

JUN 11 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30271-7-III

SPOKANE COUNTY CAUSE NO. 10-2-03086-1

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

EVELYN RUTH ZEHNER, a widow

Respondent,

v.

EVELYN MARIE ZEHNER, aka
EVELYN MARIE ZEHNER-SMITH, individually

Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I.	Introduction.....	1
II.	Counter-Statement Of Case.....	1
III.	Argument.....	3
	A. Standard Of Review.....	3
	1. Summary Judgment.....	3
	2. Findings Of Fact.....	5
	3. Gift.....	6
IV.	First Assignment Of Error–Summary Judgment.....	6
	A. Quit Claim Deed Not Intended To Be A Gift.....	6
	B. Deed Reformation.....	10
	C. Siblings Absent From Quit Claim Deed.....	11
	D. Trial Court Did Not Need To Engage In Assessing Credibility.....	14
	E. No Consideration For Quit Claim Deed.....	18
	F. Utility And Tax Contributions.....	18
V.	Alleged Error Of Finding Of Fact 12.....	23
VI.	Alleged Error Of Finding Of Fact 13.....	27
VII.	Alleged Error Of Finding Of Fact 15.....	28
VIII.	Alleged Error Of Finding Of Fact 18.....	28
IX.	Conclusion.....	32

TABLE OF AUTHORITIES

Cases

<u>Akers v. Sinclair, 37 Wn.2d 693, 704, 226 P.2d 225 (1950)</u>	13
<u>Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 618 P.2d 96 (1980)</u>	4-5
<u>Bitter Root Creamery Co. v. Muntzer, 90 Mont. 77, 300 Pac. 251</u>	13
<u>Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 880, 224 P.3d 761, cert. denied, U.S., 130 S. Ct. 3482, 177 L. Ed. 2d 1059 (2010)</u>	6
<u>Fay v. Best, 137 Wash. 1, 241 Pac. 354</u>	13
<u>Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)</u>	6
<u>Halbert v. Forney, 88 Wn.App. 669, 674, 945 P.2d 1137 (1997)</u>	11
<u>In re Estate of Pappuleas, 5 Wash.App. 826, 490 P.2d 1340 (1971)</u>	6, 7
<u>In re Estates of Palmer, 145 Wn. App. 249, 265-66, 187 .3d 758 (2008)</u>	6
<u>Logan v. North- West Ins. Co., 45 Wn.App. 95, 724 P.2d 1059 (1986)</u>	5
<u>McPhaden v. Scott, 95 Wn.App 43 1, 434, 975 P.2d 1033 (1999)</u>	4
<u>Oman v. Yates, 70 Wash. 2d 181, 422 P.2d 489 (1967)</u>	8

<u>Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.</u> , 102 Wn. App. 422, 425, 10 P.3d 417 (2000).....	5-6
<u>Ranger Ins. Co. v. Pierce County</u> , 164 Wn.2d 545, 552; 192 P.3d 886 (2008).....	4
<u>Simonson v. Fendell</u> , 101 Wash.2d 88, 91, 675 P.2d 1218 (1984).....	11
<u>Wilhelm v. Beyersdorf</u> , 100 Wn. App. 836, 843-844, 999 P.2d 54 (2000).....	10
<u>Wilson v. Steinbach</u> , 98 Wn.2d 434, 437, 656 P.2d 1030 (1982);.....	4-5

Rules

<u>Wash. R. Civ. Pro. 56(c)</u>	4
<u>Wash. R. Civ. Pro. 56(e)</u>	5
Thornton on Gifts, § 217.....	7

Appendix

Exhibit 1, Deposition of Evelyn Marie Zehner.....	Appendix 1
Findings of Fact, Conclusions of Law, and Order....	Appendix 2
Trial Exhibits P-114 through P-126.....	Appendix 3
Trial Exhibit P-139.....	Appendix 4

I. INTRODUCTION

This case involves a dispute between the Respondent, Evelyn Ruth Zehner, and the Appellant, her daughter, Evelyn Marie Zehner-Smith, regarding a quit claim of the family farm. The dispute arose due to misunderstanding between the parties as to the purpose behind the Quit Claim Deed

II. COUNTER-STATEMENT OF CASE

The Respondent, Evelyn Ruth Zehner, is an eighty-two year old woman, widowed for the past forty-six years, her husband having passed away on February 2, 1965. (CP 71)

The Respondent and her husband purchased a small farm located at 22115 E. Blanchard Road, Newport Washington in 1944. (CP 4), (CP 71), (RP 57)

The Respondent and her husband had five daughters. The Appellant Evelyn Marie Smith (Zehner) is Respondent's eldest daughter. (CP 72)(RP 74)

In March of 1971, the Respondent had several events going on in her life which were extremely

worrisome thus causing her to execute a Quit Claim Deed for the aforementioned property to the Appellant, Evelyn Marie Smith. (CP 72) (CP 8)

It was during this period that the Respondent was divorcing her second husband from a very short-term marriage. (CP 32), (CP 74) The marriage was extremely bad as he was a drug user making the Respondent concerned about what he may do. (CP31) (CP 74) Additionally, Respondent had to undergo major surgery which caused her great concern. (CP32) (CP 72) (CP 93)

Respondent believed her only choice at the time was to put her property into the name of the Appellant, her eldest daughter, as her other children were minors. (CP 34), (CP 72), (CP 93)

Respondent talked to her daughter, (Appellant) Evelyn Marie and told the Appellant that she was preparing a Quit Claim Deed so that Appellant could protect the property for her sisters if something was to happen to the Respondent. (CP 72) The Appellant believed the property to be a gift to her (CP 114)

As the years went by the Respondent forgot about the Quit Claim Deed until recently when she requested that the Appellant's sisters be placed on the Deed as intended and the Appellant refused. (CP 73)

As a result of the Appellant's refusal to add her siblings to the Quit Claim Deed this litigation was commenced. (CP 5)

The trial court granted summary judgment on the issue of reformation. (CP 268)

The Appellant's claim for damages was tried before the bench and an order and judgment entered. (CP 262-264)

III. ARGUMENT

A. STANDARD OF REVIEW

1. SUMMARY JUDGMENT

When reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court; thus, the standard of review is *de novo*. *McPhaden v. Scott*, 95 Wn.App 43 1, 434, 975 P.2d 1033 (1999).

Summary judgment is subject to a burden-shifting scheme. The moving party is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552; 192 P.3d 886 (2008).

The moving party is entitled to summary judgment as a matter of law when the evidence, taken in the light most favorable to the nonmoving party, creates no genuine issue of material fact. Wash. R. Civ. Pro. 56(c); Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. Ranger Ins. Co. v. Pierce County, 164 Wn.2d at 552 citing Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 618 P.2d 96 (1980); Wash. R. Civ. Pro. 56(e).

CR 56(e) provides:

plaintiff "may not rest upon the mere allegations or denials of his pleading, but his response, by

affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. In response to a motion for summary judgment a party may not rest on mere allegations. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Wash. R. Civ Pro. 56(e) (emphasis added).

A party seeking to avoid summary judgment cannot simply rest on conclusory allegations in his pleadings, but party must affirmatively present factual evidence upon which he relies. Logan v. North- West Ins. Co., 45 Wn.App. 95, 724 P.2d 1059 (1986).

2. FINDINGS OF FACT

We review a trial court's Findings of Fact and Conclusions of Law under a two-step process. (CP 255-261) We first determine whether substantial evidence in the record supports the findings of fact and, if so, whether those findings support the conclusions of law. Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000).

Substantial evidence exists if a rational, fair-minded person would be convinced by it. In re Estates of Palmer, 145 Wn. App. 249, 265-66, 187 .3d 758 (2008).

We review questions of law de novo. Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 880, 224 P.3d 761, cert. denied, U.S., 130 S. Ct. 3482, 177 L. Ed. 2d 1059 (2010).

