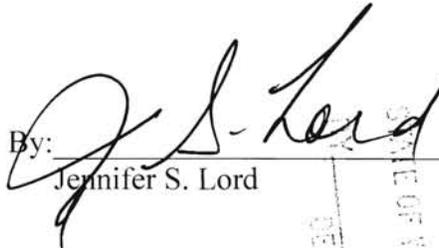
On the 10th day of October, 2013, I placed in the USPS Priority Mail to Gary Granfeld at the address listed below, a true and correct copy of the "*Brief of Appellant*"

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 120th Street NW
Gig Harbor, WA 98332

DATED this 10th day of October, 2013, at Gig Harbor, Washington.

By: 
Jennifer S. Lord

2013 OCT 14 11 09:17
STATE OF WASHINGTON
DEPT. OF APPELLATE
COURTS

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

Jane Ryan Koler
WSBA No. 13541
Attorney for Appellants

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(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 10th day of October, 2013, I placed in the USPS Priority Mail to Gary Granfeld at the address listed below, a true and correct copy of the "*Brief of Appellant*"

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 120th Street NW
Gig Harbor, WA 98332

DATED this 10th day of October, 2013, at Gig Harbor, Washington.

By: 
Jennifer S. Lord