3. GIFT

The existence or absence of intent to make a gift is an evidentiary issue to be resolved by the finder of the fact. The court's resolution of that issue will not be overturned on appeal if the court's finding is supported by substantial evidence. In re Estate of Pappuleas, 5 Wash.App. 826, 490 P.2d 1340 (1971).

IV. FIRST ASSIGNMENT OF ERROR – Summary Judgment

The court properly granted summary judgment due to numerous mutual mistakes associated with the creation of the Quit Claim Deed at issue.

A. QUIT CLAIM DEED NOT INTENDED TO BE A GIFT

The Appellant alleged at summary judgment that the Quit Claim Deed was a gift.

As stated in **Thornton on Gifts**, § 217:

“What constitutes a gift, what combination of circumstances will bring a case within the legal definition of a gift, is essentially a matter of evidence, and not of law, and each particular case must depend upon its own circumstances, and must be such as to authorize the belief that a gift was intended.”

The existence or absence of intent to make a gift is an evidentiary issue to be resolved by the finder of the fact. The court’s resolution of that issue will not be overturned on appeal if the court’s finding is supported by substantial evidence. In re Estate of Pappuleas, 5 Wash.App. 826, 490 P.2d 1340 (1971).

The Appellant failed to produce any evidence what so ever at the summary judgment hearing of the Respondent’s intent to make a gift.

In Washington it is required, in order for a completed gift to be found, that there exist (1) a donative intent and (2) that delivery of the property be as perfect as the nature of the property and the circumstances and surroundings will reasonably permit. Oman v. Yates, 70 Wash. 2d 181, 422 P.2d 489 (1967).

The issue of the Quit Claim Deed being a gift was supported and evidenced by the Appellant's declaration which simply stated:

"The Quit Claim Deed was a gift to me." (CP 114)

The facts presented at the summary judgment hearing clearly show that the Respondent did not intend to make a gift but rather executed the Quit Claim Deed only as a mechanism to protect the property.

The Appellant clearly stated in her declaration which was in evidence for the summary judgment hearing as follows:

- 1 Q. Did you ever have any conversations with your
- 2 mother regarding her intent to protect the property
- 3 for the whole family?
- 4 A. To protect it was all that was ever said about
- 5 it, nothing else.

(CP 94)

The Appellant was told by her mother (Respondent) the Quit Claim Deed was so the property would be "protected" due to the Respondent's pending divorce and medical condition. The Appellant was mistaken that it was

intended as a gift to her. If the Quit Claim Deed was a gift, what would the Appellant be protecting?

The Appellant further stated in her deposition she was "protecting" the property even at the time of her deposition by stating:

5 Q. (BY MR. LOCKWOOD) Is it your contention that
6 none of your siblings have an interest in this
7 property?

8 A. They want it.

9 Q. Pardon me?

10 A. They want it.

11 Q. But it's your contention that they don't have
12 an interest.

13 A. What do you mean by "interest"?

14 Q. Okay. They have an ownership of the
15 property?

16 A. They don't, no.

17 Q. Why do you feel that?

18 A. That they want it?

19 Q. No. Why do you feel that they are not
20 entitled to an interest in the property?

21 A. They are all in debt. And I gave my word that
22 I would protect it. And if they go and they have
23 their name on the place, it'll go, too.

24 Q. So, in essence, you're protecting the property
25 for your siblings?

1 A. For my mother. That's what she asked me to

2 do.
(CP 42-44) (CP 98)

The Respondent thought the Quit Claim Deed would protect the property for all the children and the Appellant thought she was protecting the mother. They both were mistaken.

B. DEED REFORMATION

The court in Wilhelm v. Beyersdorf, 100 Wn. App. 836, 843-844, 999 P.2d 54 (2000), held that:

A trial court has equitable power to reform an instrument if there is clear, cogent and convincing evidence of a mutual mistake or a unilateral mistake coupled with inequitable conduct.

It should also be noted that the courts stated in Halbert v. Forney, 88 Wn.App. 669, 674, 945 P.2d 1137 (1997) that:

The parameters of a mutual mistake for reformation purposes are not explicitly defined by our case law. The Supreme Court has, however, adopted the Restatement's definition of mistake, which is "a belief not in accord with the facts." Simonson v. Fendell, 101 Wash.2d 88, 91, 675 P.2d 1218 (1984) (quoting RESTATEMENT (SECOND) OF

CONTRACTS § 151 (1981)). The Restatement recognizes that such mistakes can include a misunderstanding of the law, since the law in existence at the time of the making of the contract is part of the total state of facts at that time.

At the time of execution of the Quit Claim Deed the parties made several mutual mistakes and the deed needed to be reformed adding all of the plaintiff's children to the Deed to conform to the intent of the parties.

C. SIBLINGS ABENT FROM QUIT CLAIM DEED

The Quit Claim Deed that was at issue in the summary judgment hearing did not have the Appellant's siblings named on the Deed due to children's age at the time.

The Appellant in her deposition which was in evidence for the summary judgment hearing stated:

23 Q. Do you know why your siblings are not on
24 Exhibit Number 1? (Quit Claim Deed) (CP 8)

25 A. They were underage, for one thing.

(CP 34) (CP 93)

The Respondent further echoed the Appellant in her declaration by stating:

“I thought I had no choice but to put my property into my eldest's daughter's name, in order to protect it. So, I had Evelyn Marie promise me that she would keep the property for her and her sisters. I trusted her completely and never thought she would claim the whole property for herself.

I talked to Evelyn Marie and told her that I was preparing a Quit Claim Deed so that she could protect the property for her sisters if something happened to me.

Evelyn Marie was my only child that was of legal age and that is why the deed was in her name. Had my other children been of legal age at the time, I would have included them as well.” (CP 72 - 73)

Although there is nothing in the law which prevents minors from being placed on a Quit Claim Deed both parties felt the siblings could not be placed on the deed due to their age. Although, not a preferred legal practice, this was a mutual mistake as to the siblings being placed on the deed. This is a mistaken belief of the law.

In Akers v. Sinclair, 37 Wn.2d 693, 704, 226 P.2d 225(1950) the court held that:

A mere denial that a mistake was made will not defeat an action for reformation. Fay v. Best, 137 Wash. 1, 241 Pac. 354; Bitter Root Creamery Co. v. Muntzer, 90 Mont. 77, 300 Pac. 251.

In this case the Appellant has alleged there was no mistake, only that a gift was made to her.

It is undisputed that the Respondent only intended to have the Appellant look after the property for herself and her sisters. Both parties have noted that the purpose of the Quit Claim Deed was to protect the property. This is clearly a mutual mistake as to the legal effect of the Quit Claim Deed.

There were no material facts in dispute. Both parties indicated the purpose or intent behind the Quit Claim Deed was to protect the family farm. The execution of the Quit Claim Deed, instead of protecting the family farm, transferred it to the Appellant's name alone. That result was not the intent. That was a mutual mistake.

The parties both indicated that the Appellant's siblings were not placed on the Quit Claim Deed due to the Appellant's siblings being minors at the time of the Quit Claim Deed being executed. This is a mutual mistake as to the law at the time of the Quit Claim Deed being executed.

These mutual mistakes support the court's equitable power of reformation of the Quit Claim Deed.

D. TRIAL COURT DID NOT NEED TO ENGAGE IN ASSESSING CREDIBILITY

The Appellant has argued that the trial court engaged in the weighing and determining credibility at the summary judgment hearing.

The court relied upon the evidence presented at the summary judgment hearing.

There was no issue of material dispute as to the reason why the Respondent created the Quit Claim Deed.

The Respondent was fearful of what might happen in her divorce and had concerns over a pending surgery. The Respondent stated in her declaration submitted into evidence:

"In March of 1971, I had several events going on in my life which were extremely worrisome which caused me to execute a quitclaim deed to my daughter, Evelyn Marie Smith. At that time I was divorcing my second husband from a very short term marriage. The marriage was extremely bad as he was a drug user and I was concerned what this man may do. Additionally, I had to undergo a major surgery which caused me great concern."(CP 72)

The Appellant addressed the facts causing the Quit Claim Deed to be created in her deposition and stated:

20 Q. Do you have any knowledge of the purpose of
21 creating Exhibit Number 1?
(Quit Claim Deed) (CP 8)

22 A. She wanted the property protected.

23 Q. What do you mean by that?

24 A. That's just what she said is she wanted it
25 protected.

1 Q. She didn't give any more explanation other
2 than that?

3 A. She was married and I don't know what was
4 going on there.

5 Q. Who was she married to at the time?

6 A. William Lense.

7 Q. How long was your mother married to Mr. Lense?

8 A. From March 6th of 1971 to October 14th of

9 1971.

10 Q. So, is it your belief that Exhibit Number 1

11 was executed in part because of this relationship?

12 A. I think so, but I don't -- I can't say for

13 sure.

14 Q. At the time that Exhibit Number 1 (CP 8) was

15 prepared, do you know if your mother was

 suffering

16 from any medical conditions at that time?

17 A. Not at the time that this was prepared.

18 Q. Did she have any surgeries shortly after this?

19 A. In about October or thereabouts, she had some

20 sort of kidney surgery at Deaconess.

(CP 31 - 32) (CP 93)

There is no issue of credibility as both parties identified the divorce and medical condition as the precipitating events that lead to the Quit Claim Deed being executed.

The Respondent's intent behind the Quit Claim Deed was to protect the property for her children including the Appellant. She stated in her declaration:

"I thought I had no choice but to put my property into my eldest's daughter's name, in order to protect it. So, I had Evelyn Marie promise me that she would keep the property for her and her sisters. I

trusted her completely and never thought she would claim the whole property for herself.

I did not have the advice of an attorney when I wrote the deed and with my limited education believed that by putting the property in Evelyn Marie's name she could protect it for her sisters. My husband and I always wanted the girls to each share equally in our property. We had no one else to leave it to. This was discussed with my children and we all understood that each of my daughters would share equally.

I talked to Evelyn Marie and told her that I was preparing a Quit Claim Deed so that she could protect the property for her sisters if something happened to me." (CP 72)

The Respondent was mistaken and thought it was a gift to her by stating in her declaration:

"On March 26, 1971, my mother, Evelyn Ruth Zehner, conveyed to me a Quit Claim Deed for the property located 22115 E. Blanchard Road, Newport, WA. The Quit Claim Deed was a gift to me." (CP113-114)

The question of which one is right or wrong is not the issue but rather do the facts support a mutual mistake

as to the purpose behind the Quit Claim Deed. It is clear that the parties were mistaken on this point.

E. NO CONSIDERATION FOR QUIT CLAIM DEED

Additional facts the court considered was that the Appellant gave no consideration for the quit claim deed. The Appellant indicated in her deposition she paid nothing in exchange:

8 Q. Did you give your mother any monies in
9 exchange for this document?

10 A. No, not at the time.

11 Q. When I say "this document," that would be
12 Exhibit Number 1.

13 A. No. I never paid her for it or gave her any
14 money that I know of.

(CP 93)

The Appellant not paying any consideration is a fact that can arguably be said to support both parties position.

F. UTILITY AND TAX CONTRIBUTIONS

Additional, evidence the trial court considered were the payment of taxes and utilities.

The Appellant admitted in her deposition used at the summary judgment hearing that her mother paid or contributed to property taxes by stating:

2 Q. When did you begin paying property taxes on
3 this property?

4 A. My lawyer has all the receipts. You can look
5 at them. I can't say for sure right now.

6 Q. Okay. Roughly, did you start paying taxes
7 immediately following the execution of Exhibit
8 Number 1? (CP 8)

9 A. No, because I wasn't through school.

10 Q. When did you graduate from school?

11 A. In September of '71, I think.

12 Q. And beginning September of 1971, you started
13 paying all the property taxes?

14 A. I can't say I did.

15 Q. Do you know if any of your siblings
16 contributed to the property taxes?

17 A. Not that I know of.

18 Q. Did your mother contribute to the property
19 taxes?

20 A. She gave me monies every once in a while.

21 Q. Do you know how often your mother gave money
22 for the property taxes?

23 A. I don't know.

(CP 94)

The Appellant did not challenge the fact that her siblings helped with property tax payments on the property. The Respondent addressing the issues at the summary judgment hearing stated in her declaration:

“In late 1990s, I stopped maintaining a personal checking account. At that time all my children contributed to property taxes and other expenses on the farm, and when items needed be paid by check, all my children wrote checks at different times. As to the property taxes, all my children contributed to the property taxes and so did. Marie volunteered to pay the taxes with her check, but we all contributed.” (CP 120 – 121)

The Appellant’s sister Lila Clark-Antcliff’s statement which was unchallenged at the summary judgment hearing stated:

“I am the daughter of Evelyn Ruth Zehner, the plaintiff in the above captioned action, and the sister of Evelyn Marie Zehner-Smith, aka Marie Smith, the defendant in the above-captioned action.

Evelyn Ruth Zehner has not had a checking account for all of my adult life so when she needs to make a payment on a bill she will give one of her

daughters the money and they will write a check out for her like her phone bill, house insurance or taxes.” (CP 123 – 124)

The Appellant’s sister Velma M. Cox’s statement which was unchallenged at the summary judgment hearing stated:

“I am the daughter of Evelyn Ruth Zehner, the plaintiff in the above captioned action, and the sister of Evelyn Marie Zehner-Smith, aka Marie Smith, the defendant in the above-captioned action. My Mom didn't have a checking account so she would have her daughters write checks for her and she would pay us in cash. Each of her daughters has done this at numerous times. We all have helped purchase and paid for farm items and also gave cash for property taxes several times which our Mom in return gave to Marie.”(133 – 134)

The uncontroverted statements of the Appellant’s sisters indicate that all the children contributed to property taxes. This is not indicative of intent to gift property to the Appellant.

Further, the Appellant herself indicated that the Respondent paid utilities for the farm in her declaration by simply stating:

24 Q. Do you know who paid the utilities at the
25 properties indicated in Exhibit Number 1? (Quit
Claim Deed) (CP 8)

1 A. She (Respondent) usually did.
(CP 94 – 95)

The payment of taxes and utilities is evidence which the trial court relied upon in reaching its decision.

Based upon the evidence presented at trial, it is clear that the Respondent met her burden of showing several mistakes that were made by the parties in relation to the Quit Claim Deed's creation. There were mistakes as to the law in placing the minor children on the deed and further the parties were mistaken as to the intent of the deed. The mistake of simply protecting the property for the children or to make a gift to one child. The above was simply looking at the facts not determining issues of credibility.

V. ALLEGED ERROR OF FINDING OF FACT 12

The Appellant alleges insufficient evidence to support the trial courts Findings of Fact 12.(CP 259)

Following a full day of trial the court found in its Finding of Fact 12:

The well placed on the property by Marie Smith would ordinarily be deemed an improvement on the property; however, testimony was that the Plaintiff, Evelyn Zehner, did not know that the improvement was being constructed, nor was it necessary.

The testimony at trial by the Respondent clearly shows the well placed on the property was not needed.

The Respondent stated:

13. Q. Was there, is there a well on the property?
14. A. Yes, there has always been a well. I have always had a well.
15. Q. Okay. Are there any public water supplies to your property?
16. A. No.
17. Q. So how many wells service your property as we sit here today?
18. A. My well, the well, I have always had.

19. Q How many wells service the property as we sit here today that
20. you are aware of?
21. A Well, there is only one that I get water out of.
22. Q Is there another well?
23. A She had another one. Yes, she had another one, but they have
24. never been used.
- (RP 63)
5. Q Ms. Zehner, do you recall a second well being drilled on your
6. property?
7. A I knew when she brought them in and they drilled it, yes.
8. Q When did that occur?
9. A A few years ago. I don't know exactly.
10. Q Why was that done, if you know?
11. A Because they wanted it. I didn't.
12. Q Were you aware that it was being dug?
13. A I was aware when they come and did it. I was there.
14. Q All right. Do you know who paid for the drilling of the
15. second well?
16. A Well, she would have had to. I didn't. I had nothing to do
17. with it.
18. Q When you are referring to "she", who are you referring to?

19. A Marie, she is the one that had it done.
20. Q Did she ever talk to you about why she was having it done?
21. A I know that Ruthie wanted to put, to get, I know she wanted a
22. shower. I didn't have a shower, and she brought in that
23. camper. I don't know if they wanted it for that or what or
24. maybe they thought -- I don't know what really.
25. Q. Did you ever have trouble drawing water from the well that was

(RP 64)

1. originally there?
2. A No.
3. Q What was that water -- was that water only used for the inside
4. of the house or was it also used to water the garden and feed
5. the animals, or water the animals?
6. A It was used for everything, yes.
7. Q Did you irrigate the property?
8. A Just the garden a little was all.
9. Q You didn't grow any large crops or anything of that nature?
10. A No.

(RP 65)

The Appellant admitted at trial that she had no knowledge of the original well running dry. She stated:

9. Q Are you aware if any of the neighbors have fire insurance?
10. A They do, but they lied about it.
11. Q Okay. The well that is on the property, that you had drilled
12. on the property, it has never been utilized; has it?
13. A No, I never had the money to do it.
14. Q. The well that serves your mother's home, that is the same well
15. that was there when you lived there as a child?
16. A Yes.
17. Q Did it ever run dry when you were a child?
18. A It come pretty close, but my husband dug it deeper so that
19. helped.
20. Q So the answer would be no, it has never run dry?
21. A If it has, I didn't know.

(RP 100)

The Respondent summed up the need for the well as:

16. Q Ms. Zehner, this well that was drilled by your daughter, did
17. it add any value to the property?
18. A I don't see how.
19. Q Why do you say that?

20. A Well, for one thing it don't have that much water
and it just
21. sits there with a barrel over it.
22. Q Did the old well ever go dry?
23. A No, it never did go dry.
(RP 105)

The court relied on sufficient evidence in ruling that the well was not need nor was it ever used. Both parties testified that the original well did not go dry and the new well drilled by the Appellant was of no value never having being needed or used.

VI. ALLEGED ERROR OF FINDING OF FACT 13

The Appellant alleges insufficient evidence to support the trial courts Findings of Fact 13 which stated:

The original well on the property was adequate and available throughout the year. (CP 259)

The record stated above supports the trial court's Findings of fact 13, that the original well was adequate. (CP 259) The well did not go dry and serviced the needs of the household.

VII. ALLEGED ERROR OF FINDING OF FACT 15.

The Appellant alleges insufficient evidence to support the trial courts Findings of Fact 15 which stated:

There was no evidence about the well's serviceability. It could not be determined if the well was working and provided the type and quality of water needed to service that property. Based upon the lack of evidence, the court is not able to determine that the well was a reasonable and necessary expense to care for the property. (CP 259)

The Appellant failed to present any evidence at trial regarding the viability and necessity of a new well. All the evidence presented indicated the well was not necessary and further more has never been used. The lack of evidence presented by the Appellant at trial and the trial record supports the trial courts Findings of Fact 15. (CP 259)

VIII. ALLEGED ERROR OF FINDING OF FACT 18.

The Appellant alleges insufficient evidence to support the trial courts Findings of Fact 18 which stated:

The clean-up costs of the materials hauled in by the Defendant could be up to \$20,000 based upon Mr. Atchley estimate which was entered into evidence (Exhibit 139) and his testimony which were uncontroverted.

3. Q. Does it appear to have any recycling value?
4. A. Not for us.
5. Q. Look at Exhibit 114. What do those photographs depict?
6. A. Some concrete and some just regular garbage.
7. Q. Anything in those two photographs which appear to be
8. recyclable?
9. A. Not for me.
10. Q. To save a little bit of time, if you look at, briefly just
11. review Photographs 115, Exhibit 116, 117, 118, 119, 120, 121,
12. 122, and 123 and 124 and 125 and 126. Just look through those
13. and when you get done reviewing those let me know.
14. A. (Complying.) It is all garbage unless somebody wanted to take
15. their time to go through it and sort everything. Other than
16. that it is garbage.
17. Q. And could you look at Exhibit 139.

18. A (Complying.)
19. Q Could you identify that for me please.
20. A It is an estimate on cleaning up the property.
21. Q Do you know who prepared this estimate?
22. A I prepared the estimate.
23. Q Could you tell the Court how you determined the value of this
24. estimate for cleaning the garbage up on the Zehner property?
25. A Basically from the location where it is at. It is (RP 118)
1. approximately I would say 50 to 60 miles away, and it is about
 2. 35 miles from our actual shop so when we have to drive there
 3. we account for the gas, account for the time and the bobcat
 4. and when we are actually cleaning up, bobcat, scrape the
 5. hillside because it goes back 100 yards or more on the
 6. property, and it is a hillside. We can't back a truck and
 7. load it up. We have to bring a bobcat in.
 8. When you are picking it up you also grab grass, dirt in
 9. there because it is all on the ground. There is glass. When

10. you are loading it, just one bucket can weigh \$40 at the dump.
11. That is how we got it.
12. When I presented it this would be the best, worse case
13. scenario going into and getting all the trash out. I can't
14. tell the customers a low estimate and then when I get done
15. tell them it is higher. I have done in that future and I got
16. bit and lost some money so, I mean, it could fluctuate I would
17. say a couple thousand dollars. Depends when I am done how
18. much I am into it, how much time, because the property is
19. spread out so much.
20. Q When you say spread out, how much area was this debris spread
21. over?
22. A I would say it probably went to three to 400 yards up the
23. hill, 200 yards wide is a rough estimate. I mean, there is a
24. car up on the hillside and tractors. You have to bring
25. oxygen, acetylene to cut up the stuff that does not just fit

(RP 119)

1. into our trailers so that is another expense.
2. MR. LOCKWOOD: Your Honor, move for admission of
3. Exhibit 139.

(RP 120)

15. THE COURT: All right. Thank you. Do you have
16. objection to the admission of 139?
17. MR. CASEY: No, I do not object to the admission of
18. that exhibit.
19. THE COURT: 139 will be admitted.

(RP 122) (CP 283)

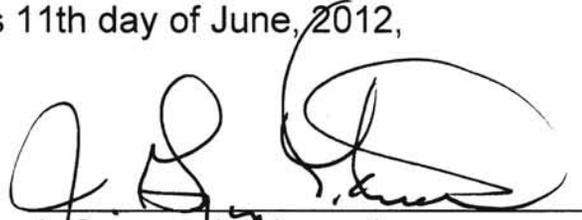
IX. CONCLUSION

The trial court found that no material facts were in dispute in granting summary judgment on the issue of reformation of the Quit Claim Deed. The facts as presented to the trial court clearly show that the parties were mistakes as to the purpose behind the deed. The court reformed the deed as to the true intent and that was to protect the property not to gift it to the Appellant.

As to the findings of fact made by the court at trial sufficient evidence was presented to support the court's findings.

It is respectfully requested that the Appellant's appeal be denied and the trial court's ruling sustained.

Dated this 11th day of June, 2012,

A handwritten signature in black ink, appearing to read 'J. Gregory Lockwood', written over a horizontal line.

J. Gregory Lockwood
WSBA No. 20629
Law Office of
J. Gregory Lockwood, P.L.L.C.
522 West Riverside Avenue, Suite 420
Spokane, Washington 99201
Phone: (509) 624-8200
Fax: (509) 623-1491
Attorney for Respondent Evelyn Zehner

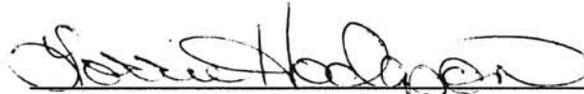
CERTIFICATE OF SERVICE

I, LORRIE HODGSON, do declare that on June 11, 2012 I caused to be served a copy of the foregoing RESPONDENT'S BRIEF to the following listed party(s) via the means indicated:

Kenneth H. Kato
1020 North Washington Street
Spokane WA 99201

- U.S. MAIL
- FACSIMILE
- HAND DELIVERY
- ELECTRONIC DELIVERY
- OTHER
- _____

DATED June 11, 2012.



LORRIE HODGSON

APPENDIX 1



Pioneer National Title Insurance Company
WASHINGTON TITLE DIVISION
Filed for Record at Request of

THIS SPACE RESERVED FOR RECORDER'S USE

540330C

FILED OR RECORDED
REQUEST Grantee

MAR 26 12 44 PM 1971

VERNON OHLARD, AUDITOR
SPOKANE COUNTY, WASH.
DEPUTY *711 miles*

Req Rt 2 Box 83
Newport, WA 2.00

REVENUE STAMPS

MAR 26 1971

TO _____

FORM L86 R

Quit Claim Deed

THE GRANTOR

Evelyn Ruth Zahner

for and in consideration of

convey and quit claim to *Evelyn Marie Zahner*

the following described real estate, situated in the County of *Spokane* *22 29 45 SW 1/4 of SW 1/4*
27 29 45 NW 1/4 of NW 1/4
State of Washington including any interest therein which grantor may hereafter acquire:

123 ✓

S T R
22 29 45 SW 1/4 of SW 1/4
S T R
27 29 45 NW 1/4 of NW 1/4

1% Excise Tax on Real Estate
Sale, Arst Pd \$ *none*
Date *3-26-71* No. *46087*
MERTON HOWARD, Co. Treas.
By *[Signature]*

Dated this *m* *26* day of *March* 1971

Evelyn Ruth Zahner (SEAL)

(SEAL)

EXHIBIT
1
01-91-11

STATE OF WASHINGTON,
County of *Spokane* } ss.

On this day personally appeared before me *Evelyn Ruth Zahner*
to me known to be the individual described in and who executed the within and foregoing instrument, and
acknowledged that *she* signed the same as *her* free and voluntary act and deed, for the
uses and purposes therein mentioned.

GIVEN under my hand and official seal this *26* day of *March* 1971
P. O. A. O.

APPENDIX 2

COPY
ORIGINAL FILED

AUG 24 2011

THOMAS R. FALLOQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

EVELYN RUTH ZEHNER, a widow,

Plaintiff,

v.

EVELYN MARIE ZEHNER, aka
EVELYN MARIE ZEHNER-SMITH, aka
EVELYN MARIE SMITH, individually

Defendant.

Cause No.: **10-2-03086-1**

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

This matter came before this court on a bench trial on July 25, 2011 before the Honorable Linda G. Tompkins.

The only remaining issue before the court is the counterclaim of the Defendant requesting reimbursement of expenses from the Plaintiff. The issue of quieting title and deed reformation had been decided upon Plaintiff's motion for summary judgment.

Plaintiff Evelyn Zehner has been represented by Mr. J Gregory Lockwood. Defendant and Counter-Claimant Marie Smith has been represented by Mr. Mark Casey.

The Court has considered the parties exhibits offered and admitted into evidence, the testimony of witnesses, the argument of counsel, and the legal authorities applicable to the issues before the Court.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER -1

Law Office of
J. Gregory Lockwood, PLLC
522 W. Riverside, Ste. 420
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

1 This matter began through a Petition of Plaintiff Evelyn Zehner for reformation or
2 nullification of a quit claim deed executed in March of 1971. Defendant Marie Smith filed a
3 counter claim seeking to quiet title and in her prayer for additional equitable relief the court
4 deemed just and equitable.

5 On motion by the Plaintiff, the Court granted summary judgment to Evelyn Zehner on
6 the question of quiet title and reformation of the quit claim deed dated March 26, 1971, for
7 the two adjacent parcels located at the address of 22115 East Blanchard Road, Spokane
8 County, Washington.

9 By way of a clarification of the court's ruling on Plaintiffs summary judgment, the
10 Court found the original grantor in this case is the mother Evelyn Zehner. She was able to
11 testify in her Declarations and again reinforced at trial that she had directed Marie Smith to
12 add the other sisters' names to the property.

13 Marie had refused and the matter appeared to deteriorate within the family circle to
14 the extent that Marie Smith sent written correspondence to her mother directing her to move
15 out of the property and threatening litigation. It is clear that the joint intent of the quit claim
16 deed was to protect the property. The Defendant argued that it was a unilateral mistake in
17 that the Defendant intended protection for just the mother and the Plaintiff intended
18 protection for the entire family. The Court found this argument to be not persuasive as to a
19 mutual mistake since neither version intended outright transfer to the defendant alone or
20 recognized a life estate to the Plaintiff.

21 The evidence supported the intent to create a life estate to the mother with equal title
22 to be shared by all five of the children.

23
24
25
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER -2

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Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

Findings of Fact

1
2 1. The bench trial was to determine if the Defendant, based upon equity, is entitled to a
3 reimbursement of expenses.

4 2. Ms. Smith in her counter-claim only sought a quiet title of the property in her name
5 solely and, if not granted, based upon a request for equity in her prayer for reimbursement of
6 expenses.

7 3. The Defendant did not actively litigate and present a constructive trust to the Court,
8 but in reviewing the entire quantity of evidence before the Court, it is apparent that Defendant
9 Marie Smith was and should be construed to have been acting as a constructive trustee.

10 4. In order to prevent unjust enrichment, Defendant Marie Smith should be entitled to
11 actual and necessary expenses in caring for the property at 22115 East Blanchard Road,
12 Spokane County, Washington.

13 5. Defendant Marie Smith offered testimony and evidence of payment of real estate
14 taxes since 1987, payment of property insurance, and the installation of a new well on the
15 property.

16 6. The Plaintiff offered testimony of contribution by the Plaintiff and Defendant's siblings
17 as to payment of property taxes, but had no evidence of receipts from the Plaintiff or from the
18 other siblings.

19 7. The Defendant did testify that she received contributions from the Plaintiff and the
20 other sisters, but there are no records to support such contributions.

21 8. The parties' actions resulted in a constructive trust being created and as such the
22 Defendant is entitled to actual and necessary expenses in caring for the property which
23 would include reimbursement for property taxes and insurance. Defendant's Exhibit 10
24

1 identifies the actual payments that were made by Marie Smith on the real property. Tax
2 payments for the mobile home of Marie Smith and her husband were not considered.

3 9. Reimbursable tax payments under the constructive trust are as follows:

- 4 a. 1987 of \$177.42;
- 5 b. 1988 of \$185.78;
- 6 c. 1989, \$194.09;
- 7 d. 1990 of \$203.77;
- 8 e. 1991 of \$189.66;
- 9 f. 1992 of \$210.00;
- 10 g. 1993 of \$208.26;
- 11 h. 1994 of \$355.20;
- 12 i. There is no evidence offered for calendar year 1995;
- 13 j. 1996 of \$377.95;
- 14 k. 1997 of \$376.40;
- 15 l. 1998 of \$357.22;
- 16 m. No evidence offered for calendar year 1999;
- 17 n. 2000 of \$321.42;
- 18 o. 2001 of \$324.58;
- 19 p. 2002 of \$325.61;
- 20 q. No evidence offered for calendar year 2003;
- 21 r. 2004 of \$290.10;
- 22 s. 2005 of \$317.53;
- 23 t. 2006 of \$305.53;
- 24 u. 2007 of \$277.98;
- 25 v. 2008 of \$381.56;
- w. 2009 of \$377.48;
- x. 2010 of \$545.84; and for
- y. 2011 of \$567.43.

17 The total reimbursable tax payments by the Defendant total \$6,867.81.

18 10. Insurance payments by the Defendant are reimbursable as well based upon the
19 constructive trust. Evidence of Defendant's payment of insurance is evidenced by
20 Defendant's Exhibit 6.

21 11. Reimbursable insurance payments, under the constructive trust are as follows:

- 22 a. May 1987 of \$72.00;
- 23 b. August 1997 of \$150.00;
- 24 c. August 1998 of \$196.00;
- 25 d. July 1999 of \$196;
- e. July 2003 of \$215.00;

25 FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER -4

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Facsimile: (509) 623-1491

- f. July 2003 of \$215.00;
- g. July 2004 of \$221.00; and
- h. July 2006 of \$195.00.

The total reimbursement for fire insurance payments is \$1,245.00.

12. The well placed on the property by Marie Smith would ordinarily be deemed an improvement on the property; however, testimony was that the Plaintiff, Evelyn Zehner, did not know that the improvement was being constructed, nor was it necessary.

13. The original well on the property was adequate and available throughout the year.

14. The new well was never used and was capped before any use.

15. There was no evidence about the well's serviceability. It could not be determined if the well was working and provided the type and quality of water needed to service that property. Based upon the lack of evidence, the court is not able to determine that the well was a reasonable and necessary expense to care for the property.

16. Defendant Marie Smith and her husband deposited garbage, excess materials, metals, fencing and other materials on the property as shown on Plaintiff's Exhibits 103 to 138.

17. Some of the materials have recyclable value, but the majority would simply incur hauling costs to remove as garbage.

18. The clean-up costs of the materials hauled in by the Defendant could be up to \$20,000 based upon the testimony of Defendant's witness Mr. Atchley.

19. Some of the items deposited on the property by the Defendants do have value, but there was no evidence of any particular value for those items.

20. Whatever limited values there is in the items deposited on the property by the Defendants, the remainder is waste on the property and adds no value to that property.

1 **CONCLUSIONS OF LAW**

2 1. A constructive trust was created by the March 26, 1971 quit claim deed and as such
3 the Defendant is entitled to actual and necessary expenses in caring for the property which
4 would include reimbursement for property taxes;

5 2. Insurance payments by the Defendant are reimbursable as well due to the
6 constructive trust;

7 3. The Court could not determine if the well, placed on the property by Marie Smith was
8 a reasonable and necessary expense for the property and, therefore, it is not reimbursable.

9 4. Defendant Marie Smith is to sign all documents necessary to record a reformed deed
10 that recognizes Evelyn Zehner's life estate with the title to be shared equally by all five of her
11 children.

12 5. The materials placed upon the property at 22115 East Blanchard Road, Spokane
13 County, Washington, by Defendant Marie Smith have limited value with the bulk of the
14 material constituting waste;

15 6. The expenses of the Defendant in maintaining and responsibly caring for the property
16 are offset by the expenses in the clean-up of the garbage that has been deposited on the
17 property by the Defendant.

18 7. Defendant Marie Smith is entitled to a judgment against the Plaintiff in the amount of
19 \$1,113.27 which constitutes the 2010 and 2011 tax payments.
20

ORDER

THEREFORE IT IS ORDERED that:

1. Marie Smith shall execute all documents necessary to record a reformed deed for the March 26, 1971 Quit Claim Deed that recognizes Evelyn Zehner's life estate with the title to be shared equally by all five of her children;

2. That Defendant Marie Smith shall have a judgment against Plaintiff Evelyn Zehner in the amount of \$1,113.27; and

3. Marie Smith shall be allotted three months from entry of this Order to remove from the real property located at 22115 East Blanchard Road, Spokane County, Washington, at her expense, any and all materials and metals she placed on the real property that she believes to have value, excluding the well.

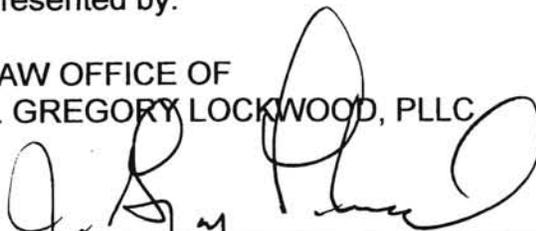
DONE IN OPEN COURT this _____ day of August, 2011.

LINDA G. TOMPKINS

JUDGE LINDA G. TOMPKINS

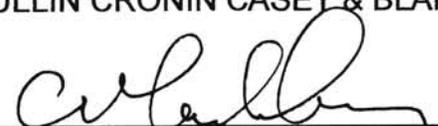
Presented by:

LAW OFFICE OF
J. GREGORY LOCKWOOD, PLLC


J. GREGORY LOCKWOOD, WSBA No. 20629
Attorney for Plaintiff Evelyn Ruth Zehner

Approved as to form and content,
presentment waived.

MULLIN CRONIN CASEY & BLAIR, P.S.


C. MARK CASEY, WSBA No. 6476
Attorney for Defendants

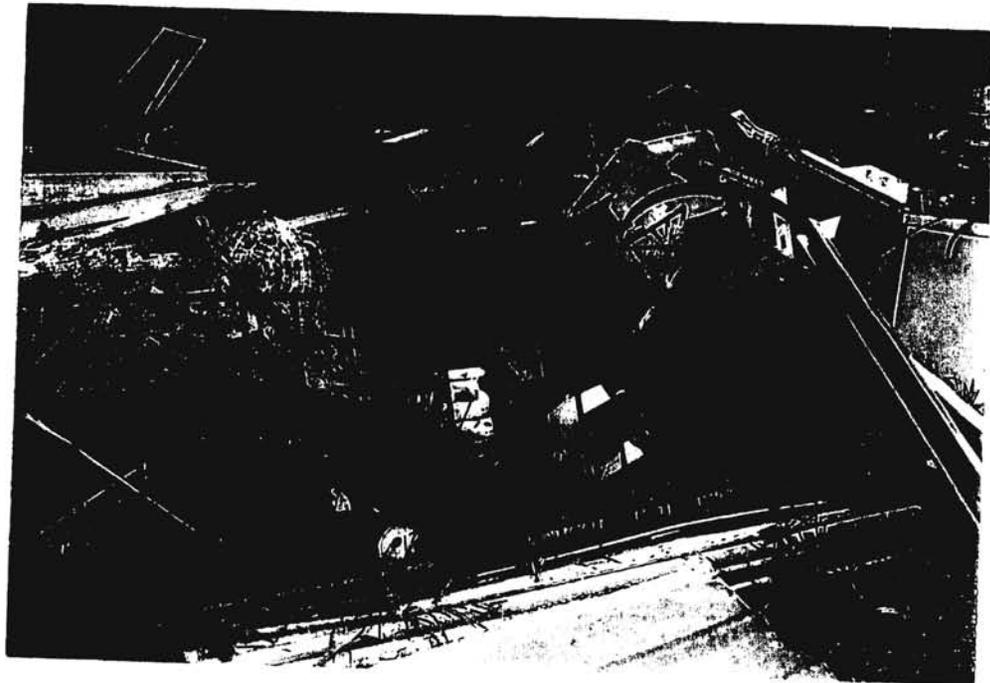
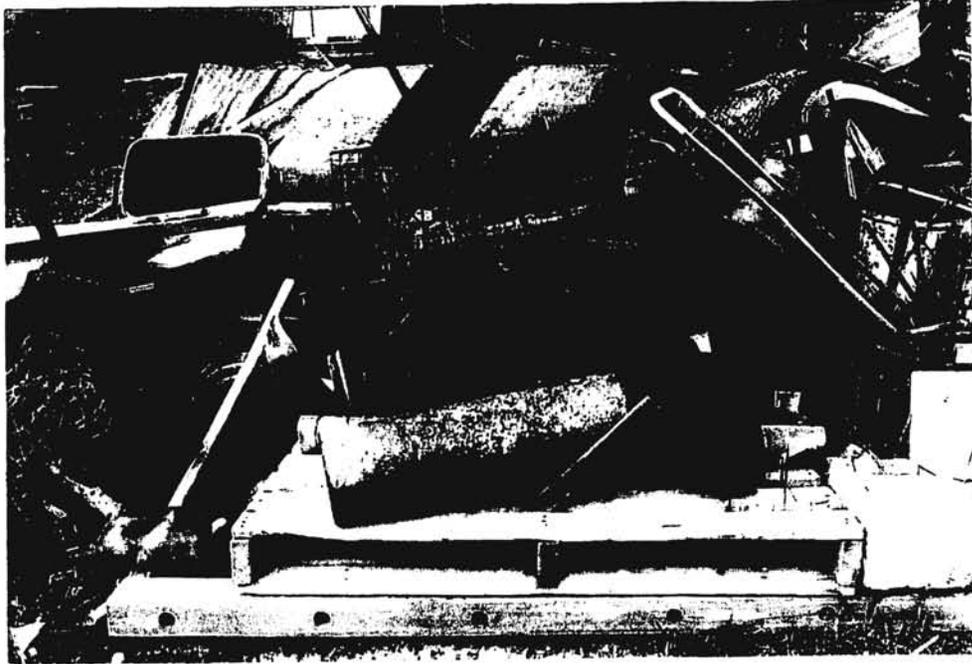
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER -7

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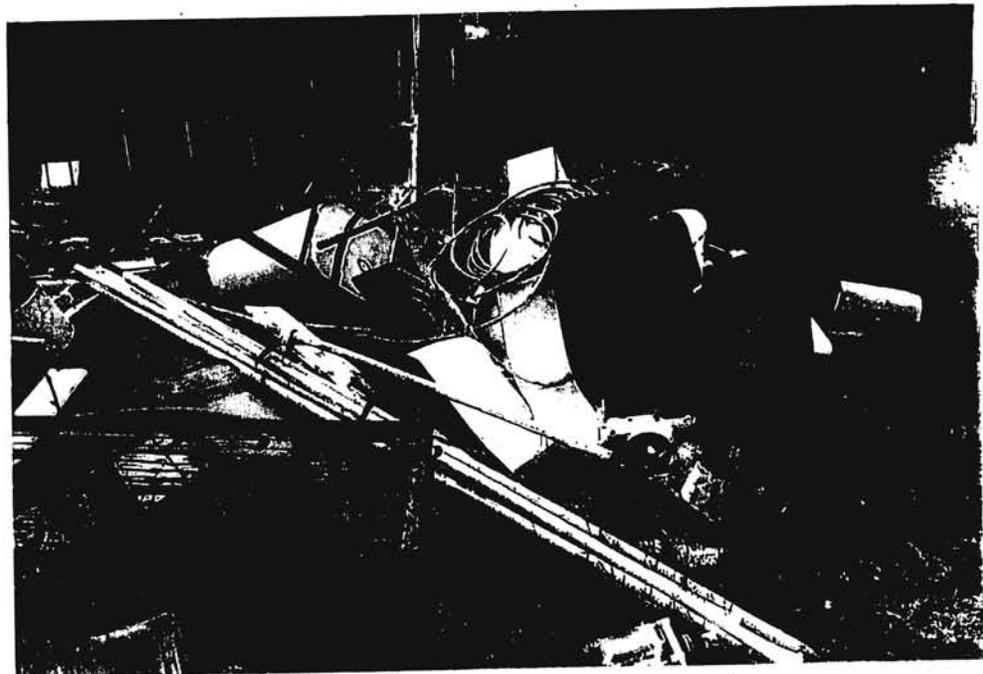
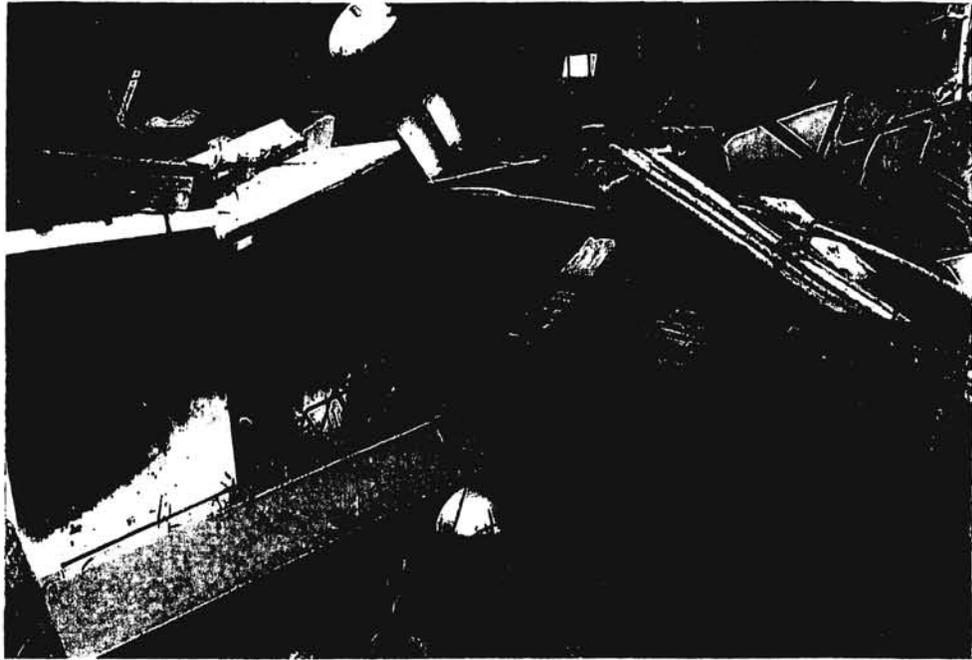
APPENDIX 3



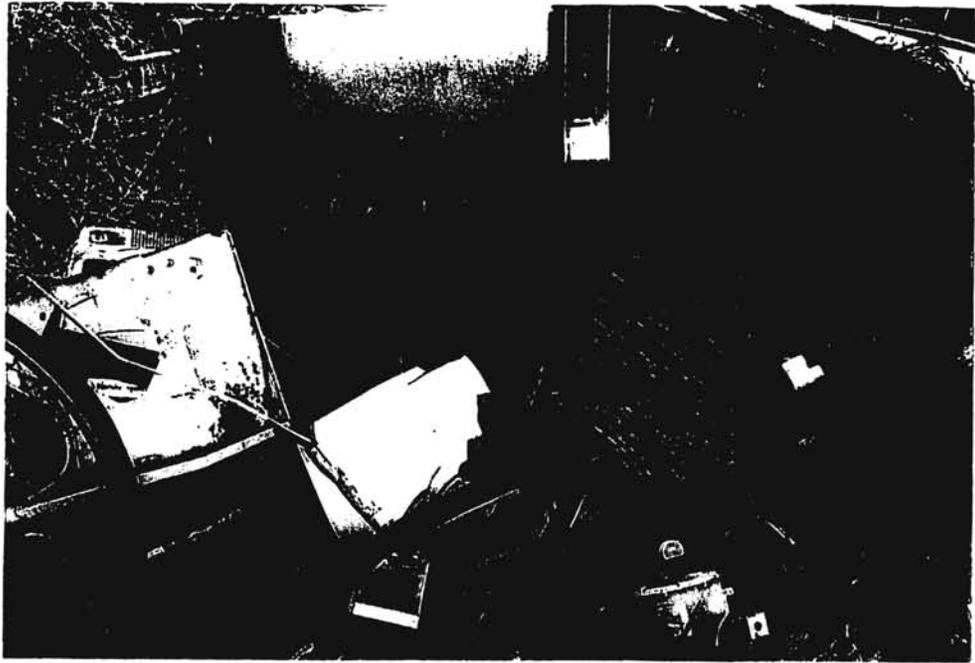
Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-114



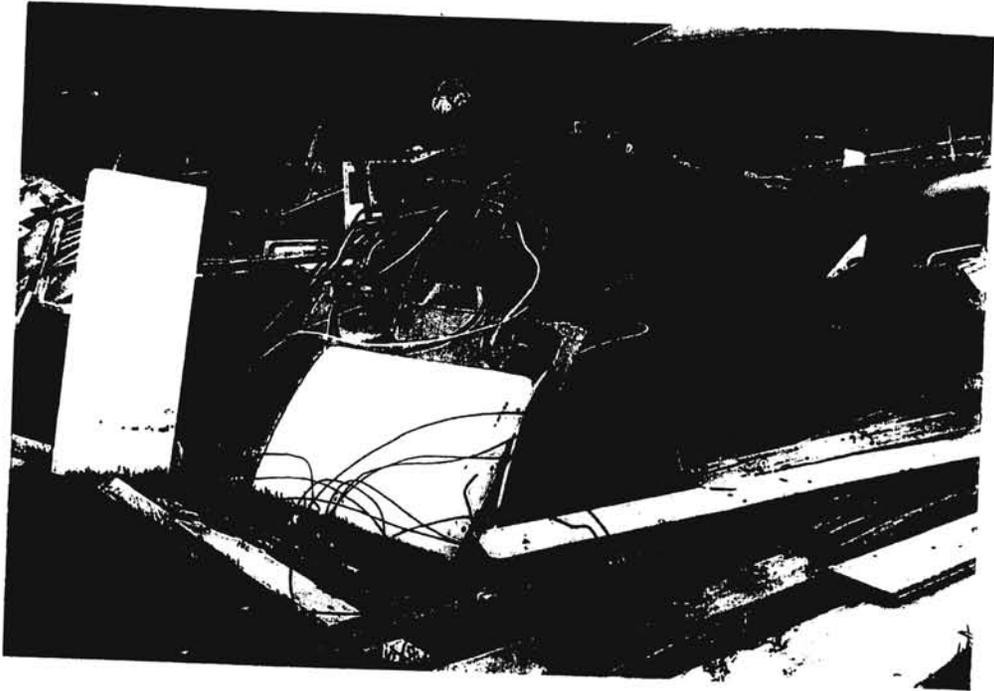
Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-115



Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-116



Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-117



Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-118



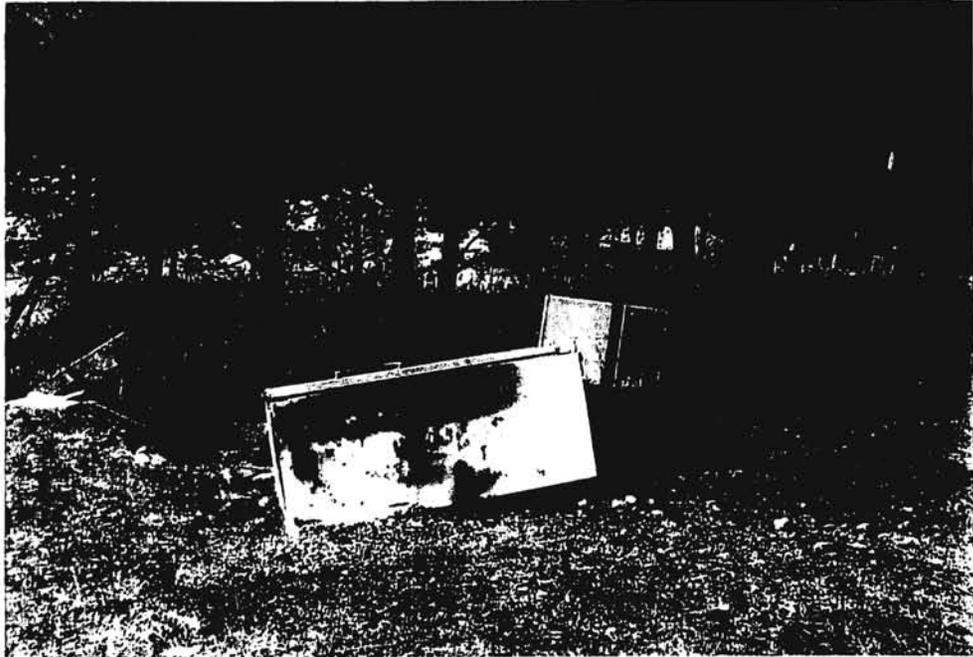
Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-119



Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-120



Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-121



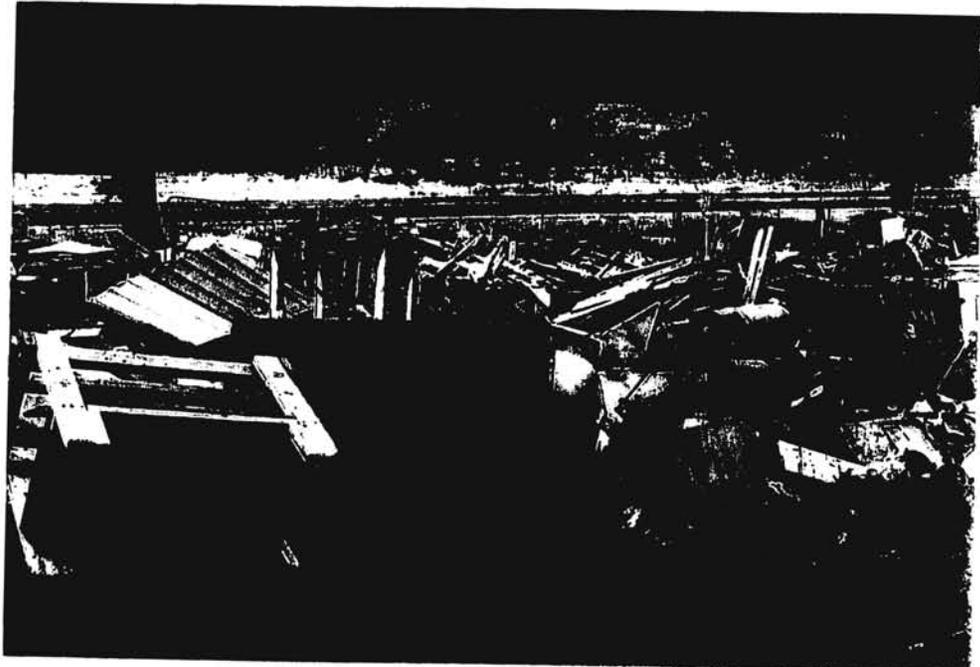
Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-122



Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-123



Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-124



Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-125



Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-126

APPENDIX 4



ATCHLEY'S HAULING, INC.

You call we do it all!!!

PO BOX 155
Colbert, WA 99005
509-464-HAUL (4285)

josh@atchleyhauling.com
BILL TO:

DATE: May 13, 2011
INVOICE # Bid

FOR:
22115 E. Blanchard Rd.
Newport, WA 99156

DESCRIPTION	HOURS	RATE	AMOUNT
Clean up property east of house			18,500.00
SUBTOTAL			\$ 18,500.00
TAX RATE			8.70%
SALES TAX			1,609.50
OTHER			
TOTAL			\$ 20,109.50

Make all checks payable to Atchley's Hauling

THANK YOU FOR YOUR BUSINESS!

Zehner v. Zehner-Smith
Case No. 10-2-03086-1
Exhibit P-139